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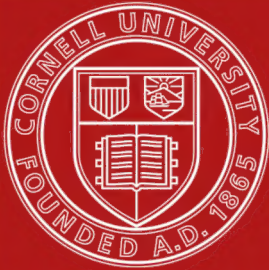


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SUPPLEMENT  
TO THE  
AMERICAN AND ENGLISH  
ENCYCLOPÆDIA OF LAW  
(SECOND EDITION)

EDITED BY  
DAVID S. GARLAND AND CHARLES PORTERFIELD  
UNDER THE SUPERVISION OF  
JAMES COCKCROFT

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VOLUME III.

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NORTHPORT, LONG ISLAND, N. Y.  
EDWARD THOMPSON COMPANY  
LONDON: C. D. CAZENOVE AND SON, 26 HENRIETTA STREET

1906



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## HOW TO USE THE SUPPLEMENT.

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THE titles of the articles and defined words and phrases are repeated in the order in which they are to be found in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Second Edition. At the top of each page are given the name of the subject and the pages thereof which are supplemented by reference to and statement of the late cases. Thus:

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**956-961**

*AGENCY.*

Vol. I.

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at the top of a page signifies that pages 956 to 961 of the article "Agency" in the first volume of the Second Edition are supplemented.

In both text and notes the catch lines which appear in the Second Edition are here repeated in connection with new cases, thereby denoting that such new cases support the statement of law made in the text or notes of the Second Edition under the corresponding catch line.

The large heavy-faced figures refer to the pages of the volume of the Second Edition. The smaller figure following the page number in the notes refers to the original note numbered by that same figure on that page. Thus, a note numbered **950. 2.**, with cases cited, indicates that those cases support the proposition to which the cases in note 2 on page 950 were cited.

In some instances the new cases have necessitated the writing of new text, and the fact that such text is new is indicated by inclosing it with brackets. In the notes great freedom has been indulged in stating new illustrations and applications.

The omission of a title that appeared in the Second Edition implies that no new cases on that subject have been found.





# SUPPLEMENT

TO THE

## American and English Encyclopædia of Law

(SECOND EDITION.)

1. FEW. — See note 3.
2. FICTION OF LAW. — See note 1.

1. 3. Few. — Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; Anderson v. Williams, 44 W. N. C. (Pa.) 418.

2. 1. Fiction of Law. — See Snider v. Newell, 132 N. Car. 614.

## FIDELITY AND GUARANTY INSURANCE.

BY BASIL JONES.

3. II. GUARANTY OF FIDELITY OF EMPLOYEE — 1. In General. — See note 3.
4. 2. Validity of Policy — [Indemnity Bond]. — See note 3a.
5. 3. Care and Diligence Required of Insured — *b*. STIPULATION AS TO NOTICE OF ACTS OF INFIDELITY — (1) *In General*. — See note 1.
6. (2) *Notice of Mere Suspicion Unnecessary*. — See note 1.
- c*. LEGAL PROSECUTION AS CONDITION PRECEDENT TO RECOVERY. — See note 3.

3. 3. Acts Covered by Bond. — Indemnity afforded by the bond is not limited to acts committed while the employee is occupying the position which he filled at the time the bond was issued, but also covers such acts as were committed by him in any other position in the insured's employment to which he may have been appointed or which he may have been called upon to fill. *Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co.*, 115 Ky. 863.

Loss "Through the Dishonesty or Any Act of Fraud" of the Employee "Amounting to Larceny or Embezzlement." — *City Trust, etc., Co. v. Lee*, 204 Ill. 69; *Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co.*, 115 Ky. 863.

4. 3a. Failure to Secure Employee's Signature. — *Union Cent. L. Ins. Co. v. U. S. Fidelity, etc., Co.*, 99 Md. 423; *Adelberg v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 376.

Effect of Renewal. — *Nashville First Nat. Bank v. U. S. Fidelity, etc., Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765.

5. 1. Reasonable Time for Giving Notice Allowed. — *Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 118 Iowa 729; *Remington v. Fidelity, etc., Co.*, 27 Wash. 429; *Globe Sav.,*

*etc., Co. v. Employers' Liability Assur. Corp.*, 13 Manitoba 531.

Insurer May Waive Provision. — *Globe Sav., etc., Co. v. Employers' Liability Assur. Corp.*, 13 Manitoba 531; *Goldman v. Fidelity, etc., Co.*, (Wis. 1905) 104 N. W. Rep. 80.

Chief Resident Officer of Foreign Corporation May Waive Compliance. — *Globe Sav., etc., Co. v. Employers' Liability Assur. Corp.*, 13 Manitoba 531.

Power of Inspector of Insurer to Waive Provision. — *Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 118 Iowa 729.

Acts Constituting Waiver of Provision. — *Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 118 Iowa 729; *Goldman v. Fidelity, etc., Co.*, (Wis. 1905) 104 N. W. Rep. 80.

Sufficiency of Compliance with Provision a Question of Fact. — *Remington v. Fidelity, etc., Co.*, 27 Wash. 429.

6. 1. Notice of Mere Suspicion Unnecessary. — See *Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 118 Iowa 729.

3. Recovery of Expenses of Prosecution. — *Globe Sav., etc., Co. v. Employers' Liability Assur. Corp.*, 13 Manitoba 533.

Recovery from Third Person Not Prerequisite. —

6. 4. Effect of False Representations on Part of Insured. — See note 4.
7. Declarations as to Future. — See notes 2, 3.
8. 5. Limitation of Period of Risk — Liability for Acts of Infidelity Prior to Contract. — See note 1.
9. Limitations of Period of Risk Subsequent to Date of Contract. — See notes 1, 2.
10. 7. General Principles of Interpretation. — See note 2.  
 [IV. TERMINATION OF LIABILITY. — See note 6a.]  
 [V. PROOF OF LOSS. — See note 6b.]
11. FIDUCIARY. — See note 1.
12. FIELD. — See note 1.

Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co., 115 Ky. 863.

6. 4. Contract Avoided by Material Misrepresentations. — Carstairs v. American Bonding, etc., Co., (C. C. A.) 116 Fed. Rep. 449; Rice v. Fidelity, etc., Co., (C. C. A.) 103 Fed. Rep. 427; Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co., 118 Iowa 729; Model Mill Co. v. Fidelity, etc., Co., 1 Tenn. Ch. App. 365.

Mistake in Statement of Fact Does Not Avoid Policy in Absence of Fraud. — Remington v. Fidelity, etc., Co., 27 Wash. 429.

The Tennessee statute (Shannon's Code, § 3306) which provides that no written or oral misrepresentation or warranty therein made, in negotiations for a contract or a policy of insurance, or in an application thereof by the assured, or in his behalf, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increases the risk of the loss, applies to an indemnity bond issued by a fidelity insurance company. Nashville First Nat. Bank v. U. S. Fidelity, etc., Co., 110 Tenn. 10, 100 Am. St. Rep. 765.

Policy Avoided by False Answer as to Previous Application by Employee to Other Insurers. — Imperial Bldg., etc., Co. v. U. S. Fidelity, etc., Co., 23 Ohio Cir. Ct. 243.

Truth or Falsity of Representation a Question of Fact. — Nashville First Nat. Bank v. U. S. Fidelity, etc., Co., 110 Tenn. 10, 100 Am. St. Rep. 765.

Burden of Proving Falsity on Insurer. — Goldman v. Fidelity, etc., Co., (Wis. 1905) 104 N. W. Rep. 80.

Waiver — Evidence. — Rice v. Fidelity, etc., Co., (C. C. A.) 103 Fed. Rep. 427.

7. 2. Effect of False Statement as to Future. — City Trust, etc., Co. v. Lee, 204 Ill. 69.

Kentucky Statute. — Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co., 115 Ky. 863.

3. Effect of Proviso Making Any Misrepresentations Avoid Policy. — See Phenix Ins. Co. v. Guarantee Co. of North America, (C. C. A.) 115 Fed. Rep. 964.

8. 1. Previous Defaults. — If the employee actually turned over to the insured all the sums actually collected by him after the execution of the bond, the insurer cannot be held for his default, notwithstanding he may have given credit on the wrong account in order to cover up a previous default. Model Mill Co. v. Fidelity, etc., Co., 1 Tenn. Ch. App. 365.

9. 1. Risk Limited to Acts Discovered Within

Given Time. — Remington v. Fidelity, etc., Co., 27 Wash. 429.

2. Losses Occurring Subsequent to Discovery of First Loss by Employer Not Included. — Remington v. Fidelity, etc., Co., 27 Wash. 429.

10. 2. Ambiguous Terms Construed Against Insurer. — Carstairs v. American Bonding, etc., Co., (C. C. A.) 116 Fed. Rep. 449; City Trust, etc., Co. v. Lee, 204 Ill. 69; Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co., 115 Ky. 863; Remington v. Fidelity, etc., Co., 27 Wash. 429, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 10.

6a. Settlement by Defaulting Employee — What Constitutes. — Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co., 118 Iowa 729.

Acceptance of Property from Defaulting Employee to Be Credited on Shortage Not a Settlement or Condonation. — Remington v. Fidelity, etc., Co., 27 Wash. 429.

Implied Cancellation of Contract. — Sun L. Ins. Co. v. U. S. Fidelity, etc., Co., 130 N. Car. 129.

6b. Proof of Loss. — A condition in the bond requiring the furnishing of proof of loss to the satisfaction of the insurer is not to be construed as compelling the insured to establish to the satisfaction of the insurer the absolute liability of the latter and the absence of any defense. A condition requiring all reasonable verification of the statements made in the proposal and of the compliance therewith is to be construed as meaning such subsequent compliance with the indicated future course of conducting the business. Globe Sav., etc., Co. v. Employers' Liability Assur. Corp., 13 Manitoba 531.

11. 1. Fiduciaries. — Ryan v. Ryan, 174 Mo. 286, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 11.

Fiduciary Relation. — Meyer v. Reimer, 65 Kan. 822; Studybaker v. Cofield, 159 Mo. 596, wherein it was held that whether or not a person stands in a fiduciary relation is a question of fact.

Agent. — Thomas v. Whitney, 186 Ill. 225; Bracken v. Milner, 104 Fed. Rep. 522.

Factors. — In re Gaylord, 113 Fed. Rep. 131. No Fiduciary Capacity Between Vendor and Purchaser. — Harrington v. Herman, (Mo. 1903) 72 S. W. Rep. 550.

12. 1. Field has been defined as a wide extent of land suitable for tillage or pasture. Southern Kansas R. Co. v. Isaacs, 20 Tex. Civ. App. 466.

Field and Inclosure Interchangeable Terms. — Southern Kansas R. Co. v. Isaacs, 20 Tex. Civ. App. 466.

- 12. FIGHT.** — See note 3.  
**13. FILE.** — See notes 1, 2.  
**15. Action by Clerk.** — See note 1.  
**16.** See note 1.  
**17.** See note 1.  
**Notice to the Officer.** — See note 2.  
**Custody of Clerk.** — See note 3,  
**18. Time of Filing.** — See note 1.  
**FILL.** — See note 2.  
**19. FINAL — FINALLY.** — See note 5.

**12. 3.** See *Carpenter v. People*, 31 Colo. 284.  
**13. 1.** *Dawson v. Cross*, 88 Mo. App. 299.  
 See also *City St. Imp. Co. v. Babcock*, (Cal. 1902) 68 Pac. Rep. 584.

**2. California.** — *City St. Imp. Co. v. Babcock*, (Cal. 1902) 68 Pac. Rep. 584; *Hoyt v. Stark*, 134 Cal. 178; *Edwards v. Grand*, 121 Cal. 254.  
**Florida.** — *Jacksonville St. R. Co. v. Walton*, 42 Fla. 54.

**Indiana.** — *Oats v. State*, 153 Ind. 436.  
**Indian Territory.** — *McClellan v. Tootle*, 3 Indian Ter. 325; *Noyes v. Guy*, 2 Indian Ter. 205.

**Kansas.** — *State v. Heth*, 60 Kan. 560.  
**Minnesota.** — *Hastay v. Bonness*, 84 Minn. 120.

**Missouri.** — *Dawson v. Cross*, 88 Mo. App. 299.

**Nebraska.** — *Medland v. Linton*, 60 Neb. 249.  
**Oregon.** — *Conant's Estate*, 43 Oregon 530, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13.

**South Dakota.** — *Starkweather v. Bell*, 12 S. Dak. 146.

**Texas.** — *Dallas v. Beeman*, 18 Tex. Civ. App. 335.

See also *Southern Bldg., etc., Assoc. v. Carey*, 117 Fed. Rep. 331; *In re Von Borcke*, 94 Fed. Rep. 352.

**File and Deposit Distinguished.** — *U. S. v. Van Duzee*, 185 U. S. 278.

**Filed with the Pleading.** — *Thompson v. Recht*, 158 Ind. 302.

**Necessary that Clerk Receive Statutory Fee.** — *Hilts v. Hilts*, 43 Oregon 162.

**15. 1. Indorsement.** — See *City St. Imp. Co. v. Babcock*, (Cal. 1902) 68 Pac. Rep. 584.

**16. 1. Indorsement Held Not Necessary.** — *Edwards v. Grand*, 121 Cal. 254; *Jacksonville St. R. Co. v. Walton*, 42 Fla. 54; *Noyes v. Guy*, 2 Indian Ter. 205; *Faivre v. Mandercheid*, 117

*Iowa* 724; *State v. Heth*, 60 Kan. 560; *Medland v. Linton*, 60 Neb. 249; *Hilts v. Hilts*, 43 Oregon 162, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15 [161]; *Conant's Estate*, 43 Oregon 530; *Starkweather v. Bell*, 12 S. Dak. 146.

**Evidence of Filing.** — *Oats v. State*, 153 Ind. 436; *McClellan v. Tootle*, 3 Indian Ter. 325; *State v. Heth*, 60 Kan. 560; *Starkweather v. Bell*, 12 S. Dak. 146.

**17. 1. Different Senses of the Term.** — *Medland v. Linton*, 60 Neb. 249. See also *Conant's Estate*, 43 Oregon 530.

**2. Notice.** — *Edwards v. Grand*, 121 Cal. 254.

**3. Custody.** — *Medland v. Linton*, 60 Neb. 249.

**Same — Secretary of State.** — *Delaware Surety Co. v. Layton*, (Del. Ch. 1901) 50 Atl. Rep. 378.

**18. 1. Time — Delivery to an Officer When He Is Not at the Office.** — *Hoyt v. Stark*, 134 Cal. 178; *Edwards v. Grand*, 121 Cal. 254; *Matter of Norton*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 48. But see *In re Von Borcke*, 94 Fed. Rep. 352.

**2. Filling an Office** or place is temporary, while election implies permanency for the full term. *Opinion of Justices*, 23 R. I. 635.

**19. 5. Blanding v. Sayles, 23 R. I. 226, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 19.**

**Final and Conclusive.** — *Lambert v. Bates*, 137 Cal. 676; *Carter v. Superior Ct.*, 138 Cal. 150; *Pittsburgh, etc., R. Co. v. Gillespie*, 158 Ind. 454, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 19; *People v. Kingston*, 53 N. Y. App. Div. 58.

**Final Passage of a Bill.** — *State v. Dillon*, 42 Fla. 95.

**Final Passage of Ordinance.** — See *Roberts v. Paducah*, 95 Fed. Rep. 67.

**Final Settlement.** — *In re Hirsch*, 97 Fed. Rep. 571.

# FINAL JUDGMENTS AND DECREES.

BY G. E. FLEMING.

## 24. I. DEFINITIONS — Final Judgments. — See note 1.

Termination of Particular Action. — See note 2.

## 25. The Sustaining or Overruling of a Demurrer. — See note 1.

## 26. II. WHERE APPEALABILITY TEST OF FINALITY — 2. Dismissal of Appeal Where Judgment or Decree Not Final. — See note 2.

**24. 1. Final Judgments.** — "The word 'judgment' means all final orders, decrees, and determinations in an action; also, all orders upon which execution may issue." *Tolles v. Spencer*, 18 Colo. App. 294, 296.

**2.** *Hay v. McDanel*, 156 Ind. 390, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24-28.

**25. 1. Sustaining or Overruling Demurrer Not Final Judgment** — *United States*. — *Carmichael v. Texarkana*, (C. C. A.) 116 Fed. Rep. 845; *Coltrane v. Templeton*, 45 C. C. A. 328, 106 Fed. Rep. 370.

*Alabama*. — *Breeding v. Grantland*, 135 Ala. 497; *Walker v. National Guaranty L. & T. Co.*, 133 Ala. 240; *Throne-Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

*Arkansas*. — *Gates v. Solomon*, 73 Ark. 8.

*Colorado*. — *Greig v. Elliott*, 29 Colo. 283.

*Connecticut*. — *Martin v. Sherwood*, 74 Conn. 202.

*District of Columbia*. — *Commercial Nat. Bank v. Consumers Brewing Co.*, 16 App. Cas. (D. C.) 186.

*Georgia*. — *United Glass Co. v. McConnell*, 110 Ga. 616; *Sayer v. Harding*, 118 Ga. 642; *Hollis v. Nelms*, 115 Ga. 5; *Stromberg-Carlson Telephone Mfg. Co. v. Bisbee*, 115 Ga. 346.

*Idaho*. — *Havens v. Stewart*, 7 Idaho 298.

*Illinois*. — *People v. Severson*, 113 Ill. App. 496, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24; *Wormley v. Wormley*, 207 Ill. 411; *Livingston County Bldg., etc., Assoc. v. Keach*, 213 Ill. 59; *Mackenzie v. Judson*, 96 Ill. App. 26.

*Indian Territory*. — *Case v. Ingle*, 2 Indian Ter. 309; *Houston v. Brown*, (Indian Ter. 1904) 82 S. W. Rep. 775.

*Kentucky*. — *Dumont v. Payne*, 68 S. W. Rep. 418, 24 Ky. L. Rep. 288; *Bennett v. Louisville*, 62 S. W. Rep. 1041, 23 Ky. L. Rep. 373; *Ferguson v. Mason*, (Ky. 1899) 50 S. W. Rep. 15.

*Maine*. — *Copeland v. Hewett*, 93 Me. 554.

*Mississippi*. — *Barrier v. Kelly*, 81 Miss. 266.

*Missouri*. — *Kautsch v. Droste*, 82 Mo. App. 412; *Rodgers v. Kallmeyer*, 104 Mo. App. 137; *Akins v. Hicks*, (Mo. App. 1903) 77 S. W. Rep. 86; *Lyons v. Rollinson*, 109 Mo. App. 68.

*Nebraska*. — *Leavitt v. S. D. Mercer Co.*, 64 Neb. 31.

*Tennessee*. — *Neely v. Neely*, (Tenn. Ch. 1901) 61 S. W. Rep. 1033; *Jones v. Stewart*, (Tenn. Ch. 1900) 61 S. W. Rep. 105.

*Texas*. — *Texas Land, etc., Co. v. Winter*, 93 Tex. 560, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24, 25; *Boren v. Jack*, (Tex. Civ.

App. 1903) 73 S. W. Rep. 1061; *Thomas v. Hawpe*, 25 Tex. Civ. App. 534; *State v. Trilling*, (Tex. Civ. App. 1900) 57 S. W. Rep. 311.

*Vermont*. — *Taft v. Mossey*, 77 Vt. 165.

*Virginia*. — *Hobson v. Hobson*, 100 Va. 216, 4 Va. Sup. Ct. 156; *Gillespie v. Coleman*, 98 Va. 276.

**Demurrers to the Merits Final.** — *Copeland v. Hewett*, 93 Me. 554.

**26. 2. When Judgment Not Final, Appeal Will Be Dismissed** — *United States*. — *Menge v. Warriner*, 57 C. C. A. 432, 120 Fed. Rep. 816; *Macfarland v. Brown*, 187 U. S. 239; *Macfarland v. Byrnes*, 187 U. S. 246; *Southern R. Co. v. Postal Tel. Cable Co.*, (C. C. A.) 93 Fed. Rep. 393, affirmed 179 U. S. 641; *Carmichael v. Texarkana*, (C. C. A.) 116 Fed. Rep. 845.

*Alabama*. — *Betts v. Cobb*, 121 Ala. 154; *McKleroy v. Gadsden Land, etc., Co.*, 126 Ala. 184; *Alexander v. Chapman*, 127 Ala. 465; *Beall v. Lehman*, 128 Ala. 165.

*Arizona*. — *Spicer v. Simms*, 6 Ariz. 347.

*California*. — *Free Gold Min. Co. v. Spiers*, 136 Cal. 484.

*Colorado*. — *Brockway v. W. & T. Smith Co.*, 17 Colo. App. 96; *In re Emanuel*, 31 Colo. 440; *Tolles v. Spencer*, 18 Colo. App. 294, 296.

*Florida*. — *Heinberg v. Thompson*, (Fla. 1903) 35 So. Rep. 335; *Marsh v. Bennett*, (Fla. 1903) 35 So. Rep. 336; *Morrison v. McCaskill*, (Fla. 1903) 35 So. Rep. 877; *Birmingham Trust, etc., Co. v. Jackson County Mill Co.*, (Fla. 1903) 35 So. Rep. 877; *Ropes v. Lansing*, (Fla. 1903) 35 So. Rep. 863; *Wilder v. Dunne*, 45 Fla. 662.

*Georgia*. — *Smith v. Willis*, 107 Ga. 792; *Deadwyler v. University Bank*, 110 Ga. 511; *Berryman v. Haden*, 112 Ga. 752; *Ray v. Anderson*, 117 Ga. 136; *Stubbs v. McConnell*, 119 Ga. 21; *United Glass Co. v. McConnell*, 110 Ga. 616; *Fugazzi, etc., Co. v. Tomlinson*, 119 Ga. 622; *Johnson v. Battle*, 120 Ga. 649, 102 Am. St. Rep. 118; *Sayer v. Harding*, 118 Ga. 642.

*Idaho*. — *Mahoney v. Elliott*, 8 Idaho 356.

*Illinois*. — *Maley v. Lake Erie, etc., R. Co.*, 84 Ill. App. 55; *Fitzsimmons v. Giddings*, 89 Ill. App. 434; *Lewis v. New Music Hall Co.*, 100 Ill. App. 415; *Hecht v. Kaestner*, 107 Ill. App. 252; *Harvey v. Cochran*, 103 Ill. App. 576; *Coons v. Frost*, 100 Ill. App. 303; *Glos v. Clark*, 109 Ill. 147; *Brodhead v. Minges*, 198 Ill. 513; *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255; *Livingston County Bldg., etc., Assoc. v. Keach*, 213 Ill. 59; *Wenon v. Fossick*, 213 Ill.



**27. III. DECREES IN COURTS OF EQUITY—CONSIDERATIONS BY WHICH FINALITY TESTED—1. In General.**—See note 2.

70; *Vandalia v. St. Louis, etc.*, R. Co., 209 Ill. 73; *Cahill v. Welch*, 208 Ill. 57; *Amberg v. Bartlett*, 190 Ill. 15; *Hagemann v. Hagemann*, 188 Ill. 363; *Partridge v. Stevens*, 187 Ill. 383; *Illinois Trust, etc., Bank v. Howard*, 185 Ill. 332.

*Indiana*.—*Hallagan v. Tanner*, 32 Ind. App. 655; *Hay v. McDaniel*, 156 Ind. 390; *Stewart v. Marion Trust Co.*, 155 Ind. 174; *In re Ray*, 155 Ind. 31.

*Indian Territory*.—*Case v. Ingle*, 2 Indian Ter. 309; *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, *reversed* (C. C. A.) 104 Fed. Rep. 595.

*Kansas*.—*Reynolds v. Packers' Nat. Bank*, 66 Kan. 461; *Wagstaff v. Wagstaff*, 67 Kan. 832.

*Kentucky*.—*Woolley v. Louisville*, 62 S. W. Rep. 517, 23 Ky. L. Rep. 100; *Specht v. Barber Asphalt Co.*, 70 S. W. Rep. 192, 24 Ky. L. Rep. 887; *Dumont v. Payne*, 68 S. W. Rep. 418, 24 Ky. L. Rep. 288; *Humber v. Hubble*, (Ky. 1899) 52 S. W. Rep. 926.

*Louisiana*.—*State v. Allen*, 110 La. 853; *Nicholls v. Maddox*, 52 La. Ann. 496.

*Maryland*.—*Cunningham v. School Com'rs*, 93 Md. 738; *Keifer v. Reichert*, 93 Md. 97; *Stump v. Stump*, 91 Md. 699; *Chappell v. Clarke*, 94 Md. 178; *Monumental Mut. L. Ins. Co. v. Wilkinson*, 100 Md. 31.

*Massachusetts*.—*Sprague v. Auffmordt*, 183 Mass. 7.

*Michigan*.—*Dodge v. Reynolds*, 135 Mich. 692, 10 Detroit Leg. N. 949; *U. S. Heater Co. v. Iron Molders' Union*, 129 Mich. 354, 8 Detroit Leg. N. 978.

*Minnesota*.—*McGinty v. Kelley*, 85 Minn. 117.

*Mississippi*.—*Savings, etc., Assoc. v. Tart*, (Miss. 1901) 30 So. Rep. 693; *Barrier v. Kelly*, 81 Miss. 266.

*Missouri*.—*Sperling v. Stubblefield*, 83 Mo. App. 266; *Rucking v. McMahon*, 76 Mo. App. 372; *Culbertson v. Young*, 156 Mo. 261; *Russell v. St. Louis, etc., R. Co.*, 154 Mo. 428; *Lyons v. Rollinson*, 109 Mo. App. 68; *Akins v. Hicks*, (Mo. App. 1903) 77 S. W. Rep. 86.

*Montana*.—*Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 27 Mont. 152; *Kinman v. Scheuer*, 30 Mont. 73.

*Nebraska*.—*Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129; *Browne v. Croft*, (Neb. 1903) 93 N. W. Rep. 406; *Rose v. Dempster Mill Mfg. Co.*, (Neb. 1903) 94 N. W. Rep. 964; *Stansbury v. Storer*, (Neb. 1902) 91 N. W. Rep. 197; *Parmele v. Schroeder*, 59 Neb. 553; *State v. Higby*, 60 Neb. 765; *Creamery Package Mfg. Co. v. Magill*, (Neb. 1902) 89 N. W. Rep. 170; *Bock v. Grooms*, (Neb. 1902) 90 N. W. Rep. 204.

*New Mexico*.—*Lyndonville Nat. Bank v. Folsom*, 10 N. Mex. 306; *De Harrison v. Perea*, 11 N. Mex. 505; *Jung v. Myer*, 11 N. Mex. 378; *Socorro County v. Blackington*, 11 N. Mex. 360.

*New York*.—*Hammond v. National L. Assoc.*, 168 N. Y. 262; *People v. York*, 169 N. Y. 452; *Matter of Strong*, 177 N. Y. 400; *Townsend v. Van Buskirk*, 162 N. Y. 265; *Anderson v. Daley*, 159 N. Y. 146.

*North Carolina*.—*Albemarle Steam Nav. Co. v. Worrell*, 133 N. Car. 93.

*North Dakota*.—*Oliver v. Wilson*, 8 N. Dak. 590; *Bolton v. Donavan*, 9 N. Dak. 575.

*Ohio*.—*McArthur v. Central Trust Co.*, 12 Ohio Cir. Dec. 149, 21 Ohio Cir. Ct. 654.

*Oklahoma*.—*Easton v. Broadwell*, 8 Okla. 442.

*Oregon*.—*State v. Downing*, 40 Oregon 309; *Wilder v. Reed*, (Oregon 1905) 78 Pac. Rep. 1027.

*Pennsylvania*.—*Powell v. Gayley*, 9 Pa. Super. Ct. 405; *Drum v. Uplinger*, 9 Pa. Super. Ct. 404; *Matter of Titusville Oil Exch.*, 10 Pa. Super. Ct. 496; *Huntingdon County v. Mason*, 21 Pa. Super. Ct. 148; *Kurrie v. Cottingham*, 209 Pa. St. 12; *Dailey v. Iselin*, 200 Pa. St. 200; *Hopper's Estate*, 192 Pa. St. 287, 44 W. N. C. (Pa.) 345; *Watkins v. Hughes*, 206 Pa. St. 526; *Philadelphia v. Pemberton*, 206 Pa. St. 73; *Belcher's Estate*, 205 Pa. St. 153; *Moore's Appeal*, 203 Pa. St. 376; *Schomaker v. Dean*, 201 Pa. St. 439.

*Tennessee*.—*Hely v. Lee*, 108 Tenn. 715; *Cole v. Cole*, (Tenn. Ch. 1900) 62 S. W. Rep. 1008; *Read v. Franklin*, (Tenn. Ch. 1900) 60 S. W. Rep. 215; *Woman's College v. Horne*, (Tenn. Ch. 1899) 53 S. W. Rep. 980.

*Texas*.—*Gregory v. Thompson's Sav. Bank*, 31 Tex. Civ. App. 497; *Mendoza v. Atchison, etc., R. Co.*, 94 Tex. 650, 62 S. W. Rep. 418; *Davis v. Martin*, 15 Tex. Civ. App. 62; *E. L. Wilson Hardware Co. v. Duff*, (Tex. Civ. App. 1904) 83 S. W. Rep. 907.

*Utah*.—*Musser v. Edmunds*, 23 Utah 425; *Popp v. Daisy Gold Min. Co.*, 22 Utah 457.

*Virginia*.—*Hobson v. Hobson*, 100 Va. 216, 4 Va. Sup. Ct. 156; *Valley Turnpike Co. v. Strickler*, 100 Va. 702; *Gillespie v. Coleman*, 98 Va. 276.

*Washington*.—*Green v. Moore*, 24 Wash. 241.

*West Virginia*.—*Hopkins v. Prichard*, 51 W. Va. 385; *Wheeling, etc., R. Co. v. Atkinson*, 53 W. Va. 539.

*Wisconsin*.—*State v. German Exch. Bank*, 114 Wis. 436.

**Interlocutory Order or Decree Examinaible After Final Judgment, but Not Before.**—*Moore's Appeal*, 203 Pa. St. 376.

**27. 2. Final Decree Fully Decides and Finally Disposes of Merits of Cause**—*United States*.—*Sanders v. Bluefield Waterworks, etc.*, Co., 45 C. C. A. 475, 106 Fed. Rep. 587; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. Rep. 780; *East Coast Cedar Co. v. People's Bank*, 49 C. C. A. 422, 111 Fed. Rep. 446; *Coltrane v. Templeton*, 45 C. C. A. 328, 106 Fed. Rep. 370; *Western Electric Co. v. Williams-Abbott Electric Co.*, 48 C. C. A. 159, 108 Fed. Rep. 952; *Macfarland v. Brown*, 187 U. S. 239.

*California*.—*People v. Mendocino County Bank*, 133 Cal. 107; *Nolan v. Smith*, 137 Cal. 360.

*Colorado*.—*Tolles v. Spencer*, 18 Colo. App. 294, 296.

*Illinois*.—*Bourke v. Sanitary Dist.*, 92 Ill. App. 333; *Lewis v. New Music Hall Co.*, 100 Ill. App. 415; *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98; *Cutting-Kaestner*

**29. 2. Where Further Orders Necessary to Carry Decree into Effect — a. WHEN RESERVATION OF SUCH ORDER DOES NOT AFFECT FINALITY — (1) In General.** — See note 1.

(2) *Accounts to Be Thereafter Stated in Accordance with Decree.* — See note 5.

**30. b. WHEN RESERVATION OF SUCH ORDER DOES AFFECT FINALITY.** — See note 1.

**32. IV. EFFECT OF FINAL DECREE — 1. In General.** — See notes 1, 2.

2. *Court Without Power to Alter Decree at Subsequent Term.* — See note 3.

**33. 3. Effect of Unauthorized Attempt to Alter Final Decree — a. IN GENERAL.** — See notes 1, 3.

**34. V. DISPOSITION OR NONDISPOSITION OF THE QUESTION OF COSTS AS AFFECTING FINALITY — 1. Conflict of Authority as to Finality of Decree When Question of Costs Reserved — b. JURISDICTIONS IN WHICH SUCH RESERVATION DOES NOT AFFECT FINALITY.** — See note 3.

*Co. v. Goldberg*, 107 Ill. App. 592; *Wenon v. Fossick*, 213 Ill. 70.

*Indian Territory.* — *Little v. Atchison*, etc., R. Co., 2 Indian Ter. 551; *Case v. Ingle*, 2 Indian Ter. 309; *Houston v. Brown*, (Indian Ter. 1904) 82 S. W. Rep. 775; *Woods v. Woods*, (Indian Ter. 1904) 82 S. W. Rep. 878.

*Kansas.* — *Reynolds v. Packers' Nat. Bank*, 66 Kan. 461.

*Kentucky.* — *Maxwell v. England*, 115 Ky. 783; *McKinney v. Thomson*, 69 S. W. Rep. 707, 24 Ky. L. Rep. 337.

*Maryland.* — *Chappell v. Clarke*, 94 Md. 178.

*Montana.* — *Butte*, etc., *Consol. Min. Co. v. Montana Ore Purchasing Co.*, 27 Mont. 152.

*Nebraska.* — *Ribble v. Furmin*, (Neb. 1903) 94 N. W. Rep. 967.

*New Mexico.* — *Jung v. Myer*, 11 N. Mex. 378.

*New York.* — *Matter of Munn*, 165 N. Y. 149.

*Oregon.* — *Marquam v. Ross*, (Oregon 1904) 78 Pac. Rep. 698.

*Texas.* — *Staacke v. Walker*, (Tex. Civ. App. 1903) 73 S. W. Rep. 408; *Railroad Commission v. Weld*, 95 Tex. 278; *Harvey v. Sutton*, 94 Tex. 79.

*Utah.* — *Standard Steam Laundry v. Dole*, 20 Utah 469; *Stoll v. Daly Min. Co.*, 19 Utah 271; *Popp v. Daisy Gold Min. Co.*, 22 Utah 457; *Matter of Tasanen*, 25 Utah 396.

*Virginia.* — *Trammell v. Ashworth*, 99 Va. 646.

*West Virginia.* — *Hopkins v. Prichard*, 51 W. Va. 385.

**29. 1. Where Finality Not Affected Because Further Orders Necessary to Carry Decree into Effect.** — *Kemp v. National Bank of Republic*, 48 C. C. A. 213, 109 Fed. Rep. 48; *Philadelphia*, etc., *St. R. Co.'s Petition*, 203 Pa. St. 354; *Hopkins v. Prichard*, 51 W. Va. 385.

**Where Appeal Taken from Subsequent Order Rather than from Final Decree.** — *Lovejoy v. Arnold*, 88 Ill. App. 449; *Murphy v. People*, 207 Ill. 337; *Osborn v. Cardeza*, 180 N. Y. 69.

**A Judgment Appointing a Receiver never terminates a cause.** *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246.

**Order Quashing Execution Final.** — *Little v. Atchison*, etc., R. Co., (Indian Ter. 1903) 76 S. W. Rep. 283.

**5. Accounts to Be Adjusted in Accordance with Decree** — *Colorado.* — *Haines v. Christie*, 27 Colo. 288.

*New York.* — *Matter of Prentice*, 160 N. Y. 568.

*Oregon.* — *Marquam v. Ross*, (Oregon 1904) 78 Pac. Rep. 698; *State v. O'Day*, 41 Oregon 495.

*Pennsylvania.* — *Moore's Appeal*, 203 Pa. St. 376.

*Washington.* — *Bennett v. Thorne*, 36 Wash. 253.

**30. 1. Where Reservation of Such Order Does Affect Finality — United States.** — *Denison*, etc., R. Co. v. *Ranney-Alton Mercantile Co.*, 44 C. C. A. 65, 104 Fed. Rep. 595.

*Illinois.* — *Davis v. McCullouch*, 192 Ill. 277; *Eggleston v. Morrison*, 185 Ill. 577; *French v. Genoa Junction Ice Co.*, 82 Ill. App. 318.

*Kansas.* — *Fry v. Rush*, 63 Kan. 429.

*Kentucky.* — *Harris v. Tuttle*, 62 S. W. Rep. 729, 23 Ky. L. Rep. 220.

*Maryland.* — *Wickes v. Wickes*, 98 Md. 307.

**Confirmation of Master's Report Before Final Decree.** — *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. Rep. 780; *Woods v. Woods*, (Indian Ter. 1904) 82 S. W. Rep. 878.

**An Order Directing Entry of Judgment in an action is not final so that it will support an appeal.** *Oliver v. Wilson*, 8 N. Dak. 590.

**32. 1. Final Decree Reviewed on Appeal or Writ of Error.** — *Spicer v. Simms*, 6 Ariz. 347; *Bannard v. Duncan*, 65 Neb. 179; *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 640, 655.

**2. Bill of Review will not lie after the time for taking an appeal has passed.** *Halsted v. Forest Hill Co.*, 109 Fed. Rep. 820.

**3. Court Without Power to Alter Decree at Subsequent Term.** — *Halsted v. Forest Hill Co.*, 109 Fed. Rep. 820; *Hendryx v. Perkins*, 52 C. C. A. 435; 114 Fed. Rep. 801.

**In Nebraska the court has power to vacate its judgments or decrees at a subsequent term, and such an order of vacation is final.** *Bannard v. Duncan*, 65 Neb. 179.

**33. 1. There Can Be But One Final Judgment or Decree Supporting Appeal or Writ of Error.** — *Nolan v. Smith*, 137 Cal. 360; *Russell v. St. Louis*, etc., R. Co., 154 Mo. 428; *Pittsburg Plate Glass Co. v. Peper*, 96 Mo. App. 595; *Sater v. Hunt*, 75 Mo. App. 468; *Marquam v. Ross*, (Oregon 1904) 78 Pac. Rep. 698.

**3. Effect of Court's Action Repaired by Application for Writ of Mandamus.** — *Justice v. Phillips*, 68 S. W. Rep. 630, 24 Ky. L. Rep. 290.

**34. 3. Jurisdictions in Which Reservation**

**34.** 2. Judgment or Decree for Costs Merely, Interlocutory. — See notes 4, 5.

**35.** When to Be Paid Out of Particular Fund. — See note 1.

**VI. WHERE DECREE FINAL AS TO SOME PARTIES AND NOT AS TO OTHERS.**

— See note 2.

**36.** VII. DISMISSAL OF COMPLAINT, BILL, OR CROSS-BILL — 1. General Dismissal of Bill or Complaint Final Decree. — See note 4.

**38.** See note 2.

2. Whether Dismissal of Cross-bill Final Decree — Jurisdictions Where Not So Regarded. — See note 4.

**39.** 3. Dismissal of Bill or Complaint as to Some Defendants Only — a. GENERAL RULE. — See note 3.

**40.** VIII. DECREE DISSOLVING INJUNCTION WHEN BILL RETAINED. — See notes 1, 2, 3.

Does Not Affect Finality. — *In re Michigan Cent. R. Co.*, 59 C. C. A. 643, 124 Fed. Rep. 727.

**34.** 4. Judgment for Costs Merely, Interlocutory — *Florida*. — *Hall v. Patterson*, 45 Fla. 353; *Haynes v. Bramlett*, (Fla. 1903) 35 So. Rep. 3; *Birmingham Trust, etc., Co. v. Jackson County Mill Co.*, (Fla. 1903) 35 So. Rep. 877.

*Illinois*. — *People v. Severson*, 113 Ill. App. 496; *Cutting-Kaestner Co. v. Goldberg*, 107 Ill. App. 592.

*Nebraska*. — *Thompson v. Nelson*, (Neb. 1903) 96 N. W. Rep. 194; *Welch v. Tippery*, (Neb. 1901) 95 N. W. Rep. 491; *Carlson v. Jordan*, (Neb. 1901) 95 N. W. Rep. 671; *Jarvis v. Chase County*, (Neb. 1903) 97 N. W. Rep. 831.

5. Decree for Costs Merely, Interlocutory. — *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. Rep. 324; *West v. East Coast Cedar Co.*, 51 C. C. A. 416, 113 Fed. Rep. 742; *Neher v. Crawford*, 10 N. Mex. 725; *Philadelphia, etc., St. R. Co.'s Petition*, 203 Pa. St. 354.

**35.** 1. Costs Ordered Paid Out of Fund in Hands of Executor or Administrator, Final Decree. — *In re Currier*, 19 Colo. App. 245.

2. Where Decree Final as to Some Parties to Original Cause, Though Not as to Others. — *Lough v. Davis*, 30 Wash. 204, 94 Am. St. Rep. 848.

**36.** 4. Where Dismissal of Complaint or Bill Final Judgment or Decree — *United States*. — *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 36 C. C. A. 263, 94 Fed. Rep. 312.

*California*. — *Pacific Paving Co. v. Vizelich*, 141 Cal. 4; *Marks v. Keenan*, 140 C. l. 33.

*Georgia*. — *Ray v. Anderson*, 117 Ga. 136.

*Illinois*. — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Livingston County Bldg., etc., Assoc. v. Keach*, 213 Ill. 59; *Wormley v. Wormley*, 207 Ill. 411.

*Indiana*. — *Osborn v. Maxinkuckee Lake Ice Co.*, 154 Ind. 101.

*Kentucky*. — *Wood v. Downing*, 110 Ky. 656.

*Maryland*. — *Ridgely v. Wilmer*, 97 Md. 725.

*New Jersey*. — *New Jersey Bldg., etc., Co. v. Lord*, 66 N. J. Eq. 344.

*Virginia*. — *Gillespie v. Coleman*, 98 Va. 276.

*Wisconsin*. — *Finlay v. Prescott*, 104 Wis. 614.

When Order Sustaining Demurrer Is Not Final. — *Neely v. Neely*, (Tenn. Ch. 1901) 61 S. W. Rep. 1033.

Where Dismissal of Petition Not Final Judgment. — *Appler v. Merryman*, 91 Md. 706.

Appeal Must Be from Judgment, Not from Order Dismissing Complaint. — *Kromback v. Pennsylvania Steel Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 297.

An Order Striking the Cause from the Docket, after a verdict has been rendered in favor of the plaintiff and a motion in arrest of judgment has been sustained, is final. *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78.

**38.** 2. Dismissal of Certain Parts of Bill Not Final Decree. — *Woman's College v. Horne*, (Tenn. Ch. 1899) 53 S. W. Rep. 980.

4. Dismissal of Cross-bill Not Final Decree. — *Bickley v. Bickley*, 129 Ala. 403; *Van Housen v. Thorne*, 90 Ill. App. 245.

**39.** 3. Where Judgment of Dismissal as to Some Parties Not Final. — *Nolan v. Smith*, 137 Cal. 360; *Maley v. Lake Erie, etc., R. Co.*, 84 Ill. App. 55; *Mackenzie v. Judson*, 96 Ill. App. 26; *Cole v. Cole*, (Tenn. Ch. 1900) 62 S. W. Rep. 1008; *Stewart v. Lenoir*, 31 Tex. Civ. App. 470.

**40.** 1. *Arizona*. — *Spicer v. Simms*, 6 Ariz. 347.

*Georgia*. — *Smith v. Willis*, 107 Ga. 792.

*Illinois*. — *Cahill v. Welch*, 208 Ill. 57; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19.

*Iowa*. — *Hawkeye Ins. Co. v. Huston*, 121 Iowa 393.

*Missouri*. — *Rose v. Combs Tp.*, 163 Mo. 396.

*Montana*. — *Maloney v. King*, 25 Mont. 256.

*Nebraska*. — *Stansbury v. Storer*, (Neb. 1902) 91 N. W. Rep. 197; *Huffman v. Rhodes*, (Neb. 1904) 100 N. W. Rep. 159.

*New Mexico*. — *Machen v. Keeler*, 11 N. Mex. 413.

*Texas*. — *Medlin v. Seidemann*, (Tex. Civ. App. 1904) 79 S. W. Rep. 590.

Order Denying Motion to Dissolve Preliminary Injunction Not Final. — *U. S. Heater Co. v. Iron Molders' Union*, 129 Mich. 354, 8 Detroit Leg. N. 978.

Dissolution by Act of Complainant Interlocutory. — *Robertson v. Montgomery Base Ball Assoc.*, 140 Ala. 320.

2. When Injunction Sole Relief Sought — Disposition Held Final Decree. — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Cahill v. Welch*, 208 Ill. 57; *Dreiske v. People's Lumber Co.*, 107 Ill. App. 285; *Cotten v. Christen*, 110 La. 444; *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 25 Mont. 135; *Hopkins v. Prichard*, 51 W. Va. 385.

An Order Imposing a Fine for Violation of a

**40. IX. DECREE UPON COLLATERAL MATTER WHERE ENTIRE CAUSE NOT DISPOSED OF.** — See note 6.

**41. X. JUDGMENTS IN ATTACHMENT CASES — SUSTAINING OR OVERRULING MOTION TO QUASH.** — See notes 2, 3.

**42. XI. ORDERS GRANTING OR DENYING NEW TRIALS OR REHEARINGS —**  
1. When Made on Motion. — See note 4.

**43.** See note 1.

**44. XII. CONSIDERATIONS BY WHICH FINALITY OF JUDGMENT OF APPELLATE TRIBUNAL DETERMINED — 2. Judgments of Affirmance — a. WHEN FINAL.** — See note 2.

*b. WHEN NOT FINAL — (1) Judgment Affirming Interlocutory Decree.* — See note 4.

**45. 3. Judgments of Reversal and Remandment — a. WHEN FINAL.** — See notes 2, 3, 4.

*b. WHEN NOT FINAL.* — See note 6.

**Preliminary Injunction** cannot be reviewed, except upon an appeal from the final decree in the cause. *Nassau Electric R. Co. v. Sprague Electric R., etc., Co.*, (C. C. A.) 95 Fed. Rep. 415.

**40. 3. Irrespective of Relief Sought, Dissolution Where Bill Retained Interlocutory.** — *Compare Bailey v. Willeford*, (C. C. A.) 131 Fed. Rep. 242.

**6. Finality of Decrees upon Collateral Matter.** — *Battery Park Bank v. Western Carolina Bank*, 126 N. Car. 531; *Bennett v. Thorne*, 36 Wash. 253.

**Decree Denying Injunction Interlocutory.** — *Western Electric Co. v. Williams-Abbott Electric Co.*, 48 C. C. A. 159, 108 Fed. Rep. 952; *Tracy v. Scott*, (N. Dak. 1904) 101 N. W. Rep. 905.

**41. 2. Refusal to Quash Attachment Not Reversible on Error.** — *Houston v. Brown*, (Indian Ter. 1904) 82 S. W. Rep. 775; *Steuart v. Chappell*, 98 Md. 527; *Bellah v. Poole*, 292 Pa. St. 71.

**3. Dissolution of Attachment Not Final Judgment.** — *United States.* — *Atlantic Lumber Co. v. L. Bucki, etc., Lumber Co.*, 35 C. C. A. 59, 92 Fed. Rep. 864.

*Arizona.* — *Spicer v. Simms*, 6 Ariz. 347.

*Indian Territory.* — *Houston v. Brown*, (Indian Ter. 1904) 82 S. W. Rep. 775.

*New Mexico.* — *Jung v. Myer*, 11 N. Mex. 378.

*Oklahoma.* — *Westheimer v. Hahn*, (Okla. 1904) 78 Pac. Rep. 378.

**Contrary Rule.** — *Steuart v. Chappell*, 98 Md. 527; *Anderson v. Matthews*, 8 Wyo. 307.

**42. 4. On Motions Granting New Trials or Rehearings.** — *Arizona.* — *Spicer v. Simms*, 6 Ariz. 347.

*California.* — *Kaltschmidt v. Weber*, 136 Cal. 675.

*District of Columbia.* — *Pickrell v. Thompson*, 12 App. Cas. (D. C.) 449.

*Kentucky.* — *Kemery v. Louisville, etc., R. Co.*, (Ky. 1899) 51 S. W. Rep. 804.

*Ohio.* — *Hoyt Dry Goods Co. v. Thomas*, 10 Ohio Cir. Dec. 341, 19 Ohio Cir. Ct. 638.

*Missouri.* — See *Ormiston v. Trumbo*, 77 Mo. App. 310.

**43. 1. On Motion Denying New Trial or Rehearing.** — *State Mut. L., etc., Assoc. v. Kemp*, 115 Ga. 355; *Young v. Gilmour*, 167 N. Y. 500; *Popp v. Daisy Gold Min. Co.*, 22 Utah 457. But see *Hanley v. Cass County*, 87 Minn. 209.

**44. 2. When Judgments of Affirmance Final.** — *United States.* — *Sanders v. Bluefield Waterworks, etc., Co.*, 45 C. C. A. 475, 106 Fed. Rep. 587; *Macfarland v. Brown*, 187 U. S. 239; *Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co.*, 173 U. S. 582; *West v. East Coast Cedar Co.*, 51 C. C. A. 416, 113 Fed. Rep. 742; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. Rep. 780; *East Coast Cedar Co. v. People's Bank*, 49 C. C. A. 422, 111 Fed. Rep. 446; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. Rep. 801; *Carmichael v. Texarkana*, (C. C. A.) 116 Fed. Rep. 845; *Mercantile Trust Co. v. Chicago, etc., R. Co.*, (C. C. A.) 123 Fed. Rep. 289.

*Illinois.* — *Lewis v. New Music Hall Co.*, 100 Ill. App. 415; *Curran v. Houston*, 201 Ill. 442; *Callahan v. Ball*, 197 Ill. 318; *Glos v. Clark*, 199 Ill. 147; *Coyne v. Newburg*, 185 Ill. 269; *Amberg v. Bartlett*, 190 Ill. 15; *Hagemann v. Hagemann*, 188 Ill. 363.

*Indian Territory.* — *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, 3 Indian Ter. 104, reversed (C. C. A.) 104 Fed. Rep. 595; *Woods v. Woods*, (Indian Ter. 1904) 82 S. W. Rep. 878.

*Nebraska.* — *Parmelee v. Schroeder*, 59 Neb. 553.

**4. Judgment of Affirmance of Interlocutory Judgments or Decrees Not Final.** — *Vandalia v. St. Louis, etc., R. Co.*, 209 Ill. 73; *Moore v. Lincoln Park, etc., Consol. Co.*, 196 Pa. St. 519.

**45. 2. Where Cause Remanded with Instructions to Enter Specified Judgment.** — *West v. East Coast Cedar Co.*, 51 C. C. A. 416, 113 Fed. Rep. 742; *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238, 46 U. S. (L. ed.) 1144; *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255; *Curran v. Houston*, 201 Ill. 442; *Matter of Brenner*, 170 N. Y. 185.

*3. Hagemann v. Hagemann*, 188 Ill. 363; *Morris, etc., R. Co. v. Orange*, 63 N. J. L. 252.

**4. Reversal and Remandment of Cause with Directions to Dismiss Complaint.** — *Mitchell v. King*, 187 Ill. 452; *Champlain v. McCrea*, 165 N. Y. 264.

**6. Judgment of Appellate State Tribunal Reversing and Remanding Case for Further Proceedings.** — *Cincinnati St. R. Co. v. Snell*, 179 U. S. 395, 45 U. S. (L. ed.) 248; *Haseltine v. Central Nat. Bank*, 183 U. S. 130; *Partridge v. Stevens*, 187 Ill. 383; *Callahan v. Ball*, 197 Ill. 318; *Hartel*



46. See note 2.

47. XIII. JUDGMENTS BY DEFAULT AND DECREES PRO CONFESSO — 1. Judgments by Default — When Interlocutory. — See note 2.

48. When Final. — See note 1.

2. Taking Bill as Confessed. — See note 3.

51. FINDING. — See note 1.

[FINE ARTS. — See note 3a.]

*v. Jefferies*, 94 Tex. 649, 54 S. W. Rep. 242; *Valley Turnpike Co. v. Strickler*, 100 Va. 702.

46. 2. Where Applied to Intermediate State Appellate Court. — *Osgood v. Skinner*, 186 Ill. 491; *Knapp v. Ross*, 181 Ill. 392.

47. 2. Judgment of Default Interlocutory. — *Dailey v. Iselin*, 200 Pa. St. 200. But see *Jameison v. Simonds Saw Co.*, 144 Cal. 3.

48. 1. Judgment of Non Pros. Final. — "The appeal must be regarded as taken from the judgment of *non pros.* and for defendant's costs. From such a judgment an appeal will

lie, because as to plaintiff, it is a final judgment." *Henderson v. Maryland Home F. Ins. Co.*, 90 Md. 47.

3. Effect of Failure to Answer Bill. — *New Jersey Bldg., etc., Co. v. Lord*, 66 N. J. Eq. 344.

51. 1. Decision and Finding Used Synonymously. — *Cobban v. Hecklen*, 27 Mont. 245.

3a. Fine Arts — Distinguished from Useful Arts — Copyright Act. — See *Bleistein v. Donaldson Lithographing Co.*, 98 Fed. Rep. 608.

## FINES AND PENALTIES.

BY W. B. ROBINSON.

53. II. DEFINITIONS AND DISTINCTIONS — 2. Fine. — See note 2.

3. Penalty. — See note 3.

54. See note 1.

Idea of Punishment Necessarily Involved. — See notes 2, 3, 4.

Distinction Between Fine and Penalty. — See note 5.

4. Forfeiture. — See note 6.

55. III. POWER TO CREATE. — See note 1.

53. 2. Definition of Fine. — See *U. S. v. Nash*, 111 Fed. Rep. 525, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *State v. McConnell*, 70 N. H. 158.

3. Broadest Meaning of Term "Penalty." — *Blum v. Widdicomb*, 90 Fed. Rep. 220. See also *U. S. v. Nash*, 111 Fed. Rep. 525.

54. 1. Specific Meaning — Confined to Pecuniary Punishment. — *Blum v. Widdicomb*, 90 Fed. Rep. 220; *People v. Sloane*, 98 N. Y. App. Div. 450. See also *U. S. v. Nash*, 111 Fed. Rep. 525, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Anderson v. Byrnes*, 122 Cal. 272.

Imprisonment Not a Penalty. — See *Kanter v. Circuit Ct.*, 108 Ill. App. 287.

Sum Payable on Breach of Any of Several Stipulations Held a Penalty. — *Bradley v. Walsh*, 88 L. T. N. S. 737.

Penalties Distinguished from Liquidated Damages. — *In re White*, 84 L. T. N. S. 594, 50 W. R. 81; *Strickland v. Williams*, (1899) 1 Q. B. 382, 68 L. J. Q. B. 241, 80 L. T. N. S. 4.

2. Idea of Punishment Necessarily Involved. — *McDonald v. Hearst*, 95 Fed. Rep. 656.

3. Statute Imposing Liability for Actual Loss or Damage Occasioned by Its Violation Does Not Create Penalty. — *Hutchinson v. Young*, 80 N. Y. App. Div. 246, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Kennealy v.*

*Leary*, 67 N. J. L. 435. See also *Latshaw v. State*, 156 Ind. 194.

Statutes Held Remedial. — *Atlanta v. Chattanooga Foundry, etc., Co.*, 101 Fed. Rep. 900; *Payne v. Sheets*, 75 Vt. 335.

4. Statute Imposing Liability of Treble the Loss or Damage Occasioned by Its Violation Is Penal. — *Blair v. Sioux City, etc., R. Co.*, 109 Iowa 369. See also *Atlanta v. Chattanooga Foundry, etc., Co.*, 101 Fed. Rep. 903.

5. Penalty May Be Incurred Without Criminality. — See *U. S. v. Two Barrels Whisky*, 37 C. C. A. 518, 96 Fed. Rep. 479; *U. S. v. Nash*, 111 Fed. Rep. 525.

A "fine" is the sentence pronounced by the court for a violation of the criminal law of the state, while a "penalty" is the amount recovered — the penalty prescribed — for a violation of the statute law of the state or the ordinance of a town. *Board of Education v. Henderson*, 126 N. Car. 689.

6. Distinction Between Fine and Forfeiture. — See *State v. McConnell*, 70 N. H. 158.

55. 1. Power of Legislature to Provide for Fines, Etc. — *Com. v. Intoxicating Liquors*, 172 Mass. 311; *Johnstown Cemetery Assoc. v. Parker*, 45 N. Y. App. Div. 55; *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035; *State v. Constantine*, 76 Vt. 192. See also *Gottlob v.*

**55.** Delegation of Power. — See notes 2, 3.

**IV. PENALTIES MUST BE EXPRESSLY CREATED.** — See note 4.

**V. RULES FOR THE CONSTRUCTION OF PENAL STATUTES** — 1. Penal Statutes Strictly Construed. — See note 5.

**57.** 2. Limitation of Rule. — See note 2.

**58.** 3. Imposition of Penalty Implies Prohibition or Compulsion. — See notes 1, 2.

Schmidt, 66 N. J. L. 180; Lloyd v. Dollisin, 23 Ohio Cir. Ct. 571.

**55. 2. Express Delegation of Power Necessary.** — Calhoun v. Little, 106 Ga. 336, 71 Am. St. Rep. 254; Papworth v. Fitzgerald, 106 Ga. 378. See also *Ex p.* McGee, 33 Oregon 165; State v. Nohl, 113 Wis. 15.

**3. Power Strictly Limited by Terms of Grant.** — See Springfield v. Starke, 93 Mo. App. 70.

**4. Penalty Must Be Expressly Created.** — Vicksburg, etc., R. Co. v. Traylor, 104 La. 284. See also Lead v. Klatt, 13 S. Dak. 140.

**Penal Statute Cannot Be Extended by Implication.** — Johnson v. Southern Pac. R. Co., 54 C. C. A. 508, 117 Fed. Rep. 462, reversed 196 U. S. 1; Southwestern Bldg., etc., Assoc. v. Rowe, 125 Ala. 491; McCormick Harvesting Mach. Co. v. Mills, 64 Neb. 166; Gloversville v. Enos, 70 N. Y. App. Div. 326; Thompson v. Western Union Tel. Co., (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 443; Geneseo First Nat. Bank v. National Live Stock Bank, 13 Okla. 719; Philadelphia v. Costello, 17 Pa. Super. St. 339.

**5. Penal Statutes Strictly Construed.** — *United States.* — Ross v. Raphael Tuck, etc., Co., (C. C. A.) 91 Fed. Rep. 128; Bennett v. Carr, (C. C. A.) 96 Fed. Rep. 213; The Carrie L. Tyler, 45 C. C. A. 405, 106 Fed. Rep. 426; Falk v. Curtis Pub. Co., 46 C. C. A. 201, 107 Fed. Rep. 126, affirming 98 Fed. Rep. 989; Johnson v. Southern Pac. R. Co., 54 C. C. A. 508, 117 Fed. Rep. 462, reversed 196 U. S. 1; U. S. v. Baltic Mills Co., 117 Fed. Rep. 959, reversed (C. C. A.) 124 Fed. Rep. 38.

*Alabama.* — Southwestern Bldg., etc., Assoc. v. Rowe, 125 Ala. 491.

*Arkansas.* — State v. Arkadelphia Lumber Co., 70 Ark. 329.

*Colorado.* — Mitchell v. Wheeler, (Colo. App. 1904) 77 Pac. Rep. 361.

*Illinois.* — People v. Smith, 208 Ill. 31; Pierce v. Dillingham, 96 Ill. App. 300, affirmed 203 Ill. 148; Walker v. Dailey, 101 Ill. App. 575; Palmer v. People, 109 Ill. App. 269; Schulte v. Menke, 111 Ill. App. 212, affirmed 210 Ill. 357.

*Indiana.* — State v. Hogreiver, 152 Ind. 652; Southern Indiana Loan, etc., Inst. v. Doyle, 26 Ind. App. 102.

*Iowa.* — Jolley v. Chicago, etc., R. Co., 119 Iowa 491.

*Kentucky.* — Com. v. Louisville, etc., R. Co., 112 Ky. 783.

*Maine.* — Millett v. Mullen, 95 Me. 400.

*Michigan.* — Van Camp v. Michigan Cent. R. Co., (Mich. 1904) 100 N. W. Rep. 771, 11 Detroit Leg. N. 362.

*Mississippi.* — Southern R. Co. v. Murrell, 78 Miss. 446; Cumberland Tel., etc., Co. v. Sanders, 83 Miss. 357.

*Missouri.* — State v. Missouri Pac. R. Co., 149 Mo. 104; McFarland v. Mississippi River, etc., R. Co., 175 Mo. 422; State v. St. Louis,

etc., R. Co., 105 Mo. App. 207; State v. Grassle, 74 Mo. App. 313.

*New Jersey.* — State v. Woodruff, 68 N. J. L. 89. See also Fitzgerald v. Schloss, 62 N. J. L. 472.

*New York.* — Wichelman v. Western Union Tel. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 450; Moore v. Champlain Electric Co., 88 N. Y. App. Div. 289; People v. Sloane, 98 N. Y. App. Div. 450; Hearn v. Western Union Tel. Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 557; Thompson v. Western Union Tel. Co., (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 443. See also Watson v. New York, etc., R. Co., (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 628.

*Ohio.* — Mathers v. Bull, 9 Ohio Dec. 408, 6 Ohio N. P. 45; State v. Oak Harbor Gas Co., 4 Ohio Cir. Dec. 158, 18 Ohio Cir. Ct. 751.

*Oklahoma.* — Geneseo First Nat. Bank v. National Live Stock Bank, 13 Okla. 719.

*Rhode Island.* — State v. Foster, 22 R. I. 163.

*Tennessee.* — Graham v. House-Bldg., etc., Assoc., (Tenn. Ch. 1898) 52 S. W. Rep. 1011. *Texas.* — Texas, etc., R. Co. v. Barrow, 33 Tex. Civ. App. 611.

*Vermont.* — Payne v. Sheets, 75 Vt. 335.

*Wisconsin.* — Musback v. Schaefer, 115 Wis. 357; Johnson v. Huber, 117 Wis. 58.

**Infliction of Actual Damage Held Necessary to Subject to Penalty.** — Nolan v. Grider, 135 Cal. 49; Jolley v. Chicago, etc., R. Co., 119 Iowa 491. But see Hoffman v. Knight, 127 Ala. 149.

**Whether Motives May Be Considered.** — Belt v. Reid, 84 Ill. App. 501; State v. Chicago, etc., R. Co., 122 Iowa 22; Haley v. Taylor, 77 Miss. 867, 78 Am. St. Rep. 549; Stewart v. Duerr, 11 Ohio Cir. Dec. 310, 20 Ohio Cir. Ct. 505; Schumacher v. Falter, 113 Wis. 563; Johnson v. Huber, 117 Wis. 58. But compare New York v. Hewitt, 91 N. Y. App. Div. 445.

**Exemption from Penalties Liberally Construed.** — See Philadelphia v. Costello, 17 Pa. Super. Ct. 339.

**Revenue Statutes Imposing Forfeitures Reasonably Construed.** — 581 Diamonds v. U. S., (C. C. A.) 119 Fed. Rep. 556.

**Pleadings in Civil Action to Recover Penalty Liberally Construed.** — State v. Zillmann, 121 Wis. 472.

**57. 2. Limitation of Rule.** — Peonage Cases, 123 Fed. Rep. 671; Bolles v. Outing Co., 175 U. S. 262; State v. Hogreiver, 152 Ind. 652; Com. v. Intoxicating Liquors, 172 Mass. 311. See also Com. v. Trent, 77 S. W. Rep. 390, 25 Ky. L. Rep. 1180; Sturgis v. Coleman, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 302.

**58. 1. Penalty for Commission Implies Prohibition.** — Chester v. Chester First Nat. Bank, 9 Pa. Super. Ct. 517; Musback v. Schaefer, 115 Wis. 357.

**2. Penalty for Omission Implies Legal Compulsion.** — Chester v. Chester First Nat. Bank,

**58. 4. Who May Be Subjected to Fines and Penalties — a. PERSON MUST BE ONE TO WHOM PENAL STATUTE CLEARLY APPLIES.** — See note 3.

**c. RULE AS TO OFFENSES COMMITTED BY SEVERAL PERSONS.** — See note 5.

**59. 5. When Forfeitures Take Effect.** — See note 2.

**60. Forfeiture Cannot Be Defeated by Subsequent Transfer of Property.** — See note 1.

**VI. EXTENT OF IMPOSITION — 1. General Principles — Constitutional Prohibition of Excessive Fines.** — See note 5.

**How Fines Fixed — Legislative Discretion.** — See note 6.

**61. See notes 1, 2.**

9 Pa. Super. Ct. 517; *Musback v. Schaefer*, 115 Wis. 357.

**58. 3. Penal Statute Applies to Those Only Who Are Clearly Within Its Terms.** — *Southwestern Bldg., etc., Assoc. v. Rowe*, 125 Ala. 491; *Atlantic City v. Turner*, 67 N. J. L. 520. See also *Ross v. Raphael Tuck, etc., Co.*, (C. C. A.) 91 Fed. Rep. 128; *McDonald v. Hearst*, 95 Fed. Rep. 656; *Gimbel v. Hogg*, 38 C. C. A. 419, 97 Fed. Rep. 791; *Callum v. District of Columbia*, 15 App. Cas. (D. C.) 529; *Crosson v. Rutherford*, 66 N. J. L. 120; *Wilson v. Tennent*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 273, *affirmed* 61 N. Y. App. Div. 100; *Meares v. Butler*, 123 N. Car. 206; *Crawford v. Pennsylvania R. Co.*, 4 Ohio Dec. (Reprint) 359; *Davis v. Pullman Co.*, 34 Tex. Civ. App. 621.

**Owner of Railroad.** — Where a statute imposed a penalty upon a company owning a railroad for failure to give signals at crossings, etc., it was held that a company in exclusive possession and operating the road was the owner of the road within the meaning of the statute. *State v. Missouri Pac. R. Co.*, 149 Mo. 104.

**5. Rule that All Offenses and the Penalties Thereof Are Several.** — *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035.

**59. 2. Statutory Forfeiture Takes Effect Immediately upon Commission of Offense.** — 581 *Diamonds v. U. S.*, (C. C. A.) 119 Fed. Rep. 556; *U. S. v. One Dark Bay Horse*, 130 Fed. Rep. 240; *Pilcher v. Faircloth*, 135 Ala. 311; *State v. Swann*, 46 W. Va. 128.

**60. 1. Forfeiture Cannot Be Defeated by Third Person After Decree.** — *The St. Paul*, 1 Alaska 71.

**5. State Provisions.** — See *Stone's Petition*, 21 R. I. 14.

**6. Fines Should Be Fixed with Reference to Object to Be Accomplished.** — *State v. Lube*, 93 Me. 418; *State v. Constantino*, 76 Vt. 192, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60. See also *Ex p. Brady*, 70 Ark. 376; *State v. Poole*, 93 Minn. 148.

**61. 1. Regulation of Fines a Legislative Function — Indiana.** — *State v. Hogreiver*, 152 Ind. 652.

*Maine.* — See *State v. Lube*, 93 Me. 418.

*Minnesota.* — *State v. Poole*, 93 Minn. 148.

*Missouri.* — See *Sanders v. Southern Electric R. Co.*, 147 Mo. 411.

*Nebraska.* — *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035.

*Ohio.* — *Lloyd v. Dollisin*, 23 Ohio Cir. Ct. 571.

*Texas.* — *State v. Laredo Ice Co.*, 96 Tex. 461, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 60. See also *Texas, etc., R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1047.

**2. Courts Will Not Interfere with Legislative Discretion unless Fine Is Flagrantly Disproportioned — Arkansas.** — See *Ex p. Brady*, 70 Ark. 376.

*Colorado.* — *Cardillo v. People*, 26 Colo. 355.

*Indiana.* — *State v. Hogreiver*, 152 Ind. 652.

*Maine.* — See *State v. Lube*, 93 Me. 418.

*Nebraska.* — *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035.

*Texas.* — *State v. Laredo Ice Co.*, 96 Tex. 461, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

*Vermont.* — *State v. Constantino*, 76 Vt. 192.

*Wyoming.* — *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**Fines Held Not Excessive — Violation of Liquor Laws.** — A fine of thirty-two hundred dollars for twenty offenses, under a statute fixing a fine of two hundred to five hundred dollars for each day's selling without a license. *Ex p. Brady*, 70 Ark. 376.

A fine of not less than one hundred and not more than five hundred dollars, or imprisonment, or both, for violating an act regulating the closing of saloons. *Cardillo v. People*, 26 Colo. 355.

A fine of not less than three hundred dollars, or imprisonment, or both, for selling and exposing for sale intoxicating liquor without a license. *State v. Constantino*, 72 Vt. 192.

**Violation of Game Laws.** — A fine of twenty thousand dollars for the possession of two thousand wild ducks with intent to sell the same under a statute imposing a fine of not less than ten nor more than twenty-five dollars for each bird so possessed. *State v. Poole*, 93 Minn. 148.

A fine of five dollars for each prairie chicken found in one's possession out of season. *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035.

A fine of twenty dollars for each of eighteen birds defendant had in his possession contrary to statute. *Stone's Petition*, 21 R. I. 14.

**Violation of Fisheries Laws.** — A fine of five dollars for each lobster less than ten and one-half inches in length in one's possession for any purpose. *State v. Lube*, 93 Me. 418; *Campbell v. Burns*, 94 Me. 127.

**Failure to List for Taxes.** — A fine of fifteen hundred dollars for failure to list for taxation stocks and bonds to the value of twenty thousand dollars. *La Plante v. State*, 152 Ind. 80.

**Disturbing Religious Meeting.** — A fine of one hundred dollars and imprisonment for one year

**62.** Failure to Fix Maximum. — See note 1.

**2.** How Amount of Fine or Penalty in Individual Cases Is Determined. — See notes 2, 3.

**3.** Interest — *a.* ON PENALTY. — See note 4.

**63.** 4. Incurring of Several Penalties by a Single Unlawful Act. — See note 2.

**5.** Cumulation of Penalties. — See note 5.

**64.** VII. METHOD OF IMPOSITION OR RECOVERY — **2.** Penalties — Statutory Form of Action. — See notes 3, 4.

at hard labor for disturbing a religious congregation while at worship. *State v. Sheppard*, 54 S. Car. 178.

*Failure of Carriers to Redeem Tickets.* — A fine of one hundred to five hundred dollars for refusal to redeem tickets. *Texas, etc., R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1047.

*Violation of Street-railway Regulations.* — A fine of twenty-five to one hundred dollars for each day of operating an electric car in the winter without a screen for the motorman. *State v. Whitaker*, 160 Mo. 59.

*Fines Held Excessive — Cumulative Sentence.* — See *Ordway v. Cornelius*, 23 Pa. Co. Ct. 281; *Graham v. House-Bldg., etc., Assoc.*, (Tenn. Ch. 1808) 52 S. W. Rep. 1011.

**62.** 1. Failure to Fix Maximum Fine Does Not Render Statute Unconstitutional. — *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; *State v. Constantino*, 76 Vt. 192, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62. See also *Latshaw v. State*, 156 Ind. 194.

**2.** Amount of Fine May Be Left to Court or Jury Within Limits Fixed by Statute — *United States.* — *Atlanta v. Chattanooga Foundry, etc., Co.*, 101 Fed. Rep. 903.

*Indiana.* — See *Latshaw v. State*, 156 Ind. 194.

*Iowa.* — *Beatty v. Roberts*, 125 Iowa 619.

*Minnesota.* — *State v. Grimes*, 83 Minn. 460.

*New Jersey.* — *State v. Corson*, 67 N. J. L. 178; *Atlantic City v. Crandol*, 67 N. J. L. 488.

*South Carolina.* — *State v. Sheppard*, 54 S. Car. 178.

*Tennessee.* — *Kittrell v. State*, 104 Tenn. 522.

**3.** Fine or Penalty Cannot Be More or Less than Amount Prescribed by Statute. — *Stark v. State*, 81 Miss. 397; *Derby v. State*, 24 Ohio Cir. Ct. 304. See also *Smith v. State*, 24 Ohio Cir. Ct. 140.

**Void as to Excess Only.** — *Madden v. State*, (Tenn. 1901) 67 S. W. Rep. 74.

**Where a Sentence of Both Fine and Imprisonment** was imposed for a contempt of court under a statute prescribing fine or imprisonment, it was held that, while the court had no jurisdiction to impose both, yet the sentence should stand till one or the other was satisfied. *Ex p. Davis*, 112 Fed. Rep. 139.

**4.** Rule as to Interest on Penalty. — *Blair v. Sioux City, etc., R. Co.*, 109 Iowa 369. See also *Vicksburg, etc., R. Co. v. Trayler*, 104 La. 284; *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508, modified 175 N. Y. 328.

**63.** 2. Several Penalties May Be Incurred by a Single Unlawful Act. — *Beaumont v. Huddersfield Corp.*, 1 Local Gov. Rep. 118, 67 J. P. 57, distinguishing *Lewis v. Swansea Corp.*, 4 Times L. Rep. 122, 706.

**5.** Recovery Limited to One Penalty. — *Morgan*

*v. Hedstrom*, 164 N. Y. 224; *Jones v. Rochester Gas, etc., Co.*, 168 N. Y. 65, reversing (Supm. Ct. App. Div.) 64 N. Y. Supp. 1138; *Watson v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 628. See also *Hoyt v. Computing Scale Co.*, 96 Fed. Rep. 250; *George F. Dittman Boot, etc., Co. v. Nixon*, 120 Ala. 206; *Jolley v. Chicago, etc., R. Co.*, 119 Iowa 491; *People v. Buell*, 85 N. Y. App. Div. 141; *Arnold v. Ford*, 53 N. Y. App. Div. 25.

**64.** 3. Penalty Recoverable in Civil Action — *United States.* — *U. S. v. Younger*, 92 Fed. Rep. 672; *McDonald v. Hearst*, 95 Fed. Rep. 656. *Arkansas.* — *St. Louis, etc., R. Co. v. State*, 68 Ark. 561; *State v. Arkadelphia Lumber Co.*, 70 Ark. 329.

*Colorado.* — *People v. Braisted*, 13 Colo. App. 532.

*Illinois.* — *Sloan v. People*, 108 Ill. App. 545.

*Indiana.* — *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; *Greensburg v. Cleveland, etc., R. Co.*, 23 Ind. App. 141.

*Kentucky.* — *Harp v. Com.*, 61 S. W. Rep. 467, 22 Ky. L. Rep. 1792.

*Maine.* — *Campbell v. Burns*, 94 Me. 127.

*Missouri.* — See *In re Jones*, 90 Mo. App. 318; *Springfield v. Starke*, 93 Mo. App. 70.

*New York.* — *People v. Bremer*, 69 N. Y. App. Div. 14; *People v. Laesser*, 79 N. Y. App. Div. 384; *People v. Snyder*, 90 N. Y. App. Div. 422; *People v. Sloane*, 98 N. Y. App. Div. 450. See also *People v. Bootman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 27.

*North Carolina.* — *Board of Education v. Henderson*, 126 N. Car. 689.

*North Dakota.* — *State v. Messner*, 9 N. Dak. 186.

*Pennsylvania.* — *Philadelphia v. Junker*, 9 Pa. Dist. 673; *Com. v. Davison*, 11 Pa. Super. Ct. 130.

*Wisconsin.* — *State v. Zillmann*, 121 Wis. 472.

**Penalty Not Recoverable in Criminal Proceeding.** — *U. S. v. Nash*, 111 Fed. Rep. 525; *Com. v. Conrad*, 25 Pa. Co. Ct. 32.

Where a statute contains an express prohibition or command, the violation of which is a public offense, such violation is punishable by a criminal proceeding, although the punishment imposed is denominated in the statute as a "penalty." *U. S. v. Nash*, 111 Fed. Rep. 525.

**Preponderance of Evidence Is Sufficient.** — *State v. Chicago, etc., R. Co.*, 122 Iowa 22. See also *Texas, etc., R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1047. But see *Louisville, etc., R. Co. v. Com.*, 112 Ky. 635; *Gunkel v. Bachs*, 103 Ill. App. 494; *Sloan v. People*, 108 Ill. App. 545; *Palmer v. People*, 109 Ill. App. 269.

**Statute Must Designate for Whose Benefit Recoverable in Civil Actions.** — *State v. Messner*, 9 N. Dak. 186.



**64.** Action of Debt. — See note 5.

**65.** 3. Forfeitures. — See note 2.

**VIII. METHODS OF ENFORCING PAYMENT OF FINES — 2. Execution. —**

See note 5.

**66.** 3. Imprisonment — *a.* POWER TO IMPRISON FOR NONPAYMENT. — See notes 1, 2.

*b.* CONSTITUTIONALITY OF IMPRISONMENT. — See note 3.

**67.** *c.* DURATION OF IMPRISONMENT. — See note 1.

**64.** 4. Statutory Form of Action — *United States.* — *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 844; *U. S. v. McElroy*, 115 Fed. Rep. 252.

*Colorado.* — *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361.

*Idaho.* — *Portneuf Lodge No. 20 v. Western Loan, etc., Co.*, 6 Idaho 673; *Cleveland v. Western Loan, etc., Co.*, 7 Idaho 477.

*Illinois.* — *Zeller v. White*, 106 Ill. App. 183, affirmed 208 Ill. 518; *Schulte v. Menke*, 111 Ill. App. 212, affirmed 210 Ill. 357.

*Indiana.* — *Latshaw v. State*, 156 Ind. 194.

*Iowa.* — *Lippert v. Lippert*, 110 Iowa 550; *State v. Chicago, etc., R. Co.*, 122 Iowa 22.

*Kentucky.* — *Harp v. Com.*, (Ky. 1901) 61 S. W. Rep. 467; *Cincinnati, etc., R. Co. v. Baughman*, 116 Ky. 479.

*Maine.* — *Dexter v. Blackden*, 93 Me. 473; *State v. Hanna*, 99 Me. 224.

*Michigan.* — *Highway Overseer v. Pelton*, 129 Mich. 31, 8 Detroit Leg. N. 842.

*Missouri.* — *State v. Missouri Exploration, etc., Co.*, 97 Mo. App. 226.

*Nebraska.* — *Courier Printing, etc., Co. v. Leese*, 65 Neb. 581.

*New Hampshire.* — *State v. McConnell*, 70 N. H. 158.

*New Jersey.* — *Hickman v. State*, 62 N. J. L. 499, affirmed 63 N. J. L. 666; *Gottlob v. Schmidt*, 66 N. J. L. 180; *Board of Health v. Rosenthal*, 67 N. J. L. 216; *Woolley v. Bell*, 69 N. J. L. 581; *Hunter v. Erie R. Co.*, 70 N. J. L. 101.

*Oregon.* — *Ex p. McGee*, 33 Oregon 165.

*Pennsylvania.* — *Philadelphia v. Junker*, 9 Pa. Dist. 673; *Com. v. Davison*, 11 Pa. Super. Ct. 130.

*Texas.* — *Moore v. Bell*, 95 Tex. 151; *Davis v. Pullman Co.*, 34 Tex. Civ. App. 621.

*Wisconsin.* — *State v. Childs*, 109 Wis. 233; *State v. Zillmann*, 121 Wis. 472.

**5. Debt the Proper Form of Action.** — *U. S. v. Younger*, 92 Fed. Rep. 672; *Higdon v. Kenemer*, 120 Ala. 193; *Southern Car, etc., Co. v. Calhoun County*, 141 Ala. 250; *State v. McConnell*, 70 N. H. 158.

**65.** 2. Proceeding to Enforce Forfeiture. — *U. S. v. Two Barrels Whisky*, 37 C. C. A. 518, 96 Fed. Rep. 479; *Three Packages Distilled Spirits v. U. S.*, 63 C. C. A. 263, 129 Fed. Rep. 329; *U. S. v. One Dark Bay Horse*, 130 Fed. Rep. 240; *U. S. v. Seven Barrels Whisky*, 131 Fed. Rep. 806; *Campbell v. Burns*, 94 Me. 127.

**5. Execution May Issue for Satisfaction of Fine** — *United States.* — *Clark v. Allen*, 114 Fed. Rep. 374, affirmed (C. C. A.) 126 Fed. Rep. 738.

*Iowa.* — *McConkie v. Landt*, 126 Iowa 317.

*Kentucky.* — *Harp v. Com.*, (Ky. 1901) 61 S. W. Rep. 467; *Louisville, etc., R. Co. v. Com.*,

112 Ky. 635; *Farris v. Dozier*, (Ky. 1904) 82 S. W. Rep. 615.

*Montana.* — *Petelin v. Kennedy*, 29 Mont. 466.

*Nebraska.* — *Everson v. State*, 66 Neb. 154.

*Ohio.* — *In re McAdams*, 11 Ohio Cir. Dec. 780, 21 Ohio Cir. Ct. 450.

*Utah.* — *Roberts v. Howells*, 22 Utah 389.

*Wisconsin.* — *State v. Nohl*, 113 Wis. 15.

*Wyoming.* — *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**A Penalty May Be Enforced by Attachment** under Code Ala., 1896, § 524, subd. 2. *George F. Dittman Boot, etc., Co. v. Mixon*, 120 Ala. 206.

**66.** 1. Imprisonment for Nonpayment of Fine — *Arkansas.* — See *Ex p. Brady*, 70 Ark. 376.

*Florida.* — *Eggart v. State*, 40 Fla. 527.

*Georgia.* — *Calhoun v. Little*, 106 Ga. 336, 71 Am. St. Rep. 254; *Papworth v. Fitzgerald*, 106 Ga. 378.

*Illinois.* — *Pierce v. Dillingham*, 96 Ill. App. 300, affirmed 203 Ill. 148.

*Louisiana.* — *State v. Arnault*, 52 La. Ann. 1079.

*New Jersey.* — *Belmar v. Barkalow*, 67 N. J. L. 504.

*Ohio.* — *In re McAdams*, 11 Ohio Cir. Dec. 780, 21 Ohio Cir. Ct. 450.

*Oregon.* — *Ex p. McGee*, 33 Oregon 165.

*Utah.* — *Roberts v. Howells*, 22 Utah 389.

*Wisconsin.* — *Starry v. State*, 115 Wis. 50.

*Wyoming.* — *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**Sentence to Fine and Imprisonment as Punishment — When Imprisonment for Nonpayment of Fine Begins.** — *Berkenfeld v. People*, 191 Ill. 272.

**California Rule that Imprisonment as Punishment Precludes Imprisonment for Nonpayment of Fine.** — The California rule is followed in *Utah*. *Roberts v. Howells*, 22 Utah 389. See also *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

**Where Money Was Found on the Person of the Prisoner** and the magistrate applied the same in payment of the fine, it was held that the prisoner had not the option of demanding back the money and taking imprisonment in lieu of the fine. *McCann v. Barr*, 16 Lanc. L. Rev. 183.

**2. Implied Power to Imprison for Nonpayment of Fine.** — *Ex p. McGee*, 33 Oregon 165.

**Effect of General Law Authorizing Imprisonment.** — *Berkenfeld v. People*, 191 Ill. 272. See also *Kanter v. Circuit Ct.*, 108 Ill. App. 287.

**3. Imprisonment for Nonpayment of Fines Constitutional.** — *Sothman v. State*, 66 Neb. 302.

**67.** 1. Duration of Imprisonment Limited. — *Berkenfeld v. People*, 191 Ill. 272; *In re Lorkowski*, 94 Mo. App. 623; *Starry v. State*, 115 Wis. 50; *Fisher v. McDaniel*, 9 Wyo. 457, 89 Am. St. Rep. 971.

**Erroneous Order.** — An order of imprisonment,

- 67.** Discharge from Imprisonment on Showing Inability to Pay Fine. — See note 3.
- 68.** *d.* WHETHER IMPRISONMENT SATISFIES FINE. — See note 1.  
Provisions for Satisfaction of Fine by Imprisonment and Labor. — See note 2.
- 69.** **X. APPLICATION OF FINES AND PENALTIES** — 1. General Rule. — See note 1.  
2. Constitutional and Statutory Regulation. — See notes 2, 3.
- 70.** **XI. COMPOUNDING PENALTIES** — 2. The Right to Compound. — See note 4.
- 71.** **XII. REMISSION OF FINES AND PENALTIES** — 1. Power of Executive. — See notes 1, 2.  
2. Power of Courts. — See note 4.  
3. Power of Municipal Officers. — See note 5.
- 72.** **FINISH.** — See note 1.

where the fines of several parties are separate, which requires one to remain in jail until his fine is satisfied, "or until he and they and each of them be otherwise released pursuant to law," was held to be erroneous. *Kanter v. Circuit Ct.*, 108 Ill. App. 287.

**67.** 3. Discharge from Imprisonment on Showing Inability to Pay Fine — *United States*. — *Clark v. Allen*, 114 Fed. Rep. 374, affirmed (C. C. A.) 126 Fed. Rep. 738.

*Colorado*. — *Tate v. People*, 25 Colo. 335.

*Montana*. — *Petelin v. Kennedy*, 29 Mont. 466.

*New York*. — See *Matter of Collins*, (Surrogate Ct.) 39 Misc. (N. Y.) 753.

*Ohio*. — *Ex p. Mullaney*, 10 Ohio Dec. 419, 8 Ohio N. P. 49.

*Texas*. — *Ex p. Rodriquez*, (Tex. Crim. 1903) 73 S. W. Rep. 1050.

**68.** 1. Imprisonment Does Not Relieve from Liability for Fine. — *Petelin v. Kennedy*, 29 Mont. 466.

2. Satisfaction of Fine by Imprisonment or Labor — *Arkansas*. — *Ex p. Brady*, 70 Ark. 376.

*Illinois*. — *Berkenfield v. People*, 191 Ill. 272.

*Missouri*. — *St. Louis v. Karr*, 85 Mo. App. 608. See also *In re Lorkowski*, 94 Mo. App. 623.

*Texas*. — *Ex p. Banks*, 41 Tex. Crim. 201; *Ex p. Reeves*, 41 Tex. Crim. 266; *Ex p. Rodriquez*, (Tex. Crim. 1903) 73 S. W. Rep. 1050.

**69.** 1. Person to Whom Fine Is Payable Should Be Designated. — *Provost v. Leclerc*, 14 Quebec Super. Ct. 208.

2. Constitutional and Statutory Regulation — *United States*. — *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 844.

*Maine*. — *Dexter v. Blackden*, 93 Me. 473; *State v. Hanna*, 99 Me. 224.

*Missouri*. — *State v. Missouri Pac. R. Co.*, 149 Mo. 104.

*New Jersey*. — *Vandegrift v. Meihle*, 66 N. J. L. 92.

*North Dakota*. — *State v. Messner*, 9 N. Dak. 186.

*Ohio*. — *In re McAdams*, 11 Ohio Cir. Dec. 780, 21 Ohio Cir. Ct. 450; *Lloyd v. Dollisin*, 23 Ohio Cir. Ct. 571.

*Vermont*. — *State v. Bosworth*, 74 Vt. 315.

3. Application of Fines to Support of Schools — *Illinois*. — *Palmer v. People*, 109 Ill. App. 269.

*Indiana*. — *Judy v. Thompson*, 156 Ind. 533.

*Missouri*. — *State v. Whitaker*, 160 Mo. 59.

*Nebraska*. — *Sothman v. State*, 66 Neb. 302.

*Nevada*. — *Ex p. McMahon*, 26 Nev. 243.

*North Carolina*. — *Board of Education v. Henderson*, 126 N. Car. 689.

**70.** 4. Void Compromise. — *Adams v. Cox*, 80 Miss. 561.

**71.** 1. Executive May Remit Fines and Penalties. — *Meul v. People*, 198 Ill. 258; *McConkie v. Landt*, 126 Iowa 317.

2. Vested Rights in Fines or Penalties Cannot Be Impaired. — *Meul v. People*, 198 Ill. 258; *Dunham v. Anders*, 128 N. Car. 207, 83 Am. St. Rep. 668. See also *Anderson v. Byrnes*, 122 Cal. 272.

Repeal of Act After Verdict but Before Judgment. — *Cleveland, etc., R. Co. v. Wells*, 65 Ohio St. 313.

4. New York — Court of General Sessions Can Remit Fines. — *People v. Kelly*, (Ct. Gen. Sess.) 32 Misc. (N. Y.) 319. See also *Matter of De Graaf*, (Surrogate Ct.) 24 Misc. (N. Y.) 147.

5. In Quebec fines imposed under the charter of the city of Montreal cannot be remitted by the city council. *Ex p. Armitage*, 11 Quebec K. B. 165, 5 Can. Crim. Cas. 345.

**72.** 1. Finished or Partly Finished Articles — Customs Duties Act. — *U. S. v. Eschwege*, (C. C. A.) 98 Fed. Rep. 600.

A Railroad Is Not Finished where its cars are run across a river on ferryboats pending the completion of a bridge in course of construction. *Garner v. Hall*, 122 Ala. 221.

## FIRE DEPARTMENT.

- 74.** **III. REMOVAL FROM OFFICE** — 1. Fire Commissioners. — See note 3.  
**75.** 2. Firemen and Officers of Force — Dismissal Without Cause. — See note 1. Necessity of Notice of Charge and Trial. — See note 2.  
**76.** See note 1.  
**77.** **IV. COMPENSATION OF FIREMEN AND OFFICERS** — 1. In General. — See note 1.  
**V. PENSIONING FIREMEN.** — See note 7.  
**78.** **VIII. LIABILITY OF MUNICIPALITY** — 1. For Negligence of Firemen —  
**a.** IN GENERAL. — See note 4.  
**79.** See note 2.  
 2. Neglect to Provide Means for Extinguishing Fires. — See note 4.  
**80.** 5. Injuries to Firemen — Defective Appliances. — See note 8. Defective Streets. — See note 10.  
**81.** See note 1.

**74.** 3. Removal of Commissioners by Municipal Authorities. — See *Matter of Carter*, 141 Cal. 316.

**75.** 1. Dismissal of Firemen Without Cause Prohibited by Statute. — *Crocker v. Sturgis*, 175 N. Y. 158.

Abolition of Office as Mere Pretext for Dismissal. — *People v. Coleman*, 99 N. Y. App. Div. 88.

An Error of Judgment committed by the chief of a fire department in the management of a large fire does not warrant his dismissal. *People v. Sturgis*, 91 N. Y. App. Div. 286.

2. Retirement for Disability. — *People v. Scannell*, 53 N. Y. App. Div. 161, *affirmed* 164 N. Y. 572.

Right to Counsel. — *People v. Flood*, 64 N. Y. App. Div. 209.

**76.** 1. *People v. Sturgis*, 85 N. Y. App. Div. 20, *affirmed* 196 N. Y. 563; *People v. Sturgis*, 87 N. Y. App. Div. 413.

**77.** 1. In Minnesota compensation may be fixed by ordinance. *Hart v. Minneapolis*, 81 Minn. 476.

Full Pay for Disabled Fireman. — *People v. Sturgis*, 85 N. Y. App. Div. 20, *affirmed* 176 N. Y. 563.

7. What Constitutes Death in Performance of Duty to Entitle Widow to Pension. — *Scott v. Jersey City*, 68 N. J. L. 687.

In Illinois it is the duty of the medical officer to examine applicant and report to board of trustees of pension fund, but he cannot conclusively decide that the applicant should be retired and pensioned. *People v. Firemen's Pension Fund*, 95 Ill. App. 300.

**78.** 4. Nonliability of Municipality for Negligence of Firemen. — *Peterson v. Wilmington*, 130 N. Car. 76; *Blankenship v. Sherman*, 33 Tex. Civ. App. 507; *Wagner v. Portland*, 40 Oregon 389; *Lynch v. North Yakima*, 37 Wash. 657; *Quebec v. Mahoney*, 10 Quebec K. B. 392, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 78.

The Nonliability of a Municipality — *Personal Injury by Hose Carriage*. — *Blankenship v. Sherman*, 33 Tex. Civ. App. 507.

*Damage by Water to Neighboring Building*. — See *Aschoff v. Evansville*, 34 Ind. App. 25.

*Damage by Water*. — A municipality is not liable for the damage to goods caused by water negligently used in extinguishing a fire. *Davis v. Lebanon*, 108 Ky. 688.

Liability of Municipality — *Injury by Fireboat*. — But in *Workman v. New York*, 179 U. S. 552, it was held that a municipality was liable for damages to a vessel struck and injured by a city fireboat going to a fire.

**79.** 2. See *Lynch v. North Yakima*, 37 Wash. 657.

4. Neglect to Provide Means to Extinguish Fires. — *Sandusky v. Central City*, (Ky. 1900) 58 S. W. Rep. 516.

**80.** 8. Liability of Municipality to Firemen Injured by Defective Appliance. — *Peterson v. Wilmington*, 130 N. Car. 76 (defective hose reel). But see *Lynch v. North Yakima*, 37 Wash. 657.

Defective Fire Station. — *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187.

The Owner or Occupant of a Building owes no duty to keep it in a reasonably safe condition for members of a public fire department who might in the exercise of their duty have occasion to enter the building. *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 79 Am. St. Rep. 350.

10. Liability of Municipality to Firemen by Reason of Defective Street. — *Kansas City v. McDonald*, 60 Kan. 481.

Negligence Question for Jury. — *Farley v. New York*, 152 N. Y. 222.

Ordinances Prohibiting Rapid Driving Not Applicable to Firemen. — *Kansas City v. McDonald*, 60 Kan. 481; *Farley v. New York*, 152 N. Y. 222.

**81.** 1. *Kansas City v. McDonald*, 60 Kan. 481.

## FIRE ESCAPES.

- 82.** I. AT COMMON LAW. — See note 1.  
 II. UNDER STATUTES. — See note 2.
- 83.** Constitutionality. — See note 1.  
 Sufficiency. — See note 2.
- 84.** Direction by Officer. — See note 1.
- 85.** Upon Whom the Duty Rests. — See note 1.  
 Contributory Negligence — Waiver. — See note 2.  
 Action for Damages. — See note 3.

[FIRE HUNTING. — See note 3a.]

**82.** 1. Common Law. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357; *Landgraf v. Kuh*, 188 Ill. 484.

2. Illinois Statute. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357.

Pennsylvania Statute. — *Bonbright v. Schoettler*, (C. C. A.) 127 Fed. Rep. 320.

**83.** 1. Constitutionality — Illinois. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357.

2. *Landgraf v. Kuh*, 188 Ill. 484.

Sufficiency — Examples. — *Landgraf v. Kuh*, 188 Ill. 484.

Obstructions — Question for Jury. — *Landgraf v. Kuh*, 188 Ill. 484.

**84.** 1. Notice by Commissioners. — *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, following the doctrine of the *New York* cases set out in 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 84.

The duty of the owner of a building to provide fire escapes does not depend upon the action of the municipal officers or fire engineers

or upon their failure to take action. *Carrigan v. Stillwell*, 97 Me. 247.

**85.** 1. Duty Imposed on Owner. — *Carrigan v. Stillwell*, 97 Me. 247; *Landgraf v. Kuh*, 188 Ill. 484.

As to When a Building Is Used for Manufacturing Purposes, within the meaning of the Illinois Fire Escape Act, see *Landgraf v. Kuh*, 188 Ill. 484.

2. Assumption of Risk — Question for Jury. — *Landgraf v. Kuh*, 188 Ill. 484.

3. *Landgraf v. Kuh*, 188 Ill. 484.

Proximate Cause of Injury. — Whether absence of fire escapes is proximate cause of injury is a question for the jury. *Landgraf v. Kuh*, 188 Ill. 484; *Carrigan v. Stillwell*, 97 Me. 247.

3a. Under the Arkansas statute camp hunting and *fire hunting* "mean persons camping in the woods or at or near any house with guns and dogs for the purpose of hunting game," etc. *Du Bose v. State*, 71 Ark. 347.

# FIRE INSURANCE.

BY BASIL JONES.

**101. 1. THE CONTRACT IN GENERAL — 1. Definition and Nature — *b*. A CONTRACT OF INDEMNITY.** — See note 2.

**A Personal Contract.** — See note 7.

**102. 2. Kinds of Fire Policies — *a*. OPEN POLICIES.** — See note 1.

***b*. VALUED POLICIES — (1) Definition — A Valued Policy.** — See note 4.

**103. (2) Test of Valued Policy.** — See note 1.

**(3) Effect of Valuation.** — See note 5.

**104. (4) Valued-policy Statutes.** — See note 2.

**101. 2. Fire Insurance a Contract of Indemnity — *United States*.** — *Kiesel v. Sun Ins. Office*, (C. C. A.) 88 Fed. Rep. 243; *Langan v. Aetna Ins. Co.*, 96 Fed. Rep. 705; *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451; *In re West Norfolk Lumber Co.*, 112 Fed. Rep. 759.

***Illinois*.** — *Niagara F. Ins. Co. v. Heenan*, 181 Ill. 575; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161.

***Indiana*.** — *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549.

***Kentucky*.** — *Niagara F. Ins. Co. v. Heflin*, 60 S. W. Rep. 393, 22 Ky. L. Rep. 1212; *Thuringia Ins. Co. v. Malott*, 111 Ky. 917; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

***Maine*.** — *Hilton v. Phoenix Assur. Co.*, 92 Me. 272.

***Maryland*.** — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485. See also *Svea Assur. Co. v. Packham*, 92 Md. 464.

***Massachusetts*.** — *Tabbutt v. American Ins. Co.*, 185 Mass. 419, 102 Am. St. Rep. 353.

***Minnesota*.** — *Poppitz v. German Ins. Co.*, 85 Minn. 118.

***Missouri*.** — *Key v. Continental Ins. Co.*, 101 Mo. App. 344.

***Ohio*.** — *Brown v. Hartford F. Ins. Co.*, 12 Ohio Dec. 358; *Walrath v. Royal Ins. Co.*, 9 Ohio Cir. Dec. 233, 16 Ohio Cir. Ct. 413.

***Pennsylvania*.** — *Meigs v. Insurance Co. of North America*, 205 Pa. St. 378.

**7. A Personal Contract.** — *Shadgett v. Phillips, etc., Co.*, 131 Ala. 478, 90 Am. St. Rep. 95; *Lindley v. Orr*, 83 Ill. App. 70; *Miles Lamp Chimney Co. v. Erie F. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 107; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549; *Saunders v. Armstrong*, 61 S. W. Rep. 700, 22 Ky. L. Rep. 1789; *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485; *Hubbard v. Austin*, 8 Ohio Dec. 111; *Bennett v. Featherstone*, 110 Tenn. 27; *Hartford F. Ins. Co. v. Ransom*, (Tex. Civ. App. 1901) 61 S. W. Rep. 144. See also *infra*, this title, **239. 5**.

**102. 1. Definition of Open Policy.** — *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448.

quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102 *et seq.*; *Ulmer v. Phoenix F. Ins. Co.*, 61 S. Car. 459, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102. See also *London Assur. Corp. v. Paterson*, 106 Ga. 538.

**Overvaluation in Application for Open Policy Immaterial.** — *Insurance Co. of North America v. Osborn*, 26 Ind. App. 88.

**Provision in Open Policy Limiting Insurance to Certain Proportion of Value Not Enforced.** — *Ramsey v. Philadelphia Underwriters Assoc.*, 71 Mo. App. 380.

**4. Valued Policy Defined.** — *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102 *et seq.*; *Ulmer v. Phoenix F. Ins. Co.*, 61 S. Car. 459, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102. See also *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

**103. 1. Language of Policy.** — *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102 *et seq.*; *Ulmer v. Phoenix F. Ins. Co.*, 61 S. Car. 459, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**5. Amount Conclusive.** — *Jones v. Philadelphia Underwriters*, 78 Mo. App. 296; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

**Overvaluation at the time of issuance of the policy is immaterial.** *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146. But see, as to the defense of fraud in the statement of value in the application, under the *South Carolina* statute, *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. Rep. 681.

**104. 2. Valued-policy Statutes — *Kentucky*.** — *Continental Ins. Co. v. Moore*, (Ky. 1901) 62 S. W. Rep. 517; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295.

***Nebraska*.** — *Home F. Ins. Co. v. Weed*, 55 Neb. 146; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.

***Ohio*.** — *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 41; *Schild v. Phoenix Ins. Co.*, 8 Ohio Dec. 45.

***Pennsylvania*.** — *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. St. 30.

***Tennessee*.** — *Burkett v. Georgia Home Ins. Co.*, 105 Tenn. 548.

**104. Apply to Realty Alone.** — See notes 3, 4, 5, 6, 7.*c.* BLANKET POLICIES. — See note 9.*d.* FLOATING POLICIES. — See note 11.

**3. Scope of the Contract** — *a.* THE SUBJECT-MATTER — (1) *In General: What May Be Insured* — (a) Corporeal Property — [Use and Occupancy of Factory]. — See note 12a.

**105. (c) Profits** — In General. — See note 2.

Insured Must Have Interest in Property Itself. — See note 7.

**106. [(i) Property Destroyed Before Insurance.** — See note 5a.]

*West Virginia.* — *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261.

*Wisconsin.* — *Temple v. Niagara F. Ins. Co.*, 109 Wis. 372.

**Valued-policy Statutes Constitutional.** — *Ætna Ins. Co. v. Brigham*, 120 Ga. 925; *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

**Mississippi Statute Construed.** — *Hartford F. Ins. Co. v. Shlenker*, 80 Miss. 667.

**Missouri Statute Construed.** — *Gibson v. Missouri Town Mut. Ins. Co.*, 82 Mo. App. 515; *Siegle v. Phoenix Ins. Co.*, 107 Mo. App. 456; *Marshall v. American Guarantee Mut. F. Ins. Co.*, 80 Mo. App. 18; *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152.

**Wisconsin Statute Construed.** — *Newton v. Theresa Mut. F. Ins. Co.*, (Wis. 1905) 104 N. W. Rep. 107.

**Provision Limiting Recovery to Actual Cash Value Not in Conflict with Valued-policy Statute.** — *Burket v. Georgia Home Ins. Co.*, 105 Tenn. 548.

**Valued-policy Statute Applicable to Insurance on Builder's Risk.** — *American Cent. Ins. Co. v. Anthram*, (Miss. 1905) 38 So. Rep. 626.

**104. 3. Minneapolis F. & M. Mut. Ins. Co. v. Fultz**, 72 Ark. 365; *Hudson v. Scottish Union, etc., Ins. Co.*, 110 Ky. 722; *De Soto v. American Guaranty Fund Mut. F. Ins. Co.*, 102 Mo. App. 1. And see *Thurber v. Royal Ins. Co.*, 1 Marv. (Del.) 251, holding that the *Delaware* statute, declaring all insurance void where a policy is obtained for more than the agreed value, applies to realty only.

**Statutes Applicable to Personalty.** — The *Mississippi* and *Missouri* statutes are applicable to personalty as well as to realty. See *Hartford F. Ins. Co. v. Shlenker*, 80 Miss. 667; *Hewerton v. Iowa State Ins. Co.*, 105 Mo. App. 575. And see *Gibson v. Missouri Town Mut. Ins. Co.*, 82 Mo. App. 515, and *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152.

**Kentucky Statute Construed.** — *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244.

**Statute Applicable to Building Erected by Holder of Contract for Conveyance of Realty.** — See *Bode v. Firemen's Ins. Co.*, 103 Mo. App. 289.

**4. Building and Machinery on Mining Lease Not Within Missouri Statute.** — *Millis v. Scottish Union, etc., Ins. Co.*, 95 Mo. App. 211.

**5. Scottish Union, etc., Ins. Co. v. Enslie**, 78 Miss. 157.

**6. Eureka F. & M. Ins. Co. v. Gray**, 24 Ohio Cir. Ct. 268.

**7. Statute Not Avoided by Provisions of Policy.** — *Phoenix Ins. Co. v. Peak*, (Ky. 1898) 47 S. W. Rep. 1089; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Sachs v. London, etc., F. Ins. Co.*, 113 Ky. 88; *Hartford F. Ins.*

*Co. v. Bourbon County Ct.*, 115 Ky. 109; *Western Assur. Co. v. Phelps*, 77 Miss. 625; *Hartford F. Ins. Co. v. Shlenker*, 80 Miss. 667; *Marshall v. American Guarantee Mut. F. Ins. Co.*, 80 Mo. App. 18; *Home F. Ins. Co. v. Weed*, 55 Neb. 146; *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 41; *Schild v. Phoenix Ins. Co.*, 8 Ohio Dec. 45; *Russell v. Milwaukee Mechanics' Ins. Co.*, 8 Ohio Dec. 613; *Brown v. Hartford F. Ins. Co.*, 12 Ohio Dec. 358; *Phoenix Ins. Co. v. Port Clinton Fish Co.*, 7 Ohio Cir. Dec. 468, 14 Ohio Cir. Ct. 160; *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261; *Temple v. Niagara F. Ins. Co.*, 109 Wis. 372.

The acceptance of a policy with a different provision as to the amount of recovery is not a waiver. *Western Assur. Co. v. Phelps*, 77 Miss. 625.

**9. Chandler v. Insurance Co. of North America**, 70 Vt. 562. See also *Phoenix Ins. Co. v. Port Clinton Fish Co.*, 7 Ohio Cir. Dec. 468, 14 Ohio Cir. Ct. 160.

**"Blanket" or "Compound" Policy Defined.** — *Schmaelzle v. London, etc., F. Ins. Co.*, 75 Conn. 397, 96 Am. St. Rep. 233. See also *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73.

**11. Smith v. Carmack**, (Tenn. Ch. 1901) 64 S. W. Rep. 372.

**Floating Policies Defined.** — *Peabody v. Liverpool, etc., Ins. Co.*, 171 Mass. 114.

**Property Covered.** — Cotton which, while stored in a particular warehouse, is specifically covered by a policy of fire insurance, does not, until by removal from the warehouse or otherwise it loses the protection thus afforded, come within the operation of a "floating" policy which in express terms stipulates that it shall not be held to "apply to or cover any cotton which, at the time of the loss, may be covered by any more specific insurance." *Macon F. Ins. Co. v. Powell*, 116 Ga. 703.

**12a. That the Use and Occupancy of a Factory Is Insurable** see *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

**105. 2. Profits Are Insurable.** — *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492, discussing the sufficiency of description.

**7. Insured Must Have Interest in the Property.** — Compare *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492.

**106. 5a. Property Not Insurable After Destruction.** — "A contract of insurance may be retrospective where by reason of the remoteness of the property it is not known to the insured whether it is not already destroyed, a familiar case being the insurance of ships and cargoes at sea, 'lost or not lost,' but if the insured knows of its loss, and does not reveal it, the contract



- 107.** (2) *Description* — (a) In General — Comprehensive Descriptions. — See note 1.
- 108.** (b) Inclusiveness — aa. REALTY — (bb) Buildings — aaa. In General. — See note 6.
- 109.** See note 1.  
Materials of Buildings Partly Constructed or in Ruins. — See note 11.
- 110.** bbb. House. — See note 4.
- 111.** ddd. Additions — Must Be Expressly Mentioned. — See note 2.
- 112.** The Phrase "Additions." — See notes 3, 5.  
bb. PERSONALTY — (aa) Merchandise — aaa. General Scope. — See note 7.
- 114.** (bb) Furniture and Fixtures — A Policy upon Household Furniture. — See note 9.
- 115.** Fixtures. — See note 3.  
(cc) Machinery and Tools. — See note 13.  
(dd) Agricultural Products — Grain. — See note 14.
- 116.** (ff) Goods Held in Trust — A Policy for the Benefit of the Insured and Others upon Tobacco Stored. — See note 13.
- 117.** (gg) Railway Insurance. — See note 6.  
(hh) Shifting Risks. — See note 9.
- 118.** (c) Correctness of Description — aa. IN GENERAL. — See note 4.

is fraudulent and not binding." *Henshaw v. Insurance Co.*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 405.

**107.** 1. Construction of General Description. — *Niagara F. Ins. Co. v. Heenan*, 181 Ill. 575; *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385. See also *Mallery v. Frye*, 21 App. Cas. (D. C.) 105.

**108.** 6. Buildings Divided into Compartments. — See *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385.

**109.** 1. Fixtures Built into Building Covered. — *Niagara F. Ins. Co. v. Heenan*, 181 Ill. 575.

11. Policy on Unfinished Building Covers Completed One. — See *Bode v. Firemen's Ins. Co.*, 103 Mo. App. 289.

**110.** 4. Furnace and Boiler Included in House. — *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147.

Outside Painting Not Included in "Decorations to Walls and Ceilings." — *Sherlock v. German-American Ins. Co.*, 21 N. Y. App. Div. 18, affirmed 162 N. Y. 656.

**111.** 2. Buildings Which Are Included in Term "Additions." — See *Marsh v. New Hampshire F. Ins. Co.*, 70 N. H. 590; *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253.

"Additions" Include New Buildings. — See *Arlington v. Colonial Assur. Co.*, 180 N. Y. 337.  
Parol Evidence to Show What Included in "Sheds and Additions" Admissible. — *Cummins v. German-American Ins. Co.*, 197 Pa. St. 61.

**112.** 3. Separate Structure. — *Maisel v. Fire Assoc.*, 59 N. Y. App. Div. 461. See also *Wolverine Lumber Co. v. Palatine Ins. Co.*, (Mich. 1905) 102 N. W. Rep. 991.

5. Additions to Other Property Not Included. — *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.*, (C. C. A.) 107 Fed. Rep. 662.

7. "Appliances" of Dental Office Do Not Include Dental Books. — *American F. Ins. Co. v. Bell*, 33 Tex. Civ. App. 11.

**114.** 9. When Wearing Apparel Included in Policy on Household Furniture. — See *German F. Ins. Co. v. Seibert*, 24 Ind. App. 279.

**115.** 3. Exception of "Store Furniture and Fixtures." — See *Dougherty v. Lion F. Ins. Co.*,

(Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 285, affirmed 95 N. Y. App. Div. 618.

Policy on Saloon "Furniture and Fixtures" Does Not Include Safe. — *Moriarty v. U. S. Fire Ins. Co.*, 19 Tex. Civ. App. 669.

13. Self-feeder Included in Policy on Threshing Outfit. — *Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. Dak. 279.

14. "Grain" Includes Broom Corn in Bale but Not in Panicles. — *Reavis v. Farmers' Mut. F. Ins. Co.*, 78 Mo. App. 14.

"Grain and Seed" Includes Oilcake Made Therefrom. — *Marsh Oil Co. v. Aetna Ins. Co.*, 79 Mo. App. 21.

**116.** 13. Parol Evidence Admissible to Show that Certain Goods Were Excepted. — *Leftwich v. Royal Ins. Co.*, 91 Md. 596.

**117.** 6. Cars of Other Lines in Possession of Insured Included. — *Phenix Ins. Co. v. Belt R. Co.*, 182 Ill. 33.

9. Policy on Goods Constantly Sold and Renewed. — *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308.

**118.** 4. See Underwriters F. Assoc. v. Henry, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072.

Sufficiency of Description. — See *Edwards v. Fireman's Ins. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 354.

Inadvertent Misdescription — Reformation of Policy. — *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 N. Y. App. Div. 562.

A Misdescription by the Insurer's Agent Having Notice of the Facts is no defense to an action on the policy. *Glover v. National F. Ins. Co.*, (C. C. A.) 85 Fed. Rep. 125.

Clerical Error of Insurer's Agent Does Not Avoid Policy. — *Shanahan v. Agricultural Ins. Co.*, 6 Pa. Super. Ct. 65.

Description of House Story and a Half High as "Two-story House" Sufficient. — *Mallery v. Frye*, 21 App. Cas. (D. C.) 105.

Evidence of Extraneous Facts Admissible to Show Property Intended to Be Covered. — *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.*, (C. C. A.) 107 Fed. Rep. 662.

Extrinsic Evidence Not Admissible to Show that

- 118.** Description Applicable to Two Buildings. — See note 8.  
**119.** *cc.* CHARACTER OF BUILDING — The Term "Dwelling." — See notes 5, 6.  
**120.** *dd.* CONDITION, ETC. — See note 7.  
     (3) Location — (a) General Rule. — See note 12.  
**121.** Effect of Erroneous Location. — See note 1.  
**122.** (b) Particular Designation — In a Certain Building. — See note 1.  
**123.** See note 1.  
     Live Stock and Farm Produce. — See note 9.  
     Thrashing Machine. — See note 2.  
**125.** (c) Qualifications of Rule — Comprehensive Designation of Place. — See note 3.  
     Goods in Building Described by Particular Name, Description, or Street Number. — See note 6.  
     Consent and Waiver. — See note 8.

**Building Other than That Described Was Intended.** — *Boak Fish Co. v. Manchester F. Assur. Co.*, 84 Minn. 419.

**118. 8. Parol Evidence Admissible.** — *Zeigler v. Clinton Mut. County F. Ins. Co.*, 84 Ill. App. 442; *Saunders v. Agricultural Ins. Co.*, 39 N. Y. App. Div. 631; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558.

**Former Policy Admissible to Show Building Intended.** — *Saunders v. Agricultural Ins. Co.*, 167 N. Y. 261.

**119. 5. Boarding House a Dwelling.** — *Burner v. German-American Ins. Co.*, 103 Ky. 370.

**Bawdy House and Saloon Not Dwelling House.** — *Allen v. Home Ins. Co.*, 133 Cal. 29.

**Misdescription by Agent Does Not Avoid Policy.** — *Mead v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 282, *affirmed* 179 N. Y. 537.

**6. Store Not Dwelling.** — *Lennox v. Greenwich Ins. Co.*, 9 Pa. Super. Ct. 171.

**Building Partly Used as Store Not Properly Described as Dwelling.** — *Dougherty v. Greenwich Ins. Co.*, 64 N. J. L. 716; *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 97 Mo. App. 79.

**120. 7. Manner of Construction — Division Walls Must Be as Warranted in Policy.** — *Northrup v. Piza*, 43 N. Y. App. Div. 284, *affirmed* 167 N. Y. 578.

**12. Location Essential.** — *Thuringia Ins. Co. v. Goldsmith*, (C. C. A.) 132 Fed. Rep. 456; *L'Anse v. Philadelphia F. Assoc.*, 119 Mich. 427, 75 Am. St. Rep. 410; *Miller v. Insurance Co. of North America*, 106 Mo. App. 205; *Leventhal v. Home Ins. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 685; *Montgomery v. Delaware Ins. Co.*, 67 S. Car. 399.

**The Insurer Is Not Exempted from Liability** because of a change in the location without its consent, if the risk of such new location is not operative at the time of the loss. *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 119, 87 Am. St. Rep. 596.

**Policy Covering Express Matter on Specified Line.** — Under a policy insuring an express company against loss on express matter "while contained in cars while in transit upon lines owned, leased, or operated" by a certain railroad company, the insurer is liable for losses occurring on all lines coming within that description at the date of the policy, irrespective of whether they are so owned, leased, or operated at the time of the loss. *Northern Pac. Express Co. v. Traders' Ins. Co.*, 183 Ill. 356.

**Failure of Insurer to Declare Forfeiture Waives Breach.** — *Fidelity Mut. F. Ins. Co. v. Murphy*, (Neb. 1903) 95 N. W. Rep. 702.

**121. 1. Location Erroneously Described.** — *Cook v. Loew*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 276.

**122. 1. Property Described as in Certain Building.** — *Thuringia Ins. Co. v. Goldsmith*, (C. C. A.) 132 Fed. Rep. 456.

**Clothes on Line Outside Building Not Covered.** — *Leventhal v. Home Ins. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 685.

**123. 1. Rule Holds Though Goods Removed but Temporarily.** — See *Leventhal v. Home Ins. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 685.

**9. A Policy on Hay and Grain on Certain Premises** does not cover hay and grain on premises leased by the insured after the policy has gone into effect. *Brandt v. Berlin Farmers' Mut. Feuer, etc., Co.*, 108 Wis. 231.

**124. 2. Thrashing Machine "in Use."** — *Compare Slinkard v. Manchester F. Assur. Co.*, 122 Cal. 595, in which case the court held that a policy upon the machine "while in use" did not cover it while it was standing idle, and that Civ. Code Cal., sec. 2754, providing that "an alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of insurance," was not applicable to such a case.

**125. 3. Place Comprehensively Designated.** — See *Boak Fish Co. v. Manchester F. Assur. Co.*, 84 Minn. 419.

**6. Description by Street Number.** — *Boyer v. Grand Rapids F. Ins. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338.

**Erroneous Designation of Street Number.** — Where a policy is issued upon goods contained in "brick block, situate Nos. 82 to 92 Worthington street," and there is evidence that the official city number of that part of the building under the warehouse was number 82, and that the number 80, which it in fact bore, had been substituted for its official number without authority, it is a question for the jury whether the goods in number 80 were covered by the policy. *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382.

**8. Goods Removed with Consent Covered.** — See *Thuringia Ins. Co. v. Goldsmith*, (C. C. A.) 132 Fed. Rep. 456; *Ohio Farmers' Ins. Co. v. Burget*, 9 Ohio Cir. Dec. 369.

**Indorsement of Consent on Policy Essential.** —

**126.** Estoppel. — See note 2.

*b.* THE RISK — (1) *What Is Included* — (a) *Whether Actual Ignition*

*Necessary.* — See notes 3, 4, 6.

**127.** (2) *Meaning of Direct Loss or Damage* — (a) *In General.* — See notes 10, 11.

**128.** (b) *Injury by Water.* — See note 1.

**129.** (d) *Theft at Fire.* — See note 3.

(f) *Fall of Building.* — See notes 6, 9, 10.

**130.** See notes 1, 2.

Connecticut F. Ins. Co. v. Smith, 10 Colo. App. 121.

**Goods in Transit.** — Goods removed under a permit which stipulates that during removal the policy is to "attach in each location in proportion as the value in each bears to the value in all, and after removal in new location only," are not covered while in transit between the two locations. *Goodhue v. Hartford F. Ins. Co.*, (Mass. 1903) 67 N. E. Rep. 645.

**Waiver of Written Permit by Agent.** — *Pollock v. German F. Ins. Co.*, 127 Mich. 460; *Bennett v. Western Underwriters' Assoc.*, 130 Mich. 216.

**Previous Removal Without Consent Cured by Subsequent Removal With Consent.** — *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 119, 87 Am. St. Rep. 596.

**Consent May Be Given After Loss.** — *Montgomery v. Delaware Ins. Co.*, 67 S. Car. 399.

**Sufficiency of Evidence to Show Consent.** — See *Thuringia Ins. Co. v. Goldsmith*, (C. C. A.) 132 Fed. Rep. 456.

**When Failure to Return Unearned Premium Does Not Constitute Waiver.** — See *Miller v. Insurance Co. of North America*, 106 Mo. App. 205.

**126. 2. Misdescription Due to Agent — Company Liable.** — *Dryer v. Security F. Ins. Co.*, (Iowa 1900) 82 N. W. Rep. 494.

**3. Injury by Smoke from a Burning Lamp** has been held not to be covered. *Fitzgerald v. German-American Ins. Co.*, (County Ct.) 30 Misc. (N. Y.) 72.

And an insurance company which by its policy contracts to insure "against all direct loss or damage by fire," etc., is not liable for damages arising from smoke and soot escaping from a defective stovepipe, and emanating from a fire intentionally built in a stove, and kept confined therein. *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124.

**4 Modern Doctrine — Ignition Not Necessary.** — *Davis v. Insurance Co. of North America*, 115 Mich. 382.

**6. Heat Must Be Sufficient to Cause Ignition.** — See *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124.

**127. 10. Fire Must Be Proximate Cause.** — *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Hawaii 164; *Hartford Steam Boiler Inspection, etc., Co. v. Sonneborn*, 96 Md. 616; *Cohn v. National Ins. Co.*, 96 Mo. App. 315; *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472; *Foster v. Fidelity F. Ins. Co.*, 24 Pa. Super. Ct. 585; *Cline v. Western Assur. Co.*, 101 Va. 496. See also *Warmcastle v. Scottish Union, etc., Ins. Co.*, 201 Pa. St. 302.

**No Recovery for Injury by Fire Engine on Way to Fire Elsewhere.** — *Foster v. Fidelity F. Ins. Co.*, 24 Pa. Super. Ct. 585.

**11. Meaning of "Proximate Cause."** — Where buildings are set on fire by order of a civil authority on account of infection by plague, any loss caused by order of the civil authority is excepted, but loss caused by plague is neither insured against nor excepted. The order, and not the plague, should be regarded as the cause of the loss within the meaning of the policy. *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Hawaii 164.

**Injuries to Goods in Attempt to Extinguish Fire Included.** — *Cohn v. National Ins. Co.*, 96 Mo. App. 315.

**128. 1. Injury by Water in Attempt to Extinguish Fire.** — *Davis v. Insurance Co. of North America*, 115 Mich. 382; *Cohn v. National Ins. Co.*, 96 Mo. App. 315. See also *Boak Fish Co. v. Manchester F. Assur. Co.*, 84 Minn. 419.

**Injury by Water and Smoke Included.** — *Collins v. Delaware Ins. Co.*, 9 Pa. Super. Ct. 576, 7 Del. Co. Rep. (Pa.) 365.

**No Recovery When Use of Water Not Essential to Prevent Ignition.** — *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124.

**Injury Caused by Use of Chemical Extinguisher Included.** — *Cohn v. National Ins. Co.*, 96 Mo. App. 315.

**129. 3. Sklencher v. Fire Assoc.**, (N. J. 1905) 60 Atl. Rep. 232, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

**6. Fall of Building Not Induced by Fire.** — *Western Assur. Co. v. J. H. Mohlman Co.*, (C. C. A.) 83 Fed. Rep. 811; *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472. See also *Orient Ins. Co. v. Leonard*, (C. C. A.) 120 Fed. Rep. 808; *Sechrist v. Codorus, etc., Mut. Protection Ins. Co.*, 7 Pa. Super. Ct. 246.

**External Explosion Injuring Building — Insurer Liable for Loss by Succeeding Fire.** — *Leonard v. Orient Ins. Co.*, (C. C. A.) 109 Fed. Rep. 286; *Davis v. Insurance Co. of North America*, 115 Mich. 382.

**Burden on Insurer to Prove Fall Not Caused by Fire.** — *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212; *Western Assur. Co. v. J. H. Mohlman Co.*, (C. C. A.) 83 Fed. Rep. 811; *Phenix Ins. Co. v. Luce*, (C. C. A.) 123 Fed. Rep. 257.

**9. Building Blown Over but Remaining Intact Not a Fallen Building.** — *Teutonia Ins. Co. v. Bonner*, 87 Ill. App. 231.

**The Weakening of the Walls by an Explosion**, causing them to fall the more readily from a fire which followed, does not relieve the insurer from liability. *Eppens, etc., Co. v. Hartford F. Ins. Co.*, 90 N. Y. App. Div. 221.

**10. Sufficiency of Evidence.** — See *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212.

**130. 1. Home Mut. Ins. Co. v. Tompkins,**

**130.** (g) Negligence of Insured. — See note 3.  
Qualification. — See notes 7, 8.

**131.** See note 1.

(h) Incendiarism. — See notes 4, 6.

(i) Invasion — Insurrection — Riot — Civil Commotion — Usurped Power. — See note 6a.

Destruction at Instance of Public Authorities. — See notes 7, 8.

**132.** Riots. — See note 3.

**133.** (j) Explosions — Loss by Explosions Explicitly Excepted. — See notes 5, 6.

**134.** II. PARTIES TO THE CONTRACT — 2. The Insured — a. WHO MAY BE INSURED — (1) *Any One Sui Juris*. — See note 5  
(2) *Joint Owners*. — See note 8.

30 Tex. Civ. App. 404, *affirmed* 96 Tex. 187, holding that what constitutes a material part is a question of fact. See also *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472.

**130.** 2. Fall a Direct Result of Fire — Insurer Liable. — *Nelson v. Traders Ins. Co.*, 86 N. Y. App. Div. 66, *affirmed* 181 N. Y. 472.

**3.** Ordinary Negligence of Insured Does Not Relieve Insurer. — *Rogers v. Aetna Ins. Co.*, (C. C. A.) 95 Fed. Rep. 103; *St. Paul F. & M. Ins. Co. v. Owens*, 69 Kan. 602; *Scottish Union, etc., Ins. Co. v. Strain*, 70 S. W. Rep. 274, 24 Ky. L. Rep. 958; *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 94 Am. St. Rep. 778.

Negligence a Question for Jury. — *Raymond v. Farmers' Mut. F. Ins. Co.*, 114 Mich. 386.

Burning of Brush by Tenant Not Negligence per Se. — *Bushnell v. Farmers Mut. Ins. Co.*, 110 Mo. App. 223.

Negligence as Affecting Measure of Recovery. — See *German-American Ins. Co. v. Brown*, (Ark. 1905) 87 S. W. Rep. 135, holding that the provision in a policy that the insurer "shall not be liable for loss caused \* \* \* by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire" cannot be interpreted to mean that a negligent failure to use such means to save the property works a forfeiture of the entire policy, but only prevents a recovery for so much of the property as could have been saved by the use of reasonable means at the command of the insured. See also *Home Ins. Co. v. Overturf*, (Ind. App. 1905) 74 N. E. Rep. 47.

Degree of Care Required under Provision Requiring "All Proper Precaution to Prevent Accident by Fire." — See *Price v. Patrons', etc., Home Protection Co.*, 77 Mo. App. 236.

Burden of Proving Negligence on Insurer. — *German-American Ins. Co. v. Brown*, (Ark. 1905) 87 S. W. Rep. 135; *Fletcher v. German-American Ins. Co.*, 79 Minn. 339.

**7.** Failure to Extinguish Fire in Its Incipency Culpable Negligence. — *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546.

**8.** Fraudulent Negligence. — *St. Paul F. & M. Ins. Co. v. Owens*, 69 Kan. 602, holding that the negligence of the assured, to defeat his recovery, must have been wilful and of such a degree as to amount to fraud.

**131.** 1. Insured Preventing Efforts Which Would Have Saved Property. — *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546.

**4.** Loss by Act of Husband of Insured Covered. — *Union Ins. Co. v. McCullough*, (Neb. 1901) 96 N. W. Rep. 79.

**6.** Fraudulent Burning by Insured. — *German-American Ins. Co. v. Yeagley*, 163 Ind. 651; *Joy v. Liverpool, etc., Ins. Co.*, 32 Tex. Civ. App. 433; *Hamburg-Bremen F. Ins. Co. v. Rud-dell*, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

Burden of Proof on Insurer. — *Spencer v. Farmer's Mut. Ins. Co.*, 79 Mo. App. 213.

**6a.** To What Losses Applicable. — Where a policy provides that the insurer shall "not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft," the words "directly" and "indirectly" apply in cases of loss caused by order of any civil authority as well as in the case of loss caused by invasion, etc. And the order of the civil authority need not be lawful and justifiable. *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Hawaii 164.

**7.** Fire under Military Authority — "Military or Usurped Authority." — See *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Hawaii 164.

Stipulation Not a Warranty. — *Conner v. Manchester Assur. Co.*, (C. C. A.) 130 Fed. Rep. 743.

Destruction by De Facto Civil Authority Releases Insurer from Liability. — *Conner v. Manchester Assur. Co.*, (C. C. A.) 130 Fed. Rep. 743.

**8.** See *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Hawaii 164, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 131.

**132.** 3. Loss Caused by Fire Set by Rioters is within the exception of loss by riots. *Michigan F. & M. Ins. Co. v. Whitelaw*, 25 Ohio Cir. Ct. 197.

**133.** 5. Clause Exempting Insurer from Liability for Explosion. — *Cohn v. National Ins. Co.*, 96 Mo. App. 315.

Where Fire Proximate Cause of Explosion Insurer Liable. — *Hustace v. Phenix Ins. Co.*, 71 N. Y. App. Div. 309, *reversed* 175 N. Y. 292.

Lighted Match Causing Explosion Not a "Fire" Within Meaning of Policy. — *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42.

**6.** Liability for Losses by Fire Caused by Explosion Not Affected. — *Cohn v. National Ins. Co.*, 96 Mo. App. 315.

Insurer Liable for Fire Caused by Explosion in Another Building. — *Leonard v. Orient Ins. Co.*, (C. C. A.) 109 Fed. Rep. 286.

**134.** 5. Agent Acting in Good Faith May Insure His Property. — *Fireman's Fund Ins. Co. v. McGreevy*, (C. C. A.) 118 Fed. Rep. 415.

Policy Insuring Estate of Deceased Person Valid. — *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370.

**8.** Separate Insurance by Joint Owners. — Clapp

- 135.** (4) *Corporations.* — See note 6.
- 136.** *b.* INSURABLE INTEREST — (1) *Necessity* — (a) In General. — See note 3.
- 138.** (b) *Origin of the Doctrine — Fire Insurance.* — See note 1.
- (c) *Time When Interest Must Exist* — *aa.* GENERAL RULE. — See note 2.
- 139.** *Interest at Time of Loss Probably Sufficient.* — See notes 4, 5, 6.
- 141.** (d) *Effect of Want of Insurable Interest — Enforcement of the Policy.* — See note 3.
- 142.** (2) *What Constitutes an Insurable Interest* — (a) *Definition.* — See notes 3, 4.
- (b) *Requisites* — *aa.* INTEREST MUST BE PECUNIARY AND OF APPRECIABLE VALUE. — See note 6.
- 143.** *bb.* INTEREST MUST BE ACTUAL. — See note 1.
- cc.* THE SUBJECT OF INSURANCE AND THE INTEREST MUST BE LAWFUL. — See note 2.
- 144.** See note 1.

*v.* Farmers' Mut. F. Ins. Assoc., 126 N. Car. 388.

**Right of Joint Owner to Share in Proceeds.** — Where a contract of insurance contained no provision extending its terms to any one but the insured, but did contain a provision that the company should not be liable beyond the interest of the insured in the property, a stranger to the contract cannot collect thereon simply because he was the owner of an undivided interest in the property destroyed. *Continental Ins. Co. v. Maxwell*, 9 Kan. App. 268.

**135. 6. A Foreign Corporation** may take out valid insurance though not authorized to do business. *Cummer Lumber Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 67 N. Y. App. Div. 151, *affirmed* 173 N. Y. 633.

**136. 8. Insurable Interest Essential** — *Alabama.* — *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670.

*Indiana.* — *Vernon Ins., etc., Co. v. Toronto Bank*, 29 Ind. App. 678; *Phenix Ins. Co. v. Moffitt*, (Ind. App. 1898) 51 N. E. Rep. 948; *Ohio Farmers Ins. Co. v. Vogel*, 30 Ind. App. 281.

*Maine.* — *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273.

*Maryland.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Bennett v. Mutual F. Ins. Co.*, 100 Md. 337.

*Missouri.* — *Gustin v. Concordia F. Ins. Co.*, 90 Mo. App. 373.

*New York.* — *Bryan v. Farmers' Mut. Indemnity Assoc.*, 81 N. Y. App. Div. 542.

*Ohio.* — *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191, *affirmed* 68 Ohio St. 469.

*Pennsylvania.* — *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366.

*West Virginia.* — *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

**138. 1. Wager Policies.** — *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

**2. Interest Required Both at Time of Issuance and Time of Loss.** — *Ohio Farmers Ins. Co. v. Vogel*, 30 Ind. App. 281; *Bennett v. Mutual F. Ins. Co.*, 100 Md. 337.

**139. 4. Rules Governing Marine Insurance Applicable in Fire Insurance.** — *Sun Ins. Office v. Merz*, 64 N. J. L. 301.

**5. Dicta that Interest at Time of Loss Sufficient.** — *Sun Ins. Office v. Merz*, 64 N. J. L. 301.

**6. Policy "on Account of Whom It May Concern."** — See *Sun Ins. Office v. Merz*, 64 N. J. L. 301.

**141. 3. If Insurable Interest Wanting, Policy Wholly Void.** — *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

**142. 3. Insurable Interest Defined.** — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416; *Key v. Continental Ins. Co.*, 101 Mo. App. 344; *State v. Springfield Underwriters Mut. F. Ins. Co.*, 14 Ohio Dec. 523. See also *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652; *Greenwich Ins. Co. v. Louisville, etc., R. Co.*, 112 Ky. 598, 99 Am. St. Rep. 313.

**An Agent of an Insurance Company Entitled to Receive a Part of the Net Profits** of the company has an insurable interest in the property insured by the company. *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492.

**Property Sold at Judicial Sale.** — One may have an insurable interest in real estate though it has been sold at judicial sale, while such sale remains unconfirmed, as the title is not divested until the confirmation of such sale: *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816.

**Owner of Building on Leased Land Has Insurable Interest.** — *Farmers', etc., Ins. Co. v. Mickel*, (Neb. 1904) 100 N. W. Rep. 130.

**4. Legal or Equitable Title Not Essential.** — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492.

**6. Must Be Pecuniary in Nature and Appreciable in Value.** — See *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416.

**143. 1. Actuality of Interest.** — "A person can have no insurable interest where his only right arises under a contract which is void or unenforceable either at law or in equity." *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670.

**2. Policy on Furniture in House of Ill Fame Not Enforced.** — *Bruneau v. Laliberte*, 19 Quebec Super. Ct. 425.

**144. 1. Persons Living in Adultery — Recovery on Policy Not Allowed.** — *McCarty v. Hartford F. Ins. Co.*, 33 Tex. Civ. App. 122.

**144.** (c) *Qualifications* — *aa. INTEREST NEED NOT BE A PERSONAL ONE.* — See notes 4, 6.

*bb. INTEREST DOES NOT NECESSARILY IMPLY PROPERTY.* — See notes 7, 8.

**145.** See note 1.

*cc. EQUITABLE INTEREST OR TITLE SUFFICIENT.* — See notes 3, 4, 5, 6.

*dd. BARE LEGAL TITLE MAY AFFORD INSURABLE INTEREST.* — See note 8.

**147.** *ff. CONTINGENT INTEREST SUFFICIENT.* — See note 2.

**148.** *c. PARTIES HAVING INSURABLE INTERESTS* — (4) *Creditors* — (a) *More General Creditors.* — See note 7.

**149.** (b) *Lien Creditors* — *cc. ATTACHING CREDITORS.* — See note 7.

**150.** (5) *Custodians and Caretakers* — (a) *Under Authority of Law* — *aa. ADMINISTRATORS AND EXECUTORS* — *An Executor.* — See note 8.

*bb. RECEIVERS.* — See note 9.

**151.** (b) *Under Contract* — *aa. IN GENERAL.* — See note 4.

*bb. AGENTS* — *An Agent Having the Property of His Principal in His Possession.* — See note 6.

**152.** *But an Agent Without Custody or Control.* — See note 1.

**144.** 4. *Interest Not Necessarily Personal.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Doyle v. American F. Ins. Co.*, 181 Mass. 139.

**6.** *Policy to Agent, Trustee, Etc.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499.

**7.** *Property or Ownership in Thing Insured Not Necessary.* — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *Doyle v. American F. Ins. Co.*, 181 Mass. 139; *Moseley v. Northwestern Nat. Ins. Co.*, 109 Mo. App. 464. See also *Continental F. Assoc. v. Wingfield*, 32 Tex. Civ. App. 194.

**8.** *Injury from Loss or Benefit from Reservation to Accrue Sufficient.* — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699; *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492; *Stone v. Granite State F. Ins. Co.*, 69 N. H. 438; *Grabbs v. Farmers Mut. F. Ins. Assoc.*, 125 N. Car. 389; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 144. See also *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416; *Greenwich Ins. Co. v. Louisville, etc., R. Co.*, 112 Ky. 598, 99 Am. St. Rep. 313; *Continental F. Assoc. v. Wingfield*, 32 Tex. Civ. App. 194.

If, by the loss, the holder of an interest in property is deprived of the possession, enjoyment, or profits of the property, or a security or lien resting thereon, or other certain benefits growing out of or dependent upon it, he has an insurable interest. *Farmers', etc., Ins. Co. v. Mickel*, (Neb. 1904) 100 N. W. Rep. 130.

**145.** 1. *Enforceable Right Where Loss Would Result in Damage.* — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

**3.** *Equitable Interest Sufficient.* — *Mallery v. Frye*, 21 App. Cas. (D. C.) 105; *Danvers Mut. F. Ins. Co. v. Schertz*, 95 Ill. App. 656; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Clapp v. Farmers' Mut. F. Ins. Assoc.*, 126 N. Car. 388; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407.

*Members of Unincorporated Company Have Insurable Interest.* — *Grabbs v. Farmer's Mut. F. Ins. Assoc.*, 125 N. Car. 389.

**4.** *Loss Dependent on Destruction.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499.

**5.** *Purchaser Taking Title in Another.* — *Mallery v. Frye*, 21 App. Cas. (D. C.) 105; *Danvers Mut. F. Ins. Co. v. Schertz*, 95 Ill. App. 656.

**6.** *Co-obligee of Bond for Title Has Insurable Interest.* — *Clapp v. Farmers' Mut. F. Ins. Assoc.*, 126 N. Car. 388.

**8.** *One Claiming Title to Property under a deed and in possession has an insurable interest even though the deed is improperly acknowledged.* *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358.

**147.** 2. *Contingent Interest May Be Sufficient.* — *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416; *Doyle v. American F. Ins. Co.*, 181 Mass. 139.

**148.** 7. *Simple Contract Creditor Has No Insurable Interest.* — *Monroe Bldg., etc., Assoc. v. Liverpool, etc., Ins. Co.*, 50 La. Ann. 1243.

**149.** 7. *Attaching Creditor May Insure.* — *McLaughlin v. Park City Bank*, 22 Utah 473.

**150.** 8. *Executors with Special Interest under the Will.* — *Security Ins. Co. v. Kuhn*, 108 Ill. App. 1, affirmed 207 Ill. 166.

**9.** *Receivers.* — *In re Hamilton*, 102 Fed. Rep. 683; *McLaughlin v. Park City Bank*, 22 Utah 473. See also *Liverpool, etc., Ins. Co. v. McNiell*, (C. C. A.) 89 Fed. Rep. 131.

**151.** 4. *One Having Charge of and Responsibility for Property May Insure* — *Amount of Recovery.* — *Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**6.** *Agents in Possession of Property.* — *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108; *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191.

*Contract by One Acting as Agent for Both Parties Voidable.* — *Georgia Home Ins. Co. v. Smithville*, (Tex. Civ. App. 1899) 49 S. W. Rep. 112.

**152.** 1. *Special Agent Without Control Has No Insurable Interest.* — See *West Branch Lum-*

- 152.** *cc. BAILEES — (aa) Generally.* — See note 3.  
*(bb) Bailees in Trust.* — See note 4.
- 153.** *dd. COMMISSION MERCHANTS OR FACTORS.* — See note 6.  
*ee. COMMON CARRIERS.* — See note 9.
- 154.** *Extent of Recovery.* — See note 3.  
*May Insure Against Negligence.* — See note 8.
- 156.** *hh. WAREHOUSEMEN.* — See note 1.  
*In Goods Held "in Trust" or "on Commission."* — See notes 4, 5.
- 158.** *(g) Husbands — (a) Generally.* — See note 2.  
*(b) In Wife's Personal Property.* — See note 6.  
*(c) In Wife's Real Property.* — See notes 8, 10.
- 160.** *(12) Insurers (in Reinsurance).* — See note 7.  
*(13) Lessees — (a) Generally.* — See note 11.
- 161.** *(b) Covenants by Lessee to Insure.* — See note 12.
- 162.** *(14) Lessors.* — See note 3.  
*In Property of Lessee.* — See note 8.  
*(15) Lienholders — (a) In General — As a General Rule.* — See note 9.
- 164.** *(b) Specific Liens — aa. MECHANICS' LIENS — (bb) Common-law Liens — Builders and Contractors.* — See note 1.  
*(16) Married Women — (b) Under the Married Women's Acts.* — See note 9.

berman's Exch. v. American Cent. Ins. Co., 183 Pa. St. 366.

**An Agent of an Insurance Company Entitled to Receive Part of the Net Profits** has an insurable interest in the property insured by the company. *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492.

**152. 3. Bailees — Depositories.** — *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108; *Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**A Bailee Having Possession under a Contract Requiring Insurance** may take out a policy upon it in her own name for the benefit of the owner and recover thereon. *Wagner v. Westchester F. Ins. Co.*, 92 Tex. 549.

**4. Bailees in Trust.** — *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108.

**Adoption of Insurance by Owner.** — See *Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**153. 6. Insurable Interest of Commission Merchants.** — See *Westchester F. Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140.

**9. Insurable Interest of Common Carrier.** — *Liverpool, etc., Ins. Co. v. McNeill*, (C. C. A.) 89 Fed. Rep. 131; *Home Ins. Co. v. Minneapolis, etc., R. Co.*, 71 Minn. 296.

**154. 3. Amount of Recovery.** — See *Home Ins. Co. v. Minneapolis, etc., R. Co.*, 71 Minn. 296.

**8. Carrier May Insure Against His Negligence.** — *Liverpool, etc., Ins. Co. v. McNeill*, 89 Fed. Rep. 131, 59 U. S. App. 499.

**156. 1. Warehouseman's Insurable Interest.** — *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108; *Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 545; *Boyd v. McKee*, 99 Va. 72, 3 Va. Sup. Ct. 26.

**4. Goods Held in Trust.** — *Dawson v. Waldheim*, 80 Mo. App. 52.

**"The Expression 'Held in Trust,' as used in insurance policies, means simply that the goods or property are in the custody of the insured."**

*Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 546.

**5. Liability for Moneys Collected.** — *Boyd v. McKee*, 99 Va. 72, 3 Va. Sup. Ct. 26.

**158. 2. Husband's Interest in Wife's Property.** — *Doyle v. American F. Ins. Co.*, 181 Mass. 139.

**6. In Arkansas the same rule obtains as in Michigan.** *Planters' Mut. Ins. Co. v. Lloyd*, 71 Ark. 292.

**8. Husband May Insure Wife's Realty.** — *Continental F. Assoc. v. Wingfield*, 32 Tex. Civ. App. 194.

**10. Husband Held to Have No Insurable Interest.** — *Planters' Mut. Ins. Co. v. Lloyd*, 71 Ark. 292. See also *Union Ins. Co. v. McCullough*, (Neb. 1901) 96 N. W. Rep. 79.

*In West Virginia* a husband living with his wife in a house which is on her separate estate has no insurable interest therein. *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

**160. 7. Reinsurance.** — *Sun Ins. Office v. Merz*, 64 N. J. L. 301.

**11. Unpaid Rent and Taxes.** — Though at the time when the insurance is procured there are unpaid rent and taxes, which by the terms of the lease are made a lien upon the lessee's interest in the property, he has notwithstanding an insurable interest therein while he remains in possession. *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816.

**161. 12. Extent of Interest.** — *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652.

**162. 3. Lessor Has Insurable Interest.** — *Sun Ins. Office v. Varble*, 103 Ky. 758; *McArdle v. German Alliance Ins. Co.*, 98 N. Y. App. Div. 598.

**8. Right to Distrain.** — *Watson v. Southern Ins. Co.*, (Miss. 1902) 31 So. Rep. 904.

**9. Lienholders.** — *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147.

**164. 1. Builder's Common-law Lien.** — *Ulmer v. Phoenix F. Ins. Co.*, 61 S. Car. 459, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164.

**9. Under Statutes Giving Married Woman Com-**



**165.** (17) *Mortgagees* — (a) Who Is Included — *aa.* ORDINARY MORTGAGEE. — See note 6.

**166.** (b) Nature of Mortgagee's Interest — *aa.* GENERALLY. — See note 10.

**167.** (c) Mortgagor Cannot Affect Mortgagee's Interest. — See note 9.

**168.** (e) Extinction of Mortgagee's Insurable Interest. — See note 6.

(18) *Mortgagors* — (a) Who Is Included. — See note 7.

**169.** (d) Insurance by Mortgagee Does Not Affect Mortgagor's Insurable Interest. — See note 7.

(e) Disclosure of Interest. — See note 9.

**170.** (f) After Decree of Foreclosure. — See note 2.

(j) Amount of Insurable Interest of Mortgagor. — See note 7.

**171.** (k) Mortgagor Insuring for Benefit of Mortgagee. — See note 1.

Effect of Such Agreements. — See note 3.

**172.** See note 1.

(19) *Mortgagor and Mortgagee* — Both May Obtain Insurance. — See notes 3, 4.

(20) *Occupants* — Without Liability or Interest. — See note 9.

plete Control of Separate Estate. — Sun Ins. Office v. Beneke, (Tex. Civ. App. 1899) 53 S. W. Rep. 98.

**165.** 6. Mortgagee May Insure. — Crawford v. Aachen, etc., F. Ins. Co., 100 Ill. App. 454, affirmed 199 Ill. 367; Home Ins. Co. v. Koob, 113 Ky. 360, 101 Am. St. Rep. 354; Banyer v. Albany Ins. Co., 85 N. Y. App. Div. 122, affirmed 179 N. Y. 554; Carnes v. Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

Attorney for Mortgagee Has Insurable Interest. — Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.

**166.** 10. Nature of Mortgagee's Interest. — See Gardner v. Continental Ins. Co., 75 S. W. Rep. 283, 25 Ky. L. Rep. 426.

**167.** 9. Mortgagee's Insurance Unaffected by Mortgagor's Acts. — The rule that the mortgagor cannot affect the mortgagee's interests is limited and controlled by a particular provision in the policy that insurance issued thereon to parties having an insurable interest shall be prorated. Sun Ins. Office v. Varble, 103 Ky. 458.

**168.** 6. Interest Continues After Foreclosure. — Compare Reynolds v. London, etc., F. Ins. Co., 128 Cal. 16, limiting National Bank v. Union Ins. Co., 88 Cal. 497, 22 Am. St. Rep. 324, cited in the original note.

**7.** Mortgagor May Obtain Insurance. — Nugent v. Rensselaer County Mut. F. Ins. Co., 106 N. Y. App. Div. 308, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.

**169.** 7. Failure of Mortgagee to Sue Within Stipulated Time — Effect on Mortgagor's Right of Action. — Where a policy of insurance contains a mortgage clause providing that the loss, if any, is payable to the mortgagee as interest may appear, and other provisions constituting a separate contract of insurance of the mortgagee's interest, and by the provisions of the policy any action for loss thereunder must be brought within six months after the loss occurs, and the mortgagee fails to bring any action thereon within the time so limited, and is barred thereby, such bar is not effectual against an action by the mortgagor brought within the time so limited by the contract. Shawnee F. Ins. Co. v. Bayha, 8 Kan. App. 169.

9. Mortgagor May Insure as Owner. — Slobodsky v. Phenix Ins. Co., 53 Neb. 816.

**170.** 2. After the Right of Redemption Has Expired, the mortgagor has no insurable interest, even though the secretary of the mortgagee corporation has expressed a willingness to accept the debt due. Pope v. Glenn Falls Ins. Co., 136 Ala. 670.

**7.** Recovery of Full Value by Mortgagee — Effect on Rights of Mortgagor. — Where an owner of property which was destroyed by fire had taken out a number of insurance policies thereon, each of which contained a "mortgage clause," making the insurance payable to a mortgagee of the property, and the full value of the property destroyed was paid to such mortgagee by some of the insurance companies, it was held that such owner thereafter had no right of action against another insurance company, even if before such settlement of the loss it might have been liable to him under its policy. Norwich Union F. Ins. Soc. v. Wellhouse, 113 Ga. 970.

**171.** 1. Insurance under Stipulation that Mortgagor Shall Insure for Mortgagee. — See Swearingen v. Hartford F. Ins. Co., 56 S. Car. 355.

Covenant to Insure for Benefit of Mortgagee a Personal Contract. — Huey v. Ewell, 22 Tex. Civ. App. 638.

**3.** Effect of Policy Payable to Mortgagee as His Interest May Appear. — Boyd v. Thuringia Ins. Co., 25 Wash. 447. See also Swearingen v. Hartford Ins. Co., 52 S. Car. 309.

**172.** 1. Acts of Mortgagor Forfeit Such Policy. — Boyd v. Thuringia Ins. Co., 25 Wash. 447. And see *infra*, this title, **203.** 3 *et seq.*

Fraudulent Destruction of Property by Mortgagor Defeats Mortgagee's Recovery. — Hocking v. Virginia F., etc., Ins. Co., 99 Tenn. 729.

**3.** Both Mortgagor and Mortgagee May Insure. — Banyer v. Albany Ins. Co., 85 N. Y. App. Div. 122, affirmed 179 N. Y. 554.

**4.** Interests of Both Covered by Single Policy. — See Banyer v. Albany Ins. Co., 85 N. Y. App. Div. 122, 179 N. Y. 554.

**9.** Person Having Mere Custody or Possession. — Schaeffer v. Anchor Mut. F. Ins. Co., 113 Iowa 652.

**174.** (21) *Partnerships and Partners* — Firm May Take Insurance. — See note 6.

Nominal Partners May Join. — See note 8.

Partner May Obtain Insurance upon His Interest Separately. — See note 10.

**176.** (26) *Remaindermen and Reversioners*. — See note 7.

(28) *Stockholders* — May Effect Insurance on Corporate Property. — See note 10.

**177.** (29) *Tenants* — (c) *Tenants for Life* — Separate Insurance. — See notes 4, 5. Joint Insurance. — See note 6.

Amount of Insurable Interest. — See note 8.

[(d) *Tenants at Will*. — See note 8a.]

[(e) *Tenants by Entireties*. — See note 8b.]

(30) *Trustees* — Generally. — See note 9.

**178.** (31) *Vendees* — (a) *In General*. — See note 5.

(b) *Vendee in Possession under Contract of Purchase*. — See note 6.

**174.** 6. *Firm May Insure Partnership Property*. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699; *Grabbs v. Farmers Mut. F. Ins. Assoc.*, 125 N. Car. 389.

8. *Nominal Partnership*. — *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445.

10. *Partner May Insure His Interest in Firm Property*. — *Grabbs v. Farmers' Mut. F. Ins. Assoc.*, 125 N. Car. 389.

**176.** 7. *Remainderman*. — *Bennett v. Featherstone*, 110 Tenn. 27.

10. *Stockholders in Corporations*. — *Crawford v. Aachen*, etc., F. Ins. Co., 100 Ill. App. 454, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176, affirmed 199 Ill. 367.

**177.** 4. *Life Tenants*. — *Farmers' Mut. F.*, etc., Ins. Co. v. *Lecroy*, 91 Ill. App. 41; *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616; *Bennett v. Featherstone*, 110 Tenn. 27.

5. *Insurance on Life Term — Remainderman No Interest*. — *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616; *Bennett v. Featherstone*, 110 Tenn. 27.

*Policy Taken Out by Owner of Fee*. — If insurance is taken out by the owner of the fee, who subsequently dies, and the estate is thereupon divided into a life estate and a remainder, the proceeds of the policy will go to those who succeeded to the estate of the insured after his death. *Bennett v. Featherstone*, 110 Tenn. 27.

6. *Joint Insurance by Tenant and Remainderman or Reversioner*. — *Bennett v. Featherstone*, 110 Tenn. 27.

8. *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616; *Hubbard v. Austin*, 8 Ohio Dec. 111; *Grant v. Buchanan*, 36 Tex. Civ. App. 334, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177.

8a. *A Tenant at Will* has an insurable interest. *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652.

8b. *A Tenant by the Entireties* has an insurable interest in the whole estate. *Clawson v. Citizens' Mut. F. Ins. Co.*, 121 Mich. 591.

9. *Trustee May Insure for Cestui Que Trust*. — *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177; *Dalton v. Germania F. Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 127; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

**178.** 5. *Vendee*. — *Milwaukee Mechanics'*

*Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Phenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477; *Tabbutt v. American Ins. Co.*, 185 Mass. 419, 102 Am. St. Rep. 353; *Ryan v. Agricultural Ins. Co.*, (Mass. 1905) 73 N. E. Rep. 849; *Brooks v. Erie F. Ins. Co.*, 76 N. Y. App. Div. 275, affirmed 177 N. Y. 572; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *State v. Springfield Underwriters Mut. F. Ins. Co.*, 14 Ohio Dec. 523; *Dunn v. Yakish*, 10 Okla. 388.

*Vendee Has Insurable Interest Though Title Remains in Vendor until Delivery*. — *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477.

6. *Vendee in Possession under Contract*. — *Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Phenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *DeWitt v. Agricultural Ins. Co.*, 157 N. Y. 353; *Brooks v. Erie F. Ins. Co.*, 76 N. Y. App. Div. 275, affirmed 177 N. Y. 572; *Clapp v. Farmers' Mut. F. Ins. Assoc.*, 126 N. Car. 388; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Gettelman v. Commercial Union Assur. Co.*, 97 Wis. 237.

*Vendee on Conditional Sale*. — *Tabbutt v. American Ins. Co.*, 185 Mass. 419, 102 Am. St. Rep. 353.

*Extent of Interest*. — Where, by the terms of the contract, the vendee in possession of goods under a contract of conditional sale is liable to the vendor for the destruction of the goods by fire, his insurable interest extends not only to the amount of the advances towards the purchase, but also to his liability for the possible destruction of the property. *Ryan v. Agricultural Ins. Co.*, (Mass. 1905) 73 N. E. Rep. 849.

*Property Held under Option*. — The interest of an owner of property which another holds under his option to purchase, which is irrevocable by the owner, but which the holder of the option has not bound himself to accept, and which he is free to abandon, is the sole and unconditional ownership of the property within the proper interpretation of the clause upon that subject in insurance policies, because the

- 179.** Under a Parol Contract of Purchase. — See note 7.  
 (c) When Contract Is Wholly Executory. — See notes 10, 11.
- 180.** (f) Vendee Whose Title Is Voidable for Fraud — So Where Property Is Sold or Conveyed with an Intent to Defraud Creditors. — See note 6.
- 181.** (32) Vendors — (a) In General. — See note 4.  
 (b) Vendor After Delivery, but Unpaid. — See note 7.
- 182.** See note 2.  
 (a) Vendor under Contract to Sell. — See note 4.  
 Amount of Insurable Interest. — See note 6.
- 183.** (d) Vendor in Conditional Sale. — See note 3.
- 184.** 3. Parties by Assignment — a. UNDER ASSIGNMENTS BEFORE LOSS — (i) *Legal Assignments* — (a) In General — aa. POLICY DOES NOT PASS WITH SALE OF PROPERTY. — See note 8.
- 185.** See note 1.  
 bb. POLICY NOT ASSIGNABLE WITHOUT CONSENT OF INSURER. — See note 3.  
 cc. BUT ASSIGNMENT WITHOUT CONSENT AVOIDS POLICY ONLY WHEN SO STIPULATED. — See notes 6, 7.
- 186.** (b) What Transfers Forbidden by Clause Prohibiting Assignment — aa. ABSOLUTE ASSIGNMENT ONLY INCLUDED. — See note 5.

owner cannot compel the holder of the option to take the property or suffer the loss. *Phenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723. See also *Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9.

**179.** 7. Possession under Parol Contract. — *Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 179.

**10.** Where the Vendee Has Paid No Part of the Consideration. — *Phenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 179; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 179.

**11.** After Execution of Contract but Before Delivery of Possession or Part Payment. — See *Dunn v. Yakish*, 10 Okla. 388.

**180.** 6. Vendee of Property Conveyed in Fraud of Creditors. — *Steinmeyer v. Steinmeyer*, 64 S. Car. 413, 92 Am. St. Rep. 809.

**181.** 4. Insurable Interest to Extent of Interest Retained. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699; *Jacobs v. Mutual Ins. Co.*, 52 S. Car. 110.

**7.** Unpaid Vendor After Delivery. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699. See also *Ambrose v. First Nat. F. Ins. Co.*, 19 Pa. Super. Ct. 117.

**182.** 2. Equitable Lien. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

**4.** Vendor's Interest — Vendee Not in Possession. — *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614; *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485; *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108; *Merchants' Ins. Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846.

**6.** Extent of Interest — Surplus Held as Trustee. — *Burke v. Continental Ins. Co.*, 100 N. Y. App. Div. 108. See also *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846.

**183.** 3. Conditional Sale. — *Merchants' Ins.*

*Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198.

**184.** 8. Grantee of Property No Interest in Policy. — *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451; *In re West Norfolk Lumber Co.*, 112 Fed. Rep. 759; *Shadgett v. Phillips, etc., Co.*, 131 Ala. 478, 90 Am. St. Rep. 95; *Miles Lamp Chimney Co. v. Erie F. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 107; *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273; *Bennett v. Mutual F. Ins. Co.*, 100 Md. 337; *Doggett v. Blanke*, 70 Mo. App. 499; *Cummins v. National F. Ins. Co.*, 81 Mo. App. 291; *Watts v. Fire Assoc.*, 87 Mo. App. 83; *Hubbard v. Austin*, 8 Ohio Dec. 111.

A Transfer of a Mortgage by the Mortgagee and the assignment to his vendee of his interest as mortgagee in a policy on the property, taken out by the mortgagor, payable to him as mortgagee, is not an assignment of the policy. *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445.

**185.** 1. Rule Applies to Transfer by Corporation to Another Having Same Stockholders. — *Miles Lamp Chimney Co. v. Erie F. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 107.

**3.** Consent of Insurer Necessary to Assignment. — *In re Hamilton*, 102 Fed. Rep. 683; *In re West Norfolk Lumber Co.*, 112 Fed. Rep. 759; *Hall v. Continental Ins. Co.*, (Ky. 1905) 84 S. W. Rep. 519; *Key v. Continental Ins. Co.*, 101 Mo. App. 344. See also *Fuller v. New York F. Ins. Co.*, (Mass. 1903) 67 N. E. Rep. 879.

The Fact that the Policy Contains a Blank Form of Assignment does not alter the rule. *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273.

**6.** Unless Stipulated, Assignment Without Consent Does Not Avoid Policy. — *Key v. Continental Ins. Co.*, 101 Mo. App. 344.

**7.** Stipulation that Assignment Avoids Policy Valid. — *In re Hamilton*, 102 Fed. Rep. 683; *Miles Lamp Chimney Co. v. Erie F. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 107; *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273; *Bennett v. Mutual F. Ins. Co.*, 100 Md. 337; *Watts v. Fire Assoc.*, 87 Mo. App. 83.

**186.** 5. Equitable Assignments. — See North-

- 187.** *bb.* DEPOSIT OR PLEDGE OF POLICY. — See notes 2, 3, 6.  
*cc.* ASSIGNMENT FOR BENEFIT OF CREDITORS OR IN BANKRUPTCY. — See note 8.
- 188.** (c) *Consent to the Assignment* — *aa.* CONDITIONS OF OBTAINING CONSENT MUST BE OBSERVED — See notes 2, 3.  
*bb.* FORM OR MANNER OF GIVING CONSENT — *What Is Sufficient Consent Generally.* — See note 4.
- 189.** *Mere Notice to Insurance Company.* — See note 8.
- 190.** *cc.* CONSIDERATION FOR GIVING CONSENT. — See note 11.
- 191.** *gg.* WAIVER OF CONSENT — (*aa.*) *Consent May Be Waived.* — See notes 1, 2.  
*(bb.) What Constitutes a Waiver.* — See note 5.
- 192.** (2) *Equitable Assignments* — (*a.*) *In General* — *aa.* EQUITABLE ASSIGNMENT MAY EXIST WITHOUT LEGAL. — See notes 1, 2.  
*bb.* RIGHTS OF EQUITABLE ASSIGNEE. — See note 5.
- 193.** (3) *Interest of Assignee* — (*a.*) *In Legal Assignments.* — See note 4.  
*(b.) In Equitable Assignments.* — See notes 6, 8.
- 194.** (5) *Assignment After Breach of Conditions* — (*a.*) *In General.* — See notes 5, 7.
- 195.** (*a.*) *Breach of Other Conditions.* — See note 5.
- 196.** See note 1.  
*(6.) Assignment of Invalid Policy.* — See notes 2, 3, 5.

*am v. International Ins. Co.*, 45 N. Y. App. Div. 177, *affirmed* 165 N. Y. 666.

**187.** 2. *Deposit as Collateral Not an Assignment.* — *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; *Northam v. International Ins. Co.*, 45 N. Y. App. Div. 177, *affirmed* 165 N. Y. 666.

An assignment as collateral does not affect the validity of the policy though absolute in form, and parol evidence is admissible to show the true object of the assignment. *Imperial Ins. Co. v. Wolf*, 11 Ohio Cir. Dec. 815, 21 Ohio Cir. Ct. 202.

**3.** *Contra, Where Partial Assignment Forbidden.* — *Key v. Continental Ins. Co.*, 101 Mo. App. 351, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**6.** *Deposit of Policy with Mortgagees.* — *Key v. Continental Ins. Co.*, 101 Mo. App. 351, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

**8.** *General Assignment for Creditors.* — *In re Hamilton*, 102 Fed. Rep. 683.

**188.** 2. *Conditions in Policy as to Consent Upheld.* — See *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451.

**3.** *Effect of Insured's Failure to Procure Consent.* — *Farmers Mut. Ins. Assoc. v. Price*, 112 Ga. 264; *Hall v. Continental Ins. Co.*, (Ky. 1905) 84 S. W. Rep. 519.

**4.** *Any Method of Consent in Absence of Stipulation Sufficient.* — *Queen Ins. Co. v. Block*, 58 S. W. Rep. 471, 22 Ky. L. Rep. 626.

*Consent to Transfer a Policy to One Co-owner* has been held to be sufficient consent to transfer to another. *Palatine Ins. Co. v. Boyd*, (Tex. Civ. App. 1899) 50 S. W. Rep. 643.

**189.** 8. *Mere Notice to Company.* — *Hall v. Continental Ins. Co.*, (Ky. 1905) 84 S. W. Rep. 519.

**190.** 11. *When Assignee Agrees to Pay the Premium.* — *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311.

**191.** 1. *Clause Against Assignment May Be Waived.* — *Hayes v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 287, *affirmed* 179 N. Y. 535.

2. *Provisions as to Form of Consent Waivable.* — *Northam v. International Ins. Co.*, 45 N. Y. App. Div. 177, *affirmed* 165 N. Y. 666.

5. *Receipt of Premiums from Assignee.* — *Northam v. International Ins. Co.*, 45 N. Y. App. Div. 177, *affirmed* 165 N. Y. 666.

**192.** 1. *Assignment of Policy Alone Before Loss Upheld in Equity.* — See *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280.

2. *Right Vests on Loss.* — See *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280.

5. *Assignee in Equity Takes Subject to Equities.* — *McDonald v. Daskam*, (C. C. A.) 116 Fed. Rep. 276.

**193.** 4. *When Company Consents to Assignment with Full Knowledge.* — See *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325.

6. *Assignment in Equity Effective Without Interest.* — *Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

8. *Policy Indorsed to Third Party.* — *Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

**194.** 5. *Assignee Takes Subject to Conditions of Original Policy.* — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324.

7. See *Home Mut. Ins. Co. v. Nichols*, (Tex. Civ. App. 1903) 72 S. W. Rep. 440.

**195.** 5. *Sole Ownership Required.* — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324.

**196.** 1. *Breach of Condition Against Other Insurance.* — *Migner v. St. Lawrence F. Ins. Co.*, 10 Quebec K. B. 122.

2. *Void Policy Not Validated by Assignment.* — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324; *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311, holding that the policy may be validated by agreement amounting to a new contract.

**196.** (7) *Assignment to Particular Person* — (a) *To Alienee of Property* — aa. CONSTITUTES A NEW CONTRACT OF INSURANCE. — See note 8.

**197.** cc. EFFECT OF BREACH OF CONDITIONS BY ASSIGNOR. — See note 5.

**198.** (b) *To Creditor as Collateral Security* — aa. ASSIGNEE HAS A LIEN ON PROCEEDS OF POLICY. — See note 3.

**200.** b. UNDER ASSIGNMENTS AFTER LOSS — (1) *An Assignment of a Chose in Action*. — See notes 1, 2, 3, 4, 5.

(2) *Assignee Takes Policy Subject to Equities*. — See note 7.

(3) *Insurer Cannot Prevent or Restrict Such Assignment*. — See note 9.

**201.** See note 3.

**202.** 4. *Mortgagees* — b. UNDER PARTICULAR CONTRACTS OR POLICIES — (1) *Policy Payable to Mortgagee* — (a) *By Ordinary or "Open" Mortgage Clause* — aa. CONTRACT STILL BETWEEN MORTGAGOR AND INSURER. — See notes 6, 7.

bb. A MERE DIRECTION AS TO MODE OF PAYMENT. — See note 8.

**Policy Invalidated by Assignment—Effect of Subsequent Consent.** — Where the owner of property conveyed it to a married woman, and at the same time, by mistake, assigned to the husband of the vendee the insurance policy on the property, the insurer consenting thereto, but subsequently before the loss the husband assigned the policy to the vendee with the consent of the insurer, the latter assignment and the insurer's consent were held to validate the policy, even though it was void while held by the vendee's husband. *Rines v. German Ins. Co.*, 78 Minn. 46.

**196.** 3. *Wagering Policies*. — *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549. See also *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311.

**5.** *Misrepresentation of Title*. — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324.

**3.** *Assignment to Alienee Creates New Contract*. — *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451; *Bayless v. Merchants' Town Mut. Ins. Co.*, 106 Mo. App. 684; *Home Mut. Ins. Co. v. Nichols*, (Tex. Civ. App. 1903) 72 S. W. Rep. 440; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558. See also *In re Hamilton*, 102 Fed. Rep. 683.

**197.** 5. *Effect of Assignor's Acts*. — *Bayless v. Merchants' Town Mut. Ins. Co.*, 106 Mo. App. 684; *Home Mut. Ins. Co. v. Nichols*, (Tex. Civ. App. 1903) 72 S. W. Rep. 440.

**198.** 3. *Assignment as Collateral Attaches as Lien*. — *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325.

**Assignee's Interest Extends Only to Amount of Debt**. — *Clark v. German Ins. Co.*, 84 Mo. App. 243.

**200.** 1. *After Loss Insured's Interest Is Chose in Action*. — *Fuller v. New York F. Ins. Co.*, (Mass. 1903) 67 N. E. Rep. 879; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

**2.** *Such Interest Assignable*. — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228; *Fuller v. New York F. Ins. Co.*, (Mass. 1903) 67 N. E. Rep. 879; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

**Proof of Loss by the Insured Is Not a Pre-requisite to a valid assignment**. *Greenwich Ins. Co. v. Columbia Mfg. Co.*, 73 Ill. App. 560.

**3.** *Assignee May Sue*. — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35

So. Rep. 228; *Georgia Co-operative F. Assoc. v. Borchardt*, 123 Ga. 181; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258. See also *Frels v. Little Black Farmers' Mut. Ins. Co.*, 120 Wis. 590.

**4.** *Assignee Not Affected by Assignor's Acts*. — *Georgia Co-operative F. Assoc. v. Borchardt*, 123 Ga. 181.

**5.** *Frels v. Little Black Farmers' Mut. Ins. Co.*, 120 Wis. 590.

**7.** *Assignee Takes Subject to Equities*. — *Georgia Co-operative F. Assoc. v. Borchardt*, 123 Ga. 181.

**9.** *Assignable After Loss Without Consent*. — *Fuller v. New York F. Ins. Co.*, (Mass. 1903) 67 N. E. Rep. 879.

**201.** 3. *Provisions Against Assignment Inapplicable After Loss*. — *Georgia Co-operative F. Assoc. v. Borchardt*, 123 Ga. 181.

**202.** 6. *"Open Mortgage Clause" — Contract Between Insured and Mortgagor*. — *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676; *Farmers Bank v. Manchester Assur. Co.*, 106 Mo. App. 114; *Post Printing, etc., Co. v. Insurance Co. of North America*, 189 Pa. St. 300; *Swearingen v. Hartford Ins. Co.*, 52 S. Car. 309; *Hamburg-Bremen F. Ins. Co. v. Ruddell*, (Tex. Civ. App. 1904) 82 S. W. Rep. 826; *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447; *Staats v. Georgia Home Ins. Co.*, (W. Va. 1905) 50 S. E. Rep. 815; *Keith v. Royal Ins. Co.*, 117 Wis. 531.

**Where Mortgage Exceeds the Amount of Policy, Mortgagee May Sue for Entire Amount**. — *Panhandle Nat. Bank v. Security Co.*, 18 Tex. Civ. App. 96.

**7.** *Mortgagor Remains the Insured*. — *Monroe Bldg., etc., Assoc. v. Liverpool, etc., Ins. Co.*, 50 La. Ann. 1243; *Post Printing, etc., Co. v. Insurance Co. of North America*, 189 Pa. St. 300; *Swearingen v. Hartford Ins. Co.*, 52 S. Car. 309; *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447; *Staats v. Georgia Home Ins. Co.*, (W. Va. 1905) 50 S. E. Rep. 815; *Keith v. Royal Ins. Co.*, 117 Wis. 531.

**8.** *Direction of Payment Not an Assignment*. — *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549; *Christenson v. Fidelity Ins. Co.*, 117 Iowa 77, 94 Am. St. Rep. 286, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Staats v. Georgia Home Ins. Co.*, (W. Va. 1905) 50 S. E. Rep. 815.

**203.** See note 1.

*cc.* POLICY AVOIDED BY BREACHES OF MORTGAGOR. — See notes 3, 4.

**204.** Acts of Mortgagor Avoiding Policy. — See notes 1, 2.

*dd.* EQUITABLE RIGHTS OF MORTGAGEE. — See note 8.

**205.** See note 1.

(b) By the "Union Mortgage Clause" — *aa.* IN GENERAL. — See notes 2, 3, 4.

**206.** *bb.* INDEPENDENT INSURANCE UPON MORTGAGEE'S INTEREST — The Union Mortgage Clause Incorporated into a Policy. — See note 1.

Where the Clause Is Attached to an Existing Policy. — See note 2.

**203. 1. Effect of Such Direction.** — Delaware Ins. Co. *v.* Greer, (C. C. A.) 120 Fed. Rep. 916; Hamburg-Bremen F. Ins. Co. *v.* Ruddell, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

**3. Mortgagee Succeeds Only to Rights of Mortgagor.** — Delaware Ins. Co. *v.* Greer, (C. C. A.) 120 Fed. Rep. 916; Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549; Christenson *v.* Fidelity Ins. Co., 117 Iowa 77, 94 Am. St. Rep. 286, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203; Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243; Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557; Hamburg-Bremen F. Ins. Co. *v.* Ruddell, (Tex. Civ. App. 1904) 82 S. W. Rep. 826; Boyd *v.* Thuringia Ins. Co., 25 Wash. 447; Staats *v.* Georgia Home Ins. Co., (W. Va. 1905) 50 S. E. Rep. 815.

**4. Breach by Mortgagor Defeats Mortgagee — United States.** — Delaware Ins. Co. *v.* Greer, (C. C. A.) 120 Fed. Rep. 916.

*Connecticut.* — Collinsville Sav. Soc. *v.* Boston Ins. Co., 77 Conn. 676.

*Indiana.* — Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549.

*Iowa.* — Christenson *v.* Fidelity Ins. Co., 117 Iowa 77, 94 Am. St. Rep. 286, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203.

*Louisiana.* — Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243.

*New York.* — Rosenstein *v.* Traders Ins. Co., 79 N. Y. App. Div. 481; Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557.

*Texas.* — Hamburg-Bremen F. Ins. Co. *v.* Ruddell, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

*West Virginia.* — Staats *v.* Georgia Home Ins. Co., (W. Va. 1905) 50 S. E. Rep. 815.

*Canada.* — Stanstead, etc., Mut. F. Ins. Co. *v.* Gooley, 9 Quebec Q. B. 324.

And see *supra*, this title, **172.** 1, 2.

**Conditions Held Not to Attach to Mortgagee's Interest.** — East *v.* New Orleans Ins. Assoc., 76 Miss. 697.

**When Mortgages Not Affected.** — See Senor *v.* Western Millers' Mut. F. Ins. Co., 181 Mo. 104.

**Where the Mortgage Is the Party Whose Assurance Is Intended** by the policy, no subsequent acts of the mortgagor will invalidate the policy. Boyd *v.* Thuringia Ins. Co., 25 Wash. 447.

**204. 1. Other Insurance.** — Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549; Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243. See also Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557.

**2. Alienation.** — Rosenstein *v.* Traders' Ins. Co., 79 N. Y. App. Div. 481.

**Exception Provided by Policy.** — Where the

policy stipulates that alienation of the property by the owner shall not invalidate the policy as against the interests of the mortgagee, provided the latter notifies the insurer, if the mortgagee has knowledge thereof and there is evidence tending to show that the owner was at the time of the transfer such agent and representative of the mortgagee as that his knowledge of the transfer would be imputed to the mortgagee, and that notice was not given of the transfer, the question of the compliance of the mortgagee with the provision as to notice is for the jury. Alamo F. Ins. Co. *v.* Davis, 25 Tex. Civ. App. 342.

**8. Mortgagee's Consent to Revocation Required.** — Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575. See also Panhandle Nat. Bank *v.* Security Co., 18 Tex. Civ. App. 96.

**205. 1. Entry into Accord and Satisfaction.** — *Contra*, Collinsville Sav. Soc. *v.* Boston Ins. Co., 77 Conn. 676.

**2. Union Mortgage Clause.** — See Magoun *v.* Fireman's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205.

**Diminution of Security.** — Under the mortgage clause the company undertakes that the capacity of the property to pay the mortgage debt shall not be diminished, and that, if it is diminished by fire, it will pay over the loss to the mortgagee, irrespective of the fact that the property in its damaged condition may be more than sufficient to pay the mortgage debt. Uhlfelder *v.* Palatine Ins. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 153.

**3. Collinsville Sav. Soc. *v.* Boston Ins. Co.,** 77 Conn. 676; Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568; Magoun *v.* Fireman's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205; Uhlfelder *v.* Palatine Ins. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 153.

**4. Such Clause Valid.** — Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568.

**206. 1. Union Mortgage Clause Is Independent Policy for Mortgagee.** — Collinsville Sav. Soc. *v.* Boston Ins. Co., 77 Conn. 676; Queen Ins. Co. *v.* Dearborn Sav., etc., Assoc., 75 Ill. App. 371, affirmed 175 Ill. 115; Magoun *v.* Fireman's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206; Burnham *v.* Royal Ins. Co., 75 Mo. App. 394; Uhlfelder *v.* Palatine Ins. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 153; Smith *v.* Union Ins. Co., 25 R. I. 260, 105 Am. St. Rep. 882. Compare Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568.

**2. Clause Attached to Existing Policy Is Independent.** — Baldwin *v.* German Ins. Co., 105 Iowa 379.

**206. Mortgagee a Party — Two Contracts in Substance. — See note 3.**

*cc.* POLICY NOT AVOIDED BY ACT OR NEGLIGENCE OF MORTGAGOR. — See notes 4, 5. Illustrations. — See note 6.

**207. See notes 2, 3.**

*dd.* STIPULATIONS OF POLICY BINDING UPON MORTGAGEE. — See note 5.

Some Limitations upon the General Rule. — See notes 6, 9.

**208. (2) Assignment to Mortgagee — Contract Does Not Become One of Indemnity to Mortgagee. — See note 1.**

Assignee May Recover Only When Assignor Could. — See notes 2, 7.

**209. 5. Parties under Peculiar Forms of Policies — a. POLICY MADE PAYABLE TO THIRD PARTY — (1) Contract with Insured Is Not Changed. — See notes 1, 2, 3.**

Attaching Clause to Invalid Policy. — A new and valid contract is not made by attaching to an invalid policy an agreement for the benefit of the mortgagee, unless there is a new consideration for it. *Baldwin v. German Ins. Co.*, 105 Iowa 379.

**206. 3. Under Such Clause Mortgagee a Party.** — *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676; *Queen Ins. Co. v. Dearborn Sav. etc., Assoc.*, 75 Ill. App. 371, *affirmed* 175 Ill. 115; *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394; *Smith v. Union Ins. Co.*, 25 R. I. 260, 105 Am. St. Rep. 882; *Uhlfelder v. Palatine Ins. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 153. Compare *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568.

**4. Mortgagee's Rights Unaffected by Act of Mortgagor.** — *Scottish Union, etc., Ins. Co. v. Field*, 18 Colo. App. 68; *Collinsville Sav. Soc. v. Boston Ins. Co.*, 77 Conn. 676; *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568; *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206. See also *Key v. Continental Ins. Co.*, 101 Mo. App. 344; *State Ins. Co. v. Hale*, (Neb. 1901) 95 N. W. Rep. 473; *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445; *Agner v. Fireman's Ins. Co.*, 14 Ohio Dec. 268; *Utter v. Lewis*, 10 Pa. Dist. 50; *Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co.*, 23 Pa. Super. Ct. 88.

**5. Scottish Union, etc., Ins. Co. v. Field**, 18 Colo. App. 68 (holding that the mortgagee was not bound by a stipulation of the mortgagor fixing the amount of loss); *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568; *Agner v. Fireman's Ins. Co.*, 14 Ohio Dec. 268; *Smith v. Union Ins. Co.*, 25 R. I. 260, 105 Am. St. Rep. 882.

**Canadian Rule.** — In Canada the provision applies only to the acts of the mortgagor after the policy comes into operation, and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy. *Liverpool, etc., Ins. Co. v. Agricultural Sav., etc., Co.*, 33 Can. Sup. Ct. 94.

**6. Other Insurance.** — *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445.

Where the agent who issued the policy was a part owner of the insured premises as an heir at law of his mother, who died after the execution of the mortgage, and was also one of the makers of the note to secure which the mortgage was given, it was held that his failure, when issuing the policy, to notify the company of these facts, and his failure to inform the company that there was a prior mortgage upon

the property, issued to the mortgagee, could not be attributed to his mother, nor would that fact invalidate the policy issued by him, although the amount was in excess of the amount permitted as concurrent insurance. *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370.

**207. 2. Alienation by Mortgagor.** — *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445; *Utter v. Lewis*, 10 Pa. Dist. 50; *Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co.*, 23 Pa. Super. Ct. 88.

**3. Misrepresentation by Mortgagor.** — *Smith v. Union Ins. Co.*, 25 R. I. 260, 105 Am. St. Rep. 882.

**5. Failure to Give Notice of Change of Title Does Not Invalidate.** — *Whitney v. American Ins. Co.*, (Cal. 1899) 56 Pac. Rep. 50.

**6. Proof of Loss Not Dispensed With.** — Compare *Glens Falls Ins. Co. v. Porter*, 44 Fla. 568.

It is otherwise, however, where it is apparent from the form of the contract that the provision as to proofs of loss was not intended to bind the mortgagee. *Queen Ins. Co. v. Dearborn Sav., etc., Assoc.*, 75 Ill. App. 371, *affirmed* 175 Ill. 115.

**9. Policy to Be Void if Building Not on Insured's Ground.** — See *Allen v. Home Ins. Co.*, 133 Cal. 29.

**208. 1. Effect of Assignment to Mortgagee.** — *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8.

**2. Mortgagee Who Is Assignee Bound by Acts of Mortgagor.** — *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8, holding, however, that where the assignment is based upon a contract between the insurer and the assignee, which is supported by a new and distinct consideration, the contract will control.

**7. Mortgagee's Right No Better than Mortgagor's.** — *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8.

**209. 1. Policy Issued Payable to Third Person.** — *Bradford v. Mutual F. Ins. Co.*, 112 Iowa 495; *Milliken v. Woodward*, 64 N. J. L. 444.

**2. Policy Indorsed Payable to Third Person — What "Interest" Included.** — An indorsement making the policy payable to a third person "as his interest may appear" refers not to an interest existing at the time when the indorsement was written, but to such interest as may appear at the time of the loss, if any, without regard to the character of the interest, or the time when it may have arisen. The interest referred to is not an interest in the property



**210.** (2) *A Direction to the Insurer as to Payment.* — See note 2.

(3) *Payee Takes Subject to All Equities.* — See notes 6, 7, 8.

**211.** See notes 1, 2.

(4) *Such Direction Not an Assignment.* — See notes 5, 7.

(5) *Payee Need Have No Insurable Interest.* — See note 8.

**212.** *b. POLICY FOR ANOTHER'S BENEFIT* — (1) *In General.* — See note 2.

**213.** *c. POLICY FOR WHOM IT MAY CONCERN* — (1) *In General* — The Words "Whom It May Concern." — See note 6.

**214.** (2) *Policy Inures to Benefit of Person Intended.* — See note 1.

**216.** *d. POLICIES ON GOODS IN TRUST OR ON COMMISSION* — (1) *In General.* — See note 9.

(2) *What Goods Are Included.* — See note 11.

**217.** (3) *Recovery under Policy.* — See note 2.

**218.** III. FORM OF THE CONTRACT — 1. *Parol Contracts of Fire Insurance* — *a. VALIDITY* — (1) *In General.* — See note 5.

**220.** *Statute of Frauds.* — See note 1.

insured, but is an interest in the payment of the loss, whether predicated upon an interest in the property or otherwise. *Atlas Reduction Co. v. New Zealand Ins. Co.*, (C. C. A.) 138 Fed. Rep. 497.

**209.** 3. *Assignment and Consent Does Not Substitute New Insured.* — *Atlas Reduction Co. v. New Zealand Ins. Co.*, (C. C. A.) 138 Fed. Rep. 497.

**210.** 2. *Payment Must Be Made to Third Party in Accordance with Direction.* — *Atlas Reduction Co. v. New Zealand Ins. Co.*, (C. C. A.) 138 Fed. Rep. 497; *Milliken v. Woodward*, 64 N. J. L. 444.

6. *Takes Subject to Conditions of Policy.* — *Heyl v. Aetna Ins. Co.*, (Ala. 1905) 38 So. Rep. 118; *Antes v. State Ins. Co.*, 61 Neb. 55; *Milliken v. Woodward*, 64 N. J. L. 444.

7. *Takes Subject to Equities.* — See *Antes v. State Ins. Co.*, 61 Neb. 55.

8. *Want of Insurable Interest.* — *Milliken v. Woodward*, 64 N. J. L. 444.

**211.** 1. *Misstatement of Interest.* — *Milliken v. Woodward*, 64 N. J. L. 444.

2. *Procuring Other Insurance.* — *Heyl v. Aetna Ins. Co.*, (Ala. 1905) 38 So. Rep. 118.

5. *Such Direction Not Assignment.* — See *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451.

7. *Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546.

8. *Insurable Interest for Payee Not Necessary.* — *Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

**212.** 2. *Insured Need Not Be Named.* — See *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499.

**213.** 6. *Specific Person Need Not Be Contemplated.* — *Hagan v. Scottish Ins. Co.*, 186 U. S. 423.

**214.** 1. *Policy "for Whom It May Concern" Inures to Benefit of Party Intended.* — *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.*, 108 Fed. Rep. 451.

**216.** 9. *Insurance by Agent or Consignee Inuring to Real Owner.* — See *Smith v. Carmack*, (Tenn. Ch. 1901) 64 S. W. Rep. 372.

11. *Policy Covers Property Subsequently Received.* — *Smith v. Carmack*, (Tenn. Ch. 1901) 64 S. W. Rep. 372.

**217.** 2. *Surplus Held in Trust.* — *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217; *Dalton v. Germania F. Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 127.

**218.** 5. *Oral Insurance Valid* — *Illinois.* — *Milwaukee Mechanics Ins. Co. v. Graham*, 80 Ill. App. 549, affirmed 181 Ill. 158; *Concordia F. Ins. Co. v. Heffron*, 84 Ill. App. 610; *Fire Ins. Co. v. Sinsabaugh*, 101 Ill. App. 55; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77.

*Indiana.* — *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333.

*Kansas.* — *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644.

*Kentucky.* — *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624; *Hartford F. Ins. Co. v. Trimble*, (Ky. 1904) 78 S. W. Rep. 462; *Mattingly v. Springfield F., etc., Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, (Ky. 1905) 84 S. W. Rep. 551.

*Massachusetts.* — *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358; *Goodhue v. Hartford F. Ins. Co.*, 175 Mass. 187.

*Missouri.* — *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311.

*New Jersey.* — *J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674.

*New York.* — *Northam v. Dutchess County Mut. Ins. Co.*, 177 N. Y. 73; *Abel v. Phoenix Ins. Co.*, 57 N. Y. App. Div. 629.

*Pennsylvania.* — *Keystone Mattress, etc., Co. v. Pittsburg Underwriters*, 21 Pa. Super. Ct. 38.

*Authority of Agent to Make Oral Contract.* — See *King v. Phoenix Ins. Co.*, 101 Mo. App. 163.

*Parol Contract by Agent Having General Authority to Make Contracts Valid.* — *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333.

*Contract Contained in "Binder" Slip Valid.* — *British American Ins. Co. v. Wilson*, 77 Conn. 559; *J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674.

*"Binder" Slip — Nature of Contract Question for Jury.* — *Underwood v. Greenwich Ins. Co.*, 66 N. Y. App. Div. 531.

**220.** 1. *Statute of Frauds Inapplicable.* — *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644; *Mattingly v. Springfield F., etc., Ins. Co.*, (Ky.

**220.** (3) *In Mutual Insurance.* — See note 7.

**221.** *b. ESSENTIALS OF PAROL INSURANCE* — (1) *Must Be Clearly Established.* — See note 1.

(2) *Must Be in Præsentia.* — See note 2.

*c. DISTINCTIONS* — *Parol Agreement to Issue Policy Not a Complete Contract of Insurance.* — See note 3.

**222.** *d. LOSS BEFORE POLICY ISSUES.* — See notes 1, 2, 3.

*e. CONDITIONS OF PAROL CONTRACT.* — See note 5.

*f. MERGER* — *Parol Contract Not Merged.* — See note 6.

**2. The Standard Fire Policy** — *a. CHARACTER.* — See note 7.

1904) 83 S. W. Rep. 577; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, (Ky. 1905) 84 S. W. Rep. 551.

*Contract Which May Be Performed in a Year Not Within Statute.* — *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358.

**220.** *7. Rule Applies to Mutual Companies.* — *Alliance Co-operative Ins. Co. v. Corbett*, 69 Kan. 564; *Loomis v. Jefferson County Patrons' F. Relief Assoc.*, 92 N. Y. App. Div. 601.

**221.** *1. Burden of Proof.* — *Keystone Mat-tress, etc., Co. v. Pittsburg Underwriters*, 21 Pa. Super. Ct. 38.

*Essentials of Parol Contract.* — "In order to make a valid contract of insurance, several things must concur: First, the parties must agree upon the company in which the insurance is to be placed; second, the amount of the insurance must be definitely fixed; third, the duration of the risk must be agreed upon, and the contract must be definite and certain. The absence of either or any of these requisites is fatal." *Insurance Co. of North America v. Bird*, 175 Ill. 42. See also *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674.

*Express Agreement as to Premium and Duration Not Essential.* — *Concordia F. Ins. Co. v. Heffron*, 84 Ill. App. 610.

*Where the Agent Represents Several Companies*, the particular company must be designated. *Hartford F. Ins. Co. v. Trimble*, (Ky. 1904) 78 S. W. Rep. 462; *Kleis v. Niagara F. Ins. Co.*, 117 Mich. 469.

*Notice of Lack of Agent's Power* — *Insurer Not Bound.* — *Hartford F. Ins. Co. v. Trimble*, (Ky. 1904) 78 S. W. Rep. 462.

*Contract Presumed to Call for Written Policy.* — *Agricultural Ins. Co. v. Fritz*, 61 N. J. L. 211.

*Existence of Contract a Question of Fact.* — *Insurance Co. of North America v. Bird*, 175 Ill. 42.

**2. Agreements to Insure Not Included.** — *German Ins. Co. v. Downman*, (C. C. A.) 115 Fed. Rep. 481; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Abel v. Phoenix Ins. Co.*, 47 N. Y. App. Div. 81; *Brown v. Dutchess County Mut. Ins. Co.*, 64 N. Y. App. Div. 9; *Cleveland Oil, etc., Mfg. Co. v. Norwich Union F. Ins. Soc.*, 34 Oregon 228.

*Payment of Premium Not Condition Precedent.* — *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423.

**3. Parol Agreements to Issue Policy.** — *German Ins. Co. v. Downman*, (C. C. A.) 115 Fed. Rep. 481; *Consumers' Match Co. v. German Ins. Co.*, 70 N. J. L. 226; *Brown v. Dutchess*

*County Mut. Ins. Co.*, 64 N. Y. App. Div. 9. See also *King v. Phoenix Ins. Co.*, 101 Mo. App. 163.

**222.** *1. Loss Before Policy Issues under Agree-ment.* — See *Everett v. O'Leary*, 90 Minn. 154, holding that the right of action accrues and the statute of limitations commences to run at the expiration of a reasonable time within which the policy should have issued, and not from the time when a fire occurs. The fact that the party to whom the policy should have been issued did not know that the contract had been violated will not prevent the running of the statute.

**2.** *Sproul v. Western Assur. Co.*, 33 Oregon 98.

**3. Direct Payment of Loss Deceed.** — *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Hicks v. British America Assur. Co.*, 162 N. Y. 284.

**5. Conditions Implied.** — *Continental Ins. Co. v. Roller*, 101 Ill. App. 77; *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311; *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Sproul v. Western Assur. Co.*, 33 Oregon 98; *Cleveland Oil, etc., Mfg. Co. v. Norwich F. Ins. Soc.*, 34 Oregon 228; *Young v. St. Paul F. & M. Ins. Co.*, 68 S. Car. 387. See also *Concordia F. Ins. Co. v. Heffron*, 84 Ill. App. 610; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423.

*Conditions of Standard Policy Included in "Binder Slip" Contract by Reference Thereto.* — *British American Ins. Co. v. Wilson*, 77 Conn. 559.

*Memorandum of Contract.* — When a memorandum of a contract for additional insurance is indorsed upon a policy previously issued, the stipulations therein contained, in so far as they may be applicable, are to be treated as constituting the basis of the new contract. *London Assur. Corp. v. Paterson*, 106 Ga. 538.

*Waiver of Conditions.* — Where the existence of a contract to insure is denied by the insurer and the issuance of the policy is refused, the insurer will be held to have waived such conditions as are calculated to render the policy void at the moment of its execution, unless it has given notice to the insured that they will be contained in the policy and insisted upon. *Sproul v. Western Assur. Co.*, 33 Oregon 98.

*Waiver of Proof of Loss by Refusing to Issue Policy.* — *Sproul v. Western Assur. Co.*, 33 Oregon 98.

**6. As to Merger of Parol Contract**, see *Kleis v. Niagara F. Ins. Co.*, 117 Mich. 469.

**7. States Adopting Standard Form.** — See *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481, citing 13 AM. AND ENG.

**223.** See note 1.

*b.* CLASSES OF STANDARD POLICIES. — See note 3.

*c.* INTERPRETATION OF STANDARD POLICY. — See note 4.

*d.* VALIDITY — (1) *Constitutionality of Statute* — [Other States]. —

See note 5*a*.

(2) *Binding Force* — Effect of Using Other than Standard Form. — See note 7.

Waiver Not Permitted. — See note 9.

**224. IV. PROHIBITIONS AND EXCEPTIONS — 1. Alienation and Incumbrance** — *a.* OBJECT AND PURPOSE OF THESE CLAUSES. — See note 2.

*b.* STATEMENTS AS TO TITLE — (2) *Necessity of Stating Title* —

(*a*) In General. — See notes 5, 6.

(*b*) What Constitutes Material Misrepresentation and Concealment. — See note 6*a*.

ENCYC. OF LAW (2d ed.) 222; *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, *affirmed* 39 N. Y. App. Div. 639; *Temple v. Niagara F. Ins. Co.*, 109 Wis. 372; *Straker v. Phenix Ins. Co.*, 101 Wis. 413.

Statute Not Applicable to Policies on Property in Other States. — *Loomis v. Lewis*, 62 N. Y. App. Div. 433.

**223. 1. Purpose and Effect of Standard Policy.** — *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223; *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Commonwealth Mut. F. Ins. Co. v. Edwards*, 124 N. Car. 116; *Straker v. Phenix Ins. Co.*, 101 Wis. 413; *Vorous v. Phenix Ins. Co.*, 102 Wis. 76.

3. See *Goodhue v. Hartford F. Ins. Co.*, 175 Mass. 187.

4. Construction. — See *Kollitz v. Equitable Mut. F. Ins. Co.*, 92 Minn. 234.

Construction to Be According to Plain Meaning of Language Employed. — *Nelson v. Traders' Ins. Co.*, 86 N. Y. App. Div. 66, *affirmed* 181 N. Y. 472.

5*a.* In Maine the enactment of a standard policy statute has been held to be within the powers of the legislature. Opinion of Justices, 97 Me. 590.

In Michigan and Wisconsin the statutes have been held to be unconstitutional. *King v. Concordia F. Ins. Co.*, (Mich. 1905) 103 N. W. Rep. 616; *Vorous v. Phenix Ins. Co.*, 102 Wis. 76.

7. Use of Other Form a Criminal Offense under New York Statute. — *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, *affirmed* 39 N. Y. App. Div. 639.

Under the Massachusetts Statute of 1894, c. 522, §§ 60, 105, providing that no company shall issue a different policy, under penalty of a fine, and that policies issued in violation of the statute shall be binding on the insurer, a policy so issued must be construed according to its terms, not as though it conformed to the requirements of the standard policy. *Hewins v. London Assur. Corp.*, 184 Mass. 177.

Standard Policy Statute Not Applicable to Mutual Insurance Companies. — *Worachek v. New Denmark Mut. Home F. Ins. Co.*, 102 Wis. 81.

9. Waiver. — *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Tompkins v. Hartford F. Ins. Co.*, 22 N. Y. App. Div. 380. Compare *Goodhue v. Hartford F. Ins. Co.*, 175 Mass. 187.

Provision Prohibiting Waiver Not for Benefit of Insured. — *Belt v. American Cent. Ins. Co.*, 29 N. Y. App. Div. 546, *affirmed* 163 N. Y. 555.

**224. 2.** See *Saunders v. Armstrong*, 61 S. W. Rep. 700, 22 Ky. L. Rep. 1789; *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485; *Dow v. National Assur. Co.*, (R. I. 1904) 58 Atl. Rep. 999.

5. Material Misrepresentation Avoids Policy. — *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670; *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136; *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694, *affirmed* 140 Cal. 645; *Alberts v. Insurance Co. of North America*, 117 Ga. 854; *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341; *Seal v. Farmers, etc., Ins. Co.*, 59 Neb. 253; *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702; *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

Severable Contract — Misrepresentation as to Part Will Not Invalidate as to Remainder. — *Donley v. Glens Falls Ins. Co.*, 100 N. Y. App. Div. 69; *Continental Ins. Co. v. Gardner*, (Ky. 1901) 62 S. W. Rep. 886.

6. Material Concealment Avoids Policy. — *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559; *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341.

6*a.* Inquiry and Intentional Concealment Necessary to Constitute Legal Concealment. — *American Cent. Ins. Co. v. Nunn*, (Tex. Civ. App. 1904) 79 S. W. Rep. 88, *reversed* on other grounds 98 Tex. 191.

Where it is stipulated that the application shall be a part of the contract and a warranty by the assured, and that, if the interest of the latter in the property be not truly stated therein, the policy shall be void, the parties have settled for themselves what shall be material, and the assured cannot be permitted, in case of loss, to claim that an answer is immaterial which he has contracted should be considered material. *Cerys v. State Ins. Co.*, 71 Minn. 338.

Constitutionality of Statute. — The Tennessee statute (Acts Tenn. 1895, c. 160, p. 332) which provides that "no written or oral misrepresentation or warranty therein made in the negotiation of a contract or policy of insurance, or in the application therefor by the assured, or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss," is consti-

**225.** *aa.* MARITAL INTERESTS. — See note 1.

*bb.* MISCELLANEOUS INTERESTS. — See notes 6, 8, 9.

**226.** *cc.* MORTGAGES. — See note 1.

*dd.* TAXES — A Void Tax Sale. — See note 4.

(e) Qualifications. — See notes 5, 6, 7.

**227.** (3) *Effect and Construction of Statements* — (a) In General —

*aa.* NONDISCLOSURE FATAL. — See note 3.

*bb.* SUBSTANTIAL ACCURACY SUFFICIENT. — See note 4.

tutional. *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151.

**225. 1. Husband Insuring as Owner of Wife's Property.** — *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136; *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63.

**6. Express Condition as to Ownership of Land.** — In an action on a policy which provided that "this entire policy shall be void \* \* \* if the interest of the insured in the property be not truly stated herein, \* \* \* or if the subject of the insurance be a building on ground not owned by the insured in fee simple," where it appeared from the evidence introduced by the plaintiff that she did not have title to the property insured, and that her interest therein was not correctly stated in the policy, and it further appeared from the evidence of the plaintiff's husband and agent that he told the agent of the insurance company, at the time when the policy was written, that the property insured belonged to the plaintiff, it was held that a nonsuit was properly granted. *Alberts v. Insurance Co. of North America*, 117 Ga. 854.

**8. Of Vendor's Lien.** — See *Underwriters F. Assoc. v. Palmer*, 32 Tex. Civ. App. 447.

**9. Of Mortgage.** — *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559; *McCarty v. Imperial Ins. Co.*, 126 N. Car. 820; *Southern Ins. Co. v. Estes*, 106 Tenn. 472; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923.

It is otherwise, however, where the insured voluntarily states that the property is unincumbered, even though such statement is innocently made. *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.

**226. 1. Mortgagor Insuring for Mortgagee.** — *Compare Dunham v. Citizens Ins. Co.*, 34 Wash. 205.

**4. Unpaid Taxes.** — See *McClelland v. Greenwich Ins. Co.*, 107 La. 124.

**Whiskey in Bonded Warehouse — Unpaid Taxes Cannot Be Deducted by Insurer.** — *Queen Ins. Co. v. McCain*, 105 Ky. 806.

**5. When Interest Need Not Be Disclosed.** — *Farmers' Mut. F., etc., Ins. Co. v. Lecroy*, 91 Ill. App. 41; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559; *Glens Falls Ins. Co. v. Michael*, (Ind. 1905) 74 N. E. Rep. 964; *German Ins. Co. v. Davis*, 6 Kan. App. 268; *McClelland v. Greenwich Ins. Co.*, 107 La. 124; *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816; *Hubbard v. Austin*, 8 Ohio Dec. 111; *Arthur v. Palatine Ins. Co.*, 35 Oregon 217, 76 Am. St. Rep. 450; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923. See also *Manchester F. Assur. Co. v. Abrams*, (C. C. A.) 89 Fed. Rep. 932.

**6. Where No Inquiries Made, Failure to Disclose Not Fatal.** — *McClelland v. Greenwich Ins. Co.*, 107 La. 124; *Slobodisky v. Phenix Ins. Co.*,

53 Neb. 816; *Farmers', etc., Ins. Co. v. Mickel*, (Neb. 1904) 100 N. W. Rep. 130; *Arthur v. Palatine Ins. Co.*, 35 Oregon 27, 76 Am. St. Rep. 450. See also *Manchester F. Assur. Co. v. Abrams*, (C. C. A.) 89 Fed. Rep. 932; *Sharp v. Scottish Union, etc., Ins. Co.*, 136 Cal. 542; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923.

**Failure to Disclose Existence of Mortgage Not a Breach Where No Inquiry.** — *Koshland v. Hartford F. Ins. Co.*, 31 Oregon 402.

**7. Concealment Must Be Intentional and Fraudulent.** — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *Seal v. Farmers, etc., Ins. Co.*, 59 Neb. 253; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923. See also *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151. *Compare Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.

**227. 3. Specific Inquiries Must Be Faithfully Answered.** — *Baldwin v. German Ins. Co.*, 105 Iowa 379; *Niles v. Farmers' Mut. F. Ins. Co.*, 119 Mich. 252; *King v. Tioga County Patrons' F. Relief Assoc.*, 35 N. Y. App. Div. 58; *Arthur v. Palatine Ins. Co.*, 35 Oregon 27, 76 Am. St. Rep. 450. See also *Roe v. Town Mut. F. Ins. Co.*, 78 Mo. App. 452; *Fire Assoc. v. American Cement Plaster Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1115.

**Where a Policy Was Issued to Joint Owners, nondisclosure of an incumbrance on the interest of one was held to be a misrepresentation.** *Denver Tp. Mut. F. Ins. Co. v. Resor*, 95 Ill. App. 197.

**Policy Avoided by Misrepresentation as to Amount of Incumbrance.** — *Cerys v. State Ins. Co.*, 71 Minn. 338; *Seal v. Farmers, etc., Ins. Co.*, 59 Neb. 253.

**Failure to Disclose Incumbrance — Sufficiency of Evidence to Show Collusion Between Agent and Insured.** — See *Phenix Ins. Co. v. McKernan*, (Ky. 1898) 46 S. W. Rep. 10.

**Misstatement as to Incumbrance Waived by Acceptance of Premium After Notice.** — *Kingston Mut. County F., etc., Ins. Co. v. Olmstead*, 68 Ill. App. 111.

**4. Answer Substantially Accurate Is Sufficient.** — *Hubbard v. Austin*, 8 Ohio Dec. 111.

**An Innocent Misstatement of the Owner's Name by a Mortgagee will not avoid the policy.** *Phenix Assur. Co. v. Hinds*, 67 Kan. 595.

**Sole Ownership of Partnership Property.** — The statement by one trading under a firm name that the property insured is that of the firm does not constitute a material misrepresentation, where it is also stated that the person insuring the property is the sole member of the firm. *Bonnet v. Merchants' Ins. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 316.

**A Statement by the Insured that He Has the Equitable Title is sufficient where he holds a**

- 228.** *cc.* APPLICATION TO POLICIES NOW IN USE. — See note 1.  
*dd.* STATEMENT INSERTED BY AGENT OF INSURER. — See note 2.  
**229.** See notes 1, 2, 3.

contract for the land which he has pledged for security for a debt. *Born v. Home Ins. Co.*, 120 Iowa 299.

**A Statement by the Insured that His Title Is by "Deed"** is sufficient to put the insurer upon inquiry as to the nature of the title; and the policy is not avoided by the fact that the interest of the insured is that of a tenant by entireties, although it contains a provision avoiding the policy in case the title of the insured is other than that of sole and unconditional owner. *Clawson v. Citizens' Mut. F. Ins. Co.*, 121 Mich. 591.

**Question for Jury.** — Under the *Maine* statute which provides that erroneous descriptions of value or title by the insured shall not prevent a recovery unless the jury finds that the difference between the property as described and as it really existed contributed to the loss, or materially increased the risk, and that a breach of any of the terms of the policy by the insured does not affect the policy unless it materially increases the risk, it is a question for the jury whether the risk is enhanced by the fact that the building insured was on ground not owned by the insured. *Atherton v. British America Assur. Co.*, 91 Me. 289.

**Burden of Proof.** — See *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354.

**228. 1. Doctrine under Policies Now in Use.** — *Allen v. Home Ins. Co.*, 133 Cal. 29; *Crikelair v. Citizens' Ins. Co.*, 168 Ill. 309, 61 Am. St. Rep. 119; *Kingston Mut. County F.*, etc., *Ins. Co. v. Olmstead*, 68 Ill. App. 111; *Baldwin v. German Ins. Co.*, 105 Iowa 379; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674; *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702; *Duda v. Home Ins. Co.*, 20 Pa. Super. Ct. 244, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228. See also *Slope Mine Coal Co. v. Quaker City Mut. F. Ins. Co.*, 13 Pa. Super. Ct. 626; *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776; *Hickey v. Dwelling-House Ins. Co.*, 11 Ohio Cir. Dec. 135, 20 Ohio Cir. Ct. 387. Compare *Glens Falls Ins. Co. v. Michael*, (Ind. 1905) 74 N. E. Rep. 964.

**2. Erroneous Statements Chargeable to Agents.** — *Southern Ins. Co. v. Hastings*, 64 Ark. 253; *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207; *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652; *McKibban v. Des Moines Ins. Co.*, 114 Iowa 41; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 65 Am. St. Rep. 611; *De Land v. Aetna Ins. Co.*, 68 Mo. App. 277; *Bushnell v. Farmers Mut. Ins. Co.*, 110 Mo. App. 223; *Continental F. Assoc. v. Norris*, 30 Tex. Civ. App. 299; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846. See also *Greenwich Ins. Co. v. State*, (Ark. 1905) 84 S. W. Rep. 1025; *Fire Assoc. v. Yeagley*, 34 Ind. App. 387.

**Statement to Soliciting Broker of Insurer's Agents Not Notice to Insurer.** — *McGrath v. Home Ins. Co.*, 88 N. Y. App. Div. 153.

**Notice to Agent Before Inception of Agency Not**

**Notice to Insurer.** — *Sergeant v. Liverpool*, etc., *Ins. Co.*, 66 N. Y. App. Div. 46.

**Effect of Provision in Policy Against Notice to Agent.** — The provision in the policy that any knowledge of the agent not set forth in the application shall not be binding upon the company does not relieve the insurer from liability where the agent has inserted incorrect statements. *Parno v. Iowa Merchants Mut. Ins. Co.*, 114 Iowa 133.

**Sufficiency of Evidence to Show Knowledge of Agent.** — See *Sergeant v. Liverpool*, etc., *Ins. Co.*, 96 N. Y. App. Div. 117.

**Burden of Proving Knowledge of Agent on Insured.** — *Sergeant v. Liverpool*, etc., *Ins. Co.*, 96 N. Y. App. Div. 117.

**Effect of Acceptance of Policy by Insured.** — Where a party makes application for a policy to the agent of the company, designating in such application the company from which he desires the policy, describing therein the property, and answering the usual questions as to ownership, liens, etc., and in his absence, and without his consent or knowledge, the application is so changed as to make it an application to another and different company, which issues the policy, varying in several respects from the application, which latter is sent by mail to the assured, although such party accepts the policy, he is not bound by the representations and answers contained in the application, and the policy will not be avoided if such representations and answers are not true. *Cleavenger v. Franklin F. Ins. Co.*, 47 W. Va. 595.

**Incumbrances.** — Issuance of a policy after the insured has fully informed the agent as to existing incumbrances on the property is a waiver of a condition in the policy that it should be void if the property was incumbered, notwithstanding a provision that there should be no waiver of any of the conditions of the policy unless such waiver was written upon it or attached thereto. *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13.

**Reformation of Policy Where Agent Has Misstated Interest.** — See *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377; *Dalton v. Agricultural Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 125; *Dalton v. Providence-Washington Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 126.

**229. 1. Statements of Title by Agent — Misconceptions, etc., Not Fatal — Alabama.** — *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356.

*California.* — *Allen v. Home Ins. Co.*, 133 Cal. 29; *Sharp v. Scottish Union*, etc., *Ins. Co.*, 136 Cal. 542; *Parrish v. Rosebud Min.*, etc., *Co.*, (Cal. 1903) 71 Pac. Rep. 694, affirmed 140 Cal. 645.

*Colorado.* — *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416.

*Georgia.* — *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 107 Am. St. Rep. 93.

*Illinois.* — *Danvers Mut. F. Ins. Co. v. Schertz*, 95 Ill. App. 656.

*Iowa.* — *Taylor v. Anchor Mut. F. Ins. Co.*, 116 Iowa 625, 93 Am. St. Rep. 261; *Born v. Home Ins. Co.*, 120 Iowa 299.

**230.** See notes 1, 2.

*Kansas.* — Hartford F. Ins. Co. v. McCarthy, 69 Kan. 555; German Ins. Co. v. Davis, 6 Kan. App. 268.

*Kentucky.* — Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295. See also Teutonia Ins. Co. v. Howell, (Ky. 1900) 54 S. W. Rep. 852.

*Mississippi.* — Southern Ins. Co. v. Stewart, (Miss. 1901) 30 So. Rep. 755.

*Missouri.* — Montgomery v. Lebanon Town Mut. F. Ins. Co., 80 Mo. App. 500; Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 105 Mo. App. 143; Nute v. Hartford F. Ins. Co., 109 Mo. App. 585.

*Nebraska.* — Fidelity Mut. F. Ins. Co. v. Lowe, (Neb. 1903) 93 N. W. Rep. 749.

*New York.* — Skinner v. Norman, 165 N. Y. 565, 80 Am. St. Rep. 776; Brooks v. Erie F. Ins. Co., 76 N. Y. App. Div. 275, affirmed 177 N. Y. 572; Hayes v. Saratoga, etc., F. Ins. Co., 81 N. Y. App. Div. 287, affirmed 179 N. Y. 535; Loomis v. Jefferson County Patrons' F. Relief Assoc., 92 N. Y. App. Div. 601.

*North Carolina.* — Clapp v. Farmers' Mut. F. Ins. Assoc., 126 N. Car. 388; Gerringer v. North Carolina Home Ins. Co., 133 N. Car. 407. See also Strause v. Palatine Ins. Co., 128 N. Car. 64.

*Ohio.* — Mitchell v. Aetna Ins. Co., 6 Ohio Dec. 420, 4 Ohio N. P. 386.

*Oregon.* — Koshland v. Hartford F. Ins. Co., 31 Oregon 402.

*Pennsylvania.* — Carnes v. Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

*Tennessee.* — Home Ins. Co. v. Hancock, 106 Tenn. 513; Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151.

*Texas.* — Westchester F. Ins. Co. v. Wagner, 24 Tex. Civ. App. 140; Continental Ins. Co. v. Cummings, 98 Tex. 115.

*Washington.* — Foster v. Pioneer Mut. Ins. Co., 37 Wash. 288.

*West Virginia.* — Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595; Medley v. German Alliance Ins. Co., 55 W. Va. 342.

*Canada.* — Le Bell v. Norwich Union F. Ins. Soc., 34 N. Bruns. 515.

**A Concealment and Misrepresentation by an Insurance Broker,** in his application to the insurer, and in procuring insurance, of the interest and ownership of the insured, in accordance with which the insurance is effected, will avoid the policy of insurance if there be any express conditions therein to the effect that if the interest of the assured be not truly stated, or if the interest of the assured be other than unconditional and sole ownership, the policy shall be void. The application for insurance in the face of and taken in connection with such conditions contained in the policy is a warranty on the part of the assured as to such interest and ownership, a breach of which avoids the policy. Milliken v. Woodward, 64 N. J. L. 444.

**229. 2. Untruth of Statements Known to Insurer or Its Agent — Alabama.** — Pope v. Glens Falls Ins. Co., 130 Ala. 356.

*Arkansas.* — State Mut. Ins. Co. v. Latourette, 71 Ark. 242, 100 Am. St. Rep. 63.

*Georgia.* — Phenix Ins. Co. v. Searles, 100 Ga. 97.

*Illinois.* — American Ins. Co. v. Walston, 111 Ill. App. 133.

*Indiana.* — Traders Ins. Co. v. Cassell, 24 Ind. App. 239; Farmers' Mut. F. Ins. Co. v. Jackman, (Ind. App. 1905) 73 N. E. Rep. 730.

*Iowa.* — Born v. Home Ins. Co., 120 Iowa 299.

*Kentucky.* — See Germania Ins. Co. v. Wingfield, (Ky. 1900) 57 S. W. Rep. 456. See also Manchester Assur. Co. v. Dowell, (Ky. 1904) 80 S. W. Rep. 207.

*Maryland.* — Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.

*Missouri.* — Scott v. German Ins. Co., 69 Mo. App. 337; Wooldridge v. German Ins. Co., 69 Mo. App. 413; O'Brien v. Greenwich Ins. Co., 95 Mo. App. 301; Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371. See also Cagle v. Chillicothe Town Mut. F. Ins. Co., 78 Mo. App. 431.

*Nebraska.* — Farmers, etc., Ins. Co. v. Wiard, 59 Neb. 451.

*North Carolina.* — Grabbs v. Farmers' Mut. F. Ins. Assoc., 125 N. Car. 389; Clapp v. Farmers' Mut. F. Ins. Assoc., 126 N. Car. 388; Strause v. Palatine Ins. Co., 128 N. Car. 64; Gerringer v. North Carolina Home Ins. Co., 133 N. Car. 407.

*Ohio.* — Farmers' Mut. F., etc., Ins. Co. v. Ward, 24 Ohio Cir. Ct. 156.

*Pennsylvania.* — Davis v. Fireman's Fund Ins. Co., 5 Pa. Super. Ct. 506, 40 W. N. C. (Pa.) 569.

*Texas.* — Wagner v. Westchester F. Ins. Co., 92 Tex. 549; Queen Ins. Co. v. May, (Tex. Civ. App. 1897) 43 S. W. Rep. 73; German Ins. Co. v. Everett, 18 Tex. Civ. App. 514; Continental F. Ins. Co. v. Cummings, (Tex. Civ. App. 1903) 78 S. W. Rep. 378, 98 Tex. 115.

**Rule Not Changed by Wisconsin Statute.** — Welch v. Philadelphia F. Assoc., 120 Wis. 456.

**Knowledge of Subagent Is Knowledge of Company.** — Teutonia Ins. Co. v. Howell, (Ky. 1900) 54 S. W. Rep. 852.

**Insurable Interest in Another.** — Where the agent knows that the interest of the assured is other than sole and unconditional, and insures the whole title, if the assured has an insurable interest, the recovery on the policy in case of loss is not affected by the mere fact that another person also had an interest therein. St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257.

**3. Insurer or Agent Must Be Informed.** — Phenix Ins. Co. v. Searles, 100 Ga. 97.

**Actual Notice Essential.** — Ordway v. Chace, 57 N. J. Eq. 478.

**230. 1. Written Description Inconsistent with Statement of Title.** — Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; Grabbs v. Farmers' Mut. F. Ins. Assoc., 125 N. Car. 389; Home Ins. Co. v. Hancock, 106 Tenn. 513; Queen Ins. Co. v. May, (Tex. Civ. App. 1897) 43 S. W. Rep. 73; Virginia F. & M. Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595.

**Application Admissible to Show Knowledge of Insurer.** — Raymond v. Farmers' Mut. F. Ins. Co., 114 Mich. 386.

**230.** *cc.* BASIS OF RULES. — See note 3.

(b) Statement that Insured Is "Owner" of the Property or that It Is "His" — *aa.* IN GENERAL. — See notes 4, 5, 6.

**231.** *bb.* QUALIFICATIONS. — See note 11.

(c) Statement that Insured Is Owner in Fee Simple — *aa.* IN GENERAL. — See note 12.

**232.** *bb.* MEANING OF FEE SIMPLE — But a Life Estate. — See note 2.

**233.** (d) Statement that Insured Is Sole and Unconditional Owner — *aa.* FORCE AND SCOPE OF CLAUSE — (*aa.*) Insurance of Real Property — (*aaa.*) Generally — (*aaa.*) Form and Validity. — See notes 2, 3.

**230. 2. Insurer Not Chargeable with Notice of Public Records.** — Pope v. Glenn Falls Ins. Co., 136 Ala. 670; Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 61 Am. St. Rep. 119; Phoenix Ins. Co. v. Overman, 21 Ind. App. 516; Ordway v. Chace, 57 N. J. Eq. 478. See also Tyree v. Virginia F. & M. Ins. Co., 55 W. Va. 63.

**3. Rules Based on Estoppel — Provisions as to Waiver Immaterial — Alabama.** — Pope v. Glens Falls Ins. Co., 130 Ala. 356.

*Arkansas.* — State Mut. Ins. Co. v. Latourette, 71 Ark. 242, 100 Am. St. Rep. 63.

*Georgia.* — Johnson v. Aetna Ins. Co., 123 Ga. 404, 107 Am. St. Rep. 93.

*Maryland.* — Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.

*Missouri.* — Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co., 105 Mo. App. 143. See also Ross-Langford v. Mercantile Town Mut. Ins. Co., 97 Mo. App. 79; Brennen v. Connecticut F. Ins. Co., 99 Mo. App. 718.

*Nebraska.* — German Ins. Co. v. Shader, (Neb. 1903) 93 N. W. Rep. 972.

*North Carolina.* — Grabbs v. Farmers' Mut. F. Ins. Assoc., 125 N. Car. 389.

*Texas.* — Wagner v. Westchester F. Ins. Co., 92 Tex. 549; German Ins. Co. v. Everett, 18 Tex. Civ. App. 514; Westchester F. Ins. Co. v. Wagner, 24 Tex. Civ. App. 140. See also Continental F. Assoc. v. Norris, 30 Tex. Civ. App. 299.

*Virginia.* — Virginia F. & M. Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846.

*Washington.* — Foster v. Pioneer Mut. Ins. Co., 37 Wash. 288.

*West Virginia.* — Medley v. German Alliance Ins. Co., 55 W. Va. 342.

*Wisconsin.* — Welch v. Philadelphia F. Assoc., 120 Wis. 456; St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257.

**Effect of Texas Statute Regulating Powers of Agents.** — See Delaware Ins. Co. v. Harris, 26 Tex. Civ. App. 537; Hartford F. Ins. Co. v. Walker, 94 Tex. 473.

**Insured Must Have Actual Notice of Limitation of Agent's Powers.** — Virginia F. & M. Ins. Co. v. Richmond Mica Co., 102 Va. 439; Medley v. German Alliance Ins. Co., 55 W. Va. 342.

**4. Convis v. Citizens' Mut. F. Ins. Co., 127 Mich. 616, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230.**

**5. Wide Scope of Interests Covered.** — Mallery v. Frye, 21 App. Cas. (D. C.) 105, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230; Convis v. Citizens' Mut. F. Ins. Co., 127 Mich. 616, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230 and holding that a life estate is included.

**6. Equitable Interest.** — Mallery v. Frye, 21 App. Cas. (D. C.) 105, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230; Convis v. Citizens' Mut. F. Ins. Co., 127 Mich. 616.

**231. 11. The Fact that the Property of Another Is in the Same Building** does not invalidate a policy covering certain personalty where the policy is limited to the property belonging to the insured. Liverpool, etc., Ins. Co. v. Nations, 24 Tex. Civ. App. 562.

**12. What Facts Sufficient under Statement of Fee-simple Title.** — Security Ins. Co. v. Kuhn, 108 Ill. App. 1, affirmed 207 Ill. 166.

**232. 2. Life Estate.** — See Kleis v. Niagara F. Ins. Co., 117 Mich. 469.

**233. 2. Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.** See also Virginia F. & M. Ins. Co. v. Cummings, (Tex. Civ. App. 1904) 78 S. W. Rep. 716.

**Provision Not Contrary to Public Policy.** — Ordway v. Chace, 57 N. J. Eq. 478.

**3. Effect of Provision for Sole and Unconditional Ownership — Arkansas.** — Planters' Mut. Ins. Co. v. Loyd, 67 Ark. 584, 77 Am. St. Rep. 136. *Georgia.* — Phenix Ins. Co. v. Searles, 100 Ga. 97.

*Illinois.* — Prussian Nat. Ins. Co. v. Empire Catering Co., 113 Ill. App. 67.

*Maryland.* — Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499; Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485.

*Mississippi.* — Liverpool, etc., Ins. Co. v. Cochran, 77 Miss. 348, 78 Am. St. Rep. 524.

*Missouri.* — Overton v. American Cent. Ins. Co., 79 Mo. App. 1.

*New Jersey.* — Ordway v. Chace, 57 N. J. Eq. 478.

*New York.* — Matthie v. Globe F. Ins. Co., 68 N. Y. App. Div. 239, affirmed 174 N. Y. 489; McGrath v. Home Ins. Co., 88 N. Y. App. Div. 153.

*Ohio.* — State v. Springfield Underwriters Mut. F. Ins. Co., 14 Ohio Dec. 523.

*Pennsylvania.* — Ambrose v. First Nat. Fire Ins. Co., 19 Pa. Super. Ct. 117; Elliott v. Teutonia Ins. Co., 20 Pa. Super. Ct. 359.

*Texas.* — Philadelphia F. Assoc. v. Calhoun, 28 Tex. Civ. App. 409.

**What Constitutes Sole and Unconditional Ownership.** — To be "unconditional and sole," the interest must be completely vested in the assured, not contingent or conditional, nor for years or life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.



**233.** (bbb) *Sole and Unconditional Owner — Building on Another's Land.* — See note 4.

(ccc) *Life Estate.* — See notes 5, 6.

(ddd) *Marital Estates.* — See note 7.

(eee) *Fraudulent Conveyances.* — See note 10.

(fff) *Miscellaneous Interests.* — See notes 11, 12, 14.

**234.** See note 2.

(ggg) *Defective Title.* — See note 6.

bbb. *Land Contracts — (aaa) Vendee.* — See note 10.

**Partial Ownership Insufficient.** — *Dow v. National Assur. Co.*, (R. I. 1904) 58 Atl. Rep. 999.

**Owner of Undivided Interest.** — A policy of fire insurance which expressly stipulates that it shall be void "if the interest of the insured be other than unconditional and sole ownership" cannot be enforced where it appears that the insured had title to only an undivided interest in the property insured, although such insured may have also had a mortgage on the remainder of the property for an amount greater than the value of the whole. *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794.

**Contingent Interest in Proceeds of Sale.** — An agreement between the insured and a third person that in case one-third of the amount realized upon a sale of the insured property should be more than sufficient to reimburse him for his outlay and expenses, the residue of that third should go to such third person, does not prevent the insured from being the sole and unconditional owner of the property. *Manchester F. Assur. Co. v. Abrams*, (C. C. A.) 89 Fed. Rep. 932.

**Assignment of Policy with Consent of Company.** — Where the policy is assigned, with the consent of the insurer, to one who holds a bill of sale for the insured property, having agreed, however, to reconvey under certain circumstances, the insurer, if he had notice of the particulars of the transaction before the assignment, cannot object that the assignee is not the absolute owner. *Phenix Ins. Co. v. Lindley*, 111 Ill. App. 266.

**Policy Issued Expressly to Other than Owner.** — The printed condition in the policy which requires that the insured be the sole and unconditional owner of the insured property is controlled by the written portion of the policy which shows its issuance to the insured as contractor for the erection of a building on property owned by another. *Sullivan v. Spring Garden Ins. Co.*, 34 N. Y. App. Div. 128.

**Property in Indian Territory.** — It has been held that the insurer cannot claim the forfeiture of a policy on the ground that the insured property was on land in the Indian Territory of which, at the time the policy was issued, by Act of Congress, the insured could not be sole and unconditional owner. *German-American Ins. Co. v. Paul*, (Indian Ter. 1904) 83 S. W. Rep. 60.

**Partnership Trading as Company.** — A grant by the owners of property to a partnership which is trading as a company renders the partnership the sole and unconditional owner of the property. *Missouri Sav. Assoc. v. German-American Ins. Co.*, 73 Mo. App. 158.

**The Holder of the Legal Title to Property of a Syndicate** is not the sole and unconditional

owner. *Bradley v. German-American Ins. Co.*, 90 Mo. App. 369.

**Policy as Prima Facie Evidence of Title.** — The policy is *prima facie* an admission by the insurer of the title or ownership of the insured to the property covered by the policy. *American F. Ins. Co. v. Landfare*, 56 Neb. 482.

**Policy Voidable, Not Void.** — *Glens Falls Ins. Co. v. Michael*, (Ind. 1905) 74 N. E. Rep. 964.

**233. 4. House on Land of Another.** — *Compare Milwaukee F. Ins. Co. v. Todd*, 32 Ind. App. 214.

**Where Insurer Has Notice.** — An insurance policy issued with full notice to the company that the building insured stands upon leased ground is not invalidated by a provision that it shall be void if the subject thereof is on ground not owned by the assured in fee simple. *Cowell v. Phoenix Ins. Co.*, 126 N. Car. 684.

**5. Where the Life Estate and the Estate Devised to Executors Are United** in the same person, this person is the sole and unconditional owner, although the property in his hands is impressed with a trust. *Security Ins. Co. v. Kuhn*, 207 Ill. 166.

**6. Compare** *Hubbard v. Austin*, 8 Ohio Dec. 111.

**7. Husband Insuring as Sole Owner Estate in Which Wife Jointly Interested.** — *Milliken v. Woodward*, 64 N. J. L. 444; *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63. *Compare Sharp v. Scottish Union, etc., Ins. Co.*, 136 Cal. 542; *Doyle v. American F. Ins. Co.*, 181 Mass. 139.

**10. Insured Holding under Fraudulent Deed.** — *Steinmeyer v. Steinmeyer*, 64 S. Car. 413, 92 Am. St. Rep. 809.

**11. An Executrix Who Has the Legal Title** and exclusive management of the property, with power to sell at her discretion, and who is also a beneficiary having exclusive use of all of the estate until her death or remarriage, is a sole and unconditional owner. *Security Ins. Co. v. Kuhn*, 108 Ill. App. 1, *affirmed* 207 Ill. 166.

**12. Lienholder.** — *Ordway v. Chace*, 57 N. J. Eq. 478.

**14. A Purchaser at a Mortgage Foreclosure** is not a sole and unconditional owner within the meaning of the provision until his purchase has been ratified by the court. *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499.

**234. 2. Sole Beneficial Owner.** — See *Manchester F. Assur. Co. v. Abrams*, (C. C. A.) 89 Fed. Rep. 932.

**6. Parol Conveyance of Real Estate.** — The insurer cannot object that the insured property was conveyed by parol, contrary to the statute of frauds, as this objection is available only to the parties to the transfer. *Cowell v. Phoenix Ins. Co.*, 126 N. Car. 684.

**10. Vendee in Possession Not in Default.** —

**235.** See notes 1, 2.(bbb) *Vendor*. — See note 5.ccc. *Liens and Incumbrances*. — See note 6.**236.** The Clause in Question Refers to the Quality of the Title. — See notes 2, 4, 5.(bb) *Insurance of Personal Property* — aaa. Generally — *Chattel Mortgage, Bill of Sale, Conditional Sale, Etc.* — See notes 11, 12.

Conditional Sale. — See note 14.

**237.** See note 1.bbb. *Partnership Property*. — See notes 3, 5.db. *TIME TO WHICH CLAUSE RELATES*. — See note 12.**238.** (e) *Other Phrases Employed* — aa. "ABSOLUTE INTEREST." — See note 3.

*Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9; *Born v. Home Ins. Co.*, 120 Iowa 299; *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 234; *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272. See also *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Hamburg-Bremen F. Ins. Co. v. Ruddell*, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

**Rule Applies to Personal Property.** — *Pennsylvania F. Ins. Co. v. Hughes*, (C. C. A.) 108 Fed. Rep. 497.

**235.** 1. *Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9; *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272. See also *Born v. Home Ins. Co.*, 120 Iowa 299; *Hamburg-Bremen F. Ins. Co. v. Ruddell*, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

**Rule Applicable to Personal Property.** — *Pennsylvania F. Ins. Co. v. Hughes*, (C. C. A.) 108 Fed. Rep. 497.

**2. Contrary Rule.** — *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47. See also *Philadelphia F. Assoc. v. Calhoun*, 28 Tex. Civ. App. 409.

**5. After Vendee in Possession Vendor Not Sole Owner.** — *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 235; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674; *Ambrose v. First Nat. F. Ins. Co.*, 19 Pa. Super. Ct. 117. See also *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136.

**6. Mortgagor Is Sole Owner.** — *Breedlove v. Norwich Union F. Ins. Soc.*, (Cal. 1898) 54 Pac. Rep. 93; *Born v. Home Ins. Co.*, 120 Iowa 299; *McClelland v. Greenwich Ins. Co.*, 107 La. 124; *McCarty v. Imperial Ins. Co.*, 126 N. Car. 820; *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 82 Am. St. Rep. 892; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734; *Wolf v. Theresa Village Mut. F. Ins. Co.*, 115 Wis. 402. See also *Steinmeyer v. Steinmeyer*, 64 S. Car. 413, 92 Am. St. Rep. 809.

**236.** 2. *Quality of Title Only Is Involved.* — *McClelland v. Greenwich Ins. Co.*, 107 La. 124.

**4. Pennsylvania F. Ins. Co. v. Hughes, (C. C. A.) 108 Fed. Rep. 497; *McClelland v. Greenwich Ins. Co.*, 107 La. 124. Compare *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 82 Am. St. Rep. 892.**

**5. Born v. Home Ins. Co.**, 120 Iowa 299.

**11. Mortgagee of Personal Property.** — *Light v. Greenwich Ins. Co.*, 105 Tenn. 480.

**12. Personal Property on Leased Premises.** — A policy on personal property in which the insured warranted that the unconditional and sole ownership was in himself was held to be void where it appeared that the personal property insured was a stock of goods in a saloon, and that the insured was in possession of the saloon under a lease providing that all personal property on the premises should be left there at the expiration of the term in as good condition as when found, or that the insured would pay its value in cash. *Duda v. Home Ins. Co.*, 20 Pa. Super. Ct. 244.

**14. Vendee under Contract of Conditional Sale.** — *State v. Springfield Underwriters Mut. F. Ins. Co.*, 14 Ohio Dec. 523.

**Where Title Is in the Vendee he is owner.** *Scottish Union, etc., Ins. Co. v. Strain*, 70 S. W. Rep. 274, 24 Ky. L. Rep. 958. This is true also where the vendee takes the sole and absolute ownership of the property, even though it is accompanied with the privilege of reselling at a specified date. *Stowell v. Clark*, 47 N. Y. App. Div. 626, affirmed 171 N. Y. 673.

**237.** 1. *Vendor in Conditional Sale.* — *Post Printing, etc., Co. v. Insurance Co. of North America*, 189 Pa. St. 300.

**3. Partner Not Sole and Unconditional Owner of Partnership Property.** — *McGrath v. Home Ins. Co.*, 88 N. Y. App. Div. 153.

**5. Nominal Partnership.** — The fact that the business of the insured was carried on under the style of a partnership does not render him other than the sole and unconditional owner where the other partner had no interest in the property, but merely allowed the use of his name to secure credit for the insured. *Phoenix Ins. Co. v. McKernan*, (Ky. 1898) 46 S. W. Rep. 10.

**12. Statement of Title Refers to Date of Issuance.** — *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674.

**238.** 3. *Property Encumbered with Chattel Mortgage.* — Where the policy provides that if the interest of the insured be "a leasehold or other interest not absolute" it must be stated in the application, or the policy will be void, the provision is limited to other estates of like kind or character to that of leasehold, and therefore the failure to disclose that the property is encumbered with a chattel mortgage does not avoid the insurance. *Boulware v. Farmers', etc., Co-Operative Ins. Co.*, 77 Mo. App. 639.

**The Fact that the Legal Title Is in Another Does Not Avoid the Policy** on the ground that the insured has not complied with the pro-

**238.** 88. "LEASED GROUND" — See note 11.

**239.** (f) Waiver. — See note 2.

c. ALIENATION CLAUSE — (1) *Application and Influence of Older Decisions.* — See note 3.

(2) *First Stage — Alienation Not Mentioned.* — See note 5.

**240.** See note 1.

A Mere Change in the Interest of the Insured. — See notes 2, 3.

(3) *Second Stage — Alienation Expressly Forbidden* — (a) *Validity of Conditions.* — See note 4.

**241.** (e) *Phrases Used* — aa. SALE, TRANSFER, ALIENATION — (aa) *In General.* — See note 1.

(bb) *Nominal Transfers.* — See note 2.

(cc) *Temporary Alienation.* — See note 3.

**242.** (dd) *Increase of Interest.* — See note 1.

(ee) *Incomplete and Involuntary Transfers.* — See note 2.

vision, if the insured is the beneficial owner. *McCoy v. Iowa State Ins. Co.*, 107 Iowa 80.

**238.** 11. *Compare Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816.

**239.** 2. *Retention of Premium After Notice Waiver of Provision as to Title.* — *Mechanics', etc., Ins. Co. v. Smith*, 79 Miss. 142.

*Waiver Presumed from Failure to Act on Notice that Title Is Otherwise than Required.* — *Glens Falls Ins. Co. v. Michael*, (Ind. 1905) 74 N. E. Rep. 964.

*The Act of the Adjuster in Advising the Filing of Proofs of Loss* and the fact that the preparation caused the insured to incur expense will not constitute a waiver of a breach of the clause providing for sole and unconditional ownership. *Matthie v. Globe F. Ins. Co.*, 174 N. Y. 489.

3. *Clauses Providing for Forfeiture Construed Against Insurer.* — *Wm. Skinner, etc., Shipbuilding, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239.

5. *Contract Personal.* — *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273; *Clinton v. Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325. See also *supra*, this title, 101. 7.

**240.** 1. *Insurance Terminated by Complete Transfer of Interest.* — *Clinton v. Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325.

2. *Change in Interest Does Not Work Forfeiture.* — *Clinton v. Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240.

3. *Clinton v. Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240. See also *Farmers' Mut. F., etc., Ins. Co. v. Lecroy*, 91 Ill. App. 41.

4. *Conditions Enforced — United States.* — *In re Hamilton*, 102 Fed. Rep. 683.

*Arkansas.* — *Planters' Mut. Ins. Assoc. v. Dewberry*, 69 Ark. 295, 86 Am. St. Rep. 195.

*California.* — See *Gillon v. Northern Assur. Co.*, 127 Cal. 480.

*Georgia.* — *Farmers Mut. Ins. Assoc. v. Price*, 112 Ga. 264.

*Kentucky.* — *Robinson v. North British Mercantile Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 660. *Mississippi.* — *East v. New Orleans Ins. Assoc.*, 76 Miss. 697.

*Missouri.* — *Cummins v. National F. Ins. Co.*,

81 Mo. App. 291; *Watts v. Philadelphia F. Assoc.*, 87 Mo. App. 83.

*Nebraska.* — *Home F. Ins. Co. v. Collins*, 61 Neb. 198.

*New Hampshire.* — *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445.

*New York.* — *Northam v. Dutchess County Mut. Ins. Co.*, 166 N. Y. 219, 82 Am. St. Rep. 655.

*Ohio.* — See *Mitchell v. Aetna Ins. Co.*, 6 Ohio Dec. 420, 4 Ohio N. P. 386.

*Texas.* — *Hartford F. Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644; *Hartford F. Ins. Co. v. Ransom*, (Tex. Civ. App. 1901) 61 S. W. Rep. 144.

*Vermont.* — *Findlay v. Union Mut. F. Ins. Co.*, 74 Vt. 211, 93 Am. St. Rep. 885.

*West Virginia.* — *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261.

A *Condition Against Change of Possession* is valid. *Elliott v. Farmers' Ins. Co.*, 114 Iowa 154.

*Transfer Between Husband and Wife Avoids Policy.* — *Melcher v. Pennsylvania Ins. Co.*, 97 Me. 512.

**241.** 1. *Clause Against Sale, etc., Strictly Construed.* — *Hartford F. Ins. Co. v. Warbritton*, 66 Kan. 93; *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 241; *Clinton v. Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 79 Am. St. Rep. 325, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 241.

*Pooling Agreement No Breach of Provision.* — *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

2. *Admissibility of Evidence to Show Character of Transfer.* — See *Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc.*, 198 Ill. 474.

3. *Temporary Alienation.* — *Schloss v. Westchester F. Ins. Co.*, 141 Ala. 566; *Johansen v. Home F. Ins. Co.*, 54 Neb. 548; *German Mut. F. Ins. Co. v. Fox*, (Neb. 1903) 96 N. W. Rep. 652. *Compare Stuart v. Reliance Ins. Co.*, 179 Mass. 434.

**242.** 1. *Increase of Interest — Mortgagee Acquiring Sole Interest.* — See *Collings v. American Cent. Ins. Co.*, 70 Mo. App. 14.

2. *Transfer Must Be Complete at Loss to Avoid Policy.* — *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 77 Am. St. Rep. 129; *Whitney v. American Ins. Co.*, 127 Cal. 464; *Schaeffer v.*

**242.** A Sheriff's or Foreclosure Sale. — See note 3.

**243.** A Levy of Execution. — See note 1.

(ff) Partial Alienation. — See note 6.

**244.** Alienation "in Whole or in Part" Forbidden. — See note 1.

(gg) Void Transfers. — See note 9.

**245.** See note 2.

(hh) Conditional Sales and Transfers as Security — *aaa. In General.* — See note 4.

*bbb. Absolute Transfer as Security.* — See note 5.

**246.** See note 1.

*ddd. Mortgage.* — See notes 3, 4.

**247.** *eee. Trust Deed.* — See note 1.

*ggg. Agreement to Convey.* — See note 5.

Anchor Mut. F. Ins. Co., 113 Iowa 652; International Wood Co. v. National Assur. Co., 99 Me. 415, 105 Am. St. Rep. 288; Moseley v. Northwestern Nat. Ins. Co., 109 Mo. App. 464; Burke v. Continental Ins. Co., 100 N. Y. App. Div. 108; Home Mut. Ins. Co. v. Tompkins, 30 Tex. Civ. App. 404, affirmed 96 Tex. 187; Browne Nat. Bank v. Southern Ins. Co., 22 Wash. 379; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595. Compare Robinson v. North British Mercantile Ins. Co., (Ky. 1899) 53 S. W. Rep. 660.

**Judgment of Ouster for Nonpayment of Rent.** — Under the Washington statute which provides that when the lease has not, by its terms, expired, "execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term or other party interested in its continuance," may pay into court the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate, the judgment of ouster is not complete until the five days have elapsed. And where the property is destroyed before the end of that time the insurer cannot defeat recovery under the policy on the ground that there has been a change in the interest, title, or possession of the insured. Browne Nat. Bank v. Southern Ins. Co., 22 Wash. 379.

Under the Michigan Standard Policy any material change in the interest of the insured in the property insured will avoid the policy, even though the insured is not divested of all his interest. Excelsior Foundry Co. v. Western Assur. Co., 135 Mich. 467.

**242. 3. Foreclosure or Sheriff's Sale.** — Stuart v. Reliance Ins. Co., 179 Mass. 434.

**243. 1. Levy on Personalty.** — McClelland v. Greenwich Ins. Co., 107 La. 124.

**6. Partial Alienation Not Fatal in Absence of Special Clause.** — Kiesel v. Sun Ins. Office, (C. C. A.) 88 Fed. Rep. 243. See also Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 79 Am. St. Rep. 325, holding that a sale did not avoid the policy where a life estate was retained by the insured. Compare Home F. Ins. Co. v. Bernstein, 55 Neb. 260.

**Transfer to Partnership of Which Insured a Member Violates Provision.** — Royal Ins. Co. v. Martin, 192 U. S. 149.

**244. 1. Sale and Mortgage Back.** — Kahler v. Iowa State Ins. Co., 106 Iowa 380. See also Curlee v. Texas Home F. Ins. Co., 31 Tex. Civ. App. 471.

**9. Void Transfer No Breach.** — Phoenix Ins. Co. v. Asbury, 102 Ga. 565; Westchester F. Ins. Co. v. Jennings, 70 Ill. App. 539; Schaeffer v. Anchor Mut. F. Ins. Co., 113 Iowa 652; Hogadone v. Grange Mut. F. Ins. Co., 133 Mich. 339; Moseley v. Northwestern Nat. Ins. Co., 109 Mo. App. 464.

**Fraudulent Delivery of a Deed** duly executed does not create a forfeiture. Hartford F. Ins. Co. v. Warbritton, 66 Kan. 93.

**245. 2. Hogadone v. Grange Mut. F. Ins. Co., 133 Mich. 339.**

**4. Conditional Transfer.** — Henton v. Farmers, etc., Ins. Co., (Neb. 1901) 95 N. W. Rep. 670.

**A Marriage Settlement to Become Void Should the Wife Be Unfaithful** vests the title to the property conveyed absolutely in the wife, and is a breach of a policy thereon even though after the loss the parties were divorced and the husband was the innocent party. Cummins v. National F. Ins. Co., 81 Mo. App. 291.

**5. Transfer Absolute in Form, Conditional in Fact.** — Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Burkhardt v. Farmers Union Assoc., etc., Co., 11 Pa. Super. Ct. 280.

**246. 1. Contract to Resell in Definite Time for Stipulated Price Breach of Condition.** — Farmers', etc., Ins. Co. v. Hahn, (Neb. 1901) 96 N. W. Rep. 255.

**Conveyance Absolute in Form Breach of Provision though Accompanied by Parol Agreement to Reconvey.** — Bennett v. Mutual F. Ins. Co., 100 Md. 337.

**3. Mortgage Not Alienation.** — Bushnell v. Farmers' Mut. Ins. Co., 110 Mo. App. 223, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246; Koshland v. Hartford F. Ins. Co., 31 Oregon 402; Peck v. Girard F. & M. Ins. Co., 16 Utah 121, 67 Am. St. Rep. 600; Wolf v. Theresa Village Mut. F. Ins. Co., 115 Wis. 402.

**Assignment of Mortgagee's Interest Does Not Avoid Policy.** — Whiting v. Burkhardt, 178 Mass. 535, 86 Am. St. Rep. 503.

**4. Mortgage Not Breach of Condition Against Change of Title or Interest.** — Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Bushnell v. Farmers' Mut. Ins. Co., 110 Mo. App. 223, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246; Koshland v. Hartford F. Ins. Co., 31 Oregon 402; Peck v. Girard F. & M. Ins. Co., 16 Utah 1, 67 Am. St. Rep. 600; Wolf v. Theresa Village Mut. F. Ins. Co., 115 Wis. 402.

**247. 1. Trust Deed.** — Bushnell v. Farmers' Mut. Ins. Co., 110 Mo. App. 223, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247.

**5. Executory Agreement to Convey.** — Jones v.

**248.** See note 1.(ii) *Bankruptcy* — Assignment for Benefit of Creditors. — See note 3.**A Voluntary Assignment for the Benefit of Creditors.** — See note 4.(jj) *Transfer by or between Partners and Joint Owners.* — See note 6.**249.** See note 1.**250.** As Affecting Conditions Against Change of Title. — See note 1.

Change of Interest. — See note 2.

**251.** (kk) *Mortgaged Property* — What Constitutes Insurance of the Mortgagee. — See note 6.**252.** (mm) *Death of Insured.* — See notes 2, 3.

bb. CHANGE OF TITLE. — See note 4.

cc. CHANGE OF INTEREST — (aa) *In General.* — See notes 5, 6, 9.**253.** (cc) *Partition.* — See note 2.(dd) *Appointment of Receiver.* — See note 4.

dd. CHANGE OF POSSESSION. — See notes 10, 11.

Capital City Ins. Co., 122 Ala. 421; Phenix Ins. Co. v. Caldwell, 85 Ill. App. 104, affirmed 187 Ill. 73; Swank v. Farmers' Ins. Co., 126 Iowa 547; Tiemann v. Citizens' Ins. Co., 76 N. Y. App. Div. 5; Home Mut. Ins. Co. v. Tompkins, 30 Tex. Civ. App. 404, affirmed 96 Tex. 187.

**248. 1. Vendee in Possession Having Made Payments.** — Brighton Beach Racing Assoc. v. Home Ins. Co., (Supm. Ct. Spec. T.) 93 N. Y. Supp. 654.

**3. No Breach Where Receiver Not Appointed Before Loss.** — Fuller v. Jameson, 98 N. Y. App. Div. 53.

**4. Voluntary Assignment.** — Northam v. Dutchess County Mut. Ins. Co., 166 N. Y. 319, 82 Am. St. Rep. 655; Ohio Farmers' Ins. Co. v. Waters, 65 Ohio St. 157.

**6. Transfers Between Partners and Joint Owners.** — German Mut. F. Ins. Co. v. Fox, (Neb. 1903) 96 N. W. Rep. 652; Moulton v. Aetha F. Ins. Co., 25 N. Y. App. Div. 275; Loeb v. Firemen's Ins. Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 107, affirmed 78 N. Y. App. Div. 113; Royal Ins. Co. v. Sockman, 8 Ohio Cir. Dec. 404, 15 Ohio Cir. Ct. 105.

**249. 1. Contrary Authorities, Real and Apparent.** — Dornblaser v. Sugar Valley Mut. F. Ins. Co., 20 Pa. Super. Ct. 536; Keith v. Royal Ins. Co., 117 Wis. 531.

**250. 1. Change of Title.** — See Moulton v. Aetha F. Ins. Co., 25 N. Y. App. Div. 275.

**Transfer a Breach of Condition.** — Keith v. Royal Ins. Co., 117 Wis. 531.

**2. Change of Interest.** — Keith v. Royal Ins. Co., 117 Wis. 531.

**251. 6. Effect of Mortgage Clause.** — Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

**Alienation by Mortgagor Does Not Affect Rights of Mortgagee's Assignee.** — Whiting v. Burkhardt, 178 Mass. 535, 86 Am. St. Rep. 503.

**When Duty of Mortgagee to Give Notice of Alienation by Mortgagor Attaches.** — See Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

**252. 2. Effect of Death of Insured.** — Hardesty v. Forest City Ins. Co., 77 Ill. App. 413, affirmed 182 Ill. 39. *Contra*, Planters' Mut. Ins. Assoc. v. Dewberry, 69 Ark. 295, 86 Am. St. Rep. 195.

**3. Death Results in Change in Title.** — *Contra*, Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 74

Am. St. Rep. 161, under a policy providing for payment of loss to the insured, "his executors, administrators, and assigns," although there was a further stipulation rendering the policy void where there was any change in the title, interest, or possession of the insured property. *Followed in* Forest City Ins. Co. v. Eaton, 86 Ill. App. 463.

**4. Title and Interest Distinguished.** — See Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499.

**5. Change of Interest.** — Stenzel v. Pennsylvania F. Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252 and holding that the word "interest," as here used, has the same meaning as in the phrase "right, title, and interest." It means a proprietary or insurable interest, not a mere sentimental interest. So long as the insured continues to be the sole and exclusive owner and possessor of the property insured, the condition is not violated. See also Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 77 Am. St. Rep. 129.

**Consideration for Transfer Not Essential.** — Home F. Ins. Co. v. Collins, 61 Neb. 198. See also Rosenstein v. Traders' Ins. Co., 79 N. Y. App. Div. 481, 102 N. Y. App. Div. 147 (re-hearing).

**A Subsequent Reconveyance** of the property does not avoid the breach worked by a prior absolute conveyance. Bemis v. Harborcreek Mut. F. Ins. Co., 200 Pa. St. 340.

**6. Stenzel v. Pennsylvania F. Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.**

**9. Stenzel v. Pennsylvania F. Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.**

**253. 2. Partition Proceedings.** — See Dornblaser v. Sugar Valley Mut. F. Ins. Co., 20 Pa. Super. Ct. 536.

**4. Receivers.** — See Fuller v. Jameson, 98 N. Y. App. Div. 53.

**10. Leasing Property and Surrendering Possession Constitutes a change of possession.** Planters' Mut. Ins. Assoc. v. Dewberry, 69 Ark. 295, 86 Am. St. Rep. 195.

**11. Occupancy by a Tenant Is a Breach of the Condition** where the policy expressly provides against occupancy by tenants. Elliott v. Farmers Ins. Co., 114 Iowa 154.

**254.** *cc.* CONDITIONS AGAINST LEVY, FORECLOSURE, ETC. — See note 2.

(*aa*) *Conditions Against Levy of Execution or Attachment.* — See note 4.

(*bb*) *Conditions Against Foreclosure.* — See note 9.

**255.** What Are Foreclosure Proceedings. — See note 2.

Under the Condition Against Commencement of Foreclosure Proceedings. — See note 7.

Advertising for Sale under Mortgage Prohibited. — See note 8.

What Is Notice. — See note 11.

**256.** Effect of Acts of Mortgagor under Policy to Mortgagee. — See notes 2, 3.

(*cc*) *Condition Against Legal Proceedings Involving Title or Possession.* — See note 4.

**257.** (4) *Waiver* — (a) *In General.* — See note 1.

**254.** 2. Findlay *v.* Union Mut. F. Ins. Co., 74 Vt. 211, 93 Am. St. Rep. 885. See also Norris *v.* Hartford F. Ins. Co., 55 S. Car. 450, 74 Am. St. Rep. 765.

Knowledge by the Insured of the Proceedings Prior to Service of Process is not essential. Schroeder *v.* Imperial Ins. Co., 132 Cal. 18, 84 Am. St. Rep. 17.

4. Appointment of Receiver Pendente Lite Not Breach of Provision. — Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545.

9. Only Foreclosure Subsequent to Policy Covered. — Orient Ins. Co. *v.* Burrus, 63 S. W. Rep. 453, 23 Ky. L. Rep. 656.

Insurer's Knowledge of Existence of Mortgage Not Waiver of Condition. — Hartford F. Ins. Co. *v.* Clayton, 17 Tex. Civ. App. 644.

Time of Notice to Insured. — Unless otherwise provided by agreement indorsed on or added to the policy, the insurance of a mortgagee under the customary clause, which reads, in substance, "Loss, if any, payable to —, mortgagee, as his interest may appear," ceases if foreclosure proceedings are instituted against the mortgagor, and the latter knows that they have been commenced, at any time before the fire which causes the loss occurs. Delaware Ins. Co. *v.* Greer, (C. C. A.) 120 Fed. Rep. 916.

**255.** 2. Sale under Judgment on Note. — Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25. Provision Not Applicable to Judgments. — Ulysses Elgin Butter Co. *v.* Home Ins. Co., 20 Pa. Super. Ct. 320.

Extrajudicial Enforcement. — A stipulation in a standard policy, "if notice be given of sale of any property covered by this policy, by virtue of any mortgage," has reference to extrajudicial enforcement of a mortgage by means of a notice given to the insurer, and is inoperative in a jurisdiction in which that mode of enforcement is not known. Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481.

7. Condition Against Commencement of Foreclosure Proceedings. — Hayes *v.* U. S. Fire Ins. Co., 132 N. Car. 702; Norris *v.* Hartford F. Ins. Co., 55 S. Car. 450, 74 Am. St. Rep. 765, discussing the question what constitutes commencement under the South Carolina statute.

By "commencement of foreclosure proceedings" is meant the institution of judicial proceedings for the enforcement of the mortgage; and waivers of legal delays, and other waivers of a nature to facilitate and expedite the judicial proceedings, if ever begun, do not constitute of themselves the commencement of fore-

closure proceedings. Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 98 Am. St. Rep. 481.

Service of Citation Not Commencement of Proceedings. — London, etc., F. Ins. Co. *v.* Davis, (Tex. Civ. App. 1904) 84 S. W. Rep. 260.

Service of Petition Is Commencement Within Provision. — Findlay *v.* Union Mut. F. Ins. Co., 74 Vt. 211, 93 Am. St. Rep. 885.

Policy Not Avoided by Proceeding Commenced and Dismissed Without Knowledge of Insured. — Sharp *v.* Scottish Union, etc., Ins. Co., 136 Cal. 542.

8. Prohibition Against Advertisement for Sale. — Pearson *v.* German Ins. Co., 73 Mo. App. 480. See also Hayes *v.* U. S. Fire Ins. Co., 132 N. Car. 702, holding that advertising for sale constitutes a breach.

11. Advertisement of Sale as Notice to Insurer. — See Horton *v.* Home Ins. Co., 122 N. Car. 498, 65 Am. St. Rep. 717.

Sale under Judgment — Sufficiency of Notice. — Where an insurance company has been notified of the entry of a judgment against the insured, and the issuance of execution thereon, it is not necessary for the insured to notify the company of the advertisement for sale of the insured property by the sheriff. Ulysses Elgin Butter Co. *v.* Home Ins. Co., 20 Pa. Super. Ct. 320.

**256.** 2. Policy to Mortgagee — Proceedings by Mortgagor. — Sun Ins. Office *v.* Beneke, (Tex. Civ. App. 1899) 53 S. W. Rep. 98.

Where Provisions Not Applicable to Mortgagee. — It has been held that where there is no provision in the policy making the conditions therein expressed as to the insured applicable to the mortgage, the policy is not rendered void by the commencement of foreclosure proceedings by a mortgagee to whom the loss is payable. Henton *v.* Farmers', etc., Ins. Co., (Neb. 1901) 95 N. W. Rep. 670.

3. Delaware Ins. Co. *v.* Greer, (C. C. A.) 120 Fed. Rep. 916.

4. What Litigation of Title Included. — A suit to enforce a mechanic's lien has been held to be within the prohibition. Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa 225.

**257.** 1. When Consent Required Mere Notice Insufficient to Establish Waiver. — Kahler *v.* Iowa State Ins. Co., 106 Iowa 380; Northam *v.* Dutchess County Mut. Ins. Co., 166 N. Y. 319, 82 Am. St. Rep. 655; Woodside Brewing Co. *v.* Pacific F. Ins. Co., 11 N. Y. App. Div. 68, affirmed 159 N. Y. 549; Hartford F. Ins. Co. *v.* Ransom, (Tex. Civ. App. 1901) 61 S. W. Rep. 144; Keith *v.* Royal Ins. Co., 117 Wis. 531.

- 257.** When Notice Alone Sufficient. — See note 2.  
 Recognition After Knowledge a Waiver. — See notes 3, 4.  
**258.** See note 2.  
 (b) Consent of Agent. — See notes 3, 4, 5.

See also *Gillon v. Northern Assur. Co.*, 127 Cal. 480.

**General Rule as to Waiver.** — "Conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer." *Horton v. Home Ins. Co.*, 122 N. Car. 498, 65 Am. St. Rep. 717.

**Conditional Consent to Transfer.** — Where a policy of insurance on a horse stipulated that it should be void in the event of a transfer of the property without the assent of the insurance company, a promise by the company or its agents to ratify such transfer upon certain conditions imposed upon the transferee, which were never complied with, was held not to amount to a waiver of the forfeiture. *Hubert v. Southern Live-Stock Ins. Co.*, 103 Ga. 294.

**Notice to Insurer Before Issuance of Policy.** — Where the insured notifies the agent of the insurer before the issuance of the policy of his intention to transfer the possession of the property, the insurer cannot, when the transfer subsequently takes place, avoid the policy on the ground that there has been a breach of the condition against the transfer. *Queen Ins. Co. v. Union Bank, etc., Co.*, (C. C. A.) 111 Fed. Rep. 697.

So the agent's knowledge of the commencement of foreclosure proceedings at the time of issuance of the policy is a waiver. *Benjamin v. Palatine Ins. Co.*, 80 N. Y. App. Div. 260, affirmed 177 N. Y. 588.

**An Investigation of the Loss** by the insurer does not waive a breach of the condition against incumbrance where the policy provides that such investigation shall not operate as a waiver of the breach of any of its conditions. *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.

**Payment to Mortgagee Without Notice of Breach No Waiver.** — *Cotton v. National F. Ins. Co.*, 65 Kan. 511.

**257. 2. Only Notice Required.** — *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559. See also *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358.

**Notice to Agent Signing Policy as Insurer's Agent Sufficient.** — *Whitney v. American Ins. Co.*, (Cal. 1899) 56 Pac. Rep. 50.

**3. Waiver by Recognition After Knowledge.** — *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136; *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325; *Traders Ins. Co. v. Cassell*, 24 Ind. App. 239; *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546; *Millis v. Scottish Union, etc., Ins. Co.*, 95 Mo. App. 211; *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559; *Nugent v. Rensselaer County Mut. F. Ins. Co.*, 106 N. Y. App. Div. 308. See also *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.

**Statement of Rule.** — "The rule is that where an insurance company has by its assurances or conduct led the insured to believe that a forfeiture of his policy will not be insisted upon, and he has been in fact induced by it to act upon this understanding, the company will not be allowed to set up the forfeiture of the policy,

and thus to defeat a recovery upon the policy by reason of the failure of the assured to do something which the company itself induced him not to do." *Mattingly v. Springfield F., etc., Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577.

**Failure to Return the Unearned Premium** after notice of the commencement of foreclosure proceedings constitutes a waiver of the breach of a provision in the policy rendering it void if such proceedings should be commenced with knowledge of the insured. *Horton v. Home Ins. Co.*, 122 N. Car. 498, 65 Am. St. Rep. 717.

**Payment to Mortgagee.** — No waiver of forfeitures by breaches on the part of the mortgagor can be predicated upon the payment to the mortgagee under the "union mortgage clause," nor does the payment to the mortgagor of the balance constitute a waiver where the parties by stipulation agreed that it should have no such effect. *Wisconsin Nat. Loan, etc., Assoc. v. Webster*, 119 Wis. 476.

**Waiver of One Ground of Forfeiture Does Not Waive Another.** — *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 585, 77 Am. St. Rep. 136.

**Acceptance of the Premium on a Contract Secured by Fraudulent Representations** does not constitute a waiver, as the contract was absolutely vitiated in its inception by the fraud. *American Cent. Ins. Co. v. Anthram*, (Miss. 1905) 38 So. Rep. 626.

**Burden of Showing Waiver on Insured.** — *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 585, 77 Am. St. Rep. 136.

**4. Consent to Assignment After Notice of Alienation.** — *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8; *Stuart v. Reliance Ins. Co.*, 179 Mass. 434. See also *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325.

**An Agreement to Transfer on Condition that an Increased Rate Will Be Paid** is a waiver. *Medearis v. Anchor Mut. F. Ins. Co.*, 104 Iowa 88, 65 Am. St. Rep. 428.

**258. 2. Making Loss Payable to Mortgagee After Notice.** — *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325.

**3. Consent of Agent.** — *Mattingly v. Springfield F., etc., Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577; *Union Trust Co. v. Provident Washington Ins. Co.*, 79 Mo. App. 362. See also *Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co.*, 98 Mo. App. 371; *Nute v. Hartford F. Ins. Co.*, 109 Mo. App. 585; *Horton v. Home Ins. Co.*, 122 N. Car. 498, 65 Am. St. Rep. 717; *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514.

**A General Agent** may waive the provision. *Scottish Union, etc., Ins. Co. v. Brown*, 24 Ohio Cir. Ct. 52.

**Oral Consent of Agent Waives Provision.** — *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614.

**Oral Consent by Authorized Agent Binding Notwithstanding Requirement of Written Consent.** — *Home Mut. Ins. Co. v. Nichols*, (Tex. Civ. App. 1903) 72 S. W. Rep. 440.

**Oral Statement of Officer Made After Loss Not a**

**258.** *d. INCUMBRANCE CLAUSE* — (1) *Introductory*. — See note 8.

**259.** (3) *Second Stage — Incumbrances Prohibited* — (a) *In General*. — See note 2.

(b) *What Constitutes an Incumbrance* — *aa. GENERALLY*. — See notes 4, 5.

**260.** See notes 1, 2, 3, 5.

**Waiver.** — *Findlay v. Union Mut. F. Ins. Co.*, 74 Vt. 211, 93 Am. St. Rep. 885.

**Waiver by Agent After Termination of Agency.** — See *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614.

**Power of Agent to Waive Provision a Question of Fact.** — *Cave v. Home Ins. Co.*, 57 S. Car. 347.

**258.** 4. *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559; *Ritchie County Bank v. Fireman's Ins. Co.*, 55 W. Va. 261. Compare *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546. *Contra*, *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73.

**Insurer May Waive Provision Against Waiver by Agent.** — *Phenix Ins. Co. v. Caldwell*, 85 Ill. App. 104, affirmed 187 Ill. 73.

5. See *Lippman v. Aetna Ins. Co.*, 120 Ga. 247; *Elliott v. Farmers' Ins. Co.*, 114 Iowa 154.

**8. Incumbrance Clause Reasonable.** — *Hunt v. Springfield F. & M. Ins. Co.*, 20 App. Cas. (D. C.) 48, affirmed 196 U. S. 47; *Phenix Ins. Co. v. Overman*, 21 Ind. App. 516; *Traders Ins. Co. v. Cassell*, 24 Ind. App. 239; *Home F. Ins. Co. v. Johansen*, 59 Neb. 349; *Insurance Co. of North America v. Wicker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 300, affirmed 93 Tex. 390; *Hogue v. Farmers' Mut. F. Ins. Co.*, 116 Wis. 656. See also *Atlas Reduction Co. v. New Zealand Ins. Co.*, (C. C. A.) 138 Fed. Rep. 497; *Fitzgerald v. Atlanta Home Ins. Co.*, 61 N. Y. App. Div. 350; *Slope Mine Coal Co. v. Quaker City Mut. F. Ins. Co.*, 13 Pa. Super. Ct. 626.

**259.** 2. *Condition Equivalent to Express Inquiry.* — *Brennen v. Connecticut F. Ins. Co.*, 99 Mo. App. 718; *Vucci v. North British, etc., Ins. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 986.

**Effect of Agent's Advice.** — Under Stat. Ky. 1903, § 639, which provides that "all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," an applicant for insurance who, in accordance with the agent's advice, states that his property is not encumbered, there being no fraudulent intent, may recover. *Manchester Assur. Co. v. Dowell*, (Ky. 1904) 80 S. W. Rep. 207.

**Mortgage on Property Not Covered by Policy.** — Since a policy on certain personality in a saloon and "such other furniture and fixtures as is usual to saloons" does not cover a safe purchased after the policy took effect, a mortgage on the safe is not within the prohibition in the policy against incumbrances. *Moriarty v. U. S. Fire Ins. Co.*, 19 Tex. Civ. App. 669.

**Chattel Mortgage a Violation of Incumbrance Clause.** — *Thorne v. Aetna Ins. Co.*, 102 Wis. 593.

**4. Undelivered Mortgage.** — *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Insurance Co. of North America v. Wicker*, 93 Tex. 390;

**Delivery a Question of Fact.** — *Phenix Ins. Co. v. Overman*, 21 Ind. App. 516.

5. *Weigen v. Council Bluffs Ins. Co.*, 104 Iowa 410.

**260.** 1. *Mortgage of Part Held No Breach.* — *Born v. Home Ins. Co.*, 110 Iowa 379, 80 Am. St. Rep. 300, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 260; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537. Compare *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260; *Fitzgerald v. Atlanta Home Ins. Co.*, 61 N. Y. App. Div. 350; *Vucci v. North British, etc., Ins. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 986.

**Mortgage from One Partner to Another.** — Where a policy of fire insurance covering personal property was issued to a partnership, the fact that one member thereof subsequently executed and delivered to another member a mortgage on such property was held not to constitute such an incumbrance as was contemplated by a stipulation in the policy to the effect that it should be void "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." *Alston v. Phenix Ins. Co.*, 100 Ga. 287.

**Mortgage of Joint Owner's Interest.** — A policy issued to the joint owners of property prohibiting incumbrances thereon is forfeited by the placing of a chattel mortgage on his interest by one of such joint owners. *Denver Tp. Mut. F. Ins. Co. v. Resor*, 95 Ill. App. 197.

**Question of Intention.** — Where the policy covers several distinct classes of property, the question whether or not the placing of an incumbrance on one of the risks causes a forfeiture of the policy as to all is one of the intention of the parties. If the condition of the property is such that the risk as to one of the classes of property would be affected by the destruction of the other, then it must be presumed that breach of condition as to one class is a violation of the contract as to the other also. If the loss of the one class of property cannot affect the risk as to the other, then it must be presumed that there was no intention that the conditions as to one should apply to the risks as to the other. *Taylor v. Anchor Mut. F. Ins. Co.*, 116 Iowa 625, 93 Am. St. Rep. 261.

**2. Mortgage Discharged Before Loss.** — *Weigen v. Council Bluffs Ins. Co.*, 104 Iowa 410; *Born v. Home Ins. Co.*, 110 Iowa 379, 80 Am. St. Rep. 300; *Johansen v. Home F. Ins. Co.*, 54 Neb. 548; *Home F. Ins. Co. v. Johansen*, 59 Neb. 349; *Tompkins v. Hartford F. Ins. Co.*, 22 N. Y. App. Div. 380. Compare *Secrest v. Hartford F. Ins. Co.*, 68 S. Car. 378, in which case it was held that a chattel mortgage in violation of the provision against incumbrance constituted a breach of the condition, even though it was subsequently set aside by a decree rendered after the loss as in fraud of creditors and void; *Insurance Co. of North America v. Wicker*, 93 Tex. 300, holding that where the policy provides that it shall be void if, at the



- 261.** *bb. INSTANCES — (bb) Mechanic's Lien.* — See note 1.  
*(cc) Judgment.* — See note 2.  
*(ff) Lease.* — See note 7.
- 262.** *(hh) Incumbrances Prior to Policy.* — See note 2.  
*(ii) Miscellaneous Instances — Notice.* — See note 7.  
*(4) Waiver — [Miscellaneous Instances].* — See note 10a.

time of issuance, there be an incumbrance upon the property insured, forfeiture occurs where there is a mortgage in existence at the time when the policy is issued, of which the insurer has no notice, even though the mortgage is discharged before the loss.

**Mortgage Paid Before Issuance of Policy.** — Although before the issuance of the policy the property has been encumbered by a chattel mortgage and by a judgment and execution thereon, the policy is not avoided thereby where the mortgage and judgment were actually paid, though not satisfied of record, at the date of the policy. *Laird v. Littlefield*, 34 N. Y. App. Div. 43, *affirmed* 164 N. Y. 597.

**Burden of Proving Discharge of Lien on Insured.** — *Home F. Ins. Co. v. Johansen*, 59 Neb. 349.

**260. 3. A New Incumbrance in Lieu of an Existing Incumbrance** is not a breach of the condition where the insurer knew of the existing incumbrance at the time of the issuance of the policy. *Koshland v. Home Mut. Ins. Co.*, 31 Oregon 321; *Koshland v. Fire Assoc.*, 31 Oregon 362. But see *Insurance Co. of North America v. Wicker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 300, *affirmed* 93 Tex. 390, holding that a mortgage given to other parties constitutes a breach even though the money received thereby was for the payment of an existing incumbrance of which the insurer had notice.

**5. Change and Increase in Incumbrance.** — A policy provided that it should become void if the property should be encumbered. At the time when the policy was issued the property was encumbered by a mortgage, and another tract belonging to the insured was also encumbered. A portion of the two incumbrances was a common charge on both tracts. After the policy was issued, and before the loss, the insured took up both incumbrances and executed in their stead a mortgage on both tracts for the amount of the old debts with accrued interest. It was held that the fact that the incumbrance on the insured property had been substantially changed and increased in such manner rendered the policy void, and that the court would not seek to ascertain the relative value of the two tracts or the probable manner of enforcement of the mortgages to determine if the risks had been increased. *Johansen v. Home F. Ins. Co.*, 54 Neb. 548.

**261. 1. Mechanic's Lien.** — *Contra*, *Smith v. St. Paul F. & M. Ins. Co.*, 106 Iowa 225.

**2. Recovery of Judgment.** — *Phenix Ins. Co. v. Smith*, 9 Kan. App. 828.

**7. Lease — Condition Against Chattel Mortgages.** — See *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816.

**262. 2. Prior Incumbrances.** — Subsequent incumbrances defeat the policy, whether they fall upon the property with or without the knowledge or consent of the insured; this rule

also applies where a false statement is made in the application upon which the policy is issued; but judgments which were incumbrances prior to the time of issuing the policy do not invalidate it when it does not appear that the plaintiffs ever made any false statement as to them upon the faith of which the property was insured. *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366. *Compare* *Curlee v. Texas Home F. Ins. Co.*, 31 Tex. Civ. App. 471.

**7. Record of Incumbrance Not Notice.** — *Traders Ins. Co. v. Cassell*, 24 Ind. App. 239.

**10a. Agent May Waive Provision.** — *Brennen v. Connecticut F. Ins. Co.*, 99 Mo. App. 718.

**Insurance Solicitor Cannot Waive.** — *American Ins. Co. v. Walston*, 111 Ill. App. 133.

**Oral Waiver by Agent Valid.** — *German-American Ins. Co. v. Yeagley*, 163 Ind. 651; *Fire Assoc. v. Yeagley*, 34 Ind. App. 387; *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776. *Compare* *Atlas Reduction Co. v. New Zealand Ins. Co.*, (C. C. A.) 138 Fed. Rep. 497.

**Issuance of the Policy with Knowledge of an Incumbrance** is a waiver. *German-American Ins. Co. v. Yeagley*, 163 Ind. 651; *Fire Assoc. v. Yeagley*, 34 Ind. App. 387; *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776.

**Effect of Prohibition in Policy Against Waiver by Agent.** — Where the agent knows of the existence of an incumbrance at the time he issues the policy, the insurer will be deemed to have waived the provision rendering the policy void if the insured's title is other than an unencumbered title, and this is true even though the policy contains a further provision prohibiting the waiver of any of its terms by any agent, as this clause was intended to operate as a limitation upon the power of the agent to waive or modify the terms of the policy after issuance, and not upon their power to agree upon and settle the terms of the policy before issuance. *Flournoy v. Traders' Ins. Co.*, 80 Mo. App. 655.

**Provision Waived by Failure to Require Applicant to Answer Inquiry.** — *Parker v. Otsego County Farmers' Co-operative F. Ins. Co.*, 47 N. Y. App. Div. 204, *affirmed* 168 N. Y. 655.

**Notice to Officer — Effect on Insurer's Rights.** — An insurance company cannot be charged with notice of incumbrances which an applicant for insurance had failed to disclose in his application, by evidence that the secretary of the insurance company, who was also secretary of a building association which owned certain of the incumbrances, had, while acting in the latter capacity, acquired knowledge, more than a year before the date of the policy, of the existence of the incumbrances, and that a year and a half after the policy was issued the secretary, again acting for the loan association in a transaction in which the insurance company had no interest, had seen the record of judg-

**267. 2. Vacancy, Disuse, and Neglect — e. FOURTH STAGE — VACANCY, DISUSE, AND NEGLECT PROHIBITED IN EXPRESS TERMS — (2) Phrases Employed — (a) "If the Premises Become Unoccupied" — The Word "Unoccupied." — See note 7.**

**269. (b) "Vacated by Removal of Owner or Occupant" — A Provision Forbidding the Premises to "Become Vacated by the Removal of the Owner or Occupant." — See note 11.**

**273. (d) "Vacant and Unoccupied" — "Vacant" Held to Be Requirement Superadded to "Unoccupied." — See note 1.**

**(e) "Vacant or Unoccupied" — bb. WHEN THE CLAUSE IS VALID AND ENFORCEABLE — (aa) Increase of Risk. — See notes 3, 4.**

**274. See note 2.**

**(bb) Requisites of Occupancy. — See note 4.**

ments against the insured. *Sitler v. Spring Garden Mut. F. Ins. Co.*, 18 Pa. Super. Ct. 139.

**Parol Evidence Inadmissible to Show Notice to Agent of Incumbrance at Issuance of Policy. — *Hammel v. Pennsylvania Ins. Co.*, 24 Ohio Cir. Ct. 101.**

**Recognition of the Policy After Notice of the Incumbrance and acts of the insurer causing expense to the insured constitute a waiver of a breach of the provision. *Nugent v. Rensselaer County Mut. F. Ins. Co.*, 106 N. Y. App. Div. 308.**

**Making Policy Payable to Other than Insured Not a Waiver. — The mere fact that the insurer procured an indorsement to be made upon the policy making the loss payable to others than the insured, as such persons' interests should appear, does not of itself show a waiver of a breach of the provision, where it is not shown that the insurer had notice of the fact that the persons whose names were so indorsed were mortgagees. *Atlas Reduction Co. v. New Zealand Ins. Co.*, 121 Fed. Rep. 929, (C. A.) 138 Fed. Rep. 497.**

**Acceptance of Proofs of Loss Not a Waiver. — *American Ins. Co. v. Walston*, 111 Ill. App. 133.**

**Stipulation Against Waiver. — The furnishing of proofs of loss at the request of the insurer does not constitute a waiver of the provision, where the proofs contain the stipulation that "it is expressly understood and agreed that the furnishing of this proof of loss blank to the assured, or making up proofs by an adjuster, of any agent of the company or companies named herein, is not a waiver of any rights of said company." *Curlee v. Texas Home F. Ins. Co.*, 31 Tex. Civ. App. 471.**

**Investigation of Loss — Stipulation Against Waiver. — The inference of waiver from the fact that the agent of the insured investigates the loss and determines the amount of damages is negated by a stipulation in the policy that such an investigation, in case of loss, was not to be deemed a waiver of any objection to the liability of the insurer under the policy, and also by a written agreement between the insured and the agent that the investigation and adjustment should not waive or invalidate any of the conditions of the policy or any rights of either party. *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.**

**Provision Waived by Adjustment of Loss by Authorized Agent. — *Todd v. Quaker City Mut. F. Ins. Co.*, 9 Pa. Super. Ct. 371, 43 W. N. C. (Pa.) 476.**

**267. 7. "Untenanted" and "Unoccupied"**

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**Synonymous. — *Spahr v. North Waterloo Ins. Co.*, 31 Ont. 525.**

**269. 11. General Intention of Returning Insufficient. — Compare *Stone v. Granite State F. Ins. Co.*, 69 N. H. 438, holding that the question whether the provision is broken by a temporary absence is one of fact.**

**273. 1. "Vacant" and "Unoccupied" Not Synonymous. — *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612.**

**3. *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612; *Piscataqua Sav. Bank v. Traders' Ins. Co.*, 8 Kan. App. 241; *Thomas v. Hartford F. Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 297, rehearing denied (Ky. 1899) 56 S. W. Rep. 264; *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111. See also *Burner v. German-American Ins. Co.*, 103 Ky. 370.**

**The Minnesota Statute (Laws 1895, c. 175, § 53) which provides that, if the insured premises "shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without the assent" of the insurer, the policy shall be void, is not affected, qualified, or modified by the clause of the same statute which provides that in the absence of any change increasing the risk without the assent of the insurer and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid. *Doten v. Aetna Ins. Co.*, 77 Minn. 474.**

**Where Property Vacant at Issuance of Policy Vacancy Must Further Exist for Ten Days Thereafter. — *Moore v. Niagara F. Ins. Co.*, 199 Pa. St. 49, 85 Am. St. Rep. 771.**

**4. Ohio — Increase of Risk Must Be Shown. — *Security F. Ins. Co. v. McFarland*, 12 Ohio Cir. Dec. 591; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368.**

**274. 2. *Baldwin v. German Ins. Co.*, 105 Iowa 379; *Couch v. Farmers' F. Ins. Co.*, 64 N. Y. App. Div. 367.**

**4. "Occupancy" Varies with Uses of Building Insured. — The words "occupied" and "unoccupied" will be construed with reference to the nature and character of the building, the purposes for which it is designed, and the uses contemplated by the parties as expressed in the contract. The construction given to these words as applied to a dwelling will not cover a barn, a mill, a sawmill, a factory, a schoolhouse, a music hall, a theatre, or a church. A church building kept for use for the purposes for which**

**274.** (cc) *Definition and Tests of Occupancy* — aaa. *Dwellings*. — See notes 5, 6, 7, 8.

**275.** See notes 1, 3, 4.

cc. WHEN THE CLAUSE IS NOT ENFORCED — (aa) *Temporary Absence*. — See note 8.

**276.** *Illustrations*. — See note 1.

(cc) *Vacancy Incident to the Purpose for Which the Building Is Used* — aaa. *Rented Dwellings*. — See notes 4, 5.

**277.** See notes 1, 5.

**278.** (dd) *Vacancy Preparatory to Occupation*. — See note 8.

(ee) *Partial Nontenancy* — aaa. *As to Space*. — See note 10.

**279.** See note 1.

(ff) *Waiver* — *Insurer's Knowledge of Facts as Waiver*. — See note 5.

it is designed, and used as occasion presents, and as the convenience of the congregation may require, no intent appearing to abandon it for the purposes of its use by the temporary periods of nonuser, even though such periods exceed the ten-day limit in the policy, is not *per se* left vacant and unoccupied, within the forfeiture clause of the policy. *Hampton v. Hartford F. Ins. Co.*, 65 N. J. L. 265. See also *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111.

**Reasonable Construction Required.** — *Home F. Ins. Co. v. Peyson*, 54 Neb. 495.

**274. 5. Occupancy of Dwelling Defined.** — See *Morgan v. Illinois Ins. Co.*, 130 Mich. 427; *Thieme v. Niagara F. Ins. Co.*, 100 N. Y. App. Div. 278, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274. See also *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612; *Burner v. German-American Ins. Co.*, 103 Ky. 370; *Thomas v. Hartford F. Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 297, rehearing denied (Ky. 1899) 56 S. W. Rep. 264; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368; *Spahr v. North Waterloo Ins. Co.*, 31 Ont. 525. Compare *Home Ins. Co. v. Hancock*, 106 Tenn. 513.

**"Occupation" of Dwelling House.** — "Occupation" of a dwelling house means living in it. The uses for which premises are intended should be considered in determining what is meant by the word "unoccupied" as contained in a policy. *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111.

**The Description of the Building as a Dwelling** is not a representation that the house is occupied at the time. *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816.

**6. Leaving Furniture.** — See *Stoltenberg v. Continental Ins. Co.*, 106 Iowa 565, 68 Am. St. Rep. 323; *Thieme v. Niagara F. Ins. Co.*, 100 N. Y. App. Div. 278, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274; *Spahr v. North Waterloo Ins. Co.*, 31 Ont. 525.

In *German American Ins. Co. v. Evans*, 94 Tex. 490, it was held that where the insured, on moving from the insured premises, left a large portion of his furniture there, and caused a servant to occupy and remain in the house, the property did not become vacant or unoccupied within the meaning of the provision.

**7. Leaving Tools.** — *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

**8. Miscellaneous Effects.** — *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

**275. 1. Visitation Insufficient.** — *Morgan v. Illinois Ins. Co.*, 130 Mich. 427. See also *Burner v. German-American Ins. Co.*, 103 Ky.

370. Compare *Home Ins. Co. v. Hancock*, 106 Tenn. 513.

**3. Temporary Use Insufficient.** — See *Spahr v. North Waterloo Ins. Co.*, 31 Ont. 525.

**4. Trying to Procure Tenant.** — *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

**8. Temporary Absence with Intention of Retaining No Forfeiture.** — See *Thomas v. Hartford F. Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 297, rehearing denied (Ky. 1899) 56 S. W. Rep. 264; *Johnson v. Norwalk F. Ins. Co.*, 175 Mass. 529; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427; *Raymond v. Farmers' Mut. F. Ins. Co.*, 114 Mich. 386; *Sullivan v. Germania F. Ins. Co.*, 89 Mo. App. 106; *Home F. Ins. Co. v. Peyson*, 54 Neb. 495; *Stone v. Granite State F. Ins. Co.*, 69 N. H. 438.

**Occupancy for Portion of Each Day Sufficient.** — *Thieme v. Niagara F. Ins. Co.*, 100 N. Y. App. Div. 278.

**276. 1. Absence for Single Night.** — *Thieme v. Niagara F. Ins. Co.*, 100 N. Y. App. Div. 278.

**4. Use for Which Premises Intended to Be Considered.** — *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111.

**5. Change of Tenants Not a Vacancy.** — *Sullivan v. Germania F. Ins. Co.*, 89 Mo. App. 106; *Union Ins. Co. v. McCullough*, (Neb. 1901) 96 N. W. Rep. 79.

**Occupancy by Watchman Prior to Renting Sufficient.** — *Thieme v. Niagara F. Ins. Co.*, 100 N. Y. App. Div. 278.

**277. 1. See Ohio Farmers' Ins. Co. v. Vogel, (Ind. App. 1905) 73 N. E. Rep. 612.**

**5. Compare Eureka F. & M. Ins. Co. v. Baldwin, 62 Ohio St. 368.**

**278. 8. Vacancy Pending Repair After Fire No Breach.** — *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.

**10. Vacating One of Several Buildings.** — *Central Montana Mines Co. v. Fireman's Fund Ins. Co.*, 92 Minn. 223.

**Provision Applies Only to Property Insured.** — *Thomas v. Hartford F. Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 297.

**279. 1. Where Risk Is Increased.** — Although a policy so written as to place separate valuations upon separate subjects of insurance will ordinarily be severable, it will not be so if the risk intended to be excluded by the condition against vacancy, which has been violated, affected the item of property for the destruction of which recovery was sought. *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 146, 105 Am. St. Rep. 157.

**5. Insuring Vacant Buildings.** — *Hilton v. Phenix Assur. Co.*, 92 Me. 272; *De Soto v.*

**280.** Many Modifications of This Doctrine. — See notes 4, 5, 6, 7, 9.

**281.** (gg) *Permit for Vacancy.* — See notes 1, 2.

(hh) *Necessity of Election on Part of Insurer.* — See note 4.

American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1; Slohodisky v. Phenix Ins. Co., 53 Neb. 816; Bear v. Atlanta Home Ins. Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613; Frasier v. New Zealand Ins. Co., 39 Oregon 342; Philadelphia F. Assoc. v. Bynum, (Tex. Civ. App. 1898) 44 S. W. Rep. 579. See also Stephens v. Phenix Assur. Co., 85 Ill. App. 671. Compare Hanscom v. Home Ins. Co., 90 Me. 333.

**Slight Circumstances Sufficient to Show Waiver.** — Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo. App. 111.

**Agent Issuing Policy with Knowledge of Vacancy Waives Provision.** — Hackett v. Philadelphia Underwriters, 79 Mo. App. 16; Chamberlain v. British-American Assur. Co., 80 Mo. App. 589, 7 Mo. App. Rep. 748.

**The Acceptance by the Insurer of Premiums Previously Earned** after the property has been lost does not constitute a waiver of the provision. Burner v. German-American Ins. Co., 103 Ky. 370.

**280. 4. Knowledge of Vacancy at Issuance Not Waiver of Subsequent Breach.** — Sergeant v. Liverpool, etc., Ins. Co., 96 N. Y. App. Div. 117; Moore v. Niagara F. Ins. Co., 199 Pa. St. 49, 85 Am. St. Rep. 771.

**5. Notice Not Presumed.** — Thomas v. Hartford F. Ins. Co., (Ky. 1899) 53 S. W. Rep. 297, rehearing denied (1899) 56 S. W. Rep. 264; Bartlett v. British America Assur. Co., 35 Wash. 525, holding further that failure to make inquiry is not a waiver.

**Failure to Inspect in Accordance with Statute.** — Noncompliance on part of the insurer with the provisions of the Minnesota statute requiring examination by the insurer of the premises insured does not charge the insurer with notice that the premises are vacant. Aiple v. Boston Ins. Co., 92 Minn. 337.

**6. Knowledge of Subsequent Vacancy Not a Waiver.** — Hanscom v. Home Ins. Co., 90 Me. 333, holding, however, that failure to claim a forfeiture for nonoccupancy may operate as a waiver. Compare Wilson v. Commercial Union Assur. Co., 51 S. Car. 540, 64 Am. St. Rep. 700.

**Retention of Unearned Premium After Knowledge of Vacancy Not Waiver While Breach Continues.** — Stephens v. Phenix Assur. Co., 85 Ill. App. 671.

**Recognition of Policy After Knowledge of Vacancy.** — If the insurer, with knowledge of the facts by reason whereof it is entitled to insist upon forfeiture, continues to recognize the policy as in force, or does any act inconsistent with insistence upon the forfeiture, the forfeiture is waived, and may not be relied upon thereafter. Hunt v. State Ins. Co., 66 Neb. 121.

**7. Sending Adjuster Not Waiver.** — Burnham v. Royal Ins. Co., 75 Mo. App. 394.

**Acts of Adjuster After Knowledge of Breach as Waiver.** — See German-American Ins. Co. v. Evans, 25 Tex. Civ. App. 300.

**9. Insurer Bound by Agent's Construction of**

**Clause.** — See De Soto v. American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1; Home Ins. Co. v. Hancock, 106 Tenn. 513.

**Waiver by General Agent Valid.** — Wilson v. Commercial Union Assur. Co., 51 S. Car. 540, 64 Am. St. Rep. 700.

**Condition Against Waiver by Agent.** — Where the policy provides that no officer, agent, or representative of the insurer shall be held to have waived any of the conditions of the policy unless the waiver shall be indorsed thereon in writing, the provision is a direct limitation on the authority of the agent of which the insured is charged with notice, and he cannot avail himself of a waiver made by the agent in violation of the provision. Hunt v. State Ins. Co., 66 Neb. 121.

**281. 1. Permit Commences to Operate on Delivery of Policy to Agent.** — Sullivan v. Germania F. Ins. Co., 89 Mo. App. 106.

**One Who Relies on the Statement of the Insurer's Agent** that a vacancy permit has been granted and attached to the policy may recover for loss occurring during the life of the permit. Morgan v. Illinois Ins. Co., 130 Mich. 427.

**Provision Decreasing Amount of Insurance While Permit Operates Valid.** — Sullivan v. Germania F. Ins. Co., 89 Mo. App. 106.

**Grant of Permit by Agent After Revocation of Agency.** — It has been held that where a permit for vacancy is granted to the insured by the agent through whom his policy was issued, the permit is valid though before it was granted the agency had been terminated, where the insured had no notice of the revocation of the agency. Wilson v. Commercial Union Assur. Co., 51 S. Car. 540, 64 Am. St. Rep. 700.

**2. Permit for Limited Time.** — Burnham v. Royal Ins. Co., 75 Mo. App. 394; Couch v. Farmers' F. Ins. Co., 64 N. Y. App. Div. 367.

**Oral Agreement for Extension of Permit Not Binding.** — Burner v. German-American Ins. Co., 103 Ky. 370.

**4. Vacancy Clause Merely Gives Insurer Right to Declare Forfeiture.** — Frasier v. New Zealand Ins. Co., 39 Oregon 342; Hunt v. State Ins. Co., 66 Neb. 121. See also Thomas v. Hartford F. Ins. Co., (Ky. 1899) 53 S. W. Rep. 297, rehearing denied (1899) 56 S. W. Rep. 264. Compare Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo. App. 111; Couch v. Farmers' F. Ins. Co., 64 N. Y. App. Div. 367.

**Notice to Agent Notice to Insurer.** — Hunt v. State Ins. Co., 66 Neb. 121.

**Loss After Termination of Vacancy.** — If the loss occurs while the vacancy continues to exist, the company is not necessarily rendered liable because, knowing the fact, it has not meantime forfeited the policy. But if it does not exercise its right in this respect, and the premises are again occupied, and are not vacant or unoccupied when the loss occurs, the liability on the policy again attaches. Stephens v. Phenix Assur. Co., 85 Ill. App. 671.

**Policy Forfeited by Vacancy — Not Revived by Re-occupancy.** — German Ins. Co. v. Russell, 65 Kan. 373.

**281.** *dd.* A QUESTION OF FACT. — See notes 5, 6.

(f) "Ceased to Be Operated" — *aa.* LIBERAL RULE — TEMPORARY OR INCIDENTAL CESSATION NOT INCLUDED. — See note 10.

**282.** See note 2.

**283.** *cc.* SCOPE OF CLAUSE — (*aa.*) *What Is a Manufacturing Establishment.* — See note 2.

(*bb.*) *What Is Cessation.* — See notes 3, 4.

*dd.* WAIVER. — See note 6.

**284.** (g) "Keep a Watchman on the Premises" — *bb.* EXPRESS CLAUSE REQUIRING WATCHMAN TO BE KEPT — (*bb.*) *What Constitutes Compliance* — *aaa.* Generally. — See notes 4, 6.

*cc.* WAIVER. — See note 11.

**285.** 3. Hazardous Use and Occupation — *a.* INCREASE OF RISK OR HAZARD — (1) *Form* — Policy Suspended During Time of Increased Hazard. — See note 4.

(2) *Validity and Application* — (*a.*) In General. — See note 6.

Increase per Se. — See note 7.

Instances. — See note 9.

**286.** Increase of Risk a Question for the Jury. — See note 1.

**281.** 5. Meaning of Vacancy Clause Is for Court. — *Home F. Ins. Co. v. Peyson*, 54 Neb. 495.

6. Whether Facts Bring Case Within Clause Is for Jury. — *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816; *Home F. Ins. Co. v. Peyson*, 54 Neb. 495; *Hunt v. State Ins. Co.*, 66 Neb. 121.

**Sufficiency of Evidence.** — In *Omaha F. Ins. Co. v. Sinnott*, 54 Neb. 522, it was held that where a tenant had only removed a portion of his furniture from an insured tenement house at the time of its destruction by fire, the finding of a jury adverse to the contention of the insurance company, that at the time of the loss the house was unoccupied, in violation of the terms of the policy, would not be disturbed as being without sufficient evidence to sustain it.

10. Provision Valid. — *El Paso Reduction Co. v. Hartford F. Ins. Co.*, 121 Fed. Rep. 937.

Provision Not Limited to Cessation Immediately Preceding Loss. — *Cronin v. Philadelphia F. Assoc.*, 123 Mich. 277.

**282.** 2. Temporary Incidental or Necessary Cessation Does Not Work Forfeiture. — *Central Montana Mines Co. v. Fireman's Fund Ins. Co.*, 92 Minn. 223, holding further that where the policy covers several buildings as a whole the fact that the operation has ceased in one of the buildings does not render the policy void.

**283.** 2. Provision Not Applicable to Mining Plant. — See *Queen Ins. Co. v. Excelsior Milling Co.*, 69 Kan. 114.

3. What Constitutes Cessation Is for Jury. — See *Ulysses Elgin Butter Co. v. Hartford F. Ins. Co.*, 20 Pa. Super. Ct. 384.

Burden of Proving Breach on Insurer. — *Barker v. Citizens' Mut. F. Ins. Co.*, 136 Mich. 626.

4. Court May Pronounce on Undisputed Facts. — *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520.

6. Permit to Cease Operation During Winter Construed. — See *Barker v. Citizens' Mut. F. Ins. Co.*, 136 Mich. 626.

**284.** 4. Substantial Compliance Sufficient. — *McGannon v. Michigan Millers' Mut. F. Ins. Co.*, 127 Mich. 636, 89 Am. St. Rep. 501.

6. Temporary Absence of Watchman. — *McGannon v. Michigan Millers' Mut. F. Ins. Co.*, 127 Mich. 636, 89 Am. St. Rep. 501, holding that under Comp. Laws Mich., § 5180, providing that no policy of insurance shall be declared void by the insurer for the breach of any condi-

tion of the policy, if the insured has not been injured by such breach, or where a loss has not occurred during the breach or by reason of the breach, the failure of the insured to keep a watchman on the premises on Sunday in accordance with the provisions of the policy does not relieve the insurer from liability for loss occurring by fire during the week; *McGannon v. Millers Nat. Ins. Co.*, 171 Mo. 143, 94 Am. St. Rep. 778.

11. Waiver. — See *Kansas Mill-Owners', etc., Mut. F. Ins. Co. v. Central Nat. Bank*, 60 Kan. 630.

**285.** 4. Providing for Suspension While Increased Hazard Exists. — See *Born v. Home Ins. Co.*, 110 Iowa 379, 80 Am. St. Rep. 300; *North British Mercantile Ins. Co. v. Union Stockyards Co.*, (Ky. 1905) 87 S. W. Rep. 285.

6. Clause Valid and Enforceable. — *Alston v. Greenwich Ins. Co.*, 100 Ga. 282; *Janvrin v. Rockingham Farmers' Mut. F. Ins. Co.*, 70 N. H. 35; *Yentzer v. Farmers' Mut. Ins. Co.*, 200 Pa. St. 325. See also *Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 434; *Dougherty v. Greenwich Ins. Co.*, 64 N. J. L. 716; *Keller v. Liverpool, etc., Ins. Co.*, 27 Tex. Civ. App. 102; *Wilson v. Union Mut. F. Ins. Co.*, 75 Vt. 320.

Provision Not Applicable to Conditions Not Existing at Issuance of Policy. — *Straker v. Phenix Ins. Co.*, 101 Wis. 413.

Insured Presumed to Have Knowledge of Contents of Provision. — *Hartford F. Ins. Co. v. Post*, 25 Tex. Civ. App. 428.

"Clear Space" Provision Valid. — *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585.

7. Increase of Risk Declared as a Matter of Law. — *Alston v. Greenwich Ins. Co.*, 100 Ga. 282.

Judicial Notice of Increase of Risk by Storage of Fireworks. — *Betcher v. Capital F. Ins. Co.*, 78 Minn. 240.

9. Additions and Adjacent Buildings. — See *Yentzer v. Farmers' Mut. Ins. Co.*, 200 Pa. St. 325.

**286.** 1. Whether Risk Increased a Question of Fact for Jury. — *Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 434; *Orient Ins. Co. v. McKnight*, 197 Ill. 190; *Krell v. Chickasaw Farmers' Mut. F. Ins. Co.*, (Iowa 1905) 104 N. W. Rep. 364; *Western Assur. Co. v. Ray*, 105 Ky. 523; *North British Mercantile Ins. Co. v.*

**286.** (b) *Essentials.* — See note 3.

*Must Be Within Knowledge and Control of Assured.* — See notes 5, 6.

**287.** (c) *What Is Not an Increase of Risk* — *Vacancy and Nontenancy.* — See note 2. *Other Illustrations.* — See notes 6, 7.

**288.** See note 4.

(d) *Waiver.* — See notes 5, 6.

*b. SPECIFIC ACTS AND USES PROHIBITED* — (1) *Alterations, Repairs, and Additions* — (a) *In General* — *Express Clause Forbidding Alterations, Etc.* — See note 11.

Union Stockyards Co., (Ky. 1905) 87 S. W. Rep. 285; *Atherton v. British-America Assur. Co.*, 91 Me. 289; *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286; *Janvrin v. Rockingham Farmers' Mut. F. Ins. Co.*, 70 N. H. 35; *Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. Dak. 279.

*The Burden of Proof* is usually on the insurer. *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231. But where the statute provides that a violation of a condition of the policy shall not defeat the right of recovery thereon "if it shall be shown by the plaintiff" that the violation did not contribute to the loss, the burden of proof is on the insured. *Krell v. Chickasaw Farmers' Mut. F. Ins. Co.*, (Iowa 1905) 104 N. W. Rep. 364.

*Ascertaining Violation of "Clear Space" Clause.* — In determining whether there has been a violation of a provision forbidding the piling of lumber within a hundred feet of the insured building, the distance is to be estimated from structures attached to the main building, and not necessarily from a permanent corner of the main building. *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 225.

*Expert Evidence.* — The opinion of experts, if admissible, is not conclusive upon the question what constitutes an increase of risk within the meaning of the provision. *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231.

**286.** 3. *Must Be of Substantial Character.* — *Janvrin v. Rockingham Farmers' Mut. F. Ins. Co.*, 70 N. H. 35.

*Temporary Increase of Risk.* — *Born v. Home Ins. Co.*, 110 Iowa 379, 80 Am. St. Rep. 300.

*Effect of Express Stipulation.* — *Straker v. Phenix Ins. Co.*, 101 Wis. 413.

*Effect of Failure to Comply with Requirement as to Water Supply.* — See *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537.

**5. Increase Without Insured's Knowledge Not Fatal.** — *North British Mercantile Ins. Co. v. Union Stockyards Co.*, (Ky. 1905) 87 S. W. Rep. 285; *Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625; *Northern Assur. Co. v. Crawford*, 24 Tex. Civ. App. 574.

A provision in the policy that it shall be void "if the hazard be increased by any means within the control or knowledge of the insured" refers to means not specifically mentioned in the policy itself, and does not modify the force of the clause prohibiting the keeping of inflammable or combustible materials. *Thuringia Ins. Co. v. Norwaysz*, 104 Ill. App. 390, affirmed 204 Ill. 334.

**6. Increase by Means Not Within Insured's Control.** — *German Ins. Co. v. Wright*, 6 Kan. App. 611; *North British Mercantile Ins. Co. v.*

*Union Stockyards Co.*, (Ky. 1905) 87 S. W. Rep. 285; *Northern Assur. Co. v. Crawford*, 24 Tex. Civ. App. 574.

*Temporary Failure to Maintain Sprinkling System.* — *Cummer Lumber Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 67 N. Y. App. Div. 151, affirmed 173 N. Y. 633.

*An Increase of Risk Not Within Control of the Insurer* may avoid the policy. *Straker v. Phenix Ins. Co.*, 101 Wis. 413.

**287.** 2. *Vacancy Not per Se Increase.* — *Boardman v. North Waterloo Ins. Co.*, 31 Ont. 55.

**6. Repairs and Alterations.** — See *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231.

**7. Additions and Adjacent Buildings.** — See *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231.

**288.** 4. *Increase in One Direction Offset in Another.* — *Born v. Home Ins. Co.*, 110 Iowa 379, 80 Am. St. Rep. 300, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

**5. Waiver.** — *Cassimus v. Scottish Union, etc., Ins. Co.*, 135 Ala. 256; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720; *Farmers Ins. Assoc. v. Reavis*, 163 Ind. 321.

*Agent Cannot Waive Provision by Authorizing Change of Use in Future.* — *Cornelius v. Farmers' Ins. Co.*, 113 Iowa 183.

*Sufficiency of Evidence to Show Knowledge of Violation.* — See *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 225.

*"Clear Space" Provision* — *Power of Agent to Waive.* — See *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585.

*Extent of Waiver* — *Extent to Which Waived.* — *Hartford F. Ins. Co. v. Post*, 25 Tex. Civ. App. 428.

*Knowledge of Breach of "Clear Space" Clause Not Waiver of Provision.* — *Petit v. German Ins. Co.*, 98 Fed. Rep. 800; *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 225.

*Oral Waiver of "Clear Space" Clause Binding.* — *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, (Ky. 1905) 84 S. W. Rep. 551.

*Sufficiency of Evidence to Show Waiver of "Clear Space" Clause.* — See *Keller v. Liverpool, etc., Ins. Co.*, 27 Tex. Civ. App. 102.

**6. Orient Ins. Co. v. McKnight**, 197 Ill. 190. *Provision May Be Waived by Oral Consent of Agent of Insured.* — *Orient Ins. Co. v. McKnight*, 197 Ill. 190.

*Wisconsin Statute.* — *Straker v. Phenix Ins. Co.*, 101 Wis. 413.

**11. Clause Prohibiting Alteration Valid and Enforceable.** — *German Ins. Co. v. Hearne*, (C. C. A.) 117 Fed. Rep. 289; *McCoy v. Iowa State Ins. Co.*, 107 Iowa 80; *Hill v. Middlesex Mut. Assur. Co.*, 174 Mass. 542; *Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237.

**289.** See note 1.

Alterations to Be at Risk of Insured — Option to Terminate. — See note 3.

(b) Application of the Clause. — See note 4.

**290.** (c) Knowledge and Control of the Insured. — See notes 1, 2.**291.** (2) *Keeping Inflammable and Extra-combustible Materials* — (a) *What Are Included in the Prohibition* — *aa. PETROLEUM AND ITS PRODUCTS* — (*aa*) *Generally*. — See notes 1, 3.**292.** *cc. OTHER INFLAMMABLES* — (*bb*) *Dynamite*. — See note 9.(b) *What Constitutes Keeping and Using* — *aa. IN GENERAL*. — See notes 13, 14.**293.** *Storing Prohibited*. — See note 9.

"Allowed" on the Premises. — See note 10.

*bb. PROHIBITED ARTICLES INCIDENTAL TO TRADE OR BUSINESS*. — See note 10a.(*aa*) *Manufacturing Establishments*. — See note 13.**294.** (*bb*) *Mercantile Establishments*. — See note 10.**295.** See note 4.**296.** (*cc*) *Domestic Use*. — See note 1.**297.** (*dd*) *Qualifications* — *Clause Limiting Use of Kerosene for Lighting*. — See note 1.*Prohibition Confined to Insured Buildings*. — See note 3.(c) *Questions of Evidence*. — See note 10.**289.** 1. *The Completion of the Alteration Before the Loss* does not terminate the right of the insurer to avoid the policy. *Hill v. Middlesex Mut. Assur. Co.*, 174 Mass. 542.3. *Giving Insurer Option to Avoid for Alterations*. — See *Crete Farmers' Mut. Tp. Ins. Co. v. Miller*, 70 Ill. App. 599.4. *Necessary and Incidental Repairs Permitted*. — *Hill v. Middlesex Mut. Assur. Co.*, 174 Mass. 542.*Only Such Repairs Allowed as Can Be Made Within Time Fixed by Policy*. — *German Ins. Co. v. Hearne*, (C. C. A.) 117 Fed. Rep. 283.*Alteration Diminishing Risk Not Breach of Provision*. — *Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625.*As to What Constitute "Repairs,"* within the meaning of the provision, see *German Ins. Co. v. Hearne*, (C. C. A.) 117 Fed. Rep. 289.**290.** 1. *Breach by Third Party*. — *Thuringia Ins. Co. v. Norwysz*, 104 Ill. App. 390, *affirmed* 204 Ill. 334.2. *An Increase of Risk Not Within Control of the Insurer* will avoid the policy. *Straker v. Phenix Ins. Co.*, 101 Wis. 413.**291.** 1. *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42; *Bastian v. British American Assur. Co.*, 143 Cal. 287; *Norwysz v. Thuringia Ins. Co.*, 204 Ill. 334; *Boyer v. Grand Rapids F. Ins. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338; *Lutz v. Royal Ins. Co.*, 205 Pa. St. 159.3. *Keeping Prohibited Article Forfeiture per Se*. — *Bastian v. British American Assur. Co.*, 143 Cal. 287; *Thuringia Ins. Co. v. Norwysz*, 104 Ill. App. 390, *affirmed* 204 Ill. 334, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291; *Kenne-fick-Hammond Co. v. Norwich Union F. Ins. Co.*, (Mo. App. 1904) 80 S. W. Rep. 694.**292.** 9. *Violation of Prohibition Against Keeping Dynamite Avoids Policy*. — *Bastian v. British American Assur. Co.*, 143 Cal. 287.13. See *Phœnix Ins. Co. v. Sherman*, 17 Tex. Civ. App. 456.*Prohibition Applies to Manufacture*. — *Lutz v. Royal Ins. Co.*, 205 Pa. St. 159.14. *Casual Deposit Not a Keeping*. — *Springfield F. & M. Ins. Co. v. Wade*, 95 Tex. 598, 93 Am. St. Rep. 870.**293.** 9. *Use for Cooking*. — *Boyer v. Grand Rapids F. Ins. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338.10. *Gasoline "Allowed" on Premises*. — *Springfield F. & M. Ins. Co. v. Wade*, 95 Tex. 598, 93 Am. St. Rep. 870.10a. *Prohibited Articles Incidental to Business*. — *Szymkus v. Eureka F. & M. Ins. Co.*, 114 Ill. App. 401, *quoting* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293.13. *Watchmaker*. — *Szymkus v. Eureka F. & M. Ins. Co.*, 114 Ill. App. 401, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293 and holding that the keeping of benzine by one conducting a jewelry shop did not constitute a violation of the policy.**294.** 10. *Explosives May Be Kept as Part of Stock*. — *Phœnix Ins. Co. v. Walters*, 24 Ind. App. 87, 79 Am. St. Rep. 257; *Vandervolgen v. Manchester F. Assur. Co.*, 123 Mich. 291; *Ackley v. Phenix Ins. Co.*, 25 Mont. 272. See also *Lutz v. Royal Ins. Co.*, 205 Pa. St. 159.*Extent of Usage*. — *Traders' Ins. Co. v. Dobbins*, (Tenn. 1905) 86 S. W. Rep. 383.**295.** 4. *Saltpetre in Drug Store*. — *Ackley v. Phenix Ins. Co.*, 25 Mont. 272.*Benzine in Drug Store*. — *Phœnix Ins. Co. v. Fleming*, 65 Ark. 54, 67 Am. St. Rep. 900.**296.** 1. *Evidence Admissible to Show Custom as to Domestic Use of Gasoline*. — *Northern Assur. Co. v. Crawford*, 24 Tex. Civ. App. 574.**297.** 1. *Use in Other than Manner Specified*. — *Vandervolgen v. Manchester F. Assur. Co.*, 123 Mich. 291.3. *Prohibition Not Extended*. — See *Phœnix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456.*But the Use of a Platform Annexed to the Building* has been held to be a violation of the provision. *Kohlmann v. Selva*, 34 N. Y. App. Div. 780.10. *Question of Fact*. — See *Phœnix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456.

**297.** (d) Who May Violate Clause. — See note 12.

(e) Permission and Waiver. — See notes 14, 15.

**298.** Waiver. — See notes 3, 4.

(3) *Other Prohibited Acts and Uses* — (a) *Illegal Business* — *aa. GENERALLY* — (aa) *Sale of Intoxicating Liquors*. — See note 7.

(cc) *Prostitution*. — See notes 10, 11.

bb. *LIABILITY FOR ACTS OF TENANT*. — See notes 12, 13.

**299.** dd. *WAIVER*. — See note 2.

(b) *Running Factory Overtime or at Night* — *Waiver*. — See note 7.

**300.** (a) *Miscellaneous Prohibitions* — *aa. STOVES AND FIRES* — [*Agricultural Machinery*]. — See note 1a.

**4. Other Insurance** — *a. OBJECT AND PURPOSE OF THE CLAUSE*. — See note 7.

*Supported by Authority*. — See note 13.

**302.** *b. ORIGIN AND DEVELOPMENT* — (2) *Second Stage* — *Other Insurance Mentioned in General Terms* — (b) *Other Insurance Permitted or Required* — *Renewals and Substitutions*. — See notes 4, 7.

**297. 12. Act of Lessee.** — *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, *affirming* 104 Ill. App. 390; *Badger v. Platts*, 68 N. H. 222, 73 Am. St. Rep. 572.

The insured is liable for the violation of the provision by his lessee, although the prohibited use was made without the knowledge of the insured. *Kohlmann v. Selvage*, 34 N. Y. App. Div. 380.

**14. Effect of Special Permit.** — *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42; *Betcher v. Capital F. Ins. Co.*, 78 Minn. 240.

**Policy Avoided by Retention of Goods After Expiration of Permit.** — *Betcher v. Capital F. Ins. Co.*, 78 Minn. 240.

**15. Permit to Use Gasoline in Specified Manner** is not a permit to use it in another manner. *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334.

**298. 3. Waiver.** — *Cassimus v. Scottish Union, etc., Ins. Co.*, 135 Ala. 256; *Merchants Ins. Co. v. Oberman*, 99 Ill. App. 357; *Hartley v. Pennsylvania F. Ins. Co.*, 91 Minn. 382.

**What Constitutes Knowledge.** — *Worachek v. New Denmark Mut. Home F. Ins. Co.*, 102 Wis. 88.

**Notice to Agent of Insurer.** — *Cassimus v. Scottish Union, etc., Ins. Co.*, 135 Ala. 256.

**Sufficiency of Evidence to Show Waiver.** — See *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900.

**Objection by the Defendant to the Proofs of Loss** does not constitute a waiver of the forfeiture where liability is also denied on the policy, which is claimed by the defendant to be void. *Betcher v. Capital F. Ins. Co.*, 78 Minn. 240.

**4. Fischer v. London, etc., F. Ins. Co.**, 83 Fed. Rep. 807.

**7. Illegal Sale of Liquors.** — *Compare Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308; *Petty v. Mutual F. Ins. Co.*, 111 Iowa 358, in which latter case it was held that the mere fact that a saloon keeper does not conduct his business in strict compliance with the state law does not avoid a policy on the building in which the saloon is situated nor a policy which covers personal property therein.

**In Absence of Intent to Protect Illegal Sales.** — *Insurance Co. of North America v. Evans*, 64 Kan. 770.

**10. House Used for Prostitution.** — See Na-

tional F. Ins. Co. v. U. S. Building, etc., Assoc., (Ky. 1900) 54 S. W. Rep. 714, in which case it was held that the policy was not avoided by the fact that the property was used for purposes of prostitution where the agent had knowledge of the character of the use at the time when the policy was issued and the insured was guilty of no fraud or misrepresentation. *Compare Bruneau v. Laliberté*, 19 Quebec Super. Ct. 425.

**11.** See *Allen v. Home Ins. Co.*, 133 Cal. 29.

**12. Illegal Acts of Tenant.** — *Allen v. Home Ins. Co.*, 133 Cal. 29.

**13.** See *Thuringia Ins. Co. v. Norwaysz*, 104 Ill. App. 390, *affirmed* 204 Ill. 334, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298.

**299. 2. Acceptance of Premium After Notice a Waiver.** — *Colonial Mut. F. Ins. Co. v. Ellinger*, 112 Ill. App. 302.

**7. Waiver by Notice to Agent.** — *Improved Match Co. v. Michigan Mut. F. Ins. Co.*, 122 Mich. 256.

**Provision Waived by Permit from Agent.** — *Strause v. Palatine Ins. Co.*, 128 N. Car. 64.

**300. 1a. Restrictions as to Fuel.** — *Thurston v. Burnett, etc., Farmers' Mut. F. Ins. Co.*, 98 Wis. 476.

**Operating Cotton Gin by Steam.** — *Edwards v. Planters, etc., Mut. F. Assoc.*, 111 Ga. 449.

**As to Prohibitions Against the Use of "Steam Farm Engines,"** and what is included in that term, see *Wilson v. Union Mut. F. Ins. Co.*, 77 Vt. 28.

**7. Purpose to Discourage Fraud and Encourage Care.** — *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, *affirmed* 39 N. Y. App. Div. 639.

**13. Migner v. St. Lawrence F. Ins. Co.**, 10 Quebec K. B. 122; *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565; *Nebraska Mercantile Mut. Ins. Co. v. Sasek*, 64 Neb. 17; *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370; *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. Div. 113; *Nestler v. Germania F. Ins. Co.*, (N. Y. City Ct. Tr. T.) 44 Misc. (N. Y.) 97, *affirmed* (Supm. Ct. App. T.) 91 N. Y. Supp. 29; *Arnold v. St. Paul F. & M. Ins. Co.*, 106 Tenn. 529, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *Teutonia Ins. Co. v. Bussell*, (Tenn. Ch. 1897) 48 S. W. Rep. 703.

**302. 4. Where the Policy Authorizes Total**



**305.** (c) *Meaning* — *aa. GENERALLY* — *Effect of Clause Permitting Other Insurance and Providing for Contribution.* — See note 1.

**306.** (a) *Effect of Procuring Valid Other Insurance.* — See note 3.

**307.** (3) *Third Stage — Other Insurance, "Valid or Invalid," Forbidden* — (b) *Validity.* — See notes 2, 4.

**308.** c. *CHARACTER AND ESSENTIALS OF OTHER INSURANCE* — (1) *In General — Definition.* — See note 1.

**309.** (2) *Other Insurance Must Constitute Indemnity — A Mere Application.* — See note 4.

(3) *Time of Issuance.* — See note 5.

(4) *Concurrent Operation.* — See note 8.

**310.** See note 5.

(5) *Identity of Subject-matter.* — See note 7.

*Subject-matter Partially the Same.* — See note 11.

*Insurance to Three-fourths of the Value of the insured property the provision against other insurance is not broken by insurance not exceeding the limit fixed.* *Bush v. Missouri Town Mut. Ins. Co.*, 85 Mo. App. 155; *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666.

**302.** 7. *Provisions of Wisconsin Standard Policy Construed.* — See *Stephenson v. Agricultural Ins. Co.*, 116 Wis. 277.

**305.** 1. *The Fact that the Policy Contains the "Eighty per Cent." Clause does not authorize subsequent insurance without the insurer's consent or waive a breach of the provision as to previously secured insurance in excess of the stipulated percentage.* *Nestler v. Germania F. Ins. Co.*, (N. Y. City Ct. Tr. T.) 44 Misc. (N. Y.) 97, *affirmed* (Supm. Ct. App. T.) 91 N. Y. Supp. 29. Nor does such clause, stamped on the face of the policy, supersede provisions in the policy against further insurance, although the policy itself is for an amount in excess of the stated percentage. *Cutler v. Royal Ins. Co.*, 70 Conn. 566.

*Concurrent Insurance on a Part of the property, when authorized by the policy, will not be treated as being on the whole property, in pro-rating the loss between the insurers.* *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445.

**306.** 3. *Valid Other Insurance Constitutes Breach.* — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.

**307.** 2. *Clause Valid and Reasonable* — *Arkansas.* — *Planters' Mut. Ins. Co. v. Green*, 72 Ark. 305.

*Connecticut.* — *Cutler v. Royal Ins. Co.*, 70 Conn. 566.

*Illinois.* — *Hartford F. Ins. Co. v. Peterson*, 209 Ill. 112.

*Indiana.* — *Home Ins. Co. v. Overturf*, (Ind. App. 1905) 74 N. E. Rep. 47.

*Louisiana.* — *Monroe Bldg., etc., Assoc. v. Liverpool, etc., Ins. Co.*, 50 La. Ann. 1243.

*Maine.* — *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39.

*Missouri.* — *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666; *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244.

*South Carolina.* — *Young v. St. Paul F. & M. Ins. Co.*, 68 S. Car. 387.

*Tennessee.* — *Arnold v. St. Paul F. & M. Ins. Co.*, 106 Tenn. 529.

*Texas.* — *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446; *Works v. Springfield F. & M.*

*Ins. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 42.

*Policy Voidable, Not Void.* — *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395. See also *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.*, (Mich. 1904) 100 N. W. Rep. 442.

**4.** *Clause Not Enforced.* — See *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353.

Under the *Iowa* statute the other insurance must be valid in order to effect a forfeiture. *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa 547.

**308.** 1. *Other Insurance Defined.* — See *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 80 Am. St. Rep. 311.

*Double Insurance Defined.* — "Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk, and the same interest." *Meigs v. Insurance Co. of North America*, 205 Pa. St. 378.

*Concurrent and Double Insurance Distinguished.* — *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580.

"*Other Concurrent Insurance.*" — *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, *affirmed* 39 N. Y. App. Div. 639.

**309.** 4. *Application Not a Breach.* — *Cutler v. Royal Ins. Co.*, 70 Conn. 566.

**5.** *Construction of Terms.* — *Lippman v. Aetna Ins. Co.*, 120 Ga. 247; *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa 65; *Migner v. St. Lawrence F. Ins. Co.*, 10 Quebec K. B. 122.

*Provision Referring to Subsequent Insurance.* — *State v. Busse*, (Iowa 1904) 100 N. W. Rep. 536; *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa 547.

**8.** *Mode of Determining Whether Concurrent Insurance Prior or Subsequent.* — *London Assur. Corp. v. Paterson*, 106 Ga. 538.

*Renewal Policy.* — *Liverpool, etc., Ins. Co. v. Agricultural Sav., etc., Co.*, 33 Can. Sup. Ct. 94.

**310.** 5. *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 310.

**7.** *Same Subject-matter Essential.* — *Home Ins. Co. v. Overturf*, (Ind. App. 1905) 74 N. E. Rep. 47; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366.

*Goods Purchased Subsequently.* — *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565.

**11.** *Partial Identity Is Breach as to All.* —

**311.** See note 1.(7) *Identity of Interest* — (a) *General Rule*. — See note 4.(b) *What Interests Are Distinct*. — See note 5.**312.** See note 8.**313.** (9) *Knowledge of Insured*. — See note 7.**314.** See note 1.*d. CONSENT AND WAIVER* — (1) *Notice* — (a) *In General*. — See

notes 3, 5.

**315.** (c) *Parties to the Notice*. — See note 5.(2) *Express Consent* — (a) *In General*. — See note 9.**316.** (b) *By Whom Given*. — See notes 2, 3, 4, 5.**317.** *Waiver and Estoppel*. — See note 3.(c) *Contribution and Proportionate Clauses*. — See notes 5, 7.

*Meigs v. London Assur. Co.*, 126 Fed. Rep. 781, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 310. See also *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445.

**Exact Concurrence as to Subject and Time Not Essential.** — *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 80 Am. St. Rep. 311.

**311. 1. Pennsylvania Rule.** — *Meigs v. Insurance Co. of North America*, 205 Pa. St. 378.

**4. Identity of Interest Essential.** — *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231.

**5. Mortgagor and Mortgagee.** — *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231.

**It Is Otherwise**, however, where the policy provides that notice must be given whether the insurance is concurrent or not, and insurance effected by the mortgagee will render the mortgagor's policy void. *Perry v. Liverpool, etc., Ins. Co.*, 34 N. Bruns. 380.

**312. 8. A Vendor and a Vendee.** — *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353.

**313. 7. Knowledge on Part of Insured Essential.** — *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366.

**The Transfer of an Existing Policy** from the mortgagee to the vendee in possession under a contract of purchase, without the latter's knowledge, does not constitute other insurance. *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353.

**314. 1. Knowledge and Consent Essential.** — *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366.

**Where Want of Knowledge Is Due to Negligence** the policy is forfeited. *Arnold v. St. Paul F. & M. Ins. Co.*, 106 Tenn. 529.

**Ratification of Unauthorized Act by Acceptance of Benefit.** — *German Ins. Co. v. Emporia Mut. Loan, etc., Assoc.*, 9 Kan. App. 803.

**3. Proof of Mailing Notice Not Proof of Receipt by Insurer.** — *McSparan v. Southern Mut. F. Ins. Co.*, 193 Pa. St. 184, 44 W. N. C. (Pa.) 533.

**5. Notice of Future Intent Inadequate.** — *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446.

**315. 5. Notice to Whom.** — *Magoun v. Fire-*

*man's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370; *Kalmutz v. Northern Mut. Ins. Co.*, 186 Pa. St. 571.

**Notice to Agent Sufficient.** — *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa 65; *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395; *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441. See also *Power v. Monitor Ins. Co.*, 121 Mich. 364.

**Notice to Soliciting Agent Insufficient.** — *Tabor v. Rockingham Farmers' Mut. F. Ins. Co.*, 69 N. H. 666.

**9. Duty of Insurer to Issue Policy Authorizing Other Insurance.** — See *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624.

**What Constitutes Sufficient Consent.** — See *L'Engle v. Scottish Union, etc., Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

**Permit in Policy for "Other Concurrent Insurance" Does Not Authorize Additional Insurance.** — *Senor v. Western Millers' Mut. F. Ins. Co.*, 181 Mo. 104.

**Reformation of Policy from Which Permit Has Been Omitted Through Mistake.** — See *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377.

**316. 2. A Secretary or Other Officer of the Company**, empowered to do so, may waive the condition by an indorsement on the policy, and thereby revive and continue the policy in force. *Nebraska Mercantile Mut. Ins. Co. v. Sasek*, 64 Neb. 17.

**3. Agent Having Power to Permit Other Insurance May Waive Provision.** — *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 82.

**Power of Agent a Question of Fact.** — *Cave v. Home Ins. Co.*, 57 S. Car. 347.

**4. Agency Restricted in Policy.** — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.

**5. Soliciting Agent Without Power to Give Consent.** — *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781; *Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co.*, 123 Ala. 667.

**317. 3. The Clause Will Be Strictly Enforced.** — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.

**5. Clause Limiting Liability to Proportionate Contribution.** — *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781.

**7. See Nestler v. Germania F. Ins. Co.**, (N. Y. City Ct. Tr. T.) 44 Misc. (N. Y.) 97, affirmed (Supm. Ct. App. T.) 91 N. Y. Supp. 29.

**318.** (3) *Implied Consent — Waiver and Estoppel — (a) In General.* — See notes 3, 5, 6, 7, 8.

**319.** (b) *Principles Governing — aa. WAIVER OF PRIOR OTHER INSURANCE BY PRIOR OR CONTEMPORANEOUS ACT.* — See note 1.

*bb. PROMISE TO CONSENT IN THE FUTURE NO WAIVER.* — See note 2.

**320.** *cc. SUBSEQUENT OTHER INSURANCE AND AFFIRMATIVE ACTS.* — See notes 1, 2, 3.

*dd. SUBSEQUENT OTHER INSURANCE MET BY SILENCE.* — See note 9.

**318. 3. Other-insurance Clause Is for Benefit of Insurer.** — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361; *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62; *Philadelphia Underwriters' Ins. Co. v. Bigelow*, (Fla. 1904) 37 So. Rep. 210; *Mattingly v. Springfield F. & M. Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318. See also *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39; *Kalmutz v. Northern Mut. Ins. Co.*, 186 Pa. St. 571.

**Waiver by Agent.** — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361.

5. See *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361; *McSparran v. Southern Mut. Ins. Co.*, 193 Pa. St. 184.

**Waiver Must Comply with Requirements of Policy.** — *Philadelphia Underwriters' Ins. Co. v. Bigelow*, (Fla. 1904) 37 So. Rep. 210.

**Oral Promise of Agent Not Binding.** — *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. Div. 113.

**6. Clause Stipulating Against Oral Waiver May Itself Be Waived.** — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62; *Phenix Ins. Co. v. Grove*, 215 Ill. 299; *Mattingly v. Springfield F. & M. Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318.

**7. Actual Knowledge.** — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.*, (Mich. 1904) 100 N. W. Rep. 442.

**8. Implied Knowledge.** — See *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361.

**319. 1. Issuance with Knowledge — United States.** — *McElroy v. British America Assur. Co.*, (C. C. A.) 94 Fed. Rep. 990.

*Arkansas.* — *German-American Ins. Co. v. Harper*, (Ark. 1905) 86 S. W. Rep. 817.

*Florida.* — *Philadelphia Underwriters' Ins. Co. v. Bigelow*, (Fla. 1904) 37 So. Rep. 210.

*Georgia.* — *Swain v. Macon F. Ins. Co.*, 102 Ga. 96.

*Illinois.* — *Rockford Ins. Co. v. Cline*, 72 Ill. App. 495.

*Maine.* — *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39.

*Mississippi.* — *Western Assur. Co. v. Phelps*, 77 Miss. 625.

*Missouri.* — *Montgomery v. Lebanon Town Mut. F. Ins. Co.*, 80 Mo. App. 500; *Turner v. Providence-Washington Ins. Co.*, 86 Mo. App. 387; *Wolf v. Dwelling House Ins. Co.*, 86 Mo. App. 580.

*New Hampshire.* — *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441.

*New York.* — *Lewis v. Guardian F., etc., Assur. Co.*, 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557; *Lewis v. Guardian F., etc., Assur. Co.*, 181 N. Y. 392, 106 Am. St. Rep. 557.

*Ohio.* — *Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739.

*South Carolina.* — *Schroeder v. Springfield F. & M. Ins. Co.*, 51 S. Car. 180; *Gandy v. Orient Ins. Co.*, 52 S. Car. 224; *McBryde v. South Carolina Mut. Ins. Co.*, 55 S. Car. 589, 74 Am. St. Rep. 769.

*Texas.* — *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446.

*Utah.* — *Osborne v. Phenix Ins. Co.*, 23 Utah 428.

*Canada.* — *Manitoba Assur. Co. v. Whitla*, 34 Can. Sup. Ct. 191.

**Renewal Policy.** — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62; *Stage v. Home Ins. Co.*, 76 N. Y. App. Div. 509.

**Sufficiency of Notice.** — See *Gandy v. Orient Ins. Co.*, 52 S. Car. 224; *Philadelphia Underwriters' Ins. Co. v. Bigelow*, (Fla. 1904) 37 So. Rep. 210.

**Knowledge of President of Insurer Notice to Insurer.** — *Brumbaugh v. Home Mut. F. Ins. Co.*, 20 Pa. Super. Ct. 144.

**Knowledge of Agent Notices to Insurer.** — *McElroy v. British America Assur. Co.*, (C. C. A.) 94 Fed. Rep. 990; *Palatine Ins. Co. v. McElroy*, 100 Fed. Rep. 391, 40 C. C. A. 441; *Stage v. Home Ins. Co.*, 76 N. Y. App. Div. 509; *Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739. *Compare* *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 361.

**Notice to One Member of a Firm of Agents** is sufficient to bind the company though not imparted by him to the company or to the other agent who secured the insurance. *Lewis v. Guardian F., etc., Assur. Co.*, 181 N. Y. 392, 106 Am. St. Rep. 557.

**When Notice to Agent Insufficient.** — *Wolf v. Dwelling House Ins. Co.*, 75 Mo. App. 337.

**2. Promise to Consent in Future.** — *United Firemen's Ins. Co. v. Thomas*, 82 Fed. Rep. 406, 53 U. S. App. 517.

**320. 1. Recognition of Policy After Knowledge of Other Insurance.** — *Farmers' Mut. Ins. Co. v. Home F. Ins. Co.*, 54 Neb. 740; *Bowman v. Mutual F. Ins. Co.*, 203 Pa. St. 150.

**Retention of Premium and Inspection of Damage Without Expense to Insured Not Waiver.** — *Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co.*, 123 Ala. 667.

**2. Both Policies by Same Agent.** — *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.*, (Mich. 1904) 100 N. W. Rep. 442.

**3. Collection of Premium After Breach.** — *Kalmutz v. Northern Mut. Ins. Co.*, 186 Pa. St. 571.

**Waiver a Question of Fact.** — *Lutz v. Anchor F. Ins. Co.*, 120 Iowa 136, 98 Am. St. Rep. 349.

**9. Silence After Breach Is No Waiver.** — *German Ins. Co. v. Emporia Mut. Loan, etc., Assoc.*, 9 Kan. App. 803; *McSparran v. Southern Mut. Ins. Co.*, 193 Pa. St. 184. See also *Lewis v. Guardian F., etc., Assur. Co.*, 181 N. Y.

**321.** See note 1.

*cc.* AFFIRMATIVE ACT AFTER LOSS. — See notes 2, 4.

**322.** See note 1.

[5. Necessity that Loss Arise During or by Reason of Breach. — See note 1*a.*]

[6. Condition Against Release from Liability for Loss Caused by Fire. — See note 1*b.*]

**V. LOSS AND ADJUSTMENT** — 1. Duty of Insured at Fire — *b.* FORM AND VALIDITY. — See note 4.

**323.** 2. Extent of Loss — *a.* GENERALLY. — See note 3.

*b.* WHEN LOSS IS TOTAL. — See note 4.

Where All the Combustible Material Has Been Destroyed. — See note 5.

**324.** Where Rebuilding Not Permitted. — See note 1.

**325.** As to What Constitutes a Destruction of the Building, as Such. — See note 1.

392, 106 Am. St. Rep. 557. Compare Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co., 123 Ala. 667; Home F. Ins. Co. v. Bernstein, 55 Neb. 260.

**321.** 1. Silence Is Waiver Where There Is a Duty to Speak — *Alabama.* — Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co., 123 Ala. 667.

*Arkansas.* — German-American Ins. Co. v. Harper, (Ark. 1905) 86 S. W. Rep. 817.

*Illinois.* — Phenix Ins. Co. v. Grove, 215 Ill. 299.

*Iowa.* — Glasscock v. Des Moines Ins. Co., 125 Iowa 170.

*Kansas.* — Swedish American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382.

*Michigan.* — Rauch v. Michigan Millers' Mut. F. Ins. Co., 131 Mich. 281.

*Missouri.* — Thompson v. Traders' Ins. Co., 169 Mo. 12.

*Nebraska.* — Slobodisky v. Phenix Ins. Co., 52 Neb. 395. See also Home F. Ins. Co. v. Bernstein, 55 Neb. 260.

*Pennsylvania.* — Kalmutz v. Northern Mut. Ins. Co., 186 Pa. St. 571. See also McSparran v. Southern Mut. Ins. Co., 193 Pa. St. 184, 44 W. N. C. (Pa.) 533.

*Virginia.* — Mutual F. Ins. Co. v. Ward, 95 Va. 231.

**Local Agent Cannot Waive Forfeiture.** — Lippman v. Aetna Ins. Co., 120 Ga. 247.

**Rule Applies to Renewed or Substituted Policies.** — Lewis v. Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557.

**Insurer Estopped by Notice to Agent.** — Aetna Ins. Co. v. Eastman, (Tex. Civ. App. 1904) 80 S. W. Rep. 255.

**2. Affirmative Acts After Loss.** — Commercial Assur. Co. v. New Jersey Rubber Co., 61 N. J. Eq. 446.

**Condition Not Waived by Delivery of Policy After Loss.** — Young v. St. Paul F. & M. Ins. Co., 68 S. Car. 389.

**4. Failure to Return Premium After Notice a Waiver.** — Mississippi Home Ins. Co. v. Dobbins, 81 Miss. 623.

**Waiver a Question of Fact.** — Lutz v. Anchor F. Ins. Co., 120 Iowa 136, 98 Am. St. Rep. 349.

**322.** 1. Affirmative Acts After Loss No Waiver When Not Inducing Detriment. — Young v. St. Paul F. & M. Ins. Co., 68 S. Car. 387.

*1a.* Time and Cause of Loss — *Michigan Statute.*

McGannon v. Michigan Millers' Mut. F. Ins. Co., 127 Mich. 636, 89 Am. St. Rep. 501.

**1*b.* Release of Third Persons from Liability.** — A provision in the policy that it shall be void if the insured shall make or have any contract or understanding whereby any person or corporation cannot be liable for any act or neglect in causing the fire is valid and will be enforced. Kennedy v. Iowa State Ins. Co., 119 Iowa 29.

**4.** See Boak Fish Co. v. Manchester F. Assur. Co., 84 Minn. 419.

**Care of Goods After Fire.** — Thornton v. Security Ins. Co., 117 Fed. Rep. 773.

**323.** 3. Total Loss. — See Hartford F. Ins. Co. v. Bourbon County Ct., 115 Ky. 109.

**Total or Partial Loss a Question of Fact.** — Liverpool, etc., Ins. Co. v. Heckman, 64 Kan. 388; Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608.

**4. Meaning of "Total Loss."** — Liverpool, etc., Ins. Co. v. Heckman, 64 Kan. 388; Palatine Ins. Co. v. Weiss, 109 Ky. 464; Moore v. Susquehanna Mut. F. Ins. Co., 196 Pa. St. 30.

*Under Minnesota Statute.* — See Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48; Poppitz v. German Ins. Co., 85 Minn. 118.

*Under Ohio Statute.* — Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608.

*Under Texas Statute.* — See Murphy v. American Cent. Ins. Co., (Tex. Civ. App. 1899) 54 S. W. Rep. 407.

**5. Total Loss Where All Combustible Materials Destroyed.** — Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608. See also American Cent. Ins. Co. v. Murphy, (Tex. Civ. App. 1901) 61 S. W. Rep. 956.

**324.** 1. Measure of Recovery Where Rebuilding Is Prohibited. — Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 81 Am. St. Rep. 286. See further *infra*, this title. **379.** 4.

**325.** 1. When Building as Such Destroyed. — Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48; Poppitz v. German Ins. Co., 85 Minn. 118. See also Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608.

**Illustration.** — There can be no total loss of a building so long as the remnant of the structure standing is reasonably adapted for use as a basis on which to restore the building to the

- 325.** Basis of Interpretation. — See note 2.  
**326.** 3. Parties to the Adjustment — *b.* AGENTS OF INSURER. — See note 5.  
**327.** 4. Notices and Proofs of Loss — *a.* IN GENERAL. — See note 1.  
*b.* NECESSITY OF GIVING — (1) *General Rule.* — See notes 2, 5.  
**328.** (2) *When Not Necessary* — (a) *No Policy Issued.* — See note 2.  
 (d) *Other Exceptions.* — See note 6.  
*c.* TIME OF FURNISHING — (1) *Effect of Not Furnishing in Time Limited.* — See notes 7, 8, 9.  
**329.** See notes 1, 2, 3.

condition in which it was before the injury. *Palatine Ins. Co. v. Weiss*, 109 Ky. 464. See also *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360.

Insurance on "Use and Occupancy" — When Loss Is Total. — See *Chatfield v. Aetna Ins. Co.*, 71 N. Y. App. Div. 164.

Value of Foundation to Be Deducted. — *Burkett v. Georgia Home Ins. Co.*, 105 Tenn. 548.

**325.** 2. Purpose of Statute. — See *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39.

**326.** 5. Where the Insurer Has Knowledge that a person has been appointed by its agent to adjust a loss, and that he acted with others interested in fixing the loss, it cannot thereafter object on the ground that the adjuster so appointed was without authority. *Schlesinger v. Columbian F. Ins. Co.*, 37 N. Y. App. Div. 531.

**327.** 1. Object of Notice. — *Fournier v. German-American Ins. Co.*, 23 R. I. 36. See also *Mason v. St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 83 Am. St. Rep. 433.

Purpose of Requirement for Immediate Proof. — *Fletcher v. German-American Ins. Co.*, 79 Minn. 337.

2. Provisions Requiring Notice, etc., Enforced — *Florida.* — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

*Indiana.* — *Hanover F. Ins. Co. v. Johnson*, 26 Ind. App. 122.

*Iowa.* — *Erway v. Philadelphia F. Assoc.*, 119 Iowa 304; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 80 Am. St. Rep. 311.

*Kentucky.* — *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Fallon v. Farmers' Home Mut. Aid Assoc.*, 66 S. W. Rep. 1029, 23 Ky. L. Rep. 2207.

*Maryland.* — *Pentz v. Pennsylvania F. Ins. Co.*, 92 Md. 444.

*Massachusetts.* — *Boruszewski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589.

*Minnesota.* — *Mason v. St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 83 Am. St. Rep. 433.

*Missouri.* — *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394.

*New York.* — *National Wall Paper Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 60 N. Y. App. Div. 222; *Riker v. Fire Ins. Co. of North America*, 90 N. Y. App. Div. 391; *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. Div. 113; *Hicks v. British America Assur. Co.*, 162 N. Y. 284.

*Ohio.* — *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667; *Billings v. National Ins. Co.*, 14 Ohio Dec. 387.

*Rhode Island.* — *Fournier v. German American Ins. Co.*, 23 R. I. 36.

*Texas.* — *St. Paul F. & M. Ins. Co. v. Hodge*,

30 Tex. Civ. App. 257; *Texas Home Mut. F. Ins. Co. v. Bowlin*, (Tex. Civ. App. 1902) 70 S. W. Rep. 797.

*West Virginia.* — *Munson v. German-American F. Ins. Co.*, 55 W. Va. 423.

5. Loss of Policy No Excuse. — *Munson v. German-American F. Ins. Co.*, 55 W. Va. 423.

**328.** 2. Contrary Rule. — *Hicks v. British America Assur. Co.*, 162 N. Y. 284.

6. Proof of Loss Not Necessary under Texas Statute Making Policy a Liquidated Demand. — *London, etc., F. Ins. Co. v. Schwulst*, (Tex. Civ. App. 1898) 46 S. W. Rep. 89.

7. Conditions Precedent — *United States.* — *Missouri Pac. R. Co. v. Western Assur. Co.*, 129 Fed. Rep. 610.

• *Arkansas.* — *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484.

*California.* — *White v. Home Mut. Ins. Co.*, 128 Cal. 131.

*Georgia.* — *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 78 Am. St. Rep. 124.

*Indiana.* — *Hanover F. Ins. Co. v. Johnson*, 26 Ind. App. 122.

*Kansas.* — *State Ins. Co. v. School Dist. No. 19*, 66 Kan. 77; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, affirmed 62 Kan. 867, 63 Pac. Rep. 1126.

*Maryland.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Leftwich v. Royal Ins. Co.*, 91 Md. 596.

*Nebraska.* — *Northern Assur. Co. v. Hanna*, 60 Neb. 29, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328.

*New York.* — *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Huse, etc., Ice, etc., Co. v. Wieler*, (Supm. Ct. App. T.) 86 N. Y. Supp. 24; *Lake Geneva Ice Co. v. Salvage*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 212.

*North Carolina.* — *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407.

8. Forfeiture Provided. — *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; *St. Paul F. & M. Ins. Co. v. Owens*, 69 Kan. 602; *Northern Assur. Co. v. Hanna*, 60 Neb. 29, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407.

9. *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407. See also *Welch v. Fire Assoc.*, 120 Wis. 456.

**329.** 1. Reasonable Time. — *McNeess v. Southern Ins. Co.*, 69 Mo. App. 232.

"Immediate" Notice Required — What Consti-

**329.** Discussion of Cases as to Whether Forfeiture Results from Failure. — See note 4. Where the Time Within Which Suit Is to Be Brought Is Limited. — See note 7.

**330.** (2) *Time of Sending or Time of Receipt.* — See note 1.

(3) *Construction of Conditions as to Time of Notice or Proofs.* — See notes 5, 6.

What Is Reasonable Time. — See note 7.

**331.** Excuses. — See notes 1, 8.

**332.** d. WHO MAY FURNISH — (1) *Not Strangers.* — See note 1.

(2) *Agent of Insured.* — See notes 2, 4.

**333.** (6) *Representatives of the Insured.* — See notes 3, 4, 5.

tutes Unreasonable Delay. — See *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394.

**329.** 2. Forfeiture Not Declared — Failure Merely Postpones Payment — *Alabama.* — *Taber v. Royal Ins. Co.*, 124 Ala. 681.

*Arkansas.* — *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484.

*Florida.* — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228; *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

*Georgia.* — *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216.

*Kansas.* — *St. Paul F. & M. Ins. Co. v. Owens*, 69 Kan. 602.

*Minnesota.* — *Mason v. St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 83 Am. St. Rep. 433.

*Missouri.* — *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329.

*Nebraska.* — *Northern Assur. Co. v. Hanna*, 60 Neb. 29.

*North Carolina.* — *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407.

*Ohio.* — *Eureka F. & M. Ins. Co. v. Gray*, 24 Ohio Cir. Ct. 268.

*Tennessee.* — *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

*West Virginia.* — *Munson v. German-American F. Ins. Co.*, 55 W. Va. 423, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329.

*Wisconsin.* — *Welch v. Philadelphia F. Assoc.*, 120 Wis. 456.

3. *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484; *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916; *Munson v. German-American F. Ins. Co.*, 55 W. Va. 423, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329. See also *Orient Ins. Co. v. Clark*, (Ky. 1900) 59 S. W. Rep. 863.

4. *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 329.

7. Time Within Which Suit to Be Brought Limited. — *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484.

Time Reckoned from Termination of Fire. — *National Wall Paper Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 175 N. Y. 226.

**330.** 1. Time of Mailing Considered. — *Contra*, *Peabody v. Satterlee*, 166 N. Y. 174; *Lake Geneva Ice Co. v. Selva*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 212; *Huse, etc., Ice, etc., Co. v. Wielar*, (Supm. Ct. App. T.) 86 N. Y. Supp. 24.

*Manner of Computing Time.* — See *McKibban v. Des Moines Ins. Co.*, 114 Iowa 41.

5. Reasonable Time. — *Taber v. Royal Ins. Co.*, 124 Ala. 681; *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595, 73 Am. St. Rep. 707, affirming 28 N. Y. App. Div. 213; *Eureka F. & M. Ins. Co. v. Gray*, 24 Ohio Cir. Ct. 268; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

6. Various Phrases Held to Require Only Due Diligence. — See generally *Dezell v. Fidelity, etc., Co.*, 176 Mo. 253, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 330; *Loomis v. Lewis*, 62 N. Y. App. Div. 433.

*Immediately.* — *Taber v. Royal Ins. Co.*, 124 Ala. 681; *Hanover F. Ins. Co. v. Johnson*, 26 Ind. App. 122; *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595, 73 Am. St. Rep. 707.

*Fortwith.* — *Cook v. North British, etc., Ins. Co.*, 183 Mass. 50; *Rines v. German Ins. Co.*, 78 Minn. 46; *Fletcher v. German-American Ins. Co.*, 79 Minn. 337; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

*As Soon as Possible.* — *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368.

7. Reasonable Time — Question for Jury. — *Fletcher v. German-American Ins. Co.*, 79 Minn. 337; *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595, 73 Am. St. Rep. 707, affirming 28 N. Y. App. Div. 213; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368.

**331.** 1. Various Excuses. — *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595, 73 Am. St. Rep. 707, affirming 28 N. Y. App. Div. 213.

8. Unreasonable Delays. — *Parker v. Middlesex Mut. Assur. Co.*, 179 Mass. 528; *Cook v. North British, etc., Ins. Co.*, 183 Mass. 50, 181 Mass. 101; *Lake Geneva Ice Co. v. Selva*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 212.

**332.** 1. Burns v. Michigan Manufacturers' Mut. F. Ins. Co., 130 Mich. 561, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

Proof by Son of Insured Having Power of Attorney Sufficient. — *Western Assur. Co. v. Pharaud*, 11 Québec K. B. 144.

2. Insured Absent. — *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

Insured Critically Ill. — *Burns v. Michigan Manufacturers' Mut. F. Ins. Co.*, 130 Mich. 561, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332, and approving the whole text paragraph.

4. Facts Known Only to Agent. — *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 332.

**333.** 3. Receiver of Absconded Bankrupt May Furnish. — *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804.

4. Assignee in Bankruptcy May Make Proofs. —

- 333.** (7) *Mortgagees and Payees.* — See note 11.  
 (8) *Creditors.* — See note 13.
- 334.** *e.* TO WHOM AND HOW GIVEN — (1) *Notice.* — See note 5.  
*And Oral Notice Is Sufficient.* — See note 7.  
*Notice to Agents.* — See note 11.
- 335.** (2) *Proofs.* — See note 2.  
*f.* FORM AND CONTENTS OF NOTICES AND PROOFS — (1) *Generally.* — See note 3.  
 (a) *Form of Notice.* — See note 5.
- 336.** (c) *Substantial Compliance Sufficient.* — See note 1.  
*Formal Defects and Irregularities.* — See note 4.
- 337.** (d) *Particular Account.* — See note 2.  
 (e) *Cash Value of Each Item.* — See note 6.  
 (f) *Total Loss.* — See note 13.
- 338.** See notes 1, 2.

Fuller v. New York F. Ins. Co., (Mass. 1903) 67 N. E. Rep. 879.

*Equitable Assignee.* — Stainer v. Royal Ins. Co., 13 Pa. Super. Ct. 25.

**333. 5. Administratrix.** — See Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333.

**11.** Glens Falls Ins. Co. v. Porter, 44 Fla. 568. See also Queen Ins. Co. v. Dearborn Sav., etc., Assoc., 75 Ill. App. 371, affirmed 175 Ill. 115.

**13. Attaching Creditor.** — Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 333.

**334. 5. Requirement of Notice in Writing Not Satisfied by Parol.** — See Ervay v. Philadelphia F. Assoc., 119 Iowa 304.

*Notice by Mail.* — Munson v. German-American F. Ins. Co., 55 W. Va. 423.

**7. Insurer Waives Written Notice by Acting on Verbal Notice.** — Petit v. German Ins. Co., 98 Fed. Rep. 800.

**11. To Agent Who Countersigns Policy.** — Jacoby v. North British, etc., Ins. Co., 10 Pa. Super. Ct. 366 (under statute).

**335. 2. Notice to Company Assuming Insurer's Liabilities Sufficient.** — Whitney v. American Ins. Co., (Cal. 1899) 56 Pac. Rep. 50, affirmed 127 Cal. 464.

*Authority of Agent to Receive Proofs a Question of Fact.* — Schloss v. Westchester F. Ins. Co., 141 Ala. 566.

*Service of Preliminary Proofs on the Countersigning Officer* is sufficient under the Pennsylvania statute. Jacoby v. North British, etc., Ins. Co., 10 Pa. Super. Ct. 366.

**3. Form and Contents Must Conform to Requirements.** — Ervay v. Philadelphia F. Assoc., 119 Iowa 304; Boruszewski v. Middlesex Mut. Assur. Co., 186 Mass. 589; Ulysses Elgin Butter Co. v. Home Ins. Co., 20 Pa. Super. Ct. 320; Ulysses Elgin Butter Co. v. Hartford F. Ins. Co., 20 Pa. Super. Ct. 384; St. Paul F. & M. Ins. Co. v. Hodge, 30 Tex. Civ. App. 257. See also Clemens v. American F. Ins. Co., 70 N. Y. App. Div. 435.

*Where the Form of Notice Is Provided for by Statute*, the form so prescribed is sufficient, although it is not in compliance with that provided for by the policy. Westenhaber v. German American Ins. Co., 113 Iowa 726.

**5. Form of Notice Not Strictly Enforced.** —

Hartford F. Ins. Co. v. Redding, (Fla. 1904) 37 So. Rep. 62.

**336. 1. Form of Proofs—Substantial Compliance Enough** — Delaware. — Schilansky v. Merchants, etc., F. Ins. Co., 4 Penn. (Del.) 293.  
 Florida. — Hartford F. Ins. Co. v. Redding, (Fla. 1904) 37 So. Rep. 62.

Georgia. — Phenix Ins. Co. v. Hart, 112 Ga. 765.

Hawaii. — Merricourt v. Norwalk F. Ins. Co., 13 Hawaii 218.

Indiana. — Ft. Wayne Ins. Co. v. Irwin, 23 Ind. App. 53.

Iowa. — Parks v. Anchor Mut. F. Ins. Co., 106 Iowa 402.

Kansas. — Westchester F. Ins. Co. v. Coverdale, 9 Kan. App. 651, affirmed 62 Kan. 867, 63 Pac. Rep. 1126.

Maryland. — Pentz v. Pennsylvania F. Ins. Co., 92 Md. 444.

Michigan. — Wicking v. Citizens' Mut. F. Ins. Co., 118 Mich. 640.

Minnesota. — De Raiche v. Liverpool, etc., Ins. Co., 83 Minn. 398, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 336.

Missouri. — Thompson v. Traders' Ins. Co., 169 Mo. 12; Swofford Bros. Dry Goods Co. v. American Cent. Ins. Co., 76 Mo. App. 27.

New Mexico. — Robinson v. Palatine Ins. Co., 11 N. Mex. 162, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 336.

Virginia. — Georgia Home Ins. Co. v. Goode, 95 Va. 751.

**4. Formal Defects Overlooked.** — Thompson v. Traders' Ins. Co., 169 Mo. 12.

**337. 2. Under the Minnesota Statute** the presentation of a specific claim is not essential. De Raiche v. Liverpool, etc., Ins. Co., 83 Minn. 398.

**6. Cash Value of Items Required.** — Schilansky v. Merchants, etc., F. Ins. Co., 4 Penn. (Del.) 293; Thomas v. Western Ins. Co., 5 Pa. Super. Ct. 383. See also De Raiche v. Liverpool, etc., Ins. Co., 83 Minn. 398 (under statute); National Ins. Co. v. Strong, 25 Ohio Cir. Ct. 101.

**13. Where Property Is Totally Destroyed.** — Parks v. Anchor Mut. F. Ins. Co., 106 Iowa 402; Improved Match Co. v. Michigan Mut. F. Ins. Co., 122 Mich. 256. See also National Ins. Co. v. Strong, 25 Ohio Cir. Ct. 101.

**338. 1. Minneapolis F. & M. Mut. Ins. Co. v. Fultz**, 72 Ark. 365; Davis v. Fireman's Fund

- 338.** (g) Title, Interest, Etc. — See note 4.  
 (i) Cause and Circumstances of Loss. — See note 9.  
 (j) Other Insurance. — See note 11.  
**339.** (2) Effect of Statements or Omissions. — See note 3.  
 (3) Objections — Waiver of Defects. — See notes 9, 10.  
**340.** See note 2.  
**341.** See notes 1, 2.  
**342.** See notes 1, 2, 3, 4, 5.

Ins. Co., 5 Pa. Super. Ct. 506; *Hower v. Susquehanna Mut. F. Ins. Co.*, 9 Pa. Super. Ct. 153; *Rice v. Palatine Ins. Co.*, 17 Pa. Super. Ct. 261; *Hamburg-Bremen F. Ins. Co. v. Rud-dell*, (Tex. Civ. App. 1904) 82 S. W. Rep. 826.

**338. 2.** See *Rice v. Palatine Ins. Co.*, 17 Pa. Super. Ct. 261.

**4. Provision Not Applicable to Interest Acquired After Loss.** — *Mauck v. Merchants, etc.*, F. Ins. Co., 4 Penn. (Del.) 325.

Use of the Present Tense in the proof of loss is sufficient although the proof is dated after the loss. *Wicking v. Citizens' Mut. F. Ins. Co.*, 118 Mich. 640.

**Insurance of Freight — Sufficiency of Statement of Liability by Carrier.** — See *Force v. St. Paul F. & M. Ins. Co.*, 81 N. Y. App. Div. 633.

**9. Statement of Circumstances of Loss.** — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

**11. Statement of Amount and Name of Insurer Sufficient.** — *Swofford Bros. Dry Goods Co. v. American Cent. Ins. Co.*, 76 Mo. App. 27.

A Statement that No Other Insurance Existed than the amount called for by the insurer's policy is sufficient. *Schilansky v. Merchants, etc.*, F. Ins. Co., 4 Penn. (Del.) 293.

**What Constitutes Sufficient Compliance under Texas Statute.** — See *London, etc.*, F. Ins. Co. v. Schwulst, (Tex. Civ. App. 1898) 46 S. W. Rep. 89.

**339. 3. Statements Not Conclusive.** — *Schild v. Phoenix Ins. Co.*, 8 Ohio Dec. 45; *Brumbaugh v. Home Mut. F. Ins. Co.*, 20 Pa. Super. Ct. 144.

In the Absence of Fraud or Mistake, when a distinct proposition as to the extent of the insurer's liability has been incorporated in the proofs of loss and accepted and acted upon by the insurer, the insured is bound thereby. *McLean v. American Mut. F. Ins. Co.*, 122 Iowa 355.

**9. Insurer Chargeable with Notice of Requirements.** — *Minneapolis F. & M. Mut. Ins. Co. v. Fultz*, 72 Ark. 365; *German-American Ins. Co. v. Paul*, (Indian Ter. 1904) 83 S. W. Rep. 60; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12.

**Proofs Prepared by Company's Agent.** — Where proofs of loss are prepared in the office and under the advice, aid, and instruction of the company's authorized agent, the company thereby waives the right to object to defects in them. *Merricourt v. Norwalk F. Ins. Co.*, 13 Hawaii 218.

**10. Failure to Object Waives Defects — Alabama.** — *Taber v. Royal Ins. Co.*, 124 Ala. 681.

**Arkansas.** — *Minneapolis F. & M. Mut. Ins. Co. v. Fultz*, 72 Ark. 365.

**Maryland.** — *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545.

**Missouri.** — *De Land v. Aetna Ins. Co.*, 68

Mo. App. 277; *Sisk v. American Cent. F. Ins. Co.*, 95 Mo. App. 695; *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244.

**New York.** — *Cummer Lumber Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 67 N. Y. App. Div. 151, affirmed 173 N. Y. 633.

**Pennsylvania.** — *Cummins v. German-American Ins. Co.*, 197 Pa. St. 61; *Thomas v. Western Ins. Co.*, 5 Pa. Super. Ct. 383; *Davis v. Fireman's Fund Ins. Co.*, 5 Pa. Super. Ct. 506; *Yuengling v. Jennings*, 6 Pa. Super. Ct. 614; *Jacoby v. North British, etc.*, Ins. Co., 10 Pa. Super. Ct. 366; *Stainer v. Royal Ins. Co.*, 13 Pa. Super. Ct. 25; *Standard Wheel Co. v. Phoenix Ins. Co.*, 13 Pa. Dist. 77.

**Texas.** — *London, etc.*, F. Ins. Co. v. Schwulst, (Tex. Civ. App. 1898) 46 S. W. Rep. 89.

**Virginia.** — *Georgia Home Ins. Co. v. Goode*, 95 Va. 751.

**Canada.** — *Western Assur. Co. v. Pharand*, 11 Quebec K. B. 144.

**340. 2. Failure to Object in Reasonable Time — Arkansas.** — *Minneapolis F. & M. Mut. Ins. Co. v. Fultz*, 72 Ark. 365.

**Georgia.** — *Alston v. Phoenix Ins. Co.*, 100 Ga. 287.

**Indian Territory.** — *German-American Ins. Co. v. Paul*, (Indian Ter. 1904) 83 S. W. Rep. 60.

**Maryland.** — *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545.

**Missouri.** — *De Land v. Aetna Ins. Co.*, 68 Mo. App. 277; *St. John v. German-American Ins. Co.*, 107 Mo. App. 700.

**New York.** — *Glazer v. Home Ins. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 426.

**Pennsylvania.** — *Cummins v. German American Ins. Co.*, 197 Pa. St. 61; *Standard Wheel Co. v. Phoenix Ins. Co.*, 13 Pa. Dist. 77; *Yuengling v. Jennings*, 6 Pa. Super. Ct. 614; *Stainer v. Royal Ins. Co.*, 13 Pa. Super. Ct. 25.

**South Carolina.** — *McBryde v. South Carolina Mut. Ins. Co.*, 55 S. Car. 589, 74 Am. St. Rep. 769.

**Virginia.** — *Georgia Home Ins. Co. v. Goode*, 95 Va. 751.

**341. 1. Failure to Specify Defects.** — *Cummins v. German American Ins. Co.*, 197 Pa. St. 61; *Thomas v. Western Ins. Co.*, 5 Pa. Super. Ct. 383; *Davis v. Fireman's Fund Ins. Co.*, 5 Pa. Super. Ct. 506; *Yuengling v. Jennings*, 6 Pa. Super. Ct. 614; *Jacoby v. North British, etc.*, Ins. Co., 10 Pa. Super. Ct. 366.

**2. Specifying Some but Not All Defects.** — *Er-vay v. Philadelphia Fire Assoc.*, 119 Iowa 304.

**342. 1. Where Proofs Are Accompanied with Inquiries as to Need of Further Proofs.** — *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545; *St. John v. German-American Ins. Co.*, 107 Mo. App. 700; *Cummins v. German American Ins. Co.*, 197 Pa. St. 61.



**342.** (4) *Fraud and False Swearing*—(a) *Purpose and Validity of Clauses Forbidding — Validity.* — See note 8.

**343.** (b) *What Constitutes.* — See notes 1, 3, 4, 5, 6.

**344.** See notes 2, 4, 5.

**342. 2. Reasonable Time Allowed to Supply Defects, Etc.** — *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545; *St. John v. German-American Ins. Co.*, 107 Mo. App. 700.

**3. Insurer's Objections Not Permitting of Answer in Time Limited.** — *St. John v. German-American Ins. Co.*, 107 Mo. App. 700.

**4. If Objections Obviated, Further Objections Not Admissible.** — See *Erway v. Philadelphia Fire Assoc.*, 119 Iowa 304.

**5. Objections Seasonably Made Must Be Obviated.** — *Thomas v. Western Ins. Co.*, 5 Pa. Super. Ct. 383.

**8. Fraud or False Swearing.** — *German-American Ins. Co. v. Brown*, (Ark. 1905) 87 S. W. Rep. 135; *Schmidt v. Philadelphia Underwriters*, 109 La. 884; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Rovinsky v. Northern Assur. Co.*, (Me. 1905) 60 Atl. Rep. 1025; *Anibal v. Insurance Co. of North America*, 84 N. Y. App. Div. 634; *Fowler v. Phoenix Ins. Co.*, 35 Oregon 559; *Ellis v. Agricultural Ins. Co.*, 7 Pa. Super. Ct. 264, 42 W. N. C. (Pa.) 374. See also *Bannon v. Insurance Co. of North America*, 115 Wis. 250.

**Provision Waived by Compromise of Claim.** — *Concordia F. Ins. Co. v. Koretz*, 14 Colo. App. 386.

**Fraud as to Portion of Policy.** — *Home Ins. Co. v. Connelly*, 104 Tenn. 93.

**Policy Covering Distinct Items.** — *Herzog v. Palatine Ins. Co.*, 36 Wash. 611.

**343. 1. Falsehood Intentional and Wilful** — *Arkansas*. — *American Cent. Ins. Co. v. Ware*, 65 Ark. 336; *German-American Ins. Co. v. Brown*, (Ark. 1905) 87 S. W. Rep. 135.

*Hawaii*. — *Merricourt v. Norwalk F. Ins. Co.*, 13 Hawaii 218, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

*Iowa*. — *Petty v. Mutual F. Ins. Co.*, 111 Iowa 358; *Garner v. Mutual F. Ins. Co.*, (Iowa 1901) 86 N. W. Rep. 289; *Goldstein v. St. Paul F. & M. Ins. Co.*, 124 Iowa 143; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377; *Dalton v. Germania F. Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 127.

*Kentucky*. — *Western Assur. Co. v. Ray*, 105 Ky. 523.

*Louisiana*. — *Dunn v. Springfield F. & M. Ins. Co.*, 109 La. 520.

*Maine*. — *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Atherton v. British-America Assur. Co.*, 91 Me. 289; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272.

*New York*. — *Nugent v. Rensselaer County Mut. F. Ins. Co.*, 106 N. Y. App. Div. 308, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, affirmed 39 N. Y. App. Div. 639.

*Pennsylvania*. — *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366.

*Tennessee*. — *Boston Marine Ins. Co. v. Scales*, 101 Tenn. 628.

*Texas*. — *Phoenix Ins. Co. v. Shearman*, 17

*Tex. Civ. App.* 456; *Westchester F. Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140.

*Washington*. — *Herzog v. Palatine Ins. Co.*, 36 Wash. 611.

**Intentional Inclusion of Article Not Burned Avoids Policy.** — *Rovinsky v. Northern Assur. Co.*, (Me. 1905) 60 Atl. Rep. 1025.

**3.** See *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366.

**4. Overvaluation Due to Mistakes.** — *American Cent. Ins. Co. v. Ware*, 65 Ark. 336; *German-American Ins. Co. v. Brown*, (Ark. 1905) 87 S. W. Rep. 135; *Goldstein v. St. Paul F. & M. Ins. Co.*, 124 Iowa 143; *Western Assur. Co. v. Ray*, 105 Ky. 523; *Dunn v. Springfield F. & M. Ins. Co.*, 109 La. 520; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Cheever v. Scottish Union, etc., Ins. Co.*, 86 N. Y. App. Div. 328; *Nugent v. Rensselaer County Mut. F. Ins. Co.*, 106 N. Y. App. Div. 605, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456.

**5. Omission Accidental and Bona Fide.** — *Atherton v. British-America Assur. Co.*, 91 Me. 289; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, affirmed 39 N. Y. App. Div. 639.

**6. Innocent Misstatements.** — *American Cent. Ins. Co. v. Ware*, 65 Ark. 336; *Petty v. Mutual F. Ins. Co.*, 111 Iowa 358; *Garner v. Mutual F. Ins. Co.*, (Iowa 1901) 86 N. W. Rep. 289; *Western Assur. Co. v. Ray*, 105 Ky. 523; *Atherton v. British-America Assur. Co.*, 91 Me. 289; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Nugent v. Rensselaer County Mut. F. Ins. Co.*, 106 N. Y. App. Div. 308, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343; *Gough v. Davis*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 245, affirmed 39 N. Y. App. Div. 639; *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456; *Westchester F. Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140. See also *Newton v. Theresa Mut. F. Ins. Co.*, (Wis. 1905) 104 N. W. Rep. 107.

**344. 2. Materiality.** — *Herzog v. Palatine Ins. Co.*, 36 Wash. 611.

**4. Prejudicial to Insurer.** — *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377; *Dalton v. Germania F. Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 127; *Home Ins. Co. v. Lowenthal*, (Miss. 1905) 36 So. Rep. 1042, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 344.

**Actual Injury Not Essential.** — The rule that false swearing must be such as will be liable to work an injury to the insurer, in order that the policy shall be forfeited thereby, does not render it necessary that injury actually take place. It is sufficient if there be false swearing to the actual prejudice of the insurer, or which is liable to have that effect. And where the policy covers a building and its contents and the entire property is destroyed, false swearing as to any portion of the loss is sufficient to forfeit the policy as to the entire loss.

**345.** See notes 1, 2.(e) *By Insured's Agent.* — See note 3.g. **WAIVER** — (2) *What Constitutes* — **Acts Classified** — **General Rule.** —

See note 5a.

**346.** Various Illustrations. — See notes 1, 2, 4.*Worachek v. New Denmark Mut. Home F. Ins. Co.*, 102 Wis. 88.**344. 5. Loss Greatly in Excess of Insurance — Overvaluation Not Cause of Forfeiture.** — See *Home Ins. Co. v. Lowenthal*, (Miss. 1904) 36 So. Rep. 1042; *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456. See also *Phoenix Ins. Co. v. McKernan*, (Ky. 1898) 46 S. W. Rep. 10.**345. 1. Discrepancy Between Statement of Loss and Value Not Conclusive of Fraud.** — *American Cent. Ins. Co. v. Ware*, 65 Ark. 336; *Goldstein v. St. Paul F. & M. Ins. Co.*, 124 Iowa 143; *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 395. See also *Western Assur. Co. v. Ray*, 105 Ky. 523; *Dunn v. Springfield F. & M. Ins. Co.*, 109 La. 520.**Burden of Proving Fraud on Insurer.** — *Goldstein v. St. Paul F. & M. Ins. Co.*, 124 Iowa 143; *Newton v. Theresa Mut. F. Ins. Co.*, (Wis. 1905) 104 N. W. Rep. 107.**Sufficiency of Evidence to Show Intentional and Wilful False Swearing.** — See *Anibal v. Insurance Co. of North America*, 84 N. Y. App. Div. 634.**Presumption of Fraud from Presence of False Invoices in Proofs of Loss.** — *Vaughan v. Virginia F. & M. Ins. Co.*, 102 Va. 541.**2. Discrepancy Evidence of Fraud.** — *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 382.**3. Fraud of Insured's Agent to Which Insured Not a Party.** — *Boston Marine Ins. Co. v. Scales*, 101 Tenn. 628.**5a. Failure to Furnish Blank Forms** operates as a waiver under the *Missouri* statute. *Brownfield v. Mercantile Town Mut. Ins. Co.*, 84 Mo. App. 134; *St. John v. German-American Ins. Co.*, 107 Mo. App. 700; *Farmers Bank v. Manchester Assur. Co.*, 106 Mo. App. 114.**Question of Law or of Fact.** — The question whether proof of loss has been waived is generally one of fact. *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385; *Sergent v. Liverpool*, etc., *Globe Ins. Co.*, 155 N. Y. 349; *Glaser v. Home Ins. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 89. But where the evidence is free from conflict the question is one of law. *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264.**Admissibility of Evidence as to Acts Showing Waiver.** — *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654.**Parol Evidence to Show Waiver.** — *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 113 La. 1053.**Estoppel — Statement of Rule.** — "In order that an insurer under a standard fire policy shall estop itself, some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of breach, have done something which could only be done by virtue of the policy, or have required something of the insured that he was bound to do only under a valid policy." *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. Div. 113.**346. 1. Insurer's Acts Inducing Failure or Delay in Making or Perfecting Proofs** — *Arkansas.* — *Minneapolis F. & M. Mut. Ins. Co. v. Fultz*, 72 Ark. 365.*Colorado.* — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264.*Georgia.* — *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296; *Phenix Ins. Co. v. Hart*, 112 Ga. 765.*Illinois.* — *Citizens Ins. Co. v. Stoddard*, 197 Ill. 330; *Manchester F. Assur. Co. v. Ellis*, 85 Ill. App. 634; *Gray v. Merchants Ins. Co.*, 113 Ill. App. 537.*Indiana.* — *Ft. Wayne Ins. Co. v. Orwin*, 23 Ind. App. 53; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559; *Germania F. Ins. Co. v. Pitcher*, (Ind. 1902) 64 N. E. Rep. 921.*Indian Territory.* — See *German-American Ins. Co. v. Paul*, (Indian Ter. 1904) 83 S. W. Rep. 60.*Iowa.* — *Brock v. Des Moines Ins. Co.*, 106 Iowa 30; *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa 229.*Kentucky.* — *Smith v. Herd*, 110 Ky. 56; *Phoenix Ins. Co. v. McKernan*, (Ky. 1898) 46 S. W. Rep. 10; *National F. Ins. Co. v. U. S. Building, etc., Assoc.*, (Ky. 1900) 54 S. W. Rep. 714.*Louisiana.* — *McClelland v. Greenwich Ins. Co.*, 107 La. 124.*Maine.* — *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385.*Maryland.* — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545.*Massachusetts.* — *Wholley v. Western Assur. Co.*, 174 Mass. 263, 75 Am. St. Rep. 314.*Mississippi.* — *Western Assur. Co. v. White*, (Miss. 1899) 25 So. Rep. 494.*Missouri.* — *Landrum v. American Cent. Ins. Co.*, 68 Mo. App. 339; *Branigan v. Jefferson Mut. F. Ins. Co.*, 102 Mo. App. 70; *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654.*New Jersey.* — *Gray v. Blum*, 55 N. J. Eq. 553.*New York.* — *McCoubay v. St. Paul F. & M. Ins. Co.*, 50 N. Y. App. Div. 416, *affirmed* 169 N. Y. 590; *Glazer v. Home Ins. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 426; *Bear v. Atlanta Home Ins. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613.*North Carolina.* — *Pretzfelder v. Merchants' Ins. Co.*, 123 N. Car. 164; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64.*Ohio.* — *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.*Pennsylvania.* — *Sutton v. American F. Ins. Co.*, 188 Pa. St. 380; *Carnes v. Farmers' F. Ins. Co.*, 20 Pa. Super. Ct. 634.*Texas.* — *Continental F. Ins. Co. v. Cummings*, (Tex. Civ. App. 1903) 78 S. W. Rep. 378; *Virginia F. & M. Ins. Co. v. Cummings*, (Tex. Civ. App. 1904) 78 S. W. Rep. 716.*Washington.* — *Henry v. Aetna Indemnity Co.*, 36 Wash. 553, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 346.

**347.** See notes 1, 2, 4.

**Express Waiver Not Essential.** — *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557.

**Agreement to Arbitrate.** — A provision for proof of loss is waived if the insurer objects solely to the amount claimed, and agrees with the insured to the ascertainment of the damage by appraisers, and to pay the amount so ascertained. *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289.

**Whether the Provision Is Waived by Sending an Adjuster** at the expiration of the time limited for furnishing proofs is a question of fact, *Rice v. Palatine Ins. Co.*, 17 Pa. Super. Ct. 261.

**Consent to Adjustment** waives notice and proofs. *Gerhart Realty Co. v. Northern Assur. Co.*, 86 Mo. App. 596.

**Commencement of Arbitration Proceedings a Waiver.** — *Murphy v. North British, etc., Ins. Co.*, 70 Mo. App. 78.

**Retention of Proofs Furnished After Time Limited Evidence of Waiver.** — *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557.

**Retention of Defective Proof — Waiver Question for Jury.** — *Messmer v. Niagara F. Ins. Co.*, 24 N. Y. App. Div. 241.

**Waiver Precludes Subsequent Demand of Proofs.** — *Roberts v. Insurance Co. of North America*, 94 Mo. App. 142; *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

**346. 2. Insurer's Acts After Forfeiture Has Become Fixed.** — *State Ins. Co. v. School Dist. No. 19*, 66 Kan. 77; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, affirmed 62 Kan. 867, 63 Pac. Rep. 1126; *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. 113.

4. See *Hilton v. Phoenix Assur. Co.*, 92 Me. 272.

**347. 1. Recognition of Liability, Etc.** — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264; *Manchester F. Assur. Co. v. Ellis*, 85 Ill. App. 634; *Gray v. Merchants' Ins. Co.*, 113 Ill. App. 537; *Lake v. Farmers' Ins. Co.*, 110 Iowa 473; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545; *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347; *Landrum v. American Cent. Ins. Co.*, 68 Mo. App. 339; *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654; *Robinson v. Palatine Ins. Co.*, 11 N. Mex. 162; *Continental F. Ins. Co. v. Cummings*, (Tex. Civ. App. 1903) 78 S. W. Rep. 378; *Virginia F. & M. Ins. Co. v. Cummings*, (Tex. Civ. App. 1904) 78 S. W. Rep. 716; *Western Assur. Co. v. Pharand*, 11 Quebec K. B. 144.

**Acts Showing Waiver.** — Where the insurer expressly recognizes liability, prepares proofs of loss, and presents such proofs to the insured for signature, failure of the insured to make and serve formal proofs of loss is waived notwithstanding he refuses to sign the proofs submitted because of stipulations therein to which he is unwilling to assent. *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286.

**Demand for Agreement to Appraise a Waiver.** — *Harrison v. Hartford F. Ins. Co.*, (Iowa 1899) 80 N. W. Rep. 309.

**Retention of Proofs Made by Other than Insured a Waiver.** — *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353.

**Appraisal in Accordance with Policy Provisions Not Waiver.** — *Fournier v. German American Ins. Co.*, 23 R. I. 36.

**2. Acts Showing that Furnishing Proofs Would Be Nugatory.** — *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347. Compare *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385.

**4. Denial of Liability — United States.** — *Royal Ins. Co. v. Martin*, 192 U. S. 149; *Missouri Pac. R. Co. v. Western Assur. Co.*, 129 Fed. Rep. 610; *Phenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723.

*Arkansas.* — *Greenwich Ins. Co. v. State*, (Ark. 1905) 84 S. W. Rep. 1025.

*Colorado.* — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264.

*Florida.* — *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273; *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

*Illinois.* — *Phenix Ins. Co. v. Belt R. Co.*, 182 Ill. 33; *Phenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265; *American Cent. Ins. Co. v. Henninger*, 87 Ill. App. 440; *Erie F. Ins. Co. v. Hill*, 99 Ill. App. 178; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283.

*Indiana.* — *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *German F. Ins. Co. v. Seibert*, 24 Ind. App. 279; *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289; *Germania F. Ins. Co. v. Pitcher*, (Ind. 1902) 64 N. E. Rep. 921; *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. 1905) 73 N. E. Rep. 612.

*Iowa.* — *Soorholtz v. Marshall County Farmers' Mut. F. Ins. Co.*, 109 Iowa 522; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 80 Am. St. Rep. 311.

*Kentucky.* — *Orient Ins. Co. v. Clark*, (Ky. 1900) 59 S. W. Rep. 863; *Germania Ins. Co. v. Ashby*, 112 Ky. 303; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Pennsylvania F. Ins. Co. v. Young*, (Ky. 1904) 78 S. W. Rep. 127; *Continental Ins. Co. v. Daniel*, 78 S. W. Rep. 866, 25 Ky. L. Rep. 1501.

*Louisiana.* — *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 113 La. 1053; *St. Landry Wholesale Mercantile Co. v. Springfield F. & M. Ins. Co.*, 114 La. 1.

*Maine.* — *Hanscom v. Home Ins. Co.*, 90 Me. 333.

*Michigan.* — *Improved Match Co. v. Michigan Mut. F. Ins. Co.*, 122 Mich. 256; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

*Missouri.* — *Siegle v. Phoenix Ins. Co.*, 107 Mo. App. 456.

*Nebraska.* — *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756.

*New York.* — *Smaldone v. Insurance Co. of North America*, 162 N. Y. 580; *Bini v. Smith*, 36 N. Y. App. Div. 463, appeal dismissed 161 N. Y. 120.

**349.** See notes 1, 2.(3) *What Does Not Constitute.* — See note 4.

*North Carolina.* — *Gerringer v. North Carolina Home Ins. Co.*, 133 N. Car. 407.

*Ohio.* — *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368; *Stacy v. Norwich Union F. Ins. Soc.*, 25 Ohio Cir. Ct. 67; *Ohio Farmers' Ins. Co. v. Burget*, 9 Ohio Cir. Dec. 369; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

*Pennsylvania.* — *Standard Wheel Co. v. Phoenix Ins. Co.*, 13 Pa. Dist. 77; *Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co.*, 23 Pa. Super. Ct. 88.

*South Carolina.* — *Wilson v. Commercial Union Assur. Co.*, 51 S. Car. 540, 64 Am. St. Rep. 700.

*Texas.* — *Merchants' Ins. Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558; *Ætna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214; *Scottish Union, etc., Ins. Co. v. Moore*, 36 Tex. Civ. App. 312.

*Vermont.* — *Frost v. North British, etc., Ins. Co.*, 77 Vt. 407.

*West Virginia.* — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

*Wisconsin.* — *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272.

*Canada.* — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324; *Migner v. St. Lawrence F. Ins. Co.*, 10 Quebec K. B. 122.

**Direct Denial to Insured Not Essential.** — A denial of liability by the insurer, made to others than the insured, in the period prescribed for making proof, is, if it comes to the knowledge of the insured, as effectual as a waiver as if made directly to him. *Merchants' Ins. Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198.

**Insured Not Compelled to Treat Denial of Liability as Waiver of Proof.** — *Bradford v. Mutual F. Ins. Co.*, 112 Iowa 495.

**Denial by Agent of Contract to Insure Not a Waiver.** — *Hicks v. British America Assur. Co.*, 162 N. Y. 284.

**349. 1. Defense that Policy Was Procured by Fraud, Forfeited, and the Like** — *United States.* — *Royal Ins. Co. v. Martin*, 192 U. S. 149; *Missouri Pac. R. Co. v. Western Assur. Co.*, 129 Fed. Rep. 610; *Phoenix Ins. Co. v. Kerr*, (C. C. A.) 129 Fed. Rep. 723.

*Arkansas.* — *Greenwich Ins. Co. v. State*, (Ark. 1905) 84 S. W. Rep. 1025.

*Colorado.* — *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264.

*Florida.* — *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273; *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

*Georgia.* — *Phoenix Ins. Co. v. Searles*, 100 Ga. 97.

*Illinois.* — *Phoenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265, *affirmed* 182 Ill. 33; *American Cent. Ins. Co. v. Henninger*, 87 Ill. App. 440; *Erie F. Ins. Co. v. Hill*, 99 Ill. App. 178; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283.

*Indiana.* — *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289; *Germania F. Ins. Co. v. Pitcher*, (Ind. 1902) 64 N. E. Rep. 921; *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. 1905) 73 N. E. Rep. 612.

*Iowa.* — *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 80 Am. St. Rep. 311.

*Kentucky.* — *Orient Ins. Co. v. Clark*, (Ky. 1900) 59 S. W. Rep. 863; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Pennsylvania F. Ins. Co. v. Young*, (Ky. 1904) 78 S. W. Rep. 127; *Continental Ins. Co. v. Daniel*, 78 S. W. Rep. 866, 25 Ky. L. Rep. 1501.

*Louisiana.* — *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 113 La. 1053; *St. Landry Wholesale Mercantile Co. v. Springfield F. & M. Ins. Co.*, 114 La. 1.

*Massachusetts.* — *Boruszowski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589.

*Michigan.* — *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

*Missouri.* — *Siegle v. Phoenix Ins. Co.*, 107 Mo. App. 456.

*Nebraska.* — *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756.

*Ohio.* — *Ohio Farmers' Ins. Co. v. Burget*, 9 Ohio Cir. Dec. 369, 17 Ohio Cir. Ct. 619; *Stacy v. Norwich Union F. Ins. Soc.*, 25 Ohio Cir. Ct. 67; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

*Pennsylvania.* — *Southern Bldg., etc., Assoc. v. Pennsylvania F. Ins. Co.*, 23 Pa. Super. Ct. 88; *Standard Wheel Co. v. Phoenix Ins. Co.*, 13 Pa. Dist. 77.

*South Carolina.* — *Wilson v. Commercial Union Assur. Co.*, 51 S. Car. 540, 64 Am. St. Rep. 700.

*Texas.* — *Merchants' Ins. Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558; *Ætna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214; *Scottish Union, etc., Ins. Co. v. Moore*, 36 Tex. Civ. App. 312.

*Vermont.* — *Frost v. North British, etc., Ins. Co.*, 77 Vt. 407.

*West Virginia.* — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

*Wisconsin.* — *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272.

*Canada.* — *Stanstead, etc., Mut. F. Ins. Co. v. Gooley*, 9 Quebec Q. B. 324; *Migner v. St. Lawrence F. Ins. Co.*, 10 Quebec K. B. 122.

*Compare Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385.

**2. Denial of Liability After Time for Proofs Expired.** — *Ervay v. Philadelphia Fire Assoc.*, 119 Iowa 304; *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543. See also *Stacy v. Norwich Union F. Ins. Soc.*, 25 Ohio Cir. Ct. 67. *Compare Orient Ins. Co. v. Clark*, (Ky. 1900) 59 S. W. Rep. 863; *Sutton v. American F. Ins. Co.*, 188 Pa. St. 380.

**4. Acts Coupled with Demand of Proofs.** — See *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900.

**Failure to Deny Authority to Waive.** — Failure of the insurer to deny the authority of an unauthorized person to waive proofs is not necessarily a waiver. *Parker v. Farmers' F. Ins. Co.*, (Mass. 1905) 74 N. E. Rep. 286.

**350.** See note 1.

(4) *Who May Waive Proofs* — Effect of Conditions of the Policy as to Waiver.

— See note 2.

Proofs of Loss May Be Waived. — See notes 4, 5, 6.

**351.** See notes 1, 2, 3, 5.

**352.** 5. Certificate of Magistrate — Generally. — See notes 1, 2, 4, 5.

Time of Furnishing Certificate. — See note 14.

**353.** Where a Certificate of the Nearest Magistrate Is Required. — See note 1.

Substantial Compliance Sufficient. — See note 5.

**350. 1. Mere Investigation Not Waiver.** — Missouri Pac. R. Co. v. Western Assur. Co., 129 Fed. Rep. 610; Phenix Ins. Co. v. Hart, 112 Ga. 765; Boruszewski v. Middlesex Mut. Assur. Co., 186 Mass. 589; Riker v. Fire Ins. Co. of North America, 90 N. Y. App. Div. 391; Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667; Billings v. National Ins. Co., 14 Ohio Dec. 387.

**Submission to Arbitration Not Waiver.** — Cook v. North British, etc., Ins. Co., 181 Mass. 101.

**Submission to Appraisal Not Waiver.** — Fourrier v. German American Ins. Co., 23 R. I. 36.

**Written Waiver Essential under Michigan Standard Policy.** — Wadhams v. Western Assur. Co., 117 Mich. 514.

**2. Conditions as to Waiver Generally Inapplicable to Giving Notice and Proofs.** — Indian River State Bank v. Hartford F. Ins. Co., (Fla. 1903) 35 So. Rep. 228; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330; Brock v. Des Moines Ins. Co., 106 Iowa 30; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co., 110 Iowa 432, 80 Am. St. Rep. 311; Lake v. Farmers' Ins. Co., 110 Iowa 473; Farmers' F. Ins. Co. v. Baker, 94 Md. 545; Strause v. Palatine Ins. Co., 128 N. Car. 64; Frost v. North British, etc., Ins. Co., 77 Vt. 407; Matthews v. Capital F. Ins. Co., 115 Wis. 272.

**4. Waiver by Secretary Valid.** — Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co., 110 Iowa 423, 80 Am. St. Rep. 311.

**Receiver May Waive Proofs.** — Gray v. Blum, 55 N. J. Eq. 553.

**5. By General Agent.** — Brock v. Des Moines Ins. Co., 106 Iowa 30.

**6. By Adjuster** — *Colorado*. — Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264.

*Illinois*. — American Cent. Ins. Co. v. Henninger, 87 Ill. App. 440.

*Indiana*. — German F. Ins. Co. v. Seibert, 24 Ind. App. 279; Germania F. Ins. Co. v. Pitcher, (Ind. 1902) 64 N. E. Rep. 921.

*Iowa*. — Heusinkveld v. St. Paul F. & M. Ins. Co., 106 Iowa 229; Lake v. Farmers' Ins. Co., 110 Iowa 473.

*Louisiana*. — St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., 113 La. 1053.

*Michigan*. — Morgan v. Illinois Ins. Co., 130 Mich. 427.

*Missouri*. — Roberts v. Insurance Co. of America, 94 Mo. App. 142.

*New York*. — Smaldone v. Insurance Co. of North America, 162 N. Y. 580. Compare *Sergeant v. Liverpool, etc., Ins. Co.*, 66 N. Y. App. Div. 46; *Emanuel v. Maryland Casualty Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 378.

*North Carolina*. — Strause v. Palatine Ins.

Co., 128 N. Car. 64, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.

*Ohio*. — Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667. *Contra*, under express stipulations in the policy limiting the power to waive and requiring writing, *Billings v. National Ins. Co.*, 14 Ohio Dec. 387.

*Wisconsin*. — Matthews v. Capital F. Ins. Co., 115 Wis. 272.

In *Indiana* an agent with authority to examine and adjust a loss may orally waive preliminary proofs of loss, notwithstanding a clause *contra* in the policy. *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. 1905) 73 N. E. Rep. 612.

**Person Delegated by Adjuster Cannot Waive.** — Aloers v. Phoenix Ins. Co., 68 Mo. App. 543.

**351. 1. By Special Agent.** — Phoenix Ins. Co. v. McKernan, (Ky. 1898) 46 S. W. Rep. 10; Dobson v. Hartford F. Ins. Co., 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557; Strause v. Palatine Ins. Co., 128 N. Car. 64. See also *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499.

**2. Indian River State Bank v. Hartford F. Ins. Co.**, (Fla. 1903) 35 So. Rep. 228; *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499; *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545; *Stacy v. Norwich Union F. Ins. Soc.*, 25 Ohio Cir. Ct. 67.

**3. Local Agent.** — Perry v. Caledonian Ins. Co., 103 N. Y. App. Div. 113. See also *Stacy v. Norwich Union F. Ins. Soc.*, 25 Ohio Cir. Ct. 67.

**5. Indian River State Bank v. Hartford F. Ins. Co.**, (Fla. 1903) 35 So. Rep. 228; *Harness v. National F. Ins. Co.*, 76 Mo. App. 410.

**352. 1. Magistrate's Certificate.** — Sullivan v. Germania F. Ins. Co., 89 Mo. App. 106; *McBryde v. South Carolina Mut. Ins. Co.*, 55 S. Car. 589, 74 Am. St. Rep. 769.

**2. Sullivan v. Germania F. Ins. Co.**, 89 Mo. App. 106.

**4. Need Not Be Furnished but by Special Request.** — Sullivan v. Germania F. Ins. Co., 89 Mo. App. 106; *Norris v. Equitable F. Assoc.*, (S. Dak. 1905) 102 N. W. Rep. 306; *Ætna Ins. Co. v. Shacklett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 583.

**5. What Amounts to Request.** — Sullivan v. Germania F. Ins. Co., 89 Mo. App. 106.

**14. Unreasonable Delay in Demanding the Certificate** will excuse failure to produce it. *Ætna Ins. Co. v. Shacklett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 583.

**353. 1. Certificate of "Nearest" Magistrate Required.** — Compare *Vorous v. Phenix Ins. Co.*, 102 Wis. 76.

**5. Substantial Compliance Sufficient.** — National

**353.** Waiver. — See note 9.

**354.** 6. Production of Books and Vouchers — *a.* IN GENERAL. — See notes 1, 2, 3, 5, 7, 8, 9.

**355.** See note 2.

*b.* WAIVER. — See notes 3, 5, 6.

7. Iron-safe Clause — *a.* PURPOSE AND VALIDITY. — See notes 11, 12.

Ins. Co. v. Strong, 25 Ohio Cir. Ct. 101, supporting the whole text paragraph.

**353.** 9. Denial of Liability a Waiver of Provision. — American Cent. Ins. Co. v. Henninger, 87 Ill. App. 440.

Want of Certificate Waived by Failure to Object. — Taber v. Royal Ins. Co., 124 Ala. 681.

**354.** 1. Conditions as to Producing Books Valid. — American Cent. Ins. Co. v. Ware, 65 Ark. 336; Niagara F. Ins. Co. v. Forehand, 169 Ill. 626; L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co., 55 W. Va. 238.

2. Production or Excuse Required. — Sun Mut. Ins. Co. v. Dudley, 65 Ark. 240; Liverpool, etc., Ins. Co. v. Kearney, 2 Indian Ter. 67; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154; Tucker v. Colonial F. Ins. Co., (W. Va. 1905) 51 S. E. Rep. 86.

Inability to Produce All does not excuse compliance with the demand in so far as it lies in the power of the insured. Seibel v. Lebanon Mut. Ins. Co., 197 Pa. St. 106.

3. Production Impossible. — Liverpool, etc., Ins. Co. v. Kearney, 2 Indian Ter. 67; L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co., 55 W. Va. 238. See also Narinsky v. Fidelity Surety Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 771.

Oral Testimony as to Contents of Lost Books Admissible. — Liverpool, etc., Ins. Co. v. Kearney, 2 Indian Ter. 67; McNutt v. Virginia F. & M. Ins. Co., (Tenn. Ch. 1897) 45 S. W. Rep. 61.

8. Substantial Compliance Enough. — Liverpool, etc., Ins. Co. v. Kearney, 2 Indian Ter. 67; McNutt v. Virginia F. & M. Ins. Co., (Tenn. Ch. 1897) 45 S. W. Rep. 61; Tucker v. Colonial F. Ins. Co., (W. Va. 1905) 51 S. E. Rep. 86.

7. Demand Necessary. — Narinsky v. Fidelity Surety Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 771; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154.

8. Essentials of Demand. — See McNutt v. Virginia F. & M. Ins. Co., (Tenn. Ch. 1897) 45 S. W. Rep. 61.

9. Tucker v. Colonial F. Ins. Co., (W. Va. 1905) 51 S. E. Rep. 86. See also McNutt v. Virginia F. & M. Ins. Co., (Tenn. Ch. 1897) 45 S. W. Rep. 61.

**355.** 2. Reasonable Place Must Be Designated. — Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154; Tucker v. Colonial F. Ins. Co., (W. Va. 1905) 51 S. E. Rep. 86.

3. Waiver of Production. — Wells Whip Co. v. Farmers' Mut. F. Ins. Co., 209 Pa. St. 488. See also L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co., 55 W. Va. 238.

Failure to Designate Place for Production a Waiver. — Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154.

Time for Taking Advantage of Forfeiture. — Sun Mut. Ins. Co. v. Dudley, 65 Ark. 240.

5. American Cent. Ins. Co. v. Ware, 65 Ark. 336; Colonial Mut. F. Ins. Co. v. Ellinger, 112 Ill. App. 302.

6. See American Cent. Ins. Co. v. Ware, 65 Ark. 336.

11. See Citizens' Ins. Co. v. Crist, (Ky. 1900) 56 S. W. Rep. 658, in which case it was held that the provision was a promissory warranty, merely tending to the better preservation of the evidence and not decreasing the risk, and that a breach of the condition would not prevent recovery.

12. Clause Valid and Enforceable — *Alabama.* — Hanover F. Ins. Co. v. Crawford, 121 Ala. 258, 77 Am. St. Rep. 55; Georgia Home Ins. Co. v. Allen, 128 Ala. 451; Robinson v. Aetna F. Ins. Co., 135 Ala. 650; Georgia Home Ins. Co. v. Allen, 119 Ala. 436.

*Georgia.* — Hester v. Scottish Union, etc., Ins. Co., 115 Ga. 454.

*Illinois.* — Niagara F. Ins. Co. v. Forehand, 169 Ill. 626; Merchants' Nat. Ins. Co. v. Dunbar, 88 Ill. App. 574.

*Iowa.* — Sowers v. Mutual F. Ins. Co., 113 Iowa 551.

*Louisiana.* — Murphy v. Royal Ins. Co., 52 La. Ann. 775.

*Missouri.* — Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Gillum v. Fire Assoc., 106 Mo. App. 673; Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co., 100 Mo. 504.

*Texas.* — City Drug Store v. Scottish Union, etc., Ins. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 21; Beville v. Merchants' Ins. Co., (Tex. Civ. App. 1898) 46 S. W. Rep. 914; Roberts, etc., Co. v. Sun Mut. Ins. Co., 19 Tex. Civ. App. 338; Western Assur. Co. v. Kemendo, 94 Tex. 367; Philadelphia Fire Assoc. v. Masterson, 25 Tex. Civ. App. 518; Philadelphia Fire Assoc. v. Calhoun, 28 Tex. Civ. App. 409; Rives v. Philadelphia Fire Assoc., (Tex. Civ. App. 1903) 77 S. W. Rep. 424; Aetna Ins. Co. v. Fitze, 34 Tex. Civ. App. 214; Continental Ins. Co. v. Cummings, 98 Tex. 115; American Cent. Ins. Co. v. Nunn, 98 Tex. 191. See also Phoenix Ins. Co. v. Padgett, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

*West Virginia.* — Maupin v. Scottish Union, etc., Ins. Co., 53 W. Va. 557.

Clause Contained in Rider to Policy. — The fact that the clause is contained in a rider attached to the policy and not in the policy itself does not render it any the less a part of the contract, where other matter contained in the rider is essential to render the contract complete. King v. Concordia F. Ins. Co., (Mich. 1905) 103 N. W. Rep. 616.

Provision Appended to Policy and Referred to Therein Becomes Part of Contract. — Couch v. Home Protective F. Ins. Co., 32 Tex. Civ. App. 44.

Consideration for the Clause. — The promise of

**356. b. APPLICATION.** — See notes 1, 2.(1) *What Is Not Sufficient Compliance.* — See note 5.(2) *What Is Sufficient Compliance.* — See notes 8, 9, 10.

the insurer to indemnify the insured is sufficient consideration to support the clause. *King v. Concordia F. Ins. Co.*, (Mich. 1905) 103 N. W. Rep. 616.

**Necessity that Breach Contribute to Loss.** — Under the Iowa statute a breach of the provision must have contributed to the loss in order to be a defense. *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565.

**Entire and Divisible Contracts — Partial Breach.** — Where the clause applies to only one class of several covered by the policy, the violation of the clause does not prevent recovery for the goods to which it did not apply. *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147. See also *Hanover F. Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55 (insurance on realty not avoided).

So where the policy covers several classes of goods, each class being separate from the other and insured for its specific amount, and there is a breach of the iron-safe clause as to one class of the property, the contract should be considered not as one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, act condemned by public policy, or increase of the risk of the company on the whole property insured because of the breach. *Miller v. Delaware Ins. Co.*, 14 Okla. 81.

But where a policy, the consideration for which is a premium payable in a gross sum, insures both the building and a stock of merchandise therein contained, and provides that in the event the insured fails to take an inventory of the goods at the time specified the policy shall be void from such date, a breach of this stipulation avoids the insurance on the building as well as on the stock of goods. *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216.

**Burden of Showing Noncompliance on Insurer.** — *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706.

**356. 1. Construction.** — *Tillis v. Liverpool*, etc., Ins. Co., (Fla. 1903) 35 So. Rep. 171. See also *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333; *Roberts, etc., Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338.

**Clause a Promissory Warranty.** — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

**Breach of All Provisions Essential to Avoid Policy.** — *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338.

**2. Substantial Compliance Sufficient — Alabama.** — *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436.

*Arkansas.* — *American Cent. Ins. Co. v. Ware*, 65 Ark. 336.

*Illinois.* — *Merchants' Nat. Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Fire Assoc. v. Short*, 100 Ill. App. 553.

*Indian Territory.* — *Liverpool, etc., Ins. Co. v. Kearney*, 2 Indian Ter. 67.

*Kentucky.* — *Niagara F. Ins. Co. v. Heffin*, 60 S. W. Rep. 393, 22 Ky. L. Rep. 1212.

*Missouri.* — *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599; *Gillum v. Fire Assoc.*, 106 Mo. App. 673; *Major v. Insurance Co. of North America*, 112 Mo. App. 235.

*Nebraska.* — See *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338.

*Ohio.* — *Billings v. National Ins. Co.*, 14 Ohio Dec. 387; *Connecticut F. Ins. Co. v. Clark*, 24 Ohio Cir. Ct. 33; *German Ins. Co. v. Kistner*, 26 Ohio Cir. Ct. 569.

*Tennessee.* — *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

*Texas.* — *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706; *Western Assur. Co. v. Kemendo*, 94 Tex. 367; *Philadelphia Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409; *Kemendo v. Western Assur. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 293; *Rives v. Philadelphia Fire Assoc.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 424; *Ætna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214; *Continental F. Ins. Co. v. Cummings*, (Tex. Civ. App. 1903) 78 S. W. Rep. 378; *Virginia F. & M. Ins. Co. v. Cummings*, (Tex. Civ. App. 1904) 78 S. W. Rep. 716; *Scottish Union, etc., Ins. Co. v. Moore*, 36 Tex. Civ. App. 312; *Hubbard First Nat. Bank v. Cleland*, 36 Tex. Civ. App. 478; *Philadelphia Fire Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

*West Virginia.* — *Tucker v. Colonial F. Ins. Co.*, (W. Va. 1905) 51 S. E. Rep. 86.

**Safe Not Essential.** — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

**What Constitutes "Fireproof" Safe.** — See *Underwriters F. Assoc. v. Palmer*, 32 Tex. Civ. App. 447.

**Sufficiency of Safe.** — If the safe is of a kind commonly used, such as, in the judgment of prudent men in the locality of the property insured, is sufficient, the provision is sufficiently complied with, and it does not render the policy void that the insured failed to provide a safe absolutely proof against every fire that might occur. *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132.

**Care to Be Exercised in Emergency.** — *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 90 Am. St. Rep. 98.

**5. Excuses for Noncompliance.** — *Western Assur. Co. v. Kemendo*, 94 Tex. 367; *Philadelphia Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409; *Rives v. Philadelphia Fire Assoc.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 424.

**8. How Books Must Be Kept.** — See *American Cent. Ins. Co. v. Ware*, 65 Ark. 336; *Fire Assoc. v. Short*, 100 Ill. App. 553; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706; *Scottish Union, etc., Ins. Co. v. Moore*, 36 Tex. Civ. App. 312; *Tucker v. Colonial F. Ins. Co.*, (W. Va. 1905) 51 S. E. Rep. 86.

The provision is sufficiently complied with if the books kept are such as will fairly show to a man of ordinary intelligence all purchases and sales, both for cash and on credit. *Connecticut F. Ins. Co. v. Clark*, 24 Ohio Cir. Ct. 33.

**357. An Invoice of Goods Purchased.** — See note 1.

Safe and Contents Destroyed. — See note 2.

Books Partially Destroyed. — See note 3.

c. QUESTIONS FOR THE JURY. — See note 6.

d. WAIVER. — See notes 11, 12, 13.

**When Requirements as to Keeping Books Take Effect.** — *Continental Ins. Co. v. Waugh*, 60 Neb. 348.

**Memoranda Kept by Others Not a Compliance with Provision.** — *Rives v. Philadelphia Fire Assoc.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 424.

**Production of Bank Passbook Not Sufficient Compliance.** — *Gillum v. Fire Assoc.*, 106 Mo. App. 673.

**Keeping Cash Register Slips Not Sufficient Compliance.** — *Monger v. Delaware Ins. Co.*, 97 Tex. 362.

**Goods Taken for Domestic Consumption** are not required to be in an account of sales, purchases, and shipments, called for by the policy. *Ætna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214.

**356. 9. German Ins. Co. v. Kistner**, 26 Ohio Cir. Ct. 569. See also *Hubbard First Nat. Bank v. Cleland*, 36 Tex. Civ. App. 478.

**Books Which Fail to Show Cash Sales Not Sufficient.** — *German Ins. Co. v. Bates*, 67 Ill. App. 370.

**10. Time Within Which Books to Be in Safe.** — See *Major v. Insurance Co. of North America*, 112 Mo. App. 235; *Western Assur. Co. v. Kemendo*, 94 Tex. 367.

**Burden of Showing that Books Were Out at Improper Time on Insurer.** — *Hubbard First Nat. Bank v. Cleland*, 36 Tex. Civ. App. 478.

**Where the Fire Occurs in the Daytime**, the defense that the books were not kept in an iron safe by the insured is not available, if the books were required to be kept in the safe only when the store was closed. *Billings v. National Ins. Co.*, 14 Ohio Dec. 387.

**357. 1. Invoice of Goods Not Inventory.** — *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216; *Philadelphia Fire Assoc. v. Masterson*, 25 Tex. Civ. App. 518.

**But an Invoice Tendered with the Agent's Consent** has been held to be a sufficient compliance. *Philadelphia Fire Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

**Inventory Furnished Presumed to Be in Compliance with Provision.** — *Billings v. National Ins. Co.*, 14 Ohio Dec. 387.

**What Constitutes Sufficient Compliance with Inventory Clause.** — See *St. Landry Wholesale Mercantile Co. v. Springfield F. & M. Ins. Co.*, 114 La. 1; *Gillum v. Fire Assoc.*, 106 Mo. App. 673; *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575; *Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625; *Philadelphia Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409; *Delaware Ins. Co. v. Monger*, (Tex. Civ. App. 1903) 74 S. W. Rep. 792; *Phoenix Assur. Co. v. Stenson*, 34 Tex. Civ. App. 471; *Roberts, etc., Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338; *Continental Ins. Co. v. Cummings*, 98 Tex. 115; *Western Assur. Co. v. Kemendo*, 94 Tex. 367.

**Time Within Which Inventory May Be Taken.** — See generally *North British, etc., Ins. Co. v. Rudy*, 26 Ind. App. 472; *Merchants' Nat. Ins.*

*Co. v. Dunbar*, 88 Ill. App. 574; *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333; *Bayless v. Merchants' Town Mut. Ins. Co.*, 106 Mo. App. 684; *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338; *St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co.*, 114 La. 146; *Tucker v. Colonial F. Ins. Co.*, (W. Va. 1905) 51 S. E. Rep. 86; *Newton v. Theresa Mut. F. Ins. Co.*, (Wis. 1905) 104 N. W. Rep. 107.

**What Is "Complete" Inventory.** — *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 113 La. 1053.

**2. Safe and Contents Destroyed.** — *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132; *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599.

**3. Where Certain Books Destroyed.** — See *Continental F. Ins. Co. v. Cummings*, (Tex. Civ. App. 1903) 78 S. W. Rep. 378; *Virginia F. & M. Ins. Co. v. Cummings*, (Tex. Civ. App. 1904) 78 S. W. Rep. 716.

**6. Sufficiency of Compliance for Jury.** — *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706.

So the question whether the business of the insured was such that compliance was not necessary has been held to be one of fact. *Sowers v. Mutual F. Ins. Co.*, 113 Iowa 551.

**An Instruction to Find for the Insurer** is proper, where it is shown that the noncompliance with the provision was due to the negligence of the insured or his agents. *Western Assur. Co. v. Kemendo*, 94 Tex. 367.

**In Sudden Emergency.** — *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 90 Am. St. Rep. 98.

**11. General Rule as to Waiver.** — "If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognizes and treats the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture." *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451.

**Question of Law and Fact.** — *Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co.*, 100 Mo. App. 504.

**Time of Waiver.** — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557, was *disapproved* by *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, in so far as the former case asserted that there could be no waiver of the "iron-safe" or a similar clause before the time of the issuance of the policy.

**Acts Constituting Waiver.** — Where the adjuster of a fire-insurance company, after a loss, learns of a noncompliance by the insured with a provision of the policy with regard to keeping books, and instead of declaring a forfeiture therefor, negotiates with the insured for the making of other and better proofs, extends the time to make proofs, and requires the insured, at some trouble and expense, to submit to an examination under oath as to the fire and the property destroyed, the company will be deemed



**357.** Acts of Agents. — See note 15.

**358.** See notes 1, 2.

**8. Examination under Oath — a. VALIDITY OF REQUIREMENT. —**

See note 3.

**b. DEMAND. —** See notes 4, 5.

**359. 9. Arbitration and Appraisement — b. FIRST STAGE — ARBITRATION OR APPRAISEMENT PROVIDED AS SOLE MEANS OF FIXING LIABILITY. —** See notes 1, 3.

to have waived the right of forfeiture. *German Ins. Co. v. Allen*, 69 Kan. 729.

**Clause Waived by Failure to Forfeit Policy After Knowledge of Noncompliance.** — *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333.

**Waiver of Breach as Excuse for Nonproduction of Books.** — *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

**Investigation and Adjustment of the Loss After Knowledge of a Breach** will operate as a waiver. *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436; *Tillis v. Liverpool, etc., Ins. Co.*, (Fla. 1903) 35 So. Rep. 171.

**Waiver by Examination Before Notary After Notice of Breach.** — *Couch v. Home Protective F. Ins. Co.*, 32 Tex. Civ. App. 44; *American Cent. Ins. Co. v. Nunn*, (Tex. Civ. App. 1904) 79 S. W. Rep. 88, *reversed* 98 Tex. 191.

**Effect of Stipulation of Nonwaiver.** — *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

**Stipulation that Examination of Insured Shall Not Waive Forfeiture Binding.** — *American Cent. Ins. Co. v. Nunn*, 98 Tex. 191.

**Investigation of Loss under Nonwaiver Agreement Does Not Waive Provision.** — *Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co.*, 100 Mo. App. 504.

**Retention of Unearned Premium After Loss and Notice of Breach Not a Waiver.** — *Robinson v. Ætna F. Ins. Co.*, 135 Ala. 650.

**Failure to Demand Production of Inventory Not a Waiver of Breach.** — *Robinson v. Ætna F. Ins. Co.*, 135 Ala. 650.

**Agreement to Appraise Not a Waiver of Provision.** — *City Drug Store v. Scottish Union, etc., Ins. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 21.

**357. 12. Requiring Production of Duplicates.** — *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

**13. Knowledge that Insured Is Without Safe.** — *Citizens' Ins. Co. v. Crist*, (Ky. 1900) 56 S. W. Rep. 658; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720; *Gibson v. Missouri Town Mut. Ins. Co.*, 82 Mo. App. 515; *Bush v. Missouri Town Mut. Ins. Co.*, 85 Mo. App. 155.

**It Is Otherwise**, however, where the policy further provides that the books may be kept "in some place secure against fire in another building." *King v. Concordia F. Ins. Co.*, (Mich. 1905) 103 N. W. Rep. 616.

**15. Waiver by Acts of Agents.** — *Sowers v. Mutual F. Ins. Co.*, 113 Iowa 551; *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775; *Gillum v. Fire Assoc.*, 106 Mo. App. 673; *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557. *Contra*, *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333. *Compare* *Richard v. Springfield F. & M. Ins. Co.*, 114 La. 794; *Philadelphia Fire Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

**Insurer May Waive Provision Limiting Agent's Authority.** — *American Cent. Ins. Co. v. Nunn*, (Tex. Civ. App. 1904) 79 S. W. Rep. 88, *reversed* 98 Tex. 191.

**Adjuster May Waive.** — *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436.

**Production of Inventory Not Waived by Act of Agent Not Having Knowledge of Its Destruction.** — *Continental Ins. Co. v. Cummings*, 98 Tex. 115.

**Oral Evidence of Oral Waiver by Agent Inadmissible.** — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

**358. 1.** See *Gillum v. Fire Assoc.*, 106 Mo. App. 673. *Compare* *Philadelphia Fire Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

**Parol Waiver by Agent Held Valid.** — *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333.

**2.** *Sowers v. Mutual F. Ins. Co.*, 113 Iowa 551. *Compare* *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333; *German Ins. Co. v. Allen*, 69 Kan. 729; *Citizens' Ins. Co. v. Crist*, (Ky. 1900) 56 S. W. Rep. 658.

**3. Provision for Examination of Insured under Oath.** — *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804, holding that the examination of the receiver of an absconded bankrupt was not sufficient; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, *affirmed* 62 Kan. 867, 63 Pac. Rep. 1126.

**Where the Insured Voluntarily Absents Himself** in such a manner that he cannot be found for the purpose of examination under oath, his absence will be taken as equivalent to a refusal, where the company has in due time elected to require such examination and made all reasonable efforts to notify the insured of the requirement. In such a case neither the insured nor any one claiming under or through him can maintain an action on the policy until after the insured has complied with such requirement. *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 940.

**Forfeiture for Refusal to Comply Waived by Subsequent Examination.** — *Wicking v. Citizens' Mut. F. Ins. Co.*, 118 Mich. 640.

**Denial of Liability Waiver of Provision.** — See *American Cent. Ins. Co. v. Henninger*, 87 Ill. App. 440.

**4.** *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, *affirmed* 62 Kan. 867, 63 Pac. Rep. 1126.

**5. Specific Demand Necessary.** — See *Wells Whip Co. v. Tanners Mut. F. Ins. Co.*, 209 Pa. St. 488.

**359. 1. Agreement to Refer All Matters in Dispute to Arbitration.** — *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

**359.** *c.* SECOND STAGE — ARBITRATION MADE A CONDITION PRECEDENT — (1) *Validity*. — See note 6.

**360.** See note 1.

**When Clause Constitutes Condition Precedent.** — See notes 2, 3, 4.

**359. 3.** *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428; *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35.

**Provision Limited to Amount of Liability.** — A provision in the policy for arbitration where there is disagreement "as to the amount of valuation" relates only to the amount of liability, and not to the validity of the policy. *Hogadone v. Grange Mut. F. Ins. Co.*, 133 Mich. 339.

**6. Arbitration Made Condition Precedent** — *England*. — *Spurrier v. La Cloche*, (1902) A. C. 446, 71 L. J. P. C. 101.

*Canada*. — *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35.

*Illinois*. — *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63.

*Indiana*. — *Vernon Ins., etc., Co. v. Maitlen*, 158 Ind. 393; *Providence Washington Ins. Co. v. Wolf*, (Ind. 1904) 72 N. E. Rep. 606.

*Iowa*. — *George Dee, etc., Co. v. Key City F. Ins. Co.*, 104 Iowa 167; *Westenhaver v. German American Ins. Co.*, 113 Iowa 726.

*Kentucky*. — *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218.

*Missouri*. — *McNees v. Southern Ins. Co.*, 69 Mo. App. 232; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

*New York*. — *Silver v. Western Assur. Co.*, 164 N. Y. 381.

*Ohio*. — *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

*Oregon*. — *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 65.

*Tennessee*. — *Palatine Ins. Co. v. Morton-Scott-Robertson Co.*, 106 Tenn. 558.

**360. 1. Must Be Complied With** — *England*. — *Spurrier v. La Cloche*, (1902) A. C. 446, 71 L. J. P. C. 101.

*Canada*. — *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35.

*United States*. — *Langan v. Aetna Ins. Co.*, 96 Fed. Rep. 705.

*Illinois*. — *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63.

*Indiana*. — *Vernon Ins., etc., Co. v. Maitlen*, 158 Ind. 393; *Providence Washington Ins. Co. v. Wolf*, (Ind. 1904) 72 N. E. Rep. 606.

*Iowa*. — *George Dee, etc., Co. v. Key City F. Ins. Co.*, 104 Iowa 167.

*Kentucky*. — *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218.

*Missouri*. — *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311.

*New York*. — *Silver v. Western Assur. Co.*, 164 N. Y. 381.

*Ohio*. — *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

*Tennessee*. — *Palatine Ins. Co. v. Morton-Scott-Robertson Co.*, 106 Tenn. 558.

**Failure Not Due to Insured.** — *Fritz v. British America Assur. Co.*, 208 Pa. St. 268. See also *Fowle v. Phoenix Ins. Co.*, 106 Mo. App. 527; *Hooker v. Phoenix Ins. Co.*, 69 Mo. App. 141, holding that an offer by the insured to submit to arbitration and a refusal by the insurer

amounted to compliance on the part of the insured.

**Effect of Refusal by Insured.** — *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

**Where the Appraisal is Defeated by the Act of the Insured's Appraiser**, he may recover if the act was not due to the insured and he was free from fault. *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294, 99 Am. St. Rep. 445.

**Effect of Refusal by Insurer.** — *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

**Failure of Appraisal by Act of Parties.** — *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

**Abandonment by Insured.** — *Williams v. German Ins. Co.*, 90 N. Y. Div. 413.

**If Either Party Acts in Bad Faith**, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and is not bound to enter into a new arbitration agreement. *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

**2. Where Provision for Arbitration an Independent Promise.** — *Barry v. Farmers' Mut. Hail Assoc.*, 114 Iowa 186; *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428; *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 71 Am. St. Rep. 736; *German Ins. Co. v. Kistner*, 26 Ohio Cir. Ct. 569. See also *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251; *Palatine Ins. Co. v. Morton-Scott-Robertson Co.*, 106 Tenn. 558.

**3. Must Be Expressly Made Condition Precedent.** — *Farmers' Mut. F., etc., Ins. Co. v. Lecroy*, 91 Ill. App. 41; *Barry v. Farmers' Mut. Hail Assoc.*, 114 Iowa 186; *Garretson v. Merchants', etc., F. Ins. Co.*, 114 Iowa 17; *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428; *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251; *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 71 Am. St. Rep. 736.

**Arbitration Optional.** — *Winn v. Farmers Mut. F. Ins. Co.*, 83 Mo. App. 123.

**4. When Clause Is Condition Precedent** — *United States*. — *Langan v. Aetna Ins. Co.*, 96 Fed. Rep. 705.

*Illinois*. — *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63.

*Indiana*. — *Providence Washington Ins. Co. v. Wolf*, (Ind. 1904) 72 N. E. Rep. 606.

*Iowa*. — *Vincent v. German Ins. Co.*, 120 Iowa 272; *Westenhaver v. German American Ins. Co.*, 113 Iowa 726.

*Kentucky*. — *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218.

*Maine*. — *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

*Michigan*. — *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10.

*Minnesota*. — *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

*Missouri*. — *Hooker v. Phoenix Ins. Co.*, 69 Mo. App. 141; *McNees v. Southern Ins. Co.*, 69 Mo. App. 232; *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

*Pennsylvania*. — *Penn Plate Glass Co. v.*

**360.** When Applicable. — See notes 5, 6.

Revocability. — See note 7.

**361.** (2) *Arbitration Agreement After Loss.* — See notes 1, 2, 3.

(3) *Total Loss.* — See notes 5, 6.

*d.* APPRAISEMENT PROCEEDINGS — (1) *Demand and Notice* — Necessity of Demand. — See notes 7, 9.

**362.** See note 1.

Essentials of Demand. — See notes 2, 3.

Several Insurers — Joint Demand. — See note 5.

Demand or Request Must Be Unconditional. — See note 6.

Spring Garden Ins. Co., 189 Pa. St. 255, 69 Am. St. Rep. 810.

*Tennessee.* — Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558.

**360.** 5. *Arbitration Unnecessary Unless There Is Disagreement.* — Hanover F. Ins. Co. v. Harper, 77 Ill. App. 453; Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218; Fletcher v. German-American Ins. Co., 79 Minn. 337; Kelly v. Liverpool, etc., Ins. Co., (Minn. 1905) 102 N. W. Rep. 380; McNees v. Southern Ins. Co., 69 Mo. App. 232; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261.

What Constitutes Disagreement — Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

A Written Statement of Disagreement and the Selection of an Appraiser by the parties is sufficient evidence of disagreement. Fowle v. Phoenix Ins. Co., 106 Mo. App. 527.

Where the insurer, knowing the amount claimed by the insured, demands arbitration, this act on its part indicates a disagreement between the parties. The fact that both parties entered into the arbitration is also conclusive proof that such disagreement existed as justified arbitration. Kersey v. Phoenix Ins. Co., 135 Mich. 10.

6. Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218; Fletcher v. German-American Ins. Co., 79 Minn. 337; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261.

7. *Agreement Held Revocable.* — Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. St. 255, 69 Am. St. Rep. 810; Needy v. German American Ins. Co., 197 Pa. St. 460; Rice v. Palatine Ins. Co., 17 Pa. Super. Ct. 261; Seibel v. Firemen's Ins. Co., 24 Pa. Super. Ct. 154.

In New Jersey the agreement has been held not to be revocable. American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73.

**361.** 1. *Waiver by Arbitration Agreement After Loss.* — British America Assur. Co. v. Darragh, (C. C. A.) 128 Fed. Rep. 890; Wholley v. Western Assur. Co., 174 Mass. 263, 75 Am. St. Rep. 314; Montgomery v. American Cent. Ins. Co., 108 Wis. 146.

*Arbitration Agreement by Married Woman Valid.* — Montgomery v. American Cent. Ins. Co., 108 Wis. 146.

2. *Validity of Agreement After Loss.* — See Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608; Montgomery v. American Cent. Ins. Co., 108 Wis. 146.

3. Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361.

5. *Total Loss under Valued-policy Laws* — Provision Inapplicable. — Merchants' Ins. Co. v.

Stephens, 59 S. W. Rep. 511, 22 Ky. L. Rep. 999; Hartford F. Ins. Co. v. Bourbon County Ct., 115 Ky. 109; Ohage v. Union Ins. Co., 82 Minn. 426; Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 81 Am. St. Rep. 608, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; Connecticut F. Ins. Co. v. Carnahan, 10 Ohio Cir. Dec. 186; Aetna Ins. Co. v. Shacklett, (Tex. Civ. App. 1900) 57 S. W. Rep. 583.

6. *Applicable in Absence of Such Statutes or Provisions.* — Stout v. Phoenix Assur. Co., 65 N. J. Eq. 566.

7. *Policy Providing for Arbitration on Request* — Demand Essential. — Garretson v. Merchants, etc., F. Ins. Co., 114 Iowa 17; Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513, 71 Am. St. Rep. 736; German Ins. Co. v. Kistner, 26 Ohio Cir. Ct. 569. See also Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218; Norris v. Equitable F. Assoc., (S. Dak. 1905) 102 N. W. Rep. 306.

*Demand May Be Made by Either Party.* — Western Assur. Co. v. Decker, (C. C. A.) 98 Fed. Rep. 381.

9. *Arbitration Condition Precedent* — Demand Held Unnecessary. — Phoenix Ins. Co. v. Lorton, 109 Ill. App. 63; McNees v. Southern Ins. Co., 69 Mo. App. 232; Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

**362.** 1. *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 169 N. Y. 304.

2. *Demand Must Be Made in Reasonable Time.* — Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304; Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513, 71 Am. St. Rep. 736; Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667.

*Demand Within Sixty Days of Fire Essential.* — Lion F. Ins. Co. v. Heath, 29 Tex. Civ. App. 203.

*Demand Within Sixty Days from Receipt of Proofs of Loss Essential.* — American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445.

3. *Sufficiency of Demand.* — See generally Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

The demand must be made in such direct and explicit terms that a person of ordinary intelligence may fairly understand that a submission to appraisers for an ascertainment of the loss is requested. When it is claimed that demand was made in writing, the instrument, if ambiguous, will be construed most strongly against insurer. Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513, 71 Am. St. Rep. 736.

*Notice to Agent.* — Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213.

5. *Joint Demand by Several Insurers.* — Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558.

6. *Conditions Vitiating Demand.* — Palatine Ins.

- 362.** (2) *Choice of Appraisers and Their Qualifications.* — See notes 7, 8.  
**363.** See notes 1, 2, 3.  
 (3) *Examination and Hearing.* — See notes 4, 5, 8, 9, 10, 11, 12.

Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558.

**362.** 7. *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527.

**The Failure of the Insured to Except to an Appraiser** on the ground that he is not a resident must be deemed a waiver of any objection to his eligibility on that ground. *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 65.

**Appointment and Power of Referee under Minnesota Statute.** — See *Christianson v. Norwich Union F. Ins. Soc.*, 84 Minn. 526, 87 Am. St. Rep. 379.

**Appraisers Must Be Residents of the County**, under the Ohio statute. *Germania Ins. Co. v. Cincinnati, etc., Packet Co.*, 7 Ohio Dec. 571, 6 Ohio N. P. 173. But this requirement may be waived. *Margolis v. London, etc., F. Ins. Co.*, 12 Ohio Dec. 166.

**8. Appraiser's Unreasonable Refusal to Agree on Umpire.** — *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48; *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502; *Fowble v. Phoenix Ins. Co.*, 106 Mo. App. 527. See also *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10.

**It Is the Duty of the Insured to Appoint a Second Appraiser** on refusal of the first to act. *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73.

**Inability to Agree on Umpire.** — *Westenhaver v. German American Ins. Co.*, 113 Iowa 726.

**Evidence Insufficient to Show Waiver by Acts of Insurer.** — See *Williams v. German Ins. Co.*, 90 N. Y. App. Div. 413.

**363.** 1. **"Disinterested" Appraisers.** — *Hall v. Western Assur. Co.*, 133 Ala. 637; *Insurance Co. of North America v. Hegewald*, 161 Ind. 631. See also *Produce Refrigerating Co. v. Norwich Union F. Ins. Soc.*, 91 Minn. 210; *Phoenix Ins. Co. v. Romeis*, 8 Ohio Dec. 633, 15 Ohio Cir. Ct. 697.

**Waiver of Objection.** — *Western Assur. Co. v. Hall*, (Ala. 1905) 38 So. Rep. 853.

**Question for Jury.** — The question whether the person selected is "competent and disinterested" is for the jury. *National F. Ins. Co. v. O'Bryan*, (Ark. 1905) 87 S. W. Rep. 129.

**2. Appraiser Habitually Employed by Insurers.** — *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 105 Am. St. Rep. 218; *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525, affirmed 172 N. Y. 663.

**3. Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218; *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 65.**

**Evidence of Partiality.** — *National F. Ins. Co. v. O'Bryan*, (Ark. 1905) 87 S. W. Rep. 129.

**4. Not Bound by Judicial Methods.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73.

**5. Refusal to Hear Evidence.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *Vincent v. German Ins. Co.*, 120 Iowa 272; *Stout v. Phoenix Assur. Co.*, 65 N. J. Eq. 566.

**Evidence to Be Heard Where Appraisers Unable to Fix Value.** — *Phoenix Ins. Co. v. Romeis*, 8 Ohio Dec. 633, 15 Ohio Cir. Ct. 697.

**8. Disagreement Warranting Selection of Umpire by Arbitrators.** — *Ætna F. Ins. Co. v. Davis*, (Ky. 1900) 55 S. W. Rep. 705.

**9. Both Appraisers Should Join.** — *British American Assur. Co. v. Darragh*, (C. C. A.) 128 Fed. Rep. 890; *Providence Washington Ins. Co. v. Wolf*, (Ind. 1904) 72 N. E. Rep. 606; *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251; *New York Mut. Sav., etc., Assoc. v. Manchester F. Assur. Co.*, 94 N. Y. App. Div. 104; *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234. Compare *American Cent. Ins. Co. v. Landau*, 62 N. J. Eq. 73.

**10. Duty of Umpire.** — See *New York Mut. Sav., etc., Assoc. v. Manchester F. Assur. Co.*, 94 N. Y. App. Div. 104.

**11. Duties of Appraisers.** — *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234.

**12. Notice to Parties Necessary.** — *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525, affirmed 172 N. Y. 663, holding, however, that formal notice is not essential.

**Party May Waive Notice.** — *Vincent v. German Ins. Co.*, 120 Iowa 272.

**Sufficiency of Evidence to Show Waiver.** — The mere fact that the insured saw the appraisers when they were not in session and that he did not ask to be heard or object to their proceedings without notice does not constitute a waiver. *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589. See also *Sterling v. German-American Ins. Co.*, (N. J. 1905) 60 Atl. Rep. 200.

**When Failure to Notify Parties Ground for Setting Aside Award.** — *Sterling v. German-American Ins. Co.*, (N. J. 1905) 60 Atl. Rep. 200. See also *Stout v. Phoenix Assur. Co.*, 65 N. J. Eq. 566; *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234.

Where a mere examination by the appraisers is insufficient to inform them as to the character of the property before the fire, and they cannot, without some evidence, know the sound value of the property or the loss and damage, it is their duty to give notice to both parties of the time and place of hearing and require evidence in respect of facts which they could not otherwise know, and a failure to do so will invalidate the award. *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589.

But it has been held that in the absence of bad faith lack of notice is not ground for setting aside the award. *Townsend v. Greenwich Ins. Co.*, 86 N. Y. App. Div. 323, affirmed 178 N. Y. 634.

**Right of Insured to Hearing.** — The insured is entitled to appear before the arbitrators and to be heard, and to offer evidence touching his loss. A denial of this right by the arbitrators is ground for setting aside the award. *Redner v. New York F. Ins. Co.*, 92 Minn. 306.

**Notice to the Umpire** is not essential in the absence of disagreement. *Vincent v. German Ins. Co.*, 120 Iowa 272.

**364. (4) Award — (a) Generally.** — See notes 1, 4, 6.(b) **Effect and Validity.** — See notes 7, 8, 9, 11, 12.**364. 1.** See *Rutter v. Hanover F. Ins. Co.*, 138 Ala. 202.

**Determination as to Extent of Loss.** — Under a provision that in the event of disagreement the amount of loss shall be ascertained by two appraisers and an umpire, and that the appraisers shall estimate and appraise the loss, stating separately sound value and damage, and shall submit their differences to the umpire, and the award of any two shall determine the amount of the loss, the appraisers are empowered to determine whether the loss is total, as well as to determine its amount in case it is partial. *Williamson v. Liverpool, etc., Ins. Co.*, (C. C. A.) 122 Fed. Rep. 59.

**4.** *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589; *Rutter v. Hanover F. Ins. Co.*, 138 Ala. 202; *Kearney v. Washtenaw Mut. F. Ins. Co.*, 126 Mich. 246. See also *Phoenix Ins. Co. v. Romeis*, 8 Ohio Dec. 633, 15 Ohio Cir. Ct. 697.

**Reasonable Time for Making Award.** — See *Vincent v. German Ins. Co.*, 120 Iowa 272.

**Act of Arbitrator in Excess of Authority Avoids Award.** — *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360.

**Omission of Property by Appraisers Invalidates Award.** — *American F. Ins. Co. v. Bell*, 33 Tex. Civ. App. 11.

**Failure to Find Sound Value Invalidates Award.** — *Continental Ins. Co. v. Garrett*, (C. C. A.) 125 Fed. Rep. 589.

**6.** *Barnard v. Lancashire Ins. Co.*, 101 Fed. Rep. 36, 41 C. C. A. 170; *Williamson v. Liverpool, etc., Ins. Co.*, (C. C. A.) 122 Fed. Rep. 59; *Vincent v. German Ins. Co.*, 120 Iowa 272.

**7. Validity of Award — Iowa.** — *Vincent v. German Ins. Co.*, 120 Iowa 272.

*Kentucky.* — *Etna F. Ins. Co. v. Davis*, (Ky. 1900) 55 S. W. Rep. 705.

*Maine.* — *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

*Massachusetts.* — *Farrell v. German American Ins. Co.*, 175 Mass. 340.

*Michigan.* — *Michels v. Western Underwriters' Assoc.*, 129 Mich. 417; *Raymond v. Farmers' Mut. F. Ins. Co.*, 114 Mich. 380.

*Missouri.* — *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

*New York.* — *Townsend v. Greenwich Ins. Co.*, 86 N. Y. App. Div. 323, *affirmed* 178 N. Y. 634.

*Oregon.* — *Stemmer v. Scottish Union, etc., Ins. Co.*, 33 Oregon 65.

*Texas.* — *American F. Ins. Co. v. Bell*, 33 Tex. Civ. App. 11.

**Liability Not Fixed by Award.** — The award ascertains only the amount of loss, where it is limited to this by the terms of the submission and the provisions of the policy. *Smith v. Herd*, 110 Ky. 56.

**A Parol Submission to Arbitration is sufficient and binding upon the parties unless unconditionally revoked before the making of the award.** *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289.

**Award Only Prima Facie Correct.** — *Wicking v. Citizens' Mut. F. Ins. Co.*, 118 Mich. 640.

**Award Only Prima Facie Evidence under Michi-**

**gan Statute.** — *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10.

**Appraisement of Loss by Other Companies as Evidence.** — *Western Assur. Co. v. Ray*, 105 Ky. 523.

**Ex Parte Appraisement Not Competent Evidence of Amount of Loss.** — *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810.

**Validity Presumed.** — *Williamson v. Liverpool, etc., Ins. Co.*, (C. C. A.) 122 Fed. Rep. 59.

**Bona Fides in Making Award Presumed.** — *Barnard v. Lancashire Ins. Co.*, (C. C. A.) 101 Fed. Rep. 36.

**Setting Aside Award.** — Suit may be brought to set aside an award and recover judgment under the policy even though by the terms of the policy arbitration is made a condition precedent. *Vincent v. German Ins. Co.*, 120 Iowa 272.

**Award Vacated by Agreement for New Arbitration.** — *Goodwin v. Merchants, etc., Mut. Ins. Co.*, 118 Iowa 601.

**Award Invalidated by Withdrawal of Either Party Before It Is Made.** — *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251. *Compare Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

**Resignation of an Appraiser After Signing and Delivery of the Award** does not affect its validity. *Eisenberg v. Stuyvesant Ins. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 463.

**Award Not Set Aside by Court of Law for Fraud.** — *Fire Assoc. v. Allesina*, 45 Oregon 154.

**Equity Will Not Set Aside Award Because Not Made under Oath.** — *Barnard v. Lancashire Ins. Co.*, (C. C. A.) 101 Fed. Rep. 36.

**8.** *Produce Refrigerating Co. v. Norwich Union F. Ins. Soc.*, 91 Minn. 210; *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525, *affirmed* 172 N. Y. 663.

**Bias.** — *Insurance Co. of North America v. Hegewald*, 161 Ind. 631.

**Burden of Proving Bias on Plaintiff.** — *Hall v. Western Assur. Co.*, 133 Ala. 637.

**Appointment of Improper Appraiser.** — *Western Assur. Co. v. Hall*, (Ala. 1905) 38 So. Rep. 853.

**Forfeiture Not Waived by Making of Appraisement.** — *City Drug Store v. Scottish Union, etc., Ins. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 21.

**9.** *Vincent v. German Ins. Co.*, 120 Iowa 272; *Michels v. Western Underwriters' Assoc.*, 129 Mich. 417.

**Inadequacy Accompanied by Fraud** is a ground for setting aside. *Kaiser v. Hamburg-Bremen F. Ins. Co.*, 59 N. Y. App. Div. 525, *affirmed* 172 N. Y. 663.

**Inadequacy Accompanied by Improper Conduct of the Appraisement** is likewise a ground for setting aside the award. *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234.

**In a Subsequent Action on the policy, the fact that the award is less than the amount of the loss sworn to by the insured at the trial is not conclusive evidence of fraud.** *Goldstein v. Franklin Mut. F. Ins. Co.*, 170 Mass. 243.

**11.** *Farrell v. German-American Ins. Co.*, 175 Mass. 340; *Raymond v. Farmers' Mut. F. Ins. Co.*, 114 Mich. 386.

**12.** *Vincent v. German Ins. Co.*, 120 Iowa

**365.** *c.* **WAIVER.** — See notes 1, 3, 5.

**366.** **10. Payment** — *a.* **AMOUNT OF LIABILITY** — (1) *In General.* — See notes 1, 2.

**Rents, Gains, or Profits.** — See note 4.

(2) *For Personal Property.* — See notes 6, 7, 8, 9, 10.

272; *Ætna F. Ins. Co. v. Davis*, (Ky. 1900) 55 S. W. Rep. 705; *Farrell v. German-American Ins. Co.*, 175 Mass. 340; *Michels v. Western Underwriters' Assoc.*, 129 Mich. 417.

**Second Appraisal.** — "An honest but futile effort by the appraisers, unless it caused a too protracted and wholly unreasonable delay, would not dispense with the need of an appraisal." *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

If the appraisal falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed. *Western Assur. Co. v. Decker*, (C. C. A.) 98 Fed. Rep. 381.

"If an award be set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement for an appraisal still remains in force, and a new appraisal, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived." *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

**Second Appraisal Essential When Neither Party Is at Fault.** — *Vernon Ins., etc., Co. v. Maitlen*, 158 Ind. 393.

**An Award Based on an Inventory Furnished by the Insured** will be upheld although the insured subsequently claims that the inventory was incorrect. *Kentucky Chair Co. v. Rochester German Ins. Co.*, (Ky. 1899) 49 S. W. Rep. 780.

**365. 1. Acts Amounting to Waiver of Arbitration** — *Alabama.* — *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48.

*Colorado.* — *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416.

*Illinois.* — *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549.

*Missouri.* — *Thomas v. Lebanon Town Mut. F. Ins. Co.*, 78 Mo. App. 268; *Montgomery v. Lebanon Town Mut. F. Ins. Co.*, 80 Mo. App. 500; *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311; *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590; *Seigle v. Badger Lumber Co.*, 106 Mo. App. 110.

*Texas.* — *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558.

*Vermont.* — *Stoddard v. Cambridge Mut. F. Ins. Co.*, 75 Vt. 253.

*Canada.* — See *Duffy v. La Compagnie, etc.*, 23 Quebec Super. Ct. 181.

**Requisites of Denial.** — The denial must be unqualified and before disagreement as to the amount of loss. *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63.

**Denial of Ultimate Liability Not a Waiver.** — *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

**Failure to Admit Liability.** — "Neither the failure to admit liability, nor the demand for arbitration, is equivalent to a denial of liability, which, as is generally held, amounts to a waiver of arbitration, for the reason that in case of such denial the dispute is not about the amount

of loss." *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48.

**Sufficiency of Evidence to Show Waiver.** — See *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 52 N. Y. App. Div. 104, affirmed 169 N. Y. 304.

**Provision Waived by Failure to Make Written Request.** — *Garretson v. Merchants, etc., F. Ins. Co.*, 114 Iowa 17.

**Waiver of Clause by Failure of Insurer to Apply Within Time Limited.** — *Hayes v. Milford Mut. F. Ins. Co.*, 170 Mass. 492.

**Waiver by Failure to Comply with Demand of Insured for Appraisal.** — *Milwaukee Mechanic's Ins. Co. v. Schallman*, 90 Ill. App. 280, affirmed 188 Ill. 213.

**Interference by the Insurer to Prevent or Delay Appraisal** waives the requirement of the policy. *Harrison v. Hartford F. Ins. Co.*, (Iowa 1899) 80 N. W. Rep. 309.

**Waiver by Unreasonable Delay.** — *Stephens v. Union Assur. Soc.*, 16 Utah 22, 67 Am. St. Rep. 595.

**Waiver by Retention of Proofs of Loss.** — *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305.

**Adjuster May Waive Provision.** — *Smaildone v. Insurance Co. of North America*, 162 N. Y. 580.

**Agent May Waive Provision.** — *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213.

**Renewal of Arbitration Cannot Be Demanded After Waiver.** — *Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 105 Am. St. Rep. 218.

3. *Carp v. Queen Ins. Co.*, 104 Mo. App. 502.

5. **Arbitration under New Agreement.** — *Schouweiler v. Merchants' Mut. Ins. Assoc.*, 11 S. Dak. 401. See also *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

**Standing on an Invalid Award** waives the right to a new appraisal. *American F. Ins. Co. v. Bell*, 33 Tex. Civ. App. 11.

**366. 1. Indemnity the Basis of the Contract.** — *Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48. And see *supra*, this title, 101. 2; 323. 1 et seq.

**Proof of Value Essential under Missouri Statute.** — *De Soto v. American Guaranty Fund Mut. F. Ins. Co.*, 102 Mo. App. 1.

2. **Where Policy Covers Several Items.** — *Ætna Ins. Co. v. Glasgow Electric Light, etc., Co.*, 107 Ky. 77.

**Inventory Admissible to Show Amount of Loss.** — *Phoenix Ins. Co. v. Padgitt*, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

4. **Profits or Gains.** — *Niagara F. Ins. Co. v. Hefflin*, 60 S. W. Rep. 393, 22 Ky. L. Rep. 1212.

6. **Actual Cash Value of Insured Personalty Lost.** — See *Lion F. Ins. Co. v. Heath*, 29 Tex. Civ. App. 203.

**Value a Question of Fact.** — *Petty v. Mutual F. Ins. Co.*, 111 Iowa 358.

**Burden of Proving Value on Insured.** — *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575.

**Owner's Evidence Admissible to Show Value.** — *Phoenix Ins. Co. v. McAtee*, 33 Ind. App. 106.

**367.** (3) *For Real Property.* — See notes 2, 3, 4, 5.

(4) *Special Clauses as to Amount of Liability* — (a) *In General.* — See notes 6, 7.

**368.** (b) *Pro Rata or Contribution Clause.* — See note *a*.

**Sufficiency of Proof of Value.** — *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575; *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. St. 30.

**Proof of Loss Not Competent to Show Value.** — *Jarrett v. Hoover*, 54 Neb. 65; *Tucker v. Colonial F. Ins. Co.*, (W. Va. 1905) 51 S. E. Rep. 86.

**Evidence of Cost Price Admissible.** — *Glaser v. Home Ins. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 89.

**A List Made by the Insured of the articles destroyed and their price is admissible on the question of their value.** *Cheever v. Scottish Union, etc., Co.*, 86 N. Y. App. Div. 328.

**Manner of Determining Value of Crop.** — See *McIlrath v. Farmers' Mut. Hail Ins. Assoc.*, 114 Iowa 244; *Barry v. Farmers' Mut. Hail Assoc.*, 114 Iowa 186.

**Measure of Recovery under Mississippi Valued-policy Statute.** — *Hartford F. Ins. Co. v. Shlenker*, 80 Miss. 667.

**A Vendee under a Contract of Purchase is entitled to recover to the extent of her interest in the property.** *Tabbut v. American Ins. Co.*, 185 Mass. 419, 102 Am. St. Rep. 353.

**Deduction of Sale Value of Salvaged Goods.** — Where the insured, against the protests of the insurer and pending efforts at an arbitration, sells the goods at auction, he cannot insist that the price realized at the sale is binding on the insurer in determining the amount of loss. *Reading Ins. Co. v. Egelhoff*, 115 Fed. Rep. 393.

**Sale of Salvage Prevents Recovery on Policy.** — *Astrich v. German-American Ins. Co.*, (C. C. A.) 131 Fed. Rep. 13.

**Sale of Salvaged Property Where There Are Several Insurers.** — *North German Ins. Co. v. Morton-Scott-Robertson Co.*, 108 Tenn. 384.

**Waiver by Insurer of Right to Take Damaged Property.** — *Phoenix Assur. Co. v. Stenson*, 34 Tex. Civ. App. 471; *Lundvick v. Westchester F. Ins. Co.*, (Iowa 1905) 104 N. W. Rep. 429.

**Election Not to Be Bound by Arbitration Waiver of Insurer's Right to Take Damaged Goods.** — *Model Dry-Goods Co. v. North British, etc., Ins. Co.*, 79 Mo. App. 550.

**366.** 7. *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305.

**Evidence of the Value of the Property at Another Time and Place is incompetent, unless it is also shown that its value at both times and places was practically the same, or unless any difference in the value is pointed out.** *Lundvick v. Westchester F. Ins. Co.*, (Iowa 1905) 104 N. W. Rep. 429.

**8. Place of Loss.** — *Lundvick v. Westchester F. Ins. Co.*, (Iowa 1905) 104 N. W. Rep. 429; *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305.

**9. Cost of Property Not Measure.** — *Jarrett v. Hoover*, 54 Neb. 65.

**10. Cost of Replacing Not Measure.** — *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305.

**Cost of Replacing Made Measure.** — *Standard Sewing Mach. Co. v. Royal Ins. Co.*, 201 Pa. St. 645. See also *Texas Moline Plow Co. v.*

*Niagara F. Ins. Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 192 (as to the time allowed for replacing).

**367. 2. Measure of Liability for Loss of Insured Building.** — *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367, and supporting the whole text paragraph; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514.

**Proof of Value.** — *Granite State F. Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 53 Neb. 123.

**Cost as Evidence of Value.** — See *Bini v. Smith*, 36 N. Y. App. Div. 463, appeal dismissed 161 N. Y. 120.

**Measure of Damage.** — *Hewins v. London Assur. Corp.*, 184 Mass. 177; *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481.

**Life Tenant's Interest.** — *Beckman v. Fulton, etc., Counties Farmers' Mut. F. Ins. Assoc.*, 66 N. Y. App. Div. 72.

**Tenant by Curtesy.** — *Doyle v. American F. Ins. Co.*, 181 Mass. 139.

**3. Stenzel v. Pennsylvania F. Ins. Co.**, 110 La. 1019, 98 Am. St. Rep. 481, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272.

**Effect of Option to Rebuild.** — *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360.

**4. Stenzel v. Pennsylvania F. Ins. Co.**, 110 La. 1019, 98 Am. St. Rep. 481, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367. See also *Tiemann v. Citizens' Ins. Co.*, 76 N. Y. App. Div. 5.

**5. Real, Not Relative, Value.** — *Stenzel v. Pennsylvania F. Ins. Co.*, 110 La. 1019, 98 Am. St. Rep. 481, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367 and note 5. See also *Tiemann v. Citizens' Ins. Co.*, 76 N. Y. App. Div. 5.

**Repairs.** — If by reason of statute it is impossible to reconstruct the building in accordance with the specifications of the survey to which reference was made in the policy, the liability of the insurer must be determined with reference to the increased cost of repairing it in the manner provided by statute, such liability not to exceed, however, the amount for which the insurer is liable under the policy provisions. *Pennsylvania Ins. Co. v. Philadelphia Contributionship*, 201 Pa. St. 497.

**6. Cash Value Clause.** — *Osborne v. Phenix Ins. Co.*, 23 Utah 428.

**7. Manner of Prorating Between Blanket and Specific Policies.** — See *Schmaelzle v. London, etc., F. Ins. Co.*, 75 Conn. 397, 96 Am. St. Rep. 233; *Chandler v. Insurance Co. of North America*, 70 Vt. 562.

**Method of Apportionment under South Carolina Statute.** — See *Cave v. Home Ins. Co.*, 57 S. Car. 347.

**368. a. Mode of Apportionment.** — *Farmers' Feed Co. v. Scottish Union, etc., Ins. Co.*, 173 N. Y. 241,

- 368.** When Clause Applicable. — See notes 1, 3, 6.  
**369.** In Case Another Insurer Has Paid More than Its Share of the Loss. — See note 1.  
 Void and Invalid Policies. — See note 2.  
 In Case of a Partial Loss. — See note 7.  
**370.** (c) Two-thirds and Three-fourths Clauses. — See notes 1, 2.  
 (5) Interest — (a) When Interest Is Allowable. — See note 9.  
**371.** See note 1.  
 (b) When Interest Begins to Run. — See note 15.  
 Interest from Fixed Time After Furnishing Proofs of Loss. — See note 16.  
**372.** See notes 1, 2.  
 Interest from Date of Waiver. — See notes 6, 7.

**368.** 1. Same Interest Must Be Insured. — See *Home Ins. Co. v. Minneapolis, etc., R. Co.*, 71 Minn. 296.

Provision Applicable to Insurance by Lessor and Lessee. — *Sun Ins. Office v. Varble*, 103 Ky. 758.

3. Same Risks. — *Home Ins. Co. v. Minneapolis, etc., R. Co.*, 71 Minn. 296.

Policies containing the contribution clause and covering additions on the building insured must contribute, in case of a loss on the additions, to policies containing the same provisions, subsequently issued, insuring the additions specifically. *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781.

6. The Fact that a Different Mode of Adjustment Is Provided in the Concurrent Policies is immaterial. *Kansas City Paper Box Co. v. American F. Ins. Co.*, 100 Mo. App. 691.

**369.** 1. An Agreement Whereby One Insurer Has Paid a Smaller Amount than that for which it might have been held liable does not reduce the amount for which the other insurer is liable. *Goodwin v. Merchants', etc., Mut. Ins. Co.*, 118 Iowa 601.

2. Under the Iowa Statute which provides that no condition in the policy fixing the amount of the liability under the policy with reference to the *pro rata* with other insurance on the property shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding, a stipulation of a policy in so far as it undertakes to include a void policy in prorating will not be enforced. It is immaterial that the insurer under the invalid policy may have regarded this policy as valid or paid an amount in compromise thereof, and this is especially true when the total amount received by the insured does not equal the loss suffered. *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa 547.

7. Mode of Computation. — See *Farmers' Feed Co. v. Scottish Union, etc., Ins. Co.*, 65 N. Y. App. Div. 70, reversed 173 N. Y. 241.

**370.** 1. Provision Requiring Certain Percentage of Other Insurance. — *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1; *Quinn v. Philadelphia Fire Assoc.*, 180 Mass. 560.

Provision in Violation of Valued-policy Statute. — *Sachs v. London, etc., F. Ins. Co.*, 113 Ky. 88.

Stipulation for Concurrent Insurance. — *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580.

2. Clause Limiting Insurer's Liability to Certain Percentage. — *Roberts v. Insurance Co. of America*, 94 Mo. App. 142; *Millis v. Scottish*

*Union, etc., Ins. Co.*, 95 Mo. App. 211; *Pharand v. Lancashire Ins. Co.*, 18 Quebec Super. Ct. 35.

Provision Valid as to Personality. — *Hudson v. Scottish-Union, etc., Ins. Co.*, 110 Ky. 722.

Where Insurance Is Less than Three-fourths. — *Malin v. Mercantile Town Mut. Ins. Co.*, 105 Mo. App. 625.

Policy Covering Several Items of Personality. — *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147.

Effect of Valued-policy Statutes. — See *Western Assur. Co. v. Phelps*, 77 Miss. 625.

Under Statute in Kentucky, the full estimated value of the property insured, as fixed on the face of the policy, is recoverable, even though the policy contains the "three-fourths clause." *Phoenix Ins. Co. v. Peak*, (Ky. 1898) 47 S. W. Rep. 1089.

Waiver of Three-fourths Clause. — See *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa 547.

9. American Rule — Interest Generally Allowable. — *Reading Ins. Co. v. Egelhoff*, 115 Fed. Rep. 393; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234; *Bear v. Atlanta Home Ins. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613.

By What Law Governed. — A policy of insurance covering property in Illinois, made and delivered in Nebraska, and upon which action is brought in Nebraska, is subject to the law of Nebraska relative to interest upon the amount due thereon. *Lancashire Ins. Co. v. Barnard*, (C. C. A.) 111 Fed. Rep. 702.

**371.** 1. Allowed as Damages for Detention. — *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

15. Reading Ins. Co. v. Egelhoff, 115 Fed. Rep. 393; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291. See also *Bear v. Atlanta Home Ins. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613. And see *infra*, this title, **374**. 16 *et seq.*

16. Interest from Sixty Days After Proof of Loss. — *Hilton v. Phoenix Assur. Co.*, 92 Me. 272; *Schmitt v. Boston Ins. Co.*, 82 N. Y. App. Div. 234.

Interest from Date of Judgment. — *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590.

**372.** 1. See *White v. Farmers' Mut. F. Ins. Co.*, 97 Mo. App. 590.

2. Interest from Award. — *Reading Ins. Co. v. Egelhoff*, 115 Fed. Rep. 393.

Where Insured Delays Arbitration. — *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291.

6. Time Reckoned from Waiver. — *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559.

7. See also *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559.



**373.** *b.* TO WHOM PAYABLE — (1) *Mortgagor or Mortgagee.* — See note 1.

Loss Payable to Mortgagee as Interest Appears. — See note 3.

(2) *Vendor and Purchaser.* — See note 9.

**374.** (4) *Miscellaneous Parties — Remainders.* — See note 5.

*d.* TIME OF PAYMENT — (1) *Generally.* — See note 16.

**375.** See note 1.

(2) *Waiver.* — See note 5.

Denial of Liability. — See note 6.

**376.** *e.* PENALTIES FOR NONPAYMENT — (1) *Where Authorized.* — See note 1.

(2) *Constitutionality.* — See notes 7, 7a.

(3) *Construction and Application.* — See note 8.

**377.** *Missouri Statute — Delay Must Be Vexatious.* — See note 7.

(4) *Allowance of Attorneys' Fees.* — See note 11.

**378.** *The Evidence.* — See note 1.

*f.* RECOVERING BACK PAYMENTS. — See note 10.

**373.** 1. Compare *Huey v. Ewell*, 22 Tex. Civ. App. 638.

3. Loss Payable to Mortgagee as Interest May Appear. — *Banyer v. Albany Ins. Co.*, 85 N. Y. App. Div. 122, affirmed 179 N. Y. 554.

Renewal of the Mortgage After Issuance of the Policy does not affect the mortgagee's right. *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546.

9. *Vendee.* — *Wm. Skinner, etc., Ship-building, etc., Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485.

374. 5. Life Tenant to Hold in Trust for Remainderman. — *Bennett v. Featherstone*, 110 Tenn. citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

16. When Loss Due and Payable. — *Continental Ins. Co. v. Wickham*, 110 Ga. 129, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374; *Northern Assur. Co. v. Hanna*, 60 Neb. 29.

Where a policy provides that the loss shall be payable sixty days after the delivery of proofs, and does not make the award of appraisers a part of the proofs, the damages are due immediately after the filing of an award subsequent to the expiration of the sixty days. *Lancashire Ins. Co. v. Barnard*, (C. C. C.) 111 Fed. Rep. 702.

375. 1. Time Begins to Run When Proofs Served. — *Continental Ins. Co. v. Wickham*, 110 Ga. 129, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375.

In *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, it was held that the provision that the loss should be payable within sixty days after the submission of proofs of loss was not absolute, but that in case of a reference it would not be payable until the referees had made their award, providing the insured was not at fault in delaying the reference.

5. *Waiver.* — *Continental Ins. Co. v. Wickham*, 110 Ga. 129, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Northern Assur. Co. v. Hanna*, 60 Neb. 29, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375. See also *Hosmer v. St. Joseph Town Mut. F. Ins. Co.*, 80 Mo. App. 419.

6. *Continental Ins. Co. v. Wickham*, 110 Ga. 129, quoting 13 AM. AND ENG. ENCYC. OF LAW

(2d ed.) 375; *Hosmer v. St. Joseph Town Mut. F. Ins. Co.*, 80 Mo. App. 419; *Northern Assur. Co. v. Hanna*, 60 Neb. 29, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375.

376. 1. *Penalty Statutes.* — *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

7. *Kansas — Constitutionality Upheld* — *Hartford F. Ins. Co. v. Warbritton*, 66 Kan. 93; *Shawnee F. Ins. Co. v. Bayha*, 8 Kan. App. 169; *Alliance Cooperative Ins. Co. v. Corbett*, 69 Kan. 564.

7a. *Other States.* — The *Florida* statute allowing recovery of attorney's fees has been held to be valid. *Tillis v. Liverpool, etc., Ins. Co.*, (Fla. 1903) 35 So. Rep. 171; *L'Engle v. Scottish Union, etc., Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

And the *Tennessee* statute (Acts Tenn. 1901, c. 141) providing for the payment of damages as a penalty for delay is constitutional. *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

But the *Georgia* statute has been declared to be unconstitutional. *Phenix Ins. Co. v. Hart*, 112 Ga. 765.

8. *Not Retroactive.* — *Thompson v. Traders' Ins. Co.*, 169 Mo. 12.

377. 7. *Missouri Statute.* — *Thompson v. Traders' Ins. Co.*, 169 Mo. 12.

What Constitutes "Vexatious" Refusal. — See *Blackwell v. American Cent. Ins. Co.*, 80 Mo. App. 75.

Damages May Be Less than Ten Per Cent. — *Ramsey v. Philadelphia Underwriters Assoc.*, 71 Mo. App. 380.

11. *Fees Recoverable in Same Suit, under Florida Statute.* — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

378. 1. *The Amount of Attorney's Fee Is to Be Fixed by the Court, under the Kansas statute.* — *Alliance Co-operative Ins. Co. v. Corbett*, 69 Kan. 564.

10. *Recovery Back of Payments.* — See *Teutonia Ins. Co. v. Bussell*, (Tenn. Ch. 1897) 48 S. W. Rep. 703.

As to Recovery under the *Georgia Statute*, see *Rome Grocery Co. v. Greenwich Ins. Co.*, 119 Ga. 618.

- 379.** 11. **Option to Rebuild** — *a.* IN GENERAL. — See notes 1, 4.  
**Manner and Cost of Rebuilding.** — See notes 6, 7.  
*b.* TIME AND MANNER OF EXERCISING. — See notes 9, 11, 13.
- 380.** See note 2.  
*c.* EFFECT. — See note 4.  
**Election Creates New Cause of Action.** — See note 11.  
*d.* MEASURE OF DAMAGE. — See note 12.
- 381.** See notes 1, 2.  
*e.* WAIVER. — See notes 7, 8.  
**12. Effect of Adjustment** — *a.* IN GENERAL. — See note 10.  
**Fraud.** — See note 11.

**379. 1. The Provision of the Standard Policy** as to the conclusiveness of the value of the property destroyed and the amount of loss and damage must be construed in connection with the provisions of the statute limiting the liability of the insurer to the actual cash value of the property at the time of loss, except where otherwise provided by statute, and providing that the liability shall not exceed what it would then cost the insured to repair or replace the property, and giving to the insurer the optional right to rebuild. *Temple v. Niagara F. Ins. Co.*, 109 Wis. 372.

**Insurer Has No Option under Missouri Statute.** — *Branigan v. Jefferson Mut. F. Ins. Co.*, 102 Mo. App. 70.

**Under the Ohio Statute**, a provision in a policy giving to the insurer the option to rebuild in case of total loss is void. *Milwaukee Mechanics Ins. Co. v. Russell*, 65 Ohio St. 230; *Security F. Ins. Co. v. McFarland*, 12 Ohio Cir. Dec. 591.

**4. City Ordinance Precluding Rebuilding.** — *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286. See also *supra*, this title, 324. 1.

"Where the law prohibits the repair of a building which has been partially destroyed by fire, in the absence of any express provision in the policy to the contrary, the loss is not measured by the sum required to restore the building to its condition before the fire, but it is total, less the value of the remaining materials for removal. Since the change in the building is caused solely by the fire, the difference in its value caused by that change is loss or damage by fire within the meaning of the policy, in the absence of anything therein to the contrary. The principle is the same whether its application results in a total loss, or in an increase of a partial loss." *Hewins v. London Assur. Corp.*, 184 Mass. 177.

**Ordinance Part of Policy.** — *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286.

**Measure Fixed by Policy.** — *McCready v. Hartford F. Ins. Co.*, 61 N. Y. App. Div. 583.

**6. In Rebuilding Must Conform to Building Regulations.** — *Hewins v. London Assur. Corp.*, 184 Mass. 177. See also *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286.

**7. Effect of Provisions in Policy.** — *Hewins v. London Assur. Corp.*, 184 Mass. 177.

**9. Time for Exercise of Option.** — *Lancashire Ins. Co. v. Barnard*, (C. C. A.) 111 Fed. Rep. 702.

**Option to Be Exercised Within Reasonable**  
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**Time.** — *Langan v. Aetna Ins. Co.*, 99 Fed. Rep. 374, *affirmed* (C. C. A.) 108 Fed. Rep. 985.

**Under the Standard Policy** in use in *New York* the option continues for thirty days after service of proofs of loss. *McAllaster v. Niagara F. Ins. Co.*, 156 N. Y. 80.

**11. Resort to Arbitration an Election to Pay.** — *McAllaster v. Niagara F. Ins. Co.*, 156 N. Y. 80.

**Power of Adjuster to Exercise.** — *Lancashire Ins. Co. v. Barnard*, (C. C. A.) 111 Fed. Rep. 702.

**13. Election Must Be Carried Out in Reasonable Time.** — *Maryland Home F. Ins. Co. v. Kimmell*, 89 Md. 437.

**380. 2. Branigan v. Jefferson Mut. F. Ins. Co.**, 102 Mo. App. 70.

**4. Alliance Coöperative Ins. Co. v. Arnold**, 65 Kan. 163.

**11. Election Once Made Irrevocable.** — *Langan v. Aetna Ins. Co.*, 99 Fed. Rep. 374, *affirmed* (C. C. A.) 108 Fed. Rep. 985, holding that the insurer cannot withdraw because of an increase in the cost of building.

**12. Damages Recoverable for Breach.** — *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380.

**381. 1. Measure of Damages.** — *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230; *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360.

**2. Milwaukee Mechanics' Ins. Co. v. Russell**, 65 Ohio St. 230.

**7. When Option Waived.** — *Iowa Cent. Bldg., etc., Assoc. v. Merchants, etc., F. Ins. Co.*, 120 Iowa 530; *Alliance Coöperative Ins. Co. v. Arnold*, 65 Kan. 163.

**Where the Loss Is Payable to the Mortgagee**, and the insurer by a demand for an appraisalment has waived his option to rebuild, the insured cannot bind the mortgagee by an agreement relieving the insurer from the obligation to make payment in money. *Iowa Cent. Bldg., etc., Assoc. v. Merchants, etc., F. Ins. Co.*, 120 Iowa 530.

**8. Langan v. Aetna Ins. Co.**, 96 Fed. Rep. 705.

**10. Under the Ohio Valued-policy Statute** the insured, by consenting to arbitrate the amount of loss sustained by fire, in pursuance to the provisions of the policy, is not precluded, in a suit upon the policy, from claiming and recovering as for a total loss, if the evidence sustains his claim. *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 41, 81 Am. St. Rep. 608.

**11. Fraud.** — Fraud cannot be predicated upon a promissory statement of the insurer's agent as to the terms of the submission, in conflict with the written agreement, whereby the in-

- 382.** *b.* RESCISSION — (2) *When Allowed.* — See note 7.  
*c.* ADJUSTMENT AS A BAR TO SUIT. — See notes 9, 11.

**383.** See note 1.

**13.** Subrogation — Subrogation to Rights of Insured Against Person Causing Loss. — See note 11.

**384.** To Rights of Creditors. — See note 2.

To Rights Against Carriers. — See note 3.

**385.** Revenue Stamps. — See note 1.

**VI. RECOVERY AFTER FAILURE OF ADJUSTMENT** — 1. When Right of Action Accrues. — See notes 4, 5, 6, 7.

**386.** 2. When Right of Action Expires — The Limitation Clause — *a.* VALIDITY — (1) *General Rule.* — See notes 1, 3.

sured was induced to enter into the written agreement. *Townsend v. Greenwich Ins. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 87, *affirmed* 86 N. Y. App. Div. 323.

**382.** 7. Return of Money Received on Settlement Before Suit on Policy. — *Townsend v. Greenwich Ins. Co.*, 86 N. Y. App. Div. 323, *affirmed* 178 N. Y. 634; *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448.

9. No Suit on Policy until Rescission of Compromise. — *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428; *Townsend v. Greenwich Ins. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 87, *affirmed* 86 N. Y. App. Div. 323.

Where the Award Is Limited to an Estimate of the Damage, the action of the insured is properly upon the policy, and not upon the award. *British America Assur. Co. v. Darragh*, (C. C. A.) 128 Fed. Rep. 890.

Adjustment an Accord but Not a Satisfaction. — *Vining v. Franklin F. Ins. Co.*, 89 Mo. App. 311.

11. Suit on Compromise. — *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428; *Dwelling House Ins. Co. v. Garvey*, 8 Ohio Cir. Dec. 86, 14 Ohio Cir. Ct. 657.

Under the New Hampshire Policy the insured is not limited to the amount of the award. *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251.

**383.** 1. Promise Essential. — See *Dwelling House Ins. Co. v. Garvey*, 8 Ohio Cir. Dec. 86, 14 Ohio Cir. Ct. 657.

11. See *Svea Assur. Co. v. Packham*, 92 Md. 464.

**384.** 2. Insurance of Mortgaged Property. — See *New Hampshire F. Ins. Co. v. National L. Ins. Co.*, (C. C. A.) 112 Fed. Rep. 199.

3. A Breach of a Prohibition Against Releasing the Carrier's Liability by entering into a special agreement to that effect avoids the policy. *Bloomington v. Columbia Ins. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 572. See also the title SUBROGATION, 260. 1.

**385.** 1. *Phenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265, *affirmed* 182 Ill. 33.

4. Premature Action. — *Gillon v. Northern Assur. Co.*, 127 Cal. 480; *Bellinger v. German Ins. Co.*, 95 N. Y. App. Div. 262; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667. See also *Vail v. Pennsylvania F. Ins. Co.*, 67 N. J. L. 66; *Clemens v. American F. Ins. Co.*, 70 N. Y. App. Div. 435.

Object of Stipulation. — See *Northern Assur. Co. v. Hanna*, 60 Neb. 29.

When Mortgagee's Right of Action Accrues. — See *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8.

Repeal of Statute Existing When Insurance Effected. — *Jones v. German Ins. Co.*, 110 Iowa 75. 5. See *Continental Ins. Co. v. Wickham*, 110 Ga. 129.

Provision Construed. — *Putze v. Saginaw Valley Mut. F. Ins. Co.*, 132 Mich. 670.

When Right of Action Accrues under Michigan Statute. — See *Putze v. Saginaw Valley Mut. F. Ins. Co.*, 132 Mich. 670.

6. *Bradford v. Mutual F. Ins. Co.*, 112 Iowa 495.

7. *Continental Ins. Co. v. Wickham*, 110 Ga. 129; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Northern Assur. Co. v. Hanna*, 60 Neb. 29; *Edwards v. Fireman's Ins. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 354; *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667; *Home Ins. Co. v. Hancock*, 106 Tenn. 513; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558; *Frost v. North British, etc., Ins. Co.*, 77 Vt. 407. See also *Planters' Mut. Ins. Assoc. v. Southern Sav. Fund, etc., Co.*, 68 Ark. 8; *Phenix Ins. Co. v. Luce*, (C. C. A.) 123 Fed. Rep. 257.

Delay in Completing Proofs Caused by the Insurer is a waiver. *Western Assur. Co. v. Pharrand*, 11 Quebec K. B. 144.

Waiver of Proof Unaccompanied by Denial of Liability does not, however, give to the insured the right to sue at once. *Dun v. Germania F. Ins. Co.*, 10 Ohio Dec. 667.

A Statute Providing that the Right of Action Accrues Within a Specified Time after failure of adjustment controls. *Franklin v. New Hampshire F. Ins. Co.*, 70 N. H. 251.

**386.** 1. Limitation Clause Valid — *Colorado.* — *Daly v. Concordia F. Ins. Co.*, 16 Colo. App. 349.

*Connecticut.* — *Chichester v. New Hampshire F. Ins. Co.*, 74 Conn. 510.

*Hawaii.* — *Tong Chong Chan v. New Zealand Ins. Co.*, 13 Hawaii 483, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386.

*Illinois.* — *Stephens v. Phenix Assur. Co.*, 85 Ill. App. 671.

*Iowa.* — *Garretson v. Merchants', etc., F. Ins. Co.*, 114 Iowa 17.

*Kentucky.* — *Smith v. Herd*, 110 Ky. 56.

*Michigan.* — *Barry, etc., Lumber Co. v. Citizens' Ins. Co.*, 136 Mich. 42.

*Mississippi.* — *Ward v. Pennsylvania F. Ins. Co.*, 82 Miss. 124.

**387.** (2) *Restrictions by Statute.* — See notes 2, 3, 4.

**388.** *b. WHEN LIMITATION BEGINS* — (1) *First Stage* — “*After the Loss or Damage Shall Occur*” — *Later Construction.* — See note 5.

**390.** (2) *Second Stage* — “*After the Fire.*” — See notes 2, 4.

(3) *In Mutual Benefit Certificates.* — See note 5.

*c. WAIVER OF THE LIMITATION* — (1) *Generally* — *Acts of Insurer Inducing Delay in Bringing Suit.* — See note 6.

**391.** (2) *Qualifications.* — See notes 2, 3, 4, 8, 9.

*Pennsylvania.* — *Atlas Mut. Ins. Co. v. Downing*, 12 Pa. Super. Ct. 305.

*Vermont.* — *Morrill v. New England F. Ins. Co.*, 71 Vt. 281.

**Actions by Minors.** — A contract of limitation in the policy controls the general statute of limitations, and is good even against minor beneficiaries. *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, 104 Am. St. Rep. 412.

**386.** 3. *Contra*, where it appears from the form of the contract that the limitation was not intended to bind the mortgagee, *Queen Ins. Co. v. Dearborn Sav., etc., Assoc.*, 75 Ill. App. 371, affirmed 175 Ill. 115.

**387.** 2. *General Statute of Limitations Not Applicable.* — *Tong Chong Chan v. New Zealand Ins. Co.*, 13 Hawaii 483; *Wilhelmi v. Des Moines Ins. Co.*, 103 Iowa 532; *Smith v. Herd*, 110 Ky. 56.

3. *A Statute Fixing the Minimum Limitation* is not applicable to a loss incurred before the statute went into effect. *Farmer's Co-operative Creamery Co. v. Iowa State Ins. Co.*, 112 Iowa 608.

**Nonsuit Taken by Insured — Limitation under Arkansas Statute.** — *Moore v. Susquehanna Mut. F. Ins. Co.*, 196 Pa. St. 30.

4. *Lancashire Ins. Co. v. Stanley*, 70 Ark. 1; *Omaha F. Ins. Co. v. Dreman*, 56 Neb. 623.

**388.** 5. *Later Doctrine — Limitation Dated from Time When Cause of Action Arose.* — *Harrison v. Hartford F. Ins. Co.*, (Iowa 1899) 80 N. W. Rep. 309.

**The Provision in the Minnesota Standard Policy** that no suit to recover for loss under the policy shall be sustained unless commenced within two years from the time when the loss occurred, as a limitation, applies to and runs from the time of the fire or actual destruction of the property, but not from the time when the cause of action accrues. *Rottier v. German Ins. Co.*, 84 Minn. 116.

**Effect of Appraisal.** — *Williams v. German Ins. Co.*, 90 N. Y. App. Div. 413.

**Appraisal Proceedings Not in Conformity with Provisions of Policy.** — *Harrison v. Hartford F. Ins. Co.*, (Iowa 1899) 80 N. W. Rep. 309.

**390.** 2. *After the Fire, Etc. — Literal Construction.* — *Chichester v. New Hampshire F. Ins. Co.*, 74 Conn. 510.

4. *After the Fire — Liberal Construction.* — *Daly v. Concordia F. Ins. Co.*, 16 Colo. App. 349; *Bradford v. Mutual F. Ins. Co.*, 112 Iowa 495; *Boston Marine Ins. Co. v. Scales*, 101 Tenn. 628. *Compare Allen v. Dutchess County Mut. Ins. Co.*, 95 N. Y. App. Div. 86.

**Where Provision for Arbitration Is Waived.** — *Garretson v. Merchants, etc., F. Ins. Co.*, 114 Iowa 17.

5. *Manner of Calculating Time.* — See *Daly v. Concordia F. Ins. Co.*, 16 Colo. App. 349.

6. **Estoppel of Insurer** — *United States.* — *Alten v. McFall*, 89 Fed. Rep. 463.

*Connecticut.* — See *Chichester v. New Hampshire F. Ins. Co.*, 74 Conn. 510.

*District of Columbia.* — *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.

*Florida.* — *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273 (delay caused by nonsuit due to the insurer's wrongful withholding of the policy and necessary information as to its terms).

*Illinois.* — *Farmers' F. Ins. Co. v. Gorzelany*, 89 Ill. App. 388. See also *Phenix Ins. Co. v. Belt R. Co.*, 82 Ill. App. 265, affirmed 182 Ill. 33.

*Iowa.* — *Goodwin v. Merchants', etc., Mut. Ins. Co.*, 118 Iowa 601.

*Mississippi.* — *Scottish Union, etc., Ins. Co. v. Ensley*, 78 Miss. 157.

*New York.* — *McArdle v. German Alliance Ins. Co.*, 98 N. Y. App. Div. 594, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390; *Williams v. German Ins. Co.*, 90 N. Y. App. Div. 413.

*Vermont.* — *Morrill v. New England F. Ins. Co.*, 71 Vt. 281.

*West Virginia.* — *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237.

*Wisconsin.* — *Frels v. Little Black Farmers' Mut. Ins. Co.*, 120 Wis. 590.

**Slight Evidence Is Sufficient** to sustain estoppel. *McArdle v. German Alliance Ins. Co.*, 98 N. Y. App. Div. 594.

**Delay Caused by Appraisal Proceedings**, without fault of the insured, appraisal being required by the policy, was held to postpone the running of the limitation clause notwithstanding a provision in the policy that the company should “not be held to have waived any provision or condition of this policy” by any act on its part relating to the appraiser. *Fritz v. British America Assur. Co.*, 208 Pa. St. 268.

**Postponement of Action by Agreement** will operate as an estoppel. *Phenix Ins. Co. v. Belt R. Co.*, 182 Ill. 33.

**Suit Must Be Brought Within a Reasonable Time** after the waiver has been made. *Goodwin v. Merchants, etc., Mut. Ins. Co.*, 118 Iowa 601.

**391.** 2. *Intent Must Be Clear.* — *Tong Chong Chan v. New Zealand Ins. Co.*, 13 Hawaii 483; *McArdle v. German Alliance Ins. Co.*, 98 N. Y. App. Div. 594. See also *Morrill v. New England F. Ins. Co.*, 71 Vt. 281; *Allen v. Dutchess County Mut. Ins. Co.*, 95 N. Y. App. Div. 86.

3. *McArdle v. German Alliance Ins. Co.*, 98 N. Y. App. Div. 594. See also *Allen v. Dutchess County Mut. Ins. Co.*, 95 N. Y. App. Div. 86.

**Acts of Insurer After Time Allowed Has Elapsed Not a Waiver.** — *Chichester v. New Hampshire F. Ins. Co.*, 74 Conn. 510.

**392.** Acts of Agents as Waiver. — See note 2.

Loss Occurring After Death of Insured — Absence of Party to Be Served. — See note 7.

**393.** *e.* SCOPE OF PROVISIONS AS TO LIMITATION. — See note 4.

*f.* WHEN ACTION IS COMMENCED — (1) *In General.* — See note 11.

**394.** Failure to Serve Process. — See note 1.

**391.** 4. Compare *Frels v. Little Black Farmers Mut. Ins. Co.*, 120 Wis. 590.

8. *Allen v. Dutchess County Mut. Ins. Co.*, 95 N. Y. App. Div. 86. See also *Morrill v. New England F. Ins. Co.*, 71 Vt. 281.

9. A Refusal by the Insurer to Pay the Loss, after the demand of the insured, on the ground that it would be paid by governmental authority, does not constitute a waiver by the insurer of the right to rely on the clause of limitation as a defense or estop the insurer from presenting such defense. *Tong Chong Chan v. New Zealand Ins. Co.*, 13 Hawaii 483.

**392.** 2. *Barry, et c., Lumber Co. v. Citizens Ins. Co.*, 136 Mich. 42.

7. The Absconding of the Insurer's Officers, preventing the service of process, has been held

to excuse failure to comply with the provision. *Taber v. Royal Ins. Co.*, 124 Ala. 681.

**393.** 4. An Action to Enforce a Compromise Agreement is not within the provision. *Hanover F. Ins. Co. v. Hatton*, (Ky. 1900) 55 S. W. Rep. 681.

11. *Ward v. Pennsylvania F. Ins. Co.*, 82 Miss. 124.

When Action Deemed Commenced. — See *Colonial Mut. F. Ins. Co. v. Ellinger*, 112 Ill. App. 302.

**394.** 1. Failure to Serve Process — Alias or Pluries Writ. — *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 65 Am. St. Rep. 611.

As to Computation of Time see *Colonial Mut. F. Ins. Co. v. Ellinger*, 112 Ill. App. 302.

## FIRE LIMITS.

**396.** II. AUTHORITY OF MUNICIPALITY — 1. In the Absence of Legislative Authority. — See note 1.

**398.** III. STRICT CONSTRUCTION. — See note 1.

IV. REPAIRS AND ALTERATIONS. — See note 2.

What Constitutes New Building. — See note 4.

**400.** VI. REMOVAL BY CITY OF WOODEN BUILDINGS WITHIN THE FIRE LIMITS. — See note 1.

**401.** VIII. INJUNCTIONS. — See note 1.

**402.** FIREPROOF. — See note 2.

**396.** 1. Inherent Authority. — See *Griffin v. Gloversville*, 67 N. Y. App. Div. 403.

**398.** 1. Liberal Construction. — See *Chimene v. Baker*, 32 Tex. Civ. App. 520.

Ordinance Broader than Statute. — *City of Marion v. Robertson*, 84 Ill. App. 113; *Winthrop v. New England Chocolate Co.*, 180 Mass. 464.

Statute Not Retrospective. — *Jackson v. Miller*, (N. J. 1905) 60 Atl. Rep. 1019.

2. Repairs. — *O'Brien v. Louer*, 158 Ind. 211; *Contas v. Bradford*, 206 Pa. St. 291; *Roanoke v. Bolling*, 101 Va. 182.

4. What Changes Amount to a New Building. — See *Noland v. People*, 33 Colo. 322.

Repairs Not Amounting to Violation of Ordinance. — *Contas v. Bradford*, 206 Pa. St. 291.

Removal of Building. — *Lemmon v. Guthrie Center*, 113 Iowa 36, 86 Am. St. Rep. 361; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403.

**400.** 1. Removal. — *Lemmon v. Guthrie Center*, 113 Iowa 36, 86 Am. St. Rep. 361; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403.

**401.** 1. Injunction. — *O'Brien v. Louer*, 158 Ind. 211; *Jackson v. Miller*, (N. J. 1905) 60 Atl. Rep. 1019; *Chimene v. Baker*, 32 Tex. Civ. App. 520, following *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, stated in original note.

Enjoining City. — *Lemmon v. Guthrie Center*, 113 Iowa 36, 86 Am. St. Rep. 361; *Roanoke v. Bolling*, 101 Va. 182.

**402.** 2. Fireproof. — *Dietz v. Yetter*, 34 N. Y. App. Div. 453; *Chimene v. Baker*, 32 Tex. Civ. App. 520.

Fireproof Safe. — *Underwriters F. Assoc. v. Palmer*, (Tex. Civ. App. 1903) 74 S. W. Rep. 603.

# FIRES.

BY JOHN C. MYERS.

**409.** II. RULE OF EARLY COMMON LAW — 1. In General. — See note 3.

**410.** 2. Common-law Rule as Changed by English Statutes. — See notes 2, 3.  
Exemption Not Afforded for Negligent Fires. — See note 5.

**411.** III. GENERAL RULE AS NOW EXISTING — 1. In Absence of Special Statute — a. LIABILITY FOR NEGLIGENCE. — See note 1.

b. NECESSITY FOR NEGLIGENCE — (1) *In General*. — See note 2.

**413.** (3) *Person Using Fire Not Insurer Against Injury*. — See notes 3, 4.

(4) *Rule as Applied to Railroads*. — See note 5.

The Fact that Railroad Companies Habitually Use a Dangerous Element. — See note 6.

**409.** 3. Rule of Early Common Law. — *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288; *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603; *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715.

**410.** 2. Recognition of Hardship of Common-law Rule. — *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603; *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715.

**3.** Terms of Statute of 14 Geo. III. — See *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715.

**5.** Construction of English Statutes — Doctrine that Exemption Not Afforded for Negligent Fires. — *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603.

**411.** 1. Liability for Negligence. — *Indiana*, etc., R. Co. v. *Hawkins*, 81 Ill. App. 570; *Alabama*, etc., R. Co. v. *Fried*, 81 Miss. 314; *German-American Ins. Co. v. Standard Gas Light Co.*, 67 N. Y. App. Div. 539, affirmed 174 N. Y. 508; *Lieuallen v. Mosgrove*, 37 Oregon 446.

**2.** Present Rule — Negligence Necessary — *United States*. — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Lesser Cotton Co. v. St. Louis*, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

*Georgia*. — *Southern R. Co. v. Myers*, 108 Ga. 165; *Akins v. Georgia R., etc., Co.*, 111 Ga. 815; *Georgia*, etc., R. Co. v. *Rawson*, 112 Ga. 471; *Southern R. Co. v. Williams*, 113 Ga. 335.

*Illinois*. — *Chicago*, etc., R. Co. v. *Madison*, 81 Ill. App. 393.

*Indiana*. — *Toledo*, etc., R. Co. v. *Parks*, 163 Ind. 592; *McDoel v. Gill*, 23 Ind. App. 95; *Wabash R. Co. v. Schultz*, 30 Ind. App. 495.

*Indian Territory*. — *Missouri*, etc., R. Co. v. *Wilder*, 3 Indian Ter. 85.

*Iowa*. — *Connors v. Chicago*, etc., R. Co., 111 Iowa 384.

*Kentucky*. — *Louisville*, etc., R. Co. v. *Samuels*, (Ky. 1900) 57 S. W. Rep. 235.

*Nebraska*. — *Vansyoc v. Freewater-Cemetery Assoc.*, 63 Neb. 143; *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603.

*New Hampshire*. — *Gerrish v. Whitfield*, 72 N. H. 222.

*New York*. — *Peck v. New York Cent., etc.,*

*R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; *Hitchcock v. Riley*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 260.

*Oregon*. — *Anderson v. Oregon R., etc., Co.*, 45 Oregon 211.

*Pennsylvania*. — *Baylor v. Stevens*, 16 Pa. Super. Ct. 365.

*Rhode Island*. — *MacDonald v. New York*, etc., R. Co., 23 R. I. 558.

*Tennessee*. — *Louisville*, etc., R. Co. v. *Fort*, 112 Tenn. 432.

*Texas*. — *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256.

*Washington*. — *Abrams v. Seattle*, etc., R. Co., 27 Wash. 507.

*Canada*. — *Canadian Pac. R. Co. v. Roy*, (1902) A. C. 220, 12 Quebec K. B. 543; *Jackson v. Grand Trunk R. Co.*, 32 Can. Sup. Ct. 245; *Chaz v. Les Cisterciens Reformes*, 12 Manitoba 330; *Rainville v. Grand Trunk R. Co.*, 28 Ont. 625, affirmed 25 Ont. App. 243, 29 Can. Sup. Ct. 201; *Oatman v. Michigan Cent. R. Co.*, 1 Ont. L. Rep. 145.

**413.** 3. Person Using Fire to Clear Land Not Insurer. — *Chaz v. Les Cisterciens Reformes*, 12 Manitoba 330; *Hitchcock v. Riley*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 260.

**4.** *Vansyoc v. Freewater-Cemetery Assoc.*, 63 Neb. 143; *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603; *Creighton v. Chicago*, etc., R. Co., (Neb. 1903) 94 N. W. Rep. 527.

**5.** Liability of Railroads. — *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110.

**6.** Lawful Use of Dangerous Element — No Liability Except for Negligence — *United States*. — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Lesser Cotton Co. v. St. Louis*, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133.

*Indiana*. — *Toledo*, etc., R. Co. v. *Parks*, 163 Ind. 592.

*Kentucky*. — *Louisville*, etc., R. Co. v. *Samuels*, (Ky. 1900) 57 S. W. Rep. 235; *Cincinnati*, etc., R. Co. v. *Caskey*, (Ky. 1903) 74 S. W. Rep. 201; *Mills v. Louisville*, etc., R. Co., 116 Ky. 309.

*Oregon*. — *Anderson v. Oregon R., etc., Co.*, 45 Oregon 211.

*Texas*. — *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256.

- 414.** Lawful Use of Fire — Not Liable in Exercise of Due Care and Skill. — See note 1. But Where a Company Was Not Authorized. — See note 2.
- 415.** *c.* DEGREE OF CARE REQUIRED — (1) *In General.* — See note 1. Every Possible Precaution. — See note 2. With Reference to Railroad Companies. — See note 4.
- 416.** (2) *Degree of Care as Varied by Particular Circumstances* — (a) *In General.* — See note 3.
- 417.** See note 1.
- 418.** The First Consideration in Connection with the Rule. — See note 1.

*Virginia.* — Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

**414. 1. Railroad Companies — Due Care and Skill — Alabama.** — Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 237.

*Indiana.* — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Toledo, etc., R. Co. v. Fenstermaker, 163 Ind. 534; Toledo, etc., R. Co. v. Parks, 163 Ind. 592; McDoel v. Gill, 23 Ind. App. 95.

*New York.* — Peck v. New York Cent., etc., R. Co., 165 N. Y. 347, reversing 37 N. Y. App. Div. 110.

*Oregon.* — Anderson v. Oregon R., etc., Co., 45 Oregon 211.

*Tennessee.* — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

*Canada.* — Canadian Pac. R. Co. v. Roy, (1902) A. C. 220, 12 Quebec K. B. 543; Jackson v. Grand Trunk R. Co., 32 Can. Sup. Ct. 245; Rainville v. Grand Trunk R. Co., 28 Ont. 625, affirmed 25 Ont. App. 243, 29 Can. Sup. Ct. 201; Oatman v. Michigan Cent. R. Co., 1 Ont. L. Rep. 145.

**2. Rule Applicable to Unchartered Railroads.** — Craft v. Albemarle Timber Co., 132 N. Car. 151, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414.

**415. 1. Degree of Care Required — United States.** — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Denver v. Porter, (C. C. A.) 126 Fed. Rep. 288; Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

*Alabama.* — Alabama G. S. R. Co. v. Clark, 136 Ala. 450.

*Georgia.* — Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415; Georgia, etc., R. Co. v. Rawson, 112 Ga. 471.

*Illinois.* — See Chicago, etc., R. Co. v. Madison, 81 Ill. App. 393.

*Kentucky.* — Mills v. Louisville, etc., R. Co., 116 Ky. 309.

*Louisiana.* — Brady v. Jay, 111 La. 1071.

*Mississippi.* — Clisby v. Mobile, etc., R. Co., 78 Miss. 937.

*Nebraska.* — Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603.

*New York.* — Hitchcock v. Riley, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 260.

*Pennsylvania.* — Baylor v. Stevens, 16 Pa. Super. Ct. 365.

*Rhode Island.* — MacDonald v. New York, etc., R. Co., 23 R. I. 558.

*Texas.* — St. Louis, etc., R. Co. v. Knight, 20 Tex. Civ. App. 477; Meadows v. Truesdell, (Tex. Civ. App. 1900) 56 S. W. Rep. 932; St. Louis Southwestern R. Co. v. Goodnight, 32

Tex. Civ. App. 256; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1903) 74 S. W. Rep. 607; Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40; Missouri, etc., R. Co. v. Hopkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 414; Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791.

*Wisconsin.* — Nass v. Schulz, 105 Wis. 146.

**Degree of Care Used by Others in Same Locality Not the Measure of Duty of a User of Fire.** — Rylander v. Laursen, 124 Wis. 2.

**Care Exercised by Careful and Prudent Railway Companies.** — Abrams v. Seattle, etc., R. Co., 27 Wash. 507.

**Regulations of Railroad Company Requiring Exercise of Extraordinary Care.** — Alabama G. S. R. Co. v. Clark, 136 Ala. 450.

**Negligence Not Determined by Comparison with Actual Conduct of Others.** — Rylander v. Laursen, 124 Wis. 2.

**Fire Is a Dangerous Agent** to use in the removal of rubbish, and, where the property of others is exposed to destruction by such use of it, it can be set out rightfully only after every reasonable preparation and precaution has been taken to prevent damage to such property. Harris v. Savage, (Kan. 1905) 79 Pac. Rep. 113.

**2. Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791.**

**Unreasonable or Extremely Difficult Measures of Precaution Are Not Required.** — Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

**4. Degree of Care — Railroad Companies Within General Rule.** — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.

**"All Reasonable Care and Caution."** — A charge that imposes on the railroad the duty of exercising "all reasonable care and caution" is erroneous. Its duty is only to use ordinary care. St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408.

**"It Is the Duty of a Railway Company to Exercise Every Reasonable Precaution** to avoid injury to others by scattering fire along its right of way." Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

**416. 3. Degree of Care as Varied by Circumstances.** — Lieuallen v. Mosgrove, 37 Oregon 446; Stephenson v. Pennsylvania R. Co., 20 Pa. Super. Ct. 157; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432. See also Chicago, etc., R. Co. v. Madison, 81 Ill. App. 393.

**417. 1. Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341; Meadows v. Truesdell, (Tex. Civ. App. 1900) 56 S. W. Rep. 932; Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.**

**418. 1. Fire an Inherently Dangerous Ele-**

**418.** (b) Considerations of Dryness of Season and Direction and Velocity of Wind. — See note 2.

(c) Proximity and Exposed Position of Combustible Property. — See note 4.

**419.** Railroad Running Through Village. — See note 1.

Nature of Surface of Country. — See note 2.

**2. Rule under Modern Statutes — a. LIABILITY IRRESPECTIVE OF NEGLIGENCE.** — See note 4.

The General Scheme of These Statutes. — See note 5.

**420.** b. NATURE AND CONSTRUCTION OF SUCH STATUTES — (1) *In General.* — See note 1.

Revival of Rule of Ancient Common Law. — See notes 2, 3.

(2) *To Be Liberally Construed.* — See note 4.

ment. — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432; Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

**418. 2. Dryness of Season and Strength and Direction of Wind — United States.** — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Great Northern R. Co. v. Coats, (C. C. A.) 115 Fed. Rep. 452; Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341. *Alabama.* — Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 237, 132 Ala. 520, 90 Am. St. Rep. 917.

*Illinois.* — Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530.

*Indiana.* — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Lake Erie, etc., R. Co. v. McFall, (Ind. 1904) 72 N. E. Rep. 552; McDoel v. Gill, 23 Ind. App. 95; Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222; Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.

*Kansas.* — Atchison, etc., R. Co. v. Geiser, 68 Kan. 281.

*Missouri.* — Grant v. Omaha, etc., R. Co., 94 Mo. App. 312.

*New York.* — Munson v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 523.

*Oregon.* — Lieuallen v. Mosgrove, 37 Oregon 446, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

*Pennsylvania.* — Stephenson v. Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

*Tennessee.* — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

*Virginia.* — Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

*Compare* Fort Worth, etc., R. Co. v. Dial, (Tex. Civ. App. 1905) 85 S. W. Rep. 22.

**Among the Circumstances to Be Considered Are** "the character of the exposure to the fires, the hour of night, the direction and velocity of the wind, the condition of the weather as to dryness or moisture, and as being clear or cloudy." Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

**4. Exposure of Combustible Property.** — Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341; Lake Erie, etc., R. Co. v. McFall, (Ind. 1904) 72 N. E. Rep. 552; Alabama, etc., R. Co. v. Fried, 81 Miss. 314; Norwich Ins. Co. v. Oregon R. Co., (Oregon 1905) 78 Pac. Rep. 1025; Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911. See also Lieuallen v. Mosgrove, 37 Oregon 446, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

**419. 1. Norwich Ins. Co. v. Oregon R. Co.,**

(Oregon 1905) 78 Pac. Rep. 1025; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432; Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

**2. Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.**

**4. For Examples of These Statutes — Maine.** — Boston Excelsior Co. v. Bangor, etc., R. Co., 93 Me. 52; Dyer v. Maine Cent. R. Co., 99 Me. 195.

*Massachusetts.* — Bowen v. Boston, etc., R. Co., 179 Mass. 524.

*Missouri.* — Wabash R. Co. v. Ordelheide, 172 Mo. 436; Sims v. Chicago, etc., R. Co., 83 Mo. App. 246; McFarland v. Missouri, etc., R. Co., 94 Mo. App. 336.

*North Carolina.* — Williams v. Southern R. Co., 130 N. Car. 116, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419 in dissenting opinion of Douglas and Clark, JJ.

*Ohio.* — Baltimore, etc., R. Co. v. Kreager, 61 Ohio St. 312.

*Rhode Island.* — MacDonald v. New York, etc., R. Co., 23 R. I. 558.

*South Carolina.* — Dean v. Charleston, etc., R. Co., 55 S. Car. 504; Dent v. South Bound R. Co., 61 S. Car. 329; Bush v. Southern R. Co., 63 S. Car. 96; Wilson v. Southern R. Co., 65 S. Car. 421; Brown v. Carolina Midland R. Co., 67 S. Car. 481, 100 Am. St. Rep. 756.

**5. Need Not Show Negligence — Maine.** — Pierce v. Bangor, etc., R. Co., 94 Me. 171.

*Massachusetts.* — Bowen v. Boston, etc., R. Co., 179 Mass. 524.

*Missouri.* — Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; Wabash R. Co. v. Ordelheide, 172 Mo. 436; McFarland v. Missouri, etc., R. Co., 94 Mo. App. 336.

*Ohio.* — Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297.

*Rhode Island.* — MacDonald v. New York, etc., R. Co., 23 R. I. 558, 25 R. I. 40.

*South Carolina.* — Dean v. Charleston, etc., R. Co., 55 S. Car. 504; Brown v. Carolina Midland R. Co., 67 S. Car. 481, 100 Am. St. Rep. 756.

**420. 1. Remedial Nature.** — MacDonald v. New York, etc., R. Co., 23 R. I. 558.

**2. The Statutory Remedy Does Not Abolish the Common-law Remedy.** — Crissey, etc., Lumber Co. v. Denver, etc., R. Co., 17 Colo. App. 275.

**3. One of Two Innocent Parties.** — Bowen v. Boston, etc., R. Co., 179 Mass. 524.

**4. Liberal Construction.** — Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; MacDonald v. New York, etc., R. Co., 23 R. I. 558.



- 421.** (3) *Contrary Doctrine.* — See note 3.
- 422.** *c.* TO WHAT PROPERTY STATUTE LIABILITY EXTENDS — (1) *In General.* — See note 1.
- 423.** (2) *Property of Movable Nature.* — See note 4.  
 (3) *Growing Trees and Herbage.* — See note 9.  
 (4) *Distance of Property from Track.* — See note 10.
- 424.** Illustrations. — See note 1.  
*d.* PROVISION FOR "INSURABLE INTEREST" — (1) *In General.* — See note 4.  
 (2) *Insurable Interest as Coextensive with Liability.* — See notes 5, 6.
- 425.** Property Usually Regarded as Insurable. — See notes 4, 5.
- 426.** *f.* CONTRIBUTORY NEGLIGENCE. — See note 5.
- 427.** See notes 1, 2.  
*h.* CONTRACT EXEMPTING FROM LIABILITY. — See note 5.  
*i.* CONSTITUTIONALITY OF SUCH STATUTES — (1) *In General.* — See note 6.
- 428.** Justification as Exercise of Police Power. — See note 2.

**421. 3. A Statute Providing for the Recovery of Treble Damages** for the damages resulting from a fire negligently set by a person to his own woods or negligently suffered to extend beyond his own land is penal in its nature and should be construed strictly. *Clark v. San Francisco, etc., R. Co., 142 Cal. 614.*

**422. 1. Real and Personal Property.** — *Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; Spink v. New York, etc., R. Co., 24 R. I. 560; MacDonald v. New York, etc., R. Co., 25 R. I. 40; Dean v. Charleston, etc., R. Co., 55 S. Car. 504; Dent v. South Bound R. Co., 61 S. Car. 329.*

**Goods in Hands of Railroad as Common Carrier.** — *Blackmore v. Missouri Pac. R. Co., 162 Mo. 455.*

**423. 4. Property of Movable Nature.** — *Dent v. South Bound R. Co., 61 S. Car. 329.*

**9. Growing Trees and Herbage.** — *Dent v. South Bound R. Co., 61 S. Car. 329.*

**10. No Arbitrary Rule as to Distance.** — *Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; MacDonald v. New York, etc., R. Co., 23 R. I. 558.*

**424. 1. Dean v. Charleston, etc., R. Co., 55 S. Car. 504.**

**4. Provision for Insurable Interest Does Not Apply Where Railroad Was Negligent.** — *Dyer v. Maine Cent R. Co., 99 Me. 195.*

**Policy Issued Before Creation of Insurable Interest.** — *Lyons v. Boston, etc., R. Co., 181 Mass. 551.*

**5. Coextensive with Statutory Liability.** — *Pierce v. Bangor, etc., R. Co., 94 Me. 171; Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297.*

**6. Pierce v. Bangor, etc., R. Co., 94 Me. 171.**

**425. 4. Dean v. Charleston, etc., R. Co., 55 S. Car. 504.**

**5. Dean v. Charleston, etc., R. Co., 55 S. Car. 504.**

**426. 5. Contributory Negligence Not a Defense.** — *Boston Excelsior Co. v. Bangor, etc., R. Co., 93 Me. 52; Peter v. Chicago, etc., R. Co., 121 Mich. 324, 80 Am. St. Rep. 500.*

**427. 1. Contributory Negligence Short of Fraud Not a Defense.** — *Bowen v. Boston, etc., R. Co., 179 Mass. 524.*

**2. In Connecticut, the absence of contributory**

negligence is a condition precedent to the right of the plaintiff to recover. *Hubbard v. New York, etc., R. Co., 72 Conn. 24.*

**5. Contract Exempting from Liability.** — *Kennedy v. Iowa State Ins. Co., 119 Iowa 29; Mann v. Pere Marquette R. Co., 135 Mich. 210; Wash R. Co. v. Ordeltelheide, 172 Mo. 436, 175 Mo. 337; Hahn v. Missouri, etc., R. Co., 80 Mo. App. 411; Missouri, etc., R. Co. v. Carter, 95 Tex. 461. See also Hartford F. Ins. Co. v. Chicago, etc., R. Co., 175 U. S. 91.*

**Destruction of Property Not Covered by Contract.** — *Kansas City, etc., R. Co. v. Blaker, 68 Kan. 244.*

**The Stockholders of a Warehouse Company** who suffer a loss by fire of their goods stored in a warehouse are not bound by a contract whereby the warehouse company released the railroad company from liability for loss by fire. *Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502.*

**One Who Is Not Privy to Such a Contract** is not bound thereby. *Texas, etc., R. Co. v. Watson, 190 U. S. 287; Missouri, etc., R. Co. v. Keahey, (Tex. Civ. App. 1904) 83 S. W. Rep. 1102.*

**A Statutory Prohibition Against Limiting the Liability of a Common Carrier** is not violated by a contract exempting a railroad company from liability for fires set out by its locomotives. *Missouri, etc., R. Co. v. Carter, 95 Tex. 461.*

**Court Must Construe a Contract Exempting a Railroad from Liability for Loss by Fire.** — *Mann v. Pere Marquette R. Co., 135 Mich. 210.*

**For Construction of Particular Contracts,** see *Richmond v. New York, etc., R. Co., 26 R. I. 225; Woodward v. Ft. Worth, etc., R. Co., 35 Tex. Civ. App. 14.*

**6. Such Statutes Constitutional.** — *Continental Trust Co. v. Toledo, etc., R. Co., 80 Fed. Rep. 637; Blackmore v. Missouri Pac. R. Co., 162 Mo. 455; McFarland v. Missouri, etc., R. Co., 94 Mo. App. 336; Baltimore, etc., R. Co. v. Kreager, 61 Ohio St. 312; Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297; Brown v. Carolina Midland R. Co., 67 S. Car. 481, 100 Am. St. Rep. 756.*

**428. 2. Police Power.** — *Lake Erie, etc., R.*

- 428.** (2) *Equal Protection of Laws.* — See note 4.  
*Unequal Restraints and Qualifications.* — See notes 5, 6.  
*Does Not Abridge Privileges and Immunities.* — See note 8.  
 (3) *Due Process of Law.* — See note 9.
- 429.** (4) *Obligation of Contracts.* — See note 1.
- 430.** *j.* STATUTES RELATING TO PRAIRIE AND WOODLAND FIRES —  
 (1) *In General.* — See note 1.
- 431.** *k.* SETTING OUT FIRES AS A CRIMINAL OFFENSE. — See note 5.
- 432.** IV. REQUISITES TO RECOVERY — 2. Title to Maintain Action —  
*b.* DAMAGES TO REAL ESTATE — (1) *In General.* — See note 4.
- 434.** (2) *Action by Lessor.* — See note 6.
- 435.** (3) *Action by Lessee.* — See note 2.
- 436.** *c.* DAMAGES TO PERSONAL PROPERTY. — See note 3.
- 437.** 4. Essentials to Defendant's Liability — *a.* GENERALLY. — See note 1.  
*b.* FACT OF DEFENDANT'S ACT — (1) *Ownership and Operation of Road.* — See note 4.

*Co. v. Falk*, 8 Ohio Cir. Dec. 765, 16 Ohio Cir. Ct. 125. See also *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455.

**428.** 4. *Equal Protection of Laws.* — *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312; *Brown v. Carolina Midland R. Co.*, 67 S. Car. 481, 100 Am. St. Rep. 756. See also *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455.

5. *Unequal Restraints and Discriminations.* — *Brown v. Carolina Midland R. Co.*, 67 S. Car. 481, 100 Am. St. Rep. 756.

6. *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312.

8. *No Abridgment of "Privileges and Immunities."* — *Brown v. Carolina Midland R. Co.*, 67 S. Car. 481, 100 Am. St. Rep. 756.

9. *Due Process of Law.* — *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312; *Lake Erie, etc., R. Co. v. Falk*, 8 Ohio Cir. Dec. 765, 16 Ohio Cir. Ct. 125. See also *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455.

**429.** 1. *Obligation of Contracts.* — *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312.

**430.** 1. *Necessity for Negligence.* — *Kelley v. Anderson*, 15 S. Dak. 107.

**431.** 5. *California.* — Wantonly and wilfully setting fire to woods is a misdemeanor. *Clark v. San Francisco, etc., R. Co.*, 142 Cal. 614.

**432.** 4. *Possession Evidence of Title.* — *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 292, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 432. See also *Olmstead v. Oregon Short Line R. Co.*, 27 Utah 515; *Cullen v. Bowen*, 36 Wash. 665.

*Sufficient Evidence of Plaintiff's Title.* — *Van Inwegen v. Port Jervis, etc., R. Co.*, 41 N. Y. App. Div. 628.

*A Township Trustee May Sue in His Official Capacity for an Injury to a Highway.* — *Pittsburgh, etc., R. Co. v. Iddings*, 28 Ind. App. 504.

**434.** 6. *Lessor Not in Possession at Time of Fire.* — *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378.

**435.** 2. *A Tenant at Will may sue for the destruction during his tenancy of grass which was uncut and standing on the land.* *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302.

**436.** 3. *Though the Plaintiff Has No Interest in Any Injury to the Freehold, he may recover*

*for the destruction of personal property owned by him.* *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809.

**437.** 1. *Essentials to Liability* — *United States.* — *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

*Georgia.* — *Southern R. Co. v. Williams*, 113 Ga. 335; *Georgia R., etc., Co. v. Roberts*, 114 Ga. 387.

*Indiana.* — *Lake Erie, etc., R. Co. v. McFall*, (Ind. 1904) 72 N. E. Rep. 552; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592.

*Indian Territory.* — *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85.

*New York.* — *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; *O'Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 228; *White v. New York Cent., etc., R. Co.*, 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

*North Carolina.* — *Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co.*, 126 N. Car. 797; *Armstrong v. Wilmington, etc., R. Co.*, 130 N. Car. 64; *Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co.*, 132 N. Car. 75; *Cheek v. Oak Grove Lumber Co.*, 134 N. Car. 225.

*Texas.* — *Jackson v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1904) 78 S. W. Rep. 724.

*Utah.* — *Olmstead v. Oregon Short Line R. Co.*, 27 Utah. 515.

*Virginia.* — *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

*Wisconsin.* — *Clifford v. Minneapolis, etc., R. Co.*, 105 Wis. 618.

4. *Presumption as to Operation and Control.* — *Brooks v. Missouri Pac. R. Co.*, 98 Mo. App. 166.

*Presumption of Ownership from Operation and Possession.* — *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

*Actual Title to Right of Way Immaterial.* — *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333, following *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252, 45 Am. & Eng. R. Cas. 544.

*Liability of Railroad Company Permitting Another Railroad to Use a Portion of Its Road.* — *McFarland v. Missouri, etc., R. Co.*, 94 Mo. App. 336. See also *Jefferson v. Chicago, etc., R. Co.*, 117 Wis. 549.

**438.** (2) *Liability of Lessor.* — See notes 1, 2.

**439.** (3) *Liability of Lessee.* — See note 5.

**440.** (4) *Liability for Act of Agent* — (a) *In General.* — See note 1.

**441.** (6) *Independent Contractor Rule.* — See note 2.

**442.** (5) *Origin of Fire Question of Fact for Jury.* — See note 2.

**443.** *Wherever, Therefore, There Is a Conflict of Evidence.* — See note 1.

*Against Weight of Evidence.* — See note 2.

*Presumption or Inference of Origin of Fire.* — See note 3.

*Where No Evidence as to Origin of Fire.* — See note 5.

c. *THAT DEFENDANT'S ACT WAS NEGLIGENT* — (1) *In General.*

— See note 7.

**444.** (2) *Direct Proof of Particular Act.* — See note 1.

**445.** *Particular Engine Causing Fire.* — See note 3.

(3) *Degree of Negligence Required.* — See note 8.

**438.** 1. *Liability of Lessor.* — *Brady v. Jay*, 111 La. 1071.

2. *Consequences of Different Rule.* — *Brady v. Jay*, 111 La. 1071.

**439.** 5. *Liability of Lessee.* — *Bush v. Southern R. Co.*, 63 S. Car. 96.

**440.** 1. *Liability for Act of Agent.* — *Rolfe v. Boston, etc.*, R. Co., 69 N. H. 476.

**441.** 2. *Acts of Independent Contractors.* — *Craft v. Albemarle Timber Co.*, 132 N. Car. 151.

*Liability of Railroad for Fire Caused by Defective Engine.* — *Brady v. Jay*, 111 La. 1071.

**442.** 2. *Origin of Fire — Question for Jury* — *United States.* — *Lesser Cotton Co. v. St. Louis, etc.*, R. Co., (C. C. A.) 114 Fed. Rep. 133; *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

*Alabama.* — *Louisville, etc.*, R. Co. v. *Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Southern R. Co. v. Johnson*, 141 Ala. 575.

*Colorado.* — *Burlington, etc.*, R. Co. v. *Burch*, 17 Colo. App. 491.

*Illinois.* — *Cleveland, etc.*, R. Co. v. *Hornsby*, 202 Ill. 138.

*Iowa.* — *Black v. Minneapolis, etc.*, R. Co., 122 Iowa 32.

*Kansas.* — *St. Louis, etc.*, R. Co. v. *Ludlum*, 63 Kan. 719; *Kansas City, etc.*, R. Co. v. *Perry*, 65 Kan. 792; *Kansas City, etc.*, R. Co. v. *Blaker*, 68 Kan. 244.

*Massachusetts.* — *Bowen v. Boston, etc.*, R. Co., 179 Mass. 524.

*Nebraska.* — *Creighton v. Chicago, etc.*, R. Co., (Neb. 1903) 94 N. W. Rep. 527; *Chicago, etc.*, R. Co. v. *Beal*, (Neb. 1903) 94 N. W. Rep. 956; *Union Pac. R. Co. v. Fickenschier*, (Neb. 1904) 100 N. W. Rep. 207.

*New York.* — *O'Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 228; *Smith v. Long Island R. Co.*, 79 N. Y. App. Div. 171.

*North Carolina.* — *Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co.*, 132 N. Car. 75; *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95, reversing 131 N. Car. 518; *Cheek v. Oak Grove Lumber Co.*, 134 N. Car. 225.

*Pennsylvania.* — *Matthews v. Pittsburg, etc.*, R. Co., 18 Pa. Super. Ct. 10; *Elder Tp. School Dist. v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 112.

*Rhode Island.* — *MacDonald v. New York, etc.*, R. Co., 25 R. I. 40.

*South Carolina.* — *Brown v. Carolina Midland R. Co.*, 64 S. Car. 365.

*Texas.* — *Missouri, etc.*, R. Co. v. *Florence*,

(Tex. Civ. App. 1903) 74 S. W. Rep. 802; *Duckworth v. Ft. Worth, etc.*, R. Co., 33 Tex. Civ. App. 66.

*Washington.* — *Abrams v. Seattle, etc.*, R. Co., 27 Wash. 507.

*Canada.* — *Rainville v. Grand Trunk R. Co.*, 28 Ont. 625, affirmed 25 Ont. App. 243, 29 Can. Sup. Ct. 201.

**443.** 1. *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288; *Southern R. Co. v. Johnson*, 141 Ala. 575; *Cheek v. Oak Grove Lumber Co.*, 134 N. Car. 225; *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333.

2. *Against Weight of Evidence.* — *Brennan Lumber Co. v. Great Northern R. Co.*, 77 Minn. 360; *Union Pac. R. Co. v. Fickenschier*, (Neb. 1904) 100 N. W. Rep. 207; *Chesapeake, etc.*, R. Co. v. *Heath*, 103 Va. 64.

3. *Presumption as to Origin of Fire.* — *Grand Trunk R. Co. v. Rainville*, 29 Can. Sup. Ct. 201, affirming 25 Ont. App. 242, 28 Ont. 625; *Southern R. Co. v. Johnson*, 141 Ala. 575; *Baltimore, etc.*, R. Co. v. *Perryman*, 95 Ill. App. 199; *Baltimore, etc.*, R. Co. v. *Irwin*, 97 Ill. App. 337; *Kansas City, etc.*, R. Co. v. *Blaker*, 68 Kan. 244; *Bowen v. Boston, etc.*, R. Co., 179 Mass. 524; *Gibbs v. St. Louis, etc.*, R. Co., 104 Mo. App. 276; *Brown v. Carolina Midland R. Co.*, 64 S. Car. 365.

5. *Where No Evidence of Origin.* — *Ragsdale v. Southern R. Co.*, 121 Fed. Rep. 924; *Brennan Lumber Co. v. Great Northern R. Co.*, 77 Minn. 360; *Swenson v. Erlandson*, 86 Minn. 263; *Gibbs v. St. Louis, etc.*, R. Co., 104 Mo. App. 276.

7. *Negligence Gist of Action.* — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288; *Wabash R. Co. v. Lackey*, 31 Ind. App. 103; *Anderson v. Oregon R., etc.*, Co., 45 Oregon 211; *Matthews v. Pittsburg, etc.*, R. Co., 18 Pa. Super. Ct. 10.

**444.** 1. *Particular Act of Negligence.* — *Toledo, etc.*, R. Co. v. *Fenstermaker*, 163 Ind. 534; *Norwich Ins. Co. v. Oregon R. Co.*, (Oregon 1905) 78 Pac. Rep. 1025.

**445.** 3. *Particular Engine.* — *Chicago, etc.*, R. Co. v. *Kreig*, 22 Ind. App. 393; *Alabama, etc.*, R. Co. v. *Ætna Ins. Co.*, 82 Miss. 770.

8. *Gross Negligence Unnecessary.* — *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809, distinguishing and explaining *Macon, etc.*, R. Co. v. *McConnell*, 31 Ga. 133, 76 Am. Dec. 685.

**447. V. NATURAL AND PROXIMATE CAUSE — 4. General Rule of Liability.**

— See note 3.

**448. 6. How Liability Determined — a. RULE OF ANTICIPATION OF CONSEQUENCES — (1) In General.** — See note 2.**449. The Material Question in Cases of the Present Description.** — See notes 1, 2.**450.** See note 1.**(2) Extent and Limits of Rule of Anticipation of Consequences.** —

See notes 3, 4.

**b. NECESSITY FOR DIRECT COMMUNICATION OF FIRE — (1) General Rule.** — See note 5.**451.** See notes 1, 3.**452. (2) Contrary Doctrine — Ryan and Kerr Cases.** — See note 5.**453. (3) No Arbitrary Limit of Time or Distance.** — See note 1.**454. The True Rule Is that Intervening Time or Distance.** — See note 3.**c. FIRE FIRST COMMUNICATED TO DEFENDANT'S OWN PROPERTY.** — See notes 4, 5.**455. 7. Intervening Agencies — b. NEGLIGENCE OF THIRD PARTY.** — See note 6.**457. c. INTERVENTION OF NATURAL FORCES — (1) In General.** — See note 1.**447. 3. Proximate Consequences.** — *Armstrong v. Wilmington, etc., R. Co., 130 N. Car. 64.*

**Usual, Direct, and Necessary Consequences.** — *Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809.*

**448. 2. General Rule as to Anticipation of Consequences.** — *Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530; Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393; Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222; Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417; Hoffman v. King, 160 N. Y. 618, 73 Am. St. Rep. 715.*

**The Test Is that the Consequences Ought to Have Been Anticipated by an Ordinarily Prudent Person, under like circumstances, and not that they ought to have been anticipated by the defendant.** *Knickel v. Chicago, etc., R. Co., 123 Wis. 327.*

**449. 1. Statement of Material Consideration.** — *Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530.*

**2. Fire Communicated from Intermediate Building.** — *Kansas City, etc., R. Co. v. Blaker, 68 Kan. 244.*

**450. 1. Injury Not Too Remote.** — *Clark v. San Francisco, etc., R. Co., 142 Cal. 614; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**3. Particular Manner of Loss.** — *Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225; Lieuallen v. Mosgrove, 37 Oregon 446.*

**The Test Is Not the Consequences That the Defendant Might Have Anticipated as the result of its act or omission, but what an ordinarily prudent person, under like circumstances, would have anticipated.** *Knickel v. Chicago, etc., R. Co., 123 Wis. 327.*

**4. If the Consequences Follow in Unbroken Sequence from the Wrong to the Injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence.** *Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225.*

**5. Direct Communication of Fire Unnecessary.** — *Clark v. San Francisco, etc., R. Co., 142 Cal. 614; Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222; Kansas City, etc., R. Co. v. Blaker, 68 Kan. 244; Alabama, etc., R. Co. v. Barrett, 78 Miss. 432; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**451. 1. On What Liability Depends.** — *Pittsburgh, etc., R. Co. v. Iddings, 28 Ind. App. 504.*

**3. Fire Burning Across Intervening Lands.** — *Clark v. San Francisco, etc., R. Co., 142 Cal. 614; Kansas City, etc., R. Co. v. Blaker, 68 Kan. 244; Alabama, etc., R. Co. v. Barrett, 78 Miss. 432; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**452. 5. Ryan Case Followed.** — *Hoffman v. King, 160 N. Y. 618, 73 Am. St. Rep. 715; Van Inwegen v. Port Jervis, etc., R. Co., 165 N. Y. 625, reversing 34 N. Y. App. Div. 95; Hitchcock v. Riley, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 260.*

**453. 1. Period of Time Elapsing.** — *Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417; Alabama, etc., R. Co. v. Barrett, 78 Miss. 432; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**454. 3. Statement of Approved Rule.** — *Alabama, etc., R. Co. v. Barrett, 78 Miss. 432; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**4. Rule When Fire First Communicated to Defendant's Own Property.** — *Craft v. Albemarle Timber Co., 132 N. Car. 151, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 454; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.*

**5. Fire Originating on Roadbed or Right of Way.** — *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.*

**455. 6. Negligence of Third Person.** — *Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222.*

**457. 1. Natural Agencies.** — *Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.*

**458.** (2) *Wind as Intervening Cause.* — See note 3.

**459.** See note 1.

*The Line of Liability Is Drawn.* — See note 2.

*As the Rule with Reference to Railroads Is Expressed.* — See note 3.

**460.** 8. *Natural and Proximate Cause Question of Fact for Jury* — *a.* IN GENERAL. — See note 2.

**461.** See note 1.

**462.** 9. *Action by Insurer Who Has Paid Loss* — *b.* RULE OF SUBROGATION. — See note 1.

VI. NEGLIGENCE — 2. *What Is Negligence* — *b.* IN CONNECTION WITH PRESENT TOPIC. — See note 6.

**463.** *It May Be Observed Generally.* — See note 1.

*c.* NEGLIGENCE IN STARTING FIRE. — See notes 2, 3, 4.

**464.** *d.* NEGLIGENCE IN NOT PREVENTING SPREAD. — See note 3.

**465.** *Illustration.* — See note 1.

**458.** 3. *Wind as Intervening Cause.* — Alabama G. S. R. Co. v. Johnston, 128 Ala. 292; Chicago, etc., R. Co. v. Lesh, 158 Ind. 423; Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222; Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417; Baylor v. Stevens, 16 Pa. Super. Ct. 365.

**459.** 1. *May Be Intervening Cause.* — Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530; Hitchcock v. Riley, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 260.

2. *Rule of Exemption Stated — Wind Must Be Extraordinary.* — Lieuellen v. Mosgrove, 37 Oregon 446. See also Louisville, etc., R. Co. v. Sullivan Timber Co., 138 Ala. 379.

*Whirlwind.* — "One who kindles a fire on his own land is not bound to anticipate and guard against a whirlwind or any extraordinary high winds that may ensue." Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603.

3. *Rule as to Railroads.* — Alabama G. S. R. Co. v. Johnston, 128 Ala. 292.

**460.** 2. *Question of Fact for Jury.* — Clark v. San Francisco, etc., R. Co., 142 Cal. 614; Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1904) 80 S. W. Rep. 844.

*Question of Proximate Cause Is for Court to Decide.* — Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222.

**461.** 1. *Whether There Has Been Intervening Agency.* — Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530.

**462.** 1. *Subrogation of Insurer.* — German-American Ins. Co. v. Standard Gas Light Co., 67 N. Y. App. Div. 539, affirmed 174 N. Y. 508; Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297. See also Dyer v. Maine Cent. R. Co., 99 Me. 195; Missouri, etc., R. Co. v. Keahey, (Tex. Civ. App. 1904) 83 S. W. Rep. 1102.

*Whether the Action Is a Statutory or a Common-law One,* an insurance company which has paid the loss may be subrogated to the rights of the insured, but in the former case the action must be brought in the name of the insured. Crissey, etc., Lumber Co. v. Denver, etc., R. Co., 17 Colo. App. 275.

*The Insurance Company May Maintain the Action in its own name, in North Carolina,* by virtue of the North Carolina Laws of 1899, c. 54, § 43. Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co., 132 N. Car. 75.

*Contract Exempting Railroad from Liability.* — Kennedy v. Iowa State Ins. Co., 119 Iowa 29.

6. *Negligence in Fire Cases.* — Anderson v. Oregon R., etc., Co., 45 Oregon 211.

**463.** 1. *In What Negligence May Consist.* — Wabash R. Co. v. Lackey, 31 Ind. App. 103.

2. *Negligence in Starting Fire.* — Vansyoc v. Freewater-Cemetery Assoc., 63 Neb. 143; Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603.

3. *Fire Set on Calm Morning.* — Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603.

4. *May Be Negligence.* — Harris v. Savage, (Kan. 1905) 79 Pac. Rep. 113; Craft v. Albe-marle Timber Co., 132 N. Car. 151, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463; Texas Pac. R. Co. v. Leon & H. Blum Land Co., (Tex. Civ. App. 1899) 49 S. W. Rep. 253.

*Due Care in Preventing Spread No Excuse.* — Wabash R. Co. v. Lackey, 31 Ind. App. 103.

**464.** 3. *Permitting or Not Preventing Spread — United States.* — Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

*California.* — Clark v. San Francisco, etc., R. Co., 142 Cal. 614.

*Illinois.* — Indiana, etc., R. Co. v. Hawkins, 84 Ill. App. 39.

*Indiana.* — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Lake Erie, etc., R. Co. v. Miller, 24 Ind. App. 662; Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.

*Kansas.* — St. Louis, etc., R. Co. v. Ludlum, 63 Kan. 719; Harris v. Savage, (Kan. 1905) 79 Pac. Rep. 113.

*Missouri.* — Grant v. Omaha, etc., R. Co., 94 Mo. App. 312.

*Nebraska.* — Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603.

*Oregon.* — Lieuellen v. Mosgrove, 37 Oregon 446.

*Washington.* — Abrams v. Seattle, etc., R. Co., 27 Wash. 507.

*Wisconsin.* — Rylander v. Laursen, 124 Wis. 2.

*Continuing Duty to Prevent Escape or Spread of Fire.* — Brister v. Illinois Cent. R. Co., 84 Miss. 33.

*Liability Not Dependent on Knowledge of Existence of Fire.* — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.

**465.** 1. *Fire from Engine — No Negligence in Escape.* — Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.

*Train Crew Not Obligated to Extinguish Fire.* —

**466.** Failure to Keep Watchmen Stationed Along Line of Road. — See note 1.

*f.* COMBUSTIBLES ON RIGHT OF WAY — (1) *General Rule.* — See note 4.

**467.** Illustration. — See note 2.

**468.** Combustibles Must Have Contributed to Damage. — See note 1.

(3) *Degree of Care Required.* — See note 4.

**469.** (4) *Fire Need Not Be Negligently Started.* — See note 2.

**470.** (6) *Combustibles on Right of Way Not Negligence Per Se* — (a) *General Rule.* — See notes 2, 3.

Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40.

**466.** 1. *Watchmen Along Line of Road.* — See Crofoot *v.* Syracuse, etc., R. Co., 75 N. Y. App. Div. 157.

4. *Combustibles on Right of Way — United States.* — Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452.

*California.* — Clark *v.* San Francisco, etc., R. Co., 142 Cal. 614.

*Illinois.* — Indiana, etc., R. Co. *v.* Hawkins, 84 Ill. App. 39.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 466; Wabash R. Co. *v.* Miller, 158 Ind. 174; Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662; Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504.

*Kansas.* — Sprague *v.* Atchison, etc., R. Co., (Kan. 1904) 78 Pac. Rep. 828.

*New York.* — Hoffman *v.* King, 160 N. Y. 618, 73 Am. St. Rep. 715.

*North Carolina.* — McMillan *v.* Wilmington, etc., R. Co., 126 N. Car. 725; Shields *v.* Norfolk, etc., R. Co., 129 N. Car. 1; Livermon *v.* Roanoke, etc., R. Co., 131 N. Car. 527; Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. Car. 75; Craft *v.* Albemarle Timber Co., 132 N. Car. 151; Simpson *v.* Enfield Lumber Co., 133 N. Car. 95, reversing 131 N. Car. 518.

*North Dakota.* — McTavish *v.* Great Northern R. Co., 8 N. Dak. 333.

*Pennsylvania.* — Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112.

*Texas.* — Texas, etc., R. Co. *v.* Wooldridge, (Tex. Civ. App. 1901) 63 S. W. Rep. 905; Texas, etc., R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590.

*Washington.* — Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507.

**467.** 2. *Accumulation of Combustibles Held to Be Negligence — United States.* — Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452.

*Illinois.* — Indiana, etc., R. Co. *v.* Hawkins, 84 Ill. App. 39.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 467; Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662.

*Kansas.* — St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719.

*New York.* — Hoffman *v.* King, 160 N. Y. 618, 73 Am. St. Rep. 715.

*North Carolina.* — Shields *v.* Norfolk, etc., R. Co., 129 N. Car. 1; Livermon *v.* Roanoke, etc., R. Co., 131 N. Car. 527.

*Canada.* — Grand Trunk R. Co. *v.* Rainville.

29 Can. Sup. Ct. 201, affirming 25 Ont. App. 242.

**468.** 1. *Damage Due to Combustibles.* — Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. Car. 75. See also Louisville, etc., R. Co. *v.* Sullivan Timber Co., 138 Ala. 379.

*Evidence of Condition of Right of Way Immaterial.* — International, etc., R. Co. *v.* Morgan, 28 Tex. Civ. App. 348.

4. *Degree of Care.* — Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322; Waters *v.* Atlantic City R. Co., (N. J. 1899) 43 Atl. Rep. 670.

*Only Reasonable Care Required.* — Waters *v.* Atlantic City R. Co., (N. J. 1899) 43 Atl. Rep. 670; Ft. Worth, etc., R. Co. *v.* Dial, (Tex. Civ. App. 1905) 85 S. W. Rep. 22.

**469.** 2. *Lack of Negligence in Starting Fire — United States.* — Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452.

*Illinois.* — Indiana, etc., R. Co. *v.* Hawkins, 84 Ill. App. 39; Baltimore, etc., R. Co. *v.* Perryman, 95 Ill. App. 199; Baltimore, etc., R. Co. *v.* Irwin, 97 Ill. App. 337. See also Lake Erie, etc., R. Co. *v.* Murray, 86 Ill. App. 461.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469; Lake Erie, etc., R. Co. *v.* Miller, 24 Ind. App. 662; Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504.

*Kansas.* — St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719.

*North Carolina.* — Simpson *v.* Enfield Lumber Co., 133 N. Car. 95, reversing 131 N. Car. 518.

*Texas.* — Texas, etc., R. Co. *v.* Wooldridge, (Tex. Civ. App. 1901) 63 S. W. Rep. 905; Galveston, etc., R. Co. *v.* Chittim, 31 Tex. Civ. App. 40.

*Washington.* — Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507.

**470.** 2. *Combustibles Not Negligence Per Se.* — Owen *v.* Cook, 9 N. Dak. 134; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157; Ft. Worth, etc., R. Co. *v.* Dial, (Tex. Civ. App. 1905) 85 S. W. Rep. 22; Gulf, etc., R. Co. *v.* Jordan, 25 Tex. Civ. App. 82.

**A Railroad Is Guilty of Actionable Negligence** if it knowingly permits the accumulation of combustible materials on its right of way; and it is liable for the escape of a fire which it starts thereon by sparks from one of its engines, though it has no knowledge of the existence of the fire. Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322.

3. *May Constitute Negligence.* — Livermon *v.* Roanoke, etc., R. Co., 131 N. Car. 527; Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. Car. 75.

**471.** *Prima Facie Sufficient to Warrant Finding of Negligence.* — See note 1.

(b) *Rule under Statutes.* — See note 2.

**472.** *g. CONSTRUCTION OF ENGINES AND MACHINERY — (2) Appliances to Prevent Escape of Fire* — (a) *General Rule.* — See note 2.

**473.** *Every Possible Precaution Not Required.* — See notes 1, 2.

**474.** See note 1.

*If a Railroad Company Discharges Its Duty in This Respect.* — See note 2.

**471.** 1. *Prima Facie Negligence.* — Grand Trunk R. Co. v. Rainville, 29 Can. Sup. Ct. 201, affirming 25 Ont. App. 242.

2. *Rule under Statutes.* — Baltimore, etc., R. Co. v. Perryman, 95 Ill. App. 199.

**472.** 2. *Appliances to Prevent Escape of Fire* — *United States.* — McCullen v. Chicago, etc., R. Co., (C. C. A.) 101 Fed. Rep. 66; Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Great Northern R. Co. v. Coats, (C. C. A.) 115 Fed. Rep. 452.

*Georgia.* — Southern Pine Co. v. Smith, 113 Ga. 629.

*Illinois.* — Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138; Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 268.

*Kentucky.* — Illinois Cent. R. Co. v. Scheible, (Ky. 1903) 72 S. W. Rep. 325; Mills v. Louisville, etc., R. Co., 116 Ky. 309.

*Louisiana.* — Brady v. Jay, 111 La. 1071, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

*Mississippi.* — Clisby v. Mobile, etc., R. Co., 78 Miss. 937.

*North Carolina.* — Raleigh Hosiery Co. v. Raleigh, etc., R. Co., 131 N. Car. 238; Bottoms v. Seaboard Air Line R. Co., 136 N. Car. 472.

*Oregon.* — Anderson v. Oregon R., etc., Co., 45 Oregon 211.

*Pennsylvania.* — Matthews v. Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 10.

*Tennessee.* — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

*Texas.* — Missouri, etc., R. Co. v. Carter, 95 Tex. 461; San Antonio, etc., R. Co. v. Adams, (Tex. Civ. App. 1902) 66 S. W. Rep. 578; St. Louis Southwestern R. Co. v. Goodnight, 32 Tex. Civ. App. 256; Missouri, etc., R. Co. v. Florence, (Tex. Civ. App. 1903) 74 S. W. Rep. 802.

*Virginia.* — Kimball v. Borden, 97 Va. 477; White v. New York, etc., R. Co., 99 Va. 357; Norfolk, etc., R. Co. v. Perrow, 101 Va. 345.

*Canada.* — Jackson v. Grand Trunk R. Co., 32 Can. Sup. Ct. 245.

*Evidence Must Show Equipment with Most Approved Spark Arrester.* — Southern R. Co. v. Puckett, 121 Ga. 322.

*Failure to Have Spark Arrester Must Be Proximate Cause of Fire.* — Cheek v. Oak Grove Lumber Co., 134 N. Car. 225.

*Duty of Mill Owner to Employ Spark Arrester.* — Rylander v. Laursen, 124 Wis. 2.

**473.** 1. *Every Possible Precaution.* — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 258; Duckworth v. Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 66; Farrington v. Rutland R. Co., 72 Vt. 24; Kimball v. Borden, 97 Va. 477.

2. *Most Approved Appliances.* — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Anderson v. Oregon R., etc., Co., 45 Oregon 211; Missouri, etc., R. Co. v. Carter, 95 Tex. 461.

*Degree of Care Required.* — St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; Missouri, etc., R. Co. v. Hopkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 414; Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791; Houston, etc., R. Co. v. Laforge, (Tex. Civ. App. 1905) 84 S. W. Rep. 1072.

*Reasonable Care in the Procuring of the Most Approved Appliances,* and not reasonable care in their actual adoption, is the measure of a railroad company's duty. Anderson v. Oregon R., etc., Co., 45 Oregon 211.

**474.** 1. *Best and Most Approved.* — Louisville, etc., R. Co. v. Samuels, (Ky. 1900) 57 S. W. Rep. 235; Missouri, etc., R. Co. v. Carter, 95 Tex. 461.

"*Best Appliances.*" — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133.

"*The Best Approved Appliances.*" — St. Louis Southwestern R. Co. v. Goodnight, 32 Tex. Civ. App. 256.

"*Best*" and "*Safest*" Are Interchangeable Terms. — Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138.

*The Exercise of the Degree of Care that Would Be Exercised by a Person of Ordinary Prudence* under the same or similar circumstances is all that is required of a railroad in the equipment of its engines. Duckworth v. Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 66.

2. *Effect of Compliance with Rule as to Appliances* — *Georgia.* — Akins v. Georgia R., etc., Co., 111 Ga. 815; Georgia, etc., R. Co. v. Rawson, 112 Ga. 471; Southern R. Co. v. Williams, 113 Ga. 335.

*Illinois.* — Chicago, etc., R. Co. v. Madison, 81 Ill. App. 393.

*Indiana.* — Toledo, etc., R. Co. v. Fenstermaker, 163 Ind. 534; Toledo, etc., R. Co. v. Parks, 163 Ind. 592.

*Kentucky.* — Louisville, etc., R. Co. v. Samuels, (Ky. 1900) 57 S. W. Rep. 235; Cincinnati, etc., R. Co. v. Caskey, (Ky. 1903) 74 S. W. Rep. 201; Mills v. Louisville, etc., R. Co., 116 Ky. 309.

*Michigan.* — Peter v. Chicago, etc., R. Co., 121 Mich. 324, 80 Am. St. Rep. 500.

*Mississippi.* — Clisby v. Mobile, etc., R. Co., 78 Miss. 937.

*New York.* — Polacsek v. Manhattan R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 140; White v. New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

*Oregon.* — Anderson v. Oregon R., etc., Co., 45 Oregon 211, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473.

**474.** (b) *Presumption as to Adequacy of Appliances.* — See note 3.

**475.** (3) *Adoption of New Appliances* — (a) *General Rule.* — See note 2. Question for Jury. — See note 4.

(b) *Limits and Extent of Rule.* — See note 5.

**476.** See notes 1, 2.

(4) *Duty to Maintain in Proper State of Repair.* — See note 3.

**477.** See note 1.

*h. NEGLIGENCE IN MANAGEMENT OF ENGINES* — (1) *In General.*

— See notes 2, 3, 4.

*Tennessee.* — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

*Texas.* — St. Louis Southwestern R. Co. v. Goodnight, 32 Tex. Civ. App. 256; St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; Missouri, etc., R. Co. v. Hopkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 414.

*Virginia.* — Kimball v. Borden, 97 Va. 477.

*Canada.* — Jackson v. Grand Trunk R. Co., 32 Can. Sup. Ct. 245; Oatman v. Michigan Cent. R. Co., 1 Ont. L. Rep. 145.

**474. 3. Presumption as to Appliances** — *United States.* — Norris v. Baltimore, etc., R. Co., (C. C. A.) 109 Fed. Rep. 591; Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133; Carter v. Pennsylvania R. Co., (C. C. A.) 120 Fed. Rep. 663.

*Georgia.* — Central of Georgia R. Co. v. Trammell, 114 Ga. 312.

*Indiana.* — Toledo, etc., R. Co. v. Fenstermaker, 163 Ind. 534.

*Kentucky.* — Louisville, etc., R. Co. v. Samuels, (Ky. 1900) 57 S. W. Rep. 235; Illinois Cent. R. Co. v. Scheible, (Ky. 1903) 72 S. W. Rep. 325; Cincinnati, etc., R. Co. v. Caskey, (Ky. 1903) 74 S. W. Rep. 201.

*Maine.* — Dyer v. Maine Cent. R. Co., 99 Me. 195.

*New York.* — Peck v. New York Cent., etc., R. Co., 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; Munson v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 523.

*Texas.* — Scott v. Texas, etc., R. Co., 93 Tex. 625.

*Virginia.* — White v. New York, etc., R. Co., 99 Va. 357.

**475. 2. Adoption of New Devices.** — Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 268; Peter v. Chicago, etc., R. Co., 121 Mich. 324, 80 Am. St. Rep. 500.

**4. Question for Jury.** — See Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 268.

**5. Used and Approved.** — Bottoms v. Seaboard Air Line R. Co., 136 N. Car. 472; Missouri, etc., R. Co. v. Carter, 95 Tex. 461; St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1903) 74 S. W. Rep. 607.

**476. 1. Railroad Not Bound to Test Every New Invention.** — Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 268; Bottoms v. Seaboard Air Line R. Co., 136 N. Car. 472.

**2. Reasonable Diligence.** — Missouri, etc., R. Co. v. Carter, 95 Tex. 461; St. Louis Southwestern R. Co. v. Goodnight, 32 Tex. Civ. App. 256; St. Louis Southwestern R. Co. v. Gentry,

(Tex. Civ. App. 1903) 74 S. W. Rep. 607; Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791.

**3. Duty to Repair.** — Norris v. Baltimore, etc., R. Co., (C. C. A.) 109 Fed. Rep. 591; Great Northern R. Co. v. Coats, (C. C. A.) 115 Fed. Rep. 452; Cleveland, etc., R. Co. v. Tate, 104 Ill. App. 615; Chicago, etc., R. Co. v. Gilmore, 22 Ind. App. 466; Illinois Cent. R. Co. v. Barret, (Ky. 1902) 66 S. W. Rep. 9; Illinois Cent. R. Co. v. Scheible, (Ky. 1903) 72 S. W. Rep. 325; Anderson v. Oregon R., etc., Co., 45 Oregon 211; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400.

**Degree of Care Required as to Repairs.** — Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791. See also St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. App. 1903) 74 S. W. Rep. 607.

**477. 1. Failure to Keep Spark Arrester in Repair.** — Illinois Cent. R. Co. v. Barret, (Ky. 1902) 66 S. W. Rep. 9; Illinois Cent. R. Co. v. Scheible, (Ky. 1903) 72 S. W. Rep. 325; Clisby v. Mobile, etc., R. Co., 78 Miss. 937.

**2. Negligence in Management of Engine.** — Great Northern R. Co. v. Coats, (C. C. A.) 115 Fed. Rep. 452; Cleveland, etc., R. Co. v. Tate, 104 Ill. App. 615; McDoel v. Gill, 23 Ind. App. 95; Glanz v. Chicago, etc., R. Co., 119 Iowa 611; Anderson v. Oregon R., etc., Co., 45 Oregon 211; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

**3. Negligence in Handling Properly Equipped Engine.** — Norris v. Baltimore, etc., R. Co., (C. C. A.) 109 Fed. Rep. 591; Pittsburgh, etc., R. Co. v. Wilson, 161 Ind. 701. See also Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393; McDoel v. Gill, 23 Ind. App. 95; Mills v. Louisville, etc., R. Co., 116 Ky. 309; Matthews v. Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 10; Scott v. Texas, etc., R. Co., 93 Tex. 625; San Antonio, etc., R. Co. v. Adams, (Tex. Civ. App. 1902) 66 S. W. Rep. 578; Norfolk, etc., R. Co. v. Perrow, 101 Va. 345.

**4. Necessity for Employment of Skilled Workmen.** — Franey v. Illinois Cent. R. Co., 104 Ill. App. 499.

**When the Engine Was in Charge of a Competent and Skilful Engineer,** was carefully managed at the time of the fire, and was in good order and equipped with one of the best and most approved appliances in use for the purpose of preventing the emission of sparks, the railroad cannot be held liable. Chicago, etc., R. Co. v. Madison, 81 Ill. App. 393.

**The Jury May Infer Negligence at the Time of the Fire** from evidence that the employees were "usually" careless, incautious, or negligent in



**478.** Care as Varying with Circumstances. — See note 2.

(2) *Preventing Emission of Sparks.* — See notes 4, 5, 6.

**479.** (3) *Speed of Train.* — See note 1.

i. FUEL. — See notes 2, 4.

**480.** j. VIOLATION OF STATUTE OR ORDINANCE. — See note 1.

VII. EFFECT OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE — 1. In

General. — See note 5.

**481.** See note 1.

the operation of the engine. *Norwich Ins. Co. v. Oregon R. Co.*, (Oregon 1905) 78 Pac. Rep. 1025.

**Ordinary Care Required.** — *Missouri, etc., R. Co. v. Jordan*, (Tex. Civ. App. 1904) 82 S. W. Rep. 791.

**478.** 2. Care as Varied by Circumstances. — *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432. See also *Abrams v. Seattle, etc., R. Co.*, 27 Wash. 507.

**4. Emission of Sparks.** — *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Southern R. Co. v. Williams*, 113 Ga. 335; *Mills v. Louisville, etc., R. Co.*, 116 Ky. 309; *Weeks v. Erie R. Co.*, 57 N. Y. App. Div. 192; *Williams v. Southern R. Co.*, 130 N. Car. 116; *Oatman v. Michigan Cent. R. Co.*, 1 Ont. L. Rep. 145.

**5. Emission of Unusual Amount of Sparks** — *United States.* — *Texas, etc., R. Co. v. Watson*, 190 U. S. 287; *Norris v. Baltimore, etc., R. Co.*, (C. C. A.) 109 Fed. Rep. 591; *Lesser Cotton Co. v. St. Louis, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 133; *Carter v. Pennsylvania R. Co.*, (C. C. A.) 120 Fed. Rep. 663.

*Alabama.* — *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450.

*Georgia.* — *Southern R. Co. v. Williams*, 113 Ga. 335; *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312.

*Indiana.* — *Chicago, etc., R. Co. v. Kreig*, 22 Ind. App. 393; *McDoel v. Gill*, 23 Ind. App. 95.

*Kentucky.* — *Illinois Cent. R. Co. v. Scheible*, (Ky. 1903) 72 S. W. Rep. 325.

*Montana.* — *Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502.

*Oregon.* — *Norwich Ins. Co. v. Oregon R. Co.*, (Oregon 1905) 78 Pac. Rep. 1025.

**Evidence that the Engine Was Working Hard on a Heavy Grade**, and emitting a large quantity of heavy cinders and a large volume of heavy smoke, is sufficient to justify an inference that the engine ejected an unusual quantity of sparks. *Anderson v. Oregon R., etc., Co.*, 45 Oregon 211.

**6.** *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Weeks v. Erie R. Co.*, 57 N. Y. App. Div. 192.

**479.** 1. *Speed of Train.* — *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Clisby v. Mobile, etc., R. Co.*, 78 Miss. 937.

**High or Unusual Rate of Speed Not Negligence Per Se.** — *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Norwich Ins. Co. v. Oregon R. Co.*, (Oregon

1905) 78 Pac. Rep. 1025; *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911.

**Attaining a Great Rate of Speed in a Short Distance** from the starting point may constitute negligence, as being an improper operation of the engine. *McDoel v. Gill*, 23 Ind. App. 95.

**Running at a Rate of Fifteen Miles an Hour May Be Negligence** if the engine has a defective smokestack and the train is proceeding through a village. *Kansas City, etc., R. Co. v. Chamberlain*, 61 Kan. 859, 60 Pac. Rep. 15.

**It May Be the Duty of an Engineer to Shut Off Steam and Reduce Speed** when he is operating an engine that is emitting an unusual number of large sparks and is passing combustible property, located close to the right of way, at a time when the weather is unusually dry and a high wind is blowing toward such property from the right of way. *Lake Erie, etc., R. Co. v. McFall*, (Ind. 1904) 72 N. E. Rep. 552.

**Evidence of the Speed of the Train at a Point Over Two Miles from the Scene of the Fire** is irrelevant, and its admission is erroneous. *Norfolk, etc., R. Co. v. Briggs*, 103 Va. 105.

**2. The Question of Fuel.** — *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611.

**4. Use of Particular Variety of Fuel Not Per Se Negligence.** — *Raleigh Hosiery Co. v. Raleigh, etc., R. Co.*, 131 N. Car. 238.

**480.** 1. *Violation of Statute or Ordinance.* — *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Clisby v. Mobile, etc., R. Co.*, 78 Miss. 937. See also *Frontier Steam Laundry Co. v. Connolly*, (Neb. 1904) 101 N. W. Rep. 995.

**The Mere Fact that a Train Was Running at a Rate of Speed Prohibited by Ordinance** will not render the railroad liable, unless the increased speed caused the fire. *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237.

**5. Contributory Negligence — General Rule.** — *Ann Arbor R. Co. v. Fox*, (C. C. A.) 92 Fed. Rep. 494; *Chicago, etc., R. Co. v. McCoy*, 24 Ind. App. 651.

**If the Plaintiff Could Have Prevented the Loss by Reasonable Effort**, his failure to make such effort constitutes contributory negligence. *Baltimore, etc., R. Co. v. Does*, 20 Ind. App. 680.

**The Doctrine of Contributory Negligence Applies to the Negligent Setting Out of a Fire.** — *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379.

**Contributory Negligence Cannot Be Charged Against a Township.** — *Pittsburgh, etc., R. Co. v. Iddings*, 28 Ind. App. 504.

**481.** 1. *Voluntary Exposure to Risk.* — *Liverpool, etc., Ins. Co. v. Southern Pac. R. Co.*, 125 Cal. 434.

**Invitation by Plaintiff to Use Locomotive on His Premises.** — *Mann v. Pere Marquette R. Co.*, 135 Mich. 210.

**481.** It Has Been Held that the True Rule. — See note 3.

On the Other Hand It Has Been Declared. — See note 4.

**482.** 2. Plaintiff's Negligence Must Have Proximately Contributed. — See note 2.

**3. What Is Contributory Negligence — a. GENERAL RULE — (1) Statement of Terms.** — See note 5.

**483.** Such Proprietors in General Owe No Duty to Railroad Companies. — See notes 1, 2, 3.

**481. 3. Rule Stated.** — *Clark v. Kansas City, etc.*, R. Co., (C. C. A.) 129 Fed. Rep. 341; *Louisville, etc.*, R. Co. *v. Sullivan Timber Co.*, 138 Ala. 379; *Hubbard v. New York, etc.*, R. Co., 72 Conn. 24; *Chicago, etc.*, R. Co. *v. Willard*, 111 Ill. App. 225; *Indiana Clay Co. v. Baltimore, etc.*, R. Co., 31 Ind. App. 258; *Ft. Worth, etc.*, R. Co. *v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408.

**The Plaintiff Is Not an Insurer**, but the measure of his duty is to exercise care and diligence to prevent the fire from spreading to his property. *Lake Erie, etc.*, R. Co. *v. Keiser*, 25 Ind. App. 417.

**4. Presence of Seen Danger.** — *Louisville, etc.*, R. Co. *v. Sullivan Timber Co.*, 138 Ala. 379; *Franey v. Illinois Cent. R. Co.*, 104 Ill. App. 499.

**If the Plaintiff Had No Knowledge of the Danger**, his failure to take precautions to guard against it would not constitute contributory negligence. *Brister v. Illinois Cent. R. Co.*, 84 Miss. 33.

**Duty of Plaintiff to Extinguish Fire on Defendant's Premises.** — *Clark v. Kansas City, etc.*, R. Co., (C. C. A.) 129 Fed. Rep. 341.

**The Failure to Do an Impossibility** does not render the plaintiff guilty of contributory negligence. Thus, he is not chargeable with contributory negligence where some of his property is destroyed while he is trying to save other property of his, and is using reasonable care to prevent injury. *Chicago, etc.*, R. Co. *v. Willard*, 111 Ill. App. 225.

**What Is Sufficient Care on Plaintiff's Part.** — *Lake Erie, etc.*, R. Co. *v. Keiser*, 25 Ind. App. 417.

**482. 2. Contributory Negligence — Proximate Cause.** — *Ann Arbor R. Co. v. Fox*, (C. C. A.) 92 Fed. Rep. 494; *Louisville, etc.*, R. Co. *v. Marbury Lumber Co.*, 125 Ala. 237; *Franey v. Illinois Cent. R. Co.*, 104 Ill. App. 499; *Boston Excelsior Co. v. Bangor, etc.*, R. Co., 93 Me. 52; *Brister v. Illinois Cent. R. Co.*, 84 Miss. 33; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; *Norfolk, etc.*, R. Co. *v. Perrow*, 101 Va. 345.

**5. Need Not Anticipate Negligence — United States.** — *Clark v. Kansas City, etc.*, R. Co., (C. C. A.) 129 Fed. Rep. 341.

*Alabama.* — *Louisville, etc.*, R. Co. *v. Marbury Lumber Co.*, 125 Ala. 237.

*Illinois.* — *Illinois Cent. R. Co. v. Almon*, 100 Ill. App. 530; *Franey v. Illinois Cent. R. Co.*, 104 Ill. App. 499; *Cleveland, etc.*, R. Co. *v. Tate*, 104 Ill. App. 615.

*Indiana.* — *Pittsburgh, etc.*, R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482; *Indiana Clay Co. v. Baltimore, etc.*, R. Co., 31 Ind. App. 258.

*Kentucky.* — *Louisville, etc.*, R. Co. *v. Samuels*, (Ky. 1900) 57 S. W. Rep. 235.

*Maine.* — *Boston Excelsior Co. v. Bangor, etc.*, R. Co., 93 Me. 52.

*Mississippi.* — *Alabama, etc.*, R. Co. *v. Aetna Ins. Co.*, 82 Miss. 770.

*Tennessee.* — *Louisville, etc.*, R. Co. *v. Short*, 110 Tenn. 713, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480-491.

*Texas.* — *Texas Pac. R. Co. v. Leon & H. Blum Land Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 253; *Rutherford v. Texas, etc.*, R. Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 422. *Compare Ft. Worth, etc.*, R. Co. *v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22.

**Party Need Not Stand Guard over Property.** — *Lake Erie, etc.*, R. Co. *v. Keiser*, 25 Ind. App. 417.

**483. 1. Rule Stated.** — *Alabama, etc.*, R. Co. *v. Aetna Ins. Co.*, 82 Miss. 770.

**2. Use of Property in Any Lawful Manner — Alabama.** — *Louisville, etc.*, R. Co. *v. Marbury Lumber Co.*, 125 Ala. 237.

*Illinois.* — *Cleveland, etc.*, R. Co. *v. Tate*, 104 Ill. App. 615.

*Indiana.* — *Pittsburgh, etc.*, R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 483.

*Kentucky.* — *Louisville, etc.*, R. Co. *v. Samuels*, (Ky. 1900) 57 S. W. Rep. 235.

*Maine.* — *Boston Excelsior Co. v. Bangor, etc.*, R. Co., 93 Me. 52.

*Mississippi.* — *Alabama, etc.*, R. Co. *v. Fried*, 81 Miss. 314; *Alabama, etc.*, R. Co. *v. Aetna Ins. Co.*, 82 Miss. 770.

*Tennessee.* — *Louisville, etc.*, R. Co. *v. Short*, 110 Tenn. 713, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480-491.

*Texas.* — *Rutherford v. Texas, etc.*, R. Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 422; *Texas, etc.*, R. Co. *v. Rutherford*, 28 Tex. Civ. App. 590; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408. *Compare Ft. Worth, etc.*, R. Co. *v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22.

**If the Injury Could Have Been Avoided** by the exercise of reasonable care, prudence, and skill on the part of the defendant, the plaintiff may maintain an action for the injury, though he was guilty of negligence remotely connected with the injury. *Brister v. Illinois Cent. R. Co.*, 84 Miss. 33.

**3. Rule Stated.** — *Chicago, etc.*, R. Co. *v. American Strawboard Co.*, 91 Ill. App. 635, affirmed 190 Ill. 268; *Illinois Cent. R. Co. v. Almon*, 100 Ill. App. 530; *Cleveland, etc.*, R. Co. *v. Tate*, 104 Ill. App. 615; *Pittsburgh, etc.*, R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322; *Indiana Clay Co. v. Baltimore, etc.*, R. Co., 31 Ind. App. 258; *Louisville, etc.*, R. Co. *v. Samuels*, (Ky. 1900) 57 S. W. Rep. 235.

484. See notes 1, 2.

485. (2) *Limits of Rule.* — See note 2.

(3) *Permitting Combustibles on Premises.* — See note 3.

486. See note 1.

487. (4) *Conduct of Farming Operations* — (b) *Construction of Fire Breaks.* — See note 1.

(5) *Erection of Buildings and Improvements.* — See notes 2, 3.

(6) *Property Placed on Right of Way.* — See note 4.

488. See note 1.

489. *b. CONTRARY DOCTRINES (AS OPPOSED TO GENERAL RULE SUPRA)* — (2) *General Rule Modified.* — See note 2.

(3) *Question of Fact for Jury* — (a) *In General.* — See note 4.

490. 5. *Negligence of Third Person.* — See note 7.

491. See note 1.

VIII. NEGLIGENCE AS QUESTION OF FACT FOR JURY — 1. Defendant's Negligence — *a. IN GENERAL.* — See note 3.

484. 1. *May Use Property in Any Natural and Lawful Manner.* — *Rutherford v. Texas*, etc., R. Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 422.

2. *Assumption of Additional Risk.* — Louisville, etc., R. Co. *v. Marbury Lumber Co.*, 125 Ala. 237; Pittsburgh, etc., R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322; Louisville, etc., R. Co. *v. Samuels*, (Ky. 1900) 57 S. W. Rep. 235; Alabama, etc., R. Co. *v. Fried*, 81 Miss. 314; Alabama, etc., R. Co. *v. Aetna Ins. Co.*, 82 Miss. 770; St. Louis Southwestern R. Co. *v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408.

485. 2. *Fraud or Intentional Exposure.* — See *Ft. Worth*, etc., R. Co. *v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22.

3. *Combustibles on Premises.* — Louisville, etc., R. Co. *v. Marbury Lumber Co.*, 125 Ala. 237; Louisville, etc., R. Co. *v. Sullivan Timber Co.*, 138 Ala. 379; Chicago, etc., R. Co. *v. American Strawboard Co.*, 91 Ill. App. 635, *affirmed* 190 Ill. 268; Cleveland, etc., R. Co. *v. Tate*, 104 Ill. App. 615; Peter *v. Chicago*, etc., R. Co., 121 Mich. 324, 80 Am. St. Rep. 500; Alabama, etc., R. Co. *v. Fried*, 81 Miss. 314; Alabama, etc., R. Co. *v. Aetna Ins. Co.*, 82 Miss. 770; Louisville, etc., R. Co. *v. Short*, 110 Tenn. 713, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480-491; *Rutherford v. Texas*, etc., R. Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 422; Texas, etc., R. Co. *v. Rutherford*, 28 Tex. Civ. App. 590; *Kimball v. Borden*, 97 Va. 477. See also *Ann Arbor R. Co. v. Fox*, (C. C. A.) 92 Fed. Rep. 494.

486. 1. *Removal of Combustibles from Right of Way.* — Pittsburgh, etc., R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486; Texas, etc., R. Co. *v. Wooldridge*, (Tex. Civ. App. 1901) 63 S. W. Rep. 905.

Though the Plaintiff Stores Hay in His Barn Near the Defendant's Right of Way, and the hay is burned by a fire communicated to corn shucks which have been thrown from the barn and permitted to accumulate on the right of way, he is not guilty of contributory negligence. *Texas*, etc., R. Co. *v. Rutherford*, 28 Tex. Civ. App. 590.

487. 1. *Fire Breaks.* — *Union Pac. R. Co. v. Holmes*, 68 Kan. 810.

2. *Buildings and Improvements.* — Pittsburgh, etc., R. Co. *v. Indiana Horseshoe Co.*, 154 Ind.

322, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

3. *Erecting House with Knowledge of Danger.* — Pittsburgh, etc., R. Co. *v. Indiana Horseshoe Co.*, 154 Ind. 322, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

4. *Property on Right of Way.* — *Ann Arbor Co. v. Fox*, (C. C. A.) 92 Fed. Rep. 494; *Southern R. Co. v. Wilson*, 138 Ala. 510, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487; *Kansas City*, etc., R. Co. *v. Chamberlain*, 61 Kan. 859, 60 Pac. Rep. 15; *Kansas City*, etc., R. Co. *v. Blaker*, 68 Kan. 244, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487; *Louisville*, etc., R. Co. *v. Samuels*, (Ky. 1900) 57 S. W. Rep. 235; *Boston Excelsior Co. v. Bangor*, etc., R. Co., 93 Me. 52; *Livermon v. Roanoke*, etc., R. Co., 131 N. Car. 527.

*Duty of Defendant to Keep Right of Way Free from Combustibles.* — *Sprague v. Atchison*, etc., R. Co., (Kan. 1904) 78 Pac. Rep. 828.

*Plaintiff Property on Defendant's Right of Way by Mere License.* — *Connelly v. Erie R. Co.*, 68 N. Y. App. Div. 542.

488. 1. *Property on Right of Way Without Permission.* — See *Livermon v. Roanoke*, etc., R. Co., 131 N. Car. 527.

*Willful Destruction by Railway.* — *Norfolk*, etc., R. Co. *v. Perrow*, 101 Va. 345.

489. 2. *Ft. Worth*, etc., R. Co. *v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408. See also *Louisville*, etc., R. Co. *v. Sullivan Timber Co.*, 138 Ala. 379.

4. *Contributory Negligence Question for Jury.* — *Toledo*, etc., R. Co. *v. Needham*, 105 Ill. App. 25; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408.

490. 7. *Negligence of Third Person.* — *Chicago*, etc., R. Co. *v. Ross*, 24 Ind. App. 222; *Boston*, etc., R. Co. *v. Sargent*, 72 N. H. 455.

*Negligence of Employees of Independent Contractor Not Imputable to Plaintiff.* — *San Antonio*, etc., R. Co. *v. Adams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 578.

491. 1. *Liability of Both Defendant and Third Person.* — *Chicago*, etc., R. Co. *v. Ross*, 24 Ind. App. 222; *Boston*, etc., R. Co. *v. Sargent*, 72 N. H. 455.

3. *Defendant's Negligence — Question of Fact —*

**493.** Reluctance of Court to Disturb Finding of Jury. — See note 2.

*d.* OPERATION OF ENGINE. — See note 5.

*e.* CONSTRUCTION AND CONDITION OF ENGINES AND APPLIANCES.

— See note 7.

**494.** *g.* COMBUSTIBLES ON RIGHT OF WAY. — See note 6.

**495.** See note 1.

**2. Plaintiff's Negligence.** — See notes 2, 3.

— *United States.* — McCullen *v.* Chicago, etc., R. Co., (C. C. A.) 101 Fed. Rep. 66; Carter *v.* Pennsylvania R. Co., (C. C. A.) 120 Fed. Rep. 663; Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288; Clark *v.* Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

*Alabama.* — Alabama G. S. R. Co. *v.* Taylor, 129 Ala. 238.

*Georgia.* — Akins *v.* Georgia R., etc., Co., 111 Ga. 815; Central of Georgia R. Co. *v.* Trammell, 114 Ga. 312.

*Illinois.* — Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138; Baltimore, etc., R. Co. *v.* Irwin, 97 Ill. App. 337.

*Iowa.* — Thompson *v.* Keokuk, etc., R. Co., 116 Iowa 215.

*Kansas.* — St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719; Kansas City, etc., R. Co. *v.* Chamberlain, 61 Kan. 859, 60 Pac. Rep. 15; Walker *v.* Monohon, 10 Kan. App. 580, 58 Pac. Rep. 567.

*New York.* — Munson *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 523; German-American Ins. Co. *v.* Standard Gas Light Co., 67 N. Y. App. Div. 539, affirmed 174 N. Y. 508.

*North Carolina.* — McMillan *v.* Wilmington, etc., R. Co., 126 N. Car. 725; Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. Car. 75.

*Oregon.* — Lieuellen *v.* Mosgrove, 37 Oregon 446, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491.

*Pennsylvania.* — Baylor *v.* Stevens, 16 Pa. Super. Ct. 365; Matthews *v.* Pittsburg, etc., R. Co., 18 Pa. Super. Ct. 10.

*South Carolina.* — Brown *v.* Carolina Midland R. Co., 64 S. Car. 365.

*Tennessee.* — Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432.

*Texas.* — Texas Midland R. Co. *v.* Hooten, 21 Tex. Civ. App. 139; Meadows *v.* Truesdell, (Tex. Civ. App. 1900) 56 S. W. Rep. 932.

*Utah.* — Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515.

*Vermont.* — Farrington *v.* Rutland R. Co., 72 Vt. 24.

*Virginia.* — Norfolk, etc., R. Co. *v.* Fritts, 103 Va. 687, 106 Am. St. Rep. 911.

*Washington.* — Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507.

*Canada.* — Oatman *v.* Michigan Cent. R. Co., 1 Ont. L. Rep. 145.

**493. 2. Disturbing Finding of Jury** — *United States.* — Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288. See also Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452.

*Illinois.* — Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138; Baltimore, etc., R. Co. *v.* Irwin, 97 Ill. App. 337. See also Cleveland, etc., R. Co. *v.* Tate, 104 Ill. App. 615.

*Iowa.* — Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304.

*Mississippi.* — Clisby *v.* Mobile, etc., R. Co., 78 Miss. 937.

*Missouri.* — Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166.

*Virginia.* — Norfolk, etc., R. Co. *v.* Perrow, 101 Va. 345.

*Washington.* — Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507.

*Canada.* — Grand Trunk R. Co. *v.* Rainville, 29 Can. Sup. Ct. 201, affirming 25 Ont. App. 242.

**5. Rule Stated.** — Texas, etc., R. Co. *v.* Watson, 190 U. S. 287; Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452; Central of Georgia R. Co. *v.* Trammell, 114 Ga. 312; Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304; Atchison, etc., R. Co. *v.* Geiser, 68 Kan. 281; St. Louis Southwestern R. Co. *v.* Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; Missouri, etc., R. Co. *v.* Hopkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 414.

**7. Construction and Condition of Engines and Appliances** — *United States.* — Texas, etc., R. Co. *v.* Watson, 190 U. S. 287.

*Illinois.* — Cleveland, etc., R. Co. *v.* Hornsby, 202 Ill. 138.

*Indiana.* — Toledo, etc., R. Co. *v.* Fenstermaker, 163 Ind. 534.

*Iowa.* — Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304.

*Kansas.* — Atchison, etc., R. Co. *v.* Geiser, 68 Kan. 281.

*Kentucky.* — Southern R. Co. *v.* Hanna, (Ky. 1899) 53 S. W. Rep. 1.

*North Carolina.* — Craft *v.* Albemarle Timber Co., 132 N. Car. 151.

*Texas.* — Missouri, etc., R. Co. *v.* Florence, (Tex. Civ. App. 1903) 74 S. W. Rep. 802; St. Louis Southwestern R. Co. *v.* Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; Missouri, etc., R. Co. *v.* Hopkins, (Tex. Civ. App. 1904) 80 S. W. Rep. 414.

*Utah.* — Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515.

**494. 6. Combustibles on Right of Way.** — Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452; St. Louis, etc., R. Co. *v.* Ludlum, 63 Kan. 719; Craft *v.* Albemarle Timber Co., 132 N. Car. 151; McTavish *v.* Great Northern R. Co., 8 N. Dak. 333; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157; Elder Tp. School Dist. *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 112; St. Louis, etc., R. Co. *v.* Knight, 20 Tex. Civ. App. 477; Abrams *v.* Seattle, etc., R. Co., 27 Wash. 507; Rainville *v.* Grand Trunk R. Co., 28 Ont. 625, affirmed 25 Ont. App. 243, 29 Can. Sup. Ct. 201.

**495. 1. Surrounding Circumstances.** — Great Northern R. Co. *v.* Coats, (C. C. A.) 115 Fed. Rep. 452; Stephenson *v.* Pennsylvania R. Co., 20 Pa. Super. Ct. 157.

**2. Plaintiff's Negligence** — *United States.* —

**495. 3. When Negligence Not a Question for Jury — a. IN GENERAL.** — See note 5.

**496. b. PLAINTIFF'S NEGLIGENCE.** — See note 1.

**c. DEFENDANT'S NEGLIGENCE.** — See notes 4, 6.

But Wherever There Is a Conflict of Evidence. — See note 8.

**497.** See note 1.

**498. IX. PRESUMPTION OF NEGLIGENCE FROM COMMUNICATION OF FIRE — 1. In General** — Thus, the Mere Fact that a Person Starts a Fire on His Own Premises. — See note 1.

**2. Doctrine that Communication of Fire Prima Facie Negligence — a. IN GENERAL.** — See note 4.

Texas, etc., R. Co. v. Watson, 190 U. S. 287; Clark v. Kansas City, etc., R. Co., (C. C. A.) 129 Fed. Rep. 341.

California. — Liverpool, etc., Ins. Co. v. Southern Pac. R. Co., 125 Cal. 434.

Illinois. — Franey v. Illinois Cent. R. Co., 104 Ill. App. 499; Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225.

Indiana. — Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.

Mississippi. — Alabama, etc., R. Co. v. Fried, 81 Miss. 314.

North Dakota. — McTavish v. Great Northern R. Co., 8 N. Dak. 333.

Virginia. — Kimball v. Borden, 97 Va. 477.

**495. 3. Contributory Negligence Question for Jury.** — Ann Arbor R. Co. v. Fox, (C. C. A.) 92 Fed. Rep. 494; Louisville, etc., R. Co. v. Sullivan Timber Co., 138 Ala. 379; Atchison, etc., R. Co. v. Ireton, 63 Kan. 888, 66 Pac. Rep. 987; Alabama, etc., R. Co. v. Fried, 81 Miss. 314; McTavish v. Great Northern R. Co., 8 N. Dak. 333; Ft. Worth, etc., R. Co. v. Dial, (Tex. Civ. App. 1905) 85 S. W. Rep. 22; St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; Kimball v. Borden, 97 Va. 477.

**5. When Negligence Question for Court.** — Gibbs v. St. Louis, etc., R. Co., 104 Mo. App. 276.

**496. 1. Alabama, etc., R. Co. v. Ætna Ins. Co., 82 Miss. 770.**

**4. Defendant's Negligence.** — Ragsdale v. Southern R. Co., 121 Fed. Rep. 924; Toledo, etc., R. Co. v. Parks, 163 Ind. 592; Minneapolis Sash, etc., Co. v. Great Northern R. Co., 83 Minn. 370; Swenson v. Erlandson, 86 Minn. 263; Livermon v. Roanoke, etc., R. Co., 131 N. Car. 527; Jackson v. Grand Trunk R. Co., 32 Can. Sup. Ct. 245. See also White v. New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

**6. See Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 237; Williams v. Southern R. Co., 130 N. Car. 116.**

**8. Jackson v. Grand Trunk R. Co., 32 Can. Sup. Ct. 245; Livermon v. Roanoke, etc., R. Co., 131 N. Car. 527.**

**497. 1. See Brooks v. Missouri Pac. R. Co., 98 Mo. App. 166.**

**498. 1. Mere Fact of Starting Fire.** — Alabama G. S. R. Co. v. Johnston, 128 Ala. 292.

**4. View that Communication of Fire Prima Facie Negligence** — United States. — Continental Trust Co. v. Toledo, etc., R. Co., 89 Fed. Rep. 637; Ann Arbor R. Co. v. Fox, (C. C. A.) 92 Fed. Rep. 494; McCullen v. Chicago, etc., R. Co., (C.

C. A.) 101 Fed. Rep. 66; Norris v. Baltimore, etc., R. Co., (C. C. A.) 109 Fed. Rep. 591; Great Northern R. Co. v. Coats, (C. C. A.) 115 Fed. Rep. 452.

Alabama. — Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 237; Alabama G. S. R. Co. v. Taylor, 129 Ala. 238; Louisville, etc., R. Co. v. Marbury Lumber Co., 132 Ala. 520, 90 Am. St. Rep. 917; Louisville, etc., R. Co. v. Sullivan Timber Co., 138 Ala. 379.

Arkansas. — St. Louis, etc., R. Co. v. Ayres, 67 Ark. 371.

Georgia. — Central of Georgia R. Co. v. Trammell, 114 Ga. 312; Southern R. Co. v. Pace, 114 Ga. 712.

Illinois. — Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138; Lake Erie, etc., R. Co. v. Ericson, 80 Ill. App. 625; Indiana, etc., R. Co. v. Hawkins, 84 Ill. App. 39; Chicago, etc., R. Co. v. American Strawboard Co., 91 Ill. App. 635, affirmed 190 Ill. 268; Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530; Franey v. Illinois Cent. R. Co., 104 Ill. App. 499; Cleveland, etc., R. Co. v. Tate, 104 Ill. App. 615; Toledo, etc., R. Co. v. Valodin, 109 Ill. App. 132.

Indiana. — Indiana Clay Co. v. Baltimore, etc., R. Co., 31 Ind. App. 258.

Indian Territory. — St. Louis, etc., R. Co. v. Lawrence, (Indian Ter. 1903) 76 S. W. Rep. 254.

Iowa. — Thompson v. Keokuk, etc., R. Co., 116 Iowa 215; Swanson v. Keokuk, etc., R. Co., 116 Iowa 304; Krejci v. Chicago, etc., R. Co., 117 Iowa 344; West Side Mut. F. Ins. Co. v. Chicago, etc., R. Co., (Iowa 1903) 95 N. W. Rep. 193.

Kansas. — Atchison, etc., R. Co. v. Geiser, 68 Kan. 281; Walker v. Kendall, 7 Kan. App. 801; Atchison, etc., R. Co. v. Hays, 8 Kan. App. 545; Atchison, etc., R. Co. v. Hutchinson, 8 Kan. App. 605; Clark v. Ellithorp, 9 Kan. App. 503.

Michigan. — Peter v. Chicago, etc., R. Co., 121 Mich. 324, 80 Am. St. Rep. 500.

Minnesota. — Minneapolis Sash, etc., Co. v. Great Northern R. Co., 83 Minn. 370.

Mississippi. — Alabama, etc., R. Co. v. Barrett, 78 Miss. 432; Drake v. Yazoo, etc., R. Co., 79 Miss. 84.

Nebraska. — Chicago, etc., R. Co. v. Beal, (Neb. 1903) 94 N. W. Rep. 956.

North Carolina. — Williams v. Southern R. Co., 130 N. Car. 116, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498, in dissenting opinion of Douglas and Clark, JJ.; Raleigh Hosiery Co. v. Raleigh, etc., R. Co., 131 N. Car. 238, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498; Simpson v. Enfield Lumber Co., 133 N. Car. 95, reversing 131 N. Car. 518.

**500. b. JURISDICTIONS WHERE RULE OF STATUTORY ORIGIN —**(1) *Generally.* — See note 1.**501. (2) Effect of Such Statutes on Burden of Proof.** — See note 1.**502. c. FOUNDATION AND RATIONALE OF RULE.** — See note 1.**d. NATURE OF PRESUMPTION — PRIMA FACIE OR REBUTTABLE.**

— See notes 3, 4.

*North Dakota.* — *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333.*Ohio.* — *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312; *Lake Erie, etc., R. Co. v. Falk*, 62 Ohio St. 297.*Oregon.* — *Anderson v. Oregon R., etc., Co.*, 45 Oregon 211.*Tennessee.* — *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.*Texas.* — *Scott v. Texas, etc., R. Co.*, 93 Tex. 625; *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461; *Texas Midland R. Co. v. Hooten*, 21 Tex. Civ. App. 139; *Texas, etc., R. Co. v. Rice*, 24 Tex. Civ. App. 374; *Gulf, etc., R. Co. v. Jordan*, 25 Tex. Civ. App. 82; *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400; *Texas, etc., R. Co. v. Wooldridge*, (Tex. Civ. App. 1901) 63 S. W. Rep. 905; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649; *San Antonio, etc., R. Co. v. Adams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 578; *Texas Southern R. Co. v. Hart*, 32 Tex. Civ. App. 212; *Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co.*, 32 Tex. Civ. App. 82; *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395; *Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40; *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256; *Missouri, etc., R. Co. v. Florence*, (Tex. Civ. App. 1903) 74 S. W. Rep. 802.*Utah.* — *Preece v. Rio Grande Western R. Co.*, 24 Utah 493; *Olmstead v. Oregon Short Line R. Co.*, 27 Utah 515.*Vermont.* — *Farrington v. Rutland R. Co.*, 72 Vt. 24.*Virginia.* — *White v. New York, etc., R. Co.*, 99 Va. 357; *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911.**Presumption Arising from Repeated Fires.** — *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333.**500. 1. Michigan** — See *Ann Arbor R. Co. v. Fox*, (C. C. A.) 92 Fed. Rep. 494; *Peter v. Chicago, etc., R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500.**501. 1. The Burden of Proof Does Not Shift**, but it merely devolves on the defendant to rebut the *prima facie* case made out by the plaintiff. *St. Louis Southwestern R. Co. v. Moss*, (Tex. Civ. App. 1904) 84 S. W. Rep. 281; *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400.**Negligence Still Essential to Recovery.** — *Continental Trust Co. v. Toledo, etc., R. Co.*, 89 Fed. Rep. 637.**502. 1. Reason of Rule.** — *McCullen v. Chicago, etc., R. Co.*, (C. C. A.) 101 Fed. Rep. 66; *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Connors v. Chicago, etc., R. Co.*, 111 Iowa 384; *Atchison, etc., R. Co. v. Geiser*, 68 Kan. 281; *Dyer v. Maine Cent. R. Co.*, 99Me. 195; *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95, reversing 131 N. Car. 518; *Spink v. New York, etc., R. Co.*, 26 R. I. 115; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432; *Texas Midland R. Co. v. Hooten*, 21 Tex. Civ. App. 139.**3. Presumption Is Rebuttable.** — *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238; *Southern R. Co. v. Williams*, 113 Ga. 335; *Lake Erie, etc., R. Co. v. Ericson*, 80 Ill. App. 625; *Indiana, etc., R. Co. v. Hawkins*, 84 Ill. App. 39; *Toledo, etc., R. Co. v. Valodin*, 109 Ill. App. 132; *Krejci v. Chicago, etc., R. Co.*, 117 Iowa 344; *Peter v. Chicago, etc., R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500; *Preece v. Rio Grande Western R. Co.*, 24 Utah 493.**The Setting Out of the Fire Is Evidence of Negligence**, and does not merely raise a presumption of negligence. *Atchison, etc., R. Co. v. Geiser*, 68 Kan. 281.**4. Burden on Defendant to Rebut** — *United States.* — *Lesser Cotton Co. v. St. Louis, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 133; *Great Northern R. Co. v. Coats*, (C. C. A.) 115 Fed. Rep. 452.*Alabama.* — *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 292; *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238; *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Southern R. Co. v. Johnson*, 141 Ala. 575.*Arkansas.* — *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371.*Illinois.* — *Cleveland, etc., R. Co. v. Hornsby*, 202 Ill. 138; *Lake Erie, etc., R. Co. v. Ericson*, 80 Ill. App. 625; *Chicago, etc., R. Co. v. American Strawboard Co.*, 91 Ill. App. 635, affirmed 190 Ill. 268; *Cleveland, etc., R. Co. v. Tate*, 104 Ill. App. 615; *Toledo, etc., R. Co. v. Needham*, 105 Ill. App. 25; *Toledo, etc., R. Co. v. Valodin*, 109 Ill. App. 132.*Indian Territory.* — *St. Louis, etc., R. Co. v. Lawrence*, (Indian Ter. 1903) 76 S. W. Rep. 254.*Iowa.* — *Connors v. Chicago, etc., R. Co.*, 111 Iowa 384; *West Side Mut. F. Ins. Co. v. Chicago, etc., R. Co.*, (Iowa 1903) 95 N. W. Rep. 193.*Kansas.* — *Atchison, etc., R. Co. v. Geiser*, 68 Kan. 281; *Clark v. Ellithorp*, 9 Kan. App. 503.*Michigan.* — *Peter v. Chicago, etc., R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500.*Nebraska.* — *Creighton v. Chicago, etc., R. Co.*, (Neb. 1903) 94 N. W. Rep. 527; *Chicago, etc., R. Co. v. Beal*, (Neb. 1903) 94 N. W. Rep. 956.*North Carolina.* — *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95, reversing 131 N. Car. 518.*Ohio.* — *Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312.*Oregon.* — *Anderson v. Oregon R., etc., Co.*, 45 Oregon 211.*Tennessee.* — *Nashville, etc., R. Co. v. Hei-*

**503.** *e.* EXTENT AND LIMITS OF PRESUMPTION. — See note 2.

**504.** *f.* WHAT MUST BE SHOWN TO REBUT — (1) *In General.* — See note 1.

**Rebutting Evidence as Broad as Presumption.** — See note 2.

(2) *Construction, Condition, and Control of Engine.* — See note 5.

**505.** See notes 1, 2, 3.

*kens*, 112 Tenn. 378; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

*Texas.* — *Scott v. Texas, etc., R. Co.*, 93 Tex. 625; *Missouri, etc., R. Co. v. Carter*, 95 Tex. 461; *Texas Midland R. Co. v. Hooten*, 21 Tex. Civ. App. 139; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649; *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400; *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395; *Texas Southern R. Co. v. Hart*, 32 Tex. Civ. App. 212; *Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40; *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256; *Missouri, etc., R. Co. v. Florence*, (Tex. Civ. App. 1903) 74 S. W. Rep. 802; *Texas Midland R. Co. v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 942; *St. Louis Southwestern R. Co. v. Moss*, (Tex. Civ. App. 1904) 84 S. W. Rep. 281.

*Utah.* — *Preece v. Rio Grande Western R. Co.*, 24 Utah 493; *Olmstead v. Oregon Short Line R. Co.*, 27 Utah 515.

*Vermont.* — *Farrington v. Rutland R. Co.*, 72 Vt. 24.

*Virginia.* — *White v. New York, etc., R. Co.*, 99 Va. 357; *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911.

**The Burden Is Not Cast on the Defendant Until the Origin of the Fire Is Established.** — *Duckworth v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 66.

**503. 2. Where Circumstances of Fire Are Shown.** — *Southern R. Co. v. Hanna*, (Ky. 1899) 53 S. W. Rep. 1.

**504. 1. What Must Be Shown to Rebut.** — *Great Northern R. Co. v. Coats*, (C. C. A.) 115 Fed. Rep. 452.

**Preponderance of Evidence Not Required of Defendant.** — *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395. See also *Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40.

**2. Rebutting Evidence as Broad as Presumption.** — *McCullen v. Chicago, etc., R. Co.*, (C. C. A.) 101 Fed. Rep. 66; *Drake v. Yazoo, etc., R. Co.*, 79 Miss. 84, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649.

**The Evidence of the Plaintiff, as Well as the Legal Presumption, must be rebutted.** *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312.

**5. Construction, Condition, and Control of Engine** — *Alabama.* — *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238; *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379.

*Georgia.* — *Southern R. Co. v. Myers*, 108 Ga. 165; *Georgia R., etc., Co. v. Roberts*, 114 Ga. 387; *Southern R. Co. v. Pace*, 114 Ga. 712.

*Illinois.* — *Indiana, etc., R. Co. v. Hawkins*, 84 Ill. App. 39; *Toledo, etc., R. Co. v. Needham*, 105 Ill. App. 25; *Toledo, etc., R. Co. v. Valodin*, 109 Ill. App. 132.

*Indiana.* — *Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592.

*Kentucky.* — See *Southern R. Co. v. Hanna*, (Ky. 1899) 53 S. W. Rep. 1.

*Mississippi.* — *Drake v. Yazoo, etc., R. Co.*, 79 Miss. 84, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504.

*North Dakota.* — *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333.

*Texas.* — *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649; *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395; *Smith v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 22; *Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co.*, 32 Tex. Civ. App. 82; *Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40; *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256; *St. Louis Southwestern R. Co. v. Gentry*, (Tex. Civ. App. 1903) 74 S. W. Rep. 607; *Missouri, etc., R. Co. v. Florence*, (Tex. Civ. App. 1903) 74 S. W. Rep. 802; *Texas Midland R. Co. v. Moore*, (Tex. Civ. App. 1903) 74 S. W. Rep. 942.

*Utah.* — *Preece v. Rio Grande Western R. Co.*, 24 Utah 493; *Olmstead v. Oregon Short Line R. Co.*, 27 Utah 515.

*Virginia.* — *White v. New York, etc., R. Co.*, 99 Va. 357.

**Degree of Certainty Required in Rebuttal Evidence.** — *Gulf, etc., R. Co. v. Jordan*, 25 Tex. Civ. App. 82.

**Not Necessary for a Railroad to Show "Innocent Intention."** — *Texas Midland R. Co. v. Hooten*, 21 Tex. Civ. App. 139.

**505. 1. Proper Construction and Approved Appliances — Due Care.** — *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238; *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371; *Drake v. Yazoo, etc., R. Co.*, 79 Miss. 84, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504; *Scott v. Texas, etc., R. Co.*, 93 Tex. 625; *San Antonio, etc., R. Co. v. Adams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 578.

**Necessity of Showing Proper Equipment at Time of Fire.** — The presumption of negligence is not rebutted by the testimony of a witness that he knew the defendant had adopted the latest and best improvement in spark arresters, it not appearing that the engines were equipped therewith at the time the injury occurred. *Southern R. Co. v. Puckett*, 121 Ga. 322.

**2. Competent and Skilful Servants.** — *Great Northern R. Co. v. Coats*, (C. C. A.) 115 Fed. Rep. 452; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371; *Toledo, etc., R. Co. v. Needham*, 105 Ill. App. 25; *Illinois Cent. R. Co. v. Scheible*, (Ky. 1903) 72 S. W. Rep. 325;

**506.** But It Should Be Observed in This Connection. — See note 1.

(3) *Plaintiff's Course When Presumption Rebutted.* — See note 2.

*g.* WHETHER PRESUMPTION REBUTTED, QUESTION OF FACT FOR JURY — (1) *General Rule.* — See note 3.

**507.** (2) *Qualification.* — See note 1.

3. *Doctrine that Communication of Fire Not Prima Facie Negligence* —

*a.* IN GENERAL. — See note 3.

**508.** *b.* RATIONALE OF RULE. — See notes 2, 3.

*Drake v. Yazoo, etc., R. Co.,* 79 Miss. 84, *quoting* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 505; *San Antonio, etc., R. Co. v. Adams, (Tex. Civ. App. 1902)* 66 S. W. Rep. 578; *White v. New York, etc., R. Co.,* 99 Va. 357; *Norfolk, etc., R. Co. v. Fritts,* 103 Va. 687, 106 Am. St. Rep. 911.

**Regardless of Whether the Employees Operating the Engine Were Generally Incompetent,** the defendant is entitled to a verdict if it is shown that the engine was properly equipped and was properly and carefully handled at the time of the fire. *Gulf, etc., R. Co. v. Johnson,* 28 Tex. Civ. App. 395.

**505. 3. Careful Management at Time of Fire** — *United States.* — *Norris v. Baltimore, etc., R. Co., (C. C. A.)* 109 Fed. Rep. 591.

*Arkansas.* — *St. Louis, etc., R. Co. v. Ayres,* 67 Ark. 371.

*Illinois.* — *Cleveland, etc., R. Co. v. Tate,* 104 Ill. App. 615.

*Iowa.* — *West Side Mut. F. Ins. Co. v. Chicago, etc., R. Co., (Iowa 1903)* 95 N. W. Rep. 193.

*Kentucky.* — *Illinois Cent. R. Co. v. Scheible, (Ky. 1903)* 72 S. W. Rep. 325.

*Mississippi.* — *Drake v. Yazoo, etc., R. Co.,* 79 Miss. 84, *quoting* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 505.

*Texas.* — *San Antonio, etc., R. Co. v. Adams, (Tex. Civ. App. 1902)* 66 S. W. Rep. 578; *Texas Southern R. Co. v. Hart,* 32 Tex. Civ. App. 212.

*Virginia.* — *White v. New York, etc., R. Co.,* 99 Va. 357.

**Competency of Evidence that Engine Was Properly Handled.** — *Texas Southern R. Co. v. Hart,* 32 Tex. Civ. App. 212.

**506. 1. Where There Is Evidence Tending to Show Negligence in Fact,** in addition to the presumption of negligence raised by the communication of the fire, it is for the jury to say whether the plaintiff's *prima facie* case has been rebutted. *Preece v. Rio Grande Western R. Co.,* 24 Utah 493; *Thompson v. Keokuk, etc., R. Co.,* 116 Iowa 215; *Swanson v. Keokuk, etc., R. Co.,* 116 Iowa 304.

**Affirmative Evidence of Negligence — Question for Jury.** — *McTavish v. Great Northern R. Co.,* 8 N. Dak. 333.

**2. Plaintiff's Course When Presumption Rebutted.** — *Alabama G. S. R. Co. v. Taylor,* 129 Ala. 238; *Louisville, etc., R. Co. v. Marbury Lumber Co.,* 132 Ala. 520, 90 Am. St. Rep. 917; *Gulf, etc., R. Co. v. Johnson,* 28 Tex. Civ. App. 395; *Smith v. Missouri, etc., R. Co., (Tex. Civ. App. 1903)* 73 S. W. Rep. 22; *Galveston, etc., R. Co. v. Chittim,* 31 Tex. Civ. App. 40; *Olmstead v. Oregon Short Line R. Co.,* 27 Utah 515.

**3. Jury Must Decide Whether Presumption Is Rebutted** — *United States.* — *McCullen v. Chicago, etc., R. Co., (C. C. A.)* 101 Fed. Rep. 66;

*Norris v. Baltimore, etc., R. Co., (C. C. A.)* 109 Fed. Rep. 591; *Great Northern R. Co. v. Coats, (C. C. A.)* 115 Fed. Rep. 452.

*Alabama.* — *Alabama G. S. R. Co. v. Taylor,* 129 Ala. 238.

*Georgia.* — *Southern R. Co. v. Williams,* 113 Ga. 335; *Central of Georgia R. Co. v. Trammell,* 114 Ga. 312.

*Illinois.* — *Cleveland, etc., R. Co. v. Hornsby,* 202 Ill. 138; *Cleveland, etc., R. Co. v. Tate,* 104 Ill. App. 615.

*Indiana.* — *Toledo, etc., R. Co. v. Fenstermaker,* 163 Ind. 534.

*Iowa.* — *Thompson v. Keokuk, etc., R. Co.,* 116 Iowa 215; *Swanson v. Keokuk, etc., R. Co.,* 116 Iowa 304.

*Kansas.* — *Atchison, etc., R. Co. v. Geiser,* 68 Kan. 281; *Clark v. Ellithorp,* 9 Kan. App. 503.

*Texas.* — *Scott v. Texas, etc., R. Co.,* 93 Tex. 625; *Texas, etc., R. Co. v. Rice,* 24 Tex. Civ. App. 374.

*Utah.* — *Preece v. Rio Grande Western R. Co.,* 24 Utah 493; *Olmstead v. Oregon Short Line R. Co.,* 27 Utah 515.

*Vermont.* — *Farrington v. Rutland R. Co.,* 72 Vt. 24.

**Compare** *McTavish v. Great Northern R. Co.,* 8 N. Dak. 333, holding that the question as to whether the statutory presumption of negligence is overcome by the defendant's evidence is, in the first instance, a question of law for the court.

**Charge Ignoring Care in Construction and Operation.** — *Louisville, etc., R. Co. v. Sullivan Timber Co.,* 138 Ala. 379.

**507. 1. Conflict of Evidence.** — *Louisville, etc., R. Co. v. Marbury Lumber Co.,* 125 Ala. 237, *quoting* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507; *Weeks v. Erie R. Co.,* 57 N. Y. App. Div. 192.

**3. View that Communication of Fire Not Prima Facie Negligence.** — *Oatman v. Michigan Cent. R. Co.,* 1 Ont. L. Rep. 145; *Garrett v. Southern R. Co., (C. C. A.)* 101 Fed. Rep. 102; *Missouri, etc., R. Co. v. Wilder,* 3 Indian Ter. 85; *Peck v. New York Cent., etc., R. Co.,* 165 N. Y. 347, *reversing* 37 N. Y. App. Div. 110; *White v. New York Cent., etc., R. Co.,* 90 N. Y. App. Div. 356, *affirmed* 181 N. Y. 577; *Matthews v. Pittsburg, etc., R. Co.,* 18 Pa. Super. Ct. 10; *Stephenson v. Pennsylvania R. Co.,* 20 Pa. Super. Ct. 157.

**508. 2. Rationale of Rule.** — *Jackson v. Grand Trunk R. Co.,* 32 Can. Sup. Ct. 245; *Oatman v. Michigan Cent. R. Co.,* 1 Ont. L. Rep. 145; *Missouri, etc., R. Co. v. Wilder,* 3 Indian Ter. 85; *Weeks v. Erie R. Co.,* 57 N. Y. App. Div. 192; *White v. New York Cent., etc., R. Co.,* 90 N. Y. App. Div. 356, *affirmed* 181 N. Y. 577.

**Judicial Notice** may be taken of the fact that no engine can be so constructed that some



**508.** 4. Negligence in Manner of Commission of Act. — See note 4.

**510.** X. EVIDENCE — 2. Doctrine of Liberality in Rule of Admission. — See note 3.

3. Circumstantial Evidence — *a*. IN GENERAL. — See note 4.

**512.** *b*. EXCLUSION OF OTHER ORIGINS OF FIRE. — See notes 2, 4.

**513.** 4. Documentary Evidence. — See note 3.

5. Evidence of Origin of Fire — *a*. IN GENERAL. — See note 4.

sparks will not escape. *White v. New York Cent., etc., R. Co.*, 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

**508.** 3. Negligence Apart from Mere Fact of Injury. — *Jackson v. Grand Trunk R. Co.*, 32 Can. Sup. Ct. 245; *Oatman v. Michigan Cent. R. Co.*, 1 Ont. L. Rep. 145; *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85; *Stephenson v. Pennsylvania R. Co.*, 20 Pa. Super. Ct. 157.

4. Negligence in Manner of Commission. — *Carter v. Pennsylvania R. Co.*, (C. C. A.) 120 Fed. Rep. 663.

**510.** 3. Liberality in Rules of Admission. — *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611; *Dyer v. Maine Cent. R. Co.*, 99 Me. 195; *Matthews v. Pittsburgh, etc., R. Co.*, 18 Pa. Super. Ct. 10.

Discretion of Court as to Time of Admission. — "Testimony as to the effect of the fire was admissible on the question of damages, and the time of its admission was in the discretion of the court." *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

4. Circumstantial Evidence. — *United States. — Carter v. Pennsylvania R. Co.*, (C. C. A.) 120 Fed. Rep. 663.

*Alabama. — Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917.

*California. — Liverpool, etc., Iris. Co. v. Southern Pac. R. Co.*, 125 Cal. 434.

*Colorado. — Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, 17 Colo. App. 275.

*Georgia. — Southern R. Co. v. Williams*, 113 Ga. 335; *Central of Georgia R. Co. v. Trammell*, 114 Ga. 312; *Southern R. Co. v. Pace*, 114 Ga. 712.

*Indiana. — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; *Pittsburgh, etc., R. Co. v. Wilson*, 161 Ind. 701; *McDoel v. Gill*, 23 Ind. App. 95.

*Iowa. — Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611.

*Kansas. — St. Louis, etc., R. Co. v. Ludlum*, 63 Kan. 719; *Kansas City, etc., R. Co. v. Perry*, 65 Kan. 792; *Kansas City, etc., R. Co. v. Blaker*, 68 Kan. 244.

*Kentucky. — Southern R. Co. v. Hanna*, (Ky. 1899) 53 S. W. Rep. 1.

*Massachusetts. — McGinn v. Platt*, 177 Mass. 125; *Bowen v. Boston, etc., R. Co.*, 179 Mass. 524.

*Minnesota. — Swenson v. Erlandson*, 86 Minn. 263.

*Mississippi. — Alabama, etc., R. Co. v. Barrett*, 78 Miss. 432.

*Missouri. — Brooks v. Missouri Pac. R. Co.*, 98 Mo. App. 166; *Gibbs v. St. Louis, etc., R. Co.*, 104 Mo. App. 276.

*Nebraska. — Chicago, etc., R. Co. v. Beal*, (Neb. 1903) 94 N. W. Rep. 956.

*New York. — Peck v. New York Cent., etc.,*

*R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; *Smith v. Long Island R. Co.*, 79 N. Y. App. Div. 171.

*North Carolina. — McMillan v. Wilmington, etc., R. Co.*, 126 N. Car. 725; *Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co.*, 126 N. Car. 797; *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95, reversing 131 N. Car. 518; *Cheek v. Oak Grove Lumber Co.*, 134 N. Car. 225.

*Ohio. — Baltimore, etc., R. Co. v. Kreager*, 61 Ohio St. 312.

*Pennsylvania. — Matthews v. Pittsburgh, etc., R. Co.*, 18 Pa. Super. Ct. 10; *Stephenson v. Pennsylvania R. Co.*, 20 Pa. Super. Ct. 157.

*Rhode Island. — MacDonald v. New York, etc., R. Co.*, 25 R. I. 40; *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

*South Carolina. — Brown v. Carolina Midland R. Co.*, 64 S. Car. 365.

*Texas. — San Antonio, etc., R. Co. v. Adams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 578; *Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co.*, 32 Tex. Civ. App. 82.

*Washington. — Abrams v. Seattle, etc., R. Co.*, 27 Wash. 507.

*Canada. — Rainville v. Grand Trunk R. Co.*, 28 Ont. 625, affirmed 25 Ont. App. 243, 29 Can. Sup. Ct. 207.

Negligence May Be Established by Circumstantial Evidence. — *Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534.

If the Circumstances Shown Are Sufficient to Convince Reasonable Men that the fire was caused by the defendant's negligence, the jury may base a verdict thereon. *Atchison, etc., R. Co. v. Hutchinson*, 8 Kan. App. 665.

**512.** 2. Possibility of Other Origins. — *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85.

It Is Not Necessary to Exclude Every Possibility of a Different Origin, but it is necessary to exclude every other reasonable probability. *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, 17 Colo. App. 275.

4. Missouri, etc., R. Co. v. Jordan, (Tex. Civ. App. 1904) 82 S. W. Rep. 791.

**513.** 3. Admissibility of Memoranda Made by Defendant's Witness. — *Manchester Assur. Co. v. Oregon R., etc., Co.*, (Oregon 1905) 79 Pac. Rep. 60.

4. Evidence as to Origin of Fire — *United States. — Carter v. Pennsylvania R. Co.*, (C. C. A.) 120 Fed. Rep. 663.

*Alabama. — Southern R. Co. v. Johnson*, 141 Ala. 575.

*Colorado. — Burlington, etc., R. Co. v. Burch*, 17 Colo. App. 491.

*Illinois. — Baltimore, etc., R. Co. v. Perryman*, 95 Ill. App. 199; *Baltimore, etc., R. Co. v. Irwin*, 97 Ill. App. 337.

*Indiana. — Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592.

**514. b. EVIDENCE OF OTHER FIRES — (1) Other Fires by Same Engine.**

— See notes 3, 5.

**515. (2) Other Fires by Other Engines — (a) General Rule. — See note 2.****Distance of Emission of Sparks. — See note 3.****Evidence of Both Prior and Subsequent Fires. — See note 4.****516. (b) Qualification of General Rule — aa. EVIDENCE IN REBUTTAL. — See note 1.****bb. SIMILARITY OF CIRCUMSTANCE AND CONDITION. — See note 2.****cc. WHERE PARTICULAR ENGINE IDENTIFIED. — See notes 4, 5.****517. 6. Evidence to Show Negligence — c. EMISSION OF SPARKS. — See note 3.***Iowa.* — *Black v. Minneapolis, etc., R. Co.,* 112 Iowa 32.*Kansas.* — *Kansas City, etc., R. Co. v. Perry,* 65 Kan. 792, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513; *Kansas City, etc., R. Co. v. Blaker,* 68 Kan. 244.*Maine.* — *Dyer v. Maine Cent. R. Co.,* 99 Me. 195, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513.*Missouri.* — *Gibbs v. St. Louis, etc., R. Co.,* 104 Mo. App. 276; *Wright v. Chicago, etc., R. Co.,* 107 Mo. App. 209.*New York.* — *O'Reilly v. Erie R. Co.,* 72 N. Y. App. Div. 228; *Smith v. Long Island R. Co.,* 79 N. Y. App. Div. 171; *White v. New York Cent., etc., R. Co.,* 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.*North Carolina.* — *Simpson v. Enfield Lumber Co.,* 133 N. Car. 95, reversing 131 N. Car. 518.*North Dakota.* — *McTavish v. Great Northern R. Co.,* 8 N. Dak. 333.*Pennsylvania.* — *Elder Tp. School Dist. v. Pennsylvania R. Co.,* 26 Pa. Super. Ct. 112.*Rhode Island.* — *Spink v. New York, etc., R. Co.,* 26 R. I. 115.*Washington.* — *Abrams v. Seattle, etc., R. Co.,* 27 Wash. 507.*Canada.* — *Grand Trunk R. Co. v. Rainville,* 29 Can. Sup. Ct. 201, affirming 25 Ont. App. 242, 28 Ont. 625.**514. 3. Where There Is No Evidence that the Fire Was Caused by a Particular Engine,** evidence of other fires by that engine is inadmissible. *Chicago, etc., R. Co. v. Ross,* 24 Ind. App. 222.**5. Clark v. Ellithorp,** 9 Kan. App. 503.**515. 2. Other Fires by Other Engines — United States.** — *Texas, etc., R. Co. v. Watson,* 190 U. S. 287; *Lesser Cotton Co. v. St. Louis, etc., R. Co.,* (C. C. A.) 114 Fed. Rep. 133.*Alabama.* — *Alabama G. S. R. Co. v. Johnston,* 128 Ala. 292, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 515.*Indian Territory.* — *St. Louis, etc., R. Co. v. Lawrence, (Indian Ter. 1903)* 76 S. W. Rep. 254.*Kentucky.* — *Mills v. Louisville, etc., R. Co.,* 116 Ky. 309, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 515.*Massachusetts.* — *McGinn v. Platt,* 177 Mass. 125.*Mississippi.* — *Alabama, etc., R. Co. v. Ætna Ins. Co.,* 82 Miss. 770.*Missouri.* — *Gibbs v. St. Louis, etc., R. Co.,* 104 Mo. App. 276.*Rhode Island.* — *MacDonald v. New York, etc., R. Co.,* 25 R. I. 40.*Tennessee.* — *Louisville, etc., R. Co. v. Fort,* 112 Tenn. 432.*Texas.* — *Wilson v. Pecos, etc., R. Co.,* 23 Tex. Civ. App. 706.*Washington.* — *Noland v. Great Northern R. Co.,* 31 Wash. 430.**Proof of Other Fires a Year Before the Fire in Question** is inadmissible for this purpose. *Louisville, etc., R. Co. v. Short,* 110 Tenn. 713.**3. Black v. Minneapolis, etc., R. Co.,** 122 Iowa 32; *McGinn v. Platt,* 177 Mass. 125; *Gibbs v. St. Louis, etc., R. Co.,* 104 Mo. App. 276.**4. Prior and Subsequent Fires.** — *Alabama, etc., R. Co. v. Ætna Ins. Co.,* 82 Miss. 770.**516. 1. The Evidence Is Competent in Rebuttal,** as tending to contradict the defendant's evidence that its locomotives were properly constructed and equipped, in good repair, and carefully handled. *Louisville, etc., R. Co. v. Fort,* 112 Tenn. 432.**2. Conditions Must Be Similar.** — *O'Reilly v. Erie R. Co.,* 72 N. Y. App. Div. 228; *O'Reilly v. King,* 72 N. Y. App. Div. 357; *Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co.,* 126 N. Car. 797.**Must Be Coincidence of Time.** — *Akins v. Georgia R., etc., Co.,* 111 Ga. 815.**4. Fire Communicated by One of Two Engines.** — *Lesser Cotton Co. v. St. Louis, etc., R. Co.,* (C. C. A.) 114 Fed. Rep. 133; *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.,* 17 Colo. App. 275; *San Antonio, etc., R. Co. v. Home Ins. Co.,* (Tex. Civ. App. 1902) 70 S. W. Rep. 999.**Proof that the Fire Must Have Been Set Out by One or More of Four Engines** does not sufficiently identify the engine as to render evidence of other fires inadmissible. *Louisville, etc., R. Co. v. Fort,* 112 Tenn. 432.**5. Lesser Cotton Co. v. St. Louis, etc., R. Co.,** (C. C. A.) 114 Fed. Rep. 133.**517. 3. Emission of Sparks — United States.** — *Texas, etc., R. Co. v. Watson,* 190 U. S. 287; *Norris v. Baltimore, etc., R. Co.,* (C. C. A.) 109 Fed. Rep. 591; *Lesser Cotton Co. v. St. Louis, etc., R. Co.,* (C. C. A.) 114 Fed. Rep. 133; *Carter v. Pennsylvania R. Co.,* (C. C. A.) 120 Fed. Rep. 663.*Alabama.* — *Alabama G. S. R. Co. v. Clark,* 136 Ala. 450; *Birmingham R., etc., Co. v. Hinton,* 141 Ala. 606.*Indiana.* — *McDoel v. Gill,* 23 Ind. App. 95.*Kentucky.* — *Louisville, etc., R. Co. v. Samuels,* (Ky. 1900) 57 S. W. Rep. 235; *Illinois Cent. R. Co. v. Scheible,* (Ky. 1903) 72 S. W. Rep. 325.*Mississippi.* — *Alabama, etc., R. Co. v. Fried,* 81 Miss. 314.

**518. e. EVIDENCE OF OTHER FIRES — (2) Other Fires by Same Engine**  
 — (a) In General. — See note 3.

**519.** Several Fires on Same Trip. — See note 1.

Similarity of Circumstances and Condition. — See note 2.

**520.** (3) Other Fires by Other Engines — (a) General Rule. — See note 3.

**521.** See note 1.

(b) Limits and Qualifications of Rule — aa. IN GENERAL. — See notes 2, 3.

**522.** bb. WHERE PARTICULAR ENGINE IDENTIFIED. — See note 4.

*New York.* — Peck v. New York Cent., etc., R. Co., 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; Munson v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 523.

*Oregon.* — Anderson v. Oregon R., etc., Co., 45 Oregon 211.

Evidence as to Number and Size of Sparks Held Admissible. — Louisville, etc., R. Co. v. Marbury Lumber Co., 132 Ala. 520, 90 Am. St. Rep. 917.

Comparison as to Sparks Emitted by Different Engines. — Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502.

Cinders Found Several Months After Fire. — Gulf, etc., R. Co. v. Johnson, 28 Tex. Civ. App. 395.

**518. 3. Other Fires by Same Engine — Alabama.** — Alabama G. S. R. Co. v. Clark, 136 Ala. 450.

*Indiana.* — Wabash R. Co. v. Miller, 158 Ind. 174; Chicago, etc., R. Co. v. Gilmore, 22 Ind. App. 466.

*Indian Territory.* — Missouri, etc., R. Co. v. Wilder, 3 Indian Ter. 85.

*Iowa.* — Glanz v. Chicago, etc., R. Co., 119 Iowa 611.

*North Dakota.* — McTavish v. Great Northern R. Co., 8 N. Dak. 333.

*Oregon.* — See Lieuallen v. Mosgrove, 37 Oregon 446.

*Texas.* — Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82.

*Canada.* — Peacock v. Cooper, 27 Ont. App. 128.

Evidence of Other Fires by Same Engine on Same Day at Different Adjacent Places Admissible. — Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393.

**519. 1.** Texas, etc., R. Co. v. Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82.

**2.** Cheek v. Oak Grove Lumber Co., 134 N. Car. 225.

**520. 3. Other Fires by Other Engines — United States.** — Texas, etc., R. Co. v. Watson, 190 U. S. 287; Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133.

*Alabama.* — Alabama G. S. R. Co. v. Johnston, 128 Ala. 292.

*Indiana.* — Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322; Chicago, etc., R. Co. v. Gilmore, 22 Ind. App. 466.

*Indian Territory.* — Missouri, etc., R. Co. v. Wilder, 3 Indian Ter. 85.

*Kansas.* — Sprague v. Atchison, etc., R. Co., (Kan. 1904) 78 Pac. Rep. 828.

*Kentucky.* — Louisville, etc., R. Co. v. Samuels, (Ky. 1900) 57 S. W. Rep. 235; Illinois Cent. R. Co. v. Scheible, (Ky. 1903) 72 S. W. Rep. 325; Mills v. Louisville, etc., R. Co., 116 Ky. 309.

*Mississippi.* — Alabama, etc., R. Co. v. Fried, 81 Miss. 314; Alabama, etc., R. Co. v. Aetna Ins. Co., 82 Miss. 770.

*North Carolina.* — Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co., 126 N. Car. 797.

*Oregon.* — Manchester Assur. Co. v. Oregon R., etc., Co., (Oregon 1905) 79 Pac. Rep. 60.

*Tennessee.* — Louisville, etc., R. Co. v. Short, 110 Tenn. 713; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

*Texas.* — Missouri, etc., R. Co. v. Carter, 95 Tex. 461; Texas, etc., R. Co. v. Wooldridge, (Tex. Civ. App. 1901) 63 S. W. Rep. 905; Texas, etc., R. Co. v. Rutherford, 28 Tex. Civ. App. 590; Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40.

*Canada.* — Oatman v. Michigan Cent. R. Co., 1 Ont. L. Rep. 145.

To Show Condition of Right of Way. — Abrams v. Seattle, etc., R. Co., 27 Wash. 507. See also Wabash R. Co. v. Miller, 158 Ind. 174.

Evidence that the Engine Which Set Out the Fire Was in Proper Condition is sufficient to rebut any presumption of negligence that may arise from evidence of other fires by other engines. White v. New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

Engines of Similar Construction. — Louisville, etc., R. Co. v. Short, 110 Tenn. 713.

**521. 1.** Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co., 126 N. Car. 797.

**2. The Evidence Is Competent to Show Habitual Negligence.** — Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

**3.** Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.

**522. 4. Where Particular Engine Identified — United States.** — Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133.

*Alabama.* — Alabama G. S. R. Co. v. Johnston, 128 Ala. 292.

*Illinois.* — Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25.

*Indiana.* — Chicago, etc., R. Co. v. Gilmore, 22 Ind. App. 466.

*Indian Territory.* — Missouri, etc., R. Co. v. Wilder, 3 Indian Ter. 85.

*Kansas.* — Sprague v. Atchison, etc., R. Co., (Kan. 1904) 78 Pac. Rep. 828.

*North Carolina.* — Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co., 126 N. Car. 797.

*Texas.* — San Antonio, etc., R. Co. v. Home Ins. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 999; Texas Midland R. Co. v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 942.

*Virginia.* — Norfolk, etc., R. Co. v. Briggs, 103 Va. 105.

Where the Fire Might Have Been Caused by One of Two Engines, the engine is not sufficiently identified to justify the application of this rule, if it is in any case applicable. Louisville, etc., R. Co. v. Short, 110 Tenn. 713.

**523.** See note 1.

**524.** 9. Expert and Opinion Evidence — *a.* IN GENERAL. — See note 3.  
*b.* AS TO ORIGIN OF FIRE. — See note 4.

**525.** *d.* VALUE OF PROPERTY. — See note 3.

**526.** See note 1.

**527.** For Jury to Say What Such Evidence Is Worth. — See note 1.

10. Exhibitions and Experiments — Some Cases Illustrating the Specific Application of the Rules. — See note 3.

**529.** 12. Acts Admitting Liability. — See note 2.

The Admission of Such Evidence Was Held to Be Harmless Error where the court instructed the jury to disregard the evidence if they believed the evidence identifying the engine, and the evidence of identification was so clear and convincing that the jury must necessarily have believed it. Central of Georgia R. Co. v. Trammell, 114 Ga. 312.

When the Evidence Is Offered Before the Particular Engine Is Identified, it is admissible for the purpose of showing the defendant's negligence in the selection and care of its locomotives, though the engine is subsequently identified. Missouri, etc., R. Co. v. Carter, 95 Tex. 461.

**523.** 1. The Evidence Is Competent though the particular engine is identified. Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

**524.** 3. Rebuttal of Expert Testimony. — Where the defendant's evidence tended to show that a diamond stack engine, equipped with extension front, spark arrester, and standard netting, all in good condition, would not and could not throw out sparks so as to set out a fire, it was held that the plaintiff could introduce in rebuttal evidence tending to show that similar engines, equipped similarly in all respects, both engines and equipments being in good condition, would throw sparks and set fire, and had done so. Bowen v. Boston, etc., R. Co., 179 Mass. 524.

4 Opinion as to Origin of Fire. — Texas, etc., R. Co. v. Wooldridge, (Tex. Civ. App. 1901) 63 S. W. Rep. 905.

Evidence Establishing Origin by Process of Exclusion. — Texas, etc., R. Co. v. Watson, 190 U. S. 287.

Opinion as to Origin of Fire Inadmissible. — Chicago, etc., R. Co. v. Ross, 24 Ind. App. 222; Norfolk, etc., R. Co. v. Briggs, 103 Va. 105.

Distance of Communication of Sparks. — Gibbs v. St. Louis, etc., R. Co., 104 Mo. App. 276; Peck v. New York Cent., etc., R. Co., 165 N. Y. 347, reversing 37 N. Y. App. Div. 110.

Devices for Prevention of Sparks. — Peck v. New York Cent., etc., R. Co., 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; Louisville, etc., R. Co. v. Marbury Lumber Co., 132 Ala. 520, 90 Am. St. Rep. 917.

Operation and Effect of Spark Arresters. — Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393; Kansas City, etc., R. Co. v. Blaker, 68 Kan. 244.

Setting Out Fires as Test of Engine's Condition. — Texas, etc., R. Co. v. Watson, 190 U. S. 287.

Evidence that Well-equipped Engines Have Set Out Fires. — Norfolk, etc., R. Co. v. Briggs, 103 Va. 105.

**525.** 3. Opinion as to Value of Property — Arkansas. — St. Louis, etc., R. Co. v. Ayres, 67 Ark. 371.

California. — Clark v. San Francisco, etc., R. Co., 142 Cal. 614.

Indiana. — Chicago, etc., R. Co. v. Brown, 157 Ind. 544; Pennsylvania R. Co. v. Hunsley, 23 Ind. App. 37.

Iowa. — Thompson v. Keokuk, etc., R. Co., 116 Iowa 215.

South Carolina. — Dent v. South Bound R. Co., 61 S. Car. 329.

Texas. — Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400; Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40; St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. App. 1904) 80 S. W. Rep. 408.

Virginia. — Norfolk, etc., R. Co. v. Briggs, 103 Va. 105.

Wisconsin. — Rylander v. Laursen, 124 Wis. 2.

Opinion as to Amount of Damages Held Admissible. — St. Louis, etc., R. Co. v. Hall, 71 Ark. 302.

The Effect of the Fire on the Meadow and the Hedge Burned may be shown by expert witnesses who properly qualify as such. Bradley v. Iowa Cent. R. Co., 111 Iowa 562.

A Mere Opinion as to the State of Repair of a House Destroyed is inadmissible, but the witness may describe the house in detail, in order that the jury may determine its condition from the evidence. McMahon v. Dubuque, 107 Iowa 62, 70 Am. St. Rep. 143.

Evidence as to Damage to Similar Property. — Castner v. Chicago, etc., R. Co., 126 Iowa 581.

**526.** 1. Knowledge of Property Consumed. — Pennsylvania R. Co. v. Hunsley, 23 Ind. App. 37; Baylor v. Stevens, 16 Pa. Super. Ct. 365; Spink v. New York, etc., R. Co., 26 R. I. 115; Wilson v. Southern R. Co., 65 S. Car. 421; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400.

**527.** 1. St. Louis, etc., R. Co. v. Ayres, 67 Ark. 371; Pennsylvania R. Co. v. Hunsley, 23 Ind. App. 37.

3. Use of Model of Locomotive. — McMahon v. Dubuque, 107 Iowa 62, 70 Am. St. Rep. 143.

**529.** 2. An Offer by Defendant to Settle. — Creighton v. Chicago, etc., R. Co., (Neb. 1903) 94 N. W. Rep. 527.

The admission of evidence of an offer to settle is not injurious to the defendant, where the court instructs the jury that the offer was neither an admission of negligence nor of liability. Liverpool, etc., Ins. Co. v. Southern Pac. R. Co., 125 Cal. 434.

Defendant's Servants Aiding in Putting Out Fire. — Clarke v. New York, etc., R. Co., 26 R. I. 59.

Declarations Not Part of Res Gestæ Inadmissible. — Houston, etc., R. Co. v. Laforge, (Tex. Civ. App. 1905) 84 S. W. Rep. 1072.

Admissions Not Precluding Proof of Nonliability. — Cheek v. Oak Grove Lumber Co., 134 N. Car. 225.

**529. XI. BURDEN OF PROOF — 1. Generally.** — See note 4.

**2. Title to Property Destroyed.** — See note 5.

**3. Origin of Fire.** — See note 6.

**4. Negligence — a. GENERAL RULE.** — See note 7.

**530. b. DEFENDANT'S NEGLIGENCE.** — See notes 1, 2.

**c. PLAINTIFF'S NEGLIGENCE.** — See note 3.

**531.** See notes 1, 3.

**529. 4. General Rule Stated.** — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102.

**5. Title to Property Destroyed.** — *Minneapolis Sash, etc., Co. v. Great Northern R. Co.*, 83 Minn. 370.

**6. Origin of Fire — United States.** — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Lesser Cotton Co. v. St. Louis, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 133; *Ragsdale v. Southern R. Co.*, 121 Fed. Rep. 924.

*Alabama.* — *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917.

*Georgia.* — *Southern R. Co. v. Myers*, 108 Ga. 165; *Georgia R., etc., Co. v. Roberts*, 114 Ga. 387.

*Indiana.* — *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592.

*Indian Territory.* — *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85; *St. Louis, etc., R. Co. v. Lawrence*, (Indian Ter. 1903) 76 S. W. Rep. 254.

*Minnesota.* — *Brennan Lumber Co. v. Great Northern R. Co.*, 77 Minn. 360; *Swenson v. Erlandson*, 86 Minn. 263.

*Missouri.* — *Bates County Bank v. Missouri Pac. R. Co.*, 98 Mo. App. 330.

*Nebraska.* — *Creighton v. Chicago, etc., R. Co.*, (Neb. 1903) 94 N. W. Rep. 527; *Union Pac. R. Co. v. Fickenschier*, (Neb. 1904) 100 N. W. Rep. 207.

*New York.* — *White v. New York Cent., etc., R. Co.*, 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

*North Carolina.* — *Armstrong v. Wilmington, etc., R. Co.*, 130 N. Car. 64; *Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co.*, 132 N. Car. 75.

*North Dakota.* — *Balding v. Andrews*, 12 N. Dak. 267.

*Pennsylvania.* — *Stephenson v. Pennsylvania R. Co.*, 20 Pa. Super. Ct. 157; *Elder Tp. School Dist. v. Pennsylvania R. Co.*, 26 Pa. Super. Ct. 112.

*Tennessee.* — *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378.

*Texas.* — *Tyler Chair, etc., Works v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 350; *International, etc., R. Co. v. Morgan*, 28 Tex. Civ. App. 348; *St. Louis Southwestern R. Co. v. Goodnight*, 32 Tex. Civ. App. 256; *Duckworth v. Ft. Worth, etc., R. Co.*, 33 Tex. Civ. App. 66.

*Utah.* — *Olmstead v. Oregon Short Line R. Co.*, 27 Utah 515.

*Virginia.* — *White v. New York, etc., R. Co.*, 99 Va. 357; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

*Wisconsin.* — *Clifford v. Minneapolis, etc., R. Co.*, 105 Wis. 618.

*Canada.* — *Rainville v. Grand Trunk R. Co.*, 28 Ont. 625, affirmed 25 Ont. App. 242, 29 Can. Sup. Ct. 201.

**7. General Rule as to Negligence.** — *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Boston, etc., R. Co. v. Sargent*, 72 N. H. 455; *Matthews v. Pittsburg, etc., R. Co.*, 18 Pa. Super. Ct. 10; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

**530. 1. Defendant's Negligence — United States.** — *Continental Trust Co. v. Toledo, etc., R. Co.*, 89 Fed. Rep. 637; *Garrett v. Southern R. Co.*, (C. C. A.) 101 Fed. Rep. 102; *Lesser Cotton Co. v. St. Louis, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 133; *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

*Indiana.* — *Lake Erie, etc., R. Co. v. McFall*, (Ind. 1904) 72 N. E. Rep. 552; *Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592.

*Indian Territory.* — *Missouri, etc., R. Co. v. Wilder*, 3 Indian Ter. 85.

*Iowa.* — *Connors v. Chicago, etc., R. Co.*, 111 Iowa 384.

*New York.* — *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347, reversing 37 N. Y. App. Div. 110; *White v. New York Cent., etc., R. Co.*, 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

*North Carolina.* — *McMillan v. Wilmington, etc., R. Co.*, 126 N. Car. 725; *Hygienic Plate Ice Mfg. Co. v. Raleigh, etc., Air-Line R. Co.*, 126 N. Car. 797.

*Pennsylvania.* — *Stephenson v. Pennsylvania R. Co.*, 20 Pa. Super. Ct. 157.

*South Dakota.* — *Kelley v. Anderson*, 15 S. Dak. 107.

*Texas.* — *St. Louis Southwestern R. Co. v. Gentry*, (Tex. Civ. App. 1903) 74 S. W. Rep. 607.

*Utah.* — *Preece v. Rio Grande Western R. Co.*, 24 Utah 493.

*Canada.* — *Jackson v. Grand Trunk R. Co.*, 32 Can. Sup. Ct. 245; *Oatman v. Michigan Cent. R. Co.*, 1 Ont. L. Rep. 145.

**Communication of Fire Made Prima Facie Negligence by Statute.** — *Walker v. Kendall*, 7 Kan. App. 801.

**Burden on Plaintiff to Show Existence of Combustibles on Right of Way.** — *Indiana, etc., R. Co. v. Hawkins*, 84 Ill. App. 39.

**2. Slight Proof of Defendant's Negligence Sufficient.** — *Abrams v. Seattle, etc., R. Co.*, 27 Wash. 507.

**3. Contributory Negligence.** — *Clark v. Kansas City, etc., R. Co.*, (C. C. A.) 129 Fed. Rep. 341; *Kelley v. Anderson*, 15 S. Dak. 107.

**531. 1. Kansas City, etc., R. Co. v. Perry**, 65 Kan. 792.

**3. Indiana.** — The plaintiff must show want of contributory negligence. *Pennsylvania R. Co. v. Manderville*, 22 Ind. App. 697, following *Wabash R. Co. v. Miller*, 18 Ind. App. 549; *Baltimore, etc., R. Co. v. Does*, 20 Ind. App. 680.

**531.** 5. Preponderance of Evidence — *a.* GENERALLY. — See note 4.  
If, Therefore, It Is Equally Probable. — See note 5.  
Mere Probability or Conjecture. — See note 6.

**532.** See note 1.

But It Is Not Necessary to Entitle a Plaintiff to Recover. — See note 2.

*b.* RULE OF REASONABLE DOUBT. — See note 3.

**533.** XII. MEASURE OF DAMAGES AND ELEMENTS OF RECOVERY — 1. Compensation the General Rule. — See note 1.

2. Value of Property Destroyed — *a.* IN GENERAL. — See note 2.

**535.** *b.* MARKET VALUE. — See note 1.

**536.** *c.* WHERE NO MARKET VALUE. — See notes 1, 2.

*d.* VALUE WITH REFERENCE TO USES TO WHICH PROPERTY ADAPTED. — See note 3.

**531.** 4. Preponderance of Evidence. — Toledo, etc., *R. Co. v. Fenstermaker*, 163 Ind. 534; *Bates County Bank v. Missouri Pac. R. Co.*, 98 Mo. App. 330; *Smith v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 22; *Missouri, etc., R. Co. v. Florence*, (Tex. Civ. App. 1903) 74 S. W. Rep. 802; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

5. Equal Probabilities. — Toledo, etc., *R. Co. v. Fenstermaker*, 163 Ind. 534; *Peffer v. Missouri Pac. R. Co.*, 98 Mo. App. 291; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

6. Mere Probability. — Southern *R. Co. v. Myers*, 108 Ga. 165; *Swenson v. Erlandson*, 86 Minn. 263; *Minneapolis Sash, etc., Co. v. Great Northern R. Co.*, 83 Minn. 370; *Peffer v. Missouri Pac. R. Co.*, 98 Mo. App. 291; *Bates County Bank v. Missouri Pac. R. Co.*, 98 Mo. App. 330; *Balding v. Andrews*, 12 N. Dak. 267; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64.

**532.** 1. Mere Conjecture, Guess, or Supposition, not legitimately based on facts, circumstances, and material conditions shown by the evidence, is insufficient. *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, 17 Colo. App. 275; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592; *Brennan Lumber Co. v. Great Northern R. Co.*, 77 Minn. 360; *Union Pac. R. Co. v. Fickenschier*, (Neb. 1904) 100 N. W. Rep. 207; *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64; *Peacock v. Cooper*, 27 Ont. App. 128.

Inferences May Be Drawn from Facts as to Cause and Effect. — *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

2. Conclusive Proof Unnecessary. — *Liverpool, etc., Ins. Co. v. Southern Pac. R. Co.*, 125 Cal. 434; *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, 17 Colo. App. 275.

3. Reasonable Doubt. — *Brown Store Co. v. Chattahoochee Lumber Co.*, 112 Ga. 809.

**533.** 1. Compensation the Rule. — *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562; *Lake Erie, etc., R. Co. v. Falk*, 62 Ohio St. 297; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649.

2. Rule Stated — Value of Property Destroyed. — *Baltimore, etc., R. Co. v. Perryman*, 95 Ill. App. 199; *Chicago, etc., R. Co. v. Brown*, 157 Ind. 544; *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

Amount of Recovery — Value at Time of Fire. — *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

An Offer by the Plaintiff to Compromise is not an admission by him as to the actual amount of the damages he has suffered. And if a letter of the plaintiff is introduced wherein he specified his damages as being an amount smaller than that to which he testifies on the trial, he may show that the letter was written in an effort to effect a compromise, though it contains nothing to show that such was its purpose. *Castner v. Chicago, etc., R. Co.*, 126 Iowa 581.

**535.** 1. Market Value at Place of Destruction. — *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371; *Chicago, etc., R. Co. v. Brown*, 157 Ind. 544; *Pennsylvania R. Co. v. Hunsley*, 23 Ind. App. 37; *Thompson v. Keokuk, etc., R. Co.*, 116 Iowa 215; *Baylor v. Stevens*, 16 Pa. Super. Ct. 365; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432; *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400; *Galveston, etc., R. Co. v. Chittim*, 31 Tex. Civ. App. 40.

Evidence of the Market Demand for the Property Destroyed Is Admissible. — *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

Evidence of Actual Value of a House Destroyed. — *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

Evidence of Cost of Property. — *Swanson v. Keokuk, etc., R. Co.*, 116 Iowa 304.

**536.** 1. Market Value Unnecessary. — *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400.

A Charge as to Difference in Market Value as the measure of damages is improper where there is no evidence as to the market value of the property destroyed. *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649.

2. No Market Value — "Actual" Value. — *Tyler Southeastern R. Co. v. Hitchins*, 26 Tex. Civ. App. 400; *San Antonio, etc., R. Co. v. Stone*, (Tex. Civ. App. 1901) 60 S. W. Rep. 461; *Highland v. Houston, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 649.

Evidence of Cost, Use, and Condition. — *McMahon v. Dubuque*, 107 Iowa 62, 70 Am. St. Rep. 143.

3. Value with Reference to Any Natural and Lawful Use. — *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322; *San Antonio, etc., R. Co. v. Stone*, (Tex. Civ. App. 1901) 60 S. W. Rep. 461.

**537.** See note 2.

*e.* COST OF REPLACING PROPERTY OR RESTORATION TO ORIGINAL CONDITION. — See notes 3, 4.

**538.** See note 1.

**3. Injury to or Destruction of Personal Property.** — See note 2.

**4. Injury to Real Property.** — See note 3.

**539.** See notes 2, 3.

**5. Injury to Property Attached to Realty** — *a.* RULE AS TO SEPARABLE VALUE. — See note 4.

**540.** See note 1.

**541.** *c.* VALUE AS ATTACHED TO REALTY. — See notes 1, 2.

**Standing Timber.** — *Spink v. New York, etc., R. Co., 26 R. I. 115.*

**That the Property Had a Special and Peculiar Value as a Manufacturing Plant** may be shown. *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.*

**537. 2. Value of Grass Destroyed.** — *San Antonio, etc., R. Co. v. Stone, (Tex. Civ. App. 1901) 60 S. W. Rep. 461; Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40.*

**3. Rule Stated.** — *Alabama G. S. R. Co. v. Johnston, 128 Ala. 292; Thompson v. Keokuk, etc., R. Co., 116 Iowa 215; St. Louis Southwestern R. Co. v. Moss, (Tex. Civ. App. 1904) 84 S. W. Rep. 281.*

**4. Illustrations — Destruction of Buildings.** — *Alabama G. S. R. Co. v. Johnston, 128 Ala. 292.*

**The Cost of Reproducing a Hedge Destroyed** may be taken into consideration in fixing the measure of damages. *Thompson v. Keokuk, etc., R. Co., 116 Iowa 215.*

**Evidence of the Cost of Household Goods Destroyed Held Admissible.** — *St. Louis Southwestern R. Co. v. Moss, (Tex. Civ. App. 1904) 84 S. W. Rep. 281.*

**538. 1. Cost of Re-seeding Meadow.** — *Krejci v. Chicago, etc., R. Co., 117 Iowa 344; Black v. Minneapolis, etc., R. Co., 122 Iowa 32; Bradley v. Iowa Cent. R. Co., 111 Iowa 562.*

**Measure of Damages for Fence Destroyed by Fire.** — *Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40.*

**2. Personal Property.** — *Chicago, etc., R. Co. v. Brown, 157 Ind. 544.*

**Cattle Injured by Fire.** — *Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225.*

**Evidence of Cost and of Depreciation.** — *McMahon v. Dubuque, 107 Iowa 62, 70 Am. St. Rep. 143; Southern R. Co. v. Williams, 113 Ga. 335.*

**Market Value at Nearest Market, Plus Transportation.** — *Chicago G. W. R. Co. v. Gitchell, 95 Ill. App. 1.*

**3. Injury to Real Property — Arkansas.** — *St. Louis, etc., R. Co. v. Ayres, 67 Ark. 371.*

*Illinois.* — *Baltimore, etc., R. Co. v. Irwin, 97 Ill. App. 337; Illinois Cent. R. Co. v. Almon, 100 Ill. App. 530.*

*Kansas.* — *Atchison, etc., R. Co. v. Geiser, 68 Kan. 281.*

*Pennsylvania.* — *Baylor v. Stevens, 16 Pa. Super. Ct. 365.*

*South Carolina.* — *Wilson v. Southern R. Co., 65 S. Car. 421.*

*Texas.* — *Texas, etc., R. Co. v. Rice, 24 Tex. Civ. App. 374; Tyler Southeastern R. Co. v. Hitchins, 26 Tex. Civ. App. 400; Jackson v.*

*Missouri, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. Rep. 724; Texas Midland R. Co. v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 942.*

**Animals or Fowls In or Near Barn Burned.** — *Highland v. Houston, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 649.*

**539. 2. Permanent Injury Though Not Perpetual.** — *Texas, etc., R. Co. v. Rice, 24 Tex. Civ. App. 374; San Antonio, etc., R. Co. v. Stone, (Tex. Civ. App. 1901) 60 S. W. Rep. 461; Texas Midland R. Co. v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 942. See also Krejci v. Chicago, etc., R. Co., 117 Iowa 344.*

**Fence Destroyed and Turf Injured.** — *Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40.*

Evidence that roots were not injured in another meadow burned at the same time should be received, where it appears that the grass in the two meadows was of equal height at the time of the fire. *Bradley v. Iowa Cent. R. Co., 111 Iowa 562.*

**3. Injury to Meadow.** — *Bradley v. Iowa Cent. R. Co., 111 Iowa 562; Krejci v. Chicago, etc., R. Co., 117 Iowa 344; Black v. Minneapolis, etc., R. Co., 122 Iowa 32.*

**4. The Measure of Damages for the Destruction of Grass** is its reasonable market value at the time of its destruction. *Galveston, etc., R. Co. v. Chittim, 31 Tex. Civ. App. 40.*

**Immature Grass May Be Valued as Hay.** — *Kyle v. Ohio River R. Co., 49 W. Va. 296.*

**540. 1 Where Property Has Not Separable Value.** — *Baylor v. Stevens, 16 Pa. Super. Ct. 365; Texas Midland R. Co. v. Moore, (Tex. Civ. App. 1903) 74 S. W. Rep. 942.*

**541. 1. Value as Attached to Realty.** — *Atchison, etc., R. Co. v. Arthurs, 63 Kan. 404; Kansas City, etc., R. Co. v. Perry, 65 Kan. 792; Dent v. South Bound R. Co., 61 S. Car. 329.*

**2. Destruction of Orchard.** — *Atchison, etc., R. Co. v. Geiser, 68 Kan. 281.*

**Destruction of Growing Timber.** — *Toledo, etc., R. Co. v. Fenstermaker, 163 Ind. 534. See also Clarke v. New York, etc., R. Co., 26 R. I. 59.*

**"The Rule of Damage for the Destruction of a Hedge** is the difference in value of the entire farm before and after its destruction, and in determining this the value of the hedge must necessarily be taken into consideration." *Swanson v. Keokuk, etc., R. Co., 116 Iowa 304.*

**For the Destruction of Grass,** the measure of damages is "the difference between the usable value of the land before and after the grass was burned down to the time of the trial." *St. Louis, etc., R. Co. v. Hall, 71 Ark. 302.*

**541. 6. Mitigation of Damages** — *a. GENERAL RULE* — (1) *Incidental Benefits*. — See note 3.

**542. (2) Insurance Money on Property Burned**. — See note 1.

**543. (4) Injuries Which Might Have Been Prevented** — (a) *General Rule*. — See note 7.

**544.** See note 1.

**546. 7. Excessive and Inadequate Damages**. — See note 4.

**547. 9. Elements of Recovery** — *a. ATTORNEY'S FEE*. — See note 3.

*b. PERSONAL INJURIES*. — See notes 4, 5.

**548. d. INTEREST ON DAMAGES ASSESSED**. — See notes 2, 3.

**549.** See note 2.

**550. FIRM**. — See note 1.

**FIRST**. — See note 3.

**553. FIRST CLASS**. — See note 1.

**FISCAL**. — See note 3.

**541. 3. Evidence that Fire Was Benefit Rather than Injury**. — *Pennsylvania R. Co. v. Hunsley*, 23 Ind. App. 37.

**542. 1. Insurance on Property Burned**. — *Kansas City, etc., R. Co. v. Blaker*, 68 Kan. 244; *Rolfe v. Boston, etc., R. Co.*, 69 N. H. 476; *Lake Erie, etc., R. Co. v. Falk*, 62 Ohio St. 297.

**The Insured Sustains the Relation of Trustee to the Insurer**, as to the money recovered. *Kansas City, etc., R. Co. v. Blaker*, 68 Kan. 244.

**543. 7. Damages Which Might Have Been Prevented**. — *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371.

**544. 1. Bar to Right of Recovery**. — *St. Louis, etc., R. Co. v. Ayres*, 67 Ark. 371.

**546. 4. Damages Held Not Excessive**. — *Baltimore, etc., R. Co. v. Irwin*, 97 Ill. App. 337; *Spink v. New York, etc., R. Co.*, 26 R. I. 115.

**Verdict on Conflict of Evidence**. — *Illinois Cent. R. Co. v. Almon*, 100 Ill. App. 530.

**547. 3. Illinois**. — *Baltimore, etc., R. Co. v. Perryman*, 95 Ill. App. 199.

**Statute Providing for Attorney's Fees Is Constitutional**. — *Chicago, etc., R. Co. v. Spring Hill Cemetery Assoc.*, 9 Kan. App. 882, 57 Pac. Rep. 252.

**Attorney's Fee Allowed for One Trial Only**. — *Clark v. Ellithorp*, 9 Kan. App. 503.

**Right to Attorney's Fee Does Not Constitute Separate Cause of Action**. — *St. Louis, etc., R. Co. v. Ludlum*, 63 Kan. 719.

**4. Injuries in Effort to Extinguish Fire**. — *McTavish v. Great Northern R. Co.*, 8 N. Dak. 333; *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611.

**Burning on Returning to House After Exposure to Cold**. — It has been held that the fact that a child of five years of age, after having been taken from a burning house and left on the veranda in his night clothes, went back into the house (the night being very cold) and there re-

ceived the injuries complained of, did not break the chain of causation between the defendant's negligence and such injuries. *Birmingham R., etc., Co. v. Hinton*, 141 Ala. 606.

**5. When a Person Is Burned in an Effort to Save Property in His Hands from Destruction by Fire**, he is not entitled to recover damages from the railroad company which set out the fire, as the setting out of the fire was not the proximate cause of his injury. A different rule might obtain if he were injured by a fire communicated at night to his house while he was asleep therein. *Logan v. Wabash R. Co.*, 96 Mo. App. 461.

**Contributory Negligence Barring Recovery**. — *Kalz v. Winona, etc., R. Co.*, 76 Minn. 351.

**Injury to Trespassing Child of Tender Years**. — *Erickson v. Great Northern R. Co.*, 82 Minn. 60.

**548. 2. Interest**. — *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32; *Gulf, etc., R. Co. v. Sheperd*, (Tex. Civ. App. 1903) 76 S. W. Rep. 800.

**3. Louisville, etc., R. Co. v. Fort**, 112 Tenn. 432.

**549. 2. Kansas**. — Where wheat was destroyed by fire, it was held erroneous to allow interest on the value of the wheat from the date of the fire. *Union Pac. R. Co. v. Holmes*, 68 Kan. 810.

**550. 1. People v. Strauss, 97 Ill. App. 47. **When Existing Partnership Not Implied**. — *Wood v. Martin*, 115 Ga. 147.**

**3. First Privilege of Renewal**. — See *Holloway v. Schmidt*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 747.

**553. 1. A First Class Investment** is one which requires "little or no personal care or supervision in order to avoid loss." *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

**3. Fiscal Year of a county** is the calendar year. *State v. Cornell*, 54 Neb. 647.



# FISH AND FISHERIES.

By X. P. HUDDY.

**555. I. LEGAL CLASSIFICATION — WHAT TERM "FISH" INCLUDES.** — See note 1.

**556. II. PROPERTY IN FISH.** — See notes 1, 3.

An Individual May Acquire a Qualified Property in Fish. — See notes 4, 5, 6.

**III. RIGHTS IN THE PRODUCTS OF FISHING VOYAGES — 1. Lien of Seamen on a Fishing Voyage.** — See note 7.

**557. 2. Rights of Seamen Who Are to Receive a Share of Fish Caught.** — See note 1.

**558. IV. FISHERIES DEFINED AND CLASSIFIED — 1. Fishery Defined.** — See note 2.

2. Several Kinds of Fisheries — Several Fishery. — See note 5.

**559.** See notes 2, 3.

**560. V. RIGHT TO FISH — 1. Without the Territorial Limits of Any State — a. GENERALLY.** — See note 2.

2. Within the Territorial Limits of a State — a. IN NAVIGABLE WATERS — (1) *In England.* — See note 6.

**555. 1. Fish Are Animals Feræ Naturæ.** — *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *State v. Thomas*, 11 Ohio Dec. 753; *State v. Shaw*, 67 Ohio St. 157. See also *Griffith v. Holman*, 23 Wash. 347.

**Fish Classified as Game.** — *McDonald v. Southern Express Co.*, 134 Fed. Rep. 282.

**556. 1. Fish Unconfined Are Public Property.** — *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *State v. Price*, 71 N. J. L. 249; *People v. Bootman*, 180 N. Y. 8, *affirming* 95 N. Y. App. Div. 469; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254; *People v. Booth*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321, *judgment reversed* 105 N. Y. App. Div. 184; *State v. Thomas*, 11 Ohio Dec. 753. See also *State v. Dow*, 70 N. H. 286.

**3. Property of State.** — *Brooks v. Tripp*, 135 N. Car. 159.

**Vested in State for Benefit of Public.** — *Sawyer v. Beal*, 97 Me. 356.

**Not a Proprietary Ownership.** — *State v. Malory*, 73 Ark. 236; *State v. Price*, 71 N. J. L. 249.

**4. There Is a Qualified Property in Fish Confined.** — See *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *Vroom v. Tilly*, 99 N. Y. App. Div. 516; *State v. Thomas*, 11 Ohio Dec. 753. See also *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**5. Rights of One Having a Qualified Property in Fish.** — *State v. Thomas*, 11 Ohio Dec. 753.

**6. If Fish Confined Escape They Again Become Public Property.** — *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**7. Lien of Seamen.** — *The Carrier Dove*, 93 Fed. Rep. 978.

**557. 1. Where Seamen Are to Receive a Certain Share of the Catch.** — *The Carrier Dove*, 93 Fed. Rep. 978.

**558. 2. A Profit à Prendre.** — *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504.

**5. Several Fishery Defined.** — *Hanbury v.*

*Jenkins*, (1901) 2 Ch. 401, 70 L. J. Ch. 730, 49 W. R. 615, 65 J. P. 631.

**Rights in Hawaii.** — "A right within certain metes and bounds to set apart one species of fish to the owner's sole use, or alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds, \* \* \* is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit à prendre* as such." *Damon v. Hawaii*, 194 U. S. 154.

**Vermont Statute — Owner of Land.** — A party owning the exclusive right to fish upon the lands of another is the "owner" of the land within the provision of a *Vermont* statute which provides for a forfeiture of ten dollars by a person who wilfully enters upon such lands without the permission of the owner or occupant, for the purpose of fishing, trapping, or shooting thereon, "to be recovered by the owner thereof in an action of trespass, in addition to the damages sustained thereby." *Payne v. Sheets*, 75 Vt. 337.

**559. 2. Contrary Authorities.** — *Hanbury v. Jenkins*, (1901) 2 Ch. 401, 70 L. J. Ch. 730, 49 W. R. 615, 65 J. P. 631.

**3. Several Fishery Presumed to Comprehend the Soil.** — *Hanbury v. Jenkins*, (1901) 2 Ch. 401, 70 L. J. Ch. 730, 49 W. R. 615, 65 J. P. 631.

**560. 2. Right of Fishing on the High Seas.** — *Pacific Steam Whaling Co. v. Alaska Packers' Assoc.*, 138 Cal. 632.

**6. Right of Fishing in Navigable Waters a Public Right.** — See *Com. v. Hilton*, 174 Mass. 29; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**561.** *Magna Charta Prohibited Royal Grants of Exclusive Fisheries in Navigable Waters.* — See notes 1, 2.

**562.** (2) *In the United States* — Interpretation of Colonial Charters. — See note 1.

Grants from Colonial Legislatures. — See note 2.

**563.** *Rights Residing in the State Since the Revolution.* — See notes 1, 2.

**564.** *Legislative Grants of Fisheries.* — See notes 1, 2.

**566.** (5) *Right to Plant and Cultivate Oysters* — (a) *In General.* — See note 7.

**567.** (b) *Under Statutes.* — See note 5.

**568.** See note 1.

**569.** *b. IN WATERS NOT NAVIGABLE* — (1) *Rivers and Streams* — (a) *In General.* — See note 1.

**Appropriation of Foreshore.** — A party has no right to appropriate a section of the foreshore for his own purposes, for storing his own oysters, to the exclusion of the rest of the public. *Truro Corp. v. Rowe*, (1902) 2 K. B. 709, *reversing* (1901) 2 K. B. 870.

**561. 1. Effect of Magna Charta.** — *Com. v. Hilton*, 174 Mass. 29; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**2. Notwithstanding Magna Charta**, the king still retained the right to grant the soil under navigable waters, and with it the exclusive right of fishery. *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**562. 1. Right of Fishing under Colonial Charters.** — *Com. v. Hilton*, 174 Mass. 29.

**2. Power of Governor and Colonial Assembly to Grant Exclusive Fishing Rights.** — See *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**563. 1. Right of Fishing in Navigable Waters in United States Resides in People of State.** — *Sutter v. Heckman*, 1 Alaska 81, 188; *Pacific Steam Whaling Co. v. Alaska Packers' Assoc.*, 138 Cal. 632; *State v. Meek*, 112 Iowa 338, 84 Am. St. Rep. 342; *Sanborn v. People's Ice Co.*, 82 Minn. 50; *Slingerland v. International Contracting Co.*, 43 N. Y. App. Div. 215, *affirmed* 169 N. Y. 60; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**2. Rights of the Federal Government under the Constitution.** — See *Richardson v. U. S.*, 100 Fed. Rep. 714; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**564. 1. State Legislature May Grant Exclusive Right of Fishing.** — *Jones v. Oemler*, 110 Ga. 202.

**Exclusive Grant Will Not Be Presumed.** — *Sutter v. Heckman*, 1 Alaska 81, 188; *Slingerland v. International Contracting Co.*, 43 N. Y. App. Div. 215, *affirmed* 169 N. Y. 60.

**The Organic Act of the Territory of Hawaii** repealed all laws of the Republic of Hawaii which conferred exclusive fishing rights, subject, however, to vested rights; and the Hawaiian Act of 1846 with royal grants previously made created and confirmed rights in favor of land-lords in adjacent fishing grounds within the reef or one mile to seaward which were vested rights within the organic act above referred to. *Damon v. Hawaii*, 194 U. S. 154.

**2. In New York** it is probable that section 18 of article 3 of the Constitution would prohibit the legislature from granting to any individual or association the exclusive right of fishery in

any of the navigable waters of the state; for such a grant would be in the nature of an exclusive privilege or franchise. *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254.

**566. 7. Right to Cultivate Oysters in Navigable Waters.** — Oysters which one plants in a marked-off bed in such a way as not to interfere with navigation or public fishing are thus captured and subjected to private ownership. *Slingerland v. International Contracting Co.*, 43 N. Y. App. Div. 220, *affirmed* 169 N. Y. 60.

**Ownership of the Land** whereon the oysters are deposited is not a prerequisite to ownership in the oysters. If a party is guilty of trespass in planting or cultivating oysters on the lands of another, such fact does not authorize the owner of the land to take those oysters to his own use, although he might compel the trespasser to take them up, or might remove them as a nuisance. *Vroom v. Tilly*, 99 N. Y. App. Div. 516. See also *Davis v. Davis*, 72 N. Y. App. Div. 593.

**Rights in Massachusetts.** — Where a party is licensed "to plant, grow, and dig oysters" on certain flats, under Pub. Stat. Mass., c. 91, § 97, by § 99, this gives him the exclusive use of the flats and one has no right to dig quohaugs thereon. *Griffith v. Savary*, 181 Mass. 227.

**567. 5. Statutory Right to Plant Oysters in Navigable Waters** — General Statutes. — *Travers v. Dean*, 98 Md. 72; *State v. Goulding*, 131 N. Car. 715; *Barataria Canning Co. v. Ott*, 84 Miss. 737.

**Virginia** — Application for Location Need Not Be in Writing. — *Sinclair v. Quackenbush*, 101 Va. 245.

**Georgia** — Political Code, § 1696, Construed. — *Parsons v. Prey*, 115 Ga. 955.

**New York** — Act Not in Conflict with Colonial Patents. — *Denton v. Bennett*, 102 N. Y. App. Div. 454.

**568. 1. Local Statutes and Statutes Applying to a Particular Class of Persons.** — *Richardson v. U. S.*, 100 Fed. Rep. 714.

**569. 1. Right of Fishing in Rivers Not Navigable.** — *Tetreault v. Lewis*, 19 Quebec Super. Ct. 257; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254. See also *Slingerland v. International Contracting Co.*, 43 N. Y. App. Div. 220, *affirmed* 169 N. Y. 60.

**Riparian Owner Must Not Interfere with Rights of Others.** — *Griffith v. Holtman*, 23 Wash. 359.

**The Owner of Water in a Stream or Pond** not navigable, or of all the privileges therein, has

**571.** (2) *Lakes and Ponds* — (b) In the United States — Small Inland Lakes. — See note 1.

**572.** VI. STATUTORY REGULATION OF FISHERIES — 1. General Principles — a. POWER TO REGULATE RESIDES IN PARLIAMENT OR LEGISLATURE. — See note 4.

**573.** See notes 1, 2.

**574.** Power to Authorize the Destruction, Without Judicial Warrant, of Unlawful Fishing Devices. — See note 2.

c. CONSTITUTIONAL LIMITATIONS IN THE UNITED STATES --

(1) *Generally*. — See note 4.

the exclusive right of fishing in the same, though the land lying under the water may belong to another. Accordingly, a conveyance of land lying upon the natural bank of an unnavigable stream, upon which is located a mill standing on other land of the grantor and across which is a dam, causing a pond a portion of which covers a part of the land conveyed, does not pass to the grantee any right to fish in such pond at any point below the then existing high-water mark thereof, when by terms of the conveyance an exception is made in the grantor's favor as to "all water privileges up to high-water mark, and all other privileges in going to his mill." *Lee v. Mallard*, 116 Ga. 18.

**571. 1. United States — Small Inland Lakes.** — *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504.

The public may take fish from a lake, where fish migrate at times between a public river and the lake, even though the lake is stocked by the owner of the land on which the lake is situated, and the surrounding land is posted. *People v. Horling*, (Mich. 1904) 100 N. W. Rep. 691.

**572. 4. Power of Legislature to Regulate Fisheries in Public Waters.** — *In re Deininger*, 108 Fed. Rep. 623; *State v. Meek*, 112 Iowa 338, 84 Am. St. Rep. 342; *State v. Corson*, 67 N. J. L. 178; *People v. Bootman*, 180 N. Y. 8, affirming 95 N. Y. App. Div. 469; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254; *Brooks v. Tripp*, 135 N. Car. 159; *State v. Nergaard*, 124 Wis. 414.

**Powers of States Broader than Those of Crown in England.** — *Com. v. Hilton*, 174 Mass. 29.

**Source of Power.** — The authority to enact these limitations flows from the power to prohibit, and this rests on the proposition that the individual has no vested right in fish not reduced to possession. *State v. Dow*, 70 N. H. 286.

**Jurisdiction — River on State Boundary.** — The enforcement by the state of *Minnesota* of its fish and game laws on the *Wisconsin* side of the main channel of the *Mississippi* river is not justifiable on the theory of common ownership of the river or things in or on or under the same on the *Wisconsin* side of the main channel. *Roberts v. Fullerton*, 117 Wis. 222.

**Canning Business.** — In *Maine* the policy of law seeks to regulate the canning business, for the purpose of protecting the fishing industry, by preventing the decimation of herring on the coast of *Maine*. *State v. Kaufman*, 98 Me. 546.

**573. 1. Power of Legislature to Regulate Fisheries in Private Waters.** — *State v. Mallory*, 73 Ark. 236.

**2. Power of Legislature to Prescribe Penalties**

**for the Violation of Fishery Regulations.** — *State v. Meek*, 112 Iowa 338, 84 Am. St. Rep. 342.

**Fish Caught Outside of State.** — There is no ownership by the state, or by the people in their collective capacity, in the game or fish taken or killed outside the borders of the state, for it is not a food supply which belongs in common to all people of the state. Therefore, fish caught without the borders of the state are not subject to the limitations and restrictions that are imposed on the ownership or possession of fish caught within its borders. *McDonald v. Southern Express Co.*, 134 Fed. Rep. 282; *Tyler v. State*, 93 Md. 309; *People v. Buffalo Fish Co.*, 164 N. Y. 93, affirming 45 N. Y. App. Div. 631, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 130; *People v. Cone*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 393, 15 N. Y. Crim. 287. But see *In re Deininger*, 108 Fed. Rep. 623, disapproving *In re Davenport*, 102 Fed. Rep. 540; *People v. Dornbos*, 127 Mich. 136; *People v. Booth*, 105 N. Y. App. Div. 184, reversing (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; *People v. Bootman*, 180 N. Y. 1, affirming 95 N. Y. App. Div. 469 (express provision of statute); *State v. Schuman*, 36 Oregon 16, 78 Am. St. Rep. 754.

**574. 2. Contra in Michigan.** — *Neal v. Morse*, 134 Mich. 186.

**Contra in Ohio.** — *Edson v. Crangle*, 62 Ohio St. 49, distinguished *State v. French*, 71 Ohio St. 186; *French v. Shirley*, 9 Ohio Dec. 181; *Yensen v. State*, 9 Ohio Dec. 168; *In re Fish Seizure*, 5 Ohio Dec. 553.

**4. Constitutional Limitations.** — *McDonald v. Southern Express Co.*, 134 Fed. Rep. 282; *People v. Buffalo Fish Co.*, 164 N. Y. 93, affirming 45 N. Y. App. Div. 631, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 130; *People v. Booth*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321, judgment reversed 105 N. Y. App. Div. 184; *People v. Cone*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 393, 15 N. Y. Crim. 287; *Edson v. Crangle*, 62 Ohio St. 49; *Yensen v. State*, 9 Ohio Dec. 168; *French v. Shirley*, 9 Ohio Dec. 181; *In re Fish Seizure*, 5 Ohio Dec. 553; *Sibley v. State*, 107 Tenn. 515.

**Statute Held Not to Impose Excessive Penalty.** — See *State v. Lubec*, 93 Me. 418.

**Due Process of Law.** — *State v. Schuman*, 36 Oregon 16, 78 Am. St. Rep. 754; *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722.

**Taxation Held Constitutional.** — *Brooks v. Tripp*, 135 N. Car. 159; *Thormah v. Broderick*, 52 La. Ann. 1298.

**License Tax Upheld.** — *Morgan v. Com.*, 98 Va. 812.

**License Fee Not "Duty of Tonnage."** — *State v. Corson*, 67 N. J. L. 178.

**574.** (2) *Power of Congress to Regulate Commerce.* — See notes 6, 7.

**575.** (4) *Limiting Right of Taking Fish or Planting Oysters to Citizens.* — See note 3.

*d.* DELEGATION OF POWER TO LOCAL AUTHORITIES — (1) *Local Boards.* — See notes 5, 6, 7.

(2) *Cities and Towns.* — See note 8.

**576.** 3. *Prohibiting Obstruction of Migratory Fish.* — See note 2.

4. *Regulating Time and Manner of Taking.* — See note 3.

**574.** 6. *Federal Power to Regulate Commerce Paramount.* — *McDonald v. Southern Express Co.*, 134 Fed. 282; *People v. Buffalo Fish Co.*, 164 N. Y. 93, *affirming* 45 N. Y. App. Div. 631, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 130; *People v. Cone*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 393, 15 N. Y. Crim. 287.

The "Lacy Act" provides in substance that foreign game when transported into any state shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced in such state, and shall not be exempt therefrom by reason of importation in original packages. 31 U. S. Stat. L., c. 553, p. 187. See *People v. Bootman*, 180 N. Y. 6; *People v. Booth*, 105 N. Y. App. Div. 184, *reversing* (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; *People v. Bootman*, 180 N. Y. 1, *affirming* 95 N. Y. App. Div. 469, as to the effect of this act. In the latter case it was said: "The action of Congress has taken away all questions of interstate commerce, so that the state can act with entire freedom and can prevent the shipment of game into or out of its own territory; and if game is imported, it can regulate or prohibit the sale thereof. Such provisions are warranted by the police power, and are not in conflict with either the state or Federal Constitution."

7. *Regulation of Fisheries Not a Regulation of Commerce.* — *In re Deininger*, 108 Fed. Rep. 623; *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *State v. Corson*, 67 N. J. L. 178; *Morgan v. Com.*, 98 Va. 812.

**575.** 3. *State Statutes Prohibiting Persons Not Citizens Taking Fish or Planting Oysters Constitutional.* — *State v. Corson*, 67 N. J. L. 178. See also *Com. v. Hilton*, 174 Mass. 29; *State v. Gallop*, 126 N. Car. 979.

*Statute Prohibiting Nonresident Landowners from Fishing Unconstitutional.* — *State v. Mallory*, 73 Ark. 236.

5. *Clayton v. Peirse*, (1904) 1 K. B. 424, 73 L. J. K. B. 268, 90 L. T. N. S. 119, 52 W. R. 495, 68 J. P. 233; *Rex v. Chandler*, 6 Can. Crim. Cas. (Nova Scotia) 308; *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722.

6. *Local Boards Must Act Strictly Within Power Conferred.* — See *Stead v. Nicholas*, (1901) 2 K. B. 163, 70 L. J. K. B. 653, 85 L. T. N. S. 23, 49 W. R. 522, 65 J. P. 484, 20 Cox C. C. 27.

In England where a board was authorized to make laws to determine "the length, size, and description of nets \* \* \* for taking salmon," it was authorized to make a by-law which prohibited the use of particular kinds of nets. *Clayton v. Peirse*, (1904) 1 K. B. 424, 73 L. J. K. B. 268, 90 L. T. N. S. 119, 52 W. R. 495, 68 J. P. 233.

In Iowa a Fish Warden cannot take fish from public waters to stock a private pond. *State v. Sears*, 115 Iowa 28.

*Action Not Conclusive on Direct Attack.* — Legislative authority to county commissioners to grant exclusive rights to plant oysters on exhausted or barren oyster beds does not make the finding by such tribunal that a certain bed is barren or exhausted conclusive on the courts in a direct proceeding to test the validity of a lease under such authority. *State v. Gibson*, (Fla. 1904) 37 So. Rep. 651.

*Commissioners' Action Not Subject to Collateral Attack.* — *Halleck v. Davis*, 22 Wash. 393.

*Decision of Inspector Judicial — Not Subject to Mandamus.* — *Rowe v. Drisgell*, 100 Va. 137.

*Appeal.* — In *Rhode Island* the decision of the Common Pleas Division of the Supreme Court under Pub. Laws, cap. 853, §§ 15, 17, on an appeal from the shellfish commissioners is final and conclusive; and a petition for new trial after such decision will not be entertained. *Hopkins v. Shell Fisheries Com'rs*, 25 R. I. 570.

7. *Local Ordinances Conflicting with a Legislative Enactment Are Void.* — *Eaton v. State*, 80 Miss. 588.

A Strong Case is needed to induce the court to hold such regulations void for unreasonableness. *Clayton v. Peirse*, (1904) 1 K. B. 424, 73 L. J. K. B. 268, 90 L. T. N. S. 119, 52 W. R. 495, 68 J. P. 233, *citing* *Kruse v. Johnson*, (1898) 2 Q. B. 91.

8. *Com. v. Hilton*, 174 Mass. 29.

*Without Legislative Authority the inhabitants of a town have no power to adopt by-laws or regulations controlling the subject of sea-shore fisheries.* *State v. Bunker*, 98 Me. 387.

**576.** 2. *Legislature May Prohibit the Obstruction of Migratory Fish.* — *State v. Meek*, 112 Iowa 338, 84 Am. St. Rep. 342; *State v. Beardsley*, 108 Iowa 396.

In Arkansas no person has a right to place, erect, or maintain a dam in the waters of the state, to be used in connection with a trap for the purpose of catching fish, except in waters wholly on his own premises. *Lynch v. State*, 69 Ark. 555.

*Pennsylvania Act Permitting Erection of Dams Construed.* — *French Creek Obstruction*, 8 Pa. Dist. 702, *affirmed* 15 Pa. Super. Ct. 57.

*Tennessee Act Forbidding Dams Held Void.* — *Sibley v. State*, 107 Tenn. 518.

3. *Time and Manner of Taking Fish May Be Regulated.* — *In re Deininger*, 108 Fed. Rep. 623; *State v. Mallory*, 73 Ark. 236; *Sawyer v. Beal*, 97 Me. 356; *People v. Horling*, (Mich. 1904) 100 N. W. Rep. 691; *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *People v. Bootman*, 180 N. Y. 1, *affirming* 95 N. Y. App. Div. 469; *Rockefeller v. Lamora*, 85 N. Y. App. Div. 254; *State*

**577.** See note 1.

**578.** See notes 1, 2, 3, 4.

**579.** Forbidding Sale During Close Seasons. — See note 1.

**5. Regulation by Special or Local Legislation — a. LOCAL STATUTES APPLYING TO ALL PERSONS EQUALLY.** — See note 3.

**b. SPECIAL CONSTITUTIONAL PROVISIONS.** — See note 4.

**VII. HOW RIGHTS OF FISHING MAY BE ACQUIRED — 1. By Grant — a. GENERALLY.** — See note 8.

**581. 2. By Prescription — a. IN NAVIGABLE WATERS — In the United States.** — See note 3.

*v. French*, 71 Ohio St. 186; *State v. Dow*, 70 N. H. 286; *State v. Nergaard*, 124 Wis. 414.

**Michigan Statute Held Inapplicable to Private Waters.** — *People v. Conrad*, 125 Mich. 1.

**Statute Not Directed Against Fishermen Only.** — A Michigan statute providing that it shall be unlawful to have in possession any lake trout weighing less than one and one-half pounds, was held not to apply to fishermen only. *People v. Dornbos*, 127 Mich. 136.

**Statute Prohibiting Fishing in Newly Stocked Stream Construed.** — *State v. Eldredge*, 71 Vt. 374. See also *Rockefeller v. Lamora*, 96 N. Y. App. Div. 93.

**Statute Prohibiting Traps at Greater Depth than Sixty-five Feet Construed.** — *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558.

**577. 1. Statutes Prohibiting Nets and Other Devices Construed.** — *Wedderburn v. Atholl*, (1900) A. C. 403; *Rex v. Chandler*, 6 Can. Crim. Cas. (Nova Scotia) 308; *Roetzel v. State*, 68 Ark. 487; *People v. Miles*, 143 Cal. 636; *People v. Gillingham*, 131 Mich. 105; *Com. v. Wetherill*, 8 Pa. Dist. 653. See also *Davies v. Evans*, 86 L. T. N. S. 419, 66 J. P. 392.

**Location of Fish Traps — Washington Statute.** — *Point Roberts Fishing Co. v. Georgia*, etc., Co., 28 Wash. 200.

**578. 1. Weirs Prohibited.** — See *Sawyer v. Beal*, 97 Me. 356. See also *Dunton v. Parker*, 97 Me. 461, holding that a weir injuriously affected the right of the plaintiff as the shore owner.

**2. Fish Dams Prohibited.** — *Lynch v. State*, 69 Ark. 555.

**3. Various Devices Forbidden.** — *People v. Horling*, (Mich. 1904) 100 N. W. Rep. 691. See also *Gill v. State*, 45 Tex. Crim. 256.

**4. Forbidding the Taking of Fish Otherwise than by Angling.** — See *People v. Horling*, (Mich. 1904) 100 N. W. Rep. 691.

**Shooting.** — The Ohio law as amended, 92 O. L. 332, does not prohibit shooting fish. *State v. Moder*, 5 Ohio Dec. 564, 7 Ohio N. P. 514.

**579. 1. Jurisdiction of California Superior Court.** — *People v. Haagen*, 139 Cal. 115.

**Evidence.** — Where it was charged in effect that the defendant had in his possession and sold fresh salmon on the eleventh day of September, which was the first day of the season prohibited by the statute, it was not error to refuse to allow the defendant to offer evidence to show that the fish in question were caught prior to the eleventh day of September. *People v. Haagen*, 139 Cal. 115.

**3. See State v. Gallop, 126 N. Car. 979; *State v. Dow*, 70 N. H. 286.**

The New Jersey act for the better regulation

and control of the taking, planting, and cultivating of oysters and clams on lands lying under the tidal waters of the county of Ocean, in the state of New Jersey, approved March 26, 1902 (P. L. 1902, p. 170), is constitutional. *State v. Price*, 71 N. J. L. 249.

**Not Special or Local Legislation.** — *State v. Corson*, 67 N. J. L. 178.

**4. Tennessee Constitution Construed.** — *Sibley v. State*, 107 Tenn. 515.

**8. Construction of Grants.** — *Barataria Can-ning Co. v. Ott*, 84 Miss. 737; *Slingerland v. International Contracting Co.*, 43 N. Y. App. Div. 215, affirmed 169 N. Y. 60.

"When the description of land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not; it is enough that the grant is its own dictionary and explains that it means by 'land' in the habendum land and fishery as well." *Damon v. Hawaii*, 194 U. S. 154.

**Leased Lands — Right of Fishing Passes to Lessee.** — *Jones v. Davies*, 86 L. T. N. S. 447, 66 J. P. 439.

**A Staking Out of Oyster Grounds by a committee stands on the same footing, as matter of evidence, as a staking out by the grantor of land when he delivers possession.** *Hamilton v. Smith*, 74 Conn. 374.

**Grant Without Reservation Gives Exclusive Right.** — *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275.

**Grant of Weirs Gives Exclusive Right.** — *Hanbury v. Jenkins*, (1904) 2 Ch. 401, 70 L. J. Ch. 730, 49 W. R. 615, 65 J. P. 631.

**581. 3. Injunction — Continued Occupation.** — Where a party relies on an implied license to plant and cultivate oyster lands to the exclusion of the owner, he must show his continued occupation of such lands. He cannot be permitted to abandon the premises, and afterwards exclude the owner, simply because at one time he may have had a right thereto. If the party ever had any right to the lands in dispute, the failure to establish possession and occupation at the time the defendant took possession will defeat his right to restrain the defendant's possession. *Riddell v. Brown*, 25 Wash. 514.

**Evidence of Prescriptive Right to Fish.** — The assertion of a right, acquired by prescription, of the defendant in common with others to angle and catch fish in the plaintiff's pond was not supported by the evidence, where the only land of which the defendant was owner or lessee was situated at a considerable distance from the pond, no attempt was made to prescribe in a *que* estate, and the defendant testified that he had commenced to fish in the pond in 1862, and from

**582.** *b.* IN WATERS NOT NAVIGABLE. — See note 2.

**583.** 3. By Treaty — Treaties of the United States with Indian Tribes. — See note 1.

**584.** VIII. LIABILITY FOR INJURIES TO FISHING RIGHTS AND FOR VIOLATIONS OF FISHERY REGULATIONS — 1. Civil Liability — Remedies — *a.* ACTION FOR DAMAGES. — See notes 4, 5.

**585.** See note 5.

Measure of Damages. — See note 6.

*b.* INJUNCTION AND ABATEMENT — Injunction. — See note 8.

**586.** Abatement — Unauthorized Obstructions in Navigable Waters. — See note 2.

Fishing Devices Used in Contravention of Law. — See notes 3, 4.

2. Criminal or Penal Liability — (2) *When Fish Are the Subject of Larceny.* — See notes 8, 9.

*b.* BY STATUTE — (1) *For Violating Statutes Regulating Fisheries* — (a) In General. — See note 12.

that time down until 1895 he had fished there quite often in the summer time, sometimes three or four times a week, and had fished all over the pond; that nobody had ever interfered with him until within the year last named; that other persons had always fished there in the same manner, and that prior to 1895 he had never heard of any objections from the owners of the land. *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275.

**582.** 2. Cannot Be Acquired by Custom. — *Albright v. Cortright*, 64 N. J. L. 330, 81 Am. St. Rep. 504.

**583.** 1. Treaties with the Indians. — See *U. S. v. Winans*, 198 U. S. 371, reversing 73 Fed. Rep. 72, holding that the Indians could not be excluded by owners of lands bordering on the Columbia river.

In *Minnesota* the state laws relating to hunting and fishing are held to be not applicable to the Indians living on the White Earth Reservation. *State v. Coonry*, 77 Minn. 518.

In *Wisconsin* also it is held that the fish and game laws do not extend to the arrest and punishment of Indians maintaining their tribal relation and residing on Indian reservations within the limits of the state. *In re Blackbird*, 109 Fed. Rep. 139.

**584.** 4. Liability for Entering or Taking Fish from Private Fishery. — *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275.

5. Taking or Destroying Oysters. — *Palmer v. Hartford Dredging Co.*, 73 Conn. 182; *Vroom v. Tilly*, 99 N. Y. App. Div. 516. See also *Davis v. Davis*, 72 N. Y. App. Div. 593.

Damage by Vessel. — Where a vessel negligently ran into an oyster bed, it was held that damages were recoverable for injury to the oysters and bed. *The Swift*, (1901) P. 168, 70 L. J. P. 47, 85 L. T. N. S. 346.

**585.** 5. Destroying Fishing Apparatus. — *Hopkins v. Norfolk, etc., R. Co.*, 131 N. Car. 463.

A tug is not liable for an injury to a fishing seine caused by entanglement with a tow, where due care and skill was exercised. *The Oscar B.*, (C. C. A.) 121 Fed. Rep. 978.

6. Measure of Damages for Injuries to Fishing Rights. — *Pacific Steam Whaling Co. v. Alaska Packers' Assoc.*, 138 Cal. 632; *Palmer v. Hartford Dredging Co.*, 73 Conn. 183.

8. Injunction — Interfering with Another's Right of Fishing. — *Cherry Point Fish Co. v. Nelson*,

25 Wash. 558. See also *American Fisheries Co. v. Lennen*, 118 Fed. Rep. 869.

The fact that it is made criminal by statute to take oysters from private beds does not prevent the owner of such beds from enjoining insolvent persons from committing depredations thereon, when it is apparent that without such remedy the damage will be irreparable. *Jones v. Oemler*, 110 Ga. 202.

**586.** 2. Obstructions in Navigable Waters May Be Abated. — *State v. Beardsley*, 108 Iowa 396.

3. Abatement of Fishing Devices Used in Contravention of Law. — *State v. French*, 71 Ohio St. 186.

4. *State v. Shaw*, 67 Ohio St. 157.

8. Fish in an Open River or Pond. — *State v. Thomas*, 11 Ohio Dec. 753. See also *State v. Shaw*, 67 Ohio St. 157.

9. Fish in a Trunk or Net. — *State v. Shaw*, 67 Ohio St. 157.

Insufficient Confinement. — Where food fish were in a "trap" or "pot" of a pound net set in Lake Erie and the net was so constructed that the fish could escape through an aperture two and one-half feet square, the avenue of entrance, it was held that the fish were not sufficiently confined in possession to be the subject of larceny. *State v. Thomas*, 11 Ohio Dec. 753.

Fish in Smack. — Fish are in the possession of the owner of the smack when taken, and consequently are subject to larceny. *Rex v. Mallison*, 86 L. T. N. S. 600, 66 J. P. 503, 20 Cox C. C. 204.

12. Statutory Criminal Liability — *United States.* — *In re Deininger*, 108 Fed. Rep. 623.

*California.* — See *People v. Tom Nop*, 124 Cal. 150.

*Idaho.* — *State v. Dolan*, (Idaho 1905) 81 Pac. Rep. 640.

*Iowa.* — *State v. Meek*, 112 Iowa 338, 84 Am. St. Rep. 342.

*Maine.* — *Campbell v. Burns*, 94 Me. 127.

*Maryland.* — *Dean v. State*, 98 Md. 80; *Tyler v. State*, 93 Md. 309.

*Mississippi.* — *Ex p. Fritz*, (Miss. 1905) 38 So. Rep. 722; *Valentine v. State*, (Miss. 1903) 35 So. Rep. 170.

*New Jersey.* — *State v. Corson*, 67 N. J. L. 178; *State v. Nelson*, 65 N. J. L. 500.

*New York.* — *People v. Buffalo Fish Co.*, 164

**587.** (b) Behring Sea Seal Fisheries—Violating Statutes Enacted to Give Effect to the Behring Sea Award. — See note 4.

**589.** (4) For Violating Statutes Regulating the Sale of Fish — Selling Short Lobsters. — See note 6.

**590. FISHING BILL.** — See note 7.  
[FISH OILS. — See note 7a.]

FIT. — See note 8.

**591. FITTINGS.** — See note 1.

N. Y. 93, affirming 45 N. Y. App. Div. 631, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 130.

North Carolina. — State v. Goulding, 131 N. Car. 715.

Oregon. — State v. Schuman, 36 Oregon 16, 78 Am. St. Rep. 754.

Texas. — Taylor v. State, (Tex. Crim. 1900) 55 S. W. Rep. 832. See also O'Quinn v. State, (Tex. Crim. 1899) 53 S. W. Rep. 110.

Canada. — Reg. v. Vachon, 3 Can. Crim. Cas. (British Columbia) 558.

In Michigan a party is criminally liable under the statute, for catching fish in a lake by an unlawful device, where fish migrated at times from a public river to the lake; even though the party owned the land under and surrounding the lake, posted the premises, and stocked the lake. People v. Horling, (Mich. 1904) 100 N. W. Rep. 691.

In New Jersey under an indictment for unlawfully dredging oysters (Act March 22, 1901), it is not necessary for the state to prove that the oyster bed in question had been marked, buoyed, or staked by or under the supervision of the state oyster commission. State v. Lee, 70 N. J. L. 368, affirmed (N. J. 1905) 59 Atl. Rep. 1118.

Act N. J., March 22, 1901, known as the "Rough Cull Law," makes it a misdemeanor for any person engaged in dredging oysters from any of the beds and the grounds above the "southwest line under the waters of Delaware River, Delaware Bay, and Maurice River Cove," to neglect or refuse to cull such oysters, oyster shells, and other materials as soon as they are emptied out of the dredges on the deck of the vessel. State v. Hand, 71 N. J. L. 137.

Evidence. — Under the New York statute the possession of the fish or game at the forbidden season, within the state, is *prima facie* evidence that the possessor has violated the law, and the burden is then cast upon him of proving facts to show that the possession was lawful. People v. Buffalo Fish Co., 164 N. Y. 99, affirming 45 N. Y. App. Div. 631, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 130.

Evidence that a person was seen on the river in a canoe between certain hours at night with the appliances commonly used in illegal fishing, in the absence of any explanation of the situation and where the charge was not denied on oath, was held to be sufficient to justify a conviction for illegal fishing. Rex v. Fraser, 36 N. Bruns. 209.

Variance. — Where it is specifically charged that the catching of fish was by means of dynamite, the proof must show that dynamite was used. Gill v. State, 45 Tex. Crim. 256.

An indictment, under Pen. Code Ga., § 588,

for removing oysters from a private oyster bed, is not supported by proof showing that the accused persons took oysters from a bed situated between high-water mark and low-water mark upon the shore of an inlet of the sea, title to the bed not being shown to exist in any private person. Johnson v. State, 114 Ga. 790.

Where it was charged that the defendant used a seine in a certain lake, and the evidence was that the seine was set during high water in an overflowed field covered with water from the lake, there was a fatal variance. State v. Weeks, 88 Mo. App. 263.

Locus of Offense. — A complaint for illegal fishing charged the locus to be in the waters of the Grand river, in the township of Grand Haven, in the county of Ottawa, and counsel requested the court to instruct the jury that if the fishing was done within the limits of the city of Grand Haven, and not within the township, they must acquit. This was refused, the court instructing them that it was sufficient to convict if the act was done within the county of Ottawa. The instruction was held correct. People v. Van Maren, 126 Mich. 103.

**587. 4. Statutes to Effectuate Behring Sea Award.** — The Challenge, 1 Alaska 70; The St. Paul, 1 Alaska 71.

**589. 6. Selling Short Lobsters Penalized.** — State v. Hanna, 99 Me. 224; Campbell v. Burns, 94 Me. 127; State v. Lube, 93 Me. 418, wherein it was held that the Maine statute was constitutional.

**590. 7. Hurricane Telephone Co. v. Mohler,** 51 W. Va. 1.

**7a. Fish Oils Include Cod Oils.** — The words *fish oils* as used in the Customs Duties Act mean every oil made from fish and are broad enough to cover cod oil. Swan, etc., Co. v. U. S., (C. C. A.) 113 Fed. Rep. 243.

**8. Fit in the Sense of Suitable.** — Oil Seeds Pressing Co. v. U. S., 114 Fed. Rep. 793.

The Terms *Fitness* and *Merit* as used in the Civil Service Act are not synonymous; the former means the quality of being suitable and adapted to the performance of one's duties, while the latter means the quality of deserving the office because of excellence and worth. People v. Knauber, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 253. Compare People v. Knauber, 43 N. Y. App. Div. 342.

**591. 1.** The word *ittings* in an indictment charging the defendant with receiving a certain lot of brass *ittings*, knowing the same to have been stolen, is demurrable as being too general. In this case there are several dictionary definitions of the word. Brown v. State, 116 Ga. 559.

**591. FIX.** — See note 2.

**591. 2. Fixed Rate of Interest.** — *Daggs v. Phoenix Nat. Bank*, 5 Ariz. 409.

**Fixed — Bills of Exchange and Promissory Notes.** — *Cincinnati Fifth Nat. Bank v. Woolsey*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 757.

**Salary of Officers.** — *Cole v. Humphries*, 78 Miss. 163; *State v. Daggett*, 28 Wash. 1.

**Fixed Machinery.** — *Campbell v. John W. Taylor Mfg. Co.*, 62 N. J. Eq. 307.

**Fixed Time of Holding Office — Civil Service Act.** — See *People v. Loeffler*, 175 Ill. 585.

**Fixing Fees of Officer.** — See *Hardy v. Kingman County*, 65 Kan. 111.

**Fixed Value of Chattels — Replevin.** — *Wolff v. Moses*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 500.

## FIXTURES.

BY M. G. BEAMAN.

**597. II. INTENTION.** — See note 2.**599. Character of Intention.** — See notes 1, 2.

**597. 2. Intention Is Primary Consideration** — *England*. — *Leigh v. Taylor*, (1902) A. C. 157.

*United States*. — *William Firth Co. v. South Carolina L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 569.

*Alabama*. — *Nelson v. Howison*, 122 Ala. 573.

*District of Columbia*. — *Towson v. Smith*, 13 App. Cas. (D. C.) 48.

*Illinois*. — *Ward v. Earl*, 86 Ill. App. 635.

*Indiana*. — *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264.

*Maine*. — *Hayford v. Wentworth*, 97 Me. 347; *Young v. Hatch*, 99 Me. 465.

*Massachusetts*. — *Munroe v. Armstrong*, 179 Mass. 165.

*Michigan*. — *Schellenberg v. Detroit Heating, etc., Co.*, 130 Mich. 439, 97 Am. St. Rep. 489.

*Nebraska*. — *Oliver v. Lansing*, 59 Neb. 219; *Moore v. Moran*, 64 Neb. 84.

*New Jersey*. — *Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140; *Temple Co. v. Penn Mut. L. Ins. Co.*, 69 N. J. L. 36; *Crane Iron Works v. Wilkes*, 64 N. J. L. 193; *Ashby v. Ashby*, 59 N. J. Eq. 536; *Holmes v. Standard Pub. Co.*, (N. J. 1903) 55 Atl. Rep. 1107; *Amcs v. Trenton Brewing Co.*, 56 N. J. Eq. 309, *affirmed* 57 N. J. Eq. 347.

*New York*. — *Fitzgerald v. Atlanta Home Ins. Co.*, 61 N. Y. App. Div. 350; *McMillan v. Leaman*, 101 N. Y. App. Div. 436; *Schreyer v. Jordan*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 643.

*Oklahoma*. — *Great Western Mfg. Co. v. Bathgate*, (Okla. 1905) 79 Pac. Rep. 903.

*Oregon*. — *Albertson v. Elk Creek Gold Min. Co.*, 39 Oregon 552.

*Texas*. — *Rotan Grocery Co. v. Dowlin*, (Tex. Civ. App. 1903) 77 S. W. Rep. 430.

*Wisconsin*. — *Gunderson v. Swarthout*, 104 Wis. 186, 76 Am. St. Rep. 860; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867; *Mueller v. Chicago, etc., R. Co.*, 111 Wis. 300.

**Intent One Factor.** — *Royce v. Latshaw*, 15 Colo. App. 420.

**599. 1. Character of Intention Implied from External Acts** — *England*. — *Monti v. Barnes*, (1901) 1 K. B. 205.

*Canada*. — *Stack v. T. Eaton Co.*, 4 Ont. L. Rep. 335.

*Arkansas*. — *Ozark v. Adams*, 73 Ark. 227.

*District of Columbia*. — *Towson v. Smith*, 13 App. Cas. (D. C.) 48.

*Illinois*. — *Madison v. Madison*, 206 Ill. 534, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 594; *Gunderson v. Kennedy*, 104 Ill. App. 117; *Baker v. McClurg*, 96 Ill. App. 165, *affirmed* 198 Ill. 28.

*Indiana*. — *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264.

*Iowa*. — *Thomson v. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541.

*Kansas*. — *Dodge City Water, etc., Co. v. Alfalfa Land, etc., Co.*, 64 Kan. 247.

*Maine*. — *Readfield Telephone, etc., Co. v. Cyr*, 95 Me. 287.

*Nebraska*. — *Brownell v. Fuller*, 60 Neb. 558.

*New Jersey*. — *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305; *Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140.

*New York*. — *Cosgrove v. Troesch*, 62 N. Y. App. Div. 123.

*Rhode Island*. — *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858.

*Texas*. — *Mundine v. Pauls*, 28 Tex. Civ. App. 46.

**2. Secret Intention Immaterial** — *United States*. — *William Firth Co. v. South Carolina L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 569; *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229.

*Colorado*. — *Fisk v. People's Nat. Bank*, 14 Colo. App. 21.

*Georgia*. — *Wright v. Du Bignon*, 114 Ga. 765.

*Illinois*. — *Baker v. McClurg*, 96 Ill. App. 165, *affirmed* 198 Ill. 28.

*Iowa*. — *Thomson v. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541.

*Maine*. — *Hayford v. Wentworth*, 97 Me. 347; *Young v. Hatch*, 99 Me. 465; *Readfield Telephone, etc., Co. v. Cyr*, 95 Me. 287.

*Michigan*. — See *People v. Jones*, 120 Mich. 283.

*New York*. — *Pfuger v. Carmichael*, 54 N. Y. App. Div. 153; *Cosgrove v. Troesch*, 62 N. Y. App. Div. 123.



**600.** Of Person Not Owning Land. — See note 1.

**III. PHYSICAL ANNEXATION — 1. Necessity — a. IN GENERAL. —**  
See note 2.

**601.** See note 1.

**602.** 2. Sufficiency of Annexation — *b. INJURY BY REMOVAL.* — See note 3.

**603.** See note 1.

*c. RETENTION IN PLACE BY GRAVITY.* — See note 3.

**604.** *d. BY WHOM ANNEXATION TO BE MADE.* — See note 1.

**605.** *e. CONSTRUCTIVE ANNEXATION — Parts of Articles Annexed.* — See note 3.

**607.** 3. As Showing Intention — *a. MODE OF ANNEXATION NOT CONCLUSIVE.* — See notes 1, 2.

*Oregon.* — *Alberson v. Elk Creek Gold Min. Co.*, 39 Oregon 552.

*Pennsylvania.* — *Straight v. Mahoney*, 16 Pa. Super. Ct. 155.

**Question of Mixed Law and Fact —** *Alabama.* — *Nelson v. Howison*, 122 Ala. 573.

*Arkansas.* — *British, etc., Mortg. Co. v. Scott*, 70 Ark. 230.

*District of Columbia.* — *Towson v. Smith*, 13 App. Cas. (D. C.) 48.

*Indiana.* — *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264.

*Maine.* — *Hayford v. Wentworth*, 97 Me. 347.

*Michigan.* — *Thomas v. Wagner*, 131 Mich. 601.

*Nebraska.* — *Brownell v. Fuller*, 60 Neb. 558.

*Oklahoma.* — *Great Western Mfg. Co. v. Bathgate*, (Okla. 1905) 79 Pac. Rep. 903.

*Oregon.* — *Alberson v. Elk Creek Gold Min. Co.*, 39 Oregon 552.

*Pennsylvania.* — See *Silliman v. Whitmer*, 196 Pa. St. 363.

*Texas.* — *Mundine v. Pauls*, 28 Tex. Civ. App. 46.

*Virginia.* — *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682.

**600. 1. Annexation to Another's Land.** — *Schellenberg v. Detroit Heating, etc., Co.*, 130 Mich. 439, 97 Am. St. Rep. 489; *Moore v. Moran*, 64 Neb. 84.

**"Intention" Used in Different Senses.** — The language used in *Alberson v. Elk Creek Gold Min. Co.*, 39 Oregon 552, is subject to the same criticism.

**Agreement Between Affixers.** — See *Harris v. Hackley*, 127 Mich. 46.

**2. Physical Annexation Necessary —** *United States.* — *In re Welch*, 108 Fed. Rep. 367.

*Arkansas.* — *Ozark v. Adams*, 73 Ark. 227.

*District of Columbia.* — *Towson v. Smith*, 13 App. Cas. (D. C.) 48.

*Kansas.* — *Dodge City Water, etc., Co. v. Alfalfa Land, etc., Co.*, 64 Kan. 247.

*Maine.* — *Young v. Hatch*, 99 Me. 465.

*Nebraska.* — *Oliver v. Lansing*, 59 Neb. 219; *Hillebrand v. Nelson*, (Neb. 1901) 95 N. W. Rep. 1068; *Brownell v. Fuller*, 60 Neb. 558.

*New Jersey.* — *Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305; *Security Trust Co. v. Temple Co.*, (N. J. 1904) 58 Atl. Rep. 865; *Temple Co. v. Penn Mut. L. Ins. Co.*, 69 N. J. L. 36; *Crane Iron Works v. Wilkes*, 64 N. J. L.

193; *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

*New York.* — *Fitzgerald v. Atlanta Home Ins. Co.*, 61 N. Y. App. Div. 350; *Cosgrove v. Troescher*, 62 N. Y. App. Div. 123; *Jermyn v. Hunter*, 93 N. Y. App. Div. 175; *McMillan v. Leaman*, 101 N. Y. App. Div. 436.

*Oklahoma.* — *Great Western Mfg. Co. v. Bathgate*, (Okla. 1905) 79 Pac. Rep. 903.

*Texas.* — *Rotan Grocery Co. v. Dowlin*, (Tex. Civ. App. 1903) 77 S. W. Rep. 430.

*Wisconsin.* — *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867; *Gunderson v. Swarthout*, 104 Wis. 186, 76 Am. St. Rep. 860; *Mueller v. Chicago, etc., R. Co.*, 111 Wis. 300.

**601. 1. Annexation Unnecessary —** *Pennsylvania Doctrine.* — *Wick v. Bredin*, 189 Pa. St. 83.

**602. 3. Injury by Removal Not Controlling.** — *Thomson v. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305; *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875.

**Contra.** — *Mundine v. Pauls*, 28 Tex. Civ. App. 46.

**603. 1. Injury by Removal May Be Considered.** — *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229; *Schellenberg v. Detroit Heating, etc., Co.*, 130 Mich. 439, 97 Am. St. Rep. 489; *Conde v. Lee*, 55 N. Y. App. Div. 401, affirmed 171 N. Y. 662.

**3. Gravity Held Sufficient.** — *Monti v. Barnes*, (1901) 1 K. B. 205.

**Buildings.** — *Miles v. Ankatell*, 25 Ont. App. 458, reversing 29 Ont. 21.

**604. 1. Must Be Unity of Title in Land and Chattel.** — *Schellenberg v. Detroit Heating, etc., Co.*, 130 Mich. 439, 97 Am. St. Rep. 489.

**605. 3. Wagon Scales set on castings resting on a solid foundation are realty.** *Thomson v. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605.

**607. 1. Mode of Annexation Is One Factor Only.** — *Leigh v. Taylor*, (1902) A. C. 157; *Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140.

**2. Mode of Annexation Unimportant —** *United States.* — *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229.

*Connecticut.* — *Camp v. Charles Thatcher Co.*, 75 Conn. 165.

*Maine.* — *Hayford v. Wentworth*, 97 Me. 347.

**607.** *b. INJURY BY REMOVAL.* — See notes 3, 4.

**608.** *d. ATTACHMENT FOR CONVENIENCE IN USE.* — See note 2.

**609.** **IV. CHARACTER OF ARTICLE ANNEXED — 2. Adaptation to Use of Freehold.** — See note 1.

**Adaptation One Factor.** — See note 2.

**610.** **3. Adaptation to Use Elsewhere.** — See note 2.

**4. Necessity of Article.** — See note 3.

**611.** **Pennsylvania Rule.** — See note 3.

**612.** **5. Purpose of Annexation.** — See notes 1, 4, 5.

*Michigan.* — Schellenberg *v.* Detroit Heating, etc., Co., 130 Mich. 439, 97 Am. St. Rep. 489.

*New Jersey.* — Knickerbocker Trust Co. *v.* Penn Cordage Co., 66 N. J. Eq. 305; Security Trust Co. *v.* Temple Co., (N. J. 1904) 58 Atl. Rep. 865; Ashby *v.* Ashby, 59 N. J. Eq. 536; Ames *v.* Trenton Brewing Co., 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

*New York.* — Berliner *v.* Piqua Club Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 470.

*Pennsylvania.* — Wick *v.* Bredin, 189 Pa. St. 83.

*Rhode Island.* — Canning *v.* Owen, 22 R. I. 624, 84 Am. St. Rep. 858.

**607.** **3. Must Be Substantial or Serious Injury.** — Duntz *v.* Granger Brewing Co., (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, affirmed 96 N. Y. App. Div. 631.

**4. Injury to Be Considered.** — Camp *v.* Charles Thatcher Co., 75 Conn. 165; Gunderson *v.* Kennedy, 104 Ill. App. 117; Madison *v.* Madison, 206 Ill. 534; Harris *v.* Hackley, 127 Mich. 46; Andrews *v.* Powers, 66 N. Y. App. Div. 216.

**It Is Enough if Value of Article and Building Be Impaired by Removal.** — Lord *v.* Detroit Sav. Bank, 132 Mich. 510.

**608.** **2. Attachment for Convenience in Use.** — Crane Iron Works *v.* Wilkes, 64 N. J. L. 193; Ames *v.* Trenton Brewing Co., 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

**609.** **1. Necessity of Adaptation — Arkansas.** — Ozark *v.* Adams, 73 Ark. 227.

*District of Columbia.* — Towson *v.* Smith, 13 App. Cas. (D. C.) 48.

*Iowa.* — Thomson *v.* Smith, 111 Iowa 718, 82 Am. St. Rep. 541.

*Maine.* — Young *v.* Hatch, 99 Me. 465.

*Nebraska.* — Oliver *v.* Lansing, 59 Neb. 219; Brownell *v.* Fuller, 60 Neb. 558.

*New Jersey.* — Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140; Security Trust Co. *v.* Temple Co., (N. J. 1904) 58 Atl. Rep. 865; Temple Co. *v.* Penn Mut. L. Ins. Co., 69 N. J. L. 36; Crane Iron Works *v.* Wilkes, 64 N. J. L. 193; Ashby *v.* Ashby, 59 N. J. Eq. 536.

*New York.* — Andrews *v.* Powers, 66 N. Y. App. Div. 216; Fitzgerald *v.* Atlanta Home Ins. Co., 61 N. Y. App. Div. 350; Cosgrove *v.* Troesch, 62 N. Y. App. Div. 123; McMillan *v.* Leaman, 101 N. Y. App. Div. 436.

*Oklahoma.* — Great Western Mfg. Co. *v.* Bathgate, (Okla. 1905) 79 Pac. Rep. 903.

*Oregon.* — Alberson *v.* Elk Creek Gold Min. Co., 39 Oregon 552.

*Texas.* — Rotan Grocery Co. *v.* Dowlin, (Tex. Civ. App. 1903) 77 S. W. Rep. 430.

*Wisconsin.* — Fuller-Warren Co. *v.* Harter, 110 Wis. 80; Gunderson *v.* Swarthout, 104 Wis.

186, 76 Am. St. Rep. 860; Mueller *v.* Chicago, etc., Co., 111 Wis. 300.

**Adaptation Is Immaterial** if there is an agreement that all articles annexed by the tenant shall be left by him. Ames *v.* Trenton Brewing Co., 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

**2. Adaptation One Factor.** — McFarlane *v.* Foley, 27 Ind. App. 484, 87 Am. St. Rep. 264; Dodge City Water, etc., Co. *v.* Alfalfa Land, etc., Co., 64 Kan. 247.

**610.** **2. Adaptation to Use Elsewhere.** — New York L. Ins. Co. *v.* Allison, 46 C. C. A. 229; Hayford *v.* Wentworth, 97 Me. 347; Hillebrand *v.* Nelson, (Neb. 1901) 95 N. W. Rep. 1068; Crane Iron Works *v.* Wilkes, 64 N. J. L. 193; Ames *v.* Trenton Brewing Co., 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347; Neufelder *v.* Third St., etc., R. Co., 23 Wash. 470, 83 Am. St. Rep. 831.

**3. Necessity of Article.** — Giddings *v.* Freedley, 63 C. C. A. 85; New York L. Ins. Co. *v.* Allison, 46 C. C. A. 229; Security Trust Co. *v.* Temple Co., (N. J. 1904) 58 Atl. Rep. 865; Andrews *v.* Powers, 66 N. Y. App. Div. 216; Condit *v.* Goodwin, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312.

**611.** **3. Contrary Decisions.** — Hillebrand *v.* Nelson, (Neb. 1901) 95 N. W. Rep. 1068.

**612.** **1. Purpose of Annexation Is Important.** — Cunningham *v.* Seaboard Realty Co., (N. J. 1904) 58 Atl. Rep. 819; Pfluger *v.* Carmichael, 54 N. Y. App. Div. 153; Gartland *v.* Hickman, 56 W. Va. 75; Gunderson *v.* Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860.

**4. Use for Better Enjoyment of Premises.** — Gunderson *v.* Kennedy, 104 Ill. App. 117.

**5. Permanent Use and Improvement of Land.** — Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 87 Am. St. Rep. 75; Young *v.* Hatch, 99 Me. 465; Berliner *v.* Piqua Club Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 470.

"Whenever chattels have been placed in and annexed to a building by their owner as a part of the means by which to carry out the purposes for which the building was erected or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures, and as much a part of the realty as the building itself; and this is true notwithstanding that such chattels may be severed from and taken out of the building in which they are located, without doing any injury either to them or to it, and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be devoted to a use entirely different from that which was contemplated when the annexation was made." *Per* Gummere, C.

**613.** Machinery or Apparatus in Building. — See note 2.

**615.** Railroad Tracks. — See note 1.

**616.** V. SEVERANCE — 1. In General — Intention to Sever. — See note 1.

2. Constructive Severance — Treatment of Articles as Personalty. — See note 2.

**617.** Sale or Mortgage. — See note 1.

**620.** VI. ANNEXATIONS BY STRANGERS TO TITLE — 1. General Rule. — See note 1.

2. Erections on Public Land. — See note 2.

3. Effect of Mistake. — See note 4.

**622.** VII. AGREEMENT AS TO CHARACTER OF ARTICLES ANNEXED —

1. Making and Effect of Agreement as Between Parties Thereto — *a.* IN GENERAL. — See note 1.

**623.** See note 1.

*c.* TIME OF AGREEMENT. — See note 4.

**624.** *d.* IMPLIED AGREEMENT — (2) *From Making of Chattel Mortgage.* — See note 2.

*J.*, in *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305.

**613.** 2. Machinery Accessory to Realty. — New York L. Ins. Co. v. Allison, 46 C. C. A. 229; *In re Welch*, 108 Fed. Rep. 367; *William Firth Co. v. South Carolina L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 569; *Ozark v. Adams*, 73 Ark. 227; *Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140; *Jermyn v. Hunter*, 93 N. Y. App. Div. 175; *Great Western Mfg. Co. v. Bathgate*, (Okla. 1905) 79 Pac. Rep. 903.

**615.** 1. Railroad Tracks Not Part of Realty. — *Skinner v. Ft. Wayne, etc., R. Co.*, 99 Fed. Rep. 465; *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500. *Contra*, *Bedford-Bowling Green Stone Co. v. Oman*, 115 Ky. 369.

**616.** 1. Intention to Sever Not Carried Out. — *People v. Jones*, 120 Mich. 283; *Minhinnick v. Jolly*, 29 Ont. 238, *affirmed* 26 Ont. App. 42.

2. Articles May Be Constructively Reannexed by being treated as part of the realty. *Solomon v. Staiger*, 65 N. J. L. 617.

**617.** 1. Sale Ineffectual unless Contract in Writing. — *Johnston v. Philadelphia Mortg., etc., Co.*, 129 Ala. 515, 87 Am. St. Rep. 75.

**620.** 1. Erection on Another's Land Part Thereof. — *Jacoby v. Johnson*, 56 C. C. A. 637, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 519, 620; *Ebersol v. Trainor*, 81 Ill. App. 645; *Brandser v. Mjageto*, 79 Minn. 457; *Rotan Grocery Co. v. Dowlin*, (Tex. Civ. App. 1903) 77 S. W. Rep. 430.

An Erection on Corporate Land by the Majority Shareholder becomes a part of the realty. *Murray v. Bender*, 60 C. C. A. 473.

Agreement Necessary to Authorize Removal. — *Quimby v. Straw*, 71 N. H. 160.

2. *Contra* as to Fences. — *Bingham County Agricultural Assoc. v. Rogers*, 7 Idaho 63.

4. A House Built on Wooden Blocks, partly on the land of another, may be removed within a reasonable time. *Page v. Urlick*, 31 Wash. 601, 96 Am. St. Rep. 924.

**622.** 1. Agreement as to Character or Removability of Article — *Alabama*. — *Broadbush v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61.

*District of Columbia*. — *J. L. Mott Iron*

*Works v. Middle States Loan, etc., Co.*, 17 App. Cas. (D. C.) 584.

*Maryland*. — *O'Brien v. Mueller*, 96 Md. 134, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 622.

*Mississippi*. — *Decell v. McRee*, 83 Miss. 423.

*Missouri*. — *Union Cent. L. Ins. Co. v. Tilley*, 152 Mo. 421, 75 Am. St. Rep. 480.

*New York*. — *New York Invest., etc., Co. v. Cosgrove*, 47 N. Y. App. Div. 35, *affirmed* 167 N. Y. 601; *Duntz v. Granger Brewing Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, *affirmed* 96 N. Y. App. Div. 631; *Condit v. Goodwin*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312. See also *McMillan v. Leaman*, 101 N. Y. App. Div. 436.

*Oregon*. — *Hershberger v. Johnson*, 37 Oregon 109.

*Virginia*. — *Turnis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682.

*West Virginia*. — *Gartland v. Hickman*, 56 W. Va. 75.

*Wisconsin*. — *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867.

Such Contract May Be Made by Husband and Wife. — *Peaks v. Hutchinson*, 96 Me. 530.

Agreement Between Vendor and Contractor Not Binding on Owner. — *Jermyn v. Hunter*, 93 N. Y. App. Div. 175.

**623.** 1. Articles Deprived of Character of Personalty. — See *Hershberger v. Johnson*, 37 Oregon 109.

4. Agreement May Be After Annexation. — *O'Brien v. Mueller*, 96 Md. 134, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

Agreement Made After Annexation Not Good as Against Prior Mortgage of Realty. — *Fisk v. People's Nat. Bank*, 14 Colo. App. 21.

A Declaration of the Owner After Foreclosure Proceedings have been begun is not admissible to prove intent, as it is a mere self-serving statement. *Lord v. Detroit Sav. Bank*, 132 Mich. 510.

**624.** 2. Agreement Implied from Making of Chattel Mortgage. — *Ozark v. Adams*, 73 Ark. 227, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624, 626; *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho 200, 101 Am. St. Rep. 188; *Gordon v. Miller*, 28 Ind. App. 612; *Bern-*

**625.** (3) *From Conditional Character of Sale.* — See note 1.

(4) *From Annexation under License.* — See note 2.

**627.** 3. *Effect of Agreement as Against Third Persons — b. AS AGAINST SUBSEQUENT PURCHASER OR MORTGAGEE OF LAND — (1) With Notice.* — See note 2.

**628.** (2) *Without Notice.* — See notes 1, 2.

**629.** See note 1.

**630.** (3) *What Constitutes Notice.* — See note 2.

c. AS AGAINST PRIOR MORTGAGEE OF LAND. — See note 3.

**631.** See notes 1, 2.

**633.** See note 2.

The English Rule. — See note 3.

**634.** d. AS AGAINST PERSONS OTHER THAN MORTGAGEES OR PURCHASERS OF LAND — (3) *Vendors of Land.* — See note 3.

(4) *Holders of Vendor's Liens.* — See note 4.

**635.** (7) *Lessors of Land.* — See note 1.

**638.** X. *FIXTURES AS BETWEEN LIFE TENANT AND REMAINDERMAN — 4. Domestic and Ornamental Fixtures.* — See note 3.

**639.** XI. *ANNEXATIONS BY HUSBAND TO WIFE'S LAND.* — See note 1.

heimer v. Adams, 70 N. Y. App. Div. 114, affirmed 175 N. Y. 472; Alberson v. Elk Creek Gold Min. Co., 39 Oregon 552.

**625.** 1. *Conditional Sale Preserves Personal Character of Articles Annexed.* — Schellenberg v. Detroit Heating, etc., Co., 130 Mich. 439, 97 Am. St. Rep. 489; Duntz v. Granger Brewing Co., (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, affirmed 96 N. Y. App. Div. 631.

**2. Annexation under License.** — Skinner v. Ft. Wayne, etc., R. Co., 99 Fed. Rep. 465; Sallee v. Robinson, 96 Me. 474, 90 Am. St. Rep. 410; Readfield Telephone, etc., Co. v. Cyr, 95 Me. 287.

**627.** 2. *Purchasers or Mortgagees of Land with Notice of Agreement Bound Thereby.* — Moore v. Moran, 64 Neb. 84; Alberson v. Elk Creek Gold Min. Co., 39 Oregon 552.

**628.** 1. *Purchasers or Mortgagees of Land Without Notice of Agreement Not Bound Thereby.* — Thomson v. Smith, 111 Iowa 718, 82 Am. St. Rep. 541, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628; Watson v. Alberts, 120 Mich. 508; Moore v. Moran, 64 Neb. 84. See also Lorain Stee Co. v. Norfolk, etc., St. R. Co., 187 Mass. 500.

**2. Purchasers of Land Without Notice of Agreement Bound Thereby — Maine.** — Peaks v. Hutchinson, 96 Me. 530, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628.

**New York Decisions.** — Duntz v. Granger Brewing Co., (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, affirmed 96 N. Y. App. Div. 631; New York Invest., etc., Co. v. Cosgrove, 47 N. Y. App. Div. 35, affirmed 167 N. Y. 601. But see McMillan v. Leaman, 101 N. Y. App. Div. 436, where the prevailing rule is approved and applied.

**Filing Contract Protects Vendor as Against Subsequent Mortgagee.** — Nichols v. Potts, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 273.

**629.** 1. *Consent to Annexation.* — Jermyn v. Hunter, 93 N. Y. App. Div. 175.

**630.** 2. *Recording of Agreement Is Notice.* — Condit v. Goodwin, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312.

**Record or Filing of Chattel Mortgage or Con-**

**ditional Sale Is Notice.** — New York Invest., etc., Co. v. Cosgrove, 47 N. Y. App. Div. 35, affirmed 167 N. Y. 601.

**3. Agreement Effective as Against Prior Mortgagee.** — Broadus v. Smith, 121 Ala. 335, 77 Am. St. Rep. 61; J. L. Mott Iron Works v. Middle States Loan, etc., Co., 17 App. Cas. (D. C.) 584; Anderson v. Creamery Package Mfg. Co., 8 Idaho 200, 101 Am. St. Rep. 188; Harris v. Hackley, 127 Mich. 46; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319; Nichols v. Potts, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 273. See also Ames v. Trenton Brewing Co., 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

**631.** 1. *Injury to Mortgage of Realty.* — Fisk v. People's Nat. Bank, 14 Colo. App. 21; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319.

**2. Agreement Not Effective as Against Prior Mortgagee.** — Great Western Mfg. Co. v. Bathgate, (Okla. 1905) 79 Pac. Rep. 903; McCrillis v. Cole, 25 R. I. 156, 105 Am. St. Rep. 875; Fuller-Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867; Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860.

**In New York.** — See McMillan v. Leaman, 101 N. Y. App. Div. 436.

**633.** 2. *Recent Federal Case.* — The case referred to has been followed in Evans v. Kister, 35 C. C. A. 28.

**3. English Rule.** — Miles v. Ankateil, 25 Ont. App. 458, reversing 29 Ont. 21.

**634.** 3. *Contrary Decision.* — Andrews v. Powers, 65 N. Y. App. Div. 216.

**4. Holders of Vendor's Liens.** — Mundine v. Pauls, 28 Tex. Civ. App. 46.

**635.** 1. *Agreement Good Against Lessor with Notice.* — Conde v. Lee, 55 N. Y. App. Div. 401, affirmed 171 N. Y. 662.

**638.** 3. *Tenant for Life May Remove Ornamental Articles Annexed to Freehold.* — Leigh v. Taylor, (1902) A. C. 157, affirming (1901) 1 Ch. 523.

**639.** 1. *Land Owned by Both in Entirety.* — Where the husband places chattels on land belonging to both himself and wife as tenants by the entirety, under agreement that the title is

**639. XII. FIXTURES AS BETWEEN LANDLORD AND TENANT — 1. General Rule —** Tenant Favored as Against Landlord. — See note 4.

Particular Articles. — See note 6.

**640.** See note 1.

**642. 2. Rights of Removal Independent of Agreement — c. TRADE FIXTURES. —** See note 2.

**643.** See notes 1, 2.

**644.** The Term "Trade," — See note 3.

**647. e. DOMESTIC AND ORNAMENTAL FIXTURES. —** See note 3.

**648. g. TIME OF REMOVAL AND LOSS OF RIGHTS BY TENANT — (1) General Rule. —** See notes 1, 2.

**649. (2) Rights of Tenant Holding Over. —** See note 1.

**650. (3) Tenancy of Uncertain Duration. —** See note 1.

**651. (5) Forfeiture of Lease. —** See note 2.

(6) Removal Prevented by Landlord. — See note 3.

to remain in the seller of the chattels, the wife cannot claim such chattels, however attached to the realty. *Schellenberg v. Detroit Heating, etc. Co.*, 130 Mich. 439, 97 Am. St. Rep. 489.

**639. 4. Tenant Favored. —** *Gunderson v. Kennedy*, 104 Ill. App. 117; *Morrison v. Sehn*, 90 Mo. App. 76; *Couch v. Welsh*, 24 Utah 36, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 639.

**6. Articles Constituting Part of Realty. —** A corncrib standing on posts sunk in the earth to a depth of fifteen inches. *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314.

Iron gutters on roof, water pipes in the ground, cement walk. *Wright v. Du Bignon*, 114 Ga. 765.

Boilers built into the walls of the house, electric wiring, pipes, and refrigerating machinery. *Matter of New York*, 101 N. Y. App. Div. 527, affirmed 182 N. Y. 281.

An addition to the leased building, which cannot be removed without leaving the latter badly in need of repair. *Holmes v. Standard Pub. Co.*, (N. J. 1903) 55 Atl. Rep. 1107.

**640. 1. Articles Not Part of Realty, but Merely Chattels. —** A blacksmith shop supported on runners, brought to the premises by the tenant, and remaining on the runners. *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314, affirming 105 Ill. App. 510.

**642. 2. Trade Fixtures Are Removable. —** *Colorado. — Updegraff v. Lesem*, 15 Colo. App. 297; *Royce v. Latshaw*, 15 Colo. App. 420.

*Illinois. —* *Baker v. McClurg*, 96 Ill. App. 165, affirmed 198 Ill. 28; *Dreiske v. People's Lumber Co.*, 107 Ill. App. 285; *Ward v. Earl*, 86 Ill. App. 635.

*Indiana. —* *Gordon v. Miller*, 28 Ind. App. 612.

*Iowa. —* *Union Terminal Co. v. Wilmer, etc.*, R. Co., 116 Iowa 392.

*Maryland. —* *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278.

*Mississippi. —* *Winner v. Williams*, 82 Miss. 669.

*New York. —* *Cohen v. Wittemann*, 109 N. Y. App. Div. 338, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642.

*Utah. —* *Couch v. Welsh*, 24 Utah 36.

*Virginia. —* *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682.

**Intention of Tenant. —** See *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278; *Conde v.*

*Lee*, 55 N. Y. App. Div. 401, affirmed 171 N. Y. 662; *Straight v. Mahoney*, 16 Pa. Super. Ct. 155.

**Georgia Statute Limited to Trade Fixtures. —** *Wright v. Du Bignon*, 114 Ga. 765.

**643. 1. Removal Must Not Injure Realty. —** *Cohen v. Wittemann*, 109 N. Y. App. Div. 338, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642.

**Injury Must Be Material. —** *Bernheimer v. Adams*, 70 N. Y. App. Div. 114, affirmed 175 N. Y. 472.

**2. American Decisions to the Contrary. —** *Baker v. McClurg*, 96 Ill. App. 165, affirmed 198 Ill. 28.

**644. 3. Articles Held to Be Trade Fixtures. —** A large ice box and wainscoting put in a room used as a meat market. *Ward v. Earl*, 86 Ill. App. 635.

Counters and shelves in a drug store, fastened in place so as to be removed readily. *Roth v. Collins*, 109 Iowa 501.

Boilers. *Winner v. Williams*, 82 Miss. 669.

A greenhouse and heating apparatus, resting on the ground. *Royce v. Latshaw*, 15 Colo. App. 420.

A scenic railway built on brick piers, together with cars and machinery. *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278.

**Articles Substituted by Lessee. —** *Ashby v. Ashby*, 59 N. J. Eq. 536.

**647. 3. A Water-closet put in an office is a domestic fixture. —** *Hayford v. Wentworth*, 97 Me. 347.

**Annexations Held Not Removable. —** Servant's room attached to house, gutters on roof, water pipes under ground, cement walks. *Wright v. Du Bignon*, 114 Ga. 765.

**648. 1. Removal Must Be During Term. —** *Stevens v. Burnham*, 62 Neb. 672; *Donnelly v. Frick, etc., Co.*, 207 Pa. St. 597.

**Reasonable Time After Expiration of Term. —** See *Gartland v. Hickman*, 56 W. Va. 75.

**2. Before Surrender of Premises. —** *Van Vleet v. White*, 66 N. Y. App. Div. 14; *Mueller v. Chicago, etc., R. Co.*, 111 Wis. 300.

**649. 1. Tenant Holding Over Against Landlord's Consent Has No Right of Removal. —** *Dreiske v. People's Lumber Co.*, 107 Ill. App. 285.

**650. 1. Tenancy of Uncertain Duration. —** *Updegraff v. Lesem*, 15 Colo. App. 297.

**651. 2. Right Not Lost by Forfeiture of Lease. —** *Updegraff v. Lesem*, 15 Colo. App. 297.

**3. Removal Prevented by Landlord. —** *Young v. Consolidated Implement Co.*, 23 Utah 586.

**651.** (7) *Renewal of Lease.* — See note 4.

**653.** See note 1.

**655.** 3. *Rights of Removal as Affected by Agreement* — *a.* STIPULATIONS GRANTING RIGHTS OF REMOVAL — (1) *In General.* — See note 1.

**656.** (3) *Time of Removal and Loss of Rights by Tenant.* — See note 2.

**657.** See note 1.

**658.** *b.* STIPULATIONS RESTRICTING RIGHTS OF REMOVAL. — See note 1.

**660.** See note 2.

**661.** 5. *Rights of Removal By or Against Third Persons* — *a.* BY PERSONS CLAIMING UNDER TENANT. — See note 3.

*b.* AGAINST PERSONS CLAIMING UNDER LESSOR — (1) *Subsequent Purchasers.* — See note 4.

**662.** (2) *Prior Mortgagees.* — See note 1.

**XIII. FIXTURES IN CONNECTION WITH CONVEYANCE, MORTGAGE, OR SALE OF REALTY** — 1. *Annexations by Grantor or Mortgagor Before Conveyance or Mortgage* — *a.* INDEPENDENT OF AGREEMENT OR INTENTION OF PARTIES — (1) *Rules and Principles Applicable.* — See note 4.

**651.** 4. *Renewal of Lease Terminates Right of Removal.* — *Davis v. Carsley Mfg. Co.*, 112 Ill. App. 112; *Guggel v. Ainley*, 83 Ill. App. 582; *Unz v. Price*, (Ky. 1900) 58 S. W. Rep. 705; *Champ Spring Co. v. Roth Tool Co.*, 103 Mo. App. 103; *Hayes v. Schultz*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 137; *Nieland v. Mahnken*, 89 N. Y. App. Div. 463; *Van Vleck v. White*, 66 N. Y. App. Div. 14; *Spencer v. Commercial Co.*, 30 Wash. 520, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651.

*Renewal of Lease Does Not Terminate Right of Removal.* — *Radey v. McCurdy*, 209 Pa. St. 306; *Baly v. Simonson*, 126 Iowa 716.

*The Rule Does Not Apply* where the new lease is merely to release one of the lessees. *Baker v. McClurg*, 96 Ill. App. 165, affirmed 198 Ill. 28.

*Written Renewal of Oral Lease.* — Where under an oral lease it is expressly agreed that the lessee may remove improvements, the lessee does not lose this right by renewing the lease in writing. *McCarthy v. Trumacher*, 108 Iowa 284.

*Rule Not Applicable to Trade Fixtures.* — *Bernheimer v. Adams*, 70 N. Y. App. Div. 114, affirmed 175 N. Y. 472.

*Fixtures Sold to Tenant.* — Where the fixtures are sold to the tenant, and the landlord agrees not to regard them as fixtures, the tenant's assignee does not lose his rights by taking a new lease. *O'Brien v. Mueller*, 96 Md. 134.

**653.** 1. *Holding Over under Original Lease.* — *Donnelly v. Frick, etc., Co.*, 207 Pa. St. 597; *Young v. Consolidated Implement Co.*, 23 Utah 586, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651; *Spencer v. Commercial Co.*, 30 Wash. 520, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 653. See also *Union Terminal Co. v. Wilmar, etc., R. Co.*, 116 Iowa 392.

**655.** 1. *Contract Giving Lessee Right to Remove.* — *Young v. Consolidated Implement Co.*, 23 Utah 586, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

Where the tenant has the right to remove a building erected by him on leased premises, machinery put in the building does not become part of the realty. *In re Welch*, 108 Fed. Rep. 367.

The fact that the lease, though giving per-

mission to erect a building, is silent as to removal, is not conclusive that the parties intended the building should be removed. *Holmes v. Standard Pub. Co.*, (N. J. 1903) 55 Atl. Rep. 1107.

**656.** 2. *A Tenant Taking a New Lease from the Grantee of the Lessor* may remove all articles which he had the right to remove by agreement with the original lessor, the grantee having notice of such agreement. *Hertzberg v. Witte*, 22 Tex. Civ. App. 320.

**657.** 1. *Reasonable Time Allowed.* — *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61.

**658.** 1. *"Improvements."* — A covenant to leave undisturbed all "improvements made upon the premises" does not include saloon bars fastened to the wall merely to steady them, and beer pumps and pipes attached thereto, it appearing that it was not the intention of the tenant to make a permanent improvement. *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, affirmed 57 N. J. Eq. 347.

**660.** 2. *Improvements Required of Tenant by Lease.* — *Boyd v. Douglass*, 72 Vt. 449, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 660; *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682.

**661.** 3. *Removal by Persons Claiming under Tenant.* — *Ward v. Earl*, 86 Ill. App. 635; *O'Brien v. Mueller*, 96 Md. 134; *Morrison v. Sohn*, 90 Mo. App. 76.

*Rights No Greater than Tenant's.* — *Ozark v. Adams*, 73 Ark. 227.

4. *Notice Immaterial.* — See *Royce v. Latshaw*, 15 Colo. App. 420.

*No Right Against Purchaser Without Notice.* — *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314; *Union Cent. L. Ins. Co. v. Tillery*, 152 Mo. 421, 75 Am. St. Rep. 480.

*A Subsequent Lessee Without Notice* may hold as against the lessee. *Trask v. Little*, 182 Mass. 8.

**662.** 1. *Prior Mortgagee Bound by Agreement for Removal.* — *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61.

4. *Same Rules Apply to Deed and Mortgage.* — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Pfluger v. Carmichael*, 54 N. Y. App. Div. 153; *McCrillis v. Cole*, 25 R. I. 156, 105 Am.

- 662.** A Purchaser at Foreclosure Sale. — See note 5.  
The General Rule Applicable. — See note 6.
- 663.** See note 1.  
Trade Fixtures. — See note 3.  
(2) *Articles and Structures Constituting Part of Realty* — **Motive Power.**  
— See note 4.
- 664.** Other Machinery and Apparatus. — See note 3.
- 666.** Gas Fixtures. — See note 2.  
Water Pipes. — See note 3.
- 667.** Buildings. — See note 1.  
Stoves and Furnaces. — See note 3.  
Steam Heating Apparatus. — See note 4.  
Mirrors. — See note 5.  
Miscellaneous Articles. — See note 6.

St. Rep. 875; Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860.

**662.** 5. Purchaser at Foreclosure Sale. — Williams v. Chicago Exhibition Co., 188 Ill. 19. See also McMillan v. Leaman, 101 N. Y. App. Div. 436.

**6.** Strict Rule in Favor of Realty. — William Firth Co. v. South Carolina L. & T. Co., (C. C. A.) 122 Fed. Rep. 569; Solomon v. Staiger, 65 N. J. L. 617; Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858; McCrillis v. Cole, 25 R. I. 156, 105 Am. St. Rep. 875.

**663.** 1. Articles Annexed Pass with Land. — Taylor v. Plunkett, 4 Penn. (Del.) 467.

**3.** Trade Fixtures Held Removable. — Dodge City Water, etc., Co. v. Alfalfa Land, etc., Co., 64 Kan. 247.

**4.** Engines and Boilers. — Berliner v. Piqua Club Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 470.

**664.** 3. Machinery Held to Be Realty. — Machinery in a cotton mill. William Firth Co. v. South Carolina L. & T. Co., (C. C. A.) 122 Fed. Rep. 569.

Machinery in a laundry plant. Atlantic Safe Deposit, etc., Co. v. Atlantic City Laundry Co., 64 N. J. Eq. 140.

Machinery in a cordage factory, such as breakers, spreaders, twisters, etc. Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. 305.

Pieces of machinery in a sugar mill, which if removed would be only scrap-iron. Swoop v. St. Martin, 110 La. 237.

Heavy machinery in brickworks. Fisk v. People's Nat. Bank, 14 Colo. App. 21.

Cupola and crane bricked into a factory. Lord v. Detroit Sav. Bank, 132 Mich. 510.

Elevator and its appurtenances. Condit v. Goodwin, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312.

**Machines Not Constituting Part of Realty.** — Machinery in a sawmill, attached by screws and bolts but removable without injury to the building. Neufelder v. Third St., etc., R. Co., 23 Wash. 470, 83 Am. St. Rep. 831.

Electric-lighting machinery in a theatre, together with switchboards, chandeliers, and signs. New York L. Ins. Co. v. Allison, 46 C. C. 229.

**666.** 2. Gas Fixtures. — L'Hote v. Fulham, 51 La. Ann. 780; Cosgrove v. Troescher, 62 N. Y. App. Div. 123; Condit v. Goodwin, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312; Hall v. Law Guarantee, etc., Soc., 22 Wash. 305, 79 Am.

St. Rep. 935. *Contra*, Stack v. T. Eaton Co., 4 Ont. L. Rep. 335.

**Gas Logs and Chandeliers** attached to the buildings, specially designed therefor, and necessary to the use of the buildings, are fixtures, as between a mortgagee of the realty and a vendee of the personalty. Cunningham v. Seaboard Realty Co., (N. J. 1904) 58 Atl. Rep. 819; Security Trust Co. v. Temple Co., (N. J. 1904) 58 Atl. Rep. 865; Berliner v. Piqua Club Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 470.

**Electric Light Fixtures** pass by a conveyance of the realty. Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858.

**3. Water Mains** laid in the streets of an addition to a city and connected with the waterworks system are considered as personalty where the purpose of laying them is to improve the waterworks system. Dodge City Water, etc., Co. v. Alfalfa Land, etc., Co., 64 Kan. 247.

**The Plumbing in a Building**, including bath tubs, sinks, waterclosets, basins, pipes, faucets, etc., was held to be realty in McMillan v. Leaman, 101 N. Y. App. Div. 436.

**667.** 1. Buildings. — Commercial Bank v. Pritchard, 126 Cal. 600; Moore v. Moran, 64 Neb. 84; Rotan Grocery Co. v. Dowlin, (Tex. Civ. App. 1903) 77 S. W. Rep. 430.

**3. Stoves and Furnaces.** — Gunderson v. Kennedy, 104 Ill. App. 117; Temple Co. v. Penn Mut. L. Ins. Co., 69 N. J. L. 36.

**A Kitchen Range** resting on a piece of zinc is not part of the realty. Jennings v. Vahey, 183 Mass. 47; Cosgrove v. Troescher, 62 N. Y. App. Div. 123.

**4. Steam Heating Apparatus.** — Young v. Hatch, 99 Me. 465.

**5. Mirrors.** — Security Trust Co. v. Temple Co., (N. J. 1904) 58 Atl. Rep. 865.

**Mirror as Personalty.** — Cranston v. Beck, 70 N. J. L. 145.

**6. Miscellaneous Articles — Part of Realty.** — Shelving and drawers held in place by fastenings let into the walls. Johnston v. Philadelphia Mortg., etc., Co., 129 Ala. 515, 87 Am. St. Rep. 75.

Shelving in a store, made in sections and readily removable without damage. Stack v. T. Eaton Co., 4 Ont. L. Rep. 335.

Counters, shelving, and a desk surrounded by railing. Towson v. Smith, 13 App. Cas. (D. C.) 48.

Heavy dog grates, put in by the mortgagor in

**668.** *b.* AS AFFECTED BY INTENTION OR AGREEMENT OF PARTIES. — See note 1.

Conveyance of Factory by Name. — See note 2.

**669.** Conveyance of "Fixtures." — See note 1.

Collateral Agreement or Transaction. — See note 4.

**670.** 2. Annexations by Mortgagor After Mortgage. — See note 3.

**672.** 3. Annexations by Vendee in Possession. — See notes 1, 2.

Default by Vendor. — See note 4.

**674.** XV. EFFECT OF LEVY OR SALE UNDER EXECUTION — 2. Levy on Articles Annexed to Land — *a.* GENERAL RULE. — See notes 2, 3.

**675.** *b.* ARTICLES REMOVABLE BY AGREEMENT. — See note 1.

Articles Subject to Levy. — See note 2.

**676.** XVI. EFFECT OF ESTOPPEL. — See note 3.

place of ordinary fixed grates. *Monti v. Barnes*, (1901) 1 K. B. 205.

Theatre chairs screwed to the floor, and large mirrors forming part of the decoration of the theatre. *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229.

Stage scenery and theatre chairs specially adapted to building. *Oliver v. Lansing*, 59 Neb. 219.

Nursery trees. *Dubois v. Bowles*, 30 Colo. 44.

**Miscellaneous Articles — Not Part of Realty.** — Ticket boxes, chairs, tools, and a large portable sectional dance floor, stored away when not in use. *Security Trust Co. v. Temple Co.*, (N. J. 1904) 58 Atl. Rep. 865.

Roller shades for windows. *Durkee v. Powell*, 75 N. Y. App. Div. 176.

Curtains, screen doors, window screens, windmill, and hot-water tank. *Hall v. Law Guarantee, etc., Soc.*, 22 Wash. 305, 79 Am. St. Rep. 935.

Carpets, window shades, and ash cans. *Cosgrove v. Troesch*, 62 N. Y. App. Div. 123.

Stage scenery. *New York L. Ins. Co. v. Allison*, 46 C. C. A. 229.

Fittings in a saloon. *Schreyer v. Jordan*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 643.

Heavy ornamental garden vases, and a stepping stone with the mortgagor's name cut thereon. *Pfluger v. Carmichael*, 54 N. Y. App. Div. 153.

Hop press placed in room just large enough to receive it. *Sherrick v. Cotter*, 28 Wash. 25, 92 Am. St. Rep. 821.

**668.** 1. Intention of Parties Controlling. — *Dubois v. Bowles*, 30 Colo. 44.

**2. Mortgage of "Plant and Machinery" — What Not Covered.** — Patterns made in an electro-plating factory, but sent to a foundry to have castings made from them, do not pass under a mortgage covering "the plant and machinery." *McCosh v. Barton*, 2 Ont. L. Rep. 77.

**669.** 1. A Conveyance of "Improvements" includes only articles attached to the realty so as to become permanent fixtures. *Royce v. Latshaw*, 15 Colo. App. 420.

The Term "Improvements" does not include ornamental vases weighing two hundred pounds, placed in the garden. *Pfluger v. Carmichael*, 54 N. Y. App. Div. 153.

**4. Collateral Agreement May Control.** — *Tenniswood v. Smith*, 72 Ark. 500; *Richards v. Gilbert*, 116 Ga. 382; *Adams v. Tully*, 164 Ind. 292; *Durkee v. Powell*, 75 N. Y. App. Div. 176.

**670.** 3. Annexations by Mortgagor After Mortgage Given. — *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Berliner v. Piqua Club Assoc.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 470. See also *McMillan v. Leaman*, 101 N. Y. App. Div. 436.

**672.** 1. Annexations by Vendee in Possession. — *Seiberling v. Miller*, 207 Ill. 443, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 672; *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619; *Morley v. Quimby*, 132 Mich. 140; *Chandler v. Harnell*, 57 N. Y. App. Div. 305; *Andrews v. Powers*, 66 N. Y. App. Div. 216.

**Priority of Vendor over Subsequent Mortgagees of Chattels.** — Where the vendor of land is to be entitled to all improvements and fixtures on default by the vendee, his rights are superior to those of a subsequent chattel mortgagee who has notice of the contract. *Church v. Lapham*, 94 N. Y. App. Div. 550.

**Vendee in Possession under Option Contract May Remove Articles Annexed.** — *Alberson v. Elk Creek Gold Min. Co.*, 39 Oregon 552.

**2. Vendee's Rights Same as Mortgagor's.** — *Gunderson v. Kennedy*, 104 Ill. App. 117.

**4. Default by Vendor.** — *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619.

**674.** 2. Articles Annexed Not Subject to Levy. — *Off v. Finkelstein*, 200 Ill. 43, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674.

**3. Rule in Case of Grant Applicable.** — *Giddings v. Freedley*, 63 C. C. A. 85.

**675.** 1. Articles Annexed under Agreement for Removal. — *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep. 61.

**2. Articles Subject to Levy as Personalty.** — Wheelbarrows, tool boxes, oil tanks, loose boards and planks, crowbars, shovels, and pallets used in brickmaking. *Hillebrand v. Nelson*, (Neb. 1901) 95 N. W. Rep. 1068.

Telephone poles and wires erected in a highway by permission of the municipality. *Readfield Telephone, etc., Co. v. Cyr*, 95 Me. 287.

**Articles Necessary to Factory.** — It has been held that the main belt transmitting the power in a marble mill, is not subject to levy as personal property. *Giddings v. Freedley*, 63 C. C. A. 85.

**676.** 3. By Giving Chattel Mortgage. — *Gordon v. Miller*, 28 Ind. App. 612.

**By Suffering Sale.** — *Hibernia Nat. Bank v. Sarah Planting, etc., Co.*, 107 La. 650; *W. J. Adams Mach. Co. v. Newman*, 107 La. 702.



**677.** See note 2.

**680. XVIII. REMEDIES — 3. Replevin — General Rule. — See note 1.**  
**Articles Retaining Personal Character. — See note 3.**  
**Effect of Wrongful Severance. — See note 4.**

**682. FLAGGING. — See note 1.**  
**[FLAX. — See note 3a.]**

**683. FLOAT. — See note 2.**  
**FLOATABLE STREAMS. — See note 3.**  
**FLOATING DEBT. — See note 5.**  
**FLOATING SECURITY. — See note 6.**

**677. 2. By Declarations. — Nelson v. Howison, 122 Ala. 573.**

**Estoppel by Conduct. —** A lessor who encourages a lessee to buy fixtures from a prior lessee is estopped to deny his right to remove them. *Morrison v. Sohn*, 90 Mo. App. 76.

**Failure to Give Notice of the Claim** by one who had put plumbing into a building under an agreement with the mortgagor that it should remain his property till paid for, estops the claimant as against a purchaser at the foreclosure sale, where such claimant was present at the salesroom on the day of the sale and knew that the property was to be sold. *McMillan v. Leaman*, 101 N. Y. App. Div. 436.

**680. 1. Replevin Does Not Lie for Articles Annexed. —** *Camp v. Charles Thatcher Co.*, 75 Conn. 165.

**Question to Be Settled by Evidence. —** *Contra*, *Bridges v. Thomas*, 8 Okla. 620.

**3. Articles Remaining Personalty by Agreement. —** *Adams v. Tully*, 164 Ind. 292; *Page v. Urlick*, 31 Wash. 601, 96 Am. St. Rep. 924.

**4. Wrongful Severance. —** *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619.

**682. 1.** See *New York v. Brown*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 218.

**3a. Flax Is Grain** within a warehouse statute providing for the protection of grain. *State v. Cowdery*, 79 Minn. 94.

**683. 2.** The *New York Canal Law* defines *float* as including every boat, vessel, raft, or floating thing navigated on the canal or moved thereupon under the direction of a master. *Wagner v. Buffalo, etc., Transit Co.*, 59 N. Y. App. Div. 419.

**3. Floatable Stream. —** *Parker v. Hastings*, 123 N. Car. 671; *Hutton v. Webb*, 126 N. Car. 897.

**5. Floating Debt. —** *Huron v. Second Ward Sav. Bank*, (C. C. A.) 86 Fed. Rep. 272; *German Ins. Co. v. Manning*, 95 Fed. Rep. 610.

**6. Floating Security. —** See *In re Yorkshire Woolcombers Assoc.*, (1903) 2 Ch. 284; *Wallace v. Evershed*, (1899) 1 Ch. 891; *Illingworth v. Houldsworth*, (1904) A. C. 355.

## FLOODS.

By H. W. HOYE.

**687. II. LIABILITY FOR FLOODING LAND — 1. By the Obstruction or Diversion of Water — a. STREAMS AND SURFACE WATER DISTINGUISHED — To**  
**Constitute a Watercourse. — See note 3.**

**Overflow of Streams. — See note 5.**

**688. See note 1.**

**b. WATERCOURSES — (1) Ordinary Floods — (a) Obstructing Streams**  
**— aa. GENERAL PRINCIPLES — Duty to Study Habits of Stream. — See note 3.**

**687. 3. Watercourse Defined. —** *Sanguinetti v. Pock*, 136 Cal. 466, 89 Am. St. Rep. 169; *Ribordy v. Murray*, 177 Ill. 134; *Schwartz v. Nie*, 29 Ind. App. 329; *Maxwell v. Shirts*, 27 Ind. App. 529, 87 Am. St. Rep. 268; *Erwin v. Erie R. Co.*, 98 N. Y. App. Div. 402; *Wolf v. Crothers*, 21 Pa. Co. Ct. 627; *Kislinski v. Gilboy*, 19 Pa. Super. Ct. 453; *Neal v. Ohio River R. Co.*, 47 W. Va. 316; *Blohowak v. Grochoski*, 119 Wis. 189.

**5. Flood Water Considered Part of Watercourse. —** *Fordham v. Northern Pac. R. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181, quot-

ing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 107 Am. St. Rep. 860.

**688. 1.** *Fordham v. Northern Pac. R. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729.

**3. Duty to Study Habits of Stream. —** *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553; *Southern R. Co. v. Plott*, 131 Ala. 312; *Houghtaling v. Chicago G. W. R. Co.*, 117 Iowa 540; *Fordham v. Northern Pac. R. Co.*, 30 Mont. 421, 104 Am. St. Rep. 729; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 181. See also *Denison, etc., R. Co. v. Barry*, 98 Tex. 248; *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 72 Am. St. Rep. 784.

**689.** *bb.* DAMS. — See note 1.

**690.** *cc.* INSUFFICIENT BRIDGES AND CULVERTS. — See note 2.

**691.** See note 2.

**A Municipal Corporation Is Liable.** — See note 3.

**692.** *cc.* BOOMS — Boom Companies Not Insurers Against Injuries to Riparian Owners. — See note 3.

**693.** Log Jams. — See note 1.

**Erection of Booms.** — See note 2.

**694.** See note 1.

(b) Diverting Streams — *aa.* CHANGING BED OF STREAM. — See note 2.

*bb.* INTERFERENCE WITH NATURAL BARRIERS. — See note 3.

**695.** *cc.* DIVERTING THE FLOW OF FLOOD WATER. — See notes 1, 2.

**689.** 1. Dams. — *Alabama.* — Southern R. Co. v. Plott, 131 Ala. 312.

*Illinois.* — Ribordy v. Murray, 177 Ill. 134.

*Indiana.* — Maxwell v. Shirts, 27 Ind. App. 529, 87 Am. St. Rep. 268.

*Kentucky.* — Banks v. Frazier, 111 Ky. 909.

*Minnesota.* — Alkin v. St. Croix Lumber Co., 88 Minn. 119.

*Mississippi.* — Liles v. Cawthorn, 78 Miss. 559.

*Oregon.* — Richmond v. Bloch, 36 Oregon 590.

*Pennsylvania.* — Lynch v. Troxell, 207 Pa. St. 162.

*Tennessee.* — Harmon v. Carter, (Tenn. Ch. 1900) 59 S. W. Rep. 656; Coleman v. Bennett, 111 Tenn. 705.

*Texas.* — Hall v. Austin, 20 Tex. Civ. App. 59; Ennis v. Gilder, 32 Tex. Civ. App. 351.

*West Virginia.* — Uhl v. Ohio River R. Co., 56 W. Va. 494, 107 Am. St. Rep. 860.

*Canada.* — Hart v. McMullin, 32 Nova Scotia 340, affirmed 30 Can. Sup. Ct. 245.

**Municipality Liable for Damage from Flashboards.** — Southeast v. New York, 96 N. Y. App. Div. 598.

**Riparian Owner May Protect Land from Floods.** — Marotte v. Dubeau, 16 Quebec Super. Ct. 151.

**690.** 2. Insufficient Bridges, Culverts, etc. — *United States.* — Hagge v. Kansas City St. R. Co., 104 Fed. Rep. 391.

*Alabama.* — Birmingham R., etc., Co. v. Doss, 131 Ala. 177.

*Iowa.* — Vyse v. Chicago, etc., R. Co., 126 Iowa 90; Houghtaling v. Chicago G. W. R. Co., 117 Iowa 540.

*Michigan.* — Morley v. Buchanan, 124 Mich. 128.

*Missouri.* — Edwards v. Missouri, etc., R. Co., 97 Mo. App. 103.

*Nebraska.* — Chicago, etc., R. Co. v. Andreesen, 62 Neb. 456.

*South Carolina.* — Jones v. Seaboard Air Line Co., 69 S. Car. 181, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690; Lampley v. Atlantic Coast Line R. Co., 63 S. Car. 462.

*Texas.* — Texas, etc., R. Co. v. Whitaker, 36 Tex. Civ. App. 571; Bell v. Missouri, etc., R. Co., 36 Tex. Civ. App. 569; San Antonio, etc., R. Co. v. Gurley, (Tex. Civ. App. 1904) 83 S. W. Rep. 842; Gulf, etc., R. Co. v. Provo, (Tex. Civ. App. 1904) 84 S. W. Rep. 275; Denison, etc., R. Co. v. Barry, 98 Tex. 248; Gulf, etc., R. Co. v. Steele, 29 Tex. Civ. App. 328; Mis-

souri, etc., R. Co. v. McGregor, (Tex. Civ. App. 1902) 68 S. W. Rep. 711.

*Canada.* — Robitaille v. Canadian Pac. R. Co., 15 Quebec Super. Ct. 246.

**691.** 2. Erections by Legislative Authority. — Hornby v. New Westminster, etc., R. Co., 6 British Columbia 588.

**3. Liability of Municipal Corporations.** — Arndt v. Cullman, 132 Ala. 540, 90 Am. St. Rep. 922.

**692.** 3. Boom Companies Not Insurers. — Pickens v. Coal River Boom, etc., Co., 51 W. Va. 445, 90 Am. St. Rep. 819; Hunter v. Grande Ronde Lumber Co., 39 Oregon 448; Ward v. Grenville Tp., 32 Can. Sup. Ct. 510, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692-694; Neely v. Peter, 5 Ont. L. Rep. 381, affirming 4 Ont. L. Rep. 293. *Contra*, Watkinson v. McCoy, 23 Wash. 372.

**693.** 1. Delay in Breaking Jams. — Ward v. Grenville Tp., 32 Can. Sup. Ct. 510, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692-694.

**Liabile Where Jam Caused by Negligence.** — Watkins v. Dorris, 24 Wash. 636.

**2. Alabama Lumber Co. v. Keel,** 125 Ala. 603, 82 Am. St. Rep. 265; Baumgartner v. Sturgeon River Boom Co., 120 Mich. 321; Hueston v. Mississippi, etc., Boom Co., 76 Minn. 251.

**694.** 1. Injuries from Erection of Booms — **Charter Will Not Protect.** — Baumgartner v. Sturgeon River Boom Co., 120 Mich. 321; Gravel v. Little Falls Imp., etc., Co., 74 Minn. 416; Hueston v. Mississippi, etc., Boom Co., 76 Minn. 251.

**2. Liability for Directing Flow of Streams — Kentucky.** — Illinois Cent. R. Co. v. Bom, (Ky. 1903) 76 S. W. Rep. 352.

*North Carolina.* — Briscoe v. Young, 131 N. Car. 386.

*Oregon.* — Oldenburg v. Oregon Sugar Co., 39 Oregon 564.

*Texas.* — San Antonio, etc., R. Co. v. Gurley, (Tex. Civ. App. 1904) 83 S. W. Rep. 842.

*Washington.* — Neal v. Ohio River R. Co., 47 W. Va. 316.

**3. Removal of Natural Barrier.** — Craft v. Norfolk, etc., R. Co., 136 N. Car. 49; Ward v. Ford, 58 S. Car. 557.

**695.** 1. Places Washed Away May Be Filled In by a riparian proprietor where an extraordinary flood has changed the course of a stream. York County v. Rolls, 27 Ont. App. 72.

**2. Riparian Owner Cannot Divert Flood Water upon Land of Another.** — Canadian Pac. R. Co. v.

- 695.** (2) *Extraordinary Floods* — (a) *No Liability Generally.* — See note 3.
- 696.** See note 1.  
Whether a Flood Was of Such an Extraordinary Character. — See note 3.
- 697.** (b) *When Defendant Is Also Negligent.* — See note 1.
- 698.** 3. *By Escape or Discharge of Collected Water* — *a. LIABILITY FOR ESCAPE* — (2) *Rule in the United States.* — See note 4.
- 699.** See note 1.  
The Degree of Care and Foresight Which It Is Necessary to Use. — See note 3.
- 701.** *b. LIABILITY FOR WILFUL DISCHARGE.* — See note 2.
- 702.** So if the Owners of an Irrigating Ditch. — See note 1.  
4. *Remedies* — *b. DAMAGES* — (2) *Recoverable by Action* — (a) *When Cause of Action Accrues* — *aa. IN GENERAL.* — See note 5.  
*Injury Must Be Sustained.* — See note 6.
- 703.** *bb. PERMANENT AND TEMPORARY INJURIES DISTINGUISHED* — *Permanent Injuries Recoverable in One Action.* — See note 1.  
(b) *Who May Recover* — *aa. SUBSEQUENT PURCHASERS* — *When Injury Is Permanent.* — See note 5.  
*When Injury Is Temporary.* — See note 6.
- 704.** (c) *Against Whom Recovery May Be Had* — *aa. VENDOR AND VENDEE* — *Liability of Vendee.* — See note 5.
- 705.** *dd. JOINT AND SEVERAL TORTFEASORS* — *When They Have Acted in Conjunction.* — See note 4.
- 707.** (d) *Measure of Damage and Elements of Recovery* — *aa. IN GENERAL* — *Nominal Damages.* — See note 1.
- 708.** *bb. MODE OF COMPUTATION* — (aa) *Injury to Land* — *If the Land Has Been Permanently Injured.* — See note 1.

McBryan, 6 British Columbia 136, reversed 29 Can. Sup. Ct. 359.

**695.** 3. *Extraordinary Floods* — *Bridges and Culverts* — *Indian Territory.* — Kansas City, etc., R. Co. v. Williams, 3 Indian Ter. 352.

**696.** 1. *Dams.* — Palmyra v. Waverly Woolen Co., 99 Me. 134.

3. *Character of Storm a Question of Fact.* — Vyse v. Chicago, etc., R. Co., 126 Iowa 90; Patterson v. Illinois Cent. R. Co., (Miss. 1901) 29 So. Rep. 93; Temple v. St. Louis, etc., R. Co., 83 Mo. App. 64; Berninger v. Sunbury, etc., R. Co., 203 Pa. St. 516; Jones v. Seaboard Air Line R. Co., 67 S. Car. 181; Bell v. Missouri, etc., R. Co., 36 Tex. Civ. App. 569.

*Freshet May Be Extraordinary Though Not Unprecedented.* — Palmyra v. Waverly Woolen Co., 99 Me. 134.

**697.** 1. *Defendant's Negligence the Proximate Cause.* — Vyse v. Chicago, etc., R. Co., 126 Iowa 90; Albers v. San Antonio, etc., R. Co., 36 Tex. Civ. App. 186.

**698.** 4. *Rule in Minnesota.* — See Gemblor v. Echterhoff, (Tex. Civ. App. 1900) 57 S. W. Rep. 313.

*Rule in Texas.* — See Texas, etc., R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631.

**699.** 1. *Rule in United States Generally* — *Negligence Must Be Shown.* — Murphy v. Gillum, 73 Mo. App. 487. *Contra*, Texas, etc., R. Co. v. O'Mahoney, (Tex. Civ. App. 1899) 50 S. W. Rep. 1049.

3. *The Measure of Care Demanded.* — See Davis v. Fry, 14 Okla. 340.

**701.** 2. *Liability for Wilful Discharge of Water.* — Frisbie v. Cowen, 18 App. Cas. (D. C.) 381; Throop v. Griffin, 77 Ill. App. 505. See also Noyes v. Cosselman, 29 Wash. 635, 92

Am. St. Rep. 937; Schwartz v. Nie, 29 Ind. App. 329.

**702.** 1. *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343, 72 Am. St. Rep. 784. See also Crowder v. McDonnell, 21 Mont. 367.

5. *Cause of Action* — *Accrues When.* — Gulf, etc., R. Co. v. Provo, (Tex. Civ. App. 1904) 84 S. W. Rep. 275.

6. *Chicago, etc., R. Co. v. Andreesen*, 62 Neb. 456.

**703.** 1. *When Injury Is of a Permanent Character.* — See Platt v. Curtiss, 89 Ill. App. 575.

5. See Gulf, etc., R. Co. v. Provo, (Tex. Civ. App. 1904) 84 S. W. Rep. 275.

6. *Subsequent Purchasers* — *Right of Action.* — Crowder v. McDonnell, 21 Mont. 367.

**704.** 5. *A Vendor of Land Bordering on a Stream May Recover from the Vendee* for any floods caused by dams constructed by the vendee, where the deed provides that any damages caused by the construction of such dams shall be assessed by arbitrators and paid by the vendee. Hamelin v. Bannerman, 31 Can. Sup. Ct. 534.

**705.** 4. *Liability of Joint Tortfeasors.* — Coleman v. Bennett, 111 Tenn. 705.

**707.** 1. *Nominal Damages.* — Kennedy v. Murphy, 112 Ill. App. 607; Chaffin v. Fries Mfg., etc., Co., 135 N. Car. 95.

**708.** 1. *When Injury to Land Is Permanent* — *Georgia.* — See Southern R. Co. v. Morris, 119 Ga. 234.

*Illinois.* — Sanitary Dist. v. Herbert, 108 Ill. App. 532; Sanitary Dist. v. Pearce, 110 Ill. App. 592.

*Indiana.* — Baltimore, etc., R. Co. v. Quillen, 34 Ind. App. 330, 107 Am. St. Rep. 158.

**708.** If the Land Is Merely Temporarily Injured. — See note 2.

**709.** (bb) Destruction of or Injury to Crops — Damages for the Destruction of a Crop. — See note 1.

When the Crop Is More or Less Matured. — See note 3.

**710.** 5. Defenses — a. EASEMENT by PRESCRIPTION. — See note 2.

**712.** e. FORMER RECOVERY — When Cause of Action Is Entire. — See note 4.

f. STATUTE OF LIMITATIONS. — See note 7.

**713.** g. NECESSITY OF NOTICE OR DEMAND. — See note 3.

**714.** h. CONTRIBUTORY NEGLIGENCE — (1) *In Not Preventing or Limiting the Damage* — Cutting Ditches. — See note 3.

**720.** V. LIABILITY OF RAILROAD COMPANIES — 1. For Injuries to Passengers and Employees — a. DUTY TO SECURE TRACKS AGAINST THE EFFECTS OF ORDINARY FLOODS — (1) *In General* — Duty to Passengers. — See note 2.

**721.** (2) *Bridges and Waterways* — In the Location and Erection of Bridges and Trestles. — See note 1.

b. ACCIDENTS CAUSED BY EXTRAORDINARY FLOODS — (1) *In General*. — See note 3.

**722.** 2. As Carriers of Goods — a. FOR LOSS OF OR DAMAGE TO GOODS — (2) *Loss or Damage from Extraordinary Floods* — (a) *In General*. — See note 1.

(b) When Carrier's Negligence Has Exposed Goods to Peril — Proximate and Remote Causes. — See note 4.

**723.** b. FOR DELAY IN TRANSPORTATION — (3) *Delay in Transit* — (a) *In General*. — See note 3.

**724.** [FLOTATION. — See note 1a.]

**725.** [FLUSHING. — See note 3a.]

*Massachusetts.* — Rourke v. Central Massachusetts Electric Co., 177 Mass. 46.

*Minnesota.* — Hueston v. Mississippi, etc., Boom Co., 76 Minn. 251.

*Missouri.* — St. Louis Trust Co. v. Bambrick, 149 Mo. 560.

*North Carolina.* — See Briscoe v. Young, 131 N. Car. 386.

*Tennessee.* — Coleman v. Bennett, 111 Tenn. 705. See also Atlanta, etc., R. Co. v. Higdon, 111 Tenn. 121.

*Texas.* — Hall v. Austin, 20 Tex. Civ. App. 59; Texas, etc., R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631.

**708.** 2. Where Injury Only Temporary. — Post v. Merritt, 85 N. Y. App. Div. 239; Jones v. Kramer, 133 N. Car. 446.

**709.** 1. Destruction of Crops — Measure of Damage. — Larson v. Lammers, 81 Minn. 239.

3. When Crop Is Growing. — See Lampley v. Atlantic Coast Line R. Co., 63 S. Car. 462.

**710.** 2. Easement by Prescription. — Although a dam may have remained unchanged in height for twenty years, yet if, during that time, by reason of a change in using the water, it caused the filling up of the bed of the stream with sand, injuring and damaging the plaintiff's land by percolation and seeping of the water, this is an invasion of the plaintiff's land and he may recover for the damages sustained. Carrington v. Brooks, 121 Ga. 250.

Right Not Lost by Failure to Repair. — Hall v. State, 72 N. Y. App. Div. 360.

**712.** 4. Clark v. Lanier, 104 Ga. 184.

7. Statute Runs from Time of Injury. — Daneri

v. Southern California R. Co., 122 Cal. 507; Ludlow Mfg. Co. v. Indian Orchard Co., 177 Mass. 61; Erwin v. Erie R. Co., 98 N. Y. App. Div. 402.

New Injuries Caused by Rebuilding Dam. — Lynch v. Troxell, 207 Pa. St. 162.

**713.** 3. Necessity of Notice or Demand. — Lynch v. Troxell, 207 Pa. St. 162. See also Pearl v. Benton Tp., 131 Mich. 275.

**714.** 3. Raleigh v. Clark, 114 Ky. 732; Filiatrault v. La Corporation, etc., 23 Quebec Super. Ct. 62.

**720.** 2. Duty in Constructing Tracks. — Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134.

**721.** 1. See Missouri, etc., R. Co. v. Davidson, 25 Tex. Civ. App. 134.

3. Company Not Liable for Effects of Extraordinary Storms. — Herring v. Chesapeake, etc., R. Co., 101 Va. 778.

**722.** 1. Heavy Dew Does Not Excuse Carrier. — Missouri, etc., R. Co. v. Truskett, (C. C. A.) 104 Fed. Rep. 728, affirmed 186 U. S. 480.

4. Proximate and Remote Causes. — Grier v. St. Louis Merchant's Bridge Terminal R. Co., 108 Mo. App. 565; Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229.

**723.** 3. Delay in Transit — Extraordinary Flood. — See Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 229.

**724.** 1a. Flotation. — As to what constitutes a flotation of mining claims in English land, see Torva Exploring Syndicate v. Kelly, (1900) A. C. 612.

**725.** 3a. Flushing Brick Wall — Local Custom. — See Laycock v. Parker, 103 Wis. 161.

- 725.** [FLUTE. — See note 3b.]  
**FLYING SWITCH.** — See note 4.  
**726.** F. O. B. — See note 3.  
**727.** [FOLIE BRIGHTIQUE. — See note 5a.]  
**729.** FOLLOW. — See note 2.  
**FOOD.** — See note 3.  
**730.** FOOT. — See note 2.  
**731.** FOR. — See note 4.  
**738.** Computation of Time. — See note 2.  
**740.** FORCE — FORCIBLE. — See note 2.

**725.** 3b. The word *flute* as used in a patent case was said to convey to the mind the idea of a noticeable depression of some length in a surface. *Schreiber, etc., Mfg. Co. v. Adams Co.*, (C. C. A.) 117 Fed. Rep. 833.

**4.** *Bradley v. Ohio River, etc.*, R. Co., 126 N. Car. 735. See also *Baker v. Kansas City, etc.*, R. Co., 147 Mo. 140.

**726.** 3. F. O. B. — See *J. K. Armsby Co. v. Blum*, 137 Cal. 552; *Tustin Fruit Assoc. v. Earl Fruit Co.*, (Cal. 1898) 53 Pac. Rep. 697; *Rose v. Weinberger*, 108 Ga. 533; *Consolidated Coal Co. v. Schneider*, 163 Ill. 393; *Fairbanks Midvale Min., etc., Co.*, 105 Mo. App. 653, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 726; *Dannemiller v. Kirkpatrick*, 201 Pa. St. 218.

**727.** 5a. *Folie Brightique* has been defined as a form of insanity resulting from Bright's disease. *Matter of McKean*, (Surrogate Ct.) 31 Misc. (N. Y.) 703.

**729.** 2. Following Any Occupation — Insurance Law. — See *Monahan v. Supreme Lodge, etc.*, 88 Minn. 224.

**3.** Food Includes Drink — Pennsylvania Adulteration Act. — *Com. v. Kebort*, 26 Pa. Super. Ct. 584.

**Includes Coffee.** — The word *food* in the Ohio Pure Food Law includes all articles used as food or drink by man, whether simple, mixed, or compound, and in this case was held to in-

clude coffee. *Arbuckle v. Blackburn*, (C. C. A.) 113 Fed. Rep. 622.

**But Not Alcoholic Liquors.** — The word *food* in an adulteration statute held not to include alcoholic liquors. *State v. Meek*, 26 Wash. 405.

**730.** 2. Foot Frontage Rule. — See *Matter of Klock*, 30 N. Y. App. Div. 24. And see *infra*, FRONT

**731.** 4. For in the Sense of "with Respect to." — *Western Ranches v. Custer County*, 28 Mont. 278.

**For or in Behalf of.** — *Donovan v. Welch*, 11 N. Dak. 113.

**For the Use of the Government.** — See *The Santo Domingo*, 119 Fed. Rep. 386.

**738.** 2. Computation of Time. — *Leavitt v. Bell*, 55 Neb. 57.

**Only One Publication.** — *Leavitt v. Bell*, 55 Neb. 57. See also *State v. Cherry County*, 58 Neb. 734.

**740.** 2. Actual and Implied Force. — *State v. McLeod*, 97 Me. 80, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740; *State v. Lewis*, 113 Wis. 391.

**Violence and Force as Equivalents.** — See *State v. Lewis*, 113 Wis. 391.

**Force and Compel.** — *Higgins v. Wilmington*, 3 Penn. (Del.) 356.

**Forced Heir — Louisiana Law.** — *Miller v. Miller*, 105 La. 257.

**Insurance in Force.** — *Dimick v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367.

## FORCIBLE ENTRY AND DETAINER.

BY BASIL JONES.

- 743.** I. DEFINITION AND GENERAL CONSIDERATIONS. — See note 1.  
 Object of Forcible Entry and Detainer. — See note 2.

**743.** 1. Definition. — *Frantz v. Saylor*, 12 Okla. 282.

**Statutory Definitions.** — *Farley v. Bay Shell Road Co.*, 125 Ala. 184; *Kerr v. O'Keefe*, 138 Cal. 415; *Goad v. Heckler*, 19 Colo. App. 479; *Griffin v. Griffin*, 116 Ga. 754; *Young v. Milward*, 109 Ky. 123; *Cuyler v. Estis*, 64 S. W. Rep. 673, 23 Ky. L. Rep. 1063; *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601; *McCleary v. Crowley*, 22 Mont. 245; *Kennedy v. Dickie*, 27 Mont. 70; *Gore v. Altice*, 33 Wash. 335.

**Forcible Entry Defined.** — See *Williams v. State*, 120 Ga. 488; *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904.

**Forcible Detainer Defined.** — See *McQuiston v. Walton*, 12 Okla. 130.

**Distinguished from Forcible Trespass.** — *State v. Leary*, 136 N. Car. 579.

**2. Object of Action.** — *Brown v. Slater*, 23 App. Cas. (D. C.) 51; *Cuyler v. Estis*, 64 S. W. Rep. 673, 23 Ky. L. Rep. 1063, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743; *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504; *Vidger v. Nolin*, 10 N. Dak. 353; *Anderson v. Ferguson*, 12 Okla. 307; *Goore v. Altice*, 33 Wash. 335. See also *Adkins v. Andrews*, (Neb. 1901) 96 N. W. Rep. 228; *Brown v. Hartshorn*, 12 Okla. 121,

**744.** Distinction Between Foreible Entry and Foreible Detainer. — See notes 1, 2.

**II. ORIGIN AND HISTORY.** — See notes 3, 4.

**745.** See notes 1, 2.

Criminal Prosecution. — See notes 3, 4.

**III. ELEMENTS OF FORCIBLE ENTRY AND DETAINER** — 1. The Possession Necessary — *a.* IN GENERAL. — See note 5.

**748.** *b.* WHAT CONSTITUTES POSSESSION — (1) *In General.* — See note 1.

Statutes Constitutional. — *Morris v. Healy Lumber Co.*, 33 Wash. 451.

**744.** 1. Foreible Entry and Foreible Detainer Different. — *Roth v. State*, 89 Md. 524. See also *Griffin v. Griffin*, 116 Ga. 754.

2. Foreible Entry Not Essential to Unlawful Detainer. — *Kennedy v. Dickie*, 27 Mont. 70.

The Oklahoma Statute which provides that "every person guilty of using or procuring, encouraging, or assisting another to use any force or violence in entering upon or detaining any lands or possessions of another," etc., is guilty of a misdemeanor, creates and defines two distinct offenses — one for forcibly entering upon or detaining lands of another, and the other for forcibly entering upon or detaining the possession of another. "Lands," as here used, implies title or ownership, while "possession" implies only possessory interests or rights. *Foust v. Territory*, 8 Okla. 541.

3. *Griffin v. Griffin*, 116 Ga. 754, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744. See also *Lobdell v. Keene*, 85 Minn. 90.

Action of Statutory Origin. — *Armstrong v. Mayer*, 60 Neb. 423.

4. *Griffin v. Griffin*, 116 Ga. 754, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744. See also *Roth v. State*, 89 Md. 524.

**745.** 1. *Griffin v. Griffin*, 116 Ga. 754.

2. *Eveleth v. Gill*, 97 Me. 315. See also *Armstrong v. Mayer*, 60 Neb. 423; *Kircher v. Gilmore*, 7 Pa. Dist. 708.

3. Indictment at Common Law for Foreible Entry. — *Bailey v. Blacksher Co.*, (Ala. 1904) 37 So. Rep. 827.

4. Indictment for Foreible Entry and Detainer. — *Williams v. State*, 120 Ga. 488; *State v. Leary*, 136 N. Car. 579; *Com. v. Shindell*, 9 Pa. Dist. 298, 16 Lanc. L. Rev. 407. See also *Eisele v. Oddie*, 128 Fed. Rep. 941; *Peelle v. State*, 161 Ind. 378.

Who Is Liable. — The provision of the *New York* statute making it a misdemeanor for any person to use, procure, encourage, or assist another to use any force or violence in entering upon or detaining any lands or other possessions of another, except in the case and the manner allowed by law, is not applicable to a workman employed to make repairs on a building the title to which is in dispute. *McMorris v. Howell*, 89 N. Y. App. Div. 272.

5. Actual Possession Necessary — *United States*. — See *Clark v. Langenbach*, (C. C. A.) 130 Fed. Rep. 755.

*Arkansas*. — *Towell v. Etter*, 69 Ark. 34.

*California*. — *Knowles v. Crocker Estate Co.*, 125 Cal. 264.

*Illinois*. — *Preston v. Davis*, 112 Ill. App. 636; *Aurner v. Pierce*, 106 Ill. App. 206.

*Kentucky*. — *Cuyler v. Estis*, 64 S. W. Rep.

673, 23 Ky. L. Rep. 1063; *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904.

*Mississippi*. — *Owen v. Monroe County Alliance*, 77 Miss. 500.

*Missouri*. — *Stewart v. Miles*, 80 Mo. App. 24; *Esch v. Hirning*, 80 Mo. App. 570; *Collier v. Green*, 83 Mo. App. 166; *Rochester v. Gate City Min. Co.*, 86 Mo. App. 447; *Lowe v. American Zinc, etc., Co.*, 89 Mo. App. 680.

*Montana*. — *Kennedy v. Dickie*, 27 Mont. 70.

*New Jersey*. — *Funkhauser v. Collopy*, 67 N. J. L. 132.

*New York*. — *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Sarconi v. De Falo*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 780.

*Oklahoma*. — *Dysart v. Enslow*, 7 Okla. 386; *Frantz v. Saylor*, 12 Okla. 282.

*South Dakota*. — *Torrey v. Berke*, 11 S. Dak. 155.

*Tennessee*. — *Clay v. Sloan*, 104 Tenn. 401; *Rook v. Godfrey*, 105 Tenn. 534.

*Washington*. — *McGrew v. Lamb*, 31 Wash. 485.

*New York Statute* — *Forcible Holding Out*. — See *Waterbury v. Deckelmann*, 50 N. Y. App. Div. 434.

*New York Statute* — *Interest in Premises Necessary*. — See *Waterbury v. Deckelmann*, 50 N. Y. App. Div. 434.

*Bona Fide Possession Essential*. — *Buck v. Endicott*, 103 Mo. App. 248.

*Possession under License to Labor for Owner Not Sufficient*. — *Rochester v. Gate City Min. Co.*, 86 Mo. App. 447. See also *Lowe v. American Zinc, etc., Co.*, 89 Mo. App. 680.

*Possession by Suffrance Insufficient*. — *State v. Leary*, 136 N. Car. 579.

*Action Maintainable by Purchaser under Deed of Trust*. — *Wishart v. Gerhart*, 165 Mo. App. 112.

*Clear Right of Possession at Time of Notice to Quit Essential*. — *Dysart v. Enslow*, 7 Okla. 386.

**748.** 1. General Rule as to Sufficient Possession. — *Eisele v. Oddie*, 128 Fed. Rep. 941, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748; *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748; *Crain v. Murry*, 76 Mo. App. 548; *Holladay Coal Co. v. Kirker*, 20 Utah 192.

*Illustrations*. — The conveyance of premises as security for the payment of a loan is not such possession as will authorize the maintenance of an action for forcible detainer where possession has never been taken under the contract to convey. *Aurner v. Pierce*, 106 Ill. App. 206.

*Possession of submerged lands constitutes possession of land emerging therefrom*. *Bussen v. Dickson*, 97 Ill. App. 310.

Pending an appeal by the defendant, the owner of the property has no right during the

**749.** (2) *Fences*. — See note 1.

**750.** (3) *Actual Residence*. — See note 2.

(5) *Possession of Part of Tract*. — See note 4.

(6) *Scrambling Possession*. — See note 6.

**751.** (7) *Abandonment of Possession*. — See note 1.

*d.* POSSESSION OF HEIRS AND LEGAL REPRESENTATIVES. — See note 4.

**752.** See note 1.

*e.* POSSESSION OF TENANTS IN COMMON. — See notes 2, 3.

*f.* POSSESSION OF TENANT. — See note 4.

**753.** See note 1.

*g.* POSSESSION OF A MARRIED WOMAN. — See note 3.

*i.* TITLE NOT INVOLVED. — See note 6.

defendant's temporary absence from the property to take possession thereof and forcibly resist his return. *Lohdell v. Keene*, 85 Minn. 90.

Raising crops during two seasons without interference is sufficient possession. *Crain v. Murry*, 76 Mo. App. 548.

Forcible entry and detainer or unlawful detainer cannot be maintained for land of which the plaintiff has never had possession otherwise than to stretch a wire across it, making no inclosure. *Clay v. Sloan*, 104 Tenn. 401.

Locking the doors of a house and keeping the keys is, in ordinary cases, evidence of actual possession. *Eisele v. Oddie*, 128 Fed. Rep. 941.

**Burden of Proof**. — See *Hammond v. Doty*, 184 Ill. 246; *Clay v. Sloan*, 104 Tenn. 401.

**749. 1. Possession by Means of Fences**. — *Coffey v. Pace*, 106 Ga. 293; *Hammond v. Doty*, 184 Ill. 246.

**750. 2. Actual Residence Unnecessary**. — *Eisele v. Oddie*, 128 Fed. Rep. 941; *Hammond v. Doty*, 184 Ill. 246; *Howard v. Whitaker*, (Ky. 1903) 61 S. W. Rep. 355; *Mansfield v. Northcut*, 112 Tenn. 536. See also *Bromley v. Broyles*, 58 S. W. Rep. 984, 22 Ky. L. Rep. 830.

**4. Part of Tract Only in Actual Possession**. — *Bailey v. Blacksher Co.*, (Ala. 1904) 37 So. Rep. 827; *Nauman v. Burch*, 91 Ill. App. 48; *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 750. See also *Kirby v. Scott*, (Ky. 1903) 73 S. W. Rep. 749; *Eisele v. Oddie*, 128 Fed. Rep. 941.

**6. Scrambling Possession Insufficient**. — *Lohdell v. Keene*, 85 Minn. 90; *Rochester v. Gate City Min. Co.*, 86 Mo. App. 447. See also *State v. Leary*, 136 N. Car. 579.

**751. 1. Agreement to Surrender Signed under Compulsion Does Not Constitute Abandonment**. — *Eisele v. Oddie*, 128 Fed. Rep. 941.

**4. Heirs May Bring**. — See *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396.

**752. 1. Personal Representatives May Bring**. — See *Bulkley v. Sims*, 48 W. Va. 104.

**2. Tenants in Common Against Strangers**. — *Cagwin v. Chicago, etc., R. Co.*, 114 Iowa 129.

**Possession of One Joint Owner is possession of all**. *Billingsley v. Stutler*, 52 W. Va. 92.

**3. One Tenant in Common Against Another**. — *Cagwin v. Chicago, etc., R. Co.*, 114 Iowa 129; *Stewart v. Miles*, 80 Mo. App. 24.

**4. Tenant Must Bring**. — *Floersheim v. Baude*, 110 Ill. App. 536; *Hammel v. Atkinson*, 82 Miss. 465, citing 13 AM. AND ENG. ENCYC. OF LAW

(2d ed.) 752. See also *Kirby v. Scott*, (Ky. 1903) 73 S. W. Rep. 749; *Collier v. Green*, 83 Mo. App. 166; *Clark v. Langenbach*, (C. C. A.) 130 Fed. Rep. 755.

**753. 1. After Expiration of Tenancy**. — *Crain v. Murry*, 76 Mo. App. 548.

**3. Funkhauser v. Colloty**, 67 N. J. L. 132, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753, but holding that a married woman has no right of action where the actual possession is in her husband.

**6. No Inquiry as to Title** — *United States*. — *Eisele v. Oddie*, 128 Fed. Rep. 941; *Clark v. Langenbach*, (C. C. A.) 130 Fed. Rep. 755.

*Alabama*. — *Farley v. Bay Shell Road Co.*, 125 Ala. 184; *Fearn v. Beirne*, 129 Ala. 435.

*California*. — *Kerr v. O'Keefe*, 138 Cal. 415.

*Colorado*. — *Smith v. Soper*, 12 Colo. App. 264.

*District of Columbia*. — *Brown v. Slater*, 23 App. Cas. (D. C.) 51.

*Georgia*. — *Lane v. Williams*, 114 Ga. 124; *Griffin v. Griffin*, 116 Ga. 754.

*Illinois*. — *Hammond v. Doty*, 184 Ill. 246; *Roby v. Calumet, etc., Canal, etc., Co.*, 211 Ill. 173; *Merki v. Merki*, 212 Ill. 121. See also *Floersheim v. Baude*, 110 Ill. App. 536.

*Indiana*. — *Peelle v. State*, 161 Ind. 378.

*Indian Territory*. — *Brown v. Woolsey*, 2 Indian Ter. 329; *Hill v. Watkins*, (Indian Ter. 1902) 69 S. W. Rep. 837; *Moore v. Girtten*, (Indian Ter. 1904) 82 S. W. Rep. 848. See also *Hewlett v. Hyden*, (Indian Ter. 1902) 69 S. W. Rep. 839.

*Iowa*. — *Delmonica Hotel Co. v. Smith*, 112 Iowa 659.

*Kansas*. — *Wideman v. Taylor*, 63 Kan. 884, 65 Pac. Rep. 664.

*Kentucky*. — *Bromley v. Broyles*, 58 S. W. Rep. 984, 22 Ky. L. Rep. 830; *Cuyler v. Estis*, 64 S. W. Rep. 673, 23 Ky. L. Rep. 1063; *Terry v. Terry*, 66 S. W. Rep. 1024, 23 Ky. L. Rep. 2242; *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396; *Bush v. Coomer*, 69 S. W. Rep. 793, 24 Ky. L. Rep. 702; *Kirby v. Scott*, (Ky. 1903) 73 S. W. Rep. 749; *Caldwell v. McVean*, (Ky. 1904) 82 S. W. Rep. 992.

*Missouri*. — *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504; *Van Stewart v. Miles*, 105 Mo. App. 242; *Berry v. Fortney*, 81 Mo. App. 284; *Graham v. Conway*, 91 Mo. App. 391.

*Nebraska*. — *Tarpenning v. King*, 60 Neb. 213.

*North Carolina*. — See *State v. Thompson*, 130 N. Car. 680.

**756.** Showing Character or Extent of Possession by Muniments of Title. — See notes 1, 2.

When Right of Possession Involved. — See note 3.

*j.* RIGHT OF POSSESSION NOT INVOLVED. — See note 4.

**757.** Otherwise under Some Statutes. — See note 1.

2. The Force Necessary — *a.* IN GENERAL. — See note 4.

*Oklahoma.* — *Dysart v. Enslow*, 7 Okla. 386; *McClung v. Penny*, 11 Okla. 474; *McQuiston v. Walton*, 12 Okla. 130; *Brown v. Hartshorn*, 12 Okla. 121; *Hackney v. McKee*, 12 Okla. 401; *Jones v. Seawell*, 13 Okla. 711.

*Oregon.* — *Heiney v. Heiney*, 43 Oregon 577.

*South Dakota.* — *Chicago, etc., R. Co. v. Nield*, 16 S. Dak. 370.

*Texas.* — *Renfro v. Harris*, 28 Tex. Civ. App. 58; *Beauchamp v. Runnels*, 35 Tex. Civ. App. 212.

*Washington.* — *McGrew v. Lamb*, 31 Wash. 485, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; *Gore v. Altice*, 33 Wash. 335.

*West Virginia.* — *Bulkley v. Sims*, 48 W. Va. 104, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; *Brumbaugh v. Sterringer*, 48 W. Va. 121.

*Reason of Rule.* — *Eisele v. Oddie*, 128 Fed. Rep. 941.

*Evidence of Title Admissible to Show Purpose of Entry.* — *Wideman v. Taylor*, 63 Kan. 884, 65 Pac. Rep. 664.

*Inability of Party in Possession to Acquire Title No Defense.* — *Sanders v. Thornton*, (C. C. A.) 97 Fed. Rep. 863.

Under the *Illinois* Statute, in an action for forcible detainer, the title to the land cannot be inquired into for any purpose unless the lease was procured by fraud, artifice, or mistake. *Barkman v. Barkman*, 107 Ill. App. 332.

**756. 1. Evidence of Title to Show Character of Possession.** — *Bulkley v. Sims*, 48 W. Va. 104, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754-756. See also *Moore v. Parker*, 59 Neb. 29; *Gladwell v. Hume*, 9 Ohio Cir. Dec. 767, 18 Ohio Cir. Ct. 845; *Jones v. Seawell*, 13 Okla. 711.

*Pleading Abstract of Title — Washington Statute.* — The provision of the Washington statute requiring that the abstract of the plaintiff's title shall be embodied in the complaint does not render the abstract admissible to prove his title. Its purpose is to show the line of his title. *Roberts v. Center*, 26 Wash. 435. See also *McGrew v. Lamb*, 31 Wash. 485.

**2. Evidence of Title to Show Extent of Possession.** — *Bush v. Coomer*, 69 S. W. Rep. 793, 24 Ky. L. Rep. 702; *Terry v. Terry*, 66 S. W. Rep. 1024, 23 Ky. L. Rep. 2242; *Hewlett v. Hyden*, (Indian Ter. 1902) 69 S. W. Rep. 839; *Moore v. Girten*, (Indian Ter. 1904) 82 S. W. Rep. 848; *Bulkley v. Sims*, 48 W. Va. 104, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754-756. See also *Fearn v. Beirne*, 129 Ala. 435; *Kirby v. Scott*, (Ky. 1903) 73 S. W. Rep. 749; *Clark v. Langenbach*, (C. C. A.) 130 Fed. Rep. 755.

**3. Evidence of Title to Show Right of Possession.** — See *Brown v. Hartshorn*, 12 Okla. 121.

**4. No Inquiry as to Right of Possession — California.** — *Kerr v. O'Keefe*, 138 Cal. 415.

*Illinois.* — *Chicago, etc., R. Co. v. Vaughn*, 99 Ill. App. 386.

*Indian Territory.* — See *Quigley v. Stephens*, 3 Indian Ter. 265; *Hunt v. Hicks*, 3 Indian Ter. 275.

*Iowa.* — *Herkimer v. Keeler*, 109 Iowa 680; *Delmonica Hotel Co. v. Smith*, 112 Iowa 659; *Cagwin v. Chicago, etc., R. Co.*, 114 Iowa 129.

*Kentucky.* — *Bromley v. Broyles*, 58 S. W. Rep. 984, 22 Ky. L. Rep. 830; *Cuyler v. Estis*, 64 S. W. Rep. 673, 23 Ky. L. Rep. 1063; *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396; *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904.

*Missouri.* — *Tolbert v. Hendrick*, 77 Mo. App. 272; *Graham v. Womack*, 82 Mo. App. 618; *Van Stewart v. Miles*, 105 Mo. App. 242. See also *Graham v. Conway*, 91 Mo. App. 391.

*Nebraska.* — *Tarpenning v. King*, 60 Neb. 213.

*New York.* — *Crane v. Van Derveer*, 45 N. Y. App. Div. 139.

*Oklahoma.* — *Cope v. Braden*, 11 Okla. 291.

*Washington.* — *McGrew v. Lamb*, 31 Wash. 485. See also *Gore v. Altice*, 33 Wash. 335.

**757. 1. Right to Possession Involved.** — *Floersheim v. Baude*, 110 Ill. App. 536, holding further that proof of the right of possession at the time of suit casts the burden on the other party. See also *Bulkley v. Sims*, 48 W. Va. 104.

**4. Actual Force Necessary — Arkansas.** — *Towell v. Etter*, 69 Ark. 34.

*Colorado.* — *Goad v. Heckler*, 19 Colo. App. 479, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

*Georgia.* — *Griffin v. Griffin*, 116 Ga. 754.

*Indian Territory.* — *Hunt v. Hicks*, 3 Indian Ter. 275.

*Maryland.* — See *Roth v. State*, 89 Md. 524.

*Missouri.* — *Stewart v. Miles*, 80 Mo. App. 24.

*Montana.* — See *McCleary v. Crowley*, 22 Mont. 245.

*New York.* — *Mullen v. Conyngham*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 807; *Vallauri v. Loftus*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 760.

*North Carolina.* — *State v. Leary*, 136 N. Car. 579, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

*Oregon.* — *Slater v. Reed*, 37 Oregon 274; *Twiss v. Boehmer*, 39 Oregon 359.

*Degree of Force.* — "The earlier English statutes, and the earlier English decisions upon them, and many decisions in the states of the United States, define the meaning of the word 'forcible,' in statutes of this kind, as importing the idea of taking possession of land with 'a strong hand,' with 'a multitude of people,' and with 'threats of personal injury to the occupant' sought to be expelled." *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601.

As to the degree of force required under the



**758.** Peaceable Entry by One Entitled to Possession. — See note 1.

**759.** See note 1.

*b.* WHAT CONSTITUTES ACTUAL FORCE — (1) *In General.* — See

note 4.

**760.** (2) *Mere Trespass Insufficient.* — See note 1.

**761.** (3) *Breaking into House.* — See notes 1, 2.

**762.** (5) *Threats and Appearance of Violence.* — See note 1.

**763.** Forcible Detainer. — See note 1.

*c.* ENTRY BY FRAUD OR STEALTH. — See note 2.

*d.* ENTRY AGAINST WILL OF THE POSSESSOR. — See note 3.

**764.** *e.* ACTIONS WITHOUT FORCE. — See note 1.

Alabama statute see *Mallon v. Moog*, 121 Ala. 303.

**Actual and Hostile Force Essential.** — *Riley v. Catron*, (Indian Ter. 1902) 69 S. W. Rep. 908.

**Actual Physical Force Not Essential.** — *Eisele v. Oddie*, 128 Fed. Rep. 941.

**Entry Against "Expressed Will" of Plaintiff Not Essential.** — *Tolbert v. Hendrick*, 77 Mo. App. 272.

**Use of Force After Peaceable Entry Constitutes Forcible Entry.** — *Kerr v. O'Keefe*, 138 Cal. 415. See also *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

**758. 1. Entry Lawful and Peaceable** — *Alabama*. — *Mallon v. Moog*, 121 Ala. 303.

*Arkansas*. — *Towell v. Etter*, 69 Ark. 34.

*Colorado*. — *Goad v. Heckler*, 19 Colo. App. 479.

*Georgia*. — *Griffin v. Griffin*, 116 Ga. 754.

*Kentucky*. — *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904.

*Minnesota*. — *Loddell v. Keene*, 85 Minn. 90.

*Missouri*. — *Stewart v. Miles*, 80 Mo. App. 24; *Wamsanz v. Wolff*, 86 Mo. App. 205.

*Oklahoma*. — See *Frantz v. Saylor*, 12 Okla. 282.

**759. 1. Retaining Possession by Force.** — *Towell v. Etter*, 69 Ark. 34; *Clower v. Maynard*, 112 Ga. 340.

**4. Removal of Plaintiff's Fence.** — See *Mallon v. Moog*, 121 Ala. 303, *distinguishing* *McGonegal v. Walker*, 23 Ala. 361, stated in the original note.

**The Presence or Absence of the Party in Possession Is Immaterial** in determining whether there was force. *Mallon v. Moog*, 121 Ala. 303.

**Inclosure of Property Not Essential.** — *Geoghegan v. Turner*, (Ky. 1904) 82 S. W. Rep. 244.

**Retention by Force After Peaceable Entry.** — See *Moore v. Girten*, (Indian Ter. 1904) 82 S. W. Rep. 848.

**760. 1. Insufficiency of Mere Trespass.** — *Mallon v. Moog*, 121 Ala. 303; *Goad v. Heckler*, 19 Colo. App. 479; *Vallauri v. Loftus*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 760; *State v. Leary*, 136 N. C. 579.

**Alabama — Entry Must Have Been under Claim of Title.** — *Mallon v. Moog*, 121 Ala. 303.

**761. 1. Breaking in During Temporary Absence** of the person entitled to possession is not forcible entry under the *Georgia* statute. *Griffin v. Griffin*, 116 Ga. 754.

2. See *Crain v. Murry*, 76 Mo. App. 548.

**762. 1. Threats and Other Indications of Force.** — *Eisele v. Oddie*, 128 Fed. Rep. 941; *Goad v. Heckler*, 19 Colo. App. 479, *quoting* 13 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 762. See also *Hunt v. Hicks*, 3 Indian Ter. 275; *Vallauri v. Loftus*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 760; *Wegner v. Lubenow*, 12 N. Dak. 95.

**Illustrations.** — To constitute forcible entry, there need be only such a number of persons or show of force as is calculated to deter the person in possession from undertaking to send them away or retain his possession. It is not necessary that the party in possession resist to such an extent that he is actually assaulted. *Williams v. State*, 120 Ga. 488.

**763. 1. Circumstances Constituting Forcible Detainer.** — See *Moore v. Girten*, (Indian Ter. 1904) 82 S. W. Rep. 848.

**2. Fraud or Stealth.** — See *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601.

**3. Actual Force Unnecessary.** — *Hammond v. Doty*, 184 Ill. 246; *Cross v. Campbell*, 89 Ill. App. 489; *Seals v. Williams*, 80 Miss. 234, 92 Am. St. Rep. 601.

**Forcible Entry by One Entitled to Possession — Kentucky Doctrine.** — *Bromley v. Broyles*, 58 S. W. Rep. 984, 22 Ky. L. Rep. 830.

**764. 1. Unlawful Detainer — California.** — *Schnittger v. Rose*, 139 Cal. 656.

*Indian Territory.* — See *Brown v. Woolsey*, 2 Indian Ter. 329.

*Kentucky.* — *Andrews v. Erwin*, (Ky. 1904) 78 S. W. Rep. 902.

*Missouri.* — *Logan v. Byers*, 76 Mo. App. 559; *Stewart v. Miles*, 80 Mo. App. 24; *Tucker v. McClenney*, 103 Mo. App. 318.

*Nebraska.* — See *Thull v. Allen*, (Neb. 1904) 101 N. W. Rep. 1024.

*Ohio.* — *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 465.

*Oklahoma.* — See *Burns v. Noell*, 12 Okla. 133; *Steele v. Noell*, 12 Okla. 137.

*Oregon.* — *Twiss v. Boehmer*, 39 Oregon 359.

*Washington.* — See *Morris v. Healy Lumber Co.*, 33 Wash. 451.

*Wisconsin.* — *Erauchle v. Nothhelfer*, 107 Wis. 457.

**The Fact that the Premises Are Rented for Immoral Purposes.** — *King v. Wilson*, (Neb. 1901) 95 N. W. Rep. 494.

**Action Maintainable by Landlord's Grantee.** — *Tucker v. McClenney*, 103 Mo. App. 318; *Drew v. Mosbarger*, 104 Ill. App. 635.

**Ownership of Premises by Tenant No Defense.** — *Hill v. Watkins*, (Indian Ter. 1902) 69 S. W. Rep. 837.

**Acquisition of Title by Tenant.** — While the tenant is in possession under a lease, he cannot dispute the landlord's title by setting up a

- 765.** Persons in Privity with the Tenant. — See note 1.  
**766.** Relation of Landlord and Tenant Necessary. — See note 1.  
 Purchasers at Judicial and Mortgage Sales. — See note 2.  
**IV. AGAINST WHOM BROUGHT** — 1. In General. — See note 3.  
**767.** 3. Vendee under Contract to Purchase. — See note 5.  
**768.** 7. Owner of Premises. — See note 7.  
**V. FOR WHAT THE ACTION WILL LIE.** — See note 8.  
**769.** VI. NOTICE TO QUIT AND DEMAND FOR POSSESSION — 1. Necessity For.  
 — See notes 1, 2.

title that he, the tenant, had of the date of the creation of the tenancy, or one that he has since acquired. *Barkman v. Barkman*, 107 Ill. App. 332.

**Provision for Extension of Lease at Tenant's Option a Defense.** — *Bard v. Jones*, 96 Ill. App. 370.

**An Option Given to the Landlord to Purchase**, by terms of the lease, property of the tenant on the leased premises does not prevent the maintenance of an action by the landlord for forcible entry and detainer. *Bodwell Water Power Co. v. Old Town Electric Co.*, 96 Me. 117.

**A Forfeiture Occurring Before the Sale of the property** by the lessor cannot be made a ground of forcible entry and detainer by the grantee. *Small v. Clark*, 97 Me. 304.

**Person Having Equitable Rights.** — Where one has acquired equitable rights in the property and to possession and has made improvements thereon his rights may not be determined and cut off in an action of forcible entry and detainer. *Gilmore v. Asbury*, 64 Kan. 383.

**Breach of Implied Conditions Against Gambling on the Premises** is ground for maintaining the action in *Ohio*. *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 456.

**Breach by Landlord of Independent Agreement No Defense.** — *Carmack v. Drum*, 27 Wash. 382.

**Failure of Landlord to Perform Agreement to Make Improvements No Defense.** — *Malick v. Kellogg*, 118 Wis. 405.

**Counterclaim Not Allowed under Idaho Statute.** — *Hunter v. Porter*, (Idaho 1904) 77 Pac. Rep. 434.

**Grantee's Right of Action under Illinois Statute.** — *Mayberry v. Woodard*, 79 Ill. App. 547.

**Acquisition of Right of Way by Railroad from Life Tenant — Right to Acquire Eminent Domain as Defense to Action by Remainderman.** — *Chicago, etc., R. Co. v. Vaughn*, 99 Ill. App. 386.

**Action to Recover Possession of Indian Lands Under Federal Statute.** — *Casteel v. McNeeley*, (Indian Ter. 1901) 64 S. W. Rep. 594.

**765. 1. Subtenants.** — A landlord who has recovered a judgment in an action of forcible entry and detainer against his tenant may, under the writ, dispossess a subtenant not a party to the suit, if the latter has entered pending the suit, but not when he was previously in possession. *People's Bldg., etc., Assoc. v. McElroy*, 79 Ill. App. 266.

**766. 1. Confined to Actions Between Landlord and Tenant.** — *Sanders v. Thornton*, (C. C. A.) 97 Fed. Rep. 863; *Colored Homestead, etc., Assoc. v. Harvey*, (Ky. 1901) 64 S. W. Rep. 676; *Cuyler v. Estis*, 64 S. W. Rep. 673, 23 Ky. L. Rep. 1063; *Logan v. Byers*, 76 Mo. App.

559; *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 465, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

**Lessee of Landlord.** — *Capital Brewing Co. v. Crosbie*, 22 Wash. 269.

**2. Purchasers at Judicial or Mortgage Sales.** — *Smith v. Soper*, 12 Colo. App. 264.

**Action Not Maintainable by Purchaser Before Expiration of Lease.** — *Taylor v. Bell*, 129 Ala. 464.

**3. Person in Possession.** — *Preston v. Davis*, 112 Ill. App. 636; *Loan v. Smith*, 76 Mo. App. 510, distinguishing *Tuttle v. Davis*, 48 Mo. App. 9; *Esch v. Hirning*, 80 Mo. App. 570; *Jennings v. Robinson*, 82 Mo. App. 544; *Champ Spring Co. v. B. Roth Tool Co.*, 96 Mo. App. 518; *Slater v. Reed*, 37 Oregon 274.

**An Officer Putting a Person in Possession Without Authority** is liable in forcible entry and detainer under the *Indian Territory* statute. *Quigley v. Stephens*, 3 Indian Ter. 265.

**767. 5. No Action Against Vendee under Contract to Purchase.** — *Contra* under the *Illinois* statute, after breach by the vendee and demand by the vendor. *Leach v. Ritzke*, 86 Ill. App. 483.

**768. 7. Against the Owner.** — *Robinson v. Marshall*, (Ky. 1904) 78 S. W. Rep. 904; *Quigley v. Stephens*, 3 Indian Ter. 265; *Hunt v. Hicks*, 3 Indian Ter. 275; *Tarpenning v. King*, 60 Neb. 213; *Frantz v. Saylor*, 12 Okla. 282. See also *Crane v. Van Derveer*, 45 N. Y. App. Div. 139.

**8. Lies for Recovery of Realty.** — *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

**Right of Way.** — Under the *Alabama* statute the action lies to recover the right of way of a toll-road company. *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

**Accretion.** — The action may be brought by a riparian owner to recover accretion. *Nauman v. Burch*, 91 Ill. App. 48.

**769. 1. Notice to Quit and Demand Required.** — *Hill v. Watkins*, (Indian Ter. 1902) 69 S. W. Rep. 837; *Logan v. Byers*, 76 Mo. App. 559; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445; *Heller v. Beal*, 23 Ohio Cir. Ct. 540; *Smith v. Finger*, (Okla. 1905) 79 Pac. Rep. 759. See also *Farley v. Bay Shell Road Co.*, 125 Ala. 184; *Lacabere v. Wise*, 141 Cal. 554; *Smith v. Soper*, 12 Colo. App. 264; *Preston v. Davis*, 112 Ill. App. 636; *Samuels v. Greenspan*, 9 Kan. App. 140; *Stewart v. Miles*, 80 Mo. App. 24; *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504; *McCleary v. Crowley*, 22 Mont. 245; *Sires v. Moseley*, 60 S. Car. 504.

**2. No Demand When Entry Illegal and Forcible.** — *Farley v. Bay Shell Road Co.*, 125 Ala. 184; *Nauman v. Burch*, 91 Ill. App. 48; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445.

**769.** 2. In What Actions — *b.* LANDLORD AND TENANT ACTION. — See notes 5, 6.

**770.** Termination of Tenancy for Breach of Covenant. — See notes 1, 2.  
Waiver of Notice. — See note 5.

**771.** 4. Form of Notice. — See note 4.

5. By Whom Notice Given. — See note 5.

6. Time for Making Demand or Giving Notice. — See note 6.

7. Service of Written Notice. — See note 7.

**772.** See note 1.

VII. RESTITUTION AND RE-RESTITUTION — Restitution. — See note 2.  
Re-restitution. — See note 4.

VIII. DAMAGES — 1. In General. — See note 5.

**773.** See note 1.

2. Elements of Damage — *a.* IN GENERAL. — See notes 3, 4.

*b.* RENTS AND PROFITS. — See note 5.

**769.** 5. When Landlord and Tenant Notice Unnecessary. — *Andrews v. Erwin*, (Ky. 1904) 78 S. W. Rep. 902; *Bodwell Water Power Co. v. Old Town Electric Co.*, 96 Me. 117; *Stanford Land Co. v. Steidle*, 28 Wash. 72; *Morris v. Healy Lumber Co.*, 33 Wash. 451. See also *Earl Orchard Co. v. Fava*, 138 Cal. 76.

6. When Landlord and Tenant Notice Necessary. — *Twiss v. Boehmer*, 39 Oregon 359.

Tenant at Will — Notice Necessary. — *Rogers v. Hill*, 3 Indian Ter. 562. *Contra*, under the Illinois statute, *Cross v. Campbell*, 89 Ill. App. 489.

Notice to Tenant at Sufferance Not Necessary. — *Wamsganz v. Wolff*, 86 Mo. App. 205.

**770.** 1. Demand upon Failure to Pay Rent. — *Logan v. Byers*, 76 Mo. App. 559.

Possession Sought for Failure to Perform Covenants — Demand Necessary. — *Schnittger v. Rose*, 139 Cal. 656.

2. No Demand upon Failure to Pay Taxes. — See also *Walker v. Dowling*, (Ky. 1902) 68 S. W. Rep. 135.

5. Waiver by Contract. — See *Walker v. Dowling*, (Ky. 1902) 68 S. W. Rep. 135.

**771.** 4. Sufficiency of Notice. — *Earl Orchard Co. v. Fava*, 138 Cal. 76; *Hunter v. Porter*, (Idaho 1904) 77 Pac. Rep. 434; *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504; *Brauchle v. Nothhelfer*, 107 Wis. 457. See also *Miller v. Hall*, 14 Colo. App. 367; *Ensley v. Page*, 13 Colo. App. 452.

Written Notice has been held not essential. *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

Notice Must Fix Time for Termination of Lease. — *Waggoner v. Preston*, 83 Minn. 336.

5. Notice Given by Principal or Authorized Agent. — *Earl Orchard Co. v. Fava*, 138 Cal. 76; *Ensley v. Page*, 13 Colo. App. 452; *Burns v. Noell*, 12 Okla. 133.

Service by Agent of Corporation. — See *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

6. Time of Demand or Notice. — See *Heller v. Beal*, 23 Ohio Cir. Ct. 540; *Smith v. Finger*, (Okla. 1905) 79 Pac. Rep. 759; *Burns v. Noell*, 12 Okla. 133; *Sires v. Moseley*, 60 S. Car. 504; *Holladay Coal Co. v. Kirker*, 20 Utah 192; *Ferguson v. Hoshi*, 25 Wash. 664; *McGinnis v. Genes*, 25 Wash. 490.

Time for Demand in Absence of Statute. — See *Beauchamp v. Runnels*, 35 Tex. Civ. App. 212.

7. The Burden of Proving Service is on the

plaintiff, and the question is one of fact. *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

Proof of Service under Illinois Statute. — See *Campbell v. McFarland*, 86 Ill. App. 467.

**772.** 1. Under the Kentucky Statute, the notice may be served on a member of the defendant's family over sixteen years of age if the defendant be absent and not to be found. *Swanson v. Smith*, (Ky. 1903) 77 S. W. Rep. 700.

2. Restitution. — *Howard v. Whitaker*, (Ky. 1901) 61 S. W. Rep. 355; *Funkhauser v. Collopy*, 67 N. J. L. 132. See also *Barnett v. Palmer*, 79 Ill. App. 403; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445.

4. Re-restitution. — *McCormick v. Short*, 49 W. Va. 1.

5. Recovery of Damages. — *Eisele v. Oddie*, 128 Fed. Rep. 941; *Nolan v. Hertig*, 138 Cal. 281; *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, affirmed (C. C. A.) 118 Fed. Rep. 430; *Caldwell v. McVean*, (Ky. 1904) 82 S. W. Rep. 992; *Noyes v. French Lumbering Co.*, 80 Minn. 397; *Waterbury v. Deckelmann*, 50 N. Y. App. Div. 434.

**773.** 1. Damages Only Incidental. — *Compare Cutler v. Co-operative Brotherhood*, 31 Wash. 680.

3. Recovery Confined to Natural and Proximate Result. — See *Eisele v. Oddie*, 128 Fed. Rep. 941.

Recovery of Punitive Damages. — See *Wamsganz v. Wolff*, 86 Mo. App. 205.

Damages Recoverable from Date of Demand Only. — *Moston v. Stow*, 91 Mo. App. 554.

Counterclaim for Damages for Wrongful Eviction Not Allowed. — *Owens v. Swanton*, 25 Wash. 112.

Recovery Allowed for Personalty Destroyed. — *Eisele v. Oddie*, 128 Fed. Rep. 941.

4. *Eisele v. Oddie*, 128 Fed. Rep. 941.

5. Rents and Profits as Damages. — *Osteen v. Stovall*, (Indian Ter. 1904) 82 S. W. Rep. 710; *Butterfield v. Kirkley*, 115 Iowa 207; *Caldwell v. McVean*, (Ky. 1904) 82 S. W. Rep. 992, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 773. See also *Keyes v. Moy Jin Mun*, 136 Cal. 120.

The Measure of Recovery is the reasonable value of the use. *Noyes v. French Lumbering Co.*, 80 Minn. 397.

Evidence as to Rental Value. — The peculiar location and conditions surrounding the prem-

**774.** *c.* WASTE AND INJURY. — See note 1.

**3.** Double and Treble Damages. — See notes 2, 3.

**IX. DEFENSES — 3.** Statute of Limitations. — See note 7.

**775.** [FORE AND AFT TREE. — See note 3*a*.]

ises at the time may be shown in determining the rental value. *Noyes v. French Lumbering Co.*, 80 Minn. 397.

**Damages for Improvements Not Allowed.** — *Pybos v. McLaughlin*, 2 Indian Ter. 432.

**A Cross-demand cannot be set up by the defendant.** *Mark v. Schumann Piano Co.*, 105 Ill. App. 490, affirmed 208 Ill. 282.

**Counterclaim Not Properly Pleaded unless Recovery of Rent or Damages Sought.** — *Vidger v. Nolin*, 10 N. Dak. 353.

**774. 1. Waste and Injury as Damages.** — *Compare Osteen v. Stovall*, (Indian Ter. 1904) 82 S. W. Rep. 710.

**2. Double Damages.** — *Hadley v. Bernero*, 97 Mo. App. 314; *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445; *Ferguson v. Hoshi*, 25 Wash. 664.

**3. Treble Damages.** — *Nolan v. Hentig*, 138 Cal. 281; *Mendelson v. Kitt*, (N. Y. City Ct. Spec. T.) 92 N. Y. Supp. 127. See also *Block*

*v. Kearney*, 132 Cal. xviii, 64 Pac. Rep. 267; *Waterbury v. Deckelmann*, 50 N. Y. App. Div. 434; *O'Callaghan v. Hennessy*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 760.

**To Recover Treble Damages under the North Dakota Statute** the entry must have been forcible, but it is not necessary that the force shall have been actually applied. It is enough that it was present and threatened, and it was justly to be feared. *Wegner v. Lubenow*, 12 N. Dak. 95.

**7. Three Years.** — *Buck v. Endicott*, 103 Mo. App. 248; *Billingsley v. Stutler*, 52 W. Va. 92.

**Two Years.** — *Gilmore v. Asbury*, 64 Kan. 383.

**One Year.** — *Weatherford v. Union Pac. R. Co.*, (Neb. 1904) 98 N. W. Rep. 1089.

**775. 3*a*. A Fore and Aft Tree** as used in surveying is a tree in the line and the chops are on the sides showing the direction of the line. *Belding v. Hebard*, (C. C. A.) 103 Fed. Rep. 537.

## FORECLOSURE OF MORTGAGES.

By O. D. ESTEE.

**780. I. INTRODUCTORY — 1. Definition and Nature — b. WHAT IT INCLUDES — (4) Exercising Power of Sale — (e) Generally.** — See note 3.

**782. II. FORMS AND METHODS — 1. Judicial Foreclosure — Strict Foreclosure.** — See note 10.

**783. Scire Facias.** — See note 2.

**3. Summary Foreclosure — a. ADVERTISEMENT AND SALE UNDER POWER.** — See notes 9, 10.

**785. III. WHEN RIGHT TO FORECLOSE IS BARRED — 2. Period of Limitation — a. IN GENERAL.** — See note 4.

**786. b. WHETHER NOTE OR MORTGAGE PERIOD GOVERNS — (1) Majority Rule — (a) Generally.** — See note 1.

**780. 3. Exercising Power of Sale.** — See *Shelby v. Bowden*, 16 S. Dak. 531.

In Canada, under the Land Titles Act in the Territories, a mortgage does not operate as a transfer, but only as security, and accordingly the word "foreclose" as applied to proceedings under that act is not to be treated as identical with "foreclosure" proceedings where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. *Colonial Invest., etc., Co. v. King*, 5 N. W. Ter. 371.

**782. 10. Strict Foreclosure Allowed under Special Circumstances.** — *South Omaha Sav. Bank v. Levy*, (Neb. 1901) 95 N. W. Rep. 603.

**Strict Foreclosure of Vendor's Lien on Land.** — In *Flanagan v. Great Cent. Land Co.*, 45 Oregon 335, the court permitted a strict foreclosure of a vendor's lien on land because of

the failure of the defendant to pay the purchase price.

**783. 2. Scire Facias.** — *Brown v. Schintz*, 109 Ill. App. 598.

**9. Expressly Authorized by Statute in South Dakota.** — *Shelby v. Bowden*, 16 S. Dak. 531.

**10. Rule in Nebraska.** — *Cullen v. Casey*, (Neb. 1901) 95 N. W. Rep. 605.

**785. 4. Period of Limitation — Ten Years.** — *Kraft v. Holzmann*, 206 Ill. 548; *Satterlund v. Beal*, 12 N. Dak. 122.

**786. 1. Action Barred by Mortgage Period Only.** — *Bailey v. Butler*, 138 Ala. 153; *Northrop v. Chase*, 76 Conn. 146; *Campbell v. Upton*, 56 Neb. 385; *Yarnal v. Hupp*, (Neb. 1902) 90 N. W. Rep. 645; *Teegarden v. Burton*, 62 Neb. 639; *Miller v. Cox*, 133 N. Car. 578; *Satterlund v. Beal*, 12 N. Dak. 122; *Alexander v. Ransom*, 16 S. Dak. 302; *Houghton v. Tolman*,

**787.** (b) To What Applicable — *aa.* DEEDS OF TRUST. — See note 1.

*cc.* VENDOR'S LIENS. — See note 4.

**788.** *cc.* SALE UNDER POWER. — See note 1.

**789.** (2) *Minority Rule* — (a) Generally. — See note 7.

**790.** (b) Applications of Rule. — See note 1.

**791.** (c) Qualifications — *aa.* GENERALLY. — See note 1.

*dd.* WHETHER DOCTRINE APPLIES TO PROBATE LIMITATION. — See note 8.

**793.** 3. Commencement of Period of Limitation — *b.* OPTION OF MORTGAGEE TO FORECLOSE. — See note 1.

**794.** *d.* MISCELLANEOUS POINTS — Extending Time of Payment. — See note 5.

4. Tolling the Statute — *a.* PART PAYMENT — (1) *General Rule*. — See note 7.

(2) *Who May Make Payment* — (a) In General. — See note 8.

**795.** (b) Mortgagor After Conveyance of Mortgaged Premises. — See note 2.

*b.* ACKNOWLEDGMENT OR NEW PROMISE — (1) *In General*. — See note 6.

74 Vt. 467, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785, 786. See also the title LIMITATION OF ACTIONS, 177. 4.

**787.** 1. Limitation Applicable to Deeds of Trust. — Wallace v. Goodlett, 104 Tenn. 670.

4. Doctrine Applied to Vendor's Liens. — Hood v. Hammond, 128 Ala. 569, 86 Am. St. Rep. 159.

**788.** 1. Power of Sale — Same Limitation as in Judicial Foreclosure. — Menzel v. Hinton, 132 N. Car. 660, 95 Am. St. Rep. 647.

**789.** 7. Rule that Foreclosure Is Barred When Debt Is Barred — *Arkansas*. — Whipple v. Johnson, 66 Ark. 204; New England Mortg. Security Co. v. Reding, 65 Ark. 489; Austin v. Steele, 68 Ark. 348.

*California*. — Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53; Newhall v. Sherman, 124 Cal. 509; Wilcox v. Gregory, 135 Cal. 217.

*Colorado*. — McGovney v. Gwillim, 16 Colo. App. 284.

*Kansas*. — Cleveland Paper Co. v. Mauk, 8 Kan. App. 562; McDonald v. Hutchinson Wholesale Grocer Co., 65 Kan. 17.

*Kentucky*. — Worsham v. Lancaster, (Ky. 1898) 47 S. W. Rep. 448.

*Missouri*. — Eyermann v. Piron, 151 Mo. 107, which case arose prior to the operation of Laws Mo. 1891, p. 184.

Rev. Stat. Mo. 1899, § 4277, exempts from the operation of Laws Mo. 1891, p. 184, for two years all mortgages that were executed prior to the passage of this act, and during this period a mortgagee might foreclose his mortgage though an action at law on his note was barred. Stanton v. Gibbins, 103 Mo. App. 264.

*Washington*. — George v. Butler, 26 Wash. 456, 90 Am. St. Rep. 756.

*Wyoming*. — Balch v. Arnold, 9 Wyo. 17.

See also the title LIMITATION OF ACTIONS, 177. 4.

**790.** 1. Rule Applicable to Deeds of Trust. — McGovney v. Gwillim, 16 Colo. App. 284.

**791.** 1. Statute Not Available Against Debt Is Not Available Against Mortgage. — London, etc., Bank v. Horton, (C. C. A.) 126 Fed. Rep. 593; Kraft v. Holzmänn, 206 Ill. 548; Cliff v. Williams, 105 Ky. 559.

Likewise the statute is not available against a deed of trust where it is not available against

the debt secured thereby. Brown v. Brown, 107 Tenn. 349.

8. Probate Limitation. — Compare Cowan v. Mueller, 176 Mo. 192.

**793.** 1. Option to Foreclose on Intermediate Defaults. — Keene Five Cent. Sav. Bank v. Reid, (C. C. A.) 123 Fed. Rep. 221; California Sav., etc., Soc. v. Culver, 127 Cal. 107.

**794.** 5. Extending Time of Payment. — Austin v. Steele, 68 Ark. 348; Wilcox v. Gregory, 135 Cal. 217; Kraft v. Holzmänn, 206 Ill. 548; Shaw v. Western Land, etc., Co., (Tex. Civ. App. 1901) 62 S. W. Rep. 941.

7. Part Payment of Mortgage Debt. — Skinner v. Moore, 64 Kan. 360, 91 Am. St. Rep. 244; Teegarden v. Burton, 62 Neb. 639; Bangs v. Crebbin, (Tex. Civ. App. 1902) 69 S. W. Rep. 441.

Record of Payment Required. — The *Arkansas* statute has no application to a written agreement between the parties extending the time of payment of the notes. Austin v. Steele, 68 Ark. 348.

Payment After Debt Is Barred by Statute of Limitations. — In Ewbank v. Ewbank, 64 S. Car. 434, it was held that a payment made on a note secured by an equitable mortgage after the statute had barred both the note and the mortgage, revived both the note and the mortgage.

8. Payments by a Husband on his individual note secured by a mortgage executed by both himself and his wife will prevent the statute from running against the mortgage. Skinner v. Moore, 64 Kan. 360, 91 Am. St. Rep. 244.

Payment by Mortgages in Possession. — Where there are three mortgages on property and it is conveyed to the mortgagees without any provision as to the order in which the rents are to be applied in paying the mortgages, a payment on the first mortgage tolls the statute of limitations. Leach v. Curtin, 123 N. Car. 85.

**795.** 2. Rule that Payment by Mortgagor Does Not Toll Statute as to Grantee of Mortgaged Premises. — Simonson v. Nafis, 36 N. Y. App. Div. 473; Murdock v. Waterman, 145 N. Y. 55.

6. Acknowledgment or New Promise. — Cleveland Paper Co. v. Mauk, 8 Kan. App. 562; Fuller v. McMahon, 64 Kan. 441; Teegarden v. Burton, 62 Neb. 639. See also Southern Pac.

**796.** (2) *Essentials of Acknowledgment or New Promise* — (b) *What Is Not Sufficient*. — See note 8.

(3) *Who May Make Acknowledgment*. — See notes 9, 10.

**797.** (5) *Time of Acknowledgment*. — See note 2.

*d.* ABSENCE OF MORTGAGOR FROM THE STATE — (1) *Majority Rule*. — See note 4.

(2) *Minority Rule*. — See note 6.

*e.* COMMENCEMENT OF SUIT. — See note 7.

**799.** V. FORECLOSURE SUIT AS NOTICE — 2. *Statutory Lis Pendens* — *a.* OFFICE AND NECESSITY — *The Office of Such a Notice*. — See notes 7, 8.

**804.** VI. SET-OFF, RECOUPMENT, AND COUNTERCLAIM IN FORECLOSURE — 3. *Principles of Application* — *b.* CONNECTION WITH FORECLOSURE SUIT — (1) *Rule that Cross-demand Must Be Connected*. — See note 4.

**808.** 4. *Items and Subjects of Set-off, Etc.* — *b.* BREACH OF COLLATERAL AGREEMENTS. — See note 4.

**810.** 6. *To and Against Whom the Right Is Available* — *b.* ASSIGNEE OF EQUITY OF REDEMPTION. — See note 12.

**812.** VII. DEFENSES — 3. *Consideration — Want or Failure Of* — *a.* GENERAL RULE. — See note 3.

**816.** 8. *Fraud or Undue Influence*. — See note 5.

**817.** 10. *Incapacity or Disability of Mortgagor*. — See notes 3, 4.

*Co. v. Prosser*, (Cal. 1898) 52 Pac. Rep. 836, reversed 122 Cal. 413.

**796.** 8. *Statutory Provisions*. — Under the California statute a letter from the debtor to the creditor acknowledging the debt and casually mentioning the mortgage does not operate to stop the running of the statute of limitations against the mortgage lien. *Southern Pac. Co. v. Prosser*, (Cal. 1898) 52 Pac. Rep. 836, reversed 122 Cal. 413.

9. *Acknowledgment by Husband of Debt Secured on Homestead*. — In *Fuller v. McMahan*, 64 Kan. 441, where a wife joined with her husband in making a note and in giving a mortgage on their homestead as security, it was held that an acknowledgment of liability by the husband barred the statute of limitations from running against the mortgage.

10. *Acknowledgment by Mortgagor After Conveyance Not Binding on Purchaser*. — *Levy v. Williams*, 20 Tex. Civ. App. 651.

**797.** 2. *Time of Acknowledgment*. — *Weinberger v. Weidman*, 134 Cal. 599; *Fuller v. McMahan*, 64 Kan. 441.

4. *Rule that Absence of Mortgagor Suspends Statute*. — *Simonson v. Nafis*, 36 N. Y. App. Div. 473.

6. *Rule that Absence of Mortgagor Does Not Suspend Statute*. — *Hogaboom v. Flower*, 67 Kan. 47.

*Rule as to Grantee of Mortgagor*. — In *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756, it was held that the absence of the mortgagor from the state did not suspend the statute of limitations from running in favor of his grantee of the mortgaged premises.

7. *What Is Commencement of Proceeding*. — In the case of a chattel mortgage the bringing of an action of replevin to recover possession of the chattels bars the running of the statute of limitation. *McDonald v. Hutchinson Wholesale Grocer Co.*, 65 Kan. 17.

**799.** 7. *Office of Notice*. — *Stuyvesant v. Weil*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.)

445, reversed 41 N. Y. App. Div. 551. See generally the title NOTICE OF PENDENCY AND LIS PENDENS.

8. *Failure to File Notice Not Available to Purchaser from Defendant After Decree*. — *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593.

*Effect of Failure to File Notice*. — A failure to file notice does not injuriously affect the title of a purchaser at a foreclosure sale where no conveyance from the owner of the equity of redemption was recorded before the purchaser recorded his deed. *Stuyvesant v. Weil*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 445, reversed 41 N. Y. App. Div. 551.

**804.** 4. *Claim Arising Out of Tort*. — A claim for waste of the premises that in no wise arises out of the mortgage relation cannot be set up in a foreclosure suit. *McMichael v. Webster*, 57 N. J. Eq. 295, 73 Am. St. Rep. 630.

**808.** 4. *Failure to Secure Consent to Assignment of Insurance*. — In *Ottawa First Nat. Bank v. Renn*, 63 Kan. 334, it appeared that it was the duty of the mortgagee to secure the consent of a fire insurance company to any change of ownership in the premises. The mortgagor sold the premises, and the mortgagee neglected to secure the consent of the insurance company to the change of ownership, thus rendering the policy void. It was held that the resulting loss by fire might be set up as a counterclaim in an action to foreclose the mortgage.

**810.** 12. *Equity of Redemption Passing to Third Person*. — See *Ottawa First Nat. Bank v. Renn*, 63 Kan. 334.

**812.** 3. *Absence of Consideration a Complete Defense*. — *Roscoe v. Safford*, 61 N. Y. App. Div. 289; *Cassada v. Stabel*, 98 N. Y. App. Div. 600.

**816.** 5. *Fraud as a Sufficient Defense to Foreclosure*. — *Roscoe v. Safford*, 61 N. Y. App. Div. 289.

**817.** 3. *Insanity as a Defense*. — *Boyd v. Mulvihill*, 61 Neb. 878. See also *Farmers'*

**818.** 12. Payment and Satisfaction — *a.* IN GENERAL. — See note 1.

**819.** 13. Usury — *b.* EFFECT OF USURY ON THE FORECLOSURE PROCEEDING. — See note 4.

*c.* WHO MAY URGE THE DEFENSE. — See note 6.

**820.** Purchasers of the Mortgaged Property. — See notes 6, 7.

**821.** 15. Insufficient Defenses. — See note 8.

**823.** IX. DECREE — 1. Provision for Attorney's Fees — *a.* VALIDITY OF STIPULATION FOR — (1) *Majority Rule.* — See notes 1, 2.

**824.** Contingent Provision. — See note 1.

Allowance Discretionary. — See note 3.

Contrary Stipulation. — See note 4.

(2) *Minority Rule.* — See note 6.

*b.* AMOUNT OF ATTORNEY'S FEE. — See notes 7, 8.

**825.** See notes 1, 2.

*Bank v. Normand*, (Neb. 1902) 92 N. W. Rep. 723.

**817.** 4. Habitual Drunkenness as Defense. — See *Tatum v. Tatum*, 101 Va. 77.

**818.** 1. Satisfaction of Debts Secured a Complete Defense to Foreclosure. — *Hibernia Nat. Bank v. Gragard*, 109 La. 677. See also *Northrop v. Chase*, 76 Conn. 146.

**819.** 4. Usury Ordinarily Good Defense to Foreclosure. — *Male v. Wink*, 61 Neb. 748.

**6. Usury a Personal Defense.** — *Eslava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480; *Male v. Wink*, 61 Neb. 748; *Bird v. Kendall*, 62 S. Car. 178; *Smith v. McMillan*, 46 W. Va. 577.

**820.** 6. Purchaser from Mortgagor. — A purchased land from B, a mortgagor, and agreed to pay liens thereon to the extent of two thousand two hundred dollars. In foreclosure proceedings both A and B set up the defense of usury, and it was held that the defense was available to B and also to A, as he did not specifically assume the mortgage debt. *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696.

**7. Purchaser Assuming Mortgage or Taking Deed Subject Thereto.** — *Male v. Wink*, 61 Neb. 748.

**821.** 8. Want of Title in Mortgagor Not Sufficient Defense. — *Joslin v. Williams*, 61 Neb. 859; *State Mut. Bldg., etc., Assoc. v. Batterson*, 65 N. J. Eq. 610; *Pennsylvania Ins. Co. v. Beaumont*, 190 Pa. St. 101. See also *Parlin, etc., Co. v. Galloway*, 95 Ill. App. 60.

**823.** 1. Stipulation for Attorney's Fees Generally Held Valid — *Alabama.* — *Bailey v. Butler*, 138 Ala. 153.

*California.* — *Hellier v. Russell*, 136 Cal. 143; *Peachy v. Witter*, 131 Cal. 316; *McNamara v. Oakland Bldg., etc., Assoc.*, 131 Cal. 336; *Hotelling v. Montieth*, 128 Cal. 556; *County Bank v. Goldtree*, 129 Cal. 160.

*Idaho.* — *Warren v. Stoddart*, 6 Idaho 692.

*Illinois.* — *Thornton v. Commonwealth Loan, etc., Assoc.*, 181 Ill. 456; *Culver v. Brinkerhoff*, 180 Ill. 548; *Salomon v. Stoddard*, 107 Ill. App. 227.

*Iowa.* — *Guaranty Sav., etc., Assoc. v. Ascherman*, 108 Iowa 150.

*Mississippi.* — *Millsaps v. Chapman*, 76 Miss. 942, 71 Am. St. Rep. 547.

*Pennsylvania.* — *Scott v. Carl*, 24 Pa. Super. Ct. 460; *Bronson v. Brown*, 8 Pa. Dist. 365.

*South Carolina.* — *Bird v. Kendall*, 62 S. Car. 178.

*Contra.* — *Turner v. Boger*, 126 N. Car. 300.

**Provision for Inclusion in Mortgage Lien.** — The mortgage must expressly provide that the attorney's fees are to be included in the mortgage lien or the mortgagee will merely have the right of a personal judgment against the mortgagor for such fees. *Klokke v. Escailler*, 124 Cal. 297. See also *Haensel v. Pacific States Sav., etc., Co.*, 135 Cal. 41; *Luddy v. Pavkovich*, 137 Cal. 284; *Orange Growers' Bank v. Duncan*, 133 Cal. 254; *Cortelyou v. Jones*, 132 Cal. 131.

**Foreclosure on Cross-bill.** — A holder of a second mortgage brought a foreclosure suit without making the holder of the first mortgage a party thereto. The holder of the first mortgage was then permitted to file a cross-bill of foreclosure, and upon foreclosure being decreed it was held proper to include an attorney's fee in the decree, as provision had been made for it in the first mortgage. *Town v. Alexander*, 185 Ill. 254.

**2. Rule Applicable to Trust Deeds.** — *Unity Co. v. Equitable Trust Co.*, 204 Ill. 595; *Henke v. Gunzenhauser*, 195 Ill. 130; *Vedelhofen v. Mason*, 201 Ill. 465; *Kinsella v. Cahn*, 185 Ill. 208; *Baker v. Jacobson*, 183 Ill. 171; *Gantzer v. Schmeltz*, 206 Ill. 560.

**824.** 1. Contingent Provision — Necessity of Counsel. — Where the mortgagor agreed to pay necessary counsel fees that the mortgagee incurred in collecting the debt, the burden of proof was held to be on the mortgagee to show that it was necessary to employ counsel. *Foster's Succession*, 51 La. Ann. 1670.

**3. Discretion as to Enforcement of Stipulation.** — *Scott v. Carl*, 24 Pa. Super. Ct. 460.

**4. Decree Limited by Stipulation.** — *Henke v. Gunzenhauser*, 195 Ill. 130.

**6. Stipulation for Attorney's Fees Held Invalid in Some Jurisdictions.** — *Southern Warehouse, etc., Co. v. Mechanics' Trust Co.*, (Ky. 1900) 56 S. W. Rep. 162; *Turner v. Boger*, 126 N. Car. 300.

**7. Ten Per Cent. Allowed.** — *Thornton v. Commonwealth Loan, etc., Assoc.*, 181 Ill. 456.

**8. Five Per Cent. Proper.** — *Hough v. Wells*, 86 Ill. App. 186.

**825.** 1. Reasonable Allowance Made. — *Weigley v. Charlier*, 9 Pa. Dist. 670. See also *Warren v. Stoddart*, 6 Idaho 692.

**How Allowance Computed.** — Where the mort-

**829. XI. EFFECT OF FORECLOSURE — 1. Strict Foreclosure.** — See note 4.

**830. XII. FORECLOSURE OF CHATTEL MORTGAGES — Bill in Equity Prevalent.** — See notes 2, 3.

**FOREIGN.** — See note 9.

gage provides for a reasonable allowance in case of foreclosure, in estimating the allowance to be made the court should consider the reasonable value of the services of the attorney rather than the amount involved in the mortgage. *Wattson v. Jones*, 101 Ill. App. 572.

**Evidence.** — In *Unity Co. v. Equitable Trust Co.*, 204 Ill. 595, where a deed of trust provided for the payment of an attorney's fee in case of foreclosure, it was held to be proper for the court, after the evidence in chief at the foreclosure trial had been received, to receive evidence of the reasonable worth of the attorney's services.

**825. 2. Instances of Allowances Deemed Reasonable.** — In *Wright v. Neely*, 100 Ill. App. 310, an allowance of seven hundred and fifty dollars was held to be reasonable in a foreclosure proceeding involving thirty-eight thousand seven hundred and twenty-five dollars.

In *Follansbee v. Northwestern Mut. L. Ins. Co.*, 87 Ill. App. 609, an allowance of one thousand two hundred dollars was held to be proper where the decree exclusive of the allowance was over forty thousand dollars.

In *Surety Loan, etc., Co. v. Kick*, 90 Ill. App. 231, an allowance of two hundred dollars as an attorney fee for foreclosing a mortgage of five thousand dollars was held to be reasonable.

An allowance of two hundred dollars as an attorney fee for foreclosing a mortgage of fourteen thousand dollars is reasonable. *Hazleton v. Birdie*, 10 Kulp (Pa.) 98.

**829. 4. A Foreclosure Order Nisi** does not destroy the power of sale, because the remedies of the mortgagee are only suspended for the purpose of carrying out that particular relief which he has sought. *Stevens v. Theatres*, (1903) 1 Ch. 857, 72 L. J. Ch. 764, 88 L. T. N. S. 458, 51 W. R. 585.

**830. 2. Equitable Foreclosure Allowed.** — *H. B. Claflin Co. v. Furtick*, 119 Fed. Rep. 429. See also *Richardson v. Opelt*, 60 Neb. 180.

**3. Meeker v. Waldron**, 62 Neb. 689; *Momrich v. Schwartz*, (Neb. 1903) 96 N. W. Rep. 636.

**9. Foreign Government.** — See *Bigley v. New York, etc., Steamship Co.*, 105 Fed. Rep. 76.

**Foreign Port.** — *Bigley v. New York, etc., Steamship Co.*, 105 Fed. Rep. 76.

**Same — Maritime Liens.** — See *Bigley v. New York, etc., Steamship Co.*, 105 Fed. Rep. 76.

**Same — Pilotage — New York Statute.** — See *Bigley v. New York, etc., Steamship Co.*, 105 Fed. Rep. 76.

**Foreign and Home Missions.** — *Bruere v. Cook*, 63 N. J. Eq. 624.

**A Foreign Country** is one that is exclusively within the sovereignty of a *foreign* nation and without the sovereignty of the United States. *De Lima v. Bidwell*, 182 U. S. 1. In this case it was held that Porto Rico was not a *foreign* country within the meaning of the Tariff Act, after its cession to the United States by Spain.

## FOREIGN CORPORATIONS.

By R. N. CHAFFEE.

**837. I. DEFINITION.** — See note 1.

**II. STATUS AND POWERS GENERALLY — 1. Foreign Corporations Have No Extraterritorial Existence.** — See note 2.

**2. Exercise of Powers Outside of Domiciliary Jurisdiction Dependent on Comity.** — See note 4.

**837. 1. Subject of Domiciliary State.** — *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484, 71 L. J. K. B. 857; *Alaska Steamship Co. v. Macauley*, 7 British Columbia 388.

**2. No Extraterritorial Existence — United States.** — *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Pinney v. Nelson*, 183 U. S. 144.

*Idaho.* — *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74.

*Minnesota.* — *Tolerton, etc., Co. v. Barck*, 84 Minn. 497, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875 [837].

*Missouri.* — See *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1.

*New York.* — *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608.

*North Carolina.* — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

*Texas.* — *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76.

*Vermont.* — *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912.

**4. Comity the Sole Basis of Recognition — United States.** — *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Pinney v. Nelson*, 183 U. S. 144; *Corley v. Travelers' Protective Assoc.*, (C. C. A.) 105 Fed. Rep. 854; *London, etc.,*



**838.** 3. Cases in Which Comity Will Be Extended. — See notes 2, 4.

**839.** 4. Cases in Which Comity Will Be Denied. — See note 3.

5. Limitations of Powers by Charter and Governing Laws. — See notes 6, 7.

*Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502.

*Alabama*. — *Fitts v. National L. Assoc.*, 130 Ala. 413.

*California*. — *Keystone Driller Co. v. San Francisco*, 138 Cal. 738.

*Colorado*. — *Iron Silver Min. Co. v. Cowie*, 31 Colo. 455.

*Delaware*. — *E. F. Kirwan Mfg. Co. v. Truxton*, 2 Penn. (Del.) 48.

*District of Columbia*. — *Howard v. Chesapeake*, etc., R. Co., 11 App. Cas. (D. C.) 300.

*Illinois*. — *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

*Iowa*. — *Tootle v. Singer*, 118 Iowa 533.

*Kansas*. — *State v. Topeka Water Co.*, 61 Kan. 547.

*Kentucky*. — *Cumberland Tel., etc., Co. v. Louisville Home Telephone Co.*, 114 Ky. 892.

*Louisiana*. — *State v. North American Land, etc., Co.*, 106 La. 621; *Southwestern Telephone Co. v. Kansas City, etc., R. Co.*, 108 La. 691; *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459.

*Minnesota*. — *Tolerton, etc., Co. v. Barck*, 84 Minn. 497, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875 [837].

*Missouri*. — See *Ehrhardt v. Robertson*, 78 Mo. App. 404; *Frick Co. v. Marshall*, 86 Mo. App. 463; *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1.

*Nebraska*. — *Schmitt, etc., Co. v. Mahoney*, 60 Neb. 20; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449.

*New Jersey*. — *Coler v. Tacoma R., etc., Co.*, 64 N. J. Eq. 133, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837.

*New York*. — *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608; *People v. Granite State Provident Assoc.*, 41 N. Y. App. Div. 257, affirmed 161 N. Y. 492.

*North Carolina*. — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831; *Lacy v. Armour Packing Co.*, 134 N. Car. 567; *Fisher v. Traders Mut. L. Ins. Co.*, 136 N. Car. 217.

*Ohio*. — *State v. Aetna L. Ins. Co.*, 69 Ohio St. 317.

*Texas*. — *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76.

*West Virginia*. — *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

*Wisconsin*. — *Chicago Title, etc., Co. v. Bashford*, 120 Wis. 281.

**838.** 2. May Exercise Charter Rights if Not Against Public Policy — *Florida*. — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

*Illinois*. — *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

*Louisiana*. — *Southwestern Telephone Co. v. Kansas City, etc., R. Co.*, 108 La. 691.

*New Jersey*. — *Coler v. Tacoma R., etc., Co.*, 64 N. J. Eq. 133, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839.

*Oregon*. — *Pacific Bldg. Co. v. Hill*, 40 Oregon 280, 91 Am. St. Rep. 477.

*Texas*. — *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76.

*West Virginia*. — *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

4. Comity Presumed to Exist Till Contrary Shown. — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831; *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

**839.** 3. Cannot Exercise Powers Denied to Domestic Corporations — *Florida*. — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

*Illinois*. — *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

*Missouri*. — *State v. Cook*, 171 Mo. 348.

*Oregon*. — *Pacific Bldg. Co. v. Hill*, 40 Oregon 280, 91 Am. St. Rep. 477.

*Texas*. — *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76.

*Utah*. — *Hiskey v. Pacific States Sav., etc., Co.*, 27 Utah 409.

*West Virginia*. — *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

Cannot Exercise Extraordinary Power. — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300.

6. Limitations of Power by Charter and Governing Laws — *United States*. — *Seattle Gas, etc., Co. v. Citizens' Light, etc., Co.*, 123 Fed. Rep. 588.

*Delaware*. — *E. F. Kirwan Mfg. Co. v. Truxton*, 2 Penn. (Del.) 48.

*District of Columbia*. — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300.

*Kansas*. — *State v. Topeka Water Co.*, 61 Kan. 547.

*Louisiana*. — *State v. Southern Pac. R. Co.*, 52 La. Ann. 1822; *Southwestern Telephone Co. v. Kansas City, etc., R. Co.*, 108 La. 691.

*Oklahoma*. — *Myatt v. Ponca City Land, etc., Co.*, 14 Okla. 189.

*Utah*. — *Rio Grande Western R. Co. v. Telluride Power Transmission Co.*, 23 Utah 22.

Charter Rights Only Partially Sanctioned. — A foreign corporation with rights under its charter not sanctioned by the laws of the domestic state, will not be prevented from doing business under that portion of its charter which conforms to the laws of such state. *State v. New Orleans Warehouse Co.*, 109 La. 64.

Eminent Domain. — The general rule that a corporation cannot exercise any powers in a state other than that of its creation is subject to limitations. So where domestic corporations of *Missouri* are authorized to condemn land, and a foreign corporation is chartered to build a bridge across the Mississippi river, and is authorized by an act of Congress to construct such bridge, such corporation, being authorized to do business in *Missouri*, may exercise the right of eminent domain there without regard to whether it could exercise such right in the domiciliary state. *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1.

**840.** See note 1.

**841.** 6. How Far Dealings Governed by General Laws of Domiciliary State. — See notes 1, 2.

**842.** 7. Subjection to Laws of Domestic State. — See notes 6, 7.

**843.** See note 1.

8. Incapacity to Perform Corporate Acts in Domestic State. — See note 3.

**844.** 9. For What Purposes Considered Citizens — *a.* CITIZENS FOR PURPOSES OF FEDERAL JURISDICTION. — See note 6.

**845.** *b.* NOT CITIZENS WITHIN PRIVILEGE AND IMMUNITY CLAUSE OF FEDERAL CONSTITUTION. — See note 1.

**846.** 10. Persons Within Equal Protection Clause of Federal Constitution. — See notes 3, 4, 5.

**839.** 7. Charter the Law of Existence. — London, etc., Bank *v.* Aronstein, 117 Fed. Rep. 601, 54 C. C. A. 663; Matter of Stewart, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 275.

**840.** 1. Who Bound by Notice of Charter Provisions. — Matter of Stewart, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 275.

**841.** 1. Limitations of Powers by General Laws of Domiciliary State. — A citizen of the domestic state, who acquires stock in a foreign corporation, holds such stock subject to the law and policy of the domiciliary state. Hudson River Pulp, etc., Co. *v.* Warner, 99 Fed. Rep. 187, 39 C. C. A. 452.

2. Extraterritorial Effect of Domiciliary Laws in Conflict with State Laws. — Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 841, note 2.

**842.** 6. Contracts Must Be Sanctioned by Domestic Laws. — Corley *v.* Travelers' Protective Assoc., (C. C. A.) 105 Fed. Rep. 854; Equitable Bldg., etc., Assoc. *v.* King, (Fla. 1904) 37 So. Rep. 181; Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198; Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 84 Am. St. Rep. 657; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805.

Instances. — A foreign corporation must conform to the laws of the domestic state in regard to the sale, disposition, or transfer of its shares of stock. London, etc., Bank *v.* Aronstein, 117 Fed. Rep. 601, 54 C. C. A. 663.

7. Corporation Must Accept Responsibilities Imposed by Domestic Laws. — Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; Franklin Ins. Co. *v.* Villeneuve, 25 Tex. Civ. App. 356; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805.

A foreign corporation by sending its agents into another state becomes amenable to its laws and subject to the jurisdiction of its courts. Buie *v.* Chicago, etc., R. Co., 95 Tex. 51.

Statute Imposing Personal Liability on Stockholders. — Stockholders of a foreign corporation whose charter provided for doing business within the foreign state, must be deemed to have contracted with reference to the statutes of the foreign state imposing personal liability upon stockholders of corporations. Pinney *v.* Nelson, 183 U. S. 144.

**843.** 1. Statutes of Domiciliary State Have No Extraterritorial Operation. — Zacher *v.* Fidelity Trust, etc., Co., 109 Ky. 441; Shannon

*v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 84 Am. St. Rep. 657; National Bldg., etc., Assoc. *v.* Wilson, 78 Miss. 993; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805.

3. Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 78 Am. St. Rep. 560.

**844.** 6. Citizens for Purposes of Federal Jurisdiction. — Boyer *v.* Northern Pac. R. Co., 8 Idaho 74; Lewis *v.* Maysville, etc., R. Co., 76 S. W. Rep. 526, 25 Ky. L. Rep. 948; McKean *v.* New York Nat. Bldg., etc., Assoc., 10 Pa. Dist. 197; Calvert *v.* Southern R. Co., 64 S. Car. 139; Wilson *v.* Southern R. Co., 64 S. Car. 162.

Right to Remove Cause to Federal Court. — The fact that a foreign corporation has complied with the Ky. Stat., § 841, providing that no foreign corporation shall do business in the state until it shall have become a citizen thereof, does not prevent it from securing the removal of a cause against it to the federal court. Illinois Cent. R. Co. *v.* Hibbs, 78 S. W. Rep. 1116, 25 Ky. L. Rep. 1899.

**845.** 1. Not Citizens Within the Immunity Clause — *United States.* — Hartford F. Ins. Co. *v.* Perkins, 125 Fed. Rep. 502. See also Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28.

*Delaware.* — Caldwell *v.* Armour, 1 Penn. (Del.) 545.

*Louisiana.* — State *v.* Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459.

*Minnesota.* — Tolerton, etc., Co. *v.* Barck, 84 Minn. 497.

*New York.* — Anglo-American Provision Co. *v.* Davis Provision Co., 169 N. Y. 506, 88 Am. St. Rep. 608.

*Tennessee.* — D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845.

*Vermont.* — Cook *v.* Howland, 74 Vt. 393, 93 Am. St. Rep. 912; Hawley *v.* Hurd, 72 Vt. 122, 82 Am. St. Rep. 922.

*West Virginia.* — Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805.

*Wisconsin.* — Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281.

**846.** 3. Corporation a "Person" Within Equal Protection Clause. — D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846; Hawley *v.* Hurd, 72 Vt. 122, 82 Am. St. Rep. 922; Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 87 Am. St. Rep. 805.

4. Reason for Rule. — Hawley *v.* Hurd, 72 Vt.

- 846.** 11. Status of Corporations Created under Federal Laws. — See notes 6, 7.
- 848.** 12. Status of Corporations Organized by Domestic Citizens under Laws of Foreign State — Decisions Having an Opposite Tendency. — See note 2.
- 849.** 13. Right to Protection of Corporate Name. — See note 4.
14. Control of Domestic Courts over Internal Management of Foreign Corporations. — See note 6.
- 850.** See note 3.
- 851.** III. RIGHTS IN RESPECT TO REAL ESTATE — 1. In General — *a*. STATEMENT OF RULE. — See note 3.
- 855.** 2. Right to Acquire Mortgages — Effect of Noncompliance with Statutory Conditions Precedent to Doing Business. — See note 2.
- 858.** 7. Right of Eminent Domain. — See note 4.
- 859.** See note 2.
- 860.** IV. DOMESTIC STATUTES IMPOSING RESTRICTIONS ON RIGHT TO DO BUSINESS — 1. Power of State to Impose Restrictions — *a*. STATEMENT OF RULE. — See notes 2, 3.

122, 82 Am. St. Rep. 922. See also the title CONSTITUTIONAL LAW, 970. *2*.

**846.** 5. *D'Arcy v. Connecticut Mut. L. Ins. Co.*, 108 Tenn. 567, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846.

**6.** Corporations Organized under National Laws. — *Territory v. Baker*, (N. Mex. 1904) 78 Pac. Rep. 624; *Matter of Cushing*, (Surrogate Ct.) 40 Misc. (N. Y.) 505.

**7.** Corporations Organized by Congress Legislating for Particular Territory. — *Layden v. Endowment Rank, etc.*, 128 N. Car. 546.

**848.** 2. Foreign Incorporation of Domestic Citizens to Do Business in Several States. — Where all the incorporators of a foreign corporation but one were residents of the domestic state and the object of incorporation elsewhere was the advantage of less rigorous laws and the state raised no objection, it was held that a suit might be had in the domestic courts to enforce the rights of such corporation. *Cumberland Tel., etc., Co. v. Louisville Home Telephone Co.*, 114 Ky. 892.

**849.** 4. Use of Name Not Restrained When No Intent to Deceive. — *American Clay Mfg. Co. v. American Clay Mfg. Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 31.

**6.** *United States*. — *Sidway v. Missouri Land, etc., Co.*, 101 Fed. Rep. 481. See also *London, etc., Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663.

*District of Columbia*. — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300.

*Massachusetts*. — See *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580.

*North Carolina*. — *Howard v. Mutual Reserve Fund L. Assoc.*, 125 N. Car. 49.

*Pennsylvania*. — *Madden v. Penn Electric Light Co.*, 199 Pa. St. 454; *Harley v. Welsh*, 16 Montg. Co. Rep. (Pa.) 13.

*Virginia*. — *Taylor v. Mutual Reserve Fund L. Assoc.*, 97 Va. 60.

**When Jurisdiction Exercised.** — Where the court acquires complete jurisdiction, and is able to enforce its determination in such a manner as to do complete justice, the jurisdiction will be exercised, although the result may be the regulation of the internal affairs of a foreign corporation. *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309.

**Applications of Principle** — *To Allow Inspec-*

*tion of Books.* — At common law a stockholder of a foreign corporation has no right to demand an inspection of its books. But it is otherwise by statute in *New York*. *People v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 446; *People v. Montreal, etc., Copper Co.*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 282.

**850.** 3. What Are Considered Affairs Relating to Internal Management. — *Howard v. Mutual Reserve Fund L. Assoc.*, 125 N. Car. 49; *Taylor v. Mutual Reserve Fund L. Assoc.*, 97 Va. 60.

**Application of Rule.** — Requiring the consent of the stockholders of a foreign corporation to the sale of mining ground is not a regulation of the internal affairs of the corporation. *Williams v. Gaylord*, 186 U. S. 157.

The directors may be compelled to account for the corporation's property taken and misappropriated by them. *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580.

**851.** 3. Right to Acquire and Hold Realty — By What Considerations Determined. — *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 58 C. C. A. 79; *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252; *Ex p. New Vancouver Coal Min., etc., Co.*, 9 British Columbia 571, reversing 2 British Columbia 8.

**855.** 2. Noncompliance with Statutory Conditions Precedent to Doing Business. — A mortgage, executed to a foreign corporation before it has filed its articles, statement, and consent of agent, as required by statute, is voidable. *Ames v. Kruzner*, 1 Alaska 598.

**858.** 4. Right of Eminent Domain. — *Columbus Water Works Co. v. Long*, 121 Ala. 245; *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858; *Southwestern Telephone Co. v. Kansas City, etc., R. Co.*, 108 La. 691; *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1.

**859.** 2. Legislative Assent May Be Implied. — *Compare Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419, holding that unless both the letter and the spirit of the statute relied upon clearly confer the power, it cannot be exercised.

**860.** 2. May Exclude Foreign Corporations Entirely. — *United States*. — *London, etc., Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663; *Cady v. Associated Colonies*, 119 Fed. Rep.

**861.** See notes 1, 2, 4.

*b.* CONSTITUTIONAL LIMITATIONS OF RULE. — See notes 5, 6, 8.

**862. 2. Enumeration of Statutes** — *a.* STATUTES REQUIRING DESIGNATION OF AGENT AND PLACE OF BUSINESS. — See notes 1, 4.

420; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502. See also *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816.

*Arkansas*. — *Woodson v. State*, 69 Ark. 521. *Illinois*. — *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419.

*Kentucky*. — *Com. v. Read Phosphate Co.*, 113 Ky. 32.

*Louisiana*. — *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309; *State v. New Orleans Warehouse Co.*, 109 La. 64; *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459.

*Nebraska*. — *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063.

*New York*. — *Woodward v. Mutual Reserve L. Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519.

*North Carolina*. — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831; *Lacy v. Armour Packing Co.*, 134 N. Car. 567; *Fisher v. Traders Mut. L. Ins. Co.*, 136 N. Car. 217.

*Tennessee*. — *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941; *D'Arcy v. Connecticut Mut. L. Ins. Co.*, 108 Tenn. 567.

*Vermont*. — *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912.

*West Virginia*. — *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805.

**860. 3. Must Assent to Terms Imposed by State** — *United States*. — *Corley v. Travelers' Protective Assoc., (C. C. A.)* 105 Fed. Rep. 854; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. Rep. 239, 55 C. C. A. 93; *Cady v. Associated Colonies*, 119 Fed. Rep. 420; *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502; *U. S. Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. Rep. 398. See also *Niagara F. Ins. Co. v. Cornell*, 110 Fed. Rep. 816.

*Arkansas*. — *Woodson v. State*, 69 Ark. 521.

*Colorado*. — *Iron Silver Min. Co. v. Cowie*, 31 Colo. 455, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

*Delaware*. — *Caldwell v. Armour*, 1 Penn. (Del.) 545.

*Illinois*. — *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

*Indiana*. — *People's Bldg., etc., Assoc. v. Markley*, 27 Ind. App. 128, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860; *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198; *Barwicklow v. Stewart*, 31 Ind. App. 446.

*Kentucky*. — *Com. v. Read Phosphate Co.*, 113 Ky. 32.

*Louisiana*. — *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669; *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309.

*Michigan*. — *Pollock v. German F. Ins. Co.*, 132 Mich. 225, 9 Detroit Leg. N. 586.

*Minnesota*. — *Tolerton, etc., Co. v. Barck*, 84 Minn. 497; *G. Heileman Brewing Co. v. Peimels*, 85 Minn. 121.

*Mississippi*. — *Shannon v. Georgia State Bldg., etc., Assoc.*, 78 Miss. 955, 84 Am. St. Rep. 657.

*Missouri*. — *Ehrhardt v. Robertson*, 78 Mo. App. 404.

*Montana*. — See *Manhattan Trust Co. v. Davis*, 23 Mont. 273.

*Nebraska*. — *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063.

*New York*. — *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608; *Vaughn Mach. Co. v. Lighthouse*, 64 N. Y. App. Div. 138; *Dunbarton Flax Spinning Co. v. Greenwich, etc., R. Co.*, 87 N. Y. App. Div. 21.

*North Carolina*. — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

*Ohio*. — *State v. Aetna L. Ins. Co.*, 69 Ohio St. 317.

*Tennessee*. — *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941; *State v. Connecticut Mut. L. Ins. Co.*, 106 Tenn. 282; *D'Arcy v. Connecticut Mut. L. Ins. Co.*, 108 Tenn. 567.

*Vermont*. — *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912.

**861. 1. Statutes Imposing Conditions Not Unconstitutional.** — *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502; *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41; *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669.

**Expediency of Legislation.** — *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502.

**2. Admission of Foreign Corporations Discretionary with Legislature.** — *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941.

**4. State May Revoke License.** — *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449; *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

**5. Statutes Imposing Restrictions Must Not Be Unconstitutional.** — *Kessler v. Perilloux*, 127 Fed. Rep. 1012, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860, 861; *Vaughn Mach. Co. v. Lighthouse*, 64 N. Y. App. Div. 138; *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831. See also *Com. v. Read Phosphate Co.*, 113 Ky. 32.

**6. Interstate Commerce.** — *Kessler v. Perilloux*, 127 Fed. Rep. 1012, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860, 861; *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41; *Vaughn Mach. Co. v. Lighthouse*, 64 N. Y. App. Div. 138; *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805. See also *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259.

**8. Restrictions on Corporations in Employ of Government.** — *Floyd v. National Loan, etc., Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805. See also *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Com. v. Read Phosphate Co.*, 113 Ky. 32; *Hawley v. Hurd*, 72 Vt. 122, 82 Am. St. Rep. 922.

**862. 1. Statutes Requiring Appointment of Agent, Etc.** — *United States*. — *U. S. Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. Rep. 398. See also *Smith v. Empire State-Idaho Min., etc.,*

**863.** *b.* STATUTES REQUIRING FILING OF CHARTER, ETC. — See note 1.

**864.** *d.* RETALIATORY STATUTES — (1) *Constitutionality of Statutes.* — See note 5.

**866.** (2) *Construction and Operation of Statutes.* — See note 1.

**867.** *e.* STATUTES REQUIRING AGREEMENT NOT TO REMOVE CAUSES TO FEDERAL COURTS. — See note 1.

**868.** 3. Right to Compel Issuance of License on Complying with Statutes. — See note 7.

**869.** See note 1.

4. What Constitutes Doing Business in This Connection — *a.* ACTS HELD NOT TO CONSTITUTE DOING BUSINESS — (1) *Institution and Prosecution of Actions.* — See note 2.

(2) *Single Acts of Business.* — See note 3.

Co., 127 Fed. Rep. 462; *Olson v. Buffalo Hump Min. Co.*, 130 Fed. Rep. 1017.

*Alabama.* — *Hanchey v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 245.

*Arkansas.* — *Lesser Cotton Co. v. Yates*, 69 Ark. 396.

*Idaho.* — *Smith v. Alberta, etc., Exploration, etc., Co.*, 9 Idaho 399.

*Indian Territory.* — *Ammons v. Brunswick-Balke Collender Co.*, (Indian Ter. 1904) 82 S. W. Rep. 937.

*Kentucky.* — *Com. v. Read Phosphate Co.*, 113 Ky. 32; *Com. v. Parlin, etc., Co.*, 80 S. W. Rep. 791, 26 Ky. L. Rep. 58.

*Minnesota.* — *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121. See also *Tolerton, etc., Co. v. Barck*, 84 Minn. 497.

*Texas.* — *Bankers Union of World v. Nabors*, 36 Tex. Civ. App. 38.

*Utah.* — *Rio Grande Western R. Co. v. Teluride Power Transmission Co.*, 23 Utah 22.

*Reason for Rule.* — See *Tolerton, etc., Co. v. Barck*, 84 Minn. 497.

**Power to Accept Service Not Revocable.** — *Collier v. Mutual Reserve Fund L. Assoc.*, 119 Fed. Rep. 617; *Davis v. Kansas, etc., Coal Co.*, 129 Fed. Rep. 149; *Woodward v. Mutual Reserve L. Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519; *Johnston v. Mutual Reserve L. Ins. Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 316, affirmed 104 N. Y. App. Div. 544.

**862.** 4. What Designation of Place of Business Sufficient. — See *Eslava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480.

**863.** 1. Statutes Requiring Filing of Charter — *Constitutionality.* — *Manhattan Trust Co. v. Davis*, 23 Mont. 273; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66.

**864.** 5. Not Denial of Equal Protection of Laws. — *Keystone Driller Co. v. Superior Ct.*, 138 Cal. 738.

**866.** 1. Strict Construction the Rule. — *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201.

**867.** 1. Constitutionality of Statutes Prohibiting Removal of Cause to Federal Courts. — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831. See also *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502.

**868.** 7. Refusal of Officer Reviewable on Mandamus. — *State v. Vorys*, 69 Ohio St. 56; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

**869.** 1. In Discretion of Officer to Refuse License. — *Vorys v. State*, 67 Ohio St. 15.

2. Prosecution of Actions — *Alabama.* — *Eslava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480.

*Arkansas.* — *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87.

*Colorado.* — *Kephart v. People*, 28 Colo. 73.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*New York.* — *Citizens' State Bank v. Cowles*, 89 N. Y. App. Div. 281, reversed 180 N. Y. 346, 105 Am. St. Rep. 765.

*Wisconsin.* — *Chicago Title, etc., Co. v. Bashford*, 120 Wis. 281.

3. Doing Single Act of Business — *United States.* — *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *Empire Milling, etc., Co. v. Tombstone Mill, etc., Co.*, 100 Fed. Rep. 910; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. Rep. 239, 55 C. C. A. 93.

*Indian Territory.* — *Ammons v. Brunswick-Balke Collender Co.*, (Indian Ter. 1904) 82 S. W. Rep. 937, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

*Kansas.* — *John Deere Plow Co. v. Wyland*, 69 Kan. 255, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869; *Sigel-Campion Livestock Commission Co. v. Haston*, 68 Kan. 749.

*New Jersey.* — *Delaware, etc., Canal Co. v. Mahlenbrock*, 63 N. J. L. 281; *Henry v. Simanton*, 64 N. J. Eq. 572.

*New York.* — See *Vaughn Mach. Co. v. Light-house*, 64 N. Y. App. Div. 138.

*Texas.* — *Lane, etc., Co. v. City Electric Light, etc., Co.*, 31 Tex. Civ. App. 449.

*Virginia.* — *Goldsberry v. Carter*, 100 Va. 438.

**Instances.** — Making a contract merely is not doing business. *Commercial Wood, etc., Co. v. Northampton Portland Cement Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 242.

**The Transaction of an Isolated Business Act** is not doing business in a state. *Doe v. Springfield Boiler, etc., Co.*, 104 Fed. Rep. 684, 44 C. C. A. 128.

**When Single Act Constitutes "Doing Business."** — A single transaction by a foreign corporation may constitute a doing of business, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of the dealings in the domestic state. *John Deere Plow Co. v. Wyland*, 69 Kan. 255.

- 870.** (3) *Sales of Merchandise by Commercial Corporations.* — See notes 1, 3, 4.  
**871.** See notes 1, 3, 4.  
 (4) *Acts in Relation to Insurance.* — See note 8.  
**872.** See note 3.  
 (5) *Miscellaneous.* — See notes 4, 5, 9.  
**873.** See notes 2, 5, 11, 11a.

**870. 1. Sales on Orders Approved at Home Office.** — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. L. 214, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *Vaughn Mach. Co. v. Lighthouse*, 64 N. Y. App. Div. 138; *Cummer Lumber Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 67 N. Y. App. Div. 151, affirmed 173 N. Y. 633; *Jones v. Keeler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 221.

**Sales by an Agent under a Written Contract Addressed to and Accepted by the Corporation at Its Home Office.** — *Harvard Co. v. Wicht*, 99 N. Y. App. Div. 507. See also *Penn Collieries Co. v. McKeever*, 93 N. Y. App. Div. 303.

**3. Sales Through Itinerant Salesmen.** — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41. See also *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683; *West Jersey Ice Mfg. Co. v. Armour*, 12 Pa. Super. Ct. 443.

**4. Sales on Unsolicited Order.** — *Wagner v. Meakin*, (C. C. A.) 92 Fed. Rep. 76.

**871. 1. Sales Through Local Merchants on Commission.** — *Hovey's Estate*, 9 Pa. Dist. 183.

Where a commission merchant took an order from a dealer and forwarded it to a foreign corporation which delivered the goods directly to such dealer, it was held that the corporation was not "doing business" within the state. *Waller v. Rothfield*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 177. See also *Lasater v. Purcell Mill, etc., Co.*, 22 Tex. Civ. App. 33.

**3. Agreement to Furnish and Set Up Machinery.** — *See Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466.

**4. Violation of Interstate Commerce Act — United States.** — *Wagner v. Meakin*, (C. C. A.) 92 Fed. Rep. 76; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. Rep. 239, 55 C. C. A. 93.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*Kansas.* — *John Deere Plow Co. v. Wyland*, 69 Kan. 255, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

*Kentucky.* — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41.

*Tennessee.* — *Davis, etc., Bldg., etc., Co. v. Caigle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240.

*Texas.* — *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241; *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232; *Texas, etc., R. Co. v. Davis*, 93 Tex. 378; *Lane, etc., Co. v. City Electric Light, etc., Co.*, 31 Tex. Civ. App. 449; *De Witt v. Berger Mfg. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 334.

**8. Issuing Policies on Contracts Made Outside**

**of State.** — *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *State v. Connecticut Mut. L. Ins. Co.*, 106 Tenn. 282.

**Receipt of Insurance Premiums at Bank, Not Doing Business.** — *Swann v. Mutual Reserve Fund L. Assoc.*, 100 Fed. Rep. 922.

**872. 3. Other Acts in Relation to Policy.** — A foreign corporation insuring its property in a domestic insurance company is not doing business. *Cummer Lumber Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 67 N. Y. App. Div. 151, affirmed 173 N. Y. 633.

**4. Soliciting Subscriptions for Paper, Not Doing Business.** — *Crocker v. Muller*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 685.

**Soliciting Advertisements** for a publishing corporation is not doing business. *Boardman v. S. S. McClure Co.*, 123 Fed. Rep. 614; *American Contractor Pub. Co. v. Bagge*, (Supm. Ct. App. T.) 91 N. Y. Supp. 73.

**5. Purchasing a Mortgage** is not "doing business." *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572.

**Passively Continuing to Hold a Previously Existing and Valid Lien** or title is not transacting business. *Chicago Title, etc., Co. v. Bashford*, 120 Wis. 281.

**9. Other Loans.** — See *People's Bldg., etc., Assoc. v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764 (to the same effect as *Eastern Bldg., etc., Assoc. v. Bedford*, 88 Fed. Rep. 7, set out in the original note).

A loan made by a construction company, not chartered to engage in the business of loaning money, is not doing business. *New York, etc., Constr. Co. v. Winton*, 208 Pa. St. 467.

**873. 2. A Subscription to the Capital Stock of a Foreign Corporation** is not a doing of business. *Wildwood Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct. 389; *Galena Min., etc., Co. v. Frazier*, 20 Pa. Super. Ct. 394.

**5. Purchase of Securities.** — *Miller v. Williams*, 27 Colo. 34.

**The Purchase of Stock in a Domestic Corporation and the Voting for Directors** is not a doing of business. *Shepp v. Schuylkill Valley Traction Co.*, 17 Montg. Co. Rep. (Pa.) 52.

**11. Leasing Land in Domestic State.** — A foreign corporation which has leased its land to tenants for agricultural purposes since it ceased "the mining and sale of coal, and the manufacture of coke therefrom," has not been doing business within an act requiring the filing of its charter. *Missouri Coal, etc., Co. v. Ladd*, 160 Mo. 435.

**11a. Other Acts Held Not to Constitute "Doing Business."** — Entering into a contract with a city for lighting its streets. *Hogan v. St. Louis*, 176 Mo. 149.

Advertising the business of the corporation. *Rich v. Chicago, etc., R. Co.*, 34 Wash. 14.

An agreement to supply the public schools

**874. b. ACTS HELD TO CONSTITUTE DOING BUSINESS.** — See notes 1, 3, 7, 8, 9, 9a.

**875. V. EFFECT OF NONCOMPLIANCE WITH DOMESTIC STATUTES IMPOSING RESTRICTIONS ON RIGHT TO DO BUSINESS** — 2. Rule that Statutes Making It Unlawful to Do Business Without Compliance Avoid Contracts. — See notes 1, 2.

3. Effect of Noncompliance Where Statutes Impose Penalties — a. VIEW THAT CONTRACTS ARE NOT RENDERED UNENFORCEABLE BY NONCOMPLIANCE. — See note 3.

with text books. *State v. American Book Co.*, 69 Kan. 1.

Running a boat in New York harbor as a ferry between two different points. *Savage v. Atlanta Home Ins. Co.*, 55 N. Y. App. Div. 20.

Receiving a note in compromise of a claim against a resident corporation. *Creteau v. Foote, etc., Glass Co.*, 40 N. Y. App. Div. 215.

**874. 1. Erecting and Furnishing Dwelling Houses and Churches.** — *Chicago Bldg., etc., Co. v. Myton*, 24 Pa. Super. Ct. 16.

3. **Appointing Agents and Effecting Loans in Domestic State.** — *Chattanooga Nat. Bldg., etc., Assoc. v. Denson*, 189 U. S. 408; *People's Bldg., etc., Assoc. v. Berlin*, 15 Pa. Super. Ct. 393. See also *J. B. Watkins Land Mortg. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385.

7. **A Contract of Fire Insurance**, the subject of which is property within the domestic state, is an attempt to do business in such state, without regard to where the contract was made. *Commonwealth Mut. F. Ins. Co. v. Sharpless*, 12 Pa. Super. Ct. 333.

**Paying Benefits and Receiving Applications.** — A foreign insurance association, having a post in the domestic state, where benefits are paid and applications for membership are received, is doing business within such state. *Corley v. Travelers' Protective Assoc., (C. C. A.)* 105 Fed. Rep. 857.

8. **Taking Notes for Other Purposes.** — *Alleghany Co. v. Allen*, 69 N. J. L. 270.

9. **Making Single Loans on Mortgage.** — *People's Bldg., etc., Assoc. v. Markley*, 27 Ind. App. 128.

**Making Loan Through Traveling Soliciting Agents** is doing business, where the prohibition of the statute is against doing "any business." *Denson v. Chattanooga Nat. Bldg., etc., Assoc.*, 107 Fed. Rep. 777, 46 C. C. A. 634, affirmed 189 U. S. 408.

9a. **Other Acts Held to Constitute "Doing Business."** — Constructing a railroad. *Delaware River Quarry, etc., Co. v. Bethlehem, etc., Pass. R. Co.*, 204 Pa. St. 22.

Maintenance of a place of business conducted by a local manager and the sale of goods within the domestic state. *Wall Paper Co.'s Appeal*, 15 Pa. Super. Ct. 407.

A contract for the delivery and storage of ice at designated places within the state. *West Jersey Ice Mfg. Co. v. Armour*, 12 Pa. Super. Ct. 443.

Appointing an agent in the domestic state and consigning to him goods for sale on commission. *Milsom Rendering, etc., Co. v. Kelly*, 10 Pa. Super. Ct. 565.

Buying timber and lumber within a state and shipping it out. *Chicago Mill, etc., Co. v. Sims*, 101 Mo. App. 569.

The execution of a contract of sale. *Knoxville Nursery Co. v. Com.*, 108 Ky. 6.

Shipping agricultural implements to agents to be stored and sold by them. *Com. v. Parlin, etc., Co.*, 80 S. W. Rep. 791, 26 Ky. L. Rep. 58.

Sales through factors on commission. *U. S. Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. Rep. 398.

A contract whereby a foreign corporation is to have control of the manufacturing and operation of a factory within a state. *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611.

**875. 1. Effect of Statutes Making It Unlawful to Do Business.** — *Ehrhardt v. Robertson*, 78 Mo. App. 404; *Henni v. Fidelity Bldg., etc., Assoc.*, 61 Neb. 744, 87 Am. St. Rep. 519; *Pioneer Sav., etc., Co. v. Eyer*, 62 Neb. 810; *Milsom Rendering, etc., Co. v. Kelly*, 10 Pa. Super. Ct. 565; *Commonwealth Mut. F. Ins. Co. v. Sharpless*, 12 Pa. Super. Ct. 333; *West Jersey Ice Mfg. Co. v. Armour*, 12 Pa. Super. Ct. 443; *People's Bldg., etc., Assoc. v. Berlin*, 15 Pa. Super. Ct. 393; *People's Bldg., etc., Assoc. v. Neal*, 15 Pa. Super. Ct. 400; *Wall Paper Co.'s Appeal*, 15 Pa. Super. Ct. 407; *Chicago Bldg., etc., Co. v. Myton*, 24 Pa. Super. Ct. 16; *Delaware River Quarry, etc., Co. v. Bethlehem, etc., Pass. R. Co.*, 204 Pa. St. 22.

**Effect of Statutes Making Contracts Wholly Void.** — *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66.

2. **Decisions under Statutes Whose Provisions Do Not Appear — Alabama.** — *Hanchey v. Southern Home Bldg., etc., Assoc.*, 140 Ala. 245.

*Illinois.* — *Illinois State Trust Co. v. St. Louis, etc., R. Co.*, 208 Ill. 419.

*Michigan.* — *Hoskins v. Rochester Sav., etc., Assoc.*, 133 Mich. 505.

*New Jersey.* — *Wolf v. Lancaster*, 70 N. J. L. 201.

*Pennsylvania.* — *Delaware River Quarry, etc., Co. v. Bethlehem, etc., St. R. Co.*, 7 Northam. Co. Rep. (Pa.) 337.

*Tennessee.* — *Harris v. Columbia Water, etc., Co.*, 108 Tenn. 245.

*Utah.* — *Rio Grande Western R. Co. v. Telluride Power Transmission Co.*, 23 Utah 22.

**Cases Contra.** — *Enterprise Brewing Co. v. Grime*, 173 Mass. 252; *Miller v. Gates*, 22 Mont. 305; *National Cash Register Co. v. Wilson*, 9 N. Dak. 112.

3. **Statutes Held Not to Render Contracts Unenforceable.** — *Esjava v. New York Nat. Bldg., etc., Assoc.*, 121 Ala. 480; *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87; *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327; *State v. American Book Co.*, 69 Kan. 1; *Hamilton v. Reeves*, 69 Kan. 844.

**Legislative Intent.** — In the absence of an express provision of statute to the contrary, the innocent acts and contracts of a foreign cor-

**876.** *b.* CONTRARY VIEW. — See note 4.

**877.** 4. Rule that Contracts of Noncomplying Corporations Are Void if Statute Contains Prohibition but Imposes No Penalty. — See note 2.

5. Rule that Noncompliance Only Suspends Remedy. — See note 4.

**878.** 6. Rule that Question of Noncompliance Cannot Be Raised Collaterally. — See note 4.

8. Application of Doctrine of Estoppel to Contracts of Noncomplying Corporations — *a.* RULE THAT CORPORATION CANNOT SET UP NONCOMPLIANCE AS A DEFENSE. — See note 6.

**880.** *b.* RULE THAT OTHER CONTRACTING PARTY IS ESTOPPED FROM SETTING UP NONCOMPLIANCE. — See note 1.

10. Effect of Statutes Prohibiting Suit in Case of Noncompliance. — See note 5.

**881.** 12. Status of Contracts in Case of Substantial Compliance with Statutory Requirements. — See note 1.

13. Effect on Contracts Made Outside of Domestic State. — See note 3.

poration, which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts done, are valid and enforceable, because it is not the intent of the authors of such laws to strike down contracts, or acts in performance of them, that are not evil in themselves. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 58 C. C. A. 79.

**876.** 4. Rule that Statutes Render Contracts Unenforceable. — *Ehrhardt v. Robertson*, 78 Mo. App. 404. See also *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121.

**877.** 2. Statute Containing No Prohibition — *Minnesota*. — Laws Minn. 1895, c. 332, was not intended to render void and unenforceable contracts made by foreign corporations without complying with the terms of the act, but only to provide a mode of serving process on such corporations. *Tolerton, etc., Co. v. Barck*, 84 Minn. 497.

4. Noncompliance Only Suspends Remedy. — *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198; *North Mercer Natural Gas Co. v. Smith*, 27 Ind. App. 472; *Chicago Mill, etc., Co. v. Sims*, 101 Mo. App. 569; *Dunbarton Flax Spinning Co. v. Greenwich, etc., R. Co.*, 87 N. Y. App. Div. 21; *Lewis Pub. Co. v. Palmer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 141.

Assignee May Sue Where Corporation Cannot. — *Lindheim v. Sitt*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 62.

**878.** 4. Noncompliance Not Subject to Collateral Attack. — *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428; *Dunbarton Flax Spinning Co. v. Greenwich, etc., R. Co.*, 87 N. Y. App. Div. 21.

6. Corporation Estopped to Set Up Its Own Wrongful Acts. — *Corley v. Travelers' Protective Assoc.*, (C. C. A.) 105 Fed. Rep. 854; *Greaves v. Posner*, 111 Iowa 651; *Fisher v. Traders Mut. L. Ins. Co.*, 136 N. Car. 217.

**880.** 1. Party Contracting with Corporation Estopped to Set Up Noncompliance — *United States*. — *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 58 C. C. A. 79.

*Alabama*. — *Greenville v. Greenville Water Works Co.*, 125 Ala. 625.

*Colorado*. — *Miller v. Williams*, 27 Colo. 34.  
*Iowa*. — *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351.

*Kansas*. — *State v. American Book Co.*, 69 Kan. 1.

*Kentucky*. — *Hallam v. Ashford*, 70 S. W. Rep. 197, 24 Ky. L. Rep. 870.

5. Statutes Denying Right to Sue. — *Union Cloak, etc., Co. v. Carpenter*, 102 Ill. App. 339; *Central Mfg. Co. v. Briggs*, 106 Ill. App. 417; *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121; *South Amboy Terra Cotta Co. v. Poerschke*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 358. See also *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

Noncompliance with such a statute does not make a foreign corporation a trespasser in using a highway in the state. *Bischoff v. Automobile Touring Co.*, 97 N. Y. App. Div. 17.

Such a statute does not prohibit a foreign corporation from defending a suit or maintaining actions in the federal courts. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 58 C. C. A. 79.

Compliance After Making of Contract. — Compliance with such a statute after making the contract will not remove the bar of the statute. *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121.

**881.** 1. Substantial Compliance with Statutes. — An action brought by a foreign corporation will not be dismissed, where the statute is not technically complied with, there being an honest effort to comply with the statute and a compliance had as far as possible. *Jordan v. Western Union Tel. Co.*, 69 Kan. 140.

3. Effect on Contracts Made Outside Domestic State — *Alabama*. — *American Bldg., etc., Assoc. v. Haley*, 132 Ala. 135.

*Illinois*. — See *March-Davis Cycle Mfg. Co. v. Strobridge Lithographing Co.*, 79 Ill. App. 683.

*New Jersey*. — *MacMillan Co. v. Stewart*, 69 N. J. L. 212; *Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. L. 214.

*New York*. — *Matter of Simonds Furnace Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 209; *Box Board, etc., Co. v. Vincennes Paper Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 1, affirmed 98 N. Y. App. Div. 623.

*Tennessee*. — *W. W. Kimball Co. v. First Nat. Bank*, 1 Tenn. Ch. App. 505.

*Texas*. — *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575; *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252.



**881. 14. Effect on Existing Contracts of Statutes Imposing Conditions.** — See note 4.

**16. Effect of Noncompliance on Enforcement of Domestic Contract in Another State.** — See note 6.

**882. 17. Rights of Innocent Third Parties Who Have Purchased Notes Given to Noncomplying Company.** — See note 1.

**18. How Noncompliance Affects Rights of Corporation as Against Its Agent and His Sureties.** — See note 4.

**883. 20. Ouster of Foreign Corporation for Noncompliance.** — See note 3.

**884. VI. DOMESTICATION OF FOREIGN CORPORATIONS — 1. Acts Held Not to Constitute Domestication.** — See notes 3, 6.

**885. 2. Adoption of Foreign Corporation.** — See notes 1, 2.

**Language of Statute Must Imply Adoption.** — See note 4.

**886. Effect of Adoption.** — See note 3.

**887. 3. Interstate Consolidation of Corporations — c. STATUS OF CONSOLIDATED CORPORATION — (1) A Domestic Corporation of Each State.** — See notes 3, 5.

**889. 4. Status of Adopted or Consolidated Corporations for Jurisdictional Purposes.** — See note 4.

**890.** See notes 1, 2, 4.

**891. VII. ACTIONS BY AND AGAINST FOREIGN CORPORATIONS — 1. Right to Sue — a. IN GENERAL.** — See note 1.

*Virginia.* — *Goldsberry v. Carter*, 100 Va. 438.

**881. 4. Effect of Statutes on Existing Contracts.** — *Sidway v. Harris*, 66 Ark. 387; *Richardson v. U. S. Mortgage, etc., Co.*, 194 Ill. 259; *Security Sav., etc., Assoc. v. Elbert*, 153 Ind. 198; *National Home Bldg., etc., Assoc. v. Black*, 153 Ind. 701; *Keystone Mfg. Co. v. Howe*, 89 Minn. 256, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 881; *Atlantic Constr. Co. v. Kreusler*, 40 N. Y. App. Div. 268; *MacLeod v. Putnam*, 24 R. I. 500.

**Impairment of Contract Obligation.** — *Lewis Pub. Co. v. Lenz*, 86 N. Y. App. Div. 451.

**6. Suit Brought in Another State.** — *Alleghany Co. v. Allen*, 69 N. J. L. 270.

**882. 1. Rights of Innocent Purchasers of Notes.** — *Hamilton v. Fowler*, 99 Fed. Rep. 18, 40 C. C. A. 47; *National Bank of Commerce v. Pick*, (N. Dak. 1904) 99 N. W. Rep. 63.

**Note Held Void.** — *Massillon First Nat. Bank v. Coughron*, (Tenn. Ch. 1899) 52 S. W. Rep. 1112.

**4. Rights of Company Not Based on Bond.** — *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350; *Hovey's Estate*, 198 Pa. St. 385. See also *Julius King Optical Co. v. Royal Ins. Co.*, 24 Pa. Super. Ct. 527.

**883. 3. Ouster of Foreign Corporations.** — *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449.

**884. 3. License with Greater Powers.** — The acceptance of an act, which amounts to mere license to a foreign corporation to do business with greater powers than it possessed under the laws of the state of its creation, does not make it a domestic corporation. *Goodloe v. Tennessee Coal, etc., Co.*, 117 Fed. Rep. 348.

**6. Where Domestic Charter Is Filed Without the Knowledge and Consent of the Corporation.** — *Mutual Reserve Fund L. Assoc. v. Thompson*, 125 N. Car. 435.

**885. 1. Adoption of Foreign Corporation.** —

*Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552; *Russell v. St. Louis Southwestern R. Co.*, 71 Ark. 451; *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

**2. Louisville, etc., R. Co. v. Louisville Trust Co.**, 174 U. S. 552.

**4. Language of Statute Must Imply Adoption.** — *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552; *Sidway v. Missouri Land, etc., Co.*, 101 Fed. Rep. 481.

**886. 3. Status of Adopted Corporation.** — *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

**887. 3. Consolidated Corporation a Corporation of Each State.** — *Winn v. Wabash R. Co.*, 118 Fed. Rep. 55.

**5. Existence Dependent on Laws of Each State.** — *Winn v. Wabash R. Co.*, 118 Fed. Rep. 55.

**889. 4. Status for Jurisdictional Purposes.** — *Goodwin v. New York, etc., R. Co.*, 124 Fed. Rep. 358; *Alabama, etc., Mfg. Co. v. Riverdale Cotton Mills*, (C. C. A.) 127 Fed. Rep. 497; *Debnam v. Southern Bell Telephone, etc., Co.*, 126 N. Car. 831.

**890. 1. Whether Adopted Corporation Citizen of State Adopting for Jurisdictional Purposes — The Affirmative View.** — *Layden v. Endowment Rank, etc.*, 128 N. Car. 546.

**2. Contrary View.** — *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552.

**4. Whether Consolidated Corporation a Citizen of Each State for Jurisdictional Purposes — Affirmative View.** — *Winn v. Wabash R. Co.*, 118 Fed. Rep. 55; *Dodd v. Louisville Bridge Co.*, 130 Fed. Rep. 186.

**891. 1. Right to Sue — Delaware.** — *E. F. Kirwan Mfg. Co. v. Pruxton*, 2 Penn. (Del.) 48.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*Kansas.* — *Colonial, etc., Mortg. Co. v. Catlin*, 8 Kan. App. 860, 57 Pac. Rep. 140.

*Louisiana.* — *Buck v. Massie*, 109 La. 776.

**892.** *b.* FOR WHAT CAUSES OF ACTION — *Torts.* — See note 8.

**893.** *2.* Liability to Be Sued — *a.* WHERE CORPORATION IS NOT DOING BUSINESS IN DOMESTIC STATE. — See note 1.

**894.** *b.* WHERE CORPORATION IS DOING BUSINESS IN DOMESTIC STATE — (1) *English Rule.* — See note 1.

(2) *Common-law Rule in America.* — See note 2.

(3) *Under Statutes Requiring Corporations to Maintain Known Place of Business and Resident Agent.* — See notes 4, 5.

**895.** See notes 1, 2, 3.

(4) *Modern Relaxation of Common-law Rule.* — See note 6.

**898.** (9) *Suits of Nonresidents Against Foreign Corporations* — (b) *Right of Suit under Statutes Authorizing It.* — See note 8.

*Missouri.* — See *Frick Co. v. Marshall*, 86 Mo. App. 463.

*Nebraska.* — *Schmidt, etc., Co. v. Mahoney*, 60 Neb. 20.

*Pennsylvania.* — *New York, etc., Constr. Co. v. Winton*, 208 Pa. St. 467.

**892.** *8.* Effect of Noncompliance with Statutes. — *Delaware, etc., Tel., etc., Co. v. Pensauken Tp.*, 116 Fed. Rep. 910.

**893.** *1.* Corporations Not Doing Business in Domestic State — *United States.* — *Mecke v. Valletown Mineral Co.*, 93 Fed. Rep. 697, 35 C. C. A. 151; *Eirich v. Donnelly Contracting Co.*, 104 Fed. Rep. 1; *Doe v. Springfield Boiler, etc., Co.*, 104 Fed. Rep. 684, 44 C. C. A. 128; *Conley v. Mathieson Alkali Works*, 110 Fed. Rep. 730, affirmed 190 U. S. 406; *Cady v. Associated Colonies*, 119 Fed. Rep. 420; *Boardman v. S. S. McClure Co.*, 123 Fed. Rep. 614; *Frawley v. Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *Central Grain, etc., Exch. v. Board of Trade*, 125 Fed. Rep. 463, 60 C. C. A. 299; *Earle v. Chesapeake, etc., R. Co.*, 127 Fed. Rep. 235; *Martin v. New Trinidad Lake Asphalt Co.*, 130 Fed. Rep. 394.

*Alabama.* — See *Lee v. Baird*, 139 Ala. 526.

*California.* — *Eureka Mercantile Co. v. California Ins. Co.*, 130 Cal. 153.

*Illinois.* — *Schillinger Bros. Co. v. Henderson Brewing Co.*, 107 Ill. App. 335.

*Kansas.* — See *J. B. Watkins Land Mortg. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385.

*Louisiana.* — See *Payne v. East Union Lumber Co.*, 109 La. 706.

*Missouri.* — *Zelnicker Supply Co. v. Mississippi Cotton Oil Co.*, 103 Mo. App. 94.

*New Jersey.* — *Puster v. Parker Mercantile Co.*, (N. J. 1904) 59 Atl. Rep. 232. See also *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341.

*North Carolina.* — *Jester v. Baltimore Steam Packet Co.*, 131 N. Car. 54.

*South Carolina.* — *Abbeville Electric Light, etc., Co. v. Western Electrical Supply Co.*, 61 S. Car. 361, 85 Am. St. Rep. 890.

*Washington.* — *Rich v. Chicago, etc., R. Co.*, 34 Wash. 14.

**Where License Revoked.** — The status of a foreign corporation whose license has been revoked is the same as if it had never done business in the state. *Swann v. Mutual Reserve Fund L. Assoc.*, 100 Fed. Rep. 922.

**Service on Resident Director Held Insufficient.** — *Conley v. Mathieson Alkali Works*, 190 U. S. 406; *Geer v. Mathieson Alkali Works*, 190

U. S. 428; *Reilly v. Philadelphia, etc., R. Co.*, 109 Fed. Rep. 349.

**894.** *1.* *English Rule.* — *Merritt v. Copper Crown Co.*, 36 Nova Scotia 383.

*2.* *Rule at Common Law in America.* — *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68.

*4.* *Constitutionality of Statutes.* — *Empire Milling, etc., Co. v. Tombstone Mill, etc., Co.*, 100 Fed. Rep. 910.

*5.* *Sufficiency of Service to Support Jurisdiction.* — *Iesser Cotton Co. v. Yates*, 69 Ark. 396; *Cathcart v. Cincinnati, etc., R. Co.*, 108 Ga. 253; *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309; *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302.

**Service on Insurance Agent Who Issued Policy Sufficient.** — *Purvancher v. Union Casualty, etc., Co.*, 81 Miss. 32.

**Service Must Be Made on an Agent upon Whom Service Is Authorized, or it must be shown that such agent could not be found.** *Venner v. Denver Union Water Co.*, 32 Colo. 207.

**Service on Agent Corporation Sufficient.** — *Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687.

**After a Foreign Corporation Has Withdrawn** and is represented no longer by the designated agent, service upon him is insufficient. *Forrest v. Pittsburgh Bridge Co.*, (C. C. A.) 116 Fed. Rep. 357.

**Service on Insurance Commissioner Held Sufficient.** — *Old Wayne Mut. L. Assoc. v. Flynn*, (Ind. App. 1903) 66 N. E. Rep. 57; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Mutual Reserve Fund L. Assoc. v. Phelps*, 190 U. S. 147.

**895.** *1.* *In Federal Courts.* — *Reilly v. Philadelphia, etc., R. Co.*, 109 Fed. Rep. 349.

*2.* *Doing Business on Implied Assent to State Laws.* — *Reilly v. Philadelphia, etc., R. Co.*, 109 Fed. Rep. 349.

*3.* *Noncompliance with Laws — How Rule Affected By.* — *American Cotton Co. v. Beasley*, (C. C. A.) 116 Fed. Rep. 256.

*6.* *Statutes Authorizing Service of Process Unnecessary.* — *Weston v. Citizen's Nat. Bank*, 64 N. Y. App. Div. 148, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 895. See also *McCord Lumber Co. v. Doyle*, 97 Fed. Rep. 22, 38 C. C. A. 34; *Banister v. Weber Gas, etc., Engine Co.*, 82 Mo. App. 528.

**898.** *8.* *A Director of a Foreign Corporation* may sue for an accounting under Code Civ. Pro. N. Y., § 1782. *Miller v. Quincy*, 179 N. Y. 294, reversing 88 N. Y. App. Div. 529.

- 899.** (c) Right of Suit under Statutes Restricting to Specified Cases. — See note 2.
- 901.** 3. Proof of Corporate Existence — *a.* IN CIVIL CASES. — See note 4.
- 903.** *b.* IN CRIMINAL CASES. — See note 3.
4. Proof of Compliance with Statutory Requirements. — See notes 4, 6, 8.
- 904.** 6. Statute of Limitations — *a.* RIGHT OF FOREIGN CORPORATION TO PLEAD DOMESTIC STATUTE OF LIMITATIONS AS A DEFENSE. — See note 2.
- 906.** VIII. PROCEEDINGS IN REM, ATTACHMENT, AND GARNISHMENT —
2. Attachment — *a.* LIABILITY TO ATTACHMENT. — See note 1.
- 907.** *c.* ATTACHMENT BY NONRESIDENT CREDITORS. — See note 7.
- 908.** IX. DISSOLUTION OF FOREIGN CORPORATIONS. — See notes 3, 5, 7, 8, 10.
- 909.** Control of Domestic Court over Assets Within Its Jurisdiction. — See note 1.
- X. RECEIVERS OF FOREIGN CORPORATIONS — 1. Appointment by Domestic Court — *a.* WHERE DOMICILIARY RECEIVER HAS NOT BEEN APPOINTED — Power of Domestic Courts to Appoint Receiver. — See notes 2, 4.**
- Grounds for Appointing Receiver. — See note 8.

**899.** 2. Statutes Restricting Suit to Specified Cases. — *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603.

**901.** 4. Prima Facie Proof of the Existence of a Corporation Plaintiff is sufficient where the defendant fails to make the existence of the corporation an issue in the case. *MacMillan Co. v. Stewart*, 69 N. J. L. 212.

**903.** 3. Corporate Existence May Be Proved by a duly certified copy of the charter. *Com. v. Corkery*, 175 Mass. 460.

4. License to Do Business. — *Washington Nat. Bldg., etc., Assoc. v. Stanley*, 38 Oregon 319, 84 Am. St. Rep. 793.

6. Suit on Contract. — *Lehigh Valley Coal Co. v. Gilmore*, 93 Minn. 432.

8. Parlin, etc., Co. v. Boatman, 84 Mo. App. 67. See also *State v. Hudson*, 86 Mo. App. 501.

**904.** 2. Right to Plead Statute Denied. — See *McClure v. Supreme Lodge, etc.*, 41 N. Y. App. Div. 131.

**906.** 1. Liability to Attachment. — *Voss v. Evans Marble Co.*, 101 Ill. App. 373; *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341; *Diener v. Wopsononock Hotel Co.*, 10 Pa. Dist. 57.

No Attachment for Tort Committed in Another State. — *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68.

**907.** 7. Attachment by Nonresidents. — *Coolidge v. American Realty Co.*, 91 N. Y. App. Div. 14. See also *Hodgson v. Southern Bldg., etc., Assoc.*, 91 Md. 439.

**908.** 3. State Has No Power to Dissolve Foreign Corporation. — *Sidway v. Missouri Land, etc., Co.*, 101 Fed. Rep. 481; *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580; *Miller v. Barlow*, 88 N. Y. App. Div. 529, reversed 179 N. Y. 294.

5. Effect of Decree of Dissolution in Domiciliary State. — A foreign corporation dissolved in the domiciliary state is deemed to be alive in the foreign state, so far as to save the remedies of its own citizens against property within its own jurisdiction. *Hammond v. National L. Assoc.*, 58 N. Y. App. Div. 453, appeal dismissed 168 N. Y. 262.

7. Abatement of Suits Against Corporation. — *Fitts v. National L. Assoc.*, 130 Ala. 413, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.)

908. See also *Matter of Stewart*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 275. But see *Hammond v. National L. Assoc.*, 58 N. Y. App. Div. 453, appeal dismissed 168 N. Y. 262.

8. Statute Held Not to Apply to Foreign Corporations. — *Fitts v. National L. Assoc.*, 130 Ala. 413; *Olds v. City Trust, etc., Co.*, 185 Mass. 500, 102 Am. St. Rep. 356.

10. Invalidity of Judgment Against Dissolved Corporation. — *Matter of Stewart*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 275.

**909.** 1. Control of Domestic Court over Local Assets. — *People v. Granite State Provident Assoc.*, 41 N. Y. App. Div. 257, affirmed 161 N. Y. 492.

2. Appointing Receiver for Foreign Corporation. — *Shinney v. North American Sav., etc., Co.*, 97 Fed. Rep. 9; *Reusens v. Manufacturing, etc., Co.*, 99 N. Y. App. Div. 214.

A receiver will not be appointed where the receivership will amount in effect to a dissolution of the corporation. *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580.

4. Inherent Right of Court of Equity to Appoint. — The Supreme Court has jurisdiction to appoint a receiver of the assets of an insolvent foreign corporation. *Popper v. Supreme Council, etc.*, 61 N. Y. App. Div. 405.

8. Grounds of Appointment — Fraudulent Disposition of Assets. — *Whitman v. Holmes Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 47.

Dissipation of Assets in Litigation. — Where an insolvent foreign corporation has property in New York which is in danger of being wasted and dissipated in litigation, through claims of resident attaching creditors and of a foreign receiver, a resident creditor not secured by attachment can maintain an action in his own behalf for an appointment of a receiver. *Popper v. Supreme Council, etc.*, 61 N. Y. App. Div. 405.

Where a Foreign Corporation Is Solvent a receiver will not be appointed to wind up its affairs, the suit being brought by a minority stockholder who complains alone of its internal management whereby the value of his stock has been diminished, and is threatened with further loss. *Sidway v. Missouri Land, etc., Co.*, 101 Fed. Rep. 481.

**911. b.** AS ANCILLARY TO DOMICILIARY RECEIVERS. — See note 2.

**2. Recognition of Receivers Appointed in Domiciliary State — a.** COMITY THE BASIS OF RECOGNITION. — See notes 3, 4, 5.

**912. b.** CASES TO WHICH COMITY DOES NOT EXTEND. — See notes 1, 2, 3.

**913. c.** CASES TO WHICH COMITY WILL BE EXTENDED — In General. — See note 5.

**911. 2. Nont Compliance of Corporation with Statutory Requirements.** — *Wilson v. Keels*, 54 S. Car. 545, 71 Am. St. Rep. 816.

**3. Foreign Receiver Without Extraterritorial Authority.** — *Hale v. Allinson*, 188 U. S. 56; *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *Barley v. Gittings*, 15 App. Cas. (D. C.) 427.

**4. Must Exercise Powers Within State Where Appointed.** — *Frowert v. Blank*, 205 Pa. St. 302.

**5. Effect of Comity.** — *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *Barley v. Gittings*, 15 App. Cas. (D. C.) 427; *Frowert v. Blank*, 205 Pa. St. 302; *Wilson v. Keels*, 54 S. Car. 545, 71 Am. St. Rep. 816. See also *Tompkins v. Blakey*, 70 N. H. 584.

**912. 1. Duty of State to Its Own Citizens.** — *Frowert v. Blank*, 205 Pa. St. 302, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912.

**2. Rights of Domestic Creditors as Against Foreign Receiver.** — *Frowert v. Blank*, 205 Pa. St. 302, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912.

**Applications of Rule.** — A receiver of a foreign corporation, appointed by the courts of its domicile, who has not taken actual possession of the property, does not thereby acquire such title to the property of the corporation situate in the domestic state as to defeat an attachment subsequently issued at the instance of a creditor by the courts of such state. *Gray v. Covert*, 25 Ind. App. 561, 81 Am. St. Rep. 117.

**3. People v. Granite State Provident Assoc.**, 41 N. Y. App. Div. 257, affirmed 161 N. Y. 492.

**913. 5. Suit to Recover Debt Due by a Resident of the Domestic State.** — *Hallam v. Ashford*, 70 S. W. Rep. 197, 24 Ky. L. Rep. 870.

## FOREIGN EXECUTORS AND ADMINISTRATORS

BY ALFRED PIZEY.

**916. I. DEFINITIONS — A Foreign Executor or Administrator.** — See note 1.  
An Ancillary Administrator. — See note 2.

**II. TERRITORIAL LIMITATION OF AUTHORITY OF REPRESENTATIVE —**

**1. Common-law Rule — a. IN GENERAL.** — See note 3.

**919. III. DISTINCTION BETWEEN PRINCIPAL AND ANCILLARY ADMINISTRATIONS.** — See note 4.

**916. 1. Definitions.** — A foreign executor is one who derives his authority from another state or nation. *McCahan v. Reeder*, 10 Pa. Dist. 298, 25 Pa. Co. Ct. 148.

By the phrase "foreign executor" the courts never mean the mere nonresidence of the individual holding the office, but the foreign origin of the representative character. *Hopper v. Hopper*, 125 N. Y. 400, quoted with approval *Flandrow v. Hammond*, 13 N. Y. App. Div. 325, and *Courtney v. Pradt*, 135 Fed. Rep. 818.

**2. Ancillary Administrator Defined.** — *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389, affirmed on opinion below 160 N. Y. 703.

**3. Letters Testamentary or of Administration Have No Extraterritorial Effect — United States.** — *Overby v. Gordon*, 177 U. S. 214, affirming 13 App. Cas. (D. C.) 392; *Filer, etc., Co. v. Rainey*, 120 Fed. Rep. 718; *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571.

*Alabama.* — *Grayson v. Robertson*, 122 Ala. 336, 82 Am. St. Rep. 80; *Johnston v. McKinnon*, 129 Ala. 223.

*Kentucky.* — *Purdy v. Purdy*, (Ky. 1897) 42 S. W. Rep. 89.

*Missouri.* — *Emmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734.

*Nebraska.* — *Burton v. Williams*, 63 Neb. 431.

*New York.* — *Maas v. German-Sav. Bank*, 73 N. Y. App. Div. 524 [reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], affirmed 176 N. Y. 377.

*Ohio.* — *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, affirmed 68 Ohio St. 58.

*Pennsylvania.* — *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299; *Mansfield v. McFarland*, 24 Pa. Co. Ct. 591, affirmed 202 Pa. St. 173.

*South Carolina.* — *In re Neubert*, 58 S. Car. 469.

*Vermont.* — *In re Hall*, 70 Vt. 458.

**919. 4. Administration Granted in Jurisdiction Other than Domicile Is Ancillary — United States.** — *Ingersoll v. Coram*, 127 Fed. Rep. 418, 132 Fed. Rep. 168, affirmed (C. C. A.) 133 Fed. Rep. 226.

*Illinois.* — *Smith v. Smith*, 174 Ill. 52; *Ramsay v. Ramsay*, 196 Ill. 179, affirming 97 Ill.

**920.** See note 1.

**IV. PRIVACY BETWEEN DIFFERENT ADMINISTRATIONS**—Where Ancillary Letters of Administration Have Been Granted.—See notes 4, 5.

**921.** See note 1.

**V. APPOINTMENT OF ANCILLARY REPRESENTATIVES**—1. When Appointment Is Necessary or Proper.—See note 5.

**922.** See note 1.

App. 270; Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166.

*Kansas.*—Greenwalt v. Bastian, 10 Kan. App. 101.

*Missouri.*—Bealey v. Smith, 158 Mo. 515, 81 Am. St. Rep. 317.

*New York.*—O'Brien v. Baker, (Surrogate Ct.) 34 Misc. (N. Y.) 436, affirmed 65 N. Y. App. Div. 282; Matter of Newell, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

*Ohio.*—Meswald v. Marks, 10 Ohio Cir. Dec. 355, 19 Ohio Cir. Ct. 605.

**Rule Not Affected by Priority of Grant.**—Hopkins's Appeal, 77 Conn. 644.

**The Domicil of a Married Woman** is that of her husband within this rule. McPherson v. McPherson, 70 Mo. App. 330.

**Testate Estates—New York Statute.**—The New York Code preserves a marked distinction between wills admitted to probate in that state and those which are permitted to be filed or recorded on the production of an exemplified record of probate in a foreign state. On wills of the latter class the surrogate's power is limited to the issue of ancillary letters testamentary, or ancillary letters of administration with the will annexed. Baldwin v. Rice, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241.

**920. 1. An Ancillary Administration Is Subordinate.**—Taylor v. Syme, 162 N. Y. 513, 31 Civ. Pro. (N. Y.) 1, reversing on other grounds 17 N. Y. App. Div. 517.

**Ancillary Administration Not Dependent on Administration of Domicil.**—Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90.

The ancillary administration is an entirely independent administration. Winter v. Winter, 101 Wis. 494.

**Each Administration May Be Considered as a Principal One.**—Cooper v. Ives, 62 Kan. 395.

**4. No Privy Between Ancillary and Domiciliary Representatives.**—Johnston v. McKinnon, 129 Ala. 223; Doss v. Stevens, 13 Colo. App. 535; American Missionary Assoc. v. Hall, (Mich. 1904) 101 N. W. Rep. 535, 11 Detroit Leg. N. 562; Price v. Ward, 25 Nev. 203.

**A Decree Removing a Foreign Executor Is Not Conclusive** on him or the court in a proceeding to remove him as ancillary administrator in another jurisdiction. American Missionary Assoc. v. Hall, (Mich. 1904) 101 N. W. Rep. 535, 11 Detroit Leg. N. 562.

**5. The Allowance of a Claim Against a Foreign Administrator.**—Johnston v. McKinnon, 129 Ala. 223; Elting v. Biggsville First Nat. Bank, 173 Ill. 368, affirming 68 Ill. App. 204; Strauss v. Phillips, 189 Ill. 9, 91 Ill. App. 373; Ramsay v. Ramsay, 97 Ill. App. 270, affirmed 196 Ill. 179; Carter v. Pierce, 114 Ill. App. 589; Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 30.

**Judgment Against Administrator in One Juris-**

**diction Not Evidence Against Administrator in Another Jurisdiction.**—Ingersoll v. Coram, 127 Fed. Rep. 418; Smith v. Smith, 174 Ill. 52; Price v. Ward, 25 Nev. 203.

**921. 1. If the Same Person Is Both the Ancillary and the Domiciliary Administrator.**—Contra, Johnston v. McKinnon, 129 Ala. 223.

**5. Jurisdiction to Grant Ancillary Letters—Existence of Local Assets—United States.**—Thormann v. Frame, 176 U. S. 350; Coe Brass Mfg. Co. v. Savlik, (C. C. A.) 93 Fed. Rep. 519; Cincinnati, etc., R. Co. v. Thiebaud, (C. C. A.) 114 Fed. Rep. 918; U. S. v. Tyndale, (C. C. A.) 116 Fed. Rep. 820.

*Kentucky.*—Turner v. Louisville, etc., R. Co., 110 Ky. 879; Louisville, etc., R. Co. v. Schumaker, 112 Ky. 431, rehearing denied 108 Ky. 263.

*Missouri.*—Stevens v. Larwill, 110 Mo. App. 140. See also *In re Davison*, 100 Mo. App. 263.

*New Jersey.*—Matter of Bracher, 60 N. J. Eq. 350.

*New York.*—Maas v. German Sav. Bank, 73 N. Y. App. Div. 524 [reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], affirmed 176 N. Y. 377; Czech v. Bean, (County Ct.) 35 Misc. (N. Y.) 729.

*North Carolina.*—Morefield v. Harris, 126 N. Car. 626, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921; Coleman v. Howell, 131 N. Car. 125.

*Ohio.*—As to the rule under the Ohio statute see *In re McCreight*, 9 Ohio Dec. 450, 454, 6 Ohio N. P. 479.

*Rhode Island.*—Williams v. Ripley, 25 R. I. 510.

*Wyoming.*—Bliler v. Boswell, 9 Wyo. 57.

*Canada.*—Trites v. Humphreys, 2 N. Bruns. Eq. Rep. 1.

**Application by Nonresident Creditors.**—Matter of Gennert, 96 N. Y. App. Div. 8.

**Legacy under Domestic Will Left to Decedent's "Personal Representatives."**—A colonial grant of letters will be resealed in England, though the decedent left no estate there, where a legacy is payable to his "personal representatives," under a domestic will. In Goods of Sanders, (1900) P. 292.

**922. 1. Necessity of Ancillary Appointment—Collection of Local Assets.**—In some jurisdictions it is provided by statute that domiciliary representatives appointed in other states shall have full power to sue, etc. (see *infra*, this title, **953. 4 et seq.**); and where such statutes have been enacted, the necessity for ancillary administration is thereby largely dispensed with. Thus, the *Ohio* statute limits ancillary administration to cases where the decedent was a non-resident engaged in business in Ohio at the time of his death, restricting the right of appointment in such cases to creditors of the decedent.

**923.** The Chief Object. — See notes 2, 3.

If Property Is Brought After the Owner's Death into a State. — See notes 6, 7.

**924.** Where a Nonresident Decedent Left Only Real Property. — See note 1.

2. Jurisdiction. — See note 2.

3. Situs of Assets for Purpose of Granting Administration. — See notes 3, 4, 5.

**925.** See notes 2, 3, 4.

Under such statute it is held that while the court has jurisdiction in the premises, ancillary administration is not favored and should only be granted when required to preserve an estate or to secure the payment of the claim of a resident creditor. *In re McCreight*, 9 Ohio Dec. 450, 454.

**923.** 2. Protection of Local Creditors Held the Chief Object of Ancillary Letters. — *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90; *Matter of Gennett*, 96 N. Y. App. Div. 8; *Maas v. German Sav. Bank*, 176 N. Y. 377, affirming 73 N. Y. App. Div. 524, which reversed (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193; *Montgomery v. Boyd*, 78 N. Y. App. Div. 64.

3. Existence of Local Creditors Essential to Ancillary Administration. — *Matter of Gennett*, 96 N. Y. App. Div. 8; *Spratt v. Syms*, 104 N. Y. App. Div. 232. See also *Joy v. Elton*, 9 N. Dak. 428. Compare *Mansfield v. McFarland*, 202 Pa. St. 173, affirming 24 Pa. Co. Ct. 591, holding that the nonexistence of local creditors cannot legally be known until after an exhibition of an account by an ancillary administrator and the statutory notice to creditors to present their claims is given.

Under the California Statute providing for administration upon the estate of any nonresident who has died leaving property in the state, it has been held not to be necessary to show that there are creditors, or that the property requires care to preserve it, in order to obtain the letters. *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90.

6. Property Brought into State After Decedent's Death. — *Morefield v. Harris*, 126 N. Car. 626. See also *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820.

7. Exceptions Growing Out of Special Circumstances. — *Matter of McCabe*, 84 N. Y. App. Div. 145, affirmed without opinion 177 N. Y. 584.

If assets of a nonresident are brought into the state solely for the purpose of the appointment of an administrator to prosecute a negligence action against a foreign corporation on a cause of action arising in, and between residents of, another state, such appointment, if made, is fraudulent and collusive, and under the *New York* statute declaring the effect of surrogates' decrees may be collaterally attacked on that ground. *Hoes v. New York, etc., R. Co.*, 173 N. Y. 435, reversing 73 N. Y. App. Div. 363.

**924.** 1. Ancillary Administration Founded on Realty Alone. — See *Mowry v. McQueen*, 80 Minn. 385 (construing *Wisconsin* law); *Matter of Gennett*, 96 N. Y. App. Div. 8; *Trites v. Humphreys*, 2 N. Bruns. Eq. Rep. 1. Compare *Spratt v. Syms*, 104 N. Y. App. Div. 232.

In California the law provides for the administration of the estates of all nonresidents who die leaving property in the state, whether per-

sonal or real. *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90.

2. Jurisdiction to Appoint Ancillary Administrators. — In *Pennsylvania* and *South Carolina* the granting of letters to administer on the estate of a nonresident belongs to the probate judge of the county in which the greater part of the estate is found. *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299; *Dunlap v. Savings Bank*, 69 S. Car. 270, 104 Am. St. Rep. 796.

3. Situs of Tangible Personalty. — Personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction into possession. *Richards v. Riverside Iron Works*, 56 W. Va. 510.

Personal Property Found on the Body of a Deceased Person Floating on the High Seas, out of the territorial jurisdiction of any particular state and of the United States, is assets for purposes of administration in that state into which it is brought by the salvors. *U. S. v. Tyndale*, (C. C. A.) 116 Fed. Rep. 820.

4. Situs of Judgments. — But see, as to the proposition that a judgment has its situs at the debtor's place of residence, *Angier v. Jones*, 28 Tex. Civ. App. 402.

Where a foreign administrator sends into another state a judgment obtained by him in the state of his appointment, that realty situated in the former state may be subjected to its payment, the judgment constitutes assets there for purposes of administration. *Morefield v. Harris*, 126 N. Car. 626.

5. Situs of Specialty Debts. — *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299.

Scope of Rule. — *Re Ontario Mut. L. Ins. Co.*, 30 Ont. 666.

**925.** 2. Situs of Shares of Corporate Stock. — *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90; *Matter of Fitch*, 160 N. Y. 87, 30 Civ. Pro. (N. Y.) 1, affirming 39 N. Y. App. Div. 609. Compare *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

3. Situs of Simple Contract Debts. — *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109; *Angier v. Jones*, 28 Tex. Civ. App. 402.

Situs of Debt Due on Bill or Note. — *Tryon v. U. S.*, 32 Ct. Cl. 425. Compare, as to debts evidenced by bank books and certificates of deposit, *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380. *Contra* under a statute providing that letters over the estate of a nonresident shall be granted only in the county where the principal part of the goods or estate of the decedent shall be. *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299.

**925.** A Life Insurance Policy. — See note 6.

**926.** A Cause of Action for Death by Wrongful Act. — See note 2.

**4. Right to Ancillary Letters — a. IN GENERAL.** — See notes 3, 4, 5, 6.

**927.** See note 1.

**b. DUTY OF DOMICILIARY REPRESENTATIVE TO TAKE OUT ANCILLARY LETTERS.** — See note 3.

**925. 4. Simple Contract Debts Secured by Mortgages.** — *Martin v. Stovall*, 103 Tenn. 1.

**6. Situs of Life Insurance Policies — Domicil of Decedent.** — See *Ellis v. Ellis*, (Tenn. Ch. 1899) 54 S. W. Rep. 666. Compare *Ellis v. Northwestern Mut. L. Ins. Co.*, 100 Tenn. 177; *Re Ontario Mut. L. Ins. Co.*, 30 Ont. 666.

**926. 2. Cause of Action for Death by Wrongful Act — United States.** — Boston, etc., R. Co. v. Hurd, (C. C. A.) 108 Fed. Rep. 116; Cincinnati, etc., R. Co. v. Thiebaud, (C. C. A.) 114 Fed. Rep. 918; *In re Burnstine*, 131 Fed. Rep. 828; *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571.

*District of Columbia.* — Washington Asphalt Block, etc., Co. v. Mackey, 15 App. Cas. (D. C.) 410; *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104.

*Illinois.* — *Chicago, etc., R. Co. v. Smith*, 77 Ill. App. 492, affirmed 180 Ill. 453.

*Indiana.* — *Ex p. Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285.

*Kentucky.* — *Hall v. Louisville, etc., R. Co.*, 102 Ky. 480; *Turner v. Louisville, etc., R. Co.*, 110 Ky. 879.

*New York.* — *Hoes v. New York, etc., R. Co.*, 173 N. Y. 435, reversing 73 N. Y. App. Div. 363; *Ziemer v. Crucible Steel Co.*, 99 N. Y. App. Div. 169; *Matter of Paola*, (Surrogate Ct.) 36 Misc. (N. Y.) 514.

*North Carolina.* — *Vance v. Southern R. Co.*, 138 N. Car. 460.

*South Carolina.* — *In re Mayo*, 60 S. Car. 401. *West Virginia.* — *Richards v. Riverside Iron Works*, 56 W. Va. 510.

**3. Public Administrators.** — In *California* in the case of a foreign will the public administrator is not "entitled" to letters of administration. This rule is apparently based upon the fact that he is not "interested in the will." *Matter of Brundage*, 141 Cal. 538.

**Creditors of Domiciliary State.** — A creditor, resident of the domiciliary state, has no right to invoke the jurisdiction of the court to grant ancillary letters, under the provisions of the *New York* statute. *Matter of Gennert*, 96 N. Y. App. Div. 8.

**4. Preference of Domiciliary Representatives.** — In *Goods of Whitelegg*, (1899) P. 267; In *Goods of Meatyard*, (1903) P. 125. See also In *Goods of Vannini*, (1901) P. 330; *Matter of Brundage*, 141 Cal. 538; *Rice v. Tilton*, (Wyo. 1905) 80 Pac. Rep. 828.

**Provisional Executor.** — See In *Goods of Groos*, (1904) P. 269.

**A Colonial Grant**, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by the Colonial Probates Act, 1892, have been complied with. In *Goods of Smith*, (1904) P. 114.

In *Missouri* it seems that the statute requires

the issue of the letters to some person qualified to administer in that state, and thereby excludes nonresident executors. *Stevens v. Larwill*, 110 Mo. App. 140.

**Foreign Letters Not Conclusive on Local Court.** — *In re Neubert*, 58 S. Car. 469.

**5. Attorney or Nominee of Domiciliary Representative.** — *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299.

Where the executor of a will which disposes of all the property of the testator wherever situated has renounced, the attorney of the person appointed by the foreign court is entitled to administration, though the latter is the official administrator and the foreign grant is made subject to any orders of the court touching the collection, management, and administration of the assets. In *Goods of Scarr*, 80 L. T. N. S. 296.

In *California* if the executor fails to apply himself, "letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy." Code Civ. Pro., § 1350. A person interested in the will who applies for such letters is entitled to the grant, *Matter of Engle*, 124 Cal. 292. See also *Matter of Coan*, 132 Cal. 401; *Matter of Brundage*, 141 Cal. 538.

The appointment of a person not interested in the will, but applying merely as the nominee of persons entitled to administer a testate estate, is discretionary with the court. *Matter of Richardson*, 120 Cal. 344.

**6. Statutory Provisions.** — Under the *New York* statute no one can take an ancillary administration except through or by the voluntary action of the foreign representative. Section 2697 limits the issue of such letters to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent "unless another person applies therefor, and files with his petition an instrument executed by the foreign executor or administrator or person otherwise entitled as aforesaid, authorizing the petitioner to receive such ancillary letters." *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 41, citing *Montgomery v. Boyd*, 78 N. Y. App. Div. 64.

**927. 1. Domiciliary Grant Not Followed if Contrary to Local Law.** — In *Goods of Meatyard*, (1903) P. 125.

**Pennsylvania — Widow First Entitled.** — *Hein's Estate*, 22 Pa. Super. Ct. 31, affirming 18 Montg. Co. Rep. (Pa.) 177.

**3. Domiciliary Representative under No Legal Obligation to Take Out Ancillary Letters.** — It is undoubtedly the right of the creditors of a decedent to have the assets of the estate, whether local or foreign, applied in payment of his debts; and it is the duty of the resident per-

**928. d. TIME WHEN ANCILLARY APPOINTMENT MAY BE MADE.** — See note 3.

**A Previous Domiciliary Grant.** — See note 5.

**e. VALIDITY AND EFFECT OF ANCILLARY LETTERS.** — See note 6.

**929.** See notes 1, 2.

**931. VI. BONDS — 3. Property Covered by Bond.** — See note 1.

**VII. TITLE OF ANCILLARY REPRESENTATIVES.** — See notes 2, 3.

**932. VIII. COLLECTION OF ASSETS — 1. Collections by Foreign Representatives.** — See note 2.

sonal representative to see that administration is granted in the foreign jurisdiction, if necessary to accomplish that end. *Ramsay v. Ramsay*, 196 Ill. 179, *affirming* 97 Ill. App. 270. See also *Doss v. Stevens*, 13 Colo. App. 535; *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

**928. 3. Statutory Limitation Not Applicable to Ancillary Letters.** — *Contra*, *Nelson v. Bridge*, 98 Tex. 523, *criticising dictum in* *Henry v. Roe*, 83 Tex. 450.

**5. Previous Domiciliary Grant Not Necessary.** — *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166. *Contra in New York* under Code Civ. Pro. N. Y., § 2695, *Taylor v. Syme*, 162 N. Y. 513, *reversing* 17 N. Y. App. Div. 517. See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 115, note 2; p. 116, note 9.

In *New Jersey* the prerogative court has jurisdiction to grant letters upon original foreign wills. *Matter of Bracher*, 60 N. J. Eq. 350, *citing Matter of Coursen*, 4 N. J. Eq. 408.

**6. Collateral Attack—Errors and Irregularities in Proceeding.** — *Johnson v. Keyser*, 127 Ala. 309.

**Delay in Applying for Ancillary Letters.** — *Nelson v. Bridge*, 98 Tex. 523.

**Want of Jurisdiction Apparent on Face of Record.** — In *New York* by statute (Code Civ. Pro., § 2695) the power of the surrogate to grant ancillary letters upon a foreign probate of a will of personal property is limited to cases where the will is probated in the state or territory where it was executed or where the testator resided at the time of his death; and a grant of such letters is void if the want of such jurisdictional facts is apparent from the record. *Taylor v. Syme*, 162 N. Y. 513, *reversing* 17 N. Y. App. Div. 517.

**929. 1. Administration on Estate of Non-resident Leaving No Property in State.** — *Compare Boston, etc., R. Co. v. Hurd*, (C. C. A.) 108 Fed. Rep. 116.

As to where it appears on the face of the letters that there were no assets situated in the state, see *McKinzie v. U. S.*, 34 Ct. Cl. 278.

**2. Previous Grant by Court of Domicil.** — An ancillary administrator has the same general powers as a domestic or principal administrator, except to the extent that it is provided otherwise by statute. *Smith v. New York Second Nat. Bank*, 169 N. Y. 467, *reversing mem. judgment* 52 N. Y. App. Div. 631. See also *supra*, this title, **920. 1.**

**931. 1. The Proceeds of Foreign Real Estate.** — Full responsibility on the part of an ancillary executor and his bondsman attaches where there are local creditors of the estate and assets situated within it; and this is true where there

is real property belonging to the deceased situated in a state foreign to his domicil. *Joy v. Elton*, 9 N. Dak. 428.

**2. Distinction Between Title of Ancillary and Domiciliary Representatives.** — *Ramsay v. Ramsay*, 97 Ill. App. 270, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931, *affirmed* 196 Ill. 179; *Matter of McCabe*, 84 N. Y. App. Div. 145, *affirmed* without opinion 177 N. Y. 584.

The title of an ancillary administrator to the assets of his decedent is no different from that of a principal or domestic administrator, unless it is provided otherwise by statute. *Smith v. New York Second Nat. Bank*, 169 N. Y. 467, *reversing mem. judgment* 52 N. Y. App. Div. 631.

The common-law rule as to title does not prevail in some states. Thus, in *California*, both real and personal property descend to the heir or to the beneficiary named in the will, with a qualified right in the personal representative, who holds it for the purpose of administration more like a receiver than a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court. *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90. See also the title EXECUTORS AND ADMINISTRATORS.

**A Chose in Action** follows the person of the owner, and its legal possession is deemed to be in an intestate at the place of his residence no matter where the evidence of the chose in action may be. *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389, *affirmed* on opinion below 160 N. Y. 703.

**3. Title to Assets Taken into Other Jurisdictions.** — *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 931.

**932. 2. Voluntary Payment by Foreign Debtors — England.** — See *Atty.-Gen. v. New York Breweries Co.*, (1898) 1 Q. B. 205, *reversing* (1897) 1 Q. B. 738, *affirmed* (1899) A. C. 62.

*United States.* — *Brown v. Equitable L. Assur. Soc.*, 112 Fed. Rep. 845.

*Massachusetts.* — *Gardiner v. Thorndike*, 183 Mass. 81.

*New York.* — *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389, *affirmed* on opinion below 160 N. Y. 703.

*Pennsylvania.* — See *Grimes v. Pennsylvania R. Co.*, 189 Pa. St. 619, *affirming* 7 Pa. Dist. 417; *Mansfield v. McFarland*, 24 Pa. Co. Ct. 591, *affirmed* 202 Pa. St. 173.

*North Dakota.* — *Joy v. Elton*, 9 N. Dak. 428.

*Rhode Island.* — *Egan v. Wirth*, 26 R. I. 363.

*South Carolina.* — See *Heyward v. Williams*, 57 S. Car. 235.

*Virginia.* — *Com. v. Williams*, 102 Va. 778.



**933.** See note 2.

**934.** See notes 2, 3.

2. Collections by Ancillary Representatives. — See note 5.

**935.** See note 2.

**IX. DISPOSAL OF ASSETS BY ANCILLARY REPRESENTATIVE — 1. Payment of Debts — a. GENERAL RULE.** — See note 3.

**936.** See note 3.

**937.** c. NONRESIDENT CLAIMANTS. — See notes 3, 4.

**938.** See note 1.

Administration granted at the place of domicil covers all the estate, wherever situated, which the representative can reduce to possession without suit. *McKinzie v. U. S.*, 34 Ct. Cl. 278.

**Opposing Authorities.** — *In re Joyslin*, 76 Vt. 88. **Effect of Pendency of Suit** for appointment of representative in state where assets have their situs, on collection by foreign executor or administrator, see *Overby v. Gordon*, 177 U. S. 214, *affirming* 13 App. Cas. (D. C.) 392.

**933. 2. Foreign Domiciliary Representative Not Entitled to Receive Payment as Against Domestic Ancillary Administrator.** — *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80. *Contra*, *Thorman v. Broderick*, 52 La. Ann. 1298, 51 La. Ann. 1747.

**Collection by Consent of Ancillary Administrator.** — *McClung v. Sieg*, 54 W. Va. 467.

**The Rule Applies to Shares of Stock**, not transferred before appointment of an ancillary administrator, though the foreign representative has completed payments due on them, and power is conferred by statute upon such representative to transfer shares of stock or receive dividends paid. *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80.

**Exception to Rule.** — The delivery by a bank to a foreign administrator of the amount of a deposit made by the decedent is valid against an ancillary administrator, though appointed prior thereto, where the decedent left no creditors in the state and the delivery was made in good faith and without actual notice of the ancillary administration. *Maas v. German Sav. Bank*, 176 N. Y. 377, *affirming* 73 N. Y. App. Div. 524, which *reversed* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193.

**934. 2. Action Against Foreign Debtor Coming into Jurisdiction of Domiciliary Representative.** — *Brown v. Equitable L. Assur. Soc.*, 112 Fed. Rep. 845; *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524 [*reversing* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which *affirmed* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], *affirmed* 176 N. Y. 377. See also *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389, *affirmed* on opinion below 160 N. Y. 703.

**Action for Waste.** — A representative has no right of action for waste, where the real property is situated in a foreign state. *Price v. Ward*, 25 Nev. 203, *Bonnifield, C. J., dissenting*.

**3. Duty to Collect Foreign Debts.** — *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524, *reversing* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which *affirmed* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193, 176 N. Y. 377.

**5. Collection of Local Assets by Ancillary Administrator.** — *Grayson v. Robertson*, 122 Ala.

330, 82 Am. St. Rep. 80; *Ramsay v. Ramsay*, 196 Ill. 179, *affirming* 97 Ill. App. 270.

**Actions on Life Insurance Policies.** — *Contra*, at least where there is no such agent in the foreign jurisdiction and the company is not doing business there. *Re Ontario Mut. L. Ins. Co.*, 30 Ont. 666.

**935. 2. Authority of Local Administrator Exclusive of Foreign Domiciliary Representative.** — *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80; *Doss v. Stevens*, 13 Colo. App. 535.

**3. Payment of Debts by Ancillary Administrator.** — *Ramsay v. Ramsay*, 97 Ill. App. 270, *affirmed* 196 Ill. 179.

In *New York* by statute, Code Civ. Pro., §§ 2699-2701, it is discretionary with the court whether to require the payment of local creditors or to require security to insure their payment by the foreign administrator. *Maas v. German Sav. Bank*, 73 N. Y. App. Div. 524 [*reversing* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which *affirmed* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], *affirmed* 176 N. Y. 377.

**936. 3. Pro Rata Payments.** — *Warrington's Estate*, 7 Pa. Dist. 712. See also *Ramsay v. Ramsay*, 196 Ill. 179, *affirming* 97 Ill. App. 270.

**937. 3. Ancillary Administrator May Pay Foreign as Well as Domestic Creditors.** — *Ramsay v. Ramsay*, 97 Ill. App. 270, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937, *affirmed* 196 Ill. 179.

A statute providing that "every person" having a claim proper to be allowed who shall not present it within a designated period of time shall be "forever barred," applies to the claim of a nonresident whether sought to be enforced within the jurisdiction of a domiciliary or of an ancillary administration. *Winter v. Winter*, 101 Wis. 494; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39.

**Jurisdiction of Federal Courts to Establish Claims of Foreign Creditors.** — That a nonresident creditor may establish his claim or debt in the courts of the United States against the personal representatives of his deceased debtor, the requisite amount and diversity of citizenship appearing, is well settled, notwithstanding that the laws of the state of the debtor's residence relative to the settlement and administration of estates of deceased persons in terms limit the right to establish such claims to proceedings in the proper probate courts of the state. *Alice E. Min. Co. v. Blanden*, 136 Fed. Rep. 252; *Shurmeier v. Connecticut Mut. L. Ins. Co.*, (C. C. A.) 137 Fed. Rep. 42.

**4. Rule that Ancillary Administrator May Pay Only Resident Creditors.** — See *Lewis v. Rutherford*, 71 Ark. 218; *Warrington's Estate*, 7 Pa. Dist. 712.

**938. 1. Presenting Claim in Both Juris-**

**938.** 2. Residue After Payment of Debts — *a*. TRANSMISSION OF RESIDUE TO JURISDICTION OF DOMICIL. — See note 3.

**939.** See notes 1, 2.

**940.** See notes 1, 2.

As to the Proceeds of Real Estate. — See note 5.

*b*. DISTRIBUTION BY ANCILLARY REPRESENTATIVE. — See note 6.

**941.** See note 1.

**942.** X. POWER TO SELL OR TRANSFER PROPERTY IN FOREIGN JURISDICTIONS — 1. Transfer of Foreign Choses in Action. — See note 3.

**944.** See note 2.

2. Power of Sale Given by Will. — See notes 3, 4.

**945.** See note 1.

dictions — Protection of Other Creditors. — Ramsay v. Ramsay, 97 Ill. App. 270, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938, affirmed 196 Ill. 179.

**938.** 3. Transmitting Residue to Domicil — United States. — See Ingersoll v. Caram, 127 Fed. Rep. 418, 132 Fed. Rep. 168, affirmed (C. C. A.) 133 Fed. Rep. 226.

Alabama. — Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80.

California. — Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90.

Colorado. — Doss v. Stevens, 13 Colo. App. 535.

Illinois. — Ramsay v. Ramsay, 196 Ill. 179, affirming 97 Ill. App. 270.

Missouri. — Stevens v. Larwill, 110 Mo. App. 140.

New York. — Maas v. German Sav. Bank, 176 N. Y. 377, affirming 73 N. Y. App. Div. 524, which reversed (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193.

North Dakota. — Joy v. Elton, 9 N. Dak. 428.

Ohio. — Meswald v. Marks, 10 Ohio Cir. Dec. 355, 19 Ohio Cir. Ct. 605.

Pennsylvania. — Warrington's Estate, 7 Pa. Dist. 712; Troxell's Estate, 15 Montg. Co. Rep. (Pa.) 29.

**939.** 1. Rule that Court Granting Ancillary Letters Cannot Order Distribution. — The ancillary administrator is charged with the duty of finally accounting to the domiciliary administrator. Egan v. Wirth, 26 R. I. 363.

2. Discretion of Court to Order Transmission of Residue to Domicil. — Maas v. German Sav. Bank, 73 N. Y. App. Div. 524 [reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], affirmed 176 N. Y. 377; McClung v. Sieg, 54 W. Va. 467. Compare in New York, where domiciliary executor is also ancillary representative, Matter of Newell, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

**940.** 1. Payment of Local Creditors Before Transmitting Assets to Domicil. — Thomas's Estate, 8 Pa. Dist. 385.

2. Security for Local Claimants Should Be Required. — Yerkes's Estate, 8 Pa. Dist. 36.

5. Proceeds of Realty Not Transmitted to Domicil for Distribution. — Smith v. Smith, 174 Ill. 52.

6. Distribution by Ancillary Representative. — Matter of Dunn, 39 N. Y. App. Div. 510; Yerkes's Estate, 8 Pa. Dist. 36; Ehrhart's Estate, 18 York Leg. Rec. (Pa.) 134, 17 York

Leg. Rec. (Pa.) 137. See also Ingersoll v. Coram, 132 Fed. Rep. 168, affirmed (C. C. A.) 127 Fed. Rep. 418, 133 Fed. Rep. 226.

**941.** 1. Laws of Owner's Domicil Govern in Distribution of Personality. — Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90; Falke v. Terry, 32 Colo. 85; Ramsay v. Ramsay, 97 Ill. App. 270, affirmed 196 Ill. 179; Locke v. McPherson, 163 Mo. 493; Matter of Dunn, 39 N. Y. App. Div. 510; Matter of Barandon, (Surrogate Ct.) 41 Misc. (N. Y.) 380; Rittenhouse's Estate, 8 Pa. Dist. 700; Ehrhart's Estate, 18 York Leg. Rec. (Pa.) 134, 17 York Leg. Rec. (Pa.) 137; Ellis v. Northwestern Mut. L. Ins. Co., 100 Tenn. 177.

The succession to, and the distribution of, the estate of an intestate is governed by the law of the domicil. Maas v. German Sav. Bank, 176 N. Y. 377, affirming 73 N. Y. App. Div. 524, which reversed (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193.

**942.** 3. Power to Transfer Foreign Choses in Action. — Maas v. German Sav. Bank, 73 N. Y. App. Div. 524 [reversing (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, which affirmed (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193], affirmed 176 N. Y. 377; Keller v. Alexander, 24 Tex. Civ. App. 186; Camp v. Simon, 23 Utah 56.

**944.** 2. Power to Transfer Foreign Choses in Action Denied. — Heyward v. Williams, 57 S. Car. 235. See also Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90.

3. Successor May Exercise Power of Sale. — Hoysradt v. Tionesta Gas Co., 194 Pa. St. 251.

4. Probate and Record of Will Essential to Sale of Real Estate by Foreign Executor under Power. — In re Devine, 62 N. J. Eq. 704; McIntosh v. Marathon Land Co., 110 Wis. 296.

The executor can only convey such property in conformity with the laws of the state where he attempts to operate under the will, and not from the will alone. Emmons v. Gordon, 140 Mo. 490, 62 Am. St. Rep. 734.

Validity of Sale Made Before Probate. — Allison v. Cocke, 106 Ky. 763; Green v. Alden, 92 Me. 177.

**945.** 1. The Iowa Statute. — Moore v. Petty, (C. C. A.) 135 Fed. Rep. 668.

Rev. Stat. Tex., art. 1879a, validating sales made under wills probated in other states of the United States, has no application to a sale under a foreign will which does not confer power to make it. League v. Williamson, 33 Tex. Civ. App. 647.

**945.** 3. Sale of Real Estate under Order of Court. — See note 2.

**XI. ACTIONS**—1. Actions by Foreign Executors and Administrators — *a.* AT COMMON LAW — (1) *Disability in General.* — See note 4.

**948.** The Reason of the Rule. — See note 5.

**950.** (3) *Waiver of Objections to Disability.* — See note 1.

**951.** (4) *Actions Not in Representative Capacity.* — See notes 1, 2, 4.

**952.** A Judgment Recovered by an Executor or Administrator. — See note 3.

**953.** Action for Death by Wrongful Act. — See note 2.

*b.* STATUTORY AUTHORITY TO SUE — (1) *In General.* — See note 5.

**945.** 2. Statutory Authority to Obtain License to Sell Real Estate. — *Mowry v. McQueen*, 80 Minn. 385 (construing *Wisconsin* law); *In re Devine*, 62 N. J. Eq. 703.

In *Wisconsin* it is provided by statute that upon the filing of an authenticated copy of the original appointment of a foreign executor or administrator in the County Court, he may exercise any power over the estate, including sales or assignments of the same, which an executor or administrator duly appointed by the proper court of that state can exercise. This section provides for cases where the representative must obtain judicial authority to sell or convey lands, but not those where, by the terms of the will, the lands are devised or authority given to convey. *McIntosh v. Marathon Land Co.*, 110 Wis. 296.

A License Granted by a Court of the Domicil. — *Seldner v. Katz*, 96 Md. 212.

4. Executor or Administrator Cannot Sue Out of Jurisdiction in Which He Was Appointed — *United States.* — *Moore v. Petty*, (C. C. A.) 135 Fed. Rep. 668.

*Alabama.* — *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80.

*Georgia.* — *Taylor v. McKee*, 121 Ga. 223, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 945.

*Missouri.* — *Enmons v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734; *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306; *Sommer v. Franklin Bank*, 108 Mo. App. 490.

*New York.* — *Matter of Fitch*, 160 N. Y. 87, 30 Civ. Pro. (N. Y.) 1, affirming 39 N. Y. App. Div. 609; *Maas v. German Sav. Bank*, 176 N. Y. 377, affirming 73 N. Y. App. Div. 524, which reversed (Supm. Ct. App. T.) 36 Misc. (N. Y.) 154, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 193; *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389, affirmed on opinion below 160 N. Y. 703; *Hoes v. New York, etc., R. Co.*, 73 N. Y. App. Div. 363, reversed on other grounds 173 N. Y. 435; *Downey v. Owen*, 98 N. Y. App. Div. 411; *Taylor v. Syme*, 162 N. Y. 513, reversing on other grounds 17 N. Y. App. Div. 517.

*North Carolina.* — *Morefield v. Harris*, 126 N. Car. 626.

*Pennsylvania.* — *Viosca's Estate*, 197 Pa. St. 280, affirming 29 Pittsb. Leg. J. N. S. (Pa.) 299; *Mansfield v. McFarland*, 24 Pa. Co. Ct. 591, affirmed 202 Pa. St. 173.

*South Carolina.* — *Heyward v. Williams*, 57 S. Car. 235; *Stoddard v. Aiken*, 57 S. Car. 134; *In re Mayo*, 60 S. Car. 401.

*Texas.* — *Hynes v. Winston*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1069.

**948.** 5. Considerations of Policy. — *Manley v. Meyer*, 68 Kan. 377, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948.

**950.** 1. Waiver of Objection to Disability. — *Johnson v. Kyser*, 127 Ala. 309; *Sommer v. Franklin Bank*, 108 Mo. App. 490; *Pope v. Waugh*, (Wis. 1905) 103 N. W. Rep. 500.

**951.** 1. Disability Exists Only When Action Is in Right of Decedent. — *Brown v. Equitable L. Assur. Soc.*, 112 Fed. Rep. 845; *Moore v. Petty*, (C. C. A.) 135 Fed. Rep. 668; *Steitler v. Helenbush*, 61 S. W. Rep. 701, 23 Ky. L. Rep. 174; *Green v. Heritage*, 63 N. J. L. 455.

A foreign executor having the legal title to the assets of the estate is a proper and necessary party to a suit in another state to settle the title and right to property held there, in which he is interested as such representative. *Stone v. Demarest*, 67 N. Y. App. Div. 549. See also *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

2. Allegations as to Representative Character Treated as Surplusage. — *Moore v. Petty*, (C. C. A.) 135 Fed. Rep. 668.

*Contra.* — *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306.

4. Insurance Policy Assigned to Administrator. — *Wolf v. Sun Ins. Co.*, 75 Mo. App. 306.

**952.** 3. Action on Judgment Recovered in Jurisdiction Where Letters Were Granted. — *Brown v. Equitable L. Assur. Soc.*, 112 Fed. Rep. 845.

**953.** 2. Rule that Foreign Administrator May Sue for Death by Wrongful Act. — *Bolden v. Pennsylvania R. Co.*, 205 Pa. St. 264; *Robertson v. Chicago, etc., R. Co.*, 122 Wis. 66, 106 Am. St. Rep. 925. *Contra, In re Mayo*, 60 S. Car. 401, *McIver, C. J., dissenting.*

See for a general discussion of the subject *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571.

5. Foreign Representatives Authorized to Sue by Statute in United States. — *Williams v. Camden Interstate R. Co.*, 138 Fed. Rep. 571 (discussing *Ohio* statute); *Western Union Tel. Co. v. Lipscomb*, 22 App. Cas. (D. C.) 104; *Taylor v. McKee*, 121 Ga. 223; *Chicago Transit Co. v. Campbell*, 110 Ill. App. 366; *Jackson v. Phillips*, 57 Neb. 189.

*Corporation as Administrator.* — The statute applies whether the person appointed is a corporation or a natural person. *Germantown Trust Co. v. Whitney*, (S. Dak. 1905) 102 N. W. Rep. 304.

*Special and Limited Administrators.* — The power of the representative will not be extended beyond his letters, and if these are special and limited to the administration of

**954.** See note 1.

**955.** See note 4.

(2) *Evidence of Representative Character.* — See note 5.

**956.** (3) *Bond.* — See note 4.

**957.** (4) *Scope and Effect of Statutes.* — See notes 2, 4, 6.

**2. Actions Against Foreign Executors and Administrators** — *a. EXEMPTION FROM LIABILITY TO SUIT* — (1) *General Rule Stated.* — See note 7.

**958.** See notes 1, 3.

**959.** *b. EXCEPTIONS TO RULE OF EXEMPTION* — (1) *Exceptions in Equity.* — See note 4.

**960.** (2) *Exceptions at Law.* — See note 2.

(3) *Statutory Liability to Be Sued.* — See note 4.

**961.** See note 1.

(4) *Voluntary Submission to Suits.* — See notes 3, 4.

**XII. ACCOUNTING** — *The Probate Courts.* — See note 6.

specific property, he can only sue to recover assets as to which they confer authority to administer. *Taylor v. McKee*, 121 Ga. 223.

**954. 1. Unconditional Authority to Sue Given to Foreign Representatives.** — *Overby v. Gordon*, 177 U. S. 214, *affirming* 13 App. Cas. (D. C. 392; Cincinnati, etc., R. Co. v. Thiebaud, (C. C. A.) 114 Fed. Rep. 918 (quoting *Ohio statute*); *Greenwalt v. Bastian*, 10 Kan. App. 101.

**955. 4. Filing Letters Pending Suit Authorized by Terms of Statute.** — *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80; *Buecker v. Carr*, 60 N. J. Eq. 300.

In Georgia a certified copy of the proceedings by which a will was probated, etc., must also be filed before a foreign executor is authorized to sue. In the case of foreign administrators, however, no similar requirement is provided. It must further appear that the decedent was domiciled in the foreign state at the time of his death, and that no ancillary administration has been opened in Georgia. *Taylor v. McKee*, 121 Ga. 223.

**5. Evidence of Representative Character — Filing or Producing Authenticated Copies of Letters.** — *Buecker v. Carr*, 60 N. J. Eq. 300.

**956. 4. Bond for Faithful Administration of Assets Received.** — *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80.

**957. 2. No Authority to Sue After Ancillary Grant.** — *Taylor v. McKee*, 121 Ga. 223.

Where there are no debts in the state requiring the protection of the court and there is nothing to be done but to collect the assets of the estate, the right of a foreign representative whose suit was commenced prior to the appointment of the ancillary administrator, will be sustained. *Greenwalt v. Bastian*, 10 Kan. App. 101.

**4. No Right to Sue if Subject-matter Would Not Be Assets.** — *Contra* of actions for death caused by wrongful act. *Popp v. Cincinnati, etc., R. Co.*, 96 Fed. Rep. 465 (construing *Ohio statute*). See *supra*, this title, **953. 2.**

**6. Cause of Action Not Given by Law of Domicil.** — *Jones v. Cliett*, 114 Ga. 673.

**7. Exemption from Liability to Suits in General.** — *Scruggs v. Scruggs*, 105 Fed. Rep. 28; *Lewis v. Parrish*, (C. C. A.) 115 Fed. Rep. 285; *Filter, etc., Co. v. Rainey*, 120 Fed. Rep. 718; *Skiff v. White*, 127 Fed. Rep. 175; *Courtney v. Pradt*, 135 Fed. Rep. 818, *quoting* 13 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 957; *Falke v. Terry*, 32 Colo. 85; *Burton v. Williams*, 63 Neb. 431; *Ferguson v. Harrison*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 380; *Netting v. Strickland*, 9 Ohio Cir. Dec. 841, 18 Ohio Cir. Ct. 136.

*Contra* in *Pennsylvania* as to actions by resident claimants. *Leaming's Estate*, 10 Pa. Dist. 389, 25 Pa. Co. Ct. 438, *citing* *Laughlin v. Solomon*, 180 Pa. St. 177, 40 W. N. C. (Pa.) 1, which *reversed* 5 Pa. Dist. 282.

**958. 1. Pending Action Cannot Be Continued Against Foreign Representative of Decedent.** — *McGrath v. Weiller*, 98 N. Y. App. Div. 291.

**3. Process Served Personally on Foreign Executor or Administrator.** — *Scruggs v. Scruggs*, 105 Fed. Rep. 28.

**959. 4. Suits in Equity Against Foreign Representatives.** — *Falke v. Terry*, 32 Colo. 85; *Gates v. McClenahan*, 124 Iowa 593; *Keiningham v. Keiningham*, 71 S. W. Rep. 497, 24 Ky. L. Rep. 1330, same case on subsequent appeal *sub nom.* *Finley v. Keiningham*, 79 S. W. Rep. 236, 25 Ky. L. Rep. 1955; *Hussey v. Sargent*, 116 Ky. 53; *Holzer v. Thomas*, (N. J. 1905) 61 Atl. Rep. 154. See also *Courtney v. Pradt*, 135 Fed. Rep. 818.

The same rule applies to assets which were in the state when the foreign executors first became entitled to them and which they left within it. *Montgomery v. Boyd*, 78 N. Y. App. Div. 64.

**960. 2. Foreign Representative Not Chargeable as Executor De Son Tort.** — *Ferguson v. Harrison*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 380.

**4. The Kansas Statute.** — *Manley v. Mayer*, 68 Kan. 377.

**961. 1. Statute Authorizing Foreign Representatives to Sue Held Not to Render Them Liable to Be Sued.** — *Burton v. Williams*, 63 Neb. 431.

**3. Rule that Foreign Representative Cannot Voluntarily Submit to Suit.** — *Jefferson v. Beall*, 117 Ala. 436, 67 Am. St. Rep. 177.

**4. Rule that Exemption from Liability to Be Sued May Be Waived.** — *Netting v. Strickland*, 9 Ohio Cir. Dec. 841, 18 Ohio Cir. Ct. 136.

**6. Representatives Ordinarily Accountable Only in Jurisdiction of Appointment.** — *Lewis v. Parrish*, (C. C. A.) 115 Fed. Rep. 285; *Elting v. Biggsville First Nat. Bank*, 173 Ill. 368, *affirming* 68 Ill. App. 204; *In re Hall*, 70 Vt. 458.

A foreign court has no jurisdiction of a domiciliary administrator as such, and cannot de-

**962.** See note 3.

**963.** Courts of Equity. — See note 4.

**964.** Effect of Accounting by Foreign Representative. — See note 2.

termine his official responsibilities or duties. *Egan v. Wirth*, 26 R. I. 363.

The probate court at the accounting of an ancillary representative is vested with authority to consider only the subject-matter of the property taken by him under the ancillary letters, and to make a decree disposing of such property, and none other. *Joy v. Elton*, 9 N. Dak. 428.

An ancillary administrator cannot be required to file an account, in the absence of creditors in the ancillary jurisdiction, where he has voluntarily paid the money collected by him to the administrator of the domicil, who has accounted for it there. *Thomas's Estate*, 8 Pa. Dist. 385.

**Character of Proceedings for Accounting.** — The proceedings have been said to be not, as a rule, *in personam* but *in rem*, and if regular, binding upon all persons equally, whether they appear personally to take part in the controversies or proceedings or hold themselves aloof; and they are within section 1, art. 4, of the Federal Constitution, requiring full faith and credit to be given in each state to the judicial proceedings of every other state. *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* 68 Ohio St. 58.

**962. 3. Ancillary Administrator Who Is Also Domiciliary Representative.** — *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* 68 Ohio St. 58.

**963. 4. Equity Jurisdiction to Compel Foreign Representatives to Account.** — *Lewis v. Parrish*, (C. C. A.) 115 Fed. Rep. 285 (construing *New York law*).

If any law of the foreign state or decree of its court requires the ancillary representative to do anything, he may be protected in doing it, but subject to this limitation the assets recovered there belong to the general estate which he must account for in the domiciliary jurisdiction. *Matter of Newell*, (Surrogate Ct.) 38 Misc. (N. Y.) 563.

**Foreign Representative Chargeable as Trustee in Equity.** — *Lewis v. Parrish*, (C. C. A.) 115 Fed. Rep. 285.

**964. 2. Settlement in One Jurisdiction Conclusive in Other Jurisdictions.** — *Tunncliffe v. Fox*, (Neb. 1903) 94 N. W. Rep. 1032; *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554, *affirmed* 68 Ohio St. 58.

**Compensation of Ancillary Representative.** — A balance due the representative as ancillary administrator for compensation, allowed by the court of the foreign jurisdiction, is a proper credit in the settlement of his account as domiciliary administrator. *Doss v. Stevens*, 13 Col. App. 535.

Where an ancillary administrator took the assets of the estate to the domiciliary jurisdiction, there accounted for them as executor and received commissions thereon in a larger sum than allowed by statute in the ancillary jurisdiction or than was warranted by the time, trouble, and labor expended, he will not be allowed commissions in a suit in equity to compel him to account as ancillary administrator. *Porter v. Long*, 136 Mich. 150, 10 Detroit Leg. N. 987.

## FOREIGN GUARDIANS.

By H. W. HOYE.

**965. I. DEFINITION.** — See note 1.

**966. II. RIGHTS AND POWERS OF FOREIGN GUARDIANS — 1. At Common Law — a. GUARDIAN'S AUTHORITY CONFINED TO COUNTRY OR STATE OF HIS APPOINTMENT — (1) Rule Stated — In the United States.** — See note 1.

**967. (2) Applications of Rule.** — See note 3.

**b. RECOGNITION OF FOREIGN GUARDIANS BY COMITY — (1) In General.** — See note 5.

**968. (2) When Custody of Ward Will Be Given to Foreign Guardian — Discretion of Court.** — See note 2.

**965. 1. A Testamentary Guardian** is not a foreign guardian although the testator was domiciled in a foreign state, provided the will was proved and allowed in the state of the former as well as in the state of the testator's domicil. *Githens's Estate*, 24 Pa. Co. Ct. 248, 16 Montg. Co. Rep. (Pa.) 196, 9 Pa. Dist. 465.

**966. 1. Rule in United States.** — *Hanrahan v. Sears*, 72 N. H. 71; *Banning v. Gotshall*, 62

Ohio St. 210; *Wren v. Howland*, 33 Tex. Civ. App. 87; *Adkins v. Loucks*, 107 Wis. 587.

**967. 3. Rizzo's Estate, 8 Pa. Dist. 724.**

**5. Recognition by Comity.** — *Hanrahan v. Sears*, 72 N. H. 71. See also *Boyle v. Griffin*, 84 Miss. 41.

**968. 2. The Ward's Interests the First Consideration in Awarding Custody.** — *Hanrahan v. Sears*, 72 N. H. 71. See also *Jones v. Bowman*, (Wyo. 1904) 77 Pac. Rep. 439.

**968.** (3) *Recognition of Authority of Foreign Guardian over Ward's Property* — Funds Delivered to Foreign Guardian. — See note 5.

**969.** But the Court Is Clothed with a Broad Discretion. — See notes 3, 5.

**970.** 2. By Statute — *b.* GRANTS OF ANCILLARY LETTERS TO FOREIGN GUARDIANS. — See note 2.

**971.** *c.* RECOGNITION WITHOUT ANCILLARY LETTERS — Removal of Personal and Real Property. — See note 3.

**972.** Required to Give Security. — See note 2.

Court's Discretion. — See note 4.

**973.** III. DUTIES AND LIABILITIES OF FOREIGN GUARDIANS — 2. Guardian's Liability to Account in a Foreign State. — See note 2.

**968.** 5. Delivery of Funds to Foreign Guardian. — *Boyle v. Griffin*, 84 Miss. 41.

**969.** 3. Court Will Permit Removal of Property Only Where Ward's Interests Require It. — *Blanchard v. Andrews*, 90 Mo. App. 425; *Banning v. Gotshall*, 62 Ohio St. 210.

5. Ample Security Will Be Required. — *Rizzo's Estate*, 8 Pa. Dist. 724.

**970.** 2. Security Required in Court to Which Application Made. — *Gill v. Everman*, 94 Tex. 209.

**971.** 3. Authority to Remove Ward's Personal

Property. — *Woolridge v. Woolridge*, (Ky. 1904) 80 S. W. Rep. 775.

**972.** 2. Conditions Prerequisite to Guardian's Authority to Act. — *Woolridge v. Woolridge*, (Ky. 1904) 80 S. W. Rep. 775; *Gill v. Everman*, (Tex. Civ. App. 1900) 60 S. W. Rep. 913; *Gill v. Everman*, 94 Tex. 209.

4. Court May Exercise a Sound Discretion. — *Banning v. Gotshall*, 62 Ohio St. 210.

**973.** 2. Liability of Foreign Guardian to Account. — *Netting v. Strickland*, 9 Ohio Cir. Dec. 841, 18 Ohio Cir. Ct. 136.

## FOREIGN JUDGMENTS.

BY G. W. WALSH.

**976.** I. INTRODUCTORY — DEFINITION, MANNER OF TREATMENT, AND SCOPE OF ARTICLE — "Sister State Judgments." — See note 2.

**977.** II. EFFECT AND CONCLUSIVENESS — 1. General Rule — *a.* RULE STATED. — See note 2.

**979.** Judgment in Rem. — See note 3.

When Judgment of Foreign Country Will Not Be Held Conclusive — Want of Reciprocity. — See note 5.

**980.** *b.* EARLY FLUCTUATIONS OF THE DOCTRINE IN REGARD TO JUDGMENTS IN PERSONAM OF FOREIGN COUNTRIES. — See note 1.

**982.** *d.* DEVELOPMENT OF THE RULE AS TO SISTER STATE JUDGMENTS — (3) *Full Faith and Credit Clause in Federal Constitution, and Legislation Pursuant Thereto.* — See note 2.

**976.** 2. A Judgment Recovered in Another State is termed a foreign judgment. *Wabash R. Co. v. Tourville*, 179 U. S. 322, affirming 148 Mo. 614, 71 Am. St. Rep. 650.

**977.** 2. Foreign Judgments Conclusive on the Merits — *England.* — *Pemberton v. Hughes*, (1899) 1 Ch. 781, 68 L. J. Ch. 281.

*Canada.* — See *Rice v. Holmes*, 16 Quebec Super. Ct. 492.

*United States.* — *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71; *Gioe v. Westervelt*, 116 Fed. Rep. 1017; *Strauss v. Conried*, 121 Fed. Rep. 199; *Eau Claire Nat. Bank v. Benson*, (C. C. A.) 128 Fed. Rep. 277.

*California.* — *Banister v. Campbell*, 138 Cal. 455.

*Indiana.* — *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 15.

*Iowa.* — *Longueville v. May*, 115 Iowa 709.

*Kentucky.* — *Brand v. Brand*, 116 Ky. 785.

*Ohio.* — *Barr v. Closterman*, 1 Ohio Cir. Dec. 546.

*Pennsylvania.* — *Levison v. Blumenthal*, 25 Pa. Super. Ct. 55.

**979.** 3. Title Obtained by Virtue of Judgment in Rem Cannot Be Questioned. — *Fraxis v. Carr*, 81 L. T. N. S. 50.

5. Want of Reciprocity as Affecting Conclusiveness of Judgments of Foreign Countries. — *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71; *MacDonald v. Grand Trunk R. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550. See also *Gioe v. Westervelt*, 116 Fed. Rep. 1017.

**980.** 1. Cases Holding Judgments in Personam Prima Facie Evidence Only. — See *Jones v. Quaker City Mut. F. Ins. Co.*, 23 Pa. Co. Ct. 529, 9 Pa. Dist. 213.

In Maine the doctrine that judgments of foreign countries are *prima facie* evidence only is still adhered to. *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

**982.** 2. "Full Faith and Credit" Clause in Federal Constitution. — *Atherton v. Atherton*,

**983.** See note 1.

**984.** (5) *Modern Doctrine—Judgment of Sister State Conclusive on the Merits.*—See note 1.

**986.** *c.* JUDGMENT OF SISTER STATE MERELY A DEBT OF RECORD.—See notes 1, 2, 3.

**987.** 2. What Judgments Will Be Recognized and Enforced—*a.* IN GENERAL.—See note 1.

Presumption of Regularity and Validity.—See note 2.

**988.** *c.* FOREIGN COURT MUST HAVE HAD JURISDICTION—(1) *Rule Stated.*—See note 3.

181 U. S. 155; *Thompson v. Williamson*, 67 N. J. Eq. 212; *Arrington v. Arrington*, 127 N. Car. 190, 80 Am. St. Rep. 791; *Holstein v. Edgefield County*, 64 S. Car. 374.

**983.** 1. Act of Congress Pursuant to Full Faith and Credit Clause.—*Atherton v. Atherton*, 181 U. S. 155.

**984.** 1. *United States.*—*Keyser v. Lowell*, (C. C. A.) 117 Fed. Rep. 400; *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, *reversed* 189 U. S. 71; *Eau Claire Nat. Bank v. Benson*, (C. C. A.) 128 Fed. Rep. 277; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434.

*California.*—*Banister v. Campbell*, 138 Cal. 455.

*Illinois.*—*Leathe v. Thomas*, 109 Ill. App. 434; *Baltimore, etc., R. Co. v. McDonald*, 112 Ill. App. 391.

*Indiana.*—*American Mut. L. Ins. Co. v. Mason*, 159 Ind. 15.

*Iowa.*—*Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590; *Longueville v. May*, 115 Iowa 709.

*Kentucky.*—*Brand v. Brand*, 116 Ky. 785.

*Missouri.*—*Hudson-Kimberly Pub. Co. v. Young*, 90 Mo. App. 505.

*New Jersey.*—*Bennett v. Bennett*, 63 N. J. L. 306.

*New York.*—*Waters v. Spencer*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 15; *Everett v. Everett*, 75 N. Y. App. Div. 369; *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332; *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608.

*North Carolina.*—*Arrington v. Arrington*, 127 N. Car. 190, 80 Am. St. Rep. 791.

*Ohio.*—*Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554; *Barr v. Closterman*, 1 Ohio Cir. Dec. 546.

*Pennsylvania.*—*Levison v. Blumenthal*, 25 Pa. Super. Ct. 55; *Sevison v. Blumenthal*, 9 Kulp (Pa.) 392.

*West Virginia.*—*Stewart v. Northern Assur. Co.*, 45 W. Va. 734.

*Wisconsin.*—*Anderson v. Chicago Title, etc., Co.*, 101 Wis. 385.

*Contra Where Judgment Based on Immoral Contract.*—*Lum v. Fauntleroy*, 80 Miss. 757, 92 Am. St. Rep. 620.

**986.** 1. Judgments of One State Have No Extraterritorial Effect as Judgments in a Sister State.—*United States.*—*Lynde v. Lynde*, 181 U. S. 183, *affirming* 162 N. Y. 405, 76 Am. St. Rep. 332.

*Maine.*—*Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415.

*New Jersey.*—*Bennett v. Bennett*, 63 N. J. Eq. 306.

*New York.*—*Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608.

*Pennsylvania.*—*Wilmer v. Lewis*, 24 Pa. Co. Ct. 613, 10 Pa. Dist. 137.

2. Judgment of Sister State Merely a Debt of Record.—*Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415; *Bennett v. Bennett*, 63 N. J. Eq. 306.

*Holder of Sister State Judgment Merely a Creditor at Large.*—*Frye-Bruhn Co. v. Meyer*, (C. C. A.) 121 Fed. Rep. 533.

3. Judgment Must Be Recovered in State Where Sister State Judgment Is Sought to Be Enforced.—*Frye-Bruhn Co. v. Meyer*, (C. C. A.) 121 Fed. Rep. 533; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415; *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 88 Am. St. Rep. 608; *Wilmer v. Lewis*, 24 Pa. Co. Ct. 613, 10 Pa. Dist. 137.

**987.** 1. Judgments Valid and Enforceable at Home Will Be Recognized and Enforced Elsewhere.—*Pemberton v. Hughes*, (1899) 1 Ch. 781, 68 L. J. Ch. 281, 80 L. T. N. S. 369; *Miller v. Miller*, 21 Pa. Co. Ct. 252.

2. *Presumption of Regularity and Validity.*—*Clark v. Barber*, 21 App. Cas. (D. C.) 274; *Mutual Nat. Bank v. Moore*, 50 La. Ann. 1332; *Coveney v. Phiscator*, 132 Mich. 258, 9 Detroit Leg. N. 603; *McDugle v. Fulmer*, 82 Miss. 200; *Bracken v. Milner*, 99 Mo. App. 187; *Martin v. Martin*, (Neb. 1903) 97 N. W. Rep. 289; *Matter of Law*, 56 N. Y. App. Div. 454.

**988.** 3. Foreign Court Must Have Had Jurisdiction.—*England.*—See *Pemberton v. Hughes*, (1899) 1 Ch. 781, 68 L. J. Ch. 281, 80 L. T. N. S. 369.

*Canada.*—*Deacon v. Chadwick*, 1 Ont. L. Rep. 346.

*United States.*—*Clarke v. Clarke*, 178 U. S. 186, *affirming* 70 Conn. 195, 483; *Bell v. Bell*, 181 U. S. 175, *affirming* 157 N. Y. 719; *Andrews v. Andrews*, 188 U. S. 14.

*Alabama.*—*Louisville, etc., R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181.

*Delaware.*—*Pritchard v. Henderson*, 2 Penn. (Del.) 553.

*Idaho.*—*Thum v. Pyke*, 8 Idaho 11.

*Illinois.*—*Newman v. Greeley State Bank*, 92 Ill. App. 638.

*Indiana.*—*Dunn v. Dilks*, 31 Ind. App. 673.

*Kansas.*—*Abercrombie v. Abercrombie*, 64 Kan. 29.

*Maine.*—*Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

*Massachusetts.*—*Van Norman v. Gordon*, 172 Mass. 576.

**991.** Rule Not Modified by Full Faith and Credit Clause. — See note 1.

(2) *Right to Inquire into Jurisdiction* — (a) *In General*. — See note 6.

**992.** Rule Not Changed by Full Faith and Credit Clause in Federal Constitution. — See note 2.

**993.** (b) *Contradiction of Record Which on Its Face Shows Jurisdiction*. — See note 2.

**994.** See note 2.

*Duly Authenticated Record Prima Facie Evidence of Jurisdiction*. — See note 3.

**995.** Effect of Direct Adjudication in Court of Sister State as to Jurisdiction. — See note 1.

(3) *Presumption as to Jurisdiction*. — See note 3.

**996.** See note 1.

*Minnesota*. — Boyle v. Musser-Sauntry Land, etc., Co., 88 Minn. 456.

*Missouri*. — Seymour v. Newman, 77 Mo. App. 578.

*Nebraska*. — Commonwealth Mut. F. Ins. Co. v. Hayden, 61 Neb. 454.

*New York*. — Matter of Law, 56 N. Y. App. Div. 454; Matter of Kimball, 155 N. Y. 62; Atherton v. Atherton, 155 N. Y. 129, 63 Am. St. Rep. 650; Matter of Norton, (Surrogate Ct.) 32 Misc. (N. Y.) 224.

*Pennsylvania*. — Com. v. Stevens, 25 Pa. Co. Ct. 68.

*West Virginia*. — Stewart v. Northern Assur. Co., 45 W. Va. 734.

*Wisconsin*. — Frame v. Thormann, 102 Wis. 653.

**991. 1. Rule Not Modified by Full Faith and Credit Clause or Legislation Pursuant Thereto.** — Andrews v. Andrews, 188 U. S. 14.

**6. Impeachment for Lack of Jurisdiction** — *United States*. — Warrington v. Ball, (C. C. A.) 90 Fed. Rep. 464; Lamb v. Powder River Live Stock Co., (C. C. A.) 132 Fed. Rep. 434.

*California*. — Banister v. Campbell, 138 Cal. 455.

*Maine*. — Tremblay v. Aetna L. Ins. Co., 97 Me. 547, 94 Am. St. Rep. 521.

*Missouri*. — Weller Mfg. Co. v. Eaton, 81 Mo. App. 657.

*New York*. — Waters v. Spencer, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 15; Matter of Law, 56 N. Y. App. Div. 454.

*North Carolina*. — Coleman v. Howell, 131 N. Car. 125.

*West Virginia*. — Wick v. Dawson, 48 W. Va. 469.

**992. 2. Jurisdiction of Court of Sister State May Be Inquired Into** — *United States*. — Wood v. Mobile, (C. C. A.) 107 Fed. Rep. 846.

*Alabama*. — Louisville, etc., R. Co. v. Nash, 118 Ala. 477, 72 Am. St. Rep. 181.

*Idaho*. — Thum v. Pyke, 8 Idaho 11.

*Indiana*. — Dunn v. Dilks, 31 Ind. App. 673.

*Indian Territory*. — Sibley v. Miller, 3 Indian Ter. 688.

*Kansas*. — Abercrombie v. Abercrombie, 64 Kan. 29.

*Minnesota*. — Boyle v. Musser-Sauntry Land, etc., Co., 88 Minn. 456.

*Missouri*. — Weller Mfg. Co. v. Eaton, 81 Mo. App. 657; Banister v. Weber Gas, etc., Co., 82 Mo. App. 528.

*New York*. — Hammond v. National L. Assoc., (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 182; Matter of Norton, (Surrogate Ct.) 32 Misc. (N.

Y.) 224; Plant v. Harrison, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; Everett v. Everett, 75 N. Y. App. Div. 369; Matter of Kimball, 155 N. Y. 62; Atherton v. Atherton, 155 N. Y. 129, 63 Am. St. Rep. 650.

*Ohio*. — Hafner v. Bank of Enterprise, 24 Ohio Cir. Ct. 652.

**993. 2. Record Showing Jurisdiction May Be Contradicted** — *United States*. — Bell v. Bell, 181 U. S. 175.

*Indiana*. — Old Wayne Mut. L. Assoc. v. Flynn, 31 Ind. App. 473.

*Missouri*. — Weller Mfg. Co. v. Eaton, 81 Mo. App. 657; Banister v. Weber Gas, etc., Co., 82 Mo. App. 528; Caffery v. Choctaw Coal, etc., Co., 95 Mo. App. 174.

*Nebraska*. — National Exch. Bank v. Wiley, (Neb. 1902) 92 N. W. Rep. 582.

*New York*. — Matter of Norton, (Surrogate Ct.) 32 Misc. (N. Y.) 224.

*Ohio*. — Hafner v. Bank of Enterprise, 24 Ohio Cir. Ct. 652.

*Pennsylvania*. — Jones v. Quaker City Mut. F. Ins. Co., 9 Pa. Dist. 213, 23 Pa. Co. Ct. 529.

**994. 2. Doctrine that Record Cannot Be Contradicted as to Jurisdiction.** — See McHaddon v. Rhodes, 143 Cal. 275, 101 Am. St. Rep. 125.

**3. Duly Authenticated Record Prima Facie Evidence of Jurisdiction.** — Seymour v. Newman, 77 Mo. App. 578.

**995. 1. Court of Limited Jurisdiction.** — In *Connecticut* a probate court being a court of limited jurisdiction, it cannot conclusively determine the facts giving it jurisdiction whether those facts be quasi-jurisdictional or otherwise. Plant v. Harrison, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**3. Presumption of Jurisdiction as to Courts of Sister States** — *United States*. — Hale v. Tyler, 104 Fed. Rep. 757.

*Alaska*. — Baker v. Healey, 1 Alaska 45.

*California*. — Cummings v. O'Brien, 122 Cal. 204; McHaddon v. Rhodes, 143 Cal. 275, 101 Am. St. Rep. 125.

*Michigan*. — Coveney v. Phiscator, 132 Mich. 260, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 995.

*New York*. — Matter of Law, 56 N. Y. App. Div. 454; Matter of Norton, (Surrogate Ct.) 32 Misc. (N. Y.) 224.

*Ohio*. — Hafner v. Bank of Enterprise, 24 Ohio Cir. Ct. 652.

*Pennsylvania*. — Levison v. Blumenthal, 25 Pa. Super. Ct. 55.

*Washington*. — See Trowbridge v. Spinning, 23 Wash. 48, 83 Am. St. Rep. 806.

**996. 1. No Presumption in Favor of Jurisdic-**



**997.** See note 1.

What Courts Are Presumed to Be of General Jurisdiction. — See note 2.

**998.** Presumption Arising from Appearance of Attorney. — See note 4.

**999.** When Presumption of Jurisdiction Ceases. — See note 2.

(5) *Submission to Jurisdiction*. — See note 4.

**1002.** *e.* JUDGMENT MUST BE FINAL. — See note 1.

*f.* JUDGMENT MUST BE UPON THE MERITS. — See note 2.

**1004.** *l.* ENGLISH RULE AS TO JUDGMENTS REPUGNANT TO NATURAL JUSTICE. — See notes 2, 3.

**1005.** *m.* RULE AS TO JUDGMENTS FOUNDED ON LOCAL LAWS NOT RECOGNIZED ELSEWHERE — (2) *Judgments Founded on Penal Laws*. — See notes 1, 2.

**1006.** *n.* RULE AS TO JUDGMENTS BY CONFESSION. — See note 5.

**1008.** *o.* RULE AS TO JUDGMENTS BY DEFAULT. — See note 1.

*p.* DECREES IN EQUITY. — See notes 2, 3, 4.

**1009.** *3.* Extent to Which Foreign Judgment Will Be Given Effect. — See notes 1, 2, 3.

tion of Court of Inferior and Limited Jurisdiction. — Matter of Law, 56 N. Y. App. Div. 454.

**997.** 1. No Presumption of Jurisdiction Where Such Jurisdiction Rests Solely upon Statute. — Matter of Law, 56 N. Y. App. Div. 454; *Wilhelm v. Parker*, 9 Ohio Cir. Dec. 724, 17 Ohio Cir. Ct. 234.

2. What Courts Are Presumed to Be of General Jurisdiction. — *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 15; *Poll v. Hicks*, 67 Kan. 193, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Van Norman v. Gordon*, 172 Mass. 576.

**998.** 4. Presumption that Attorney Who Appeared for Defendant Had Necessary Authority. — *Van Norman v. Gordon*, 172 Mass. 576. See also *Davis v. Cohn*, 96 Mo. App. 589.

**999.** 2. Where Service Was by Publication the same presumption exists as in case of personal service. *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125.

4. Submission to Jurisdiction by Nonresident. — *Feybrick v. Hubbard*, 71 L. J. K. B. 509, 86 L. T. N. S. 829; *Swaizie v. Swaizie*, 31 Ont. 324; *Willock v. Wilson*, 178 Mass. 68; *Grant v. Birrell*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 768; *Lynde v. Lynde*, 162 N. Y. 403; 76 Am. St. Rep. 332; *Richardson, etc., Co. v. Utah Stove, etc., Co.*, 28 Utah 85.

**1002.** 1. Judgment Must Be Conclusive and Final. — *Lynde v. Lynde*, 162 N. Y. 485, 76 Am. St. Rep. 332; *Burnside v. Burnside*, 2 Dauphin Co. Rep. (Pa.) 261.

Presumption that Judgment Is Final. — *Thompson v. Williamson*, 67 N. J. Eq. 212.

2. Judgment Must Be upon the Merits. — The Challenge and Duc D'Aumale, (1904) P. 41, 73 L. J. P. 2, 89 L. T. N. S. 481.

**1004.** 2. Judgment Repugnant to Natural Justice May Be Disregarded. — *Pemberton v. Hughes*, (1899) 1 Ch. 781, 68 L. J. Ch. 281; *Francis v. Carr*, 81 L. T. N. S. 50. See also *Wilhelm v. Parker*, 9 Ohio Cir. Dec. 724, 17 Ohio Cir. Ct. 234.

3. Repugnance Must Concern Mode of Procedure and Not Relate to Merits. — *Francis v. Carr*, 81 L. T. N. S. 50.

**1005.** 1. Courts of One Country Do Not Execute the Penal Laws of Another. — *Kennealy v. Leary*, 67 N. J. L. 435.

2. Foreign Judgments Founded on Penal Laws Not Enforced. — *Israel v. Israel*, 130 Fed. Rep. 237. But compare *Schuler v. Schuler*, 209 Ill. 522, reversing 104 Ill. App. 463.

Nature of Original Proceeding May Be Inquired Into. — *Israel v. Israel*, 130 Fed. Rep. 237.

**1006.** 5. Judgments by Confession in Sister State Conclusive. — *Van Norman v. Gordon*, 172 Mass. 576.

Canada. — United States Judgment by Confession Recognized. — A judgment, in due form, obtained by confession in the United States, is valid in Canada. *Ritter v. Fairfield*, 32 Ont. 350.

**1008.** 1. Judgment by Default. — *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 Am. St. Rep. 529; *Boyle v. Victoria Yukon Trading Co.*, 9 British Columbia 213.

2. Decrees in Equity Conclusive. — *American Trading, etc., Co. v. Gottstein*, 123 Iowa 267; *Bennett v. Bennett*, 63 N. J. Eq. 306.

3. Decrees in Equity for Payment of Money Enforceable. — *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332; *Wagler v. Wagner*, 26 R. I. 27.

4. Decrees in Equity for Performance of Acts Other than Payment of Money, Not Enforceable. — *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332.

**1009.** 1. Foreign Judgment Must Be Given Same Effect as It Has at Home. — *United States*. — *Warrington v. Ball*, (C. C. A.) 90 Fed. Rep. 464; *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 551, reversed 189 U. S. 71; *Glen-cove Granite Co. v. City Trust, etc., Co.*, (C. C. A.) 118 Fed. Rep. 386; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640.

*Illinois*. — *Newman v. Greeley State Bank*, 92 Ill. App. 638; *Baltimore, etc., R. Co. v. McDonald*, 112 Ill. App. 391.

*Kentucky*. — *Calloway v. Glenn*, 105 Ky. 648.

*New York*. — *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Everett v. Everett*, 75 N. Y. App. Div. 369.

*Virginia*. — *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908.

2. Judgment of Foreign Country Should Not Be Given Greater Effect than It Has at Home. — *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 551, reversed 189 U. S. 71.

**1009.** Inquiry as to Effect at Home. — See note 4.

**1010.** 4. What Matters Are Concluded. — See notes 1, 2.

**1011.** 5. What Persons Are Bound by Adjudication — *a.* GENERAL RULE — (1) *Judgments in Personam.* — See note 2.

(2) *Judgments in Rem.* — See note 3.

**1012.** *b.* RULE AS TO JUDGMENTS AGAINST JOINT DEFENDANTS — (1) *When Sister State Judgment Will Be Regarded as Joint and Not Several.* — See note 2.

**1014.** 6. Foreign Judgment as *Res Adjudicata* — *a.* GENERAL RULE STATED. — See note 1.

*b.* EFFECT OF JUDGMENT FOR PLAINTIFF — (1) *As Merger of Original Cause of Action* — (a) *Sister State Judgment.* — See notes 2, 3.

**1016.** (b) *Judgment of Foreign Country.* — See notes 1, 2.

(2) *As a Bar to Subsequent Action by Defendant.* — See note 4.

*c.* EFFECT OF JUDGMENT FOR DEFENDANT. — See note 5.

**1009.** 3. *Sister State Judgment Need Not Be Given Greater Effect than It Has at Home.* — Baltimore, etc., *R. Co. v. McDonald*, 112 Ill. App. 391; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Everett v. Everett*, 75 N. Y. App. Div. 369; *Barr v. Closterman*, 1 Ohio Cir. Dec. 546.

**4.** *Inquiry as to Effect at Home.* — *Warrington v. Ball*, (C. C. A.) 90 Fed. Rep. 464; *Union, etc., Bank v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, *reversed* 189 U. S. 71; *Glencove Granite Co. v. City Trust, etc., Co.*, (C. C. A.) 118 Fed. Rep. 386; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640; *Newman v. Greeley State Bank*, 92 Ill. App. 638; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**1010.** 1. *Probate of Will in Sister State.* — See *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649.

**2.** *Judgment Conclusive Only as to Matters Directly Before the Court.* — *Overby v. Gordon*, 177 U. S. 214; *Frame v. Thormann*, 102 Wis. 653.

**1011.** 2. *Foreign Judgments in Personam Binding Only upon Parties and Their Privies.* — See *Thompson v. Williamson*, 67 N. J. Eq. 212.

*Members of a Corporation.* — *Calloway v. Glenn*, 105 Ky. 648.

**3.** *Judgment in Rem Binding on All the World as Regards the Res.* — *Howarth v. Angle*, 162 N. Y. 179.

*Status.* — "The rule of *res adjudicata* is as broad, where status is the subject upon which the judgment acts, in that it is binding on the whole world, as it is *inter partes*, where mere personal rights are the subject of the litigation." *State v. McDonald*, 108 Wis. 8, 81 Am. St. Rep. 878.

**1012.** 2. *Judgment Construed in Light of Pleadings.* — In a suit upon a foreign judgment it is proper to consider the entire record, and the judgment rendered should be construed in the light of the pleadings. Though the judgment be in its terms apparently a joint one, yet, if the pleadings and the exhibits show that the liability is several only, the judgment will be construed so as to fix the liability according to the pleadings and exhibits. *McIntyre v. Moore*, 105 Ga. 112.

**1014.** 1. *General Rule as to Effect of Foreign Judgment as Res Adjudicata.* — *Norton v. House of Mercy*, (C. C. A.) 101 Fed. Rep. 382; *Gorham v. Broad River Tp.*, 109 Fed. Rep. 772,

*affirmed* (C. C. A.) 118 Fed. Rep. 1016; *Covington First Nat. Bank v. Covington*, 129 Fed. Rep. 792; *Phillips v. Phillips*, 69 Kan. 324; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *Tunncliffe v. Fox*, (Neb. 1903) 94 N. W. Rep. 1032; *MacDonald v. Grand Trunk R. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550; *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, *modified and affirmed* 100 N. Y. App. Div. 241.

In Quebec foreign judgments have not the character of *chose jugée*. *Rice v. Holmes*, 16 Quebec Super. Ct. 492.

**2.** *Judgment for Plaintiff in Sister State a Merger of Original Cause of Action.* — *Angle v. Manchester*, (Neb. 1902) 91 N. W. Rep. 501; *Gray v. Richmond Bicycle Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 165, *affirmed* 40 N. Y. App. Div. 506, *reversed* 167 N. Y. 348.

**3.** *Sister State Judgment for Plaintiff a Bar to Subsequent Action for Same Cause of Action.* — *Angle v. Manchester*, (Neb. 1902) 91 N. W. Rep. 501.

*Action Dismissed Without Trial.* — "When a cause has been dismissed out of a court of the United States without any trial or determination of the merits, it is not perceived why a new suit may not be brought on the same cause of action in any court of competent jurisdiction." *Foley v. Cudahy Packing Co.*, 119 Iowa 246.

**1016.** 1. *Judgment of Foreign Country Does Not Merge Original Cause of Action.* — *Rice v. Holmes*, 16 Quebec Super. Ct. 492.

In England it has been held that where a plaintiff elects to take the judgment of a foreign country, to which he has appealed, in discharge of the whole cause of action, he cannot afterwards treat such judgment as a part payment and sue for the residue in England. *Taylor v. Hollard*, (1902) 1 K. B. 676, 71 L. J. K. B. 278, 86 L. T. N. S. 228.

**2.** *A Judgment of a Foreign Country When Satisfied Is a Bar.* — *Taylor v. Hollard*, (1902) 1 K. B. 676, 71 L. J. K. B. 278, 86 L. T. N. S. 228.

**4.** *Judgment for Plaintiff Bars Subsequent Action by Defendant in Another Jurisdiction.* — *MacDonald v. Grand Trunk R. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550; *Gray v. Richmond Bicycle Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 165, *affirmed* 40 N. Y. App. Div. 506.

**5.** *Judgment of Foreign Country in Favor of Defendant a Bar to Subsequent Suit.* — See *Bald-*

**1017. 8. To Judgments of What Courts Full Faith and Credit Clause Applies** — *a. JUDGMENTS OF STATE COURTS* — Recognition by Federal Courts of Judgments of State Courts. — See note 3.

**1018. *b. JUDGMENTS OF FEDERAL COURTS.*** — See note 1.

**1021. 10. Decrees of Divorce.** — See note 1.

**1022. 11. Adjudications in Habeas Corpus Proceedings** — Custody of Infants. — See notes 2, 3.

**12. Probate Adjudications.** — See note 5.

**1023.** See note 1.

**13. Adjudications in Bankruptcy Proceedings.** — See note 3.

**1024. 15. Garnishment Proceedings.** — See note 1.

Court Must Have Had Jurisdiction. — See note 2.

**III. ACTIONS ON FOREIGN JUDGMENTS** — 1. Right to Bring Action. —

See note 4.

**1025.** See note 1.

**1026. 2. Form of Action** — *b. ON JUDGMENT OF FOREIGN COUNTRY.* — See note 3.

**3. Defenses** — *a. GENERAL RULE AS TO WHAT DEFENSES ARE PERMISSIBLE.* — See notes 5, 6.

**1027.** See note 1.

*b. THE GENERAL ISSUE.* — See note 2.

win *v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241.

**1017. 3. Federal Court Must Recognize Adjudications of State Courts.** — Union, etc., Bank *v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71; *Eau Claire Nat. Bank v. Benson*, (C. C. A.) 128 Fed. Rep. 277.

**1018. 1. Judgments of Federal Courts Must Be Recognized.** — *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246; *Bracken v. Milner*, 99 Mo. App. 187; *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241; *Holstein v. Edgefield County*, 64 S. Car. 374.

**1021. 1. Recognition of Foreign Decrees of Divorce.** — *Atherton v. Atherton*, 181 U. S. 155, reversing 155 N. Y. 129, 63 Am. St. Rep. 650; *Benton's Succession*, 106 La. 494; *Eldred v. Eldred*, 62 Neb. 613; *Bennett v. Bennett*, 63 N. J. Eq. 306; *Davenport v. Davenport*, 67 N. J. Eq. 320; *Lacey v. Lacey*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 196.

**Decree for Alimony.** — *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332; *Waterhouse v. Waterhouse*, 8 Ohio Dec. 73, 6 Ohio N. P. 106; *Miller v. Miller*, 21 Pa. Co. Ct. 252; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806. See also *Israel v. Israel*, 130 Fed. Rep. 237; *Schuler v. Schuler*, 209 Ill. 522; *Wagner v. Wagner*, 26 R. I. 27.

**1022. 2. Decree as to Custody of Infant Conclusive on Contestants.** — *Beardsley v. Thomas*, 31 Tex. Civ. App. 453, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022.

**3. Infant Not Bound.** — *Beardsley v. Thomas*, 31 Tex. Civ. App. 452.

**5. Probate of Will in Sister State Must Be Recognized.** — *Barr v. Closterman*, 1 Ohio Cir. Dec. 546; *McIntosh v. Marathon Land Co.*, 110 Wis. 296. See also *Sherman v. American Cong. Assoc.*, (C. C. A.) 113 Fed. Rep. 609.

**Not Recognized as to Property in Home State.** — *Jones v. Jones*, 107 Ill. App. 464; *Doe v. Roe*, 2 Penn. (Del.) 553.

**1023. 1. Probate Judgment Settling Accounts.** — *Matter of Crawford*, 11 Ohio Cir. Dec. 605, 21 Ohio Cir. Ct. 554.

**3. Binding Effect of Adjudication in Bankruptcy Proceedings.** — *Wilson v. Parr*, 115 Ga. 629.

**1024. 1. Payment by Garnishee Relieves Him from Further Liability to Original Creditor.** — See *Baltimore, etc., R. Co. v. McDonald*, 112 Ill. App. 391.

**Garnishment of Wages Exempt Where Defendant Resides.** — *Williams v. St. Louis, etc., R. Co.*, 109 La. 90.

**2. Court Must Have Had Jurisdiction.** — *Louisville, etc., R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181; *Stewart v. Northern Assur. Co.*, 45 W. Va. 734.

**4. Foreign Judgment Furnishes a Good Cause of Action.** — *Kennealy v. Leary*, 67 N. J. L. 435; *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332; *Wilmer v. Lewis*, 10 Pa. Dist. 139, 24 Pa. Co. Ct. 616, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024; *Ritter v. Fairfield*, 32 Ont. 350.

**1025. 1. Judgment Has No Extraterritorial Effect.** — *Wilmer v. Lewis*, 10 Pa. Dist. 139, 24 Pa. Co. Ct. 616, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024, 1025.

**1026. 3. In Canada it has been held that the party in whose favor a foreign judgment has issued may sue on the original cause as well as on the judgment.** *Bugbee v. Clergue*, 27 Ont. App. 96, affirmed 31 Can. Sup. Ct. 66.

**5. Any Defense Available in State Where Judgment Was Rendered May Be Pleaded.** — Union, etc., Bank *v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71; *Jaster v. Currie*, (Neb. 1903) 94 N. W. Rep. 995.

**6. Only Such Defenses as Would Be Available to Defeat Judgment in State Where Rendered Admissible.** — Union, etc., Bank *v. Memphis*, (C. C. A.) 111 Fed. Rep. 561, reversed 189 U. S. 71.

**1027. 1. Defenses on the Merits or Otherwise Available in Original Action Not Admissible.** — *Freeman's Appeal*, 71 Conn. 708.

**2. Nul Tiel Record, and Not Nil Debat, the**

- 1028.** *c. SPECIAL DEFENSES* — (1) *Lack of Jurisdiction*. — See note 3.  
**1029.** *Defense Must Be Specially Plead.* — See note 1.  
**1030.** *Burden of Proof*. — See note 1.  
 (2) *Fraud*. — See note 2.  
*Modification in Regard to Sister State Judgments*. — See note 3.  
**1031.** *Cases Holding Defense of Fraud Not Admissible*. — See note 1.  
**1032.** (4) *Pendency of Appeal*. — See note 3.  
**1033.** (5) *Statute of Limitations* — (a) *An Admissible Plea*. — See note 3.  
 (b) *What Statute Governs*. — See note 5.  
**1034.** See notes 1, 6.  
*Particular Rules in Various Jurisdictions*. — See note 7.  
**1035.** See note 1.  
**1036.** (7) *Payment or Release*. — See note 1.  
 (8) *Counterclaim*. — See note 3.

**Proper Plea.** — *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332; *Jones v. Quaker City Mut. F. Ins. Co.*, 23 Pa. Co. Ct. 529.

**1028. 3. Lack of Jurisdiction a Good Defense** — *Indian Territory*. — *Sibley v. Miller*, 3 Indian Ter. 688.

*Iowa*. — See *Longueville v. May*, 115 Iowa 709.

*Massachusetts*. — *Chicago Title, etc., Co. v. Smith*, 185 Mass. 363, 102 Am. St. Rep. 350.

*Nebraska*. — *National Exch. Bank v. Wiley*, (Neb. 1902) 92 N. W. Rep. 582.

*Pennsylvania*. — *Jones v. Quaker City Mut. F. Ins. Co.*, 23 Pa. Co. Ct. 529.

*Texas*. — *League v. Scott*, 25 Tex. Civ. App. 318.

*Vermont*. — *Ferry v. Miltimore Elastic Steel Car Wheel Co.*, 71 Vt. 457, 76 Am. St. Rep. 787.

**1029. 1. Defense Not Admissible under Plea of General Issue.** — *Rice v. Coutant*, 38 N. Y. App. Div. 543.

**Contrary Doctrine in Missouri.** — *Seymour v. Newman*, 77 Mo. App. 578.

**1030. 1. Defendant Who Denies Jurisdiction Assumes Burden of Proof.** — *Seymour v. Newman*, 77 Mo. App. 578; *Commonwealth Mut. F. Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545; *Chemical Nat. Bank v. Kellogg*, 71 N. J. L. 126; *Matter of Norton*, (Surrogate Ct.) 32 Misc. (N. Y.) 224; *Hafner v. Bank of Enterprise*, 24 Ohio Cir. Ct. 652; *Russell v. Butler*, (Tex. Civ. App. 1898) 47 S. W. Rep. 406; *Ferry v. Miltimore Elastic Steel Car Wheel Co.*, 71 Vt. 457, 76 Am. St. Rep. 787; *Swaizie v. Swaizie*, 31 Ont. 324.

**2. Fraud in Obtaining Judgment a Permissible Defense** — *United States*. — *Warrington v. Ball*, (C. C. A.) 90 Fed. Rep. 464.

*Iowa*. — See *Longueville v. May*, 115 Iowa 709.

*Kansas*. — *Abercrombie v. Abercrombie*, 64 Kan. 29.

*Michigan*. — *Coveney v. Phiscator*, 132 Mich. 258.

*New York*. — *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, reversing 40 N. Y. App. Div. 506.

*Ohio*. — *Pilcher v. Graham*, 9 Ohio Cir. Dec. 825, 18 Ohio Cir. Ct. 5.

*Texas*. — See *Babcock v. Marshall*, 21 Tex. Civ. App. 145.

**3. Fraud a Good Defense When Available in State Where Judgment Was Rendered.** — *Ball v.*

*Warrington*, (C. C. A.) 108 Fed. Rep. 472; *Jaster v. Currie*, (Neb. 1903) 94 N. W. Rep. 995.

**1031. 1. Cases Holding Fraud Not an Admissible Defense.** — *Leathe v. Thomas*, 109 Ill. App. 434.

**1032. 3. Rule Held to Apply Though Appeal Does Operate as Supersedeas.** — *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, 6 Northam. Co. Rep. (Pa.) 358.

**1033. 3. Statute of Limitations a Good Defense.** — *Newman v. Eldridge*, 107 La. 315. See also *Longueville v. May*, 115 Iowa 709. And see the dissenting opinion of Clark, J., in *Arrington v. Arrington*, 127 N. Car. 200, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033.

**5. Statute of Forum Where Judgment Is Sought to Be Enforced Governs.** — *Leathe v. Thomas*, 109 Ill. App. 434; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415; *Arrington v. Arrington*, 127 N. Car. 190, 80 Am. St. Rep. 791; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39. See also the dissenting opinion of Clark, J., in *Arrington v. Arrington*, 127 N. Car. 200, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033.

**1024. 1. Full Faith and Credit Clause Does Not Restrict Right to Limit Time for Bringing Actions on Sister State Judgments.** — *Leathe v. Thomas*, 109 Ill. App. 434; *Fields v. Mundy*, 106 Wis. 383, 80 Am. St. Rep. 39.

**6. Rule under Louisiana Statute.** — *Newman v. Eldridge*, 107 La. 315.

**7. Statutes Prescribing Limitation of Actions on Foreign Judgments — Construction — Oklahoma.** — An action on a foreign judgment must be brought within one year from the time the action accrues thereon. An appeal from the final order and judgment of the foreign court, in the absence of a supersedeas or stay bond, does not postpone or suspend the operation of the statute of limitations. *Stockham Bank v. Weins*, 12 Okla. 502.

**1035. 1. English Rule — Simple Contract Debts.** — *Stewart v. Guibord*, 6 Ont. L. Rep. 262.

**New Jersey Rule — Common-law Prescription.** — *Little v. McVey*, (N. J. 1900) 47 Atl. Rep. 61.

**1036. 1. Payment or Release a Good Defense.** — See *Longueville v. May*, 115 Iowa 709.

**3. Case Holding Plea of Set-off Not Admissible under Statute.** — See *Leathe v. Thomas*, 109 Ill. App. 434.

**1040. IV. PROOF OF FOREIGN JUDGMENTS—2. Sister State Judgments—**

*a.* STATUTORY REGULATION. — See note 7.

**1041.** Mode of Authentication Prescribed by Act of Congress Not Exclusive. — See note 1.

**1043.** *b.* ATTESTATION OF CLERK—(2) *Whether Deputy Clerk May Attest.* — See note 1.

**1045.** *f.* WHETHER ENTIRE RECORD MUST BE PRODUCED. — See note 6.

**1046.** See note 1.

*g.* JUDGMENTS OF COURTS NOT OF RECORD. — See notes 2, 5.

**1047.** See note 2.

**VI. IMPEACHMENT OF FOREIGN JUDGMENTS—1. Impeachment for Error or Irregularity Not Permissible.** — See note 6.

**1048.** 3. Impeachment for Fraud. — See note 2.

**1040.** 7. No Certificates Other than Those Prescribed by Act of Congress Necessary. — *Graham v. Troth*, 69 Kan. 861.

**1041.** 1. Mode of Authentication Prescribed by Act of Congress Not Exclusive. — *Tomlin v. Woods*, 125 Iowa 367; *Willock v. Wilson*, 178 Mass. 68.

**1043.** 1. Officer Having Charge of the Records. — In *Massachusetts* under Pub. Stat., c. 169, § 67, the attestation must be by the clerk, prothonotary, or other officer having charge of the records. The clerk is the proper custodian of the records of the court, but where the certifying officer is other than the clerk it should appear by the certificate or otherwise that he has charge of the records. *Willock v. Wilson*, 178 Mass. 68.

**1045.** 6. Cases Holding Production of Entire Record Necessary. — *Severson v. Blumenthal*, 9 Kulp (Pa.) 392. See also *Verhallen v. Laveochia*, 79 Miss. 370.

Contrary Opinion. — *Little Rock Cooperage Co. v. Hodge*, 112 Ga. 521.

**1046.** 1. Rule Followed in Georgia. — *Little Rock Cooperage Co. v. Hodge*, 112 Ga. 526, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1045 [1046].

2. Act of Congress Does Not Apply to Judgments of Courts Not of Record. — *Winham v. Kline*, 77 Mo. App. 36.

5. Proof According to Common-law Rule. — *Winham v. Kline*, 77 Mo. App. 36.

**1047.** 2. Proof of Parol Evidence. — *Winham v. Kline*, 77 Mo. App. 36.

6. Cannot Be Collaterally Impeached for Error or Irregularity. — *Wood v. Mobile*, (C. C. A.) 107 Fed. Rep. 846; *U. S. v. Eisenbeis*, (C. C. A.) 112 Fed. Rep. 190; *Witbeck v. Marshall-Wells Hardware Co.*, 188 Ill. 154; *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 15.

**1048.** 2. Foreign Judgment May Be Impeached for Fraud—*United States.* — *Warrington v. Ball*, (C. C. A.) 90 Fed. Rep. 464; *Gioe v. Westervelt*, 116 Fed. Rep. 1017; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434.

*Kentucky.* — *Clark v. Ogilvie*, 111 Ky. 181.

*New York.* — *Gray v. Richmond Bicycle Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 165, affirmed 40 N. Y. App. Div. 506; *Waters v. Spencer*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 15; *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241; *Everett v. Everett*, 75 N. Y. App. Div. 369; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, reversing 40 N. Y. App. Div. 506.

*North Carolina.* — *Coleman v. Howell*, 131 N. Car. 125.

*Washington.* — *Dormitker v. German Sav., etc., Soc.*, 23 Wash. 132.

The Full Faith and Credit Clause. — *Everett v. Everett*, 75 N. Y. App. Div. 369.

## FOREIGN LAWS.

By G. W. WALSH.

**1051. I. INTRODUCTORY—2. What Are Included—b. LAWS OF ANOTHER STATE.** — See note 5.

**1053.** 3. What Are Not Included—*a.* LAWS OF FORMER SOVEREIGNTY—(2) *Common Law of England*—(c) *English Statutes.* — See note 4.

**1054. II. EXTRATERRITORIAL FORCE—1. General Rule.** — See note 2.

**1051.** 5. Laws of Another State Deemed Foreign Laws. — *Matter of Stewart*, 26 Wash. 34, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060 [1051]. The case involved a devise of real estate executed in *California*.

**1053.** 4. Early English Statutes. — *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

**1054.** 2. Extraterritorial Force of Foreign Laws—General Rule Stated. — *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779.

**1054.** 2. Exceptions — *c.* LAW OF STATUS. — See note 7.

**1055.** III. FOREIGN LAWS IN EVIDENCE — 1. Judicial Notice — *a.* LAWS JUDICIALLY NOTICED — (1) *Federal and State Laws* — *State Laws*. — See note 5.

**1056.** (2) *Non-domestic Laws*. — See note 8.

**1057.** *b.* LAWS NOT JUDICIALLY NOTICED — (1) *Generally* — The Domestic or Municipal Laws of a Foreign Nation. — See notes 3, 4.

**1058.** The Laws, Usages, and Customs of an Indian Tribe. — See note 3*a*.

(2) *State Laws Inter Se*. — See note 4.

**1059.** See notes 1, 2,

**1054.** 7. Legitimacy of Children. — See Bates *v.* Virolet, 33 N. Y. App. Div. 436.

**1055.** 5. Public State Laws Judicially Noticed in Federal Courts. — *Andruss v. People's Bldg.*, etc., Assoc., (C. C. A.) 94 Fed. Rep. 573; *Mutual L. Ins. Co. v. Hill*, (C. C. A.) 97 Fed. Rep. 263; *Hathaway v. Mutual L. Ins. Co.*, 99 Fed. Rep. 534.

**1056.** 8. Maritime Law. — Where reliance is placed on a foreign maritime law that is different from the law of the forum it must be alleged and proved. *The Matterhorn*, (C. C. A.) 128 Fed. Rep. 863. See further the title JUDICIAL NOTICE, 983. 2.

**1057.** 3. Foreign Municipal Laws Not Judicially Noticed. — *The Matterhorn*, (C. C. A.) 128 Fed. Rep. 863; *Thomas v. Grand Trunk R. Co.*, 1 Penn. (Del.) 593; *Schlee v. Guckenheimer*, 179 Ill. 593; *Chesapeake, etc., Co. v. Venable*, 111 Ky. 41; *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. Rep. 521.

**4. Foreign Laws Considered Facts to Be Proved Like Other Facts.** — *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74; *Thomas v. Grand Trunk R. Co.*, 1 Penn. (Del.) 593; *Schlee v. Guckenheimer*, 179 Ill. 593; *Alexandria, etc., R. Co. v. Johnson*, 61 Kan. 424, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057; *Chesapeake, etc., R. Co. v. Venable*, 111 Ky. 41; *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. Rep. 521; *Matter of Stewart*, 26 Wash. 34, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060 [1057]; *Gunderson v. Gunderson*, 25 Wash. 459.

**1058.** 3*a.* Indian Tribal Laws Not Judicially Noticed. — *Hockett v. Alston*, 3 Indian Ter. 432, (C. C. A.) 110 Fed. Rep. 910; *Campbell v. Scott*, 3 Indian Ter. 462; *Kelly v. Churchill*, (Indian Ter. 1902) 69 S. W. Rep. 817; *Sass v. Thomas*, (Indian Ter. 1902) 69 S. W. Rep. 893; *Engleman v. Cable*, (Indian Ter. 1902) 69 S. W. Rep. 894.

**4. Laws of Other States Not Judicially Noticed** — *California*. — *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74.

*Delaware*. — *Thomas v. Grand Trunk R. Co.*, 1 Penn. (Del.) 593.

*Florida*. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

*Illinois*. — *Leathe v. Thomas*, 109 Ill. App. 434; *Schlee v. Guckenheimer*, 179 Ill. 593.

*Indiana*. — *Old Wayne Mut. L. Assoc. v. Flynn*, 31 Ind. App. 473; *Baltimore, etc., R. Co. v. Ryan*, 31 Ind. App. 597.

*Kentucky*. — *Louisville, etc., R. Co. v. Sullivan*, (Ky. 1903) 76 S. W. Rep. 525.

*Massachusetts*. — *Washburn Crosby Co. v. Boston, etc., R. Co.*, 180 Mass. 252; *Hancock*

*Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232.

*Michigan*. — *Phelps v. American Sav., etc., Assoc.*, 121 Mich. 343.

*Minnesota*. — *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458.

*Missouri*. — *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1; *Nenno v. Chicago, etc., R. Co.*, 105 Mo. App. 540.

*Nebraska*. — *People's Bldg., etc., Assoc. v. Backus*, (Neb. 1902) 89 N. W. Rep. 315.

*North Carolina*. — *Lassiter v. Norfolk, etc., R. Co.*, 136 N. Car. 89.

*Ohio*. — *Worthington v. Smyth*, 2 Cleve. L. Rep. 395, 4 Ohio Dec. (Reprint) 574; *Barr v. Closterman*, 1 Ohio Cir. Dec. 546.

*Oklahoma*. — *Keagy v. Wellington Nat. Bank*, 12 Okla. 33.

*Pennsylvania*. — *Whiting Mfg. Co. v. Fourth St. Nat. Bank*, 15 Pa. Super. Ct. 419.

*Rhode Island*. — *Taylor v. Slater*, 21 R. I. 104.

*Vermont*. — *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, holding that the court could not take judicial notice of the constitution or statutes of another state nor of their interpretation by the highest court of that state.

*Washington*. — *Matter of Stewart*, 26 Wash. 34, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060 [1058]; *Gunderson v. Gunderson*, 25 Wash. 459.

**Statutory Modifications of Common-law Rules** must be proved in *Louisiana*. *Rush v. Landers*, 107 La. 559, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058.

**The Construction of a Foreign Law** by the courts of the foreign state will not be judicially noticed. *Pacific Express Co. v. Pitman*, 30 Tex. Civ. App. 626.

**"The Rule Is the Same in the Case of a Judicial Decision of a sister state as in that of a statute.** Neither is judicially noticed except for the purpose of construing our own laws or determining what they are." *Ferd Heim Brewing Co. v. Gimber*, 67 Kan. 834. But where counsel on both sides cite and rely on decisions of a foreign state, construing its statutes, without proof, such decisions will be followed. *Hendryx v. Evans*, 120 Iowa 310.

**Stipulations.** — The statutes of another state and the decisions of its courts can be considered by the *Wisconsin* courts only when put in evidence in the way prescribed by Stat. Wis. (1898), §§ 4136, 4138, unless some other method is adopted by stipulation of the parties. *Howe v. Ballard*, 113 Wis. 375.

**1059.** 1. **Statutory Provisions.** — *Arkansas* has passed an act requiring the courts of that

**1060.** 2. Presumptions. — See note 1.

**1061.** See notes 1, 2.

**1062.** See note 1.

state to take judicial notice of the laws of other states. See *Louisiana, etc., R. Co. v. Phelps*, 70 Ark. 17.

In *Georgia* it is provided (2 Civ. Code Ga. 1895, § 5231) that "the public laws of the United States, and of the several states thereof, as published by authority, shall be judicially recognized without proof." *Seaboard Air Line R. Co. v. Phillips*, 117 Ga. 98.

**1059.** 2. Operation of "Full Faith and Credit" Clause. — *Hull v. Webb*, 78 Ill. App. 617; *Dormitzer v. German Sav., etc., Soc.*, 23 Wash. 132.

**Giving Full Faith and Credit to Acts, etc., of Other States.** — See *Jones v. Quaker City Mut. F. Ins. Co.*, 9 Pa. Dist. 213, citing *Ohio v. Hinchman*, 27 Pa. St. 479, stated in the original note, and holding that the court could take notice of the local laws of another state, in an action on a judgment of that state, to determine the validity of a sheriff's return of service. See also on this question *Baltimore, etc., R. Co. v. McDonald*, 112 Ill. App. 391; *Gill v. Everman*, 94 Tex. 209; *I. B. Rosenthal Millinery Co. v. Lennox*, (Tex. Civ. App. 1899) 50 S. W. Rep. 401; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806; *Fidelity Ins., etc., Co. v. Nelson*, 30 Wash. 340. And see *supra*, this title, **1055. 7.**

**Jurisdiction of Courts of Other States Judicially Noticed.** — *Poll v. Hicks*, 67 Kan. 191; *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806. See also *Leathe v. Thomas*, 109 Ill. App. 434.

**1060. 1. Laws of Sister State Presumed to Be Like Lex Fori** — *California*. — *Bovard v. Dickenson*, 131 Cal. 162; *Matter of Richards*, 133 Cal. 524; *Matter of Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, rehearing denied 140 Cal. 294.

*Georgia*. — *Wells v. Gress*, 118 Ga. 566, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

*Iowa*. — *Tolman v. Janson*, 106 Iowa 455; *Besser v. Saarman*, 112 Iowa 720; *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351; *McMillan v. American Express Co.*, 123 Iowa 236.

*Kansas*. — *Alexandria, etc., R. Co. v. Johnson*, 61 Kan. 424, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Heery v. J. L. Mott Iron Works Co.*, 10 Kan. App. 579, 62 Pac. Rep. 904; *Woolacott v. Case*, 63 Kan. 35; *Mutual Home, etc., Assoc. v. Worz*, 67 Kan. 506.

*Kentucky*. — *Chesapeake, etc., R. Co. v. Venable*, 111 Ky. 41.

*Massachusetts*. — *Hazen v. Mathews*, 184 Mass. 388.

*Minnesota*. — *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458.

*Missouri*. — *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215.

*Nebraska*. — *Welton v. Atkinson*, 55 Neb. 674, 70 Am. St. Rep. 416; *Angle v. Manchester*, (Neb. 1902) 91 N. W. Rep. 501; *Stauchfield v. Jeutter*, (Neb. 1903) 96 N. W. Rep. 642.

*New Jersey*. — *Dittman v. Distilling Co.*, 64 N. J. Eq. 537,

*North Carolina*. — *Lassiter v. Norfolk, etc., R. Co.*, 136 N. Car. 89.

*Pennsylvania*. — *Peter Adams Paper Co. v. Cassard*, 206 Pa. St. 179.

*South Dakota*. — *Baird v. Vines*, (S. Dak. 1904) 99 N. W. Rep. 89.

*Tennessee*. — *Loud v. Hamilton*, (Tenn. Ch. 1898) 51 S. W. Rep. 140; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239.

*Texas*. — *Gill v. Everman*, 94 Tex. 209; *Southern Pac. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57; *Boyd v. Boyd*, 34 Tex. Civ. App. 57. See also *Rosenthal Millinery Co. v. Lennox*, (Tex. Civ. App. 1899) 50 S. W. Rep. 401.

*Utah*. — *Dignan v. Nelson*, 26 Utah 186.

*Washington*. — *Gunderson v. Gunderson*, 25 Wash. 459.

*Wisconsin*. — *MacCarthy v. Whitcomb*, 110 Wis. 113; *Hyde v. German Nat. Bank*, 115 Wis. 170; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

**Rule Does Not Apply to Penalties and Forfeitures.** — *Louisiana, etc., R. Co. v. Phelps*, 70 Ark. 17; *People's Building, etc., Assoc. v. Backus*, (Neb. 1902) 89 N. W. Rep. 315.

**Presumption as to Construction.** — In the absence of evidence to the contrary, where proof of a foreign law is material to the cause of action or defense, and none is produced, it will be presumed that the local law on the same subject and the foreign law, similarly worded, have the same meaning. *Howe v. Ballard*, 113 Wis. 375.

**1061. 1. Presumption as to Laws of Foreign Countries.** — *Mexican Cent. R. Co. v. Glover*, (C. C. A.) 107 Fed. Rep. 356; *Alexandria, etc., R. Co. v. Johnson*, 61 Kan. 424, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061; *Mittenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404; *Townsend v. Van Buskirk*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 287; *Mackey v. Mexican Cent. R. Co.*, (N. Y. City Ct. Spec. T.) 78 N. Y. Supp. 966; *Mexican Cent. R. Co. v. Olmstead*, (Tex. Civ. App. 1900) 60 S. W. Rep. 267. See also *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411.

**2. Presumption as to Statute Law Denied.** — *Pardoe v. Merritt*, 75 Minn. 12; *Nenno v. Chicago, etc., R. Co.*, 105 Mo. App. 540; *Casola v. Kugelman*, 33 N. Y. App. Div. 428, affirmed 164 N. Y. 608; *Waters v. Spencer*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 15.

**A Defense of Usury.** — *Rooney v. Southern Bldg., etc., Assoc.*, 119 Ga. 941.

**1062. 1. Presumption Extended to Statutory as Well as to Common Law** — *Iowa*. — *Barringer v. Ryder*, 119 Iowa 121.

*Kansas*. — *Woolacott v. Case*, 63 Kan. 35; *Poll v. Hicks*, 67 Kan. 191; *Mutual Home, etc., Assoc. v. Worz*, 67 Kan. 506.

*Nebraska*. — *Fisher v. Donovan*, 57 Neb. 361; *People's Bldg., etc., Assoc. v. Backus*, (Neb. 1902) 89 N. W. Rep. 315.

*Tennessee*. — *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239.

*Texas*. — *Texarkana, etc., R. Co. v. Gray*, (Tex. Civ. App. 1901) 65 S. W. Rep. 85.

**1062.** Presumption as to Existence of Common Law. — See note 3.

**1063.** See note 3.

Presumption of Continuance. — See note 5.

**1064.** 3. Proof — a. STATUTE OR WRITTEN LAW — (1) *Prevailing Rule* — (a) Best Evidence Required. — See notes 2, 3.

**1066.** (b) Books of Foreign Law — aa. GENERAL RULE OF ADMISSIBILITY — Private Publication. — See note 5.

bb. STATUTORY PROVISIONS. — See note 6.

**1067.** cc. AUTHENTICATION — (aa) *Generally*. — See notes 1, 2.

**1068.** (bb) *Federal Mode*. — See note 4.

**1069.** (2) *Minority Rule*. — See note 3.

b. COMMON OR UNWRITTEN LAW. — See note 6.

**1070.** Statutes. — See note 1.

c. COMPETENCY OF WITNESSES — (1) *General Rule*. — See note 4.

(2) *Lawyers*. — See note 6.

*Washington*. — *Gunderson v. Gunderson*, 25 Wash. 459.

*Wisconsin*. — *MacCarthy v. Whitcomb*, 110 Wis. 113.

See also *Rooney v. Southern Bldg., etc., Assoc.*, 119 Ga. 941; *Dittman v. Distilling Co.*, 64 N. J. Eq. 537; *Lassiter v. Norfolk, etc., R. Co.*, 136 N. Car. 89.

Where the Local Statute Prescribes Penalties and Forfeitures the presumption fails. *People's Bldg., etc., Assoc. v. Backus*, (Neb. 1902) 89 N. W. Rep. 315.

Construction of Similarly Worded Statutes Presumed to Be Same. — *Howe v. Ballard*, 113 Wis. 375.

**1062.** 3. Presumption as to Existence of Common Law — *Georgia*. — *Charleston, etc., R. Co. v. Miller* 113 Ga. 15; *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98.

*Illinois*. — *Scaling v. Knollin*, 94 Ill. App. 443; *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427; *McCurdy v. Alaska, etc., Commercial Co.*, 102 Ill. App. 120; *Jo Daviess County v. Staples*, 108 Ill. App. 539; *Schlee v. Guckenheimer*, 179 Ill. 593.

*Indiana*. — *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87; *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688; *Baltimore, etc., R. Co. v. Hollenbeck*, 161 Ind. 452.

*Kentucky*. — *Bank of Commerce v. Windmuller*, 106 Ky. 395; *Chesapeake, etc., R. Co. v. Hanmer*, 66 S. W. Rep. 375, 23 Ky. L. Rep. 1846; *Klenke v. Noonan*, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305.

*Michigan*. — *Schroeder v. Boyce*, 127 Mich. 33, 8 Detroit Leg. N. 210.

*Minnesota*. — *Pardoe v. Merritt*, 75 Minn. 12; *Engstrand v. Kleffman*, 86 Minn. 403, 91 Am. St. Rep. 359.

*Missouri*. — *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Searles v. Lum*, 81 Mo. App. 607; *Davis v. Cohn*, 85 Mo. App. 530; *Gaylord v. Duryea*, 95 Mo. App. 574; *Price v. Clevenger*, 99 Mo. App. 536; *Nenno v. Chicago, etc., R. Co.*, 105 Mo. App. 540.

*New Hampshire*. — *Ela v. Ela*, 70 N. H. 163.

*New York*. — *Casola v. Kugelman*, 33 N. Y. App. Div. 428, affirmed 164 N. Y. 608; *Ernst v. Elmira Municipal Imp. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 583.

*North Carolina*. — *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663;

*South Carolina*. — *Rosemand v. Southern R. Co.*, 66 S. Car. 91; *Columbian Bldg., etc., Assoc. v. Rice*, 68 S. Car. 236.

**1063.** 3. Countries or People Without English Institutions. — There is no presumption that the common law exists in *Mexico*. *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065 [1063].

5. Presumption as to Continuance of Laws. — *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98.

**1064.** 2. Foreign Statutes Not Provable by Parol. — *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74; *Johnson v. Hesser*, 61 Neb. 634, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064.

3. Mode of Authentication. — See *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98.

**1066.** 5. Private Publications Not Admissible. — *Johnson v. Hesser*, 61 Neb. 634, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064 [1066]. But see *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367.

6. Statutory Provisions. — *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98; *Lassiter v. Norfolk, etc., R. Co.*, 136 N. Car. 89.

**1067.** 1. Books Purporting to Contain Foreign Laws. — *Main v. Aukam*, 12 App. Cas. (D. C.) 375.

2. Admissibility of Statute as Published by Authority of Government. — *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 100, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1067.

**1068.** 4. Rule Prescribed by State Statute Not Exclusive. — *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98; *Brady v. Palmer*, 10 Ohio Cir. Dec. 27, 19 Ohio Cir. Ct. 687.

**1069.** 3. Parol Evidence Held Admissible to Prove Written Law. — *Brady v. Palmer*, 10 Ohio Cir. Dec. 27, 19 Ohio Cir. Ct. 687.

6. Common Law Provable by Parol. — *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *Patterson v. Kennedy*, 122 Mich. 343.

**1070.** 1. Judicial Decisions Made Evidence by Statute. — *Klenke v. Noonan*, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305; *Lassiter v. Norfolk, etc., R. Co.*, 136 N. Car. 89.

4. Competency of Witnesses in General. — *De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367.

6. Lawyers — Competency to Testify as to For-



- 1071.** *d. TO WHOM SUBMITTED* — (1) *Generally*. — See note 8.  
 (2) *Documentary Evidence*. — See note 9.

**1072.** **FOREMAN.** — See note 1.  
**[FORESIGHT.** — See note 2*a*.]

**1073.** **FOREVER.** — See note 1.

**1074.** **FORFEIT—FORFEITURE.** — See note 2.

**1077.** See note 1.

**1080.** **FORGE.** — See note 2.

**sign Laws.** — *Patterson v. Kennedy*, 122 Mich. 343; *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. Rep. 521.

**1071. 8. Rule that Foreign Laws Must Be Proved to Jury.** — *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232; *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305; *Sierra Madre Constr. Co. v. Brick*, (Tex. Civ. App. 1900) 55 S. W. Rep. 521.

**9. Documentary Evidence.** — *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232.

**1072. 1. Foreman a Fellow Workman.** — *Prevost v. Citizen's Ice, etc., Co.*, 185 Pa. St. 617.

**2*a*.** By *foresight* is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that without due care are likely to follow and that due care would prevent. *Hansen v. North Jersey St. R. Co.*, 64 N. J. L. 686.

**1073. 1. Wills.** — *McNally v. McNally*, 23 R. I. 180.

**1074. 2. Punishment.** — *Featherstone v. People*, 194 Ill. 325.

**Forfeiture Synonymous with Fine and Penalty.** — *State v. McConnell*, 70 N. H. 158.

**Forfeiture and Penalty Used Synonymously.** — *Featherstone v. People*, 194 Ill. 325; *Butler v. Butler*, 62 S. Car. 165, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073-1080.

**Usury.** — *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384; *Butler v. Butler*, 62 S. Car. 165.

**Forfeiture Not Equivalent to Sale and Purchase.** — *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1094.

**1077. 1. Liquidated Damages.** — *Millar v. Smith*, 28 Tex. Civ. App. 386.

**Mines and Mining Claims.** — *McKay v. McDougall*, 25 Mont. 258.

**1080. 2. Forge Distinguished from Furnace.** — See *Boston v. Sarni*, 175 Mass. 357. And see *infra*, FURNACE.

## FORGERY.

BY A. A. WADSWORTH.

**1082. I. DEFINITION.** — See note 1.

**II. ELEMENTS OF THE OFFENSE—1. In General.** — See note 2.

**1082. 1. Other Definitions** — *United States*. — See *In re Count De Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082.

*California.* — *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141.

*Delaware.* — *State v. Pratt*, 3 Penn. (Del.) 264.

*Georgia.* — *Brazil v. State*, 117 Ga. 32; *Shope v. State*, 106 Ga. 226.

*Kentucky.* — *Colson v. Com.*, 110 Ky. 233, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 and *quoting* text paragraph covered by note; *Richie v. Com.*, (Ky. 1902) 70 S. W. Rep. 629.

*Mississippi.* — *France v. State*, 83 Miss. 281.

*Nebraska.* — *Hickson v. State*, 61 Neb. 763.

*New York.* — *People v. Hertz*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 177.

*South Carolina.* — *State v. Bullock*, 54 S. Car. 300.

*Texas.* — *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792, *citing* 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088 [1082]; *Scott v. State*, 40 Tex. Crim. 105.

The false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability, constitutes forgery. *State v. Hendry*, 156 Ind. 392.

In *Kentucky* it has been held that the addition of certain names to an instrument in writing purporting to be a copy of an original contract between a teacher and the trustees of a common school, was not the subject of forgery where it was alleged that "it was unknown to the grand jury whether there was or is an original written agreement, of which the copy set out purported to be a copy." *Com. v. Brewer*, 113 Ky. 217.

*California—Forgery under Penal Code, § 470.* — *People v. Compton*, 123 Cal. 403.

*Canada—Statutory Definition.* — See *Re Abeel*, 7 Ont. L. Rep. 327.

**2. Elements of the Offense.** — *Burden v. State*, 120 Ala. 388, 74 Am. St. Rep. 37; *Hale v. State*, 120 Ga. 183; *State v. Greenwood*, 76 Minn. 211, 77 Am. St. Rep. 632; *Com. v. Compton*, 11 Pa. Dist. 119; *Reg. v. Weir*, 9 Quebec Q. B. 253.

**1082.** 2. False Making. — See note 3.

**1083.** Act Must Appear to Be the Act of Another. — See note 2.

3. Guilty Knowledge and Fraudulent Intent. — See note 4.

**1084.** Signing Another's Name in Honest Belief that Signer Is Authorized. — See note 1.

That Forger Entitled to Fruits of Act No Defense. — See notes 2, 3.

Whether Intent to Defraud Particular Person Necessary. — See note 4.

Statutes. — See note 7.

**1085.** No One Need Be in Fact Injured. — See note 2.

Uttering Not Essential. — See note 3.

4. Capacity for Injury. — See note 4.

Resemblance of Forged to Genuine Instrument Need Not Be Perfect. — See note 5.

**1086.** See note 2.

III. HOW FORGERY ACCOMPLISHED — 1. In General — A Writing. —

See note 4.

**1082.** 3. False Making. — *Hale v. State*, 120 Ga. 183.

**1083.** 2. Use of Own Name May be Forgery in New York. — *People v. Filkin*, 83 N. Y. App. Div. 589, affirmed 176 N. Y. 548.

4. Intent to Defraud — *United States*. — *Staton v. U. S.*, (C. C. A.) 88 Fed. Rep. 253. *Alabama*. — *Benson v. State*, (Ala. 1899) 26 So. Rep. 119.

*California*. — *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

*Delaware*. — *State v. Hegeman*, 2 Penn. (Del.) 143.

*District of Columbia*. — *Towles v. U. S.*, 19 App. Cas. (D. C.) 471.

*Georgia*. — *Hale v. State*, 120 Ga. 183.

*Indiana*. — *Selby v. State*, 161 Ind. 667.

*Minnesota*. — *State v. Bjornaas*, 88 Minn. 301; *State v. Greenwood*, 76 Minn. 211, 77 Am. St. Rep. 632.

*Missouri*. — *Krup v. Corley*, 95 Mo. App. 640. *Nebraska*. — *Burlingim v. State*, 61 Neb. 276.

*New York*. — *People v. Weaver*, 177 N. Y. 434; *Matter of Van Orden*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 215.

*Pennsylvania*. — *Com. v. Compton*, 11 Pa. Dist. 119.

*South Carolina*. — *State v. Allen*, 56 S. Car. 495; *State v. Bullock*, 54 S. Car. 300.

*Texas*. — *Jones v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 143; *Adkins v. State*, 41 Tex. Crim. 577.

*Virginia*. — *Gordon v. Com.*, 100 Va. 825.

*Canada*. — *Re Abeel*, 7 Ont. L. Rep. 327; *Reg. v. Weir*, 9 Quebec Q. B. 253.

Question of Intent One of Fact. — *Matter of Van Orden*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 215.

Fraudulent Intent Essential Element of Aiding and Abetting Forgery. — *Burlingim v. State*, 61 Neb. 276.

**1084.** 1. Signing in Belief that Party Is So Authorized. — *Towles v. U. S.*, 19 App. Cas. (D. C.) 471; *Knowles v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 767; *Jones v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 143.

Question of Authority to Sign Is for Jury. — *People v. Weaver*, 177 N. Y. 434. See also *Towles v. U. S.*, 19 App. Cas. (D. C.) 471.

Good Faith of Accused Question for Jury. — *Knowles v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 767.

Belief Must Be Founded on Reasonable Grounds. — *Towles v. U. S.*, 19 App. Cas. (D. C.) 471.

2. Forgery in Support of Just Claim. — *Curtis v. State*, 118 Ala. 125; *Plemons v. State*, 44 Tex. Crim. 555, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; *Gordon v. Com.*, 100 Va. 825.

3. Intent to Apply Money Obtained to Payment of Debt. — *Plemons v. State*, 44 Tex. Crim. 555, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

4. Intent to Defraud Particular Person. — See *State v. Eaton*, 166 Mo. 575; *Crayton v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 839.

7. Statutes. — See *Benson v. State*, (Ala. 1899) 26 So. Rep. 119; *State v. McElvain*, 35 Oregon 365.

**1085.** 2. Actual Injury Unnecessary. — *Benson v. State*, (Ala. 1899) 26 So. Rep. 119; *Scott v. State*, 40 Tex. Crim. 105.

Return of Money No Defense. — *Williams v. State*, 126 Ala. 50.

3. Uttering Unnecessary. — *Hale v. State*, 120 Ga. 183.

4. Must Have Capacity for Injury. — *King v. State*, 43 Fla. 211; *Colson v. Com.*, 110 Ky. 233. See also *Burden v. State*, 120 Ala. 388, 74 Am. St. Rep. 37.

An Instrument Is One of Legal Efficacy within the rules relating to forgery where by any possibility it may operate to the injury of another. *Gordon v. Com.*, 100 Va. 825.

5. Exact Similitude Unnecessary. — *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798; *Com. v. Compton*, 11 Pa. Dist. 119; *State v. Bullock*, 54 S. Car. 300.

Instrument Must Be Calculated to Deceive. — *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798.

**1086.** 2. Persons of Ordinary Observation. — *Com. v. Compton*, 11 Pa. Dist. 119.

4. What Included in Word "Writing." — It has been held that an instrument signed by a party, although it be partly printed and partly in writing, is, in legal parlance, the paper writing of such party. *State v. Ridge*, 125 N. Car. 655.

**1086.** 2. By Signing Name of Another. — See note 9.

**1087.** See notes 1, 2.

3. By Fraudulently Procuring a Genuine Signature. — See note 3.

**1088.** 4. By Use of Fictitious Name. — See note 2.

Apparent Validity Sufficient. — See note 3.

Credit Given to Person and Not to Name. — See note 5.

**1089.** 5. By Use of One's Own Name When Same as That of Another. — See notes 3, 4.

6. By Fraudulently Filling in Blanks. — See note 5.

**1090.** 7. By Fraudulent Alterations. — See notes 5, 6, 7.

**1091.** See notes 2, 5.

What Alterations Are Not Forgery. — See note 6.

**1093.** IV. INSTRUMENTS SUBJECTS OF FORGERY—1. Statement of General Rules. — See notes 3, 4, 5, 6.

**1086.** 9. Signing Another's Name. — *Adkins v. State*, 41 Tex. Crim. 577.

**1087.** 1. Signing under Direction of Another. — *Staton v. U. S.*, (C. C. A.) 88 Fed. Rep. 253.

2. Signing Must Be Without Authority. — *Staton v. U. S.*, (C. C. A.) 88 Fed. Rep. 253.

3. Procuring Genuine Signature by Fraud. — See *In re Count De Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878.

**1088.** 2. Using Fictitious Name — *United States*. — *Logan v. U. S.*, (C. C. A.) 123 Fed. Rep. 291.

*Alabama*. — *Williams v. State*, 126 Ala. 50, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088.

*California*. — *People v. Chretien*, 137 Cal. 450; *People v. Nishiyama*, 135 Cal. 299.

*Nebraska*. — *Randolph v. State*, 65 Neb. 520.

*Texas*. — *Allen v. State*, 44 Tex. Crim. 63; *Adkins v. State*, 41 Tex. Crim. 577; *Scott v. State*, 40 Tex. Crim. 105; *Hanks v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 587.

*Canada*. — *In re Lazier*, 26 Ont. App. 260.

**Georgia** — Statute Making Signing of Fictitious Name to Bank Check Felonious. — *Brazil v. State*, 117 Ga. 32.

3. Apparent Validity Sufficient. — *State v. Alexander*, 113 La. 747, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088, and quoting text paragraph covered by note; *Scott v. State*, 40 Tex. Crim. 105.

5. Where Credit Given to Person and Not to Name. — *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088, and quoting text paragraph covered by note.

**1089.** 3. Falsely Personating Another and Signing Name. — *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141; *Beattie v. National Bank*, 174 Ill. 571, 66 Am. St. Rep. 318.

4. Names Which Are Idem Sonans. — *Leath v. State*, 132 Ala. 26; *Hale v. State*, 120 Ga. 183; *Selby v. State*, 161 Ind. 667.

The Fact that the Names Differ in the Middle Initial Letter does not make the case other than a case where the name of the real payee and the name of the assumed payee are the same. *Beattie v. National Bank*, 174 Ill. 571, 66 Am. St. Rep. 318.

5. Fraudulently Filling in Blanks. — *Shope v. State*, 106 Ga. 226.

When Want of Authority Must Be Shown. — *State v. Pine*, 56 W. Va. 1.

**1090.** 5. Fraudulent Alterations. — *State v. Henning*, 158 Ind. 196; *Com. v. Pioso*, 17 Pa. Super. Ct. 45; *Franklin v. State*, 46 Tex. Crim. 181; *Lawless v. State*, 114 Wis. 189; *Hamilton Bank v. Imperial Bank*, 27 Ont. App. 590, affirmed 31 Can. Sup. Ct. 344.

Alteration Must Be Material. — *Turnipseed v. State*, 45 Fla. 110.

6. Altering Date of Note or Order. — *Owen v. Brown*, 70 Vt. 521.

7. Altering Amount of Note. — *Com. v. Pioso*, 17 Pa. Super. Ct. 45.

Question for Jury. — In *State v. Pratt*, 3 Penn. (Del.) 264, it was held that where the defendant induced another to indorse a note in blank under a promise that defendant would fill in the blank for one hundred and ten dollars, but afterwards filled out the note for three hundred dollars, the question as to whether the act was forgery was for the jury on the question of the defendant's intent.

**1091.** 2. Adding to Words of Receipt. — *Gordon v. Com.*, 100 Va. 825.

What Constitutes "Receipt." — *State v. Hendry*, 156 Ind. 392.

5. Altering Words of Check. — *Gordon v. Com.*, 100 Va. 825.

Altering Amount of Check. — *State v. Eaton*, 166 Mo. 575; *Franklin v. State*, 46 Tex. Crim. 181; *Lawless v. State*, 114 Wis. 189.

Raising Amount of Certified Check — *Canada*. — The alteration of a certified check from five dollars to five hundred dollars by the drawer after its certification is a forgery. *Hamilton Bank v. Imperial Bank*, 27 Ont. App. 590, affirmed 31 Can. Sup. Ct. 344.

Erasure of Word in Deed. — In *Pennsylvania* it has been held to be forgery to alter a deed by the erasure of the word "trustee" after the name of the grantor. *Flitcraft v. Commonwealth Title Ins., etc., Co.*, 211 Pa. St. 114.

The Altering of a Satisfaction of a Judgment entered by an attorney authorized to enter the same constitutes forgery. *State v. Henning*, 158 Ind. 196.

6. Immaterial Alteration Not Forgery. — *State v. Hendry*, 156 Ind. 392.

**1093.** 3. Instruments Capable of Defrauding. — *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792, quoting 13 AM. AND ENG. ENCYC. OF LAW (ed ed.) 1093; *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 73; *Scott v. State*, 40 Tex. Crim. 105.

**1093.** Instrument Void on Its Face. — See note 8.

**1094.** See notes 1, 2.

**2. Particular Instances of Instruments Held Subjects of Forgery —**

**a. ORDERS FOR MONEY OR GOODS.** — See note 4.

**1095.** See note 1.

**1096.** Date. — See note 2.

**Need Not Be Addressed to Any Particular Person.** — See note 3.

**Payable to Bearer.** — See notes 4, 5.

**1093. 4. Instruments Operating as Foundation of Liability.** — *King v. State*, 42 Tex. Crim. 100, 96 Am. St. Rep. 792, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093; *Scott v. State*, 40 Tex. Crim. 105.

**5. Validity of Instrument Unnecessary.** — *U. S. v. McKinley*, 127 Fed. Rep. 166, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093; *King v. State*, 42 Tex. Crim. 108, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

**6. Validity of Instrument on Its Face Sufficient.** — *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

**8. Instruments Void on Their Face Not Subjects of Forgery — Alabama.** — *Burden v. State*, 120 Ala. 388, 74 Am. St. Rep. 37.

*California.* — *People v. Terrill*, 127 Cal. 99.

*Florida.* — *King v. State*, 43 Fla. 211.

*Georgia.* — *Brazil v. State*, 117 Ga. 32, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

*Kentucky.* — *Pearson v. Com.*, (Ky. 1904) 78 S. W. Rep. 1128; *Com. v. Brewer*, 113 Ky. 217.

*Louisiana.* — *State v. Leo*, 108 La. 496.

*Mississippi.* — *France v. State*, 83 Miss. 281.

*Missouri.* — *State v. Leonard*, 171 Mo. 622,

94 Am. St. Rep. 798.

*New York.* — *People v. Drayton*, 168 N. Y.

10, reversing 41 N. Y. App. Div. 40.

*North Dakota.* — *State v. Ryan*, 9 N. Dak.

419.

*Texas.* — *Joiner v. State*, 46 Tex. Crim. 408; *Huckaby v. State*, 45 Tex. Crim. 577; *Wilson v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 504; *Head v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 394; *Black v. State*, 42 Tex. Crim. 585; *Scott v. State*, 40 Tex. Crim. 105; *Crawford v. State*, 40 Tex. Crim. 344; *Cagle v. State*, 39 Tex. Crim. 109; *Womble v. State*, 39 Tex. Crim. 24.

*Virginia.* — *Gordon v. Com.*, 100 Va. 825.

**Gopher Tails Certificate.** — In *State v. Ryan*, 9 N. Dak. 419, it was held that a written certificate purporting to have been made by a township clerk, reciting that one thousand gopher tails had been presented to him by the defendant, and that he destroyed them, of itself was not the subject of forgery, in that, standing alone, the said certificate did not on its face either create, or purport to create, any liability, or create any right by which any one might be affected.

**Certificate for Bounty for Destroying Fish Nets.** — For a certificate for a bounty for destroying fish nets under Laws N. Y., p. 1158, c. 451, held not to be void on its face and a subject of forgery, see *People v. Filkin*, 83 N. Y. App. Div. 589, affirmed 176 N. Y. 548.

**1094. 1. Incapacity to Defraud.** — See the cases cited in the preceding note.

**2. Void Instruments Sometimes Subject of For-**

**gery.** — *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 73, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093, 1094; *Scott v. State*, 40 Tex. Crim. 105; *Roberts v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 864; *Colter v. State*, 40 Tex. Crim. 165. See also the cases cited *supra*, p. 1093, note 8.

**Test of Validity.** — In *Cagle v. State*, 39 Tex. Crim. 109, it was held that it might be considered a safe test if the instrument is such on its face that it imports an obligation in regard to money or property, and will afford the basis of a civil action without resorting to extrinsic testimony.

**4. Orders for Money.** — *People v. Walkey*, 26 Colo. 483; *State v. Hauser*, 112 La. 313; *Hanks v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 587; *Plemons v. State*, 44 Tex. Crim. 555; *Thomas v. State*, 40 Tex. Crim. 562, 76 Am. St. Rep. 740.

**Without Revenue Stamp.** — An order for money, which requires a revenue stamp, is the subject of forgery although it is unstamped. *Thomas v. State*, 40 Tex. Crim. 562, 76 Am. St. Rep. 740. See also *Hanks v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 587.

**State Certificate Promising Payment of Money.**

— A bounty certificate entitling the destroyer of fish nets to certain payments from the county treasurer, under Laws N. Y. 1898, p. 1158, c. 451, was held to fall within Pen. Code N. Y., § 509, making it forgery in the first degree to forge a certificate issued under the authority of the state by which the payment of money is promised. *People v. Filkin*, 83 N. Y. App. Div. 589, affirmed 176 N. Y. 548.

**1095. 1. Orders for Goods.** — *State v. Alexander*, 113 La. 747; *People v. Palmer*, 127 Mich. 383; *People v. Phillips*, 118 Mich. 699, 74 Am. St. Rep. 436.

**A Mere Gratuitous Order** from A to B to let C have such goods as he may desire, without any obligation upon C to comply with such order, and without obligating A to pay for the goods that B might let C have on such order, is not the subject of forgery. *West v. State*, 45 Fla. 118.

**Order For Livery Rig.** — A statement in the following form is the subject of forgery: "Mr. Sage: Please let this boy have a single rig — a good one — and oblige. I will bring it back myself. [Signed] George Klinger." *Hickson v. State*, 61 Neb. 763.

**1096. 2. Date of Presentation May Be Shown by Parol.** — *Laudermilk v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1107.

**3. Need Not Be Addressed to Particular Person.** — *Allen v. State*, 44 Tex. Crim. 63, 100 Am. St. Rep. 839.

**4. Name of Payee in Blank.** — *Henderson v. State*, 120 Ala. 360.

- 1096.** *Obligation to Honor the Order.* — See note 6.  
*Legal Disability of Drawee.* — See note 8.  
*Prefixing the Word "Please."* — See note 9.  
*b. PROMISSORY NOTES, BILLS OF EXCHANGE, BANK NOTES OR BILLS, CHECKS, RECEIPTS, DUEBILLS.* — See note 12.
- 1097.** See notes 2, 4.
- 1098.** *c. DEEDS, MORTGAGES, WARRANTS, BONDS, BOOK ENTRIES.* — See notes 1, 4, 5, 8, 10.  
*d. RECORDS OF PUBLIC OFFICE; JUDICIAL WRITS; RAILROAD, THEATRE, OR PAWN TICKETS.* — See note 15.
- 1099.** See note 4.  
*e. MISCELLANEOUS.* — See notes 8, 9, 11, 12, 13, 16.

**1096.** 5. "Pay the Boy." — *Henderson v. State*, 120 Ala. 360.

6. *Obligation to Pay Unnecessary.* — *State v. Hauser*, 112 La. 313, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1096; *People v. Phillips*, 118 Mich. 699, 74 Am. St. Rep. 436.

8. *Legal Disability of Drawee.* — *State v. Alexander*, 113 La. 747, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1096; *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792.

9. *Effect of Prefixing the Word "Please."* — *People v. Phillips*, 118 Mich. 699, 74 Am. St. Rep. 436.

12. *Promissory Notes.* — *Cross v. People*, 192 Ill. 291; *Selby v. State*, 161 Ind. 667; *Com. v. Hall*, 23 Pa. Super. Ct. 104.

A Memorandum on the Back of a Promissory Note, which was made simultaneous with the execution of the note, forms a part of the note, and an alteration of figures in such memorandum is forgery. *State v. Donovan*, 75 Vt. 308.

An Indorsement of a Promissory Note is the subject of forgery under Rev. Stat. Ohio, § 7091. *Cosner v. State*, 24 Ohio Cir. Ct. 734. See also *People v. Weaver*, 177 N. Y. 434.

*Instrument Not Amounting to Promissory Note.* — In *Michigan* an instrument by which the signers promise "three years after date" to pay a certain sum with interest, "and ten per cent. attorney's fees for collecting same, \* \* \* without relief from valuation or appraisement laws," while not a promissory note, is nevertheless the subject of forgery at common law. *People v. Bennett*, 122 Mich. 281.

**1097.** 2. *Without Revenue Stamp.* — *State v. Imboden*, 157 Mo. 83; *King v. State*, 42 Tex. Crim. 108, 96 Am. St. Rep. 792.

4. *Checks.* — *Brazil v. State*, 117 Ga. 32; *State v. Shields*, 112 Iowa 27; *Matter of Van Orden*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 215; *State v. Newton*, 29 Wash. 373.

The Indorsement of the Payee's Name on the back of a check is the subject of forgery. *Cosner v. State*, 24 Ohio Cir. Ct. 734.

*Forging Indorsement on Genuine Government Draft.* — *De Lemos v. U. S.*, (C. C. A.) 91 Fed. Rep. 497.

*Unstamped Check Subject of Forgery.* — *State v. Shields*, 112 Iowa 27. See also *Beer v. State*, 42 Tex. Crim. 505, 96 Am. St. Rep. 810.

**1098.** 1. *Deeds.* — *People v. Stork*, 133 Cal. 371; *State v. Mills*, 146 Mo. 195; *Grooms v. State*, 40 Tex. Crim. 319.

4. *A Married Woman's Deed Without Her Signature and Privy Acknowledgment* is not the

subject of forgery. *Johnson v. State*, 40 Tex. Crim. 605, 76 Am. St. Rep. 742.

5. *Mortgages.* — *State v. Moore*, 86 Minn. 418.

8. *School Warrants.* — *State v. Woods*, 112 La. 617; *State v. Allen*, 56 S. Car. 495.

10. *Bonds.* — *State v. Leo*, 108 La. 496, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1098, and note.

Convict Bonds are the subject of forgery, provided the approval of the county judge be shown, which approval is necessary to make such a bond a valid instrument. *Crayton v. State*, 45 Tex. Crim. 84.

A Bail Bond is the subject of forgery. *Richie v. Com.*, (Ky. 1902) 70 S. W. Rep. 629.

15. *Records of Public Office.* — *State v. Henning*, 158 Ind. 196.

England — Register of Ordinance Not Subject of Forgery. — *Rex v. Etheridge*, 19 Cox C. C. 676.

**1099.** 4. *Railway Ticket.* — *People v. Smith*, 125 Mich. 566; *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798.

*Erasure of Date on Railroad Ticket Not Forgery.* — *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798.

8. *Telegrams.* — *People v. Chadwick*, 143 Cal. 116.

9. *Witnesses' Certificates.* — *State v. Bullock*, 54 S. Car. 300.

11. *Power of Attorney.* — *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141; *Leslie v. State*, 10 Wyo. 10.

12. *Demand for Money Due for Labor.* — A demand on a city and county treasury for the money due for labor on the streets is the subject of forgery under Pen. Code Cal., § 470. *People v. McGlade*, 139 Cal. 66.

13. *Certificate of Deposit.* — *State v. Patch*, 21 Mont. 534.

16. *Signature of Fictitious Names to National Bank Note.* — The unauthorized signing of the names of fictitious persons as president and cashier to a genuine but unsigned national bank note constitutes the crime of forgery, under Rev. Stat. U. S., § 5415, 2 Fed. Stat. Annot. 299, § 5415. *Logan v. U. S.*, (C. C. A.) 123 Fed. Rep. 291.

An Army Paymaster's Certificate of Deposit to an enlisted soldier under the provisions of Rev. Stat. U. S., § 1305, is the subject of forgery, and an indictment is good which charges the forgery of such an instrument under Rev. Stat., § 5414 (see 2 Fed. Stat. Annot. 298, § 5414). *Neall v. U. S.*, (C. C. A.) 118 Fed. Rep. 699.

**1100.** See notes 5, 6, 12, 15, 16.

**1101.** See note 1.

**3. Particular Instances of Instruments Held Not Subjects of Forgery.**

— See notes 5, 7, 11, 17.

**1102. V. WHO MAY COMMIT FORGERY — Any Person Who Is Responsible for His Acts.** — See note 1.

The Offense May Be Committed by Agent. — See note 2.

**VI. UTTERING AND PUBLISHING — 1. In General.** — See notes 7, 8.

**1103.** See notes 1, 2, 3, 4.

**2. Guilty Knowledge.** — See notes 5, 6, 7.

**1100. 5. Teacher's License.** — *Arnold v. State*, 71 Ark. 367; *Taylor v. State*, 123 Ga. 133; *Heard v. State*, 121 Ga. 138; *Brooks v. State*, 45 Tex. Crim. 206; *Dudley v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 111.

In *Texas* it is an offense under Pen. Code, art. 542, to attempt to pass as true a forged diploma or teacher's certificate. *Brooks v. State*, 45 Tex. Crim. 206.

**6. Forged Letter of Introduction.** — *People v. Abel*, (Ct. Gen. Sess.) 45 Misc. (N. Y.) 86, affirmed 100 N. Y. App. Div. 516.

**12. Trademark or Label.** — See *contra*, *White v. Wagar*, 185 Ill. 195.

**15. Marriage Certificate.** — *Com. v. Compton*, 11 Pa. Dist. 119.

**16. Application for Bounty Land.** — *U. S. v. McKinley*, 127 Fed. Rep. 166.

**1101. 1. Naturalization Papers.** — *People v. Weaver*, 177 N. Y. 434.

**5. Consent to Marriage.** — *Pearson v. Com.*, (Ky. 1904) 78 S. W. Rep. 1128.

**7. Pension Affidavit.** — Forging an affidavit by a pensioner to be used by way of resisting or defending against a claim of his deserted wife for one-half of his pension under the provisions of the Act of March 3, 1899, 30 U. S. Stat. at L. 1379, c. 460, is not an offense under Rev. Stat. U. S., § 5421, 2 Fed. Stat. Annot. 303. *U. S. v. Swan*, 131 Fed. Rep. 140.

**11. Alteration of Dates of Birth by School Census Trustee.** — A false census enumeration by altering the dates of births creates no obligation against the state, and hence is not forgery. *Munoz v. State*, 40 Tex. Crim. 457.

**17. Blank Form of Certificate of Residence under Chinese Exclusion Act.** — It has been held that knowingly and unlawfully making and counterfeiting a blank form of a certificate of residence issued by the United States to Chinese persons lawfully entitled to remain in the United States, is not within the penalty denounced under Rev. Stat. U. S., § 5418, making it a crime to falsely make, alter, or forge any writing for the purpose of defrauding the United States. *U. S. v. Ah Won*, 97 Fed. Rep. 494.

**False Invitation.** — A false letter purporting to have been written and signed by a woman inviting a man to come to her house at night for a private conversation is not the subject of indictable forgery. *Colson v. Com.*, 110 Ky. 233.

**1102. 1. Thirteen-year-old Boy Presumed Incapable.** — *Harrison v. State*, 72 Ark. 117.

**2. Offense May Be Committed by Agent.** — *Eldridge v. Com.*, (Ky. 1899) 54 S. W. Rep. 10.

**7. Other Definitions.** — *People v. Nishiyama*,

135 Cal. 299; *People v. Compton*, 123 Cal. 403; *Brazil v. State*, 117 Ga. 32, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1102; *State v. Mills*, 146 Mo. 195; *Reg. v. Weir*, 9 Quebec Q. B. 253.

**Nature of Injury Intended.** — In *Texas*, under Pen. Code, 1895, articles 536, 537, the injury intended must be such as to affect one pecuniarily, or in relation to his property. *Huckaby v. State*, 45 Tex. Crim. 577, 107 Am. St. Rep. 1011.

**8. Forging and Uttering Distinct Offenses.** — *King v. State*, 43 Fla. 211; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441; *Preston v. State*, 40 Tex. Crim. 72; *Lovejoy v. State*, 40 Tex. Crim. 89; *Johnson v. Com.*, 102 Va. 927; *Reg. v. Weir*, 3 Can. Crim. Cas. (Quebec) 499.

**Forging and Uttering as One Transaction** constitutes but one offense. *State v. Klugherz*, 91 Minn. 406; *Pitts v. State*, 40 Tex. Crim. 667.

**1103. 1. Uttering Not an Element of Forgery.** — *Eldridge v. Com.*, (Ky. 1899) 54 S. W. Rep. 10; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441; *Preston v. State*, 40 Tex. Crim. 72.

**Uttering Teacher's License Not Comprehended by Statute.** — *Heard v. State*, 121 Ga. 138.

**2. Implication in Forgery Unnecessary.** — *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441.

**Need Not Be in Handwriting of Accused.** — *Leslie v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 367.

**Previous Forgery Unnecessary.** — *In re Count De Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878.

**3. Aiding and Abetting — Meaning of Terms.** — *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

**4. Presence of Defendant Necessary.** — *People v. Compton*, 123 Cal. 403; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

**Uttering by Agent.** — In *People v. Compton*, 123 Cal. 403, it was held that, if one delivers to his agent a false instrument, with the design that such agent shall utter or pass it, the crime of uttering, or attempting to pass, is not complete until after some overt act is done by the agent to that end.

**5. Knowledge that Instrument Was Forged — England.** — *Christie v. Cooper*, (1900) 2 Q. B. 522, 83 L. T. N. S. 54.

*Canada.* — *Reg. v. Weir*, 9 Quebec Q. B. 253.  
*California.* — *People v. Elphis*, 139 Cal. xix, 72 Pac. Rep. 838; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

*Georgia.* — *Hale v. State*, 120 Ga. 183.

*Louisiana.* — *State v. Hauser*, 112 La. 313.

*Missouri.* — *State v. Webster*, 152 Mo. 87; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441.

**1103.** 3. Intent to Defraud. — See note 8.

**1104.** See notes 1, 2, 3, 6, 7.

4. Capacity to Injure. — See note 8.

5. Instances of Uttering and Publishing. — See notes 9, 11, 12.

**1105.** See notes 5, 6.

## VII. CIVIL RIGHTS AND LIABILITIES ARISING OUT OF FORGERY —

Forged Note in Payment of Debt. — See note 8.

**1106.** Negligence. — See note 2.

Estoppel. — See note 3.

*Pennsylvania.* — *Com. v. Hall*, 24 Pa. Super. Ct. 558; *Com. v. Hall*, 23 Pa. Super. Ct. 104.

*South Carolina.* — *State v. Allen*, 56 S. Car. 495.

*Texas.* — *Wolf v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 108.

**1103.** 6. Evidence of Possessing or Uttering Other Forged Instruments. — *Wright v. State*, 138 Ala. 69; *Williams v. State*, 126 Ala. 50; *State v. Allen*, 56 S. Car. 495; *Wolf v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 108.

7. Offenses Subject of Other Indictments. — *State v. Allen*, 56 S. Car. 495.

8. Necessity of Intent to Defraud — *California.* — *People v. Elphis*, 139 Cal. xix, 72 Pac. Rep. 838; *People v. Arlington*, 123 Cal. 356; *People v. Compton*, 123 Cal. 403; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

*Georgia.* — *Hale v. State*, 120 Ga. 183; *Brazil v. State*, 117 Ga. 32.

*Indiana.* — *Selby v. State*, 161 Ind. 667.

*Louisiana.* — *State v. Leo*, 108 La. 496.

*Minnesota.* — *State v. Bjornaas*, 88 Minn. 301.

*Missouri.* — *State v. Hathhorn*, 166 Mo. 229; *State v. Webster*, 152 Mo. 87; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441; *State v. Mills*, 146 Mo. 195.

*Montana.* — *State v. Patch*, 21 Mont. 534.

*South Carolina.* — *State v. Allen*, 56 S. Car. 495.

*Texas.* — *Jones v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 143; *Wolf v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 108.

*Canada.* — *Re Abeel*, 7 Ont. L. Rep. 327; *Reg. v. Weir*, 9 Quebec Q. B. 253.

**1104.** 1. Successful Attempt Unnecessary. — *People v. Compton*, 123 Cal. 403; *Brazil v. State*, 117 Ga. 32; *State v. Leo*, 108 La. 496; *State v. Hathhorn*, 166 Mo. 229; *State v. Patch*, 21 Mont. 534.

2. Offering Constitutes Uttering. — *People v. Compton*, 123 Cal. 403; *Brazil v. State*, 117 Ga. 32.

3. Precise Manner of Uttering Immaterial. — *Selby v. State*, 161 Ind. 667. See also *Reg. v. Weir*, 3 Can. Crim. Cas. (Quebec) 499.

6. The Tender of a Check Purporting to Be Signed by Another is in itself a representation that the paper is genuine. *People v. Walker*, 140 Cal. 153.

7. Intent Inferable from Circumstances. — *Towles v. U. S.*, 19 App. Cas. (D. C.) 471. See also *State v. Bjornaas*, 88 Minn. 301.

8. Instrument Should Be Capable of Injuring. — *Colson v. Com.*, 110 Ky. 233; *Huckaby v. State*, 45 Tex. Crim. 577.

9. Forged Draft or Order. — *State v. Hauser*, 112 La. 313.

11. Forged Mortgage. — *People v. Hallen*, 48 N. Y. App. Div. 39, affirmed 164 N. Y. 565.

12. Having Forged Will in Possession During Lifetime of Purported Testator. — Under an indictment for having in possession a forged will with intent to utter the same, the death of the purported testator must be shown in order to sustain a conviction. There can be no illegal uttering of such a will — much less, having the same in possession with intent to utter — during the lifetime of the purported testator. *Huckaby v. State*, 45 Tex. Crim. 577.

**1105.** 5. Giving Engraving of Bond as Specimen of Skill. — While a copy of a bond prepared for a corporation is not a forgery when innocently retained by the engraver and given out as a sample, yet if a third person offer it as genuine, knowing it not to be so, he is guilty of uttering a forged instrument, although he makes no alteration therein. *In re Count De Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878.

6. A Letter of Introduction presented to a party with the intention that the party should believe and act upon it as genuine, to his prejudice, has been held to be the subject of forgery. *Re Abeel*, 7 Ont. L. Rep. 327. See also *Com. v. Compton*, 11 Pa. Dist. 119.

8. Consult the General Index for other matters touching the effect of forgery on civil rights and liabilities.

**1106.** 2. Effect of Negligence on Rights of One Sustaining Loss. — *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Neal v. Lebanon First Nat. Bank*, 26 Ind. App. 503; *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478; *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, affirming 59 N. Y. App. Div. 103; *Critten v. Chemical Nat. Bank*, 60 N. Y. App. Div. 241, 171 N. Y. 219; *States v. Montrose First Nat. Bank*, 203 Pa. St. 69; *Western Union Tel. Co. v. Uvalde Nat. Bank*, 97 Tex. 219, affirming (Tex. Civ. App. 1903) 72 S. W. Rep. 232; *London L. Ins. Co. v. Molsons Bank*, 5 Ont. L. Rep. 407.

Negligence of Bank Which First Cashd Forged Check Not Imputed to Subsequent Transferee. — *Marshalltown First Nat. Bank v. Marshalltown State Bank*, 107 Iowa 327.

What Not Negligence Per Se. — In *Robb v. Pennsylvania Ins. Co.*, 186 Pa. St. 456, 65 Am. St. Rep. 868, it was held that it was not negligence per se for a depositor to have possession, without notice to a bank, of a rubber stamp which would make a facsimile of his signature, and with which an employee forged a check, where the depositor had taken the proper precautions in the way of his custody of such stamp to prevent an unlawful appropriation or use of it.

3. Ratification of Forgery. — *Phoenix Nat. Bank*

- **1106.** Restoration of Property Obtained. — See note 4.
- 1107.** VIII. JURISDICTION — Of Forgery. — See note 3.  
The Offense of Uttering and Publishing. — See note 4.
- 1108.** IX. EVIDENCE — 2. Proof of Guilty Knowledge and Fraudulent Intent —  
— *a.* IN GENERAL. — See notes 6, 7.
- 1109.** See notes 1, 2, 3.  
*b.* PROOF OF OTHER FORGERIES BY DEFENDANT. — See note 4.
- 1110.** See notes 1, 2, 3.  
*c.* PROOF OF POSSESSION OF OR UTTERING OTHER FORGED  
PAPER ON TRIAL FOR UTTERING. — See notes 4, 5.
- 1111.** 4. Production of Forged Instrument and Secondary Evidence There-  
of. — See notes 3, 4, 5.

*v.* Taylor, 113 Ky. 61. See the title AGENCY, vol. 1, pp. 1186, 1187.

**Acts Held to Create Estoppel.** — Palo Alto Bank *v.* Pacific Postal Tel. Cable Co., 103 Fed. Rep. 841.

**Acts Held Not to Create Estoppel.** — Bradford *v.* Hanover F. Ins. Co., (C. C. A.) 102 Fed. Rep. 48; Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863; Furnish *v.* Burge, (Tenn. Ch. 1899) 54 S. W. Rep. 90.

**1106. 4. Restoration by One Receiving Value from Another on Forged Instrument.** — Lafayette *v.* Merchants Bank, 73 Ark. 561; Metropolitan Nat. Bank *v.* Merchants Nat. Bank, 77 Ill. App. 316, affirmed 182 Ill. 367; Egner *v.* Corn Exch. Bank, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 552. But see Neal *v.* Coburn, 92 Me. 139, 69 Am. St. Rep. 495.

**1107. 3. County Where Instrument Was Forged, Used, or Passed.** — Jessup *v.* State, 44 Tex. Crim. 83; Grooms *v.* State, 40 Tex. Crim. 319.

**Signature Forged in One County and Blanks Filled in Another.** — It has been held that where a party forges the name of another to a note in one county, and fills up the blanks in another, he is guilty of forgery in the county where the blanks were filled up, and the venue should be laid in the latter county. State *v.* Spayde, 110 Iowa 726.

**4. Uttering and Publishing.** — Jessup *v.* State, 44 Tex. Crim. 83, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1107.

**1108. 6. Fraudulent Intent the Principal Element.** — See cases cited *supra*, p. 1083, note 4.

**7. Surrounding Circumstances Bearing on Question of Fraud Competent Evidence.** — Towles *v.* U. S., 19 App. Cas. (D. C.) 471; State *v.* Bjornaas, 88 Minn. 301.

**Evidence Held Inadmissible.** — Evidence that upon occasions prior to the making and passing of a forged order, the defendant had gone under assumed names, and had been arrested for drunkenness, is inadmissible to show intent, system, and guilty knowledge, or that on a former occasion he wrote a check under an assumed name. People *v.* Arlington, 123 Cal. 356.

**Presumption of Fraudulent Intent Rebuttable.** — State *v.* Bjornaas, 88 Minn. 301.

**1109. 1. Limiting Effect of Evidence by Instructions.** — In an indictment for fraudulently making, uttering, and publishing a note, it is error to charge the jury that the fact that the defendant brought suit upon a forged note warrants a conviction for uttering the same, since the charge ignores the question whether the de-

fendant forged the note or knew it to be forged. Com. *v.* Hall, 23 Pa. Super. Ct. 104.

**2. Proof of Actual Injury Unnecessary.** — State *v.* Hathorn, 166 Mo. 229.

**3. Proof of Good Character Admissible.** — Brazil *v.* State, 117 Ga. 32.

**4. Proof of Similar Forgeries** — United States. — Pirscher *v.* U. S., (C. C. A.) 133 Fed. Rep. 526.

*Alabama.* — Williams *v.* State, 126 Ala. 50, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109 and notes; Wright *v.* State, 138 Ala. 69.

*California.* — People *v.* McGlade, 139 Cal. 66; People *v.* Arlington, 123 Cal. 356.

*Iowa.* — State *v.* Prins, 113 Iowa 72, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109; State *v.* Prins, 117 Iowa 505.

*Nebraska.* — Burlingim *v.* State, 61 Neb. 276.

*New York.* — People *v.* Weaver, 177 N. Y. 434.

*South Carolina.* — State *v.* Allen, 56 S. Car. 495.

*Texas.* — Usher *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 712; Taylor *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 933.

**1110. 1. Proof that Other Instruments Are Forgeries Necessary.** — People *v.* Bird, 124 Cal. 32; State *v.* Prins, 113 Iowa 72; Eldridge *v.* State, 76 Miss. 353.

**2. Proof of Defendant's Culpable Connection.** — People *v.* Bird, 124 Cal. 32; State *v.* Prins, 113 Iowa 72; Eldridge *v.* State, 76 Miss. 353; Lauder milk *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 1107; Taylor *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 933.

**3. Inadmissible to Prove Corpus Delicti.** — Wright *v.* State, 138 Ala. 69; People *v.* Bird, 124 Cal. 32.

**4. Possession of or Uttering Other Forged Paper.** — Williams *v.* State, 126 Ala. 50, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110 and notes; State *v.* Allen, 56 S. Car. 495, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110; Wolf *v.* State, (Tex. Crim. 1899) 53 S. W. Rep. 108.

**5. Acquittal under Other Indictments Immateral.** — State *v.* Allen, 56 S. Car. 495, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110.

**1111. 3. Forged Instrument and Secondary Evidence.** — Cross *v.* People, 192 Ill. 291; State *v.* Hauser, 112 La. 313.

**4. Proof by Parol Evidence or by Copy.** — Cross *v.* People, 192 Ill. 291; Com. *v.* Hall, 24 Pa. Super. Ct. 558.

**A Witness May Give the Substance of a forged**



- 1112.** 5. Showing Place of Forgery. — See notes 3, 6.  
 7. Evidence of Defendant's Pecuniary Condition. — See note 9.  
 8. Evidence to Show the Forged Name Fictitious. — See note 10.  
**1113.** 9. Proof of Existence of Bank. — See note 4.  
 10. Order of Proof. — See note 7.  
 11. Sufficiency of Evidence — Questions for Jury. — See notes 8, 9, 10.  
**1114.** X. PUNISHMENT. — See note 9.  
**1117.** FORMED DESIGN. — See note 2.

instrument when the instrument is shown to be lost. *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1111.

**1111.** 5. Notice to Produce Necessary When in Defendant's Hands. — *Com. v. Hall*, 24 Pa. Super. Ct. 558.

**1112.** 3. Place of Utterance Prima Facie Place of Forgery. — *Heard v. State*, 121 Ga. 138.

6. Sufficient Proof of Venue. — *Womble v. State*, 107 Ga. 666. See also *Long v. State*, 118 Ga. 319.

9. Evidence of Defendant's Pecuniary Condition. — In *People v. Gaffey*, 98 N. Y. App. Div. 461, reversed 182 N. Y. 257.

Evidence of the Financial Condition of the Prosecuting Witness is not admissible in a prosecution for forging a note. *People v. Lapique*, 136 Cal. 503.

10. Evidence to Show Forged Name Fictitious. — *Williams v. State*, 126 Ala. 50, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1112.

**1113.** 4. Production of Certified Copy of Charter Unnecessary. — *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441.

7. *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141.

8. Sufficiency of Evidence — *California*. — *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141.

*Georgia*. — *Hale v. State*, 120 Ga. 183; *Long v. State*, 118 Ga. 319; *Womble v. State*, 107 Ga. 666.

*Illinois*. — *Howell v. People*, 178 Ill. 176.

*Iowa*. — *State v. Olds*, 106 Iowa 110.

*Kentucky*. — *Richie v. Com.*, (Ky. 1902) 70 S. W. Rep. 629.

*Louisiana*. — *State v. Hauser*, 112 La. 313; *State v. Woods*, 112 La. 617.

*Missouri*. — *State v. Pyscher*, 179 Mo. 140; *State v. Caudle*, 174 Mo. 388; *State v. Eaton*, 166 Mo. 575.

*Montana*. — *State v. Patch*, 21 Mont. 534.

*Nebraska*. — *Mays v. State*, (Neb. 1904) 101 N. W. Rep. 979.

*New York*. — *People v. Hallen*, 48 N. Y. App. Div. 39, affirmed 164 N. Y. 565.

*Pennsylvania*. — *Com. v. Hall*, 24 Pa. Super. Ct. 558.

*Texas*. — *Stroggins v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 510; *Rountree v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 106.

9. Evidence Showing Guilty Knowledge. — *Williams v. State*, 126 Ala. 50, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1013; *Curtis v. State*, 118 Ala. 125.

10. Presumption Arising from Possession. — *Womble v. State*, 107 Ga. 666; *State v. Pyscher*, 179 Mo. 140; *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756.

One who is recently in possession of, and attempts to sell or obtain money on a forged note, is presumed to have forged the same, and unless such possession or the forgery is satisfactorily explained, the presumption becomes conclusive. *State v. Williams*, 152 Mo. 115.

**1114.** 9. See *State v. Hathhorn*, 166 Mo. 229; *Johnson v. Com.*, 102 Va. 927; *State v. Newton*, 29 Wash. 373.

Cumulative Punishment on Second Conviction — *Kentucky*. — *Ashcraft v. Com.*, (Ky. 1901) 60 S. W. Rep. 931.

**1117.** 2. Formed Design. — *Wilson v. State*, 128 Ala. 17.

## FORNICATION.

By C. T. GREEN.

**1119.** III. THE STATUTORY OFFENSE — 2. Statutes Defining the Offense. — See note 5.

**1123.** 4. Distinguished from Other Offenses — Seduction. — See note 1

**1119.** 5. In Georgia both parties must be shown to be unmarried. *Neil v. State*, 117 Ga. 14.

*Texas Statute*. — The question whether the woman was of previous chaste character is of no importance. *Boatright v. State*, 42 Tex. Crim. 442.

In Wisconsin — Who is a "Man" Within Meaning of Statute. — In Wisconsin the word "man"

in the statute has been deemed to mean a male person who has arrived at the age of puberty, or is capable of committing rape. *State v. Seiler*, 106 Wis. 346.

*Nebraska Statute*. — In Nebraska the gist of the offense is the unlawful cohabitation. *Musfelt v. State*, 64 Neb. 445.

**1123.** 1. Distinguished from Seduction. — See *Boatright v. State*, 42 Tex. Crim. 442.

- 1124.** IV. LIVING IN FORNICATION. — See note 4.  
V. EVIDENCE — 2. Admissibility of Evidence. — See note 6.  
**1125.** See note 1.  
**1127.** 3. Sufficiency of Evidence — Number of Witnesses. — See note 3.  
Proof that Party Was Unmarried. — See note 7.  
**1128.** VII. PUNISHMENT. — See note 2.

**1124.** 4. Living Together in Fornication. — The *Nebraska* statute does not require that living in a state of fornication be open and notorious, in order to constitute the offense. *Musfelt v. State*, 64 Neb. 445.

**6.** Admissibility of Evidence — Acts and Conduct of Defendants. — *Musfelt v. State*, 64 Neb. 445.

**1125.** 1. Character of the Woman. — It is error to allow the prosecution to introduce evidence of the woman's previous chaste character, where the statute does not make that an element of the offense. *Boatright v. State*, 42 Tex. Crim. 442.

**1127.** 3. The Previous Chaste Character of the complaining witness may be sufficiently established by her own uncorroborated testimony to sustain a conviction under Stat. Wis. (1898), § 4580, as amended by Laws Wis. 1899, c. 99, making it a felony to commit fornication

with a sane female of previous chaste character under the age of eighteen years. *State v. Seiler*, 106 Wis. 346, 112 Wis. 293.

**7.** Under Particular Statutes. — In *Georgia* the prosecution must establish that both parties to the act were unmarried. *Neil v. State*, 117 Ga. 14.

**1128.** 2. Punishment. — Under Rev. Stat. Wis. (1898), § 4580, as amended by Laws Wis. 1899, c. 99, fornication with a sane female over fourteen years of age is a misdemeanor, while fornication with a sane female "of previous chaste character" under the age of eighteen years is made a felony. This statute is not invalid as putting it within the discretion of the district attorney to say under which clause the offending party shall be prosecuted. *State v. Seiler*, 106 Wis. 346.

## FORTHCOMING AND DELIVERY BONDS.

By LEO GOODMAN.

- 1131.** I. THE REMEDY IN GENERAL — 2. Comparisons and Distinctions —  
*a.* RECEIPTS. — See note 2.  
**1133.** 5. When Allowed. — See note 2.  
6. Right of Debtor to Give. — See note 3.  
**1134.** II. EXECUTION OF BOND — 2. By Whom Given — *d.* PARTNERS. —  
See note 5.  
**1135.** III. REQUISITES AND VALIDITY OF BOND — 1. In General. — See  
notes 4, 6.  
**1136.** 2. Time for Giving Bond. — See note 1.  
3. Recitals — *c.* TIME OF DELIVERY OF PROPERTY. — See note 4.  
**1137.** *e.* PENALTY AND AMOUNT DUE. — See note 4.  
*h.* OMISSIONS SUPPLIED BY INTENDMENT OF LAW. — See note 10.

**1131.** 2. Possession of Receptor Is Possession of Officer. — *Itey v. Gorman*, 118 Wis. 8.

**1133.** 2. Forthcoming Bond Given by Defendant in Attachment. — *Keith v. Moore*, 2 Ohio Cir. Dec. 245; *Phillips-Buttloff Mfg. Co. v. Williams*, (Tenn. 1900) 63 S. W. Rep. 185. And see the title ATTACHMENT, 230. 6 *et seq.*

**3.** Taking of Bond Compulsory on Officer. — *Keith v. Moore*, 2 Ohio Cir. Dec. 245; *Phillips-Buttloff Mfg. Co. v. Williams*, (Tenn. 1900) 63 S. W. Rep. 185.

**1134.** 5. Estoppel of Partner to Deny Authority. — One partner who has voluntarily received the benefits of the bond is estopped to deny its execution by showing want of authority to sign his name. *Smith v. Packard*, 98 Fed. Rep. 793, 39 C. C. A. 294.

**1135.** 4. Parties. — Under the *South Carolina* statute the defendant need not be a party to the bond if he furnishes the proper security. *Polite v. Bero*, 63 S. Car. 209.

**6.** Delivery. — *Fountain v. Napier*, 109 Ga. 225.

**1136.** 1. Bond Given After Return of Execution. — *Smith v. Packard*, 98 Fed. Rep. 793, 39 C. C. A. 294.

**4.** Time of Delivery Must Be Specified in Bond. — See *Weston v. Ralston*, 51 W. Va. 157, wherein the bond was held to be sufficiently definite in this particular.

**1137.** 4. Recital of Penalty — Necessity. — Compare *Holmes v. Langston*, 110 Ga. 861, wherein the court said: "The provision [in the statute] requiring the penalty in the bond to be twice the amount sworn to is merely directory, and the failure to insert such a penalty will neither vitiate the bond nor prevent the same from being treated as a statutory bond."

**10.** Substantial Compliance with the statute is sufficient. *Ebner v. Heid*, 125 Fed. Rep. 680, 60 C. C. A. 370; *Holmes v. Langston*, 110 Ga. 861.

**1139. 7. Effect of Irregularities and Defects — *b*. SUFFICIENCY AS COMMON-LAW BOND** — See note 5.

**1140. IV. EFFECT OF BOND — 2. Effect on the Parties — *a*. DUTY OF OBLIGORS.** — See note 2.

*b*. ADMISSIONS AND ESTOPPELS — (2) *As to Execution or Attachment* — (b) *Levy* — See note 6.

**1141.** See note 2.

(c) *Liability of Property to Levy.* — See note 3.

**1142. 3. Effect on Judgment and Levy.** — See note 3.

**1146. VII. PERFORMANCE OF CONDITION OF BOND — 1. Delivery of Property — The Tender Must Be of All the Goods.** — See note 3.

**1148. 3. Excuses for Nonperformance — *c*. LOSS OR DESTRUCTION OF PROPERTY.** — See note 3.

*d*. SEIZURE UNDER PARAMOUNT TITLE OR JUDICIAL PROCESS. — See note 4.

**1152. IX. DEFENSES AND RELIEF AFTER FORFEITURE — 1. Defenses at Law — *b*. GROUNDS OF DEFENSE AT LAW — (5) *Impossibility of Performance.*** — See note 4.

**1154. X. ENFORCEMENT OF BOND AFTER FORFEITURE — 2. Manner of Enforcement — *a*. ACTION ON BOND.** — See note 2.

*b*. MOTION FOR JUDGMENT. — See note 3.

**1156. 3. Amount of Recovery.** — See note 1.

**1157. FORTHWITH.** — See note 5.

**1158.** See note 1.

**1139. 5. Bond Insufficient under Statute May Be Valid as Common-law Obligation.** — *Ebner v. Heid*, 125 Fed. Rep. 680, 60 C. C. A. 370; *Terry v. Johnson*, 109 Ky. 589.

**1140. 2. Obligation to Deliver Property.** — *Doolan v. Wilson*, 73 Conn. 446, referring to the obligation of a receptor.

**6. Estoppel to Deny Fact of Levy.** — *Hilton, etc., Lumber Co. v. Clements*, 108 Ga. 791; *Garner v. Clark*, 115 Ga. 666; *Weston v. Ralston*, 51 W. Va. 157, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140.

**1141. 2. Estoppel to Deny Regularity and Validity of Levy.** — *Weston v. Ralston*, 51 W. Va. 157, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140.

**3. No Estoppel to Deny Liability of Property to Levy.** — *Weston v. Ralston*, 51 W. Va. 157, quoting 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141.

**1142. 3. Bond Not Satisfaction of Judgment or Discharge of Levy.** — *Smith v. Packard*, 98 Fed. Rep. 793, 39 C. C. A. 294; *Chittenden v. Nichols*, 31 Colo. 202. But see *Rosenthal v. Perkins*, 123 Cal. 240 (wherein it was held that the giving of the bond destroys the lien of the attachment); *Meyer v. Knight*, 21 Pa. Super. Ct. 1.

**Receipt.** — Surrendering the property back to the attachment debtor upon his receipt does not affect the lien. *Gallun v. Weil*, 116 Wis. 236.

**1146. 3. Condition of Goods.** — That the obligors are liable for diminution in the value of the goods, resulting from use by the defendant, to an amount not exceeding the unpaid residue of the judgments, see *Creswell v. Woodside*, 15 Colo. App. 468.

**1148. 3. Delivery Excused by Unavoidable Loss.** — *Carr v. Houston Guano, etc., Co.*, 105 Ga. 268.

**4. Seizure under Paramount Title or Judicial Process.** — *Floyd v. Cook*, 118 Ga. 526; *Allen v. Allen*, 119 Ga. 278.

**1152. 4. Impossibility of Performance.** — *Carr v. Houston Guano, etc., Co.*, 105 Ga. 268.

**1154. 2. The Sheriff** may maintain a suit for the use of the plaintiff on the bond. *Turner v. Camp*, 110 Ga. 631.

**3. Motion for Judgment.** — *Holmes v. Langston*, 110 Ga. 861.

**1156. 1. Amount of Recovery.** — The amount of recovery is limited to the value of the property at the time of the execution of the bond. *Jolley v. Rutherford*, 112 Ga. 342.

**Value of Property — Effect of Recital.** — The recital in the bond that the value of the property does not exceed a certain amount is conclusive against the assertion of a larger worth, but establishes no particular value. *Smith v. Packard*, (C. C. A.) 98 Fed. Rep. 793.

**1157. 5. Dickerman v. Northern Trust Co.**, 176 U. S. 193; *Rines v. German Ins. Co.*, 78 Minn. 46.

**Other Definitions.** — *Hackney v. Schow*, 21 Tex. Civ. App. 613; *Austin v. Welch*, 31 Tex. Civ. App. 526.

**1158. 1. Reasonable Time.** — *Northwestern College v. Shreck*, (Neb. 1902) 89 N. W. Rep. 289; *Leavitt v. S. D. Mercer Co.*, 64 Neb. 31; *Hubbard v. Hennessey*, (Neb. 1902) 90 N. W. Rep. 220; *Gunn v. Lauder*, 10 N. Dak. 389; *Sluga v. Walker*, 9 N. Dak. 108; *Austin v. Welch*, 31 Tex. Civ. App. 526; *Hackney v. Schow*, 21 Tex. Civ. App. 613.

**Same — Insurance Policy.** — *Rines v. German Ins. Co.*, 78 Minn. 46; *Fletcher v. German-American Ins. Co.*, 79 Minn. 339, citing 13 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1157 [1158];

**1161.** See note 1.

**1163. FORWARD.** — See note 4.

Solomon v. Continental F. Ins. Co., 160 N. Y. 595.

Same — Accident Insurance. — Munz v. Standard L., etc., Ins. Co., 26 Utah 69.

Same — Entering Verdict and Judgment. — Sluga v. Walker, 9 N. Dak. 108.

Same — Question of Law or Fact. — Sluga v. Walker, 9 N. Dak. 108.

Twenty-four Hours. — Empire Min. Co. v. Propeller Tow-Boat Co., 108 Fed. Rep. 905; Dickerman v. Northern Trust Co., 176 U. S. 193.

**1161. 1. Judicial Sale.** — Chadron Loan, etc., Assoc. v. O'Linn, (Neb. 1901) 95 N. W. Rep. 358.

**1163. 4. Forward Part of Vessel.** — Under an English statute requiring vessels to carry lights in the *forward* part, it has been held that a light in the rigging seventy-two feet abaft the stem of a vessel three hundred and thirteen feet long is in the *forward* part. The Philadelphian, (1900) P. 262.

## FORWARDERS.

**1167. IV. DEGREE OF DILIGENCE REQUIRED OF FORWARDER — 1. In Absence of Specific Instructions — a. IN GENERAL.** — See note 4.

*b. IN PRESERVING PROPERTY WHILE IN HIS POSSESSION AS SUCH.* — See note 5.

**1168. c. IN SELECTION OF CARRIER AND IN DELIVERY OF GOODS — (1) In General.** — See note 1.

**1169. (2) Liability for Loss Resulting from Failure to Transmit Instructions.** — See note 4.

**1170. 2. Where Bound by Specific Instructions — a. IN GENERAL.** — See note 3.

**1171. b. AS TO CARRIER TO WHOM DELIVERY SHALL BE MADE — (1) In General.** — See notes 1, 4.

**1172. (2) Where Delivery to Designated Carrier Impossible — (a) In General.** — See note 1.

**1167. 4. Forwarder Held to the Use of Ordinary Diligence.** — Buston v. Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808; Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

**5. When Forwarder's Liability That of Warehouseman.** — Buston v. Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808.

**1168. 1. Forwarder Liable Only for Want of Ordinary Diligence in Selecting Carrier.** — Mills v. Weir, 82 N. Y. App. Div. 396.

**1169. 4. Liability of Forwarder for Failure to Transmit Instructions.** — See St. Louis, etc., R. Co. v. Miller, 34 Tex. Civ. App. 528.

**1170. 3. Duty of Forwarder to Follow Instructions of Shipper.** — Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

**1171. 1. Forwarder's Liability for Loss of Goods.** — See Buston v. Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808.

But where, by a mutual mistake of the forwarder and the shipper, the bill of lading failed to set out the proper steamer by which goods were to be shipped, but the forwarder shipped by the first steamer according to a custom between them, it was held that the forwarder was not liable for the loss of the goods. Fowle v. Pitt, 183 Mass. 351.

**4. Where Breach of Contract Occasions Additional Cost for Transportation.** — Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

**1172. 1. Failure or Refusal of Designated Carrier to Receive Does Not Justify Forwarder in Disobeying Directions.** — Buston v. Pennsylvania R. Co., (C. C. A.) 119 Fed. Rep. 808; Fisher v. Boston, etc., R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

1. **FOUND.** — See note 3.
2. **FOUNDED.** — See note 1.
4. **FRANCHISES.** — See notes 1, 2, 3.
5. **Broad Sense.** — See note 1.  
Grant from State. — See note 2.
6. **Property — Incorporal Hereditament.** — See note 2.  
Corporation. — See note 3.
8. See note 1.  
Powers, Property, and Franchises of Corporation. — See note 2.
9. See note 1.  
Examples. — See note 2.
11. **FRATERNAL — FRATERNITY.** — See note 3.

1. 3. **Found in a County.** — *Eirich v. Donnelly Contracting Co.*, 104 Fed. Rep. 1.  
Same — *Coroner's Inquest.* — *State v. Bellows*, 62 Ohio St. 307.

A Purchaser Is Found by a Broker within the meaning of the law entitling the latter to commissions, if procured through his exertions. *Evans v. Gay*, (Tex. Civ. App. 1903) 74 S. W. Rep. 575.

2. 1. **Founded upon an Account.** — As to what constitutes such an action see *Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20.

4. 1. **Blackstone's Definition.** — *Atty.-Gen. v. British Museum*, (1903) 2 Ch. 612; *Lasher v. People*, 183 Ill. 226; *Maestri v. Assessors*, 110 La. 517; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

2. *Martens v. People*, 186 Ill. 314, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 4.

3. **Supreme Court Definition.** — *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189; *Martens v. People*, 186 Ill. 314, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 4; *Lasher v. People*, 183 Ill. 226; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234; *Miller v. Com.*, (Ky. 1902) 65 S. W. Rep. 1129; *Maestri v. Assessors*, 110 La. 517; *Baltimore v. Johnson*, 96 Md. 737; *Hamtramck Tp. v. Rapid R. Co.*, 122 Mich. 472; *State v. Austin, etc.*, R. Co., 94 Tex. 530; *Watson v. Fairmont, etc.*, R. Co., 49 W. Va. 528; *State v. Portage City Water Co.*, 107 Wis. 441.

**Kent's Definition.** — See *Maestri v. Assessors*, 110 La. 517.

**Other Definitions.** — *State v. Travelers Ins. Co.*, 70 Conn. 590; *Southampton v. Jessup*, 162 N. Y. 122; *Matter of Water Com'rs*, 71 N. Y. App. Div. 544; *Watson v. Fairmont, etc.*, R. Co., 49 W. Va. 528.

5. 1. **Broad Sense.** — *Lawrence v. Times Printing Co.*, 22 Wash. 482.

2. **Legislative Grant.** — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 279; *Lasher v. People*, 183 Ill. 226; *State v. Topeka Water Co.*, 61 Kan. 547; *Maestri v. Assessors*, 110 La. 517; *Hamtramck Tp. v. Rapid R. Co.*, 122 Mich. 472; *Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529; *Ghee v. Northern Union Gas Co.*, 34 N. Y. App. Div. 551; *Lawrence v. Times Printing Co.*, 22 Wash. 482. See also *Fresno Canal, etc.*, Co. v. Park, 129 Cal. 437.

**Grant Need Not Be Direct.** — It is not essential to a franchise that the grant be made direct; it is sufficient if it be made through legitimate

legislative agency. *State v. Portage City Water Co.*, 107 Wis. 441.

6. 2. **Property.** — Compare *Baltimore v. Johnson*, 96 Md. 737.

3. **Corporations.** — *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234.

8. 1. **Corporate Franchise and Franchises — Use of the Corporation.** — *Central Trust Co. v. Western North Carolina R. Co.*, 89 Fed. Rep. 31; *Linden Land Co. v. Milwaukee Electric R., etc.*, Co., 107 Wis. 493.

2. **Powers.** — *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

9. 1. **Franchise Distinguished from Property Acquired.** — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 279; *Martens v. People*, 186 Ill. 314; *State v. Topeka Water Co.*, 61 Kan. 547; *Bailey v. Southern R. Co.*, 110 Ky. 231.

2. **Office — Power to Appoint to Office.** — Compare *Lasher v. People*, 183 Ill. 226.

**Licensing the Sale of Intoxicating Liquors.** — *Martens v. People*, 186 Ill. 314; *Miller v. Com.*, (Ky. 1902) 65 S. W. Rep. 1129.

**Street Railroads.** — *Hamtramck Tp. v. Rapid R. Co.*, 122 Mich. 472; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

**Railroad Franchises.** — *State v. Austin, etc.*, R. Co., 94 Tex. 530.

**Roadway a Franchise.** — *Southampton v. Jessup*, 162 N. Y. 122.

**Water Works Company.** — *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234; *State v. Portage City Water Co.*, 107 Wis. 441.

**Bridge a Franchise.** — *Southampton v. Jessup*, 162 N. Y. 122.

**Market.** — The exclusive privilege vested in an individual of conducting a public market is a franchise and taxable under the revenue laws of the state. *Maestri v. Assessors*, 110 La. 517.

**Withdrawal of Franchise.** — *Wilmington City R. Co. v. Wilmington, etc.*, R. Co., (Del. 1900) 46 Atl. Rep. 16.

**Treasure Trove** cannot be classed under a general grant of franchises in a royal charter, but must itself be expressly granted, although when so granted it becomes a franchise to the grantor. *Atty.-Gen. v. British Museum*, (1903) 2 Ch. 612.

11. 3. **Fraternal Society.** — Under the *Connecticut* statute a fraternal society must have a lodge system with a ritualistic form of work. In this case it was held that the Odd Fellows Mutual Aid Association was not a fraternal society. *Miles v. Odd Fellows Mut. Aid Assoc.*, 76 Conn. 132.

# FRAUD AND DECEIT.

By H. O'B. COOPER.

**19. I. DEFINITION AND NATURE OF FRAUD — 1. In General.** — See note 1.

**20. 2. Classification of Fraud** — Fraud Apparent from the Intrinsic Nature and Subject of the Bargain. — See note 1.

Fraud Presumed from Circumstances and Condition of the Parties. — See note 2.

**21. 3. Actual and Constructive Fraud.** — See note 1.

Constructive Fraud. — See note 2.

**6. Fraud at Law — a. AS GROUND FOR AN ACTION OF DECEIT.** — See note 9,

**23. II. FALSE REPRESENTATIONS — 1. In General.** — See notes 3, 10, 11.

**25. 2. Subject-matter of the Representation — d. REPRESENTATIONS AS TO SOLVENCY, CREDIT, OR STANDING — (1) As to the Solvency, Credit, or Standing of Another.** — See note 2,

**28. (2) As to One's Own Solvency, Credit, or Standing — Rescission.** — See note 4.

Action of Deceit. — See note 5.

**29. 3. Representations by Agents.** — See note 2.

**30. 5. Representations by Conduct — a. IN GENERAL.** — See note 1.

**32. 6. Necessity for Writing — b. STATUTE OF FRAUDS.** — See note 1.

Representations as to the Solvency, Credit, or Standing of Another. — See note 2.

**19. 1. Definition of Fraud.** — *Rhodes v. Dickerson*, 95 Mo. App. 395. See also *Holt v. King*, 54 W. Va. 447.

**Fraud Is a Wilful Wrong.** — *People's Nat. Bank v. Central Trust Co.*, 179 Mo. 648.

**Fraud Is Sometimes Defined** as "the deception practiced in order to induce another to part with property or to surrender some legal right;" and sometimes as the deception which leads "a man into damage by wilfully or recklessly causing him to believe and act on a falsehood." The second definition seems to be more comprehensive than the first. *Fottler v. Moseley*, 179 Mass. 295.

**20. 1. Inequitable and Unconscientious Bargains.** — *Turner v. Washburn*, (Ky. 1904) 80 S. W. Rep. 460, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20; *Bowen v. Wolff*, 23 R. I. 56, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20.

**2. Fiduciary and Confidential Relations.** — *Bowen v. Wolff*, 23 R. I. 56, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20.

**21. 1. Actual Fraud.** — *Snively v. Meixsell*, 97 Ill. App. 365.

**No Distinction Between Actual and Intentional Fraud.** — *Finney v. Morris*, 116 Ga. 758.

**2. Constructive Fraud.** — *Snively v. Meixsell*, 97 Ill. App. 365.

**9. Fraud as Ground for Action of Deceit.** — *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21.

**23. 8. False Representations in General.** — *Schorr v. Gewirz*, (Supm. Ct. Spec. T.) 39 Misc.

(N. Y.) 186, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23 [notes 3-8].

**10. Rescission of Contract at Law.** — *Miller v. John*, 111 Ill. App. 56, affirmed 208 Ill. 173.

**11. Rescission or Other Relief in Equity.** — *Hickson v. Early*, 62 S. Car. 42, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23 et seq.

**25. 2. Representations as to Another's Credit or Standing.** — See *infra*, p. 46, note 5, and p. 133, note 3.

**28. 4. False Representations as to One's Own Credit or Standing.** — *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

**Representations to Mercantile Agencies.** — *Bradley v. Seaboard Nat. Bank*, 46 N. Y. App. Div. 550, reversed 167 N. Y. 427; *Converse v. Sickles*, 16 N. Y. App. Div. 49, affirmed 161 N. Y. 666; *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427.

**5. As Ground for Action of Deceit.** — *Fitchard v. Doheny*, 93 N. Y. App. Div. 9.

**29. 2. False Representations by Agent to Principal.** — *Miller v. John*, 111 Ill. App. 56, affirmed 208 Ill. 173; *Emmons v. Alvord*, 177 Mass. 466.

**30. 1. Representations by Conduct — Action of Deceit.** — *Leonard v. Springer*, 197 Ill. 532.

**32. 1. Statute of Frauds.** — *Kemp v. National Bank of Republic*, (C. C. A.) 109 Fed. Rep. 53, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32.

**2. Representations as to Another's Credit or Standing** need not be in writing to sustain an action for deceit if they be false and fraudulent. *Kemp v. National Bank of Republic*, (C.

**33. III. CHARACTER OF REPRESENTATION AS ONE OF FACT — 1. In General.**

— See note 5.

**34. 2. Statements of Opinion and Prediction — a. GENERAL RULE. —** See notes 1, 2.**35.** See note 1.**36. b. WHETHER STATEMENT IS OF OPINION OR OF FACT. —** See note 1.C. A.) 109 Fed. Rep. 53, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32.**33. 5. Representation Must Be One of Fact — United States. —** Bartol v. Walton, etc., Co., 92 Fed. Rep. 13; Patent Title Co. v. Stratton, 89 Fed. Rep. 174.*Alabama. —* Bamar v. Rosser, 131 Ala. 215.*California. —* Matter of Johnson, 134 Cal. 662; Dow v. Swain, 125 Cal. 674.*Delaware. —* Thomas v. Grise, 1 Penn. (Del.) 381.*Illinois. —* Miller v. John, 111 Ill. App. 56, *affirmed* 208 Ill. 173; Coolidge v. Rhodes, 199 Ill. 24; Dickinson v. Atkins, 100 Ill. App. 401; Stockham v. Adams, 96 Ill. App. 152; Harris v. Dumont, 207 Ill. 583; Wenegar v. Bollenbach, 180 Ill. 222.*Iowa. —* Ley v. Metropolitan L. Ins. Co., 120 Iowa 203; Higbee v. Trumbauer, 112 Iowa 74.*Michigan. —* Crowley v. Langdon, 127 Mich. 51.*Missouri. —* Meier v. Jackson, 78 Mo. App. 396; Culver v. Smith, 82 Mo. App. 390; Hequembourg v. Edwards, 155 Mo. 514; Estes v. Desnoyers Shoe Co., 155 Mo. 577.*Nebraska. —* McCready v. Phillips, 56 Neb. 446; Pollard v. McKenny, (Neb. 1903) 96 N. W. Rep. 679; Canon v. Farmers' Bank, (Neb. 1902) 91 N. W. Rep. 585.*New Hampshire. —* Anderson v. Scott, 70 N. H. 350; Spoad v. Tomlinson, (N. H. 1904) 59 Atl. Rep. 376.*New York. —* Spier v. Hyde, 92 N. Y. App. Div. 467; Marshall v. Seelig, 49 N. Y. App. Div. 433; Benedict v. Guardian Trust Co., 91 N. Y. App. Div. 103, *affirmed* 180 N. Y. 558; Prahar v. Tousey, 93 N. Y. App. Div. 507; Ettlinger v. Weil, 94 N. Y. App. Div. 291; Frank v. Bradley, etc., Co., 42 N. Y. App. Div. 178.*Pennsylvania. —* Miller v. Fulmer, 25 Pa. Super. Ct. 106; Devers v. Sollenberger, 25 Pa. Super. Ct. 64.*Texas. —* Collinson v. Jefferies, 21 Tex. Civ. App. 653; Hunter v. International Bldg., etc., Assoc., 24 Tex. Civ. App. 453; Downes v. Self, 28 Tex. Civ. App. 336; American Cotton Co. v. Collier, 30 Tex. Civ. App. 105; Davis v. Driscoll, 22 Tex. Civ. App. 14.*Virginia. —* Grosh v. Ivanhoe Land, etc., Co., 95 Va. 161; Dudley v. Minor, 100 Va. 728; Owens v. Boyd Land Co., 95 Va. 560; Campbell v. Eastern Bldg., etc., Assoc., 98 Va. 729; Trammell v. Ashworth, 99 Va. 646; Scott v. Boyd, 101 Va. 28.*Washington. —* O'Connor v. Lighthizer, 34 Wash. 152.*West Virginia. —* Buena Vista Co. v. Billmyer, 48 W. Va. 382, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.*Wisconsin. —* Milwaukee Brick, etc., Co. v. Schoknecht, 108 Wis. 457; Hubbard v. McLean, 115 Wis. 9.**Future Facts. —** Collinson v. Jefferies, 21 Tex. Civ. App. 653.**Present Determination to Do Future Act. —** Fox v. Duffy, 95 N. Y. App. Div. 202.**Past Earnings of Street Railroad. —** Old Colony Trust Co. v. Dubuque Light, etc., Co., 89 Fed. Rep. 794.**34. 1. Expression of Opinion or Belief — Action of Deceit Does Not Lie — California. —** Lloyd v. Kehl, 132 Cal. 107.*District of Columbia. —* Consumers' Brewing Co. v. Tobin, 19 App. Cas. (D. C.) 353, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34.*Illinois. —* Williams v. Wilson, 101 Ill. App. 541.*Iowa. —* Boyer v. Commercial Bldg. Invest. Co., 110 Iowa 491.*Missouri. —* Lovelace v. Suter, 93 Mo. App. 429.*New York. —* Brady v. Edwards, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 435.*Texas. —* Hunter v. International Bldg., etc., Assoc., 24 Tex. Civ. App. 453.*Virginia. —* Campbell v. Eastern Bldg., etc., Assoc., 98 Va. 729; Dudley v. Minor, 100 Va. 728.*West Virginia. —* Buena Vista Land Co. v. Billmyer, 48 W. Va. 382.**Defense to Action for Price. —** Vodrey Pottery Co. v. Horne, 117 Wis. 1.**2. Contract Not Voidable at Law for Expression of Opinion or Belief — Alabama. —** Stevens v. Alabama State Land Co., 121 Ala. 450.*Illinois. —* Coolidge v. Rhodes, 96 Ill. App. 17, *reversed* 199 Ill. 24.*Kansas. —* William B. Grimes Dry Goods Co. v. Jordan, 7 Kan. App. 192.*Nebraska. —* Perry v. Rogers, 62 Neb. 898; Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116.*New York. —* Leszynsky v. Ross, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 652.*Pennsylvania. —* See Devers v. Sollenberger, 25 Pa. Super. Ct. 64.*Wisconsin. —* Milwaukee Brick, etc., Co. v. Schoknecht, 108 Wis. 457.**35. 1. Expression of Opinion Not Fraud in Equity — United States. —** Huber v. Guggenheim, 89 Fed. Rep. 598.*California. —* Matter of Johnson, 134 Cal. 662.*Kansas. —* Atchison, etc., R. Co. v. Bennett, 63 Kan. 781.*Missouri. —* Dalrymple v. Craig, 149 Mo. 345.*Texas. —* International, etc., R. Co. v. Shuford, 36 Tex. Civ. App. 251, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35.*Virginia. —* Campbell v. Eastern Bldg., etc., Assoc., 98 Va. 729; Dudley v. Minor, 100 Va. 728; Grosh v. Ivanhoe Land, etc., Co., 95 Va. 161.**36. 1. Question for Jury. —** American Nat. Bank v. Hammond, 25 Colo. 367; Marshall v.

**36.** A Statement of a Fact Susceptible of Knowledge. — See note 2.

*c.* FALSE STATEMENT OF OPINION. — See notes 4, 5.

**37.** *d.* STATEMENTS AS TO EXTRINSIC FACTS, CONCEALMENT OF FACTS, ETC. — *Extrinsic Facts.* — See note 5.

**38.** Artifice to Prevent Inquiry. — See note 2.

*e.* PERSONS OCCUPYING RELATION OF TRUST OR CONFIDENCE. —

See note 3.

**39.** *h.* PREDICTION — (1) *In General.* — See note 4.

**40.** (3) *Future Profits and Benefits.* — See note 3.

**41.** (4) *Prediction Involving a Representation of Fact.* — See note 2.

*i.* PARTICULAR STATEMENTS — (1) *Statements as to Value.* — See note 3.

**42.** Illustrations. — See note 2.

Statements of Value as Statements of Fact. — See note 6.

**43.** Value Known Only to Experts — Relation of Confidence. — See note 1.

(2) *Statements as to Quality or Quantity.* — See note 2.

**44.** As Statements of Fact. — See note 8.

Seelig, 49 N. Y. App. Div. 433; Bjorklund v. Seattle Electric Co., 35 Wash. 439.

**36.** 2. Statement of Fact Susceptible of Knowledge. — Davis v. Driscoll, 22 Tex. Civ. App. 14.

4. False Statement of Opinion — Not Fraud. — Miller v. Fulmer, 25 Pa. Super. Ct. 106.

5. False Statement of Opinion Involving Misrepresentation of Fact. — Snively v. Meixsell, 97 Ill. App. 365; International, etc., R. Co. v. Shuford, 36 Tex. Civ. App. 251, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**37.** 5. False Representation as to Extrinsic Facts. — Loucks v. Taylor, 23 Ind. App. 245.

Price Offered for Patent Right. — Strickland v. Graybill, 97 Va. 602.

**38.** 2. Inducing Person Not to Make Inquiry for Himself. — Cole v. Smith, 26 Colo. 506.

3. Persons Occupying Confidential Relation. — Cole v. Smith, 26 Colo. 506; Shelton v. Healy, 74 Conn. 265; International, etc., R. Co. v. Shuford, 36 Tex. Civ. App. 251, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38; Buena Vista Co. v. Billmyer, 48 W. Va. 382; Potter v. Necedah Lumber Co., 105 Wis. 25.

**39.** 4. Prediction or Statements as to Future Events. — Patent Title Co. v. Stratton, 89 Fed. Rep. 174; Ryan v. Middlesborough Town-Lands Co., (Ky. 1899) 52 S. W. Rep. 33. See also Devers v. Sollenberger, 25 Pa. Super. Co. 64.

**40.** 3. Future Profits and Benefits. — Donoho v. Equitable L. Assur. Soc., 22 Tex. Civ. App. 192.

**41.** 2. Prediction Involving a Representation of Fact. — Miller v. Fulmer, 25 Pa. Super. Ct. 106. See also Collinson v. Jefferies, 21 Tex. Civ. App. 653.

3. Statements as to Value Not Amounting to Fraud — United States. — Patent Title Co. v. Stratton, 89 Fed. Rep. 174.

California. — Taylor v. Ford, 131 Cal. 440.

Colorado. — Cole v. Smith, 26 Colo. 506.

Florida. — Stackpole v. Hancock, 40 Fla. 362.

Illinois. — Leonard v. Springer, 197 Ill. 532, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 41; Mayberry v. Rogers, 81 Ill. App. 581; Strubhar v. Shorthose, 78 Ill. App. 394; Evans v. Gerry, 174 Ill. 595.

Iowa. — Bossingham v. Syck, 118 Iowa 192; McDowell v. Caldwell, 116 Iowa 475.

Maine. — Braley v. Powers, 92 Me. 203.

Missouri. — Chase v. Rusk, 90 Mo. App. 25; Hess v. Draffen, 99 Mo. App. 580.

Nebraska. — McKibbin v. Day, (Neb. 1904) 98 N. W. Rep. 845.

New Jersey. — Hallinger v. Zimmerman, 58 N. J. Eq. 217.

New York. — Seis v. Plaisantin, 52 N. Y. App. Div. 206.

Ohio. — McMullen v. Griggs, 23 Ohio Cir. Ct. 417.

Pennsylvania. — Cote v. Christy, 10 Pa. Super. Ct. 318.

Tennessee. — Long v. Gilbert, (Tenn. Ch. 1900) 59 S. W. Rep. 414.

Utah. — Whitney v. Richards, 17 Utah 226.

**42.** 2. Sale or Lease of Real Property. — Seis v. Plaisantin, 52 N. Y. App. Div. 206.

6. Statements of Value Amounting to Representations of Fact — United States. — Strand v. Griffith, (C. C. A.) 97 Fed. Rep. 854.

California. — See Evans v. Duke, (Cal. 1902) 69 Pac. Rep. 688.

Connecticut. — Shelton v. Healy, 74 Conn., 265.

Illinois. — Leonard v. Springer, 197 Ill. 532; Custer v. Harmon, 105 Ill. App. 76; Snively v. Meixsell, 97 Ill. App. 365; Mayberry v. Rogers, 81 Ill. App. 581.

New York. — Jackson v. Foley, 53 N. Y. App. Div. 97.

Washington. — Stack v. Nolte, 29 Wash. 188.

Wisconsin. — Benolkin v. Guthrie, 111 Wis. 554; Horton v. Lee, 106 Wis. 439.

Statements of Actual Cost. — Hess v. Draffen, 99 Mo. App. 580.

Market Value. — The representation that a certain kind of property, constantly sold, has a market value at certain figures, and that it readily sells at those figures, is a statement of a fact. Stoll v. Wellborn, (N. J. 1903) 56 Atl. Rep. 894.

**43.** 1. Special Knowledge of Value and Relation of Confidence. — Shelton v. Healy, 74 Conn. 265; Coulter v. Clark, 160 Ind. 311; McKibbin v. Day, (Neb. 1904) 98 N. W. Rep. 845.

2. Statements as to Quality or Quantity May Be Mere Expressions of Opinion. — Barrie v. Jerome, 112 Ill. App. 320.

**44.** 8. Statements of Quality or Quantity as



**45.** Real Property. — See note 1.

(3) *Statements as to Boundaries and Acreage.* — See note 4.

**46.** (4) *Statements as to Title and Incumbrances.* — See notes 1, 2, 3.

(5) *Statements as to Location.* — See note 4.

(6) *Statements as to Credit or Standing* — Credit or Standing of Another.

— See notes 5, 6.

**47.** Statements as to One's Own Credit. — See notes 3, 4.

**3.** Promises and Statements of Intention — *a.* GENERAL RULE. — See note 5.

**49.** *b.* RULE IN EQUITY. — See note 5.

**51.** *c.* PROMISE A MERE DEVICE TO ACCOMPLISH FRAUD — (2) *Intention Not to Perform Promise* — (a) In General. — See note 3.

(b) *Intention Not to Pay for Goods Purchased.* — See note 5.

**Statements of Fact.**—*Strand v. Griffith*, (C. C. A.) 97 Fed. Rep. 854; *Allen v. Henn*, 197 Ill. 486; *Horton v. Lee*, 106 Wis. 439; *Benolkin v. Guthrie*, 111 Wis. 554.

**45.** 1. Quality and Condition of Real Property. — *Allen v. Henn*, 197 Ill. 486.

4. *Lovejoy v. Isbell*, 73 Conn. 368; *Nelson v. Allen*, 117 Wis. 91.

**46.** 1. Statements as to Title — As Mere Opinions. — *Choate v. Hyde*, 129 Cal. 580.

2. As Representations of Fact. — *Loucks v. Taylor*, 23 Ind. App. 245; *Spencer v. Sandusky*, 46 W. Va. 582; *Hurlbert v. T. D. Kellogg Lumber, etc.*, Co., 115 Wis. 225.

3. Incumbrances. — *Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158, affirming 112 Ill. App. 77.

4. Representation as to Location of Land. — *Allen v. Henn*, 197 Ill. 486.

5. Representations as to Credit or Standing of Another May Be Mere Expressions of Opinion. — *Wrenn v. Truitt*, 116 Ga. 708; *Albion Milling Co. v. Weeping Water First Nat. Bank*, 64 Neb. 116.

6. Representations of Fact Constituting Fraud. — *Hume v. Steele*, (Tex. Civ. App. 1900) 59 S. W. Rep. 812.

**47.** 3. Statements as to One's Own Credit. — *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447.

4. *Richardson-Roberts-Byrne Dry Goods Co. v. Goodkind*, 22 Mont. 462.

**5.** Promise or Statement of Intention — *United States.* — *Huber v. Guggenheim*, 89 Fed. Rep. 598.

*Illinois.* — *Stockham v. Adams*, 96 Ill. App. 152; *Murphy v. Murphy*, 189 Ill. 360.

*Iowa.* — *Boyer v. Commercial Bldg. Invest. Co.*, 110 Iowa 491.

*Kentucky.* — *Livermore v. Middlesborough Town Lands Co.*, 106 Ky. 140; *Pine Mountain Iron, etc., Co. v. Ford*, (Ky. 1899) 50 S. W. Rep. 27; *Jones v. Middlesborough Town Lands Co.*, 106 Ky. 194.

*Missouri.* — *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577; *Culbertson v. Young*, 86 Mo. App. 277.

*Nebraska.* — *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679; *Canon v. Farmers' Bank*, (Neb. 1902) 91 N. W. Rep. 585.

*Ohio.* — *American Hosiery Co. v. Baker*, 10 Ohio Cir. Dec. 219, 18 Ohio Cir. Ct. 604.

*Pennsylvania.* — *Miller v. Fulmer*, 25 Pa. Super. Ct. 106.

*West Virginia.* — *Buena Vista Co. v. Billmyer*, 48 W. Va. 382.

*Wisconsin.* — *Hubbard v. McLean*, 115 Wis. 9.

**Present Intention to Do Future Act** — Statement of Fact. — *Fox v. Duffy*, 95 N. Y. App. Div. 202.

**49.** 5. Doctrine in Equity. — *Murphy v. Murphy*, 189 Ill. 360.

**51.** 3. Intention Not to Perform Promise. — *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794; *Culbertson v. Young*, 86 Mo. App. 277; *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679; *Jones v. Jones*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 360; *Troxler v. New Era Bldg. Co.*, 137 N. Car. 51; *American Hosiery Co. v. Baker*, 10 Ohio Cir. Dec. 219, 18 Ohio Cir. Ct. 604; *American Cotton Co. v. Collier*, 30 Tex. Civ. App. 105.

*Contra.* — *Murphy v. Murphy*, 189 Ill. 360; *Ayres v. Blevins*, 28 Ind. App. 101; *Miller v. Fulmer*, 25 Pa. Super. Ct. 106.

**Intention Subsequent to Sale Immaterial.** — *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413.

**5.** Purchase of Goods with Intent Not to Pay for Them — *England.* — *In re Eastgate*, (1905) 1 K. B. 465.

*Alabama.* — *McKensie v. Rothschild*, 119 Ala. 419.

*Delaware.* — *Freeman v. Topkis*, 1 Marv. (Del.) 174.

*Illinois.* — *Hacker v. Munroe*, 176 Ill. 384.

*Kansas.* — *Fountain v. Kenney*, 66 Kan. 797, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 51.

*Kentucky.* — *Coppage v. Murphy*, (Ky. 1902) 68 S. W. Rep. 416.

*Maryland.* — *Sec Gaither v. Slack*, 89 Md. 727.

*Michigan.* — *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413.

*Missouri.* — *Stein v. Hill*, 100 Mo. App. 38; *Culbertson v. Young*, 86 Mo. App. 277; *Gratton, etc., Mfg. Co. v. Troll*, 77 Mo. App. 339. See also *Royal Remedy, etc., Co. v. Gregory Grocer Co.*, 90 Mo. App. 53.

*Nebraska.* — *McCready v. Phillips*, 56 Neb. 446.

*New Hampshire.* — *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447.

*Ohio.* — *Gobrecht v. McDonald*, 8 Ohio Dec. 526, 5 Ohio N. P. 427. See also *Gallipolis Furniture Co. v. Symmes*, 10 Ohio Cir. Dec. 514, 19 Ohio Cir. Ct. 659.

*Wisconsin.* — *Consolidated Milling Co. v. Fogo*, 104 Wis. 92; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881.

**54.** *d.* PROMISE ACCOMPANIED BY FALSE REPRESENTATION OR CONCEALMENT. — See notes 2, 3.

**55.** 4. False Representations as to the Law — *a.* GENERAL RULE. — See note 1.

*The Reason.* — See note 2.

**56.** *b.* REPRESENTATIONS AS TO THE LEGAL EFFECT OF INSTRUMENTS. — See note 4.

**57.** *d.* RELATION OF TRUST OR CONFIDENCE — IGNORANCE. — See note 8.

**58.** *e.* REPRESENTATIONS OF LAW AND FACT, DISTINGUISHED — (1) *In General.* — See note 1.

**59.** IV. MATERIALITY OF REPRESENTATIONS — 1. *In General.* — See note 3.

**60.** 2. What Representations Are Material — *a.* IN GENERAL. — See note 5.

**Pennsylvania Rule Is Contra.** — *Reed v. Felmlee*, 25 Pa. Super. Ct. 37.

**54.** 2. Promise Accompanied by False Representation or Concealment of Facts. — *Hubbard v. McLean*, 115 Wis. 9, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54.

**53.** Immaterial that Promise Is Also Relied Upon. — *Hubbard v. McLean*, 115 Wis. 9, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54.

**55.** 1. Representations as to the Law Not Fraud. — *Rogan v. Illinois Trust, etc., Bank*, 93 Ill. App. 39, affirmed 194 Ill. 600; *Dalrymple v. Craig*, 149 Mo. 345; *Jackson v. Pennsylvania R. Co.*, 69 N. J. L. 79, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Brady v. Edwards*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 435; *Frankfort Marine, etc., Ins. Co. v. Witty*, 208 Pa. St. 569; *Hubbard v. McLean*, 115 Wis. 9.

**2.** Reason for This Doctrine. — *Rogan v. Illinois Trust, etc., Bank*, 93 Ill. App. 39, affirmed 194 Ill. 600.

**56.** 4. Representations as to Legal Effect of Instrument. — *Hart v. Waldo*, 117 Ga. 590; *Jackson v. Pennsylvania R. Co.*, 69 N. J. L. 79, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56.

**57.** 8. Relation of Trust or Confidence — Known Ignorance of Party. — *Hubbard v. McLean*, 115 Wis. 9, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Allen v. Frawley*, 106 Wis. 638.

**58.** 1. Distinction Between Representation of Law and Fact — Title. — *Dashiel v. Harshman*, 113 Iowa 283.

**59.** 3. Representation Must Relate to Material Fact — *United States*. — *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794.

*Alabama.* — *Bomar v. Rosser*, 131 Ala. 215; *Hooper v. Whitaker*, 130 Ala. 324; *King v. White*, 119 Ala. 429.

*Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305.

*California.* — *Dow v. Swain*, 125 Cal. 674.

*Connecticut.* — *Wilson v. Nichols*, 72 Conn. 173.

*Delaware.* — *Thomas v. Grise*, 1 Penn. (Del.) 381.

*District of Columbia.* — *Jackson, etc., Co. v. Fay*, 20 App. Cas. (D. C.) 105; *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1.

*Georgia.* — *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *Newman v. Claffin Co.*, 107 Ga. 89.

*Illinois.* — *Hale Elevator Co. v. Hale*, 201 Ill.

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131; *Dickinson v. Atkins*, 100 Ill. App. 401; *Williams v. Wilson*, 101 Ill. App. 541; *Coolidge v. Rhodes*, 96 Ill. App. 17, reversed 199 Ill. 24; *Snively v. Meixsell*, 97 Ill. App. 365; *Schwartz v. Berkshire L. Ins. Co.*, 91 Ill. App. 494; *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139; *Jacobs v. Marks*, 83 Ill. App. 156, affirmed 183 Ill. 533; *Wenegar v. Bollenbach*, 180 Ill. 222.

*Iowa.* — *Higbee v. Trumbauer*, 112 Iowa 74.

*Kentucky.* — *Warren Deposit Bank v. Fidelity, etc., Co.*, 116 Ky. 38; *Akers v. Martin*, 110 Ky. 335.

*Maine.* — *Greenleaf v. Gerald*, 94 Me. 91.

*Maryland.* — *Cahill v. Applegarth*, 98 Md. 493.

*Massachusetts.* — *Lee v. Tarplin*, 183 Mass. 52.

*Missouri.* — *Chase v. Rusk*, 90 Mo. App. 25; *Culbertson v. Young*, 86 Mo. App. 277; *Culver v. Smith*, 82 Mo. App. 390; *Hequembourg v. Edwards*, 155 Mo. 514.

*Nebraska.* — *Canon v. Farmers' Bank*, (Neb. 1902) 91 N. W. Rep. 585.

*New Hampshire.* — *Anderson v. Scott*, 70 N. H. 350.

*New York.* — *L. D. Garrett Co. v. Clark*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610, reversed 102 N. Y. App. Div. 611; *Prahar v. Tousey*, 93 N. Y. App. Div. 507.

*Ohio.* — *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Oregon.* — *Martin v. Eagle Development Co.*, 41 Oregon 448.

*Pennsylvania.* — *Devers v. Sollenberger*, 25 Pa. Super. Ct. 64.

*Texas.* — *Furneaux v. Webb*, 33 Tex. Civ. App. 560; *Jones v. Gulf, etc., R. Co.*, 32 Tex. Civ. App. 198; *International, etc., R. Co. v. Shuford*, 36 Tex. Civ. App. 251; *Cabaness v. Holland*, 19 Tex. Civ. App. 383; *Collinson v. Jefferies*, 21 Tex. Civ. App. 653.

*Virginia.* — *Dudley v. Minor*, 100 Va. 728; *Grosh v. Ivanhoe Land, etc., Co.*, 95 Va. 161; *Reed v. Gold*, 102 Va. 37; *Trammell v. Ashworth*, 99 Va. 646.

*Wisconsin.* — *Krause v. Busacker*, 105 Wis. 350; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881.

**Representation of Ownership of Part of Tract.** — *Spoor v. Tilson*, 97 Va. 279.

**Ontario Insurance Corporations Act.** — *Jordan v. Provincial Provident Inst.*, 28 Can. Sup. Ct. 554.

**60.** 5. Considerations Determining Materiality

**60. b. REPRESENTATIONS AFFECTING SUBJECT-MATTER OF CONTRACT.** — See note 6.

**61.** See note 4.

**c. REPRESENTATIONS NOT OPERATING AS AN INDUCEMENT.** — See note 5.

**d. TRIVIAL MISREPRESENTATIONS.** — See note 6.

**62. e. COLLATERAL MATTERS** — The Representation Need Not Relate Directly to the Subject-matter. — See note 3.

**63. V. FALSITY OF REPRESENTATIONS — 1. General Rule.** — See note 1.

of Representation. — See *Culbertson v. Young*, 86 Mo. App. 277.

**Material Representation Defined.** — The general rule seems to be that a representation is to be regarded as material if the complaining party would not have done the act by which he was injured, had he known that the representation was false. *Gerner v. Yates*, 61 Neb. 100.

**Solvency of Corporation.** — Representations that a corporation is solvent, has large amount of unencumbered assets, and that its business is profitable, are material. *Shaw v. Gilbert*, 111 Wis. 165.

**60. 6. Representations of Fact Affecting Subject-matter of Contract.** — *King v. White*, 119 Ala. 429; *Martin v. Eagle Development Co.*, 41 Oregon 448; *Engeman v. Taylor*, 46 W. Va. 669; *Doucet v. Clercx*, 23 Quebec Super. Ct. 107.

**Quantity of Land.** — *Leicher v. Keeney*, 98 Mo. App. 394.

**61. 4. Sales of Personal Property.** — *Brale v. Powers*, 92 Me. 203.

**5. Representations Not Acted Upon.** — *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931. See *Gerner v. Yates*, 61 Neb. 100; *Shaw v. Gilbert*, 111 Wis. 165, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61.

**6. Trivial Misrepresentations Not Material.** — *Downes v. Self*, 28 Tex. Civ. App. 356. See also *McCleary v. Chipman*, 32 Ind. App. 489.

**62. 3. See Hubbard v. International Mercantile Agency, (N. J. 1904) 59 Atl. Rep. 24.**

**63. 1. Representations Must Be False** — *England*. — See *Burrows v. Rhodes*, (1899) 1 Q. B. 816.

*Canada.* — *Doucet v. Clercx*, 23 Quebec Super. St. 107; *Barnard v. Riendeau*, 31 Can. Sup. Ct. 234.

*United States.* — *Sprigg v. Commonwealth Title Ins., etc., Co.*, (C. C. A.) 131 Fed. Rep. 5; *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931.

*Alabama.* — *King v. White*, 119 Ala. 429; *Bomar v. Rosser*, 131 Ala. 215.

*Arkansas.* — *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.*, 73 Ark. 542.

*California.* — *Dow v. Swain*, 125 Cal. 674; *Nisson v. Hood*, 140 Cal. 224.

*Colorado.* — *Oakes v. Miller*, 11 Colo. App. 374.

*Connecticut.* — *Wilson v. Nichols*, 72 Conn. 173.

*Delaware.* — *Thomas v. Grise*, 1 Penn. (Del.) 381; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511.

*District of Columbia.* — *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1.

*Florida.* — *Mizell v. Upchurch*, (Fla. 1903) 35 So. Rep. 9.

*Georgia.* — *Newman v. Clafin Co.*, 107 Ga. 89; *Brooke v. Cole*, 108 Ga. 251; *Fenley v. Moody*, 104 Ga. 790; *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *Hart v. Waldo*, 117 Ga. 590; *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

*Illinois.* — *Haines v. Downey*, 86 Ill. App. 373; *American Ins. Co. v. France*, 111 Ill. App. 382; *Miller v. John*, 208 Ill. 173; *Jacobs v. Marks*, 83 Ill. App. 156, affirmed 183 Ill. 533; *Wenegar v. Bollenbach*, 180 Ill. 222; *Jones v. Foster*, 175 Ill. 459; *Allen v. Henn*, 197 Ill. 486; *John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185; *Dickinson v. Atkins*, 100 Ill. App. 401; *Williams v. Wilson*, 101 Ill. App. 541; *Stockham v. Adams*, 96 Ill. App. 152; *Coolidge v. Rhodes*, 96 Ill. App. 17, reversed 199 Ill. 24; *Snively v. Meixsell*, 97 Ill. App. 365; *Schwartz v. Berkshire L. Ins. Co.*, 91 Ill. App. 494; *Tilden v. Blackwell*, 94 Ill. App. 605.

*Indiana.* — *Ludwig v. Petrie*, 32 Ind. App. 550.

*Iowa.* — *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203; *Higbee v. Trumbauer*, 112 Iowa 74; *Sykes v. Reiher*, (Iowa 1902) 91 N. W. Rep. 920.

*Kansas.* — *Fountain v. Kenney*, 66 Kan. 797.

*Kentucky.* — *Coffey v. Hendrick*, (Ky. 1901) 65 S. W. Rep. 127; *Akers v. Martin*, 110 Ky. 335; *Warren Deposit Bank v. Fidelity, etc., Co.*, 116 Ky. 38; *Dinwiddie v. Stone*, (Ky. 1899) 52 S. W. Rep. 814.

*Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1; *Fottler v. Moseley*, 185 Mass. 563.

*Missouri.* — *Feller v. McKillip*, 100 Mo. App. 660; *Chase v. Rusk*, 90 Mo. App. 25; *Lovelace v. Suter*, 93 Mo. App. 429; *Edwards v. Noel*, 88 Mo. App. 434; *Culbertson v. Young*, 86 Mo. App. 277; *Paretti v. Rebenack*, 81 Mo. App. 494; *Hequembourg v. Edwards*, 155 Mo. 514.

*Nebraska.* — *Perry v. Rogers*, 62 Neb. 898; *Murphy v. Illinois Trust, etc., Bank*, 57 Neb. 519; *Jones v. Stewart*, 62 Neb. 207; *Hitchcock v. Gothenburg Water Power, etc., Co.*, (Neb. 1903) 95 N. W. Rep. 638.

*New Hampshire.* — *Spread v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

*New York.* — *Secis v. Plaisantin*, 52 N. Y. App. Div. 206; *Grosjean v. Galloway*, 82 N. Y. App. Div. 380; *Sarasohn v. Miles*, 52 N. Y. App. Div. 628, affirmed 169 N. Y. 573; *Jackson v. Foley*, 53 N. Y. App. Div. 97; *Slayback v. Raymond*, 93 N. Y. App. Div. 326; *L. D. Garrett Co. v. Clark*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610, reversed 102 N. Y. App. Div. 611; *Benedict v. Guardian Trust Co.*, 91 N. Y. App. Div. 103, affirmed 180 N. Y. 558; *Louis*

**66. VI. FAILURE TO DISCLOSE FACTS AND CONCEALMENT — 1. In General.** — See note 4.

**2. The Rule at Law — a. ACTION OF DECEIT.** — See note 5.

**67. b. RESCISSION OF CONTRACTS.** — See note 1.

**3. The Rule in Equity — a. RESCISSION AND CANCELLATION OF CONTRACTS.** — See note 3.

**68. c. EQUITABLE ESTOPPEL.** — See note 2.

**4. Silence When There Is a Duty to Speak — a. IN GENERAL.** — See note 3.

**Relief in Equity.** — See note 4.

**69. Action of Deceit.** — See note 2.

**b. CIRCUMSTANCES IMPOSING A DUTY TO SPEAK — (2) Relation of Trust or Confidence — (a) In General.** — See note 3.

**70.** See note 1.

**71. (b) Particular Relations — Partners.** — See note 1.  
**Quasi-partners.** — See note 2.

**72. Debtor and Creditor.** — See note 3.

**(c) Dealings Between Strangers — b. FACTS EQUALLY WITHIN THE MEANS OF KNOWLEDGE OF BOTH PARTIES.** — See note 5.

*v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, *affirmed* 172 N. Y. 659; *Powell v. F. C. Linde Co.*, 58 N. Y. App. Div. 261, *affirmed* 171 N. Y. 675; *Prahar v. Tousey*, 93 N. Y. App. Div. 507; *Ettlinger v. Weil*, 94 N. Y. App. Div. 291; *Reynolds v. Leyden*, 39 N. Y. App. Div. 650; *Frank v. Bradley, etc., Co.*, 42 N. Y. App. Div. 178; *Darling v. Klock*, 33 N. Y. App. Div. 270, *affirmed* 165 N. Y. 623.

*Ohio.* — *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Oregon.* — *Martin v. Eagle Development Co.*, 41 Oregon 448.

*Tennessee.* — *Driver v. White*, (Tenn. Ch. 1898) 51 S. W. Rep. 994.

*Texas.* — *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109; *Hume v. Steele*, (Tex. Civ. App. 1900) 59 S. W. Rep. 812; *Jones v. Gulf, etc., R. Co.*, 32 Tex. Civ. App. 198; *International, etc., R. Co. v. Shuford*, 36 Tex. Civ. App. 251.

*Virginia.* — *Trammell v. Ashworth*, 99 Va. 646; *Spoor v. Tilson*, 97 Va. 279; *Owens v. Boyd Land Co.*, 95 Va. 560; *Dudley v. Minor*, 100 Va. 728; *Reed v. Gold*, 102 Va. 37.

*Wisconsin.* — *Krause v. Busacker*, 105 Wis. 350; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881; *Horton v. Lee*, 106 Wis. 439; *Shaw v. Gilbert*, 111 Wis. 165.

**66. 4. Mere Nondisclosure of Facts Not Generally Fraud — England.** — See *Seddon v. North Eastern Salt Co.*, (1905) 1 Ch. 326.

*Florida.* — *Stackpole v. Hancock*, 40 Fla. 362.

*Illinois.* — *Dayton v. Kidder*, 105 Ill. App. 107.

*Kentucky.* — *Akers v. Martin*, 110 Ky. 335.

*Maryland.* — *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66.

*Nebraska.* — *Jones v. Stewart*, 62 Neb. 207.

*Pennsylvania.* — *Guaranty Safe Deposit, etc., Co. v. Liebold*, 207 Pa. St. 399. See also *Standard Steel Car Co. v. Stamm*, 207 Pa. St. 419.

*Texas.* — *Boyd v. Leith*, (Tex. Civ. App. 1899) 50 S. W. Rep. 618.

**5. Action of Deceit.** — *O'Leary v. Tillinghast*,

22 R. I. 161; *Dickson v. Pritchard*, 111 Wis. 310.

**67. 1. Rescission of Contract at Law.** — *Morrow v. Moore*, 98 Me. 373.

**3. Rescission and Cancellation of Contracts and Conveyances.** — *Pratt Land, etc., Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35; *Opie v. Pacific Invest. Co.*, 26 Wash. 505, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 67; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92.

**68. 2. Equitable Estoppel.** — *Dayton v. Kidder*, 105 Ill. App. 107; *Vail v. Northwestern Mut. L. Ins. Co.*, 192 Ill. 567.

**3. Silence When There Is a Duty to Speak.** — *Stockham v. Adams*, 96 Ill. App. 152. See also *Standard Steel Car Co. v. Stamm*, 207 Pa. St. 419.

**4. Relief in Equity.** — *Oliver v. Oliver*, 118 Ga. 362; *Stephens v. Ozbourn*, 107 Tenn. 572, 89 Am. St. Rep. 957.

**69. 2. Contrary Doctrine.** — *Gordan v. Irvine*, 105 Ga. 144.

**3. Relation of Trust and Confidence.** — *Oliver v. Oliver*, 118 Ga. 362; *Hitchcock v. Hustace*, 14 Hawaii 232; *Toomey v. Whitney*, 94 N. Y. App. Div. 154; *Iron City Nat. Bank v. Du Puy*, 194 Pa. St. 205; *Potter v. Necedah Lumber Co.*, 105 Wis. 25.

**70. 1. Hanley v. Sweeny, (C. C. A.) 109 Fed. Rep. 712.**

**Surety and Payee — No Fiduciary Relation.** — *Opie v. Pacific Invest. Co.*, 26 Wash. 505.

**71. 1. Partners.** — *Powell v. Cash*, 54 N. J. Eq. 218, *affirmed* 55 N. J. Eq. 826; *Spier v. Hyde*, 92 N. Y. App. Div. 467; *Lay v. Emery*, 8 N. Dak. 515; *Butler v. Edwards*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1045.

**2. Joint Purchasers.** — *Hinton v. Ring*, 111 Ill. App. 369.

**72. 3. Debtor and Creditor.** — *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 72.

**5. Facts as to Which Parties Have Equal Means of Knowledge — Delaware.** — *Clayton v. Caven-der*, 1 Marv. (Del.) 191.

*Georgia.* — *Oliver v. Oliver*, 118 Ga. 362.

*Illinois.* — *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218.

- 73.** *cc.* FACTS PECULIARLY WITHIN THE KNOWLEDGE OF ONE PARTY. — See notes 1, 2.
- 74.** *dd.* KNOWLEDGE OF THE OTHER'S IGNORANCE — CORRECTION OF MISAPPREHENSION. — See note 2.
- ee.* STATEMENT OR CONDUCT CAUSING MISAPPREHENSION. — See note 3.
- 75.** *gg.* FAILURE TO DISCLOSE CHANGE OF CIRCUMSTANCES. — See note 2.
- 76.** (3) *Inquiry and Denial or Concealment of Knowledge.* — See note 1.  
(5) *Mental Incapacity of Party.* — See note 4.  
(6) *Particular Transactions* — (a) *Sales of Real Property.* — See notes 5, 8.
- 78.** (e) *Stock Subscriptions and Sales of Stock.* — See note 3.
- 79.** *Sales of Stock by a Stockholder.* — See note 1.  
(f) *Contracts of Insurance.* — See note 2.
- 80.** (7) *Failure to Disclose Insolvency* — *Failure to Disclose One's Own Insolvency.* — See note 3.
- 81.** *Application of the Rule.* — See note 1.  
*So, if Inquiry Is Made.* — See note 8.  
*Acceptance of Deposit by Insolvent Bank.* — See note 10.
- 82.** 5. *Concealment of Facts.* — See note 2.
- 83.** *Diverting Attention and Preventing Examination or Inquiry.* — See note 1.

*Iowa.* — *Burnett v. Hensley*, 118 Iowa 575; *McDowell v. Caldwell*, 116 Iowa 475.

*Missouri.* — *Davis v. Phoenix Ins. Co.*, 81 Mo. App. 264.

*Washington.* — *Opie v. Pacific Invest. Co.*, 26 Wash. 505; *Mulholland v. Washington Match Co.*, 35 Wash. 315.

**73.** 1. *Facts Peculiarly Within One Party's Knowledge or Means of Knowledge.* — See *infra*, p. 120, note 3.

2. *Thomas v. Murphy*, 87 Minn. 358.

**74.** 2. *Wilson v. Nichols*, 72 Conn. 173; *Oliver v. Oliver*, 118 Ga. 362; *Riley v. Bell*, 120 Iowa 618; *Thomas v. Murphy*, 87 Minn. 358. See also *Custer v. Harmon*, 105 Ill. App. 76.

3. *Correction of Misapprehension Caused by Misstatement.* — *Bell v. Felt*, 102 Ill. App. 218, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74, modified 205 Ill. 213; *Holt v. King*, 54 W. Va. 441, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.

**75.** 2. *Decisions to the Contrary.* — See *Chilson v. Houston*, 9 N. Dak. 498.

**76.** 1. *Denial or Concealment When Inquiry Is Made.* — *Stackpole v. Hancock*, 40 Fla. 362; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659.

4. *Mental Incapacity of Party to Contract.* — *Stephens v. Ozbourn*, 107 Tenn. 572, 89 Am. St. Rep. 957.

5. *Nondisclosure by Vendor of Land — Defects in Title.* — *Hartwig v. Clark*, 138 Cal. 668.

8. *Judgment as to Value.* — *Pratt Land, etc., Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35.

**78.** 3. *Subscriptions for Stock and Sales of Stock.* — *Shelton v. Healy*, 74 Conn. 265; *Walker v. Russell*, 186 Mass. 69; *Collinson v. Jefferies*, 21 Tex. Civ. App. 633; *Mulholland v. Washington Match Co.*, 35 Wash. 315; *West End Real Estate Co. v. Nash*, 51 W. Va. 341.

**79.** 1. *No Connection with Bank and No Knowledge of Condition — No Duty to Disclose.* — *Kirtley v. Shinkle*, (Ky. 1902) 69 S. W. Rep. 723.

2. *Contracts of Insurance.* — *Drakeford v. Supreme Conclave, etc.*, 61 S. Car. 338.

**80.** 3. *Failure to Disclose One's Own Insolvency*

— *Delaware.* — *Freeman v. Topkis*, 1 Marv. (Del.) 174.

*Indiana.* — *West v. Graff*, 23 Ind. App. 410.

*Missouri.* — *Stein v. Hill*, 100 Mo. App. 38.

*New York.* — *Pinckney v. Darling*, 3 N. Y. App. Div. 553, affirmed 158 N. Y. 728.

*Ohio.* — *Wachtel v. Reichel*, 10 Ohio Cir. Dec. 531, 19 Ohio Cir. Ct. 626.

*Pennsylvania.* — *North American Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99.

*Wisconsin.* — *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881; *David Adler, etc., Clothing Co. v. Thorp*, 102 Wis. 70; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92.

*Evidence of Intent Not to Pay.* — *Gratton, etc., Mfg. Co. v. Troll*, 77 Mo. App. 339.

*Corporation Insolvent — Purchase by Manager with Knowledge — No Liability.* — *North American Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99.

*In Alabama* it has been said that "although a purchaser may intend to pay, yet if he has no reasonable expectation of being able to pay, and fails to disclose his condition, he commits a fraud which vitiates the purchase." *McKensie v. Rothschild*, 119 Ala. 419.

**81.** 1. *Application of Rule — Sales of Goods.* — *Wachtel v. Reichel*, 10 Ohio Cir. Dec. 531, 19 Ohio Cir. Ct. 626.

8. *Nondisclosure of Insolvency Is Fraud if Inquiry Is Made.* — See *Stein v. Hill*, 100 Mo. App. 38.

10. *Acceptance of Deposit by Insolvent Bank.* — *Chicago Title, etc., Co. v. Household Guest Co.*, 88 Ill. App. 126; *Cassidy v. Uhlmann*, 54 N. Y. App. Div. 205, affirmed 170 N. Y. 505.

**82.** 2. *Gordon v. Street*, (1899) 2 Q. B. 641; *Stackpole v. Hancock*, 40 Fla. 362; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413; *Manley v. Carl*, 11 Ohio Cir. Dec. 1, 20 Ohio Cir. Ct. 161; *Engeman v. Taylor*, 46 W. Va. 669; *Spencer v. Sandusky*, 46 W. Va. 582.

*Facts Must Be Material.* — *McCleary v. Chipman*, 32 Ind. App. 489.

**83.** 1. *Diverting Attention and Preventing Examination or Inquiry.* — *Alger v. Keith*, (C. C. A.) 105 Fed. Rep. 105.

**83.** 6. Partial Disclosure of Facts. — See note 2.

**84.** 7. Equitable Estoppel — Personal Property. — See note 5.

**85.** Requisites of Estoppel. — See note 2.

**VII. KNOWLEDGE AND INTENT** — 1. The General Rule — False Representations. — See note 3.

The Reasons. — See note 6.

**86.** 2. Knowledge that Representation Is False — *a.* ACTION OF DECEIT. — See note 7.

**88.** Deceit and Breach of Warranty Distinguished. — See note 1.

(1) *Sales of Real Property.* — See notes 3, 4.

(2) *Sales of Personal Property.* — See note 5.

**83.** 2. Partial Disclosure of Facts Equivalent to False Representation. — *Manley v. Carl*, 11 Ohio Cir. Dec. 1, 20 Ohio Cir. Ct. 161.

**84.** 5. Allowing Another to Deal as Owner of Personal Property. — See *Dayton v. Kidder*, 105 Ill. App. 107.

**85.** 2. General Requisites of Estoppel. — See *Vail v. Northwestern Mut. L. Ins. Co.*, 192 Ill. 567.

*Ignorance of Fraud.* — *Griffith v. Bergeson*, 115 Iowa 279.

**3. Knowledge and Intent — Fraudulent Intent Necessary** — *Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305; *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.*, 73 Ark. 542. *Connecticut.* — *Scholfield Gear, etc., Co. v. Scholfield*, 71 Conn. 1.

*Delaware.* — *Thomas v. Grise*, 1 Penn. (Del.) 381; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; *Clayton v. Cavender*, 1 Marv. (Del.) 191.

*Georgia.* — *Brooke v. Cole*, 108 Ga. 251; *Cooley v. King*, 113 Ga. 1163; *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799.

*Illinois.* — *Dickinson v. Atkins*, 100 Ill. App. 401; *Stockham v. Adams*, 96 Ill. App. 152; *Coolidge v. Rhodes*, 96 Ill. App. 17, reversed 199 Ill. 24; *Miller v. John*, 111 Ill. App. 566, affirmed 208 Ill. 173.

*Iowa.* — *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203.

*Kentucky.* — *Coffey v. Hendrick*, (Ky. 1901) 65 S. W. Rep. 127.

*Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1.

*Missouri.* — *Edwards v. Noel*, 88 Mo. App. 434; *Hequembourg v. Edwards*, 155 Mo. 514; *Paretti v. Rebenack*, 81 Mo. App. 494; *Chase v. Rusk*, 90 Mo. App. 25; *Culver v. Smith*, 82 Mo. App. 390.

*Nebraska.* — *Royal Neighbors of America v. Wallace*, (Neb. 1904) 99 N. W. Rep. 256.

*New Hampshire.* — *Anderson v. Scott*, 70 N. H. 350; *Spead v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

*New York.* — *L. D. Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507; *Benedict v. Guardian Trust Co.*, 91 N. Y. App. Div. 103, affirmed 180 N. Y. 558; *Darling v. Klock*, 33 N. Y. App. Div. 270, affirmed 165 N. Y. 623; *Frank v. Bradley, etc., Co.*, 42 N. Y. App. Div. 178; *Slayback v. Raymond*, 93 N. Y. App. Div. 326. *Oregon.* — *Martin v. Eagle Development Co.*, 41 Oregon 448.

*Pennsylvania.* — *Devers v. Sollenberger*, 25 Pa. Super. Ct. 64; *Nelson v. Steen*, 192 Pa. St. 581.

*Texas.* — *Hume v. Steele*, (Tex. Civ. App.

1900) 59 S. W. Rep. 812; *Downes v. Self*, 28 Tex. Civ. App. 356.

*Washington.* — *Northwestern Steamship Co. v. Horton*, 29 Wash. 565, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 85.

*Wisconsin.* — *Krause v. Busacker*, 105 Wis. 350.

**6. "No Actual Fraud Which Is Not Also Moral Fraud."** — *Northwestern Steamship Co. v. Horton*, 29 Wash. 565, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 85.

**86.** 7. Knowledge that Representation Is False — Action of Deceit — *United States.* — *Sprigg v. Commonwealth Title Ins., etc., Co.*, (C. C. A.) 131 Fed. Rep. 5.

*Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86.

*Florida.* — *Mizell v. Upchurch*, (Fla. 1903) 35 So. Rep. 9.

*Georgia.* — *Cooley v. King*, 113 Ga. 1163.

*Illinois.* — *Miller v. John*, 111 Ill. App. 56, affirmed 208 Ill. 173; *John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185.

*Iowa.* — *Boddy v. Henry*, 113 Iowa 462; *Warfield v. Clark*, 118 Iowa 69; *Riley v. Bell*, 120 Iowa 618; *Mentzer v. Sargeant*, 115 Iowa 527.

*Maryland.* — *Cahill v. Applegarth*, 98 Md. 493. See also *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. Rep. 346.

*Missouri.* — *Summers v. Metropolitan L. Ins. Co.*, 90 Mo. App. 691; *Lovelace v. Suter*, 93 Mo. App. 429; *Green v. Worman*, 83 Mo. App. 568; *Culver v. Smith*, 82 Mo. App. 390.

*New York.* — *Clover Farms Co. v. Schubert*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 434; *Ettlinger v. Weil*, 94 N. Y. App. Div. 291.

*Pennsylvania.* — *Anderson v. Snyder*, 14 Pa. Super. Ct. 424.

*South Carolina.* — *Poag v. Charlotte Oil, etc., Co.*, 61 S. Car. 190, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86.

*Washington.* — *Northwestern Steamship Co. v. Horton*, 29 Wash. 565, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86.

**88.** 1. Distinction Between Deceit and Warranty. — *Poag v. Charlotte Oil, etc., Co.*, 61 S. Car. 190, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88; *Northwestern Steamship Co. v. Horton*, 29 Wash. 565, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.

**3. Sales of Real Property.** — *Paretti v. Rebenack*, 81 Mo. App. 494.

*4. Williams v. Wilson*, 101 Ill. App. 541.

**5. Sales of Personal Property.** — *Mason v. Thornton*, (Ark. 1905) 84 S. W. Rep. 1048; *Boddy*

- 89.** (3) *Representations as to Solvency or Credit — Of Another.* — See note 2. Condition of Corporation. — See note 4.
- 90.** (5) *View that Knowledge of Falsity Is Not Necessary.* — See note 5.
- 91.** *b. RESCISSION OF CONTRACT AT LAW — General Rule.* — See note 1.
- 93.** *c. THE RULE IN EQUITY — (2) Rescission and Cancellation.* — See note 2.
- 94.** See note 1.
- 95.** *d. CONSTRUCTIVE KNOWLEDGE OF FALSITY — (1) In General.* — See note 4.
- (2) *Circumstances Imposing Duty to Know the Facts — (a) In General.* — See note 5.
- 96.** (b) *Facts Putting One on Inquiry.* — See note 1.
- (c) *Representations by Officers of Corporations.* — See note 2.
- 97.** (4) *Reckless Statements.* — See notes 1, 2, 3.
- 99.** (5) *False Assumption of Knowledge — Affirmation of Knowledge.* — See note 1.

*v. Henry*, 113 Iowa 462; *Edwards v. Noel*, 88 Mo. App. 434; *Poag v. Charlotte Oil, etc., Co.*, 61 S. Car. 190.

**89.** 2. *Representations as to Solvency or Credit of Another.* — *Jacobs v. Marks*, 83 Ill. App. 156, affirmed 183 Ill. 533.

4. *Representation by Officer as to Condition of Corporation.* — See *Henry v. Dennis*, 93 Me. 106.

**90.** 5. *View that Knowledge of Falsity or Recklessness Is Not Necessary.* — *Newman v. Clafflin Co.*, 107 Ga. 89; *Bishop v. Seal*, 87 Mo. App. 256; *Bauer v. Taylor*, (Neb. 1904) 98 N. W. Rep. 29; *Hitchcock v. Gothenburg Water Power Co.*, (Neb. 1903) 95 N. W. Rep. 638; *Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109; *Texas Cotton Products Co. v. Denny*, (Tex. Civ. App. 1903) 78 S. W. Rep. 557; *Beatty v. Bulger*, 28 Tex. Civ. App. 117.

**91.** 1. *Rescission of Contract at Law — Cases Requiring Knowledge of Falsity.* — *Powell v. F. C. Linde Co.*, 58 N. Y. App. Div. 261, affirmed 171 N. Y. 675.

**93.** 2. *Rescission and Cancellation of Contracts and Conveyances — Cases Holding Knowledge of Falsity Necessary.* — *Patent Title Co. v. Stratton*, 95 Fed. Rep. 745; *Jones v. Foster*, 175 Ill. 459; *Wenegar v. Bollenbach*, 180 Ill. 222; *Coolidge v. Rhodes*, 199 Ill. 24.

*Executed Contract.* — See *Seddon v. North Eastern Salt Co.*, (1905) 1 Ch. 326.

**94.** 1. *View that Knowledge of Falsity Is Not Necessary in Equity.* — *Newman v. Clafflin Co.*, 107 Ga. 89; *Weise v. Grove*, 123 Iowa 585; *Cabaness v. Holland*, 19 Tex. Civ. App. 383; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881.

**95.** 4. *Constructive Knowledge of Falsity of Representation.* — *Stevens v. Alabama State Land Co.*, 121 Ala. 450; *Lampman v. Lampman*, 118 Iowa 140; *Jack v. Hixon*, 23 Pa. Super. Ct. 453; *Devers v. Sollenberger*, 25 Pa. Super. Ct. 64.

5. *Circumstances Imposing Duty to Have Knowledge.* — *Ricker v. Sanitary Dist.*, 89 Fed. Rep. 251, reversed (C. C. A.) 91 Fed. Rep. 833; *Patent Title Co. v. Stratton*, 95 Fed. Rep. 745; *Sprigg v. Commonwealth Title Ins., etc., Co.*, (C. C. A.) 131 Fed. Rep. 5; *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *Snively v. Meixsell*,

97 Ill. App. 365; *Gallipolis Furniture Co. v. Symmes*, 10 Ohio Cir. Dec. 514, 19 Ohio Cir. Ct. 659; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881; *Krause v. Busacker*, 105 Wis. 350.

**96.** 1. *Knowledge of Facts Putting One on Inquiry.* — *Gordon v. Irvine*, 105 Ga. 144.

2. *Representations by Officers of Corporation.* — *Coolidge v. Rhodes*, 199 Ill. 24; *Drake v. Holbrook*, (Ky. 1902) 66 S. W. Rep. 512.

**97.** 1. *Reckless Statements — Knowledge of Falsity Implied or Imputed.* — *Cahill v. Applegarth*, 98 Md. 493.

2. *Action of Deceit — Prevailing Doctrine — United States.* — *Simon v. Goodyear Metallic Rubber Shoe Co.*, (C. C. A.) 105 Fed. Rep. 573; *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931.

*Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305.

*Connecticut.* — *Scholfield Gear, etc., Co. v. Scholfield*, 71 Conn. 1.

*District of Columbia.* — *Jackson, etc., Co. v. Fay*, 20 App. Cas. (D. C.) 105.

*Illinois.* — *Snively v. Meixsell*, 97 Ill. App. 365; *Miller v. John*, 208 Ill. 173.

*Iowa.* — *Riley v. Bell*, 120 Iowa 618.

*Missouri.* — *Paretti v. Rebenack*, 81 Mo. App. 494; *Edwards v. Noel*, 88 Mo. App. 434; *Lovelace v. Suter*, 93 Mo. App. 429; *People's Nat. Bank v. Central Trust Co.*, 179 Mo. 648.

*New York.* — *Ryder v. Wall*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 377; *Prahar v. Tousey*, 93 N. Y. App. Div. 507.

*Texas.* — *Downes v. Self*, 28 Tex. Civ. App. 356; *Davis v. Driscoll*, 22 Tex. Civ. App. 14.

*Utah.* — *Whitney v. Richards*, 17 Utah 226.

*Wisconsin.* — *Krause v. Busacker*, 105 Wis. 350.

**99.** 1. *False Assumption of Knowledge — Express Affirmation of Knowledge — Iowa.* — *Riley v. Bell*, 120 Iowa 618.

*Maryland.* — *Cahill v. Applegarth*, 98 Md. 493.

*Missouri.* — *People's Nat. Bank v. Central Trust Co.*, 179 Mo. 648.

*New York.* — *Frank v. Bradley, etc., Co.*, 42

**99.** Positive Statements as to One's Own Knowledge. — See note 3.

**101.** *f.* FALSE WARRANTY. — See notes 4, 5.

**102.** *g.* REPRESENTATIONS ON INFORMATION RECEIVED FROM OTHERS. — See note 3.

*i.* REPRESENTATIONS BY AGENTS AND PARTNERS — By Agent. — See note 6.

By Partner. — See note 7.

**3.** Intention that Representation Shall Deceive — *a.* IN GENERAL. — See note 8.

N. Y. App. Div. 178; *Prahar v. Tousey*, 93 N. Y. App. Div. 507.

*Rhode Island.* — *Piche v. Robbins*, 24 R. I. 325.

*Texas.* — *Davis v. Driscoll*, 22 Tex. Civ. App. 14.

*Vermont.* — *Johnson v. Cate*, 75 Vt. 100.

**99. 3.** Positive Statement as to One's Own Knowledge — *Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305; *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.*, 73 Ark. 542. *District of Columbia.* — *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1.

*Georgia.* — *Newman v. Claffin Co.*, 107 Ga. 89. *Illinois.* — *Snively v. Meixsell*, 97 Ill. App. 365; *Miller v. John*, 111 Ill. App. 56, *affirmed* 208 Ill. 173.

*Maine.* — *Braley v. Powers*, 92 Me. 203.

*Maryland.* — *Cahill v. Applegarth*, 98 Md. 493. *Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1.

*Missouri.* — *Paretti v. Rebenack*, 81 Mo. App. 494; *Culver v. Smith*, 82 Mo. App. 390; *Edwards v. Noel*, 88 Mo. App. 434; *Lovell v. Suter*, 93 Mo. App. 429; *Chase v. Rusk*, 90 Mo. App. 25; *Live Stock Remedy Co. v. White*, 90 Mo. App. 498.

*Nebraska.* — *Gerner v. Yates*, 61 Neb. 100.

*New Hampshire.* — *Anderson v. Scott*, 70 N. H. 350.

*New York.* — *L. D. Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507; *Ryder v. Wall*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 377.

*Oregon.* — *Martin v. Eagle Development Co.*, 41 Oregon 448.

*Pennsylvania.* — *Jack v. Hixon*, 23 Pa. Super. Ct. 453; *Thompson v. Chambers*, 13 Pa. Super. Ct. 213.

*Texas.* — *Texas Cotton Products Co. v. Denny*, (Tex. Civ. App. 1903) 78 S. W. Rep. 557; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109.

**101. 4.** Ontario Insurance Corporations Act — Policy Avoided for Material Statements Untrue. — *Jordan v. Provincial Provident Inst.*, 28 Can. Sup. Ct. 554.

**5.** *Trenchard v. Kell*, 127 Fed. Rep. 596; *Live Stock Remedy Co. v. White*, 90 Mo. App. 498; *Piche v. Robbins*, 24 R. I. 325.

**102. 3.** Title to Land — Certificate of Town Clerk and Advice of Counsel. — No fraud can be imputed by law to one who makes representations as to the title to real estate in honest reliance on the certificate of the town clerk and the advice of counsel. *Elwell v. Russell*, 71 Conn. 462.

**6.** Agent's Knowledge Imputable to Principal. — *Summers v. Metropolitan L. Ins. Co.*, 90 Mo. App. 691; *Delouche v. Metropolitan L. Ins. Co.*, 69 N. H. 587; *Argentine Min. Co. v. Benedict*, 18 Utah 183.

**7.** Notice to One Partner. — *Gill v. First Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 751.

**8.** Intention that Representation Shall Deceive — *United States.* — *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Sprigg v. Commonwealth Title Ins., etc., Co.*, (C. C. A.) 131 Fed. Rep. 5; *Bartol v. Walton, etc., Co.*, 92 Fed. Rep. 13; *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794.

*Alabama.* — *Bomar v. Rosser*, 131 Ala. 215; *King v. White*, 119 Ala. 429.

*Arkansas.* — *Hutchinson v. Gorman*, 71 Ark. 305; *Louisiana Molasses Co. v. Ft. Smith Wholesale Grocery Co.*, 73 Ark. 542; *Mason v. Thornton*, (Ark. 1905) 84 S. W. Rep. 1048.

*California.* — *Nisson v. Hood*, 140 Cal. 224.

*Connecticut.* — *Scholfield Gear, etc., Co. v. Scholfield*, 71 Conn. 1; *Wilson v. Nichols*, 72 Conn. 173.

*District of Columbia.* — *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1.

*Florida.* — *Mizell v. Upchurch*, (Fla. 1903) 35 So. Rep. 9.

*Georgia.* — *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *Fenley v. Moody*, 104 Ga. 790; *Brooke v. Cole*, 108 Ga. 251.

*Illinois.* — *Miller v. John*, 208 Ill. 173; *American Ins. Co. v. France*, 111 Ill. App. 382; *Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158; *Coolidge v. Rhodes*, 96 Ill. App. 17, *reversed* 199 Ill. 24; *Stockham v. Adams*, 96 Ill. App. 152; *Hale Elevator Co. v. Hale*, 201 Ill. 131.

*Iowa.* — *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203; *Higbee v. Trumbauer*, 112 Iowa 74.

*Kansas.* — *Fountain v. Kenney*, 66 Kan. 797. *Kentucky.* — *Dinwiddie v. Stone*, (Ky. 1899) 52 S. W. Rep. 814.

*Maine.* — *Henry v. Dennis*, 95 Me. 24.

*Maryland.* — See *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. Rep. 346.

*Massachusetts.* — *Cocke v. Greene*, 180 Mass. 525; *Walker v. Russell*, 186 Mass. 69.

*Missouri.* — *Hequembourg v. Edwards*, 155 Mo. 514; *Green v. Worman*, 83 Mo. App. 568; *Thompson v. Irwin*, 76 Mo. App. 418.

*Nebraska.* — *Stuart v. Staplehurst Bank*, 57 Neb. 569; *Royal Neighbors of America v. Wallace*, (Neb. 1904) 99 N. W. Rep. 256.

*New Hampshire.* — *Spread v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

*New York.* — *L. D. Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507; *Jones v. Jones*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 360; *Mahoney v. O'Neill*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 795; *Grosjean v. Galloway*, 82 N. Y. App. Div. 380; *Jackson v. Foley*, 53 N. Y. App. Div. 97; *Powell v. F. C. Linde Co.*, 58 N. Y. App. Div. 261, *affirmed* 171 N. Y. 675; *Bernstein v. Lester*, (Supm. Ct. App. T.) 84 N. Y. Supp. 496; *Ward v. Petrie*, 92 Hun (N.



**103. Representations Calculated to Deceive. — See note 3.**

Representations as to Solvency or Credit. — See notes 4, 5.

*b.* PRESUMPTION OF INTENT FROM KNOWLEDGE. — See note 7.**104. *d.* DISHONESTY OF MOTIVE OR INTENTION. — See note 2.****106. VIII. ACTING UPON REPRESENTATIONS — 1. General Rule that Representations Must Be Relied Upon. — See note 8.**

Y.) 605, *affirmed* 157 N. Y. 301, 68 Am. St. Rep. 790; *Pinckney v. Darling*, 3 N. Y. App. Div. 553, *affirmed* 158 N. Y. 728; *Frank v. Bradley, etc., Co.*, 42 N. Y. App. Div. 178; *Darling v. Klock*, 33 N. Y. App. Div. 270, *affirmed* 165 N. Y. 623.

Ohio. — *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

Oregon. — *Martin v. Eagle Development Co.*, 41 Oregon 448.

Pennsylvania. — *Devers v. Sollenberger*, 25 Pa. Super. Ct. 64.

Texas. — *Wuest v. Moehrig*, 24 Tex. Civ. App. 124; *Hume v. Steele*, (Tex. Civ. App. 1900) 59 S. W. Rep. 812; *Downes v. Self*, 28 Tex. Civ. App. 356; *Jones v. Gulf, etc., R. Co.*, 32 Tex. Civ. App. 198; *Collinson v. Jefferies*, 21 Tex. Civ. App. 653.

Utah. — *Whitney v. Richards*, 17 Utah 226.

Virginia. — *Dudley v. Minor*, 100 Va. 728; *Owens v. Boyd Land Co.*, 95 Va. 560; *Trammell v. Ashworth*, 99 Va. 646; *Scott v. Boyd*, 101 Va. 28.

West Virginia. — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

Wisconsin. — *Hart v. Moulton*, 104 Wis. 349, 65 Am. St. Rep. 881; *Allen v. Frawley*, 106 Wis. 638.

**103. 3. Acts and Declarations Showing Intent.**

— An intent to deceive may be shown by acts and declarations, and if a party is guilty of an act which defrauds another, his declarations that his intentions were honest cannot be taken as sufficient to overthrow the act. *Brown v. J. I. Case Plow Works*, 9 Kan. App. 685.

**4. Representation as to Solvency and Credit of Another.** — *Northwestern Steamship Co. v. Horton*, 29 Wash. 565, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

**5. Representations as to One's Own Financial Condition.** — *Clement v. Swanson*, 110 Iowa 106.

**7. Intent Presumed from Knowledge of Falsity.** — *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103; *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *People's Nat. Bank v. Central Trust Co.*, 179 Mo. 648.

**104. 2. Actual Dishonesty of Motive or Intention Not Necessary.** — *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1; *John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185.

**106. 8. Representations Must Be Acted Upon** — *England.* — See *Burrows v. Rhodes*, (1899) 1 Q. B. 816.

Canada. — *Doucet v. Clerex*, 23 Quebec Super. Ct. 107.

United States. — *Bartol v. Walton, etc., Co.*, 92 Fed. Rep. 13; *Sprigg v. Commonwealth Title Ins., etc., Co.*, (C. C. A.) 131 Fed. Rep. 5; *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Huber v. Guggenheim*, 89 Fed. Rep. 598.

Alabama. — *Bomar v. Rosser*, 131 Ala. 215; *Hooper v. Whitaker*, 130 Ala. 324.

Arkansas. — *Hutchinson v. Gorman*, 71 Ark. 305; *Mason v. Thornton*, (Ark. 1905) 84 S. W. Rep. 1048.

California. — *Dow v. Swain*, 125 Cal. 674.

Colorado. — *American Nat. Bank v. Hammond*, 25 Colo. 367; *Oakes v. Miller*, 11 Colo. App. 374.

Connecticut. — *Wilson v. Nichols*, 72 Conn. 173; *Lovejoy v. Isbell*, 73 Conn. 368.

Delaware. — *Clayton v. Cavender*, 1 Marv. (Del.) 191; *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; *Freeman v. Topkis*, 1 Marv. (Del.) 174.

District of Columbia. — *Browning v. National Capital Bank*, 13 App. Cas. (D. C.) 1; *Jackson, etc., Co. v. Fay*, 20 App. Cas. (D. C.) 105.

Florida. — *Stackpole v. Hancock*, 40 Fla. 362; *Mizell v. Upchurch*, (Fla. 1903) 35 So. Rep. 9.

Georgia. — *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *Newman v. Clafin Co.*, 107 Ga. 89; *Fenley v. Moody*, 104 Ga. 790.

Illinois. — *John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185; *Dickinson v. Atkins*, 100 Ill. App. 401; *Williams v. Wilson*, 101 Ill. App. 541; *Stockham v. Adams*, 96 Ill. App. 152; *Coolidge v. Rhodes*, 96 Ill. App. 17, *reversed* 199 Ill. 24; *Wenegar v. Bollenbach*, 180 Ill. 222; *Jacobs v. Marks*, 83 Ill. App. 156, *affirmed* 183 Ill. 533; *Miller v. John*, 208 Ill. 173; *Kehl v. Abram*, 210 Ill. 218; *Hale Elevator Co. v. Hale*, 201 Ill. 131; *Tilden v. Blackwell*, 94 Ill. App. 605.

Indiana. — *Ludwig v. Petrie*, 32 Ind. App. 550.

Iowa. — *Riley v. Bell*, 120 Iowa 618; *Sykes v. Reiher*, (Iowa 1902) 91 N. W. Rep. 920; *Burnett v. Hensley*, 118 Iowa 575; *Lev v. Metropolitan L. Ins. Co.*, 120 Iowa 203.

Kansas. — *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106; *Lesem v. Miller*, 10 Kan. App. 579, 62 Pac. Rep. 538; *Missouri Pac. R. Co. v. Goodholm*, 61 Kan. 758.

Kentucky. — *Pineville Land, etc., Co. v. Hollingsworth*, (Ky. 1899) 53 S. W. Rep. 279; *Dinwiddie v. Stone*, (Ky. 1899) 52 S. W. Rep. 814; *Coffey v. Hendrick*, (Ky. 1901) 65 S. W. Rep. 127.

Maine. — *Henry v. Dennis*, 95 Me. 24.

Maryland. — *Cahill v. Applegarth*, 98 Md. 493.

Massachusetts. — *Arnold v. Teel*, 182 Mass. 1; *Fottler v. Moseley*, 185 Mass. 563; *Cocke v. Greene*, 180 Mass. 525; *Lee v. Tarplin*, 183 Mass. 52.

Minnesota. — *Mountain v. Day*, 91 Minn. 249.

Missouri. — *Meier v. Jackson*, 78 Mo. App. 396; *Hequembourg v. Edwards*, 155 Mo. 514; *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577; *Paretti v. Rebenack*, 81 Mo. App. 494; *Culver v. Smith*, 82 Mo. App. 390; *Edwards v. Noel*, 88 Mo. App. 434; *Rhodes v. Dickerson*, 95 Mo. App. 395; *Chase v. Rusk*, 90 Mo. App. 25.

**108.** See note 1.

**109.** 2. Knowledge or Belief that Representation Is False — *a.* IN GENERAL. — See note 5.

**110.** *b.* WHEN KNOWLEDGE MAY BE INFERRED. — See note 3.

**111.** *c.* AGENT'S KNOWLEDGE IMPUTABLE TO PRINCIPAL. — See note 4.

3. Effect of Independent Examination or Investigation. — See note 5.

**112.** Artifice to Prevent Ascertaining the Truth. — See note 5.

4. Ignorance of Representation. — See note 6.

**113.** 6. Several Inducements Contributing — *a.* IN GENERAL. — See note 5.

*Nebraska.* — McKibbin *v.* Day, (Neb. 1904) 98 N. W. Rep. 845; Stuart *v.* Staplehurst Bank, 57 Neb. 569; Murphey *v.* Illinois Trust, etc., Bank, 57 Neb. 519; Jones *v.* Stewart, 62 Neb. 207; Hitchcock *v.* Gothenburg Water Power, etc., Co., (Neb. 1903) 95 N. W. Rep. 638; Canon *v.* Farmers' Bank, (Neb. 1902) 91 N. W. Rep. 585; Perry *v.* Rogers, 62 Neb. 898.

*New York.* — Seis *v.* Plaisantin, 52 N. Y. App. Div. 206; Darling *v.* Klock, 33 N. Y. App. Div. 270, affirmed 165 N. Y. 623; Reynolds *v.* Leyden, 39 N. Y. App. Div. 650; Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178; Ettlinger *v.* Weil, 94 N. Y. App. Div. 291; Prahar *v.* Tousey, 93 N. Y. App. Div. 507; Powell *v.* F. C. Linde Co., 58 N. Y. App. Div. 261, affirmed 171 N. Y. 675; Tindle *v.* Birkett, 57 N. Y. App. Div. 450, reversed 171 N. Y. 520, 89 Am. St. Rep. 822; L. D. Garrett Co. *v.* Clark, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610, reversed 102 N. Y. App. Div. 611; Slayback *v.* Raymond, 93 N. Y. App. Div. 326; Jackson *v.* Foley, 53 N. Y. App. Div. 97; Sarasohn *v.* Miles, 52 N. Y. App. Div. 628, affirmed 169 N. Y. 573; Grosjean *v.* Galloway, 82 N. Y. App. Div. 380; Mahoney *v.* O'Neill, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 795; Jones *v.* Jones, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 360.

*North Dakota.* — Chilson *v.* Houston, 9 N. Dak. 498.

*Ohio.* — Northwestern Mut. L. Ins. Co. *v.* Risley, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Oregon.* — Martin *v.* Eagle Development Co., 41 Oregon 448.

*Pennsylvania.* — Devers *v.* Sollenberger, 25 Pa. Super. Ct. 64.

*Tennessee.* — Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374.

*Texas.* — Cabaness *v.* Holland, 19 Tex. Civ. App. 383; McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109; Wuest *v.* Moehrig, 24 Tex. Civ. App. 124; Hume *v.* Steele, (Tex. Civ. App. 1900) 59 S. W. Rep. 812; Downes *v.* Self, 28 Tex. Civ. App. 356; Hollifield *v.* Landrum, 31 Tex. Civ. App. 187; Jones *v.* Gulf, etc., R. Co., 32 Tex. Civ. App. 198; International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251; Collinson *v.* Jefferies, 21 Tex. Civ. App. 653.

*Utah.* — Whitney *v.* Richards, 17 Utah 226.

*Virginia.* — Owens *v.* Boyd Land Co., 95 Va. 560; Grosh *v.* Ivanhoe Land, etc., Co., 95 Va. 161; Dudley *v.* Minor, 100 Va. 728; Trammell *v.* Ashworth, 99 Va. 646; Reed *v.* Gold, 102 Va. 37.

*Wisconsin.* — Hart *v.* Moulton, 104 Wis. 349,

76 Am. St. Rep. 881; Allen *v.* Frawley, 106 Wis. 638; Krause *v.* Busacker, 105 Wis. 350; Shaw *v.* Gilbert, 111 Wis. 165.

**Trivial Representation.** — When a false representation is alleged, which is of so trivial a character that it cannot be believed to have affected the vendee's judgment, it furnishes no ground on which to rescind the sale. Garrison *v.* Technic Electrical Works, 59 N. J. Eq. 440.

**108.** 1. Provident Loan Trust Co. *v.* McIntosh, 68 Kan. 460, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 108.

**109.** 5. Representations Known to Be False Not Fraud. — Merritt *v.* Morris, 132 Ala. 190; Hooper *v.* Whitaker, 130 Ala. 324; Merchants', etc., Bank *v.* Cleland, (Ky. 1902) 67 S. W. Rep. 386; Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414; Estes *v.* Desnoyers Shoe Co., 155 Mo. 577; Martin *v.* Eagle Development Co., 41 Oregon 448.

**110.** 3. When Knowledge of Falsity of Representations May Be Inferred. — Hooper *v.* Whitaker, 130 Ala. 324. See also Hirschberg Optical Co. *v.* Michaelson, (Neb. 1901) 95 N. W. Rep. 461.

**111.** 4. Agent's Knowledge of Falsity of Representation. — McIntire *v.* Pryor, 173 U. S. 38; Cook *v.* Boyd, (Iowa 1904) 99 N. W. Rep. 1063; L. D. Garrett Co. *v.* Clark, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610, reversed 102 N. Y. App. Div. 611. See also Lee *v.* Tarplin, 183 Mass. 52.

**5. Effect of Independent Examination or Investigation — General Rule — United States.** — Alger *v.* Keith, (C. C. A.) 105 Fed. Rep. 105; Brown *v.* Smith, 109 Fed. Rep. 26; Stratton *v.* Dines, 126 Fed. Rep. 968.

*Kansas.* — Munkres *v.* McCaskill, 64 Kan. 516.

*Kentucky.* — Sohan *v.* Gibson, (Ky. 1904) 80 S. W. Rep. 1173; Newton *v.* Levy, (Ky. 1892) 82 S. W. Rep. 259.

*Mississippi.* — Chicago Bldg., etc., Co. *v.* Higginbotham, (Miss. 1901) 29 So. Rep. 79.

*Ohio.* — McMullen *v.* Griggs, 23 Ohio Cir. Ct. 417.

*Virginia.* — West End Real Estate Co. *v.* Claiborne, 97 Va. 734.

*Washington.* — Zilke *v.* Woodley, 36 Wash. 84.

**112.** 5. Artifice to Prevent Ascertaining the Truth. — Alger *v.* Keith, (C. C. A.) 105 Fed. Rep. 105.

**6. Ignorance of Representation.** — Sprigg *v.* Commonwealth Title Ins., etc., Co., (C. C. A.) 131 Fed. Rep. 5.

**113.** 5. Immaterial that Other Inducements Contributed — *United States.* — Hindman *v.*

**114.** *b.* REPRESENTATIONS PARTLY FALSE. — See note 1.

*c.* RELIANCE IN PART ON EXAMINATION OR INVESTIGATION. — See note 2.

**115.** IX. RIGHT TO RELY ON REPRESENTATIONS — 1. In General. — See note 7.

2. Negligence in General. — See note 8.

**116.** See note 1.

**117.** Reason for the Doctrine. — See note 1.

Estoppel by False Representations. — See note 3.

**118.** 6. Commendatory Expressions and Puffing. — See note 4.

**120.** 9. Only Ordinary Prudence and Diligence Required. — See note 1.

10. Facts Peculiarly Within Party's Knowledge or Means of Knowledge. — See note 3.

Louisville First Nat. Bank, (C. C. A.) 112 Fed. Rep. 931.

*Alabama.* — Rice v. Gilbreath, 119 Ala. 424.

*Connecticut.* — Scholfield Gear, etc., Co. v. Scholfield, 71 Conn. 1.

*Delaware.* — Thomas v. Grise, 1 Penn. (Del.) 381.

*Illinois.* — Snively v. Meixsell, 97 Ill. App. 365.

*Iowa.* — Dashiell v. Harshman, 113 Iowa 283.

*Maine.* — Braley v. Powers, 92 Me. 203.

*Massachusetts.* — Light v. Jacobs, 183 Mass. 206.

*Vermont.* — Cameron v. Estabrooks, 73 Vt. 73.

*Canada.* — See Barnard v. Riendeau, 31 Can. Sup. Ct. 234.

**Report of Commercial Agency — Statement of Buyer.** — A sale of goods made in the faith of the entire report of a commercial agency as to the financial standing of the proposed buyer, and not particularly in reliance on a statement made by him to the agency, cannot be rescinded because such statement was false and untrue. Berkson v. Heldman, 58 Neb. 595; Poška v. Stearns, 56 Neb. 541, 71 Am. St. Rep. 688.

**114. 1. Several Representations False in Part Only.** — Stackpole v. Hancock, 40 Fla. 362.

**2. Reliance in Part upon Examination or Investigation.** — Dow v. Swain, 125 Cal. 674.

**115. 7. Right to Rely on Representations.** — Paretti v. Rebenack, 81 Mo. App. 494; Davis v. Phoenix Ins. Co., 81 Mo. App. 264; Edwards v. Noel, 88 Mo. App. 434; Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116. See Driver v. White, (Tenn. Ch. 1898) 51 S. W. Rep. 994. See also Engeman v. Taylor, 46 W. Va. 669.

**8. Exercise of Ordinary Diligence Question for Jury.** — Summerour v. Pappa, 119 Ga. 1; Davis Sewing Mach. Co. v. Crutchfield, 117 Ga. 873; Kehl v. Abram, 210 Ill. 218, 102 Am. St. Rep. 158, affirming 112 Ill. App. 77.

**116. 1. United States.** — Brown v. Smith, 109 Fed. Rep. 26; U. S. v. Beebe, (C. C. A.) 92 Fed. Rep. 244, reversed 180 U. S. 343; American Fine Art Co. v. Reeves Pulley Co., (C. C. A.) 127 Fed. Rep. 808.

*California.* — Choate v. Hyde, 129 Cal. 580; Oppenheimer v. Clunie, 142 Cal. 313.

*Georgia.* — Fenley v. Moody, 104 Ga. 790.

*Illinois.* — Jones v. Foster, 175 Ill. 459; Williams v. Wilson, 101 Ill. App. 541.

*Massachusetts.* — Lee v. Tarplin, 183 Mass. 52.

*Missouri.* — Mires v. Summerville, 85 Mo. App. 183; Davis v. Phoenix Ins. Co., 81 Mo. App. 264.

*Nebraska.* — Osborne v. Missouri Pac. R. Co., (Neb. 1904) 98 N. W. Rep. 685.

*Ohio.* — Graft v. Western Methodist Book Concern, 11 Ohio Dec. 152, 8 Ohio N. P. 240.

*Pennsylvania.* — Kreamer v. Smith, 187 Pa. St. 209; Cote v. Christy, 10 Pa. Super. Ct. 318.

*Virginia.* — West End Real Estate Co. v. Claiborne, 97 Va. 734; American Net., etc., Co. v. Mayo, 97 Va. 182; Fischer v. Lee, 98 Va. 159.

*Washington.* — Griffith v. Strand, 19 Wash. 686; Mulholland v. Washington Match Co., 35 Wash. 315.

*Wisconsin.* — Dowagiac Mfg. Co. v. Schroeder, 108 Wis. 109; Bostwick v. Mutual L. Ins. Co., 116 Wis. 392.

**117. 1. Reason for This Doctrine.** — Munkres v. McCaskill, 64 Kan. 516, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117; Bostwick v. Mutual L. Ins. Co., 116 Wis. 392, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117.

**3. Estoppel.** — Goree v. Goree, 22 Tex. Civ. App. 470; Bostwick v. Mutual L. Ins. Co., 116 Wis. 392.

**118. 4. Commendatory Expressions and Puffing.** — Consumers' Brewing Co. v. Tobin, 19 App. Cas. (D. C.) 353, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 118; Terhune v. Coker, 107 Ga. 352; Burnett v. Hensley, 118 Iowa 575; German Nat. Bank v. Nagel, (Ky. 1904) 82 S. W. Rep. 433; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308.

**120. 1. Only Ordinary, Not Extraordinary, Diligence Required.** — Thomas v. Grise, 1 Penn. (Del.) 381; Osborne v. Missouri Pac. R. Co., (Neb. 1904) 98 N. W. Rep. 685; Shaw v. Gilbert, 111 Wis. 165. See also Dickinson v. Atkins, 100 Ill. App. 401; Riley v. Bell, 120 Iowa 618; Kaiser v. Nummerdor, 120 Wis. 234.

**8. Facts Peculiarly, though Not Exclusively, Within Party's Knowledge.** — United States, — Old Colony Trust Co. v. Dubuque Light, etc., Co., 89 Fed. Rep. 794.

*Alabama.* — King v. White, 119 Ala. 429; Rice v. Gilbreath, 119 Ala. 424.

*California.* — Dow v. Swain, 125 Cal. 674.

*Colorado.* — Oakes v. Miller, 11 Colo. App. 374.

*Connecticut.* — Wilson v. Nichols, 72 Conn. 173; Shelton v. Healy, 74 Conn. 265.

*Delaware.* — Thomas v. Grise, 1 Penn. (Del.) 381.

*Georgia.* — Fenley v. Moody, 104 Ga. 790.

*Idaho.* — Watson v. Molden, (Idaho 1905) 79

**121.** Opportunity to Ascertain the Truth. — See note 2.

Employment of Another to Make an Examination. — See note 3.

**122.** 11. Doctrine that Inquiry Is Not Necessary if Representation Is Positive.

— See notes 2, 3, 4.

12. Relation of Trust or Confidence — *a.* IN GENERAL. — See note 5.*b.* PARTICULAR RELATIONS — Trustee and Beneficiary, Principal and Agent,

Partners, Etc. — See note 7.

**123.** See note 2.*c.* CONFIDENCE ACTUALLY REPOSED. — See notes 6, 7.

13. Artifice to Prevent Inquiry or Knowledge. — See note 8.

**124.** 14. Representations by Third Persons — Collusion. — See note 1.15. Particular Representations — *b.* REPRESENTATIONS AS TO VALUE.

— See note 7.

**125.** Market Price or Value — Where Parties Deal on Equal Footing. — See note 1.

Parties Not Dealing at Arm's Length and on Equal Terms. — See notes 2, 3.

**126.** Property Situated at a Distance. — See note 2.*c.* REPRESENTATIONS AS TO RENTAL, INCOME, OR PROFITS. —

See notes 6, 7.

Pac. Rep. 503, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120.

*Illinois.* — Haines *v.* Downey, 86 Ill. App. 373.*Indiana.* — Coulter *v.* Clark, 160 Ind. 311.*Iowa.* — McDowell *v.* Caldwell, 116 Iowa 475; Riley *v.* Bell, 120 Iowa 618.*Missouri.* — Chase *v.* Rusk, 90 Mo. App. 25.*Nebraska.* — McKibbin *v.* Day, (Neb. 1904)98 N. W. Rep. 845; Perry *v.* Rogers, 62 Neb. 898.*Texas.* — Jones *v.* Gulf, etc., R. Co., 32 Tex. Civ. App. 198.*Washington.* — Mulholland *v.* Washington Match Co., 35 Wash. 315.*Wisconsin.* — Bostwick *v.* Mutual L. Ins. Co., 116 Wis. 392, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120; Horton *v.* Lee, 106 Wis. 439; Krause *v.* Busacker, 105 Wis. 350; Benalokin *v.* Guthrie, 111 Wis. 554; Hubbard *v.* McLean, 115 Wis. 9.**121.** 2. Dow *v.* Swain, 125 Cal. 674.**3.** Employment of Third Person to Make Examination. — Dow *v.* Swain, 125 Cal. 674; Mulholland *v.* Washington Match Co., 35 Wash. 315.**122.** 2. Doctrine that No Inquiry Necessary Where Representation Is Positive. — Dow *v.* Swain, 125 Cal. 674; Watson *v.* Molden, (Idaho 1905) 79 Pac. Rep. 503, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122; Leonard *v.* Springer, 98 Ill. App. 530, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122, reversed 197 Ill. 532; Swinney *v.* Patterson, 25 Nev. 411. See also Perry *v.* Rogers, 62 Neb. 898.**3.** Hunt *v.* Barker, 22 R. I. 18, 84 Am. St. Rep. 812.**4.** Rule in England. — See Watson *v.* Molden, (Idaho 1905) 79 Pac. Rep. 503, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122.**5.** Relation of Trust or Confidence. — Hess *v.* Draffen, 99 Mo. App. 580; Potter *v.* Necedah Lumber Co., 105 Wis. 25.**7.** Principal and Agent. — Faust *v.* Hasford, 119 Iowa 97; Tilden *v.* Blackwell, 94 Ill. App. 605.**123.** 2. Persons Jointly Entering into Business Enterprise. — Johnson *v.* Gavitt, 114 Iowa 183; Hess *v.* Draffen, 99 Mo. App. 580.**6.** Known Trust and Confidence Actually Re-posed. — King *v.* White, 119 Ala. 429; Haines *v.* Downey, 86 Ill. App. 373; McDowell *v.* Caldwell, 116 Iowa 475; Slayback *v.* Raymond, 93 N. Y. App. Div. 326; Atherholt *v.* Hughes, 209 Pa. St. 156; Krcamer *v.* Smith, 187 Pa. St. 209; Potter *v.* Necedah Lumber Co., 105 Wis. 25.**7.** Trust and Confidence Necessarily Reposed. — Chase *v.* Rusk, 90 Mo. App. 25.**8.** Artifice to Prevent Inquiry or Knowledge. — Strand *v.* Griffith, (C. C. A.) 97 Fed. Rep. 854; Stackpole *v.* Hancock, 40 Fla. 362; Haines *v.* Downey, 86 Ill. App. 373; Munkres *v.* McCaskill, 64 Kan. 516; Frank *v.* Bradley, etc., Co., 42 N. Y. App. Div. 178; Corbett *v.* McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278; Horton *v.* Lee, 106 Wis. 439.**124.** 1. Representations by Third Persons. — L. D. Garrett Co. *v.* McComb, 58 N. Y. App. Div. 419.**Representations by Remote Vendors — No Rescission.** — Jones *v.* Middlesborough Town Lands Co., 106 Ky. 194.**7.** Mayberry *v.* Rogers, 81 Ill. App. 581; Perkins *v.* Embry, (Ky. 1903) 72 S. W. Rep. 788, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 124; German Nat. Bank *v.* Nagel, (Ky. 1904) 82 S. W. Rep. 433; Griffith *v.* Strand, 19 Wash. 686.**125.** 1. Representations as to Market Price Value. — Perkins *v.* Embry, (Ky. 1903) 72 S. W. Rep. 788, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.**2.** Relation of Trust and Confidence. — Perkins *v.* Embry, (Ky. 1903) 72 S. W. Rep. 788, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.**3.** Value Peculiarly Within Knowledge of Party Making Representation. — Mayberry *v.* Rogers, 81 Ill. App. 581; Perkins *v.* Embry, (Ky. 1903) 72 S. W. Rep. 788, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125; Jackson *v.* Foley, 53 N. Y. App. Div. 97.**126.** 2. Representations as to Distant Property. — Stackpole *v.* Hancock, 40 Fla. 362; Wenegar *v.* Bollenbach, 180 Ill. 222; Mountain *v.* Day, 91 Minn. 249; Bishop *v.* Seal, 87 Mo. App. 256; Jackson *v.* Foley, 53 N. Y. App. Div. 97; Whitney *v.* Richards, 17 Utah 226.**6.** Statement as to Rental or Income of Property.

**127. d. REPRESENTATIONS AS TO PRICE PAID AND OFFERS MADE.** — See notes 1, 2.

**128. e. REPRESENTATIONS AS TO QUALITY OR CONDITION OF PROPERTY — Real Property.** — See notes 1, 2.

**129. Personal Property.** — See note 2.

**Property Situated at a Distance.** — See note 6.

**130. f. REPRESENTATIONS AS TO TITLE AND INCUMBRANCES.** — See note 2.

**131. g. REPRESENTATIONS AS TO LOCATION AND BOUNDARIES.** — See note 1.

**h. REPRESENTATIONS AS TO QUANTITY.** — See note 3.

**132. See note 1.**

**i. FAILURE TO EXAMINE RECORDS.** — See note 2.

**133. j. REPRESENTATIONS AS TO SOLVENCY OR CREDIT — As to Solvency or Credit of Another.** — See note 3.

**134. As to One's Own Solvency or Credit.** — See note 1.

**k. IGNORANCE AND MISREPRESENTATION AS TO CONTENTS OF INSTRUMENT — Ignorance Without Misrepresentation.** — See notes 3, 4.

**135. Misrepresentation as to Contents.** — See notes 1, 2, 3.

**137. X. DAMAGE OR PREJUDICE — 1. Necessity in General.** — See notes 5, 6.

— Old Colony Trust Co. v. Dubuque Light, etc., Co., 89 Fed. Rep. 794; Sykes v. Reiher, (Iowa 1902) 91 N. W. Rep. 920; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308; Seis v. Plaisantin, 52 N. Y. App. Div. 206; Powell v. F. C. Linde Co., 49 N. Y. App. Div. 286.

**126. 7. Statements as to Profits.** — Nisson v. Hood, 140 Cal. 224; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308.

**127. 1. View that Statements as to Price Paid and Offers Made Are Not Fraud.** — Mayberry v. Rogers, 81 Ill. App. 581; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308.

**2. View that Such Representations Are Fraud.** — Johnson v. Gavitt, 114 Iowa 183; Warren v. Miller, (Iowa 1904) 99 N. W. Rep. 127; Strickland v. Graybill, 97 Va. 602; Barnard v. Riendeau, 71 Can. Sup. Ct. 234.

**128. 1. Representations as to Quality or Condition of Real Property.** — Lee v. Tarplin, 183 Mass. 52.

**2. Representations that Land Is Not Subject to Overflow.** — Oakes v. Miller, 11 Colo. App. 374.

**129. 2. Representations as to Quality of Personal Property.** — Griffith v. Strand, 19 Wash. 686.

**6. Contrary View.** — Mountain v. Day, 91 Minn. 249; Bishop v. Seal, 87 Mo. App. 256.

**130. 2. Hahl v. Brooks,** 114 Ill. App. 644, affirmed 213 Ill. 134; Loucks v. Taylor, 23 Ind. App. 245; Riley v. Bell, 120 Iowa 618; Bishop v. Seal, 87 Mo. App. 256; Paretti v. Rebenack, 81 Mo. App. 494; Singleton v. Houston, 35 Tex. Civ. App. 10. See Corbett v. McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.

**131. 1. Representations as to Boundaries and Location of Land.** — Sykes v. Reiher, (Iowa 1902) 91 N. W. Rep. 920; Rasmussen v. Reedy, 14 S. Dak. 15.

**3. May Rely on Representations as to Quantity of Land.** — Ludwig v. Petrie, 32 Ind. App. 550; Boddy v. Henry, 113 Iowa 462; Atherholt v. Hughes, 209 Pa. St. 156.

**132. 1. Opportunity to Examine — No Fraud.** — Griffith v. Strand, 19 Wash. 686.

**2. Ordinary Diligence Does Not Generally Require Examination of Records.** — Kehl v. Abram, 210 Ill. 218, 102 Am. St. Rep. 158; Faust v. Hosford, 119 Iowa 97; Swinney v. Patterson, 25 Nev. 411.

**133. 3. Representations as to Solvency or Credit of Another.** — Dow v. Swain, 125 Cal. 674; Browning v. National Capital Bank, 13 App. Cas. (D. C.) 1. See Henry v. Dennis, 93 Me. 106; Walker v. Russell, 186 Mass. 69; Shaw v. Gilbert, 111 Wis. 165.

**134. 1. Representations as to One's Own Solvency and Credit May Be Relied Upon.** — Freeman v. Topkis, 1 Marv. (Del.) 174; Morris v. Posner, 111 Iowa 335; Hamilton Brown Shoe Co. v. Milliken, 62 Neb. 116; Pekin Plow Co. v. Wilson, 66 Neb. 115; Fitchard v. Doheny, 93 N. Y. App. Div. 9.

**Future Credit.** — Goldsmith v. Stern, (Supm. Ct. App. T.) 84 N. Y. Supp. 869.

**3. Mere Ignorance of Contents of Instrument.** — Harrison v. Wilson Lumber Co., 119 Ga. 6; Magee v. Verity, 97 Mo. App. 486; Johnston v. Covenant Mut. L. Ins. Co., 93 Mo. App. 580; Osborne v. Missouri Pac. R. Co., (Neb. 1904) 98 N. W. Rep. 685; Leszynsky v. Ross, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 652; Gulf, etc., R. Co. v. Fenn, 33 Tex. Civ. App. 352; Bostwick v. Mutual L. Ins. Co., 116 Wis. 302.

**4. Taking Advantage of Ignorance of Illiterate Person.** — Loucks v. Tyler, 23 Ind. App. 245.

**135. 1. Misrepresentations as to Contents of Instrument.** — Dunham Lumber Co. v. Holt, 123 Ala. 336; Jones v. Foster, 175 Ill. 459; Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691; Magee v. Verity, 97 Mo. App. 486.

**2. View that Failure to Read Does Not Bar Relief.** — Heitsman v. Wirtz, 125 Iowa 207; Alexander v. Brogley, 62 N. J. L. 584.

**3. Persons Illiterate Unable to Read.** — Gore v. Malsby, 110 Ga. 893; Pioneer Cooperation Co. v. Romanowicz, 186 Ill. 9; Indiana, etc., R. Co. v. Fowler, 201 Ill. 152, 94 Am. St. Rep. 158; Siblev v. Holcomb, 104 Ky. 670.

**137. 5. Damage or Prejudice Is Necessary —**

**137.** 2. Action of Deceit. — See note 8.

**138.** 3. Rescission of Contract at Law. — See note 2.

**139.** 4. Rescission and Other Relief in Equity — Rescission. — See note 2.

**140.** 6. Sufficiency of Damage or Prejudice — *a.* IN GENERAL. — See note 3.

Amount of Damage Immaterial. — See note 4.

*c.* NECESSITY FOR ACTUAL PECUNIARY DAMAGE. — See note 6.

Rescission of Contracts. — See note 7.

**142.** *d.* CONTINGENT DAMAGES — (1) *In General* — Rescission and Cancellation. — See note 2.

(2) *Future Damages Inevitable*. — See note 3.

*United States.* — *In re Pennewell*, (C. C. A.) 119 Fed. Rep. 139.

*Arkansas.* — *Storthez v. Arnold*, (Ark. 1905)

84 S. W. Rep. 1036; *Louisiana Molasses Co. v.*

*Ft. Smith Wholesale Grocery Co.*, 73 Ark. 542.

*Connecticut.* — *Wilson v. Nichols*, 72 Conn.

173.

*Georgia.* — *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799.

*Illinois.* — *Coolidge v. Rhodes*, 96 Ill. App.

17, reversed 199 Ill. 24.

*Indiana.* — *Ludwig v. Petrie*, 32 Ind. App.

550.

*Iowa.* — *Ley v. Metropolitan L. Ins. Co.*, 120

*Iowa* 203.

*Maine.* — *Henry v. Dennis*, 95 Me. 24.

*Missouri.* — *Bishop v. Seal*, 87 Mo. App. 256.

*Nebraska.* — *Carrington v. Omaha L. Assoc.*,

59 Neb. 116; *Jones v. Stewart*, 62 Neb. 207;

*Canon v. Farmers' Bank*, (Neb. 1902) 91 N. W.

Rep. 585.

*New York.* — *Slayback v. Raymond*, 93 N. Y.

App. Div. 326; *Darling v. Klock*, 33 N. Y. App.

Div. 270, affirmed 165 N. Y. 623; *Reynolds v.*

*Leyden*, 39 N. Y. App. Div. 650; *Grosjean v.*

*Galloway*, 82 N. Y. App. Div. 380.

*North Dakota.* — *Nelson v. Grondahl*, 12 N.

Dak. 130.

*Oregon.* — *Martin v. Eagle Development Co.*,

41 Oregon 448.

*Utah.* — *Whitney v. Richards*, 17 Utah 226.

*Wisconsin.* — *Hurlbert v. T. D. Kellogg Lum-*

*ber, etc., Co.*, 115 Wis. 225.

**137.** 6. Bomar v. Rosser, 131 Ala. 215,

citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.)

137.

**8. Damages Necessary to Sustain Action of De-**

**ceit** — *United States.* — *Simon v. Goodyear*

*Metallic Rubber Shoe Co.*, (C. C. A.) 105 Fed.

Rep. 573; *Sprigg v. Commonwealth Title Ins.*,

*etc., Co.*, (C. C. A.) 131 Fed. Rep. 5.

*Arkansas.* — *Hutchinson v. Gorman*, 71 Ark.

305; *Mason v. Thornton*, (Ark. 1905) 84 S. W.

Rep. 1048.

*Colorado.* — *Oakes v. Miller*, 11 Colo. App.

374.

*District of Columbia.* — *Jackson, etc., Co. v.*

*Fay*, 20 App. Cas. (D. C.) 105, citing 14 AM.

AND ENG. ENCYC. OF LAW (2d ed.) 137; *Brown-*

*ing v. National Capital Bank*, 13 App. Cas. (D.

C.) 1.

*Florida.* — *Mizell v. Upchurch*, (Fla. 1903)

35 So. Rep. 9.

*Georgia.* — *Fenley v. Moody*, 104 Ga. 790.

*Illinois.* — *Dickinson v. Atkins*, 100 Ill. App.

401; *Tilden v. Blackwell*, 94 Ill. App. 605; *John*

*V. Farwell Co. v. Nathanson*, 99 Ill. App. 185;

*American Ins. Co. v. France*, 111 Ill. App. 382;

*Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep.

158; *Miller v. John*, 208 Ill. 173; *Jacobs v.*

*Marks*, 83 Ill. App. 156, affirmed 183 Ill. 533.

*Iowa.* — *Riley v. Bell*, 120 Iowa 618.

*Maryland.* — *Cahill v. Applegarth*, 98 Md. 493.

*Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1.

*Missouri.* — *Rhodes v. Dickerson*, 95 Mo.

App. 395; *Edwards v. Noel*, 88 Mo. App. 434;

*Paretti v. Rebenack*, 81 Mo. App. 494; *Lambert*

*v. Jones*, 91 Mo. App. 288; *Feller v. McKillip*,

100 Mo. App. 660; *Meier v. Jackson*, 78 Mo.

App. 396.

*Nebraska.* — *McKibbin v. Day*, (Neb. 1904)

98 N. W. Rep. 845; *Hitchcock v. Gothenburg*

*Water Power, etc., Co.*, (Neb. 1903) 95 N. W.

Rep. 638; *Stuart v. Staplehurst Bank*, 57 Neb.

569.

*New York.* — *Prahar v. Tousey*, 93 N. Y.

App. Div. 507; *Ettlinger v. Weil*, 94 N. Y. App.

Div. 291; *Frank v. Bradley, etc., Co.*, 42 N. Y.

App. Div. 178.

*Texas.* — *Hume v. Steele*, (Tex. Civ. App.

1900) 59 S. W. Rep. 812.

*Wisconsin.* — *Shaw v. Gilbert*, 111 Wis. 165;

*Krause v. Busacker*, 105 Wis. 350.

**138.** 2. Damage or Prejudice Necessary for

**Rescission at Law.** — *Bomar v. Rosser*, 131 Ala.

215, citing 14 AM. AND ENG. ENCYC. OF LAW

(2d ed.) 138; *Neuman v. Claflin Co.*, 107 Ga.

89; *Perry v. Rogers*, 62 Neb. 898; *Powell v.*

*F. C. Linde Co.*, 58 N. Y. App. Div. 261, af-

firmated 171 N. Y. 675; *Devers v. Sollenberger*,

25 Pa. Super. Ct. 64.

**139.** 2. Rescission and Cancellation in Equity.

— *Bartol v. Walton, etc., Co.*, 92 Fed. Rep. 13;

*Alger v. Keith*, (C. C. A.) 105 Fed. Rep. 105;

*Wenegar v. Ballenbach*, 180 Ill. 222; *Jones v.*

*Foster*, 175 Ill. 459; *Culver v. Smith*, 82 Mo.

App. 390; *Jones v. Jones*, (Supm. Ct. Spec. T.)

40 Misc. (N. Y.) 360; *Horton v. Lee*, 106 Wis.

439.

**140.** 3. *Feller v. McKillip*, 100 Mo. App.

660.

**Damage to Feelings Insufficient.** — *Cable v.*

*Bowlus*, 11 Ohio Cir. Dec 526, 21 Ohio Cir.

Ct. 53.

**4. Amount of Damage Immaterial.** — *Engeman*

*v. Taylor*, 46 W. Va. 669.

**6. View that Actual Pecuniary Damage Not**

**Necessary.** — *Brett v. Cooney*, 75 Conn. 338.

**7. Rescission of Contract.** — *Brett v. Cooney*, 75

Conn. 338.

**142.** 2. Contingent Damages — Rescission or

Cancellation. — But see *Computing Scales Co. v.*

*Long*, 66 S. Car. 379.

**3. Actual Damage Inevitable Because of Legal**

**144.** 7. Causal Connection Between Fraud and Damage. — See note 2.  
Remote and Proximate Cause. — See note 3.

**8. Particular Transactions and Injuries — a. SALE OR EXCHANGE OF PROPERTY.** — See note 5.

**146.** *e.* MISREPRESENTATIONS AS TO SOLVENCY OR CREDIT. — See note 7.

**148.** XI. PERSONS ENTITLED TO RELIEF OR REDRESS — 1. In General. — See note 2.

2. Representations Not Intended to Be Acted On by Party Complaining. — See note 3.

**149.** 3. Representations Made Indirectly — *a.* IN GENERAL. — See note 4.

**150.** *c.* REPRESENTATIONS TO AGENTS. — See note 1.

*e.* GENERAL REPRESENTATIONS TO THE PUBLIC OR TO A CLASS

— (1) *In General.* — See note 4.

**151.** (6) *Statements by Promoters or Officers of a Corporation.* — See note 4.

**152.** (7) *Statements Made to Mercantile Agencies.* — See note 1.

XII. PERSONS RESPONSIBLE — 1. In General. — See note 4.

**153.** 2. Benefit to the Defendant Not Necessary. — See note 2.

Liability of Agents. — See note 5.

**154.** An Officer of a Corporation. — See note 1.

3. Fraud of Third Persons — *a.* GENERAL RULE — An Action of Deceit. — See note 5.

**Obigation Incurred.** — *Computing Scales Co. v. Long*, 66 S. Car. 379, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142.

**144.** 2. Fraud Must Be Cause of Damage. — *Ajello v. Worsley*, (1898) 1 Ch. 274; *Fottler v. Moseley*, 179 Mass. 295.

3. Damage Direct and Proximate Result. — See *Feller v. McKillip*, 100 Mo. App. 660.

5. Getting All That Was Bargained For. — See *Feller v. McKillip*, 100 Mo. App. 660.

**146.** 7. Representations as to One's Own Solvency. — See *Fitchard v. Doheny*, 93 N. Y. App. Div. 9.

**148.** 2. Persons Entitled to Relief or Redress — Fraud Is Personal. — *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931.

3. Representations Not Intended to Be Acted on by Complainant. — *Henry v. Dennis*, 95 Me. 24, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 148.

**149.** 4. Representations Need Not Be Made Directly to Complainant. — *Henry v. Dennis*, 95 Me. 24, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 149; *Bradley v. Seaboard Nat. Bank*, 46 N. Y. App. Div. 550, reversed 167 N. Y. 427.

**150.** 1. Representation to Agent. — *Bradley v. Seaboard Nat. Bank*, 46 N. Y. App. Div. 550, reversed 167 N. Y. 427.

4. Representations to Public Generally or to Class. — *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931; *Warfield v. Clark*, 118 Iowa 69, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150; *Stuart v. Staplehurst Bank*, 57 Neb. 569; *Gerner v. Mosher*, 58 Neb. 135.

**151.** 4. Statements by Promoters or Officers of Corporations. — *Leonard v. Springer*, 98 Ill. App. 530, reversed 197 Ill. 534; *Walker v. Russell*, 186 Mass. 69; *Mulholland v. Washington Match Co.*, 35 Wash. 315.

Statement by Directors of National Bank. — *Stuart v. Staplehurst Bank*, 57 Neb. 569.

**152.** 1. Statements to Mercantile Agencies.

— *Mashburn v. Dannenberg Co.*, 117 Ga. 567, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 151; *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427; *Tindle v. Birkett*, 57 N. Y. App. Div. 450, reversed 171 N. Y. 520, 89 Am. St. Rep. 822; *Converse v. Sickles*, 16 N. Y. App. Div. 49, affirmed 161 N. Y. 666; *Bradley v. Seaboard Nat. Bank*, 46 N. Y. App. Div. 550, reversed 167 N. Y. 427.

4. Perpetrator of Fraud. — Where parties are induced to part with their property through misrepresentation and fraud, the ones who perpetrate the frauds are responsible to the parties injured for the damages thereby sustained. *Burnham v. Lutz*, 8 Kan. App. 361.

**153.** 2. The Gravamen of the Charge. — *Leonard v. Springer*, 197 Ill. 532, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153.

5. Liability of Agents — *Illinois*. — *Miller v. John*, 111 Ill. App. 56, affirmed 208 Ill. 173.

*Iowa*. — *Warfield v. Clark*, 118 Iowa 69; *Riley v. Bell*, 120 Iowa 618.

*Minnesota*. — *Barnett v. Block*, (Minn. 1905) 102 N. W. Rep. 390.

*Missouri*. — *Thompson v. Irwin*, 76 Mo. App. 418; *Chase v. Rusk*, 90 Mo. App. 25; *Continental Nat. Bank v. Farris*, 77 Mo. App. 186. *Nebraska*. — *Stuart v. Staplehurst Bank*, 57 Neb. 569; *Gerner v. Mosher*, 58 Neb. 135.

*New York*. — *Mahoney v. O'Neill*, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 437, reversed (Supm. Ct. App. T.) 29 Misc. (N. Y.) 619.

*North Carolina*. — *Austin v. Murdock*, 127 N. Car. 454.

*Ohio*. — *Cable v. Bowlus*, 11 Ohio Cir. Dec. 526, 21 Ohio Cir. Ct. 53.

**154.** 1. Officers of Corporation. — *Shepherd v. Broome*, (1904) A. C. 342. See *Pieratt v. Young*, (Ky. 1899) 49 S. W. Rep. 964.

5. Fraud of Third Persons — Where One of Two Innocent Persons must suffer loss by reason of the fraud or deceit of another, the loss should

**154.** Avoidance of Contracts and Conveyances. — See note 7.

**155.** *b.* PARTICIPATION IN ANOTHER'S FRAUD. — See notes 6, 7.

**156.** Agency. — See note 1.

**XIII. EFFECT AND REMEDIES** — 1. Effect of Fraud on Contracts —

*a.* IN GENERAL. — See note 8.

**158.** 2. Remedies at Law — *a.* RESCISSION — (1) *In General.* — See note 1.

Knowledge of Falsity of Representation. — See note 3.

**159.** (2) *Rescission of Conveyance or Lease* — Rescission by Grantee or Lessee. — See note 2.

(4) *Rescission of Release.* — See note 4.

(5) *Limitations on Right to Rescind* — (b) *Affirmance as a Bar to Rescission.* — See note 5.

What Constitutes an Affirmance. — See note 6.

**160.** Bringing an Action. — See note 3.

fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud. *Vanderslice v. Royal Ins. Co.*, 13 Pa. Super. Ct. 455.

**154.** 7. Avoidance of Contracts and Conveyances. — *Feigenspan v. Wilson*, 68 N. J. L. 83, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154; *Voisin v. Providence Washington Ins. Co.*, 51 N. Y. App. Div. 553, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

**155.** 6. Participation in Another's Fraud. — *Miller v. John*, 208 Ill. 173, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155; *Bell v. Felt*, 102 Ill. App. 218, modified 205 Ill. 213.

7. Co-conspirators. — *Miller v. John*, 208 Ill. 173; *McDonald v. Smith*, (Mich. 1905) 102 N. W. Rep. 668.

**156.** 1. Principal's Responsibility for Fraud of Agent. — *Hahl v. Brooks*, 213 Ill. 134, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156.

8. Fraud Renders Contract Voidable, Not Void — *Delaware*. — *Freeman v. Topkis*, 1 Marv. (Del.) 174.

*Georgia*. — *Bacon v. Moody*, 117 Ga. 207; *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

*Minnesota*. — *Minazek v. Libera*, 83 Minn. 288, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156.

*Nebraska*. — *Perry v. Rogers*, 62 Neb. 898.

*Rhode Island*. — *Fleming v. Hanley*, 21 R. I. 141.

*Virginia*. — *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837; *Rouzie v. Daingerfield*, 97 Va. 708; *Virginia University v. Snyder*, 100 Va. 567.

*West Virginia*. — *Engeman v. Taylor*, 46 W. Va. 669.

**158.** 1. Right to Rescind Contract at Law — *California*. — *Westerfield v. New York L. Ins. Co.*, 129 Cal. 68.

*Colorado*. — *Cole v. Smith*, 26 Colo. 506.

*Iowa*. — *Morris v. Posner*, 111 Iowa 335.

*Minnesota*. — *Minazek v. Libera*, 83 Minn. 288.

*Missouri*. — *Edwards v. Noel*, 88 Mo. App. 434.

*New York*. — *Jackson v. Foley*, 53 N. Y. App. Div. 97.

*Virginia*. — *Hurt v. Miller*, 95 Va. 32.

*Wisconsin*. — *Smeesters v. Schroeder*, 123 Wis. 116.

3. Knowledge that Representation Is False. — *Grosjean v. Galloway*, 64 N. Y. App. Div. 547.

**159.** 2. Rescission by Grantee or Lessee of Land. — *Haines v. Downey*, 86 Ill. App. 373.

4. Avoidance of Release. — See G. H. Hammond Co. v. Papke, 91 Ill. App. 563, affirmed 192 Ill. 631.

5. Limitations on Right to Rescind — Affirmance. — *Westerfield v. New York L. Ins. Co.*, 129 Cal. 68; *Chicago Trust, etc., Bank v. Anderson*, 93 Ill. App. 347, affirmed 195 Ill. 341; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 458, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159; *Hequembourg v. Edwards*, 155 Mo. 514; *Burnham v. Smith*, 82 Mo. App. 35; *Trammell v. Ashworth*, 99 Va. 646; *Campbell v. Eastern Bldg., etc., Assoc.*, 98 Va. 729; *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895.

**Election Resisted.** — An election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, and especially if rendered impossible or difficult or of doubtful advantage by the act of the guilty party, bar an action based upon a subsequent affirmation of the contract. *Montgomery v. McLauri*, 143 Cal. 83.

6. Affirmance by Acting on Contract with Knowledge of Fraud — *California*. — *Evans v. Duke*, 140 Cal. 22; *Oppenheimer v. Clunie*, 142 Cal. 313.

*District of Columbia*. — *Shappirio v. Goldberg*, 20 App. Cas. (D. C.) 185, affirmed 192 U. S. 232.

*Illinois*. — *Naugle v. Yerkes*, 187 Ill. 358; *Tolman v. Coleman*, 104 Ill. App. 70; *Stockham v. Adams*, 96 Ill. App. 152; *Chicago Trust, etc., Bank v. Anderson*, 93 Ill. App. 347, affirmed 195 Ill. 341; *Brown v. Follett*, 88 Ill. App. 489, affirmed 188 Ill. 244.

*Iowa*. — *Higbee v. Trumbauer*, 112 Iowa 74.

*Kansas*. — *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 458, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.

*Tennessee*. — *Talbott v. Manard*, 106 Tenn. 60.

*Texas*. — *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

*Virginia*. — *Hurt v. Miller*, 95 Va. 32; *West End Real Estate Co. v. Claiborne*, 97 Va. 734; *Trammell v. Ashworth*, 99 Va. 646.

**Question for Jury — Two Months' Delay.** — *Fleming v. Hanley*, 21 R. I. 141.

**160.** 3. Action on Contract. — *Montgomery v. McLauri*, 143 Cal. 83; *Chicago Trust, etc., Bank*



**160.** Accepting Security. — See note 4.

Ignorance of Fraud. — See note 6.

**161.** Diligence in Discovering Fraud. — See note 1.

(c) Delay in Rescinding. — See note 2.

(d) Rescission in Toto. — See note 3.

(e) Return of Consideration. — See note 4.

*v. Ball*, 208 Ill. 256; *Chicago Trust, etc., Bank v. Anderson*, 93 Ill. App. 347, *affirmed* 195 Ill. 341.

**Action for Deceit.** — *McCready v. Phillips*, 56 Neb. 446.

**160. 4. Acceptance of Security.** — *Burnham v. Smith*, 82 Mo. App. 35.

**6. Ignorance of Fraud.** — *Montgomery v. Mc-Laury*, 143 Cal. 83; *Davis Sewing Mach. Co. v. Crutchfield*, 117 Ga. 873; *Felt v. Bell*, 205 Ill. 213; *Brown v. Brown*, 62 Kan. 666; *Mulholland v. Washington Match Co.*, 35 Wash. 315.

**161. 1. Diligence in Discovering Fraud.** — See *Dean v. Oliver*, 131 Ala. 634; *Bennett v. Massachusetts Mut. L. Ins. Co.*, 107 Tenn. 371; *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

**Demand for Injuries — Sum Received Credited.** — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

**2. Delay as Bar to Rescission — England.** — *In re Eastgate*, (1905) 1 K. B. 465; *Gordon v. Street*, (1899) 2 Q. B. 641.

**United States.** — *Patent Title Co. v. Stratton*, 89 Fed. Rep. 174; *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794; *Alger v. Anderson*, 92 Fed. Rep. 696; *Bartol v. Walton, etc., Co.*, 92 Fed. Rep. 13; *Alger v. Keith, (C. C. A.)* 105 Fed. Rep. 105; *De Roux v. Girard, (C. C. A.)* 112 Fed. Rep. 89; *Hart v. Globe Ins. Co.*, 113 Fed. Rep. 307.

**Alabama.** — *Dean v. Oliver*, 131 Ala. 634.

**California.** — *Evans v. Duke*, 140 Cal. 22; *Oppenheimer v. Clunie*, 142 Cal. 313.

**Connecticut.** — *Wilson v. Nichols*, 72 Conn. 173.

**Georgia.** — *Hoyle v. Southern Saw Works*, 105 Ga. 123; *Wilkes v. Phillips*, 120 Ga. 728.

**Illinois.** — *Robertson v. Merriam*, 106 Ill. App. 610, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *Stockham v. Adams*, 96 Ill. App. 152; *Naugle v. Yerkes*, 187 Ill. 358; *Brown v. Follett*, 88 Ill. App. 489, *affirmed* 188 Ill. 244.

**Kansas.** — *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 458, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 159.

**Kentucky.** — *New York L. Ins. Co. v. Weaver*, 114 Ky. 295.

**Maine.** — *Duffy v. Metropolitan L. Ins. Co.*, 94 Me. 414.

**Massachusetts.** — See *Boles v. Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308.

**Nebraska.** — *Hamilton Brown Shoe Co. v. Milliken*, 62 Neb. 116; *Pekin Plow Co. v. Wil-son*, 66 Neb. 115.

**New Jersey.** — *Tierney v. Parker*, 58 N. J. Eq. 117.

**New York.** — *Powell v. F. C. Linde Co.*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 419, *reversed* 49 N. Y. App. Div. 286, 647. See also *Slayback v. Raymond*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 601, *affirmed* 93 N. Y. App. Div. 326.

**Pennsylvania.** — *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386.

**South Dakota.** — See *Whitney v. Hazzard*, (S. Dak. 1904) 101 N. W. Rep. 346.

**Tennessee.** — *Bennett v. Massachusetts Mut. L. Ins. Co.*, 107 Tenn. 371; *Talbott v. Manard*, 106 Tenn. 60.

**Texas.** — *Park v. Kribs*, 24 Tex. Civ. App. 650.

**Virginia.** — *Hurt v. Miller*, 95 Va. 32; *West End Real Estate Co. v. Claiborne*, 97 Va. 734; *Rouzie v. Daingerfield*, 97 Va. 708; *National Mut. Bldg., etc., Assoc. v. Blair*, 98 Va. 490; *Campbell v. Eastern Bldg., etc., Assoc.*, 98 Va. 729; *Trammell v. Ashworth*, 99 Va. 646; *Virginia University v. Synder*, 100 Va. 567.

**Washington.** — *Pronger v. Old Nat. Bank*, 20 Wash. 618; *Mulholland v. Washington Match Co.*, 35 Wash. 315.

**Wisconsin.** — *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

**Delay Due to Defendant.** — *Jackson v. Foley*, 53 N. Y. App. Div. 97.

**Ignorance of Fraud.** — *Edwards v. Noel*, 88 Mo. App. 434.

**3. Rescission Must Be in Toto.** — *National Bank, etc., Co. v. Petrie*, 189 U. S. 423; *Cole v. Smith*, 26 Colo. 506. See the titles RESCISSION; SALES; VENDOR AND PURCHASER.

**4. Consideration Must Be Returned — Alabama.** — *Henderson v. Boyett*, 126 Ala. 172.

**California.** — *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68.

**Connecticut.** — *Wilson v. Nichols*, 72 Conn. 173.

**Illinois.** — *Robertson v. Merriam*, 106 Ill. App. 610, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *Felt v. Bell*, 205 Ill. 213; *Hemphill v. Miller*, 75 Ill. App. 488; *Naugle v. Yerkes*, 187 Ill. 358.

**Indiana.** — *Rohrof v. Schulte*, 154 Ind. 183.

**Iowa.** — *Hale v. Kobbett*, 109 Iowa 128.

**Kansas.** — *Hargadine-McKittrick Dry-Goods Co. v. Swofford Bros. Dry-Goods Co.*, 10 Kan. App. 198, *reversed* 65 Kan. 572.

**Kentucky.** — *New York L. Ins. Co. v. Weaver*, 114 Ky. 295.

**Minnesota.** — *Corse v. Minnesota Grain Co.*, (Minn. 1905) 102 N. W. Rep. 728.

**Missouri.** — *Culbertson v. Young*, 86 Mo. App. 277; *Bailey v. Gilman Bank*, 99 Mo. App. 571.

**New York.** — *Powell v. F. C. Linde Co.*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 419, *reversed* 49 N. Y. App. Div. 286, 647; *Brady v. Edwards*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 435; *Littlejohn v. Littlejohn*, 40 N. Y. App. Div. 13; *Grosjean v. Galloway*, 64 N. Y. App. Div. 547. See also *Chisholm v. Eisenhuth*, 69 N. Y. App. Div. 134.

**Oregon.** — *State v. Blize*, 37 Oregon 404.

**Pennsylvania.** — *Thompson v. Chambers*, 13 Pa. Super. Ct. 213; *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386.

**Rhode Island.** — See *Hearn v. Hearn*, 24 R. I. 328.

**162.** See notes 1, 2, 3, 4.

Effect of Tender. — See note 5.

(f) Inability to Place Parties in Statu Quo. — See note 6.

**164.** b. REMEDIES AFTER RESCISSION — (2) *Pleading the Fraud as a Defense.* — See note 5.

**165.** (3) *Recovery of What Was Parted With* — (a) *In General.* — See note 2.

(b) *Assumpsit for Money Had and Received.* — See note 3.

(c) *Replevin.* — See note 4.

(d) *Trover.* — See note 6.

(e) *Trespass.* — See note 8.

(f) *Recovery of Real Property.* — See note 9.

**166.** (4) *Contracts under Seal.* — See notes 3, 4.

c. RECOVERY OF DAMAGES — (1) *In General — Action of Deceit.* — See note 7.

*Virginia.* — *Hurt v. Miller*, 95 Va. 32; *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837.

*Washington.* — *Pronger v. Old Nat. Bank*, 20 Wash. 618.

*Wisconsin.* — *Smeesters v. Schroeder*, 123 Wis. 116.

*Tender of Purchase-money Note Is Sufficient.* — *Wenegar v. Bollenbach*, 180 Ill. 222.

*Nothing Paid nor Parted With — No Return.* — *Healey v. Martin*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 236.

**162.** 1. *Things of No Value.* — *Campbell v. Park*, (Iowa 1904) 101 N. W. Rep. 861; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413; *Bailey v. Gilman Bank*, 99 Mo. App. 571; *Kumsey v. Shaw*, 25 Pa. Super. Ct. 386; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

2. *Property Lost or Destroyed Without Fault of Party Defrauded.* — *Hale v. Kobbert*, 109 Iowa 128. See also *Bell v. Felt*, 102 Ill. App. 218, modified 205 Ill. 213.

3. *Inability to Restore Through Fault of Party Defrauding.* — *Felt v. Bell*, 205 Ill. 213.

4. *Use and Deterioration in Value.* — See *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286.

5. *Tender Made and Refused.* — See *Corse v. Minnesota Grain Co.*, (Minn. 1905) 102 N. W. Rep. 728.

6. *Inability to Place Parties in Statu Quo.* — *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286; *Deppen v. German-American Title Co.*, (Ky. 1902) 70 S. W. Rep. 868; *State v. Blize*, 37 Oregon 404. See the titles RESCISSION, REFORMATION, AND CANCELLATION; SALES; VENDOR AND PURCHASER.

**164.** 5. *Remedies After Rescission — Fraud as Defense.* — *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Ludwig v. Petrie*, 32 Ind. App. 550.

**165.** 2. *Recovery of What Was Parted With — California.* — *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68.

*Connecticut.* — *Wilson v. Nichols*, 72 Conn. 173.

*Iowa.* — *Johnson v. Saum*, 123 Iowa 145.

*Minnesota.* — *Minazek v. Libera*, 83 Minn. 288; *Corse v. Minnesota Grain Co.*, (Minn. 1905) 102 N. W. Rep. 728.

*New York.* — *L. D. Garrett Co. v. Clark*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610,

3 Supp. E. of L. — 14.

reversed 102 N. Y. App. Div. 611; *Grosjean v. Galloway*, 64 N. Y. App. Div. 547; *Slayback v. Raymand*, 93 N. Y. App. Div. 326; *Nichols v. Coleman*, 96 N. Y. App. Div. 353.

*Virginia.* — *Wilson v. Hundley*, 96 Va. 96, 70 Am. St. Rep. 837.

*Wisconsin.* — *Smeesters v. Schroeder*, 123 Wis. 116; *Potter v. Necedah Lumber Co.*, 105 Wis. 25.

3. *Assumpsit for Money Had and Received — England.* — *Bavins v. London, etc., Bank*, (1900) 1 Q. B. 270.

*United States.* — *Wright v. Stewart*, 130 Fed. Rep. 905.

*District of Columbia.* — *Main v. Aukam*, 12 App. Cas. (D. C.) 375.

*Illinois.* — *Sturgeon v. Birkey*, 86 Ill. App. 489.

*Michigan.* — *Hallett v. Gordon*, 128 Mich. 364.

*New York.* — *Seeber v. People's Bldg., etc., Assoc.*, 36 N. Y. App. Div. 312.

*Pennsylvania.* — See *McElwee v. Chandler*, 198 Pa. St. 575.

*Texas.* — *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

*Washington.* — *Hindle v. Halcomb*, 34 Wash. 336.

4. *Replevin.* — *Hacker v. Munroe*, 176 Ill. 384; *Morris v. Posner*, 111 Iowa 335; *Pekin Plow Co. v. Wilson*, 66 Neb. 115.

6. *Trover.* — *Schack v. McKey*, 97 Ill. App. 460; *Love v. McElroy*, 106 Ill. App. 294.

8. *Trespass.* — *McElwee v. Chandler*, 198 Pa. St. 575.

9. *Recovery of Real Property.* — *Healey v. Martin*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 236.

**166.** 3. *Fraud Not a Bar — Reduction of Recovery.* — *Rogers v. Baker*, 66 N. J. L. 56.

4. *Relief in Equity.* — *Way v. Union Cent. L. Ins. Co.*, 61 S. Car. 501, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166.

7. *Recovery of Damages — United States.* — *Modern Woodmen of America v. Union Nat. Bank*, (C. C. A.) 108 Fed. Rep. 753.

*California.* — *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68; *Montgomery v. McLaury*, 143 Cal. 83; *La Marche v. New York L. Ins. Co.*, 126 Cal. 498.

*Colorado.* — *Cole v. Smith*, 26 Colo. 506; *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286.

*Georgia.* — *Bacon v. Moody*, 117 Ga. 207.

- 168.** In Cases of Contract. — See note 1.  
 (2) *Retention of Property or Other Consideration.* — See note 2.  
 Thus a Purchaser of Goods. — See note 3.  
 And the Purchaser of Land. — See note 4.  
 (4) *Effect of Promise by Party Defrauding.* — See note 6.
- 169.** (6) *Recoupment or Counterclaim in Action on Contract.* — See note 2.  
 In Action for Price of Property Sold. — See note 3.  
 (7) *Waiver of Right to Recover Damages.* — See note 4.  
 Action on Contract. — See note 5.
- 170.** Rescission. — See note 3.  
 Affirmance of Contract. — See note 6.  
 Performance of Contract After Discovery of the Fraud. — See note 9.
- 171.** Asking Favors, Making New Arrangement, Etc. — See note 2.

*Illinois.* — Miller v. John, 208 Ill. 173.

*Iowa.* — Warfield v. Clark, 118 Iowa 69;  
 Boddy v. Henry, 113 Iowa 462.

*Kansas.* — Missouri Pac. R. Co. v. Goodholm,  
 61 Kan. 758; Hargadine-McKittrick Dry Goods  
 Co. v. Swofford Bros. Dry Goods Co., 10 Kan.  
 App. 198, reversed 65 Kan. 572.

*Michigan.* — Anderson Carriage Co. v. Pungs,  
 134 Mich. 79.

*Minnesota.* — Mlnazek v. Libera, 83 Minn.  
 288; Corse v. Minnesota Grain Co., (Minn.  
 1905) 102 N. W. Rep. 728.

*Missouri.* — Rhodes v. Dickerson, 95 Mo.  
 App. 395.

*New York.* — Hill v. Chamberlain, 64 N. Y.  
 App. Div. 609, affirmed 170 N. Y. 595; Nichols  
 v. Coleman, 96 N. Y. App. Div. 353.

*North Dakota.* — Chilson v. Houston, 9 N.  
 Dak. 493.

*Pennsylvania.* — Rumsey v. Shaw, 25 Pa.  
 Super. Ct. 386.

*Utah.* — Whitney v. Richards, 17 Utah 226.  
*Wisconsin.* — Smeesters v. Schroeder, 123  
 Wis. 116.

**Action of Assumpsit — Michigan Statute.** —  
*In re Pennewell*, (C. C. A.) 119 Fed. Rep. 139.

**168. 1. May Affirm Contract and Sue for Damages.** — Allen v. Henn, 197 Ill. 486; Grosjean v. Galloway, 64 N. Y. App. Div. 547; Hurt v. Miller, 95 Va. 32.

**2. May Retain What Was Received under Contract** — *Arkansas.* — Binghamton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168.  
*Connecticut.* — Wilson v. Nichols, 72 Conn. 173.

*Illinois.* — Indiana, etc., R. Co. v. Fowler, 201 Ill. 152, 94 Am. St. Rep. 158; Quincy Horse R., etc., Co. v. Omer, 109 Ill. App. 238.

*Iowa.* — Campbell v. Park, (Iowa 1904) 101 N. W. Rep. 861.

*Massachusetts.* — Whiting v. Price, 172 Mass. 240, 70 Am. St. Rep. 262. See also Arnold v. Teel, 182 Mass. 1.

*Minnesota.* — Mlnazek v. Libera, 83 Minn. 288.

*Missouri.* — Edwards v. Noel, 88 Mo. App. 434.

*New York.* — Grosjean v. Galloway, 64 N. Y. App. Div. 547.

*Rhode Island.* — See Fleming v. Hanley, 21 R. I. 141.

*Virginia.* — Wilson v. Hundley, 96 Va. 96, 70 Am. St. Rep. 837.

**3. Sales of Goods.** — Pike's Peak Paint Co. v. Masury, 19 Colo. App. 286; Hallwood Cash Register Co. v. Berry, 35 Tex. Civ. App. 554.

**4. Sales of Land.** — Ludwig v. Petrie, 32 Ind. App. 550; Guinn v. Ames, 36 Tex. Civ. App. 613.

**6. Promise by Party Defrauding Does Not Bar Action.** — Hill v. Chamberlain, 64 N. Y. App. Div. 609, affirmed 170 N. Y. 595.

**169. 2. Recoupment or Counterclaim for Damages.** — Barbour v. Flick, 126 Cal. 628; Haines v. Douney, 86 Ill. App. 373; Bauer v. Taylor, (Neb. 1903) 96 N. W. Rep. 268; Rumsey v. Shaw, 25 Pa. Super. Ct. 386; Griffith v. Strand, 19 Wash. 686. See also Trenchard v. Kell, 127 Fed. Rep. 596.

**8. In Action for Price of Property.** — Nisson v. Hood, 140 Cal. 224; Pike's Peak Paint Co. v. Masury, 19 Colo. App. 286; Allen v. Henna, 197 Ill. 486; Strickland v. Graybill, 97 Va. 602; Griffith v. Strand, 19 Wash. 686.

**4. Written Release — Fraud upon Ignorant Man.** — Great Northern R. Co. v. Kasischke, (C. C. A.) 104 Fed. Rep. 440.

**Execution of Release Fraudulent.** — When the execution of a release has been obtained by fraud or trick, without the assent of the party executing it, the instrument is entirely void; but where it was executed intentionally, and the party's assent was procured by means of false representation and deceit, it is voidable at the option of the maker. Hill v. Northern Pac. R. Co., 104 Fed. Rep. 754.

**5. Waiver by Signing on Contract.** — See Anderson v. Scott, 70 N. H. 350.

**170. 3. Failure to Rescind — No Waiver.** — Griffith v. Strand, 19 Wash. 686.

**6. Edwards v. Noel**, 88 Mo. App. 434; Pronger v. Old Nat. Bank, 20 Wash. 618. See also Charbonnel v. Seabury, 23 R. I. 543.

**9. Simon v. Goodyear Metallic Rubber Shoe Co.**, (C. C. A.) 105 Fed. Rep. 573; Baltimore, etc., R. Co. v. Jolly, 71 Ohio St. 92; Barber v. Morgan, (Tex. Civ. App. 1900) 76 S. W. Rep. 319.

**171. 2. Asking Favors, Making New Agreement or Engagements, Etc.** — Barber v. Morgan, (Tex. Civ. App. 1900) 76 S. W. Rep. 319.

**Acceptance of Security.** — Burnham v. Smith, 82 Mo. App. 35.

**Renewal of Note.** — Although notes for the purchase price were renewed from time to time, with knowledge on the part of the makers of the falsity of representations by which they had

**171.** Dealing with Party Defrauding. — See note 3.

**172.** Delay in Bringing Suit. — See note 1.

Ignorance of the Fraud. — See note 2.

**3. Effect and Remedies in Equity** — *a. GENERAL EQUITY JURISDICTION IN CASES OF FRAUD.* — See note 3.

*b. EXCEPTION WHERE THERE IS AN ADEQUATE REMEDY AT LAW.* — See note 7.

**174.** *c. EXCLUSIVE JURISDICTION IN EQUITY.* — See note 6.

*d. PARTICULAR REMEDIES IN EQUITY* — (2) *Rescission and Cancellation.* — See note 8.

**175.** Adequate Remedy at Law. — See note 1.

(3) *Reformation of Instruments.* — See notes 2, 3.

(4) *Specific Performance.* — See note 4.

Defense in Suit for Specific Performance. — See note 5.

**176.** (5) *Relief Against Judgment or Decree.* — See note 1.

been induced to enter into the contract, if it satisfactorily appears that there was no purpose to waive the defense or ratify the original transaction, there is no waiver. *Strickland v. Graybill*, 97 Va. 602.

**171. 3. Subsequently Dealing with Party Defrauding.** — *Lee v. Tarplin*, 183 Mass. 52.

**172. 1. Delay in Suing Not a Waiver.** — *Irwin v. Harris*, 199 Pa. St. 405.

**2. Ignorance of Fraud.** — *Strand v. Griffith*, (C. C. A.) 97 Fed. Rep. 854; *Alabama Foundry, etc., Works v. Dallas*, 127 Ala. 513; *Montgomery v. McLaurry*, 143 Cal. 83; *Hinton v. Ring*, 111 Ill. App. 369.

**3. Equity — General Jurisdiction in Cases of Fraud** — *United States*. — *Missouri Broom Mfg. Co. v. Guymon*, (C. C. A.) 115 Fed. Rep. 112.

*Illinois*. — *Bank of Montreal v. Waite*, 105 Ill. App. 373; *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139.

*Missouri*. — *Barrington v. Ryan*, 88 Mo. App. 85.

*New Jersey*. — *Eggers v. Anderson*, 63 N. J. Eq. 264.

*New York*. — *Converse v. Sickles*, 16 N. Y. App. Div. 49, affirmed 161 N. Y. 666.

*Vermont*. — *Delaney v. Brown*, 72 Vt. 344.

*Virginia*. — *Buck v. Ward*, 97 Va. 209.

**7. Doubtful, Inadequate, or Incomplete Remedy at Law.** — *Naugle v. Yerkes*, 187 Ill. 358; *Schack v. McKey*, 97 Ill. App. 460; *Barrington v. Ryan*, 88 Mo. App. 85; *Benson v. Keller*, 37 Oregon 120; *Wilson v. Maxon*, 56 W. Va. 194.

"When the remedy at law is plain, adequate, and complete, the court of chancery is reluctant to exercise its jurisdiction, and will not do so unless the administration of justice will thereby evidently be facilitated." *Eggers v. Anderson*, 63 N. J. Eq. 264.

**174. 6. Exclusive Jurisdiction of Courts of Equity.** — *Sanford v. White*, 132 Fed. Rep. 531; *Thayer v. Lidgate*, 14 Hawaii 544, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 174.

**8. Rescission and Cancellation** — *United States*. — *National Bank, etc., Co. v. Petrie*, 189 U. S. 423.

*California*. — *More v. More*, 133 Cal. 489; *Montgomery v. McLaurry*, 143 Cal. 83.

*Hawaii*. — *Hall v. Winam*, 14 Hawaii 306.

*Illinois*. — *Robinson v. Sharp*, 201 Ill. 86.

*Kentucky*. — *Austin v. Bridges*, (Ky. 1899) 52 S. W. Rep. 966.

*Maryland*. — *Keller v. Gill*, 92 Md. 190.

*Massachusetts*. — *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557.

*Michigan*. — *Anderson Carriage Co. v. Pungs*, 134 Mich. 79.

*Minnesota*. — *Corse v. Minnesota Grain Co.*, (Minn. 1905) 102 N. W. Rep. 728.

*Missouri*. — *Summers v. Metropolitan L. Ins. Co.*, 90 Mo. App. 691; *Sheridan v. Nation*, 159 Mo. 27; *Barrington v. Ryan*, 88 Mo. App. 85; *Dashner v. Buffington*, 170 Mo. 260.

*New Hampshire*. — *Delouche v. Metropolitan L. Ins. Co.*, 69 N. H. 587.

*New Jersey*. — *Hubbard v. International Mercantile Agency*, (N. J. 1904) 59 Atl. Rep. 24.

*New York*. — *Quimby v. Clock*, 44 N. Y. App. Div. 616; *Grosjean v. Galloway*, 64 N. Y. App. Div. 547; *L. D. Garrett Co. v. Clark*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 610, reversed 102 N. Y. App. Div. 611; *Slayback v. Raymond*, 93 N. Y. App. Div. 326.

*Pennsylvania*. — *Thompson v. Chambers*, 13 Pa. Super. Ct. 213.

*Rhode Island*. — *Hearn v. Hearn*, 24 R. I. 328.

*Utah*. — *Whitney v. Richards*, 17 Utah 226.

**175. 1. Adequate Remedy at Law.** — *Thayer v. Lidgate*, 14 Hawaii 544, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175.

**2. Reformation of Instruments.** — *Robinson v. Sharp*, 201 Ill. 86; *Bowen v. Wolff*, 23 R. I. 56; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

**3. Adequate Remedy at Law.** — *Cook v. Liston*, 192 Pa. St. 19.

**4. Suit for Specific Performance.** — *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98; *Cooper v. Cooper*, 8 Ohio Dec. 35, 6 Ohio N. P. 99; *Livesley v. Heise*, 45 Oregon 148.

**5. Fraud as a Defense to Specific Performance.** — *American Fine Art Co. v. Reeves Pulley Co.*, (C. C. A.) 127 Fed. Rep. 808.

**176. 1. Relief Against Judgment or Decree.** — *New River Mineral Co. v. Seeley*, (C. C. A.) 120 Fed. Rep. 193; *Norwood v. Richardson*, (Del. Ch. 1903) 57 Atl. Rep. 244; *Williams v. Davidson*, 64 Kan. 707; *Pelz v. Bollinger*, 180 Mo. 252; *Smith v. Taylor*, 78 Mo. App. 630; *Fears v. Riley*, 148 Mo. 49; *Dowell v. Goodwin*, 22 R. I. 287, 84 Am. St. Rep. 842.

**Fraud Must Have Been Successful.** — *Allen v. Allen*, (C. C. A.) 97 Fed. Rep. 525.

**176.** (6) *Constructive Trusts*. — See note 3.

(7) *Suit for Accounting*. — See notes 6, 7.

**177.** (9) *Fraud in Connection with Wills* — *Fraud in Suppressing or Destroying Will*. — See note 1.

**XIV. DAMAGES** — 1. *In General*. — See note 2.

**178.** See note 3.

2. *After Rescission of Contract*. — See note 4.

**179.** 6. *Remote and Proximate Damages* — *a. IN GENERAL*. — See note 5.

**180.** *c. EXPENDITURES* — (1) *In General*. — See notes 1, 2.

(2) *Compensation for Improvements*. — See note 3.

**181.** *e. SPECULATIVE DAMAGES*. — See note 9.

**182.** 7. *Particular Transactions* — *a. SALES OF REAL OR PERSONAL PROPERTY* — (1) *Difference Between Actual Value and Price Paid*. — See note 1.

(2) *Difference Between Actual Value and Represented Value*. —

See note 2.

**176.** 3. *Constructive Trusts*. — *Central Stock, etc.*, *Exch. v. Bendinger*, (C. C. A.) 109 Fed. Rep. 926; *Missouri Broom Mfg. Co. v. Guymon*, (C. C. A.) 115 Fed. Rep. 112; *Jones v. Jones*, 140 Cal. 587; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98; *More v. More*, 133 Cal. 489; *Aldrich v. Hassinger*, 13 *Hawai* 138; *Barnes v. Thuet*, 116 Iowa 359; *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679; *Goodwin v. McMin*, 193 Pa. St. 646, 74 Am. St. Rep. 703.

6. *Guardian and Ward, Etc.* — *Lorimer v. Lorimer*, 124 Mich. 631; *Spier v. Hyde*, 92 N. Y. App. Div. 467.

7. *Principal and Agent*. — *Somervail v. McDermott*, 116 Wis. 504.

**177.** 1. *Fraudulent Suppression or Destruction of Will*. — *Shawvan v. Shawvan*, 110 Wis. 590.

2. *Damages for Fraud — General Rule — United States*. — *Sigafus v. Porter*, 179 U. S. 116. *Arkansas*. — *Neely v. Rembert*, 71 Ark. 91. *California*. — *American F. Ins. Co. v. Hart*, 141 Cal. 678.

*Colorado*. — *Oakes v. Miller*, 11 Colo. App. 374; *American Nat. Bank v. Hammond*, 25 Colo. 367.

*Illinois*. — *Goodwin v. Wilbur*, 104 Ill. App. 45.

*Kentucky*. — *Dinwiddie v. Stone*, (Ky. 1899) 52 S. W. Rep. 814.

*Massachusetts*. — *Fottler v. Moseley*, 185 Mass. 563.

*Minnesota*. — *Vilett v. Moler*, 82 Minn. 12. *New York*. — *Oehlhof v. Solomon*, 73 N. Y. App. Div. 329.

*Rhode Island*. — *Charbonnel v. Seabury*, 23 R. I. 543, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177.

*Wisconsin*. — *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 35.

**178.** 3. *Compensation the Cardinal Principle*. — *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

4. *Damages After Rescission of Contract for Fraud*. — *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**179.** 5. *Simon v. Goodyear Metallic Rubber Shoe Co.*, (C. C. A.) 105 Fed. Rep. 573; *Oakes v. Miller*, 11 Colo. App. 374; *Jamison v. Ellsworth*, 115 Iowa 90.

**180.** 1. *Expenditures as Elements of Damage*.

— *Sigafus v. Porter*, 179 U. S. 116; *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Dinwiddie v. Stone*, (Ky. 1899) 52 S. W. Rep. 814; *Schorr v. Gewirz*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 186. See *Oehlhof v. Solomon*, 73 N. Y. App. Div. 329.

*Taxes*. — *Nelson v. Allen*, 117 Wis. 91.

2. *Expenditures Not Proximate Result of Fraud*. — *Neely v. Rembert*, 71 Ark. 91.

3. *Improvements — Compensation For*. — *Jamison v. Ellsworth*, 115 Iowa 90.

*Improvements Made with Knowledge that Rescission Would Be Had*. — *Neely v. Rembert*, 71 Ark. 91.

*Affirmance of Sale — Action for Damages*. — Where the vendee elects to keep the property, and does not attempt to rescind, but affirms the sale by bringing an action for damages, expenditures for improvements made by him are expenditures upon his own property of which he has the benefit, and he can have no recovery for money so expended. *Krause v. Busacker*, 105 Wis. 350.

**181.** 9. *Speculative Damages Not Recoverable*. — *Troxler v. New Era Bldg. Co.*, 137 N. Car. 51; *Myers v. Turner*, (Tenn. Ch. 1898) 52 S. W. Rep. 332.

**182.** 1. *Difference Between Actual Value and Price Paid*. — *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931; *Mountain v. Day*, 91 Minn. 249; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109. See also *McMillan v. Reaume*, (Mich. 1904) 100 N. W. Rep. 166; *Oehlhof v. Solomon*, 73 N. Y. App. Div. 329.

2. *Difference Between Actual and Represented Value — Arkansas*. — See *Emmerson v. Dardanelle Bank*, 66 Ark. 646, 52 S. W. Rep. 274.

*Colorado*. — *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286.

*Georgia*. — *McCrary v. Pritchard*, 119 Ga. 876.

*Illinois*. — *Love v. McElroy*, 106 Ill. App. 294; *Haldeman v. Schuh*, 109 Ill. App. 259; *Hicks v. Deemer*, 187 Ill. 164.

*Indiana*. — See *Equitable Trust Co. v. Milligan*, (Ind. App. 1902) 64 N. E. Rep. 673.

*Iowa*. — *Boddy v. Henry*, 113 Iowa 462; *Warfield v. Clark*, 118 Iowa 69. See also *Johnson v. Gavitt*, 114 Iowa 183.

*Kentucky*. — *Drake v. Holbrook*, (Ky. 1902) 66 S. W. Rep. 512.

**184.** (5) *Sale of Securities*. — See note 5.

**185.** (7) *Sale of Stock in Corporation*. — See notes 1, 2.

(10) *Incumbrances*. — See note 9.

**187.** *f. SUBSCRIPTIONS FOR STOCK*. — See note 2.

*j. REPRESENTATIONS AS TO SOLVENCY OR CREDIT — Sale of Goods.*

— See note 7.

**188.** 8. *Determination of Value — Market Price*. — See note 5.

**189.** 10. *Exemplary Damages*. — See notes 9, 10.

**190.** 11. *Interest*. — See note 1.

*Money Obtained by Fraud*. — See note 2.

**XV. EVIDENCE — 1. Presumption and Burden of Proof — a. GENERAL RULE.** — See note 3.

*Massachusetts*. — Lee v. Tarplin, 183 Mass. 52.  
*New York*. — Grosjean v. Galloway, 64 N. Y. App. Div. 547; Ettlinger v. Weil, 94 N. Y. App. Div. 291; Benedict v. Guardian Trust Co., 91 N. Y. App. Div. 103, affirmed 180 N. Y. 558; Schorr v. Gewirtz, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 186; King v. Mott, 37 N. Y. App. Div. 124; Mahoney v. O'Neill, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 619.

*Ohio*. — Linerode v. Rasmussen, 63 Ohio St. 545.

*Pennsylvania*. — Martachowski v. Orawitz, 14 Pa. Super. Ct. 175.

*South Dakota*. — Western Twine Co. v. Wright, 11 S. Dak. 521.

*Texas*. — Carson v. Houssells, (Tex. Civ. App. 1899) 51 S. W. Rep. 290.

*Wisconsin*. — Potter v. Necedah Lumber Co., 105 Wis. 25.

**Rule Applicable Only Where Actual Loss Natural and Proximate Result of Deceit.** — Potter v. Necedah Lumber Co., 105 Wis. 25.

**184.** 5. *Sale of Note or Bond Secured by Mortgage*. — Drake v. Holbrook, (Ky. 1902) 66 S. W. Rep. 512, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184.

**185.** 1. *Fraud in Sale of Stock in Corporation*. — Nashua Sav. Bank v. Burlington Electric Lighting Co., 100 Fed. Rep. 673; Hunter v. International Bldg., etc., Assoc., 24 Tex. Civ. App. 453.

**2. Deduction of Actual Value of Stock.** — Nashua Sav. Bank v. Burlington Electric Lighting Co., 100 Fed. Rep. 673.

**9. Sale of Property Subject to Incumbrances.** — Hahl v. Brooks, 213 Ill. 134, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185.

**187.** 2. *Fraud by Promoter — Measure of Damages Is Compensation.* — Goodwin v. Wilbur, 104 Ill. App. 45.

**7. Fair Value of Goods.** — Shaw v. Gilbert, 111 Wis. 165.

**188.** 5. *Market Price as Evidence of Actual Value.* — Mitchell v. Simons, (Tex. Civ. App. 1899) 53 S. W. Rep. 76.

**Market Value of Stock.** — Where stock has a well-known and fixed, though variable, market value, it is the proper criterion of such value. Price v. Spencer, (Cal. 1898) 53 Pac. Rep. 1073.

**189.** 9. *Allowance for Exemplary Damages.* — See Oehlhof v. Solomon, 73 N. Y. App. Div. 329.

**10. Punitive Damages** "are not recoverable except in cases where malice, violence or passion and wanton recklessness is shown." Hoffman v. Gill, 102 Mo. App. 320.

In cases of bare fraud there can be no recovery of punitive damages; to recover such damages the fraud must be either gross or malicious, or something must show a very corrupt condition of affairs. Cable v. Bowlus, 11 Ohio Cir. Dec. 526, 21 Ohio Cir. Ct. 53.

**190.** 1. *Recovery of Interest.* — Love v. McElroy, 106 Ill. App. 294; Haldeman v. Schuh, 109 Ill. App. 259; Nichols v. Coleman, 96 N. Y. App. Div. 353; Shaw v. Gilbert, 111 Wis. 165.

**Rescission — From Day Sale Is Rescinded.** — Felt v. Bell, 205 Ill. 213.

**2. In Action for Money Fraudulently Obtained** — Shaw v. Gilbert, 111 Wis. 165.

**3. General Rule as to Presumption and Burden of Proof — England.** — Barron v. Willis, (1899) 2 Ch. 578.

*United States.* — Huber v. Guggenheim, 89 Fed. Rep. 598; De Roux v. Girard, 105 Fed. Rep. 798, affirmed (C. C. A.) 112 Fed. Rep. 89; Holton v. Davis, (C. C. A.) 108 Fed. Rep. 138; De Roux v. Girard, (C. C. A.) 112 Fed. Rep. 89; American Nat. Bank v. Supplee, (C. C. A.) 115 Fed. Rep. 657.

*California.* — Casey v. Leggett, 125 Cal. 664; Roberts v. Burr, 135 Cal. 156.

*Colorado.* — Allen v. Elrick, 29 Colo. 118.

*Delaware.* — Freeman v. Topkis, 1 Marv. (Del.) 174; Thomas v. Grise, 1 Penn. (Del.) 381; Journal Printing Co. v. Maxwell, 1 Penn. (Del.) 511.

*Georgia.* — O'Connell v. Supreme Conclave, etc., 102 Ga. 143, 66 Am. St. Rep. 159.

*Illinois.* — Merchants' Nat. Bank v. Lyon, 185 Ill. 343; Kennedy v. Kennedy, 194 Ill. 346; Off v. Jack, 204 Ill. 79; American Hoist, etc., Co. v. Hall, 208 Ill. 597; Flynn v. Todd, 77 Ill. App. 682; Means v. Flanagan, 79 Ill. App. 296; Faulkner v. I. L. Elwood Mfg. Co., 79 Ill. App. 544; Johnston v. Hirschberg, 85 Ill. App. 47, affirmed 185 Ill. 445; Bohl v. Long, 91 Ill. App. 59; Barrie v. Frost, 105 Ill. App. 187; Edwards v. Story, 105 Ill. App. 433; Eickstaedt v. Moses, 105 Ill. App. 634; Haberer v. Walzer, 109 Ill. App. 371.

*Indiana.* — Cotterell v. Koon, 151 Ind. 182.

*Iowa.* — Ley v. Metropolitan L. Ins. Co., 120 Iowa 203, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 190.

*Kansas.* — Flohr v. Schwartzberg, 9 Kan. App. 215.

*Massachusetts.* — Barron v. International Trust Co., 184 Mass. 440; Wood v. Massachusetts Mut. Acc. Assoc., 174 Mass. 217.

*Michigan.* — Walsh v. Goulden, 130 Mich. 531; McNaughton v. Smith, 136 Mich. 368.

**191.** See note 1.

When Fraud Is to Be Presumed. — See note 2.

**192.** *b.* PARTICULAR ELEMENTS OF FRAUD — (2) *Materiality and Falsity.* — See note 3.(3) *Knowledge and Intent.* — See note 6.(4) *Reliance upon Representations.* — See note 10.**194.** *c.* PROOF OF CIRCUMSTANCES INDICATING FRAUD — (1) *In General* — Mere Inadequacy of Price, or Other Inequality. — See note 2.(2) *Fiduciary or Confidential Relations, Etc.* — See note 8.**195.** See note 1.**2.** Admissibility of Evidence — *a.* IN GENERAL. — See note 2.**196.** See note 1.

Conduct Showing Good Faith. — See note 3.

*b.* OTHER FRAUDS — (1) *In General.* — See note 6.**197.** Frauds by Others than the Party Charged. — See note 1.*Missouri.* — Hoeller v. Haffner, 155 Mo. 589.  
*Nebraska.* — Hampton v. Webster, 56 Neb. 628; Crockett v. Miller, (Neb. 1902) 96 N. W. Rep. 491.*New Jersey.* — Garrison v. Technic Electrical Works, 59 N. J. Eq. 440.*New York.* — Clover Farms Co. v. Schubert, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 434; Pinckney v. Darling, 3 N. Y. App. Div. 553, affirmed 158 N. Y. 728. See also Postal v. Cohn, 83 N. Y. App. Div. 27.*North Carolina.* — See Hart v. Cannon, 133 N. Car. 10.*Pennsylvania.* — Longenecker v. Zion Evangelical Lutheran Church, 200 Pa. St. 567.*South Carolina.* — Johnson v. Franklin, 58 S. Car. 394.*Texas.* — Von Boeckmann v. Loepp, (Tex. Civ. App. 1903) 73 S. W. Rep. 849.*Virginia.* — American Net, etc., Co. v. Mayo, 97 Va. 182; Alsop v. Catlett, 97 Va. 364; New York L. Ins. Co. v. Davis, 96 Va. 737; Virginia-Carolina Chemical Co. v. Carpenter, 99 Va. 292.*West Virginia.* — Oberlin College v. Blair, 45 W. Va. 812.*Wisconsin.* — Miles v. Pike Min. Co., (Wis. 1905) 102 N. W. Rep. 555.**191.** 1. Granrud v. Rea, 24 Tex. Civ. App. 299.**2.** Proof of Facts from Which Fraud Is to Be Presumed. — Holton v. Davis, (C. C. A.) 108 Fed. Rep. 138.**192.** 3. Materiality and Falsity of Representations. — L. D. Garrett Co. v. Appleton, 101 N. Y. App. Div. 507.**6.** Jacobs v. Marks, 83 Ill. App. 156, affirmed 183 Ill. 533; L. D. Garrett Co. v. Appleton, 101 N. Y. App. Div. 507; Holt v. Sims, (Minn. 1905) 102 N. W. Rep. 386. See *supra*, 85. 3 *et seq.***10.** Reliance upon Representations. — Holt v. Sims, (Minn. 1905) 102 N. W. Rep. 386. See *supra*, 106. 8.**194.** 2. Cabaness v. Holland, 19 Tex. Civ. App. 383.**8.** Fiduciary Relation Raises Presumption of Fraud — *England.* — Powell v. Powell, (1900) 1 Ch. 243.*Alabama.* — Cannon v. Gilmer, 135 Ala. 302.*District of Columbia.* — Moran v. Sullivan, 12 App. Cas. (D. C.) 137.*Illinois.* — Wood v. Roberts, 185 Ill. 489;*Thomas v. Whitney*, 83 Ill. App. 247, affirmed 186 Ill. 225.*Indiana.* — De Ruiter v. De Ruiter, 28 Ind. App. 9, 91 Am. St. Rep. 107, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.*New York.* — Bingham v. Sheldon, 101 N. Y. App. Div. 48.*South Carolina.* — Way v. Union Cent. L. Ins. Co., 61 S. Car. 501, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.*Virginia.* — Todd v. Sykes, 97 Va. 143.**Transaction Between Relatives.** — The fact that an alleged fraudulent transaction occurs between relatives does not change the rule as to burden of proof, the relationship being merely a circumstance which may excite suspicion, but does not of itself amount to proof of fraud. *American Hoist, etc., Co. v. Hall*, 208 Ill. 597.**195.** 1. Way v. Union Cent. L. Ins. Co., 61 S. Car. 501, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.**2. Admissibility of Evidence — Great Latitude Allowed** — Freeman v. Topkis, 1 Marv. (Del.) 174; Thomas v. Grise, 1 Penn. (Del.) 381; Dunn v. Springfield F. & M. Ins. Co., 104 La. 31, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195-197; Townsend v. Felthousen, 156 N. Y. 618; Griffith v. Strand, 19 Wash. 686.**196.** 1. Statement of Rule and Its Reason. — Sheridan v. Pease, 93 Ill. App. 219; De Ruiter v. De Ruiter, 28 Ind. App. 9, 91 Am. St. Rep. 107; Dunn v. Springfield F. & M. Ins. Co., 104 La. 31, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196; Townsend v. Felthousen, 156 N. Y. 618.**Conspiracy to Defraud.** — Miller v. John, 208 Ill. 173.**3. Conduct Showing Good Faith.** — Gerner v. Mosher, 58 Neb. 135.**6. Evidence of Other Frauds and Representations.** — U. S. v. Kenney, 90 Fed. Rep. 257; Wright v. Stewart, 130 Fed. Rep. 905; Fox v. Hale, etc., Silver Min. Co., (Cal. 1898) 53 Pac. Rep. 32; Buckley v. Acme Food Co., 113 Ill. App. 210; Swinney v. Patterson, 25 Nev. 411; Boyd v. Boyd, 164 N. Y. 234; Ettlinger v. Weil, 94 N. Y. App. Div. 291; Converse v. Sickles, 16 N. Y. App. Div. 49, affirmed 161 N. Y. 666; Chisholm v. Eisenhuth, 69 N. Y. App. Div. 134. See also Sutton v. Kelliher, 115 Iowa 632.**197.** 1. Frauds Committed by Third Persons. — Obst v. Unnerstall, 184 Mo. 383.

**197.** (2) *General Scheme or Purpose to Defraud.* — See note 2.

**198.** *The Chief Reason.* — See note 1.

*Other Representations to Party Defrauded.* — See note 2.

*Restriction to Purpose of Proving Scienter.* — See note 3.

**199.** *c. PAROL EVIDENCE.* — See note 4.

*Contracts under Seal.* — See notes 5, 6.

**200.** *3. Sufficiency of Evidence — a. CIRCUMSTANTIAL EVIDENCE.* — See note 3.

**201.** *b. DEGREE OF PROOF.* — See notes 2, 5.

**197. 2. General Scheme or Purpose to Defraud** — *England.* — *Rex v. Wyatt*, (1904) 1 K. B. 188; *Reg. v. Ollis*, (1900) 2 Q. B. 768.

*United States.* — *Wright v. Stewart*, 130 Fed. Rep. 905.

*Delaware.* — *Freeman v. Topkis*, 1 Marv. (Del.) 174.

*Illinois.* — *Buckley v. Acme Food Co.*, 113 Ill. App. 210.

*Nevada.* — *Swinney v. Patterson*, 25 Nev. 411.

*New York.* — *Ettlinger v. Weil*, 94 N. Y. App. Div. 291.

*Oklahoma.* — *Price v. Winnebago Nat. Bank*, 14 Okla. 268.

*South Carolina.* — *Brown v. Newell*, 64 S. Car. 27.

**198. 1. Reason for Admitting Evidence of Other Frauds.** — *Chisholm v. Eisenhuth*, 69 N. Y. App. Div. 134.

**2. Other Representations Made to Party Defrauded.** — *Scholfield Gear, etc., Co. v. Scholfield*, 71 Conn. 1. See also *Lesser v. Brown*, 75 Conn. 491.

**3. Restriction of Such Evidence to Proof of Scienter.** — See *Tracy v. McKinney*, 82 Mo. App. 506.

**199. 4. Parol Evidence Admissible Notwithstanding a Written Contract** — *Connecticut.* — *New Idea Pattern Co. v. Whelan*, 75 Conn. 455. *District of Columbia.* — *Main v. Aukam*, 12 App. Cas. (D. C.) 375.

*Georgia.* — *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422; *McGrary v. Pritchard*, 119 Ga. 876.

*Illinois.* — *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139.

*Louisiana.* — *Hoffman v. Ackermann*, 110 La. 1070; *Le Bleu v. Savoie*, 109 La. 679.

*Michigan.* — *Rambo v. Patterson*, 133 Mich. 655.

*Minnesota.* — *Vilett v. Moler*, 82 Minn. 12.

*Missouri.* — *Phoenix Ins. Co. v. Owens*, 81 Mo. App. 201; *Leicher v. Keeney*, 98 Mo. App. 394. See also *Magee v. Verity*, 97 Mo. App. 486.

*Nebraska.* — *Bauer v. Taylor*, (Neb. 1903) 96 N. W. Rep. 268.

*New Hampshire.* — *Anderson v. Scott*, 70 N. H. 350.

*New York.* — *Grockie v. Hirshfield*, 50 N. Y. App. Div. 87; *Evans v. Columbia F. Ins. Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 316.

*North Carolina.* — *Gwaltney v. Provident Sav. L. Assur. Soc.*, 132 N. Car. 925.

*Pennsylvania.* — *Atherholt v. Hughes*, 209 Pa. St. 156; *American Harrow Co. v. Swoope*, 16 Pa. Super. Ct. 451.

*South Carolina.* — *Willcox v. Priester*, 68 S. Car. 106.

*Tennessee.* — *Fine v. Stuart*, (Tenn. Ch. 1898) 48 S. W. Rep. 371; *Bennett v. Massachusetts Mut. L. Ins. Co.*, 107 Tenn. 371.

*Texas.* — *Wuest v. Moehrig*, 24 Tex. Civ. App. 124; *Hollifield v. Landrum*, 31 Tex. Civ. App. 187; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554; *Davis v. Driscoll*, 22 Tex. Civ. App. 14.

*Vermont.* — *Cameron v. Estabrooks*, 73 Vt. 73.

*Washington.* — *O'Connor v. Lighthizer*, 34 Wash. 152; *Griffith v. Strand*, 19 Wash. 686.

*Wisconsin.* — *Hurlbert v. T. D. Kellogg Lumber, etc., Co.*, 115 Wis. 225.

**5. Parol Evidence in Case of Contracts under Seal.** — *Way v. Union Cent. L. Ins. Co.*, 61 S. Car. 501, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199.

**6. Cutter v. Roanoke R., etc., Co.**, 128 N. Car. 477; *Way v. Union Cent. L. Ins. Co.*, 61 S. Car. 501, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199; *Willcox v. Priester*, 68 S. Car. 106.

**200. 3. Circumstantial Evidence** — *United States.* — *U. S. v. Kenney*, 90 Fed. Rep. 257; *Trenchard v. Kell*, 127 Fed. Rep. 596; *Holton v. Davis*, (C. C. A.) 108 Fed. Rep. 138.

*California.* — *Casey v. Leggett*, 125 Cal. 664; *Maxson v. Llewellyn*, 122 Cal. 195.

*Delaware.* — *Journal Printing Co. v. Maxwell*, 1 Penn. (Del.) 511; *Freeman v. Topkis*, 1 Marv. (Del.) 174.

*Illinois.* — *Tuttle v. Hemenway*, 92 Ill. App. 53; *Podolski v. Stone*, 186 Ill. 540; *Sheridan v. Pease*, 93 Ill. App. 219; *Miller v. John*, 111 Ill. App. 56, affirmed 208 Ill. 173.

*Missouri.* — *Columbia Sav. Bank v. Kingsbury*, 84 Mo. App. 82.

*Virginia.* — *New York L. Ins. Co. v. Davis*, 96 Va. 737; *Todd v. Sykes*, 97 Va. 143.

*Wisconsin.* — *Horton v. Lee*, 106 Wis. 439.

**201. 2. Sufficiency of Evidence — Erroneous Statements as to Degree of Proof.** — *Grove v. Kase*, 195 Pa. St. 325; *De Douglas v. Union Traction Co.*, 198 Pa. St. 430.

**Distinction.** — Where a party seeks to vary the terms of a written instrument by parol because by fraud it does not contain the actual agreement, or its execution was induced by a contemporaneous oral agreement of such a character that its enforcement would operate as a fraud, the evidence must be clear, precise, and indubitable. But one not a party may defeat an instrument for collusion and fraud upon him by a preponderance of the evidence. See also *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603.

**Impeachment of Judgment — Proof Must Be "Clear, Distinct, and Certain."** — *Holton v. Davis*, (C. C. A.) 108 Fed. Rep. 138.



**201.** Preponderance of Evidence. — See note 7.

**202.** See note 1.

Mere Suspicion Not Enough. — See note 3.

**203.** Circumstances Consistent with Honesty. — See note 3.

**204.** Number of Witnesses. — See notes 2, 3.

Inadequacy of Price or Other Inequality. — See notes 4, 5, 6.

"Clear, Precise, and Indubitable." — *American Nat. Bank v. Supplee*, (C. C. A.) 115 Fed. Rep. 657.

**201.** 5. See *McNaughton v. Smith*, 136 Mich. 368; *Granrud v. Rea*, 24 Tex. Civ. App. 299.

**7.** Preponderance of Evidence Sufficient — *United States*. — *Huber v. Guggenheim*, 89 Fed. Rep. 598.

*Colorado*. — *Allen v. Elrick*, 29 Colo. 118.

*Georgia*. — *O'Connell v. Supreme Conclave, etc.*, 102 Ga. 143, 66 Am. St. Rep. 159; *Supreme Conclave, etc.*, *v. Wood*, 120 Ga. 328.

*Illinois*. — *American Hoist, etc., Co. v. Hall*, 110 Ill. App. 463, *affirmed* 208 Ill. 597; *Haberer v. Walzer*, 109 Ill. App. 371; *Smith v. Edelstein*, 92 Ill. App. 38; *Means v. Flanagan*, 79 Ill. App. 296; *American Hoist, etc., Co. v. Hall*, 208 Ill. 597. See also *Miller v. John*, 208 Ill. 173.

*Iowa*. — *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203.

*Michigan*. — *McDonald v. Smith*, (Mich. 1905) 102 N. W. Rep. 668.

*Nebraska*. — *Bentley v. Woolson Spice Co.*, (Neb. 1901) 95 N. W. Rep. 803.

*New York*. — *Brehm v. Gushal*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 112; *Schorr v. Gewirz*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 186; *Darling v. Klock*, 33 N. Y. App. Div. 270, *affirmed* 165 N. Y. 623.

*Pennsylvania*. — *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603.

*South Carolina*. — *Johnson v. Franklin*, 58 S. Car. 394.

*Texas*. — *Carson v. Houssels*, (Tex. Civ. App. 1899) 51 S. W. Rep. 290.

*Vermont*. — *Roscoe v. Sawyer*, 71 Vt. 367.

*Wisconsin*. — *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895.

**202.** 1. Proof Must Produce Satisfactory Conviction — *Alabama*. — *Dean v. Oliver*, 131 Ala. 634.

*Illinois*. — *Davis v. Thornley*, 204 Ill. 266; *Faulkner v. I. L. Elwood Mfg. Co.*, 79 Ill. App. 544; *Edwards v. Story*, 105 Ill. App. 433; *Johnston v. Hirschberg*, 85 Ill. App. 47, *affirmed* 185 Ill. 445.

*Michigan*. — *McNaughton v. Smith*, 136 Mich. 368.

*Nebraska*. — *Hampton v. Webster*, 56 Neb. 628.

*New York*. — *Gray v. Richmond Bicycle Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 166, *affirmed* 40 N. Y. App. Div. 506. See also *Carson v. Eisner*, (Supm. Ct. App. Div.) 58 N. Y. Supp. 826.

*Pennsylvania*. — *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; *Nelson v. Steen*, 192 Pa. St. 581.

*Virginia*. — *Virginia-Carolina Chemical Co. v.*

*Carpenter*, 95 Va. 292; *Alsop v. Catlett*, 97 Va. 364; *New York L. Ins. Co. v. Davis*, 96 Va. 737.

*West Virginia*. — *Oberlin College v. Blair*, 45 W. Va. 812.

*Wisconsin*. — *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895; *Shaw v. Gilbert*, 111 Wis. 165; *Hubbard v. McLean*, 122 Wis. 75; *Miles v. Pike Min. Co.*, (Wis. 1905) 102 N. W. Rep. 555.

**Failure to Meet Notes Insufficient.** — *Diller v. Nelson*, 10 Pa. Super. Ct. 449.

**3. Mere Suspicion Not Enough** — *United States*. — *American Nat. Bank v. Supplee*, (C. C. A.) 115 Fed. Rep. 657; *U. S. v. Clark*, 125 Fed. Rep. 774.

*California*. — *Casey v. Leggett*, 125 Cal. 664; *Roberts v. Burr*, 135 Cal. 156.

*Illinois*. — *Corbett v. Greensfelder*, 92 Ill. App. 491, *reversed* 190 Ill. 565.

*Missouri*. — *Columbia Sav. Bank v. Kingsbury*, 84 Mo. App. 82.

*Pennsylvania*. — *Nelson v. Steen*, 192 Pa. St. 581.

*Virginia*. — *Wheby v. Moir*, 102 Va. 875.

*Wisconsin*. — *Shaw v. Gilbert*, 111 Wis. 165; *Dickson v. Pritchard*, 111 Wis. 310.

**203.** 3. Circumstances as Consistent with Honesty as with Fraud. — *Hoeller v. Haffner*, 155 Mo. 589.

**204.** 2. Number of Witnesses. — *Dalrymple v. Craig*, 149 Mo. 345; *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567; *Bennett v. Massachusetts Mut. L. Ins. Co.*, 107 Tenn. 371.

**3.** Longenecker v. Zion Evangelical Lutheran Church, 200 Pa. St. 567.

**4. Inadequacy of Price or Other Inequality.** — *Talbott v. Manard*, 106 Tenn. 60.

**5.** *Harbottle v. Rawlins*, 11 Hawaii 105; *Berger v. Booth*, 13 Hawaii 291; *Mattoon Gas Light, etc., Co. v. Dolan*, 111 Ill. App. 333; *Sohan v. Gibson*, (Ky. 1904) 80 S. W. Rep. 1173.

**6. Inadequacy of Consideration and Other Circumstances** — *Georgia*. — *Hoyle v. Southern Saw Works*, 105 Ga. 123.

*Illinois*. — *Walker v. Shepard*, 210 Ill. 100; *Wenegar v. Bollenbach*, 180 Ill. 222; *Shea v. Teufert*, 207 Ill. 222.

*Iowa*. — *Hale v. Kobbert*, 109 Iowa 128.

*Kentucky*. — *Combs v. Davidson*, (Ky. 1903) 74 S. W. Rep. 261.

*Mississippi*. — *Norfleet v. Beall*, 82 Miss. 538.

*Missouri*. — *Obst v. Unnerstall*, 184 Mo. 383.

*New Jersey*. — *Coffey v. Sullivan*, 63 N. J. Eq. 296.

*Ohio*. — *Manley v. Carl*, 11 Ohio Cir. Dec. 1, 20 Ohio Cir. Ct. 161.

*Tennessee*. — *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 957.

*Canada*. — *Macpherson v. McLean*, 34 N. Bruns. 361.

- 205.** XVI. QUESTIONS OF LAW AND FACT — 1. General Rule. — See note 3.  
**206.** See note 1.  
 2. Particular Elements of Fraud — *a.* IN GENERAL. — See note 3.  
*b.* OPINION OR STATEMENT OF FACT. — See note 5.  
**207.** *c.* MATERIALITY OF REPRESENTATIONS. — See notes 1, 2.  
*d.* KNOWLEDGE, AND INTENT. — See note 4.  
*e.* RELIANCE UPON REPRESENTATIONS. — See note 6.  
**208.** *f.* RIGHT TO RELY ON REPRESENTATIONS. — See note 1.

**FRAUDULENT—FRAUDULENTLY.** — See note 3.

**205.** 3. Questions of Law and Fact — Fraud Ordinarily Question for Jury — *United States.* — *Ball v. Warrington*, (C. C. A.) 108 Fed. Rep. 472; *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Simon v. Goodyear Metallic Rubber Shoe Co.*, (C. C. A.) 105 Fed. Rep. 573; *Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440.

*Delaware.* — *Freeman v. Topkis*, 1 Marv. (Del.) 174; *Clayton v. Cavender*, 1 Marv. (Del.) 191.

*Illinois.* — *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Hacker v. Munroe*, 176 Ill. 384; *Indiana, etc., R. Co. v. Fowler*, 201 Ill. 152, 94 Am. St. Rep. 158.

*Kentucky.* — *Western Assur. Co. v. Ray*, 105 Ky. 523.

*Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1.

*Michigan.* — *McMillan v. Reaume*, (Mich. 1904) 100 N. W. Rep. 166.

*Minnesota.* — *Brown v. Bayer*, 91 Minn. 140.

*Missouri.* — *Gratton, etc., Mfg. Co. v. Troll*, 77 Mo. App. 339; *Meier v. Jackson*, 78 Mo. App. 396.

*New Jersey.* — *Alexander v. Brogley*, 62 N. J. L. 584.

*New York.* — *Hines v. John Hancock Mut. L. Ins. Co.*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 809; *Townsend v. Felthousen*, 156 N. Y. 618.

*North Carolina.* — *Southern Commission Co. v. Porter*, 122 N. Car. 692; *Cutler v. Roanoke R., etc., Co.*, 128 N. Car. 477; *Austin v. Murdock*, 127 N. Car. 454.

*Pennsylvania.* — *Meyers v. Meyers*, 24 Pa. Super. Ct. 603.

*Texas.* — *Brin v. McGregor*, (Tex. Civ. App. 1901) 64 S. W. Rep. 78.

*Washington.* — *Opie v. Pacific Invest. Co.*, 26 Wash. 505; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

*Wisconsin.* — *Potter v. Necedah Lumber Co.*, 105 Wis. 25.

**206.** 1. Facts Undisputed — Fraud Question of Law for Court. — *Wilcox v. Perkins County*, (Neb. 1903) 97 N. W. Rep. 236. See also *Hubbard v. McLean*, 122 Wis. 75.

3. Falsity of Representations. — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25; *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160; *Nash-*

*ville First Nat. Bank v. U. S. Fidelity, etc., Co.*, 110 Tenn. 10; *Texas Cotton Products Co. v. Denny*, (Tex. Civ. App. 1903) 78 S. W. Rep. 557.

5. *Tuscaloosa County v. Foster*, 132 Ala. 292; *Marshall v. Seelig*, 49 N. Y. App. Div. 433.

**207.** 1. Materiality of Representations. — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25; *Greenleaf v. Gerald*, 94 Me. 91.

2. *Fottler v. Moseley*, 179 Mass. 295; *Vilett v. Moler*, 82 Minn. 12; *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659; *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

4. Knowledge and Intent Questions of Fact — *Massachusetts.* — *Arnold v. Teel*, 182 Mass. 1.

*Michigan.* — *Zabel v. New State Telephone Co.*, 127 Mich. 402; *Crowley v. Langdon*, 127 Mich. 51.

*Minnesota.* — *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

*Missouri.* — *Gratton, etc., Mfg. Co. v. Troll*, 77 Mo. App. 339.

*New York.* — *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659.

*Ohio.* — *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Virginia.* — *Taylor v. Mallory*, 96 Va. 18.

6. Reliance upon False Representations. — *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Hess v. Draffen*, 99 Mo. App. 580; *Austin v. Murdock*, 127 N. Car. 454; *Chilson v. Houston*, 9 N. Dak. 498; *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Contra.* — *Greenleaf v. Gerald*, 94 Me. 91.

**208.** 1. Right to Rely on Representations a Question of Fact. — *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Lee v. Tarplin*, 183 Mass. 52; *Whiting v. Price*, 172 Mass. 240, 70 Am. St. Rep. 262; *Hess v. Draffen*, 99 Mo. App. 580; *Richardson-Roberts-Byrne Dry Goods Co. v. Goodkind*, 22 Mont. 462.

3. Matter of Davenport, (Surrogate Ct.) 36 Misc. (N. Y.) 475.

Fraudulently Contracted — Attachment. — See *American Surety Co. v. Haynes*, 91 Fed. Rep. 90.

# FRAUDULENT SALES AND CONVEYANCES.

BY H. N. ELDRIDGE.

**222. I. INTRODUCTORY — 3. The Statute 13 Eliz., c. 5 — b. INTERPRETATION AND CONSTRUCTION — (1) The Statute Declaratory of the Common Law.** — See note 2.

**223.** See note 1.

(2) *To Be Liberally Expounded.* — See note 2.

4. Statutes in the United States. — See note 3.

**II. RIGHTS AND OBLIGATIONS OF DEBTORS IN RESPECT TO THEIR PROPERTY — 2. Rights as Owner — a. IN GENERAL — Creditor Cannot Question Bona Fide Disposition.** — See note 6.

**224.** See note 1.

Insolvency Does Not Raise Presumption of Fraud. — See note 2.

b. TO DISPOSE OF TANGIBLE PROPERTY — (1) *For a Present Consideration* — (a) *By Absolute Conveyance.* — See note 4.

**225.** Sales to Relatives. — See note 1.

Assumption of Debts of Grantor. — See note 3.

**222. 2. Statute 13 Eliz., c. 5, a Declaratory Statute.** — *Carter v. Richardson*, (Ky. 1901) 60 S. W. Rep. 397.

**223. 1.** See *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427.

2. Statutes to Be Liberally and Beneficially Expounded. — See *Banks v. McCandless*, 119 Ga. 793; *Carter v. Richardson*, (Ky. 1901) 60 S. W. Rep. 397.

3. Statutes Modeled After 13 Eliz. — The *Arkansas, Kentucky, and North Carolina* statutes as to fraudulent conveyances are modeled after the statute 13 Elizabeth. *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116; *Carter v. Richardson*, (Ky. 1901) 60 S. W. Rep. 397; *Cox v. Wall*, 132 N. Car. 733.

The Terms of the Colorado Statute have been held to be "quite as broad as those of 13 Elizabeth, c. 5." *House v. Johnson*, 19 Colo. App. 524.

In Washington the statute of 13 Eliz., c. 5, is a part of the common law of the state. *Bates v. Drake*, 28 Wash. 447.

6. A Suit by a Vendor for Specific Performance is not subject to the defense by the vendee that the vendor was insolvent, where the sale was in good faith. *Cone v. Cone*, 118 Iowa 458.

**224. 1. Creditor Cannot Question Bona Fide Dispositions.** — *Davis v. Harper*, 14 App. Cas. (D. C.) 463.

2. Insolvency Does not Raise Presumption of Fraud. — *Vansickle v. Wells*, 105 Fed. Rep. 24, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

4. Right of Debtor to Sell His Property. — *McKenzie v. Thomas*, 118 Ga. 728; *Sellers v. Hayes*, 163 Ind. 422; *Carson v. Hawley*, 82 Minn. 204; *Gage v. Mears*, 107 Mo. App. 140; *Farmers', etc., Nat. Bank v. Mosher*, 63 Neb. 130; *Fisher v. Stout*, 74 N. Y. App. Div. 97; *Sauers v. Beechler*, 38 Oregon 228; *Herold v. Barlow*, 47 W. Va. 750.

Sales on Credit. — The law does not prohibit

honest sales of goods upon credit even though the seller is in debt at the time. *Gordon v. Alexander*, 122 Mich. 107.

**225. 1. Sales to Relatives — Alabama.** — *Clewis v. Malon*, 119 Ala. 312.

*Colorado.* — *Vote v. Karrick*, 13 Colo. App. 388.

*District of Columbia.* — *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224.

*Georgia.* — *Cooley v. Abbey*, 111 Ga. 439.

*Illinois.* — *Ackerman v. Arbaugh*, 97 Ill. App. 155.

*Kansas.* — *Parmenter v. Lomax*, 68 Kan. 61.

*Louisiana.* — *Rownd v. Davidson*, 113 La. 1047.

*Minnesota.* — *Nichols, etc., Co. v. Gerlich*, 84 Minn. 483; *Shea v. Hynes*, 89 Minn. 423.

*Mississippi.* — *Viriden v. Dwyer*, 78 Miss. 763.

*Missouri.* — *Trabue v. Henderson*, 180 Mo. 616; *Christian v. Smith*, 85 Mo. App. 117. See also *Bracken v. Milner*, 99 Mo. App. 187.

*Nebraska.* — *Carson v. Murphy*, (Neb. 1901) 96 N. W. Rep. 110.

*North Carolina.* — *Southern L. & T. Co. v. Benbow*, 135 N. Car. 303.

*Ohio.* — *Corwine v. Thompson Nat. Bank*, 105 Fed. Rep. 196 (decided in the Ohio Circuit).

*Oklahoma.* — See *Jenks v. McGowan*, 9 Okla. 306.

*Oregon.* — *Garnier v. Wheeler*, 40 Oregon 198; *Walker v. Harold*, 44 Oregon 205.

*Washington.* — *Budlong v. Budlong*, 32 Wash. 672.

*West Virginia.* — *Stauffer v. Kennedy*, 47 W. Va. 714; *Farmers' Transp. Co. v. Swaney*, 48 W. Va. 272.

*Wisconsin.* — *Oppenheimer v. Collins*, 115 Wis. 283.

*Canada.* — See *Smith v. Wright*, 2 N. Bruns. Eq. Rep. 528.

3. Assumption of Debts of Grantor. — See *Miller v. Withers*, 188 Pa. St. 128.

**226.** (b) By Conveyance in Mortgage — To Secure Money Presently Loaned. — See note 2.

**227.** (2) *In Payment or Security of Antecedent Debts* — (a) *At Common Law* — aa. WHEN THE DEBTOR IS A NATURAL PERSON — (aa) *By Direct Conveyance to Creditor* — aaa. In General — Right to Pay Creditor. — See note 1.

**226.** 2. Right to Give Mortgage to Secure Money Presently Loaned. — *Eickstaedt v. Moses*, 105 Ill. App. 634; *German-American Bank v. Magill*, 102 Wis. 582.

That the Mortgage Is in Favor of a Relative makes no difference. *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138.

**227.** 1. Right of Debtor to Pay Antecedent Debt — *United States*. — *Dorrance v. McAlester*, (C. C. A.) 91 Fed. Rep. 614; *Fischer v. Campbell*, (C. C. A.) 101 Fed. Rep. 156; *Repauno Chemical Co. v. Victor Hardware Co.*, (C. C. A.) 101 Fed. Rep. 948; *Vansickle v. Wells*, 105 Fed. Rep. 16; *Kemp v. National Bank of Republic*, (C. C. A.) 109 Fed. Rep. 48; *In re A. L. Robertshaw Mfg. Co.*, 133 Fed. Rep. 556.

*Alabama*. — *Green v. Emens*, 135 Ala. 563; *McLendon v. Grice*, 119 Ala. 513; *Morrow v. Campbell*, 118 Ala. 330; *Inman v. Schloss*, 122 Ala. 461; *Merchants', etc., Bank v. Paulk*, 124 Ala. 591.

*Arkansas*. — *Maddox v. Reynolds*, 69 Ark. 541; *Blakemore v. Eagle*, 73 Ark. 477.

*California*. — *Merced Bank v. Ivett*, 127 Cal. 134; *Roberts v. Burr*, 135 Cal. 156; *Heath v. Wilson*, 139 Cal. 362.

*Colorado*. — *Brown v. Potter*, 13 Colo. App. 512.

*Delaware*. — *Brown v. Dickerson*, 2 Marv. (Del.) 119.

*District of Columbia*. — *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37.

*Florida*. — *Walling v. Christian, etc., Grocery Co.*, 41 Fla. 479.

*Georgia*. — *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449. See also *Lamkin v. Clary*, 103 Ga. 631.

*Illinois*. — *Glanz v. Smith*, 76 Ill. App. 630; *Williams v. Andrew*, 84 Ill. App. 289, *affirmed* 185 Ill. 98; *Eickstaedt v. Moses*, 105 Ill. App. 634; *Hoff v. Larimore*, 106 Ill. App. 589; *Morris v. Coombs*, 109 Ill. App. 176; *Taylor v. Seiter*, 199 Ill. 555.

*Indian Territory*. — *Glover v. Fitzpatrick*, (Indian Ter. 1902) 69 S. W. Rep. 856; *Turner Hardware Co. v. Reynolds*, 2 Indian Ter. 49.

*Iowa*. — *Latrobe First Nat. Bank v. Garretson*, 107 Iowa 196; *Kerr v. Kennedy*, 119 Iowa 239; *Pieter v. Bales*, 126 Iowa 170.

*Kansas*. — *Manley v. Larkin*, 59 Kan. 528; *Wilhite v. Daniels*, 64 Kan. 884, 67 Pac. Rep. 452.

*Maryland*. — *Wise v. Praff*, 98 Md. 576; *Thompson v. Williams*, 100 Md. 195.

*Michigan*. — *Michigan Trust Co. v. Comstock*, 120 Mich. 572. See also *Caswell v. Pilkinton*, (Mich. 1904) 101 N. W. Rep. 212.

*Missouri*. — *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213; *Swinford v. Teegarden*, 159 Mo. 635; *Wall v. Beedy*, 161 Mo. 625; *Bangs Milling Co. v. Burns*, 152 Mo. 350; *Meyer Bros. Drug Co. v. White*, 165 Mo. 136; *Weil v. Reiss*, 167 Mo. 125; *Burnham v. Boyd*, 167 Mo. 185; *Bates County Bank v. Gailey*, 177

Mo. 181; *State v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181; *Hearn v. Due*, 79 Mo. App. 322; *Esselbruegge Mercantile Co. v. Troll*, 79 Mo. App. 558; *Norton v. Thiebes Sterling Music Co.*, 82 Mo. App. 216; *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447; *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275; *Baker, etc., Co. v. Schneider*, 85 Mo. App. 412; *Kurtz v. Lewis Voight, etc., Co.*, 86 Mo. App. 649; *Hewitt v. Price*, 99 Mo. App. 666; *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599.

*Nebraska*. — *Bennett v. McDonald*, 59 Neb. 234; *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 83 Am. St. Rep. 503; *Ogg v. Schultz*, 61 Neb. 221; *Blair State Bank v. Bunn*, 61 Neb. 464; *Tackaberry v. Gilmore*, 57 Neb. 450; *Chamberlain Banking House v. Turner Frazer Mercantile Co.*, 66 Neb. 48.

*New Jersey*. — *Joseph M. Smith Co. v. O'Brien*, 57 N. J. Eq. 365; *Thompson v. Williamson*, 67 N. J. Eq. 212.

*New York*. — *Barker v. Archer*, 49 N. Y. App. Div. 80; *O'Connor v. Docen*, 50 N. Y. App. Div. 610; *Obermeyer v. Jung*, 51 N. Y. App. Div. 247; *Shidlovsky v. Gorman*, 51 N. Y. App. Div. 253; *Stackhouse v. Holden*, 66 N. Y. App. Div. 423; *New York County Nat. Bank v. American Surety Co.*, 69 N. Y. App. Div. 153, *affirmed* 174 N. Y. 544; *Bridgham v. Kelly*, 84 N. Y. App. Div. 163; *Iselin v. Goldstein*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 489; *National Bank of Republic v. Thurber*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 13; *Dodge v. McKechnie*, 156 N. Y. 514.

*North Carolina*. — *City Nat. Bank v. Bridgers*, 128 N. Car. 322.

*North Dakota*. — *Salemonson v. Thompson*, 13 N. Dak. 182.

*Ohio*. — *Chicago First Nat. Bank v. F. C. Trebein Co.*, 59 Ohio St. 316.

*Oregon*. — *Hesse v. Barrett*, 41 Oregon 204, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226 [227]; *Fleischner v. McMinnville First Nat. Bank*, 36 Oregon 556; *Mendenhall v. Elwert*, 36 Oregon 375.

*Pennsylvania*. — *Penn. Plate Glass Co. v. Jones*, 189 Pa. St. 290; *Thornburn v. Thompson*, 192 Pa. St. 298; *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818; *Shibler v. Hartley*, 201 Pa. St. 286, 88 Am. St. Rep. 811; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603; *Peck v. Spruks*, 6 Lack. Leg. N. (Pa.) 132.

*South Carolina*. — *Lenhardt v. Ponder*, 64 S. Car. 354.

*Tennessee*. — *Warren v. Hinson*, (Tenn. Ch. 1899) 52 S. W. Rep. 498.

*Texas*. — *Texas Drug Co. v. Shields*, 20 Tex. Civ. App. 274; *Half v. Goldfrank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1095; *Bruce v. Koch*, 94 Tex. 192, *reversing* (Tex. Civ. App. 1900) 58 S. W. Rep. 189; *Rilling v. Schultze*, 95 Tex. 352; *Moore v. Robinson*, (Tex. Civ. App. 1903) 75 S. W. Rep. 890; *Eason v. Garrison*, 36 Tex. Civ. App. 574; *Riske v. Rotan Grocery Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 243.

**228.** Directing Purchase Money Paid to Preferred Creditors. — See note 1.

**229.** Debtor's Intention to Defeat Particular Creditor. — See note 5.

Secrecy in Making Preference. — See note 6.

Debt Barred by Statute of Limitations. — See note 7.

**230.** Right to Secure Creditor. — See note 1.

*Virginia* — *Johnson v. Lucas*, 103 Va. 37.

*Washington*. — *Dow v. Dempsey*, 21 Wash. 86; *Troy v. Morse*, 22 Wash. 280.

*West Virginia*. — *Herold v. Barlow*, 47 W. Va. 750; *Kennewig Co. v. Moore*, 49 W. Va. 323; *Farmers' Bank v. Gould*, 48 W. Va. 99, 86 Am. St. Rep. 24; *Bartles v. Dodd*, 56 W. Va. 383.

*Wisconsin*. — *Haring v. Hamilton*, 107 Wis. 112; *Kickbusch v. Corwith*, 108 Wis. 634.

*Canada*. — *Atkinson v. Bourgeois*, 7 N. Bruns. Eq. Rep. 641; *Beaubien v. Perrault*, 17 Quebec Super. Ct. 410; *Delong v. Gillis*, 31 Nova Scotia 61. See also *Bertrand v. Canadian Rubber Co.*, 12 Manitoba 27.

**Conveyance of Excessive Amount of Property.** —

When a creditor knows, or is charged with knowledge, of the insolvency of his debtor, and he takes in payment of his claim more property than is reasonably sufficient to satisfy it, the transaction is void as to creditors. *Thompson v. Rosenstein*, (Tex. Civ. App. 1902) 67 S. W. Rep. 440. See also *Bauer Grocer Co. v. McKee Shoe Co.*, 87 Ill. App. 434.

**Effect of Statutes.** — The *Louisiana* code does not recognize "preferred" creditors. *Marx v. Meyer*, 50 La. Ann. 1229.

In *Oklahoma* it is expressly provided by statute that "a debtor may pay one creditor in preference to another, or may give to one creditor security in payment of his demand, in preference to another." *Brittain v. Burnham*, 9 Okla. 522.

**In Payment of Contemplated Services.** — A failing debtor may pass over his creditors and make a payment for services to be subsequently rendered, provided he acts *bona fide*. *Farmers'*, etc., *Nat. Bank v. Mosher*, 63 Neb. 130.

**Preferred Creditor's Claim Not Due.** — The law does not forbid a debtor to pay and a creditor to receive a debt before it is due, provided the creditor's purpose is to receive his own debt, and not to defeat or delay another's. *McElwee v. Kennedy*, 56 S. Car. 171.

**Delegation of Power to Prefer Creditors.** —

While an insolvent debtor may lawfully prefer one creditor to another, he has no right to delegate that power to a third person. *Hargadine-McKittrick Dry Goods Co. v. Carnahan*, 79 Mo. App. 219.

**Assignment of Claims Due to Debtor.** — A failing debtor may prefer a creditor by assigning to him claims due from third persons. *Ruthven v. Clarke*, 109 Iowa 25; *Fradd v. Charon*, 69 N. H. 180.

**228. 1. Payment of Consideration to Preferred Creditors.** — *Farwell v. Norton*, 77 Ill. App. 685; *Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 581.

**229. 5. Green v. Emens, 135 Ala. 563.**

**6. Secrecy in Making Preference Not Fraudulent.** — *Repauno Chemical Co. v. Victor Hardware Co.*, (C. C. A.) 101 Fed. Rep. 948; *Robinson v. Hawley*, 45 N. Y. App. Div. 292.

"When a creditor is seeking payment or security for his debt from an insolvent debtor, it is commonly to his interest to act with celerity and secretly. If he made open proclamation of his intended action, it would probably result in some other creditor obtaining the preference." *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 154.

**7. Debt Barred by Statute of Limitations.** — *Eickstaedt v. Moses*, 105 Ill. App. 634; *Plummer v. Rohman*, 62 Neb. 145, *affirming* 61 Neb. 61. *Contra*, *Liver v. Thielke*, 115 Wis. 392, the court saying: "It is the settled law of this state that the effect of the statute of limitations is to completely extinguish the right upon which it has operated." See also the title **LIMITATION OF ACTIONS**, 147. 1, note.

**230. 1. Right of Debtor to Give Security** — *United States*. — *National Wall-Paper Co. v. Davis*, 98 Fed. Rep. 472; *Ontario Bank v. Hurst*, (C. C. A.) 103 Fed. Rep. 231; *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 145; *McCartney v. Earle*, (C. C. A.) 115 Fed. Rep. 462.

*Arkansas*. — *Blass v. Goodbar*, 65 Ark. 511.

*California*. — *Heath v. Wilson*, 139 Cal. 362.

*District of Columbia*. — *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37.

*Illinois*. — *Nelson v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142, *affirming* 93 Ill. App. 176; *Spalding v. Heideman*, 96 Ill. App. 405; *Eickstaedt v. Moses*, 105 Ill. App. 634; *Adams v. Pease*, 113 Ill. App. 356; *Morriss v. Blackman*, 179 Ill. 103. See also *Deane v. John A. Tolman Co.*, 83 Ill. App. 486.

*Indian Territory*. — *Noyes v. Tootle*, 2 Indian Ter. 144.

*Iowa*. — *Groves v. Steel*, 117 Iowa 701; *Brooks v. Jones*, 114 Iowa 385.

*Michigan*. — *Belding Sav. Bank v. Moore*, 118 Mich. 150; *Franklin Needle Co. v. Amazon Hosiery Co.*, 128 Mich. 198; *Heath v. Koon*, 130 Mich. 54; *Crusoe Bros. Co. v. Kudner*, 136 Mich. 583.

*Mississippi*. — *Anderson v. McNeal*, 82 Miss. 542.

*Missouri*. — *St. Louis Nat. Bank v. Field*, 154 Mo. 368; *Wood v. Porter*, 179 Mo. 56; *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599.

*Montana*. — *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543.

*Nebraska*. — *Greenwood v. Ingersoll*, 61 Neb. 785; *Grainger v. Erwin*, (Neb. 1902) 91 N. W. Rep. 592.

*New Jersey*. — *Platt v. McClong*, (N. J. 1901) 49 Atl. Rep. 1125.

*New York*. — *Stackhouse v. Holden*, 66 N. Y. App. Div. 423; *Baker v. Potts*, 73 N. Y. App. Div. 29; *New York County Nat. Bank v. American Surety Co.*, 69 N. Y. App. Div. 153, *affirmed* 174 N. Y. 544.

*Ohio*. — *Hegler v. Grove*, 63 Ohio St. 404; *First Nat. Bank v. Leise*, 23 Ohio Cir. Ct. 45.

*Oklahoma*. — *Nix v. Underhill*, 8 Okla. 123.

**231.** So the Giving of an Indemnity. — See note 1.

bbb. Confession of Judgment. — See note 2.

**232.** Giving Judgment Notes. — See note 1.

ddd. Preference of Relations. — See note 3.

*Oregon.* — *Fleischner v. McMinnville First Nat. Bank*, 36 *Oregon* 556.

*South Dakota.* — *F. Meyer Boot, etc., Co. v. C. Shenkberg Co.*, 11 *S. Dak.* 620; *Studebaker Bros. Mfg. Co. v. Zollars*, 12 *S. Dak.* 296.

*Tennessee.* — *McGrew v. Hancock*, (Tenn. Ch. 1899) 52 *S. W. Rep.* 500; *Phillips v. Cunningham*, (Tenn. Ch. 1899) 58 *S. W. Rep.* 463.

*Texas.* — *Wade v. Odle*, 21 *Tex. Civ. App.* 656; *Watts v. Dubois*, (Tex. Civ. App. 1902) 66 *S. W. Rep.* 698; *Rilling v. Schultze*, 95 *Tex.*

*Virginia.* — *Johnson v. Lucas*, 103 *Va.* 37.

*Washington.* — *Straw-Ellsworth Mfg. Co. v. Cain*, 20 *Wash.* 351; *California Bank v. Puget Sound Loan, etc., Co.*, 20 *Wash.* 636.

*Wisconsin.* — *Haring v. Hamilton*, 107 *Wis.* 112; *Ritzinger v. Eau Claire Nat. Bank*, 103 *Wis.* 346; *Kickbusch v. Corwith*, 108 *Wis.* 634.

**Shares Owned by the Debtor** may be turned over to a preferred creditor as security for the debt. *Scripps v. Crawford*, 123 *Mich.* 173.

**Accepting Property in Excess of Debt.** — It is legal for a creditor to accept from his debtor any amount of property in excess of his debt when he takes it merely as security. In that event, however, he is entitled only to the payment of his debt, and the balance is available for other creditors. *Hollis v. Drescher*, 46 *N. Y. App. Div.* 151.

**231. 1. Securing Sureties.** — *Owens v. Gascho*, 154 *Ind.* 225; *Dodge v. McKechnie*, 156 *N. Y.* 514; *Chicago First Nat. Bank v. F. C. Trebein Co.*, 59 *Ohio St.* 316.

**But an Absolute Conveyance to a Surety Who Has Not Satisfied Any Liability of the Principal** is fraudulent as to the principal's existing creditors, there being no valid consideration for the conveyance. *Craft v. Schlag*, 61 *N. J. Eq.* 567.

**2. Confession of Judgment** — *District of Columbia.* — *Strasburger v. Dodge*, 12 *App. Cas.* (D. C.) 37.

*Illinois.* — See *International Trust Co. v. Chicago First Nat. Bank*, 101 *Ill. App.* 548.

*Nebraska.* — See *Pitkin v. Burnham*, 62 *Neb.* 385, 89 *Am. St. Rep.* 763.

*New York.* — *New York County Nat. Bank v. American Surety Co.*, 69 *N. Y. App. Div.* 153, affirmed 174 *N. Y.* 544.

*Pennsylvania.* — *Rine v. Hall*, 187 *Pa. St.* 264; *Page v. Simpson*, 188 *Pa. St.* 393; *Thornburn v. Thompson*, 192 *Pa. St.* 298; *Snayberger v. Fahl*, 195 *Pa. St.* 336, 78 *Am. St. Rep.* 818; *Shibler v. Hartley*, 201 *Pa. St.* 286, 88 *Am. St. Rep.* 811; *In re Dalley*, 13 *Pa. Super. Ct.* 506, reversed 200 *Pa. St.* 140; *Peck v. Spruks*, 6 *Lack. Leg. N. (Pa.)* 132. See also *Page v. Williamsport Suspender Co.*, 191 *Pa. St.* 511.

*South Carolina.* — *Mechanics' Bldg., etc., Assoc. v. Fowler*, 57 *S. Car.* 110.

*Virginia.* — *Johnson v. Lucas*, 103 *Va.* 37.

**A Confession of Judgment Brought About by Fraud** is, however, voidable at the election of the debtor's other creditors. *Anderson v. Lassen County Bank*, 140 *Cal.* 695; *Argo v. Fox*, 95 *Ill. App.* 610.

**Judgment Confessed in Favor of Brother.** —

To secure a *bona fide* debt a debtor has the right, though in failing circumstances, to prefer his brother by a confession of judgment, so far as the statute of Elizabeth or the common law is concerned, provided he does not thereby intend also to delay or defraud his other creditors, or does not thereby, as the price of the preference, secure to himself a direct advantage at the expense of his creditors. *Sloan v. Hunter*, 56 *S. Car.* 385, 76 *Am. St. Rep.* 551.

**Judgment Confessed in Favor of Wife.** — A judgment honestly confessed to a wife by an insolvent husband on account of money loaned by the wife is good against creditors, though there was no agreement for interest on the money advanced, and such interest was included in the judgment. *Hawley v. Griffith*, 187 *Pa. St.* 306.

**Delay in Recording.** — A delay by the creditor in recording the confessed judgment does not in itself render the judgment invalid as to other creditors of the judgment debtor. *Robinson v. Hawley*, 45 *N. Y. App. Div.* 287. See also *infra*, this title, 526. 1.

**232. 1.** *U. S. Rubber Co. v. American Oak Leather Co.*, 181 *U. S.* 434 (construing the *Illinois* law); *Groves v. Steel*, 117 *Iowa* 701.

**3. Preference of Relations Generally** — *United States.* — *Vansickle v. Wells*, 105 *Fed. Rep.* 24, citing 14 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 232; *Walker v. Houghteling*, (C. C. A.) 120 *Fed. Rep.* 928.

*Alabama.* — *Morrow v. Campbell*, 118 *Ala.* 330.

*Iowa.* — *Woods v. Allen*, 109 *Iowa* 484; *Brooks v. Jones*, 114 *Iowa* 385.

*Kansas.* — *Parmenter v. Lomax*, 68 *Kan.* 61. See also *Miller v. Wilkerson*, 10 *Kan. App.* 576, 62 *Pac. Rep.* 253.

*Maryland.* — *Commonwealth Bank v. Kearns*, 100 *Md.* 202.

*Montana.* — *Noyes v. Ross*, 23 *Mont.* 425, 75 *Am. St. Rep.* 543.

*Nebraska.* — *Blair State Bank v. Bunn*, 61 *Neb.* 464; *Knudson v. Parker*, (Neb. 1902) 91 *N. W. Rep.* 850; *Pope v. Kingman*, (Neb. 1901) 96 *N. W. Rep.* 519.

*New York.* — *Nichols v. Nichols*, (Supm. Ct. Tr. T.) 40 *Misc. (N. Y.)* 9.

*Oregon.* — *Hesse v. Barrett*, 41 *Oregon* 202.

*South Dakota.* — *Studebaker Bros. Mfg. Co. v. Zollars*, 12 *S. Dak.* 296.

*Tennessee.* — *Warren v. Hinson*, (Tenn. Ch. 1899) 52 *S. W. Rep.* 498.

**Preference of Son by Father.** — *Redd v. Redd*, (Ky. 1902) 67 *S. W. Rep.* 367; *Jones v. Geery*, 153 *Mo.* 476; *Phillips v. Cunningham*, (Tenn. Ch. 1899) 58 *S. W. Rep.* 463.

**Preference of Daughter by Father.** — *Donnelly v. Smith*, 83 *Ill. App.* 656; *Clow v. Brown*, (Ind. App. 1904) 72 *N. E. Rep.* 534; *Mitchell v. Simpson*, 62 *Kan.* 343; *Thompson v. Williams*, 100 *Md.* 195; *Stuart v. Neely*, 50 *W. Va.* 508.

**Preference of Father by Son.** — *Merchants' Nat. Bank v. Lyon*, 185 *Ill.* 343; *Riddick v. Parr*, 111 *Iowa* 733; *Pieter v. Bales*, 126 *Iowa* 170; *Smith v. Smith*, 48 *W. Va.* 51.

- 233.** Conveyance from Husband to Wife. — See note 1.  
**234.** Debt Barred by Statute of Limitations. — See note 1.  
 Conversion of Wife's Separate Estate. — See note 3.  
**235.** Express Promise of Repayment. — See note 1.  
 Services of Emancipated Minor. — See note 5.  
 Services by Other Members of the Grantor's Family. — See note 7.  
**236.** See Conveyance to Creditor to Pay Himself and Others. — See note 2.

**Preference of Mother by Son.** — *Cooper v. Sawyer*, 31 Tex. Civ. App. 620.

**Preference of Brother by Brother.** — *Krippendorf-Dittman Co. v. Trenoweth*, 16 Colo. App. 178; *Müller v. Winton*, (Tenn. Ch. 1900) 56 S. W. Rep. 1049.

**Preference of Sister by Brother.** — *O'Neill v. Walsh*, 92 Ill. App. 61, *affirmed* 192 Ill. 207.

**Preference of Brother-in-Law.** — *Thompson v. Zuckmayer*, (Iowa 1903) 94 N. W. Rep. 476.

**Preference of Mother by Daughter.** — *Mueller v. Renkes*, 31 Mont. 100.

**Preference of Daughter by Mother.** — *National Bank v. Bonnell*, 46 N. Y. App. Div. 302.

**233. 1. Conveyance from Husband to Wife** — *Alabama*. — *Little v. Sterne*, 125 Ala. 609.

*Arkansas*. — See *Reeves v. Slade*, 71 Ark. 611.

*Colorado*. — *Knox v. Clark*, 15 Colo. App. 356.

*Illinois*. — *Earl v. Earl*, 186 Ill. 370; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172, *affirming* 89 Ill. App. 469; *Dean v. Plane*, 195 Ill. 495; *Benepe v. Meier*, 75 Ill. App. 561; *Schuberth v. Schillo*, 177 Ill. 346, *affirming* 76 Ill. App. 356; *Vietor v. Swisky*, 87 Ill. App. 583, *reversed* 200 Ill. 257; *Cooke v. Peter*, 93 Ill. App. 1.

*Iowa*. — *King v. Wells*, 106 Iowa 649; *Woods v. Allen*, 109 Iowa 484; *McCormick Harvesting Mach. Co. v. Griffin*, 116 Iowa 397; *Meredit v. Schaap*, (Iowa 1901) 85 N. W. Rep. 628; *Clark v. Ford*, 126 Iowa 460.

*Kentucky*. — *Taylor v. Cooley*, (Ky. 1899) 49 S. W. Rep. 335; *McCandless v. Rea*, (Ky. 1900) 56 S. W. Rep. 10.

*Michigan*. — *Ullman v. Thomas*, 126 Mich. 61; *Cole v. Cole*, 126 Mich. 569; *Sullivan v. Parkinson*, 128 Mich. 527; *Winslow v. Putnam*, 130 Mich. 359; *Heath v. Koon*, 130 Mich. 54.

*Mississippi*. — *Donoghue v. Shull*, 85 Miss. 404.

*Missouri*. — *Balz v. Nelson*, 171 Mo. 682; *Citizens Bank v. Burrus*, 178 Mo. 716; *Sedalia Third Nat. Bank v. Cramer*, 78 Mo. App. 476; *Mayfield Woolen Mills v. Wilson*, 87 Mo. App. 145.

*Montana*. — *Mueller v. Renkes*, 31 Mont. 100.

*Nebraska*. — *Dunn v. Bozarth*, 59 Neb. 244; *Plummer v. Rohman*, 62 Neb. 145.

*New York*. — *Vogedes v. Beakes*, 38 N. Y. App. Div. 380; *Bogert v. Hess*, 50 N. Y. App. Div. 253; *Willis v. Willis*, 79 N. Y. App. Div. 9.

*North Carolina*. — *Howard v. Early*, 126 N. Car. 170.

*Pennsylvania*. — *Rine v. Hall*, 187 Pa. St. 264.

*South Carolina*. — *McElwee v. Kennedy*, 56 S. Car. 154; *Lenhardt v. Ponder*, 64 S. Car. 354. See also *Mechanics Bldg., etc., Assoc. v. Fowler*, 57 S. Car. 110.

*Tennessee*. — *Byler v. Adams*, (Tenn. Ch. 1901) 62 S. W. Rep. 21.

*Texas*. — *Massie v. McKee*, (Tex. Civ. App.

1900) 56 S. W. Rep. 119; *Thompson v. Wilson*, 24 Tex. Civ. App. 666; *McCrory v. Lutz*, 94 Tex. 650, 64 S. W. Rep. 780; *Grevils v. Smith*, 29 Tex. Civ. App. 150.

*Virginia*. — *McConville v. National Valley Bank*, 98 Va. 9. See also *New South Bldg., etc., Assoc. v. Reed*, 96 Va. 345, 70 Am. St. Rep. 858; *Kline v. Kline*, 103 Va. 263.

In *Graham v. Morgan*, 83 Miss. 601, the court said: "Under uniform decisions of our court, a husband, though insolvent, has a right to prefer his wife, and protect her interest by conveying his property to her, even though by so doing his other creditors are defeated of their rights, and even though the conveyance is made on account of the pendency of suits by other creditors against him; the only condition being that there must be existing between husband and wife a valid indebtedness equal to the fair value of the property conveyed."

**234. 1. Debt Barred by Statute of Limitations.** — *Roberts v. Brothers*, 119 Iowa 309; *Dickinson v. Johnson*, 110 Ky. 236, 96 Am. St. Rep. 434; *Plummer v. Rohman*, 62 Neb. 145, *affirming* 61 Neb. 61; *Dalley's Estate*, 13 Pa. Super. Ct. 506, *reversed* 200 Pa. St. 140.

**3. Conversion of Wife's Separate Estate.** — See *Stacker v. Wilson*, (Tenn. Ch. 1899) 52 S. W. Rep. 709.

**235. 1. Promise of Repayment Necessary.** — In *Albuquerque First Nat. Bank v. McClellan*, 9 N. Mex. 641, the court said: "Where a wife advances money to her husband, without any promise to repay, or under such circumstances as not to create the relation of debtor and creditor at the time, such advancement is no consideration for a subsequent conveyance to her."

**Voluntary Contributions by a Wife for the Support of Her Family** will not sustain a conveyance to her by her husband who is insolvent. *Adoue v. Spencer*, 59 N. J. Eq. 231.

**5. Services of Emancipated Child.** — *Perry v. Cornelius*, (Ky. 1901) 63 S. W. Rep. 23.

**7. Services by Wife.** — A contract between a husband and wife, by which the latter is to be paid for her services rendered in the household, is void as against the creditors of the husband, and, if his estate is transferred to the wife in payment of such services and in performance of such a contract, the transfer is void as against the creditors of the husband, and the property so transferred or purchased with the avails of such a contract may be reached by his creditors. *Conger v. Corey*, 39 N. Y. App. Div. 241.

**236. 2. Conveyance to Creditor to Pay Himself and Others.** — *Rosenheim v. Flanders*, 114 Iowa 291; *Berry v. Berk*, 62 Neb. 538, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 236; *Desmond v. Roth*, 9 Ohio Cir. Dec. 204, 16 Ohio Cir. Ct. 481.

**236.** (bb) *By Conveyance to Trustee* — *aaa. Partial Assignments.* — See note 3.

**237.** bb. WHEN THE DEBTOR IS A PARTNERSHIP — (aa) *Right of Firm to Prefer Creditors.* — See note 2.

**239.** (dd) *Paying Personal Debt with Partnership Assets* — *When the Partnership Is Solvent.* — See note 3.

But *When the Partnership Is Insolvent.* — See notes 4, 5.

**240.** cc. WHEN THE DEBTOR IS A CORPORATION — (aa) *Paying or Securing Directors.* — See note 4.

**241.** (bb) *Paying or Securing Particular Creditors.* — See note 1.

**242.** e. TO INVEST IN A HOMESTEAD. — See note 9.

**243.** f. TO PAY PREMIUMS FOR LIFE INSURANCE. — See note 3.

**244.** 3. *Obligation as Quasi Trustee for Creditors* — b. WHAT CONSTITUTES BAD FAITH — (1) *In Respect to Existing Creditors* — (b) *Intent to Hinder or Delay Creditors.* — See notes 2, 3.

**236.** 3. *Conveyance to Trustee — Partial Assignments* — *Alabama.* — *Inman v. Schloss*, 122 Ala. 461.

*California.* — *Heath v. Wilson*, 139 Cal. 362. *District of Columbia.* — *Strasburger v. Dodge*, 12 App. Cas. (D. C.) 37.

*Illinois.* — *Nelson v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142, affirming 93 Ill. App. 176.

*Mississippi.* — *Melton v. Williams Co.*, 83 Miss. 624.

*Missouri.* — *Ross v. Ashton*, 73 Mo. App. 254; *Brookshier v. Chillicothe Town Mut. F. Ins. Co.*, 91 Mo. App. 599. See also *Hungerford v. Greengard*, 95 Mo. App. 653.

*Nebraska.* — *Pope v. Kingman*, (Neb. 1901) 6 N. W. Rep. 519.

*New York.* — See *Neresheimer v. Smyth*, 167 N. Y. 202.

*North Carolina.* — *City Nat. Bank v. Bridgers*, 28 N. Car. 322.

*Oregon.* — *Hesse v. Barrett*, 41 Oregon 202.

*Tennessee.* — *Johnson v. Goldston*, (Tenn. Ch. 1899) 52 S. W. Rep. 474.

*Texas.* — *Galveston Dry Goods Co. v. Blum*, 23 Tex. Civ. App. 703.

*Virginia.* — See *Alsop v. Catlett*, 97 Va. 364.

In *Michigan* conveyances of land in trust to sell for the benefit of creditors are expressly authorized by statute. Under this statute there may be a trust to sell for the benefit of certain creditors. *Geer v. Traders' Bank*, 132 Mich. 215.

**Sale to Trustee for Benefit of Vendor's Children.** — *Dalrymple v. Security L. & T. Co.*, 9 N. Dak. 106.

**237.** 2. *Right of Partnership to Make Preferences.* — *Merced Bank v. Ivett*, 127 Cal. 134; *Selz v. Mayer*, 151 Ind. 422; *Dyson v. St. Paul Nat. Bank*, 74 Minn. 439, 73 Am. St. Rep. 358; *Timon v. Simcox*, 75 Mo. App. 143; *Watts v. Dubois*, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

**239.** 3. *Paying Personal Debt with Partnership Assets — When the Partnership Is Solvent.* — *Selz v. Mayer*, 151 Ind. 422; *King v. Wells*, 106 Iowa 649; *Millhiser v. McKinley*, 98 Va. 207.

**4. When the Partnership Is Insolvent — Conveyance Held to Be Valid.** — *Sevier v. Allen*, 80 Mo. App. 187; *Watts v. Dubois*, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

In *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 225, the court said: "The principle we think is equally well settled by the more

recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith."

**5. Conveyance Held to Be Void.** — *Metcalfe v. Arnold*, 132 Ala. 74; *Millhiser v. McKinley*, 98 Va. 207.

**240.** 4. *Directors Cannot Secure Themselves.* — *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352.

**241.** 1. *Corporations May Prefer Creditors.* — *Richards v. Halliday*, (C. C. A.) 112 Fed. Rep. 86; *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86; *Kerr Thread Co. v. Star Knitting Works*, 76 Ill. App. 544; *Fargason v. Oxford Mercantile Co.*, 78 Miss. 65; *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352. See also *Atlas Tack Co. v. Exchange Bank*, 111 Ga. 703. And see the title CORPORATIONS (PRIVATE), 742. 1.

**242.** 9. *Right to Invest in Homestead.* — *In re Wilson*, (C. C. A.) 123 Fed. Rep. 20; *Jayne v. Hymer*, 66 Neb. 785; *Scott v. Holman*, 117 Wis. 206. See also *Carson v. Hawley*, 82 Minn. 204. And see *Richards v. Orr*, 118 Iowa 724. In this case the insolvent debtor sold his former homestead and with the proceeds purchased another, such purchase being made within a reasonable time after the sale of the former. It was held that the proceeds were exempt from the payment of the insolvent debtor's debts.

**243.** 3. *Right of Debtor to Insure Life for Benefit of Wife.* — See *Asbury Park First Nat. Bank v. White*, 60 N. J. Eq. 487.

**Contra.** — *Ft. Scott First Nat. Bank v. Simpson*, 152 Mo. 638.

**Presumption.** — Where the wife is a creditor of an insolvent husband who has taken out a heavy insurance on his life and has paid in premiums less than the indebtedness to the wife, no presumption of fraud arises, but it will be presumed that he was preferring his wife as creditor. *Hendrie, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15.

**244.** 2. *Intention to Hinder or Delay* — *Georgia.* — *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449.

*Illinois.* — *Salzenstein v. Hettrick*, 105 Ill. App. 99.



**246. (c) Conveyance for Benefit of Grantor — aa. IN GENERAL. — See note 2.**  
**Future Support of Grantor. — See note 3.**

*Iowa.* — Meyer v. Baird, 120 Iowa 597.

*Missouri.* — Crothers v. Busch, 153 Mo. 606.

*New York.* — See also Dearing v. McKinnon Dash, etc., Co., 165 N. Y. 78, 80 Am. St. Rep. 708.

*Ohio.* — Chicago First Nat. Bank v. F. C. Trebein Co., 59 Ohio St. 316.

*Pennsylvania.* — Ketner v. Donten, 15 Pa. Super. Ct. 604; Simon's Estate, 20 Pa. Super. Ct. 450.

*Tennessee.* — Morris v. Clark, (Tenn. Ch. 1901) 62 S. W. Rep. 673.

*Utah.* — Deseret Nat. Bank v. Kidman, 25 Utah 395, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244.

*West Virginia.* — Edgell v. Smith, 50 W. Va. 356, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244.

**244. 3. Intention to Pay Creditors Ultimately Will Not Excuse Delay.** — Curran v. Rothschild, 14 Colo. App. 497; Adams v. Pease, 113 Ill. App. 356; McBryan v. Trowbridge, 125 Mich. 549, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244; Deseret Nat. Bank v. Kidman, 25 Utah 392, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244; Edgell v. Smith, 50 W. Va. 356, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244.

**246. 2. Conveyances for Benefit of Debtor — England.** — See Maskelyne v. Smith, (1903) 1 K. B. 671, affirming (1902) 2 K. B. 158.

*Canada.* — Atkinson v. Bourgeois, 7 N. Bruns. Eq. Rep. 641.

*United States.* — U. S. Rubber Co. v. American Oak Leather Co., 181 U. S. 434; Repauno Chemical Co. v. Victor Hardware Co., (C. C. A.) 101 Fed. Rep. 948; De Hierapolis v. Lawrence, 115 Fed. Rep. 761.

*Alabama.* — Deposit Bank v. Caffee, 135 Ala. 208; McLendon v. Grice, 119 Ala. 513; Morrow v. Campbell, 118 Ala. 330; Inman v. Schloss, 122 Ala. 461; Davidson v. Watts Min. Car-Wheel Co., 121 Ala. 591.

*Arizona.* — Luhrs v. Hancock, 6 Ariz. 340.

*Colorado.* — Longmont First Nat. Bank v. Beasley, 12 Colo. App. 313; Kelly v. Atkins, 14 Colo. App. 208.

*Georgia.* — Coleman, etc., Co. v. Rice, 115 Ga. 510; McKenzie v. Thomas, 118 Ga. 728.

*Kansas.* — Manley v. Larkin, 59 Kan. 528.

*Michigan.* — See Reeves v. Miller, 121 Mich. 311.

*Missouri.* — Wall v. Beedy, 161 Mo. 625; Meyer Bros. Drug Co. v. White, 165 Mo. 136; Revercomb v. McCully, 74 Mo. App. 575.

*Oregon.* — Mendenhall v. Elwert, 36 Oregon 375.

*Pennsylvania.* — Thornburn v. Thompson, 192 Pa. St. 298; Pennsylvania Knitting Co. v. Bibb Mfg. Co., 21 Pa. Co. Ct. 537, 12 Pa. Super. Ct. 346; Dalley's Estate, 13 Pa. Super. Ct. 506, reversed 200 Pa. St. 140; Meyers v. Meyers, 24 Pa. Super. Ct. 603; Peck v. Spruks, 6 Lack. Leg. N. (Pa.) 132.

*Rhode Island.* — Lennon v. Parker, 22 R. I. 43; Robinson v. McKenna, 21 R. I. 117, 79 Am. St. Rep. 793.

*South Carolina.* — See McElwee v. Kennedy, 56 S. Car. 154.

*Tennessee.* — McTeer v. Huntsman, (Tenn. Ch. 1898) 49 S. W. Rep. 57; Warren v. Hinson, (Tenn. Ch. 1899) 52 S. W. Rep. 498.

*Texas.* — Cooper v. Friedman, 23 Tex. Civ. App. 585; Schultze v. Schultze, (Tex. Civ. App. 1901) 66 S. W. Rep. 56, affirmed 95 Tex. 352.

*Washington.* — Adams v. Dempsey, 35 Wash. 80.

*West Virginia.* — Hanna v. Charleston Nat. Bank, 55 W. Va. 185; Bartles v. Dodd, 56 W. Va. 383.

*Wisconsin.* — Stapleton v. Brannan, 102 Wis. 26.

**A Reservation of a Benefit to the Grantor Which Is Incidental and Partial** does not make the disposition void as to creditors. Hunt v. Ahnemann, (Minn. 1904) 102 N. W. Rep. 376.

**And a Mere Expectation by the Debtor** that he will secure a benefit does not render the conveyance fraudulent. Hesse v. Barrett, 41 Oregon 202.

**Where the Mortgagor of Personal Property Is Allowed to Dispose of the Property for His Own Benefit**, the mortgage is presumptively fraudulent as to his creditors. Custer City First Nat. Bank v. Calkins, 16 S. Dak. 445.

**Stipulation as to Balance Remaining After Payment of Debt.** — A stipulation in an agreement for the transfer of property to secure payment of a debt due the transferee, that any balance remaining after the payment of a debt shall be paid as the transferrer may direct, does not render the agreement void as against creditors of the transferrer. Nor does an agreement between the debtor and the creditor, made after the assignment, that if the debtor could sell the property for more than a certain amount, the debtor could have the difference. Nor will a parol agreement, made at the time of assignment of property for the payment of debts, that the residue of the proceeds after payment of the debt shall be returned to the assignor, of itself render the transfer fraudulent, so long as the property transferred bears a reasonable proportion to the debt provided for. *In re A. L. Robertshaw Mfg. Co.*, 133 Fed. Rep. 562.

**3. Future Support of Grantor — California.** — See Tuers v. Tuers, 131 Cal. 625.

*Indiana.* — Spiers v. Whitesell, 27 Ind. App. 204, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246.

*Iowa.* — Coleman v. Gammon, (Iowa 1900) 83 N. W. Rep. 898; Mallow v. Walker, 115 Iowa 238, 91 Am. St. Rep. 158. See also Edmundson v. Waldorf, (Iowa 1900) 83 N. W. Rep. 888. Compare McCormick Harvesting Mach. Co. v. Poudet, 123 Iowa 17, wherein the agreement to support was held to be too indefinite and uncertain to determine the transaction to be fraudulent.

*Maine.* — Spear v. Spear, 97 Me. 498.

*Michigan.* — Michigan Trust Co. v. Comstock, 139 Mich. 572; Kastl v. Arthur, 135 Mich. 278.

*Minnesota.* — McCord v. Knowlton, 79 Minn. 299.

**247.** *bb.* CONVEYANCES IN TRUST—(*aa*) *Declared Trusts.*—See note 1.

(*bb*) *Secret Trusts.*—See note 2.

**248.** *cc.* BENEFITS WHICH FORM NO PART OF THE CONSIDERATION—(*aa*) *In General—Agreement for Support.*—See note 3.

(*bb*) *Reconveyance by Grantee to Debtor's Wife.*—See note 4.

**249.** (2) *In Respect to Subsequent Creditors*—(*a*) *In General.*—See note 4.

**250.** (*b*) *Conveyances in Contemplation of Future Indebtedness.*—See note 1.

*Missouri.*—Massey *v.* McCoy, 79 Mo. App. 169.

*Ohio.*—Bowlus *v.* Shanabarger, 10 Ohio Cir. Dec. 167, 19 Ohio Cir. Ct. 137.

*Pennsylvania.*—Downing *v.* Gault, 8 Pa. Super. Ct. 52, 29 Pittsb. Leg. J. N. S. (Pa.) 104; Ketner *v.* Donter, 15 Pa. Super. Ct. 604.

*West Virginia.*—Hanna *v.* Charleston Nat. Bank, 55 W. Va. 185, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246; Flaherty *v.* Stephenson, 56 W. Va. 192.

*Canada.*—McNeil *v.* McPhee, 31 Nova Scotia 140; Conrad *v.* Corkum, 35 Nova Scotia 288.

**Future Support of Grantor's Parents.**—A conveyance by a debtor to his sister of all his visible property, in consideration that she would support their parents, has been held to be in fraud of creditors of the grantor. Brown *v.* Moore, (Ky. 1899) 52 S. W. Rep. 944.

**247. 1. Trust for the Use of the Grantor.**—Coleman, etc., *Co. v.* Rice, 115 Ga. 510; Racek *v.* North Bend First Nat. Bank, 62 Neb. 669; Moulton *v.* Sturgis Nat. Bank, (Tex. Civ. App. 1901) 65 S. W. Rep. 1114.

**Fraud an Inference of Law When Trust Appears.**—When the fact appears that there was a trust in favor of the vendor, fraud is an inference of law which the court is bound to pronounce in favor of judgment creditors. Thompson *v.* Esty, 69 N. H. 551. But see Bartles *v.* Dodd, 56 W. Va. 383.

**2. Secret Trust for Benefit of Debtor**—*United States.*—*In re A. L. Robertshaw Mfg. Co.*, 133 Fed. Rep. 556; Dorrance *v.* McAlester, (C. C. A.) 91 Fed. Rep. 614; McDonald *v.* Kansas City First Nat. Bank, (C. C. A.) 116 Fed. Rep. 129.

*Alabama.*—Roden *v.* Norton, 128 Ala. 129. *Illinois.*—Highley *v.* American Exch. Nat. Bank, 185 Ill. 565.

*Iowa.*—Parlin, etc., *Co. v.* Daniels, 111 Iowa 640.

*Kansas.*—Manley *v.* Larkin, 59 Kan. 528.

*Maryland.*—Wise *v.* Praff, 98 Md. 576; Thompson *v.* Williams, 100 Md. 195.

*Missouri.*—Ely, etc., Dry Goods Co. *v.* McLaughlin, 78 Mo. App. 578; Baker, etc., *Co. v.* Schneider, 85 Mo. App. 412.

*New Hampshire.*—Stavers *v.* Stavers, 69 N. H. 159; Quimby *v.* Williams, 67 N. H. 489, 68 Am. St. Rep. 685.

*New York.*—Harris *v.* Osnowitz, 35 N. Y. App. Div. 594.

*North Dakota.*—Red River Valley Nat. Bank *v.* Barnes, 8 N. Dak. 432.

*Ohio.*—Bowlus *v.* Shanabarger, 10 Ohio Cir. Dec. 167, 19 Ohio Cir. Ct. 137.

*Texas.*—O'Neal *v.* Clymer, (Tex. Civ. App. 1900) 61 S. W. Rep. 545.

*Utah.*—Wilson *v.* Cunningham, 24 Utah 167.

*West Virginia.*—See Horner-Gaylord Co. *v.*

Fawcett, 50 W. Va. 487; Stuart *v.* Neely, 50 W. Va. 508.

**248. 3. Agreement for Support.**—Hanna *v.* Charleston Nat. Bank, 55 W. Va. 185, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246 [248].

**4. Reconveyance by Creditor to Debtor's Wife.**—Blair State Bank *v.* Bunn, 61 Neb. 464.

**249. 4. Subsequent Creditors.**—Chicago Daily News Co. *v.* Siegel, 212 Ill. 617; Kechn *v.* Kechn, 115 Iowa 467; State Ins. Co. *v.* Prestage, 116 Iowa 466; Schmitt *v.* Dahl, 88 Minn. 506; Racek *v.* North Bend First Nat. Bank, 62 Neb. 669; Graham *v.* Townsend, 62 Neb. 364; Searcy *v.* Gwaltney, 36 Tex. Civ. App. 158; Gorman *v.* Urquhart, 2 N. Bruns. Eq. Rep. 42.

**The Term "Subsequent Creditors"** means creditors whose debts were contracted subsequent to the conveyance in question. McGhee *v.* Wells, 57 S. Car. 280, 76 Am. St. Rep. 567.

**250. 1. Conveyances Made in Contemplation of Future Indebtedness**—*Alabama.*—Deposit Bank *v.* Caffee, 135 Ala. 208.

*California.*—Bush, etc., *Co. v.* Helbing, 134 Cal. 678, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 250; Banning *v.* Marleau, 133 Cal. 485.

*Colorado.*—Kelly *v.* Atkins, 14 Colo. App. 208; House *v.* Johnson, 19 Colo. App. 524.

*Illinois.*—Highley *v.* American Exch. Nat. Bank, 185 Ill. 565; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

*Iowa.*—Brundage *v.* Cheneworth, 101 Iowa 256, 63 Am. St. Rep. 382.

*Kansas.*—See Chantland *v.* Midland Nat. Bank, 66 Kan. 549.

*Missouri.*—Lander *v.* Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456.

*Nebraska.*—Ayers *v.* Wolcott, 66 Neb. 712, modifying 62 Neb. 805; Jayne *v.* Hymer, 66 Neb. 785.

*New Hampshire.*—Cook *v.* Lee, 72 N. H. 569.

*New Jersey.*—Hildebrand *v.* Willig, 64 N. J. Eq. 249; Clafin *v.* Frendenthal, 58 N. J. Eq. 298; Levy *v.* Levy, (N. J. 1904) 57 Atl. Rep. 1011.

*New York.*—See McLaggan *v.* Smith, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 564.

*Ohio.*—Hedrick *v.* Gregg, 10 Ohio Dec. 462, 8 Ohio N. P. 24.

*Oregon.*—Morton *v.* Denham, 39 Oregon 227.

*South Dakota.*—Aldous *v.* Olverson, 17 S. Dak. 190.

*Texas.*—Matula *v.* Lane, (Tex. Civ. App. 1900) 56 S. W. Rep. 112; Searcy *v.* Gwaltney, 36 Tex. Civ. App. 158.

**Knowledge of Actual Fraud.**—That the subsequent creditor has knowledge at the time when his claim arises that the voluntary conveyance was made with actual fraud does not affect his

**251. III. ELEMENTS OF A FRAUDULENT ALIENATION — 1. In General.** — See note 1.

**2. The Debtor — Insolvency Not Essential.** — See note 2.

**3. The Creditor — b. WHO ARE CREDITORS — (1) General Principles.** — See note 4.

**252. (2) Rights Incident to Marriage — (a) Wife's Inchoate Right to Dower.** — See note 1.

**(b) Husband's Right in Wife's Property.** — See note 2.

**253. (c) Right to Alimony.** — See note 1.

**(3) Rights Arising from Contract — (a) In General.** — See note 2.

**(b) Contingent Liability.** — See note 4.

**254. (4) Right of Action for Tort.** — See note 1.

right to have the conveyance set aside. *O'Kane v. Vinnedge*, 108 Ky. 34.

**Evidence of Intent.** — In *Stratton v. Edwards*, 174 Mass. 374, the court said: "It must appear that the conveyances were made with 'an intent on the part of the grantor to contract debts, and a design to avoid payment of such debts by the conveyance of his property;' and to establish such an intent it is not enough to show that the grantor had a general purpose to secure the property from the hazards of future business and the claims of future creditors, but it must appear that at the time of the conveyance he had an actual intent to contract debts, and a purpose to avoid the payment of them by the conveyance."

Subsequent creditors, in order to impeach a conveyance of their debtor on the ground that it was made to hinder, delay, or defraud them, must show the existence of an intention to accomplish that purpose, but such intention need not be proven as an independent fact. It is to be gathered from the deed itself, and from the acts of the parties and the surrounding circumstances. The law conclusively presumes every man to intend the necessary and even the probable consequences of an act deliberately done. *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 597.

Where one has fraudulently contracted debts which he cannot pay, and then makes a voluntary conveyance of his property, and thereafter contracts other debts which he cannot pay, the reasonable inference is that he intended by his voluntary conveyance to hinder and delay his subsequent as well as his existing creditors. *Bracken v. Milner*, 99 Mo. App. 187.

When a transaction is attacked by a subsequent creditor upon the ground of actual fraud, the fact that the transfer or conveyance is not upon a consideration deemed valuable in law may be treated as evidence of the fraud. *Miller v. Gillispie*, 54 W. Va. 450.

**251. 1. Elements of a Fraudulent Alienation.** — Builders, etc., Supply Co. *v. Montgomery First Nat. Bank*, 123 Ala. 203; *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107.

**2. Debtor Need Not Be Insolvent.** — *Teague v. Bass*, 131 Ala. 422; *Metcalf v. Arnold*, 132 Ala. 74; *Los Angeles First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64; *Bowlus v. Shanabarger*, 10 Ohio Cir. Dec. 167, 19 Ohio Cir. Ct. 137.

**4. Creditors Defined.** — *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107; *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427; *Soly*

*v. Aasen*, 10 N. Dak. 108; *Custer City First Nat. Bank v. Calkins*, 16 S. Dak. 445; *Deseret Nat. Bank v. Kidman*, 25 Utah 395.

**Claims Must Not Have Been Barred by Statute of Limitations.** — *Grimmett v. Midgett*, (Tenn. Ch. 1899) 57 S. W. Rep. 399.

**The Debt Need Not Have Been Reduced to Judgment** at the time of the fraudulent conveyance to make one a creditor. *Gustin v. Mathews*, 25 Utah 168.

**252. 1. Inchoate Right of Dower.** — *Hach v. Rollins*, 158 Mo. 187, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252. And see the title DOWER, 203. 4 *et seq.*

**Widow May Avoid Conveyance Made to Defeat Her Marital Rights.** — *Cook v. Lee*, 72 N. H. 569.

**2. Husband's Right in Wife's Property.** — *Lohmeyer v. Durbin*, 213 Ill. 500, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252; *Hach v. Rollins*, 158 Mo. 187, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252.

**253. 1. Claim for Alimony.** — *Tully v. Tully*, 137 Cal. 60; *Ruffenach v. Ruffenach*, 13 Colo. App. 102; *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107. See also *Tuers v. Tuers*, 131 Cal. 625.

**2. Rights Arising upon Contract.** — *Woodbury v. Sparrell Print*, 187 Mass. 426; *McCollum v. Crain*, 101 Mo. App. 522.

**4. Contingent Liability upon Contract.** — *Duke v. Pigman*, 110 Ky. 756; *Jones v. Leeds*, 10 Ohio Dec. 173, 7 Ohio N. P. 480.

**A Surety Is a Creditor.** — *Banks v. McCandless*, 119 Ga. 793; *Boies v. Johnson*, 25 Ohio Cir. Ct. 331; *Ellis v. Southwestern Land Co.*, 108 Wis. 313, 81 Am. St. Rep. 909.

**A Surety Is an Existing Creditor of a Cosurety**, and is entitled to protection against fraudulent conveyances made by the latter at any time subsequent to the execution of the common obligation. *Washington v. Norwood*, 128 Ala. 383.

**"The Undertaking of an Indorser of a negotiable promissory note is sufficient to establish the relation of debtor and creditor within the meaning of the statute against fraudulent conveyances, and he is as much prohibited from making a voluntary conveyance that has the effect to defraud the holder of a note indorsed by him as if he were the principal."** *Farmer's Nat. Bank v. Thomson*, 74 Vt. 442. But see *Mason v. Somers*, 59 N. J. Eq. 451, wherein it was held that an accommodation indorser does not become a creditor of the maker until he pays the note.

**254. 1. Right to Action for Tort Constitutes Holder a Creditor.** — *Gunn v. Hardy*, 130 Ala.

**255.** (5) *Right to Fines and Penalties.* — See note 1.

**4. The Thing Conveyed** — *a. MUST BE SOMETHING OUT OF WHICH THE CREDITOR COULD HAVE SATISFIED HIS CLAIM* — (1) *In General.* — See notes 2, 3.

(2) *Property in Which the Alienor Had No Beneficial Interest.* — See note 4.

**256.** (3) *Things of No Substantial Value* — (a) *In General.* — See note 2.

(b) *Property Encumbered to or beyond Its Value.* — See note 4.

(4) *Property Exempt by Statute* — (a) *Homesteads.* — See note 6.

642; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62; Banks v. McCandless, 119 Ga. 793; Spuck v. Logan, 97 Md. 152, 99 Am. St. Rep. 427; McInnis v. Wiscassett Mills, 78 Miss. 52; Jones v. Jones, 79 Miss. 261; Krueger v. Vorhauer, 164 Mo. 156; McCollum v. Crain, 101 Mo. App. 522; Bates v. Drake, 28 Wash. 447.

**One Who Has a Cause of Action for an Assault and Battery** is within the protection of the statute. Anglin v. Conley, 114 Ky. 741. But see Detwiler v. Louison, 10 Ohio Cir. Dec. 95, holding that one having a claim for damages for an assault and battery is not a creditor until his claim is reduced to judgment.

**255. 1. Fines and Penalties.** — See Spuck v. Logan, 97 Md. 152, 99 Am. St. Rep. 427.

**2. The Thing Conveyed.** — De Ruiter v. De Ruiter, 28 Ind. App. 9, 91 Am. St. Rep. 107; Deposit Bank v. Rose, 113 Ky. 949, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255; Aretz v. Kloos, 89 Minn. 432; Stam v. Smith, 183 Mo. 464; Cook v. Lee, 72 N. H. 569; Barron v. Williams, 58 S. Car. 280, 79 Am. St. Rep. 840; Roberts v. Hartley, 14 Manitoba 290.

**3. Sumpter v. Arkansas Nat. Bank,** 69 Ark. 224.

**4. Property in Which the Alienor Had No Beneficial Interest.** — Daugherty v. Bogy, (C. C. A.) 104 Fed. Rep. 938; Thayer v. Usher, 98 Me. 468; Perkins v. Meighan, 147 Mo. 617, 71 Am. St. Rep. 586; Griswold v. Nichols, 117 Wis. 267.

**A Transfer of Property Held by the Alienor in Trust** cannot be fraudulent as to his creditors. Gottstein v. Wist, 22 Wash. 581.

**A Conveyance by Husband and Wife of the Wife's Separate Estate** is not fraudulent as to the husband's creditors. Guernsey v. Lazear, 51 W. Va. 328.

**In Kentucky** it is held that a husband has no such interest in the personal property of his wife that his consent to her testamentary disposition of it is a fraud on his creditors. Louisville City Nat. Bank v. Wooldridge, 116 Ky. 641.

**The Owner May by His Conduct Be Estopped** to deny that the alienor had title. Morris v. Fletcher, 67 Ark. 105, 77 Am. St. Rep. 87; Cowling v. Hill, 69 Ark. 350, 86 Am. St. Rep. 200.

**256. 2. Things of No Substantial Value.** — Olson v. O'Connor, 9 N. Dak. 504, 81 Am. St. Rep. 595.

**Burden of Proof.** — The burden of showing whether the thing fraudulently conveyed is of substantial value is on the grantee, and not on the creditor seeking to have the conveyance set aside. Fryberger v. Berven, 88 Minn. 311.

**4. Conveyance of Valueless Equity of Redemp-**

**tion.** — Berla v. Meisel, (N. J. 1902) 52 Atl. Rep. 999. See also Marmon v. White, 151 Ind. 445.

The conveyance of a tract of land, which is, for all practical purposes, mortgaged to the full amount of its value, by a mortgagor to the mortgagee, in satisfaction of the debt, is not fraudulent and void as to a judgment creditor of the mortgagor, although such conveyance may have been made with intent to put the land beyond the creditor's reach. Aretz v. Kloos, 89 Minn. 432, 440.

**6. Alienation of Homestead Not Fraudulent** — United States. — Thompson v. McConnell, (C. C. A.) 107 Fed. Rep. 33.

**Alabama.** — Talladega First Nat. Bank v. Browne, 128 Ala. 557, 86 Am. St. Rep. 156; Steiner v. Berney, 130 Ala. 289; Cross v. Berry, 132 Ala. 92.

**Arkansas.** — Hinkle v. Broadwater, 73 Ark. 489; Godfrey v. Herring, (Ark. 1905) 85 S. W. Rep. 232; Wilks v. Vaughan, 73 Ark. 174. See also Reeves v. Slade, 71 Ark. 611.

**Indiana.** — Marmon v. White, 151 Ind. 445; Hedrick v. Hall, 155 Ind. 371; Bass v. Citizens' Trust Co., 32 Ind. App. 583.

**Iowa.** — Joyce v. Perry, 111 Iowa 567; Richards v. Orr, 118 Iowa 724; Clearfield Bank v. Olin, 112 Iowa 476; State Ins. Co. v. Prestage, 116 Iowa 466; Smyth v. Hall, 126 Iowa 627.

**Kentucky.** — Deposit Bank v. Rose, 113 Ky. 949, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 256; McMillan v. Stephens, (Ky. 1899) 49 S. W. Rep. 778; Morrow v. Bailey, 109 Ky. 359, 95 Am. St. Rep. 382; Davis v. H. Feltman Co., 112 Ky. 293, 99 Am. St. Rep. 280; Perry v. Cornelius, (Ky. 1901) 63 S. W. Rep. 23; Cincinnati Tobacco Warehouse Co. v. Matthews, (Ky. 1903) 74 S. W. Rep. 242; Roark v. Bach, 116 Ky. 457.

**Michigan.** — Cole v. Cole, 126 Mich. 569; Sullivan v. Parkinson, 128 Mich. 527; Eagle v. Smylie, 126 Mich. 612; Noble v. McKeith, 127 Mich. 163; Michigan Trust Co. v. Comstock, 130 Mich. 572; Palmer v. Bray, 136 Mich. 85.

**Minnesota.** — Hunt v. Dean, 91 Minn. 96.

**Mississippi.** — See Dulon v. Harkness, 80 Miss. 8, 92 Am. St. Rep. 563.

**Missouri.** — Moore v. Wilkerson, 169 Mo. 334; Spratt v. Early, 169 Mo. 357; Balz v. Nelson, 171 Mo. 682; Stam v. Smith, 183 Mo. 464; Chance v. Jennings, 159 Mo. 544; Harris v. Meredith, 106 Mo. App. 586; Osborne v. Evans, 185 Mo. 509.

**Nebraska.** — Smith v. Neufeld, 61 Neb. 699; Plummer v. Rohman, 61 Neb. 61, modified 62 Neb. 145; Howard v. Raymers, 64 Neb. 213; Jayne v. Hymer, 66 Neb. 785; Omaha Brewing Assoc. v. Zeller, (Neb. 1903) 93 N. W. Rep.

**257.** (b) *Personal Property.* — See note 1.

**258.** b. *PROPERTY TO WHICH THE ALIENEE HAS AN EQUITABLE TITLE* — (1) *In General.* — See note 1.

**259.** (2) *Property Purchased with Funds of Wife's Separate Estate.* — See note 1.

(4) *Reconveyance of Property Fraudulently Conveyed.* — See note 5.

**260.** c. *PROPERTY SUSCEPTIBLE OF FRAUDULENT ALIENATION* — (1) *In General.* — See note 2.

*Property Not Subject to Execution — Choses in Action.* — See notes 4, 5.

762; *National Bank of Commerce v. Chamberlain*, (Neb. 1904) 100 N. W. Rep. 943.

*New Mexico.* — *Heisch v. Bell*, 11 N. Mex. 523.

*North Dakota.* — *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595; *Dalrymple v. Security Imp. Co.*, 11 N. Dak. 65.

*Oregon.* — *Walker v. Harold*, 44 Oregon 205; *Sears v. Davis*, 40 Oregon 236; *Richmond v. Bloch*, 36 Oregon 590.

*South Carolina.* — *Finley v. Cartwright*, 55 S. Car. 198; *Barron v. Williams*, 58 S. Car. 280, 79 Am. St. Rep. 840; *McNair v. Moore*, 64 S. Car. 82.

*South Dakota.* — *Kettleschlag v. Ferrick*, 12 S. Dak. 455, 76 Am. St. Rep. 623.

*Texas.* — *Gwaltney v. Searcy*, (Tex. Civ. App. 1902) 68 S. W. Rep. 304; *Heidelbach, etc., Co. v. Carter*, 34 Tex. Civ. App. 579.

*Wisconsin.* — *Scott v. Holman*, 117 Wis. 206; *Brinker v. Brinker*, 105 Wis. 231.

*Canada.* — *Logan v. Rea*, 40 Canada L. J. 44.

**Homestead Descending to Children.** — The legal title to a homestead descends, on the death of the owner intestate, to his widow and children, and gives to such children a valuable interest, which they cannot convey in fraud of creditors. *Hollinger v. Boatmen's Bank*, 69 Kan. 519.

**The Conveyance of Any Surplus Above What the Grantor Is Entitled to as a Homestead Right** may be set aside if fraudulent. *Brown v. Campbell*, (Neb. 1903) 93 N. W. Rep. 1007.

**Conveyance of Equitable Title to Homestead.** — Though a debtor has only the equitable title to his homestead, the legal title being held by his vendor to secure a lien for the purchase price, his voluntary conveyance of such title to his wife cannot be fraudulent as to his creditors. *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566.

**A Conveyance of Land Which Has Been Abandoned as a Homestead** may be set aside if fraudulent. *Brown v. Moore*, (Tex. Civ. App. 1901) 64 S. W. Rep. 781.

**Necessity of Recording Conveyance.** — In *Kentucky* it is held that a conveyance of a homestead is not void as to creditors of the grantor, though the deed of conveyance has not been recorded, notwithstanding deeds generally are required by statute to be recorded in order to be valid as to creditors of the grantor. *Kuhn v. Kuhn*, (Ky. 1902) 69 S. W. Rep. 1077.

**The Burden of Proof** is on the creditor to show that property conveyed had ceased to be homestead property. *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292.

**A Conveyance of Land Purchased with Proceeds from the Sale of a Homestead**, though made directly to the debtor's wife, cannot be set aside

as in fraud of creditors. *Schell v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741.

**257. 1. Conveyance of Exempt Personal Property Not Fraudulent.** — *Skinner v. Jennings*, 137 Ala. 295; *Berry v. Ewen*, (Ky. 1905) 85 S. W. Rep. 227; *McClelland v. Barnard*, 36 Tex. Civ. App. 118.

**Wages and Earnings.** — *Jarboe v. Jarboe*, 106 Mo. App. 459; *Furth v. March*, 101 Mo. App. 329.

But an insolvent husband having creditors will not be permitted systematically and continuously to give his wife practically all his earnings and allow her with these gifts to acquire personal property in her own name and for her separate use, and hold it exempt from the just demand of his creditors. *Wolfsberger v. Mort*, 104 Mo. App. 257.

**258. 1. Conveyance of Legal Title to Equitable Owner.** — *Behrens v. Steidley*, 198 Ill. 303; *Summers v. Glenwood Gold, etc., Min. Co.*, 15 S. Dak. 25, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258. See also *Fox v. Erbe*, 100 N. Y. App. Div. 343.

**259. 1. Property Purchased with Wife's Money.** — See *Smith v. Curd*, (Ky. 1903) 72 S. W. Rep. 744.

**5. Reconveyance of Things Fraudulently Conveyed.** — *Berg v. Frantz*, 113 Ky. 894, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 259; *Bolton v. Pitney*, 46 N. J. Eq. 610, affirming 45 N. J. Eq. 639; *Buttlar v. Buttlar*, 67 N. J. Eq. 136; *Lockren v. Rustan*, 9 N. Dak. 43; *Farmers' Bank v. Gould*, 48 W. Va. 102, 86 Am. St. Rep. 24, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 259.

**The Reconveyance Is Not a Voluntary Conveyance** within the meaning of a statute making voluntary conveyances invalid as to creditors. *Farmers' Bank v. Gould*, 48 W. Va. 99, 86 Am. St. Rep. 24.

**260. 2. A Wife's Right of Dower** is susceptible of fraudulent alienation. *Tenbrook v. Jessup*, 60 N. J. Eq. 234.

**4. An Assignment of Wages to Be Earned** is not fraudulent as to creditors if the assignor is indebted to the assignee and the only purpose of the assignment is to pay the assignee's debt, and not to create in addition a secret trust in the assignee for the benefit of the assignor. *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775.

In *Lennon v. Parker*, 22 R. I. 43, the court said: "That a debtor has the right to make an assignment of his wages to secure the payment of some one of his creditors in preference to others is doubtless true, so far as the law of this state is concerned, outside of the insolvency law, which is now held in abeyance by the na-

**260.** Life Insurance Policy. — See note 6.

**261.** (2) *Wife's Earnings and Their Products* — But by Statute. — See note 2.

(3) *Earnings of Minor Children* — Right of Father to Emancipate Child. — See note 4.

**5. The Form and Mode of Conveyance** — *a.* CHARACTER OF CONVEYANCE IMMATERIAL. — See note 5.

**262.** Fraud Accomplished through Lawful Instrument. — See note 1.

**263.** *b.* EXPENDING MONEY — (1) *In Payment of Consideration for Property Conveyed to Third Person.* — See note 1.

**264.** Burden of Proof. — See notes 4, 5.

(2) *Improving Property of Another.* — See note 6.

tional bankruptcy law; but to attempt under the guise of such an assignment to secure one's wages to his own use is a fraud upon his other creditors. It is seeming to do a legal and honest thing, but in fact doing an illegal and dishonest thing."

**260.** 5. Choses in Action Are Now Subject to Attachment in England by virtue of 17 & 18 Vict., c. 125, and an assignment of them in fraud of creditors may be avoided. *Edmunds v. Edmunds*, (1904) P. 362.

**6. Life Insurance Policies.** — Fidelity, etc., Co. v. Thompson, 128 Cal. 506; *Walter v. Hartman*, (Tenn. 1902) 67 S. W. Rep. 476, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 260. See also *McKown's Estate*, 198 Pa. St. 96.

**Assignment of Policy to Wife.** — By statute in Kentucky an assignment of an insurance policy to a wife or for her benefit cannot be held to be fraudulent as to creditors of the husband, except as to premiums paid when the husband was insolvent. *Morehead v. Mayfield*, 109 Ky. 51.

In Missouri the assignment is not void as to creditors of a husband unless the premiums in any year exceed five hundred dollars. *Judson v. Walker*, 155 Mo. 182.

**261.** 2. *Wife Entitled to Her Own Earnings.* — When the wife purchases a home with her own means and on her own account, and, with the consent of her husband, keeps boarders therein as a means of earning money for herself, and not for her husband, her earnings are her property, and are not subject to her husband's debts. *Furth v. March*, 101 Mo. App. 329.

**4. Right of Father to Emancipate Child.** — *Wisner v. Osborne*, 64 N. J. Eq. 614; *Flynn v. Baisley*, 35 Oregon 268, 76 Am. St. Rep. 495.

**5. Form and Mode of Conveyance.** — *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A.) 116 Fed. Rep. 261.

**262.** 1. *Fraud May Be Accomplished through Lawful Instrument.* — *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

**263.** 1. *Payment of Consideration for Property Conveyed to Third Person* — *Arkansas.* — *Davis v. Yonge*, (Ark. 1905) 85 S. W. Rep. 90.

*Indiana.* — *Marmion v. White*, 151 Ind. 445.

*Louisiana.* — *Hoffmann v. Ackermann*, 110 La. 1070.

*Minnesota.* — *Christian v. Klein*, 77 Minn. 116.

*Missouri.* — *Lang v. Williams*, 166 Mo. 1.

*Nebraska.* — *W. J. Perry Live Stock Commission Co. v. Biggs*, (Neb. 1903) 94 N. W.

Rep. 712; *Kearney County Bank v. Dullenty*, (Neb. 1903) 96 N. W. Rep. 169.

*New York.* — *McCormick v. Wilder*, 61 N. Y. App. Div. 619.

*Pennsylvania.* — *Brown v. Atkinson*, 9 KulP (Pa.) 164.

*Canada.* — *Merchants' Bank v. McKenzie*, 13 Manitoba 19; *Miller v. McCuaig*, 13 Manitoba 220.

**Evidence of Intent.** — Payment by a husband, though indebted, but clearly solvent, for lots intended as a permanent home and conveyed to the wife by his vendor at his request, or payment by him for building a house thereon, will not alone establish actual fraudulent intent, so as to subject the lots to debts subsequently incurred; but these are circumstances to be considered with others upon the question of such intent. *Enslow v. Sliger*, 51 W. Va. 405.

**264.** 4. *Burden of Proof* — *Alabama.* — *Kelley v. Connell*, 110 Ala. 543; *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107; *Southern Home Bldg., etc., Assoc. v. Riddle*, 129 Ala. 562; *Watts v. Burgess*, 131 Ala. 333.

*Missouri.* — *Ft. Scott First Nat. Bank v. Simpson*, 152 Mo. 638; *Halstead v. Mustion*, 166 Mo. 488; *Orchard v. Collier*, 171 Mo. 390; *Tipton Bank v. Adair*, 172 Mo. 156; *Furth v. March*, 101 Mo. App. 329.

*Nebraska.* — *Rice v. Allen*, (Neb. 1903) 95 N. W. Rep. 704.

*New Jersey.* — *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484.

*West Virginia.* — *Root-Tea-Na-Herb Co. v. Rightmire*, 48 W. Va. 225; *Kimble v. Wotring*, 48 W. Va. 412.

**5. Property Purchased with Wife's Money Cannot Be Subjected to Payment of Husband's Debts.** — *Gruner v. Scholz*, 154 Mo. 415.

**6. Improvements Placed upon Property of Another.** — *Brand v. Connery*, 132 Mich. 88; *Vandervort v. Fouse*, 52 W. Va. 214. See also *Enslow v. Sliger*, 51 W. Va. 405.

**Removing Incumbrances on Property of Another.** — *Delo v. Johnson*, 110 Mo. App. 642.

**Permanent Improvements Put on Wife's Property.** — *Morris v. Fletcher*, 67 Ark. 105, 77 Am. St. Rep. 87; *New South Bldg., etc., Assoc. v. Reed*, 96 Va. 345, 70 Am. St. Rep. 858.

**A Husband May Manage the Separate Property of His Wife** without necessarily subjecting it or the profits arising from his management to the claims of his creditors. *Gruner v. Scholz*, 154 Mo. 415; *State v. Jones*, 83 Mo. App. 151. And though a husband gives his services to the management of his wife's property without consid-

**265.** 6. The Fraudulent Intent — *a.* NECESSITY OF A FRAUDULENT INTENT. — See note 4.

**266.** See note 1.

*b.* FRAUD MUST BE DIRECTED AGAINST CREDITORS — (1) *In General.* — See note 2.

**267.** (2) *Fraud Against One Creditor Avoids Conveyance as to All.* — See note 1.

(3) *Fraud Against Existing Creditors — Whether Subsequent Creditors May Complain* — **Minority Rule.** — See note 2.

**The Majority Rule.** — See note 3.

eration other than his support, the results of his labor on such property are not subject to levy in satisfaction of his debts. *Wolfsberger v. Mort*, 104 Mo. App. 257.

**265.** 4. The Fraudulent Intent — *United States.* — *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 145.

*Alabama.* — *Builders, etc., Supply Co. v. Montgomery First Nat. Bank*, 123 Ala. 203; *Green v. Emens*, 135 Ala. 563.

*Colorado.* — *Livingston v. Swofford Bros. Dry-Goods Co.*, 12 Colo. App. 331.

*Kansas.* — *Winfield Nat. Bank v. Johnson*, 8 Kan. App. 830.

*Kentucky.* — *O'Kane v. Vinnedge*, 108 Ky. 34; *Rose v. Campbell*, (Ky. 1903) 76 S. W. Rep. 505.

*Maine.* — *Whitehouse v. Bolster*, 95 Me. 465.

*Minnesota.* — *Aretz v. Kloos*, 89 Minn. 432.

*Nebraska.* — *Farmers', etc., Nat. Bank v. Mosher*, 63 Neb. 130; *Grainger v. Erwin*, (Neb. 1902) 91 N. W. Rep. 592.

*New York.* — *National State Bank v. Wheeler*, 40 N. Y. App. Div. 563.

*North Dakota.* — *Dalrymple v. Security L. & T. Co.*, 9 N. Dak. 306.

*Oregon.* — *Hesse v. Barrett*, 41 Oregon 202.

*South Carolina.* — *Jerkowski v. Marco*, 57 S. Car. 402. See also *Edmunds T. Brown Co. v. Allen*, 56 S. Car. 237.

*West Virginia.* — *Dent v. Pickens*, 46 W. Va. 378.

*Wisconsin.* — *Missinskie v. McMurdo*, 107 Wis. 578; *Adkins v. Loucks*, 107 Wis. 587; *Probert v. Sonju*, 110 Wis. 181.

*Wyoming.* — *Metz v. Blackburn*, 9 Wyo. 516, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

**Fraud of Agent Is Fraud of Principal.** — *Adams v. Pease*, 113 Ill. App. 356.

**266.** 1. Effect of Conveyance Not Conclusive. — *Repauno Chemical Co. v. Victor Hardware Co.*, (C. C. A.) 101 Fed. Rep. 948; *In re A. L. Robertshaw Mfg. Co.*, 133 Fed. Rep. 556; *Inman v. Schloss*, 122 Ala. 461; *Hargadine v. McKittrick Dry-Goods Co.*, (Indian Ter. 1902) 69 S. W. Rep. 862; *National State Bank v. Wheeler*, 40 N. Y. App. Div. 563; *Shibler v. Hartley*, 201 Pa. St. 286, 88 Am. St. Rep. 811; *Peck v. Spruks*, 6 Lack. Leg. N. (Pa.) 132; *Metz v. Blackburn*, 9 Wyo. 516, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

**2. Fraud Must Be Directed Against Creditors.** — *Fisher v. McInerney*, 137 Cal. 28, 92 Am. St. Rep. 68; *Metz v. Blackburn*, 9 Wyo. 516, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

**A Creditor Cannot Complain of Fraudulent Conveyances to His Debtor**, but only of fraudulent

conveyances by him. *Bangs Milling Co. v. Burns*, 152 Mo. 350.

**267.** 1. Conveyance Void as to One Creditor, Void as to All. — *Spuck v. Logan*, 97 Md. 158, 99 Am. St. Rep. 427, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266; *Ketner v. Donten*, 15 Pa. Super. Ct. 604; *Sibley v. Stacey*, 53 W. Va. 292.

**But a Creditor with a Lien on Property Conveyed** subject to the lien has no right to object to the conveyance as fraudulent, notwithstanding other creditors may object. *Brinkerhoff-Faris Trust, etc., Co. v. Horn*, 83 Mo. App. 114.

**2. Conveyances Fraudulent as to Existing Creditors Not Void as to Subsequent Creditors** — *Missouri.* — *Krueger v. Vorhauer*, 164 Mo. 156.

*Nebraska.* — See *Ayers v. Wolcott*, 66 Neb. 712, modifying 62 Neb. 805; *News Pub. Co. v. Tyndale*, (Neb. 1902) 96 N. W. Rep. 125.

*Pennsylvania.* — *Best v. Smith*, 193 Pa. St. 89, 74 Am. St. Rep. 676; *McCullough v. Willey*, 192 Pa. St. 176; *Thomas v. Butler*, 116 Pa. Super. Ct. 268.

*South Dakota.* — *Aldous v. Olverson*, 17 S. Dak. 190.

*Texas.* — *Matula v. Lane*, (Tex. Civ. App. 1900) 56 S. W. Rep. 112. See also *Monday v. Vance*, (Tex. Civ. App. 1899) 51 S. W. Rep. 346.

**3. Conveyances Fraudulent as to Existing Creditors May Be Set Aside by Subsequent Creditors.** — *Woodbury v. Sparrell Print*, 187 Mass. 426; *Perrine v. Perrine*, (N. J. 1901) 50 Atl. Rep. 694; *Hedrick v. Gregg*, 10 Ohio Dec. 462, 8 Ohio N. P. 24; *Miller v. Gillispie*, 54 W. Va. 450; *Zimmerman v. Bannon*, 101 Wis. 407.

**Judicial Statement of Rule.** — *In Iowa* the correct rule is declared to be as follows: (1) A conveyance which is merely voluntary, when the grantor has no fraudulent view or intent, cannot be impeached by a subsequent creditor. (2) A conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors. (3) If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. *Brundage v. Cheneworth*, 101 Iowa 256, 63 Am. St. Rep. 382, enumerating certain exceptions to the second rule laid down, where the conveyance in question was made with actual intent to affect subsequent creditors.

**The Persons in Whose Favor the Rule Is to Be Invoked** are those who have become creditors through the operation of a scheme concocted by the debtor to put his property out of his hands

**268.** Where a Conveyance Is Merely Colorable. — See note 4.

c. CONVEYANCE FRAUDULENT IN PART, VOID IN TOTO —

(i) *Single Transaction.* — See note 5.

**269.** Illustrations. — See notes 2, 3.

d. INTENT MUST EXIST AT TIME OF CONVEYANCE. — See note 12.

**270.** e. PARTICIPATION BY ALIENEE — NECESSITY OF — (i) *When the Conveyance Is upon Consideration.* — See note 4.

with the view of presently obtaining credit. Where a conveyance is made for the purpose of hindering a single creditor, who is afterwards paid in full, and there were no other concurrent creditors who might have been hindered or delayed, and there was no immediate intention of engaging in hazardous business and becoming indebted, one who becomes a creditor years afterwards cannot set up the old fraud in avoidance of the conveyance. *Gray v. Folwell*, 57 N. J. Eq. 446.

**268.** 4. Secret Trust Avoids Deed as to Subsequent Creditors. — *Spuck v. Logan*, 97 Md. 158, 99 Am. St. Rep. 427, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268; *Bowlus v. Shanabarger*, 10 Ohio Cir. Dec. 167.

In *Nebraska* it is expressly provided by statute that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." *Racek v. North Bend First Nat. Bank*, 62 Neb. 669. See also *Graham v. Townsend*, 62 Neb. 364. In this case the court said: "The theory of the statute seems to be that property held in trust is to be regarded, so far as creditors are concerned, as the property of the beneficial owner. Whether a transfer of property is the result of an honest or corrupt motive is not, under section 7, [Comp. Stat. Neb. (1899), c. 32] of the least importance."

That the Subsequent Creditor Has Notice of the Trust is immaterial. *Scott v. Keane*, 87 Md. 709.

**5. Conveyance Fraudulent in Part, Void in Toto.** — *Thompson v. McConnell*, (C. C. A.) 107 Fed. Rep. 33; *Adams v. Pease*, 113 Ill. App. 356; *Robinson v. Blood*, 64 Kan. 290; *Gleitz v. Schuster*, 168 Mo. 298, 90 Am. St. Rep. 461; *Plattsburg First Nat. Bank v. Fry*, 168 Mo. 492; *Bates County Bank v. Gailey*, 177 Mo. 181; *Garvin v. Garvin*, 55 S. Car. 360. See also *Millhiser v. McKinley*, 98 Va. 207.

**269.** 2. *Livingston v. Swofford Bros. Dry Goods Co.*, 12 Colo. App. 331.

3. *Haydon v. Alkire Grocery Co.*, 88 Mo. App. 241.

**12. Fraudulent Intent Must Exist at Time of Conveyance.** — *Vansickle v. Wells*, 105 Fed. Rep. 24, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269; *Long v. Campbell*, 133 Ala. 353. See also *Curtis v. Lewis*, 74 Conn. 367.

**Illegal Contemporaneous Agreement.** — "The rule that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties has no application when the fraudulent or illegal act is the consummation of an illegal agreement made contemporaneously with the deed. In such case the illegal act is part of the original design, and the

deed is void *ab initio*." *Parkersburg First Nat. Bank v. Prager*, 50 W. Va. 660.

**Fraud Can Have No Retroactive Effect on prior transactions.** *Krueger v. Vorhauer*, 164 Mo. 156.

**Evidence.** — Though fraud must be proved to be in the inception of the matter, the subsequent conduct of the parties is evidence going to explain the motives which controlled the actions in the beginning, and give point to the original purpose. *Messick v. Fries*, 128 N. Car. 450.

**270.** 4. Participation by the Alienee — When the Conveyance Is upon Consideration — *United States*. — *Vansickle v. Wells*, 105 Fed. Rep. 25, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270.

*Arkansas*. — *Maddox v. Reynolds*, 69 Ark. 541.

*California*. — *Casey v. Leggett*, 125 Cal. 664; *Roberts v. Burr*, 135 Cal. 156.

*Colorado*. — *Livingston v. Swofford Bros. Dry Goods Co.*, 12 Colo. App. 331.

*Connecticut*. — *Murphy v. Murphy*, 74 Conn. 198.

*District of Columbia*. — *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224.

*Illinois*. — *Walsh v. O'Neill*, 192 Ill. 202; *Behrens v. Steidley*, 198 Ill. 303; *Johnston v. Hirschberg*, 85 Ill. App. 47, affirmed 185 Ill. 445; *Ball v. Callahan*, 95 Ill. App. 615, dismissed 197 Ill. 318; *Edwards v. Story*, 105 Ill. App. 433; *Eickstaedt v. Moses*, 105 Ill. App. 634.

*Indiana*. — *Owens v. Gascho*, 154 Ind. 225; *Bass v. Citizens' Trust Co.*, 32 Ind. App. 583.

*Iowa*. — *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293; *Witham v. Blood*, 124 Iowa 695.

*Kansas*. — *Hood v. Gibson*, 8 Kan. App. 588; *Winfield Nat. Bank v. Johnson*, 8 Kan. App. 830.

*Maine*. — *Spear v. Spear*, 97 Me. 498.

*Maryland*. — *Commonwealth Bank v. Kearns*, 100 Md. 202.

*Minnesota*. — *Scheffer v. Lowe*, 77 Minn. 279.

*Missouri*. — *Gleitz v. Schuster*, 168 Mo. 298, 90 Am. St. Rep. 461.

*Nebraska*. — *Farmers', etc., Nat. Bank v. Mosher*, 63 Neb. 130; *Grainger v. Erwin*, (Neb. 1902) 91 N. W. Rep. 592; *Foley v. Doyle*, (Neb. 1901) 95 N. W. Rep. 1067.

*New Jersey*. — *Clafin v. Freudenthal*, 58 N. J. Eq. 298.

*New York*. — *Lary v. Pettit*, 55 N. Y. App. Div. 631; *De Hierapolis v. Reilly*, 44 N. Y. App. Div. 22; *Ravin v. Subin*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 742, reversing (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 193; *Fisher v. Stout*, 74 N. Y. App. Div. 97.

*North Carolina*. — *Howard v. Early*, 126 N. Car. 170.



**271.** (2) *When the Conveyance Is Voluntary.* — See note 2.

**272.** 7. *Accomplishment of the Fraudulent Purpose.* — See note 1.

**273.** IV. VALIDITY OF FRAUDULENT CONTRACTS AND CONVEYANCES — 1. In Respect to Whom Fraudulent Contracts and Conveyances Are Binding — a. PARTIES AND THOSE IN PRIVITY WITH THEM — (1) *When Parties Are in Pari Delicto* — (a) *Executed Conveyances* — aa. FRAUDULENT CONVEYANCES GOOD INTER PARTES. — See note 1.

*Ohio.* — *Hegler v. Grove*, 63 Ohio St. 404.  
*Oregon.* — *Hesse v. Barrett*, 41 Oregon 202;  
*Garnier v. Wheeler*, 40 Oregon 198.

*South Carolina.* — *McElwee v. Kennedy*, 56 S. Car. 154; *Lenhardt v. Ponder*, 64 S. Car. 354.

*Tennessee.* — *Handly v. Handly*, (Tenn. Ch. 1897) 46 S. W. Rep. 1016; *Hetterman Bros. Co. v. Young*, (Tenn. Ch. 1898) 52 S. W. Rep. 532; *Overall v. Parker*, (Tenn. Ch. 1899) 58 S. W. Rep. 905.

*Vermont.* — *Corey v. Morrill*, 71 Vt. 51;  
*Farmer's Nat. Bank v. Thomson*, 74 Vt. 442.

*Virginia.* — *Wheby v. Moir*, 102 Va. 875.

*Washington.* — *Dow v. Dempsey*, 21 Wash. 86.

*West Virginia.* — *Dent v. Pickens*, 46 W. Va. 378; *Blubaugh v. Loomis*, 48 W. Va. 666.

*Wisconsin.* — *German-American Bank v. Magill*, 102 Wis. 582; *Missinskie v. McMurdo*, 107 Wis. 578; *Adkins v. Loucks*, 107 Wis. 587; *Probert v. Sonju*, 110 Wis. 181.

*Wyoming.* — *Metz v. Blackburn*, 9 Wyo. 481.

**271. 2. When the Conveyance Is Voluntary**  
— *California.* — *Fidelity, etc., Co. v. Thompson*, 128 Cal. 506; *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62; *Bush, etc., Co. v. Helbing*, 134 Cal. 676.

*Connecticut.* — *Mallory v. Gallagher*, 75 Conn. 665; *State v. Martin*, 77 Conn. 142.

*Indiana.* — *Jameson v. Dilley*, 27 Ind. App. 429; *Borror v. Carrier*, (Ind. App. 1905) 73 N. E. Rep. 123.

*Maine.* — *Spear v. Spear*, 97 Me. 498.

*Maryland.* — *Rickards v. Rickards*, 98 Md. 136.

*Massachusetts.* — *Gray v. Chase*, 184 Mass. 444.

*Minnesota.* — *Knatvold v. Wilkinson*, 83 Minn. 265.

*Missouri.* — *Needles v. Ford*, 167 Mo. 495; *Clark v. Thias*, 173 Mo. 628; *Dunlap v. Mitchell*, 80 Mo. App. 393.

*Nebraska.* — *Ayers v. Wolcott*, 62 Neb. 805;

*Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309.

*New Jersey.* — *National State Bank v. McCormick*, (N. J. 1899) 44 Atl. Rep. 706.

*New York.* — *Truesdell v. Bourke*, 29 N. Y. App. Div. 95, *affirmed* 161 N. Y. 634; *Whyte v. Denike*, 53 N. Y. App. Div. 320.

*Ohio.* — *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425.

*Oregon.* — *Hesse v. Barrett*, 41 Oregon 202.

*South Carolina.* — *Lenhardt v. Ponder*, 64 S. Car. 354.

*Utah.* — *Gustin v. Mathews*, 25 Utah 168.

*Vermont.* — *Fair Haven Marble, etc., Co. v. Owens*, 69 Vt. 247; *Corey v. Morrill*, 71 Vt. 51; *Farmer's Nat. Bank v. Thomson*, 74 Vt. 442.

**272. 1. Accomplishment of the Fraudulent Purpose.** — *Aretz v. Kloos*, 89 Minn. 432.

**273. 1. Fraudulent Conveyance Good Between the Parties** — *United States.* — *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

*Alabama.* — *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200, 87 Am. St. Rep. 58; *Freeman v. Pullen*, 119 Ala. 235; *Kirby v. Raynes*, 138 Ala. 194; *McKee v. West*, 141 Ala. 531.

*Arizona.* — *Rountree v. Marshall*, 6 Ariz. 413.

*Arkansas.* — *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116.

*California.* — *Hays v. Windsor*, 130 Cal. 230; *Donnelly v. Rees*, 141 Cal. 56; *Riverside First Nat. Bank v. Eastman*, 144 Cal. 487.

*Colorado.* — *Hugus v. Hardenburg*, 19 Colo. App. 464.

*Connecticut.* — *Curtis v. Lewis*, 74 Conn. 367; *Fishel v. Motta*, 76 Conn. 197.

*Illinois.* — *Biggins v. Lambert*, 213 Ill. 630, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273; *Best v. Fuller, etc., Co.*, 185 Ill. 43, 78 Am. St. Rep. 229; *Grosse v. Sweet*, 188 Ill. 555, *affirming* 89 Ill. App. 418; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161; *Mehan v. Mehan*, 203 Ill. 180; *Lane v. Union Nat. Bank*, 75 Ill. App. 299, *affirmed* 177 Ill. 171, 69 Am. St. Rep. 216; *Davis v. Shepherd*, 87 Ill. App. 467; *Perisho v. Perisho*, 95 Ill. App. 644; *Wilson v. Derrwaldt*, 100 Ill. App. 396.

*Indiana.* — *Trent v. Edmonds*, 32 Ind. App. 432.

*Indian Territory.* — *Parrott v. Crawford*, (Indian Ter. 1904) 82 S. W. Rep. 688.

*Iowa.* — *Baldwin v. Davis*, 118 Iowa 36; *McClenahan v. Stevenson*, 118 Iowa 106; *Yetzer v. Yetzer*, 112 Iowa 162; *Hays v. Marsh*, 123 Iowa 81.

*Kentucky.* — *Sanford v. Reed*, (Ky. 1905) 85 S. W. Rep. 213.

*Louisiana.* — *Ackerman v. Peters*, 113 La. 156.

*Maryland.* — *Watts v. Vansant*, 99 Md. 577.

*Massachusetts.* — *Pierce v. Le Monier*, 172 Mass. 508; *Stratton v. Edwards*, 174 Mass. 374.

*Michigan.* — *Daniel v. Palmer*, 124 Mich. 335; *Morley v. Stringer*, 133 Mich. 690.

*Minnesota.* — *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709; *Olson v. Hanson*, 74 Minn. 337; *Lucy v. Freeman*, 93 Minn. 274.

*Mississippi.* — *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563; *Wyatt v. Wyatt*, 81 Miss. 219; *Williamson v. Wilkinson*, 81 Miss. 503; *Levy v. Royston*, 84 Miss. 15.

*Missouri.* — *Whitaker v. Whitaker*, 157 Mo. 353, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273; *Mulock v. Mulock*, 156 Mo. 431; *Looney v. Bartlett*, 106 Mo. App. 619; *Evans v. Evans*, (Mo. 1899) 52 S. W. Rep. 12.

*Nebraska.* — *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763; *Graham v. Townsend*, 62 Neb. 364; *Bradt v. Hartson*, (Neb. 1903) 96 N. W. Rep. 1008.

*New Hampshire.* — *Thompson v. Esty*, 69 N. H. 55; *Stockwell v. Stockwell*, 72 N. H. 69.

**274.** See note 3.

*bb. GRANTOR CANNOT RECOVER PROPERTY FRAUDULENTLY CONVEYED — (aa) By Action at Law.* — See note 5.

**275.** *(bb) By Suit in Equity — Equity Will Not Set Aside a Fraudulent Conveyance.* — See note 2.

*Equity Will Not Decree Reconveyance.* — See note 3.

**276.** *cc. FRAUDULENT GRANTEE WILL BE GIVEN POSSESSION.* — See note 3.

**277.** *(b) Executory Contracts — aa. AT LAW — (aa) In Actions for Recovery of the Price — Vendee May Plead Fraud.* — See note 1.

**278.** *bb. IN EQUITY — (aa) Foreclosure of Fraudulent Mortgage.* — See note 3.

*(bb) Enforcing Specific Performance of Fraudulent Contract.* — See note 4.

*Agreement to Reconvey Not Enforceable.* — See note 5.

**279.** *(2) When Parties Are Not in Pari Delicto.* — See note 1.

*b. CREDITORS OF THE FRAUDULENT GRANTEE.* — See note 2.

*New Jersey.* — Schwalbe v. Ehman, 62 N. J. Eq. 314; Hildebrand v. Willig, 64 N. J. Eq. 249.

*New York.* — Nichols v. Nichols, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 9; Castleman v. Mayer, 55 N. Y. App. Div. 515, affirmed 168 N. Y. 354; McMahon v. Specht, 64 N. Y. App. Div. 128; Standard Nat. Bank v. Garfield Nat. Bank, 70 N. Y. App. Div. 46; Harris v. Osnowitz, 35 N. Y. App. Div. 594.

*North Carolina.* — McManus v. Tarleton, 126 N. Car. 790.

*North Dakota.* — Faber v. Wagner, 10 N. Dak. 287; Salemonson v. Thompson, 13 N. Dak. 182.

*Ohio.* — Kihlken v. Kihlken, 59 Ohio St. 106; Sayle v. Guarantee Sav., etc., Co., 25 Ohio Cir. Ct. 503.

*Oklahoma.* — Walters v. Ratliff, 10 Okla. 262.

*Oregon.* — Fleischner v. McMinnville First Nat. Bank, 36 Oregon 553; U. S. Mortgage, etc., Co. v. Marquam, 41 Oregon 391.

*Pennsylvania.* — Irwin v. Hess, 12 Pa. Super. Ct. 163, 17 Lanc. L. Rev. 49; Simon's Estate, 20 Pa. Super. Ct. 450.

*South Carolina.* — Latimer v. Latimer, 53 S. Car. 483.

*Tennessee.* — German Bank v. Haller, 101 Tenn. 83.

*Texas.* — Shields v. Ord, (Tex. Civ. App. 1899) 51 S. W. Rep. 298; Burges v. New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. Rep. 602; Hugo, etc., Co. v. Hirsch, (Tex. Civ. App. 1901) 63 S. W. Rep. 163; Rilling v. Schultze, 95 Tex. 352; Hunter v. Magee, 31 Tex. Civ. App. 304.

*Utah.* — Schroeder v. Pratt, 21 Utah 176.

*Virginia.* — Ratliff v. Ratliff, 102 Va. 880; Tatum v. Tatum, 101 Va. 77.

*Washington.* — Shoemaker v. Finlayson, 22 Wash. 12; Chantler v. Hubbell, 34 Wash. 211.

*West Virginia.* — Foley v. Ruley, 50 W. Va. 158; Poling v. Williams, 55 W. Va. 69; Colston v. Miller, 55 W. Va. 490.

*Wisconsin.* — Ellis v. Southwestern Land Co., 108 Wis. 313, 81 Am. St. Rep. 909; Mueller v. Bruns, 112 Wis. 406.

*Canada.* — Union Bank v. Barbour, 12 Manitoba 166; Roberts v. Hartley, 14 Manitoba 284.

**A Fraudulent Conveyance from Husband to Wife is binding as to them.** Flannery v. Coleman, 112 Ga. 648.

**274. 3.** Edgell v. Smith, 50 W. Va. 349.

**5. Grantor Cannot Recover Property Fraudulently Conveyed.** — Jordan v. Crickett, 123 Iowa

576; Robinson v. Blood, 64 Kan. 290; Helton v. Cunnagim, (Ky. 1900) 54 S. W. Rep. 851; Walker v. Manchester Bank, (Ky. 1904) 79 S. W. Rep. 222; Hunter v. Magee, 31 Tex. Civ. App. 304.

**Heirs of Grantor Cannot Recover Property Fraudulently Conveyed.** — Foulles v. Foulles, (Miss. 1903) 33 So. Rep. 972.

**275. 2. Equity Will Not Set Aside Fraudulent Conveyance.** — Parker v. Parker, (Neb. 1903) 96 N. W. Rep. 208; Stockwell v. Stockwell, 72 N. H. 69; Hildebrand v. Willig, 64 N. J. Eq. 249.

**Heirs Cannot Have Ancestor's Fraudulent Deed Set Aside.** — Neal v. Neal, (Ky. 1904) 82 S. W. Rep. 981.

**3. Equity Will Not Decree Reconveyance.** — Hildebrand v. Willig, 64 N. J. Eq. 249.

**276. 3. Fraudulent Grantee May Recover Possession.** — Elmore v. Elmore, (Ky. 1900) 58 S. W. Rep. 980; Whitaker v. Whitaker, 157 Mo. 342, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 276; Shields v. Ord, (Tex. Civ. App. 1899) 51 S. W. Rep. 298.

**277. 1. Vendee May Plead Fraud in Defense to Action for the Price.** — McConaughy v. Farney, (Neb. 1902) 89 N. W. Rep. 812.

**278. 3. Ellwood v. Walter,** 103 Ill. App. 219; Mitchell v. Rice, 106 Ill. App. 625.

**4. Enforcing Specific Performance of Fraudulent Contract.** — Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027. See also Bradt v. Hartson, (Neb. 1903) 96 N. W. Rep. 1008.

**5. Equity Will Not Decree Specific Performance of Agreement to Reconvey.** — Stockwell v. Stockwell, 72 N. H. 69; Lockren v. Rustan, 9 N. Dak. 43; Simon's Estate, 20 Pa. Super. Ct. 450.

**Exception.** — In *Texas* it is held that, while it is well settled that deeds made in fraud of creditors pass title as between the parties to them, and that an agreement on the part of the grantee to hold in trust and to reconvey will not be enforced, still, if the creditors subsequently cease to have any claims against the grantor, equity will enforce the trust. Rivera v. White, 94 Tex. 538.

**279. 1. When Parties Are Not in Pari Delicto.** — Donnelly v. Rees, 141 Cal. 62, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 279; Sanford v. Reed, (Ky. 1905) 85 S. W. Rep. 213.

**2. Fraudulent Conveyance Good as to Creditors**

**280. c. OTHER THIRD PERSONS NOT CREDITORS OF THE GRANTOR.**

— See note 2.

**281. 2. In Respect to Whom Fraudulent Contracts and Conveyances Are Void — a. CONSTRUCTION OF THE TERM "VOID." — See note 1.**

*b. RIGHT OF CREDITORS TO AVOID CONVEYANCES — PREREQUISITES — (1) Demand Must Be Legally Enforceable — (a) In General. — See note 3.*

*(b) Must Not Be Founded on an Illegal Consideration. — See note 4.*

*(c) Must Be Due. — See note 5.*

*(2) Creditor Must Not Have Assented to the Conveyance. — See note 6.*

**282. Acquiescence. — See note 1.**

*Knowledge of Sale Alone Will Not Estop. — See note 2.*

*(4) Notice on Part of Subsequent Creditors. — See note 5.*

**283. 3. How Fraudulent Contracts and Conveyances May Be Validated —**

*a. ACT OF THE PARTIES — ABANDONMENT OF FRAUDULENT PURPOSES. — See notes 1, 2.*

*b. ACT OF THOSE ENTITLED TO COMPLAIN — CONFIRMATION — Electing to Receive Proceeds of Sale. — See note 3.*

**284. V. BONA FIDE PURCHASERS AND CREDITORS — 1. Rights of Bona Fide Purchasers — a. GENERAL PRINCIPLES — (1) Purchasers from Fraudulent Debtor. — See note 1.**

of Vendee. — *Berg v. Frantz*, 113 Ky. 888; *Standard Nat. Bank v. Garfield Nat. Bank*, 70 N. Y. App. Div. 46; *Lockren v. Rustan*, 9 N. Dak. 43. See also *Perrine v. Perrine*, (N. J. 1901) 50 Atl. Rep. 694.

**Priority of Creditors of Fraudulent Grantee. —** Creditors of the fraudulent grantee who have subjected the land to the payment of their claims before any steps are taken by the creditors of the fraudulent grantor are entitled to priority. *Applegate v. Applegate*, 107 Iowa 312.

**280. 2. Third Parties Not Creditors Cannot Impeach Fraudulent Conveyance. —** *Riverside First Nat. Bank v. Eastman*, 144 Cal. 487.

**281. 1. Construction of the Term "Void" —** *Alabama. — Robins v. Wooten*, 128 Ala. 373.

*Arkansas. — Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116.

*Indian Territory. — Parrott v. Crawford*, (Indian Ter. 1904) 82 S. W. Rep. 688.

*Minnesota. — Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 280.

*Missouri. — Torreyson v. Turnbaugh*, 105 Mo. App. 439.

*New Hampshire. — Lewis v. Dudley*, 70 N. H. 594.

*New York. — Standard Nat. Bank v. Garfield Nat. Bank*, 70 N. Y. App. Div. 46.

*North Dakota. — Salemonson v. Thompson*, 13 N. Dak. 182.

*Oregon. — Garnier v. Wheeler*, 40 Oregon 198.

*Texas. — Rilling v. Schultze*, 95 Tex. 352; *Rutherford v. Carr*, (Tex. Civ. App. 1905) 84 S. W. Rep. 659.

*West Virginia. — Foley v. Ruley*, 50 W. Va. 158.

*Wisconsin. — French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

*Canada. — Conrad v. Corkum*, 35 Nova Scotia 288.

**3. Demand Must Be Legally Enforceable. —** *Ellis v. Southwestern Land Co.*, 108 Wis. 314,

81 Am. St. Rep. 909, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 281.

**4. See** *Baum v. Corsicana Nat. Bank*, 32 Tex. Civ. App. 531.

**5. Debt Not Due. —** *Campbell, etc., Co. v. Ross*, 86 Ill. App. 356, affirmed 187 Ill. 553; *Mason v. Somers*, 59 N. J. Eq. 451; *Ashmead v. Baylor*, 59 N. J. Eq. 469; *Frye v. Miley*, 54 W. Va. 324, disapproving inadvertent rulings in *Chrislip v. Teter*, 43 W. Va. 356, and *Parkersburg First Nat. Bank v. Prager*, 50 W. Va. 660.

**6. Creditor Must Not Have Participated in or Assented to the Conveyance. —** *Robins v. Wooten*, 128 Ala. 373; *Los Angeles First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64; *Torreyson v. Turnbaugh*, 105 Mo. App. 439.

**Creditor Must Not Have Condoned Fraud. —** *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116.

**282. 1. Torreyson v. Turnbaugh, 105 Mo. App. 439.**

**2. Robins v. Wooten, 128 Ala. 373.**

**5. Notice. —** *Denoghue v. Shull*, 85 Miss. 404.

**283. 1. Abandonment of Fraudulent Intent. —** *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1; *Lowrence v. Barker*, 82 Mo. App. 125. See also *Pierce v. Le Monier*, 172 Mass. 508; *Caldwell v. Walker*, 76 Miss. 879, 71 Am. St. Rep. 545.

**2. When Abandonment of Purpose Will Not Validate. —** See *Antram v. Burch*, 84 Mo. App. 256.

**3. Electing to Receive Proceeds of Sale. —** *Torreyson v. Turnbaugh*, 105 Mo. App. 439.

**Confirmation or Estoppel. —** In *Cook v. Lee*, 72 N. H. 569, the court said: "If a conveyance is made to defeat the rights of the grantor's wife or of his creditors, it will not lose its fraudulent character as to any of them unless they confirm it, or are in some other way estopped to attack it."

**284. 1. Rights of Bona Fide Purchasers from Fraudulent Debtor —** *Alabama. — Allen v. Riddle*, 141 Ala. 621.

**285.** Subsequent Vendees from Bona Fide Purchaser. — See note 4.

(2) *Purchasers from Fraudulent Grantee — Purchaser Without Notice.* — See note 5.

**286.** Purchaser with Notice. — See note 1.

Purchase in Payment of Antecedent Debt. — See note 2.

**287.** See note 1.

*b. WHAT CONSTITUTES A BONA FIDE PURCHASER — (1) Requisites in General — The Term "Bona Fide Purchaser."* — See note 3.

Both These Requisites Must Concur. — See note 5.

*Illinois.* — Ellwood Mfg. Co. v. Faulkner, 87 Ill. App. 294.

*Indiana.* — Hedrick v. Hall, 155 Ind. 371; Jameson v. Dilley, 27 Ind. App. 429.

*Iowa.* — Shumaker v. Davidson, 116 Iowa 569.

*Kansas.* — Parmenter v. Lomax, 68 Kan. 61;

Hood v. Gibson, 8 Kan. App. 588.

*Kentucky.* — Loving v. Meyler, (Ky. 1899) 49 S. W. Rep. 961.

*Maryland.* — Riverside Brick Co. v. Wheatley, 92 Md. 410.

*Missouri.* — Kurtz v. Troll, 175 Mo. 506;

Hearn v. Due, 79 Mo. App. 322; Kurtz v. Lewis

Voight, etc., Co., 86 Mo. App. 649.

*Montana.* — Yoder v. Reynolds, 28 Mont. 183.

*Nebraska.* — Plummer v. Rohman, 62 Neb.

145; Bradt v. Hartson, (Neb. 1903) 96 N. W.

Rep. 1008.

*New York.* — Fisher v. Stout, 74 N. Y. App.

Div. 97; Leary v. Corvin, 92 N. Y. App. Div.

544, modified 181 N. Y. 222, 106 Am. St. Rep.

542; Gilmour v. Colcord, 96 N. Y. App. Div.

358; Syracuse Third Nat. Bank v. Keffe,

(Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 400;

Bailey v. Fransioli, 101 N. Y. App. Div. 140.

*North Carolina.* — Cox v. Wall, 132 N. Car.

730; Morgan v. Bostic, 132 N. Car. 743;

Mitchell v. Eure, 126 N. Car. 77.

*Oregon.* — Robson v. Hamilton, 41 Oregon

239.

*Oklahoma.* — McFadyen v. Masters, 11 Okla.

16.

*Pennsylvania.* — Low v. Ivy, 10 Pa. Super.

Ct. 32; Jennings v. Smith, 22 Pa. Co. Ct. 554;

Boyer v. Weimer, 204 Pa. St. 295.

*Texas.* — Hillboldt v. Waugh, (Tex. Civ. App.

1898) 47 S. W. Rep. 829; Davis v. Culp, (Tex.

Civ. App. 1903) 78 S. W. Rep. 554.

*Virginia.* — Davis v. Anderson, 99 Va. 620,

2 Va. Sup. Ct. 480; Newberry v. Princeton

Bank, 98 Va. 471; Flook v. Armentrout, 100

Va. 638.

*Washington.* — Berlin v. Van De Vanter, 25

Wash. 465; Rohrer v. Snyder, 29 Wash. 199.

*West Virginia.* — Wilson v. Carrico, 50 W.

Va. 336; Lowther Oil Co. v. Miller-Sibley Oil

Co., 53 W. Va. 501, 97 Am. St. Rep. 1027;

Merchant v. Whitescarver, 47 W. Va. 361;

Smith v. Smith, 48 W. Va. 51; Root-Tea-Na-

Herb Co. v. Rightmire, 48 W. Va. 225; Blu-

baugh v. Loomis, 48 W. Va. 666.

**285. 4. Subsequent Vendees from Bona Fide**

**Purchaser.** — Walp v. Moorar, 76 Conn. 515;

Witham v. Blood, 124 Iowa 695; Adelberg v.

Horowitz, 32 N. Y. App. Div. 408.

**5. Bona Fide Purchasers from Fraudulent**

**Grantee — United States.** — Brown v. Easton,

112 Fed. Rep. 502.

*Alabama.* — McKee v. West, 141 Ala. 531.

*Arkansas.* — Doster v. Manistee Nat. Bank,

67 Ark. 325, 77 Am. St. Rep. 116.

*Iowa.* — Brooks v. Jones, 114 Iowa 385.

*Massachusetts.* — White v. Dodge, 187 Mass.

449.

*Minnesota.* — Benson v. Nash, 75 Minn. 341.

*Missouri.* — Reynolds v. Faust, 179 Mo. 29,

citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.)

285; Lee v. Wilkins, 79 Mo. App. 159.

*Nebraska.* — McIntyre v. Malone, (Neb.

1902) 91 N. W. Rep. 246; Hackney v. Lincoln

First Nat. Bank, (Neb. 1904) 98 N. W. Rep.

412, affirming (Neb. 1903) 94 N. W. Rep. 805.

*New Hampshire.* — Lewis v. Dudley, 70 N. H.

594; Quimby v. Williams, 67 N. H. 489, 68 Am.

St. Rep. 685.

*New Jersey.* — Kinmonth v. White, (N. J.

1900) 47 Atl. Rep. 1.

*Ohio.* — Detwiler v. Louison, 10 Ohio Cir.

Dec. 95.

*Pennsylvania.* — Boyer v. Weimer, 204 Pa.

St. 295.

*Texas.* — Rilling v. Schultze, 95 Tex. 352.

*Canada.* — Union Bank v. Barbour, 12 Mani-

toba 166.

**286. 1. Purchaser with Notice.** — Moyer v.

Bloomington, 38 N. Y. App. Div. 227.

**2.** See Brown v. Dickerson, 2 Marv. (Del.)

119.

**287. 1. Purchaser for Antecedent Debt Not**

**Protected.** — Richardson v. Gerli, (N. J. 1903)

54 Atl. Rep. 438; Victoria Paper Mills Co. v.

New York, etc., Co., (N. Y. City Ct. Gen. T.)

27 Misc. (N. Y.) 179, affirmed (Supm. Ct. App.

T.) 28 Misc. (N. Y.) 123.

**3. What Constitutes a Bona Fide Purchaser.** —

Freeman v. Pullen, 130 Ala. 653; Carter v.

Richardson, (Ky. 1901) 60 S. W. Rep. 397;

Garnier v. Wheeler, 40 Oregon 198.

**5. Payment of Consideration Will Not Protect**

**Purchaser with Knowledge** — *Illinois.* — Salzen-

stein v. Hettrick, 105 Ill. App. 99.

*Iowa.* — Rosenheim v. Flanders, 114 Iowa

291; Sutton v. Kelliher, 115 Iowa 632.

*Indian Territory.* — Foster v. McAlester, 3

Indian Ter. 307, reversed (C. C. A.) 114 Fed.

Rep. 145.

*Kentucky.* — Huffman v. Leslie, (Ky. 1902)

66 S. W. Rep. 822.

*Maryland.* — Downs v. Miller, 95 Md. 602.

*Missouri.* — Wall v. Beedy, 161 Mo. 625;

Kurtz v. Troll, 175 Mo. 506; Monarch Rubber

Co. v. Bunn, 78 Mo. App. 55; Christian v.

Smith, 85 Mo. App. 117; Kurtz v. Lewis Voight,

etc., Co., 86 Mo. App. 649; White v. Million,

102 Mo. App. 437.

*Nebraska.* — Grainger v. Erwin, (Neb. 1902)

91 N. W. Rep. 592; Farmers', etc., Nat. Bank

v. Mosher, (Neb. 1903) 94 N. W. Rep. 1003;

**288. A Mortgagee.** — See note 1.

**289. (2) The Bona Fides** — (a) In General — To Constitute Bad Faith in the Purchase of Property. — See note 1.

(b) Knowledge of Debtor's Fraudulent Intent — *aa.* ACTUAL KNOWLEDGE. — See note 3.

Knowledge of Agent or Attorney. — See note 4.

**290. *bb.* CONSTRUCTIVE NOTICE.** — See note 3.

*Foley v. Doyle*, (Neb. 1901) 95 N. W. Rep. 1067; *Pope v. Kingman*, (Neb. 1901) 96 N. W. Rep. 519.

*New Jersey.* — *Hancock v. Elmer*, 61 N. J. Eq. 558; *Perrine v. Perrine*, (N. J. 1901) 50 Atl. Rep. 694.

*New York.* — *Gowing v. Warner*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; *Greenwald v. Wales*, 174 N. Y. 140.

*North Carolina.* — *Cox v. Wall*, 132 N. Car. 730.

*North Dakota.* — *Lockren v. Rustan*, 9 N. Dak. 43; *Salemonson v. Thompson*, 13 N. Dak. 182.

*Oregon.* — *Goodale v. Wheeler*, 41 Oregon 190.

*South Carolina.* — *Greig v. Rice*, 66 S. Car. 171.

*Virginia.* — *American Net, etc., Co. v. Mayo*, 97 Va. 182; *Flook v. Armentrout*, 100 Va. 638.

*West Virginia.* — *Parkersburg First Nat. Bank v. Prager*, 50 W. Va. 660; *Dent v. Pickens*, 46 W. Va. 378.

**288. 1. Mortgagee a Purchaser.** — *Mashburn v. Dannenberg Co.*, 117 Ga. 586, citing 14 AND ENG. ENCYC. OF LAW (2d ed.) 288; *Sparks v. Galena Nat. Bank*, 68 Kan. 152, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288; *National Bank of Commerce v. Brunswick Tobacco Works Co.*, 155 Mo. 602; *Charles P. Kellogg Co. v. Horkey*, 61 Neb. 751; *Lewis v. Lagley*, 70 N. H. 594.

Where a mortgage is given to secure an existing debt and there is an extension of credit on the faith of it, the mortgagee is to be regarded as a purchaser for value. *Lee v. Wilkins*, 79 Mo. App. 159.

**289. 1. Vendor and Purchaser Need Not Be Actuated by Like Motives.** — *Brown v. Sloan*, 61 Neb. 237.

**3. Knowledge of Debtor's Fraudulent Intent** — *United States.* — *Dorrance v. McAlester*, (C. C. A.) 91 Fed. Rep. 614.

*Alabama.* — *Green v. Emens*, 135 Ala. 563; *Teague v. Bass*, 131 Ala. 422.

*Colorado.* — *Colorado Trading, etc., Co. v. Acres Commission Co.*, 18 Colo. App. 253.

*Illinois.* — *Biggins v. Lambert*, 213 Ill. 625, 104 Am. St. Rep. 238; *Ringgold v. Leith*, 73 Ill. App. 656; *Hoff v. Larimore*, 106 Ill. App. 589.

*Indiana.* — *Farmers' Bank v. Frankfort First Nat. Bank*, 30 Ind. App. 520.

*Indian Territory.* — *Foster v. McAlester*, 3 Indian Ter. 307, reversed (C. C. A.) 114 Fed. Rep. 145.

*Iowa.* — *Rosenheim v. Flanders*, 114 Iowa 291; *Joyce v. Perry*, 111 Iowa 567; *Shumaker v. Davidson*, 116 Iowa 569.

*Kansas.* — *Hartman v. Hosmer*, 65 Kan. 595; *Hood v. Gibson*, 8 Kan. App. 588.

*Kentucky.* — *Carter v. Richardson*, (Ky. 1901)

60 S. W. Rep. 397; *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528.

*Maryland.* — *Rickards v. Rickards*, 98 Md. 136.

*Minnesota.* — *Manwaring v. O'Brien*, 75 Minn. 542.

*Missouri.* — *Esselbruegge Mercantile Co. v. Troll*, 79 Mo. App. 558; *Kurtz v. Lewis Voight, etc., Co.*, 86 Mo. App. 649.

*Nebraska.* — *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 83 Am. St. Rep. 503; *Brown v. Sloan*, 61 Neb. 237; *Grainger v. Erwin*, (Neb. 1902) 91 N. W. Rep. 592.

*New Hampshire.* — *Lewis v. Dudley*, 70 N. H. 594.

*New York.* — *Peetsch v. Sommers*, 31 N. Y. App. Div. 255; *Fisher v. Stout*, 74 N. Y. App. Div. 97; *Wilmerding v. Jarmulowsky*, 28 N. Y. App. Div. 629.

*Oregon.* — *Spalding v. Brown*, 36 Oregon 160.

*Pennsylvania.* — *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818.

*Texas.* — *Davis v. Culp*, (Tex. Civ. App. 1903) 78 S. W. Rep. 554.

*Virginia.* — *American Net, etc., Co. v. Mayo*, 97 Va. 182; *Wheby v. Moir*, 102 Va. 875; *Flook v. Armentrout*, 100 Va. 638.

*West Virginia.* — *Timms v. Timms*, 54 W. Va. 414.

**Facts Sufficient to Excite Suspicion.** — Suspicion of fraud is not alone sufficient to establish it, nor sufficient to impart notice of it; hence an instruction to the effect that if the plaintiffs had knowledge of "facts sufficient to excite the suspicions of a prudent man, or to lead a person of ordinary perception to suspect fraud," it would amount to actual notice thereof, is improper. *Urdangen v. Doner*, 122 Iowa 533.

**4. Knowledge of Agent.** — *Baldwin v. Davis*, 118 Iowa 36; *Monarch Rubber Co. v. Bunn*, 78 Mo. App. 55; *Kelly-Goodfellow Shoe Co. v. Vail*, 84 Mo. App. 94. See also *Graham Paper Co. v. St. Joseph Times Printing, etc., Co.*, 79 Mo. App. 504.

**290. 3. Constructive Notice** — *United States.* — *Dorrance v. McAlester*, (C. C. A.) 91 Fed. Rep. 614; *Thompson Nat. Bank v. Corwine*, 95 Fed. Rep. 54; *Batavia v. Wallace*, (C. C. A.) 102 Fed. Rep. 240.

*Alabama.* — *Teague v. Bass*, 131 Ala. 422.

*Arkansas.* — *Maddox v. Reynolds*, 69 Ark. 541.

*Illinois.* — *Hulman v. McBryde*, 80 Ill. App. 592.

*Iowa.* — *J. S. Brittain Dry Goods Co. v. Plowman*, 113 Iowa 624; *Rosenheim v. Flanders*, 114 Iowa 291; *Shumaker v. Davidson*, 116 Iowa 569; *Urdangen v. Doner*, 122 Iowa 533.

*Kansas.* — *Hartman v. Hosmer*, 65 Kan. 595; *Hood v. Gibson*, 8 Kan. App. 588; *McDonald v. Swisher*, 60 Kan. 610.

*Kentucky.* — *Carter v. Richardson*, (Ky.

**291.** Knowledge of Vendor's Embarrassment or Insolvency. — See note 1.

**292.** Title by Voluntary Conveyance. — See note 1.

(3) *The Consideration* — (a) Must Be Valuable. — See note 2.

(b) Must Be Adequate. — See notes 5, 6.

**293.** (a) Must Have Been Paid Before Notice. — See notes 1, 2.

Notice After Payment of Part of Purchase Money. — See notes 3, 4.

1901) 60 S. W. Rep. 397; *Botts v. Botts*, (Ky. 1903) 74 S. W. Rep. 1093.

Minnesota. — *Manwaring v. O'Brien*, 75 Minn. 542.

Mississippi. — *Spratlin v. Colson*, 80 Miss. 278.

Missouri. — *National Bank of Commerce v. Brunswick Tobacco Works Co.*, 155 Mo. 602.

Nebraska. — *Henney Buggy Co. v. Ashenfelter*, 60 Neb. 1, 83 Am. St. Rep. 503; *Ogg v. Schultz*, 61 Neb. 221; *Brown v. Sloan*, 61 Neb. 237; *Grainger v. Erwin*, (Neb. 1902) 91 N. W. Rep. 592; *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, (Neb. 1901) 96 N. W. Rep. 524.

New Jersey. — *Hancock v. Elmer*, 61 N. J. Eq. 558.

New York. — *Gilmour v. Colcord*, 96 N. Y. App. Div. 358; *Wilmerding v. Jarmulowsky*, 28 N. Y. App. Div. 629; *Greenwald v. Wales*, 174 N. Y. 140.

Oregon. — *Spalding v. Brown*, 36 Oregon 160.

Pennsylvania. — *Monessen Nat. Bank v. Lichtenstein*, 207 Pa. St. 187.

Texas. — *Hooks v. Pafford*, 34 Tex. Civ. App. 516; *McWilliams v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 596.

Virginia. — *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420; *Flook v. Armentrout*, 100 Va. 638.

Washington. — *Reed v. Loney*, 22 Wash. 433.

West Virginia. — *Dent v. Pickens*, 46 W. Va. 378; *Timms v. Timms*, 54 W. Va. 414; *Keneweg Co. v. Schilansky*, 47 W. Va. 287.

**Not Every Suspicion of Fraud Is Equivalent to Notice.** — But the facts within the knowledge of the purchaser must be of such a nature as in reason will put him upon inquiry and excite the suspicions of an ordinarily prudent person, and he is then chargeable with a knowledge of such facts as would have been gained by a diligent inquiry. *Vickers v. Buck Stove, etc., Co.*, 60 Kan. 598.

**Question Is for Jury.** — "It is not enough to invalidate a sale of chattels by an insolvent that the purchaser knew of the facts and circumstances from which he might have inferred a fraudulent purpose on the part of the seller. Such facts and circumstances are evidentiary, and the jury are entitled to consider them in determining whether or not the purchaser was aware of the fraudulent intent of his vendor; but the jury should not be told that they necessarily imply participation on the part of the purchaser in the mal-intent of the seller. They should be left free to draw their own deductions as to the effect of facts and circumstances which would ordinarily put the buyer upon inquiry as to the motives of his seller." *Hearn v. Due*, 79 Mo. App. 324.

**291. 1. Knowledge of Vendor's Embarrassment or Insolvency.** — *Parmenter v. Lomax*, 68 Kan. 61; *Kelly-Goodfellow Shoe Co. v. Vail*, 84

Mo. App. 94; *Texas Drug Co. v. Shields*, 20 Tex. Civ. App. 274; *Cross v. McKinley*, 81 Tex. 332; *Sanger v. Colbert*, 84 Tex. 668; *Edwards v. Anderson*, 31 Tex. Civ. App. 131; *Meyer Bros. Drug Co. v. Durham*, 35 Tex. Civ. App. 71. See also *Rownd v. Davidson*, 113 La. 1047; *Armstrong v. Elliott*, 20 Tex. Civ. App. 41. But see *Wallen v. Montague*, 121 Ala. 287, where the court said: "A conveyance by an insolvent or failing debtor for a present cash consideration from the grantee, with knowledge on the part of such grantee of such insolvent or failing condition of the grantor, under the law, renders the conveyance, as to existing creditors of such grantor, fraudulent and void."

**The Insolvency of a Vendor Is a Circumstance to Be Considered in determining whether fraud exists;** but it cannot be declared, as a matter of law, that insolvency alone is sufficient to establish fraud. *Vickers v. Buck Stove, etc., Co.*, 60 Kan. 598. See also *Missinskie v. McMurdo*, 107 Wis. 578, wherein the court said: "Knowledge of the financial condition of the person from whom one purchases is not knowledge of the fraudulent intent, though it may be evidence, more or less cogent, from which knowledge of that intent may be inferred, or a duty to investigate arise, so that knowledge will be imputed in case of failure to so investigate."

**292. 1. Voluntary Deed Presumed Valid.** — *McKee v. West*, 141 Ala. 531.

2. *Green v. Emens*, 135 Ala. 563; *Carter v. Richardson*, (Ky. 1901) 60 S. W. Rep. 397; *Sullivan v. Ball*, 55 S. Car. 343.

**5. Consideration Must Be Both Valuable and Adequate.** — *Wright v. Craig*, 40 Oregon 196, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292.

**6. Conveyances upon Inadequate Consideration Held to Be Partially Voluntary.** — *Oglesby v. Walton*, 118 Ga. 204, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292; *Jameson v. Dilley*, 27 Ind. App. 429; *Omaha Brewing Assoc. v. Zeller*, (Neb. 1903) 93 N. W. Rep. 762; *Wright v. Craig*, 40 Oregon 191; *Jones v. Leeds*, 10 Ohio Dec. 173, 7 Ohio N. P. 480.

**293. 1. The Purchase Money Must Have Been Paid Before Notice.** — *Keet-Roundtree Shoe Co. v. Lisman*, 149 Mo. 85; *Kurtz v. Troll*, 175 Mo. 506; *Bender v. Kingman*, 62 Neb. 469; *Garnier v. Wheeler*, 40 Oregon 198.

**Payment by Check.** — It has been held that if the purchaser, before he has reason to believe his check is cashed, has knowledge that the sale was made with intent on the part of the vendor to defraud creditors, it is his duty to stop payment of the check. *Weil v. Reiss*, 167 Mo. 125. See also *Carter v. Richardson*, 60 S. W. Rep. 397, 22 Ky. L. Rep. 1040.

**2. When Security Has Been Given for Payments.** — *McFadyen v. Masters*, 11 Okla. 16.

**3. Purchaser Protected to Extent of Payments Made Before Notice.** — *Bates Mach. Co. v. Bates*,

**294. 2. Right of Creditor to Accept Payment or Security — a. FROM THE FRAUDULENT DEBTOR — (1) In General — Right to Accept Payment. —** See note 4.

**295. Right to Accept Security. —** See note 1.

(2) *Knowledge of Debtor's Intent. —* See note 2.

**296. (3) Actual Participation in Fraudulent Design. —** See note 1.

192 Ill. 150, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293.

**293. 4. Purchaser Not Protected as to Payments Made After Notice. —** Bates Mach. Co. v. Bates, 192 Ill. 150, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; Shumaker v. Davidson, 116 Iowa 569; Nichols, etc., Co. v. Gerlich, 84 Minn. 483; Bender v. Kingman, 64 Neb. 766. See also Kurtz v. Lewis Voight, etc., Co., 86 Mo. App. 654, holding that the purchaser will not acquire a valid title if, after the sale, but before payment of the price, he learned of the fraud and failed to withhold payment, "provided his obligation to pay had not become so fixed by a transfer of negotiable paper evidencing it, or otherwise, that he could not legally resist its enforcement."

**294. 4. Right of Creditor to Accept Payment. —** Meyer Bros. Drug Co. v. White, 165 Mo. 136.

**In Louisiana, However,** a contract made between a debtor and his creditor, from which results a preference to the latter over other creditors, the creditor so favored knowing of the insolvency or embarrassed condition of the debtor, will be set aside as fraudulent. Johnson v. Levy, 109 La. 1038.

**295. 1. Right of Creditor to Accept Security. —** Rosenheim v. Flanders, 114 Iowa 291; Mendenhall v. Elwert, 36 Oregon 375; McGrew v. Hancock, (Tenn. Ch. 1899) 52 S. W. Rep. 500. But see Shideler v. Fisher, 13 Colo. App. 106.

**2. Creditor's Knowledge of Debtor's Fraudulent Intent Immaterial — United States. —** U. S. Rubber Co. v. American Oak Leather Co., 181 U. S. 434; Dorrance v. McAlester, (C. C. A.) 91 Fed. Rep. 614; Repauno Chemical Co. v. Victor Hardware Co., (C. C. A.) 101 Fed. Rep. 948; Johnson v. Trust Co. of America, (C. C. A.) 104 Fed. Rep. 174; Foster v. McAlester, (C. C. A.) 114 Fed. Rep. 145; Walker v. Houghteling, (C. C. A.) 120 Fed. Rep. 928.

**Alabama. —** Smith v. McCadden, 138 Ala. 284.

**California. —** Heath v. Wilson, 139 Cal. 362.

**Iowa. —** Rosenheim v. Flanders, 114 Iowa 291; Kerr v. Kennedy, 119 Iowa 239; Thompson v. Zucknayer, (Iowa 1903) 94 N. W. Rep. 476.

**Kentucky. —** Hoover v. Hawks, (Ky. 1899) 51 S. W. Rep. 606.

**Minnesota. —** Dyson v. St. Paul Nat. Bank, 74 Minn. 439, 73 Am. St. Rep. 358.

**Missouri. —** Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213; Wall v. Beedy, 161 Mo. 625; Bates County Bank v. Gailey, 177 Mo. 181; Ross v. Ashton, 73 Mo. App. 254; Monarch Rubber Co. v. Bunn, 78 Mo. App. 55; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Baker, etc., Co. v. Schneider, 85 Mo. App. 412; Kurtz v. Lewis Voight, etc., Co., 86 Mo. App. 649; Mayfield Woolen Mills v. Wilson, 87 Mo. App. 145; White v. Million, 102 Mo. App. 437.

**Nebraska. —** Ellis v. Musselman, 61 Neb. 263,

citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; Blair State Bank v. Bunn, 61 Neb. 464; Steinberg v. Buffum, 61 Neb. 778; Henney Buggy Co. v. Ashenfelter, 60 Neb. 3, 83 Am. St. Rep. 503; Grainger v. Erwin, (Neb. 1902) 91 N. W. Rep. 592; Pope v. Kingman, (Neb. 1901) 96 N. W. Rep. 519.

**New Hampshire. —** Fradd v. Charon, 69 N. H. 189.

**New York. —** Shidlovsky v. Gorman, 51 N. Y. App. Div. 253; New York County Nat. Bank v. American Surety Co., 69 N. Y. App. Div. 153, affirmed 174 N. Y. 544.

**North Dakota. —** Lockren v. Rustan, 9 N. Dak. 43.

**Oklahoma. —** Brittain v. Burnham, 9 Okla. 525.

**Pennsylvania. —** Shibley v. Hartley, 201 Pa. St. 286, 88 Am. St. Rep. 811; Peck v. Spruks, 6 Lack. Leg. N. (Pa.) 132.

**South Carolina. —** McElwee v. Kennedy, 56 S. Car. 154.

**Texas. —** Half v. Goldfrank, (Tex. Civ. App. 1899) 49 S. W. Rep. 1095; Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; Garrity v. Rankin, (Tex. Civ. App. 1900) 55 S. W. Rep. 368.

**Virginia. —** Johnson v. Lucas, 103 Va. 37.

**West Virginia. —** Herold v. Barlow, 47 W. Va. 750.

**Wisconsin. —** H. B. Clafin Co. v. Grashorn, 99 Wis. 356; Haring v. Hamilton, 107 Wis. 112.

**Canada. —** See White v. Hamm, 2 N. Bruns. Eq. Rep. 575.

**Asking and Urging the Deed** for his own security will not prevent the creditor from being regarded as a *bona fide* purchaser or render the deed liable to be impeached. Crothers v. Busch, 153 Mo. 612.

**296. 1. Actual Participation in Fraudulent Design — United States. — In re A. L. Robertshaw Mfg. Co., 133 Fed. Rep. 556.**

**Alabama. —** Butler v. Feeder, 130 Ala. 604. See Morrow v. Campbell, 118 Ala. 330.

**California. —** Heath v. Wilson, 139 Cal. 362.

**Georgia. —** Bigby v. Warnock, 115 Ga. 385.

**Illinois. —** Adams v. Pease, 113 Ill. App. 356; Glanz v. Smith, 177 Ill. 156, 76 Ill. App. 630; Eickstaedt v. Moses, 105 Ill. App. 634.

**Indian Territory. —** Noyes v. Tootle, 2 Indian Ter. 144; Daugherty v. Bogy, 3 Indian Ter. 197, reversed (C. C. A.) 104 Fed. Rep. 938.

**Iowa. —** Rosenheim v. Flanders, 114 Iowa 291; Ruthven v. Clarke, 109 Iowa 25; Thompson v. Zuckmayer, (Iowa 1903) 94 N. W. Rep. 476.

**Missouri. —** Crothers v. Busch, 153 Mo. 612; Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213; Wall v. Beedy, 161 Mo. 625; Balz v. Nelson, 171 Mo. 682; Bates County Bank v. Gailey, 177 Mo. 181; Ross v. Ashton, 73 Mo. App. 254; Schawacker v. Ludington, 77 Mo. App. 415; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Scott Hardware Co. v. Riddle,

**297. Trust Deed to Several Creditors.** — See note 2.

*b. FROM THE FRAUDULENT GRANTEE.* — See note 3.

**Accepting Mortgage from Fraudulent Grantee.** — See note 4.

**298. 3. Sale Partly for Cash and Partly in Payment of Debt.** — See notes 1, 2.

**VI. VOLUNTARY CONVEYANCES — 1. Definition.** — See note 3.

**299. The Inadequacy of the Consideration.** — See note 2.

**Conveyances Partly Voluntary.** — See note 3.

**300. 2. Validity as Against Existing Creditors — a. CONVEYANCE WITH ACTUAL INTENT TO DEFRAUD.** — See notes 1, 2.

84 Mo. App. 275; Baker, etc., Co. v. Schneider, 85 Mo. App. 412; Kurtz v. Lewis Voight, etc., Co., 86 Mo. App. 649; Mayfield Woolen Mills v. Wilson, 87 Mo. App. 145; Haydon v. Alkire Grocery Co., 88 Mo. App. 241.

*Nebraska.* — Ellis v. Musselman, 61 Neb. 263, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; Steinberg v. Buffum, 61 Neb. 778; Hargreaves v. Tennis, 63 Neb. 356; Chamberlain Banking House v. Turner-Frazier Mercantile Co., 66 Neb. 48; Marcus v. Leake, (Neb. 1903) 94 N. W. Rep. 100; Pope v. Kingman, (Neb. 1901) 96 N. W. Rep. 519.

*New York.* — Metcalf v. Moses, 161 N. Y. 587; Vogedes v. Beakes, 38 N. Y. App. Div. 380; New York County Nat. Bank v. American Surety Co., 69 N. Y. App. Div. 153, affirmed 174 N. Y. 544; Nichols v. Nichols, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 9.

*North Dakota.* — Salemonson v. Thompson, 13 N. Dak. 182.

*Texas.* — Wade v. Odle, 21 Tex. Civ. App. 656; Bruce v. Koch, 94 Tex. 192, reversing (Tex. Civ. App. 1900) 58 S. W. Rep. 189; Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; Cooper v. Sawyer, 31 Tex. Civ. App. 620.

*West Virginia.* — Herold v. Barlow, 47 W. Va. 750.

*Wisconsin.* — Zimmerman v. Bannon, 101 Wis. 407.

**297. 2. Conveyance Void as to One Cestui Que Trust Valid as to Another.** — Batavia v. Wallace, (C. C. A.) 102 Fed. Rep. 240; Wade v. Odle, 21 Tex. Civ. App. 656.

**3. Right of Creditor to Accept Conveyance from Fraudulent Grantee.** — Johnson v. Trust Co. of America, (C. C. A.) 104 Fed. Rep. 174.

**4. Accepting Mortgage from Fraudulent Grantee.** — A fraudulent vendee of property may lawfully mortgage it to secure a bona fide creditor of the fraudulent vendor. The consent of the vendor to such disposition of the property is implied in the conveyance by which he invested the vendee with the title. Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 17.

**298. 1. Sales Partly for Cash and Partly in Payment of Debt.** — Dorrance v. McAlester, 1 Indian Ter. 473, affirmed (C. C. A.) 91 Fed. Rep. 614; Rosenheim v. Flanders, 114 Iowa 291; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Henney Buggy Co. v. Ashenfelter, 60 Neb. 1, 83 Am. St. Rep. 503; Ogg v. Schultz, 61 Neb. 221. See also Wallen v. Montague, 121 Ala. 287.

**2. When Valid.** — Grainger v. Erwin, (Neb. 1902) 91 N. W. Rep. 592.

**3. Voluntary Conveyance Defined.** — Polk County Nat. Bank v. Scott, (C. C. A.) 132 Fed. Rep. 897; Wood v. Potts, 140 Ala. 425; Martin

v. White, 115 Ga. 866; Scudder v. Morris, 107 Mo. App. 634, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298; Albuquerque First Nat. Bank v. McClellan, 9 N. Mex. 636; Ashmead v. Baylor, 59 N. J. Eq. 469; Davis v. Anderson, 99 Va. 620. See also McNeil v. McPhee, 31 Nova Scotia 140; Hinkle v. Downing, 116 Iowa 693.

**Domestic Services Performed by a Daughter,** of legal age, while a member of her father's household, will be presumed to have been performed voluntarily; and, in the absence of a prior agreement or understanding that she should receive compensation, a subsequent conveyance to her in consideration of such services is a voluntary conveyance and void as to creditors of the father. McCord v. Knowlton, 79 Minn. 299.

**A Deed Founded on and Expressing a Merely Nominal Consideration** is deemed voluntary as to creditors. Gunn v. Hardy, 130 Ala. 642.

**A Conveyance in Consideration of Love and Affection** is voluntary. Needles v. Ford, 167 Mo. 495.

**A Conveyance of Mining Property in Exchange for Capital Stock of the Grantee** is based upon a valuable consideration. Homestead Min. Co. v. Reynolds, 30 Colo. 330.

**A Withdrawal by the Wife of Her Action for Divorce** or her consent to continue the marital relations is not a valuable consideration for a conveyance by the husband. Oppenheimer v. Collins, 115 Wis. 283.

**A Conveyance from Father to Infant Son on Account of Wages Paid Over** to the father by the son, who had not been emancipated, is voluntary. Crary v. Hoffman, 115 Iowa 332.

**Valuable Consideration Not Necessarily Full Consideration.** — Nichols, etc., Co. v. Gerlich, 84 Minn. 483.

**299. 2. Inadequacy of Consideration.** — Polk County Nat. Bank v. Scott, (C. C. A.) 132 Fed. Rep. 897; Martin v. White, 115 Ga. 866. And see the title CONSIDERATION, 694. 3 et seq.

**A Conveyance Is Not Voluntary Though the Consideration Be Inadequate,** provided it is valuable. Brown v. Case, 41 Oregon 221.

**3. Conveyance Partly Voluntary.** — See Polk County Nat. Bank v. Scott, (C. C. A.) 132 Fed. Rep. 897.

**300. 1. Voluntary Conveyance with Fraudulent Intent** — *Connecticut.* — Mallory v. Gallagher, 75 Conn. 665.

*Georgia.* — Cohen v. Parish, 105 Ga. 339.

*Illinois.* — Hauk v. Van Ingen, 97 Ill. App. 642, affirmed 196 Ill. 20.

*Indiana.* — Jameson v. Dilley, 27 Ind. App. 429; Hay v. Marsh, 152 Ind. 651.

*Iowa.* — Williams v. Snyder, (Iowa 1903) 94 N. W. Rep. 845.



**301. b. CONVEYANCE WITHOUT ACTUAL INTENT TO DEFRAUD —**  
 (1) *In General.*—Rule Stated.—See note 1.

(2) *When Donor Is Insolvent.*—See note 2.

**302. (3) When Conveyance Renders Donor Insolvent.**—See note 1.

*New Jersey.*—Le Herisse v. Hess, (N. J. 1904) 57 Atl. Rep. 808.

*Texas.*—Walters v. Cantrell, (Tex. Civ. App. 1902) 66 S. W. Rep. 790.

**Voluntary Conveyance by Husband to Wife.**—Chalmers v. Sheehy, 132 Cal. 459, affirmed 84 Am. St. Rep. 62.

**300. 2. Vollkommer v. Cody,** 177 N. Y. 124.

But an owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors. But the person assailing the deed assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities. Guy v. Craighead, 46 N. Y. App. Div. 615.

**301. 1. Right to Make Voluntary Conveyances.**

—Johnson v. Murphy, 180 Mo. 614, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.

**2. Conveyance by Insolvent Debtor**—England.

—In re Mouat, (1899) 1 Ch. 831.

*Canada.*—Quebec Bank v. Elliott, 16 Quebec Super. Ct. 393, affirmed 9 Quebec Q. B. 532; Turgeon v. Shannon, 20 Quebec Super. Ct. 135; McNeil v. McPhee, 31 Nova Scotia 140.

*California.*—Wolters v. Rossi, 126 Cal. 644; Gray v. Brunold, 140 Cal. 615; Roberts v. Burr, (Cal. 1898) 54 Pac. Rep. 849.

*Colorado.*—Colorado Trading, etc., Co. v. Acres Commission Co., 18 Colo. App. 253.

*Georgia.*—Cohen v. Parish, 105 Ga. 339.

*Illinois.*—Smith v. Patton, 194 Ill. 640, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; Earl v. Earl, 186 Ill. 370; Hauk v. Van Ingen, 196 Ill. 20; Bauer Grocer Co. v. McKee Shoe Co., 87 Ill. App. 434.

*Massachusetts.*—Matthews v. Thompson, 186 Mass. 22, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; Gray v. Chase, 184 Mass. 444.

*Michigan.*—Riggs v. Whitaker, 130 Mich. 327.

*Missouri.*—Johnson v. Murphy, 180 Mo. 614, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; Judson v. Walker, 155 Mo. 166; Needles v. Ford, 167 Mo. 495; Johnson v. Christie, 79 Mo. App. 46.

*Nebraska.*—Ayers v. Wolcott, 62 Neb. 805; Coffield v. Parmenter, (Neb. 1901) 96 N. W. Rep. 283.

*New York.*—Lippitt v. Gilmartin, 57 N. Y. App. Div. 411. See also National State Bank v. Wheeler, 40 N. Y. App. Div. 563.

*North Carolina.*—Hallyburton v. Slagle, 130 N. Car. 482; Williams v. Hughes, 136 N. Car. 58.

*Ohio.*—Maclaren v. Stone, 9 Ohio Cir. Dec. 794, 18 Ohio Cir. Ct. 854.

*Pennsylvania.*—McKown's Estate, 198 Pa. St. 96.

*Texas.*—Maddox v. Summerlin, 92 Tex. 483; Davis v. Culp, (Tex. Civ. App. 1903) 78 S. W. Rep. 554.

**Voluntary Conveyance from Husband to Wife.**—Dennis v. Ball-Warren Commission Co., 72 Ark. 58; Fishel v. Motta, 76 Conn. 197; Gustin v. Matthews, 25 Utah 68.

**If the Donor Becomes Insolvent Subsequent to the Conveyance** and not in consequence of it, there is no fraud on his creditors. American Nat. Bank v. Thornburrow, 109 Mo. App. 639.

**The Vendor's Belief in His Solvency** is immaterial. If he is really insolvent the conveyance cannot be upheld as against his creditors. Brown v. Case, 41 Oregon 221.

**302. 1. Conveyance Which Leaves Insufficient to Pay Existing Debts**—Colorado.—Rose v. Dunklee, 12 Colo. App. 403.

*Connecticut.*—Quinnipiac Brewing Co. v. Fitzgibbons, 71 Conn. 80.

*Illinois.*—Dimond v. Rogers, 203 Ill. 464.

*Maine.*—Fletcher v. Tuttle, 97 Me. 491.

*Michigan.*—Wilcox v. Hammond, 128 Mich. 516.

*Mississippi.*—Golden v. Goode, 76 Miss. 400.

*Missouri.*—Ft. Scott First Nat. Bank v. Simpson, 152 Mo. 638; Fehlig v. Busch, 165 Mo. 144; Needles v. Ford, 167 Mo. 495; Clark v. Thias, 173 Mo. 628; Johnson v. Murphy, 180 Mo. 597; Dunlap v. Mitchell, 80 Mo. App. 393.

*Nebraska.*—McIntyre v. Malone, (Neb. 1902) 91 N. W. Rep. 246.

*New Mexico.*—Albuquerque First Nat. Bank v. McClellan, 9 N. Mex. 636.

*New York.*—Kalish v. Higgins, 70 N. Y. App. Div. 192, affirmed 175 N. Y. 495; Multz v. Price, 91 N. Y. App. Div. 116.

*North Carolina.*—Cox v. Wall, 132 N. Car. 730.

*Tennessee.*—Jackson v. Crutchfield, 111 Tenn. 394.

*Vermont.*—Farmer's Nat. Bank v. Thomson, 74 Vt. 442.

*Canada.*—Sun L. Assur. Co. v. Elliott, 31 Can. Sup. Ct. 91.

"Whether the property reserved by a man making a voluntary conveyance will be deemed ample does not depend entirely on the amount and value of it; hence the nature and situation of the property, as well as its amount and value, are important, and to be considered. The property must be so circumstanced that neither delay, difficulty, nor expense need be encountered before it can be made valuable for creditors. The property reserved by the donor should not only be ample, but it should be accessible, so that it may be conveniently subjected and applied by creditors. This rule is obviously just, because the creditors are not only entitled to protection for their debts, but that their means for collecting them shall not be hindered and delayed. The conveyance, as well as the security of the creditors, is the object of the law's protection." Carpenter v. Scales, (Tenn. Ch. 1897) 48 S. W. Rep. 253.

**Voluntary Conveyance from Husband to Wife.**—

- 302.** (4) *When Donor Is in Embarrassed Circumstances.* — See note 2.  
**303.** (5) *When Donor Is Solvent* — (b) *Donation Held to Be Void.* — See note 1.  
**304.** (c) *Donation Held to Be Valid.* — See note 2.  
**306.** *Rule Stated.* — See note 1.

Bailey v. Ballou, 69 N. H. 414; Case v. Hewitt, 10 Ohio Dec. 365, 7 Ohio N. P. 609; Farmer's Nat. Bank v. Thomson, 74 Vt. 442.

**302. 2. Conveyance by Embarrassed Debtor.** — Hauk v. Van Ingen, 196 Ill. 20; Farmers Bank v. Frankfort First Nat. Bank, 30 Ind. App. 520; Johnson v. Murphy, 180 Mo. 597, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301 (302); O'Brien v. Cavanagh, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 362; Gignac v. Iler, 29 Ont. 147, affirmed 25 Ont. App. 393.

**Conveyances to Members of the Household and Near Relatives** of an embarrassed debtor are looked upon with suspicion and scrutinized with care, and when voluntary are *prima facie* fraudulent; and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors. Wilks v. Vaughan, 73 Ark. 174.

**A Voluntary Conveyance of Real Estate from Husband to Wife**, in prejudice of the rights of the husband's creditors, cannot be sustained. Woods v. Allen, 109 Iowa 484.

**303. 1. Voluntary Conveyances Void Per Se Against Existing Creditors** — *Alabama.* — Gunn v. Hardy, 130 Ala. 643; Wallen v. Montague, 121 Ala. 287; Guyton v. Terrell, 132 Ala. 66; Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107; Wood v. Potts, 140 Ala. 425.

*Missouri.* — See Johnson v. Murphy, 180 Mo. 597, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301 (303).

*New Jersey.* — Mason v. Somers, 59 N. J. Eq. 451; Ashmead v. Baylor, 59 N. J. Eq. 469; Ruppert v. Hurley, (N. J. 1900) 47 Atl. Rep. 280; Hancock v. Elmer, 63 N. J. Eq. 802, 61 N. J. Eq. 558; Craft v. Schlag, 61 N. J. Eq. 567; Bayley v. Bayley, 66 N. J. Eq. 84.

*South Carolina.* — Gentry v. Lanneau, 54 S. Car. 514, 71 Am. St. Rep. 814.

**The Revised Statutes of Kentucky.** — In Townsend v. Wilson, 114 Ky. 504, the court said: "While there is some conflict in the authorities, the rule in this state has been from the beginning that, if a party be indebted at the time of a voluntary conveyance, it is presumed to be fraudulent as to his existing debts, regardless of the amount of the debts, the intentions or circumstances of the party conveying, or the amount of property conveyed. This rule has been crystallized in our present statute, which provides: 'Every gift, conveyance, assignment, transfer, or charge made by a debtor or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities.' Ky. Stat., § 1907. As to existing liabilities, by the express terms of the statute every voluntary conveyance by a debtor of any of his estate is void. The purpose of the statute is to place the property of the debtor which is thus conveyed away in precisely the same situation as to his existing debts as if the conveyance had not been made. As to these debts, and as against the original grantee, the conveyance is a nullity." See also O'Kane v.

Vinnedge, 108 Ky. 34; Hamilton v. Combs, (Ky. 1901) 60 S. W. Rep. 371.

In *Virginia* the statute provides that "every gift, conveyance, assignment, transfer, or charge which is not upon a consideration deemed valuable in law \* \* \* shall be void as to creditors whose debts shall have been contracted at the time it was made." Davis v. Anderson, 99 Va. 622.

**A Voluntary Conveyance from Husband to Wife** is invalid as against creditors of the husband. Dickinson v. Johnson, 110 Ky. 236, 96 Am. St. Rep. 434; Rugless v. Robinson, (Ky. 1900) 57 S. W. Rep. 619; Robinson v. Woolstein, (Ky. 1900) 58 S. W. Rep. 706; Plant v. Geffinger, (Ky. 1901) 60 S. W. Rep. 520; Beatty v. Thompson, (Ky. 1902) 66 S. W. Rep. 384; Oppenheimer v. Collins, 115 Wis. 283.

**304. 2. Voluntary Conveyance Not Void Per Se.** — National La Fayette Bank v. Scott, 13 Ohio Dec. 603, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304; Bowlus v. Shanabarger, 10 Ohio Cir. Dec. 167.

**Statutes.** — American Varnish Co. v. Reed, 154 Ind. 88.

**Gift from Husband to Wife.** — In Matthews v. Thompson, 186 Mass. 20, the court said: "The mere fact that a conveyance is voluntary, especially if it is founded on a consideration of love and affection, as in the case of a gift from a husband to his wife, or from a parent to his child, does not necessarily render it fraudulent against creditors."

**306. 1. Conveyance by Solvent Debtor Valid** — *United States.* — Polk County Nat. Bank v. Scott, (C. C. A.) 132 Fed. Rep. 900, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306.

*California.* — White v. Besse, 145 Cal. 223.

*Colorado.* — Fox v. Lipe, 14 Colo. App. 258; Gwynn v. Butler, 17 Colo. 114.

*Connecticut.* — Fishel v. Motta, 76 Conn. 197.

*Georgia.* — Cohen v. Parish, 105 Ga. 339; Ayers v. Harrell, 111 Ga. 864; Wellmaker v. Wellmaker, 113 Ga. 1155; Lytle v. Black, 107 Ga. 386.

*Illinois.* — Rogers v. Dimon, 106 Ill. App. 201, reversed 203 Ill. 464; Hauk v. Van Ingen, 97 Ill. App. 642, affirmed 196 Ill. 20.

*Iowa.* — King v. Wells, 106 Iowa 649; Everist v. Pierce, 107 Iowa 44.

*Kansas.* — Miller v. Wilkerson, 10 Kan. App. 576, 62 Pac. Rep. 253.

*Maine.* — Whitehouse v. Bolster, 95 Me. 458; Spear v. Spear, 97 Me. 498.

*Massachusetts.* — Jaquith v. Massachusetts Baptist Convention, 172 Mass. 439; King v. Cram, 185 Mass. 103.

*Missouri.* — Johnson v. Murphy, 180 Mo. 597, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301 [306]; Ft. Scott First Nat. Bank v. Simpson, 152 Mo. 638; Fehlig v. Busch, 165 Mo. 144; Lang v. Williams, 166 Mo. 1; American Nat. Bank v. Thornburrow, 109 Mo. App. 639.

*Nebraska.* — Anthes v. Schroeder, (Neb. 1902) 92 N. W. Rep. 196.

*New York.* — Vollkommer v. Cody, 177 N. Y.

**307.** (d) What Constitutes Solvency — Property Retained Must Be Sufficient to Cover Debts. — See note 1.

**308.** (e) Burden of Proof to Show Solvency. — See note 5.

**309.** 3. Validity as Against Subsequent Creditors. — See note 1.

124; *Kalish v. Higgins*, 70 N. Y. App. Div. 192, affirmed 175 N. Y. 495; *Fitzpatrick v. Fox*, 80 N. Y. App. Div. 345; *Lippitt v. Gilmartin*, 37 N. Y. App. Div. 411.

*Ohio*. — *Boies v. Johnson*, 25 Ohio Cir. Ct. 331.

**Voluntary Conveyance from Husband to Wife.** — *Gruner v. Brooks*, 126 Mich. 465; *Deering v. Holcomb*, 26 Wash. 588. See also *Palmer v. Smith*, 126 Mich. 352.

**Question of Insolvency Determined as of Time of Conveyance.** — *State v. Martin*, 77 Conn. 142.

**Inference of Intent.** — In *North Carolina*, by statute, voluntary conveyances are protected when the donor retains property sufficient and available for the satisfaction of his existing debts, but the indebtedness of the donor is declared to be evidence from which an intent to defraud may be inferred. *Cox v. Wall*, 132 N. Car. 730.

**307. 1. Value of Property Retained at Time of Conveyance the Test.** — Where one made a voluntary deed and some time thereafter died, the value of his other property at the time when the deed was made is the true test of his solvency at that time, and not the value of his property at the time of his death as estimated by appraisers appointed to set aside a year's support for his widow and minor children. *Ayers v. Harrell*, 111 Ga. 864.

**Indorsements on Obligations of Others.** — As a general rule, in testing the solvency of one who has made a voluntary conveyance of property, his indorsements or suretyship on the obligations of others, not matured at the time of the conveyance, should not be counted as his debts, where it does not appear that his contingent liability was at that time likely to become absolute, or that it afterwards in fact became so. Where, therefore, one made such a conveyance to his wife and was at the time surety for another, and the obligation was thereafter paid by the principal, such a debt should not be counted against the surety, in an attack on the wife's deed, on the ground that the husband was insolvent when he made it. *Ayers v. Harrell*, 111 Ga. 864.

**308. 5. Voluntary Conveyances Presumptively Fraudulent** — *Arkansas*. — *Davis v. Yonge*, (Ark. 1905) 85 S. W. Rep. 90.

*Georgia*. — *Cohen v. Parish*, 105 Ga. 339.

*Iowa*. — *Woods v. Allen*, 109 Iowa 484.

*Michigan*. — *Wilcox v. Hammond*, 128 Mich. 516.

*Mississippi*. — *Golden v. Goode*, 76 Miss. 400.

*Missouri*. — *Fehlig v. Busch*, 165 Mo. 144; *Clark v. Thias*, 173 Mo. 628; *American Nat. Bank v. Thornburrow*, 109 Mo. App. 639.

*New Mexico*. — *Albuquerque First Nat. Bank v. McClellan*, 9 N. Mex. 636.

*Ohio*. — *Jones v. Leeds*, 10 Ohio Dec. 173, 7 Ohio N. P. 480; *Maclaren v. Stone*, 9 Ohio Cir. Dec. 794, 18 Ohio Cir. Ct. 854.

*Oregon*. — *Flynn v. Baisley*, 35 Oregon 268, 76 Am. St. Rep. 405.

*Pennsylvania*. — *McKown's Estate*, 198 Pa.

St. 96; *McKown's Estate*, 29 Pittsb. Leg. J. N. S. (Pa.) 412.

*Tennessee*. — *Carpenter v. Scales*, (Tenn. Ch. 1897) 48 S. W. Rep. 249.

*Texas*. — *Maddox v. Summerlin*, 92 Tex. 483.

*Canada*. — *McNeil v. McPhee*, 31 Nova Scotia 140. See also *Cunningham v. Curtis*, 5 British Columbia 472.

**Contra**, holding that a creditor attacking a voluntary conveyance has the burden of showing that the debtor was insolvent at the time of the conveyance. *Lewis v. Boardman*, 78 N. Y. App. Div. 394; *Kalish v. Higgins*, 70 N. Y. App. Div. 192, affirmed 175 N. Y. 495; *Multz v. Price*, 82 N. Y. App. Div. 339. Compare *Baker v. Potts*, 73 N. Y. App. Div. 29.

**309. 1. Voluntary Conveyances Presumptively Valid as Against Subsequent Creditors** — *England*. — *In re Lane-Fox*, (1900) 2 Q. B. 508, 69 L. J. Q. B. 722.

*Alabama*. — *McKee v. West*, 141 Ala. 531; *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107.

*Colorado*. — *Knox v. Clark*, 15 Colo. App. 356; *House v. Johnson*, 19 Colo. App. 524.

*Connecticut*. — *State v. Martin*, 77 Conn. 142; *Whiting v. Ralph*, 75 Conn. 41.

*Florida*. — *Florida L. & T. Co. v. Crabb*, 45 Fla. 306.

*Georgia*. — *Ross v. Cooley*, 113 Ga. 1047.

*Illinois*. — *Wilson v. Derrwaldt*, 100 Ill. App. 396; *Hunt v. Connor*, 74 Ill. App. 298.

*Kentucky*. — *O'Kane v. Vinnedge*, 108 Ky. 34; *Rose v. Campbell*, (Ky. 1903) 76 S. W. Rep. 505; *Walker v. Manchester Bank*, (Ky. 1904) 79 S. W. Rep. 222.

*Maryland*. — *Scott v. Keane*, 87 Md. 709.

*Massachusetts*. — *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439.

*Michigan*. — *Brand v. Connery*, 132 Mich. 88.

*Minnesota*. — *Schmitt v. Dahl*, 88 Minn. 506.

*Missouri*. — *Ft. Scott First Nat. Bank v. Simpson*, 152 Mo. 638; *Krueger v. Vorhauer*, 164 Mo. 156; *Bauer Grocery Co. v. Smith*, 74 Mo. App. 419; *Lander v. Ziehr*, 150 Mo. 403, 73 Am. St. Rep. 456; *Loy v. Rorick*, 100 Mo. App. 105; *Bracken v. Milner*, 90 Mo. App. 187.

*Nebraska*. — *Ayers v. Wolcott*, 62 Neb. 805; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

*New Jersey*. — *Carter v. Carter*, 63 N. J. Eq. 726; *Walsh v. Rosso*, (N. J. 1898) 41 Atl. Rep. 669; *Mason v. Somers*, 59 N. J. Eq. 451; *Kinsey v. Feller*, (N. J. 1902) 51 Atl. Rep. 485.

*New Mexico*. — *Ilfeld v. De Baca*, (N. Mex. 1905) 79 Pac. Rep. 723.

*New York*. — *Ebbitt v. Dunham*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 232.

*North Carolina*. — See also *Messick v. Fries*, 128 N. Car. 450.

*Ohio*. — *Bowlus v. Shanabarger*, 10 Ohio Cir. Dec. 167.

*Pennsylvania*. — *Best v. Smith*, 103 Pa. St. 80, 74 Am. St. Rep. 676; *Westmoreland Guarantee Bldg., etc., Assoc. v. Thomas*, 207 Pa. St.

**311. VII. HOW PROPERTY FRAUDULENTLY CONVEYED OR ITS PROCEEDS MAY BE REACHED — 2. By Levy and Sale under Execution — a. WHEN LEGAL TITLE TO PROPERTY HAS BEEN IN DEBTOR. — See notes 4, 5, 6.**

**312. Attachment. — See note 2.**

**Purchaser's Recovery in Ejectment. — See note 4.**

**313. b. WHEN LEGAL TITLE HAS NEVER BEEN IN DEBTOR. — See notes 2, 3.**

**314. 3. By Creditors' Bills and Actions in the Nature Of — a. IN GENERAL. — See note 3.**

513; *Thomas v. Butler*, 16 Pa. Super. Ct. 268; *Lieber v. Lieber*, 17 Montg. Co. Rep. (Pa.) 34. *South Carolina. — Gentry v. Lanneau*, 54 S. Car. 514, 71 Am. St. Rep. 814.

*South Dakota. — Aldous v. Olverson*, 17 S. Dak. 190.

*Tennessee. — Carpenter v. Scales*, (Tenn. Ch. 1897) 48 S. W. Rep. 249.

*Texas. — O'Neal v. Clymer*, (Tex. Civ. App. 1900) 61 S. W. Rep. 545; *Moulton v. Sturgis Nat. Bank*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1114. See also *Gonzales v. Adoue*, 94 Tex. 120.

*Virginia. — New South Bldg., etc., Assoc. v. Reed*, 96 Va. 345, 70 Am. St. Rep. 858.

*West Virginia. — See Miller v. Gillispie*, 54 W. Va. 450.

*Wisconsin. — Frei v. McMurdo*, 101 Wis. 423.

**Voluntary Conveyance from Husband to Wife.**

— *Hill v. Schmuck*, 65 Neb. 173.

**311. 4. See McNeil, etc., Co. v. Hovland**, 91 Ill. App. 315.

**5. A Fraudulent Conveyance a Nullity. — Colorado Trading, etc., Co. v. Acres Commission Co.**, 18 Colo. App. 253; *Fishel v. Motta*, 76 Conn. 197; *Morley v. Stringer*, 133 Mich. 690; *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563; *Salemonson v. Thompson*, 13 N. Dak. 182. See also *Cook v. Lee*, 72 N. H. 569; *Tucker v. Denico*, 26 R. I. 560.

**6. Levy of Execution upon Property Fraudulently Conveyed — United States. — Lynch v. Burt, (C. C. A.) 132 Fed. Rep. 417.**

*Alabama. — Howard v. Corey*, 126 Ala. 290, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 311.

*Arizona. — Rountree v. Marshall*, 6 Ariz. 413.

*California. — Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62.

*Iowa. — Meredith v. Schaap*, (Iowa 1901) 85 N. W. Rep. 628.

*Kentucky. — Walker v. Manchester Bank*, (Ky. 1904) 79 S. W. Rep. 222.

*Maine. — Fletcher v. Tuttle*, 97 Me. 491.

*Massachusetts. — Berry v. Gates*, 175 Mass. 373.

*Minnesota. — Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709.

*Missouri. — See Bradshaw v. Halpin*, 180 Mo. 666.

*New York. — Hillyer v. Le Roy*, 179 N. Y. 369.

*Ohio. — Detwiler v. Louison*, 10 Ohio Cir. Dec. 95.

*Oregon. — Wood v. Fisk*, 45 Oregon 281.

*Pennsylvania. — Orr v. Peters*, 197 Pa. St. 606; *Brough v. Greist*, 1 Dauphin Co. Rep. (Pa.) 243.

*South Dakota. — See F. Meyer Boot, etc., Co. v. C. Shengkberg Co.*, 11 S. Dak. 620.

*Texas. — Clardy v. Wilson*, 27 Tex. Civ. App. 49.

*Washington. — Anderson v. Provident L., etc., Co.*, 25 Wash. 20. See also *Preston-Parton Milling Co. v. Horton*, 22 Wash. 236, 79 Am. St. Rep. 928.

**312. 2. Attachment. — See Brasie v. Minneapolis Brewing Co.**, 87 Minn. 456, 94 Am. St. Rep. 709; *Westervelt v. Baker*, (Neb. 1901) 95 N. W. Rep. 793.

**Levy Constitutes Election by Creditor to Treat Conveyance as Void. — Salemonson v. Thompson**, 13 N. Dak. 182.

**4. Purchaser of Property under Execution May Recover Possession by Ejectment. — Gunn v. Hardy**, 130 Ala. 642; *Murphy v. Green*, 128 Ala. 486; *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427; *Detwiler v. Louison*, 10 Ohio Cir. Dec. 95; *Wood v. Fisk*, 45 Oregon 276, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 312.

**313. 2. When Legal Title Has Never Been in Debtor. — Fletcher v. Tuttle**, 97 Me. 491.

**3. Fraudulent Trust Estates Reachable in Equity. — Fletcher v. Tuttle**, 97 Me. 491; *French v. Newberry*, 124 Mich. 148, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313; *Silver v. Lee*, 38 Oregon 511, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313.

**314. 3. Equity Jurisdiction — Alabama. — Brooks v. Lowenstein**, 124 Ala. 158; *Frey v. Fenn*, 126 Ala. 291; *Taylor v. Dwyer*, 131 Ala. 91; *Noble v. Gilliam*, 136 Ala. 618; *Collier v. Wertheimer-Schwartz Shoe Co.*, 122 Ala. 320; *Little v. Sterne*, 125 Ala. 609; *Washington v. Norwood*, 128 Ala. 383; *Guyton v. Terrell*, 132 Ala. 66; *Wood v. Potts*, 140 Ala. 425.

*Arkansas. — Sumpter v. Arkansas Nat. Bank*, 69 Ark. 224.

*Colorado. — Fox v. Lipe*, 14 Colo. App. 258.

*District of Columbia. — White v. Glover*, 23 App. Cas. (D. C.) 389.

*Iowa. — Hirsch v. Israel*, 106 Iowa 498.

*Maryland. — Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427.

*Massachusetts. — Krower v. Felz*, 186 Mass. 391.

*Mississippi. — Cowgill, etc., Milling Co. v. L. M. Nicholson Co.*, (Miss. 1899) 24 So. Rep. 880.

*Missouri. — Whitaker v. Whitaker*, 157 Mo. 342.

*Nebraska. — Plummer v. Bohman*, 62 Neb. 145; *Hargreaves v. Tennis*, 63 Neb. 356; *Chamberlain Banking House v. Turner-Frazer Mercantile Co.*, 66 Neb. 48; *Plattsmouth First Nat. Bank v. Gibson*, (Neb. 1903) 94 N. W. Rep. 965; *Grandin v. First Nat. Bank*, (Neb. 1904) 98 N. W. Rep. 70.

*New Jersey. — Hall v. Nash*, 58 N. J. Eq. 554.

*Oregon. — Wood v. Fisk*, 45 Oregon 276, 281.

**315. b. PREREQUISITES OF EQUITABLE RELIEF—(1) *Reduction of Claim to Judgment*—(a) *Necessity of Judgment*—aa. AT COMMON LAW—(aa) *General Rule*.—See note 1.**

**318. (bb) *Exceptions*.—See note 1.**

**Absconding Debtor.**—See note 2.

**Nonresidence of Debtor.**—See note 3.

**Decease of Debtor.**—See note 5.

**319. bb. UNDER STATUTES.**—See note 2.

*Pennsylvania*.—*Cairns v. Ingram*, 8 Pa. Super. Ct. 514; *Orr v. Peters*, 197 Pa. St. 606.

*Rhode Island*.—*Tucker v. Denico*, 26 R. I. 560.

*South Dakota*.—*F. Meyer Boot, etc., Co. v. C. Shenkberg Co.*, 11 S. Dak. 620.

*Texas*.—*Rutherford v. Carr*, (Tex. Civ. App. 1905) 84 S. W. Rep. 659.

*Washington*.—*Troy v. Bickford*, 24 Wash. 159; *Anderson v. Provident L., etc., Co.*, 25 Wash. 20.

*West Virginia*.—*Crim v. Price*, 46 W. Va. 374.

**315. 1. Creditor's Demand Must Be Reduced to Judgment—*United States*.**—*Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21.

*California*.—*Aigeltinger v. Einstein*, 143 Cal. 609, 101 Am. St. Rep. 131; *Riverside First Nat. Bank v. Eastman*, 144 Cal. 487.

*Iowa*.—*Wiltse v. Flack*, 115 Iowa 51. See also *Baxter v. Pritchard*, 113 Iowa 422; *Hill v. Denney*, 106 Iowa 726.

*Kansas*.—*Breitkreutz v. National Bank*, (Kan. 1905) 79 Pac. Rep. 686; *Ellis v. L. Hays Saddlery, etc., Co.*, 65 Kan. 174; *Donaldson v. Jacobitz*, 67 Kan. 244.

*Maryland*.—See *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427.

*Michigan*.—*Ideal Clothing Co. v. Hazle*, 126 Mich. 262.

*Mississippi*.—*Jones v. Jones*, 79 Miss. 261.

*Missouri*.—*Davidson v. Dockery*, 179 Mo. 687; *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1.

*Nebraska*.—*Missouri, etc., Trust Co. v. Richardson*, 57 Neb. 617; *Foley v. Doyle*, (Neb. 1901) 95 N. W. Rep. 1067; *Adams v. Miller*, (Neb. 1903) 94 N. W. Rep. 711.

*New Jersey*.—*Meyers v. Wedel*, (N. J. 1904) 57 Atl. Rep. 1008.

*New York*.—*Castleman v. Mayer*, 55 N. Y. App. Div. 515, *affirmed* 168 N. Y. 354.

*North Dakota*.—*Amundson v. Wilson*, 11 N. Dak. 193.

*Ohio*.—*Detwiler v. Louison*, 10 Ohio Cir. Dec. 95.

*Oklahoma*.—*Blackwell v. Hatch*, 13 Okla. 169.

*West Virginia*.—*Frye v. Miley*, 54 W. Va. 324.

*Wisconsin*.—*Miller v. Drane*, 122 Wis. 315.

**Filing Transcript of Judgment Obtained in Another County.**—Where an insolvent debtor made a conveyance of land to his wife, which was in part voluntary, transcripts of a judgment rendered in another county need not first be filed in the county wherein such land is situated in order to entitle the judgment creditor to subject to the payment of his debt so much of the land as was conveyed without consideration. *Wiltse v. Flack*, 115 Iowa 51.

**318. 1. Exception—When Judgment Impos-**

**sible or Unavailing.**—*Springfield Grocery Co. v. Thomas*, 3 Indian Ter. 330; *Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 31; *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310; *Frye v. Miley*, 54 W. Va. 324; *Mueller v. Bruss*, 112 Wis. 406.

**2. Absconding Debtor.**—*Hanks v. Hanks*, 75 Vt. 277, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 318.

**3. Nonresidence of Debtor.**—*Riverside First Nat. Bank v. Eastman*, 144 Cal. 487; *Jones v. Jones*, 79 Miss. 261. See also *Patchen v. Rofkar*, 52 N. Y. App. Div. 367, *affirming* (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 494.

**5. Decease of Debtor.**—See *Mallow v. Walker*, 115 Iowa 238, 91 Am. St. Rep. 158.

In *New York* it is provided by statute that "a creditor of a deceased and insolvent debtor, having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, \* \* \* for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void, and resist any act done or conveyance, transfer, or agreement made in fraud of creditors, or maintain an action to set aside such act, conveyance, transfer, or agreement." *Rosselle v. Klein*, 42 N. Y. App. Div. 316.

**319. 2. The Alabama Code.**—*Metcalf v. Arnold*, 132 Ala. 74; *Steiner Land, etc., Co. v. King*, 118 Ala. 546; *Freeman v. Pullen*, 119 Ala. 235.

**The Maryland Act.**—*Sinclair v. Auxiliary Realty Co.*, 99 Md. 223.

**The Tennessee Code.**—*Dillard, etc., Co. v. Smith*, 105 Tenn. 372.

**The West Virginia Code.**—*Foley v. Ruley*, 50 W. Va. 158; *Geiser Mfg. Co. v. Chewning*, 52 W. Va. 523; *Frye v. Miley*, 54 W. Va. 324.

**Other Statutes.**—In *Kentucky* a statute provides that it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred, or mortgaged, to file in a court having jurisdiction of the subject-matter, a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a *lis pendens* shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of *nulla bona* as has heretofore been required. See *Smith v. Curd*, (Ky. 1903) 72 S. W. Rep. 744.

In *Maine*, by virtue of a statute which gives to the court general jurisdiction in bills by creditors to reach and apply in payment of a

- 321.** *cc.* BLENDING OF LEGAL AND EQUITABLE JURISDICTIONS. — See note 2.  
 (b) Sufficiency of Judgment — *aa.* IN GENERAL — A Justice's Judgment. — See note 4.
- 322.** *cc.* FOREIGN JUDGMENTS. — See note 6.
- 323.** (c) Conclusiveness of Judgment. — See note 5.
- 324.** As to What the Judgment Is Conclusive. — See note 1.  
 (2) Obtaining Lien upon Property Conveyed — (a) Necessity Of — *aa.* AT COMMON LAW. — See note 2.
- 325.** So Equity Will Not Enjoin a Defendant. — See note 2.
- 326.** (b) Mode of Obtaining Lien — *aa.* JUDGMENT AND EXECUTION — Judgment Binds Real Property. — See note 3.
- 327.** Execution Must Be Sued Out Against Personal Property. — See note 2.
- 328.** *bb.* ATTACHMENT. — See note 1.
- 329.** (3) Exhaustion of Debtor's Other Property — (a) Necessity Of — *aa.* WHEN PROPERTY FRAUDULENTLY CONVEYED CONSTITUTES A LEGAL ASSET — Creditor Must Exhaust Debtor's Other Property. — See note 1.  
 Creditor Need Not Exhaust Debtor's Other Property. — See note 2.
- 330.** See note 2.  
 Exhaustion of Collateral Securities. — See note 3.

debt any property or interest conveyed in fraud of creditors, it has been held that an equitable proceeding lies generally to reach property conveyed in fraud of creditors without prior judgment and levy at law. *Annis v. Butterfield*, 99 Me. 181.

The *Wisconsin* Act of 1901, c. 207, allows contract creditors to bring suits to set aside fraudulent transfers. No reduction of the claims to judgment is necessary as a condition precedent. *In re H. G. Andrae Co.*, 117 Fed. Rep. 561.

**321. 2. Blending of Legal and Equitable Jurisdictions.** — *Kruger v. Walker*, 111 Ga. 383.

**4. Justice's Judgment.** — *Compare* *State Ins. Co. v. Prestage*, 116 Iowa 466, holding that a judgment of a justice of the peace will not support a creditor's bill, especially where the land sought to be subjected lies in a county other than that in which the judgment was obtained.

**322. 6. Foreign Judgment Not Sufficient.** — See *Guy B. Waite Co. v. Otto*, (N. J. 1903) 54 Atl. Rep. 425.

**323. 5. Conclusiveness of Judgment.** — *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417.

**324. 1. As to What the Judgment Is Conclusive.** — *Le Herisse v. Hess*, (N. J. 1904) 57 Atl. Rep. 808.

**2. Creditor Must Have Lien upon the Property.** — *Chicago Bldg., etc., Co. v. I. A. Taylor Banking Co.*, (Kan. 1904) 78 Pac. Rep. 808; *Wyman v. Jensen*, 26 Mont. 227; *Davidson v. Dockery*, 179 Mo. 687; *Thompson v. Esty*, 69 N. H. 55; *Guy B. Waite Co. v. Otto*, (N. J. 1903) 54 Atl. Rep. 425; *Meyers v. Wedel*, (N. J. 1904) 57 Atl. Rep. 1008; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

**325. 2. Equity Will Not Enjoin Debtor from Disposing of His Property.** — See *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672.

**326. 3. Judgment a Lien upon Real Property.** — *Lazarus Jewelry Co. v. Steinhardt*, (C. C. A.) 112 Fed. Rep. 614; *Scott v. Aultman Co.*, 211 Ill. 612. *Compare* *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

**A Foreign Judgment Does Not Create a Lien**

on the property fraudulently conveyed. *Guy B. Waite Co. v. Otto*, (N. J. 1903) 54 Atl. Rep. 425.

**327. 2. Execution Must Be Sued Out Against Personal Property.** — *Frye v. Miley*, 54 W. Va. 324.

**328. 1. Attachment Sufficient to Secure Equitable Relief.** — *Davidson v. Dockery*, 179 Mo. 687; *Wyman v. Jensen*, 26 Mont. 227; *Thompson v. Esty*, 69 N. H. 55; *Guy B. Waite Co. v. Otto*, (N. J. 1903) 54 Atl. Rep. 425; *Fleischner v. McMinnville First Nat. Bank*, 36 Oregon 553; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

**329. 1. Creditor Must Exhaust Debtor's Other Property.** — *Davis v. Yonge*, (Ark. 1905) 85 S. W. Rep. 90; *Jackson v. Saylor*, 30 Ind. App. 72; *Farrar v. McNair*, 65 Kan. 147; *Ideal Clothing Co. v. Hazle*, 126 Mich. 262; *Bayley v. Bayley*, 66 N. J. Eq. 84; *Baker v. Potts*, 73 N. Y. App. Div. 29; *Patchen v. Rofkar*, 52 N. Y. App. Div. 367, *affirming* (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 494; *Blackwell v. Hatch*, 13 Okla. 169; *Reed v. Loney*, 22 Wash. 433; *Preston-Parton Milling Co. v. Horton*, 22 Wash. 236, 79 Am. St. Rep. 928.

**Search for Property Outside Jurisdiction of Court.** — A creditor, before he is permitted to attack a conveyance which he conceives to be fraudulent, is not obliged to search the entire world for unencumbered property out of which to make his debt. It is sufficient if he finds none within the jurisdiction of the court in which he seeks to set aside the fraudulent conveyance. *Rohrer v. Snyder*, 29 Wash. 199.

**2. Creditor Need Not Exhaust Debtor's Other Property.** — *Metcalf v. Arnold*, 132 Ala. 74; *Wood v. Potts*, 140 Ala. 425; *Lazarus Jewelry Co. v. Steinhardt*, (C. C. A.) 112 Fed. Rep. 614 (a *Georgia* case); *French v. Commercial Nat. Bank*, 199 Ill. 213; *Scott v. Aultman Co.*, 211 Ill. 612; *Lane v. Union Nat. Bank*, 75 Ill. App. 290, *affirmed* 177 Ill. 171, 69 Am. St. Rep. 216; *Hoffman v. Kiefer*, 10 Ohio Cir. Dec. 304.

**330. 2.** See *Foley v. Doyle*, (Neb. 1901) 95 N. W. Rep. 1067.

**3. Spooner v. Travelers Ins. Co.**, 76 Minn.

**330.** *bb.* WHEN PROPERTY FRAUDULENTLY CONVEYED CONSTITUTES AN EQUITABLE ASSET.

— See note 5.

**331.** (b) Mode of Proof — Return of Execution *Nulla Bona*. — See note 1.

**332.** Proof of Debtor's Insolvency. — See note 1.

*c.* WHO MAY INSTITUTE THE ACTION — (1) *Creditors*. — See notes 2, 3.

**333.** (2) *Those Representing or Standing in the Place of Creditors* — (a) *Executors and Administrators of Fraudulent Grantor* — At Common Law. — See note 2.

**334.** But by Statute. — See note 1.

If the Executor or Administrator Refuses. — See note 2.

**335.** (b) *Trustees and Assignees in Bankruptcy* — By the Express Provision of the Bankrupt Law. — See note 1.

311, 77 Am. St. Rep. 651; Sun L. Assur. Co. v. Elliott, 31 Can. Sup. Ct. 91.

**330. 5.** When Property Is an Equitable Asset. — Spooner v. Travelers Ins. Co., 76 Minn. 311, 77 Am. St. Rep. 651; Thompson v. Esty, 69 N. H. 55.

**331. 1.** Mode of Proof — Return of Execution *Nulla Bona* — Iowa. — See Baxter v. Pritchard, 113 Iowa 422.

Kansas. — Beery v. Naylor, 65 Kan. 368; Breittkreutz v. National Bank, (Kan. 1905) 79 Pac. Rep. 686.

Minnesota. — Spooner v. Travelers Ins. Co., 76 Minn. 311, 77 Am. St. Rep. 651. See also Fryberger v. Berven, 88 Minn. 311.

Nebraska. — Coffield v. Parmenter, (Neb. 1901) 96 N. W. Rep. 283.

New York. — Baker v. Potts, 73 N. Y. App. Div. 29.

Oklahoma. — See Blackwell v. Hatch, 13 Okla. 169.

Washington. — Reed v. Loney, 22 Wash. 433.

Wisconsin. — Weber v. Weber, 90 Wis. 467; French Lumbering Co. v. Theriault, 107 Wis. 627, 81 Am. St. Rep. 856; Ellis v. Southwestern Land Co., 108 Wis. 313, 81 Am. St. Rep. 909; Oppenheimer v. Collins, 115 Wis. 283.

**Foundation of Rule.** — In Nebraska Nat. Bank v. Hallowell, 63 Neb. 309, the court said: "The rule seems to be founded in reason that in a judgment creditor's bill to set aside a fraudulent conveyance the return of the sheriff to the execution upon the judgment *nulla bona* is conclusive of the fact that the creditor has exhausted his legal remedies. It would be of no avail to ask him to do more than this."

In Kentucky a statutory provision requiring the return of an execution *nulla bona* before the institution of a suit in equity by creditors to subject property of a debtor fraudulently conveyed to the satisfaction of their judgments has been repealed. O'Kane v. Vinnedge, 108 Ky. 34; Locheim v. Eversole, (Ky. 1902) 70 S. W. Rep. 661.

In Wisconsin the holder of a judgment which is not yet a lien, in order to set aside fraudulent conveyances, so that a lien may attach, must generally allege and show issue and unsatisfied return of an execution. But one having a specific lien, by judgment or otherwise, may maintain suit to remove fraudulent or invalid obstacles standing in the way of its enforcement without such preliminary. Level Land Co. No. 3 v. Sivyver, 112 Wis. 442. See also Mueller v. Bruss, 112 Wis. 406.

**Return of Execution Unsatisfied Not Conclusive Evidence of Insolvency.** — In an action to set aside a fraudulent conveyance, a judgment and a return of execution thereon unsatisfied is strong but not conclusive evidence of insolvency. Mauney v. Hamilton, 132 N. Car. 295.

**332. 1.** Proof of Debtor's Insolvency. — Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa 293; Wiltse v. Flack, 115 Iowa 51; Bates v. Drake, 28 Wash. 447.

**2.** Single Creditor May Bring Bill. — Nebraska Nat. Bank v. Hallowell, 63 Neb. 309; Perrine v. Perrine, 63 N. J. Eq. 483; Parkersburg First Nat. Bank v. Prager, 50 W. Va. 660.

**3.** Several Judgment Creditors May Unite in One Bill. — Anderson v. Lassen County Bank, 140 Cal. 695; Marx v. Meyer, 50 La. Ann. 1229; Morehouse v. Kissam, 58 N. J. Eq. 364; Fleischer v. McMinnville First Nat. Bank, 36 Oregon 553; Ferst v. Powers, 64 S. Car. 221.

**333. 2.** Executors and Administrators of the Fraudulent Grantor. — Mallow v. Walker, 115 Iowa 238, 91 Am. St. Rep. 158; Sayle v. Guarantee Sav., etc., Co., 25 Ohio Cir. Ct. 503; William J. Lemp Brewing Co. v. La Rose, 20 Tex. Civ. App. 575; Burges v. New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. Rep. 602.

Contra. — Thompson v. Esty, 69 N. H. 56; Cook v. Lee, 72 N. H. 569.

**334. 1.** Statutes Permitting Executors and Administrators to Impeach Decedent's Conveyances. — Ackerman v. Merle, 137 Cal. 169; Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131; Sayle v. Guarantee Sav., etc., Co., 25 Ohio Cir. Ct. 503; Walter v. Hartman, (Tenn. 1902) 67 S. W. Rep. 476. See also Schwalber v. Ehman, 62 N. J. Eq. 314.

The Receiver of an Insolvent Corporation may institute an action in behalf of creditors in Connecticut. Curtis v. Lewis, 74 Conn. 367.

**Effect of Statute on Rights of Creditors.** — The Ohio statute giving to executors and administrators the right to prosecute an action to subject property fraudulently conveyed by the intestate to the claims of creditors was not intended to take away the right of the creditors themselves to prosecute such an action. Hoffman v. Kiefer, 10 Ohio Cir. Dec. 304.

**2.** Refusal of Executor — Creditor May Bring Suit. — Campbell v. Heiland, 55 N. Y. App. Div. 05.

**335. 1.** Assignees in Insolvency May Avoid Fraudulent Conveyances. — Riggs v. Whitaker, 120 Mich. 127; Schmitt v. Dahl, 88 Minn. 506; Cox v. Wall, 132 N. Car. 730; Mueller v. Bruss, 112 Wis. 406.

- 336.** (e) Receivers in Supplementary Proceedings. — See note 1.  
**337.** (f) Surety Subrogated to Creditor's Rights. — See note 7.  
 (g) Assignees of Claims. — See note 8.  
**339.** *2. DECREE AND DISTRIBUTION* — (1) *The Decree* — (b) Decree Setting Aside the Fraudulent Conveyance. — See note 4.  
**340.** Conveyance Must Not Be Annulled in Toto. — See note 1.  
**341.** (e) Personal Judgment Against Fraudulent Grantee — *aa. IN GENERAL.* — See note 2.  
*bb. PROCEEDS OR VALUE OF THE PROPERTY.* — See note 4.  
*cc. RENTS AND PROFITS.* — See note 1.  
**342.** Time from Which Rent Accrues. — See note 2.  
**343.** Insurance. — See notes 1, 2.  
*dd. INTEREST.* — See note 3.  
**344.** (g) Allowances and Credits — *aa. CONSIDERATION PAID OR DEBT ACTUALLY DUE* — (aa) *When Fraud Is Actual and Certain* — Consideration Paid. — See note 5.  
**345.** See note 2.  
 Removing Incumbrances. — See note 3.

**336.** 1. Receiver in Supplementary Proceedings. — *Harrison v. Obermeyer, etc., Brewing Co.,* 64 N. Y. App. Div. 499.

**337.** 7. *Ellis v. Southwestern Land Co.,* 108 Wis. 313, 81 Am. St. Rep. 909.

8. Assignees of Claims. — *Noble v. McKeith,* 127 Mich. 163.

Assignee of Judgment. — Where a judgment creditor assigns the judgment his assignee may maintain an action against the judgment debtor to set aside a conveyance made in fraud of the assignor. *Rose v. Dunklee,* 12 Colo. App. 403.

**339.** 4. Directing that Property Be Sold. — The rule is well settled that, in an action by creditors, in a court of equity, assailing a fraudulent transfer of property, the court may by its decree direct that the property be sold upon an order of sale instead of an execution. The creditor, having already been hindered in the collection of his debt, ought not, as a general proposition, to be further delayed by being compelled to resort to an execution. *McNally v. White,* 154 Ind. 171.

**340.** 1. Conveyance Not to Be Annulled in Toto. — *Grosse v. Sweet,* 89 Ill. App. 418, affirmed 188 Ill. 555.

**341.** 2. When Personal Judgment Against Fraudulent Grantee Cannot Be Rendered. — *Wise v. Praff,* 98 Md. 576; *Harrison v. Obermeyer, etc., Brewing Co.,* 64 N. Y. App. Div. 499.

4. Proceeds or Value of the Property. — *Metcalf v. Arnold,* 132 Ala. 74; *Bigby v. Warnock,* 115 Ga. 390, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341; *Best v. Fuller, etc., Co.,* 185 Ill. 43; *Morrison v. Houck,* (Iowa 1903) 93 N. W. Rep. 593; *Selz v. Hocknell,* 63 Neb. 503; *German Bank v. Haller,* 101 Tenn. 83; *Dillard, etc., Co. v. Smith,* 105 Tenn. 372; *Wheeler v. Giddens,* (Tenn. Ch. 1900) 59 S. W. Rep. 181.

Where a Husband and Wife Confederate to defraud creditors by transferring property of the husband to the wife, and such property is sold to an innocent third party, so that it cannot be reached by the creditors of the husband, a personal judgment may be entered against the wife for the proceeds of such sale, provided it appears or is fairly to be presumed that she still retains such proceeds, or her separate es-

tate has had the benefit thereof. *Sheldon v. Parker,* 66 Neb. 634, modifying 66 Neb. 610.

If the Fraudulent Vendee Disposes of the Goods for Less than They Were Worth, recovery in a creditor's suit is not to be limited to the proceeds, but he may be charged with their full value. *Hargreaves v. Tennis,* 63 Neb. 356.

**342.** 1. Liability for Rents and Profits. — *Kinmonth v. White,* (N. J. 1900) 47 Atl. Rep. 1. See also *Needles v. Ford,* 167 Mo. 495.

2. Liability Dates from Possession. — *Burne v. Partridge,* 61 N. J. Eq. 437, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 342.

**343.** 1. Insurance Money. — *Steinmeyer v. Steinmeyer,* 64 S. Car. 421, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

2. *Steinmeyer v. Steinmeyer,* 64 S. Car. 421, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

3. Liability for Interest. — *Hargreaves v. Tennis,* 63 Neb. 356.

Interest on Accounts Collected. — A fraudulent purchaser of a stock of goods and book accounts is liable for interest on all accounts collected from the date of such collection. *Armour Packing Co. v. London,* 53 S. Car. 539.

**344.** 5. Fraudulent Grantee Cannot Claim Credit for Consideration Paid. — *Burt v. Gotzian,* (C. C. A.) 102 Fed. Rep. 937; *Livingston v. Swofford Bros. Dry Goods Co.,* 12 Colo. App. 331; *Biggins v. Lambert,* 213 Ill. 625, 104 Am. St. Rep. 238; *Weiser v. Weisel,* (Supm. Ct. Spec. T.) 5 N. Y. Annot. Cas. 196; *Weiser v. Kling,* 38 N. Y. App. Div. 266; *Salemonson v. Thompson,* 13 N. Dak. 182. See also *Varnum v. Bolton Shoe Co.,* 87 N. Y. App. Div. 622, 84 N. Y. Supp. 967; *Garvin v. Garvin,* 55 S. Car. 360; *Timms v. Timms,* 54 W. Va. 414.

No Credit for Articles Stolen. — The vendee in a fraudulent conveyance is not entitled to credit in a creditors' suit for articles included in the conveyance which were stolen from him while he held thereunder. *Hargreaves v. Tennis,* 63 Neb. 356.

**345.** 2. *Bigby v. Warnock,* 115 Ga. 396, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

3. Discharge of Incumbrances. — *Burt v. Gotzian,* (C. C. A.) 102 Fed. Rep. 937; *Lynch v.*



**345. Debt Actually Due. — See note 4.**

(bb) *When Fraud Is Merely Constructive or Proof Inconclusive — When Fraud Is Merely Constructive. — See note 6.*

**347. bb. IMPROVEMENTS — When Fraud Is Constructive. — See note 1.**

cc. APPLICATION OF PROCEEDS TO GRANTOR'S DEBTS. — See note 2.

(2) *Distribution of Fund Among Creditors — (a) Priorities Between Existing Creditors — aa. SUITS BY SINGLE CREDITORS. — See note 4.*

**349. Priority of Judgments. — See note 2.**

**350. (b) Right of Fraudulent Grantee to Participate. — See note 1.**

(c) Right of Subsequent Creditors to Participate. — See note 3.

(f) Disposition of Surplus. — See note 6.

**351. 4. By Garnishment and Trustee Process — b. WHAT PROPERTY MAY BE REACHED BY GARNISHMENT — Proceeds of Land. — See note 4.**

**353. 6. Statutes of Limitations at Law and Staleness in Equity — a. GENERAL PRINCIPLES — Actions at Law. — See note 2.**

Laches. — See note 5.

**354. b. WHEN TIME BEGINS TO RUN — (2) From Discovery of the Fraud — (a) In General. — See note 2.**

Burt, (C. C. A.) 132 Fed. Rep. 417; Morley v. Stringer, 133 Mich. 690.

**345. 4. Fraudulent Conveyance No Security for Debt Actually Due. — Levy v. Hamilton, 68 N. Y. App. Div. 277.**

**6. When Fraud Is Merely Constructive — United States. — Lynch v. Burt, (C. C. A.) 132 Fed. Rep. 417.**

Indiana. — Marmon v. White, 151 Ind. 445.  
Iowa. — Cox v. Collis, 109 Iowa 270. See also Wiltse v. Flack, 115 Iowa 51.

Kentucky. — Diamond Coal Co. v. Carter Dry-Goods Co. (Ky. 1899) 49 S. W. Rep. 438; Chinn v. Curtis, (Ky. 1903) 71 S. W. Rep. 923; Botts v. Botts, (Ky. 1903) 74 S. W. Rep. 1093.

New Jersey. — Gnichtel v. Jewell, (N. J. 1898) 41 Atl. Rep. 227; Kinmonth v. White, (N. J. 1900) 47 Atl. Rep. 1. See also O'Connor v. Williams, (N. J. 1902) 53 Atl. Rep. 550.

Tennessee. — Carpenter v. Scales, (Tenn. Ch. 1897) 48 S. W. Rep. 249. See also Rosenbaum v. Davis, (Tenn. Ch. 1898) 48 S. W. Rep. 706.

**Subrogation. —** When a conveyance is set aside as fraudulent as to creditors, the fraudulent vendee in such conveyance, who has paid a vendor's lien on the land conveyed as part of the consideration for the fraudulent purchase, will be subrogated to the rights of the original holder of the vendor's lien against the land. Kimble v. Wotring, 48 W. Va. 412.

**347. 1. When Fraud Is Constructive. —** Kinmonth v. White, (N. J. 1900) 47 Atl. Rep. 1. See also McWilliams v. Thomas, (Tex. Civ. App. 1903) 74 S. W. Rep. 596; Morley v. Stringer, 133 Mich. 690.

**The Mortgagee May Be Reimbursed for Taxes paid on property fraudulently mortgaged, upon the mortgage being cancelled. Lamb v. McIntire, 183 Mass. 367.**

**Allowance for Taxes Paid and Improvements. —** See Daisy Roller Mills v. Ward, 6 N. Dak. 317.

**2. Application of Proceeds of Sale. —** Bigby v. Warnock, 115 Ga. 396, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347.

So the grantee will be released if without selling the property he pays to the bona fide creditors of the grantor its fair and reasonable

value. Cottingham v. Greely Barnham Grocery Co., 129 Ala. 200, 87 Am. St. Rep. 58.

**4. Priority of Payment Secured by Diligence. —** Lane v. Union Nat. Bank, 75 Ill. App. 299, affirmed 177 Ill. 171, 69 Am. St. Rep. 216; Thompson v. Williamson, 67 N. J. Eq. 224, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347. But see Parkersburg First Nat. Bank v. Prager, 50 W. Va. 660, explaining Cumberland First Nat. Bank v. Parsons, 42 W. Va. 137; Foley v. Ruley, 50 W. Va. 158; Geiser Mfg. Co. v. Chawning, 52 W. Va. 523.

**349. 2. Priority of Judgments. —** In West Virginia, when all the creditors assailing a fraudulent or voluntary conveyance are judgment creditors, the lien of each dates from the time he obtained his judgment, and not from the date of the filing of the bill, answer, or petition attacking the fraudulent or voluntary conveyance, and the priorities among them must be settled according to the dates of their judgments. Foley v. Ruley, 50 W. Va. 158.

**350. 1. Fraudulent Grantee Cannot Participate When Fraud Is Actual. —** See Downs v. Miller, 95 Md. 602.

**3. Subsequent Creditors May Participate in Distribution. —** Ilfeld v. De Baca, (N. Mex. 1905) 79 Pac. Rep. 723.

**6. Disposition of Surplus. —** Tully v. Tully, 137 Cal. 60; Fleischner v. McMinnville First Nat. Bank, 36 Oregon 553.

**351. 4. Proceeds of Personal Property. —** Where personal property fraudulently transferred has been sold the proceeds of the sale may be reached by garnishment sued out by the defrauded creditors. Wells, etc., Grocery Co. v. Clark, 79 Mo. App. 401. And see generally the title GARNISHMENT, 790. 2 et seq.

**353. 2. Statute Will Bar Recovery of Property Fraudulently Conveyed. —** Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709.

**5. Laches and Neglect. —** Gay v. Havermale, 27 Wash. 390. See also Stubblefield v. Gadd, 112 Iowa 681.

**354. 2. Time Runs from Discovery. —** Rose v. Dunklee, 12 Colo. App. 403; Fox v. Lipe, 14 Colo. App. 258; Donaldson v. Jacobitz, 67 Kan.

**355.** (b) Negligence in Not Discovering. — See notes 1, 2.

(c) Allegation and Proof of Diligence — Allegation. — See note 3.

**356.** VIII. CHANGE OF POSSESSION — 1. Necessity For — In General. — See note 2.

**357.** Delivery Required by Statute. — See note 1.

2. Effect of Retention of Possession or Apparent Title by Vendor —

b. AS FRAUD PER SE, OR CONCLUSIVE EVIDENCE OF FRAUD. — See note 2.

244; *Green v. Salmon*, (Ky. 1901) 63 S. W. Rep. 270; *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709; *Minneapolis Threshing Mach. Co. v. Jones*, 89 Minn. 184; *Syracuse Third Nat. Bank v. Keeffe*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 400, *affirmed* 55 N. Y. App. Div. 640; *Vodrie v. Tynan*, (Tex. Civ. App. 1900) 57 S. W. Rep. 680; *Deering v. Holcomb*, 26 Wash. 588.

**Modification of Rule.** — In *Blackwell v. Hatch*, 13 Okla. 171, the court said: "It is a common expression that the statute of limitation runs from the discovery of the fraud, and this is the general rule. But, like all general rules, it has its exceptions. For instance, suppose that A holds a note against B, which will mature in four years, and B fraudulently conveys all of his property to a third person, to defraud A. The statute will not run against A before the maturity of his note, because he would not be entitled to judgment in a court of law before that time; and a creditor's bill cannot be maintained until after judgment is recovered on the debt in a court of law, and an execution returned, 'No property found.' Counsel for appellant assume that the statute begins to run as soon as the fraudulent act is committed. This is not always true, as before stated. At any rate, the commission or even the discovery of the fraud does not start the statute to running, unless under the conditions then existing a creditor's cause of action accrues."

**Reduction of Claim to Judgment.** — Under the *Nebraska* statute the fact that the creditor's claim has not been reduced to judgment does not prevent the statute of limitation from beginning to run upon the discovery of the fraud. *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

But under the *Montana* statute prescribing a limitation of two years and providing that the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud or mistake, it is held that the cause of action does not arise until, at the least, the creditor has obtained judgment against the debtor. *Finch v. Kent*, 24 Mont. 268.

In *Ohio* a statute provides that suits brought on account of fraud shall be commenced within four years from its discovery. *Boies v. Johnson*, 25 Ohio Cir. Ct. 321. This is held to apply to suits to set aside deeds for constructive as well as for actual fraud. *Stevens v. Summers*, 68 Ohio St. 421.

**355.** 1. Constructive Notice. — *Rose v. Dunklee*, 12 Colo. App. 403; *Vodrie v. Tynan*, (Tex. Civ. App. 1900) 57 S. W. Rep. 680.

**Constructive Notice to the Creditor's Attorney binds the creditor.** *Deering v. Holcomb*, 26 Wash. 588.

2. The Recording of a Deed is only notice of its

execution and contents, and is not notice of the fraud. *Donaldson v. Jacobitz*, 67 Kan. 246, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; *Stevens v. Summers*, 68 Ohio St. 421.

**3.** Allegation of Diligence. — *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239; *Newman Grove State Bank v. Linderholm*, (Neb. 1903) 94 N. W. Rep. 616.

**Presumption as to When Statute Commenced to Run.** — Where nothing to the contrary appears it will be presumed that the statute of limitations commenced to run on the day when the fraud was committed. *Minneapolis Threshing Mach. Co. v. Jones*, 89 Minn. 184.

**356.** 2. Necessity for Change of Possession. — *Dooley v. Pease*, (C. C. A.) 88 Fed. Rep. 446, *affirmed* 180 U. S. 126 (decided in the Illinois circuit); *Morse v. Velzy*, 123 Mich. 532; *Castleman v. Mayer*, 55 N. Y. App. Div. 515, *affirmed* 168 N. Y. 354; *New York County Nat. Bank v. American Surety Co.*, 69 N. Y. App. Div. 153, *affirmed* 174 N. Y. 544; *McCullough v. Willey*, 192 Pa. St. 176; *Barlow v. Fox*, 203 Pa. St. 114; *White v. Gunn*, 205 Pa. St. 229; *Lehr v. Brodbeck*, 12 York Leg. Rec. (Pa.) 142, 192 Pa. St. 535; *McGee v. Wells*, 52 S. Car. 472.

**Publication of Notice of Sale in Newspaper** is not equivalent to a change of possession in the absence of a statute to the contrary. *Harrington v. Blanchard*, 70 N. H. 597.

**357.** 1. Delivery Required by Statute — *California*. — *McKee Stair Bldg. Co. v. Martin*, 126 Cal. 557; *Riebli v. Husler*, 137 Cal. xix, 69 Pac. Rep. 1061.

*Colorado*. — *Hendrie, etc., Mfg. Co. v. Collins*, 29 Colo. 102; *Israel v. Day*, 17 Colo. App. 200; *Jones v. Mackenzie Bros. Wall Paper, etc., Co.*, 19 Colo. App. 121; *Beaman v. Stewart*, 19 Colo. App. 226; *Hugus v. Hardenburg*, 19 Colo. App. 464.

*Idaho*. — *Couch v. Montgomery*, 6 Idaho 669; *Simons v. Daly*, 9 Idaho 87; *Rapple v. Hughes*, (Idaho 1904) 77 Pac. Rep. 722.

*Montana*. — *Finch v. Kent*, 24 Mont. 268.

*Oklahoma*. — *Walters v. Ratliff*, 10 Okla. 262; *Swartzburg v. Dickerson*, 12 Okla. 566; *Enid First Nat. Bank v. Yeoman*, 14 Okla. 626.

**Whether the Transaction Was Bona Fide or Whether Creditors Had Knowledge of It** is wholly immaterial on the question of necessity of change of possession where a statute provides for such a change. *Willis v. Roberts*, 18 Colo. App. 149; *Helvert v. Stewart*, (Colo. App. 1904) 77 Pac. Rep. 1091.

**Subsequent as Well as Prior Creditors Affected.** — In *Michigan* and *Minnesota* it is held that the statute requiring delivery affects subsequent creditors of the vendor as well as prior creditors. *Williams v. Brown*, (Mich. 1904) 100 N. W. Rep. 786; *Flanigan v. Pomeroy*, 85 Minn. 264.

2. Fraud Per Se or Ground for Conclusive Pre-

**360.** Exceptions. — See note 5.

**361.** See note 4.

c. AS PRIMA FACIE EVIDENCE OF FRAUD — (1) *Rule Stated.* —

See note 5.

**364.** Public Sales. — See note 1.

**365.** Choses in Action. — See note 2.

(2) *Burden of Proof.* — See note 6.

**366.** (3) *A Question for the Jury.* — See note 1.

**367.** (5) *How Presumption of Fraud May Be Rebutted* — Circumstances

Tending to Rebut Presumption. — See notes 8, 9.

**368.** See note 1.

Where Parties Reside Together. — See note 5.

**369.** d. DOCTRINE AS TO REAL PROPERTY. — See notes 2, 3.

sumption of Fraud — *California.* — *Roberts v. Burr*, (Cal. 1898) 54 Pac. Rep. 849.

*Illinois.* — *In re Pease Car*, etc., Works, 134 Fed. Rep. 919 (a case decided in the Illinois circuit), citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358 [357]; *Davis v. Shepherd*, 87 Ill. App. 467; *Morris v. Coombs*, 109 Ill. App. 176.

*Missouri.* — *Steppacher v. Saunders*, 74 Mo. App. 475; *Mitchell v. Tinsley*, 83 Mo. App. 586; *Bowles Live Stock Commission Co. v. Hunter*, 91 Mo. App. 418.

*Montana.* — *Finch v. Kent*, 24 Mont. 268.

*Oklahoma.* — *Swartzburg v. Dickerson*, 12 Okla. 566; *Walters v. Ratliff*, 10 Okla. 262.

The Taking and Filing of a Bill of Sale by the grantee does not in *Oklahoma* prevent the court from conclusively presuming fraud. *Washburn v. Oates*, 14 Okla. 5.

**360.** 5. Property Sold under Execution. — *Matteucci v. Whelan*, 123 Cal. 312, 69 Am. St. Rep. 60.

**361.** 4. Recording Bill of Sale Not Equivalent to Change of Possession. — In *Missouri*, where no statute provides that absolute sales of personal property shall be recorded, the recording of a bill of sale is not equivalent to a change of possession. *Mitchell v. Tinsley*, 83 Mo. App. 586.

5. Retention of Possession Prima Facie Evidence of Fraud — *United States.* — *Stelling v. G. W. Jones Lumber Co.*, (C. C. A.) 116 Fed. Rep. 261.

*Alabama.* — *Ward v. Shirley*, 131 Ala. 568; *Teague v. Bass*, 131 Ala. 422.

*Georgia.* — *Ross v. Cooley*, 113 Ga. 1047.

*Michigan.* — *Williams v. Brown*, (Mich. 1904) 100 N. W. Rep. 786.

*Minnesota.* — *Flanigan v. Pomeroy*, 85 Minn. 264.

*New Hampshire.* — *Thompson v. Esty*, 69 N. H. 55.

*New Mexico.* — *Heisch v. Bell*, 11 N. Mex. 523.

*New York.* — *Vogedes v. Beakes*, 38 N. Y. App. Div. 380; *Robinson v. Hawley*, 45 N. Y. App. Div. 287; *Shidlovsky v. Gorman*, 51 N. Y. App. Div. 253; *Schidlower v. McCafferty*, 85 N. Y. App. Div. 493; *Menken v. Baker*, 40 N. Y. App. Div. 609, affirmed 166 N. Y. 628.

*South Carolina.* — *McElwee v. Kennedy*, 56 S. Car. 154; *McGhee v. Wells*, 57 S. Car. 280, 76 Am. St. Rep. 567.

*Texas.* — *Perry v. Patton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1018.

*West Virginia.* — *Colston v. Miller*, 55 W. Va. 490.

*Wisconsin.* — *Missinskie v. McMurdo*, 107 Wis. 578; *Griswold v. Nichols*, 117 Wis. 267.

*Canada.* — *Beaubien v. Perrault*, 17 Quebec Super. Ct. 410; *Fraser v. Murray*, 34 Nova Scotia 186.

**364.** 1. Execution Sales. — *Sloan v. Hunter*, 56 S. Car. 385, 76 Am. St. Rep. 551.

**365.** 2. Assignment of Choses in Action. — *Stackhouse v. Holden*, 66 N. Y. App. Div. 423.

Accounts and Choses in Action Not Affected. — The *Missouri* statute does not affect mere accounts and choses in action which may be assigned by transfer and notice to the debtor, but only tangible or corporeal property. *Schawacker v. Ludington*, 77 Mo. App. 415.

**6.** Burden of Proof. — *Flanigan v. Pomeroy*, 85 Minn. 264; *Robinson v. Hawley*, 45 N. Y. App. Div. 287; *Colston v. Miller*, 55 W. Va. 490; *Missinski v. McMurdo*, 107 Wis. 578; *Griswold v. Nichols*, 117 Wis. 267.

**366.** 1. A Question for the Jury. — *Menken v. Baker*, 40 N. Y. App. Div. 609, affirmed 166 N. Y. 628; *Schwab v. Woods*, 24 Pa. Super. Ct. 433; *McCullough v. Willey*, 200 Pa. St. 168.

**367.** 8. Payment of Consideration. — *Densmore Commission Co. v. Shong*, 98 Wis. 380. See also *Griswold v. Nichols*, 117 Wis. 267, wherein it was held that giving credit upon an existing bona fide indebtedness is tantamount to the payment of new and full consideration.

9. Bona Fide Hiring by Vendor. — *Colston v. Miller*, 55 W. Va. 490.

**368.** 1. Retention of Possession as Agent of Vendee. — *Eufaula Nat. Bank v. Pruett*, 128 Ala. 470.

5. Retention of Possession Where Vendee or Donee Is Minor Child and Resides with Vendor or Donor. — *Dasher v. Ellis*, 102 Ga. 830; *Hargrove v. Turner*, 112 Ga. 134, 81 Am. St. Rep. 24; *Ross v. Cooley*, 113 Ga. 1047.

**369.** 2. Modification of the Rule in the Case of Sales of Realty. — *Vote v. Karrick*, 13 Colo. Ann. 388.

3. Retention of Possession May Be Evidence of Fraud. — *Godfrey v. Herring*, (Ark. 1905) 85 S. W. Rep. 232; *Cincinnati Tobacco Warehouse Co. v. Matthews*, (Ky. 1903) 74 S. W. Rep. 242; *Willis v. Willis*, 79 N. Y. App. Div. 9.

Ordinarily when a grantor who is heavily indebted remains in the possession and apparent control of property which he has conveyed away, and the rights of creditors are prejudiced

- 369.** *e.* RULE AS TO CHATTEL MORTGAGES. — See note 6.
- 371.** Recording Mortgage. — See note 1.  
Possession Coupled with Power of Sale. — See note 2.  
*f.* ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. — See note 3.
- 372.** 3. Sufficiency of Change of Possession — *a.* GENERAL RULE. — See note 2.  
Variation with Circumstances. — See note 3.
- 373.** *b.* ACTUAL DELIVERY — (1) *When Required.* — See note 1.  
(2) *What Constitutes.* — See note 2.
- 374.** Delivery of Keys. — See note 1.  
A Retention of the Vendor's Signs and Employees. — See note 2.  
*c.* CONSTRUCTIVE DELIVERY — (1) *When Sufficient.* — See notes 4, 6.
- 375.** (2) *What Constitutes* — (a) General Rules. — See note 6.
- 376.** A Removal of the Property Is Not Always Necessary. — See note 4.
- 377.** (b) Rule as to Delivery of Bill of Sale. — See note 5.  
(c) Where Property Is in Possession of Third Person. — See note 7.
- 379.** *d.* POSSESSION OF VENDEE MUST BE EXCLUSIVE — (2) *Rule as to Employment of Vendor.* — See notes 1, 2.

by the conveyance, such possession and control will be considered an evident badge of fraud. *Thompson v. Williams*, 100 Md. 195.

**369.** 6. Retention of Possession by Mortgagor Affords Presumption of Fraud, But May Be Rebutted. — *Strahorn-Hutton-Evans Commission Co. v. Quigg*, (C. C. A.) 97 Fed. Rep. 735; *Robinson v. Hawley*, 45 N. Y. App. Div. 287; *Castleman v. Mayer*, 55 N. Y. App. Div. 515, *affirmed* 168 N. Y. 354; *New York County Nat. Bank v. American Surety Co.*, 69 N. Y. App. Div. 153, *affirmed* 174 N. Y. 544. See also *Bock v. Schindler*, 85 Ill. App. 361.

**371.** 1. Delivery of Property Unnecessary When Mortgage Recorded. — *Bartles v. Dodd*, 56 W. Va. 383, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 371; *Dornbrook v. M. Rumely Co.*, 120 Wis. 36.

2. Retention of Possession Coupled with Power of Sale, Fraud Per Se. — See *Cross v. Berry*, 132 Ala. 92.

3. Retention of Possession by Assignor a Badge of Fraud. — *Bartles v. Dodd*, 56 W. Va. 383, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 371.

**372.** 2. General Rule as to Sufficiency of Change of Possession. — *Morris v. Coombs*, 109 Ill. App. 176.

3. Variation with Circumstances. — *Stratton v. Burr*, (Cal. 1898) 54 Pac. Rep. 735; *Hugus v. Hardenburg*, 19 Colo. App. 464; *Brown v. Dickerson*, 2 Marv. (Del.) 119.

**373.** 1. Actual Delivery Necessary When Reasonably Possible. — *Israel v. Day*, 17 Colo. App. 200; *Reynolds v. Beck*, 108 Mo. App. 188.

2. Requirements of an Actual Delivery. — *Willis v. Roberts*, 18 Colo. App. 149; *Mitchell v. Tinsley*, 83 Mo. App. 586; *Harrington v. Blanchard*, 70 N. H. 597; *Walters v. Ratliff*, 10 Okla. 262; *Swartzburg v. Dickerson*, 12 Okla. 566; *Missinskie v. McMurdo*, 107 Wis. 578.

**374.** 1. Delivery of Keys. — Compare *Harrington v. Blanchard*, 70 N. H. 597.

2. Retention of Vendor's Signs and Employees. — See *Spencer v. Mugge*, 45 Fla. 585; *Esselbrugge Mercantile Co. v. Troll*, 79 Mo. App. 558; *Harrington v. Blanchard*, 70 N. H. 597.

Compare *Dann v. Luke*, 74 Conn. 146, where the word "proprietor" was painted off the sign and the word "manager" substituted.

4. Such Possession as Nature of Property Admits of Sufficient. — *Avery Mfg. Co. v. Emsweller*, 31 Ind. App. 293, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

6. Constructive or Formal Delivery Sufficient. — *Stelling v. G. W. Jones Lumber Co.*, (C. C. A.) 116 Fed. Rep. 261; *Avery Mfg. Co. v. Emsweller*, 31 Ind. App. 293, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374; *Huffman v. McIlvaine*, 13 Pa. Super. Ct. 108.

**375.** 6. Regard Must Be Had to Character of Property, Etc. — *Avery Mfg. Co. v. Emsweller*, 31 Ind. App. 293, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Morris v. McLaughlin*, 25 Mont. 151; *McCullough v. Willey*, 200 Pa. St. 168; *White v. Gunn*, 205 Pa. St. 229.

**376.** 4. Removal Not Always Necessary. — *Dann v. Luke*, 74 Conn. 146.

**377.** 5. Delivery of Bill of Sale Insufficient. — *Hadden v. Docley*, (C. C. A.) 93 Fed. Rep. 728, *affirming* (C. C. A.) 92 Fed. Rep. 274, *reversed* 179 U. S. 646. See also *Cottingham v. Greely*, 123 Ala. 479.

7. Notice to Bailee Sufficient. — *Jones v. Mackenzie Bros. Wall Paper, etc., Co.*, 19 Colo. App. 121; *Hendrie, etc., Mfg. Co. v. Collins*, 29 Colo. 102; *Christy v. Ashlock*, 93 Ill. App. 651; *Wachtel v. Ewing*, 82 Mo. App. 594; *Baldwin v. Thayer*, 71 N. H. 257; 93 Am. St. Rep. 510. See also *Young v. Evans*, 118 Iowa 144.

Notice to Bailee Indispensable. — *Strahorn-Hutton-Evans Commission Co. v. Quigg*, (C. C. A.) 97 Fed. Rep. 735.

**379.** 1. Vendor May Be Employed to Assist in Management of Property. — *Dann v. Luke*, 74 Conn. 146; *Blakely Printing Co. v. Pease*, 95 Ill. App. 341; *Fisher v. Stout*, 74 N. Y. App. Div. 101, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 379; *Menken v. Baker*, 40 N. Y. App. Div. 609, *affirmed* 166 N. Y. 628; *Schidlower v. McCafferty*, 85 N. Y. App. Div. 493; *Overall v. Parker*, (Tenn. Ch. 1899) 58 S. W. Rep. 905. See also *Reynolds v. Beck*, 108 Mo. App. 188.

**380.** (3) *Rule as to Persons Living Together.* — See notes 1, 2.

*e.* REQUIREMENT THAT CHANGE OF POSSESSION BE CONTINUED.

— See note 3.

**381.** See note 1.

**382.** *g.* TIME FOR DELIVERY — (1) *General Rule.* — See notes 3, 4.  
Circumstances to Be Considered. — See note 5.

**383.** (2) *Rule as to Delivery Before Specific Liens of Creditors Have Attached.* — See note 1.

*h.* A QUESTION FOR THE JURY. — See note 4.

**385.** IX. GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS —  
2. Right to Make Assignments — *b.* ASSIGNMENTS AT COMMON LAW. — See note 1.

**386.** Voluntary Assignments. — See note 1.

*c.* RIGHT TO MAKE PREFERENCES. — See note 4.

**389.** Statutory Restrictions. — See note 1.

**390.** *g.* KNOWLEDGE AND CONSENT OF CREDITORS. — See note 4.

**391.** Presumption of Assent. — See note 1.

**379.** 2. Where Circumstances Do Not Indicate Any Change of Possession. — *Spencer v. Mugge*, 45 Fla. 585; *Best v. Fuller, etc., Co.*, 185 Ill. 43; *Marshall v. Grazier*, 31 Pittsb. Leg. J. N. S. (Pa.) 45.

Where Property Remained in Possession of the Vendor's Tenant after the sale, it was held that the statute requiring a change of possession was not satisfied. *Coombs v. Collins*, 6 Idaho 536.

**380.** 1. Persons Living Together. — *Hamilton v. Combs*, (Ky. 1901) 60 S. W. Rep. 371, applying the rule in the case of a sale of personal property by a brother to a sister, the parties living together on a farm; *Anglin v. Conley*, 114 Ky. 741; *Huffman v. McIlvaine*, 13 Pa. Super. Ct. 108. See also *McElwee v. Kennedy*, 56 S. Car. 154.

2. Sale Not Good Where No Change in Possession Manifest. — *McKee Stair Bldg. Co. v. Martin*, 126 Cal. 557; *Lehr v. Brodbeck*, 192 Pa. St. 535, 73 Am. St. Rep. 828.

3. Change of Possession Must Be Continued. — *Teague v. Bass*, 131 Ala. 422; *Hunt v. Hammel*, 142 Cal. 456; *Revercomb v. Duker*, 74 Mo. App. 570; *Reynolds v. Beck*, 108 Mo. App. 188; *Finch v. Kent*, 24 Mont. 268; *Walters v. Ratliff*, 10 Okla. 262; *Washburn v. Oates*, 14 Okla. 5.

But if the Continuity of Possession Is Broken by the Unlawful Act of the Vendor his creditors cannot complain as against the vendee that there has been no continuous change of possession. *Couch v. Montgomery*, 6 Idaho 669.

**381.** 1. Sufficient if Vendee Retain Possession Long Enough to Generally Advertise Change of Title. — *Roberts v. Burr*, (Cal. 1898) 54 Pac. Rep. 849; *Hewitt v. Gibson*, 93 Ill. App. 427. See also *Reynolds v. Beck*, 108 Mo. App. 188.

**382.** 3. Delivery Instantanor Not Absolutely Required. — *Feeley v. Boyd*, 143 Cal. 282.

4. Delivery Within Reasonable Time Sufficient. — *Feeley v. Boyd*, 143 Cal. 282; *Bowles Live Stock Commission Co. v. Hunter*, 91 Mo. App. 418; *Reynolds v. Beck*, 108 Mo. App. 188; *Robinson v. Hawley*, 45 N. Y. App. Div. 287; *Kinney v. Rock Springs First Nat. Bank*, 10 Wyo. 122, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 382.

5. Circumstances Surrounding Transaction Must

Be Considered. — *Feeley v. Boyd*, 143 Cal. 282; *Scully v. Albers*, 89 Mo. App. 118.

**383.** 1. Delivery Before Any Specific Liens of Creditors Have Attached Sufficient. — *Scully v. Albers*, 89 Mo. App. 118.

4. Change of Possession a Question for the Jury. — *Hickey v. Coschina*, 133 Cal. 81; *Feeley v. Boyd*, 143 Cal. 282; *Simons v. Daly*, 9 Idaho 87; *Rapple v. Hughes*, (Idaho 1904) 77 Pac. Rep. 722; *Vogedes v. Beakes*, 38 N. Y. App. Div. 380; *Lehr v. Brodbeck*, 192 Pa. St. 535, 73 Am. St. Rep. 828.

When the Facts Are Undisputed it is for the court to determine as a question of law whether such facts show a sufficient actual and continued change of possession. *Reynolds v. Beck*, 108 Mo. App. 188; *Walters v. Ratliff*, 10 Okla. 262.

**385.** 1. At Common Law. — *Brown v. Parker*, (C. C. A.) 97 Fed. Rep. 446; *Lucy v. Freeman*, 93 Minn. 274; *Roberts v. Norcross*, 69 N. H. 533.

The Right to Make an Assignment Is to Be Regarded as Existing in the several states of the Union unless shown to have been changed or abrogated by statute. *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 461.

**386.** 1. Voluntary Assignments. — *Weston v. Nevers*, 72 N. H. 65.

4. Preferences Do Not Render Assignment Fraudulent. — *Roberts v. Norcross*, 69 N. H. 533. See also the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 71. 3 *et seq.*

**389.** 1. Statutory Restrictions and Prohibitions. — See *Haring v. Hamilton*, 107 Wis. 112, and the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 72. 4 *et seq.*

**390.** 4. Consent of Creditors Not Necessary. — In *Roberts v. Norcross*, 69 N. H. 533, the court said: "Apart from statute, a common-law assignment for the benefit of creditors, made in good faith, and supported by a sufficient consideration, cannot be avoided by dissenting creditors." But see *Farrar v. Powell*, 71 Vt. 247. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 62. 3 *et seq.*

**391.** 1. When Assent of Creditors Is Not Presumed. — The assent of creditors cannot be presumed when the assignment contains un-

**391.** 3. Fraudulent Intent — *d.* INTENT TO PREVENT SACRIFICE — (2) *Insolvent Debtors.* — See note 1.

**395.** *c.* PARTICIPATION BY ASSIGNEE AND CREDITORS. — See note 2.  
Notice to Assignee Alone. — See note 5.

**396.** 4. Selection and Control of Assignee — *a.* IN GENERAL. — See notes 1, 2.

**400.** 5. Description and Schedules of Property — *d.* DEFECTIVE SCHEDULE. — See note 4.

**406.** 6. Particular Provisions Rendering Assignment Fraudulent — *g.* PROVISIONS AS TO SALE AND COLLECTION OF ASSETS — (7) *Time of Sale* — (b) Delay of Sale. — See note 6.

**407.** See note 1.

**412.** (9) *Mode of Sale* — (c) Carrying On of Business — Qualifications of This Rule. — See note 4.

**413.** Replenishing Stock. — See note 1.

**419.** *i.* PROVISIONS AS TO DISTRIBUTION OF ASSETS — (3) *Distribution of Assets Among Creditors* — (f) Particular Debts Payable or Preferred — *bb.* FICTITIOUS DEBTS AND DEBTS DUE FROM OTHERS. — See note 5.

**431.** 7. Reservations for Benefit of Assignor — *a.* IN GENERAL. — See note 4.

**432.** What Reservations Are Fraudulent — In General. — See note 2.

**433.** *b.* RETENTION OF POSSESSION BY THE ASSIGNOR — (1) *In General.* — See note 8.

**436.** *d.* EMPLOYMENT OF ASSIGNOR BY ASSIGNEE. — See note 3.

**437.** Express Stipulation. — See note 1.

*e.* NECESSITY TO ASSIGN ALL THE DEBTOR'S PROPERTY — (1) *General Assignment.* — See note 2.

necessary conditions which may be prejudicial to their substantial rights. *Weston v. Nevers*, 72 N. H. 65.

**394.** 1. Intent Immaterial. — In *Kentucky* it is provided by a recent statute that the intent of the insolvent assignor in making the assignment is immaterial. The deed is operative irrespective of the intent with which it was made. See *Maskovitz v. Simon*, 110 Ky. 841.

**395.** 2. Contrary View. — *Mitchell v. Eure*, 126 N. Car. 77.

5. Notice to Assignee as Affecting Creditors. — See *Van Frank v. Walther*, 84 Mo. App. 472.

**396.** 1. Selection of Assignee — Right of Debtor to Select. — *Contra*, *Farrar v. Powell*, 71 Vt. 247. See generally the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **32.** 4.

2. Creditors. — *State v. Johnson*, 105 Wis. 164. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **33.** 4, 5.

**400.** 4. Omission of Property from Schedule. — *Turrill v. McCarthy*, 114 Iowa 681; *Troesch v. Cosgrove*, 46 N. Y. App. Div. 498. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **59.** 1 *et seq.*

**406.** 6. Unreasonable Delay. — *Robinson v. Baugh*, (Tenn. Ch. 1900) 61 S. W. Rep. 98. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **98.** 3 *et seq.*

**407.** 1. Reasonable Delay. — *Hull v. Evans*, (Ky. 1900) 59 S. W. Rep. 851.

**412.** 4. Qualifications of Rule Against Continuing Business. — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798. See also *Brown's Estate*, 193 Pa. St. 281. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **89.** 1 *et seq.*

**413.** 1. Replenishing Stock in Trade. — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798.

**419.** 5. Provision for Payment of Fictitious Debts a Badge of Fraud. — *Patchen v. Waefelaer*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 494, affirmed 52 N. Y. App. Div. 367. See also *Jordan v. Newsome*, 126 N. Car. 556.

**431.** 4. Reservation for Benefit of the Assignor. — *Union, etc., Bank v. Allen*, 77 Miss. 442; *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **81.** 4 *et seq.*

**432.** 2. Reservation for Support or Use of Assignor and His Family. — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798.

**433.** 8. In Absence of Statute Does Not Necessarily Render Assignment Invalid. — See *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798, where the court said: "If the debtor failed to turn over or to deliver up to the trustee, in pursuance of the terms of the deed, any property of any kind, except that embraced in the exemption in favor of poor debtors, that fact would not invalidate the deed of assignment. The title to all the property was absolutely vested in the trustee by the conveyance, with the right to take immediate possession thereof for the purposes of the deed, and he could recover from the debtor or other person any that might be withheld from him."

**436.** 3. But Does Not Necessarily Invalidate the Assignment. — *Hurst v. Leckie*, 97 Va. 550, 75 Am. St. Rep. 798. See further the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, **83.** 1.

**437.** 1. Stipulation for Employment of Assignor. — *Union, etc., Bank v. Allen*, 77 Miss. 442.

2. Failure of General Assignment to Convey All of Debtor's Property. — *Union, etc., Bank v. Allen*, 77 Miss. 442.

**438.** Statutory Requirement. — See note 1.

**441.** *h.* RESERVATION OF EXEMPT PROPERTY. — See note 4.

**444.** *j.* RESERVATION OF POWER TO REVOKE. — See note 3.

**445.** 8. Imposing Conditions and Coercion of Creditors — *b.* EXACTION OF RELEASE FROM CREDITORS — (2) *View that Such Assignments Are Fraudulent* — (a) In General. — See note 3.

**446.** (3) *View that Such Assignments Are Valid* — (a) In General. — See note 3.

**447.** (b) Requisites of Such Assignments — *cc.* NECESSITY TO ASSIGN ALL THE DEBTOR'S PROPERTY. — See note 4.

**450.** 9. Acts Before and After Assignment — *a.* IN GENERAL. — See note 5.

**451.** *b.* WITHDRAWAL OR CONVEYANCE OF PROPERTY. — See note 4.

**452.** *c.* CONCEALMENT, WITHHOLDING, OR REMOVAL OF PROPERTY. — See note 1.

**453.** *e.* WITHHOLDING ASSIGNMENT FROM RECORD. — See note 3.

**455.** 11. Alteration and Substitution of New Assignment — Abandonment of Fraudulent Assignment or Provision. — See note 1.

**459.** 15. What Law Governs — In General. — See note 1.

**462.** X. FRAUD UPON SUBSEQUENT PURCHASERS — 2. The Statute of 27 Elizabeth and Its Construction — *c.* IN FORCE IN THE UNITED STATES. — See note 2.

**463.** *e.* WHAT CONVEYANCES ARE FRAUDULENT WITHIN THE STATUTE — (1) *Conveyances Made with Actual Intent to Defraud Purchasers.* — See note 2.

Notice. — See note 4.

**464.** (2) *Conveyances Made with Intent to Defraud Creditors.* — See note 5.

**438.** 1. Statutory Provisions. — Ontario Bank *v.* Hurst, (C. C. A.) 103 Fed. Rep. 231 (under the Michigan statute).

**441.** 4. Assignment Reserving Exempt Property Not Fraudulent. — Long *v.* Campbell, 133 Ala. 353; Ringen Stove Co. *v.* Bowers, 109 Iowa 175; Union, etc., Bank *v.* Allen, 77 Miss. 442; Hurst *v.* Leckie, 97 Va. 550, 75 Am. St. Rep. 798. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 83, 5 *et seq.*

Homestead. — Jordan *v.* Newsome, 126 N. Car. 553.

**444.** 3. Reserving Power of Revocation. — Hurst *v.* Leckie, 97 Va. 550, 75 Am. St. Rep. 798.

**445.** 3. View that Assignments Exacting Releases Are Fraudulent. — See Lanpher *v.* Burns, 77 Minn. 407, and see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 85, 5 *et seq.*

**446.** 3. View that Assignments Exacting Releases Are Valid. — Hurst *v.* Leckie, 97 Va. 550, 75 Am. St. Rep. 798. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 86, 6, 7.

**447.** 4. All of Assignor's Property Must Be Conveyed. — Hurst *v.* Leckie, 97 Va. 550, 75 Am. St. Rep. 798.

**450.** 5. Fraud Must Be in Making the Assignment. — Long *v.* Campbell, 133 Ala. 353.

**451.** 4. A Badge of Fraud. — King *v.* Baer, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 308. See also Fleischner *v.* McMinnville First Nat. Bank, 36 Oregon 553.

Gift to Wife of Assignor. — See Patchen *v.*

Waefelaer, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 494, *affirmed* 52 N. Y. App. Div. 367.

**452.** 1. Concealment, Removal, or Withholding of Property After Assignment — Evidence of Fraud in Assignment. — Armour *v.* Doig, 45 Fla. 162.

**453.** 3. Compare *Friedenwald Co. v. Sparger*, 128 N. Car. 446, wherein it was held that the fact that the deed of assignment was prepared and kept to be registered in case of proceedings by creditors was no evidence of fraud.

**455.** 1. Fraudulent Assignment or Provision Must Be Abandoned. — Moore *v.* Wood, (Tenn. Ch. 1901) 61 S. W. Rep. 1063, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455.

**459.** 1. What Law Governs Assignments. — Roberts *v.* Norcross, 69 N. H. 533. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 48, 3 *et seq.*

**462.** 2. Statute Re-enacted in Many States. — Cox *v.* Wall, 132 N. Car. 730; McLeod *v.* Lloyd, 43 Oregon 260.

**463.** 2. Actual Intent to Defraud Subsequent Purchasers. — Davidson *v.* Dockery, 179 Mo. 687; McLeod *v.* Lloyd, 43 Oregon 260.

4. In Oregon it is expressly provided by statute that the prior fraudulent conveyance is not void as to subsequent purchasers with notice of the fraud unless the grantee in the conveyance was privy to the fraud. McLeod *v.* Lloyd, 43 Oregon 260.

**464.** 5. Conveyances to Defraud Creditors. — Reynolds *v.* Faust, 179 Mo. 29, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 461 [464];

**466.** (3) *Voluntary Conveyances* — (a) *In General* — *bb. AMERICAN RULE* — (aa) *Purchasers with Notice*. — See note 6.

**468.** (cc) *What Is Notice to a Subsequent Purchaser* — *bbb. Constructive Notice from Recording*. — See note 2.

**471.** (d) *What Conveyances Are Voluntary* — *cc. MARRIAGE SETTLEMENTS*. — See note 5.

**472.** *dd. SETTLEMENTS AFTER MARRIAGE* — *Postnuptial Settlements in Pursuance of Antenuptial Parol Agreements*. — See note 8.

**475.** *f. CONVEYANCES MAY BE VALIDATED BY MATTER EX POST FACTO* — *But a Fraudulent Grantee*. — See note 3.

**486.** **XII. EVIDENCE** — **1. Burden of Proof** — *a. GENERALLY* — *That Property Conveyed Is Not Exempt*. — See note 1.

*b. OF FRAUD* — (i) *Generally on Person Attacking Conveyance*. — See notes 3, 4, 5.

Davidson v. Dockery, 179 Mo. 697, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

**466.** **6. Voluntary Conveyance Valid as Against Subsequent Purchaser with Notice**. — Reynolds v. Faust, 179 Mo. 21; Brinkley v. Brinkley, 128 N. Car. 512, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 466.

**468.** **2. Recording Notice to Subsequent Purchaser**. — Reynolds v. Faust, 179 Mo. 21.

**471.** **5. The Consideration of Marriage Will Support a Settlement**. — Campbell, etc., Co. v. Ross, 86 Ill. App. 356, affirmed 187 Ill. 553; Metz v. Blackburn, 9 Wyo. 481. See also Marmon v. White, 151 Ind. 445; Clow v. Brown, (Ind. App. 1904) 72 N. E. Rep. 534.

**472.** **8. Settlement in Pursuance of Antenuptial Parol Agreement Voluntary**. — Brinkley v. Brinkley, 128 N. Car. 512, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

**475.** **3. Spuck v. Logan**, 97 Md. 160, 99 Am. St. Rep. 427, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 475.

**486.** **1. Contra**, holding that the burden of proof is on the person claiming the property as exempt from execution. Pace v. Robbins, 67 Ark. 232; State Ins. Co. v. Prestage, 116 Iowa 466.

**3. Person Alleging Fraud Must Prove It** — Arizona. — Costello v. Friedman, (Ariz. 1903) 71 Pac. Rep. 935.

Arkansas. — Foster v. Haglin, 68 Ark. 621, 58 S. W. Rep. 128; Maddox v. Reynolds, 69 Ark. 541.

California. — Bush, etc., Co. v. Helbing, 134 Cal. 676; Roberts v. Burr, 135 Cal. 156.

Colorado. — Homestead Min. Co. v. Reynolds, 30 Colo. 330.

Connecticut. — Fishel v. Motta, 76 Conn. 197. District of Columbia. — Droop v. Ridenour, 11 App. Cas. (D. C.) 224.

Illinois. — Merchants' Nat. Bank v. Lyon, 185 Ill. 343; Johnston v. Hirschberg, 85 Ill. App. 47, affirmed 185 Ill. 445; Ellwood Mfg. Co. v. Faulkner, 87 Ill. App. 294; Lamont v. Regan, 96 Ill. App. 359; Adams v. Pease, 113 Ill. App. 356.

Indiana. — Baldwin v. Heil, 155 Ind. 682; Selz v. Mayer, 151 Ind. 422.

Indian Territory. — Noyes v. Tootle, 2 Indian Ter. 144; Hargadine-McKittrick Dry Goods Co. v. Bradley, (Indian Ter. 1902) 69 S. W. Rep. 862.

Iowa. — Shaffer v. Rhynders, 116 Iowa 472;

Kerr v. Kennedy, 119 Iowa 239; Thompson v. Zuckmayer, (Iowa 1903) 94 N. W. Rep. 476; Klay v. McKellar, 122 Iowa 163; Clark v. Ford, 126 Iowa 460; Smyth v. Hall, 126 Iowa 627.

Kansas. — Hartman v. Hosmer, 65 Kan. 595; Magee v. Hartzell, 7 Kan. App. 489, reversed 60 Kan. 646; Culp v. Mulvane, 66 Kan. 143.

Kentucky. — Harrison v. Calvert, (Ky. 1901) 64 S. W. Rep. 521.

Maryland. — Crooks v. Brydon, 93 Md. 640; Commonwealth Bank v. Kearns, 100 Md. 202.

Minnesota. — Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 94 Am. St. Rep. 709; Shea v. Hynes, 89 Minn. 423.

Missouri. — Wall v. Beedy, 161 Mo. 625; Johnson v. Stebbins-Thompson Realty Co., 167 Mo. 325; Jacob Furth Grocery Co. v. May, 78 Mo. App. 323; Hearn v. Due, 79 Mo. App. 322; Hax v. Acme Cement Plaster Co., 82 Mo. App. 447; Kelly-Goodfellow Shoe Co. v. Vail, 84 Mo. App. 94; State v. Cryts, 87 Mo. App. 440; Haydon v. Alkire Grocery Co., 88 Mo. App. 241; King v. Richardson, 94 Mo. App. 670; Loy v. Rorick, 100 Mo. App. 105.

Montana. — Finch v. Kent, 24 Mont. 268.

Nebraska. — Knapp v. Fisher, 58 Neb. 651; Steinberg v. Buffum, 61 Neb. 778; Grandin v. First Nat. Bank, (Neb. 1904) 98 N. W. Rep. 70.

New York. — Gennerich v. Voigt, 46 N. Y. App. Div. 622; Edmondson v. Hamilton, 60 N. Y. App. Div. 630; Fitzpatrick v. Fox, 80 N. Y. App. Div. 345; Gowing v. Warner, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; Gould Paper Co. v. Frank, 38 N. Y. App. Div. 636; Curnen v. Reilly, 99 N. Y. App. Div. 159; Bailey v. Fransioli, 101 N. Y. App. Div. 140.

North Carolina. — Cox v. Wall, 132 N. Car. 730.

Oklahoma. — Brittain v. Burnham, 9 Okla. 525.

Oregon. — Morton v. Denham, 39 Oregon 227.

Pennsylvania. — Snayberger v. Fahl, 195 Pa. St. 336, 78 Am. St. Rep. 818; Simon's Estate, 20 Pa. Super. Ct. 450; Briggs v. Brown, 23 Pa. Super. Ct. 163.

Tennessee. — Maury Nat. Bank v. McAdams, 106 Tenn. 404; Young v. Hurst, (Tenn. Ch. 1898) 48 S. W. Rep. 355; Warren v. Hinson, (Tenn. Ch. 1899) 52 S. W. Rep. 498; Hetterman Bros. Co. v. Young, (Tenn. Ch. 1898) 52 S. W. Rep. 532; Grimmitt v. Midgett, (Tenn. Ch. 1899) 57 S. W. Rep. 399.



**487. Illustrations.** — See notes 3, 4, 5.

(2) *When Rests on Person Claiming under Conveyance.* — See note 6.  
**Conveyances Between Relatives.** — See note 7.

*Texas.* — *Wade v. Odle*, 21 Tex. Civ. App. 656; *Matula v. Lane*, 22 Tex. Civ. App. 391; *Talcott v. Rose*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1009; *Edwards v. Anderson*, 31 Tex. Civ. App. 131; *Eason v. Garrison*, 36 Tex. Civ. App. 574.

*Utah.* — *Wilson v. Cunningham*, 24 Utah 167.  
*Virginia.* — *Todd v. Sykes*, 97 Va. 143; *Alsop v. Catlett*, 97 Va. 364; *American Net, etc., Co. v. Mayo*, 97 Va. 182.

*West Virginia.* — *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838; *Dent v. Pickens*, 46 W. Va. 378; *Smith v. Smith*, 48 W. Va. 51; *Stauffer v. Kennedy*, 47 W. Va. 714; *Blubaugh v. Loomis*, 48 W. Va. 666.

*Canada.* — *McNeil v. McPhee*, 31 Nova Scotia 140.

**Fraud Must Be Established by Preponderance of Evidence.** — *Doxsee v. Waddick*, 122 Iowa 599.

**486. 4. Fraud Never Presumed—*Delaware.*** — *Brown v. Dickerson*, 2 Marv. (Del.) 119.

*District of Columbia.* — *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224.

*Illinois.* — *Flynn v. Todd*, 77 Ill. App. 682; *Nott v. Shutts*, 87 Ill. App. 341; *Edwards v. Story*, 105 Ill. App. 433; *Eickstaedt v. Moses*, 105 Ill. App. 634.

*Indiana.* — *American Varnish Co. v. Reed*, 154 Ind. 88; *Owens v. Gascho*, 154 Ind. 225; *Rownd v. State*, 152 Ind. 39.

*Iowa.* — *J. S. Brittain Dry Goods Co. v. Plowman*, 113 Iowa 624; *Seekel v. Winch*, 108 Iowa 102; *Dunning v. Bailly*, 120 Iowa 729.

*Kansas.* — *Parmenter v. Lomax*, 68 Kan. 61.  
*Kentucky.* — *Combs v. Davis*, (Ky. 1902) 69 S. W. Rep. 765.

*Maine.* — *Whitehouse v. Bolster*, 95 Me. 458.  
*Mississippi.* — *McInnis v. Wiscassett Mills*, 78 Miss. 52.

*Missouri.* — *Hoeller v. Haffner*, 155 Mo. 589; *Sedalia Third Nat. Bank v. Cramer*, 78 Mo. App. 476.

*Nebraska.* — *Steinberg v. Buffum*, 61 Neb. 778; *Knapp v. Fisher*, 58 Neb. 651; *McNerny v. Hubbard*, (Neb. 1903) 97 N. W. Rep. 1118, *affirming* (Neb. 1903) 93 N. W. Rep. 1123.

*New Hampshire.* — See *Stockwell v. Stockwell*, 72 N. H. 69.

*New Jersey.* — *Gray v. Folwell*, 57 N. J. Eq. 446.

*New York.* — *Greenwald v. Wales*, 174 N. Y. 140; *National Bank v. Bonnell*, 46 N. Y. App. Div. 302; *Yaw v. Whitmore*, 46 N. Y. App. Div. 422, *affirmed* 167 N. Y. 605; *Obermeyer v. Jung*, 51 N. Y. App. Div. 247; *Fisher v. Stout*, 74 N. Y. App. Div. 97.

*Pennsylvania.* — *Meyers v. Meyers*, 24 Pa. Super. Ct. 603.

*South Carolina.* — *Jerkowski v. Marco*, 57 S. Car. 402.

*Texas.* — *Love v. Hudson*, 24 Tex. Civ. App. 377.

*Virginia.* — *Alsop v. Catlett*, 97 Va. 364; *Flook v. Armentrout*, 100 Va. 638.

*Washington.* — *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351; *Rohrer v. Snyder*, 29 Wash. 199.

**Facts Tending to Establish Fraud.** — In *Cooper v. Friedman*, 23 Tex. Civ. App. 585, the court said: "It is true that fraud must be proven like any other fact, and, as a matter of law, in the absence of proof it may not be presumed; but from the existence of certain facts which have a tendency to establish fraud, the jury might be warranted in indulging in the presumption that fraud existed in the transaction complained of."

**5. If Consideration Established, Fraud Must Be Shown.** — *Casey v. Leggett*, 125 Cal. 664; *Wilmerding v. Jarmulowsky*, 28 N. Y. App. Div. 629; *Talcott v. Rose*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1009.

**487. 3. Officer Levying on Property Fraudulently Conveyed.** — *Sedalia Third Nat. Bank v. Cramer*, 78 Mo. App. 476.

**4. Defendant Alleging Fraud.** — *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818.

**5. Notice Must Be Shown as Against Bona Fide Purchaser.** — *Crooks v. Brydon*, 93 Md. 640.

**6.** See *American Net, etc., Co. v. Mayo*, 97 Va. 182; *Dent v. Pickens*, 46 W. Va. 378. See also *Cincinnati Tobacco Warehouse Co. v. Matthews*, (Ky. 1903) 74 S. W. Rep. 242.

**7. Deeds Between Relatives When Grantor Insolvent—Burden on Grantee—*Nebraska.*** — *Dunn v. Bozarth*, 59 Neb. 244; *Boldt v. West Point First Nat. Bank*, 59 Neb. 283; *Lusk v. Riggs*, 65 Neb. 258; *Knudson v. Parker*, (Neb. 1902) 91 N. W. Rep. 850; *Ayers v. Wolcott*, 66 Neb. 712, *modifying* 62 Neb. 805; *Omaha Brewing Assoc. v. Zeller*, (Neb. 1903) 93 N. W. Rep. 762; *Coffield v. Parmenter*, (Neb. 1901) 96 N. W. Rep. 283; *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, (Neb. 1901) 96 N. W. Rep. 524; *Lusk v. Riggs*, (Neb. 1904) 97 N. W. Rep. 1033. See also *Penn v. Trompen*, (Neb. 1904) 100 N. W. Rep. 312.

*North Carolina.* — *Mitchell v. Eure*, 126 N. Car. 77.

*Oregon.* — *Mendenhall v. Elwert*, 36 Oregon 381; *Garnier v. Wheeler*, 40 Oregon 198; *Goodale v. Wheeler*, 41 Oregon 190; *Brown v. Case*, 41 Oregon 221; *Robson v. Hamilton*, 41 Oregon 239.

*Pennsylvania.* — *Miller v. Withers*, 188 Pa. St. 128.

*Virginia.* — *Todd v. Sykes*, 97 Va. 143.

"When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of *bona fides* of the transaction. If a conveyance provides for near relatives at the expense of creditors, the relatives must assume the burden of proof, and make things clear." *Stauffer v. Kennedy*, 47 W. Va. 714.

*Contra.* — In *Minnesota* it is held that from the mere relationship of the parties other than husband and wife and the insolvency of the one making the sale, no presumption of fraud arises. In the case of husband and wife, however, a presumption of fraud arises. *Shea v. Hynes*, 89 Minn. 423; *Heim v. Heim*, 90 Minn. 499.

**488.** See notes 1, 2.

**Defendant Alleging Purchase for Value, Etc.** — See note 4.

**489.** *c.* OF CONSIDERATION — Whether Deed *Prima Facie* Evidence of Consideration. — See notes 1, 2.

**When Grantee Must Establish Consideration.** — See notes 4, 5.

**490.** Conveyance from Husband to Wife. — See note 1.

**In Conveyances Between Near Relatives.** — See note 2.

**491.** *d.* SHIFTING THE BURDEN OF PROOF. — See notes 1, 2, 3.

**Deed from Husband to Wife.** — A deed from husband to wife is *prima facie* fraudulent as to existing creditors. Howard *v.* Early, 126 N. Car. 170; Wright *v.* Craig, 40 Oregon 191; Runkle *v.* Runkle, 98 Va. 664; Crowder *v.* Garber, 97 Va. 565; Robinson *v.* Bass, 100 Va. 190; Lee *v.* Willis, 101 Va. 188; Baker *v.* Watts, 101 Va. 702; Miller *v.* Gillispie, 54 W. Va. 450; Rankin *v.* Goodwin, 103 Va. 81; Kline *v.* Kline, 103 Va. 263. *Contra*, Kalish *v.* Higgins, 70 N. Y. App. Div. 192, *affirmed* 175 N. Y. 495.

**A Brother-in-Law Is a Relative** and has the burden of showing that a mortgage to him was made in good faith. Marcus *v.* Leake, (Neb. 1903) 94 N. W. Rep. 100.

**488.** 1. Manhard Hardware Co. *v.* Rothschild, 121 Mich. 657. See also Stauffer *v.* Kennedy, 47 W. Va. 714.

2. Relationship Held to Create No Presumption. — Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224; Klay *v.* McKellar, 122 Iowa 163; Smyth *v.* Hall, 126 Iowa 627; Nichols, etc., *Co.* *v.* Gerlich, 84 Minn. 483; Colston *v.* Miller, 55 W. Va. 490.

**Fact Raises Suspicion But Not Presumption.** — Conry *v.* Benedict, 108 Iowa 664, 75 Am. St. Rep. 282.

**Husband Conveying to Wife.** — The burden of showing fraud in a conveyance from a husband to his wife is on the creditors attacking the conveyance where the deed shows *prima facie* a valuable consideration. Virden *v.* Dwyer, 78 Miss. 763.

**4. Defendant Showing His Character as Bona Fide Purchaser.** — King *v.* Richardson, 94 Mo. App. 670.

**489.** 1. Grantee Must Show Consideration. — Butler *v.* Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838.

**Where a Deed Appears from Its Face to Have Been Voluntary** the burden is upon the grantee to show a valuable consideration. McCord *v.* Knowlton, 79 Minn. 299.

2. Creditor Must Show Absence of Consideration. — Waterbury Lumber, etc., *Co.* *v.* Hinckley, 75 Conn. 187; Crooks *v.* Brydon, 93 Md. 640; Commonwealth Bank *v.* Kearns, 100 Md. 202; Thompson *v.* Williams, 100 Md. 195; Virden *v.* Dwyer, 78 Miss. 763. See also Homestead Min. *Co.* *v.* Reynolds, 30 Colo. 330; Steinmeyer *v.* Steinmeyer, 55 S. Car. 9.

4. Penney *v.* McCulloch, 134 Ala. 580; Noble *v.* Gilliam, 136 Ala. 618; Ezzell *v.* Brown, 121 Ala. 150; Gamble *v.* Aultman, 125 Ala. 372; Allen *v.* Riddle, 141 Ala. 621.

5. Reeves *v.* Estes, 124 Ala. 303; Murphy *v.* Green, 128 Ala. 486; Russell *v.* Davis, 133 Ala. 647, 91 Am. St. Rep. 56; Killian *v.* Cox, 132 Ala. 664; Norwood *v.* Washington, 136 Ala. 657.

**490.** 1. Wife Claiming as Husband's Grantee. — Noble *v.* Gilliam, 136 Ala. 618; Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107; Camp-

bell *v.* Trosper, 108 Ky. 602; Ruppert *v.* Hurley, (N. J. 1900) 47 Atl. Rep. 280; Rankin *v.* Goodwin, 103 Va. 81; Kline *v.* Kline, 103 Va. 263; McConville *v.* National Valley Bank, 98 Va. 9; Bates *v.* Drake, 28 Wash. 447. See also Turner *v.* Gottwals, 15 App. Cas. (D. C.) 43.

But in *Connecticut* there is no presumption of law that a deed from husband to wife was without consideration. Fishel *v.* Motta, 76 Conn. 197.

In *Kentucky* it is held that the Act of 1894 as to married women and their property does not change the rule putting upon the wife the burden of showing that a conveyance from her husband was not voluntary. Sikking *v.* Fromm, 112 Ky. 773.

2. Conveyance Between Relatives — Showing Consideration. — Leonhard *v.* Flood, 68 Ark. 162; Lusk *v.* Riggs, (Neb. 1904) 97 N. W. Rep. 1033; Colfax Bank *v.* Richardson, 34 Oregon 519, 75 Am. St. Rep. 664. See also Citizens' State Bank *v.* Porter, (Neb. 1903) 93 N. W. Rep. 391.

**Showing Items of Consideration.** — In Walker *v.* Harold, 44 Oregon 205, the court said: "In a suit by a creditor to set aside a deed executed by an insolvent debtor to his relative, the burden of proof is imposed upon the grantee to show that he is an innocent purchaser for a valuable consideration, and, when the purchase price consists of an antecedent debt, money paid, or property exchanged, it is also incumbent upon him definitely to point out the various items constituting the alleged consideration, where the conveyance and the circumstances under which it was made bear the semblance of an attempt to cover up the property of the debtor."

**One Who Claims under a Sale Made to Him by His Father**, who was in insolvent circumstances, must, if the sale be attacked for simulation, show that the sale was a *bona fide* transaction. Pruyn *v.* Young, 51 La. Ann. 320.

**Deed Between Brothers Naming Nominal Consideration.** — In Bokel, etc., *Co.* *v.* Costello, 22 App. Cas. (D. C.) 81, where only a nominal consideration was named in a deed from an insolvent debtor to his brother, it was held that there was a *prima facie* presumption that the deed was voluntary.

**491.** 1. When Fraud Shown, Burden Shifts to Grantee — *Arkansas*. — Foster *v.* Haglin, 68 Ark. 621, 58 S. W. Rep. 128.

*Iowa*. — See J. S. Brittain Dry Goods Co. *v.* Plowman, 113 Iowa 624.

*Louisiana*. — See Goothey *v.* Delatour, 111 La. 766.

*New York*. — Gilmour *v.* Colcord, 96 N. Y. App. Div. 358; Gowing *v.* Warner, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; Victoria Paper Mills Co. *v.* New York, etc., *Co.*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 179, *affirmed*

**491.** *c.* PRESUMPTIONS — Insolvency. — See note 6.

2. Proof of Complainant's Relation. — See note 8.

**492.** 3. Competency and Relevancy of Evidence — *a.* AS TO THE INTENT OF THE PARTIES — (1) *In General.* — See notes 3, 4.

**493.** Wide Latitude Allowed in Admission of Evidence. — See notes 2, 3.

(2) *Testimony of the Parties* — Vendor May Testify. — See note 5.

**494.** Vendee May Testify. — See note 1.

(Supm. Ct. App. T.) 28 Misc. (N. Y.) 123; *Bailey v. Fransioli*, 101 N. Y. App. Div. 140.

*North Carolina.* — *Cox v. Wall*, 132 N. Car. 730; *Morgan v. Bostic*, 132 N. Car. 743.

*Virginia.* — *American Net, etc., Co. v. Mayo*, 97 Va. 182.

*West Virginia.* — See *Knight v. Nease*, 53 W. Va. 50; *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838.

*Contra.* — *Culp v. Mulvane*, 66 Kan. 143.

**491.** 2. If Grantee Proves Value, Burden Again Shifts. — *Roberts v. Burr*, 135 Cal. 156; *Talcott v. Rose*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1009.

3. *Reeves v. Estes*, 124 Ala. 303; *Teague v. Bass*, 131 Ala. 422; *Allen v. Riddle*, 141 Ala. 621.

6. Same — At Subsequent Date. — See *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293.

8. Plaintiff Must Prove His Relation as a Creditor. — *Russell v. Davis*, 133 Ala. 647, 91 Am. St. Rep. 56; *Sullivan v. Ball*, 55 S. Car. 343. See also *Hoerr v. Mehofer*, 77 Minn. 228.

**492.** 3. Fraudulent Intent a Question of Fact — *United States.* — *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 145.

*Connecticut.* — *State v. Martin*, 77 Conn. 142. *Illinois.* — *Nelson v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142, affirming 93 Ill. App. 176.

*Indiana.* — *Owens v. Gascho*, 154 Ind. 225; *Reagan v. Chicago First Nat. Bank*, 157 Ind. 623.

*Michigan.* — *Scandinavian Sveas Benev. Soc. v. Linquist*, 133 Mich. 91.

*Minnesota.* — *Carson v. Hawley*, 82 Minn. 204.

*Missouri.* — *Hoeller v. Haffner*, 155 Mo. 589; *Hungerford v. Greengard*, 95 Mo. App. 653.

*Nebraska.* — *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176; *Boldt v. West Point First Nat. Bank*, 59 Neb. 283; *Knapp v. Fisher*, 58 Neb. 651; *Steinberg v. Buffum*, 61 Neb. 778; *Bokhoof v. Stewart*, (Neb. 1902) 89 N. W. Rep. 759; *Pope v. Kingman*, (Neb. 1901) 96 N. W. Rep. 519.

*New York.* — *Lippitt v. Gilmartin*, 37 N. Y. App. Div. 411; *National State Bank v. Wheeler*, 40 N. Y. App. Div. 563; *Fitzpatrick v. Fox*, 80 N. Y. App. Div. 345.

*North Dakota.* — *Dalrymple v. Security L. & T. Co.*, 9 N. Dak. 306.

*Ohio.* — *National La Fayette Bank v. Scott*, 13 Ohio Dec. 603.

*Oregon.* — *Garnier v. Wheeler*, 40 Oregon 198. *Pennsylvania.* — *Meyers v. Meyers*, 24 Pa. Super. Ct. 603; *Page v. Simpson*, 188 Pa. St. 393.

*Texas.* — *Cooper v. Friedman*, 23 Tex. Civ. App. 585.

*Washington.* — *Adams v. Dempsey*, 22 Wash. 281, 79 Am. St. Rep. 933.

*Inference of Law.* — "It is ordinarily a ques-

tion of fact whether a conveyance was made with intent to hinder, delay, or defraud creditors. But in considering such cases the principle is applied that one is presumed to intend the natural consequences of his act. If the known conditions are such that the effect of the act will be to hinder, delay, or defraud creditors, the inference follows as matter of law, unless there is something else to control it." *Matthews v. Thompson*, 186 Mass. 20.

4. Fraud Not Usually Susceptible of Direct Proof. — *Bokel, etc., Co. v. Costello*, 22 App. Cas. (D. C.) 81; *Volusia County Bank v. Bigelow*, 45 Fla. 638; *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 Am. St. Rep. 107; *Bokhoof v. Stewart*, (Neb. 1902) 89 N. W. Rep. 759.

**493.** 2. Wide Latitude Allowed in Admission of Testimony. — *Batavia v. Wallace*, (C. C. A.) 102 Fed. Rep. 240; *Hinman v. Silcox*, 91 Md. 578; *Heath v. Koon*, 130 Mich. 54; *Christian v. Klein*, 77 Minn. 116; *Dyer v. Rowe*, 82 Minn. 223; *Bennett v. McDonald*, 60 Neb. 47; *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818; *Matula v. Lane*, 22 Tex. Civ. App. 391.

3. Wide Latitude Allowed in Cross-examination. — *Fabian v. Traeger*, 215 Ill. 223, 104 Am. St. Rep. 213, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

5. Vendor May Testify as to Intent. — *Brown v. Potter*, 13 Colo. App. 512; *McGhee v. Wells*, 57 S. Car. 280, 76 Am. St. Rep. 567.

A Husband May Testify that a conveyance to his wife was not made with intent to defraud creditors. *Finch v. Kent*, 24 Mont. 268.

When Vendor's Testimony Not Received. — In *Curran v. Rothschild*, 14 Colo. App. 497, it was held that the vendor's testimony as to his purpose in the transaction should not be received if the intent appears upon the face of the transaction or if the undisputed facts are irreconcilable with a lawful purpose.

**494.** 1. Vendee May Testify. — *Brown v. Potter*, 13 Colo. App. 512.

*Presumption from Vendee's Failure to Testify.* — In *Dawson v. Waltemeyer*, 91 Md. 333, the court said: "When in a case like this, a fraud is proven and suspicious circumstances are shown which implicate a grantee, and those circumstances are peculiarly within his knowledge, we cannot but draw unfavorable presumptions of fact if he fails to offer some affirmative proof that his part in the transaction is an honest one. If he has acted honestly he should not permit his conduct to wear a doubtful aspect, when by making a statement he can clear up the whole matter. As was said by the court in *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 'his failure to appear and testify in denial of a charge of something peculiarly within his own knowledge, carries with it the usual unfavorable and damaging presumption.' It, in fact, as was said in *Diggs v.*

- 494.** (3) *Declarations of the Parties* — Declarations of the Grantor. — See note 2.  
**495.** See notes 1, 2, 3, 4.  
**496.** Declarations Made Subsequent to the Sale. — See note 1.  
 When Common Purpose to Defraud Is Shown. — See note 4.  
**497.** When Vendor Remains in Possession. — See notes 1, 2.  
 Vendee's Declarations. — See note 3.

McCullough, 69 Md. 592, amounts to 'little less than a formal confession of guilt.'

**A Wife May Testify** that a conveyance from her husband was not received with intent to defraud the husband's creditors. *Finch v. Kent*, 24 Mont. 268.

**494. 2. Declarations Made Before the Sale.** — Freese v. Kemplay, (C. C. A.) 118 Fed. Rep. 429, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494; *Banning v. Marleau*, 133 Cal. 485; *Foster v. McAlester*, 3 Indian Ter. 307, reversed (C. C. A.) 114 Fed. Rep. 145; *Williams v. Snebly*, 92 Md. 9; *Beers v. Aylsworth*, 41 Oregon 251; *Colston v. Miller*, 55 W. Va. 490.

**495. 1. Contemporaneous Declarations.** — *Foster v. McAlester*, 3 Indian Ter. 307, reversed (C. C. A.) 114 Fed. Rep. 145; *Hood v. Gibson*, 8 Kan. App. 588; *Williams v. Snebly*, 92 Md. 9; *Gage v. Trawick*, 94 Mo. App. 307; *Robson v. Hamilton*, 41 Oregon 239.

**2. Subsequent Declarations.** — *Adams v. Dempsey*, 22 Wash. 284, 79 Am. St. Rep. 933.

**3. Antram v. Burch**, 84 Mo. App. 256; *Beers v. Aylsworth*, 41 Oregon 251.

**4. Declarations Before Sale Not Admissible Against Grantee.** — *Antram v. Burch*, 84 Mo. App. 256; *Beers v. Aylesworth*, 41 Oregon 251; *Colston v. Miller*, 55 W. Va. 494, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495. See *Banning v. Marleau*, 133 Cal. 485.

**Knowledge of Grantee.** — *Bender v. Kingman*, 64 Neb. 766.

**Prior Declarations of the Grantor Made in Presence of the Grantee** that the former intended to defraud his creditors are admissible for the purpose of showing the grantee's knowledge of the intent with which the conveyance was made and his participation in the fraud. *Lesser v. Brown*, 75 Conn. 491.

**496. 1. Declarations Made Subsequent to the Sale** — *Colorado*. — *Vote v. Karrick*, 13 Colo. App. 338; *Brown v. Potter*, 13 Colo. App. 512.

*Iowa*. — *Cedar Rapids Nat. Bank v. Lavery*, 110 Iowa 575, 80 Am. St. Rep. 325.

*Louisiana*. — *Burg v. Rivera*, 105 La. 144.

*Minnesota*. — *Carson v. Hawley*, 82 Minn. 204.

*New York*. — *Lent v. Shear*, 160 N. Y. 462; *Kalish v. Higgins*, 70 N. Y. App. Div. 192, affirmed 175 N. Y. 495.

*South Carolina*. — *Sullivan v. Ball*, 55 S. Car. 343.

*Tennessee*. — *Johnson v. Goldston*, (Tenn. Ch. 1899) 52 S. W. Rep. 474.

*West Virginia*. — *Colston v. Miller*, 55 W. Va. 494, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495; *Ballard v. Chewning*, 49 W. Va. 508.

**Rule and Exceptions Summarized.** — In *Moore v. Robinson*, (Tex. Civ. App. 1903) 75 S. W. Rep. 892, the court said: "The general rule is well settled that the declarations of a grantor,

after his sale, cannot be received to impeach his conveyance. There are exceptions to the rule, however, which are universally recognized: (1) Where there has been a *prima facie* case of fraud established, as where the thing granted has a *corpus*, and the possession of the thing after the sale remains with the seller; (2) where the declarations are made in the presence of the vendee, and he acquiesces in the statements, or asserts no rights where he ought to speak; and (3) where the evidence establishes a continuing conspiracy to defraud between the vendor and vendee."

**Where the Testimony Shows a Prior Dishonest Combination** between the parties to a conveyance, the declarations and admissions of the vendor, made after the execution of the deed, are admissible against the vendee to prove a fraudulent intent. *Walker v. Harold*, 44 Oregon 205.

**Admissions Prior to Payment of Consideration.** — Admissions of the vendor in the presence of the vendee, before the latter parted with the consideration, as to the intent with which the sale was made, are competent, though coming after the vendee had taken possession, since they tend to show notice of the vendor's intent to the vendee. *Bender v. Kingman*, 62 Neb. 469.

**4. When Common Purpose to Defraud Is Shown.** — *Carson v. Hawley*, 82 Minn. 204. See also *Boyer v. Weimer*, 204 Pa. St. 295.

**497. 1. Declarations Made by Vendor While in Possession.** — *Bush, etc., Co. v. Helbing*, 134 Cal. 680, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497; *Cooper v. Friedman*, 23 Tex. Civ. App. 585; *Colston v. Miller*, 55 W. Va. 490, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497.

**Declarations Made by a Mortgagor** while in possession are admissible. *Levy v. Hamilton*, 68 N. Y. App. Div. 277.

**2. Possession Consistent with Terms of Deed or Contract.** — See *Lent v. Shear*, 160 N. Y. 462.

**3. Vendee's Declarations.** — See *Foster v. McAlester*, 3 Indian Ter. 307, reversed (C. C. A.) 114 Fed. Rep. 145.

**Declarations of the Vendee's Agent** may be admitted to show that the conveyance to the vendee was fraudulent. *Kaufman v. Burchinell*, 15 Colo. App. 520.

**Prior and Contemporaneous Declarations.** — Not only are acts and declarations of the vendee made contemporaneous with the conveyance admissible, but also such as are made prior thereto, provided they refer to and are connected with it. *Williams v. Snebly*, 92 Md. 9.

**Subsequent Admissions of Grantee Held Admissible.** — *Lesser v. Brown*, 75 Conn. 491. See, however, *Ellwood Mfg. Co. v. Faulkner*, 87 Ill. App. 294, holding that while prior admissions were admissible, subsequent admissions were not.

**498.** (4) *Circumstantial Evidence* — (a) *In General*. — See note 1.

**499.** (c) *Contemporaneous Facts — Conveyances Between the Same Parties*. — See note 5.

**500.** *Conveyances to Other Parties*. — See note 1.

*When Connection Is Shown*. — See note 2.

**502.** (d) *Subsequent Facts — Proof of the Subsequent Acts of the Grantor*. — See note 3.

**503.** *b. AS TO THE CONSIDERATION*. — See note 5.

**504.** *Recitals in Deed*. — See note 4.

**506.** *c. AS TO THE DONOR'S FINANCIAL CONDITION*. — See note 6.

**507.** *4. Weight and Sufficiency of Evidence — a. CONCLUSIVE AND REBUTTABLE EVIDENCE OF FRAUD — (1) When Evidence Is Conclusive*. — See note 2.

**508.** *Statutes*. — See note 1.

**498.** 1. *Circumstantial Evidence — California*. — Bush, etc., Co. v. Helbing, 134 Cal. 680, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498; Casey v. Leggett, 125 Cal. 664; Roberts v. Burr, 135 Cal. 156.

*Delaware*. — Brown v. Dickerson, 2 Marv. (Del.) 119.

*Indiana*. — Rownd v. State, 152 Ind. 39, 45; Stout v. Price, 24 Ind. App. 360.

*Maryland*. — Williams v. Snebly, 92 Md. 9; Baltimore High Grade Brick Co. v. Amos, 95 Md. 571; Thompson v. Williams, 100 Md. 195.

*Michigan*. — Noble v. Laidlaw, 136 Mich. 680. See also Scandinavian Sveas Benev. Soc. v. Linquist, 133 Mich. 91.

*Minnesota*. — Manwaring v. O'Brien, 75 Minn. 542; Dyer v. Rowe, 82 Minn. 223.

*Missouri*. — Hoeller v. Haffner, 155 Mo. 589; Christian v. Smith, 85 Mo. App. 117; State v. Manhattan Rubber Mfg. Co., 149 Mo. 181; New York Store Mercantile Co. v. West, 107 Mo. App. 254.

*Nebraska*. — Bokhoof v. Stewart, (Neb. 1902) 89 N. W. Rep. 759.

*New York*. — Greenwald v. Wales, 174 N. Y. 140; King v. Simmons, 36 N. Y. App. Div. 623; Gowing v. Warner, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; Bailey v. Fransioli, 101 N. Y. App. Div. 140.

*Oregon*. — Garnier v. Wheeler, 40 Oregon 198.

*Pennsylvania*. — Thornburn v. Thompson, 192 Pa. St. 298; Snayberger v. Fahl, 195 Pa. St. 336, 78 Am. St. Rep. 818; Weber v. Aschbacher, 205 Pa. St. 558.

*South Carolina*. — Jerkowski v. Marco, 57 S. Car. 402.

*Texas*. — Matula v. Lane, 22 Tex. Civ. App. 391; Searcy v. Gwaltney, 36 Tex. Civ. App. 158.

*Virginia*. — Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420; Alsop v. Catlett, 97 Va. 364.

*Washington*. — Reckers v. Allmond, 29 Wash. 238.

*West Virginia*. — Lawyer v. Barker, 45 W. Va. 468; Knight v. Nease, 53 W. Va. 50; Moore v. Gainer, 53 W. Va. 403; Miller v. Gillispie, 54 W. Va. 450; Vandervort v. Fouse, 52 W. Va. 214; Stauffer v. Kennedy, 47 W. Va. 714; Ballard v. Cheurning, 49 W. Va. 508; Colston v. Miller, 55 W. Va. 490.

*Wisconsin*. — Zimmerman v. Bannon, 101 Wis. 407.

"Fraud may be inferred from the facts and circumstances of the case; and if these facts and circumstances are such as to make a *prima facie* case of fraudulent intent, they are to be taken as conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case." Parkersburg First Nat. Bank v. Prager, 50 W. Va. 660.

**499.** 5. *Conveyances Between the Same Parties*. — Colston v. Miller, 55 W. Va. 490, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 499.

**500.** 1. *Conveyances to Other Parties*. — Colston v. Miller, 55 W. Va. 490, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 500.

**2. When Connection Is Shown**. — Colston v. Miller, 55 W. Va. 490, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 500.

**502.** 3. *Subsequent Acts of the Grantor*. — See O'Connor v. Docen, 50 N. Y. App. Div. 610. See also State v. O'Neill, 151 Mo. 67.

*Evidence of Improvements*. — In an action by a judgment creditor to have his judgment declared a lien upon a farm conveyed to the debtor's wife, upon the ground that he paid the purchase price, and that it was conveyed to the wife in trust for his benefit, to defraud his creditors, it was held that it was error to exclude evidence to the effect that after the conveyance, and while the debtor was in possession of the farm, he made permanent improvements thereon, and paid for them with his own money. Christian v. Klein, 77 Minn. 116.

**503.** 5. *Antecedent Debt as Consideration*. — Colston v. Miller, 55 W. Va. 490, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 503 and supporting the whole text paragraph.

**504.** 4. *Recitals as to Consideration Not Conclusive on Parties Attacking Deed*. — Leonard v. Flood, 68 Ark. 162. See also Citizens' State Bank v. Porter, (Neb. 1903) 93 N. W. Rep. 391.

**506.** 6. *Insolvency Is Not to Be Inferred Merely from Suspicious Circumstances*, but must be proven like any other affirmative fact. Dorse v. Waddick, 122 Iowa 599.

**507.** 2. *Fraud in Law*. — Donk Bros. Coal, etc., Co. v. Kinealy, 81 Mo. App. 646; Sloan v. Thomas-Mfg. Co., 58 Neb. 713. See also Jones v. Leeds, 10 Ohio Dec. 173, 7 Ohio N. P. 480; Dalrymple v. Security L. & T. Co., 9 N. Dak. 306; Tucker v. Denico, 26 R. I. 560.

**508.** 1. *Statutes Making Fraudulent Intent*

**509.** See note 1.

(2) *When Evidence Is Rebuttable* — (a) *In General.* — See note 3.

**512.** *Circumstances Consistent with Honesty.* — See notes 1, 2, 3.

(b) *Badges of Fraud.* — See note 4.

**513.** See notes 1, 2.

*b. CIRCUMSTANCES CONSTITUTING EVIDENCE* — (1) *In Respect to the Terms of the Conveyance* — (a) *Powers Granted to Trustee — Continuance of Business by Trustee.* — See note 4.

**514.** (b) *Reservation of Powers to Grantor* — *aa. RIGHT TO REVOKE CONVEYANCE.* — See note 2.

*bb. RETENTION OF USE OF PROPERTY — Where as a Part of a Contract for the Sale of Land.* — See note 3.

**a Question of Fact — California.** — *Polk v. Boggs*, 122 Cal. 114.

*Indiana.* — *American Varnish Co. v. Reed*, 154 Ind. 88; *Reagan v. Chicago First Nat. Bank*, 157 Ind. 623; *Stout v. Price*, 24 Ind. App. 360. *Nebraska.* — *Farmer's, etc., Nat. Bank v. Mosher*, 63 Neb. 130; *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732.

*New York.* — *Maasch v. Grauer*, 58 N. Y. App. Div. 560; *Vollkommer v. Cody*, 177 N. Y. 124.

*North Dakota.* — *Salemonson v. Thompson*, 13 N. Dak. 182.

*Wisconsin.* — *Cunningham v. Eagan*, 102 Wis. 272.

**Statute Does Away with Doctrine of Constructive Fraud.** — *Bender v. Kingman*, 64 Neb. 766.

**Court May Direct Verdict.** — The statute does not interfere with the prerogative of the court to direct a verdict, where the evidence is in such condition that the court would be bound to set any other verdict aside. *Brown v. Potter*, 13 Colo. App. 512. See also *Bender v. Kingman*, 64 Neb. 766.

**509. 1. Deed Void upon Its Face.** — *Curran v. Rothschild*, 14 Colo. App. 497; *People v. Court of Appeals*, 28 Colo. 442; *New York County Nat. Bank v. American Surety Co.*, 69 N. Y. App. Div. 153, *affirmed* 174 N. Y. 544.

**3. Actual Intent a Question of Fact.** — *Gordon v. Alexander*, 122 Mich. 107; *Adams v. Dempsey*, 22 Wash. 284, 79 Am. St. Rep. 933.

**But Where There Is No Evidence Tending to Show Fraud** it is proper to refuse to submit the question to the jury. *Heath v. Koon*, 130 Mich. 54.

**512. 1. Finding of Fact Must Be Supported by Testimony.** — The declaration in Civ. Code Cal., § 3442, that the question of fraudulent intent is one of fact, and not of law, is subordinate to the rule that a finding of fact must be supported by the testimony in the case. *Walters v. Rossi*, 126 Cal. 644.

In *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 153, the court said: "Mere suspicion, unsupported by evidence, cannot be allowed to deprive a creditor of his legal rights; and fraud cannot be inferred either by the court or jury from acts, legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be when taken together

and aggregated — when interlinked and put in proper relation to each other — consistent with an honest intent. If they are, the proof of fraud is wanting."

**2. Fraud Is Not to Be Presumed.** — *Roberts v. Burr*, 135 Cal. 156. See also *Casey v. Leggett*, 125 Cal. 664.

**3. Circumstances Consistent with Honesty.** — *Allen v. Riddle*, 141 Ala. 621; *Eickstaedt v. Moses*, 105 Ill. App. 634; *American Varnish Co. v. Reed*, 154 Ind. 88; *Shaffer v. Rhynders*, 116 Iowa 472; *Shumaker v. Davidson*, 116 Iowa 569; *Albuquerque First Nat. Bank v. Lesser*, 10 N. Mex. 709, *quoting* 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512.

**Proof of a Fraudulent Conveyance Must Be Clear and Satisfactory.** — It must be sufficiently strong and cogent to satisfy a man of sound judgment as to the truth of the allegation of fraud. *Aretz v. Kloos*, 89 Minn. 432.

**4. Badges of Fraud.** — *Timms v. Timms*, 54 W. Va. 414. See also *Scandinavian Sveas Benev. Soc. v. Linquist*, 133 Mich. 91.

**513. 1.** See *Thornburn v. Thompson*, 192 Pa. St. 298.

**2. Badges of Fraud May Be Explained.** — *Timms v. Timms*, 54 W. Va. 414.

"**These Indicia Are Open to Explanation**, and they are therefore not necessarily conclusive, as is an irrebuttable legal presumption. In many instances they furnish strong and satisfactory evidence of the existence of fraud; but as they are relative, and not absolute, as respects their probative value, the special circumstances accompanying each inquiry must be known and considered, in order that the weight properly attributable to those *indicia* may be given to them." *Thompson v. Williams*, 100 Md. 195.

**4. Hungerford v. Greengard**, 95 Mo. App. 653. See also *Thornburn v. Thompson*, 192 Pa. St. 298.

**514. 2. Right to Revoke Conveyance.** — See *Scott v. Keane*, 87 Md. 709.

**3. Retention of Use and Possession of Property.** — *Low v. Ivy*, 10 Pa. Super. Ct. 32. See also *Stelling v. G. W. Jones Lumber Co.*, 116 Fed. Rep. 261; *Hollis v. Drescher*, 46 N. Y. App. Div. 151, in which case the grantor continued in active control of the property sold, collecting the rents and managing it generally without any aid or assistance from the grantee, who received from the rents whatever the grantor saw fit to give him.

Where, after an absolute conveyance of real estate by a debtor in failing circumstances, he

**515.** *dd.* RIGHT TO SUBSTITUTE OTHER PROPERTY. — See note 2.

*ee* RIGHT TO DISPOSE OF MORTGAGED PROPERTY. — See note 3.

**516.** (2) *In Respect to the Conduct of the Sale* — (a) Conducting Sale Out of Usual Course of Business. — See note 1.

Unusual Degree of Secrecy. — See note 2.

Appearance of Excessive Efforts at Regularity. — See note 3.

(b) Failure to Take Inventory. — See note 6.

(3) *In Respect to the Consideration* — (a) Inadequacy of Consideration. — See note 7.

**517.** See notes 1, 2.

remains in possession of the land without contract, and without accounting for the use of the land, these facts are evidence of fraudulent intent in such conveyance. *Timms v. Timms*, 54 W. Va. 414.

But if the Grantor Remains in Possession as Tenant and pays rent fraud will not be inferred in the absence of other evidence. *Wall v. Beedy*, 161 Mo. 625.

**515.** 2. *Compare* *Messick v. Fries*, 128 N. Car. 450.

3. *Right to Dispose of Mortgaged Property.* — *Adams v. Pease*, 113 Ill. App. 356; *Donahue v. Campbell*, 81 Minn. 107; *Gutta Percha Rubber Mfg. Co. v. Kansas City Fire Dept. Supply Co.*, 149 Mo. 538; *Block v. Fuller*, (Neb. 1903) 93 N. W. Rep. 1010; *McTeer v. Huntsman*, (Tenn. Ch. 1898) 49 S. W. Rep. 57; *Robinson v. Baugh*, (Tenn. Ch. 1900) 61 S. W. Rep. 98; *Avery v. Waples*, 19 Tex. Civ. App. 672. See also *Baker, etc., Co. v. Schneider*, 85 Mo. App. 421. *Contra*, *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543; *F. Meyer Boot, etc., Co. v. C. Shenkberg Co.*, 11 S. Dak. 620.

An agreement that the mortgagors may remain in possession and continue the sale of the mortgaged stock of merchandise, and apply to their own benefit an indefinite portion thereof, renders the mortgage fraudulent as to other creditors, and void in law. *Franzke v. Hitchon*, 105 Wis. 11.

**Mortgagor Required to Account for Proceeds.** — But a mortgage of a stock of goods is not rendered fraudulent by the fact that the mortgagor is to remain in possession and sell in the usual course of trade, if he is required to account to the mortgagee of the proceeds of his sales, to be applied to the mortgage debt. *Gee v. Van Natta-Lynds Drug Co.*, 105 Mo. App. 27; *Dunham v. Stevens*, 160 Mo. 95; *State v. Fidelity, etc., Co.*, 94 Mo. App. 184.

So in *Red River Valley Nat. Bank v. Barnes*, 8 N. Dak. 432, it was held that a chattel mortgage on a stock of merchandise which provides in terms that the mortgagor shall remain in possession, and sell the mortgaged property at retail for cash only, and also requires the mortgagor to keep accurate accounts of such sales, and turn over all the proceeds thereof daily to the creditor, to be applied by him on the mortgage debt, is not fraudulent in law.

But in *Nelden-Judson Drug Co. v. Commercial Nat. Bank*, 27 Utah 59, the court said: "While an agreement, expressed upon the face of a chattel mortgage, that the mortgagor may remain in possession of the goods, and sell the same in payment of the debt, does not, under our statute, *per se* render the mortgage fraudu-

lent and void, still, if a given state of facts *abunde* show conduct of the parties and results quite inconsistent with fairness and honesty as to other creditors of the mortgagor, the mortgage will be held to be fraudulent in fact and void."

**516.** 1. *Conducting Sale Out of Usual Course of Business.* — *Roberts v. Burr*, 135 Cal. 156; *Gage v. Trawick*, 94 Mo. App. 307. See also *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 145; *Hood v. Gibson*, 8 Kan. App. 588.

A *Hasty Sale and Delivery* is a circumstance going to show fraud. *Scheffer v. Lowe*, 77 Minn. 279; *Berlin v. Van de Vanter*, 25 Wash. 465.

That a Sale Was Made Hastily and at an Unusual Hour is evidence of fraud, but may be explained. *Gage v. Mears*, 107 Mo. App. 140. See also *Wick v. Kunzeman*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 457.

2. *Unusual Degree of Secrecy.* — *Roberts v. Burr*, 135 Cal. 156. See also *Bunch v. Schaer*, 66 Ark. 98; *Gage v. Mears*, 107 Mo. App. 140.

3. *Colston v. Miller*, 55 W. Va. 490.

6. *Failure to Take Inventory.* — *Cafe Union v. Reordan*, (Supm. Ct. App. T.) 84 N. Y. Supp. 994; *Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 604, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516. See also *Scheffer v. Lowe*, 77 Minn. 279; *Blossman v. Friske*, 33 Tex. Civ. App. 191.

In *Maryland* by statute a sale of goods not in the regular course of business is presumptively fraudulent where no inventory is made. *Hart v. Roney*, 93 Md. 432.

7. *Inadequacy of Consideration* — *District of Columbia.* — *Droop v. Ridenour*, 11 App. Cas. (D. C.) 224.

*Indiana.* — See *Jameson v. Dilley*, 27 Ind. App. 429.

*Kentucky.* — *Carter v. Richardson*, (Ky. 1901) 60 S. W. Rep. 397; *Cincinnati Tobacco Warehouse Co. v. Matthews*, (Ky. 1903) 74 S. W. Rep. 242; *Arnold v. Eastin*, 116 Ky. 686. See also *Diamond Coal Co. v. Carter Dry-Goods Co.*, (Ky. 1899) 49 S. W. Rep. 438.

*Michigan.* — *Lake Linden First Nat. Bank v. Condon*, 122 Mich. 457.

*Minnesota.* — *Carson v. Hawley*, 82 Minn. 204.

*Missouri.* — See *Webb City Lumber Co. v. Victor Min. Co.*, 78 Mo. App. 676.

*Nebraska.* — See *Dufrene v. Anderson*, 67 Neb. 136.

*Oregon.* — *Brown v. Casc.*, 41 Oregon 221.

*Pennsylvania.* — *Ketner v. Donten*, 15 Pa. Super. Ct. 604.

**517.** 1. *Inadequacy Will Not Render Sale*

**518.** Gross Inadequacy. — See note 1.

**519.** (e) Absence of Memoranda of Consideration. — See note 2.

(d) Misstatement of the Consideration. — See note 4.

**520.** Misstatement of Mortgaged Debt. — See note 2.

**521.** (e) Confessing Judgment for Larger Amount than Due. — See note 3.

(f) Sales on Long and Unusual Credit. — See notes 4, 5.

**522.** (4) *In Respect to the Thing Conveyed*—(a) Conveying Debtor's Entire Estate. — See note 3.

(b) Mortgaging More Property than Necessary. — See note 4.

**523.** See notes 1, 2.

(o) Property Consumable in Use. — See note 3.

(5) *In Respect to the Parties — Relationship.* — See note 5.

**Void Per Se.** — *Mueller v. Renkes*, 31 Mont. 100; *Greenough v. Greenough*, 32 N. Y. App. Div. 631, *affirming* (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 727; *Andreae v. Bourke*, 33 N. Y. App. Div. 638; *Edwards v. Anderson*, 31 Tex. Civ. App. 131.

**517. 2. Inadequacy Coupled with Other Circumstances May Prove Fraud**—*Iowa*. — *Baxter v. Pritchard*, 113 Iowa 422; *Urdangen, etc., v. Doner*, 122 Iowa 533.

*Maryland*. — *Downs v. Miller*, 95 Md. 602. See also *Commonwealth Bank v. Kearns*, 100 Md. 202.

*Michigan*. — See *Noble v. Laidlaw*, 136 Mich. 680.

*Minnesota*. — See *Scheffer v. Lowe*, 77 Minn. 279.

*New Jersey*. — See *Perrine v. Perrine*, (N. J. 1901) 50 Atl. Rep. 694.

*New York*. — *Hollis v. Drescher*, 46 N. Y. App. Div. 151; *Gennerich v. Voigt*, 46 N. Y. App. Div. 622; *Maasch v. Grauer*, 58 N. Y. App. Div. 560. See also *O'Connor v. Docen*, 50 N. Y. App. Div. 610.

*Pennsylvania*. — *Thornburn v. Thompson*, 192 Pa. St. 298. See also *Bossart's Estate*, 11 Pa. Super. Ct. 100; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603.

*West Virginia*. — See *Stuart v. Neely*, 50 W. Va. 508.

**518. 1. Gross Inadequacy.** — *Crooks v. Brydon*, 93 Md. 640; *Moyer v. Bloomingdale*, 38 N. Y. App. Div. 227; *McGhee v. Wells*, 57 S. Car. 280, 76 Am. St. Rep. 567; *Flook v. Armentrout*, 100 Va. 638; *Blubaugh v. Loomis*, 48 W. Va. 666. See also *Daugherty v. Bogy*, 3 Indian Ter. 197, *reversed* (C. C. A.) 104 Fed. Rep. 938; *Cox v. Collis*, 109 Iowa 270.

"To justify an inference of fraud as against a conveyance, there must not only be an inadequacy of consideration, but it must have been so clearly below the market value as to strike the understanding at once with a conviction that such a conveyance never could have been made in good faith." *Aretz v. Kloos*, 89 Minn. 432.

**519. 2. Absence of Memoranda of Consideration.** — *Colston v. Miller*, 55 W. Va. 490, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 519.

**4. Misstatement of the Consideration.** — *Webb City Lumber Co. v. Victor Min. Co.*, 78 Mo. App. 676; *Ellis v. Musselman*, 61 Neb. 262; *Colston v. Muller*, 55 W. Va. 490, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 519. See also *Tinsley v. Corbett*, 27 Tex. Civ. App. 633; *Gignac v. Iler*, 29 Ont. 147, *affirmed* 25 Ont. App. 393.

**The Statement of a Money Consideration Where the Real Consideration Is a Debt** due to the grantee does not in itself make the transaction void as to grantor's creditors. *Commonwealth Bank v. Kearns*, 100 Md. 202.

**520. 2. Misstatement of Mortgage Debt a Badge of Fraud.** — *Webb City Lumber Co. v. Victor Min. Co.*, 78 Mo. App. 676.

**521. 3. Hieber v. Neary**, 7 Pa. Dist. 596. See also *Thornburn v. Thompson*, 192 Pa. St. 298; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603; *Page v. Simpson*, 188 Pa. St. 393.

**4. Sales on Long and Unusual Credit.** — *John Deere Plow Co. v. Sullivan*, 158 Mo. 449, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521. But see *McGrew v. Hancock*, (Tenn. Ch. 1899) 52 S. W. Rep. 500.

**5. When Badge Is Conclusive.** — *John Deere Plow Co. v. Sullivan*, 158 Mo. 449, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 521.

**522. 3. Conveying Debtor's Entire Estate.** — *Mendenhall v. Elwert*, 36 Oregon 381. See also *Noble v. Laidlaw*, 136 Mich. 680; *Halff v. Goldfrank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1095; *Stuart v. Neely*, 50 W. Va. 508.

**Conveyance Between Relatives.** — See *Colston v. Miller*, 55 W. Va. 490.

**The Debtor Has the Burden of Proving that He Had Other Property** than that conveyed and that such property was sufficient to pay his debts. *Dawson v. Waltemeyer*, 91 Md. 328.

**4. Conveying More Property Mortgaged than Is Necessary Held a Badge of Fraud.** — *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275; *Imhoff v. McArthur*, 146 Mo. 371; *Liver v. Thielke*, 115 Wis. 389.

**523. 1. Held Not a Badge of Fraud.** — *Jerkowski v. Marco*, 57 S. Car. 402.

**2. Is a Circumstance Which the Jury May Consider.** — *Blass v. Goodbar*, 65 Ark. 511; *Symms Grocer Co. v. Lee*, 9 Kan. App. 574; *Smith v. Parry Mfg. Co.*, 9 Kan. App. 877. See also *Sargent v. Chapman*, 12 Colo. App. 529; *Orr v. Peters*, 197 Pa. St. 606; *City Nat. Bank v. Martin-Brown Co.*, 20 Tex. Civ. App. 52; *Lee-don v. H. B. Claffin Co.*, 104 Wis. 102.

**"Fraudulent Intent Does Not Result as an In-disputable Presumption** from the taking of excessive security. It is a conclusion of fact, to be deduced from the evidence given on the trial." *Tackaberry v. Gilmore*, 57 Neb. 450.

**3. Morris v. Clark**, (Tenn. Ch. 1901) 62 S. W. Rep. 673. See also *McGrew v. Hancock*, (Tenn. Ch. 1899) 52 S. W. Rep. 500.

**5. Fact of Relationship Not a Badge of Fraud**



**524.** See note 1.

(6) *In Respect to the Form and Purpose of the Conveyance — Absolute Conveyance as Security.* — See note 2.

**525.** See notes 1, 2.

(7) *In Respect to the Time of the Conveyance — Conveyance Pending Suit.* — See note 3.

— *United States.* — *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605.

*Alabama.* — *Morrow v. Campbell*, 118 Ala. 330; *Wallen v. Montague*, 121 Ala. 287.

*Iowa.* — *Conry v. Benedict*, 108 Iowa 664, 75 Am. St. Rep. 282; *Riddick v. Parr*, 111 Iowa 733; *Thompson v. Zuckmayer*, (Iowa 1903) 94 N. W. Rep. 476; *Klay v. McKellar*, 122 Iowa 163.

*Kentucky.* — *Warden v. Fulkerson*, (Ky. 1900) 56 S. W. Rep. 717; *Redd v. Redd*, (Ky. 1902) 67 S. W. Rep. 367.

*Minnesota.* — *Heim v. Heim*, 90 Minn. 497.

*Montana.* — *Mueller v. Renkes*, 31 Mont. 100.

*Nebraska.* — *Blair State Bank v. Bunn*, 61 Neb. 464.

*South Carolina.* — *McElwee v. Kennedy*, 56 S. Car. 154.

*Virginia.* — *Johnson v. Lucas*, 103 Va. 37.

*Washington.* — *Rohrer v. Snyder*, 29 Wash. 199.

*West Virginia.* — *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838; *Farmers' Transp. Co. v. Swaney*, 48 W. Va. 272.

*Wisconsin.* — *Missinskie v. McMurdo*, 107 Wis. 578.

**Conveyance of Entire Property.** — When a conveyance in favor of a relative leaves a man without means to satisfy his creditors it is the basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of the *bona fides* of the transaction. *Moore v. Gainer*, 53 W. Va. 403.

**Relationship of Husband and Wife.** — In *Bates v. Drake*, 28 Wash. 456, the court said: "While it may be true that a conveyance from a husband to a wife is not of itself a badge of fraud, either under the rule of the statute or the general rule cited, it is nevertheless a fact which naturally awakens suspicion, lends greater weight to other unfavorable circumstances, and will be for that reason set aside upon less proofs of fraud than will a transaction between parties not having the same confidential relation."

**524. 1. Relationship of Parties Gives Greater Weight to Other Suspicious Circumstances — Alabama.** — *Wallen v. Montague*, 121 Ala. 287.

*Arkansas.* — *Wilks v. Vaughan*, 73 Ark. 174. *Illinois.* — *Merchants Nat. Bank v. Lyon*, 185 Ill. 343; *Vietor v. Swisky*, 200 Ill. 257; *American Hoist, etc., Co. v. Hall*, 208 Ill. 597, *affirming* 110 Ill. App. 463; *Merrill v. Merrill*, 105 Ill. App. 5.

*Iowa.* — *McCormick Harvesting Mach. Co. v. Griffin*, 116 Iowa 397; *Thompson v. Zuckmayer*, (Iowa 1903) 94 N. W. Rep. 476; *Dunning v. Bailly*, 120 Iowa 729; *Klay v. McKellar*, 122 Iowa 163.

*Kansas.* — *Parmenter v. Lomax*, 68 Kan. 61.

*Kentucky.* — *Redd v. Redd*, (Ky. 1902) 67 S. W. Rep. 367; *Cincinnati Tobacco Warehouse Co. v. Matthews*, (Ky. 1903) 74 S. W. Rep. 242.

*Michigan.* — *Winslow v. Putnam*, 130 Mich.

359; *Noble v. Laidlaw*, 136 Mich. 680. See also *Heath v. Koon*, 130 Mich. 54.

*Minnesota.* — *Nichols, etc., Co. v. Gerlich*, 84 Minn. 483; *Shea v. Hynes*, 89 Minn. 423.

*Nebraska.* — *Blair State Bank v. Bunn*, 61 Neb. 464.

*South Carolina.* — *McElwee v. Kennedy*, 56 S. Car. 154.

*Tennessee.* — *Warren v. Hinson*, (Tenn. Ch. 1899) 52 S. W. Rep. 498.

*Virginia.* — *Johnson v. Lucas*, 103 Va. 37.

*West Virginia.* — *Timms v. Timms*, 54 W. Va. 414; *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838; *Smith v. Smith*, 48 W. Va. 51; *Ballard v. Chewning*, 49 W. Va. 508; *Colston v. Miller*, 55 W. Va. 490.

*Wisconsin.* — *Missinskie v. McMurdo*, 107 Wis. 578.

**An Instruction that "clearer and more convincing proof of good faith" of a transfer of property is necessary when made to a relative than when made to a stranger is proper.** *Rapp v. Rush*, 96 Ill. App. 356.

**2. Absolute Deed as Security Void Per Se.** — *Taylor v. Dwyer*, 131 Ala. 91; *Best v. Fuller, etc., Co.*, 185 Ill. 43; *McNeil, etc., Co. v. Hovland*, 91 Ill. App. 315; *Ellis v. Musselman*, 61 Neb. 262.

**525. 1. Absolute Deed Given as Security Not Void Per Se.** — *Hegler v. Grove*, 63 Ohio St. 404. See also *J. S. Brown, etc., Mercantile Co. v. Israel*, 15 Colo. App. 392.

**2. Taking Absolute Deed as Security a Badge of Fraud.** — *Davis v. Jones*, 67 Ark. 122.

**3. Conveyance Pending Suit.** — *Croarkin v. Hutchinson*, 187 Ill. 613; *Scandinavian Sveas Benev. Soc. v. Linguist*, 133 Mich. 91; *Graham v. Morgan*, 83 Miss. 601; *Mason v. Perkins*, 180 Mo. 702; *Christie v. Bridgman*, 51 N. J. Eq. 335; *Hancock v. Elmer*, 61 N. J. Eq. 558; *Robinson v. Hawley*, 45 N. Y. App. Div. 287; *Maasch v. Grauer*, 58 N. Y. App. Div. 560; *Orr v. Peters*, 197 Pa. St. 606; *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838. See also *Sauers v. Beechler*, 38 Oregon 228. And see *Cafe Union v. Reordan*, (Supm. Ct. App. T.) 84 N. Y. Supp. 994, where the sale was on the day when judgment was entered against the vendor.

**Not Conclusive.** — The mere fact of a conveyance having been executed upon the eve of pending or threatened litigation will not in itself invalidate the conveyance. *Wallen v. Montague*, 121 Ala. 287.

**A Sale by a Debtor Immediately Following a Judgment Against Him** is a suspicious circumstance. *Huffman v. Leslie*, (Ky. 1902) 66 S. W. Rep. 822.

**A Voluntary Conveyance of All of a Debtor's Property Pending Suit** is fraudulent and void as to the plaintiff in the suit. *McCollum v. Crain*, 101 Mo. App. 522.

**A Voluntary Conveyance by a Father to His Daughter of All His Property, Pending Suit by**

- 526** (8) *Failure to Record Conveyance*. — See note 1.  
 Intent to Give Debtor a Fictitious Credit. — See note 2.  
 (10) *Subsequent Employment of Vendor*. — See note 4.

**527. FREE**. — See notes 1, 2.

**529.** See note 1.

**530. FREE FISHERY**. — See note 1.

**FREEHOLD — FREEHOLDER**. — See note 2.

**His Wife** for divorce and alimony, was held to be constructively fraudulent. *Ruffenach v. Ruffenach*, 13 Colo. App. 102.

**A Conveyance by a Husband to His Wife Pending Suit Against the Husband** was held to be *prima facie* fraudulent where the husband retained nothing out of which to satisfy any judgment which might be rendered. *Hollis v. Rodgers*, 106 Ga. 13.

**Conveyance to Nephew After Judgment**. — It is a badge of fraud for a person against whom judgment has been rendered to transfer all his property subject to execution to his nephew. *Harrison v. Calvert*, (Ky. 1901) 64 S. W. Rep. 521.

**526. 1. Failure to Record Conveyance**. — *Claflin v. Freudenthal*, 58 N. J. Eq. 298; *State Bank v. Backus*, 160 Ind. 682; *Tolerton, etc., Co. v. Wayne First Nat. Bank*, 63 Neb. 674; *Andrus v. Burke*, 61 N. J. Eq. 297; *Hardin v. Dolge*, 46 N. Y. App. Div. 416; *Castelman v. Mayer*, 55 N. Y. App. Div. 515, *affirmed* 168 N. Y. 354; *Rohrer v. Snyder*, 29 Wash. 199. See also *Brown v. Easton*, 112 Fed. Rep. 592; *Philadelphia, etc., Coal, etc., Co. v. Devoy*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 640.

**When Intent Immaterial**. — In *Bunch v. Schaer*, 66 Ark. 98, the court said: "It is a rule of law based on the soundest of reasons that a vendee who by an agreement or understanding with his vendor withholds from record and keeps secret his deed of conveyance to valuable property, and allows the vendor to hold himself out as the owner of such property cannot, if the vendor becomes insolvent, set up his title to such property as against one who has in good faith parted with his goods and credited such vendor in the belief that he still owns such property. As between the vendee and creditor, in such a case, the vendor will still be considered the owner of the property; for to allow the vendee to hold the property under such circumstances would be to permit him and the vendor to perpetrate a gross fraud upon the creditor. Under such circumstances the deed will be treated as fraudulent and void as to the creditor, without regard to whether the parties to the deed intended any fraud or not."

**2. Giving Mortgagor Fictitious Credit — United States**. — *Corwine v. Thompson Nat. Bank*, (C. C. A.) 105 Fed. Rep. 196; *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630. *Colorado*. — See *Shideler v. Fisher*, 13 Colo. App. 106.

*Illinois*. — See *McNeil, etc., Co. v. Plows*, 83 Ill. App. 186.

*Iowa*. — *Hitt v. Sterling-Goold Mfg. Co.*, 111

*Iowa* 458; *Corning First Nat. Bank v. Reid*, 122 Iowa 280.

*Michigan*. — See *Durrell v. Richardson*, 119 Mich. 592; *Noble v. Laidlaw*, 136 Mich. 680.

*Missouri*. — *State v. O'Neill*, 151 Mo. 67.

*Nebraska*. — *Ellis v. Musselman*, 61 Neb. 262.

*Wisconsin*. — *Kickbusch v. Corwith*, 108 Wis. 634.

**Giving Fictitious Credit to a Grantor by failure to record the deed of conveyance is evidence of fraud**. *Thompson Nat. Bank v. Corwine*, 89 Fed. Rep. 774; *Bush, etc., Co. v. Helbing*, 134 Cal. 676.

**Effect as to Subsequent Creditors**. — A creditor whose debt accrues after the mortgage has been recorded cannot complain because it was withheld from record for several months in order to give a fictitious credit to the mortgagor. *News Pub. Co. v. Tyndale*, (Neb. 1902) 96 N. W. Rep. 125.

**4. Subsequent Employment of Vendor**. — *Hickey v. Coschina*, 133 Cal. 81. See also *Spencer v. Mugge*, 45 Fla. 585; *McKenzie v. Thomas*, 118 Ga. 728; *Bolin v. Thompson*, 51 N. Y. App. Div. 601.

**527. 1. Acknowledgment**. — *Goldstein v. Curtis*, 63 N. J. Eq. 454.

**2. Free Public Schools — Taxation**. — *Pawtucket*, for Opinion, 24 R. I. 86.

**Free and Uninterrupted Way**. — *Boyd v. Bloom*, 152 Ind. 152.

**Free and Unobstructed Use of Water — Riparian Owners**. — See *Skowhegan Water Power Co. v. Weston*, 94 Me. 285.

**529. 1. An agreement to convey lands free and clear is satisfied by a conveyance passing a good title**. *Meyer v. Madreperla*, 68 N. J. L. 258.

**530. 1. Albright v. Sussex County Lake, etc., Commission**, 68 N. J. L. 523.

**2. Freehold**. — *Harlan v. State*, 136 Ala. 150, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530; *Nevitt v. Woodburn*, 175 Ill. 376; *Cummings v. Hyatt*, 54 Neb. 35.

**Household and Freehold — Appraisers — Eminent Domain**. — *Shively v. Lankford*, 174 Mo. 535.

**Freehold — Appraisers — Foreclosure Sale**. — *Wheldon v. Cornett*, (Neb. 1903) 94 N. W. Rep. 626.

**Married Women**. — *Cummings v. Hyatt*, 54 Neb. 35.

A married man residing in a house built on his wife's land and her statutory homestead and having no real estate in his own name is not a *freeholder* entitled to sign a petition for the issuance of bonds where the petition is by statute limited to *freeholders*. *Hamilton v. Detroit*, 85 Minn. 83.

## FREEMASONS.

- 536. I. INTRODUCTORY — 5. Masonic Jurisprudence — 6. SOURCES —**  
**(3) Constitutions and By-laws.** — See note 2.
- 537. II. THE BODY — 2. Legal Status — 6. MAY BE A VOLUNTARY ASSO-**  
**CIATION.** — See note 10.
- c.* NOT A PARTNERSHIP. — See note 15.
- 539. 4. Liabilities — a. TAXATION — (1) Prevailing Rule.** — See note 5.  
*Business Property.* — See note 10.  
*Masonic Charitable Institutions.* — See note 11.
- 543. IV. MEMBERS — 3. Freemasons as Jurors.** — See note 5.
- 4. Masonic Offenses.** — See notes 8, 9.
- 544. 5. Procedure in Masonic Trials.** — See note 1.  
**6. Punishments — Generally.** — See note 3.
- 545. Judicial Interference.** — See notes 8, 9.
- 546. [FREEZER.** — See note 1*a.*]  
**FREIGHT.** — See note 4.
- 548. Marine Insurance.** — See note 1.
- 551. FREQUENT.** — See note 2.
- FRESH.** — See note 3.
- 553. FROM — I. Inclusive or Exclusive.** — See notes 1, 3.

**536. 2. Constitution and Code of Procedure.** — The Masonic fraternity has a constitution and code of procedure designed for its government and for the regulation of its members in their relation to each other. *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**537. 10. Voluntary Association.** — *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**15. Partnership.** — See *Lumbard v. Grant*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 140, affirmed 62 N. Y. App. Div. 617.

**539. 5. Masonic Property Not Exempt.** — *Lacy v. Davis*, 112 Iowa 106; *Green Bay Lodge No. 259 v. Green Bay*, 122 Wis. 452. See also *National Council, etc., v. Phillips*, 63 Kan. 799, 808.

**10. Ridgeley Lodge No. 23 v. Redus**, 78 Miss. 352.

**11. See Widows, etc., Home v. Bosworth**, 112 Ky. 200.

**543. 5. See Delaware Lodge No. 1 v. Allmon**, 1 Penn. (Del.) 160.

**8. Kopp v. White**, (Supm. Ct. Spec. T.) 30 Civ. Pro. (N. Y.) 352; *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**9. Kopp v. White**, (Supm. Ct. Spec. T.) 30 Civ. Pro. (N. Y.) 352.

**544. 1. Procedure in Trials.** — See *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.

**3. See Kopp v. White**, (Supm. Ct. Spec. T.) 30 Civ. Pro. (N. Y.) 352, wherein it appears that a member of a Masonic lodge was expelled for falsely accusing the grand master of the state of incompetency and mismanagement in office.

**545. 8. Franklin v. Burnham**, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566; *Kopp v. White*, (Supm. Ct. Spec. T.) 30 Civ. Pro. (N. Y.) 352. See also *Austin v. Dutcher*, 56 N. Y. App. Div. 393.

**9. Remedies in Order Must Be Exhausted.** — See *Delaware Lodge No. 1 v. Allmon*, 1 Penn. (Del.) 160; *Johansen v. Blume*, 53 N. Y. App. Div. 526.

**546. 1*a.* The term freezer** as used in the meat trade is a place for the preservation of meat or poultry, where the temperature is kept below the freezing point from zero up to 32° and is distinguishable from cold storage, a place where the temperature is kept at a low degree but above the freezing point. *Allen v. Somers*, 73 Conn. 355.

**4. Hire.** — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837.

**548. 1. Marine Insurance.** — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

**551. 2. Frequent Distinguished from Visit — Gambling House.** — *Roberts v. State*, 25 Ind. App. 366.

**3. Fresh Evidence** within the meaning of the Summary Jurisdiction (Married Women) Act 1895, § 7, in order to confer jurisdiction to rescind a separation order, must be such as would afford ground for a new trial in any other class of cases. *Johnson v. Johnson*, (1900) P. 19.

**553. 1. Grammatical Sense Exclusive.** — *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553. See *People v. Hornbeck*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 212.

- 554.** Question of Intent. — See note 1.  
**556.** II. Miscellaneous. — See note 1.  
**558.** FRONT. — See note 1.  
**560.** FRUIT. — See note 2.  
**FULL — FULLY.** — See note 8.  
**563.** FUND — FUNDS. — See note 3.  
**566.** The Funded Debt. — See note 3.  
**567.** FURNACE. — See note 1.  
**FURNISH.** — See note 2.  
**568.** FURNITURE. — See note 1.  
**572.** FURTHER. — See note 1.  
**573.** [FURTHERANCE. — See note a.]

**553.** 3. Hazelwood v. Rogan, 95 Tex. 295. Statutes. — But see O'Connor v. Fond du Lac, 109 Wis. 253.

**From a Day.** — Sindall v. Baltimore, 93 Md. 526, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

**554.** 1. Intent Governs. — Hazelwood v. Rogan, 95 Tex. 295.

**Exclusively — Forfeiture.** — See Supreme Council, etc., v. Gootee, (C. C. A.) 89 Fed. Rep. 941.

**Exclusively — From and After.** — Sindall v. Baltimore, 93 Md. 526.

**556.** 1. Vesting — From and After. — McGillis v. McGillis, 154 N. Y. 532; Ackerman v. Ackerman, 63 N. Y. App. Div. 370; Haug v. Schumacher, 50 N. Y. App. Div. 562; Manhattan Real Estate, etc., Assoc. v. Cudlipp, 80 N. Y. App. Div. 532; Canfield v. Fallon, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 345. See also Lyons v. Weeks, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 714.

**From Time to Time.** — Upshur v. Baltimore, 94 Md. 743; State v. McBride, 29 Wash. 335.

**The Phrase From the Grass Roots Down** means ordinarily to the centre of the earth and not merely to bed rock. Martin v. Eagle Creek Development Co., 41 Oregon 448.

**558.** 1. Special Assessments. — Mound City Constr. Co. v. Macgurn, 97 Mo. App. 403.

**Front and Frontage.** — The words *front* and *frontage* are usually used as referring to street frontage or facing according to the manner in which property is improved and used. Connecticut Mut. L. Ins. Co. v. Jacobson, 75 Minn. 425.

**560.** 2. Pineapple plants growing in the soil are parcel of the realty and not farm products or *fruit* within the *Florida* statutes. Long v. State, 42 Fla. 509.

**8. Full Compensation.** — Barnett v. Eccles, (1900) 2 Q. B. 423.

**Full and Complete Cargo.** — See Steamship Isis Co. v. Bahr, (1900) A. C. 340, affirming (1899) 2 Q. B. 364.

**Full Knowledge — Master and Servant.** — Pledger v. Texas Cent. R. Co., (Tex. Civ. App. 1902) 68 S. W. Rep. 516.

**Full Evidence.** — In construing a statute providing that a map filed by commissioners should be *full* evidence of a street and of its lines and courses, it was held that *full* evidence meant *prima facie* evidence only. Lathrop v. Morristown, 67 N. J. L. 247.

**The Words "Fully and Permanently Cured"** in a contract providing for the return of the price paid if a patient were not *fully* and

permanently cured of the morphine and chloral habit, mean the restoration of the patient to a normal condition of body and mind with the same power to resist the desire for the drug as possessed before the habit was acquired, and not that the patient should be put in that condition that he could never again take the drug. Wellman v. Jones, 124 Ala. 580.

**563.** 8. The word *fund* in its broadest meaning may include property of every kind. Matter of Tatum, 61 N. Y. App. Div. 513.

**Current Funds.** — Hatch v. Dexter First Nat. Bank, 94 Me. 348.

**566.** 3. Funded Debt. — People v. Carpenter, 31 N. Y. App. Div. 603.

**567.** 1. Furnace Distinguished from Forge. — A *furnace* is used to melt ores in making metal, while a *forge* is used to heat metals to work them. Boston v. Sarni, 175 Mass. 357. And see *supra*, FORGE.

2. Where a contract required a plaintiff to *furnish* lumber, it was held that the word *furnish* did not mean to manufacture, at plaintiff's mill, but he might obtain lumber where he chose. T. Wilce Co. v. Kelley Shingle Co., 130 Mich. 319.

**568.** 1. Furniture. — Brody v. Chittenden, 106 Iowa 524.

**Ship's Furniture.** — Hogarth v. Walker, (1900) 2 Q. B. 283, affirming Hogarth v. Walker, (1899) 2 Q. B. 401, stated in the original note.

**A Safe** is not "other *furniture* and fixtures as is usual to saloons" within a policy of fire insurance. Moriarty v. U. S. Fire Ins. Co., 19 Tex. Civ. App. 669.

**Money and Jewelry** are not within the term household *furniture* in a bequest. Ludwig v. Bungart, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 177.

**Silverware Is Within, but Wearing Apparel Is Not Within,** a bequest of household *furniture*. Scoville v. Mason, 76 Conn. 459.

**Carpets and Bedding** are covered by the term household *furniture* in a policy of insurance. Patrons Mut. Aid Soc. v. Hall, 19 Ind. App. 118.

**Furniture of a Jewelry Shop.** — Clocks, jardiniere, etc., held to be *furniture* under a chattel mortgage. Brody v. Chittenden, 106 Iowa 524.

**572.** 1. Further in the Sense of Additional. — Thompson v. Southern R. Co., 116 Fed. Rep. 890; London, etc., Bank v. Parrott, 125 Cal. 472; Todd v. Staats, 60 N. J. Eq. 507; Blair v. Scribner, (N. J. 1905) 60 Atl. Rep. 212.

**Further Denotes Order of Sequence.** — Porter v. Howe, 173 Mass. 521.

**573.** a. Furtherance. — In Powers v. Com.,

**573.** [FUSE. — See note *b*.]

[FUSION. — See note *c*.]

**574.** FUTURE ESTATE. — See note 1.

**575.** [GALE. — See note 1*a*.]

114 Ky. 263, the court said the word *furtherance* had a well-defined and generally accepted meaning, which is the act of *furthering* or helping forward or promotion or advancement.

**573.** *b*. A *fuse* consists of a piece of metallic alloy similar in nature to soft solder, one or more inches in length connected at each end with a small circular piece of copper. *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156. And see *Chicago Telephone Co. v. Northwestern Telephone Co.*, 119 Ill. 324.

*c*. *Fusion* has been defined to mean the act

of coalescing two political parties. *Nicholls v. Barrick*, 27 Colo. 432.

**574.** 1. *Haug v. Schumacher*, 166 N. Y. 517.

Future Estates or Interests—Limitation of Actions. — *Walter v. Yalden*, (1902) 2 K. B. 304.

**575.** 1*a*. A *gale* is defined as a wind having a velocity of forty to seventy miles an hour (Standard Dictionary). *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

## GAMBLING CONTRACTS.

BY BRISCOE B. CLARK.

**581.** I. DEFINITION AND ANALOGIES — 1. Definition. — See note 1.

**582.** II. ELEMENTS OF GAMBLING CONTRACTS — 1. Failure of Consideration. — See note 1.

2. Risk. — See note 2.

**584.** 4. Event — Event Must Be One in Which Parties Have No Interest. — See note 3.

**586.** III. STATUS OF GAMBLING CONTRACTS AT LAW — 1. At Common Law — *a*. DEVELOPMENT OF COMMON LAW — ENGLISH DOCTRINE — (1) *Early Assumption of General Validity*. — See note 1.

(2) *Theory of Discretion of Trial Judge*. — See note 2.

**587.** (3) *Theory of Validity with Exceptions* — (a) General Rule. — See note 1.

(b) *Classes of Invalid Wagers* — *aa*. FORBIDDEN BY STATUTE. — See note 2.

**589.** *b*. COMMON LAW AS INTERPRETED BY COURTS OF UNITED STATES — (1) *Jurisdictions Where Gambling Contracts Are Held Invalid at Common Law*. — See note 3.

**581.** 1. Definition. — *Jacobus v. Hazlett*, 78 Ill. App. 239; *Rehberg v. Tontine Surety Co.*, 131 Mich. 139, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581; *Brault v. L'Association*, etc., 12 Quebec K. B. 124, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581.

**582.** 1. Failure of Consideration. — *Rehberg v. Tontine Surety Co.*, 131 Mich. 139, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

2. Risk and Chance. — *Treacy v. Chinn*, 79 Mo. App. 648; *Thompson v. Williamson*, 67 N. J. Eq. 212.

**584.** 3. Sale of Race Horse. — In *Treacy v. Chinn*, 79 Mo. App. 648, it was held that the sale of a horse was not a gambling transaction where the greater part of the price was paid in cash and a note given for the balance payable after the horse should have won a race.

A Contract to Train Race Horses for a certain monthly salary and a percentage of the prizes or purses which might be won by the horses, is not a gambling transaction. *Brien v. Stone*, 82 N. Y. App. Div. 450.

**586.** 1. General Validity Assumed. — See *v*.

*Runzi*, 105 Mo. App. 435, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; *Drinkall v. Novius State Bank*, 11 N. Dak. 15, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586-590.

2. Theory of Discretion of Trial Judge. — *Drinkall v. Novius State Bank*, 11 N. Dak. 15, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586.

**587.** 1. Gambling Contracts Generally Enforced in England. — See *v. Runzi*, 105 Mo. App. 438, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587; *Drinkall v. Novius State Bank*, 11 N. Dak. 15, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587.

2. Wagering Contracts Forbidden by Statute. — *Drinkall v. Novius State Bank*, 11 N. Dak. 15, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586-590.

**589.** 3. Gambling Contracts Invalid at Common Law. — *Metropolitan Nat. Bank v. Jansen*, 108 Fed. Rep. 572, 47 C. C. A. 497; *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 82 Am. St. Rep. 89; *Drinkall v. Novius State Bank*,

**589.** (2) *Jurisdictions Where Statute of Anne Is Held to Be Part of Common Law.* — See note 4.

**590.** (3) *Jurisdictions Adopting English Doctrine as to Validity of Wagers.* — See note 1.

**591.** 2. Under Statutes — *a.* ENGLISH STATUTES — (2) *Object of Modern Statutes* — (a) In General. — See note 4.

**595.** IV. STATUS OF GAMBLING CONTRACTS IN EQUITY — 3. Modern Doctrines — *a.* DOCTRINE GENERALLY RECOGNIZED THAT EQUITY GIVES RELIEF. — See note 1.

4. Injunctions Against Future Gambling. — See note 3.

**597.** VII. CLASSES OF GAMBLING CONTRACTS — 2. Undisguised Gambling Contracts — *a.* BETS AND WAGERS — (2) *Definitions.* — See note 2.

(3) *Classes of Bets* — (a) Election Bets — *aa.* INVALIDITY. — See note 4.

**598.** (b) Bets on Horse Races — *aa.* WHERE ESPECIALLY FAVORED. — See note 4.

**599.** *bb.* WHERE UNENFORCEABLE. — See note 1.

*b.* GAMING — (2) *Extent of Meaning of "Gaming."* — See note 5.

**600.** *c.* LOTTERIES — (1) *Definition.* — See note 1.

**601.** (3) *Distribution by Lot Not a Lottery Where Nothing of Value Is Risked.* — See note 2.

**603.** 3. Disguised Gambling Contracts — *a.* IN GENERAL. — See note 4.

**604.** *b.* EXTRINSIC EVIDENCE ADMISSIBLE. — See note 1.

**605.** *c.* CLASSES OF DISGUISED GAMBLING CONTRACTS — (2) *Contracts for Future Differences* — (b) *Technical Terms* — Puts — Calls — Straddles. — See note 8.

**606.** "Ringing Out." — See note 3.

**607.** (d) Future Contracts Approved by Law — *aa.* FUTURE SHORT SALES — Modern View. — See note 1.

11 N. Dak. 15, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586-590; Appleton v. Maxwell, 10 N. Mex. 748; Winward v. Lincoln, 23 R. I. 476; Schoenberg v. Adler, 105 Wis. 645.

**589.** 4. Early English Statutes in Force in United States. — Spies v. Rosenstock, 87 Md. 14; Drinkall v. Novius State Bank, 11 N. Dak. 15, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586, 590.

**590.** 1. Gambling Contracts Held Valid at Common Law. — See v. Runzi, 105 Mo. App. 438, *citing* Wadde v. Loper, 1 Mo. 636; Drinkall v. Novius State Bank, 11 N. Dak. 15, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

**591.** 4. Modern English Statutes. — Shoof-bred v. Roberts, (1899) 2 Q. B. 560, 68 L. J. Q. B. 998, 81 L. T. N. S. 522.

**595.** 1. Cases Where Equity Gives Relief. — Boddie v. Brewer, etc., Brewing Co., 204 Ill. 352 (construing Ill. Crim. Code, §§ 127, 135). See, however, Baxter v. Deneen, 98 Md. 181, *distinguishing* Dauler v. Hartley, 178 Pa. St. 23.

3. Protection of Stock Exchange Quotations. — Where the transactions carried on at a stock exchange are, as a general rule, merely gambling transactions settled on differences in the price, the exchange has no standing in a court of equity to demand relief for the protection of its rights in its quotations. Board of Trade v. L. A. Kinsey Co., 125 Fed. Rep. 72, *reversed* (C. C. A.) 130 Fed. Rep. 507, on the ground that transactions were not gambling transactions, and such as were gambling transactions were without the consent of the board of trade.

**597.** 2. Wager. — Mitchell v. Orr, 107 Tenn. 534.

4. General Invalidity of Election Bets. — Maher v. Van Horn, 15 Colo. App. 14; McLennan v. Whiddon, 120 Ga. 666; Pabst Brewing Co. v. Liston, 80 Minn. 473, 81 Am. St. Rep. 275; Mitchell v. Orr, 107 Tenn. 534.

**598.** 4. Bets on Horse Races — Where Favored. — See Shreveport v. Maloney, 107 La. 193.

**599.** 1. Bets on Horse Races — Where Unenforceable. — Central Trust, etc., Co. v. Respass, 112 Ky. 606, 99 Am. St. Rep. 317.

The fact that the race takes place in another state is immaterial. Hensler v. Jennings, 62 N. J. L. 209.

5. Gaming Includes Racing. — Spies v. Rosenstock, 87 Md. 14.

**600.** 1. Definition of Lottery. — Elder v. Chapman, 176 Ill. 142, *reversing* 70 Ill. App. 288; Quatsoe v. Eggleston, 42 Oregon 318, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 600.

**601.** 2. Distribution by Lot Not a Lottery Where Nothing of Value Is Risked. — Elder v. Chapman, 176 Ill. 142, *reversing* 70 Ill. App. 288.

**603.** 4. Disguised Gambling Contracts. — Quillian v. Johnson, 122 Ga. 49; Morris v. Western Union Tel. Co., 94 Me. 423.

**604.** 1. Extrinsic Evidence. — *In re Gieve*, (1899) 1 Q. B. 794; Minzesheimer v. Doolittle, 60 N. J. Eq. 394; Waite v. Frank, 14 S. Dak. 626.

**605.** 8. Puts. — Lane v. Logan Grain Co., 105 Mo. App. 215.

**606.** 3. Ringing Out. — Pardridge v. Cutler, 168 Ill. 504.

**607.** 1. Short Sales Now Valid — *United*

**607.** Special Statutory Provisions. — See note 2.

**608.** *bb.* MARGINS. — See note 1.

Special Statutory Rule. — See note 2.

*cc.* OPTIONS. — See note 3.

Special Statutory Rule. — See note 4.

**609.** *dd.* SALE AND RESALE. — See note 1.

*ee.* SETTTLING DIFFERENCES. — See note 2.

(*e*) Future Contracts Not Approved by Law — *aa.* IN GENERAL. — See note 4

*States.* — *Clews v. Jamieson*, 182 U. S. 461; *Hill v. Levy*, 98 Fed. Rep. 94; *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373; *Boyle v. Henning*, 121 Fed. Rep. 376; *Board of Trade v. L. A. Kinsey Co.*, 125 Fed. Rep. 72, (C. C. A.) 130 Fed. Rep. 507.

*Alabama.* — *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 82 Am. St. Rep. 89.

*Arkansas.* — *Johnston v. Miller*, 67 Ark. 172.

*Georgia.* — *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607.

*Illinois.* — *Taylor v. Bailey*, 169 Ill. 181; *Jones v. Jones*, 103 Ill. App. 382.

*Indiana.* — *Tuthill Spring Co. v. Holliday*, 164 Ind. 13.

*Louisiana.* — *Losecco v. Gregory*, 108 La. 648.

*Maine.* — *Morris v. Western Union Tel. Co.*, 94 Me. 423.

*Massachusetts.* — *Farnum v. Whitman*, 187 Mass. 381.

*Michigan.* — *Donovan v. Daiber*, 124 Mich. 49.

*Missouri.* — *Lane v. Logan Grain Co.*, 105 Mo. App. 215.

*Nebraska.* — *Rogers v. Marriott*, 59 Neb. 759.

*New Jersey.* — *Thompson v. Williamson*, 67 N. J. Eq. 212.

*New York.* — *Fletcher v. Jacob Dold Packing Co.*, 169 N. Y. 571, affirming 41 N. Y. App. Div. 30.

*Ohio.* — *Goodhart v. Rastert*, 10 Ohio Dec. 40, 7 Ohio N. P. 534.

*Pennsylvania.* — *Taylor's Estate*, 192 Pa. St. 304; *Jennings v. Morris*, 211 Pa. St. 600.

*Rhode Island.* — *Winward v. Lincoln*, 23 R. I. 476.

*Texas.* — *Cleveland v. Heidenheimer*, (Tex. Civ. App. 1898) 44 S. W. Rep. 551.

*Canada.* — *Venne v. Christin*, 16 Quebec Super. Ct. 164.

**607.** 2. "Futures" Declared Illegal. — *Stillwell v. Cutter*, 146 Cal. 657.

**608.** 1. Margins Legal — *Connecticut.* — *Ling v. Malcom*, 77 Conn. 517.

*Florida.* — *Hocker v. Western Union Tel. Co.*, 45 Fla. 363.

*Missouri.* — *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516.

*New Jersey.* — *Kendall v. Fries*, 71 N. J. L. 401.

*Pennsylvania.* — *Wagner v. Hildebrand*, 187 Pa. St. 136; *Taylor's Estate*, 192 Pa. St. 304;

*Smyth v. Glendinning*, 194 Pa. St. 550; *Hirst v. Maag*, 13 Pa. Super. Ct. 4; *MacDonald v. Gessler*, 208 Pa. St. 177; *Jennings v. Morris*, 211 Pa. St. 600.

*Rhode Island.* — *Winward v. Lincoln*, 23 R. I. 476.

**Broker Carrying Purchase on Margin.** — *Johnston v. Miller*, 67 Ark. 172; *Rice v. Winslow*, 180 Mass. 500; *Post v. Leland*, 184 Mass. 601.

2. Statute Prohibiting Dealing on Margins. — *Maurer v. King*, 127 Cal. 114; *Carland v. Western Union Tel. Co.*, 118 Mich. 369; *Conrad v. Lepper*, (Wyo. 1905) 81 Pac. Rep. 307.

**Constitutional Law.** — The provision of the *California* constitution prohibiting contracts for the sale of corporate stock on margins or for future delivery, is not in violation of the Federal Constitution. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56.

3. Options Valid. — *Wiggin v. Federal Stock, etc., Co.*, 77 Conn. 507; *Wolf v. National Bank*, 178 Ill. 85, reversing 77 Ill. App. 325; *Kendall v. Fries*, 71 N. J. L. 401.

**Constitutional Prohibition.** — The *California* constitutional provision against the sale of stock to be delivered at a future day does not prohibit a transaction in which stock is taken in payment of a certain sum with a guaranty by the payer that the payee would be able to get a certain price for the stock within a certain time and a promise by the payer, if such price could not be gotten, to himself repurchase the stock at such price. *Maurer v. King*, 127 Cal. 114.

4. Cases Decided under Statutes Declaring Options Illegal. — *Clews v. Jamieson*, 96 Fed. Rep. 648, 38 C. C. A. 473, reversed 182 U. S. 461 (construing *Illinois* statute); *Bensinger v. Kantzler*, 112 Ill. App. 293, reversed 214 Ill. 589.

**Valid Options.** — *Ubben v. Binnian*, 182 Ill. 508 reversing 78 Ill. App. 330 (sale of stock with agreement to repurchase if required by buyer at sale price); *Skinner v. Osgood*, 83 Ill. App. 454, following *Wolf v. National Bank*, 178 Ill. 85; *Loeb v. Stern*, 198 Ill. 371, affirming 99 Ill. App. 637; *Osgood v. Skinner*, 211 Ill. 229 affirming 111 Ill. App. 606, following *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85; *Wolf v. National Bank*, 178 Ill. 85; *Ubben v. Binnian*, 182 Ill. 508.

**609.** 1. Sale and Resale Valid. — *Jennings v. Morris*, 211 Pa. St. 600.

2. Settling Differences Legal. — *Board of Trade v. L. A. Kinsey Co.*, 125 Fed. Rep. 72, (C. C. A.) 130 Fed. Rep. 507; *Venne v. Christin*, 11 Quebec Super. Ct. 164.

4. Future Contracts Not Approved by Law — *England.* — *In re Cronmire*, (1898) 2 Q. B. 383; *In re Gieve*, (1899) 1 Q. B. 794.

*Canada.* — *Venne v. Christin*, 16 Quebec Super. Ct. 164; *Morris v. Brault*, 23 Quebec Super. Ct. 190.

*United States.* — *Clews v. Jamieson*, 182 U. S. 461; *Hill v. Levy*, 98 Fed. Rep. 94; *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373; *Marden v. Phillips*, 103 Fed. Rep. 196; *Boyce v. Odell Commission Co.*, 107 Fed. Rep. 58; *Metropolitan Nat. Bank v. Jansen*, 10 Fed. Rep. 572, 47 C. C. A. 497; *Boyle v. Her-ning*, 121 Fed. Rep. 376; *Board of Trade v. I*

**611.** *bb. INTENTION TO GAMBLE — (aa) Where Both Parties Intend to Gamble. — See note 1.*

*(bb) Where One Only Intends to Gamble. — See note 2.*

**612.** *(dd) Effect of Abandonment of Intention to Gamble. — See note 1.*

**614.** **VIII. LEGITIMATE BUSINESS CONTRACTS CONFUSED WITH GAMBLING CONTRACTS — 2. Prizes and Premiums — b. WHERE NO ENTRANCE FEE IS CHARGED. — See note 5.**

**617.** *d. SPECIAL STATUTORY RULES. — See note 1.*

**IX. EVIDENCE IN GAMBLING CONTRACTS — 2. Disguised Gambling Contracts — b. EXTRINSIC EVIDENCE — (2) Admissibility — General Rule. — See note 5.**

A. Kinsey Co., 125 Fed. Rep. 72, *reversed* (C. C. A.) 130 Fed. Rep. 507.

*Alabama.* — Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 82 Am. St. Rep. 89.

*Georgia.* — Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; Singleton v. Monticello Bank, 113 Ga. 527.

*Illinois.* — Kruse v. Kennett, 181 Ill. 199, *reversing* 69 Ill. App. 566; Calumet Grain, etc., Co. v. Williams, 97 Ill. App. 36; Staninger v. Tabor, 103 Ill. App. 330; Jones v. Jones, 103 Ill. App. 382.

*Indiana.* — Pearce v. Dill, 149 Ind. 136.

*Iowa.* — People's Sav. Bank v. Gifford, 108 Iowa 277; Munns v. Donovan Commission Co., 117 Iowa 516.

*Kentucky.* — Boyd Commission Co. v. Coates, (Ky. 1902) 69 S. W. Rep. 1090.

*Maine.* — Morris v. Western Union Tel. Co., 94 Me. 423.

*Maryland.* — Baxter v. Deneen, 98 Md. 181.

*Michigan.* — Carland v. Western Union Tel. Co., 118 Mich. 369.

*Minnesota.* — Askegaard v. Dalen, 93 Minn. 354.

*Mississippi.* — Violet v. Mangold, (Miss. 1900) 27 So. Rep. 875.

*Missouri.* — A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516; Lane v. Logan Grain Co., 105 Mo. App. 215.

*Nebraska.* — Rogers v. Marriott, 59 Neb. 759; Mendel v. Boyd, (Neb. 1902) 91 N. W. Rep. 860.

*New Hampshire.* — Wheeler v. Metropolitan Stock Exch., 72 N. H. 315.

*New Jersey.* — Minzesheimer v. Doolittle, 60 N. J. Eq. 394; Sharp v. Stalker, 63 N. J. Eq. 596; Van Pelt v. Schauble, 68 N. J. L. 638.

*North Carolina.* — Garseed v. Sternberger, 135 N. Car. 501; State v. Clayton, 138 N. Car. 732.

*Ohio.* — Goodhart v. Rastert, 10 Ohio Dec. 40.

*Pennsylvania.* — Wagner v. Hildebrand, 187 Pa. St. 136; Taylor's Estate, 192 Pa. St. 304.

*South Dakota.* — Waite v. Frank, 14 S. Dak. 626, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609.

*Wisconsin.* — Atwater v. Manville, 106 Wis. 64; Bartlett v. Collins, 109 Wis. 477, 83 Am. St. Rep. 928.

**611.** **1. Effect of Mutuality of Intention to Gamble.** — Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610, 611; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Pardridge v. Cutler, 168 Ill. 504.

**2. Effect of Intention of One Only to Gamble —**

*United States.* — Clews v. Jamieson, 182 U. S. 461; Hill v. Levy, 98 Fed. Rep. 94; Ponder v. Jerome Hill Cotton Co., (C. C. A.) 100 Fed. Rep. 373; Boyle v. Henning, 121 Fed. Rep. 376; Board of Trade v. L. A. Kinsey Co., (C. C. A.) 130 Fed. Rep. 507.

*Arkansas.* — Johnston v. Miller, 67 Ark. 172.

*Georgia.* — Forsyth Mfg. Co. v. Castlen, 112 Ga. 199.

*Illinois.* — Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Staninger v. Tabor, 103 Ill. App. 330.

*Massachusetts.* — Farnum v. Whitman, 187 Mass. 381.

*Michigan.* — Donovan v. Daiber, 124 Mich. 49.

*Missouri.* — A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516.

*Nebraska.* — Rogers v. Marriott, 59 Neb. 759.

*New Jersey.* — Thompson v. Williamson, 67 N. J. Eq. 212.

*Ohio.* — Goodhart v. Rastert, 10 Ohio Dec. 40.

*Pennsylvania.* — MacDonald v. Gessler, 208 Pa. St. 177.

*Rhode Island.* — Winward v. Lincoln, 23 R. I. 476.

One of the parties may, however, testify that it was his intention to gamble and not to receive or deliver the commodity sold, since such testimony is necessary to show the intention of the parties. Waite v. Frank, 14 S. Dak. 626.

**612.** **1. The Effect of Abandoning the Gambling Features.** — Smyth v. Glendinning, 194 Pa. St. 550.

But where in an order to a broker for the purchase of stock, the intention of the party is to gamble, the fact that the broker actually purchases the stock will not relieve the transaction of the gambling feature. Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302.

**614.** **5. Where No Entrance Fee, Not Gambling.** — Wilkinson v. Stitt, 175 Mass. 581; Treacy v. Chinn, 79 Mo. App. 648; Brien v. Stone, 82 N. Y. App. Div. 450.

**A Contest Between Bicycle Clubs for a Cup presented by a third person to be contested for is not gambling.** Wilkinson v. Stitt, 175 Mass. 581.

**617.** **1. Special Statutes Forbidding Racing for Prizes.** — Ballou v. Willey, 180 Mass. 562.

**5. Extrinsic Evidence Admissible.** — Metropolitan Nat. Bank v. Jansen, 108 Fed. Rep. 572, 47 C. C. A. 497; Boyle v. Henning, 121 Fed. Rep. 376; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; Jones v. Jones, 103 Ill. App. 382; Lane v. Logan Grain Co., 105 Mo. App. 215; Wheeler v. Metropolitan Stock Exch., 72 N. H. 315; Sharp v. Stalker, 63 N. J. Eq. 596. *Compare* Winward



**618.** (3) *Question of Fact for Jury.* — See note 2.

(4) *Burden of Proof—On Party Alleging Illegality.* — See note 3.

**619.** *Contrary Doctrine.* — See note 2.

**620.** *c. EVIDENCE IN SPECIAL CLASSES OF GAMBLING CONTRACTS—*  
(2) *Contracts for Future Differences—*(b) *Admissibility of Various Circumstances to Prove Intent—aa. ONE PARTY'S KNOWLEDGE OF FINANCIAL INABILITY OF THE OTHER.* — See notes 2, 3, 4.

*bb. FACT THAT PARTIES SETTLED DISPUTED TRANSACTION BY DIFFERENCES.* — See note 5.

**621.** *cc. ACTUAL DEALINGS OF PARTIES IN OTHER TRANSACTIONS.* — See note 1.

*dd. A PARTY'S DEALINGS WITH THIRD PARTIES.* — See note 2.

*ee. CUSTOM OF MARKET—HABITS OF PARTY.* — See note 3.

**623.** *X. RIGHTS AND LIABILITIES OF ADVERSARY PARTIES TO GAMBLING CONTRACTS—2. Under Modern Statutes Invalidating Gambling Contracts—b. LOSER CANNOT RECOVER IN ABSENCE OF STATUTE.* — See note 1.

*v. Lincoln, 23 R. I. 476. See, however, Wiggin v. Federal Stock, etc., Co., 77 Conn. 507.*

*Hearsay Evidence is inadmissible. Jacobs v. Cohn, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 115.*

**618.** 2. *Question of Fact for Jury.* — *Cantwell v. Boykin, 127 N. Car. 64; Bartlett v. Collins, 109 Wis. 486, 83 Am. St. Rep. 928, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618.*

In order to prove that a transaction was intended as a gambling transaction, it is not indispensable that declarations or statements of the parties showing such intention or understanding should be proved; the intent and purpose of the parties may be established by all the attending circumstances of the transaction. *Bartlett v. Slusher, 215 Ill. 348, following Pope v. Hanke, 155 Ill. 617; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Weare Commission Co. v. People, 209 Ill. 528.*

**3. Burden of Proof on Party Alleging Illegality—United States.** — *Clews v. Jamieson, 182 U. S. 461; Hill v. Levy, 98 Fed. Rep. 94; Ponder v. Jerome Hill Cotton Co., (C. C. A.) 100 Fed. Rep. 373; Boyle v. Henning, 121 Fed. Rep. 376. Arkansas.* — *Johnston v. Miller, 67 Ark. 172. Florida.* — *Hocker v. Western Union Tel. Co., 45 Fla. 363.*

*Georgia.* — *Forsyth Mfg. Co. v. Castlen, 112 Ga. 199.*

*Illinois.* — *West v. Marquart, 78 Ill. App. 61; Marvel v. Marvel, 96 Ill. App. 609; Broderick v. O'Leary, 112 Ill. App. 658.*

*Missouri.* — *A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516.*

*New Jersey.* — *Thompson v. Williamson, 67 N. J. Eq. 212.*

*New York.* — *Brien v. Stone, 82 N. Y. App. Div. 450. See, however, Jacobs v. Cohn, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 115.*

*Pennsylvania.* — *Jennings v. Morris, 211 Pa. St. 600.*

*Wisconsin.* — *Bartlett v. Collins, 109 Wis. 486, 83 Am. St. Rep. 928, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618, per Cassoday, C. J.*

**619.** 2. *Legality to Be Proved.* — *Bartlett v. Collins, 109 Wis. 486, 83 Am. St. Rep. 928.*

**620.** 2. *Circumstances and Financial Standing of Party to Gambling Contract.* — *Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302; Jones v. Jones, 103 Ill. App. 382; Rogers v. Marriott, 59 Neb. 759; Merrill v. Garver, (Neb.*

*1903) 96 N. W. Rep. 619; Waite v. Frank, 14 S. Dak. 626, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; Atwater v. Manville, 106 Wis. 64; Morris v. Brault, 23 Quebec Super. Ct. 203, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620. Compare Winward v. Lincoln, 23 R. I. 476.*

**3. Occupation of Party to Gambling Contract.** — *Merrill v. Garver, (Neb. 1903) 96 N. W. Rep. 619; Waite v. Frank, 14 S. Dak. 626, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; Morris v. Brault, 23 Quebec Super. Ct. 203, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.*

**4. Where Knowledge of Adversary Party Is Immaterial.** — *Morris v. Brault, 23 Quebec Super. Ct. 203, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.*

**5. Evidence of Dealings of Parties in That Transaction.** — *Board of Trade v. L. A. Kinsey Co., 125 Fed. Rep. 72, reversed (C. C. A.) 130 Fed. Rep. 507; Jones v. Jones, 103 Ill. App. 382; Thompson v. Brady, 182 Mass. 321; Rice v. Winslow, 180 Mass. 500; Sharp v. Stalker, 63 N. J. Eq. 596; Waite v. Frank, 14 S. Dak. 626, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; Atwater v. Manville, 106 Wis. 64; Morris v. Brault, 23 Quebec Super. Ct. 203, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620. Compare Winward v. Lincoln, 23 R. I. 476.*

**Evidence that Broker Merely Called for Margin** is admissible to show intention to gamble. *Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302.*

**621.** 1. *Evidence of Former Dealings Held Admissible.* — *Staninger v. Tabor, 103 Ill. App. 330; Rogers v. Marriott, 59 Neb. 759.*

**2. Dealing of One Party with Third Parties Is Inadmissible.** — *Pardridge v. Cutler, 168 Ill. 504; MacDonald v. Gessler, 208 Pa. St. 177, where evidence that the broker ran a bucket shop was held inadmissible.*

**3. Custom of Market.** — *Wiggin v. Federal Stock, etc., Co., 77 Conn. 507; Pardridge v. Cutler, 168 Ill. 504 (rules of board of trade). See, however, Waite v. Frank, 14 S. Dak. 626; Bartlett v. Collins, 109 Wis. 477, 83 Am. St. Rep. 928 (rule of Chicago Board of Trade).*

**623.** 1. *Loser Cannot Recover in Absence of Statute—England.* — *Crawley v. White, 78 L. T. N. S. 167.*

*Canada.* — *Seely v. Dalton, 36 N. Bruns. 442,*

**624.** 3. Under Modern Statutes Giving Right of Action to Loser Who Has Paid Voluntarily — *a.* DIVERSITY OF STATUTES. — See note 1.

**625.** *b.* CONSTRUCTION OF STATUTES — (1) Remedial. — See note 1.

**626.** (2) Penal — Where Right of Action Is Given to Informer. — See note 1.

(3) Status as Winner or Loser Determined by One Sitting. — See note 4.

*c.* DEFINITION OF WINNER — (1) At Ordinary Gambling. — See note 5.

(2) In Gambling on Credit. — See note 6.

*United States.* — *Boyce v. O'Dell Commission Co.*, 109 Fed. Rep. 758; *In re Arnold*, 133 Fed. Rep. 789.

*Illinois.* — *Kruse v. Kennett*, 69 Ill. App. 566, reversed 181 Ill. 199; *Bryan v. Lamson*, 88 Ill. App. 261.

*Massachusetts.* — *Wilson v. Head*, 184 Mass. 515.

*Michigan.* — *Lassen v. Karrer*, 117 Mich. 512.

*Missouri.* — *Cofer v. Riseling*, 153 Mo. 633; See *v. Runzi*, 105 Mo. App. 435.

*Nebraska.* — *Bowen v. Lynn*, (Neb. 1905) 102 N. W. Rep. 460.

**Bucket Shop Not a Game.** — The *Indiana* statute (Burns's Rev. Stat. 1894, § 6676) providing for the recovery of money lost by any person "by betting on any game," or "betting on the hands or sides of such as play at any game," does not authorize a loser to recover money lost in bucket shop speculation. *Lancaster v. McKinley*, 33 Ind. App. 448.

**624.** 1. Cases Decided under Statutes Giving Loser Right of Action Against Winner — *United States.* — *Boyce v. O'Dell Commission Co.*, 107 Fed. Rep. 58.

*Georgia.* — *Quillian v. Johnson*, 122 Ga. 49.

*Illinois.* — *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302; *Kruse v. Kennett*, 181 Ill. 199, reversing 69 Ill. App. 566; *Bartlett v. Slusher*, 215 Ill. 348.

*Kentucky.* — *Boyd Commission Co. v. Coates*, (Ky. 1902) 69 S. W. Rep. 1090; *Paducah Commission Co. v. Boswell*, (Ky. 1904) 83 S. W. Rep. 144.

*Missouri.* — *Dooley v. Jackson*, 104 Mo. App. 21.

*New Hampshire.* — *Wheeler v. Metropolitan Stock Exch.*, 72 N. H. 315.

*New Mexico.* — *Armstrong v. Aragon*, (N. Mex. 1905) 79 Pac. Rep. 291.

*New York.* — *Moulton v. Westchester Racing Assoc.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 487, affirmed 95 N. Y. App. Div. 276; *Mendoza v. Rose*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 241.

*Ohio.* — *Rogers v. Edmund*, 12 Ohio Cir. Dec. 291, 21 Ohio Cir. Ct. 675.

*West Virginia.* — *Cramer v. Pomeroy*, 47 W. Va. 56.

The fact that payment is made by the loser through his agent, is immaterial. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56.

*Nebraska Criminal Code*, § 214, as amended in 1887 (Laws 1887, p. 665, § 108) which provides for the recovery by civil action of money lost at gambling applies to such kinds or descriptions only as are mentioned in that section. *Bowen v. Lynn*, (Neb. 1905) 102 N. W. Rep. 460.

The *New York Statute* (Laws 1895, c. 570, p.

370) known as the "Percy Gray Racing Law," did not repeal 1 N. Y. Rev. Stat., p. 662, §§ 8, 9 (1 Birds. Rev. Stat. (3d ed.) pp. 299, 300) authorizing the recovery of money lost at gambling so as to prevent the recovery of money lost on a bet on a horse race. *Mendoza v. Levy*, 98 N. Y. App. Div. 326.

**Demand Not Necessary.** — *Mendoza v. Levy*, 98 N. Y. App. Div. 326, following *Ruckman v. Pitcher*, 1 N. Y. 392.

**Loss of Chips or Counters.** — *Zeller v. White*, 208 Ill. 518, 100 Am. St. Rep. 243; *Vincent v. Taylor*, 60 Ohio St. 309.

**Liability of Lessor of Building Wherein Gaming Is Permitted.** — *Gaby v. Hankins*, 86 Ill. App. 529; *Trout v. Marvin*, 24 Ohio Cir. Ct. 333, 62 Ohio St. 132.

**Payment under Judgment.** — *Jacob v. Clark*, (Ky. 1901) 66 S. W. Rep. 37.

**Recovery of Statutory Penalty of Double Amount of Loss.** — *Meyers v. Dillon*, 39 Oregon 581.

**Bucket Shop Transaction Not a "Game."** — *Boyce v. O'Dell Commission Co.*, 109 Fed. Rep. 758. See also *See v. Runzi*, 105 Mo. App. 435.

**A Wrestling Match Is a "Game"** under Burns's Rev. Stat. 1901, § 6676, authorizing the recovery of money lost by betting on any game. *Desgain v. Wessner*, 161 Ind. 205.

**Election Bet.** — *Mitchell v. Orr*, 107 Tenn. 534.

**No Vested Right in Remedy.** — *Wilson v. Head*, 184 Mass. 515.

**Informer.** — *Kizer v. Walden*, 198 Ill. 274, 96 Ill. App. 593; *Staninger v. Tabor*, 103 Ill. App. 330 (recovery of penalty of treble damages); *Jacob v. Clark*, 115 Ky. 255; *Fitzgerald v. Schloss*, 62 N. J. L. 472; *Trout v. Marvin*, 62 Ohio St. 132.

**Wife of Loser.** — *Vincent v. Taylor*, 60 Ohio St. 309; *Ervin v. State*, 150 Ind. 332.

**Right of General Creditors of Lose to Recover.** — *Cofer v. Riseling*, 153 Mo. 633.

**Partnership — Liability of One Partner to Creditors of Other Partner.** — *Stapp v. Mason*, 114 Ky. 900.

**Gaming Out of the State — Statute Does Not Apply.** — *Jacob v. Clark*, 115 Ky. 255.

**625.** 1. Right of Action for His Own Benefit Given to Loser. — *Mendoza v. Levy*, 98 N. Y. App. Div. 326.

**626.** 1. Statutes Strictly Construed. — *Jacob v. Clark*, 115 Ky. 255.

4. What Constitutes One "Sitting." — *Zeller v. White*, 106 Ill. App. 183, affirmed 208 Ill. 518, 100 Am. St. Rep. 243.

5. Winning Through Agent. — *Zellers v. White*, 208 Ill. 518, 100 Am. St. Rep. 243.

6. After Payment. — *Jacob v. Clark*, 115 Ky. 255. (This is true where note has not been paid, though judgment has been recovered.)

**627.** (6) *Winner from Winner Liable to Original Loser.* — See note 4.

**629.** 5. *Right of Owner to Recover Property Staked and Lost by Another Without His Consent.* — See note 2.

**631.** XI. *RIGHTS AND LIABILITIES OF PARTIES JOINTLY ASSOCIATED IN GAMBLING CONTRACTS* — 2. *Losses* — No Indemnity Is Enforced. — See note 1.

**632.** XII. *RIGHTS AND LIABILITIES OF STAKEHOLDERS* — 3. *Duty of Stakeholder* — *b. AFTER EVENT* — (1) *To Deliver Stake to Winner.* — See note 3.

4. *Liability to Parties* — *a. TO WINNER.* — See note 5.

**633.** *b. TO DEPOSITORS WHO REPUDIATE WAGER* — (1) *Before Event.* — See note 1.

(2) *After Event but Before Payment to Winner.* — See note 2.

**634.** (3) *After Payment to Winner* — *General Rule.* — See notes 1, 2.

**635.** 5. *Demand* — *d. FORM OF DEMAND.* — See note 6.

6. *Liability to Real Owner of Stake Deposited Without His Consent.* —

See note 7.

**636.** XIII. *PARTIES TO AGREEMENTS COLLATERAL TO A GAMBLING CONTRACT* — 1. *Agents Other than Brokers* — *a. IN GENERAL.* — See note 5.

**637.** *c. WHETHER LIABLE TO PRINCIPAL FOR WINNINGS RECEIVED FROM LOSER.* — See note 1.

**638.** *d. RIGHT OF PRINCIPAL TO REVOKE AUTHORITY AND RECOVER PROPERTY ADVANCED* — (2) *In England* — *Since This Statute.* — See note 3.

**627.** 4. *Winner from Winner.* — *Zeller v. White*, 106 Ill. App. 183, affirmed 208 Ill. 518, 100 Am. St. Rep. 243.

**629.** 2. *Right of Innocent Party to Follow His Property Staked and Lost by Another.* — *Mendel v. Boyd*, (Neb. 1902) 91 N. W. Rep. 860.

**631.** 1. *No Indemnity Between Parties Jointly Interested in Gambling.* — *Saffery v. Mayer*, (1901) 1 Q. B. 11; *Turner v. Thompson*, 107 Ky. 647; *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 99 Am. St. Rep. 317; *Spies v. Rosenstock*, 87 Md. 14; *Virden v. Murphy*, 78 Miss. 515; *Atwater v. Manville*, 106 Wis. 64. See also *Thomas v. Belleville First Nat. Bank*, 213 Ill. 261.

**632.** 3. *The Decision of the Stakeholder as to who is the winner seems to be conclusive.* — *Trenery v. Goudie*, 106 Iowa 693.

5. *Whole Deposit Not Recoverable by Winner.* — *Shoolbred v. Roberts*, (1899) 2 Q. B. 560, 68 L. J. Q. B. 998, 81 L. T. N. S. 522; *Trenery v. Goudie*, 106 Iowa 693.

**633.** 1. *Right of Depositors to Reclaim Stake Before Event.* — *White v. Gilleland*, 93 Mo. App. 310.

In case of a bet on a horse race, where the race has been partly run, and it is apparent to the bettors which horse will win, one of the bettors cannot at such time repudiate the bet and hold the stakeholder liable for his stake on the ground that he repudiated the bet before the happening of the event. *Cutshall v. McGowan*, 98 Mo. App. 702.

*Cheating.* — The fact that the stake was deposited in pursuance of a conspiracy to cheat is immaterial. *Wright v. Stewart*, 130 Fed. Rep. 905.

2. *Right of Depositor to Reclaim Stake After Event but Before Payment* — *England.* — *O'Sullivan v. Thomas*, (1895) 1 Q. B. 698; *Shoolbred v. Roberts*, (1899) 2 Q. B. 560, 68 L. J. Q. B. 998, 81 L. T. N. S. 522; *Burge v. Ashley*, (1900) 1 Q. B. 744, 69 L. J. Q. B. 538, 82 L. T. N. S. 518, 48 W. R. 438.

*Colorado.* — *Maher v. Van Horn*, 15 Colo. App. 14.

*Georgia.* — *McLennan v. Whiddon*, 120 Ga. 666, distinguishing *Colson v. Meyers*, 80 Ga. 499.

*Kentucky.* — *Turner v. Thompson*, 107 Ky. 647.

*Minnesota.* — *Pabst Brewing Co. v. Lisson*, 80 Minn. 473, 81 Am. St. Rep. 275.

*Missouri.* — See also *White v. Gilleland*, 93 Mo. App. 310. See, however, *Cutshall v. McGowan*, 98 Mo. App. 702; *Dooley v. Jackson*, 104 Mo. App. 21.

*New Jersey.* — *Van Pelt v. Schauble*, 68 N. J. L. 638.

*New York.* — *French v. Matteson*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 425.

*Oklahoma.* — *Dunn v. Drummond*, 4 Okla. 461.

*Recovery by Trustee in Bankruptcy.* — *Shoolbred v. Roberts*, (1899) 2 Q. B. 560.

**634.** 1. *Stakeholder Not Liable After Payment.* — *Maher v. Van Horn*, 15 Colo. App. 14; *Trenery v. Goudie*, 106 Iowa 693.

2. *Demand of Whole as Winner Held Sufficient.* — *Van Pelt v. Schauble*, 68 N. J. L. 638.

**635.** 6. *Sufficiency of Demand.* — *Trenery v. Goudie*, 106 Iowa 693; *Turner v. Thompson*, 107 Ky. 647; *Vandolah v. McKee*, 99 Mo. App. 342.

*Forms Insufficient.* — *Maher v. Van Horn*, 15 Colo. App. 14.

7. *Right of Real Owner Where Stake Is Deposited Without His Consent.* — *Turner v. Thompson*, 107 Ky. 647.

**636.** 5. *Agency Does Not Exist in Gambling Contracts.* — *Munns v. Donovan Commission Co.*, 117 Iowa 519, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 636.

**637.** 1. *Contrary View* — *Agent Liable.* — *Bryan v. Lamson*, 88 Ill. App. 261; *Russell v. Kidd*, (Tex. Civ. App. 1904) 84 S. W. Rep. 273, following *Floyd v. Patterson*, 72 Tex. 205; *Overholt v. Burbridge*, 28 Utah 408.

**638.** 3. *Rights of Principal under 55 Victoria.*

**638. 2. Brokers** — *a.* POSITION AS AGENT AFFECTED BY ILLEGALITY OF TRANSACTION — (2) *Intention of Principal and Broker.* — See note 5.

**639. b. RIGHTS OF CUSTOMER AGAINST BROKER** — (1) *Right to Recover Property in Hands of Agent Before Payment* — At Any Time Before Loss Is Incurred. — See note 3.

In England. — See note 5.

**640. (2) Right to Recover Property in Hands of Agent After Payment** — Right Recognized. — See note 1.

*c.* RIGHT OF BROKER TO COMMISSIONS AND ADVANCES — No Recovery Allowed to Broker. — See note 4.

**641. 3. Persons Lending Money to Parties to Gambling Contracts** — *a.* LOAN TO BE USED IN GAMBLING — Mere Knowledge of Proposed Use Does Not Defeat Recovery. — See note 2.

**642. Use in Gambling Required by Contract of Lending.** — See note 1.

*b.* LOAN TO ENABLE LOSER TO REPAY — Person Unconnected with Gambling May Recover. — See note 2.

Loan a Mere Device to Avoid Effect of Statute. — See note 3.

**643. c. SPECIAL STATUTORY RULE.** — See note 1.

— *Levy v. Warburton*, 70 L. J. K. B. 708 (agent cannot compel reimbursement for losses incurred on behalf of his principal).

**638. 5. Knowledge of Broker Material.** — *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373; *Parker v. Moore*, 111 Fed. Rep. 470, (C. C. A.) 115 Fed. Rep. 799, 125 Fed. Rep. 807 (construing *South Carolina law*); *Boyle v. Henning*, 121 Fed. Rep. 376; *Donovan v. Daiber*, 124 Mich. 49; *Thompson v. Williamson*, 67 N. J. Eq. 212; *Young v. Glendenning*, 8 Pa. Dist. 57.

**639. 3. Right of Principal to Recover Property in Hands of Broker Before Loss Incurred.** — *Munns v. Donovan Commission Co.*, 117 Iowa 516.

*5. Recovery of Cover or Margin.* — *In re Cronmire*, (1898) 2 Q. B. 383.

**640. 1. Customer May Recover Property from Broker After Broker Has Paid Winner** — *California.* — *Stillwell v. Cutter*, 146 Cal. 657.

*Illinois.* — *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302; *Kruse v. Kennett*, 181 Ill. 199, reversing 69 Ill. App. 566.

*Massachusetts.* — *Davy v. Bangs*, 174 Mass. 238; *Rice v. Winslow*, 180 Mass. 500, 182 Mass. 273; *Bailou v. Willey*, 180 Mass. 562; *Allen v. Fuller*, 182 Mass. 202; *Thompson v. Brady*, 182 Mass. 321; *Wilson v. Head*, 184 Mass. 515; *Loughlin v. Parkinson*, 184 Mass. 565; *Post v. Leland*, 184 Mass. 601.

*South Carolina.* — *Saunders v. Phelps Co.*, 53 S. Car. 173.

*Recovery by Broker.* — Stat. Mass. 1890, c. 437, § 2, did not authorize a broker to recover winnings paid over to his customer. *Lyons v. Coe*, 177 Mass. 382.

*Person Gratuitously Carrying Stock in His Name for Another* is not "employed" by the latter so as to be liable to the latter for losses. (*Mass. Stat. 1890, c. 437*). *Bingham v. Scott*, 177 Mass. 208.

**4. Broker Cannot Recover for Commissions and Advances.** — *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373; *Violett v. Mangold*, (*Miss.* 1900) 27 So. Rep. 875; *Rogers v.*

*Marriott*, 59 Neb. 759; *Merrill v. Garver*, (Neb. 1903) 96 N. W. Rep. 619; *Cantwell v. Boykin*, 127 N. Car. 64; *Garseed v. Sternberger*, 135 N. Car. 501; *Wagner v. Hildebrand*, 187 Pa. St. 136; *Waite v. Frank*, 14 S. Dak. 626; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928; *Morris v. Brault*, 23 Quebec Super. Ct. 190, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 640.

**641. 2. Use in Gambling Not Required by Contract of Lending** — *Recovery Permitted.* — *Singleton v. Monticello Bank*, 113 Ga. 527, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 641; *Appleton v. Maxwell*, 10 N. Mex. 748; *Venne v. Christin*, 16 Quebec Super. Ct. 164. Compare *Hurlburt v. Straub*, 54 W. Va. 303 (statutory prohibition).

**642. 1. When Use in Gambling Is Required by Contract of Lending, Lender Cannot Recover.** — *Marden v. Phillips*, 103 Fed. Rep. 196; *Singleton v. Monticello Bank*, 113 Ga. 527, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 641; *Spies v. Rosenstock*, 87 Md. 14; *Higginbotham v. McGready*, 183 Mo. 96, 105 Am. St. Rep. 461; *Appleton v. Maxwell*, 10 N. Mex. 748; *Johnson v. Clark*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 346; *Jones v. Akin*, (*Tex.* Civ. App. 1904) 80 S. W. Rep. 385; *Ash v. Clark*, 32 Wash. 390; *Schoenberg v. Adler*, 105 Wis. 645.

*Sale of "Chips."* — *Ayer v. Younker*, 10 Colo. App. 27.

**2. Money Advanced to Pay Losses Already Incurred Recoverable.** — *Searles v. Lum*, 89 Mo. App. 235; *Jacoby v. Heidelberg*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 111, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642; *Hurlburt v. Straub*, 54 W. Va. 303, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642.

**3. Loan a Pretext Merely.** — *Appleton v. Maxwell*, 10 N. Mex. 748, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642; *Jacoby v. Heidelberg*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 111.

**643. 1. Statutes Forbidding Recovery.** — *Schoenberg v. Adler*, 105 Wis. 645.

**644.** 5. Persons Furnishing Labor or Material in Furtherance of Gambling Contracts — Mere Knowledge of the Unlawful Purpose to Which Materials Are to Be Applied. — See note 1.

6. Rent for Property Used for Gambling. — See note 2.

7. Liability of Telegraph Companies Where Telegrams Are Sent for Gambling Purposes. — See note 3.

8. Contracts of Indemnity Against Liability Growing Out of Gambling Contracts. — See note 4.

**645. XIV. SECURITIES FOR DEBTS INCURRED IN GAMBLING CONTRACTS —**

1. Statutes in General. — See note 1.

3. Negotiable Instruments — *a.* RECOVERY BY ORIGINAL PARTY. — See note 3.

*b.* RECOVERY BY ASSIGNEE WHO IS NOT A BONA FIDE HOLDER. — See note 4.

**646.** *c.* RECOVERY BY BONA FIDE HOLDER — (1) *Recovery Allowed.* — See note 1.

Presumption as to Bona Fides. — See note 2.

(2) *Recovery Not Allowed.* — See note 3.

**648.** *e.* VALIDITY OF TITLE TO COMMERCIAL PAPER WON AT GAMBLING — Indorsement on Gambling Consideration — Holder's Rights Against Maker. — See note 2.

Bank's Refusal to Honor Checks. — See note 3.

**650.** 4. Judgments — *b.* CLASSES OF JUDGMENTS — (4) *Judgments Rendered in Adversary Proceedings After Contest.* — See note 1.

**644.** 1. Where an article is designed and manufactured to be used for gambling purposes, and the seller knows it, he cannot recover the purchase price from the buyer. *Ohlsen v. Wilson*, 31 Tex. Civ. App. 178.

2. Recovery of Rent Where Premises Are Used for Gambling — In the United States. — *Boddie v. Brewer, etc., Brewing Co.*, 204 Ill. 352 (construing Ill. Cr. Code, §§ 217, 135; *Heidenreich v. Raggio*, 88 Ill. App. 521; *Violett v. Mangold*, (Miss. 1900) 27 So. Rep. 875.

Sale of Privilege of Book-making at Race Track. — In case of breach of contract by seller, purchase price cannot be recovered. *Ullman v. St. Louis Fair Assoc.*, 167 Mo. 273.

3. Liability of Telegraph Company. — *Morris v. Western Union Tel. Co.*, 94 Me. 423.

4. Indemnity Contracts. — *Ferguson v. Yunt*, 13 S. Dak. 120 (indemnity contract is unenforceable).

Surety on Contract to Indemnify Stakeholder cannot recover from his principal. *Ferguson v. Yunt*, 13 S. Dak. 120.

**645.** 1. Securities on Gambling Transactions. — *Marden v. Phillips*, 103 Fed. Rep. 196.

Bill of Sale as Security for indebtedness based on gambling transaction, held invalid. *Marden v. Phillips*, 103 Fed. Rep. 196.

3. Original Party Cannot Recover. — *Ayer v. Younker*, 10 Colo. App. 27; *Gardner v. Meeker*, 169 Ill. 40; *Roff v. Harmon*, (Indian Ter. 1901) 64 S. W. Rep. 755 (no liability on indorsement); *People's Sav. Bank v. Gifford*, 108 Iowa 277; *Violett v. Mangold*, (Miss. 1900) 27 So. Rep. 875; *Woolfolk v. Duncan*, 80 Mo. App. 421; *Lane v. Logan Grain Co.*, 105 Mo. App. 215; *Rogers v. Corre*, 6 Ohio Cir. Dec. 602. 10 Ohio Cir. Ct. 346; *Corre v. Rogers*, 9 Ohio Cir. Dec. 854, 18 Ohio Cir. Ct. 892.

4. Assignee Who Is Not a Bona Fide Holder

Cannot Recover. — *Woolf v. Hamilton*, (1898) 2 Q. B. 337; *Metropolitan Nat. Bank v. Jansen*, 108 Fed. Rep. 572, 47 C. C. A. 497; *Ash v. Clark*, 32 Wash. 390.

**646.** 1. Cases Where Bona Fide Holder Can Recover. — *Sullivan v. German Nat. Bank*, 18 Colo. App. 99; *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283; *Northern Nat. Bank v. Arnold*, 187 Pa. St. 356 (note given for margins in stock gambling transaction); *Ash v. Clark*, 32 Wash. 390; *Dion v. Lachance*, 14 Quebec Super. Ct. 77.

2. Presumption Against Bona Fides. — *Askegaard v. Dalen*, 93 Minn. 354.

3. Cases Where Bona Fide Holder Cannot Recover. — *Higginbotham v. McGready*, 183 Mo. 96, 105 Am. St. Rep. 461; *Hurlburt v. Straub*, 54 W. Va. 303.

Statutes Strictly Construed. — *Sullivan v. German Nat. Bank*, 18 Colo. App. 99.

Conflict of Laws. — Where a negotiable instrument is indorsed in payment of a gambling debt in a state which permits a bona fide holder of a negotiable instrument to recover thereon, though given for a gambling debt, recovery should be allowed against the indorsee in favor of a bona fide holder, though the law of the forum does not allow a recovery by a bona fide holder. *Sullivan v. German Nat. Bank*, 18 Colo. App. 99.

**648.** 2. Contrary Doctrine. — See *Drinkall v. Novius State Bank*, 11 N. Dak. 15.

Certificate of Deposit. — *Thomas v. Belleville First Nat. Bank*, 213 Ill. 261.

3. See *Drinkall v. Novius State Bank*, 11 N. Dak. 15.

**650.** 1. No Relief Where Judgment Was Rendered After Contest. — See *Jacob v. Clark*, (Ky. 1901) 66 S. W. Rep. 37.

A court of equity will not grant aid to enforce a judgment recovered in a foreign state on a

**650.** 6. Gambling Contract as Consideration for a New Promise. — See note 4.

**651.** 7. Renewals. — See note 1.

gambling transaction. *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394.

**Setting Aside Conveyances Fraudulent.** — Where a judgment creditor, whose judgment was based on a gambling transaction, sues to set aside conveyances by his judgment debtor as in fraud of creditors, the grantees under the alleged fraudulent conveyance may set up in defense of the suit that the judgment was based on a gambling transaction. *Thompson v. Williamson*, 67 N. J. Eq. 212, following *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, and overruling *McCanless v. Smith*, 51 N. J. Eq. 505.

**Judgment — Supersedeas Bond.** — The *Kentucky* statute (Stat. Ky., § 1955) providing that "every contract, conveyance, transfer, or assur-

ance" for money lost in gambling transactions shall be void, does not render void a judgment recovered on a note given in a gambling transaction, and a supersedeas bond on appeal from such judgment is enforceable. *Jacob v. Hill*, 111 Ky. 926.

**650.** 4. Liability on Gambling Contract No Consideration for a New Promise. — *In re Cronmire*, (1898) 2 Q. B. 383; *Treat v. Snyder*, etc., Co., 92 Ill. App. 458; *Ash v. Clark*, 32 Wash. 390.

**651.** 1. Renewals of Contracts Based on Gambling Consideration. — *Ayer v. Younker*, 10 Colo. App. 27; *People's Sav. Bank v. Gifford*, 108 Iowa 277.

## GAME AND GAME LAWS.

By J. HAVILAND SMITH.

**654.** I. DEFINITION OF GAME — 1. In General. — See note 1.

**655.** II. PROPERTY IN GAME — 1. In General. — See note 1.

**656.** 2. As Between Individuals. — See note 1.

III. TRESPASS IN PURSUIT OF GAME. — See note 4.

**657.** Form of Action. — See note 3.

IV. DECOYING AND ENTICING AWAY GAME. — See note 4.

**658.** V. DEFINITION AND FOUNDATION OF GAME LAWS. — See note 3.

**654.** 1. "Game" Defined. — *Meul v. People*, 108 Ill. 258.

**655.** 1. United States — Extent of Government Ownership. — *State v. Mallory*, 73 Ark. 236. See also *Smith v. State*, 155 Ind. 611.

"With us, landholders can keep others from hunting on their land, not by virtue of their ownership of the game, but from their right to keep trespassers off the land." *State v. Gallop*, 126 N. Car. 979.

**656.** 1. Rights as Between Owner of Land and Public. — The owner of land, in dedicating a highway over it, does not part with his exclusive right to game on the portion of the premises covered by the highway, and he may, therefore, enjoin persons from shooting birds in their passage across such highway. *L. Realty Co. v. Johnson*, 92 Minn. 363.

**Injunction.** — Under a statute forbidding the establishment of a blind nearer than three hundred yards from one already licensed, a person who has obtained a license but has not yet located his blind has no right to an injunction to restrain the establishment of another blind. *Bannon v. Shekell*, 94 Md. 738.

**4. Trespass — What Constitutes.** — The *Vermont* constitution gives the inhabitants of the state the right to hunt on uninclosed land. *Payne v. Gould*, 74 Vt. 208.

**Firing upon Land of Adjacent Owner.** — *Horn v. Raine*, 78 L. T. N. S. 654, 67 L. J. Q. B. 533, 19 Cox C. C. 119.

**Trespass — Who May Maintain — Owner of Shooting Privileges.** — *Payne v. Sheets*, 75 Vt. 335.

**657.** 3. Criminal Prosecution. — *Davis v. State*, 45 Tex. Crim. 183.

**Evidence Sufficient for Conviction.** — An intention to kill game need not be shown. *Stiff v. Billington*, 84 L. T. N. S. 467, 19 Cox C. C. 680.

**4. Interference with Shooting.** — In *State v. Gallop*, 126 N. Car. 979, it was held that the legislature had power to forbid any one interfering with "any citizen who may be gunning or fishing in Currituck Sound or its tributaries, for the purpose of keeping them from shooting."

**658.** 3. Preservation of Game. — *Cummings v. People*, 211 Ill. 392; *State v. Ward*, 75 Vt. 438.

**Arkansas — Camp-hunting and Fire-hunting.** — In *Arkansas*, Act Feb. 11, 1897, p. 26, makes it unlawful to engage in what is commonly known as camp-hunting and fire-hunting. *Du Bose v. State*, 71 Ark. 347.

**Guides.** — The legislature has the constitutional power to regulate the employment of guides in fishing and hunting so as to assure the better preservation of game. *State v. Snowman*, 94 Me. 90, 80 Am. St. Rep. 380.

**Use of Repeating or Magazine Guns.** — In *In re Marshall*, 102 Fed. Rep. 323, it was held that a provision against killing certain birds with a repeating shotgun or any kind of a magazine gun was unconstitutional, as it destroyed the property right in such a gun.

**658.** VI. KILLING GAME OUT OF SEASON. — See note 4.

**659.** VII. HAVING GAME IN POSSESSION OUT OF SEASON. — See note 1.

**660.** See note 1.

**661.** IX. TRANSPORTATION OF GAME KILLED WITHIN STATE. — See note 2.

X. CONSTITUTIONALITY OF STATUTES—1. In General. — See note 3.

**662.** 2. Interstate Commerce. — See note 1.

XI. VIOLATIONS OF GAME LAWS—1. How Prosecuted. — See notes

2, 4.

**663.** 2. By Whom Prosecuted. — See note 2.

**658.** 4. Killing Game Out of Season. — Com. v. Penn Forest Brook Trout Co., 11 Pa. Dist. 349, 26 Pa. Co. Ct. 163, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658; State v. Jewett, 76 Vt. 435.

Birds for Which No Open Season — New York. — People v. Bootman, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 27.

**659.** 1. Possession of Game Out of Season. — Hornbeke v. White, (Colo. App. 1904) 76 Pac. Rep. 926; Javins v. U. S., 11 App. Cas. (D. C.) 345; Smith v. State, 155 Ind. 611; Com. v. Chase-Davidson Co., 109 Ky. 236; State v. Poole, 93 Minn. 148; McMahon v. State, (Neb. 1904) 97 N. W. Rep. 1035; People v. Cohen, 91 N. Y. App. Div. 89; People v. Dunston, (Supm. Ct. App. T.) 84 N. Y. Supp. 257.

Possession Prima Facie Evidence of Guilt. — Crosby v. State, 121 Ga. 198.

Possession of Skin of Protected Animal. — Linden v. McCormick, 90 Minn. 337.

Birds for Use of Taxidermists. — State v. Fields, 118 Iowa 530.

**660.** 1. Game Brought from Foreign Jurisdiction. — Stevens v. State, 89 Md. 669; People v. Bootman, 180 N. Y. 1.

As to the Illinois statute see People v. Merritt, 91 Ill. App. 620.

**661.** 2. Transportation of Game. — Ex p. Knapp, 127 Cal. 101.

Actual Shipment or Delivery to a Carrier is essential to constitute an offense under Act of Congress, May 25, 1900. Mere intent to ship or preparation for shipment is not enough. U. S. v. Smith, 115 Fed. Rep. 423.

3. Constitutionality of Statutes — California. — Ex p. Kenneke, 136 Cal. 527, 89 Am. St. Rep. 177; In re Marshall, 102 Fed. Rep. 323.

Colorado. — Hornbeke v. White, (Colo. App. 1904) 76 Pac. Rep. 926.

Georgia. — Harris v. State, 110 Ga. 887.

Illinois. — Meul v. People, 198 Ill. 258.

Indiana. — Smith v. State, 155 Ind. 611.

Michigan. — People v. Van Pelt, 130 Mich. 621.

Minnesota. — State v. Poole, 93 Minn. 148.

Nebraska. — McConnell v. McKillip, (Neb. 1904) 99 N. W. Rep. 505; McMahon v. State, (Neb. 1904) 97 N. W. Rep. 1035.

New York. — People v. Bootman, 180 N. Y. 1; People v. Cohen, 91 N. Y. App. Div. 89.

Pennsylvania. — Com. v. Barnett, 9 Pa. Dist. 517.

Discrimination Against Nonresidents. — In re Eberle, 98 Fed. Rep. 295; State v. Mallory, 73 Ark. 236.

**662.** 1. Interstate Commerce. — Stevens v. State, 89 Md. 669.

2. See U. S. v. Smith, 115 Fed. Rep. 423; Powers v. State, 129 Ala. 126; Com. v. Boettcher, 10 Pa. Dist. 101.

Indians on Reservations Not Amenable to State Game Laws. — In re Lincoln, 129 Fed. Rep. 247. See also In re Blackbird, 109 Fed. Rep. 139.

4. State v. Poole, 93 Minn. 148.

**663.** 2. Both a Criminal and a Civil Liability is imposed by N. Y. Laws 1901, c. 91, § 39, for a violation of the game law. See People v. Bootman, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 27.

## GAMING.

BY BRISCOE B. CLARK.

**665.** I. DEFINITIONS—Gaming. — See note 1.

**666.** Gambling. — See note 1.

Betting. — See note 2.

II. STATUS OF GAMING AS A CRIME—1. As a Common-law Offense. —

See note 3.

Keeping a Gaming House. — See note 4.

**665.** 1. Rex v. Fortier, 13 Quebec K. B. 308, 7 Can. Crim. Cas. 422.

**666.** 1. Gambling. — People v. Stedeker, 175 N. Y. 57, 17 N. Y. Crim. 326.

2. Betting and Gaming Distinguished. — The definition of the term "bet" given in the second paragraph of the original note was ap-

proved in Mayo v. State, (Tex. Crim. 1904) 82 S. W. Rep. 515.

3. Gaming Not a Common-law Offense. — Thrower v. State, 117 Ga. 753; Woods v. Cottrell, 55 W. Va. 481, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666.

4. Gaming Houses. — Woods v. Cottrell, 55 W.

**666. 2. As a Statutory Offense** — *a.* EARLY ENGLISH STATUTES. — See note 5.

*c.* VALIDITY OF STATUTES. — See note 8.

**667.** See note 1.

**668. III. WHAT CONSTITUTES GAMING** — 1. The Game — *a.* IN GENERAL. — See note 1.

2. The Element of Chance — See note 7.

**669. 3. The Wager** — *a.* NECESSITY FOR A WAGER. — See notes 1, 3.

*b.* WHAT CONSTITUTES A WAGER — (1) *Mutuality of Risk*. — See note 5.

**671. (4) Loser Paying Rent of Table, etc., on Which Game Is Played.** — See notes 2, 3.

(5) *Contests for Purses and Prizes*. — See note 6.

**672. c. PARTICIPATION IN THE WAGER.** — See note 1.

*d.* THE CONTRACT OF WAGER — OFFER AND ACCEPTANCE — Where Made. — See note 3.

IV. GAMING IN PARTICULAR PLACES — 1. In General. — See notes 4, 5.

2. In Private Residence. — See note 6. See also the title RESIDENCE, RESIDENT, ETC.

Va. 481, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666.

**666. 5. Persons "Haunting, Resorting, and Playing" in Gaming Houses.** — See Murphy v. Arrow, (1897) 2 Q. B. 527.

**8. A Statute Prohibiting the Possession of Policy Paper** is constitutional. *People v. Flynn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 87, affirmed 72 N. Y. App. Div. 67.

**A Statute Prohibiting Visiting Gaming Houses** is valid. *Matter of Ah Cheung*, 136 Cal. 678.

**Betting in Particular Places.** — The Tennessee statute permitting betting on horse races within the inclosure in which the race is run, but prohibiting betting outside of such inclosure, is not unconstitutional. *Debardelaben v. State*, 99 Tenn. 649.

**667. 1. Regulation of Gaming by Municipalities.** — *In re Murphy*, 128 Cal. 29; *New Orleans v. Collins*, 52 La. Ann. 973.

In the Absence of Statutory Authority a municipality has no power to prevent betting on horse races within its limits. *Shreveport v. Maloney*, 107 La. 193.

**Repeal of Ordinance by Subsequent Ordinances Repealing All Ordinances in Conflict.** — See *Clark v. State*, 46 Tex. Crim. 566.

**668. 1. Pool Selling on races** is not a "game" under Stat. Ky. 1903, § 1978. *Louisville v. Wehmoff*, (Ky. 1904) 79 S. W. Rep. 201, denying rehearing 116 Ky. 812.

**7. Element of Chance Necessary.** — *Rex v. Fortier*, 13 Quebec K. B. 308, 7 Can. Crim. Cas. 422.

**669. 1. Wager Necessary.** — See *State v. Brooks*, 94 Mo. App. 57, holding that evidence of playing poker with chips, without any showing that the chips represented money, was not sufficient to support a conviction.

3. *Russell v. State*, 44 Tex. Crim. 465; *Hankins v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 191; *Williams v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 192.

**5. To Constitute a Bet There Must Be a Mutual Risk** — Sales — Payment Contingent on Event. — See *Cullinan v. Hosmer*, 100 N. Y. App. Div. 148.

**Contrary View** — Slot Machine. — *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, applying *Horner v. U. S.*, 147 U. S. 449. See, however, *Cullinan v. Hosmer*, 100 N. Y. App. Div. 148. See further the titles GAMBLING CONTRACTS, 601. 1; LOTTERIES, 592. 3.

**671. 2. Loser to Pay Rent of Table Not Gaming.** — *Steuer v. Royal Cigar Co.*, 9 Ohio Cir. Dec. 456, 17 Ohio Cir. Ct. 82.

3. **Loser to Pay Price of Game Is Gaming.** — *Mayo v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 515.

6. **Purse Made up Entirely from Entrance Fees.** — *Blades v. State*, 43 Tex. Crim. 409. And see the title GAMBLING CONTRACTS, 614. 4 et seq.

**672. 1. Participation in the Wager.** — Compare *In re Rowland*, 8 Idaho 595 (express statutory provision).

3. **Where Made.** — *McQuesten v. Steinmetz*, (N. H. 1904) 58 Atl. Rep. 876.

In Tennessee. — See *Debardelaben v. State*, 99 Tenn. 649.

**Bets Made by Agents of Foreign Principals.** — *Jones v. State*, 120 Ga. 185; *Ames v. Kirby*, 71 N. J. L. 442; *State v. Thompson*, 8 Ohio Dec. 682 (pool selling).

**Bucket-shop Transactions by Agent of Foreign Principal.** — See *State v. Logan*, 84 Mo. App. 584; *State v. Kentner*, 178 Mo. 487; *Scales v. State*, 46 Tex. Crim. 296.

**Offer and Acceptance Are Necessary** to constitute a wager. *Windsor v. State*, 46 Tex. Crim. 140.

**The Fact that the Stakeholder Resides in Another State** and the stakes are sent to him there is immaterial if the wager is actually made within the state. *Brand v. Com.*, 110 Ky. 980.

4. *Borders v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1102.

5. *Borders v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1102.

6. **Private Residence.** — See *Harper v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 217.

**Outside of Residence.** — Gaming outside of a private residence and within ten feet thereof is "at a private residence," within the Texas stat-



- 673.** 3. In Hotel, Tavern, or Inn — *a.* IN GENERAL. — See note 1.
- 674.** 5. In Outhouse Where People Resort — *b.* WHAT IS AN OUTHOUSE. — See note 2.
- 676.** 8. In House or Place Where Spirituous Liquors Are Retailled, Sold, or Given Away — *b.* CONNECTION BETWEEN PLACE OF SALE AND OTHER PORTIONS OF BUILDING. — See note 3.
- 677.** 9. In Public Houses — *a.* IN GENERAL. — See note 3.  
Public Right of Access Essential. — See note 6.
- 678.** *b.* SEPARATE PARTS OF SAME BUILDING. — See note 1.  
*c.* BUSINESS HOUSES AFTER BUSINESS HOURS. — See note 3.
- 679.** 10. In Public Places — *a.* IN GENERAL — The Term "Public Place." — See note 1.  
*b.* PUBLIC RIGHT OF ACCESS TO PLACE. — See note 2.  
Private Assemblage. — See note 3.
- 680.** *c.* PLACES OF BUSINESS. — See note 2.  
*d.* PLACES MADE PUBLIC BECAUSE WITHIN VIEW OF OTHER PLACES. — See notes 3, 4.  
*e.* SEPARATE PARTS OF SAME BUILDING. — See note 5.
- 681.** *g.* "OTHER PUBLIC PLACES." — See note 2.
- V. PARTICULAR GAMES PROHIBITED — 1. In General.** — See note 3.
- 682.** Horse Racing. — See note 2.  
2. Games of Chance. — See note 4.

ute of 1901. *Hipp v. State*, 45 Tex. Crim. 200.

An Outhouse has been held not to be a part of the private residence though situated on the same lot. *Huse v. State*, 46 Tex. Crim. 585.

A Tent May Constitute a Private Residence, within a statute excepting gaming at a private residence. *Hipp v. State*, 45 Tex. Crim. 200.

Actual Occupation as a Private Residence is necessary to give such character to a house. *Williams v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1155.

Private Residence Commonly Resorted to for the Purpose of Gaming. — See *Floekinger v. State*, 45 Tex. Crim. 199.

**673.** 1. *Wilkinson v. State*, 44 Tex. Crim. 455.

**674.** 2. What Constitutes an Outhouse. — *Stuart v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 554; *Huse v. State*, 46 Tex. Crim. 585.

**676.** 3. Prohibition Extended to Building as an Entirety. — *Kicker v. State*, 133 Ala. 193; *Harvell v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 622.

A Back Yard Connected with a Saloon is within the Alabama statute prohibiting gaming at retailing liquor stores. *James v. State*, 133 Ala. 208.

**677.** 3. Questions of Law and Fact. — Compare *Lewis v. State*, 140 Ala. 126.

6. Jail House. — *Lewis v. State*, 140 Ala. 126.

**678.** 1. Separate Parts of Same Building. — *State v. Kyer*, 55 W. Va. 46.

3. After Business Hours. — Compare *Green v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 481.

**679.** 1. Places Made Public by the Assemblage of People. — *Dennis v. State*, 139 Ala. 109; *Crutcher v. State*, 39 Tex. Crim. 233.

A Common Gaming House is a public place. *Lafferty v. State*, 41 Tex. Crim. 606; *Thorp v. State*, 42 Tex. Crim. 231. See further the title GAMING HOUSES, **699.** 2, 3, 4.

2. Bedroom Used as Common Gaming Room. — *Cartledge v. State*, 132 Ala. 17.

3. Private Assemblage. — *White v. State*, 39 Tex. Crim. 269; *Harper v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 217.

**680.** 2. After Business Hours. — *Green v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 481.

3. A Place in a Private Yard forty feet from and open to observation from a public highway is as a matter of law a public place. *Lee v. State*, 136 Ala. 31. See also *Ford v. State*, 123 Ala. 81 (rear of house).

4. Secluded Outdoor Places. — A pasture is not *per se* a public place. *Russ v. State*, 132 Ala. 20.

5. Separate Parts of Same Building. — See *Osborn v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 592.

**681.** 2. Other Public Places. — *State v. Kyer*, 55 W. Va. 46.

3. "Game" — Broad Signification. — *Desgain v. Wessner*, 161 Ind. 206, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

Craps. — See *Williams v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 987.

Crack-loo. — Betting at crack-loo is prohibited by Pen. Code Tex., art. 388. *Donathan v. State*, 43 Tex. Crim. 427.

**682.** 2. Horse Racing Held to Be a Game. — *Miller v. U. S.*, 6 App. Cas. (D. C.) 6; *Thrower v. State*, 117 Ga. 756, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682; *McQuستن v. Steinmetz*, (N. H. 1904) 58 Atl. Rep. 876. And see the title HORSE RACING.

4. All Games of Cards. — *State v. Maupin*, 71 Mo. App. 54.

Horse Race. — *Lester v. Ousted*, 85 L. T. N. S. 487. See, however, *Miller v. U. S.*, 6 App. Cas. (D. C.) 6.

Black Jack is a game "the chances of which are not alike favorable to all the players, including among the players the banker." Reg.

**683.** 4. Gaming Tables, Banks, and Banking Games — Banking Games. — See note 4.

**684.** 6. Gambling Devices — *a.* IN GENERAL. — See notes 3, 4.

**685.** 7. Substitutes for Prohibited Game. — See note 5.

**686.** 8. Dealing in Futures. — See note 3.

9. Licensed Games. — See note 5.

**688.** VI. BETTING ON ELECTIONS — 3. Statutory Prohibitions — The Character of the Wager. — See note 1.

VIII. COMMON GAMBLERS. — See note 5.

**689.** See note 1.

IX. ACCESSORIES AND ACCOMPLICES. — See note 3.

X. EVIDENCE — 1. Time of Offense. — See note 6.

**690.** 4. Proof of Other Acts of Gaming. — See note 3.

6. Sufficiency of Evidence. — See note 6.

**691.** See note 1.

XI. PUNISHMENT. — See notes 4, 6, 7, 9.

*v.* Petrie, 3 Can. Crim. Cas. (British Columbia) 439.

**683.** 4. Banking Games. — *Faucett v. State*, 46 Tex. Crim. 113. And see the title GAMING HOUSES, 706. 4.

*Faro* is a banking game. *State v. Behan*, 113 La. 754, following *State v. Markham*, 15 La. Ann. 498.

**684.** 3. A Slot Machine has been held to be a gambling device. *Lyman v. Kurtz*, 166 N. Y. 274.

4. Horse Race. — *Compare Miller v. U. S.*, 6 App. Cas. (D. C.) 6.

**685.** 5. Substitutes for Prohibited Game. — *Miller v. Com.*, (Ky. 1903) 77 S. W. Rep. 682, rehearing denied (Ky. 1904) 79 S. W. Rep. 250; *Christopher v. State*, 41 Tex. Crim. 235.

**686.** 3. Statutory Offense — Bona Fide Purchase for Future Delivery. — *State v. Clayton*, 138 N. Car. 732. See also *State v. McGinnis*, 138 N. Car. 724.

Interstate Commerce. — A state may prohibit persons, while residing therein, from entering into contracts in another state for the purchase or sale of commodities on margins without the intention of delivery. *State v. Clayton*, 138 N. Car. 732.

5. Betting at a Licensed Tenpin Alley. — *Hill v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 554; *Harris v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 565.

But the Texas Act of 1901 expressly punishes betting on games at a licensed tenpin alley. *Blades v. State*, 43 Tex. Crim. 409.

**688.** 1. Wager on Number of Votes. — See *Brand v. Com.*, 110 Ky. 980.

Result in One County or Precinct. — *Brand v. Com.*, 110 Ky. 980.

5. Common Gamblers. — *Bickel v. State*, 32 Ind. App. 656; *State v. Groves*, 21 R. I. 252.

**689.** 1. Visiting or Frequenting Gaming Houses. — *Roberts v. State*, 25 Ind. App. 366.

3. Broker Acting Without Scienter. — *Reg. v. Dowd*, 17 Quebec Super. Ct. 67.

Betting on Horse Race — Texas Statute. — An agent receiving money from his principal and sending it to another as a bet on a horse

race is not guilty of taking or accepting a bet on a horse race, under Acts Tex. 1903, p. 68, c. 50. *Windsor v. State*, 46 Tex. Crim. 140.

6. *Washington v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 341; *Young v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 767; *Williams v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1155.

**690.** 3. Proof of Other Acts of Gaming. — See *Washington v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 341. *Compare Dennis v. State*, 139 Ala. 109.

6. Reasonable Doubt. — See *Ford v. State*, 123 Ala. 81; *Russ v. State*, 138 Ala. 1; *Driver v. State*, 112 Ga. 229; *Arnold v. State*, 117 Ga. 706.

Evidence Held to Be Sufficient. — See *Aguar v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 464; *Simmons v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 586; *Harnage v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 512.

Evidence Held to Be Insufficient. — See *State v. Brooks*, 94 Mo. App. 57; *Berry v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 14.

**691.** 1. *Harmon v. State*, 120 Ga. 197; *Frost v. State*, 120 Ga. 311; *People v. McCue*, 178 N. Y. 579, affirmed 87 N. Y. App. Div. 72.

4. Gaming a Misdemeanor. — *In re Rowland*, 8 Idaho 595.

Different Punishments. — In case of bookmaking on horse races, a more severe punishment may be imposed on the bookmaker than on the persons betting with him. *Ex p. Hernan*, 45 Tex. Crim. 343.

6. Pool Selling — Different Punishments. — The Texas statute (Gen. Laws 28th Legislature, p. 68, c. 50) prohibiting pool selling and imposing a greater punishment on the pool seller than on the person who makes the bet with him is not unconstitutional as imposing different punishments for the same offense. *Hernan v. Texas*, 198 U. S. 579, affirming 45 Tex. Crim. 343.

7. Fine Imposed for Gaming. — *Borders v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1102.

Forfeiture of Amount Won to Commonwealth. — See *Gardner v. Ballard*, 114 Ky. 93.

9. Imprisonment to Enforce Fine. — *Fuller v. State*, 83 Miss. 30.

# GAMING HOUSES.

BY BRISCOE B. CLARK.

- 694.** I. IN GENERAL — 2. Intention to Create Offense. — See note 2.  
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- 695.** 5. Repeal of Statutes. — See note 2.  
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- 696.** 7. Effect of Tax and License. — See note 3.  
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- 697.** 2. A Misdemeanor at Common Law and by Statute. — See note 1.  
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- 698.** III. THE HOUSE OR PLACE — 1. In General. — See notes 1, 2, 3.  
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- 700.** IV. THE GAMING, AND THE GAMING TABLES, GAMING DEVICES, ETC. —  
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**694.** 2. Construction of Statutes. — See *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64; *Jones v. Territory*, 5 Okla. 536; *State v. Nease*, (Oregon 1905) 80 Pac. Rep. 897.

The Game Permitted must be within the provisions of the statute. *Meyers v. State*, 41 Tex. Crim. 508.

**4. General Words.** — The *Louisiana* statute which punishes "whoever shall keep a banking game or banking house at which money or anything representing money \* \* \* shall be bet or hazarded" is not invalid for indefiniteness. *State v. Hunter*, 106 La. 187.

**695.** 2. No Repeal When Statutes Are Not Inconsistent or Repugnant. — *Dardem v. State*, 44 Fla. 418.

**3. Effect of Municipal Charters and Ordinances.** — *Shreveport v. Schulsinger*, 113 La. 9; *State v. Grimes*, 74 Minn. 257; *Greenville v. Kemmis*, 58 S. Car. 427; *Ruston v. Perkins*, 114 La. 851.

**696.** 3. License Held to Legalize Gaming. — See *Shreveport v. Schulsinger*, 113 La. 9.

**7. Unauthorized License** — *State v. Nease*, (Oregon 1905) 80 Pac. Rep. 897; *Debardelaben v. State*, 99 Tenn. 649.

**8. Common Gaming House Defined.** — *State v. Grimes*, 74 Minn. 257; *Morgan v. State*, 42 Tex. Crim. 422.

**697.** 1. At Common Law. — *Thrower v. State*, 117 Ga. 753; *Com. v. Western Union Tel. Co.*, 112 Ky. 355, 99 Am. St. Rep. 299; *State v. Ackerman*, 62 N. J. L. 456; *People v. Stedeker*, 175 N. Y. 57, 17 N. Y. Crim. 326; *State v. Nease*, (Oregon 1905) 80 Pac. Rep. 897; *Woods v. Cottrell*, 55 W. Va. 481.

In *Louisiana* the keeping of a turf exchange for betting on horse races is not a crime, in the absence of statute prohibiting it. The constitutional provision that "gambling is a vice and the legislature shall pass laws to suppress it"

is not self-acting. *Shreveport v. Maloney*, 107 La. 193.

**6.** Private Gaming. — *State v. Carrick*, (Vt. 1905) 61 Atl. Rep. 35.

**698.** 1. Railroad Trains. — Permitting gaming on a railroad train is within Stat. Ky., § 1978, punishing one who suffers gaming "on premises in his occupation or under his control." *Louisville, etc., R. Co. v. Com.*, 112 Ky. 635.

**2. Private Dwelling Houses.** — *Morgan v. State*, 42 Tex. Crim. 422.

**3. Rooms.** — *Toll v. State*, 40 Fla. 169; *Com. v. Coleman*, 184 Mass. 198; *Greenville v. Kemmis*, 58 S. Car. 427.

**11. Single Room.** — *Greenville v. Kemmis*, 58 S. Car. 427; *Thorp v. State*, 42 Tex. Crim. 231.

**699.** 2. A Bookmaker's Booth at a Race Track is a place. *Miller v. U. S.*, 6 App. Cas. (D. C.) 6, citing with approval *Eastwood v. Miller*, L. R. 9 Q. B. 440.

**3. A Single Room** may be a "place" within a statute prohibiting any person to permit his place to be used for gaming. *Greenville v. Kemmis*, 58 S. Car. 427.

**4. Texas Statute — Public House.** — *Williams v. State*, 42 Tex. Crim. 368, overruling *Burke v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 659, *White v. State*, 39 Tex. Crim. 269, and *Nail v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 704, where inconsistent. See also *Mohan v. State*, 42 Tex. Crim. 410; *Morgan v. State*, 42 Tex. Crim. 422; *Lafferty v. State*, 41 Tex. Crim. 606; *Gerstenkorn v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 568.

**6. Permitting Gaming in Other Rooms.** — *Douthit v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 809.

**700.** 2. The Character of the Gaming Is Immaterial under the *Georgia* statute. *Thrower v.*

**700.** *c.* PLACE OF BETTING. — See note 7.

**701.** *d.* BILLIARDS AND BOWLING — If Kept for the Purpose of Gaming. — See note 4.

Statutory Prohibitions and Restrictions. — See note 8.

*e.* POOL ROOMS, BUCKET SHOPS, POLICY SHOPS, ETC. — (1) *Pool Rooms.* — See notes 9, 10.

**702.** (3) *Races, etc., in Another State or Country.* — See notes 2, 3.

**703.** (5) *Bucket Shops.* — See note 3.

(6) *Policy Shops.* — See note 5.

**704.** *h.* GAMES OF CHANCE OR SKILL — Distinction Between Games of Chance and Skill. — See note 4.

**705.** 2. Gaming Tables, Banks, and Other Devices — *b.* "GAMING TABLES" AND "BANKS" — (1) *In General.* — See note 8.

**706.** See note 1.

Banking Games. — See note 4.

**707.** (2) *Particular Tables and Games* — *Faro.* — See note 3.

The Game of "Craps." — See notes 12, 13.

**708.** *c.* "GAMING DEVICES" — (1) *In General.* — See notes 2, 8.

**709.** Nickel-in-the-Slot Machine. — See note 5.

State, 117 Ga. 753. See also *State v. Morgan*, 133 N. Car. 743.

**700.** 7. Betting in Another State or Country. — *McQuesten v. Steinmetz*, (N. H. 1904) 58 Atl. Rep. 876.

**701.** 4. Nuisance if Kept for Purpose of Gaming. — *Mayo v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 515.

8. Prohibition Against Admitting Minors. — *Alexander v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 319.

9. Sale of Pools on Base Ball and Races. — *Thrower v. State*, 117 Ga. 753; *McQuesten v. Steinmetz*, (N. H. 1904) 58 Atl. Rep. 876; *State v. Nease*, (Oregon 1905) 80 Pac. Rep. 897.

10. Statutes Against Pool Rooms. — *State v. Burke*, 151 Mo. 136; *State v. Villines*, 107 Mo. App. 593; *People v. Levoy*, 72 N. Y. App. Div. 55; *People v. Corbalis*, 86 N. Y. App. Div. 531, 178 N. Y. 516.

Presence of Books or Apparatus. — Under the *New York* statute punishing the keeping of a room with books, papers, etc., for the purpose of recording bets or wagers, the presence of the books or apparatus is an essential ingredient of the offense. *People v. Stedeker*, 175 N. Y. 57.

Constitutional Law. — The *New York* racing law is not unconstitutional because of the great difference between the punishment for offenses when committed without the grounds of any racing association and that imposed for similar transactions on the racing ground. *People v. Stedeker*, 175 N. Y. 57; *People v. Fallon*, 152 N. Y. 1; *People v. Van De Carr*, 150 N. Y. 439; *People v. De Bragga*, 73 N. Y. App. Div. 579, appeal dismissed 176 N. Y. 557; *People v. Levoy*, 72 N. Y. App. Div. 55; *People v. Shan-non*, 87 N. Y. App. Div. 32.

**702.** 2. Betting on Races and Games in Another State. — *Thrower v. State*, 117 Ga. 753. See also *State v. Burke*, 151 Mo. 136.

3. Bets Made Out of the State. — Compare *Ames v. Kirby*, 71 N. J. L. 442.

**703.** 3. Bucket Shops Prohibited by Statute. — *Weare Commission Co. v. People*, 209 Ill. 528; *State v. Kentner*, 178 Mo. 487; *State v. Logan*,

84 Mo. App. 584; *Scales v. State*, 46 Tex. Crim. 296; *State v. Corcoran*, 73 Vt. 404.

5. Express Statutes Against Policy. — See *People v. Flynn*, 72 N. Y. App. Div. 67.

Statute Prohibiting Possession of Policy Papers. — See *People v. Adams*, 85 N. Y. App. Div. 390, affirmed 176 N. Y. 351, 98 Am. St. Rep. 675.

**704.** 4. A Slot Machine, where the player runs the chance of gaining more or less than the value of his money in cigars, is prohibited. *State v. Woodman*, 26 Mont. 348.

**705.** 8. What Gaming Tables and Banks Are Within the Statutes — In Texas. — *Coleman v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 152.

A Slot Machine may be a gaming table. *State v. Gaughan*, 55 W. Va. 692.

**706.** 1. Broader Statutes. — See *Jones v. Territory*, 5 Okla. 536.

4. "Bank" and "Banker." — Compare *Dalton v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 25, explaining *Stearns v. State*, 21 Tex. 692.

Poker has been held not to be a banking game. *Gillen v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 48.

A Slot Machine has been held to be a bank game or device. *Christopher v. State*, 41 Tex. Crim. 235, applying *Stearnes v. State*, 21 Tex. 692.

**707.** 3. *Faro Bank.* — *Jones v. Territory*, 5 Okla. 536; *State v. Behan*, 113 La. 754.

12. "Craps." — *Cummings v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 395; *Campbell v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 396.

13. Table Specially Designed for Craps. — *Jones v. Territory*, 5 Okla. 536; *Mohan v. State*, 42 Tex. Crim. 410; *Faucett v. State*, 46 Tex. Crim. 113.

**708.** 2. Subsequently Invented Device. — A statute prohibiting the keeping on exhibition, etc., of any gambling device may include a device for gaming invented subsequent to the enactment of the statute. *Christopher v. State*, 41 Tex. Crim. 235.

8. Grand Raffle. — See *Dalton v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 25.

**709.** 5. Nickel-in-the-Slot Machine. — *Field-*

**710.** *d.* GENERAL WORDS — "OTHER" DEVICES OR GAMES. — See note 5.

**711.** *V.* THE SETTING UP, KEEPING, EXHIBITING, OR PERMITTING — **3.** "Exhibiting." — See note 5.

**712.** *4.* "Keeping." — See note 1.

*5.* "Permitting." — See notes 3, 4.

**714.** *10.* Purpose of Setting Up, Keeping, or Exhibiting — *a.* IN GENERAL. — See notes 4, 5.

**715.** *c.* KEEPING FOR GAIN OR REWARD, ETC. — (1) *At Common Law.* — See note 1.

(2) *Statutory Offenses.* — See note 4.

*Statutes Requiring Keeping, etc., for "Money," "Hire," "Gain," "Reward," Etc.* — See note 5.

*11. Necessity for Actual Gaming* — *b.* UNDER STATUTES AGAINST KEEPING OR EXHIBITING. — See notes 10, 11.

**716.** *c.* UNDER STATUTES AGAINST PERMITTING. — See note 1.

*d.* KEEPING PLACE "RESORTED TO." — See note 2.

*12. Duration or Frequency of Acts* — *Keeping.* — See note 4.

*ing v. Turner*, (1903) 1 K. B. 867; *Thompson v. Mason*, 90 L. T. N. S. 649; *State v. Howell*, 83 Mo. App. 198; *Christopher v. State*, 41 Tex. Crim. 235; *New Orleans v. Collins*, 52 La. Ann. 973; *Heeman v. State*, 9 Ohio Dec. 274; *State v. Gaughan*, 55 W. Va. 692.

**Sufficiency of Evidence to Show Use for Gaming.** — Evidence that a nickel was placed in the slot and a cigar received in return is insufficient. *Heeman v. State*, 9 Ohio Dec. 274, 6 Ohio N. P. 258.

**710. 5. Construction of Statutes — Ejusdem Generis.** — *Com. v. Schatzman*, (Ky. 1904) 82 S. W. Rep. 238.

A chuck-a-luck table and a crap table are within Rev. Stat. Mo. (1899), § 2194, punishing the keeping, etc., of "any table or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, or any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property." *State v. Rosenblatt*, 185 Mo. 114. See also *State v. Lockett*, 188 Mo. 415. A poker table, however, is not within the prohibition of the above statute. *State v. Etchman*, 184 Mo. 193.

**711. 5. Exhibiting Gaming Table, Bank, or Other Device.** — The dealer and manager of a gaming table is guilty of exhibiting it though he also participates in the game. *Coffee v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 820.

But one who participates in a game of craps on equal terms with the other players is not guilty as the keeper and exhibitor of a gaming table merely because he is the owner of the table on which the game is played, but is merely guilty of violating the gaming statute. *Coleman v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 152.

**712. 1. A Slot Machine**, though a mere automaton, may be the subject of being kept or exhibited for the purpose of gaming. *Christopher v. State*, 41 Tex. Crim. 235.

**3. Permitting Gaming.** — *Stuart v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 554.

**4. Knowledge and Acquiescence Essential.** — *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64; *Com. v. McCarty*, (Ky. 1903) 74 S. W. Rep.

1046. See also *Christ v. State*, 33 Ind. App. 488.

**714. 4. Purpose of Keeping, Exhibiting, Etc.** — See *State v. Ackerman*, 62 N. J. L. 456.

**5. Purpose Implied.** — Compare *Matter of Ah Cheung*, 136 Cal. 678.

**715. 1. Keeping House or Place for Lucre or Gain.** — See *Thorp v. State*, 42 Tex. Crim. 231; *State v. Carrick*, (Vt. 1905) 61 Atl. Rep. 35.

**4. Statutory Offenses.** — *Dalton v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 25.

**5. Deduction for Refreshments.** — A room resorted to for the purpose of playing the game of poker is not shown to be kept for gaming under the *Canada Criminal Code*, § 196 (a), by the mere proof that the proprietor, who participated in the game on equal terms with the others, was allowed by consent of the players, and not as a matter of right, nor as a condition on which the playing took place, to take small sums from the stakes on several occasions by way of reimbursement for refreshments provided by him to the players, where such sums are not shown to exceed the cost or value of the refreshments. *Reg. v. Saunders*, 3 Can. Crim. Cas. (Ont.) 495.

**10. Statutory Offenses.** — *Hart v. M'Creadie*, Sc. Ct. of Just. 2 F. 1; *Brogden v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 378; *Carroll v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 294.

**11. Statutes Expressly Declaring It Unnecessary.** — *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64.

**716. 1. Permitting or Suffering Gaming.** — *Com. v. McCarty*, (Ky. 1903) 74 S. W. Rep. 1046.

**2. Place to Which Persons Are "Accustomed to Resort."** — Under the *Kansas* statute prohibiting the keeping of a place to which persons are "accustomed to resort" for the purpose of gambling, an indictment charging that persons were "permitted and accustomed to resort" is not defective on the ground that the additional word "permitted" brings a new element into the offense, as the phrase "accustomed to resort" implies the permission of the keeper of the house. *State v. Williamson*, 58 Kan. 699.

**4. Statutory Offenses.** — See *Bryan v. State*, 120 Ga. 201.

- 718.** 14. Continuous Offenses — The Exhibition. — See note 2.  
 . 15. Particular Persons Liable — *b.* AIDERS AND ABETTORS. — See note 3.  
*c.* PRINCIPAL AND AGENT, AND MASTER AND SERVANT. — See note 5.  
**719.** *h.* CORPORATIONS. — See note 8.  
**720.** *j.* LESSORS AND LESSEES — (1) *Liability of Lessors.* — See notes 2, 5. Permitting or Suffering Gaming. — See notes 6, 8.  
**721.** Keeping by Lessor After Lease. — See note 4.  
**VI. ENGLISH STATUTES** — In General — Betting Houses. — See note 6.  
**722.** "Other Place." — See note 4.  
 "Persons Using" the Place. — See note 6.  
**723.** Opening, Keeping, or Using Place for Betting. — See note 3.  
 Issue of Coupons by Proprietor of Newspaper. — See note 7.  
 "Betting with Persons Resorting Thereto." — See note 9.  
**724.** Permitting or Suffering House to Be Used for Betting. — See notes 1, 3.  
 Opening, Keeping, or Using for Unlawful Gaming. — See note 4.  
**VII. EVIDENCE** — 2. Competency of Evidence. — See note 8.  
**725.** Conclusion or Opinion of Witness. — See note 2.

**718.** 2. Exhibiting Gaming Table or Other Device. — *Compare Oerter v. State*, 57 Neb. 135.  
 3. Furnishing Machine for Betting. — *Com. v. Pease*, 6 Lack. Leg. N. (Pa.) 213, 14 York Leg. Rec. (Pa.) 94 (slot machine).

The Purchaser of a Faro Bank is guilty of "assisting in conducting the business." *Derby v. Bloomfield*, 91 L. T. N. S. 99.

A Telegraph Company furnishing racing news to a gaming house has been held not to be liable. See the title TELEGRAPHS AND TELEPHONES, 1056. 5.

5. Liability of Clerks, Servants, and Agents. — *Bryan v. State*, 120 Ga. 201; *State v. Behan*, 113 La. 754; *State v. Ackerman*, 62 N. J. L. 456; *People v. Trainor*, 57 N. Y. App. Div. 422; *People v. Canepi*, 93 N. Y. App. Div. 379, reversed 181 N. Y. 398; *State v. Thompson*, 8 Ohio Dec. 682.

Bucket Shop — Liability of Agent of Foreign Principal. — See *Fullerton v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 534.

**719.** 8. Prosecution for Permitting. — *Louisville, etc., R. Co. v. Com.*, 112 Ky. 635, holding that the right of way of a railroad company is its "premises," and that in a prosecution for permitting gaming in a passenger car it is immaterial whether the car was moving or standing still, if it was in either case on the right of way.

**720.** 2. Liability of Lessors. — *State v. Fountain*, 1 Marv. (Del.) 532.

5. Statutes Punishing Renting for Purpose of Gambling. — *Rivers v. State*, 118 Ga. 42.

Texas Statute. — *Mohan v. State*, 42 Tex. Crim. 470; *Hodges v. State*, 44 Tex. Crim. 444.

6. Permitting or Suffering Gaming. — *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 456, 21 Ohio Cir. Ct. 740; *Rankin v. State*, 42 Tex. Crim. 1 (rented room).

8. Control of Premises Necessary. — *Compare Rankin v. State*, 42 Tex. Crim. 1.

**721.** 4. Keeping by Lessor — Effect of Previous Lease. — *Bryan v. State*, 120 Ga. 201.

6. Publishing Advertisement that Office Is Used for Coupon Competition. — See *Hawke v. Macken-*

*zie*, (1902) 2 K. B. 225; *Ashley v. Hawke*, 89 L. T. N. S. 538.

Sweepstakes on Horse Race. — The organizer of a sweepstakes on a horse race, the race to be subscribed for and drawn at his house, commits no offense within section 1 of the English Betting Act of 1853, because the subscriptions he receives are not money payable on the contingency of a horse race, but on the contingency of the drawing of the sweepstakes. *Reg. v. Hobbs*, (1898) 2 Q. B. 647.

**722.** 4. Any Definite Place. — *Brown v. Patch*, (1899) 1 Q. B. 892 (use of box and stall at race course with name of bookmaker thereon).

6. "Persons Using" Place. — *Compare Rex v. Corrie*, 68 J. P. 294; *Tromans v. Hodgkinson*, (1903) 1 K. B. 30; *Rex v. Deaville*, (1903) 1 K. B. 468.

**723.** 3. Actual Betting Is Not Necessary to render one guilty of keeping a house for the purpose of betting therein. *Hart v. McCreddie*, Sc. Ct. of Just. 2 F. 1.

7. Newspaper Competition — Coupons. — *Compare Hart v. Hay*, Sc. Ct. of Just. 2 F. 39; *Stoddart v. Hawke*, (1902) 1 K. B. 353, 50 W. R. 93; *Rex v. Stoddart*, (1901) 1 K. B. 177, 83 L. T. N. S. 538, distinguishing *Stoddart v. Sagar*, (1895) 2 Q. B. 474 and approving *Hart v. Hay*, 37 Sc. L. Rep. 652.

9. Resorting Must Be Physical. — *Stoddart v. Argus Printing Co.*, (1901) 2 K. B. 470.

**724.** 1. Belton v. Busby, (1899) 2 Q. B. 380; *Stoddart v. Hawke*, (1902) 1 K. B. 353; *Lennox v. Stoddart*, (1902) 2 K. B. 21; *MacKenzie v. Hawke*, (1902) 2 K. B. 216.

3. Betting in Bar of Beer House. — See *Tromans v. Hodgkinson*, (1903) 1 K. B. 30; *Rex v. Deaville*, (1903) 1 K. B. 468.

4. "Using" for Purpose of Betting. — See *Belton v. Busby*, (1899) 2 Q. B. 380.

8. Evidence of Possession of Gaming Devices by the defendant at the time of arrest is admissible. *State v. Harmon*, (Kan. 1904) 78 Pac. Rep. 805.

**725.** 2. Description and Identification of Game. — *Miller v. Com.*, (Ky. 1903) 77 S. W. Rep.

- 725.** Reputation of Defendant. — See note 8.  
**726.** Acts and Declarations of Frequenters. — See note 3.  
 Confessions and Admissions of Defendant. — See note 4.  
 Time of Keeping. — See note 5.  
 Evidence of Other Offenses. — See note 7.  
 3. Sufficiency of Evidence. — See notes 8, 9.  
**727.** Constitutionality of Statutory Provisions. — See note 8.  
**728.** VIII. QUESTIONS OF LAW AND FACT — Questions of Law. — See note 3.  
 Questions of Fact. — See notes 4, 5, 8.  
 IX. PUNISHMENT. — See note 9.  
**729.** Abatement of Nuisance. — See note 2.

### GARBAGE. — See note 6.

682, rehearing denied (Ky. 1904) 79 S. W. Rep. 250.

**725. 8. The Defendant's Control of the Premises.** — Crippen v. State, 46 Tex. Crim. 455.

**726. 3. Declarations in Defendant's Presence.** — People v. McCue, 87 N. Y. App. Div. 72, affirmed 178 N. Y. 579.

**4. Evidence that the Defendant's Name Was on the House** is admissible to show his control of the house. Crippen v. State, 46 Tex. Crim. 455.

**5. Time of Keeping.** — See People v. Shannon, 87 N. Y. App. Div. 32, 17 N. Y. Crim. 532.

**7. Evidence of Other Offenses Not Admissible.** — Compare State v. Behan, 113 La. 701.

Evidence that the defendant was in the possession of gaming devices at the time of his arrest on warrant is not objectionable on the ground that it tends to prove the commission of an offense subsequent to that charged in the warrant. State v. Harmon, (Kan. 1904) 78 Pac. Rep. 805.

**8. Reasonable Doubt.** — Louisville, etc., R. Co. v. Com., 112 Ky. 635; State v. Ackerman, 62 N. J. L. 456.

**Evidence Held to Be Sufficient.** — State v. Logan, 84 Mo. App. 584 (bucket shop); People v. Trainor, 57 N. Y. App. Div. 422, 15 N. Y. Crim. 333; People v. McCue, 87 N. Y. App. Div. 72, affirmed 178 N. Y. 579, 17 N. Y. Crim. 534 (pool-selling); People v. Canepi, 93 N. Y. App. Div. 379, reversed 181 N. Y. 398 (pool-selling); Thorp v. State, 42 Tex. Crim. 231; Williams v. State, 42 Tex. Crim. 368; Morgan v. State, 42 Tex. Crim. 422; Meeks v. State, (Tex. Crim. 1903) 74 S. W. Rep. 910.

**Evidence Held to Be Insufficient.** — People v. Shannon, 87 N. Y. App. Div. 32 (pool room); Blum v. State, (Tex. Crim. 1898) 47 S. W. Rep. 1002.

**Effect of Finding Gaming Implements in Room.** — See Richardson v. State, 41 Fla. 303.

**Uncorroborated Testimony of a Police Officer** may be sufficient. People v. Levoy, 72 N. Y. App. Div. 55.

**Question for Jury.** — See Clark v. State, (Tex. Crim. 1904) 80 S. W. Rep. 617.

**Variance in Description of House.** — See O'Leary v. People, 188 Ill. 226, affirmed 88 Ill. App. 60.

**9. Circumstantial Evidence.** — Roberts v. State,

25 Ind. App. 372, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 726; Neeld v. State, 25 Ind. App. 603.

**727. 9. Statutory Provisions as to Evidence — Constitutionality.** — People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675, 17 N. Y. Crim. 558, affirming 85 N. Y. App. Div. 390.

**A Statute Making Possession of Policy Papers Prima Facie Evidence of Guilt** is constitutional. People v. Flynn, 72 N. Y. App. Div. 67.

**Privilege of Witness — Incriminating Testimony.** — A witness in a gambling prosecution cannot be compelled to give testimony which may tend to incriminate him, and a statute providing merely that the testimony of a witness in such proceedings shall not be used against him does not afford sufficient protection to prevent him from claiming his privilege. People v. O'Brien, 81 N. Y. App. Div. 51, affirmed 176 N. Y. 253, reversing People v. Wyatt, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 456, and declaring unconstitutional Pen. Code N. Y., § 342, as it existed prior to the enactment of Laws N. Y. 1904, c. 649.

**728. 3. Gaming Tables or Devices.** — Rex v. Fortier, 7 Can. Crim. Cas. 422, 13 Quebec K. B. 312, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728, and supporting the whole text paragraph.

**4. Questions of Fact.** — Rex v. Fortier, 7 Can. Crim. Cas. 422, 13 Quebec K. B. 312, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

**5. Whether Defendant Was Keeper of the House.** — Rex v. Fortier, 7 Can. Crim. Cas. 422, 13 Quebec K. B. 312, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

**8. Purpose of Gaming.** — Rex v. Fortier, 7 Can. Crim. Cas. 422, 13 Quebec K. B. 312, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

**Game of Skill or Chance.** — Rex v. Fortier, 7 Can. Crim. Cas. 422, 13 Quebec K. B. 312, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

**9. Punishment — Common-law Offense.** — Greenville v. Kemmis, 58 S. Car. 427.

**729. 2. Abatement of Nuisance.** — Lang v. Merwin, 99 Me. 486, 105 Am. St. Rep. 293.

**6. Municipal Ordinances.** — Grand Rapids v. De Vries, 123 Mich. 570; Iler v. Ross, 64 Neb. 710.

# GARNISHMENT.

By B. B. CLARK.

**739. II. ORIGIN OF GARNISHMENT — A Statutory Proceeding — United States.** — See note 11.

**740.** Custom of London. — See note 5.

**741. III. GENERAL NATURE, OBJECT, AND OPERATION OF PROCESS — 1. Auxiliary Remedy.** — See note 1.

Removal of Causes to Federal Courts. — See note 2.

**742. 2. Purely Legal Remedy.** — See notes 1, 2.

**3. Whether in Rem or in Personam.** — See note 3.

As Regards Defendant. — See note 5.

**743.** As Regards Garnishee. — See note 2.

**745. 6. Operation and Effect — 6. SECURITIES FOR INDEBTEDNESS OF GARNISHEE.** — See note 4.

**746. IV. GENERAL RULES FOR CONSTRUCTION OF GARNISHMENT STATUTES — Liberal Construction of Statutes.** — See note 1.

**739. 11. Exists in United States Essentially as a Statutory Remedy — Alabama.** — Henderson v. Hall, 134 Ala. 455.

*Florida.* — Duval County v. Charleston Lumber, etc., Co., 45 Fla. 256.

*Georgia.* — Davis v. Millen, 111 Ga. 451.

*Illinois.* — Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 395, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739; Arnold v. Hunt, 81 Ill. App. 430; Farnum v. North Chicago Safety Deposit Vault Co., 97 Ill. App. 439.

*Kansas.* — Swofford Bros. Dry-Goods Co. v. John S. Brittain Dry-Goods Co., 9 Kan. App. 1.

*Maine.* — Quimby v. Hewey, 92 Me. 129.

*Nebraska.* — Jeary v. American Exch. Bank, (Neb. 1902) 89 N. W. Rep. 771.

*Rhode Island.* — Leonhard v. John Hope, etc., Engraving, etc., Co., 21 R. I. 449.

*West Virginia.* — Pennsylvania R. Co. v. Rogers, 52 W. Va. 450.

*Wisconsin.* — Smith, etc., Co. v. Mutual F. Ins. Co., 110 Wis. 602.

*Indian Territory — Provisions of Arkansas Statute Prevail.* — Pace v. J. S. Merrill Drug Co., 2 Indian Ter. 218.

**740. 5. Remedy by Garnishment Based on Attachment under Custom of London.** — Chicago, etc., R. Co. v. Sturm, 174 U. S. 710; Tootle v. Coleman, (C. C. A.) 107 Fed. Rep. 41.

**741. 1. An Auxiliary Remedy.** — Logan v. Goodwin, (C. C. A.) 104 Fed. Rep. 490; Dent v. Dent, 118 Ga. 853; Willson v. Pennoyer, 93 Minn. 348; Bank of Commerce v. Franklin, 88 Ill. App. 198; Field v. Sammis, (N. Mex. 1903) 73 Pac. Rep. 617; Adamson v. Frazier, 40 Oregon 273; Townsend v. Fleming, (Tex. Civ. App. 1901) 64 S. W. Rep. 1006.

*Judicial Notice of Proceedings in Main Action.* — Jeffries v. Smith, 31 Tex. Civ. App. 582. See also Dinkins v. Crunden-Martin Woodenware Co., 99 Mo. App. 310.

*Fall with Main Action.* — Southern R. Co. v. Newton, 106 Ga. 566, 71 Am. St. Rep. 279; Cleveland v. Spencer, (Tex. Civ. App. 1899) 50 S. W. Rep. 405.

*Proceedings by Attachment and by Garnishment* though had in the same action are separate proceedings. Lefler v. Union Compress Co., 121 Ga. 40.

**2. Where the Principal Defendant in the Garnishment Proceedings is a Citizen of Another State,** the entire case may be removed to the federal court at the instance of the garnishee. Greevy v. Jacob Tome Institute, 132 Fed. Rep. 408.

**742. 1. A Legal Proceeding.** — Harmon v. Menke, 73 Mo. App. 635; Coleman v. American F. Ins. Co., 74 Mo. App. 663; Odessa Bank v. Barnett, 98 Mo. App. 477.

**2. In Nature of Equitable Actions.** — Reeves v. People, 78 Ill. App. 407; State Bank v. Thweatt, 111 Ill. App. 599; Harlow v. Bartlett, 96 Me. 294, 90 Am. St. Rep. 346.

**3. Garnishment Considered as Proceedings in Rem — United States.** — Tootle v. Coleman, (C. C. A.) 107 Fed. Rep. 41.

*Alabama.* — Louisville, etc., R. Co. v. Steiner, 128 Ala. 353.

*Connecticut.* — G. M. Williams Co. v. Mairs, 72 Conn. 430.

*Delaware.* — National Bank v. Furtick, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99.

*District of Columbia.* — Graham v. Fitch, 13 App. Cas. (D. C.) 569.

*Indiana.* — Chicago, etc., R. Co. v. Witt, 160 Ind. 681, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

*West Virginia.* — Pennsylvania R. Co. v. Rogers, 52 W. Va. 450.

**5. As Regards Defendant Not Appearing or Served with Process.** — Greevy v. Jacob Tome Institute, 132 Fed. Rep. 408; Goodwin v. Claytor, 137 N. Car. 224, 107 Am. St. Rep. 456; Glenn v. Boyd, 26 Pa. Super. Ct. 380.

**743. 2. As Regards Garnishee — In Personam.** — Graham v. Fitch, 13 App. Cas. (D. C.) 569; Keene v. Smith, 44 Oregon 525; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450.

**745. 4. Effect upon Securities for Indebtedness of Garnishee.** — Smith v. Butler, 72 Ark. 350.

**746. 1. Liberal Construction of Garnishment**



**746. Obvious Provisions Not to Be Departed From.** — See note 3.

Strict Construction. — See note 4.

**747. Intention of Legislature.** — See note 1.**V. UPON WHAT JUDGMENTS AND IN WHAT CAUSES GARNISHMENT****MAY BE HAD** — 1. Garnishments upon Judgments. — See notes 4, 5.**748. 2. Garnishment under Attachment.** — See note 2.**749. Statutory Provisions.** — See note 2.**750. VI. GROUNDS FOR ISSUANCE OF WRIT** — 1. In General. — See note 1.**2. Garnishment in Aid of Execution.** — See note 4.

Return of Execution. — See note 6.

**752. VII. AGAINST WHOM PROCEEDINGS MAY BE INSTITUTED.** — See notes 1, 2.**VIII. WHO MAY TAKE ADVANTAGE OF PROCESS.** — See note 4.**753. IX. AFFIDAVIT, BOND, SUMMONS OR WRIT, AND NOTICE TO DEFENDANT** — 1. In General. — See note 3.**2. Affidavit** — In General. — See note 4.Statutes. — *Ihorn v. Wallace*, 88 Ill. App. 562, following *Luton v. Hoehn*, 72 Ill. 81.**746. 3. Obvious Provisions of Law Not to Be Departed From.** — *Davis v. Millen*, 111 Ga. 451.**4. Strict Construction.** — *National Bank v. Furtick*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99; *Leonhard v. John Hope*, etc., Engraving, etc., Co., 21 R. I. 449.**747. 1. Garnishment on Tax Execution** — *Georgia*. — *Davis v. Millen*, 111 Ga. 451.**4. May Issue in Aid of Personal Decree for Payment of Money.** — *Ihorn v. Wallace*, 88 Ill. App. 562. See also *Westwater v. Ferguson*, 22 Pa. Co. Ct. 582.**A Judgment Against a Plaintiff** may be enforced by the judgment creditor by garnishment. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28.**When Judgment Final So as to Support Writ.** — *Raley v. Hancock*, (Tex. Civ. App. 1903) 77 S. W. Rep. 658.**The Fact that the Judgment Has Lost Its Lien** upon real estate is immaterial. *Bohan v. Reap*, 9 Kulp (Pa.) 217.**5. Effect of Arrest of Judgment Debtor.** — *Divoll v. Nichols*, 70 Vt. 537.**Dormant Judgment.** — As a judgment creditor is not entitled to an execution on a dormant judgment, a writ of garnishment in aid thereof cannot be issued. *Friedman v. Early Grocery Co.*, 22 Tex. Civ. App. 285.**748. 2. Cannot Be Extended to Cases Not Within Statute.** — *Pace v. J. S. Merrill Drug Co.*, 2 Indian Ter. 218; *E. L. Wilson Hardware Co. v. Anderson Knife*, etc., Co., 22 Tex. Civ. App. 229 (prior return of writ of attachment is not required).**Right Determined by Amount of Claim.** — *Insell v. Kennedy*, 120 Iowa 234.**749. 2. An Action by an Assignee in Insolvency to Recover a Fraudulent Preference** by the insolvent may be commenced by trustee process. *Rothschild v. Knight*, 176 Mass. 48.**750. 1. Statutory Grounds for Issuance of Writ Must Exist.** — *Hancock v. Gibson*, 72 Ark. 322; *Davis v. Millen*, 111 Ga. 451; *Davis v. Siegel*, 80 Ill. App. 278; *Arnold v. Hunt*, 81 Ill. App. 430; *Montreal Bank v. Taylor*, 86 Ill. App. 388; *Quimby v. Hewey*, 92 Me. 129.**4. Validity of Execution Essential.** — *Logan v. Goodwin*, (C. C. A.) 104 Fed. Rep. 490.**6. Return of Execution Required.** — *Bank of Commerce v. Franklin*, 88 Ill. App. 198; *Farnum v. North Chicago Safety Deposit Vault Co.*, 97 Ill. App. 439.**752. 1. Nonresidents.** — *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.**Foreign Corporation.** — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.**2. Convicts** may be proceeded against by garnishment proceedings in aid of execution. *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99.**4. Nonresidents.** — *Greevy v. Jacob Tome Institute*, 132 Fed. Rep. 408. Compare *Brown v. Pace*, (Tenn. Ch. 1898) 49 S. W. Rep. 355.**753. 3. Strict Compliance with Statutory Requirements** — *Arkansas*. — *H. B. Clafin Co. v. Bretzfelder*, 69 Ark. 271.*California*. — *Broadway Ins. Co. v. Wolters*, 128 Cal. 162.*Colorado*. — *Henkle v. Bi-Metallic Bank*, 13 Colo. App. 410.*Delaware*. — *National Bank v. Furtick*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99.*Georgia*. — *Harris v. Kittle*, 119 Ga. 29.*Illinois*. — *Farnum v. North Chicago Safety Deposit Vault Co.*, 97 Ill. App. 439.*Kansas*. — *Hutchinson v. Nelson*, 63 Kan. 327.*Maine*. — *Hathorn v. Robinson*, 98 Me. 334.*Michigan*. — *Dutcher v. Grand Rapids F. Ins. Co.*, 131 Mich. 671.*Nebraska*. — *Jeary v. American Exch. Bank*, (Neb. 1902) 89 N. W. Rep. 771.*Ohio*. — *Davis v. Lewis*, 8 Ohio Cir. Dec. 772, 16 Ohio Cir. Ct. 138.*Pennsylvania*. — *Seymour v. Fulton*, 9 Pa. Dist. 611; *Woodstown First Nat. Bank v. Trainer*, 209 Pa. St. 387.*Rhode Island*. — *Leonhard v. John Hope*, etc., Engraving, etc., Co., 21 R. I. 449.*Texas*. — *Ball v. Bennett*, 21 Tex. Civ. App. 399.*West Virginia*. — *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.*Canada*. — *Decelles v. Lafleur*, 5 Quebec Pr. 439.**4. Affidavit** — **Basis of Proceeding.** — *Dutcher v. Grand Rapids F. Ins. Co.*, 131 Mich. 671; *Heller v. People's Sav. Bank*, (Mich. 1904) 101 N. W. Rep. 226.**Affidavit Satisfies Requirement for "Written**

- 754.** By Whom to Be Made. — See notes 1, 2.  
 Contents of Affidavit. — See notes 3, 4.  
 3. Bond. — See note 7.
- 755.** See note 1.  
 4. Writ or Summons — Nature of Writ. — See note 2.  
 From What Court Issued. — See note 4.  
 The Time of Issuance. — See note 5.  
 Form and Requisites of Writ or Summons. — See note 6.  
 The Name of the Garnishee. — See note 7.  
 The Name of the Principal Defendant. — See note 8.
- 756.** Description of Property or Indebtedness. — See notes 1, 2.

Application." — *Sullivan v. King*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1048.

Slight Defects in Affidavit May Be Waived by Garnishee. — *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99.

Amendment of Affidavit. — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Sachs v. Norn*, (Mich. 1905) 102 N. W. Rep. 983.

Judgment Against Garnishee Not Void for Failure to File Affidavit. — *Hart v. O'Rourke*, 151 Ind. 205.

**754.** 1. Statutory Authority. — *E. L. Wilson Hardware Co. v. Anderson Knife, etc., Co.*, 22 Tex. Civ. App. 229.

2. Disclosing Agency. — *Jeary v. American Exch. Bank*, (Neb. 1902) 89 N. W. Rep. 771.

3. Necessary Averments — Statutory Regulation — *California*. — *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99.

*Georgia*. — *Harris v. Kittle*, 119 Ga. 29.

*Indiana*. — *Hart v. O'Rourke*, 151 Ind. 205.

*Kansas*. — *Walker v. Columbus State Bank*, 64 Kan. 884.

*Kentucky*. — *Donaldson v. Security Trust, etc., Co.*, (Ky. 1900) 56 S. W. Rep. 424.

*Nebraska*. — *Jeary v. American Exch. Bank*, (Neb. 1902) 89 N. W. Rep. 771.

*Texas*. — *Ball v. Bennett*, 21 Tex. Civ. App. 399.

*Canada*. — *De Sieyes v. Painchaud*, 3 Quebec Pr. 552, 20 Quebec Super. Ct. 230; *Michaud v. Clement*, 5 Quebec Pr. 25; *Drouin v. Brunelle*, 5 Quebec Pr. 371; *Harris v. Harris*, 8 British Columbia 307.

Stating Residence of Garnishee. — *Lash v. Morris County Bank*, (Tex. Civ. App. 1899) 54 S. W. Rep. 806.

4. Amount or Character of Claim. — *Sullivan v. King*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1048. Compare *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187.

7. Bond Required. — *Lash v. Morris County Bank*, (Tex. Civ. App. 1899) 54 S. W. Rep. 806; *Lively v. Southern Bldg., etc., Assoc.*, 46 W. Va. 180.

For Whose Benefit Bond Is Given. — *Brunswick Bank, etc., Co. v. Delegal*, 122 Ga. 189.

Damages Recoverable on Bond. — Remote and speculative damages are not recoverable. *Fleming v. Gillespie*, 7 Okla. 430.

Liability on Bond. — *State v. McCullough*, 85 Mo. App. 68; *Harrington v. Gordon*, (Wash. 1905) 80 Pac. Rep. 187.

Irregularity in Proceedings held not to affect liability on bond. *Davis v. Bickel*, 25 Ind. App. 378.

Effect of Judgment Against Defendant. — *Fleming v. Gillespie*, 7 Okla. 430.

Oklahoma — Constitutionality of Statute. — *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.

**755.** 1. Waiver of Defects in Bond. — *Logan v. Goodwin*, (C. C. A.) 104 Fed. Rep. 490.

Amendment of Bond. — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

2. When to Be Made Returnable. — *Abeles v. Friedberg*, 84 Mo. App. 667.

4. Must Issue from Court Having Jurisdiction of Original Suit. — *Thompson v. King*, 173 Mass. 439; *Willson v. Pennoyer*, 93 Minn. 348. See also *Savings Bank v. Downs*, 74 Conn. 87.

Garnishment in Aid of a Judgment must issue from the court in which the judgment was rendered. *Townsend v. Fleming*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1006.

*Georgia*. — Writ in One County on Suit in Another. — *Carr v. Roney*, 118 Ga. 634.

Single Writ Embracing Two Actions. — *Morgan v. Latham*, 111 Ga. 835.

Officers Authorized to Issue Process. — In *Oklahoma*, the probate judge may issue the process in the absence of the district judge. *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.

5. Time of Issuance. — *Merrill v. Vaughan*, 118 Ala. 438.

6. Form and Substance of Writ and Summons. — *Work v. Waggoner*, 82 Miss. 591; *Phoenix Bridge Co. v. Street*, 9 Okla. 422; *Barr v. Warner*, 38 Oregon 109.

7. Stating Name of Garnishee. — *Winner v. Weems*, 77 Miss. 662; *Kittrell v. Perry Lumber Co.*, 107 Tenn. 148.

Naming the garnishee as the "Donohoe-Kelly Company" instead of the "Donohoe-Kelly Banking Company," its proper name, is not a fatal defect. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28.

Writ Against Garnishee in Representative Capacity. — *Fleming v. Gillespie*, 7 Okla. 430.

Any Number of Persons may be included as garnishees in the same writ. *Northwestern Fuel Co. v. Kofod*, 74 Minn. 448.

8. Stating Name of Principal Defendant. — *Tapp v. Dibrell*, 134 N. Car. 546.

*Idem* Sonans — "Welch" for "Welsh" held *idem sonans*. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28.

**756.** 1. Description of Property in Hands of Garnishee. — *Smith v. Butler*, 72 Ark. 350.

**756.** Service and Return. — See notes 4, 5.

5. Notice to Principal Defendant. — See note 8.

Notice Required by Statute. — See note 9.

**757.** X. PROPERTY SUBJECT TO GARNISHMENT — 1. In General. — See notes 1, 2.

**758.** 3. Credits — *a.* IN GENERAL. — See note 4.

*b.* CREDITS NOT PRESENTLY PAYABLE — (1) *In General.* — See note 5.

**759.** See note 3.

**760.** (2) *Form of Judgment.* — See note 3.

*c.* CLAIMS ARISING UNDER CONTRACTS NOT PAYABLE IN MONEY — (1) *In General.* — See note 4.

**761.** *d.* EQUITABLE CLAIMS — (1) *In General.* — See note 5.

**756.** 2. Description Held Sufficient. — *Barr v. Warner*, 38 Oregon 109.

4. Manner of Service — Strict Compliance with Statute Required. — *H. B. Claflin Co. v. Bretzfelder*, 69 Ark. 271; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99; *Holbrook v. Evansville*, etc., R. Co., 114 Ga. 1; *Faul v. Beucus*, 124 Mich. 25; *Reid v. Mercurio*, 91 Mo. App. 673; *Struemple v. Sausser*, 8 Pa. Dist. 53; *Leonhard v. John Hope*, etc., Engraving, etc., Co., 21 R. I. 449; *King v. McElroy*, 25 R. I. 222 (misnomer of insurance company served as garnishee by leaving writ with insurance commissioner).

Summons may be served by leaving the same at the usual place of residence of the garnishee. *Theison v. Brown*, 11 Okla. 118.

Service on a Legal Holiday is invalid. *Decker v. St. Louis*, etc., R. Co., 92 Mo. App. 50.

Service on Corporations as Garnishee. — *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113.

Who Authorized to Serve Writ. — *Coleman v. American F. Ins. Co.*, 74 Mo. App. 663.

Service by Private Individual upheld. *Russell v. Millett*, 20 Wash. 212.

Tender of Witness Fees. — *Townsend v. Seelig*, 113 Wis. 31.

Effect of Voluntary Appearance of the Garnishee. — *Hathorn v. Robinson*, 98 Me. 334.

5. Sufficiency of Return. — *Holbrook v. Evansville*, etc., R. Co., 114 Ga. 4; *Burnett v. Central of Georgia R. Co.*, 117 Ga. 521, 97 Am. St. Rep. 175; *Jones v. Bibb Brick Co.*, 120 Ga. 321; *Work v. Waggoner*, 82 Miss. 591; *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715; *Decker v. St. Louis*, etc., R. Co., 92 Mo. App. 50; *Kansas*, etc., Coal Co. v. *Adams*, 99 Mo. App. 474; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.

Conclusiveness of Return. — *McAnaney v. Quigley*, 105 Ill. App. 611; *Kemp v. Northern Trust Co.*, 108 Ill. App. 242.

Amendment of Return. — *Fleming v. Pringle*, 21 Tex. Civ. App. 225.

Failure to Return. — Where a writ is served before the time for its return, the failure of the officer to return the writ before the return day does not invalidate the service. *Guarantee Trust*, etc., Co. v. *Nebeker*, 68 N. J. L. 561.

The Return Is Not Conclusive upon the Garnishee as to the Time of service so as to defeat his defense of payment prior to service of the writ. *Blom-Collier Co. v. Martin*, 98 Mo. App. 596.

8. Personal Notice is not required. *Glenny v. Boyd*, 26 Pa. Super. Ct. 380.

Where the Defendant Is a Nonresident, notice to him may be by publication. *Holford v. Trewell*, 36 Wash. 654.

9. Notice to Principal Defendant Required by Statute. — *Georgia*, etc., R. Co. v. *Stollenwerck*, 122 Ala. 539; *Smith*, etc., Co. v. *Mutual F. Ins. Co.*, 110 Wis. 602.

Service of Copy of Declaration. — The *Massachusetts* statute (Stat. 1894, § 405) requires a copy of the declaration to be furnished to the defendant. *Bowles v. Palmer*, 180 Mass. 169.

A Clerical Error in Stating the Date of the Term of Court does not render the notice void. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

**757.** 1. Baltimore, etc., R. Co. v. *McDonald*, 112 Ill. App. 391.

French Spoliation Claims. — *Thurston v. Wilmer*, 94 Md. 455, 89 Am. St. Rep. 438.

2. Stakeholder on Wager. — Where a stakeholder in a wager transaction after notice from one of the parties to the transaction not to pay over his stake, does pay over the same, his liability to such party may be reached by garnishment. *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 81 Am. St. Rep. 275.

**758.** 4. Credits Subject to Attachment — Right of Defendant to Sue in Debt or Assumpsit. — *Jefferson County Sav. Bank v. Nathan*, 138 Ala. 342; *Bank of Commerce v. Franklin*, 88 Ill. App. 198.

That the Amount of the Claim Is Uncertain and will require an accounting does not prevent it from being reached by garnishment. *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625.

5. Claims Payable at Future Day Subject to Garnishment. — *Edmunds v. Edmunds*, (1904) P. 362; *Davis v. Siegel*, 80 Ill. App. 278; *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310; *Bell v. Philadelphia Binding*, etc., Co., 10 Pa. Super. Ct. 38.

**759.** 3. Contingent Claims Not Subject to Garnishment. — *Main v. McInnes*, 4 N. W. Ter. 517.

**760.** 3. Form of Judgment as to Debt Payable at Future Time. — *Bell v. Philadelphia Binding*, etc., Co., 10 Pa. Super. Ct. 38.

4. Alabama — Option to Take Commodities in Lieu of Money. — *Stephens v. Cox*, 124 Ala. 448.

**761.** 5. Equitable Claims Held Not Garnish-

**762.** (2) *Claims Arising Out of Trusts.* — See note 2.

Dry or Terminated Trusts. — See note 3.

**763.** *e.* CLAIMS FOR UNLIQUIDATED DAMAGES — (2) *Claims for Damages Arising Out of Torts.* — See note 2.

**764.** (3) *Claims for Damages Arising Out of Contracts* — (a) *In General.* — See note 4.

(b) *Demands Ascertainable from Terms of Contract.* — See note 5.

**765.** See note 1.

*f.* CONTINGENT CLAIMS — (1) *In General.* — See note 3.

**766.** (2) *Uncompleted Contracts.* — See note 1.

(3) *Unearned Salary.* — See note 3.

**767.** (5) *Agreement to Indemnify.* — See note 2.

(6) *Claims under Insurance Policies* — (a) *Fire Insurance — Before Proof of Loss.* — See note 3.

Option to Replace Property Burned. — See note 5.

(b) *Life Insurance.* — See note 7.

**768.** (9) *Indebtedness Recoverable by Defendant Only After Demand.* — See note 4.

**769.** (10) *Contingency Must Affect Ultimate Liability.* — See note 2.

able. — *Brimblecom v. O'Brien*, 69 N. H. 370. See, however, *Swofford Bros. Dry-Goods Co. v. John S. Brittain Dry-Goods Co.*, 9 Kan. App. 1; *Farmers' F. Ins. Co. v. Conrad*, 102 Wis. 387.

**Balance of Accounts Between Partners.** — Importers, etc., *Nat. Bank v. Lyons*, 195 Pa. St. 479.

**762. 2. Claims Arising Out of Unexecuted Trusts.** — *Farmers' Bank v. Ball*, 2 Penn. (Del.) 374; *Odessa Bank v. Barnett*, 98 Mo. App. 477; *Peninsular Sav. Bank v. Union Trust Co.*, 127 Mich. 355; *Ex p. Black*, 34 N. Bruns. 638. Compare *Fidelity Trust Co. v. New York Finance Co.*, 125 Fed. Rep. 275, 60 C. C. A. 189.

**3. Dry or Terminated Trusts.** — *Grieves v. Keane*, 23 R. I. 136.

**763. 2. Claims for Damages Arising Out of Torts Not Garnishable.** — See *Fafard v. Marsan*, 5 Quebec Pr. 438.

In *Cochrane v. McShane*, 6 Quebec Pr. 465, however, it was held that though an action for personal injuries is undoubtedly a right exclusively attached to the person aggrieved, still if such person chooses to institute suit to recover the same, the amount of the judgment obtained may be seized even *pendente lite*.

**764. 4. Unliquidated Damages for Breach of Contract Held Not Garnishable.** — *Smith v. Wallace*, 82 Ill. App. 145; *Wilde v. Mahaney*, 183 Mass. 455 (the fact that a verdict has been rendered on the claim does not change the rule). See also *Waples-Platter Grocery Co. v. Texas, etc. R. Co.*, 95 Tex. 486.

**Judgment — Effect of Appeal.** — *Waples-Platter Grocery Co. v. Texas, etc. R. Co.*, 95 Tex. 486.

**5. A Claim for Breach of a Covenant of Warranty may be reached by garnishment.** *Fleming v. Pringle*, 21 Tex. Civ. App. 225.

**765. 1. Insurance Money Before Adjustment.** — *Glens Falls Ins. Co. v. Hite*, 83 Ill. App. 549 (where insurer denies all liability); *Meridian Land, etc., Co. v. Ormond*, 82 Miss. 758 (*following* *Crescent Ins. Co. v. Moore*, 63 Miss. 419); *Reid v. Mercurio*, 91 Mo. App. 673; *Sexton v. Phoenix Ins. Co.*, 132 N. Car. 1; *Jagode v. Smalley*, 10 Pa. Super Ct. 320.

**3. Contingent Claims Not Garnishable.** — *Smith v. Gilbert*, 71 Conn. 149, 71 Am. St. Rep. 163; *Stevenson v. McFarland*, 162 Mo. 159; *State v. McCullough*, 85 Mo. App. 68; *Cowell v. May*, 26 Mont. 163; *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 765; *Evans v. Rector*, 107 Wis. 286; *Becker v. Becker*, 112 Wis. 24.

**766. 1. Uncompleted Entire Contracts.** — *Streeter v. Gleason*, 120 Iowa 703; *Simmons Hardware Co. v. Baker*, (Mich. 1905) 103 N. W. Rep. 529; *Chamberlin-Hunt Academy v. Port Gibson Brick, etc., Co.*, 80 Miss. 517; *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 359; *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766; *Mundt v. Shabow*, 120 Wis. 303. See, however, *Lamothe v. Piche*, 5 Quebec Pr. 180.

**3. Unearned Salary.** — *Davis v. Siegel*, 80 Ill. App. 278; *Main v. McInnes*, 4 N. W. Rep. 517. See also *Bailey v. Pennsylvania R. Co.*, 70 N. J. L. 308.

**767. 2. After Damification.** — *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 10 Detroit Leg. N. 744 (employer's liability insurance).

**3. Claims under Insurance Policies — Not Subject to Garnishment Before Proof of Loss.** — *Lake of Woods Milling Co. v. Collin*, 13 Manitoba 154.

**Employer's Liability Insurance.** — The insurer is summonable as garnishee at the instance of one recovering judgment against the employer. *Fritchie v. Miller's Pennsylvania Extract Co.*, 197 Pa. St. 401.

**5. Option to Replace Property Destroyed.** — *Lake of Woods Milling Co. v. Collin*, 13 Manitoba 154.

**7. Tontine Policy.** — *Columbia Bank v. Equitable L. Assur. Soc.*, 79 N. Y. App. Div. 601.

**768. 4. Indebtedness Recoverable Only After Demand Not Contingent on That Account.** — See *Ellison v. Straw*, 119 Wis. 502.

**769. 2. Contingency Must Affect Ultimate Liability.** — *Barry v. Warner*, 38 Oregon 109.

- 769.** Contingency as to Amount. — See note 3.
- 770.** Contingency as to Mode of Payment. — See note 1.
- g.* INDEBTEDNESS EVIDENCED BY NEGOTIABLE PAPER — (1) *Before Maturity* — (a) *In General*. — See note 2.
- 771.** (b) Garnishment Subject to Rights of Subsequent Indorsees. — See note 3.
- 772.** See note 1.
- (c) Express Statutory Enactments — Negotiable Instruments Exempted from Process of Garnishment by Statute. — See note 3.
- Negotiable Instruments Subjected to Garnishment by Statute. — See note 4.
- 773.** (d) Negotiable Paper Effectually Controlled by Maker. — See note 1.
- 774.** (3) *Indemnification of Maker of Negotiable Paper*. — See note 5.
- 775.** *h.* INDEBTEDNESS UPON WHICH ACTIONS ARE PENDING — (1) *New England Rule* — Qualification. — See note 3.
- (2) *General Rule*. — See note 4.
- 776.** See note 1.
- (3) *Garnishment Proceedings and Action Pending Must Be Before Same Court*. — See note 2.
- 777.** *i.* INDEBTEDNESS ON WHICH JUDGMENT HAS BEEN RECOVERED — (1) *In General*. — See note 3.
- 778.** (2) *Judgment in Different Jurisdiction or Court*. — See note 1.
- 779.** *j.* STOCKHOLDER'S LIABILITY ON SUBSCRIPTIONS — (1) *In General* — Subscriptions Uncalled For. — See note 1.

**769.** 3. Contingency Affecting Amount Only. — Weeter's Estate, 21 Pa. Super. Ct. 241.

**770.** 1. Rights under Tontine Insurance Policy. — In *Ellison v. Straw*, 119 Wis. 502, the court was of the opinion that the fact that the tontine policy conferred upon the insured the option to apply payments in satisfaction of insurance for a future period, or to receive the accumulations in cash, did not, after the right to demand accumulations in cash had accrued, render the claim against the insurance company contingent prior to the exercise of the option to demand payment in cash so as to render such claim not subject to garnishment.

2. Garnishee Not Chargeable Before Maturity. — *Commercial State Bank v. Rowley*, (Neb. 1902) 89 N. W. Rep. 765; *Hutcheson v. King*, (Tex. Civ. App. 1904) 83 S. W. Rep. 215.

**771.** 3. Garnishment Subject to Rights of Subsequent Indorsee Before Maturity. — *Bell v. Philadelphia Binding, etc., Co.*, 10 Pa. Super. Ct. 38.

**772.** 1. Proof of Ownership by Defendant Essential. — *Brown v. Fisher*, (Ind. App. 1905) 74 N. E. Rep. 632; *Bell v. Philadelphia Binding, etc., Co.*, 10 Pa. Super. Ct. 38.

3. Statutory Exemptions. — *Auten v. Crahan*, 81 Ill. App. 502; *A. J. Harwi Hardware Co. v. Klippert*, 67 Kan. 743 (to prevent being charged, the garnishee must disclose that the note is negotiable); *Kimbrough v. Hornsby*, 113 Tenn. 605; *Hussa v. Sikorski*, 101 Wis. 131.

4. Statutes Expressly Subjecting Negotiable Instruments to Garnishment. — *Cox v. Severance*, 70 N. H. 86, 85 Am. St. Rep. 602.

*Vermont Statute*. — *Woodward v. Laporte*, 70 Vt. 399; *Hawley v. Hurd*, 72 Vt. 122 (is not unconstitutional on account of the exception in favor of state banks).

**773.** 1. Negotiable Paper Effectually Controlled by Maker. — Thus where the payee of

negotiable notes delivers them over to the maker to be sold by the latter for the benefit of the payee, such notes are effectively controlled by the maker within the meaning of the rule, and therefore the maker may be charged as garnishee with regard to the indebtedness evidenced by such notes. *Hutcheson v. King*, (Tex. Civ. App. 1904) 83 S. W. Rep. 215.

**774.** 5. Negotiable Warehouse Receipts. — Indemnification of the warehouseman will be required. *Roudebush v. Hollis*, 21 Pa. Co. Ct. 324.

**775.** 3. Effect of State of Proceedings. — *Wabash R. Co. v. Flannigan*, 95 Mo. App. 484, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775.

4. General Rule — Debt for Which Action Is Pending Held Subject to Garnishment. — *Barr v. Warner*, 38 Oregon 109; *Davis v. King*, (Tenn. Ch. 1899) 56 S. W. Rep. 1041.

**776.** 1. Remedy of Garnishee Against Double Liability. — *Barr v. Warner*, 38 Oregon 109.

2. Both Suits Must Be Before Same Court. — *Wabash R. Co. v. Tourville*, 179 U. S. 322, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775, 776; *Wabash R. Co. v. Flannigan*, 95 Mo. App. 477.

**777.** 3. Judgments Held Liable to Garnishment. — *Carpenter v. Phoenix Electric Light, etc., Co.*, 21 R. I. 145; *Davis v. King*, (Tenn. Ch. 1899) 56 S. W. Rep. 1041.

**778.** 1. Judgment Rendered in Another Jurisdiction Not Subject to Garnishment. — *Wabash R. Co. v. Tourville*, 179 U. S. 322, affirming 148 Mo. 614, and citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778; *Boyle v. Musser-Sauntry Land, etc., Co.*, 88 Minn. 456, 97 Am. St. Rep. 538.

**779.** 1. Subscriptions Payable on Call Not Garnishable Before Call. — *Jagode v. Smalley*, 10 Pa. Super. Ct. 320, following *Bunn's Appeal*, 105 Pa. St. 49.

**780.** (3) *Paid-up Stock Issued on Payment of Less than Par Value.* — See note 3.

*k.* INDEBTEDNESS TO MUNICIPAL CORPORATIONS — (2) *Public Revenues.* — See note 8.

**781.** *l.* INDEBTEDNESS TO DECEDENTS' ESTATES. — See note 1.

*m.* INDEBTEDNESS OWING FROM DECEDENTS' ESTATES, LEGACIES, AND DISTRIBUTIVE SHARES. — See notes 2, 3.

**783.** *n.* ASSUMPTION OF OR AGREEMENT BY GARNISHEE TO PAY DEBT OWING BY ANOTHER — (2) *Garnishment by Creditors of Original Debtor.* — See note 4.

**785.** *p.* INDEBTEDNESS TO WIFE — GARNISHMENT BY CREDITORS OF HUSBAND — *Wife's Separate Property.* — See note 2.

*r.* WAGES PAYABLE IN ADVANCE. — See note 4.

**786.** *u.* SALARIES OF PUBLIC OFFICERS. — See note 6.

**787.** 4. *Property, Goods, and Effects* — *b.* CHOSSES IN ACTION — (1) *General Rule.* — See note 4.

**788.** See notes 1, 2.

**789.** *Qualification.* — See note 1.

(2) *Minority Rule.* — See note 3.

**790.** *c.* PROPERTY TRANSFERRED IN FRAUD OF CREDITORS — (1) *In General* — *Minority Rule.* — See note 2.

*General Rule.* — See note 3.

**780.** 3. *Paid-up Share Issued on Payment of Less than Par Value.* — *Jagode v. Smalley*, 10 Pa. Super. Ct. 320.

8. *Revenues of Municipality Not Subject to Garnishment.* — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Sherman v. Shobe*, 94 Tex. 126, 86 Am. St. Rep. 825.

*Revenues of a Levee District* are subject to garnishment. *St. Francis Levee Dist. v. Bodkin*, 108 Tenn. 700.

**781.** 1. *Indebtedness to Decedents' Estates Not Garnishable.* — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Weekes v. Galveston Gas Co.*, 22 Tex. Civ. App. 245. See also *United Fireman's Ins. Co. v. McCartney*, 8 Pa. Dist. 110. But see *McDonald v. Sullivan*, 5 Ont. L. Rep. 87 (*citing Stevens v. Phelps*, L. R. 10 Ch. 417; *Nash v. Pease*, 47 L. J. Q. B. 766).

2. *Indebtedness Owning by Estate Held Subject to Garnishment.* — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374.

3. *Legacies Held Subject to Garnishment.* — See *Hunsberry v. Kratz*, 5 Ont. L. Rep. 635.

*Contingent Legacies.* — Where the right of a legatee to receive a legacy is dependent upon his surviving another person who was given a life interest in the property bequeathed, the interest of the legatee is not subject to garnishment. *Smith v. Gilbert*, 71 Conn. 149, 71 Am. St. Rep. 163.

**783.** 4. *Garnishment by Creditors of Promisee.* — *Citizens' Gen. Electric Co. v. American Electric Works*, (Ky. 1900) 55 S. W. Rep. 1078. See also *Wilson v. Hobbs*, 73 Mo. App. 656.

**785.** 2. *Wife's Separate Property Not Subject to Garnishment.* — *Badger Lumber Co. v. Stern*, 123 Wis. 618.

4. *Wages Payable in Advance.* — *Henry v. McNamara*, 124 Ala. 412; *Odum v. Macon*, etc., R. Co., 118 Ga. 792; *Davis v. Siegel*, 80 Ill. App. 278; *Wilson v. Fleming*, 1 Ont. L. Rep. 599. See also *White v. Sabiston*, 16 Quebec. Super. Ct. 597. But see *Dinkins v. Crun-*

*den-Martin Woodenware Co.*, 99 Mo. App. 310; *Gauthier v. Huot*, 16 Quebec Super. Ct. 242; *Payer v. Beauchamp*, 3 Quebec. Fr. 347.

**786.** 6. *Salaries of Public Officers Exempt.* — *Skewes v. Tennessee Coal, etc., Co.*, 124 Ala. 629; *Emes v. Fowler*, (N. Y. City Ct. Spec. T.) 43 Misc. (N. Y.) 603.

**787.** 4. *Garnishee Not Chargeable by Reason of His Possession of Choses in Action.* — *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200, 87 Am. St. Rep. 58, 137 Ala. 149.

**788.** 1. *Notes in Possession of Garnishee.* — See *Henkle v. Bi-Metallic Bank*, 13 Colo. App. 410.

2. *Certificates of Stock.* — *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644.

*Certificates of Stock of Foreign Corporation.* — *Simmons Hardware Co. v. Stokes*, 8 Ohio Cir. Dec. 776, 16 Ohio Cir. Ct. 145; *Weaver v. Manville*, 14 Montg. Co. Rep. (Pa.) 162.

**789.** 1. *Proceeds of Accounts Collected.* — *Cottingham v. Greely Barnham Grocery Co.*, 137 Ala. 149.

3. *Minority Rule.* — *Stortenbaker v. Pullman*, 112 Iowa 569; *Dunning v. Bailly*, 120 Iowa 729; *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520.

*Stock in Corporations.* — *Williamson v. Oklahoma Nat. Bank*, 7 Okla. 621.

*Drafts.* — *Weaver v. Irons*, 129 Mich. 368.

**790.** 2. *Property Transferred in Fraud of Creditors Held Not Subject to Garnishment.* — *Ex. p. Black*, 34 N. Bruns. 638.

3. *Property Transferred in Fraud of Creditors Held Subject to Garnishment* — *England.* — *Edmunds v. Edmunds*, (1904) P. 362.

*Canada.* — *Miller v. Thompson*, 19 Ont. Pr. 294.

*Alabama.* — *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200, 87 Am. St. Rep. 58, 137 Ala. 149; *Butler v. Feeder*, 130 Ala. 604.

*Indian Territory.* — *Pace v. J. S. Merrill Drug Co.*, 2 Indian Ter. 218.

**791.** See notes 1, 2.

**792.** See note 1.

**Fraudulent Transfers by Corporations.** — See note 4.

(2) *Statutory Provisions.* — See note 5.

**793.** *d. PROPERTY HELD UNDER PLEDGE, MORTGAGE, OR OTHER LIEN* — (1) *In General.* — See note 6.

**794.** See note 1.

**795.** (3) *Surplus After Sale.* — See note 1.

**796.** *e. STOCK IN CORPORATIONS* — (1) *Corporation as Garnishee.* — See note 2.

**Statutory Provisions.** — See note 3.

**797.** *f. PROPERTY CAPABLE OF DIRECT ATTACHMENT.* — See note 2.

5. *Plurality of Defendants — Indebtedness Owing to Part Only.* — See

note 4.

**798.** 6. *Indebtedness or Property in Which Others than Defendant Have Interests* — *a. INDEBTEDNESS.* — See note 3.

*Iowa.* — *Singer Piano Co. v. Barnard*, 113 Iowa 664 (mortgage fraudulent as to creditors); *Stortenbaker v. Pullman*, 112 Iowa 569; *Bolton v. Bailey*, (Iowa 1903) 93 N. W. Rep. 596.

*Michigan.* — *Sloman v. Goebel Brewing Co.*, 118 Mich. 442.

*Missouri.* — *Harmon v. Menke*, 73 Mo. App. 635; *Schawacker v. Luddington*, 83 Mo. App. 342; *Dodge v. Knapp*, 112 Mo. App. 513.

*New Hampshire.* — See *Dole v. Farwell*, 72 N. H. 183.

*Texas.* — *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187; *Ferguson-McKinney Dry Goods Co. v. City Nat. Bank*, 31 Tex. Civ. App. 238; *Houston Drug Co. v. Kirchhain*, (Tex. Civ. App. 1902) 71 S. W. Rep. 608.

*Washington.* — *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889.

**791. 1. Fraudulent Mortgages.** — *Whitehill v. Keen*, 79 Mo. App. 125, 2 Mo. App. Rep. 384; *Grainger v. Sutton First Nat. Bank*, 63 Neb. 46.

**2. Fraudulent Conveyances in Trust.** — *Ross v. Ashton*, 73 Mo. App. 254.

**792. 1. Fraudulent Assignments for Benefit of Creditors.** — *Hungerford v. Greengard*, 95 Mo. App. 653.

**4. Fraudulent Transfers by Corporations.** — *Singer Piano Co. v. Barnard*, 113 Iowa 664.

**5. Statutory Provisions.** — *Banner Cigar Mfg. Co. v. Treusch*, 125 Mich. 265.

**793. 6. Property Held under Mortgage or Other Lien Not Garnishable** — *Colorado.* — *Bragdon v. Bradt*, 16 Colo. App. 65.

*Massachusetts.* — *Van Camp Hardware, etc., Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296.

*Michigan.* — *Merchants' Nat. Bank v. Barrett*, 122 Mich. 650; *Gregg v. Durand First Nat. Bank*, 135 Mich. 285.

*Missouri.* — *Ross v. Ashton*, 73 Mo. App. 254; *Harmon v. Menke*, 73 Mo. App. 635.

*Pennsylvania.* — *Willis v. Curtze*, 203 Pa. St. 111.

*Wisconsin.* — *Grimsrud v. Linley*, 109 Wis. 632.

**Where a Pledge Is Invalid for Usury** the pledgee may be charged as garnishee. *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715.

**Bailee of Mortgagee.** — Where mortgaged chat-

tels are placed by the mortgagee in the hands of a bailee, the interest of the mortgagor therein cannot be reached by garnishment by summoning as garnishee the bailee. *Jenness v. Shrieves*, 188 Mass. 70.

**794. 1. Interest of Mortgagor in Mortgaged Chattels Held Subject to Garnishment.** — *Swoford Bros. Dry-Goods Co. v. John S. Brittain Dry-Goods Co.*, 9 Kan. App. 1, *approving* *McCown v. Russell*, 84 Wis. 122.

**When Sale of Pledge Not Ordered.** — *Hamilton v. San Antonio Foundry Co.*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1104.

**795. 1. Surplus After Satisfaction of Mortgage Debt.** — *Sands v. Berkley*, 88 Mo. App. 54.

**796. 2. Corporate Stock Not Subject to Garnishment.** — *Compare* *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832 (*approving* *Chesapeake, etc., R. Co. v. Paine*, 29 Gratt. (Va.) 502; *Union Nat. Bank v. Byram*, 131 Ill. 92).

**Stock in Foreign Corporations.** — *Ashley v. Quintard*, 90 Fed. Rep. 84.

**3. Statutory Provisions for Reaching Stock by Garnishment.** — *Mann v. Peer*, 4 Penn. (Del.) 279; *Farmers', etc., Nat. Bank v. Mosher*, (Neb. 1904) 100 N. W. Rep. 133; *Hardin v. White Swan Min., etc., Co.*, 26 Wash. 583.

**797. 2. Property Subject to Direct Attachment.** — *Westheimer v. Giller*, 84 Mo. App. 122; *Hauptman v. Richards*, 85 Mo. App. 188. But see *Wilson v. Harris*, 21 Mont. 374.

**4. Plurality of Defendants — Indebtedness Owing to Part Only.** — *American Cigar Co. v. Mayer*, 68 Ohio St. 623; *Ball v. Bennett*, 21 Tex. Civ. App. 399; *Jeffries v. Smith*, 31 Tex. Civ. App. 582.

*Contra*, *Chicago, etc., R. Co. v. Scott*, 174 Ill. 413 (*reversing* 67 Ill. App. 92, and *following* *Siegel v. Schueck*, 167 Ill. 522), *followed in* *Zemba v. Hasterlik*, 80 Ill. App. 141; *Arnold v. Hunt*, 81 Ill. App. 430. (These decisions are based on the ground that the defendants could not in their joint names maintain an action against the garnishee.)

**Partnership.** — *Contra*, *Commercial Nat. Bank v. Kirkwood*, 85 Ill. App. 235, *affirmed* 184 Ill. 139. And *compare* also *Excelsior Mill Co. v. Hanover*, 102 Wis. 309.

**798. 3. Indebtedness to Defendant and Another**

**798.** The Better Doctrine. — See note 4.

*c.* INDEBTEDNESS AND PROPERTY OF PARTNERSHIP — (1) *Indebtedness*. — See note 6.

**800.** 7. Garnishment of Credits or Property as Affected by Situs — *a.* PROPERTY IN HANDS OF GARNISHEE. — See note 2.

Property in Hands of Carrier. — See note 3.

Power to Compel Garnishee to Bring Chattels Within State. — See note 5.

**801.** Proceeds of Sale of Goods Without State. — See note 1.

*b.* DEBTS OWING BY GARNISHEE — (1) *In General*. — See note 2.

General Rule as to Situs of Debts Not Applicable to Garnishment Proceedings. —

See note 5.

**802.** (2) *Debts Owning by Resident Garnishee to Nonresident Defendant*. — See note 1.

**803.** Custom of London. — See note 1.

(3) *Debts Payable by Nonresidents to Nonresidents*. — See notes 2, 3.

**Held Garnishable — Minority Rule.** — *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798. See also *Geurinck v. Alcott*, 66 Ohio St. 94. But see *Macks v. Columbia Theatre Co.*, 86 Mo. App. 224; *Olcott v. Guerinck*, 10 Ohio Cir. Dec. 131, 19 Ohio Cir. Ct. 32.

**798. 4. Indebtedness to Defendant and Another Held Not Garnishable — Majority Rule.** — *Van Bianchi v. Wayne Circuit Judge*, 124 Mich. 462 (following *Markham v. Gehan*, 42 Mich. 74); *Badger Lumber Co. v. Stern*, 123 Wis. 618, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798.

**6. Indebtedness to Partners Not Garnishable on Claim Against Individual Partner.** — *Stone v. Dowling*, 119 Mich. 476; *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625.

The defendant cannot assert the defense that the indebtedness disclosed by the garnishee as owing the defendant was in fact owing to a firm of which he is a member. *Dancy v. Skidmore*, 21 Tex. Civ. App. 338.

**800. 2. Chattels Without State Cannot Be Reached by Garnishment.** — *Van Camp Hardware, etc., Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296; *Stine v. Greene*, 65 N. Y. App. Div. 221; *Balk v. Harris*, 124 N. Car. 467, 70 Am. St. Rep. 606, denying rehearing 122 N. Car. 64; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 78 Am. St. Rep. 743; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450. Compare *Barbour v. Boyce*, 9 Ohio Dec. 332, 6 Ohio N. P. 425.

**Stock of Foreign Corporation.** — *Ashley v. Quintard*, 90 Fed. Rep. 84.

**3. Rule Applied to Property in Hands of Common Carrier.** — *Pittsburgh, etc., R. Co. v. Cox*, (Ind. App. 1905) 73 N. E. Rep. 120.

**5. Power to Compel Garnishee to Bring Property Within State.** — *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 78 Am. St. Rep. 743.

**801. 1. Proceeds of Goods Sold Without State.** — *Pittsburg, etc., R. Co. v. Bartels*, 108 Ky. 216; *Sexton v. Phoenix Ins. Co.*, 132 N. Car. 1.

**2. Personal Jurisdiction Obtained over Defendant.** — *Kansas City, etc., R. Co. v. Parker*, 69 Ark. 401, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801.

**Debt Neither Contracted Nor Payable Within State.** — In *Louisville, etc., R. Co. v. Steiner*,

128 Ala. 353, it was held that though a nonresident defendant appeared in the suit, still an indebtedness owing from a foreign corporation to him could not be reached by garnishment proceedings where such indebtedness was neither contracted nor payable in the state.

**5. Situs of Debt Not Determined by Residence of Creditor.** — *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710; *Tootle v. Coleman*, (C. C. A.) 107 Fed. Rep. 41. But see *Central of Georgia R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382; *Padrosa v. High*, 122 Ga. 264; *R. A. Kelley Co. v. Garvin Mach. Co.*, 4 Ohio Dec. 374, 6 Ohio N. P. 350; *Opdyke v. Murphy Iron Works*, 10 Pa. Dist. 68.

**802. 1. Debts Owning by Residents to Nonresidents.** — *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710; *Tootle v. Coleman*, (C. C. A.) 107 Fed. Rep. 41; *Georgia, etc., R. Co. v. Stollenwerck*, 122 Ala. 539; *Johnson v. Foster*, 69 Ark. 617; *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688; *Rothschild v. Knight*, 176 Mass. 48; *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310; *Hawley v. Hurd*, 72 Vt. 122. See, however, *Central of Georgia R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382; *Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13; *Padrosa v. High*, 122 Ga. 264.

**Indebtedness Payable to Nonresident in Another State.** — In *Nebraska*, a debt owing from a resident of Nebraska to a nonresident and payable in the state of the nonresident's domicile cannot be reached by garnishment. *Bullard v. Chaffee*, 61 Neb. 83.

**What Not Debt Due to Nonresident.** — *Nashville Produce Co. v. Sewell*, 121 Ga. 278, distinguishing *Henry v. Lennox-Haldeman Co.*, 116 Ga. 9; *High v. Padrosa*, 119 Ga. 648.

**803. 1. Custom of London.** — *Opdyke v. Murphy Iron Works*, 10 Pa. Dist. 68.

**2. Debts Owning by Nonresident Garnishee to Nonresident Not Garnishable.** — *Louisville, etc., R. Co. v. Steiner*, 128 Ala. 353; *G. M. Williams Co. v. Mairs*, 72 Conn. 430; *Allen v. United Cigar Stores Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 500; *R. A. Kelley Co. v. Garvin Mach. Co.*, 4 Ohio Dec. 374, 6 Ohio N. P. 350; *Goodhue v. O'Leary*, 17 Quebec Super. Ct. 201.

**Debts Owning from Foreign Corporations Doing Business in the State.** — In *Strause v. Aetna F. Ins. Co.*, 126 N. Car. 223, it was held that an indebtedness owing from a foreign corporation



**804.** (4) *Place of Payment as Affecting Liability of Debt to Garnishment.* — See notes 1, 3, 4.

**805.** (5) *Debts Garnishable Wherever Garnishee Could Be Sued by Defendant.* — See note 1.

**8.** *Liability to Garnishment as Affected by Title.* — See notes 3, 4.

**806.** See note 1.

**807.** **10. Real Estate Vested in Garnishee.** — See note 2.

*Proceeds of Land Sold and Rents and Profits Received Therefrom.* — See note 3.

**11. Statutory Exemptions.** — See note 4.

**808.** **XI. WHO MAY BE SUMMONED AS GARNISHEE — 3. Husband or Wife of Defendant as Garnishee.** — See note 8.

**809.** **4. Plaintiff as Garnishee.** — See notes 1, 3.

doing business in a state to a nonresident of such state could not be reached by garnishment, if no personal jurisdiction is acquired over the principal defendant. In this case the court approved *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 71 Am. St. Rep. 492.

**803.** **3. Minority Rule.** — *Harris v. Balk*, 198 U. S. 215, reversing 130 N. Car. 381; *Greevy v. Jacob Tome Institute*, 132 Fed. Rep. 408; *E. L. Wilson Hardware Co. v. Anderson Knife, etc., Co.*, 22 Tex. Civ. App. 229; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.

**Debts Owning from Foreign Corporations Doing Business Within the State to nonresidents are garnishable.** *Pittsburg, etc., R. Co. v. Bartels*, 108 Ky. 216; *Kansas City, etc., R. Co. v. Parker*, 69 Ark. 401; *Goodwin v. Clayton*, 137 N. Car. 224, 107 Am. St. Rep. 456. But see *Opdyke v. Murphy Iron Works*, 10 Pa. Dist. 68. And compare also *Goodhue v. O'Leary*, 17 Quebec Super. Ct. 201 (foreign corporation doing business in Quebec).

**804.** **1. Debts Payable Without State.** — *Bullard v. Chaffee*, 61 Neb. 83; *Balk v. Harris*, 124 N. Car. 467, 70 Am. St. Rep. 606; *R. A. Kelley Co. v. Garvin Mach. Co.*, 4 Ohio Dec. 374, 6 Ohio N. P. 350; *Opdyke v. Murphy Iron Works*, 10 Pa. Dist. 68; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450; *Goodhue v. O'Leary*, 17 Quebec Super. Ct. 201.

**3. Debts Payable Out of State Held Garnishable.** — *Tootle v. Coleman*, (C. C. A.) 107 Fed. Rep. 41; *Hawley v. Hurd*, 72 Vt. 122.

**4.** See *Holt v. Ladd*, 71 Vt. 204.

**805.** **1. Debts Garnishable Wherever Garnishee Could Have Been Sued by Defendant.** — *Harris v. Balk*, 198 U. S. 215, reversing 130 N. Car. 381; *National F. Ins. Co. v. Ming*, (Ariz. 1900) 60 Pac. Rep. 720 (following *Chicago, etc., Co. v. Sturm*, 174 U. S. 710); *Kansas City, etc., R. Co. v. Parker*, 69 Ark. 401, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801 et seq. See also *Pittsburg, etc., R. Co. v. Bartels*, 108 Ky. 216; *Rothschild v. Knight*, 176 Mass. 48.

See, however, *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, disapproving *Harvey v. Great Northern R. Co.*, 50 Minn. 405, and holding that where all of the parties to an action brought in Minnesota, the plaintiff, the defendant, and the garnishee are nonresidents, none of them being within the state except the garnishee, who is served with summons while he is in the borders of the state temporarily upon business, the garnishee process must be discharged whenever the facts are brought to the

attention of the court. In this case the court quotes numerous extracts with approval from 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801-805. See also *Northwestern Life, etc., Co. v. Gippe*, 92 Minn. 36, following *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278.

**3. Property Must Belong to Defendant.** — *Hendrickson v. Trenton Nat. Bank*, 81 Mo. App. 332; *Stagl v. Holland Bldg. Co.*, 81 Mo. App. 620; *Jackson v. Coffman*, 110 Tenn. 271.

**Indebtedness Belonging to Plaintiff.** — *Develin v. Ford*, 19 Pa. Super. Ct. 381.

**Money Belonging to Another Deposited by Defendant in His Own Name.** — *Stephens v. Higgins*, 5 Quebec Pr. 1.

**Heirs' Title to Property of Estate.** — *Trueheart v. Savings, etc., Co.*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1003.

**4. Money Deposited by Agent as Agent.** — *Lindsay v. Continental Nat. Bank*, 82 Mo. App. 301; *Miller v. State*, (Tex. Civ. App. 1905) 84 S. W. Rep. 844.

**806.** **1. Deposit of Trust Funds.** — *Carthage First Nat. Bank v. Moss*, 80 Mo. App. 408.

**Mortuary Calls and Premiums from Persons Insured in Mutual Insurance Company.** — *Mutual Reserve Fund L. Assoc. v. Phelps*, 103 Fed. Rep. 515, reversed (C. C. A.) 112 Fed. Rep. 453.

**807.** **2. Fraudulent Grantee of Real Estate.** — *Genge v. Wachter*, 4 N. W. Ter. 122.

**3. Rents and Profits of Land Held in Trust and Proceeds if Sold.** — *Jolls v. Keegan*, 4 Penn. (Del.) 21.

**Equitable Conversion** by will of land into personality will enable a creditor of one entitled to a share in the proceeds of the land to reach such share by garnishment though there has been no actual conversion. *Weeter's Estate*, 21 Pa. Super. Ct. 241.

**4. Property Exempt from Execution or Attachment.** — The fact that the indebtedness owing from the garnishee was exempt does not render a judgment charging him void. *Hart v. O'Rourke*, 151 Ind. 205.

**808.** **8. Delaware.** — The Married Woman's Act of Delaware (14 Del. Laws, c. 550) does not authorize a husband to maintain a suit against his wife, and therefore a wife cannot be summoned as garnishee at the instance of a creditor of the husband. *Forbes v. Thompson*, 2 Penn. (Del.) 530.

**809.** **1. Rule that Plaintiff Cannot Summon Himself as Garnishee.** — *Ft. Scott First Nat. Bank v. Elliott*, 62 Kan. 764, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809.

**3. Plaintiff Surety on Obligation Sought to Be**

- 810.** 6. Common Carriers — *a.* PROPERTY IN TRANSIT. — See notes 2, 3.  
*b.* PROPERTY NOT IN TRANSIT. — See notes 5, 6.
- 811.** 7. Corporations — *a.* PRIVATE CORPORATIONS. — See note 2.  
*b.* PUBLIC CORPORATIONS — (1) *In General* — (*a*) *Minority Rule*. — See note 3.
- 812.** (b) *General Rule*. — See note 1.
- 813.** (2) *Application of Rule to Specific Corporations*. — See note 1.  
 (3) *Right of Corporation to Waive Exemption* — See note 4.
- 814.** See note 1.  
 (4) *Officers of Public Corporations*. — See note 3.
- 8.** National and State Governments and Their Officials. — See note 6.
- 815.** Government Officials. — See note 1.
- 9.** Nonresidents — *a.* INDIVIDUALS. — See note 2.

**Reached.** — The fact that the plaintiff in garnishment proceedings is a surety on the obligation sought to be reached by the process does not prevent his summoning as garnishee the principal debtor on such obligation. *Turner v. Wade*, (Tex. Civ. App. 1898) 48 S. W. Rep. 542.

**810.** 2. Common Carrier Not Liable as Garnishee for Property in Transit. — *Pittsburgh, etc., R. Co. v. Cox*, (Ind. App. 1905) 73 N. E. Rep. 120.

**3. Massachusetts Rule — Qualification.** — In *Van Camp Hardware, etc., Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296, it was held that though the fact that property in the hands of a common carrier was in transit, would not of itself entitle the carrier to be discharged as trustee, still, where at the time of service of the writ the property had been laden on a ship for the purpose of transportation, and the cost of unloading it and the loss which the trustee would have suffered by the delay in unloading would have amounted to more than the value of the property, it was proper to discharge the trustee.

**5. Before Property Is in Transit.** — *Pittsburgh, etc., R. Co. v. Cox*, (Ind. App. 1905) 73 N. E. Rep. 120.

**6. Carrier Holding Goods After Transit Is Completed.** — *Pittsburgh, etc., R. Co. v. Cox*, (Ind. App. 1905) 73 N. E. Rep. 120.

**Interstate Commerce.** — *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485, 94 Am. St. Rep. 948.

**811.** 2. Corporations Included in Term "Persons." — *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113.

**Statutory Provisions for Summoning Corporations as Garnishee.** — *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19, 8 Detroit Leg. N. 211; *Johnson v. Bergman*, 80 Minn. 73.

**A Bank may be summoned as a garnishee.** *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520.

**3. Rule that Public Corporations Are Subject to Garnishment.** — *Wilcox v. Busiel*, 70 N. H. 626; *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 359. See also *McNamara v. Mattei*, 74 Conn. 170. But see *Sherman v. Shobe*, 94 Tex. 126.

**812.** 1. Rule that Public Corporations Are Exempt from Garnishment. — *Pringle v. Guild*, 118 Fed. Rep. 655, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811, 812; *Sanders v. Steele*, 124 Ala. 415; *Duval County v. Charleston Lumber*,

*etc., Co.*, 45 Fla. 256; *Dollar v. Allen-West Commission Co.*, 78 Miss. 274; *Clarksdale Compress Co. v. Caldwell Co.*, 80 Miss. 343, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 812; *McBain v. Rodgers*, (Miss. 1901) 29 So. Rep. 91; *Emes v. Fowler*, (N. Y. City Ct. Spec. T.) 43 Misc. (N. Y.) 603; *Tucker v. Pollock*, 21 R. I. 317. See also *Skewes v. Tennessee Coal, etc., Co.*, 124 Ala. 629.

**Minnesota — Change in Rule.** — See *Mitchell v. Miller*, (Minn. 1905) 103 N. W. Rep. 716 (overruling *McDougal v. Hennepin County*, 4 Minn. 184).

**813.** 1. Counties Not Liable to Be Summoned as Garnishees. — *Duval County v. Charleston Lumber, etc., Co.*, 45 Fla. 256; *Sherman v. Shobe*, 94 Tex. 126 (approving *Herring-Hall-Marvin Co. v. Bexar County*, 16 Tex. Civ. App. 673, and doubting *Laredo v. Nalle*, 65 Tex. 361, wherein a city was held summonable as garnishee).

**4. Corporations May Waive Exemption.** — *Duval County v. Charleston Lumber, etc., Co.*, 45 Fla. 256; *Tone v. Shanklin*, 110 Iowa 525; *Dollar v. Allen-West Commission Co.*, 78 Miss. 274.

**Failure to Appear and Claim Exemption** from being summoned as garnishee is not a waiver. *Duval County v. Charleston Lumber, etc., Co.*, 45 Fla. 256.

**814.** 1. Rule that Corporation Cannot Waive Exemption Without Consent of Defendant. — *Sherman v. Shobe*, 94 Tex. 126.

**3. Officers of Public Corporations.** — *Dollar v. Allen-West Commission Co.*, 78 Miss. 274; *Tucker v. Pollock*, 21 R. I. 317.

**6. Federal and State Governments.** — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Keene v. Smith*, 44 Oregon 525. See also *Beauchemin v. Fournier*, 20 Quebec Super. Ct. 272.

**815.** 1. Government Officials. — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Keene v. Smith*, 44 Oregon 525.

**Statutory Provisions.** — *Ruperich v. Baehr*, 142 Cal. 190 (Cal. Code Civ. Pro., § 710).

**State Treasurer Holding Bonds of Foreign Insurance Company.** — *Buck v. Guarantors' Liability Indemnity Co.*, 97 Va. 719, following *Rollo v. Andes Ins. Co.*, 23 Gratt. (Va.) 509, 14 Am. Rep. 147.

**2. Nonresidents Not Liable to Be Summoned as Garnishees.** — *R. A. Kelley Co. v. Garvin Mach. Co.*, 4 Ohio Dec. 374, 6 Ohio N. P. 350; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.

- 816.** See notes 2, 3.  
*b.* FOREIGN CORPORATIONS — (1) *In General*. — See note 4.
- 817.** (2) *Corporations Doing Business in State*. — See note 1.  
 (3) *Interstate Corporations*. — See note 2.  
 10. **Persons Holding as Agents of the Law** — *a.* IN GENERAL. — See note 4.
- 821.** *b.* PARTICULAR PERSONS HOLDING AS AGENTS OF THE LAW — (5) *Receivers* — General Rule. — See note 3.
- 822.** Order for Payment. — See note 3.  
 Leave of Court. — See note 4.  
 Want of Jurisdiction in Court Appointing Receiver. — See note 5.  
 (6) *Trustees Appointed by Courts of Equity*. — See note 6.
- 824.** (8) *Assignees in Insolvency* — Void Assignments. — See note 3.  
 (9) *Clerks of Courts* — General Rule. — See note 4.
- 825.** Exceptions. — See note 1.  
 (10) *Sheriffs and Similar Officers* — (a) *In General* — General Rule. — See note 3.
- 826.** (b) *Limitation to General Rule*. — See note 2.
- 827.** See note 1.  
 (c) *Statutory Changes*. — See note 2.
- 828.** (d) *Money and Property Taken from Prisoners* — *aa.* GENERAL RULE — After the Prisoner Has Been Convicted. — See note 3.
- 829.** (11) *Executors and Administrators* — (a) *In General*. — See notes 1, 2, 3.
- 816.** 2. Rule that Nonresidents Are Not Exempt. — *Harris v. Balk*, 198 U. S. 215.
3. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815, 816.
4. *Foreign Corporations Not Summonable as Trustees*. — *R. A. Kelley Co. v. Garvin Mach. Co.*, 4 Ohio Dec. 374, 6 Ohio N. P. 350; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.
- 817.** 1. *Foreign Corporations Doing Business in State*. — *Ashley v. Quintard*, 90 Fed. Rep. 84 (Ohio statute); *Goodwin v. Claytor*, 137 N. Car. 224, 107 Am. St. Rep. 456; *Holt v. Ladd*, 71 Vt. 204; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450.
2. *Interstate Corporations*. — *Georgia, etc., R. Co. v. Stollenwerck*, 122 Ala. 539.
4. *Persons Holding as Agents of the Law*. — *Allen v. Gerard*, 21 R. I. 467.
- 821.** 3. *Receiver Not Liable to Be Summoned as Garnishee*. — *Smith v. People*, 93 Ill. App. 135; *Campau v. Detroit Driving Club*, 135 Mich. 575, 10 Detroit Leg. N. 870.
- Garnishment Process Not Within Federal Act Authorizing Suits Against Receiver*. — See *Bardon v. McCall*, 108 Wis. 181.
- A Garnishment Summons Served on One in His Individual Capacity does not bind any property or money held by him as a receiver*. *Fleming v. Gillespie*, 7 Okla. 430.
- 822.** 3. *After Order for Payment* — See *Smith v. People*, 93 Ill. App. 135.
4. *Leave of Court*. — *Van Bianchi v. Wayne Circuit Judge*, 124 Mich. 462; *Yeiser v. Cathers*, (Neb. 1903) 97 N. W. Rep. 840.
5. *Want of Jurisdiction in Court Appointing Receiver*. — *Greene v. Williams*, 22 R. I.
6. *Trustees Appointed by Courts of Chancery*. — *Evans v. Rector*, 107 Wis. 286.
- 824.** 3. *Void Assignments*. — *Hungerford v. Greengard*, 95 Mo. App. 653; *McCord-Brady Co. v. Mills*, 8 Wyo. 258.
4. *Clerks of Court as Garnishees*. — *Swinerton v. Oregon Pac. R. Co.*, 133 Cal. 417, 56 Pac. Rep. 40; *Allen v. Gerard*, 21 R. I. 467; *Loftus v. Williams*, 24 Tex. Civ. App. 393.
- But it is otherwise if he does not hold the funds in his possession by virtue of his official capacity. *Reid v. Walsh*, (Tex. Civ. App. 1901) 63 S. W. Rep. 940.
- 825.** 1. *Termination of Suit*. — See *Allen v. Gerard*, 21 R. I. 467 (surplus of proceeds of attached property); *Loftus v. Williams*, 24 Tex. Civ. App. 393, following *Pace v. Smith*, 57 Tex. 555, and *Curtis v. Ford*, 78 Tex. 262, and *disapproving Leroux v. Baldus*, (Tex. 1890) 13 S. W. Rep. 1019.
3. *Sheriffs Exempt under General Rule*. — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374.
- Judgment Confessed by Fraud*. — See *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763.
- 826.** 2. *Cash Bail Received by Justice of the Peace Without Authority*. — See *McAlmond v. Bevington*, 23 Wash. 315.
- 827.** 1. *Surplus After Satisfaction of Execution*. — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374.
2. *Statutory Change*. — *Pierce v. Commercial Invest. Co.*, 30 Wash. 272.
- Where a Judgment in an Attachment Is Procured by Collusion between the attaching creditor and the defendant, and is therefore fraudulent as to other creditors of the defendant, the latter may reach the proceeds of the attached property in the hands of the sheriff by garnishment proceedings*. *Stern v. Butler*, 123 Ala. 606, 82 Am. St. Rep. 146.
- 828.** 3. *After Conviction of Prisoner*. — *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99.
- 829.** 1. *General Rule — Executors and Ad-*

**830.** (b) Limitations to Rule — Order for Distribution Among Legatees and Distributees. — See note 2.

(c) Statutory Provisions for Summoning Executors and Administrators as Garnishees. — See note 3.

**831.** 11. Agents of Principal Defendant — *a.* IN GENERAL. — See note 7.

**832.** *c.* EMPLOYEES AND OFFICERS OF CORPORATIONS. — See note 2.

Funds Held by Officer in His Individual Capacity. — See note 3.

**833.** XII. GENERAL LIABILITY OF GARNISHEE — 1. In General. — See note 2.

ministrators Not Subject to Garnishment. — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Harris v. Kittlè*, 119 Ga. 29; *Nelson v. Stull*, 65 Kan. 589, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828; *Weekes v. Galveston Gas Co.*, 22 Tex. Civ. App. 245. But see *Ladd v. Judson*, 174 Ill. 344.

**829.** 2. Not Subject to Garnishment for Interests of Creditors. — *Farmers' Bank v. Ball*, 2 Penn. (Del.) 374; *Graham v. Fitch*, 13 App. Cas. (D. C.) 569.

3. Not Subject to Garnishment for Shares of Legatees and Distributees. — *Orlopp v. Schueller*, 72 Ohio St. 41, 106 Am. St. Rep. 583, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829. Compare *Watson's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 206.

**830.** 2. Order for Distribution Among Legatees and Distributees. — *Farmers Bank v. Ball*, 2 Penn. (Del.) 374; *Radeke Brewing Co. v. Granger*, 101 Ill. App. 599.

3. Statutory Provisions. — *Smith v. Gilbert*, 71 Conn. 149, 71 Am. St. Rep. 163; *Hatch v. Boucher*, 77 Conn. 347 (statutory prohibition, Conn. Gen. Stat. 1902, § 881); *Brown v. Wiley*, 107 Ga. 85; *Jewett v. Morrison*, 175 Mass. 161; *Sampsell v. Sampsell*, 9 Ohio Cir. Dec. 510, 17 Ohio Cir. Ct. 455; *Gallagher's Estate*, 8 Pa. Dist. 699.

Garnishment Against Executor or Administrator. — *Radeke Brewing Co. v. Granger*, 101 Ill. App. 599.

**831.** 7. Agent Summonable as Garnishee. — *Bluthenthal v. Silverman*, 113 Ga. 102.

An Attorney to whom money is given to be paid to another may be summoned as garnishee at the instance of creditors of the latter. *Grieves v. Keane*, 23 R. I. 136.

**832.** 2. The Secretary and Treasurer of a corporation was held not to be summonable as a garnishee. *Macon Nav. Co. v. Schofield*, 111 Ga. 881.

3. Officer Holding Funds of Corporation in Individual Capacity. — Thus, where the treasurer of a corporation transfers funds of the corporation to his individual account, he may be summoned as garnishee with respect thereto at the instance of the creditors of the corporation. *Little v. New Hampshire Press Assoc.*, 71 N. H. 426.

**833.** 2. Liability of Garnishee Fixed by His Liability to Defendant — *England*. — *Spence v. Coleman*, (1901) 2 K. B. 199.

*Canada*. — *Genge v. Wachter*, 4 N. W. Ter. 122.

*United States*. — *Daugherty v. Bogy*, (C. C. A.) 104 Fed. Rep. 938; *Allen v. Gilman*, 137 Fed. Rep. 136.

*Alabama*. — *Steiner v. Birmingham First Nat. Bank*, 127 Ala. 595; *Skewes v. Tennessee Coal, etc., Co.*, 124 Ala. 629.

*Arkansas*. — *St. Louis Southwestern R. Co. v. Gate City Co-operative Grocery Co.*, 70 Ark. 10.

*Delaware*. — *Forbes v. Thompson*, 2 Penn. (Del.) 530; *Netter v. Stoeckle*, 4 Penn. (Del.) 345.

*District of Columbia*. — *Graham v. Fitch*, 13 App. Cas. (D. C.) 569.

*Illinois*. — *Supreme Sitting, etc. v. Grigsby*, 178 Ill. 57; *Hibernian Banking Assoc. v. Morrison*, 188 Ill. 279, affirming 88 Ill. App. 230; *Fanning v. Smith*, 84 Ill. App. 77; *State Bank v. Boyesen*, 87 Ill. App. 539; *Bank of Commerce v. Franklin*, 88 Ill. App. 198, 90 Ill. App. 91.

*Kentucky*. — *Potter v. Skiles*, 114 Ky. 141, modifying 114 Ky. 132.

*Massachusetts*. — *Van Camp Hardware, etc., Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296; *Cummins v. Christie*, 179 Mass. 74, 88 Am. St. Rep. 357.

*Mississippi*. — *Chamberlin-Hunt Academy v. Port Gibson Brick, etc., Co.*, 80 Miss. 517.

*Missouri*. — *Griebel v. Imboden*, 158 Mo. 632; *Stevenson v. McFarland*, 162 Mo. 159; *Wilson v. Hobbs*, 73 Mo. App. 656; *Sands v. Berkley*, 83 Mo. App. 259; *Reid v. Mercurio*, 91 Mo. App. 673; *Young v. Princeton Bank*, 97 Mo. App. 576.

*Nebraska*. — *Cahn v. Carpiess Co.*, 61 Neb. 512.

*New Hampshire*. — *Wallace v. Glasgow Invest. Co.*, 68 N. H. 188; *Corning v. Records*, 69 N. H. 390, 76 Am. St. Rep. 178; *Newport First Nat. Bank v. Hunton*, 70 N. H. 224.

*New Mexico*. — *Field v. Sammis*, (N. Mex. 1903) 73 Pac. Rep. 617.

*North Carolina*. — *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car. 359; *Goodwin v. Claytor*, 137 N. Car. 224, 107 Am. St. Rep. 456.

*Oklahoma*. — *Williamson v. Oklahoma Nat. Bank*, 7 Okla. 621.

*Pennsylvania*. — *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632.

*Tennessee*. — *Crudginton v. Hogan*, 105 Tenn. 448.

*Texas*. — *Ragsdale v. Groos*, (Tex. Civ. App. 1899) 51 S. W. Rep. 256; *Trueheart v. Savings, etc., Co.*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1003.

*Washington*. — *McAlmond v. Bevington*, 23 Wash. 315.

*Wisconsin*. — *Southwestern Land Co. v. Ellis*, 104 Wis. 445; *Bardon v. McCall*, 108 Wis. 181; *Grimsrud v. Linley*, 109 Wis. 632; *Becker v. Becker*, 112 Wis. 24.

Where a debtor of the principal defendant placed money in the hands of his agent to be paid over to the defendant, the agent is not chargeable as garnishee at the suit of the creditors of the defendant. *Hussa v. Sikorski*, 101 Wis. 131.

**834.** Contract Rights of Garnishee Not Impaired. — See note 1.

**835.** 3. As Determined by Circumstances Existing at Time of Service of Garnishment — General Rule. — See notes 1, 2.

Minority Rule. — See note 3.

**836.** After Disclosure. — See note 1.

4. Discharge of Garnishee's Liability to Defendant Before Service of Writ. — See note 2.

**838.** 5. Liability of Garnishee for Interest — *a.* TO PLAINTIFF — (2) Interest During Time Following Service of Writ. — See note 3.

Garnishee Assuming Attitude of Litigant. — See note 5.

**839.** *b.* TO THE DEFENDANT — Interest Recoverable as Damages for Detention of Money. — See note 1.

**840.** 6. Character of Possession Necessary to Charge Garnishee — *a.* IN GENERAL. — See note 3.

**841.** *b.* CONTROL MUST BE INDEPENDENT OF DEFENDANT. — See note 1.

*c.* PERSONAL CUSTODY. — See note 2.

Possession Through Agent. — See note 3.

Property Received in Payment of Debt. — *Sloman v. Goebel Brewing Co.*, 118 Mich. 442.

Trustee as Garnishee. — *Fidelity Trust Co. v. New York Finance Co.*, (C. C. A.) 125 Fed. Rep. 275.

Want of Consideration. — *Willingham Sash, etc., Co. v. Drew*, 117 Ga. 850.

**834.** 1. Contract Rights of Garnishee Not Impaired. — *Simmons Hardware Co. v. Baker*, (Mich. 1905) 103 N. W. Rep. 529; *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485, 94 Am. St. Rep. 948.

Building Contract. — *Cunningham Lumber Co. v. New York, etc., R. Co.*, 77 Conn. 628.

**835.** 1. Garnishee Not Liable for Property Coming into His Hands After Service of Writ. — *Swofford Bros. Dry-Goods Co. v. John S. Brittain Dry-Goods Co.*, 9 Kan. App. 1.

The rule that a garnishee cannot be charged with regard to property which comes into his possession after the service of the writ upon him does not apply where the garnishee had in his possession stock belonging to the defendant at the time of the service of the writ, and subsequent to such service the corporation was dissolved and its assets distributed ratably amongst its stockholders so as to prevent the garnishee from being charged for the proceeds so received. *Cooley v. Janes*, (Kan. 1905) 80 Pac. Rep. 506.

Where an Executor or Administrator Is Summoned as Trustee at the suit of the creditors of a legatee, his liability is not confined to property in his possession at the time of the service of the trustee process upon him. *Jewett v. Morrison*, 175 Mass. 161.

2. Garnishee Not Liable for Indebtedness Incurred After Service. — *Wallace v. Singer Mfg. Co.*, 12 S. Dak. 168. But see *Goodwin v. Claytor*, 137 N. Car. 224, 107 Am. St. Rep. 456.

3. Minority Rule. — *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310; *Pawnee City First Nat. Bank v. Manning*, (Neb. 1901) 95 N. W. Rep. 1128; *Gallagher v. Pugh*, (Tex. Civ. App. 1902) 66 S. W. Rep. 118.

**836.** 1. After Disclosure. — *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384; *Dar-*

*lington-Miller Lumber Co. v. National Surety Co.*, 35 Tex. Civ. App. 346.

After Judgment Against the Garnishee he cannot be held liable for moneys of the defendant subsequently coming into his hands. *Importers', etc., Nat. Bank v. Lyons*, 8 Pa. Dist. 675.

2. Discharge of Garnishee's Liability Before Service of Writ. — *Henkle v. Bi-Metallic Bank*, 13 Colo. App. 410; *Abbott v. Danewood*, 115 Ga. 651; *Odum v. Macon, etc., R. Co.*, 118 Ga. 792; *Kemp v. Northern Trust Co.*, 108 Ill. App. 242; *Young v. Princeton Bank*, 97 Mo. App. 576; *Blom-Collier Co. v. Martin*, 98 Mo. App. 596; *Robertson v. Robertson*, 37 Oregon 339; *Austin Nat. Bank v. Bergen*, (Tex. Civ. App. 1899) 48 S. W. Rep. 743; *Harris v. Cardingley*, 16 Quebec Super. Ct. 501.

Stoppage of Payment of Check. — The garnishee is not, however, under any obligation to stop payment upon his check given in payment prior to the service of the writ, and cannot be charged for failure to do so. *Prewitt v. Brown*, 101 Mo. App. 254. See also *Edmunds v. Edmunds*, (1904) P. 362.

Proof of Payment Prior to Service of Writ. — *Altona v. Dabney*, 37 Oregon 334.

**838.** 3. Interest Allowable Only as Damages — Garnishee Held Not Liable. — *Barnes v. Bamberger*, 196 Pa. St. 123; *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520.

5. Garnishee Assuming Attitude of Litigant. — *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189.

**839.** 1. Garnishment Proceedings Stay Running of Interest as Damages. — *Chicago, etc., R. Co. v. Moran*, 187 Ill. 316, affirming 85 Ill. App. 543; *Barnes v. Bamberger*, 196 Pa. St. 123.

**840.** 3. *Walcott v. Richman*, 94 Me. 364.

**841.** 1. Property in Safe Deposit Vault. — *Trowbridge v. Spinning*, 23 Wash. 48, 83 Am. St. Rep. 806.

2. A Distilling Company in whose name a warehouse is bonded may be charged as garnishee with respect to whiskey stored therein, as the company alone can withdraw the whiskey. *Roudebush v. Hollis*, 21 Pa. Co. Ct. 324.

3. Possession Through Agents. — *Westheimer v. Giller*, 84 Mo. App. 122.

**841.** *d.* LEGAL RIGHT TO TAKE POSSESSION. — See note 4.

**842.** *e.* MANNER IN WHICH POSSESSION WAS ACQUIRED. — See notes 2, 3.

7. Liability as Affected by Events Occurring After Service of Writ —

*a.* IN GENERAL. — See notes 4, 5.

**843.** *b.* PAYMENT AND SURRENDER OF PROPERTY BY GARNISHEE — (1) *In General.* — See notes 2, 3.

(2) *Ignorance of Garnishee as to Service of Writ.* — See note 4.

**844.** See note 1.

*Payment by Agent of Garnishee.* — See note 2.

(4) *Ignorance of Defendant's Right to Funds or Property in Hands of Garnishee.* — See note 4.

(5) *Payment or Surrender of Property under Legal Coercion.* — See note 5.

**845.** 8. Liability Limited by Amount of Plaintiff's Claim Against Defendant. — See note 1.

**841.** 4. Legal Right to Take Possession. — See *Avery v. Monroe*, 172 Mass. 132, 70 Am. St. Rep. 250, where an assignee for benefit of creditors was held chargeable as trustee though he had not taken actual possession of the property assigned.

**842.** 2. Manner in Which Possession Was Acquired Immaterial. — *Van Camp Hardware, etc., Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296.

*Money Taken from the Defendant When Drunk* for safe keeping and without collusion with the garnishing creditor may be reached by garnishment. *Canning v. Knights*, 71 N. H. 404.

3. Possession Acquired by Collusion with Garnishing Creditor. — See *Canning v. Knights*, 71 N. H. 404, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 842.

4. Subsequent Contracts Between Garnishee and Defendant. — *Little Rock Traction, etc., Co. v. Wilson*, 66 Ark. 582; *Citizens' Gen. Electric Co. v. American Electric Works*, (Ky. 1900) 55 S. W. Rep. 1078; *Chamberlain Banking House v. Reliance Ins. Co.*, 59 Neb. 195; *Eddington v. Matthews*, (Tenn. Ch. 1899) 53 S. W. Rep. 1099.

5. Self-discovering Admissions by the Principal Debtor, made after the service of the writ of garnishment, are not admissible in favor of the garnishee and against the plaintiff in garnishment. *Phenix Ins. Co. v. Jacobs*, 23 Ind. App. 510.

**843.** 2. Surrender of Property to Defendant. — *Dunning v. Baily*, 120 Iowa 729; *Weaver v. Irons*, 129 Mich. 368; *Westheimer v. Giller*, 84 Mo. App. 122; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632; *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 189; *Eidemiller v. Elder*, 32 Wash. 605.

3. Payment of Indebtedness. — *Fitzgerald Military Band v. Colony Bank*, 115 Ga. 790; *Maggard v. Asher*, (Ky. 1904) 82 S. W. Rep. 1002; *Hyde v. Chadwick*, 132 Mich. 270, 9 Detroit Leg. N. 616; *Farmers', etc., Nat. Bank v. Mosher*, (Neb. 1903) 94 N. W. Rep. 1003; *Bixby v. Whitcomb*, 69 N. H. 646; *Pieffer v. Campeau*, 5 Quebec Pr. 135; *Montambault v. Lapointe*, 23 Quebec Super. Ct. 413.

*Payment Pending Appeal from Judgment Discharging Garnishee.* — *Stephens v. Willis*, (Ky. 1899) 51 S. W. Rep. 9; *Stannard v. Youmans*,

110 Wis. 375, following *Maxwell v. New Richmond Bank*, 101 Wis. 286, 70 Am. St. Rep. 926.

*Gratuitous Payment.* — Where the principal defendant had no legal or enforceable claim against the garnishee, the fact that after the service of the writ of garnishment the garnishee makes a gratuitous payment to the defendant will not impose any liability upon him. *Steiner v. Birmingham First Nat. Bank*, 127 Ala. 595.

4. Payment in Ignorance of Service of Writ — Service on Agent of Garnishee. — See *Montreal Bank v. Clark*, 108 Ill. App. 163 (neglect of branch bank to notify principal of service of writ).

**844.** 1. Service of Writ at Place of Abode of Garnishee. — *Contra, Montambault v. Lapointe*, 23 Quebec Super. Ct. 413.

2. Payment by Agent of Garnishee. — It is the duty, however, of a garnishee, who has money or other property subject to garnishment in his hands or within his control at the time of the service of the writ upon him, to exercise reasonable diligence to prevent the payment of such money or the delivery of such property to such debtor by any agent of his. *Binkley v. Clay*, 112 Ill. App. 332.

4. Ignorance of Defendant's Right to Property or Funds in Possession of Garnishee. — *Pittsburgh, etc., R. Co. v. Cox*, (Ind. App. 1905) 73 N. E. Rep. 120.

5. Payment or Surrender of Property under Legal Coercion. — *Harris v. Cordingley*, 16 Quebec Super. Ct. 501.

**845.** 1. Liability Limited by Amount of Plaintiff's Claim Against Defendant. — *Henkle v. Bi-Metallic Bank*, 13 Colo. App. 410; *Pace v. J. S. Merrill Drug Co.*, 2 Indian Ter. 218; *Cleveland v. Spencer*, (Tex. Civ. App. 1899) 50 S. W. Rep. 405.

*Judgment Against Defendant Essential to Charge Garnishee.* — *Norman v. Poole*, 70 Ark. 127; *Americus Grocery Co. v. Link*, 116 Ga. 813; *Dent v. Dent*, 118 Ga. 853; *Bank of Commerce v. Franklin*, 88 Ill. App. 198; *Levis-Zukoski Mercantile Co. v. Exchange Nat. Bank*, 63 Kan. 550; *Hauptman v. Richards*, 85 Mo. App. 188.

*Judgment against the garnishee should not be rendered until after judgment against the defendant.* *Burton v. Frame*, (Del. 1904) 58 Atl. Rep. 804.

**845. XIII. GARNISHEE'S RIGHT OF SET-OFF, RECOUPMENT. AND RETAINER —**

1. **Right of Set-off** — *a.* IN GENERAL — See note 3.

**846.** *b.* WHAT MAY BE SUBJECT OF SET-OFF — (1) *In General.* — See note 2.

**848.** (6) *Mutuality.* — See note 7.

**850. XIV. DEFENSES AVAILABLE TO GARNISHEE — 1. In General.** — See note 3.

**852.** 2. **Irregularities in Proceedings** — *a.* GARNISHMENT UNDER ATTACHMENT — **Irregularities Affecting Jurisdiction.** — See note 2.

**853.** **Irregularities Not Affecting Jurisdiction.** — See note 1.

*b.* GARNISHMENT IN AID OF EXECUTION. — See note 2.

**854.** See note 1.

3. **Defendant's Exemption Rights as Defense** — **General Rule.** — See note 3.

**855.** **Minority Rule.** — See note 1.

**XV. DUTY OF GARNISHEE TO DEFENDANT — 1 In General.** — See notes 2, 4.

**845. 3. Right of Set-off.** — Daugherty *v.* Bogy, (C. C. A.) 104 Fed. Rep. 938; Henry *v.* McNamara, 124 Ala. 412; Jefferson County Sav. Bank *v.* Nathan, 138 Ala. 342, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845; Bank of Commerce *v.* Franklin, 90 Ill. App. 91; Williams *v.* West Chicago St. R. Co., 101 Ill. App. 291, affirmed 199 Ill. 57; Van Camp Hardware, etc., *C. v.* Plimpton, 174 Mass. 208, 75 Am. St. Rep. 296; Wilson *v.* Fleming, 1 Ont. L. Rep. 599.

**846. 2. Set-off Allowable as Against Defendant.** — Martin *v.* Throckmorton, 15 Pa. Super. Ct. 632.

**A Garnishee Will Not Be Allowed** to reduce his liability by using as a set-off a claim against the defendant, which by reason of his agreement was not to be used in such reduction. Stephens *v.* Cox, 124 Ala. 448.

**848. 7. Personal Representative as Garnishee Setting Off Individual Claim.** — An administrator summoned as garnishee, at the instance of creditors of a legatee, cannot set off an indebtedness owing by such legatee to him individually. Howe *v.* Howe, 97 Me. 422.

**850. 3. Defenses Available Against Defendant.** — Forbes *v.* Thompson, 2 Penn. (Del.) 530; Netter *v.* Stoeckle, 4 Penn. (Del.) 345; Hilliard *v.* Enders, 196 Pa. St. 587; Willis *v.* Curtze, 203 Pa. St. 111.

**Title or Claim of a Third Person** may be set up by garnishee. Curtis *v.* Parker, 136 Ala. 217; Hawley *v.* Hurd, 72 Vt. 122. See also Crudginton *v.* Hogan, 105 Tenn. 448.

The garnishee may show that the property belongs to or the indebtedness is payable to a third person, though such third person after obtaining leave fails to intervene. Corning *v.* Records, 69 N. H. 390, 76 Am. St. Rep. 178.

A warehouseman summoned as garnishee may show a prior transfer by the defendant of negotiable warehouse receipts. Adamson *v.* Frazier, 40 Oregon 273.

**Claim of Third Person to Money Deposited with Garnishee.** — Lindsay *v.* Continental Nat. Bank, 82 Mo. App. 301.

**Unsuccessful Prior Garnishments.** — A garnishee cannot set up in defense to his own liability the fact that the plaintiff had unsuccessfully at-

tempted by other garnishment writs to secure the satisfaction of his judgment. Brown *v.* Preston, (Ky. 1899) 48 S. W. Rep. 974.

**852. 2. Garnishment under Attachment — Irregularities Affecting Jurisdiction.** — Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582; State Bank *v.* Thweatt, 111 Ill. App. 599; McKinney *v.* Mills, 80 Minn. 478, 81 Am. St. Rep. 278; Hauptman *v.* Richards, 85 Mo. App. 188; Phoenix Bridge Co. *v.* Street, 9 Okla. 422; Smith, etc., Co. *v.* Mutual F. Ins. Co., 110 Wis. 602.

**853. 1. Irregularities Not Affecting Jurisdiction.** — Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582; Cross *v.* Standard Granite Co. Quarries, 9 Pa. Dist. 557; Seymour *v.* Fulton, 9 Pa. Dist. 611.

**2. Garnishment in Aid of Execution — Jurisdictional Defects.** — Phillips *v.* Wait, 105 Ga. 848; London Guarantee, etc., Co. *v.* Mosness, 98 Ill. App. 651; Hedrix *v.* Hedrix, 103 Mo. App. 40.

**854. 1. Defects Not Affecting Jurisdiction.** — Artope *v.* Macon, etc., R. Co., 110 Ga. 346; Reid *v.* Mercurio, 91 Mo. App. 673; Patterson *v.* Seeton, 19 Tex. Civ. App. 430; Hyde *v.* Baker, 26 Tex. Civ. App. 287.

**When Suit Undeferred by Principal Debtor.** — Doak *v.* Stahlman, (Tenn. Ch. 1899) 58 S. W. Rep. 741.

**3. Rule that Garnishee May Set Up Defendant's Exemption Rights.** — Armour Packing Co. *v.* Wynn, 119 Ga. 683; Choquette *v.* Ford, 178 Mass. 6. See, however, Seitz *v.* Starks, 136 Mich. 90, 10 Detroit Leg. N. 978.

**855. 1. Rule that Garnishee Cannot Set Up Defendant's Exemption Rights.** — Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, following Osborne *v.* Schutt, 67 Mo. 712.

**2. Notice to Defendant of Garnishment.** — National F. Ins. Co. *v.* Ming, (Ariz. 1900) 60 Pac. Rep. 720. But see Baltimore, etc., R. Co. *v.* McDonald, 112 Ill. 391; Stewart *v.* Northern Assur. Co., 45 W. Va. 734.

Where a creditor is summoned as garnishee in a foreign state, it is his duty to notify the defendant in the garnishment proceedings who is not personally served with notice that he has been summoned as garnishee, so as to enable the defendant to have an opportunity to defend the

**855. 2. Duty of Garnishee in Regard to Defendant's Exemption Rights.** — See note 6.

**856. Ineffectual Claim of Exemption by Defendant.** — See note 4.

Ineffectual Claim of Exemption by Garnishee. — See note 5.

**857. XVI. ASSIGNMENTS BY DEFENDANT — 1. In General — a. PRIOR ASSIGNMENTS.** — See note 3.

**858. b. SUBSEQUENT ASSIGNMENTS.** — See notes 1, 2.

Assignments of Negotiable Paper Before Maturity. — See note 3.

claim of the garnishing plaintiff. *Harris v. Balk*, 198 U. S. 215.

**855. 4. Not Required to Defend Main Action.** — Baltimore, etc., *R. Co. v. Adams*, 159 Ind. 688.

**6. Garnishee Required to Interpose Exemption Rights to Defendant.** — *In re Beals*, 116 Fed. Rep. 530, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855; Baltimore, etc., *R. Co. v. McDonald*, 112 Ill. App. 391; *Rumbold v. Supreme Council Royal League*, 206 Ill. 513 (*reversing* 103 Ill. App. 596); *Laurel v. Turner*, 80 Miss. 530; *Day v. Burnham*, 82 Mo. App. 538.

**856. 4. Ineffectual Claim of Exemption by Defendant.** — *Cunningham v. Kansas City, etc., R. Co.*, 60 Kan. 268. See also *Hart v. O'Rourke*, 151 Ind. 205.

**5. Ineffectual Claim of Exemption by Garnishee.** — Baltimore, etc., *R. Co. v. Adams*, 159 Ind. 688.

**857. 3. Prior Assignment Takes Precedence of Subsequent Garnishment — England.** — *Edmunds v. Edmunds*, (1904) P. 362.

*Canada.* — *Wilson v. Fleming*, 1 Ont. L. Rep. 599; *Ex p. Black*, 34 N. Bruns. 638.

*Alabama.* — *Norwood v. Voorhees*, 129 Ala. 314.

*Colorado.* — *American Nat. Bank v. Barnard*, 15 Colo. App. 110.

*Georgia.* — *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 857; *Hargett v. McCadden*, 107 Ga. 773; *Akers v. Jefferson County Sav. Bank*, 120 Ga. 1066.

*Illinois.* — *Williams v. West Chicago St. R. Co.*, 199 Ill. 57; *Harrington v. Marseilles First Nat. Bank*, 85 Ill. App. 212; *Commercial Nat. Bank v. Kirkwood*, 85 Ill. App. 235, *affirmed* 184 Ill. 139.

*Iowa.* — *Seymour v. Aultman*, 109 Iowa 297; *Tone v. Shankland*, 110 Iowa 525; *Ruthven v. Clarke*, 109 Iowa 25; *Sioux City First Nat. Bank v. Stone*, (Iowa 1902) 91 N. W. Rep. 1076; *Kerr v. Kennedy*, 119 Iowa 239; *O'Melia v. Hoffmeyer*, 119 Iowa 444; *Bolton v. Bailey*, 122 Iowa 729.

*Maine.* — *Walcott v. Richman*, 94 Me. 364; *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346; *Meserve v. Nason*, 96 Me. 412; *Howe v. Howe*, 97 Me. 422; *Mace v. Richardson*, (Me. 1905) 60 Atl. Rep. 701.

*Michigan.* — *Merchants' Nat. Bank v. Barrett*, 122 Mich. 650.

*Minnesota.* — *Smith v. Meyer*, 84 Minn. 455; *Peterson v. Knuutila*, (Minn. 1905) 102 N. W. Rep. 368.

*Missouri.* — *Hendrickson v. Trenton Nat. Bank*, 81 Mo. App. 332; *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447; *Whiteside v.*

*Long-Acre*, 88 Mo. App. 168; *Young v. Princeton Bank*, 97 Mo. App. 576; *Alexander v. Wade*, 106 Mo. App. 141.

*Nebraska.* — *Cahn v. Carplless Co.*, 61 Neb. 512; *Farmers', etc., Nat. Bank v. Mosher*, (Neb. 1904) 100 N. W. Rep. 133.

*New Hampshire.* — *Wallace v. Glasgow Invest. Co.*, 68 N. H. 188; *Glauber Mfg. Co. v. Voter*, 71 N. H. 68; *Dole v. Farwell*, 72 N. H. 183.

*North Dakota.* — *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 474.

*Rhode Island.* — *Westminster Bank v. Atherton*, 24 R. I. 334.

*Tennessee.* — *Crudgington v. Hogan*, 105 Tenn. 448.

*Texas.* — *Ragsdale v. Groos*, (Tex. Civ. App. 1899) 51 S. W. Rep. 256; *New York L. Ins. Co. v. Patterson*, 35 Tex. Civ. App. 447.

*Vermont.* — *Parker v. Parker*, 71 Vt. 387. See also *Crampton v. McBain*, 71 Vt. 242.

*Virginia.* — *Mack Mfg. Co. v. Smoot*, 102 Va. 724.

*West Virginia.* — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

*Wisconsin.* — *Frels v. Little Black Farmers' Mut. Ins. Co.*, 120 Wis. 590.

**Equitable Assignment.** — *Reeves v. People*, 78 Ill. App. 407; *Williams v. West Chicago St. R. Co.*, 101 Ill. App. 291, *affirmed* 199 Ill. 57.

**Recording Assignment of Interests in Decedent's Estate.** — *Porter v. Glenn*, 87 Ill. App. 106.

**Surplus Over Claim of Plaintiff.** — *Yates v. Terry*, (1901) 1 Q. B. 102, *reversed* (1902) 1 K. B. 527. See also *Rogers v. Whiteley*, (1892) A. C. 118.

**858. 1. Subsequent Assignments.** — *In re National United Invest. Corp.*, (1901) 1 Ch. 950; *Ruthven v. Clarke*, 109 Iowa 25; *Cahn v. Carplless Co.*, 61 Neb. 512; *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 474; *Westminster Bank v. Atherton*, 24 R. I. 334; *Fleming v. Pringle*, 21 Tex. Civ. App. 225.

**Executory Agreement to Assign.** — A mere executory agreement on the part of a debtor to assign an indebtedness owing to him by the garnishee will not take precedence of a writ of garnishment served prior to the execution of the agreement to assign. *Hutcheson v. King*, (Tex. Civ. App. 1904) 83 S. W. Rep. 215.

**2. Want of Notice on Part of Assignee.** — *Smith v. Butler*, 72 Ark. 350.

**3. Assignment of Negotiable Instrument Before Maturity.** — *Robinson v. Manchester Bank*, (Ky. 1901) 62 S. W. Rep. 1024; *Bell v. Philadelphia Binding, etc., Co.*, 10 Pa. Super. Ct. 38.

**Lis Pendens as Notice.** — *Bell v. Philadelphia Binding, etc., Co.*, 10 Pa. Super. Ct. 38.



**859.** 2. Particular Assignments — *a.* ASSIGNMENTS AS SECURITIES. — See note 1.

Surplus. — See note 2.

*b.* VOIDABLE ASSIGNMENTS. — See note 3.

*c.* CONDITIONAL ASSIGNMENTS. — See note 4.

*d.* ASSIGNMENTS FOR BENEFIT OF CREDITORS. — See note 6.

**860.** *e.* FOREIGN ASSIGNMENTS. — See note 3.

**861.** *g.* INVALID AND FRAUDULENT ASSIGNMENTS. — See notes 1, 2.

4. What Constitutes an Assignment — *b.* NOTICE TO GARNISHEE OF ASSIGNMENT — (1) *In General.* — See note 6. /

**862.** Minority Rule. — See note 1.

**863.** (5) *Notice in Time to Enable Garnishee to Protect Himself.* — See note 3.

**864.** (6) *Character and Sufficiency of Notice* — (b) *By Whom Given.* — See note 1.

(c) *To Whom Given.* — See note 2.

**865.** *d.* RECORDING ASSIGNMENT OF EARNINGS OR WAGES. — See note 3.

**866.** 5. Duty of Garnishee to Disclose Assignment. — See note 1.

Notice of Assignment After Answer. — See note 2.

**867.** 6. Proof of and Contesting Assignment. — See note 1.

**859.** 1. Assignments as Securities. — Walton *v.* Horkan, 112 Ga. 814, 81 Am. St. Rep. 77, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859; Wilt *v.* Huffman, 46 W. Va. 473.

2. Surplus. — Cahn *v.* Carless Co., 61 Neb. 512. Future Advance. — Where the assignment is security for present indebtedness and future advances, a writ of garnishment will take precedence of advances made after the service. Howe *v.* Howe, 97 Me. 422.

3. Voidable Assignments. — Harmon *v.* Menke, 73 Mo. App. 635.

4. Conditional Assignment. — Southwestern Land Co. *v.* Ellis, 104 Wis. 445.

6. Assignment for Benefit of Creditors — Summoning Assignee as Garnishee. — Smith *v.* Lamson, 82 Ill. App. 466, affirmed 184 Ill. 71; Wilson *v.* National Bank, 27 Tex. Civ. App. 54; McAvoy *v.* Harkins, (Wash. 1905) 81 Pac. Rep. 77.

If the Assignment Is Invalid as to Creditors, the rule is otherwise. Avery *v.* Monroe, 172 Mass. 132, 70 Am. St. Rep. 250.

**860.** 3. Foreign Assignment. — Smith *v.* Lamson, 82 Ill. App. 466, affirmed 184 Ill. 71.

**861.** 1. Invalid and Fraudulent Assignments. — Spielman *v.* Dorf, (Iowa 1900) 82 N. W. Rep. 489; Dow *v.* Taylor, 71 Vt. 337; Eau Claire Nat. Bank *v.* Chippewa Valley Bank, 124 Wis. 520. But see Dole *v.* Farwell, 72 N. H. 183.

The Burden of Proving a Valuable Consideration for the Assignment is upon the assignee. Meserve *v.* Nason, 96 Me. 412.

2. Invalid Assignments for Benefit of Creditors. — Avery *v.* Monroe, 172 Mass. 132, 70 Am. St. Rep. 250.

Wisconsin — Assigned Fund Not Garnishable. — Under Laws Wis. 1897, c. 334, § 2, where a fund has been assigned for the benefit of creditors it cannot be garnished by one of the creditors, although the assignment be void. Gilbert Paper Co. *v.* Whiting Paper Co., 123 Wis. 472.

6. General Rule — Notice of Assignment Prior to Garnishment Not Required — Georgia. — Wal-

ton *v.* Horkan, 112 Ga. 814, 81 Am. St. Rep. 77, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

Illinois. — Williams *v.* West Chicago St. R. Co., 199 Ill. 57; Reeves *v.* People, 78 Ill. App. 407; Harrington *v.* Marseilles First Nat. Bank, 85 Ill. App. 212.

Iowa. — Ruthven *v.* Clarke, 109 Iowa 25.

Maine. — Walcott *v.* Richman, 94 Me. 364; Howe *v.* Howe, 97 Me. 422.

Michigan. — Harris *v.* Chamberlain, 126 Mich. 280.

Missouri. — Hendrickson *v.* Trenton Nat. Bank, 81 Mo. App. 332.

**862.** 1. Minority Rule — Notice Before Service of Garnishment Required. — Chicago Sugar-Refining Co. *v.* Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. Rep. 275; Davis *v.* King, (Tenn. Ch. 1899) 56 S. W. Rep. 1041.

**863.** 3. Satisfaction of Judgment Against Debtor Bar to Action by Assignee. — Peterson *v.* Kingman, 59 Neb. 667.

**864.** 1. Notice May Be Given by Agent of assignee. Parker *v.* Parker, 71 Vt. 387.

2. To Whom Given. — Parker *v.* Parker, 71 Vt. 387.

**865.** 3. What Constitutes "Earnings." — A claim for the price of a tombstone under a contract to furnish the same is not "earnings" where the tombstone was not made by the seller, but by his servants. Chester *v.* McDonald, 185 Mass. 54.

Statute Not Applicable Where Work Completed and Wages Fully Earned. — Allen *v.* Mayers, 184 Mass. 486.

**866.** 1. Duty of Garnishee to Disclose Assignment. — Tarrant *v.* Burch, 102 Ill. App. 393.

2. Notice of Assignment Received After Answer. — Gerow *v.* Hyde, 131 Mich. 442.

**867.** 1. Citing in Assignee. — Westminster Bank *v.* Atherton, 24 R. I. 334.

Burden of Proving Invalidity of Assignment on Party Attacking Same. — Hax *v.* Acme Cement Plaster Co., 82 Mo. App. 447.

**868. XVII. PRIORITIES AND LIEN OF GARNISHMENT — 1. Priorities — b. AS BETWEEN GARNISHING CREDITORS — (1) In General.** — See note 4.

**869.** (2) *Intervention by Junior Garnishing Creditor.* — See note 8.

**870.** (3) *Protection of Garnishee — (b) Staying Proceedings in Subsequent Garnishment Proceedings.* — See note 3.

Pendency of Prior Garnishment Not Ground for Discharging Garnishee. — See note 4.

**871. 2. Lien of Garnishment — General Rule.** — See note 2.

Chattels Capable of Manual Delivery. — See note 3.

Indebtedness Owing from Garnishee. — See note 4.

**872. Lien on Property of Garnishee.** — See note 2.

**XVIII. EFFECT OF GARNISHMENT UPON OTHER PROCEEDINGS AGAINST GARNISHEE — 1. In General.** — See note 3.

**2. Upon Subsequent Action by Defendant — b. GROUND FOR CONTINUANCE.** — See note 6.

**873. d. AS BAR TO SUBSEQUENT ACTION.** — See note 2.

**e. GARNISHMENT PENDING IN FOREIGN JURISDICTION.** — See notes 3, 4.

**874.** See note 1.

**875. 4. Upon Actions by Third Persons.** — See note 2.

The burden of proving that the assignment was not prior to service of the writ of garnishment is upon the plaintiff. *Williams v. West Chicago St. R. Co.*, 101 Ill. App. 291, affirmed 199 Ill. 57.

**Payment by Garnishee to Assignee.** — A garnishee is not justified in making payment to the assignee after service of the trustee process, though he has no notice of the fraudulent character of the assignment. *Dow v. Taylor*, 71 Vt. 337.

**868. 4. Priority Exists Between Successive Garnishments.** — *Brown v. Ellsworth*, 72 N. H. 186; *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384; *Kinsman v. Onderdonk*, 38 Can. L. J. 692. Compare *Wilson v. Robertson*, 9 British Columbia 30, where priority was given to the party securing the first charging order.

**Prior Garnishment in Foreign State.** — *Prichard v. Critchlow*, 56 W. Va. 547.

**869. 8. Junior Garnishing Creditor Allowed to Intervene.** — See *Medley v. American Radiator Co.*, 27 Tex. Civ. App. 384.

**870. 3. Prior Garnishment in Foreign State — Stay of Proceedings Should Be Granted.** — *Prichard v. Critchlow*, 56 W. Va. 547, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

**4. Pendency of Prior Proceeding Not Ground for Discharging Garnishee.** — *Prichard v. Critchlow*, 56 W. Va. 547, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

**871. 2. Creates No Lien.** — *Bowen v. Port Huron Engine, etc., Co.*, 109 Iowa 255, 77 Am. St. Rep. 539; *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715; *Dodge v. Knapp*, 112 Mo. App. 513; *Wilson v. Harris*, 21 Mont. 374 (disapproving dicta in *Montana Nat. Bank v. Merchants Nat. Bank*, 19 Mont. 589); *Wyman v. Jensen*, 26 Mont. 227; *Corning v. Records*, 69 N. H. 390, 76 Am. St. Rep. 178.

**3. Lien on Chattels in Possession of Garnishee.** — *Little Rock Traction, etc., Co. v. Wilson*, 66 Ark. 582; *Pace v. J. S. Merrill Drug Co.*, 2 Indian Ter. 218. See also *Farmers', etc., Nat.*

*Bank v. Mosher*, (Neb. 1903) 94 N. W. Rep. 1003; *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763. But see *Benedict v. T. L. V. Land, etc., Co.*, 66 Neb. 236.

**4. Indebtedness Owing from Garnishee.** — *Barr v. Warner*, 38 Oregon 109. See, however, *Smith v. Butler*, 72 Ark. 350; *Johnson v. Foster*, 69 Ark. 617; *Keuhter v. Temmen*, 8 Ohio Dec. 584; *Locher's Estate*, 18 Lanc. L. Rev. 6; *Lemon v. McCurdy*, 30 Pittsb. Leg. J. N. S. (Pa.) 343; *Davis v. King*, (Tenn. Ch. 1899) 56 S. W. Rep. 1041; *Kothman v. Faseler*, (Tex. Civ. App. 1904) 84 S. W. Rep. 390.

**872. 2. In Maggard v. Asher, (Ky. 1904) 82 S. W. Rep. 1002, where pending the garnishment proceedings the garnishee conveyed land to the defendant in satisfaction of an indebtedness owing by the garnishee to him, it was held that the garnishing plaintiff was entitled to have satisfied from such land his claim against the defendant in preference to other creditors of the defendant who subsequently attached the land so conveyed to the defendant.**

**3. Jurisdiction.** — The pendency of trustee process does not affect the jurisdiction of the court over a subsequent action in the same court by the defendant in such process against the trustee. *Hall v. Hunt*, 180 Mass. 380.

**6. Ground for Continuance.** — The Massachusetts statute (Pub. Stat., c. 183, § 40) expressly provides as to continuances by reason of the pendency of trustee process. *Gilchrist v. Cowley*, 181 Mass. 290.

**873. 2. As Bar to Action by Defendant.** — *Bailey v. Pennsylvania R. Co.*, 69 N. J. L. 194.

**3. Garnishment Pending in Foreign Jurisdiction Not Pleadable in Abatement.** — *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688.

**4. Contrary Doctrine.** — See *Bailey v. Pennsylvania R. Co.*, 70 N. J. L. 308.

**874. 1. Stay of Proceedings.** — *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 688.

**875. 2. Actions by Third Persons Not Affected.** — *Brown v. Fisher*, (Ind. App. 1905) 74 N. E.

**875. XIX. JUDGMENT CHARGING GARNISHEE AS A DEFENSE — 1. As Between Defendant and Garnishee — a. IN GENERAL. —** See note 4.

**876.** See note 1.

**877. A Judgment of a Court of a Foreign Jurisdiction. —** See note 1.

**879. c. WHEN PAYMENT BY GARNISHEE IS AUTHORIZED. —** See note 2.

**Collusion or Wilful Default by Garnishee. —** See note 3.

**880. 2. As Between Garnishee and Third Persons — a. IN GENERAL. —** See notes 3, 4.

**b. PERSONS CLAIMING THROUGH DEFENDANT — (1) In General. —** See note 5.

**881.** See note 2.

**882. Equivalent to Payment to Defendant. —** See note 1.

**883. (3) Notice to Equitable Assignee to Defend. —** See note 2.

**c. THIRD PERSONS MADE PARTIES — Persons Voluntarily Intervening. —** See note 5.

**Persons Interpleaded. —** See note 6.

**884. 3. As Between Plaintiff and Defendant. —** See note 1.

Rep. 632. *Compare* Shannon v. North American L. Assur. Co., 19 Quebec Supr. Ct. 321.

**875. 4. Payment of Judgment Discharges Liability of Garnishee Pro Tanto. —** National F. Ins. Co. v. Ming, (Ariz. 1900) 60 Pac. Rep. 720; Baltimore, etc., R. Co. v. Adams, 159 Ind. 688; Alberts v. Baker, 21 Ind. App. 373; Cunningham v. Kansas City, etc., R. Co., 60 Kan. 286; Pendleton v. Tackett, (Ky. 1901) 60 S. W. Rep. 846; Sexton v. Phoenix Ins. Co., 132 N. Car. 1; Cross v. Standard Granite Co. Quarries, 9 Pa. Dist. 557; Carpenter v. Phoenix Electric Light, etc., Co., 21 R. I. 145.

**876. 1. Payment or Delivery of Property into Court. —** Taney v. Vollenweider, 28 Mont. 147; Barr v. Warner, 38 Oregon 109.

**877. 1. Judgments of Courts of Sister States. —** Baltimore, etc., R. Co. v. Adams, 159 Ind. 688. *Compare* Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391 (as affecting exemption rights).

**Full Faith and Credit. —** The refusal of the courts of one state to give effect to a judgment against a garnishee rendered in another state, the courts of which had jurisdiction of the indebtedness owing from the garnishee, as a defense in a subsequent action by the principal debtor would be a violation of the constitutional provision that full faith and credit shall be given to judgments of the courts of sister states. Chicago, etc., R. Co. v. Sturm, 174 U. S. 710; Harris v. Balk, 198 U. S. 215, reversing 130 N. Car. 381.

**Effect of Failure to Notify Defendant. —** Harris v. Balk, 198 U. S. 215. See also Baltimore, etc., R. Co. v. McDonald, 112 Ill. App. 391.

**879. 2. Payment Must Be under Compulsion. —** Barnes v. Shelburne Falls Sav. Bank, 186 Mass. 574, following Burnap v. Campbell, 6 Gray (Mass.) 241.

**3. Collusion or Wilful Default of Garnishee. —** Scottish Rite, etc., Aid Assoc. v. Union Trust Co., 195 Pa. St. 45.

**880. 3. Judgment Not Conclusive Against Persons Not Parties. —** Bessemer Sav. Bank v. Anderson, 134 Ala. 343, 92 Am. St. Rep. 38; Bartlett v. Willis Mfg. Co., 106 Ill. App. 248; Radzinski v. Fry, 111 Ill. App. 645; Brown v.

Fisher, (Ind. App. 1905) 74 N. E. Rep. 632; Stone v. Dowling, 119 Mich. 476; Coleman v. American F. Ins. Co., 74 Mo. App. 663; Mul-laney v. Evans, 33 Oregon 330; Adamson v. Frazier, 40 Oregon 273; Importers', etc., Nat. Bank v. Lyons, 195 Pa. St. 479.

**4. Rock Island Lumber, etc., Co. v. Wichita Fourth Nat. Bank, 63 Kan. 768.**

**5. Persons Claiming Through Defendant. —** Tarrant v. Burch, 102 Ill. App. 393.

**881. 2. Failure of Garnishee to Disclose Assignment. —** Bessemer Sav. Bank v. Anderson, 134 Ala. 343, 92 Am. St. Rep. 38; Chott v. Tivoli Amusement Co., 82 Ill. App. 244; Seymour v. Aultman, 109 Iowa 297; Rock Island Lumber, etc., Co. v. Wichita Fourth Nat. Bank, 63 Kan. 768; Scottish Rite, etc., Aid. Assoc. v. Union Trust Co., 195 Pa. St. 45; Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590.

**Assignee May Recover of Garnishee. —** Harris v. Chamberlain, 126 Mich. 280.

**882. 1. Equivalent to Payment to Defendant. —** Ihorn v. Wallace, 88 Ill. App. 562.

**Assignment of Negotiable Paper Before Maturity. —** Commercial State Bank v. Rowley, (Neb. 1902) 89 N. W. Rep. 765.

**Notice of Assignment After Payment into Court** will not render the garnishee liable to the assignee. Peterson v. Kingman, 59 Neb. 667.

**883. 2. Notice to Equitable Assignee to Defend. —** Rock Island Lumber, etc., Co. v. Wichita Fourth Nat. Bank, 63 Kan. 768.

**5. Interveners Concluded by Judgment. —** Swearingen Lumber Co. v. Washington School Tp., 125 Iowa 283.

**6. Persons Interpleaded. —** Radzinski v. Frv., 111 Ill. App. 645; Bryant v. Wilcox, (Mich. 1904) 100 N. W. Rep. 918.

**884. 1. Not Discharge of Judgment Against Defendant — Defendant Discharged to Extent of Judgment Against Garnishee. —** Bowen v. Port Huron Engine, etc., Co., 109 Iowa 255, 77 Am. St. Rep. 539.

**A Judgment Discharging the Garnishee Is Not Res Adjudicata** as between the plaintiff and the defendant in garnishment, where the defendant was not served with process. Hilliard v. Burlington Shoe Co., 76 Vt. 57.

**884. 4. Defects in Proceedings as Affecting Availability Thereof as Defense** — *a. DEFECTS AFFECTING JURISDICTION* — (1) *In General.* — See note 2.

**885.** *Necessity for Service of Process on Garnishee.* — See note 1.

**886. b. DEFECTS NOT AFFECTING JURISDICTION.** — See note 2.

**887. 5. Judgment in Garnishment Proceedings as Res Judicata** — *a. AS BETWEEN PLAINTIFF AND GARNISHEE.* — See notes 1, 2.

*b. AS BETWEEN GARNISHEE AND DEFENDANT.* — See note 3.

**888. XX. CARE, CUSTODY, AND CONTROL OF PROPERTY** — 1. *Garnishee's Right to Retain Possession* — Direct Attachment of Property in Hands of Garnishee. — See note 10.

**889. 2. Payment into Court** — Garnishee's Right of Payment into Court. — See note 1.

*Power of Court to Require Payment into Court.* — See note 3.

**XXI. DISSOLUTION OF GARNISHMENT AND DISCHARGE OF GARNISHEE** — 1. *Who May Move for Dissolution or Discharge.* — See note 7.

**890. 2. Grounds for Dissolution or Discharge** — *a. IN GENERAL.* — See notes 1, 2, 4.

**884. 2. Matters Affecting Jurisdiction of Court.** — Southern R. Co. v. Ward, 123 Ala. 400; Southern R. Co. v. Newton, 106 Ga. 566, 71 Am. St. Rep. 279; Hedrix v. Hedrix, 103 Mo. App. 40; Tapp v. Dihrell, 134 N. Car. 546; Balk v. Harris, 124 N. Car. 467, 70 Am. St. Rep. 606; Stewart v. Northern Assur. Co., 45 W. Va. 734.

*Want of Jurisdiction of Res.* — McKinney v. Mills, 80 Minn. 478, 81 Am. St. Rep. 278; Boyle v. Musser-Sauntry Land, etc., Co., 88 Minn. 456, 97 Am. St. Rep. 538; Allen v. United Cigar Stores Co., (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 500; Strause v. Aetna F. Ins. Co., 126 N. Car. 223.

*Want of Affidavit.* — Dutcher v. Grand Rapids F. Ins. Co., 131 Mich. 671.

*Setting Aside Judgment.* — If a garnishee answers to a void garnishment summons and a judgment is rendered against him thereon, the judgment is void and should be set aside on motion. Phoenix Bridge Co. v. Street, 9 Okla. 422.

**885. 1. Voluntary Appearance by Garnishee.** — H. B. Claffin Co. v. Bretzfelder, 69 Ark. 271; Phoenix Bridge Co. v. Street, 9 Okla. 422; Altona v. Dabney, 37 Oregon 334; Barr v. Warner, 38 Oregon 109; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450. Compare Mulhollan v. Mix, 24 Pa. Co. Ct. 143.

**886. 2. Irregularities Not Affecting Jurisdiction.** — Barr v. Warner, 38 Oregon 109.

*Irregularities in Determining the Extent of the Garnishee's Liability* may be waived by him. Altona v. Dabney, 37 Oregon 334.

**887. 1. Judgment Conclusive as Between Plaintiff and Garnishee.** — Fulton v. Gesterding, (Fla. 1904) 36 So. Rep. 56.

2. Wightman v. Kruger, 23 R. I. 78.

**3. Judgment Charging Garnishee Not Conclusive Against Defendant.** — Hukill v. Yoder, 29 Pittsb. Leg. J. N. S. (Pa.) 94. But see Schwartz v. Flaherty, 99 Me. 463.

**888. 10. Pitkin v. Burnham,** 62 Neb. 385, 89 Am. St. Rep. 763.

**889. 1. Discharge of Garnishee on Payment into Court.** — Peterson v. Kingman, 59 Neb. 667.

*Where the Garnishment Proceedings Are Adjudged Void* after payment by the garnishee into

court, the court should order the money so paid in to be returned to the garnishee. Yeiser v. Cathers, (Neb. 1905) 102 N. W. Rep. 612.

**3. Power of Court to Require Payment into Court.** — Barbour v. Boyce, 9 Ohio Dec. 332, 6 Ohio N. P. 425.

**7. Garnishee.** — Weaver v. Manville, 14 Montg. Co. Rep. (Pa.) 162.

A foreign attachment will not be dissolved on the motion of the garnishee on the ground that the defendant does not owe the debt demanded. Dempsey v. Petersburg Sav., etc., Co., 26 Pa. Super. Ct. 633.

*The Principal Defendant may move for discharge of garnishment.* Greaves v. Posner, 111 Iowa 651; Schomberg Hardwood Lumber Co. v. Engel, 114 Wis. 273.

**890. 1. Fund Not Attachable—Exemption.** — Garnishment may be discharged under Iowa Code, § 3948, on the ground that the property was exempt. Greaves v. Posner, 111 Iowa 651.

*Want of Jurisdiction of Res.* — Swearingin Lumber Co. v. Washington School Tp., 125 Iowa 283.

*Situs of Debt.* — The defendant may move for discharge of the garnishment writ on the ground that the situs of the debt attempted to be garnished was in another state. Greaves v. Posner, 111 Iowa 651.

*Failure to Serve Garnishee.* — The principal defendant may move for the discharge of the writ of garnishment on the ground that the garnishee was not served. Greaves v. Posner, 111 Iowa 651.

*Application for Involuntary Bankruptcy Against the Defendant.* — Where the plaintiff in garnishment proceedings institutes involuntary bankruptcy proceedings against the principal defendant, if the court in such proceedings refuses to declare bankruptcy, the garnishment proceedings are not dissolved by such proceedings. Sullivan v. King, 31 Tex. Civ. App. 432.

*Discharge After Default in Answering.* — Grant v. New York L. Ins. Co., 24 R. I. 11.

*The Plaintiff by Taking Judgment Against the Principal Defendant Only Discontinues* as to the trustee and waives all right to pursue him further. Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15.

**891.** *c.* DEATH OF PARTIES — (2) *Death of Defendant* — In General. — See note 4.

**892.** *d.* DISSOLUTION BY BOND — (1) *In General*. — See note 6.

**893.** (3) *Form and Sufficiency of Bond* — Sufficiency. — See note 6.

(4) *Liabilities on Dissolution Bond* — (a) In General. — See notes 7, 8.

(b) Bond Conditioned to Pay Judgment Recovered Against Defendant. — See note 9.

**894.** (c) Bond Conditioned to Pay Judgment Rendered Against Garnishee. — See notes 2, 3.

Estoppel to Deny Defendant's Ownership. — See note 4.

(5) *Recovery on Bond*. — See note 7.

**895.** *e.* INSOLVENCY AND BANKRUPTCY. — See note 1.

**XXII. RIGHT TO AND LIABILITY OF GARNISHEE FOR COSTS** — 1. When Liable for Costs — *b.* CONTEST AS TO EXTENT OF GARNISHEE'S LIABILITY. — See note 4.

**896.** See note 2.

*c.* UNNECESSARY LITIGATION. — See note 3.

2. When Entitled to Costs — In General. — See note 5.

**897.** See notes 1, 3.

**890.** 2. Rendition of Judgment for Defendant. — *Cotzhausen v. H. W. Johns Mfg. Co.*, 107 Wis. 59.

4. Abuse or Misuse of Process. — *Rustad v. Bishop*, 80 Minn. 497, 81 Am. St. Rep. 232; *Remington v. Hazard*, 23 R. I. 142, *approving McNally v. Wilkinson*, 20 R. I. 315.

**891.** 4. Dissolved by Death of Defendant Before Garnishment. — *Reynolds v. Nesbitt*, 10 Kulp (Pa.) 113.

**892.** 6. Dissolution by Bond. — *McNamara v. Mattei*, 74 Conn. 170; *Maddox v. American Trust, etc., Co.*, 109 Ga. 787; *Callaway v. Maxwell*, 123 Ga. 208; *Woodbridge v. Drought*, 118 Ga. 671; *Russell v. Brunswick Grocery Co.*, 120 Ga. 38; *American Cigar Co. v. Mayer*, 68 Ohio St. 623.

Liability of Garnishee. — *Garden v. Crutchfield*, 112 Ga. 274.

Liability of Officer Taking Insufficient Bond. — *Santee River Co. v. Webster*, 23 R. I. 599.

**893.** 6. Sufficiency — Must Comply with Statutory Requirements. — *Warlick v. Neal Loan etc., Co.*, 120 Ga. 1070; *American Cigar Co. v. Mayer*, 68 Ohio St. 623.

In New Hampshire the bond should run to the officer serving the writ. *Santee River Co. v. Webster*, 23 R. I. 599.

Where the Bond Is Fatally Defective the garnishee is not protected from liability by reason of payments to the defendant after the filing of the bond. *Fitzgerald Military Band v. Colony Bank*, 115 Ga. 790.

7. Claimant's Bond — Interest from Dissolution Held Recoverable. — *McCall v. Miller*, 120 Ga. 262.

8. Mistake of Surety as to Extent of His Liability. — *McNamara v. Mattei*, 74 Conn. 170.

Fraud of Defendant No Defense. — *Wilkinson v. U. S. Fidelity, etc., Co.*, 119 Wis. 226.

9. Bond Conditioned to Pay Judgment Recovered Against Defendant. — *Wilkinson v. U. S. Fidelity, etc., Co.*, 119 Wis. 226.

**894.** 2. Conclusiveness of Judgment Against Garnishee. — The principal and sureties on the bond are concluded thereby. *McCoslin v. David*, 22 Tex. Civ. App. 53.

3. Defenses Available to Obligors. — *Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13; *Tinsley v. Ardrey*, 26 Tex. Civ. App. 561.

Effect of Dismissal of Proceedings. — *Sullivan v. King*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1048.

Where the Garnishment Proceedings Are Void, the plaintiff is not entitled to judgment upon the garnishment bond given to dissolve the garnishment proceedings. *Morgan v. Latham*, 111 Ga. 835.

4. Estoppel to Deny Defendant's Ownership of Property. — *McNamara v. Mattei*, 74 Conn. 170.

7. Judgment Against Defendant Essential to Recovery on Bond. — *Klipstein v. Allen-Miles Co.*, (C. C. A.) 136 Fed. Rep. 385.

Summary Judgment Against Bondsmen. — *Tinsley v. Ardrey*, 26 Tex. Civ. App. 561.

**895.** 1. Insolvency and Bankruptcy Proceedings. — See *Klipstein v. Allen-Miles Co.*, (C. C. A.) 136 Fed. Rep. 385; *In re Beals*, 116 Fed. Rep. 530; *Armour Packing Co. v. Wynn*, 110 Ga. 683.

After Judgment Has Been Rendered Against a Garnishee the subsequent discharge in bankruptcy of the principal defendant does not affect his liability. *Marx v. Hart*, 166 Mo. 503, 89 Am. St. Rep. 715.

4. Unsuccessful Contest by Garnishee as to His Liability. — *Kothman v. Faseler*, (Tex. Civ. App. 1904) 84 S. W. Rep. 390.

**896.** 2. Indebtedness Larger than Admitted. — *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 124 Wis. 520.

3. Unnecessary Litigation. — *Patterson v. Setton*, 19 Tex. Civ. App. 430.

5. When Entitled to Costs — Garnishee Charged. — *New York Finance Co. v. Potter*, 126 Fed. Rep. 432; *McCarty v. Nugent*, 176 Mass. 124; *Barnes v. Bamberger*, 196 Pa. St. 123.

**897.** 1. Garnishee Discharged. — *Buckingham v. Shoyer*, 86 Ill. App. 364; *Shotwell v. Wren*, 85 Mo. App. 151; *Hamburg-Bremen F. Ins. Co. v. Bailey*, 33 Tex. Civ. App. 562; *Cotzhausen v. H. W. Johns Mfg. Co.*, 107 Wis. 59.

3. Dismissal of Proceedings. — *Dowling v. Philadelphia F. Assoc.*, 102 Wis. 383.

- 897.** Garnishee Contesting His Liability. — See note 4.  
**3.** Items Allowable to Garnishee — *a.* IN GENERAL. — See note 6.  
**899.** *c.* ATTORNEYS' FEES. — See note 1.  
**901.** XXIII. APPEALS — 1. Right of Appeal — *b.* PLAINTIFF'S RIGHT OF APPEAL. — See note 5.  
*c.* DEFENDANT'S RIGHT OF APPEAL. — See note 7.  
**902.** Defendant's Exemption Rights Involved. — See note 1  
**903.** 2. Appealable Orders and Judgments — *b.* WHAT ARE FINAL ORDERS OR JUDGMENTS — (1). *In General.* — See note 4.  
*(2) Judgments as to Garnishee's Liability.* — See notes 5, 6.  
**905.** 3. Review on Appeal — Adjudications on Questions of Fact. — See note 6.  
**907.** XXIV. ADVERSE CLAIMANTS — 2. Right of Adverse Claimant to Intervene — *a.* RIGHT DEPENDENT UPON STATUTORY AUTHORITY. — See notes 1, 2.  
*b.* STATUTORY PROVISIONS FOR INTERVENTION. — See note 3.  
**908.** 3. Plaintiff's Right to Interplead Claimant — *a.* IN GENERAL. — See note 2.  
*b.* DUTY OF PLAINTIFF TO CITE IN CLAIMANT. — See note 1.  
**909.** 4. Right of Garnishee to Interplead Claimant. — See note 3.  
**910.** 7. Determination of Claimant's Claim — *a.* ISSUE IS BETWEEN CLAIMANT AND PLAINTIFF. — See note 2.

**897.** 4. Garnishee Contesting His Liability. — *Reid v. Walsh*, (Tex. Civ. App. 1901) 63 S. W. Rep. 940.

**6.** Items Allowable to Garnishee. — *Cotzhansen v. H. W. Johns Mfg. Co.*, 107 Wis. 59; *Dowling v. Philadelphia F. Assoc.*, 102 Wis. 383.

**899.** 1. Statutory Provisions for Allowance of Attorney's Fees. — *New York Finance Co. v. Potter*, 126 Fed. Rep. 432; *Shotwell v. Wren*, 85 Mo. App. 151; *Lummi v. Big Sandy Land, etc.*, Co., 188 Pa. St. 27 (Pa. Pub. Laws 1891, p. 35); *Swoope v. Brown*, 22 Pa. Co. Ct. 531; *Beatty v. Duffy*, 24 Pa. Co. Ct. 559; *Friedman v. Early Grocery Co.*, 22 Tex. Civ. App. 285; *Fife v. Netherlands F. Ins. Co.*, (Tex. Civ. App. 1901) 61 S. W. Rep. 160; *Hamburg-Bremen F. Ins. Co. v. Bailey*, 33 Tex. Civ. App. 562; *Fields v. Rust*, 36 Tex. Civ. App. 350.

**901.** 5. Appeal by Plaintiff. — *Pick v. Mutual L. Ins. Co.*, 94 Ill. App. 483, dismissed 192 Ill. 157; *Donaldson v. Security Trust, etc., Co.*, (Ky. 1900) 56 S. W. Rep. 424.

**7.** Appeal by Defendant from Judgment in Reference to Garnishee's Liability. — *Schwartz v. Flaherty*, 99 Me. 463; *Badger Lumber Co. v. Stern*, 123 Wis. 618.

**902.** 1. Judgment Affecting Defendant's Exemption Rights. — *Cunningham v. Kansas City, etc., R. Co.*, 60 Kan. 268.

**903.** 4. An Order Denying the Defendant's Claim of Exemptions is final so as to be subject to review. *Cunningham v. Kansas City, etc., R. Co.*, 60 Kan. 268.

Judgment in Favor of Claimant Appealable. — *Stacher v. Rockhill*, 7 Kan. App. 491.

**5.** Judgments or Orders Discharging Garnishee. — *Sprague v. Auffmordt*, 183 Mass. 7.

**6.** Judgments Charging Garnishee. — *Wightman v. Kruger*, 23 R. I. 78.

**905.** 6. Adjudication on Conflicting Evidence. — See *Hendrie, etc., Mfg. Co. v. Collins*, 29 Colo. 102.

**907.** 1. Intervention Without Statutory Authority. — *Field v. Sammis*, (N. Mex. 1903) 73

Pac. Rep. 617; *Ragsdale v. Groos*, (Tex. Civ. App. 1899) 51 S. W. Rep. 256.

**2.** Statutory Authority to Intervene Necessary. — *Buckingham v. Shoyer*, 86 Ill. App. 364; *Schloredt v. Boyden*, 9 Wyo. 392.

Cannot Intervene in Original Action. — A claimant to property or indebtedness in the hands of or owing by the garnishee, cannot intervene in the original action against the defendant. *Stanley v. Foote*, 9 Wyo. 335.

**3.** Statutes Authorizing Intervention by Claimants. — *Louisville, etc., R. Co. v. Sharp*, 131 Ala. 623; *Page v. Pitt*, 109 Ga. 557; *Chott v. Tivoli Amusement Co.*, 82 Ill. App. 244; *Bartlett v. Willis Mfg. Co.*, 106 Ill. App. 248; *Schawacker v. Luddington*, 83 Mo. App. 342; *Corning v. Records*, 69 N. H. 390, 76 Am. St. Rep. 178; *Field v. Sammis*, (N. Mex. 1903) 73 Pac. Rep. 617; *Barndollar v. Fogarty*, 203 Pa. St. 617.

Bond by Claimant. — In *Mississippi* the claimant is not required to give bond. *Butler v. Savannah Guano Co.*, 122 Ala. 326.

**908.** 2. Plaintiff's Right to Interplead Claimant. — *Marx v. Wayne Circuit Judge*, 119 Mich. 19; *King v. Carroll-Porter Boiler, etc., Co.*, 74 Minn. 470.

**909.** 1. Necessity for Citing In Claimant Disclosed. — *Chott v. Tivoli Amusement Co.*, 82 Ill. App. 244; *Bartlett v. Willis Mfg. Co.*, 106 Ill. App. 248; *Schawacker v. Luddington*, 83 Mo. App. 342; *Importers, etc., Nat. Bank v. Lyons*, 105 Pa. St. 479. But see *Seitz v. Starks*, 136 Mich. 90.

**3.** Garnishee May Interplead Claimant. — *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625; *Barnes v. Bamberger*, 196 Pa. St. 123.

**910.** 2. Issue Is Between Claimant and Plaintiff. — *Florida Cent., etc., R. Co. v. Carstens*, (Fla. 1904) 37 So. Rep. 566; *Chott v. Tivoli Amusement Co.*, 114 Ill. App. 178; *O'Melia v. Hoffmeyer*, 119 Iowa 444; *Wichita v. Rock Island Lumber, etc., Co.*, 68 Kan. 445.

**910.** *b.* CLAIMANT CAN RECOVER ONLY ON STRENGTH OF HIS OWN TITLE. — See note 4

**911.** Sufficiency of Claimant's Title. — See note 1.

*c.* RIGHT TO JURY TRIAL. — See note 3.

*d.* EVIDENCE — (1) *In General*. — See note 4.

**912.** (2) *Burden of Proof*. — See note 1.

*e.* JUDGMENT. — See note 3.

**913.** See notes 1, 3.

*f.* COSTS — If the Claimant Is Successful. — See note 4.

Claimant Unsuccessful — But if He Appears and Is Unsuccessful. — See note 5.

**914.** XXV. WRONGFUL AND MALICIOUS GARNISHMENT — Wrongful Garnishment. — See note 3.

**910.** 4. Non-garnishable Character of Indebtedness — In Support of Subsequent Assignment. — A claimant intervening in trustee process may show that the indebtedness owing from the trustee was not subject to trustee process so as to support his claim to the indebtedness through an assignment subsequent to the service of the trustee process. *Wilde v. Mahaney*, 183 Mass. 455.

**911.** 1. Sufficiency of Claimant's Title. — *Butler v. Savannah Guano Co.*, 122 Ala. 326; *Rushton v. Davis*, 127 Ala. 279; *Norwood v. Voorhees*, 129 Ala. 314; *Louisville, etc., R. Co. v. Sharp*, 131 Ala. 623.

Equitable Assignee. — *Harlow v. Bartlett*, 96 Me. 294, 90 Am. St. Rep. 346; *Howe v. Howe*, 97 Me. 422.

**3.** Express Waiver. — *O'Melia v. Hoffmeyer*, 119 Iowa 444.

**4.** Weight and Sufficiency of Evidence. — *Sullivan v. Greene*, 92 Me. 102; *Bullard v. Avery*, 126 Mich. 711; *Twohy Mercantile Co. v. Melbye*, 83 Minn. 394; *Schloredt v. Boyden*, 9 Wyo. 392.

**912.** 1. Burden of Proof on Claimant. — *Racek v. North Bend First Nat. Bank*, 62 Neb. 669. See also *Davis v. Pringle*, 108 Ga. 93.

**3.** *Buckingham v. Shoyer*, 86 Ill. App. 364.

Judgment Cannot Be Rendered for Claimant Against Garnishee. — *Florida Cent., etc., R. Co. v. Carstens*, (Fla. 1904) 37 So. Rep. 566, following *Carpenter v. McClure*, 37 Vt. 127; *Commercial Nat. Bank v. Payne*, 60 Ill. App. 346, affirmed 161 Ill. 316.

**913.** 1. No Personal Judgment Against Garnishee. — *Stacher v. Rockhill*, 7 Kan. App. 491.

**3.** *Wichita v. Rock Island Lumber, etc., Co.*, 68 Kan. 445.

**4.** Claimant Entitled to Costs if Successful. — *Buckingham v. Shoyer*, 86 Ill. App. 364; *Peterson v. Knuutila*, (Minn. 1905) 102 N. W. Rep. 368.

**5.** Unsuccessful Claimant Liable for Costs. — *Meserve v. Nason*, 96 Me. 412.

**914.** 3. Wrongful Garnishment. — *Insell v. Kennedy*, 120 Iowa 234. But see *Veitch v. Cebell*, 105 Wis. 260, 76 Am. St. Rep. 914.

Garnishment to Secure Exempt Property. — *Coursey v. Cornwell*, (Tex. Civ. App. 1901) 65 S. W. Rep. 73.

Good Faith No Defense. — The fact that the plaintiff's agent making affidavit for the writ believed that grounds for the issuance of the writ existed is immaterial. *Barr v. Cardiff*, 32 Tex. Civ. App. 495.

## GAS COMPANIES.

By H. W. HOVE.

**917.** I. CHARACTER OF CORPORATION AND NATURE OF BUSINESS. — See note 2.

II. INCORPORATION. — See note 7.

**918.** III. CONSOLIDATION. — See note 4.

IV. REGULATION — 1. State. — See notes 6, 7.

**917.** 2. Gas Companies Generally Held to Be Public or Quasi-Public Corporations. — *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97; *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505.

**7.** Transportation and Business Corporations. — Under the *New York* statutes a corporation supplying natural gas is a business corporation, but corporations formed for the purpose of manufacturing gas are transportation corporations, and are excluded from organizing un-

der the Business Corporations Law. *Wilson v. Tennent*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 273, affirmed 61 N. Y. App. Div. 100.

**918.** 4. Effect of Consolidation. — *People's Gaslight, etc., Co. v. Chicago*, 114 Fed. Rep. 384, affirmed 194 U. S. 1; *People's Gaslight, etc., Co. v. Hale*, 94 Ill. App. 406; *Covington Gaslight Co. v. Covington*, (Ky. 1900) 58 S. W. Rep. 805.

**6.** Police Power. — *Ohio Oil Co. v. Indiana*,

**919.** Constitutional Limitation of State's Right to Regulate the Transportation of Natural Gas. — See note 1.

**2. Municipal.** — See notes 5, 6, 7.

**920. V. RIGHTS — 1. In General** — Conditional Grants. — See notes 3, 4.

**2. Right to Supply Municipalities with Gas and to Lay Pipes in Highways** — *a. HOW ACQUIRED* — (1) *In General.* — See note 5.

(2) *Grants by Municipal Corporations.* — See notes 6, 7.

**921. (3) Rights of Abutting Owners.** — See note 3.

*b. GRANTS OF EXCLUSIVE RIGHTS.* — See note 5.

**922. c. NATURE OF RIGHT.** — See note 2.

**923. d. MODE OF EXERCISING RIGHT.** — See notes 1, 2.

**3. Right of Eminent Domain.** — See notes 5, 6.

**925. VI. CONSTRUCTION OF LEGISLATIVE GRANTS TO GAS COMPANIES —**

**1. In General.** — See notes 2, 3, 5.

**927. VII. PRICE OF GAS — 1. State or Municipal Regulation.** — See notes 1, 2, 3.

177 U. S. 190; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95. See also *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505.

**918. 7. Dobbins v. Los Angeles, 105 U. S. 223.**

**919. 1. Natural Gas — Interstate Commerce.** Manufacturers' Gas, etc., *Co. v. Indiana Natural Gas, etc., Co.*, 155 Ind. 545.

**5. Limitations of the Police Power of Municipal Corporation.** — *Mills v. Chicago*, 127 Fed. Rep. 731; *In re Johnston*, 137 Cal. 115; *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97; *Consolidated Gas Co. v. Baltimore County*, 98 Md. 689. See also *People v. Cromwell*, 89 N. Y. App. Div. 291.

**6. Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300; *In re Smith*, 143 Cal. 368; *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162; *Lima Gas Co. v. Lima*, 2 Ohio Cir. Dec. 396; *Logan Natural Gas, etc., Co. v. Chillicothe*, 65 Ohio St. 186.**

**7. Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95; *Capital City Light, etc., Co. v. Tallahassee*, 42 Fla. 462.**

**920. 3. Annexing Conditions to Grant.** — *Newark Gas, etc., Co. v. Newark*, 8 Ohio Dec. 418, 7 Ohio N. P. 76.

**4. Sandy Lake v. Sandy Lake, etc., Gas Co.**, 16 Pa. Super. Ct. 234; *School Dist. v. Enterprise Natural Gas Co.*, 18 Pa. Super. Ct. 73.

**5. How Right Is Acquired.** — See *Twin Village Water Co. v. Damariscotta Gas Light Co.*, 98 Me. 325.

**6. Right of Municipal Corporation Limited by Its Legislative Authority.** — *Capital City Light, etc., Co. v. Tallahassee*, 42 Fla. 462.

**7. Municipality Must Act in Strict Conformity to Authority.** — *Mills v. Chicago*, 127 Fed. Rep. 731.

**921. 3. Rights of Owners of Land Traversed by a Country Highway.** — *Ward v. Triple State Natural Gas, etc., Co.*, 115 Ky. 723. See also *Muncie Natural Gas Co. v. Allison*, 31 Ind. App. 50.

**5. Exclusive Rights.** — *Lawrence v. Hennessy*, 165 Mo. 659. See also *Kentucky Heating Co. v. Louisville Gas Co.*, (Ky. 1901) 63 S. W. Rep. 751.

**922. 2. Grant of Franchise a Contract Protected by Constitution from Impairment.** — *In re Smith*, 143 Cal. 368.

**923. 1. Gas Company Assumes Risk of Loca-**

**tion of Pipes.** — *New Orleans Gaslight Co. v. Drainage Commission*, 111 La. 838. See also *Springfield Water Co. v. Suburban Gas Co.*, 8 Del. Co. Rep. (Pa.) 130, 14 York Leg. Rec. (Pa.) 135.

**2. After Laying Pipes Street Must Be Put in Good Condition.** — *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74.

**5. Right of Eminent Domain.** — *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662.

**6. Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662.**

**925. 2. Grants Strictly Construed.** — *Capital City Light, etc., Co. v. Tallahassee*, 42 Fla. 462; *People's Gas Light, etc., Co. v. Hale*, 94 Ill. App. 406.

**3. Implied Power to Lay Pipes in New Streets.** — *People v. Cromwell*, 89 N. Y. App. Div. 291.

**5. Authority to Lay Pipes in Highway.** — See *Batcheller v. Tunbridge Wells Gas Co.*, 84 L. T. N. S. 765, 65 J. P. 680.

**Power to Lay Pipes in "Morristown and Vicinity"** does not include a neighboring municipality. *Madison v. Morristown Gas Light Co.*, 65 N. J. Eq. 356.

**Power to Lay Pipes and Distribute Gas** does not include the right to establish telephone or telegraph service. *Woods v. Greensboro Natural Gas Co.*, 204 Pa. St. 606.

**For Other Examples of the Construction of the Peculiar Provisions of the Charters.** — *Kalamazoo v. Kalamazoo Heat, etc., Co.*, 124 Mich. 74.

**927. 1. Power of State or Municipal Corporation to Regulate Price of Gas.** — *People's Gaslight, etc., Co. v. Chicago*, 114 Fed. Rep. 384, affirmed 194 U. S. 1; *People's Gas Light, etc., Co. v. Hale*, 94 Ill. App. 406; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97; *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122; *Toledo v. Northwestern Ohio Natural Gas Co.*, 8 Ohio Dec. 277, 6 Ohio N. P. 531; *Cline v. Springfield*, 10 Ohio Dec. 389, 7 Ohio N. P. 626.

**A City Has No Inherent Power** to regulate the price to be charged for gas. *Mills v. Chicago*, 127 Fed. Rep. 731.

**2. Regulations Must Not Violate Charter Rights.** *Toledo v. Northwestern Ohio Natural Gas Co.*, 8 Ohio Dec. 277, 6 Ohio N. P. 531.

**3. Meter Rent.** — *Smith v. Capital Gas Co.*, 132



**928.** 2. In Absence of State or Municipal Regulation. — See note 6.

3. Contracts Between Companies and Municipal Corporations. — See note 7.

**929.** VIII. DUTIES AND LIABILITIES — 1. Duty to Furnish Gas — *a*. GENERAL RULE. — See notes 1, 2, 3.

**930.** *c*. RIGHT TO REQUIRE SECURITY OR DEPOSIT. — See note 7.

**931.** *d*. WHERE APPLICANT OR CONSUMER IS INDEBTED TO COMPANY. — See notes 2, 3.

The Question Whether or Not a Customer of a Gas Company Is in Arrears. — See note 4.

**932.** 2. Liability for Not Furnishing Gas or for Wrongfully Cutting Off Supply. — See notes 2, 3, 4.

Measure of Damages. — See note 5.

**934.** 5. Liability for Creating Nuisance — *b*. PRIVATE NUISANCE — (1) *Injuries Caused by Company's Works* — (*a*) In General. — See notes 2, 4.

**935.** (*b*) Polluting Air to Injury of Neighboring Proprietor. — See note 1.

Cal. 209; Indiana Natural, etc., Gas Co. v. State, 158 Ind. 516; Buffalo v. Buffalo Gas Co., 81 N. Y. App. Div. 505.

**928.** 6. Price of Gas in Absence of Legislation on Subject. — See Baily v. Fayette Gas Fuel Co., 193 Pa. St. 175, holding that a gas company cannot charge one rate for gas for lighting purposes and another rate for the same gas if used for heating.

7. Authorized Contracts Between Gas Companies and Municipal Corporations Inviolable. — Noblesville v. Noblesville Gas, etc., Co., 157 Ind. 162; Logan Natural Gas, etc., Co. v. Chillicothe, 65 Ohio St. 186.

**929.** 1. Application under New York Statute. — See Wilson v. Tennent, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 273, affirmed 61 N. Y. App. Div. 100.

2. Duty to Furnish Gas to Applicants. — People's Gas Light, etc., Co. v. Hale, 94 Ill. App. 406; Indiana Natural Gas, etc., Co. v. State, 162 Ind. 690; Indiana Natural, etc., Gas Co. v. Anthony, 26 Ind. App. 307; State v. Consumers Gas Trust Co., 157 Ind. 345; Bennett v. Eastchester Gas Light Co., 54 N. Y. App. Div. 74; Miller v. Wilkes-Barre Gas Co., 206 Pa. St. 254; Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662. See also American Lighting Co. v. Public Service Corp., 132 Fed. Rep. 794.

3. Jones v. Rochester Gas, etc., Co., 168 N. Y. 65; Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80.

Statutes Construed. — The penalty for refusing to supply gas imposed by section 65 of the New York Transportation Corporations Law does not apply to corporations organized for supplying natural gas to consumers, since such companies, unlike those formed for the purpose of manufacturing gas, are business and not transportation corporations. Wilson v. Tennent, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 273, affirmed 61 N. Y. App. Div. 100.

Mandamus, Not Injunction, Proper to Compel Company to Supply Gas. — State v. Consumers' Gas Trust Co., 157 Ind. 345; State v. New Orleans Gaslight Co., 108 La. 67; Johnson v. Atlantic City Gas, etc., Co., 65 N. J. Eq. 129.

**930.** 7. Right to Require Security. — Baker v. San Francisco Gas, etc., Co., 141 Cal. 710.

**931.** 2. Right to Refuse to Furnish Gas to Applicants and Consumers Who Are in Arrears. — Hitchcock v. Essex, etc., Gas Co., 70 N. J. L. 492.

By an English Statute. — Montreal Gas Co. v. Cadieux, 11 Quebec K. B. 93, affirming 68 L. J. P. C. 126, (1899) App. Cas. 589, 81 L. T. N. S. 274.

3. In New York. — See Bennett v. Eastchester Gas Light Co., 54 N. Y. App. Div. 74.

In Oregon a gas company may refuse to supply an applicant with gas until he has paid a bill for gas furnished to him at his former residence. Mackin v. Portland Gas Co., 38 Oregon 120.

Under an English Statute providing that a gas company may stop the gas from entering the premises of any person who neglects to pay any rate, rent, or charge due to the company, it has been held that a gas company may stop the supply of gas on all the premises of such person although there are no arrears in respect to part of the premises. Montreal Gas Co. v. Cadieux, (1899) A. C. 589, 68 L. J. P. C. 126, 81 L. T. N. S. 274.

Arrears Created by Former Occupants. — A gas company cannot, even under a by-law, refuse to supply a citizen on the ground that the former tenant had not paid his bill. Miller v. Wilkes-Barre Gas Co., 206 Pa. St. 254.

4. Bennett v. Eastchester Gas Light Co., 54 N. Y. App. Div. 74.

**932.** 2. Liability for Refusal to Furnish or for Wrongfully Cutting Off Gas. — Indiana Natural, etc., Gas Co. v. Anthony, 26 Ind. App. 307.

3. Statutory Penalty. — Bennett v. Eastchester Gas Light Co., 54 N. Y. App. Div. 74.

4. State v. Connersville Natural Gas Co., 163 Ind. 563.

5. Measure of Damages. — See Miller v. Wilkes-Barre Gas Co., 206 Pa. St. 254.

**934.** 2. The Question Whether a Substantial Injury Has Been Caused. — Armbruster v. Auburn Gas Light Co., 18 N. Y. App. Div. 447, affirmed 162 N. Y. 655.

4. Right of Action Not Dependent upon Negligence. — Jordonson v. Sutton, etc., Gas Co., (1898) 2 Ch. 614, 67 L. J. Ch. 666, 79 L. T. N. S. 478, affirmed (1899) 2 Ch. 217, 68 L. J. Ch. 457, 80 L. T. N. S. 815.

**935.** 1. Polluting Air. — Armbruster v. Au-

**935.** (2) *Special Injuries from Obstructions in Public Highways.* — See note 5.

(3) *Injunction to Restrain Private Nuisance.* — See note 6.

**936.** 6. *Liability for Negligence in Conduct of Business* — *a. IN GENERAL.* — See notes 3, 4.

*What Degree of Care Required.* — See notes 5, 7.

**937.** *When Notice Necessary to Make Company Liable.* — See note 3.

**938.** *Negligence Must Have Been Proximate Cause of Injury.* — See note 1.

*Injury Resulting from Joint Negligence of Gas Company and Another.* — See note 2.

*b. BURDEN OF PROOF.* — See note 5.

*c. EXISTENCE OF NEGLIGENCE QUESTION FOR JURY.* — See note 6.

**939.** *See note 1.*

*d. NEGLIGENCE OF AGENTS AND EMPLOYEES* — (1) *In General.* —

See note 2.

*f. INJURIES ARISING IN DELIVERING GAS TO CONSUMERS.* — See

notes 6, 7.

**940.** *g. ESCAPE OF GAS INTO NEIGHBORING PREMISES.* — See notes 1, 3.

burn Gas Light Co., 18 N. Y. App. Div. 447, affirmed 162 N. Y. 655.

**935.** 5. *Obstructions in Public Highways Resulting in Special Injury.* — San Antonio Gas Co. v. Singleton, 24 Tex. Civ. App. 341.

6. *Erection of Gasholder Which Would Obstruct Lights of Houses Restrained.* — Jordonson v. Sutton, etc., Gas Co., (1898) 2 Ch. 614, 67 L. J. Ch. 666, 79 L. T. N. S. 478, affirmed (1899) 2 Ch. 217, 66 L. J. Ch. 457, 80 L. T. N. S. 815, and see generally the title LIGHT AND AIR, 124. 2 et seq.

**936.** 3. See Triple-State Natural Gas, etc., Co. v. Wellman, 114 Ky. 79.

4. *Liability for Negligence.* — Aurora Gas Light Co. v. Bishop, 81 Ill. App. 493; Citizens' Gas, etc., Min. Co. v. Whipple, 32 Ind. App. 203; Indiana Natural, etc., Gas Co. v. Long, 27 Ind. App. 219; German-American Ins. Co. v. Standard Gas Light Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 594.

5. *Degree of Care Required.* — Aurora Gas Light Co. v. Bishop, 81 Ill. App. 493; Indiana Natural, etc., Gas Co. v. Long, 27 Ind. App. 219, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936; Greaney v. Holyoke Water-Power Co., 174 Mass. 437; Hartman v. Citizens' Natural Gas Co., 210 Pa. St. 19; Barrickman v. Marion Oil Co., 45 W. Va. 634.

*To Lay Natural-gas Pipe on Top of the Ground* has been held to be negligence. Indiana Natural, etc., Gas Co. v. McMath, 26 Ind. App. 154.

7. *Inspection and Superintendence.* — Indiana Natural, etc., Gas Co. v. Long, 27 Ind. App. 219, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936; Citizens Gas, etc., Min. Co. v. Whipple, 32 Ind. App. 203; Wichita Gas, etc., Co. v. Wright, 9 Kan. App. 730.

**937.** 3. *Where Notice Will Be Presumed.* — Aurora Gas Light Co. v. Bishop, 81 Ill. App. 493; Alexandria Min., etc., Co. v. Irish, 16 Ind. App. 534; Hartman v. Citizens Natural Gas Co., 210 Pa. St. 19. See also Koplan v. Boston Gaslight Co., 177 Mass. 15.

**938.** 1. *Proximate Cause.* — Richmond v. Gay, 103 Va. 320; Barrickman v. Marion Oil Co., 45 W. Va. 634.

*The Jury Cannot Found Its Verdict Merely on*

*Conjecture.* — People's Gas Light, etc., Co. v. Amphlett, 93 Ill. App. 194.

2. *Joint Tortfeasors.* — Aurora Gas Light Co. v. Bishop, 81 Ill. App. 493; Chicago, etc., R. Co. v. Rhodes, 35 Tex. Civ. App. 432. See also Howard v. Union Traction Co., 195 Pa. St. 391.

5. *Burden of Proving Negligence Is upon Plaintiff.* — People's Gas Light, etc., Co. v. Porter, 102 Ill. App. 461.

6. *Whether There Has Been Negligence Question for Jury.* — United Oil Co. v. Miller, 19 Colo. App. 46; Consolidated Gas Co. v. Getty, 96 Md. 683, 94 Am. St. Rep. 603; Koplan v. Boston Gas Light Co., 177 Mass. 15; Beyer v. Consolidated Gas Co., 44 N. Y. App. Div. 158; Tiehr v. Consolidated Gas Co., 51 N. Y. App. Div. 446; Heh v. Consolidated Gas Co., 201 Pa. St. 443, 88 Am. St. Rep. 819.

**939.** 1. *Essential to Recovery that Evidence Tending to Establish Negligence Be Submitted.* — Triple-State Natural Gas, etc., Co. v. Wellman, 114 Ky. 79; King v. Consolidated Gas Co., 90 N. Y. App. Div. 166; Skogland v. St. Paul Gaslight Co., 89 Minn. 1; McKenna v. Bridgewater Gas Co., 193 Pa. St. 633; Lodge v. United Gas Imp. Co., 209 Pa. St. 533.

2. *Liability for Negligence of Agents and Employees.* — United Oil Co. v. Miller, 19 Colo. App. 46; United Oil Co. v. Roseberry, 30 Colo. 177; Tipton Light, etc., Co. v. Newcomer, 33 Ind. App. 42; Beyer v. Consolidated Gas Co., 44 N. Y. App. Div. 158; German-American Ins. Co. v. Standard Gas Light Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 594; Chicago, etc., R. Co. v. Rhodes, 35 Tex. Civ. App. 432.

6. *Degree of Care Required in Delivering Gas to Consumers.* — Citizens' Gas, etc., Min. Co. v. Whipple, 32 Ind. App. 203.

7. *Liability for Negligence in Delivering Gas to Consumers.* — See Ibach v. Huntington Light, etc., Co., 23 Ind. App. 281.

*Where Pipes Are Owned and Controlled by Consumer Company Not Responsible.* — See King v. Consolidated Gas Co., 90 N. Y. App. Div. 166; Smith v. Pawtucket Gas Co., 24 R. I. 292, 96 Am. St. Rep. 713.

**940.** 1. *Baudler v. People's Gas Light, etc., Co., 108 Ill. App. 187.*

**941.** *h.* LIABILITY FOR INJURIES TO PERSONS ON STREET — (1) *From Explosion of Gas.* — See note 2.

*i.* MEASURE OF DAMAGES IN ACTIONS FOR NEGLIGENCE. — See note 5.

**942.** *j.* CONTRIBUTORY NEGLIGENCE — (3) *Province of Court and Jury in Determining Question of Contributory Negligence.* — See note 4.

(4) *Neglect to Take Precautionary Measures Where Gas Is Escaping into House.* — See note 6.

(5) *Searching for Leak with Match or Light.* — See note 9.

**943.** See note 4.

(6) *When Contributory Negligence of Third Person Will Preclude Recovery* — Contributory Negligence of Tenant in Possession. — See note 8.

**946.** X. LIABILITY FOR INTERFERENCE WITH OR INJURY TO COMPANY'S PROPERTY — 1. Property Placed in Public Highway under Authority of Law. — See notes 1, 2.

**948.** GENERAL. — See notes 2, 5.

**940.** 3. Liability for Injuries from Gas Escaping into Neighboring Premises. — *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187.

*Injuries to Trees and Plants.* — *Wichita Gas, etc., Co. v. Wright*, 9 Kan. App. 730; *Hansen v. St. Paul Gaslight Co.*, 82 Minn. 84.

**941.** 2. Injuries to Persons on Street. — *Tiehr v. Consolidated Gas Co.*, 51 N. Y. App. Div. 446.

5. Measure of Damages. — *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603; *Hansen v. St. Paul Gaslight Co.*, 82 Minn. 84.

**942.** 4. Existence of Contributory Negligence Ordinarily Question for Jury. — *Indiana Natural, etc., Gas Co. v. McMath*, 26 Ind. App. 154; *Tiehr v. Consolidated Gas Co.*, 51 N. Y. App. Div. 446; *Richmond v. Gay*, 103 Va. 320.

6. Whether He Has Such Knowledge or Not Is a Question for the Jury. — See *Appelbach v. Consolidated Gas Co.*, 204 Pa. St. 570.

9. *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603.

**943.** 4. Contributory Negligence Question for Jury. — *People's Gas Light, etc., Co. v. Amphlett*, 93 Ill. App. 194; *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187.

8. Contributory Negligence of Tenant in Possession of Property. — See *Creel v. Charleston Natural Gas Co.*, 51 W. Va. 129, 90 Am. St. Rep. 772.

**946.** 1. Liability for Interference with or Injury to Property in Highway. — See *Crystal*

*Palace Gas Co. v. Idris*, 82 L. T. N. S. 200, 64 J. P. 452 (injury to lamp post by negligent driving).

2. Interference with or Injury to Property Will Be Restrained. — *Alliance, etc., Gas Co. v. Dublin County Council*, (1901) Ir. R. 492.

**948.** 2. General and Notorious. — *Watson v. Richardson*, 110 Iowa 673; *Duffy v. Duffy*, 114 Iowa 581; *McCorkendale v. McCorkendale*, 111 Iowa 314.

5. General Election. — *Wilson v. Clark*, 63 Kan. 505.

General Election Distinguished from Regular Election. — *McIntyre v. Iliff*, 64 Kan. 747.

General and Special Terms. — *State v. Eggers*, 152 Mo. 485.

General Verdict. — *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588.

General and Special Benefits — Eminent Domain. — See *Beveridge v. Lewis*, 137 Cal. 619.

General and Special Courts. — See *Wertheim v. Fidelity, etc., Co.*, 72 Vt. 326.

A General Judgment is a judgment *in personam*; a special judgment operates *in rem*. *Smith v. Colloty*, 69 N. J. L. 365.

General Assignment. — See *People v. Mercantile Credit Guarantee Co.*, 55 N. Y. App. Div. 594.

General Reputation. — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 811.

General and Special Are Antonyms. — *Platt v. Craig*, 66 Ohio St. 75.

# GENERAL AVERAGE.

BY A. W. VARIAN.

**954. I. INTRODUCTORY** — General Average and Particular Average. — See note 1.

**955. II. DEFINITION AND GENERAL PRINCIPLES** — Classes of Losses Giving Rise to General Average. — See note 1.

Antiquity and History of Doctrine. — See note 3.

**956. III. GENERAL AVERAGE ACT** — 2. Requisites — *a. IN GENERAL.* — See note 4.

**957. *b. COMMUNITY OF INTEREST AND PERIL*** — Common Peril. — See note 3.

**958. Where Interests Are Separated After Peril Begins.** — See note 1.

Imminence and Character of Peril. — See note 2.

**960. *d. NECESSITY OF ACT*** — Master Judge of Necessity of Act. — See note 2.

**961. Negligence.** — See note 2.

**962. *e. EXTRAORDINARY NATURE OF ACT.*** — See note 1.

**963. 3. Where Article the Sacrifice of Which Is Claimed Was Inevitably Doomed** — Property Threatening Adventure Through Its Own Defect. — See note 1.

**IV. GENERAL AVERAGE LOSS** — 1. Definition and Nature of General Average Loss — *a. IN GENERAL.* — See note 3.

**966. *c. INCIDENTAL LOSSES*** — Immediate Consequences of Act Are General Average. — See note 2.

Act Must Be Proximate Cause of Loss. — See note 3.

**954. 1. The Phrase "General Average,"** as found in policies of marine insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. *Montgomery v. Indemnity Mut. Marine Ins. Co.*, (1902) 1 K. B. 734.

**955. 1. *Iredale v. China Traders Ins. Co.***, (1900) 2 Q. B. 515.

**3. Antiquity and History.** — See *Milburn v. Jamaica Fruit Importing, etc., Co.*, (1900) 2 Q. B. 540.

**956. 4. *Iredale v. China Traders Ins. Co.***, (1900) 2 Q. B. 515.

**957. 3. *Iredale v. China Traders Ins. Co.***, (1900) 2 Q. B. 515; *Kidd v. Thomson*, 26 Ont. App. 220.

**958. 1. After the Common Danger Has Ceased** there can be no sacrifice or expenditure that can be the subject of a general average contribution. *Iredale v. China Traders Ins. Co.*, (1900) 2 Q. B. 515.

**2. Imminence of Peril.** — *Kidd v. Thomson*, 26 Ont. App. 220.

**960. 2. Master Judge of Necessity.** — *Montgomery v. Indemnity Mut. Marine Ins. Co.*, (1901) 1 Q. B. 147, *affirmed* (1902) 1 K. B. 734.

**961. 2. Where Master's Negligence Proximate Cause of Loss.** — *Milburn v. Jamaica Fruit Importing, etc., Co.*, (1900) 2 Q. B. 540.

**Where Charter-party Exempts Servant's Negligence.** — *Milburn v. Jamaica Fruit Importing, etc., Co.*, (1900) 2 Q. B. 540.

**Effect of Harter Act.** — *The Strathdon*, 94 Fed.

Rep. 206, *affirmed* (C. C. A.) 101 Fed. Rep. 600.

**962. 1. Act Must Be Extraordinary.** — *Kidd v. Thomson*, 26 Ont. App. 220.

**965. 1. Spontaneous Combustion or Superheating of Cargo.** — See *Iredale v. China Traders Ins. Co.*, (1899) 2 Q. B. 356, *affirmed* (1900) 2 Q. B. 515.

**3. Depreciation in Value of Goods** brought about by a general average act must be made good in general average. *Anglo-Argentine Live Stock, etc., Agency v. Temperley Shipping Co.*, (1899) 2 Q. B. 493.

Also loss occasioned by the sale of a part of the cargo at an intermediate port because of its endangering the whole venture is to be made good in general average. *The Brewster*, 95 Fed. Rep. 1000.

**966. 2. Immediate Consequences of Sacrifice Are General Average.** — *Norwich, etc., Transp. Co. v. Insurance Co. of North America*, 118 Fed. Rep. 307, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966, *affirmed* (C. C. A.) 129 Fed. Rep. 1006.

**The Damage Occasioned Need Not Be Foreseen;** if it is incidental to the saving of the ship and cargo it is a general average loss. *McCall v. Houlder*, 76 L. T. N. S. 469.

**3. Causa Proxima, Non Remota, Spectatur.** — The doctrine of general average does not seem to be concluded by the primary cause of the loss, but is rather dependent on what occurred in the effort to save property. The sacrificial act which brings the doctrine into operation, and the success which ensues in the saving of property,

**968.** 2. General Average Losses Arising from Acts of Sacrifice — *a.* JETTISON — (2) *Deck Cargo* — Strict Rule — No Contribution. — See note 1.

**970.** (4) *Contribution for Freight on Jettisoned Goods.* — See note 2.  
*b.* STRANDING. — See note 3.

**972.** Where the Stranding Is Inevitable. — See note 1.

**977.** 3. General Average Losses Arising from Extraordinary Expenditures —  
*a.* EXTRAORDINARY EXPENSES IN SAVING STRANDED OR SUNKEN VESSEL — (2) *Stranding or Sinking Accidental* — (c) *Cargo Discharged in Whole or Part Before Ship Saved* — Expenses or Damages in Unloading Cargo. — See note 1.

**978.** *b.* SALVAGE AND TOWAGE EXPENSES — Salvage Expenses Are General Average — See note 2.

**979.** *c.* PORT OF REFUGE EXPENSES — (1) *Voluntary Deviation to Port of Refuge.* — See note 2.

**981.** (2) *Expenses at and Coming Out of Port of Refuge* — (c) *Rule in United States.* — See note 1.

**984.** 5. Miscellaneous Cases Considered — *c.* EXPENSES OR RANSOM IN CASE OF EMBARGO OR CAPTURE — Expenses for Wages and Provisions of the Crew. — See note 5.

**985.** V. GENERAL AVERAGE CONTRIBUTION — 1. Interests Liable — Generally All Property at Risk Contributes. — See note 3.

**987.** Contribution from Freight. — See note 3.

Contribution Between Two Interests Only. — See note 6.

**989.** 2. Persons Liable — Individuals Saved by Sacrifice. — See note 1.

**990.** 3. Adjustment and Estimation — *b.* PLACE OF ADJUSTMENT — (1) *Place Is Port of Destination.* — See note 6.

**991.** *c.* CONTRIBUTORY VALUE OF INTERESTS — (1) *Valuation of Cargo* — Valuation at Port of Destination or Adjustment Governs. — See note 3.

**992.** (2) *Valuation of Ship.* — See note 5.

are the proximate bases for a contribution to the sacrifice. *Norwich, etc., Transp. Co. v. Insurance Co. of North America*, 118 Fed. Rep. 307, affirmed (C. C. A.) 129 Fed. Rep. 1006.

**968.** 1. *Deck Cargo, No Claim for General Average.* — See *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, affirmed (C. C. A.) 110 Fed. Rep. 1006.

**970.** 2. *Contribution for Freight on Cargo Jettisoned.* — *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, affirmed (C. C. A.) 110 Fed. Rep. 1006.

3. *Stranding Is General Average.* — *Norwich, etc., Transp. Co. v. Insurance Co. of North America*, 118 Fed. Rep. 307, affirmed (C. C. A.) 129 Fed. Rep. 1006.

**972.** 1. *A Voluntary Stranding to Escape an Inevitable Sinking in deep water is a general average act.* *Norwich, etc., Trans. Co. v. Insurance Co. of North America*, 118 Fed. Rep. 307, affirmed (C. C. A.) 129 Fed. Rep. 1006.

**977.** 1. *Unloading of Cargo — Contra.* — *The L'Amérique*, 35 Fed. Rep. 847, approved in *Earnmoor Steamship Co. v. Union Ins. Co.*, 44 Fed. Rep. 374.

**978.** 2. *Salvage Expenses.* — *The Eliza Lines*, 102 Fed. Rep. 184.

**979.** 2. *Putting into Port of Refuge Is General Average Act.* — *Iredale v. China Traders Ins. Co.*, (1900) 2 Q. B. 515.

**981.** 1. *Rule in United States as to All Port of Refuge Expenses.* — *May v. Keystone Yellow Pine Co.*, 117 Fed. Rep. 287, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 980 [981].

**984.** 5. *Expense Necessary to Release Ship*

from Capture, which involves the ship, cargo, and freight, is a subject of general average. *Woods v. Olsen*, (C. C. A.) 99 Fed. Rep. 451.

**985.** 3. *One Owner of Several Interests.* — The distribution of loss among the respective underwriters is not affected because the interests belong to the same person. *Montgomery v. Indemnity Mut. Marine Ins. Co.*, (1902) 1 K. B. 734, affirming (1901) 1 Q. B. 147.

**987.** 3. *Round Voyage — Outward in Ballast.* — Where a ship is chartered for a round voyage and goes on outward trip in ballast, and is stranded, thereby necessitating a general average sacrifice, the chartered freight must contribute to the general average loss. *Steamship Carisbrook Co. v. London, etc., Marine, etc., Ins. Co.*, (1901) 2 K. B. 861, affirmed (1902) 2 K. B. 681.

6. *Contribution Between Two Interests Only.* — See *Steamship Carisbrook Co. v. London, etc., Marine, etc., Ins. Co.*, (1901) 2 K. B. 861, affirmed (1902) 2 K. B. 681.

**989.** 1. *No Contribution for Lives Saved.* — *Montgomery v. Indemnity Mut. Marine Ins. Co.*, (1901) 1 Q. B. 147, affirmed (1902) 1 K. B. 734.

**990.** 6. *Voyage Terminated at Intermediate Port.* — *The Eliza Lines*, 102 Fed. Rep. 184.

**991.** 3. *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, affirmed (C. C. A.) 110 Fed. Rep. 1006.

**992.** 5. But see *The Eliza Lines*, 102 Fed. Rep. 184, where a voyage was improperly broken up at an intermediate port, and the adjustment was made at such port, but based upon valuations at port of destination. Thus the

**993.** (3) *Valuation of Freight* — Round Voyage, Outward Bound in Ballast. — See note 4.

**997.** VII. *GENERAL AVERAGE AS AFFECTED BY CONTRACT OR CUSTOM.* — See note 2.

**998.** A General Custom. — See note 2.

**1000.** IX. *AVERAGE LIEN AND AVERAGE BOND* — Master's Lien for General Average. — See note 2.

**1001.** *GENERAL DEMURRER.* — See note 3.

*GENERAL DEPOSITS.* — See note 4.

*GENERAL ISSUE.* — See note 5.

**1002.** *GENERAL MANAGER.* — See note 3.

**1003.** [*GENERIC.* — See note 1*a*.]

**1005.** *GIFT ENTERPRISE.* — See note 1.

costs of repairs at the intermediate port, which were the subject of general average, were added to her appraised value at the intermediate port.

**993.** 4. *Round Voyage, Outward in Ballast — No Apportionment.* — Steamship Carisbrook Co. v. London, etc., Marine, etc., Ins. Co., (1902) 2 K. B. 681, *affirming* (1901) 2 K. B. 861.

**997.** 2. See *Christie v. Davis Coal, etc., Co.*, 95 Fed. Rep. 837, *affirmed* (C. C. A.) 110 Fed. Rep. 1006.

**998.** 2. *General Custom in Trade or Business.* — According to the practice of average adjusters a loss of time-charter freight is never included in general average. *The Leitrim*, (1902) P. 256, 87 L. T. N. S. 240, 71 L. J. P. 108.

**1000.** 2. See *Wavertree Sailing Ship Co.*

v. Love, (1897) A. C. 373, 76 L. T. N. S. 376.

**1001.** 3. *Darr v. Berquist*, 63 Neb. 713.

4. *General Deposits — Distinguished from Special Deposits and Loans.* — *Officer v. Officer*, 120 Iowa 389.

5. *Eastern Advertising Co. v. McGaw*, 89 Md. 72.

**1002.** 3. *Kansas City v. Cullinan*, 65 Kan. 68, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002.

**1003.** 1*a*. *Generic* means that which pertains to a class of related things, and which is of general application. *Continental Ins. Co. v. Continental F. Assoc.*, 96 Fed. Rep. 848.

**1005.** 1. *Examples.* — A trading-stampscheme held not to be a *gift enterprise*. *State v. Dalton*, 22 R. I. 77.

# GIFTS.

BY WILLIAM HOWARD BUCHANAN.

**1008.** I. DEFINITIONS. — See note 1.

**1009.** See note 1.

II. GIFTS DISTINGUISHED FROM VOLUNTARY TRUSTS. — See note 4.

III. GIFTS VIEWED AS CONTRACTS. — See notes 5, 7.

IV. WHO MAY MAKE A GIFT — 1. Generally. — See note 9.

**1010.** Gift by Equitable Owner. — See note 2.

2. Mental Capacity. — See note 3.

Tests of Mental Capacity — Gifts Inter Vivos. — See notes 4, 5, 7.

**1011.** Burden of Proof. — See note 3.

Mental Weakness as Raising Presumption of Undue Influence. — See note 5.

V. FRAUD AND UNDUE INFLUENCE — 1. Generally. — See note 6.

**1008.** 1. Definition of Gift. — *Chambers v. McCreery*, 98 Fed. Rep. 783; *Calkins v. Equitable Bldg., etc., Assoc.*, 126 Cal. 531; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *Main's Appeal*, 73 Conn. 638; *Martin v. Martin*, 202 Ill. 382, citing 14 Am. AND ENG. ENCYC. OF LAW (2d ed.) 1008; *Clapper v. Frederick*, 199 Pa. St. 609. See also *In re Bauernschmidt*, 97 Md. 35; *Picksley v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740.

A gift is a transfer of personal property which vests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed or is necessarily implied. *Driscoll v. Driscoll*, 143 Cal. 528.

A gift is a voluntary, immediate, and absolute transfer of property without consideration. *Morey v. Wiley*, 100 Ill. App. 75.

Gift or Loan — Transaction Held to Be Gift. — See *Russell v. Langford*, 135 Cal. 356.

A Contract Based on an Illegal Consideration is not a gift. *Watkins v. Nugen*, 118 Ga. 372.

**1009.** 1. *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

A Legal Liability of the Donor cannot be discharged by a gift, as it is essential to the validity of a gift that it be without consideration. *Martin v. Martin*, 202 Ill. 382.

4. *Bray v. O'Rourke*, 89 N. Y. App. Div. 400.

5. Gift Must Be Without Consideration. — *Watkins v. Nugen*, 118 Ga. 372. See also *Deneff v. Helms*, 42 Oregon 161.

Gift in Form of Sale. — See *Reinerth v. Rhody*, 52 La. Ann. 209.

7. Completed Gift an Executed Contract. — See *Deneff v. Helms*, 42 Oregon 161; *Fiscus's Estate*, 13 Pa. Super. Ct. 615; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202; *Phinney v. State*, 36 Wash. 236.

9. Authority of Owner to Give Away His Property. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Meyer v. Jacobs*, 123 Fed. Rep. 900.

Gift by Husband. — *Farrell v. Puthoff*, 13 Okla. 159.

Gift by Wife. — A married woman may dispose of any of her property without the assent of her

husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 135 N. Car. 661.

**1010.** 2. *Polt v. Polt*, 205 Pa. St. 139.

3. Donor Must Be Mentally Competent to Make a Gift. — *Reeves v. Howard*, 118 Iowa 121; *Polt v. Polt*, 205 Pa. St. 139; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

Voidable, Not Void. — A gift by an insane person who is not under guardianship at the time is voidable only, and not void. *Bishop v. Leonard*, 123 Fed. Rep. 981.

The Burden of Showing Mental Incompetency where the gift has been established is upon the party seeking to avoid such gift. *Galer v. Galer*, 108 Iowa 496.

4. Testamentary Capacity Considered Sufficient. — *Thorne v. Cosand*, 160 Ind. 566; *Davis v. Kuck*, 93 Minn. 262.

Mere Physical Weakness is not sufficient to invalidate a gift. *Meyer v. Jacobs*, 123 Fed. Rep. 900.

5. Mere Mental Weakness of Donor Not Sufficient to Invalidate Gift. — *Slack v. Rees*, 66 N. J. Eq. 447. See also *Reed v. Carroll*, 82 Mo. App. 102.

7. *Meyer v. Jacobs*, 123 Fed. Rep. 900; *Thorne v. Cosand*, 160 Ind. 566. See also *Spencer v. Spruell*, 196 Ill. 119; *Citizens' Loan, etc., Co. v. Holmes*, 116 Wis. 220.

**1011.** 3. Burden of Proving Mental Incapacity on Party Asserting It. — *Richardson v. Smart*, 152 Mo. 623, 75 Am. St. Rep. 488. See also *Meyer v. Jacobs*, 123 Fed. Rep. 900.

5. Mental Weakness Sufficient to Raise Presumption of Undue Influence. — *Reed v. Carroll*, 82 Mo. App. 102; *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567.

6. Gift Must Be Free from Fraud or Undue Influence. — *Soencer v. Spruell*, 196 Ill. 119; *Reeves v. Howard*, 118 Iowa 121; *Prescott v. Johnson*, 91 Minn. 273; *Davis v. Kuck*, 93 Minn. 262; *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567; *Scollard v. Scollard*, (Ky. 1900) 56 S. W. Rep. 648.

Influence Gained by Kindness and Affection

- 1011.** Donor Must Understand Transaction. — See note 7.  
 Presumption as to Fairness and Validity of Gift. — See note 8.
- 2. Gifts to Persons Standing in Confidential Relations — a. GENERALLY — Gifts Between Persons in Confidential Relations Prima Facie Void.** — See note 9.
- 1012.** Independent Advice Necessary in England. — See note 1.  
 The Mere Fact that a Confidential Relation Exists. — See note 2.  
 Clear Proof of Gift Required. — See note 3.  
 The Mere Fact that the Donor Knew What He Was Doing. — See note 5.  
 Ratification of Gift After Termination of Confidential Relation. — See note 6.
- 1013.** *b. TO ATTORNEY.* — See notes 1, 2.
- 1014.** *c. TO NEAR RELATIVE.* — See note 1.
- VI. GIFTS INTER VIVOS — 1. Definition.** — See note 6.  
 Gift Made in Extremis. — See note 7.
- 1015.** See note 1.  
**2. Requisites to Valid Gift — a. GENERALLY.** — See note 2.

will not be regarded as undue, if no imposition or fraud be practiced and the donation be voluntarily made. *Meyer v. Jacobs*, 123 Fed. Rep. 900.

**1011.** 7. *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567.

8. See *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567.

The Free Agency of the Donor Must Be Destroyed and the will of another substituted therefor in order that a gift may be invalidated on the ground of undue influence. *Prescott v. Johnson*, 91 Minn. 273.

A Donation Which Is Not Registered is presumed in *Quebec* to be fraudulent. *Bouchard v. Beaulieu*, 14 Quebec Super. Ct. 483.

9. Gifts Between Persons in Confidential Relations Prima Facie Void. — *Hutcheson v. Bibb*, (Ala. 1905) 38 So. Rep. 754; *Reed v. Reed*, (Md. 1905) 60 Atl. Rep. 621; *In re Sperl*, (Minn. 1905) 103 N. W. Rep. 502; *Richardson v. Smart*, 152 Mo. 623, 75 Am. St. Rep. 488; *Reed v. Carroll*, 82 Mo. App. 102; *Slack v. Rees*, 66 N. J. Eq. 447; *Snook v. Sullivan*, 53 N. Y. App. Div. 602, affirmed 167 N. Y. 536, 85 Am. St. Rep. 699; *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; *Bowron v. De Selding*, 105 N. Y. App. Div. 500; *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553.

A Gift to a Paramour carries no presumption of the exertion of an undue influence overcoming the will of the donor, although it calls for and justifies a close and suspicious scrutiny. *Schwalber v. Ehman*, 62 N. J. Eq. 314.

Actual Fraud Need Not Be Shown in order to avoid a gift between partners having a special confidential or fiduciary relation. *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567.

**1012.** 1. Rule in England. — *Wright v. Carter*, 86 L. T. N. S. 110; *Willis v. Barron*, (1902) A. C. 271, 86 L. T. N. S. 805. See also *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553.

In New Jersey the English rule has been adopted. *Slack v. Rees*, 66 N. J. Eq. 447.

2. *Towson v. Moore*, 173 U. S. 17; *Reed v. Reed*, (Md. 1905) 60 Atl. Rep. 621; *Reed v. Carroll*, 82 Mo. App. 102.

3. *Slack v. Rees*, 66 N. J. Eq. 447; *Longenecker v. Zion Evangelical Lutheran Church*,

200 Pa. St. 567. See also *Davis v. Walker*, 5 Ont. L. Rep. 173.

Burden of Proof to Show Undue Influence on Party Alleging It. — *Towson v. Moore*, 173 U. S. 17; *Meyer v. Jacobs*, 123 Fed. Rep. 900.

Showing Competent and Independent Advice to the Grantor by some disinterested third party is the usual mode of repelling the presumption of undue influence. *Hutcheson v. Bibb*, (Ala. 1905) 38 So. Rep. 754; *Reed v. Reed*, (Md. 1905) 60 Atl. Rep. 621.

5. Confidential Relation Not Raising Strong Presumption of Undue Influence. — See *Longenecker v. Zion Evangelical Lutheran Church*, 200 Pa. St. 567. See also *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553.

6. Ratification of Gift by Donor. — *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553.

**1013.** 1. Gift Between Attorney and Client Void. — See *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553; *Davis v. Walker*, 5 Ont. L. Rep. 173.

2. *Davis v. Walker*, 5 Ont. L. Rep. 173.

**1014.** 1. Sisters between whom the relation of principal and agent does not exist are not in such a confidential relation that one who becomes the donee of the other must show an absence of undue influence. *Funston v. Twining*, 202 Pa. St. 88.

6. Gifts Inter Vivos — Definition. — See *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

A donation *inter vivos* is an act by which the donor divests himself at present and irrevocably of the thing given, in favor of the donee who accepts it. *Sinnot v. Hibernia Nat. Bank*, 105 La. 705.

7. Gift Made in Extremis. — *Peck v. Scofield*, 186 Mass. 108; *Wilson v. Jourdan*, 79 Miss. 133, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1014.

**1015.** 1. *Wilson v. Jourdan*, 79 Miss. 133, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015.

If the Intention Is to Make an Absolute and Unconditional Gift such gift cannot operate as *donatio causa mortis*. *Ward v. Bradley*, 1 Ont. L. Rep. 118.

2. The Elements Necessary to the Validity of a Gift Inter Vivos. — *Burt v. Andrews*, 112 Ga. 465; *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal



**1015.** *b. GIFT MUST GO INTO IMMEDIATE EFFECT* — (1) *Generally.* — See note 3.

(2) *Gift to Take Effect After Death of Donor.* — See note 4.

**1016.** See notes 1, 2.

*c. GIFT MUST BE FULLY EXECUTED* — (1) *Generally.* — See notes 4, 5.

*dismissed* 188 Ill. 363; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Calvin v. Free*, 66 Kan. 466, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Davis v. Kuck*, 93 Minn. 262, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Bowron v. De Selding*, 105 N. Y. App. Div. 500. See also *Malone v. Lebus*, 116 Ky. 975; *Matter of Timerson*, (Surrogate Ct.) 39 Misc. (N. Y.) 675.

**1015.** 3. *Gift Must Take Effect Immediately* — *United States.* — *Chambers v. McCreery*, 98 Fed. Rep. 783, 45 C. C. A. 332; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

*California.* — *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137. See also *Williams v. Tam*, 131 Cal. 64.

*Connecticut.* — *Main's Appeal*, 73 Conn. 638. *Georgia.* — *Harrell v. Nicholson*, 119 Ga. 458. *Illinois.* — *Shaw v. Camp*, 160 Ill. 425; *Pratt v. Griffin*, 184 Ill. 514.

*Indiana.* — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

*Iowa.* — *Matter of Brown*, 113 Iowa 351.

*Kansas.* — *Gallagher v. Donahy*, 65 Kan. 341, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Calvin v. Free*, 66 Kan. 466. See also *Smith v. Holden*, 58 Kan. 535.

*Kentucky.* — *Rodemer v. Rettig*, 114 Ky. 634.

*Louisiana.* — *Compare Sinnot v. Hibernia Nat. Bank*, 105 La. 705.

*Maine.* — *Bickford v. Mattocks*, 95 Me. 547; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62; *Brown v. Crafts*, 98 Me. 40.

*Maryland.* — *DeGrange v. DeGrange*, 96 Md. 609.

*Michigan.* — *Casserly v. Casserly*, 123 Mich. 44; *Snyder v. Snyder*, 131 Mich. 658. See also *Conrad v. Manning*, 125 Mich. 77.

*Minnesota.* — *Davis v. Kuck*, 93 Minn. 262, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; *Hooper v. Vanstrum*, 92 Minn. 406.

*New Jersey.* — *Taylor v. Coriell*, 66 N. J. Eq. 262.

*New York.* — *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, *reversing* 22 N. Y. App. Div. 43; *Tyrrel v. Emigrant Industrial Sav. Bank*, 77 N. Y. App. Div. 131; *Kelly v. Home Sav. Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, *reversed* 103 N. Y. App. Div. 141; *Bowron v. De Selding*, 105 N. Y. App. Div. 500; *Matter of Tnber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, *affirmed* 54 N. Y. App. Div. 629.

*Pennsylvania.* — *Clapper v. Frederick*, 199 Pa. St. 609; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202.

*Tennessee.* — *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288.

*Canada.* — *Desrochers v. Roy*, 18 Quebec Super Ct. 70, 16 Quebec Super. Ct. 273. See also *Ward v. Bradley*, 1 Ont. L. Rep. 118.

4. *Gift to Take Effect After Death of Donor* **Void.** — *Wright v. Bragg*, 45 C. C. A. 204;

*Rogers v. Richards*, 67 Kan. 706; *Bruce v. Squires*, 68 Kan. 199; *Dimon v. Keery*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 231, *affirmed* 54 N. Y. App. Div. 318; *Matter of Rose*, (Surrogate Ct.) 35 Misc. (N. Y.) 21, *affirmed* 75 N. Y. App. Div. 615; *Deneff v. Helms*, 42 Oregon 161. See also *Priester v. Hohloch*, 70 N. Y. App. Div. 256.

**1016.** 1. *Priester v. Hohloch*, 70 N. Y. App. Div. 256; *Deneff v. Helms*, 42 Oregon 161. See also *Wright v. Bragg*, 45 C. C. A. 204.

2. *Jacobs v. Jolley*, 29 Ind. App. 25.

4. *Gift Must Be Fully Executed* — *United States.* — *Chambers v. McCreery*, 98 Fed. Rep. 783; *Wright v. Bragg*, 45 C. C. A. 204; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

*Arkansas.* — *Williams v. Smith*, 66 Ark. 299.

*California.* — See *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *Collins v. Maude*, 144 Cal. 289.

*Florida.* — *Ross v. Walker*, 44 Fla. 704.

*Georgia.* — *Donaldson v. Everett*, 122 Ga. 318.

*Illinois.* — *Martin v. Martin*, 89 Ill. App. 147, 101 Ill. App. 640.

*Indiana.* — *Jacobs v. Jolley*, 29 Ind. App. 25.

*Iowa.* — *Matter of Brown*, 113 Iowa 351; *Stroup v. Bridger*, 124 Iowa 401.

*Kansas.* — *Gallagher v. Donahy*, 65 Kan. 341. See also *Bruce v. Squires*, 68 Kan. 199.

*Maine.* — *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408; *Bickford v. Mattocks*, 95 Me. 547.

*Maryland.* — *DeGrange v. DeGrange*, 96 Md. 609.

*Massachusetts.* — *Weatherbee v. Litchfield*, 186 Mass. 399.

*Michigan.* — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Clay v. Layton*, 134 Mich. 317. *Compare Ebel v. Piehl*, 134 Mich. 64.

*Minnesota.* — *Davis v. Kuck*, 93 Minn. 262.

*Missouri.* — *Jones v. Falls*, 101 Mo. App. 536.

*New Hampshire.* — *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686.

*New York.* — See *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, *modified and affirmed* 93 N. Y. App. Div. 604; *Matter of Sproule*, (Surrogate Ct.) 42 Misc. (N. Y.) 448.

*Pennsylvania.* — *Clapper v. Frederick*, 199 Pa. St. 609.

*Tennessee.* — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288.

*West Virginia.* — See *Clayton v. Pierson*, 55 W. Va. 167.

*Canada.* — See *Ward v. Bradley*, 1 Ont. L. Rep. 118.

5. *Unexecuted Gift Revoked by Death of Donor.* — *In re Bauernschmidt*, 97 Md. 35; *Conrad v. Manning*, 125 Mich. 77; *Clapper v. Frederick*,

**1017. A Mere Intention to Make a Gift.** — See note 5.

Imperfect Gift Not Enforceable as Declaration of Trust. — See note 6.

(2) *Delivery* — (a) *Necessity for Delivery* — *aa. GENERALLY.* — See note 7.

199 Pa. St. 609. See also *Collins v. Maude*, 144 Cal. 289; *Jacobs v. Jolley*, 29 Ind. App. 25; *Casteel v. Flint*, 112 Iowa 92; *DeGrange v. DeGrange*, 96 Md. 609; *Burns v. Burns*, 132 Mich. 441; *Clay v. Layton*, 134 Mich. 317; *Hooper v. Vanstrum*, 92 Minn. 406; *Ward v. Bradley*, 1 Ont. L. Rep. 118.

**1017. 5. Mere Intention to Give a Nullity** — *United States*. — *Chambers v. McCreery*, 98 Fed. Rep. 783.

*Arkansas*. — *Williams v. Smith*, 66 Ark. 299. See also *Ragan v. Hill*, 72 Ark. 307.

*Georgia*. — *Burt v. Andrews*, 112 Ga. 465; *Donaldson v. Everett*, 122 Ga. 318.

*Kansas*. — *Bruce v. Squires*, 68 Kan. 199, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017; *Gallagher v. Donahy*, 65 Kan. 341.

*Kentucky*. — *Rodemer v. Rettig*, 114 Ky. 634; *Denunzio v. Scholtz*, (Ky. 1903) 77 S. W. Rep. 715.

*Maine*. — *Bickford v. Mattocks*, 95 Me. 547.

*Maryland*. — *In re Bauernschmidt*, 97 Md. 35.

*Michigan*. — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

*Minnesota*. — *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454.

*Missouri*. — *Jones v. Falls*, 101 Mo. App. 536.

*New York*. — *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Dimon v. Keery*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 231, affirmed 54 N. Y. App. Div. 318; *Matter of Timerson*, (Surrogate Ct.) 39 Misc. (N. Y.) 675.

*Ohio*. — *Rote v. Warner*, 9 Ohio Cir. Dec. 540.

*Pennsylvania*. — *Clapper v. Frederick*, 199 Pa. St. 609; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202.

**6. Declaration of Trust.** — *Chambers v. McCreery*, 98 Fed. Rep. 783; *Jacobs v. Jolley*, 29 Ind. App. 25; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62; *Brown v. Crafts*, 98 Me. 40; *Clay v. Layton*, 134 Mich. 317; *Priester v. Hohloch*, 70 N. Y. App. Div. 256; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230. See also *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472.

**7. Delivery Essential to Complete Gift** — *United States*. — *Chambers v. McCreery*, 98 Fed. Rep. 783, 45 C. C. A. 322; *Wright v. Bragg*, 45 C. C. A. 204; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

*Alabama*. — *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 So. Rep. 695.

*California*. — See *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *Collins v. Maude*, 144 Cal. 289.

*Colorado*. — *Wittman v. Pickens*, 33 Colo. 484, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017.

*Connecticut*. — *Main's Appeal*, 73 Conn. 638.

*Florida*. — *Ross v. Walker*, 44 Fla. 704.

*Georgia*. — *Burt v. Andrews*, 112 Ga. 465;

*Harrell v. Nicholson*, 119 Ga. 458.

*Illinois*. — *Pratt v. Griffin*, 184 Ill. 514.

*Indiana*. — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017.

*Iowa*. — *Casteel v. Flint*, 112 Iowa 92. See also *Olson v. Gifford*, 96 Iowa 734.

*Kansas*. — *Gallagher v. Donahy*, 65 Kan. 341; *Calvin v. Free*, 66 Kan. 466.

*Kentucky*. — *Rodemer v. Rettig*, 114 Ky. 634; *Denunzio v. Scholtz*, (Ky. 1903) 77 S. W. Rep. 715. See also *Scollard v. Scollard*, (Ky. 1900) 56 S. W. Rep. 648.

*Maine*. — *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408; *Bickford v. Mattocks*, 95 Me. 547; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62.

*Massachusetts*. — *Duryea v. Harvey*, 183 Mass. 429.

*Michigan*. — *Chaddock v. Chaddock*, 134 Mich. 48, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1014 [1017]; *Clay v. Layton*, 134 Mich. 317; *Trombly v. Klersy*, (Mich. 1905) 104 N. W. Rep. 419; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

*Minnesota*. — *Hooper v. Vanstrum*, 92 Minn. 406; *Davis v. Kuck*, 93 Minn. 262.

*Missouri*. — *Jones v. Falls*, 101 Mo. App. 536.

*New Hampshire*. — *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686.

*New York*. — *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, reversing on other grounds 22 N. Y. App. Div. 43; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Mace v. Thayer*, 51 N. Y. App. Div. 121; *Priester v. Hohloch*, 70 N. Y. App. Div. 256; *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Kelly v. Home Sav. Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141; *Bowron v. De Selding*, 105 N. Y. App. Div. 500. See also *Picksley v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740; *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, modified and affirmed 93 N. Y. App. Div. 604; *Matter of Sproule*, (Surrogate Ct.) 42 Misc. (N. Y.) 448.

*North Carolina*. — *Gross v. Smith*, 132 N. Car. 604. See also *Duckworth v. Orr*, 126 N. Car. 674.

*Ohio*. — *Rote v. Warner*, 9 Ohio Cir. Dec. 540.

*Oregon*. — *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764. See also *Deneff v. Helms*, 42 Oregon 161.

*Pennsylvania*. — *Clapper v. Frederick*, 199 Pa. St. 609; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202. See also *Funston v. Twining*, 202 Pa. St. 88.

*Tennessee*. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288.

*Texas*. — *Love v. Hudson*, 24 Tex. Civ. App. 277.

*Wisconsin*. — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

**1019.** See note 1.

*bb.* WHERE PROPERTY IS ALREADY IN POSSESSION OF DONEE. — See note 2.

(b) *Essentials of Valid Delivery* — *bb.* DELIVERY MUST BE ABSOLUTE. — See note 6.

**1020.** See note 1.

*cc.* INTENT — Delivery Must Be with Intent to Make Gift. — See notes 2, 3.

**1019.** 1. *Possession Not Equivalent of Delivery.* — *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137.

2. *No Delivery Necessary Where Donee Is Already in Possession.* — *Jacobs v. Jolley*, 29 Ind. App. 25; *Calvin v. Free*, 66 Kan. 466, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1019.

6. *Delivery Must Be Absolute* — *United States*. — *Chambers v. McCreery*, 98 Fed. Rep. 783, affirmed 106 Fed. Rep. 364, 45 C. C. A. 322; *Wright v. Bragg*, 45 C. C. A. 204; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

*Alabama.* — *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 S. W. Rep. 695.

*California.* — *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35; *Driscoll v. Driscoll*, 143 Cal. 528. See also *Williams v. Tam*, 131 Cal. 64; *Frantz v. Porter*, 132 Cal. 49.

*Georgia.* — *Burt v. Andrews*, 112 Ga. 465; *Harrell v. Nicholson*, 119 Ga. 458.

*Illinois.* — *Pratt v. Griffin*, 184 Ill. 514; *Martin v. Martin*, 89 Ill. App. 147; *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; *Yokem v. Hicks*, 93 Ill. App. 667.

*Indiana.* — *Jacobs v. Jolley*, 29 Ind. App. 25; *Goetz v. People's Sav. Bank*, 31 Ind. App. 67.

*Iowa.* — *Matter of Brown*, 113 Iowa 351.

*Kansas.* — *Gallagher v. Donahy*, 65 Kan. 341; *Calvin v. Free*, 66 Kan. 466; *Bruce v. Squires*, 68 Kan. 199.

*Kentucky.* — *Rodemer v. Rettig*, 114 Ky. 634.

*Maine.* — *Bickford v. Mattocks*, 95 Me. 547; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62; *Brown v. Crafts*, 98 Me. 40.

*Maryland.* — *In re Bauernschmidt*, 97 Md. 35. See also *DeGrange v. DeGrange*, 96 Md. 609.

*Michigan.* — *Chaddock v. Chaddock*, 134 Mich. 48, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1014 [1019]; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Snyder v. Snyder*, 131 Mich. 658; *Burns v. Burns*, 132 Mich. 441.

*Minnesota.* — *Richardson v. Colburn*, 77 Minn. 412; *Hooper v. Vanstrum*, 92 Minn. 406.

*Missouri.* — *Jones v. Falls*, 101 Mo. App. 536. *New Hampshire.* — *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686.

*New Jersey.* — See *Taylor v. Coriell*, 66 N. J. Eq. 262.

*New York.* — *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Tyrrel v. Emigrant Industrial Sav. Bank*, 77 N. Y. App. Div. 131; *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Kelly v. Home Sav. Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141. See also *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, modified and affirmed 93 N. Y. App. Div. 604.

*North Dakota.* — *Luther v. Hunter*, 7 N. Dak. 544.

*Ohio.* — *Rote v. Warner*, 9 Ohio Cir. Dec. 540. See also *Prindle v. Wood*, 24 Ohio Cir. Ct. 74.

*Oklahoma.* — See *Farrell v. Puthoff*, 13 Okla. 159.

*Pennsylvania.* — *Clapper v. Frederick*, 199 Pa. St. 609; *Funston v. Twining*, 202 Pa. St. 88; *Wendt's Estate*, 14 Pa. Super. Ct. 644; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202. See also *Fiscus's Estate*, 13 Pa. Super. Ct. 615.

*Rhode Island.* — See *Wickford Sav. Bank v. Corey*, 25 R. I. 217.

*Tennessee.* — *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288.

*West Virginia.* — *Claytor v. Pierson*, 55 W. Va. 167.

*Wisconsin.* — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

*Canada.* — *Ward v. Bradley*, 1 Ont. L. Rep. 118. See also *Sisenwain v. Roque*, 23 Quebec Super. Ct. 115.

**1020.** 1. *Nature of Title to Be Transferred.* — *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335.

2. *Intention to Give Essential* — *Alabama.* — *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 So. Rep. 695.

*California.* — *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35; *Collins v. Maude*, 144 Cal. 289; *Sprague v. Walton*, 145 Cal. 228. See also *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19.

*Connecticut.* — *Main's Appeal*, 73 Conn. 638.

*Georgia.* — *Burt v. Andrews*, 112 Ga. 465; *Harrell v. Nicholson*, 119 Ga. 458.

*Illinois.* — *Hagemann v. Hagemann*, 204 Ill. 378. See also *Pratt v. Griffin*, 184 Ill. 514.

*Iowa.* — *Matter of Brown*, 113 Iowa 351; *Stroup v. Bridger*, 124 Iowa 401.

*Kansas.* — *Gallagher v. Donahy*, 65 Kan. 341.

*Maine.* — *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62.

*Michigan.* — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 420.

*Minnesota.* — *Hooper v. Vanstrum*, 92 Minn. 406. See also *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454.

*Missouri.* — *Jones v. Falls*, 101 Mo. App. 536.

*New Jersey.* — *Taylor v. Coriell*, 66 N. J. Eq. 262.

*New York.* — *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, reversing 22 N. Y. App. Div. 43; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Schwind v. Ibert*, 60 N. Y. App. Div. 378; *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Matter of Rose*,

**1020.** No Form of Words Necessary to Show Intent. — See note 4.*dd.* DELIVERY MUST BE ACCORDING TO NATURE OF PROPERTY — (*aa*) Generally.

— See note 5.

**1021.** See notes 1, 2.

Property Capable of Manual Delivery. — See note 3.

But Where the Articles Are of a Bulky Character. — See note 4.

*(bb)* Constructive and Symbolical Delivery. — See note 6.**1022.** *(cc)* Delivery of Choses in Action — Necessity for Written Assignment — Generally.

— See note 3.

Chose in Action Evidenced by Written Instrument. — See note 4.

**1023.** Life-insurance Policy. — See note 1.

Gifts of Stock. — See notes 4, 5, 6.

(Surrogate Ct.) 35 Misc. (N. Y.) 21, *affirmed* 75 N. Y. App. Div. 615. See also *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, *modified and affirmed* 93 N. Y. App. Div. 604.

*Oregon*. — *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764.

*Pennsylvania*. — *Clapper v. Frederick*, 199 Pa. St. 609; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202. See also *Funston v. Twining*, 202 Pa. St. 88.

*Tennessee*. — See *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. *Wisconsin*. — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

*Canada*. — *Ward v. Bradley*, 1 Ont. L. Rep. 118; *Sisenwain v. Roque*, 23 Quebec Super. Ct. 115.

**1020.** 3. *Crippen v. Adams*, 132 Mich. 31. *Compare* *Pickslay v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740.

4. *Main's Appeal*, 73 Conn. 638.

**5. Sufficiency of Delivery — Generally.** — *Chambers v. McCreery*, 98 Fed. Rep. 783; *Driscoll v. Driscoll*, 143 Cal. 528; *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, *reversing* 22 N. Y. App. Div. 43; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004. See also *Rodemer v. Rettig*, 114 Ky. 634; *Claytor v. Pierson*, 55 W. Va. 167.

**1021.** 1. *Driscoll v. Driscoll*, 143 Cal. 528; *McMullen v. Stripling*, 120 Ga. 658; *People v. Benson*, 99 Ill. App. 325.

**2. Delivery Must Be According to Nature of Property and Situation of Parties.** — *Chambers v. McCreery*, 45 C. C. A. 322; *Jacobs v. Jolley*, 29 Ind. App. 25; *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, *modified and affirmed* 93 N. Y. App. Div. 604. See also *Fiscus's Estate*, 13 Pa. Super. Ct. 615; *Claytor v. Pierson*, 55 W. Va. 167.

**Pointing Out Several Places Where Money Is Buried** has been held to constitute a complete gift, where the donee afterwards went to the places thus indicated, dug up the treasure, and reduced it to possession. See *Harrell v. Nicholson*, 119 Ga. 458.

**When Everything Is Done That Can Be Done in an attempt to make a gift**, it would seem that the gift should be deemed completed. *Mace v. Thayer*, 51 N. Y. App. Div. 121.

3. See *Richardson v. Colburn*, 77 Minn. 412.

**The Record of a Mortgage** may take the place of a manual delivery of such mortgage. *Prindle v. Wood*, 24 Ohio Cir. Ct. 74.

**4. Gift of Bulky Articles.** — *Harrell v. Nicholson*, 119 Ga. 458, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021. See also *Moore v. Cline*, 115 Ga. 405.

**6. Constructive Delivery.** — *Harrell v. Nicholson*, 119 Ga. 458, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021, 1022; *Hagemann v. Hagemann*, 204 Ill. 378; *People v. Benson*, 99 Ill. App. 325; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Driscoll v. Driscoll*, 143 Cal. 528. See also *Hagemann v. Hagemann*, 90 Ill. App. 251, *appeal dismissed* 188 Ill. 363; *Clapper v. Frederick*, 199 Pa. St. 609; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335. *Compare* *Love v. Hudson*, 24 Tex. Civ. App. 377.

**Any Act Indicating a Renunciation of Dominion** by the donor and the transfer of dominion to the donee is a constructive delivery. *Burt v. Andrews*, 112 Ga. 465.

**Delivery by Writing.** — *McGavic v. Cossum*, 72 N. Y. App. Div. 35.

**1022.** 3. **Approval of Chancellor Kent's Doctrine.** — See *Driscoll v. Driscoll*, 143 Cal. 528; *Claytor v. Pierson*, 55 W. Va. 167. *Compare* *Ebel v. Piehl*, 134 Mich. 64.

**4. Delivery of Written Evidence of Chose in Action Sufficient.** — *Jacobs v. Jolley*, 29 Ind. App. 25; *Brown v. Crafts*, 98 Me. 40; *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, *reversing* 22 N. Y. App. Div. 43; *Luther v. Hunter*, 7 N. Dak. 544; *Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004. See also *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401; *Steele v. Gatlin*, 115 Ga. 929; *Matter of Timerson*, (Surrogate Ct.) 39 Misc. (N. Y.) 675; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 202; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335.

**Attorney's Receipt for Bond Sufficient Delivery of Bond.** — See *Claytor v. Pierson*, 55 W. Va. 167.

**1023.** 1. **Gift of Life-insurance Policy.** — *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819; *Barron v. Williams*, 58 S. Car. 280; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004. *Compare* *Steele v. Gatlin*, 115 Ga. 920.

**4. Gift Executed by Delivery of Certificate,** —

- 1023.** No Indorsement Necessary. — See note 7.  
**1024.** Money in Hands of Third Person. — See note 2.  
*cc.* WHERE PARTIES RESIDE TOGETHER. — See notes 5, 6.  
**1025.** *ff.* WHERE PROPERTY IS IN HANDS OF THIRD PERSON. — See note 2.  
 (c) Delivery to Third Person — *bb.* AS AGENT OF DONOR. — See note 5.  
 Agent's Authority to Make Delivery Revoked by Death of Donor. — See note 6.  
**1026.** See note 1.  
*cc.* AS TRUSTEE FOR DONEE. — See notes 2, 3.

*Denunzio v. Scholtz*, (Ky. 1903) 77 S. W. Rep. 715; *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686; *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Matter of Brandreth*, 58 N. Y. App. Div. 575, *reversed* 169 N. Y. 437; *O'Donnell v. Gaffney*, 22 Pa. Super. Ct. 316; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335. See also *Liscomb v. Manchester*, etc., R. Co., 70 N. H. 312; *Hani v. Germania L. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

**Contrary Decisions.** — *Sinnot v. Hibernia Nat. Bank*, 105 La. 705.

**1023.** 5. *Calkins v. Equitable Bldg.*, etc., Assoc., 126 Cal. 531. Compare *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

6. Compare *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401.

**Reservation of Dividends by the donor during his lifetime does not affect the validity of a gift of stock.** *Calkins v. Equitable Bldg.*, etc., Assoc., 126 Cal. 531.

7. No Indorsement Necessary. — *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686; *Clayton v. Pierson*, 55 W. Va. 167, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1023; *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335. Compare *Prindle v. Wood*, 24 Ohio Cir. Ct. 74.

**1024.** 2. The Delivery of a Written Assignment. — *Cowen v. Brownsville First Nat. Bank*, 94 Tex. 547.

The Delivery of an Order for Payment to the donee of money in the hands of a third person is sufficient. *Sprague v. Walton*, 145 Cal. 228.

5. What Change of Possession Required When Parties Live Together. — *Moore v. Cline*, 115 Ga. 405; *Olson v. Gifford*, 96 Iowa 734; *Colby v. Portman*, 115 Mich. 95. See also *Harrell v. Nicholson*, 119 Ga. 458; *Donaldson v. Everett*, 122 Ga. 318; *Matter of Meehan*, 59 N. Y. App. Div. 156.

6. See *Richmond First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335.

**1025.** 2. Failure of Agent to Make Delivery. — Compare *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454.

5. Delivery to Third Person as Agent of Donor. — *Wright v. Bragg*, 45 C. C. A. 204; *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025; *Bickford v. Mattocks*, 95 Me. 547; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Clapper v. Frederick*, 199 Pa. St. 609. See also *Pratt v. Griffin*, 184 Ill. 514.

Delivery to the Donee by the Agent of the Donor constitutes a sufficient delivery. *Hagerman v. Wigent*, 108 Mich. 192,

In the Absence of Instructions or Statements a delivery of personal property to a third person is not a sufficient delivery to pass a gift *inter vivos*. *Luther v. Hunter*, 7 N. Dak. 544.

Deposit of the Gift by the Agent to the credit of the donee is a sufficient delivery. *Citizens' L. & T. Co. v. Holmes*, 116 Wis. 220.

6. Agent's Authority to Make Delivery Revoked by Death of Donor. — *Wittman v. Pickens*, 33 Colo. 484; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025; *Furenes v. Eide*, 109 Iowa 511, 77 Am. St. Rep. 545; *Clapper v. Frederick*, 199 Pa. St. 609.

**1026.** 1. Delivery to Be Made by Agent After Principal's Death a Nullity. — *Jarrell v. Crow*, 30 Tex. Civ. App. 629, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1025, 1026.

2. Delivery to Third Person as Trustee for Donee — *Arkansas*. — *Williams v. Smith*, 66 Ark. 299; *Smith v. Youngblood*, 68 Ark. 255, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026.

*Connecticut*. — See *Main's Appeal*, 73 Conn. 638.

*Indiana*. — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026.

*Kansas*. — *Calvin v. Free*, 66 Kan. 466, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026.

*Kentucky*. — *Burge v. Burge*, (Ky. 1903) 76 S. W. Rep. 873. See also *Malone v. Lebus*, 116 Ky. 975.

*Maine*. — *Bickford v. Mattocks*, 95 Me. 547. *Massachusetts*. — *Peck v. Scofield*, 186 Mass. 108.

*Michigan*. — *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

*New York*. — *Matter of Reichert*, (Surrogate Ct.) 38 Misc. (N. Y.) 228, *affirmed* 85 N. Y. App. Div. 620. See also *Bray v. O'Rourke*, 89 N. Y. App. Div. 400.

*Ohio*. — *Rote v. Warner*, 9 Ohio Cir. Dec. 540.

*Texas*. — *Jarrell v. Crow*, 30 Tex. Civ. App. 629, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020 [1026].

Deposit in National Bank in Name of Donee Sufficient Delivery. — *Dehm v. Dehm*, 86 Ill. App. 479.

3. Delivery to Be Made to Donee After Donor's Death Valid. — *Smith v. Youngblood*, 68 Ark. 255, *quoting* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *Ranken v. Donovan*, 46 N. Y. App. Div. 225, *affirmed* 166 N. Y. 626; *Jarrell v. Crow*, 30 Tex. Civ. App. 629, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029 [1026].

**1026. Donor as Trustee for Donee.** — See note 4.

(d) **Time of Making Delivery** — **Delivery Need Not Be Simultaneous with Gift.** — See note 6.

(e) **Repossession by Donor.** — See note 7.

**1027. Redelivery to Donor.** — See note 2.

(3) **Acceptance** — **Gift Must Be Accepted.** — See note 3.

**Presumption as to Acceptance.** — See note 4.

**1028. Acceptance by Minor.** — See note 1.

**Effect of Donee's Ignorance of Gift.** — See note 2.

**The Acceptance of a Gift Need Not Be Immediate.** — See note 3.

**Evidence of Acceptance.** — See note 4.

**3. What May Be Given** — *a. GENERALLY.* — See note 5.

**1029. b. CHOSSES IN ACTION** — (1) *Generally.* — See notes 2, 3.

**1026. 4. Donor Trustee for Donee.** — *Vokem v. Hicks*, 93 Ill. App. 667; *Casteel v. Flint*, 112 Iowa 92. See also *Malone v. Lebus*, 116 Ky. 975.

**6. Delivery Need Not Be at Time of Gift.** — *Calvin v. Free*, 66 Kan. 466, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *Casserly v. Casserly*, 123 Mich. 44.

**7. Title of Donee Not Divested by Subsequent Possession by Donor.** — *Whiting v. Ralph*, 75 Conn. 41; *Moore v. Cline*, 115 Ga. 405; *Hagemann v. Hagemann*, 204 Ill. 378; *Hagemann v. Hagemann*, 90 Ill. App. 251, *appeal dismissed* 188 Ill. 363; *Jacobs v. Jolley*, 29 Ind. App. 25; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1026; *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, *reversing* 22 N. Y. App. Div. 43; *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, *modified and affirmed* 93 N. Y. App. Div. 604; *Bowron v. De Selding*, 105 N. Y. App. Div. 500; *McNally v. McAndrew*, 98 Wis. 62. See also *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255. Compare *Chambers v. McCreery*, 98 Fed. Rep. 783.

**Subsequent Possession by a Third Party** will not of itself defeat the title of the donee. *Vann v. Edwards*, 135 N. Car. 661.

**Possession of a Note by the Payee** at the time of his death is evidence tending to prove that there has been no gift of the note. *Oelke v. Theis*, (Neb. 1903) 97 N. W. Rep. 588.

**1027. 2. Redelivery to Donor as Agent or Bailee of Donee.** — *Gannon v. McGuire*, 160 N. Y. 476, 73 Am. St. Rep. 694, *reversing* 22 N. Y. App. Div. 43; *Turgeon v. Guay*, 15 Quebec Super. Ct. 332. See also *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**3. Gift Must Be Accepted by Donee** — *Georgia.* — *Burt v. Andrews*, 112 Ga. 465; *Harrell v. Nicholson*, 119 Ga. 458.

*Illinois.* — *Pratt v. Griffin*, 184 Ill. 514; *Hagemann v. Hagemann*, 90 Ill. App. 251, *appeal dismissed* 188 Ill. 363.

*Indiana.* — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.

*Kansas.* — *Bruce v. Squires*, 68 Kan. 199.

*Kentucky.* — *Denunzio v. Scholtz*, (Ky. 1903) 77 S. W. Rep. 715. See also *Scollard v. Scollard*, (Ky. 1900) 56 S. W. Rep. 648.

*Minnesota.* — *Davis v. Kuck*, 93 Minn. 262.

*New York.* — *Mace v. Thayer*, 51 N. Y. App. Div. 121. See also *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, *modified and affirmed* 93 N. Y. App. Div. 604.

*Ohio.* — See *Rote v. Warner*, 9 Ohio Cir. Dec. 540.

*Oregon.* — *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764.

*Pennsylvania.* — See *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230.

**4. Acceptance Presumed in Case of Beneficial Gift.** — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Denunzio v. Scholtz*, (Ky. 1903) 77 S. W. Rep. 715; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430; *Prindle v. Wood*, 24 Ohio Cir. Ct. 74; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230. See also *Hooper v. Vanstrum*, 92 Minn. 406; *Matter of Timeron*, (Surrogate Ct.) 39 Misc. (N. Y.) 675.

**Where a Gift Is Beneficial to an Infant** its acceptance will be presumed. *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.

**A Donee of Unsound Mind** will be presumed to accept. *Malone v. Lebus*, 116 Ky. 975.

**1028. 1. Acceptance by Minor.** — See *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

**2. Knowledge of Gift on Part of Donee Not Essential.** — See *Clapper v. Frederick*, 199 Pa. St. 609.

**3. See** *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

**4. Evidence of Acceptance.** — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

**5. All Property**, real and personal, may be the subject of a gift. *Mace v. Thayer*, 51 N. Y. App. Div. 121; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Claytor v. Pierson*, 55 W. Va. 167, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1028.

**1029. 1. Choses in Action Subject of Gift.** — *Jacobs v. Jolley*, 29 Ind. App. 25; *Claytor v. Pierson*, 55 W. Va. 167, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029, supporting the whole text paragraph and applying the principles there stated to a gift *causa mortis* of a receipt for money deposited for safe keeping with a third person.

**A Gift of a Chose in Action Stands on the Same Footing as a Sale** if no claims of creditors interfere to affect its validity. *Hagemann v. Hagemann*, 90 Ill. App. 251, *appeal dismissed* 188 Ill. 363.

**A Life-insurance Policy** may be the subject of

**1029.** (2) *Deposit in Savings Bank* — Valid Gift of Savings-bank Deposit Made by Delivery of Book. — See note 8.

**1030.** No Assignment Necessary. — See notes 1, 2.

(3) *Donor's Own Note or Check* — Promissory Note Not Subject of Gift by Maker. — See note 5.

Donor's Check Not Subject of Gift unless Accepted and Paid. — See note 7.

**1031.** Revocation by Death of Donor. — See notes 1, 2.

Gift of Check Valid upon Payment. — See note 3.

(4) *Debt Due from Donee to Donor*. — See note 4.

Gift Must Be Executed. — See note 6.

**1032.** The Indorsement of Payments. — See note 2.

**1033.** 4. Particular Cases of Gifts Considered — a. GIFTS BETWEEN HUSBAND AND WIFE — (1) *From Husband to Wife* — Under the Modern Practice. — See note 1.

Purchase of Property by Husband for Wife. — See notes 4, 5.

Clear Proof of Gift Required. — See note 7.

a valid gift. *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Barron v. Williams*, 58 S. Car. 280.

**1029.** 3. *Promissory Note Subject of Gift*. — *Dehm v. Dehm*, 86 Ill. App. 479. See also *Harrell v. Nicholson*, 119 Ga. 458.

8. *Gift of Savings-bank Book*. — Main's Appeal, 73 Conn. 638; *Jacobs v. Jolley*, 29 Ind. App. 25; *McGuire v. Murphy*, 107 N. Y. App. Div. 104, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029; *Hill v. Escort*, (Tex. Civ. App. 1905) 86 S. W. Rep. 367. See also *Claytor v. Pierson*, 55 W. Va. 167, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029, and criticising the contrary holding in *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848.

The delivery of a savings-bank book with written authority for the donee to withdraw the account and interest, together with evidence of exclusive possession of the book and order on such donee's part for several years, constitutes a valid gift of the book and account. *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814.

A Gift of a Joint Interest in a Deposit in a Savings Bank may be made by the delivery of the deposit book with the intention of making a gift. *Industrial Trust Co. v. Scanlon*, 26 R. I. 228.

**1030.** 1. No Assignment of Bank Book Necessary. — Main's Appeal, 73 Conn. 638.

2. Compare *Jacobs v. Jolley*, 29 Ind. App. 25.

5. *Shaw v. Camp*, 160 Ill. 425; *Martin v. Martin*, 89 Ill. App. 147; *Callender v. Callender*, (Ky. 1902) 70 S. W. Rep. 844; *De Grange v. De Grange*, 96 Md. 609; *Conrad v. Manning*, 125 Mich. 77; *Picksley v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740. And see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, 194.

7. *Donor's Check Not Subject of Gift unless Paid or Accepted*. — *Frantz v. Porter*, 132 Cal. 49; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *Martin v. Martin*, 89 Ill. App. 147, 101 Ill. App. 640, reversed 202 Ill. 382. See also *Collins v. Maude*, 144 Cal. 289.

**1031.** 1. *Martin v. Martin*, 101 Ill. App. 640. See also *Collins v. Maude*, 144 Cal. 289. And see the title CHECKS, 1080, 1, 2.

2. *Gift of Check Held Complete*. — *Martin v. Martin*, 89 Ill. App. 147.

3. *Picksley v. Starr*, 149 N. Y. 432, 52 Am. St. Rep. 740.

4. *Gift of Debt*. — *Morey v. Wiley*, 100 Ill. App. 75; *Adams v. Cook*, 200 Pa. St. 258; *Funston v. Twining*, 202 Pa. St. 88.

6. *Consummation of Gift by Delivery Necessary*. — *Collins v. Maude*, 144 Cal. 289; *Ross v. Walker*, 44 Fla. 704, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1031; *Harrell v. Nicholson*, 119 Ga. 458; *Gallagher v. Donahy*, 65 Kan. 341; *Burge v. Burge*, (Ky. 1903) 76 S. W. Rep. 873; *Trombly v. Klersy*, (Mich. 1905) 104 N. W. Rep. 419; *Matter of Timerson*, (Surrogate Ct.) 39 Misc. (N. Y.) 675; *Funston v. Twining*, 202 Pa. St. 88.

Possession of a Note by the Payee at the time of his death is evidence tending to prove that there has been no gift of the note. *Oelke v. Theis*, (Neb. 1903) 97 N. W. Rep. 588.

**1032.** 2. *Indorsement of Payments*. — Indorsements made upon a note in the presence of the obligee, with the deliberate and expressed intention to make a gift, are an extinguishment of the debt to the extent of the indorsement. *Morey v. Wiley*, 100 Ill. App. 75.

A Receipt for a Larger Sum than Is Received amounts to a gift of the amount in excess of that paid. *Holmes v. Holmes*, 129 Mich. 412, 95 Am. St. Rep. 444.

**1033.** 1. *Gifts from Husband to Wife Held Valid*. — *Morey v. Wiley*, 100 Ill. App. 75.

The Prima Facie Presumption is that real estate voluntarily conveyed to the wife of the grantor is intended as a gift or advancement. *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892.

Notes Made Payable to the Wife of a member of an insolvent firm at the instance of the husband, and which were paid by depositing the money in a bank to the wife's credit, have been held to constitute a gift. *Flanner v. Butler*, 131 N. Car. 151, 92 Am. St. Rep. 773.

4. *Rowe v. Johnson*, 33 Colo. 469; *Doane v. Dunham*, 64 Neb. 135. See also *Selover v. Selover*, 62 N. J. Eq. 761, 90 Am. St. Rep. 478.

5. *Improvement of a Wife's Separate Property* by a husband will be presumed to be in the nature of a gift unless there is proof that such was not the intention. *Selover v. Selover*, 62 N. J. Eq. 761, 90 Am. St. Rep. 478.

7. *Clear Proof of Gift Required*. — *Matter of Brown*, 113 Iowa 351. See also *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408.

**1034.** (2) *From Wife to Husband.* — See note 1.

*b. GIFTS BETWEEN PARENT AND CHILD — (1) From Parent to Child.* — See note 3.

**1035.** See note 2.

*Presumption of Gift.* — See notes 3, 4, 5, 7.

**1036.** *Gift by Aged and Infirm Parent.* — See note 2.

(2) *From Child to Parent.* — See note 4.

**1037.** *c. DEPOSIT OF MONEY IN SAVINGS BANK IN NAME OR TO CREDIT OF ANOTHER — (1) Generally — Mere Fact of Deposit to Credit of Another Not Sufficient to Establish Gift.* — See notes 1, 2.

(2) *Nature of Deposit a Question of Intention.* — See notes 4, 5, 6.

**1038.** (3) *Deposit Upheld as Gift When So Intended.* — See note 1.

*Deposit to Credit of Depositor and Another.* — See notes 2, 3, 4.

Evidence that a husband handed money to his wife without making any remarks or with the request that she take care of it has been held not to establish a gift, especially where the husband was in the habit of handing his money to the wife for her to take care of. *Peirce v. Giles*, 93 Ill. App. 524.

**1034.** 1. *Gifts from Wife to Husband.* — See *Buckel v. Smith*, (Ky. 1904) 82 S. W. Rep. 235.

3. *Gifts from Parent to Child Upheld.* — *Turgeon v. Guay*, 15 Quebec Super. Ct. 332.

**1035.** 2. *The Circumstances of the Transaction Should Be Carefully Scrutinized*, but the presumption is in favor of its validity, and, in order to set it aside on the ground of undue influence, the court must be satisfied that it was not the voluntary act of the donor. *Prescott v. Johnson*, 91 Minn. 273.

3. *Presumption of Gift from Parent to Child More Easily Raised than That of Gift Between Strangers.* — *Towson v. Moore*, 173 U. S. 17; *Schwindt v. Schwindt*, 61 Kan. 377; *Brown v. Crafts*, 98 Me. 40; *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764. See also *Prescott v. Johnson*, 91 Minn. 273. Compare *Holsberry v. Harris*, 56 W. Va. 320, holding that to establish a gift by a parent to a child requires much stronger evidence than that which might suffice between strangers.

4. *Gifts from Parent to Child Regarded Favorably.* — *Spitler v. Kaeding*, 133 Cal. 500; *Prescott v. Johnson*, 91 Minn. 273; *Wendt's Estate*, 14 Pa. Super. Ct. 644.

5. *Delivery of Property by Parent to Child Presumed to Be Gift.* — See *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230.

*Taking a Mortgage in the Name of a Daughter* is presumed to be a gift to such daughter, and the mere retention of the manual custody of the note and mortgage makes no difference. *Spitler v. Kaeding*, 133 Cal. 500.

7. See *Prescott v. Johnson*, 91 Minn. 273; *Reinisch's Estate*, 212 Pa. St. 359.

*Where a Father Is Indebted to His Son*, the presumption is that money placed to the son's credit in a bank is intended as a payment on account. *Watts v. Watts*, (Va. 1905) 51 S. E. Rep. 359.

**1036.** 2. *Gift by Aged or Infirm Parent.* — *Slack v. Rees*, 66 N. J. Eq. 447.

4. *Gift from Child to Parent.* — *Albert v. Haerberly*, (N. J. 1905) 61 Atl. Rep. 380. See also *Prescott v. Johnson*, 91 Minn. 273.

*The Presumption Is in Favor of a Child's Gift to a parent*, and in order to set it aside the court must be satisfied that it was not the voluntary act of the donor. *Towson v. Moore*, 173 U. S. 17.

**1037.** 1. *Mere Fact of Deposit Not Sufficient to Establish Gift.* — *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 80 Am. St. Rep. 408; *Dodge v. Lunt*, 181 Mass. 320; *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257; *Green v. Sutherland*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 559; *Nicklas v. Parker*, (N. J. 1905) 61 Atl. Rep. 267; *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814. See also *Main's Appeal*, 73 Conn. 638; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67.

2. See *Cogswell v. Newburyport Sav. Inst.*, 165 Mass. 524; *Dodge v. Lunt*, 181 Mass. 320; *Taylor v. Coriell*, 66 N. J. Eq. 262.

4. *Nature of Deposit a Question of Intention.* — *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35; *Main's Appeal*, 73 Conn. 638; *Taylor v. Coriell*, 66 N. J. Eq. 262; *Green v. Sutherland*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 559. See also *Matter of Brown*, 113 Iowa 351; *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257; *Schwind v. Ibert*, 60 N. Y. App. Div. 378.

5. *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 So. Rep. 695, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35; *Kelly v. Home Sav. Bank*, 103 N. Y. App. Div. 141, reversing (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102.

6. *Extraneous Evidence Admissible on Question of Intention.* — *Main's Appeal*, 73 Conn. 638.

**1038.** 1. *Deposit a Valid Gift When So Intended.* — *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255. See also *Main's Appeal*, 73 Conn. 638.

2. *Deposit to Credit of Depositor and Another Held a Gift.* — *Main's Appeal*, 73 Conn. 638; *Matter of Meehan*, 59 N. Y. App. Div. 156; *Hallenbeck v. Hallenbeck*, 103 N. Y. App. Div. 107; *Kelly v. Home Sav. Bank*, 103 N. Y. App. Div. 141, reversing (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102; *Industrial Trust Co. v. Scanlon*, 26 R. I. 228.

3. *Contrary Decisions.* — *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35; *Noyes v. Savings Inst.*, 164 Mass. 583, 49 Am. St. Rep. 484. See also *Matter of Brown*,



**1039.** (4) *Gift Must Be Completely Executed* — (a) Generally. — See note 1. Depositor Must Part with Dominion and Control Over Deposit. — See note 2.

Attempted Testamentary Gift. — See note 3.

(b) Delivery. — See note 5.

Delivery to Bank Sufficient. — See note 6.

Delivery of Deposit Book Not Required. — See notes 7, 8.

(c) Acceptance. — See note 9.

**1040.** d. PURCHASE OR INVESTMENT BY ONE PERSON FOR ANOTHER. — See note 3.

**1041.** e. PAROL GIFT OF REAL ESTATE — Gift Upheld Where Donee Has Taken Possession and Made Improvements. — See note 2.

Mere Promise. — See note 3.

Expenditures on Faith of Promise. — See note 4.

**1042.** But the Expenditures Must Have Been Made upon the Faith of the Gift. — See note 1.

113 Iowa 351; Taylor v. Coriell, 66 N. J. Eq. 262; Schwind v. Ibert, 60 N. Y. App. Div. 378.

The Mere Fact that a Deposit Is Made So that Either of Two Persons Can Draw It does not of itself suffice as proof of a gift from the original owner of the money to the other party to the account. Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141.

**1038.** 4. Main's Appeal, 73 Conn. 638; Matter of Brown, 113 Iowa 351. See also Taylor v. Coriell, 66 N. J. Eq. 262; Industrial Trust Co. v. Scanlon, 26 R. I. 228.

**1039.** 1. Donor's Intention Must Be Executed. — Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35; Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141. See also Industrial Trust Co. v. Scanlon, 26 R. I. 228.

2. Donor Must Part with Dominion Over Deposit. — Montgomery First Nat. Bank v. Taylor, (Ala. 1904) 37 So. Rep. 695, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35; Matter of Brown, 113 Iowa 351; De Grange v. De Grange, 96 Md. 609; Dodge v. Lunt, 181 Mass. 320; Nicklas v. Parker, (N. J. 1905) 61 Atl. Rep. 267; Taylor v. Coriell, 66 N. J. Eq. 262; Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141. See also Schwind v. Ibert, 60 N. Y. App. Div. 378.

3. Taylor v. Coriell, 66 N. J. Eq. 262. See also Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141.

5. Montgomery First Nat. Bank v. Taylor, (Ala. 1904) 37 So. Rep. 695, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039; Getchell v. Biddeford Sav. Bank, 94 Me. 452, 80 Am. St. Rep. 408; Schwind v. Ibert, 60 N. Y. App. Div. 378; Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141.

6. Hollowell Sav. Inst. v. Titcomb, 96 Me. 62; Scallan v. Brooks, 54 N. Y. App. Div. 248. See also Scrivens v. North Easton Sav. Bank, 166 Mass. 255.

7. Retention of Bank Book by Depositor Immaterial. — Jacobs v. Jolley, 29 Ind. App. 25; Goelz v. People's Sav. Bank, 31 Ind. App. 67; Scal-

lan v. Brooks, 54 N. Y. App. Div. 248. See also Scrivens v. North Easton Sav. Bank, 166 Mass. 255.

Possession of a Bank Book by the Donee may be a circumstance in determining the ownership of the money represented by it, but it is not of itself determinative of that fact, in the absence of any evidence as to how the possession was obtained. Denigan v. Hibernia Sav., etc., Soc., 127 Cal. 137.

8. Retention of Deposit Book Where Depositor Is Trustee for Donee. — See Main's Appeal, 73 Conn. 638; DeGrange v. DeGrange, 96 Md. 609.

9. Deposit Must Be Accepted by Donee. — See Noyes v. Savings Inst., 164 Mass. 583, 49 Am. St. Rep. 484.

**1040.** 3. Purchase or Investment by One Person for Another. — Rowe v. Johnson, 33 Colo. 469.

When a daughter is named as grantee in a mortgage which is delivered to her, the father paying the consideration and causing the mortgage to be recorded in her name, there is a valid gift to the daughter. Prindle v. Wood, 24 Ohio Cir. Ct. 74.

**1041.** 2. Parol Gift of Land Enforced upon Possession Taken and Improvements Made by Donee. — Hadaway v. Smedley, 119 Ga. 264; Rowe v. Henderson, (Indian Ter. 1903) 76 S. W. Rep. 250; Schwindt v. Schwindt, 61 Kan. 377; Schmitt v. Schmitt, (Minn. 1905) 103 N. W. Rep. 214; Tannery v. McMinn, (Tex. Civ. App. 1905) 86 S. W. Rep. 640. See also Hamilton v. Ogee, 10 Kan. App. 241; Matthews v. Matthews, 11 Pa. Super. Ct. 381; Caldwell v. Caldwell, 24 Pa. Super. Ct. 230; Shannon v. Marchbanks, 35 Tex. Civ. App. 615; Kelley v. Crawford, 112 Wis. 368. And see the title SPECIFIC PERFORMANCE, 97. 2 et seq.

A Mere Parol Gift Is Not Sufficient in Itself to pass title. Thaggard v. Crawford, 112 Ga. 326.

3. Bigelow v. Bigelow, 93 Me. 439; Buhler v. Trombly, (Mich. 1905) 102 N. W. Rep. 647. See also Murphy v. Bordwell, 83 Minn. 54, 85 Am. St. Rep. 454.

4. Hadden v. Thompson, 118 Ga. 207; Bigelow v. Bigelow, 93 Me. 439. See also Hamilton v. Ogee, 10 Kan. App. 241.

**1042.** 1. Improvements Must Have Been Made in Reliance upon Gift. — Rowe v. Henderson, (Indian Ter. 1903) 76 S. W. Rep. 250; Bigelow v. Bigelow, 93 Me. 439; Shannon v. Marchbanks, 35 Tex. Civ. App. 615.

- 1042.** Improvements Must Be of Material Value. — See note 2.  
Validity of Parol Gifts of Land Denied. — See note 3.  
Clear Proof of Gift Required. — See note 5.
- 1043** See note 1.  
Burden of Proving Improvements. — See note 2.  
Donee's Possession Adverse to Donor. — See note 4.  
5. Conditional or Qualified Gifts — *a.* GENERALLY. — See note 6.
- 1044.** Condition Subsequent. — See note 3.  
Reservation of Proprietary Rights. — See note 6.
- 1045.** The Reservation of a Life Interest. — See note 1.  
*A* Reservation of a Power of Revocation. — See note 3.  
*b.* GIFTS IN CONTEMPLATION OF MARRIAGE. — See note 5.  
6. Deeds of Gift. — See notes 6, 7.
- 1046.** 7. Validity and Effect Of — *a.* AS BETWEEN PARTIES. — See note 6
- 1047.** See note 1.  
Gift Irrevocable When Fully Executed. — See note 2.

**1042.** 2. Improvements Must Be of Material Value.— *Thaggard v. Crawford*, 112 Ga. 326; *Rowe v. Henderson*, (Indian Ter. 1903) 76 S. W. Rep. 250; *Hamilton v. Ogee*, 10 Kan. App. 241; *Holsberry v. Harris*, 56 W. Va. 320. See also *Bigelow v. Bigelow*, 93 Me. 439.

3 *Nicholas v. Nicholas*, 100 Va. 660.

5. Clear Proof of Parol Gift of Land Required.— *Heidt v. Heidt*, 115 Ga. 965; *Polk v. Clark*, 92 Md. 372; *Moross v. Moross*, 131 Mich. 339; *Matthews v. Matthews*, 11 Pa. Super. Ct. 381; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230; *Raleigh v. Wells*, (Utah 1905) 81 Pac. Rep. 908, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042; *Holsberry v. Harris*, 56 W. Va. 320. See also *Thompson v. Thompson*, 118 Ga. 543.

For Evidence Held Sufficient.— *Schmitt v. Schmitt*, (Minn. 1905) 103 N. W. Rep. 214.

For Evidence Held Insufficient.— *Tannery v. McMinin*, (Tex. Civ. App. 1905) 86 S. W. Rep. 640.

**1043.** 1. *Rowe v. Henderson*, (Indian Ter. 1903) 76 S. W. Rep. 250.

2. *Raleigh v. Wells*, (Utah 1905) 81 Pac. Rep. 908, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041-1045.

4. Title Acquired by Donee by Adverse Possession.— See *Thaggard v. Crawford*, 112 Ga. 326; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230.

6. Conditional or Qualified Gifts.— See *Funston v. Twining*, 202 Pa. St. 88. Compare *Chaddock v. Chaddock*, 134 Mich. 48.

**1044.** 3. Conditions Subsequent.— *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288. Compare *Flint v. Ruthrauff*, 26 N. Y. App. Div. 624, affirmed 163 N. Y. 588.

6. Gift Not Invalidated by Reservation of Proprietary Rights.—*Ranken v. Donovan*, 46 N. Y. App. Div. 225, affirmed 166 N. Y. 626. See also *Driscoll v. Driscoll*, 143 Cal. 528.

**1045.** 1. A Gift of Stock may be valid although the donor retains the right to vote on it and to collect the dividends during his lifetime. *Matter of Brandreth*, 58 N. Y. App. Div. 575, reversed 169 N. Y. 437.

3. *Calvin v. Free*, 66 Kan. 466; *In re Bauernschmidt*, 97 Md. 35. See also *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; *Bickford v. Mattocks*, 95 Me. 547.

5. A Present Given in the Ordinary Way to a party engaged to be married to the donor is not affected by the fact that the engagement is subsequently broken. *Richmond v. Nye*, 126 Mich. 602.

6. Gift by Deed.— *Driscoll v. Driscoll*, 143 Cal. 528.

7. Deed Must Be Delivered.— *Hooper v. Vanstrum*, 92 Minn. 406.

**1046.** 6. *Whiting v. Ralph*, 75 Conn. 41; *Jacobs v. Jolley*, 29 Ind. App. 25; *Reeves v. Howard*, 118 Iowa 121; *Scollard v. Scollard*, (Ky. 1900) 56 S. W. Rep. 648; *Farrell v. Puthoff*, 13 Okla. 159; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**1047.** 1. Gift Passes Legal Title to Donee — *United States*. — *Chambers v. McCreery*, 45 C. C. A. 322.

*Arkansas*. — *Williams v. Smith*, 66 Ark. 299. See also *Ragan v. Hill*, 72 Ark. 307.

*California*. — *Calkins v. Equitable Bldg., etc., Assoc.*, 126 Cal. 531; *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137; *Collins v. Maude*, 144 Cal. 289. See also *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19.

*Connecticut*. — *Whiting v. Ralph*, 75 Conn. 41.

*Georgia*. — *Moore v. Cline*, 115 Ga. 405. See also *Walker v. Neil*, 117 Ga. 733.

*Illinois*. — *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed 188 Ill. 363. See also *People v. Benson*, 99 Ill. App. 325.

*Kentucky*. — *Malone v. Lebus*, 116 Ky. 975.

*Missouri*. — *Jones v. Falls*, 101 Mo. App. 536.

*New York*. — *McGlynn v. Curry*, 82 N. Y. App. Div. 431.

*Oklahoma*. — *Farrell v. Puthoff*, 13 Okla. 159.

*Pennsylvania*. — *Clapper v. Frederick*, 199 Pa. St. 609.

See also *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288.

A Gift Procured by False and Fraudulent Artifices operating on a weakened and diseased mind has been held to pass title to the donee, leaving in the donor simply the right to disaffirm and sue for the recovery. *Bishop v. Leonard*, 123 Fed. Rep. 981.

2. Gift Irrevocable When Fully Executed.— *Williams v. Smith*, 66 Ark. 299; *Calkins v. Equitable Bldg., etc., Assoc.*, 126 Cal. 531; *Goelz*

**1047.** Effect of Testamentary Disposition of Property. — See note 3.

**1048.** *b.* AS AGAINST THIRD PERSONS — (1) *Generally*. — See note 2.  
(2) *Creditors* — Gift Void as Against Subsisting Creditors. — See note 4.  
As Against Subsequent Creditors. — See note 8.

**1049.** 8. Proof of Gift — *a.* CLEAR PROOF OF GIFT REQUIRED. — See note 4.

The General Rule. — See note 5.

**1050.** *b.* ADMISSIBILITY AND EFFECT OF EVIDENCE — (1) *Circumstances of Parties*. — See note 1.

*v.* People's Sav. Bank, 31 Ind. App. 67; *Jacobs v. Jolley*, 29 Ind. App. 25; *Mace v. Thayer*, 51 N. Y. App. Div. 121. See also *Clapper v. Frederick*, 199 Pa. St. 609. Compare *Evans v. Evans*, 118 Ga. 890, 98 Am. St. Rep. 180.

In *Quebec* a donation may be revoked for ingratitude. *Rousseau v. Majeur*, 18 Quebec Super. Ct. 447; *Dépatie v. Charbonneau*, 22 Quebec Super. Ct. 80. See also *Jacob v. Klein*, 3 Quebec Pr. 519.

**1047. 3.** Gift Not Revoked by Subsequent Will. — *Ranken v. Donovan*, 46 N. Y. App. Div. 225, affirmed 156 N. Y. 626.

**1048. 2.** Validity of Gift a Question Between Donor and Donee. — See *Burge v. Burge*, (Ky. 1903) 76 S. W. Rep. 873.

**4.** Gift Void as Against Subsisting Creditors. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Whiting v. Ralph*, 75 Conn. 41; *Morey v. Wiley*, 100 Ill. App. 75.

Creditors Must Show that Their Rights Were Impaired in order to avoid for fraud a gift by a husband to his wife. *Barron v. Williams*, 58 S. Car. 280.

**8.** Gifts Valid as Against Subsequent Creditors. — See *Richmond First Nat. Bank v. Holland*, 99 Va. 895, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335.

**1049. 4.** Clear Proof of Gift Required — *United States*. — See *Fitzpatrick v. Graham*, 122 Fed. Rep. 401, 58 C. C. A. 619.

*California*. — *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137.

*Iowa*. — *Wilson v. Wilson*, 99 Iowa 688. See also *Belknap v. Belknap*, (Iowa 1904) 100 N. W. Rep. 115.

*Kentucky*. — *Callender v. Callender*, (Ky. 1902) 70 S. W. Rep. 844; *Buckel v. Smith*, (Ky. 1904) 82 S. W. Rep. 235. See also *Reed v. Litsey*, (Ky. 1896) 33 S. W. Rep. 827.

*Louisiana*. — *Alexander's Succession*, 110 La. 1027.

*Michigan*. — See *Comstock v. McDonald*, 126 Mich. 142.

*Minnesota*. — *Hooper v. Vanstrum*, 92 Minn. 406.

*Missouri*. — *Jones v. Falls*, 101 Mo. App. 536.  
*New Jersey*. — *In re Bayley*, 67 N. J. Eq. 566. See also *Berla v. Meisel*, (N. J. 1902) 52 Atl. Rep. 999.

*New York*. — *Gilkinson v. Third Ave. R. Co.*, 47 N. Y. App. Div. 472; *Robinson v. Carpenter*, 77 N. Y. App. Div. 520; *Bray v. O'Rourke*, 89 N. Y. App. Div. 400; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Matter of Reichert*, (Surrogate Ct.) 38 Misc. (N. Y.) 228, affirmed 85 N. Y. App. Div. 620. See also *Kelly v. Home Sav. Bank*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141.

*Ohio*. — See *Rote v. Warner*, 9 Ohio Cir. Dec. 540.

*Pennsylvania*. — *Clapper v. Frederick*, 199 Pa. St. 609; *Fiscus's Estate*, 13 Pa. Super. Ct. 615.

*Tennessee*. — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

*Utah*. — *Raleigh v. Wells*, (Utah 1905) 81 Pac. Rep. 908, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049.

*Virginia*. — *Watts v. Watts*, (Va. 1905) 51 S. E. Rep. 359.

There Is No Presumption in favor of a gift. *Denigan v. Hibernia Sav., etc., Soc.*, 127 Cal. 137.

Evidence Reasonably Tending to Show a Gift has been held to be sufficient. *Johnson v. Holst*, 86 Minn. 496.

Where the Donor Is Dead, and the thing given was in his possession at the time of his death, the clearest evidence is required to establish a gift. *Bowron v. De Selding*, 105 N. Y. App. Div. 500.

**5.** General Rule. — *Donaldson v. Everett*, 122 Ga. 318; *Prescott v. Johnson*, 91 Minn. 273; *Ringemann v. Broxtermann*, 11 Ohio Cir. Dec. 368. See also *McMullen v. Stripling*, 120 Ga. 658; *Alexander's Succession*, 110 La. 1027; *Comstock v. McDonald*, 126 Mich. 142.

Evidence Sufficient to Establish Gift. — For examples of evidence held to establish gifts in the particular cases see *Fitzpatrick v. Graham*, 122 Fed. Rep. 401, 58 C. C. A. 619; *Ford v. Ellis*, (Ky. 1900) 56 S. W. Rep. 512; *Scollard v. Scollard*, (Ky. 1900) 56 S. W. Rep. 648; *Reed v. Reed*, (Md. 1905) 60 Atl. Rep. 621; *Mason v. Willhite*, (Tenn. Ch. 1900) 61 S. W. Rep. 298; *Walker v. Hargear*, 36 Wash. 672; *Lee v. Wrixon*, 37 Wash. 47.

For Evidence Held Insufficient see *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 So. Rep. 695; *Buckel v. Smith*, (Ky. 1904) 82 S. W. Rep. 235; *Gittings v. Winter*, (Md. 1905) 60 Atl. Rep. 630; *Trombly v. Klersy*, (Mich. 1905) 104 N. W. Rep. 419; *Nicklas v. Parker*, (N. J. 1905) 61 Atl. Rep. 267; *Snook v. Sullivan*, 53 N. Y. App. Div. 602, affirmed 167 N. Y. 536, 85 Am. St. Rep. 699; *Tyrrel v. Emigrant Industrial Sav. Bank*, 77 N. Y. App. Div. 131; *Robinson v. Carpenter*, 77 N. Y. App. Div. 520; *Matter of Taber*, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; *Adler v. Davis*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 120; *Bowron v. De Selding*, 105 N. Y. App. Div. 500; *Albert v. Haeblerly*, (N. J. 1905) 61 Atl. Rep. 380; *Huber's Estate*, 21 Pa. Super. Ct. 34; *Ekemberg v. Mousseau*, 19 Quebec Super. Ct. 289.

**1050. 1.** Circumstances of Parties Admissible

**1050.** (2) *Delivery and Possession of Property* — Possession of Donee After Donor's Death. — See notes 3, 4.

(3) *Declarations of Alleged Donor* — Antecedent and Contemporaneous Declarations. — See note 5.

**1051.** See note 2.

*Subsequent Declarations.* — See notes 3, 4, 6.

c. BURDEN OF PROOF. — See note 7.

d. FACT OF GIFT A QUESTION FOR JURY. — See note 8.

**1052.** e. DONEE AS WITNESS AFTER DEATH OF DONOR. — See note 1.

VII. GIFTS CAUSA MORTIS — 1. Definition. — See note 2.

**on Question of Gift.** — Russell v. Langford, 135 Cal. 356; Main's Appeal, 73 Conn. 638; Crouse v. Judson, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, modified and affirmed 93 N. Y. App. Div. 604; Barron v. Williams, 58 S. Car. 280; Blaisdell v. Davis, 72 Vt. 295. See also McMullen v. Stripling, 120 Ga. 658; Taylor v. Coriell, 66 N. J. Eq. 262; Hafer v. McKelvey, 23 Pa. Super. Ct. 202.

**Proof of Friendly Relations** is not admissible where there is no other testimony directly tending to prove the gift. Moore v. Machen, 124 Mich. 216.

**1050. 3. Possession of Donee After Donor's Death of Little Weight.** — Chambers v. McCreery, 45 C. C. A. 322; Bruce v. Squires, 68 Kan. 199. See also Claytor v. Pierson, 55 W. Va. 167. Compare Roy v. Garneau, 15 Quebec Super. Ct. 181.

4. See Morey v. Wiley, 100 Ill. App. 75.

**5. Donor's Antecedent or Contemporaneous Declarations Admissible to Show Intention.** — Denunzio v. Scholtz, (Ky. 1903) 77 S. W. Rep. 715; Matthews v. Matthews, 11 Pa. Super. Ct. 381; Shannon v. Marchbanks, 35 Tex. Civ. App. 615. See also Jarrell v. Crow, 30 Tex. Civ. App. 629.

**1051. 2.** See Matthews v. Matthews, 11 Pa. Super. Ct. 381. Compare Shannon v. Marchbanks, 35 Tex. Civ. App. 615.

**3. Donor's Subsequent Declarations Admissible to Show Intent.** — Dehm v. Dehm, 86 Ill. App. 479; Yokem v. Hicks, 93 Ill. App. 667; Goelz v. People's Sav. Bank, 31 Ind. App. 67; Olson v. Gifford, 96 Iowa 734; Denunzio v. Scholtz, (Ky. 1903) 77 S. W. Rep. 715; Sparling v. Smeltzer, 133 Mich. 454; Matter of Meehan, 59 N. Y. App. Div. 156; Crouse v. Judson, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338, modified and affirmed 93 N. Y. App. Div. 604; Gross v. Smith, 132 N. Car. 604; Richmond First Nat. Bank v. Holland, 99 Va. 495, 86 Am. St. Rep. 898, 3 Va. Sup. Ct. 335; Caldwell v. Caldwell, 24 Pa. Super. Ct. 230. See also Hagemann v. Hagemann, 204 Ill. 378; Blaisdell v. Davis, 72 Vt. 295.

**4. Donor's Subsequent Declarations Not Admissible to Controvert Gift.** — Kelly v. Home Sav. Bank, 103 N. Y. App. Div. 141, reversing (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102.

**6.** Chambers v. McCreery, 45 C. C. A. 322; Burt v. Andrews, 112 Ga. 465; Gross v. Smith, 132 N. Car. 604. Compare Peirce v. Giles, 93 Ill. App. 524.

**Loose Declarations of a Father**, without explanation, are not sufficient evidence of a gift to a son. Holsberry v. Harris, 56 W. Va. 320.

**7. Burden of Proving Gift Rests upon Person Asserting It.** — Wright v. Bragg, 45 C. C. A.

204; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401; Frantz v. Porter, 132 Cal. 49; Sprague v. Walton, 145 Cal. 228; Wilson v. Wilson, 99 Iowa 688; Galer v. Galer, 108 Iowa 496; Buckel v. Smith, (Ky. 1904) 82 S. W. Rep. 235; Jones v. Falls, 101 Mo. App. 536; Matter of Rose, (Surrogate Ct.) 35 Misc. (N. Y.) 21, affirmed 75 N. Y. App. Div. 615; Clapper v. Frederick, 199 Pa. St. 609. See also Bruce v. Squires, 68 Kan. 199; Comstock v. McDonald, 126 Mich. 142; Kelly v. Home Sav. Bank, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 102, reversed 103 N. Y. App. Div. 141; Claytor v. Pierson, 55 W. Va. 167. Compare Longenecker v. Zion Evangelical Lutheran Church, 200 Pa. St. 567.

**8. Gift a Question for Jury.** — Fitzpatrick v. Graham, 122 Fed. Rep. 401, 58 C. C. A. 619; Frantz v. Porter, 132 Cal. 49; Stroup v. Bridger, 124 Iowa 401; Harris v. Cable, 113 Mich. 192; Sparling v. Smeltzer, 133 Mich. 454; Parke v. Nixon, (Mich. 1905) 104 N. W. Rep. 597; Liscomb v. Manchester, etc., R. Co., 70 N. H. 312; Gross v. Smith, 132 N. Car. 604; Vann v. Edwards, 135 N. Car. 661. See also Clapper v. Frederick, 199 Pa. St. 609.

**1052. 1. Donee Incompetent Witness After Death of Donor.** — Couch v. Couch, 141 Ala. 361. See also Freese v. Odd Fellows' Sav. Bank, 136 Cal. 662; Casserly v. Casserly, 123 Mich. 44.

**Trustee Competent Witness After Death of Donor.** — Jarrell v. Crow, 30 Tex. Civ. App. 629. **Declarations of Alleged Donee to Show Gift Inadmissible.** — Couch v. Couch, 141 Ala. 361.

**In Kentucky a Husband Is Not Competent** to testify that certain property was given him by the wife. Buckel v. Smith, (Ky. 1904) 82 S. W. Rep. 235.

**Evidence of the Donee Is Admissible to Rebut the Inference of an Admission** against the ownership of a note sought to be drawn from the donee's production of such note given to the donee. Harris v. Cable, 113 Mich. 192.

**The Donee's Aunt** is competent to testify as to facts showing a gift *inter vivos*. Gilkinson v. Third Ave. R. Co., 47 N. Y. App. Div. 472.

**2. Justinian's Definition of Donatio Causa Mortis.** — Calvin v. Free, 66 Kan. 466, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052.

**Blackstone's Definition.** — Hagemann v. Hagemann, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; Hawn v. Stöler, 22 Pa. Super. Ct. 307; Royston v. McCulley, (Tenn. Ch. 1900) 50 S. W. Rep. 725; Claytor v. Pierson, 55 W. Va. 167.

**Redfield's Definition.** — Davis v. Kuck, 93 Minn. 262; Royston v. McCulley, (Tenn. Ch. 1900) 50 S. W. Rep. 725.

**1053.** Contingent Nature of Gift Inferred from Circumstances. — See note 1.

Gifts Causa Mortis Derived from Civil Law. — See note 3.

**1054.** 2. Gifts Causa Mortis Distinguished from Other Gratuitous Transfers — *b.* FROM GIFTS INTER VIVOS — A Gift Causa Mortis Differs from a Gift Inter Vivos. — See notes 4, 5.

3. Requisites to Valid Gift Causa Mortis — *a.* GENERALLY. — See note 6.

**1055.** *b.* GIFT MUST BE MADE IN EXPECTATION OF DEATH. — See notes 2, 3.

**1056.** See note 2.

Apprehension of Death Must Be Immediate. — See note 4.

*c.* GIFT MUST BE FULLY EXECUTED — (1) Generally. — See note 6.

Judge Woodward. — Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

For Other Definitions see *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410; Sorrells v. Collins, 110 Ga. 518; Stokes v. Sprague, 110 Iowa 89; Reeves v. Howard, 118 Iowa 121; Sinnott v. Hibernia Nat. Bank, 105 La. 705; Peck v. Scofield, 186 Mass. 108; Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**1053.** 1. Gift Made by Dying Person Presumed to Be Gift Causa Mortis. — Matter of Swade, 65 N. Y. App. Div. 592.

The Circumstances under Which the Gift Is Made Must Show that the subject of the gift is to revert to the donor in case of recovery. Thorne v. Perry, 2 N. Bruns. Eq. Rep. 146, affirmed 35 N. Bruns. 398.

3. Noble v. Garden, 146 Cal. 225.

**1054.** 4. Hagemann v. Hagemann, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; Bickford v. Mattocks, 95 Me. 547; Phinney v. State, 36 Wash. 236.

5. Distinction Between Gifts Causa Mortis and Inter Vivos. — Burt v. Andrews, 112 Ga. 465; Hagemann v. Hagemann, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; Sinnott v. Hibernia Nat. Bank, 105 La. 705; Bickford v. Mattocks, 95 Me. 547; Davis v. Kuck, 93 Minn. 262; Buecker v. Carr, 60 N. J. Eq. 300; Matter of Taber, (Surrogate Ct.) 30 Misc. (N. Y.) 172, affirmed 54 N. Y. App. Div. 629; Deneff v. Helms, 42 Oregon 161; Phinney v. State, 36 Wash. 236. See also Duryea v. Harvey, 183 Mass. 429; Claytor v. Pierson, 55 W. Va. 167.

6. Essentials of Donatio Causa Mortis — Generally. — Sorrells v. Collins, 110 Ga. 518; Hagemann v. Hagemann, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; Stokes v. Sprague, 110 Iowa 89; Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442; Winslow v. McHenry, 93 Minn. 507, 106 Am. St. Rep. 448; Callanan v. Clement, 162 N. Y. 618, affirming (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 621; Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 890; Claytor v. Pierson, 55 W. Va. 167.

There Must Be an Intent to make the gift. Dunn v. Houghton, (N. J. 1902) 51 Atl. Rep. 71.

**1055.** 2. Gift Must Be Made in Contemplation of Death — England. — *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410.

Canada. — See Brown v. Toronto Gen. Trusts Co., 32 Ont. 319; Ward v. Bradley, 1 Ont. L. Rep. 118.

Georgia. — Sorrells v. Collins, 110 Ga. 518.

Illinois. — Hagemann v. Hagemann, 90 Ill. App. 251, appeal dismissed 188 Ill. 363.

Iowa. — Stokes v. Sprague, 110 Iowa 89.

Kansas. — Calvin v. Free, 66 Kan. 466; Rogers v. Richards, 67 Kan. 706.

Maine. — See Bickford v. Mattocks, 95 Me. 547.

Minnesota. — Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442; Winslow v. McHenry, 93 Minn. 507, 106 Am. St. Rep. 448.

New Jersey. — Snyder v. Harris, 61 N. J. Eq. 480.

New York. — O'Brien v. Elmira Sav. Bank, 99 N. Y. App. Div. 76; Callanan v. Clement, 162 N. Y. 618, affirming (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 621; Dimon v. Keery, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 231, affirmed 54 N. Y. App. Div. 318. See also Dickinson v. Hoes, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

Pennsylvania. — Hawn v. Stoler, 22 Pa. Super. Ct. 307.

Tennessee. — Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

Vermont. — See Darling v. Emery, 74 Vt. 167.

Virginia. — Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 890.

Washington. — Phinney v. State, 36 Wash. 236.

West Virginia. — Claytor v. Pierson, 55 W. Va. 167.

There Must Be Contemplation, Though Not Necessarily Expectation, of death. Thorne v. Perry, 2 N. Bruns. Eq. Rep. 146, affirmed 35 N. Bruns. 398.

3. Apprehension of Death from Illness. — Burt v. Andrews, 112 Ga. 465; Claytor v. Pierson, 55 W. Va. 167. See also Sorrells v. Collins, 110 Ga. 518.

Existing Illness. — The gift must be conditioned to take effect on the donor's death by his existing illness. Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442.

**1056.** 2. Threatened Danger or Peril. — Burt v. Andrews, 112 Ga. 465; Claytor v. Pierson, 55 W. Va. 167. See also Sorrells v. Collins, 110 Ga. 518.

4. Apprehension of Death Must Be Immediate. — Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 890. See also Duryea v. Harvey, 183 Mass. 429.

6. Gift Must Be Completely Executed During Life of Donor. — Ragan v. Hill, 72 Ark. 307;

**1056.** (2) *Delivery* — (a) *Necessity for Delivery*. — See note 7.

**1057.** The Fact that the Property Is Already in the Possession of the Donee. — See notes 1, 2.

**1058.** (b) *What Is Valid Delivery* — *aa. GENERALLY* — *Delivery Must Be Absolute and Complete*. — See note 2.

*Delivery Must Be for Purpose of Consummating Gift*. — See note 3.

*Delivery Must Be Best of Which Property Is Capable*. — See notes 4, 5.

**1059.** *bb. CONSTRUCTIVE OR SYMBOLICAL DELIVERY*. — See notes 1, 2, 3.

*Stokes v. Sprague*, 110 Iowa 89; *Sinnot v. Hi-bernia Nat. Bank*, 105 La. 705; *Davis v. Kuck*, 93 Minn. 262; *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890; *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299. See also *Chambers v. McCreery*, 98 Fed. Rep. 783; *Rodemer v. Rettig*, 114 Ky. 634. Compare *Hogan v. Sullivan*, 114 Iowa 456.

**1056. 7. Property Must Be Delivered**—*United States*. — *Chambers v. McCreery*, 45 C. C. A. 322.

*Arkansas*. — *Ragan v. Hill*, 72 Ark. 307.

*California*. — *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19. See also *Collins v. Maude*, 144 Cal. 289.

*Colorado*. — *Wittman v. Pickens*, 33 Colo. 484, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056.

*Georgia*. — *Burt v. Andrews*, 112 Ga. 465. See also *Sorrells v. Collins*, 110 Ga. 518.

*Illinois*. — *Hagemann v. Hagemann*, 90 Ill. App. 251, *appeal dismissed* 188 Ill. 363.

*Iowa*. — *Stokes v. Sprague*, 110 Iowa 89; *Hogan v. Sullivan*, 114 Iowa 456.

*Kansas*. — *Calvin v. Free*, 66 Kan. 466.

*Kentucky*. — See *Rodemer v. Rettig*, 114 Ky. 634.

*Maine*. — See *Bickford v. Mattocks*, 95 Me. 457.

*Massachusetts*. — *Duryea v. Harvey*, 183 Mass. 429, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056.

*Minnesota*. — *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442; *Davis v. Kuck*, 93 Minn. 262; *Winslow v. McHenry*, 93 Minn. 507, 106 Am. St. Rep. 448.

*New Jersey*. — *Buecker v. Carr*, 60 N. J. Eq. 300.

*New York*. — *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76; *Callanan v. Clement*, 162 N. Y. 618, *affirming* (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 621. See also *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

*North Carolina*. — *Duckworth v. Orr*, 126 N. Car. 674.

*Oregon*. — *Deneff v. Helms*, 42 Oregon 161. See also *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764.

*Pennsylvania*. — *Hawn v. Stoler*, 22 Pa. Super. Ct. 307.

*Tennessee*. — *Balling v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

*Virginia*. — *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890.

*Washington*. — *Phinney v. State*, 36 Wash. 236.

*Canada*. — *Thorne v. Perry*, 2 N. Bruns. Eq. Rep. 146, *affirmed* 35 N. Bruns. 308; *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299.

**1057. 1. Delivery Necessary Although Donee Is in Possession**. — *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442.

2. *Davis v. Kuck*, 93 Minn. 262.

**1058. 2. Delivery Must Be Complete and Absolute**. — *Treasury Solicitor v. Lewis*, (1900) 2 Ch. 812, 83 L. T. N. S. 139; *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299; *Ragan v. Hill*, 72 Ark. 307; *Duryea v. Harvey*, 183 Mass. 429; *Buecker v. Carr*, 60 N. J. Eq. 300; *Dunn v. Houghton*, (N. J. 1902) 51 Atl. Rep. 71; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Claytor v. Pierson*, 55 W. Va. 167. See also *Chambers v. McCreery*, 98 Fed. Rep. 783; *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764.

*Delivery of Depositary's Receipt for Money Sufficient*. — *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

**3. Delivery by Way of Bailment**. — *Buecker v. Carr*, 60 N. J. Eq. 300; *Duckworth v. Orr*, 126 N. Car. 674; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**4. Delivery Must Be Best of Which Property Is Capable**. — *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764, *citing* 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058. See also *Claytor v. Pierson*, 55 W. Va. 167.

5. *Hawn v. Stoler*, 22 Pa. Super. Ct. 307; *Phinney v. State*, 36 Wash. 236; *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299. See also *Sorrells v. Collins*, 110 Ga. 518.

**A Creditor's Verbal Order or Request to His Debtor** that the debt be paid to a third person constitutes all the delivery of which the debt is capable, and upon the debtor's promise to pay to the third person the original creditor loses all control over the subject. *Castle v. Persons*, 54 C. C. A. 133.

**1059. 1. Symbolical Delivery**. — See *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299.

2. *Dunn v. Houghton*, (N. J. 1902) 51 Atl. Rep. 71.

**Intention to Give and Delivery Being Shown**, the possession of a certificate of stock by the alleged donee is *prima facie* evidence of property. *Liscomb v. Manchester, etc., R. Co.*, 70 N. H. 312.

**In North Carolina** symbolical delivery does not prevail, but in a certain class of cases constructive delivery is sufficient when actual delivery is impossible. *Duckworth v. Orr*, 126 N. Car. 674.

**3. Delivery of Key of Trunk Held Sufficient**. — *Charleton v. Brooks*, 6 Ont. L. Rep. 87. See also *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764; *Phinney v. State*, 36 Wash. 236; *Claytor v. Pierson*, 55 W. Va. 167; *Foster v. Walker*, 32 Nova Scotia 156, *reversed* 30 Can. Sup. Ct. 299.

**1059.** *cc.* DELIVERY OF CHOSSES IN ACTION. — See note 4.

**1060.** Delivery Must Be Absolute. — See notes 1, 2.

The Delivery of a Savings-bank Book. — See note 3.

*dd.* DELIVERY TO THIRD PERSON — As Trustee for Donee. — See note 6.

**1061.** As Agent of Donor. — See note 1.

Presumption as to Capacity in Which Third Person Receives Property. — See note 2.

(3) Donee Must Retain Possession. — See note 3.

(4) Acceptance. — See notes 4, 5.

*d.* DEATH OF DONOR. — See note 6.

**1062.** 4. What May Be Given — *a.* GENERALLY. — See note 2.

*b.* CHOSSES IN ACTION — (1) Generally. — See notes 3, 5, 6, 8.

Pointing Out Definitely and Particularly the Several Places Where Money Is Concealed, with a positive and unequivocal declaration of gift, is a good constructive delivery. *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764.

Delivery of Keys of Desk Held to Be Actual Delivery. — *Walker v. Foster*, 30 Can. Sup. Ct. 299.

**1059.** 4. Delivery of Choses in Action — No Indorsement or Assignment Necessary. — *Dennin v. Hilton*, (N. J. 1901) 50 Atl. Rep. 600; *Varick v. Hitt*, (N. J. 1903) 55 Atl. Rep. 139; *Matter of Swade*, 65 N. Y. App. Div. 592; *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059.

**1060.** 1. *Dunn v. Houghton*, (N. J. 1902) 51 Atl. Rep. 71.

2. Delivery of Bank Pass-book. — The delivery of a deposit book by a father to his daughter with the intention, expressed at the time, to give her the money and bonds, a memorandum of which was kept in the deposit book, is not a delivery of the money and bonds. *Wilson v. Featherston*, 122 N. Car. 747.

But Where Production of the Pass-book Was Required as a prerequisite to demanding payment of the money, it has been held that a delivery of such pass-book was a good delivery of the deposit. *Brown v. Toronto Gen. Trusts Corp.*, 32 Ont. 319.

3. Savings-bank Book. — *In re Weston*, (1902) 1 Ch. 680, 86 L. T. N. S. 551; *In re Andrews*, (1902) 2 Ch. 394, 87 L. T. N. S. 20; *In re Reid*, 6 Ont. L. Rep. 421; *Dennin v. Hilton*, (N. J. 1901) 50 Atl. Rep. 600; *Matter of Swade*, 65 N. Y. App. Div. 592; *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Hill v. Escort*, (Tex. Civ. App. 1905) 86 S. W. Rep. 367. See also *Varick v. Hitt*, (N. J. 1903) 55 Atl. Rep. 139; *Phinney v. State*, 36 Wash. 236; *Clayton v. Pierson*, 55 W. Va. 167; *Thorne v. Perry*, 2 N. Bruns. Eq. Rep. 146, affirmed 35 N. Bruns. 398. Compare *Dunn v. Houghton*, (N. J. 1902) 51 Atl. Rep. 71.

6. Delivery to Third Person Sufficient. — *Stokes v. Sprague*, 110 Iowa 89; *Sorrells v. Collins*, 110 Ga. 518, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Hogan v. Sullivan*, 114 Iowa 456; *Duryea v. Harvey*, 183 Mass. 429; *Matter of Reichert*, (Surrogate Ct.) 38 Misc. (N. Y.) 228, affirmed 85 N. Y. App. Div. 620; *Deneff v. Helms*, 42 Oregon 161; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Walker v. Foster*, 30 Can. Sup. Ct. 299; *Mc-*

*Donald v. McDonald*, 35 Nova Scotia 205, affirmed 33 Can. Sup. Ct. 145. See also *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Callanan v. Clement*, 162 N. Y. 618, affirming (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 621; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890; *Foster v. Walker*, 32 Nova Scotia 156, reversed 30 Can. Sup. Ct. 299.

**1061.** 1. Delivery to Third Person as Agent of Donor Insufficient. — *Kimball v. Tripp*, 136 Cal. 631; *Duckworth v. Orr*, 126 N. Car. 674; *Deneff v. Helms*, 42 Oregon 161; *Walker v. Foster*, 30 Can. Sup. Ct. 299, reversing 32 Nova Scotia 156. See also *Sorrells v. Collins*, 110 Ga. 518.

2. *Hogan v. Sullivan*, 114 Iowa 456; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890.

3. Donee Must Retain Possession. — See *Chambers v. McCreery*, 98 Fed. Rep. 783; *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; *Foster v. Walker*, 32 Nova Scotia 156, reversed 30 Can. Sup. Ct. 299.

4. Acceptance Essential. — *Davis v. Kuck*, 93 Minn. 262. See also *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101; *Matter of Swade*, 65 N. Y. App. Div. 592; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890.

5. *Hogan v. Sullivan*, 114 Iowa 456; *Deneff v. Helms*, 42 Oregon 161; *Walker v. Foster*, 30 Can. Sup. Ct. 299.

6. Death of Donor Essential. — *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410; *Foster v. Walker*, 32 Nova Scotia 156, reversed 30 Can. Sup. Ct. 299; *Hagemann v. Hagemann*, 90 Ill. App. 251, appeal dismissed 188 Ill. 363; *Stokes v. Sprague*, 110 Iowa 89; *Winslow v. McHenry*, 93 Minn. 507, 106 Am. St. Rep. 448; *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76; *Hawn v. Stoler*, 22 Pa. Super. Ct. 307; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890; *Phinney v. State*, 36 Wash. 236; *Clayton v. Pierson*, 55 W. Va. 167. See also *Sorrells v. Collins*, 110 Ga. 518; *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101; *Ward v. Bradley*, 1 Ont. L. Rep. 118.

**1062.** 2. Every Species of Personal Property. — *Phinney v. State*, 36 Wash. 236. See also *Sorrells v. Collins*, 110 Ga. 518. Compare *Sinnot v. Hibernia Nat. Bank*, 105 La. 705.

The Residue of a Fund After Payment of Burial Expenses may be the subject of a valid gift. *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

3. Gifts of Choses in Action. — Compare *Deneff v. Helms*, 42 Oregon 161,

**1063.** (3) *Donor's Own Note or Check* — *The Donor's Own Note*. — See note 3.

**A Gift of the Donor's Own Check.** — See note 4.

*c.* **REAL ESTATE.** — See note 9.

**1064.** 5. **Conditional or Qualified Gifts Causa Mortis** — See notes 4, 5.

**1065.** 7. **Validity and Effect Of** — *a.* **AS BETWEEN PARTIES** — (1) *Generally* — **Gifts Causa Mortis Valid.** — See note 1.

**When Title Passes to Donee.** — See notes 2, 3.

(2) *Revocation* — *aa.* **BY ACT OF DONOR.** — See note 4.

**1066.** **Gift Causa Mortis Not Revoked by Subsequent Will.** — See note 1.

*bb.* **BY OPERATION OF LAW** — (*aa*) *Through Recovery or Survival of Donor.* —

See note 3.

**Intervening Recovery.** — See note 4.

(*bb*) *Through Death of Donee Before Donor.* — See note 5.

*b.* **AS AGAINST CREDITORS.** — See note 6.

**Nonnegotiable Choses in Action** may be the subject of a gift *causa mortis*. Matter of Swade, 65 N. Y. App. Div. 592.

**Local Loans Stock** in which money has been invested in the post-office savings bank have been held in *England* not to be the proper subject-matter of a *donatio causa mortis*. *In re Andrews*, (1902) 2 Ch. 394, 87 L. T. N. S. 20.

**Building Society Shares** have been held in *England* not to be the proper subject-matter of a *donatio causa mortis*. *In re Weston*, (1902) 1 Ch. 680, 86 L. T. N. S. 551.

**1062.** 5. **Bill of Exchange.** — See *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410.

6. **Promissory Note.** — *Varick v. Hitt*, (N. J. 1903) 55 Atl. Rep. 139; Matter of Swade, 65 N. Y. App. Div. 592; *Charleton v. Brooks*, 6 Ont. L. Rep. 87. See also *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410.

8. **Certificate of Deposit.** — *In re Griffin*, (1899) 1 Ch. 408, 79 L. T. N. S. 442; *McDonald v. McDonald*, 33 Can. Sup. Ct. 145, affirming 35 Nova Scotia 205. See also *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410.

**1063.** 3. **Donor's Own Note Not Subject of Gift Causa Mortis.** — *Mason v. Gardner*, 186 Mass. 515. See also *Varick v. Hitt*, (N. J. 1903) 55 Atl. Rep. 139.

4. **Donor's Check.** — *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410; *Re Davis*, 86 L. T. N. S. 889; *Castle v. Persons*, 54 C. C. A. 133. See also *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; *McDonald v. McDonald*, 35 Nova Scotia 205, affirmed 33 Can. Sup. Ct. 145. Compare *Phinney v. State*, 36 Wash. 236.

9. **Real Estate Not Subject of Gift Causa Mortis.** — *Reeves v. Howard*, 118 Iowa 121; *Hawn v. Stoler*, 22 Pa. Super. Ct. 307; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890. See also *Wilson v. Jourdan*, 79 Miss. 133.

**1064.** 4. **Gift Coupled with Trust or Condition.** — *Thorne v. Perry*, 2 N. Bruns. Eq. Rep. 146, affirmed 35 N. Bruns. 398.

5. **Stipulation that Donee Shall Pay Donor's Debts and Funeral Expenses.** — *Podmore v. South Brooklyn Sav. Inst.*, 48 N. Y. App. Div. 218; *Mahon v. Dime Sav. Bank*, 92 N. Y. App. Div. 506.

**1065.** 1. **In Louisiana.** — See *Sinnot v. Hi-bernia Nat. Bank*, 105 La. 705.

**The Necessity for the Concurrence of a Surety Company** to the possession of a fund does not invalidate a gift of such fund. *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

2. **When Title Passes—Death of Donor.** — *Buecker v. Carr*, 60 N. J. Eq. 300. See also *Ward v. Bradley*, 1 Ont. L. Rep. 118.

**In Louisiana** the capacity to take under a gift *causa mortis* must be judged, of as at the time of the testator's death. *Vance's Succession*, 110 La. 760.

3. **Title Passes to Donee upon Delivery.** — *In re Beaumont*, (1902) 1 Ch. 889, 86 L. T. N. S. 410; *Hogan v. Sullivan*, 114 Iowa 456; *Dur-yea v. Harvey*, 183 Mass. 429; *Deneff v. Helms*, 42 Oregon 161; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890.

4. **Gift Causa Mortis Revocable at Option of Donor.** — *Harrell v. Nicholson*, 119 Ga. 458; *Davis v. Kuck*, 93 Minn. 262; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890; *Foster v. Walker*, 32 Nova Scotia 156, reversed 30 Can. Sup. Ct. 299; *Ward v. Bradley*, 1 Ont. L. Rep. 118. See also *Hogan v. Sullivan*, 114 Iowa 456; *Bickford v. Mattocks*, 95 Me. 547; *Deneff v. Helms*, 42 Oregon 161; *Walker v. Foster*, 30 Can. Sup. Ct. 299.

**Repossession by the Donor Is Not Essential** to the power of revocation. *Adams v. Atherton*, 132 Cal. 164.

**1066.** 1. **Gift Causa Mortis Not Revoked by Subsequent Will.** — *Darling v. Emery*, 74 Vt. 167, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065, 1066. Compare dicta in *Adams v. Atherton*, 132 Cal. 164.

3. **Recovery or Survival of Donor.** — *Peck v. Scofield*, 186 Mass. 108; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890. See also *Hogan v. Sullivan*, 114 Iowa 456; *Deneff v. Helms*, 42 Oregon 161; *Walker v. Foster*, 30 Can. Sup. Ct. 299.

4. **Failure of Gift Through Intervening Recovery** — See *Ward v. Bradley*, 1 Ont. L. Rep. 118.

5. **Death of Donee Before Donor.** — *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890. See also *Deneff v. Helms*, 42 Oregon 161.

6. **Gifts Causa Mortis Not Good Against Donor's Creditors.** — *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725.

**Where There Is No Existing Indebtedness Shown** an administrator cannot claim possession of funds for administrative purposes when such



- 1066.** 8. Proof of Gift *Causa Mortis*. — See notes 8, 9.  
**1067.** The Common Law. — See notes 2, 3.  
 Quantum of Proof Required. — See note 5.  
**1068.** The Mere Possession of the Property. — See note 1.  
 The Donor's Declarations. — See note 8.  
 The Burden of Proving a Gift *Causa Mortis*. — See note 10.  
 Question for Jury. — See note 11.  
**1069.** GIN HOUSE. — See note 4.  
 GIST. — See note 7.  
 GIVE—GIVEN—GIVING. — See note 8.  
**1072.** GO, GOING, ETC. — See note 3.  
**1073.** GOOD. — See note 4.

funds have been disposed of by a valid gift *causa mortis*. *Deneff v. Helms*, 42 Oregon 161.

**1066.** 8. See *McDonald v. McDonald*, 33 Can. Sup. Ct. 145. *Compare Deneff v. Helms*, 42 Oregon 161.

9. Gifts *Causa Mortis* Are Not Favored. — *Buecker v. Carr*, 60 N. J. Eq. 300; *Snyder v. Harris*, 61 N. J. Eq. 480; *Varick v. Hitt*, (N. J. 1903) 55 Atl. Rep. 139; *Bailing v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890.

**1067.** 2. Clear Proof of Gift *Causa Mortis* Required. — *Snyder v. Harris*, 61 N. J. Eq. 480; *In re Bayley*, 67 N. J. Eq. 566; *Matter of Swade*, 65 N. Y. App. Div. 592; *Lehr v. Jones*, 74 N. Y. App. Div. 54; *Podmore v. Dime Sav. Bank*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 393, *affirmed* 55 N. Y. App. Div. 624; *Matter of Reichert*, (Surrogate Ct.) 38 Misc. (N. Y.) 228, *affirmed* 85 N. Y. App. Div. 620; *Bailing v. Manhattan Sav. Bank, etc., Co.*, 110 Tenn. 288; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 890. See also *Ragan v. Hill*, 72 Ark. 307; *Buecker v. Carr*, 60 N. J. Eq. 300; *Bray v. O'Rourke*, 89 N. Y. App. Div. 400.

3. *Podmore v. Dime Sav. Bank*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 393, *affirmed* 55 N. Y. App. Div. 624.

5. For Evidence Held Sufficient to Establish a Gift *Causa Mortis* see *Mahon v. Dime Sav. Bank*, 92 N. Y. App. Div. 506; *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76; *Charleton v. Brooks*, 6 Ont. L. Rep. 87.

*Evidence Sufficient to Prove Any Fact Against the Estate of a Deceased Person is sufficient in Ontario to prove a donatio causa mortis.* *In re Reid*, 6 Ont. L. Rep. 421.

For Evidence Held Insufficient to Establish a Gift *Causa Mortis* see *Lehr v. Jones*, 74 N. Y. App. Div. 54.

**1068.** 1. Mere Possession Insufficient to Prove Gift. — *Podmore v. Dime Sav. Bank*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 393, *affirmed* 55 N. Y. App. Div. 624; *Buecker v. Carr*, 60 N. J. Eq. 300. See also *Clayton v. Pierson*, 55 W. Va. 167.

8. Declarations in Evidence. — *Matter of Swade*, 65 N. Y. App. Div. 592; *Waite v. Grubbe*, 43 Oregon 406, 99 Am. St. Rep. 764. See also *Callanan v. Clement*, 162 N. Y. 618,

*affirming* (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 621.

Declarations of the Alleged Donor as to Family Matters are incompetent to show the probability of his making a gift to the donee. *Lehr v. Jones*, 74 N. Y. App. Div. 54.

10. Burden of Proof upon Party Asserting Gift. — *Lehr v. Jones*, 74 N. Y. App. Div. 54; *Duckworth v. Orr*, 126 N. Car. 674; *Royston v. McCulley*, (Tenn. Ch. 1900) 59 S. W. Rep. 725. See also *Clayton v. Pierson*, 55 W. Va. 167.

11. *Castle v. Persons*, 54 C. C. A. 133; *Davis v. Kuck*, 93 Minn. 262; *Podmore v. South Brooklyn Sav. Inst.*, 48 N. Y. App. Div. 218; *Hawn v. Stoler*, 22 Pa. Super. Ct. 307.

**1069.** 4. Burglary—Ginhouse Not Equivalent to Storehouse—Variance. — *Givens v. State*, 40 Fla. 200.

7. *Hoffman v. Knight*, 127 Ala. 149; *Beckman v. Mange*, 82 Ill. App. 228; *Jernberg v. Mix*, 199 Ill. 254.

8. Giving a Mortgage Not Equivalent to Recording It—Bankruptcy Act.—*American Bible Soc. v. American Tract Soc.*, 62 N. J. Eq. 219.

Give and Bequeath. — In *Chick v. Ives*, (Neb. 1902) 90 N. W. Rep. 751, the court said: "The words *give* and *bequeath* used in the will are apt terms used in the disposition of money or personal property only. Such terms work no gift or conveyance of any interest in real estate."

**1072.** 3. Go in the Sense of Vest. — See *Jackson County v. Derrick*, 117 Ala. 348; *Plass v. Plass*, 121 Cal. 131.

To Go. — *Adams v. Alexander*, 159 Ind. 175. Going Concern. — See *Oliver v. Lansing*, 59 Neb. 219.

Going Value. — In *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, the court said: "By *going* value we understand is meant that value which arises from having an established 'going' business. While not the exact equivalent of good will as applied to ordinary business, it is of a somewhat similar nature and attaches to the business rather than to the property employed in such business."

**1073.** 4. Good Cause—Appeals. — *Christensen v. Anderson*, 24 Tex. Civ. App. 345.

Good and Sufficient Cause. — *Stoner v. Bitters*, 151 Ind. 575.

Good Order and Condition. — *Denver v. Moewes*, 15 Colo. App. 28.

Good and Sufficient Deed. — *Louisville, etc., R. Co. v. Shepard*, 126 Ala. 416; *Whicker v.*

**1078. GOOD FAITH.** — See notes 1, 2.

**1080. GOODS.** — See note 1.

**1083. Intangible Interest.** — See note 1.

Hushaw, 159 Ind. 1; Bash v. Cascade Min. Co., 29 Wash. 50.

**Good Health — Life Insurance.** — Chapin v. Maine Cent. R. Co., 97 Me. 151; Woodmen of the World v. Locklin, 28 Tex. Civ. App. 486.

**Good Standing.** — Royal Circle v. Achterath, 204 Ill. 549.

**Good Title.** — Hall v. Clountz, 26 Tex. Civ. App. 348.

**1078. 1. Good Faith.** — Battey v. Eureka Bank, 62 Kan. 384, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; Breaux-Renoudet Cypress Lumber Co. v. Shadel, 52 La. Ann. 2094. See also Friedrich v. Fergen, 15 S. Dak. 541.

**2. Without Notice.** — Breaux-Renoudet Cypress Lumber Co. v. Shadel, 52 La. Ann. 2094; Sapp v. Frazier, 51 La. Ann. 1718; Johnston v. Wood, 19 Wash. 441; Strahorn-Hutton-Evans Commission Co. v. Florer, 7 Okla. 499. See also Dormitzer v. German Sav., etc., Soc., 23 Wash. 132; Lindt v. Uihlein, 116 Iowa 48.

**Color of Title.** — Keppel v. Dreier, 187 Ill. 298.

**Good Faith — Bona Fide Settlement on Public**

**Lands.** — Walraven v. Farmers, etc., Nat. Bank, 96 Tex. 331.

**Lands Used in Good Faith for Agricultural Purposes.** — Windsor v. Polk County, 109 Iowa 156.

**1080. 1. Personal Property — Bailment.** — Knapp v. McCaffrey, 178 Ill. 107.

**Goods and Chattels — Animals — Mules.** — Pilcher v. Faircloth, 135 Ala. 311, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079 [1080].

**Dog.** — Rockwell v. Oakland Circuit Judge, 133 Mich. 11.

**Money.** — Patton v. Brady, 184 U. S. 613. Compare State v. King, 95 Md. 125.

**1083. 1. Stocks.** — Banta v. Chicago, 172 Ill. 204.

**Debt.** — Minor v. Gurley, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 662.

**Choses in Action not goods** or chattels within a statute requiring that gifts shall be made by actual possession. Cowen v. Brownsville First Nat. Bank, 94 Tex. 547; Richmond First Nat. Bank v. Holland, 99 Va. 495.

**Recording Acts.** — See Young v. Upson, 115 Fed. Rep. 195.

## GOOD WILL.

By BASIL JONES.

**1085. I. DEFINITION — SCOPE OF TITLE — Definition.** — See note 1.

**1086. II. COMMERCIAL GOOD WILL — 1. Local Attachment.** — See notes 3, 4.

**2. Personal Property — a. IN GENERAL.** — See note 6.

**1085. 1. Good Will Defined.** — Douthart v. Logan, 86 Ill. App. 294, affirmed 190 Ill. 243; Millsbaugh Laundry v. Sioux City First Nat. Bank, 120 Iowa 1, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085; Fisk v. Fisk, 77 N. Y. App. Div. 83, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085; Slater v. Slater, 78 N. Y. App. Div. 449, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085, modified 175 N. Y. 143. See also People v. Roberts, 159 N. Y. 70; In re Race St., 24 Pa. Co. Ct. 433.

**Lord Eldon's Definition.** — Slack v. Suddoth, 102 Tenn. 375; Jackson v. Byrnes, 103 Tenn. 698.

**Definition under California Statute.** — Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 71 Am. St. Rep. 94.

**Nature and Characteristics Stated.** — Lindemann v. Rusk, (Wis. 1905) 104 N. W. Rep. 119.

**Right to Use Firm Name a Part of Good Will.** — Slater v. Slater, 175 N. Y. 143, 96 Am. St. Rep. 605.

**Right to Use of Firm Name Not an Element Where There Is Express Contract to the Contrary.** — Fite v. Dorman, (Tenn. 1900) 57 S. W. Rep. 129.

**1086. 3. Slater v. Slater,** 78 N. Y. App. Div. 449, modified 175 N. Y. 143; People v. Roberts, 159 N. Y. 70.

**4. Good Will Not Local.** — Slater v. Slater, 78 N. Y. App. Div. 449, modified 175 N. Y. 143; Matter of Jones, (Surrogate Ct.) 28 Misc. (N. Y.) 356, modified 69 N. Y. App. Div. 237. See also In re Race St., 24 Pa. Co. Ct. 433.

**Good Will Not Necessarily Connected with Premises.** — Millsbaugh Laundry v. Sioux City First Nat. Bank, 120 Iowa 1.

**6. Good Will Considered as Property.** — In re Leas Hotel Co., (1902) 1 Ch. 332; Millsbaugh Laundry v. Sioux City First Nat. Bank, 120 Iowa 1; In re Race St., 24 Pa. Co. Ct. 433.

**Banking Corporation May Have Good Will Which Constitutes Property.** — Lindemann v. Rusk, (Wis. 1905) 104 N. W. Rep. 119.

**Good Will Not Taxable.** — Hart v. Smith, 159 Ind. 182, 95 Am. St. Rep. 280.

**Good Will Considered an Element of Value in Fixing Privilege Tax on Foreign Corporation.** — People v. Roberts, 159 N. Y. 70.

**Good Will Not Property but an Incident Attached to or Connected with the Property.** — Hart v. Smith, 159 Ind. 182, 95 Am. St. Rep. 280.

- 1087.** *b. ASSETS — (2) Of Trade Partnerships.* — See note 3.  
*Survivorship — Old Doctrine.* — See note 4.  
*Modern Doctrine.* — See note 5.
- 1088.** *(3) Valuation — On the Dissolution of a Partnership with Articles.* — See note 3.
- 3. Transfer of Good Will — a. CONTRACT OF SALE.** — See note 5.
- 1089.** *Specific Performance.* — See note 2.  
*b. ON DISSOLUTION OF PARTNERSHIP.* — See note 5.  
*c. TRANSFER WITHOUT EXPRESS MENTION.* — See note 6.
- 1090.** *4. Effect of Sale of — Rights of Vendor — a. TO RESUME BUSINESS.* — See note 2.  
*Doctrine Applied to Partners.* — See note 3.

**1087. 3. Firm Assets.** — *Tennant v. Dunlop*, 97 Va. 234. See also *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280.

"A trading corporation may, equally with a private person, have a well-founded expectation of continued public patronage, and this constitutes the good will of its business." *Dodge Stationery Co. v. Dodge*, 145 Cal. 380.

**4. Under the Former Rule in England** the good will of a partnership survived for the benefit of the living partner. According to the modern rule, however, on the death of a partner the executor or administrator of the deceased partner can have the good will sold as the assets of one of the firm. *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390.

**5. No Survivorship of Good Will — Present Doctrine.** — *Fisk v. Fisk*, 77 N. Y. App. Div. 83; *Tennant v. Dunlop*, 97 Va. 234. See also *Slater v. Slater*, 175 N. Y. 143, 96 Am. St. Rep. 605.

**1088. 3. Transfer of Good Will of Corporation.** — *Dodge Stationery Co. v. Dodge*, 145 Cal. 380.

**5. Contract of Sale.** — *Meyer v. Labau*, 51 La. Ann. 1726; *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390; *Slater v. Slater*, 78 N. Y. App. Div. 449, modified 175 N. Y. 143; *Slack v. Suddoth*, 102 Tenn. 375.

**Separate Sale.** — The good will of a business, which is an incident of the business, may be sold separate from the plant or property of the business, also from the book debts of the concern. *Tennant v. Dunlop*, 97 Va. 234.

**Stockholder Cannot Transfer Good Will of Corporation.** — *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94.

**Time Within Which Good Will of Defunct Corporation May Be Transferred.** — *Lindemann v. Rusk*, (Wis. 1905) 104 N. W. Rep. 119.

**Wrongful Appropriation of Good Will of Defunct Corporation — Remedy of Persons Interested.** — *Lindemann v. Rusk*, (Wis. 1905) 104 N. W. Rep. 119.

**Actual Loss Measure of Recovery for Breach of Agreement.** — *Jackson v. Byrnes*, 103 Tenn. 698.

**Measure of Recovery for Wilful and Malicious Breach of Agreement.** — *Salinger v. Salinger*, 69 N. H. 589.

**1089. 2. Jackson v. Byrnes, 103 Tenn. 698.  
**5. Sale for Benefit of Partners.** — See also *Hutchinson v. Nay*, 183 Mass. 355.**

**Partners May Contract that There Shall Be No Good Will.** — *Douthart v. Logan*, 190 Ill. 243.

**Dissolution Caused by Death of Partner.** — *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390.

**6. No Mention of Good Will in Conveyance.** — *Hutchinson v. Nay*, 183 Mass. 355; *Fite v. Dorman*, (Tenn. 1900) 57 S. W. Rep. 129.

**Purchase of Business by One Partner.** — The general rule is that upon the dissolution of a firm, where one of the partners purchases and succeeds to the business, the purchaser acquires the good will of the firm, and this includes, as against the retiring partners, the exclusive right to use the name under which the firm did business. *Steinfeld v. National Shirt Waist Co.*, 99 N. Y. App. Div. 286.

**1090. 2. Vendor of Good Will May Resume Business.** — *Gillingham v. Beddow*, (1900) 2 Ch. 242; *Webster v. Webster*, 180 Mass. 310; *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390; *Zanturjian v. Boornezian*, 25 R. I. 151; *Jackson v. Byrnes*, 103 Tenn. 698; *MacMartin v. Stevens*, 37 Wash. 616.

**What Constitutes Engaging in Business.** — A contract by the vendor not to engage in the same business, directly or indirectly, does not prevent him from accepting employment as an assistant or clerk to others engaged in the business mentioned in the contract. *Battershell v. Bauer*, 91 Ill. App. 181. *Compare Corwin v. Hawkins*, 42 N. Y. App. Div. 571.

**Covenant Passes on Sale of Interest.** — The benefit of a partner's covenant not to carry on a similar business to that of the partnership during a fixed period from the commencement thereof passes by an assignment of the good will of the partnership. *Townsend v. Jarman*, (1900) 2 Ch. 698.

**Wife Not Enjoined from Carrying on Same Business Where Good Will Sold under Mortgage Given by Husband.** — *Vinall v. Hendricks*, 33 Ind. App. 413.

In Massachusetts a person who sells the good will of his business cannot set up a competing business, if doing so would derogate from his grant. *Hutchinson v. Nay*, 183 Mass. 355, 187 Mass. 262, 105 Am. St. Rep. 390.

But where a sale of partnership assets is forced upon the survivor by the administrator of a deceased person, the survivor is not in the position of a sole trader who has voluntarily parted with the good will of his business. He is not bound to retire from the business, as a sole trader impliedly elects to do, by voluntarily selling his good will. *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390.

**3. Resumption of Business by Retiring Partners.** — *Vinall v. Hendricks*, 33 Ind. App. 413. See also *Hutchinson v. Nay*, 183 Mass. 355.

- 1091.** *b. To SOLICIT OLD CUSTOMERS — English Doctrine.* — See note 1.  
*United States Authorities.* — See notes 3, 4.  
**5. Eminent Domain Proceedings — Compensation.** — See note 6.  
**III. PROFESSIONAL GOOD WILL.** — See note 7.

- 1092.** *Assets.* — See note 1.  
*Sale of Professional Good Will.* — See note 3.

**GOSPEL.** — See note 6.

- 1094. GOVERNMENT.** — See note 3.

**1091. 1. Solicitation of Former Customers Enjoined.** — *Gillingham v. Beddow*, (1900) 2 Ch. 242; *Ranft v. Reimers*, 200 Ill. 386; *Hutchinson v. Nay*, 183 Mass. 355. See also *Webster v. Webster*, 180 Mass. 310.

*Under the English Rule*, one who has voluntarily sold the good will of his business can set up a competing business, but cannot also derogate from his grant. He cannot solicit business from the customers of the old firm. *Hutchinson v. Nay*, 187 Mass. 262, 105 Am. St. Rep. 390.

The rule that the vendor is not entitled to solicit his old customers applies in the case of a purchase of the business of a firm by one of the partners, even though the articles provide that the outgoing partner may set up a similar business in the neighborhood, as this provision is merely declaratory. *Gillingham v. Beddow*, (1900) 2 Ch. 242.

**3. Personal Solicitation Sanctioned.** — *Vinall v. Hendricks*, 33 Ind. App. 413.

**4. English Rule Followed in Illinois.** — See *Ranft v. Reimers*, 200 Ill. 386.

*English Rule Followed in Rhode Island.* — *Zanturjian v. Boornazian*, 25 R. I. 151.

*Solicitation of Old Customers Prohibited under California Statute.* — *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94.

**6. Damage to Good Will by Injury to Premises.** — *Compare In re Race St.*, 24 Pa. Co. Ct. 433.

**7. Personal Attachment.** — *Douthart v. Logan*,

86 Ill. App. 294, *affirmed* 190 Ill. 243. See also *Snider v. McKelvey*, 27 Ont. App. 339.

**1092. 1. Not Partnership Assets.** — See also *Douthart v. Logan*, 86 Ill. App. 294, *affirmed* 190 Ill. 243.

**3. Validity of Sale.** — *Snider v. McKelvey*, 27 Ont. App. 339; *Slack v. Suddoth*, 102 Tenn. 375.

*Forced Sale.* — There can be no forced sale or transfer *in invitum* of good will attaching to professional partnership, so far as it is based upon professional reputation and standing. *Slack v. Suddoth*, 102 Tenn. 375.

**Amount Recoverable for Breach of Agreement.** — In agreements for the sale of a business containing covenants against carrying on a similar business within certain limits, on the breach of which a certain sum is to be paid, this sum has frequently been held to be recoverable in full as being liquidated damages, on the principle that it was stipulated to be paid on the breach of a condition of uncertain value. *Snider v. McKelvey*, 27 Ont. App. 339.

**6. Gospel.** — *Crawford v. Thomas*, 114 Ky. 484. The word *gospel* in the *Ohio* statute designating the class who may solemnize marriages is used in its broad sense and means any minister of religion and is not confined to the Christian religion. *Matter of Reinhart*, 9 Ohio Dec. 441.

**1094. 3. Government Bond.** — *New York L. Ins., etc., Co. v. Baker*, 165 N. Y. 484.

## GOVERNOR.

By H. O'B. COOPER.

**1097. I. INTRODUCTORY — 2. Classes of Governors — c. GOVERNOR OF STATE — In General.** — See note 7.

**1099. II. GOVERNORS OF STATES — 3. Salary — Increase or Diminution.** — See note 4.

**1102. 4. Powers and Duties — c. LEGISLATIVE — (2) Considering Measures — (c) Time Allowed for Consideration — Computation of Time.** — See note 7.

**1103. (a) Procedure — Revocation of Approval.** — See notes 6, 7.

**1097. 7. Office of Governor Not Property.** — *Taylor v. Beckham*, 178 U. S. 548.

**1099. 4. See State v. Tingey**, 24 Utah 225.

**1102. 7. Computing Time — Allowance of Time a Privilege — Waiver.** — *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

*Connecticut Rule — Day of Legislative Session.* — The "three days" within which the Connecticut constitution requires the governor to

return a bill to prevent its becoming a law without his signature, means days during each of which it is possible to return the bill to the house in which it originated. *State v. South Norwalk*, 77 Conn. 257.

**1103. 6. Right of Revocation Until Return of Measure.** — *People v. McCullough*, 210 Ill. 488.

**7. People v. McCullough**, 210 Ill. 488.

**1103.** (e) *Proof*. — See note 14.

**1104.** *d. JUDICIAL POWERS* — (2) *Requisitions for Fugitives from Justice*. — See note 2.

*Warrant*. — See note 3.

*e. MILITARY POWER* — (1) *Organization* — Governor as a Commander in Chief. — See note 12.

**1105.** (3) *Disbandment*. — See note 5.

*g. MISCELLANEOUS POWERS AND DUTIES* — (2) *Contracts*. — See note 12.

**1106.** 5. *Immunity from Judicial Control*. — See note 5.

*Mandamus, Injunction, Subpoena*. — See note 6.

*Certiorari*. — See note 8.

**1107.** 6. *Vacancy in Office* — *a. HOW EFFECTED*. — See note 4.

*b. SUCCESSOR*. — See note 14.

**1108.** *c. EFFECT OF SUCCESSION ON OFFICE OF SUCCESSOR*. — See note 1.

*GRADE*. — See note 9.

**1109.** *GRADUATE — GRADUATION*. — See note 1.

**1110.** *GRAIN*. — See note 1.

*GRANDCHILD*. — See note 3.

**1111.** *GRANT*. — See note 3.

**1114.** *Common Law*. — See note 1.

*Covenants*. — See note 5.

**1115.** *GRANTOR — GRANTEE*. — See note 1.

**1103.** 14. *People v. McCullough*, 210 Ill. 488.

**1104.** 2. *Examination of Extradition Papers Personal Duty*. — *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616.

3. *Issuance of Warrant — Power Cannot Be Delegated*. — *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616.

12. *State v. Jelks*, 138 Ala. 115.

**1105.** 5. *State v. Jelks*, 138 Ala. 115.

12. *Employment of Counsel to Draft Legislation*. — A governor has no authority, in the absence of statute, to employ counsel to assist in preparing bills or joint resolutions to be submitted to the legislature. *Cahill v. State Auditors*, 127 Mich. 487; *Phelps v. Auditor Gen.*, 136 Mich. 439.

**1106.** 5. *Immunity from Judicial Control*. — See *State v. Savage*, 64 Neb. 684.

*Theory of Checks and Balances*. — "The legislative, executive, and judicial departments of the state government are not so absolutely distinct that an arbitrary exercise of power, or what is the same thing, an arbitrary refusal to exercise power, could not be checked or opposed by either of the other departments. Such a theory is opposed to the principle of checks and balances upon which the federal and state constitutions have been framed." *State v. Nash*, 66 Ohio St. 612.

6. *Mandamus*. — *State v. Jelks*, 138 Ala. 115; *State v. Savage*, 64 Neb. 684; *State v. Nash*, 66 Ohio St. 612.

8. *Certiorari*. — *State v. Buchanan*, (Tenn. Ch. 1898) 52 S. W. Rep. 480.

**1107.** 4. *Causes of Vacancy*. — *State v. McBride*, 29 Wash. 335.

14. *Lieutenant-governor Succeeds*. — *State v. McBride*, 29 Wash. 335.

**1108.** 1. *Former Office Retained*. — *State v. McBride*, 29 Wash. 335.

9. *Grading Streets*. — *McChesney v. Chicago*, 201 Ill. 344; *Ryan v. Dubuque*, 112 Iowa 284.

The term *grade* refers to the physical condition of a street where its construction is complete. *Como v. Worcester*, 177 Mass. 543; *Bissell v. Larchmont*, 57 N. Y. App. Div. 61, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1106 [1108].

**1109.** 1. *Graduation of Taxes*. — *Brown v. Selser*, 106 La. 691.

**1110.** 1. *Flax Is Grain*. — See *State v. Cowdery*, 79 Minn. 94. And see *supra*, *FLAX*.

The Term *Grain* in an Insurance Policy is comprehensive enough to include broom corn in the bale, but it will not cover the baled panicles from which the seed has been threshed. *Reavis v. Farmers Mut. F. Ins. Co.*, 78 Mo. App. 14.

3. *Great-grandchildren*. — *Bragg v. Carter*, 171 Mass. 324; *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566.

**1111.** 3. *Other Definitions*. — *Jordan v. Indianapolis Water Co.*, 159 Ind. 337.

*General Sense of Term*. — *Blood v. Sielert*, 38 Wash. 643.

*Convey*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

*Convey and Grant Synonymous*. — *Blood v. Sielert*, 38 Wash. 643.

*Granted Lands*. — *Altschul v. Clark*, 39 Ore. 315.

*Granted Lands Do Not Include Tide Lands*. — *Sullivan v. Callvert*, 27 Wash. 600.

**1114.** 1. *Blood v. Sielert*, 38 Wash. 643.

5. *Mershon v. Williams*, 63 N. J. L. 398.

**1115.** 1. See *Heller v. Dailey*, 28 Ind. App. 555.

**1117. GREAT BODILY INJURY, HARM, ETC.** — See note 3.

**1118. [GRISTWORK.** — See note 3*a*.]

[**GROOVE.** — See note 5*a*.]

**GROSS.** — See note 6.

**1120. GROUND — GROUNDS.** — See note 1.

**GROUND OF ACTION.** — See note 3.

**1117. 3.** The words *great bodily injury* as employed in the *Nebraska* Criminal Code imply an injury of a graver and more serious character than an ordinary battery. *Likens v. State*, 63 Neb. 249; *Smith v. State*, 58 Neb. 531.

**Great Personal Injury.** — *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466.

**1118. 3*a*. Gristwork** has been defined as the grinding of grain for toll for farmers. *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367.

**5*a*.** The word *groove* conveys the idea of a noticeable depression of some length in a surface. *Schreiber, etc., Mfg. Co. v. Adams Co.*, (C. C. A.) 117 Fed. Rep. 833.

**6. Gross and Net.** — *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410.

**Gross Earnings.** — *People v. Roberts*, 32 N. Y. App. Div. 113.

**Gross Amount of Premiums.** — *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410.

The Term *Gross Sales* means actual sales without deducting expenses. *Seven Sutherland Sisters v. McInnerney*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 720.

**Gross Ton.** — *Higgins v. California Petroleum, etc., Co.*, 120 Cal. 631.

**Grossly Inadequate Consideration.** — In *McGhee v. Wells*, 57 S. Car. 280, the court said that a *grossly* inadequate consideration means "a consideration so far short of the real value of property as to shock a correct mind."

**1120. 1. Ground of Belief Equivalent to Grounds of Belief.** — *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823.

**Ground Floor and Basement Floor Synonymous.** — "The basement floor is the lowest floor below which there are any rooms and is therefore here used as synonymous with *ground floor*." *Isaacs v. Dawson*, 70 N. Y. App. Div. 232.

**3. Dunnett v. Thornton**, 73 Conn. 1.

## GROUND RENTS.

BY BASIL JONES.

**1121. I. SCOPE OF TITLE — DEFINITION — Pennsylvania.** — See note 1.

**II. THE ESTATE CONSIDERED — 1. As Real Estate — In Pennsylvania**

— *a. IN GENERAL.* — See note 3.

**1122. b. ESTATES OF GRANTOR AND GRANTEE.** — See note 1.

**III. CHARACTERISTICS — 2. Apportionment.** — See note 7.

**1121. 1. Pennsylvania Definition.** — *Wilson v. Iseminger*, 185 U. S. 55.

**3. Ground Rents Are Realty.** — *Wilson v. Iseminger*, 185 U. S. 55.

**Creation by Executory Agreement.** — An executory contract to convey land upon ground rent, upon performance of a stipulated condition, leaves the whole legal title in the covenantor, and a ground rent may legally be reserved by proper covenants in the deed, executed in pursuance of the contract. *Real Estate Title Ins., etc., Co. v. Hodges*, 15 Pa. Super. Ct. 299.

**Existence of Deed Creating Presumed.** — *Real Estate Title Ins., etc., Co. v. Hodges*, 15 Pa. Super. Ct. 299.

**Ohio Statute — Descent and Distribution.** — A "ground rent," being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands within the meaning of section 4158, *Ohio Rev. Stat.* 1892, relating to descent and distribution. Where the owner of such ground rent dies intestate and without issue the right descends under the provisions of the sections of the Revised Statutes which control the descent of real estate, and is not within the purview of section 4163, which relates to personal property. *McCammon v. Cooper*, 69 Ohio St. 366.

**What Constitutes Irredeemable Ground Rent.** — See *Norris v. Crowe*, 206 Pa. St. 438, 98 Am. St. Rep. 783.

**1122. 1. Fee-simple Estates.** — See *Wilson v. Iseminger*, 185 U. S. 55.

**Under Massachusetts Public Statutes, c. 121, § 1**, which provides that when land is demised for a term of one hundred years or more, the term, so long as fifty years of it remain unexpired, shall be regarded as an estate in fee simple as to everything concerning its descent, a lease of term for one hundred years, without words of inheritance, reserving a certain rent, and giving a perpetual right of renewal at the choice of the tenants, does not give the lessee a fee, but merely gives to his interest a dignity and quality equal to life estate. The statute is not intended to destroy or impair any reversion of the lessor or to make it in any degree less an estate than it was before. *Stark v. Mansfield*, 178 Mass. 76.

**New York Statute Providing for Taxation of Rents as Personal Property of Recipient Constitutional.** — *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23.

**7. Rent Apportionable upon Residue of Land — Estoppel to Deny Apportionment.** — *Jones v. Rose*, 96 Md. 483.

**1123.** 3. Extinguishment — *b. LACHES* — Under Statutes. — See note 7.

**1124.** 4. Redemption and Renewal. — See notes 2, 4.

IV. PAYMENT — 1. Who Liable For. — See note 7.

**1125.** 2. Of Arrears — Out of Proceeds of Judicial Sale. — See note 2.

3. Remedies for Collection. — See note 7.

**1126.** GROWING CROPS. — See note 1.

[GROWING UP IN CRIME. — See note 1a.]

**1123.** 7. Pennsylvania Statute Constitutional. — *Wilson v. Isenminger*, 185 U. S. 55.

**1124.** 2. Power of Redemption under Canadian Constitution. — *Laviolette v. Toupin*, 21 Quebec Super. Ct. 538.

4. Right of Redemption under Maryland Code of Pub. Gen. Laws, Art. 21, § 85. — *Plaenker v. Smith*, 95 Md. 389.

7. The Provision of the Pennsylvania Act of 1878 that the grantee of real estate which is subject to ground rent shall not be personally liable for the payment thereof, unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability, was intended to be prospective only; therefore it does not apply to grantees, after the date of the act, of real estate subject to ground rent reserved before the act. *Sachse v. Myers*, 15 Pa. Super. Ct. 426.

**1125.** 2. A Purchaser at a Sheriff's Sale

takes land free from a lien for arrears of ground rent, and a subsequent judgment for the same against the covenantor acquires no lien on the property which will support a sheriff's sale and carry the title. Where, therefore, a purchaser at sheriff's sale pays or tenders payment of the principal and all arrearages that have accrued since his purchase, all liability so far as he or the land is concerned is extinguished. *Sergeant v. Fleckenstein*, 9 Pa. Super. Ct. 557.

7. Remedies — Set-off Not Allowed. — In an action to recover arrears of ground rent, a set-off based on unliquidated damages cannot be allowed. *Connor v. Schildt*, 16 Pa. Super. Ct. 88.

**1126.** 1. Alfalfa Not a Growing Crop within a statute exempting such from taxation. *Miller v. Kern County*, 137 Cal. 516.

1a. A youth who is incorrigible is *growing up in crime* within the meaning of a state constitution providing for the passage of an act committing such to the reform school. *Scott v. Flowers*, 60 Neb. 675.

## GUARANTY.

By J. HAVILAND SMITH.

**1128.** I. DEFINITION. — See note 1.

**1129.** II. NATURE OF CONTRACT — 1. In General. — See note 1.

Guaranties May Be Either Prospective or Retrospective in Their Operation. —

See note 3.

Liability of Guarantor Coextensive with That of Principal. — See note 5.

Knowledge of Guaranty by Debtor Unnecessary. — See note 7.

An Independent Contract. — See note 9.

**1128.** 1. Definition. — *Pfaelzer v. Kau*, 207 Ill. 116; *Hernley v. Brannum*, 23 Ind. App. 388; *People v. Feitner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 30, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1128, modified 61 N. Y. App. Div. 129; *Andrews v. Pope*, 126 N. Car. 472; *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. Rep. 845; *Fales*, etc., *Mach. Co. v. Browning*, 68 S. Car. 13, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1128.

**1129.** 1. Field *v. Haish*, 85 Ill. App. 164; *Lemmert v. Guthrie*, (Neb. 1903) 95 N. W. Rep. 1046; *Consolidated Electric Storage Co. v. Atlantic Trust Co.*, 161 N. Y. 605.

3. *Harvard Brewing Co. v. Sperber*, 90 N. Y. App. Div. 417.

5. Coextensiveness of Guarantor's Liability with That of Principal. — *Groendyke v. Musgrave*, 123 Iowa 535; *Roth v. Adams*, 185 Mass. 341. See also *Little v. Bradley*, 43 Fla. 402.

Where a person guaranteed that a penalty incurred under a lease should be paid, and the penalty was void, it was held that the guaranty was also void. *Jack v. Sinsheimer*, 125 Cal. 563.

Estoppel to Set Up Nonliability. — In *Perry v. Brown*, (Ky. 1899) 51 S. W. Rep. 457, it was held that a guarantor of a debt contracted *ultra vires* by a school district was estopped from setting up that the act was *ultra vires*, and that he was liable on his guaranty although the school district was not.

7. *Dublin Cotton-Oil Co. v. Robinson*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1054.

9. Distinct Obligation from Contract Guaranteed — *Illinois*. — *Pfaelzer v. Kau*, 207 Ill. 116; *Davis v. Wolff Mfg. Co.*, 84 Ill. App. 579; *Duncanson v. Kirby*, 90 Ill. App. 15.

*Missouri*. — *Corbyn v. Brokmeyer*, 84 Mo. App. 653, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1129.

**1129.** 2. Distinguished from Certain Other Contracts — Distinguished from Indorsement. — See note 11.

**1130.** See note 2.

Distinguished from Suretyship. — See notes 3, 4, 5, 6, 9.

**1131.** Distinguished from Indemnity. — See note 11.

3. By What Law Governed. — See notes 4, 5.

III. FORM AND REQUISITES — 1. In General. — See note 8.

**1132.** 2. Who May Act as Guarantors. — See note 7.

**1133.** 3. Consideration — a. NECESSITY OF CONSIDERATION. — See notes 1, 2.

*Nebraska.* — See *Lemmer v. Guthrie*, (Neb. 1903) 95 N. W. Rep. 1046.

*New Hampshire.* — *Bank Com'rs v. Security Trust Co.*, 70 N. H. 536.

*North Carolina.* — *Hutchins v. Planters Nat. Bank*, 130 N. Car. 287.

*Washington.* — *Swenson v. Stoltz*, 36 Wash. 318. See also *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529.

*Wisconsin.* — *Spencer v. Holman*, 113 Wis. 340.

**1129. 11. Guaranty and Indorsement Distinguished.** — *Edgerly v. Lawson*, 176 Mass. 551.

"An indorser is only a security for the solvency of the maker of the bill, while a guarantor guarantees or warrants the payment of the debt evidenced by the bill." *Tucker v. Gentry*, 93 Mo. App. 655.

In *Illinois* "if a note is payable to a specific person, all indorsers become guarantors for the payment." *Tinker v. Catlin*, 205 Ill. 108.

**1130. 2. Liability of Guarantor and Indorser Several.** — *Corbyn v. Prokmeyer*, 84 Mo. App. 653, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1129.

3. Distinction Between Guaranty and Suretyship. — *California.* — See *Sather Banking Co. v. Arthur R. Briggs Co.*, 138 Cal. 724; *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

*Hawaii.* — *Schweitzer v. Fishel*, 13 Hawaii 691, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1130.

*Indiana.* — *Durand, etc., Co. v. Rockwell*, 23 Ind. App. 11; *Hernley v. Brannum*, 23 Ind. App. 388.

*Kentucky.* — *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

*Louisiana.* — *Hornor v. McDonald*, 52 La. Ann. 396; *Minor v. Hart*, 52 La. Ann. 395; *Roder v. Hart*, 52 La. Ann. 215.

*Massachusetts.* — *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302.

*Mississippi.* — *Galloway Coal Co. v. Hunter*, 79 Miss. 559.

*Pennsylvania.* — *Main Belting Co. v. Fowkes*, 24 Pa. Co. Ct. 475.

*Washington.* — See *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529.

4. Surety Bound Equally with Principal. — *Schweitzer v. Fishel*, 13 Hawaii 691; *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

5. Guaranty a Separate and Not a Joint Contract. — *Schweitzer v. Fishel*, 13 Hawaii 691; *Duncanson v. Kirby*, 90 Ill. App. 15; *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450. See also *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529.

6. Surety an Insurer of Debt. — *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

9. Difference Between Guaranty and Surety Illustrated — Undertaking Held to Be Guaranty. — "Let Mrs. Turner select about \$500 to \$750 worth of goods and see to me for payment." *Schweitzer v. Fishel*, 13 Hawaii 691.

**1131. 1. Distinguished from Indemnity.** — *Kentucky Live Stock Breeders' Assoc. v. Miller*, (Ky. 1905) 84 S. W. Rep. 301. See also *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56.

4. Law of Place Where Guaranty Accepted Governs Construction. — *Callender, etc., Co. v. Flint*, 187 Mass. 104.

5. *Farmers Trust Co. v. Schenuit*, 83 Ill. App. 267.

8. What Is a Guaranty. — The following words indorsed on the back of a bond are sufficient to charge the guarantor with liability: "For value received, I guarantee the payment of the within bond." *Greene v. Odell*, 43 N. Y. App. Div. 494.

What Is Not a Guaranty. — The following words do not show that the parties intended them to be a guaranty, but are a mere expression of opinion: "We are very much interested in seeing that you get the goods, and from the position we occupy, we would say that the contract is good, and that we will look after the same both to your interest and for our own." *Kenneweg Co. v. Finney*, 98 Md. 114.

"He wishes to purchase a full line of groceries, and I recommend him to you. They are perfectly reliable, and will pay as soon as bills mature. Any favors conferred \* \* \* will be appreciated by me." This was held not to be a guaranty. *Crooks v. Propp*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 309.

Exclusive Reliance on Guaranty Not Necessary. — *McDonald v. Tootle-Weakley Millinery Co.*, 64 Neb. 577.

Indefinite Guaranty. — An indefinite guaranty will be cured of its invalidity by the guarantor's subsequently recognizing and ratifying it. *Leis v. Sinclair*, 67 Kan. 748.

**1132. 7. Partnerships.** — It is a well-settled general rule that one partner has no right without the assent or subsequent ratification of his copartners to bind the firm as guarantor of the debt of a third person. *Lewin v. Barry*, 15 Colo. App. 461; *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438. But the individual partner who makes the unauthorized guaranty for the firm is himself bound thereby, even though the firm is not. *Gunder-son v. Hasterlik*, 100 Ill. App. 429.

**1133. 1. Necessity for Consideration.** — *Connecticut.* — *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182.



**1133.** *b. SUFFICIENCY OF CONSIDERATION — (1) In General.* — See note 3.

(2) *When Consideration of Original Contract Sufficient.* — See note 5.

**1134.** See notes 1, 2, 4.

**1135.** See note 1.

(3) *When New Consideration Necessary.* — See notes 2, 3.

**1136.** (4) *Particular Considerations Held Sufficient — (a) Extension of Time of Payment.* — See note 1.

**1137.** *Necessity of Agreement to Forbear for Definite Time.* — See note 1.

*Necessity of Actual Forbearance.* — See note 5.

**1138.** *Necessity of Agreement to Forbear.* — See note 1.

(c) *Other Instances of Sufficient Consideration.* — See note 3.

*Illinois.* — *Richner v. Kreuter*, 100 Ill. App. 548.

*Iowa.* — See *Lane v. Richards*, 119 Iowa 24.

*Missouri.* — *Tucker v. Gentry*, 93 Mo. App. 655.

*New York.* — *Schworn v. Goodrich*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 721.

*Pennsylvania.* — *Burt v. Flynn*, 24 Pa. Co. Ct. 451.

*South Carolina.* — *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133.

*Consideration Need Not Be Expressed in Guaranty, but May Be Shown by Parol.* — *Cahill Iron Works v. Pemberton*, 48 N. Y. App. Div. 468, affirmed 168 N. Y. 649.

*In Wisconsin*, by Rev. Stat. (1898), § 2307, the consideration for the guaranty must be expressed. *Coxe v. Milbrath*, 110 Wis. 499.

*Burden of Proving Consideration.* — "The written instrument imported a consideration, and it was for defendant to show want of consideration by way of defense." *McKee v. Needles*, 123 Iowa 195.

*Lack of Consideration Is an Affirmative Defense*, and where denied the burden is on the guarantor to prove it. *Long, etc., Co. v. Barnes*, 162 Ind. 22.

"Where the Guaranty Imports and Recites a Consideration it raises a presumption of consideration, and would be sufficient to authorize a recovery until overcome by proof; and the burden of proof would be upon the defendant to establish by a preponderance of the testimony that it was made without consideration." *Rattelmiller v. Stone*, 28 Wash. 104.

**1133.** 2. *Guaranty under Seal.* — *Roth v. Adams*, 185 Mass. 341.

*Guaranty under Seal May Be Shown to Be Without Consideration.* — *Bullen v. Morrison*, 98 Ill. App. 669.

3. *Small or Nominal Consideration Sufficient.* — *Savage v. Robinson*, 93 Me. 262; *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. Rep. 845; *Washington Iron Works v. McNaught*, 35 Wash. 10.

5. *Guaranty Executed Contemporaneously with Principal Contract — United States.* — *Silver v. Kent*, 105 Fed. Rep. 840, affirmed (C. C. A.) 108 Fed. Rep. 365.

*Connecticut.* — *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182.

*Illinois.* — *Davis v. Wolff Mfg. Co.*, 84 Ill. App. 579; *Duncanson v. Kirby*, 90 Ill. App. 15.

*Missouri.* — *Adams v. Huggins*, 78 Mo. App. 219; *Tucker v. Gentry*, 93 Mo. App. 655.

*New York.* — *Cahill Iron Works v. Pemberton*, 48 N. Y. App. Div. 468, affirmed 168 N. Y. 649; *De Reszke v. Duss*, 99 N. Y. App. Div. 353.

*South Carolina.* — *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133.

**1134.** 1. *Benefit to Debtor Sufficient.* — *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133 [all of text on p. 1134].

2. *Adams v. Huggins*, 78 Mo. App. 219.

4. *Guaranty of Payment After Agreement to Sell but Before Delivery.* — *Providence Mach. Co. v. Browning*, 68 S. Car. 1.

**1135.** 1. *Guaranty Given in Accordance with Promise Previous to Execution of Contract.* — *Helios-Upton Co. v. Thomas*, 96 N. Y. App. Div. 401.

2. *Guaranty Subsequent to Creation of Debt and Not Inducement Thereof.* — *McKee v. Needles*, 123 Iowa 195. See also *Rattelmiller v. Stone*, 28 Wash. 104.

3. *Consideration Moving Towards Principal Debtor Sufficient.* — *McKee v. Needles*, 123 Iowa 195.

**1136.** 1. *Extending Time of Payment.* — *Union Trust Co. v. Conus*, 129 Mich. 160, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1136; *Wiggenhorn v. Fitzgerald*, (Neb. 1904) 98 N. W. Rep. 1079; *Greene v. Odell*, 43 N. Y. App. Div. 494; *Brumm v. Gilbert*, 50 N. Y. App. Div. 430.

*Status of Guaranty of Void Claim.* — If the forbearance to sue is in respect to a claim which it is honestly believed is just, even though if prosecuted it would have been defeated, there is a consideration which will support the promise of a person who guarantees that it will be paid. *Di Iorio v. Di Brasio*, 21 R. I. 208.

**1137.** 1. *McMicken v. Safford*, 197 Ill. 546, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1137.

5. *Actual Forbearance Necessary.* — *McMicken v. Safford*, 197 Ill. 546, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1136.

**1138.** 1. *Actual Forbearance Prima Facie Evidence of Agreement.* — *Union Trust Co. v. Conus*, 129 Mich. 160.

3. *Instances of Sufficient Consideration.* — A trustee guaranteed a note taken for the purchase price of certain property sold by him

**1138. IV. CLASSES OF GUARANTIES — 2. General or Special Guaranties — The True Distinction.** — See note 8.

**Special Guaranty.** — See note 9.

**1139.** See note 1.

**3. Limited or Continuing Guaranties.** — See notes 2, 3, 4.

**1140.** See notes 1, 2, 3, 5.

**1141.** See note 1.

**In Conclusion.** — See note 5.

**1142. 4. Absolute or Conditional Guaranties.** — See notes 2, 3.

upon consideration that the trustee who succeeded him would accept it as part of the trust property. It was held that this was a sufficient consideration. *Wilson v. St. John's Hospital*, 92 Ill. App. 413.

An agreement to sell beer made by the guarantor on the premises of the principal was held to be a sufficient consideration for a guaranty. *Gunderson v. Hasterlik*, 100 Ill. App. 429.

**1138. 8. General Guaranties Defined and Explained.** — *Bacon v. Grossman*, 71 N. Y. App. Div. 574.

**9. Special Guaranties Defined and Explained.** — *Levy v. Cohen*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 95, reversed 103 N. Y. App. Div. 195. See also *Brumm v. Gilbert*, 50 N. Y. App. Div. 430.

**1139. 1. Special Guaranty Contemplates Trust in Person to Whom Addressed.** — *Brumm v. Gilbert*, 50 N. Y. App. Div. 430.

**2. Limited or Continuous Guaranties.** — *Carson v. Reid*, 137 Cal. 253; *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135. See also *Hartwell, etc., Co. v. Moss*, 22 R. I. 583.

**3. Where Intent that Guaranty Shall Be Continuing Is Apparent** — *Arkansas*. — *West-Winfree Tobacco Co. v. Waller*, 66 Ark. 445.

*Illinois*. — *Mamerow v. National Lead Co.*, 206 Ill. 634.

*Massachusetts*. — *Celluloid Co. v. Haines*, 176 Mass. 415.

*New Jersey*. — *Columbia Electrical Supply Co. v. Kemmet*, 67 N. J. L. 18.

*Tennessee*. — *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

*Wisconsin*. — *John A. Tolman Co. v. Butt*, 116 Wis. 597.

*Canada*. — *St. Lawrence Steel, etc., Co. v. Leys*, 6 Ont. L. Rep. 235, affirmed 7 Ont. L. Rep. 72.

**4. Guaranties Without Limitation as to Time or Amount.** — *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135.

**1140. 1. Construction as to Time and Amount Must Be Reasonable.** — *Mamerow v. National Land Co.*, 206 Ill. 634, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140; *Rotch v. French*, 176 Mass. 1, 79 Am. St. Rep. 292.

**What Not Unreasonable Time.** — Where the guarantor said that the guarantee might charge bills to him "for the present" it was held that this meant so long as there was no termination by notice, with an implied condition that it should not be unreasonably long; fifteen months was held not to be an unreasonable time. *Lewis v. Worrell*, 185 Mass. 572.

**2. Doyle v. Nichols**, 15 Colo. App. 458.

**3. Guaranties Limited as to Amount but Not as to Time** — *Iowa*. — *Fisk v. Rickel*, 108 Iowa 370.

*Missouri*. — *L. Bauman Jewelry Co. v. Bertig*, 81 Mo. App. 393; *Peoria Rubber-Mfg. Co. v. During*, 85 Mo. App. 131.

*Tennessee*. — *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

*Texas*. — *Schneider-Davis Co. v. Hart*, 23 Tex. Civ. App. 529.

*Vermont*. — See *Cheshire Beef Co. v. Thrall*, 72 Vt. 9.

*Canada*. — *Struthers v. Henry*, 32 Ont. 365.

**5. Fisk v. Rickel**, 108 Iowa 370; *Rouss v. Krauss*, 126 N. Car. 668, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140.

**What Are Not Continuing Guaranties Within the Rule.** — *Callender, etc., Co. v. Flint*, 187 Mass. 104.

**1141. 1. Definite Amount — Goods to Be Furnished from Time to Time.** — *White Sewing Mach. Co. v. Powell*, 74 S. W. Rep. 746, 25 Ky. L. Rep. 94, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141.

**Parol Evidence** will not be admitted to show that this kind of guaranty is only for one year. *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489.

**5. Guaranties Held Not Continuing.** — A guaranty of "the value of a consignment stock \* \* \* to the extent of one thousand dollars; said stock to be on memoranda for a period of no less than six months, and all reorders from said stock to be accompanied and paid for in cash," covers only a single consignment of goods, not exceeding one thousand dollars, and is not a continuous guaranty. *Fogel v. Blitz*, 128 Mich. 503, 8 Detroit Leg. N. 763.

An instrument of guaranty was in these words: "We hereby guarantee the account of \* \* \* to the amount of two thousand five hundred dollars. It is agreed and understood that this guaranty is to cover all amounts which above firm may owe the said bank to the above specified amount." This was held to be confined to the account, as of its date, and not to be a continuing guaranty. *Merchants, etc., Bank v. Calmes*, 82 Miss. 603.

**Guaranties Held Continuing.** — *Montreal v. Ste. Cunégonde*, 32 Can. Sup. Ct. 135; *Struthers v. Henry*, 32 Ont. 365.

**1142. 2. Absolute and Conditional Guaranties Distinguished.** — *Stewart v. Sharp County Bank*, 71 Ark. 588, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141; *Yager v. Kentucky Title Co.*, 112 Ky. 936, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141.

**Illustrations of Absolute Guaranty.** — Where a person agrees to provide all labor and materials in such manner as not to delay the progress of the work, and in case of failure to do so, to reimburse for any loss, this is an absolute guar-

**1143. V. RULES OF CONSTRUCTION AND INTERPRETATION — 1. View that Strict Interpretation Should Be Applied in Guarantor's Favor.** — See note 1.

**2. View that Guaranty Should Be Construed Most Strongly Against Guarantor.** — See note 2.

**3. View that Rules of Construction Applicable to Contracts Generally Should Govern.** — See notes 4, 5, 6.

**1144.** See note 1.

**4. Guaranties to Be Strictly Construed After Intent Determined — Evidence to Explain Guaranty.** — See note 3.

anty. *Fontano v. Robbins*, 18 App. Cas. (D. C.) 402.

The following have been held guaranties of payment and absolute:

"Draft drawn by J. W. Hutchins on B. D. Chalkley & Co., for green salted hides \* \* \*; amount not to exceed three hundred dollars will be paid." *Hutchins v. Planters' Nat. Bank*, 130 N. Car. 287, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141; the court saying: "The guaranty here made was absolute, and the right of action accrued against the guarantor immediately upon default of the principal. It is not dependent upon any extraneous event, beyond the mere default by which the guaranty would have become binding."

"I guarantee payment of this note \* \* \* until it is paid, and I agree to be liable and pay said note to him the same as if it was my note and I had signed it." *Brown v. Wilcox*, 73 Conn. 100.

"I \* \* \* hereby guarantee the payment of said rent." *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182.

A guaranty of payment of a loan. *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56.

A guaranty for the prompt payment of a note at maturity. *Fegley v. Jennings*, 44 Fla. 203; *Duncanson v. Kirby*, 90 Ill. App. 15; *Silver v. Kent*, 105 Fed. Rep. 840, judgment affirmed (C. C. A.) 108 Fed. Rep. 365.

A guaranty of payment of a share in an estate. *Chauvet v. Ives*, 52 N. Y. App. Div. 411.

A guaranty that one should faithfully perform his contract and "pay faithfully the price of the goods sold to him by said contract according to the terms thereof." *Voorhees v. Porter*, 134 N. Car. 591.

A guaranty to pay certain notes if another should fail to pay. *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13; *Providence Mach. Co. v. Browning*, 68 S. Car. 1, 70 S. Car. 148.

"For value received I hereby guarantee \* \* \* the payment of the principal and interest of within note." *National Guarantee L. & T. Co. v. Fly*, 29 Tex. Civ. App. 533. See also *Getty v. Schantz*, (C. C. A.) 100 Fed. Rep. 577.

**Estoppel to Set Up Ultra Vires as Defense.** — Where a school district contracts a debt which is *ultra vires* because its indebtedness exceeded the constitutional limit, the guarantor of the debt is estopped from setting up that he was not liable on this ground, unless he shows ignorance of it. *Perry v. Brown*, (Ky. 1899) 51 S. W. Rep. 457.

**1142. 3. Guaranty of Collection.** — See *Getty v. Schantz*, (C. C. A.) 100 Fed. Rep. 577.

**1143. 1. Strict Interpretation in Favor of**

**Guarantor.** — "One who becomes a guarantor without valuable consideration should not be subjected to an increased liability by legal implication, and the burden should be upon the one who desires a continuing guaranty to see that the language employed is sufficient to indicate it." *Cheshire Beef Co. v. Thrall*, 72 Vt. 9.

**2. Strict Interpretation Against Guarantor.** — *Hurley v. Fidelity, etc., Co.*, 95 Mo. App. 88; *Hartwell, etc., Co. v. Moss*, 22 R. I. 583; *St. Lawrence Steel, etc., Co. v. Leys*, 6 Ont. L. Rep. 235, affirmed 7 Ont. L. Rep. 72. See also *Cheshire Beef Co. v. Thrall*, 72 Vt. 9.

**4. Rule that Guaranties Are to Be Construed Like Other Contracts.** — *Hernley v. Brannum*, 23 Ind. App. 388; *Central Bank v. Kimball*, 73 N. Y. App. Div. 100; *Alger v. Alger*, 83 N. Y. App. Div. 168; *National Bank of Commerce v. Garn*, 23 Ohio Cir. Ct. 447; *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135. See also *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694; *Closson v. Billman*, 161 Ind. 610.

**5. Not to Be Construed Strongly in Favor of or Against Guarantor.** — *National Bank of Commerce v. Garn*, 23 Ohio Cir. Ct. 447.

**6. Reasonable Interpretation According to Intent of Parties the Rule — California.** — *Pierce v. Merrill*, 128 Cal. 464, 79 Am. St. Rep. 56; *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694; *Redlands First Nat. Bank v. Bowers*, 141 Cal. 253.

*Illinois.* — *Mamerow v. National Lead Co.*, 206 Ill. 634; *Walter A. Wood Mowing, etc., Mach. Co. v. Trexler*, 97 Ill. App. 170.

*Indiana.* — *Hernley v. Brannum*, 23 Ind. App. 388.

*Iowa.* — *Aultman v. Roemer*, 112 Iowa 651.

*Maryland.* — *Donnelly v. Newbold*, 94 Md. 223.

*Massachusetts.* — *Callender, etc., Co. v. Flint*, 187 Mass. 104.

*Missouri.* — *Craig v. Seybt*, 91 Mo. App. 242.

*Nebraska.* — *Rice v. McCague*, 61 Neb. 861.

*New York.* — *Webel v. Clark*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 329.

*Tennessee.* — *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

*Texas.* — *Irion v. Eskrigge*, 30 Tex. Civ. App. 466.

*Wyoming.* — *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135.

**1144. 1. Words to Be Construed According to Ordinary Meaning.** — *Tolerton, etc., Co. v. Barck*, 81 Minn. 470.

**3. Evidence of Surrounding Circumstances Admissible.** — *California.* — *Redlands First Nat. Bank v. Bowers*, 141 Cal. 253.

*Colorado.* — *Doyle v. Nichols*, 15 Colo. App. 458.

**1144.** After the Intent of the Parties Has Been Determined. — See note 6.

**1145.** VI. REQUISITE STEPS TO BIND GUARANTOR — 1. Notice of Acceptance of Guaranty — a. NECESSITY OF NOTICE — (1) *Where Guaranty Is Absolute.* — See note 1.

**1146.** See notes 1, 2, 3, 5.

(2) *Offers to Guarantee.* — See note 8.

*Indiana.* — *Hernley v. Brannum*, 23 Ind. App. 388.

*Massachusetts.* — *Callender, etc., Co. v. Flint*, 187 Mass. 104.

*Mississippi.* — *Galloway Coal Co. v. Hunter*, 79 Miss. 559, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144.

*New York.* — *Central Bank v. Kimball*, 73 N. Y. App. Div. 100; *Alger v. Alger*, 83 N. Y. App. Div. 168; *Harvard Brewing Co. v. Sperber*, 90 N. Y. App. Div. 417.

*Tennessee.* — See *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

*Washington.* — *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529.

**Parol Evidence** is not admissible to show that the parties intended something different from what is imported, where the terms of the guaranty are plain and unambiguous. *West Win-free Tobacco Co. v. Waller*, 66 Ark. 445.

Parol evidence, if clear and convincing, may sometimes be used to explain ambiguities, or supplement statements contained in a written memorandum of guaranty. *Stern v. Deutsch*, 9 Kan. App. 218.

**1144. 6. Guarantor Not Held Beyond Precise Terms of Contract** — *Illinois.* — *Mamerow v. National Lead Co.*, 206 Ill. 634; *Osborne v. McCarthy*, 99 Ill. App. 351.

*Iowa.* — *Byers v. Hickman Grain Co.*, 112 Iowa 451; *Bousquet v. Ward*, 116 Iowa 126; *Green dyke v. Musgrave*, 123 Iowa 535.

*Kansas.* — *McPherson First Nat. Bank v. Bradley*, 61 Kan. 615.

*New York.* — *Creamer v. Mitchell*, 162 N. Y. 477; *American Copper Co. v. Lowther*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 441, affirmed 38 N. Y. App. Div. 134, affirmed 165 N. Y. 625; *Crooks v. Propp*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 309; *Beagle v. Cable*, 55 N. Y. App. Div. 155; *Central Bank v. Kimball*, 73 N. Y. App. Div. 100; *McAfee v. Wyckoff*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 380; *Jewett v. Griesheimer*, 100 N. Y. App. Div. 210. See also *Page Belting Co. v. Parker*, 21 N. Y. App. Div. 160, affirmed 163 N. Y. 583.

*Tennessee.* — *Greer Machinery Co. v. Stains*, (Tenn. Ch. 1900) 59 S. W. Rep. 692.

*Texas.* — *Schuab v. E. P. Dodge Mfg. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 126.

*Wyoming.* — *Blyth v. Pinkerton Nat. Detective Agency*, 10 Wyo. 135.

**1145. 1. Absolute Guaranty — Notice of Acceptance Not Necessary** — *United States.* — *Kent v. Silver*, (C. C. A.) 108 Fed. Rep. 365.

*Arkansas.* — *Stewart v. Sharp County Bank*, 71 Ark. 588, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

*California.* — *Scribner v. Schenkel*, 128 Cal. 250.

*Indiana.* — *Hernley v. Brannum*, 23 Ind. App. 388.

*Iowa.* — *German Sav. Bank v. Drake Roofing*

*Co.*, 112 Iowa 184, 84 Am. St. Rep. 335; *Bankers' Iowa State Bank v. Mason Hand Lathe Co.*, 121 Iowa 574; *McKee v. Needles*, 123 Iowa 195.

*Kentucky.* — *White Sewing Mach. Co. v. Powell*, 74 S. W. Rep. 746, 25 Ky. L. Rep. 94. See also *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

*Louisiana.* — *People's Bank v. Lemarie*, 106 La. 429.

*Missouri.* — *Clinton Bank v. Goldstein*, 86 Mo. App. 516.

*North Carolina.* — *Cowan v. Roberts*, 134 N. Car. 415, 101 Am. St. Rep. 845.

*Pennsylvania.* — *Acme Mfg. Co. v. Reed*, 197 Pa. St. 359, 80 Am. St. Rep. 832.

*Tennessee.* — *Alexandria Bank v. Turney*, (Tenn. Ch. 1898) 52 S. W. Rep. 762.

*Washington.* — *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529.

**1146. 1. Contemporaneous Execution of Contract and Guaranty.** — *Closson v. Billman*, 161 Ind. 610; *Greer Machinery Co. v. Sears*, 66 S. W. Rep. 521, 23 Ky. L. Rep. 2025, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1146. See also *Hernley v. Brannum*, 23 Ind. App. 388.

**2. Guaranty and Acceptance Contemporaneous.** — *Field v. Haish*, 85 Ill. App. 164; *Greer Machinery Co. v. Sears*, 66 S. W. Rep. 521, 23 Ky. L. Rep. 2025; *Clinton Bank v. Goldstein*, 86 Mo. App. 516. See also *N. O. Nelson Mfg. Co. v. Shreve*, 94 Mo. App. 518.

**3. Recital of Consideration in Guaranty.** — *Field v. Haish*, 85 Ill. App. 164; *Buhrer v. Baldwin*, (Mich. 1904) 100 N. W. Rep. 468, 11 Detroit Leg. N. 298; *Clinton Bank v. Goldstein*, 86 Mo. App. 516; *Standard Sewing Mach. Co. v. Church*, 11 N. Dak. 422.

**5. Notice Held Unnecessary.** — *N. O. Nelson Mfg. Co. v. Shreve*, 94 Mo. App. 518.

**8. Offer to Guarantee** — *Delaware.* — *Wanamaker v. Benn*, 3 Penn. (Del.) 188.

*Georgia.* — *Barnes Cycle Co. v. Schofield*, 111 Ga. 880.

*Hawaii.* — *Schweitzer v. Fishel*, 13 Hawaii 691.

*Illinois.* — *Field v. Haish*, 85 Ill. App. 164.

*Indiana.* — *Stewart v. Knight, etc., Co.*, (Ind. App. 1904) 71 N. E. Rep. 182.

*Iowa.* — *German Sav. Bank v. Drake Roofing Co.*, 112 Iowa 184, 84 Am. St. Rep. 335; *Bankers' Iowa State Bank v. Mason Hand Lathe Co.*, 121 Iowa 574.

*Kentucky.* — *Greer Machinery Co. v. Sears*, 66 S. W. Rep. 521, 23 Ky. L. Rep. 2025, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1146; *Goff v. Janeway*, 82 S. W. Rep. 267, 26 Ky. L. Rep. 525. See also *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

*Louisiana.* — *People's Bank v. Lemarie*, 106 La. 429.

*Michigan.* — See *Buhrer v. Baldwin*, (Mich. 1904) 100 N. W. Rep. 468, 11 Detroit Leg. N. 298.

**1147.** See notes 1, 2.

*b.* SUFFICIENCY OF NOTICE — Time of Giving Notice. — See note 5.

**1148.** Form and Requisites of Notice. — See notes 5, 6.

**1149.** *c.* WAIVER OF NOTICE. — See note 5.

**2. Demand and Notice of Default — a. NECESSITY OF DEMAND AND NOTICE — (1) Where Guaranty Is Absolute.** — See note 6.

**1151.** (2) *Where Guaranty Is Conditional — (a) Statement of General Rule.* — See notes 1, 2, 3.

**1152.** See note 3.

(b) Effect of Insolvency of Principal. — See note 4.

*b.* SUFFICIENCY OF DEMAND AND NOTICE. — See notes 6, 7.

*Missouri.* — Pearsell Mfg. Co. v. Jeffreys, 183 Mo. 386, 105 Am. St. Rep. 496; Deering Harvester Co. v. Sulser, 78 Mo. App. 670; John Deere Plow Co. v. McCullough, 102 Mo. App. 458. See also N. O. Nelson Mfg. Co. v. Shreve, 94 Mo. App. 518.

*North Carolina.* — See Cowan v. Roberts, 134 N. Car. 415, 101 Am. St. Rep. 845.

*North Dakota.* — Standard Sewing Mach. Co. v. Church, 11 N. Dak. 422, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1146.

*Pennsylvania.* — Acme Mfg. Co. v. Reed, 197 Pa. St. 359, 80 Am. St. Rep. 832.

*Washington.* — W. W. Kimball Co. v. Cockrell, 23 Wash. 529.

**1147.** 1. See Stewart v. Sharp County Bank, 71 Ark. 588; N. O. Nelson Mfg. Co. v. Shreve, 94 Mo. App. 518.

**2.** Schweitzer v. Fishel, 13 Hawaii 691; Greer Machinery Co. v. Sears, 66 S. W. Rep. 521, 23 Ky. L. Rep. 2025. See also N. O. Nelson Mfg. Co. v. Shreve, 94 Mo. App. 518.

**5. Notice Within Reasonable Time Necessary.** — Wanamaker v. Benn, 3 Penn. (Del.) 188; Deering Harvester Co. v. Sulser, 78 Mo. App. 670; Peninsular Stove Co. v. Adams Hardware, etc., Co., 93 Mo. App. 237.

**1148.** **5. Notice May Be Inferred from Circumstances.** — Schweitzer v. Fishel, 13 Hawaii 691; Hickox v. Fels, 86 Ill. App. 216; Pearsell Mfg. Co. v. Jeffreys, 183 Mo. 386, 105 Am. St. Rep. 596.

**6. Knowledge Equivalent to Notice.** — Greer Machinery Co. v. Sears, 66 S. W. Rep. 521, 23 Ky. L. Rep. 2025, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1148; Lynn Safe Deposit, etc., Co. v. Andrews, 180 Mass. 527; Peoria Rubber Mfg. Co. v. During, 85 Mo. App. 131; N. O. Nelson Mfg. Co. v. Shreve, 94 Mo. App. 518.

**1149.** **5. Effect of Express Waiver.** — Swisher v. Deering, 104 Ill. App. 572, affirmed 204 Ill. 203; Hughes v. Roberts, etc., Shoe Co., 72 S. W. Rep. 799, 24 Ky. L. Rep. 2003.

**6. Demand and Notice of Default Unnecessary Where Guaranty Absolute — Arkansas.** — Stewart v. Sharp County Bank, 71 Ark. 588, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1149.

*Connecticut.* — Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 182.

*Florida.* — Fegley v. Jennings, 44 Fla. 203.

*Illinois.* — Pfaelzer v. Kau, 207 Ill. 116; Ewen v. Wilbur, 99 Ill. App. 132, affirmed 208 Ill. 492; Yeazel v. Harbor Bros. Co., 106 Ill. App. 408.

*Iowa.* — McKee v. Needles, 123 Iowa 195.

*Kentucky.* — White Sewing Mach. Co. v.

Powell, 74 S. W. Rep. 746, 25 Ky. L. Rep. 94; Goff v. Janeway, 82 S. W. Rep. 267, 26 Ky. L. Rep. 525.

*Massachusetts.* — Welch v. Walsh, 177 Mass. 555, 83 Am. St. Rep. 302; Roth v. Adams, 185 Mass. 341.

*New Hampshire.* — Bank Com'rs v. Security Trust Co., 70 N. H. 536.

*New Jersey.* — Wilkinson-Gaddis Co. v. Van Riper, 63 N. J. L. 394; Pleasantville Mut. Loan, etc., Soc. v. Moore, 70 N. J. L. 306.

*South Carolina.* — Fales, etc., Mach. Co. v. Browning, 68 S. Car. 13.

*Tennessee.* — Alexandria Bank v. Turney, (Tenn. Ch. 1898) 52 S. W. Rep. 762; Greer Machinery Co. v. Stains, (Tenn. Ch. 1900) 59 S. W. Rep. 692.

**1151.** **1. Demand and Notice Necessary — Illinois.** — Mamerow v. National Lead Co., 206 Ill. 634; Pfaelzer v. Kau, 207 Ill. 116.

*Maryland.* — Donnelly v. Newbold, 94 Md. 223. *Nebraska.* — Lemmert v. Guthrie, (Neb. 1903) 95 N. W. Rep. 1046.

*Tennessee.* — Alexandria Bank v. Turney, (Tenn. Ch. 1898) 52 S. W. Rep. 762; Greer Machinery Co. v. Stains, (Tenn. Ch. 1900) 59 S. W. Rep. 692.

*Washington.* — W. W. Kimball Co. v. Cockrell, 23 Wash. 529.

**2. Object of Notice.** — Pfaelzer v. Kau, 207 Ill. 116.

In Mamerow v. National Lead Co., 206 Ill. 636, it is said: "The purpose of this notice is to enable the guarantor, if he elects to pay the guaranty and at once proceed against the principal debtor, to reimburse himself for the moneys thus paid."

**3. Injury Resulting from Want of Proper Notice Necessary to Discharge Guarantor.** — Mamerow v. National Lead Co., 206 Ill. 634; Donnelly v. Newbold, 94 Md. 223, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1151; Lemmert v. Guthrie, (Neb. 1903) 95 N. W. Rep. 1046. See also Welch v. Walsh, 177 Mass. 555, 83 Am. St. Rep. 302; Pleasantville Mut. Loan, etc., Soc. v. Moore, 70 N. J. L. 306; Swisher v. Deering, 204 Ill. 203.

**1152.** **3. Burden of Proof on Guarantor to Show Notice.** — Mamerow v. National Lead Co., 206 Ill. 634, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1152; Closson v. Billman, 161 Ind. 610.

**4. Insolvency of Principal Debtor.** — German Sav. Bank v. Drake Roofing Co., 112 Iowa 184, 84 Am. St. Rep. 335; Andrews v. Pope, 126 N. Car. 472.

**6. Liability of Guarantor and Indorser Dis-**

**1153.** *c.* WAIVER OF DEMAND AND NOTICE. — See note 6.

**3.** Suit Against Principal — *a.* NECESSITY OF SUIT — (1) *Where Guaranty Is Absolute.* — See note 8.

**1154.** (2) *Where Guaranty Is Conditional* — (a) In General — In a Number of Jurisdictions. — See note 1.

The Rule Established by the Courts of Other Jurisdictions. — See note 2.

**1155.** (b) *Where Guarantee Holds Collateral Security.* — See note 4.

**1156.** *b.* WHAT DILIGENCE REQUIRED OF GUARANTEE — As to the Diligence Required in Commencing Suit. — See note 7.

**1158.** VII. ASSIGNMENT AND NEGOTIABILITY — 2. Guaranty of Notes — By a Separate Instrument. — See note 1.

Guaranty Indorsed on Note. — See notes 2, 3, 4, 7.

**1159.** 5. Guaranty of Mortgages. — See note 4.

**1160.** VIII. REVOCATION OF GUARANTIES. — See notes 1, 2, 3.

By Death of Guarantor. — See note 7.

tinguished. — See *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302.

**1152.** 7. Reasonable Diligence Dependent on Facts of Each Case. — *Pfaelzer v. Kau*, 207 Ill. 116; *Central Bonds v. Kimball*, 73 N. Y. App. Div. 100.

**1153.** 6. Waiver of Notice and Demand. — *Sands v. Melchionda*, 186 Mass. 270.

**8.** Suit Unnecessary Where Guaranty Is Absolute — *Florida.* — *Fegley v. Jennings*, 44 Fla. 203.

*Georgia.* — *Penn Tobacco Co. v. Leman*, 109 Ga. 428.

*Indiana.* — *Hernley v. Brannum*, 23 Ind. App. 388.

*Kentucky.* — *Yager v. Kentucky Title Co.*, 112 Ky. 936; *White Sewing Mach. Co. v. Powell*, 74 S. W. Rep. 746, 25 Ky. L. Rep. 94.

*Missouri.* — *Hill v. Combs*, 92 Mo. App. 242.

*New Hampshire.* — *Bank Com'rs v. Security Trust Co.*, 70 N. H. 536.

*North Carolina.* — *Voorhees v. Porter*, 134 N. Car. 591.

*South Carolina.* — *Fales, etc., Mach. Co. v. Browning*, 68 S. Car. 13; *Providence Mach. Co. v. Browning*, 68 S. Car. 1.

*South Dakota.* — *Hanna v. Stroud*, 13 S. Dak. 352.

**Necessity of Establishing Default.** — In an action on a guaranty of payment of a note, it is a condition precedent to the liability of the guarantor, that it be found that the person primarily liable has failed to or is unable to pay the debt. *Slinghuff v. Andrew Volk Builders' Supply Co.*, 89 Md. 557.

It is not necessary to exhaust legal remedies against the principal before bringing suit against the guarantor. It is only necessary to establish default. *Howland v. Currier*, 69 N. H. 202.

**1154.** 1. Conditional Guaranty. — *Getty v. Schantz*, (C. C. A.) 100 Fed. Rep. 577 (following the *Wisconsin* doctrine). See also *Wilkinson-Gaddis Co. v. Van Riper*, 63 N. J. L. 394.

**2.** *Rice v. McCague*, 61 Neb. 861; *Colby v. Farwell*, 71 N. H. 83; *Dutton v. Pyle*, 195 Pa. St. 8. See also *Schweitzer v. Fishel*, 13 Hawaii 691.

**1155.** 4. Exhaustion of Collateral Security Necessary. — *Johnson v. Cook*, 24 Wash. 482, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155.

**1156.** 7. At What Term of Court Suit Should

Be Brought. — See *Getty v. Schantz*, (C. C. A.) 100 Fed. Rep. 577.

**1158.** 1. Guaranty Accompanying Negotiable Note Transferable. — Where a note and a guaranty went together in every transaction, and were identical as to the names of the parties, the amount payable, and the date and duration of time and the place of payment, it was held that the guaranty being in terms given to secure the holder of the note the guarantor was liable to the holder, the guaranty being transferable in the same way as the note, and coming under the law merchant. *Herrick v. Guarantors' Finance Co.*, 58 N. Y. App. Div. 30.

**2.** Guaranty Indorsed on Note Held Negotiable. — *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267.

**3.** Reason for Holding. — *Farmers' Trust Co. v. Schenuit*, 83 Ill. App. 267.

**4.** Rule that Transferee Cannot Sue in His Own Name. — *Edgerly v. Lawson*, 176 Mass. 551.

**7.** Liability of Guarantor of Nonnegotiable and Negotiable Notes Equal. — "If the holder of a non-negotiable note transfers it with a guaranty of payment, he is just as liable to the transferee upon the contract of guaranty as if the note were negotiable." *Jenness v. Barron*, 95 Me. 531.

**1159.** 4. *Alger v. Alger*, 83 N. Y. App. Div. 168.

**1160.** 1. Classes of Guaranties. — *White Sewing Mach. Co. v. Powell*, 25 Ky. L. Rep. 94, 74 S. W. Rep. 746, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159.

**2.** Not Revocable Where Consideration Entire and Indivisible. — *White Sewing Mach. Co. v. Powell*, 25 Ky. L. Rep. 94, 74 S. W. Rep. 746, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159.

**3.** Guaranties for Divisible Consideration Revocable. — *Mamerow v. National Lead Co.*, 206 Ill. 634, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160; *White Sewing Mach. Co. v. Powell*, 25 Ky. L. Rep. 94, 74 S. W. Rep. 746, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159.

Guaranty May Be Revoked by Parol. — *Picker v. Fitzelle*, 60 N. Y. App. Div. 453, quoting 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160.

**7.** Revocation by Death of Guarantor and Notice. — *Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191.

**1161. X. RIGHTS OF GUARANTOR AGAINST PRINCIPAL.** — See note 5.

**XI. OPERATION OF STATUTE OF LIMITATIONS.** — See note 9.

**1162.** See note 1.

**XII. WHAT WILL OPERATE AS DISCHARGE OF GUARANTOR —**

**1. Extinguishment or Satisfaction of Principal Obligation.** — See note 2.

**2. Alteration of Contract Guaranteed — a. STATEMENT OF RULE.**

— See note 6.

A continuing guaranty under seal and for a consideration is not revoked by the guarantor's death even though the person to whom the guaranty was given had knowledge of it. This kind of a guaranty cannot be terminated by notice either by the guarantor or his executors. *In re Crace*, (1902) 1 Ch. 733, 71 L. J. Ch. 358.

**1161. 5. Implied Promise to Reimburse Guarantor.** — *Anthony Invest. Co. v. Law*, 62 Kan. 193; *Taylor v. Simpkins*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 246. See also *Seabury v. Sibley*, 183 Mass. 105.

Where a guaranty company guarantees a person in the employ of an express company, and he agrees in consideration of the issue of the bond to indemnify the guarantor against liability on the bond, and that any proper evidence of payment by it to the express company or his account should be conclusive evidence against him, and the company pays claims under the guaranty, the guarantor is entitled to judgment although the justice of the claim is denied. *Guarantee Co. of North America v. Pitts*, 78 Miss. 837.

**9. *Acers v. Acers*, 22 Tex. Civ. App. 584.**

**When Action Not Barred Against Guarantor.** — An action is not barred against a guarantor by the statute of limitations because an action by the guarantee is so barred. *Seabury v. Sibley*, 183 Mass. 105.

**1162. 1. *Corbyn v. Brokmeyer*, 84 Mo. App. 653.**

**2. Satisfaction or Extinguishment of Principal Obligation.** — *Pennsylvania Trust Co. v. McElroy*, (C. C. A.) 112 Fed. Rep. 512, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1162; *Jack v. Sinsheimer*, 125 Cal. 563; *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694; *Brown v. Mason*, 55 N. Y. App. Div. 395, affirmed 170 N. Y. 584.

**Part Payment by Debtor.** — A guarantor is discharged by the first payment of the debtor to the amount guaranteed, if the guaranty is not to continue until the whole debt of the principal is to be paid. *Carson v. Reid*, 137 Cal. 253.

**Where a Lease Is Void**, the guarantor of the payment of rent under it is discharged from liability. *Jewett v. Griesheimer*, 100 N. Y. App. Div. 210.

**Destruction of Subject-matter of Guaranty.** — "When the contract depends upon the continued existence of the person or thing, the subject-matter thereof, the death or destruction of it puts an end to the contract." *Mason v. Standard Distilling, etc., Co.*, 85 N. Y. App. Div. 520.

**Fact that Principal Has Personal Defense to Lease Will Not Discharge Guarantor.** — *Sidney B. Bowman Cycle Co. v. Dyer*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 496.

**When Guarantor Not Released.** — Where a collateral contract of guaranty of illegal bonds is

made for a valuable consideration, it is not tainted with the illegality, and is enforceable against the guarantor, and the general rule that whatever discharges a contract against the principal debtor will discharge it against the guarantor does not apply. *Nelson v. Hinchman*, (C. C. A.) 118 Fed. Rep. 435.

**6. Material Changes Discharge Guarantor — *California*.** — *Pacific Press Pub. Co. v. Loofbourn*, 129 Cal. 24.

*Iowa*. — *Byers v. Hickman Grain Co.*, 112 Iowa 451.

*Kansas*. — *McPherson First Nat. Bank v. Bradley*, 61 Kan. 615.

*Montana*. — *Stanford v. Coram*, 26 Mont. 303, citing 14 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1162.

*New York*. — *American Copper Co. v. Lowther*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 441, affirmed 38 N. Y. App. Div. 134, affirmed 165 N. Y. 625.

*Tennessee*. — *Greer Machinery Co. v. Stains*, (Tenn. Ch. 1900) 59 S. W. Rep. 692.

*Texas*. — *Stafford v. Christian*, (Tex. Civ. App. 1904) 79 S. W. Rep. 595.

**Consent to Alteration of Contract.** — The guarantor is not discharged by alteration in the contract if he consents to it. *Pacific Press Pub. Co. v. Loofbourn*, 129 Cal. 24.

Where repayment of money to be given to a certain corporation was guaranteed, but the money was paid to a creditor of the corporation with the assent of the guarantors, who were directors of the company, even if there was an alteration of the guaranty, the guarantors would not be discharged, as they consented to such payment. *American Copper Co. v. Lowther*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 441, affirmed 38 N. Y. App. Div. 134, affirmed 165 N. Y. 625.

**What Is Not an Alteration of the Contract.** — See *American Copper Co. v. Lowther*, 38 N. Y. App. Div. 134, affirmed 165 N. Y. 625.

The guarantor guaranteed the payment of dividends on stock until a certain date. The subscription on the stock was not paid by that date, the purchaser of the stock having died, but his administrator paid the balance with reasonable diligence. It was held that the guarantor was not discharged from liability. *Rogers v. Chambers*, 112 Ga. 258.

Where a guaranty is given for twine purchased of a certain person, and twine is delivered, which on account of its inferior quality is returned, this is not such a change in the original contract as will relieve the guarantor from liability. *Groendyke v. Musgrave*, 123 Iowa 535.

**When Question of Alteration for Jury.** — Where goods are ordered by a partnership and shipped to it, but meanwhile it has become a corporation, it is a question for the jury whether the contract has been altered so as to discharge

- 1163.** 6. APPLICATION OF RULE. — See note 7.  
**1165.** 3. Extension of Time of Payment or Performance. — See notes 1, 5.  
**1166.** See notes 1, 6.  
 4. Taking Other Security for Debt. — See note 8.  
 5. Fraud and Duress — Fraud. — See note 10.  
**1167.** See note 3.  
 8. Surrender on Negligent Loss of Security for Debt. — See note 8.  
**1168.** See note 3.  
 9. Failure of Consideration. — See note 4.  
 10. Release of Co-guarantor. — See note 5.

the guarantor. *Providence Mach. Co. v. Browning*, 70 S. Car. 148.

**1163.** 7. Change in Membership of Firm. — *Byers v. Hickman Grain Co.*, 112 Iowa 451.

The guarantor guaranteed the payment of goods to be purchased by a firm up to a certain amount. The firm dissolved without notice to either the guarantor or the guarantee, and one of the members continued business under the firm name and made purchases from the guarantee under such name. There was no fact that gave the vendors notice of any change. It was held that the guaranty did not expire upon the dissolution of the partnership. *In re Cinque*, 109 Fed. Rep. 455.

**1165.** 1. General Rule. — *Toombs v. Stockwell*, 127 Mich. 379, 8 Detroit Leg. N. 320; *Rushton v. Dierks Lumber Co.*, (Neb. 1902) 89 N. W. Rep. 616; *Antisdel v. Williamson*, 165 N. Y. 372; *Buffalo Bank v. Schwartz*, 53 N. Y. App. Div. 517; *Providence Mach. Co. v. Browning*, 70 S. Car. 148. See also *Hartwell, etc., Co. v. Moss*, 22 R. I. 583; *Pleasantville Mut. Loan, etc., Soc. v. Moore*, 70 N. J. L. 306.

**What Not Extension of Time.** — The time of payment of an obligation is not extended so as to release a guarantor on a guaranty for payment for belting on four months' time, where it appears that the note was given thirteen days after sale of the belting. *Page Belting Co. v. Parker*, 21 N. Y. App. Div. 160, affirmed 163 N. Y. 583.

Where the date of payment is extended two years, but the guaranty was that the debt was to be paid in six years, the extension did not discharge the guarantor. *Alger v. Alger*, 83 N. Y. App. Div. 168.

In *Buffalo Bank v. Schwartz*, 53 N. Y. App. Div. 517, it was held that where several notes were held, among which were those that were guaranteed, and it was provided by the guaranty that the unguaranteed notes were to be paid before those that were guaranteed, and two of the notes were renewed without the guarantor's knowledge, but the date of renewal did not extend beyond the time when the last of the notes became due, there was not an extension of time which would discharge the guarantor.

**Extension of Time Does Not Discharge Guarantor for What Is Done Before Extension.** — *O'Brien v. Champlain Constr. Co.*, 107 Fed. Rep. 338.

**5. Where Indulgence of Creditor Does Not Re-**

lease Guarantor. — *Providence Mach. Co. v. Browning*, 70 S. Car. 148.

**1166.** 1. Agreement Must Be Binding. — *Providence Mach. Co. v. Browning*, 70 S. Car. 148.

**6. Injury to Guarantor Not Necessary to Release.** — *Buffalo Bank v. Schwartz*, 53 N. Y. App. Div. 517.

**8. Taking Other Security Does Not Release.** — *Providence Mach. Co. v. Browning*, 70 S. Car. 148.

**10. Misrepresentation of Material Facts by Guaranty.** — *Strouse v. Querns*, 22 Pa. Super. Ct. 6.

**Waiver of Right to Set Up Fraud as Defense.** — Where a person is induced to guarantee a note through fraud on the part of the guarantee, but obtains knowledge of the fraud shortly after, waives protest of the note and secures an extension of two years on it, he cannot three years after the note was guaranteed set up the fraud. *Dunn v. Columbia Nat. Bank*, 204 Pa. St. 53.

**What Not Such Misrepresentation as Will Avoid Guaranty.** — *Milwaukee First Nat. Bank v. Buetow*, 123 Wis. 285.

**1167.** 3. What Insufficient Evidence of Fraud to Set Aside Guaranty. — *Sands v. Melchionda*, 186 Mass. 270.

**8. Surrender of Securities.** — *Mutual Loan, etc., Co. v. Hope*, 112 Ga. 729.

**Where the Guarantor Consents to the surrender** he is not discharged. *Batchelder v. Jennings*, 83 Ill. App. 569.

**1168.** 3. Defense of Application of Money to Other Debts. — Where a guarantor of a note makes a special defense that the holder of a note had money of the maker in his hands which should have been applied in payment of the note, but which by a fraudulent agreement with the maker he was released from paying, the guarantor must show that the money should have been applied on the note, and it was the guarantor's duty so to apply it. *Ewen v. Wilbor*, 208 Ill. 492.

**4. Failure of Consideration.** — *Hitchcock v. Burchell*, 74 N. Y. App. Div. 622, affirmed 177 N. Y. 570.

**5. Release of Co-guarantor.** — "The release of one of several joint guarantors or sureties will not effect a discharge of the others, unless the release of the one is granted without the consent or acquiescence of such others." *Blewett v. Bash*, 22 Wash. 536.



1. GUARANTY INSURANCE. — See note 1.

1. 1. Classes of Guaranty Insurance. — See *Cowles v. U. S. Fidelity, etc., Co.*, 32 Wash. 120.

## GUARDIAN AD LITEM.

By J. HAVILAND SMITH.

2. I. DEFINITIONS — 1. In General. — See notes 1, 2.

2. 2. Guardian ad Litem and Prochein Ami Distinguished. — See notes 1, 2, 4, 5.

II. APPOINTMENT — 1. When Necessary — Actions and Suits Against Infants. — See note 6.

4. See note 1.

5. All Proceedings Where Infant's Property Interests Involved. — See note 2.

2. 1. Guardian ad Litem Not Party to Suit. — *Behlen v. Behlen*, 73 N. Y. App. Div. 143; *Burbach v. Milwaukee Electric R., etc., Co.*, 119 Wis. 384.

When Considered a Party. — In *was held in McMillan v. Hunnicutt*, 109 Ga. 699, that while a guardian ad litem was not strictly a party to the case, in the sense that the judgment is rendered for or against him personally, he was such a party as could consent to a trial of his wards at the first term under section 4848 of the Georgia Civil Code, which authorized "parties to proceedings for equitable relief," by consent, to try cases at the first term.

2. Guardian ad Litem Officer of Court. — *Vaile v. Sprague*, 179 Mo. 393; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937; *Burbach v. Milwaukee Electric R., etc., Co.*, 119 Wis. 384.

3. 1. Statute Abolishing Necessity of Guardian ad Litem for Infant Plaintiff. — See *Williams v. Cleveland*, 76 Conn. 426.

2. Where Statute Authorizes Appointment of Guardian ad Litem for Infant Plaintiff. — *Dent v. Merriam*, 113 Ga. 83; *Kerrigan v. Langstaff*, 64 N. Y. App. Div. 497; *Callahan v. New York Cent., etc., R. Co.*, 99 N. Y. App. Div. 56; *Wideman v. Patton*, 64 S. Car. 408; *Blair v. Henderson*, 49 W. Va. 282.

4. Infant Sues by Next Friend and Defends by Guardian ad Litem. — *Williams v. Cleveland*, 76 Conn. 426; *Duke v. Wheeler*, 28 Tex. Civ. App. 391.

5. *Vaile v. Sprague*, 179 Mo. 393.

Neither a Party to the Suit. — *Williams v. Cleveland*, 76 Conn. 426; *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477.

6. How Lunatics Defend. — *Stoner v. Riggs*, 128 Mich. 129, 8 Detroit Leg. N. 557.

In Bankruptcy Proceedings. — *In re Burka*, 107 Fed. Rep. 674.

4. 1. Where Infants and Insane Persons Should Be Represented by Guardians ad Litem — *United States*. — *In re Burka*, 107 Fed. Rep. 674.

Arkansas. — *Cowling v. Hill*, 69 Ark. 350, 86 Am. St. Rep. 200.

Connecticut. — *Williams v. Cleveland*, 76 Conn. 426.

Georgia. — *Burnett v. Summerlin*, 110 Ga. 349; *Allen v. Barnwell*, 120 Ga. 537.

Idaho. — *Pine v. Callahan*, 8 Idaho 684.

Illinois. — *Binns v. La Forge*, 191 Ill. 598; *White v. Kilmartin*, 205 Ill. 525; *Pyott v. Pyott*, 90 Ill. App. 210, affirmed 191 Ill. 280.

Iowa. — *Wise v. Schloesser*, 111 Iowa 16; *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634.

Kansas. — *Saville v. Saville*, 63 Kan. 861.

Kentucky. — *Thornton v. Thornton*, 64 S. W. Rep. 524, 23 Ky. L. Rep. 930; *Womble v. Trice*, 112 Ky. 533.

Maine. — *Conary v. Sawyer*, 92 Me. 463, 69 Am. St. Rep. 525.

Michigan. — *Stoner v. Riggs*, 128 Mich. 129, 8 Detroit Leg. N. 557; *Schimpf v. Wayne Circuit Judge*, 129 Mich. 886, 8 Detroit Leg. N. 886.

Missouri. — *Weiss v. Coudrey*, 102 Mo. App. 65.

New York. — *Platt v. Finck*, 60 N. Y. App. Div. 312; *Matter of McCusker*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 47.

Ohio. — *Roberts v. Roberts*, 61 Ohio St. 96.

Pennsylvania. — *Mitchell v. Spaulding*, 206 Pa. St. 220.

Texas. — *Stephens v. Hewett*, 22 Tex. Civ. App. 304; *Duke v. Wheeler*, 28 Tex. Civ. App. 391; *Butner v. Norwood*, (Tex. Civ. App. 1904) 81 S. W. Rep. 78.

Virginia. — *Turner v. Barraud*, 102 Va. 324.

West Virginia. — *Eakin v. Hawkins*, 52 W. Va. 124; *Ferrell v. Ferrell*, 53 W. Va. 515.

Wisconsin. — *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937; *Ziegler v. Bark*, 121 Wis. 533.

5. 2. In Partition Proceedings where the interests of the infant's guardian are adverse to those of the infant a guardian ad litem should be appointed. *Phillips v. Phillips*, 185 Ill. 629.

Upon a Reference to Ascertain the Fees of a Guardian ad Litem for services, a new guardian ad litem should be appointed. *Loftis v. Butler*, (Tenn. Ch. 1900) 58 S. W. Rep. 886.

On the Appointment of an Administrator it is necessary to appoint a guardian ad litem in order to bind infant heirs. *Hubbard v. Chicago, etc., R. Co.*, 104 Wis. 160, 76 Am. St. Rep. 855.

On the Report of an Administrator who is guardian of an infant, a guardian ad litem should be appointed. *State v. Burkam*, 23 Ind. App. 271.

6. When General Guardian May Act. — See note 1.
2. Power to Appoint — Power Incident to Every Court. — See notes 2, 3.
3. Upon Whose Motion Appointment Is Made. — See note 4.
- Appointment by Court Sua Sponte. — See note 6.
7. 4. At What Stage of Proceeding Appointment Is Made. — See note 1.
5. Who Should Be Appointed. — See note 2.
8. General Guardian, Relative, Attorney, or Officer of Court. — See notes 1, 2.
- Should Have No Interest Adverse to Defendant. — See notes 3, 4.
- Should Not Be Selection of Adverse Party. — See note 8.
9. Consulting Infant as to Appointee. — See note 2.
6. Effect of Failure to Appoint or of Irregular Appointment — Failure to Appoint — Judgment or Decree Erroneous. — See notes 4, 5, 7.

Upon Application of the Committee of a Lunatic to Resign, a special guardian should be appointed. Matter of McCusker, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 47.

Where Minors Acquired Title to the Subject-matter of an Action while it was pending and after jurisdiction had attached, it was held that the failure to appoint a guardian *ad litem* for them did not invalidate the judgment or entitle the minors to have it set aside. Shelby v. St. James Orphan Asylum, 66 Neb. 40.

6. 1. In Massachusetts by Pub. Stat., c. 139, § 29, a statutory guardian is given the right to represent his ward in all legal suits and proceedings "unless another person is appointed for that purpose as guardian *ad litem* or next friend." If a guardian *ad litem* is appointed his power is paramount. Elder v. Adams, 180 Mass. 303.

2. Power of Court to Appoint Guardian *ad Litem*. — Vaile v. Sprague, 179 Mo. 393.

3. Magistrate May Appoint Guardian *ad Litem*. — Wideman v. Patton, 64 S. Car. 408.

4. Guardian *ad Litem* Appointed on Motion of Plaintiff. — *In re* Burka, 107 Fed. Rep. 674; Granger v. Sheriff, 133 Cal. 416; Rice v. Bolton, (Iowa 1904) 100 N. W. Rep. 634; Platt v. Finck, 60 N. Y. App. Div. 312.

6. Appointment by Court Sua Sponte. — Jarvis v. Crozier, 98 Fed. Rep. 753; Pine v. Callahan, 8 Idaho 684; Matter of Cutting, 38 N. Y. App. Div. 247; Platt v. Finck, 60 N. Y. App. Div. 312.

Refusal of Family Council To Advise as to Appointment of Curator Immaterial. — *Ex p.* Wood, 6 Quebec Pr. 70, 24 Quebec Super. Ct. 227.

7. 1. Process Should Be Served on Minor Before Guardian Appointed. — Georgia. — Richards v. East Tennessee, etc., R. Co., 106 Ga. 614.

Illinois. — Trevor v. Colgate, 181 Ill. 129.

Indiana. — Holliday v. Miller, 28 Ind. App. 121.

Iowa. — Rice v. Bolton, (Iowa 1904) 100 N. W. Rep. 634.

Kentucky. — Womble v. Trice, 112 Ky. 533.

Minnesota. — Phelps v. Heaton, 79 Minn. 476.

Missouri. — Westmeyer v. Gallenkamp, 154 Mo. 28, 77 Am. St. Rep. 747.

Nebraska. — Shelby v. St. James Orphan Asylum, 66 Neb. 40.

Texas. — Maury v. Keller, (Tex. Civ. App. 1898) 53 S. W. Rep. 59.

May Be Appointed During Trial. — Gulf, etc., R. Co. v. Conder, 23 Tex. Civ. App. 488.

2. A Person Without the Jurisdiction may be selected. Pine v. Callahan, 8 Idaho 684. See

also Shannon v. Consolidated Tiger, etc., Min. Co., 24 Wash. 119, where a person within the jurisdiction of the court, being the party plaintiff but a nonresident, was appointed guardian *ad litem* for minor plaintiffs.

8. 1. Solicitor or Attorney. — Ramsey v. Keith, 76 S. W. Rep. 142, 25 Ky. L. Rep. 582.

2. Must Be Officer of Court in Wisconsin by Circuit Court rule 9. Richardson v. Tyson, 110 Wis. 572, 84 Am. St. Rep. 937.

3. Improper that Guardian Selected Should Have Interests Adverse to Defendant. — Ruffel v. Police Beneficiary Assoc., 9 Pa. Dist. 182.

If General Guardian Interested, Another Should Be Appointed. — Phillips v. Phillips, 185 Ill. 629.

Must Not Be Connected in Business with Plaintiff's Attorneys. — Lake v. Kessel, 64 N. Y. App. Div. 540.

4. Plaintiff or Complainant Improper Appointee. — Ellis v. Massenburg, 126 N. Car. 129.

8. Parish v. Parish, 77 N. Y. App. Div. 267, reversed 175 N. Y. 181.

Not Nominee of Adverse Party. — Allen v. McGee, (Ind. App. 1901) 60 N. E. Rep. 460; Frieske v. Frieske, (Mich. 1904) 101 N. W. Rep. 632, 11 Detroit Leg. N. 637; Matter of Cutting, 38 N. Y. App. Div. 247.

9. 2. Matter of White, 101 N. Y. App. Div. 172.

4. Judgment in Case Where Guardian *ad Litem* Not Appointed Erroneous but Not Void — Arkansas. — Cowling v. Hill, 69 Ark. 350, 86 Am. St. Rep. 200.

Georgia. — Burnett v. Summerlin, 110 Ga. 349.

Illinois. — Phillips v. Phillips, 185 Ill. 629; White v. Kilmartin, 205 Ill. 525.

Indian Territory. — Cook v. Keith, (Indian Ter. 1904) 82 S. W. Rep. 918.

Iowa. — Wise v. Schloesser, 111 Iowa 16; Carroll Imp. Co. v. Engleman, (Iowa 1904) 99 N. W. Rep. 574; Rice v. Bolton, (Iowa 1904) 100 N. W. Rep. 634.

Kentucky. — Thornton v. Thornton, 64 S. W. Rep. 524, 23 Ky. L. Rep. 930.

Michigan. — Schimpf v. Wayne Circuit Judge, 129 Mich. 103, 8 Detroit Leg. N. 886.

Missouri. — Weiss v. Coudrey, 102 Mo. App. 65.

New York. — Rook v. Dickinson, (County Ct.) 38 Misc. (N. Y.) 690; Pearsall v. Rosebrook, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 10.

South Carolina. — Robertson v. Blair, 56 S. Car. 96, 76 Am. St. Rep. 543.

Texas. — Stephens v. Hewett, 22 Tex. Civ.

**10.** Appointment of Improper Person. — See notes 1, 3.

**III. COURT'S CONTROL OF GUARDIAN AD LITEM.** — See notes 4, 5.

**11. IV. DUTIES, POWERS, AND LIABILITIES — 1. General Duty in Making Defense.** — See note 1.

**2. Extent of Authority to Bind Infant — a. GENERAL STATEMENT AS TO HIS POWERS.** — See notes 5, 6.

**12.** See note 1.

**b. ADMISSIONS, ANSWERS, AND JUDGMENTS BY CONSENT — Infant Not Bound by Guardian's Admissions or Stipulations.** — See notes 2, 4.

**14. V. COMPENSATION.** — See note 5.

App. 304; *Butner v. Norwood*, (Tex. Civ. App. 1904) 81 S. W. Rep. 78.

*West Virginia.* — *Eakin v. Hawkirs*, 52 W. Va. 124.

In *Turner v. Barraud*, 102 Va. 324, it was said that any step taken before the appointment of a guardian *ad litem* was void as to the infant, and a decree of sale was declared null and void as against the infant.

**Waiver of Failure to Appoint.** — *Watson v. Wrightsman*, 26 Ind. App. 437.

**9. 5. Judgment Rendered Against Insane Person Without Appointment of Guardian ad Litem Not Void.** — *Eakin v. Hawkins*, 52 W. Va. 124.

**The Court Is Without Jurisdiction** if, upon application of the committee of a lunatic to resign, a special guardian is not appointed. *Matter of McCusker*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 47.

**7. Such Judgment Not Subject to Impeachment upon Collateral Attack.** — *Cook v. Keith*, (Indian Ter. 1904) 82 S. W. Rep. 918; *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634; *Weiss v. Coudrey*, 102 Mo. App. 65.

**Enforcement of Such Judgment Not Restrained by Injunction.** — *Cook v. Keith*, (Indian Ter. 1904) 82 S. W. Rep. 918.

**10. 1. Where Error of Court Corrected by Appellate Tribunal.** — *Matter of Cutting*, 38 N. Y. App. Div. 252.

**3. Where a Clerk in the Office of the Plaintiff's Attorney was appointed in a partition suit, the court held that a purchaser at the sale would be relieved from his purchase before title was given.** *Lake v. Kessel*, 64 N. Y. App. Div. 540. See also *Parish v. Parish*, 77 N. Y. App. Div. 267, reversed 175 N. Y. 181.

**4. Persons under Disability Are Wards of Courts.** — *Parken v. Safford*, (Fla. 1904) 37 So. Rep. 567; *Williams v. Williams*, 204 Ill. 44; *Vaile v. Sprague*, 179 Mo. 393; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937.

**5. The Benefit of All Defenses.** — *Parken v. Safford*, (Fla. 1904), 37 So. Rep. 567.

**Neglect of His Duty to Prepare the Case for trial on the part of the guardian will not defeat the substantial rights of the infant.** *Hagen v. N. Y. Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 540.

**11. 1. Energy and Vigilance Should Be Used in Defense.** — *Allen v. McGee*, (Ind. App. 1901) 60 N. E. Rep. 460; *Boden v. Mier*, (Neb. 1904) 98 N. W. Rep. 701; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937.

**Kentucky — Duty to Examine Record.** — Under Ky. Civ. Code Prac., § 36, subsec. 3, the guardian *ad litem* is required either to make defense, or report that, after a careful examina-

tion of the case, he is unable to make a defense; and a mere report that he is unable to make defense, without any statement that he has made the required examination, is insufficient to warrant rendition of a judgment against the infant. *Womble v. Trice*, 112 Ky. 533. See also *Ramsey v. Keith*, 76 S. W. Rep. 142, 25 Ky. L. Rep. 582.

**Defense Must Be Made by Guardian.** — *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634.

**A General Denial Must Be Filed by the guardian ad litem in Kansas in accordance with Code Civ. Pro., § 101.** *Swartwood v. Sage*, 68 Kan. 817.

**5. Williams v. Cleaveland**, 76 Conn. 426.

**6. May Employ Attorney.** — *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937.

**May Consent to Trial at First Term.** — *McMillan v. Hunnicutt*, 109 Ga. 699.

**12. 1. Waiver of Notice.** — The five days' notice of the setting of a case for trial required by Code Civ. Pro. Cal., § 594, as amended in 1899, may be waived by a guardian *ad litem*. *Granger v. Sheriff*, 133 Cal. 416.

**2. Admissions or Stipulations Cannot Prejudice Infants.** — *Anderson v. Anderson*, 191 Ill. 100.

**4. Compromising Cause.** — A guardian *ad litem* has no power to settle or compromise without the express sanction of the court. *Fletcher v. Parker*, 53 W. Va. 422.

But the court may sanction a compromise by the guardian. *Williams v. Williams*, 204 Ill. 44.

**14. 5. Court May Make Guardian's Compensation Lien on Property Protected.** — *Loftis v. Butler*, (Tenn. Ch. 1900) 58 S. W. Rep. 886.

**Where There Is No Fund Belonging to the Infant out of which the guardian ad litem can be compensated, he cannot tax his compensation against a successful complainant.** *Patton v. Dixon*, 105 Tenn. 97.

**Standard of Compensation.** — *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937.

**Kentucky — Allowance Made by Appointing Court.** — "In many states of the Union the allowance to a guardian *ad litem* is made by the court wherein the services were rendered. But in this state it has been expressly decided that the allowance to a guardian *ad litem* for the services rendered by him in the entire case must be made by the court wherein he was appointed." *Staggenborg v. Bailey*, 80 S. W. Rep. 1109, 26 Ky. L. Rep. 188.

**Services and Attorney's Fees.** — A guardian *ad litem* may be allowed for services and for attorney's fees paid in the hearing. *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937.

**Paid Out of Interest of Ward and Not Out of**

**15. VI. TERMINATION OF OFFICE — 1. In General.** — See note 1.**2. Right to Prosecute Appeal.** — See note 4.

**General Estate.** — *Brinckerhoff v. Farias*, 52 N. Y. App. Div. 256, *affirmed* 170 N. Y. 427.

In *New York* a Surrogate's Court has no power to award a special guardian, even when appointed on its own motion to represent an infant party to an executor's accounting, any compensation for his services out of the general estate of the decedent, in excess of the costs authorized by Code Civ. Pro., §§ 2557-2561. *Matter of Robinson*, 160 N. Y. 448; *Matter of Farmers' L. & T. Co.*, 49 N. Y. App. Div. 1; *New York L. Ins., etc., Co. v. Sands*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 252.

**15. 1. Authority Continues until Final Judgment in Cause.** — In *Griffith v. Cromley*, 58 S. Car. 448, it was held that if a guardian *ad litem*

is appointed for infants about to sue for the partition of certain lands, his authority is not terminated by issuing a summons to the sheriff, recalling the same and commencing another action, and a new appointment is not necessary for the second action.

**Cannot Receive Payment of Judgment.** — "His duties and powers end with judgment recovered. He cannot receive pay of it, but payment must be made to the regular guardian or to the court." *Fletcher v. Parker*, 53 W. Va. 422.

**4. Authority Continues until After Decision of Cause on Appeal.** — *Staggenborg v. Bailey*, 80 S. W. Rep. 1109, 26 Ky. L. Rep. 188; *Cunningham v. Davis*, 175 Mass. 213.

## GUARDIAN AND WARD.

BY H. W. HOYE.

**22. III. MODERN FORMS OF GUARDIANSHIP, THEIR NATURE AND ORIGIN —**

**1. Guardianship by Nature — a. IN WHOM VESTED — (1) In Father —** By the Common Law. — See note 5.

**23. (2) In Mother.** — See note 1.

**24. (5) Natural Guardianship over Bastards — In England.** — See note 4.

**25. b. CONTROLLED BY COURTS.** — See note 4.

**26. c. IS OVER PERSON ONLY — At Common Law Natural Guardianship Is over the Person Only.** — See note 1.

**27.** See note 6.

**2. Testamentary Guardianship — b. POWER OF APPOINTMENT — (1) General Rule.** — See note 11.

**22. 5. Guardian by Nature — General Rule — California.** — *Matter of Campbell*, 130 Cal. 380.

*Indian Territory.* — *Indian Land, etc., Co. v. Shoenfelt*, (Indian Ter. 1904) 79 S. W. Rep. 134.

*Mississippi.* — *Hibbette v. Baines*, 78 Miss. 695.

*New York.* — *Matter of Jacquet*, (Surrogate Ct.) 40 Misc. (N. Y.) 575.

*Texas.* — *Watts v. Lively*, (Tex. Civ. App. 1901) 60 S. W. Rep. 676; *Heinemier v. Arlitt*, 29 Tex. Civ. App. 140.

*Canada.* — See *In re Marshall*, 33 Nova Scotia, 104.

**Father Cannot Transfer Custody of Infant.** — *Watt's Succession*, 111 La. 937.

**23. 1. When Natural Guardianship Passes to Mother.** — *Indian Land, etc., Co. v. Shoenfelt*, (Indian Ter. 1904) 79 S. W. Rep. 134; *Matter of Brigg*, 39 N. Y. App. Div. 485, *affirmed* 165 N. Y. 673; *Sancho v. Martin*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1015.

**24. 4. Guardianship over Bastards — English Rule.** — See *Re Slater*, 14 Manitoba 523.

**25. 4. The American Cases.** — A father who is willing to give his children a good home is entitled to their custody although in the past he may have been immoral. *Com. v. Womels-*

*dorf*, 10 Kulp (Pa.) 62. But compare *In re McChesney*, 106 Wis. 315.

The grandmother of the infant was appointed temporary guardian, where the father was a drunkard and guilty of larceny, and the mother was incompetent. *Matter of Jacquet*, (Surrogate Ct.) 40 Misc. (N. Y.) 575.

A father will not be removed on the ground that his second wife abuses and ill-treats the children, where it appears that the ill-treatment occurred during his absence and without his countenance. *In re Muench*, 11 Ohio Cir. Dec. 124, 20 Ohio Cir. Ct. 350.

**Child's Welfare Cause for Removal.** — *Reg. v. Redner*, 6 British Columbia, 73.

**Mother May Be Removed from Guardianship for Cause.** — *Noël v. Chevrefils*, 15 Quebec Super. Ct. 530.

**26. 1. Natural Guardianship Is over Person Only.** — *Williams v. Cleaveland*, 76 Conn. 426; *Indian Land, etc., Co. v. Shoenfelt*, (Indian Ter. 1904) 79 S. W. Rep. 134.

**27. 6. Statutory Authority of Natural Guardians.** — *Indian Land, etc., Co. v. Shoenfelt*, (Indian Ter. 1904) 79 S. W. Rep. 134.

**11. Divorce Decree Giving Custody of Child to Mother.** — In *In re McChesney*, 106 Wis. 315, it was said that, whether or not the mother

**28.** See note 2.

(2) *Statutory Modifications.* — See note 8.

**29.** See note 2.

c. METHOD OF APPOINTMENT — (1) *May Be by Deed or Will.* —

See note 5.

**31.** *INCIDENTS OF TESTAMENTARY GUARDIANSHIP.* — See note 3.

**32.** 3. Guardianship by Judicial or Legislative Appointment — a. GENERAL POWER — (1) *Of Chancery.* — See note 3.

**33.** (3) *Of Statutory Courts* — Concurrent Jurisdiction with Courts of Chancery. — See notes 1, 4.

b. JURISDICTION OF PARTICULAR COURT — (1) *Arising from Ward's Domicil.* — See note 5.

**34.** What Constitutes Domicil for the Purpose — Infant's Domicil Primarily That of Father. — See note 1.

When Domicil of Mother Determines That of Infant. — See note 2.

**35.** Effect of Removal of Infant by Guardian. — See note 1.

When Domicil of Person Standing in Loco Parentis Determines Infant's Domicil. —

See note 2.

When a Court Has Taken Jurisdiction over a Ward. — See note 3.

**36.** (2) *Arising from Ward's Ownership of Property Within Jurisdiction.* — See note 2.

c. FACTS NECESSARY TO JUSTIFY APPOINTMENT. — See note 6.

had power in such case to appoint a testamentary guardian, it was proper to consider her wishes, expressed in her will, in determining the propriety of appointing as guardian the person she had attempted by will to appoint.

**28.** 2. *Lamar v. Harris*, 117 Ga. 993.

8. The New York Legislation. — Matter of Welsh, 50 N. Y. App. Div. 189.

**29.** 2. Statutes Authorizing Mother to Appoint Guardian Where Father Dies Without Appointing. — Laws N. Y. 1896, c. 272, § 51; Rev. Stat. Mo. (1889), § 5283.

5. Right to Appoint Separate Guardians for Person and Estate. — It is doubtful if a testator by his will can appoint a guardian of the estate of his child separate from the guardian of his person. Matter of Brigg, 39 N. Y. App. Div. 485, affirmed 165 N. Y. 673. And see *infra*, this title, 41. 7.

**31.** 3. Powers Identical with Those of Guardian Appointed by Court. — *In re Grimes*, 79 Mo. App. 274.

**32.** 3. Power of Chancery to Control Guardians in Performance of Their Trust. — *Pearson v. Haydel*, 87 Mo. App. 495.

**33.** 1. Jurisdiction of Statutory Courts Generally Concurrent with That of Chancery. — The Surrogate's Court is restricted in its power over the ward and his property to the authority vested in it by statute. Matter of Bolton, 159 N. Y. 129.

4. When Chancery Will Supersede Statutory Court. — Matter of Barry, 61 N. J. Eq. 135.

5. General Guardian Appointed by Court of Ward's Domicil. — *Connell v. Moore*, (Kan. 1904) 78 Pac. Rep. 164. See also Matter of Taylor, 131 Cal. 180.

Absence of Infant from State of Domicil. — A court having jurisdiction by reason of the infant's domicil can appoint a guardian, although the infant at the time is without the state. *Modern Woodmen of America v. Hester*, 66 Kan. 129.

**34.** 1. Domicil of Infant Primarily That of Father. — *Randall v. Wadsworth*, 130 Ala. 633; *Boyle v. Griffin*, 84 Miss. 41.

2. Removal of Infant by Surviving Mother. — *Modern Woodmen of America v. Hester*, 66 Kan. 129; *Jewell v. De Blanc*, 110 La. 810.

**35.** 1. Unauthorized Removal or Removal by Infant's Own Act. — Matter of Kiernan, (Surrogate Ct.) 38 Misc. (N. Y.) 394.

2. When Infant's Domicil Determined by That of Persons Acting in Loco Parentis. — Matter of Taylor, 131 Cal. 180; *Jones v. Bowman*, (Wyo. 1904) 77 Pac. Rep. 439.

Child Living in Almshouse. — Where the child has neither legal father nor living mother, and is being cared for at the county almshouse, that will be taken as his domicil, and the appointment of a guardian by the court of that county will stand. *Louisville, etc., R. Co. v. Kimbrough*, 115 Ky. 512.

3. Court Appointing Guardian Retains Its Jurisdiction Notwithstanding Ward's Change of Residence. — *Randall v. Wadsworth*, 130 Ala. 633; Matter of Henning, 128 Cal. 214, 79 Am. St. Rep. 43.

Where the jurisdiction of a court has once attached, it will not be changed by the guardian changing his domicil nor by the removal of the ward's property to another state. *Netting v. Strickland*, 9 Ohio Cir. Dec. 847, 18 Ohio Cir. Ct. 136.

**36.** 2. Special Jurisdiction to Appoint Guardian to Administer Ward's Property. — *McVaw v. Shelby*, (Ky. 1903) 75 S. W. Rep. 227.

Appointment of Tutor ad Hoc Where Property Interests of Tutor and Minor Conflict. — *Trapier v. Birabin*, 6 Quebec Pr. 103.

6. A Former Guardian Must Have Been Removed Before a Successor Can Be Appointed. — *Gilbert v. Stephens*, 106 Ga. 753; *Estridge v. Estridge*, (Ky. 1903) 76 S. W. Rep. 1101; *St. Paul Sanitarium v. Crim*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1114.

**37. e. WHEN APPOINTMENT MAY BE ATTACKED COLLATERALLY.** — See notes 4, 5.

**38. f. SELECTION OF GUARDIAN — (1) Is Discretionary with Trial Court.** — See note 1.

(2) *Infant's Welfare Controls.* — See notes 2, 3.

(3) *Parents' Wishes.* — See note 4.

**39. (4) Preference of Next of Kin.** — See notes 1, 2, 3, 4, 5, 6.

**40. (5) Religious Belief of Guardian — Present Rule in England.** — See note 4. Rule in the United States. — See note 5.

**41. (8) Appointment of Married Women.** — See note 1.

(9) *Appointment of Nonresidents.* — See note 4.

**Where There Is a Testamentary Guardian.** — *In re Grimes*, 79 Mo. App. 274.

**37. 4. Appointment by Court Not Having Jurisdiction.** — *Modern Woodmen of America v. Hester*, 66 Kan. 129.

**5. Appointment by Court Having Jurisdiction.** — *In re Lundberg*, 143 Cal. 403, citing 15 Am. & Eng. ENCYC. OF LAW (2d ed.) 37; *Matter of Lewis*, 137 Cal. 682; *In re Chin Mee Ho*, 140 Cal. 263; *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483; *In re Stittgen*, 110 Wis. 625.

**38. 1. Choice of Guardian Discretionary with Court.** — *Matter of Lewis*, 137 Cal. 682; *Ohrns v. Woodward*, 134 Mich. 596; *Chadwick v. Dunham*, 83 Minn. 366; *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980; *Matter of Buckler*, 96 N. Y. App. Div. 397.

**2. Infant's Welfare Controlling Consideration** — *Georgia*. — *Lamar v. Harris*, 117 Ga. 993.

*Iowa*. — *Hadley v. Forrest*, 112 Iowa 125.

*Minnesota*. — *Greenwood v. Greenwood*, 84 Minn. 203.

*New York*. — *Matter of Burdick*, (Surrogate Ct.) 41 Misc. (N. Y.) 346; *Matter of Jacquet*, (Surrogate Ct.) 40 Misc. (N. Y.) 575.

*Ohio*. — *In re Luck*, 10 Ohio Dec. 1, 7 Ohio N. P. 49.

*Washington*. — *Willet v. Warren*, 34 Wash. 647.

*Wisconsin*. — *In re McChesney*, 106 Wis. 315.

*Wyoming*. — *Jones v. Bowman*, (Wyo. 1904) 77 Pac. Rep. 439.

**3. Child's Wishes Entitled to Consideration.** — *Willet v. Warren*, 34 Wash. 647.

**4. Weight to Be Given to Mother's Wishes.** — *Schenk's Estate*, 17 Lanc. L. Rev. 369.

**Nonresident Nominees Who Have Not Furnished Required Bonds.** — *Matter of Welsh*, 50 N. Y. App. Div. 189.

**39. 1. Father Entitled in Absence of Cause to Contrary.** — *Matter of Campbell*, 130 Cal. 380; *Matter of Salter*, 142 Cal. 412; *Hibbette v. Baines*, 78 Miss. 695.

**Child in Custody of Divorced Mother.** — *Coons's Application*, 11 Ohio Cir. Dec. 208, 20 Ohio Cir. Ct. 47.

**Where Parents Have Abandoned Infant.** — *Com. v. Klemsen*, 23 Pa. Co. Ct. 207, 9 Pa. Dist. 165.

**Father's Surrender of Custody by Contract.** — *Lamar v. Harris*, 117 Ga. 993.

**Where the Father Gave the Children to Their Grandmother.** — *Fletcher v. Hickman*, 50 W. Va. 244.

**2. Mother Preferred Next to Father.** — *Edwards v. Edwards*, 84 Mo. App. 552; *Matter of Burdick*, (Surrogate Ct.) 41 Misc. (N. Y.) 346; *Sancho v. Martin*, (Tex. Civ. App. 1901) 64

S. W. Rep. 1015. See also *Matter of Van Loan*, 142 Cal. 423.

**Mother's Immorality Sufficient Cause for Not Appointing Her.** — *Hoyle's Succession*, 109 La. 623.

**Mother Cannot Alienate Her Right.** — Where the father of the infant by his will appointed a guardian for his child, the mother, by consenting to the probate of the will, does not waive her right to object to the appointment. *Ohrns v. Woodward*, 134 Mich. 596.

Where the mother abandons her right to the guardianship, and a guardian has been appointed who binds the ward to service, the mother will not be allowed the custody of the infant. *Phillips's Petition*, 9 Pa. Dist. 745.

**3. Next to Mother Nearest Relative Preferred.** — *Strubbe v. Kings County Trust Co.*, 60 N. Y. App. Div. 548, affirmed 160 N. Y. 603.

**Waiver by Mother — Right of Grandmother.** — *Polasek v. Janacek*, 22 Tex. Civ. App. 411.

**An Uncle Is Entitled to Appointment as Guardian Rather than a Stepmother.** — *Heinemier v. Arlitt*, 29 Tex. Civ. App. 140.

**4. No Preference as Between Paternal and Maternal Relatives.** — In *Louisiana* it is provided by Civ. Code La., art. 264, that "in case there shall be more than one ascendant in the same degree in the direct line, but of different sexes, the tutorship shall be given to the male." See *Oliver's Succession*, 113 La. 877.

**5. Court Not Bound to Appoint Relative.** — *In re Luck*, 10 Ohio Dec. 1, 7 Ohio N. P. 49.

**6. Relative Preferred to Stranger.** — *Matter of Buckler*, 96 N. Y. App. Div. 397.

**40. 4. English Rule to Appoint Guardian of Father's Religion.** — But in *In re Marshall*, 33 Nova Scotia 104, it was held that a father who has allowed his daughter to live with her aunt, by whom she was brought up in the Protestant faith, would not be allowed her custody for the sole reason that he wished her to adopt the Roman Catholic faith.

**5. No Religious Discrimination in United States — Court Guided by Parent's Wishes.** — *Matter of Jacquet*, (Surrogate Ct.) 40 Misc. (N. Y.) 575; *In re Luck*, 10 Ohio Dec. 1, 7 Ohio N. P. 49; *Jones v. Bowman*, (Wyo. 1904) 77 Pac. Rep. 439.

**41. 1. In the Indian Territory** it is provided by statute (Annot. Stat. Ind. Ter. 1899, § 2382) that no married woman shall be appointed guardian. *Campbell v. Scott*, 3 Indian Ter. 462.

**4. In Louisiana**, since preference is given to male relatives, a paternal grandfather will be appointed tutor instead of a maternal grandmother, 'although the grandfather reside

- 41.** (11) *Other Considerations.* — See note 7.
- 42.** *g. RIGHT OF NOMINATION BY WARD* — (1) *In General.* — See notes 1, 2.
- 43.** *h. NECESSITY OF QUALIFICATION.* — See notes 2, 3, 4.
- 44.** *4. New York Guardianship in Socage.* — See note 3.
- 5.** *Louisiana System of Guardianship — Mortgage on Tutor's Real Estate as Security for Trust.* — See note 8.
- 45.** *IV. TERMINATION OF GUARDIANSHIP* — 1. *By Death or by Ward's Arrival at Full Age.* — See note 3.
- 3.** *By Marriage of Female Guardian.* — See note 5.
- 46.** *4. By Marriage of Female Ward.* — See note 2.
- 48.** *8. By Removal from Trust* — *b. JURISDICTION TO REMOVE* — (2) *Of Probate Courts.* — See note 2.
- d. CAUSE FOR REMOVAL* — (1) *In General.* — See note 4.
- (2) *Removal of Guardian's Residence.* — See note 5.
- 49.** (3) *Unfitness of Guardian.* — See notes 2, 5, 6, 8.
- (4) *Malfeasance in Office.* — See note 12.
- 50.** See note 2.

in a foreign state. *Oliver's Succession*, 113 La. 877.

**41. 7. Whether Guardianship of Person and Estate Can Be Separated.** — *Matter of Buckler*, 96 N. Y. App. Div. 397. Compare *Matter of Briggs*, 39 N. Y. App. Div. 485, affirmed 165 N. Y. 673.

**Applicant's Means.** — The father is entitled to custody of his child, though the child is living with his grandparents, who are much more wealthy. *Watts v. Lively*, (Tex. Civ. App. 1901) 60 S. W. Rep. 676.

**42. 1. Right of Infant to Choose His Own Guardian.** — *White v. Strong*, 75 Conn. 308.

**2.** *State v. Mast*, 104 Mo. App. 348.

**43. 2. Giving of Bond Essential to Complet Appointment.** — See *Ormiston v. Trumbo*, 77 Mo. App. 310.

**3. Failure of the Order of Appointment to Require a Bond does not invalidate the appointment.** *In re Chin Mee Ho*, 140 Cal. 263.

**Where Additional Bond Required.** — Where bond of a guardian was fixed by surrogate before the letters of guardianship were issued, and it appeared afterwards that it was the duty of the surrogate to require an additional bond, it was held that the giving of such additional bond was not a condition precedent to the right of the guardian to maintain an action, the sole object of which was the protection of the infant. *Van Zandt v. Grant*, 175 N. Y. 150.

**4.** Compare *Brian v. Bonvillian*, 52 La. Ann. 1794.

**44. 3.** See *Hickey v. Dixon*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 4.

**8. Tacit Mortgage on Tutor's Real Estate.** — *Manson's Succession*, 51 La. Ann. 130.

**45. 3. Louisiana — Emancipation of Ward.** — *Lee's Emancipation*, 105 La. 254; *In re Begue*, 107 La. 744. See also the title *INFANTS*, vol. 16, p. 262.

**Effect of Emancipation in State of Domicil.** — *Memphis Trust Co. v. Blessing*, 103 Tenn. 237.

**5. Termination of Guardianship of Feme Sole by Marriage.** — *Fowler v. McLaughlin*, 131 N. Car. 209.

*In Louisiana.* — *Marinovich's Succession*, 105

La. 106; *Jewell v. De Blanc*, 110 La. 810; *Carbajal's Succession*, 111 La. 944.

**46. 2. Marriage to Adult Terminates Guardianship.** — *Read v. Henderson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 78.

*In Louisiana* it would seem to depend upon the question whether the guardian's consent had been secured. *Guillebert v. Grenier*, 107 La. 614.

**48. 2. Jurisdiction of Statutory Court to Remove Guardian.** — *Estridge v. Estridge*, (Ky. 1903) 76 S. W. Rep. 1101.

**4. Must Be Definite Cause for Removal.** — *Lesko's Estate*, 10 Kuip (Pa.) 177; *Polasek v. Janecek*, 22 Tex. Civ. App. 411. See also *Fitz Allan v. Rieutord*, 5 Quebec Pr. 387.

**Change of Religion by Testamentary Guardian Cause for Removal.** — *F. v. F.*, (1902) 1 Ch. 688, 71 L. J. Ch. 415.

**5. Removal from Jurisdiction of Supervising Court.** — *Mahan v. Steele*, 109 Ky. 31.

**49. 2. Immorality of Character.** — The immorality of a father will not justify his removal unless the acts which are complained of are very generally known and discussed. *St. Pierre v. Tucker*, 18 Quebec Super. Ct. 451.

**5. Insanity or Other Incapacitating Illness.** — *Stansbrough's Tutorship*, 51 La. Ann. 1324.

**6. Insolvency.** — *St. Pierre v. Tucker*, 18 Quebec Super. Ct. 451.

**8. Hostility of Interests Between Guardian and Ward.** — *Voliva v. Moffitt*, 30 Ind. App. 225; *Mansfield's Estate*, 206 Pa. St. 64.

**12. Acts Held Not to Justify Removal.** — The decision of a guardian not to appeal from a judgment adverse to his wards is not sufficient ground for his removal, where his refusal to appeal was due to his conviction that such a proceeding would be unwise. *Kester v. Alexander*, 47 W. Va. 329.

When a guardian has once been appointed, he will not be removed at the request of another applicant no nearer in kinship, merely because the applicant lives in a city where the schools are better than in the country where the guardian resides. *Woodruff v. Snoover*, (N. J. 1900) 45 Atl. Rep. 980.

**50. 2. Neglect to Keep and File Accounts.** — *Mahan v. Steele*, 109 Ky. 31.

**50. V. POWERS AND DUTIES OF GUARDIAN**—1. As to Person—*a*. WHEN GUARDIANSHIP EXTENDS TO PERSON.—See note 6

**51.** *b*. RIGHT TO CUSTODY OF WARD.—See note 1.

**52.** *c*. RIGHT TO ALTER WARD'S DOMICIL.—See notes 3, 4.

**53.** *d*. RIGHT TO CONSENT TO MARRIAGE, ADOPTION, OR ENLISTMENT.—See note 1.

Right to Bind Out Ward as Apprentice.—See note 2.

**2. As to Estate**—*a*. GENERAL NATURE OF GUARDIAN'S INTEREST.—See note 3.

**54.** See notes 1, 2.

*b*. GUARDIAN'S RIGHT TO POSSESSION—(1) *In General*.—See note 3.

**55.** (2) *Right to Invest Funds*.—See note 2.

*c*. TO COLLECT AND SETTLE CHOSSES IN ACTION.—See note 4.

**56.** *d*. TO BRING AND DEFEND SUITS—(1) *To Bring Suits*.—See note 1.

*e*. TO SELL PERSONAL ESTATE.—See note 6.

**57.** See note 1.

*f*. TO SELL REAL ESTATE—(1) *Guardian Has No Inherent Power to Sell Real Estate*.—See note 2.

No Inherent Power to Make Contract of Sale.—See note 3.

**59.** (4) *Power by Order of Court*—(c) *Causes Justifying Sale*.—See note 1.

(d) *What Interest May Be Sold*.—See note 4.

**50. 6. Guardianship over Orphan.**—*Palin v. Voliva*, 158 Ind. 380.

**51. 1. Court Not to Be Influenced by Mere Whim of Infant.**—*Palin v. Voliva*, 158 Ind. 380.

**52. 3. Guardian Cannot Change Ward's Domicil from One State to Another.**—*Randall v. Wadsworth*, 130 Ala. 633; *Matter of Henning*, 128 Cal. 214, 79 Am. St. Rep. 43.

**4. Right of Testamentary Guardian to Change Ward's Domicil.**—*Matter of Kiernan*, (Surrogate Ct.) 38 Misc. (N. Y.) 394.

**53. 1. Marriage.**—In *Louisiana* the marriage of the ward without the consent of her guardian will prevent the ward from obtaining a decree of emancipation. *Guillebert v. Grenier*, 107 La. 614.

**2. Power to Apprentice Ward.**—See *Ide v. Brown*, 178 N. Y. 26.

**3. Special Trusts Not Included in Guardian's Control.**—*Hallinan v. Hearst*, 133 Cal. 645.

**54. 1. Naked Power Not Coupled with Interest.**—See *Judson v. Walker*, 155 Mo. 166.

**2. A Testamentary Guardian Is Entitled to Receive the Rents and Profits of Property unless the testator has otherwise provided.** *In re Helyar*, (1902) 1 Ch. 391, 71 L.J. Ch. 209, 85 L. T. N. S. 627, 50 W. R. 285.

**3. Guardian Entitled to Possession of Ward's Estate.**—*Norris v. Baumgardner*, 97 Md. 534; *Shippers' Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558.

**Right of Guardian to Funds Held by Court to Credit of Ward.**—*Re Harrison*, 18 Ont. Pr. 303, following *Re Smith*, 18 Ont. 327, and distinguishing *Huggins v. Law*, 14 Ont. App. 383, and *Hanrahan v. Hanrahan*, 19 Ont. 396.

**55. 2. Sending Ward's Funds Out of State.**—In *Kentucky* a guardian desiring to be released from his trust turned over to another the property of his ward, consisting of notes secured by a lien upon Tennessee lands. The successor

died insolvent and the original guardian was held liable on the ground that without authorization by the court he sent the ward's funds out of the state. *Selph v. Burton*, (Ky. 1902) 68 S. W. Rep. 407.

**4. Guardian's Right to Collect and Settle Choses in Action.**—*Mosebach v. Hess*, 16 Montg. Co. Rep. (Pa.) 16, 13 York Leg. Rec. (Pa.) 123.

**56. 1. Guardian's Right to Sue.**—*Williams v. Cleaveland*, 76 Conn. 426; *Elder v. Adams*, 180 Mass. 303; *Stewart v. Sims*, 112 Tenn. 296. See also *Supreme Council, etc., v. Nidelet*, 85 Mo. App. 283.

**Action on Predecessor's Bond.**—*Van Zandt v. Grant*, 175 N. Y. 150.

**6. Guardian May Sell Personal Property Without Order of Court.**—*Schmidt v. Shaver*, 196 Ill. 115, 89 Am. St. Rep. 250, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56; *Schmidt v. McBean*, 98 Ill. App. 421, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56.

**57. 1. Statutes.**—*Brown v. Fidelity, etc., Co.*, 98 Tex. 55.

**2. Special Grant of Power Essential to Authorize Sale of Real Estate.**—*Bush v. Coomer*, (Ky. 1902) 69 S. W. Rep. 793; *De Armit v. Milnor*, 20 Pa. Super. Ct. 369. See also *Morse v. Hinckley*, 124 Cal. 154.

**3. Guardian Cannot Contract to Sell Real Estate Unless Legally Authorized.**—*Le Roy v. Jacobosky*, 136 N. Car. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

**59. 1. Grounds on Which Sale May Be Ordered.**—*Williams v. Clarke*, 82 N. Y. App. Div. 199; *Ammons v. Ammons*, 50 W. Va. 390.

The ward's real estate can be sold only for the education and support of the ward or for reinvestment. *Leet v. Gratz*, 92 Mo. App. 422.

**4. Caution Will Be Exercised to Protect Ward's Interest.**—*Siler v. Archer*, (Ky. 1904) 82 S. W. Rep. 256.



- 60.** (e) Requisites of Valid Sale. — See note 3.  
**61.** See note 1.  
**62.** See notes 1, 2, 3, 4.  
**63.** (f) Sale Cannot Be Collaterally Attacked for Mere Irregularities of Procedure. — See note 4.  
**64.** (g) Obligations and Rights of Purchaser. — See notes 1, 2, 3, 4, 5, 6, 7.  
**65.** But a Bona Fide Purchaser from the Vendee. — See note 1.  
 The Purchaser May Refuse to Complete the Sale. — See note 2.  
**66.** (h) Ratification of Sale by Ward. — See note 1.

**60. 3. Sale by One Guardian Where Former Guardian Has Not Been Removed Is Void.** — St. Paul Sanitarium v. Crim, (Tex. Civ. App. 1905) 84 S. W. Rep. 1114.

**Ward Must Be Alive at Time of Sale.** — Matter of Livermore, 132 Cal. 99, 84 Am. St. Rep. 27.

**61. 1. Proper Sale Bond Requisite.** — Kreimendahl's Estate, 17 Pa. Super. Ct. 496; Kreimendahl v. Neuheuser, 8 Pa. Dist. 558, 30 Pittsb. Leg. J. N. S. (Pa.) 60.

**Bond Not Essential.** — Hughes v. Goodale, 26 Mont. 93, 91 Am. St. Rep. 410.

**62. 1. Oath.** — This oath is a prerequisite to a valid sale, and an oath by the attorney of the guardian will not be sufficient. Levara v. McNeny, (Neb. 1904) 98 N. W. Rep. 679.

**2. Order of Court Essential.** — But a sale of real estate is void although ordered by the court, where the court did not have jurisdiction over the land. Beezley v. Phillips, (C. C. A.) 117 Fed. Rep. 105.

**3. A Private Sale to Pay Debts** is absolutely void under the Louisiana statutes. Blair v. Dwyer, 110 La. 332.

**Fraud to Misrepresent Sale as Made for Cash.** — Compare Stroud v. Hawkins, 28 Tex. Civ. App. 321.

**Inadequacy of Price.** — Where, after land had been sold by the guardian by order of the court, another bidder offered a greater sum than had been received, it was held proper for the court to order a resale. McCallum v. Chicago Title, etc., Co., 203 Ill. 142.

**Waiver of Advertisement.** — Hieatt v. Schmidt, (Ky. 1905) 84 S. W. Rep. 740.

**4. Report and Confirmation of Sale.** — Morrow v. James, 69 Ark. 539; Kreimendahl v. Neuheuser, 8 Pa. Dist. 558, 30 Pittsb. Leg. J. N. S. (Pa.) 60; Kreimendahl's Estate, 17 Pa. Super. Ct. 496.

**Sale Lacking in Legal Requirement Validated by Confirmation.** — Lenow v. Arrington, 111 Tenn. 720.

**63. 4. Mere Irregularities of Procedure Not Ground for Collateral Attack — California.** — Asher v. Yorba, 125 Cal. 513.

*Illinois.* — Field v. Peeples, 180 Ill. 376.

*Missouri.* — Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483.

*Nebraska.* — Hyatt v. Anderson, (Neb. 1903) 96 N. W. Rep. 620.

*Texas.* — Greer v. Ford, 31 Tex. Civ. App. 389; Taffinder v. Merrell, 95 Tex. 95, 93 Am. St. Rep. 814.

**As to Fraud in Sale.** — See Frazier v. Jeakins, 64 Kan. 615.

**64. 1. How Far Maxim Caveat Emptor Applies.** — Cooper v. Burns, 133 Fed. Rep. 398;

Dormitzer v. German Sav., etc., Soc., 23 Wash. 132.

**Where a Guardian Was Appointed by a Court Without Jurisdiction** and by an order from that court sold his ward's interest in some land, the deed of the guardian was held void not only against the purchaser, but against his grantee. Connell v. Moore, (Kan. 1904) 78 Pac. Rep. 164.

**2. Ward Required to Do Equity.** — See Foreman v. Hinchcliffe, 106 La. 225; Taffinder v. Merrell, 95 Tex. 95, 93 Am. St. Rep. 814.

**3. Purchaser Not Bound to Inquire into Irregularities Not Appearing of Record.** — Weil v. Schwartz, 51 La. Ann. 1547.

A vendee's good faith is not impugned because of the fact or the probability that a careful examination of the conveyance records would have disclosed the nullity of the vendor's title. Blair v. Dwyer, 110 La. 332.

**4. Purchaser Need Not Inquire into Application of Purchase Money.** — Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290; Ammons v. Ammons, 50 W. Va. 390.

**5. Where Purchaser Has Actual Knowledge of Defects.** — Smith v. May, (Ky. 1902) 70 S. W. Rep. 199; Rocques v. Levecque, 110 La. 306.

**Grantor Attorney in Fact of Grantee.** — A purchaser is charged with all the knowledge of his grantor, when the grantor is the attorney in fact of the purchaser. La Dow v. North American Trust Co., 113 Fed. Rep. 13.

**6. Where Purchaser Guilty of Collusion.** — Parker v. Bowers, (Tex. Civ. App. 1904) 84 S. W. Rep. 380.

**7. Purchase Price Must Be Paid in Cash.** — A failure to pay the purchase price will render the vendee liable to the ward, although ten years have elapsed since the sale. Rocques v. Levecque, 110 La. 306.

**65. 1. Bona Fide Purchaser from Vendee.** — Blair v. Dwyer, 110 La. 332; Foreman v. Hinchcliffe, 106 La. 225.

**Innocent Assignee of Mortgage Given by Guardian.** — Hutchinson v. McCarron, 9 Ohio Cir. Dec. 593, 17 Ohio Cir. Ct. 500.

**2. When Purchaser May Refuse to Complete Sale.** — When a deed by a guardian to defendant, conveying a right of way over the ward's land, contained a provision reserving a right of way to the ward over the land conveyed, which reservation did not appear in the order of the court ordering such sale, it was held that the purchaser could not object, since he received substantially everything for which he contracted. Porter v. Kansas City, etc., Connecting R. Co., 103 Mo. App. 422.

**66. 1. A Void Sale** is not binding upon the ward even though he receive the consideration

**66.** (i) Sale to Guardian. — See notes 2, 3.

**68.** g. TO PURCHASE REAL ESTATE — In the United States. — See note 4.

h. TO LEASE REAL ESTATE. — See note 5.

**69.** See note 1.

j. TO MORTGAGE REAL ESTATE. — See notes 4, 5.

**70.** See note 1.

k. TO MAKE CONTRACTS. — See note 2.

**71.** See note 1.

**72.** l. TO RELEASE OR WAIVE WARD'S RIGHTS. — See notes 1, 3.

m. TO MAKE ELECTION FOR WARD. — See note 4.

n. TO ARBITRATE OR COMPROMISE DISPUTED CLAIMS. — See

note 6.

arising from the sale. *Hobbs v. Nashville, etc.*, R. Co., 122 Ala. 602, 82 Am. St. Rep. 103.

**66.** 2. Purchase by Guardian. — *Cooper v. Burns*, 133 Fed. Rep. 398; *Manion v. Conley*, (Ky. 1900) 69 S. W. Rep. 11; *Brown v. Fischer*, 77 Minn. 1; *Munsell v. Munsell*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 185.

A guardian cannot exercise the power of sale contained in a mortgage executed to the guardian by the ward, and purchase the mortgaged property at the sale, even though the power of sale was given before he became the guardian. *Horton v. Maine*, 22 R. I. 126.

**Sale to Guardian's Attorney Held Void.** — *Parker v. Bowers*, (Tex. Civ. App. 1904) 84 S. W. Rep. 380.

**Guardian in Socage with an Interest May Purchase.** — *Boyer v. East*, 161 N. Y. 580, 76 Am. St. Rep. 290.

**3. Sale Voidable Though There Was No Fraudulent Intent.** — *Goodell v. Goodell*, 173 Mass. 140.

**When Sale Not Set Aside.** — Although a sale by a guardian to his wife is suspicious, yet where it appears to the court that such a sale was an advantageous one to the ward, it will not be set aside, especially where the suit was instituted twenty-six years after the sale and long after the ward became of age. *Strauss v. Bendheim*, 162 N. Y. 469.

**68.** 4. Rule in United States. — *Ingram v. Heintz*, 112 La. 496; *Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527; *Matter of Bolton*, 159 N. Y. 129; *Scheib v. Thompson*, 23 Utah 564.

**In Alabama** the guardian may invest his ward's funds in real estate, taking title to the ward, but he is liable to the ward for loss sustained by failure or defect of title. *Scott v. Reeves*, 131 Ala. 612.

**5. Guardian's Power to Make Leases.** — *Jackson v. O'Rourke*, (Neb. 1904) 98 N. W. Rep. 1068.

**Guardian Cannot Lease Land for Development of Oil Deposits.** — *Haskell v. Sutton*, 53 W. Va. 206.

**69.** 1. The Death of a Natural Guardian terminates a lease of the ward's land. *Maxwell v. Urban*, 22 Tex. Civ. App. 565.

**4. Implied Authority.** — Although a court may order a sale of land, it has no implied power to order the guardian to mortgage the ward's property, and an order to that effect is void. *Davidson v. Wampler*, 20 Mont. 61.

**5. Extent of Power to Mortgage.** — In *Howard v. Bryan*, 133 Cal. 257, the guardian attempted to mortgage the interest of five minors to se-

cure a sum in excess of their aggregate indebtedness, and this it was held could not be done.

**70.** 1. Mortgage Cannot Be Collaterally Attacked. — *Chase v. Brown*, 22 Pa. Co. Ct. 598.

**2. Contracts by Guardian** — *California*. — *McKee v. Hunt*, 142 Cal. 526; *Morse v. Hinckley*, 124 Cal. 154.

*Indiana*. — *Hall v. Ferguson*, 24 Ind. App. 532. *Kentucky*. — *Moore v. Metz*, (Ky. 1903) 72 S. W. Rep. 294.

*Michigan*. — *Lothrop v. Duffield*, 134 Mich. 485.

*Montana*. — *Davidson v. Wampler*, 29 Mont. 67, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

*New Jersey*. — *Gallagher v. McBride*, 66 N. J. L. 360.

*New York*. — *Ide v. Brown*, 178 N. Y. 26, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70; *Murphy v. Holmes*, 87 N. Y. App. Div. 366.

*North Carolina*. — *Le Roy v. Jacobosky*, 136 N. Car. 443.

*North Dakota*. — *Shepard v. Hanson*, 9 N. Dak. 249.

*Utah*. — *Andrus v. Blazzard*, 23 Utah 246, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

**In Quebec** a tutor to minors has no power to create an obligation binding on such minors, by the mere acknowledgment of an indebtedness on their part made by him, nor the promise made by him on their part to pay the amount of such indebtedness. *Nash v. Jorjoine*, 15 Quebec Super. Ct. 70.

**71.** 1. *In re Mason*, (Neb. 1903) 94 N. W. Rep. 990; *McCoy v. Lane*, 66 Neb. 847.

**In North Carolina** a guardian who held stock for his ward in an insolvent bank authorized the trustees to borrow money to pay the liabilities, and this agreement was held binding upon the wards. *Hanover Nat. Bank v. Cocke*, 127 N. Car. 467.

**72.** 1. Guardian Cannot Bind Ward by Admissions Contrary to His Interest. — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 563, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71.

**Guardian Cannot Bind His Colleague by Admissions.** — *Davis v. Beall*, 21 Tex. Civ. App. 183.

**3. Cannot Ratify Unauthorized Disposition of Ward's Lands.** — *Hobbs v. Nashville, etc., R. Co.*, 122 Ala. 602, 82 Am. St. Rep. 103.

**4. Election of Remedies Prejudicial to Ward.** — *Mitchell v. Rice*, 132 Ala. 120.

**6. Guardian's Power to Compromise Claims.** —

**73.** See note 1.

**VI. RIGHTS AND DUTIES ARISING FROM RELATION OF GUARDIAN AND WARD — 1. Obligations of Guardian — a. TO WARD — (1) Generally — Measure of Care Required.** — See note 5.

**74.** See notes 1, 2, 3.

**75.** (2) *Is under Trust Obligations.* — See notes 3, 4, 5.

**76.** See note 1.

(3) *Estoppel to Deny His Appointment or His Acts Thereunder.* — See note 2.

**78. b. TO THIRD PERSONS — (3) For Necessaries Furnished to Ward.** — See notes 6, 7.

**79.** See note 1.

**80. 3. Remedies of Ward — a. WARD'S RIGHT OF ACTION AGAINST GUARDIAN — (2) Upon Termination of Guardianship.** — See note 2.

(3) *Incidents of Ward's Right of Action — (a) What Constitutes Conversion.* — See note 4.

**81. (b) Ward's Right of Election in Case of Conversion or Misuse of Funds.** — See notes 1, 2.

**82. (c) Statute of Limitations.** — See notes 1, 2.

— *Malpass v. Graves*, 111 Ga. 743. But see *Davis v. Beall*, 32 Tex. Civ. App. 406.

**Statute Requiring Approval of Court.** — *Davis v. Beall*, 21 Tex. Civ. App. 183; *Bunnell v. Bunnell*, 111 Ky. 566.

A guardian has no right to accept less than the face value of promissory notes, even when paid before maturity. *Browne v. Fidelity, etc., Co.*, 98 Tex. 55.

**73. 1. Compromise Must Be Bona Fide.** — *Berdon v. Milwaukee Mut. L. Ins. Co.*, 136 Mich. 396.

**5. Measure of Diligence and Care Required of Guardian — Alabama.** — *Scott v. Reeves*, 131 Ala. 612.

*Missouri.* — *Taylor v. Kellogg*, 103 Mo. App. 258; *Pearson v. Haydel*, 87 Mo. App. 495.

*New Jersey.* — *Kidder v. Houston*, (N. J. 1900) 47 Atl. Rep. 336.

*New York.* — *Matter of Nowak*, (Surrogate Ct.) 38 Misc. (N. Y.) 713; *Matter of Terry*, (Surrogate Ct.) 31 Misc. (N. Y.) 477; *Otto v. Van Riper*, 164 N. Y. 536, 79 Am. St. Rep. 673.

**74. 1. Guardian Must Manage Ward's Estate Himself.** — A guardian is not protected if he turns over the funds of the ward to a foreign guardian unless he has an order of the court directing him to do so. *Banning v. Gotshall*, 62 Ohio St. 210.

**2. Measure of Diligence Required in Collecting Assets.** — *Short v. Mathis*, 107 Ga. 807.

**3. Measure of Care Required in Making Investments.** — A guardian is not liable for money lost through the failure of a savings bank in which he had kept his ward's money for six months. *In re Grammel*, 120 Mich. 487.

**75. 3. Where the Guardian Is Life Tenant of an estate with the reversion in the wards, the guardian cannot give her consent on behalf of the wards to a sale of the property.** *Ream v. Wolks*, 61 Ohio St. 131.

**4. Matter of Terry, (Surrogate Ct.) 31 Misc. (N. Y.) 477.**

**Statute Allowing Ward to Engage in Business.** — *Ullmer v. Fitzgerald*, 106 Ga. 815.

**5. Guardian Must Account to Ward for Profits.** — *Rogers v. Dickey*, 117 Ga. 819.

**Commissions for Loaning Ward's Money.** — The guardian will not be compelled to account to the ward for commissions paid him for loaning the ward's money. *Townsend v. Stern*, (Iowa 1904) 99 N. W. Rep. 570.

**76. 1. Land Purchased Held in Trust for Ward.** — *Ingram v. Heintz*, 112 La. 496; *Kidder v. Houston*, (N. J. 1900) 47 Atl. Rep. 336.

**Husband of Guardian Cannot Purchase Ward's Real Estate.** — *Frazier v. Jeakins*, 10 Kan. App. 558, reversed 64 Kan. 615.

**2. Estoppel to Deny Appointment.** — *Griffin v. Collins*, 122 Ga. 102.

**78. 6. Guardian Not Personally Liable for Necessaries Furnished to Ward Without His Order.** — *Strubbe v. Kings County Trust Co.*, 60 N. Y. App. Div. 548, affirmed 169 N. Y. 603; *Pinnell v. Hinkle*, 54 W. Va. 119. See also *Leach v. Williams*, 30 Ind. App. 413.

**7. Liability of Guardian in His Fiduciary Capacity.** — *Murphy v. Holmes*, 87 N. Y. App. Div. 366; *Heery's Estate*, 10 Kulp (Pa.) 134.

**79. 1. Maintenance at Father's Request — Payment Out of Ward's Estate.** — *Fitzsimmons v. Fitzsimmons*, 81 Mo. App. 604.

**80. 2. Ward's Right of Action upon Termination of Guardianship.** — *State v. Stockwell*, 28 Ind. App. 530.

**4. Surrender of Note to Maker.** — Where a guardian delivers a note belonging to the estate of his ward to the maker, the presumption is that he has been paid and his sureties are liable for full value. *Lincoln Trust Co. v. Wolff*, 91 Mo. App. 133.

**81. 1. Ward's Right of Election.** — *Rogers v. Dickey*, 117 Ga. 819; *Manson v. Simplot*, 119 Iowa 94; *Matter of Terry*, (Surrogate Ct.) 31 Misc. (N. Y.) 477.

**2. Ward Cannot Assert Inconsistent Claim.** — *Manion v. Conley*, (Ky. 1900) 59 S. W. Rep. 11.

**82. 1. Statute of Limitations Begins to Run at Ward's Majority.** — *Indiana.* — *Wilkinson v. Wilkinson*, 33 Ind. App. 540.

*Minnesota.* — *Hanson v. Swenson*, 77 Minn. 70.

*New York.* — *Libby v. Van Derzee*, 80 N. Y. App. Div. 494, affirmed 176 N. Y. 591; *Matter of Lewis*, (Surrogate Ct.) 36 Misc. (N. Y.) 741.

**83. b. RIGHT OF FOLLOWING HIS PROPERTY INTO ESTATE OF GUARDIAN.** — See note 1.

**c. RIGHT TO RECLAIM HIS PROPERTY FROM THIRD PERSONS.** — See notes 3, 4.

**84.** See notes 1, 2.

**e. RATIFICATION OR LACHES BY WARD.** — See notes 7, 9.

**85. 4. Liabilities of Ward** — **a. TO GUARDIAN** — (2) *After Termination of Guardianship.* — See note 3.

**b. TO THIRD PARTIES** — **A Judgment Against the Guardian.** — See note 8.

**5. Contracts Between Guardian and Ward** — **a. DURING WARD'S MINORITY.** — See note 9.

**86. c. AFTER MAJORITY AND SETTLEMENT.** — See note 3.

**87. VII. ACCOUNTING BY GUARDIAN** — **1. To Whom Made** — **a. TO WARD** — (1) *Ward's Right to Settle Account.* — See note 3.

**88. (2) Suspicion Attaching Thereto.** — See note 1.

**(3) Confirmation by Long Acquiescence.** — See note 2.

**89. b. TO SUCCEEDING GUARDIAN.** — See notes 1, 2.

**90. c. TO COURT** — (1) *What Court Has Jurisdiction.* — See note 3.

**91. (3) Who May Ask for Accounting.** — See note 1.

*North Carolina.* — *Self v. Shugart*, 135 N. Car. 188, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 82.

*Texas.* — *Stroud v. Hawkins*, 28 Tex. Civ. App. 321.

**82. 2. Or at Termination of Guardianship from Other Cause.** — Thus the statute begins to run upon the marriage of a female ward to an adult husband. *Read v. Henderson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 78.

**83. 1. Funds Used for Paying Debt for or Lien on Guardian's Land.** — *Myers v. Myers*, 47 W. Va. 487.

**3. Collusion with Guardian.** — *Kidder v. Houston*, (N. J. 1900) 47 Atl. Rep. 336.

**4. Knowledge of Wrong.** — *La Dow v. North American Trust Co.*, 115 Fed. Rep. 443, *affirmed* (C. C. A.) 126 Fed. Rep. 119; *Montgomery v. Rauer*, 125 Cal. 227; *Smith v. May*, (Ky. 1902) 70 S. W. Rep. 199; *Cohnfeld v. Walser*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 128.

**84. 1. Knowledge of Facts Sufficient to Put Purchaser on Inquiry.** — *Moyers v. Kinnick*, 1 Tenn. Ch. App. 65.

**2. Facts Appearing on Face of Papers.** — *Frazier v. Jeakins*, 10 Kan. App. 558.

**7. Ratification by Ward.** — *Davis v. Richards*, (Ky. 1900) 58 S. W. Rep. 477; *Matter of Klunck*, (Surrogate Ct.) 33 Misc. (N. Y.) 267.

**9. Laches Equivalent to Ratification.** — *Boyer v. East*, 161 N. Y. 580, 76 Am. St. Rep. 290.

**85. 3. Ward's Liability for Necessaries.** — *Boulard's Estate*, 10 Pa. Dist. 235; *Myers v. Myers*, 47 W. Va. 487.

**8. Where Guardian Has Invested Money in Ward's Land.** — Although a guardian in socage has invested some of his own money as well as some of his ward's in repairing real property, a judgment creditor for necessities furnished will not be permitted to come against the real property of the ward. *Hickey v. Dixon*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 4.

**9. Ratification.** — *Ullmer v. Fitzgerald*, 106 Ga. 815.

**86. 3. Contracts Between Guardian and Ward After Majority and Settlement.** — *Van Rees v.*

*Witzenburg*, 112 Iowa 30; *Williams v. Davison*, 133 Mich. 346, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86; *Matter of Strickland*, 1 Ohio Dec. 702, 7 Ohio N. P. 233.

**87. 3. Settlement After Ward's Marriage.** — Where, after the ward marries, the guardian makes a settlement, a waiver signed by the ward and her husband is binding. *Brown v. Adkinson*, (Ky. 1900) 58 S. W. Rep. 524.

**88. 1. What Essential to Valid Settlement Between Guardian and Ward.** — *Short v. Mathis*, 107 Ga. 807; *Witt v. Day*, 112 Iowa 110; *Van Rees v. Witzenburg*, 112 Iowa 30; *Norris v. Norris*, 85 N. Y. App. Div. 113.

**A Receipt Signed by the Ward Before Her Majority** releasing her guardian is void. *Griffin v. Collins*, 122 Ga. 102.

**2. Long Acquiescence Treated as Confirmation of Settlement.** — *Ralston's Estate*, 8 Pa. Dist. 328, 23 Pa. Co. Ct. 44, 15 Montg. Co. Rep. (Pa.) 209. See also *Holscher v. Gehrig*, (Iowa 1903) 94 N. W. Rep. 486.

**Length of Delay Essential to Ratification.** — Sixteen years, in *Hanson v. Swenson*, 77 Minn. 70.

**When Delay Is No Ratification.** — *Willis v. Rice*, 141 Ala. 168; *Short v. Mathis*, 107 Ga. 807.

**89. 1. Where the Predecessor Is Dead.** — *Van Zandt v. Grant*, 175 N. Y. 150.

**2. How Account Should Be Adjusted.** — *Begue's Succession*, 112 La. 1046.

**90. 3. Dawkins v. Hough, 112 Ky. 855.**

**Guardian to Account in County of His Domicil.** — *Rively's Estate*, 7 Del. Co. Rep. (Pa.) 522.

**91. 1. The Successor of a Guardian**, who has been removed, may ask for an accounting. *Wilson's Guardianship*, 40 Oregon 356.

After the death of a guardian, his successor may demand an accounting from the administrator of the decedent. *Van Zandt v. Grant*, 67 N. Y. App. Div. 70, *affirmed* 175 N. Y. 150.

**The Sureties on the Guardian's Bond** may, it seems, apply for a settlement of the guardian's account. *Wilson's Guardianship*, 40 Oregon 356, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 90.

**91.** (4) *Defenses to Demand for Account* — (a) *Statute of Limitations*. — See note 2.

**2. Principles on Which Accounting Is Had** — *a. CHARGES AGAINST GUARDIAN* — (1) *All Property Received*. — See note 4.

**92.** (2) *Property Which He Ought to Have Received* — (a) *Sums Lost by His Neglect*. — See note 1.

**93.** See note 1.

(b) *Sums Due from Himself*. — See note 2.

**95.** (3) *Profits on Funds Used by Guardian*. — See notes 1, 3.

(4) *Interest on Funds*. — See note 4.

**96.** See note 1.

*Compound Interest*. — See note 6.

**97.** See notes 1, 4.

**91.** 2. *New York Rule*. — *Matter of Lewis*, (Surrogate Ct.) 36 Misc. (N. Y.) 741.

**4. Guardian Must Account for All Property Received**. — *Matter of Dow*, 133 Cal. 446; *Matter of Gray*, 120 Iowa 144; *Jennings v. Parr*, 62 S. Car. 306. See also *Keeney v. Henning*, 58 N. J. Eq. 74.

Where a Guardian Advances Money to the ward without knowledge of the purpose for which it is to be used, he will be liable on his account, although given credit by the ward in a settlement out of court, *In re Holscher*, (Iowa 1904) 101 N. W. Rep. 759.

**Order to Pay Out Money Obtained by Fraud**. — A guardian will be charged with money paid out by order of court, where the order was obtained through his own fraudulent acts. *Matter of Carter*, 120 Iowa 215.

**Note Taken in Lieu of Other Assets**. — If a guardian takes a note as a valid interest-bearing debt, in lieu of other assets to which his wards would have been entitled, he must account for the note with legal interest in his settlement, and will not then be allowed to say that it was not a valid collectible debt. *Hedges v. Hedges*, (Ky. 1903) 73 S. W. Rep. 1112.

**Liability for Money Received from an Award**. — *Matter of Camp*, 18 N. Y. App. Div. 110, affirmed 161 N. Y. 651.

**92.** 1. *Guardian Charged with Funds Which He Negligently Fails to Collect*. — *Taylor v. Kellogg*, 103 Mo. App. 258; *Waile's Estate*, 14 York Leg. Rec. (Pa.) 51; *Hutson v. Jenson*, 110 Wis. 26.

**Property Which Guardian Not Entitled to Receive as Such**. — *Howard v. Pope*, 109 Ga. 250.

**Neglect to Collect Insurance**. — *Husting's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 29.

**Failure to Foreclose Mortgage**. — *Matter of Schandonney*, 133 Cal. 387.

Where the Guardian Neglected to Collect Part of a good claim, he was held personally liable for the difference. *Emonot's Succession*, 109 La. 359.

**Allowing Another to Use Ward's Property**. — *Short v. Mathis*, 107 Ga. 807.

**Loss by Selling at Private Sale**. — *Matter of Nowak*, (Surrogate Ct.) 38 Misc. (N. Y.) 713.

**93.** 1. *Loss from Failure Properly to Invest Funds or Rent Real Estate*. — *Pearson v. Haydell*, 87 Mo. App. 495.

**Guardian's Duty to Invest Funds**. — *Matter of Pruyn*, 68 N. Y. App. Div. 584.

**2. Guardian's Liability for Sums Due from Himself**. — *Hutson v. Jenson*, 110 Wis. 26.

**95.** 1. *Guardian's Liability for Using Ward's Property*. — *Hedges v. Hedges*, (Ky. 1903) 73 S. W. Rep. 1112.

**Guardian to Pay Rental for Using Ward's Land**. — *Sutton v. Sutton*, (Tenn. Ch. 1900) 58 S. W. Rep. 891.

3. *Matter of Hamilton*, 139 Cal. 671.

**4. On What Funds Guardian Will Be Charged with Interest** — *Georgia*. — *Jones v. Nolan*, 120 Ga. 588.

*Hawaii*. — *Matter of Hoare*, 14 Hawaii 443, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 95.

*Louisiana*. — *Watson's Tutorship*, 51 La. Ann. 1641.

*New York*. — *Matter of Pruyn*, 68 N. Y. App. Div. 584.

*Pennsylvania*. — *Scott's Estate*, 24 Pa. Co. Ct. 295, 9 Pa. Dist. 416. See also *In re Hoshour*, 11 York Leg. Rec. (Pa.) 159.

*Utah*. — *Scheib v. Thompson*, 23 Utah 564.

**Guardian Charged with Interest upon Notes**. — Where the guardian received notes from the estate of the ward's intestate, the notes bearing interest at eight per cent., the guardian will be charged with this interest. *Hedges v. Hedges*, (Ky. 1903) 73 S. W. Rep. 1112.

**96.** 1. *When Less than Legal Rate Charged*. — Where a guardian received money on deposit in a savings bank which earned four per cent., and the amount was very small, she was charged only four per cent on the money not expended, it appearing that she had exercised her best judgment. *Matter of Klunck*, (Surrogate Ct.) 33 Misc. (N. Y.) 267.

**Where No Evidence Is Given as to What Is the Prevailing Rate of Interest**, in the locality in which the guardian lives, on mortgage investments, it has been held that six per cent. per annum is the most the guardian is chargeable with, unless it is shown that he has received a higher rate. *Murdy v. Burr*, 2 Ont. L. Rep. 310.

**6. Compound Interest Charged**. — *Matter of Pruyn*, 68 N. Y. App. Div. 584.

**97.** 1. *Simple Interest Only Charged*. — *McGeary v. McGeary*, 181 Mass. 539.

**4. Interest Compounded for Wilful or Extreme Disregard of Duty**. — *Matter of Dow*, 133 Cal. 446; *Blakeney v. Wyland*, 115 Iowa 607; *Scheib v. Thompson*, 23 Utah 664.

**One Who Has Used His Ward's Money for His**

**97.** Interest Compounded to Termination of Trust. — See note 5.

(5) *Value of Ward's Labor.* — See note 7.

**98.** *b.* CREDITS ALLOWED TO GUARDIAN — (1) *Expenses of Administering Trust* — (a) In General. — See notes 2, 3.

(b) Expenses of Litigation and Counsel Fees. — See notes 4, 5.

**99.** See notes 1, 2.

(2) *Support and Education of Ward* — (a) In General. — See note 3.

**100.** (b) Limitation to Income. — See note 1.

**101.** See notes 1, 2.

**Own Purposes.** — *Matter of Hamilton*, 139 Cal. 671.

**97.** 5. *Stewart v. Sims*, 112 Tenn. 296; *Windon v. Stewart*, 48 W. Va. 488.

**7.** *Ward's Labor Considered in Fixing Allowance for Board.* — *Scott's Estate*, 24 Pa. Co. Ct. 295, 9 Pa. Dist. 416.

**98.** 2. *Trust Company Acting as Guardian.* — The general rule is that guardians must perform within reasonable limits the actual manual labor requisite to the administration of the trust, and where the ward's property is near the office of the trust company, no credit will be allowed for the collection of rents. *Matter of Binghamton Trust Co.*, 87 N. Y. App. Div. 26.

*Expenses in Managing Farm.* — The guardian will be allowed for money paid to a steward who was in charge of a large farm belonging to the ward. *State v. Elliott*, 82 Mo. App. 458.

**3.** *Payments for Joint Benefit of Guardian and Ward.* — When guardian and ward own land in common the guardian will be credited with half the cost of a barn erected upon the land. *Sutton v. Sutton*, (Tenn. Ch. 1900) 58 S. W. Rep. 891.

*Not Allowed for Services of Auditor Necessitated by Guardian's Carelessness in Keeping His Accounts.* — *In re Hoshour*, 11 York Leg. Rec. (Pa.) 159; *Miller's Estate*, 24 Pa. Super. Ct. 32.

**4.** *Expenses of Litigation.* — *Matter of Tolifaro*, 113 Iowa 747; *Scheib v. Thompson*, 23 Utah 564.

*Suit by Guardian to Be Relieved of Trust.* — A guardian will not be allowed the expenses of a suit brought by him to be relieved of his trust before the ward becomes of age. *Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527.

*Expense of Habeas Corpus to Obtain Custody of Ward.* — *Matter of Pruyne*, 68 N. Y. App. Div. 584.

Where a mother brings habeas corpus proceedings to secure the custody of the infant upon the sole ground that she is his mother, she will not be allowed her expenditures in the proceeding. *Matter of Grant*, 56 N. Y. App. Div. 176, affirmed 166 N. Y. 640.

**5.** *Counsel Fees Incident to Litigation.* — *Matter of Tolifaro*, 113 Iowa 747; *Billington v. Sims*, 52 La. Ann. 2083; *Scheib v. Thompson*, 23 Utah 564.

**99.** 1. *Fees Must Have Been Paid.* — But it has been held that the guardian may charge the fees without having actually paid them, where it appears that he, *bona fide*, intends to pay over to the attorney the entire sum allowed by the court. *In re Mason*, (Neb. 1903) 94 N. W. Rep. 990.

*Assistance of Counsel in Preparing Accounts.* —

*Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527.

*Counsel Fees on Settlement.* — No credit will be allowed a guardian for fees paid an attorney for his assistance in the settlement of the estate, where it has been shown that the guardian converted a part of his ward's estate. *Berkshire v. Hoover*, 92 Mo. App. 349.

**2.** *Expenses of Defending Guardian's Accounts.* — *State v. Elliott*, 82 Mo. App. 458; *Clopton v. Simonds*, (Mo. App. 1903) 77 S. W. Rep. 467; *Nagle v. Robins*, 9 Wyo. 211.

*Costs of Appeal by Tutor.* — When the accounts of a tutor are attacked, the costs of the litigation will be laid on the ward's estate, but if the tutor appeals from the decision he will be liable for the costs on appeal personally. *Watson's Tutorship*, 51 La. Ann. 1641.

**3.** *Allowance for Support and Education of Ward.* — *In re Hoga*, 134 Mich. 361; *Wing v. Hibbert*, 11 Ohio Cir. Dec. 190, 20 Ohio Cir. Ct. 404; *Wilson's Guardianship*, 40 Oregon 353; *Scott's Estate*, 24 Pa. Co. Ct. 295, 9 Pa. Dist. 416; *Boulard's Estate*, 10 Pa. Dist. 235.

**100.** 1. *Expenditures in Excess of Income Not Allowed Unless Ordered by Court* — *Iowa*. — *Ellis v. Soper*, 111 Iowa 631.

*Kentucky.* — *Griffith v. Bybee*, (Ky. 1902) 69 S. W. Rep. 767; *Hedges v. Hedges*, (Ky. 1903) 73 S. W. Rep. 1112.

*Louisiana.* — See *Watson's Tutorship*, 51 La. Ann. 1641.

*Missouri.* — *Buie v. White*, 94 Mo. App. 367.

*New Jersey.* — *Matter of Barry*, 61 N. J. Eq. 135.

*New York.* — *Williams v. Clarke*, 82 N. Y. App. Div. 199.

*North Carolina.* — *Duffy v. Williams*, 133 N. Car. 195.

*Oregon.* — *Wilson's Guardianship*, 40 Oregon 357, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.

*Pennsylvania.* — *Lewis's Estate*, 9 Kulp (Pa.) 397, 13 York Leg. Rec. (Pa.) 24.

*Texas.* — *Freedman v. Vallie*, (Tex. Civ. App. 1903) 75 S. W. Rep. 322; *De Cordova v. Rogers*, 97 Tex. 60; *De Cordova v. Rodgers*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1042; *Wheeler v. Duke*, 29 Tex. Civ. App. 20.

**101.** 1. *In re Hoga*, 134 Mich. 361.

In *North Carolina* the expenditure of the principal for the support and education of the wards will be approved where the income was not sufficient. *Duffy v. Williams*, 133 N. Car. 195.

*When the Ward's Life Is in Danger*, the guardian may contract for the services of a physician, though it be necessary to expend the principal of the estate in satisfaction of the

- 102.** (c) *When Father Is Guardian* — *aa.* GENERAL RULE. — See note 1.  
*bb.* EXCEPTIONS TO RULE. — See note 3.
- 103.** (d) *Allowance of Support to Mother.* — See note 2.
- 104.** (e) *To Other Persons in Loco Parentis.* — See note 2.
- 105.** (f) *Items of Support Allowed.* — See notes 2, 5.
- 106.** (3) *Repairs, Taxes, and Insurance.* — See note 2.  
 (4) *Improvements.* — See note 3.
- 107.** (5) *Losses Not Attributable to Guardian's Negligence* — (b) *Applications of Rule* — *aa.* LOANS WITHOUT SUFFICIENT SECURITY. — See note 3.  
*cc.* INVESTMENTS WITHOUT ORDER OF COURT. — See note 2.  
*dd.* INVESTMENTS OUTSIDE OF JURISDICTION. — See note 4.
- 109.** (6) *Compensation for Services.* — See notes 5, 6.
- 110.** See notes 1, 2, 3.

physician's fee. *Williams v. Bonner*, 79 Miss. 664.

**101. 2.** *Matter of Hayden*, 146 Cal. 73; *v. Embry*, (Ky. 1903) 76 S. W. Rep. 1086.

**102. 1.** *Father Not Ordinarily Allowed for Support and Education.* — *Matter of Ceas*, 134 Cal. 114; *Hedges v. Hedges*, (Ky. 1903) 73 S. W. Rep. 1112; *Harper v. Payne*, (Ky. 1903) 73 S. W. Rep. 1123; *Matter of Wilher*, (Surrogate Ct.) 27 Misc. (N. Y.) 53; *Allen v. Stovall*, 94 Tex. 618.

**3.** *Where Allowance Will Be Made to Father.* — *Hedges v. Hedges*, (Ky. 1902) 67 S. W. Rep. 835; *Harper v. Payne*, (Ky. 1903) 73 S. W. Rep. 1123; *McGeary v. McGeary*, 181 Mass. 539.

**103. 2.** *Mother Allowed for Board and Education.* — *Matter of Carter*, 120 Iowa 215; *Matter of Klunck*, (Surrogate Ct.) 33 Misc. (N. Y.) 267. And see *Matter of Barry*, 61 N. J. Eq. 135.

**No Allowance unless Claimed by Mother.** — *Hutson v. Jensen*, 110 Wis. 26.

**When Not Allowed.** — Where the mother by habeas corpus proceedings took the child away from its grandmother and took it to live with her and her second husband, no allowance will be made her for the support and maintenance of the child, where she did not make any arrangements with the infant's stepfather. *Matter of Grant*, 56 N. Y. App. Div. 176, *affirmed* 166 N. Y. 540.

**Where Mother Receives Daughter's Earnings.** — A mother who is guardian cannot receive the money earned by her daughter and also charge her for board and clothing. *Keeney v. Henning*, 58 N. J. Eq. 74.

**Where the Mother Has a Considerable Income,** she will not be allowed to use the principal belonging to the infants. *Ellis v. Soper*, 111 Iowa 631.

**Not Allowed for Confirmation Outfit and Wedding.** — *Keeney v. Henning*, 64 N. J. Eq. 65.

**104. 2.** *Where the Ward Paid Her Own Expenses,* including rent and the expenses of the table, the guardian will not be given an allowance. *Scott's Estate*, 24 Pa. Co. Ct. 295, 9 Pa. Dist. 416.

**105. 2.** *Velvet Carpet, Rugs, and Portieres.* — Where the ward buys velvet carpets, rugs, and portieres, against the guardian's wishes, and orders him to pay for them, he will be credited with the expenditures, where it appears that the

ward constantly used the articles. *Hedges v. Hedges*, (Ky. 1902) 67 S. W. Rep. 835.

**5.** *Purchase or Hiring of Horse.* — *Griffith v. Bybee*, (Ky. 1902) 69 S. W. Rep. 767.

**106. 2.** *Allowance to Guardian for Repairs, Taxes, and Insurance.* — *Billington v. Sims*, 52 La. Ann. 2083; *State v. Elliott*, 82 Mo. App. 458; *Buie v. White*, 94 Mo. App. 367; *Burgert v. Caroline*, 31 Wash. 62, 96 Am. St. Rep. 889.

**Taxes Illegally Assessed.** — *Matter of Pruyne*, 68 N. Y. App. Div. 584.

**3.** *Nagle v. Robins*, 9 Wyo. 211.

**107. 3.** *Guardian Liable for Losses Arising from Loans Without Security.* — *Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527.

**Not Liable if Guardian Secured Order from Court.** — *Matter of Schandoney*, 133 Cal. 387.

**108. 2.** *Investments Without Order of Court.* — *Rogers v. Dickey*, 117 Ga. 819; *Easton v. Somerville*, 111 Iowa 164, 82 Am. St. Rep. 502. See also *Nagle v. Robins*, 9 Wyo. 211.

**Where No Loss Results.** — But a guardian is not liable for making an unauthorized loan where no loss results. *Townsend v. Stern*, (Iowa 1904) 99 N. W. Rep. 570.

**4.** *Investment Out of Jurisdiction.* — *Selph v. Burton*, (Ky. 1902) 68 S. W. Rep. 407; *Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527.

**109. 5.** *If Interest Is Compounded Against Guardian.* — See *Matter of Decker*, (Surrogate Ct.) 37 Misc. (N. Y.) 527.

**Father Entitled to Commissions.** — *Hedges v. Hedges*, (Ky. 1902) 67 S. W. Rep. 835.

**6.** *Statutory Provisions Construed* — *Commissions on Receipts and Disbursements.* — *Harkleroad v. Maxwell*, 77 Miss. 117.

**Allowance for Services Usually Confined to Statutory Commission.** — *Maxwell v. Harkleroad*, 77 Miss. 456.

**110. 1.** *Amount of Compensation Discretionary with Court* — *Guiding Considerations.* — *In re Hoga*, 134 Mich. 361; *Maxwell v. Harkleroad*, 77 Miss. 456; *In re Steele*, 97 Mo. 9.

**Compensation Fixed by Will Not Allowed if No Services Were Rendered by Guardians.** — *Matter of Brigg*, 39 N. Y. App. Div. 485, *affirmed* in 165 N. Y. 673.

**2.** *Commissions Disallowed Where Guardian Fails to Render Account.* — *Peterson v. Erwin*, 28 Ind. App. 330; *Kashner's Estate*, 15 Pa. Super. Ct. 70; *Kester v. Hill*, 46 W. Va. 744.

**3.** *Guardian Guilty of Gross Violation of Duty Not Allowed Commissions.* — *State v. Stockwell*, 28 Ind. App. 530; *Matter of Nowak*, (Surro-

**111.** (7) *Interest on Credits.* — See note 2.

**112.** 3. *Accounting in Case of Guardian's Death or Disability.* — See note 10.

**113.** 5. *Payment of Balance.* — See note 5.

**114.** If the Guardian Gives His Note, or in Any Other Way Postpones the Actual Payment of the Balance. — See note 1.

6. *Effect of Account as Res Judicata* — *a.* AS TO ANNUAL ACCOUNTS. — See note 4.

**115.** *b.* AS TO FINAL ACCOUNT. — See note 2.

**116.** 7. *Opening Account.* — See note 3.

**117.** VIII. *GUARDIAN'S BONDS* — 1. *Their Construction and Effect* — *b.* WHAT CONSTITUTES BREACH. — See note 2.

*c.* WHAT FUNDS ARE COVERED BY BOND. — See notes 3, 5.

**118.** *d.* ADDITIONAL AND SUBSTITUTED BONDS. — See notes 2, 4.

gate Ct.) 38 Misc. (N. Y.) 713; *Scott's Estate*, 24 Pa. Co. Ct. 295, 9 Pa. Dist. 416; *Scheib v. Thompson*, 23 Utah 364.

**Where Guardian Uses Ward's Money in His Own Business.** — Although the guardian used his ward's money in his own business, contrary to the statute, yet if he has always rendered exact annual reports and charged himself interest, he will be allowed his commission upon the money which passed through his hands. *Fisher v. Brown*, 135 N. Car. 198.

**Carelessness of Guardian in Keeping Accounts.** — *In re Hoshour*, 11 York Leg. Rec. (Pa.) 159.

**Where the Guardian Manages the Estate for His Own Profit** he will not be allowed any compensation for services. *Robards v. Bryan*, 105 Mo. App. 249.

**111.** 2. *Griffith v. Bybee*, (Ky. 1902) 69 S. W. Rep. 767.

**112.** 10. *Accounting Generally Covers Only Transactions During Ward's Minority.* — *Van Zandt v. Grant*, 67 N. Y. App. Div. 70, affirmed 175 N. Y. 150.

**Power of Court over Guardian's Executor** — *New York*. — *Matter of Lewis* (Surrogate's Ct.) 36 Misc. (N. Y.) 741.

**The Administrator of a Deceased Guardian May Settle with the Succeeding Guardian**, and this settlement will be final and cannot be reopened by the ward when he reaches his majority. *Begue's Succession*, 112 La. 1046.

**113.** 5. *Where There Is a Suit Against the Guardian for a debt of the ward's ancestor*, the guardian cannot be compelled to turn over to the ward the assets without being given security to cover the action pending against him. *Points v. Frank*, (Ky. 1901) 64 S. W. Rep. 637.

**114.** 1. *Berkshire v. Hoover*, 92 Mo. App. 349.

**4. Settlement on Annual Accounts Not Res Judicata.** — See *State v. Greer*, 101 Mo. App. 669.

**In New York** after an accounting has been had, and the decree entered, the sureties cannot ask to have the court retry the issues, for the decree is binding and cannot be attacked collaterally. *Eberle v. Bryant*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 814, affirmed (Supm. Ct. App. T.) 32 Misc. (N. Y.) 195.

**115.** 2. *Settlement on Final Account* — *California*. — *Matter of Wells*, 140 Cal. 349.

*Kentucky*. — *Blake v. Wolfe*, 105 Ky. 380.

*Michigan*. — *Rice v. Wilson*, 129 Mich. 520.

*Minnesota*. — *Cross v. White*, 80 Minn. 413.

*New York*. — *Norris v. Norris*, 85 N. Y. App.

Div. 113. See also *Matter of Turner*, 79 N. Y. App. Div. 495.

*Pennsylvania*. — *Hortz's Estate*, 26 Pa. Super. Ct. 489.

*Texas*. — *Fahey v. Boulma*, 24 Tex. Civ. App. 279; *De Berry v. Wootters*, (Tex. Civ. App. 1900) 57 S. W. Rep. 885; *Hornung v. Schramm*, 22 Tex. Civ. App. 327.

*Vermont*. — *Scoville v. Brock*, 75 Vt. 248, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115.

**116.** 3. *Account Will Not Be Opened unless It Is Erroneous and Inequitable.* — *Plum's Estate*, 16 Lanc. L. Rev. 268.

**117.** 2. *Obligations of Bond.* — *State v. Berger*, 92 Mo. App. 631; *Ordinary v. Wolfson*, 65 N. J. L. 418.

**3. Funds Covered by Bond.** — *Jennings v. Parr*, 62 S. Car. 306; *Brehm v. U. S. Fidelity, etc., Co.*, 124 Wis. 339.

**Illegal Possession and Disposition of Ward's Estate by Guardian Before Appointment.** — *Fardette v. U. S. Fidelity, etc., Co.*, 86 N. Y. App. Div. 50; *Loflin v. Cobb*, 126 N. Car. 58.

**Money Received Without Legal Authority.** — But sureties are liable for funds which guardian received as the result of a compromise in a legal action. *Allen v. Stovall*, 94 Tex. 618.

**Sureties Not Liable for Defalcations of Guardian Before Execution of Bond.** — *Howe v. White*, 162 Ind. 74.

A surety will not be held liable for interest upon funds that guardian neglected to invest previous to the execution of the bond. *Freedman v. Vallie*, (Tex. Civ. App. 1903) 75 S. W. Rep. 322.

**Not Liable for Acts After Discharge of Sureties.** — *Johnson v. Jones*, (Ky. 1902) 68 S. W. Rep. 14.

**5. General Bond Not Liable for Proceeds of Sale of Real Estate.** — *Allen v. Kelly*, 55 N. Y. App. Div. 454; *Allen v. Fahy*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 377, reversed 55 N. Y. App. Div. 454; *Com. v. American Bonding, etc., Co.*, 16 Pa. Super. Ct. 570; *Kester v. Hill*, 46 W. Va. 744.

But in some jurisdictions the general bond is held to secure the proceeds of real estate in the guardian's hands. *Mahan v. Steele*, 109 Ky. 31.

**118.** 2. *Additional Bond Does Not Relieve Former Bond.* — *Middleton v. Hensley*, (Ky. 1899) 52 S. W. Rep. 974; *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528.



119. See note 3.

120. 2. Suit upon Guardian's Bond — *b*. SETTLEMENT OF ACCOUNT MUST PRECEDE SUIT. — See notes 5, 6.

121. See note 1.

*c*. SURETIES MAY BE SUED WITHOUT PRIOR SUIT AND JUDGMENT AGAINST GUARDIAN. — See note 2.

122. *f*. DEFENSES — (1) *Statute of Limitations*. — See notes 1, 2.

(2) *Waiver or Laches*. — See note 4.

123. IX. GUARDIAN DE SON TORT. — See note 2.

118. 4. *Johnson v. Jones*, (Ky. 1902) 68 S. W. Rep. 14.

119. 3. *Lincoln Trust Co. v. Wolff*, 91 Mo. App. 133.

120. 5. Suit Cannot Be Maintained until Account Is Settled. — *Zurfluh v. Smith*, 135 Cal. 644; *Wegner v. Wiltsie*, 23 Ohio Cir. Ct. 302; *Fidelity, etc., Co. v. Schelper*, (Tex. Civ. App. 1904) 83 S. W. Rep. 871; *Pinnell v. Hinkle*, 54 W. Va. 119.

6. Where Guardian Died Hopelessly Insolvent. — Where it appears that an accounting is impossible or impracticable, as where the guardian dies intestate in a foreign state leaving no property in either state, a suit in equity to establish the extent of his liability and charge the sureties is proper. *Otto v. Van Riper*, 164 N. Y. 536, 79 Am. St. Rep. 673.

Where Guardian Has Become Insane. — *McDonald v. People*, 29 Colo. 503.

Where the Guardian Has Absconded from the state and the plaintiff is unable to find him or serve him with process the general rule that an action may not be brought against the sureties until there has been an accounting does not apply. *Kurz v. Hess*, 86 N. Y. App. Div. 529.

121. 1. Suit May Be Brought Without Precedent Settlement of Account. — An order of the County Court directing the guardian to pay a certain sum is conclusive against the sureties. *Woodard v. Bird*, 105 Tenn. 671.

2. See *Van Zandt v. Grant*, 67 N. Y. App. Div. 70, affirmed 175 N. Y. 150. But compare *Long v. Copeland*, 182 Mass. 332.

Where a Guardian Dies Insolvent, the ward, upon reaching his majority, may bring an action against the guardian's sureties, without first exhausting the guardian's estate. *Brannon v. Wright*, 113 Tenn. 692.

No Execution Against Guardian's Property Required. — *Allen v. Kelly*, 55 N. Y. App. Div. 454.

122. 1. *Alabama*. — *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39.

*Kentucky*. — *Bybee v. Poynter*, (Ky. 1903) 77 S. W. Rep. 698.

*Nebraska*. — *Goble v. Simeral*, 67 Neb. 276.

*New York*. — See *Matter of Ransier*, (Surrogate Ct.) 26 Misc. (N. Y.) 582.

*North Carolina*. — *Self v. Shugart*, 135 N. Car. 188, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121; *Fowler v. McLaughlin*, 131 N. Car. 209.

*Texas*. — *Freedman v. Vallie*, (Tex. Civ. App. 1903) 75 S. W. Rep. 322.

2. *Self v. Shugart*, 135 N. Car. 188.

From Discharge of Guardian. — *Allen v. Stovall*, 94 Tex. 618.

4. Giving Guardian More Time to File Account Does Not Release Sureties. — *Dufour v. Dufour*, (Ky. 1899) 54 S. W. Rep. 176.

123. 2. Guardian de Son Tort. — *Kester v. Hill*, 46 W. Va. 744.

## HABEAS CORPUS.

By M. G. BEAMAN.

128. II. HISTORY OF WRIT — 1. In England — *a*. HISTORY OF HABEAS CORPUS AT COMMON LAW. — See note 3.

129. *b*. HISTORY OF HABEAS CORPUS UNDER ENGLISH STATUTES. — See note 5.

131. 2. In the United States — *b*. HABEAS CORPUS IN THE STATES. — See note 3.

132. III. SEVERAL KINDS OF HABEAS CORPUS ENUMERATED. — See note 1.

128. 3. Early History of Writ. — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 128, 129.

129. 5. Writ Not Granted During Vacation. — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

131. 3. Statutes Relating to Habeas Corpus in United States. — See *People v. Wells*, 57 N.

Y. App. Div. 140, wherein *Jenks, J.*, reviews the history of such legislation in New York.

Statute 31 Car. II. Adopted as Part of Law of Georgia. — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305.

132. 1. Several Kinds of Habeas Corpus Enumerated. — *Com. v. Ross*, 28 Pa. Co. Ct. 276, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 131.

**133. IV. JURISDICTION — 1. In England — c. PLACES TO WHICH WRIT RUNS.** — See note 3.

**134. 3. In the United States — a. FEDERAL COURTS — (1) Source of Federal Jurisdiction.** — See note 1.

**135. (2) Extent of Federal Jurisdiction in General.** — See note 5.

**137. (3) Limitation of Federal Jurisdiction — (b) Present Rule — bb. CUSTODY FOR ACTS DONE OR OMITTED BY FEDERAL AUTHORITY.** — See note 3.

**138. The Arrest of United States Marshals by State Authority.** — See note 1.

**cc. CUSTODY IN VIOLATION OF CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.** — See note 2.

**139. See note 2.**

**142. (4) Discretionary Power to Refuse Writ.** — See note 1.

**143. (5) What Federal Courts May Issue Writ — (a) Circuit, District, and Territorial Courts — Most, if Not All, of the Territories.** — See note 4.

**145. b. STATE COURTS — (1) In General.** — See note 5.

**(2) State Courts and Judicial Officers Authorised to Issue Writ —**

**(a) Courts of Original Jurisdiction and Judges Thereof.** — See note 8.

**148. See note 2.**

**133. 3. Writ Runs to Any Part of King's Dominions.** — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 133.

**134. 1. Federal Jurisdiction Is Statutory.** — *In re Celestine*, 114 Fed. Rep. 551; *Clifford v. Williams*, 131 Fed. Rep. 100; *McGowan v. Moody*, 22 App. Cas. (D. C.) 148.

**135. 5. No Jurisdiction to Avoid Custody of Infant Not Actually Imprisoned.** — *Clifford v. Williams*, 131 Fed. Rep. 100.

**137. 3. Acts Done or Omitted Pursuant to Federal Law, Etc.** — *In re Fair*, 100 Fed. Rep. 149; *Ohio v. Thomas*, 173 U. S. 276; *West Virginia v. Laing*, (C. C. A.) 133 Fed. Rep. 887; *U. S. v. Fuellhart*, 106 Fed. Rep. 911; *In re Turner*, 119 Fed. Rep. 231. See also *Boske v. Comingore*, 177 U. S. 459.

**The Writ Is Not Granted Where It Is Doubtful** whether or not the petitioner's acts were justified by the federal statute. *In re Matthews*, 122 Fed. Rep. 248.

**138. 1. United States Marshals Arrested by State Authority for Official Acts.** — *Anderson v. Elliott*, (C. C. A.) 101 Fed. Rep. 609.

**Persons Summoned to Assist Marshal.** — *In re Laing*, 127 Fed. Rep. 213.

**2. Custody in Violation of Constitution, etc., of United States.** — *Ex p. Glenn*, 111 Fed. Rep. 257; *U. S. v. Lewis*, 129 Fed. Rep. 823; *In re Dowd*, 133 Fed. Rep. 747; *Ex p. Powers*, 129 Fed. Rep. 985.

**139. 2. Imprisonment Without Due Process of Law.** — *Jamison v. Wimbish*, 130 Fed. Rep. 351; *Ex p. Stricker*, 109 Fed. Rep. 145.

**142. 1. Discretionary Power of Federal Courts to Refuse Writs of Habeas Corpus.** — *Minnesota v. Brundage*, 180 U. S. 499; *Davis v. Burke*, 179 U. S. 399; *Gusman v. Marrero*, 180 U. S. 81; *Reid v. Jones*, 187 U. S. 153; *Storti v. Massachusetts*, 183 U. S. 138; *Markuson v. Boucher*, 175 U. S. 184; *Ex p. Glenn*, 103 Fed. Rep. 947; *In re Stone*, 120 Fed. Rep. 101; *In re Dowd*, 133 Fed. Rep. 747; *Ex p. Rearick*, 118 Fed. Rep. 928; *In re Ammon*, 132 Fed. Rep. 714; *U. S. v. Lewis*, 129 Fed. Rep. 823; *In re Wyman*, 132 Fed. Rep. 708; *Ex p. Powers*, 129 Fed. Rep. 985; *Ex p. McMinn*, 110 Fed. Rep. 954; *In re*

*Reeves*, 123 Fed. Rep. 343; *In re Matthews*, 122 Fed. Rep. 248; *In re Strauss*, (C. C. A.) 126 Fed. Rep. 327. See also *U. S. v. Sing Tuck*, 194 U. S. 161.

**As to What Constitute Special Circumstances.** — *Boske v. Comingore*, 177 U. S. 459; *Cohn v. Jones*, 100 Fed. Rep. 639.

**Appeal Unnecessary if Law Perfectly Clear.** — *Ex p. Green*, 114 Fed. Rep. 959.

**Appeal to State Courts Idle.** — In case an appeal to the state courts would for any reason be vain or useless, the court will grant the writ. *Jamison v. Wimbish*, 130 Fed. Rep. 351.

**Confinement for Act Involving No Moral Turpitude.** — If the act for which the petitioner is held by the state involves no moral turpitude, and is illegal only because so declared by an unconstitutional statute, the court will grant the writ. *In re Davenport*, 102 Fed. Rep. 540.

**143. 4. District of Columbia.** — *McGowan v. Moody*, 22 App. Cas. (D. C.) 148.

**145. 5. Jurisdiction of State Courts of General Original Jurisdiction.** — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *Com. v. Ross*, 28 Pa. Co. Ct. 276, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145.

**8. State Courts of Original Jurisdiction — Alabama.** — The probate judge has no jurisdiction to issue the writ where the petitioner is confined under an order of the Circuit Court. *Hall v. State*, 130 Ala. 139.

*Georgia.* — By Acts 1899, p. 432, the judge of the City Court of Wrightsboro may issue the writ. *Sumner v. Sumner*, 117 Ga. 229.

*Montana.* — The District Court may issue the writ. *State v. First Judicial Dist. Ct.*, 24 Mont. 539.

*Texas.* — A County Court has no jurisdiction to determine, by habeas corpus proceedings, the right of custody of an infant. *Rice v. Rice*, 24 Tex. Civ. App. 506.

*West Virginia.* — The Supreme Court is given jurisdiction by the constitution. *Ex p. Hill*, 51 W. Va. 536.

**148. 2. The South Dakota Statute enumerates seven classes of cases.** *In re Taber*, 13 S. Dak. 62.

- 149.** (b) Appellate Courts and Judges Thereof. — See notes 1, 2.  
**150.** (c) Court Officers. — See note 1.  
**152.** c. CONFLICTING JURISDICTION — (1) *Custody under Federal Authority*. — See note 2.  
**153.** (2) *Custody under State Authority*. — See note 3.  
**154.** V. NATURE AND SCOPE OF REMEDY — 1. In General. — See notes 5, 6.  
**155.** See notes 1, 2, 3, 4.  
**156.** See note 2.  
**157.** See notes 2, 3.  
 2. Civil or Criminal Proceeding. — See notes 4, 5.  
**158.** 3. Original Legality or Illegality of Detention. — See notes 2, 6.

**149.** 1. Appellate Courts and Judges Authorized to Issue Habeas Corpus by Virtue of Appellate Jurisdiction — *Texas*. — A court of civil appeals has no original jurisdiction to issue the writ. *Wetz v. Thompson*, 26 Tex. Civ. App. 396.

**2.** Appellate Courts and Judges Having Original Jurisdiction to Issue Habeas Corpus — *Oklahoma*. — A justice of the Supreme Court may issue the writ and the Supreme Court as a body does not have jurisdiction until a final judgment by such justice. *Matter of McMaster*, 9 Okla. 432.

**150.** 1. Court Officers Authorized to Issue Writs of Habeas Corpus — *Oklahoma*. — The clerk may issue writs, whether ordered by the court or by a single justice. *Matter of McMaster*, 9 Okla. 432.

*Wisconsin*. — Court commissioners may issue the writ. *Longstaff v. State*, 120 Wis. 346.

**152.** 2. Decision in *Tarble's Case* Acquiesced in by State Courts. — *Com. v. Butler*, 19 Pa. Super. Ct. 626.

In *Ex p. Chance*, (Tex. Crim. 1900) 58 S. W. Rep. 110, it was held that the Texas courts had no authority to release on habeas corpus a person held by a United States marshal under a commissioner's warrant issued on a copy of an indictment in a federal court of the Indian Territory.

**153.** 3. Paramount Power of Federal Courts to Be Exercised with Caution. — *In re Matthews*, 122 Fed. Rep. 248.

Respect for State Authority. — *Ex p. Powers*, 129 Fed. Rep. 985.

**154.** 5. Habeas Corpus a Prerogative Writ. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

**6.** Habeas Corpus of Common-law Origin. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

Writ Is Common-law Remedy, Not Equitable. — *Sumner v. Sumner*, 117 Ga. 229.

**155.** 1. Authority of Habeas Corpus Paramount to That of All Other Writs. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155.

**2.** Purpose of Writ — Release from Any Illegal Detention. — *In re Jewett*, 69 Kan. 830; *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155; *State v. District Ct.*, 32 Mont. 18; *People v. New York Juvenile Asylum*, 57 N. Y. App. Div. 383.

**3.** Punishment of Offender and Redress of Injury Not Within Scope of Writ. — *State v. District Ct.*, 32 Mont. 18; *People v. New York Juvenile Asylum*, 57 N. Y. App. Div. 383; *State v. Huegin*, 110 Wis. 189.

**4.** Available as Quo Warranto if Officer Acts by

Commission Absolutely Void. — *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

**156.** 2. Right of Guardianship Not Triable on Habeas Corpus. — *State v. Lawrence*, 86 Minn. 310.

**157.** 2. Writ Issues Ex Debito Justitiæ. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157.

Statutory Modification. — By statute in *Maine* persons in confinement charged with the commission of a felony are not entitled to the writ as a matter of right. *Welch v. Sheriff*, 95 Me. 451.

**3.** Probable Cause for Writ Must Be Shown. — *U. S. v. Sing Tuck*, 194 U. S. 161; *Iowa v. Jones*, 128 Fed. Rep. 626; *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305; *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157.

Where It Appears that Prisoner Must Necessarily Be Remanded. — *Ex p. Roberts*, 166 Mo. 207; *In re Dowd*, 133 Fed. Rep. 747.

Imprisonment Expiring Before Return to Writ Can Be Made. — Where it appears that the term of imprisonment will expire before the return to the writ can be made, the court will refuse to issue the writ. *Ex p. Baez*, 177 U. S. 378.

**4.** Habeas Corpus Considered Civil Proceeding. — *Stewart v. Paul*, 141 Ala. 516; *In re Jewett*, 69 Kan. 830; *In re Greaser*, (Neb. 1904) 101 N. W. Rep. 235; *State v. Huegin*, 110 Wis. 189.

Not Criminal Proceeding. — *State v. Fenton*, 30 Wash. 325.

**5.** Habeas Corpus Is Analogous to Proceeding in Rem. — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157, 158.

Not a "Civil Action." — *Ex p. Miller*, 10 Ohio Cir. Dec. 760, 19 Ohio Cir. Ct. 544.

Neither Civil Nor Criminal Action. — *Carruth v. Taylor*, 8 N. Dak. 166.

Controversy as to Custody of Children a Civil Suit. — *People v. Court of Appeals*, 27 Colo. 405.

**158.** 2. Detention Originally Illegal but Becoming Legal. — *In re Dye*, 32 Mont. 132.

Custody under New Process Supersedes Old. — *Ex p. Cannon*, 41 Tex. Crim. 76; *Ex p. Tripp*, (Tex. Crim. 1903) 77 S. W. Rep. 222; *Ex p. McDonald*, (Tex. Crim. 1901) 65 S. W. Rep. 188; *Ex p. Kennedy*, (Tex. Crim. 1900) 56 S. W. Rep. 921; *Ex p. Brown*, (Tex. Crim. 1900) 55 S. W. Rep. 814.

The Legality of the Detention is to be determined by the circumstances existing at the time of the hearing. Thus, if the petitioner is held without a warrant, but a warrant is sworn out

**159.** 4. Necessity of Actual Restraint. — See notes 2, 3.

5. Anticipating Decision of Trial Court. — See note 6.

**160.** VI. GROUNDS OF REMEDY — 1. In General. — See note 3.

**161.** 2. Custody under Warrant or Commitment on Criminal Charge ---

a. BEFORE INDICTMENT. — See note 3.

**162.** See notes 1, 2, 3, 4, 5, 6.

**163.** See note 3.

b. AFTER INDICTMENT — (1) *In General*. — See notes 5, 6, 7.

(2) *Defects or Irregularities in Drawing Grand Jury*. — See note 9.

**164.** (3) *Insufficiency of Indictment*. — See note 2.

If There Was No Legal Evidence Before the Grand Jury. — See note 3.

(4) *Delay in Bringing Indictment to Trial*. — See note 5.

**165.** See note 4.

before the hearing, the writ will be refused.  
*Ex p.* Healy, 8 Ohio Dec. 692.

**158.** 6. Recovery of Habitual Drunkard. —  
Matter of Lerner, 79 N. Y. App. Div. 134.

**159.** 2. Necessity of Actual Restraint. — *In re O'Brien*, 29 Mont. 530; *Ex p.* Patterson, (Tex. Crim. 1900) 56 S. W. Rep. 912; *Ex p.* Allen, (Tex. Crim. 1900) 56 S. W. Rep. 926; *Ex p.* Lawrence, 45 Tex. Crim. 521; *Ex p.* Snyder, 39 Tex. Crim. 120; *Ex p.* McMinn, (Tex. Crim. 1901) 63 S. W. Rep. 322; *Ex p.* Wolston, (Tex. Crim. 1902) 68 S. W. Rep. 679; *Ex p.* Walton, 45 Tex. Crim. 74; *Ex p.* Brown, 43 Tex. Crim. 45.

Any Restraint Sufficient That Precludes Absolute Freedom of Action. — *Ex p.* Snodgrass, 43 Tex. Crim. 359; *Ex p.* Foster, 44 Tex. Crim. 423, 100 Am. St. Rep. 866.

A Person Released on Bail Pending an Appeal in Habeas Corpus proceedings is still restrained of his liberty. *Costello v. Palmer*, 20 App. Cas. (D. C.) 210.

3. Persons at Large on Bail or Recognizance Not Entitled to Habeas Corpus. — *In re Dykes*, 13 Okla. 339, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 339.

6. Moot Case. — *In re Dykes*, 13 Okla. 339.  
Must Be Actual Imprisonment or Restraint. — A mere voluntary surrender to an officer, followed by an immediate release on the petitioner's own recognizance, merely for the purpose of testing the validity of an ordinance, is not such restraint as will support the writ of habeas corpus. *In re Gow*, 139 Cal. 242.

**160.** 3. Grounds of Remedy in General — Any Illegal Restraint. — *State v. Lawrence*, 86 Minn. 310; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706; *Ex p.* Blankenship, (Tex. Crim. 1901) 57 S. W. Rep. 646.

**161.** 3. Custody under Commitment Before Indictment. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; Matter of Marceau, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *People v. Wells*, 57 N. Y. App. Div. 140. See also *Motherwell v. U. S.*, (C. C. A.) 107 Fed. Rep. 437, reversed 183 U. S. 24.

**162.** 1. Want of Jurisdiction in Committing Magistrate. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162; *Com. v. Scott*, 8 Pa. Dist. 367.

2. Failure to Indict Within Limited Time. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

3. Commitment Charging Acts Not Criminal in Law. — *Ex p.* Harris, (Miss. 1904) 37 So. Rep. 505; *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162; *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

4. Defects in Warrant of Commitment. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 162.

5. Mere Irregularity in Commitment Not Ground for Discharge. — *Chow Loy v. U. S.*, (C. C. A.) 112 Fed. Rep. 354.

6. Matters Properly Determinable by Committing Magistrate or Grand Jury. — *U. S. v. Robinson*, 126 Fed. Rep. 1016; *Cruthers v. Bray*, 159 Ind. 685.

**163.** 3. Pendency of Proceeding Before Examining Magistrate. — *State v. Humphrey*, 125 Ala. 110; *State v. Sistrunk*, 138 Ala. 68; *Ex p.* Krug, (Tex. Crim. 1900) 60 S. W. Rep. 38. See also *In re Greene*, 22 Quebec Super. Ct. 91.

5. Offense Not Committed Within Jurisdiction Where Indictment Was Found. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

6. Want of Jurisdiction in Court in Which Prosecution Is Pending. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

7. Interfering with Province of Jury. — *Ex p.* Lucas, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163; *Com. v. McAleese*, 192 Pa. St. 410.

9. Defects or Irregularities in Drawing Grand Jury. — *In re Corcoran*, 6 Idaho 657; *In re Davies*, 68 Kan. 791; *In re McElroy*, 10 Kan. App. 348; *Younger v. Hehn*, 12 Wyo. 289, 107 Am. St. Rep. 946.

**164.** 2. Rule as to Defective Indictments. — *In re Lewis*, 114 Fed. Rep. 963.

3. Sufficiency of Evidence Before Grand Jury Cannot Be Examined. — *In re Kennedy*, 144 Cal. 634.

5. Delay in Bringing Indictment to Trial. — *Dudley v. State*, 55 W. Va. 472.

If There Has Been No Demand for Trial. — *People v. Murphy*, 212 Ill. 584.

The Prisoner Must First Demand Trial and then apply to the court where the indictment is triable. *In re Dykes*, 13 Okla. 339.

**165.** 4. Delay Without Fault of Prosecution Not Ground of Discharge. — Matter of Blair, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 175, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164, 165.

**165.** (5) *Former Jeopardy*. — See note 7.

**166.** 3. *Custody under Judgments or Orders of Court* — *a. GENERAL RULE*.

— See note 4.

*b. VOID JUDGMENTS AND PROCESS* — (1) *In General*. — See note 5.

**167.** See note 1.

**168.** See notes 1, 2.

(2) *Defective Organization of Court*. — See note 4.

**169.** (6) *Conviction under Unconstitutional Statute*. — See note 6.

(7) *Conviction under Void Municipal Ordinance*. — See note 7.

**170.** (8) *Conviction of Acts Not Criminal in Law*. — See note 1.

(9) *Want of Power to Render Particular Judgment* — *The Modern Rule*.

— See notes 4, 5.

**171.** *c. JUDGMENTS BECOMING INOPERATIVE AFTER RENDITION*. —

See notes 2, 4.

**172.** *d. EXCESSIVE JUDGMENTS*. — See note 1.

**165.** 7. *Former Jeopardy Not Ground for Habeas Corpus*. — *Gillespie v. Rump*, 163 Ind. 457.

**166.** 4. *Custody under Judgment, etc., of Competent Court Not Relievable by Habeas Corpus*.

— *Young v. Fain*, 121 Ga. 737; *Gillespie v. Rump*, 163 Ind. 457; *In re McAdams*, 11 Ohio Cir. Dec. 78a, 21 Ohio Cir. Ct. 450; *Com. v. May*, 24 Pa. Co. Ct. 546.

**5. Custody under Void Judgment — Release on Habeas Corpus — United States**. — *Cuyler v. Atlantic, etc., R. Co.*, 131 Fed. Rep. 95; *Cohn v. Jones*, 100 Fed. Rep. 639; *Mackey v. Miller*, (C. C. A.) 126 Fed. Rep. 161.

*Georgia*. — *Griffin v. Eaves*, 114 Ga. 65.

*Minnesota*. — *State v. Matter*, 78 Minn. 375.

*Missouri*. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166; *Ex p. Neet*, 157 Mo. 527, 80 Am. St. Rep. 638.

*Nebraska*. — *Michaelson v. Beemer*, (Neb. 1904) 101 N. W. Rep. 1007.

*Nevada*. — *Ex p. Dela*, 25 Nev. 346, 83 Am. St. Rep. 603.

*Oklahoma*. — *Matter of Comstock*, 10 Okla. 299.

*Pennsylvania*. — *Com. v. May*, 24 Pa. Co. Ct. 546.

*Texas*. — *Ex p. Duncan*, 42 Tex. Crim. 661.

**167.** 1. *Void Process*. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166.

*Unauthorized Execution Against the Person*. — *People v. Gill*, 85 N. Y. App. Div. 192, affirmed 176 N. Y. 606.

**168.** 1. *Defective Mittimus Issued on Valid Sentence*. — *In re Rogers*, 75 Vt. 329.

**2. Entry of a Meaningless and Defective Judgment against a prisoner convicted of crime does not entitle him to his discharge on habeas corpus. The entry should be amended.** *Ex p. Walker*, 132 Cal. 143.

**4. De Facto Judge**. — *In re Hewes*, 62 Kan. 288.

**169.** 6. *Conviction under Unconstitutional Statutes — Discharge on Habeas Corpus*. — *Stoutenburgh v. Frazier*, 16 App. Cas. (D. C.) 229; *Moore v. Wheeler*, 109 Ga. 62; *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169. See also *Ex p. Neet*, 157 Mo. 527, 80 Am. St. Rep. 638.

Where a defendant has been convicted of a misdemeanor in a justice court, and no appeal

has been had, and the time for an appeal has expired, he may challenge the constitutionality of the statute under which he was convicted, in an application to the Supreme Court for a writ of habeas corpus. *In re Jarvis*, 66 Kan. 329.

**Same Is True as to Conviction under Repealed Statute**. — *Griffin v. Eaves*, 114 Ga. 65.

**7. Conviction under Void City Ordinance**. — *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

**Petitioner Must Show Wherein Ordinance Void**.

— Where the municipality has the power to make ordinances on the subject in question, the petitioner must show wherein the particular ordinance is void. *In re Smith*, 143 Cal. 368.

**170.** 1. *Imprisonment for Acts Not Criminal in Law*. — *Mackey v. Miller*, (C. C. A.) 126 Fed. Rep. 161; *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170; *Ex p. Neet*, 157 Mo. 527, 80 Am. St. Rep. 638.

**4. Modern Rule — Want of Power to Render Particular Judgment Held Ground for Discharge**

— *Colorado*. — See *In re Mahany*, 29 Colo. 442.

*Kansas*. — *In re Jewett*, 69 Kan. 830.

*Nevada*. — *Ex p. Dela*, 25 Nev. 346, 83 Am. St. Rep. 603.

*North Dakota*. — *State v. Beaverstad*, 12 N. Dak. 527.

*South Dakota*. — *In re Taber*, 13 S. Dak. 62.

*Texas*. — *Ex p. Duncan*, 42 Tex. Crim. 661; *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000.

*Wisconsin*. — *State v. Hueglin*, 110 Wis. 189.

*Wyoming*. — *Miskimins v. Shaver*, 8 Wyo. 392; *Bandy v. Hehn*, 10 Wyo. 167.

**Variance between Sentence and Statute Prescribing Punishment**. — *In re Burns*, 113 Fed. Rep. 987.

**5. When Judgment Is Void for Want of Power to Render It**. — *Ex p. Lucas*, 160 Mo. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170; *Ex p. Maher*, 25 Nev. 422, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170 et seq; *Matter of Casey*, 27 Wash. 686, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170.

**171.** 2. *Matters Arising Since Commitment*. — *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212 (by statute).

**4. Aggregate Time Must Be Served in Case of Concurrent Sentences**. — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305.

**172.** 1. *Excessive Sentence Valid Except as*

**172.** *e. ERRORS AND IRREGULARITIES.* — See note 5.

**175.** *Generally Speaking.* — See note 2.

*Objections to Indictment, etc.* — See note 3.

*to Excess — Performance of Valid Portion.* — *De Bara v. U. S.*, (C. C. A.) 99 Fed. Rep. 942; *Ex p. Davis*, 112 Fed. Rep. 139; *In re Clarke*, 125 Cal. 388; *Tindall v. Nisbet*, 113 Ga. 1114, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 171; *State v. Foster*, 109 La. 587; *Kellar v. Davis*, (Neb. 1903) 95 N. W. Rep. 1028; *Rex v. Kavanagh*, 5 Can. Crim. Cas. (Nova Scotia) 507.

**172. 5. Mere Errors or Irregularities Not Reviewable on Habeas Corpus — United States.** — *Terlinden v. Ames*, 184 U. S. 270; *Dimmick v. Tompkins*, 194 U. S. 540; *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *Iowa v. Jones*, 128 Fed. Rep. 626; *Ex p. Powers*, 129 Fed. Rep. 985; *In re Strauss*, (C. C. A.) 126 Fed. Rep. 327; *Ex p. Haggerty*, 124 Fed. Rep. 441; *De Bara v. U. S.*, (C. C. A.) 99 Fed. Rep. 942; *Castner v. Pochontas Collieries Co.*, 117 Fed. Rep. 184; *Ex p. Davis*, 112 Fed. Rep. 139; *In re Lewis*, 114 Fed. Rep. 963; *Ex p. O'Neal*, 125 Fed. Rep. 967; *Cohn v. Jones*, 100 Fed. Rep. 639.

*Alabama.* — *Bray v. State*, 140 Ala. 172; *Ex p. Roberson*, 123 Ala. 103, 82 Am. St. Rep. 107.

*Arizona.* — *Matter of Smith*, 4 Ariz. 95.

*Arkansas.* — *Ex p. Foote*, 70 Ark. 12; *Ex p. Brady*, 70 Ark. 376.

*California.* — *In re Reed*, 143 Cal. 634, 101 Am. St. Rep. 138; *In re Knowlton*, 136 Cal. 107; *In re Chin Mee Ho*, 140 Cal. 263; *In re Lapique*, 139 Cal. 204.

*Colorado.* — *In re Mahany*, 29 Colo. 442.

*Delaware.* — *In re Phillips*, (Del. 1904) 59 Atl. Rep. 47.

*District of Columbia.* — *U. S. v. Davis*, 18 App. Cas. (D. C.) 280; *Palmer v. Calladay*, 18 App. Cas. (D. C.) 426.

*Florida.* — *Randall v. Tillis*, 43 Fla. 43; *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119.

*Georgia.* — *Young v. Faith*, 121 Ga. 737, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172, 175, 176; *McFarland v. Donaldson*, 115 Ga. 567, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172; *Tindall v. Nisbet*, 113 Ga. 1114.

*Idaho.* — *Ex p. Knudtson*, (Idaho 1903) 79 Pac. Rep. 641; *In re Alcorn*, 7 Idaho 101; *In re Green*, 7 Idaho 94; *In re Marshall*, 6 Idaho 516.

*Illinois.* — *People v. Murphy*, 212 Ill. 584, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172; *People v. Murphy*, 202 Ill. 493; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *People v. Murphy*, 188 Ill. 144.

*Indiana.* — *Gillespie v. Rump*, 163 Ind. 457, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172; *Winslow v. Green*, 155 Ind. 368; *Peters v. Koepke*, 156 Ind. 35; *Webber v. Harding*, 155 Ind. 408; *Koepke v. Hill*, 157 Ind. 172, 87 Am. St. Rep. 161; *Pritchett v. Cox*, 154 Ind. 108; *Williams v. Hert*, 157 Ind. 211, 87 Am. St. Rep. 203.

*Kansas.* — *In re Nolan*, 68 Kan. 796; *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382.

*Louisiana.* — *State ex rel. Cayard*, 52 La. Ann. 4.

*Massachusetts.* — *Sellers Case*, 186 Mass. 301.

*Michigan.* — *In re Lewis*, 124 Mich. 199; *In*

*re Butler*, (Mich. 1904) 101 N. W. Rep. 630; *In re Maguire*, 114 Mich. 80.

*Minnesota.* — *State v. Matter*, 78 Minn. 377.

*Mississippi.* — *Ex p. Grubbs*, 79 Miss. 358.

*Montana.* — *In re Downey*, 31 Mont. 441, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172; *In re Boyle*, 26 Mont. 365.

*Nebraska.* — *McCarty v. Hopkins*, 61 Neb. 530; *In re Walker*, 61 Neb. 803; *Michaelson v. Beemer*, (Neb. 1904) 101 N. W. Rep. 1007; *Kellar v. Davis*, (Neb. 1903) 95 N. W. Rep. 1028.

*Nevada.* — *Ex p. Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568.

*New York.* — *People v. Fallon*, 73 N. Y. App. Div. 471; *People v. New York Catholic Protectors*, 93 N. Y. App. Div. 196; *People v. City Prison*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 149; *People v. Hayes*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 163; *People v. Fox*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 82; *People v. Hagan*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 24; *People v. City Prison*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 635; *People v. Flynn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 90; *People v. State Reformatory*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 92; *People v. New York Soc.*, etc., (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 457.

*North Dakota.* — *State v. Beaverstad*, 12 N. Dak. 527.

*Ohio.* — *In re McAdams*, 11 Ohio Cir. Dec. 780, 21 Ohio Cir. Ct. 450; *Milford v. Perry*, 9 Ohio Cir. Dec. 492, 18 Ohio Cir. Ct. 76.

*Oklahoma.* — *Matter of Maas*, 16 Okla. 302.

*Oregon.* — *Ex p. Stacey*, 45 Oregon 85.

*Pennsylvania.* — See *Com. v. County Prison*, 26 Pa. Super. Ct. 191.

*South Carolina.* — *State v. Garlington*, 56 S. Car. 413.

*Texas.* — *Ex p. Beeler*, 41 Tex. Crim. 240; *Ex p. Douthitt*, (Tex. Crim. 1901) 63 S. W. Rep. 131; *Ex p. English*, (Tex. Crim. 1899) 53 S. W. Rep. 106.

*Utah.* — *Matter of Clark*, 28 Utah 268.

*Washington.* — *State v. Graham*, 34 Wash. 81; *Matter of Casey*, 27 Wash. 686.

*Wisconsin.* — *In re Meggett*, 105 Wis. 291; *In re Stittgen*, 110 Wis. 625.

*Wyoming.* — *Younger v. Hehn*, 12 Wyo. 389, 107 Am. St. Rep. 946; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971.

*Canada.* — *Reg. v. St. Clair*, 3 Can. Crim. Cas. (Ont.) 551; *Rex v. Beamish*, 5 Can. Crim. Cas. (British Columbia) 388.

**175. 2. In the Following Cases Habeas Corpus Has Been Not Proper Remedy: Where a Sentence Is Imposed Less than That Authorized by Law.** — *In re Reed*, 143 Cal. 634, 101 Am. St. Rep. 138.

*Where a Court Granted Several Alleged Unlawful Stays of Execution of a Sentence, at the Request of the Petitioner.* — *People v. Murphy*, 212 Ill. 549.

**3. Defective Indictment Not Ground for Discharge on Habeas Corpus.** — *Dimmick v. Tompkins*, 194 U. S. 540; *McFarland v. Donaldson*,

- 176.** The Denial of a Trial by Jury. — See note 1.  
Existence of Remedy by Appeal, etc., as Affecting Habeas Corpus. — See note 4.  
*f.* JUDGMENTS OF COURTS MARTIAL. — See note 8.
- 177.** *g.* COMMITMENTS FOR CONTEMPT — (1) *In General.* — See notes 2, 3.
- 178.** But if the Court Did Not Have Jurisdiction. — See notes 1, 3.
- 179.** See note 1.  
(2) *Refusal of Witness to Take Oath or to Testify.* — See notes 3, 5.
- 180.** *h.* DECISIONS OF QUASI-JUDICIAL OFFICERS. — See notes 5, 6.
- 181.** See note 2.
- 4.** Custody of Husband or Wife — *a.* REMEDY OF HUSBAND OR WIFE AGAINST THIRD PERSONS — If a Husband Is Unlawfully Restrained of His Liberty. — See note 5.
- 182.** **5.** Custody of Infants — *a.* DETENTION OF CHILDREN FROM PARENTS. — See notes 4, 5.

115 Ga. 567, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175; *In re* Alcorn, 7 Idaho 101; *Ex p.* Stacey, 45 Oregon 85.

**176.** 1. Denial of Trial by Jury — When Not Ground for Discharge on Habeas Corpus. — *Tindall v. Nisbet*, 113 Ga. 1114, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176; *McFarland v. Donaldson*, 115 Ga. 567, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176; *Williams v. Hert*, 157 Ind. 211, 87 Am. St. Rep. 203; *In re* Walker, 61 Neb. 803.

**4.** Effect of Remedy by Writ of Error on Appeal. — *Ex p.* Windsor, (Tex. Crim. 1904) 78 S. W. Rep. 510; *Ex p.* Patterson, 42 Tex. Crim. 256. See also *Ex p.* Bettis, (Ala. 1904) 37 So. Rep. 640.

**8.** Custody under Judgment of Court Martial. — *Carter v. Roberts*, 177 U. S. 496; *Carter v. McClaughry*, 183 U. S. 365; *McClaughry v. Deming*, 186 U. S. 49; *Ex p.* Townsend, 133 Fed. Rep. 74.

Court Will Not Interfere in Advance of Determination by Military Tribunal. — *In re* Cadwallader, 127 Fed. Rep. 881.

**177.** 2. Commitment for Contempt Not Impeachable by Habeas Corpus Where Court Had Jurisdiction. — *Ex p.* O'Neal, 125 Fed. Rep. 967; *In re* Nevitt, (C. C. A.) 117 Fed. Rep. 448; *Ex p.* Davis, 112 Fed. Rep. 139; *Ex p.* Haggerty, 124 Fed. Rep. 441; *In re* Boyle, 26 Mont. 365; *In re* Taber, 13 S. Dak. 62.

**3.** Commitment for Disobeying Erroneous Judgment or Order. — *In re* Downey, 31 Mont. 441; *In re* Meggett, 105 Wis. 291.

Washington Statute. — Ball. Annot. Codes and Stat. Wash., § 5826, provides that the legality of a commitment for a civil contempt may be inquired into on habeas corpus. *Matter of Coulter*, 25 Wash. 526.

**178.** 1. Commitment Void for Want of Jurisdiction — *United States.* — *In re* Reese, (C. C. A.) 107 Fed. Rep. 942; *Ex p.* Stricker, 109 Fed. Rep. 145; *Cuyler v. Atlantic*, etc., R. Co., 131 Fed. Rep. 95.

*California.* — *Ex p.* Hoar, 146 Cal. 132.

*District of Columbia.* — *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456.

*Hawaii.* — *Ex p.* Pahia, 13 Hawaii 575, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

*Kansas.* — *In re* Jewett, 69 Kan. 830, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

*Texas.* — *Ex p.* Stone, (Tex. Crim. 1903) 72 S. W. Rep. 1000.

**3.** Contempt Predicated on Disobedience of Unauthorized Order. — *Ex p.* Clarke, 126 Cal. 235, 77 Am. St. Rep. 176; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296.

**179.** 1. Acts Not Constituting Contempt. — *Ex p.* Foster, 44 Tex. Crim. 423, 100 Am. St. Rep. 866; *Ex p.* Snodgrass, 43 Tex. Crim. 359; *Ex p.* Duncan, 42 Tex. Crim. 661.

**3.** Refusal of Witness to Answer Legal and Proper Questions. — *Ex p.* Gfeller, 178 Mo. 248.

**5.** Refusal to Answer Improper Questions — Discharge on Habeas Corpus. — *Rogers v. Superior Ct.*, 145 Cal. 88; *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456; *Matter of Green*, 86 Mo. App. 216; *Miskimmins v. Shaver*, 8 Wyo. 392.

Refusal to Produce Papers and Books. — If the court has no right to require the production of papers and books, the petitioner will be released on habeas corpus. *Ex p.* Clarke, 126 Cal. 235, 77 Am. St. Rep. 176.

**180.** 5. Decisions of Quasi-judicial Officers — Exclusion of Immigrants. — *Chin Bak Kan v. U. S.*, 186 U. S. 193.

**6.** Same Principle Applies to Alien Claiming to Remain in United States. — *In re* Lea, 126 Fed. Rep. 234.

**181.** 2. Power of Courts to Review Decisions of Immigration Officers Taken Away by Statute. — *U. S. v. Williams*, 194 U. S. 279; *Japanese Immigrant Case*, 189 U. S. 86; *Fok Yung Yo v. U. S.*, 185 U. S. 296; *Lavin v. Le Fevre*, (C. C. A.) 125 Fed. Rep. 693; *In re* Moy Quong Shing, 125 Fed. Rep. 641.

Court Will Not Interfere Before Appeal Has Been Taken to Secretary of Commerce and Labor. — *U. S. v. Sing Tuck*, 194 U. S. 161; *Mok Chung v. U. S.*, (C. C. A.) 133 Fed. Rep. 166.

Deportation of Aliens. — Under 32 U. S. Stat. 1218, c. 1012, § 21, providing for the deportation of aliens found to be illegally within the United States, the determination of the secretary of commerce and labor is conclusive. *In re* Lea, 126 Fed. Rep. 231.

**5.** Remedy of Wife for Unlawful Detention of Husband. — *In re* Chace, 26 R. I. 351, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 181.

**182.** 4. Habeas Corpus by Mother of Infant Child. — *Matter of Baier*, 11 Ohio Dec. 47, 8 Ohio N. P. 107.

**5.** Habeas Corpus by One Parent Against Other.

- 183.** Transfer or Forfeiture of Parental Right. — See notes 2, 3.  
**184.** See note 1.  
**185.** *d.* PRINCIPLES GOVERNING AWARD OF CUSTODY ON HABEAS CORPUS. — See note 5.  
**186.** See note 1.  
 No Exact Rule Can Be Laid Down as to the Age. — See note 3.  
 Custody of the Child Is Withheld. — See note 4.  
**187.** See note 1.  
 The Welfare of the Infant Is the Primary Consideration. — See notes 2, 3, 4.  
**188.** 6. Custody in Extradition Proceedings. — See notes 1, 2, 3.

— *Stickel v. Stickel*, 18 App. Cas. (D. C.) 149; *State v. Michel*, 105 La. 741.

**183.** 2. Custody of Child Recoverable on Habeas Corpus Notwithstanding Transfer or Surrender. — *Hibbette v. Baines*, 78 Miss. 695.

3. Restoration of Custody After Release or Abandonment Denied. — *Carter v. Brett*, 116 Ga. 114; *Lamar v. Harris*, 117 Ga. 993; *McDonald v. Stitt*, 118 Iowa 199; *Anderson v. Young*, 54 S. Car. 388.

Agreement to Be Enforceable Must Be Clearly Proven. — *Monk v. McDaniel*, 116 Ga. 108; *Dunkin v. Seifert*, 123 Iowa 64; *Miller v. Miller*, 123 Iowa 165.

**184.** 1. Custody Lost Without Fault of Parent. — *McKercher v. Green*, 13 Colo. App. 270.

**185.** 5. Removal of Restraint — Right of Infant to Choose Custodian. — *Lamar v. Harris*, 117 Ga. 993; *Matter of Cunningham*, 61 N. J. Eq. 454; *People v. Buffett*, 75 N. Y. App. Div. 365; *People v. Ciarcia*, 49 N. Y. App. Div. 90.

Where the child avows equal love for each parent, an expression of preference will be given little weight. *People v. Elder*, 98 N. Y. App. Div. 244.

Jurisdiction to Award Custody of Infants. — The Circuit Courts have no jurisdiction to determine the right of custody. *Clifford v. Williams*, 131 Fed. Rep. 100.

**186.** 1. No Absolute Right in Infant to Choose Custodian. — *Hibbette v. Baines*, 78 Miss. 695.

3. Age of Discretion in United States. — *Neville v. Reed*, 134 Ala. 317, 92 Am. St. Rep. 35; *Matter of Cunningham*, 61 N. J. Eq. 454.

Seventeen Years Not Old Enough in Louisiana. — *Prieto v. St. Alphonsus Convent*, 52 La. Ann. 531.

The Nearer the Child Approaches Fourteen, the greater is the weight to be given its wish. *Chunn v. Graham*, 117 Ga. 551.

4. What Not Harboring. — But merely furnishing a boy of fifteen with money for traveling expenses, with no intention to deprive the parent of his custody, is not enough to support the writ. *In re Christal*, 141 Cal. 523.

**187.** 1. Custody of Young Children Awarded on Habeas Corpus. — *Bullock v. Robertson*, 160 Ind. 522, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

Court Acts as *Parentes Patriæ*. — *In re Soy King*, 7 British Columbia 291; *In re Quai Shing*, 6 British Columbia 86.

2. Welfare of Infant Primary Consideration — *Alabama*. — *Neville v. Reed*, 134 Ala. 317, 92 Am. St. Rep. 35; *Kirkbride v. Harvey*, 139 Ala. 231.

*Arizona*. — *New York Foundling Hospital v. Gatti*, (Ariz. 1905) 79 Pac. Rep. 231.

*Colorado*. — *McKercher v. Green*, 13 Colo. App. 270.

*District of Columbia*. — *Stickel v. Stickel*, 18 App. Cas. (D. C.) 149.

*Georgia*. — *Chunn v. Graham*, 117 Ga. 551; *Lamar v. Harris*, 117 Ga. 993.

*Indiana*. — *Bullock v. Robertson*, 160 Ind. 522, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185-187; *Berkshire v. Caley*, 157 Ind. 1.

*Iowa*. — *McDonald v. Stitt*, 118 Iowa 199.

*Kansas*. — *In re King*, 66 Kan. 695, 97 Am. St. Rep. 399, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; *In re Hamilton*, 66 Kan. 754.

*Louisiana*. — See *State v. Jones*, 113 La. 298.

*New York*. — *People v. Elder*, 98 N. Y. App. Div. 244; *People v. New York Juvenile Asylum*, 58 N. Y. App. Div. 133; *People v. Ciarcia*, 49 N. Y. App. Div. 90; *People v. Fuller*, 41 N. Y. App. Div. 404.

*Ohio*. — *Coon's Application*, 11 Ohio Cir. Dec. 208, 20 Ohio Cir. Ct. 47.

*Pennsylvania*. — *Com. v. Oplinger*, 28 Pa. Co. Ct. 282.

*South Carolina*. — *Anderson v. Young*, 54 S. Car. 388.

*Texas*. — *Plahn v. Dribred*, 36 Tex. Civ. App. 600.

*Wisconsin*. — *In re Stittgen*, 110 Wis. 625.

*Canada*. — *In re Soy King*, 7 British Columbia, 291.

Financial Interests Not Controlling. — *Cormack v. Marshall*, 211 Ill. 519.

Happiness for the Present is not to outweigh the child's future welfare. *Hibbette v. Baines*, 78 Miss. 695.

3. Rights of Parents Considered. — *Miller v. Miller*, 123 Iowa 165.

4. Award of Custody to Person Having Legal Right. — *Monk v. McDaniel*, 116 Ga. 108; *Carter v. Brett*, 116 Ga. 114; *Dunkin v. Seifert*, 123 Iowa 64; *Coon's Application*, 11 Ohio Cir. Dec. 208, 20 Ohio Cir. Ct. 47.

**188.** 1. Custody in Extradition Proceedings — Remedy by Habeas Corpus. — *Bruce v. Rayner*, 62 C. C. A. 501; *In re Taylor*, 118 Fed. Rep. 196; *Stewart v. U. S.* (C. C. A.) 119 Fed. Rep. 89; *State v. Clough*, 72 N. H. 178; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706.

2. Sufficiency of Charge of Crime in International Extradition. — *Ex p. Gaynor*, 22 Quebec Super. Ct. 109.

Sufficiency of Charge of Crime in Interstate Extradition. — *Hyatt v. Corkran*, 188 U. S. 691; *Munsey v. Clough*, 196 U. S. 364; *Bruce v. Rayner*, 62 C. C. A. 501; *State v. Clough*, 72 N. H. 504; *People v. Police Com'r*, 100 N. Y. App. Div. 483; *In re Renshaw*, (S. Dak. 1904).



**189. 7. Custody by Military Officers.** — See notes 2, 3.

**8. Habeas Corpus to Admit to Bail.** — See note 5.

**190. 9. Habeas Corpus to Procure Temporary Enlargement for Special Purposes** — *a.* IN GENERAL. — See note 3.

**191. Habeas Corpus to Bring Up Accused in Pending Criminal Proceedings.** — See note 5.

**192. HABEAS CORPUS AD TESTIFICANDUM.** — See notes 1, 2, 3.

**VII. THE APPLICATION — 2. Who May Apply for Writ** — *a.* PERSON UNDER RESTRAINT. — See note 6.

*b.* APPLICATION BY THIRD PERSON ON BEHALF OF PERSON DETAINED — See note 7.

**194. 3. Court or Judge to Whom Application Must Be Made.** — See note 2.

**VIII. To WHOM WRIT IS TO BE DIRECTED.** — See note 4.

**195. IX. THE RETURN — 1. Necessity** — The Body of the Person Detained Must Be Produced. — See notes 3, 4, 5.

**196. 3. Time and Mode of Making** — *c.* TO WHAT COURT OR JUDGE. — See note 4.

99 N. W. Rep. 83; *Armstrong v. Van De Venter*, 21 Wash. 682.

**188. 3. Insufficiency of Evidence Not Ground for Discharge.** — *Tenderlin v. Ames*, 184 U. S. 270; *Greene v. Henkel*, 183 U. S. 249; *In re Count de Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878; *State v. Justus*, 84 Minn. 237; *Ex p. Denison*, (Neb. 1904) 101 N. W. Rep. 1045; *State v. Clough*, 71 N. H. 594.

**189. 2. Illegal Detention by Military or Naval Officers.** — *Ex p. Houghton*, 129 Fed. Rep. 239; *Ex p. Reaves*, 121 Fed. Rep. 848, reversed (C. C. A.) 126 Fed. Rep. 127; *In re Lessard*, 134 Fed. Rep. 305; *In re Carver*, 103 Fed. Rep. 624; *Thomas v. Winne*, (C. C. A.) 122 Fed. Rep. 395.

**3. After the Jurisdiction of the Court Has Attached** the military authorities cannot deprive the court of its jurisdiction by arresting the petitioner. *Ex p. Houghton*, 129 Fed. Rep. 239.

**5. Habeas Corpus to Admit to Bail in Modern Practice.** — *State v. Berkstresser*, 137 Ala. 109; *In re Tubbs*, (Mich. 1905) 102 N. W. Rep. 626; *Packenhams v. Reed*, 37 Wash. 258, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189.

**190. 3. Should Not Be to Judge under Whose Order Petitioner Is Confined.** — *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456.

**Return Is Heard and Determined by Court and Not by Jury.** — *Sumner v. Sumner*, 117 Ga. 229.

**191. 5. Habeas Corpus to Bring Up Prisoner for Trial.** — *Com. v. Ross*, 28 Pa. Co. Ct. 276.

**192. 1. Prisoner Desiring to Testify in His Own Behalf.** — *Com. v. Ross*, 28 Pa. Co. Ct. 276, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 191.

**2. Habeas Corpus to Bring Up Prisoner Undergoing Sentence.** — *Com. v. Ross*, 28 Pa. Co. Ct. 276, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

**3. All Courts Have Power to Issue Habeas Corpus ad Testificandum.** — *Com. v. Ross*, 28 Pa. Co. Ct. 276, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192.

**6. Federal Courts Cannot Grant Writ on Application of Indian.** — *In re Celestine*, 114 Fed. Rep. 551.

**Insane Person.** — Under Cal. Const., art. 1, § 5, and Pen. Code, § 1473, an inmate of an insane

asylum may prosecute a writ of habeas corpus to have it decided that he has become sane. *Gardner v. Jones*, 126 Cal. 614.

A person restrained in a state hospital may himself apply for the writ, notwithstanding that a statute provides that any person restrained in a hospital may be released on application of a friend or relative. *Matter of Everett*, 138 Cal. 490.

**7. Wife May Apply for Writ if Husband Detained.** — *In re Chace*, 26 R. I. 351, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

**194. 2. Application to Local Court or Judge Required.** — *Ex p. Gaume*, 162 Mo. 390; *Matter of Bailey*, 10 Okla. 294; *Ex p. Tremblay*, 11 Quebec K. B. 454, 6 Can. Crim. Cas. 147; *Rex v. Wilson*, 35 N. Bruns. 461, 37 Can. L. J. 431. See also *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305.

The Supreme Court of the District of Columbia has no jurisdiction to entertain habeas corpus proceedings in behalf of one held in custody in the island of Guam. *McGowan v. Moody*, 22 App. Cas. (D. C.) 148.

**4. Restraint by Corporation.** — The writ should not be directed to the corporation as such, but to the person having the actual physical control of the person restrained of his liberty. *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.

**195. 3. Producing Body of Person Detained.** — *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305.

**Immaterial that Person Out of Jurisdiction if in Custody of Respondent.** — *People v. Winston*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 21, affirmed 61 N. Y. App. Div. 614.

**4. Production of Body Dispensed With — Persons Not in Custody of Respondent.** — *People v. New York Juvenile Asylum*, 57 N. Y. App. Div. 383; *People v. New York Juvenile Asylum*, 58 N. Y. App. Div. 133; *People v. Baxter*, 57 N. Y. App. Div. 179.

**5. Instructions from Superior Officer Not to Obey Writ.** — *Greene v. Carpenter*, 22 Quebec Super. Ct. 104.

**196. 4. Returnable to Judge of County Where Indictments Pending.** — *Ex p. Fulton*, (Tex. Crim.

**197. 5. Effect of Return** — *a. RULE IN UNITED STATES* — (2) *In State Courts.* — See note 9.

**198. X. HEARING AND DETERMINATION** — 1. *Extent of Inquiry on Hearing* — *b. WHERE CUSTODY IS UNDER JUDICIAL PROCESS* — (1) *Commitment on Criminal Charge Before Indictment.* — See note 5.

**199. Examination of Evidence Before Committing Officer.** — See notes 3, 4, 6.

**200.** See note 1.

**201. (2) After Indictment and Before Conviction** — *The Guilt or Innocence of the Accused.* — See note 3.

(3) *After Conviction.* — See note 6.

**202.** See notes 1, 2, 3.

**203. (4) Commitments for Contempt.** — See note 5.

**204. The Existence of the Facts Recited in the Commitment.** — See notes 1, 2. *Contempts by Witnesses.* — See note 4.

(5) *Constitutionality of Statutes.* — See note 6.

**205.** See note 1.

1901) 65 S. W. Rep. 1059; *Ex p. Graham*, (Tex. Crim. 1901) 64 S. W. Rep. 932.

**197. 9. Failure to Contradict Return.** — *Bray v. State*, 140 Ala. 172; *People v. New York Catholic Protectory*, 93 N. Y. App. Div. 196; *People v. Baxter*, 57 N. Y. App. Div. 179.

**198. 5. Inquiry into Jurisdiction or Power of Committing Officer.** — *Palmer v. Colladay*, 18 App. Cas. (D. C.) 426; *People v. Wells*, 57 N. Y. App. Div. 140; *State v. Beaverstad*, 12 N. Dak. 527; *State v. Garlington*, 56 S. Car. 413.

*Presumption Is that Trial Court Had Jurisdiction.* — *Pruitt v. State*, 130 Ala. 147.

**199. 3. Inquiry as to Whether Commitment Is Supported by Any Legal Evidence.** — *U. S. v. Robinson*, 126 Fed. Rep. 1016; *People v. Van De Carr*, 87 N. Y. App. Div. 386; *People v. Wells*, 57 N. Y. App. Div. 140; *State v. Beaverstad*, 12 N. Dak. 527; *State v. Huegin*, 110 Wis. 189.

**4. Sufficiency of Evidence Before Committing Officer Not Inquired into by Federal Courts.** — *U. S. v. Robinson*, 126 Fed. Rep. 1016; *Palmer v. Colladay*, 18 App. Cas. (D. C.) 426.

**6. State Decisions Holding Evidence Before Committing Officer Not Reviewable.** — *Young v. Fain*, 121 Ga. 737.

*Evidence May Be Reviewed to See Whether It Furnishes Reasonable Ground for Commitment.* — *State v. Huegin*, 110 Wis. 189.

**200. 1. State Decisions Holding Evidence Before Committing Officer Reviewable.** — *In re Levy*, 8 Idaho 53; *Rhea v. State*, 61 Neb. 15; *People v. Wells*, 57 N. Y. App. Div. 140; *State v. Beaverstad*, 12 N. Dak. 527.

**Guilt or Innocence Will Not Be Determined.** — *In re Chamberlin*, 62 Kan. 866, 61 Pac. Rep. 805; *In re Gilmore*, 61 Kan. 857, 58 Pac. Rep. 961.

**Weight of Evidence Not Considered.** — *People v. Dunlap*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 390.

**201. 3. Question of Guilt or Innocence Cannot Be Considered.** — *In re Kennedy*, 144 Cal. 634; *Matter of Van Orden*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 215.

**6. Extent of Inquiry on Habeas Corpus — Jurisdiction of Trial Court.** — *Ex p. Knudtson*, (Idaho 1905) 79 Pac. Rep. 641, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201; *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255;

*People v. Crane*, 94 N. Y. App. Div. 397; *People v. Van De Carr*, 86 N. Y. App. Div. 9; *People v. City Prison*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 149; *People v. Fox*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 82; *Com. v. May*, 24 Pa. Co. Ct. 546, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

**202. 1. Validity of Sentence — Defective Record.** — *Ex p. Knudtson*, (Idaho 1905) 79 Pac. Rep. 641, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

**2. No Inquiry into Sufficiency of Evidence.** — *Benson v. State*, 124 Ala. 92; *Matter of Smith*, 4 Ariz. 95; *People v. Flynn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 90.

**3. No Inquiry into Matters Within Province of Trial Court to Determine.** — *Ex p. Knudtson*, (Idaho 1905) 79 Pac. Rep. 641, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

**203. 5. Inquiry into Matters Outside Record.** — *Ex p. Pahia*, 13 Hawaii 575, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203; *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000.

**204. 1. Facts Recited in Commitment Not Reviewable on Habeas Corpus.** — See *In re Reese*, (C. C. A.) 107 Fed. Rep. 942.

**2. Sufficiency of Facts to Constitute Contempt.** — *Miskimmins v. Shaver*, 8 Wyo. 392.

**4. Inquiry into Propriety of Questions.** — *Rogers v. Superior Ct.*, 145 Cal. 88.

**6. Inquiry into Constitutionality of Statute Allowed.** — *Stoutenburgh v. Frazier*, 16 App. Cas. (D. C.) 229; *Moore v. Wheeler*, 109 Ga. 62; *Ex p. Lucas*, 160 Mo. 218.

Where the petitioner applies for relief to a court which he claims to have no legal existence, the appellate court will not examine the constitutionality of the statute creating such court. *Wright v. Davis*, 120 Ga. 670.

**Inquiry Allowed After Conviction.** — *In re Jarvis*, 66 Kan. 329.

**205. 1. Inquiry into Constitutionality of Statutes Denied.** — *People v. District Ct.*, 26 Colo. 380; *Koepke v. Hill*, 157 Ind. 172, 87 Am. St. Rep. 161, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; *In re Maguire*, 114 Mich. 80.

**Inquiry Not Allowed Before Conviction.** — *In re Gray*, 64 Kan. 850.

**Otherwise if Statute Attacked Affects Detention and Not Conviction.** — *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212.

- 205.** (6) *Custody in Extradition Proceedings.* — See notes 2, 3, 4, 5, 7.
- 206.** The Guilt or Innocence. — See note 1.
- 208.** 2. Evidence — *a.* IN GENERAL. — See note 3.  
*b.* AVERMENTS OF PETITION. — See note 5.
- 210.** 3. Decision on Hearing — *a.* REMAND OR DISCHARGE OF PARTY. — See notes 1, 3.  
 In Case of a Void Conviction. — See note 4.
- 211.** If the Judgment Is Unauthorized. — See note 1.  
*b.* EFFECT OF DECISION — (1) *Remanding Prisoner.* — See note 2.
- 212.** See note 1.  
 Remedy by Appeal. — See note 2.  
 (2) *Discharge of Prisoner.* — See note 3.
- 213.** See note 3.  
 (3) *Awarding Custody of Children.* — See notes 6, 7.
- 205.** 2. Inquiry into Validity of Warrant. — *State v. Justus*, 84 Minn. 237; *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616.
3. Inquiry into Jurisdiction. — *Terlinden v. Ames*, 184 U. S. 270; *Greene v. Henkel*, 183 U. S. 249; *In re Greene*, 22 Quebec Super. Ct. 91.
4. Inquiry as to Identity of Prisoner. — *In re Palmer*, (Mich. 1904) 100 N. W. Rep. 996.
5. Whether Alleged Fugitive Is Substantially Charged with Crime. — *Bruce v. Rayner*, 62 C. C. A. 501; *Stewart v. U. S.*, (C. C. A.) 119 Fed. Rep. 89; *In re Palmer*, (Mich. 1904) 100 N. W. Rep. 996; *Ex p. Dennison*, (Neb. 1904) 101 N. W. Rep. 1045; *Katyuga v. Cosgrove*, 67 N. J. L. 213; *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616.
- Mode of Proving Law of Demanding State. — *In re Renshaw*, (S. Dak. 1904) 99 N. W. Rep. 83.
- Regularity of Proceedings Had Before Extradition Are Not Reviewable. — *In re Letcher*, 145 Cal. 563.
7. Inquiry as to Whether Prisoner Is Fugitive from Justice. — *Hyatt v. Corkran*, 188 U. S. 691; *Munsey v. Clough*, 196 U. S. 364, affirming 72 N. H. 178; *Bruce v. Rayner*, 62 C. C. A. 501; *In re Count de Toulouse Lautrec*, (C. C. A.) 102 Fed. Rep. 878; *Ex p. Dennison*, (Neb. 1904) 101 N. W. Rep. 1045; *State v. Clough*, 71 N. H. 594; *Katyuga v. Cosgrove*, 67 N. J. L. 213; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706, reversing 72 N. Y. App. Div. 629; *In re Tod*, 12 S. Dak. 386, 76 Am. St. Rep. 616.
- 206.** 1. No Inquiry into Guilt or Innocence of Prisoner. — *Grin v. Shine*, 187 U. S. 181, affirming 112 Fed. Rep. 790; *Munsey v. Clough*, 196 U. S. 364; *Bruce v. Rayner*, 62 C. C. A. 501; *In re Palmer*, (Mich. 1904) 100 N. W. Rep. 996; *People v. Hyatt*, 172 N. Y. 176, 92 Am. St. Rep. 706. See also *Milford v. Perry*, 9 Ohio Cir. Dec. 492, 18 Ohio Cir. Ct. 76.
- 208.** 3. Burden of Proof. — *In re Clarke*, 125 Cal. 388; *Ex p. Douthitt*, (Tex. Crim. 1901) 63 S. W. Rep. 131.
5. Averments of Petition. — In *California* the practice is to consider the petition as a traverse to the return, and if any matters are denied, issue must be joined. Otherwise the facts averred in the petition will be taken as true. *In re Smith*, 143 Cal. 368.
- 210.** 1. Recombitment of Prisoner. — *Michaelson v. Beemer*, (Neb. 1904) 101 N. W. Rep. 1007.
3. Disposition of Party as Law and Justice Require. — *Motherwell v. U. S.*, (C. C. A.) 107 Fed. Rep. 437, reversed 183 U. S. 424; *Rex v. Hayward*, 6 Can. Crim. Cas. (Ont.) 399.
4. Void Conviction — Remand for Further Proceedings. — *Coleman v. Nelms*, 119 Ga. 307.
- 211.** 1. Void Sentence under Valid Conviction. — *White v. State*, 134 Ala. 197; *Russell v. Tatum*, 104 Ga. 332; *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305; *Ex p. Cohen*, 159 Mo. 662.
2. Refusal to Discharge Not Bar to Subsequent Applications. — *Rogers v. Superior Ct.*, 145 Cal. 88; *Carruth v. Taylor*, 8 N. Dak. 166; *State v. Beaverstad*, 12 N. Dak. 527; *Smith v. Perry*, 9 Ohio Cir. Dec. 778, 18 Ohio Cir. Ct. 826; *Ex p. Mullaney*, 10 Ohio Dec. 419, 8 Ohio N. P. 49; *Ex p. Martinez*, 46 Tex. Crim. 565; *Ex p. Blankenship*, (Tex. Crim. 1900) 57 S. W. Rep. 646; *Miskimmins v. Shaver*, 8 Wyo. 392; *Ex p. Gaynor*, 22 Quebec Super. Ct. 109; *Rex v. Carter*, 5 Can. Crim. Cas. (Nova Scotia) 401. See also *Cormack v. Marshall*, 211 Ill. 519; *State v. Kennie*, 24 Mont. 45.
- 212.** 1. Effect of Previous Refusal Considered on Second Application. — *In re White*, 31 Can. Sup. Ct. 383.
2. Effect of Remedy by Appeal. — *State v. Whitcher*, 117 Wis. 668, 98 Am. St. Rep. 968; *State v. Huegin*, 110 Wis. 189; *Taylor v. Scott*, 30 Ont. 475. *Contra*, *Smith v. Perry*, 9 Ohio Cir. Dec. 778, 18 Ohio Cir. Ct. 826.
3. Effect of Discharge — Res Judicata. — *Palmer v. Thompson*, 20 App. Cas. (D. C.) 273; *Palmer v. Colladay*, 18 App. Cas. (D. C.) 426; *Castor v. Bates*, 127 Mich. 285, 89 Am. St. Rep. 471, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.
- 213.** 3. Discharge Not Bar to Subsequent Prosecution on Same Charge. — *In re Begerow*, 136 Cal. 293; *People v. Crane*, 94 N. Y. App. Div. 397.
6. Decision as to Custody of Children — Operation as Res Judicata. — *Cormack v. Marshall*, 211 Ill. 519, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213; *In re King*, 66 Kan. 695, 97 Am. St. Rep. 399, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213; *Matter of Lederer*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 668; *People v. Winston*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 21, affirmed 61 N. Y. App. Div. 614.
7. Application Made on New Facts. — *Williams v. Croshy*, 118 Ga. 296; *Everitt v. Everitt*, 29

**213. XI. CUSTODY PENDING HEARING.** — See note 8.

**214.** See note 1.

**220. HABIT.** — See note 1.

**HABITUAL.** — See note 4.

Ind. App. 508, 94 Am. St. Rep. 276; *In re Hamilton*, 66 Kan. 754.

**Parties May Be Estopped and Yet Court May Decide What Is Best for Child.** — *In re King*, 66 Kan. 695, 97 Am. St. Rep. 399.

**213. 8. Appeal in Habeas Corpus Proceedings** does not stay the proceedings in the criminal cause in which the petitioner is restrained. *State v. Fenton*, 30 Wash. 325.

**214. 1. Writ of Habeas Corpus Terminates Original Custody.** — Wilkin's Petition, 71 N. H. 591, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213, 214; *Matter of Grant*, 26 Wash. 412, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213.

**220. 1. Single Act.** — Supreme Lodge, etc., *v. Foster*, 26 Ind. App. 333.

**4. Habitual — Residence.** — *In re Banff Election*, 4 N. W. Ter. 140.

## HABITUAL DRUNKARDS.

By W. H. CROW.

**223. II. DEFINITIONS AND DISTINCTIONS.** — See note 1.

**225. III. WHAT CONSTITUTES HABITUAL DRUNKENNESS — 1. In General.** — See note 2.

**226. 2. No Numerical Rule as to Frequency of Intoxication — Excess Should Be as Frequent as Opportunity — Habit Must Be Beyond Control.** — See note 2.

**227. IV. HABITUAL DRUNKENNESS UNDER CRIMINAL LAWS — 1. As a Criminal Offense — b. NOT PUNISHABLE WHEN PRACTICED IN PRIVATE.** — See note 3.

**228. V. JURISDICTION AND AUTHORITY OF CIVIL COURTS OVER HABITUAL DRUNKARDS — 1. Origin and History.** — See note 1.

**229. 3. Purpose of Authority — To Benefit Drunkard.** — See note 6.

**230. 4. Nature of Authority — b. ANALOGOUS TO THAT EXERCISED OVER LUNATICS.** — See note 2.

**232. VI. CIVIL STATUS OF HABITUAL DRUNKARD PRIOR TO INQUISITION — 2. Incompetency Must Usually Be Specifically Established.** — See note 1.

**235. VII. INQUISITION OF HABITUAL DRUNKENNESS — 6. Party Must Have Notice of Inquisition.** — See note 1.

**7. Evidence Before Inquisition — a. WHAT EVIDENCE NECESSARY.** — See note 3.

**239. VIII. EFFECT OF INQUISITION FINDING HABITUAL DRUNKENNESS — 2. Habitual Drunkard Rendered Non Sui Juris — c. REVOKES AUTHORITY OF DRUNKARD TO ACT AS AGENT FOR ANOTHER.** — See note 1.

**223. 1. A Drunkard is one who habitually drinks strong drinks immoderately; one whose habit is to get drunk.** *Glenn v. Glenn*, 87 Mo. App. 377.

**225. 2. A Person Shown to Be "Constantly Drinking" and "Very Rarely Sober," and who has assaulted his wife and threatened other people, has been adjudged an habitual drunkard.** *Robson v. Robson*, 68 J. P. 416.

**226. 2. Excess Should Be as Frequent as Opportunity — Habit Beyond Control.** — *People v. Radley*, 127 Mich. 628, 8 Detroit Leg. N. 467.

**227. 3. Not Punishable When Practiced in Private.** — *Com. v. Conlin*, 184 Mass. 195.

**224. 1. Origin and History — Crown Charged with Care of Lunatic.** — *Tarr's Estate*, 10 Pa. Super. Ct. 554.

**229. 6. In re Stackhouse**, 2 N. Bruns. Eq. Rep. 91.

**230. 2.** See *Niven v. Boland*, 177 Mass. 11; *Tarr's Estate*, 10 Pa. Super. Ct. 554.

**232. 1. The Drunkard May Dispense with Legal Proceedings and appoint his own committee under the Maryland statute.** *Tome v. Stump*, 89 Md. 264.

**235. 1. Notice as Matter of Right.** — *Matter of Coffin*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 131; *People v. St. Saviour's Sanitarium*, 34 N. Y. App. Div. 363.

**3. Physician's Certificate Required.** — *Niven v. Boland*, 177 Mass. 11.

**239. 1.** A judgment secured against the drunkard after the appointment of a committee gives no priority of lien and is not enforceable

**245. X. COMMITTEE OF HABITUAL DRUNKARD — POWERS AND DUTIES —**4. Committee of Estate — *a.* IN GENERAL. — See note 2.*b.* CONTROL OF PERSONALTY. — See note 3.*d.* MORTGAGE OR SALE OF REAL ESTATE. — See note 6.**248. XII. REMOVAL OF DISABILITY AND REHABILITATION OF HABITUAL DRUNKARD — 3. Decree of Rehabilitation. — See note 4.****249. HAIL INSURANCE. — See note 1.****HALF. — See note 3.****251. [HANDBILL. — See note *a.*]****HANDCARS. — See note 1.****HANDLING. — See note 5.**by execution. *Boner v. Meyer*, 11 York Leg. Rec. (Pa.) 58.**245. 2. May Order Payment of Attorneys. —** The court, having ultimate control of the drunkard's estate, may properly order payment out of such estate for the services of attorneys whom the drunkard's children have employed to secure proper treatment for him and manage his estate. *Tarr's Estate*, 21 Pa. Co. Ct. 358, affirmed 10 Pa. Super. Ct. 554.**3. Power of Court to Order Appropriation of Funds for Support of Drunkard and Family. —** *In re Stackhouse*, 2 N. Bruns. Eq. Rep. 91.**6. In Maryland,** where an habitual drunkard appeared in person, expressed his desire to discontinue with the legal proceedings, and appointed his own committee, it was held that the court had the same power to order a sale of his lands as if he had been declared an habitual drunkard. *Tome v. Stump*, 89 Md. 264.**248. 4. Suspending Commission. — See** *Roberts's Estate*, 197 Pa. St. 621.In *Matter of Lerner*, (Supm. Ct. App. Div.) 12 N. Y. Annot. Cas. 362, 79 N. Y. App. Div. 134, an order had been made that the petitioner be released on probation, to be recommitted if she should relapse. It was argued on habeas corpus proceedings that under Code Civ. Pro. N. Y., § 2031, the judge should have granted a final decree — had no power to discharge on probation. The court held that the fact that the order was qualified furnished no legal cause for complaint to her committee.**249. 1. Arbitration. —** In an action on a policy of *hail insurance* where arbitration of the amount of the loss was not made a condition precedent to bringing the action, a failure to arbitrate would not defeat it. *Barry v. Farmer's Mut. Hail Assoc.*, 114 Iowa 186.**Measure of Damages. —** In an action on a policy of *hail insurance* an instruction that the recovery should be the market value of thegrain at the time of threshing less a reasonable expense of threshing and marketing, and as to corn a reasonable expense of husking and cribbing, is erroneous because no deduction was made for the cost of fitting the crop for market, such as harvesting and stacking, etc. *Barry v. Farmers Mut. Hail Assoc.*, 114 Iowa 186. And see *McIlrath v. Farmers Mut. Hail Ins. Assoc.*, 114 Iowa 244.**Evidence as to Loss. —** In an action on a policy of *hail insurance* the jury is justified in taking the farmer's knowledge of the number of bushels of corn injured by hail as well as the number of acres planted in preference to the figures of the insurance company's witnesses, based partly upon their conclusions as to the fulness of the crib and acreage in cultivation. *Condon v. Des Moines Mut. Hail Assoc.*, 120 Iowa 80.In an action on a policy of *hail insurance* an instruction permitting the jury to consider the yield of other fields of similar kind and quality in that neighborhood in estimating the depreciation of yield suffered is correct. *Condon v. Des Moines Mut. Hail Assoc.*, 120 Iowa 80.**Waiver of Proofs of Loss. — See** *Condon v. Des Moines Mut. Hail Assoc.*, 120 Iowa 80.**Competency of Expert Evidence. —** *McIlrath v. Farmers Mut. Hail Ins. Assoc.*, 114 Iowa 244.**3. Half-section. —** *Edinger v. Woodke*, 127 Mich. 41.**251. a. Handbill Equivalent to Circular. —** See *People v. McLaughlin*, (Ct. Gen. Sess.) 33 Misc. (N. Y.) 651.**1. Handcars. —** *Perez v. San Antonio, etc., R. Co.*, 28 Tex. Civ. App. 255.**5. Handling Firearms. —** As to what constitutes *handling* firearms within the meaning of an insurance policy, see *Thomas v. Masons Fraternal Acc. Assoc.*, 64 N. Y. App. Div. 22; *Doody v. National Masonic Acc. Assoc.*, 66 Neb. 493.

# HANDWRITING.

BY J. E. BRADY.

**254. II. PROOF OF HANDWRITING — 2. Modes of Proof — a. GENERALLY**  
— Rules the Same in Civil and Criminal Cases. — See note 1.

*b. BY WRITER HIMSELF — Proof by Writer's Own Testimony. — See note 2.*

*c. BY NONEXPERT WITNESSES — (1) Who Saw Instrument Written. — See note 4.*

*(2) Who Are Familiar with Writer's Handwriting — (a) Generally. — See note 5.*

**255.** *(b) From Having Seen Him Write — Proof of Handwriting by Witness Who Has Seen Party Write. — See note 2.*

*Writing Once. — See note 4.*

**256.** *(c) From Having Seen Papers Known to Be in His Handwriting — aa. GENERALLY, — See note 3.*

*Handwriting Acknowledged by Writer to Be Genuine. — See note 4.*

*Handwriting Seen in Usual Course of Business. — See note 6.*

**257.** *bb. THROUGH CORRESPONDENCE. — See note 4.*

*Where Witness Was Confidential Clerk of Person Addressed. — See note 5.*

**259.** *(d) Competency and Testimony of Witnesses — aa. WITNESS MUST BE FAMILIAR WITH PERSON'S HANDWRITING — (aa) Generally — Witness Must Claim to Have Knowledge. — See note 1.*

**254. 1. Proving Genuineness of Standard. —**  
In civil cases the genuineness of a document to be used as a standard may be established by a preponderance of evidence, while in criminal cases such a paper must be proved beyond a reasonable doubt. *People v. Molineux*, 168 N. Y. 264.

**2. Proof of Handwriting by Writer Himself. —**  
See *Southern L. & T. Co. v. Benbow*, 131 N. Car. 415.

**4. Proof by Witnesses of Execution. —**  
*People v. Molineux*, 168 N. Y. 264; *Groff v. Groff*, 209 Pa. St. 603. See also *Archer v. U. S.*, 9 Okla. 569.

**5. Proof by Witnesses Acquainted with Writer's Handwriting. —**  
*U. S. v. Ortiz*, 176 U. S. 422; *Matter of Marchall*, 126 Cal. 95; *State v. Barrett*, (Del. 1904) 59 Atl. Rep. 45; *Morell v. Morell*, 157 Ind. 179; *Monumental Bronze Co. v. Doty*, 99 Mo. App. 195; *People v. Molineux*, 168 N. Y. 264; *People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101. See also *Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751; *Archer v. U. S.*, 9 Okla. 569; *Wilmington Sav. Bank v. Waste*, 76 Vt. 331. But see *Neall v. U. S.*, (C. C. A.) 118 Fed. Rep. 699.

A person is not presumed to be acquainted with the signature of his father. *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596.

**255. 2. Proof by Witness Who Has Seen Person Write — United States. —**  
*U. S. v. Ortiz*, 176 U. S. 422.

*Delaware. — State v. Barrett*, (Del. 1904) 59 Atl. Rep. 45.

*Georgia. — Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751.

*Illinois. — Kelly v. Fallon*, 108 Ill. App. 108.

*Indiana. — Morell v. Morell*, 157 Ind. 179.

*New York. — People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101.

*South Dakota. — State v. Hall*, 16 S. Dak. 6, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

*Vermont. — See Wilmington Sav. Bank v. Waste*, 76 Vt. 331.

**4. Seeing Person Write Once Qualifies. —**  
*U. S. v. Ortiz*, 176 U. S. 422.

**256. 3. Knowledge Acquired by Seeing Papers Written by Party. —**  
*U. S. v. Ortiz*, 176 U. S. 422.

**4. Knowledge Acquired by Seeing Writings Acknowledged to Be Genuine. —**  
*Kelly v. Fallon*, 108 Ill. App. 108.

**6. Handwriting Seen in the Usual Course of Business. —**  
*People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101.

**257. 4. Proof by Witness Who Has Corresponded with Alleged Writer. —**  
*U. S. v. Ortiz*, 176 U. S. 422; *State v. Barrett*, (Del. 1905) 59 Atl. Rep. 45; *Morell v. Morell*, 157 Ind. 179; *Monumental Bronze Co. v. Doty*, 99 Mo. App. 195; *People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101.

**5. Proof by Clerk in Charge of Correspondence. —**  
See *Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751.

**259. 1. Witness Must Claim Acquaintance. —**  
*Gress Lumber Co. v. Georgia Pine Shingle Co.*, 120 Ga. 751; *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596.

- 259.** (*bb*) *Extent of Knowledge*. — See note 6.
- 260.** (*cc*) *Cross-examination — Testing Witness — Testing Witness by Use of Other Writings*. — See note 2.
- 261.** *bb*. WHERE WITNESS HAS ACQUIRED HIS KNOWLEDGE AFTER CONTROVERSY AROSE — (*aa*) *Generally*. — See note 2.
- 263.** *d*. BY COMPARISON OF HANDWRITING — (1) *Definition*. — See notes 4, 5.
- 264.** (2) *Historical Statement — English Law*. — See note 4.  
(3) *In Absence of Statute* — (a) *Generally — Comparison of Handwriting Not Allowed at Common Law*. — See note 6.
- 265.** *Reasons for Rule*. — See note 1.  
*Exceptions to General Rule*. — See note 3.  
*American Decisions*. — See note 4.  
*Law in Pennsylvania and South Carolina*. — See note 5.
- 266.** (b) *With Papers Already in Case — Comparison Allowed*. — See notes 1, 2.
- 267.** (c) *With Irrelevant Papers* — *bb*. CLASSIFICATION OF DECISIONS — *Introduction of Irrelevant Writings as Standards Permitted*. — See note 3.  
*Irrelevant Writings Excluded*. — See note 4.
- 268.** *Intermediate Rule — Irrelevant Writings Admitted under Limitations*. — See note 3.
- 269.** *cc*. *Grounds for Exclusion of Such Evidence*. — See note 7.
- 270.** See note 3.  
(4) *Under Statutes — Proof by Comparison Authorized by Statute*. — See note 9.
- 271.** See notes 2, 3, 4, 8.

**259.** 6. *Extent of Knowledge Immaterial So Far as Competency Is Concerned*. — *Ratliff v. Ratliff*, 131 N. Car. 425.

**260.** 2. *Testing Witness by Use of Irrelevant Papers Not Permissible*. — *Wilmington Sav. Bank v. Waste*, 76 Vt. 331. But see *Groff v. Groff*, 209 Pa. St. 603.

**261.** 2. *Ratliff v. Ratliff*, 131 N. Car. 425.

**263.** 4. *Establishing a Relevant Fact by Comparison*. — *People v. Molineux*, 168 N. Y. 264.

A writing which is merely evidential and not the issue cannot be proved by means of comparison. *People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101.

**6.** *All Indirect Evidence of Handwriting in Its Nature Comparison*. — *People v. Molineux*, 168 N. Y. 264.

**264.** 4. *English Common-law Decisions*. — *State v. Batson*, 108 La. 491, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264; *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264.

**6.** *Comparison of Handwriting Not Allowed at Common Law*. — *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264; *Tower v. Whip*, 53 W. Va. 158.

**265.** 1. *No Comparison by Illiterate Jury*. — See *Illinois University v. Spalding*, 71 N. H. 166.

**3.** *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

**4.** *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

**5.** *Pennsylvania Law*. — Under the Act of 1895 (P. L. 69) expert witnesses may make comparisons. *Groff v. Groff*, 209 Pa. St. 603.

**266.** 1. *Comparison Allowed with Papers Already in Evidence*. — *Martin v. Leslie*, 93 Ill. App. 44; *People v. Hutchings*, (Mich. 1904) 100 N. W. Rep. 753, 11 Detroit Leg. N. 367; *Ratliff v. Ratliff*, 131 N. Car. 425; *People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101; *People v. Dorthy*, 50 N. Y. App. Div. 44; *People v. Fleechter*, 44 N. Y. App. Div. 199; *People v. Molineux*, 168 N. Y. 264; *Tower v. Whip*, 53 W. Va. 158, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

**2.** *Papers on File in Case*. — *Tower v. Whip*, 53 W. Va. 158, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266.

**267.** 3. *Cases Holding that Other Writings May Be Instituted for Sole Purpose of Comparison*. — *State v. Ryno*, 68 Kan. 352; *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267; *People v. Truck*, 170 N. Y. 203; *Johnson v. Com.*, 102 Va. 927. See also *Murphy v. People*, 213 Ill. 154.

**4.** *Irrelevant Papers Held Inadmissible for Purposes of Comparison*. — *Martin v. Leslie*, 93 Ill. App. 44; *State v. Batson*, 108 La. 491; *Ratliff v. Ratliff*, 131 N. Car. 425; *People v. Molineux*, 168 N. Y. 264; *Sheppard v. Love*, (Tex. Civ. App. 1902) 71 S. W. Rep. 67.

**268.** 3. *New Hampshire*. — *Illinois University v. Spalding*, 71 N. H. 166, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268.

**269.** 7. *Grounds for Exclusion of Irrelevant Instruments*. — *Illinois University v. Spalding*, 71 N. H. 166.

**270.** 3. *No Danger Where Genuineness of Standard Is Admitted*. — See *Illinois University v. Spalding*, 71 N. H. 166.

**9.** *Georgia*. — *McCombs v. State*, 109 Ga. 496.

**271.** 2. *Kentucky*. — *Storey v. Louisville*

- 271.** No Distinction Between Relevant and Irrelevant Writings. — See notes 14, 15. Statutes Construed Strictly. — See note 16.
- 272.** (5) *The Standard of Comparison* — (b) Proof of Genuineness — Standard Must Be Proved Genuine. — See note 3.
- 273.** Character of Evidence Required. — See notes 1, 2, 3. Proof of Standard by Comparison. — See note 4. Proof of Genuineness Question for Court. — See notes 5, 6.
- 274.** (c) Use of Letterpress or Photographic Copies — Photographic Copies — Photographs Generally Inadmissible. — See note 2. Photographs of Documents on File in Public Archives. — See note 3. Where the Original Documents Are in Evidence. — See note 5. (a) Writings Specially Prepared — Writing by Witness on Stand. — See note 7. A Writing by a Witness on the Stand. — See note 8.
- 275.** (e) Standard Must Be Produced in Court. — See note 2. (6) *Who May Make Comparison* — (a) Generally — In Great Britain. — See note 3.

First Nat. Bank, 72 S. W. Rep. 318, 24 Ky. L. Rep. 1799; *Bogard v. Johnstone*, (Ky. 1899) 53 S. W. Rep. 651.

**271.** 3. Louisiana. — See *State v. Batson*, 108 La. 491, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.

**4.** Missouri. — *Cook v. Strother*, 100 Mo. App. 622.

**8.** New York. — *People v. Molineux*, 168 N. Y. 264; *People v. Kennedy*, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101; *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596; *People v. Dorthy*, 50 N. Y. App. Div. 44; *Hoag v. Wright*, 174 N. Y. 36.

**14.** Irrelevant Papers Admissible under Statutes. — See also *McCombs v. State*, 109 Ga. 496; *People v. Dorthy*, 50 N. Y. App. Div. 44.

**15.** See *State v. Batson*, 108 La. 491, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.

**16.** Strict Construction. — *Cook v. Strother*, 100 Mo. App. 622.

**272.** 3. Genuineness of Standard Must Be Established — *United States*. — *U. S. v. Ortiz*, 176 U. S. 422.

*Georgia*. — *McCombs v. State*, 109 Ga. 496.

*Kentucky*. — *Storey v. Louisville First Nat. Bank*, 72 S. W. Rep. 318, 24 Ky. L. Rep. 1799; *Bogard v. Johnstone*, (Ky. 1899) 53 S. W. Rep. 651.

*New Hampshire*. — *Illinois University v. Spalding*, 71 N. H. 166, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 272.

*New York*. — *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596; *People v. Molineux*, 168 N. Y. 264; *People v. Dorthy*, 50 N. Y. App. Div. 44.

*Oklahoma*. — *Archer v. U. S.*, 9 Okla. 569.

It is immaterial that the standard was not proved genuine at the time it was submitted for comparison, if its genuineness was afterwards established. *Matter of Marchall*, 126 Cal. 95.

**Lead Pencil Signature**, admittedly genuine, may be used as a standard of comparison. *Groff v. Groff*, 209 Pa. St. 603.

**273.** 1. Genuineness of Standard Must Be Clearly Proved. — *McCombs v. State*, 109 Ga. 496; *Illinois University v. Spalding*, 71 N. H. 166, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273; *People v. Molineux*, 168 N. Y. 264; *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596.

**2.** Proof by Direct or Equivalent Evidence Required. — *Archer v. U. S.*, 9 Okla. 569. See also *People v. Molineux*, 168 N. Y. 264.

**3.** Proof by Preponderance of Evidence Held Sufficient. — *U. S. v. Ortiz*, 176 U. S. 422; *State v. Ryno*, 68 Kan. 352. See also *People v. Molineux*, 168 N. Y. 264.

**Sufficient Standard.** — Signatures on a will and bank checks which have been paid are admissible as standards. *Matter of Koch*, (Surrogate Ct.) 33 Misc. (N. Y.) 153.

**4.** *Archer v. U. S.*, 9 Okla. 569.

**5.** Proof of Genuineness Question for Court. — *State v. Ryno*, 68 Kan. 352; *Illinois University v. Spalding*, 71 N. H. 166, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273; *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596.

**6.** *Farrell v. Manhattan R. Co.*, 83 N. Y. App. Div. 393, affirmed 178 N. Y. 596.

**274.** 2. Photographic Copies Not Admissible as Standards. — See *Storey v. Louisville First Nat. Bank*, 72 S. W. Rep. 318, 24 Ky. L. Rep. 1799.

**3.** Photographic Copies of Church Records. — See *Murphy v. People*, 213 Ill. 154.

**6.** Photographs Admissible Where Original Is in Evidence. — *U. S. v. Ortiz*, 176 U. S. 422; *Johnson v. Com.*, 102 Va. 927.

**7.** Writings Specially Prepared Not Admissible as Standards. — *Storey v. Louisville First Nat. Bank*, 72 S. W. Rep. 318, 24 Ky. L. Rep. 1799; *Illinois University v. Spalding*, 71 N. H. 166; *Whittle v. State*, 43 Tex. Crim. 468.

Although "writings created *post litem motam* are inadmissible in favor of a party creating them," such writings are admissible as standards when offered by the adverse party. *People v. Molineux*, 168 N. Y. 264.

**8.** Witness Not Permitted to Write for Purpose of Making Evidence in His Own Favor. — *Whittle v. State*, 43 Tex. Crim. 468.

**275.** 2. Standard Must Be Produced in Court. — *People v. Dorthy*, 50 N. Y. App. Div. 44; *Whittle v. State*, 43 Tex. Crim. 468.

**3.** At Common Law comparison could be made by "witnesses, or by the court or jury without the aid of witnesses, between the disputed writing and other writings already in evidence for other purposes." *People v. Molineux*, 168 N. Y. 264.



- 276.** Comparison by Jury or Witnesses. — See note 1.  
 Witness Must Be Expert. — See note 9.  
 Right of Jury to Make Comparison in Jury Room. — See note 10.  
 (b) Previous Knowledge of Person's Handwriting Not Essential. — See note 12.
- 277.** *e.* BY EXPERT WITNESSES — (2) *Who Are Experts.* — See notes 3, 5, 9, 10.
- 278.** (3) *Competency and Testimony of Experts* — (a) *Witness Must Be Expert.* — See notes 1, 2.  
 (b) *Cross-examination — Testing Expert.* — See note 4.  
*Testing Expert with Other Papers.* — See note 5.
- 279.** (c) *To What Expert May Testify — Illustrations.* — See note 3.
- 280.** See note 1.  
*An Expert Must Give His Opinion as to Facts.* — See note 4.  
*Reasons for Opinion.* — See note 5.
- 281.** *Use of Blackboard.* — See note 2.  
 (d) *Value of Expert Testimony — Of Slight Value.* — See note 5.  
 (e) *Function of Court and Jury — Competency of Witness.* — See note 8.
- 282.** *The Weight of Expert Testimony.* — See note 1.  
 4. *Proof of Mark.* — See note 8.

## **287. HAVE, HAVING, ETC.** — See note 1.

**276.** 1. *Comparison by Jury or Witnesses.* — *Tower v. Whip*, 53 W. Va. 158; *Groff v. Groff*, 209 Pa. St. 603.

The jury may take to the jury room papers which have been introduced for comparison. *Johnson v. Com.*, 102 Va. 927.

9. *Witness Must Be Expert.* — See also *Tower v. Whip*, 53 W. Va. 158.

10. *Right of Jury to Make Comparison in Jury Room.* — *Johnson v. Com.*, 102 Va. 927.

12. *Traced Writing.* — In giving testimony as to whether a signature is traced, a previous acquaintance on the part of the expert with the handwriting of the person by whom the signature purports to have been made is not necessary. *Dolan v. Meehan*, (Tex. Civ. App. 1904) 80 S. W. Rep. 99.

**277.** 3. *Who Are Experts — Need Not Be Professional.* — *People v. Flechter*, 44 N. Y. App. Div. 199.

5. *Bank Officers.* — *People v. Flechter*, 44 N. Y. App. Div. 199; *Tower v. Whip*, 53 W. Va. 158.

9. *Teachers of Writing.* — *Heffernan v. O'Neill*, (Neb. 1901) 96 N. W. Rep. 244.

10. *For Other Examples.* — *People v. Flechter*, 44 N. Y. App. Div. 199; *Pope v. Anthony*, 29 Tex. Civ. App. 298.

**278.** 1. *Witness Must Be Shown to Be Expert.* — *Tower v. Whip*, 53 W. Va. 158, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.

The court must be clearly satisfied as to the competence of the witness. *Groff v. Groff*, 209 Pa. St. 603.

2. *Witness Need Not Claim to Be Expert.* — *Tower v. Whip*, 53 W. Va. 158, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.

4. *Witness May Be Interrogated as to His Experience.* — *Hoag v. Wright*, 174 N. Y. 36.

*Effect of Cross-examination.* — Where the evidence of an expert is weakened on cross-

examination, the fact affects the weight of the evidence merely, and not its admissibility. *Grooms v. State*, 40 Tex. Crim. 319.

5. *Testing Expert with Irrelevant Papers Not Admitted to Be Genuine.* — See *Hoag v. Wright*, 174 N. Y. 36.

**279.** 3. *Whether a Signature Was Traced.* — *Dolan v. Meehan*, (Tex. Civ. App. 1904) 80 S. W. Rep. 99.

**280.** 1. *Age of Writing.* — *Murphy v. People*, 213 Ill. 154. See also *Matter of Hopkins*, 172 N. Y. 360, 92 Am. St. Rep. 746.

4. *Expert Must Testify to Facts.* — *Lowe v. Dorsett*, 125 N. Car. 301.

5. *Expert May Give Reasons for His Opinion.* — *State v. Ryno*, 68 Kan. 352; *Pope v. Anthony*, 29 Tex. Civ. App. 298.

**281.** 2. *Expert May Use Blackboard.* — *State v. Ryno*, 68 Kan. 352, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 281. See also *Groff v. Groff*, 209 Pa. St. 603.

5. *Expert Testimony as to Handwriting of Slight Value.* — *Hoag v. Wright*, 174 N. Y. 36; *Archer v. U. S.*, 9 Okla. 569.

8. *Whether Witness Competent as Expert Question for Judge.* — *Hoag v. Wright*, 174 N. Y. 36; *People v. Flechter*, 44 N. Y. App. Div. 199; *Groff v. Groff*, 209 Pa. St. 603.

**282.** 1. *Weight of Expert's Testimony for Jury.* — *State v. Ryno*, 68 Kan. 352; *Hoag v. Wright*, 174 N. Y. 36; *Lowe v. Dorsett*, 125 N. Car. 301.

8. *Mark Cannot Be Proved.* — An expert cannot testify as to who made or did not make perpendicular lines canceling the signature to a will. *Matter of Hopkins*, 172 N. Y. 360, 92 Am. St. Rep. 746.

**287.** 1. *Ownership or Possession.* — *Gee v. Hasbrouck*, 128 Mich. 509.

# HAWKERS AND PEDDLERS.

By J. H. FREESE.

**291. I. DEFINITIONS AND DISTINCTIONS — Hawkers and Peddlers. —** See note 1. Differentiated in England. — See note 2.

The Essential Difference Between a Peddler and the Ordinary Merchant. — See note 3.

The Distinction Between a Peddler and a Commercial Traveler or Drummer. — See notes 4, 5.

Itinerant Vendors or Transient Merchants. — See note 6.

**292. Traveling Agents. —** See note 1.

**II. WHAT CONSTITUTES HAWKING AND PEDDLING — 1. Itinerant Retail Traffic — a. IN GENERAL. —** See note 3.

Traveling Generally Necessary. — See note 5.

**293. Single Act of Selling Not Peddling. —** See note 1.

b. SELLING ON INSTALMENT PLAN. — See note 3.

**3. Exceptions and Exemptions — a. MANUFACTURERS, REAL WORKERS, AND MANUFACTURING MECHANICS. —** See note 6.

**294. b. FARMERS AND GARDENERS. —** See note 2.

**291. 1. Hawkers and Peddlers Defined. —** *In re Pringle*, 67 Kan. 364; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291; *Moberly v. Hoover*, 93 Mo. App. 663; *State v. Ninestein*, 132 N. Car. 1039. See also *State v. Frank*, 130 N. Car. 724, 89 Am. St. Rep. 885.

A Hawker is a person who goes through the streets or roads of a city or country calling out his wares for sale. *Reg. v. Phillips*, 7 Can. Crim. Cas. 131, 35 N. Bruns. 393.

The Word "Peddler" is commonly used to describe one who travels about retailing small wares. It carries the idea of pettiness as respects the character of the business transacted. *Montreal v. Emond*, 23 Quebec Super. Ct. 77.

**2. Differentiated in England. —** See *Holland v. Hall*, 86 L. T. N. S. 355, 50 W. R. 525, 66 J. P. 424, 20 Cox C. C. 167; *O'Dea v. Crowhurst*, 68 L. J. Q. B. 655, 80 L. T. N. S. 491, 63 J. P. 424, 19 Cox C. C. 260.

**3. Distinction Between Peddler and Ordinary Merchant. —** *State v. Foster*, 22 R. I. 163. See also *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291.

**4. Distinction Between Peddler and Drummer. —** *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 291; *New Castle v. Cutler*, 15 Pa. Super. Ct. 612; *Montreal v. Emond*, 23 Quebec Super. Ct. 77.

**5. Potts v. State**, 45 Tex. Crim. 45.

**6. Itinerant Optician. —** Under Code Iowa, § 700, an itinerant optician is not a merchant. *Waukon v. Fisk*, 124 Iowa 464.

**292. 1. In re Abel, (Idaho 1904) 77 Pac. Rep. 621; *Watkins Medical Co. v. Paul*, 87 Ill. App. 278.**

**3. What Constitutes — England. —** *Holland v. Hall*, 86 L. T. N. S. 355, 50 W. R. 525, 66 J. P.

424; *O'Dea v. Crowhurst*, 80 L. T. N. S. 491, 68 L. J. Q. B. 655, 63 J. P. 424, 19 Cox C. C. 260.

*Canada. —* *Montreal v. Emond*, 23 Quebec Super. Ct. 77.

*Georgia. —* *Standard Oil Co. v. Swanson*, 121 Ga. 412.

*Kentucky. —* *Standard Oil Co. v. Com.*, 107 Ky. 606; *Hays v. Com.*, 107 Ky. 655; *West v. Mt. Sterling*, 65 S. W. Rep. 120, 23 Ky. L. Rep. 1670; *Coffey v. Hendrick*, 65 S. W. Rep. 127, 23 Ky. L. Rep. 1328; *Standard Oil Co. v. Com.*, 80 S. W. Rep. 1150, 26 Ky. L. Rep. 142.

*Massachusetts. —* *Com. v. Reid*, 175 Mass. 325.

*Mississippi. —* *Lynch v. State*, 78 Miss. 347.

*North Carolina. —* *State v. Frank*, 130 N. Car. 724, 89 Am. St. Rep. 885.

*Pennsylvania. —* *New Castle v. Cutler*, 15 Pa. Super. Ct. 612; *Leighton v. Smith*, 9 Pa. Dist. 428, 6 Lack. Leg. N. (Pa.) 192, 7 Northam. Co. Rep. 190; *Com. v. Roenick*, 10 Pa. Dist. 51, 31 Pittsb. Leg. J. N. S. (Pa.) 191.

*Wyoming. —* *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

**5. Traveling Usually Necessary. —** *Standard Oil Co. v. Com.*, 80 S. W. Rep. 1150, 26 Ky. L. Rep. 142; *Hays v. Com.*, 107 Ky. 655; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554; *Montreal v. Emond*, 23 Quebec Super. Ct. 77.

**293. 1. Single Act of Selling Does Not Constitute Peddling. —** *State v. Feingold*, 77 Conn. 326; *Hays v. Com.*, 107 Ky. 655; *Reg. v. Phillips*, 7 Can. Crim. Cas. 131, 35 N. Bruns. 393. See also *O'Dea v. Crowhurst*, 68 L. J. Q. B. 655, 80 L. T. N. S. 491, 63 J. P. 424, 19 Cox C. C. 260.

**3. Selling on Instalment Plan. —** *Collier v. Burgin*, 130 N. Car. 632.

**6. A Watchmaker and Jeweler. —** See *Saulsbury v. State*, 43 Tex. Crim. 90.

**294. 2. Farmers and Gardeners. —** *Et. p.*

**294.** *d.* SELLERS BY SAMPLE AND SELLERS FOR FUTURE DELIVERY — General Rule in United States and Canada. — See note 4.

**295.** Are Hawkers in England. — See note 2.

**III. RESTRICTIONS UPON HAWKING AND PEDDLING — 1. Restrictions Usually an Exercise of Police Power.** — See note 3.

**4. Calling Taxed, Not Merchandise.** — See note 6.

**296.** Residence of Peddler Immaterial. — See note 1.

**5. Licensee Not Exempt from Ordinary Police Regulations.** — See note 2.

**IV. CONSTITUTIONALITY AND VALIDITY OF STATUTES — 2. Must Not Affect Foreign or Interstate Commerce — Goods Not Yet in State, or in Original Packages.** — See note 4.

**297.** When Not under Federal Protection. — See note 1.

**3. Must Not Affect Patent Rights.** — See note 2.

**298.** **4. Requirements as to Uniformity of Operation — b. RESIDENTS OR PRODUCTS OF SAME STATE.** — See note 1.

Snyder, (Idaho 1905) 79 Pac. Rep. 819, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294; Mechanicsburg v. Koons, 18 Pa. Super. Ct. 131.

**Butcher Held Not a Peddler.** — *Ex p.* Snyder, (Idaho 1905) 79 Pac. Rep. 819.

**Ice Not Included, under Statute Permitting Sale of "Provisions" Without License.** — *Com. v. Reid*, 175 Mass. 325.

**Fruit Declared Within Statute Allowing Sale of "Provisions" Without License.** — *State v. Angelo*, 71 N. H. 224.

**294. 4. Sellers by Sample and Sellers for Future Delivery Not Peddlers — Illinois.** — See McDermott v. Lewistown, 92 Ill. App. 474.

*Michigan.* — See Muskegon v. Zeeryp, 134 Mich. 181, 10 Detroit Leg. N. 519.

*Minnesota.* — *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554.

*New Hampshire.* — *State v. Wells*, 69 N. H. 424.

*North Carolina.* — *State v. Frank*, 130 N. Car. 724, 89 Am. St. Rep. 885; *State v. Nine-stein*, 132 N. Car. 1039; *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506. But see *State v. Franks*, 127 N. Car. 510; *Collier v. Burgin*, 130 N. Car. 632.

*Pennsylvania.* — *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

*Texas.* — *Potts v. State*, 45 Tex. Crim. 45; *Harkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 26.

*Wisconsin.* — *Wausau v. Heideman*, 119 Wis. 244.

*Wyoming.* — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

*Canada.* — *Reg. v. Phillips*, 7 Can. Crim. Cas. 131, 35 N. Bruns. 393.

**Established Merchant May Solicit and Fill Orders in General Vicinity.** — *Wausau v. Heideman*, 119 Wis. 244.

**295. 2. Holland v. Hall**, 86 L. T. N. S. 355, 50 W. R. 525, 66 J. P. 424, 20 Cox C. C. 167.

**3. Nebraska — Exercise of Taxing Power.** — *Comp. Stat. Neb.*, c. 77, art. 1, §§ 152-154, regarding the licensing of peddlers, is held to be a valid exercise of the taxing power and not of the police power. *Rosenbloom v. State*, 64 Neb. 342; *Gerrard v. State*, 64 Neb. 368.

**6. Calling Taxed, Not Goods.** — *Rosenbloom v. State*, 64 Neb. 342; *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157; *Knisely v. Cotterel*,

3 Dauphin Co. Rep. (Pa.) 120; *In re Watson*, 17 S. Dak. 486; *In re Garfinkle*, 37 Wash. 650. See also *New Castle v. Cutler*, 15 Pa. Super. Ct. 612. But see *State v. Jensen*, 93 Minn. 88; *State v. Hoyt*, 71 Vt. 59.

**296. 1. Residence of Peddler Immaterial.** — *West v. Mt. Sterling*, 65 S. W. Rep. 120, 23 Ky. L. Rep. 1670; *State v. Foster*, 22 R. I. 163.

**2. Licensee Must Obey Police Regulations.** — *Montz v. District of Columbia*, 20 App. Cas. (D. C.) 568.

**4. Goods Not Within State, or in Original Packages — Georgia.** — See *Stone v. State*, 117 Ga. 292.

*Kansas.* — *In re Pringle*, 67 Kan. 364, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297. *Nebraska.* — *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020.

*North Carolina.* — *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506. But see *Collier v. Burgin*, 130 N. Car. 632.

*North Dakota.* — *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157.

*Texas.* — *Harkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 26.

*Wyoming.* — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

**297. 1. When Not under Federal Protection — Georgia.** — *Stone v. State*, 117 Ga. 292.

*Idaho.* — *In re Abel*, (Idaho 1904), 77 Pac. Rep. 621.

*Illinois.* — *McDermott v. Lewiston*, 92 Ill. App. 474.

*Kansas.* — *In re Pringle*, 67 Kan. 364, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297.

*Kentucky.* — *West v. Mt. Sterling*, 65 S. W. Rep. 120, 23 Ky. L. Rep. 1670.

*Maine.* — *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386.

*Michigan.* — *Muskegon v. Zeeryp*, 134 Mich. 181, 10 Detroit Leg. N. 519.

*Minnesota.* — *State v. Jensen*, 93 Minn. 88.

*North Carolina.* — *Collier v. Burgin*, 130 N. Car. 632.

*North Dakota.* — *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157.

*Texas.* — *Saulsbury v. State*, 43 Tex. Crim. 90.

**2. Patent Rights — Contra.** — *Burns v. Sparks*, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688.

**298. 1. Residents or Products of Same State,**

**298. c. UNIFORMITY IN LICENSE TAX — FEE IMPOSED UNDER POLICE POWER.** — See note 2.

*d. FEE OR TAX IMPOSED UNDER REVENUE LAWS.* — See note 3.

*e. EQUAL APPLICATION WITHIN SAME CLASS.* — See note 4.

*f. PROMOTION OF SPECIAL INTERESTS.* — See notes 5, 6.

*g. EXCEPTIONS TO APPLICATION OF RULE REQUIRING UNIFORMITY OF OPERATION — (1) Veteran Soldiers Sometimes Privileged.* — See note 7.

**299. V. LICENSES — 3. License a Personal and Individual Privilege.** — See note 5.

*Corporations or Firms Cannot Be Licensed.* — See note 6.

**4. License Tax or Fee — a. AMOUNT MUST BE REASONABLE.** — See note 7.

**300. b. REASONABLENESS — HOW DETERMINED.** — See note 1.

*When for Regulation Alone.* — See note 2.

**5. Requisites to Obtain License.** — See note 3.

**VI. WHO MAY RESTRICT, REGULATE, OR LICENSE — 2. Municipal Corporations — Must Be Delegated.** — See note 8.

— *In re Abel*, (Idaho 1904) 77 Pac. Rep. 621; *Hays v. Com.*, 107 Ky. 655; *State v. Jensen*, 93 Minn. 88.

**298. 2. License Charge Rather than Tax.** — *In re Abel*, (Idaho 1904) 77 Pac. Rep. 621; *Rosenbloom v. State*, 64 Neb. 342; *State v. Foster*, 22 R. I. 163; *In re Watson*, 17 S. Dak. 486; *Morrill v. State*, 38 Wis. 428.

**3. For Revenue Purposes.** — *In re Abel*, (Idaho 1904) 77 Pac. Rep. 621; *Gerrard v. State*, 64 Neb. 368; *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157. See also *Rosenbloom v. State*, 64 Neb. 342.

**4. Equal Application Within Same Class — Idaho.** — *Ex p. Snyder*, (Idaho 1905), 79 Pac. Rep. 819; *In re Abel*, (Idaho 1904) 77 Pac. Rep. 621.

*Iowa.* — *State v. Garbroski*, 111 Iowa 496, 82 Am. St. Rep. 524.

*Kansas.* — *In re Jarvis*, 66 Kan. 329; *Kansas City v. Overton*, 68 Kan. 565.

*Michigan.* — *People v. De Blaay*, (Mich. 1904) 100 N. W. Rep. 598, 11 Detroit Leg. N. 323.

*Nebraska.* — *Rosenbloom v. State*, 64 Neb. 342; *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020.

*North Dakota.* — *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157.

*Pennsylvania.* — *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131.

*Rhode Island.* — *State v. Foster*, 22 R. I. 163.

*South Dakota.* — *In re Watson*, 17 S. Dak. 486.

*Washington.* — *In re Garfinkle*, 37 Wash. 650.

*Wisconsin.* — *State v. Whitcom*, 122 Wis. 110.

**5. Promotion of Special Interests.** — *Ex p. Snyder*, (Idaho 1905) 79 Pac. Rep. 819, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298.

**6. Protection of Established Dealers Sometimes Sanctioned.** — *Com. v. Reid*, 175 Mass. 325; *State v. Foster*, 22 R. I. 163.

**7. Former Soldiers, Sailors, or Marines Privileged.** — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

**Statute Exempting Residents of the State and**

**Soldiers in the Civil War from Payment of the License Tax — Unconstitutional.** — *State v. Shedrovi*, 75 Vt. 277; *In re Jarvis*, 66 Kan. 329. See also *State v. Garbroski*, 111 Iowa 496, 82 Am. St. Rep. 524.

**299. 5. License a Personal and Individual Privilege.** — *Rosenbloom v. State*, 64 Neb. 342.

**Principal Held Liable for the Penalty.** — *Watkins Medical Co. v. Paul*, 87 Ill. App. 278; *Collier v. Burgin*, 130 N. Car. 632.

**6. Corporation or Business Firm Cannot Be Licensed.** — *Bohannon v. Wrought-Iron Range Co.*, 111 Ga. 860.

**Corporation May Be Punished for Peddling of Its Unlicensed Agent.** — *Hays v. Com.*, 107 Ky. 655; *Com. v. Standard Oil Co.*, 60 S. W. Rep. 518, 22 Ky. L. Rep. 1567; *Standard Oil Co. v. Com.*, 107 Ky. 606.

**Being Employee of Corporation Does Not Make Acts Any Less Violation.** — *Com. v. Reid*, 175 Mass. 325.

**In England** a co-operative society, registered under the Industrial and Provident Societies Act, 1893, cannot trade as a hawker without a license. Co-operative Drapery, etc., Co. v. Bligh, Sc. Ct. of Just. 4 F. 97.

**7. License Fee Must Be Reasonable.** — *Kansas City v. Overton*, 68 Kan. 565; *Muskegon v. Zeeryp*, 134 Mich. 181, 10 Detroit Leg. N. 519; *State v. Jensen*, 93 Minn. 88; *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157; *State v. Foster*, 22 R. I. 163; *In re Garfinkle*, 37 Wash. 650.

**300. 1. State v. Angelo**, 71 N. H. 224; *State v. Foster*, 22 R. I. 163.

**2. Kansas City v. Overton**, 68 Kan. 565.

**3. Requiring Citizenship as Pre-requisite to Obtaining License Is Unconstitutional.** — *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386.

**Statute Discriminating Against Aliens — Unconstitutional.** — *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386.

**8. Power Suspended.** — *Laws N. H. 1897, c. 76*, in regard to the licensing of peddlers, suspended the authority given to municipalities by Pub. Stat. N. H., c. 50, § 10, cl. 14, to make ordinances in that respect. *State v. Angelo*, 71 N. H. 224.

- 301.** To Be Strictly Construed — See note 1.  
 Ordinance Must Be Reasonable. — See note 3.  
 Does Not Imply Power to Tax for Revenue Purposes. — See note 4.  
 Nor to Prohibit Directly or Indirectly. — See note 5.  
 Abuse of Power Should Be Palpable. — See note 6.  
 3. Courts, Boards, and Officers. — See note 7.

**302.** VII. HAWKING AND PEDDLING IN VIOLATION OF LAW — 1. Effect upon Contract of Sale — Contract Sometimes Valid. — See note 2.

**303.** HAY. — See note 2.

HE. — See note 4.

**305.** HEAD. — See note 1.

HEAD OF A FAMILY. — See note 2.

**308.** HEARING. — See note 1.

**301.** 1. Delegated Authority Strictly Construed. — *Waukon v. Fisk*, 124 Iowa 464; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554; *Moberly v. Hoover*, 93 Mo. App. 663; *State v. Angelo*, 71 N. H. 224; *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

3. Municipal Ordinance Regulating or Licensing Peddling Must Be Reasonable. — *State v. Feingold*, 77 Conn. 326; *Ex p. Snyder*, (Idaho 1905) 79 Pac. Rep. 819; *In re Pringle*, 67 Kan. 364; *State v. Angelo*, 71 N. H. 224.

4. Does Not Imply Power to Tax for Revenue Purposes. — *State v. Angelo*, 71 N. H. 224.

5. Not to Prohibit. — *Ex p. Snyder*, (Idaho 1905) 79 Pac. Rep. 819. But see *Warden's License*, 24 Pa. Super. Ct. 75.

6. Abuse of Municipal Discretion. — *State v. Feingold*, 77 Conn. 326; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554; *Moberly v. Hoover*, 93 Mo. App. 663.

7. Officer Cannot Arrest the Unlicensed Without a Warrant. — *Tillman v. Beard*, 121 Mich. 475.

**302.** 2. "Peddler's Note" — Kentucky Statute. — *Burns v. Sparks*, 82 S. W. Rep. 425, 26 Ky. L. Rep. 688; *Nunn v. Citizens' Bank*, 107 Ky. 262.

**303.** 2. Natural Grass. — See *State v. Crook*, 132 N. Car. 1053.

4. Masculine and Feminine. — *State v. Prater*, 59 S. Car. 271.

Same — Deed of Attorney in Fact. — *Donovan v. Welch*, 11 N. Dak. 113.

In Insurance Policies. — *Insurance Co. of North America v. Hegewald*, 161 Ind. 631.

**305.** 1. The Head of a Stream is the highest point on that stream which furnishes a continuous stream of water and not necessarily its longest prong. *Uhl v. Reynolds*, (Ky. 1901) 64 S. W. Rep. 501.

2. Husband and Wife. — *Bennett v. Trust Co.*, 106 Ga. 578.

A married woman living with her husband but trading as a *feme sole* is a *head of a family*. *Richardson v. Woodward*, (C. C. A.) 104 Fed. Rep. 873.

Same — Support. — Wife held to be *head of a family*. *Ness v. Jones*, 10 N. Dak. 587.

Brother. — *Broyles v. Cox*, 153 Mo. 242.

Unmarried Man. — *In re Morrison*, 110 Fed. Rep. 734.

A bachelor living with two sisters whom he supports is the *head of a family*. *Wike v. Garner*, 179 Ill. 257.

A Son whose widowed mother and two sisters reside with him is the *head of a family*. *Rolator v. King*, 13 Okla. 37.

Widow. — *Oppenheim v. Myers*, 99 Va. 582.

Widower not living with his children but boarding not a *head of a family*. *Gibson v. Gross*, 8 Kan. App. 548.

A Grandfather having his granddaughter living with him is a *head of a family*. *Adams v. Clark*, (Fla. 1904) 37 So. Rep. 734.

Son and Mother. — See *Broyles v. Cox*, 153 Mo. 242.

**308.** 1. Equity. — *Joseph Dry Goods Co. v. Hecht*, (C. C. A.) 120 Fed. Rep. 760.

## HEARSAY EVIDENCE.

By JOHN SIMPSON.

**309.** I. DEFINITION. — See note 1.

II. ADMISSIBILITY — 1. General Rule. — See note 2.

**309.** 1. Hearsay Evidence Defined. — *Morell v. Morell*, 157 Ind. 179; *People v. Albers*, (Mich. 1904) 100 N. W. Rep. 908; *State v. Levy*, 168 Mo. 521; *Harris v. Halverson*, 23 Wash. 779.

2. General Rule as to Admissibility of Hearsay — *United States*. — *In re De Gottardi*, 114 Fed. Rep. 328.

*Alabama*. — *Wildman v. State*, 139 Ala. 125;

*Ramsey v. Smith*, 138 Ala. 333; *Vaughn v. State*, 130 Ala. 18; *St. Louis, etc., Packet Co. v. McPeters*, 124 Ala. 451; *Parker v. State*, 125 Ala. 86; *Abel v. State*, 90 Ala. 633.

*Arkansas*. — *Trulock v. State*, 70 Ark. 558; *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302; *Milwaukee Harvester Co. v. Ty-nich*, 68 Ark. 225.

*California*. — *Harrington v. Goldsmith*, 136

**310.** See note 1.

Cal. 168; *People v. Teshara*, 134 Cal. 542; *People v. Machado*, 130 Cal. xviii, 63 Pac. Rep. 66; *People v. Hill*, 123 Cal. 571; *People v. John*, 137 Cal. 220.

*Connecticut*. — *Smith v. Hall*, 69 Conn. 651.

*Delaware*. — *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.

*Georgia*. — *Coker v. Memphis First Nat. Bank*, 112 Ga. 71.

*Illinois*. — *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Treat v. Merchants' L. Assoc.*, 198 Ill. 431; *Glucose Sugar Refining Co. v. Flinn*, 184 Ill. 123; *Chicago City R. Co. v. Douglas*, 104 Ill. App. 41; *Caruthers v. Balsley*, 89 Ill. App. 559.

*Indiana*. — *Treschman v. Treschman*, 28 Ind. App. 206; *Morell v. Morell*, 157 Ind. 179; *Cooper v. Merchants', etc., Nat. Bank*, 25 Ind. App. 341.

*Indian Territory*. — *Walker v. Stilson*, 1 Indian Ter. 688.

*Iowa*. — *Wolfson v. Allen Bros. Co.*, 120 Iowa 455; *Trumble v. Happy*, 114 Iowa 624; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80, *rehearing denied* 115 Iowa 88; *Stoltenberg v. Continental Ins. Co.*, 106 Iowa 565, 68 Am. St. Rep. 323.

*Kentucky*. — *Selby v. Com.*, (Ky. 1904) 80 S. W. Rep. 221; *Com. v. Bright*, (Ky. 1902) 66 S. W. Rep. 604.

*Louisiana*. — *State v. Ducre*, 50 La. Ann. 1336.

*Michigan*. — *People v. Albers*, (Mich. 1904) 100 N. W. Rep. 908; *Sterling v. Detroit*, 134 Mich. 22; *People v. Abbott*, 116 Mich. 263.

*Mississippi*. — *Barclay v. Smith*, (Miss. 1904) 36 So. Rep. 449.

*Missouri*. — *Love v. Love*, 98 Mo. App. 562; *State v. Levy*, 168 Mo. 521; *Roe v. Versailles Bank*, 167 Mo. 406; *State v. Goddard*, 162 Mo. 198; *State v. Rapp*, 142 Mo. 443.

*Montana*. — *Finch v. Kent*, 24 Mont. 268; *Anaconda Copper Min. Co. v. Heinze*, 27 Mont. 161.

*Nebraska*. — *Runquist v. Anderson*, 64 Neb. 755; *Donner v. State*, (Neb. 1903) 95 N. W. Rep. 40.

*New York*. — *White Mfg. Co. v. De La Vergne Refrigerating Mach. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 192; *Bowen v. Preferred Acc. Ins. Co.*, 68 N. Y. App. Div. 342; *Francis v. Campbell*, 68 N. Y. App. Div. 287; *Weigley v. Kneeland*, 60 N. Y. App. Div. 614, *affirmed* 172 N. Y. 625; *Clary-Squire v. Press Pub. Co.*, 58 N. Y. App. Div. 362; *Welsbach Commercial Co. v. Popper*, (N. Y. City Ct. Gen. T.) 59 N. Y. Supp. 1016; *Woods v. Buffalo R. Co.*, 35 N. Y. App. Div. 203.

*North Carolina*. — *Hopkins v. Hopkins*, 132 N. Car. 25; *Cogdell v. Wilmington, etc., R. Co.*, 130 N. Car. 313; *Bradley v. Ohio River, etc., R. Co.*, 126 N. Car. 735.

*North Dakota*. — *Kneeland v. Great Western Elevator Co.*, 9 N. Dak. 49.

*Oklahoma*. — *Drury v. Territory*, 9 Okla. 398.

*Oregon*. — *State v. Houghton*, 43 Oregon 125.

*Pennsylvania*. — *Wheeler v. Ahlers*, 189 Pa. St. 138; *Ranck v. Brackbill*, 209 Pa. St. 499; *Com. v. Hazlett*, 16 Pa. Super. Ct. 534.

*Rhode Island*. — *State v. Peabody*, 25 R. I.

544; *State v. Terline*, 23 R. I. 530, 91 Am. St. Rep. 650.

*South Carolina*. — *Kennington v. Catoe*, 68 S. Car. 470; *Going v. Mutual Ben. L. Ins. Co.*, 58 S. Car. 201.

*South Dakota*. — *State v. Bergland*, 15 S. Dak. 638.

*Tennessee*. — *Louisville, etc., Terminal Co. v. Jacobs*, 109 Tenn. 727.

*Texas*. — *Hackney v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 554; *Southern Kansas R. Co. v. Crump*, 32 Tex. Civ. App. 222; *Sims v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 90; *Rodriguez v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 993; *Gulf, etc., R. Co. v. Johnson*, 28 Tex. Civ. App. 395; *Harris v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 327; *Faris v. State*, 43 Tex. Crim. 370; *Stallings v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 127; *Johnson v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 755; *Catlett v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 485; *Aldenhoven v. State*, 42 Tex. Crim. 6; *Sparks v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1120; *Chowning v. State*, 41 Tex. Crim. 81; *Murphy v. State*, 41 Tex. Crim. 120.

*Utah*. — *Jensen v. McCormick*, 20 Utah 355.

*Vermont*. — *Wilmington Sav. Bank v. Waste*, 76 Vt. 331; *State v. Buckman*, 74 Vt. 309; *Boyd v. Fitchburg R. Co.*, 72 Vt. 89.

*Virginia*. — *Wadley v. Com.*, 98 Va. 803; *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284.

*Washington*. — *Spokane, etc., Gold, etc., Co. v. Colfelt*, 24 Wash. 568.

*Wisconsin*. — *Koepeke v. Milwaukee*, 112 Wis. 475.

**If Admitted Without Objection** hearsay evidence is not wholly without probative force. *Western Union Tel. Co. v. Hirsch*, (Tex. Civ. App. 1904) 84 S. W. Rep. 394.

**Witness's Knowledge Derived Wholly from Letters**. — Testimony of a witness is inadmissible where his only knowledge of the matter is derived from letters in his possession, which the party examining the witness refuses to permit him to produce. *Western Assur. Co. v. Polk*, (C. C. A.) 104 Fed. Rep. 649.

**Words Spoken in Sleep** are hearsay and inadmissible. *Plummer v. Ricker*, 71 Vt. 114, 76 Am. St. Rep. 757.

**Telephonic Communications**. — Hearsay evidence based on telephonic communications is inadmissible as proof of what actually occurred. *Jacobs v. Cohn*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 115.

**Trial Without Jury — When Objection Untenable**. — An objection to hearsay evidence is untenable where the court, trying a case without a jury, has stated that it did not consider the evidence. *Hornberger v. Giddings*, 31 Tex. Civ. App. 283.

**310. 1. Hearsay in Writing — United States**. — *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, *affirming* (C. C. A.) 108 Fed. Rep. 475; *Lake County v. Keene Five-Cents Sav. Bank*, (C. C. A.) 108 Fed. Rep. 505.

*Arkansas*. — *Sandefur-Julian Co. v. State*, 72 Ark. 11.

*Connecticut*. — *Hammond v. Hammond Buckle Co.*, 72 Conn. 130.

*Georgia*. — *White v. Jones*, 105 Ga. 26.

**310. The Reason.** — See note 2.**Self-serving Declarations.** — See note 3.

*Illinois.* — *Harmison v. Fleming*, 105 Ill. App. 43; *Bishop v. Bishop*, 95 Ill. App. 53.

*Indiana.* — *Kellner v. Phillips*, 29 Ind. App. 100.

*Iowa.* — *Wilbur v. Cedar Rapids, etc., R. Co.*, 116 Iowa 65.

*Kansas.* — *Ft. Scott v. Elliott*, 68 Kan. 805.

*Louisiana.* — *New Orleans v. Manfre*, 111 La. 927.

*Maine.* — *Rich v. Hayes*, 97 Me. 293.

*Maryland.* — *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Missouri.* — *Gordon v. Burris*, 141 Mo. 602.

*Montana.* — *Stagg v. St. Jean*, 29 Mont. 288.

*New Jersey.* — *Cowen v. Bloomberg*, 66 N. J. L. 385.

*New York.* — *Ives v. Ellis*, 169 N. Y. 85, *reversing* 50 N. Y. App. Div. 399; *Reilly v. Freeman*, 84 N. Y. App. Div. 433; *Kuster v. Press Pub. Co.*, 80 N. Y. App. Div. 615; *Rothchild v. Schwarz*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 521; *O'Brien v. Gallagher*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 838; *Rock v. London*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 533, *reversing* (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 384.

*Pennsylvania.* — *Dinan v. Supreme Council, etc.*, 201 Pa. St. 363.

*Texas.* — *Poling v. San Antonio, etc., R. Co.*, 32 Tex. Civ. App. 487; *Western Union Tel. Co. v. Lovely*, 29 Tex. Civ. App. 584; *Jordan v. Young*, (Tex. Civ. App. 1900) 56 S. W. Rep. 762; *Majors v. Goodrich*, (Tex. Civ. App. 1900) 54 S. W. Rep. 919; *San Antonio, etc., R. Co. v. Manning*, 20 Tex. Civ. App. 504; *Rieker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909; *McCoy v. Pease*, 17 Tex. Civ. App. 303.

*Utah.* — *State v. Carrington*, 15 Utah 480.

**The Account of Sales.** — *Chicago, etc., R. Co. v. Willard*, 111 Ill. App. 225; *International, etc., R. Co. v. Startz*, 97 Tex. 167.

**The Report of a Grand Jury** calling attention to the unsafe condition of a theatre is hearsay, the grand jury having no jurisdiction over private property. *Oppenheimer v. Clunie*, 142 Cal. 313.

**A Resolution** passed by a church is not admissible evidence to justify an article containing an alleged libel. *Putnam v. Press Pub. Co.*, 46 N. Y. App. Div. 600.

**An Unsworn Transcript** of the stenographer's notes of a party's testimony on a former trial is hearsay and inadmissible. *St. Louis Southwestern R. Co. v. Rea*, (Tex. Civ. App. 1904) 84 S. W. Rep. 428.

**310. 2. Reason for Inadmissibility of Hearsay.** — *Morell v. Morell*, 157 Ind. 179, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 310.

**3. Inadmissibility of Self-serving Declarations** — *United States.* — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812.

*Arkansas.* — *Tharp v. Page*, 66 Ark. 229.

*California.* — *People v. Jan John*, 144 Cal. 284; *Leibbrandt v. Sorg*, (Cal. 1901) 65 Pac. Rep. 318; *People v. Rodley*, 131 Cal. 240; *Thaxter v. Inglis*, 121 Cal. 593.

*Connecticut.* — *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461.

*Delaware.* — *Wilkins v. Wilmington*, 2 Marv. (Del.) 132.

*Florida.* — *Fields v. State*, (Fla. 1903) 35 So. Rep. 183; *Long v. State*, 44 Fla. 134.

*Georgia.* — *Taylor v. State*, 121 Ga. 348; *Sullivan v. State*, 101 Ga. 800.

*Idaho.* — *Work v. Kinney*, 8 Idaho 771.

*Illinois.* — *Chicago, etc., R. Co. v. Donworth*, 203 Ill. 192; *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607; *Wenegar v. Bollenbach*, 180 Ill. 222.

*Indiana.* — *Goode v. Elwood Lodge No. 166*, 160 Ind. 251; *Turner v. Turner*, 26 Ind. App. 677; *Morell v. Morell*, 157 Ind. 179.

*Iowa.* — *Bennett v. Marion*, 119 Iowa 473.

*Kentucky.* — *Carson v. Singleton*, (Ky. 1901) 65 S. W. Rep. 821.

*Louisiana.* — *State v. Brown*, 111 La. 170.

*Maine.* — *Carter v. Clark*, 92 Me. 225.

*Maryland.* — *Duvall v. Hambleton*, 98 Md. 12. *Massachusetts.* — *Cusick v. Whitcomb*, 173 Mass. 330.

*Michigan.* — *National Lumberman's Bank v. Miller*, 131 Mich. 564, 100 Am. St. Rep. 623.

*Missouri.* — *State v. Blitz*, 171 Mo. 530; *Miles v. Chicago, etc., R. Co.*, 76 Mo. App. 484; *Bagnell v. Chemical Bank*, 76 Mo. App. 121.

*Montana.* — *State v. Brooks*, 23 Mont. 146.

*Nebraska.* — *Green v. Morse*, 57 Neb. 391, 73 Am. St. Rep. 518; *Bourke v. Falck*, 52 Neb. 768.

*Nevada.* — *Kennedy v. Kennedy*, 27 Nev. 152.

*New York.* — *Kelly v. Theiss*, 65 N. Y. App. Div. 146; *Matter of Dittman*, 65 N. Y. App. Div. 343; *Rutherford v. Krause*, 45 N. Y. App. Div. 172; *Walton v. Chesebrough*, 39 N. Y. App. Div. 665; *Lieberman v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 704.

*North Carolina.* — *Holt v. Johnson*, 129 N. Car. 138.

*Ohio.* — *Pennsylvania Co. v. Files*, 65 Ohio St. 403.

*Oregon.* — *State v. Morse*, 35 Oregon 462.

*Pennsylvania.* — *Frazer v. Linton*, 183 Pa. St. 186; *Com. v. Shoener*, 25 Pa. Super. Ct. 526; *Jacoby v. North British, etc., Ins. Co.*, 10 Pa. Super. Ct. 366.

*Rhode Island.* — *Providence County Sav. Bank v. Hughes*, 26 R. I. 73.

*South Dakota.* — *Tenney v. Rapid City*, 17 S. Dak. 283; *Reagan v. McKibben*, 11 S. Dak. 270.

*Tennessee.* — *Kolb v. Knoxville*, 111 Tenn. 311.

*Texas.* — *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198; *Vicars v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 286; *Click v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1104; *Kershner v. Latimer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 237; *Renfro v. State*, 42 Tex. Crim. 393; *Porter v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 380; *Siebert v. Lott*, 20 Tex. Civ. App. 191; *Andrews v. Bonham*, 19 Tex. Civ. App. 179.

*Utah.* — *State v. Carrington*, 15 Utah 480.

*Washington.* — *McNicol v. Collins*, 30 Wash. 318. See also *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 91 Am. St. Rep. 829.

*Wisconsin.* — *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503; *Buel v. State*, 104 Wis. 132.

**312.** See note 1.

Declarations of Persons Not Parties to Suit. — See note 2.

See also the titles **ADMISSIONS 675. 3, par.**  
**Self-serving Declarations: DECLARATIONS (IN EVIDENCE) 5. 2.**

**Declarations in Support of Title.** — *Couch v. Couch*, 141 Ala. 361; *Rowe v. Hibernia Sav., etc., Soc.*, 134 Cal. 403; *Dozier v. McWhorter*, 117 Ga. 786; *Skidmore v. Smith*, (Ky. 1905) 84 S. W. Rep. 1163; *Enneking v. Woeckenberg*, 88 Minn. 259; *Kansas-City, etc., R. Co. v. Smith*, 152 Mo. 608; *Ratliff v. Ratliff*, 131 N. Car. 425; *Lumm v. Howells*, 27 Utah 80.

**Self-serving Declarations by Agents.** — *Lehman v. Shiver*, 129 Ala. 318; *Illinois Cent. R. Co. v. Winslow*, (Ky. 1905) 84 S. W. Rep. 1175; *Hutchinson v. Nay*, 183 Mass. 355; *Supreme Tent etc., v. Port Huron Sav. Bank*, (Mich. 1904) 100 N. W. Rep. 898; *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Simmon v. Bloomingdale*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 847; *Houston, etc., R. Co. v. Laforge*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1072.

**Self-serving Declarations Made on Behalf of a County by Its Officers** are inadmissible. *Lake County v. Keene Five-Cents Sav. Bank*, (C. C. A.) 108 Fed. Rep. 505.

**A Self-serving Act** cannot be proved by a party in his own favor. *Latimer v. Burrows*, 163 N. Y. 7; *State v. Strong*, 153 Mo. 548; *Mechanics Bank v. Woodward*, 73 Conn. 470.

**Exception.** — **The Result of a Search for the Whereabouts of a Person**, where the duty of making it devolves upon the party, is admissible in evidence. *Wiley v. Shivel*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1100.

**312. 1.** *Ætna Ins. Co. v. Eastman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 255.

**2. Declarations by Third Persons** — *United States*. — *Hastings Lumber Co. v. Garland*, (C. C. A.) 115 Fed. Rep. 15; *Kansas City Star Co. v. Carlisle*, (C. C. A.) 108 Fed. Rep. 344; *Nevada Co. v. Farnsworth*, (C. C. A.) 102 Fed. Rep. 573.

*Alabama*. — *Webb v. State*, 135 Ala. 36; *Curtis v. Parker*, 136 Ala. 217; *Butler v. Butler*, 133 Ala. 377; *Carwile v. Carwile*, 131 Ala. 603; *Southern Iron Works v. Central of Georgia R. Co.*, 131 Ala. 649; *Barrett v. Kelly*, 131 Ala. 378; *Laster v. Blackwell*, 128 Ala. 143; *Langford v. State*, 130 Ala. 74; *Mobile County v. Sands*, 127 Ala. 493; *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194; *Lett v. State*, 124 Ala. 64; *Childress v. State*, 122 Ala. 21; *Thompson v. State*, 122 Ala. 12; *Lalonde v. Brown*, 121 Ala. 513; *Price v. State*, 117 Ala. 113.

*Arkansas*. — *Casteel v. State*, 73 Ark. 152.

*California*. — *Matter of McKenna*, 143 Cal. 580; *People v. Landis*, 139 Cal. 426; *Matter of Wickes*, 139 Cal. 195; *Williams v. Long*, 139 Cal. 186; *People v. Altmeyer*, 135 Cal. 80; *People v. Warren*, 134 Cal. 202; *Borchard v. Eastwood*, 133 Cal. xix, 65 Pac. Rep. 1047; *Jenkin v. Pacific Mut. L. Ins. Co.*, 131 Cal. 121; *People v. Winters*, 125 Cal. 325; *People v. Hill*, 123 Cal. 571; *Lewis v. Burns*, 122 Cal. 358; *Matter of More*, 121 Cal. 609.

*Colorado*. — *Kaufman v. Burchinell*, 15 Colo. App. 520; *Howard v. People*, 27 Colo. 396.

*Connecticut*. — *State v. Kelly*, 77 Conn. 266; *Leonard v. Mallory*, 75 Conn. 433; *State v. Yanz*, 74 Conn. 177, 92 Am. St. Rep. 205; *Hamilton v. Smith*, 74 Conn. 374; *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668.

*Florida*. — *Mizell v. Travelers' Ins. Co.*, 44 Fla. 799; *Kirby v. State*, 44 Fla. 81.

*Georgia*. — *Simmons v. State*, 115 Ga. 574; *Heard v. Shedden*, 113 Ga. 162; *Harris v. Little Rock Bank*, 107 Ga. 407; *Daniel v. Hannah*, 106 Ga. 91.

*Idaho*. — *Kier v. Hill*, 8 Idaho 111.

*Illinois*. — *Spohr v. Chicago*, 206 Ill. 441; *Treat v. Merchants' L. Assoc.*, 198 Ill. 431, reversing 98 Ill. App. 59; *Scott v. Scott*, 191 Ill. 628; *Howard v. People*, 185 Ill. 552; *Helbig v. Citizens' Ins. Co.*, 108 Ill. App. 624; *Harrison v. Fleming*, 105 Ill. App. 43; *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583; *Bishop v. Bishop*, 95 Ill. App. 53.

*Indiana*. — *George v. Hurst*, 31 Ind. App. 660; *Ellis v. Baird*, 31 Ind. App. 295; *Turner v. Gonzales*, 3 Indian Ter. 649; *Kellner v. Phillips*, 29 Ind. App. 100; *Treschman v. Treschman*, 28 Ind. App. 206; *Morell v. Morell*, 157 Ind. 179; *Green v. State*, 154 Ind. 655.

*Iowa*. — *Schaefer v. Anchor Mut. F. Ins. Co.*, (Iowa 1904) 100 N. W. Rep. 857; *Fischer v. Johnson*, 106 Iowa 181; *Stoltenberg v. Continental Ins. Co.*, 106 Iowa 565, 68 Am. St. Rep. 323.

*Kansas*. — *McGuirk v. Johnson*, 63 Kan. 884, 65 Pac. Rep. 654; *Miller v. McDowell*, 63 Kan. 75; *State v. Hewes*, 60 Kan. 765; *Crawford v. Crawford*, 60 Kan. 126.

*Kentucky*. — *Alexander v. Harrodsburg First Nat. Bank*, 114 Ky. 683; *Louisville, etc., R. Co. v. Smith*, (Ky. 1905) 84 S. W. Rep. 755; *Powers v. Com.*, 114 Ky. 237, 276; *Howard v. Com.*, 110 Ky. 356; *Powers v. Com.*, 110 Ky. 386; *Utterback v. Com.*, (Ky. 1900) 59 S. W. Rep. 515; *Louisville, etc., R. Co. v. Idleman*, (Ky. 1900) 57 S. W. Rep. 237; *Franklin v. Com.*, 105 Ky. 237; *Gish v. Nolen*, (Ky. 1898) 47 S. W. Rep. 757.

*Louisiana*. — *State v. Mitchell*, 107 La. 618; *State v. Jackson*, 106 La. 413; *State v. Buford*, 52 La. Ann. 539; *State v. Ducre*, 50 La. Ann. 1336; *New Orleans v. Manfre*, 111 La. 927.

*Maine*. — *Smith v. Lawrence*, 98 Me. 92; *Rich v. Hayes*, 97 Me. 293.

*Maryland*. — *Black v. Westminster First Nat. Bank*, 96 Md. 399.

*Massachusetts*. — *Com. v. Nelson*, 180 Mass. 83; *Com. v. Storti*, 177 Mass. 339.

*Michigan*. — *Roberts v. Bidwell*, 136 Mich. 191; *Culver v. Smith*, 131 Mich. 359; *Baumgardner v. Henry*, 131 Mich. 240; *People v. Beech*, 129 Mich. 622; *Derham v. Derham*, 125 Mich. 109; *Henrich v. Saier*, 124 Mich. 86; *Olin v. Henderson*, 120 Mich. 149; *Gore v. Canada L. Assur. Co.*, 119 Mich. 136.

*Minnesota*. — *Lloyd v. Simons*, 90 Minn. 237; *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St. Rep. 351; *Bathke v. Krassin*, 82 Minn. 226; *Church v. Church Cement Co.*, 75 Minn. 85.

*Mississippi*. — *Williams v. State*, 79 Miss.



555; *State v. Spengler*, (Miss. 1898) 23 So. Rep. 33.

*Missouri*. — *Knapp v. Hanley*, 108 Mo. App. 353; *Allen v. St. Louis Transit Co.*, 183 Mo. 411; *State v. Faulkner*, 175 Mo. 546; *Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627; *State v. Terry*, 172 Mo. 213; *State v. Yandle*, 166 Mo. 589; *Kice v. St. Louis*, 165 Mo. 636; *State v. Levy*, 90 Mo. App. 643.

*Montana*. — *Reynolds v. Fitzpatrick*, 28 Mont. 170; *Farleigh v. Kelley*, 28 Mont. 421; *State v. Welch*, 22 Mont. 92.

*Nebraska*. — *Mays v. State*, (Neb. 1904) 101 N. W. Rep. 979; *Stewart v. James*, (Neb. 1901) 95 N. W. Rep. 778.

*New Hampshire*. — *Elwell v. Roper*, 72 N. H. 585.

*New Jersey*. — *Arata v. Sullivan*, 63 N. J. L. 46.

*New York*. — *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, reversing 41 N. Y. App. Div. 612; *People v. Molineux*, 168 N. Y. 264; *Morris v. New York City R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 16; *Carpenter v. New York Evening Journal Pub. Co.*, 96 N. Y. App. Div. 376; *Copp v. Gabler*, 95 N. Y. App. Div. 164; *Platt v. Hollands*, 85 N. Y. App. Div. 231; *Woarms v. Becker*, 84 N. Y. App. Div. 491; *Kramer v. Kramer*, 80 N. Y. App. Div. 20; *Lehr v. Jones*, 74 N. Y. App. Div. 54; *Francis v. Campbell*, 68 N. Y. App. Div. 287; *Storm v. McGrover*, 70 N. Y. App. Div. 33, appeal dismissed 174 N. Y. 525; *Billings v. Albright*, 66 N. Y. App. Div. 239; *Abrams v. Braunstein*, 64 N. Y. App. Div. 538; *Shidlovsky v. Gorman*, 51 N. Y. App. Div. 253; *Rothchild v. Schwarz*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 521; *Wallace v. Syracuse Rapid Transit R. Co.*, 42 N. Y. App. Div. 536; *Lecour v. Importers, etc.*, Nat. Bank, 38 N. Y. App. Div. 384; *Woods v. Buffalo R. Co.*, 35 N. Y. App. Div. 203; *Hubbard v. Brown*, 35 N. Y. App. Div. 254.

*North Carolina*. — *Westfield v. Adams*, 135 N. Car. 591; *Newberry v. Norfolk, etc., R. Co.*, 133 N. Car. 45; *Cogdell v. Wilmington, etc., R. Co.*, 130 N. Car. 313; *Perkins v. Thompson*, 123 N. Car. 175.

*Oregon*. — *Noblitt v. Durbin*, 41 Oregon 555.

*Pennsylvania*. — *Callendar v. Kelly*, 190 Pa. St. 455; *Wheeler v. Ahlers*, 189 Pa. St. 138; *Shoemaker v. Wood*, 9 Kulp (Pa.) 436.

*Rhode Island*. — *State v. Epstein*, 25 R. I. 131; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105.

*South Carolina*. — *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Earle v. Poat*, 63 S. Car. 439; *Perry v. Jefferies*, 61 S. Car. 292.

*South Dakota*. — *Catlett v. Stokes*, 15 S. Dak. 635.

*Tennessee*. — *Low v. State*, 108 Tenn. 127; *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

*Texas*. — *Mahon v. Barnett*, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; *Newton v. Alexander*, (Tex. Civ. App. 1897) 44 S. W. Rep. 416; *McCullough v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 517; *Womble v. State*, 39 Tex. Crim. 24; *Tippens v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1000; *Western Union Tel. Co. v. Wofford*, (Tex. Civ. App. 1897) 42 S. W. Rep. 119; *Woodard v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1122; *Sparks v. State*, (Tex. Crim. 1899)

51 S. W. Rep. 1120; *Bruce v. State*, 41 Tex. Crim. 27; *Chowning v. State*, 41 Tex. Crim. 81; *Skelton v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 943; *Luttrell v. State*, 40 Tex. Crim. 651; *Wilson v. State*, 41 Tex. Crim. 115; *Clay v. State*, 40 Tex. Crim. 556; *Merritt v. State*, 40 Tex. Crim. 359; *Davis v. Beall*, 21 Tex. Civ. App. 183; *James v. State*, 40 Tex. Crim. 190; *Halff v. Goldfrank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 1095; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435; *Wash v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 469; *Woods v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 244; *Johnson v. State*, 42 Tex. Crim. 298; *Sweat v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 265; *Johnson v. Hamby*, 24 Tex. Civ. App. 398; *Ex p. Kennedy*, (Tex. Crim. 1900) 57 S. W. Rep. 648; *Newton v. State*, 41 Tex. Crim. 610; *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1900) 56 S. W. Rep. 237; *Merchants' Ins. Co. v. Nowlin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; *Johnson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 576; *McLane v. Maurer*, 28 Tex. Civ. App. 75; *Millard v. State*, (Tex. Crim. 1901) 66 S. W. Rep. 300; *Corley v. State*, (Tex. Crim. 1901) 66 S. W. Rep. 453; *Mercer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555; *Bass v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 919; *Guinn v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 376; *Faulkner v. State*, 43 Tex. Crim. 311; *Ezell v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 370; *Wooley v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1054; *Adams v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1055; *Walker v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1052; *Nelson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 107; *Halliday v. Lambright*, 29 Tex. Civ. App. 226; *Morton v. State*, 43 Tex. Crim. 533; *Wells v. State*, 43 Tex. Crim. 451; *Steed v. State*, 43 Tex. Crim. 567; *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539; *McElroy v. Phink*, 97 Tex. 147; *Lee v. State*, 44 Tex. Crim. 354; *Knowles v. State*, 44 Tex. Crim. 322; *Wells Fargo Express Co. v. Williams*, (Tex. Civ. App. 1902) 71 S. W. Rep. 314; *Efrid v. State*, 44 Tex. Crim. 447; *Donley v. State*, 44 Tex. Crim. 428; *West v. State*, 44 Tex. Crim. 417; *Martin v. State*, 44 Tex. Crim. 279; *Gipson v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 216; *Johnson v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 925; *Ward v. Forrester*, 35 Tex. Civ. App. 319; *Gibson v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1119; *Gray v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 705; *Goodman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 196; *Vauter v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 186; *Holley v. State*, 46 Tex. Crim. 324; *Bell v. Bates*, 36 Tex. Civ. App. 233.

*Utah*. — *Church of Jesus Christ v. Watson*, 25 Utah 45; *Muldoon v. Brown*, 21 Utah 121; *Jensen v. McCormick*, 20 Utah, 355; *Van Pelt v. Park*, 18 Utah 141; *Murray v. Salt Lake City R. Co.*, 16 Utah 356.

*Virginia*. — *O'Boyle v. Com.*, 100 Va. 785, 3 Va. Sup. Ct. 608.

*Washington*. — *Spokane, etc., Lumber Co. v. Boyd*, 28 Wash. 90; *Harris v. Halverson*, 23 Wash. 779; *Gregory v. Loose*, 19 Wash. 599; *State v. Hunter*, 18 Wash. 670.

*Wisconsin*. — *New Home Sewing Mach. Co. v. Simon*, 113 Wis. 267; *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29; *Selleck v.*

**314.** 2. Effect of Death of Declarant. — See note 1.

**315.** 5. Evidence Admitted as Not Being Hearsay — *a.* STATEMENTS OF THIRD PERSONS VIEWED AS FACTS IN CONTROVERSY — Commercial Reports as to Market Prices. — See note 1.

*b.* DECLARATIONS AS TO BODILY OR MENTAL FEELINGS. — See note 2.

6. Relaxation of General Rule — *b.* DECLARATIONS AS TO PEDIGREE. — See note 8.

**317. HEDGE.** — See note 2.

Janesville, 104 Wis. 570, 76 Am. St. Rep. 892; O'Toole v. State, 105 Wis. 18.

Statements as to Sanity or Insanity. — Kimbrell v. State, 130 Ala. 40; Clarke v. Irwin, 63 Neb. 539.

Evidence of Motive or Intention. — But the rule is otherwise where the act forms part of the *res gestæ*. Hood v. Gibson, 8 Kan. App. 588.

Statements of Physician. — Kelly v. Moore, 22 App. Cas. (D. C.) 9, affirmed 196 U. S. 38; Missouri, etc., R. Co. v. Criswell, 34 Tex. Civ. App. 278.

A Person Who Can Neither Read nor Write. — McIntyre v. White, 124 Ala. 177.

Recital of the Contents of medical works or the substance thereof is hearsay and inadmissible. Baily v. Kreutzmann, 141 Cal. 519; Scott v. Astoria R. Co., 43 Oregon 26, 99 Am. St. Rep. 710.

Declarations of a Servant are hearsay and inadmissible against his master, unless made in pursuance of a special authority. King v. Atlantic City Gas, etc., Co., 70 N. J. L. 679; Huebner v. Erie R. Co., 69 N. J. L. 327.

**314.** 1. Effect of Death of Declarant — *California.* — People v. Landis, 139 Cal. 426; Rulofson v. Billings, 140 Cal. 452.

*Connecticut.* — Hammond v. Hammond Buckle Co., 72 Conn. 130; Baxter v. Camp, 71 Conn. 245, 71 Am. St. Rep. 169; Brown v. Butler, 71 Conn. 576.

*Indiana.* — Morell v. Morell, 157 Ind. 179; Foster v. Honan, 22 Ind. App. 252.

*Iowa.* — Albright v. Hannah, 103 Iowa 98.

*Kansas.* — Atchison, etc., R. Co. v. Logan, 65 Kan. 748.

*Kentucky.* — New York L. Ins. Co. v. Johnson, (Ky. 1903) 72 S. W. Rep. 762; Parker v. Com., (Ky. 1899) 51 S. W. Rep. 573.

*Louisiana.* — State v. Robinson, 51 La. Ann. 694.

*Maryland.* — Duvall v. Hambleton, 98 Md. 12; Jacob Tome Institute v. Davis, 87 Md. 591.

*Michigan.* — Rose v. Lockerby, 116 Mich. 277.

*Missouri.* — State v. Pyscher, 179 Mo. 140; State v. Terry, 172 Mo. 213; Obuchon v. Boyd, 92 Mo. App. 412; Bosard v. Powell, 79 Mo. App. 184.

*Montana.* — State v. Shafer, 22 Mont. 17.

*New York.* — Griffin v. Train, 90 N. Y. App. Div. 16; Morgan v. Warner, 45 N. Y. App. Div. 424, affirmed 162 N. Y. 612.

*North Carolina.* — Batts v. Staton, 123 N. Car. 45.

*South Carolina.* — State v. Allen, 56 S. Car. 495.

*Texas.* — International, etc., R. Co. v. Boykin, 32 Tex. Civ. App. 72; Morgan v. Butler, 23 Tex. Civ. App. 470; Johnson v. State, (Tex. Crim. 1900) 55 S. W. Rep. 576; Turner v. Seacock, 21 Tex. Civ. App. 594; Long v. Moore, 19 Tex. Civ. App. 363; Anglin v. Barlow, (Tex. Civ. App. 1898) 45 S. W. Rep. 827.

*Virginia.* — Bowles v. Com., 103 Va. 816.

**315.** 1. Admissibility of Commercial Reports as to Market Prices. — Betts v. Southern California Fruit Exch., 144 Cal. 402; Chicago, etc., R. Co. v. Halsell, (Tex. Civ. App. 1904) 81 S. W. Rep. 1241; St. Louis Southwestern R. Co. v. Barnes, (Tex. Civ. App. 1903) 72 S. W. Rep. 1041.

Accounts of Sales sent to a shipper by his commission merchants are not admissible to show the value of stock in the market. Norfolk, etc., R. Co. v. Reeves, 97 Va. 284.

2. Declarations as to Bodily or Mental Feeling. — Jacobi v. State, 133 Ala. 1; Postal Tel. Cable Co. v. Jones, 133 Ala. 217; Rogers v. Manhattan L. Ins. Co., 138 Cal. 285; Indiana R. Co. v. Maurer, 160 Ind. 25, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 315; Louisville, etc., R. Co. v. Miller, 141 Ind. 533.

8. Admissibility of Declarations as to Pedigree — *Alabama.* — Boyett v. State, 130 Ala. 77, 89 Am. St. Rep. 19; Locklayer v. Locklayer, 139 Ala. 354.

*California.* — Matter of Heaton, 135 Cal. 385; Russell v. Langford, 135 Cal. 356.

*Georgia.* — Malone v. Adams, 113 Ga. 791, 84 Am. St. Rep. 259.

*Illinois.* — Chilvers v. Race, 196 Ill. 71.

*Iowa.* — Alston v. Alston, 114 Iowa 29.

*Kentucky.* — Mann v. Cavanaugh, 110 Ky. 776.

*Nebraska.* — Grand Lodge, etc., v. Bartes, (Neb. 1904) 98 N. W. Rep. 715.

*New York.* — Washington v. Savings Bank, 171 N. Y. 166, 89 Am. St. Rep. 800.

*Texas.* — Sheppard v. Avery, 28 Tex. Civ. App. 479; Summerhill v. Darrow, 94 Tex. 71.

Such Declarations Must Have Been Made Ante Litem Motam. — Nehring v. McMurrian, 94 Tex. 45.

**317.** 2. Hedging — Produce Exchange Transactions. — See Board of Trade v. O'Dell Commission Co., 115 Fed. Rep. 585.

# HEIR, HEIRS, AND THE LIKE.

BY H. N. ELDRIDGE.

## 318. I. DEFINITION IN GENERAL. — See note 1.

## 319. In the Civil Law. — See note 1.

## 320. II. TECHNICAL SENSE — WORD OF LIMITATION. — See note 2.

## 322. Who Shall Take and the Manner of Taking. — See note 3.

Time. — See note 4.

## 323. III. HEIRS IN THE SENSE OF HEIRS OF THE BODY OR ISSUE. — See note 1.

## IV. WORD OF PURCHASE — CHILDREN. — See note 2.

## 324. Children, Grandchildren, Issue. — See note 1.

**318. 1. Common-law Definition.**—Tingier v. Chamberlin, 71 Conn. 466; Butterfield v. Sawyer, 187 Ill. 598, 79 Am. St. Rep. 246; Hoover v. Smith, 96 Md. 393; Clarkson v. Hatton, 143 Mo. 38; Rozier v. Graham, 146 Mo. 352; Howell v. Gifford, 64 N. J. Eq. 180; Armstrong v. Galusha, 43 N. Y. App. Div. 248; *In re Ferguson*, 28 Can. Sup. Ct. 38; Allison v. Allison, 101 Va. 537; *In re Cowley*, 120 Wis. 263. See also Sparks v. Wolff, 25 Ont. App. 326, 29 Can. Sup. Ct. 583.

**319. 1. Civil Law.**—Butterfield v. Sawyer, 187 Ill. 598, 79 Am. St. Rep. 246.

**320. 2. Technical Sense Presumed.**—Alabama. — Findley v. Hill, 133 Ala. 229, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 320; Wilson v. Alston, 122 Ala. 630.

California. — Hochstein v. Berghauser, 123 Cal. 681.

Illinois. — Hobbie v. Ogden, 178 Ill. 357; Akers v. Clark, 184 Ill. 136, 75 Am. St. Rep. 152; Davis v. Sturgeon, 198 Ill. 520.

Indiana. — Chamberlain v. Runkle, 28 Ind. App. 599; Lamb v. Medsker, (Ind. App. 1905) 74 N. E. Rep. 1012; Bonner v. Bonner, 28 Ind. App. 147.

Kentucky. — Lane v. Lane, 106 Ky. 530; Pepper v. Pepper, 115 Ky. 520; Jabine v. Sawyer, (Ky. 1904) 78 S. W. Rep. 140; Underwood v. Magruder, (Ky. 1903) 87 S. W. Rep. 1076.

Massachusetts. — Gardiner v. Fay, 182 Mass. 492.

Mississippi. — Harkleroad v. Bass, 84 Miss. 483.

Missouri. — Roberts v. Crume, 173 Mo. 572. New Jersey. — Zabriskie v. Huyler, 62 N. J. Eq. 697.

New York. — Matter of Hull, (Surrogate Ct.) 30 Misc. (N. Y.) 281.

North Carolina. — Neal v. Nelson, 117 N. Car. 393, 53 Am. St. Rep. 590; Wool v. Fleetwood, 136 N. Car. 460.

Ohio. — Brockschmidt v. Archer, 64 Ohio St. 502.

Pennsylvania. — Reimer v. Reimer, 192 Pa. St. 571, 73 Am. St. Rep. 833; Bacon's Estate, 202 Pa. St. 535.

South Carolina. — Bishop v. Tinsley, 64 S. Car. 180.

West Virginia. — Baer v. Forbes, 48 W. Va. 208.

**322. 3. Persons Who Take and Manner of Taking.**—Maclean v. Williams, 116 Ga. 257, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 322; Hoover v. Smith, 96 Md. 395, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 322.

**4. Time of Ancestor's Death.**—Walsh v. McCutcheon, 71 Conn. 283; Connecticut Trust, etc., Co. v. Hollister, 74 Conn. 228; Clark v. Shawen, 190 Ill. 47; Hoover v. Smith, 96 Md. 395, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 322; Yocum v. Siler, 160 Mo. 281; Arnot v. Arnot, 75 N. Y. App. Div. 234, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 322; *In re Mitchell*, 74 Vt. 186; Allison v. Allison, 101 Va. 537. See also *In re Cowley*, 120 Wis. 263.

**323. 1. Heirs in the Sense of Issue or Heirs of the Body.**—Sain v. Baker, 128 N. Car. 256; McMillan v. McMillan, 27 Ont. App. 209.

**Heirs in the Sense of Heirs of Body.**—Walsh v. McCutcheon, 71 Conn. 283; Johnson v. Brasington, 156 N. Y. 181; Snider v. Snider, 160 N. Y. 151 affirming 11 N. Y. App. Div. 171.

**Heirs in Sense of Issue.**—Gardiner v. Fay, 182 Mass. 492; Harkleroad v. Bass, 84 Miss. 483; Schwencke v. Haffner, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 293.

**2. Heirs a Word of Purchase.**—Wilson v. Alston, 122 Ala. 630; Chamberlain v. Runkle, 28 Ind. App. 599; Bonner v. Bonner, 28 Ind. App. 147; Matter of Cramer, 170 N. Y. 271; Jones v. Jones, 201 Pa. St. 548; Bishop v. Tinsley, 64 S. Car. 180.

**324. 1. Heirs in the Sense of Children.**—Alabama. — Findley v. Hill, 133 Ala. 229, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 324; Watson v. Williamson, 129 Ala. 362.

Arkansas. — Wyman v. Johnson, 68 Ark. 369.

Colorado. — Hindry v. Holt, 24 Colo. 464, 65 Am. St. Rep. 235.

Connecticut. — Walsh v. McCutcheon, 71 Conn. 283.

Illinois. — Fishback v. Joesting, 183 Ill. 463; Davis v. Sturgeon, 198 Ill. 520; Bradsby v. Wallace, 202 Ill. 239.

Indiana. — Lamb v. Medsker, (Ind. App. 1905) 74 N. E. Rep. 1012.

Kentucky. — Jabine v. Sawyer, (Ky. 1904) 78 S. W. Rep. 140; Dulaney v. Dulaney, (Ky. 1904) 79 S. W. Rep. 195; Cralle v. Jackson, (Ky. 1904) 81 S. W. Rep. 669.

**326.** See note 1.

*Deeds.* — See note 3.

**V. NEMO EST HÆRES VIVENTIS.** — See notes 4, 5, 6.

**327. VI. PERSONAL PROPERTY.** — See notes 1, 2, 4.

**328.** See note 1.

**329. Mixed Gift.** — See note 2.

**VII. HUSBAND AND WIFE.** — See note 4.

**331. VIII. ADOPTED CHILDREN, REPRESENTATIVES, BASTARDS, ETC.** — See notes 1, 3, 4.

**333. HELD.** — See note 2.

**334. [HENCEFORTH.** — See note 3a.]

*Maryland.* — *Plummer v. Shepherd*, 94 Md. 466.

*Massachusetts.* — *Gardiner v. Fay*, 182 Mass. 492.

*Missouri.* — *Gross v. Hoch*, 149 Mo. 325; *Roberts v. Crume*, 173 Mo. 572.

*New York.* — *Johnson v. Brasington*, 156 N. Y. 181; *Janda v. Bohemian Roman Catholic First Cent. Union*, 71 N. Y. App. Div. 150, affirmed 173 N. Y. 617.

*North Carolina.* — *Sain v. Baker*, 128 N. Car. 256. See also *Lee v. Baird*, 132 N. Car. 755.

*Ohio.* — *Walker v. Walker*, 11 Ohio Cir. Dec. 291, 20 Ohio Cir. Ct. 409; *Mooney v. Purpus*, 70 Ohio St. 57.

*South Carolina.* — See *Sease v. Sease*, 64 S. Car. 216.

*Tennessee.* — *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138.

*West Virginia.* — *Baer v. Forbes*, 48 W. Va. 208.

**326. 1. Grandchildren.** — *Mooney v. Purpus*, 70 Ohio St. 57.

**3. Deeds — Heir as Word of Purchase.** — *Shirley v. Clark*, 72 Ark. 539; *Davis v. Sturgeon*, 198 Ill. 520; *Lamb v. Medsker*, (Ind. App. 1905) 74 N. E. Rep. 1012; *Roberts v. Crume*, 173 Mo. 572; *Darrah v. Darrah*, 202 Pa. St. 492; *Hennegar v. Deadrick*, (Tenn. Ch. 1899) 54 S. W. Rep. 138. See also *Gardiner v. Fay*, 182 Mass. 492.

**4. Nemo Est Hæres Viventis.** — *Watson v. Williamson*, 129 Ala. 362; *Gardiner v. Fay*, 182 Mass. 492; *Mooney v. Purpus*, 70 Ohio St. 57; *Baer v. Forbes*, 48 W. Va. 208.

**5. Heirs in the Sense of Heirs Apparent or Presumptive.** — *Baer v. Forbes*, 48 W. Va. 208.

**6. Heirs of a Living Person — Heirs Held to Mean Children.** — *Watson v. Williamson*, 129 Ala. 362; *Shirley v. Clark*, 72 Ark. 539; *Baer v. Forbes*, 48 W. Va. 208.

**327. 1. Not Applicable to Personality.** — *Hochstein v. Berghauser*, 123 Cal. 687; *Cook v. First Universalist Church*, 23 R. I. 62; *Allison v. Allison*, 101 Va. 537.

**2. Personal Property — Technical Sense Presumed.** — *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235.

**4. Personal Property — Next of Kin.** — *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470; *Miller v. Metcalf*, 77 Conn. 176; *Hoover v. Smith*, 96 Md. 393; *Tuttle v.*

*Woolworth*, 62 N. J. Eq. 532; *Fisk v. Fisk*, 60 N. J. Eq. 195; *Trenton Trust, etc., Co. v. Donnelly*, 65 N. J. Eq. 119; *Armstrong v. Galusha*, 43 N. Y. App. Div. 248; *Matter of Fidelity Trust, etc., Co.*, 57 N. Y. App. Div. 532; *Matter of Hull*, (Surrogate Ct.) 30 Misc. (N. Y.) 281; *Cook v. First Universalist Church*, 23 R. I. 62, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327. See also *Re Bromley*, 83 L. T. N. S. 315.

**328. 1. Heirs in the Sense of Persons Taking under Statute of Distributions.** — *Matter of Devoe*, 171 N. Y. 281; *Cogan v. McCabe*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 739; *Lee v. Baird*, 132 N. Car. 755; *Cook v. First Universalist Church*, 23 R. I. 62, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; *Allison v. Allison*, 101 Va. 537; *Re Wrigley*, 32 Ont. 108.

**329. 2. Mixed Property — Heirs at Law Held to Take.** — *Allison v. Allison*, 101 Va. 537.

**4. Heirs Held Not to Include Widow.** — *Raleigh's Estate*, 206 Pa. St. 451; *Lesieur's Estate*, 205 Pa. St. 119.

But the Word "Heirs" or "Descendants," Used in the Creation of a Separate Estate for a Married Woman, will not, at her death, exclude the marital rights of the husband except as to the children. *Wood v. Reamer*, (Ky. 1904) 82 S. W. Rep. 572.

**331. 1. Adopted Child.** — *Butterfield v. Sawyer*, 187 Ill. 598, 79 Am. St. Rep. 246.

**3. Heirs in the Sense of Legatees and Devisees.** — *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470; *Taylor v. Perkins*, 72 N. H. 349; *Shapleigh v. Shapleigh*, 69 N. H. 577; *Matter of Hull*, (Surrogate Ct.) 30 Misc. (N. Y.) 281; *Sauerbier's Estate*, 202 Pa. St. 187; *Allan v. Evans*, 30 Can. Sup. Ct. 416.

**4. "Heir of Blood" Held to Include Illegitimate Child.** — *Hayden v. Barrett*, 172 Mass. 472, 70 Am. St. Rep. 295.

**333. 2. Shares of Stock.** — *Flour City Nat. Bank v. Shire*, 179 N. Y. 587.

**Same — Held in Trust.** — *Southern Cold Storage, etc., Co. v. Dechman*, (Tex. Civ. App. 1903) 73 S. W. Rep. 545.

**Held Open.** — See *State v. McBain*, 102 Wis. 431.

**334. 3a. Henceforth as a Word of Futurity.** — See *Platt v. Albany R. Co.*, 170 N. Y. 115.

## HERD LAWS.

**335. II. LAWS FORBIDDING REMOVAL OF LIVE STOCK WITHOUT OWNER'S CONSENT.** — See note 1.

**336. HEREAFTER — HERETOFORE.** — See note 3.

**339. HEREIN.** — See note 6.  
**HEREINAFTER.** — See note 7.

**340. HIDE.** — See note 3.

**HIGH.** — See note 6.

**HIGHEST BIDDER.** — See note 8.

**342. HIGH-WATER MARK.** — See note 1.

**335. 1.** Under the Texas Statute the gravamen of the offense is wilfully driving cattle from their accustomed range, and in the absence of such intent the offense is not committed. *Day v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 657.

**Sufficiency of Evidence of Driving Cattle from Their Accustomed Range.** — See *Newport v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 224; *Butcher v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 923.

**336. 3.** *Brewster v. People*, 183 Ill. 143; *State v. Hamey*, 168 Mo. 167; *Dumois v. New York*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 614.

**339. 6.** *Williams v. Iron Belt Bldg., etc., Assoc.*, 131 N. Car. 267.

**7. Will.** — Executors *hereinafter* named in a will means those finally named. *Shey's Appeal*, 73 Conn. 122.

**340. 3.** The word *hide* in a statute providing for the inspection and tagging of *hides*

has no application to pelts or skins of animals. *Territory v. Denver, etc.*, R. Co., (N. Mex. 1904) 78 Pac. Rep. 74.

**6.** In Louisville, etc., *R. Co. v. Tucker*, (Ky. 1901) 65 S. W. Rep. 454, the court said: "*High* and low are relative terms. A thing is said to be *high* or low when compared to other things. \* \* \* So in this case the bridge is *high* or low according to the height of cars to pass under it."

**8. Good Faith.** — *Irving Sav. Inst. v. Robinson*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 449.

**342. 1. Tidal Water.** — *Mobile Transp. Co. v. Mobile*, 128 Ala. 335.

**Rivers.** — *State v. District Ct.*, 83 Minn. 464; *Dow v. Electric Co.*, 69 N. H. 498.

**Ordinary High-water Mark.** — *Welch v. Browning*, 115 Iowa 690; *Dow v. Electric Co.*, 69 N. H. 498.

# HIGHWAYS.

BY R. N. CHAFFEE.

**350. I. WHAT CONSTITUTES A HIGHWAY—1. In General.**—See notes 1, 2, 3, 4, 7.

**351. Statutory Use of Term.**—See note 1.

The Term "Road."—See note 3.

**2. Characteristics of Highways—*a.* USER BY INDIVIDUALS.**—See notes 5, 7.

*b.* CUL DE SAC AS HIGHWAY.—See note 8.

**352. II. CLASSES OF HIGHWAYS—1. City Streets and Sidewalks.**—See notes 2, 3.

**3. State Roads.**—See note 6.

**5. Section-line Roads.**—See note 8.

**353. 7. Town Ways.**—See note 2.

**III. EVIDENCE AS TO HIGHWAY CHARACTER.**—See note 4.

**IV. ESTABLISHMENT OF HIGHWAYS—1. General Considerations.**—

See note 12.

**354. 3. Necessity or Desirability of Highway—*a.* IN GENERAL.**—See notes 9, 12.

**355. *b.* BENEFIT TO INDIVIDUALS.**—See note 5.

**350. 1. Definition.**—*Liekens v. Staten Isl.* and *Midland R. Co.*, 64 N. Y. App. Div. 329, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.

**2. Turnpike as Highway.**—See dissenting opinion in *People v. Selkirk*, 180 N. Y. 412, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.

**3. Railroad as Highway.**—*McClanahan v. Vicksburg, etc.*, R. Co., 111 La. 781; *McLucas v. St. Joseph, etc.*, R. Co., 67 Neb. 603.

**4. River as Highway.**—*Leverich v. Mobile*, 110 Fed. Rep. 170; *Chapin v. Maine Cent. R. Co.*, 97 Me. 151; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73; *Styles v. Victoria*, 8 British Columbia 406.

**7. Bridge as Highway.**—*Denver v. Baldasari*, 15 Colo. App. 157; *Sachs v. Sioux City*, 109 Iowa 224. See also *Ledbetter v. Clarksville, etc.*, *Turnpike Co.*, 110 Tenn. 92.

**351. 1. "Highway" Used in Different Senses in Statute.**—*Chamberlain v. Iowa Telephone Co.*, 119 Iowa 621, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350.

**3. Term "Road."**—The word "road" in a popular sense includes all public traveled ways, whether county or town ways. *Clark v. Hull*, 184 Mass. 164.

**A Winter Road**, which is used by everybody and is open to the public, is a public highway. *Duchene v. Beauport*, 23 Quebec Super. Ct. 80.

**5. Must Be Open to Public Use.**—*Megrath v. Nickerson*, 24 Wash. 235; *Styles v. Victoria*, 8 British Columbia 406.

**7. Use by One Person Only.**—*Galveston, etc., R. Co. v. Baudat*, 21 Tex. Civ. App. 236.

**8. Cul de Sac as Highway.**—*Chrisman v. Omaha, etc., R., etc., Co.*, 125 Iowa 133, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 351;

*Dycher v. Weichselbaum*, 9 Kan. App. 360; *Schuylkill River Road*, 19 Pa. Super. Ct. 376; *In re Roads in Lower Merion Tp.*, 16 Montg. Co. Rep. (Pa.) 66; *Heninger v. Peery*, 102 Va. 896.

**352. 2. City Streets.**—*Sachs v. Sioux City*, 109 Iowa 224; *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 621; *Chrisman v. Omaha, etc., R. etc., Co.*, 125 Iowa 133; *State v. Red Lodge*, 30 Mont. 338; *Lord v. Gifford*, 67 N. J. L. 193; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82.

**3. Sidewalk as Highway.**—*Martinovich v. Wooley*, 128 Cal. 141; *Straub v. St. Louis*, 175 Mo. 413.

**6. State Roads.**—*Houlton v. Carpenter*, 29 Ind. App. 646, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 352.

**8. Section-line Roads.**—By Comp. Stat. Neb. (1897), c. 78, § 46, all section lines are declared to be public roads, and the county board may, whenever the public good requires it, open such roads to travel. *Demary v. Carlson*, 58 Neb. 546.

**353. 2. Town Ways.**—*Clark v. Hull*, 184 Mass. 164.

**4. Presumption from Use and Recognition.**—*Madison Tp. v. Scott*, 9 Kan. App. 871, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 353; *Raht v. Southern R. Co.*, (Tenn. Ch. 1897) 50 S. W. Rep. 72.

**12. Creation by Legislature.**—*Knowles v. Knowles*, 25 R. I. 325.

**354. 9. Public Convenience.**—*Spaulding v. Groton*, 68 N. H. 77.

**12. Other Considerations.**—*Angell v. Hornbeck*, 31 Ind. App. 59; *In re Roads in Lower Merion Tp.*, 16 Montg. Co. Rep. (Pa.) 66.

**355. 5. Individual Benefit Not Ground for**

**355.** *c.* EXPENSES INVOLVED. — See note 6.

**356.** *e.* TERMINUS OF HIGHWAY. — See notes 2, 4, 6, 8.

*g.* LEGISLATIVE QUESTION. — See note 11.

**357.** 4. Where Highway May Be Located — *b.* OVER NAVIGABLE WATERS. — See notes 3, 5.

*d.* ON EXISTING HIGHWAY. — See note 11.

**358.** *e.* ACROSS PRIVATE PROPERTY — (2) *Buildings and Fixtures* — In New Jersey. — See notes 7, 10.

**359.** 6. Application for Highway — *a.* NECESSITY. — See notes 7, 8, 10.  
*b.* QUALIFICATIONS OF APPLICANTS. — See note 11.

**360.** See note 1.

*c.* SUFFICIENCY OF APPLICATION — (1) *In General*. — See note 4.

**361.** (3) *Description of Proposed Highway*. — See notes 3, 4, 5.

**362.** (4) *Showing as to Qualifications of Applicants*. — See note 3.

**363.** (8) *Amendment* — (a) *In General*. — See note 8.

**Refusing Highway.** — *Heninger v. Peery*, 102 Va. 896.

**355.** 6. Expenses of Highway. — A township may defeat the establishment of a highway by showing that the cost thereof will exceed the benefit that the public will derive therefrom. *Miller v. Oakwood Tp.*, 9 N. Dak. 623.

**356.** 2. In Pennsylvania. — See *In re Road* in Penn Tp., 24 Pa. Co. Ct. 526; *Schuylkill River Road*, 19 Pa. Super. Ct. 376.

4. At Burial Ground. — Road in Lower Merion Tp., 8 Pa. Dist. 581.

6. At State Line. — *Schuylkill River Road*, 19 Pa. Super. Ct. 376, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.

8. At Town Line. — Matter of *Burdick*, (County Ct.) 27 Misc. (N. Y.) 298.

Wholly Within Town. — That a highway is wholly within a single town is immaterial. *Watertown v. Middlesex County*, 176 Mass. 22.

11. Discretion of Officers. — *San Mateo County v. Coburn*, (Cal. 1900) 63 Pac. Rep. 78; *Fohl v. Common Council*, 80 Minn. 67; *State v. Superior Ct.*, 29 Wash. 1.

Discretion Not Controllable by Mandamus. — *Howe v. Rose*, 35 Tex. Civ. App. 328.

**357.** 3. Navigable Waters. — *Chapin v. Maine Central R. Co.*, 97 Me. 151.

5. Land Above High-water Mark. — A highway may be laid out over land that is above the mean high-water mark. *Hunt v. Com.*, 183 Mass. 307.

11. Pennsylvania Decisions. — *In re Road* in Greene, etc., Tp., 21 Pa. Super. Ct. 418.

**358.** 7. New Jersey Statute — *Dwelling Houses*. — Uncompleted buildings not furnished with either doors or windows, and not occupied, nor reasonably capable of occupancy, for dwelling purposes, are not dwelling houses within the meaning of the statute. *Whittingham v. Hopkins*, 70 N. J. L. 322.

10. If, After the Road Is Laid Out, buildings in the course of construction become dwelling houses, they are then encroachments upon the road. *Whittingham v. Hopkins*, 70 N. J. L. 322.

**359.** 7. Application. — *Davern v. Decatur County*, 34 Ind. App. 44; *Bennett v. Hall*, 184 Mo. 407; *Spaulding v. Grotton*, 68 N. H. 77; *Megrath v. Nickerson*, 24 Wash. 235; *Flint v. Horsley*, 25 Wash. 648.

8. Petition for Alteration Insufficient. — *State v. Burgeson*, 108 Wis. 174.

Where the change practically amounts to a new road, a petition asking for an alteration of the old road and a vacation of that part of such road rendered useless, is insufficient. *Bacon v. Noble*, 11 Ohio Cir. Dec. 49, 20 Ohio Cir. Ct. 281.

10. Application Not Required by Statute. — *Huggins v. Hurt*, 23 Tex. Civ. App. 404.

11. Qualifications of Applicants. — *Highway Com'rs v. Ellwood*, 193 Ill. 304; *Thrall v. Gosnell*, 28 Ind. App. 174; *Craft v. De Soto County*, 79 Miss. 618; *State v. Morgan*, 79 Miss. 659.

**360.** 1. Qualifications of Petitioners Must Be Shown by Record. — *Craft v. De Soto County*, 79 Miss. 618; *State v. Morgan*, 79 Miss. 659.

4. Two Petitions for the establishment of the same road may be presented at the same time and may be treated as one petition. *Gifford v. Baker*, 158 Ind. 339.

**361.** 3. Description. — *In re Cornplanter Tp. Road*, 26 Pa. Super. Ct. 20.

Illustration of Insufficient Description. — A petition stating that the beginning of the road is at a point near a bridge on a road near the house of S., the bridge being 250 yards from the house, is bad for uncertainty. *In re Road* in Warrington Tp., 8 Del. Co. Rep. (Pa.) 79, 14 York Leg. Rec. (Pa.) 53.

4. Sufficient if Identification Possible. — *Davern v. Decatur County*, 34 Ind. App. 44; *Nelson v. Yamhill County*, 41 Oregon 560; *In re Cornplanter Tp. Road*, 26 Pa. Super. Ct. 20; *Chelan County v. Navarre*, 38 Wash. 684.

The description must be sufficiently definite so that a surveyor can ascertain the location of the road. *Shell v. Poulson*, 23 Wash. 535.

5. Description of Termini. — *Davern v. Decatur County*, 34 Ind. App. 44; *Sheehan v. Bath*, 80 Minn. 355; *Nelson v. Yamhill County*, 41 Oregon 560; *In re Road* in Dunbar Tp., 12 Pa. Super. Ct. 491; *Flint v. Horsley*, 25 Wash. 648.

Insufficient as to Place of Beginning. — A petition for a road to commence at a stake on the boundary line between M. and C. is too indefinite as to the place of beginning. *In re Mills*, (Del. 1904) 58 Atl. Rep. 825.

**362.** 3. Need Not Recite Qualifications of Applicants. — *Highway Com'rs v. Ellwood*, 193 Ill. 304, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 362.

**363.** 8. Amendment. — *Thrall v. Gosnell*, 28

**363.** (b) Addition or Withdrawal of Names. — See note 9.

*d.* VARIANCE. — See note 11.

**364.** See note 1.

The Establishment of a Part of the Highway. — See note 6.

**365.** 7. Notice — *a.* NECESSITY — (1) *In General.* — See notes 1, 4.

**366.** (2) *Waiver of Notice.* — See note 1.

**367.** *b.* SUFFICIENCY OF NOTICE — (2) *Formal Requisites — Signature and Seal.* — See note 1.

**368.** (6) *Description of Route.* — See note 2.

**369.** (8) *Personal Notice* — (b) *To Owners of Land.* — See notes 3, 7.

(c) *To Occupants of Land.* — See note 10.

**370.** *c.* PROOF OF NOTICE — (1) *In General.* — See note 7.

**371.** (3) *Return of Officers.* — See note 4.

**372.** 8. Commissioners or Viewers — *c.* ORDER FOR VIEW — (1) *Description of Road.* — See note 6.

**374.** *e.* WHO MAY ACT — (2) *Relationship or Affinity.* — See notes 8, 9.

**375.** (4) *Freeholders.* — See note 2.

(5) *Owners of Land Affected.* — See note 5.

**377.** *g.* OATH TO BE TAKEN — (1) *In General.* — See note 4.

Ind. App. 174; *In re* Upper Mt. Bethel Road, 7 Northam. Co. Rep. (Pa.) 29.

**363.** 9. Addition of Names. — *Sisson v. Carithers*, (Ind. App. 1904) 72 N. E. Rep. 267.

11. Correspondence to Description in Application. — *Matter of King*, (County Ct.) 42 Misc. (N. Y.) 480; *In re* Frankford Tp. Road, 24 Pa. Co. Ct. 649.

**364.** 1. Substantial Correspondence Sufficient. — *Whittingham v. Hopkins*, 69 N. J. L. 189. See also *Matter of King*, (County Ct.) 42 Misc. (N. Y.) 480.

6. Establishment of Part Not Allowable. — *Matter of King*, (County Ct.) 42 Misc. (N. Y.) 480; *Flint v. Horsley*, 25 Wash. 648.

**365.** 1. Statutory Notice Must Be Given. — *Halliday v. Smith*, 67 Ark. 310; *Grinstead v. Wilson*, 69 Ark. 587; *Cummings v. Noble County*, 13 Okla. 21; *In re* Road in Greenwood Tp., 23 Pa. Co. Ct. 85; *In re* Road in Chartiers Tp., 30 Pittsb. Leg. J. N. S. (Pa.) 268.

Where the Petition Is Amended a new notice must be given. *Thrall v. Gosnell*, 28 Ind. App. 174.

Texas — Notice Not Essential. — But under *Sayles's Annot. Civ. Stat. Tex.* 1897, arts. 4674, 4675, 4676, notice to the owners of the land through which the road is to be laid out is not essential to the validity of the proceedings. *Morgan v. Oliver*, (Tex. Civ. App. 1904) 80 S. W. Rep. 111.

4. Notice Jurisdictional. — *Perry v. Bozarth*, 95 Ill. App. 566, reversed 198 Ill. 328; *State v. Bogardus*, 63 Kan. 259; *Bennett v. Hall*, 184 Mo. 407.

**366.** 1. Waiver of Notice. — *Hurst v. Martinsburg*, 80 Minn. 40; *In re* Road in Lower Merion Tp., 8 Pa. Dist. 581; *McCown v. Hill*, (Tex. Civ. App. 1903) 73 S. W. Rep. 850. See also *Lafollette v. Road Com'r*, 105 Tenn. 536.

What Not Waiver. — A landowner, who files exceptions to the report of the viewers, does not thereby waive his right to the statutory notice of their meeting. *Beck v. Biggers*, 66 Ark. 292.

**367.** 1. Contrary Decision. — See *In re Parker*, 2 Penn. (Del.) 336.

**368.** 2. Description of Route. — *Jenkins v. Riggs*, 100 Md. 427.

Must Correspond with Petition. — The description in the notice must correspond with that of the petition. *In re Parker*, 2 Penn. (Del.) 336.

**369.** 3. Notice to Landowners. — *Mathewson v. Skinner*, 66 Kan. 309.

7. Notice to Husband. — But where the legal title is in the husband, notice to the wife is not necessary. *Mathewson v. Skinner*, 66 Kan. 309.

10. Notice to Occupants of Land. — This means a service upon the person having actual possession and control of the land. *Thompson v. Berlin*, 87 Minn. 7.

**370.** 7. Proof of Notice — Necessity. — *In re Parker*, 2 Penn. (Del.) 336.

**371.** 4. Return of Officers. — It will be presumed that the landowners had notice of the laying out of the road, where the officers' report showed that they endeavored to obtain a release of damages from such landowners, there being no evidence to contradict their report. *In re Forest Lake Road*, 24 Pa. Co. Ct. 606.

**372.** 6. Order for View — Description of Road. — An order appointing commissioners to view need not recite in detail the names of the parties upon whose application it is made. *Ford v. Collins*, 108 Ky. 553.

**374.** 8. Brother of Petitioner. — *Beck v. Biggers*, 66 Ark. 292.

9. Father-in-law of Petitioner. — *Beck v. Biggers*, 66 Ark. 292.

**375.** 2. Freeholders. — The appointment of a person not a freeholder will be vacated upon motion when that fact is made to appear. *Matter of Trask*, 81 N. Y. App. Div. 318.

5. Owner of Land Near Terminal. — The fact that one of the viewers owns land near the terminal of the highway being laid out is fatal to the proceedings. *In re Road in Warrington Tp.*, 8 Del. Co. Rep. (Pa.) 79, 14 York Leg. Rec. (Pa.) 53.

**377.** 4. Necessity of Oath. — *Matter of David*, (County Ct.) 44 Misc. (N. Y.) 192.



**379.** *j. IMPROPER CONDUCT — (1) Entertainment by Parties Interested.*  
— See note 2.

**380.** *m. REVIEWERS.* — See notes 1, 2.

*Re-review.* — See note 4.

**9. Report or Return — a. IN GENERAL.** — See note 6.

*b. TIME OF MAKING.* — See notes 9, 11, 12.

**381.** *c. DESCRIPTION OF HIGHWAY.* — See notes 2, 3.

*Width of Highway.* — See notes 6, 7.

*A Variance.* — See note 8.

*d. REFERENCE TO IMPROVEMENTS.* — See note 13.

**382.** *e. STATEMENT AS TO NECESSITY OF HIGHWAY.* — See note 1.

*f. SIGNING OF REPORT.* — See note 3.

**383.** **10. Order for Establishment — a. IN GENERAL.** — See note 2.

*b. DESCRIPTION OF HIGHWAY.* — See note 7.

**384.** *Statement of Width of Highway.* — See note 12.

*c. STATEMENT OF NECESSITY OF HIGHWAY.* — See note 14.

**385.** *d. CONDITIONAL ORDER.* — See notes 1, 2.

*e. TIME OF RENDITION.* — See note 8.

**379. 2. Entertainment.** — *In re Eldred Tp. Road*, 24 Pa. Co. Ct. 321.

**The Fact that Transportation Was Furnished** to a viewer to the place of view is no ground for setting aside the report of the viewers. *In re Springfield Tp. Road*, 24 Pa. Co. Ct. 625.

**380. 1. Reviewers.** — *In re Overfield Tp. Road*, 25 Pa. Super. Ct. 5.

**2. In re Overfield Tp. Road, 25 Pa. Super. Ct. 5.**

**4. Re-review.** — *In re Overfield Tp. Road*, 25 Pa. Super. Ct. 5.

**6. Report or Return.** — A report by the viewers is necessary to establish a highway. *Whitesides v. Earles*, (Tenn. Ch. 1901) 61 S. W. Rep. 1038.

**Notice to County Commissioners.** — Where the report does not show that notice was given to the county commissioners it will be set aside. *In re Road in West Brunswick Tp.*, 23 Pa. Co. Ct. 359, 9 Pa. Dist. 256.

**9. Time of Return.** — *In re Knox St.*, 12 Pa. Super. Ct. 534; *In re Sewickley Tp. Road*, 26 Pa. Super. Ct. 572.

**Report Made on Holiday.** — The report is not rendered invalid because made on a holiday. *Lord v. Gifford*, 67 N. J. L. 193.

**11. Premature Report.** — *Goehring v. Rankin*, 17 Pa. Super. Ct. 186.

**12. Effect of Failure to Report.** — *Compare In re Sewickley Tp. Road*, 26 Pa. Super. Ct. 572.

**381. 2. Termini.** — *Beck v. Biggers*, 66 Ark. 292; *Public Road's Petition*, 11 Pa. Super. Ct. 232; *In re Hector Tp. Road*, 19 Pa. Super. Ct. 120; *Flint v. Horsley*, 25 Wash. 648.

**3. Courses and Distances.** — *Yardley Borough*, 22 Pa. Co. Ct. 179; *Flint v. Horsley*, 25 Wash. 648.

**6. Width of Highway.** — See *Springfield Tp. Road*, 24 Pa. Co. Ct. 625.

Viewers have no authority to determine the width of a highway, and the record of their report is not evidence of its width. *Maus v. Mahoning Tp.*, 24 Pa. Super. Ct. 624.

**7. Matter of King, (County Ct.) 42 Misc. (N. Y.) 480.**

**8. Variance from Petition.** — *State v. Price*, 63

N. J. L. 151; *Whittingham v. Hopkins*, 70 N. J. L. 322; *Matter of King*, (County Ct.) 42 Misc. (N. Y.) 480; *Hector Tp. Road*, 19 Pa. Super. Ct. 120; *Cornplanter Tp. Road*, 26 Pa. Super. Ct. 20.

**13. Effect of Omission.** — Where the draft shows the residences of two of the adjoiners of the proposed road, and there is no proof of the existence of other improvements, the report will not be set aside on the ground of not setting forth the improvements. *Mt. Joy Tp. Road*, 25 Pa. Co. Ct. 111.

**382. 1. Substantial Finding.** — *Flint v. Horsley*, 25 Wash. 648.

**3. In New Jersey.** — The statute regulating the laying out of highways contemplates the joint action of the surveyors, or a majority of them acting as a body, in dating, signing, and delivering their return; and where it appears that two of the four purporting to have signed the return did so upon separate dates and occasions, when alone and apart from their associates, such return is invalid. *Whittingham v. Hopkins*, 70 N. J. L. 322.

**383. 2. Order for Establishment.** — In the absence of statute an order is necessary. *Whitesides v. Earles*, (Tenn. Ch. 1901) 61 S. W. Rep. 1038.

**7. Description of Road.** — *Cox v. Highway Com'rs*, 194 Ill. 355.

**Description Too Indefinite.** — If the description in the order is so indefinite that the road therein mentioned cannot be located therefrom, then the order is void. *Blair v. Milwaukee Light, etc., Co.*, 110 Wis. 64.

**384. 12. Public Road's Petition, 11 Pa. Super. Ct. 232.**

**14. Statement as to Necessity of Highway.** — Where the petitioners pay the damages of constructing the highway, it is not requisite that the order state that the highway is a public necessity. *Seafeld v. Bohne*, 169 Mo. 537.

**385. 1. Conditional Order.** — *Illinois Cent. R. Co. v. Swalm*, 83 Miss. 631.

**2. Statutory Provision.** — *Strickland v. Western etc., R. Co.*, 119 Ga. 70.

**8. Time of Order.** — See *Douglass v. Faust*, 112 La. 1050.

- 385.** *g. RESCISSION.* — See note 14.  
**11. Appeal and Certiorari.** — See note 16.  
**386.** See notes 1, 2, 3, 5.  
**387.** *Certiorari.* — See note 2.  
**12. Record of Proceedings.** — See note 3.  
*The Existence of the Highway.* — See note 8.  
**13. Collateral Attack.** — See note 11.  
**388.** See note 5.  
**389.** *Presumption of Regularity.* — See note 2.  
**15. Curative Acts.** — See note 8.  
**390.** **16. Opening of Highway** — *a. IN GENERAL.* — See note 4.  
*b. TIME FOR OPENING.* — See note 9.  
*c. DESCRIPTION IN PROCEEDINGS TO BE FOLLOWED.* — See note 11.  
**391.** *e. REMOVAL OF BUILDINGS AND FENCES.* — See notes 4, 5.  
*f. INJUNCTION.* — See notes 7, 12.  
**17. Establishment by Estoppel.** — See note 13.

**385. 14. Rescission of Order.** — Robson *v.* Richey, 159 Ind. 660.

**16. Right of Appeal.** — Kirsch *v.* Braun, 153 Ind. 247; Seafeld *v.* Bohne, 169 Mo. 537; Bennett *v.* Hall, 184 Mo. 407; Williams *v.* Turner Tp., 15 S. Dak. 182; Huggins *v.* Hurt, 23 Tex. Civ. App. 404; State *v.* Geneva, 107 Wis. 1. See also McElrath *v.* Lakeville Tp., 92 Minn. 248.

If there is no question of damages in the proceedings no appeal will lie. Cummings *v.* Noble County, 13 Okla. 21.

The laying out of a highway by the selectmen is vacated by an appeal. Morse *v.* Wheeler, 69 N. H. 292.

**386. 1. Statutory Authority Necessary.** — Under Rev. Stat. Wis. (1898), § 1299, providing for the laying out of a logging road, no right of appeal is given. State *v.* Wallman, 110 Wis. 312.

**2. Order Refusing to Establish Highway.** — Selde *v.* Lincoln County, 25 Wash. 198.

**3. Who May Appeal.** — Hegenbaumer *v.* Heckenkamp, 202 Ill. 621; Imhoff *v.* Highway Com'rs, 89 Ill. App. 66.

**Individual Taxpayers** as such have no right to appeal. Bennett *v.* Tuftonborough, 72 N. H. 63.

**5. Trial De Novo.** — Seafeld *v.* Bohne, 169 Mo. 537; Bennett *v.* Hall, 184 Mo. 407; Williams *v.* Turner Tp., 15 S. Dak. 182.

**387. 2. Certiorari.** — Grinstead *v.* Wilson, 69 Ark. 587; Perry *v.* Bozarth, 95 Ill. App. 566, reversed 198 Ill. 328.

**3. Record of Proceedings.** — See Ford *v.* Collins, 108 Ky. 553.

**Failure to Record** the order establishing a highway does not invalidate the proceedings. People *v.* Vandewater, 83 N. Y. App. Div. 60, appeal dismissed 176 N. Y. 558.

**8. Proof of Existence of Highway.** — Compare Raht *v.* Southern R. Co., (Tenn. Ch. 1897) 50 S. W. Rep. 72; Brigham City *v.* Crawford, 20 Utah 130.

**The Records of Defective Proceedings** in laying out a highway are admissible to prove its existence. Gage *v.* Pittsfield Tp., 120 Mich. 436.

**11. Collateral Attack** — Georgia. — Crum *v.* Hargrove, 119 Ga. 471.

Idaho. — Canyon County *v.* Toole, 9 Idaho 561.

Indiana. — Helms *v.* Bell, 155 Ind. 502; Phillips *v.* Hutchinson, 34 Ind. App. 486.

Maryland. — Jenkins *v.* Riggs, 100 Md. 427.

Mississippi. — Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631.

Missouri. — Seafeld *v.* Bohne, 169 Mo. 537.

New Hampshire. — Spaulding *v.* Groton, 68 N. H. 77.

North Carolina. — State *v.* Yoder, 132 N. Car. 1111.

Pennsylvania. — Crescent Tp. *v.* Pittsburg, etc., R. Co., 210 Pa. St. 334.

Texas. — Kelley *v.* State, 46 Tex. Crim. 23.

**388. 5. Void Order.** — Halliday *v.* Smith, 67 Ark. 310.

**389. 2. Presumption of Regularity.** — See Cox *v.* Highway Com'rs, 194 Ill. 355.

**8. Curative Acts.** — Fair *v.* Buss, 117 Iowa 164.

**390. 4. What Constitutes Opening.** — Where a municipality has graded the street, put in curbing between the highway and the carriage-way, and permitted the citizens to make a sidewalk of cinders, which is constantly used by them, there is a sufficient opening or taking charge of the highway to require the city to keep the sidewalk free from dangerous obstructions or excavations. Madisonville *v.* Pemberton, (Ky. 1903) 75 S. W. Rep. 229.

**9. Reasonable Time.** — Lee *v.* Harris, 206 Ill. 428, 99 Am. St. Rep. 176.

**11. Following Designated Route.** — Flint *v.* Horsley, 25 Wash. 648.

**Liability for Deviating.** — A sheriff who cuts ferces at a point not upon the route opened by the order of the court is liable for the damages occasioned thereby. Morgan *v.* Oliver, (Tex. Civ. App. 1904) 80 S. W. Rep. 111.

**391. 4. Removal of Fences.** — See Monroe *v.* Crawford, 163 Mo. 178.

**5. Effect of Failure to Give Notice.** — See Monroe *v.* Crawford, 163 Mo. 178.

**7. Injunction.** — Monroe *v.* Crawford, 163 Mo. 178.

**12. Removal of Fences.** — See Monroe *v.* Crawford, 163 Mo. 178.

**13. Estoppel.** — Pedlow *v.* Renfrew, 27 Ont. App. 611, affirming 31 Ont. 499.

- 392.** VI. ALTERATION OF HIGHWAYS — 1. In General. — See note 11.  
**393.** See note 1.  
**394.** 3. Proceedings — *b.* APPLICATION. — See notes 2, 3.  
*c.* NOTICE. — See note 6.  
**395.** *d.* VIEWERS OR COMMISSIONERS. — See note 3.  
*e.* ORDER. — See note 4.  
*f.* APPEAL AND CERTIORARI. — See note 7.  
 4. Relocation and Straightening of Road. — See note 9.  
**396.** VII. VACATION OR DISCONTINUANCE OF HIGHWAYS — 1. Reasons for Vacation. — See note 4.  
**397.** 2. What Roads May Be Vacated — A Road Recently Established. — See notes 1, 2.  
 3. Vacation of Part of Highway. — See note 5.  
**398.** 5. Who May Vacate. — See notes 2, 3, 6.  
**399.** 6. Proceedings — *a.* STATUTORY METHOD TO BE FOLLOWED. — See note 2.  
*b.* PETITION. — See notes 6, 7, 9.

**392.** 11. Alteration Refers to Change of Course. — *Buchholz v. New York, etc., R. Co.*, 71 N. Y. App. Div. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392, affirmed 177 N. Y. 550.

**393.** 1. Alteration Includes Establishment and Vacation. — *Buchholz v. New York, etc., R. Co.*, 71 N. Y. App. Div. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393, affirmed 177 N. Y. 550.

**394.** 2. Petition for New Road Insufficient. — See *Norton v. Truitt*, 70 N. J. L. 611.

3. Description of Alteration. — *Scherer v. Bailey*, 34 Ind. App. 172; *West Penn Road*, 23 Pa. Co. Ct. 477.

A petition which sets forth two roads in the alternative is insufficient. *Middletown Road*, 15 Pa. Super. Ct. 167.

6. Notice. — But where the deviation is wholly upon the petitioner's land notice is not necessary. *Franklin v. Raborn*, 60 S. Car. 78.

**395.** 3. Report or Return. — The report must state the improvements through which the old road passes. *West Penn Road*, 23 Pa. Co. Ct. 477.

4. Order — Description of Alteration. — *State v. Burgeson*, 108 Wis. 174.

7. Right to Review. — *Middletown Road*, 15 Pa. Super. Ct. 167. See also *Morris, etc., R. Co. v. Jersey City*, 64 N. J. L. 148.

Ministerial Act. — Ordering a change of the direction of a highway is regarded as a ministerial act of the County Court, from which no appeal lies unless a special damage is suffered by the appellant. *Schroeder v. Jabin*, 94 Mo. App. 111.

9. Relocation of Road. — Supervisors have no authority to relocate a road in order to place it on what might be supposed its recorded location. *Gray v. North Versailles Tp.*, 208 Pa. St. 77.

**396.** 4. Construction of Railroad. — Under Act Pa. 1836, § 18, the court cannot vacate a road upon a statement by reviewers that they are of the opinion that the same is becoming useless and inconvenient on account of the construction of a coal tippie and railroad siding. *Sewickley Tp. Road*, 23 Pa. Super. Ct. 170.

**397.** 1. Road Recently Established. — *Miller v. Oakwood Tp.*, 9 N. Dak. 623, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

2. Road Not Actually Opened. — *Matter of McFadden*, 96 N. Y. App. Div. 58.

5. Vacation of Part. — *Pence v. Bryant*, 54 W. Va. 263, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397.

But upon an application under the road act to vacate a public road between certain points named, it is not lawful to vacate a part only of such road. *Condict v. Ramsey*, 65 N. J. L. 503.

**398.** 2. Vacation by Legislature. — *Fisher v. Union County*, 43 Oregon 223.

3. Vacation by County Officials. — Under Comp. Laws Nev. § 479, as amended by Stat. 1895, c. 37, p. 35, the duty of the board of county commissioners is discretionary. *State v. Douglas County*, 27 Nev. 469.

6. Vacation by Court. — *Fisher v. Union County*, 43 Oregon 223.

**399.** 2. Statutory Method to Be Adopted. — *Sheppard v. May*, 83 Mo. App. 272.

Oregon — Application to Be by Petition. — Where the statute states that petitions to the County Court for the vacation of a county road must be accompanied by proof of publication thirty days previous to presentation, the application for the vacation of such a road should be made by petition. *Fisher v. Union County*, 43 Oregon 223.

6. Qualifications of Petitioners. — *State v. Douglas County*, 27 Nev. 469; *In re Road in Rapho, etc., Tp.*, 7 Del. Co. Rep. (Pa.) 571, 7 Northam. Co. Rep. (Pa.) 171.

7. Description of Road. — *Sheehan v. Bath*, 80 Minn. 355; *Road in Curtin, etc., Tp.*, 23 Pa. Co. Ct. 328; *Hancock Tp. Road*, 13 York Leg. Rec. (Pa.) 48.

What Not a Fatal Defect. — The fact that the application asks for the vacation of a larger part of the highway than is afterwards sought to be discontinued, does not render such application invalid. *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244.

9. Alleging Uselessness of Road. — *In re Road in Peachbottom, etc., Tp.*, 11 York Leg. Rec. (Pa.) 11, 65.

- 399.** *c.* NOTICE. — See note 10.  
**400.** See notes 2, 3.  
**401.** *f.* REPORT OR RETURN. — See note 2.  
*g.* ORDER FOR VACATION. — See note 3.  
*h.* APPEAL AND CERTIORARI. — See notes 6, 7.  
 Who May Ask Review. — See note 11.  
**403.** 11. Rights of Abutting Owners. — See note 3.  
 A Statute. — See notes 4, 5.  
**404.** 12. Vacation Implied from Alteration. — See note 1.  
 VIII. ABANDONMENT AND NONUSER — 1. In General. — See note 4.  
**405.** 3. Duration of Nonuser. — See note 4.  
 5. Abandonment of Part of Width. — See note 10.

**Supplemental Petition.** — The original petition may be supplemented by another petition which gives the reasons for the vacation. *Cheltenham Tp. Road*, 17 Montg. Co. Rep. (Pa.) 18.

**Meaning of "Useless."** — In *New York* the word "useless" is not employed in its absolute sense, but the highway must be "practically useless." *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244.

**399. 10. Giving of Notice Jurisdictional.** — *Perry v. Bozarth*, 95 Ill. App. 566, reversed 198 Ill. 328; *Hill v. Hoffman*, (Tenn. Ch. 1899) 58 S. W. Rep. 929.

**Where a Petitioner Has No Claim for Damages** notice is not required to be given to him. *Sullivan v. Robbins*, 109 Iowa 235.

**Notice to All Property Owners on Whole Highway Required.** — Notice must be given to all the property owners on the whole highway. A waiver by those abutting on the portion discontinued is insufficient. *Schroeder v. Klipp*, 120 Wis. 245.

**400. 2. Description of Highway.** — Where there is a variance between the petition and notice in describing the terminal of the road, the County Court is without jurisdiction to make the order vacating such road. *Fisher v. Union County*, 43 Oregon 223.

**3. Showing in Record.** — *Imhoff v. Highway Com'rs*, 89 Ill. App. 66.

**401. 2. Description of Road.** — Where the petition is defective in not giving the location of the road to be vacated, it may be supplied by the report. *Hancock Tp. Road*, 13 York Leg. Rec. (Pa.) 48.

**3. Conclusiveness of Adjudication.** — Where the viewers report adversely to the vacation prayed for, the county commissioners have no authority to order the road vacated. *England v. Duncan*, 10 Kan. App. 577, 62 Pac. Rep. 710.

**Order Presumptive Evidence.** — Under Rev. Stat. Wis. (1898), § 1298, the order is presumptive evidence of the facts therein stated; this presumption may be rebutted by other evidence. *Schroeder v. Klipp*, 120 Wis. 245.

**6. Right of Appeal.** — *Wendt v. Minnetrista*, 87 Minn. 403; *McElrath v. Lakeville Tp.*, 92 Minn. 248; *Fisher v. Union County*, 43 Oregon 223.

**7. Proceeding De Novo.** — *McElrath v. Lakeville Tp.*, 92 Minn. 248.

**11. Person "Interested."** — Compare *Imhoff v. Highway Com'rs*, 89 Ill. App. 66.

**403. 3. Deprivation of Ingress and Egress.** — In order that the owner may recover damages he must aver and prove that he suffers a special

injury by reason of the vacation of the road. *Doppas v. Cincinnati, etc., R. Co.*, 19 Ohio Cir. Ct. 582.

**4. Statutory Provision for Compensation.** — *Wendt v. Minnetrista*, 87 Minn. 403.

**Some Other Way of Access Provided.** — In *Ontario* it is provided by statute that no municipal council shall close up any public road or highway whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence. A farm lot occupied by the owner as one farm was diagonally divided by a railway into two separate parcels, having a farm crossing provided by the railway, giving access from one parcel to the other. In addition to a road which afforded access to the parcel where his residence was, there was another road which gave access to the other parcel, and which, except by the farm crossing, was the only mode of access thereto. It was held that the latter road came within the statute, and could not be closed up by the municipal council unless, in addition to compensation, another road or way was provided in lieu thereof. *Re Martin*, 1 Ont. L. Rep. 645.

**5. Wendt v. Minnetrista**, 87 Minn. 403.

**404. 1. Vacation Implied from Alteration.** — *Buchholz v. New York, etc., R. Co.*, 71 N. Y. App. Div. 456, affirmed 177 N. Y. 550; *West Penn Road*, 23 Pa. Co. Ct. 477; *Bare v. Williams*, 101 Va. 890.

**When Old Road Considered Discontinued.** — When the route of a public road is changed by ordinance of the police jury, the old road continues to be the public highway until the new is laid out, opened, and made practicable. *Lawson v. Shreveport Waterworks Co.*, 111 La. 73.

**Where Proceedings for New Road Void.** — A highway is not discontinued where there is an attempt to lay out a highway in its place, the proceedings being void and no highway existing in fact. *Chippewa Falls v. Hopkins*, 109 Wis. 611.

**4. Abandonment of Highway.** — *Phillips v. Lawrence*, (Ky. 1901) 64 S. W. Rep. 411; *Bayard v. Standard Oil Co.*, 38 Oregon 438.

**405. 4. Duration of Nonuser.** — *Kelsoe v. Oglethorpe*, 120 Ga. 956, 102 Am. St. Rep. 138, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405, and quoting all of text paragraph.

**10. Abandonment of Part of Width.** — *Konkel v. Pella*, 122 Wis. 143.

**407. 6. Statutory Abandonment — b. OF HIGHWAY ALREADY OPENED.**  
— See notes 9, 10.

Nonuser of Part of Highway. — See notes 12, 13.

**408. X. IMPROVEMENTS AND REPAIRS — 1. In General.** — See note 5.

**409. 4. Injuries to Private Property — There Is in Some States.** — See note 8.

**410. XI. HIGHWAY OFFICERS — 1. Powers Limited.** — See notes 11, 12.

**411. Contract Obligations.** — See note 1.

2. Are Not Agents of Municipality. — See note 4.

3. Advancements by Officer. — See note 5.

**412. 6. Liabilities of Officers — a. FAILURE TO REPAIR HIGHWAY.** —  
See notes 2, 3.

**415. XII. OWNERSHIP OF FEE — 1. Mere Easement Generally in Public.** —  
See note 5.

**407. 9. Statutory Abandonment of Opened Highway.** — *Newsome v. Walker*, (Neb. 1901) 95 N. W. Rep. 772; *Buffalo v. Delaware*, etc., R. Co., 68 N. Y. App. Div. 488, affirmed 178 N. Y. 561; *People v. Marlette*, 94 N. Y. App. Div. 592.

The provision in Comp. Stat. Neb. (1901), c. 78, § 3, "that all roads that have not been used within five years shall be deemed vacated," was intended to apply exclusively to roads that had not been used within five years before the enactment of such section. *Williams v. Smith*, (Neb. 1903) 94 N. W. Rep. 150.

**Question for Jury.** — Whether a highway has been abandoned is a question for the jury. *Townsend v. Bishop*, 61 N. Y. App. Div. 18.

**10. Nonuser.** — A highway cannot be declared abandoned because bars and gates are placed across such highway for the accommodation of abutting owners. *People v. Marlett*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 151.

**12. Nonuser of Part of Highway.** — *Newsome v. Walker*, (Neb. 1901) 95 N. W. Rep. 772. But see *Krueger v. Jenkins*, 59 Neb. 641; *Baker v. Hogaboom*, 12 S. Dak. 405.

**13. Newsome v. Walker, (Neb. 1901) 95 N. W. Rep. 772.**

**408. 5. Discretion of Officers.** — *Sells v. Dermody*, 114 Iowa 344; *Clay City v. Abner*, (Ky. 1904) 82 S. W. Rep. 276; *House v. Covington*, (Ky. 1904) 82 S. W. Rep. 374; *Fokenga v. Churchill*, (Neb. 1902) 96 N. W. Rep. 143. See also *Brush v. New York*, 59 N. Y. App. Div. 12.

**409. 8. Liability of Individuals for Repairs Due to Use of Highway for "Extraordinary Traffic."** — In England it is provided by statute that, where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighborhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic

as aforesaid. *Norfolk County Council v. Green*, 90 L. T. N. S. 451.

**410. 11. Powers of Officers.** — *Walnut Tp. v. Heth*, 9 Kan. App. 498; *Ledbetter v. Clarks-ville*, etc., Turnpike Co., 110 Tenn. 92.

**A Road Overseer** has no right to make a road a public road. *Ehlers v. State*, 44 Tex. Crim. 156.

**12. Surrender of Highway.** — *Rupp v. Howard*, 114 Iowa 65.

**411. 1. Power to Contract Limited.** — *People v. Oyster Bay*, 175 N. Y. 394; *Wright v. Wil-murt*, (County Ct.) 44 Misc. (N. Y.) 456.

**4. Municipality Not Liable for Acts of Officers.** — *Hall v. Concord*, 71 N. H. 367; *Wright v. Wil-murt*, (County Ct.) 44 Misc. (N. Y.) 456; *N. A. Matthews Lumber Co. v. Van Zandt County*, (Tex. Civ. App. 1903) 77 S. W. Rep. 960.

**5. Advances by Officer.** — But a commissioner *de facto* cannot recover for money paid out by him for materials furnished. *Wiley v. In-habitants of Windham*, 95 Me. 482.

**412. 2. Liability for Failure to Repair High-way.** — *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171; *Sells v. Dermody*, 114 Iowa 344, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 412. See also *Rainey v. Hinds County*, 79 Miss. 238; *Osterhout v. Bethlehem*, 55 N. Y. App. Div. 198.

In Maryland, the Act of 1900, taking away the authority of the county commissioners to make repairs, removes the liability of such commis-sioners for failure to repair. *Baltimore County v. Wilson*, 97 Md. 207.

**3. Officers Not Liable.** — See *Sells v. Dermody*, 114 Iowa 344.

**415. 5. Easement Only Vested in Public.** — *London*, etc., R. Co. v. Westminster, (1902) 1 Ch. 269; *Plumbley v. Lock*, 67 J. P. 237. See also *Mappin v. Liberty*, (1903) 1 Ch. 118; *Glen-coe v. Reed*, 93 Minn. 518; *Mitchell v. Ein-stein*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 358; *Mott v. Eno*, 97 N. Y. App. Div. 580, re-versed 181 N. Y. 346; *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 541.

**But in Ontario There Is No Private Proprietor-ship in the Soil of Public Roads.** — The land, at first the waste land of the Crown, held for the beneficial use of the public, was, in course of settlement, surveyed so as to allocate road al-lowances, which became the streets and high-ways of the country. *Ricketts v. Markdale*, 31 Ont. 610.

**416.** See note 2.

**2. Rights as Between Public and Owner of Fee — a. RIGHTS OF USER IN GENERAL.** — See notes 4, 7.

**Municipal Structure.** — See note 10.

**b. TREES IN HIGHWAY — (1) In General.** — See notes 12, 13.

**418. d. SPRINGS IN HIGHWAY.** — See note 1.

**e. SOIL AND MINERAL DEPOSITS — (1) Rights of Owner of Fee.** — See notes 2, 3.

**419. f. EXCAVATIONS BY OWNER OF FEE.** — See notes 2, 3.

**3. Remedies of Owner of Fee — a. EJECTMENT.** — See note 4.

**b. TRESPASS.** — See note 5.

**c. INJUNCTION.** — See note 6.

**420. 4. Reversion on Vacation or Abandonment of Highway.** — See notes 1, 2.

**XIII. DEFECTIVE AND UNSAFE HIGHWAYS — 1. Municipal Corporations Liable — a. MUNICIPAL CORPORATIONS PROPER.** — See note 4;

**416. 2. Civil Law.** — See *Blain v. Staab*, 10 N. Mex. 743.

**4. User by Owner of Fee.** — *Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.*, (1900) 1 Ch. 276; *Lynn v. Hooper*, 93 Me. 46; *Glencoe v. Reed*, 93 Minn. 518. See also *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363. 7. *Hickman v. Maisey*, (1900) 1 Q. B. 752.

**10. Municipal Structure.** — *Davis v. Appleton*, 109 Wis. 580.

**12. Rights as to Trees.** — *Western Union Tel. Co. v. Krueger*, 30 Ind. App. 28; *L'Hussier v. Brosseau*, 20 Quebec Super. Ct. 170.

**13. Abutting Proprietor — Trees in Front of Property.** — An abutting proprietor, as to shade trees growing in front of his property and upon land the fee of which he owns, has the rights and remedies of the owner of a freehold, subject only to the public easement. *Western Union Tel. Co. v. Krueger*, 30 Ind. App. 28.

**418. 1. Percolating Waters.** — The municipality cannot use the percolating waters under the surface of the highway for the purpose of sprinkling the streets. *Proulx v. Graves*, 143 Cal. 243.

**2. Soil and Mineral Deposits.** — *Rawls v. Tallahassee Hotel Co.*, 43 Fla. 288; *Western Union Tel. Co. v. Krueger*, 30 Ind. App. 28.

**3. Rawls v. Tallahassee Hotel Co.**, 43 Fla. 288; *Clarendon v. Medina Quarry Co.*, 102 N. Y. App. Div. 217.

**419. 2. Excavations.** — *Glencoe v. Reed*, 83 Minn. 518; *Rupp v. Burgess*, 70 N. J. L. 7, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419; *Whitty v. Oshkosh*, 106 Wis. 87.

**3. Duty to Keep in Repair.** — *Rupp v. Burgess*, 70 N. J. L. 7, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419.

**4. Ejectment by Owner of Fee.** — *Bork v. United New Jersey R., etc., Co.*, 70 N. J. L. 268; *Little v. American Telephone, etc., Co.*, 96 N. Y. App. Div. 559; *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 541.

**5. Trespass.** — An unreasonable use of the highway constitutes a trespass. *Hickman v. Maisey*, (1900) 1 Q. B. 752.

**6. Injunction — England.** — *London, etc., R. Co. v. Westminster*, (1902) 1 Ch. 269.

*Alabama.* — *Cabbell v. Williams*, 127 Ala. 320.

*Indiana.* — *Martin v. Marks*, 154 Ind. 549;

*Strunk v. Pritchett*, 27 Ind. App. 582.

*Kansas.* — *Hayden v. Stewart*, (Kan. 1905) 80 Pac. Rep. 43.

*Michigan.* — *Forbes v. Detroit*, (Mich. 1905) 102 N. W. Rep. 740.

*New York.* — *Finegan v. Eckerson*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 574; *Odell v. Bretney*, 93 N. Y. App. Div. 607.

*Ohio.* — *Mantell v. Bucyrus Telephone Co.*, 11 Ohio Cir. Dec. 274, 20 Ohio Cir. Ct. 345.

*Pennsylvania.* — *Dafinger v. Pittsburg, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 37.

**To Remove Obstructing Fence.** — The abutting owner may maintain a bill in his own name to compel the removal of a fence obstructing the highway. *Smith v. Union Switch, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 21.

**420. 1. Reversion to Owner of Fee.** — *Blain v. Staab*, 10 N. Mex. 743.

**2. Abutting Owner.** — *Meloche v. Davidson*, 11 Quebec K. B. 302.

**4. Municipalities Proper Liable in Absence of Statute — District of Columbia.** — *District of Columbia v. Sullivan*, 11 App. Cas. (D. C.) 533.

*Idaho.* — *Carson v. Genesec*, 9 Idaho 244; *Moreton v. St. Anthony*, 9 Idaho 532.

*Illinois.* — *Decatur v. Hamilton*, 89 Ill. App. 561.

*Iowa.* — *Parmenter v. Marion*, 113 Iowa 297.

*Kansas.* — *Atchison v. Acheson*, 9 Kan. App. 33; *Hari v. Ohio Tp.*, 62 Kan. 315.

*Kentucky.* — *Louisville v. Michels*, 114 Ky. 551; *Carlisle v. Secrest*, (Ky. 1903) 75 S. W. Rep. 268.

*Louisiana.* — *Aucoin v. New Orleans*, 105 La. 271.

*Maryland.* — *Keen v. Havre de Grace*, 93 Md. 34; *Baltimore v. Walker*, 98 Md. 637.

*Minnesota.* — *Bieber v. St. Paul*, 87 Minn. 35.

*Mississippi.* — *Excelsior Springs v. Mississippi Valley Trust Co.*, 188 Mo. 133, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

*Missouri.* — *Stern v. Bensieck*, 161 Mo. 146; *Fockler v. Kansas City*, 94 Mo. App. 464; *Buckley v. Kansas City*, 95 Mo. App. 188.

*Montana.* — *Snook v. Anaconda*, 26 Mont. 128; *May v. Anaconda*, 26 Mont. 140.

*Nebraska.* — *Goddard v. Lincoln*, (Neb. 1903) 96 N. W. Rep. 273. See also *Wilson v. Ulysses Tp.*, (Neb. 1904) 101 N. W. Rep. 986.

- 422.** *b.* QUASI-MUNICIPAL CORPORATIONS. — See note 1.  
*c.* NEW ENGLAND RULE. — See note 3.
- 423.** *d.* STATUTES IMPOSING LIABILITY. — See notes 1, 2, 3, 4, 5.
- 424.** See notes 1, 2, 4.
- 2. Highways for Which Municipality Is Liable** — *a.* ADOPTION OR ASSUMPTION OF CONTROL BY MUNICIPALITY. — See notes 7, 8.
- 425.** Highways Constructed by Others. — See note 3.  
 User by the Public. — See note 6.
- 426.** See notes 1, 2.

*New York.* — *Dennis v. Elmira Heights*, 59 N. Y. App. Div. 404; *Mott v. Eno*, 97 N. Y. App. Div. 580, reversed 181 N. Y. 346.

*North Carolina.* — *Neal v. Marion*, 129 N. Car. 345.

*North Dakota.* — *Gagnier v. Fargo*, 11 N. Dak. 73, 95 Am. St. Rep. 705.

*Pennsylvania.* — *Brown v. Towanda*, 24 Pa. Super. Ct. 378.

*Washington.* — *Shearer v. Buckley*, 31 Wash. 370.

**422. 1. Quasi-municipalities Liable Only by Statute.** — *Hari v. Ohio Tp.*, 62 Kan. 315; *Sinkhorn v. Lexington, etc., Turnpike Co.*, 112 Ky. 205; *Wilson v. Ulysses Tp.*, (Neb. 1904) 101 N. W. Rep. 986; *Schroeder v. Multnomah County*, 45 Oregon 92.

**3. Municipalities Not Liable in Absence of Statute.** — *Collier v. Ft. Smith*, 73 Ark. 447; *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171; *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; *Moody v. Bristol*, 71 Vt. 473.

**Failure to Place Danger Signals Where Repairs in Progress.** — A city is not liable for injuries received in consequence of the neglect of its servants to display danger signals at a point where the street was being repaired: *Collier v. Ft. Smith*, 73 Ark. 447.

**423. 1. Connecticut.** — *Upton v. Windham*, 75 Conn. 288, 96 Am. St. Rep. 197.

**2. Maine.** — *Barnes v. Rumford*, 96 Me. 315. The standard of duty fixed by Rev. Stat. Me. 1903, c. 23, §§ 56 and 76, is that the way shall be "safe and convenient for travelers." *Moriarty v. Lewiston*, 98 Me. 482.

**3. Massachusetts.** — A bicycle is not a "carriage" within the meaning of this statute. *Richardson v. Danvers*, 176 Mass. 413, 79 Am. St. Rep. 320.

A flight of stairs in a building leading only to a room in it is not a highway or a townway within the meaning of Pub. Stat., c. 52, §§ 17, 18, or a way "entering on and uniting with an existing public highway" within c. 49, § 95. *McNeil v. Boston*, 178 Mass. 326.

Under the Rev. Laws, c. 51, § 1, a traveler is not precluded from recovery by the fact that when the accident occurred he was riding in an automobile, if the defect was one dangerous to ordinary travel. *Baker v. Fall River*, 187 Mass. 53.

**4. Michigan.** — The requirement is merely that the highway shall be reasonably safe and fit for travel: *Caldwell v. Detroit*, (Mich. 1904) 100 N. W. Rep. 897.

The liability applies to obstructions as well as defects. *McEvoy v. Sault Ste. Marie*, 136 Mich. 172.

**5. New Hampshire.** — See *Gale v. Dover*, 68 N. H. 403.

Under Laws (1893) c. 59, p. 47, the town is not liable for injuries sustained by a person falling into a ditch dug by a private individual. *Wilder v. Concord*, 72 N. H. 259. And under the same statute it was held that a bicyclist could not recover where the highway was unsuitable for foot passengers or travelers in other vehicles. *Hendry v. North Hampton*, 72 N. H. 351, 101 Am. St. Rep. 681.

**424. 1. Rhode Island.** — This statute does not require towns to keep their highways safe and convenient for travelers on bicycles. *Fox v. Clarke*, 25 R. I. 515.

**2. South Carolina.** — *Hutchison v. Summer-ville*, 66 S. Car. 442.

**4. Wisconsin.** — *Rhyner v. Menasha*, 107 Wis. 201.

**7. Assumption of Control by Municipality** — *Illinois.* — See *Rock Island v. Starkey*, 189 Ill. 515.

*Indiana.* — *Huntington v. McClurg*, 22 Ind. App. 261.

*Kentucky.* — *Maysville v. Guilfoyle*, 110 Ky. 670.

*Montana.* — *May v. Anaconda*, 26 Mont. 140.

*Tennessee.* — *Nellums v. Nashville*, 106 Tenn. 222.

*Texas.* — *Still v. Houston*, 27 Tex. Civ. App. 447.

*Vermont.* — *Hyde v. Swanton*, 72 Vt. 242.

*Virginia.* — *Winchester v. Carroll*, 99 Va. 727.

*Washington.* — *Brabon v. Seattle*, 29 Wash. 6.

*Canada.* — *Brunet v. Pointe Claire*, 14 Quebec Super. Ct. 278; *Holland v. York Tp.*, 7 Ont. L. Rep. 533.

**A Winter Road Open to the General Public, Over Which a Large Number of Persons Are Accustomed to Pass and on Which There Is Nothing to Indicate That It Is Private**, is a public road, and the corporation of the municipality in which it is situated is liable for accident happening from neglect to keep it in repair. *Duchene v. Beauport*, 23 Quebec Super. Ct. 80.

**8. Work and Repairs.** — *Rock Island v. Starkey*, 189 Ill. 515; *May v. Anaconda*, 26 Mont. 140.

**425. 3. Adoption of Highway Laid Out or Improved by Others.** — *Steel v. Huntington*, 191 Pa. St. 627; *Rimby v. Philadelphia*, 208 Pa. St. 119. See also *Huntington v. McClurg*, 22 Ind. App. 261.

**6. User by Public.** — *Rock Island v. Starkey*, 189 Ill. 515.

**426. 1. Insufficient to Show Municipal Liability.** — *Downend v. Kansas City*, 156 Mo. 60; *State v. Dry Fork R. Co.*, 50 W. Va. 235.

**2. Sidewalks.** — Where, for a term of years, there is a general use by foot travelers of the part of a public street lying outside of the

**426. b. NEWLY ESTABLISHED HIGHWAY.** — See note 9.

**c. DISCONTINUED HIGHWAY.** — See note 11.

**3. Municipal Duties and Liabilities in General — a. ORDINARY AND REASONABLE CARE.** — See note 12.

improved roadway, the city may be deemed to have recognized such use and assumed responsibility for its being made safe, although no artificial sidewalk has been constructed. *Atchison v. Mayhood*, 69 Kan. 672.

**426. 9. Downend v. Kansas City**, 156 Mo. 60.

**11. D'Amico v. Boston**, 176 Mass. 599; *Neal v. Marion*, 129 N. Car. 345; *Snyder v. Penn Tp.*, 14 Pa. Super. Ct. 143.

Where a city built a sidewalk and afterwards permitted part of it to be removed, it is liable for injuries received there, although not bound to construct a walk at that point. *Belyea v. Port Huron*, 136 Mich. 504.

**12. Ordinary Care Required — Colorado.** — *Denver v. Moewes*, 15 Colo. App. 28; *Denver v. Baldasari*, 15 Colo. App. 157; *Denver v. Cochran*, 17 Colo. App. 72; *Colorado Springs v. May*, (Colo. App. 1904) 77 Pac. Rep. 1093.

*Delaware.* — *Colbourn v. Wilmington*, 4 Penn. (Del.) 443.

*Florida.* — *Daytona v. Edson*, (Fla. 1903) 34 So. Rep. 954.

*Georgia.* — *Augusta v. Tharpe*, 113 Ga. 152.

*Illinois.* — *Salem v. Webster*, 192 Ill. 369; *Elgin v. Nofs*, 200 Ill. 252; *Beardstown v. Clark*, 204 Ill. 524; *Lockport v. Richards*, 81 Ill. App. 533; *Decatur v. Hamilton*, 89 Ill. App. 561; *Powell v. Bowen*, 92 Ill. App. 453; *Elgin v. Thompson*, 98 Ill. App. 358; *Chicago v. Gillett*, 108 Ill. App. 455; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Nokomis v. Farley*, 113 Ill. App. 161.

*Indiana.* — *Terre Haute v. Constans*, 26 Ind. App. 421; *Elwood v. Addison*, 26 Ind. App. 28; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Huntington v. Lusch*, 33 Ind. App. 476; *Michigan City v. Phillips*, 163 Ind. 449; *Muncie v. Spence*, 33 Ind. App. 599; *Vincennes v. Spees*, (Ind. App. 1904) 72 N. E. Rep. 531; *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.

*Iowa.* — *Padelford v. Eagle Grove*, 117 Iowa 616; *Belken v. Iowa Falls*, 122 Iowa 430; *Bauer v. Dubuque*, 122 Iowa 500; *Hill v. Glenwood*, 124 Iowa 479.

*Kansas.* — *Kansas City v. Orr*, 62 Kan. 61; *Burns v. Emporia*, 63 Kan. 285; *Holitz v. Kansas City*, 68 Kan. 157.

*Kentucky.* — *Covington v. Asman*, 113 Ky. 608; *Wickliffe v. Moring*, 113 Ky. 597; *Covington v. Manwaring*, 113 Ky. 592; *Covington v. Johnson*, (Ky. 1902) 69 S. W. Rep. 703; *Louisville v. Johnson*, (Ky. 1902) 69 S. W. Rep. 803; *Louisville v. Michels*, 114 Ky. 551; *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 206; *Carroll v. Louisville*, (Ky. 1904) 78 S. W. Rep. 1117; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917; *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270; *Clay City v. Abner*, (Ky. 1904) 82 S. W. Rep. 276.

*Maine.* — *Moriarty v. Lewiston*, 98 Me. 482. *Michigan.* — *Finch v. Bangor*, 133 Mich. 149; *Newman v. Ann Arbor*, 134 Mich. 29; *Gilson v. Cadillac*, 134 Mich. 189.

*Minnesota.* — *Cunningham v. Thief River*

*Falls*, 84 Minn. 21; *Bieber v. St. Paul*, 87 Minn. 35; *Kennedy v. St. Cloud*, 90 Minn. 523.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

*Missouri.* — *Young v. Webb City*, 150 Mo. 333; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462; *Buckley v. Kansas City*, 156 Mo. 16; *Fockler v. Kansas City*, 94 Mo. App. 464; *Buckley v. Kansas City*, 95 Mo. App. 188; *Reed v. Mexico*, 101 Mo. App. 155; *Fehlauer v. St. Louis*, 178 Mo. 635; *Norton v. Kramer*, 180 Mo. 536; *Ely v. St. Louis*, 181 Mo. 723; *Wallis v. Westport*, 82 Mo. App. 522; *Kaiser v. St. Louis*, 185 Mo. 366; *St. Louis v. Kansas City*, 110 Mo. App. 653; *Deland v. Cameron*, 112 Mo. App. 704; *Burnes v. St. Joseph*, 91 Mo. App. 489.

*Montana.* — *Leonard v. Butte*, 25 Mont. 410; *May v. Anaconda*, 26 Mont. 140; *Meisner v. Dillon*, 29 Mont. 116.

*Nebraska.* — *Andersson v. Albion*, 64 Neb. 280; *Nothdurft v. Lincoln*, 66 Neb. 434.

*New York.* — *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709; *Tubising v. Buffalo*, 51 N. Y. App. Div. 14; *Archer v. Mt. Vernon*, 57 N. Y. App. Div. 32; *Brush v. New York*, 59 N. Y. App. Div. 12; *Dennis v. Elmira Heights*, 59 N. Y. App. Div. 404; *Hulse v. Gosken*, 71 N. Y. App. Div. 436; *O'Shaughnessy v. Middleport*, 93 N. Y. App. Div. 93; *Bradner v. Warwick*, 91 N. Y. App. Div. 408; *Foley v. New York*, 95 N. Y. App. Div. 374.

*Ohio.* — *Dayton v. Taylor*, 62 Ohio St. 11; *Leipsis v. Gerdeman*, 68 Ohio St. 1; *Murphy v. Dayton*, 8 Ohio Dec. 354; *Ohliger v. Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142; *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 166; *Toledo v. Nitz*, 23 Ohio Cir. Ct. 350.

*Oklahoma.* — *Nofman v. Teel*, 12 Okla. 60.

*Pennsylvania.* — *Johnson v. Philadelphia*, 208 Pa. St. 182; *Rimby v. Philadelphia*, 208 Pa. St. 119; *Kelchner v. Nanticoke*, 209 Pa. St. 412; *Russell v. Westmoreland County*, 26 Pa. Super. Ct. 425.

*South Dakota.* — *Bohl v. Dell Rapids*, 15 S. Dak. 619; *Jones v. Sioux Falls*, (S. Dak. 1904) 101 N. W. Rep. 43.

*Tennessee.* — *Franklin v. House*, 104 Tenn. 1; *Archer v. Johnson City*, (Tenn. 1901) 64 S. W. Rep. 474.

*Texas.* — *Davis v. Austin*, 22 Tex. Civ. App. 460; *Laredo Electric, etc., Co. v. Hamilton*, 23 Tex. Civ. App. 480; *Dallas v. Moore*, 32 Tex. Civ. App. 236; *McKinney v. Brown*, (Tex. Civ. App. 1904) 81 S. W. Rep. 88.

*Virginia.* — *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

*Wisconsin.* — *Kleiner v. Madison*, 104 Wis. 339; *Peak v. Superior*, 106 Wis. 403.

Municipal corporations owe it to the public to keep the sidewalks in such a condition that pedestrians who are ordinarily careful will not be exposed to injury. *Blume v. New Orleans*, 108 La. 345.

**Street in Outskirts.** — The same duty rests



**427.** See notes 1, 2, 3.**Opportunity to Remove Defect.** — See note 4.*b.* **ORDINARY TRAVEL ONLY TO BE CONSIDERED.** — See notes 5, 6.**428.** *c.* **SPECIAL CONDITIONS OF MUNICIPAL ACTION.** — See note 3.*d.* **AMOUNT OF USE OF HIGHWAY.** — See note 5.

upon the municipality though the street is in the outskirts of the village. *Mt. Morris v. Kanode*, 98 Ill. App. 373.

**Street in Course of Repair.** — The duty on the part of a city to keep its streets in a reasonably safe condition for travel does not exist while such streets are being repaired and improved. *South Omaha v. Burke*, (Neb. 1902) 91 N. W. Rep. 562.

**Defects in Construction.** — The duty devolving on cities and villages to keep streets and sidewalks reasonably safe and fit for travel applies to defects in construction, as well as neglect to repair. *Plainview v. Mendelson*, 65 Neb. 85.

**427. 1. Requirement of Particular Statute.** — *Cunningham v. Clay Tp.*, 69 Kan. 373.

**2. No Guaranty of Safety—Colorado.** — *Denver v. Moewes*, 15 Colo. App. 28.

*Connecticut.* — *Tiesler v. Norwich*, 73 Conn. 199.

*Delaware.* — *Colbourn v. Wilmington*, 4 Penn. (Del.) 443.

*Illinois.* — *Elgin v. Nofs*, 200 Ill. 252; *Lockport v. Richards*, 81 Ill. App. 533; *Nokomis v. Farley*, 113 Ill. App. 161.

*Indiana.* — *Terre Haute v. Constans*, 26 Ind. App. 421; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Vincennes v. Spees*, (Ind. App. 1904) 72 N. E. Rep. 531, (Ind. App. 1905) 74 N. E. Rep. 277.

*Iowa.* — *Harvey v. Clarinda*, 111 Iowa 528.

*Kansas.* — *Holitz v. Kansas City*, 68 Kan. 157.

*Kentucky.* — *Covington v. Asman*, 113 Ky. 608; *Covington v. Manwaring*, 113 Ky. 592; *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 206; *Carroll v. Louisville*, (Ky. 1904) 78 S. W. Rep. 1117; *Clay City v. Abner*, (Ky. 1904) 82 S. W. Rep. 276.

*Michigan.* — *Gilson v. Cadillac*, 134 Mich. 189; *Harden v. Jackson*, (Mich. 1904) 100 N. W. Rep. 389.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

*Missouri.* — *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462; *Reed v. Mexico*, 101 Mo. App. 155; *Burnes v. St. Joseph*, 91 Mo. App. 489.

*Montana.* — *Meisner v. Dillon*, 29 Mont. 116.

*Nebraska.* — *Nothdruff v. Lincoln*, 66 Neb. 434.

*New York.* — *O'Shaughnessey v. Middleport*, 93 N. Y. App. Div. 93; *Beck v. Buffalo*, (Supm. Ct. App. Div.) 63 N. Y. Supp. 499; *Snowden v. Somerset*, 52 N. Y. App. Div. 84; *Tubising v. Buffalo*, 51 N. Y. App. Div. 14; *Archer v. Mt. Vernon*, 57 N. Y. App. Div. 32.

*North Carolina.* — *Jones v. Greensboro*, 124 N. Car. 310.

*Ohio.* — *Dayton v. Taylor*, 62 Ohio St. 11; *Fremont v. Dunlap*, 69 Ohio St. 286; *Leipsic v. Gerdeman*, 68 Ohio St. 1; *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 160.

*Oklahoma.* — *Norman v. Teel*, 12 Okla. 69.

*Pennsylvania.* — *Wible v. Philadelphia*, 21

*Pa. Super. Ct.* 486; *Martin v. Williamsport*, 208 Pa. St. 590.

*South Dakota.* — *Jones v. Sioux Falls*, (S. Dak. 1904) 101 N. W. Rep. 43.

*Tennessee.* — *Archer v. Johnson City*, (Tenn. 1901) 64 S. W. Rep. 474.

**Liability Not Absolute.** — *Jackson v. Lansing*, 121 Mich. 279; *Wallis v. Westport*, 82 Mo. App. 522; *King v. Ft. Ann*, 180 N. Y. 496; *Bohl v. Dell Rapids*, 15 S. Dak. 619; *Kleiner v. Madison*, 104 Wis. 339; *Peake v. Superior*, 106 Wis. 403.

**3. Remote Dangers.** — *Colbourn v. Wilmington*, 4 Penn. (Del.) 443; *Wickliffe v. Moring*, 113 Ky. 597; *Fremont v. Dunlap*, 69 Ohio St. 286.

**4. Repairs Within Reasonable Time After Notice—Colorado.** — *Denver v. Moewes*, 15 Colo. App. 28.

*Delaware.* — *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*Indiana.* — *Lewisville v. Batson*, 29 Ind. App. 21; *Huntington v. Lusch*, 33 Ind. App. 476.

*Kentucky.* — *Wickliffe v. Moring*, 113 Ky. 597; *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Michigan.* — *Newman v. Ann Arbor*, 134 Mich. 29.

*Missouri.* — *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 454; *Buckley v. Kansas City*, 156 Mo. 16.

*New York.* — *Blakeslee v. Geneva*, 61 N. Y. App. Div. 42.

**Presumption of Reasonable Time.** — Where a defect has existed for a long time, the law presumes that the municipality has had reasonable time within which to remedy such defect. *Hitt v. Kansas City*, 110 Mo. App. 713.

**5. Ordinary Travel Only to Be Considered.** — A municipality is not bound to maintain the sidewalk in such a way as to insure the safety of one moving a safe. *Kohlhof v. Chicago*, 192 Ill. 249, 85 Am. St. Rep. 335.

The roadway must be kept in such a state of repair as to be safe for horses and vehicles but not necessarily for foot passengers. *Belling v. Hamilton*, 3 Ont. L. Rep. 318.

**6. Bicyclers.** — *Overhouser v. American Cereal Co.*, 118 Iowa 417; *Rust v. Essex*, 182 Mass. 313; *Leslie v. Grand Rapids*, 120 Mich. 28; *Morrison v. Syracuse*, 45 N. Y. App. Div. 421.

One riding a bicycle has a right to assume no more than that the walk is in a safe condition for pedestrians to use, and if he is injured when the walks are in such condition he cannot recover. *Gagnier v. Fargo*, 11 N. Dak. 73, 95 Am. St. Rep. 705.

**428. 3. Negligence of Municipal Officers.** *Kleopfert v. Minneapolis*, 90 Minn. 158.

**5. Amount of Use of Highway.** — *Denver v. Moewes*, 15 Colo. App. 28; *Holitz v. Kansas City*, 68 Kan. 157; *Moriarty v. Lewiston*, 98 Me. 482; *Snowden v. Somerset*, 52 N. Y. App. Div. 84.

**428.** *e.* TOTAL EXTENT OF HIGHWAYS. — See note 8.

*f.* DEFECTIVE PLAN OF CONSTRUCTION. — See note 10.

**429.** See note 1.

*g.* ACTION OF ELEMENTS. — See notes 2, 3, 5.

*i.* LACK OF MEANS FOR REPAIR. — See note 8.

**430.** 4. Rule of Liability in England and Canada. — See note 13.

**431.** 5. Defects Created by Individuals — *a.* MUNICIPAL LIABILITY. — See note 1.

**432.** See note 2.

Liability for Negligence of Railroad Company. — See notes 5, 6, 7.

**433.** *b.* INDIVIDUAL LIABILITY — (1) *In General.* — See notes 1, 2.

**428.** 8. Extent of Highways Requiring Supervision. — *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791.

10. Defective Plan of Construction — Municipality Not Liable. — See *Augusta v. Little*, 115 Ga. 124.

What Necessary to Show Freedom from Liability. — Before a corporation can claim exemption from liability for a defect in a highway because of a fault in the plans, it must appear, not only that the work was done precisely in accordance with the plan, but that the plan was one adopted by the corporation and that some steps have been taken to remedy the defect. *Collett v. New York*, 51 N. Y. App. Div. 394.

**429.** 1. Plan Manifestly Unsafe. — *Teager v. Flemingsburg*, 109 Ky. 746, 95 Am. St. Rep. 400; *Stone v. Seattle*, 30 Wash. 65.

2. Defects from Natural Causes. — Snow does not afford an excuse for negligence of cities charged with the duty of keeping the streets in repair. *Waters v. Kansas City*, 94 Mo. App. 413.

3. Extraordinary Flood or Storm. — *Beattie v. Detroit*, (Mich. 1904) 100 N. W. Rep. 574; *Schrunk v. Joseph*, 120 Wis. 223; *Jenewin v. Irving*, 122 Wis. 228, rehearing denied 122 Wis. 237.

5. Effect of Action of Elements. — *Beattie v. Detroit*, (Mich. 1904) 100 N. W. Rep. 574.

8. Contra. — *McKinney v. Brown*, (Tex. Civ. App. 1904) 81 S. W. Rep. 88.

**430.** 13. English Decisions. — *Whyler v. Bingham Rural Dist. Council*, (1901) 1 Q. B. 45. See also *Shoreditch v. Bull*, 90 L. T. N. S. 210.

Canada Decisions. — *Duclos v. Ely Tp.*, 5 Rev. de Jur. 177.

Statutory Provision — In Ontario. — *Ince v. Toronto*, 27 Ont. App. 410, affirmed 31 Can. Sup. Ct. 323; *Leizert v. Matilda Tp.*, 26 Ont. App. 1; *Ricketts v. Markdale*, 31 Ont. 610; *Hogg v. Brooke Tp.*, 7 Ont. L. Rep. 273; *Holland v. York Tp.*, 7 Ont. L. Rep. 533.

**431.** 1. Municipality Liable Though Defect Created by Another — *Connecticut*. — *Hillyer v. Winsted*, 77 Conn. 304.

*Indiana*. — *Vincennes v. Spees*, (Ind. App. 1905) 74 N. E. Rep. 277.

*Kansas*. — *Holitz v. Kansas City*, 68 Kan. 157.

*Kentucky*. — *Glasgow v. Gillenwaters*, 113 Ky. 140; *Covington v. Johnson*, (Ky. 1902) 69 S. W. Rep. 703; *Bromley v. Bodkin*, (Ky. 1903) 77 S. W. Rep. 696; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917; *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270.

*Missouri*. — *Fehlauer v. St. Louis*, 178 Mo. 635.

*New York*. — *Leggett v. Watertown*, 55 N. Y. App. Div. 321; *Higgins v. Brooklyn*, etc., R. Co., 54 N. Y. App. Div. 69.

*Washington*. — *Beall v. Seattle*, 28 Wash. 593, 92 Am. St. Rep. 892.

*Canada*. — *Holland v. York Tp.*, 7 Ont. L. Rep. 533. See also *Taylor v. Winnipeg*, 12 Manitoba 479.

**432.** 2. Municipality and Individual Not Joint Tortfeasors. — *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547; *Brown v. Louisville*, 128 N. Car. 701, 78 Am. St. Rep. 677; *Dutton v. Lansdowne*, 198 Pa. St. 563, 82 Am. St. Rep. 814.

5. Negligence of Railroad Company. — *Kansas City v. Orr*, 62 Kan. 61; *Binner v. New York*, 80 N. Y. App. Div. 438, modified 177 N. Y. 199. See also *Prevost v. Montreal*, 15 Quebec Super. Ct. 39.

6. In Massachusetts. — *Hyde v. Boston*, 186 Mass. 115.

7. Street Railroads. — *Decatur v. Hamilton*, 89 Ill. App. 561; *Hyde v. Boston*, 186 Mass. 115.

**433.** 1. Individual Obstructing or Excavating Highway Liable to Person Injured — *Georgia*. — *Brunswick*, etc., R. Co. v. *Hardey*, 112 Ga. 604.

*Idaho*. — *Horn v. Boise City Canal Co.*, 7 Idaho 640.

*Kentucky*. — *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Minnesota*. — *Isham v. Broderick*, 89 Minn. 397.

*Montana*. — *Robinson v. Mills*, 25 Mont. 397, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*New Hampshire*. — *Dow v. Portsmouth*, etc., St. R. Co., 70 N. H. 410.

*New York*. — *Gremblay v. Harmony Mills*, 171 N. Y. 598; *Ann v. Herter*, 79 N. Y. App. Div. 6.

*Oregon*. — *Nosler v. Coos Bay*, etc., R., etc., Co., 39 Oregon 335, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.

*Texas*. — *Shippers Compress*, etc., Co. v. *Davidson*, 35 Tex. Civ. App. 558.

*West Virginia*. — *O'Hanlin v. Carter Oil Co.*, 54 W. Va. 510.

*Canada*. — *Cox v. Nova Scotia Telephone Co.*, 35 Nova Scotia 148; *Minns v. Omamee*, 8 Ont. L. Rep. 508, affirming 2 Ont. L. Rep. 579; *McIntyre v. Lindsay*, 2 Ontario L. Rep. 448.

2. Though Municipality Not Liable. — *Tremblay v. Harmony Mills*, 171 N. Y. 598.

**433.** (2) *Based on Creation of Nuisance.* — See notes 4, 5.

**434.** See note 3.

*c. EFFECT OF LICENSE — (1) On Municipal Liability — (a) In General.* — See notes 4, 7, 8.

(b) *Improper License.* — See note 9.

**435.** See note 1.

(c) *Duty to Supervise Work.* — See note 2.

(2) *On Individual Liability.* — See notes 6, 7.

**436.** See note 1.

**6. Liabilities of Abutting Owners — a. IN GENERAL.** — See notes 4, 5, 6.

**437.** *b. IMPOSITION OF DUTY OF REPAIR.* — See notes 1, 2, 3, 5.

*c. DANGEROUS CONDITION OF PROPERTY.* — See note 7.

**433. 4. Interference with Highway Is Nuisance.** — *Davis v. Rich*, 180 Mass. 235; *Leahan v. Cochran*, 178 Mass. 566, 86 Am. St. Rep. 506; *Isham v. Broderick*, 89 Minn. 397; *Lawton v. Olmstead*, 40 N. Y. App. Div. 544; *Nosler v. Coos Bay, etc., R., etc., Co.*, 39 Oregon 335; *Smith v. Gilreath*, 69 S. Car. 353.

**5. Negligence Immaterial When Use of Highway Wrongful.** — *Leahan v. Cochran*, 178 Mass. 566, 86 Am. St. Rep. 506; *Davis v. Rich*, 180 Mass. 235; *Smith v. Gilreath*, 69 S. Car. 353; *Shippers Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558.

**434. 3. Boise City v. Boise Rapid Transit Co.**, 6 Idaho 779.

**4. Precautions to Be Taken by Municipality.** — *Kansas City v. McDonald*, 60 Kan. 481; *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 266; *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270; *Beattie v. Detroit*, 129 Mich. 20; *Mischke v. Seattle*, 26 Wash. 616.

**7. Municipality Not Liable for Licensee's Negligence.** — *Thompson v. West Bay City*, (Mich. 1904) 100 N. W. Rep. 280; *Wright v. Muskegon*, (Mich. 1905) 103 N. W. Rep. 558; *Browne v. Bachman*, 31 Tex. Civ. App. 430; *Copeland v. Seattle*, 33 Wash. 415.

**8. Contrary Decisions.** — *Decatur v. Hamilton*, 89 Ill. App. 561; *Whitty v. Oshkosh*, 106 Wis. 87.

**9. Obstruction Maintained under Invalid Municipal License.** — *Richmond v. Smith*, 101 Va. 161.

**435. 1. Use Intrinsically Dangerous.** — *Landon v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709.

**2. Municipality Bound to Exercise Supervision.** — *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270; *Mohje v. Grand Rapids*, 122 Mich. 645; *Beattie v. Detroit*, 129 Mich. 20; *Hewitt v. Cleveland*, 11 Ohio Cir. Dec. 710, 21 Ohio Cir. Ct. 505.

**6. Licensee Must Not Endanger Travelers.** — *Endicott v. Triple State Natural Gas, etc., Co.*, (Ky. 1903) 76 S. W. Rep. 516, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435; *Powers v. St. Joseph*, 91 Mo. App. 55; *Bonn v. Bell Telephone Co.*, 30 Ont. 696.

**7. Excavation Must Be Guarded and Lighted.** — *Endicott v. Triple State Natural Gas, etc., Co.*, (Ky. 1903) 76 S. W. Rep. 516, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435; *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270; *Robinson v. Mills*, 25 Mont. 397.

**436. 1. Must Restore Highway to Condi-**

**tion of Safety.** — *Robinson v. Mills*, 25 Mont. 397.

**4. Abutting Owner Not Bound to Repair.** — *Martinovich v. Wooley*, 128 Cal. 141; *Beck v. Ferd Heim Brewing Co.*, 167 Mo. 195; *Blackwell v. Hill*, 76 Mo. App. 46; *Rupp v. Burgess*, 70 N. J. L. 7. See also *Robinson v. Mills*, 25 Mont. 397; *Mullins v. Siegel-Cooper Co.*, 95 N. Y. App. Div. 234.

**5. Abutter Liable for Defects Created by Him.** — *Blackwell v. Hill*, 76 Mo. App. 46; *Rupp v. Burgess*, 70 N. J. L. 7; *Ann v. Herter*, 79 N. Y. App. Div. 6; *Matthews v. New York*, 78 N. Y. App. Div. 422; *Mullins v. Siegel-Cooper Co.*, 95 N. Y. App. Div. 234. See also *Schubkegel v. Butler*, 76 N. Y. App. Div. 10.

**6. Care Required to Cover Permanent Excavation.** — *Jegglin v. Roeder*, 79 Mo. App. 428; *Sutphen v. Hedden*, 67 N. J. L. 324; *O'Malley v. Gerth*, 67 N. J. L. 610; *Rupp v. Burgess*, 70 N. J. L. 7. See also *Reedy v. St. Louis Brewing Assoc.*, 161 Mo. 523; *Schubkegel v. Butler*, 76 N. Y. App. Div. 10; *Whitty v. Oshkosh*, 106 Wis. 87.

**437. 1. Imposition of Repair on Abutter.** — *Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478.

**2. Does Not Inure to Benefit of Person Injured.** — *Martinovich v. Wooley*, 128 Cal. 141; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462; *Dallas v. Meyers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 742. See also *Mullins v. Siegel-Cooper Co.*, 95 N. Y. App. Div. 234.

**3. Continuing Liability of City.** — *Lancaster v. Walter*, (Ky. 1904) 80 S. W. Rep. 189; *Lincoln v. Pirner*, 59 Neb. 634; *Dallas v. Jones*, (Tex. Civ. App. 1898) 54 S. W. Rep. 606, reversed 93 Tex. 38; *Dallas v. Meyers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 742.

**Supervision Required of Municipal Officers.** — When the proper authorities direct a material change to be made in the highway by an abutting owner, they are bound to maintain such a supervision of the work as will protect the public from any danger likely to arise from it. *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649.

**5. Statutory Provision Invalid.** — But in *Nebraska* the abutting owner is made liable by statute. *Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478.

**7. Dangerous Place Near Highway.** — *Perrigo v. St. Louis*, 185 Mo. 274; *Brown v. Wabash R. Co.*, 90 Mo. App. 20; *Carson v. Mackin*, 23 Pa. Super. Ct. 50.

**438.** See note 1.

**439.** 7. Liabilities of Contractors. — See notes 7, 8.

**440.** 8. Defects Involving Liability — *a.* QUESTION OF FACT. — See note 1.

*b.* UNGUARDED HOLES OR EXCAVATIONS IN HIGHWAY — (1) *Municipal Liability.* — See note 3.

**438.** 1. Unguarded Excavation. — *Reynolds v. Garst*, 25 R. I. 83.

**439.** 7. City's Duty to Warn Travelers. — Where a city has placed the work of repairing a street in charge of an independent contractor it must see that proper warnings are given to travelers. *Glasgow v. Gillenwaters*, 113 Ky. 140.

**8.** By Street Railway Company. — *Cunningham v. Thief River Falls*, 84 Minn. 21.

**440.** 1. Question for Jury — *United States*. — *Watertown v. Græves*, (C. C. A.) 112 Fed. Rep. 183.

*Colorado.* — *Denver v. Baldasari*, 15 Colo. App. 157; *Denver v. Hyatt*, 28 Colo. 129; *Denver v. Hubbard*, 29 Colo. 529.

*Delaware.* — *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*Georgia.* — *Augusta v. Thorpe*, 113 Ga. 152, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440.

*Illinois.* — *Fulton v. Green*, 103 Ill. App. 96. *Iowa.* — *Bridgeman v. Missouri Valley*, (Iowa 1902) 88 N. W. Rep. 1069; *Goucher v. Sioux City*, 115 Iowa 639; *Bauer v. Dubuque*, 122 Iowa 500.

*Kansas.* — *Lawrence v. Little*, 9 Kan. App. 130; *Lincoln Tp. v. Koenig*, 10 Kan. App. 504; *Holitz v. Kansas City*, 68 Kan. 157; *Cunningham v. Clay Tp.*, 69 Kan. 373.

*Kentucky.* — *Henderson v. Reed*, (Ky. 1901) 62 S. W. Rep. 1039; *Covington v. Asman*, 113 Ky. 608; *Louisville v. Bailey*, (Ky. 1903) 74 S. W. Rep. 688; *Midway v. Lloyd*, (Ky. 1903) 74 S. W. Rep. 195; *Carlisle v. Secrest*, (Ky. 1903) 75 S. W. Rep. 268; *Houise v. Covington*, (Ky. 1904) 82 S. W. Rep. 374.

*Maine.* — *York v. Athens*, 99 Me. 82.

*Massachusetts.* — *Bailey v. Cambridge*, 174 Mass. 188; *Redford v. Woburn*, 176 Mass. 520; *Lamb v. Worcester*, 177 Mass. 82; *Coles v. Revere*, 181 Mass. 175; *Stanford v. Hyde Park*, 185 Mass. 253; *Hydé v. Boston*, 186 Mass. 115; *Baker v. Fall River*, 187 Mass. 53.

*Michigan.* — *Urtel v. Flint*, 122 Mich. 65; *Williams v. West Bay City*, 126 Mich. 156; *Miller v. Meade Tp.*, 128 Mich. 98; *Wilkins v. Flint*, 128 Mich. 262; *Finch v. Bangor*, 133 Mich. 149; *Newman v. Ann Arbor*, 134 Mich. 29; *Beaudin v. Bay City*, 136 Mich. 333; *Caldwell v. Detroit*, (Mich. 1904) 100 N. W. Rep. 897.

*Minnesota.* — *Kennedy v. St. Cloud*, 90 Minn. 523.

*Mississippi.* — *Meridian v. McBeath*, 80 Miss. 485.

*Missouri.* — *Goble v. Kansas City*, 148 Mo. 476; *Milledge v. Kansas City*, 190 Mo. App. 490; *Quinlan v. Kansas City*, 104 Mo. App. 616; *Jackson v. Kansas City*, 106 Mo. App. 52; *Gerber v. Kansas City*, 105 Mo. App. 191; *Norton v. Kramer*, 186 Mo. 536; *Darrell v. St. Joseph*, 106 Mo. App. 168; *Perrigo v. St. Louis*, 185 Mo. 274.

*Montana.* — *Leonard v. Butte*, 25 Mont. 410; *Metz v. Butte*, 27 Mont. 506.

*New Hampshire.* — *Wildér v. Concord*, 72 N. H. 259; *Seeton v. Dunbarton*, 72 N. H. 269.

*New York.* — *Fordham v. Gouverneur*, 160 N. Y. 541; *Cummings v. New Rochelle*, 38 N. Y. App. Div. 583; *Fisher v. Mt. Vernon*, 41 N. Y. App. Div. 293; *Hewett v. Thurman*, 41 N. Y. App. Div. 6; *Archer v. Mt. Vernon*, 57 N. Y. App. Div. 32; *Brush v. New York*, 59 N. Y. App. Div. 12; *Link v. New York*, 82 N. Y. App. Div. 486.

*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.

*Pennsylvania.* — *Henry v. Williamsport*, 197 Pa. St. 465; *Wall v. Pittsburg*, 205 Pa. St. 48; *Behl v. Philadelphia*, 206 Pa. St. 329; *Iseminger v. York Haven Water, etc., Co.*, 206 Pa. St. 591; *Gunter v. Williamsport*, 208 Pa. St. 587.

*Rhode Island.* — *Hutchinson v. Clarke*, 26 R. I. 307.

*Texas.* — *Dallas v. Webb*, 22 Tex. Civ. App. 48; *San Antonio v. Chism*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606.

*Washington.* — *Smith v. Seattle*, 33 Wash. 488.

*Wisconsin.* — *La Fave v. Superior*, 104 Wis. 454; *Peake v. Superior*, 106 Wis. 403; *Rhyner v. Menasha*, 107 Wis. 201; *Prahl v. Waupaca*, 109 Wis. 299; *Stegé v. Milwaukee*, 110 Wis. 484; *Wells v. Remington*, 118 Wis. 573; *Jenewein v. Irving*, 122 Wis. 228, rehearing denied 122 Wis. 237.

**Question of Law.** — The court may decide that there is no evidence of an actionable defect. *Burroughs v. Milwaukee*, 110 Wis. 478.

**3. Unguarded Holes or Excavations in Highway** — *Iowa.* — *Finnegan v. Sioux City*, 112 Iowa 232; *Earl v. Cedar Rapids*, 126 Iowa 361, 106 Am. St. Rep. 361.

*Kentucky.* — *Covington v. Huber*, (Ky. 1902) 66 S. W. Rep. 619.

*Michigan.* — *Monje v. Grand Rapids*, 122 Mich. 645.

*New York.* — *Eckert v. New York*, 59 N. Y. App. Div. 611.

*Ohio.* — *Toledo v. Nitz*, 23 Ohio Cir. Ct. 350.

*Texas.* — *Dallas v. Jones*, (Tex. Civ. App. 1898) 54 S. W. Rep. 606, reversed 93 Tex. 38.

*Canada.* — *Homewood v. Hamilton*, 1 Ont. L. Rep. 266; *McInnes v. Egremont Tp.*, 5 Ont. L. Rep. 713; *McIntyre v. Lindsay*, 4 Ont. L. Rep. 448; *Belling v. Hamilton*, 3 Ont. L. Rep. 318; *Duclos v. Ely Tp.*, 5 Rev. de Jur. 177.

**Drowning of Child in Unguarded Pond.** — A municipality is liable for the death of a child who was drowned in a pond of water situate in part on a public street and part on abutting lots, when it is shown that the accumulation of water was occasioned by the negligence of the city in filling in the street with earth, that no fence or barrier was erected, and that the child entered the pond from the street. *Bowman v. Omaha*, 59 Neb. 84.

**441.** See note 1.

(2) *Individual Liability*. — See note 3.

c. *FAILURE TO LIGHT HIGHWAY*. — See note 4.

**442.** *Obstructed or Defective Highway*. — See note 1.

d. *GUARDS, SIGNALS, AND LIGHTS* — (1) *In General*. — See notes

2, 3, 4.

**443.** (3) *Sufficiency*. — See notes 4, 5.

(4) *Unauthorized Removal*. — See note 6.

**444.** See note 1.

**Gas Accumulated in Unguarded Trench.** — Where the municipality leaves a trench unguarded and deadly gas accumulates at the bottom it is liable for injuries caused to a person who voluntarily enters the trench. *Corbin v. Philadelphia*, 195 Pa. St. 461, 78 Am. St. Rep. 825.

**441. 1. Previous Accidents as Establishing Dangerous Nature.** — "While in the first instance, a defect might be disregarded by the municipality as insignificant so long as its existence had never harmed any one, the occurrence of numerous accidents in consequence thereof would suffice to characterize it as dangerous, and in course of time impose upon the city authorities the obligation to repair it." *Corson v. New York*, 78 N. Y. App. Div. 481.

**3. Excavation Ground of Individual Liability** — *Idaho*. — *Horn v. Boise City Canal Co.*, 7 Idaho 640.

*Minnesota*. — *Ray v. Jones, etc., Co.*, 92 Minn. 101.

*Montana*. — *Robinson v. Mills*, 25 Mont. 397.  
*New York*. — *Eckert v. New York*, 59 N. Y. App. Div. 611; *Ann v. Herter*, 79 N. Y. App. Div. 6.

*Texas*. — *Laredo Electric, etc., Co. v. Hamilton*, 23 Tex. Civ. App. 480.

**4. No Obligation to Light Highway** — *Colorado*. — *Oliver v. Denver*, 13 Colo. App. 345.

*Florida*. — *Daytona v. Edison*, (Fla. 1903) 34 So. Rep. 954, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 441.

*Indiana*. — *Vincennes v. Spees*, (Ind. App. 1905) 74 N. E. Rep. 277; *Vincennes v. Thuis*, 28 Ind. App. 523.

*Pennsylvania*. — *Horner v. Philadelphia*, 194 Pa. St. 542.

*South Dakota*. — *Bohl v. Dell Rapids*, 15 S. Dak. 619.

**Whether the City Has Assumed the Duty to light a street is a question for the jury.** *Chicago v. Baker*, 195 Ill. 54.

**Whether the Street Is Sufficiently Lighted** the court cannot determine; this is a matter confided to the judgment and discretion of the municipal authorities. *Wolf v. District of Columbia*, 21 App. Cas. (D. C.) 464, affirmed 196 U. S. 152.

**442. 1. Lighting of Defective Street.** — *Denver v. Hyatt*, 28 Colo. 129.

**2. Guards, Signals, and Lights — Duty of Municipality** — *Illinois*. — *Normal v. Webb*, 91 Ill. App. 183; *La Salle v. Evans*, 111 Ill. App. 69.

*Maryland*. — *Baltimore v. Beck*, 96 Md. 183.

*New York*. — *Snowden v. Somerset*, 171 N. Y. 99; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443.

*Pennsylvania*. — *Canfield v. East Stroudsburg*, 19 Pa. Super. Ct. 649.

*Washington*. — *Reed v. Spokane*, 21 Wash. 218; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844.

*Canada*. — *McIntyre v. Lindsay*, 4 Ont. L. Rep. 448.

**Need Not Have Both Lights and Guards.** — But a municipality is not bound to guard an excavation by putting up both lights and rails. *Campbell v. Stanberry*, 85 Mo. App. 159.

**3. Duty of Individual.** — *McIntyre v. Lindsay*, 4 Ont. L. Rep. 448. See also *Blackslee v. Geneva*, 61 N. Y. App. Div. 42.

**4. Change of Grade.** — In order to suspend the duty imposed by statute to keep its streets which are open to public travel in good repair for that purpose, a city, while grading and paving a street under the power conferred by its charter, must close to the public travel that portion thereby rendered unfit or unsafe. *Beatrice v. Detroit*, (Mich. 1904) 100 N. W. Rep. 574.

**443. 4. Placing of Barriers — Ordinary Care.** — *Sutphen v. Hedden*, 67 N. J. L. 324.

**5. Sufficiency of Barrier or Signal** — *Iowa*. — *Sutherland v. Council Bluffs*, (Iowa 1904) 99 N. W. Rep. 572; *Achey v. Marion*, 126 Iowa 47.

*Kansas*. — *Wetmore Tp. v. Chamberlain*, 64 Kan. 327.

*Michigan*. — *Hannon v. Gladstone*, 136 Mich. 621.

*Missouri*. — *Jackson v. Kansas City*, 106 Mo. App. 52; *Campbell v. Stanberry*, 85 Mo. App. 159.

*New Hampshire*. — *Wilder v. Concord*, 72 N. H. 259.

*New Jersey*. — *Sutphen v. Hedden*, 67 N. J. L. 324.

*New York*. — *Donnelly v. Rochester*, 166 N. Y. 315; *Snowden v. Somerset*, 171 N. Y. 99; *Kane v. Yonkers*, 43 N. Y. App. Div. 599, reversed 169 N. Y. 392; *Walsh v. Central New York Telephone, etc., Co.*, 75 N. Y. App. Div. 1, reversed 176 N. Y. 163; *Gribben v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 196; *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194, affirmed 182 N. Y. 565.

*North Carolina*. — *Foy v. Winston*, 126 N. Car. 381.

*South Dakota*. — *Overpeck v. Rapid City*, 14 S. Dak. 507.

**6. Unauthorized Removal of Guards or Signals.** — *Hesselbach v. St. Louis*, 179 Mo. 505; *McFeeters v. New York*, 102 N. Y. App. Div. 32. See also *Wetmore Tp. v. Chamberlain*, 64 Kan. 327; *Reed v. Spokane*, 21 Wash. 218.

**444. 1. Failure to Provide Against Removal.** — Where barriers are removed by a third person during the temporary absence of a watch-

**444.** *c.* OBJECTS OBSTRUCTING HIGHWAY. — See notes 2, 3, 5, 6, 7, 8, 9, 10, 11, 12.

**445.** See note 1.

*f.* OBJECTS FRIGHTENING HORSES — (1) *Municipal Liability*. — See note 2.

**446.** See note 1.

(2) *Individual Liability*. — See notes 2, 3, 4.

(3) *Character of Object*. — See notes 6, 7.

**447.** Evidence that Other Horses Were Frightened. — See note 4.

man, a liability arises for injuries incurred by one falling into the excavation. *Cox v. Nova Scotia Telephone Co.*, 35 Nova Scotia 148.

**444. 2. Stump in Highway.** — *Lamb v. Cedar Rapids*, 108 Iowa 629; *Madison Tp. v. Scott*, 9 Kan. App. 871; *Foley v. East Flamborough Tp.*, 26 Ont. App. 43.

**Trapdoor in Highway.** — See *Ewing v. Hewitt*, 27 Ont. App. 296.

**3. A Telephone Pole** placed in the traveled part of the street constitutes an illegal obstruction, making the city liable for injuries caused thereby. *Atkinson v. Chatham Tp.*, 26 Ont. App. 521.

**5. Hydrant.** — The municipality is liable for injuries caused by a hydrant improperly placed in the highway. *Burnes v. St. Joseph*, 91 Mo. App. 489. See also *St. Germain v. Fall River*, 177 Mass. 550.

**6. Projecting Rails.** — See *Prévost v. Montreal*, 15 Quebec Super. Ct. 39.

**7. Articles Lying in Highway.** — The municipality is liable for injuries to a traveler by reason of a fall on the sidewalk caused by fruit rinds and decayed vegetables. *Archer v. Johnson City*, (Tenn. 1901) 64 S. W. Rep. 474.

**Vehicles Left in Highway.** — Where a city allows a street to be used as a storage place for vehicles it is liable for injuries incurred thereby. *Radichel v. Kendall*, 121 Wis. 560.

**Leaving a Gravel Heater** next to the curb on a street for more than a week, the tongue being held up by a defective wire, constitutes a defect for which the city is liable to a pedestrian for injuries incurred thereby. *Griffin v. Boston*, 182 Mass. 409.

**8. Stones in Highway.** — *Overhouser v. American Cereal Co.*, 118 Iowa 417; *May v. Anacanda*, 26 Mont. 140.

The city is liable for injuries incurred by reason of a pile of loose stones which had been left between the sidewalk and the curbing. *Fockler v. Kansas City*, 94 Mo. App. 464.

**9. Piles of Brick.** — *Murphy v. Seneca Falls*, 57 N. Y. App. Div. 438.

**10. Lumber and Logs.** — *Smith v. Davis*, 22 App. Cas. (D. C.) 298; *Evansville v. Senhehin*, 26 Ind. App. 362; *Harper v. Kopp*, (Ky. 1903) 73 S. W. Rep. 1127; *Ricketts v. Markdale*, 31 Ont. 610.

**A Milk Stand** which projects slightly over the traveled part of the highway, constitutes a want of repair making the municipality liable for injuries caused thereby. *Huffman v. Bayham Tp.*, 26 Ont. App. 514.

**11. Pile of Dirt.** — See *Messenger v. Bridge-town*, 31 Can. Sup. Ct. 379, *affirming* 33 Nova Scotia 201.

**12. Objects Rightfully in Highway.** — *Cunningham v. Clay Tp.*, 69 Kan. 373, *citing* 15

AM. AND ENG. ENCYC. OF LAW (2d ed.) 444; *Horne v. Philadelphia*, 194 Pa. St. 542.

**Necessity Question for Jury.** — Whether there was a reasonable necessity for placing an obstacle in the street is for the jury to decide. *Lewis v. Ballston Terminal R. Co.*, 45 N. Y. App. Div. 129.

**When Such Obstructions Are Obvious** greater care is required on the part of the pedestrian. *Richmond v. Leaker*, 99 Va. 1.

**Coal Hole.** — The municipality is not liable for injuries caused by a coal hole which is constructed like the majority of coal holes in the city. *Rushton v. Allegheny*, 192 Pa. St. 574.

**445. 1. Obstructions Created in Course of Repair.** — *Sanford v. White*, 132 Fed. Rep. 531.

**2. Objects Frightening Horses.** — *District of Columbia v. Moulton*, 182 U. S. 576; *Elgin v. Thompson*, 98 Ill. App. 358; *Halstead v. Warsaw*, 43 N. Y. App. Div. 39.

**446. 1. Objects in Untraveled Part of Road.** — *District of Columbia v. Moulton*, 182 U. S. 576.

**2. Individual Liability.** — *Galt v. Woliver*, 103 Ill. App. 71; *Golden v. Chicago, etc., R. Co.*, 84 Mo. App. 59.

**3. Reasonableness of Use of Highway.** — *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

**4. Ownership of Fee.** — *Lynn v. Hooper*, 93 Me. 46.

**6. Object Must Be Calculated to Frighten Ordinary Horse.** — *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

**7. Question for Jury — Illinois.** — *Galt v. Woliver*, 103 Ill. App. 71.

*Indiana.* — *Huntington v. Lusch*, 33 Ind. App. 476.

*Kansas.* — *Cunningham v. Clay Tp.*, 69 Kan. 373.

*Maine.* — *York v. Athens*, 99 Me. 82.

*New York.* — *Barr v. Bainbridge*, 42 N. Y. App. Div. 628; *Halstead v. Warsaw*, 43 N. Y. App. Div. 39; *Lewis v. Ballston Terminal R. Co.*, 45 N. Y. App. Div. 129.

*Washington.* — *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 446.

**447. 4. Proof of Other Horses Being Frightened by Objects — Illinois.** — *Elgin v. Thompson*, 98 Ill. App. 358; *Galt v. Woliver*, 103 Ill. App. 71.

*Kansas.* — *Cunningham v. Clay Tp.*, 69 Kan. 373, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 447.

*Minnesota.* — *Nye v. Dibley*, 88 Minn. 465. *Missouri.* — *Golden v. Chicago, etc., R. Co.*, 84 Mo. App. 59.

**447.** *g. SNOW AND ICE — (1) Municipal Liability — (a) In General.* — See notes 5, 6, 7.

**448.** See notes 1, 2.

**449.** See note 1.

(b) Rules in Particular States. — See notes 3, 5.

(c) Ice Resulting from Negligence. — See notes 6, 10, 11.

Drippings from Building. — See note 13.

*New Hampshire.* — *Gould v. Hutchins*, (N. H. 1904) 58 Atl. Rep. 1046.

**447. 5. Liability Based on Negligence.** — *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317; *Crawford v. New York*, 68 N. Y. App. Div. 107, affirmed 174 N. Y. 518; *White v. Manhattan R. Co.*, 82 N. Y. App. Div. 259; *Hopkins v. Williamsport*, 25 Pa. Super. Ct. 498; *Galt Knitting Co. v. Cote*, 16 Quebec Super. Ct. 424; *Leclerc v. Montreal*, 15 Quebec Super. Ct. 205; *Rosseau v. St. Nicolas*, 15 Quebec Super. Ct. 214. See also *Young v. Stanstead Tp.*, 21 Quebec Super. Ct. 148.

**6. Reasonable Care and Diligence.** — *Illinois.* — *Chicago v. McDonald*, 111 Ill. App. 436.

*Maryland.* — *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317.

*Missouri.* — *Reedy v. St. Louis Brewing Assoc.*, 161 Mo. 523.

*New York.* — *O'Hara v. Brooklyn*, 57 N. Y. App. Div. 176; *Crawford v. New York*, 68 N. Y. App. Div. 107, affirmed 174 N. Y. 518.

*Virginia.* — *Charlottesville v. Failes*, 103 Va. 53.

*Canada.* — *Taylor v. Winnipeg*, 12 Manitoba 479; *Bonin v. Montreal*, 15 Quebec Super. Ct. 492.

**7. Question for Jury.** — *Shumway v. Burlington*, 108 Iowa 424; *Haight v. Elmira*, 42 N. Y. App. Div. 391; *Morris v. Saratoga Springs*, 55 N. Y. App. Div. 263; *O'Hara v. Brooklyn*, 57 N. Y. App. Div. 176; *Cresler v. Asheville*, 134 N. Car. 311; *Russell v. Toledo*, 19 Ohio Cir. Dec. 367, 19 Ohio Cir. Ct. 418; *Bloom v. Toledo*, 25 Ohio Cir. Ct. 235.

**Whether Ice a Nuisance.** — Whether ice in the highway constitutes a public nuisance is a question for the jury. *Shipley v. Proctor*, 177 Mass. 498.

**448. 1. No Liability for Mere Slippery Condition.** — *Illinois.* — *Mareck v. Chicago*, 89 Ill. App. 358; *Metzger v. Chicago*, 103 Ill. App. 605; *Chicago v. McDonald*, 111 Ill. App. 436.

*Iowa.* — *Templin v. Boone*, 127 Iowa 91.

*Missouri.* — *Reno v. St. Joseph*, 169 Mo. 642; *Quinlan v. Kansas City*, 104 Mo. App. 616.

*New York.* — *Crawford v. New York*, 68 N. Y. App. Div. 107, affirmed 174 N. Y. 518; *O'Shaughnessey v. Middleport*, 93 N. Y. App. Div. 93. See also *Haight v. Elmira*, 42 N. Y. App. Div. 391; *O'Reilly v. Syracuse*, 49 N. Y. App. Div. 538.

*North Carolina.* — *Cresler v. Asheville*, 134 N. Car. 311.

*Ohio.* — See *Russell v. Toledo*, 19 Ohio Cir. Dec. 367, 19 Ohio Cir. Ct. 418.

*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.

*Pennsylvania.* — *Hopkins v. Williamsport*, 25 Pa. Super. Ct. 498.

*Virginia.* — *Charlottesville v. Failes*, 103 Va. 53.

*Wisconsin.* — *De Pere v. Hibbard*, 104 Wis. 666; *Dapper v. Milwaukee*, 107 Wis. 88.

*Canada.* — *D'Estimoville v. Montreal*, 18 Quebec Super. Ct. 470.

**2. Mounds and Bridges.** — *Illinois.* — *Mareck v. Chicago*, 89 Ill. App. 358.

*Iowa.* — *Hodges v. Waterloo*, 109 Iowa 444; *Templin v. Boone*, 127 Iowa 91.

*Missouri.* — *Reno v. St. Joseph*, 169 Mo. 642; *Quinlan v. Kansas City*, 104 Mo. App. 616.

*New York.* — *Haight v. Elmira*, 42 N. Y. App. Div. 391; *Beck v. Buffalo*, (Supm. Ct. App. Div.) 63 N. Y. Supp. 499. See also *O'Shaughnessey v. Middleport*, 93 N. Y. App. Div. 93.

*Pennsylvania.* — *Scott v. Scranton*, 5 Lack. Leg. N. (Pa.) 73.

*Washington.* — *Piper v. Spokane*, 22 Wash. 147.

*Wisconsin.* — See *De Pere v. Hibbard*, 104 Wis. 666.

**449. 1. Failure to Remove Drifts.** — *Kennedy v. Portage la Prairie*, 12 Manitoba 634; *Hogg v. Brooke Tp.*, 7 Ont. L. Rep. 273.

**3. Ohio Decisions.** — *Circleville v. Sohn*, 11 Ohio Cir. Dec. 193, 20 Ohio Cir. Ct. 368.

**5. In Massachusetts.** — See *Bailey v. Cambridge*, 174 Mass. 188; *Newton v. Worcester*, 174 Mass. 181.

This statute applies only to the liability of municipalities. *Shipley v. Proctor*, 177 Mass. 498.

**In Rhode Island.** — See *Allen v. Cook*, 21 R. I. 525.

**6. Accumulation of Ice Caused by Negligence.** — *District of Columbia.* — *District of Columbia v. Frazer*, 21 App. Cas. (D. C.) 154.

*Iowa.* — *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488.

*Maryland.* — *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 449.

*New York.* — *Graham v. Poughkeepsie*, 68 N. Y. App. Div. 262.

*Ohio.* — *Russell v. Toledo*, 19 Ohio Cir. Dec. 367, 19 Ohio Cir. Ct. 418; *Cincinnati v. Grebner*, 25 Ohio Cir. Ct. 700.

*Canada.* — *Ince v. Toronto*, 27 Ont. App. 410, affirmed 31 Can. Sup. Ct. 323. See also *Taylor v. Winnipeg*, 12 Manitoba 479.

**Individual Liability.** — An individual is also liable for such accumulations. *Brown v. White*, 202 Pa. St. 297; *Benard v. Woonsocket Bobbin Co.*, 23 R. I. 581.

**10. Character of Ice Immaterial.** — *District of Columbia v. Frazer*, 21 App. Cas. (D. C.) 154; *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317.

**11. Ice Resulting from Structural Defect in Highway.** — *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.

**13. Ice Formed by Drippings from Elevated**

- 450.** (a) *Pre-existing Defect in Highway.* — See notes 1, 3, 4.  
 (e) *Notice to Municipality.* — See notes 5, 6, 7.  
 (f) *Reasonable Time for Removal.* — See notes 8, 9.

- 451.** (2) *Individual Liability.* — See notes 4, 5.

*4. DEFECTS OUTSIDE OF TRAVELED PATH — (1) Municipality Generally Not Liable.* — See note 6.

- 452.** *Natural and Artificial Obstacles.* — See note 1.

*In Regard to City Streets.* — See notes 4, 5.

(2) *Resulting Danger to Persons on Traveled Path.* — See note 6.

- 454.** *2. DANGERS OUTSIDE OF HIGHWAY.* — See note 3.

**Railroad.** — See *White v. Manhattan R. Co.*, 82 N. Y. App. Div. 259, where the defendant was held liable for injuries caused by slipping on ice which was created by drippings from the elevated structure.

**450. 1. Pre-existing Defect Combining with Snow or Ice.** — *Hodges v. Waterloo*, 109 Iowa 444; *Hamilton v. Buffalo*, 55 N. Y. App. Div. 423, *reversed* 173 N. Y. 72; *Gardner v. Wasco County*, 37 Oregon 392. But see *Bailey v. Cambridge*, 174 Mass. 188.

**3. Massachusetts Decisions.** — See *Bailey v. Cambridge*, 174 Mass. 188; *Newton v. Worcester*, 174 Mass. 181.

**4. New Formation of Ice or Snow.** — Compare *Hodges v. Waterloo*, 109 Iowa 444.

**5. Notice to Municipality.** — *Illinois.* — *Ransom v. Belvidere*, 87 Ill. App. 167.

*Maine.* — *Gurney v. Rockport*, 93 Me. 360.

*Michigan.* — *Corey v. Ann Arbor*, 124 Mich. 134.

*New York.* — *Hawkins v. New York*, 54 N. Y. App. Div. 258; *Berger v. New York*, 65 N. Y. App. Div. 394. See also *O'Shaughnessy v. Middleport*, 93 N. Y. App. Div. 93.

*Ohio.* — *Leipsic v. Gerdeman*, 68 Ohio St. 1.  
*Canada.* — *Ince v. Toronto*, 27 Ont. App. 410; *Gunlack v. Montreal*, 17 Quebec Super. Ct. 294. See also *Hogg v. Brooks Tp.*, 7 Ont. L. Rep. 273.

**6. Constructive Notice.** — *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250; *Reedy v. St. Louis Brewing Assoc.*, 161 Mo. 523; *Piper v. Spokane*, 22 Wash. 147; *Kennedy v. Portage la Prairie*, 12 Manitoba 634; *Gunlack v. Montreal*, 17 Quebec Super. Ct. 294.

In *Hawkins v. New York*, 54 N. Y. App. Div. 258, it was held that the circumstances were not such as to charge the municipality with notice.

**Question for Jury.** — The question whether the city had constructive notice of the defect is for the jury. *Hodges v. Waterloo*, 109 Iowa 444.

**7. Compare** *Gurney v. Rockport*, 93 Me. 360, holding that notice of a great fall of snow is not sufficient to show knowledge of a drift of snow at a particular place.

**8. Reasonable Time for Removal.** — *Reedy v. St. Louis Brewing Assoc.*, 161 Mo. 523; *Foley v. New York*, 95 N. Y. App. Div. 374; *Moran v. New York*, 98 N. Y. App. Div. 301; *Davies v. Reg.*, 6 Can. Exch. 344; *Ince v. Toronto*, 27 Ont. App. 410, *affirmed* 31 Can. Sup. Ct. 323.

**Evidence as to the Number of Miles of Sidewalk** in a city is admissible to show the time within which the city must remove the snow. *Crawford v. New York*, 68 N. Y. App. Div. 107, *affirmed* 174 N. Y. 518.

**9.** *Hawkins v. New York*, 54 N. Y. App.

Div. 258; *Berger v. New York*, 65 N. Y. App. Div. 394; *Crawford v. New York*, 68 N. Y. App. Div. 107, *affirmed* 174 N. Y. 518; *Foley v. New York*, 95 N. Y. App. Div. 374; *Moran v. New York*, 98 N. Y. App. Div. 301.

**451. 4. Individual Liability.** — *Reedy v. St. Louis Brewing Assoc.*, 161 Mo. 523; *Tremblay v. Harmony Mills*, 171 N. Y. 598.

**5. Effect of Municipal Ordinance.** — *Tremblay v. Harmony Mills*, 171 N. Y. 598.

In *Illinois* the municipality cannot by an ordinance compel the property owner to remove the snow from the sidewalk. *Chicago v. McDonald*, 111 Ill. App. 436.

**6. Only Traveled or Wrought Portion of Highway Need Be Fit for Travel.** — *Orr v. Gldtown*, 99 Me. 190; *Lynch v. Boston*, 186 Mass. 148; *King v. Ft. Ann*, 180 N. Y. 496; *Gallagher v. Buckley*, 31 Wash. 380; *Hammacher v. New Berlin*, 124 Wis. 249.

**What Constitutes Traveled Part.** — The traveled portion of a highway is not confined to the part actually used the greater portion of the time by vehicles, but is that part which is held open to the public as a highway and which is used in passing other teams. *Newell v. Stony Point*, 59 N. Y. App. Div. 237.

**452. 1. Artificial Obstructions in Margin.** — See *Emery v. Philadelphia*, 208 Pa. St. 492.

**4. Whole Width of City Street to Be Passable** — *Indiana.* — *Odon v. Dobbs*, 25 Ind. App. 522; *Thuis v. Vincennes*, (Ind. App. 1905) 73 N. E. Rep. 141.

*Iowa.* — *Lamb v. Cedar Rapids*, 108 Iowa 629.

*Kentucky.* — *Glasgow v. Gillenwaters*, 113 Ky. 140.

*Missouri.* — *Kossman v. St. Louis*, 153 Mo. 293.

*Pennsylvania.* — See *Beach v. Scranton*, 5 Lack. Leg. N. (Pa.) 25.

*Tennessee.* — *Oliver v. Nashville*, 106 Tenn. 272.

**This Rule Also Applies to Sidewalks.** — *Augusta v. Tharpe*, 113 Ga. 152.

It is incumbent upon a city to keep the entire space thrown open to the public as a sidewalk, in a condition reasonably safe for pedestrians. *Coffey v. Carthage*, 186 Mo. 573.

**5. Question for Jury.** — The question whether the portion of the street in repair is of sufficient width, is for the jury to determine under proper instructions. *Meisner v. Dillon*, 29 Mont. 116.

**6. Untraveled Portion Not to Render Traveled Portion Unsafe.** — *Elwood v. Addison*, 26 Ind. App. 28.

**454. 3. Municipality Not Liable for Injuries Received Outside the Highway.** — *Leggett v. Watertown*, 93 N. Y. App. Div. 80.



**455.** *j.* BARRIERS AND RAILINGS — (1) *To Prevent Straying from Highway.* — See note 2.

(2) *At Dangerous Places Near Road.* — See note 3.

**456.** Questions of Law and Fact. — See note 7.

**457.** *k.* OBJECTS AND STRUCTURES OVERHANGING HIGHWAY. — See note 5.

**A Rope or Wire Stretched Across a Highway.** — See notes 7, 9.

**458.** *l.* FALLING OBJECTS. — See note 5.

**459.** *m.* SLIPPERY SURFACES. — See note 1.

*n.* OBJECTS IN MOTION OR SUBJECT TO HUMAN CONTROL. —

See notes 3, 4.

**9. Proximate and Concurring Causes** — *a.* PROXIMATE CAUSE. —

See note 7.

**460.** *b.* CONCURRING CAUSES. — See notes 2, 4.

**455. 2. Barriers Not Necessary to Prevent Traveler Straying from Highway.** — *Vincennes v. Spees*, (Ind. App. 1905) 74 N. E. Rep. 277; *Bohl v. Dell Rapids*, 15 S. Dak. 619.

But in *Sweet v. Poughkeepsie*, 97 N. Y. App. Div. 82, the municipality was held liable, where it had erected nothing to indicate the lines of the highway, and the plaintiff in turning a street corner ran into a stump.

**Persons Entering Highway.** — A municipal corporation is under no duty to erect barriers or maintain lights to prevent injuries to persons seeking to enter a street from private land at a point at which there is no traveled way, either public or private, and at which there is nothing to put the municipality on notice that an entrance is likely to be attempted. *Ivester v. Atlanta*, 115 Ga. 853.

**3. Barrier Necessary Against Dangerous Places.** — *Vincennes v. Spees*, (Ind. App. 1905) 74 N. E. Rep. 277; *Davis v. Snyder Tp.*, 196 Pa. St. 273; *Curry v. Luzerne*, 24 Pa. Super. Ct. 514; *San Antonio v. Porter*, 24 Tex. Civ. App. 444, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555 [453].

**456. 7. Question for Jury.** — *Chicago v. Baker*, 195 Ill. 54; *Rosedale v. Cosgrove*, 10 Kan. App. 211; *Coney v. Gilboa*, 55 N. Y. App. Div. 111; *Littlebrant v. Sidney*, 77 N. Y. App. Div. 545; *San Antonio v. Porter*, 24 Tex. Civ. App. 444, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

**457. 5. Limbs of Trees.** — The municipality is liable for injuries incurred by reason of limbs of trees which project into the street dangerously low. *Louisville v. Michels*, 114 Ky. 551.

**7. Rope or Wire Across Highway.** — *Sanford v. White*, 132 Fed. Rep. 531, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 444 *et seq.*; *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428.

**Derrick Guy.** — A derrick erected on the defendant's land, with the guy stretched across the highway so low as to be dangerous to persons driving over the way, is a nuisance. *Rockport v. Rockport Granite Co.*, 177 Mass. 246.

**9. Individual Liability.** — See *Mogk v. New York*, etc., Telephone Co., 78 N. Y. App. Div. 560.

**458. 5. Trees in Highway.** — *McGarey v. New York*, 89 N. Y. App. Div. 500.

**459. 1. Slippery Surfaces.** — *Leonard v. Butte*, 25 Mont. 410.

**Muddy Walk.** — A municipality is not liable for injuries caused by the slippery condition of the walk, which is produced by mud. *O'Reilly v. Syracuse*, 49 N. Y. App. Div. 538.

**Evidence of Slippery Surface for the Jury.** — *Smith v. Seattle*, 33 Wash. 488, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458, 459.

**3. Objects in Motion or under Human Control.** — *Custer v. New Philadelphia*, 11 Ohio Cir. Dec. 9, 20 Ohio Cir. Ct. 177.

**4. Coasting.** — *Dudley v. Flemingsburg*, 115 Ky. 5.

**7. Defect Must Be Proximate Cause of Injury** — *Delaware.* — *Anderson v. Wilmington*, 2 Penn. (Del.) 28; *Neal v. Wilmington*, etc., Electric R. Co., 3 Penn. (Del.) 467; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*Iowa.* — *Parmenter v. Marion*, 113 Iowa 297. *Kentucky.* — *Carroll v. Louisville*, (Ky. 1904) 78 S. W. Rep. 1117.

*Massachusetts.* — *Kelley v. Boston*, 180 Mass. 233; *Block v. Worcester*, 186 Mass. 526.

*Minnesota.* — *La Londe v. Peake*, 82 Minn. 124.

*Missouri.* — *Ashby v. Elsberry*, etc., Gravel Road Co., 99 Mo. App. 178.

*Oregon.* — *Bayard v. Standard Oil Co.*, 38 Oregon 438.

*Pennsylvania.* — *Ohl v. Bethlehem Tp.*, 199 Pa. St. 588; *Nichols v. Pittsfield Tp.*, 209 Pa. St. 240.

*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

*Wisconsin.* — *Dapper v. Milwaukee*, 107 Wis. 88; *Gagan v. Janesville*, 106 Wis. 662; *Ehleiter v. Milwaukee*, 121 Wis. 85, 105 Am. St. Rep. 1027.

**Whether Defect Proximate Cause of Accident Question for Jury** — *Iowa.* — *Brown v. Chillicothe*, 122 Iowa 640; *Harvey v. Clarinda*, 111 Iowa 528.

*New Hampshire.* — *Hendry v. North Hampton*, 71 N. H. 26.

*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.

*Washington.* — *Ziegler v. Spokane*, 25 Wash. 439.

*Wisconsin.* — *Jenewein v. Irving*, 122 Wis. 228, rehearing denied 122 Wis. 237; *Kennedy v. Lincoln*, 122 Wis. 301.

**460. 2. Recovery Though Other Causes Concur** — *Illinois.* — *Flora v. Pruett*, 81 Ill. App. 161.

**461.** See note 1.

*c.* ESCAPE OF HORSES FROM CONTROL. — See notes 2, 3.

**462.** In Some States. — See notes 1, 2.**463.** 10. Persons Entitled to Protection — *a.* NECESSITY OF SPECIAL DAMAGE. — See note 1.

*b.* UNDER STATUTES — A Liberal Construction. — See notes 5, 6.

**464.** Question for Jury. — See note 1.

*c.* TRAVELER STOPPING IN HIGHWAY. — See notes 3, 6.

*d.* CHILDREN PLAYING IN HIGHWAY. — See notes 7, 8.

**465.** *f.* STREET LABORERS. — See note 2.

*h.* MUNICIPAL EMPLOYEES. — See notes 4, 5.

*i.* PERSONS VIOLATING LAW. — See note 6.

11. Contributory Negligence — *a.* IN GENERAL. — See note 10.

*Iowa.* — *Hodges v. Waterloo*, 109 Iowa 444; *Overhouser v. American Cereal Co.*, 118 Iowa 417; *Schnee v. Dubuque*, 122 Iowa 459; *Templin v. Boone*, 127 Iowa 91.

*Kansas.* — *Lincoln Tp. v. Koenig*, 10 Kan. App. 504.

*Massachusetts.* — *Block v. Worcester*, 186 Mass. 526.

*Missouri.* — *Ashby v. Elsberry, etc.*, Gravel Road Co., 99 Mo. App. 178.

*Montana.* — *Meisner v. Dillon*, 29 Mont. 116.

*New Jersey.* — *Sutphen v. Hedden*, 67 N. J. L. 324, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

*New York.* — *Graham v. Poughkeepsie*, 68 N. Y. App. Div. 262.

*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.

*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

**460.** 4. Act of Third Person Must Be Wrongful. — *Block v. Worcester*, 186 Mass. 526.

**461.** 1. No Recovery When Other Causes Concur. — *Swart v. District of Columbia*, 17 App. Cas. (D. C.) 407; *Barnes v. Rumford*, 96 Me. 315; *Whitman v. Lewiston*, 97 Me. 519; *Orr v. Oldtown*, 99 Me. 190.

**2.** Highway Need Not Be Safe for Uncontrolled or Runaway Horses. — *Nichols v. Pittsfield Tp.*, 209 Pa. St. 240; *Hungerman v. Wheeling*, 46 W. Va. 761; *Ehleiter v. Milwaukee*, 121 Wis. 85, 105 Am. St. Rep. 1027.

**3.** Loss of Control of Horse Does Not Prevent Recovery. — *Thunborg v. Pueblo*, 18 Colo. App. 80; *Harvey v. Clarinda*, 111 Iowa 528; *Meisner v. Dillon*, 29 Mont. 116.

In *Pennsylvania.* — In *Card v. Columbia Tp.*, 191 Pa. St. 254, the municipality was held not to be liable.

**Straying Horse.** — A town is liable for injuries to a horse escaping from the owner's inclosure, where the defect is such that it would be liable had the horse been driven. *Nocks v. Whiting*, 126 Iowa 405, 106 Am. St. Rep. 371.

**462.** 1. Loss of Control of Horse Prevents Recovery. — *Doak v. Saginaw Tp.*, 119 Mich. 680; *Bell v. Wayne*, 123 Mich. 386, 81 Am. St. Rep. 204; *Hungerman v. Wheeling*, 46 W. Va. 761; *Johnson v. Superior*, 103 Wis. 66; *Ehleiter v. Milwaukee*, 121 Wis. 85; 105 Am. St. Rep. 1027.

**2.** Momentary Loss of Control. — *Ehleiter v. Milwaukee*, 121 Wis. 85, 105 Am. St. Rep. 1027.

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There is no difference in principle between a case where a horse has momentarily escaped from its driver and the case of one momentarily escaping from the barn or inclosure of its owner. *Nocks v. Whiting*, 126 Iowa 405, 106 Am. St. Rep. 371.

**463.** 1. No Right of Action for Deprivation of Use of Highway. — *Bembe v. Anne Arundel County*, 94 Md. 321, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463; *Parsons v. Hunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 120; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

**5.** Who Are Travelers. — *Columbus v. Anglin*, 120 Ga., 785.

**6.** Where the occupant of a building, finding one entrance locked, goes on the sidewalk to another entrance, he is a traveler on the street. *Strack v. Milwaukee*, 121 Wis. 91.

**464.** 1. Question for Jury. — *Kessler v. Berger*, 205 Pa. St. 289; *Whitewright v. Taylor*, 23 Tex. Civ. App. 486.

**3.** Traveler Stopping in Highway. — *Kessler v. Berger*, 205 Pa. St. 289; *Whitewright v. Taylor*, 23 Tex. Civ. App. 486.

**6.** *Kessler v. Berger*, 205 Pa. St. 289; *Whitewright v. Taylor*, 23 Tex. Civ. App. 486.

**7.** Children Playing in Highway — *Georgia.* — *Augusta v. Tharpe*, 113 Ga. 152.

*Illinois.* — *Waverly v. Reesor*, 93 Ill. App. 649; *Bath v. Blake*, 97 Ill. App. 35.

*Michigan.* — *Beaudin v. Bay City*, 136 Mich. 333.

*Missouri.* — *Caskey v. La Beile*, 101 Mo. App. 590; *Straub v. St. Louis*, 175 Mo. 413.

*Wisconsin.* — *Collins v. Janesville*, 111 Wis. 348. See also *Busse v. Rogers*, 120 Wis. 443.

*Canada.* — *Ricketts v. Markdale*, 31 Ont. 610.

**8.** Play Incidental to Travel. — *Augusta v. Tharpe*, 113 Ga. 152, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

**465.** 2. Laborers on Street. — *Kansas City v. Orr*, 62 Kan. 61.

**4.** Firemen. — *Kansas City v. McDonald*, 60 Kan. 481.

**5.** A Councilman is entitled to recover for injuries received from a defective highway. *Danville v. Robinson*, 99 Va. 448.

**6.** Injury to Person Violating Law. — *Atchison v. Acheson*, 9 Kan. App. 33; *Pewonka v. Stewart*, 13 N. Dak. 117.

**10.** Ordinary Care — *Colorado.* — *Denver v. Hyatt*, 28 Colo. 129.

*Delaware.* — *Anderson v. Wilmington*, 2

**466. b. RIGHT TO ASSUME SAFETY OF HIGHWAY.** — See notes 1, 2, 3.

Penn. (Del.) 28; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467.

*Georgia*. — See *Kent v. Southern Bell Telephone, etc., Co.*, 120 Ga. 980.

*Illinois*. — *Spring Valley v. Gavin*, 182 Ill. 232; *Aurora v. Scott*, 185 Ill. 539; *Hursen v. Chicago*, 85 Ill. App. 298; *Dehlinger v. Chicago*, 100 Ill. App. 314; *Upper Alton v. Green*, 112 Ill. App. 439. See also *Vocke v. Chicago*, 208 Ill. 192.

*Indiana*. — *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512.

*Iowa*. — *Rusch v. Dubuque*, 116 Iowa 402; *Hill v. Glenwood*, 124 Iowa 479.

*Kansas*. — *Jewell City v. Van Meter*, (Kan. 1905) 79 Pac. Rep. 149.

*Kentucky*. — *Floyd v. Henderson, etc., Gravel-Road Co.*, (Ky. 1900) 56 S. W. Rep. 6; *Maysville v. Guilfoyle*, 110 Ky. 670; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Maine*. — *Whitman v. Fisher*, 98 Me. 575.

*Michigan*. — *King v. Colan Tp.*, 125 Mich. 511.

*Minnesota*. — *Cunningham v. Thief River Falls*, 84 Minn. 21.

*Missouri*. — *Fockler v. Kansas City*, 94 Mo. App. 464; *Johnson v. St. Joseph*, 96 Mo. App. 663; *Wheat v. St. Louis*, 179 Mo. 572; *Jackson v. Kansas City*, 106 Mo. App. 52; *Ball v. Neosho*, 109 Mo. App. 683; *Coffey v. Carthage*, 186 Mo. 573; *Deland v. Cameron*, 112 Mo. App. 704.

*Nebraska*. — *South Omaha v. Meyers*, (Neb. 1902) 92 N. W. Rep. 743.

*New Jersey*. — *Quimby v. Filter*, 62 N. J. L. 766.

*Ohio*. — *Cincinnati v. Frazer*, 9 Ohio Cir. Dec. 487, 18 Ohio Cir. Ct. 50.

*Oklahoma*. — *Norman v. Teel*, 12 Okla. 69.

*Oregon*. — *Gardner v. Wasco County*, 37 Oregon 392.

*Pennsylvania*. — *Butcher v. Philadelphia*, 202 Pa. St. 1; *Rachmel v. Clark*, 205 Pa. St. 314; *Iseminger v. York Haven Water, etc., Co.*, 206 Pa. St. 591; *Sickels v. Philadelphia*, 209 Pa. St. 113; *Dougherty v. Philadelphia*, 210 Pa. St. 591; *Snyder v. Penn Tp.*, 14 Pa. Super. Ct. 145; *Walton v. Colwyn*, 19 Pa. Super. Ct. 172.

*South Dakota*. — *Bohl v. Dell Rapids*, 15 S. Dak. 619.

*Texas*. — *Dallas v. Muncton*, (Tex. Civ. App. 1904) 83 S. W. Rep. 431.

*Virginia*. — *Danville v. Robinson*, 99 Va. 448; *Winchester v. Carroll*, 99 Va. 727.

*Washington*. — *Reed v. Spokane*, 21 Wash. 218; *Cowie v. Seattle*, 22 Wash. 659; *Lemman v. Spokane*, 38 Wash. 98.

*Wisconsin*. — *Johnson v. Superior*, 103 Wis. 66; *Strack v. Milwaukee*, 121 Wis. 91.

*Canada*. — *Hogg v. Brooke Tp.*, 7 Ont. L. Rep. 273; *Homewood v. Hamilton*, 1 Ont. L. Rep. 266; *Beaulieu v. St. Urbain Premier*, 22 Quebec Super. Ct. 208.

**Imputable Contributory Negligence.** — In an action to recover for injuries caused by a defective way, plaintiff must prove that his driver as well as himself exercised due care. *Orr v. Oldtown*, 99 Me. 190.

For a full treatment of this subject see the title CONTRIBUTORY NEGLIGENCE, vol. 7, pp. 445-451.

**Comparative Negligence.** — In *Georgia* contributory negligence does not necessarily debar a recovery. *Columbus v. Anglin*, 120 Ga. 785.

For a full discussion of this subject, see the title COMPARATIVE NEGLIGENCE, vol. 6, p. 360.

**466. 1. Presumption of Safety** — *Colorado*. — *Denver v. Baldasari*, 15 Colo. App. 157.

*Delaware*. — *Anderson v. Wilmington*, 2 Penn. (Del.) 28; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467.

*Georgia*. — *Columbus v. Anglin*, 120 Ga. 785.

*Illinois*. — *Spring Valley v. Gavin*, 182 Ill. 232; *Chicago v. McCrudden*, 92 Ill. App. 257; *Strehmann v. Chicago*, 93 Ill. App. 206; *Savanna v. Trusty*, 98 Ill. App. 277; *Campbell v. Chicago*, 100 Ill. App. 358; *Chicago v. Gillett*, 108 Ill. App. 455; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Birch v. Charleston Light, etc., Co.*, 113 Ill. App. 229. See also *Vocke v. Chicago*, 208 Ill. 192.

*Indiana*. — *Terre Haute v. Constans*, 26 Ind. App. 421; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Union Traction Co. v. Barnett*, 31 Ind. App. 467; *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250; *Kokomo v. Boring*, 24 Ind. App. 552.

*Iowa*. — *Wheeler v. Boone*, 108 Iowa 235; *Rusch v. Dubuque*, 116 Iowa 402.

*Kansas*. — *Wetmore Tp. v. Chamberlain*, 64 Kan. 327.

*Kentucky*. — *Louisville v. Keher*, (Ky. 1904) 79 S. W. Rep. 270. See also *Reusch v. Licking Rolling Mill Co.*, (Ky. 1904) 80 S. W. Rep. 1168.

*Louisiana*. — *Ancoin v. New Orleans*, 105 La. 271.

*Maryland*. — See *Knight v. Baltimore*, 97 Md. 647.

*Missouri*. — *Perrette v. Kansas City*, 162 Mo. 238; *Coffey v. Carthage*, 186 Mo. 573.

*New Jersey*. — *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236.

*New York*. — *Snowden v. Somerset*, 171 N. Y. 99; *White v. Manhattan R. Co.*, 82 N. Y. App. Div. 259; *Gribben v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 196; *Cummings v. New Rochelle*, 38 N. Y. App. Div. 583.

*North Carolina*. — *Neal v. Marion*, 129 N. Car. 345; *Cresler v. Asheville*, 134 N. Car. 311.

*Ohio*. — *Ohliger v. Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142.

*Oklahoma*. — *Norman v. Teel*, 12 Okla. 69.

*Texas*. — *Davis v. Austin*, 22 Tex. Civ. App. 460; *Dallas v. Muncton*, (Tex. Civ. App. 1904) 83 S. W. Rep. 431.

*Virginia*. — *Winchester v. Carroll*, 99 Va. 727.

*Washington*. — *Beall v. Seattle*, 28 Wash. 593, 92 Am. St. Rep. 892; *Gallamore v. Olympia*, 34 Wash. 379; *Lemman v. Spokane*, 38 Wash. 98.

*Wisconsin*. — *Duncan v. Grand Rapids*, 121 Wis. 626.

**2. Need Not Watch for Defects** — *Illinois*. — *Chicago v. McCrudden*, 92 Ill. App. 257; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Upper Alton v. Green*, 112 Ill. App. 439.

*Maryland*. — *Knight v. Baltimore*, 97 Md. 647,

**467.** See notes 2, 3.

## c. QUESTIONS OF LAW OR FACT. — See note 4.

citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416, 417, [466].

*Missouri*. — Perrette v. Kansas City, 162 Mo. 238; Powers v. St. Joseph, 91 Mo. App. 55.

*Ohio*. — Ohliger v. Toledo, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142.

*Washington*. — Mischke v. Seattle, 26 Wash. 616.

**Pedestrians** are not required at their peril to discover every defect, even though open and visible. *Rusch v. Dubuque*, 116 Iowa 402.

**466. 3. Stepping into Excavation.** — *Powers v. St. Joseph*, 91 Mo. App. 55.

**467. 2. Obvious Defect.** — *Williams v. Port Leyden*, 62 N. Y. App. Div. 490; *Easton v. Philadelphia*, 26 Pa. Super. Ct. 517; *Jejorek v. Nanticoke*, 9 Kulp (Pa.) 501. See also *Stainback v. Meridian*, 79 Miss. 447.

**3. Smith v. Jackson Tp.**, 26 Pa. Super. Ct. 234.

**A Rope Stretched Across a Highway** is not such an obstruction as is to be anticipated in the ordinary use of the highway, and in the absence of anything tending to warn travelers of its existence it cannot be said that a careful person engaged in driving must of necessity have seen the danger and avoided it. Driving into the rope cannot be said to be contributory negligence as a matter of law. *Mogk v. New York, etc., Telephone Co.*, 78 N. Y. App. Div. 560.

**4. Question for Jury** — *United States*. — *Mosheuvell v. District of Columbia*, 191 U. S. 247. *District of Columbia*. — *District of Columbia v. Crumbaugh*, 13 App. Cas. (D. C.) 553; *District of Columbia v. Whippis*, 17 App. Cas. (D. C.) 415.

*Georgia*. — *Shiflet v. Cedartown*, 111 Ga. 834; *Pate v. Atlanta*, 119 Ga. 671; *Kent v. Southern Bell Telephone, etc., Co.*, 120 Ga. 980.

*Idaho*. — *Carson v. Genesee*, 9 Idaho 244.

*Illinois*. — *Streator v. Chrisman*, 182 Ill. 215, affirming 82 Ill. App. 24; *Aurora v. Scott*, 185 Ill. 539; *Beardstown v. Clark*, 204 Ill. 524; *Flora v. Pruett*, 81 Ill. App. 161; *Litchfield v. Anglim*, 83 Ill. App. 55; *Hursen v. Chicago*, 85 Ill. App. 298; *Glickson v. Shannon*, 88 Ill. App. 240; *Chicago v. McCrudden*, 92 Ill. App. 257; *Mt. Morris v. Kanode*, 98 Ill. App. 373; *Campbell v. Chicago*, 100 Ill. App. 358; *Metzger v. Chicago*, 103 Ill. App. 605; *Schmidt v. Chicago*, 107 Ill. App. 64; *Pontiac v. Grandy*, 108 Ill. App. 466; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Upper Alton v. Green*, 112 Ill. App. 439.

*Indiana*. — *Huntingburgh v. First*, 22 Ind. App. 66; *Indianapolis v. Marold*, 25 Ind. App. 428; *Terre Haute v. Constans*, 26 Ind. App. 421; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Lafayette v. Fitch*, 32 Ind. App. 134.

*Iowa*. — *Lamb v. Cedar Rapids*, 108 Iowa 629; *Hodges v. Waterloo*, 109 Iowa 444; *Hoover v. Mapleton*, 110 Iowa 571; *Sylvester v. Casey*, 110 Iowa 256; *Cox v. Des Moines*, 111 Iowa 646; *Harvey v. Clarinda*, 111 Iowa 528; *Yeager v. Spirit Lake*, 115 Iowa 593; *Bell v. Clarion*, 115 Iowa 357; *Bailey v. Centerville*, 115 Iowa 271; *Goucher v. Sioux City*, 115 Iowa 639; *Rusch v. Dubuque*, 116 Iowa 402; *Brown v.*

*Chillicothe*, 122 Iowa 640; *Streeter v. Marshalltown*, 123 Iowa 449; *Houseman v. Belle Plaine*, 124 Iowa 510; *Hill v. Glenwood*, 124 Iowa 479; *Evans v. Iowa City*, 125 Iowa 202; *Achey v. Marion*, 126 Iowa 47; *Bussell v. Ft. Dodge*, 126 Iowa 308; *Considine v. Dubuque*, 126 Iowa 283; *Templin v. Boone*, 127 Iowa 91; *Earl v. Cedar Rapids*, 126 Iowa 361, 106 Am. St. Rep. 361.

*Kansas*. — *Lawrence v. Littell*, 9 Kan. App. 130; *Ottawa v. Black*, 10 Kan. App. 439; *Wetmore Tp. v. Chamberlain*, 64 Kan. 327; *Anderson v. Pierce*, 68 Kan. 57; *Wiens v. Ebel*, 69 Kan. 701.

*Kentucky*. — *Maysville v. Guilfoyle*, 110 Ky. 670; *Paducah R., etc., Co. v. Ledsinger*, (Ky. 1901) 63 S. W. Rep. 11; *Fordsville v. Spencer*, (Ky. 1901) 65 S. W. Rep. 132; *Midway v. Lloyd*, (Ky. 1903) 74 S. W. Rep. 195; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229; *Carlisle v. Secrest*, (Ky. 1903) 75 S. W. Rep. 268; *Endicott v. Triple State Natural Gas, etc., Co.*, (Ky. 1903) 76 S. W. Rep. 516.

*Massachusetts*. — *Lamb v. Worcester*, 177 Mass. 82; *Leonard v. Boston*, 183 Mass. 68; *Sampson v. Boston*, 184 Mass. 46; *Stanford v. Hyde Park*, 185 Mass. 253; *Hyde v. Boston*, 186 Mass. 115; *Baker v. Fall River*, 187 Mass. 53; *Block v. Worcester*, 186 Mass. 526; *McCarthy v. Dedham*, 188 Mass. 204; *Torphy v. Fall River*, 188 Mass. 310.

*Michigan*. — *Monje v. Grand Rapids*, 122 Mich. 645; *Vergin v. Saginaw*, 125 Mich. 499; *Kopelka v. Bay City*, 125 Mich. 625; *Wilton v. Flint*, 128 Mich. 156; *Styles v. Decatur*, 131 Mich. 443; *Hunt v. Lincoln Tp.*, 131 Mich. 637; *Belyea v. Port Huron*, 136 Mich. 504; *Herring v. St. Joseph*, (Mich. 1904) 100 N. W. Rep. 747; *Hunter v. Durand*, (Mich. 1904) 100 N. W. Rep. 191; *Vander Velde v. Leroy*, (Mich. 1905) 103 N. W. Rep. 812.

*Minnesota*. — *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428; *Cunningham v. Thief River Falls*, 84 Minn. 21; *Isham v. Broderick*, 89 Minn. 397.

*Mississippi*. — *Meridan v. McBeath*, 80 Miss. 485.

*Missouri*. — *Plummer v. Milan*, 79 Mo. App. 439; *Darrell v. St. Joseph*, 109 Mo. App. 168; *Hitt v. Kansas City*, 110 Mo. App. 713; *Deland v. Cameron*, 112 Mo. App. 704; *Bradley v. Spickardsville*, 90 Mo. App. 416; *Powers v. St. Joseph*, 91 Mo. App. 55.

*Nebraska*. — *Nebraska Telephone Co. v. Jones*, 60 Neb. 396; *South Omaha v. Taylor*, (Neb. 1903) 96 N. W. Rep. 209; *Lexington v. Kreitz*, (Neb. 1905) 103 N. W. Rep. 444.

*New Hampshire*. — *Dow v. Portsmouth, etc.*, St. R. Co., 70 N. H. 410.

*New Jersey*. — *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236.

*New York*. — *Fordham v. Gouverneur*, 160 N. Y. 541; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443; *Richardson v. Syracuse*, 41 N. Y. App. Div. 118; *Lewis v. Ballston Terminal R. Co.*, 45 N. Y. App. Div. 129; *Rysdyke v. Mt. Hope*, 46 N. Y. App. Div. 624; *Collett v. New York*, 51 N. Y. App. Div. 394; *Morris v. Saratoga Springs*, 55 N. Y. App. Div. 263; *Birngruber*

**468.** See notes 1, 2.*d.* KNOWLEDGE OF DEFECT — (1) *Effect in General.* — See note 6.

*v. Eastchester*, 54 N. Y. App. Div. 80; *Higgins v. Brooklyn, etc.*, R. Co., 54 N. Y. App. Div. 69; *Walsh v. Central New York Telephone, etc.*, Co., 176 N. Y. 163; *O'Hara v. Brooklyn*, 57 N. Y. App. Div. 176; *Blakeslee v. Geneva*, 61 N. Y. App. Div. 42; *Norton v. Webber*, 69 N. Y. App. Div. 130, *affirmed* 174 N. Y. 514; *Walsh v. Central New York Telephone, etc.*, Co., 75 N. Y. App. Div. 1, *reversed* 176 N. Y. 163; *Littebrant v. Sidney*, 77 N. Y. App. Div. 545; *Ann v. Herter*, 79 N. Y. App. Div. 6; *Wynn v. Yonkers*, 80 N. Y. App. Div. 277; *Link v. New York*, 82 N. Y. App. Div. 486; *Binninger v. New York*, 80 N. Y. App. Div. 438, *modified* 177 N. Y. 199; *Gribben v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 196; *Bradner v. Warwick*, 91 N. Y. App. Div. 408; *Snowden v. Somerset*, 100 N. Y. App. Div. 39.

*Ohio.* — *Ohliger v. Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142.

*Oklahoma.* — *Norman v. Teel*, 12 Okla. 69; *Guthrie v. Finch*, 13 Okla. 496.

*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.

*Pennsylvania.* — *Mellor v. Bridgeport*, 191 Pa. St. 562; *Nicholson v. Philadelphia*, 194 Pa. St. 460; *Corbin v. Philadelphia*, 195 Pa. St. 461, 78 Am. St. Rep. 825; *Lavis v. Snyder Tp.*, 196 Pa. St. 273; *Dean v. New Castle*, 201 Pa. St. 51; *Glading v. Philadelphia*, 202 Pa. St. 324; *Brown v. White*, 202 Pa. St. 297; *Butcher v. Philadelphia*, 202 Pa. St. 1; *Musselman v. Hatfield*, 202 Pa. St. 489; *Shaffer v. Harmony*, 204 Pa. St. 339; *Quinlan v. Philadelphia*, 205 Pa. St. 309; *Wall v. Pittsburgh*, 205 Pa. St. 48; *Brown v. White*, 206 Pa. St. 106; *Iseminger v. York Haven Water, etc., Co.*, 206 Pa. St. 591; *Curry v. Erie*, 209 Pa. St. 283; *Iseminger v. York Haven Water, etc., Co.*, 209 Pa. St. 615; *Dougherty v. Philadelphia*, 210 Pa. St. 591; *Allen v. Warwick Tp.*, 9 Pa. Super. Ct. 507; *Snader v. Murphy*, 19 Pa. Super. Ct. 35; *Waltson v. Colwyn*, 19 Pa. Super. Ct. 172; *Graham v. Philadelphia*, 19 Pa. Super. Ct. 292; *Farrell v. Plymouth*, 26 Pa. Super. Ct. 183.

*South Dakota.* — *Overpeck v. Rapid City*, 14 S. Dak. 507.

*Tennessee.* — *Knoxville v. Cox*, 103 Tenn. 368.

*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444; *Palestine v. Addington*, (Tex. Civ. App. 1903) 75 S. W. Rep. 322; *McKinney v. Brown* (Tex. Civ. App. 1904) 81 S. W. Rep. 88.

*Virginia.* — *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791; *Danville v. Robinson*, 99 Va. 448; *Newport News, etc., R., etc., Co. v. Bradford*, 100 Va. 231; *Charlottesville v. Stratton*, 102 Va. 95.

*Washington.* — *Cowie v. Seattle*, 22 Wash. 659; *Mischke v. Seattle*, 26 Wash. 616; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844; *Shearer v. Buckley*, 31 Wash. 370; *Gallamore v. Olympia*, 34 Wash. 379; *Benson v. Hamilton*, 34 Wash. 201; *McClammy v. Spokane*, 36 Wash. 339; *Lemman v. Spokane*, 38 Wash. 98.

*West Virginia.* — *Arthur v. Charleston*, 51 W. Va. 132.

*Wisconsin.* — *Petrich v. Union*, 117 Wis. 46;

*Strack v. Milwaukee*, 121 Wis. 91; *Wells v. Remington*, 118 Wis. 573; *Hoffman v. North Milwaukee*, 118 Wis. 278; *Kennedy v. Lincoln*, 122 Wis. 301; *Jenewein v. Irving*, 122 Wis. 228, *rehearing denied* 122 Wis. 237; *Lynch v. Waldwick*, 123 Wis. 351.

**468. 1. Negligence as a Matter of Law.** — *Knight v. Baltimore*, 97 Md. 647, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 416, 417 [468]; *Tracey v. South Haven Tp.*, 132 Mich. 492.

**2. Occupying Dangerous Position.** — *Bender v. Minden*, 124 Iowa 685.

**3. Knowledge of Defect Not Conclusive of Contributory Negligence.** — *United States.* — *Moshevel v. District of Columbia*, 191 U. S. 247; *Swift v. Langbein*, (C. C. A.) 127 Fed. Rep. 111.

*Idaho.* — *Carson v. Genesee*, 9 Idaho 244.

*Illinois.* — *Streator v. Chrisman*, 182 Ill. 215, *affirming* 82 Ill. App. 24; *Litchfield v. Anglim*, 83 Ill. App. 55; *Harvard v. Wilson*, 100 Ill. App. 9; *Fulton v. Green*, 103 Ill. App. 96; *Veach v. Champaign*, 113 Ill. App. 151; *Lockport v. Licht*, 113 Ill. App. 613.

*Indiana.* — *Huntingburgh v. First*, 22 Ind. App. 66; *Huntington v. Folk*, 154 Ind. 91; *Indianapolis v. Marold*, 25 Ind. App. 428; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512; *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.

*Iowa.* — *Harvey v. Clarinda*, 111 Iowa 528; *Bailey v. Centerville*, 115 Iowa 271; *Yeager v. Spirit Lake*, 115 Iowa 593; *Sachra v. Manilla*, 120 Iowa 562; *Brown v. Chillicothe*, 122 Iowa 640; *Hollingworth v. Ft. Dodge*, 125 Iowa 627; *Templin v. Boone*, 127 Iowa 91. See also *Evans v. Iowa City*, 125 Iowa 202.

*Kansas.* — *Erie Tp. v. Beamer*, (Kan. 1905) 79 Pac. Rep. 1070, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468; *Missouri, etc., Telephone Co. v. Vandervort*, (Kan. 1905) 79 Pac. Rep. 1068, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468; *Lawrence v. Littell*, 9 Kan. App. 130; *Ottawa v. Black*, 10 Kan. App. 439; *Garnett v. Hamilton*, 69 Kan. 866.

*Kentucky.* — *Maysville v. Guilfoyle*, 110 Ky. 670; *Fordsville v. Spencer*, (Ky. 1901) 65 S. W. Rep. 132; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229; *Carlisle v. Secrest*, (Ky. 1903) 75 S. W. Rep. 268; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Massachusetts.* — *Torphy v. Fall River*, 188 Mass. 310; *Harvey v. Malden*, 182 Mass. 133.

*Michigan.* — *Urtel v. Flint*, 122 Mich. 65; *Vergin v. Saginaw*, 125 Mich. 499; *McTiver v. Grant Tp.*, 131 Mich. 456; *Belyea v. Port Huron*, 136 Mich. 504; *Oesterreich v. Detroit*, (Mich. 1904) 100 N. W. Rep. 593.

*Missouri.* — *Perrette v. Kansas City*, 162 Mo. 238; *Beauvais v. St. Louis*, 169 Mo. 500; *Huff v. Marshall*, 97 Mo. App. 542; *Ashby v. Elsberry, etc., Gravel Road Co.*, 99 Mo. App. 178; *Stevens v. Walpole*, 76 Mo. App. 213; *Swanson v. Sedalia*, 80 Mo. App. 121; *Bradley v. Spickardsville*, 90 Mo. App. 416. See also *Wheat v. St. Louis*, 170 Mo. 572.

*Nebraska.* — *Nebraska Telephone Co. v.*

**469.** See notes 1, 2, 3.

(2) *To Be Considered in Determining Negligence.* — See note 4.

**470.** See note 1.

**Degree of Care Required.** — See note 2.

Jones, 60 Neb. 396; *South Omaha v. Taylor*, (Neb. 1903) 96 N. W. Rep. 209.

*New York.* — *Richardson v. Syracuse*, 41 N. Y. App. Div. 118; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443; *Beck v. Buffalo*, (Supm. Ct. App. Div.) 63 N. Y. Supp. 499.

*Ohio.* — *Ohliger v. Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142; *Leber v. Kelley Island Lime, etc., Co.*, 11 Ohio Cir. Dec. 568, 21 Ohio Cir. Ct. 773.

*Oklahoma.* — *Guthrie v. Finch*, 13 Okla. 496. *Pennsylvania.* — *Mellor v. Bridgeport*, 191 Pa. St. 562; *Wilson v. O'Hara Tp.*, 14 Pa. Super. Ct. 258.

*Tennessee.* — *Knoxville v. Cox*, 103 Tenn. 368.

*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

*Utah.* — *Dwyer v. Salt Lake City*, 19 Utah 521.

*Virginia.* — *Newport News, etc., R., etc., Co. v. Bradford*, 100 Va. 231; *Charlottesville v. Stratton*, 102 Va. 95.

*Washington.* — *Cowie v. Seattle*, 22 Wash. 659, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468; *Benson v. Hamilton*, 34 Wash. 201; *McClammy v. Spokane*, 36 Wash. 339; *Lemman v. Spokane*, 38 Wash. 98.

*Wisconsin.* — *Collins v. Janesville*, 107 Wis. 436, 117 Wis. 415.

**Present Knowledge Required.** — Knowledge of the unsafe condition of a street, to be a complete defense, must be present knowledge. *McLeod v. Spokane*, 26 Wash. 346.

**469. 1. No Presumption of Safety.** — *King v. Colon Tp.*, 125 Mich. 511; *Perrette v. Kansas City*, 162 Mo. 238; *Wheat v. St. Louis*, 179 Mo. 572; *Cowie v. Seattle*, 22 Wash. 659, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468, 469; *Collins v. Janesville*, 107 Wis. 436, 111 Wis. 348. See also *Spring Valley v. Gavin*, 81 Ill. App. 456, affirmed 182 Ill. 322.

**2. Latent Defect.** — Although a pedestrian is charged with the assumption of the ordinary risks of attempting to pass an excavation, he does not assume the danger occasioned by latent and unknown defects, such as those caused by an undermining, whereby the bank caved when the crossing was attempted. *Kent v. Southern Bell Telephone, etc., Co.*, 120 Ga. 980.

**3. Presumption of Repair.** — People using public sidewalks may rely to some extent upon the implied assurance that the way is reasonably safe, and that, after the lapse of sufficient time in which to make repairs, defects previously noticed have been remedied. *Deland v. Cameron*, 112 Mo. App. 704.

**Question for Jury.** — Whether the plaintiff had the right to presume that the municipality had repaired the defect is a question for the jury. *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 160.

**4. Knowledge Is Element to Be Considered** — *Illinois.* — *Litchfield v. Anglim*, 83 Ill. App. 55; *Harvard v. Wilson*, 100 Ill. App. 9.

*Indiana.* — *Huntingburgh v. First*, 22 Ind. App. 66.

*Iowa.* — *Cox v. Des Moines*, 111 Iowa 646. See also *Keim v. Ft. Dodge*, 126 Iowa 27.

*Kansas.* — *Erie Tp. v. Beamer*, (Kan. 1905) 79 Pac. Rep. 1070; *Missouri, etc., Telephone Co. v. Vandervort*, (Kan. 1905) 79 Pac. Rep. 1068.

*Kentucky.* — *Fordsville v. Spencer*, (Ky. 1901) 65 S. W. Rep. 132; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Michigan.* — *Vergin v. Saginaw*, 125 Mich. 499; *Belyea v. Port Huron*, 136 Mich. 504.

*Missouri.* — *Beauvais v. St. Louis*, 169 Mo. 500; *Huff v. Marshall*, 97 Mo. App. 542; *Stevens v. Walpole*, 76 Mo. App. 213; *Jennings v. Kansas City*, 105 Mo. App. 677; *Perrigo v. St. Louis*, 185 Mo. 274; *Bradley v. Spickardsville*, 90 Mo. App. 416.

*Nebraska.* — *South Omaha v. Taylor*, (Neb. 1903) 96 N. W. Rep. 209.

*New York.* — *Richardson v. Syracuse*, 41 N. Y. App. Div. 118.

*Ohio.* — *Leber v. Kelley Island Line, etc., Co.*, 11 Ohio Cir. Dec. 568, 21 Ohio Cir. Ct. 773.

*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469.

*Utah.* — *Dwyer v. Salt Lake City*, 19 Utah 521.

*Virginia.* — *Newport News, etc., R., etc., Co. v. Bradford*, 100 Va. 231; *Charlottesville v. Stratton*, 102 Va. 95.

*Washington.* — *Reed v. Spokane*, 21 Wash. 218; *Cowie v. Seattle*, 22 Wash. 659; *McLeod v. Spokane*, 26 Wash. 346; *Benson v. Hamilton*, 34 Wash. 201; *Lemman v. Spokane*, 38 Wash. 98.

*Canada.* — *Messenger v. Bridgetown*, 31 Can. Sup. Ct. 379, affirming 33 Nova Scotia 291; *Gunlack v. Montreal*, 17 Quebec Super. Ct. 294.

**Where There Is Ice on a Sidewalk** a pedestrian is required to exercise a greater amount of care. *Denver v. Hubbard*, 29 Colo. 529.

**470. 1. Presumption of Negligence.** — *Collins v. Janesville*, 111 Wis. 348; *Lyon v. Grand Rapids*, 121 Wis. 609.

**2. Extraordinary Care Not Required.** — *Hoover v. Mapleton*, 110 Iowa 571; *Cunningham v. Clay Tp.*, 69 Kan. 373, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 470; *Cowie v. Seattle*, 22 Wash. 659; *Collins v. Janesville*, 107 Wis. 436.

A person who ventures to pass a dangerous defect in a highway, knowing its condition, is bound to exercise a degree of care proportionate to the danger. *Swart v. District of Columbia*, 17 App. Cas. (D. C.) 407.

A person passing a street which is being torn up must exercise unusual care, that is, greater care than would be required in passing over a street without obstacles. *Walsh v. Central New York Telephone, etc., Co.*, 176 N. Y. 163.

Knowledge of a defect in a walk requires one to use greater care than he would have been required to use to come up to the standard of ordinary care in the absence of such knowledge. *Lyon v. Grand Rapids*, 121 Wis. 609.

**470.** (3) *Duty to Refrain from Using Highway.* — See note 3.

Defective Sidewalk. — See notes 4, 5, 6.

Negligence as Matter of Law. — See note 7.

**471.** Accessibility of Other Way. — See notes 3, 4.**472.** (4) *Duty to Remember and Locate Defect.* — See notes 1, 2.**470. 3. Not Bound to Refrain from Using Highway**—*United States.* — See *Mosheuev v. District of Columbia*, 191 U. S. 247.*Indiana.* — *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512.*Iowa.* — *Overhouser v. American Cereal Co.*, 118 Iowa 417.*Kansas.* — *Wiens v. Ebel*, 69 Kan. 701.*Maryland.* — *Charles County v. Mandanyohl*, 93 Md. 150.*Michigan.* — *Hunt v. Lincoln Tp.*, 131 Mich. 637.*Missouri.* — *Jennings v. Kansas City*, 105 Mo. App. 677; *Swanson v. Sedalia*, 89 Mo. App. 121. See also *Wheat v. St. Louis*, 179 Mo. 572.*Oregon.* — *Gardner v. Wasco County*, 37 Oregon 392.*Texas.* — *San Antonio v. Porter*, 24 Tex. Civ. App. 444, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 470; *Dallas v. Muncion*, (Tex. Civ. App. 1904) 83 S. W. Rep. 431.*Utah.* — *Dwyer v. Salt Lake City*, 19 Utah 521.*Virginia.* — *Danville v. Robinson*, 99 Va. 448.**4. Leaving Sidewalk.** — *Savanna v. Trusty*, 98 Ill. App. 277; *Fulton v. Green*, 103 Ill. App. 96; *Evansville v. Christy*, 29 Ind. App. 44; *Houseman v. Belle Plaine*, 124 Iowa 510; *Ohlinger v. Toledo*, 10 Ohio Cir. Dec. 762, 20 Ohio Cir. Ct. 142; *Evans v. Philadelphia*, 205 Pa. St. 193, 97 Am. St. Rep. 732; *Jordan v. Seattle*, 26 Wash. 61. See also *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.Where all the sidewalks which a person could have used in going to his destination are defective, it is a question for the jury whether he should have gone into the street. *Carter v. Lineville*, 117 Iowa 532.**5. Question for Jury.** — Whether one is negligent in choosing a defective sidewalk is for the jury to determine. *Houseman v. Belle Plaine*, 124 Iowa 510.**6.** *Jennings v. Kansas City*, 105 Mo. App. 677; *Neal v. Marion*, 126 N. Car. 412.**7. Care as to Whether to Make Attempt** — *District of Columbia.* — *Mosheuev v. District of Columbia*, 17 App. Cas. (D. C.) 401, reversed 191 U. S. 247.*Georgia.* — *Columbus v. Griggs*, 113 Ga. 597, 84 Am. St. Rep. 257. See also *Kent v. Southern Bell Telephone, etc., Co.*, 120 Ga. 980.*Indiana.* — *Evansville v. Christy*, 29 Ind. App. 44. See also *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.*Massachusetts.* — *Compton v. Revere*, 179 Mass. 413.*Michigan.* — *McTiver v. Grant Tp.*, 131 Mich. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 470; *Irion v. Saginaw*, 120 Mich. 295; *Howey v. Fisher*, 122 Mich. 43; *Cloney v. Kalamazoo*, 124 Mich. 655.*Minnesota.* — *Friday v. Moorhead*, 84 Minn. 273.*New York.* — *Shepard v. Bellew, etc., Co.*, 101 N. Y. App. Div. 257.*North Carolina.* — *Neal v. Marion*, 129 N. Car. 345.*Ohio.* — *Dayton v. Taylor*, 62 Ohio St. 11.*Pennsylvania.* — *Bailey v. Brown Tp.*, 190 Pa. St. 530; *Mellor v. Bridgeport*, 191 Pa. St. 562; *Snyder v. Penn Tp.*, 14 Pa. Super. Ct., 145; *Decker v. East Washington*, 21 Pa. Super. Ct. 211.*Rhode Island.* — *Nicholas v. Peck*, 21 R. I. 404.*South Dakota.* — *Bohl v. Dell Rapids*, 15 S. Dak. 619.*Texas.* — See *Browne v. Bachman*, 31 Tex. Civ. App. 430.*Virginia.* — *Winchester v. Carroll*, 99 Va. 727, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 468 [470].*Washington.* — See *Jordan v. Seattle*, 26 Wash. 61.*Wisconsin.* — *De Pere v. Hibbard*, 104 Wis. 666; *Devine v. Fond du Lac*, 113 Wis. 61; *Schrunk v. St. Joseph*, 120 Wis. 223.*Canada.* — *Gunlack v. Montreal*, 17 Quebec Super. Ct. 294.Where a person voluntarily exposes himself to danger by traveling on a defective street and is injured, such injury is presumptive evidence of negligence on his part. *Lockport v. Licht*, 113 Ill. App. 613.**471. 3. Accessibility of Other Road or Path.** — *Evansville v. Christy*, 29 Ind. App. 44; *Irion v. Saginaw*, 120 Mich. 295; *Hoffman v. North Milwaukee*, 118 Wis. 278.Even though it would be of itself negligence to knowingly pass over a dangerous road when there is an equally available safe one, it does not necessarily follow that it would be negligence to knowingly pass over a road more dangerous than another dangerous one equally available. *Muncie v. Spence*, 33 Ind. App. 599.**4. Icy Sidewalk.** — *Irion v. Saginaw*, 120 Mich. 295; *Howey v. Fisher*, 122 Mich. 43.**472. 1. Failure to Bear Defect in Mind Not Necessarily Negligence** — *Kentucky.* — *Lancaster v. Walter*, (Ky. 1904) 80 S. W. Rep. 189.*Michigan.* — *Vergin v. Saginaw*, 125 Mich. 499.*New York.* — *Delaney v. Mt. Vernon*, 89 N. Y. App. Div. 209.*Ohio.* — *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 160.*Tennessee.* — *Knoxville v. Cox*, 103 Tenn. 368.*Utah.* — *Dwyer v. Salt Lake City*, 19 Utah 521.*Washington.* — *Cowie v. Seattle*, 22 Wash. 659, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.*Wisconsin.* — *Collins v. Janesville*, 111 Wis. 348.**Failure of Father to Notify Son.** — Where a father, knowing of the defect, forgot to warn his son who was behind him, the latter is not guilty of contributory negligence. *Miller v. Meade Tp.*, 128 Mich. 98.

- 472.** *e.* ACTS IN PRESENCE OF DANGER. — See note 3.  
*f.* TRAVELING AT NIGHT — (1) *In General.* — See note 6.

- 473.** See notes 1, 3.

Carrying Light. — See note 4.

(2) *Rate of Speed.* — See note 5.

(3) *Knowledge of Defect.* — See note 7.

*g.* WALKING IN ROADWAY. — See notes 8, 9.

- 474.** *h.* PERSONS UNDER PHYSICAL DISABILITIES — (1) *Defective Sight.* — See notes 1, 2, 3.

**Decisions of Opposite Tendency.** — A person traveling on the highway has no right to have his mind so engrossed in his business as not to think of an obstruction. *Wheat v. St. Louis*, 179 Mo. 572.

The plaintiff cannot recover where she was thoroughly familiar with the defect in the street and through forgetfulness carelessly walked into it in the nighttime. *Neal v. Marion*, 126 N. Car. 412.

- 472. 2. Mistake as to Location of Defect.** — *Tuttle v. Clear Lake*, (Iowa 1905) 102 N. W. Rep. 136.

**3. Acts in Presence of Danger.** — *Tuttle v. Clear Lake*, (Iowa 1905) 102 N. W. Rep. 136; *Nosler v. Coos Bay, etc., R. etc., Co.*, 39 Oregon 335.

**6. Presumption of Safety** — *Illinois.* — *Chicago v. Harris*, 113 Ill. App. 633.

*Iowa.* — *Earl v. Cedar Rapids*, 126 Iowa 361, 106 Am. St. Rep. 361.

*Kentucky.* — *Glasgow v. Gillenwaters*, 113 Ky. 140.

*Missouri.* — *Hitt v. Kansas City*, 110 Mo. App. 713; *Excelsior Springs v. Mississippi Valley Trust Co.*, 188 Mo. 133.

*Montana.* — *May v. Anaconda*, 26 Mont. 140.

*New York.* — *Higgins v. Brooklyn, etc., R. Co.*, 54 N. Y. App. Div. 69.

*Washington.* — *Jordan v. Seattle*, 26 Wash. 61; *Mischke v. Seattle*, 26 Wash. 616.

A person has a lawful right, notwithstanding the darkness of the night, to travel the highway. *Watts v. Southern Bell Telephone, etc., Co.*, 100 Va. 45.

- 473. 1. Greater Vigilance Required at Night.** — *Kelly v. Otterstedt*, 80 N. Y. App. Div. 398; *Jordan v. Seattle*, 26 Wash. 61.

**3. Question for Jury.** — *Hewett v. Thurman*, 41 N. Y. App. Div. 6; *Jordan v. Seattle*, 26 Wash. 61; *Huffman v. Bayham Tp.*, 26 Ont. App. 514.

**4. Need Not Carry Light.** — See *Mischke v. Seattle*, 26 Wash. 616.

**When Negligence Not to Carry Light.** — But where it is a very dark night and the road is dangerous, one who does not carry a light is negligent. *Conrad v. Upper Augusta Tp.*, 200 Pa. St. 337.

**5. Speed of Travel.** — It is not negligent *per se* to drive at the rate of six miles an hour on a much traveled road, although it is a very dark night. *Huffman v. Bayham Tp.*, 26 Ont. App. 514.

**7. Knowledge of Defect.** — *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9; *Jordan v. Seattle*, 26 Wash. 61; *Madill v. Caledon Tp.*, 3 Ont. L. Rep. 66. See also *Tuttle v. Clear Lake*, (Iowa 1905) 102 N. W. Rep. 136.

**8. Walking in Roadway.** — *Bell v. Clarion*, 115 Iowa 397; *Glasgow v. Gillenwaters*, 113 Ky.

140; *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317; *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 160.

**Middle of Road Proper Place.** — There is a presumption of negligence on the part of a person, who, on a dark night, walks on the sidepath of a country road, the middle of the highway being the proper place. *Siegler v. Mellinger*, 203 Pa. St. 256, 93 Am. St. Rep. 767.

**9. Crossing Highway** — *Georgia.* — *Augusta v. Tharpe*, 113 Ga. 152.

*Iowa.* — *Bell v. Clarion*, 115 Iowa 357.

*Kentucky.* — *Glasgow v. Gillenwaters*, 113 Ky. 140.

*Maryland.* — *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317.

*Texas.* — *Dallas v. Webb*, 22 Tex. Civ. App. 48.

*Virginia.* — *Winchester v. Carroll*, 99 Va. 727, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 473.

It is not negligent *per se* to pass from the sidewalk to the street at a place other than a street crossing. *Bell v. Clarion*, 113 Iowa 126; *Plummer v. Milan*, 79 Mo. App. 439.

A person crossing at such a place assumes the danger of a street kept in ordinary safe condition, but not dangers caused by unnecessary defects or obstructions. *Durbin v. Napoleon*, 11 Ohio Cir. Dec. 584, 21 Ohio Cir. Ct. 160.

**Ridge of Snow at Edge of Sidewalk.** — A municipality is not liable for injuries to a pedestrian, caused by a ridge of snow at the edge of the sidewalk, while crossing the street at a place other than the regular crossing. *Olive v. Westmount*, 16 Quebec Super. Ct. 426.

**Crossing at Night.** — Where the plaintiff, on a dark night, without previous knowledge of the conditions of the locality, attempted to pass from the sidewalk space into the street, he was held to be negligent. *Holding v. St. Joseph*, 92 Mo. App. 143.

**474. 1. Persons under Disabilities** — *Defective Sight.* — *Yeager v. Spirit Lake*, 115 Iowa 593; *Homewood v. Hamilton*, 1 Ont. L. Rep. 266.

**2. Total Blindness.** — *Carter v. Nunda*, 55 N. Y. App. Div. 501.

**3. Vigilance Necessary.** — *Kaiser v. Hahn*, 126 Iowa 561; *Ham v. Lewiston*, 94 Me. 265.

But see *Hill v. Glenwood*, 124 Iowa 479, holding that a blind person is not required to exercise a higher degree of care, and *Yeager v. Spirit Lake*, 115 Iowa 593, holding that ordinary care under the circumstances is all that is required of one who has a defective sight.

**Feeling Way with Cane.** — Where a pedestrian is old and has defective eyesight, and, knowing that a certain railing is gone, tries



- 474.** *i.* INTOXICATION. — See note 6.  
*j.* DEFECTS IN VEHICLE, HORSE, OR HARNESS. — See note 7.  
 Question of Ordinary Care. — See note 8.
- 475.** See note 1.
- 476.** See note 1.  
 Obstruction Originally Lawful. — See note 2.  
 Direct Act of Municipality. — See note 3.

to feel his way with a cane, a finding of contributory negligence is warranted. *Garbanati v. Durango*, 30 Colo. 358.

**474. 6. Intoxication as Defense.** — *Thuis v. Vincennes*, (Ind. App. 1905) 73 N. E. Rep. 141; *Sylvester v. Casey*, 110 Iowa 256; *Atchison v. Acheson*, 9 Kan. App. 33; *Guertin v. Hudson*, 71 N. H. 505, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 474.

Intoxication is evidence from which the jury may infer contributory negligence. *Rhyner v. Menasha*, 107 Wis. 201.

**7. Defects in Vehicle, Horse, or Harness.** — *Gardner v. Wasco County*, 37 Oregon 392, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 474; *Nosler v. Coos Bay, etc., R., etc., Co.*, 39 Oregon 335, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 474. See also *Foley v. East Flamborough Tp.*, 26 Ont. App. 43.

**8. Care in Selection for Use.** — *Gardner v. Wasco County*, 37 Oregon 392.

**475. 1. Question for Jury — Fitness of Vehicle.** — *Gardner v. Wasco County*, 37 Oregon 392; *Nosler v. Coos Bay, etc., R., etc., Co.*, 39 Oregon 335. See also *Cunningham v. Thief River Falls*, 84 Minn. 21.

**Riding Without Saddle or Bridle.** — It cannot be said, as a matter of law, that a man who rides a gentle horse, with a halter only, and without saddle or bridle, is guilty of such contributory negligence as will preclude a recovery for injuries caused by a defect in a public street. *Helbig v. Grays Harbor Electric Co.*, 37 Wash. 130.

**8. Necessity of Notice — Colorado.** — *Boulder v. Weger*, 17 Colo. App. 69.

*Delaware.* — *Downs v. Smyrna*, 2 Penn. (Del.) 132; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*District of Columbia.* — *District of Columbia v. Payne*, 13 App. Cas. (D. C.) 500.

*Illinois.* — *Reid v. Chicago*, 83 Ill. App. 554; *Decatur v. Hamilton*, 89 Ill. App. 561; *Williams v. Carterville*, 97 Ill. App. 160; *Sherman v. Chicago*, 101 Ill. App. 312.

*Indiana.* — *Evansville v. Senhenn*, 26 Ind. App. 362; *Lewisville v. Ratson*, 29 Ind. App. 21; *Huntington v. Lusch*, 33 Ind. App. 476.

*Kansas.* — *Holitz v. Kansas City*, 68 Kan. 157; *Cunningham v. Clay Tp.*, 69 Kan. 373.

*Kentucky.* — *Wickliffe v. Moring*, 113 Ky. 597; *Canfield v. Newport*, (Ky. 1903) 73 S. W. Rep. 788; *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 206; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

*Maryland.* — *Keen v. Havre de Grace*, 93 Md. 34.

*Massachusetts.* — *Parker v. Boston*, 175 Mass. 501; *Dwyer v. Boston*, 180 Mass. 381.

*Michigan.* — *Newman v. Ann Arbor*, 134 Mich. 29.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

*Missouri.* — *Young v. Webb City*, 150 Mo. 333; *Carvin v. St. Louis*, 151 Mo. 334; *Baustian v. Young*, 152 Mo. 317; *McKissick v. St. Louis*, 154 Mo. 588; *Buckley v. Kansas City*, 156 Mo. 16; *Carle v. De Soto*, 156 Mo. 443; *Williams v. Hannibal*, 94 Mo. App. 549; *Fehlauer v. St. Louis*, 178 Mo. 635; *Gerber v. Kansas City*, 105 Mo. App. 191; *Ball v. Neosho*, 109 Mo. App. 683.

*Nebraska.* — *Nothdurft v. Lincoln*, 66 Neb. 430, on rehearing 66 Neb. 434; *South Omaha v. Meyers*, (Neb. 1902) 92 N. W. Rep. 743; *Goddard v. Lincoln*, (Neb. 1903) 96 N. W. Rep. 273.

*New York.* — *Tarta v. Rochester*, 41 N. Y. App. Div. 188; *Blakeslee v. Geneva*, 61 N. Y. App. Div. 42; *Leary v. Yonkers*, 95 N. Y. App. Div. 126.

*North Carolina.* — *Jones v. Greensboro*, 124 N. Car. 310.

*Ohio.* — *Fremont v. Dunlap*, 69 Ohio St. 286; *Alliance v. Campbell*, 6 Ohio Cir. Dec. 762, 17 Ohio Cir. Ct. 595; *Circleville v. Sohn*, 11 Ohio Cir. Dec. 193, 20 Ohio Cir. Ct. 368.

*Pennsylvania.* — *Rogers v. Williamsport*, 199 Pa. St. 450; *Allen v. East Buffalo Tp.*, 22 Pa. Co. Ct. 346; *Hopkins v. Williamsport*, 25 Pa. Super. Ct. 498.

*Tennessee.* — *Franklin v. House*, 104 Tenn. 1.

*Texas.* — *Sherman v. Greening*, (Tex. Civ. App. 1903) 73 S. W. Rep. 424; *Houston v. Vatter*, 32 Tex. Civ. App. 298.

*Wisconsin.* — *Whitty v. Oshkosh*, 106 Wis. 87; *Rhyner v. Menasha*, 107 Wis. 201.

**476. 1. Opinion of Authorities Immaterial.** — *Cunningham v. Clay Tp.*, 69 Kan. 373.

**2. Obstruction Originally Lawful.** — *Lincoln v. Pirner*, 59 Neb. 634.

**3. Direct Act of Municipality — Illinois.** — *Salem v. Webster*, 192 Ill. 369.

*Indiana.* — *Muncie v. Hey*, (Ind. 1905) 74 N. E. Rep. 250.

*Iowa.* — *Evans v. Iowa City*, 125 Iowa 202.

*Kentucky.* — *Carroll v. Louisville*, (Ky. 1904) 78 S. W. Rep. 1117.

*Maine.* — *Jones v. Deering*, 94 Me. 165.

*Maryland.* — *Baltimore v. Walker*, 98 Md. 637.

*Massachusetts.* — *Pratt v. Cohasset*, 177 Mass. 488.

*Minnesota.* — *Kleopfert v. Minneapolis*, 93 Minn. 118; *McDonald v. Duluth*, 93 Minn. 206.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

*Missouri.* — *Brake v. Kansas City*, 100 Mo. App. 611.

*Ohio.* — *Alliance v. Campbell*, 6 Ohio Cir. Dec. 762, 17 Ohio Cir. Ct. 595.

*Pennsylvania.* — *Hager v. Wharton Tp.*, 200

**477.** See note 1.

**Statutory Liability Irrespective of Notice.** — See note 4.

*b.* **WHAT CONSTITUTES NOTICE** — (1) *Actual Notice.* — See notes

6, 9, 10.

**478.** See notes 4, 5, 6, 7, 9, 10, 12.

**479.** (2) *Implied or Constructive Notice* — (a) *In General.* — See notes 1, 3, 4.

(b) *Time of Existence of Defect.* — See note 5.

Pa. St. 281; *Rowland v. Philadelphia*, 202 Pa. St. 50.

*Rhode Island.* — *Hutchinson v. Clarke*, 26 R. I. 307.

*Texas.* — *Houston v. Owen*, (Tex. Civ. App. 1902) 67 S. W. Rep. 788.

**477. 1. Notice to Individuals Unnecessary.** — *Carroll v. Louisville*, (Ky. 1904) 78 S. W. Rep. 1117.

**4. Statutory Liability** — *In West Virginia.* — *Arthur v. Charleston*, 51 W. Va. 132.

**6. Notice to Municipal Officers.** — *Lundon v. Chicago*, 83 Ill. App. 208; *Mattoon v. Russell*, 91 Ill. App. 252; *Madison Tp. v. Scott*, 9 Kan. App. 871; *Cunningham v. Thief River Falls*, 84 Minn. 21.

**9. City Council.** — *Norman v. Teel*, 12 Okla. 69.

**10. Member of Council.** — *Pittsburg v. Broderston*, 10 Kan. App. 430.

**478. 4. Highway Officers.** — *Sprague v. Rochester*, 159 N. Y. 20.

**5. Superintendent or Commissioner of Streets** — *Maine.* — *Jones v. Deering*, 94 Me. 165.

*Michigan.* — *Hart v. New Haven*, 130 Mich. 181; *McEvoy v. Sault Ste Marie*, 136 Mich. 172.

*Missouri.* — *Small v. Kansas City*, 110 Mo. App. 721.

*Wisconsin.* — *Mauch v. Hartford*, 112 Wis. 40.

**Knowledge of a Street Inspector** is the knowledge of the city. *Williams v. Hannibal*, 94 Mo. App. 549.

**6. The Fact that the Officer Walked Along** the alleged defective sidewalk is not sufficient to establish actual notice. *McManus v. Watertown*, 88 N. Y. App. Div. 361.

**7 City Marshal.** — As a general rule, notice to the city marshal is insufficient, but where he is instructed by the city council to look after the streets and sidewalks, notice to him will be good. *Norman v. Teel*, 12 Okla. 69.

**9. Policeman.** — *Lundon v. Chicago*, 83 Ill. App. 208; *Chicago v. Davies*, 110 Ill. App. 427; *Leonard v. Butte*, 25 Mont. 410.

Where it is the duty of a policeman to report defects in the street, notice to him is notice to the city. *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28.

**10. Chicago v. Davies, 110 Ill. App. 427; *Cleveland v. Payne*, 72 Ohio St. 347; *Dallas v. Meyers*, (Tex. Civ. App. 1900) 55 S. W. Rep. 742.**

**Officers with No Duties as to Streets.** — A notice to the city treasurer, police magistrate, or other city officer whose duties in no way relate to the care of streets, would not be notice to the city. *Savanna v. Trusty*, 98 Ill. App. 277.

**12. Notice to City Clerk Not Sufficient.** — *Corey v. Ann Arbor*, 134 Mich. 376.

**479. 1. Actual Notice Required by Statute.** — *Hari v. Ohio Tp.*, 62 Kan. 315; *Stege v. Milwaukee*, 110 Wis. 484.

Actual knowledge of the defective condition of the highway is equivalent to actual notice. *Erie Tp. v. Beamer*, (Kan. 1905) 79 Pac. Rep. 1070.

**3. Implied Notice Sufficient** — *Colorado.* — *Denver v. Hyatt*, 28 Colo. 129.

*Connecticut.* — *Dean v. Sharon*, 72 Conn. 667.

*Delaware.* — *Downs v. Smyrna*, 2 Penn. (Del.) 132; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*Illinois.* — *Lockport v. Richards*, 81 Ill. App. 533; *Reid v. Chicago*, 83 Ill. App. 554; *Streator v. O'Brien*, 103 Ill. App. 85; *Chicago v. Gillett*, 108 Ill. App. 455.

*Indiana.* — *Evansville v. Frazer*, 24 Ind. App. 628.

*Kentucky.* — *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229.

*Maryland.* — *Keen v. Havre de Grace*, 93 Md. 34.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

*Missouri.* — *Buckley v. Kansas City*, 95 Mo. App. 188; *Clark v. Brookfield*, 97 Mo. App. 16; *Small v. Kansas City*, 185 Mo. 291.

*Nebraska.* — *Anderson v. Albion*, 64 Neb. 280.

*Oklahoma.* — *Norman v. Teel*, 12 Okla. 69.

*Texas.* — *Dallas v. Moore*, 32 Tex. Civ. App. 230.

*Washington.* — *Born v. Spokane*, 27 Wash. 719; *Gallamore v. Olympia*, 34 Wash. 379.

**4. Matter of Notoriety.** — *Jones v. Greensboro*, 124 N. Car. 310.

**5. Time of Existence of Defect** — *Connecticut.* — *Dean v. Sharon*, 72 Conn. 667.

*Delaware.* — *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*District of Columbia.* — *Domer v. District of Columbia*, 21 App. Cas. (D. C.) 284.

*Illinois.* — *Streator v. Chrisman*, 182 Ill. 215; *Streator v. O'Brien*, 103 Ill. App. 85; *Chicago v. Gillett*, 108 Ill. App. 455; *Chenoa v. Kramer*, 109 Ill. App. 85; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Birch v. Charleston Light, etc., Co.*, 113 Ill. App. 229; *Nokomis v. Farley*, 113 Ill. App. 161.

*Indiana.* — *Mt. Vernon v. Hoehn*, 22 Ind. App. 282; *Indianapolis v. Mitchell*, 27 Ind. App. 589; *Lewisville v. Batson*, 29 Ind. App. 21; *Michigan City v. Phillips*, 163 Ind. 449.

*Iowa.* — *Smith v. Sioux City*, 119 Iowa 50.

*Kentucky.* — *Canfield v. Newport*, (Ky. 1903) 73 S. W. Rep. 788; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229.

*Michigan.* — *Corey v. Ann Arbor*, 134 Mich. 376.

*Missouri.* — *McKissick v. St. Louis*, 154 Mo. 588; *Buckley v. Kansas City*, 156 Mo. 16; *Reed v. Mexico*, 101 Mo. App. 155; *Fehlauer v. St. Louis*, 178 Mo. 635; *Small v. Kansas City*, 185 Mo. 291.

**480.** See notes 1, 2, 3, 4, 5.

**481.** (c) Character of Highway. — See note 2.

(d) Character of Defect. — See notes 3, 4.

(e) Structures Liable to Decay. — See note 6.

**482.** (f) Defects Noticed by Persons Passing. — See note 2.

(g) Generally Defective Condition of Highway. — See notes 5, 6.

*New York.* — *Donnelly v. Rochester*, 166 N. Y. 315; *Osterhout v. Bethlehem*, 55 N. Y. App. Div. 198.

*Ohio.* — *Cincinnati v. Frazer*, 9 Ohio Cir. Dec. 487, 18 Ohio Cir. Ct. 50.

*Oklahoma.* — *Norman v. Teel*, 12 Okla. 69.

*Tennessee.* — *Franklin v. House*, 104 Tenn. 1.

*Texas.* — *Davis v. Austin*, 22 Tex. Civ. App. 460.

*Washington.* — *Cowie v. Seattle*, 22 Wash. 659; *Born v. Spokane*, 27 Wash. 719.

**480. 1. Time Sufficient to Sustain Implication of Notice — Defect Existing a Year or More —**  
*Colorado.* — *Denver v. Murray*, 18 Colo. App. 142.

*Delaware.* — *Douns v. Smyrna*, 2 Penn. (Del.) 132.

*Illinois.* — *Lockport v. Richards*, 81 Ill. App. 533.

*Indiana.* — *Michigan City v. Phillips*, 163 Ind. 449.

*Kansas.* — *Atchison v. Acheson*, 9 Kan. App. 33.

*Kentucky.* — *Paducah R., etc., Co. v. Ledsinger*, (Ky. 1901) 63 S. W. Rep. 11; *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9.

*Michigan.* — *Cutcher v. Detroit*, (Mich. 1905) 102 N. W. Rep. 629.

*Missouri.* — *Buckley v. Kansas City*, 95 Mo. App. 188; *Hitt v. Kansas City*, 110 Mo. App. 713.

*New York.* — *Fisher v. Mt. Vernon*, 41 N. Y. App. Div. 293.

*Washington.* — *Gallamore v. Olympia*, 34 Wash. 379.

*Wisconsin.* — *Whitty v. Oshkosh*, 106 Wis. 87.

**2. Defect Existing a Month or More —**  
*Colorado.* — *Denver v. Hyatt*, 28 Colo. 129.

*Illinois.* — *Belvidere v. Crichton*, 81 Ill. App. 595; *Kankakee v. Steinbach*, 89 Ill. App. 513; *Taylorville v. Stafford*, 99 Ill. App. 418, *affirmed* 196 Ill. 288; *Chicago v. Davies*, 110 Ill. App. 427.

*Indiana.* — *Indianapolis v. Mitchell*, 27 Ind. App. 589.

*Iowa.* — *Hoover v. Mapleton*, 110 Iowa 571; *Wilberding v. Dubuque*, 111 Iowa 484; *Brown v. Chillicothe*, 122 Iowa 640.

*Michigan.* — *Urtel v. Flint*, 122 Mich. 65.

*Missouri.* — *Young v. Webb City*, 150 Mo. 333; *Clark v. Brookfield*, 97 Mo. App. 16; *DeLand v. Cameron*, 112 Mo. App. 704.

*New York.* — *Cummings v. New Rochelle*, 38 N. Y. App. Div. 583.

*Washington.* — *Devenish v. Spokane*, 21 Wash. 77; *Shearer v. Buckley*, 31 Wash. 370.

*Wisconsin.* — *Steger v. Milwaukee*, 110 Wis. 484.

**3. Defect Existing Between a Week and a Month —**  
*Illinois.* — *Streator v. Chrisman*, 82 Ill. App. 24, *affirmed* 182 Ill. 215; *Chicago v. Gillett*, 108 Ill. App. 455.

*Indiana.* — *Huntington v. Lusch*, 33 Ind. App. 476.

*Missouri.* — *Straub v. St. Louis*, 175 Mo. 413.

*New York.* — *Sweet v. Poughkeepsie*, 75 N. Y. App. Div. 274.

Evidence of the condition of the highway ten days previous to the accident is admissible as showing time for the municipality to discover the defect. *Burt v. Utah Light, etc., Co.*, 26 Utah 157.

**4. Defect Existing Less than a Week.** — *Covington v. Johnson*, (Ky. 1902) 69 S. W. Rep. 703; *O'Hara v. Buffalo*, 39 N. Y. App. Div. 443; *Reed v. Schuylkill Haven*, 22 Pa. Super. Ct. 27.

**Ice on Sidewalk Five Days — No Notice.** — Where ice formed on a sidewalk on Monday it was held that the city would not be presumed to have had notice on the succeeding Friday. *Corey v. Ann Arbor*, 134 Mich. 376.

**5. Defect Existing One Day or Less.** — The municipality under certain circumstances may be charged with notice of a defect that has existed only a few hours or a fraction of a day. *Beauvais v. St. Louis*, 169 Mo. 500.

**481. 2. Character of Highway.** — *Young v. Webb City*, 150 Mo. 333; *McKissick v. St. Louis*, 154 Mo. 588.

**3. Character of Defect.** — *Domer v. District of Columbia*, 21 App. Cas. (D. C.) 284; *Streator v. Chrisman*, 182 Ill. 215; *Lincoln v. Pirner*, 59 Neb. 634; *Matthews v. New York*, 78 N. Y. App. Div. 422; *Davis v. Austin*, 22 Tex. Civ. App. 460.

**4. Latent Defects —**  
*Georgia.* — *Columbus v. Anglin*, 120 Ga. 785.

*Illinois.* — *Powell v. Bowen*, 92 Ill. App. 453.

*Kentucky.* — *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 206.

*Maryland.* — *Keen v. Havre de Grace*, 93 Md. 34.

*Minnesota.* — See *Kennedy v. St. Cloud*, 90 Minn. 523.

*Missouri.* — *Carvin v. St. Louis*, 151 Mo. 334; *Buckley v. Kansas City*, 156 Mo. 16.

*North Carolina.* — *Jones v. Greensboro*, 124 N. Car. 310.

**6. Of Sidewalk —**  
*Illinois.* — *Mattoon v. Woodland*, 97 Ill. App. 13.

*Indiana.* — *Evanville v. Frazer*, 24 Ind. App. 628.

*Iowa.* — See *Frohs v. Dubuque*, 109 Iowa 219.

*Minnesota.* — *Peterson v. Cokato*, 84 Minn. 205; *Kennedy v. St. Cloud*, 90 Minn. 523.

*Mississippi.* — *Carver v. Jackson*, 82 Miss. 583.

**482. 2. Sufficiency to Attract Notice of Persons.** — *Alliance v. Campbell*, 6 Ohio Cir. Dec. 762, 17 Ohio Cir. Ct. 595.

**5. General Disrepair of Highway.** — *Evans v. Iowa City*, 125 Iowa 202; *Kuntsch v. New Haven*, 83 Mo. App. 174; *Nothdurft v. Lincoln*, 66 Neb. 430.

**482.** (h) Notice of Other Defects. — See notes 9, 10.

**483.** (i) Question for Jury. — See notes 1, 2.

(j) Evidence. — See notes 3, 4, 5, 6.

**13. Notice Preliminary to Suit — a. IN GENERAL.** — See note 7.

**Evidence of General Disrepair Admissible to Show Notice.** — *Illinois.* — *Elgin v. Nofs*, 212 Ill. 20, 200 Ill. 252; *Taylorville v. Stafford*, 196 Ill. 288.

*Iowa.* — *Beaver v. Eagle Grove*, 116 Iowa 485; *Kircher v. Larchwood*, 120 Iowa 578.

*Michigan.* — *Boyle v. Saginaw*, 124 Mich. 348.

*Missouri.* — *Huff v. Marshall*, 97 Mo. App. 542.

*Washington.* — *Laurie v. Ballard*, 25 Wash. 127; *Shearer v. Buckley*, 31 Wash. 370.

*Wisconsin.* — *Viellesse v. Green Bay*, 110 Wis. 160; *Pumoro v. Merrill*, (Wis. 1905) 103 N. W. Rep. 464.

**482. 6.** If there are apparent and obvious defects so near and closely related to a condition which is apparently safe, but in fact defective, that an investigation of the former would lead to a knowledge of the latter, the city is presumed to have notice of the latter defect. *Dallas v. Moore*, 32 Tex. Civ. App. 230.

**9. Defect of Different Character.** — *Nothdurft v. Lincoln*, 66 Neb. 430.

**10. Defect Apparent During Repairs.** — *Dallas v. Muncion*, (Tex. Civ. App. 1904) 83 S. W. Rep. 431.

**483. 1. Notice Question for Jury** — *Colorado.* — *Denver v. Baldasari*, 15 Colo. App. 157; *Denver v. Hyatt*, 28 Colo. 129.

*Delaware.* — *Jarrell v. Wilmington*, 4 Penn. (Del.) 454.

*District of Columbia.* — *Domer v. District of Columbia*, 21 App. Cas. (D. C.) 284.

*Illinois.* — *Decatur v. Hamilton*, 89 Ill. App. 561; *Powell v. Bowen*, 92 Ill. App. 453; *Savanna v. Trusty*, 98 Ill. App. 277; *Fulton v. Green*, 103 Ill. App. 96; *McLeansboro v. Trammel*, 109 Ill. App. 524.

*Indiana.* — *Evansville v. Senhenn*, 26 Ind. App. 362; *Huntington v. Lusch*, 33 Ind. App. 476.

*Iowa.* — *Bailey v. Centerville*, 108 Iowa 20; *Smith v. Sioux City*, 119 Iowa 50.

*Kansas.* — *Burns v. Emporia*, 63 Kan. 285; *Holitz v. Kansas City*, 68 Kan. 157.

*Kentucky.* — *Henderson v. Reed*, (Ky. 1901) 62 S. W. Rep. 1039; *Wickliffe v. Moring*, 113 Ky. 597; *Madisonville v. Pemberton*, (Ky. 1903) 75 S. W. Rep. 229; *Bromley v. Bodkin*, (Ky. 1903) 77 S. W. Rep. 696; *Covington v. Jones*, (Ky. 1904) 79 S. W. Rep. 243.

*Maine.* — *Ham v. Lewiston*, 94 Me. 265.

*Massachusetts.* — *Leonard v. Boston*, 183 Mass. 68; *Stanford v. Hyde Park*, 185 Mass. 253; *Hyde v. Boston*, 186 Mass. 115; *Cornford v. Boston*, 187 Mass. 564; *McCarthy v. Dedham*, 188 Mass. 204.

*Michigan.* — *Wilkins v. Flint*, 128 Mich. 262; *Brown v. Owosso*, 130 Mich. 107; *Allen v. West Bay City*, (Mich. 1905) 103 N. W. Rep. 514.

*Missouri.* — *McKissick v. St. Louis*, 154 Mo. 588; *Beauvais v. St. Louis*, 169 Mo. 500; *Goodman v. Kahoka*, 100 Mo. App. 278; *Squiers v. Kansas City*, 100 Mo. App. 628; *Reed v. Mexico*, 101 Mo. App. 155.

*Montana.* — *Leonard v. Butte*, 25 Mont. 410.

*Nebraska.* — *South Omaha v. Meyers*, (Neb.

1902) 92 N. W. Rep. 743; *Lincoln v. Miller*, (Neb. 1901) 96 N. W. Rep. 484.

*New York.* — *Barr v. Bainbridge*, 42 N. Y. App. Div. 628; *Higgins v. Brooklyn, etc.*, R. Co., 54 N. Y. App. Div. 69; *Archer v. Mt. Vernon*, 57 N. Y. App. Div. 32; *Sweet v. Poughkeepsie*, 75 N. Y. App. Div. 274, 97 N. Y. App. Div. 82.

*Ohio.* — *Alliance v. Campbell*, 6 Ohio Cir. Dec. 762, 17 Ohio Cir. Ct. 505.

*Oklahoma.* — *Norman v. Teel*, 12 Okla. 69.

*Utah.* — *Johnson v. Park City*, 27 Utah 420.

*Washington.* — *Laurie v. Ballard*, 25 Wash. 127.

*Wisconsin.* — *Peake v. Superior*, 106 Wis. 403; *Rhyner v. Menasha*, 107 Wis. 201; *Lyon v. Grand Rapids*, 121 Wis. 609.

**2. Burns v. Emporia**, 63 Kan. 285.

**3. Evidence — Resolutions and Reports.** — *Beardstown v. Clark*, 204 Ill. 524; *Bauer v. Dubuque*, 122 Iowa 500.

**A Letter Written by the Chief Inspector of Public Works**, which shows his actual knowledge of the defect, is admissible, after his decease, to show knowledge on the part of the city. *Denver v. Cochran*, 17 Colo. App. 72.

**Service of Notice on a Lot Owner to Repair his sidewalk** is evidence of knowledge of its actual condition on the part of the city. *Wilson v. Cedar Rapids*, 123 Iowa 10.

**Admissions by the Authorities Are Competent to Show Notice.** — *Mt. Morris v. Kanode*, 98 Ill. App. 373.

**4. Complaints.** — *Wood v. Stafford Springs*, 74 Conn. 437.

**5. Other Accidents.** — *Chicago v. Vesey*, 105 Ill. App. 194, quoting 11 [15] AM. AND ENG. ENCYC. OF LAW (2d ed.) 483; *Wilberding v. Dubuque*, 111 Iowa 484; *Piper v. Spokane*, 22 Wash. 147.

**Prior Condition.** — Evidence of the condition of the walk prior to the accident is competent to charge the defendant with notice of the defect. *Butcher v. Philadelphia*, 202 Pa. St. 1.

**6. Presumptions and Inferences.** — *Chicago v. Vesey*, 105 Ill. App. 194, quoting 11 [15] AM. AND ENG. ENCYC. OF LAW (2d ed.) 483.

**7. Necessity of Notice** — *Connecticut.* — *Tiesler v. Norwich*, 73 Conn. 199.

*Iowa.* — *Giles v. Shenandoah*, 111 Iowa 83.

*Minnesota.* — *Engstrom v. Minneapolis*, 78 Minn. 200.

*New York.* — *Krall v. New York*, 44 N. Y. App. Div. 259.

*Washington.* — *Mears v. Spokane*, 22 Wash. 323.

*Wisconsin.* — *McKeague v. Green Bay*, 106 Wis. 577; *Kolb v. Fon du Lac*, 118 Wis. 311; *Garske v. Ridgeville*, 123 Wis. 503.

*Canada.* — *Leizert v. Matilda Tp.*, 26 Ont. App. 1; *McInnes v. Egremont Tp.*, 5 Ont. L. Rep. 713; *Chartrand v. Montreal*, 17 Quebec Super. Ct. 143.

But see *Foster v. Bellaire*, 127 Mich. 13, where it was held that the requirements of such a statute are not mandatory.

**484.** See notes 1, 2.

**Questions of Law and Fact.** — See note 8.

**b. BY WHOM TO BE GIVEN.** — See notes 11, 12.

**c. SUFFICIENCY** — (1) *Statement of Time of Injury.* — See note 13.

**485.** (2) *Description of Place.* — See notes 1, 2, 4, 5.

(3) *Description of Defect.* — See note 9.

**486.** (4) *Description of Injuries.* — See notes 1, 2.

(6) *Statement of Claim for Damages.* — See notes 6, 7.

**487.** *e. TIME OF GIVING NOTICE.* — See notes 1, 2.

*f. MODE OF SERVICE.* — See note 3.

**The Statute Should Be Liberally Construed.** — *Schnee v. Dubuque*, 122 Iowa 459; *Brown v. Owosso*, 126 Mich. 91; *Lincoln v. Pirner*, 59 Neb. 634.

**Claim for Damages Against Two or More Municipalities.** — In *Ontario* it is provided by statute that where the claim for damages is against two or more municipalities notice must be served on both. *Jones v. Stephenson Tp.*, 32 Ont. 226.

**484. 1. Waiver.** — *Chamberlain v. Saginaw*, 135 Mich. 61; *Van Auker v. Adrian*, 135 Mich. 534; *Mears v. Spokane*, 22 Wash. 323.

**The Common Council May Waive the formalities of a notice.** *Lindley v. Detroit*, 131 Mich. 8. See also *Hamilton v. Buffalo*, 55 N. Y. App. Div. 423, *reversed* 173 N. Y. 72; *Foster v. Belaire*, 127 Mich. 13.

**2. Allegation in Pleading.** — *Engstrom v. Minneapolis*, 78 Minn. 200; *Krall v. New York*, 44 N. Y. App. Div. 259; *Harris v. Fond du Lac*, 104 Wis. 44. See also *McKeague v. Green Bay*, 106 Wis. 577.

**8. Question of Law or Fact.** — *Schaefer v. Ashland*, 117 Wis. 553.

**11. By Third Person.** — *McKeague v. Green Bay*, 106 Wis. 577.

**12. McKeague v. Green Bay**, 106 Wis. 577.

**13. Time Should Be Stated with Reasonable Particularity** so as to identify the occasion. *McInnes v. Egremont Tp.*, 5 Ont. L. Rep. 713.

**485. 1. Description of Place.** — *Carrier v. Concord*, 68 N. H. 294; *Maloney v. Cook*, 21 R. I. 471; *McKeague v. Green Bay*, 106 Wis. 577. See also *Marcotte v. Lewiston*, 94 Me. 233.

**Place Should Be Stated with Reasonable Particularity.** — *McInnes v. Egremont Tp.*, 5 Ont. L. Rep. 713.

**2. Breen v. Cornwall**, 73 Conn. 309; *Wheeler v. Detroit*, 127 Mich. 329; *Lyons v. Red Wing*, 76 Minn. 20; *Lincoln v. Pirner*, 59 Neb. 634; *Kolb v. Fond du Lac*, 118 Wis. 311. See also *Dean v. Sharon*, 72 Conn. 667.

**Reasonable Certainty** as to the place is all that is required. *Rusch v. Dubuque*, 116 Iowa 402.

**4. Name of Highway Insufficient.** — *Mears v. Spokane*, 22 Wash. 323.

**5. Reference to a Certain Bridge.** — *York v. Athens*, 99 Me. 82.

**9. Nature of Defect.** — *Giles v. Shenandoah*, 111 Iowa 83; *Maloney v. Cook*, 21 R. I. 471; *McKeague v. Green Bay*, 106 Wis. 577. See also *Marcotte v. Lewiston*, 94 Me. 233.

**Sufficient Notice.** — A notice, giving the defect as a hole into which the person injured fell, is sufficient. *Denver v. Strobridge*, 19 Colo. App. 435.

**Insufficient Notice.** — A notice stating that the plaintiff "slipped and fell on the public highway at Denver" is insufficient as not stating what alleged defect in the walk caused the fall. *Stoors v. Denver*, 19 Colo. App. 159.

**Causes Need Not Be Enumerated.** — While the circumstances of the injury are to be stated in the notice, the causes which produced the injury are not required to be enumerated. *McCartney v. Washington*, 124 Iowa 382.

**Defect Not Mentioned in Notice.** — Where the notice sets forth as the sole ground of claim conditions caused by ice and snow upon a sidewalk, an action cannot be maintained to recover for a dangerous hole into which the injured party fell, caused by age and decay of boards, to which the slippery condition caused by coasting on the walk is alleged to be incidental. *Olcott v. St. Paul*, 91 Minn. 207.

**486. 1. Nature of Injuries.** — *Tattan v. Detroit*, 128 Mich. 650. See also *Marcotte v. Lewiston*, 94 Me. 233.

**2. See Joy v. York**, 99 Me. 237.

**6. Amount of Damages.** — *Marcotte v. Lewiston*, 94 Me. 233.

**7. Terryll v. Faribault**, 84 Minn. 341.

**487. 1. Time of Giving Notice.** — *Schmidt v. Fremont*, (Neb. 1903) 97 N. W. Rep. 830; *McInnes v. Egremont Tp.*, 5 Ont. L. Rep. 713. See also *Minns v. Omamee*, 8 Ont. L. Rep. 508, *affirming* 2 Ont. L. Rep. 579.

**2. Disability of Person Injured** — In *New Hampshire*. — *Welsh v. Franklin*, 70 N. H. 491.

**The Absence of Statutory Provision.** — *Green v. Port Jervis*, 55 N. Y. App. Div. 58; *Williams v. Port Chester*, 97 N. Y. App. Div. 84. See also *Walden v. Jamestown*, 178 N. Y. 213; *Ehrhardt v. Seattle*, 33 Wash. 664.

Where the statute required the notice to be served within forty-eight hours after the accident, service within three days is sufficient, the plaintiff being unable because of injuries to prepare his notice before such time. *Walden v. Jamestown*, 79 N. Y. App. Div. 433, *affirmed* 178 N. Y. 213.

Where the claimant is under a physical or mental disability, liberal compliance with the time limitation will not be required. *Born v. Spokane*, 27 Wash. 719; *O'Connor v. Hamilton*, 8 Ont. L. Rep. 391.

**3. Mode of Service.** — *Lyons v. Red Wing*, 76 Minn. 20; *Durham v. Spokane*, 27 Wash. 615.

**Presumption of Receipt of Notice.** — Where the plaintiff's counsel testifies that notice was sent to the corporation counsel of the city by an office boy, and it appears that the city council considered the plaintiff's claim under advice received from the corporation counsel regard-

**487. 14. Evidence as to Defective Condition — a. EXPERIENCE OF OTHERS AT SAME PLACE.** — See notes 4, 5.

**488. b. LONG CONTINUANCE OF SAME CONDITIONS.** — See note 3.

**c. CUSTOM AS TO CARE OF HIGHWAYS.** — See note 6.

**15. Damages Recoverable.** — See notes 8, 9.

**489. 16. Action Over Against Wrongdoer — a. IN GENERAL.** — See notes 3, 6.

**For Breach of Contract.** — See note 8.

**490. d. AMOUNT OF RECOVERY.** — See note 10.

**491. XIV. OBSTRUCTIONS AND ENCROACHMENTS — 1. General Considerations — Question for Jury.** — See note 7.

**492. Improper Obstruction Is Nuisance.** — See note 8.

**493. 2. Illegality Not Dependent on Prevention of Travel.** — See notes 1, 3.

ing such claim, it will be presumed that the notice was received by the corporation counsel, although the office boy is unable to swear that he delivered it. *Beattie v. Detroit*, (Mich. 1904) 100 N. W. Rep. 574.

**Who May Be Served.** — Where the statute provides that service upon the clerk or chairman of the common council is sufficient, service upon the president of such council is a sufficient compliance. *McIntee v. Middletown*, 80 N. Y. App. Div. 434.

Service upon the town treasurer and upon the individual members of the town council when separate and apart from one another, and not in session as the town council, is not sufficient, but service upon the town clerk is sufficient. *Seamons v. Fitts*, 21 R. I. 236.

**Notice to Mayor.** — See *McCartney v. Washington*, 124 Iowa 382.

**487. 4. Other Accidents at Same Place — Evidence Admissible — Illinois.** — *Taylorville v. Stafford*, 99 Ill. App. 418, affirmed 196 Ill. 288. *Iowa*. — *Frohs v. Dubuque*, 109 Iowa 219; *Yeager v. Spirit Lake*, 115 Iowa 593.

*Kansas*. — *Madison Tp. v. Scott*, 9 Kan. App. 871.

*Kentucky*. — *Yates v. Covington*, (Ky. 1904) 83 S. W. Rep. 592.

*New Hampshire*. — *Dow v. Wear*, 68 N. H. 345.

*New York*. — *Fordham v. Gouverneur*, 160 N. Y. 541.

*Ohio*. — *Russell v. Toledo*, 19 Ohio Cir. Dec. 367, 19 Ohio Cir. Ct. 418.

*Washington*. — *Smith v. Seattle*, 33 Wash. 488.

**5. Evidence Inadmissible.** — *Smart v. Kansas City*, 91 Mo. App. 586; *Goble v. Kansas City*, 148 Mo. 470.

**488. 3. Continuous Existence of Highway in Same Condition.** — *Brush v. New York*, 59 N. Y. App. Div. 12.

**6. Custom of Defendant Municipality Inadmissible.** — *McLeod v. Spokane*, 26 Wash. 346.

**8. Amount of Damages.** — *Boyle v. Saginaw*, 124 Mich. 348.

**9. Bodily Pain.** — *Wilberding v. Dubuque*, 111 Iowa 484.

**489. 3. Action Over by Municipality.** — *Holyoke v. Hadley Co.*, 174 Mass. 424; *Boston v. Coon*, 175 Mass. 283; *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547; *Brown v. Louisville*, 126 N. Car. 701, 78 Am. St. Rep. 677; *Corsicana v. Tobin*, 23 Tex. Civ. App. 492; *Atkinson v. Chatham*, 26 Ont. App. 521; *Hol-*

*land v. York Tp.*, 7 Ont. L. Rep. 533; *Rosseau v. St. Nicholas*, 15 Quebec Super. Ct. 214.

**6. Not in Pari Delicto.** — *Independence v. Missouri Pac. R. Co.*, 86 Mo. App. 585; *Corsicana v. Tobin*, 23 Tex. Civ. App. 492.

**8. Contract to Keep Highway in Repair.** — See also *Mitchell v. Hamilton*, 2 Ont. L. Rep. 58.

**490. 10.** See *Corsicana v. Tobin*, 23 Tex. Civ. App. 492.

**491. 7. Question for Jury.** — *Burnes v. St. Joseph*, 91 Mo. App. 489; *Nutter v. Pearl*, 71 N. H. 247, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491; *State v. Kean*, 69 N. H. 122; *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236; *Carpenter v. Rolling*, 107 Wis. 559.

**492. 8. Improper Obstruction Is Nuisance — England.** — *Atty.-Gen. v. Brighton*, etc., Co-operative Supply Assoc., (1900) 1 Ch. 276.

*Alabama*. — *Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46.

*District of Columbia*. — *Smith v. Davis*, 22 App. Cas. (D. C.) 298.

*Georgia*. — *Savannah*, etc., R. Co. v. *Gill*, 118 Ga. 737.

*Indiana*. — *Martin v. Marks*, 154 Ind. 549.

*Missouri*. — *State v. Campbell*, 80 Mo. App. 110.

*Pennsylvania*. — *Brown v. White*, 202 Pa. St. 297.

*Tennessee*. — *Hill v. Hoffman*, (Tenn. Ch. 1899) 58 S. W. Rep. 929.

*Virginia*. — *Richmond v. Smith*, 101 Va. 161.

*Washington*. — *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359.

*West Virginia*. — *Weston v. Ralston*, 48 W. Va. 170; *Mason v. Ohio River R. Co.*, 51 W. Va. 183; *O'Hanlin v. Carter Oil Co.*, 54 W. Va. 510.

**493. 1. Obstructions Outside of Traveled Path.** — *Reg. v. Yates*, 6 Can. Crim. Cas. (Nova Scotia) 282, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492; *State v. Kean*, 69 N. H. 122.

The obstacle must be of such a character and kind as to operate as an obstruction to public travel or to public rights, or to endanger the safety of persons traveling there, or to offend and annoy those who come in contact with it. *State v. Campbell*, 80 Mo. App. 110.

**3. Obstruction Need Not Be of Entire Highway.** — *Reg. v. Yates*, 6 Can. Crim. Cas. (Nova Scotia) 282, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492.

**493. 3. What Are Highways Subject to Obstruction — a. IN GENERAL.** — See notes 5, 8.

**494. b. MODE OF CREATION.** — See notes 3, 5.

**495. c. NECESSITY AND EFFECT OF OPENING.** — See note 3.

**4. Authority of Legislature or Municipality.** — See notes 8, 10.

**496.** See notes 2, 3, 4, 6.

**497. 6. Authorized Uses by Abutting Owners.** — See notes 4, 5, 6, 7, 8, 9.

**498. 7. Particular Modes of Obstruction — a. BUILDINGS.** — See notes 3, 4.

**493. 5. Existence of Highway.** — State v. Morgan, 79 Miss. 659; Woody v. State, (Tex. Crim. 1902) 69 S. W. Rep. 155; State v. Dry Fork R. Co., 50 W. Va. 235.

**8. Hill v. Hoffman**, (Tenn. Ch. 1899) 58 S. W. Rep. 929.

**494. 3. Highway Created by Dedication.** — Brown v. Edmonton, 23 Can. Sup. Ct. 308.

**5. Collateral Attack on Establishment.** — Penwonka v. Stewart, 13 N. Dak. 117.

**495. 3. Compare Brown v. Edmonton**, 23 Can. Sup. Ct. 308, holding that the right of the public to the free and unobstructed use of a street cannot be taken away by the existence of an obstruction when the street was dedicated.

**8. Legislative Power to Permit Obstructions.** — People v. Keating, 62 N. Y. App. Div. 348, reversed 168 N. Y. 390; Lake Shore, etc., R. Co. v. Wiley, 193 Pa. St. 496; Richmond v. Smith, 101 Va. 161. See also Young v. Rothrock, 121 Iowa 588.

**10. Power Cannot Be Exercised as Against Private Property Rights.** — See People v. Keating, 62 N. Y. App. Div. 348, reversed 168 N. Y. 390.

**496. 2. Power May Be Delegated to Municipality.** — Pittsburgh, etc., R. Co. v. Hood, 94 Fed. Rep. 618, 36 C. C. A. 423.

**3. Delegation Strictly Construed.** — Mobile v. Louisville, etc., R. Co., 124 Ala. 132; South Highland Land, etc., Co. v. Kansas City, 100 Mo. App. 518, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

**4. Revocation of Municipal License.** — South Highland Land, etc., Co. v. Kansas City, 100 Mo. App. 518, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

**6. No Municipal Power in Absence of Statute — Alabama.** — Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46; Mobile v. Louisville, etc., R. Co., 124 Ala. 132.

**District of Columbia.** — Smith v. Davis, 22 App. Cas. (D. C.) 298.

**Illinois.** — Pagames v. Chicago, 111 Ill. App. 590; Chicago v. Pooley, 112 Ill. App. 343. See also Pennsylvania Co. v. Chicago, 181 Ill. 289.

**Iowa.** — Bennett v. Mt. Vernon, 124 Iowa 537.

**Maryland.** — Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441.

**Missouri.** — South Highland Land, etc., Co.

v. Kansas City, 100 Mo. App. 518, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

**New York.** — Odell v. Bretney, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 603.

**Virginia.** — Richmond v. Smith, 101 Va. 161.

**Canada.** — Caldwell v. Galt, 27 Ont. App. 162.

**497. 4. Uses by Abutting Owners.** — Tube-

sing v. Buffalo, 51 N. Y. App. Div. 14; Kelly

v. Otterstedt, 80 N. Y. App. Div. 398; Cincin-

nati v. Fleischer, 63 Ohio St. 229.

**A Carriage Block** placed on the sidewalk near the curb is not an obstruction to the street or sidewalk. Wolf v. District of Columbia, 21 App. Cas. (D. C.) 464, affirmed 196 U. S. 152; Tiesler v. Norwich, 73 Conn. 199; Robert v. Powell, 168 N. Y. 411, 85 Am. St. Rep. 673.

**5. Deposit of Building Materials and Accessories Permitted — Illinois.** — See Pennsylvania Co. v. Chicago, 181 Ill. 289.

**Iowa.** — See Young v. Rothrock, 121 Iowa 588.

**Kansas.** — Kansas City v. McDonald, 60 Kan. 481.

**Missouri.** — Hesselbach v. St. Louis, 179 Mo. 505; Pueschell v. Kansas City Wire, etc., Works, 79 Mo. App. 459.

**New Jersey.** — Friedman v. Snare, etc., Co., (N. J. 1905) 61 Atl. Rep. 401.

**Virginia.** — Richmond v. Leaker, 99 Va. 1; Richmond v. Smith, 101 Va. 161.

See also the title **STREETS AND SIDEWALKS**, vol. 27, p. 156.

Where building materials were placed in a street under an ordinance, it must appear that they occupied no more of the street than allowed by the ordinance and that they were necessarily placed there during the continuous construction of the building. Martin v. Chicago, etc., R. Co., 87 Ill. App. 208.

**6. Deposit of Goods in Transit.** — Rachmel v. Clark, 205 Pa. St. 314; Richmond v. Smith, 101 Va. 161. See also Garibaldi v. O'Connor, 210 Ill. 284; Young v. Rothrock, 121 Iowa 588.

**7. Vehicles.** — General Electric R. Co. v. Chicago, etc., R. Co., (C. C. A.) 107 Fed. Rep. 771.

Using half the highway for several hours each day in loading and unloading vans is unreasonable. Atty-Gen. v. Brighton, etc., Co-operative Supply Assoc., (1900) 1 Ch. 276.

**8. Wagon on Sidewalk.** — Parmenter v. Marion, 113 Iowa 297.

**9. Use by Abutting Owner Must Be Reasonable.** — Atty-Gen. v. Brighton, etc., Co-operative Supply Assoc., (1900) 1 Ch. 276; Garibaldi v. O'Connor, 210 Ill. 284; Kelly v. Otterstedt, 80 N. Y. App. Div. 398; Rachmel v. Clark, 205 Pa. St. 314; Richmond v. Smith, 101 Va. 161.

**498. 3. Buildings Encroaching on Highway.** — Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46; State v. Kean, 69 N. H. 122; Northern Pac. R. Co. v. Lake, 10 N. Dak. 541; Caldwell v. Galt, 27 Ont. App. 162. See also Smith v. Davis, 22 App. Cas. (D. C.) 298.

A temporary building, erected in the street, for the purpose of giving a free exhibition, is an obstruction and a nuisance. Richmond v. Smith, 101 Va. 161.

**4. A Bay Window.** — State v. Kean, 69 N. H. 122.

- 498.** *b. FENCES, WALLS, AND GATES.* — See note 5.  
**499.** See note 1.  
*c. AWNINGS.* — See note 7.  
*d. TREES.* — See note 8.  
*e. USE OF HIGHWAY FOR TRADE PURPOSES.* — See note 10.  
**500.** See notes 1, 2, 3.  
*f. VEHICLES.* — See note 7.  
*g. COLLECTING CROWDS.* — See note 8.  
**8. Persons Liable.** — See note 12.  
**501.** *Railroad Companies.* — See notes 3, 4.  
**9. Remedies** — *a. CRIMINAL PROSECUTION.* — See note 6.  
**502.** See notes 1, 2, 3, 4, 6, 7.  
**503.** *c. PROCEEDINGS BY HIGHWAY OFFICERS FOR REMOVAL.* — See notes 3, 5.  
**504.** *Preliminary Notice or Order.* — See note 3.  
**505. XV. USER FOR PASSAGE AND TRANSIT — 1. In General** — *Sliding on the Highway.* — See note 2.

**498. 5. Fence in Highway** — *Georgia.* — Savannah, etc., R. Co. v. Gill, 118 Ga. 737.

*Indiana.* — Martin v. Marks, 154 Ind. 549.

*Kansas.* — Hayden v. Stewart, (Kan. 1905) 80 Pac. Rep. 43.

*Kentucky.* — Glasgow v. Gillenwaters, 113 Ky. 140.

*Missouri.* — State v. Craig, 79 Mo. App. 412.

*Texas.* — Kelly v. State, 46 Tex. Crim. 23.

**499. 1. Statutory Provision.** — Seidschlag v. Antioch, 207 Ill. 280; Konkel v. Pella, 122 Wis. 143.

**7. Awnings.** — Ivins v. Trenton, 68 N. J. L. 501, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 499. See also Jarrell v. Wilmington, 4 Penn. (Del.) 454.

*Veranda.* — Caldwell v. Galt, 27 Ont. App. 162.

**8. Trees.** — Frostburg v. Wineland, 98 Md. 239. See also Young v. Rothrock, 121 Iowa 588; Fockler v. Kansas City, 94 Mo. App. 464; Blackwell v. Hill, 76 Mo. App. 46.

**10. Business Convenience No Justification.** — Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc., (1900) 1 Ch. 276.

**500. 1. Use for Purposes of Trade.** — Chicago v. Pooley, 112 Ill. App. 343.

**2. Stands and Booths for Trade.** — Pagames v. Chicago, 111 Ill. App. 590; Chicago v. Pooley, 112 Ill. App. 343.

**3. Show Cases.** — Wells v. New York, 45 N. Y. App. Div. 623.

**7. When Vehicle May Stand in Highway.** — Richmond v. Smith, 101 Va. 161.

**8. Collecting of Crowds by Salvation Army.** — See Reg. v. Watson, 6 Can. Crim. Cas. (Nova Scotia) 331.

**12. Persons Liable.** — Rockport v. Rockport Granite Co., 177 Mass. 246; Stevens v. Walpole, 76 Mo. App. 213; Lawton v. Olmstead, 20 N. Y. App. Div. 544.

**501. 3. Railroads Obstructing Highways.** — Lake Shore, etc., R. Co. v. Wiley, 193 Pa. St. 496; Mason v. Ohio River R. Co., 51 W. Va. 183.

**Construction of Contract for Removal of Snow from Tracks on Highway.** — In Montreal v. Montreal St. R. Co., (1903) A. C. 482, it was held that a street railway company having contracted with the city of Montreal to keep its

track free from ice and snow, did not, having regard to the surrounding circumstances and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping the snow into the street.

**4. Standing Cars.** — Mason v. Ohio River R. Co., 51 W. Va. 183.

**6. Criminal Prosecution.** — Salter v. People, 92 Ill. App. 481; Walker v. Vicksburg, etc., R. Co., 52 La. Ann. 2036; State v. White, 96 Mo. App. 34; State v. Campbell, 80 Mo. App. 110; Dyerle v. State, (Tex. Crim. 1902) 68 S. W. Rep. 174. See also Caldwell v. Galt, 27 Ont. App. 162.

**502. 1. Prosecutions under Statutes.** — State v. Craig, 79 Mo. App. 412; Dyrley v. State, (Tex. Crim. 1901) 63 S. W. Rep. 631; Kelley v. State, 46 Tex. Crim. 23; Wees v. Coal, etc., R. Co., 54 W. Va. 421.

**2. Knowledge and Intent.** — Reg. v. Yates, 6 Can. Crim. Cas. (Nova Scotia) 292, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

**3. Wilful Obstruction.** — State v. White, 96 Mo. App. 34; Dyrley v. State, (Tex. Crim. 1901) 63 S. W. Rep. 631; Dyerle v. State, (Tex. Crim. 1902) 68 S. W. Rep. 174.

**4. Meaning of Term.** — The words "wilfully or knowingly" should be given their plain, ordinary, and natural force and effect. State v. White, 96 Mo. App. 34.

**6. Ignorance as to Highway.** — State v. White, 96 Mo. App. 34; Dyerle v. State, (Tex. Crim. 1902) 68 S. W. Rep. 174.

**7. Mistake of Law.** — Ward v. State, 42 Tex. Crim. 435.

**503. 3. Removal by Officials.** — Crouse v. Miller, 19 Pa. Super. Ct. 384; Miller v. Pierce County, 34 Wash. 592.

**5. Summary Removal.** — West Union v. Richey, 64 N. Y. App. Div. 156.

**504. 3. Preliminary Notice or Order.** — The party charged with obstructing a road is entitled to understand from the notice what place he is charged with having obstructed, so that he may ascertain what his rights are. Farlow v. Camp Point, 186 Ill. 256.

**505. 2. Sliding on Highway.** — Compare Reusch v. Licking Rolling Mill Co., (Ky. 1904) 80 S. W. Rep. 1168, where it was held that sliding is *per se* a nuisance.



**505.** 2. Extraordinary Traffic. — See note 5.

3. Moving of Houses. — See note 8.

**507.** XVI. INJURIES TO HIGHWAYS — 1. Civil Liability. — See note 4.

**HINDER.** — See note 9.

**509.** HOG. — See note 6.

**HOLDER.** — See notes 8, 9.

**510.** HOLD, HOLDING, ETC. — See note 1.

**511.** See note 1.

**512.** HOLIDAY. — See note 2.

**513.** HOME. — See note 1.

**514.** See note 1.

**515.** Support and Maintenance. — See note 1.

**505.** 5. Propulsion by Steam. — The use of a steam roller upon a street is not negligence. *McMulkin v. Chicago*, 92 Ill. App. 331.

**8.** Moving Houses. — *A. M. Richards Bldg. Moving Co. v. Boston Electric Light Co.*, 188 Mass. 265.

**507.** 4. Civil Liability for Injuries. — *Pittsburgh, etc., R. Co. v. Iddings*, 28 Ind. App. 504.

**9.** Hinder, Delay, and Defraud. — See *Edgell v. Smith*, 50 W. Va. 349.

**509.** 6. Receiving Stolen Goods. — In an indictment for receiving stolen goods the word *hog* will, in the absence of a contrary intention, be presumed to mean a live animal. *Hutchinson v. State*, 72 Ark. 640.

**8.** Holders Equivalent to Beneficiaries — Life Insurance Policy. — *Entwistle v. Travelers Ins. Co.*, 202 Pa. St. 141.

**9.** Crocker-Woolworth Nat. Bank *v. Nevada Bank*, 139 Cal. 564.

**Holder in Due Course.** — *Sutherland v. Mead*, 80 N. Y. App. Div. 103.

**Holder in His Own Right.** — See *Nash v. De Freville*, (1900) 2 Q. B. 72.

**510.** 1. *Park v. Candler*, 113 Ga. 672, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 510.

**Own and Hold in Same Sense — Shares of Stock.** — *Burden v. Burden*, 159 N. Y. 287.

**Actual Possession.** — See *Hunt v. Hopley*, 120 Iowa 695.

**Liens.** — *Willingham v. Rushing*, 105 Ga. 72.

**Hold Shares of Stock.** — Under articles of a company requiring a director to *hold* shares in his own right, it is not necessary that he *hold* as beneficial owner, but he must *hold* them so that the company can safely deal with him in respect to the shares whatever his interest may be. *Holding* as trustee without beneficial ownership is a compliance, but not *holding* in a representative capacity. *Sutton v. English, etc., Produce Co.*, (1902) 2 Ch. 502.

**511.** 1. Holding Office. — *Bledsoe v. Colgan*, 138 Cal. 34; *Keen v. Featherston*, 29 Tex. Civ. App. 563.

**Holding Over.** — *Baylis v. Ingram*, 84 N. Y. App. Div. 360.

**Holding Up a Railroad Train** is understood to mean the forcible detention of the train with intent to commit a robbery or some other felony. *Territory v. McGinnis*, 10 N. Mex. 269.

**512.** 2. Dies Non. — See *State v. Lewis*, 31 Wash. 515.

**513.** 1. Home Port. — See *Yost v. Lake Erie Transp. Co.*, (C. C. A.) 112 Fed. Rep. 748.

**Home and Foreign Missions.** — See *Bruere v. Cook*, 63 N. J. Eq. 624.

**514.** 1. Home and Domicil. — *King v. King*, 155 Mo. 406.

**515.** 1. Held Not to Include Support and Maintenance. — *Clough v. Clough*, 71 N. H. 412.

# HOMESTEAD.

By P. B. McKENZIE.

## 525. II. DEFINITION, ORIGIN, AND NATURE OF HOMESTEAD EXEMPTION —

1. Definition. — See notes 2, 3.

526. 3. Object of Homestead Laws. — See note 3.

4. Nature of Estate or Right — *a.* IN GENERAL. — See notes 4, 5.

*b.* TITLE TO PROPERTY. — See note 6.

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527. See notes 2, 3, 6.

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531. IV. CONSTITUTIONALITY OF STATUTORY PROVISIONS — 2. Constitutional Provisions and Limitations — *e.* EFFECT OF CONSTITUTIONAL PROVISIONS FOR EXEMPTION — (6) *Restraint on Alienation.* — See note 5.

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532. V. REPEAL OR MODIFICATION OF HOMESTEAD LAWS — 1. Power to Modify or Repeal — *a.* IN GENERAL. — See note 5.

525. 2. Homestead Defined. — *Lyon v. Hardin*, 129 Ala. 643.

3. *Thorp v. Wilbur*, 71 Vt. 266.

526. 3. Object of Homestead Laws — *United States*. — *In re Buckingham*, 102 Fed. Rep. 972; *Moran v. King*, 111 Fed. Rep. 730, 49 C. C. A. 578; *In re Stone*, 116 Fed. Rep. 35.

*Arkansas*. — *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282; *Grimes v. Luster*, 73 Ark. 266.

*California*. — *Matter of Adams*, 128 Cal. 380; *Matter of Fath*, 132 Cal. 609.

*Illinois*. — *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180.

*Iowa*. — *Fullerton v. Sherrill*, 114 Iowa 511.

*Kentucky*. — *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775; *Galloway v. Rowlett*, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503.

*Michigan*. — *Koster v. Gellen*, 124 Mich. 149.

*Minnesota*. — *Brown v. Hughes*, 89 Minn. 150.

*Mississippi*. — *Martin v. Martin*, 8 Miss. 533.

*Missouri*. — *Clark v. Thias*, 173 Mo. 628;

*Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

*Nebraska*. — *Blumer v. Albright*, 64 Neb. 249.

*Texas*. — *Loessin v. Washington*, 23 Tex. Civ. App. 515.

4. Nature of Homestead Estate or Right. — *Matter of Gallagher*, 134 Cal. 96; *Sayers v. Childers*, 112 Iowa 681, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 526; *Chapman v. McGrath*, 163 Mo. 292; *State Bank v. Dougherty*, 167 Mo. 1, 90 Am. St. Rep. 422; *Adams v. Adams*, 183 Mo. 396; *Osborne v. Evans*, 185 Mo. 509.

5. Property Rights Not Generally Infringed. — *Kerns v. Linden*, 23 Ohio Cir. Ct. 162.

6. Title Not Affected. — *Atwell v. Shook*, 133 N. Car. 387; *Beaty v. Richardson*, 56 S. Car. 173.

7. An Estate. — *Helm v. Kaddatz*, 107 Ill. App. 413.

527. 2. Estate for Life. — *In re Tollett*, 106

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Fed. Rep. 866, 46 C. C. A. 11 (construing the *Tennessee* statutes); *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654; *Beland v. Goss*, 68 N. H. 257; *Coile v. Hudgins*, 109 Tenn. 217.

3. Determinable Fee. — For a full discussion of the *North Carolina* decisions on this question see *Joyner v. Sugg*, 131 N. Car. 324, 132 N. Car. 580.

6. Mere Privilege. — *Sayers v. Childers*, 112 Iowa 681; *Fullerton v. Sherrill*, 114 Iowa 511; *Joyner v. Sugg*, 132 N. Car. 580; *Genell v. Hiron*, 70 Ohio St. 309; *Geiger v. Geiger*, 57 S. Car. 521.

The homestead right is a personal privilege which must be availed of in the manner provided by law. *Jones v. Dillard*, 70 Ark. 69.

528. 1. What Law Governs Right to Homestead Exemption. — *Bell v. Whitehead*, 115 Ga. 589; *Sloan v. Hunter*, 65 S. Car. 235; *Nichols, etc., Co. v. Cunningham*, 16 S. Dak. 475.

The Laws in Force at the Time of the Husband's Death fix the widow's homestead rights. *O'Rear v. Jackson*, 124 Ala. 298.

The Wife's Homestead in a Deceased Husband's Estate is governed by the statute in force at the time of her application for allotment. *Matter of Thorn*, 24 Utah 209.

Proceedings for Sale of the Excess over homestead must be conducted according to the law in force at the time of its selection. *Whitworth v. McKee*, 32 Wash. 83.

531. 5. Requiring Joinder by Wife. — *Virginia-Tennessee Coal, etc., Co. v. McClelland*, 98 Va. 424.

A contrary rule was adopted in *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517.

6. Allowing Alienation Contrary to Constitution. — Where the constitution prescribes the mode of alienation the legislature cannot alter it. *Couch v. Capitol Bldg., etc., Assoc.*, (Tenn. Ch. 1890) 64 S. W. Rep. 340.

532. 5. Impairment of Obligation of Contract. — *Folsom v. Asper*, 25 Utah 299.

**532.** Contrary View. — See note 6.

**533.** VI. RULES FOR CONSTRUCTION OF HOMESTEAD LAWS — 2. Liberal Construction. — See note 5.

**535.** VII. PERSONS ENTITLED TO BENEFIT OF HOMESTEAD EXEMPTION —

1. In General — *a.* NECESSITY FOR FAMILY. — See note 5.

**536.** *b.* HOUSEHOLDER AND HOUSEKEEPER — *Householder.* — See notes 2, 3.

*Housekeeper.* — See note 5.

**537.** 2. Definition of "Family" and "Head of Family" — *a.* IN GENERAL. — See notes 1, 2.

*b.* STATUTORY DEFINITION. — See note 3.

*c.* NUMBER OF PERSONS. — See note 6.

**538.** 3. Obligation to Support and Condition of Dependence — *a.* IN GENERAL. — See note 3.

*Illustrations.* — See notes 6, 7.

**539.** Louisiana Homestead Law. — See note 1.

*b.* MERE NATURAL OR MORAL OBLIGATION TO SUPPORT. — See note 4.

**540.** Particular Cases — In General. — See notes 3, 4, 6.

**532.** 6. View that Exemption Cannot Be Diminished. — *White v. Danforth*, 122 Iowa 403. Homestead Exemption a Vested Right. — In *Whitworth v. McKee*, 32 Wash. 83, it was held that the homestead exemption was a vested right, and the manner of making the claim was not altered by the repeal of the statute under which it was acquired.

**533.** 5. Homestead Laws to Be Liberally Construed — *United States.* — In *re* *Buckingham*, 102 Fed. Rep. 972; *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *In re Carmichael*, 108 Fed. Rep. 789; *In re Stone*, 116 Fed. Rep. 35.

*Arkansas.* — *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282.

*California.* — *Matter of Fath*, 132 Cal. 609.

*Idaho.* — *Mellen v. McMannis*, 9 Idaho 418.

*Iowa.* — *Fullerton v. Sherrill*, 114 Iowa 511; *Edmonds v. Davis*, 122 Iowa 561.

*Kansas.* — *Ard v. Pratt*, 61 Kan. 775.

*Kentucky.* — *Roark v. Bach*, 116 Ky. 457.

*Michigan.* — *Corey v. Waldo*, 126 Mich. 706, 8 Detroit Leg. N. 173.

*Minnesota.* — *Brown v. Hughes*, 89 Minn. 150.

*Missouri.* — *Clark v. Thias*, 173 Mo. 628; *Sharp v. Stewart*, 185 Mo. 518.

*Nebraska.* — *Bane v. Kopietz*, (Neb. 1901) 95 N. W. Rep. 1126.

*Tennessee.* — *Moses v. Groner*, (Tenn. Ch. 1900) 59 S. W. Rep. 161, *affirmed* 106 Tenn. 121; *Walt v. Walt*, 113 Tenn. 189.

*Texas.* — *Wallis v. Wendler*, 27 Tex. Civ. App. 235; *Birdwell v. Burleson*, 31 Tex. Civ. App. 31.

*Utah.* — *Folsom v. Asper*, 25 Utah 299.

**535.** 5. Family Necessary. — *Stodgell v. Jackson*, 111 Ill. App. 256; *Fullerton v. Sherrill*, 114 Iowa 511; *Suter v. Quarles*, 58 S. W. Rep. 990, 22 Ky. L. Rep. 1080; *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.

**536.** 2. Householder. — *Stodgell v. Jackson*, 111 Ill. App. 256; *Oppenheim v. Myers*, 99 Va. 582.

3. Necessity for Family. — *Stodgell v. Jackson*, 111 Ill. App. 256; *Gregg v. Brickley*, 27 Ind. App. 154.

5. Housekeeper. — *Lee v. Hughes*, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201.

One who provides a home for his mother, brothers, and sisters in his own home is a housekeeper. *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714.

**537.** 1. "Family" and "Head of a Family." — *In re Rafferty*, 112 Fed. Rep. 512; *Caro v. Caro*, 45 Fla. 203; *Arnold v. Coleman*, 88 Ill. App. 608; *Fullerton v. Sherrill*, 114 Iowa 511; *Betts v. Mills*, 8 Okla. 351; *Oppenheim v. Myers*, 99 Va. 582.

A "Head of a Family." — *De Cottes v. Clarkson*, 43 Fla. 1; *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714.

2. Necessary Relation Between Head of Family and Other Members. — *Betts v. Mills*, 8 Okla. 351.

3. *Oppenheim v. Myers*, 99 Va. 582.

6. Two Persons Enough. — *Collins v. Gibson*, (Ky. 1900) 54 S. W. Rep. 945.

**538.** 3. Prevailing Doctrine that Obligation to Support and Dependence Are Necessary. — *In re Morrison*, 110 Fed. Rep. 734; *Stodgell v. Jackson*, 111 Ill. App. 256; *Hyde v. Hyde*, 60 Neb. 502; *Rolator v. King*, 13 Okla. 37.

6. Man Supporting Brother or Nephew. — *Stodgell v. Jackson*, 111 Ill. App. 256.

7. Widow and Married Daughter. — *Hays City First Nat. Bank v. Vest*, 187 Ill. 389.

**539.** 1. Homestead Exemption in Louisiana. — *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299.

4. Either Legal or Natural Obligation Sufficient. — *In re Morrison*, 110 Fed. Rep. 734; *Baldwin v. Thomas*, 71 Ark. 206; *Fullerton v. Sherrill*, 114 Iowa 511; *Cross v. Benson*, 68 Kan. 495; *Collins v. Gibson*, (Ky. 1900) 54 S. W. Rep. 945; *Ragsdale v. Watkins*, 76 S. W. Rep. 45, 25 Ky. L. Rep. 506; *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714.

**540.** 3. Grandmother and Grandson. — *Chamberlain Banking House v. Zutavern*, 59 Neb. 623.

4. Man Supporting Indigent Father, Mother, Brother, or Sister. — *In re Morrison*, 110 Fed. Rep. 734; *Baldwin v. Thomas*, 71 Ark. 206; *Hyser v. Mansfield*, 72 Vt. 71.

- 541.** *f.* ILLEGITIMATE CHILDREN. — See note 4.
- 4.** Living Together and Keeping House — *a.* IN GENERAL. — See note 8.
- 542.** **5.** Widowers and Widows. — See notes 6, 7, 8.
- 543.** **6.** Unmarried Persons — Unmarried Man. — See note 5.  
Unmarried Woman. — See note 6.
- 544.** See note 1.
- 7.** Time of Acquiring Status — *b.* LIENS ATTACHING BEFORE MARRIAGE. — See note 3.
- 545.** **8.** Termination of Status — *a.* TEMPORARY SEPARATION OF FAMILY. — See note 1.  
*b.* PERMANENT SEPARATION OR LOSS OF FAMILY — In Some States. — See note 2.  
Prevailing Doctrine. — See note 4.  
Death or Removal of Wife. — See note 5.
- 546.** *d.* PERSONS HAVING CARE AND SUPPORT OF DEPENDENT FEMALES. — See note 4.
- 9.** Rights of Married Women — *a.* SEPARATE PROPERTY — (1) *In General.* — See notes 5, 6.
- 547.** Statutes Allowing to Married Women Homestead Exemption in Separate Property. — See note 1.
- 540.** **6.** A Divorced Husband Supporting a Minor Child was held entitled to claim exemption of homestead. *In re Rhodes*, 109 Fed. Rep. 117.
- A Man Supporting His Daughter-in-Law and a Grandchild** is entitled to the homestead. *Ragsdale v. Watkins*, 76 S. W. Rep. 45, 25 Ky. L. Rep. 506.
- 541.** **4.** Illegitimate Children. — *Contra*, *Moore v. Baughman*, 8 Ohio Dec. 396, 7 Ohio N. P. 149.
- 8.** Living Together and Keeping House — View that This Is Necessary. — *Beitz v. Schueller*, 8 Ohio Dec. 674, 7 Ohio N. P. 619.
- 542.** **6.** Widower Head of Family. — *Collins v. Gibson*, (Ky. 1900) 54 S. W. Rep. 945.
- 7.** Widows with Children or Dependents. — *Grimes v. Luster*, 73 Ark. 266; *Chamberlain Banking House v. Zutavern*, 59 Neb. 623; *Oppenheim v. Myers*, 99 Va. 582.
- 8.** Widower or Widow Without Children or Dependents. — *Betts v. Mills*, 8 Okla. 351.
- 543.** **5.** Unmarried Man Supporting Dependents. — *Bunker v. Coons*, 21 Utah 164, 81 Am. St. Rep. 680; *Hyser v. Mansfield*, 72 Vt. 71.
- 6.** Unmarried Women Without Dependents. — A divorced woman without children is within the operation of this rule. *Clemans v. Penfield*, 111 Iowa 511.
- 544.** **1.** Unmarried Woman Supporting Dependents. — *American Nat. Bank v. Cruger*, 31 Tex. Civ. App. 17.
- 3.** Marriage After Lien Attaches. — *Browneller v. Wells*, 109 Iowa 230.
- 545.** **1.** Temporary Separation Does Not Break Up Family. — The fact that the head of the family is confined in a lunatic asylum will not deprive him of the homestead exemption. *Holburn v. Pfannmiller*, 114 Ky. 831.
- 2.** Permanent Loss of Status as Head of a Family. — *Herrin v. Brown*, 44 Fla. 782; *Fullerton v. Sherrill*, 114 Iowa 511; *Gaar v. Wilson*, (Iowa 1901) 88 N. W. Rep. 332; *Ellinger v. Thomas*, 64 Kan. 180; *Betts v. Mills*, 8 Okla. 351.
- All Children Reaching Majority.** — In *Washington* where the surviving husband had claimed a homestead out of the community property for the benefit of himself and minor children, it was held that the subsequent attaining of majority by all the children did not affect the homestead right. *Matter of Feas*, 30 Wash. 51.
- 4.** Prevailing Doctrine Against Cessation of Right. — *United States.* — *In re Buckingham*, 102 Fed. Rep. 972.
- Arkansas.* — *Baldwin v. Thomas*, 71 Ark. 206.
- Illinois.* — *Slaterry v. Keefe*, 201 Ill. 483.
- Kentucky.* — *Collins v. Gibson*, (Ky. 1900) 54 S. W. Rep. 945; *Suter v. Quarles*, 58 S. W. Rep. 990, 22 Ky. L. Rep. 1080; *Davis v. H. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289; *Holburn v. Pfannmiller*, 114 Ky. 831.
- Nebraska.* — *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292.
- Texas.* — *Chamberlain v. Leland*, 94 Tex. 502; *Allen v. Ashburn*, 27 Tex. Civ. App. 239.
- The death of the parents will not destroy the homestead right where any of the children continue to occupy the homestead, even though such children be adults. *In re Rafferty*, 112 Fed. Rep. 512.
- The loss of the members of a widow's family will not terminate her right to the homestead. *Holmes v. Nichols*, 93 Mo. App. 513.
- 5.** Death of Wife Without Children. — *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704.
- 546.** **4.** Persons Supporting Dependent Females. — And the homestead exemption terminates on the death of the exemptioner. *Sutton v. Rosser*, 109 Ga. 204, 77 Am. St. Rep. 367.
- 5.** Married Women — Domicil of Wife. — *Wilmoth v. Gossett*, 71 Ark. 594; *Beranek v. Beranek*, 113 Wis. 272.
- 6.** Homestead in Separate Property. — *Wilmoth v. Gossett*, 71 Ark. 594; *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755; *Oppenheim v. Myers*, 99 Va. 582.
- 547.** **1.** Statutes Allowing to Married Women Homestead in Separate Property. — *Richardson v.*

**547.** (2) *Wife Supporting Family.* — See note 2.

(3) *Deserted Wife.* — See note 3.

**548.** *b. HUSBAND'S PROPERTY* — (1) *In General.* — See notes 1, 2, 3.

(2) *Deserted Wife.* — See notes 4, 5, 6.

**549.** (3) *Refusal or Failure of Husband to Claim Exemption.* — See note 2.

(4) *Conveyance or Incumbrance by Husband.* — See note 3.

**550.** (6) *Wife Who Has Left Her Husband.* — See note 2.

10. *Rights of Children.* — See notes 6, 7.

**551.** 11. *Effect of Divorce* — *b. RIGHTS OF HUSBAND* — (1) *In His Own Property.* — See note 6.

**552.** *c. RIGHTS OF WIFE* — (1) *In Her Own Property.* — See note 3.

(2) *In Her Husband's Property.* — See notes 4, 6.

Woodward, 104 Fed. Rep. 873, 44 C. C. A. 235 (construing the Virginia statutes); *In re Pope*, 98 Fed. Rep. 722 (construing the Iowa statutes); *Grimes v. Luster*, 73 Ark. 266; *Herring v. Johnston*, 72 S. W. Rep. 793, 24 Ky. L. Rep. 1940.

Under Rev. Stat. Mo. 1899, § 4335, a married woman living with her husband on her separate land, he having failed to claim any homestead in his own land, may claim homestead in her separate estate. *Sharp v. Stewart*, 185 Mo. 518.

**547. 2. Wife Supporting Family.** — The husband must be under some disability. *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755.

**3. Deserted Wife.** — *Shaw v. Foley*, 62 Ohio St. 30.

And it makes no difference that the husband contributes to her support. *Lee v. Hughes*, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201.

**Insane Wife.** — Where the husband, having mortgaged the homestead, abandoned it, leaving his adult children in possession, it was held that the right of homestead continued in the wife, though she was confined in an insane asylum, and under her right the children could hold the homestead against the purchaser at the foreclosure sale made under decree of court. *Way v. Scott*, 118 Iowa 197.

**548. 1. Claim by Wife in Husband's Property.** — *Osman v. Wisted*, 78 Minn. 295; *Temple v. Watkins Land Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1188.

**In Michigan** it has been held to be the right of the wife, as well as the husband, to protect the homestead. *Burkhardt v. Walker*, 132 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525.

**2. Wife Has No Estate in Homestead During Life of Husband.** — *Gatti v. New Orleans R., etc., Co.*, 77 Miss. 754; *Roberts v. Roberts*, 10 N. Dak. 531; *Helgebye v. Dammen*, 13 N. Dak. 167; *Beranek v. Beranek*, 113 Wis. 272.

**3. Statutes Giving to Wife Right to Claim.** — *Warner v. Warner*, 144 Cal. 615.

**In Nebraska** it was held that the wife could claim homestead in the life estate of the husband. *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801.

**4. Desertion of Wife by Husband — Express Provision.** — *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110.

**5. Under Statute Prohibiting Alienation by Husband.** — *Long v. Long*, 30 Tex. Civ. App. 368.

**In Arkansas** the deserted wife may claim the homestead against her husband's alienee. *Hall v. Roulston*, 70 Ark. 343.

A deserted wife may claim the homestead against her husband's grantee. *Hoselton v. Hoselton*, 166 Mo. 182.

**By the Michigan Statute.** — Desertion by the husband will not bar the wife's right of homestead. *Gardner v. Gardner*, 123 Mich. 673.

**6. Statutes Not Allowing Claim by Deserted Wife.** — Where, under the laws of California (Civ. Code, § 61), it was provided that a deserted wife, who had for five consecutive years been without any knowledge that her husband was living, could contract a marriage which would be valid until annulled by a court, even though her husband was living, it was held that a deserted wife who had married again and whose marriage had not been annulled could not claim the homestead of her first husband. *Matter of Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, rehearing denied 140 Cal. 294.

**549. 2. Claim by Wife on Failure or Refusal of Husband to Claim.** — *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354; *Helgebye v. Dammen*, 13 N. Dak. 167; *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967; *Ross v. Howard*, 25 Wash. 1.

**3. Claim by Wife After Conveyance or Mortgage by Husband Alone.** — *Gardner v. Gardner*, 123 Mich. 673.

**550. 2. Wife Who Has Left Husband Without Excuse.** — *Freeman v. Freeman*, 111 Tenn. 151.

**6. Rights of Children During Life of Parents.** — *Willingham v. Slade*, 112 Ga. 418; *Cutler v. Cutler*, 188 Ill. 285; *Lee v. British, etc., Mortg. Co.*, 25 Tex. Civ. App. 481; *Stewin v. Thrift*, 30 Wash. 36.

**7. Statutes Protecting Children.** — Where a father, being a widower, deserted his minor children, it was held competent for the grandfather of the children, acting as their next friend, to claim a homestead for their benefit. *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282.

**551. 6. Husband Having Custody of Children.** — *In re Rhodes*, 109 Fed. Rep. 117.

**552. 3. Rights of Wife in Her Separate Property.** — *In re Pope*, 98 Fed. Rep. 722.

**A Divorced Woman with No Children** cannot claim homestead. *Clemans v. Penfield*, 111 Iowa 511.

**4. Wife's Rights in Husband's Property.** — In Tennessee, where the statute (Shannon's Code, § 3810) provides that the homestead shall be decreed to the wife obtaining a divorce on account of her husband's fault, it was held that the wife, failing to claim the homestead

**553.** *f. DISPOSITION OF HOMESTEAD BY COURT.* — See notes 4, 5.

**554.** **12. Residence and Citizenship** — *a. RESIDENCE* — (1) *In General* — In Absence of Express Restriction. — See note 4.

**555.** **Domicil Not Equivalent to Residence.** — See note 2.

(2) *Removal from State.* — See note 3.

**556.** (5) *Rights of Married Women* — (b) *Rights of Nonresident Wife* — In Other States. — See notes 1, 2.

**VIII. TITLE OR INTEREST NECESSARY TO SUPPORT HOMESTEAD EXEMPTION** — 1. *In General.* — See notes 9, 11.

**557.** **2. Possessory Interest Necessary** — *b. REMAINDER OR REVERSION.* — See note 2.

**3. Whether Exemption Is Dependent upon Title** — *b. AS AGAINST CREDITORS* — (1) *View that Title Is Necessary.* — See note 5.

**558.** (2) *Possession Held Sufficient.* — See note 3.

*The Reason.* — See note 4.

**4. Life Estates** — *a. IN GENERAL.* — See note 7.

**559.** *b. CURTESY.* — See note 3.

**5. Leasehold Estates** — *a. IN GENERAL.* — See note 6.

**560.** *d. TENANCY AT WILL.* — See note 7.

*e. TENANCY BY SUFFERANCE.* — See note 8.

during the pendency of the divorce proceedings, could not afterwards maintain an independent suit for it against a purchaser at an execution sale made prior to the divorce. *Moore v. Ward*, 107 Tenn. 731.

**552.** **6. Wife and Children Occupying Premises.** — *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110.

**553.** **4. Effect of Partition by Decree of Divorce.** — See *Canney v. Canney*, 131 Mich. 363, 9 Detroit Leg. N. 356.

**5.** *Under the Iowa Statute.* — Where a wife was adjudged a bankrupt, and subsequently obtained a divorce from her husband, securing by the decree the homestead and custody of one child, it was held that the homestead was exempt from administration by the trustee in bankruptcy. *In re Le Claire*, 124 Fed. Rep. 654 (construing the Iowa statute).

**South Dakota.** — Comp. Laws S. Dak., § 2585, vests the court with power to give the homestead to the innocent party "either absolutely or for a limited time." *Harding v. Harding*, 16 S. Dak. 406, 102 Am. St. Rep. 694.

**554.** **4. Construed as Restricted to Residents, Though Not Expressly So Restricted.** — *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952.

**555.** **2. Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952.**

**3. Permanent Removal from State.** — *Cope v. Snider*, 99 Mo. App. 496.

**556.** **1. Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952.**

**2. Voluntary Abandonment of Husband.** — *Ullman v. Abbott*, 10 Wyo. 97.

**9. Title or Interest to Support Homestead — Estates Liable to Execution.** — *Steiner v. Berney*, 130 Ala. 289; *Bailey v. D. R. Dunlap Mercantile Co.*, 138 Ala. 415; *Jones v. Jones*, 213 Ill. 228, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 556; *McNair v. Moore*, 64 S. Car. 82.

**11. Ownership in Fee Not Necessary.** — *Moore v. Graham*, 29 Tex. Civ. App. 235.

**557.** **2. Remainder or Reversion.** — *Davis v. Brown*, (Tenn. Ch. 1901) 62 S. W. Rep. 381; *Loessin v. Washington*, 23 Tex. Civ. App. 515.

Where the remainderman died before the termination of the particular estate, it was held that his widow could not claim homestead in the property on the death of the life tenant. *Hampton v. Gilliland*, 23 Tex. Civ. App. 87.

**Devisees Occupying under Widow.** — *Roach v. Dance*, 80 S. W. Rep. 1097, 26 Ky. L. Rep. 157.

**5.** *Want of Title as Against Creditors — View that Title Is Necessary.* — *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654.

**558.** **3. View that Debtor's Want of Title Cannot Be Set Up by Creditor.** — *Ard v. Pratt*, 61 Kan. 775, reversing 10 Kan. App. 335; *Birdwell v. Burleson*, 31 Tex. Civ. App. 31; *American Nat. Bank v. Cruger*, 31 Tex. Civ. App. 17.

**4.** *Ard v. Pratt*, 61 Kan. 775.

**7. Life Estate Will Support Homestead.** — *In re Marquette*, 103 Fed. Rep. 777, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 558; *Steiner v. Berney*, 130 Ala. 289; *Sharp v. Stewart*, 185 Mo. 518; *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801; *Silverman v. Landrum*, (Tex. Civ. App. 1900) 56 S. W. Rep. 107; *Birdwell v. Burleson*, 31 Tex. Civ. App. 31.

**559.** **3. Tenant by Curtesy.** — *Suter v. Quarles*, 58 S. W. Rep. 990, 22 Ky. L. Rep. 1080.

**6. Leasehold Estates.** — *Bailey v. D. R. Dunlap Mercantile Co.*, 138 Ala. 415; *White v. Danforth*, 122 Iowa 403; *Allen v. Ashburn*, 27 Tex. Civ. App. 239; *Moore v. Graham*, 29 Tex. Civ. App. 235; *Birdwell v. Burleson*, 31 Tex. Civ. App. 31; *Beranek v. Beranek*, 113 Wis. 272.

**Croppers.** — One growing crops on shares is not a leaseholder and cannot claim homestead rights in the lands cultivated or crops raised thereon. *Webb v. Garrett*, 30 Tex. Civ. App. 240.

**560.** **7. Tenancy at Will.** — *Jones v. Jones*, 213 Ill. 228; *Tapley v. Ogle*, 162 Mo. 190; *Howard v. Raymers*, 64 Neb. 213; *Rank v. Garvey*, 66 Neb. 767.

**8. Tenancy by Sufferance.** — *Tapley v. Ogle*, 162 Mo. 190.

**560.** 6. Equitable Estate or Interest — *a.* IN GENERAL. — See note 11.

**561.** *c.* LAND HELD UNDER CONTRACT TO PURCHASE — (1) *In General.* — See note 3.

**562.** (2) *Oral Contract* — Statute of Frauds. — See note 3.

(4) *Purchase of Public Lands.* — See note 5.

(5) *Claim as Against Vendor.* — See note 6.

**563.** (6) *Abandonment of Contract.* — See note 1.

*d.* EQUITY OF REDEMPTION. — See note 3.

*e.* TITLE TAKEN IN ANOTHER'S NAME — (1) *In General.* — See notes 5, 6.

**564.** (2) *Fraud upon Creditors.* — See note 1.

7. Several Lots or Tracts Held by Different Titles. — See note 2.

8. Property Held in Trust. — See notes 3, 4.

**565.** 9. Title in Husband or Wife or Both — *a.* SEPARATE PROPERTY OF WIFE — Claim of Homestead by Husband. — See notes 1, 2.

**566.** *d.* SEPARATE HOMESTEADS. — See note 3.

*e.* LAND OWNED IN COMMON OR JOINTLY. — See note 4.

*f.* TENANCY BY ENTIRETIES. — See note 5.

**560.** 11. Prevailing Doctrine to Contrary — *Illinois.* — Miller *v.* McAlister, 197 Ill. 72.

*Iowa.* — Foster *v.* Rice, 126 Iowa 190.

*Kentucky.* — Carr *v.* Winlock, 109 Ky. 488.

*Minnesota.* — Keith *v.* Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566; Hook *v.* Northwest Thresher Co., 91 Minn. 482.

*Missouri.* — Barton *v.* Walker, 165 Mo. 25.

*North Dakota.* — Helgebye *v.* Dammen, 13 N. Dak. 167.

*Texas.* — Birdwell *v.* Burleson, 31 Tex. Civ. App. 31.

**561.** 3. Land Held under Contract to Purchase — *Iowa.* — Duffield *v.* Dosh, 124 Iowa 286.

*Kentucky.* — Carr *v.* Winlock, 109 Ky. 488; Torbitt *v.* Jackson, 80 S. W. Rep. 1123, 26 Ky. L. Rep. 196.

*Michigan.* — Gardner *v.* Gardner, 123 Mich. 673.

*Minnesota.* — Hook *v.* Northwest Thresher Co., 91 Minn. 482; Keith *v.* Albrecht, 89 Minn. 247, 99 Am. St. Rep. 560.

*Nebraska.* — Rawles *v.* Reichenbach, 65 Neb. 29.

*North Dakota.* — Helgebye *v.* Dammen, 13 N. Dak. 167, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

*Texas.* — Powers *v.* Palmer, 36 Tex. Civ. App. 212.

**562.** 3. Part Performance under Oral Contract — Statute of Frauds. — Gardner *v.* Gardner, 123 Mich. 673. But see Alvis *v.* Alvis, 123 Iowa 546.

5. Purchasers of Public Lands. — Rawles *v.* Reichenbach, 65 Neb. 29; Gibbons *v.* Hall, (Tex. Civ. App. 1900) 59 S. W. Rep. 814.

6. No Homestead as Against Liability for Purchase Money. — Helgebye *v.* Dammen, 13 N. Dak. 167, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 562.

**563.** 1. Abandonment of Contract. — Helgebye *v.* Dammen, 13 N. Dak. 167, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563.

3. Homestead May Be Claimed in Equity of Redemption. — Foster *v.* Rice, 126 Iowa 190; Elstroth *v.* Young, 83 Mo. App. 253; State *v.* Hull, 99 Mo. App. 703; Barton *v.* Walker, 165 Mo. 25; Rose *v.* Smith, 167 Mo. 81; Scheel *v.* Lackner, (Neb. 1903) 93 N. W. Rep. 741.

5. Payment of Consideration for Conveyance to Another. — Where the husband paid the consideration and title was taken in the wife's name, and she died leaving him in possession of the property, which he occupied for nine years and died, it was held that his holding was of the homestead right and on his death the property descended to the wife's heirs. McGuire *v.* McGuire, (Iowa 1900) 81 N. W. Rep. 451.

6. See Richards *v.* Orr, 118 Iowa 724; Roark *v.* Bach, 116 Ky. 457.

In Oklahoma the rule as stated in the text prevails. Hunter *v.* Griffith, 12 Okla. 436.

**564.** 1. Transactions in Fraud of Creditors. — Where a solvent husband buys a homestead and takes the title in his wife, his creditors cannot complain. Lang *v.* Williams, 166 Mo. 1.

2. Claiming Several Lots or Tracts Held by Different Titles. — Kilmer *v.* Garlick, 185 Ill. 406; Clark *v.* Thias, 173 Mo. 628.

3. Title Held in Trust — Rights of Trustee. — Rivers *v.* Morris, 78 S. W. Rep. 196, 25 Ky. L. Rep. 1416.

4. Resulting Trusts. — Treece *v.* Carr, (Tenn. Ch. 1900) 58 S. W. Rep. 1078; Kaphan *v.* Toney, (Tenn. Ch. 1899) 58 S. W. Rep. 909.

**565.** 1. Jurisdictions in Which Homestead May Be Claimed in Wife's Property. — Worley *v.* Hicks, 161 Mo. 340; Rouse *v.* Caton, 168 Mo. 288, 90 Am. St. Rep. 456; Brin *v.* Anderson, 25 Tex. Civ. App. 323.

2. Jurisdictions in Which Husband Has No Homestead in Wife's Property. — Arkle *v.* Beedie, 141 Cal. 459.

**566.** 3. Separate Homesteads. — Grimes *v.* Luster, 73 Ark. 266; Rouse *v.* Caton, 168 Mo. 288, 90 Am. St. Rep. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 566. *Contra*, Friday *v.* Glasser, 14 Pa. Super. Ct. 94.

4. Land Owned in Common or Jointly by Husband and Wife. — *In re Carmichael*, 108 Fed. Rep. 789; Lee *v.* Hughes, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201; Chapman *v.* White Sewing Mach. Co., 78 Miss. 438, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 566.

5. Land Held in Tenancy by Entireties. — Cole *v.* Cole, 126 Mich. 569.

**566.** 10. Title Acquired by Descent or Devise. — See note 7.

**567.** See note 1.

12. Title by Adverse Possession. — See note 3.

13. Public Lands of the United States. — See note 4.

15. Mortgaged Premises. — See note 6.

17. Property Held in Common or in Joint Tenancy — *a.* VIEW THAT HOMESTEAD CANNOT BE CLAIMED. — See note 10.

**568.** *b.* PREVAILING DOCTRINE ALLOWS HOMESTEAD — (1) *In General.* — See note 5.

**569.** *c.* PARTITION BETWEEN COTENANTS — (1) *In General.* — See note 7.

**570.** (4) *Proceeds of Partition Sale.* — See note 3.

**571.** 18. Partnership Property — *b.* PREVAILING DOCTRINE DENIES EXEMPTION. — See note 5.

**572.** *c.* CONSENT OF COPARTNER. — See note 1.

**574.** IX. PROPERTY IN WHICH EXEMPTION MAY BE CLAIMED — 2. Urban or Rural Property. — See note 7.

**575.** 3. Occupancy — *a.* NECESSITY FOR OCCUPANCY IN GENERAL. — See note 2.

**576.** *In South Carolina and Tennessee.* — See note 1.

**566.** 7. Land Acquired by Descent or Devise. — *Park v. Wright*, 74 S. W. Rep. 712, 25 Ky. L. Rep. 128; *Roark v. Bach*, 116 Ky. 457.

**567.** 1. *Clark v. Thias*, 173 Mo. 628.

3. Adverse Possession. — *Hennessy v. Savings, etc.*, Co., 22 Tex. Civ. App. 591; *Williams v. Galveston*, (Tex. Civ. App. 1900) 58 S. W. Rep. 551.

4. Public Lands of United States. — *Griffin v. Chattanooga Southern R. Co.*, 127 Ala. 570, 85 Am. St. Rep. 143.

6. Mortgaged Premises. — One having only a statutory right of redemption in lands cannot claim a homestead without redeeming within the statutory period, and failure to redeem destroys all claim to homestead. *Richardson v. Baker*, 68 N. H. 297.

10. View that Homestead Cannot Be Claimed in Estates in Common. — *Jeanerette Bank v. Stansbury*, 110 La. 301; *Adcock v. Adcock*, 104 Tenn. 154; *Gardenhire v. White*, (Tenn. Ch. 1900) 59 S. W. Rep. 661.

**568.** 5. Prevailing Doctrine Allows Homestead Exemption in Estates in Common — *Alabama*. — *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316.

*Illinois*. — *Miller v. McAlister*, 197 Ill. 72.

*Michigan*. — *Lawrence v. Morse*, 122 Mich. 269.

*Missouri*. — *Clark v. Thias*, 173 Mo. 628; *Gorman v. Hale*, 109 Mo. App. 176.

*Nebraska*. — *Rank v. Garvey*, 66 Neb. 767.

*Texas*. — *Birdwell v. Burleson*, 31 Tex. Civ. App. 31.

**569.** 7. Effect of Partition. — *Long v. Long*, 30 Tex. Civ. App. 368.

**570.** 3. Exemption Attaches to Proceeds of Partition Sale. — But not where the homestead right has not attached. *Albion First Nat. Bank v. Snyder*, (Neb. 1901) 96 N. W. Rep. 285.

Where the homestead was the joint property of the husband and wife, a decree of divorce in favor of the wife provided that the husband should convey his interest to the wife on the payment to him of eight hundred dollars, and it was held that the husband could claim the money so paid as exempt. *Canney v. Canney*, 131 Mich. 363, 9 Detroit Leg. N. 356.

**571.** 5. *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

**572.** 1. Contrary Doctrine. — *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

**574.** 7. A Homestead Partly Within and Partly Without an Incorporated Town. — In *Texas* it is held that there can be no blending of urban and rural property so as to make it one as a homestead. *George v. Ryan*, (Tex. Civ. App. 1901) 61 S. W. Rep. 138, *affirmed* 32 Tex. Civ. App. 504; *Saunders v. Lanham*, (Tex. Civ. App. 1900) 57 S. W. Rep. 70; *Roberts v. Cawthon*, 26 Tex. Civ. App. 477; *Mikael v. Equitable Securities Co.*, 32 Tex. Civ. App. 182.

**How Nature of Property Determined.** — Whether property is urban or rural is to be determined by the conditions existing at the time the adverse parties attempted to fix their liens. *Lauchheimer v. Saunders*, 27 Tex. Civ. App. 484.

**575.** 2. Occupancy as Home Necessary. — *United States*. — *In re Buelow*, 98 Fed. Rep. 86. *Arkansas*. — *Gill v. Gill*, 69 Ark. 596, 86 Am. St. Rep. 213; *Reeves v. Slade*, 71 Ark. 611.

*California*. — *Matter of Gallagher*, 134 Cal. 96. *Illinois*. — *Sill v. Sill*, 185 Ill. 594; *Stodgell v. Jackson*, 111 Ill. App. 256.

*Iowa*. — *White v. Danforth*, 122 Iowa 403.

*Louisiana*. — *Clausen v. Sanders*, 109 La. 996.

*Missouri*. — *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 575.

*Nebraska*. — *Bane v. Kopietz*, (Neb. 1901) 95 N. W. Rep. 1126.

*North Dakota*. — *Brokken v. Baumann*, 10 N. Dak. 453.

*Ohio*. — *Kerns v. Linden*, 23 Ohio Cir. Ct. 162.

*Oklahoma*. — *Ball v. Houston*, 11 Okla. 233; *Betts v. Mills*, 8 Okla. 351.

*Texas*. — *Heatherly v. Little*, 21 Tex. Civ. App. 664; *Harris v. Matthews*, 36 Tex. Civ. App. 424.

**576.** 1. States in Which Occupancy Is Not Necessary — *South Carolina*. — Under the



**577.** *b.* DOCTRINE THAT ACTUAL OCCUPANCY IS NECESSARY. — See notes 6, 7.

**578.** *c.* DOCTRINE THAT INTENTION TO OCCUPY MAY SUFFICE — (1) *In General.* — See note 2.

**579.** Occupancy of Other Property. — See note 1.

Actual Occupancy Must Follow. — See note 2.

Abandonment of Intention. — See note 3.

(2) *Definiteness of Intention.* — See note 4.

(3) *Manifestation of Intention.* — See note 5.

**580.** (5) *Lapse of Time Before Actual Occupancy.* — See notes 2, 3.

*d.* INTENTION IN OCCUPYING PREMISES. — See note 6.

**581.** See note 2.

South Carolina Constitution of 1868, a debtor residing with his wife and family on his wife's land could not claim as exempt a tract of land owned by him adjoining, and cultivated by him in connection with his wife's property. *McClenaghan v. McEachern*, 56 S. Car. 350.

*Tennessee.* — *Moses v. Groner*, (Tenn. Ch. 1900) 59 S. W. Rep. 161. *affirmed* 106 Tenn. 121; *Walt v. Walt*, 113 Tenn. 189.

In *Utah* the claim need not cover the property actually occupied as a homestead. *Folsom v. Asper*, 25 Utah 299.

**577.** 6. *Actual Occupancy Necessary* — *California.* — *Matter of Gallagher*, 134 Cal. 96.

*Iowa.* — *White v. Danforth*, 122 Iowa 403.

*Louisiana.* — *Jeanerette Bank v. Stansbury*, 110 La. 301.

*Minnesota.* — *Kramer v. Lamb*, 84 Minn. 468.

*Missouri.* — *Adams v. Adams*, 183 Mo. 396, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582 [577]; *Barton v. Walker*, 165 Mo. 25; *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456; *Feurt v. Caster*, 174 Mo. 289; *Zollinger v. Dunnaway*, 105 Mo. App. 36.

*Oklahoma.* — *Ball v. Houston*, 11 Okla. 233.

*Sufficient Occupation.* — Where the husband purchased a homestead that was within the statutory limit, removed some of his household goods into it, but died before completing the removal and making his home there, it was held a sufficient occupancy to vest the homestead in the widow. *Gill v. Gill*, 69 Ark. 596, 86 Am. St. Rep. 213.

7. *Purchase or Improvement with Intent to Occupy.* — *Ball v. Houston*, 11 Okla. 233.

**578.** 2. *Intention to Occupy May Suffice* — *Arkansas.* — *Gill v. Gill*, 69 Ark. 596, 86 Am. St. Rep. 213.

*Kansas.* — *Evans v. Carson*, 9 Kan. App. 714.

*Michigan.* — *Ware v. Hall*, (Mich. 1904) 101 N. W. Rep. 47, 11 Detroit Leg. N. 488.

*Nebraska.* — *Davis v. Kelly*, 62 Neb. 642.

*Texas.* — *Sproule v. McFarland*, (Tex. Civ. App. 1900) 56 S. W. Rep. 693; *Loessin v. Washington*, 23 Tex. Civ. App. 515; *Evans v. Daniel*, 25 Tex. Civ. App. 362; *Rutherford v. Cox*, 25 Tex. Civ. App. 499; *Foley v. Holtkamp*, 28 Tex. Civ. App. 123; *Texas Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1901) 67 S. W. Rep. 173; *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822; *Schneider v. Dorsey*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1029; *Hardin v. Neal*, 32 Tex. Civ. App. 335.

*Utah.* — *Bunker v. Coons*, 21 Utah 164, 81 Am. St. Rep. 680.

*Vermont.* — *Hyser v. Mansfield*, 72 Vt. 71.

**579.** 1. *Occupancy of Other Property as Homestead.* — *Davis v. Kelly*, 62 Neb. 642; *O'Brien v. Woeltz*, 94 Tex. 148.

2. *Intention to Occupy Must Be Carried Out.* — *Davis v. Kelly*, 62 Neb. 642; *Bane v. Kopietz*, (Neb. 1901) 95 N. W. Rep. 1126.

3. *Intention May Be Abandoned.* — *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822.

4. *Indefinite Intention Not Enough* — *Kentucky.* — *Higgins v. Higgins*, 78 S. W. Rep. 1124, 25 Ky. L. Rep. 1824.

*Michigan.* — *Ware v. Hall*, (Mich. 1904) 101 N. W. Rep. 47, 11 Detroit Leg. N. 488.

*Nebraska.* — *Davis v. Kelly*, 62 Neb. 642; *Bane v. Kopietz*, (Neb. 1901) 95 N. W. Rep. 1126.

*Texas.* — *Carothers v. Lange*, (Tex. Civ. App. 1900) 55 S. W. Rep. 580; *George v. Ryon*, (Tex. Civ. App. 1901) 61 S. W. Rep. 138; *Warren v. Kohr*, 26 Tex. Civ. App. 331.

*Must Be Both Intent and Ability.* — There must be not only the intent to occupy, but the power and right to appropriate to homestead use. *Loessin v. Washington*, 23 Tex. Civ. App. 515.

5. *Intention Must Be Manifested.* — *Gill v. Gill*, 69 Ark. 596, 86 Am. St. Rep. 213; *Ware v. Hall*, (Mich. 1904) 101 N. W. Rep. 47, 11 Detroit Leg. N. 488; *Davis v. Kelly*, 62 Neb. 642; *Brokken v. Baumann*, 10 N. Dak. 453; *Churchwell v. Sweeney*, 29 Tex. Civ. App. 166; *Long v. Long*, 30 Tex. Civ. App. 368; *Muckelroy v. House*, 21 Tex. Civ. App. 673.

**580.** 2. *A Delay of Two Years.* — *Evans v. Carson*, 9 Kan. App. 714; *Hardin v. Neal*, 32 Tex. Civ. App. 335; *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822; *Foley v. Holtkamp*, 28 Tex. Civ. App. 123; *Rutherford v. Cox*, 25 Tex. Civ. App. 499; *Bunker v. Coons*, 21 Utah 164, 81 Am. St. Rep. 680.

3. *Unreasonable Delay.* — *Ware v. Hall*, (Mich. 1904) 101 N. W. Rep. 47, 11 Detroit Leg. N. 488; *Davis v. Kelly*, 62 Neb. 642; *Brokken v. Baumann*, 10 N. Dak. 453.

6. *Intention to Occupy as Homestead Necessary.* — *Rank v. Garvey*, 66 Neb. 767; *Long v. Long*, 30 Tex. Civ. App. 368; *Thorp v. Wilbur*, 71 Vt. 266.

**581.** 2. *Occupancy Conclusive in Texas.* — *Batts v. Middlesex Banking Co.*, 26 Tex. Civ. App. 515. But see *Long v. Long*, 30 Tex. Civ. App. 368, where it was held that the occupancy must be with the intention of making the property a homestead.

**581.** *e.* CONTINUOUS OCCUPANCY. — See note 3.

*f.* TIME OF OCCUPANCY. — See notes 5, 8.

**582.** *g.* OCCUPANCY BY FAMILY. — See note 2.

**4. Use for Other Purposes than as Residence — b. PREMISES LEASED TO OTHERS.** — See note 8.

**583.** *c.* USE IN PART FOR OTHER PURPOSES — (1) *In General.* — See notes 1, 2.

(2) *Use in Part for Business.* — See note 3.

Office, Shop, or Store. — See note 4.

Hotels and Lodging Houses. — See note 5.

**584.** (3) *Lease of Part.* — See notes 3, 4, 5.

**585.** 6. Adjoining Lots or Tracts — *a.* IN GENERAL. — See note 2.

Residence on Leased Land. — See note 4.

**581. 3. Occupancy Need Not Be Continuous.** — *In re Marquette*, 103 Fed. Rep. 777; *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299; *Kramer v. Lamb*, 84 Minn. 468; *Ball v. Houston*, 11 Okla. 233; *Lewis v. Mauerman*, 35 Wash. 156.

**5. Time of Commencement of Occupancy.** — *Huenergardt v. John S. Brittain Dry Goods Co.*, (C. C. A.) 116 Fed. Rep. 31; *In re Stone*, 116 Fed. Rep. 35; *In re Irvin*, 120 Fed. Rep. 733, 57 C. C. A. 147; *Lawrence v. Morse*, 122 Mich. 269; *Sharp v. Stewart*, 185 Mo. 518, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581.

**8. Barton v. Walker**, 165 Mo. 25; *Bane v. Kopietz*, (Neb. 1901) 95 N. W. Rep. 1126.

**582. 2. Actual Occupation by Family Unnecessary.** — *Lawrence v. Morse*, 122 Mich. 269.

**8. Premises Not Used as Home, but Leased to Others.** — *In re Vincent*, 115 Fed. Rep. 236; *Poncelor v. Campbell*, 10 Kan. App. 581, 63 Pac. Rep. 606; *Roberts v. Cawthon*, 26 Tex. Civ. App. 477; *Thorp v. Wilbur*, 71 Vt. 266.  
**Lease by Guardian of Orphan Infants.** — Where, both parents being dead, the guardian of minor children removes them from the homestead and leases the property, there is a sufficient occupation to protect the homestead from the debts of the deceased father. *Rockwood v. St. John*, 10 Okla. 476.

**583. 1. Use of Homestead in Part for Other Purposes.** — *Clausen v. Sanders*, 109 La. 996, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582 [583]; *Wilkins v. Fremaux*, 112 La. 921, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; *Adams v. Adams*, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583.

**2. Adams v. Adams**, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583.

**3. Homestead May Be Used in Part for Business Purposes — United States.** — *In re Stone*, 116 Fed. Rep. 35; *In re Irvin*, 120 Fed. Rep. 733, 57 C. C. A. 147.

*Alabama.* — *Marx v. Threet*, 131 Ala. 340.

*Arkansas.* — *Berry v. Meir*, 70 Ark. 129.

*California.* — *Lima v. County Bank*, 142 Cal. 245.

*Iowa.* — *Edmonds v. Davis*, 122 Iowa 561.

*Missouri.* — *Adams v. Adams*, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583.

*Canada.* — *Codville v. Pearce*, 13 Manitoba 468.

**4. Illustrations — Office, Shop, or Store.** —

*Adams v. Adams*, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; *Thorp v. Wilbur*, 71 Vt. 266.

**Building Containing Unused Store Exempt.** — *Codville v. Pearce*, 13 Manitoba 468.

**5. Use as Hotel.** — *Adams v. Adams*, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583.

**584. 3. Lease of Part of Premises.** — *Matter of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92; *Adams v. Adams*, 183 Mo. 396, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584.

Where the owner's homestead is a farm, and it does not exceed in extent or value the statutory limit, he may lease a part without subjecting such part to his debts. *Bailey v. D. R. Dunlap Mercantile Co.*, 138 Ala. 415.

**Decisions to the Contrary.** — Where the owner occupied the second story of a house as a residence, and one room of the first floor as a store, and rented the other rooms of the first floor for business purposes, the premises were divided by a perpendicular line and a portion set off as a homestead and the other subjected to execution. *Smith v. Guckenheimer*, 42 Fla. 1.

**4. A Double House Intended for Two Families.** — *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322.

**5. Adjoining Tracts or Lots Leased to Others.** — *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584, and quoting whole of text paragraph; *Clausen v. Sanders*, 109 La. 996, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582 [584].

**585. 2. Homestead Embraces Adjoining Tracts or Lots — United States.** — *In re Stone*, 116 Fed. Rep. 35.

*Alabama.* — *Marx v. Threet*, 131 Ala. 340.

*Illinois.* — *Kilmer v. Garlick*, 185 Ill. 406.

*Kansas.* — *Ard v. Pratt*, 61 Kan. 775.

*Kentucky.* — *Meade v. Wright*, (Ky. 1900) 56 S. W. Rep. 523.

*Missouri.* — *Clark v. Thias*, 173 Mo. 628;

*Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

*Texas.* — *Weidemeyer v. Bryan*, 21 Tex. Civ. App. 428; *Schneider v. Dosey*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1029.

*Canada.* — *Codville v. Pearce*, 13 Manitoba 468.

**4. Residence on Leased Premises by Owner of Adjoining Land.** — *Bunker B. Coons*, 21 Utah 164, 81 Am. St. Rep. 680. *Contra*, *Jeanerette Bank v. Stansbury*, 110 La. 301.

A mere tenant at will cannot claim lands

**585.** *b.* USE IN CONNECTION WITH HOMESTEAD. — See note 6.

**586.** Particular Uses. — See notes 2, 4, 6.

*c.* ADJOINING LAND LEASED TO OTHERS. — See note 9.

**7.** Separate and Detached Parcels of Land — *a.* IN GENERAL. — See note 10.

**587.** See note 1.

Parcels of Land Cornering on Each Other. — See note 3.

*b.* WHAT CONSTITUTES SEPARATION OF TRACTS — Separation by a Stream. — See note 6.

Quarter-section Lines and Fences. — See notes 7, 8.

**588.** *c.* USE IN CONNECTION WITH HOMESTEAD. — See note 1.

*d.* LOTS OR TRACTS LEASED TO OTHERS. — See note 3.

**589.** 8. Appurtenances and Improvements — *d.* IMPROVEMENTS BY INSOLVENT DEBTOR. — See note 4.

*e.* STATUTE SUBJECTING IMPROVEMENTS. — See note 5.

*g.* BUILDINGS NOT USED FOR HOMESTEAD PURPOSES — (1) *In General.* — See note 8.

**590.** (2) *Buildings Leased to Others.* — See note 3.

owned by him adjoining his place of residence as a homestead. To support a claim for homestead in adjoining lands the owner must have such title in the premises of his residence as will support a homestead claim. *Howard v. Raymers*, 64 Neb. 213.

**585.** 6. Use for Homestead Purposes. — *Heatherly v. Little*, 21 Tex. Civ. App. 664; *Torres v. Cuneo*, (Tex. Civ. App. 1899) 53 S. W. Rep. 828; *Wurzbach v. Menger*, 27 Tex. Civ. App. 290; *Birdwell v. Burselson*, 31 Tex. Civ. App. 31.

**586.** 2. Particular Uses. — An Orchard may constitute a part of the homestead. *Brin v. Anderson*, 25 Tex. Civ. App. 323.

4. Use for Drying Clothes. — The occasional use of the lots for the purpose of drying clothes was held insufficient in *Wurzbach v. Menger*, 27 Tex. Civ. App. 290.

6. Use for Stable. — *Wurzbach v. Menger*, 27 Tex. Civ. App. 290.

9. Adjoining Tract Leased to Others Held Not Exempt. — *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; *Wurzbach v. Menger*, 27 Tex. Civ. App. 290.

10. States in Which Separate and Detached Parcels May Be Claimed — *Alabama.* — *Slappy v. Hanners*, 137 Ala. 199.

*Kentucky.* — *Donaldson v. Richart*, 60 S. W. Rep. 405, 22 Ky. L. Rep. 1268.

*Missouri.* — *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

*Tennessee.* — *Moses v. Groner*, (Tenn. Ch. 1900) 59 S. W. Rep. 161, affirmed 106 Tenn. 121.

*Texas.* — *Heidelbach v. Carter*, 34 Tex. Civ. App. 579; *Brown v. Moore*, (Tex. Civ. App. 1901) 64 S. W. Rep. 781; *Moore v. Graham*, 29 Tex. Civ. App. 235; *Maupin v. McCall*, (Tex. Civ. App. 1899) 54 S. W. Rep. 623; *Levingston v. Davis*, 24 Tex. Civ. App. 497; *Roberts v. Cawthon*, 26 Tex. Civ. App. 477.

Urban and Rural Lands which lie in separate parcels cannot be included in a homestead. *Mikael v. Equitable Securities Co.*, 32 Tex. Civ. App. 182.

**587.** 1. States in Which Separate and De-

tached Parcels Cannot Be Claimed. — In *Iowa* the law was changed by the Code of 1897 under which separate and detached parcels cannot be claimed. *White v. Danforth*, 122 Iowa 403.

3. In *Alabama* the latter rule was adopted. *Lyon v. Harden*, 129 Ala. 643.

6. Separation by Stream. — *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

7. Quarter-section Lines. — *Tindall v. Peterson*, (Neb. 1904) 98 N. W. Rep. 688.

8. Fences. — *Berry v. Meir*, 70 Ark. 129.

**588.** 1. Detached Parcel Must Be Used as Part of Homestead. — *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354; *Heidelbach v. Carter*, 34 Tex. Civ. App. 579; *Temple v. Watkins Land Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1188.

Character of Use. — That the detached lots contribute to the support of the family by rentals or products is not enough to make them part of the homestead. *Roberts v. Cawthon*, 26 Tex. Civ. App. 477.

3. Separate Tracts or Lots Leased to Others. — *Kelley v. Williams*, 110 Iowa 153; *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

**589.** 4. Improvements on Homestead by Insolvent Debtor. — *Ebersole v. Moot*, 112 Iowa 596.

5. Statute Declaring Improvements Subject to Debts Previously Contracted. — The painting of the house, or the construction of a shanty subject to be removed at the will of the builder, are not such improvements as will make the homestead liable. *Weber v. Gardner*, 80 S. W. Rep. 481, 26 Ky. L. Rep. 44.

8. Detached Buildings Not Used in Connection with Homestead — View that They Are Exempt. — *In re Irvin*, 120 Fed. Rep. 733, 57 C. C. A. 147 (under the *Arkansas* statute); *Wilkins v. Fremaux*, 112 La. 921.

**590.** 3. View that Detached Buildings Leased to Others Are Not Exempt. — *Garrison v. Penn*, 66 S. W. Rep. 14, 23 Ky. L. Rep. 1775; *Clausen v. Sanders*, 109 La. 996.

**591. 9. Business Homestead.** — See notes 1, 4, 9.

Character of Business. — See note 11.

Loss and Abandonment. — See notes 14, 15, 16.

**592. 10. Exemption of Money and Other Personal Property — a. IN GENERAL.** — See note 2.

c. BUILDINGS DISCONNECTED FROM THE SOIL. — See note 6.

**11. Proceeds and Product of Exempt Homestead — a. PROCEEDS IN GENERAL — In Georgia.** — See note 9.**593. b. RENT OF PROPERTY.** — See note 3.

c. CROPS RAISED ON HOMESTEAD. — See note 6.

**594. f. PROCEEDS OF VOLUNTARY SALE OF HOMESTEAD — (1) In General.** — See note 1.(2) *Statutes Protecting Proceeds.* — See notes 2, 3.**591. 1. Business Homestead.** — *Batts v. Middlesex Banking Co.*, 26 Tex. Civ. App. 575.**4. Burrow v. Grand Lodge, etc.**, (C. C. A.) 133 Fed. Rep. 708; *Roberts v. Cawthon*, 26 Tex. Civ. App. 477; *Batts v. Middlesex Banking Co.*, 26 Tex. Civ. App. 515.**9. Separate Business Ventures.** — Where a person owns two houses which he uses alternately for the conduct of his business, the one not actually occupied is not exempt. *Gibbs v. Hartenstein*, (Tex. Civ. App. 1904) 81 S. W. Rep. 59.The right of selection between several business homesteads vests in the widow, upon the death of the owner, and her selection, if not prejudicial to the children, is binding. *Wingfield v. Hackney*, 30 Tex. Civ. App. 39.**11. Cooper Grocery Co. v. Peter, 35 Tex. Civ. App. 49.****14. Loss and Abandonment.** — *In re Flannagan*, 117 Fed. Rep. 695; *Sanger v. Hicks Co.*, 22 Tex. Civ. App. 473; *Alexander v. Lovitt*, 95 Tex. 661; *R. E. Bell Hardware Co. v. Riddle*, 31 Tex. Civ. App. 411; *Cooper Grocery Co. v. Peter*, 35 Tex. Civ. App. 49.**15. Lease by Owner.** — *Carothers v. Lange*, (Tex. Civ. App. 1900) 55 S. W. Rep. 580; *Warren v. Kohr*, 26 Tex. Civ. App. 331; *Alexander v. Lovitt*, 95 Tex. 661. But see *Billings v. Matlage*, 36 Tex. Civ. App. 619.Where the owner was conducting a grocery store in the premises, and also carried on the business of buying cotton and taking orders for clothing, and he sold his stock of goods and leased the premises to others, reserving desk room for himself, and continued his cotton and clothing business, it was held that he was entitled to homestead. *Cooper Grocery Co. v. Peter*, 35 Tex. Civ. App. 49.**16. Freeman v. Cates, 22 Tex. Civ. App. 623; *Alexander v. Lovitt*, (Tex. Civ. App. 1900) 56 S. W. Rep. 685; *Gibbs v. Hartenstein*, (Tex. Civ. App. 1904) 81 S. W. Rep. 59; *Billings v. Matlage*, 36 Tex. Civ. App. 619.****The Temporary Surrender of the Building**, in which is the stock in trade, to the assignee in bankruptcy is not an abandonment of the business homestead. *In re Harrington*, 99 Fed. Rep. 390.**592. 2. Exemption of Money or Other Personal Property.** — In *Ohio* it is provided by statute that a debtor who owns no homestead may claim the value thereof out of his personal estate in lieu of homestead. *Shaw v. Foley*, 62 Ohio St. 30.**6. View that Building Alone May Be Exempt.** — *Birdwell v. Burleson*, 31 Tex. Civ. App. 31.**9. See Locke v. Post, 71 Vt. 343, 76 Am. St. Rep. 778.****593. 3. Rent Accruing from Temporary Lease.** — *In re Oleson*, 110 Fed. Rep. 796.**6. Exemption of Crops Growing on Homestead.** — *Parker v. Hale*, (Tex. Civ. App. 1903) 78 S. W. Rep. 555; *Allen v. Ashburn*, 27 Tex. Civ. App. 239; *Moore v. Graham*, 29 Tex. Civ. App. 235; *Stagg v. Piland*, 31 Tex. Civ. App. 245.**One Raising Crops on Shares**, though he lives with his family on the cultivated land, cannot claim the growing crops as exempt, he having no estate in the land to support homestead. *Webb v. Garrett*, 30 Tex. Civ. App. 240.**594. 1. Proceeds of Voluntary Sale of Homestead.** — *Kinzer v. Stephens*, 121 Iowa 347; *Massey-Harris Co. v. Schram*, 5 N. W. Ter. 338.**2. Statutes Exempting Proceeds — Iowa.** — *In re Johnson*, 118 Fed. Rep. 312 (under the Iowa statute); *Richards v. Orr*, 118 Iowa 724; *Milner v. Davis*, 120 Iowa 231.*Kentucky.* — *Weber v. Zook*, (Ky. 1899) 53 S. W. Rep. 1034; *Torbitt v. Jackson*, 80 S. W. Rep. 1123, 26 Ky. L. Rep. 196; *Fitch v. Duckwall*, 78 S. W. Rep. 185, 25 Ky. L. Rep. 1535; *Lee v. Hughes*, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201.*Missouri.* — Rev. Stat. 1899, § 3623; *State v. Hull*, 99 Mo. App. 703.**Money Borrowed on Homestead.** — The exemption will not extend to money borrowed on the homestead. *Boettger v. Galloway*, 115 Iowa 353.**Statutes Do Not Impair Contract Obligations.** — Such statutes are not invalid as impairing the obligation of contracts, even though they may affect debts created before the acquisition of the homestead. *Lewis v. Goldthwaite Nat. Bank*, 36 Tex. Civ. App. 437.**3. Limited Time.** — In *Nebraska* the exemption is six months. *Scheel v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741.In *Texas* the proceeds are exempt for six months. *Lewis v. Goldthwaite Nat. Bank*, 36 Tex. Civ. App. 437.In *Illinois* the proceeds are protected for one year, but where the owner made a voluntary conveyance of the homestead and removed therefrom, never thereafter occupying the same, the reconveyance to her within a year would not reinvest the homestead interest, and the

- 594.** Sale for Reinvestment in Georgia. — See note 4.  
**595.** (3) *Sale on Time.* — See note 1.  
 (4) *Intention to Reinvest.* — See note 2.  
 (5) *Proceeds Given to Wife.* — See note 3.  
**596.** *h. INVOLUNTARY CONVERSION* — (1) *In General.* — See note 2.  
 (2) *Judgment for Unlawful Sale, Trespass, or Injury.* — See note 3.  
**597.** (5) *Judicial and Execution Sales of Homestead* — (e) *After Setting Aside Conveyance as Fraudulent.* — See note 3.  
**598.** (e) *Foreclosure of Mortgage.* — See note 1.  
*i. CHANGE OF HOMESTEAD.* — See notes 2, 3.  
**599.** *j. EXCHANGE OF HOMESTEAD OR SALE AND PURCHASE OF NEW HOMESTEAD* — (1) *In General.* — See notes 3, 4.

property was subject to the payment of her debts. *Slattery v. Keefe*, 201 Ill. 483.

**Rights of Wife on Death of Husband.** — Where, after the husband's death, the widow sold the homestead under order of court and elected to take her distributive share therein, such money was not exempt from the payment of her debts, nor was a homestead subsequently acquired therewith. *Edinger v. Bain*, 125 Iowa 391.

**Burden of Proof.** — Such proceeds are exempt only when there is a *bona fide* intention to invest them in another homestead, and the burden of proof is on the claimant to show such intention. *State v. Hull*, 99 Mo. App. 703.

**594. 4. Sale under Order of Court for Reinvestment — Georgia Statute.** — *Walden v. A. P. Brantley Co.*, 116 Ga. 298.

**595. 1. Sale May Be on Credit.** — *In re Johnson*, 118 Fed. Rep. 312. See also *Milner v. Davis*, 120 Iowa 231.

**2. Absence of Intention to Purchase Another Homestead.** — *Boettger v. Galloway*, 115 Iowa 353; *Kinzer v. Stephens*, 121 Iowa 347.

**Proceeds Invested in Business.** — *Fitch v. Duckwall*, 78 S. W. Rep. 185, 25 Ky. L. Rep. 1535.

**3. Right of Wife to Proceeds of Homestead.** — *Scheel v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741.

**Investment in New Homestead in Wife's Name.** — In Iowa the taking of the title of a new homestead, acquired with the proceeds of the old, in the name of the wife cannot be the subject of complaint by creditors. *Richards v. Orr*, 118 Iowa 724.

See also *Roark v. Bach*, 116 Ky. 457, where it was held that a lot taken in the wife's name as part consideration for a part of the homestead could not be subjected to the husband's debts.

**596. 2. Involuntary Conversion of Homestead.** — *Kinzer v. Stephens*, 121 Iowa 347; *Huntington Bank v. Bowers*, 58 S. W. Rep. 418, 22 Ky. L. Rep. 497.

**Where the Homestead of Minor Children Was Sold** to pay debts of the deceased parent they were entitled to the interest on the value of the homestead or to have that sum invested in a home for them during minority. *Schnabel v. Schnabel*, 108 Ky. 536.

**3. Judgment for Unlawful Sale of or Injury to Homestead.** — *Kinzer v. Stephens*, 121 Iowa 347.

**597. 3. Sale After Setting Conveyance Aside as Fraudulent.** — *Contra*, *McNally v. White*, 154 Ind. 163.

**Mortgagor's Homestead Right Inuring to Benefit of Mortgagee.** — Where a mortgage of land

is declared a general assignment for the benefit of creditors, the homestead right of the mortgagor is not affected, but inures to the benefit of the mortgagee. *Davis v. H. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289.

**Where a Conveyance of Land by the Husband to the Wife** was set aside at the instance of his creditors, it was held that the husband could move on the land and claim it as homestead against the assailing creditors. *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563.

**598. 1. Proceeds of Foreclosure of Mortgage on Homestead.** — *Elstroth v. Young*, 83 Mo. App. 253; *State v. Hull*, 99 Mo. App. 703. But see *Pearman v. McKee*, 79 Mo. App. 210.

**2. Change of Homestead.** — *Huenergardt v. John S. Britain Dry Goods Co.*, (C. C. A.) 116 Fed. Rep. 31.

**After Setting Apart Homestead on Levy of Execution.** — And a judgment debtor, having claimed and sold one homestead, was denied the right to immediately claim another to defeat his creditor. *Brantley v. Batson*, 84 Miss. 411.

**Fraud as Against Creditors.** — Where a debtor, for the express purpose of defrauding his creditors, conveyed his homestead to his wife, and subsequently abandoned the same and acquired a new homestead, it was held that the conveyance to the wife was void and the old homestead was subject to the payment of his debts. *Kettleschlag v. Ferrick*, 12 S. Dak. 455, 76 Am. St. Rep. 623.

**3. Statutes Allowing Change of Homestead — Iowa.** — *In re Johnson*, 118 Fed. Rep. 312 (construing the Iowa statute).

**599. 3. Exchange of Homestead.** — *Grimes v. Luster*, 73 Ark. 226; *Zollinger v. Dunnaway*, 105 Mo. App. 36; *Osborne v. Evans*, 185 Mo. 509; *Rutherford v. Cox*, 25 Tex. Civ. App. 499; *Ellis v. Light*, (Tex. Civ. App. 1903) 73 S. W. Rep. 551.

**4. Exemption of Land Purchased with Proceeds of Homestead — United States.** — *In re Carmichael*, 108 Fed. Rep. 789; *In re Johnson*, 118 Fed. Rep. 312; *In re Nye*, (C. C. A.) 133 Fed. Rep. 33.

**Illinois.** — *Macavenny v. Ralph*, 107 Ill. App. 542.

**Iowa.** — *Boettger v. Galloway*, 115 Iowa 353.

**Kentucky.** — *Lee v. Hughes*, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201.

**Michigan.** — *Corey v. Waldo*, 126 Mich. 706, 8 Detroit Leg. N. 173.

**Missouri.** — *Zollinger v. Dunnaway*, 105 Mo.

- 600.** See notes 1, 2.  
 (2) *Delay in Reinvesting.* — See note 4.  
 (3) *Homestead in Another State.* — See note 5.  
**601.** (9) *Occupancy of New Homestead.* — See note 7.  
**602.** (10) *Vacant Property.* — See note 1.  
 12. *Separate Homesteads at Same Time.* — See note 2.  
 13. *Separate Homesteads in Same Tract.* — See notes 4, 5.  
**603.** 14. *Limitations as to Value and Extent* — *a. IN GENERAL* — *Right of Selection.* — See note 6.  
**604.** *b. URBAN AND RURAL HOMESTEADS.* — See notes 2, 3.  
**605.** *d. EXCESSIVE HOMESTEADS* — (1) *Status.* — See note 6.  
**606.** (2) *Subjecting Excess.* — See note 3.  
**607.** *f. RIGHT TO ADD TO HOMESTEAD.* — See note 1.  
*g. REVALUATION OF HOMESTEAD.* — See note 2.  
*h. DETERMINING VALUE* — (2) *Incumbrances.* — See note 7.

App. 36; *New Madrid Banking Co. v. Brown*, 165 Mo. 32; *Rose v. Smith*, 167 Mo. 81.

*Nebraska.* — *Scheel v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741.

*Appropriating the Proceeds to Discharge an Incumbrance on Other Lands* already owned by the homesteader, will not support a claim of homestead in the latter property. *Chamberlain v. Leland*, 94 Tex. 502, reversing (Tex. Civ. App. 1901) 60 S. W. Rep. 435.

**600.** 1. *Investment of Proceeds in Business Before Purchase of New Homestead.* — *Fitch v. Duckwall*, 78 S. W. Rep. 185, 25 Ky. L. Rep. 1535.

2. *Land Exempt Only as Homestead.* — *Osborne v. Evans*, 185 Mo. 509; *Drake v. Davidson*, 28 Tex. Civ. App. 184.

4. *Time Allowed for Reinvestment in New Homestead.* — *Zollinger v. Dunnaway*, 105 Mo. App. 36.

5. *Proceeds of Homestead in Another State.* — *Wickwire v. Zeller*, 68 S. W. Rep. 630, 24 Ky. L. Rep. 421; *State Bank v. Dougherty*, 167 Mo. 1, 90 Am. St. Rep. 422.

**601.** 7. *Necessity for Occupancy.* — *Corey v. Waldo*, 126 Mich. 706, 8 Detroit Leg. N. 173; *Zollinger v. Dunnaway*, 105 Mo. App. 36; *Schneider v. Dorsey*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1029.

**602.** 1. *Exchange for Vacant Lot.* — Where vacant land was taken in exchange for an abandoned homestead, and the owner intended to improve and occupy it as a homestead whenever he got able, it was held he could not claim homestead therein. *Zollinger v. Dunnaway*, 105 Mo. App. 36.

2. *Separate Homesteads at Same Time.* — *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220; *Stickle v. Widle*, 122 Iowa 400; *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Barton v. Walker*, 165 Mo. 25; *Rose v. Smith*, 167 Mo. 81; *Davis v. Kelly*, 62 Neb. 642; *Powers v. Palmer*, 36 Tex. Civ. App. 212.

Where the homestead selected by a bankrupt was consumed in paying off mortgages on the land, it was held that a claim of homestead out of the proceeds of other lands was properly allowed. *In re Buckingham*, 102 Fed. Ren. 972.

There Cannot Exist an Option to choose be-

tween two homesteads. *Wapello County v. Brady*, 118 Iowa 482.

4. *Two Estates of Homestead Cannot Exist Together in Same Land.* — *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654.

5. *Loessin v. Washington*, 23 Tex. Civ. App. 515.

**603.** 6. *Debtor's Right of Selection.* — *Lyon v. Hardin*, 129 Ala. 643; *Ard v. Pratt*, 61 Kan. 775; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

In Illinois it has been held that where land is located in several different forty-acre tracts in different sections, and the answers do not designate which tract is the homestead, the right of homestead does not extend beyond the particular tract on which the home dwelling is located if such tract is worth one thousand dollars. *Hopkins v. Cofoid*, 103 Ill. App. 167.

**604.** 2. *In Texas.* — *Burow v. Grand Lodge, etc.*, (C. C. A.) 133 Fed. Rep. 708 (construing the Texas statute).

The homestead cannot be claimed in rural and urban lands; it must be confined to one or the other. And property may be urban, though situated in an unincorporated town. *Roberts v. Cawthon*, 26 Tex. Civ. App. 477; *Batts v. Middlesex Banking Co.*, 26 Tex. Civ. App. 515; *Lauchheimer v. Saunders*, 97 Tex. 137.

It is not necessary that the land should be surveyed and platted by the city to make it urban. It is sufficient that it is recognized as a part of the city. *Harris v. Matthews*, 36 Tex. Civ. App. 424.

3. *Only Property Within Platted Portion Is Urban* — *Iowa.* — *Parrott v. Thiel*, 117 Iowa 392; *Foster v. Rice*, 126 Iowa 190.

**605.** 6. *Excess Reachable* — *Fitzhugh v. Connor*, 32 Tex. Civ. App. 277; *Massey-Harris Co. v. Schram*, 5 N. W. Ter. 338.

**606.** 8. *Sale of Whole Where Property Indivisible.* — *Steiner v. Berney*, 130 Ala. 289.

**607.** 1. *Homestead May Be Enlarged to Maximum Allowed.* — *Wilks v. Vaughan*, 73 Ark. 174; *Heidelberg v. Carter*, 34 Tex. Civ. App. 579.

2. *Revaluation.* — *McCaskill v. McKinnon*, 125 N. Car. 179.

7. *Incumbrances Deducted.* — *Kilmer v. Garlick*, 185 Ill. 406; *Murphy v. Wilson*, 84 Mo. App. 178; *Sanford v. Anderson*, (Neb. 1902) 92 N. W. Rep. 152; *Omaha Brewing Assoc. v. Zeller*, (Neb. 1903) 93 N. W. Rep. 762; *National Bank*

**608.** (4) *Fee Value the Basis of Valuation.* — See notes 1, 2.

(5) *Time to Which Determination of Value Should Relate.* — See note 5.

(6) *Burden of Proof and Evidence.* — See notes 6, 7.

**609.** *i.* EFFECT OF LAWS CHANGING VALUE AND EXTENT OF HOMESTEAD — (2) *Extending Limits of City, Town, or Village.* — See notes 2, 4.

**611.** X. LIABILITIES AS AGAINST WHICH HOMESTEAD MAY BE CLAIMED —

2. *Liabilities Antedating Homestead Law* — *a.* CONTRACTUAL LIABILITIES — (1) *State Laws Creating or Increasing Exemption* — (b) *Contrary View* — This Construction the Supreme Law of the Land. — See note 2.

**613.** (c) *Continuing Early Laws in Force.* — See note 2.

**614.** (3) *Laws Decreasing Exemption.* — See note 1.

**615.** 3. *Liabilities Incurred After Enactment of Law* — *b.* DEBTS TO STATE. — See note 3.

*c.* LIABILITIES ARISING OUT OF TORTS AND PUBLIC WRONGS —

In General. — See note 4.

**616.** "Debts Contracted." — See note 2.

of Commerce *v.* Chamberlain, (Neb. 1904) 100 N. W. Rep. 943.

**Commissioners Cannot Appraise Incumbrances.** — Commissioners appointed to appraise the homestead have no authority to apportion the incumbrances. Fraaman *v.* Fraaman, 64 Neb. 472.

**Where Nothing Was Left of the Proceeds after payment of incumbrances,** it was held that a claim to exemption was properly allowed out of other lands. *In re* Buckingham, 102 Fed. Rep. 972.

**608.** 1. *Fee Value Basis of Estimation.* — McDowell *v.* Grubbs, 116 Ky. 751.

2. *In re* Marquette, 103 Fed. Rep. 777 (construing the Vermont statute).

5. *In a Controversy Between the Heirs and the Executor of the Widow,* who claimed the excess under a deed from the husband to the wife, the court held that the value of the homestead was to be determined at the present time, and not at the time of the conveyance nor of the death of the husband. Jaspersen *v.* Mech, 213 Ill. 488.

6. *Burden of Proof of Value.* — Strayer *v.* Dickerson, 205 Ill. 257.

The creditors of an insolvent homesteader have the burden of showing that the property claimed exceeds in value the statutory limit. Fitzhugh *v.* Connor, 32 Tex. Civ. App. 277.

The burden of proof is on the one asserting a lien where the homestead has not been allotted. Kilmer *v.* Garlick, 185 Ill. 406.

7. *Time to Which Evidence of Value Must Relate.* — Jaspersen *v.* Mech, 213 Ill. 488; Fitzhugh *v.* Connor, 32 Tex. Civ. App. 277.

**Where the Owner Had Sold Off a Part of the homestead the value of that portion was to be determined at the date of the transfer.** Kilmer *v.* Garlick, 185 Ill. 406.

**609.** 2. *Extension of Limits of City, Town, or Village* — *Texas.* — Where a city, acting under legislative authority, extends its limits, it may convert rural into urban property, and thereafter the homestead right is determined by the law applicable to urban homesteads. Lauchheimer *v.* Saunders, 27 Tex. Civ. App. 484.

The mere extension of the corporate limits so as to include a rural homestead, without the

owner's consent, coupled with a laying out of contiguous lands into blocks and lots, will not diminish such homestead in accordance with the law as to urban homesteads. Lauchheimer *v.* Saunders, 97 Tex. 137.

4. *Property Not Within Laid-out or Platted Portion of City or Town.* — Parrott *v.* Thiel, 117 Iowa 392.

**611.** 2. *Retroactive Homestead Exemption Laws Impairing Obligation of Contracts* — *Decisions of State Courts.* — Blouin *v.* Ledet, 109 La. 709, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610 [611]; Lloyd *v.* Hamilton, 52 La. Ann. 861; Walker *v.* Harold, 44 Oregon 205; Canadian, etc., Mortg., etc., Co. *v.* Blake, 24 Wash. 102, 85 Am. St. Rep. 946.

**613.** 2. *Homestead Rights under Early Laws Not in Force.* — Whitworth *v.* McKee, 32 Wash. 83.

**614.** 1. *Illustration — Decreasing Exemption by Bringing Farm Land Within Corporate Limits of Town.* — *Contra*, Sayers *v.* Childers, 112 Iowa 681, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614; Brown *v.* Hughes, 89 Minn. 150.

**615.** 3. *State Has No Greater Remedies Against Homesteads than Other Creditors.* — See Fields *v.* Napier, 80 S. W. Rep. 1110, 26 Ky. L. Rep. 240.

4. *Exemption May Be Claimed Against All Debts Not Specifically Excepted.* — Wilcox *v.* Cowart, 110 Ga. 320; Wachovia Nat. Bank *v.* Ireland, 127 N. Car. 238.

**Fines Imposed by United States Courts.** — In Allen *v.* Clark, (C. C. A.) 126 Fed. Rep. 738, it was held that the homestead exemption could be claimed against a fine imposed by a federal court, though a fine in favor of the state could be enforced against it.

**616.** 2. "Debts Contracted" Refers Only to Contract Debts. — Gunn *v.* Hardy, 130 Ala. 642; Knight *v.* Davis, 135 Ala. 139.

**Bonds of Public Officials.** — Under statute in Kentucky bonds of public officers are liens on their property, and homestead cannot be claimed against liability thereon. Baker *v.* Fidelity, etc., Co., 73 S. W. Rep. 1025, 24 Ky. L. Rep. 2196; Fields *v.* Napier, 80 S. W. Rep. 1110, 26 Ky. L. Rep. 240. And the lien inures to the benefit

**616.** Other Statutory Provisions. — See note 3.

**617.** *d.* INSOLVENT DEBTORS. — See note 1.

**618.** *e.* LIENS BY CONTRACT AND OPERATION OF LAW — (1) *Prior to Homestead Right* — General Rule. — See notes 1, 2.

**619.** Other Views. — See note 1.

**620.** When Homestead Right Is Perfected with Reference to Prior Liens. — See note 2.  
Status of Judgment Lien as Against After-acquired Title. — See note 3.

**621.** (2) *Subsequent to Homestead Right* — (a) Liens by Contract. — See note 1.  
(b) Liens by Operation of Law — Laws Exempting from Levy and Sale. — See

note 2.

**622.** See note 1.

Laws Which Expressly or by Implication Refuse Liens. — See note 2.

of a surety who has paid the liability on the bond. *Hudson v. Combs*, 110 Ky. 762.

**616. 3. "Any Debt."** — The expense of maintaining a lunatic is not a debt, and the homestead of such lunatic is exempt from liability therefor. *Holburn v. Pfanmiller*, 114 Ky. 831.

**617. 1. Exemption May Be Claimed by One Indebted or Insolvent.** — *In re Anderson*, 103 Fed. Rep. 854, reversed (C. C. A.) 113 Fed. Rep. 115; *In re Stone*, 116 Fed. Rep. 35; *In re Irvin*, 120 Fed. Rep. 733, 57 C. C. A. 147; *In re Wilson*, (C. C. A.) 123 Fed. Rep. 20; *McConnell v. Wolcott*, (Kan. 1904) 78 Pac. Rep. 848, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617; *Jayne v. Hymer*, 66 Neb. 785; *Lewis v. Goldthwaite Nat. Bank*, 36 Tex. Civ. App. 437, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617.

But see *McGahan v. Anderson*, (C. C. A.) 113 Fed. Rep. 115.

**Taking Conveyance in Name of Third Party.** — In *Hunter v. Griffith*, 12 Okla. 436, the purchase was by the widow, and deed was made to a stranger, and it was upheld as a sufficient title to support the widow's homestead exemption.

**618. 1. Liens by Contract — Mortgage Liens — California.** — *Kleinsorge v. Kleinsorge*, 133 Cal. 412; *Lowenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115.

*Kansas.* — *Kinner v. Moore*, 64 Kan. 360, 91 Am. St. Rep. 244.

*Kentucky.* — *Park v. Wright*, 74 S. W. Rep. 712, 25 Ky. L. Rep. 128.

*Louisiana.* — *Jeanerette Bank v. Stansbury*, 110 La. 301.

*Missouri.* — *Markwell v. Markwell*, 157 Mo. 326.

*South Dakota.* — *Charles Betcher Co. v. Cleveland*, 13 S. Dak. 347.

*Texas.* — *Jones v. Male*, 26 Tex. Civ. App. 181; *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66; *Johnston v. Arrendale*, 30 Tex. Civ. App. 504; *Ferguson v. Connolly*, 33 Tex. Civ. App. 245.

*Wisconsin.* — *Perkins v. McAuliffe*, 105 Wis. 582.

Where the mortgagee sought the collection of his debt by suit on the notes at law, it was held that the homestead could be claimed against the judgment. *Baldwin v. Thomas*, 71 Ark. 206.

**2. Liens by Operation of Law — Judgment Liens — Alabama.** — *Emerich v. Gilbert Mfg. Co.*, 138 Ala. 316.

*Arkansas.* — *Burgauer v. Parker*, 69 Ark. 109.  
*Illinois.* — *Hay City First Nat. Bank v. Vest*, 187 Ill. 389.

*Iowa.* — *Jasper County v. Sparham*, 125 Iowa 464.

*Kansas.* — *Ellinger v. Thomas*, 64 Kan. 180.

*Kentucky.* — *Marshall v. Mahorney*, 111 Ky. 157.

*Texas.* — *Cahill v. Dickson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 281.

**Attachment Liens.** — *Noble v. McKeith*, 127 Mich. 163, 8 Detroit Leg. N. 281; *Barton v. Walker*, 165 Mo. 25.

**Mechanic's Liens.** — *Delray Lumber Co. v. Keohane*, 132 Mich. 17, 9 Detroit Leg. N. 494; *Sunnerville v. King*, 98 Tex. 332, affirming (Tex. Civ. App. 1904) 80 S. W. Rep. 1250.

**619. 1. Judgment Liens.** — *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563.

**620. 2. When Homestead Right Perfected with Reference to Prior Liens — Liens by Operation of Law.** — *Maples v. Rawlins*, 105 Tenn. 457, 80 Am. St. Rep. 903; *Wallis v. Wendler*, 27 Tex. Civ. App. 235.

**3. Status of Judgment Lien as Against After-acquired Title.** — *Wright v. Bond*, 127 N. Car. 39, 80 Am. St. Rep. 781.

**621. 1. Agreement to Make Attorney's Fee a Lien.** — Where an attorney defended a homestead against attachment, and also set aside a fraudulent sale made by the homesteader in order to make the right available, and the homesteader agreed that the attorney's fee should be decreed a lien on the homestead, such agreement was held a mortgage, binding on the homestead, and properly foreclosed by a court of equity. *McLean v. Lerch*, 105 Tenn. 693.

**2. Lien of Judgment Attaches to Homestead Property.** — *Hyder v. Butler*, 103 Tenn. 289.

**622. 1. No Lien Attaches to Homestead Property — Florida.** — *Wilhelm v. Locklar*, (Fla. 1903) 35 So. Rep. 6.

*Illinois.* — *Kilmer v. Garlick*, 185 Ill. 406.

*Iowa.* — *Johnson County Sav. Bank v. Carroll*, 109 Iowa 564; *Mitchell v. West*, (Iowa 1903) 93 N. W. Rep. 380.

*Kansas.* — *Randolph v. Sprague*, 10 Kan. App. 583, 63 Pac. Rep. 446.

*Michigan.* — *Cleland v. Clark*, 123 Mich. 179.

*Ohio.* — *Genell v. Hiron*, 70 Ohio St. 309.

**2. Arkansas.** — *Jones v. Dillard*, 70 Ark. 69.

*Missouri.* — *Burton v. Look*, 162 Mo. 502; *Smith v. Thompson*, 169 Mo. 553.

*Nebraska.* — *Scheel v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741.

*North Dakota.* — *Dalrymple v. Security Imp. Co.*, 11 N. Dak. 65.

*Texas.* — *Thompson v. McConnell*, 107 Fed.



**623.** Judgment for Alimony. — See note 1.

**624.** *f.* LIABILITIES EXPRESSLY EXCEPTED — (1) *Debts Contracted Before Purchase* — (a) *In General* — Liabilities Incurred Prior to Acquisition of Homestead. — See notes 1, 2.

**625.** See note 1.

**626.** (2) *Obligations for Purchase Money* — Liens Contemporary with Purchase Transaction. — See note 6.

**628.** "Debts" or "Obligations" for Purchase Money. — See note 1.

**629.** Money Borrowed to Pay Purchase Price. — See note 2.

Rep. 33, 46 C. C. A. 124 (decided under the Texas statute).

*Virginia.* — Oppenheim v. Myers, 99 Va. 582, overruling Kennerly v. Swartz, 83 Va. 704.

*Washington.* — Whitworth v. McKee, 32 Wash. 83.

**623. 1. South Dakota.** — The court granting a divorce and awarding alimony to the wife may modify the decree so as to require the payment of a specific sum and make it a lien on the homestead of the husband; but it cannot cut off the husband's right of redemption from sale under the decree. *Harding v. Harding*, 16 S. Dak. 406, 102 Am. St. Rep. 694.

**Judgment Directing Lien.** — A general judgment for alimony is a lien on the husband's homestead, in *Nebraska*, if the court so directs. *Fraaman v. Fraaman*, 64 Neb. 472. See also as to the effect of a declaration in a judgment that it shall be a lien on the homestead, *Johnson v. Johnson*, 66 Kan. 546.

**624. 1. Iowa.** — *Johnson County Sav. Bank v. Carroll*, 109 Iowa 564; *Clemans v. Penfield*, 111 Iowa 511; *Richards v. Orr*, 118 Iowa 724; *Edinger v. Bain*, 125 Iowa 391.

**2. Kentucky.** — *Davidson v. Dishman*, 59 S. W. Rep. 326, 22 Ky. L. Rep. 940; *Vest v. Vest*, 66 S. W. Rep. 618, 23 Ky. L. Rep. 2106; *Andrews v. Kentucky Citizens' Bldg. Assoc.*, 67 S. W. Rep. 826, 23 Ky. L. Rep. 2418.

Where the claimant purchased several lots, paying only part of the purchase money, improved a portion of the property as a homestead, contracted a debt, and thereafter sold the unimproved portion and with the proceeds paid off the purchase money debt, he was held entitled to claim the homestead against the debt contracted. *Morrow v. Bailey*, 109 Ky. 359, 95 Am. St. Rep. 382.

Where, before contracting the debt, the claimant had paid more than one thousand dollars on the purchase price of the homestead, he was entitled to claim the homestead to the extent of one thousand dollars. *Donaldson v. Richart*, 60 S. W. Rep. 405, 22 Ky. L. Rep. 1268.

**Homestead Purchased with Pension Money.** — The homestead is not exempt from prior debts, even though purchased with exempt pension money. *Curtis v. Helton*, 109 Ky. 493, 95 Am. St. Rep. 388.

**Purchase Money Must Be Paid.** — Where one purchased a homestead on credit, paid a part of the purchase money, contracted a debt, and sold the property for more than the purchase money lien, it was held that, as against his unsecured creditor, he was entitled to claim the surplus to the full amount of his homestead exemption. *Torbitt v. Jackson*, 80 S. W. Rep. 1123, 26 Ky. L. Rep. 196.

**625. 1. Missouri.** — *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714; *Payne v. Fraley*, 165 Mo. 191; *Acreback v. Myer*, 165 Mo. 685; *Holland v. Ronney*, 168 Mo. 16; *Clark v. Thias*, 173 Mo. 628.

A patent is comprehended in the word "deed" as used in this statute. *Stinson v. Call*, 163 Mo. 323.

Merely recording the deed does not impress the character of homestead; there must be in addition an occupation as a homestead. *Barton v. Walker*, 165 Mo. 25.

**Vermont.** — *In re Marquette*, 103 Fed. Rep. 777 (decided under the Vermont statute).

**626. 6. Prior Mortgage or Vendor's Liens for Purchase Money Superior to Homestead Exemption.** — *Brown v. Ennis*, 69 Ark. 123, 86 Am. St. Rep. 171; *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908; *Denlinger v. Burkey*, 18 Lanc. L. Rev. 94; *Lennox v. Sanders*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1076; *Naquin v. Texas Sav., etc., Assoc.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 908.

Where two persons, at different times, purchased two tracts of land, one of them paying the greater part of the purchase money, and the lands were immediately divided and partitioned between them as soon as acquired, it was held that the one paying the greater part of the purchase price had a lien for his money, but that the other could claim a homestead out of the first tract purchased as against the lien for the money paid on account of the last-acquired tract. *Crenshaw v. Crenshaw*, 61 S. W. Rep. 366, 22 Ky. L. Rep. 1782.

**In Wisconsin** it has been held that the right to a purchase-money lien is lost if not enforced during the lifetime of the homesteader. This rule is dependent on Rev. Stat., § 2271. *Berger v. Berger*, 104 Wis. 282, 76 Am. St. Rep. 877.

**628. 1. Illustrations of What Constitutes Obligation for Purchase Money.** — A judgment for damages for failure to deliver personalty, a bill of sale of which was given as part of the purchase price, was held enforceable against the homestead purchased. *Harris v. Larsen*, 24 Utah 139.

**Loan of Money under Guise of Purchase-money Transaction.** — *Spratt v. Early*, 169 Mo. 357; *Campbell v. Crowley*, (Tex. Civ. App. 1900) 56 S. W. Rep. 373; *Breneman v. Mayer*, 24 Tex. Civ. App. 164; *Noel v. Clark*, 25 Tex. Civ. App. 136; *Cooper v. Ford*, 29 Tex. Civ. App. 253; *Lybrand v. Fuller*, 30 Tex. Civ. App. 116; *Peaslee v. Walker*, 34 Tex. Civ. App. 297.

**629. 2. Money Borrowed to Pay Purchase Price.** — *Wilhelm v. Locklar*, (Fla. 1903) 35 So. Rep. 6; *Amick v. Amick*, 59 S. Car. 70; *McNair v. Moore*, 64 S. Car. 82.

**Such Debt One for Money Loaned and Not for**

**630.** See notes 1, 2.

**631.** (3) *Obligations for Labor, Material, and the Like — In General.* — See note 1.

Debts Secured by Liens. — See note 2.

General Exceptions. — See note 3.

**633.** Money Borrowed to Pay for Labor and Material. — See notes 2, 3.

(4) *Taxes and Local Assessments — Taxes Due "Thereon."* — See note 6.

**634.** Local Assessments. — See note 1.

(5) *Miscellaneous Exceptions.* — See note 2.

4. Time of Contracting Liability — Pre-existing Debts. — See note 3.

**635.** Renewal of Debts — Adjustment of Equities. — See note 1.

**637.** 5. Waiver and Estoppel of Creditor's Rights — Burden of Proof. — See note 3.

**638.** XI. WAIVER, FORFEITURE, ABANDONMENT, AND ESTOPPEL — 2. Waiver — Express Waiver. — See notes 2, 3, 4, 5.

Land Purchased. — Johnston County Sav. Bank v. Carroll, 109 Iowa 564; Hieswetter v. Kress, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239.

**630.** 1. Debt for Money Loaned Considered as Purchase-money Obligation. — Simpson v. Miller, 74 S. W. Rep. 213, 24 Ky. L. Rep. 2378; Crow v. Kellman, (Tex. Civ. App. 1902) 70 S. W. Rep. 564; Johnston v. Arrendale, 30 Tex. Civ. App. 504.

2. Obligation Incurred for Money Borrowed When Contemporary with Purchase Transaction. — Jones v. Mule, 26 Tex. Civ. App. 181; Walsh v. Ford, 27 Tex. Civ. App. 573.

**631.** 1. Illustrations of What Constitutes Such Indebtedness — Attorney's Fees. — Harn v. American Mut. Bldg., etc., Assoc., 95 Tex. 79; American Bldg., etc., Assoc. v. Daugherty, 27 Tex. Civ. App. 430; Summerville v. King, 98 Tex. 341, modifying 98 Tex. 332.

A lien for attorney's fees for defending the homestead was denied in McBroom v. Whitefield, 108 Tenn. 422.

Attorney's fees were allowed where there was a contest over the right to the lien. Sproulle v. McFarland, (Tex. Civ. App. 1900) 56 S. W. Rep. 693.

2. Debts Secured by Liens. — Charles Betcher Co. v. Cleveland, 13 S. Dak. 347.

3. Obligations for Debts Due for Labor, Etc. — Texas. — Summerville v. King, 98 Tex. 332, affirming (Tex. Civ. App. 1904) 80 S. W. Rep. 1050; West End Town Co. v. Grigg, (Tex. Civ. App. 1899) 54 S. W. Rep. 904, reversed 93 Tex. 451; Moreno v. Spencer, (Tex. Civ. App. 1904) 82 S. W. Rep. 1054.

**633.** 2. Debt for Loan of Money Within Exception. — Interstate Bldg., etc., Assoc. v. Go-forth, 94 Tex. 259.

3. Debt for Loan of Money Not Within Exception. — Steger v. Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225.

6. Taxes Due "Thereon." — State v. Jordan, 25 Tex. Civ. App. 17.

Must Be Listed as Homestead. — Where the homestead was exempt from all taxes except those due thereon, it was necessary to list it as a homestead in order to avoid liability for taxes on other property. Bitzer v. Becke, (Iowa 1902) 89 N. W. Rep. 193, 120 Iowa 66.

**634.** 1. Local Assessments Not Taxes. — Compare Ahern v. Board of Improvement, 69

Ark. 68; Todd v. Atchison, 9 Kan. App. 251; Kettle v. Dallas, 35 Tex. Civ. App. 632, in which cases local assessments were enforced against the homestead.

2. Fiduciary Debts. — Huffstedler v. Kibler, 67 Ark. 239; Miller v. Davis, 69 Ark. 1, 86 Am. St. Rep. 167.

Liability on Official Bonds — Kentucky. — Kentucky Statutes, § 4176, expressly excepts liability for breach of official bond, and it has been held that this exception inures to the benefit of a surety who has paid the liability and seeks contribution from his co-surety. Hudson v. Combs, 110 Ky. 762.

Wages for Personal Services. — In Minnesota, by constitutional amendment adopted in 1888, the homestead cannot be claimed against a debt for labor or services performed. Lindberg v. Johnson, 93 Minn. 267.

3. Date of Execution of Contract Governs. — Ex p. Goldsmith, 68 S. Car. 538, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 634; Crebbin v. Moseley, (Tex. Civ. App. 1903) 74 S. W. Rep. 815.

**635.** 1. Obligations for Purchase Money. — Irwin v. Gay, (Neb. 1902) 91 N. W. Rep. 197.

**637.** 3. Burden of Proof — Alabama. — Bailey v. D. R. Dunlap Mercantile Co., 138 Ala. 415.

Arkansas. — Miller v. Davis, 69 Ark. 1, 86 Am. St. Rep. 167.

Georgia. — Sigman v. Austin, 112 Ga. 570.

Illinois. — Huening v. Buckley, 87 Ill. App. 648.

Iowa. — Walker v. Walker, 117 Iowa 609.

Kentucky. — Shirley v. Russell, 62 S. W. Rep. 483, 23 Ky. L. Rep. 33.

Intent to Reinvest Proceeds in Another Homestead. — Where one claims the proceeds of a homestead as exempt, as the right is dependent upon the intention to reinvest in another homestead, the burden is upon him to show such intent. State v. Hull, 99 Mo. App. 703.

**638.** 2. Meyer Bros. Drug Co. v. Bybee, 179 Mo. 354.

3. Wright v. Wright, 103 Fed. Rep. 580; Bell v. Whitehead, 115 Ga. 589; Eagle v. Smylie, 126 Mich. 615, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 638, 639; Gilbert v. Provident Life, etc., Co., (Neb. 1901) 95 N. W. Rep. 488.

**638.** Failure to Assert Right — In General. — See note 7.  
Failure to Assert Homestead At or Before Judicial Sale. — See note 9.

**639.** See note 1.

Persons by Whom Waiver May Be Made — In General. — See note 2.

Same — Power of Husband to Waive. — See note 3.

Same — Power of Minors to Waive. — See note 4.

Same — Power of Widow to Waive. — See note 5.

3. Forfeiture — Death of Wife and Maturity of Children. — See note 7.

**640.** 4. Abandonment — *a.* IN GENERAL. — See notes 1, 2, 3.

**641.** See note 1.

**638.** 4. Manner Prescribed by Statute. — Homestead exemption can be waived only in the manner directed by the statute. *Mattingly v. Hazel*, 78 S. W. Rep. 178, 25 Ky. L. Rep. 1483.

Strong Presumption Against Waiver. — *Walt v. Walt*, 113 Tenn. 189.

5. *Berry v. Meir*, 70 Ark. 129.

In *Louisiana* the Constitution of 1898, art. 246, requires a waiver of the homestead to be in writing and duly recorded. *Wilkins v. Fremaux*, 112 La. 921.

7. *Moran v. King*, 111 Fed. Rep. 730, 49 C. C. A. 578, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 638; *McNally v. White*, 154 Ind. 163; *Osman v. Wisted*, 78 Minn. 295; *Curtis v. Osborne*, 63 Neb. 837; *Gilbert v. Provident Life, etc., Co.*, (Neb. 1901) 95 N. W. Rep. 488; *Foogman v. Patterson*, 9 N. Dak. 254.

9. Failure to Assert Exemption Before Sale Deemed Waiver. — *Butler v. Carter*, (Tex. Civ. App. 1900) 58 S. W. Rep. 632.

Failure to Assert Before Avoidance of Conveyance. — Failure to assert homestead exemption before a decree avoiding a conveyance thereof, as a fraud upon creditors, was held a waiver of the right. *Babineau v. Guilbeau*, 52 La. Ann. 992.

**639.** 1. Failure to Assert Exemption Before Sale Not Waiver. — In *Kentucky* it was held that a voluntary surrender of the homestead to be sold under execution would not preclude the claim. *Meade v. Wright*, (Ky. 1900) 56 S. W. Rep. 523.

2. *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 186; *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124; *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57.

3. *Carr v. Winlock*, 109 Ky. 488.

4. A Guardian ad Litem cannot waive the minor's right to claim a homestead out of a deceased parent's estate. *Spence v. Goodwin*, 128 N. Car. 273.

5. *Compare Hubbard v. Sage Land, etc., Co.*, 81 Miss. 616.

7. Dissolution of Family — Effect on Homestead Exemption. — *Suter v. Quarles*, 58 S. W. Rep. 590, 22 Ky. L. Rep. 1080.

**640.** 1. Abandonment by Removal Rejected. — Under Rev. Stat. Idaho 1887, § 3041, abandonment can only be accomplished by declaration of abandonment or conveyance duly executed and acknowledged by husband and wife. *Mellen v. McMannis*, 9 Idaho 418.

The removal of minor orphaned children from and the leasing of the homestead by their guardian will not constitute abandonment and subject the property to the payment of the deceased ancestor's debts. *Rockwood v. St. John*, 10 Okla. 476.

2. Abandonment by Removal Recognized. — *In re Buelow*, 98 Fed. Rep. 86; *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220; *Smith v. Kidd*, 123 Mich. 193; *McCord, etc., Co. v. Tessier*, (Neb. 1901) 96 N. W. Rep. 342.

3. Permanent Removal Constitutes Abandonment — *Alabama*. — *Porter v. Harrison*, 124 Ala. 296.

*Arkansas*. — *Wilmoth v. Gossett*, 71 Ark. 594.

*Illinois*. — *Smith v. Kneer*, 203 Ill. 264.

*Iowa*. — *Wapello County v. Brady*, 118 Iowa 482.

*Kansas*. — *Miller v. Baker*, 9 Kan. App. 883, 58 Pac. Rep. 1002.

*Minnesota*. — *Kramer v. Lamb*, 84 Minn. 468.

*Missouri*. — *Rose v. Smith*, 167 Mo. 81; *Rouse v. Caton*, 168 Mo. 288, 90 Am. St. Rep. 456; *Smith v. Thompson*, 169 Mo. 553.

*New Hampshire*. — *Beland v. Goss*, 68 N. H. 257.

*South Carolina*. — *Ex p. Goldsmith*, 68 S. Car. 538.

*Texas*. — *Alexander v. Lovitt*, (Tex. Civ. App. 1906) 56 S. W. Rep. 685; *O'Brien v. Woeltz*, 94 Tex. 148; *Drake v. Davidson*, 28 Tex. Civ. App. 184; *Moss v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 533; *Beck v. Avindino*, 29 Tex. Civ. App. 500.

Where at the time the homestead was acquired the right existed to claim detached lots as a part thereof, and subsequently the law was so altered as to limit the homestead to contiguous lands, and after the adoption of the amendment the homesteader abandoned his residence but retained possession of the detached lots, acquiring a new homestead not contiguous thereto, it was held that he could not claim the detached lots as part of his homestead. *White v. Danforth*, 122 Iowa 403.

**641.** 1. Temporary Absence Not Abandonment — *United States*. — *In re Pope*, 98 Fed. Rep. 722.

*Arkansas*. — *White v. Swann*, 68 Ark. 102, 82 Am. St. Rep. 282; *Wilks v. Vaughan*, 73 Ark. 174.

*Illinois*. — *Macavenny v. Ralph*, 107 Ill. App. 542; *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110; *Palmer v. Riddle*, 197 Ill. 45.

*Iowa*. — *Fullerton v. Sherrill*, 114 Iowa 511; *Rand Lumber Co. v. Atkins*, 116 Iowa 242.

*Kentucky*. — *Ragsdale v. Watkins*, 76 S. W. Rep. 45, 25 Ky. L. Rep. 506; *Ball v. Ramsey*, 77 S. W. Rep. 692, 25 Ky. L. Rep. 1268.

*Louisiana*. — *Jeanerette Bank v. Stansbury*, 110 La. 301.

*Michigan*. — *Gardner v. Gardner*, 123 Mich. 673; *Burkhardt v. Walker*, 123 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525.

*Minnesota*. — *Kramer v. Lamb*, 84 Minn. 468.

**642.** Application of Rule. — See notes 1, 2, 3, 4, 5.

**643.** See note 1.

Abandonment Dependent upon Intention. — See note 2.

**644.** Intention to Return Must Be Continuing. — See note 1.

Intention to Return Formed Subsequent to Removal. — See notes 3, 4.

Intention to Return Must Be Positive. — See notes 5, 6, 8.

**645.** *b.* ACTUAL ABANDONMENT NECESSARY. — See notes 1, 2, 3, 4.

*c.* INTENTION A QUESTION OF FACT. — See note 5.

*d.* DEGREE OF PROOF REQUIRED TO SHOW INTENTION. — See notes 6, 8.

*Mississippi.* — Collins *v.* Bounds, 82 Miss. 447.

*Missouri.* — Holmes *v.* Nichols, 93 Mo. App. 513; Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354.

*Nebraska.* — Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227; Greenwood First Nat. Bank *v.* Reece, 64 Neb. 292; Blumer *v.* Albright, 64 Neb. 249; Joslin *v.* Williams, (Neb. 1902) 90 N. W. Rep. 1124; Omaha Brewing Assoc. *v.* Zeller, (Neb. 1903) 93 N. W. Rep. 762.

*Texas.* — St. Louis Brewing Assoc. *v.* Walker, 23 Tex. Civ. App. 6; Maupin *v.* McCall, (Tex. Civ. App. 1899) 54 S. W. Rep. 623; Warren *v.* Kohr, 26 Tex. Civ. App. 331; Beck *v.* Avindino, 29 Tex. Civ. App. 500.

*Wisconsin.* — Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927.

**642. 1. Removal Because of Troubles with Tenants** is not an abandonment. Bealey *v.* Blake, 153 Mo. 657.

**2. Removal Because of Burning of Dwelling.** — Jeanerette Bank *v.* Stansbury, 110 La. 301; Brokken *v.* Baumann, 10 N. Dak. 453.

**3. Removal Because of Ill Health** — *Illinois.* — Palmer *v.* Riddle, 197 Ill. 45.

*Kansas.* — Sloss *v.* Sullard, 63 Kan. 884, 65 Pac. Rep. 658.

*Kentucky.* — Galloway *v.* Rowlett, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503.

*Missouri.* — New Madrid Banking Co. *v.* Brown, 165 Mo. 32.

*Nebraska.* — Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227; Greenwood First Nat. Bank *v.* Reece, 64 Neb. 292; Blumer *v.* Albright, 64 Neb. 249.

*Wisconsin.* — Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927.

**4. Removal to Educate Children.** — Herring *v.* Johnston, 72 S. W. Rep. 793, 24 Ky. L. Rep. 1940; Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354; Maupin *v.* McCall, (Tex. Civ. App. 1899) 54 S. W. Rep. 623; Birdwell *v.* Burleson, 31 Tex. Civ. App. 31.

**5. Removal for Purposes of Business** — *Arkansas.* — Wilks *v.* Vaughan, 73 Ark. 174.

*Kentucky.* — Ragsdale *v.* Watkins, 76 S. W. Rep. 45, 25 Ky. L. Rep. 506.

*Michigan.* — Gardner *v.* Gardner, 123 Mich. 673.

*Minnesota.* — Kramer *v.* Lamb, 84 Minn. 468.

*Missouri.* — Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354.

*Nebraska.* — Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227; Blumer *v.* Albright, 64 Neb. 249; Omaha Brewing Assoc. *v.* Zeller, (Neb. 1903) 93 N. W. Rep. 762.

**643. 1. Nonoccupancy by Surviving Minor Children.** — Rockwood *v.* St. John, 10 Okla. 476.

In *Georgia* it was held that the long and con-

tinued absence of a minor from the homestead, the use and benefits of which were enjoyed by the father, was not such abandonment as would permit the subjection of the homestead to the payment of the father's debts. Sigman *v.* Austin, 112 Ga. 570.

**2. Importance of Intention with Which Removal Is Made.** — Wapello County *v.* Brady, 118 Iowa 482; Flynn *v.* Riley, 60 Neb. 491; Coile *v.* Hudgins, 109 Tenn. 217; White *v.* Epperson, 32 Tex. Civ. App. 162.

**644. 1. Effect of Abandonment of Intention to Return.** — Kramer *v.* Lamb, 84 Minn. 468; McCord, etc., Co. *v.* Tessier, (Neb. 1901) 96 N. W. Rep. 342; Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. Rep. 685.

**3. Lybrand *v.* Fuller,** 30 Tex. Civ. App. 116.

**4. Flynn *v.* Riley,** 60 Neb. 491.

**5. Qualified Intention to Return.** — Kloss *v.* Wylezalek, 207 Ill. 328, 99 Am. St. Rep. 220; Rand Lumber Co. *v.* Atkins, 116 Iowa 242; Wapello County *v.* Brady, 118 Iowa 482; White *v.* Roberts, 112 Ky. 788; Smith *v.* Kidd, 123 Mich. 193.

**6. Kloss *v.* Wylezalek,** 207 Ill. 328, 99 Am. St. Rep. 220; Wapello County *v.* Brady, 118 Iowa 482.

**8. Palmer *v.* Riddle,** 197 Ill. 45.

**645. 1. Effect of Mere Intention to Remove.** — Palmer Oil, etc., Co. *v.* Parish, 61 Kan. 311; National Bank of Commerce *v.* Chamberlain, (Neb. 1904) 100 N. W. Rep. 943; Powers *v.* Palmer, 36 Tex. Civ. App. 212.

**2. Removing to Other Lands Owned by the Husband** and continuing the use of the old homestead as a farm, where the two tracts do not exceed the statutory limit, will not constitute such abandonment as to estop the claim of homestead. Livingston *v.* Davis, 24 Tex. Civ. App. 497.

**3. Effect of Mere Intention to Remove from State.** — Lee *v.* Hughes, 77 S. W. Rep. 386, 25 Ky. L. Rep. 1201.

**4. Community Property — Conveyance to Children.** — Under statute in *Washington* the surviving husband takes the homestead in community property freed from the debts of the wife, and his conveyance of it to his children does not amount to abandonment so as to subject it to such debts. Matter of Feas, 30 Wash. 51.

**5. Intention a Question of Fact.** — Macavenny *v.* Ralph, 107 Ill. App. 542; Gardner *v.* Gardner, 123 Mich. 673; New Madrid Banking Co. *v.* Brown, 165 Mo. 32; Mathewson *v.* Kilburn, 183 Mo. 110; Flynn *v.* Riley, 60 Neb. 491; Coile *v.* Hudgins, 109 Tenn. 217; Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. Rep. 683; Zettlemoyer *v.* Mears, 36 Tex. Civ. App. 27.

**6. Sufficiency of Evidence of Intention.** — Gal-

**646.** See note 1.

*e.* BURDEN OF PROOF TO SHOW INTENTION. — See notes 2, 3.

*f.* EVIDENCE OF INTENTION TO ABANDON. — See notes 4, 5.

Removal Without Acquiring New Home. — See notes 6, 7.

**647.** Removal and Acquisition of New Home. — See notes 3, 4, 5.

Removal to Another State. — See note 7.

**648.** Voting at Place of New Residence. — See notes 1, 2.

Duration of Absence. — See note 4.

**649.** See note 1.

Declarations of Owner. — See notes 3, 6.

Removal and Subsequent Conveyance. — See note 8.

**650.** Offering Homestead for Sale. — See note 1.

Use of Premises for Other than Homestead Purposes. — See notes 2, 4, 6.

Ioway *v.* Rowlett, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645.

There is a strong presumption against abandonment. *Walt v. Walt*, 113 Tenn. 189.

**645.** 8. Galloway *v.* Rowlett, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645.

**646.** 1. O'Brien *v.* Woeltz, 94 Tex. 148.

**2. Burden of Proof to Show Abandonment.** — Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227; Greenwood First Nat. Bank *v.* Reece, 64 Neb. 292; McCord, etc., *Co. v.* Tessier, (Neb. 1901) 96 N. W. Rep. 342.

**3. Burden of Proof to Show Character of Removal.** — Blumer *v.* Albright, 64 Neb. 249.

**4. Testimony of Claimant as to Intention Admissible.** — Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. Rep. 685.

It was held incompetent for the claimant to testify that he reserved a portion of the premises "to live in," when making a lease for a term of years, and removing from the premises. *Bland v. Putman*, 132 Ala. 613.

**Claimant's Testimony May Be Sufficient.** — Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354.

**5. Kramer v. Lamb**, 84 Minn. 468; Flynn *v.* Riley, 60 Neb. 491; McCord, etc., *Co. v.* Tessier, (Neb. 1901) 96 N. W. Rep. 342.

**6. Acquiring New Home — Necessary to Abandonment.** — See Omaha Brewing Assoc. *v.* Zeller, (Neb. 1903) 93 N. W. Rep. 762.

**7. Same — Not Necessary to Abandonment.** — Galloway *v.* Rowlett, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 646, and quoting all of the text paragraph; Beck *v.* Avindino, 29 Tex. Civ. App. 500.

**647. 3. Acquisition of New Home — Abandonment Presumed.** — Wapello County *v.* Brady, 118 Iowa 482.

**4. Same — Presumption of Abandonment Not Conclusive.** — Wapello County *v.* Brady, 118 Iowa 482; Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354.

**The Acquisition of Other Land with the intent to make it a homestead will not constitute abandonment.** Powers *v.* Palmer, 36 Tex. Civ. App. 212.

**5. Acquisition of New Homestead Works Abandonment — United States.** — *In re* Buckingham, 102 Fed. Rep. 972; *In re* Johnson, 118 Fed. Rep. 312.

Arkansas. — Wilmoth *v.* Gossett, 71 Ark. 594.

Iowa. — Stickley *v.* Widle, 122 Iowa 400.

Michigan. — Smith *v.* Kidd, 123 Mich. 193.

Mississippi. — Brantley *v.* Batson, 84 Miss. 411.

Missouri. — Rose *v.* Smith, 167 Mo. 81.

Nebraska. — Flynn *v.* Riley, 60 Neb. 491.

Texas. — Griffin *v.* McKinney, 25 Tex. Civ. App. 432; Moss *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. Rep. 533; Beck *v.* Avindino, 29 Tex. Civ. App. 500.

**7. Removal to Another State with No Intention to Return Constitutes Abandonment.** — Briscoe *v.* Vaughn, 103 Tenn. 308, Hamby *v.* Lane, 107 Tenn. 598, 89 Am. St. Rep. 967; Coile *v.* Hudgins, 109 Tenn. 217; Leslie *v.* Elliott, 26 Tex. Civ. App. 578.

**648. 1. Effect of Voting at Place of New Residence.** — Porter *v.* Harrison, 124 Ala. 266; Smith *v.* Kidd, 123 Mich. 193; Kramer *v.* Lamb, 84 Minn. 468; Flynn *v.* Riley, 60 Neb. 491; Omaha Brewing Assoc. *v.* Zeller, (Neb. 1903) 93 N. W. Rep. 762; McCord, etc., *Co. v.* Tessier, (Neb. 1901) 96 N. W. Rep. 342.

**2. Myers v. Elliott**, 101 Ill. App. 86; Rand Lumber Co. *v.* Atkins, 116 Iowa 242; Zettlemoyer *v.* Mears, 36 Tex. Civ. App. 27; Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927.

**4. Long Absence Not Conclusive Proof of Abandonment.** — Omaha Brewing Assoc. *v.* Zeller, (Neb. 1903) 93 N. W. Rep. 762; Alexander *v.* Lovitt, (Tex. Civ. App. 1900) 56 S. W. Rep. 685.

**649. 1. Kramer v. Lamb**, 84 Minn. 468.

**3. Galloway v. Rowlett**, 74 S. W. Rep. 260, 24 Ky. L. Rep. 2503, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 649, and quoting the entire text paragraph.

**6. Bealey v. Blake**, 153 Mo. 657; Livingston *v.* Davis, 24 Tex. Civ. App. 497; Powers *v.* Palmer, 36 Tex. Civ. App. 212.

**8. Effect of Removal and Subsequent Conveyance.** — *Ex p.* Goldsmith, 68 S. Car. 538.

**650. 1. Offering to Sell Homestead Not Abandonment.** — *In re* Carmichael, 108 Fed. Rep. 789; Myers *v.* Elliott, 101 Ill. App. 86; Wapello County *v.* Brady, 118 Iowa 482; National Bank of Commerce *v.* Chamberlain, (Neb. 1904) 100 N. W. Rep. 943.

**2. Use of Business Homestead for Other than Business Purposes.** — Freeman *v.* Cates, 22 Tex. Civ. App. 623.

**4. Inconsistent Use of Part of Homestead.** — Torres *v.* Cuneo, (Tex. Civ. App. 1899) 53 S. W. Rep. 828; O'Brien *v.* Woeltz, 94 Tex. 148.

**6. Leasing Part of Premises.** — Freeman *v.* Cates, 22 Tex. Civ. App. 623.

**651.** Leasing Premises. — See note 1.

**652.** See note 1.

Acceptance of Lease of Premises. — See notes 4, 5, 6.

By Sale or Conveyance — In General. — See note 7.

**653.** Conveyances Operating as Such. — See note 1.

**654.** Conveyance by Husband to Wife. — See note 2.

**655.** Conveyance as Security for Debt. — See note 1.

Conveyance Absolute in Form. — See note 2.

Conveyance in Fraud of Creditors — General Rule. — See note 4.

**656.** See note 1.

The Reason of the Rule. — See note 2.

Right of Homesteader as Against Creditor. — See note 3.

**657.** Contrary Doctrine. — See note 2.

**651.** 1. Temporary Leasing of Part of Premises Not Abandonment. — *In re Pope*, 98 Fed. Rep. 722; *Alexander v. Lovitt*, (Tex. Civ. App. 1900) 56 S. W. Rep. 685; *Warren v. Kohr*, 26 Tex. Civ. App. 331.

But renting is a circumstance tending to show abandonment. *Wapello County v. Brady*, 118 Iowa 482.

**652.** 1. Leasing with No Intention of Again Occupying Homestead Constitutes Abandonment. — *Bland v. Putman*, 132 Ala. 613; *Clausen v. Sanders*, 109 La. 996; *Torres v. Cuneo*, (Tex. Civ. App. 1899) 53 S. W. Rep. 828.

4. Lease from Holder of Unforeclosed Mortgage. — Accepting a lease from one holding an unforeclosed mortgage is not an abandonment of the homestead. *Burton v. Look*, 162 Mo. 502.

5. See *Duffield v. Dosh*, 124 Iowa 286, where it was held that acceptance of a lease from a grantee under an invalid conveyance did not constitute abandonment.

6. Where the heirs paid rent to the widow, in ignorance of their right to partition, it was held not to divest them of their right to a homestead in the lands partitioned to them subsequently. *Loessin v. Washington*, 23 Tex. Civ. App. 515.

7. Sale or Mortgage Does Not Render Homestead Subject to Debts. — *Swift v. Kortrecht*, 112 Fed. Rep. 709, 50 C. C. A. 429; *Farmers' Sav., etc., Assoc. v. Berger*, 70 Ark. 613, 69 S. W. Rep. 57; *Worley v. Hicks*, 161 Mo. 340; *Briscoe v. Vaughn*, 103 Tenn. 308; *Coile v. Hudgins*, 109 Tenn. 217. See also *R. E. Bell Hardware Co. v. Riddle*, 31 Tex. Civ. App. 411.

Contrary Doctrine — Conveyance Operating as Abandonment. — An unconditional sale and conveyance of the property amounts to an abandonment. *Clay v. Wallace*, 116 Ky. 599.

**653.** 1. Alienee Takes Land Free from Claims of Other Creditors of Grantor. — *In re Nye*, (C. C. A.) 133 Fed. Rep. 33; *Jasper County v. Sparham*, 125 Iowa 464.

**654.** 2. Conveyance by Husband to Wife Not Abandonment. — *Berry v. Meir*, 70 Ark. 129; *Burkhardt v. Walker*, 132 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525.

**655.** 1. Conveyance as Security with Release. — *In re Buckingham*, 102 Fed. Rep. 972; *Swift v. Kortrecht*, 112 Fed. Rep. 709, 50 C. C. A. 429; *In re Nye*, (C. C. A.) 133 Fed. Rep. 33; *Berry v. Meir*, 70 Ark. 129; *Worley v. Hicks*, 161 Mo. 340; *Burton v. Look*, 162 Mo. 502; *Vincent v. Vineyard*, 24 Mont. 207, 81 Am. St. Rep. 423.

2. Conveyance Absolute in Form. — *Swift v. Kortrecht*, 112 Fed. Rep. 709, 50 C. C. A. 429. 4. *United States*. — *In re Stone*, 116 Fed. Rep. 35.

*Arkansas*. — *Wilks v. Vaughan*, 73 Ark. 174. *Iowa*. — *Clearfield Bank v. Olin*, 112 Iowa 476. *Kentucky*. — *Davis v. H. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289.

*Minnesota*. — *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566.

*Nebraska*. — *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292.

*Tennessee*. — *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.

As Between Creditor and Grantee. — Where the conveyance covered property out of which the homestead might have been claimed, but no claim had ever been made, it was held that a judgment lien covered the whole property as against the fraudulent grantee. *Joyce v. Perry*, 111 Iowa 567.

**656.** 1. Fraudulent Conveyance No Forfeiture. — *In re Buckingham*, 102 Fed. Rep. 972; *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11; *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563; *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292; *McNair v. Moore*, 64 S. Car. 82; *Oppenheim v. Myers*, 99 Va. 582.

A Simulated Conveyance, made with a view to protect the homestead from creditors after abandonment, is void. *Brown v. Moore*, (Tex. Civ. App. 1901) 64 S. W. Rep. 781.

2. *Daugherty v. Bogy*, 104 Fed. Rep. 938, 44 C. C. A. 266; *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *In re Carmichael*, 108 Fed. Rep. 789; *McAndrew v. Hollingsworth*, 72 Ark. 446; *Davis v. H. Feltman Co.*, 112 Ky. 293, 99 Am. St. Rep. 289; *Kuhn v. Kuhn*, 69 S. W. Rep. 1077, 24 Ky. L. Rep. 787; *Roark v. Bach*, 116 Ky. 457; *Moore v. Wilkerson*, 169 Mo. 334; *Stam v. Smith*, 183 Mo. 464; *Drake v. Davidson*, 28 Tex. Civ. App. 184; *Heidelberg v. Carter* 34 Tex. Civ. App. 579.

3. Right as Against Creditor. — *Huntington Bank v. Bowers*, 58 S. W. Rep. 418, 22 Ky. L. Rep. 497; *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714.

**657.** 2. Held a Forfeiture. — *McNally v. White*, 154 Ind. 163.

Where the owner conveys the homestead in fraud of creditors, but obtains a reconveyance before being adjudged a bankrupt, he may claim the homestead as exempt. *In re Thompson*, 115 Fed. Rep. 924 (construing the *Georgia* statute).

**657.** *g. POWER OF HUSBAND AND WIFE RESPECTIVELY TO ABANDON HOMESTEAD — Power of Husband.* — See notes 6, 7.

**658.** See note 1.

*Desertion of Wife by Husband.* — See note 4.

**659.** *5. Estoppel — Mere Acts or Declarations.* — See note 7.

**660.** *By Covenant.* — See notes 1, 2.

*As Against Parties Misled by Acts of Abandonment.* — See note 4.

*Change of Selection After Charging Other Lands.* — See note 5.

**661.** *Change of Selection After Representations Inducing Dealings.* — See note 2.

*Void Conveyance.* — See note 3.

*Conveyance by Husband Without Joinder of Wife.* — See notes 4, 5.

**662.** *Fraudulent Conveyance.* — See note 3.

**657. 6. Husband's Right to Abandon Homestead.**

— *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138; *Gardner v. Gardner*, 123 Mich. 673; *Blumer v. Albright*, 64 Neb. 249; *National Bank of Commerce v. Chamberlain*, (Neb. 1904) 100 N. W. Rep. 943; *Affleck v. Wangermann*, 93 Tex. 351, reversing (Tex. Civ. App. 1899) 54 S. W. Rep. 255; *Arnold v. Macdonald*, 22 Tex. Civ. App. 487; *Williams v. Galveston*, (Tex. Civ. App. 1900) 58 S. W. Rep. 551. See also *Way v. Scott*, 118 Iowa 197.

*7. Farmers' Bldg., etc., Assoc. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280; *Wilmoth v. Gossett*, 71 Ark. 594; *Kramer v. Lamb*, 84 Minn. 468; *Hunter v. Kelley*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890; *Mass v. Bromberg*, 28 Tex. Civ. App. 145; *Gleed v. Pickett*, 29 Tex. Civ. App. 101; *Anderson v. Carter*, 29 Tex. Civ. App. 240; *Beranek v. Beranek*, 113 Wis. 272.

But he must act in good faith. *St. Louis Brewing Assoc. v. Walker*, 23 Tex. Civ. App. 6.

The designation of the homestead by the husband is binding on the wife, where there is no evidence of fraud on his part. *Brin v. Anderson*, 25 Tex. Civ. App. 323; *Evans v. Daniel*, 25 Tex. Civ. App. 362.

Where the husband owns a city block of twelve lots and improves one on which he resides with his family as a homestead, he has authority to abandon another of the lots and make valid conveyance without the joinder of his wife. *Drew v. Wooten*, 27 Tex. Civ. App. 456.

**658. 1. Voluntary Removal of Wife with Husband.** — *Kramer v. Lamb*, 84 Minn. 468; *Helgebye v. Dammen*, 13 N. Dak. 167.

**4. Desertion by Husband, Family Continuing to Occupy Homestead.** — *National Bank of Commerce v. Chamberlain*, (Neb. 1904) 100 N. W. Rep. 943.

**659. 7. Mere Acts or Declarations.** — *Berry v. Meir*, 70 Ark. 129; *Tapley v. Ogle*, 162 Mo. 190; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354; *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124; *Hennessy v. Savings, etc., Co.*, 22 Tex. Civ. App. 591; *Texas Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1901) 67 S. W. Rep. 173; *Lybrand v. Fuller*, 30 Tex. Civ. App. 116; *Letzerich v. Lidiak*, (Tex. Civ. App. 1902) 70 S. W. Rep. 773; *Temple v. Watkins Land Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1188. See also **688. 5.**

Where the owner permitted the construction of a railroad across his homestead under a deed invalid because not executed in accordance with the homestead laws, he was held to be estopped from recovering the land in ejectment. *Hen-*

*drix v. Southern R. Co.*, 130 Ala. 205, 89 Am. St. Rep. 27. See also *Phillips v. Texas Loan Co.*, 26 Tex. Civ. App. 505.

**660. 1.** See *Butler v. Carter*, (Tex. Civ. App. 1900) 58 S. W. Rep. 632.

**2.** *Slappy v. Hanners*, 137 Ala. 199.

**4. Persons Misled by Abandonment.** — *Farmers' Bldg., etc., Assoc. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280; *Hunter v. Kelley*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890; *Leslie v. Elliott*, 26 Tex. Civ. App. 578; *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822; *Thompson Sav. Bank v. Gregory*, 36 Tex. Civ. App. 578.

Where a mortgagor resided on other land than that mortgaged, and swore the mortgaged land was not his homestead, he was estopped to claim homestead, even though his wife did not acknowledge the mortgage. *Farmers' Bldg., etc., Assoc. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280.

**5. Change of Selection After Charging Other Lands.** — *Silverman v. Landrum*, (Tex. Civ. App. 1900) 56 S. W. Rep. 107; *Thompson Sav. Bank v. Gregory*, (Tex. Civ. App. 1900) 59 S. W. Rep. 622; *Parrish v. Hawes*, 95 Tex. 185; *Thompson Sav. Bank v. Gregory*, 36 Tex. Civ. App. 578.

Where the husband made a general assignment for the benefit of his creditors, reserving his homestead, he and his wife were held estopped to change the homestead. *Osman v. Wisted*, 78 Minn. 295.

**661. 2. Change of Selection After Representations Inducing Dealings.** — *American Freehold Land Mortg. Co. v. Dulack*, (Tex. Civ. App. 1902) 67 S. W. Rep. 172; *Gleed v. Pickett*, 29 Tex. Civ. App. 101; *Anderson v. Brin*, (Tex. Civ. App. 1903) 73 S. W. Rep. 838; *Thompson Sav. Bank v. Gregory*, 36 Tex. Civ. App. 578.

**3. Void Conveyance by Wife.** — *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138; *Ach v. Milam*, 118 Ga. 105.

**4. Conveyance Without Joinder of Wife.** — *Collins v. Bounds*, 82 Miss. 447; *Colonial, etc., Mortg. Co. v. Thetford*, 27 Tex. Civ. App. 152.

Such a deed may become effectual to convey title after the death of the wife by being recognized and adopted by the husband, or he may estop himself by his acts and conduct from claiming that such deed does not convey title. *Adams v. Gilbert*, 67 Kan. 273, 109 Am. St. Rep. 456.

**5. Subsequent Ratification.** — *Mattingly v. Hazel*, 78 S. W. Rep. 178, 25 Ky. L. Rep. 1483.

**662. 3. Fraudulent Conveyance.** — *Rosen-*

**662.** Matter of Record — *Res Judicata*. — See note 5.

**663.** XII. SALES, CONVEYANCES, AND INCUMBRANCES—1. Right to Alienate or Encumber Homesteads — *a.* RULE STATED. — See notes 1, 3, 4.

**664.** *b.* SALE UNDER FORECLOSURE OF MORTGAGE OR DEED OF TRUST NOT PROHIBITED "FORCED SALE." — See notes 1, 2.

*c.* ALIENATION OR INCUMBRANCE NOT FRAUD UPON CREDITORS. — See note 4.

*baum v. Davis*, 106 Tenn. 51. See also *Wilks v. Vaughan*, 73 Ark. 174; *Kettleschlag v. Ferrick*, 12 S. Dak. 455, 76 Am. St. Rep. 623. But see *Babineau v. Guilbeau*, 52 La. Ann. 992.

The Husband Also May Claim the homestead exemption after his conveyance to the wife has been annulled as a fraud upon his creditors. *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563.

If the Fraudulent Intent Be Shared by the Husband and Wife it will not estop either to claim the homestead, "but only operate as against the remainder or reversionary interest of the husband." *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.

**662.** 5. Matter of Record. — *Willingham v. Slade*, 112 Ga. 418; *Merki v. Merki*, 212 Ill. 121.

Illustrations — *Failure to Claim in Foreclosure*. — Where the husband mortgaged the homestead and foreclosure was instituted against him alone, *lis pendens* being filed, it was held that the wife could not claim homestead after decree of sale. *McNamara v. Oakland Bldg., etc., Assoc.*, 132 Cal. 247.

*Lien of Decree for Alimony*. — Where the wife was granted a decree of divorce and the use of the homestead for two years, and nothing was said as to homestead rights in the proceedings or decree, it was an adjudication of the homestead rights of the wife. *Barkman v. Barkman*, 209 Ill. 269.

*Reviving Judgment*. — A failure to set up the claim for homestead in a proceeding to revive a judgment not a lien thereon will not operate to estop the owner from subsequently claiming it. *Burton v. Look*, 162 Mo. 502.

**663.** 1. Homestead May Be Alienated. — *McAndrew v. Hollingsworth*, 72 Ark. 446; *Stephens v. Leonard*, 122 Mich. 125; *Moore v. Wilkerson*, 169 Mo. 334; *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517; *Osborne v. Evans*, 185 Mo. 509; *Genell v. Hiron*, 70 Ohio St. 309; *Wilson v. Lewis*, 36 Tex. Civ. App. 371. See also *Codville v. Pearce*, 13 Manitoba 468.

Homestead May Be Exchanged. — *Grimes v. Luster*, 73 Ark. 266.

3. Homestead May Be Encumbered. — *Elstroth v. Young*, 83 Mo. App. 253; *Genell v. Hiron*, 70 Ohio St. 309; *McLean v. Lerch*, 105 Tenn. 693.

4. Homestead May Be Given Away. — *Genell v. Hiron*, 70 Ohio St. 309.

**664.** 1. Sale under Foreclosure of Mortgage or Deed of Trust Not Prohibited "Forced Sale." — *Rose v. Smith*, 167 Mo. 81; *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664.

2. Term "Forced Sale" Restricted to Sales Involving No Assent by Contract. — *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893 (to the same effect as *Peterson v. Hornblower*, 33 Cal. 266, set out in the original note).

4. Alienation or Incumbrance of Homestead Not Fraudulent as Against General Creditors — *United States*. — *Daugherty v. Bogy*, 104 Fed. Rep. 938, 44 C. C. A. 266; *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11; *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *In re Carmichael*, 108 Fed. Rep. 789.

*Alabama*. — *Talladega First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156; *Steiner v. Berney*, 130 Ala. 289.

*Arkansas*. — *McAndrew v. Hollingsworth*, 72 Ark. 446; *Wilks v. Vaughan*, 73 Ark. 174.

*Indiana*. — *McNally v. White*, 154 Ind. 163, rehearing denied 154 Ind. 174; *Hedrick v. Hall*, 155 Ind. 371.

*Iowa*. — *Joyce v. Perry*, 111 Iowa 567; *Clearfield Bank v. Olin*, 112 Iowa 476; *Hubblefield v. Gadd*, 112 Iowa 681; *Richards v. Orr*, 118 Iowa 724.

*Kentucky*. — *Curtis v. Helton*, 109 Ky. 493, 95 Am. St. Rep. 388; *Suter v. Quarles*, 58 S. W. Rep. 990, 22 Ky. L. Rep. 1080; *Morrow v. Bailey*, 109 Ky. 359, 95 Am. St. Rep. 382; *Kuhn v. Kuhn*, 69 S. W. Rep. 1077, 24 Ky. L. Rep. 787; *Roark v. Bach*, 116 Ky. 457.

*Michigan*. — *Cleland v. Clark*, 123 Mich. 179; *Eagle v. Smylie*, 126 Mich. 615; *Michigan Trust Co. v. Comstock*, 130 Mich. 572, 9 Detroit Leg. N. 149; *Palmer v. Bray*, 136 Mich. 85, 10 Detroit Leg. N. 974.

*Minnesota*. — *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566.

*Missouri*. — *Chance v. Jennings*, 159 Mo. 544; *Rose v. Smith*, 167 Mo. 81; *Moore v. Wilkerson*, 169 Mo. 334; *Balz v. Nelson*, 171 Mo. 682; *Stam v. Smith*, 183 Mo. 464; *Osborne v. Evans*, 185 Mo. 509.

*Nebraska*. — *Plummer v. Rohman*, 61 Neb. 61, modified 62 Neb. 145; *Smith v. Neufeld*, 61 Neb. 699; *Jayne v. Hymer*, 66 Neb. 785; *Scheel v. Lackner*, (Neb. 1903) 93 N. W. Rep. 741; *Brown v. Campbell*, (Neb. 1903) 93 N. W. Rep. 1007; *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124; *Baxter v. Avery*, (Neb. 1904) 98 N. W. Rep. 667; *National Bank of Commerce v. Chamberlain*, (Neb. 1904) 100 N. W. Rep. 943.

*North Dakota*. — *Foogman v. Patterson*, 9 N. Dak. 254; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595; *Dalrymple v. Security Imp. Co.*, 11 N. Dak. 65.

*Ohio*. — *Genell v. Hiron*, 70 Ohio St. 309.

*Tennessee*. — *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.

*Texas*. — *Brown v. Moore*, (Tex. Civ. App. 1901) 64 S. W. Rep. 781; *Drake v. Davidson*, 28 Tex. Civ. App. 184; *Heidelbach v. Carter*, 34 Tex. Civ. App. 579.

Conveyance by Husband to Wife. — Where the purpose of the conveyance to the wife is to defraud the creditors, and the debtor subsequently abandons the homestead and acquires



**665.** See note 1.

The Motive of the Vendor Is Immaterial. — See note 2.

2. Prohibition of Alienation or Incumbrance by Husband Without Joinder or Consent of Wife — *a.* RULE STATED. — See note 4.

another, the conveyance will be annulled and the property subjected to the payment of the debts. *Kettleschlag v. Ferrick*, 12 S. Dak. 455, 76 Am. St. Rep. 623.

**665. 1. Conveyance Without Consideration —** *United States*. — *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11; *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *In re Carmichael*, 108 Fed. Rep. 789.

*California*. — *Matter of Fath*, 132 Cal. 609. *Iowa*. — *State Ins. Co. v. Prestage*, 116 Iowa 466.

*Kentucky*. — *Huntington Bank v. Bowers*, 58 S. W. Rep. 418, 22 Ky. L. Rep. 497; *Curtis v. Helton*, 109 Ky. 493, 95 Am. St. Rep. 388; *Roark v. Bach*, 116 Ky. 457.

*Michigan*. — *Eagle v. Smylie*, 126 Mich. 615.

*Missouri*. — *New Madrid Banking Co. v. Brown*, 165 Mo. 32; *Osborne v. Evans*, 185 Mo. 509.

*Nebraska*. — *Jayne v. Hymer*, 66 Neb. 785; *Brown v. Campbell*, (Neb. 1903) 93 N. W. Rep. 1007.

*Texas*. — *Drake v. Davidson*, 28 Tex. Civ. App. 184.

**2. Motive of Vendor Immaterial.** — *Daugherty v. Bogy*, 104 Fed. Rep. 938, 44 C. C. A. 266; *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11; *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *McAndrew v. Hollingsworth*, 72 Ark. 446; *Richards v. Orr*, 118 Iowa 724; *Perry v. Cornelius*, 63 S. W. Rep. 23, 23 Ky. L. Rep. 425; *New Madrid Banking Co. v. Brown*, 165 Mo. 32; *Rose v. Smith*, 167 Mo. 81; *Moore v. Wilkerson*, 169 Mo. 334; *Brown v. Campbell*, (Neb. 1903) 93 N. W. Rep. 1007.

**4. Requirement that Wife Shall Join in or Consent to Alienation or Incumbrance —** *Alabama*. — *Slappy v. Hanners*, 137 Ala. 199.

*Arizona*. — *Edwards v. Simms*, (Ariz. 1903) 71 Pac. Rep. 902.

*Arkansas*. — *Berry v. Meir*, 70 Ark. 129; *Park v. Park*, 71 Ark. 283; *McAndrew v. Hollingsworth*, 72 Ark. 446.

*California*. — *Pryal v. Pryal*, (Cal. 1903) 71 Pac. Rep. 802.

*Idaho*. — *Stowell v. Tucker*, 7 Idaho 312.

*Illinois*. — *Stickel v. Crane*, 189 Ill. 211; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474; *Strayer v. Dickerson*, 205 Ill. 257; *Robertson v. Tippie*, 209 Ill. 38.

*Iowa*. — *Sayers v. Childers*, 112 Iowa 681; *Pryne v. Pryne*, 116 Iowa 82; *Way v. Scott*, 118 Iowa 197; *Stickley v. Widle*, 122 Iowa 400; *Alvis v. Alvis*, 123 Iowa 546; *Duffield v. Dosh*, 124 Iowa 286.

*Michigan*. — *H. Stern, Jr., etc., Co. v. Wing*, 135 Mich. 331, 10 Detroit Leg. N. 804.

*Mississippi*. — *Gulf, etc., R. Co. v. Singleterry*, 78 Miss. 772; *Johnson v. Hunt*, 79 Miss. 639; *Hubbard v. Sage Land, etc., Co.*, 81 Miss. 616; *Collins v. Bounds*, (Miss. 1904) 36 So. Rep. 689.

*Missouri*. — *Newton v. Newton*, 162 Mo. 173;

*Hoselton v. Hoselton*, 166 Mo. 182; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354.

*Nebraska*. — *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90, 80 Am. St. Rep. 669; *Blumer v. Albright*, 64 Neb. 249; *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654; *Rawles v. Reichenbach*, 65 Neb. 29; *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124; *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801; *Norbury v. Harper*, (Neb. 1903) 97 N. W. Rep. 438; *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57, *modifying* 65 Neb. 167.

*North Carolina*. — *Cawfield v. Owens*, 130 N. Car. 641.

*Tennessee*. — *Mason v. Jackson*, (Tenn. Ch. 1900) 57 S. W. Rep. 217; *Coe v. Nelson*, (Tenn. Ch. 1900) 59 S. W. Rep. 170; *Couch v. Capitol Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 64 S. W. Rep. 340; *Hainby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.

*Texas*. — *St. Louis Brewing Assoc. v. Walker*, 23 Tex. Civ. App. 6; *Hennessy v. Savings, etc., Co.*, 22 Tex. Civ. App. 591; *Morris v. Wells*, 27 Tex. Civ. App. 363; *Houston, etc., R. Co. v. Cluck*, 31 Tex. Civ. App. 211; *Penn v. Case*, 36 Tex. Civ. App. 4.

*Vermont*. — *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704.

*Virginia*. — *Virginia-Tennessee Coal, etc., Co. v. McClelland*, 98 Va. 424.

*Wisconsin*. — *Cumps v. Kiyo*, 104 Wis. 656; *Beranek v. Beranek*, 113 Wis. 272.

**Conveyance Prior to Declaration of Homestead.** — *In Loewenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115, it was held that a conveyance or mortgage of the homestead by the husband prior to the declaration of homestead was valid against the wife.

**Mortgage of Community Property.** — Where the husband alone mortgaged the homestead, which was community property, and the wife subsequently filed a claim of homestead and thereafter died, it was held that the mortgage was enforceable against the property without making any demand against the wife's estate. *Bay City Bldg., etc., Assoc. v. Broad*, 136 Cal. 525.

**Necessity for Joinder or Consent of Husband in Alienation or Incumbrance of Homestead by Wife.** — *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195; *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138; *Lange v. Geiser*, 138 Cal. 682.

Where the homestead has not been allotted, the wife, being owner, may convey without the joinder of the husband. *Ex p. Jeter*, 64 S. Car. 405.

**The Joinder of the Wife May Be In Pais, and need not be in writing.** *Sullivan v. Wichita*, 64 Kan. 539.

**Where the Wife Is a Minor** she cannot make a valid conveyance of the homestead, and though she may join the husband in a deed it will be avoided at her instance. *McBroom v. Whitefield*, 108 Tenn. 422.

**668. Existence of Wife Must Be Shown.** — See note 1.

b. REASON OF RULE. — See note 2.

c. NATURE OF WIFE'S RIGHT. — See note 3.

d. CONSTITUTIONALITY OF STATUTES. — See note 4.

e. APPLICATIONS OF RULE — (1) *Homestead Held under Equitable Title.* — See note 6.**669.** (4) *Occupation of More Land than Can Be Held Exempt.* — See note 3.(8) *Dedication to Public Use.* — See note 7.(10) *Changing Character of Lien, Renewing, Etc.* — See note 9**670.** (11) *Contracts to Convey.* — See notes 1, 2.**671.** *Recovery of Purchase Money.* — See note 2.*Effect of Joinder of Wife in Contract to Convey.* — See note 3.*When Specific Performance May Be Enforced.* — See notes 4, 5, 6.(13) *Acts of Husband Sufficient to Create Lien by Estoppel.* — See note 8.(14) *Conveyance by Wife of Homestead Previously Conveyed to Her by Husband.* — See note 9.**668. 1. Existence of Wife Must Be Shown.** — *Garretson v. White*, 69 Ark. 603.**2. Reason of Rule.** — *Park v. Park*, 71 Ark. 283.**3. Nature of Wife's Right.** — *Freeman v. Freeman*, 111 Tenn. 151; *Cumps v. Kiyo*, 104 Wis. 656; *Beranek v. Beranek*, 113 Wis. 272."The rights of the wife in the homestead are equal to those of her husband." *Texas Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1901) 67 S. W. Rep. 173.The wife has a distinct interest in the homestead, whether the title be community or separate, which she may assert independent of and contrary to the wishes of her husband, and the conveyance of this interest at the instance of the husband is a sufficient consideration to support a conveyance from her husband to her against any assault of his creditors. *Drake v. Davidson*, 28 Tex. Civ. App. 184. And see authorities cited in *State Bank v. Dougherty*, 167 Mo. 1, 90 Am. St. Rep. 422.**4. Statute Held to Interfere with Vested Rights.** — *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517; *Elliott v. Bristow*, 185 Mo. 15.**6. Wife Must Consent to Transfer of Equitable Title.** — *Duffield v. Dosh*, 124 Iowa 286.**669. 3. Occupation of More Land than Can Be Held Exempt.** — *Edwards v. Simms*, (Ariz. 1903) 71 Pac. Rep. 902.**7. Dedication to Public Use.** — The wife may be estopped by her conduct to attack a dedication of a part of the homestead to public use. *People v. Myring*, 144 Cal. 351.**9. Changing Character of Lien, Renewing, Etc.** — *Investment Securities Co. v. Manwarren*, 64 Kan. 636, *overruling* *Portsmouth Sav. Bank v. Hardman*, 62 Kan. 242, 84 Am. St. Rep. 381; *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801; *Arnold v. Macdonald*, 22 Tex. Civ. App. 487; *San Antonio Real Estate Bldg., etc., Assoc. v. Stewart*, 94 Tex. 441; *Cumps v. Kiyo*, 104 Wis. 656.The husband, by making payments on the mortgage, may prevent the bar of the statute of limitations as to the wife, though she had no knowledge of the payments being made. *Roberts v. Roberts*, 10 N. Dak. 531.**670. 1. Contract of One Spouse Alone to Con-****vey Homestead Cannot Be Specifically Enforced.** — *Mollen v. McMannis*, 9 Idaho 418; *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654; *Watkins v. Youll*, (Neb. 1903) 96 N. W. Rep. 1042; *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57; *Miller v. Gray*, 29 Tex. Civ. App. 183.**2. Damages Not Recoverable for Nonperformance of Such Contract.** — *Meek v. Lange*, 65 Neb. 786, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 670.**671. 2. Purchase Money Paid May Be Recovered Back with Interest in Michigan.** — *H. Stern, Jr., etc., Co. v. Wing*, 135 Mich. 331, 10 Detroit Leg. N. 804.**3. Contract to Convey Homestead Cannot Be Specifically Enforced Though Wife Joined Therein.** — *Lyon v. Hardin*, 129 Ala. 643; *Fred W. Wolf Co. v. Galbraith*, 35 Tex. Civ. App. 505.In Iowa it was held that an oral contract to convey, though joined in by the wife and based on a valuable consideration, could not be enforced. *Alvis v. Alvis*, 123 Iowa 546.In Nebraska where the contract to convey was not acknowledged it was held unenforceable either against vendor or vendee. *Solt v. Anderson*, 63 Neb. 734, 67 Neb. 103.**4. Effect of Abandonment of Homestead Before Contract to Convey Is Barred.** — *Ley v. Hahn*, 36 Tex. Civ. App. 208.**5. Death of Wife.** — *Pitman v. Mann*, (Neb. 1904) 98 N. W. Rep. 821; *Ley v. Hahn*, 36 Tex. Civ. App. 208.**6. Homestead Largely Exceeding in Value Authorized Exemption — Agreement of Purchaser to Hold Subject to Homestead Right.** — In *Nebraska* it was held that specific performance only as to the excess would be decreed. *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57.**8. Estoppel as Against Husband Cannot Affect Homestead.** — *Andrews v. Kentucky Citizens' Bldg., etc., Assoc.*, 67 S. W. Rep. 826, 23 Ky. L. Rep. 2418.**9. Joinder of Husband Necessary Though He Had Previously Conveyed Homestead to Wife.** — *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195; *Pryal v. Pryal*, (Cal. 1903) 71 Pac. Rep. 802.

- 672.** (15) *Marriage Subsequent to Application for Loan.* — See note 1.  
 (16) *Where Wife Is Insane.* — See notes 2, 3, 4.  
 Rule Otherwise in Texas. — See note 5.  
 (17) *Where Wife Is Living Apart from Husband.* — See note 6.
- 673.** *f. EXCEPTIONS TO RULE* — (2) *Incumbrance for Purchase Money.*  
 — See note 6.
- 674.** See note 2.
- 675.** (4) *Leasing.* — See note 1.  
 (5) *Grant of Right of Way to Railroad.* — See notes 3, 4.  
 (7) *Prior Incumbrances.* — See note 6.  
 (8) *License to Remove Minerals, Etc.* — See note 7.
- 676.** See note 1.  
 (9) *Conveyance to Wife.* — See notes 2, 3.  
 (10) *Express Reservation of Homestead Right.* — See note 5.  
 (11) *Land Not Allotted as Homestead.* — See note 6.  
 (12) *Where Declaration of Homestead Has Not Been Filed.* — See note 7.
- 677.** (13) *Husband Having Power of Attorney from Wife.* — See notes 1, 2

**672.** 1. *Marriage Subsequent to Application for Loan.* — See *Cahill v. Dickson*, (Tex. Civ. App. 1903) 77 S. W. Rep. 281.

2. *California Statute Allowing Husband to Convey Alone.* — In California a statute provides for conveyance by the husband, and in proceedings for authority to convey, all the statutory requirements must be strictly complied with or the conveyance will be void. *Jones v. Falvella*, 126 Cal. 24.

3. *Joinder of Insane Wife of No Effect.* — *Balenger v. Lester*, 113 Ky. 96.

4. *Consent of Guardian of Insane Wife Not Sufficient.* — *Adams v. Gilbert*, 67 Kan. 273, 100 Am. St. Rep. 456.

5. *Texas Rule — Husband Alone May Convey Where Wife Is Hopelessly Insane.* — See *Ley v. Hahn*, 36 Tex. Civ. App. 208.

6. *Wife Living Apart from Husband.* — *Gibbons v. Hall*, (Tex. Civ. App. 1900) 59 S. W. Rep. 814.

**673.** 6. *Exception in Case of Incumbrance to Secure Purchase Money.* — *Irwin v. Gay*, (Neb. 1902) 91 N. W. Rep. 197.

**674.** 2. *Necessity for Good Faith.* — *Arnold v. Macdonald*, 22 Tex. Civ. App. 487.

**675.** 1. *Lease for Purposes Not Interfering with Use as Homestead.* — *Millikin v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674.

3. *Grant of Easement.* — Where the wife owns the homestead she may grant a right of way to the owner of adjoining premises. *Stokes v. Maxson*, 113 Iowa 122, 86 Am. St. Rep. 367.

4. *Husband Alone Cannot Grant Right of Way Through Homestead.* — *Griffin v. Chattanooga Southern R. Co.*, 127 Ala. 570, 85 Am. St. Rep. 143; *Gulf, etc., R. Co. v. Singleterry*, 78 Miss. 772.

6. *Prior Incumbrances.* — *Johnston v. Arrendale*, 30 Tex. Civ. App. 504.

7. *Husband Alone May Give Valid License to Remove Minerals or Quarry Stone, Etc.* — *Millikin v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29.

**676.** 1. *Joint Consent Necessary in Kansas.* — *Palmer Oil, etc., Co. v. Parish*, 61 Kan. 311. Same Rule Prevails in Texas. — *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292.

A grant by the husband alone of the right to use the water of a spring on the homestead was held invalid. *Houston, etc., R. Co. v. Cluck*, 31 Tex. Civ. App. 211.

2. *Conveyance to Wife Valid Without Joinder of Wife.* — *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *Kindley v. Spraker*, 72 Ark. 228, 105 Am. St. Rep. 32; *Beedy v. Finney*, 118 Iowa 276.

Rule Otherwise in Illinois. — *Beasley v. Beasley*, 180 Ill. 163; *Stickel v. Crane*, 189 Ill. 211; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474; *Dinsmoor v. Rowse*, 200 Ill. 555; *Hogue v. Steel*, 207 Ill. 340; *Roberson v. Tippie*, 209 Ill. 38; *Karsten v. Winkelman*, 209 Ill. 547.

3. *Reason of Rule.* — *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124; *Kindley v. Spraker*, 72 Ark. 228, 105 Am. St. Rep. 32.

5. *Express Reservation of Homestead Rights.* — *Joyner v. Sugg*, 132 N. Car. 580.

6. *Land Not Allotted as a Homestead.* — *Park v. Wright*, 74 S. W. Rep. 712, 25 Ky. L. Rep. 128; *Joyner v. Sugg*, 132 N. Car. 580; *Treece v. Carr*, (Tenn. Ch. 1900) 58 S. W. Rep. 1078; *Thorp v. Wilbur*, 71 Vt. 266.

But the husband cannot convey where there is a judgment against him on which execution may be issued. *Cawfield v. Owens*, 130 N. Car. 641.

A Mortgage by the Wife of the homestead owned by her, made before allotment thereof under a new constitution, was held valid, though it had been allotted under a prior constitution, and the new constitution required the joinder of the husband in the conveyance or incumbrance of the homestead. *Ex p. Jeter*, 64 S. Car. 405.

7. *No Claim of Homestead Filed, Etc.* — *Lowenthal v. Conan*, 135 Cal. 381, 87 Am. St. Rep. 115; *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517; *Stark v. Anderson*, 104 Mo. App. 128; *Brokken v. Baumann*, 10 N. Dak. 453; *Wegner v. Lubenow*, 12 N. Dak. 95. But see *Townsend v. Blanchard*, 117 Iowa 36.

**677.** 1. *Husband Having Power of Attorney from Wife.* — In Texas the wife can convey the homestead by power of attorney. *Ley v. Hahn*, 36 Tex. Civ. App. 208.

**677.** (15) *Conveyance or Incumbrance of Excess over Homestead.* — See note 5.

**678.** (18) *Agreement to Give Portion of Fruit Crop to Persons Furnishing Trees.* — See note 1.

*g.* WHEN RULE HAS NO APPLICATION — (2) *Homestead Abandoned.* — See note 6.

**679.** *h.* REQUIREMENT OF JOINDER OF WIFE IN INCUMBRANCE DOES NOT PROHIBIT ALIENATION BY HUSBAND ALONE. — See note 3.

*i.* FORMAL REQUISITES OF ALIENATION — (1) *In General.* — See note 4.

(2) *Character of Instrument or Contract* — *Separate Conveyances.* — See note 7.

*The Verbal Assent.* — See note 9.

**680.** (3) *Express Release or Waiver of Right.* — See notes 1, 3.

(4) *Wife as Actual Party to Instrument.* — See notes 5, 7, 10.

**681.** *Release of Dower Insufficient.* — See note 1.

(6) *Acknowledgment.* — See notes 6, 7, 8, 9.

**677.** 2. *Husband Cannot Execute Mortgage under General Power of Attorney from Wife to Convey.* — *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927.

5. *Conveyance or Incumbrance of Excess Over Homestead* — *Iowa.* — *Hall v. Gottsche*, 114 Iowa 147; *Pryne v. Pryne*, 116 Iowa 82; *Townsend v. Blanchard*, 117 Iowa 36.

*Mississippi.* — *Nixon v. Hewes*, 80 Miss. 88. *Nebraska.* — *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57.

*North Dakota.* — *Wegner v. Lubenow*, 12 N. Dak. 95.

*Texas.* — *Mass v. Bromberg*, 28 Tex. Civ. App. 145; *Anderson v. Brin*, (Tex. Civ. App. 1903) 73 S. W. Rep. 838; *Temple v. Watkins Land Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1188.

**678.** 1. *Agreement to Give Portion of Fruit Crop to Persons Furnishing Trees.* — Such contract will not affect the wife's dower in the land. *Stark v. Anderson*, 104 Mo. App. 128.

6. *Homestead Abandoned.* — *Alvis v. Alvis*, 123 Iowa 546; *Newbro v. Friar*, 131 Mich. 368, 9 Detroit Leg. N. 355; *Levingston v. Davis*, 24 Tex. Civ. App. 497; *Colonial, etc., Mortg. Co. v. Thetford*, 27 Tex. Civ. App. 152; *Drèw v. Wooten*, 27 Tex. Civ. App. 456; *Beranek v. Beranek*, 113 Wis. 272.

Removal from the premises and acquisition of a new homestead will validate a prior conveyance of the husband alone. *Anderson v. Carter*, 29 Tex. Civ. App. 240.

**679.** 3. *Requirement of Joinder of Wife in Release or Waiver Does Not Prohibit Alienation by Husband Alone.* — *Carr v. Winlock*, 109 Ky. 488.

But such conveyance will not affect the wife's dower. *Hanna v. Gay*, 78 S. W. Rep. 915, 25 Ky. L. Rep. 1794.

4. *Statutory Requirements to Be Complied With* — *Alabama.* — *Henderson v. Kirkland*, 127 Ala. 185.

*Illinois.* — *Davis v. McCullough*, 192 Ill. 277; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225.

*Iowa.* — *Alvis v. Alvis*, 123 Iowa 546.

*Nebraska.* — *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654; *Teske v. Dittberner*, (Neb. 1903) 98 N. W. Rep. 57.

*Tennessee.* — *Couch v. Capitol Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 64 S. W. Rep. 340.

*Texas.* — *Morris v. Wells*, 27 Tex. Civ. App. 363; *Texas Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1901) 67 S. W. Rep. 173.

*Wisconsin.* — *Cumps v. Kiyo*, 104 Wis. 656; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927.

7. *Separate Conveyances.* — *Alvis v. Alvis*, 123 Iowa 546; *Couch v. Capitol Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 64 S. W. Rep. 340.

*Need Not Sign at Same Time.* — It is not necessary that the conveyance should be signed by husband and wife at the same time. *Epperly v. Ferguson*, 118 Iowa 47.

9. *Verbal Assent of Wife.* — *Sullivan v. Wichita*, 64 Kan. 539; *Durand v. Higgins*, 67 Kan. 110; *Cumps v. Kiyo*, 104 Wis. 656.

The verbal assent of the wife to a lease by the husband, and her acquiescence therein, were held sufficient to bind her and validate the contract. *Johnson v. Samuelson*, 69 Kan. 263.

**680.** 1. *Illinois Rule.* — *Davis v. McCullough*, 192 Ill. 277.

3. *Express Waiver Unnecessary.* — *Whitt v. Bailey*, 59 S. W. Rep. 514, 22 Ky. L. Rep. 1015; *Conyers v. Frye*, (Tenn. Ch. 1900) 58 S. W. Rep. 1126.

5. *Wife Must Be Party to Instrument.* — *Alvis v. Alvis*, 123 Iowa 546.

7. *Massillon Engine, etc., Co. v. Carr*, 71 S. W. Rep. 859, 24 Ky. L. Rep. 1534.

Where neither the mortgagor nor his wife was named in the body of a mortgage on the homestead, but they were referred to only by the pronouns "I" and "my," and both signed the mortgage, it was held a valid incumbrance. *Bray v. Ellison*, 83 S. W. Rep. 96, 26 Ky. L. Rep. 1039.

10. *Epperly v. Ferguson*, 118 Iowa 47; *Conyers v. Frye*, (Tenn. Ch. 1900) 58 S. W. Rep. 1126.

**681.** 1. *Release of Dower Insufficient.* — *Burrows v. Pickens*, 129 Ala. 648; *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; *Spratt v. Early*, 169 Mo. 357.

6. *Necessity of Acknowledgment.* — *Shook v. Southern Bldg., etc., Assoc.*, 140 Ala. 575;

**682.** *The Certificate.* — See notes 1, 4.

*j.* REALITY OF CONSENT — (1) *In General.* — See notes 6, 7.

(2) *Duress.* — See note 8.

(3) *Fraud.* — See note 9.

**683.** See note 1.

*k.* EFFECT OF ALIENATION OR INCUMBRANCE WITHOUT JOINDER OR CONSENT OF WIFE — (1) *Validity Subject to Homestead Privilege.* — See notes 2, 3.

**684.** (2) *Validity as to Excess over Homestead Exemption.* — See note 1.

**685.** See note 1.

**686.** (4) *Contracts to Convey.* — See note 7.

Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225; Blumer *v.* Albright, 64 Neb. 249; Buettgenbach *v.* Gerbig, (Neb. 1902) 90 N. W. Rep. 654; Solt *v.* Anderson, (Neb. 1904) 99 N. W. Rep. 678.

**Acknowledgment Taken by Interested Person Void.** — Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554; Hedblom *v.* Pierson, (Neb. 1902) 90 N. W. Rep. 218; Chadron Loan, etc., Assoc. *v.* O'Linn, (Neb. 1901) 95 N. W. Rep. 368; Watkins *v.* Youll, (Neb. 1903) 96 N. W. Rep. 1042.

**681.** 7. Karcher *v.* Gans, 13 S. Dak. 383, 79 Am. St. Rep. 893.

**8. Private Examination.** — Burrows *v.* Pickens, 129 Ala. 648; Griffin *v.* Chattanooga Southern R. Co., 127 Ala. 570, 85 Am. St. Rep. 143; Slappy *v.* Hanners, 137 Ala. 199; Garner *v.* Black, 95 Tex. 125, *affirming* (Tex. Civ. App. 1901) 63 S. W. Rep. 918; Sheridan First Nat. Bank *v.* Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925. *Compare* Adams *v.* Smith, 11 Wyo. 200.

**9. Omission of Word "Threats" Held Fatal.** — Marx *v.* Threet, 131 Ala. 340.

**682.** 1. *Identification of Grantor.* — Penny *v.* British, etc., Mortg. Co., 132 Ala. 357.

**4. Need Not State that Instrument Was Shown to Wife.** — Where the statute required the officer taking the wife's acknowledgment to show her the instrument, it was held unnecessary to state in the certificate that the instrument was so exhibited. Breneman *v.* Mayer, 24 Tex. Civ. App. 164.

**6. Rigid Scrutiny of Transactions Resulting in Joinder or Consent of Wife.** — Blumer *v.* Albright, 64 Neb. 249.

Where the husband and wife made an absolute conveyance of the homestead for a greatly inadequate consideration, and the grantee gave to the husband a contract to convey the land to him on the payment of a sum identical with the consideration named in the conveyance, and interest, and thereafter a sale of the homestead to a stranger was negotiated, and the husband, the wife consenting, canceled the contract and authorized the grantee to convey to the purchaser, it was held that the first transaction was a mortgage, no title passed to the vendee, and the conveyance to the purchaser did not estop the claim of homestead. Cumps *v.* Kiyo, 104 Wis. 656.

**7. Wife Held to Consequences of Her Act.** — Cone *v.* Cone, 118 Iowa 458; Council Bluffs Sav. Bank *v.* Smith, 59 Neb. 90, 80 Am. St. Rep. 669; Walsh *v.* Walsh, (Neb. 1901) 95 N. W. Rep. 1024; Minnesota Stoneware Co. *v.*

McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927. See also Cumps *v.* Kiyo, 104 Wis. 656.

**8. Effect of Duress.** — Blumer *v.* Albright, 64 Neb. 249.

**9. Joinder or Consent Procured through Fraud.** — Wilson *v.* Lewis, 36 Tex. Civ. App. 371.

**683.** 1. *Where Grantee or Mortgagee Is Innocent and Ignorant of Fraud.* — Wilson *v.* Lewis, 36 Tex. Civ. App. 371.

**2. Conveyance Valid Subject to Homestead Interest.** — Huntress *v.* Anderson, 110 Ga. 427, 78 Am. St. Rep. 105 (*overruling* Love *v.* Anderson, 89 Ga. 612); Walker *v.* Hodges, 113 Ga. 1042; Pitman *v.* Mann, (Neb. 1904) 98 N. W. Rep. 821; Martin *v.* Harrington, 73 Vt. 193, 87 Am. St. Rep. 704, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683; Jerdee *v.* Furbush, 115 Wis. 277, 95 Am. St. Rep. 904.

The reversionary interest acquired by such conveyance cannot be asserted until the termination of the homestead. Taylor *v.* James, 109 Ga. 327.

**3. Conveyance Invalid Though Homestead Privilege Terminated** — *Illinois.* — Strayer *v.* Dickerson, 205 Ill. 257; Jespersen *v.* Mech, 213 Ill. 488.

*Iowa.* — Goodwin *v.* Goodwin, 113 Iowa 319; Way *v.* Scott, 118 Iowa 197; Stickley *v.* Widle, 122 Iowa 400; Alvis *v.* Alvis, 123 Iowa 546; Duffield *v.* Dosh, 124 Iowa 286.

*Kansas.* — Adams *v.* Gilbert, 67 Kan. 273, 100 Am. St. Rep. 456 (to the same effect as *Miners' Sav. Bank v. Sandy*, 71 Fed. Rep. 840, set out in the original note).

*Michigan.* — Sirr *v.* Miller, 121 Mich. 598; H. Stern, Jr., etc., Co. *v.* Wing, 135 Mich. 331, 10 Detroit Leg. N. 804.

*Nebraska.* — Norbury *v.* Harper, (Neb. 1903) 97 N. W. Rep. 438; Teske *v.* Dittberner, (Neb. 1903) 98 N. W. Rep. 57.

*North Carolina.* — Cawfield *v.* Owens, 130 N. Car. 641.

*Texas.* — O'Brien *v.* Woeltz, 94 Tex. 148.

*Vermont.* — Martin *v.* Harrington, 73 Vt. 193, 87 Am. St. Rep. 704.

**684.** 1. *Alienation Valid as to Excess over Statutory Exemption.* — Jespersen *v.* Mech, 213 Ill. 488; Pryne *v.* Pryne, 116 Iowa 82; Alvis *v.* Alvis, 123 Iowa 546; Teske *v.* Dittberner, (Neb. 1903) 98 N. W. Rep. 57.

**685.** 1. *Cases Stating that Conveyance Is Absolutely Void.* — Edwards *v.* Simms, (Ariz. 1903) 71 Pac. Rep. 902.

**686.** 7. *The Wife May Ratify a Contract to Convey* by subsequently signing it, or by joining her husband in execution of the deed. Epperly *v.* Ferguson, 118 Iowa 47.

Her ratification will not affect the rights of

- 686.** (5) *Divorce or Separation.* — See note 8.  
 (6) *Estoppel.* — See note 11.  
**687.** (7) *Ratification or Acquiescence.* — See note 3.  
 (8) *Curative Acts.* — See note 8.  
 (9) *Purchasers With and Without Notice.* — See note 9.  
**688.** 3. *Texas Rule Against Incumbrances* — *a.* RULE STATED. — See note 3.  
*b.* APPLICATIONS OF RULE. — See note 5.  
*Property Not Homestead.* — See note 9.  
**689.** See notes 1, 2.  
*c.* EXCEPTIONS TO RULE — (1) *Purchase Money.* — See note 5.  
 (2) *Improvements.* — See notes 6, 7.

creditors whose liens have attached to an abandoned homestead. *Stickley v. Widle*, 122 Iowa 400.

In *Nebraska* the court refused to follow the Iowa rule. *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654.

**686.** 8. *Effect of Divorce.* — Where the husband bought a homestead, filed his claim thereto, and deeded it to the wife, who alone mortgaged it and thereafter obtained a divorce, it was held that she could hold the homestead against the mortgagee, the mortgage being invalid and its invalidity not being affected by the divorce. *Lange v. Geiser*, 138 Cal. 682.

11. *Estoppel.* — *Davis v. Thomas*, 66 Neb. 26. But see *Adams v. Gilbert*, 67 Kan. 273, 100 Am. St. Rep. 456.

**687.** 3. *Ratification and Acquiescence.* — *Alvis v. Alvis*, 123 Iowa 546; *Mattingly v. Hazel*, 78 S. W. Rep. 178, 25 Ky. L. Rep. 1483; *Hubbard v. Sage Land, etc., Co.*, 81 Miss. 616; *Norbury v. Harper*, (Neb. 1903) 97 N. W. Rep. 438. But see *People v. Myring*, 144 Cal. 351.

The Husband Cannot Ratify a conveyance of the homestead owned by the wife and conveyed by her alone. *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195.

*Ratification by Wife of Partition Agreement.* — Where the husband, owning a tract of land exceeding the statutory limit, conveyed the undivided excess and made a parol agreement with the grantee for partition, but died before partition was made, it was held that the wife could ratify the partition agreement after his death, and be bound thereby. *Mass v. Bromberg*, 28 Tex. Civ. App. 145.

8. *Curative Acts.* — *Garretson v. White*, 69 Ark. 603; *Seawel v. Dirst*, 70 Ark. 166; *Farmers' Sav., etc., Assoc. v. Berges*, 70 Ark. 613, 69 S. W. Rep. 57; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225.

*Effect of Subsequent Repeal of Curative Act.* — Where a mortgage, void because the wife did not join therein, was subsequently validated by act of the legislature, the rights of the mortgagee became vested and were not affected by a subsequent repeal of the validating act. *Beavers v. Myar*, 68 Ark. 333.

9. *Purchasers With and Without Notice.* — *Shook v. Southern Bldg., etc., Assoc.*, 140 Ala. 575.

**688.** 3. *Homestead Cannot Be Mortgaged.* — *Harbers v. Levy*, 33 Tex. Civ. App. 480; *Peaslee v. Walker*, 34 Tex. Civ. App. 297; *Delaney*

*v. Walker*, 34 Tex. Civ. App. 617; *Temple v. Watkins Land Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1188.

There can be no ratification by the wife, or any act on her part which will validate the mortgage. *Parrish v. Hawes*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1044, 95 Tex. 185.

*Transaction Held Void as Attempted Evasion of Prohibition Against Mortgaging.* — *Felsher v. Halenza*, (Tex. Civ. App. 1902) 68 S. W. Rep. 838.

5. *Covenant that Property Mortgaged Is Not Homestead.* — *Parrish v. Hawes*, 95 Tex. 185; *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822; *Parrish v. Hawes*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1044, 95 Tex. 185; *Letzerich v. Lidiak*, (Tex. Civ. App. 1902) 70 S. W. Rep. 773; *Crebbin v. Moseley*, (Tex. Civ. App. 1903) 74 S. W. Rep. 815; *Sheckels v. Lewis*, 33 Tex. Civ. App. 8; *Thompson Sav. Bank v. Gregory*, 36 Tex. Civ. App. 578.

9. *Property as to Which Homestead Right Has Not Yet Attached.* — *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822.

**689.** 1. *Abandoned Homestead.* — *Leslie v. Elliott*, 26 Tex. Civ. App. 578.

Where the husband owned two tracts of land and used them as homestead property, a mortgage by him and his wife on one tract, in which they declared that the mortgaged property was not homestead, was held to estop them from afterwards claiming homestead in the land mortgaged. *Parrish v. Hawes*, 95 Tex. 185, (Tex. Civ. App. 1902) 67 S. W. Rep. 1044.

2. *Abandonment of Homestead After Mortgage.* — *Letzerich v. Lidiak*, (Tex. Civ. App. 1902) 70 S. W. Rep. 773.

And it makes no difference that the intention to abandon existed at the time of the execution of the mortgage. *Delaney v. Walker*, 34 Tex. Civ. App. 617.

5. *Homestead May Be Encumbered for Purchase Money.* — But the mortgage is invalid as to any excess over the purchase money secured thereby. *Hillyer v. Westfall* (Tex. Civ. App. 1902) 67 S. W. Rep. 1045.

6. *Homestead May Be Encumbered for Improvements.* — *West End Town Co. v. Grigg*, 93 Tex. 451; *Summerville v. King*, 98 Tex. 332, affirming (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

7. *Strict Construction.* — Where the wife failed to sign the contract no lien attached. *Muller v. McLaughlin*, (Tex. Civ. App. 1905) 84 S. W. Rep. 687.

- 690.** 5. Louisiana Rule Against Incumbrances. — See note 3.  
 6. Georgia Rule Requiring Leave of Court. — See note 5.
- 691.** 11. Rights Between Holder of Incumbrance Covering Homestead and Other Creditors. — See note 8.
- 692.** 13. Disposition of Homestead by Will. — See notes 3, 5, 6.  
 As Against Creditors. — See note 7.
- 693.** XIII. RIGHTS OF SURVIVING SPOUSE AND CHILDREN — 1. Of Widower.  
 — See notes 1, 2, 3.
- 694.** See note 1.  
 Whether Right May Be Defeated by Will of Wife. — See notes 2, 3.  
 Effect of Abandonment. — See note 4.  
 Mere Temporary Absence. — See note 5.

**690.** 3. Constitutional Prohibition of Mortgaging. — *Maxwell v. Roach*, 106 La. 123.

5. Georgia Rule Requiring Leave of Court. — The terms of the sale prescribed by the court must be strictly pursued or the sale will be invalid. *Taylor v. James*, 109 Ga. 327.

**691.** 8. Other Creditors Cannot Compel Holder of Incumbrance to Resort to Homestead First. — *Talladega First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691; *Vincent v. Vineyard*, 24 Mont. 207, 81 Am. St. Rep. 423.

**692.** 3. Homestead May Be Devised. — *Beaty v. Richardson*, 56 S. Car. 173; *Ex p. Bullock*, 58 S. Car. 238.

Where Owner Is Without Children. — Under the Florida constitution only those who are without children can dispose of their homesteads by will. *Caro v. Caro*, 45 Fla. 203; *Palmer v. Palmer*, (Fla. 1904) 35 So. Rep. 983.

The existence of adult children will avoid the will. *De Cottes v. Clarkson*, 43 Fla. 1.

5. Homestead Cannot Be Devised Away from Wife and Children. — *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; *Mason v. Jackson*, (Tenn. Ch. 1900) 57 S. W. Rep. 217. See also *De Cottes v. Clarkson*, 43 Fla. 1.

Wife Cannot Devise Homestead Away from Husband. — *In re Marquette*, 103 Fed. Rep. 777.

6. Necessity for Written Assent to Devise. — *Tracy v. Tracy*, 79 Minn. 267.

7. Devise to Widow and Children. — *Schönbachler v. Schönbachler*, (Ky. 1900) 57 S. W. Rep. 232; *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; *Roark v. Bach*, 116 Ky. 457; *Pym v. Pym*, 118 Wis. 662; *Kuener v. Prohl*, 119 Wis. 487. See also *Schnabel v. Schnabel*, 108 Ky. 536.

A Devise to Others was held invalid as to creditors. *Roots v. Robertson*, 93 Tex. 365.

**Arkansas — Devise in Fee to Wife Held Invalid.** — In Arkansas, where on the death of the widow and the attainment of majority by the children, the homestead becomes an asset of the estate, it was held that a devise of the homestead in fee to the wife was void as to creditors in so far as it attempted to dispose of the reversionary interest. *McAndrew v. Hollingsworth*, 72 Ark. 446.

**693.** 1. Homestead Declared upon Community Property. — In Washington the surviving husband may claim a homestead in the community property for the benefit of himself and his minor children. *Matter of Feas*, 30 Wash. 51.

2. Right of Surviving Husband in Homestead of Deceased Wife. — *Roberson v. Tippie*, 209 Ill. 38.

The husband and minor children are entitled to joint occupancy during the minority of children, but when the children attain majority the husband alone is entitled to occupancy for life. *Clay v. Wallace*, 116 Ky. 599.

By the California Code of Civil Procedure, § 1474, if the homestead is selected from the community property, it vests absolutely in the survivor. *Pryal v. Pryal*, (Cal. 1903) 71 Pac. Rep. 802.

3. Existence of Children Unnecessary to Enable Surviving Husband to Claim Homestead. — *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 299; *Maxwell v. Roach*, 106 La. 123; *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292.

**694.** 1. Jurisdictions in Which No Provision Is Made for Surviving Husband. — *Chapman v. McGrath*, 163 Mo. 292.

2. View that Interest of Surviving Husband May Not Be Defeated by Will of Wife. — *In re Marquette*, 103 Fed. Rep. 777.

The Husband Must Elect whether to take his homestead or a devise to him by the wife intended to be in lieu of homestead. *Dearing v. Moran*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1545.

3. Kentucky — Must Elect Between Will and Homestead. — Where the wife devises the homestead to the husband, he must elect to take under the will or claim homestead, and his election, once made, is binding. *Dearing v. Moran*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1545.

4. Husband's Conveyance as Abandonment. — Where the surviving husband rents the homestead and removes to other lands intending to make his home on the latter, he abandons the homestead, and the interests of the heirs become vested and cannot be divested by his subsequent return to the homestead. *Moss v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 533.

5. Where the Husband Was Divorced, and the homestead and the custody of the children were granted to the wife, who married again, it was held that the divorced husband was entitled to the homestead on the death of the wife. *Stone v. McClellan*, 36 Tex. Civ. App. 364.

Abandonment of the Homestead After Wife's Death. — Where the husband abandons and ceases to occupy the homestead after his wife's death, his interest ceases, and the property reverts to the heirs at law of the wife. *Clay v. Wallace*, 116 Ky. 599.

**694.** Whether Surviving Husband's Interest Is Assignable. — See notes 6, 8.  
2. Of Widow — *a.* IN GENERAL. — See note 9.

**695.** See note 1.

**696.** See note 1.

Homestead Created After Husband's Death. — See notes 2, 3.

**697.** See note 1.

In What Property Widow Is Entitled to Homestead. — See note 2.

Lands Held for Life or for Term of Years. — See note 6.

Reversionary Interest. — See note 7.

Lands Held in Common. — See note 8.

*b.* CHARACTER AND EXTENT OF WIDOW'S INTEREST. — See note 9.

**698.** See note 1.

Whether Interest Assignable. — See note 2.

**694. 6.** *Clay v. Wallace*, 116 Ky. 599.

**8. Surviving Husband's Interest Held to Be Assignable.** — *Northrup v. Horville*, 62 Kan. 767; *Thompson v. Robinson*, (Tex. Civ. App. 1900) 56 S. W. Rep. 578; *Lee v. British, etc., Mortg. Co.*, 25 Tex. Civ. App. 481. Matter of Feas, 30 Wash. 51. But see *Clay v. Wallace*, 116 Ky. 599.

**9. Continuance of Husband's Homestead for Benefit of Widow** — *Arkansas*. — *Gates v. Solomon*, 73 Ark. 8.

*California*. — *Matter of Fath*, 132 Cal. 609.

*Illinois*. — *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180; *Roberson v. Tippie*, 209 Ill. 38.

*Kansas*. — *Cross v. Benson*, 68 Kan. 495; *Aultman v. Price*, 68 Kan. 640.

*Kentucky*. — *Pile v. Miller*, 64 S. W. Rep. 523, 23 Ky. L. Rep. 893; *Redmond v. Redmond*, 112 Ky. 760.

*Virginia*. — *Davis v. Davis*, 101 Va. 230.

**695. 1. Widow Entitled Apart from Existence of Children.** — *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292.

The widow's homestead right is not lost by the death or removal of the children. *Holmes v. Nichols*, 93 Mo. App. 513.

**696. 1. Right to Rents and Profits.** — By a statute vesting in the widow the rents and profits of the homestead she was vested with the coal lying under the surface, and this was not subject to sale by the administrator to pay the husband's debts. *Russell v. Berry*, 70 Ark. 317.

**2. Widow's Right to Probate Homestead Where No Homestead Has Been Declared in Husband's Lifetime.** — *In re Seabolt*, 113 Fed. Rep. 766, (construing the *North Carolina* statute); *Geiger v. Geiger*, 57 S. Car. 321; *Walt v. Walt*, 113 Tenn. 189; *Austin v. Clifford*, 24 Wash. 172.

In *Missouri* it was held that the widow could claim the homestead as exempt against debts contracted after the adoption of the homestead law, though no right of homestead existed during the lifetime of the husband. *Clark v. Thias*, 173 Mo. 628.

**What Law Governs.** — The widow's homestead rights are fixed by the laws existing at the time of her husband's death. *O'Rear v. Jackson*, 124 Ala. 208; *Matter of Thorn*, 24 Utah 209.

**3. In Georgia**, where by the constitution of 1877 a provision was made for a homestead exemption in favor of one having the care and support of dependent females, it was held that the

exemption could only be claimed out of the claimant's property, and the right to claim a homestead out of her deceased husband's estate was denied to the widow, even though she had children and grandchildren dependent upon her. *Sutton v. Rosser*, 109 Ga. 204, 77 Am. St. Rep. 367.

**697. 1. View that Widow Is Not Entitled to Homestead Where None Was Declared in Husband's Lifetime.** — *Higgins v. Higgins*, 78 S. W. Rep. 1124, 25 Ky. L. Rep. 1824; *Harris v. Howard*, 81 S. W. Rep. 275, 26 Ky. L. Rep. 366; *Matter of Lloyd*, 34 Wash. 84.

**2. Homestead Attaches Only to Lands of Which Husband Died Seized.** — *Hanna v. Gay*, 78 S. W. Rep. 915, 25 Ky. L. Rep. 1794; *Moore v. Wilkerson*, 169 Mo. 334.

**6. Lands Held as Tenant at Will.** — *Jones v. Jones*, 213 Ill. 228.

**7. No Homestead in Remainder.** — *Hampton v. Gilliland*, 23 Tex. Civ. App. 87.

**8. Homestead Right in Lands Held by Husband in Common with Another.** — *Compare Adcock v. Adcock*, 104 Tenn. 154.

**9. Widow Entitled to Conditional Life Estate in Homestead.** — *Dinsmoor v. Rowse*, 200 Ill. 555; *Greenwood First Nat. Bank v. Reece*, 64 Neb. 292; *Carver v. Maxwell*, 110 Tenn. 75; *Austin v. Clifford*, 24 Wash. 172.

In *Missouri*. — *Johnson v. Johnson*, 170 Mo. 34; *Wilson v. Johnson*, 160 Mo. 507; *Lyons v. Lyons*, 101 Mo. App. 494; *State v. Hull*, 99 Mo. App. 703.

**Statute Subjecting Homestead to Funeral Expenses.** — The interest of the widow and minor children is to be determined by the statute in force at the time of the application for allotment, and where the statute subjected the homestead to the payment of the expenses of the last sickness and the funeral of the husband, the administrator was authorized to sell it to pay such expenses before allotment to the widow. *Matter of Thorn*, 24 Utah 209.

**698. 1. Under Statute in California.** — *Hardwick v. Black*, 128 Cal. 672; *Otto v. Long*, 144 Cal. 144; *Matter of Fath*, 132 Cal. 609.

In *Alabama*. — *Tartt v. Negus*, 127 Ala. 301; *Newell v. Johns*, 128 Ala. 584.

In *Mississippi*, under Code Miss. 1892, § 1551, the homestead vests in the surviving spouse. *Johnson v. Hunt*, 79 Miss. 639.

**2. Widow's Interest Held Not to Be Assignable.** — *Dinsmoor v. Rowse*, 200 Ill. 555.

**Widow's Interest Assignable in Alabama.** —



**699.** After Assignment. — See note 1.

Conveyance Before Assignment of Homestead. — See note 3.

Whether Subject to Partition at Suit of Heirs. — See notes 4, 6.

**700.** *c.* NECESSITY OF OUTSTANDING INDEBTEDNESS AGAINST DECEDENT'S ESTATE. — See note 2.

*d.* AGAINST WHAT DEBTS EXEMPTION EXISTS — Debts of Decedent. — See notes 6, 7, 8.

**701.** Sale of Homestead for Payment of Debts. — See notes 1, 2, 3.

Debts of Survivor. — See notes 4, 5.

**702.** *e.* HOW INTEREST MAY BE BARRED — (1) *In General.* — See note 1.

(2) *Waiver or Abandonment* — During Lifetime of Husband. — See note 2.

Tartt *v.* Negus, 127 Ala. 301; Newell *v.* Johns, 128 Ala. 584.

**Mortgage by Widow Held Valid.** — Where the husband devised the homestead to the wife, a mortgage, made by her after his death, was held valid notwithstanding there were minor children. Allen *v.* Holtzman, 63 Kan. 40.

"The Right of the Survivor of a Community to occupy the community homestead is a personal right and not an estate in land which can be assigned or conveyed so as to vest the right to such use and occupancy in the assignee."

\* \* \* When the surviving wife sells her interest in a community homestead, the homestead right terminates, and the heirs of the deceased husband are entitled to possession of their interest in the property." York *v.* Hutcherson, (Tex. Civ. App. 1904) 83 S. W. Rep. 895.

**699. 1. Allotted Homestead Held to Be Assignable.** — Hodge *v.* Norton, 133 Cal. 99.

**3. Unallotted Homestead Held to Be Assignable.** — Wilson *v.* Johnson, 160 Mo. 507; Johnson *v.* Johnson, 170 Mo. 34; Mason *v.* Jackson, (Tenn. Ch. 1900) 57 S. W. Rep. 217.

**4. Homestead Held Not Subject to Partition During Widow's Occupancy.** — Douglas *v.* Marshall, 112 Ga. 423; Simpson *v.* Scroggins, 182 Mo. 560; McAululty *v.* Ellison, (Tex. Civ. App. 1903) 71 S. W. Rep. 670; Powell *v.* Naylor, 32 Tex. Civ. App. 340; Flynn *v.* Hancock, 35 Tex. Civ. App. 395.

In South Carolina the heirs are entitled to partition against the widow. Saunders *v.* Strobel, 64 S. Car. 489.

**6. Widow's Right Barred by Partition Suit in Which She Is a Party and Does Not Claim Homestead.** — Compare Penn *v.* Case, 36 Tex. Civ. App. 4.

**700. 2. Widow's Homestead Held Dependent on Existence of Outstanding Indebtedness Against Estate.** — The heirs cannot defeat the widow's right by paying off the debts of the estate. Davis *v.* Davis, 101 Va. 230.

**6. Widow's Homestead Not Subject to General Claims of Decedent's Creditors.** — Miller *v.* Davis, 69 Ark. 1, 86 Am. St. Rep. 167; Pile *v.* Miller, 64 S. W. Rep. 523, 23 Ky. L. Rep. 893; Burroughs *v.* Howell County, 180 Mo. 642.

**7. Widow's Homestead Subject to Specific Liens.** — Browne *v.* Sweet, 127 Cal. 332; Matter of Huelsman, 127 Cal. 275; Phillips *v.* James, 115 Ga. 425; Markwell *v.* Markwell, 157 Mo. 326; Adams *v.* Adams, 183 Mo. 396; Ford *v.* Sims, 93 Tex. 586.

In Berger *v.* Berger, 104 Wis. 282, 76 Am. St. Rep. 877, the homestead was held exempt

from a claim for purchase money by virtue of Rev. Stat. Wis., § 2271.

**A Widow Who Pays Off Her Husband's Note.** — Where a mortgage on the homestead was foreclosed after the husband's death, and the widow, in order to protect her homestead right, bid in the property at a sum in excess of the balance due on the mortgage debt and the costs of foreclosure, it was held that she could be required to pay only the balance of the debt and costs. Burroughs *v.* Howell County, 180 Mo. 642.

**8. Huffstедler *v.* Kibler,** 67 Ark. 239; Miller *v.* Davis, 69 Ark. 1, 86 Am. St. Rep. 167.

**701. 1. Homestead Held Not Subject to Sale by Administrator During Widow's Occupancy.** — Broyles *v.* Cox, 153 Mo. 242, 77 Am. St. Rep. 714; *In re* Powell, 157 Mo. 151; Tindall *v.* Peterson, (Neb. 1904) 98 N. W. Rep. 688; Bixby *v.* Jewell, (Neb. 1904) 101 N. W. Rep. 1026.

In Utah it may be sold to pay debts to which it is liable under the statutes. Matter of Thorn, 24 Utah 209.

**Sale of Homestead by Administrator a Nullity.** — Miller *v.* Davis, 69 Ark. 1, 86 Am. St. Rep. 167.

**2. Wardell *v.* Wardell,** (Neb. 1904) 99 N. W. Rep. 674.

**Consent of Widow Immaterial.** — Houf *v.* Brown, 171 Mo. 207.

**3. Sale by Administrator Subject to Widow's Occupancy Held Valid.** — Williams *v.* O'Neal, 119 Ga. 175; Keene *v.* Wyatt, 160 Mo. 1; Derge *v.* Hill, 103 Mo. App. 281.

Under the Missouri statute of 1875, since altered, such a sale was invalid. Keene *v.* Wyatt, 160 Mo. 1.

**Sale under Execution.** — The homestead may be sold under execution subject to the rights of the widow and minor children. National Loan, etc., Assoc. *v.* Maloney, 60 S. W. Rep. 12, 22 Ky. L. Rep. 1004.

**4. Widow's Right Held Liable to Her Own Debts.** — Saunders *v.* Strobel, 64 S. Car. 489.

Where the wife claimed the homestead out of the husband's estate, and thereafter he conveyed to her the reversionary estate, it was held that she was thereby invested with the fee and the property was no longer a homestead, but subject to the payment of her debts. Goodell *v.* Hall, 112 Ga. 435.

**5. Widow's Right Held Not Liable for Her Debts.** — Matter of Fath, 132 Cal. 609.

**702. 1. Merger of Homestead in Absolute Estate.** — See Joyner *v.* Surg, 132 N. Car. 580.

**2. Widow's Right Defeated by Abandonment by**

- 702.** Abandonment of Husband by Wife. — See notes 3, 4.  
 After Husband's Death. — See notes 7, 8, 9.
- 703.** Alienation as Abandonment — Conveyance During Coverture. — See notes 1, 2.  
 Alienation After Husband's Death. — See note 4.
- 704.** See note 2.  
 Lease of Homestead. — See note 3.  
 (3) *Nonresidence in State.* — See notes 5, 6.
- 705.** (5) *Divorce — Divorce a Vinculo.* — See note 7  
 (6) *Acceptance of Dower.* — See note 8.
- 706.** See notes 1, 2.

**Husband and Wife.** — Thorp v. Wilbur, 71 Vt. 266.

**702. 3. Wife's Abandoning Husband as Bar-  
 ring Homestead.** — Coe v. Nelson, (Tenn. Ch. 1900) 59 S. W. Rep. 170; Ullman v. Abbott, 10 Wyo. 97.

In *Kentucky* the wife forfeits her right to homestead by voluntarily leaving her husband and living in adultery. *McQuinn v. McQuinn*, 110 Ky. 321. Compare *Redmond v. Redmond*, 112 Ky. 760.

**4. Widow's Right Held Not Barred by Abandonment of Husband.** — Lyons v. Lyons, 101 Mo. App. 494.

**7. Effect of Widow's Abandonment of Homestead.** — Brown v. Morgan, 84 Ill. App. 233; Sill v. Sill, 185 Ill. 594; Dinsmoor v. Rowse, 200 Ill. 555; Kloss v. Wylezalek, 207 Ill. 328, 99 Am. St. Rep. 220; Freeman v. Mills, 59 S. W. Rep. 3, 22 Ky. L. Rep. 859; Jones v. Green, 83 S. W. Rep. 582, 26 Ky. L. Rep. 1191; Coile v. Hudgins, 109 Tenn. 217.

The fact that the widow acquiesces in a partition of the homestead, subject to her rights, and permits the adult children to live with her on the homestead, manage the property, and pay the taxes on their respective share will not constitute abandonment. *Salmons v. Thomas*, 25 Tex. Civ. App. 422.

**But the Mere Temporary Absence.** — Holmes v. Nichols, 93 Mo. App. 513.

**Confinement in Insane Asylum.** — Where the widow, on account of insanity, is confined in an asylum, there is no abandonment of the homestead. *National Loan, etc., Assoc. v. Maloney*, 60 S. W. Rep. 12, 22 Ky. L. Rep. 1094; *Flynn v. Hancock*, 35 Tex. Civ. App. 395.

**8. See Young v. Milward**, 109 Ky. 123.

**9. Widow's Right Held Not to Be Affected by Ceasing to Occupy Premises.** — *Tartt v. Negus*, 127 Ala. 301; *Wilson v. Johnson*, 160 Mo. 507; *Tindall v. Peterson*, (Neb. 1904) 98 N. W. Rep. 688; *Powell v. Naylor*, 32 Tex. Civ. App. 340.

**703. 1. Widow's Right Defeated by Conveyance by Husband and Wife.** — *Leamon v. Kidwell*, 70 S. W. Rep. 185, 24 Ky. L. Rep. 890; *Roberts v. Roberts*, 10 N. Dak. 531.

**2. Effect of Conveyance in Which Husband Is Not Joined.** — Where the wife made a mortgage of the homestead, which was community property, to the husband, in which he did not join, and the mortgage was assigned by the husband, who subsequently died, the wife could claim the homestead against the holder of the mortgage. *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138.

**4. Widow's Right Barred by Alienation After Husband's Death.** — *McAndrew v. Hollingsworth*, 72 Ark. 446; *Jones v. Green*, 83 S. W. Rep. 582,

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26 Ky. L. Rep. 1191; *Garrison v. Ferguson*, (Tex. Civ. App. 1899) 54 S. W. Rep. 247; *De Garcia v. Lozano*, (Tex. Civ. App. 1899) 54 S. W. Rep. 280; *Ostrom v. Arnold*, 24 Tex. Civ. App. 192.

**704. 2. Bryant v. Bennett**, 61 S. W. Rep. 1004, 22 Ky. L. Rep. 1866; *Kimberlin v. Isaacs*, 62 S. W. Rep. 494, 23 Ky. L. Rep. 42; *Moore v. Moore*, (Ky. 1904) 78 S. W. Rep. 141; *Jones v. Green*, 83 S. W. Rep. 582, 26 Ky. L. Rep. 1191.

And a reconveyance to the widow by her grantee will not restore her rights or divest the rights of the heirs. *Freeman v. Mills*, 59 S. W. Rep. 3, 22 Ky. L. Rep. 859.

**A Tax Sale** does not so alter the widow's right as to permit partition at the suit of the heirs. *Davis v. Davis*, 101 Va. 230.

**3. Effect of Widow's Lease of Homestead.** — *Moore v. Moore*, (Ky. 1904) 78 S. W. Rep. 141; *Burns v. Falls*, 23 Tex. Civ. App. 386.

**5. Widow Not Entitled to Homestead if She and Her Husband Remain Aliens.** — *Vignaud v. Dean*, 77 Miss. 860.

**6. Ullman v. Abbott**, 10 Wyo. 97.

**705. 7. Homestead Held to Be Barred by Divorce a Vinculo.** — *Walker v. Walker*, 181 Ill. 260; *Barkman v. Barkman*, 209 Ill. 269.

**8. Homestead Held Not to Be Barred by Acceptance of Dower.** — *Geiger v. Geiger*, 57 S. Car. 521.

Under Rev. Stat. Mo. 1899, § 2939, providing that, where there are no children, the widow may, in lieu of dower, take one-half of the husband's estate, subject to the payment of his debts, it was held that such estate was in addition to homestead. *Adams v. Adams*, 183 Mo. 396.

**706. 1. View that Homestead Is to Be Estimated in Allotting Dower.** — *Ball v. Ball*, 165 Mo. 312.

The value of the widow's homestead is not to be lessened because there are minor children to occupy it with her. *Gore v. Riley*, 161 Mo. 238.

**2. View that Widow Must Elect as Between Dower and Homestead.** — *Freeman v. Mills*, 59 S. W. Rep. 3, 22 Ky. L. Rep. 859; *Kimberlin v. Isaacs*, 62 S. W. Rep. 494, 23 Ky. L. Rep. 42; *Redmond v. Redmond*, 112 Ky. 760; *Jones v. Green*, 83 S. W. Rep. 582, 26 Ky. L. Rep. 1191.

**Election Not Binding Unless Made with Knowledge of All Material Facts.** — *Green v. Hambrick*, 118 Ga. 569.

In *Illinois* it has been held that, where there are no children, the wife by a post-nuptial agreement may bar her right to homestead. *Merki v. Merki*, 212 Ill. 121.

**Distributive Share in Lieu of Dower.** — *McDon-*

**706.** (7) *Antenuptial Contract*. — See note 5.

(8) *Husband's Devise*. — See notes 6, 7.

*Devise to Wife — Election*. — See note 8.

**707.** See notes 1, 2.

*f. ALLOTMENT OR SETTING APART OF HOMESTEAD*. — See note 3.

**708.** *Quantum of Interest to Be Allowed*. — See notes 1, 2, 3, 4.

*Where Wife Has Separate Property*. — See note 5.

*Whether Adverse Claims May Be Adjudicated in Proceedings for Allotment*. — See note 6.

**3. Of Children and Heirs — a. IN GENERAL — Homestead Continued for Minor Children**. — See note 8.

*ald v. Young*, 109 Iowa 704; *Edinger v. Bain*, 125 Iowa 391.

The long continued and undisturbed possession of the homestead by the widow will create the presumption that she has elected to take homestead instead of distributive share. *Huit v. Huit*, 122 Iowa 338.

*Homestead in Dower Estate*. — *Hanna v. Gay*, 78 S. W. Rep. 915, 25 Ky. L. Rep. 1794.

**706.** 5. *Widow's Homestead Held Not Defeasible by Antenuptial Contract*. — *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180.

And in *California* such contract does not preclude the wife from claiming the homestead in the lifetime of the husband if he fails to make the claim. *Warner v. Warner*, 144 Cal. 615.

**6. View that Widow's Right Is Not to Be Defeated by Husband's Will**. — *Matter of Firth*, 145 Cal. 236; *Tracy v. Tracy*, 79 Minn. 267.

**7. View that Husband May Defeat Widow's Right by Will**. — See *In re Madden*, 104 Wis. 61.

**8. View that Widow Must Elect as Between Homestead and Provision under Will**. — *Matter of Little*, 22 Utah 204.

In *Kentucky* if the devise is of such a character as to impose a condition upon the devisee, such as the payment of the testator's debts, she cannot take it as devisee free from his debts. *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239; *Schnabel v. Schnabel*, 108 Ky. 536.

In *Wisconsin* under Rev. Stat. Wis. 1898, § 3862, a devise of the husband to the wife with direction to pay debts will not subject the homestead to the payment of debts, though she takes under the will. *Pym v. Pym*, 118 Wis. 662. See also *Kuener v. Prohl*, 119 Wis. 489, where the devise was to the adult children.

*Time in Which Election Shall Be Made*. — In *Minnesota* the statute requiring dissent to be filed within a certain time was held not to apply where there were no children or descendants surviving. *Tracy v. Tracy*, 79 Minn. 267.

**707.** 1. *Matter of Firth*, 145 Cal. 236; *Palmer v. Palmer*, (Fla. 1904) 35 So. Rep. 983; *Ball v. Ball*, 165 Mo. 312.

Where the husband devised the homestead to the widow, it was held that it was not subject to the claims of creditors because she elected to take under the will. *Cross v. Benson*, 68 Kan. 495.

**2. View that Homestead Is Not Barred by Acceptance of Provision under Will**. — *Mason v. Jackson*, (Tenn. Ch. 1900) 57 S. W. Rep. 217. See also *Tracy v. Tracy*, 79 Minn. 267.

Under the *Michigan Constitution*, art. 16, § 4, the widow, where there are no children, is en-

titled to claim the homestead even though she takes under the will. *Koster v. Gellen*, 124 Mich. 149.

**3. Jurisdictions Holding Formal Assignment of Homestead by Court to Widow Unnecessary**. — *Tartt v. Negus*, 127 Ala. 301; *Newell v. Johns*, 128 Ala. 584; *Faircloth v. Carroll*, 137 Ala. 243; *Wilson v. Johnson*, 160 Mo. 507; *Houf v. Brown*, 171 Mo. 207; *Gorman v. Hale*, 109 Mo. App. 176; *Carver v. Maxwell*, 110 Tenn. 75; *Powell v. Naylor*, 32 Tex. Civ. App. 340.

In *California*, under Code Civ. Pro. Cal., § 1474, as amended April 16, 1880, where the widow by virtue of the statute takes the homestead in fee, the fact that the court sets it aside to her does not affect her rights under the statute. *Matter of Fath*, 132 Cal. 609.

*If the Homestead Exceeds the Statutory Limit in Value* a formal assignment is necessary. *Ball v. Ball*, 165 Mo. 312.

**708.** 1. *Statutory Limitations as to Quantity and Value of Premises to Be Set Apart*. — *Tyson v. Tyson*, (Neb. 1904) 98 N. W. Rep. 1076.

2. *Matter of Adams*, 128 Cal. 380; *Matter of Levy*, 141 Cal. 646, 99 Am. St. Rep. 92.

**3. Valuation of Property at the Time of Husband's Death Controls**. — *Wilson v. Johnson*, 160 Mo. 507.

*Valuation at Time of Contest*. — In a contest between the heirs and the executor of the widow who claimed the excess under a deed from the husband to the wife, it was held that the present value was the proper basis for adjustment of their respective rights. *Jespersen v. Mech*, 213 Ill. 488.

4. The quantum of the estate depends upon the character of the estate at the time of the hearing on the application. *Matter of Adams*, 128 Cal. 380.

**5. Wife's Separate Property Not to Be Estimated in Allotting Homestead**. — *Wilmoth v. Gossett*, 71 Ark. 594.

**6. Incumbrances on the Homestead** are to be estimated and deducted in allotting homestead. *Houf v. Brown*, 171 Mo. 207.

**8. Homestead Continued for Widow and Minors — Arkansas**. — *Miller v. Davis*, 69 Ark. 1, 86 Am. St. Rep. 167; *Gates v. Solomon*, 73 Ark. 8.

*Georgia*. — *Douglas v. Marshall*, 112 Ga. 423.

*Illinois*. — *Walker v. Walker*, 181 Ill. 260;

*Dinsmoor v. Rowse*, 200 Ill. 555; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180;

*Roberson v. Tippie*, 209 Ill. 38.

*Kentucky*. — *Atkins v. Baker*, 112 Ky. 877.

*Missouri*. — *Phillips v. Presson*, 172 Mo. 24.

*South Carolina*. — *Geiger v. Geiger*, 57 S. Car. 521.

**709.** See notes 1, 2.

Homestead Descending to Heirs. — See note 3.

**710.** See notes 1, 2.

**711.** In North Carolina. — See notes 2, 3.

In Texas. — See notes 5, 7.

**712.** See notes 2, 3, 4.

Setting Apart Homestead to Children. — See note 5.

Occupancy. — See notes 6, 7.

**713.** *b.* EXTENT AND CHARACTER OF INTEREST — Duration. — See note 1.

**714.** *c.* CONTROL AND CONFLICTING RIGHTS — Not Affected by Acts of Children. — See note 2.

Continued for Minor Children After Widow's Death. — In *Arkansas*, where a widow acquires a homestead in her own right it will, on her death, inure to the benefit of her minor children. *Grimes v. Luster*, 73 Ark. 266.

But in *Missouri*: where the widow owns the homestead it does not continue, on her death, to her minor children, but descends to her heirs subject to the payment of her debts. *Chapman v. McGrath*, 163 Mo. 292.

**709. 1. Children Only.** — *Macrae v. Macrae*, (Tenn. Ch. 1899) 57 S. W. Rep. 423.

The Fact that the Children Own Other Property does not affect their right to the homestead. *Spence v. Goodwin*, 128 N. Car. 273.

**2.** *Sloan v. Hunter*, 65 S. Car. 235.

Election Between Homesteads of Two Parents. — Where a minor succeeded to the homestead of his father, and subsequently succeeded to the homestead of his mother, it was held that he had the right of election between the two. *Grimes v. Luster*, 73 Ark. 266.

**3. Homestead Descends with Exemption.** — *Dinsmoor v. Rowse*, 200 Ill. 555; *Mitchell v. Mitchell*, 69 Kan. 441. See also *O'Rear v. Jackson*, 124 Ala. 298.

**Nebraska** — What Heirs Intended. — Where the statute provided that, on the death of the survivor, the homestead would descend to "his or her heirs," it was held that the reference was to the heirs of the owner of the fee. *Fort v. Cook*, (Neb. 1902) 90 N. W. Rep. 634.

In *Wisconsin* it is the rule that even vendor's liens are lost by the descent of the homestead. *Schmidt v. Schmidt*, 123 Wis. 295.

**710. 1. In Iowa.** — *Sayers v. Childers*, 112 Iowa 681; *Kinzer v. Stephens*, 121 Iowa 347; *Porter v. Perkins*, 125 Iowa 55.

If the owner devises the homestead to his widow with remainder over to some of his children, the remaindermen taking under the will lose the right of exemption from their debts. *What Cheer First Nat. Bank v. Willie*, 115 Iowa 77.

In *Kansas* the interest of the heir becomes vested on the death of the head of the family and cannot be conveyed by him in fraud of creditors. *Hollinger v. Boatmen's Bank*, 69 Kan. 519.

**2. Adults May Share.** — *In re Rafferty*, 112 Fed. Rep. 512.

**711. 2. Homestead Continued for Children Only** — *North Carolina*. — The homestead right inures to the benefit of an unborn child. *In re Seabolt*, 113 Fed. Rep. 766 (construing the North Carolina statute).

**3. Widow's Dower Right Has Priority.** — *In re Seabolt*, 113 Fed. Rep. 766.

**5. Texas** — Homestead Goes to Survivor. — *Bell v. Read*, 23 Tex. Civ. App. 95.

**7. Bell v. Read, 23 Tex. Civ. App. 95.**

The Administrator Has No Rights in the Homestead. — The order of the court setting apart the homestead withdraws it from administration, but does not affect the rights of those owning the property. *Simms v. Hixon*, (Tex. Civ. App. 1901) 65 S. W. Rep. 36.

**712. 2. Minor's Right to Occupy.** — *Garrison v. Ferguson*, (Tex. Civ. App. 1899) 54 S. W. Rep. 247; *Modisett v. National Bank*, 23 Tex. Civ. App. 589.

**3. Powell v. Naylor, 32 Tex. Civ. App. 340.**

**4. Cannot Be Claimed Against Valid Mortgage.** — The homestead cannot be claimed by the children against a valid mortgage. *Leslie v. Elliott*, 26 Tex. Civ. App. 578.

**5. Effect on Mortgage of Setting Aside Homestead to Children.** — Where the homestead was set aside to the minor children and the administration of the estate was closed, it was held that a mortgagee holding a mortgage on the homestead, who had failed to file his claim with the administrator, could not foreclose. *Tiboldi v. Palms*, 97 Tex. 414.

**6. Occupancy.** — *Grimes v. Luster*, 73 Ark. 266; *Kinzer v. Stephens*, 121 Iowa 347; *Gorman v. Hale*, 109 Mo. App. 176; *Tindall v. Peterson*, (Neb. 1904) 98 N. W. Rep. 688; *Rockwood v. St. John*, 10 Okla. 476.

**7. Illinois Statute.** — By Hurd's Rev. Stat. Ill. 1897, c. 52, § 4, the rule is changed and occupancy is no longer necessary. *Walker v. Walker*, 181 Ill. 260.

**713. 1. Homestead Vesting Absolutely.** — In *Alabama*, by statutes of 1885 and 1887, the probate court was empowered, when a decedent's estate did not exceed the amount exempted to widows and minors, and no administration on the estate was granted, after sixty days, to cause the property to be appraised and to be set apart absolutely to the widow and children. *Faircloth v. Carroll*, 137 Ala. 243.

Where a married woman, owning a homestead of less value than the statutory limit, died leaving an infant child that survived her a few weeks, and at its death the child left its father as sole heir, it was held that the child took the homestead absolutely, though not allotted during its life by decree of court, and on its death the homestead descended to the father freed from the debts of the mother. *Quinn v. Campbell*, 126 Ala. 280.

**714. 2. No Waiver by Minors.** — *Walker v. Walker*, 181 Ill. 260.

**714.** Rights of Surviving Spouse and Children During Their Lives. — See notes 4, 5, 6.

**715.** See notes 1, 2.

In Texas. — See notes 3, 4, 5, 6.

**716.** Curtesy and Dower. — See note 1.

Effect of Testamentary Disposition. — See note 3.

Sale of Homestead. — See notes 4, 5.

Partition. — See notes 8, 9.

**717.** See notes 1, 2.

**714.** 4. In Missouri the widow and children take the homestead as joint tenants. *Gore v. Riley*, 161 Mo. 238.

5. *Martin v. Martin*, 84 Miss. 553.

In Alabama the widow and minor children are tenants in common. *Faircloth v. Carroll*, 137 Ala. 243.

6. Widow Cannot Impair Children's Rights — *Kentucky*. — *Kiesewetter v. Kress*, 70 S. W. Rep. 1065, 24 Ky. L. Rep. 1239.

*Louisiana*. — *Fatjo's Succession*, 52 La. Ann. 1561.

*Michigan*. — *Gerber v. Upton*, 123 Mich. 605.

*Missouri*. — *Houf v. Brown*, 171 Mo. 207; *Phillips v. Presson*, 172 Mo. 24; *Gorman v. Hale*, 109 Mo. App. 176.

*Nebraska*. — *Tindall v. Peterson*, (Neb. 1904) 98 N. W. Rep. 688.

And the same rule applies to the widower. *Wells v. Sweeney*, 16 S. Dak. 489, 102 Am. St. Rep. 713.

The widow may sell timber from the land in order to make repairs to the buildings and fences. *Flener v. Flener*, 69 S. W. Rep. 954, 24 Ky. L. Rep. 725.

In Kentucky. — Where the homestead was devised to the wife subject to the payment of debts, and she took under the will, it was held an abandonment of her right of homestead, but not to impair that of the children. *Schnabel v. Schnabel*, 108 Ky. 536.

In Minnesota. — The renunciation of the will by the widow destroys the rights of the remainderman under the devise. *Schacht v. Schacht*, 86 Minn. 91.

**715.** 1. Illinois. — *Robb v. Howell*, 180 Ill. 177; *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220.

2. *Walker v. Walker*, 181 Ill. 260.

3. Texas — Vests in Surviving Parent. — *Salmons v. Thomas*, 25 Tex. Civ. App. 422; *Martin v. McAllister*, 94 Tex. 567.

Children Have No Interest in Rents. — The fact that the widow temporarily leased the homestead, and that the children who voluntarily abandoned it were entitled to joint occupancy with her, will not entitle them to demand any part of the rents. *Burns v. Falls*, 23 Tex. Civ. App. 386.

4. Where Debts Exist Against the Community Estate the Surviving Parent May Sell. — *Martin v. McAllister*, 94 Tex. 567.

5. Survivor Declining to Exercise Right. — Where the widow attempts to convey the whole homestead, the children are entitled to immediate possession of their half interest. *De Garcia v. Lozano*, (Tex. Civ. App. 1899) 54 S. W. Rep. 280.

6. Necessity of Guardian. — *Bell v. Read*, 23 Tex. Civ. App. 95.

**716.** 1. See *Bloom v. Strauss*, 70 Ark. 483.

3. Devise Does Not Defeat Children's Rights. — *Schnabel v. Schnabel*, 108 Ky. 336; *Bruton v. McRae*, 125 N. Car. 206; *McCrae v. McCrae*, 103 Tenn. 719, affirmed (Tenn. Ch. 1899) 57 S. W. Rep. 423.

4. Sale. — *Anderson v. Hall*, 114 Ga. 1016; *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714; *In re Powell*, 157 Mo. 151.

5. *Hodge v. Norton*, 133 Cal. 99; *Douglas v. Marshall*, 112 Ga. 423; *Goodell v. Hall*, 112 Ga. 435; *New Madrid Banking Co. v. Brown*, 165 Mo. 32.

8. No Partition. — And this rule applies to the surviving husband. *Wells v. Sweeney*, 16 S. Dak. 489, 102 Am. St. Rep. 713.

In Kansas there can be no partition among the children until all attain majority. *Trumbly v. Martell*, 61 Kan. 703, reversing 9 Kan. App. 364.

In Mississippi, though the widow and heirs take the homestead as tenants in common, it will not be partitioned at the suit of an heir while the widow continues to occupy it as a homestead. *Martin v. Martin*, 84 Miss. 553.

In Alabama, where the title to the homestead vests absolutely in the widow and minor children as tenants in common, it was held that the vendee of one of the children, who had conveyed after attaining her majority, could maintain suit for partition against the widow and minor child. *Faircloth v. Carroll*, 137 Ala. 243.

9. Partition Subject to Homestead Rights of Widow and Children. — *Turnage v. Craig*, 203 Ill. 167.

**717.** 1. In South Carolina the heirs were held entitled to partition as against the widow, there being no minor children. *Saunders v. Strobel*, 64 S. Car. 489.

And where the children were all *sui juris* they were held entitled to a partition of the homestead to the exclusion of the widow, who had taken dower in the husband's estate. *Geiger v. Geiger*, 57 S. Car. 521.

2. Texas — Constitutional Provision as to Partition. — *Salmons v. Thomas*, 25 Tex. Civ. App. 422; *Moss v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 533.

Where the widow had conveyed her interest in the homestead, and it was impracticable for the minor children to occupy it, it was held proper to order a partition thereof. *Garrison v. Ferguson*, (Tex. Civ. App. 1899) 54 S. W. Rep. 247.

Where under the Texas statute the homestead was continued for the benefit of unmarried daughters, partition was granted as against an unmarried daughter who had attained her majority. *White v. Small*, 22 Tex. Civ. App. 318.

The constitutional provision does not apply to the suit of the children against the alienee

**717. d. TERMINATION OF INTEREST.** — See note 3.

Termination — Burden of Proof. — See note 4.

**718. 4. Continuance of Homestead After Death of Survivor.** — See note 1.**XIV. ENFORCEMENT AND PROTECTION OF RIGHT — 1. Jurisdiction of Courts — a. IN GENERAL.** — See note 3.**719.** Allotment when Jurisdiction Is Acquired on Other Grounds. — See note 1.**720. c. INSOLVENCY COURTS.** — See note 6.**721. d. JURISDICTION LIMITED TO ALLOTMENT.** — See note 1.**2. Claiming, Selecting, and Setting Apart — b. OCCUPANCY AS SUFFICIENT SELECTION.** — See note 4.**722. c. CLAIM AND SELECTION — (1) In General — Homestead "to Be Selected by the Owner"** — Occupancy Not Sufficient. — See note 3.

Design of Statutes. — See note 5.

**723. (2) Where Property Not in Excess of Exemption.** — See note 2.**d. FORMAL DEDICATION AND SETTING APART.** — See note 3.**724.** See note 1.**725. e. COMPLIANCE WITH STATUTE — (1) In General.** — See note 1.

of the surviving parent, but partition may be had subject to the estate secured by such vendee. *Lee v. British, etc., Mortg. Co.*, 25 Tex. Civ. App. 481.

On the death of the widow and the attainment of majority by the children the homestead is subject to partition. *Simms v. Hixon*, (Tex. Civ. App. 1904) 65 S. W. Rep. 36.

Where the parents are dead and the guardian of the minors has not had the homestead set apart for the use of the minors, it may be partitioned. *Powell v. Naylor*, 32 Tex. Civ. App. 340.

**717. 3. Termination at Majority.** — *McAndrew v. Hollingsworth*, 72 Ark. 446; *Sutton v. Rosser*, 109 Ga. 204, 77 Am. St. Rep. 367; *Batley v. Barker*, 62 Kan. 517; *Northrup v. Horville*, 62 Kan. 767; *Simpson v. Scroggins*, 182 Mo. 560.

**Children Who Reach Majority Without an Application for a Homestead.** — A refusal to allot the homestead to a minor within sixteen days of his majority will not be set aside. *Stewin v. Thrift*, 30 Wash. 36.

**Termination by Marriage.** — In *Kentucky* the homestead is continued for the benefit of the unmarried minor children and terminates on marriage during minority. *Jones v. Crawford*, (Ky. 1905) 84 S. W. Rep. 568.

4. See *Sigman v. Austin*, 112 Ga. 570.

**718. 1. Exemption Held to Continue to Heirs.** — In *re Rafferty*, 112 Fed. Rep. 512 (decided under the *Iowa* statute).

**3. Jurisdiction Depends upon Statute.** — *Chamblée v. Cole*, 128 Ala. 649.

**719. 1. Incidental Power to Allot.** — *Jackett v. Bower*, 62 Neb. 232.

**North Carolina Superior Court.** — *Jordan v. Newsome*, 126 N. Car. 553.

**720. 6. Insolvency Courts.** — In *re Oderkirk*, 103 Fed. Rep. 779 (decided under the *Vermont* statute).

**Homestead of Bankrupts.** — The trustee in bankruptcy should set apart the homestead. In *re Hopkins*, 103 Fed. Rep. 781.

In the bankruptcy courts the homestead will not be set apart where it is apparent that creditors holding waivers of exemption, and not the bankrupt, will reap the benefit thereof. In *re Garner*, 115 Fed. Rep. 200.

Bankruptcy courts have no jurisdiction to sell the homestead set apart to the bankrupt, even where there are debts against which it is not exempt. *Ingram v. Wilson*, 125 Fed. Rep. 913, 60 C. C. A. 618. But see *In re Gordon*, 115 Fed. Rep. 445.

**721. 1. Jurisdiction Limited to Allotment.** — In *re Swords*, 112 Fed. Rep. 661; *James v. James*, 72 Ark. 329, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721; *Matter of Firth*, 145 Cal. 236.

**4. Occupancy Sufficient Designation — Illinois.** — *Charleston State Bank v. Brooks*, 109 Ill. App. 51; *Miller v. McAlister*, 197 Ill. 72.

*Iowa.* — *Mitchell v. West*, (Iowa 1903) 93 N. W. Rep. 380.

*Tennessee.* — *Carver v. Maxwell*, 110 Tenn. 75.

*Texas.* — *Texas Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1901) 67 S. W. Rep. 173; *Moore v. Graham*, 29 Tex. Civ. App. 235.

*Washington.* — *Matter of Feas*, 30 Wash. 51; *Whitworth v. McKee*, 32 Wash. 83.

**722. 3. Selection Necessary — Occupancy Not Sufficient.** — *Foogman v. Patterson*, 9 N. Dak. 254.

**5. Waiver of Right to Select Only.** — See *Harris v. Matthews*, 36 Tex. Civ. App. 424.

**723. 2. Property Not in Excess of Exemption — United States.** — In *re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11 (construing the *Tennessee* statute).

*Alabama.* — *Quinn v. Campbell*, 126 Ala. 280.

*Georgia.* — *Piedmont Nat. Bldg., etc., Assoc. v. Bryant*, 115 Ga. 417.

*Missouri.* — *Tapley v. Ogle*, 162 Mo. 190; *Houf v. Brown*, 171 Mo. 207.

*Tennessee.* — *Delk v. Yelton*, 103 Tenn. 476; *Carver v. Maxwell*, 110 Tenn. 75.

*Texas.* — *Moore v. Graham*, 29 Tex. Civ. App. 235.

*Washington.* — *Whitworth v. McKee*, 32 Wash. 83.

**3. Formal Dedication — Recording Claim.** — In *re Garner*, 115 Fed. Rep. 200 (decided under the *Virginia* statute).

**724. 1. Entry of "Homestead" on Recorded Title.** — In *re Nye*, (C. C. A.) 133 Fed. Rep. 33 (decided under the *Colorado* statutes).

**725. 1. Compliance with Statute in General.** —

**725.** (2) *Sufficiency of Claim or Declaration* — **Statutes Mandatory.** — See note 5.

**726.** See notes 3, 5.

**Substantial Compliance.** — See notes 7, 8.

**General Description of Land.** — See note 10.

**727.** *f. SELECTION.* — See note 2.

**Excessive Claim and Selection.** — See notes 7, 8.

**Capricious Selection.** — See note 10.

**728.** *g. TIME TO ASSERT CLAIM* — **Under Statutes Requiring Claim and Selection.** — See note 3.

**Time of Making Claim Before Sale.** — See notes 6, 7, 8, 9.

**729.** *h. APPRAISAL, ALLOTMENT, AND SALE* — (1) *Right to Sell in General.* — See note 1.

**730.** (3) *Duty of Officer to Appraise and Set Apart* — **Ascertainment of Extent and Value.** — See notes 2, 3.

**Homestead Should Be Set Apart.** — See notes 5, 6.

**Appointment of Commissioners or Appraisers.** — See note 7.

*In re Garner*, 115 Fed. Rep. 200; *Matter of Gallagher*, 134 Cal. 96; *Tappendorff v. Moranda*, 134 Cal. 419; *Piedmont Nat. Bldg., etc., Assoc. v. Bryant*, 115 Ga. 417.

**725.** 5. **Statutes Mandatory.** — In *Georgia*, where the wife's right to have the homestead set apart out of her husband's property depends upon his refusal to do so, the schedule filed by the wife must unequivocally show such refusal. *Batson v. Benford*, 119 Ga. 256.

**726.** 3. **Head of Family.** — *Reid v. Englehart-Davidson Mercantile Co.*, 126 Cal. 527, 77 Am. St. Rep. 206.

5. **Value of Property.** — In *Georgia* the homestead claimant need not value the property claimed, that being the duty of the surveyor. *Wood v. Collins*, 111 Ga. 32.

7. **Technical Objections Disregarded.** — *Mellen v. McMannis*, 9 Idaho 418.

8. **Reasonable Certainty.** — *Ard v. Pratt*, 61 Kan. 775.

10. **General Description of Land.** — An erroneous description of the land will avoid the claim. *Harris v. Duarte*, 141 Cal. 497.

**727.** 2. *Grimes v. Luster*, 73 Ark. 266.

5. **Excessive Claim and Selection.** — *Robb v. Robb*, (Tex. Civ. App. 1901) 62 S. W. Rep. 125.

8. **Excessive Claim Held Invalid in Georgia.** — *Piedmont Nat. Bldg., etc., Assoc. v. Bryant*, 115 Ga. 417; *Evans v. Piedmont Nat. Bldg., etc., Assoc.*, 117 Ga. 940.

10. **Capricious Selection.** — See *Slappy v. Haners*, 137 Ala. 199.

**728.** 3. **Before Sale.** — *In re Oderkirk*, 103 Fed. Rep. 779; *Curtis v. Osborne*, 63 Neb. 837.

In *Louisiana*, where a husband conveyed the homestead to the wife in fraud of his creditors, and the conveyance was set aside, it was held that the homestead could not then be claimed. *Babineau v. Guilbeau*, 52 La. Ann. 992.

**Before Order of Sale.** — *Foegman v. Patterson*, 9 N. Dak. 254.

**Before Decree of Foreclosure.** — *Gilbert v. Provident Life, etc., Co.*, (Neb. 1901) 95 N. W. Rep. 488.

6. **Before or at Time of Levy.** — *Jones v. Olson*, 17 Colo. App. 144.

Where creditors sue to set aside a conveyance of the homestead as a fraud on them, if the

claim to homestead is not asserted before final decree, there is a waiver, and the homestead cannot be subsequently claimed. *McNally v. White*, 154 Ind. 163; *Hays City First Nat. Bank v. Vest*, 187 Ill. 389.

7. **Within Reasonable Time After Levy.** — *Barrett v. Smith*, 17 Montg. Co. L. Rep. (Pa.) 22.

8. *Stinson v. Call*, 163 Mo. 323.

9. **At Any Time Before Sale.** — *Ard v. Pratt*, 61 Kan. 775; *Elstroth v. Young*, 83 Mo. App. 253; *Union Stock Yards Nat. Bank v. Smout*, 62 Neb. 227; *Folsom v. Asper*, 25 Utah 299; *Oppenheim v. Myers*, 99 Va. 582; *Ross v. Howard*, 25 Wash. 1; *Smalley v. Laugenour*, 30 Wash. 307.

A claim interposed after a cause has been appealed, reversed, and remanded, is in time. *Rosenbaum v. Davis*, 106 Tenn. 51.

**729.** 1. **Cannot Be Sold.** — *Lewis v. Mauermaun*, 35 Wash. 156.

**730.** 2. **Ascertainment of Extent and Value.** — *National Bank of Commerce v. Chamberlain*, (Neb. 1904) 100 N. W. Rep. 943.

3. **Excess Only to Be Sold.** — *Vincent v. Vineyard*, 24 Mont. 207, 81 Am. St. Rep. 423.

5. **Homestead Should Be Set Apart.** — *Palmer v. Riddle*, 197 Ill. 45; *Chamberlain Banking House v. Zutavern*, 59 Neb. 623. Compare *Miller v. McAlister*, 197 Ill. 72.

6. *Creech v. Childers*, 156 Mo. 338; *Smith v. Thompson*, 169 Mo. 553.

Where the owner of an undivided interest in eighty acres of land resided upon one forty-acre lot, and her interest in the forty on which she resided exceeded in value the homestead limit, it was held that a sale could be made of her interest in the other forty acres without an allotment of homestead. *Miller v. McAlister*, 197 Ill. 72. Compare *Palmer v. Riddle*, 197 Ill. 45.

**Where the Owner Makes the Selection** the sheriff is not required to act. *Ackerman v. Hendricks*, 117 Iowa 106.

7. **Appointment of Appraisers or Commissioners.** — *Creech v. Childers*, 156 Mo. 338.

A homestead allotment made by commissioners appointed by the trustee under a deed of assignment is invalid. *Jordan v. Newsome*, 126 N. Car. 553.

**732. Ascertainment of Value — Sale of Undivided Interest.** — See note 1.(4) *Qualification of Commissioners.* — See note 4.(5) *Allotment or Appraisement.* — See note 7.**733. (6) Failure of Officer to Set Apart — Effect of Sale.** — See note 2.**Sale Conveys No Title.** — See notes 3, 4.**734. See note 1.****Sale Subject to Homestead.** — See notes 2, 3.(7) *Sale of Indivisible Property.* — See note 9.**735. See note 1.****In Connection with Statutes as to Setting Apart Before Sale.** — See notes 2, 3.**Payment of Excess by Debtor.** — See note 5.**736. i. EXCEPTIONS TO ALLOTMENT — REASSIGNMENT — Realotment.** — See notes 2, 3.**Reassignment upon Increase or Decrease in Value.** — See note 4.**732. 1. Ascertainment of Value — Sale of Undivided Interest.** — *Delk v. Yelton*, 103 Tenn. 476.**4. Disinterested.** — The fact that a homestead was allotted by three neighbors of the claimant without notice to the creditors did not necessarily avoid the allotment. *Jordan v. Newsome*, 126 N. Car. 553.**7. Sufficiency of Allotment.** — A homestead set off by appraisers irregularly appointed by a deputy sheriff cannot be successfully attacked in a collateral proceeding, especially where long acquiesced in by creditors. *Oates v. Munday*, 127 N. Car. 439.**733. 2. Failure of Officer to Set Apart Not Prejudicial to Right.** — Where the owner had his residence on forty of one hundred and twenty acres, in a contiguous body, he was not entitled to claim an outlying forty acres as homestead against the purchaser at an execution sale thereof. *Koch v. West*, 118 Iowa 468, 96 Am. St. Rep. 394.**3. Sale Conveys No Title — Alabama.** — *Knight v. Davis*, 135 Ala. 139.*Illinois.* — *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110. But see *Strong v. Peters*, 212 Ill. 282.*Michigan.* — *Burkhardt v. Walker*, 132 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525.*Missouri.* — *Worley v. Hicks*, 161 Mo. 340; *New Madrid Banking Co. v. Brown*, 165 Mo. 32.*Nebraska.* — *Union Stock Yards Nat. Bank v. Smout*, 62 Neb. 227; *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124.*Washington.* — *Whitworth v. McKee*, 32 Wash. 83.Where a trust deed covering the homestead was invalid as to part of the debt secured thereby, a sale for the satisfaction of the whole debt conveys no title to the purchaser. *Hillier v. Westfall*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1045.**4. Without Reference to Extent or Value — Illinois.** — *Palmer v. Riddle*, 197 Ill. 45; *Miller v. McAlister*, 197 Ill. 72; *Butler v. Brown*, 205 Ill. 606.*Minnesota.* — *Hook v. Northwest Thresher Co.*, 91 Minn. 482.*Missouri.* — *Creech v. Childers*, 156 Mo. 338; *Stinson v. Call*, 163 Mo. 323; *Simpson v. Scroggins*, 182 Mo. 560.*Nebraska.* — *Chamberlain Banking House v. Zutavern*, 59 Neb. 623.*Tennessee.* — *Delk v. Yelton*, 103 Tenn. 476.*Washington.* — *Whitworth v. McKee*, 32 Wash. 83.**734. 1. Not Void.** — *Steiner v. Berney*, 130 Ala. 289; *Huff v. Miller*, (Tenn. Ch. 1900) 58 S. W. Rep. 876.**2. Cannot Be Sold Subject to Homestead.** — *Monroe v. Price*, 80 S. W. Rep. 1184, 26 Ky. L. Rep. 250; *Burkhardt v. Walker*, 132 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525; *Moore v. Wilkerson*, 169 Mo. 334. See also *Strong v. Peters*, 212 Ill. 282.**3. Reversionary Interest May Be Sold.** — *In re Tollett*, 106 Fed. Rep. 866, 46 C. C. A. 11; *National Loan, etc., Assoc. v. Maloney*, 60 S. W. Rep. 12, 22 Ky. L. Rep. 1094; *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967.**9. Sale Where Homestead Cannot Be Set Apart.** — *In re Oderkirk*, 103 Fed. Rep. 779, 4 Am. Bank. Rep. 617, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 734; *Davidson v. Dishman*, 59 S. W. Rep. 326, 22 Ky. L. Rep. 940; *Weber v. Gardner*, 80 S. W. Rep. 481, 26 Ky. L. Rep. 44; *Wardell v. Wardell*, (Neb. 1904) 99 N. W. Rep. 674.**In Bankruptcy Cases** the expense of sale must be borne by the trustee. *In re Hopkins*, 103 Fed. Rep. 781.**735. 1. Transfer of Money or Property.** — *In re Manning*, 123 Fed. Rep. 180; *Cutler v. Cutler*, 188 Ill. 285.**2. In Connection with Statutes as to Setting Apart Before Sale.** — See *Baker v. Grand Island Banking Co.*, (Neb. 1903) 93 N. W. Rep. 428.**3. In re Nye**, (C. C. A.) 133 Fed. Rep. 33.**5. Payment of Excess by Debtor.** — *In re Oderkirk*, 103 Fed. Rep. 779; *In re Hopkins*, 103 Fed. Rep. 781; *In re Anderson*, 103 Fed. Rep. 854; *In re Manning*, 123 Fed. Rep. 180.**736. 2. Allotment Not Disturbed Except for Good Cause.** — *Rugless v. Robinson*, (Ky. 1900) 57 S. W. Rep. 619.**3. Substantial Defect in Proceedings.** — *Gore v. Riley*, 161 Mo. 238.**4. Subject to Fluctuations.** — In *North Carolina* there is a statutory provision that where the property claimed as a homestead, for any reason, increases fifty per cent. or more in value, creditors of the owner may secure a reallocation. *McCaskill v. McKinnon*, 125 N. Car. 179.



**737.** *j.* PRESUMPTIONS — COLLATERAL ATTACK — Liberal Presumptions in Favor of Regularity. — See notes 1, 2.

3. Contest of Claim and Selection. — See note 5.

**738.** 4. Relief Against Infringement of Right — *a.* AT LAW — Sale Set Aside. — See notes 1, 2.

**739.** Effect of Recovery Back of Homestead. — See note 3.

*b.* IN EQUITY — Power to Protect in General. — See note 6.

Injunction — Removal of Cloud. — See note 7.

**740.** See note 3.

4. Evidence — Burden of Proof. — See notes 5, 6.

**741.** Prima Facie Case Sufficient. — See note 2.

Admissibility of Evidence. — See notes 4, 6.

**742.** 5. Exhaustion of Property Before Sale of Homestead — Adjustment of Equities Between Creditors — Equitable Rule as Between Creditors. — See note 2.

As Between Debtor and Creditor. — See notes 3, 4.

**743.** Exhaustion of Other Property Required by Statute. — See note 1.

HOMOLOGATE. — See note 3.

**744.** HONEST. — See note 1.

**745.** HOPE. — See note 6.

**737.** 1. Liberal Presumptions. — *Ach v. Milam*, 118 Ga. 105; *Hook v. Northwest Thresher Co.*, 91 Minn. 482.

2. Collateral Attack. — *Ach v. Milam*, 118 Ga. 105; *Oates v. Munday*, 127 N. Car. 439; *Sloan v. Hunter*, 65 S. Car. 235; *Shires v. Corlett*, 104 Tenn. 44.

5. In Montana, where the California statutes have been substantially adopted, the California rule prevails as stated in the original note. *Vincent v. Vineyard*, 24 Mont. 207, 81 Am. St. Rep. 423.

In Nebraska. — *Van Doren v. Weideman*, (Neb. 1903) 94 N. W. Rep. 124.

**738.** 1. On Motion. — *Knight v. Davis*, 135 Ala. 139; *Eldred v. Moehring*, 83 Ill. App. 264.

As to the Nebraska rule, see *Union Stock Yards Nat. Bank v. Smout*, 62 Neb. 227.

2. Chamberlain Banking House v. Zutavern, 59 Neb. 623. But see *Jackett v. Bower*, 62 Neb. 232.

**739.** 3. Improvements. — Where one improved property under the belief that he held title by virtue of a will, which was declared invalid, he was not entitled to recover the value of the improvements against a minor claimant of the homestead. *Bloom v. Strauss*, 70 Ark. 483.

6. Power to Protect. — *Burkhardt v. Walker*, 132 Mich. 93, 102 Am. St. Rep. 386, 9 Detroit Leg. N. 525.

7. Enjoining Sale. — *Zimmerman v. Clarke*, 9 Kan. App. 889, 58 Pac. Rep. 277; *Dulion v. Harkness*, 80 Miss. 8, 92 Am. St. Rep. 563; *Wylde v. Capps*, 27 Tex. Civ. App. 112; *Hyser v. Mansfield*, 72 Vt. 71; *Ross v. Howard*, 25 Wash. 1.

**740.** 3. Removal of Cloud Though Sale Void. — *Best v. Grist*, (Neb. 1901) 95 N. W. Rep. 836.

5. Burden on Party Claiming Right. — *Harris v. Matthews*, 36 Tex. Civ. App. 424.

6. *Thorp v. Wilbur*, 71 Vt. 266. See also *Codville v. Pearce*, 13 Manitoba 468.

**741.** 2. Prima Facie Case Sufficient. — *Walker v. Walker*, 117 Iowa 609.

4. Claim as Evidence. — See *Smith v. Veysey*, 30 Wash. 18.

6. Acts and Declarations of the Parties. — *Smith v. Veysey*, 30 Wash. 18.

**742.** 2. Rule Not Applicable. — *In re Nye*, (C. C. A.) 133 Fed. Rep. 33; *Vincent v. Vineyard*, 24 Mont. 207, 81 Am. St. Rep. 423.

3. Between Debtor and Creditor. — *Keith v. Albrecht*, 89 Minn. 247, 99 Am. St. Rep. 566.

Where the homestead exceeded in area, but not in value, the statutory limit, and the whole of it was subject to sale under the execution, the claimant was held not entitled to a setting apart of the homestead and a sale first of the excess over the statutory area, for the reason that the whole was a homestead, the excess in area not controlling its character. *Edinger v. Bain*, 125 Iowa 393, denying rehearing 125 Iowa 391.

4. Rule Applied for Creditor Only. — *Stephens v. Leonard*, 122 Mich. 125.

**743.** 1. Exhaustion of Other Property. — *Bissell v. Bissell*, 120 Iowa 127.

Where the purchaser of a part of mortgaged property agreed, as part of the consideration, to pay off the mortgage, but failed to do so, it was held that he could not invoke the statute and require the exhaustion of the balance of the land before proceeding against the part purchased, on the ground that the latter had become a part of his homestead. *Perkins v. McAuliffe*, 105 Wis. 582.

3. Homologate. — *Hecker v. Brown*, 104 La. 524.

**744.** 1. Honest Account — Receiving Stolen Property. — *Davidson v. State*, 104 Ga. 761.

Honest Belief — Negligence — Accident at Railroad Crossing. — *Redding v. Central R. Co.*, 68 N. J. L. 641.

**745.** 6. Hoping — Precatory Trusts. — *Curd v. Field*, 103 Ky. 293.

## HORSE RACING.

**746. I. GAMING.** — See note 1.

**II. HIGHWAYS.** — See note 3.

**747. III. ASSOCIATIONS.** — See note 1.

**746. 1. Game.** — *Thrower v. State*, 117 Ga. 753.

But pool selling is not a game within the meaning of the *Kentucky* statutes. *Louisville v. Wehmoff*, (Ky. 1904) 79 S. W. Rep. 201.

**3.** In *Thompson v. State*, 131 Ala. 18, the court said: "Horse racing along a public road is unlawful, and if the homicide was caused by such unlawful act, it may have amounted to manslaughter in the second degree, regard-

less of whether the running was furious, reckless, and grossly negligent."

**747. 1. Partnership.** — Since under the *Kentucky* laws the business of breeding, training, and racing horses for purses is legal, a partnership for these purposes can be settled by a chancellor, but a court of equity will not entertain a bill for an accounting between partners engaged in book making, nor will it divide the accrued profits thereof. *Central Trust, etc., Co. v. Respass*, 112 Ky. 606.

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## HORSES.

**750. I. DEFINITION.** — See note 2.

**753. II. SOUNDNESS.** — See notes 1, 2, 3.

**754. IV. WHAT CONSTITUTES UNSOUNDNESS OR VICE.** — See note 2.

**750. 2. Generic Term.** — *Troxler v. Buckner*, 126 Cal. 288.

**Same — Mares.** — *Troxler v. Buckner*, 126 Cal. 288.

**753. 1. Warranty.** — *Bates County Bank v. Anderson*, 85 Mo. App. 351.

**Examples.** — See *Bullard v. Brewer*, 118 Ga. 918; *Galbreath v. Carnes*, 91 Mo. App. 512; *Faust v. Koers*, 111 Mo. App. 560.

**No Warranty Will Be Implied** from the statement that an animal was a "thoroughbred," since this is merely a descriptive term. *Shambaugh v. Current*, 111 Iowa 121; *Burnett v. Hensley*, 118 Iowa 575.

**2. Question for Jury.** — *Galbreath v. Carnes*, 91 Mo. App. 512.

**3. Time.** — *Brown v. Edwards*, 97 Me. 564. See also *Staats v. Byers*, 68 N. Y. App. Div. 634, *affirmed* 174 N. Y. 508.

Evidence to show a horse's unsoundness nine months prior to sale and warranty, and continuously thereafter down to the time of sale, is admissible, both to show breach and false representations by the seller. *Kavanaugh v. Wausau*, 120 Wis. 611.

When at the time of sale a horse showed no disease, but within ten days thereafter a disease was discovered, the jury were justified in finding that, the disease having followed so quickly, he must have been diseased at the time of sale, and incapable of performing the service for which he was warranted. *Robinson v. Snow*, (Tex. Civ. App. 1903) 74 S. W. Rep. 328.

**754. 2. Curb.** — See *Faust v. Koers*, 111 Mo. App. 560.

**Plunging.** — See *Staats v. Byers*, 68 N. Y. App. Div. 634, *affirmed* 174 N. Y. 508.

**Running Away.** — An action for a breach of warranty that a horse is "kind and sound in all harness" is not supported by proof that the horse ran away in a hansom cab for some unexplained reason, it appearing that the cab was not adapted to the conformation of his body, that he had previously been gentle, and that the cab driver was not called nor his absence accounted for. *Brown v. Horowitz*, (Summ. Ct. App. T.) 35 Misc. (N. Y.) 287.

**Whistling.** — See *Brown v. Edwards*, 97 Me. 564.

## HOSPITALS AND ASYLUMS.

By M. G. BEAMAN.

- 758.** III. CLASSIFICATION — 1. Public Hospitals and Asylums. — See note 6.
- 759.** 2. Private Hospitals and Asylums — Payments by Patients Financially Able Do Not Affect Status of Institution. — See note 2.
- 760.** Noneleemosynary — Conducted as Business Enterprises for Profit. — See note 1.
- 761.** V. PUBLIC AND PRIVATE CHARITABLE HOSPITALS AND ASYLUMS —
2. Support and Maintenance. — See note 2.
- 762.** 3. Government — Officers and Employees — *c.* TENURE OF AND REMOVAL FROM OFFICE. — See notes 3, 4.
5. Liability for Tort or Negligence — *a.* PERSONAL LIABILITY OF OFFICER. — See note 6.
- 763.** *b.* LIABILITY OF THE INSTITUTION — Private Charitable Institution. — See note 1.

**758.** 6. *White v. Alabama Insane Hospital*, 138 Ala. 479.

**759.** 2. *Payments by Patients Do Not Change Status of Institution.* — *Powers v. Massachusetts Homœopathic Hospital*, (C. C. A.) 109 Fed. Rep. 294; *Collins v. New York Post Graduate Medical School*, 59 N. Y. App. Div. 63, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759.

**760.** 1. *Association for Mutual Profit Not Charitable.* — *Brown v. La Société, etc.*, 138 Cal. 475.

**761.** 2. *Liability of County — Right of Recovery Over.* — *Com. v. Burton*, 16 Pa. Super. Ct. 218; *Boyle's Lunacy*, 20 Pa. Super. Ct. 1.

*Liability of County.* — Under Pol. Code Cal., § 1373, the county must pay for the support of insane criminals. *Napa State Hospital v. Yuba County*, 138 Cal. 378.

*Liability of County — What Constitutes Residence.* — *In re Woodcock*, 123 Mich. 369; *Superintendents of Poor v. Hillsdale County*, 124 Mich. 17; *Thomas v. Macon County*, 175 Mo. 68.

*Lunatic Liable to County.* — *Dandurand v. Kankakee County*, 196 Ill. 537; *Simons v. Van Benthuyssen*, 121 Mich. 697.

*County Not Entitled to Reimbursement.* — *Hamlin County v. Tauer*, (S. Dak. 1904) 100 N. W. Rep. 430.

*State Aid to County Asylum.* — *Gloucester County v. Heppenheimer*, 67 N. J. L. 164.

*Liability of Town — Right of Recovery Over.* — *Kittery v. Dixon*, 96 Me. 368.

*Liability of City — New York Statute.* — *Matter of New York Juvenile Asylum*, (Super. Ct. Spec. T.) 31 Misc. (N. Y.) 445, affirmed 54 N. Y. App. Div. 637.

*Lunatics — Estate Liable.* — *Manders v. Eastern State Hospital*, (Ky. 1905) 84 S. W. Rep. 761; *State Hospital v. Fountain*, 128 N. Car. 23.

*Liability of Parent for Support of Child.* — A statutory liability does not attach if the child is over twenty-one. *Central Kentucky Asylum v. Knighton*, 113 Ky. 156.

*Support of Adult Child, No Liability on Parent at Common Law.* — *Napa State Hospital v. Flaherty*, 134 Cal. 315.

*Husband Not Liable for Support of Wife if Un-*

*able to Pay Her Expenses and His Own.* — *Tennessee Hospital v. McReynolds*, 1 Tenn. Ch. App. 349.

*Void Commitment of Lunatic.* — If the commitment to the asylum be void, the asylum may recover for necessities on a *quantum meruit*, but the lunatic may set off the value of services rendered by him. *Michaels v. Central Kentucky Insane Asylum*, (Ky. 1904) 81 S. W. Rep. 247.

*Construction of Iowa Statute.* — Code Iowa, § 2297, providing for the liability of the lunatic's estate and of his relatives for the hospital expenses, does not authorize the county to charge the estate with the cost of transportation to the hospital. *Westlake v. Scott County*, 125 Iowa 314.

**762.** 3. *California Statute.* — The medical superintendent of the state insane hospital must have had three years' actual experience as a specialist in insanity. *People v. King*, 127 Cal. 570.

4. *Spongole v. Curnow*, 136 Cal. 580.

*California Statute.* — Under Pol. Code, § 2255, the board of directors of the State Deaf, Dumb, and Blind Asylum have no power to remove a physician before the expiration of his term. *Wall v. Deaf, etc., Asylum*, 145 Cal. 468.

*Ohio Statute.* — Under Rev. Stat. O., § 962, the county infirmary directors may remove the superintendent at any time. *Littleton v. Infirmary Directors*, 9 Ohio Cir. Dec. 850, 18 Ohio Cir. Ct. 891.

6. *Superintendent Not Liable for Negligence of Physician.* — *Clough v. Worsham*, 32 Tex. Civ. App. 187.

**763.** 1. *Where Hospital or Asylum Is Public or Private Charitable Institution, No Liability.* — *Powers v. Massachusetts Homœopathic Hospital*, (C. C. A.) 109 Fed. Rep. 294; *Plant System Relief, etc.*, Dept. v. Dickerson, 118 Ga. 647; *Pepke v. Grace Hospital*, 130 Mich. 493; *Collins v. New York Post Graduate Medical School*, 59 N. Y. App. Div. 63; *Wilson v. Brooklyn Homeopathic Hospital*, 97 N. Y. App. Div. 37; *Maia v. Eastern State Hospital*, 97 Va. 507.

**763.** VI. *HOSPITALS FOR CONTAGIOUS DISEASES* — Are Public Hospitals. — See note 2.

**764.** VII. *HOSPITALS AND ASYLUMS AS NUISANCES* — Not Nuisances Per Se. — See note 1.

When Nuisances, Are Without Any Especial Defense or Immunity. — See note 5.

**765.** *HOSTILE*. — See note 3.

*HOSTLER*. — See note 5.

**766.** *HOTEL*. — See note 5.

**767.** *HOUSE*. — See note 2.

**771.** See note 3.

**773.** *HOUSEHOLD*. — See note 4.

**774.** *HOUSEHOLDER*. — See note 1.

**776.** *HOUSEKEEPER*. — See note 1.

*State Institution Not Liable*. — *White v. Alabama Insane Hospital*, 138 Ala. 479.

**763.** 2. Are Public Hospitals. — *Lexington v. Batson*, (Ky. 1904) 81 S. W. Rep. 264.

**764.** 1. A Statute Forbidding the Establishing of Additional Hospitals in cities does not prohibit rebuilding and enlarging an existing hospital. *Com. v. Charity Hospital*, 199 Pa. St. 119.

Nor does it prevent the maintenance of existing hospitals. *Mason v. Presbyterian Hospital*, 30 Pittsb. Leg. J. N. S. (Pa.) 359.

But it does prohibit the erection of a hospital in a different part of the city from that in which the original hospital is located. *Com. v. Charity Hospital*, 198 Pa. St. 270.

*Canadian Statutes*. — A hospital for consumptives is not "any other noxious or offensive trade, business, etc.," within R. S. Ont. 1897, c. 248. *Reg. v. Playter*, 4 Can. Crim. Gas. (Ont.) 338.

5. When Nuisance Is Established Courts Will Act. — *Deaconess Home, etc., v. Bontjes*, 207 Ill. 553.

**765.** 3. *Hostile*. — *Hoffine v. Ewings*, 60 Neb. 720.

5. *Hostler* — *Railroad Employee*. — *St. Louis, etc., R. Co. v. Thurmond*, 70 Ark. 411.

**766.** 5. *Matter of Moulton*, 59 N. Y. App. Div. 27, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

*Intoxicating Liquors*. — *Matter of Brewster*, (County Ct.) 39 Misc. (N. Y.) 689; *Matter of*

*Place*, 27 N. Y. App. Div. 561. See also *Matter of Moulton*, 59 N. Y. App. Div. 27.

**767.** 2. *State v. Chauvet*, 111 Iowa 687.

*Part of a House*. — See *Grant v. Langston*, (1900) A. C. 388.

*House and Building* synonymous terms in an indictment for arson. *State v. Spiegel*, 111 Iowa 701.

*Cornerib* held a *house* within a burglary statute. *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515.

*Tent* held a *house* within a burglary statute. *Favro v. State*, 39 Tex. Crim. 452.

*A Wagon* held a *house* within a statute prohibiting disorderly houses. *State v. Chauvet*, 111 Iowa 687.

**771.** 3. *What Passes*. — Board of Education v. State, 64 Kan. 6.

*Message*. — Board of Education v. State, 64 Kan. 6.

**773.** 4. *Household*. — *Ferbrache v. Grand Lodge, etc.*, 81 Mo. App. 268.

*Same* — *Gas Fixtures*. — *Baldinger v. Levine*, 83 N. Y. App. Div. 130.

*Household Furniture*. — *Ludwig v. Bungart*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 177.

**774.** 1. *Householder*. — *Brokaw v. Ogle*, 170 Ill. 115; *Shepard v. New Orleans*, 51 La. Ann. 847.

*Householder and Freeholder Distinguished*. — *Shively v. Lankford*, 174 Mo. 585.

**776.** 1. *Servant Not a Housekeeper*. — *Taylor v. Beatty*, 202 Pa. St. 120.

## HOUSES OF REFUGE AND CORRECTION.

**778. III. COMMON NATURE, OBJECT, AND PURPOSE — 3. Penal or Quasi-penal, Although Reformatory.** — See notes 4, 5.

**779. Penal Element Differs in Degree with Nature of Institution.** — See note 3.

**IV. ORGANIZATION AND MAINTENANCE — Supported by Public Funds.** — See note 6.

**780. V. MANAGEMENT — Inmates — Commitments.** — See note 1.

**781. Welfare of the Offender the Principal Consideration in the Lesser Penal Reformatory Institutions.** — See note 1.

**782. Discharges.** — See note 1.

**778. 4. Rule v. Geddes, 23 App. Cas. (D. C.) 31.**

**5. Industrial School — Quasi-penal Institution.** — See *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620.

In *Illinois* reformatorys are penal institutions. *Marshall v. State Reformatory*, 201 Ill. 9.

**779. 3. A State Reformatory Is Not a Penitentiary.** — *Rule v. Geddes*, 23 App. Cas. (D. C.) 31; *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212.

**Incompetency as a Witness.** — *State v. Clark*, 60 Kan. 450.

**Summary Transfer of Inmate of Reformatory to the Penitentiary Lawful as a Disciplinary Measure.** — *In re Murphy*, 62 Kan. 422.

And in *In re Linden*, 112 Wis. 523, a statute authorizing such a proceeding was held to be constitutional.

But the contrary view was taken in *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212.

**6. Under the New York Constitution, art. viii, § 14, no payments of public moneys can be made to correctional or reformatory institutions for any inmate not received and retained pursuant to rules established by the state board of charities.** *Matter of New York Juvenile Asylum*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 633, *affirmed* 69 N. Y. App. Div. 615.

**In Maine** the town from which a boy is committed to a reform school is liable for his expenses not exceeding a dollar a week. *Waldoboro v. Liberty*, 94 Me. 472.

**780. 1. Statutes Authorizing Commitments Sustained.** — *Rule v. Geddes*, 23 App. Cas. (D. C.) 31; *Terry v. Byers*, 161 Ind. 360; *People v. New York Catholic Protectory*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 660; *In re Gas-*

*saway*, (Kan. 1905) 79 Pac. Rep. 113. See also *In re Linden*, 112 Wis. 523.

**Statutes Authorizing Commitment Held Unconstitutional.** — *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620; *Baker v. State*, 60 Neb. 691.

**Rights of Parents Not Determined by Summary Commitment of Minor.** — *Rule v. Geddes*, 23 App. Cas. (D. C.) 31; *People v. State Industrial School*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 396.

**Minor Should Not Be Committed upon Mere Charge of Crime — Kansas.** — *In re Gassaway*, (Kan. 1905) 79 Pac. Rep. 113.

**When Prostitute Can Be Committed to Reformatory.** — *People v. House of Good Shepherd*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 453; *People v. Davis*, 80 N. Y. App. Div. 448.

**Insufficient Evidence to Warrant Commitment.** — *In re Murphy*, 62 Kan. 422; *State v. Rasch*, 24 Wash. 332.

**781. 1. Welfare of the Offender a Chief Consideration.** — *State v. Merrill*, 83 Minn. 252; *Scott v. Flowers*, 60 Neb. 675, *overruled* 61 Neb. 620.

**782. 1. Discretion of Board of Managers.** — Under the Indiana indeterminate sentence law the board of managers of a reformatory is authorized to discharge an inmate when the rules of the reformatory authorizing an allowance for good behavior have been complied with, and the courts will not interfere with this discretion. *Terry v. Byers*, 161 Ind. 360.

Whether an infant committed to a state public school shall be released before majority is discretionary with the school officers and the court will not interfere with the exercise of such discretion. *Armstrong v. State Public School*, 88 Minn. 382.

# HUSBAND AND WIFE.

BY E. G. CHILTON.

**790. I. NATURE OF RELATION AND GENERAL CONSIDERATIONS — At Common Law.** — See note 1.

**II. DISABILITIES ARISING FROM COVERTURE — 2. Of Wife — a. IN GENERAL.** — See note 3.

*b. TO MAKE CONTRACTS — (1) At Common Law.* — See note 5.

**791.** See notes 2, 3, 4.

(2) *In Equity.* — See notes 5, 6.

**792.** (3) *Under Enabling Statutes — (a) In General.* — See note 2.

**790. 1. Husband and Wife Deemed as One Person at Common Law — United States.** — Van Sickle *v. Wells*, 105 Fed. Rep. 16.

*Arkansas.* — Hunt *v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

*California.* — Henley *v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160.

*Georgia.* — Jones *v. Harrell*, 110 Ga. 373.

*Illinois.* — Merrill *v. Marshall*, 113 Ill. App. 456, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 790.

*Indiana.* — Dailey *v. Dailey*, 26 Ind. App. 14. See also Radke *v. Schlundt*, 30 Ind. App. 213.

*Kentucky.* — Louisville *v. Coleburne*, 108 Ky. 420; Deitzman *v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390.

*Maryland.* — Stonesifer *v. Shriver*, 100 Md. 24.

*Missouri.* — See Rice *v. Sally*, 176 Mo. 107. *Nebraska.* — Kerner *v. McDonald*, 60 Neb. 663, 83 Am. St. Rep. 550.

*New Jersey.* — Wolff *v. Lozier*, 68 N. J. L. 103.

*New York.* — Carver *v. Wagner*, 51 N. Y. App. Div. 47.

*Pennsylvania.* — Little *v. Hazlett*, 197 Pa. St. 591; Merritt *v. Whitlock*, 6 Lack. Leg. N. (Pa.) 76.

*Vermont.* — Sowles *v. Hall*, 73 Vt. 55.

*Wisconsin.* — Citizens' L. & T. Co. *v. Witte*, 116 Wis. 60; Wallace *v. St. John*, 119 Wis. 593.

**3. Disabilities of Married Women in General.** — Jones *v. Harrell*, 110 Ga. 373; Deitzman *v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390.

**5. Incapacity of Married Women to Contract at Common Law — Georgia.** — Jones *v. Harrell*, 110 Ga. 373.

*Indiana.* — Radke *v. Schlundt*, 30 Ind. App. 213.

*Iowa.* — Hoaglin *v. Henderson*, 119 Iowa 720, 97 Am. St. Rep. 335.

*Kentucky.* — Stapleton *v. Poynter*, 62 S. W. Rep. 730, 23 Ky. L. Rep. 76; Boughner *v. Laughlin*, (Ky. 1901) 64 S. W. Rep. 856; Ruppel *v. Kissel*, 74 S. W. Rep. 220, 24 Ky. L. Rep. 2371.

*Nebraska.* — McKell *v. Merchants' Nat. Bank*, 62 Neb. 603.

*New Jersey.* — Wolff *v. Lozier*, 68 N. J. L. 103.

*North Carolina.* — Harvey *v. Johnson*, 133 N. Car. 353.

*Ohio.* — Westlake *v. Youngstown*, 62 Ohio St. 249.

*Pennsylvania.* — Little *v. Hazlett*, 197 Pa. St. 591.

*Rhode Island.* — Radican *v. Radican*, 22 R. I. 405.

*Tennessee.* — Geneva First Nat. Bank *v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840.

*Texas.* — Blum *v. Johnson*, 28 Tex. Civ. App. 10.

*Vermont.* — Sowles *v. Hall*, 73 Vt. 55.

*Virginia.* — American Hide, etc., Co. *v. Chalkley*, 101 Va. 458; Stewart *v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

**Appointment of Agent by Married Woman.** — Linton *v. National L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 584.

**791. 2. Forms of Acknowledgment or Execution Immaterial.** — Stapleton *v. Poynter*, 62 S. W. Rep. 730, 23 Ky. L. Rep. 76; Westlake *v. Youngstown*, 62 Ohio St. 249.

**3.** Harvey *v. Johnson*, 133 N. Car. 353.

**4. Contract Executed by Wife Enforceable Against Other Party.** — Carter *v. Fischer*, 127 Ala. 52; Lee *v. Green*, 24 Tex. Civ. App. 109.

**5. Contracts with Reference to Separate Estates in Equity.** — McKell *v. Merchants' Nat. Bank*, 62 Neb. 608; Demarest *v. Terhune*, 62 N. J. Eq. 663; Harvey *v. Johnson*, 133 N. Car. 353. See also Blum *v. Johnson*, 28 Tex. Civ. App. 10.

**6. No Personal Remedy in Equity on Wife's Contracts — Florida.** — Pensacola First Nat. Bank *v. Hirschowitz*, (Fla. 1903) 35 So. Rep. 22. *Kentucky.* — Weller *v. Monroe*, (Ky. 1900) 55 S. W. Rep. 1078.

*Nebraska.* — See McKell *v. Merchants' Nat. Bank*, 62 Neb. 608.

*New Jersey.* — Demarest *v. Terhune*, 62 N. J. Eq. 663, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 791.

*North Carolina.* — Harvey *v. Johnson*, 133 N. Car. 353.

*Pennsylvania.* — Little *v. Hazlett*, 197 Pa. St. 591.

**792. 2. Presumption of Incapacity under Statutes Giving Limited Power.** — June *v. Labadie*, 132 Mich. 135; Farmers' Bank *v. Boyd*, 67 Neb. 497; Demarest *v. Terhune*, 62 N. J. Eq. 663.

**792.** (b) Statutes Authorizing Contracts with Reference to Separate Estates. — See note 3.

**793.** (c) Statutes Wholly Removing Disability. — See note 1.

(4) Confirmation or Ratification of Contract. — See notes 2, 3, 4.

**792. 3. Statutes Authorizing Contracts with Reference to Separate Estates — Arkansas.** — Hunt v. State, 72 Ark. 241, 105 Am. St. Rep. 34; Sparks v. Moore, 66 Ark. 437.

*Delaware.* — Black v. Clements, 2 Penn. (Del.) 499.

*Kentucky.* — Robertson v. Robertson, 72 S. W. Rep. 813, 24 Ky. L. Rep. 2020.

*Maryland.* — Pyle v. Gross, 92 Md. 132.

*Michigan.* — Smith v. Martin, 124 Mich. 34. See also National Lumberman's Bank v. Miller, 131 Mich. 564, 100 Am. St. Rep. 623.

*Nebraska.* — Linton v. National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584 (construing Nebraska statute); Citizens' State Bank v. Smout, 62 Neb. 223; Kitchen v. Chapin, 64 Neb. 144; Kershaw v. Barrett, (Neb. 1902) 90 N. W. Rep. 764; Leake v. Lucas, 65 Neb. 359, affirmed on rehearing 65 Neb. 366; Farmers' Bank v. Boyd, 67 Neb. 497. See also Farmers' Bank v. Normand, (Neb. 1902) 92 N. W. Rep. 723.

*New Hampshire.* — Ott v. Hentall, 70 N. H. 231.

*Pennsylvania.* — Bankard v. Shaw, 199 Pa. St. 623; Bankard v. Shaw, 23 Pa. Co. Ct. 561.

*Texas.* — Parker v. Wood, 25 Tex. Civ. App. 506; Emerson v. Kneezell, (Tex. Civ. App. 1900) 62 S. W. Rep. 551; Hugo, etc., Co. v. Hirsch, (Tex. Civ. App. 1901) 63 S. W. Rep. 163; Flannery v. Chidgey, 33 Tex. Civ. App. 638.

*Vermont.* — Russell v. Phelps, 73 Vt. 390.

*Wisconsin.* — Stack v. Padden, 111 Wis. 42; Ritter v. Bruss, 116 Wis. 55.

**Contract for Necessaries.** — In Glenn v. Gerald, 64 S. Car. 236, it was held that a married woman might bind her separate estate by contract for the services of a physician.

Under statute in Texas a married woman may contract for necessities, irrespective of her husband's ability or willingness to supply them. Blum v. Johnson, 28 Tex. Civ. App. 10; Von Carlowitz v. Bernstein, 28 Tex. Civ. App. 8.

**Suretyship for Husband.** — Under statute in Alabama the contract of a married woman to answer for the debt of her husband is void. Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614.

In Nebraska a married woman is not liable on her contract of suretyship for her husband, except when made with reference to her separate estate. McKell v. Merchants' Nat. Bank, 62 Neb. 608.

Under statute in Pennsylvania a woman is not liable on a note which she made as accommodation surety for her husband. First Nat. Bank v. Short, 15 Pa. Super. Ct. 64.

**793. 1. Statutes Wholly Removing Disability to Contract — Georgia.** — Jones v. Harrell, 110 Ga. 373. See also Orr v. Cooledge, 117 Ga. 195.

*Illinois.* — McDonald Mfg. Co. v. Williams, 96 Ill. App. 395.

*Indiana.* — Dailey v. Dailey, 26 Ind. App. 14; Robison v. Pease, 28 Ind. App. 610; Guy v. Liberenz, (Ind. App. 1902) 64 N. E. Rep. 527.

*Kentucky.* — Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390; Howard v. Gibson, 60 S. W. Rep. 491, 22 Ky. L. Rep. 1294; Ware v. Long, 69 S. W. Rep. 797, 24 Ky. L. Rep. 696.

*Mississippi.* — Wyatt v. Wyatt, 81 Miss. 219.

*Missouri.* — Farmers' Exch. Bank v. Hage-luken, 165 Mo. 443, 88 Am. St. Rep. 434; Lillard v. Wilson, 178 Mo. 145; Goza v. Sanford, 79 Mo. App. 95; Davis v. Watson, 89 Mo. App. 15; Moston v. Stow, 91 Mo. App. 554; Rogers v. Hopper, 94 Mo. App. 437; Beagles v. Beagles, 95 Mo. App. 338; Rice v. Sally, 176 Mo. 107.

*New Jersey.* — Turner v. Davenport, 63 N. J. Eq. 288; Lewis v. Ferris, (N. J. 1901) 50 Atl. Rep. 630; Wolff v. Lozier, 68 N. J. L. 103.

*New York.* — Carver v. Wagner, 51 N. Y. App. Div. 47; France v. France, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 459, affirmed 79 N. Y. App. Div. 291; Richards v. Young, (Supm. Ct. App. T.) 84 N. Y. Supp. 265.

*North Dakota.* — King v. Hanson, 13 N. Dak. 85.

*Ohio.* — Klinckhamer Brewing Co. v. Cass-man, 12 Ohio Cir. Dec. 141, 21 Ohio Cir. Ct. 465.

*South Carolina.* — Glenn v. Gerald, 64 S. Car. 236.

*Vermont.* — Buck v. Troy Aqueduct Co., 76 Vt. 75.

*Virginia.* — Catlett v. Alsop, 99 Va. 680; Augusta Nat. Bank v. Beard, 100 Va. 687.

**Contract of Suretyship.** — Russell v. Peavy, 131 Ala. 563; Rogers v. Shewmaker, 27 Ind. App. 631, 87 Am. St. Rep. 274; International Bldg., etc., Assoc. v. Watson, 158 Ind. 508; Guy v. Liberenz, (Ind. App. 1902) 64 N. E. Rep. 527; Cook v. Buhlrlage, 159 Ind. 162. See also Jones v. Weichselbaum, 115 Ga. 369; Baer v. Terry, 105 La. 479.

In Kentucky a wife's contract of suretyship for her husband, in order to be binding, must conform to the terms prescribed by statute. Postell v. Crumbaugh, 66 S. W. Rep. 830, 23 Ky. L. Rep. 2193.

Under the statute in Louisiana, the wife may become surety for her husband. Baer v. Terry, 108 La. 597.

In Pennsylvania a judgment entered on a note, signed by a wife as surety for her husband, was opened in spite of the fact that, in consideration of the payee's promise to assign to her the claim against her husband on the note, the wife, after the execution of the note, promised to pay it. McCrea v. Sisler, 17 Pa. Super. Ct. 175.

While a married woman may not ordinarily assume the debts of her husband in Georgia, she may, when purchasing property from him, agree to pay off a lien which he has created thereon, in order to obtain an unencumbered title. Lowenstein v. Meyer, 114 Ga. 709.

**2. Married Woman's Contracts Incapable of Ratification.** — Ruppel v. Kissel, 74 S. W. Rep. 220, 24 Ky. L. Rep. 2371; Radican v. Radican, 22 R. I. 405.

- 794.** *c.* TO MAKE WILLS. — See notes 2, 3.  
*d.* TO SUE AND BE SUED. — See note 5.  
 By Statute. — See note 7.  
*e.* TO ACQUIRE AND HOLD PROPERTY. — See note 9.
- 795.** *f.* TO BE SOLE TRADER — (2) *In Equity*. — See note 7.  
 (3) *Under Statutes* — (a) *Statutes Expressly Enabling Married Women to Carry on Separate Business* — *aa.* IN GENERAL. — See note 9.
- 796.** See notes 2, 3.  
*bb.* POWER CONFERRED UNDER SPECIAL CIRCUMSTANCES. — See note 7.
- 797.** *cc.* FORMALITIES PREREQUISITE TO BECOMING SOLE TRADER. — See note 5.  
 (b) *Separate Property Acts*. — See notes 6, 7.
- 798.** See note 1.  
 (c) *What Amounts to Separate Trade or Business*. — See note 2.
- 799.** *i.* TO BE ESTOPPED — (2) *Estoppel by Deed* — *Operation of Covenants as to After-acquired Title*. — See notes 4, 5, 7.  
 (3) *Estoppel in Pais* — (a) *Estoppel Predicated on Contract*. — See notes 9, 10.
- 800.** (b) *Estoppel Predicated on Tort*. — See notes 1, 5.

**793.** 3. Contract of Married Woman Not Validated by Subsequent Promise After Removal of Disability by Law. — See *Ruppel v. Kissel*, 74 S. W. Rep. 220, 24 Ky. L. Rep. 2371.

4. Affirmance After Death of Husband. — *Radican v. Radican*, 22 R. I. 405.

**794.** 2. Incapacity of Married Woman to Dispose of Personalty by Will. — *Elliot v. North*, (1901) 1 Ch. 424, 70 L. J. Ch. 217; *Louisville City Nat. Bank v. Wooldridge*, 116 Ky. 641.

3. Invalidity of Devise of Lands by Married Woman. — *Louisville City Nat. Bank v. Wooldridge*, 116 Ky. 641.

5. Incapacity of Married Woman to Sue and Be Sued at Common Law. — *Black v. Clements*, 2 Penn. (Del.) 499.

7. *Black v. Clements*, 2 Penn. (Del.) 499; *Russell v. Phelps*, 73 Vt. 390.

9. Capacity of Married Woman to Acquire Property at Common Law. — *Rice v. Sally*, 176 Mo. 107; *Lee v. Green*, 24 Tex. Civ. App. 109.

**795.** 7. Married Women Recognized as Sole Traders in Equity. — *Pensacola First Nat. Bank v. Hirschowitz*, (Fla. 1903) 35 So. Rep. 22.

9. Statutes Expressly Enabling Married Women to Carry on Separate Business — *Alabama*. — *Southern R. Co. v. Crowder*, 135 Ala. 417.

*Colorado*. — *Denver, etc., R. Co. v. Young*, 30 Colo. 349.

*Idaho*. — *McDonald v. Rozen*, 8 Idaho 352.

*Indiana*. — *Hamilton v. Hamilton*, 26 Ind. App. 114.

*Minnesota*. — See *Rahm v. Newton*, 87 Minn. 415.

*Missouri*. — *Rice v. Sally*, 176 Mo. 107.

*New Jersey*. — *Turner v. Davenport*, 63 N. J. Eq. 288.

*North Carolina*. — See *Harvey v. Johnson*, 133 N. Car. 353.

**796.** 2. Power to Contract under Statutes Expressly Enabling Married Women to Carry on Separate Trade. — *Texas, etc., R. Co. v. Humble*, (C. C. A.) 97 Fed. Rep. 837, affirmed 181 U. S. 57 (construing *Arkansas* statute); *Bankard v. Shaw*, 199 Pa. St. 623. See also *Turner v. Davenport*, 63 N. J. Eq. 288.

3. Capacity to Sue and Be Sued under Express Separate Trade Statutes. — *Turner v. Davenport*,

63 N. J. Eq. 288. See also *Bankard v. Shaw*, 199 Pa. St. 623.

7. Wife Unsupported by Husband as Sole Trader under Statute. — *Von Helmold v. Von Helmold*, 19 Pa. Super. Ct. 217.

**797.** 5. Statutes Requiring Judgment or Decree Pronouncing Married Woman Sole Trader. — *McDonald v. Rozen*, 8 Idaho 352, holding that without such a judgment a married woman cannot engage in business or recover prospective profits by reason of loss of business, even though the money invested in such business was her separate property before marriage.

6. Right to Use Property in Trade under Separate Property Acts. — *Grimes v. Reynolds*, 94 Mo. App. 578. See also *Bankard v. Shaw*, 199 Pa. St. 623.

7. Right to Bind Separate Property by Purchase of Goods. — *Pensacola First Nat. Bank v. Hirschowitz*, (Fla. 1903) 35 So. Rep. 22.

**798.** 1. Liability for Purchase on Credit under Separate Property Acts. — See *Ritter v. Bruss*, 116 Wis. 55.

2. Keeping Boarding House a Separate Trade or Business. — See *Cline v. Hackbarth*, 27 Tex. Civ. App. 391.

**799.** 4. Operation of Covenants of Married Woman by Way of Estoppel on After-acquired Title. — *Johnson v. Mutual L. Ins. Co.*, 113 Ky. 871. See also *Pyle v. Gross*, 92 Md. 132.

5. *Morrison v. Balzer*, 35 Tex. Civ. App. 247.

7. *Stacey v. Walter*, 125 Ala. 291, 82 Am. St. Rep. 235; *Johnson v. Mutual L. Ins. Co.*, 113 Ky. 871.

9. Estoppel in Pais Predicated on Contract Inoperative Against Married Women. — *Westlake v. Youngstown*, 62 Ohio St. 249; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.

10. *Abicht v. Searls*, 154 Ind. 594. See also *Cable v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871.

**800.** 1. View that Married Woman Is Estopped in Case of Pure Tort Only. — *Floyd v. Mackey*, 112 Ky. 646.

5. View that Married Women May Be Estopped by Fraud Though Connected with Contract. — See *Cable v. Worsham*, 96 Tex. 86, 97 Am.



- 800.** (c) Effect of Statutes Enabling Married Women to Contract. — See note 6.
- 801.** Statutes Permitting Contract Relating to Separate Estate Only. — See note 2. Statutes Prohibiting Contracts of Suretyship for Husband. — See note 5.
- 802.** (d) Barring Title to Real Estate — *aa.* ACTS OR REPRESENTATIONS AMOUNTING TO POSITIVE FRAUD — Construction of Statutes — Conflict of Authority. — See note 3. Positive Fraud Essential to Estoppel. — See note 7.
- 804.** *bb.* SILENCE OR CONCEALMENT OF FACTS — (*cc.*) *Permitting Husband to Contract Debts on Faith of Ownership* — Where Record Title Is in Husband. — See notes 5, 6, 7, 8.
- 807.** *k.* SPECIAL CIRCUMSTANCES ENABLING FEME COVERT TO ACT SUI JURIS — (2) *Alienage of Husband.* — See note 8.
- 808.** (3) *Banishment or Transportation of Husband.* — See note 1.
- 809.** (4) *Abandonment or Separation* — (a) Without Leaving Realm — But by Statute. — See note 3.
- 810.** (b) *Abjuration of Realm.* — See note 1.
- 811.** III. RIGHTS, DUTIES, AND LIABILITIES INTER SE — 1. Personal Rights — *a.* OF HUSBAND — (1) *To Act as Head of Family.* — See note 8.
- 812.** (3) *To Fix Matrimonial Domicil or Residence.* — See notes 6, 7. (4) *Cohabitation.* — See note 13.
- 813.** (5) *Control and Custody of Wife.* — See notes 2, 3. (7) *Services of Wife.* — See note 7. (8) *Support.* — See notes 9, 10.

St. Rep. 871; *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

**800.** 6. Effect of Statutes Enabling Married Women to Contract on Operation of Estoppel. — *Johnson v. Mutual L. Ins. Co.*, 113 Ky. 871; *Stone v. Gilliam Exch. Bank*, 81 Mo. App. 9.

**801.** 2. *Russell v. Peavy*, 131 Ala. 563. 5. See International Bldg., etc., Assoc. v. Watson, 158 Ind. 508.

**802.** 3. View that Title to Land of Married Woman May Not Be Barred by Estoppel. — *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680.

7. View that Actual Fraud Necessary to Create Estoppel. — *McNeeley v. South Penn Coal Co.*, 52 W. Va. 644, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802.

**804.** 5. Fraudulently Permitting Husband to Contract Debts on Faith of Ownership of Lands Recorded in His Name. — *Laing v. Evans*, 64 Neb. 454.

See also *Burt v. Kuhn*, 113 Ga. 1143, wherein it was held that the land could not be subjected to the satisfaction of a judgment against the husband, no credit having been given on the faith of his apparent ownership.

6. View that Permitting Record Title to Remain in Husband Estops Wife as to Creditors Apart from Actual Fraud. — *Smith v. Gott*, 51 W. Va. 141. See also *Standard Mercantile Co. v. Ellis*, 48 W. Va. 311.

7. View that Permitting Record Title to Remain in Husband Is Inoperative as Estoppel in Absence of Fraud. — *In re Platts*, 110 Fed. Rep. 126. See also *Kinsey v. Feller*, (N. J. 1902) 51 Atl. Rep. 485; *Reed v. Kimsey*, 98 Ill. App. 364; *Standard Mercantile Co. v. Ellis*, 48 W. Va. 311.

8. Credit Must Be Given to Husband on Faith of Ownership. — *Standard Mercantile Co. v. Ellis*, 48 W. Va. 311, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804; *Smith v. Gott*, 51 W. Va. 141.

**807.** 8. Wife's Disabilities Removed by Alienage of Husband. — *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

*Wife of Alien Enemy.* — See *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

**808.** 1. Wife's Disabilities Removed by Husband's Banishment. — *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

**809.** 3. Under the California Code Civ. Pro. — *Muller v. Hale*, 138 Cal. 163.

**810.** 1. Removal of Wife's Disabilities by Husband's Abjuration of the Realm. — See *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

**811.** 8. Husband Head of Family. — See *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160; *Radke v. Schlundt*, 30 Ind. App. 213; *Leake v. Luca*, 65 Neb. 359.

**812.** 6. Husband's Right to Fix Matrimonial Domicil. — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160; *Schuman v. Schuman*, 93 Mo. App. 99; *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268; *Harris v. Harris*, 83 N. Y. App. Div. 123; *Cone v. Cone*, 61 S. Car. 512.

7. Husband's Right to Fix Domicil Not Altered by Antenuptial Agreement. — *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

13. Suit for Restitution of Conjugal Rights. — *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390.

**813.** 2. Husband's Right to Custody and Control of Wife. — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160.

3. *Foote v. Nickerson*, 70 N. H. 496. See also *Powell v. Benthall*, 136 N. Car. 145.

7. Husband's Right to Wife's Services in Family. — See *Radke v. Schlundt*, 30 Ind. App. 213.

9. Wife Not Bound to Support Insolvent Husband at Common Law. — *Robinson v. Foust*, 31 Ind. App. 384, 99 Am. St. Rep. 269; *Blackhawk County v. Scott*, 111 Iowa 190.

10. *Baughman v. Baughman*, 7 Ohio Dec. 433, 7 Ohio N. P. 328.

*Married Woman Liable for Medical Attendance to Husband.* — A Nebraska statute enabling a married woman to have a separate estate, but imposing on her a liability for necessaries, authorizes a recovery against her for medical

**813.** (9) *Burial*. — See note 11.

**814.** *b. OF WIFE* — (1) *Cohabitation*. — See note 2.

(2) *Maintenance* — (a) *In General*. — See note 5.

**815.** (b) *Nonsupport of Wife as Criminal Offense*. — See notes 1, 2, 3, 4, 5.

**816.** See note 1.

**817.** (4) *Burial*. — See note 1.

2. *Property Rights* — *a. OF HUSBAND* — (1) *In Wife's Realty* —

*Interest Apart from Curtesy*. — See notes 5, 6.

**818.** See notes 1, 4.

**819.** *No Interest in Wife's Separate Estate*. — See notes 1, 2.

**820.** (2) *In Wife's Chattels Real* — Under the *Married Women's Acts*. — See note 2.

(3) *In Wife's Personalty* — (a) *In General* — Under the *Common Law*. —

See note 3.

(b) *Personalty in Possession*. — See note 6.

attendance to her husband. *Leake v. Lucas*, 65 Neb. 359, affirmed on rehearing 65 Neb. 366.

*Maintenance of Insane Husband in Asylum*. — Under statute in *Iowa* rendering the wife liable for family expenses, it was held that the wife is not chargeable with the maintenance of her husband in an insane hospital. *Blackhawk County v. Scott*, 111 Iowa 190.

**813.** 11. *Duty of Wife to Bury Husband*. — *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367.

**814.** 2. *Suit by Wife for Restitution of Conjugal Rights*. — *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390.

5. *Husband's Maintenance of Wife an Unenforceable Duty at Common Law*. — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160; *Radke v. Schlundt*, 30 Ind. App. 213.

**815.** 1. *Nonsupport of Wife a Statutory Crime*. — *Foster v. People*, 101 Ill. App. 84; *Stanley v. People*, 104 Ill. App. 294; *State v. Macklin*, 86 Mo. App. 636; *State v. Fleming*, 90 Mo. App. 241; *Com. v. Smith*, 200 Pa. St. 363.

*New York* — *Punishable as Disorderly Persons*. — *People v. Miller*, (County Ct.) 30 Misc. (N. Y.) 355; *People v. Schnitzer*, (County Ct.) 71 N. Y. Supp. 320; *Keller v. Foleron*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 534; *People v. Neyer*, (County Ct.) 79 N. Y. Supp. 367. See also *People v. Dershem*, 78 N. Y. App. Div. 626.

*Nebraska Statute*. — In *Nebraska* it is a statutory crime to abandon one's wife and wilfully neglect or refuse to support her. *Cuthbertson v. State*, (Neb. 1904) 101 N. W. Rep. 1031.

*North Carolina Statute*. — Under statute in *North Carolina*, to constitute the criminal offense, a wilful abandonment and a failure to support must be shown. *State v. Hopkins*, 130 N. Car. 647; *State v. May*, 132 N. Car. 1020.

2. *The Mere Pendency of an Action for Divorce* does not constitute a defense to a prosecution under the *New York* statute. *People v. Schnitzer*, (County Ct.) 71 N. Y. Supp. 320.

3. *Separation by Consent as Defense*. — *State v. Macklin*, 86 Mo. App. 636.

4. *Wife's Adultery as Defense*. — *Keller v. Foleron*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 534, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889 [815].

5. *Wife's Cruelty as Defense*. — *State v. Macklin*, 86 Mo. App. 636.

**816.** 1. *Husband's Offer in Good Faith to Support as Defense*. — *People v. Dershem*, 78 N. Y. App. Div. 626, holding also that the rule is otherwise if the offer is not made in good faith.

**817.** 1. *Duty of Husband to Bury Wife*. — *Matter of Richardson*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 367.

5. *Husband's Interest in Wife's Realty Distinct from Curtesy*. — *Vanata v. Johnson*, 170 Mo. 269; *Guernsey v. Lazear*, 51 W. Va. 328.

6. *Husband Has Freehold Interest in Wife's Lands*. — *Dillon v. Dillon*, 69 S. W. Rep. 1099, 24 Ky. L. Rep. 781; *Smith v. White*, 165 Mo. 590; *Jones v. Ducktown Sulphur, etc., Co.*, 109 Tenn. 375; *Guernsey v. Lazear*, 51 W. Va. 328.

*The Technical Phraseology of the Common Law*. — *Jones v. Ducktown Sulphur, etc., Co.*, 109 Tenn. 375.

**818.** 1. *Husband Entitled to Rents and Profits During Joint Lives of Himself and Wife* — *Indiana*. — *Radke v. Schlundt*, 30 Ind. App. 213. *Kentucky*. — *Dillon v. Dillon*, 69 S. W. Rep. 1099, 24 Ky. L. Rep. 781.

*Missouri*. — *Smith v. White*, 165 Mo. 590. *Tennessee*. — *Jones v. Ducktown Sulphur, etc., Co.*, 109 Tenn. 375.

*West Virginia*. — *Guernsey v. Lazear*, 51 W. Va. 328.

4. *Husband's Interest Subject to Execution Against Him*. — *Guernsey v. Lazear*, 51 W. Va. 328.

**819.** 1. *Husband Has No Interest in Separate Equitable Realty*. — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 622, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; *Guernsey v. Lazear*, 51 W. Va. 328. See also *Fields v. Gwynn*, 19 App. Cas. (D. C.) 99.

2. *Husband's Interest Removed by Statute*. — *Laufer v. Powell*, 30 Tex. Civ. App. 604; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 622, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819; *Guernsey v. Lazear*, 51 W. Va. 328.

**820.** 2. *Husband's Right to Wife's Chattels Real Abolished by Statutes*. — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160.

3. *Husband's Right to Wife's Personalty at Common Law*. — *Radke v. Schlundt*, 30 Ind. App. 213.

6. *Husband's Right to Personalty in Possession* — *Arkansas*. — *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

**822.** Possession of Third Person. — See note 2.

(c) Choses in Action — *aa.* IN GENERAL. — See note 7.

**823.** *bb.* WIFE'S RIGHT BY SURVIVORSHIP. — See note 1.

**826.** *dd.* WHAT AMOUNTS TO REDUCTION INTO POSSESSION — (*aa.*) In General. — See notes 1, 4.

(*cc.*) Husband Taking Possession in Another Capacity — Intent. — See note 9.

**832.** (d) Earnings — General Rule. — See note 3.

**833.** Necessity for Reduction to Possession. — See note 3.

**834.** *b.* OF WIFE — (1) In Husband's Property — (b) Personalty — Fraudulent Conveyance as Barring Wife's Distributive Share. — See note 7.

**846.** *c.* JOINT OWNERSHIP OF PROPERTY — (1) Realty — (a) Joint Tenancy and Tenancy in Common. — See note 4.

Lands Granted to Husband and Wife During Coverture. — See note 6.

**847.** See note 1.

(b) Estates by Entireties. — See notes 2, 3.

*Kentucky.* — *Towles v. Edwards*, 68 S. W. Rep. 1107, 24 Ky. L. Rep. 491.

*Louisiana.* — *Rush v. Landers*, 107 La. 559, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

*Maryland.* — *Downs v. Miller*, 95 Md. 602; *Stonesifer v. Shriver*, 100 Md. 24.

*Missouri.* — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

*North Carolina.* — *Fowler v. McLaughlin*, 131 N. Car. 209.

*Virginia.* — *Jesser v. Armentrout*, 100 Va. 666.

**Right Not Divested by Subsequent Legislation.** — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486; *Glaves v. Wood*, 87 Mo. App. 92.

**822.** 2. Possession of Guardian. — *Fowler v. McLaughlin*, 131 N. Car. 209, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822.

7. Choses in Action Reduced to Possession Belong to Husband. — *Johnson v. Hume*, 138 Ala. 564; *Stonesifer v. Shriver*, 100 Md. 24; *Fowler v. McLaughlin*, 131 N. Car. 209, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822.

**Right to Reduce to Possession Held a Vested Interest Not to Be Taken Away by Legislation.** — *McLeod v. Venable*, 163 Mo. 536.

**823.** 1. Wife's Right of Survivorship on Husband's Death. — *Fowler v. McLaughlin*, 131 N. Car. 209.

**826.** 1. What Amounts to a Reduction into Possession. — *Johnson v. Hume*, 138 Ala. 564.

4. Reduction Not Dependent on Wife's Acts. — *Johnson v. Hume*, 138 Ala. 564.

9. *Johnson v. Hume*, 138 Ala. 564.

**832.** 3. Husband's Right to Wife's Earnings at Common Law — *United States*. — *Vansickle v. Wells*, 105 Fed. Rep. 16.

*California.* — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160.

*Colorado.* — *Denver, etc., R. Co. v. Young*, 30 Colo. 349.

*Georgia.* — *Roberts v. Haines*, 112 Ga. 842.

*Indiana.* — *Radke v. Schlundt*, 30 Ind. App. 213; *Robinson v. Foust*, 31 Ind. App. 384, 99 Am. St. Rep. 269.

*Iowa.* — *McClintic v. McClintic*, 111 Iowa 615.

*Michigan.* — *Boyle v. Saginaw*, 124 Mich. 348.

*New Jersey.* — *Turner v. Davenport*, 63 N. J. Eq. 288; *Peterson v. Christianson*, 68 N. J. L. 392.

*New York.* — *Carver v. Wagner*, 51 N. Y. App. Div. 47; *Klapper v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 528; *Briggs v. Devoe*, 89 N. Y. App. Div. 115.

*Ohio.* — *Baltimore, etc., R. Co. v. Glenn*, 66 Ohio St. 395.

*Texas.* — *Cline v. Hackbarth*, 27 Tex. Civ. App. 391.

*Canada.* — *Doidge v. Mimms*, 13 Manitoba 48.

**Where the Community Property System Obtains** the earnings of the wife belong to the community. *Sherlock v. Denny*, 28 Wash. 170. For a full discussion, see the title COMMUNITY PROPERTY, vol. 6, p. 311.

**833.** 3. Money Due for Wife's Services Need Not Be Reduced to Possession. — See *Turner v. Davenport*, 63 N. J. Eq. 288.

**834.** 7. *Brodt v. Rannels*, 9 Ohio Dec. 503, 7 Ohio N. P. 79.

**846.** 4. Effect of Intermarriage of Joint Tenants or Tenants in Common. — *Merritt v. Whitlock*, 200 Pa. St. 50.

6. Rule that Husband and Wife Cannot Hold as Joint Tenants under Grant to Both. — *Brewer v. Bowersox*, 92 Md. 567; *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339; *McLeod v. Venable*, 163 Mo. 536. See also *Merritt v. Whitlock*, 200 Pa. St. 50.

**847.** 1. View that Grant to Husband and Wife May Create Joint Tenancy. — *Booth v. Fordham*, 100 N. Y. App. Div. 115; *Stalcup v. Stalcup*, 137 N. Car. 305, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846. See also *Merritt v. Whitlock*, 200 Pa. St. 50, wherein the court declined to decide the question whether, under the statute severing the unity of husband and wife, they could take as joint tenants or tenants in common.

2. Rationale of Doctrine of Tenancy by Entireties. — *Ray v. Long*, 132 N. Car. 891. See also *Booth v. Fordham*, 100 N. Y. App. Div. 115.

3. Common-law Doctrine of Tenancy by Entireties — *District of Columbia*. — *Loughran v. Lemmon*, 19 App. Cas. (D. C.) 141.

*Illinois.* — *Kron v. Kron*, 195 Ill. 181.

*Kentucky.* — *Louisville v. Coleburne*, 108 Ky. 420.

*Maryland.* — *Brewer v. Bowersox*, 92 Md. 567.

*Massachusetts.* — *Pease v. Whitman*, 182 Mass. 363.

*Missouri.* — *McLeod v. Venable*, 163 Mo.

**848.** See note 1.

**849.** Husband's Interest During Coverture. — See notes 1, 2, 3.

**850.** See note 1.

Effect of Statutory Enactments. — See notes 2, 4.

**851.** (2) *Personalty*. — See notes 2, 3.

**852.** See note 1.

**3. Transactions Between Husband and Wife — a. ANTENUPTIAL CONTRACTS.** — See notes 4, 5.

536; *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

*New York*. — *Price v. Pestka*, 54 N. Y. App. Div. 59; *Booth v. Fordham*, 100 N. Y. App. Div. 115.

*North Carolina*. — *Spruill v. Branning Mfg. Co.*, 136 N. Car. 42; *Ray v. Long*, 132 N. Car. 891; *Stalcup v. Stalcup*, 137 N. Car. 305.

*Oregon*. — *Howell v. Folsom*, 38 Oregon 184.  
*Pennsylvania*. — *Merritt v. Whitlock*, 200 Pa. St. 50.

*West Virginia*. — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 644.

*Wisconsin*. — *Wallace v. St. John*, 119 Wis. 593, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; *Citizens' L. & T. Co. v. Witte*, 116 Wis. 60.

**848.** 1. Jurisdictions Denying Doctrine. — *Kerner v. McDonald*, 60 Neb. 663; *Helvie v. Hoover*, 11 Okla. 687.

**849.** 1. Neither Spouse May Destroy Right of Survivor — *Kentucky*. — *Louisville v. Coleburne*, 108 Ky. 420.

*Maryland*. — *Brewer v. Bowersox*, 92 Md. 567.

*Massachusetts*. — *Pease v. Whitman*, 182 Mass. 363.

*Missouri*. — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

*North Carolina*. — *Ray v. Long*, 132 N. Car. 891.

*Oregon*. — *Howell v. Folsom*, 38 Oregon 184, 84 Am. St. Rep. 785, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848 [849].

*Pennsylvania*. — *Merritt v. Whitlock*, 200 Pa. St. 50.

*West Virginia*. — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616.

*Wisconsin*. — *Citizens' L. & T. Co. v. Witte*, 116 Wis. 60; *Wallace v. St. John*, 119 Wis. 593.

**Cannot Mortgage for Husband's Individual Debts.** — A mortgage by husband and wife on property held by them as tenants by entireties, to secure the individual indebtedness of the husband, is voidable as to the husband as well as the wife. *Abicht v. Searls*, 154 Ind. 594.

**2. Husband's Right to Usufruct** — *Kentucky*. — *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099.

*Michigan*. — *Morrill v. Morrill*, (Mich. 1904) 101 N. W. Rep. 209.

*New Jersey*. — *Collins v. Babbitt*, 67 N. J. Eq. 165.

*Oregon*. — *Howell v. Folsom*, 38 Oregon 184, 84 Am. St. Rep. 785.

*Pennsylvania*. — *Merritt v. Whitlock*, 200 Pa. St. 50.

*West Virginia*. — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 644, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849.

**3. Husband's Power to Transfer His Life Interest.** — *Howell v. Folsom*, 38 Oregon 184, 84 Am. St. Rep. 785, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848 [849]; *Merritt v. Whitlock*, 200 Pa. St. 50; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 819 [849]; *Citizens' L. & T. Co. v. Witte*, 116 Wis. 60. See also *Ray v. Long*, 132 N. Car. 891.

**850.** 1. Life Interest Subject to Claims of Creditors. — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486; *Howell v. Folsom*, 38 Oregon 184, 84 Am. St. Rep. 785; *Merritt v. Whitlock*, 200 Pa. St. 50; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 644, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849.

**2. Tenancies by Entireties Abolished by Statute.** — *Kron v. Kron*, 195 Ill. 181; *Pease v. Whitman*, 182 Mass. 363; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616; *Wallace v. St. John*, 119 Wis. 593; *Citizens' L. & T. Co. v. Witte*, 116 Wis. 60.

The Kentucky Statute abolishes tenancies by the entirety, except where the conveyance or devise to husband and wife expressly provides for a right of survivorship. *McCallister v. Folden*, 110 Ky. 732; *Louisville v. Coleburne*, 108 Ky. 420.

**4. Tenancies by Entireties Held Not to Be Abolished by Statute** — *Maryland*. — *Brewer v. Bowersox*, 92 Md. 567.

*Michigan*. — *Morrill v. Morrill*, (Mich. 1904) 101 N. W. Rep. 209.

*Missouri*. — *McLeod v. Venable*, 163 Mo. 536; *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

*New Jersey*. — *Collins v. Babbitt*, 67 N. J. Eq. 165.

*North Carolina*. — *Ray v. Long*, 132 N. Car. 891.

*Pennsylvania*. — *Merritt v. Whitlock*, 200 Pa. St. 50.

*West Virginia*. — See *McNeeley v. South Penn Oil Co.*, 52 W. Va. 627, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850.

**851.** 2. Choses in Action Due to Husband and Wife Go to Survivor. — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

**3. Doctrine of Estate by Entireties Applied to Personalty.** — *Brewer v. Bowersox*, 92 Md. 567; *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

**852.** 1. *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

**4. Effect of Intermarriage on Antenuptial Contracts.** — *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

**5. Antenuptial Debt by Husband to Wife.** — *Dillon v. Dillon*, 69 S. W. Rep. 1099, 24 Ky. L. Rep. 781, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852.

**852.** *In Equity.* — See note 11.

*b. POSTNUPTIAL CONTRACTS — (1) At Common Law.* — See note 14.

**853.** See notes 1, 2, 4, 5.

(2) *In Equity.* — See notes 6, 7.

**854.** (3) *Under Statute.* — See notes 3, 4, 5.

*Invalidity of Certain Contracts Regardless of Statute.* — See note 6.

**855.** *c. AGENCY OF ONE SPOUSE FOR THE OTHER — (1) Agency of Husband for Wife.* — See notes 1, 2, 3.

**852.** 11. *Validity of Antenuptial Marriage Settlements.* — *National Granite Bank v. Tyndale*, 176 Mass. 547; *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

14. *Invalidity of Postnuptial Contracts at Common Law — United States.* — *Vansickle v. Wells*, 105 Fed. Rep. 16.

*Indiana.* — *Dailey v. Dailey*, 26 Ind. App. 14; *Robinson v. Foust*, 31 Ind. App. 384, 99 Am. St. Rep. 269.

*Kentucky.* — *Moayon v. Moayon*, 114 Ky. 855; *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099.

*Massachusetts.* — *National Granite Bank v. Tyndale*, 176 Mass. 547. See also *Clark v. Supreme Council, etc.*, 176 Mass. 468.

*Missouri.* — See *Rice v. Sally*, 176 Mo. 107. *New Jersey.* — *Demarest v. Terhune*, 62 N. J. Eq. 663.

*New York.* — *Hulse v. Bacon*, 40 N. Y. App. Div. 89, *affirmed* 167 N. Y. 599; *Lawrence v. Lawrence*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 503.

*Tennessee.* — *Barnum v. Le Master*, 110 Tenn. 638.

**853.** 1. *Robinson v. Foust*, 31 Ind. App. 384, 99 Am. St. Rep. 269; *Rice v. Sally*, 176 Mo. 107; *Hulse v. Bacon*, 40 N. Y. App. Div. 89, *affirmed* in 167 N. Y. 599. See also *Luhrs v. Hancock*, 181 U. S. 567.

2. *Vansickle v. Wells*, 105 Fed. Rep. 16.

4. *Conveyance from One Spouse Directly to Other Invalid.* — *Rice v. Sally*, 176 Mo. 107; *Hulse v. Bacon*, 40 N. Y. App. Div. 89, *affirmed* 167 N. Y. 599; *Barnum v. Le Master*, 110 Tenn. 638.

5. *Conveyance from One Spouse to Other Through Third Person.* — See *Luhrs v. Hancock*, 181 U. S. 567.

6. *Rice v. Sally*, 176 Mo. 107; *Demarest v. Terhune*, 62 N. J. Eq. 663; *Hulse v. Bacon*, 40 N. Y. App. Div. 89, *affirmed* 167 N. Y. 599; *Lawrence v. Lawrence*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 503.

7. *Contracts Between Husband and Wife Enforceable in Equity — Kentucky.* — *Moayon v. Moayon*, 114 Ky. 855.

*Missouri.* — *Grimes v. Reynolds*, 94 Mo. App. 578; *Rice v. Sally*, 176 Mo. 107.

*New Jersey.* — *Demarest v. Terhune*, 62 N. J. Eq. 663.

*New York.* — *France v. France*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 459, *affirmed* 79 N. Y. App. Div. 291; *Hulse v. Bacon*, 40 N. Y. App. Div. 89, *affirmed* 167 N. Y. 599; *Lawrence v. Lawrence*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 503.

*South Carolina.* — *Way v. Union Cent. L. Ins. Co.*, 61 S. Car. 501.

*Tennessee.* — *Barnum v. Le Master*, 110 Tenn. 638.

**854.** 3. *Contracts Between Husband and Wife Valid under Statute — California.* — *McDougall v. McDougall*, 135 Cal. 316.

*Illinois.* — *Patterson v. Patterson*, 111 Ill. App. 342.

*Indiana.* — *Dailey v. Dailey*, 26 Ind. App. 14. See also *Robison v. Pease*, 28 Ind. App. 610.

*Iowa.* — *Hoaglin v. Henderson*, 119 Iowa 720, 97 Am. St. Rep. 335.

*Kentucky.* — *Moayon v. Moayon*, 114 Ky. 855.

*Maine.* — *Peaks v. Hutchinson*, 96 Me. 530.

*Mississippi.* — *Wyatt v. Wyatt*, 81 Miss. 219.

*Missouri.* — *Rice v. Sally*, 176 Mo. 107.

*Texas.* — *Watts v. Bruce*, 31 Tex. Civ. App. 347.

*Under the New York Statute* husband and wife may contract with each other, except where the contract is "to alter or dissolve the marriage or to relieve the husband from his liability to support his wife." *France v. France*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 459, *affirmed* 79 N. Y. App. Div. 291.

*Can Contract Only in Cases Authorized by Statute.*

— In *Texas* an agreement between husband and wife to arbitrate their respective rights to property was held to be void, since such an agreement is not within the contemplation of the statute permitting a married woman to bind herself personally by contract. *Crouch v. Crouch*, 30 Tex. Civ. App. 288.

Under B. & C. Comp. *Oregon*, § 5234, providing that "when property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them," an agreement by a husband and wife relinquishing their respective curtesy and dower rights is void. *Potter v. Potter*, 43 *Oregon* 149.

4. *Demarest v. Terhune*, 62 N. J. Eq. 663; *Thompson v. Taylor*, 66 N. J. L. 253. See also *Clark v. Supreme Council, etc.*, 176 Mass. 468.

5. *Luhrs v. Hancock*, 181 U. S. 567 (construing the *Arizona* statute).

6. *Contracts for Services.* — *In re Kaufmann*, 104 Fed. Rep. 768 (construing the *New York* statute); *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 448, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 854.

*Voluntary Agreement for Separation.* — *Foote v. Nickerson*, 70 N. H. 496.

*Agreement for Divorce a Vinculo Matrimonii.* — *Palmer v. Palmer*, 26 Utah 31, 99 Am. St. Rep. 820.

**855.** 1. *Incapacity of Wife to Appoint Husband as Agent at Common Law.* — *Linton v. National L. Ins. Co.*, (C. C. A.) 104 Fed. Rep. 584.

2. *Where Wife Is Sui Juris.* — *McDonald Mfg. Co. v. Williams*, 96 Ill. App. 395; *Stone v. Gilliam Exch. Bank*, 81 Mo. App. 9; *Francis v.*

**856.** See note 1.

(2) *Agency of Wife for Husband* — In General. — See notes 2, 3, 6, 8.

**857.** 5. Torts Between Husband and Wife — Personal Injuries. — See note 8.

**858.** Injuries to Property. — See note 1.

By Statute. — See note 2.

**IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS** — 1. Rights Against Third Persons — *b.* IN TORT — (2) *Injuries to Wife's Person or Reputation* — (a) Damages for Wife's Pain and Suffering — In General. — See note 7.

**859.** See note 1.

Husband's Right to Damages When Recovered. — See note 2.

Effect of Husband's Death. — See note 4.

**860.** Damages Considered as Wife's Separate Estate under Statute. — See note 1.

Reeves, 137 N. Car. 269; Nolan v. Moore, 96 Tex. 341, 97 Am. St. Rep. 911.

**855.** 3. Agency Not Inferred from Marital Relation Alone — *California*. — Wagoner v. Silva, 139 Cal. 559. See also Santa Cruz Rock-Pavement Co. v. Lyons, 133 Cal. 114.

*Iowa*. — Saunders v. King, 119 Iowa 291.

*Nebraska*. — Rust-Owen Lumber Co. v. Holt, 60 Neb. 80.

*Nevada*. — Vansickle v. Wells, 105 Fed. Rep. 16 (construing the Nevada statute).

*New York*. — Kwitz v. Potter, 44 N. Y. App. Div. 262, affirmed 167 N. Y. 586.

*North Carolina*. — Francis v. Reeves, 137 N. Car. 269.

*Texas*. — Cushman v. Masterson, (Tex. Civ. App. 1901) 64 S. W. Rep. 1031.

**856.** 1. Santa Cruz Rock-Pavement Co. v. Lyons, 133 Cal. 114; Baer v. Terry, 105 La. 479; Stone v. Gilliam Exch. Bank, 81 Mo. App. 9; Bankard v. Shaw, 199 Pa. St. 623. See also Korf v. Korf, 125 Mich. 259; Rahm v. Newton, 87 Minn. 415; Nunn v. Carroll, 83 Mo. App. 135; Howe v. Finnegan, 61 N. Y. App. Div. 610; Lime, etc., Co. v. Hileman, 24 Pa. Co. Ct. 184.

2. For other cases relating to the agency of the wife for the husband, see the title AGENCY, vol. 1, pp. 946, 957.

3. General Rule that No Agency Arises from Fact of Marriage Alone. — National F. Ins. Co. v. Wagley, (Tex. Civ. App. 1902) 68 S. W. Rep. 819. See also Ross v. Dunn, 130 Mich. 443.

The Wife, as Such, Is Not in Law the General Agent of the Husband; hence a telegraph company is, in the absence of the husband, under no obligation to deliver to her a message directed to him. Western Union Tel. Co. v. Moseley, 28 Tex. Civ. App. 562.

What Evidence Required to Show Agency. — While agency will not be inferred from the marital relation alone, less evidence is required than in ordinary cases to establish that the act of the wife is that of her husband. French v. Spencer, 23 Pa. Super. Ct. 428.

6. Express Authority to Wife. — Radke v. Schlundt, 30 Ind. App. 213; National F. Ins. Co. v. Wagley, (Tex. Civ. App. 1902) 68 S. W. Rep. 819.

8. Authority Implied from Previous Dealings of Parties. — See Radke v. Schlundt, 30 Ind. App. 213.

**857.** 8. Slander. — Stayton v. State, 46 Tex. Crim. 205.

**858.** 1. Remedy in Equity for Injury to Property by Either Spouse. — Clark v. Supreme Coun-

cil, etc., 176 Mass. 468; Turner v. Davenport, 63 N. J. Eq. 288.

2. Remedy under Statute. — Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335.

Recovery of Real Estate. — Cook v. Cook, 125 Ala. 583, 82 Am. St. Rep. 264.

7. Damages for Suffering Incident to Personal Injury to Wife — *California*. — Henley v. Wilson, 137 Cal. 273, 92 Am. St. Rep. 160.

*Connecticut*. — See Loomis v. Hollister, 75 Conn. 275.

*Delaware*. — See Jarrell v. Wilmington, 4 Penn. (Del.) 454.

*Georgia*. — Roberts v. Haines, 112 Ga. 842.

*Maryland*. — Wolf v. Frank, 92 Md. 138.

*Pennsylvania*. — Reagan v. Harlan, 24 Pa. Super. Ct. 27.

*South Carolina*. — See Oliver v. Columbia, etc., R. Co., 65 S. Car. 1.

*Texas*. — International, etc., R. Co. v. Anthony, 24 Tex. Civ. App. 9; San Antonio, etc., R. Co. v. Belt, 24 Tex. Civ. App. 281; Galveston, etc., R. Co. v. Baumgarten, 31 Tex. Civ. App. 253.

*Wisconsin*. — Selleck v. Janesville, 104 Wis. 570, 76 Am. St. Rep. 892.

Deserted Wife Allowed to Sue Alone. — Koch v. Williamsport, 195 Pa. St. 488.

**859.** 1. See Alcorn v. Powell, 60 S. W. Rep. 520, 22 Ky. L. Rep. 1353; Wolf v. Frank, 92 Md. 138; Long v. McWilliams, 11 Okla. 562.

2. Husband's Right to Damages When Collected. — See Wolf v. Frank, 92 Md. 138.

4. Effect of Husband's Death. — Wolf v. Frank, 92 Md. 138; St. Louis Southwestern R. Co. v. Carwile, 28 Tex. Civ. App. 208.

**860.** 1. Sole Right of Action for Tort Vested in Married Woman under Statute — *Alabama*. — Southern R. Co. v. Crowder, 135 Ala. 417.

*Arkansas*. — See Texas, etc., R. Co. v. Humble, (C. C. A.) 97 Fed. Rep. 837, affirmed 181 U. S. 57 (construing the Arkansas statute).

*Delaware*. — Hatton v. Wilmington City R. Co., 3 Penn. (Del.) 159.

*District of Columbia*. — Capital Traction Co. v. Rockwell, 17 App. Cas. (D. C.) 369.

*Georgia*. — Athens v. Smith, 111 Ga. 870.

*Kentucky*. — South Covington, etc., R. Co. v. Bolt, 59 S. W. Rep. 26, 22 Ky. L. Rep. 906.

*Michigan*. — Boyle v. Saginaw, 124 Mich. 348.

*Missouri*. — Wallis v. Westport, 82 Mo. App. 522; Cullar v. Missouri, etc., R. Co., 84 Mo. App. 340.

*Nebraska*. — Central City v. Engle, 65 Neb. 885; Pomeroy Co. v. White, (Neb. 1904) 98 N. W. Rep. 1040.

**860.** Right of Action Considered as Community Property. — See note 4.

**861.** See note 1.

(b) Consequential Damages. — See notes 2, 3, 4.

**862.** (4) *Alienation of Wife's Affections* — (a) In General. — See notes 4, 5.

*New York.* — *Sweeny v. Union R. Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 472; *Kimmel v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 466.

*North Dakota.* — *King v. Hanson*, 13 N. Dak. 85.

*Ohio.* — *Baltimore, etc., R. Co. v. Glenn*, 66 Ohio St. 395.

*Oklahoma.* — *Long v. McWilliams*, 11 Okla. 562.

*Wisconsin.* — *Green v. Nebagmain*, 113 Wis. 508.

**Rule in Louisiana.** — Under statute in Louisiana the wife brings the action for personal injuries with the authorization of her husband, and any judgment recovered belongs to her. *Harkness v. Louisiana, etc., R. Co.*, 110 La. 822.

**860. 4. Right of Action for Tort Considered as Community Property.** — *McClure v. McMartin*, 104 La. 406; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281; *St. Louis Southwestern R. Co. v. Carwile*, 28 Tex. Civ. App. 208; *Galveston, etc., R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253; *Vaughn v. St. Louis Southwestern R. Co.*, 34 Tex. Civ. App. 445; *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276.

**Effect of Domicil in Another State — California Doctrine.** — *Paine v. San Bernardino Valley Traction Co.*, 143 Cal. 654.

**When Claim Belongs to Separate Estate — Texas.** — Under statute in Texas a claim for unliquidated damages for personal injuries sustained by the wife during coverture is community property, but a claim of that character which has accrued in favor of the wife while a *feme sole* belongs to her separate estate. *St. Louis Southwestern R. Co. v. Wright*, 33 Tex. Civ. App. 80.

**861. 1. Wife May Sue for Personal Injury When Husband Has Deserted Her.** — *Bennett v. Gillett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 302.

**Wife Not to Sue Alone if It Is Not Clear that Husband Is Blamable for Separation.** — Although a wife may sue alone for a personal injury where her husband has deserted her, yet, if it appears that her husband does not even know of the pendency of the action, and the evidence fails to show the husband in the wrong as to the separation, the suit will be dismissed. *Vaughn v. St. Louis Southwestern R. Co.*, 34 Tex. Civ. App. 445.

**2. Husband's Right of Action for Consequential Damages — Alabama.** — *Southern R. Co. v. Crowder*, 135 Ala. 417.

*California.* — *Martin v. Southern Pac. R. Co.*, 130 Cal. 285.

*Colorado.* — *Denver, etc., R. Co. v. Young*, 30 Colo. 349.

*Indiana.* — *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414.

*Missouri.* — *Wallis v. Westport*, 82 Mo. App. 522; *Cullar v. Missouri, etc., R. Co.*, 84 Mo. App. 340.

*Nebraska.* — *Central City v. Engle*, 65 Neb. 885.

*New York.* — *Klapper v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 528.

*Ohio.* — *Baltimore, etc., R. Co. v. Glenn*, 66 Ohio St. 395.

*Pennsylvania.* — *Reagan v. Harlan*, 24 Pa. Super. Ct. 27.

*Texas.* — *Galveston, etc., R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253. See also *Houston, etc., R. Co. v. Harris*, 30 Tex. Civ. App. 179.

*Wisconsin.* — *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892.

**Pennsylvania — Only One Action Maintainable.** — Under statute in Pennsylvania but one action by husband and wife is maintainable for injuries sustained by the latter, not resulting in death; but either husband or wife may waive his or her cause of action. *Donoghue v. Consolidated Traction Co.*, 201 Pa. St. 181.

**Where Wife Has Paid for Medical Attention.** — The wife cannot ordinarily recover for medical attendance, since such damages belong to the husband, but where it appears that she personally paid for such attention she may recover. *McLean v. Kansas City*, 81 Mo. App. 72.

**3. Statutory Rules for Recovery of Consequential Damages.** — *Texas, etc., R. Co. v. Humble*, (C. C. A.) 97 Fed. Rep. 837, affirmed 181 U. S. 57 (construing the *Arkansas* statute); *Adams Express Co. v. Aldridge*, (Colo. App. 1904) 77 Pac. Rep. 6; *South Covington, etc., R. Co. v. Bolt*, 59 S. W. Rep. 26, 22 Ky. L. Rep. 906; *Baltimore, etc., R. Co. v. Glenn*, 66 Ohio St. 395. See also *Efroymsen v. Smith*, 29 Ind. App. 451.

**Agreement by Husband that Wife Shall Have Earnings.** — Where an agreement existed between the wife and her husband that she should have her earnings, it was held that she could recover consequential damages. *Boyle v. Saginaw*, 124 Mich. 348.

**4. Consequential Damages Not Recoverable at Common Law by Wife or by Husband and Wife Jointly.** — *Denver, etc., R. Co. v. Young*, 30 Colo. 349; *Sweeny v. Union R. Co.* (Supm. Ct. App. T.) 31 Misc. (N. Y.) 472; *Baltimore, etc., R. Co. v. Glenn*, 66 Ohio St. 395; *Long v. McWilliams*, 11 Okla. 562. See also *Efroymsen v. Smith*, 29 Ind. App. 451; *Hickey v. Welch*, 91 Mo. App. 4; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281.

**Slanderous Words Actionable Per Se.** — The wife could, even at common law, sue alone if the slanderous words were actionable *per se*. *Alcorn v. Powell*, 60 S. W. Rep. 520, 22 Ky. L. Rep. 1353.

**Only in the Cases Contemplated by the Statutes** can the wife recover consequential damages. *Pomerine Co. v. White*, (Neb. 1904) 98 N. W. Rep. 1040; *Klapper v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 528; *Kimmel v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 466; *Green v. Nebagmain*, 113 Wis. 508.

**862. 4. Right of Husband to Recover for Alienation of Wife's Affections — Illinois.** — *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303; *Shannon v. Swanson*, 208 Ill. 52.

**862.** (b) *Facts Requisite to Confer Right of Action — In General.* — See note 6.

*Enticing or Harboring Wife.* — See note 9.

**863.** *Adultery.* — See note 2.

(c) *Damages Recoverable — Compensatory Damages.* — See note 6.

*Exemplary Damages.* — See note 9.

*Circumstances in Mitigation of Damages.* — See note 10.

**864.** (d) *Evidence — Mutual Feelings of Husband and Wife.* — See notes 1, 2, 3.

*Feelings of Wife Towards Defendant.* — See note 4.

(7) *Alienation of Husband's Affections — (a) Right of Action in General.*

— See notes 8, 9, 10.

**865.** See notes 1, 2.

*Under Enabling Statutes.* — See notes 3, 4.

*Iowa.* — *Rudd v. Dewey*, 121 Iowa 454; *Christensen v. Thompson*, 123 Iowa 717. See also *Maloney v. Phillips*, 118 Iowa 9.

*Kansas.* — *Roesner v. Darrah*, 65 Kan. 599.

*Maine.* — *Oakman v. Belden*, 94 Me. 280.

*Maryland.* — *Callis v. Merrieweather*, 98 Md. 361.

*Michigan.* — *Knickerbocker v. Worthing*, (Mich. 1904) 101 N. W. Rep. 540.

*Missouri.* — *Yowell v. Vaughn*, 85 Mo. App. 206.

*New York.* — *Weston v. Weston*, 86 N. Y. App. Div. 159.

*North Dakota.* — *Lindblom v. Sonstelie*, 10 N. Dak. 140; *King v. Hanson*, 13 N. Dak. 85.

*Action Against Wife's Parents.* — The *quo animo* is the important consideration where the action is against the wife's parents for alienating her affections. *Oakman v. Belden*, 94 Me. 280.

*Liability of Person Who Marries Divorced Woman.* — It was held that one who married a divorced woman whom he had never met prior to her divorce, was not liable in action for alienation of affections, because the divorce was subsequently declared invalid; that he was no more liable for damages than a parent who has acted in good faith, and could not be considered an intermeddler or seducer. *Hollister v. Valentine*, 69 N. Y. App. Div. 582.

**862.** 5. *Alienation of Wife's Affections by Parent.* — *Oakman v. Belden*, 94 Me. 280; *Zimmerman v. Whiteley*, 134 Mich. 39.

**6.** *Loss of Consortium the Gist of the Action — Illinois.* — *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303.

*Maryland.* — *Callis v. Merrieweather*, 98 Md. 361.

*New York.* — *Billings v. Albright*, 66 N. Y. App. Div. 239; *Hollister v. Valentine*, 69 N. Y. App. Div. 582; *Weston v. Weston*, 86 N. Y. App. Div. 159.

*North Carolina.* — *Powell v. Benthall*, 136 N. Car. 145.

9. See *Plourd v. Jarvis*, 99 Me. 161.

**863.** 2. *Adultery Not an Essential Element of Cause of Action.* — *Callis v. Merrieweather*, 98 Md. 361; *Weston v. Weston*, 86 N. Y. App. Div. 159. See also *Powell v. Benthall*, 136 N. Car. 145.

**6.** *Value of Consortium as Measure of Damages.* — *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *Lindblom v. Sonstelie*, 10 N. Dak. 140. See also *Billings v. Albright*, 66 N. Y. App. Div. 239.

**9.** *Exemplary Damages.* — *Yowell v. Vaughn*,

85 Mo. App. 206; *Lindblom v. Sonstelie*, 10 N. Dak. 140.

**10.** *Circumstances in Mitigation of Damages.* — *Billings v. Albright*, 66 N. Y. App. Div. 239.

**864.** 1. *Evidence of Mutual Feelings of Husband and Wife.* — *Callis v. Merrieweather*, 98 Md. 361; *Billings v. Albright*, 66 N. Y. App. Div. 239. See also *Yowell v. Vaughn*, 85 Mo. App. 206.

2. *Roesner v. Darrah*, 65 Kan. 599; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *Billings v. Albright*, 66 N. Y. App. Div. 239.

3. *Roesner v. Darrah*, 65 Kan. 599; *Billings v. Albright*, 66 N. Y. App. Div. 239.

4. *Evidence of Wife's Feelings Towards Defendant.* — *Roesner v. Darrah*, 65 Kan. 599.

8. *Wolf v. Frank*, 92 Md. 138; *Hodge v. Wetzler*, 69 N. J. L. 492; *Lonstorf v. Lonstorf*, 118 Wis. 159. See also *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989.

*Origin of Doctrine.* — "This discrimination against the wife has its origin in the ancient common-law doctrine that the husband and wife are one." *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303.

9. See *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989; *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *Reading v. Gazzam*, 200 Pa. St. 70.

10. See *Wolf v. Frank*, 92 Md. 138, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *King v. Hanson*, 13 N. Dak. 85.

**865.** 1. *Wolf v. Frank*, 92 Md. 138. See also *Servis v. Servis*, 172 N. Y. 438.

2. *Wolf v. Frank*, 92 Md. 138; *Rubenstein v. Rubenstein*, 60 N. Y. App. Div. 238.

3. *Right of Action under Statutes Enabling Wife to Sue as Feme Sole — Maryland.* — *Wolf v. Frank*, 92 Md. 138.

*Missouri.* — *Strode v. Abbott*, 102 Mo. App. 169; *Linck v. Vorhauer*, 104 Mo. App. 368. See also *Love v. Love*, 98 Mo. App. 562.

*Nebraska.* — See *Sickler v. Mannix*, (Neb. 1903) 93 N. W. Rep. 1018.

*New Jersey.* — *Hodge v. Wetzler*, 69 N. J. L. 492, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865.

*North Dakota.* — *King v. Hanson*, 13 N. Dak. 85.

4. *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390; *Hodge v. Wetzler*, 69 N. J. L. 492, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 865.



- 865.** (b) **Facts Requisite to Confer Right of Action — In General.** — See note 5.  
Direct Acts of Interference. — See note 6.  
Action Against Husband's Parents. — See notes 7, 8.
- 866.** (c) **Damages Recoverable.** — See notes 4, 5, 6.  
(d) **Evidence — Prior Relations Between Husband and Wife.** — See notes 7, 8.  
(8) **Enticement or Abduction of Husband.** — See note 10.
- 867.** **2. Liabilities as to Third Persons — a. OF HUSBAND — (2) Wife's Antenuptial Contracts — (a) Common-law Doctrine Stated.** — See note 8.
- 868.** (b) **Doctrine Under Statute — Effect of Separate Property Acts.** — See note 3.  
Statutes Expressly Releasing Husband from Liability. — See note 4.
- 875.** (3) **Wife's Postnuptial Contracts — (1) Contracts for Necessaries — aa. IN GENERAL.** — See note 6.
- 876.** See note 1.

**865.** **5. Loss of Consortium Gist of Action — Illinois.** — Betser v. Betser, 186 Ill. 537, 78 Am. St. Rep. 303.

*Kentucky.* — Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390.

*New York.* — See Servis v. Servis, 172 N. Y. 438.

*North Dakota.* — King v. Hanson, 13 N. Dak. 85.

*Pennsylvania.* — Reading v. Gazzam, 200 Pa. St. 70.

*Rhode Island.* — Angell v. Reynolds, 26 R. I. 160, 106 Am. St. Rep. 707.

*Washington.* — Stanley v. Stanley, 32 Wash. 489.

*6. Kansas.* — Nevins v. Nevins, 68 Kan. 410.

*Missouri.* — See Love v. Love, 98 Mo. App. 562.

*Nebraska.* — Sickler v. Mannix, (Neb. 1903) 93 N. W. Rep. 1018.

*New York.* — Rubenstein v. Rubenstein, 60 N. Y. App. Div. 238.

*North Dakota.* — King v. Hanson, 13 N. Dak. 85.

*Pennsylvania.* — Reading v. Gazzam, 200 Pa. St. 70.

*7. Nevins v. Nevins,* 68 Kan. 410; *Love v. Love,* 98 Mo. App. 562; *Servis v. Servis,* 172 N. Y. 438; *Hollister v. Valentine,* 69 N. Y. App. Div. 582; *Stanley v. Stanley,* 32 Wash. 489. See also *Wolf v. Frank,* 92 Md. 138; *Rath v. Rath,* (Neb. 1902) 89 N. W. Rep. 612.

**Action Against Husband's Guardian.** — The *quo animo* is also the important consideration where the defendant is the guardian of plaintiff's husband. *Trumbull v. Trumbull,* (Neb. 1904) 98 N. W. Rep. 683.

*8. Rath v. Rath,* (Neb. 1902) 89 N. W. Rep. 612; *Trumbull v. Trumbull,* (Neb. 1904) 98 N. W. Rep. 682; *Rubenstein v. Rubenstein,* 60 N. Y. App. Div. 238; *Stanley v. Stanley,* 32 Wash. 489. See also *Wolf v. Frank,* 92 Md. 138; *Love v. Love,* 98 Mo. App. 562.

**866.** **4. Loss of Consortium Principal Element of Damages — Kansas.** — Nevins v. Nevins, 68 Kan. 410.

*Missouri.* — Linck v. Vorhauer, 104 Mo. App. 368. See *Love v. Love,* 98 Mo. App. 562.

*Nebraska.* — Rath v. Rath, (Neb. 1902) 89 N. W. Rep. 612.

*North Dakota.* — King v. Hanson, 13 N. Dak. 85.

*Pennsylvania.* — See Reading v. Gazzam, 200 Pa. St. 70.

*Rhode Island.* — Angell v. Reynolds, 26 R. I. 160, 106 Am. St. Rep. 707.

**5. Injury to Feelings as Element of Damages.** — Nevins v. Nevins, 68 Kan. 410; *Linck v. Vorhauer,* 104 Mo. App. 368; *Rath v. Rath,* (Neb. 1902) 89 N. W. Rep. 612. See also *Love v. Love,* 98 Mo. App. 562.

*6. Love v. Love,* 98 Mo. App. 562.

*7. Rubenstein v. Rubenstein,* 60 N. Y. App. Div. 238; *Angell v. Reynolds,* 26 R. I. 160, 106 Am. St. Rep. 707; *Stanley v. Stanley,* 32 Wash. 489. See also *Rath v. Rath,* (Neb. 1902) 89 N. W. Rep. 612.

**Evidence of the Wife's Infidelity** is admissible, since it is an element tending to reduce the damages sustained by her. *Wolf v. Frank,* 92 Md. 138.

*8. Stanley v. Stanley,* 32 Wash. 489.

*10. Stanley v. Stanley,* 32 Wash. 489. See also the title **ABDUCTION**, vol. 1, p. 166.

**867.** **8. Liability of Husband for Wife's Antenuptial Debts at Common Law.** — Hunt v. State, 72 Ark. 241, 105 Am. St. Rep. 34; *Smith v. Martin,* 124 Mich. 34; *McMahon v. Perkins,* 22 R. I. 116.

**868.** **3. Common-law Rule Abrogated in Michigan.** — Smith v. Martin, 124 Mich. 34.

**4. Statutes Expressly Relieving Husband of Liability for Wife's Antenuptial Debts.** — Hunt v. State, 72 Ark. 241, 105 Am. St. Rep. 34.

**875.** **6. Common-law Duty of Husband to Support Wife — Georgia.** — Roberts v. Haines, 112 Ga. 842.

*Indiana.* — Robinson v. Foust, 31 Ind. App. 384, 99 Am. St. Rep. 269.

*Kentucky.* — Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390.

*Louisiana.* — Lehman v. Coulon, 105 La. 431.

*Maryland.* — Stonesifer v. Shriver, 100 Md. 24.

*Mississippi.* — East v. King, 77 Miss. 738.

*Missouri.* — Johnson v. Briscoe, 104 Mo. App. 493.

*New York.* — Hazard v. Potts, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 365; *Grandy v. Hadcock,* 85 N. Y. App. Div. 173; *Miller v. Baltimore, etc., R. Co.,* 89 N. Y. App. Div. 457; *Ruhl v. Heintze,* 97 N. Y. App. Div. 442.

*Ohio.* — Baltimore, etc., R. Co. v. Glenn, 66 Ohio St. 395.

**876.** **1. General Rule as to Husband's Liability for Wife's Contracts for Necessaries.** — East v. King, 77 Miss. 738. See also *Cline v. Hackbarth,* 27 Tex. Civ. App. 391.

- 876.** *Ground of Husband's Liability.* — See notes 4, 5, 6.  
*bb. WHAT ARE NECESSARIES* — (*aa*) *In General.* — See note 8.
- 877.** See note 1.  
*(bb) Domestic Service.* — See note 4.  
*(cc) Medical Attention.* — See note 5.
- 878.** (*dd*) *Services of Counsel* — *Fees in Actions for Divorce* — *Divorce a Mensa et Thoro.* — See note 6.
- 879.** *Divorce a Vinculo Matrimonii.* — See note 3.  
*(ee) Advances for Purchase of Necessaries.* — See note 6.
- 880.** (*ff*) *Expenses of Wife's Burial.* — See notes 2, 7, 8.  
*(gg) Whether Question of Law or Fact.* — See note 10.
- 881.** See note 2.  
*cc. PRESUMPTION OF AUTHORITY FROM COHABITATION* — (*aa*) *In General.* — See note 3.
- Excessive or Extravagant Purchases.* — See note 5.
- 882.** (*cc*) *Rebuttal of Presumption.* — See note 4.  
*Proof of Supply by Husband.* — See note 5.

**876.** 4. *Radke v. Schlundt*, 20 Ind. App. 213; *Martin v. Oakes*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 201.

**Whenever the Wife Is Dwelling with the Husband**, the husband's liability for necessities furnished to the wife rests upon the ground of the wife's agency; but when they are dwelling apart she cannot be said to be his agent, except as a legal fiction. *Johnson v. Briscoe*, 104 Mo. App. 493.

5. See *Johnson v. Briscoe*, 104 Mo. App. 493.

**6. Husband's Liability Arising from Marriage Relation.** — *Fitzmaurice v. Buck*, 77 Conn. 390.  
**8. Absolute Necessaries of Wife.** — *Peaks v. Mayhew*, 94 Me. 571; *Johnson v. Briscoe*, 104 Mo. App. 493.

**877. 1. What Are Necessaries to Be Determined by Means and Position of Husband.** — *Stonesifer v. Shriver*, 100 Md. 24; *Johnson v. Briscoe*, 104 Mo. App. 493.

**4. When Domestic Service Regarded as Necessaries.** — *Davidson v. Bail*, 23 Pa. Super. Ct. 582, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.

**5. Medical Services as Necessaries.** — *Black v. Clements*, 2 Penn. (Del.) 499; *Towery v. McGaw*, (Ky. 1900) 56 S. W. Rep. 727; *Peaks v. Mayhew*, 94 Me. 571.

**878. 6. Legal Services in Prosecution of Divorce a Mensa et Thoro.** — *Hahn v. Rogers*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 549.

But the rule is otherwise where at the commencement of the suit there were not reasonable grounds for the proceedings. *Dodd v. Hein*, 26 Tex. Civ. App. 164.

**879. 3. Legal Services Rendered to Wife Blamable for Separation.** — In *Peaks v. Mayhew*, 94 Me. 571, it was held that legal services in defending a wife sued for divorce *a vinculo matrimonii* are necessities, but that the husband is not liable when the wife is blamable for the separation.

**6. Advances to Wife Regarded as Necessaries in Equity.** — *Kenny v. Meislahn*, 69 N. Y. App. Div. 572.

**880. 2. Liability of Husband for Wife's Burial Expenses.** — *Brand v. Brand*, 109 Ky. 721; *Stonesifer v. Shriver*, 100 Md. 24.

7. *Stonesifer v. Shriver*, 100 Md. 24.

**Chargeable Against Wife's Estate.** — Under statute in *Kentucky* providing that the surviving husband or wife "shall have an absolute estate in one-half of the surplus personalty" left by the deceased spouse, it was held that the funeral expenses of the wife are chargeable against the estate. *Towery v. McGaw*, (Ky. 1900) 56 S. W. Rep. 727.

8. *Stonesifer v. Shriver*, 100 Md. 24.

**10. What Are Necessaries Sometimes Question of Law.** — See *Johnson v. Briscoe*, 104 Mo. App. 493.

**881. 2. What Are Necessaries Generally Question for Jury.** — *Peaks v. Mayhew*, 94 Me. 571; *Martin v. Oakes*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 201. See also *Johnson v. Briscoe*, 104 Mo. App. 493.

**Piano.** — Whether a piano is within the class denominated necessities is a question for the jury under proper instructions from the court. *Vercler v. Jansen*, 96 Ill. App. 328.

**3. Presumption of Authority to Purchase Necessaries from Fact of Cohabitation — England.** — *Morel v. Westmoreland*, (1904) A. C. 11, affirming (1903) 1 K. B. 64.

*Delaware.* — *Black v. Clements*, 2 Penn. (Del.) 499.

*Illinois.* — *Bonney v. Perham*, 102 Ill. App. 634.

*Missouri.* — *Johnson v. Briscoe*, 104 Mo. App. 493.

*New York.* — *Wanamaker v. Weaver*, 73 N. Y. App. Div. 60, reversed 176 N. Y. 75.

*Ohio.* — *McMillan v. Auerbach*, 3 Ohio Dec. 688, 7 Ohio N. P. 376.

**5. No Presumption of Authority in Case of Articles Not Necessaries.** — *Black v. Clements*, 2 Penn. (Del.) 499.

Where the articles are not properly necessities, the husband can be made liable only upon the implication of agency arising from his duty to furnish necessities, in the absence of express authority to pledge his credit. *McBride v. Adams*, (Supm. Ct. App. T.) 84 N. Y. Supp. 1060.

**882. 4. Presumption Open to Rebuttal.** — *Bonney v. Perham*, 102 Ill. App. 634.

**5. Proof of Supply by Husband in Rebuttal of Presumption.** — *Bonney v. Perham*, 102 Ill. App. 634.

- 883.** **Effect of Husband's Prohibition of Purchase on Credit.** — See notes 1, 3, 4.  
*dd. WHERE HUSBAND AND WIFE ARE LIVING SEPARATE — (aa) In General.* — See note 5.
- 884.** See note 1.  
*(bb) Separation by Consent.* — See note 2.
- 885.** **Burden of Proof.** — See note 3.
- 886.** *(cc) Desertion of Wife by Husband — Without Cause.* — See notes 2, 4.  
**Abandonment for Cause.** — See note 8.  
*(dd) Wife Forced to Live Apart Through Husband's Misconduct.* — See note 9.
- 887.** See notes 1, 3.
- 888.** See note 2.  
*(ee) Abandonment by Wife Without Cause.* — See notes 3, 4, 5.
- 889.** **Offer on Part of Wife to Return.** — See note 2.
- 891.** *hh. WIFE'S CONTRACTS FOR NECESSARIES FOR THIRD PERSONS — Necessaries for Children.* — See note 4.

**883. 1. Rebuttal of Presumption by Notice to Tradesman Not to Furnish Goods to Wife.** — *Hibler v. Thomas*, 99 Ill. App. 355.

**Effect of Prohibition to Wife Not Communicated to Creditor.** — *Morel v. Westmoreland*, (1904) A. C. 11, *affirming* (1903) 1 K. B. 64.

**3. Notice Ineffectual Where Husband Fails to Provide for Wife.** — *Hibler v. Thomas*, 99 Ill. App. 355.

**4. Hibler v. Thomas**, 99 Ill. App. 355.

**5. No Presumption of Authority in Favor of Wife Living Separate.** — *Hatch v. Leonard*, 71 N. Y. App. Div. 32; *Constable v. Rosener*, 82 N. Y. App. Div. 155, *affirmed* 178 N. Y. 587, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883. See also *Wolf v. Schulman*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 418; *Sanger v. Bernay*, (Tex. Civ. App. 1903) 71 S. W. Rep. 605.

**884. 1. Notice of Separation to Creditor Immaterial.** — *Constable v. Rosener*, 82 N. Y. App. Div. 155, *affirmed* 178 N. Y. 587, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884.

**2. Nonliability of Husband upon Voluntary Separation with Adequate Allowance.** — See *Bonney v. Perham*, 102 Ill. App. 634.

**885. 3. Burden of Proof as to Adequacy or Payment of Allowance.** — *Bonney v. Perham*, 102 Ill. App. 634.

**886. 2. Liability of Husband Abandoning Wife Without Cause.** — *Bonney v. Perham*, 102 Ill. App. 634; *Kenny v. Meislahn*, 69 N. Y. App. Div. 572; *Palmer v. Coughlan*, (Tex. Civ. App. 1900) 55 S. W. Rep. 1122.

**4. Nonliability of Husband Where Wife Has Sufficient Allowance.** — *Cory v. Cook*, 24 R. I. 421.

**8. Liability of Husband Deserting Wife for Cause.** — In *Button v. Weaver*, 87 N. Y. App. Div. 224, it was held that, although the husband had ample reasons for leaving his wife, he was liable for her necessities if he had not made adequate provision for her maintenance.

**9. Husband's Liability upon Separation Through His Default — Illinois.** — *Waxmuth v. McDonald*, 96 Ill. App. 242; *Brinckerhoff v. Briggs*, 92 Ill. App. 537; *Bonney v. Perham*, 102 Ill. App. 634.

*Indiana.* — *Rariden v. Mason*, 30 Ind. App. 427, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 886.

*Michigan.* — *Travis v. Stevens*, 127 Mich.

687, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 886.

*Mississippi.* — *East v. King*, 77 Miss. 738.

*Missouri.* — *Johnson v. Briscoe*, 104 Mo. App.

493.

*New Hampshire.* — *Ott v. Hentall*, 70 N. H. 231.

**887. 1. Effect of Notice Not to Supply Wife with Necessaries.** — *Johnson v. Briscoe*, 104 Mo. App. 493.

**3. Burden of Proof as to Cause of Separation on Plaintiff.** — *Rariden v. Mason*, 30 Ind. App. 427; *Wolf v. Schulman*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 418. *Compare* *Button v. Weaver*, 87 N. Y. App. Div. 224.

**888. 2. Where Wife Has Adequate Means of Support.** — *Bonney v. Perham*, 102 Ill. App. 634.

**3. Nonliability of Husband for Necessaries of Wife Living Apart Without Cause.** — *Bonney v. Perham*, 102 Ill. App. 634; *Peaks v. Mayhew*, 94 Me. 571, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888; *Ogle v. Dershem*, 91 N. Y. App. Div. 551, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391. See also *Kirk v. Chinstrand*, 85 Minn. 108. But see *Constable v. Rosener*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 784, *reversed* 82 N. Y. App. Div. 155, holding that where a wife abandoned her husband and refused to return or maritally recognize him, he was nevertheless bound to support her, in the absence of an agreement or decree of the court relieving him of such burden.

**4. Burden of Proof as to Cause for Separation on Creditor.** — *Peaks v. Mayhew*, 94 Me. 571, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888; *Constable v. Rosener*, 82 N. Y. App. Div. 155, *affirmed* 178 N. Y. 587, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888.

**5. Creditor's Ignorance of Separation Held to Be Immaterial.** — *Constable v. Rosener*, 82 N. Y. App. Div. 155, *affirmed* 178 N. Y. 587, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888.

**889. 2. Revivor of Husband's Liability by Wife's Offer to Return.** — *Kirk v. Chinstrand*, 85 Minn. 108.

**891. 4. General Rule as to Husband's Liability for Necessaries Furnished to Children on Wife's Contract.** — *Dixon v. Chapman*, 56 N. Y. App. Div. 543, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 891.

**892.** *ii. WHERE CREDIT IS NOT GIVEN TO HUSBAND — Credit Given to Wife Alone.* — See note 4.

*Effect of Charging Goods in Wife's Name.* — See note 5.

**893.** *kk. STATUTORY MODIFICATIONS — Statutes Expressly Imposing Liability on Both Husband and Wife.* — See notes 7, 8.

**894.** (4) *Wife's Torts — (a) Antenuptial Torts.* — See note 1.

*By Statute.* — See notes 5, 6.

(b) *Postnuptial Torts — aa. AT COMMON LAW — (aa) Torts Committed by Wife Alone.* — See notes 7, 8, 9.

**895.** *Effect of Divorce or Death of Wife.* — See note 2.

*Effect of Separation.* — See note 4.

(bb) *Torts Committed in Husband's Presence.* — See note 5.

(cc) *Torts Based on Contract.* — See note 7.

**896.** (dd) *Torts Committed in Fiduciary Capacity — By Statute.* — See note 4.

*bb. UNDER STATUTE.* — See notes 5, 6, 8, 9.

**897.** *b. OF WIFE — (2) Contracts of Wife — (a) Antenuptial Contracts — aa. IN GENERAL.* — See note 7.

**899.** (3) *Wife's Torts — (a) In General.* — See notes 2, 4.

*Torts Committed in Husband's Absence.* — See note 5.

*Torts Committed in Husband's Presence.* — See notes 6, 7.

**892.** 4. *Nonliability of Husband for Necessaries Where Credit Is Given to Wife Alone.* — *Black v. Clements*, 2 Penn. (Del.) 499; *Martin v. Oakes*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 201; *Ruhl v. Heintze*, 97 N. Y. App. Div. 442; *Palmer v. Coghlan*, (Tex. Civ. App. 1900) 55 S. W. Rep. 1122.

5. *Evidence of Intention.* — The fact that the wife ordered the goods to be charged to her is evidence tending to prove that she intended to make herself personally liable. *McMillan v. Ouerbach*, 3 Ohio Dec. 688, 7 Ohio N. P. 376.

**893.** 7. *Statutes Imposing Liability on Husband and Wife.* — *Watts v. Turner*, 62 S. W. Rep. 878, 23 Ky. L. Rep. 279; *Noreen v. Hansen*, 64 Neb. 858; *Leake v. Lucas*, 65 Neb. 359, affirmed on rehearing 65 Neb. 366.

8. *Houghtaling v. Walker*, 100 Fed. Rep. 253, affirmed (C. C. A.) 107 Fed. Rep. 619 (construing the *Illinois* statute); *Straight v. McKay*, 15 Colo. App. 60; *Gilman v. Matthews*, (Colo. App. 1904) 77 Pac. Rep. 366; *Richardson v. W. L. Robinson Coal Co.*, 95 Ill. App. 283; *Bess v. Jordan*, 118 Iowa 204.

*Wife Living Apart from Husband.* — Under the *Illinois* statute, subjecting the property of both husband and wife to liability for family expenses, a wife is not chargeable with services rendered in caring for a drunken husband with whom she was not living at the time of the rendition of such services. *Featherstone v. Chapin*, 93 Ill. App. 223.

**894.** 1. *Husband's Liability for Wife's Antenuptial Torts.* — *Radke v. Schlundt*, 30 Ind. App. 213; *McElroy v. Capron*, 24 R. I. 563.

5. *McElroy v. Capron*, 24 R. I. 563.

6. *McElroy v. Capron*, 24 R. I. 561.

7. *Liability of Husband for Wife's Torts — England.* — *Beaumont v. Kaye*, (1904) 1 K. B. 292.

*Canada.* — *Traviss v. Hales*, 40 Can. L. J. 37. *Indiana.* — *Radke v. Schlundt*, 30 Ind. App. 213.

*Missouri.* — *Taylor v. Pullen*, 152 Mo. 434; *Bruce v. Bombeck*, 79 Mo. App. 231.

*Rhode Island.* — *McElroy v. Capron*, 24 R. I. 561.

8. *Radke v. Schlundt*, 30 Ind. App. 213. See also *Wolff v. Lozier*, 68 N. J. L. 103.

9. See *Radke v. Schlundt*, 30 Ind. App. 213.

**895.** 2. *Radke v. Schlundt*, 30 Ind. App. 213.

4. *Radke v. Schlundt*, 30 Ind. App. 213.

5. *Husband's Liability for Wife's Torts Committed in His Presence.* — *Radke v. Schlundt*, 30 Ind. App. 213; *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am. St. Rep. 789.

7. *Nonliability of Husband and Wife on Wife's Torts Based on Contract.* — *Wolff v. Lozier*, 68 N. J. L. 103; *Brunnell v. Carr*, 76 Vt. 174.

**896.** 4. *Wolff v. Lozier*, 68 N. J. L. 103.

5. *Statutes Expressly Relieving Husband of Liability for Wife's Torts.* — *McElroy v. Capron*, 24 R. I. 561; *Russell v. Phelps*, 73 Vt. 390.

6. *McElroy v. Capron*, 24 R. I. 561; *Russell v. Phelps*, 73 Vt. 390.

8. *Husband's Liability Not Released by Implication from Property Acts.* — *Beaumont v. Kaye*, (1904) 1 K. B. 292; *Mackenzie v. Cunningham*, 8 British Columbia 206.

9. *Wolff v. Lozier*, 68 N. J. L. 103.

**897.** 7. *Wife Jointly Liable with Husband on Her Antenuptial Contracts.* — *McElroy v. Capron*, 24 R. I. 563.

**899.** 2. *Wife Jointly Liable with Husband for Her Torts.* — *Radke v. Schlundt*, 30 Ind. App. 213; *McElroy v. Capron*, 24 R. I. 563. See also *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am. St. Rep. 789.

4. *Survivor of Action Against Wife.* — *Radke v. Schlundt*, 30 Ind. App. 213.

5. *Joint Liability with Husband for Torts Committed in His Absence.* — *Radke v. Schlundt*, 30 Ind. App. 213; *Bruce v. Bombeck*, 79 Mo. App. 231; *McElroy v. Capron*, 24 R. I. 563; *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am. St. Rep. 789.

6. *Presumption of Coercion from Husband's Presence.* — *McElroy v. Capron*, 24 R. I. 563, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899; *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am.

**899.** Under Statute. — See note 8.

**900.** (c) Torts Committed by Husband and Wife Jointly. — See note 4.

**901.** V. CRIMINAL LIABILITY — 1. Husband's Liability for Wife's Crimes. — See note 8.

**902.** See notes 1, 2.

2. Wife's Liability for Her Crimes. — See note 4.

**903.** Joint Indictment with Husband. — See note 1

**904.** Conclusiveness of Presumption. — See note 3.

3. Crimes Committed by One Spouse Against Other. — See notes 4, 5.

**905.** HYPOTHECATE — HYPOTHECATION. — See note 5.

St. Rep. 789. See also *Radke v. Schlundt*, 30 Ind. App. 213; *Russell v. Phelps*, 73 Vt. 390.

**899.** 7. Presumption of Coercion Open to Rebuttal. — *Strubing v. Mahar*, 46 N. Y. App. Div. 409; *McElroy v. Capron*, 24 R. I. 563, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899; *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am. St. Rep. 789.

8. Liability of Wife for Her Torts under Statute. — *Henley v. Wilson*, 137 Cal. 273, 92 Am. St. Rep. 160; *Radke v. Schlundt*, 30 Ind. App. 213. See also *Thomas v. Cooksey*, 130 N. Car. 148.

In Canada a married woman, separate as to property, may be sued for a tort committed during coverture. *Hugron v. Statton*, 18 Quebec Super. Ct. 200.

**900.** 4. Torts Committed by Husband and Wife Jointly. — *Edwards v. Wessinger*, 65 S. Car. 161, 95 Am. St. Rep. 789.

Fraud in Sale of Business Owned Jointly. — Husband and wife are jointly liable for fraud and deceit in the sale of a retail business, owned and sold for their joint profit, although it is not clear that the evidence warranted a finding that the wife made any false representations or heard those attributed to her husband. *Oehlhof v. Solomon*, 73 N. Y. App. Div. 329.

**901.** 8. Husband's Liability for Wife's Crimes Committed by His Direction. — *State v. Leonard*, 72 Vt. 102.

**902.** 1. Liability for Crimes Committed in

Husband's Presence. — *Reg. v. Baines*, 69 L. J. Q. B. 681; *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498; *Neys v. Taylor*, 12 S. Dak. 488; *State v. Leonard*, 72 Vt. 102.

2. *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498. See also *Reg. v. Baines*, 69 L. J. Q. B. 681.

4. Criminal Liability of Married Women. — See *State v. Leonard*, 72 Vt. 102.

Prosecution for Keeping House of Ill Fame. — It was held, in a prosecution for keeping a house of ill-fame, that the ordinary rule of coercion does not apply, for such an offense is one in which the wife has a principal share and also such an offense as may generally be presumed to be managed by the intrigues of her sex. *State v. Jones*, 53 W. Va. 613.

**903.** 1. Joint Indictment with Husband. — *Reg. v. Baines*, 69 L. J. Q. B. 681.

Husband and Wife Alone Cannot Conspire. — Husband and wife are not jointly indictable for conspiracy to obstruct justice, since, owing to their unity at common law, they cannot conspire, except with other persons. *Com. v. Allen*, 24 Pa. Co. Ct. 65.

**904.** 3. Conclusiveness of Presumption from Husband's Presence. — See *Reg. v. Baines*, 69 L. J. Q. B. 681.

4. *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

5. *Goodwin v. State*, 114 Wis. 318.

**905.** 5. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589.

## ICE.

**908.** II. AS PROPERTY — 2. When Unharvested — a. GENERAL RULE. — See notes 1, 2.

**909.** 4. Right to Take Ice a Profit à Prendre. — See note 6.

**910.** III. RIGHTS OF OWNERS OF LANDS BOUNDED BY WATERS — 3. Lands Bounded by Nonnavigable Waters. — See note 3.

**908.** 1. Title to Ice Follows Title to Land or Water on Which It Is Formed. — *John Hilt Lake Ice Co. v. Zahrt*, 29 Ind. App. 476.

2. Ice on State Canals. — The beds of the Erie and Champlain canals in New York and the land on each side of them are owned by the state in fee, and it may dispose of the ice forming over the beds as it sees fit. *Green Island Ice Co. v. Norton*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 238. Compare the Illinois and

Indiana doctrine stated *infra*, this title, **913.** 2, 3.

**909.** 6. *Mitchell v. D'Olier*, 68 N. J. L. 379, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909. See also *Walker Ice Co. v. American Steel, etc., Co.*, 185 Mass. 463. And see the title PROFIT À PRENDRE, **187.** 1.

**910.** 3. Exclusive Right of Owners of Bed to Harvest Ice on Unnavigable Stream. — *Abbott v. Cremer*, 118 Wis. 377.

**911. 4. Harvesting Ice as Affecting Rights of Other Riparian Owners — Pollution of Stream by Upper Riparian Owner. —** See note 7.

Owners of Land under Navigable Water. — See note 8.

**912. IV. RIGHT OF PUBLIC TO HARVEST ICE ON PUBLIC WATERS —**

**1. "Great Ponds" in the New England States. —** See note 2.

What Constitutes Appropriation of Ice on Great Ponds. — See note 7.

**913. 2. Canals in Illinois and Indiana. —** See note 2.

**915. VII. RESPECTIVE RIGHTS OF MILL OWNER AND RIPARIAN PROPRIETORS — 1. Right to Harvest Ice Is in Owner of Land. —** See note 2.

**917. IDENTIFY. —** See note 3.

**911. 7. Pollution of Ice by Cinders and Dirt. —** American Ice Co. v. Catskill Cement Co., 99 N. Y. App. Div. 31, appeal dismissed 182 N. Y. 553.

**8. Cutting Channel Through Private Water Lots. —** In Lake Simcoe Ice, etc., Co. v. McDonald, 31 Can. Sup. Ct. 130, it was held that an ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to its icehouses, and for that purpose may cut a channel through private water lots between the place of cutting and the shore.

**912. 2. State Cannot Exact Compensation for Ice Cut. —** Rossmiller v. State, 114 Wis. 169, 91 Am. St. Rep. 910.

Minnesota — Cannot Reduce Level of Water in

Lake. — Sanborn v. People's Ice Co., 82 Minn. 43, 83 Am. St. Rep. 401.

**7. Actual Appropriation of Ice Fit to Be Cut Necessary. —** Becker v. Hall, 116 Iowa 589.

**913. 2. Right to Harvest Ice on Canals. —** Compare, in New York, Green Island Ice Co. v. Norton, (Supm. Ct. Spec. T.) 42 Misc. (N. Y. 238, stated *supra*, this title, 908. 2.

**915. 2. Right to Use Water for Mill Purposes Does Not Give Right to Harvest Ice. —** See Abbott v. Cremer, 118 Wis. 377.

**917. 3. "To identify is to prove to be absolutely the same, and it is no stretch of the ordinary use of language to hold that this term indicates a proof of the signature" to certain papers. Schallehn v. Hibbard, 64 Kan. 601.**

## IDENTITY.

By H. O'B. COOPER.

**918. II. PRESUMPTION FROM IDENTITY OF NAMES — 1. In General. —** See note 2.

**919. 2. What Constitutes Identity of Name. —** See note 2.

A Discrepancy in the Middle Initial. — See note 4.

**920. 7. Identity of Defendant with Person Liable — a. IN CIVIL ACTIONS. —** See note 3.

b. IN CRIMINAL PROSECUTIONS. — See note 4.

**922. IV. IDENTITY OF ACCUSED. —** See notes 3, 4.

**918. 2. Presumption of Identity of Persons from Identity of Names. —** Hoge v. Canton Ins. Office, 103 Fed. Rep. 513, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; Frazier v. Jeakins, 64 Kan. 615, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; Lucas v. Current River Land, etc., Co., 186 Mo. 448; Green v. Heritage, 63 N. J. L. 455; Albright v. Lehigh Coal, etc., Co., 203 Pa. St. 65; Liscomb v. Eldredge, 20 R. I. 335.

**919. 2. Names Must Be Identical. —** Bedwell v. Ashton, 87 Ill. App. 272; Greenberg v. Angerman, (Supm. Ct. App. T.) 84 N. Y. Supp. 244.

Identity of Initials of Middle Name Sufficient. — Harriet R. Eldredge is presumed to be identical with Harriet Richmond Eldredge until the contrary appears. Liscomb v. Eldredge, 20 R. I. 335.

**4. Discrepancy in Middle Initial Immaterial. —**

Lucas v. Current River Land, etc., Co., 186 Mo. 448.

**920. 3. Identity of Maker of Instrument Presumed. —** Gumaer v. Sowers, 31 Colo. 164, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920.

**4. Jury Passes on Weight of Evidence. —** State v. Costner, 127 N. Car. 566, 80 Am. St. Rep. 809.

**922. 3. Identification of Accused. —** See State v. Dunn, 116 Iowa 219; Nite v. State, 41 Tex. Crim. 340.

Evidence of Clerk of Court as to Identity of Person Tried and Convicted. — See Williams v. State, 130 Ala. 31.

Witnesses May Describe Characteristics of Man Seen. — People v. Burt, 51 N. Y. App. Div. 106, affirmed 170 N. Y. 561.

**4. Incriminating Articles. —** State v. McDaniel, 39 Oregon 161. See also McCombs v. State, 109 Ga. 496.

**923.** See note 2.

**V. IDENTITY OF DEAD BODY.**—See note 4.

**VI. PARTICULAR CLASSES OF EVIDENCE**—1. **Photographs.**—See note 5.

2. **Handwriting.**—See note 6.

**924.** 3. **Opinions.**—See note 1.

**IDIOT.**—See note 3.

**IF.**—See note 5.

**923. 2. Comparison of Footprints.**—Terry *v.* State, 118 Ala. 79.

**4. Identity of Dead Body.**—In State *v.* Novak, 109 Iowa 717, a "St. Joseph's cord" and pieces of a shirt were held to be properly admitted to show the identity of a body.

**5. Photographs.**—People *v.* Carey, 125 Mich. 535; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307. See also Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, and see the titles DOCUMENTARY EVIDENCE, **899**. 5, 6; PHOTOGRAPHS, **773**. 5.

**6. Handwriting Is Admissible.**—People *v.* Kennedy, (Supm. Ct. Crim. T.) 34 Misc. (N. Y.) 101. See also McCombs *v.* State, 109 Ga. 496; State *v.* McDaniel, 39 Oregon 161. And see the title HANDWRITING, **283**. 5.

**924. 1. Opinion Evidence.**—State *v.* Richards, 126 Iowa 497; State *v.* Cushenberry, 157 Mo. 168. See also the title EXPERT AND OPINION EVIDENCE, **491**. 9.

"When a party identifies or recognizes an-

other, it is not a mere matter of opinion, but is as much actual knowledge as any other fact known through the senses by which things are perceived." State *v.* Powers, 72 Vt. 168.

**Weight of Evidence Question for Jury.**—State *v.* Cushenberry, 157 Mo. 168.

**3. Idiot.**—In *re* Anderson, 132 N. Car. 243; Edwards *v.* Logan, 114 Ky. 312.

**Distinguished from Lunatic.**—Bicknell *v.* Spear, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 389.

In Bicknell *v.* Spear, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 391, the court said: "A serious distinction has always been recognized between lunatics and idiots. The one had lucid intervals, the other no power of mind whatever."

**5. Condition.**—Baum *v.* Rainbow Min., etc., Co., 42 Oregon 453; Johnson *v.* Colley, 101 Va. 414.

**1. May Be Construed When.**—Sharp *v.* Behr, 117 Fed. Rep. 864.

# ILLEGAL CONTRACTS.

By B. B. CLARK.

## 932. I. DEFINITION. — See note 2.

Not Strictly Contracts. — See note 4.

## II. STATUS OF ILLEGAL CONTRACTS — In General. — See note 5.

Effect of Subsequent Illegal Contract upon Prior Contract. — See note 7.

Release Based on Illegal Consideration. — See note 8.

## 933. III. CONSTRUCTION OF CONTRACT WITH RESPECT TO ILLEGALITY. — See notes 2, 3.

## IV. PUBLIC POLICY IN GENERAL — 1. Contracts Prohibited by Public Policy Illegal. — See notes 4, 5, 6.

**932. 2.** *Henderson v. Virden Coal Co.*, 78 Ill. App. 437; *King v. King*, 63 Ohio St. 363, 81 Am. St. Rep. 635.

**Classes of Illegal Contracts.** — The contracts which the courts refuse to enforce on the ground of their illegality may be divided into two general classes: First, those which are illegal under the common law, and second, such as are made illegal by statute. *Moss v. Cohen*, 158 N. Y. 240.

**4.** *Tarbell v. Rutland R. Co.*, 73 Vt. 349, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 932.

**5. Illegal Contract Void** — *Cumberland Telephone, etc., Co. v. Evansville*, 127 Fed. Rep. 187; *Trimble v. Prudential L. Ins. Co.*, (Ky. 1901) 64 S. W. Rep. 915; *Reg. v. McNutt*, 33 Nova Scotia 14.

**7. Effect of Subsequent Illegal Contract on Prior Legal Contract.** — *Watson v. Fales*, 97 Me. 366, 94 Am. St. Rep. 504; *McCurdy v. Dillon*, 135 Mich. 678.

**8. Illegal Consideration.** — *Weston Paper Co. v. Comstock*, (Ind. 1900) 58 N. E. Rep. 79; *Foot v. Nickerson*, 70 N. H. 496; *Palmer v. Palmer*, 26 Utah 31, 99 Am. St. Rep. 820; *Nelson v. Superior*, 109 Wis. 618; *Olson v. Sawyer-Goodman Co.*, 110 Wis. 149. See also *Bishop v. Matney*, (Ky. 1904) 78 S. W. Rep. 856. Compare *McAllen v. Hodge*, (Minn. 1905) 102 N. W. Rep. 707.

**Release of Dower — Agreement Not to Oppose Divorce.** — *In re Bell*, (Utah 1905) 80 Pac. Rep. 615.

**933. 2. Construction in Favor of Legality of Contract.** — *Stride v. Martin*, 77 L. T. N. S. 600; *Hood, etc., Stores v. Jones*, 81 L. T. N. S. 169; *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Knut v. Nutt*, 83 Miss. 365; *Horton v. Rohlf*, (Neb. 1903) 95 N. W. Rep. 36; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 687; *U. S. Savings, etc., Co. v. Shain*, 8 N. Dak. 136; *Waring v. Loomis*, 35 Wash. 85.

**3. Question of Fact Where Evidence Conflicting as to Intention.** — *Dunham v. Hastings Pavement Co.*, 57 N. Y. App. Div. 426, affirming 56 N. Y. App. Div. 244.

**Evidence of Intent.** — Where the defense in an

action on a promissory note is that the note was given in a gambling transaction, evidence of a continuous chain of transactions between the parties after the giving of the note in suit is competent and relevant. *Gardner v. Meeker*, 169 Ill. 40.

**4.** *Beasley v. Texas, etc., R. Co.*, 191 U. S. 492; *Fox v. Willis*, 114 Ky. 946, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Sternaman v. Metropolitan L. Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625; *Veazey v. Allen*, 173 N. Y. 359.

**Intention of Parties Immaterial.** — *Shortall v. Fitzsimons, etc., Co.*, 93 Ill. App. 231.

**Agreement to Indemnify Against Damages for Maintaining Nuisance.** — *Lebanon Carriage, etc., Co. v. Faulkner*, (Ky. 1903) 76 S. W. Rep. 1083.

**5. Contracts Illegal as Against Public Policy.** — *Fox v. Willis*, 114 Ky. 946, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *American Cent. Ins. Co. v. Chicago, etc., R. Co.*, 74 Mo. App. 89; *Northwestern Mut. L. Ins. Co. v. Butler*, 57 Neb. 198; *Thompson v. Ft. Worth, etc., R. Co.*, 31 Tex. Civ. App. 583.

**Illustrations.** — Where a liquor dealer is under prosecution for the illegal sale of liquors to a minor, a contract between the father of the minor and such dealer not to sue the dealer for the illegal sale of liquors to the minor in consideration of the dealer's pleading guilty in the prosecution for the illegal sale is contrary to public policy. *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823.

A contract for the purchase of counterfeit money is against public policy. *Chapman v. Haley*, (Ky. 1904) 80 S. W. Rep. 190.

Any stipulation, agreement, or contract which forbids the debtor from discharging his obligation by borrowing money in whole or in part, except from the creditor, is subversive of the rights of the citizen, injurious to the general welfare of the public, and therefore void on the ground of public policy. *Union Cent. L. Ins. Co. v. Champlin*, 11 Okla. 184.

But a contract restricting the right to make payment before maturity to money borrowed from the creditor is not illegal. *Sheneberger v. Union Cent. L. Ins. Co.*, 114 Iowa 578.

**An Agreement Stifling Competition for a Public or Quasi-public Franchise** is against public policy



**933. 2. Public Policy — From What Determined. — See note 7.****934. See note 1.**

Value of Precedents. — See note 2.

**3. Extension of Principle to Be Carefully Guarded. — See notes 4, 5, 6.****4. Public Policy as Viewed by Courts of Equity and of Law. — See note 8.****5. Public Policy a Question of Law. — See note 9.****6. Injurious Tendency of Contract the Test. — See note 10.**

and illegal. *Hyer v. Richmond Traction Co.*, (C. C. A.) 80 Fed. Rep. 839, *modified* 168 U. S. 471.

**933. 6. Public Policy Incapable of Exact Definition** — *Greer v. Severson*, 119 Iowa 84. And see generally PUBLIC POLICY.

By the term "public policy" is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to injure the public or which is against the public good. *Moss v. Cohen*, 158 N. Y. 240.

**7. Public Policy — How Determined — Constitutions, Statutes, and Decisions.** — *Orrell v. Bay Mfg. Co.*, 83 Miss. 800; *Langdon v. Conlin*, 67 Neb. 243; *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683.

**934. 1. Statute or Precedent Unnecessary.** — *Woodson v. Hopkins*, (Miss. 1905) 37 So. Rep. 1000, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Veazey v. Allen*, 173 N. Y. 359.

**2. Change of Public Policy with the Times.** — *Young v. Thomson*, 14 Colo. App. 294; *Union Cent. L. Ins. Co. v. Champlin*, 11 Okla. 184; *Osgood v. Central Vermont R. Co.*, 77 Vt. 334. See also *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466.

**4. Power to Contract Unrestricted.** — *Moss v. Cohen*, 158 N. Y. 240.

**5. Public Injury Resulting Should Be Free from Doubt** — *United States*. — *Hartford F. Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91.

*California*. — *Wells v. Enright*, 127 Cal. 669; *Goad v. Hart*, 128 Cal. 197.

*Colorado*. — *Casserleigh v. Wood*, 14 Colo. App. 265, 30 Colo. 287, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.

*Georgia*. — *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177.

*Michigan*. — *Crane v. Bayley*, 126 Mich. 323.

*Mississippi*. — *Rush v. Broussard*, (Miss. 1901) 30 So. Rep. 635; *Orrell v. Bay Mfg. Co.*, 83 Miss. 800.

*Montana*. — *Morin v. Wells*, 30 Mont. 76.

*Nebraska*. — *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163; *Langdon v. Conlin*, 67 Neb. 243.

*Texas*. — *Texas, etc., R. Co. v. Texas Short Line R. Co.*, 35 Tex. Civ. App. 387.

*Vermont*. — *Osgood v. Central Vermont R. Co.*, 77 Vt. 334.

**Examples of Contracts Not Against Public Policy.** — An agreement in a contract of sale authorizing the purchaser at any time prior to shipment of the goods purchased to cancel the contract is not against public policy. *Hypse v. Avery Mfg. Co.*, 32 Tex. Civ. App. 409.

It is not against public policy for one person to purchase of another in good faith lands which turn out to be part of the unappropriated public domain, and therefore an action for

breach of covenant of warranty in such a purchase may be sustained. *Blum v. Johnson*, 28 Tex. Civ. App. 10, *explaining* *Land v. James*, 87 Tex. 485; *Rayner Cattle Co. v. Bedford*, 91 Tex. 645.

A contract by which a banking and trust company agreed to sell for a person stock held by him, at a certain price, within a year, if placed at the disposal of the company, is not against public policy. *Gause v. Commonwealth Trust Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 46, *reversed* 100 N. Y. App. Div. 427.

**An Agreement to Pay Money to Person in Consideration of His Enlistment in the Army** during a war is not illegal. *Hard v. Harris*, 24 Ohio Cir. Ct. 714.

**Sale of Trading Stamps Not Illegal.** — *Sperry, etc., Co. v. Temple*, 137 Fed. Rep. 992. And see the title TRADING STAMPS.

**6. Doctrine of Public Policy Approved.** — Where a person is admitted to a charitable institution such as an old men's home, a contract that in consideration of his admission all property which he may acquire in the future shall be turned over to the institution is against public policy. *Baltimore Humane-Impartial Soc. v. Pierce*, 100 Md. 520.

**8. Same in Courts of Equity as in Courts of Law.** — *Gorringer v. Reed*, 23 Utah 120, 90 Am. St. Rep. 692.

**9. Public Policy a Question of Law.** — *Dowden v. Pook*, (1904) 1 K. B. 45; *Mulligan v. Smith*, 32 Colo. 404; *Deering v. Cunningham*, 63 Kan. 174; *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 10 Detroit Leg. N. 366; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655; *Brett v. Warnick*, 44 Oregon 511, 102 Am. St. Rep. 639; *Hines v. Board of Education*, 49 W. Va. 426. *Compare* *Bras v. McConnell*, 114 Iowa 401.

**Where Evidence Conflicting, Question for Jury.** — *U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co.*, (C. C. A.) 126 Fed. Rep. 364.

**10. Evil Tendency of Contract the Test** — *United States*. — *McMullen v. Hoffman*, 174 U. S. 639; *Washington Irrigation Co. v. Krutz*, (C. C. A.) 119 Fed. Rep. 279.

*Alabama*. — *Spottswood v. Bentley*, 130 Ala. 310.

*Colorado*. — *Wood v. Casserleigh*, 30 Colo. 287, 97 Am. St. Rep. 138, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934; *Young v. Thomson*, 14 Colo. App. 294.

*District of Columbia*. — *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 51.

*Illinois*. — *Harding v. American Glucose Co.*, 182 Ill. 551; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Conway v. Garden City Paving, etc., Co.*, 190 Ill. 89.

*Kansas*. — *Deering v. Cunningham*, 63 Kan. 174.

**935. 7. Legislative Sanction to Contract.** — See note 1.**V. CONTRACTS IN VIOLATION OF POSITIVE LAW — 1. In General.** —

See note 6.

**936.** See note 1.

Intention of Parties to Contract. — See note 4.

Ignorance of Law. — See note 6.

**937. 2. Contracts Violating Constitutions, Orders in Council, Treaties, and Municipal Ordinances** — Municipal Ordinances. — See note 6.**4. Violation of Law in Execution of Contract.** — See note 8.**938. 5. Contracts Involving Commission of Acts Mala in Se** — Incentive to Commission of Crime. — See note 4.**6. Agreements in Violation of Statutory Prohibitions — General Rules of Construction** — *a.* INTENTION OF LEGISLATURE. — See note 5.*Michigan.* — *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438.*Minnesota.* — *Bauer v. Sawyer, etc.*, Land Co., 90 Minn. 536.*Mississippi.* — *Woodson v. Hopkins*, (Miss. 1905) 37 So. Rep. 1090, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.*New York.* — *Coverly v. Terminal Warehouse Co.*, 70 N. Y. App. Div. 82; *Glens Falls Nat. Bank v. Van Nostrand*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 526, affirmed 103 N. Y. App. Div. 598; *McCormick v. McCarton*, 95 N. Y. App. Div. 426.*North Carolina.* — *Culp v. Love*, 127 N. Car. 457.*Oklahoma.* — *Union Cent. L. Ins. Co. v. Champlin*, 11 Okla. 184, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934.*Texas.* — *Steger v. Hume*, 97 Tex. 324.The Motive or Intention of the parties to the contract is immaterial. *Edgerly v. Hale*, 71 N. H. 138.Custom. — A contract contrary to public policy cannot be rendered legal by any custom or usage. *Edgerly v. Hale*, 71 N. H. 138. See generally the title USAGES AND CUSTOMS.**935. 1. Legislative Sanction to Contract.** — *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, following *Carpenter's Estate*, 170 Pa. St. 203, 50 Am. St. Rep. 765.**6. Contracts in Violation of Law Illegal** — *United States.* — *Shea v. Nillima*, (C. C. A.) 133 Fed. Rep. 215, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935.*Alabama.* — *Bluthenthal v. Headland*, 132 Ala. 253, 90 Am. St. Rep. 904, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935; *Meyer-Marx Co. v. Ensley*, 141 Ala. 602; *Spottswood v. Bentley*, 130 Ala. 310.*Connecticut.* — *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208.*Illinois.* — *Shortall v. Fitzsimons, etc.*, Co., 93 Ill. App. 231 (contract for purpresture).*Indiana.* — *Weston Paper Co. v. Comstock*, (Ind. 1900) 58 N. E. Rep. 79 (contract for continuance of a public nuisance); *Naglebaugh v. Harder, etc.*, Coal Min. Co., 21 Ind. App. 551.*Iowa.* — *Lindt v. Uihlein*, 109 Iowa 591.*Maine.* — *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.*Michigan.* — *Koppitz-Melchers Brewing Co. v. Behm*, 130 Mich. 649.*Missouri.* — *Sedalia Board of Trade v. Brady*, 78 Mo. App. 585, 2 Mo. App. Rep. 301; *Mitchell**v. Branham*, 104 Mo. App. 480; *Tandy v. Elmore-Cooper Live Stock Commission Co.*, 113 Mo. App. 409.*Montana.* — *Glass v. Basin, etc.*, Min. Co., 31 Mont. 21.*Nebraska.* — *Rocco v. Frapoli*, 50 Neb. 665; *State v. Nebraska Home Co.*, 66 Neb. 349; *Padget v. O'Connor*, (Neb. 1904) 98 N. W. Rep. 870.*Pennsylvania.* — *Bumm's Estate*, 8 Pa. Dist. 191.*Canada.* — *Reg. v. McNutt*, 33 Nova Scotia 14.A Contract for Liquidated Damages is void by statute in *California* in a case where the actual damages are readily ascertainable. *Jack v. Sinsheimer*, 125 Cal. 563. See also the title LIQUIDATED DAMAGES, 402. 3, note.**936. 1. Common Law and Legislative Acts on Same Footing.** — *Bluthenthal v. Headland*, 132 Ala. 253, 90 Am. St. Rep. 904, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936.**4. Corrupt Intention Unnecessary.** — *Shortall v. Fitzsimons, etc.*, Co., 93 Ill. App. 231; *Harris v. Chamberlain*, 126 Mich. 280; *Edgerly v. Hale*, 71 N. H. 138.**6. Ignorance of Law.** — *Harse v. Pearl L. Assur. Co.*, (1904) 1 K. B. 558; *Cansler v. Penland*, 125 N. Car. 578.**937. 6. Contracts Violating City Ordinances.** — *Chimene v. Pennington*, 34 Tex. Civ. App. 424.**8. Violation of Law in Execution of Contract.** — *Wellman v. Jones*, 124 Ala. 580; *Knut v. Nutt*, 83 Miss. 365; *Wile v. Rochester Imp. Co.*, 24 Ind. App. 422; *Mitchell v. Branham*, 104 Mo. App. 480; *Dunham v. Hastings Pavement Co.*, 56 N. Y. App. Div. 244, rehearing denied 57 N. Y. App. Div. 426; *Drake v. Lauer*, 93 N. Y. App. Div. 86, affirmed 182 N. Y. 533. See, however, *Emshwiler v. Tyner*, 21 Ind. App. 347, 69 Am. St. Rep. 360.Contract Incidentally Aiding Violation of Law Not Void. — *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 421.Where a Contract Legal in Inception Is Rendered Illegal by reason of a change of circumstances, it is dissolved. *U. S. v. Dietrich*, 126 Fed. Rep. 671.**938. 4. Incentive to Commission** — Interest in Death of Person. — A contract to marry upon the death of the divorced wife of one of the parties is not against public policy as holding out an inducement to the murder of such divorced wife. *Brown v. O'Dill*, 104 Tenn. 250, 78 Am. St. Rep. 914.**5. Intention of Legislature.** — *Alexander v.*

- 939.** *b.* MALUM PROHIBITUM AND MALUM IN SE. — See note 1.  
*c.* VIOLATION OF STATUTE MADE A MISDEMEANOR. — See note 2.  
*d.* EFFECT OF PROHIBITION AND PENALTY. — See note 3.  
*e.* EFFECT OF IMPOSITION OF PENALTY OR FORFEITURE. — See note 5.  
**940.** See note 1.  
**941.** *f.* PROHIBITION WITHOUT IMPOSITION OF PENALTY. — See note 2.  
**942.** 7. Effect of Change of Law — Repeal of Statute Violated. — See note 2.  
**943.** VI. CONTRACTS INVOLVING COMMISSION OF CIVIL INJURY TO THIRD PERSONS GENERALLY — 1. General Principles. — See note 5.  
**944.** 4. Infringement of Copyright or Patent Right. — See note 4.  
 5. Perpetration of Fraud upon Public — *a.* IN GENERAL. — See note 5.  
**945.** 7. Contracts Tending Towards Breach of Trust or Confidence — *a.* IN GENERAL. — See note 2.

Barker, 64 Kan. 396; Weed *v.* Cuming, 12 Pa. Super. Ct. 412, *affirmed* 198 Pa. St. 442.

Sale of Untagged or Unbranded Fertilizer. — Brown *v.* Raisin Fertilizer Co., 124 Ala. 221.

Violation of Statute Requiring License for Transaction of Business. — Singer Mfg. Co. *v.* Draper, 103 Tenn. 262 (recovery denied).

Sale of Inchoate Rights in Public Lands. — Butterfield Lumber Co. *v.* Hartman, 82 Miss. 494.

**939.** 1. No Distinction Between Malum in Se and Malum Prohibitum. — Fox *v.* Willis, 114 Ky. 946, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 939; Rice *v.* National Bank of Commerce, 98 Mo. App. 696; Haggerty *v.* St. Louis Ice Mfg., etc., Co., 143 Mo. 238, 65 Am. St. Rep. 647. See also Roselle *v.* Farmers' Bank, 141 Mo. 36, 64 Am. St. Rep. 501.

2. Violation of Statute Made a Misdemeanor. — Kelly *v.* Burke, 132 Ala. 235; Naglebaugh *v.* Harder, etc., Coal Min. Co., 21 Ind. App. 551; Pinney *v.* Concordia First Nat. Bank, 68 Kan. 223, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 939.

Merchants Transacting Business under Fictitious Firm Name — Contracts Not Void. — Sinnott *v.* German-American Bank, 164 N. Y. 386.

3. Effect of Prohibition and Penalty. — Watkins Medical Co. *v.* Paul, 87 Ill. App. 278; Accetta *v.* Zupa, 54 N. Y. App. Div. 33, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 939.

5. Rule Laid Down in Bartlett *v.* Vinor Reaffirmed. — Edgerly *v.* Hale, 71 N. H. 138.

**940.** 1. Contracts Held Legal Though Violative of Statute Imposing Penalty. — Hanover Nat. Bank *v.* Burlingame First Nat. Bank, 109 Fed. Rep. 421, 48 C. C. A. 482.

**941.** 2. Prohibition Without Imposition of Penalty. — Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378; Western Union Tel. Co. *v.* Young, 178 Ala. 243, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941; Alexander *v.* Barker, 64 Kan. 396; Cansler *v.* Penland, 125 N. Car. 578. Compare Alleghany Co. *v.* Allen, 69 N. J. L. 270.

**942.** 2. Repeal of Statute Violated Does Not Validate Contract. — Denning *v.* Yount, 62 Kan. 221, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

**943.** 5. Contemplated Civil Injury to Third Person Renders Contract Illegal. — Young *v.* Thomson, 14 Colo. App. 294; Robison *v.* Wolf,

27 Ind. App. 683; Zabel *v.* New State Telephone Co., 127 Mich. 402; Bauer *v.* Sawyer, etc., Land Co., 90 Minn. 536; Torpey *v.* Murray, 93 Minn. 482; Hamblet *v.* Harrison, 80 Miss. 118; Rice *v.* National Bank of Commerce, 98 Mo. App. 696; Southard *v.* George W. Jump Co., (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 164; Wheeler *v.* Pettyjohn, 14 Okla. 71; Daily *v.* Hollis, 27 Tex. Civ. App. 570. See also Ridenbaugh *v.* Young, 145 Mo. 274.

Consideration for Withdrawal of Contest of Will. — A contract for the payment of money to a contestant of the probate of a will in consideration of his withdrawing his contest is, not against public policy. Seaman *v.* Colley, 178 Mass. 478.

But an agreement by legatees to pay a certain proportion of a decedent's estate to a person who is not entitled to share in such estate as next of kin or otherwise, in consideration of such person's forbearance to take action to set aside the will on the ground of mental incapacity of the decedent, is illegal as the perpetration of a fraud on the next of kin of the decedent. Wyckoff *v.* Weaver, 66 N. J. L. 648.

A Secret Contract Made by One Heir with Another to induce the ancestor to make a will or to change or not to change a will already made is against public policy and void; though it is otherwise if the ancestor is fully informed of the agreement and assents to it. De Boer *v.* Harmsen, 131 Mich. 91.

**944.** 4. Patent. — Compare E. W. Bliss Co. *v.* Buffalo Tin Can Co., (C. C. A.) 131 Fed. Rep. 51.

5. A Coupon Scheme for the Sale of Goods, the result of which would be to leave worthless coupons in the hands of third persons, is illegal. Hubbard *v.* Freiburger, 133 Mich. 139.

A Contract for the Use of a Musical Director's Name as designating a band with which he has no connection is illegal as the perpetration of a fraud upon the public. Blakely *v.* Sousa, 197 Pa. St. 305, 80 Am. St. Rep. 821.

**945.** 2. Contracts Tending to Breach of Trust or Confidence. — Steger *v.* Hume, 97 Tex. 324 (attorney).

An Agreement Between Co-owners of Vessel to surrender control of its management was held illegal. Smith-Green Co. *v.* Bird, 96 Me. 425, 90 Am. St. Rep. 352.

**945.** Necessity for Actual Injury to Third Person. — See note 3.

**946.** Private Confidence. — See note 1.

*b.* DUTY OWING BY EMPLOYEES TO EMPLOYERS — In General. —

See notes 4, 5.

**947.** Consent of Employer to Contract. — See note 3.

*c.* DUTY OF CORPORATE OFFICERS TOWARDS CORPORATION. —

See note 4.

**948.** Contracts for Appointment or Retention of Persons in Office. — See note 1.

*d.* DUTY OF STOCKHOLDERS TOWARDS EACH OTHER. — See notes 4, 6.

*e.* DUTY OF FIDUCIARIES. — See note 7.

**949.** Traffic in Offices of Trust. — See notes 1, 2.

Renunciation of Trust for Consideration. — See note 3.

**950.** VII. CONTRACTS PUFFING OR SUPPRESSING COMPETITION AT SALES —

1. Public Sales — *a.* IN GENERAL. — See note 1.

*c.* WHAT SALES INCLUDED IN RULE. — See note 5.

**945.** 3. Not Necessary that Third Person Be Actually Injured. — *Steger v. Hume*, 97 Tex. 324.

**946.** 1. Private Confidence. — *Torpey v. Murray*, 93 Minn. 482.

**4.** Duty of Employee to Employer. — *Clark v. Buffalo Hump Min. Co.*, 122 Fed. Rep. 243, 58 C. C. A. 607; *Smythe v. Evans*, 209 Ill. 376.

A contract to pay an employee if he will induce his employer to reduce his price for property offered for sale is illegal. *Summers v. Carey*, 69 N. Y. App. Div. 428.

Disclosure of a Secret Process of Manufacture by an employee is not necessarily a breach of trust so as to prevent recovery of consideration for such disclosure. *Francis v. Campbell*, 68 N. Y. App. Div. 287.

**5.** Agreement Between Agents of Vendor and Vendee. — *Howard v. Murphy*, 70 N. J. L. 141.

**947.** 3. Consent of Employer to Contract. See *Summers v. Carey*, 69 N. Y. App. Div. 428.

**4.** Duty of Corporate Officers Towards Corporation. — *Flaherty v. Cary*, 62 N. Y. App. Div. 116, affirmed 174 N. Y. 550; *Reed v. Johnson*, 27 Wash. 42.

**948.** 1. Contracts for Appointment or Retention of Persons in Office. — *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447; *Glass v. Basin*, etc., Min. Co., 31 Mont. 21; *Flaherty v. Cary*, 174 N. Y. 550.

**4.** Duty of Stockholders Towards Each Other — Election of Officers. — *Bensinger v. Kantzler*, 112 Ill. App. 293, reversed 214 Ill. 589; *Withers v. Edmonds*, 26 Tex. Civ. App. 189. See also *Smith-Green Co. v. Bird*, 96 Me. 425, 90 Am. St. Rep. 352. But see *Bonta v. Gridley*, 77 N. Y. App. Div. 33.

Consent of Remaining Stockholders. — In *Kantzler v. Bensinger* 214 Ill. 589, a contract entered into by all the stockholders of a corporation, providing that certain persons should hold the offices of president, secretary, and treasurer of the corporation for five years, at a stipulated salary, was upheld.

Agreement for Voting Trust Held Illegal. — *Warren v. Pim*, 66 N. J. Eq. 353.

**6.** Combinations Between Stockholders Held Legal. — *Brightman v. Bates*, 175 Mass. 105; *Jones v. Green*, 120 Mich. 203, 95 Am. St. Rep. 433; *Clowes v. Miller*, 60 N. J. Eq. 179; *Scruggs*

*v. Cotterill*, 67 N. Y. App. Div. 583; *Bonta v. Gridley*, 77 N. Y. App. Div. 33; *Fitzsimmons v. Lindsay*, 205 Pa. Sa. 79; *Withers v. Edmonds*, 26 Tex. Civ. App. 189.

**7.** Executors and Administrators. — *McVicker v. McKenzie*, 136 Cal. 656; *Orr v. Sanford*, 74 Mo. App. 187; *Beatrice Creamery Co. v. Fitzgerald*, (Neb. 1903) 97 N. W. Rep. 301. *Compare Moss v. Cohen*, 158 N. Y. 240; *Lowe v. Ring*, 106 Wis. 647; *Baker v. Delaware*, etc., R. Co., 64 N. J. L. 53.

Contract for Extra Compensation Illegal. — *Carpenter v. Taylor*, 164 N. Y. 171, reversing 28 N. Y. App. Div. 622.

**949.** 1. Agreement in Consideration of Suretyship. — An agreement between one appointed administrator and another whom he requests to become surety on his bond to pay to the latter a proportion of his fees as administrator is not illegal under the rule which forbids trafficking in the appointment of administrators or other trustees. *May v. Moore*, 99 Mo. App. 27.

**2.** *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447.

**3.** Renunciation of Trust for Consideration. — *Currier v. Clark*, 19 Colo. App. 250; *Oakeshott v. Smith*, 104 N. Y. App. Div. 384; *Wittkowsky v. Baruch*, 127 N. Car. 313; *Lewis's Estate*, 21 Pa. Super. Ct. 393.

**950.** 1. Contracts for Suppression of Competition at Public Sales Held Illegal. — *Hardy v. Jones*, 63 Kan. 8, 88 Am. St. Rep. 223; *Fisher v. Hampton Transp. Co.*, 136 Mich. 218; *Fletcher v. Johnson*, (Mich. 1905) 102 N. W. Rep. 278; *McClelland v. Citizens' Bank*, 60 Neb. 92; *Beatrice Creamery Co. v. Fitzgerald*, (Neb. 1903) 97 N. W. Rep. 301; *De Baun v. Brand*, 61 N. J. L. 624; *Fairy v. Kennedy*, 68 S. Car. 254, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873; *Barnes v. Morrison*, 97 Va. 372; *Nitro-Phosphate Syndicate v. Johnson*, 100 Va. 774; *Ralphsynder v. Shaw*, 45 W. Va. 680. See also *Le Banque Jacques Cartier v. Brigham*, 30 Can. Sup. Ct. 429, reversing 16 Quebec Super. Ct. 113.

**5.** Involuntary Sales at Auction — Sheriff's Sales. — *De Baun v. Brand*, 61 N. J. L. 624.

Mortgage Sale. — *McClelland v. Citizens' Bank*, 60 Neb. 92.

- 951.** *d.* ACTUAL EFFECT OF SUCH CONTRACT HARMLESS. — See note 2.  
*e.* HONEST COMBINATIONS AMONG PURCHASERS HELD LEGAL. —

See note 3.

- 952.** *f.* KNOWLEDGE AND CONSENT OF PERSONS LIABLE TO BE INJURED. — See note 1.

**953.** VIII. AGREEMENTS SUPPRESSING COMPETITION AT LETTING OF PUBLIC CONTRACTS — 1. In General. — See note 2.

2. Bona Fide Agreements Between Prospective Bidders Permissible. —

See note 4.

- 954.** 3. Actual Injury to Public Immaterial. — See note 1.

IX. CONTRACTS IN DEROGATION OF DOMESTIC RELATIONS — 1. Contracts Affecting the Marriage Relation — *b.* RESTRAINT OF FREEDOM OF MARRIAGE. — See note 3.

**951.** 2. That the Price Paid Was in Fact Reasonable will not prevent the contract from being illegal. *Fletcher v. Johnson*, (Mich. 1905): 102 N. W. Rep. 278.

3. Honest Combinations Among Purchasers Allowed. — *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670; *Barnes v. Morrison*, 97 Va. 372.

Agreement Between Railroad Bondholders on Foreclosure Upheld. — *Fidelity Ins., etc., Co. v. Roanoke St. R. Co.*, 98 Fed. Rep. 475.

Agreement for Protection of Interest Upheld. — *De Baun v. Brand*, 61 N. J. L. 624.

In the Leasing of Public Lands at Auction it does not seem to be against public policy for an intending purchaser of one piece of land on his own behalf to bid for another piece immediately contiguous on behalf of another purchaser, who is present and directing the bids, where the whole transaction is openly done in the presence and with the knowledge of the officer conducting the sale. *State v. Follmer*, (Neb. 1903) 94 N. W. Rep. 103.

**952.** 1. Knowledge and Consent of Person Liable to Be Injured. — *Fairy v. Kennedy*, 68 S. Car. 250; *Barnes v. Morrison*, 97 Va. 372.

**953.** 2. Suppression of Competition at Letting of Public Contracts — *United States*. — *McMullen v. Hoffman*, 174 U. S. 639, affirming (C. C. A.) 83 Fed. Rep. 372.

*Idaho*. — *Brady v. Yost*, 6 Idaho 273.

*Montana*. — *Whalen v. Harrison*, 26 Mont. 316.

*Missouri*. — *Pendleton v. Asbury*, 104 Mo. App. 723.

*New York*. — *Baird v. Sheeham*, 166 N. Y. 631, affirming 38 N. Y. App. Div. 7; *Coverly v. Terminal Warehouse Co.*, 85 N. Y. App. Div. 488, affirmed 178 N. Y. 602.

*Canada*. — *Stevenson v. Boyd*, 5 British Columbia 626.

See, however, *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 114 Iowa 574.

Withdrawing from Contract. — "There is no difference in principle between hiring a party not to bid and hiring him to withdraw his bid and allow the other party to have the contract." *Conway v. Garden City Paving, etc., Co.*, 190 Ill. 89.

Lease of Public Pier — Agreement to Stifle Competition at Public Letting Illegal. — *Coverly v. Terminal Warehouse Co.*, 70 N. Y. App. Div. 82.

In the Case of a Quasi-public Contract, awarded by a railroad company, the rule has also been

applied. *Southard v. George W. Jump Co.*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 164.

Sale of Business. — The rule does not prevent a contractor engaged in the general business of building sewers, etc., from disposing of his business and good will in good faith and retiring from the business and agreeing not to engage in such business within a restricted locality and for a specified time. *Trentman v. Wahrenburg*, 30 Ind. App. 304.

So in *Mapes v. Metcalf*, 10 N. Dak. 601, where in the sale of a newspaper by the proprietor to his rival, it was agreed that the seller should receive a certain percentage of the profits received by the buyer from public printing, and the seller further agreed not to start another paper in the locality, the contract was held not to be illegal.

Private Contract. — A contract which may suppress competition at the letting of private construction contracts is not for that reason illegal, as the public has no concern in the letting of such contracts. *Moore v. Florence First Nat. Bank*, 139 Ala. 595. But compare *Daily v. Hollis*, 27 Tex. Civ. App. 570.

4. Bona Fide Arrangements Between Bidders Sustained. — *McMullen v. Hoffman*, 174 U. S. 639.

**954.** 1. Actual Injury to Public Immaterial. — *McMullen v. Hoffman*, 174 U. S. 639; *Conway v. Garden City Paving, etc., Co.*, 190 Ill. 89.

3. Contracts in Restraint of Marriage Held Illegal. — *Moss v. Cohen*, 158 N. Y. 240; *King v. King*, 9 Ohio Cir. Dec. 439, 63 Ohio St. 363, 81 Am. St. Rep. 635; *Crowder v. Sullivan*, 6 Ont. L. Rep. 708. See also the title CONDITIONS, 512. *z.*

Inducement to Marry Particular Person. — A contract by a father for a benefit to a woman in consideration of her marrying his son, who had seduced her, is not illegal. *Wright v. Wright*, 114 Iowa 748.

Postponement of Time of Marriage. — A contract to marry which is not to be fulfilled until the death of the divorced wife of one of the parties is not against public policy as a restraint upon the freedom of marriage. *Brown v. O'Dill*, 104 Tenn. 250, 78 Am. St. Rep. 914.

Contract to Pay for Release from Employment. — A promise to pay the employer of a woman for releasing her from her contract of employment, thereby enabling the promisor to marry her, is not illegal as being in restraint of marriage. *Holz v. Hanson*, 115 Wis. 236.

**954.** *c.* MARRIAGE BROKERAGE CONTRACTS. — See note 5.

**955.** Good Faith of Broker. — See note 1.

*d.* AGREEMENTS FOR SEPARATION BETWEEN HUSBAND AND WIFE — Modern Doctrine. — See note 4.

Future Separations. — See note 5.

**956.** *c.* AGREEMENTS RELATING TO DIVORCES — (1) *Agreements Promotive of Divorces* — (a) *In General*. — See notes 2, 3.

**957.** (c) *Existence of Legal Grounds for Divorce*. — See note 2.

(d) *Operation of Agreements Conditioned on Divorce*. — See note 3.

(2) *Dismissal of Pending Divorce Proceedings*. — See note 5.

**958.** *2.* *Contracts Affecting Relation of Parent and Child*. — See note 2.

**959.** X. IMMORAL CONTRACTS — 1. *In General*. — See note 1.

**960.** 2. *Sexual Immorality* — *a.* *IN GENERAL* — FUTURE COHABITATION. — See note 2.

**961.** *Contracts Between Persons Illegally Cohabiting*. — See note 1.

*b.* PAST COHABITATION — (1) *In General*. — See note 4.

**954.** 5. *Marriage Brokerage Contracts Held Illegal*. — *Hellen v. Anderson*, 83 Ill. App. 506; *Place v. Conklin*, 34 N. Y. App. Div. 191, *affirming* (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 40; *Jangraw v. Perkins*, 76 Vt. 130, 104 Am. St. Rep. 917, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

*Promotion of Existing Agreement to Marry*. — *In re Grobe*, 127 Iowa 121; *Jangraw v. Perkins*, 76 Vt. 127, 104 Am. St. Rep. 917, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

**955.** 1. *Good Faith of Broker Immaterial*. — *Hellen v. Anderson*, 83 Ill. App. 506.

**4.** *American Doctrine*. — *Patterson v. Patterson*, 111 Ill. App. 342; *Bailey v. Dillon*, 186 Mass. 244; *Rodenbaugh v. Rodenbaugh*, 7 Northam. Co. Rep. (Pa.) 389, 31 Pittsb. Leg. J. N. S. (Pa.) 285.

The provision of the *New York Domestic Relations Law* that "a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife" does not prohibit a husband and wife who have separated because of the cruelty of the husband from contracting with each other for money to be paid by the husband for the wife's support, etc. *Dower v. Dower*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 559.

**5.** *Future Separations*. — *Patterson v. Patterson*, 111 Ill. App. 342; *Brun v. Brun*, 64 Neb. 782; *Foot v. Nickerson*, 70 N. H. 496; *Edic v. Horn*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 26; *Palmer v. Palmer*, 26 Utah 31, 99 Am. St. Rep. 820, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 955; *Baum v. Baum*, 109 Wis. 47, 83 Am. St. Rep. 894; *Anderson v. Anderson*, 122 Wis. 480. See also *Dower v. Dower*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 559.

*A Trust for a Wife So Long as She Shall Cohabit with her husband*, with remainder over to the husband, is not against public policy in that it contemplates a future separation. *In re Johnstone*, (1904) 11 Ch. 470.

**956.** 2. *Contracts for Promotion of Divorces Held Illegal*. — *Leupert v. Shields*, 14 Colo. App. 404; *Silberschmidt v. Silberschmidt*, 112 Ill. App. 58; *McCurdy v. Dillon*, 135 Mich. 678; *Davis v. Hinman*, (Neb. 1905) 103 N. W. Rep. 668; *Palmer v. Palmer*, 26 Utah 31, 99 Am. St.

Rep. 820; *Byron v. Tremaine*, 31 Nova Scotia 425, *affirmed* 29 Can. Sup. Ct. 445. Compare *Burgess v. Burgess*, 17 S. Dak. 44.

**3.** *Agreement Not to Defend Divorce Proceedings*. — *McAllen v. Hodge*, (Minn. 1905) 102 N. W. Rep. 707; *In re Bell*, (Utah 1905) 80 Pac. Rep. 615.

**957.** 2. *Effect of Legal Grounds for Divorce*. — *Palmer v. Palmer*, 26 Utah 31. See, however, *Gibbons v. Gibbons*, (Ky. 1900) 54 S. W. Rep. 710.

**3.** *Operation of Agreements Conditioned on Divorce*. — *Leupert v. Shields*, 14 Colo. App. 404.

**5.** *Contracts for Dismissal of Divorce Proceedings*. — *Parsons v. Parsons*, (Ky. 1901) 62 S. W. Rep. 719; *Sommer v. Sommer*, 87 N. Y. App. Div. 434. See, however, *Rodenbaugh v. Rodenbaugh*, 31 Pittsb. Leg. J. N. S. (Pa.) 285.

**958.** 2. *Parents' Surrender of Custody of Child*. — *Hibbette v. Baines*, 78 Miss. 695.

**959.** 1. *Contracts Contra Bonos Mores*. — *McDonald v. Born*, 135 Mich. 177; *Moss v. Cohen*, 158 N. Y. 240; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960.

*Promotion of Morality*. — A contract of employment conditioned on the employee's nonassociation with a woman of bad repute is not illegal. *Gould v. Magnolia Metal Co.*, 207 Ill. 172.

**960.** 2. *Sexual Immorality* — *Future Cohabitation*. — *Watkins v. Nugan*, 118 Ga. 378, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 960; *Lytle v. Newell*, (Ky. 1902) 68 S. W. Rep. 118; *McKibbin v. McCone*, 16 Quebec Super. Ct. 126; *Guilbault v. Brothier*, 10 British Columbia 449.

**961.** 1. *Services Rendered by Woman Illicitly Cohabiting with Man*. — A contract by a woman for services to be rendered to a man as housekeeper, etc., if it is not entered into with the intention of living in illicit relations, is not rendered illegal by the fact that subsequently illicit relations are established. *Lytle v. Newell*, (Ky. 1902) 68 S. W. Rep. 118.

**4.** *Past Cohabitation* — *Insufficient Consideration*. — *Woodson v. Hopkins*, (Miss. 1905) 137 So. Rep. 1060, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 961.

- 961.** (3) *Contract Supported by Other Consideration.* — See note 7.
- 962.** (4) *Continued Cohabitation.* — See note 2.
3. *Immorality Licensed by Law.* — See note 3.
- 963.** 4. *Contracts to Further Immoral Purposes.* — See note 1.
- 964.** XI. *CONTRACTS DETRIMENTAL TO PUBLIC SERVICE* — 3. *Contracts Relating to Compensation of Public Officers* — *a.* *ASSIGNMENT OF SALARIES OF PUBLIC OFFICERS.* — See note 3.
- b.* *CONTRACTS FOR COMPENSATION FOR PERFORMANCE OF OFFICIAL DUTY* — (1) *In General.* — See note 4.
- 965.** See note 3.
- (2) *Relinquishment of Right to Compensation.* — See note 8.
- 966.** (3) *Compensation Not Fixed by Law.* — See note 1.
- (4) *Services Outside of Official Duty.* — See note 2.
- 967.** 4. *Traffic in Public Offices* — *a.* *IN GENERAL* — *In the United States.* — See note 2.
- b.* *RESIGNATION OF OFFICE.* — See note 3.
- d.* *OFFICE BROKERAGE.* — See note 5.

**961.** 7. *Other Considerations.* — *Watkins v. Nugen*, 118 Ga. 378, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 961; *Doty v. Doty*, (Ky. 1904) 80 S. W. Rep. 803.

*Illustrations of Other Considerations Held Sufficient* — *Support of Bastard Child.* — *Jones v. Peterson*, 117 Ga. 58.

**962.** 2. *Continued Cohabitation Does Not Invalidate Contract.* — *Doty v. Doty*, (Ky. 1904) 80 S. W. Rep. 803.

3. *Houses of Prostitution Licensed.* — See *Burton v. Dupree*, 19 Tex. Civ. App. 275.

**963.** 1. *Contracts to Further Immoral Purposes.* — *Postelle v. Rivers*, 112 Ga. 850 (no recovery for board of prostitute); *Reed v. Brewer*, 90 Tex. 144, affirming (Tex. Civ. App. 1896) 36 S. W. Rep. 99; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960.

**964.** 3. *Assignment of Salaries by Public Officers.* — See *Mercantile Finance Co. v. Welsh*, (Supm. Ct. App. T.) 91 N. Y. Supp. 723; *Santleben v. Froboese*, 17 Tex. Civ. App. 626.

4. *Additional Compensation to Public Officers.* — *Humboldt County v. Stern*, 136 Cal. 63; *Edgerly v. Hale*, 71 N. H. 138; *Carpenter v. Taylor*, 164 N. Y. 171.

*Receiver.* — *National Exch. Bank v. Woodside*, 107 Mo. App. 47.

*Court Stenographer.* — *Dull v. Mammoth Min. Co.*, 28 Utah 467, approving *McCarthy v. Bonyng*, 12 Daly (N. Y.) 356, and quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964, affirmed 101 N. Y. 668.

**965.** 3. *Tending to Encourage Bribery.* — *Dull v. Mammoth Min. Co.*, 28 Utah 467, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964, 965, and supporting the whole text paragraph.

8. *Relinquishment of Right to Compensation.* — *Ashland Second Nat. Bank v. Ferguson*, 114 Ky. 516, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965; *Gallaher v. Lincoln*, 63 Neb. 339; *Nelson v. Superior*, 109 Wis. 618.

An agreement on the part of the sheriff with the plaintiff to an action that his fees for the service of papers in the action shall be contingent upon the recovery by the plaintiff is

against public policy. But an agreement by a sheriff serving papers in a litigation with the attorney for the plaintiff to look only to the plaintiff for the payment of his fees, and not to hold the attorney liable therefor, is not against public policy. *Edgerly v. Hale*, 71 N. H. 138.

*Lumping Compensation for Services and Fees.* — *In Ashland Second Nat. Bank v. Ferguson*, 114 Ky. 516, where a clerk agreed to render services as a bookkeeper and also as notary public for a bank for a total consideration of fifty dollars a month, it was held that though the agreement to accept fifty dollars a month for all notarial fees would be illegal and unenforceable if the fees in fact exceeded such amount, still where the fees were less than the fifty dollars his acceptance of the fifty dollars per month for services and fees together was binding upon him.

**966.** 1. *Compensation Not Fixed by Law.* — An agreement by a mine owner to pay for or reimburse a sheriff for expense in furnishing special deputies during a strike has been upheld. *Clark v. Cook*, 14 Pa. Super. Ct. 309, affirmed 197 Pa. St. 643.

2. *Services Outside of Official Duty.* — *National Exch. Bank v. Woodside*, 107 Mo. App. 47; *Cornwell v. St. Louis Transit Co.*, 106 Mo. App. 135. Compare *Humboldt County v. Stern*, 136 Cal. 63.

**967.** 2. *Traffic in Public Offices Illegal.* — *Harris v. Chamberlain*, 126 Mich. 283, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967; *Horstman v. Adamson*, 101 Mo. App. 119; *Cansler v. Penland*, 125 N. Car. 578; *Willis v. Weatherford Compress Co.*, (Tex. Civ. App. 1901) 66 S. W. Rep. 472; *Burck v. Abbott*, 22 Tex. Civ. App. 216; *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775; *Stephenson v. Salisbury*, 53 W. Va. 366.

*An Agreement Between Appointing Officers for Division of Patronage* as to appointments is illegal. *Sallade v. Schuylkill County*, 19 Pa. Super. Ct. 191.

3. *Resignation of Office Illegal Consideration.* — *Currier v. Clark*, 19 Colo. App. 250, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 967.

5. *Sale of Personal Influence in Securing Ap-*

**968.** *e.* CONSIDERATION MOVING TO APPOINTING POWER — (1) *In General* — Reduction of Emoluments of Office. — See note 4.

**969.** 5. Contracts to Influence Legislation (Lobbying Contracts) — *a.* IN GENERAL. — See note 3.

Inferior Legislative Bodies. — See note 4.

**970.** Prevention of Legislation. — See note 2.

*b.* WHAT SERVICES NOT IMPROPER — Drafting and Explaining Proposed Bills, Etc. — See notes 3, 4.

*c.* PRIVATE SOLICITATION OF LEGISLATORS. — See note 6.

**971.** *d.* CONTINGENT COMPENSATION. — See notes 1, 2.

*e.* SERVICES PARTLY ILLEGAL. — See note 3.

*f.* PRESUMPTION AS TO LEGALITY OF SERVICES. — See note 4.

6. Contracts Tending to Dereliction of Duty on Part of Public Officers — *a.* IN GENERAL. — See note 6.

**972.** Officers of Foreign Government. — See note 1.

pointments to Office. — *Wishek v. Hammond*, 10 N. Dak. 72.

**968.** 4. Reductions of Emoluments of Office. — *Gallaher v. Lincoln*, 63 Neb. 339.

**969.** 3. Lobbying Contracts Held Illegal. — *Colusa County v. Welch*, 122 Cal. 428; *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 51; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Richardson v. Scott's Bluff County*, 59 Neb. 400; *Veazey v. Allen*, 173 N. Y. 359.

Construction of Statute. — A statute making certain lobbying practices criminal does not by implication legalize others not within the purview of the criminal law which are void as against public policy. *Colusa County v. Welch*, 122 Cal. 428.

Legislative Investigation of Corporation. — In *Veazey v. Allen*, 61 N. Y. App. Div. 119, affirmed 173 N. Y. 359, a contract for services in securing a legislative investigation of the affairs of a corporation for the purpose of depreciating its stock was held to be illegal.

4. Subordinate Legislative Bodies. — *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Union El. R. Co. v. Nixon*, 199 Ill. 235; *McDonald v. Buckstaff*, 56 Neb. 88; *Dunham v. Hastings Pavement Co.*, 56 N. Y. App. Div. 244, rehearing denied 57 N. Y. App. Div. 426.

A contract which provides for the sale of certain municipal franchises after such franchises have been amended by the mayor and council of the municipality, and which contains no provision requiring the action of either party further than to agree upon the amendment desired before its introduction for the consideration of the mayor and council, is not void as against public policy. *Baumhoff v. Oklahoma City Electric, etc., Co.*, 14 Okla. 127.

Contract for Procurement of Franchise for Street Railway. — *Sussman v. Porter*, 137 Fed. Rep. 161.

**970.** 2. Prevention of Legislation. — *Colusa County v. Welch*, 122 Cal. 428.

3. Drafting and Explaining Proposed Bills, Etc. — *Stroemer v. Van Orsdel*, (Neb. 1905) 103 N. W. Rep. 1053, disapproving dicta in *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682; *Dunham v. Hastings Pavement Co.*, 56 N. Y. App. Div. 244, rehearing denied 57 N. Y. App. Div. 426; *Baumhoff v. Oklahoma City Electric, etc., Co.*, 14 Okla. 127.

4. Person Not Member of Legal Profession. —

*Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466.

6. Private Solicitation of Legislators. — *Colusa County v. Welch*, 122 Cal. 428.

**971.** 1. Contingent Compensation. — *Sussman v. Porter*, 137 Fed. Rep. 161; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Veazey v. Allen*, 173 N. Y. 359, affirming 61 N. Y. App. Div. 119. See, however, *Stroemer v. Van Orsdel*, (Neb. 1905) 103 N. W. Rep. 1053, disapproving *Richardson v. Scott's Bluff County*, 59 Neb. 400, 80 Am. St. Rep. 682.

A Contract to Obtain Consents from Owners of Property abutting on streets to the grant by the municipality of a street franchise, payment for such services to be made after the ordinance granting the franchise is passed, does not, when the persons obtaining such consents had nothing to do with the legislative body or the passage of the ordinance, make the obtaining of such consents contrary to public policy. *Union El. R. Co. v. Nixon*, 199 Ill. 235.

2. Reasons for Doctrine. — *Richardson v. Scott's Bluff County*, 59 Neb. 400.

3. Services Partly Legal. — *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 51; *Deering v. Cunningham*, 63 Kan. 174.

4. Legality of Services Presumed. — *Baumhoff v. Oklahoma City Electric, etc., Co.*, 14 Okla. 127.

6. Contracts Tending to Dereliction of Official Duty. — *Garman v. U. S.*, 34 Ct. Cl. 237; *Washington Irrigation Co. v. Krutz*, (C. C. A.) 119 Fed. Rep. 279; *Ramsay v. Whitbeck*, 183 Ill. 550; *State v. Windle*, 156 Ind. 648; *Johnson v. School Corp.*, 117 Iowa 319; *Ward v. Hartley*, 178 Mo. 135, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971; *Horstman v. Adamson*, 101 Mo. App. 119; *Page v. Claggett*, 71 N. H. 85; *Edgerly v. Hale*, 71 N. H. 138; *Cansler v. Penland*, 125 N. Car. 578; *Steger v. Hume*, 97 Tex. 324. See also *Whitbeck v. Ramsay*, 74 Ill. App. 524.

Contract by One Public Officer to Perform Duties of Another Illegal. — *Moore v. Cassily*, 9 Ohio Cir. Dec. 305, 16 Ohio Cir. Ct. 708.

Agreement to Pay Premiums to Dismissed Policemen Illegal. — *McCormick v. McCarlton*, 95 N. Y. App. Div. 426, affirming 91 N. Y. App. Div. 613.

**972.** 1. Officer of Sister State. — See *Smith v. Richmond*, 114 Ky. 303, 102 Am. St. Rep. 283.



**972.** Officer Not Actually Corrupted. — See note 3.

*b.* CONSIDERATION OF CONTRACT BREACH OF OFFICIAL DUTY —

(1) *In General.* — See note 6.

**974.** *c.* SALE OF PERSONAL INFLUENCE WITH PUBLIC OFFICERS. — See notes 1, 2.

*d.* EMPLOYMENT OF AGENTS TO NEGOTIATE SALES TO OR CONTRACTS WITH GOVERNMENT — (1) *In General.* — See note 4.

Employment of Legitimate Agents Allowed. — See note 6.

**975.** (3) *Contingent Compensation.* — See note 2.

Brokerage Commissions. — See note 3.

*e.* PUBLIC CONTRACTS IN WHICH PUBLIC OFFICERS ARE INTERESTED — (1) *In General.* — See note 6.

**976.** (2) *Statutory Prohibitions.* — See note 2.

**977.** 7. Contracts Affecting Service of Quasi-public Corporations. — See note 5.

**XII. AGREEMENTS INTERFERING WITH THE COURSE OF PUBLIC JUSTICE** — 1. *In General.* — See note 6.

Contracts Tending Towards Judicial Corruption. — See note 7.

**978.** 2. Contracts Relating to Suppression or Procurement of Evidence —

*a.* SUPPRESSION OF EVIDENCE. — See note 2.

**972.** 3. Actual Effect of Contract Immaterial. — Washington Irrigation Co. v. Krutz, (C. C. A.) 119 Fed. Rep. 279; Ward v. Hartley, 178 Mo. 135, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 972.

6. Consideration of Contract Breach of Official Duty. — Burck v. Abbott, 22 Tex. Civ. App. 216.

**974.** 1. Sale of Personal Influence with Officers Prohibited. — Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466; Deering v. Cunningham, 63 Kan. 174; Dunlap v. Lebus, 112 Ky. 237.

2. Influence to Induce Breach of Official Duty. — Kerr v. American Pneumatic Service Co., 188 Mass. 27.

4. Use of Social and Political Relations. — Drake v. Lauer, 93 N. Y. App. Div. 86, affirmed 182 N. Y. 533.

6. Employment of Legitimate Agents Allowed. — Mulligan v. Smith, 32 Colo. 404; Dunlap v. Lebus, 112 Ky. 237; Kerr v. American Pneumatic Service Co., 188 Mass. 27; Knut v. Nutt, 83 Miss. 365; Swift v. Aspell, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 453; Drake v. Lauer, 93 N. Y. App. Div. 86, affirmed 182 N. Y. 533.

Contract for Service in Inducing City Authorities to Adopt Particular Paving. — Dunham v. Hastings Pavement Co., 57 N. Y. App. Div. 426.

**975.** 2. Contingent Compensation. — Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466. See, however, Dunlap v. Lebus, 112 Ky. 237.

3. Brokerage Commissions. — Swift v. Aspell, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 453.

An agent who gives all of his time to the transaction of business for the government may receive a compensation increasing with the volume of the business, without rendering the contract illegal. Kerr v. American Pneumatic Service Co., 188 Mass. 27.

6. Public Officers Interested in Public Contract. — Compare Sylvester v. Webb, 179 Mass. 236.  
An Assignment to a Public Officer of a claim

arising out of a public contract is not illegal. People v. Saratoga County, 66 N. Y. App. Div. 117, reversing, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 740.

**976.** 2. Statutory Prohibitions. — Nuckols v. Lyle, 8 Idaho 589; Sedgwick County v. State, 66 Kan. 634; Baker v. Crook County, 9 Wyo. 51.

**977.** 5. Contracts Disabling Quasi-public Corporations to Perform Duties. — See the title ULTRA VIRES, 64. 1, and the following late cases: Beasley v. Texas, etc., R. Co., 191 U. S. 492; Thompson v. Schenectady R. Co., (C. C. A.) 131 Fed. Rep. 577; Graham v. Macon, etc., R. Co., 120 Ga. 757; Louisville, etc., R. Co. v. Pittsburg, etc., Coal Co., 111 Ky. 960; Scholten v. St. Louis, etc., R. Co., 101 Mo. App. 516; Gulf, etc., R. Co. v. Schawe, 22 Tex. Civ. App. 600; Gulf, etc., R. Co. v. Clay, 28 Tex. Civ. App. 176; Missouri, etc., R. Co. v. Carter, 95 Tex. 461; Tyler v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 238; Charleston Natural Gas Co. v. Kanawha Natural Gas, etc., Co., (W. Va. 1905) 50 S. E. Rep. 876.

6. Contracts Interfering with Public Justice. — Moss v. Cohen, 158 N. Y. 240. See also Ridenbaugh v. Young, 145 Mo. 274.

Contracts Requiring Institution of Fictitious Suits Illegal. — Van Horn v. Kittitas County, 112 Fed. Rep. 1.

Agreement to Influence Appointment of Receiver Upheld. — Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274.

An Agreement to Pay a Future Judgment in Consideration of a New Trial has been held to be illegal. Thompson v. Buffington, 7 Ohio Dec. 557.

7. Contracts Tending Towards Judicial Corruption. — An agreement between a commissioner appointed to take disclosures in an action and the plaintiff or his attorney therein, that the payment of his fees shall be contingent upon a recovery from the defendant, is illegal. Watson v. Fales, 97 Me. 366, 94 Am. St. Rep. 504.

**978.** 2. Civil Proceedings. — Young v. Thomson, 14 Colo. App. 294.

**978.** *b. CORRUPTION OF WITNESSES — (1) Contracts with Witnesses.* — See note 3.

Want of Consideration. — See note 6.

Compensation Contingent. — See note 8.

**979.** *(2) Agreements to Procure Testimony — Compensation Contingent.* — See notes 2, 3.

4. Contracts Tending to Suppress Criminal Justice. — See note 6.

**980.** See note 2.

5. Agreements to Secure Pardons — In General. — See note 3.

**981.** 6. Agreements Relating to Bail in Criminal Cases — Indemnification of Sureties. — See note 5.

**XIII. AGREEMENTS ENCOURAGING LITIGATION — 1. In General.** — See note 7.

**982.** **XIV. AGREEMENTS AFFECTING PUBLIC DUTIES OF CITIZENS — 1. In General.** — See note 5.

3. Public Enterprises and Improvements. — See note 8.

**983.** Buying Consent of Property Owners to Petition for Improvements. — See note 2.

4. Contracts Affecting Purity of Public Elections — *a. ELECTION OF OFFICERS.* — See note 3.

Contracts for Support During Elections. — See note 5.

**978.** 3. Agreement for Fixed Compensation to Witness Sustained. — See *Johnson v. Pietsch*, 94 Ill. App. 459.

6. Want of Consideration. — *Ramschasel's Estate*, 24 Pa. Super. Ct. 262.

8. Compensation to Witness Contingent. — *Johnson v. Pietsch*, 94 Ill. App. 459; *Bowling v. Blum*, (Tex. Civ. App. 1899) 52 S. W. Rep. 97.

Expert Testimony. — *Laffin v. Billington*, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 360; and see generally the title EXPERT AND OPINION EVIDENCE, 493. 10 *et seq.*

**979.** 2. Contingent Compensation. — *Casserleigh v. Wood*, (C. C. A.) 119 Fed. Rep. 308; *Cowles v. Rochester Folding Box Co.*, 81 N. Y. App. Div. 414, affirmed 179 N. Y. 87.

3. See *Wood v. Casserleigh*, 30 Colo. 287.

6. Agreements Tending to Suppress Legal Investigation. — *Owens v. Green*, 103 Ky. 342; *Pierson v. Green*, 69 S. Car. 559.

**980.** 2. Influence in Securing Dismissal of Criminal Proceedings. — *Simpson v. Normand*, 51 La. Ann. 1355; *Johnson v. Owen*, (Neb. 1904) 100 N. W. Rep. 945. See, however, *Rogers v. Hill*, 22 R. I. 496.

3. Use of Sinister Means to Secure Pardons. — *Deering v. Cunningham*, 63 Kan. 174.

**981.** 5. Agreement to Indemnify Surety. — An agreement to indemnify against liability a person who has entered into recognizances for the appearance of a defendant in a criminal matter is invalid, as being contrary to public policy, although the indemnity be given by a person other than the defendant. Consolidated Exploration, etc., Co. v. Musgrave, (1900) 1 Ch. 37, 69 L. J. Ch. 11, 81 L. T. N. S. 747, 48 W. R. 298, 64 J. P. 89.

7. Compromise of Litigation. — *Granat v. Kruse*, 114 Ill. App. 488, writ of error dismissed 213 Ill. 328; *Davis v. Chase*, 159 Ind. 242, 95 Am. St. Rep. 294. Compare *O'Driscoll v. Doyle*, 31 Colo. 193.

Runner for Attorneys. — See *Langdon v. Conlin*, 67 Neb. 243.

An Agreement to Waive the Defense of the Statute of Limitations in a future action is not

against public policy. *Wells v. Enright*, 127 Cal. 669; *State L. & T. Co. v. Cochran*, 130 Cal. 245.

Discovery of Omitted Taxable Property. — A contract by a county for contingent compensation to a person for the discovery of omitted taxable property is not against public policy. *Shinn v. Cunningham*, 120 Iowa 383.

**982.** 5. Consent to Saloon License. — Where the consent of property owners within a certain territory is necessary to the grant of a saloon license, a contract by the proposed licensee to pay a property owner for giving his consent is illegal. *Greer v. Severson*, 119 Iowa 84.

But a contract between a liquor seller and a firm of brewers, whereby the liquor seller, in consideration of the brewers' recommendation of his application for a license, agreed to purchase his beer from the brewers was held not to be illegal as an agreement for the purchase of a recommendation. *Savill v. Langman*, 79 L. T. N. S. 44.

8. Agreement to Promote Public Improvement. — A subscription to aid or induce a municipality to undertake a public improvement is not illegal. *Charlotte Tp. v. Piedmont Realty Co.*, 134 N. Car. 41.

**983.** 2. A Sale by Abutting Owners of Their Consent to a Grant of a Street-railway Franchise is illegal. *Montclair Military Academy v. North Jersey St. R. Co.*, 65 N. J. L. 328. See also *Brieske v. North Chicago St. R. Co.*, 82 Ill. App. 256.

Compensating Agents to Secure Consent. — A contract for the payment of compensation to an agent for services rendered in securing the consent of property owners to the erection of an elevated railroad is not against public policy. *Union El. R. Co. v. Nixon*, 199 Ill. 235.

3. Contracts to Influence Voters. — *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Specht v. Beindorf*, 56 Neb. 553; *Willis v. Weatherford Compress Co.*, (Tex. Civ. App. 1901) 66 S. W. Rep. 472.

5. A Contract for the Purchase of a Newspaper's Support of a Candidate for office has been held

**984.** Support to Secure Nomination. — See note 1.

Proper Services in the Conduct of Elections. — See note 2.

**986. XXI. CONTRACTS INDIRECTLY ILLEGAL — 1. General Principles —**

*a.* MUTUALITY OF INTENT. — See note 6.

**987. *b.* MERE KNOWLEDGE OF ILLEGAL OBJECT OF ONE PARTY — General Rule. — See note 2.**

Minority Rule. — See note 3.

*c.* ACTS IN FURTHERANCE OF ILLEGAL PURPOSE. — See note 4.

*d.* COMPLETION OF ILLEGAL PURPOSE A PART OF CONTRACT. —

See note 5.

**988. XXII. ENTIRE AND DIVISIBLE CONTRACTS AS AFFECTED BY PARTIAL ILLEGALITY — 1. Entire and Divisible Contracts Defined. — See note 3.**

**2. Effect of Partial Illegality in Entire Contract — *a.* IN GENERAL. —**

See note 4.

**989. *b.* CUMULATIVE CONSIDERATIONS WITHOUT APPORTIONMENT. — See note 1.**

in *Vermont* to be illegal. *Livingston v. Page*, 74 Vt. 356, 93 Am. St. Rep. 901.

**984. 1. Support for Nomination.** — *Livingston v. Page*, 74 Vt. 356, 93 Am. St. Rep. 901.

**2. Hiring Speakers.** — See *Ward v. Hartley*, 178 Mo. 135.

**986. 6. Necessity for Mutuality of Illegal Intent.** — *Carter-Crume Co. v. Peurrung*, (C. C. A.) 86 Fed. Rep. 439, *affirmed* (C. C. A.) 99 Fed. Rep. 888; *Hanover Nat. Bank v. Burlingame First Nat. Bank*, 109 Fed. Rep. 421, 48 C. C. A. 482; *Ramsey v. Smith*, 138 Ala. 333; *Mulligan v. Smith*, 32 Colo. 404; *Crystal Ice Co. v. Wylie*, 65 Kan. 104; *Mitchell v. Branham*, 104 Mo. App. 480; *Fox v. State*, 63 Neb. 185; *Vanuxen v. McCreary*, 7 Pa. Dist. 574. See also *Parker v. Moore*, (C. C. A.) 115 Fed. Rep. 799.

**987. 2. Knowledge of Other Party's Illegal Object — Majority Rule.** — *Singleton v. Monticello Bank*, 113 Ga. 527; *Hines v. Union Sav. Bank, etc., Co.*, 120 Ga. 711; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960.

**Work Performed on Premises to Be Used for Illegal Purpose.** — One who furnishes labor and materials in fitting up a bar and barroom is not precluded from recovering therefor by the fact that he knew that the premises were to be used for an illegal purpose. *Bryson v. Haley*, 68 N. H. 337.

**3. Minority Rule.** — *Fields v. Brown*, 188 Ill. 114, decided under the *Illinois* statute prohibiting the rental of premises for houses of prostitution and *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987. See also *Cullison v. Downing*, 42 Oregon 377. See, however, *Ramsey v. Smith*, 138 Ala. 333, holding that constructive notice, through knowledge of facts calculated to excite inquiry, was insufficient.

**4. Aid in Furtherance of Illegal Object.** — *Postelle v. Rivers*, 112 Ga. 850; *Singleton v. Monticello Bank*, 113 Ga. 527, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Hines v. Union Sav. Bank, etc., Co.*, 120 Ga. 711; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131; *Pierson v. Green*, 69 S. Car. 559; *Reed v. Brewer*, 90 Tex. 144, *affirming* (Tex. Civ. App. 1896) 36 S. W. Rep. 99; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960.

**5. Contract Contemplating Carrying Out of Illegal Object.** — *Stansfield v. Kunz*, 62 Kan. 797; *Tandy v. Elmore-Cooper Live Stock Commission Co.*, 113 Mo. App. 409.

**988. 3. Separable and Divisible Contracts.** — *Horseman v. Horseman*, 43 Oregon 94, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Potter v. Potter*, 43 Oregon 154, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988.

**4. Partial Illegality in Entire Contract.** — *United States.* — *McMullen v. Hoffman*, 174 U. S. 639; *Van Horn v. Kittitas County*, 112 Fed. Rep. 1; *Washington Irrigation Co. v. Krutz*, (C. C. A.) 119 Fed. Rep. 279.

*Alabama.* — *Sims v. Alabama Brewing Co.*, 132 Ala. 311, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988.

*Colorado.* — *Currier v. Clark*, 19 Colo. App. 250, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988.

*District of Columbia.* — *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 51.

*Illinois.* — *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Shortall v. Fitzsimons, etc., Co.*, 93 Ill. App. 231; *Bensing v. Kantzler*, 112 Ill. App. 293, *reversed* 214 Ill. 589; *Evans v. American Strawboard Co.*, 114 Ill. App. 450.

*Indiana.* — *Chicago, etc., R. Co. v. Southern Indiana R. Co.*, (Ind. App. 1904) 70 N. E. Rep. 843.

*Kansas.* — *Sedgwick County v. State*, 66 Kan. 634.

*Michigan.* — *Koppitz-Melchers Brewing Co. v. Behm*, 130 Mich. 649.

*New Hampshire.* — *Foote v. Nickerson*, 70 N. H. 496.

*New York.* — *Hess v. Allen*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 393.

*Ohio.* — *Dayton, etc., R. Co. v. Pittsburg, etc., R. Co.*, 25 Ohio Cir. Ct. 705.

*Oregon.* — *Horseman v. Horseman*, 43 Oregon 93, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Potter v. Potter*, 43 Oregon 154.

*Utah.* — *Haddock v. Salt Lake City*, 23 Utah 521.

**989. 1. Cumulative Considerations Without Apportionment.** — *Folmar v. Siler*, 132 Ala. 297; *Humboldt County v. Stern*, 136 Cal. 63; *Ramsay v. Whitbeck*, 183 Ill. 550; *Brieske v. North Chicago St. R. Co.*, 82 Ill. App. 256; *Chicago, etc., R. Co. v. Southern Indiana R. Co.*, (Ind.

**990. 3. Effect of Partial Illegality in Severable Contract — a. IN GENERAL.**

— See note 2.

**991. b. CONSIDERATION APPORTIONED TO DIFFERENT STIPULATIONS.**

— See note 1.

**992. 4. Action on Account. — See note 2.****XXIII. CONTRACTS GROWING OUT OF OR CONNECTED WITH ILLEGAL CONTRACT — 1. In General. — See notes 3, 4, 5.****993. 2. Abandonment of Illegal Contract. — See note 2.****3. Aid Required from Illegal Contract to Establish Case. — See note 3.****994. See note 1.****5. Loans to Settle Obligation of Illegal Contract. — See note 3.****7. Ratification of Illegal Contract. — See note 5.**

App. 1904) 70 N. E. Rep. 843; *Rosenbaum v. Leavitt*, 109 Iowa 292; *Deering v. Cunningham*, 63 Kan. 174; *Simpson v. Normand*, 51 La. Ann. 1355; *Padget v. O'Connor*, (Neb. 1904) 98 N. W. Rep. 870; *Burck v. Abbott*, 22 Tex. Civ. App. 216; *Sanger v. Miller*, 26 Tex. Civ. App. 111; *Reed v. Brewer*, 90 Tex. 144, *affirming* (Tex. Civ. App. 1896) 36 S. W. Rep. 99.

**990. 2. Partial Illegality in Severable Contracts. — England. —** *Sheehy v. Sheehy*, (1901) 1 Ir. R. 239.

*Canada. — Desjardins v. Roy*, 7 Quebec Q. B. 325; *Guilbault v. Brothier*, 10 British Columbia 449.

*United States. — U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co.*, (C. C. A.) 126 Fed. Rep. 364.

*Alabama. — Sims v. Alabama Brewing Co.*, 132 Ala. 311, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990, and supporting the whole text paragraph.

*California. — Mack v. Jastro*, 126 Cal. 130; *McVicker v. McKenzie*, 136 Cal. 656.

*Illinois. — Pardridge v. Cutler*, 104 Ill. App. 89; *Granat v. Kruse*, 114 Ill. App. 488, *writ of error dismissed* 213 Ill. 328; *Whitbeck v. Ramsay*, 74 Ill. App. 524.

*Indiana. — Emshwiler v. Tyner*, 21 Ind. App. 347, 69 Am. St. Rep. 360.

*Iowa. — Stewart v. Pierce*, 116 Iowa 733.

*New Jersey. — Rosenbaum v. U. S. Credit System Co.*, 65 N. J. L. 255.

*New York. — Hess v. Allen*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 393.

*Ohio. — McCausland v. Akers*, 24 Ohio Cir. Ct. 713, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *King v. King*, 63 Ohio St. 363, 81 Am. St. Rep. 635.

*South Carolina. — Pierson v. Green*, 69 S. Car. 559.

*Vermont. — Osgood v. Central Vermont R. Co.*, 77 Vt. 334.

*Washington. — Minnesota Sandstone Co. v. Clark*, 35 Wash. 466.

*West Virginia. — White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775.

*Wyoming. — Conradt v. Lepper*, (Wyo. 1905) 81 Pac. Rep. 307.

**991. 1. Apportionment of Consideration to Different Items. —** *Sims v. Alabama Brewing Co.*, 132 Ala. 311, *quoting* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 991.

**992. 2. Action on Account Including Illegal Items. —** *Compare Pardridge v. Cutler*, 104 Ill. App. 89.

**3. Contracts Arising Out of Illegal Contracts. —**

*Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120 (notes given for articles purchased under and in pursuance of an illegal contract); *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775; *Desjardins v. Roy*, 7 Quebec Q. B. 325.

**4. McMullen v. Hoffman, 174 U. S. 639; *Reed v. Johnson*, 27 Wash. 55, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992; *White v. Cook*, 51 W. Va. 216, 90 Am. St. Rep. 775, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.**

**5. Independent Contracts. —** *Hanover Nat. Bank v. Burlingame First Nat. Bank*, 109 Fed. Rep. 421, 48 C. C. A. 482; *Washington Irrigation Co. v. Krutz*, (C. C. A.) 119 Fed. Rep. 279; *McVicker v. McKenzie*, 136 Cal. 656; *Gallagher v. Cornelius*, 23 Mont. 27; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462; *Recknagel v. Steinway*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 633, *modified and affirmed* 58 N. Y. App. Div. 352; *Allen v. Line*, 11 Pa. Super. Ct. 517; *Sallade v. Schuylkill County*, 19 Pa. Super. Ct. 191; *Brault v. St. Jean-Baptiste Assoc.*, 4 Can. Crim. Cas. 304, 30 Can. Sup. Ct. 617, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

**993. 2. Ruemmel v. Cravens, 13 Okla. 342.**

**3. Resort to Illegal Contract Required to Establish Case. —** *McMullen v. Hoffman*, 174 U. S. 639; *Jemison v. Birmingham, etc., R. Co.*, 125 Ala. 378; *Spottswood v. Bentley*, 130 Ala. 310; *Weed v. Cuming*, 12 Pa. Super. Ct. 412, *affirmed* 198 Pa. St. 442; *Monahan v. Monahan*, 77 Vt. 133; *Baum v. Baum*, 109 Wis. 47, 83 Am. St. Rep. 854. See also *Hyer v. Richmond Traction Co.*, (C. C. A.) 80 Fed. Rep. 839, *modified* 168 U. S. 471.

**994. 1. Resort to Illegal Contract Not Required. —** *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713; *Ederly v. Hale*, 71 N. H. 138; *Robson v. Hamilton*, 41 Oregon 239.

**Examples. —** The rule is applicable where the plaintiff took securities in the name of the defendant for the purpose of evading taxation, and where the defendant by surreptitious means acquired possession of such securities, and such securities may be impressed with a trust in favor of the plaintiff. *Monahan v. Monahan*, 77 Vt. 133.

The fact that the assignment of a mortgage was based on an illegal transaction cannot be set up as a defense by the mortgagee in a suit by the assignee to foreclose the mortgage. *Conradt v. Lepper*, (Wyo. 1905) 81 Pac. Rep. 307. *Gallagher v. Cornelius*, 23 Mont. 27.

**5. Illegal Contract Incapable of Ratification. —**

**995. 8. Promise to Pay Money Owning on Illegal Contract — &c. IN GENERAL.** — See note 2.

**996. 9. Securities for Performance of Illegal Contracts.** — See note 5.

**997. XXIV. ENFORCEMENT OF AND RELIEF FROM ILLEGAL CONTRACTS — 1. In General.** — See note 1.

**998.** See notes 1, 2, 3.

*Lindt v. Uihlein*, 109 Iowa 591; *Mexico First Nat. Bank v. Gregg*, 74 Mo. App. 639.

**995. 2. Contracts to Pay Money Owning on Illegal Contract.** — *Hardie v. Scheen*, 110 La. 612; *Siver v. Guarantee Invest. Co.*, 183 Mo. 41.

**Award Founded on Illegal Transaction a Nullity.** — *Benton v. Singleton*, 114 Ga. 548.

**996. 5. Securities for Performance of Illegal Contract.** — *Jack v. Sinzheimer*, 125 Cal. 563; *Jones v. Dannenberg Co.*, 112 Ga. 426; *Watkins Medical Co. v. Paul*, 87 Ill. App. 278; *Evans v. American Strawboard Co.*, 114 Ill. App. 450; *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438; *Jangraw v. Perkins*, 76 Vt. 127, 104 Am. St. Rep. 917; *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775.

**Guaranty of Note.** — *Tandy v. Elmore-Cooper Live Stock Commission Co.*, 103 Mo. App. 409.

**997. 1. No Action Maintainable on Illegal Contracts — United States.** — *McMullen v. Hoffman*, 174 U. S. 639; *Hanover Nat. Bank v. Burlingame First Nat. Bank*, 109 Fed. Rep. 421, 48 C. C. A. 482; *Steele v. Nilima*, (C. C. A.) 133 Fed. Rep. 215; *Sussman v. Porter*, 137 Fed. Rep. 161.

*Alabama.* — *Spottswood v. Bentley*, 130 Ala. 310; *Western Union Tel. Co. v. Young*, 138 Ala. 243. See also *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125.

*California.* — *Merchants' Ad. Sign Co. v. Sterling*, 124 Cal. 429.

*Colorado.* — *Young v. Thomson*, 14 Colo. App. 294; *Giles v. De Cow*, 30 Colo. 412.

*Dakota.* — *Drinkall v. Movius State Bank*, 11 N. Dak. 10, 95 Am. St. Rep. 693.

*Georgia.* — *Benton v. Singleton*, 114 Ga. 548; *Beard v. White*, 120 Ga. 1078.

*Illinois.* — *Shortall v. Fitzsimons, etc., Co.*, 93 Ill. App. 231; *Ramsay v. Whitbeck*, 183 Ill. 550; *Smythe v. Evans*, 209 Ill. 376.

*Indiana.* — *Chicago, etc., R. Co. v. Southern Indiana R. Co.*, (Ind. App. 1904) 70 N. E. Rep. 843.

*Kansas.* — *Pintney v. Concordia First Nat. Bank*, 68 Kan. 223; *Keene Syndicate v. Wichita Gas, etc., Co.*, 69 Kan. 284, 105 Am. St. Rep. 164.

*Kentucky.* — *Dunlap v. Lebus*, 112 Ky. 237.

*Louisiana.* — *Simpson v. Normand*, 51 La. Ann. 1355.

*Maine.* — *Smith-Green Co. v. Bird*, 96 Me. 425, 90 Am. St. Rep. 352; *Watson v. Pales*, 97 Me. 366, 94 Am. St. Rep. 504; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

*Michigan.* — *McDonald v. Born*, 135 Mich. 177, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Fisher v. Hampton Transp. Co.*, 136 Mich. 218.

*Missouri.* — *Rice v. National Bank of Commerce*, 98 Mo. App. 696; *Mitchell v. Branham*, 104 Mo. App. 480; *Ward v. Hartley*, 178 Mo. 135; *Pendleton v. Asbury*, 104 Mo. App. 723.

*Montana.* — *Whalen v. Harrison*, 26 Mont. 316.

*Nebraska.* — *McDonald v. Buckstaff*, 56 Neb. 88; *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65; *Meek v. Lange*, 65 Neb. 783; *Davis v. Hinman*, (Neb. 1905) 103 N. W. Rep. 668.

*New Jersey.* — *Rosenbaum v. U. S. Credit-System Co.*, 64 N. J. L. 34; *Wyckoff v. Weaver*, 66 N. J. L. 648; *Somers v. Johnson*, 70 N. J. L. 695.

*New York.* — *Coverly v. Terminal Warehouse Co.*, 178 N. Y. 602, affirming 85 N. Y. App. Div. 488, 70 N. Y. App. Div. 82; *Vezzey v. Allen*, 173 N. Y. 359.

*North Carolina.* — *Wittrowsky v. Baruch*, 127 N. Car. 313.

*Oregon.* — *Cullison v. Downing*, 42 Oregon 377.

*Pennsylvania.* — *Bittin's Estate*, 8 Pa. Dist. 191.

*Texas.* — *Daily v. Hollis*, 27 Tex. Civ. App. 570.

*Utah.* — *Haddock v. Salt Lake City*, 23 Utah 528, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Overholt v. Burbridge*, 28 Utah 408.

*Washington.* — *Johnson v. Douglas*, 32 Wash. 293.

*West Virginia.* — *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775; *Charleston Natural Gas Co. v. Kanawha Natural Gas, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 876.

*Wisconsin.* — *Baum v. Baum*, 109 Wis. 47, 83 Am. St. Rep. 854.

*Canada.* — *Consumers' Cordage Co. v. Connolly*, 31 Can. Sup. Ct. 298, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Rugg v. Lewis*, 17 Quebec Super. Ct. 206; *Byron v. Tremaine*, 31 Nova Scotia 425, affirmed 29 Can. Sup. Ct. 445.

**The Court Sua Sponte**, even against the wishes of the party interested, will refuse to allow a recovery on a contract that has been declared by statute to be void. *Weed v. Cuming*, 12 Pa. Super. Ct. 412, affirmed 198 Pa. St. 442.

**Illegal Conditional Sale — Seller Cannot Recover Chattel.** — *Singer Mfg. Co. v. Draper*, 103 Tenn. 262.

**Conflict of Laws.** — Though a contract executed in one state is valid there, if it violates the rules of public policy of another state in which an action is brought thereon the action cannot be maintained. *Winward v. Lincoln*, 23 R. I. 476.

**998. 1. Ex Dolo Malo Non Oritur Actio.** — *McMullen v. Hoffman*, 174 U. S. 639; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466; *Price v. Burns*, 101 Ill. App. 418; *Bater v. Sawyer, etc., Land Co.*, 90 Minn. 536. See also *Roselle v. Farmer's Bank*, 141 Mo. 36, 64 Am. St. Rep. 501.

**2. Enforcement of Executory Contracts Denied.** — *Conway v. Garden City Paving, etc., Co.*, 190 Ill. 89. See also *Cohen v. Berlin, etc., Envelope Co.*, 166 N. Y. 292.

**998.** 2. Performance by Plaintiff — *a.* IN GENERAL. — See note 4.

**999.** *b.* IMPLIED CONTRACT. — See note 1.

**3. Executed Contracts** — *a.* IN GENERAL. — See note 2.

**1000.** See note 1.

*b.* LAND CONVEYED. — See notes 2, 3.

**1001.** *c.* RECOVERY OF CONSIDERATION PARTED WITH. — See notes 1, 2.

**998. 3. Damages for Breach of Illegal Contract Denied.** — *Stansfield v. Kunz*, 62 Kan. 797; *Haggerty v. St. Louis Ice Mfg., etc., Co.*, 143 Mo. 238, 65 Am. St. Rep. 647; *Culp v. Love*, 127 N. Car. 457.

**4. Performance by Plaintiff** — *United States*. — *Garman v. U. S.*, 34 Ct. Cl. 237.

*Alabama*. — *Brown v. Raisin Fertilizer Co.*, 124 Ala. 221; *Kelly v. Burke*, 132 Ala. 235.

*Connecticut*. — *William Wilcox Mfg. Co. v. Brazos*, 74 Conn. 208.

*Illinois*. — *Shortall v. Fitzsimons, etc., Co.*, 93 Ill. App. 231.

*Indiana*. — *Robison v. Wolf*, 27 Ind. App. 683; *Chicago, etc., R. Co. v. Southern Indiana R. Co.*, (Ind. App. 1904) 70 N. E. Rep. 843.

*Kansas*. — *Keene Syndicate v. Wichita Gas, etc., Co.*, 69 Kan. 284, 105 Am. St. Rep. 164.

*Michigan*. — *Bryant v. Wilcox*, (Mich. 1904) 100 N. W. Rep. 918.

*Missouri*. — *American Cent. Ins. Co. v. Chicago, etc., R. Co.*, 74 Mo. App. 89. See also *Ridenbaugh v. Young*, 145 Mo. 274.

*Montana*. — *Glass v. Basin, etc., Min. Co.*, 31 Mont. 21.

*Nebraska*. — *Richardson v. Scott's Bluff County*, 59 Neb. 400; *Johnson v. Owen*, (Neb. 1904) 100 N. W. Rep. 945. See also *Rocco v. Frapoli*, 50 Neb. 665.

*New Hampshire*. — *Edgerly v. Hale*, 71 N. H. 138.

*New York*. — *Carpenter v. Taylor*, 164 N. Y. 171; *Drake v. Lauer*, 93 N. Y. App. Div. 86, affirmed 182 N. Y. 533. Compare *Bonta v. Gridley*, 77 N. Y. App. Div. 33.

*North Carolina*. — *Cansler v. Penland*, 125 N. Car. 578.

*Texas*. — *Burck v. Abbott*, 22 Tex. Civ. App. 216; *S. S. White Dental Mfg. Co. v. Hertzberg*, (Tex. Civ. App. 1899) 51 S. W. Rep. 355; *Chimene v. Pennington*, 34 Tex. Civ. App. 424.

See, however, *Knut v. Nutt*, 83 Miss. 365; *Beasley v. Texas, etc., R. Co.*, (C. C. A.) 115 Fed. Rep. 952, affirmed 191 U. S. 492.

**Performance of Contract by Violating Law.** — *Wood v. Wood*, 137 Cal. 148.

**999.** 1. Implied Contract. — *Woodson v. Hopkins*, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999; *Richardson v. Scott's Bluff County*, 59 Neb. 400. See, however, *Johnson v. Cedar School Corp.*, 137 Iowa 319; *McCurdy v. Dillan*, 135 Mich. 678.

**2. Executed Contracts** — *United States*. — *McMullen v. Hoffman*, 174 U. S. 639.

*California*. — *Woodham v. Allen*, 130 Cal. 194.

*Georgia*. — *Castellow v. Brown*, 119 Ga. 461; *Beard v. White*, 120 Ga. 1018.

*Mississippi*. — *Woodson v. Hopkins*, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999.

*Montana*. — *Murray v. Haldorn*, 25 Mont. 218.  
*North Dakota*. — *Drinkall v. Movius State Bank*, 11 N. Dak. 17, 95 Am. St. Rep. 693, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999.

*Oregon*. — *Cullison v. Downing*, 42 Oregon 377.

*Washington*. — *Reed v. Johnson*, 27 Wash. 42; *Johnson v. Douglas*, 32 Wash. 293.

*Canada*. — *Braut v. St. Jean-Baptiste Assoc.*, 12 Quebec K. B. 124.

**Northern Securities Case.** — In *Harriman v. Northern Securities Co.*, 197 U. S. 247, affirming (C. C. A.) 134 Fed. Rep. 331, which reversed 132 Fed. Rep. 464, it was held that where stockholders of competing corporations transferred their stock to a holding company in violation of the Sherman Anti-trust Act the contract was illegal, and the court would not aid any of the parties to the transaction to recover the stock so transferred to the holding company.

**1000.** 1. *Woodson v. Hopkins*, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999.

**2. Land Conveyed Not Recoverable.** — *Watkins v. Nugen*, 118 Ga. 375; *Castellow v. Brown*, 119 Ga. 461; *Beard v. White*, 120 Ga. 1018; *Anderson v. Anderson*, 122 Wis. 480. Compare *Brun v. Brun*, 64 Neb. 782.

**Lease — Possession May Be Recovered After Expiration.** — *Sittel v. Wright*, (C. C. A.) 122 Fed. Rep. 434.

**3. Recovery of Possession by Grantee Denied.** — *Medearis v. Granberry*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1070, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1000. See also *Castellow v. Brown*, 119 Ga. 461.

**1001.** 1. **No Recovery of Consideration Parted With** — *England*. — *Harse v. Pearl L. Assur. Co.*, (1904) 1 K. B. 558.

*Canada*. — *McKibbin v. McCone*, 16 Quebec Super. Ct. 126.

*United States*. — *Equitable L. Assur. Soc. v. Wetherill*, 127 Fed. Rep. 947, 62 C. C. A. 579; *Harriman v. Northern Securities Co.*, 197 U. S. 244.

*Illinois*. — *Wheeler v. Mutual Reserve Fund L. Assoc.*, 102 Ill. App. 48; *Boddie v. Brewer, etc., Brewing Co.*, 107 Ill. App. 357, affirmed 204 Ill. 352.

*Kentucky*. — *Singer Mfg. Co. v. Ferrell*, (Ky. 1899) 48 S. W. Rep. 1078; *Chapman v. Haley*, (Ky. 1904) 80 S. W. Rep. 190, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001.

*Massachusetts*. — *West Springfield, etc., St. R. Co. v. Bodurtha*, 181 Mass. 583.

*Michigan*. — *McDonald v. Born*, 135 Mich. 177.

*Minnesota*. — *Bauer v. Sawyer, etc., Land Co.*, 90 Minn. 516, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001.

- 1001.** 4. In Equity — *a.* IN GENERAL. — See note 3.
- 1002.** *b.* FORECLOSURE OF ILLEGAL MORTGAGE. — See note 2.
- c.* CANCELLATION OF INSTRUMENTS. — See note 3.
- 1003.** 5. Relief from Judgments Recovered on Illegal Contracts. — See note 3.
6. Relief in Interest of Creditors or Heir of Party — *a.* IN INTEREST OF CREDITOR — See note 6.
- 1004.** *b.* IN INTEREST OF HEIR. — See note 2.
7. Parties Not in Equal Fault (Not in *Pari Delicto*) — *a.* IN GENERAL. — See note 3.
- 1005.** *b.* STATUTE FOR PROTECTION OF PARTY SEEKING RELIEF. — See note 1.
- c.* PENALTY IMPOSED ON ONE PARTY. — See note 2.
- d.* IGNORANCE OF ILLEGALITY OF CONTRACT. — See note 3.
- 1006.** *e.* FRAUD, UNDUE INFLUENCE, OR DURESS EXERCISED ON PARTY. — See note 1.
- Duress or Oppression.* — See note 3.
- 1007.** *g.* OPPORTUNITY OF WITHDRAWING (*LOCUS PŒNITENTIÆ*). — See note 1.

*Missouri.* — Sedalia Board of Trade *v.* Brady, 78 Mo. App. 585, 2 Mo. App. Rep. 301; Ward *v.* Hartley, 178 Mo. 135.

*Nebraska.* — Davis *v.* Hinman, (Neb. 1905) 103 N. W. Rep. 668.

*New Hampshire.* — Edgerly *v.* Hale, 71 N. H. 138.

*Washington.* — Reed *v.* Johnson, 27 Wash. 42.

**1001.** 2. Refusal of Other Party to Perform. — Bruer *v.* Kansas Mut. L. Ins. Co., 100 Mo. App. 540. Compare Edwards *v.* Michigan Tontine Invest. Co., 132 Mich. 1.

**3. Equity Follows the Law.** — Hyer *v.* Richmond Traction Co., (C. C. A.) 80 Fed. Rep. 339, modified 168 U. S. 471; Harriman *v.* Northern Securities Co., 197 U. S. 244; Watkins *v.* Nugen, 118 Ga. 375; Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388; Southard *v.* George W. Jump Co., (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 164; Hulen *v.* Earel, 13 Okla. 246; Robson *v.* Hamilton, 41 Oregon 239; Horseman *v.* Horseman, 43 Oregon 83; Gorringer *v.* Reed, 23 Utah 120, 90 Am. St. Rep. 692; Reed *v.* Johnson, 27 Wash. 42. See also Casserleigh *v.* Wood, (C. C. A.) 119 Fed. Rep. 308; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, dismissing a bill to enforce a contract in restraint of trade.

**1002.** 2. See Jones *v.* Dannenberg Co., 112 Ga. 426; Evans *v.* American Strawboard Co., 114 Ill. App. 450.

**3. Cancellation of Instruments Deceit.** — Brun *v.* Brun, 64 Neb. 782; Union Cent. L. Ins. Co. *v.* Champlin, 11 Okla. 184. See however, Paige *v.* Hieronymus, 192 Ill. 546.

**Cloud on Title.** — In Lindt *v.* Uihlein, 109 Iowa 591, a decree quieting the title of the plaintiff to lands conveyed by her to the defendant for an illegal consideration was affirmed.

**1003.** 3. Relief from Judgment Recovered on Illegal Contract. — Robson *v.* Hamilton, 41 Oregon 239.

**Statutory Provision for Granting Relief.** — Boddie *v.* Brewer, etc., Brewing Co., 204 Ill. 352.

**6. Relief in Interest of Creditors.** — Willis *v.*

Weatherford Compress Co., (Tex. Civ. App. 1901) 66 S. W. Rep. 472.

**1004.** 2. In Interest of Heir. — Watkins *v.* Nugen, 118 Ga. 375; Castellow *v.* Brown, 119 Ga. 461; Beard *v.* White, 120 Ga. 1018.

**3. Parties Not in Pari Delicto** — *California.* — Woodham *v.* Allen, 130 Cal. 194.

*Colorado.* — Pueblo Realty Co. *v.* Tate, 32 Colo. 67.

*Kansas.* — Stansfield *v.* Kunz, 62 Kan. 797.

*New Mexico.* — Padilla *v.* Padilla, 11 N. Mex. 540.

*New York.* — Place *v.* Conklin, 34 N. Y. App. Div. 191, affirming (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 40; Cohen *v.* Berlin, etc., Envelope Co., 38 N. Y. App. Div. 499, reversed 166 N. Y. 292; Jennings *v.* Chute, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 39; Glens Falls Nat. Bank *v.* Van Nostrand, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 526, affirmed 103 N. Y. App. Div. 598.

*Utah.* — Gorringer *v.* Reed, 23 Utah 120, 90 Am. St. Rep. 692.

*Virginia.* — Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 75 Am. St. Rep. 770.

**1005.** 1. Statute for Protection of Party Seeking Relief. — Edgerly *v.* Hale, 71 N. H. 138.

**2. Penalty Imposed on One Party.** — Jennings *v.* Chute, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 39.

**3. Ignorance of Illegality of Contract.** — Rosenbaum *v.* U. S. Credit-System Co., 64 N. J. L. 34; Glens Falls Nat. Bank *v.* Van Nostrand, 103 N. Y. App. Div. 598, affirming (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 526. See, however, Harse *v.* Pearl L. Assur. Co., (1904) 1 K. B. 558; Harriman *v.* Northern Securities Co., 197 U. S. 244.

**An Illegal Intention of One Party** to a contract will not prevent recovery by the other party where the contract is fair on its face and the plaintiff had no knowledge of the other party's wrongful intent. Parker *v.* Moore, (C. C. A.) 115 Fed. Rep. 799.

**1006.** 1. Fraud. — *In re* Arnold, 133 Fed. Rep. 789.

**3. Duress.** — Gray *v.* Freeman, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105.

**1007.** 1. *Locus Pœnitentiæ.* — De Leonis *v.*

**1007.** 8. Public Policy Advanced by Granting Relief. — See note 4.

**1008.** 9. Recovery of Money Paid to Third Person for Use of Party to Illegal Contract. — See note 1.

10. Actions Between Coparties to Illegal Contracts. — See note 3.

**1009.** 11. Accounting Between Principal and Agent — *a.* COMPELLING AGENT TO ACCOUNT — (1) *Accounting with Respect to Property Received from Principal.* — See note 2.

**1010.** (2) *Accounting with Respect to Property Received for Principal* — (b) Agent Participant in Illegal Contract. — See notes 1, 2.

Agent Transacting Business as Principal. — See note 3.

**1011.** 12. Accounting Between Partners — *a.* ACCOUNTING WITH RESPECT TO PROFITS — (1) *In General.* — See notes 3, 4.

**1012.** *b.* REIMBURSEMENT FOR LOSSES. — See note 4.

**XXV. ASSIGNEES OF ILLEGAL CONTRACTS** — Nonnegotiable and Past-due Securities. — See note 5.

With Respect to Negotiable Bills and Notes Negotiated Before Maturity. — See note 8.

**1013.** See note 2.

Walsh, 140 Cal. 175; Tate v. Commercial Bldg. Assoc., 97 Va. 74, 75 Am. St. Rep. 770. See also Card v. Moore, 68 N. Y. App. Div. 327, affirmed 173 N. Y. 598.

**Secret Repudiation of Illegal Agreement.** — In an action on a note based on an agreement to stifle bidding, the holder does not show a repudiation of the agreement entitling him to recover by evidence that he secretly violated his contract not to bid. McClelland v. Citizens' Bank, 60 Neb. 92.

**1007.** 4. Public Policy Advanced by Granting Relief. — Morgan City v. Dalton, 112 La. 9; King v. King, 63 Ohio St. 363, 81 Am. St. Rep. 635; Greater Pittsburg Real Estate Co. v. Riley, 210 Pa. St. 283; Gorringe v. Reed, 23 Utah 120, 90 Am. St. Rep. 692; White v. Cook, 51 W. Va. 201, 90 Am. St. Rep. 775.

**1008.** 1. Money Paid to Third Person for Benefit of Party to Illegal Contract. — McMullen v. Hoffman, 174 U. S. 639; Woodson v. Hopkins, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1007, 1008.

5. Division of Profits of Illegal Contract Between Coparties. — Snyder v. Nelson, 101 Ill. App. 619; Alexander v. Barker, 64 Kan. 396, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008; Smith v. Richmond, 114 Ky. 303, 102 Am. St. Rep. 283; Woodson v. Hopkins, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1008. See also the title PARTNERSHIP, 74. 4.

**1009.** 2. Agent Compelled to Account for Property Received from Principal. — Hardy v. Jones, 63 Kan. 8, 88 Am. St. Rep. 223; Smith v. Richmond, 114 Ky. 303, 102 Am. St. Rep. 283; Ruemmeli v. Cravens, 13 Okla. 354, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1009. See also Jageman v. Necco, (Tex. Civ. App. 1900) 50 S. W. Rep. 322.

The Only Legal Remedy open to one who seeks to compel an agent to account for funds furnished him for an illegal purpose is an action to recover so much of the money as was not actually used by the agent to carry such purpose into effect. Benton v. Singleton, 114 Ga. 548.

**1010.** 1. Agent a Participant in Illegal Contract. — Hardy v. Jones, 63 Kan. 8, 88 Am. St. Rep. 223; Edgerly v. Hale, 71 N. H. 138; Portsmouth Brewing Co. v. Mudge, 68 N. H. 462.

2. Accounting Refused. — See Woodson v. Hopkins, (Miss. 1905) 37 So. Rep. 1000, overruling the Mississippi cases cited to the contrary proposition in 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1010, note 1; Rocco v. Frapoli, 50 Neb. 665; Ruemmeli v. Cravens, 13 Okla. 342. See, however, Overholt v. Burbridge, 28 Utah 408. Compare Alexander v. Barker, 64 Kan. 396.

3. Agent Transacting Business as Principal. — See Wakefield v. Farnum, 170 Mass. 422.

**1011.** 3. Accounting Between Partners with Respect to Illegally Executed Contracts. — Smith v. Richmond, 114 Ky. 303, 102 Am. St. Rep. 283; Woodson v. Hopkins, (Miss. 1905) 37 So. Rep. 1000, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011.

**Illegal Conduct of One Partner.** — Where a partnership is established for the conduct of a legal business, an innocent member is not deprived of his right to compel his partner to account for profits by reason of the fact that the latter was guilty of illegal practices in the transaction of the partnership business. Vantine v. Hilands, 131 Fed. Rep. 124.

4. Purpose of Business of Partnership Illegal. — McMullen v. Hoffman, 174 U. S. 639. See, however, Card v. Moore, 68 N. Y. App. Div. 327, affirmed 173 N. Y. 598; Jennings v. Chute, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 39.

**1012.** 4. Reimbursement for Losses. — Safery v. Mayer, (1901) 1 K. B. 11, 83 L. T. N. S. 394, 49 W. R. 51, 64 J. P. 740; McDonald v. Buckstaff, 56 Neb. 88.

5. Nonnegotiable Securities. — Jones v. Dannenberg Co., 112 Ga. 426; Dickson v. Kittson, 75 Minn. 168, 74 Am. St. Rep. 447.

8. Bona Fide Holder of Negotiable Paper Not Affected by Illegality in Inception. — Northern Nat. Bank v. Arnold, 187 Pa. St. 356.

**1013.** 2. Holder with Notice Cannot Recover. — Deering v. Cunningham, 63 Kan. 174; Murray v. Haldorn, 25 Mont 218; Reed v.



**1013. XXVI. THE DEFENSE OF ILLEGALITY — 1. Right of Party to Allege Illegality.** — See note 3.

**1014. 2. Waiver or Estoppel to Assert Defense — a. WAIVER — (1) In General.** — See note 1.

(2) *Failure to Rely on Illegality as a Defense.* — See note 2.

**1015. (3) Duty of Court Sua Sponte to Take Notice of Illegality.** — See note 1.

b. **ESTOPPEL.** — See note 2.

**3. Evidence — a. ADMISSIBILITY OF PAROL EVIDENCE TO SHOW ILLEGALITY OF WRITTEN CONTRACT.** — See note 5.

**1016. b. PRESUMPTION AND BURDEN AND QUANTUM OF PROOF.** — See notes 1, 2, 3.

Brewer, 90 Tex. 144, *affirming* (Tex. Civ. App. 1896) 36 S. W. Rep. 99, and holding that a partner is charged with notice of the facts relating to a transaction with the firm.

**1013. 3. Right of Defendant to Set up Defense of Illegality.** — McMullen v. Hoffman, 174 U. S. 639; William Wilcox Mfg. Co. v. Brazos, 74 Conn. 208; Fields v. Brown, 188 Ill. 111; Pinney v. Concordia First Nat. Bank, 68 Kan. 223; Hardie v. Scheen, 110 La. 612; Somers v. Johnson, 70 N. J. L. 695, *following* Wyckoff v. Weaver, 66 N. J. L. 648; Culp v. Love, 127 N. Car. 457; Haddock v. Salt Lake City, 23 Utah 521; Burck v. Abbott, 22 Tex. Civ. App. 216.

**The Purchaser Pendente Lite of Property Distrained for Rent** may set up the illegality of the lease to the same extent as the lessee himself. Burton v. Dupree, 19 Tex. Civ. App. 275.

**1014. 1. Cannot Waive Defense of Illegality.** — McMullen v. Hoffman, 174 U. S. 639; Beasley v. Texas, etc., R. Co., 191 U. S. 492; Western Union Tel. Co. v. Young, 138 Ala. 244, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1014; Gansler v. Penland, 125 N. Car. 578; Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873; Reed v. Johnson, 27 Wash. 42; Minnesota Sandstone Co. v. Clark, 35 Wash. 466.

**Appeal.** — In some jurisdictions it is held that the illegality of the contract upon which an action is instituted may be asserted for the first time on appeal. Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466; Cullison v. Downing, 42 Oregon 377; Camp v. Bruce, 96 Va. 521, 70 Am. St. Rep. 873. But see Snyder v. Nelson, 101 Ill. App. 619.

In *New York*, however, the contrary is held. New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co., 180 N. Y. 280, *reversing* 92 N. Y. App. Div. 427, and *following* Purdy v. Erie R. Co., 162 N. Y. 42; Dr. David Kennedy Corp. v. Kennedy, 165 N. Y. 353.

**2. Illegality Need Not Be Specially Pleaded in Defense.** — Benton v. Singleton, 114 Ga. 548; Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466; Fisher v. Hampton Transp. Co., 136 Mich. 218; Baird v. Sheehan 38 N. Y. App. Div. 7, *affirmed* 166 N. Y. 631; Dunham v. Hastings Pavement Co., 56 N. Y. App. Div. 244, *rehearing denied* 57 N. Y. App. Div. 426; Drake v. Lauer, 93 N. Y. App. Div. 86, *affirmed* 182 N. Y. 533; Reed v. Johnson, 27 Wash. 42. See, however, McClure v. Uhlman, 102 Mo. App. 607; Horton v. Rohlf, (Neb. 1903) 95 N. W. Rep. 36; Minnesota Sandstone Co. v. Clark, 35 Wash. 466.

**1015. 1. Duty of Court to Dismiss Action on Illegal Contract.** — *United States.* — McMullen v. Hoffman, 174 U. S. 639; Beasley v. Texas, etc., R. Co., 191 U. S. 492.

*California.* — De Leonis v. Walsh, 140 Cal. 175, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015.

*Illinois.* — Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466; Prieske v. North Chicago St. R. Co., 82 Ill. App. 256.

*Louisiana.* — Hardie v. Scheen, 110 La. 612.

*Maryland.* — Baltimore High Grade Brick Co. v. Amos, 95 Md. 602, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015.

*Missouri.* — American Cent. Ins. Co. v. Chicago, etc., R. Co., 74 Mo. App. 89.

*New York.* — Baird v. Sheehan, 166 N. Y. 631, *affirming* 38 N. Y. App. Div. 7; Veazey v. Allen, 173 N. Y. 359.

*North Carolina.* — Gansler v. Penland, 125 N. Car. 578.

*North Dakota.* — Drinkall v. Movius State Bank, 11 N. Dak. 17, 95 Am. St. Rep. 693, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015.

*Washington.* — Reed v. Johnson, 27 Wash. 42; Minnesota Sandstone Co. v. Clark, 35 Wash. 466.

*Canada.* — Consumers' Cordage Co. v. Connelly, 31 Can. Sup. Ct. 244.

**2. Estoppel.** — Western Union Tel. Co. v. Young, 138 Ala. 244, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; Dickson v. Kittson, 75 Minn. 168, 74 Am. St. Rep. 447; Robison v. Wolf, 27 Ind. App. 683; Weed v. Cumming, 12 Pa. Super. Ct. 412, *affirmed* 198 Pa. St. 442; Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 79 Am. St. Rep. 960; Reed v. Johnson, 27 Wash. 42.

**5. Parol Evidence Held Admissible to Prove Illegality in Written Contract.** — Lytle v. Newell, (Ky. 1902) 68 S. W. Rep. 118; Detroit Salt Co. v. National Salt Co., 134 Mich. 103; McDonald v. Born, 135 Mich. 177; Sedalia Board of Trade v. Brady, 78 Mo. App. 585, 2 Mo. App. Rep. 301; Rice v. National Bank of Commerce, 98 Mo. App. 696; Corn Exch. Nat. Bank v. Jansen, (Neb. 1903) 97 N. W. Rep. 814; Hess v. Allen, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 393; Dunham v. Hastings Pavement Co., 56 N. Y. App. Div. 244, *rehearing denied* 57 N. Y. App. Div. 426; Sanger v. Miller, 26 Tex. Civ. App. 111. And see the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, **199. 5; CONSIDERATION**, **767 et seq.**, **797. 4. 5.**

**1016. 1. Presumption in Favor of Legality.** —

**1019. IMBECILE — IMBECILITY.** — See note 3.**1020. IMMEDIATE — IMMEDIATELY.** — See note 1.**1021.** See notes 1, 2, 3.**1022.** See note 1.

*Hocker v. Western Union Tel. Co.*, 45 Fla. 363; *Dunlap v. Lebus*, 112 Ky. 237; *Doty v. Doty*, (Ky. 1904) 80 S. W. Rep. 803; *Knut v. Nutt*, 83 Miss. 365; *Horton v. Rohlf*, (Neb. 1903) 95 N. W. Rep. 36; *Burgess v. Burgess*, 17 S. Dak. 44; *Waring v. Loomis*, 35 Wash. 85.

**1016. 2. Burden of Proof.** — *Frantz v. Harper*, 130 Cal. xviii, 62 Pac. Rep. 602; *Page v. Hieronymus*, 192 Ill. 546; *Shaulis v. Buxton*, 115 Iowa 425; *Brown v. Newell*, 64 S. Car. 27; *Nitro Phosphate Syndicate v. Johnson*, 100 Va. 774; *Stickney v. Hughes*, 12 Wyo. 397.

If the Contract Is Illegal on Its Face the burden of showing facts relieving the illegality is, of course, upon the party asserting the validity of the contract. *Jangraw v. Perkins*, 76 Vt. 127, 104 Am. St. Rep. 917.

**3. Quantum of Proof.** — In *U. S. Fidelity, etc., Co. v. Charles*, 131 Ala. 658, a reasonable preponderance of the evidence was held to be sufficient.

**1019. 3. Imbecile.** — *Calderon v. Martin*, 50 Ia. Ann. 1153.

**Imbecility.** — *State v. Palmer*, 161 Mo. 152.

**1020. 1. Instantly, Directly, Etc.** — *Fidelity, etc., Co. v. Courtney*, (C. C. A.) 103 Fed. Rep. 599; *National Surety Co. v. Long*, (C. C. A.) 125 Fed. Rep. 887; *Employers' Liability Assur. Corp. v. Light, etc., Co.*, 28 Ind. App. 437; *Eldridge v. Knight*, 11 N. Dak. 552.

**Directly.** — See *People v. Kingston*, 53 N. Y. App. Div. 58.

**Immediately and Forthwith.** — *Fidelity, etc., Co. v. Courtney*, (C. C. A.) 103 Fed. Rep. 599.

**Twenty-four Hours** held too long where an insurance agent was called upon for an *immediate* report, where it appeared that the report could have been made in much shorter time.

*State L. Ins. Co. v. Schwarzkopf*, 109 Mo. App. 383.

**1021. 1. Hartford F. Ins. Co. v. Nelson, 64 Kan. 115.**

**2. Relative Term.** — *Inman v. Barnum*, 115 Ga. 117; *Pool v. Warren County*, 123 Ga. 205 (hearsay evidence rule); *Matter of Hatch*, 74 N. Y. App. Div. 248.

**3. Rhode Island Hospital Trust Co. v. Harris**, 20 R. I. 160.

**Chattel Mortgage.** — *Hardcastle v. Stiles*, 70 N. J. L. 828.

**1022. 1. Reasonable Time.** — *Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co.*, 118 Iowa 729; *Fidelity, etc., Co. v. Courtney*, 186 Md. 342; *Leavitt v. S. D. Mercer Co.*, 64 Neb. 31; *Ward v. Maryland Casualty Co.*, 71 N. H. 262; *Remington v. Fidelity, etc., Co.*, 27 Wash. 429.

**Immediate Delivery.** — *Fraudulent Sales.* — See *Grant v. Griffith*, 39 N. Y. App. Div. 107.

**Fire Insurance.** — *Taber v. Royal Ins. Co.*, 124 Ala. 681; *Solomon v. Continental F. Ins. Co.*, 160 N. Y. 595.

**In Accident Insurance.** — *Smith, etc., Mfg. Co. v. Travelers' Ins. Co.*, 171 Mass. 357; *Mandell v. Fidelity, etc., Co.*, 170 Mass. 173; *Woodmen Acc. Assoc. v. Pratt*, 62 Neb. 673; *Ward v. Maryland Casualty Co.*, 71 N. H. 262; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529; *Munz v. Standard L., etc., Ins. Co.*, 26 Utah 69; *Horsfall v. Pacific Mut. L. Ins. Co.*, 32 Wash. 132.

**Employer's Liability Insurance.** — *Employers Liability Assur. Corp. v. Light, etc., Co.*, 28 Ind. App. 437.

**Death by Wrongful Act.** — *Conley v. Portland Gas Light Co.*, 96 Me. 281.

## IMMIGRATION.

**1025. I. DEFINITION.** — See note 1.**II. POWER OF CONGRESS.** — See note 2.**1026. III. REGULATION OF IMMIGRATION.** — See note 1.**1027. Conclusiveness of Officer's Decision.** — See note 1.

**1025. 1. Immigration.** — *U. S. v. Burke*, 99 Fed. Rep. 895; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375.

**2. Power of Congress.** — *Fok Yung Yo v. U. S.*, 185 U. S. 296; *Japanese Immigrant Case*, 189 U. S. 86; *U. S. v. Williams*, 194 U. S. 279.

A Sensible Construction should be given to immigration statutes. *U. S. v. Burke*, 99 Fed. Rep. 895. See also *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375.

**1026. 1. Who Is an Alien Immigrant.** — *Members of the Crew of a Vessel*, entering the ports of the United States under contracts made out of the country to labor on the vessel and to sail again with it, are not alien immigrants. *U. S. v. Burke*, 99 Fed. Rep. 895;

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*The Wife of a Naturalized Citizen Whose Marriage Is Illegal* by the laws of the United States, though legal in the country where it was contracted, is an alien immigrant, as is also a child of the marriage. *U. S. v. Rodgers*, 109 Fed. Rep. 886.

**Aliens Suffering with Contagious Disease — Stowaways.** — The immigration statute making it unlawful for transportation companies to bring into the United States any alien afflicted with a loathsome or dangerous contagious disease, applies to persons brought over as passengers or voluntarily, and not to stowaways. *Cunard Steamship Co. v. Stranahan*, 134 Fed. Rep. 318.

**1027. 1. Conclusiveness.** — See generally, on

**1028.** See note 2.

**IMMINENT.**—See note 3.

**[IMMORAL ACT, ETC.]**—See note 3a.]

**IMMOVABLE.**—See note 4.

**IMMUNITY.**—See note 5.

**1029. IMPAIR.**—See note 1.

the question of the power of Congress to vest in immigration officers the final authority to pass upon the question of the exclusion of immigrants, the following cases: *Fok Yung Yo v. U. S.*, 185 U. S. 296; *Lee Gon Yung v. U. S.*, 185 U. S. 306; *Lee Lung v. Patterson*, 186 U. S. 168, *affirming* 102 Fed. Rep. 132; *Chin Bak Kan v. U. S.*, 186 U. S. 193; *Chin Ying v. U. S.*, 186 U. S. 202; *Japanese Immigrant Case*, 189 U. S. 86; *U. S. v. Sing Tuck*, 194 U. S. 161; *U. S. v. Williams*, 194 U. S. 279; *U. S. v. Ju Toy*, 198 U. S. 253; *U. S. v. Chin Fee*, 94 Fed. Rep. 828; *In re Yamasaka*, 95 Fed. Rep. 652; *In re Way Tai*, 96 Fed. Rep. 484; *In re Ota*, 96 Fed. Rep. 487; *In re Lee Ping*, 104 Fed. Rep. 678; *U. S. v. Wong Soo Bow*, 112 Fed. Rep. 416; *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614; *U. S. v. Lee Huen*, 118 Fed. Rep. 442; *In re Neuwirth*, 123 Fed. Rep. 347; *U. S. v. Lue Yee*, 124 Fed. Rep. 303; *In re Moy Quong Shing*, 125 Fed. Rep. 641; *Lavin v. Le Fevre*, (C. C. A.) 125 Fed. Rep. 693; *Hopkins v. Fachant*, (C. C. A.) 130 Fed. Rep. 839; *Pearson v. Williams*, (C. C. A.) 136 Fed. Rep. 734. See also the title *HABEAS CORPUS*, 181. 2.

**Citizenship.**—Congress has the power to vest in executive officers of the government the final authority to pass upon the question whether a person sought to be excluded under the immigration laws is a citizen of the United States. *U. S. v. Ju Toy*, 198 U. S. 253.

**Whether the Person Excluded Is an Alien**

**Within the Meaning of the Immigration Act of March 3, 1891**, 26 U. S. Stat. at L. 1084, and amendments, is a question reviewable by the courts. *Gonzales v. Williams*, 192 U. S. 1; *U. S. v. Burke*, 99 Fed. Rep. 895; *In re Di Simone*, 108 Fed. Rep. 942; *In re Neuwirth*, 123 Fed. Rep. 347; *In re Kleibs*, 128 Fed. Rep. 656; *In re Lea*, 126 Fed. Rep. 234; *U. S. v. Williams*, 132 Fed. Rep. 894.

**1028. 2. Prostitution—Construction of Statute.**—See *Lang v. U. S.*, (C. C. A.) 133 Fed. Rep. 201; *In re Guayde*, 112 Fed. Rep. 415.

3. See *State v. Smith*, 43 Oregon 109.

3a. The collection of alms on false and fraudulent pretenses is an *immoral act* within the meaning of the Clergy Discipline Act 1892. *Fitzmaurice v. Hesketh*, (1904) A. C. 266.

Under the Clergy Discipline Act 1892, § 2, habitual swearing and ribaldry is *immoral conduct* and an offense, but it is established by evidence of occasional use of language of that character. *Moore v. Oxford*, (1904) A. C. 283.

**4. Immovable Property Includes Lands and Chattels Real.**—*Mt. Carmel Fruit Co. v. Webster*, 140 Cal. 183.

**5. Immunities—Exemption from Taxation.**—*Bancroft v. Wicomico County*, 121 Fed. Rep. 874.

**1029. 1. Impair.**—*Gladney v. Sydnor*, 172 Mo. 318.

## IMPAIRMENT OF OBLIGATION OF CONTRACTS.

BY H. N. ELDRIDGE.

### 1032. III. WHAT ARE CONTRACTS IN THE CONSTITUTIONAL SENSE—

1. In General.—See note 5.

2. Obligations Imposed by Law.—See note 6.

### 1033. 7. Grants of Exclusive Privileges.—See notes 6, 7.

**1032. 5. Invalid Contract Not Within Protection of Clause.**—*New York L. Ins. Co. v. Cuyahoga County*, (C. C. A.) 106 Fed. Rep. 123; *Westminster Water Co. v. Westminster*, 98 Md. 551.

**County Bonds under an Unconstitutional Statute**, being illegal, are not "contracts" within the meaning of the contract clause of the Constitution. *Zane v. Hamilton County*, 189 U. S. 370.

**6. Obligations Imposed by Law.**—*Read v. Mississippi County*, 69 Ark. 365, 86 Am. St. Rep. 202.

**Statutory Provisions for the Creation of a New**

**Corporation upon the Reorganization of a Railroad** by a purchaser of the same at a foreclosure sale, have been held not to constitute a contract. *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17.

**1033. 6.** See *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, 130 Fed. Rep. 180; *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Capital City Light, etc., Co. v. Tallahassee*, 42 Fla. 462.

**7. Little Falls Electric, etc., Co. v. Little Falls**, 102 Fed. Rep. 663; *North Springs Water Co. v. Tacoma*, 21 Wash. 517.

**1036.** 10. Contract Between Stockholders Themselves. — See note 5.

**1037.** 11. Statutory Liability of Stockholders. — See note 2.

12. Salaries and Compensation of Public Officials — Already Earned. —

See note 4.

**1038.** 14. Licenses. — See note 2.

15. Contract with Purchaser at Public Sale — The Purchaser of Either Lands or Chattels at a Public Sale. — See note 4.

16. Judgments — A Judgment Is Not a Contract. — See note 6.

**1039.** See note 1.

19. Necessity for Consideration. — See note 8.

**1040.** 20. Contract or No Contract a Federal Question. — See note 2.

IV. OBLIGATION OF CONTRACT — NATURE AND CHARACTERISTICS. —

See notes 3, 4.

**1041.** The Contract of a State. — See note 3.

**1042.** But the State May Wholly Annul a Municipal Corporation. — See note 2.

V. LEGISLATIVE CONTROL OVER CONTRACTS — 1. Police Power. —

See note 4.

2. Power to Tax. — See note 5.

**1036.** 5. Extent of This Contract. — Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657.

**1037.** 2. Statutory Liability of Stockholders Is Contractual. — Evans v. Nellis, 101 Fed. Rep. 920; Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764; Woodworth v. Bowles, 61 Kan. 569; Barton Nat. Bank v. Atkins, 72 Vt. 33.

4. Salaries of Public Officers. — Perry County v. Lindemann, (Ind. 1905) 73 N. E. Rep. 912.

**1038.** 2. Licenses Not Contracts. — Williams v. Wingo, 177 U. S. 601; Baker v. Lexington, (Ky. 1899) 53 S. W. Rep. 16; Wallace v. Reno, 27 Nev. 71.

4. Leet v. Armbruster, 143 Cal. 667, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038.

6. Judgment Not a Contract. — Wyoming Nat. Bank v. Brown, 9 Wyo. 153. See also Evans-Snyder-Buel Co. v. McFadden, (C. C. A.) 105 Fed. Rep. 293, affirmed 185 U. S. 505.

**1039.** 1. See Ferry v. Campbell, 110 Iowa 290.

8. Consideration Necessary to Bring Contract Within the Protection of the Clause. — Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379. See also Rochester v. Rochester R. Co., 182 N. Y. 99.

**1040.** 2. The Formation of the Contract under the Law Is a Federal Question. — Walsh v. Columbus, etc., R. Co., 176 U. S. 469; Wilson v. Standefer, 184 U. S. 399; Waggoner v. Flack, 188 U. S. 600; Board of Liquidation v. Louisiana, 179 U. S. 622, affirming State v. Board of Liquidation, 51 La. Ann. 1849; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, dismissing writ of error, 78 Minn. 39; Mercantile Trust, etc., Co. v. Columbus Waterworks Co., 130 Fed. Rep. 180.

3. Obligation of Contracts Defined. — Bedford v. Eastern Bldg., etc., Assoc., 181 U. S. 227; Ex p. Folsom, 131 Fed. Rep. 496; Lamb v. Powder River Live Stock Co., (C. C. A.) 132 Fed. Rep. 434; Smith v. Jennings, 67 S. Car. 324.

4. Definition Further Considered. — See State Sav. Bank v. Matthews, 123 Mich. 56; Westport v. Mulholland, 159 Mo. 86; Craig v. Herzman, 9 N. Dak. 140; Palmer v. Laberee, 23 Wash. 409; Howard v. Ross, 38 Wash. 627.

**1041.** 3. State Bound by Contract — Relinquishment of Sovereignty. — See also State v. Barret, 25 Mont. 119.

**1042.** 2. Little River Tp. v. Reno County, 65 Kan. 9; Atty.-Gen. v. Lowrey, 131 Mich. 639; Board of Education v. Board of Education, 76 N. Y. App. Div. 355, affirmed 179 N. Y. 556. See also Saginaw County v. Hubinger, (Mich. 1904) 100 N. W. Rep. 261.

4. United States. — New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453; Manigault v. Ward, 123 Fed. Rep. 707.

California. — Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95.

Indiana. — Bowlby v. Kline, 28 Ind. App. 659.

Iowa. — State v. Meek, 112 Iowa 338, 84 Am. St. Rep. 342.

Kansas. — Board of Education v. Phillips, 67 Kan. 549, 100 Am. St. Rep. 475.

Kentucky. — Com. v. Mobile, etc., R. Co., (Ky. 1901) 64 S. W. Rep. 451; Com. v. Reinecke Coal Min. Co., (Ky. 1904) 79 S. W. Rep. 287.

Mississippi. — Illinois Cent. R. Co. v. Copiah County, 81 Miss. 685.

Nebraska. — Lincoln St. R. Co. v. Lincoln, 61 Neb. 109.

New York. — New York v. Herdje, 68 N. Y. App. Div. 370; Lehigh Valley R. Co. v. Adam, 70 N. Y. App. Div. 427, reversed 176 N. Y. 420.

Ohio. — Baltimore, etc., R. Co. v. Kreager, 61 Ohio St. 312.

Pennsylvania. — Com. v. Keary, 198 Pa. St. 500.

Tennessee. — State v. Lebanon, etc., Turnpike Co., (Tenn. Ch. 1900) 61 S. W. Rep. 1096.

Vermont. — Clarendon v. Rutland R. Co., 75 Vt. 6.

West Virginia. — Mason v. Ohio River R. Co., 51 W. Va. 183.

5. Taxation. — New York v. Tax Com'rs, 199 U. S. 1, affirming 174 N. Y. 417; Wicomico County v. Bancroft, (C. C. A.) 135 Fed. Rep. 977, affirming 121 Fed. Rep. 874; Detroit, etc., R. Co. v. Powers, 138 Fed. Rep. 264; State v. Alabama Bible Soc., 134 Ala. 632; Bennett v. Nichols, (Ariz. 1905) 80 Pac. Rep. 392; Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300; State v. Westminster College, 175 Mo. 52.

An Agreement of an Employee to Serve His

**1043.** 3. Power of Eminent Domain. — See note 1.

4. Power to Regulate Commerce. — See note 4.

5. Reserved Power to Amend or Repeal Corporate Charters — Under the Rule Announced in the Dartmouth College Case. — See notes 6, 8, 9.

**1044.** VI. SOURCES OF LAWS AFFECTING CONTRACTS — 1. In General. — See note 9.

**1046.** 7. Laws of State Within Contract Clause — *c.* ORDINANCES. — See note 3.

*d.* JUDICIAL DECISIONS. — See note 4.

**1047.** VII. HOW OBLIGATION MAY BE IMPAIRED — 1. In General — Direct Impairment. — See notes 1, 2, 3.

**1048.** 2. Contracts of State. — See note 2.

3. Contracts of Municipality — By Impairing the Power of a Municipality. — See note 6.

Employer for a Specific Sum Is Not Impaired by an Occupation Tax subsequently laid upon the employee. *Kehrer v. Stewart*, 197 U. S. 60, *affirming* 117 Ga. 969.

A Transfer or Succession Tax, not being a direct tax on property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States. *Orr v. Gilman*, 183 U. S. 278.

**1043.** 1. Eminent Domain. — *Atty.-Gen. v. Williams*, 178 Mass. 330; *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107; *Nashville, etc., Turnpike Co. v. Davidson County*, 106 Tenn. 258.

4. *State v. Barret*, 25 Mont. 119, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1043.

6. *Looker v. Maynard*, 179 U. S. 46.

8. See *Iversen v. Minnesota Mut. L. Ins. Co.*, 137 Fed. Rep. 268; *Marshalltown Light, etc., Co. v. Marshalltown*, 127 Iowa 637; *Allen v. Ajax Min. Co.*, 30 Mont. 490; *C. H. Venner Co. v. U. S. Steel Corp.*, 116 Fed. Rep. 1012; *Polk v. Mutual Reserve Fund L. Assoc.*, 137 Fed. Rep. 273.

9. Power of Alteration and Amendment Not Without Limit. — *San Joaquin, etc., Canal, etc., Co. v. Stanislaus County*, 113 Fed. Rep. 930, *reversed* on other grounds 192 U. S. 201.

The reservation of the power to add to, alter, amend, or repeal a charter authorizes the proper legislative body to make any addition, alteration, or amendment which does not impair vested rights or substantially interfere with the accomplishment of the main purpose of the charter. *Union Pac. R. Co. v. Mason City, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 230, *affirming* 124 Fed. Rep. 409.

**1044.** 9. The Contract Clause Is Not Addressed to the National Legislature but to the legislatures of the several states. *Evans-Snyder-Buel Co. v. McFadden*, (C. C. A.) 105 Fed. Rep. 293, *affirmed* 185 U. S. 505; *Ansley v. Ainsworth*, 4 Indian Ter. 308.

**1046.** 3. Municipal Ordinances. — *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, *dismissing writ of error*, 78 Minn. 39; *Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co.*, 99 Fed. Rep. 812; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. Rep. 23; *Little Falls Elec-*

*tric, etc., Co. v. Little Falls*, 102 Fed. Rep. 663; *American Waterworks, etc., Co. v. Home Water Co.*, 115 Fed. Rep. 171; *Cleveland Electric R. Co. v. Cleveland*, 135 Fed. Rep. 368; *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300; *Freeport Water Co. v. Freeport*, 186 Ill. 179; *Rushville v. Rushville Natural Gas Co.*, (Ind. 1905) 73 N. E. Rep. 87; *Neill v. Gates*, 152 Mo. 585; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739.

4. Judicial Decisions. — *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66; *Shepherd's Point Land Co. v. Atlantic Hotel*, 134 N. Car. 397. See also *Graves v. Moore County*, 135 N. Car. 49, and *compare Alferitz v. Porgwardt*, 126 Cal. 201.

**1047.** 1. Laws in Force at Making of Contract. — *McCann v. New York*, 52 N. Y. App. Div. 361, *quoting* to end of paragraph 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1047, *affirmed* 166 N. Y. 587; *Barrett v. Millikin*, 156 Ind. 510, 83 Am. St. Rep. 220; *Small v. Hammes*, 156 Ind. 556; *Supreme Lodge, etc., v. Hunziker*, (Ky. 1905) 87 S. W. Rep. 1134; *Corbin v. Houlehan*, (Me. 1905) 51 Atl. Rep. 131; *Potter County Water Co. v. Austin*, 206 Pa. St. 297. See also *Hecht v. Wright*, 31 Colo. 117.

2. Subsequent Law Annuling Contract. — *Ludlow v. Peck-Williamson Heating, etc., Co.*, 116 Ky. 608; *New York Sanitary Utilization Co. v. Health Dept.*, 61 N. Y. App. Div. 106, *affirming* (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 577.

An Obligation Is Impaired when it is made worse for either party thereto. *Haefelein v. Jacob*, 106 N. Y. App. Div. 163.

3. Taking Away the Absolute Right of an Incapacitated Teacher to an Annuity and making the right to the annuity depend on the action of a board of trustees, impairs the obligation of a contract. *Ball v. Teachers' Retirement Fund*, 71 N. J. L. 64.

A Statute Changing the Term of County Drainage Bonds from twenty years to not more than seven years impairs the obligation of the bonds. *May v. Cass County*, 12 N. Dak. 137.

**1048.** 2. Withdrawal of Consent to Be Sued. — See *Wheeler v. Board of Control*, (Mich. 1904) 100 N. W. Rep. 394.

6. A State May Abrogate the Provisions of a Contract Between a Municipality and a railroad company with the assent of the latter. *Worcester v. Worcester Consol. St. R. Co.*, 196 U. S. 539.

**1049.** 4. Grants Generally. — See notes 1, 2.

5. Corporate Charters. — See notes 6, 8.

**1050.** 6. Changing Rules of Evidence — *a.* GENERAL RULE — NO VESTED RIGHT IN RULES OF EVIDENCE. — See note 1.

**1052.** 7. Changing Remedies — *a.* IN GENERAL. — See notes 2, 3.

**1053.** See notes 1, 2.

*b.* INCREASE OF EFFECTIVENESS OF REMEDIES NOT FORBIDDEN.

— See note 3.

**1054.** *c.* PROVISIONAL REMEDIES — (1) *Attachment and Garnishment.*  
— See note 2.

**1049.** 1. Grants Generally. — Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300; State v. Bridges, 22 Wash. 64, 79 Am. St. Rep. 914.

2. Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300; Foster v. Frankfort, etc., Turnpike Road Co., (Ky. 1901) 65 S. W. Rep. 840; Northwestern Telephone Exch. Co. v. Minneapolis, 81 Minn. 140; Gregg v. Granby Min., etc., Co., 164 Mo. 616; Austin v. Cahill, (Tex. 1905) 88 S. W. Rep. 542.

6. Corporate Charters. — State v. Lebanon, etc., Turnpike Co., (Tenn. Ch. 1900) 61 S. W. Rep. 1096.

8. Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 303 [citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049]; Sunset Telephone, etc., Co. v. Medford, 115 Fed. Rep. 202; Terre Haute, etc., R. Co. v. State, 159 Ind. 438; Com. v. Mobile, etc., R. Co., (Ky. 1901) 64 S. W. Rep. 451.

An Ordinance Reducing the Rate of Charges to Be Made by a Public Service Corporation fixed by a prior contract has been held to impair the obligation of a contract. Cleveland v. Cleveland City R. Co., 194 U. S. 517; Cleveland v. Cleveland Electric R. Co., 194 U. S. 538; Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368. See also Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. Rep. 720; People's Gas Light, etc., Co. v. Chicago, 194 U. S. 1, affirming 114 Fed. Rep. 384.

**1050.** 1. No Vested Right in Rules of Evidence. — People v. Rose, 207 Ill. 352; Hunziker v. Supreme Lodge, etc., (Ky. 1904) 78 S. W. Rep. 201.

**1052.** 2. Form of Remedy Not Material. — Wilson v. Standefer, 184 U. S. 399; *In re* Rhoads, 98 Fed. Rep. 399; Evans v. Nellis, 101 Fed. Rep. 920; Phelps-Bigelow Windmill Co. v. North American Trust Co., 62 Kan. 529; Wilson v. Simon, 91 Md. 1, 80 Am. St. Rep. 427; Johnston v. Mutual Reserve L. Ins. Co., (N. Y. City Ct. Tr. T.) 43 Misc. (N. Y.) 251; Sims v. Steadman, 62 S. Car. 300; Oshkosh Water Works Co. v. Oshkosh, 109 Wis. 208, 95 Am. St. Rep. 870.

Where Remedy Is Part of Obligation of Contract. — A distinction exists between a simple remedy, which it is within the legislative power to change, and a remedy which is part of the obligation of a contract, and which it is not within legislative power to change without impairing or lessening the value of the contract. Canadian, etc., Mortg., etc., Co. v. Blake, 24 Wash. 102. See also Weist v. Wuller, 210 Pa. St. 143; Standifer v. Wilson, 93 Tex. 232.

Creditor Deprived of Remedy Giving Him In-

equitable Advantage. — A creditor has no vested right in any particular remedy, even though that remedy may give him an inequitable advantage. Flagg v. Locke, 74 Vt. 320.

3. Effectiveness of Remedy. — Straw, etc., Mfg. Co. v. L. D. Kilbourne Boot, etc., Co., 80 Minn. 125; Burrows v. Vanderbergh, (Neb. 1903) 95 N. W. Rep. 57.

A Statute Requiring Notice to Landowners in Condemnation Proceedings passed subsequently to the granting of a railroad charter authorizing the railroad company to condemn land under a then existing statute which did not require notice to landowners, was held to impair the obligation of the charter, as it affected the remedy. Chicago, etc., R. Co. v. Abbott, 215 Ill. 416.

**1053.** 1. Obligor May Not Be Left Wholly Without Remedy. — Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437; Hicks v. Cleveland, (C. C. A.) 106 Fed. Rep. 459; Padgett v. Post, (C. C. A.) 106 Fed. Rep. 600; *Ex p.* Folsom, 131 Fed. Rep. 496; Condon v. Eureka Springs, 135 Fed. Rep. 566; Board of Education v. Henderson, 126 N. Car. 689; Standifer v. Wilson, 93 Tex. 232. See also Webster v. Bowers, 104 Fed. Rep. 627.

2. Remedy Available Must Be of Equal Coercive Force with One Existing at Time of Contract. — Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764; Ft. Madison v. Ft. Madison Water Co., (C. C. A.) 134 Fed. Rep. 214; Folsom v. Greenwood County, (C. C. A.) 137 Fed. Rep. 449, reversing 130 Fed. Rep. 730.

Enforcement of Judgment Unreasonably Restricted. — If a subsequent law, instead of directly abrogating a contract, unreasonably restricts or oppressively burdens the enforcement of a judgment rendered thereon, it is none the less obnoxious to the constitutional prohibition against impairing contracts. Lamb v. Powder River Live Stock Co., (C. C. A.) 132 Fed. Rep. 434. See also Devalinger v. Maxwell, 4 Penn. (Del.) 185.

3. Effectiveness of Remedy May Be Increased. — Waggoner v. Flack, 188 U. S. 595, affirming 21 Tex. Civ. App. 449; People v. Buffalo, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 170, affirmed 63 N. Y. App. Div. 563.

**1054.** 2. Remedy by Garnishment. — A statute which absolutely exempts to married men or heads of families their earnings for personal services rendered within sixty days next preceding the levy of execution, by garnishment or otherwise, being reasonable, and directed to the remedy, and not to the right, does not impair the obligation of contracts entered into prior to its passage. Kirkman v. Bird, 22 Utah 100, 83 Am. St. Rep. 774.

- 1058.** 9. Insolvent Laws. — See note 4.  
 10. Recording Acts. — See note 5.  
 11. Curative Statutes. — See note 6.  
 12. Statutes of Limitation. — See note 7.  
**1059.** 15. Who May Complain of Impairment. — See note 3.  
**1060.** IMPEACH. — See note 3.  
**1073.** IMPERTINENCE. — See note 7.  
**1074.** IMPLEMENT. — See note 2.  
 IMPLICATION. — See note 3.

**1058.** 4. Statute Making It a Penal Offense for Officers of Insolvent Building Association to Receive Dues. — A statute making it a felony for any officer of any mutual saving fund, loan, and building association to receive, or assent to the reception of, any money or other valuable thing in payment of any premium, dues, and fees due or owing to said association, after knowledge of the fact that the association is insolvent or in failing circumstances, has been held not to violate the impairment clause in the Constitution. *State v. Missouri Guarantee Sav., etc., Assoc.*, 167 Mo. 489, 90 Am. St. Rep. 426.

5. Recording Laws. — *Knights of Maccabees v. Nitsch*, (Neb. 1903) 95 N. W. Rep. 626.

6. *Deitch v. Staub*, (C. C. A.) 115 Fed. Rep. 309; *Petterson v. Berry*, (C. C. A.) 125 Fed. Rep. 902; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Burget v. Merritt*, 155 Ind. 143; *Nottage v. Portland*, 35 Oregon 539, 76 Am. St. Rep. 513; *Swope v. Jordan*, 107 Tenn. 166.

7. Limitation of Actions. — *Wilson v. Iseminger*, 185 U. S. 55; *affirming Clay v. Iseminger*, 187 Pa. St. 108; *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Bradley v. Lightcap*, 201 Ill. 511; *Wooster v. Bateman*, 126 Iowa 552; *Kreyling v. O'Reilly*, 97 Mo. App. 384; *Cranor v. School Dist.*, 81 Mo. App. 152; *Wilson v. Pickering*, 28 Mont. 435.

**1059.** 3. Who May Complain. — *Burke v. Snively*, 208 Ill. 358, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; *Joesting v. Baltimore*, 97 Md. 589. See also *Evans v. Nellis*, 101 Fed. Rep. 920.

An Independent Purchaser at a Mortgage Foreclosure Sale, having no connection whatever with the original contract between the mortgagor and the mortgagee, is not in a position to object to the validity of legislation impairing the obligation of the contract, provided such legislation existed at the time of the purchase. *Hooker v. Burr*, 194 U. S. 415.

**1060.** 3. To Impeach a Witness. — *Smith v. State*, 109 Ga. 479; *Com. v. Welch*, 111 Ky. 535, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

**1073.** 7. *Stokes v. Farnsworth*, 99 Fed. Rep. 836.

**1074.** 2. Examples. — *Desmond v. Young*, 173 Mass. 90. See also *Stemmer v. Scottish Union Ins. Co.*, 33 Oregon 65.

Implements of Husbandry. — As to what constitutes, under the California statute, see *Matter of Slade*, 122 Cal. 434; *Spencer v. Smith*, 121 Cal. 536; *Matter of Klemp*, 119 Cal. 41.

3. Necessary Implication. — *Green v. American Cotton Co.*, 112 Fed. Rep. 744, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074; *Weed v. Scofield*, 73 Conn. 675.

## IMPLIED OR QUASI CONTRACTS.

BY LEO GOODMAN.

**1078.** I. DEFINITION AND NATURE — 1. Contracts Implied in Fact. — See notes 1, 2, 4.

2. Contracts Implied in Law. — See notes 7, 9.

II. IMPLIED CONTRACTS EXCLUDED BY EXPRESS CONTRACTS RELATING TO SAME SUBJECT-MATTER. — See note 10.

**1078.** 1. *Lillard v. Wilson*, 178 Mo. 153, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; *Fitzpatrick v. Dooley*, 112 Mo. App. 165; *Hinkle v. Sage*, 67 Ohio St. 263, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; *Columbus, etc., R. Co. v. Gaffney*, 65 Ohio St. 104; *Rose v. Wollenberg*, 36 Oregon 154; *O'Connell v. King*, 26 R. I. 544.

2. Contracts Implied in Fact and Express Contracts Based on Actual Agreement. — *Hinkle v. Sage*, 67 Ohio St. 256, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; *Columbus, etc., R. Co. v. Gaffney*, 65 Ohio St. 104; *Rose v.*

*Wollenberg*, 36 Oregon 154. See also *Garr v. Cranney*, 25 Utah 193.

4. *Rose v. Wollenberg*, 36 Oregon 154.

7. Contracts Implied in Law — Nature of. — *Lillard v. Wilson*, 178 Mo. 153, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; *Fitzpatrick v. Dooley*, 112 Mo. App. 165; *Columbus, etc., R. Co. v. Gaffney*, 65 Ohio St. 104.

9. *Lillard v. Wilson*, 178 Mo. 153, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; *Columbus, etc., R. Co. v. Gaffney*, 65 Ohio St. 104.

10. Express Excludes Implied Contract —

**1079.** See note 5.

**III. WORK AND SERVICES — 1. Voluntary Services — a. SERVICES RENDERED WITHOUT INTENT TO CHARGE.** — See note 7.

**1080.** See notes 1, 2.

**b. SERVICES RENDERED WITHOUT REQUEST OR SUBSEQUENT PROMISE TO PAY — (1) Statement of Rule.** — See note 3.

**1081. 2. Services Performed at Request of Another — For Party Requesting Services.** — See note 4.

**1082.** See note 1.

**1083. 3. Accepted Services.** — See note 1.

**1084. 4. Services Rendered to Each Other by Members of One Family — a. STATEMENT OF RULE.** — See notes 1, 2, 3, 4.

*United States.* — Schofield v. State Nat. Bank, 38 C. C. A. 179, 97 Fed. Rep. 282; Siegel v. Borland, 191 Ill. 112, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; Ryan v. Dubuque, 112 Iowa 284; Rumford Falls Power Co. v. Rumford Falls Paper Co., 95 Me. 186; Vedder v. Leamon, 70 N. Y. App. Div. 232, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078; Park v. Laurens, 68 S. Car. 218, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078.

**1079. 5. Executed Contracts.** — Zapel v. Ennis, 104 Ill. App. 175; Union El. R. Co. v. Nixon, 99 Ill. App. 502, affirmed 199 Ill. 235; Sanitary Dist. v. McMahon, etc., Co., 110 Ill. App. 510; Leach v. Alphons Custodis Chimney Constr. Co., 110 Ill. App. 338; McArthur Bros. Co. v. Whitney, 202 Ill. 527; Peden v. Scott, (Ind. App. 1905) 73 N. E. Rep. 1099.

**7. Services Rendered Without Intention to Demand Compensation.** — Clary v. Clary, 93 Me. 220; Lillard v. Wilson, 178 Mo. 153, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; Strother v. De Witt, 98 Mo. App. 293; Kaufman Advertising Agency v. Snellenburgh, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 317; DeCesare v. Flauraud, 69 N. Y. App. Div. 299; Pick v. Bartelstone, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 762; Eldred's Estate, 9 Pa. Dist. 420; Wright v. Sheldon, 24 R. I. 336; Von Carlowitz v. Bernstein, 28 Tex. Civ. App. 8.

**1080. 1. Effect of Subsequent Change of Intention.** — Strother v. De Witt, 98 Mo. App. 293.

**2. Clary v. Clary, 93 Me. 220; Pick v. Bartelstone, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 762.**

**Compensation by Will Understood.** — Where there is an understanding that compensation is to be made by will and the same is not made, an action will lie for work and services. Von Carlowitz v. Bernstein, 28 Tex. Civ. App. 8.

**3. Services Rendered Without Request or Promise to Pay.** — Teawalt v. Ramey, 103 Va. 42.

**1081. 4. Requested Services Without Agreement as to Compensation — Louisiana.** — Sully v. Pratt, 106 La. 601.

*Michigan.* — See Shane v. Shearsmith, (Mich. 1904) 100 N. W. Rep. 123.

*Missouri.* — Lillard v. Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; Fitzpatrick v. Dooley, 112 Mo. App. 165; Ireland v. Spickard, 95 Mo. App. 53; Graham v. Rapp, 105 Mo. App. 590; Voerster v. Kunkel, 86 Mo. App. 194.

*New Hampshire.* — Elwell v. Roper, 72 N. H. 585.

*New York.* — Lane v. Calby, 95 N. Y. App. Div. 11; Lozier Motor Co. v. McIntosh, (Supm. Ct. App. T.) 88 N. Y. Supp. 382; Adamo v. Blohm, 97 N. Y. App. Div. 629; Bair v. Hager, 97 N. Y. App. Div. 358; Meislahn v. Irving Nat. Bank, 62 N. Y. App. Div. 231, affirmed 172 N. Y. 631; Shirk v. Brookfield, 77 N. Y. App. Div. 295; Mulligan v. Tobin, (Supm. Ct. App. T.) 87 N. Y. Supp. 406.

*Wisconsin.* — Ladd v. Witte, 116 Wis. 35.

**1082. 1. Failure to Prove Alleged Agreement for Compensation.** — Baumann v. Manhattan Consumers' Brewing Co., 97 N. Y. App. Div. 470; Shirk v. Brookfield, 77 N. Y. App. Div. 295.

**1083. 1. Accepted Services.** — Wilson v. Freedley, 125 Fed. Rep. 962; Aarnes v. Windham, 137 Ala. 513; Coles v. Flack, 90 Ill. App. 545; Smith v. Park, (Ky. 1905) 84 S. W. Rep. 304; Lillard v. Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; Fitzpatrick v. Dooley, 112 Mo. App. 165; Strother v. De Witt, 98 Mo. App. 293; Collins v. Fowler, 62 N. Y. App. Div. 614, affirmed 172 N. Y. 634; McReynolds v. Manger, (Supm. Ct. App. T.) 84 N. Y. Supp. 982; Crane v. Gantung, 89 N. Y. App. Div. 398; Williams v. Williams, 114 Wis. 79; Grotjan v. Rice, 124 Wis. 253.

**Necessary Services to a Lunatic** can be recovered for under a *quantum meruit*. Waldron v. Davis, 70 N. J. L. 788.

**Circumstances Warranting a Promise.** — For services rendered under circumstances which warrant a reasonable expectation that they will be paid for, the law will imply a promise. Hart v. Maloney, 101 N. Y. App. Div. 37; Crane v. Ganung, 89 N. Y. App. Div. 398.

**1084. 1. Services Rendered by Members of Common Family — Alabama.** — Meyers v. Meyers, 141 Ala. 343.

*Georgia.* — Poole v. Baggett, 110 Ga. 822.

*Illinois.* — Chapman v. Chapman, 87 Ill. App. 427; Deppen v. Personette, 93 Ill. App. 513; Dolbear v. Coultas, 94 Ill. App. 55; Boyter v. Atkinson, 96 Ill. App. 580; Neish v. Gannon, 98 Ill. App. 248, affirmed 198 Ill. 219; Gall v. Stark, 98 Ill. App. 121; Martin v. Martin, 101 Ill. App. 640, reversed 202 Ill. 382; Mayer v. Schneider, 112 Ill. App. 628, affirmed 212 Ill. 286.

*Iowa.* — Harrison v. Harrison, 124 Iowa 525.

*Kentucky.* — Compare Dance v. Magruder, (Ky. 1904) 80 S. W. Rep. 1120; Durr v. Durr, (Ky. 1904) 82 S. W. Rep. 581; Smith v. Park, (Ky. 1905) 84 S. W. Rep. 304.

*Massachusetts.* — Spencer v. Spencer, 181 Mass. 471; Marple v. Morse, 180 Mass. 508.



**1084.** Presumption that Services Were Gratuitous Not Conclusive. — See note 5.

**1085.** See note 1.

*b.* APPLICATIONS OF RULE — Parent and Child. — See notes 2, 3, 5, 6.

**1086.** See notes 1, 2.

5. Services Rendered under Mistake. — See note 3.

**1087.** 6. Services Rendered under Unfinished Contract — *a.* WHERE PLAINTIFF WILLFULLY ABANDONS CONTRACT BEFORE COMPLETION — (1) *View that There Can Be No Recovery on a Quantum Meruit* — (a) General Rule and Considerations on Which Based. — See note 1.

*Missouri.* — Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; Bosard *v.* Powell, 79 Mo. App. 184; Voerster *v.* Kunkel, 86 Mo. App. 194; Wood *v.* Flanery, 89 Mo. App. 632; Sloan *v.* Dale, 90 Mo. App. 87; Ireland *v.* Spickard, 95 Mo. App. 53; Shannon *v.* Carter, 99 Mo. App. 134; Fitzpatrick *v.* Dooley, 112 Mo. App. 165; Birch *v.* Birch, 112 Mo. App. 157.

*New York.* — Platt *v.* Hollands, 85 N. Y. App. Div. 231, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; Meehan *v.* Heffernan, 73 N. Y. App. Div. 615; Matter of Sworthout, (Surrogate Ct.) 38 Misc. (N. Y.) 56; Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552.

*North Carolina.* — Hicks *v.* Barnes, 132 N. Car. 146; Stallings *v.* Ellis, 136 N. Car. 69.

*Ohio.* — Hinkle *v.* Sage, 67 Ohio St. 256.

*Pennsylvania.* — Rathbone *v.* Rathbone, 23 Pa. Super. Ct. 297.

*Tennessee.* — Gorrell *v.* Taylor, 107 Tenn. 568.

*Virginia.* — Beale *v.* Hall, 97 Va. 383.

*Washington.* — Morrissey *v.* Faucett, 28 Wash. 52.

*Wisconsin.* — Williams *v.* Williams, 114 Wis. 79.

**1084.** 2. Considerations on Which Rule Based. — Dolbeare *v.* Coultas, 94 Ill. App. 55; Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

Opportunity for Fraud and Temptation to Perjury. — Hinkle *v.* Sage, 67 Ohio St. 262. See also Walker *v.* Taylor, 28 Colo. 233.

3. Rule Applicable to All Degrees of Relationship. — Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

4. Rule Applicable to Persons Not Related.

Walker *v.* Taylor, 28 Colo. 233; Deppen *v.* Personette, 93 Ill. App. 513; Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; Fitzpatrick *v.* Dooley, 112 Mo. App. 165; Gorrell *v.* Taylor, 107 Tenn. 568.

5. Presumption that Services Were Gratuitous Rebuttable. — *Illinois.* — Deppen *v.* Personette, 93 Ill. App. 513; Neish *v.* Gannon, 98 Ill. App. 248, affirmed 198 Ill. 219; Martin *v.* Martin, 101 Ill. App. 640, reversed 202 Ill. 382; Mayer *v.* Schneider, 112 Ill. App. 628, affirmed 212 Ill. 286.

*Minnesota.* — Johanke *v.* Schmidt, 79 Minn. 261.

*Missouri.* — Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; Shannon *v.* Carter, 99 Mo. App. 134; Bosard *v.* Powell, 79 Mo. App. 184; Fitzpatrick *v.* Dooley, 112 Mo. App. 165; Wood *v.* Flanery, 89 Mo. App. 632.

*New Jersey.* — See Waldron *v.* Davis, 70 N. J. L. 788.

*New York.* — Platt *v.* Hollands, 85 N. Y. App. Div. 231; Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552.

*North Carolina.* — Stallings *v.* Ellis, 136 N. Car. 69.

*Ohio.* — Hinkle *v.* Sage, 67 Ohio St. 256.

*Tennessee.* — Gorrell *v.* Taylor, 107 Tenn. 568.

*Washington.* — Morrissey *v.* Faucett, 28 Wash. 52.

*Wisconsin.* — Williams *v.* Williams, 114 Wis. 79; Winter *v.* Greiling, 114 Wis. 378.

"This Presumption Is Not Overcome by statements made by the parent to third persons that the son's services are valuable, or that they will be well paid for, or other like indefinite expressions." Donovan *v.* Driscoll, 116 Iowa 339.

**1085.** 1. Burden of Proof. — Lillard *v.* Wilson, 178 Mo. 153, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; Fitzpatrick *v.* Dooley, 112 Mo. App. 165; Shannon *v.* Carter, 99 Mo. App. 134; Sloan *v.* Dale, 90 Mo. App. 87; Matter of Sworthout, (Surrogate Ct.) 38 Misc. (N. Y.) 56; Platt *v.* Hollands, 85 N. Y. App. Div. 231; Jurling *v.* Garner, 11 Ohio Dec. 439, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084, and quoting all of the text paragraph; Gorrell *v.* Taylor, 107 Tenn. 568.

2. Parent and Child. — Donovan *v.* Driscoll, 116 Iowa 339.

In Missouri it is a question of fact for the jury whether the child's services were intended to be gratuitous or were rendered under an understanding that they were to be remunerated. Lillard *v.* Wilson, 178 Mo. 145.

3. Services Rendered by Parent to Child. — Fitzpatrick *v.* Dooley, 112 Mo. App. 165.

5. Cousins. — Hanly *v.* Potts, 52 W. Va. 263.

6. Brothers and Sisters. — Jurling *v.* Garner, 11 Ohio Dec. 439, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084, and quoting the whole of the text paragraph; Gorrell *v.* Taylor, 107 Tenn. 568.

**1086.** 1. Uncle and Niece or Nephew. — Hicks *v.* Barnes, 132 N. Car. 146.

Evidence Held Sufficient to Overcome Presumption that Services Were Gratuitous. — In Hamilton *v.* Thirston, 93 Md. 213, it was held that, though a nephew could not enforce an express contract within the statute of frauds, he could recover on a quantum meruit for his services, under the evidence adduced.

2. Aunt and Niece or Nephew. — Beale *v.* Hall, 97 Va. 383.

3. Services Performed under Mutual Mistake as to Price. — Russell *v.* Clough, 71 N. H. 171, 93 Am. St. Rep. 507.

**1087.** 1. Rule that Plaintiff Is Entitled to

**1088.** Reason for Rule. — See note 3.

(b) Exceptions to Rule — Building Contracts. — See note 6.

**1089.** (2) *View that Plaintiff Can Recover Value of Services Less Damages Resulting from Breach.* — See note 6.

b. WHERE FULL PERFORMANCE BY PLAINTIFF IS IMPOSSIBLE — Because of Sickness. — See note 7.

**1090.** Destruction of Property on Which Work Is Being Done. — See notes 4, 6.

c. WHERE CONTRACT IS TERMINATED THROUGH DEFAULT OF DEFENDANT — (1) *Statement of Rule* — Simple Contracts. — See note 7.

**1091.** See notes 1, 4, 5.

Contracts under Seal. — See note 6.

(2) *How Rule Affected by Statute of Frauds.* — See note 7.

**1092.** d. WHERE EITHER PARTY HAS RIGHT TO TERMINATE CONTRACT AT ANY TIME. — See note 1.

**Recover Nothing.** — *Homer v. Shaw*, 177 Mass. 1; *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44; *Steinbach v. Pettingill*, 67 N. J. L. 36; *Fry v. Miles*, 71 N. J. L. 293. See also *Barrett v. Raleigh Coal, etc., Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802.

**Illustrations of Rule — Sale of Land.** — Earnest money paid on land cannot be recovered back by the vendee where he, without excuse, refuses to perform his contract. *Steinbach v. Pettingill*, 67 N. J. L. 36.

**1088. 3. Reason for Rule.** — *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44.

**6. Building Contracts — Rule in Missouri.** — *Decker v. School Dist. No. 2*, 101 Mo. App. 115.

In *Alabama* it has been held that where the defendant moves into the house before completion, and continues to occupy it after the contractor has quit working on it, the latter may recover under the common counts for work, labor, and materials. *Aarnes v. Windham*, 137 Ala. 513.

**1089. 6. Jensen v. Lee**, 67 Kan. 539; *Murphy v. Sampson*, (Neb. 1902) 96 N. W. Rep. 494; *Wanhscaffe v. Pontoja*, (Tex. Civ. App. 1901) 63 S. W. Rep. 663.

**Acceptance by Defendant.** — In *South Dakota*, if the defendant accepts and benefits by the plaintiff's work, the law implies a promise to pay its reasonable value. *Woorford v. Kelly*, (S. Dak. 1904) 101 N. W. Rep. 1069. And the same rule obtains in *West Virginia*. *Empire Coal, etc., Co. v. Hull Coal, etc., Co.*, 51 W. Va. 474.

**7. Performance Prevented by Sickness or Death.** — See *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1.

**Where a Cause Beyond His Control prevents one from completing his contract, he may recover for what he has done under the common counts.** *Barrett v. Raleigh Coal, etc., Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802.

**1090. 4. Destruction of Property on Which Work Is Being Done.** — See *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1090; *Krause v. School Trustees*, (Ind. App. 1903) 66 N. E. Rep. 1010.

**6. Reason for Rule.** — *Krause v. School Trustees*, (Ind. App. 1903) 66 N. E. Rep. 1010.

**7. Where Defendant Prevents Full Performance of Contract — Suit in Quantum Meruit — Kansas.** — *Jensen v. Lee*, 67 Kan. 539.

*Maryland.* — *North v. Mallory*, 94 Md. 305.

*Massachusetts.* — *Brown v. Woodbury*, 183 Mass. 279; *Posner v. Seder*, 184 Mass. 331; *Forbes v. Appleyard*, 181 Mass. 354.

*Missouri.* — *Turney v. Baker*, 103 Mo. App. 390; *Cann v. Church of The Redeemer*, 111 Mo. App. 164.

*Montana.* — *Cook v. Gallatin R. Co.*, 28 Mont. 509; *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44.

*New York.* — *Boyd v. Vale*, 84 N. Y. App. Div. 414; *White v. Livingston*, 69 N. Y. App. Div. 361, affirmed 174 N. Y. 538; *Person v. Stoll*, 72 N. Y. App. Div. 141, affirmed 174 N. Y. 548; *O'Dwyer v. Smith*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 136; *Day v. Eisele*, 76 N. Y. App. Div. 304; *Toher v. Schaefer*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 618.

*Vermont.* — *Reynolds v. Reynolds*, 74 Vt. 463.

*West Virginia.* — *Barrett v. Raleigh Coal, etc., Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802.

In *Zapel v. Ennis*, 104 Ill. App. 175, it was held that an action of *indebitatus assumpsit* would lie.

**1091. 1. Action for Breach.** — *Jensen v. Lee*, 67 Kan. 539; *North v. Mallory*, 94 Md. 305; *Posner v. Seder*, 184 Mass. 331; *Brown v. Woodbury*, 183 Mass. 279; *Person v. Stoll*, 72 N. Y. App. Div. 141, affirmed 174 N. Y. 548; *Toher v. Schaefer*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 618.

**4. A Surrender of Payments Already Made** is not necessary before bringing suit on a *quantum meruit*, as such payments will be allowed as credits on the amount to be due. *O'Dwyer v. Smith*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 136.

**Contract as Evidence.** — While the contract is at an end, still it may be used as evidence in determining the value of the work. *Jensen v. Lee*, 67 Kan. 539.

**5. Truitt v. Fahey**, 3 Penn. (Del.) 573; *North v. Mallory*, 94 Md. 305; *Person v. Stoll*, 72 N. Y. App. Div. 141, affirmed 174 N. Y. 548.

**6. Contracts under Seal.** — See *Crandall v. Johnson*, 26 R. I. 250.

**7. Effect of Statute of Frauds.** — *Booker v. Wolf*, 195 Ill. 365; *Gullett v. Gullett*, 28 Ind. App. 670; *Thomas v. McManus*, 64 S. W. Rep. 446, 23 Ky. L. Rep. 837; *DeMontague v. Bacharach*, 187 Mass. 128; *Booker v. Heffner*, 95 N. Y. App. Div. 84.

**1092. 1. When a Special Contract Is Termi-**

**1092.** 7. Services Rendered under Illegal Contracts. — See note 3.

8. Services Rendered on Modified Contracts. — See note 5.

9. Services Rendered After Termination of Contract. — See note 7.

**1093.** 10. Services Rendered Not in Strict Accordance with Contract. — See note 3.

**1094.** See notes 1, 2, 3, 6.

**1095.** 11. Extra Services — Persons Employed to Do Particular Piece of Work. — See note 1.

12. Implied Contract that Party Performing Services Possesses Ordinary Skill. — See note 6.

**1097.** IV. MONEY HAD AND RECEIVED AND MONEY PAID — 1. Money Which Rightfully Belongs to Another. — See note 1.

nated by Consent of the parties, *indebitatus assumpsit* will lie. *Zapel v. Ennis*, 104 Ill. App. 175.

**1092.** 3. Parties Not in *Pari Delicto*. — See *Haskell v. Smith*, (Supm. Ct. App. T.) 86 N. Y. Supp. 779.

5. *Empire Coal, etc., Co. v. Hull Coal, etc., Co.*, 51 W. Va. 474.

7. Where the Contract Is Terminated by Agreement, but the plaintiff continues to serve the defendant, he can recover for such services upon a *quantum meruit*. *Tribune Assoc. v. Eisner, etc., Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 658, *affirmed* 70 N. Y. App. Div. 172.

**1093.** 3. Defective Performance of Contract — Recovery on Quantum Meruit — *Alabama*. — *Matthews v. Farrell*, 140 Ala. 298.

*Massachusetts*. — *Gillis v. Cobe*, 177 Mass. 584; *Norwood v. Lathrop*, 178 Mass. 208.

*Michigan*. — *Gross v. Croyts*, 130 Mich. 672. *Missouri*. — *Cann v. Church of The Redeemer*, 111 Mo. App. 164; *Roskilly v. Steiger*, 96 Mo. App. 576.

*Nebraska*. — *Harrison v. Hancock*, (Neb. 1902) 89 N. W. Rep. 374.

*New Mexico*. — *Bushnell v. Coggs*, 10 N. Mex. 601.

*Oregon*. — *Crown Cycle Co. v. Brown*, 39 Oregon 285.

In *Gwinup v. Shies*, 161 Ind. 500, and *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, it was held that no recovery could be had unless there had been an acceptance of the work in its defective condition.

**1094.** 1. *North v. Mallory*, 94 Md. 305.

2. Reason for Rule. — *Gillis v. Cobe*, 177 Mass. 584; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1.

3. *Gillis v. Cobe*, 177 Mass. 584.

6. Amount Recoverable Cannot Exceed Contract Price. — *Cann v. Church of The Redeemer*, 111 Mo. App. 164; *Harrison v. Hancock*, (Neb. 1902) 89 N. W. Rep. 374.

**1095.** 1. Extra Services Performed on Request. — *Rumford Falls Power Co. v. Rumford Falls Paper Co.*, 95 Me. 186; *Rubin v. Isaacson*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 800.

6. Implied Contract as to Skill and Knowledge. — *Van Northwick v. Holbine*, 62 Neb. 149, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095; *Schery v. Welstead*, (Supm. Ct. App. T.) 93 N. Y. Supp. 466.

**1097.** 1. Money Which Rightfully Belongs to Another — *England*. — *Bavins v. London, etc., Bank*, 69 L. J. Q. B. 164, (1900) 1 Q. B. 270.

*United States*. — *Hollister v. U. S.*, 36 Ct. Cl. 13.

*Alabama*. — *Ward v. Hood*, 124 Ala. 570, 82 Am. St. Rep. 205; *St. Louis, etc., Packet Co. v. McPeters*, 124 Ala. 451; *Rushton v. Davis*, 127 Ala. 279.

*Colorado*. — *John G. Morgan Brokerage Co. v. Shemwell*, 16 Colo. App. 185.

*Illinois*. — *Gannaway v. Barricklow*, 203 Ill. 410; *Gentle v. Stephens*, 87 Ill. App. 190; *Sturgeon v. Birkey*, 86 Ill. App. 489; *Green v. Lepley*, 88 Ill. App. 543; *Richolson v. Moloney*, 96 Ill. App. 254, *affirmed* 195 Ill. 575; *Morris v. Jamieson*, 99 Ill. App. 32, *affirmed* 205 Ill. 87; *Law v. Uhrlaub*, 104 Ill. App. 263.

*Indiana*. — *Harbaugh v. Tanner*, 163 Ind. 574.

*Kansas*. — *People's Nat. Bank v. Myers*, 65 Kan. 122; *Guernsey v. Davis*, 67 Kan. 378.

*Kentucky*. — *Maize v. Bradley*, (Ky. 1901) 64 S. W. Rep. 655.

*Maine*. — *Pease v. Bamford*, 96 Me. 23.

*Massachusetts*. — *Cole v. Bates*, 186 Mass. 584.

*Michigan*. — *Michigan Sanitarium, etc., Assoc. v. Battle Creek*, (Mich. 1904) 101 N. W. Rep. 855.

*Minnesota*. — *Schick v. Suttle*, (Minn. 1905) 102 N. W. Rep. 217.

*Missouri*. — *Richardson v. Moffitt-West Drug Co.*, 92 Mo. App. 515; *Deal v. Mississippi County Bank*, 79 Mo. App. 262; *Antinelli v. Basile*, 93 Mo. App. 138; *Quarles v. Hall*, 100 Mo. App. 523; *York v. Farmer's Bank*, 105 Mo. App. 127.

*Nebraska*. — *McCormick Harvesting Mach. Co. v. Stires*, (Neb. 1903) 94 N. W. Rep. 629; *Devries v. Hawkins*, (Neb. 1903) 97 N. W. Rep. 792; *Story v. Robertson*, (Neb. 1904) 98 N. W. Rep. 825.

*New Jersey*. — *Van Pelt v. Schauble*, 68 N. J. L. 638.

*New York*. — *Stephani v. Lent*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 346; *Dechen v. Dechen*, 59 N. Y. App. Div. 166; *Mikles v. Hawkins*, 59 N. Y. App. Div. 253; *Green Island v. Williams*, 79 N. Y. App. Div. 260; *Mulligan v. Harlam*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 571.

*Pennsylvania*. — *Albright v. Mercer*, 14 Pa. Super. Ct. 63; *Humbird v. Davis*, 210 Pa. St. 311.

*Rhode Island*. — *Atherton v. Goldsmith*, 22 R. I. 376.

*South Carolina*. — *Link v. Barksdale*, 70 S. Car. 487.

**1098.** See notes 1, 2.

Nature of Action. — See note 5.

Illegality of Transaction Between Third Persons. — See note 8.

2. Money Received as Agent. — See note 9.

**1099.** See note 1.

3. Money Paid at Another's Request. — See note 2.

4. Voluntary Payments — *a.* MONEY PAID ON ILLEGAL DEMANDS.

— See note 3.

*South Dakota.* — *Finch v. Park*, 12 S. Dak. 63, 76 Am. St. Rep. 588; *Lindskog v. Schouweiler*, 12 S. Dak. 176.

*Virginia.* — *Langhorne v. McGhee*, 103 Va. 281; *Baltimore, etc., R. Co. v. Burke*, 102 Va. 643.

*Wisconsin.* — *Milwaukee v. Milwaukee County*, 114 Wis. 374; *J. V. Le Clair Co. v. Rogers-Ruger Co.*, 124 Wis. 44.

*Wyoming.* — *Carton v. Uinta County*, 10 Wyo. 416.

An Advance Payment on Real Estate may be recovered back if the trade fails. *Payne v. Hackney*, 84 Minn. 195.

That the Defendant Was Negligent and had he not been so he would have had the money, is not competent proof to support the action. *Morris v. Jamieson*, 99 Ill. App. 32, *affirmed* 205 Ill. 87.

**1098.** 1. Immaterial How Party Got Money. — *York v. Farmer's Bank*, 105 Mo. App. 127; *Quarles v. Hall*, 100 Mo. App. 523; *Dechen v. Dechen*, 59 N. Y. App. Div. 166; *Humbird v. Davis*, 210 Pa. St. 311; *Finch v. Park*, 12 S. Dak. 63, 76 Am. St. Rep. 588.

Must Be Received from Third Person — *Canada.* — "Money had and received lies only where a person has received money under circumstances rendering the receipt of it a receipt by such person 'to the use of the plaintiff.' \* \* \* The receipt from some third person is a fact essential to the maintenance of this class of action. The cause of action arises upon the receipt." *Craig v. Matheson*, 32 Nova Scotia 452.

2. Necessity for Demand. — *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354.

5. Nature of Action for Money Had and Received. — *Rushton v. Davis*, 127 Ala. 279; *Law v. Uhrlaub*, 104 Ill. App. 263; *Morris v. Jamieson*, 99 Ill. App. 32, *affirmed* 205 Ill. 87; *Knowles v. Sullivan*, 182 Mass. 318; *Devries v. Hawkins*, (Neb. 1903) 97 N. W. Rep. 792; *New England Water Works Co. v. Farmers L. & T. Co.*, 54 N. Y. App. Div. 309; *Finch v. Park*, 12 S. Dak. 63, 76 Am. St. Rep. 588.

8. Illegality of Transaction Between Third Persons. — *State v. Patterson*, 66 Kan. 460, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1098.

9. Money Received as Agent. — *Richolson v. Maloney*, 96 Ill. App. 254, *affirmed* 195 Ill. 575.

**1099.** 1. Ward v. Work, 65 N. Y. App. Div. 84, *affirmed* 175 N. Y. 519.

2. Money Paid at Another's Request. — *McNerney v. Barnes*, 77 Conn. 155; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339; *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373; *Ball v. Beaumont*, 59 Neb. 631; *Wyckoff v. Swan*, 47 N. Y. App. Div. 627; *Bartlett v. Armstrong*, 56 W. Va. 293.

A Subsequent Promise to Reimburse is not the

equivalent of a previous request. *Massachusetts Mut. L. Ins. Co. v. Green*, 185 Mass. 306.

3. Payment of Illegal Demand with Knowledge of Facts — *United States.* — *Montgomery v. Charleston*, 40 C. C. A. 108, 99 Fed. Rep. 825. *Alabama.* — *Merrill v. Brantley*, 133 Ala. 537. *Arkansas.* — *Larrimer v. Murphy*, 72 Ark. 552; *Earl v. Westfall Commission Co.*, 70 Ark. 61.

*California.* — *Wingenter v. San Francisco*, 134 Cal. 547, 86 Am. St. Rep. 294.

*Colorado.* — *El Paso County v. Colorado Springs Co.*, 15 Colo. App. 274.

*Delaware.* — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948.

*Florida.* — *Johnson v. Atkins*, 44 Fla. 185.

*Georgia.* — *Rome Grocery Co. v. Greenwich Ins. Co.*, 110 Ga. 618.

*Illinois.* — *Chicago v. Klinkert*, 94 Ill. App. 524; *Heath, etc., Mfg. Co. v. National Linseed Oil Co.*, 99 Ill. App. 90, *affirmed* 197 Ill. 637; *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Gannaway v. Barricklow*, 203 Ill. 410.

*Iowa.* — *Hawkeye Loan, etc., Co. v. Marion*, 110 Iowa 468; *Manning v. Poling*, 114 Iowa 27; *Anderson v. Cameron*, 122 Iowa 183; *Kehe v. Blackhawk County*, 125 Iowa 549.

*Kansas.* — *Cummings Harvester Co. v. Siger-son*, 63 Kan. 340.

*Kentucky.* — *German Security Bank v. Coulter*, 112 Ky. 577; *Lehan v. Kiley*, (Ky. 1900) 54 S. W. Rep. 727; *Aultman, etc., Co. v. Mead*, 109 Ky. 583; *Brands v. Louisville*, 111 Ky. 56.

*Louisiana.* — *Fuselier v. St. Landry Parish*, 107 La. 221; *New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co.*, 109 La. 13, 94 Am. St. Rep. 395.

*Maryland.* — *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

*Massachusetts.* — *Taber v. New Bedford*, 177 Mass. 197; *Elmore v. Symonds*, 183 Mass. 321.

*Michigan.* — *Gage v. Saginaw*, (Mich. 1901) 84 N. W. Rep. 1100.

*Missouri.* — *State v. Stonestreet*, 92 Mo. App. 214; *Flinn v. Mechanics Bldg. Assoc.*, 93 Mo. App. 444; *Rhodes v. Dickerson*, 95 Mo. App. 395; *State v. Chicago, etc., R. Co.*, 165 Mo. 597; *American Brewing Co. v. St. Louis*, 187 Mo. 367.

*New Jersey.* — *Turner v. Barber*, 66 N. J. L. 496.

*New York.* — *Newburgh Sav. Bank v. Woodbury*, 64 N. Y. App. Div. 305, *affirmed* 173 N. Y. 55; *Matter of Reid*, 52 N. Y. App. Div. 243; *Toal v. New York*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 18, *affirmed* 67 N. Y. App. Div. 619; *Havens v. New York*, 67 N. Y. App. Div. 90, *affirmed* 173 N. Y. 611; *Deshong v. New York*, 74 N. Y. App. Div. 234, *affirmed* 176 N. Y. 475; *Feist v. New York*, 74 N. Y. App. Div. 627; *Boston Manufacturer's Mut. F. Ins.*

**1100. What Constitutes Voluntary Payment.** — See note 2.

Character of Payment Not Changed by Protest. — See note 3.

**1101. Effect of Apprehension of Judicial Proceedings.** — See notes 1, 2, 3, 4.

b. MONEY PAID FOR ANOTHER WITHOUT REQUEST. — See note 5.

Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479; Neufeld v. New York, 93 N. Y. App. Div. 591; Seymour v. Warren, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 316; McCue v. Monroe County, 162 N. Y. 235.

North Carolina. — Howard v. Mutual Reserve Fund L. Assoc., 125 N. Car. 49.

North Dakota. — St. Anthony, etc., Elevator Co. v. Bottineau County, 9 N. Dak. 346.

Ohio. — Burr v. Bates, 2 Ohio Cir. Dec. 1. Pennsylvania. — Schoenfeld v. Bradford, 16 Pa. Super. Ct. 165; Monongahela Nav. Co. v. Wood, 194 Pa. St. 47.

South Carolina. — Shuck v. Interstate Bldg., etc., Assoc., 63 S. Car. 134.

Tennessee. — Union, etc., Bank v. Memphis, 107 Tenn. 66.

Texas. — Coates v. Clayton, 23 Tex. Civ. App. 62; Moller v. Galveston, 23 Tex. Civ. App. 693; Ostrum v. San Antonio, 30 Tex. Civ. App. 462.

Vermont. — Turner Falls Lumber Co. v. Burns, 71 Vt. 354.

Wyoming. — Carton v. Uinta County, 10 Wyo. 416.

**1100. 2. When Payment Considered Involuntary** — Delaware. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948.

Illinois. — Chicago v. Klinkert, 94 Ill. App. 524; Chicago v. Waukesha Imperial Spring Brewing Co., 97 Ill. App. 583.

Iowa. — Hawkeye Loan, etc., Co. v. Marion, 110 Iowa 468; Chambliss v. Hass, 125 Iowa 484; Scottish Union, etc., Ins. Co. v. Herriott, 109 Iowa 606, 77 Am. St. Rep. 548.

Kansas. — Connelly v. Trego County, 64 Kan. 168.

Louisiana. — Fuselier v. St. Landry Parish, 107 La. 221; New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395.

Massachusetts. — Dexter v. Boston, 176 Mass. 247, 79 Am. St. Rep. 306.

Missouri. — Wells v. Adams, 88 Mo. App. 215; Ritchie v. Carter, 89 Mo. App. 290; State v. Slayback, 90 Mo. App. 300; State v. Stone-street, 92 Mo. App. 214; American Brewing Co. v. St. Louis, 187 Mo. 367.

Nebraska. — David City First Nat. Bank v. Sargeant, 65 Neb. 594.

New York. — Jaeger v. Koenig, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; Havens v. New York, 67 N. Y. App. Div. 90, affirmed 173 N. Y. 611; Dale v. New York, 71 N. Y. App. Div. 227; Reed v. Hayward, 82 N. Y. App. Div. 416; Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479.

North Dakota. — St. Anthony, etc., Elevator Co. v. Bottineau County, 9 N. Dak. 346.

Ohio. — Toledo v. Buechele, 10 Ohio Cir. Dec. 280, 10 Ohio Cir. Ct. 127; 11 Ohio Cir. Dec. 479, 21 Ohio Cir. Ct. 429.

Pennsylvania. — Monongahela Nav. Co. v. Wood, 194 Pa. St. 47.

South Carolina. — Shuck v. Interstate Bldg., etc., Assoc., 63 S. Car. 134.

South Dakota. — Wittaker v. Deadwood, 12 S. Dak. 608.

Washington. — Hoexter v. Judson, 21 Wash. 646.

Wyoming. — Carton v. Uinta County, 10 Wyo. 416.

**3. Effect of Protest** — Delaware. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948.

Iowa. — Hawkeye Loan, etc., Co. v. Marion, 110 Iowa 468; Anderson v. Cameron, 122 Iowa 183.

Kansas. — Cummings Harvester Co. v. Siger-son, 63 Kan. 340.

Kentucky. — Brands v. Louisville, 111 Ky. 56.

Louisiana. — New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395.

New York. — Gerry v. Siebrecht, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; Havens v. New York, 67 N. Y. App. Div. 90, affirmed 173 N. Y. 611.

North Dakota. — St. Anthony, etc., Elevator Co. v. Bottineau County, 9 N. Dak. 346.

Wyoming. — Carton v. Uinta County, 10 Wyo. 416.

**1101. 1. Payment Voluntary Though Made in Apprehension of Judicial Proceedings.** — New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395; Turner v. Barber, 66 N. J. L. 496; Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479; Murray v. Besore, 16 Lanc. L. Rev. 374.

2. New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395; Turner v. Barber, 66 N. J. L. 496.

3. Should Contest Claim. — German Security Bank v. Coulter, 112 Ky. 577; Brands v. Louisville, 111 Ky. 56; New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395; Turner v. Barber, 66 N. J. L. 496.

4. Fear of Criminal Prosecution for Nonpayment. — New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co., 109 La. 13, 94 Am. St. Rep. 395; Jaeger v. Koenig, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580.

5. Money Paid for Another Without Request — California. — McGlew v. McDade, 146 Cal. 553. Florida. — Little Brothers Fertilizer, etc., Co. v. Wilmott, 44 Fla. 166.

Illinois. — Chicago v. Chicago, etc., R. Co., 186 Ill. 300.

Iowa. — Sheldon v. Steele, 114 Iowa 616.

Minnesota. — Bryant v. Nelson-Frey Co., (Minn. 1905) 102 N. W. Rep. 850.

New Hampshire. — Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574.

New York. — Hathaway v. Delaware County, 103 N. Y. App. Div. 179; Newburgh Sav. Bank v. Woodbury, 64 N. Y. App. Div. 305, affirmed 173 N. Y. 55; Matter of Hotchkiss, 44 N. Y. App. Div. 615; Eppig v. New York, 57 N. Y. App. Div. 114.

**1101.** 5. Money Paid under Duress. — See notes 6, 7.

**1102.** 6. Money Paid by Mistake — *a.* MISTAKE OF LAW — (1) *Statement of Rule and Considerations on Which It Is Based.* — See notes 2, 3.

**1103.** (2) *Exceptions to Rule.* — See note 2.

*Fraud.* — See note 4.

*b.* MISTAKE OF FACT — (1) *In General.* — See note 7.

**1105.** See note 1.

(2) *Necessity of Belief that Money Is Due.* — See note 2.

*Vermont.* — *Fulton v. Aldrich*, 76 Vt. 310.

*Wisconsin.* — *Sanderson v. Cream City Brick Co.*, 110 Wis. 618.

**1101.** 6. Money Paid under Duress — *Illinois.* — *Chicago v. Klinkert*, 94 Ill. App. 524.

*Iowa.* — *Anderson v. Cameron*, 122 Iowa 183.

*Maine.* — *Foss v. Whitehouse*, 94 Me. 491.

*Missouri.* — *State v. Slayback*, 90 Mo. App. 300; *Wells v. Adams*, 88 Mo. App. 215.

*Nebraska.* — *David City First Nat. Bank v. Sargeant*, 65 Neb. 594.

*New Jersey.* — *Bocchino v. Cook*, 67 N. J. L. 467.

*New York.* — *Jaeger v. Koenig*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 580; *Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479.

*Pennsylvania.* — *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165.

*Tennessee.* — *Union, etc., Bank v. Memphis*, 107 Tenn. 66.

7. *Necessity for Protest.* — *American Brewing Co. v. St. Louis*, 187 Mo. 367.

**1102.** 2. In *Kentucky* it is the rule that where money is paid without consideration under a palpable mistake of law, which was not owing in law or conscience, and ought not in justice to be retained, it may be recovered. *Public Library v. Board of Education*, (Ky. 1903) 75 S. W. Rep. 225; *Ruppel v. Kissel*, (Ky. 1903) 74 S. W. Rep. 220 (citing *McMurty v. Kentucky Cent. R. Co.*, 84 Ky. 464; *Louisville Banking Co. v. Asher*, 112 Ky. 138). And the case of taxes paid under a mistake of law has also been held to be an exception to the general rule. *Brands v. Louisville*, 111 Ky. 56. But where the money, although paid under a palpable mistake of law, ought not in conscience and justice to be returned, there can be no recovery. *Ruppel v. Kissel*, 74 S. W. Rep. 220, 24 Ky. L. Rep. 2371. See also *Graves County v. Mayfield First Nat. Bank*, 108 Ky. 194; *Hall v. Farmers' Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

By *Statute in California* a recovery can be had where a payment is made under a mistake of law common to all the parties. *Gregory v. Clabrough*, 129 Cal. 475.

3. *Rule that Money Paid under Mistake of Law Is Not Recoverable* — *United States.* — *Elliott v. U. S.*, 37 Ct. Cl. 136; *Shang v. U. S.*, 36 Ct. Cl. 466; *Dewell v. Mix*, 116 Fed. Rep. 664.

*Illinois.* — *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Sullivan v. Whitfield*, 109 Ill. App. 120; *Heath, etc., Mfg. Co. v. National Linseed Oil Co.*, 99 Ill. App. 90, affirmed 107 Ill. 637; *Morgan Park v. Knopf*, 199 Ill. 444.

*Iowa.* — *Heath v. Albrook*, 123 Iowa 559.

*Maine.* — *Coburn v. Neal*, 94 Me. 541.

*Missouri.* — *American Brewing Co. v. St.*

*Louis*, 187 Mo. 367; *Williams v. Carroll County*, 167 Mo. 9.

*New York.* — *Baker v. Bucklin*, 43 N. Y. App. Div. 336; *Newburgh Sav. Bank v. Woodbury*, 173 N. Y. 55.

*North Carolina.* — *Bristol v. Morgantown*, 125 N. Car. 365.

**1103.** 2. See *Ruppel v. Kissel*, 74 S. W. Rep. 220, 24 Ky. L. Rep. 2371.

4. *Mistake Caused by Fraud of Other Party.* — *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51. See also *Hall v. Farmer's Bank*, 65 S. W. Rep. 365, 23 Ky. L. Rep. 1450.

7. *Right to Recover Money Paid under Mistake of Fact* — *England.* — *Continental Caoutchouc, etc., Co. v. Kleinwort*, 51 W. R. 541, 8 Com. Cas. (Eng.) 277.

*Alabama.* — *Hunt v. Matthews*, 132 Ala. 286.

*Georgia.* — *Sheppard v. Lang*, 122 Ga. 607; *McRae Oil, etc., Co. v. Stone*, 119 Ga. 516.

*Illinois.* — *Heath, etc., Mfg. Co. v. National Linseed Oil Co.*, 99 Ill. App. 90, affirmed 197 Ill. 637.

*Indiana.* — *Harbaugh v. Tanner*, 163 Ind. 574.

*Iowa.* — *Govern v. Russ*, 125 Iowa 188; *Johnson v. Saum*, 123 Iowa 145.

*Kentucky.* — *Brands v. Louisville*, 111 Ky. 56; *Nave v. Price*, 108 Ky. 105; *Edwards v. Fuson*, 66 S. W. Rep. 715, 23 Ky. L. Rep. 2111.

*Massachusetts.* — *Minneapolis First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 94 Am. St. Rep. 637.

*Michigan.* — *Truax v. Bliss*, (Mich. 1905) 102 N. W. Rep. 635.

*Minnesota.* — *Wheeler v. Hennepin County*, 87 Minn. 243.

*Missouri.* — *American Brewing Co. v. St. Louis*, 187 Mo. 367, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103; *Williams v. Carroll County*, 167 Mo. 9.

*New York.* — *Mulligan v. Harlam*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 571; *Martin v. Home Bank*, 160 N. Y. 190; *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 59 N. Y. App. Div. 103, affirmed 173 N. Y. 272.

*Pennsylvania.* — *Girard Trust Co. v. Harrington*, 23 Pa. Super. Ct. 615.

*Vermont.* — *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354.

*Wisconsin.* — *Butt v. Smith*, 121 Wis. 566, 105 Am. St. Rep. 1029.

*Illustrations of Rule* — *Mistake in Computing Interest.* — *Montgomery County v. Fry*, 127 N. Car. 258.

*Overpayments.* — *Behring v. Somerville*, 63 N. J. L. 568, to the same effect as *Stempel v. Thomas*, 89 Ill. 147, cited in the original note.

**1105.** 1. *Nave v. Price*, 108 Ky. 105.

2. *Plaintiff Must Believe Money Is Due.* — *American Brewing Co. v. St. Louis*, 187 Mo.

**1105.** (4) *Necessity of Showing Failure of Consideration.* — See note 5.

(5) *Necessity of Payment in Money or Its Equivalent.* — See note 7.

(6) *Retention of Money Must Be Inequitable.* — See note 8.

**1106.** (7) *Necessity of Restoring Payee to Original Status.* — See note 1.

**1107.** (9) *Effect of Plaintiff's Negligence on Right of Recovery* — In Ascertaining Facts. — See notes 2, 3.

In Asserting Claim. — See note 5.

7. Money Procured to Be Paid by Fraud. — See note 6.

**1108.** 8. Money Paid on Consideration Which Fails. — See notes 1, 2, 3.

9. Money Which One Is Compelled to Pay Through Default of Another — *a.* STATEMENT OF RULE. — See note 4.

**1109.** *b.* APPLICATIONS OF RULE — Rights of Surety Who Has Paid Principal's Obligation — As Against Principal. — See note 6.

**1110.** As Against Cosureties. — See note 1.

367, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1105.

**1105.** 5. Plaintiff Must Show Failure of Consideration. — *Dickey County v. Hicks*, (N. Dak. 1905) 103 N. W. Rep. 423.

7. Payment in Money or Its Equivalent Necessary. — *Nave v. Price*, 108 Ky. 105.

8. Retention by Payee Must Be Against Conscience. — *Rome Grocery Co. v. Greenwich Ins. Co.*, 110 Ga. 618; *Dickey County v. Hicks*, (N. Dak. 1905) 103 N. W. Rep. 423.

**1106.** 1. Parties Must Be Placed in Statu Quo. — *Behring v. Somerville*, 63 N. J. L. 568; *Fegan v. Great Northern R. Co.*, 9 N. Dak. 30. Compare *Mulligan v. Harlam*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 571.

**1107.** 2. Where Original Status of Other Party Cannot Be Restored. — *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 59 N. Y. App. Div. 103, affirmed 173 N. Y. 272; *Fegan v. Great Northern R. Co.*, 9 N. Dak. 30.

3. Continental Nat. Bank v. Tradesmen's Nat. Bank, 59 N. Y. App. Div. 103, affirmed 173 N. Y. 272; *Fegan v. Great Northern R. Co.*, 9 N. Dak. 30.

5. Laches in Asserting Claim. — *Fegan v. Great Northern R. Co.*, 9 N. Dak. 30.

6. Money Procured to Be Paid by Fraud — *Alabama*. — *Tuscaloosa County v. Foster*, 132 Ala. 392.

*Indiana*. — *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51; *Harbaugh v. Tanner*, 163 Ind. 574.

*Missouri*. — *Rhodes v. Dickerson*, 95 Mo. App. 395.

*New Jersey*. — *Hanrahan v. National Bldg., etc., Assoc.*, 66 N. J. L. 80; *Hanrahan v. National Bldg., L., etc., Assoc.*, 67 N. J. L. 526; *Eggers v. Anderson*, 63 N. J. Fq. 264.

*New York*. — *Sarasohn v. Miles*, 52 N. Y. App. Div. 628, affirmed 169 N. Y. 573.

*Pennsylvania*. — *Humbird v. Davis*, 210 Pa. St. 311.

*Texas*. — *Larned First State Bank v. McGaughey*, (Tex. Civ. App. 1905) 86 S. W. Rep. 55.

*Vermont*. — *Johnson v. Cate*, 77 Vt. 218.

**1108.** 1. Where Consideration Fails — *Alabama*. — *Merrill v. Brantley*, 133 Ala. 537.

*California*. — *Richter v. Union Land, etc., Co.*, 129 Cal. 367.

*Illinois*. — *Booker v. Wolf*, 195 Ill. 365.

*Indiana*. — *Harbaugh v. Tanner*, 163 Ind. 574.

*Kentucky*. — *Edwards v. Fuson*, 66 S. W. Rep. 715, 23 Ky. L. Rep. 2111.

*Nebraska*. — *Warder, etc., Co. v. Myers*, (Neb. 1903) 96 N. W. Rep. 992.

2. Klein v. Pederson, 65 Neb. 452.

3. Klein v. Pederson, 65 Neb. 452.

4. Payment of Money Which Another Should Have Paid — *California*. — *Treat v. Craig*, 135 Cal. 91.

*Iowa*. — *Iowa Mercantile Co. v. Blair*, 123 Iowa 290.

*Kansas*. — *Hinshaw v. Austin*, 64 Kan. 460.

*Kentucky*. — *Stanford v. Lincoln County*, (Ky. 1901) 61 S. W. Rep. 463; *Graziani v. Hall*, 67 S. W. Rep. 9, 23 Ky. L. Rep. 2351.

*New York*. — *Kimball v. Williams*, 51 N. Y. App. Div. 616.

*Pennsylvania*. — *Rawle v. Renshaw*, 15 Pa. Super. Ct. 488; *Landreth v. McCaffrey*, 9 Pa. Dist. 343, reversed 17 Pa. Super. Ct. 272, 276.

*Texas*. — *A. B. Frank Co. v. Waldrup*, (Tex. Civ. App. 1902) 71 S. W. Rep. 298.

**1109.** 6. Rights of Surety as Against Principal. — *City Trust, etc., Co. v. American Brewing Co.*, 70 N. Y. App. Div. 511, affirmed 174 N. Y. 486.

**1110.** 1. Right to Contribution from Cosureties — *Alabama*. — *Washington v. Norwood*, 128 Ala. 383.

*California*. — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Massachusetts*. — *Weeks v. Parsons*, 176 Mass. 570.

*Missouri*. — *Dysart v. Crow*, 170 Mo. 275.

*New Hampshire*. — *Weston v. Elliott*, 72 N. H. 433.

*New Jersey*. — *Bishop v. Smith*, (N. J. 1904) 57 Atl. Rep. 874.

*Oregon*. — *Ladd v. Chamber of Commerce*, 37 Oregon 49. See also *Rose v. Wollenberg*, 36 Oregon 154.

*Pennsylvania*. — *Morrison v. Warner*, 197 Pa. St. 59; *Reber's Estate*, 15 Pa. Super. Ct. 122.

*Virginia*. — *Tate v. Commercial Bldg. Assoc.*, 97 Va. 74, 75 Am. St. Rep. 770.

*Wisconsin*. — *Boutin v. Etsell*, 110 Wis. 276.

**Against Cosurety's Estate.** — This right to contribution exists against the estate of a co-surety. *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596.

The Statute of Frauds does not apply, because

**1110.** Rights of One Who Pays Money to Prevent Seizure or Sale of His Property for Another's Debt. — See note 2.

Contribution as Between Tortfeasors. — See notes 4, 5.

10. Money Paid on Illegal Contract. — See notes 6, 7.

11. Money Paid on Contract Subsequently Rescinded. — See note 8.

12. Promise Implied from Acknowledgment of Indebtedness. — See note 9.

**1111.** V. GOODS SOLD AND DELIVERED. — See notes 1, 2.

**1112.** VII. WAIVING TORT AND SUING IN ASSUMPSIT — 1. In What Cases Tort May Be Waived — Doctrine Not Applicable to Naked Trespass. — See note 2.

2. Election of Remedies and Its Consequences — Where Tort Is Committed by One Person. — See notes 3, 4.

**1113.** 3. Actions Based on Conversion of Property — *a.* WHERE PROPERTY CONVERTED IS SOLD — (1). *General Considerations Applicable to Waiver of Tort.* — See note 7.

**1116.** *b.* WHERE PROPERTY CONVERTED IS USED OR CONSUMED BY TORTFEASOR. — See note 3.

**1117.** 6. Actions Based on Wrongful Use of Real Property — *a.* STATEMENT OF RULE. — See note 3.

the obligations of the sureties are *inter sese*. Weeks v. Parsons, 176 Mass. 570.

**1110.** 2. Treat v. Craig, 135 Cal. 91.

4. Pawnee City First Nat. Bank v. Avery Planter Co., (Neb. 1903) 95 N. W. Rep. 622.

5. Rule Not Applicable Where Tort Not Wilful. — Pawnee City First Nat. Bank v. Avery Planter Co., (Neb. 1903) 95 N. W. Rep. 622.

6. Contracts Mala Prohibita. — Paducah Banking Co. v. Ragsdale, (Ky. 1902) 69 S. W. Rep. 796. See also Wright v. Stewart, 130 Fed. Rep. 905.

In Ullman v. St. Louis Fair Assoc., 167 Mo. 273, it was held that as long as the contract was executory the money might be recovered back, because thereby a violation of the law was prevented.

Where the Contract Is Executed no recovery can be had. Barrett v. Smith, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 825.

7. Contract Malum in Se. — McKibbin v. McCone, 16 Quebec Super. Ct. 126.

8. Money Paid on Rescinded Contract. — Seibel v. Purchase, 134 Fed. Rep. 484; Murphy v. Dalton, (Mich. 1905) 102 N. W. Rep. 277; Day v. Farley, 100 Mo. App. 633; Durham v. Wick, 210 Pa. St. 128, 105 Am. St. Rep. 789; Arbogast v. Mylius, 55 W. Va. 101; Summers v. Mutual L. Ins. Co., 12 Wyo. 369, 107 Am. St. Rep. 952.

Advance Payment on Real Estate. — In case of an advance payment on real estate, before the purchaser can sue for the recovery thereof, he must tender the full purchase price of the property and demand a performance of the contract by his vendor. Goldman v. Willis, 64 N. Y. App. Div. 508.

9. Acknowledgment of Indebtedness — Implied Promise. — Columbia River Packing Co. v. Tallant, 133 Fed. Rep. 990; Ivy Coal, etc., Co. v. Long, 139 Ala. 535; National Cycle Mfg. Co. v. San Diego Cycle Co., 135 Cal. 335; American Brewing Co. v. Berner-Mayer Co., 83 Ill. App. 446; Harrison v. Henderson, 67 Kan. 202; Columbia Brewing Co. v. Berney, 90 Mo. App. 96; Crawford v. Hutchinson, 38 Oregon 578.

**1111.** 1. Goods Sold and Delivered. — Ved-

der v. Leamon, 70 N. Y. App. Div. 252, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1111.

For the distinction between the actions of money had and received and goods sold, see Nelson v. Montgomery First Nat. Bank, 139 Ala. 578, 101 Am. St. Rep. 52.

2. Vedder v. Leamon, 70 N. Y. App. Div. 252, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1111.

Goods Procured Through Fraud. — Where goods have been sold, and the sale was induced by the fraud of the purchaser, the seller may disregard the contract and sue in assumpsit for their reasonable value. Crown Cycle Co. v. Brown, 39 Oregon 285.

**1112.** 2. Naked Trespass. — See Ward v. Hood, 124 Ala. 570, 82 Am. St. Rep. 205.

3. Election of Remedies — Suit in Assumpsit Bars Suit in Tort. — Price v. Parker, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 582.

4. Suit in Tort Bars Suit in Assumpsit. — Bermel v. Harmischfeger, 97 N. Y. App. Div. 402.

**1113.** 7. Present Rule — Waiver of Tort and Suit in Assumpsit — Alabama. — Ward v. Hood, 124 Ala. 570, 82 Am. St. Rep. 205; Hunt v. Matthews, 132 Ala. 286.

Georgia. — Farmer's, etc., Bank v. Bennett, 120 Ga. 1012; Southern R. Co. v. Born Steel Range Co., 120 Ga. 658.

Illinois. — Gentle v. Stephens, 87 Ill. App. 190.

Kentucky. — Merriweather v. Bell, 58 S. W. Rep. 987, 22 Ky. L. Rep. 844.

Massachusetts. — Graham v. Stanton, 177 Mass. 321.

Michigan. — Grinnell v. Anderson, 122 Mich. 533; St. John v. Antrim Iron Co., 122 Mich. 68; McCormick Harvesting Mach. Co. v. Waldo, 128 Mich. 135; Castner v. Darby, 128 Mich. 241.

New York. — Silver v. Krellman, 89 N. Y. App. Div. 363.

Washington. — Livingston v. Lovgren, 27 Wash. 109, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1113-1116.

**1116.** 3. View that Assumpsit Will Not Lie. — Hagar v. Norton, 188 Mass. 47.

**1117.** 3. Necessity of Relation of Landlord



**1118. b. APPLICATIONS OF RULE.** — See notes 1, 3, 4, 7.

**and Tenant** — *United States*. — *Adsit v. Kaufman*, (C. C. A.) 121 Fed. Rep. 355.

*California*. — *Belger v. Sanchez*, 137 Cal. 614.

*Georgia*. — *Lenney v. Finley*, 118 Ga. 718; *Atlanta, etc., R. Co. v. McHan*, 111 Ga. 822.

*Illinois*. — *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41; *Fender v. Rogers*, 97 Ill. App. 280.

*Indiana*. — *Cambridge Lodge v. Routh*, 163 Ind. 1.

*Nebraska*. — *Janouch v. Pence*, (Neb. 1903) 93 N. W. Rep. 217.

*New York*. — *Isaacs v. Minkofsky*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 347; *Ryder v. New York*, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 969; *Biglow v. Biglow*, 75 N. Y. App. Div. 98; *Ettlinger v. Degnon-McLean Contracting Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 215; *Becker v. Davis*, (Supm. Ct. App. T.) 87 N. Y. Supp. 422.

*South Dakota*. — *Parkinson v. Shew*, 12 S. Dak. 171.

**Holding Over.** — Where a tenant for a year holds over the term, the landlord may treat him as a tenant for another year or as a trespasser, but a recovery as for use and occupation cannot be supported. *Beeston v. Yale*, 75 N. Y. App. Div. 388.

**Rule in Kentucky.** — "The rule is that assumpsit lies for the use and occupation of land although there is no express contract of rent-

ing or agreement to pay for the use of the land. \* \* \* But in order to recover for the use and occupation of the land in assumpsit where the relation of landlord and tenant is not shown to exist, the plaintiff must make out his title just as he would in ejectment." *Illinois Cent. R. Co. v. Ross*, (Ky. 1904) 83 S. W. Rep. 635.

**Excavations Beneath Street Used for Private Purposes.** — A city cannot maintain an action for use and occupation for the many excavations beneath the surface of the streets, occupied with the knowledge and assent of the city for private purposes. *Chicago v. Norton Milling Co.*, 97 Ill. App. 651, *affirmed* 196 Ill. 580.

**1119. 1. Trespassers.** — *Adsit v. Kaufman*, (C. C. A.) 121 Fed. Rep. 355; *Phoenix Ins. Co. v. Hoyt*, (Neb. 1902) 91 N. W. Rep. 186; *Janouch v. Pence*, (Neb. 1903) 93 N. W. Rep. 217.

**3. Adsit v. Kaufman**, (C. C. A.) 121 Fed. Rep. 355; *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41; *Fender v. Rogers*, 97 Ill. App. 280; *Phoenix Ins. Co. v. Hoyt*, (Neb. 1902) 91 N. W. Rep. 186; *Biglow v. Biglow*, 75 N. Y. App. Div. 98.

**4. Hill v. Coal Valley Min. Co.**, 103 Ill. App. 41; *Phoenix Ins. Co. v. Hoyt*, (Neb. 1902) 91 N. W. Rep. 186.

**7. When Contract Rescinded.** — *Belger v. Sanchez*, 137 Cal. 614.

## IMPLIED TRUSTS.

By B. B. CLARK.

**1123. I. SCOPE OF TITLE AND DEFINITIONS.** — See note 1.

**1124. Resulting and Constructive Trusts Distinguished** — **Resulting Trusts.** — See note 3.

**Constructive Trusts.** — See note 4.

**Two Classes Distinct.** — See note 5.

**II. RESULTING TRUSTS — 1. Resulting Trusts Arising Out of Voluntary Conveyances — a. IN GENERAL.** — See note 8.

**1123. 1. Classification of Implied Trusts.** — *Sanders v. Steele*, 124 Ala. 415; *Green v. Green*, 56 S. Car. 193; *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909.

**When Resulting Trust Does Not Arise.** — Where land is conveyed in consideration of future support of the grantor by the grantee, with a reservation in the deed of a life estate to the grantor, a resulting trust of the life estate in favor of the grantee does not arise from a parol agreement that the reservation shall operate merely as security for the grantee's agreement to furnish support. *Hall v. Small*, 178 Mo. 629, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1123.

**1124. 3. Resulting Trusts.** — *Pickler v. Pickler*, 180 Ill. 168; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210; *Monson v. Hutchin*, 194 Ill. 431; *Potter v. Clapp*, 203 Ill. 592,

96 Am. St. Rep. 322; *Williams v. Williams*, 108 Iowa 91; *Avery v. Stewart*, 136 N. Car. 426; *Caldwell v. Bryan*, 20 Tex. Civ. App. 168.

A resulting trust cannot rest on an express agreement. *Byers v. McEniry*, 117 Iowa 499.

**4. Constructive Trusts.** — *Pope v. Dapray*, 176 Ill. 478; *Cline v. Cline*, 204 Ill. 130; *Shupe v. Bartlett*, 106 Iowa 654; *Williams v. Williams*, 108 Iowa 91; *Stubbins v. Briggs*, (Ky. 1902) 68 N. W. Rep. 392; *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679; *Aller v. Crouter*, 64 N. J. Eq. 381; *Avery v. Stewart*, 136 N. Car. 426; *Parrish v. Parrish*, 33 Oregon 486.

**5. Pollard v. McKenney**, (Neb. 1903) 96 N. W. Rep. 679.

**8. No Presumption of Resulting Trust.** — *Donghoe v. Chicago Cricket Club*, 177 Ill. 351.

**1125.** *b.* DEED RECITING CONSIDERATION. — See note 2.

*c.* HABENDUM CLAUSE DECLARING USE TO GRANTEE. — See note 5.

**1126.** *d.* DEED CONTAINING COVENANTS OF WARRANTY. — See note 1.

*f.* CONSIDERATION NATURAL LOVE AND AFFECTION — (1) *In General.* — See notes 3, 4, 5.

*Rebutting Presumption.* — See note 6.

(2) *Conveyance to Husband or Wife of Child of Grantor as Advancement.* — See note 7.

**1127.** *h.* CONVEYANCES FOR SPECIFIC PURPOSES — (1) *In General.* — See note 2.

2. *Resulting Trusts Arising Out of Conveyances and Devises upon Trusts* — *a.* CONVEYANCES INTER VIVOS — (1) *In General.* — See note 5.

**1128.** See note 1.

**1130.** *b.* LEGACIES AND DEVISES IN TRUST — (2) *Devise or Bequest in Trust Without Disposition of Entire Beneficial Interest.* — See note 5.

**1132.** 3. *Resulting Trusts Arising Out of Payment of Purchase Money* — *a.* *IN GENERAL.* — See note 6.

**1125.** 2. *Deed Reciting Valuable Consideration.* — *Davis v. Jernigan*, 71 Ark. 494; *Verzier v. Convard*, 75 Conn. 1; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *McClenahan v. Stevenson*, 118 Iowa 106; *Gregory v. Bowlsby*, 115 Iowa 327; *Luckhart v. Luckhart*, 120 Iowa 248; *Willis v. Robertson*, 121 Iowa 380; *Ostenson v. Severson*, 126 Iowa 197; *Schwingle v. Anthes*, (Neb. 1904) 98 N. W. Rep. 676; *Aller v. Crouter*, 64 N. J. Eq. 381.

5. *Habendum Clause Declaring Use to Grantee.* — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Coffey v. Sullivan*, 63 N. J. Eq. 296.

**1126.** 1. *Deed Containing Covenant of Warranty.* — *Verzier v. Convard*, 75 Conn. 1; *Goodrich v. French*, 8 Ohio Dec. 351, 7 Ohio N. P. 225.

3. *Consideration Natural Love and Affection.* — *Goodrich v. French*, 8 Ohio Dec. 351, 7 Ohio N. P. 225.

4. *Conveyance by Parent to Child.* — *Luckhart v. Luckhart*, 120 Iowa 248; *Kreps v. Kreps*, 91 Md. 692.

5. *Conveyance by Husband to Wife.* — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892; *Doane v. Dunham*, 64 Neb. 135.

6. See *Fretz v. Roth*, (N. J. 1905) 59 Atl. Rep. 676.

7. *Conveyance to Husband or Wife of Child of Grantor.* — *De Galindo v. De Galindo*, 127 Cal. 77.

**1127.** 2. *Avery v. Stewart*, 136 N. Car. 426; *McGuigan v. Boll*, 11 York Leg. Rec. (Pa.) 30; *Goodwin v. McMinn*, 193 Pa. St. 646, 74 Am. St. Rep. 703.

*Reservation in Deed Inoperative at Law.* — Where the grantor in a deed expressly reserved the right to damages caused by the construction of an elevated railway on the street upon which the property abutted, it was held that though such reservation was ineffectual to enable the grantor to sue for such damages, a court of equity would work out justice between the parties by holding the grantee and his assigns with notice to be trustees for the grantor to the extent of the damages recovered. *Western Union Tel. Co. v. Manhat-*

*tan R. Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 101, affirmed 49 N. Y. App. Div. 345.

5. *Conveyance in Trust — Resulting Trust to Grantor in Surplus.* — *In re West*, (1900) 1 Ch. 84; *In re Abbott Fund*, (1900) 2 Ch. 326; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Aller v. Crouter*, 64 N. J. Eq. 381; *Avery v. Stewart*, 136 N. Car. 426; *Bacon's Estate*, 202 Pa. St. 535; *Green v. Green*, 56 S. Car. 193.

*In re Abbott Fund*, (1900) 2 Ch. 326, where a fund was raised by subscription for the maintenance and support of two persons, and at the death of the survivor of them a portion of the fund remained unapplied, it was held that there was a resulting trust of the balance of the fund for the subscribers thereto.

**1128.** 1. *Conveyance by Grantor on Consideration Paid by Third Persons.* — *In re Davis*, 112 Fed. Rep. 129.

**1130.** 5. *Surplus Undisposed Of.* — *In re West*, (1900) 1 Ch. 84, 48 W. R. 138.

**1132.** 6. *Resulting Trusts Arising Out of Payment of Consideration — United States.* — *In re Davis*, 112 Fed. Rep. 129; *In re Peabody*, 118 Fed. Rep. 266, 55 C. C. A. 360; *In re Spencer*, 128 Fed. Rep. 654.

*Alabama.* — *Tillman v. Murrell*, 120 Ala. 239; *Sanders v. Steele*, 124 Ala. 415; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *Long v. Mechem*, (Ala. 1905) 38 So. Rep. 262.

*California.* — *Plass v. Plass*, 122 Cal. 3; *Polk v. Boggs*, 122 Cal. 114; *Brooks v. Union Trust, etc., Co.*, 146 Cal. 134.

*Colorado.* — *Rowe v. Johnson*, 33 Colo. 469.

*District of Columbia.* — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1.

*Idaho.* — *Branstetter v. Mann*, 6 Idaho 580.

*Illinois.* — *Brenneman v. Schell*, 212 Ill. 362, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210; *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601; *Madison v. Madison*, 206 Ill. 534; *Frankenstein v. North*, 79 Ill. App. 669; *Holmes v. Clifford*, 95 Ill. App. 245; *Deuter v. Deuter*, 214 Ill. 308.

*Iowa.* — *Malley v. Malley*, 121 Iowa 237; *Paulus v. Reed*, 121 Iowa 224.

*Kansas.* — *Zellmer v. Koch*, 9 Kan. App. 486.

**1135.** See note 1.

Resulting Trust as to Part of or Part Interest in Land. — See notes 3, 4.

Statutory Provisions. — See note 5.

**1136.** *b.* REBUTTING PRESUMPTION OF RESULTING TRUST. — See notes 2, 3.**1137.** Proof of Intention. — See note 1.**1138.** *f.* CONVEYANCE TO ANOTHER JOINTLY WITH PERSON PAYING CONSIDERATION. — See note 2.*h.* TITLE TAKEN IN NAME OF THIRD PERSON WITHOUT CONSENT OF PERSON PAYING PURCHASE MONEY — (1) *In General*. — See note 4.**1140.** *i.* CHARACTER OF PROPERTY IN WHICH TRUST IS ENFORCEABLE — (2) *Mortgages*. — See note 2.(3) *Personal Property*. — See note 5.

Personalty of a Perishable Nature. — See note 8.

*Kentucky*. — Sweet *v.* Stevens, (Ky. 1901) 63 S. W. Rep. 41.*Maine*. — Herlihy *v.* Coney, 99 Me. 469.*Maryland*. — Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571; Kreps *v.* Kreps, 91 Md. 692; Johnson *v.* Johnson, 96 Md. 144.*Massachusetts*. — Cooley *v.* Cooley, 172 Mass. 476; Skehill *v.* Abbott, 184 Mass. 145; Lufkin *v.* Jakeman, 188 Mass. 528.*Missouri*. — McMurray *v.* McMurray, 180 Mo. 526, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132; Small *v.* Hatch, 151 Mo. 300; Butler *v.* Carpenter, 163 Mo. 597; Wiano Land, etc., Co. *v.* Webster, 75 Mo. App. 457; Heil *v.* Heil, 184 Mo. 665; Stevenson *v.* Smith, 189 Mo. 447.*Nebraska*. — Chicago, etc., R. Co. *v.* Omaha First Nat. Bank, 58 Neb. 548; Concordia L. & T. Co. *v.* Parrotte, 62 Neb. 629; Bailey *v.* Dobbins, 67 Neb. 548.*New Hampshire*. — Lahey *v.* Broderick, 72 N. H. 180.*New Jersey*. — Schellinger *v.* Selover, (N. J. 1900) 46 Atl. Rep. 1058; Aller *v.* Crouter, 64 N. J. Eq. 381.*North Carolina*. — Avery *v.* Stewart, 136 N. Car. 426.*Oregon*. — Oregon Lumber Co. *v.* Jones, 36 Oregon 80; Hayes *v.* Horton, (Oregon 1905) 81 Pac. Rep. 386.*Pennsylvania*. — Galbraith *v.* Galbraith, 190 Pa. St. 225; Howe *v.* Bates, 21 Pa. Co. Ct. 570.*Rhode Island*. — Reynolds *v.* Blaisdell, 23 R. I. 16.*South Carolina*. — Elrod *v.* Cochran, 59 S. Car. 467, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132; Manning *v.* Screven, 56 S. Car. 78; Green *v.* Green, 56 S. Car. 193; Linnell *v.* Hudson, 59 S. Car. 283.*South Dakota*. — Hickson *v.* Culbert, (S. Dak. 1905) 102 N. W. Rep. 774.*Tennessee*. — McClung *v.* Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961; Arnold *v.* Harris, (Tenn. Ch. 1898) 52 S. W. Rep. 715.*Texas*. — Caldwell *v.* Bryan, 20 Tex. Civ. App. 168; Houser *v.* Jordan, 26 Tex. Civ. App. 398.*Vermont*. — Corey *v.* Morrill, 71 Vt. 51.*Virginia*. — Miller *v.* Miller, 99 Va. 125, 3 Va. Sup. Ct. 34; Jesser *v.* Armentrout, 100 Va. 666; Flanary *v.* Kane, 102 Va. 547; Trumbo *v.* Fulk, 103 Va. 73.*Washington*. — Funk *v.* Hensler, 31 Wash. 528.*West Virginia*. — Despard *v.* Despard, 53 W. Va. 443.Payment by a Minor will raise a resulting trust in his favor. Crowley *v.* Crowley, 72 N. H. 241.The Rule Applies Where a Purchase Is Made by a Trustee and the title is by mistake taken in name of the *cestui que trust*. *In re* Spencer, 128 Fed. Rep. 654.**1135.** 1. Independent of Agreement. — *In re* Davis, 112 Fed. Rep. 129.3. Resulting Trust as to Part of the Land. — *In re* Davis, 112 Fed. Rep. 129.4. Resulting Trust as to Part Interest in Land. — *In re* Davis, 112 Fed. Rep. 129.Resulting Trust as to Remainder After Life Interest. — Bailey *v.* Dobbins, 67 Neb. 548. See, however, Malley *v.* Malley, 121 Iowa 237.5. Statutory Provisions. — Faylor *v.* Faylor, 136 Cal. 92; Richards *v.* Fraser, 136 Cal. 460; Helvie *v.* Hoover, 11 Okla. 687.**1136.** 2. Rebutting Presumption of Trust. — *In re* Davis, 112 Fed. Rep. 129; Dorman *v.* Dorman, 187 Ill. 154, 79 Am. St. Rep. 210; Manning *v.* Screven, 56 S. Car. 78; De Hihns *v.* Free, 70 S. Car. 344.3. Payment of Consideration Raises Presumption of Trust. — Jones *v.* Beekman, (N. J. 1900) 47 Atl. Rep. 71; Reynolds *v.* Blaisdell, 23 R. I. 16; Goodrich *v.* Hicks, 19 Tex. Civ. App. 528.**1137.** 1. Proof of Intention — Circumstances Surrounding Transaction. — Dorman *v.* Dorman, 187 Ill. 154, 79 Am. St. Rep. 210.**1138.** 2. Conveyance to Another Jointly with Person Paying Consideration. — Carey *v.* Griffin, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 469.4. Title Taken Without Consent of Person Paying Purchase Money. — Booth *v.* Lenox, 45 Fla. 191; Ackley *v.* Croucher, 203 Ill. 530; Madison *v.* Madison, 206 Ill. 534; Skehill *v.* Abbott, 184 Mass. 145; Carey *v.* Griffin, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 469; Flanner *v.* Butler, 131 N. Car. 155; Standard Mercantile Co. *v.* Ellis, 48 W. Va. 309; Cresap *v.* Cresap, 54 W. Va. 581.**1140.** 2. Mortgage Security Taken in Name of Third Person. — Houser *v.* Jordan, 26 Tex. Civ. App. 398.5. Stock Purchased in Name of Another. — McClung *v.* Colwell, 107 Tenn. 592, 89 Am. St. Rep. 961.8. Perishable Property. — See Bozarth *v.* Watts, (Tenn. Ch. 1900) 61 S. W. Rep. 108.

**1140.** *j.* CHARACTER OF SALE OR CONVEYANCE — (1) *In General*. — See note 12.

**1141.** See note 1.

**1142.** *k.* NECESSITY FOR CONVEYANCE OF LEGAL TITLE. — See note 1.

*l.* CHARACTER OF CONSIDERATION — (1) *In General*. — See note 2.

*m.* PAYMENT OF PURCHASE MONEY — (1) *In General*. — See note 4.

**1144.** (4) *Time of Payment* — (a) *In General*. — See note 1.

**1145.** See note 1.

Obligation of Grantee Given for Deferred Payments. — See note 3.

(b) *Conveyance on Credit of Third Person*. — See note 4.

**1146.** (5) *Sufficiency of Payment* — (a) *In General*. — See note 4.

**1147.** (b) *Constructive Payment* — *bb.* PAYMENT BY THIRD PERSON FOR BENEFIT OF PLAINTIFF. — See notes 1, 2.

(c) *Payment of Purchase Money by Grantee as Loan* — *aa.* *IN GENERAL*. — See note 5.

**1140.** 12. A Contract for Sale taken in the name of another than the person who pays the purchase money may create a resulting trust. *Minneapolis, etc., R. Co. v. Lund*, 91 Minn. 45.

**1141.** 1. *Redemption from Mortgage Sale — Trust Held to Result*. — *Tillman v. Murrell*, 120 Ala. 239.

**1142.** 1. *Actual Conveyance of Estate Required*. — *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

2. *Character of Consideration*. — *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961.

4. *Payment of Consideration Foundation of Trust — California*. — *Los Angeles, etc., Oil, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528.

*Illinois*. — *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601.

*Maryland*. — *Nagengast v. Alz*, 93 Md. 522.

*Massachusetts*. — *Perkins v. Perkins*, 181 Mass. 401.

*Pennsylvania*. — *Fox v. Peoples*, 201 Pa. St. 9; *Banes v. Morgan*, 204 Pa. St. 185; *Brower v. Brower*, 17 Montg. Co. Rep. (Pa.) 39; *Watson v. Watson*, 31 Pittsb. Leg. J. N. S. (Pa.) 94.

*Texas*. — *Arnold v. Ellis*, 20 Tex. Civ. App. 262; *Scott v. Farmers, etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485; *Williamson v. Gore*, (Tex. Civ. App. 1903) 73 S. W. Rep. 563.

*Vermont*. — *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442.

*West Virginia*. — *Woods v. Ward*, 48 W. Va. 652.

Where One Buys Land and Pays His Own Money Therefor and takes a deed in his own name, although he may intend that it be for the benefit of another, no resulting trust arises in favor of such other, and he has no interest in the land. *Caldwell v. Bryan*, 20 Tex. Civ. App. 168.

**1144.** 1. *Payment at Time of Purchase Required — Alabama*. — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81.

*Illinois*. — *Pickler v. Pickler*, 180 Ill. 168; *Devine v. Devine*, 180 Ill. 447; *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601.

*New Hampshire*. — *Crowley v. Crowley*, 72 N. H. 241.

*Pennsylvania*. — *McCormick v. Cooke*, 199

Pa. St. 631; *Enyard v. Weinmann*, 15 Pa. Super. Ct. 439.

*Tennessee*. — *Arnold v. Harris*, (Tenn. Ch. 1898) 52 S. W. Rep. 715; *Aiken v. Taylor*, (Tenn. Ch. 1900) 62 S. W. Rep. 200.

*Texas*. — *Hirshfeld v. Howard*, (Tex. Civ. App. 1900) 59 S. W. Rep. 55; *Williamson v. Gore*, (Tex. Civ. App. 1903) 73 S. W. Rep. 563.

*Vermont*. — *Wilder v. Wilder*, 75 Vt. 178.

*West Virginia*. — *Gilbert v. Lawrence*, 56 W. Va. 281.

See, however, *Hickson v. Culbert*, (S. Dak. 1905) 102 N. W. Rep. 774.

**1145.** 1. *In Bible v. Marshall*, 103 Tenn. 324, it was held that where the grantee at the time of the purchase took from the vendor an assignment of a deed to him, under the belief that this would convey a good title, and subsequently received a proper deed, the latter deed was but the perfection of the purchase, a kind of *nunc pro tunc* performance of the vendor's contract to convey, and the payment at the time of the original purchase was sufficient to create a resulting trust.

3. *Obligation of Grantee Executed for Deferred Payments*. — *Crowley v. Crowley*, 72 N. H. 241; *Wilder v. Wilder*, 75 Vt. 178. See also *Dudley v. Dudley*, 176 Mass. 34. But see *Skahen v. Irving*, 206 Ill. 597.

4. *Conveyance on Credit of Third Person*. — *Miller v. Miller*, 90 Va. 125, 3 Va. Sup. Ct. 34.

**1146.** 4. *Payment Must Be by Person Seeking to Enforce Trust*. — *Gilfillen v. Moorhead*, 73 Conn. 710.

**1147.** 1. *Advance by Third Person for Benefit of Another*. — *Herlihy v. Coney*, 99 Me. 469.

2. *Advance by Parent for Benefit of Child*. — *Shackleford v. Elliott*, 209 Ill. 333.

5. *Purchase Money Advanced by Grantee as a Loan to Third Person*. — *Herlihy v. Coney*, 99 Me. 469; *Miller v. Miller*, (Md. 1905) 61 Atl. Rep. 210; *Johnson v. Hayward*, (Neb. 1905) 103 N. W. Rep. 1058; *Babcock v. Wells*, 25 R. I. 30; *Borrow v. Borrow*, 34 Wash. 684. See, however, *Stafford v. Stafford*, 29 Tex. Civ. App. 73 (creates mortgage instead of implied trust).

*Grantee Accommodation Maker of Purchase Money Note*. — See *Crowley v. Crowley*, 72 N. H. 241.

**1149.** (d) **Purchase Money Advanced by Third Person as Loan** — *aa.* IN GENERAL. — See note 5.

**1151.** (e) **Part Payment of Consideration** — *aa.* GENERAL RULE. — See note 1.

**1152.** See note 2.

*bb.* GRANTEES IN DEED CONTRIBUTING UNEQUALLY TOWARDS PURCHASE MONEY. — See note 4.

*cc.* PAYMENT MUST BE OF PART OF PURCHASE MONEY. — See note 7.

**1153.** *ee.* PROPORTION OF CONSIDERATION PAID — RULE AS TO ALIQUOT PART. — See notes 3, 6.

**1154.** *ff.* PROOF OF PROPORTION OF CONSIDERATION PAID. — See note 1.

*n.* EFFECT OF AGREEMENT TO HOLD IN TRUST. — See note 5.

**1155.** See notes 2, 3.

*o.* ADVANCEMENTS — (1) *Creating and Rebutting Presumption of Advancement Generally.* — See note 4.

*Rebutting Presumption of Advancement.* — See note 5.

**1156.** (2) *Presumption of Advancement as Between Husband and Wife* — (a) **Payment by Husband, Conveyance to Wife** — *aa.* IN GENERAL. — See note 1.

**1149. 5. Purchase Money Advanced as Loan to Grantee.** — *Devine v. Devine*, 180 Ill. 447; *Shupe v. Bartlett*, 106 Iowa 654; *Malley v. Malley*, 121 Iowa 237; *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71; *Smith v. Wildman*, 194 Pa. St. 294; *Cornman's Estate*, 197 Pa. St. 125; *Hornsby v. City Nat. Bank*, (Tenn. Ch. 1900) 60 S. W. Rep. 160; *Goodrich v. Hicks*, 19 Tex. Civ. App. 528; *Hirshfeld v. Howard*, (Tex. Civ. App. 1900) 59 S. W. Rep. 55.

**1151. 1. Part Payment of Consideration — Resulting Trust Pro Tanto** — *Alabama.* — *Sanders v. Steele*, 124 Ala. 415.

*Arkansas.* — *Brown v. Arkansas Cent. R. Co.*, 72 Ark. 456.

*California.* — *Plass v. Plass*, 122 Cal. 3; *Polk v. Boggs*, 122 Cal. 114; *Faylor v. Faylor*, 136 Cal. 92; *Richards v. Fraser*, 136 Cal. 460.

*Illinois.* — *Frankenstein v. North*, 79 Ill. App. 669; *Holmes v. Clifford*, 95 Ill. App. 245. *Indiana.* — *Hutton v. Cunningham*, 28 Ind. App. 295.

*Iowa.* — *Culp v. Price*, 107 Iowa 133.

*Maryland.* — *Johnson v. Johnson*, 96 Md. 144.

*Massachusetts.* — *Skehill v. Abbott*, 184 Mass. 145. See, however, *Dudley v. Dudley*, 176 Mass. 34.

*Missouri.* — *McLeod v. Venable*, 163 Mo. 536; *Owensby v. Chewning*, 171 Mo. 226; *Stevenson v. Smith*, 189 Mo. 447.

*New Hampshire.* — *Crowley v. Crowley*, 72 N. H. 241.

*South Dakota.* — *Sing You v. Wong Free Lee*, 16 S. Dak. 383.

*Tennessee.* — *Bible v. Marshall*, 103 Tenn. 324.

*Virginia.* — *Miller v. Miller*, 99 Va. 125, 3 Va. Sup. Ct. 34.

*West Virginia.* — *Despard v. Despard*, 53 W. Va. 443.

**1152. 2. Andrew v. Andrew, 114 Iowa 524; *Bible v. Marshall*, 103 Tenn. 324; *Caldwell v. Bryan*, 20 Tex. Civ. App. 168.**

**4. Grantees in Deed Contributing Towards Purchase Money.** — *Holmes v. Clifford*, 95 Ill. App. 245.

**7. Share of Consideration Secured to Be Paid.** — *Sanders v. Steele*, 124 Ala. 415.

**1153. 3. Rule Requiring Aliquot Payment.**

— *Pickler v. Pickler*, 180 Ill. 168; *Devine v. Devine*, 180 Ill. 447; *Jackson v. Kraft*, 186 Ill. 623; *Cline v. Cline*, 204 Ill. 130; *Onasch v. Zinkel*, 213 Ill. 119.

**6. Other Fractional Payment Held Sufficient.** — In *Skehill v. Abbott*, 184 Mass. 145, it was held that a contribution of one thousand dollars on a purchase of land for two thousand five hundred dollars was for payment of an "all-quot" part so as to create a resulting trust.

**1154. 1. Proof of Portion of Consideration Paid.** — *Plass v. Plass*, 122 Cal. 3; *Hutton v. Cunningham*, 28 Ind. App. 295; *Culp v. Price*, 107 Iowa 133; *Andrew v. Andrew*, 114 Iowa 524; *McClenahan v. Stevenson*, 118 Iowa 106.

**5. Effect of Oral Promise to Hold in Trust.** — *Tillman v. Murrell*, 120 Ala. 239; *Brenneman v. Schell*, 212 Ill. 363, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1154; *Arnold v. Harris*, (Tenn. Ch. 1898) 52 S. W. Rep. 715.

**1155. 2. Oral Agreement for Trust Inconsistent with Trust Implied by Law.** — *Compare In re Davis*, 112 Fed. Rep. 129; *In re Peabody*, (C. C. A.) 118 Fed. Rep. 266.

**3. Express Written Declaration of Trust.** — *Manning v. Screven*, 56 S. Car. 78.

**4. Advancement Presumed from Relationship of Parties.** — *Bailey v. Dobbins*, 67 Neb. 548.

**5. McCartney v. Fletcher, 11 App. Cas. (D. C.) 1; *Bailey v. Dobbins*, 67 Neb. 548.**

**1156. 1. Payment by Husband, Title in Wife** — *Arkansas.* — *Chambers v. Michael*, 71 Ark. 373.

*Colorado.* — *Rowe v. Johnson*, 33 Colo. 469. *District of Columbia.* — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1.

*Illinois.* — *Brenneman v. Schell*, 212 Ill. 365, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1156; *Devine v. Devine*, 180 Ill. 447; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210; *Cline v. Cline*, 204 Ill. 130; *Deuter v. Deuter*, 214 Ill. 308.

*Indiana.* — *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

*Iowa.* — *Andrew v. Andrew*, 114 Iowa 524.

*Kentucky.* — *Clay v. Clay*, (Ky. 1903) 72 S. W. Rep. 810.

*Maryland.* — *Kreps v. Kreps*, 91 Md. 692; *Johnson v. Johnson*, 96 Md. 144.

**1156.** *bb.* CIRCUMSTANCES REBUTTING PRESUMPTION. — See note 2.

**1157.** Mistake as to Effect of Deed to Wife. — See note 3.

Purchase by Wife as Agent. — See note 4.

Possession and Improvement of Land by Husband. — See notes 6, 7.

**1158.** *cc.* ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE — Admissibility. — See notes 1, 2.

Sufficiency. — See note 3.

(b) Payment by Wife, Conveyance to Husband — *aa.* IN GENERAL. — See note 4.

**1159.** See note 3.

Rebutting Presumption. — See note 6.

*bb.* PURCHASE BY HUSBAND WITH PROPERTY OF WIFE — Separate Property. —

See note 8.

*Massachusetts.* — *Cooley v. Cooley*, 172 Mass. 476.

*Missouri.* — *Curd v. Brown*, 148 Mo. 82; *Viers v. Viers*, 175 Mo. 444.

*Nebraska.* — *Doane v. Dunham*, 64 Neb. 135; *Bailey v. Dobbins*, 67 Neb. 548.

*New Hampshire.* — *Lahey v. Broderick*, 72 N. H. 180.

*North Carolina.* — *Flanner v. Butler*, 131 N. Car. 155.

*South Dakota.* — *Hickson v. Culbert*, (S. Dak. 1905) 102 N. W. Rep. 774.

*Vermont.* — *Corey v. Morrill*, 71 Vt. 51.

Title Taken in Joint Names of Husband and Wife. — See *Hayes v. Horton*, (Oregon 1905) 81 Pac. Rep. 386.

Taking Title in Name of Contemplated Wife. — In *Lufkin v. Jakeman*, 188 Mass. 528, where it appeared that the plaintiff's intestate purchased land with his own money, but the title was taken in the name of a woman whom he expected to marry whenever his wife should obtain a divorce from him and leave him free to marry again, it was held that there was no presumption of a gift, since there was no obligation on the part of the purchaser to provide for the person taking the title, and the ordinary rule creating a resulting trust in favor of the payor of the purchase money was fully applicable.

**1156.** 2. Presumption of Advancement Rebuttable. — *Illinois.* — *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210.

*Maryland.* — *Johnson v. Johnson*, 96 Md. 144.

*Missouri.* — *Curd v. Brown*, 148 Mo. 82; *Viers v. Viers*, 175 Mo. 444.

*Nebraska.* — *Bailey v. Dobbins*, 67 Neb. 548.

*New Hampshire.* — *Lahey v. Broderick*, 72 N. H. 180.

*New Jersey.* — *Fretz v. Roth*, (N. J. 1905) 59 Atl. Rep. 676.

*North Carolina.* — *Flanner v. Butler*, 131 N. Car. 155.

*South Dakota.* — *Hickson v. Culbert*, (S. Dak. 1905) 102 N. W. Rep. 774.

*Vermont.* — *Corey v. Morrill*, 71 Vt. 51.

**1157.** 3. Mistake as to Effect of Deed. — Compare *Doane v. Dunham*, 64 Neb. 135.

4. Purchase by Wife as Agent. — *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

6. Possession and Improvement of Land by Husband. — *Chambers v. Michael*, 71 Ark. 373.

7. *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210.

**1158.** 1. Admissibility of Evidence. — *Mc-*

*Cartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Brenneman v. Schell*, 212 Ill. 366, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1157, 1158; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210.

2. Subsequent Acts. — *Chambers v. Michael*, 71 Ark. 373; *Johnson v. Johnson*, 96 Md. 144.

3. Quantum of Proof. — *Chambers v. Michael*, 71 Ark. 373; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Johnson v. Johnson*, 96 Md. 144; *Viers v. Viers*, 175 Mo. 444; *Curd v. Brown*, 148 Mo. 82; *Bailey v. Dobbins*, 67 Neb. 548; *Hickson v. Culbert*, (S. Dak. 1905) 102 N. W. Rep. 774.

Ignorance of the Husband that title was taken in the wife's name has been held to be sufficient to rebut the presumption. *Flanner v. Butler*, 131 N. Car. 155.

4. Payment by Wife, Purchase in Name of Husband. — *Polk v. Boggs*, 122 Cal. 114; *Shackleford v. Elliott*, 209 Ill. 333; *Holmes v. Clifford*, 95 Ill. App. 245; *Williams v. Williams*, (Ky. 1903) 76 S. W. Rep. 413; *Helvie v. Hoover*, 11 Okla. 687; *Beringer v. Lutz*, 188 Pa. St. 364. Compare *McCormick v. Cooke*, 199 Pa. St. 631; *Pickens v. Wood*, (W. Va. 1905) 50 S. E. Rep. 818.

Family Settlement. — In *Schellinger v. Selover*, (N. J. 1900) 46 Atl. Rep. 1058, it was held that where in a partition between heirs the share of one of them, a married woman, was conveyed to the husband, the presumption of a resulting trust in favor of the wife did not arise. But in *Condit v. Bigalow*, 64 N. J. Eq. 504, it was held that where, on a partition or division of land, the wife as one of the tenants in common is entitled to the conveyance, and the husband takes title to her share, a trust results in her favor.

**1159.** 3. Title Taken by Husband Without Consent of Wife. — *Madison v. Madison*, 206 Ill. 534.

6. Rebutting Presumption of Resulting Trust. — *Helvie v. Hoover*, 11 Okla. 687.

Gift to Husband — No Resulting Trust. — *Rotter v. Scott*, 111 Iowa 31.

8. Purchase by Husband with Separate Property of Wife. — *Mercier v. Mercier*, (1903) 2 Ch. 98; *Miller v. Slupsky*, 158 Mo. 643; *McLeod v. Venable*, 163 Mo. 536; *Owensby v. Chewning*, 171 Mo. 226; *Condit v. Bigalow*, 64 N. J. Eq. 504; *Bible v. Marshall*, 103 Tenn. 324; *Arnold v. Harris*, (Tenn. Ch. 1898) 52 S. W. Rep. 715; *Oaks v. West*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; *Matador Land, etc., Co. v.*

**1160.** See note 1.

Purchase with Personality to Which Husband Is Entitled by Reason of Marital Relation. — See note 4.

**1161.** See note 1.

**1162.** (3) *Presumption of Advancement as Between Parent and Child and Persons in Loco Parentis* — (a) Payment by Parent, Conveyance to Child — aa. APPLICATION AND SCOPE OF RULE. — See note 1.

Purchase by One in Loco Parentis. — See note 3.

**1163.** By Father-in-Law. — See note 1.

A Purchase by a Mother. — See note 3.

bb. REBUTTING PRESUMPTION. — See note 5.

**1164.** cc. SUFFICIENCY OF EVIDENCE. — See note 1.

Title Taken in Name of Child Without Consent of Parent. — See note 2.

Possession and Enjoyment of Property by Parent. — See note 3.

Other Provisions for Grantee and No Provision for Other Children. — See note 6.

(b) Payment by Child, Conveyance to Parent. — See note 9.

**1166.** p. STATUTORY ENACTMENTS AFFECTING TRUSTS RESULTING FROM PAYMENT OF PURCHASE MONEY — (1) *In General*. — See notes 1, 2.

Cooper, (Tex. Civ. App. 1905) 87 S. W. Rep. 235; Sparks v. Taylor, (Tex. Civ. App. 1905) 87 S. W. Rep. 740.

**1160.** 1. Husband Authorized to Purchase for Wife Purchasing in His Own Name. — Beringer v. Lutz, 188 Pa. St. 364. See, however, Burnett v. Campbell County, 1 Tenn. Ch. App. 18.

4. Personality of Wife Vested in Husband. — Hogue v. Steel, 207 Ill. 340; Farmer's Nat. Bank v. Thomson, 74 Vt. 442.

Where, prior to the *Virginia Married Woman's Act* a husband purchased land in his own name with money belonging to his wife, it was held that no trust resulted in favor of the wife, since the presumption obtained that the money, when received by him, was his by virtue of his marital rights. *Jesser v. Armentrout*, 100 Va. 666.

**1161.** 1. Agreement to Invest for Wife Without Consideration. — Compare *Leslie v. Bell*, 73 Ark. 338; *Bible v. Marshal*, 103 Tenn. 324.

**1162.** 1. Purchase by Parent in Name of Child — *California*. — *Faylor v. Faylor*, 136 Cal. 92.

*Colorado*. — *Doll v. Gifford*, 13 Colo. App. 67. *Illinois*. — *Brenneman v. Schell*, 212 Ill. 365, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1156-1164; *Euans v. Curtis*, 190 Ill. 197; *Skahen v. Irving*, 206 Ill. 597.

*Iowa*. — *Culp v. Price*, 107 Iowa 133; *Hoon v. Hoon*, 126 Iowa 391.

*Kansas*. — *Brown v. Brown*, 62 Kan. 666.

*Kentucky*. — *Clay v. Clay*, (Ky. 1903) 72 S. W. Rep. 810.

*Maryland*. — *Kreps v. Kréps*, 91 Md. 692.

*Massachusetts*. — *Cooley v. Cooley*, 172 Mass. 476.

*Rhode Island*. — *Reynolds v. Blaisdell*, 23 R. I. 16.

3. Person in Loco Parentis. — *Reynolds v. Blaisdell*, 23 R. I. 16.

**1163.** 1. Conveyance to Son-in-Law Held Advancement to Daughter. — Compare *Wacker v. Wacker*, 147 Mo. 246.

3. *Elrod v. Cochran*, 59 S. Car. 467. See,

however, *In re Davis*, 112 Fed. Rep. 129 (payment by mother and conveyance to married daughter).

In *Trumbo v. Fulk*, 103 Va. 73, where a mother paid the purchase money and took a deed conveying a life estate to her with remainder to her children, it was held that no trust resulted in her favor with regard to such reversion.

5. Presumption of Advancement Held Rebuttable. — *In re Davis*, 112 Fed. Rep. 129; *In re Peabody*, 118 Fed. Rep. 266, 55 C. C. A. 360; *Faylor v. Faylor*, 136 Cal. 92; *Brenneman v. Schell*, 212 Ill. 365, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1163; *Skahen v. Irving*, 206 Ill. 597; *Culp v. Price*, 107 Iowa 133; *Hoon v. Hoon*, 126 Iowa 391; *Cooley v. Cooley*, 172 Mass. 476; *Reynolds v. Blaisdell*, 23 R. I. 16; *Elrod v. Cochran*, 59 S. Car. 467.

Ignorance of Mother as to Nature of Transaction. — See *Cooley v. Cooley*, 172 Mass. 476.

**1164.** 1. Sufficiency of Evidence. — *Doll v. Gifford*, 13 Colo. App. 67; *Euans v. Curtis*, 190 Ill. 197.

2. Title Taken Without Consent of Parent. — *Brenneman v. Schell*, 212 Ill. 365, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1164.

3. Possession by Parent. — *Doll v. Gifford*, 13 Colo. App. 67.

6. *Skahen v. Irving*, 206 Ill. 597.

9. Payment by Child, Purchase in Name of Parent. — *Brown v. Arkansas Cent. R. Co.*, 72 Ark. 456; *Crowley v. Crowley*, 72 N. H. 241; *Caldwell v. Bryan*, 20 Tex. Civ. App. 168.

**1166.** 1. Statutory Abolition of Trust Arising from Payment of Consideration — *Indiana*. — *Hutton v. Cunningham*, 28 Ind. App. 295; *Brown v. White*, 32 Ind. App. 100.

*Kansas*. — *Chantland v. Midland Nat. Bank*, 66 Kan. 549.

*Kentucky*. — *Curd v. Curd*, (Ky. 1899) 53 S. W. Rep. 522; *Coleman v. Bowles*, (Ky. 1900) 56 S. W. Rep. 651; *Clay v. Clay*, (Ky. 1903) 72 S. W. Rep. 810; *Stone v. Burge*, (Ky. 1903) 74 S. W. Rep. 250; *Planters' Bank, etc., Co. v. Major*, (Ky. 1904) 79 S. W. Rep. 264; *Field v. Napier*, (Ky. 1904) 80 S. W. Rep. 1110.

- 1167.** See notes 1, 2.  
 (2) *Common-law Trust Alone Abolished.* — See note 3.  
 (3) *Separate Instrument Declaring Trust.* — See note 4.  
**1168.** (6) *Relationship of Parties.* — See note 3.  
 (7) *Agreement by Grantee to Hold in Trust.* — See note 4.  
**1171.** q. EVIDENCE — (1) *Evidence to Establish Resulting Trust* —  
 (a) *Admissibility of Parol Evidence — Statute of Frauds.* — See notes 1, 2.  
     *Parol Evidence Admissible to Prove Payment of Purchase Money.* — See note 4.  
**1172.** See note 3.  
**1174.** (c) *Quantum and Burden of Proof.* — See notes 2, 3.  
**1176.** *Particular Cases.* — See notes 4, 5.

*Michigan.* — *Hamilton v. Wickson*, 131 Mich. 71.

*Minnesota.* — *Anderson v. Anderson*, 81 Minn. 329.

*New York.* — *Leary v. Corvin*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 68, *reversed* 63 N. Y. App. Div. 151; *Miller v. Munroe*, 59 N. Y. App. Div. 623.

*Statute Applied to Security for Loan Taken in Another's Name.* — *Meier v. Bell*, 119 Wis. 482.

*Not Applicable to Executory Contract of Purchase.* — *Minneapolis, etc., R. Co. v. Lund*, 91 Minn. 45.

**1166.** 2. *Even in the Absence of Such a Statutory Provision.* — *Wolfsberger v. Mort*, 104 Mo. App. 257.

*Trust Not Enforceable by Sale on Attachment or Execution.* — *Chantland v. Midland Nat. Bank*, 66 Kan. 549.

**1167.** 1. *Want of Consent of Person Paying Purchase Money.* — *Webb v. Foley*, (Ky. 1899) 49 S. W. Rep. 40; *Carey v. Griffin*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 469.

*Burden of Proof upon Grantee to Show Consent of Party Supplying Consideration.* — *Carey v. Griffin*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 469.

2. *Purchase by Grantee in Violation of Trust.* — *Stone v. Burge*, (Ky. 1903) 74 S. W. Rep. 250; *School Dist. No. 10 v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337.

3. *Only Trust Arising from Payment of Consideration Abolished.* — *Stone v. Burge*, (Ky. 1903) 74 S. W. Rep. 250.

4. *Separate Instrument Declaring Trust.* — *Miller v. Munroe*, 59 N. Y. App. Div. 623.

**1168.** 3. *Payment by Parent, Conveyance in Name of Child — Statute Operative.* — *Field v. Napier*, (Ky. 1904) 80 S. W. Rep. 1110.

*Payment by Daughter and Conveyance to Father — Statute Operative.* — *Leary v. Corvin*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 68, *reversed* 63 N. Y. App. Div. 151.

4. *Oral Agreement of Grantee to Hold in Trust.* — *Coleman v. Bowles*, (Ky. 1900) 56 S. W. Rep. 651; *Anderson v. Anderson*, 81 Minn. 329.

*Statute of Frauds Must Be Pleaded by Holder of Legal Title.* — *Miller v. Munroe*, 59 N. Y. App. Div. 623.

**1171.** 1. *Statute of Frauds.* — See *Culp v. Price*, 107 Iowa 133; *Williams v. Williams*, 108 Iowa 91.

2. *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601.

4. *Parol Evidence Admissible to Show Payment of Purchase Money.* — *Polk v. Boggs*, 122 Cal. 114; *Branstetter v. Mann*, 6 Idaho 580; *Dor-*

*man v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210; *Hogue v. Steel*, 207 Ill. 340; *Webb v. Foley*, (Ky. 1899) 49 S. W. Rep. 40; *Lahey v. Broderick*, 72 N. H. 180; *Galbraith v. Galbraith*, 190 Pa. St. 225; *Corey v. Morrill*, 71 Vt. 51.

**1172.** 3. *Contrary to Consideration Clause.* — *Chicago, etc., R. Co. v. Omaha First Nat. Bank*, 58 Neb. 548.

**1174.** 2. *Burden of Proof.* — *Hogue v. Steel*, 207 Ill. 340, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174; *Havenor v. Pipher*, 109 Wis. 108.

3. *Proof of Payment Must Be Clear and Satisfactory — California.* — *Plass v. Plass*, 122 Cal. 3; *Harris v. Harris*, 136 Cal. 379.

*Colorado.* — *Doll v. Gifford*, 13 Colo. App. 67.

*Idaho.* — *Rice v. Ringley*, 7 Idaho 115.

*Illinois.* — *Hogue v. Steel*, 207 Ill. 340, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174; *Pickler v. Pickler*, 180 Ill. 168; *Jackson v. Kraft*, 186 Ill. 623; *Cline v. Cline*, 204 Ill. 130; *Lurie v. Sabbath*, 108 Ill. App. 397, *affirmed* 208 Ill. 401.

*Indiana.* — *Hutton v. Cunningham*, 28 Ind. App. 295.

*Iowa.* — *Shupe v. Bartlett*, 106 Iowa 654; *Culp v. Price*, 107 Iowa 133; *Andrew v. Andrew*, 114 Iowa 524; *McClenahan v. Stevenson*, 118 Iowa 106; *Malley v. Malley*, 124 Iowa 237; *Cunningham v. Cunningham*, 125 Iowa 681.

*Maryland.* — *Nagengast v. Alz*, 93 Md. 522.

*Missouri.* — *Owensby v. Chewing*, 171 Mo. 226; *McMurray v. McMurray*, 180 Mo. 526; *Curd v. Brown*, 148 Mo. 82; *Heil v. Heil*, 184 Mo. 665.

*Nebraska.* — *Doane v. Dunham*, 64 Neb. 135.

*Oregon.* — *Oregon Lumber Co. v. Jones*, 36 Oregon 80.

*Pennsylvania.* — *Grove v. Kase*, 2 Dauphin Co. Rep. (Pa.) 125; *Fidelity Ins., etc., Co. v. Moore*, 104 Pa. St. 617; *Cornman's Estate*, 197 Pa. St. 125.

*Rhode Island.* — *Reynolds v. Blaisdell*, 23 R. I. 16, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174.

*South Dakota.* — *Sing 'You v. Wong Free Lee*, 16 S. Dak. 383.

*Tennessee.* — *Hornsby v. City Nat. Bank*, (Tenn. Ch. 1900) 60 S. W. Rep. 160; *Burnett v. Campbell County*, 1 Tenn. Ch. App. 18.

*Texas.* — *Hutzler v. Groff*, (Tex. Civ. App. 1808) 48 S. W. Rep. 206; *Goodrich v. Hicks*, 19 Tex. Civ. App. 328.

*West Virginia.* — *Gilbert Co. v. Lawrence*, 56 W. Va. 281.

**1176.** 4. *Evidence Held Insufficient.* —



**1177. 4. Resulting Trusts Arising Out of Purchases with Fiduciary Funds —***a. IN GENERAL.* — See note 10.**1179.** *Exchange of Trust Property.* — See note 2.**1180.** *c. RIGHT TO CLAIM LIEN — (3) Effect of and What Constitutes Election.* — See note 7.**1181.** *e. NECESSITY FOR EXISTENCE OF FRAUD.* — See note 4.**1182.** *k. APPLICATION OF RULE TO SPECIAL FIDUCIARIES — (2) Investment of Stolen Property.* — See note 5.*l. PART PAYMENT OF PURCHASE MONEY WITH FIDUCIARY FUNDS.* — See note 8.**1183.** *m. TIME OF PAYMENT — (1) In General.* — See note 5.**1184.** *(2) Use of Trust Funds in Improving Land.* — See note 2.*n. EVIDENCE.* — See note 4.

*Harris v. Harris*, 136 Cal. 379; *Goodman v. Crowley*, 161 Mo. 657; *Curtis v. Moore*, 162 Mo. 442; *Fidelity Ins., etc., Co. v. Moore*, 194 Pa. St. 617; *Reynolds v. Blaisdell*, 23 R. I. 16; *Hutzler v. Groff*, (Tex. Civ. App. 1898) 48 S. W. Rep. 206.

**1180. 5. Evidence Held Sufficient.** — *In re Peabody*, 118 Fed. Rep. 266, 55 C. C. A. 360; *Plass v. Plass*, 122 Cal. 3; *Skahen v. Irving*, 206 Ill. 597; *Shackleford v. Elliott*, 209 Ill. 333; *Miller v. Slupsky*, 158 Mo. 643; *McMurray v. McMurray*, 180 Mo. 526; *Oregon Lumber Co. v. Jones*, 36 Oregon 80; *Beringer v. Lutz*, 188 Pa. St. 364; *Galbraith v. Galbraith*, 190 Pa. St. 225; *Sing You v. Wong Free Lee*, 16 S. Dak. 383; *Hicks v. Pogue*, 33 Tex. Civ. App. 333.

**1177. 10. Purchase with Fiduciary Funds — Alabama.** — *National Mut. Bldg., etc., Assoc. v. Culberson*, (Ala. 1899) 25 So. Rep. 173; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81.

*Florida.* — *Booth v. Lenox*, 45 Fla. 191.

*Illinois.* — *Graham v. Graham*, 85 Ill. App. 460; *Dwyer v. O'Connor*, 200 Ill. 52; *Ackley v. Croucher*, 203 Ill. 530; *Metropolis First Nat. Bank v. Leech*, 207 Ill. 215; *Shackleford v. Elliott*, 209 Ill. 333.

*Indiana.* — *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109.

*Iowa.* — *Shupe v. Bartlett*, 106 Iowa 654; *Williams v. Williams*, 108 Iowa 91; *Zunkel v. Colson*, 109 Iowa 695; *Paulus v. Reed*, 121 Iowa 224; *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797.

*Kentucky.* — *Stone v. Burge*, (Ky. 1903) 74 S. W. Rep. 250.

*Minnesota.* — *School Dist. No. 10 v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337; *Dougan v. Bemis*, (Minn. 1905) 103 N. W. Rep. 882.

*Mississippi.* — *Owen v. Monroe County Alliance*, 77 Miss. 500.

*Missouri.* — *James v. Groff*, 157 Mo. 402; *Crawford v. Jones*, 163 Mo. 577; *McMurray v. McMurray*, 180 Mo. 526.

*Nebraska.* — *Withnell v. Withnell*, (Neb. 1903) 96 N. W. Rep. 221.

*North Carolina.* — *Avery v. Stewart*, 136 N. Car. 426.

*Ohio.* — *Ward v. Ward*, 12 Ohio Cir. Dec. 59.

*Oregon.* — *Schwartz v. Gerhardt*, 44 Oregon 425; *Kroll v. Coach*, 45 Oregon 459.

*South Carolina.* — *Green v. Green*, 56 S. Car. 193; *Phillips v. Yon*, 61 S. Car. 426.

*Tennessee.* — *Arnold v. Harris*, (Tenn. Ch.

1898) 52 S. W. Rep. 715; *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909; *Bozarth v. Watts*, (Tenn. Ch. 1900) 61 S. W. Rep. 108; *Hows v. Butterworth*, (Tenn. Ch. 1899) 62 S. W. Rep. 1114.

*Texas.* — *Stone v. Kahle*, 22 Tex. Civ. App. 185; *Oaks v. West*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

*West Virginia.* — *Cresap v. Cresap*, 54 W. Va. 581.

*Wisconsin.* — *Hill v. True*, 104 Wis. 294.

**Innocent Borrower of Trust Funds Not a Trustee in Invitum.** — *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86.

**1179. 2. Exchange of Trust Property.** — *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909; *Hill v. True*, 104 Wis. 294.

**1180. 7. Wilson v. Stevens**, 129 Ala. 630, 87 Am. St. Rep. 86.

**1181. 4. No Necessity for Existence of Fraud.** — *Metropolis First Nat. Bank v. Leech*, 207 Ill. 215.

**1182. 5. Contrary Doctrine.** — *Lamb v. Rooney*, (Neb. 1904) 100 N. W. Rep. 410.

**8. Resulting Trust Arises from Part Payment with Trust Funds.** — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109; *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909; *Stone v. Kahle*, 22 Tex. Civ. App. 185. See, however, *Thum v. Wolstenholme*, 21 Utah 446; *Storm v. McGrover*, 70 N. Y. App. Div. 33, *appeal dismissed* 174 N. Y. 525, *citing Schierloh v. Schierloh*, 148 N. Y. 103; *Bryant v. Allen*, 54 N. Y. App. Div. 500.

**1183. 5. Payment at Time of Purchase Required.** — *Lescalleet v. Rickner*, 9 Ohio Cir. Dec. 422, 16 Ohio Cir. Ct. 461; *Aiken v. Taylor*, (Tenn. Ch. 1906) 62 S. W. Rep. 200; *Thum v. Wolstenholme*, 21 Utah 446; *Moore v. Mustoe*, 47 W. Va. 549, 81 Am. St. Rep. 812; *Gilbert v. Lawrence*, 56 W. Va. 281; *Myers v. Myers*, 47 W. Va. 487.

**1184. 2. Funds Used in Improving Land.** — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81. See, however, *Moore v. McLure*, 124 Ala. 120.

**Where One of Several Cotenants Uses Trust Funds in improving joint property, no rights therefrom will arise in favor of the cestui que trust as against the other cotenants if they did not participate in any manner in the misappropriation of the trust funds.** *Moore v. McLure*, 124 Ala. 120.

**4. Evidence.** — *Michigan Trust Co. v. Pro-*

**1184. III. CONSTRUCTIVE TRUSTS — 1. In General. — See note 5.****1185. Fraud Basis of Constructive Trust. — See note 4.****1186. Effect of Statute Abolishing Resulting Trusts. — See note 3.****3. Constructive Trusts Arising Out of Breach of Contracts — a. IN GENERAL. — See note 10.****1187. b. EFFECT OF STATUTE OF FRAUDS — (1) Verbal Employment of Agent to Purchase Land — (a) Conflicting Views — Majority Rule. — See note 1.**

Minority Rule. — See note 2.

(b) Use of Principal's Funds. — See note 3.

(c) Confidential Relation Independent of Agency. — See note 4.

**1188. (e) Agent Employed to Purchase Outstanding Title. — See note 2.**

(f) Voluntary Grant. — See note 5.

basco, 29 Ind. App. 109; Cornelison v. Roberts, 107 Iowa 220; Garrett v. Garrett, 171 Mo. 155; Withnell v. Withnell, (Neb. 1903) 96 N. W. Rep. 221; Storm v. McGrover, 70 N. Y. App. Div. 33, appeal dismissed 174 N. Y. 525; Schwartz v. Gerhardt, 44 Oregon 425; Phillips v. Yon, 61 S. Car. 426 (evidence held sufficient); Bonner v. Ogilvie, 24 Tex. Civ. App. 237; Bromley v. Cleveland, etc., R. Co., 103 Wis. 562.

**1184. 5. Constructive Trust Arising Out of Fraud — United States.** — Missouri Broom Mfg. Co. v. Guymon, (C. C. A.) 115 Fed. Rep. 112; Trice v. Comstock, 121 Fed. Rep. 620, 57 C. C. A. 646.

Alabama. — Savage v. Johnson, 125 Ala. 673; Kent v. Dean, 128 Ala. 600; Johnston v. Little, 141 Ala. 382.

Arkansas. — Tillar v. Henry, (Ark. 1905) 88 S. W. Rep. 573; McNutt v. McNutt, (Ark. 1905) 88 S. W. Rep. 589.

California. — Costa v. Silva, 127 Cal. 351; Crosby v. Clark, 132 Cal. 1; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98; Kimball v. Tripp, 136 Cal. 631; Donnelly v. Rees, 141 Cal. 56.

District of Columbia. — McCartney v. Fletcher, 11 App. Cas. (D. C.) 1.

Illinois. — Ackley v. Croucher, 203 Ill. 530.

Indiana. — Michigan Trust Co. v. Probasco, 29 Ind. App. 109.

Iowa. — Barnes v. Thuet, 116 Iowa 359.

Kansas. — Kahm v. Klaus, 64 Kan. 24.

Kentucky. — Stubbins v. Briggs, (Ky. 1902) 68 S. W. Rep. 392; Smith v. Cornett, (Ky. 1904) 80 S. W. Rep. 1188; Coons v. Clay, (Ky. 1905) 87 S. W. Rep. 1078.

Maine. — Cole v. Fickett, 95 Me. 265; Handy v. Rice, 98 Me. 504.

Minnesota. — Eimer v. Wellsland, 93 Minn. 444.

Mississippi. — Moore v. Crump, 84 Miss. 612.

Montana. — Lutey v. Clark, 31 Mont. 45.

Nebraska. — Pollard v. McKenney, (Neb. 1903) 96 N. W. Rep. 679; Dickson v. Stewart, (Neb. 1904) 98 N. W. Rep. 1085; Schwingel v. Anthes, (Neb. 1904) 101 N. W. Rep. 335; Koefold v. Thompson, (Neb. 1905) 102 N. W. Rep. 268.

New Jersey. — Aller v. Crouter, 64 N. J. Eq. 381.

New York. — Ahrens v. Jones, 169 N. Y. 555.

North Carolina. — Avery v. Stewart, 136 N. Car. 426.

North Dakota. — Prondzinski v. Garbutt, 8 N. Dak. 191, 10 N. Dak. 300.

Pennsylvania. — Goodwin v. McMinn, 193 Pa. St. 646, 74 Am. St. Rep. 703.

Tennessee. — Arnold v. Harris, (Tenn. Ch. 1898) 52 S. W. Rep. 715.

Texas. — Burton v. Archinard, (Tex. Civ. App. 1899) 49 S. W. Rep. 684; Bridgens v. West, 35 Tex. Civ. App. 277.

Utah. — Scott v. Crouch, 24 Utah 377.

Wisconsin. — Weirich v. Dodge, 101 Wis. 621.

**1185. 4. Fraud Basis of Constructive Trusts.** — Avery v. Stewart, 136 N. Car. 426.

**1186. 3. Statute Abolishing Resulting Trusts.** — Michigan Trust Co. v. Probasco, 29 Ind. App. 109.

**10. Breach of Contract.** — Wilhite v. Skelton, (Indian Ter. 1904) 82 S. W. Rep. 932; Avery v. Stewart, 136 N. Car. 426; Brower v. Brower, 17 Montg. Co. Rep. (Pa.) 39; Simon's Estate, 20 Pa. Super. Ct. 450; Howe v. Bates, 21 Pa. Co. Ct. 570; Watson v. Watson, 31 Pittsb. Leg. J. N. S. (Pa.) 94; Woods v. Ward, 48 W. Va. 652; Seymour v. Cushway, 100 Wis. 580, 69 Am. St. Rep. 957. See, however, Pettit v. Carpenter, 86 Mo. App. 452.

**1187. 1. Agent Held Not Constructive Trustee.** — Pope v. Dapray, 176 Ill. 478; Wilhite v. Skelton, (Indian Ter. 1904) 82 S. W. Rep. 932; Dougan v. Bemis, (Minn. 1905) 103 N. W. Rep. 882, disapproving Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Largey v. Leggat, 30 Mont. 148; Brower v. Brower, 17 Montg. Co. Rep. (Pa.) 39; Whiting v. Dyer, 21 R. I. 278; Woods v. Ward, 48 W. Va. 652.

**2. Agent Held Constructive Trustee.** — Trice v. Comstock, 121 Fed. Rep. 620, 57 C. C. A. 646; Holmes v. Holmes, 106 Ga. 858; Johnson v. Hayward, (Neb. 1905) 103 N. W. Rep. 1058; Morris v. Reigel, (S. Dak. 1904) 101 N. W. Rep. 1086, citing Luscombe v. Grigsby, 11 S. Dak. 408, and Brookings Land, etc., Co. v. Bertness, 17 S. Dak. 293; Thompson v. Thompson, (Tenn. Ch. 1899) 54 S. W. Rep. 145.

**3. Booth v. Lenox,** 45 Fla. 191; Francis v. Cline, 96 Va. 201.

**4. Confidential Relation Existing Independent of Agency.** — Manchester St. R. Co. v. Williams, 71 N. H. 312.

**1188. 2. Agent to Purchase Outstanding Title.** — Kent v. Dean, 128 Ala. 600; Coons v. Clay, (Ky. 1905) 87 S. W. Rep. 1078; Avery v. Stewart, 136 N. Car. 426.

**5. Voluntary Grant.** — Francis v. Cline, 96 Va. 201.

**1188.** (2) *Oral Agreement for Interest in Land to Be Purchased.* — See note 7.

**1189.** (3) *Parol Agreement Relating to Purchase at Judicial Sale — (a) In General.* — See note 3.

Existence of Confidential Relationship. — See note 4.

(b) *Sale of Land in Which Promisee Has Interest.* — See note 5.

**1190.** See notes 1, 2, 4.

**1191.** (e) *Promise After Purchase.* — See note 3.

(f) *Proof of Agreement.* — See note 4.

(g) *Purchaser Holding Himself Out as Buying for Others Interested in Land Sold.* — See note 5.

(4) *Promise of Devisee by Which Devise Is Secured — (a) General Rule.* — See note 6.

**1192.** (b) *Decedent Induced Not to Make Will.* — See note 1.

(5) *Oral Agreement to Hold in Trust or Reconvey Lands Voluntarily Conveyed — (a) General Rule.* — See note 3.

**1193.** See note 2.

**1194.** (c) *Voluntary Execution of Trust.* — See note 2.

*Parol Declaration of Trust with Respect to Proceeds of Land.* — See notes 3, 4.

**1188.** 7. *Verbal Agreement for Interest in Land to Be Purchased.* — Lyons v. Bass, 108 Ga. 573; Nagengast v. Alz, 93 Md. 522; Largey v. Leggat, 30 Mont. 148; Banes v. Morgan, 204 Pa. St. 185; Bardon v. Hartley, 112 Wis. 74. See, however, Wakeman v. Somarindyck, 73 N. Y. App. Div. 601.

**1189.** 3. Largey v. Leggat, 30 Mont. 148; Whiting v. Dyer, 21 R. I. 278.

4. *Existence of Confidential Relationship.* — Boyd v. Hankinson, (C. C. A.) 92 Fed. Rep. 49; Kent v. Dean, 128 Ala. 600 (cotenants); McWhirter v. Bowen, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 46, modified 82 N. Y. App. Div. 144; Yuengling v. Betz, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 260.

5. *Constructive Trust Held Not to Arise.* — Phillips v. Hardenburg, 181 Mo. 463; Mackall v. Olcott, 93 N. Y. App. Div. 282; Fort v. Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402.

**1190.** 1. *Constructive Trust Held to Arise.* — Dickson v. Stewart, (Neb. 1904) 98 N. W. Rep. 1085; Avery v. Stewart, 136 N. Car. 426.

2. *Land Secured Below Its Value.* — Woodfin v. Marks, 104 Tenn. 512.

4. *Confidential Relation.* — Holmes v. Holmes, 106 Ga. 858 (attorney and client); Pope v. Dapray, 176 Ill. 478 (parent and child); Stubbins v. Briggs, (Ky. 1902) 68 S. W. Rep. 392.

**1191.** 3. *Promise After Purchase.* — Pratt v. Darlington, 17 Pa. Super. Ct. 231.

4. *Proof of Agreement.* — Mackall v. Olcott, 93 N. Y. App. Div. 282.

5. *Misrepresentations as to Purchase in Interest of Others.* — Compare Whiting v. Dyer, 21 R. I. 278.

6. *Devise Secured by Promises to Testator.* — Williams v. Williams, 180 Ill. 361; Newis v. Topfer, 121 Iowa 433, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1191; Whitehouse v. Bolster, 95 Me. 458; Ahrens v. Jones, 169 N. Y. 355; Vance v. Park, 8 Ohio Cir. Dec. 425, 15 Ohio Cir. Ct. 713.

**1192.** 1. *Execution of Will Prevented by Promises.* — Williams v. Williams, 180 Ill. 361. See, however, Cassels v. Finn, 122 Ga. 33, 106 Am. St. Rep. 91.

*No Trust Arises Unless Promise Made and Relied On.* — Whitehouse v. Bolster, 95 Me. 458.

3. *Agreement to Hold in Trust or Reconvey — General Rule — California.* — Smith v. Mason, 122 Cal. 426.

*Connecticut.* — Verzier v. Convard, 75 Conn. 1.

*Georgia.* — Cassels v. Finn, 122 Ga. 33, 106 Am. St. Rep. 91.

*Illinois.* — Williams v. Williams, 180 Ill. 361; Monson v. Hutchin, 194 Ill. 431; Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322; Skahen v. Irving, 206 Ill. 597; Gallagher v. Northrup, 114 Ill. App. 368.

*Iowa.* — Andrew v. Andrew, 114 Iowa 524; Gregory v. Bowlsby, 115 Iowa 327; Luckhart v. Luckhart, 120 Iowa 248; Willis v. Robertson, 121 Iowa 380; Newis v. Topfer, 121 Iowa 433.

*Kentucky.* — Holtheide v. Smith, (Ky. 1903) 74 S. W. Rep. 689. See, however, Row v. Johnston, (Ky. 1904) 78 S. W. Rep. 906.

*Massachusetts.* — Perkins v. Perkins, 181 Mass. 401.

*Nebraska.* — Elder v. Webber, (Neb. 1902) 92 N. W. Rep. 126; Pollard v. McKenney, (Neb. 1903) 96 N. W. Rep. 679.

*New Jersey.* — Coffey v. Sullivan, 63 N. J. Eq. 296.

*New York.* — Bullenkamp v. Bullenkamp, 34 N. Y. App. Div. 193, 43 N. Y. App. Div. 510. See, however, Ahrens v. Jones, 169 N. Y. 555.

*Pennsylvania.* — Grove v. Kase, 2 Dauphin Co. Rep. (Pa.) 125, 195 Pa. St. 325; Braun v. First German Evangelical Lutheran Church, 198 Pa. St. 152; Simonds's Estate, 201 Pa. St. 413, 20 Pa. Super. Ct. 450. See, however, Goodwin v. McMinn, 193 Pa. St. 646, 74 Am. St. Rep. 703.

*Wisconsin.* — Fillingham v. Nichols, 108 Wis. 49.

**1193.** 2. *Parol Trust in Favor of Third Person.* — Ammonette v. Black, 73 Ark. 310.

**1194.** 2. *Voluntary Execution of Trust Upheld as Against Creditors of Grantee.* — Polk v. Boggs, 122 Cal. 114.

3. *Resale by Grantee — Parol Declaration of Trust with Respect to Proceeds.* — Simonds's Estate, 201 Pa. St. 413.

- 1194.** (a) *Fraud or Imposition.* — See note 5.  
 (e) *Intention Not to Perform Agreement.* — See note 6.  
**1195.** (f) *Existence of Confidential Relation.* — See note 2.  
*Husband and Wife.* — See note 3.  
 (g) *Conveyance at Instance of Grantee.* — See note 5.  
 (h) *Proof of Agreement to Hold in Trust.* — See note 6.

**1196.** (j) *Right to Recover Recited Consideration.* — See note 4.

**4. Constructive Trusts Arising Out of Breach of Fiduciary Duties --**

**a. IN GENERAL.** — See notes 5, 6.

**1197.** *b. FIDUCIARIES PURCHASING TRUST PROPERTY AT JUDICIAL OR TRUST SALES.* — See note 1.

**1198.** *c. FIDUCIARIES PURCHASING ADVERSE TITLES — (1) In General.* — See notes 1, 3, 4.

**1194.** 4. *Willis v. Robertson*, 121 Iowa 380.

5. *Fraud or Imposition.* — *Aldrich v. Hassinger*, 13 Hawaii 138; *Williams v. Williams*, 180 Ill. 361; *Newis v. Topfer*, 121 Iowa 433; *Gregory v. Bowlsby*, 126 Iowa 588; *Bullenkamp v. Bullenkamp*, 43 N. Y. App. Div. 510.

6. *Intention Not to Perform Agreement.* — *Aldrich v. Hassinger*, 13 Hawaii 138; *Becker v. Schwerdtle*, 141 Cal. 386; *Gregory v. Bowlsby*, 115 Iowa 327; *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679.

**1195.** 2. *Existence of Confidential Relation.* — *California.* — *Kimball v. Tripp*, 13 Cal. 631; *Odeil v. Moss*, 137 Cal. 542; *Jones v. Jones*, 140 Cal. 587 (conveyance by wife to husband); *Becker v. Schwerdtle*, 141 Cal. 386.

*Georgia.* — *Holmes v. Holmes*, 106 Ga. 858.

*Hawaii.* — *Aldrich v. Hassinger*, 13 Hawaii 138.

*Illinois.* — *Stahl v. Stahl*, 214 Ill. 131, 105 Am. St. Rep. 101.

*Iowa.* — *Newis v. Topfer*, 121 Iowa 433; *Gregory v. Bowlsby*, 126 Iowa 588.

*Nebraska.* — *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679; *Kofoed v. Thompson*, (Neb. 1905) 102 N. W. Rep. 268.

*New Jersey.* — *Baldwin v. Trowbridge*, 62 N. J. Eq. 468.

*New York.* — *Bullenkamp v. Bullenkamp*, 34 N. Y. App. Div. 193, 43 N. Y. App. Div. 510.

*Pennsylvania.* — *Goodwin v. McMinn*, 193 Pa. St. 646, 74 Am. St. Rep. 703.

3. *Husband and Wife.* — Where a grantor, in contemplation of death and for the purpose of making an equitable disposition of his property between those entitled to it, conveyed it to his wife, who had no other property, upon her express promise, which was a part of the consideration of the conveyance, that she would pay a specified sum to his grandchildren, it was held that though no express trust was created by her promise, still, upon her refusal to pay, equity would declare her to be a trustee *ex maleficio* for the protection of the intended beneficiaries, the trust not affecting the deed, but acting upon the gift as it reached the possession of the grantee. *Ahrens v. Jones*, 169 N. Y. 555.

5. *Conveyance at Instance of Grantee.* — See *Bullenkamp v. Bullenkamp*, 34 N. Y. App. Div. 193.

6. *Proof of Agreement to Hold in Trust.* — *Aldrich v. Hassinger*, 13 Hawaii 138, citing 15

AM. AND ENG. ENCYC. OF LAW (2d ed.) 1195; *Buddensiek v. Lipman*, 58 N. J. Eq. 334.

**1196.** 4. *Right to Recover Recited Consideration.* — *Bellinger v. Collins*, 117 Iowa 173.

5. *Breach of Fiduciary Duty.* — *United States.* — *Trice v. Comstock*, 121 Fed. Rep. 620, 57 C. C. A. 646.

*Alabama.* — *Lagarde v. Anniston Lime, etc., Co.*, 126 Ala. 496; *Kent v. Dean*, 128 Ala. 600; *Northwestern Land Assoc. v. Grady*, 137 Ala. 219.

*Arizona.* — *Sun Dance Gold-Min. Co. v. Frost*, (Ariz. 1901) 64 Pac. Rep. 435.

*California.* — *Kofoed v. Gordon*, 122 Cal. 314; *Montgomery v. Rauer*, 125 Cal. 227.

*Colorado.* — *Van Wagemen v. Carpenter*, 27 Colo. 444.

*Illinois.* — *Frohlich v. Seacord*, 180 Ill. 85.

*Iowa.* — *Paulus v. Reed*, 121 Iowa 224.

*Kentucky.* — *Butler v. Stark*, (Ky. 1904) 79 S. W. Rep. 204.

*Minnesota.* — *Gilbert v. Heweston*, 79 Minn. 326, 79 Am. St. Rep. 486.

*Nebraska.* — *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514.

*New Jersey.* — *Seacoast R. Co. v. Wood*, 65 N. J. Eq. 530.

*Pennsylvania.* — *Walker v. Walker*, 199 Pa. St. 435.

*South Dakota.* — *Luscombe v. Grigsby*, 11 S. Dak. 408.

*Texas.* — *Halsell v. Wise County Coal Co.*, 19 Tex. Civ. App. 564.

*West Virginia.* — *Jones v. Thorn*, 45 W. Va. 186.

6. *In re Biss*, (1903) 2 Ch. 40; *Smith v. Stevenson*, 204 Pa. St. 194; *Laning v. Darling*, 209 Pa. St. 254; *Gilbert v. Windhusen*, 31 Wash. 249; *Chantler v. Hubbell*, 34 Wash. 211.

**1197.** 1. *Fiduciaries Purchasing Trust Property.* — *Williams v. Scott*, (1900) A. C. 499; *Gastonguay v. Sayoie*, 29 Can. Sup. Ct. 613; *Preston v. Preston*, 202 Pa. St. 515.

**1198.** 1. *Fiduciaries Purchasing Adverse Title.* — *Sun Dance Gold-Min. Co. v. Frost*, (Ariz. 1901) 64 Pac. Rep. 435; *Gilbert v. Heweston*, 79 Minn. 326, 79 Am. St. Rep. 486; *Merrick v. Waters*, 171 N. Y. 655, affirming 51 N. Y. App. Div. 83; *Thompson v. Thompson*, (Tenn. Ch. 1899) 54 S. W. Rep. 145.

3. *Calumet Gold Min., etc., Co. v. Phillips*, 31 Colo. 267.

*Purchases by Corporation Directors or Officers.* —

**1198.** (2) *To What Fiduciary Relations Rule Applies.* — See note 5.

**1200.** *e. CONTRACTS BETWEEN PERSONS IN FIDUCIARY RELATIONS.* — See note 1.

**IV. AGAINST WHOM IMPLIED TRUSTS WILL BE ENFORCED — Bona Fide Purchasers.** — See note 4.

**1201.** See note 1.

Creditors. — See note 2.

**1202.** See note 1.

**1203.** *V. RULES OF PUBLIC POLICY AFFECTING ENFORCEMENT OF IMPLIED TRUSTS — Perpetration of Fraud.* — See note 6.

**1204.** See note 1.

**VI. REMEDIES — 1. In General.** — See note 4.

**1205.** *VII. LACHES AND LIMITATIONS — 1. The General Principle.* — See note 5.

**2. Analogy to Statute of Limitations.** — See note 6.

*Compare* Seacoast R. Co. v. Wood, 65 N. J. Eq. 530.

**1198.** 4. *Purchase of Property Necessary to Cestui Que Trust.* — Seacoast R. Co. v. Wood, 65 N. J. Eq. 530.

5. See Trice v. Comstock, 121 Fed. Rep. 620, 57 C. C. A. 646, where the question is discussed at length

**1200.** 1. *Contracts Between Persons in Fiduciary Relations.* — Schneider v. Schneider, 125 Iowa 1.

4. *Bona Fide Purchasers for Value.* — Canfield v. Plummer, 212 Ill. 541; Banes v. Morgan, 204 Pa. St. 185; Babcock v. Wells, 25 R. I. 30.

*The Burden of Proving Notice of resulting trust is on the party seeking to enforce the trust.* Oaks v. West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

*A Grantee in Payment of an Antecedent Debt takes subject to implied trusts.* Thompson v. Thompson, (Tenn. Ch. 1899) 54 S. W. Rep. 145.

**A Voluntary Grantee** takes subject to implied trusts. Jones v. Jones, 140 Cal. 587; Bellinger v. Collins, 117 Iowa 173.

*Heirs and devisees* take subject to implied trusts. Paulus v. Reed, 121 Iowa 224; Pollard v. McKenney, (Neb. 1903) 96 N. W. Rep. 679; Bible v. Marshall, 103 Tenn. 324; Hill v. True, 104 Wis. 294.

**1201.** 1. *Purchasers with Notice* — United States. — Central Stock, etc., Exch. v. Bendinger, 109 Fed. Rep. 926, 48 C. C. A. 726; Missouri Broom Mfg. Co. v. Guymon, (C. C. A.) 115 Fed. Rep. 112; Trice v. Comstock, 121 Fed. Rep. 620, 57 C. C. A. 646.

*Alabama.* — National Mut. Bldg. etc., Assoc. v. Culbertson, (Ala. 1899) 25 So. Rep. 173; Kent v. Dean, 128 Ala. 600.

*Idaho.* — Branstetter v. Mann, 6 Idaho 580.

*Illinois.* — Metropolis First Nat. Bank v. Leech, 207 Ill. 215; Graham v. Graham, 85 Ill. App. 460.

*Kentucky.* — Webb v. Foley, (Ky. 1899) 49 S. W. Rep. 40.

*New Hampshire.* — Manchester St. R. Co. v. Williams, 71 N. H. 312.

*New Jersey.* — Condit v. Bigalow, 64 N. J. Eq. 504.

*Ohio.* — Ward v. Ward, 12 Ohio Cir. Dec. 59.

*Oregon.* — Schwartz v. Gerhardt, 44 Oregon 425.

*South Dakota.* — Luscombe v. Grigsby, 11 S. Dak. 408.

*Tennessee.* — Woodfin v. Marks, 104 Tenn. 512.

*Texas.* — Caldwell v. Bryan, 20 Tex. Civ. App. 168; Stone v. Kahle, 22 Tex. Civ. App. 185; Oaks v. West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; Sparks v. Taylor, (Tex. Civ. App. 1905) 87 S. W. Rep. 740.

*Virginia.* — Flanary v. Kane, 102 Va. 547.

**2. General Creditors.** — Tillman v. Murrell, 120 Ala. 239; Linnel v. Hudson, 59 S. Car. 283; Standard Mercantile Co. v. Ellis, 48 W. Va. 309.

*Assignee in Bankruptcy.* — In re Peabody, (C. C. A.) 118 Fed. Rep. 266; In re Spencer, 128 Fed. Rep. 654.

**1202.** 1. *Judgment Creditor.* — School Dist. No. 10 v. Peterson, 74 Minn. 122, 73 Am. St. Rep. 337.

*Attaching Creditors.* — Chicago, etc., R. Co. v. Omaha First Nat. Bank, 58 Neb. 548; McClung v. Colwell, 107 Tenn. 502, 80 Am. St. Rep. 961; Caldwell v. Bryan, 20 Tex. Civ. App. 168.

*A Judgment Creditor Purchasing at an Execution Sale* takes subject to any resulting trust. Hicks v. Pogue, 33 Tex. Civ. App. 333.

**1203.** 6. *Perpetration of Fraud.* — Chantler v. Hubbell, 34 Wash. 211.

**1204.** 1. *Fraud on Creditors.* — Goodrich v. Hicks, 19 Tex. Civ. App. 528.

**4. Bill in Equity.** — Jones v. Jones, 140 Cal. 587; James v. Groff, 157 Mo. 402; Goodwin v. McMinn, 193 Pa. St. 646, 74 Am. St. Rep. 703.

*For Matters of Procedure* in the case of bills to enforce implied trusts, see the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 117 et seq., and the Supplement thereto.

**1205.** 5. *Enforcement of Implied Trusts May Be Barred by Laches.* — Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81; Stubbins v. Briggs, (Ky. 1902) 68 S. W. Rep. 392; Smith v. Holt-heide, (Ky. 1903) 74 S. W. Rep. 718; Stevenson v. Smith, 189 Mo. 447; Crowlev v. Crowley, 72 N. H. 241; Oaks v. West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; Havenor v. Pipher, 109 Wis. 108. See generally the title LACHES, 125. 9 et seq.

*Relation of Parties.* — Zunkel v. Colson, 109 Iowa 695.

**6. General Rule Analogous to Limitation of Actions at Law Applied.** — McMurray v. McMurray.

- 1206.** Statutory Limitations Expressly Relating to Implied Trusts. — See note 3.  
**1207.** 4. Knowledge of Right. — See note 2.  
 6. Recognition of Implied Trust. — See note 4.  
 7. Possession. — See note 5.  
**1208.** 8. Lapse of Time as Affecting Quantum of Proof. — See note 1.  
 VIII. CHARACTER AND INCIDENTS OF ESTATES ARISING OUT OF IMPLIED TRUSTS — 2. Extinguishment of Trust. — See note 4.  
**1209.** 6. Attachment and Execution. — See note 3.

ray, 180 Mo. 526, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1205.

**Persons under Disability.** — See Condit v. Bigalow, 64 N. J. Eq. 504.

**1206.** 3. Statutory Provisions. — Braun v. First German Evangelical Lutheran Church, 198 Pa. St. 152; Preston v. Preston, 202 Pa. St. 515.

**1207.** 2. Knowledge of Fraud. — Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1207; McMurray v. McMurray, 180 Mo. 526.

4. Recognition of Implied Trust. — Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1207; Plass v. Plass, 122 Cal. 3; Faylor v. Faylor, 136 Cal. 92; Madison v. Madison, 206 Ill. 534; Zunkel v. Colson, 109 Iowa 695; Newis v. Top-

fer, 121 Iowa 433; Williams v. Williams, (Ky. 1903) 76 S. W. Rep. 413; Crowley v. Crowley, 72 N. H. 241.

5. Possession. — Plass v. Plass, 122 Cal. 3; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210; Ackley v. Croucher, 203 Ill. 530; Butler v. Carpenter, 163 Mo. 597. Compare Smith v. Holtheide, (Ky. 1903) 74 S. W. Rep. 718.

**1208.** 1. Lapse of Time as Affecting Quantum of Proof. — Malley v. Malley, 121 Iowa 237.

4. Trust May Be Extinguished by Matter in Pais. — Proctor v. Rand, 94 Me. 313; Phillips v. Swenson, 16 S. Dak. 357.

**1209.** 3. Implied Trusts Subject to Execution. — Goodrich v. Hicks, 19 Tex. Civ. App. 528.

## IMPLIED WARRANTIES.

BY LEO GOODMAN.

- 1213.** I. DEFINITION AND NATURE. — See note 2.  
**1215.** IV. IMPLIED WARRANTY OF TITLE — 2. Common-law Rule — *a.* AS TO CHATTELS IN VENDOR'S POSSESSION — (1) *Warranty of Title Implied.* — See note 3.  
**1218.** V. IMPLIED WARRANTY OF QUALITY — 1. In General. — See note 11.  
**1219.** 2. Implied Warranty of Sound Quality from Sound Price. — See note 5.  
**1220.** 3. Sales on Inspection — *a.* IN GENERAL. — See notes 4, 5.  
**1221.** See notes 3, 5.  
*b.* PATENT DEFECTS. — See note 7.  
**1213.** 2. Language upon Fair Construction Equivalent to Warranty Sufficient. — Petty v. Fish, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 828.  
**1215.** 3. Implied Warranty of Chattels in Possession. — Deatz v. U. S., 38 Ct. Cl. 355; Wilson v. Belles, 22 Pa. Super. Ct. 477.  
**1218.** 11. Buyer Purchases at His Own Risk. — Earl v. Westfall Commission Co., 70 Ark. 61; Burnett v. Hensley, 118 Iowa 575; Farren v. Dameron, 99 Md. 323, 105 Am. St. Rep. 297; Joy v. National Exch. Bank, 32 Tex. Civ. App. 398.  
**1219.** 5. Common-law Rule. — See Gage v. Carpenter, 47 C. C. A. 39, 107 Fed. Rep. 886.  
**1220.** 4. No Implied Warranty in Absence of Fraud — *United States.* — Dodge v. Dickson Mfg. Co., (C. C. A.) 113 Fed. Rep. 218.  
*Arkansas.* — Earl v. Westfall Commission Co., 70 Ark. 61.  
*Illinois.* — Telluride Power Transmission Co. v. Crane Co., 103 Ill. App. 647, affirmed 308 Ill. 218; Martin v. Roehm, 92 Ill. App. 87; Horwich v. Western Brewery Co., 95 Ill. App. 162.  
*Kansas.* — National Oil Co. v. Rankin, 68 Kan. 679.  
*Louisiana.* — Fee v. Sentell, 52 La. Ann. 1957.  
*Maryland.* — Farren v. Dameron, 99 Md. 323, 105 Am. St. Rep. 297.  
*Pennsylvania.* — Wilson v. Belles, 22 Pa. Super. Ct. 477.  
*Canada.* — Higgins v. Clish, (Canada) 34 Nova Scotia 135.  
 5. Inspection Unnecessary if Opportunity to Inspect Given. — Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218.  
**1221.** 3. Seller May Permit Buyer to Cheat Himself. — Horwich v. Western Brewery Co., 95 Ill. App. 171.  
 5. Vendor May Warrant Against Patent Defects. — June v. Falkinburg, 89 Mo. App. 563.  
 7. Patent Defects. — Ragsdale v. Shipp, 108 Ga. 817; Fall, etc., Fish Co. v. Point Roberts

**1222.** *d.* LATENT DEFECTS. — See note 5.

**1223.** See note 2.

**4. Sales by Description — a. WARRANTY THAT GOODS WILL CORRESPOND WITH DESCRIPTION.** — See notes 4, 5.

**1224.** *b.* RIGHTS AND REMEDIES OF BUYER FOR BREACH OF WARRANTY. — See notes 2, 3.

**1225.** **5. Sales by Sample — a. IMPLIED WARRANTY THAT GOODS WILL CORRESPOND WITH SAMPLE.** — See notes 3, 4.

**1226.** See note 1.

*b.* RIGHT TO COMPARE GOODS WITH SAMPLE BEFORE ACCEPTANCE. — See note 4.

*c.* RIGHTS AND REMEDIES OF BUYER IN CASE GOODS DO NOT CONFORM TO SAMPLE. — See note 6.

**1227.** See notes 1, 2.

Fishing, etc., Co., 24 Wash. 633, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1221-1223.

**1222.** **5. Latent Defects Unknown to Seller.** — *Gorge v. Carpenter*, 107 Fed. Rep. 886, 47 C. C. A. 39; *Higgins v. Clish*, (Canada) 34 Nova Scotia 135. But see *Haffman v. Dixon*, 105 Wis. 315.

**1223.** **2. Latent Defects Known to Seller.** — *Osborn v. American Ink Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 648.

**4. Condition Precedent.** — *Munford v. Kevil*, 109 Ky. 246; *Carleton v. Lombard*, 19 N. Y. App. Div. 297, *affirmed* 162 N. Y. 628. See also *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712.

**5. Implied Warranty that Goods Will Correspond to Description — Georgia.** — *American Grocery Co. v. Brackett*, 119 Ga. 489.

*Illinois.* — *Telluride Power Transmission Co. v. Crane Co.*, 103 Ill. App. 647, *affirmed* 208 Ill. 218.

*Iowa.* — *Timken Carriage Co. v. Smith*, 123 Iowa 554.

*Maine.* — *Noble v. Buswell*, 96 Me. 73.

*Massachusetts.* — *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412.

*Missouri.* — *Beck, etc., Iron Co. v. Holbeck*, 109 Mo. App. 179.

*New Jersey.* — *Evans v. Laury*, 67 N. J. L. 153.

*New York.* — *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712; *Abel v. Murphy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 648; *Bell v. Mills*, 78 N. Y. App. Div. 42.

*Pennsylvania.* — *Wilson v. Belles*, 22 Pa. Super. Ct. 477.

**1224.** **2. Repudiation of Contract for Nonconformity.** — *Noble v. Buswell*, 96 Me. 73; *Fall, etc., Fish Co. v. Point Roberts Fishing, etc., Co.*, 24 Wash. 633, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1224.

**3. Suit for Breach of Warranty.** — *Compare* *Munford v. Kevil*, 109 Ky. 246; *Neff v. McNeely*, (Neb. 1901) 96 N. W. Rep. 150, in which cases it appears that the rule stated in the original text does not apply if the vendee inspects or has the opportunity to inspect and then retains the goods.

**1225.** **3. Warranty that Goods Will Correspond with Sample — California.** — *Browning v. McNear*, 145 Cal. 272.

*Delaware.* — *Love v. Barnesville Mfg. Co.*, 3 Penn. (Del.) 152.

*Illinois.* — *Newton Rubber Works v. Home Rattan Co.*, 100 Ill. App. 421; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579.

*Kansas.* — *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, (Kan. 1905) 79 Pac. Rep. 141.

*Missouri.* — *Schoenberg v. Loker*, 88 Mo. App. 387; *Alabama Steel, etc., Co. v. Symons*, 110 Mo. App. 41; *Roth v. Continental Wire Co.*, 94 Mo. App. 236.

*New York.* — *Lichtenstein v. Robolinsky*, 98 N. Y. App. Div. 516; *New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330; *Ideal Wrench Co. v. Garvin Mach. Co.*, 65 N. Y. App. Div. 235.

*Texas.* — *Hume v. Sherman Oil, etc., Co.*, 27 Tex. Civ. App. 366.

**Where a Sale Is Partly by Sample and Partly by Description**, the goods must correspond to the description in the respect covered thereby, and to the sample in other respects. *Henry v. Talcott*, 175 N. Y. 385.

**4. The Rule in Pennsylvania** was changed by Act April 13, 1887, which prescribes "an implied warranty on the part of the seller that the goods, chattels, and property sold and to be delivered are the same in quality as the sample shown." *Baltimore Brick Co. v. Coyle*, 18 Pa. Super. Ct. 186; *Jones v. Jennings*, 168 Pa. St. 493; *Hoffman v. Burr*, 155 Pa. St. 218. See also *Simpson v. Karr*, 22 Pa. Super. Ct. 8.

**1226.** **1. More Accurately, the Warranty Is Express** in a case of sale by sample, "the affirmation being made by the sample itself silently asserting the qualities of the bulk it represents." *Henry v. Talcott*, 175 N. Y. 385, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1226.

**4. Right to Inspect Before Acceptance.** — *Love v. Barnesville Mfg. Co.*, 3 Penn. (Del.) 152.

**6. Rescission and Suit for Breach of Warranty.** — *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579; *Henry v. Talcott*, 175 N. Y. 385. See also *Love v. Barnesville Mfg. Co.*, 3 Penn. (Del.) 152.

**1227.** **1. Return Not Necessary in Order to Sue for Breach of Warranty.** — The rule stated in the original text is confined to rescission, and a return of the goods is not necessary in order to sue for a breach of the warranty. *Henry v. Talcott*, 175 N. Y. 385. And it is also held that the purchaser may set off the damages in an action for the price. *Browning v. McNear*,

**1227. d. LIABILITY OF SELLER WHERE SAMPLE CONTAINS LATENT DEFECTS.** — See notes 3, 4.

**e. WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE.** — See notes 6, 7, 8.

**f. WHAT CONSTITUTES SALE BY SAMPLE.** — See note 10.

**1228.** See notes 1, 2, 3, 4, 7.

**1229. 6. Particular Kinds of Warranty — a. OF MERCHANTABILITY — (1) Under What Circumstances Warranty Arises — Sales Without Inspection.** — See notes 2, 3.

**1230.** See notes 1, 2, 3.

**Rule Not Applicable Where Buyer Relies on His Own Judgment.** — See note 4.

**(3) Rights of Buyer on Breach of Warranty.** — See note 8.

**1231. b. OF FITNESS FOR PURPOSE INTENDED — (1) Principle on Which This Implied Warranty Rests.** — See note 2.

**(2) Of Manufacturer of Article to User — (a) Where Buyer Relies on Manufacturer's Judgment — aa. STATEMENT OF RULE — (aa) In General.** — See note 3.

145 Cal. 272. See also, as to the same doctrine in *Missouri*, Alabama Steel, etc., Co. v. Symons, 110 Mo. App. 41; *Miles v. Withers*, 76 Mo. App. 87; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *Schoenberg v. Loker*, 88 Mo. App. 387; *Aultman v. Hunter*, 82 Mo. App. 632.

**1227. 2. Valueless Goods.** — See *Schoenberg v. Loker*, 88 Mo. App. 387.

**3. Latent Defects — Sale by Manufacturer.** — *Price v. Kohn*, 99 Ill. App. 115; *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, (Kan. 1905) 79 Pac. Rep. 141, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227; *Henry v. Talcott*, 175 N. Y. 385.

**4. Sales by Person Not Manufacturer.** — See *Henry v. Talcott*, 175 N. Y. 385.

**6. Warranty of Merchantability.** — *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, (Kan. 1905) 79 Pac. Rep. 141, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227.

**7.** See *Schoenberg v. Loker*, 88 Mo. App. 387.

**8. Warranty of Fitness for Particular Purpose.** — *Love v. Barnesville Mfg. Co.*, 3 Penn. (Del.) 152.

**10. Mere Exhibition of Sample Does Not Constitute Sale by Sample.** — *Smith v. Coe*, 55 N. Y. App. Div. 585, affirmed 170 N. Y. 162. See also *Henry v. Talcott*, 175 N. Y. 385.

**1228. 1. Parties Must Contract with Reference to Sample.** — *Browning v. McNear*, 145 Cal. 272, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227; *Henry v. Talcott*, 175 N. Y. 385; *Smith v. Coe*, 55 N. Y. App. Div. 585, affirmed 170 N. Y. 162; *New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330.

**2. Samples Shown to Enable Purchaser to Judge Quality.** — *New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330; *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178; *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 N. Y. App. Div. 300, affirmed 164 N. Y. 593; *Henry v. Talcott*, 175 N. Y. 385; *Smith v. Coe*, 170 N. Y. 162.

**3. Goods to Be Different from Sample.** — See *Henry v. Talcott*, 175 N. Y. 385.

**4. Sales with Opportunity to Inspect.** — *Browning v. McNear*, 145 Cal. 272; *Smith v. Coe*, 170 N. Y. 162.

**7. Sale by Sample Question for Jury.** — *Browning v. McNear*, 145 Cal. 272; *Henry v. Talcott*, 175 N. Y. 385; *New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330.

**No Conflict in Evidence — Question of Law.** — *Smith v. Coe*, 170 N. Y. 162.

**1229. 2. Sales Without Inspection.** — *Frith v. Hollan*, 133 Ala. 586, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229; *Bunch v. Weil*, 72 Ark. 343; *Main v. Dearing*, 73 Ark. 470; *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636; *Standard Rope, etc., Co. v. Olmstead*, 13 S. Dak. 296. See also *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

**3. Sales on Description.** — *Frith v. Hollan*, 133 Ala. 586, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229; *Evans v. Laury*, 67 N. J. L. 153; *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

**1230. 1. Buyer Not Entitled to Article of Particular Fineness.** — *Main v. Dearing*, 73 Ark. 470; *Bunch v. Weil*, 72 Ark. 343.

**2. Best Quality Not Implied.** — *Evans v. Laury*, 67 N. J. L. 153.

**3. Bunch v. Weil, 72 Ark. 343; *Main v. Dearing*, 73 Ark. 470.**

**4. When Rule Not Applicable.** — *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712.

**8. Rescission of Contract.** — *Bunch v. Weil*, 72 Ark. 343; *Smith v. Coe*, 170 N. Y. 162; *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

**After Acceptance by Buyer.** — *Cook v. Finch*, 117 Ga. 541; *Moultrie Repair Co. v. Hill*, 120 Ga. 730.

**1231. 2. Gage v. Carpenter, 47 C. C. A. 39, 107 Fed. Rep. 886; *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92; *Horwich v. Western Brewery Co.*, 95 Ill. App. 171, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1231; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.**

**3. Manufacturer's Liability to One Purchasing for His Own Use — Alabama.** — *Troy Grocery Co. v. Potter*, 139 Ala. 359. *Colorado.* — *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142.



**1232.** See notes 1, 2, 3, 4.

**1233.** (bb) *For What Latent Defects Liable.* — See notes 1, 2, 3, 4, 5, 6.

**1234.** bb. ILLUSTRATIONS OF RULE. — See notes 11, 12, 17.

(b) *Where Known, Described, and Defined Article Is Ordered.* — See note 18.

**1235.** See notes 1, 2.

*Georgia.* — *Wells v. Gress*, 118 Ga. 566.

*Illinois.* — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218; *Murray Iron Works Co. v. DeKalb Electric Co.*, 103 Ill. App. 78, *dismissed* 200 Ill. 186.

*Indiana.* — *H. B. Smith Co. v. Williams*, 29 Ind. App. 336; *Reeves v. Byers*, 155 Ind. 535.

*Iowa.* — *Parsons Band Cutter, etc., Co. v. Wallinger*, 122 Iowa 703; *Ideal Heating Co. v. Kramer*, (Iowa 1905) 102 N. W. Rep. 840; *Burnett v. Hensley*, 118 Iowa 575.

*Kentucky.* — *Gardner v. Winter*, (Ky. 1904) 78 S. W. Rep. 143.

*Maryland.* — *Queen City Glass Co. v. Pittsburgh Clay Pot Co.*, 97 Md. 429.

*Michigan.* — *Little v. Van Syckle Co.*, 115 Mich. 480; *McCray Refrigerator, etc., Co. v. Woods*, 99 Mich. 269; *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651.

*Minnesota.* — See *Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503.

*Missouri.* — *Fairbanks v. Baskett*, 98 Mo. App. 53; *Aultman v. Hunter*, 82 Mo. App. 632; *Alabama Steel, etc., Co. v. Symons*, 110 Mo. App. 41.

*Nebraska.* — *Von Dohren v. John Deere Plow Co.*, (Neb. 1904) 98 N. W. Rep. 830.

*New Hampshire.* — *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

*New York.* — *Van Pub. Co. v. Westinghouse*, 72 N. Y. App. Div. 121; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.

*Oregon.* — *Lenz v. Blake-McFall Co.*, 44 Oregon 569.

*Pennsylvania.* — *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 188.

*Tennessee.* — *Southern Brass, etc., Co. v. Exeter Mach. Works*, 109 Tenn. 67, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1231.

*Wisconsin.* — *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

*Canada.* — *Crompton, etc., Loom Works v. Hoffman*, 5 Ont. L. Rep. 554.

**1232.** 1. *Articles Already Manufactured.* — *Southern Brass, etc., Co. v. Exeter Mach. Works*, 109 Tenn. 67.

2. *Articles to Be Manufactured on Purchaser's Order.* — *Ideal Heating Co. v. Kramer*, (Iowa 1905) 102 N. W. Rep. 840; *Southern Brass, etc., Co. v. Exeter Mach. Works*, 109 Tenn. 67.

3. *Reasons on Which Warranty Is Based.* — *Troy Grocery Co. v. Potter*, 139 Ala. 359; *Fairbanks v. Baskett*, 98 Mo. App. 53; *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650; *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

4. *Gardner v. Winter*, (Ky. 1904) 78 S. W. Rep. 143; *Queen City Glass Co. v. Pittsburgh Clay Pot Co.*, 97 Md. 429; *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

**1233.** 1. *Latent Defects Growing Out of Process of Manufacture.* — *Nixa Canning Co. v.*

*Lehmann-Higginson Grocer Co.*, (Kan. 1905) 79 Pac. Rep. 141; *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233; *Queen City Glass Co. v. Pittsburgh Clay Pot Co.*, 97 Md. 429; *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382; *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 636.

2. *Reason for Rule.* — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233.

3. *Latent Defects Caused by Use of Defective Materials When Known to Manufacturer.* — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233; *Queen City Glass Co. v. Pittsburgh Clay Pot Co.*, 97 Md. 429.

4. *That Manufacturer Is Not Liable for Undiscoverable and Latent Defects.* — *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

5. *Latent Defects from Unskilfulness in Work of Another Manufacturer.* — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233.

6. *Latent Defects from Materials Furnished by Another Manufacturer.* — *Farren v. Dameron*, 99 Md. 323, 58 Atl. Rep. 367, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233. See also *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

**1234.** 11. *Machinery.* — *Murray Iron Works Co. v. DeKalb Electric Co.*, 103 Ill. App. 78, *dismissed* 200 Ill. 186.

12. *Harvesters, Reapers, Potato Diggers, Corn Cutters.* — *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 188.

17. *Firewood.* — See *Cook v. Finch*, 117 Ga. 541.

18. *Known, Defined, and Described Articles — United States.* — *Dodge v. Dickson Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 218.

*Arkansas.* — *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92.

*Colorado.* — *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142.

*Kentucky.* — *Gardner v. Winter*, (Ky. 1904) 78 S. W. Rep. 143.

*Louisiana.* — *Dreyfus v. Lourd*, 111 La. 21.

*Missouri.* — *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650; *Fairbanks v. Baskett*, 98 Mo. App. 53.

*New Hampshire.* — *Gregg v. Page Belting Co.*, 69 N. H. 247; *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

*Pennsylvania.* — *Chippewa Lumber, etc., Co. v. Howard*, 18 Pa. Super. Ct. 423.

*Wisconsin.* — *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

**1235.** 1. *Warranty Only that Goods Will Correspond with Description.* — *Horwich v. Western Brewery Co.*, 95 Ill. App. 171, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1235; *Dreyfus v. Lourd*, 111 La. 21; *Fairbanks v. Baskett*, 98 Mo. App. 53; *Rollins Engine Co.*

- 1235.** (4) *By Dealer to User* — (a) General Rule. — See note 6.
- 1236.** See note 2.
- Necessity for Seller to Know Purpose for Which Articles Wanted. — See notes 4, 5.
- 1237.** (b) Liability for Latent Defects. — See note 1.
- (5) *By Grower or Producer to User*. — See notes 5, 6.
- 1238.** 7. Sales Imposing Exceptional Liability on Seller — *a. SALES OF FOOD* — (2) *Rule in United States* — (a) On Sales to Dealer or Middleman. — See note 1.
- (b) On Sales to Consumer by Regular Dealer. — See notes 3, 4.
- 1239.** (d) On Sales of Food for Cattle. — See note 1.
- b. SALES OF DRUGS.* — See notes 4, 5.
- 1240.** VIII. IMPLIED WARRANTY ON SALES OF SECOND-HAND CHATTELS. — See note 7.
- 1241.** IX. IMPLIED WARRANTY IN SALES OR TRANSFERS OF CHOSSES IN ACTION — Statement of Rule. — See notes 1, 2.
- Applications of Rule — Bills and Notes. — See note 3.
- 1242.** Shares of Stock. — See note 1.
- 1243.** Other Choses in Action. — See notes 1, 5.

*v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

**1235.** 2. Goods Manufactured According to Specifications of Vendee. — *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382; *Gregg v. Page Belting Co.*, 69 N. H. 247; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

6. Liability of Dealer to User. — *Gardner v. Winter*, (Ky. 1904) 78 S. W. Rep. 143; *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297; *Beck, etc., Iron Co. v. Holbeck*, 109 Mo. App. 179; *New Birdsall Co. v. Keys*, 99 Mo. App. 458; *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650; *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

**1236.** 2. Equal Means of Knowledge — How Rule Affected by. — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1236.

4. To Raise Warranty, Purpose Must Be Known to Seller. — *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412; *Walker v. Taylor*, 19 Pa. Super. Ct. 39.

5. Purchaser Must Rely on Seller's Judgment. — *Dodge v. Dickson Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 218; *Day v. Mapes-Reeve Constr. Co.*, 174 Mass. 412.

**1237.** 1. Dealer's Liability for Latent Defects. — See *Rollins Engine Co. v. Eastern Forge Co.*, (N. H. 1904) 59 Atl. Rep. 382.

5. Liability of Grower or Producer to User. — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1237; *Prentice v. Fargo*, 53 N. Y. App. Div. 608, affirmed 173 N. Y. 593.

Upon a Sale of Seeds by the Grower there is an implied warranty that they are free from any defects arising from improper and negligent cultivation. *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

6. Limitations of Rule. — *Farren v. Dameron*, 99 Md. 323, 105 Am. St. Rep. 297, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1237.

**1238.** 1. No Warranty on Sales to Dealer or Middleman. — See *Davis Provision Co. v.*

*Fowler*, 20 N. Y. App. Div. 626, affirmed 163 N. Y. 580.

3. Dicta. — *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92.

4. Reason for Rule. — *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92.

**1239.** 1. No Implied Warranty in Sales of Food for Cattle. — *National Cotton Oil Co. v. Young*, (Ark. 1905) 85 S. W. Rep. 92.

4. Sales of Drugs. — *Salmon v. Libby*, 114 Ill. App. 266, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1239.

5. Liability of Original Seller. — *Salmon v. Libby*, 114 Ill. App. 258, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1239.

**1240.** 7. Second-hand Chattels. — *Norris v. Reinstedler*, 90 Mo. App. 626. See also *Fee v. Sentell*, 52 La. Ann. 1957.

**1241.** 1. Warranty in Sales or Transfers of Choses in Action. — *Sterling First Nat. Bank v. Drew*, 191 Ill. 186, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1240.

2. Genuineness Only Warranty Implied. — *Sterling First Nat. Bank v. Drew*, 191 Ill. 186, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1240.

3. Warranty Implied of a Valid and Subsisting Obligation. — *M. Rumley Co. v. Dollarhide*, 86 Ill. App. 476.

Warranty of Genuineness of Signature. — *Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank*, 97 Fed. Rep. 181, 38 C. C. A. 108; *Gabay v. Doane*, 66 N. Y. App. Div. 507; *Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank*, 68 Ohio St. 43; *Farmers' Nat. Bank v. Squire*, 6 Ohio Cir. Dec. 697, 18 Ohio Cir. Ct. 697; *Lowry v. Stapp*, (Tenn. Ch. 1899) 53 S. W. Rep. 194.

**1242.** 1. Stock — Genuineness. — *Rogan v. Illinois Trust, etc., Bank*, 93 Ill. App. 39, affirmed 194 Ill. 600. See also *Sterling First Nat. Bank v. Drew*, 191 Ill. 186.

**1243.** 1. Applications of Rule — Accounts. — See *Sterling First Nat. Bank v. Drew*, 191 Ill. 186; *Shaw Blank Book Co. v. Maybell*, 86 Minn. 241.

5. Land Warrants. — See *Sterling First Nat. Bank v. Drew*, 191 Ill. 186.

**1245. XI. IMPLIED WARRANTY IN OFFICIAL AND JUDICIAL SALES — 1. As to Title — Sales by Executors, Administrators, Etc. — See note 4.**

**1246.** See note 2.

2. As to Quality. — See note 5.

**1247. XII. IMPLIED WARRANTY IN SALES BY AGENTS. — See notes 1, 5.**

**1249. XIII. CUSTOM AND USAGE AS AFFECTING IMPLIED WARRANTY. — See note 3.**

**XIV. EXCLUSION OF IMPLIED WARRANTIES BY EXPRESS WARRANTIES — 1. Express Warranty of Quality Excludes Implied Warranty of Quality. — See note 4.**

**1251. XV. EXCLUSION OF IMPLIED WARRANTY BY REFUSAL TO WARRANT. — See note 5.**

**1255. XVI. BREACH OF IMPLIED WARRANTY — 2. Of Quality — a. RIGHTS AND REMEDIES OF BUYER — (1) Action for Damages or Recoupment in Action for Price. — See notes 3, 4.**

**1256.** Obligation to Return Goods or Notify Seller of Defects. — See notes 1, 2.

(2) Rescission — (a) View that Buyer May Rescind Whether Contract Is Executed or Executory. — See notes 3, 4, 5.

**1257.** See notes 1, 3.

**1245. 4. Sales by Administrators, Etc. — Real Property. — Fox v. McGoodwin, (Ky. 1900) 56 S. W. Rep. 515; Calvert v. Ash, 47 W. Va. 480.**

**1246. 2. Purchaser Takes Subject to Incumbrances. — Calvert v. Ash, 47 W. Va. 480.**

**5. Warranty of Quality or Soundness. — Fox v. McGoodwin, (Ky. 1900) 56 S. W. Rep. 515; Calvert v. Ash, 47 W. Va. 480.**

**1247. 1. General Agent Has Implied Authority to Warrant. — H. B. Smith Co. v. Williams, 29 Ind. App. 336; Dreyfus v. Goss, 67 Kan. 57.**

**5. Warranties in Sales by Sample. — Dreyfus v. Goss, 67 Kan. 57.**

**1249. 3. Instances. — See Stamps v. Tennessee Producer's Marble Co., (Tenn. Ch. 1900) 59 S. W. Rep. 769.**

**4. Express Warranty of One Quality Excludes Implied Warranty of Other Qualities. — Halcomb v. Cable Co., 119 Ga. 466; Reeves v. Byers, 155 Ind. 535; Norris v. Reinstedler, 90 Mo. App. 626; Fairbanks v. Baskett, 98 Mo. App. 53; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516; Dwight Bros. Paper Co. v. Western Paper Co., 114 Wis. 414. See also Aultman v. Hunter, 82 Mo. App. 632; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214.**

**1251. 5. Refusal to Warrant Excludes Implied Warranty. — Burnett v. Hensley, 118 Iowa 575.**

**1255. 3. Setting Up Breach in Reduction of Price. — Frith v. Hollan, 133 Ala. 586, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255; Eastern Granite Roofing Co. v. Chapman, 140 Ala. 440; Newton Rubber Works v. Home Rattan Co., 100 Ill. App. 421; Alabama Steel, etc., Co. v. Symons, 110 Mo. App. 41; New Birdall Co. v. Keys, 99 Mo. App. 458; Lenz v. Blake-McFall Co., 44 Oregon 569; Southern Brass Co. v. Exeter Mach. Works, 109 Tenn. 67, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.**

**4. Action for Breach. — Frith v. Hollan, 133 Ala. 586, citing 15 AM. AND ENG. ENCYC. OF**

**LAW (2d ed.) 1255; Southern Brass, etc., Co. v. Exeter Mach. Works, 109 Tenn. 67, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.**

**1256. 1. No Obligation to Return Goods or Notify Seller of Defects. — Newton Rubber Works v. Home Rattan Co., 100 Ill. App. 421; McMillan v. De Tangle, 93 Ill. App. 65; Ideal Wrench Co. v. Garvin Mach. Co., 65 N. Y. App. Div. 235; Osborn v. American Ink Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 648; Southern Brass, etc., Co. v. Exeter Mach. Works, 109 Tenn. 67, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.**

**2. Presumption Arising from Failure to Notify Seller of Defects. — Southern Brass, etc., Co. v. Exeter Mach. Works, 109 Tenn. 67, quoting 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.**

**3. May Rescind Executed or Executory Contracts. — Timken Carriage Co. v. Smith, 123 Iowa 554; Noble v. Buswell, 96 Me. 73; Lenz v. Blake-McFall Co., 44 Oregon 569; Wilson v. Belles, 22 Pa. Super. Ct. 477.**

**4. Seller Must Be Placed in Statu Quo. — Eastern Granite Roofing Co. v. Chapman, 140 Ala. 440, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1256; Southern Brass, etc., Co. v. Exeter Mach. Co., 109 Tenn. 67, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1256, 1257.**

**5. Unless Article Worthless. — Eastern Granite Roofing Co. v. Chapman, 140 Ala. 440, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1256.**

**1257. 1. Must Be Offer to Return in Reasonable Time. — Eastern Granite Roofing Co. v. Chapman, 140 Ala. 440; Noble v. Buswell, 96 Me. 73; Von Dohren v. John Deere Plow Co., (Neb. 1904) 98 N. W. Rep. 830; Lenz v. Blake-McFall Co., 44 Oregon 569; Tete v. Eshler, 11 Pa. Super. Ct. 224. See also South Bend Pulley Co. v. W. E. Caldwell Co., (Ky. 1900) 55 S. W. Rep. 208; Alabama Steel, etc., Co. v. Symons, 110 Mo. App. 41.**

**3. Reasonable Time — When Question of Fact. — South Bend Pulley Co. v. W. E. Caldwell Co., (Ky. 1900) 55 S. W. Rep. 208; Von Dohren**

**1257.** *b.* MEASURE OF DAMAGES—(1) *Where Purchaser Retains Property*—(a) Statement of General Rule.—See note 9.

**1259.** (b) *Whether Measure of Damages Affected by Resale.*—See note 2.

(d) *Under What Circumstances Rule Extended to Allow Consequential Damages.*—See note 5.

**1261.** (3) *Where Property Is Wholly Worthless.*—See note 1.

*v. John Deere Plow Co.*, (Neb. 1904) 98 N. W. Rep. 830.

**1257. 9. Present Rule—Georgia.**—*Americus Grocery Co. v. Brackett*, 119 Ga. 489.

*Illinois.*—*Heenan v. Redmen*, 101 Ill. App. 603. *Kentucky.*—*Heilman Milling Co. v. Hotaling*, (Ky. 1899) 53 S. W. Rep. 655.

*Maine.*—*Noble v. Buswell*, 96 Me. 73.

*New York.*—*Ideal Wrench Co. v. Garvin Mach. Co.*, 65 N. Y. App. Div. 235; *Steinhardt v. Phelps*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 730; *McQuade v. Newman*, (Supm. Ct. App. T.) 88 N. Y. Supp. 363; *Lockwood v. Dewey*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 751.

*North Carolina.*—*Huyett, etc., Mfg. Co. v. Gray*, 126 N. Car. 108.

*South Dakota.*—*Standard Rope, etc., Co. v. Olmem*, 13 S. Dak. 296.

*Tennessee.*—*Southern Brass, etc., Co. v. Exeter Mach. Works*, 109 Tenn. 67, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1256, 1257.

*Wisconsin.*—*J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449.

**1259. 2. Evidence of Resale Usually Incompetent.**—*Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

**5. Under What Circumstances Consequential Damages Recoverable.**—*New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1259; *Lockwood v. Dewey*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 751; *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414.

**This Rule Has Been Frequently Applied in Sale of Seed.**—*Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474; *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145.

**1261. 1. Measure of Damages Where Goods Are Worthless.**—*Small v. Bartlett*, 96 Mo. App. 550; *J. R. Alsing Co. v. New England Quartz, etc., Co.*, 66 N. Y. App. Div. 473, affirmed 174 N. Y. 536.

**1. IMPORT — IMPORTATION — IMPORTER.** — See note 2.

**2.** See note 1.

**3. IMPOST.** — See note 2.

**1. 2. Constitutional Provision — Interstate Commerce.** — *American Steel, etc., Co. v. Speed*, 192 U. S. 500; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Dooley v. U. S.*, 183 U. S. 151; *Racine Iron Co. v. McCommons*, 111 Ga. 536.

**2. 1. Importation.** — *Lawder v. Stone*, 187 U. S. 283; *American Sugar Refining Co. v. Bidwell*, 124 Fed. Rep. 677.

**3. 2. United States Constitution.** — *Dooley v. U. S.*, 183 U. S. 151.

## IMPOUNDING.

**4. I. DEFINITION.** — See note 1.

**5. V. CHARACTER OF POUND REQUIRED TO BE USED — 2. By Statute.** — See note 4.

**6. VIII. DUTIES AND LIABILITY OF POUNDKEEPER.** — See note 2.

**IX. WHO IS REQUIRED TO FEED ANIMALS WHILE IMPOUNDED.** — See notes 3, 4.

**Poundkeeper Entitled to Charges for Food and Detention.** — See note 6.

**X. NOTICE OF IMPOUNDING.** — See note 7.

**7. XI. APPRAISEMENT OF DAMAGES.** — See notes 2, 3.

**XII. RELEASE FROM POUND.** — See note 4.

**XIII. SALE.** — See note 5.

**8. XV. LIABILITY FOR UNLAWFUL IMPOUNDING.** — See note 5.

**9. IMPRESSION.** — See note 2.

**10. IMPRISON — IMPRISONMENT.** — See note 2.

**4. 1. A Pound** is a place where animals subject to be impounded are to be confined, kept, and fed. *Farrar v. Bell*, 73 Vt. 342.

**5. 4. Impounding in Public Pound When There Is One in the Town.** — *Farrar v. Bell*, 73 Vt. 342.

**6. 2. Liable for Unlawful Impounding.** — *Kansas City v. Minor*, 89 Mo. App. 617.

**3. Duty of Feeding Animals.** — *Farrar v. Bell*, 73 Vt. 342.

**Duty to Dispose of Milk from Impounded Cows.** — *Fleetham v. Therres*, 92 Minn. 500.

**4. Farrar v. Bell, 73 Vt. 342.**

**6. White v. Clarksville**, (Ark. 1905) 87 S. W. Rep. 630.

**Under Iowa Statute.** — *Robinson v. Halley*, 124 Iowa 443.

**7. Notice of Impounding.** — *Miller v. Hoffman*, 135 Mich. 319; *Farrar v. Bell*, 73 Vt. 342.

**Time Within Which Notice Must Be Given.** — See *Farrar v. Bell*, 73 Vt. 342.

**The Impounder Is Bound by the Notice** served stating the cause of impounding, and cannot recover a statutory penalty inconsistent with claims inserted in the notice. *Miller v. Hoffman*, 135 Mich. 319.

**7. 2. Holaman v. Marsh**, 116 Iowa 483.

**Under the Michigan Statute** an impounder dissatisfied with the award of appraisers is entitled to be heard, otherwise the award is not binding. *Miller v. Hoffman*, 135 Mich. 319.

**3. Appraisement.** — See *Holaman v. Marsh*, 116 Iowa 483.

**Under the Iowa Statute** the fact that there are no town trustees to make the appraisement will not affect the impounder's right to the cost of keeping cattle during distraint. *Robinson v. Halley*, 124 Iowa 443.

**4. Release from the Pound upon Payment of Amount Due.** — See *Randall v. Gross*, 67 Neb. 255.

**5. Sale of Animals.** — *Ryall v. Smith*, 138 Ala. 145.

**Notice of Sale.** — As to what constitutes sufficient description of animal and day of sale, see *Ryall v. Smith*, 138 Ala. 145.

**Time Within Which Notice of Sale Must Be Given.** — See *Mincey v. Bradburn*, 103 Tenn. 407.

**Burden of Proving Compliance with Statute on Purchaser.** — *Ryall v. Smith*, 138 Ala. 145.

**8. 5. Liability for Unlawful Impounding — Recovery of Animals.** — See *Randall v. Gross*, 67 Neb. 255; *McConnell v. Cate*, 70 N. H. 296.

**Under the Texas Penal Code** punishing the taking up or using an estray without complying with the law regulating the same, one who impounds a hog with his own and feeds it, but does not use it in any way, is not guilty. *Williams v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 928.

**9. 2. Impression and Opinion Distinguished** — *State v. Royse*, 24 Wash. 440.

**10. 2. Imprisonment.** — *Efroymson v. Smith*, 29 Ind. App. 451.

**Hard Labor.** — "I am of the opinion that the word *imprisonment*, as used in the sixtieth article of war, was not employed in a technical sense to signify *imprisonment* at a military post without hard labor, but that it has a broader signification and empowers a court martial to inflict punishment at hard labor if the offense is one for which the civil tribunals could impose a like sentence." *Per Thayer, J.*, in *In re Langan*, 123 Fed. Rep. 132.

# IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

By H. N. ELDRIDGE.

## 17. IV. RIGHT OF ARREST AS DETERMINED BY NATURE OF ACTION —

1. Actions Arising on Contract. — See note 3.

18. 3. Equitable Actions. — See note 3.

4. Election of Remedies. — See note 5.

20. V. GROUNDS OF ARREST AND IMPRISONMENT — 2. Injuries to Person or Character. — See note 4.

21. See notes 2, 4.

22. 3. Injuries to Property. — See note 1.

23. 4. Fraud — *c.* FRAUD IN CONTRACTING DEBT — (1) *Generally*. — See note 1.

26. *d.* FRAUD IN AVOIDING PAYMENT OF DEBT — (2) *Concealment or Disposal of Property*. — See note 2.

27. An Actual Intent to Defraud. — See note 1.

29. *e.* FRAUD IN FIDUCIARY CAPACITY — Agents, Factors, or Brokers. — See note 3.

30. 5. Misconduct or Neglect in Office or in Professional Employment. — See note 10.

32. 7. Arrest and Imprisonment in Certain Cases Considered — *c.* IN ACTIONS TO RECOVER CHATTEL WHERE PROPERTY HAS BEEN FRAUDULENTLY DISPOSED OF. — See note 4.

33. *e.* FOR NONPAYMENT OF FINES AND PENALTIES — Action to Recover Fine or Penalty. — See note 8.

40. VII. PRIVILEGE FROM ARREST — 1. Persons Privileged — *f.* PERSONS IN ATTENDANCE UPON COURT — (2) *Parties* — (a) *Generally*. — See note 7.

17. 3. Actions ex contractu — Generally. — Peonage Cases, 123 Fed. Rep. 671; *Lamar v. State*, 120 Ga. 312; *Lamar v. Prosser*, 121 Ga. 153. See also *Bray v. State*, 140 Ala. 172.

18. 3. No Arrest in Equitable Action Where Equitable Relief Is Asked. — *Broome v. Cochran*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 660.

5. But Where the Plaintiff May Waive the Tort and Bring an Equitable Action or an Implied Promise, growing wholly out of the wrongful act of the defendant, a *capias* may issue. *Alexander v. Goldstein*, 13 Pa. Super. Ct. 518.

20. 4. Principal Liable to Arrest for "Personal Injury" Caused by Agent. — *Ossmann v. Crowley*, 101 N. Y. App. Div. 597, *overruling* *Daids v. Brooklyn Heights R. Co.*, (County Ct.) 45 Misc. (N. Y.) 208.

21. 2. Libel. — *Hartman v. May*, 2 Penn. (Del.) 512.

4. Divorce for Cruel and Inhuman Treatment. — *Schwartz v. Schwartz*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 487.

22. 1. Conversion of Property. — *Kryn v. Kahn*, (N. J. 1903) 54 Atl. Rep. 870; *Alexander v. Goldstein*, 13 Pa. Super. Ct. 518.

23. 1. He Who Purchases Property Not Intending to Pay for the Same is guilty of fraud in contracting a debt. *Luhrig Coal Co. v. Ludlum*, 69 Ohio St. 311, 100 Am. St. Rep. 675.

26. 2. Disposing of Property with Intent to Defraud Creditors. — *Atwater v. Slepcow*, 74 Conn. 671; *Auerbach v. Rogin*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 695.

In the District of Columbia There Has Been a Repeal of sections 794 and 795 of the Revised Statutes of the District which provided for the arrest of debtors fraudulently conveying away their property. *Costello v. Palmer*, 20 App. Cas. (D. C.) 210.

27. 1. Defendant Must Be Guilty of Actual Fraud. — *Mann v. Chrestopoulos*, 87 N. Y. App. Div. 222.

29. 3. Agent for Collection. — See *Southern Grocery Co. v. Davis*, 132 N. Car. 96.

30. 10. A Dentist Failing to Return a Deposit on his refusal to perform services agreed upon may be arrested. *Haigh v. Martin*, 62 N. Y. App. Div. 409.

32. 4. Recovery of Chattel Fraudulently Disposed Of. — *Thompson v. Thompson*, 10 N. Dak. 564.

33. 8. Arrest of Defendant in Action to Recover Fine or Penalty. — See also *Bray v. State*, 140 Ala. 172.

40. 7. Parties to Suits Privileged from Arrest. — *Lewis v. Miller*, 115 Ky. 627, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 40; *Monroe v. St. Clair Circuit Judge*, 125 Mich. 283.

42. (3) *Witnesses*. — See note 4.

47. IX. WAIVER OF RIGHT OF ARREST — Joinder of Causes of Action. — See note 7.

48. Waiver by Election. — See note 1.

X. EXECUTION AGAINST THE PERSON — 1. Generally — Grounds for Execution — Actions of Tort. — See notes 7, 8, 12.

49. In Cases of Fraud. — See note 3.

Where Defendant Could Not Have Been Arrested Before Judgment. — See note 5.

[Foreclosure of Lien on Personal Property. — See note 6a.]

[In Action on Contract by Female Domestic. — See note 6b.]

51. XI. DISCHARGE FROM ARREST AND IMPRISONMENT — 1. Defendant Arrested on Mesne Process — a. GENERALLY — Discharge on Account of Plaintiff's Laches. — See note 7.

57. IMPROPER. — See notes 5, 6.

58. IMPROVE — IMPROVEMENT. — See note 1.

42. 4. Nonresident Witness held privileged. *Dickinson v. Farwell*, 71 N. H. 213.

47. 7. Right of Arrest Waived by Improper Joinder of Causes of Action. — *Woods v. Armstrong*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 660.

48. 1. *Lehman v. Mayer*, 68 N. Y. App. Div. 12.

7. An Action by the Next of Kin of One Whose Death Was Caused by Negligence has been held to be an action for injury to property within the meaning of a statute allowing an execution against a person in an action brought to recover damages for injury to property. *People v. Gill*, 85 N. Y. App. Div. 192, affirmed 176 N. Y. 606.

8. Trover and Conversion. — *Holmes v. Leighton*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 678.

12. *Huntley v. Hasty*, 132 N. Car. 279.

49. 3. *Carroll v. Montgomery*, 128 N. Car. 278.

5. *Broome v. Cochran*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 660.

6a. Foreclosure of Lien on Personal Property. — In *Liederman v. Rovner*, 82 N. Y. App. Div. 541, it was held that a body execution would not lie in an action brought in a municipal court of the city of New York to foreclose a lien on personal property which had been wilfully and maliciously disposed of by the owner, the defendant, where no order of arrest was issued pending the trial of the action.

6b. A Female Domestic Suing in the New York City Municipal Court to Recover for Work, Labor, and Services may, by virtue of statute, have a body execution against the defendant if she recovers judgment. *Greenberg v. Laeov*, (Supm. Ct. App. T.) 84 N. Y. Supp. 930.

51. 7. An Unreasonable Delay by the Plaintiff

on the Trial of an Action entitles the defendant under arrest to his discharge from custody in New York state, by virtue of Code Civ. Pro., § 572. By "delay," as used in the statutes, is meant any positive act in the way of the obstruction of the trial of the action. *Goff v. Charlier*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 28.

57. 5. *Central of Georgia R. Co. v. Johnston*, 106 Ga. 130.

6. Improper Navigation. — *The Manitoba*, 104 Fed. Rep. 145.

Improper Removal. — See *Springs v. Southern R. Co.*, 130 N. Car. 186.

Taxes Improperly Assessed Equivalent to Taxes Illegally Assessed. — *Matter of Baumgarten*, 39 N. Y. App. Div. 174.

58. 1. Improvement Defined. — *Allen v. McKay*, 120 Cal. 332; *Lake. Whatcomb Logging Co. v. Callvert*, 33 Wash. 126.

Improvements and Fixtures. — *Smusch v. Kohn*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 344.

Improved Land — Cultivate. — See *Voight v. Meyer*, 42 N. Y. App. Div. 350.

Glass Houses erected by a nurseryman for the purpose of carrying on his trade may be removed by the tenant as they are not improvements within a lease providing that the tenant should leave improvements gratis for the landlord. *Mears v. Collender*, (1901) 2 Ch. 388.

Public Lands. — *Sullivan v. Callvert*, 27 Wash. 600.

Mechanic's Liens — Buildings Are Improvements. — *Bates v. Harte*, 124 Ala. 427; *National L. Ins. Co. v. Ayres*, 111 Iowa 200.

Same — Walls Are Improvements. — *Hoppes v. Baie*, 105 Iowa 648.

Mining Claims. — See *Power v. Sea*, 24 Mont. 243.

## IMPROVEMENTS.

**67. II. GROWTH OF THE DOCTRINE OF COMPENSATION — 1. Original Common-law Rule.** — See notes 1, 4.

2. **Modification in Equity.** — See note 6.

**68. 3. Rule Adopted in Courts of Law.** — See note 1.

**69. 4. Universal Recognition of Right to Compensation.** — See note 1.  
Right Not Dependent upon Statute. — See note 2.

**70. 5. Statutory Provisions Allowing Compensation — a. GENERAL ADOPTION OF.** — See note 1.

**71. b. EXTENT TO WHICH RIGHTS OF OCCUPYING CLAIMANTS ARE ENLARGED.** — See note 1.

c. **CONSTITUTIONALITY OF STATUTES — (1) General Rule — Statutes Constitutional — (a) Rule Stated.** — See note 3.

**72. (b) Retroactive Statutes.** — See note 1.

**73. III. GENERAL RULE AS TO WHAT CONSTITUTE IMPROVEMENTS — 1. Rule Stated.** — See notes 5, 6, 7.

**67. 1. Original Common-law Doctrine.** — *Hardeman v. Turner*, 3 Indian Ter. 338, *affirmed* (C. C. A.) 112 Fed. Rep. 41.

4. See *Voiers v. Atkins*, 113 La. 303, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66, the whole text paragraph.

6. **Modification in Equity.** — *Taylor v. James*, 109 Ga. 327; *Hoerr's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 337.

A Judgment Creditor enforcing his lien on land is asserting his legal rights and not seeking equitable relief. Hence he is not obliged to compensate the occupants for improvements. *Flanary v. Kane*, 102 Va. 547.

**68. 1. Rule Adopted in Courts of Law.** — *Muthersbaugh v. McCabe*, 22 Pa. Super. Ct. 587.

**Occupant Without Remedy if Owner Made No Claim for Rents and Profits.** — *Anderson v. Reid*, 14 App. Cas. (D. C.) 54.

**69. 1. Right of Bona Fide Occupant to Compensation for Improvements.** — *Samuels v. Simmons*, (Ky. 1901) 60 S. W. Rep. 937.

2. **Rights of Bona Fide Possessor Recognized on Equitable Principles Independent of Statute.** — *Mercer v. Justice*, 63 Kan. 225; *Darnall v. Jones*, (Ky. 1903) 72 S. W. Rep. 1108; *Patillo v. Martin*, 107 Mo. App. 653; *Schneider v. Reed*, 123 Wis. 488. See also *Dakin v. Lecklider*, 10 Ohio Cir. Dec. 308, 19 Ohio Cir. Ct. 254.

**Equity Must Be Set Up by Occupant.** — Where the occupant claims compensation under a statute within whose terms he does not bring himself, he cannot invoke the equitable jurisdiction of the court. *Skelly v. Warren*, 17 S. Dak. 25.

**70. 1. Statutory Provisions Allowing Compensation — Arizona.** — *Silver Queen Min. Co. v. Crocker*, (Ariz. 1904) 76 Pac. Rep. 479.

*Arkansas.* — *Penrose v. Doherty*, 70 Ark. 256; *Greer v. Fontaine*, 71 Ark. 665; *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

*Connecticut.* — *O'Brien v. Flint*, 74 Conn. 502.

*Georgia.* — *Mills v. Geer*, 111 Ga. 275; *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494; *Moore v. Carey*, 116 Ga. 28.

*Indiana.* — *Pulse v. Osborn*, (Ind. App. 1901) 60 N. E. Rep. 374.

*Indian Territory.* — *Hardeman v. Turner*, 3 Indian Ter. 338, *affirmed* (C. C. A.) 112 Fed. Rep. 41.

*Kansas.* — *Mercer v. Justice*, 63 Kan. 225.

*Louisiana.* — *George v. Delaney*, 111 La. 760.

*Michigan.* — *Sleight v. Roe*, 125 Mich. 585.

*Missouri.* — *Kugel v. Knuckles*, 95 Mo. App. 670.

*South Dakota.* — *Meadow v. Osterkamp*, 13 S. Dak. 571.

*Tennessee.* — *Strother v. Reilly*, 105 Tenn. 48.

*Texas.* — *Rowan v. Rainey*, 25 Tex. Civ. App. 593.

The Virginia Statute applies only to actions where a decree or judgment is rendered against the occupant for the land. *Flanary v. Kane*, 102 Va. 547.

**71. 1. Occupying Claimant May Recover in Direct Proceeding.** — *Dorer v. Hood*, 113 Wis. 607.

**Right Dependent on Statute.** — *Anderson v. Reid*, 14 App. Cas. (D. C.) 54; *Armstrong v. Ashley*, 22 App. Cas. (D. C.) 368.

3. **Statutes Allowing Compensation Constitutional.** — *Dorer v. Hood*, 113 Wis. 607.

**Statute Denying Jury Trial Unconstitutional.** — *Uhl v. Grissom*, 12 Okla. 322.

**72. 1. Statutes Giving Compensation for Improvements Made Before Their Enactment Held Constitutional.** — *Mills v. Geer*, 111 Ga. 275; *Lay v. Sheppard*, 112 Ga. 111.

**73. 5. Additions Must Be Permanent.** — *Northern Invest. Co. v. Bargquist*, 93 Minn. 106.

6. **Additions Must Have Become Part of Realty.** — *Barrett v. Kelly*, 131 Ala. 378.

7. **Value of Land Must Be Increased.** — *Barrett v. Kelly*, 131 Ala. 378; *Armijo v. Neher*, 11 N. Mex. 645.



**74.** See note 2

**75.** 2. Illustrations of Additions Held to Be Improvements — Repairs. — See note 10.

[Fertilization has been held not to be an improvement.<sup>10a</sup>]

Burden of Proof. — See note 11.

**IV. MEASURE OF COMPENSATION FOR IMPROVEMENTS — 1. General Rule Stated.** — See note 12.

**76.** See note 2.

**77.** Enhancement of "Vendible" Value. — See note 1.

**78.** 4. Whether Allowance May Exceed Actual Cost of Improvements. — See notes 3, 4.

5. Rule Restricting Compensation to Value of Rents and Profits. — See note 5.

**79.** 6. Interest. — See note 2.

**80.** V. WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION — 2. Necessity for Color of Title — *a.* RULE STATED. — See note 1.

But a Mere Trespasser. — See note 3.

*b.* IMPROVEMENTS MADE BEFORE ACQUIRING COLOR OF TITLE. — See note 4.

**81.** See note 1.

*c.* WHAT MAY CONSTITUTE COLOR OF TITLE — (2) *Meaning of Term.* — See note 3.

(3) *Color of Title Arising from Written Instrument.* — See note 5.

**82.** See note 2.

**74.** 2. Use to Which True Owner Intends to Put Land Immaterial. — *Thomas v. Wagner*, 131 Mich. 601.

**75.** 10. Repairs Not Improvements. — *Northern Invest. Co. v. Bargquist*, 93 Minn. 106.

10a. Fertilization Not Improvement. — *Crummey v. Bentley*, 114 Ga. 746.

11. Burden of Proof. — *Barrett v. Kelly*, 131 Ala. 378.

12. Cost of Improvements Not Measure of Compensation. — *Gombert v. Lyon*, (Neb. 1904) 100 N. W. Rep. 414; *Howard v. Clark*, 72 Vt. 429; *Haymord v. Camden*, 48 W. Va. 463. Compare *Fabrice v. Von der Brelie*, 190 Ill. 460, wherein the actual cost of improvements was allowed.

**76.** 2. Occupant Entitled to Compensation to Extent that Actual Value of Land Has Been Enhanced — *Arkansas*. — *Greer v. Fontaine*, 71 Ark. 605.

*Kentucky*. — *Samuels v. Simmons*, (Ky. 1901) 60 S. W. Rep. 937.

*Michigan*. — *Eighmey v. Theyer*, 135 Mich. 682.

*Missouri*. — *Burford v. Aldridge*, 165 Mo. 419.

*Nebraska*. — *Gombert v. Lyon*, (Neb. 1904) 100 N. W. Rep. 414.

*North Carolina*. — *North v. Bunn*, 128 N. Car. 196; *Bond v. Wilson*, 129 N. Car. 325. See also *Gillis v. Arringdale*, 135 N. Car. 295; *Johnson v. Armfield*, 130 N. Car. 575.

*Vermont*. — *Rutland R. Co. v. Chaffee*, 72 Vt. 404; *Howard v. Clark*, 72 Vt. 429.

*West Virginia*. — *Haymond v. Camden*, 48 W. Va. 463.

The Burden of Proof as to the enhancement in value is on the occupant. *Wilson v. Wilson*, 35 Tex. Civ. App. 192.

**77.** 1. Enhancement of "Vendible" or Salable Value of Land, Measure of Compensation. — *Jones v. Griffin*, (Ky. 1903) 74 S. W. Rep. 713; *Floyd v. Mackey*, 112 Ky. 646.

**78.** 3. Allowance Should Not Exceed Cost of Improvements. — See *Eighmey v. Thayer*, 135 Mich. 682.

4. Georgia Rule. — *Mills v. Geer*, 111 Ga. 275; *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.

5. Rule in Absence of Statute. — *Ring v. Lawless*, 190 Ill. 520; *Thompson v. Thompson*, 117 Iowa 65; *Samuels v. Simmons*, (Ky. 1901) 60 S. W. Rep. 937; *Stephenson v. Stephenson*, (Ky. 1903) 72 S. W. Rep. 742; *Huebschmann v. Cotzhausen*, 107 Wis. 64.

**79.** 2. Interest Not Allowed. — *Howard v. Clark*, 72 Vt. 429.

**80.** 1. Occupant Must Have Had Color of Title. — *Wade v. Keown*, (Ky. 1904) 78 S. W. Rep. 900; *Skelly v. Warren*, 17 S. Dak. 25. See also *Gahre v. Berry*, 82 Minn. 200.

3. Trespasser Not Entitled to Compensation for Improvements. — *Corrigan v. Hinkley*, 125 Mich. 125.

4. Acquisition of Color of Title After Making Improvements Gives No Right to Compensation. — *Uhl v. Grissom*, 12 Okla. 322.

**81.** 1. Occupant Held Entitled to Compensation for Improvements Made Before Acquiring Color of Title. — *Dorer v. Hood*, 113 Wis. 607.

3. Meaning of "Color of Title." — *Bloom v. Strauss*, 70 Ark. 483; *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224; *Dorer v. Hood*, 113 Wis. 607.

5. Instrument Must Apparently Transfer Title. — *Skelly v. Warren*, 17 S. Dak. 25.

A Bond for Title. — *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

Quitclaim Deed. — *Northern Invest. Co. v. Bargquist*, 93 Minn. 106.

**82.** 2. A Conveyance under a Power of Attorney from a Married Woman, held to be ineffectual to pass title because not joined in by

**82.** (4) *Color of Title Arising in Absence of Written Instrument.* — See note 5.

**3. Necessity for Adverse Character of Occupancy** — *a.* RULE STATED. — See note 8.

**83.** See note 1.

**84.** 4. *Necessity for Good Faith in Occupant* — *a.* RULE STATED. — See note 2.

**85.** *b.* WHAT IS MEANT BY GOOD FAITH. — See note 1.

**86.** See note 1.

Knowledge that Vendor Has No Title. — See note 3.

*c.* PRESUMPTION OF GOOD FAITH. — See note 5.

**87.** *d.* EFFECT OF NOTICE OF ADVERSE CLAIM ON QUESTION OF GOOD FAITH — (1) *General Rule Stated.* — See note 2.

**88.** (2) *Rule as to Constructive Notice* — (a) *Doctrine that Such Notice Is Insufficient.* — See note 2.

**89.** (b) *Doctrine that Such Notice Is Sufficient.* — See note 2.

**90.** (3) *When Good Faith and Notice of Adverse Claim May Coexist.* — See note 1.

Mistake of Law. — See note 2.

the husband, may nevertheless be sufficient to constitute the vendee a *bona fide* holder entitled to compensation for improvements. *Nolan v. Moore*, (Tex. Civ. App. 1902) 70 S. W. Rep. 785, *reversed* on the ground that the power of attorney was in fact sufficient, 96 Tex. 341.

**82.** 5. *Paper Title Not Invariably Necessary.* — *Pendo v. Beakey*, 15 S. Dak. 344, holding that actual possession under a *bona fide* claim of title was sufficient.

**8.** *Possession Must Have Been Adverse to True Owner.* — *Sleight v. Roe*, 125 Mich. 585.

**83.** 1. *Permissive Holding.* — *Montgomery County v. Bean*, (Ky. 1904) 82 S. W. Rep. 240.

**84.** 2. *Occupant Must Have Acted in Good Faith* — *Alabama.* — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155.

*Arkansas.* — *Neely v. Rembert*, 71 Ark. 91.

*Georgia.* — *Roberts v. Griffith*, 112 Ga. 146.

*Kentucky.* — *Darnall v. Jones*, (Ky. 1903) 72 S. W. Rep. 1108.

*Louisiana.* — *Voiers v. Atkins*, 113 La. 303.

*Missouri.* — *Kugel v. Knuckles*, 95 Mo. App. 670.

*Tennessee.* — *Lillard v. Coffee*, (Tenn. Ch. 1901) 61 S. W. Rep. 1037.

*Texas.* — *Bell v. Wright*, 94 Tex. 407; *Wilcoxon v. Howard*, 26 Tex. Civ. App. 281; *Hillen v. Williams*, 25 Tex. Civ. App. 268; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235.

*West Virginia.* — *Holsberry v. Harris*, 56 W. Va. 320; *Yock v. Mann*, (W. Va. 1905) 49 S. E. Rep. 1019.

**85.** 1. *What Is Meant by Good Faith.* — *Cleland v. Clark*, 123 Mich. 179, 81 Am. St. Rep. 161; *Rowan v. Rainey*, 25 Tex. Civ. App. 593.

**86.** 1. *Occupant Must Have Had Reasonable Ground for Belief.* — *Netzorg v. Green*, 26 Tex. Civ. App. 119; *Mumme v. McCloskey*, 28 Tex. Civ. App. 85.

**3.** *Knowledge that Vendor Has No Title.* — See *Yock v. Mann*, (W. Va. 1905) 49 S. E. Rep. 1019.

**5.** *Presumption of Good Faith.* — *Meadows v. Osterkamp*, 13 S. Dak. 571.

**87.** 2. *Occupant Not Entitled to Compensation for Improvements Made After Notice of Adverse Claim* — *Illinois.* — *Van Tassell v. Wakefield*, 214 Ill. 205.

*Kentucky.* — *Wade v. Keown*, (Ky. 1904) 78 S. W. Rep. 900.

*Missouri.* — *Kugel v. Knuckles*, 95 Mo. App. 670; *Marlow v. Liter*, 87 Mo. App. 584; *Burford v. Aldridge*, 165 Mo. 419.

*New York.* — *Willis v. McKinnon*, 79 N. Y. App. Div. 249, *affirmed* 178 N. Y. 451.

*North Carolina.* — *Hallyburton v. Slagle*, 132 N. Car. 957.

*Texas.* — *Wilcoxon v. Howard*, 26 Tex. Civ. App. 281; *Hillen v. Williams*, 25 Tex. Civ. App. 268; *Texas, etc., R. Co. v. Barber*, 31 Tex. Civ. App. 84.

*West Virginia.* — *Haymond v. Camden*, 48 W. Va. 463; *Bodkin v. Arnold*, 48 W. Va. 108; *Yock v. Mann*, (W. Va. 1905) 49 S. E. Rep. 1019.

*Improvements Pending Litigation.* — *Biffle v. Jackson*, 71 Ark. 226; *Demelman v. Bristoll*, 179 Mass. 163; *Keister v. Cubine*, 101 Va. 768.

**88.** 2. *Constructive Notice Arising from Record of Adverse Title Does Not Preclude Recovery for Improvements.* — *Northern Invest. Co. v. Bargquist*, 93 Minn. 106; *Kugel v. Knuckles*, 95 Mo. App. 670; *Marlow v. Liter*, 87 Mo. App. 584; *Rutland R. Co. v. Chaffee*, 72 Vt. 404.

**89.** 2. *Constructive Notice Sufficient.* — *Haymond v. Camden*, 48 W. Va. 463.

**90.** 1. *Reasonable Belief that Adverse Claim Is Invalid.* — *Thomas v. Wagner*, 131 Mich. 601; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577.

**2.** *Mistake of Law.* — *Haymond v. Camden*, 48 W. Va. 463; *Bodkin v. Arnold*, 48 W. Va. 108; *Yock v. Mann*, (W. Va. 1905) 49 S. E. Rep. 1019.

*Improvements Made Pending Appeal.* — *Improvements put on land by an occupant pending an appeal from a judgment awarding the land to him may be set off against the rents and profits on the reversal of the judgment.* *Samuels v. Simmons*, (Ky. 1901) 60 S. W. Rep. 937.

- 90.** (4) *Rule in South Carolina and Wisconsin.* — See note 3.

*e.* EXISTENCE OF GOOD FAITH A QUESTION FOR THE JURY. — See note 4.

**5. Requirements under Particular Statutes — b. CLAIM FOUNDED ON DESCENT OR ANY WRITTEN INSTRUMENT.** — See note 6.

- 91.** *c.* TITLE DERIVED FROM PUBLIC AUTHORITY. — See notes 1, 2.

*e.* SIX YEARS' POSSESSION. — See note 7.

- 92.** *f.* POSSESSION FOR AT LEAST ONE YEAR. — See note 1.

*g.* PURCHASER OF SUPPOSED TITLE IN FEE. — See note 2.

- 93.** 7. Requirement of Peaceable Possession. — See note 2.

8. Rule as to Occupants of Public Lands. — See note 3.

9. Rights of Purchasers at Tax Sale — *a.* GENERAL RULE. — See notes 5, 6.

- 95.** 12. Rights of Donees — *a.* PAROL GIFT. — See note 6.

**96.** 13. Rights of Vendees under Contract of Sale — *a.* AT LAW. — See note 2.

*b.* IN EQUITY — (1) *Relief May Be Afforded.* — See note 4.

(2) *Where Vendor Is Responsible for Nonfulfilment of Contract.* —

See note 5.

- 97.** See note 2.

Inability of Vendor to Make Good Title. — See note 3.

(3) *Where Vendee Fails to Carry Out Contract.* — See note 4.

**90. 3. Wisconsin Rule.** — *Dorer v. Hood*, 113 Wis. 607.

4. Good Faith of Occupant a Question for the Jury. — *Meadows v. Osterkamp*, 13 S. Dak. 571. See also *Nolan v. Moore*, (Tex. Civ. App. 1902) 70 S. W. Rep. 785, reversed on other grounds 96 Tex. 341.

Where the Facts Can Have But One Possible Construction, the question is for the court. *Bell v. Wright*, 94 Tex. 407.

6. Claim Must Be Founded on Descent or Written Instrument. — *Dorer v. Hood*, 113 Wis. 607.

**91. 1. Title Derived from Public Authority.** — *Schimpf v. Rhodewald*, 62 Neb. 105.

2. Grant from Commonwealth. — *Wintersmith v. Price*, (Ky. 1902) 66 S. W. Rep. 2; *Darnall v. Jones*, (Ky. 1903) 72 S. W. Rep. 1108.

7. Michigan Rule. — *Cleland v. Clark*, 123 Mich. 179, 81 Am. St. Rep. 161; *Sleight v. Roe*, 125 Mich. 585; *State v. Lake St. Clair Fishing, etc., Club, etc.*, 127 Mich. 580.

What Constitutes Good Faith. — *Thomas v. Wagner*, 131 Mich. 601.

**92. 1. Possession for at Least One Year.** — *Rowan v. Rainey*, 25 Tex. Civ. App. 593; *McWilliams v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 596.

2. Purchaser of Supposed Title in Fee. — *Walker v. Arnold*, 71 Vt. 263.

**93. 2. Requirement of Peaceable Possession.** — See *Turner v. Gonzales*, 3 Indian Ter. 649.

3. Occupant of Public Lands Acquires No Claim for Improvements as Against Government or Its Grantees. — *Cook v. McCord*, 13 Okla. 506.

5. Occupant under Tax Deed Entitled to Compensation for Improvements. — *Silver Queen Min. Co. v. Crocker*, (Ariz. 1904) 76 Pac. Rep. 479; *Mercer v. Justice*, 63 Kan. 225; *Thomas v. Wagner*, 131 Mich. 601; *Netzorg v. Green*, 26 Tex. Civ. App. 110.

6. Tax Deed Void on Its Face. — *Meadows v. Osterkamp*, 13 S. Dak. 571.

**95. 6. Purchaser from Parol Donee Entitled to Recover.** — *Morris v. Wells*, 27 Tex. Civ. App. 363.

Gift Must Be Clearly Proven. — *Holsberry v. Harris*, 56 W. Va. 320.

**96. 2. Vendee under Contract of Sale Not Entitled to Compensation at Law.** — *Coleman v. Stalnacke*, 15 S. Dak. 242.

Unauthorized Contract by Agent Repudiated by Principal — No Allowance for Improvements. — *Topliff v. Shadwell*, 68 Kan. 317.

4. Relief May Be Afforded in Equity. — *Floyd v. Mackey*, 112 Ky. 646; *Bond v. Wilson*, 129 N. Car. 325; *Gardenhire v. Rogers*, (Tenn. Ch. 1900) 60 S. W. Rep. 616; *Schneider v. Reed*, 123 Wis. 488, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 96.

No Recovery for Improvements Made Before Contract. — *Johnson v. Armfield*, 130 N. Car. 575.

No Recovery if Improvements Made After Deciding to Rescind. — *Neely v. Rembert*, 71 Ark. 91.

5. Contract Rescinded for Vendor's Default. — *North v. Bunn*, 128 N. Car. 196; *Isaacs v. Bardon*, 114 Wis. 142.

**97. 2. Vendee Entitled to Compensation When Vendor Takes Advantage of Statute of Frauds to Avoid Contract.** — *Pass v. Brooks*, 125 N. Car. 129; *Schneider v. Reed*, 123 Wis. 488, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97.

Where Contract Is Denied. — The rule in *North Carolina* is now different. *Luton v. Badham*, 127 N. Car. 96, 80 Am. St. Rep. 783.

3. Vendor Unable to Make Good Title. — *Latimer v. Capay Valley Land Co.*, 137 Cal. 286; *Ryder v. Wall*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 377. See also *Owen v. Pomona Land, etc., Co.*, 131 Cal. 530.

4. Vendee Who Fails to Perform His Part of the Contract Not Entitled to Compensation. — See *Forbus v. Watkins*, (Tenn. Ch. 1901) 62 S. W. Rep. 36.

**98.** 14. Occupants Holding Through Mistake as to Identity of Land. — See note 4

**99.** 16. Rights of Trespassers and Wrongdoers — In Louisiana. — See notes 5, 9.

**100.** VI. FOR WHAT IMPROVEMENTS COMPENSATION WILL BE ALLOWED —  
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**101.** VII. AS AGAINST WHOM COMPENSATION WILL BE ALLOWED —  
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**102.** VIII. WHEN OWNER OF PROPERTY IS ESTOPPED TO DISPUTE CLAIM FOR IMPROVEMENTS. — See note 2.

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**103.** (2) *Where Rents and Profits or Damages Are Not Claimed.* — See note 1.

**104.** 2. By Direct Proceedings — *b.* TIME OF MAKING CLAIM WHEN PROCEEDING IS A CONTINUATION OF POSSESSORY ACTION. — See note 1.

*f.* LIMITATION OF ACTIONS. — See note 10.

**105.** X. METHODS OF ENFORCING PAYMENT FOR IMPROVEMENTS — 1. Lien of Occupant for Improvements. — See note 1.

2. Right of Occupant to Retain Land until Payment for Improvements — *a.* AFTER ASSESSMENT OF COMPENSATION. — See note 2.

**106.** 4. Election of Owner as to Taking Land or Receiving Unimproved Value — *a.* RULE STATED. — See note 5.

**98.** 4. Mistake as to Identity — Relief Afforded. — *Pearl Tp. v. Thorp*, 17 S. Dak. 288.

**99.** 5. Trespasser Allowed to Recover for Cost of Clearing. — *Sigur v. Burguières*, 111 La. 711.

9. Improvements Set Off Against Rents, Etc. — In Louisiana an occupant in bad faith may set off useful improvements against a claim for rents and profits. *Voiers v. Atkins*, 113 La. 303.

**100.** 3. Occupant May Recover for Improvements Made by His Grantor or Predecessor in Title. — *Morris v. Wells*, 27 Tex. Civ. App. 363. See also *Mills v. Geer*, 111 Ga. 275; *Dor v. Hood*, 113 Wis. 607.

Recovery Not Allowed Unless Accounting Rendered of Rents and Profits Received by Predecessor. — *Neher v. Armijo*, 11 N. Mex. 67.

5. No Recovery Allowed Unless Occupant Has Paid for Improvements. — *Pesqueira v. Kellogg*, (Ariz. 1903) 71 Pac. Rep. 915.

Church Built by Popular Subscription. — *Crummey v. Bentley*, 114 Ga. 746.

**101.** 6. Infancy of Owner — Homestead. — In *Bloom v. Strauss*, 70 Ark. 483, it was held that the value of improvements could not be assessed against a minor's homestead.

**102.** 2. Estoppel of Owner Resulting from Fraud or Laches in Failing to Assert Title. — *Jones v. Griffin*, (Ky. 1903) 74 S. W. Rep. 713; *Potter v. Rend*, 31 Pittsb. Leg. J. N. S. (Pa.) 223. See also *Skelly v. Warren*, 17 S. Dak. 25.

Mistaken Belief of Owner as to Location of His Land. — *Contra*, *Schafer v. Wilson*, 113 Iowa 475.

5. Improvements May Be Set Off Against Claim

for Rents and Profits or Damages in Possessory Action. — *Finch v. Strickland*, 132 N. Car. 103; *Muthersbaugh v. McCabe*, 22 Pa. Super. Ct. 587; *Hoerr's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 337; *Gardenhire v. Rogers*, (Tenn. Ch. 1900) 60 S. W. Rep. 616. See also *Voiers v. Atkins*, 113 La. 303.

**103.** 1. No Allowance Can Be Made Where Plaintiff Does Not Claim Rents and Profits or Damages. — *Contra*, *Darnall v. Jones*, (Ky. 1903) 72 S. W. Rep. 1108.

**104.** 1. Claim Must Be Made Before Occupant Is Deprived of Possession. — *Mercer v. Justice*, 63 Kan. 225.

10. When Right Accrues. *Morris v. Wells*, 27 Tex. Civ. App. 363.

**105.** 1. Amount Found Due for Improvements a Lien on Improved Property. — *Hardeman v. Turner*, 3 Indian Ter. 338, affirmed (C. C. A.) 112 Fed. Rep. 41; *Robards v. Robards*, (Ky. 1905) 85 S. W. Rep. 718.

2. Right of Occupant to Retain Land Until Paid for His Improvements. — *Hardeman v. Turner*, (C. C. A.) 112 Fed. Rep. 41, affirming 3 Indian Ter. 338; *Mercer v. Justice*, 63 Kan. 225; *Pattillo v. Martin*, 107 Mo. App. 653; *North v. Bunn*, 128 N. Car. 196; *Bond v. Wilson*, 129 N. Car. 325.

Owner Enjoined from Taking Possession. — *Marlow v. Liter*, 87 Mo. App. 584.

**106.** 5. Election of Owner as to Taking Land or Receiving Unimproved Value. — *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 404.

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**107.** *c.* ADJUSTMENT WHERE BOTH OWNER AND OCCUPANT DECLINE TO PAY — (1) *Sale of Land and Division of Proceeds.* — See note 3.

**108.** **XI. SETTING OFF RENTS AND PROFITS AGAINST CLAIM FOR IMPROVEMENTS** — 1. General Rule Stated. — See notes 3, 6.

**109.** 5. Whether Rent Can Be Charged on Value of Property as Improved. — See note 5.

**110.** See note 1.

**XIII. RULES CONCERNING IMPROVEMENTS BY LESSEES.** — See note 8.

**111.** **XIV. RULES CONCERNING IMPROVEMENTS BY ONE OF SEVERAL COTENANTS** — 1. Right to Allowance Therefor. — See note 2.

**113.** 2. How the Allowance Is Made — *a.* BY ASSIGNING IMPROVED PORTION OF PROPERTY TO MAKER OF IMPROVEMENTS — (1) *Method Adopted When Practicable.* — See note 1.

**114.** (2) *Whether Cotenant Must Have Claimed Exclusive Title and Acted in Good Faith.* — See note 2.

**115.** *b.* BY REQUIRING PAYMENT OF COMPENSATION BY OTHER COTENANTS — (1) *In General.* — See note 1.

(2) *Necessity for Claim of Exclusive Title and Good Faith.* — See notes 2, 3.

**116.** *c.* BY SETTING OFF IMPROVEMENTS AGAINST RENTS AND PROFITS. — See note 6.

**117.** 3. Rents and Profits May Be Set Off Against Improvements. — See note 2.

**XV. RULES CONCERNING IMPROVEMENTS BY LIFE TENANTS OR TENANTS FOR YEARS** — 1. General Rule Stated. — See note 3.

**118.** See note 1.

4. Exceptions to the Rule — *a.* WHERE ABSOLUTE TITLE IS CLAIMED. — See note 9.

**107.** 3. Sale of Improved Land and Division of Proceeds. — *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.

**108.** 3. Owner May Set Off Rents and Profits Against Claim for Improvements. — *Bond v. Wilson*, 129 N. Car. 325.

6. Where Enhancement in Value from Improvements Does Not Exceed Value of Rents and Profits. — *Eighmey v. Thayer*, 135 Mich. 682.

**109.** 5. Rent Cannot Be Charged on Value of Property as Improved. — *Barrett v. Kelly*, 131 Ala. 378; *McCarver v. Doe*, 135 Ala. 542; *Morris v. Wells*, 27 Tex. Civ. App. 363; *Howard v. Clark*, 72 Vt. 429.

**110.** 1. Where Interest Allowed on Value of Improvements. — *Hardeman v. Turner*, 3 Indian Ter. 338, *affirmed* (C. C. A.) 112 Fed. Rep. 41. Chargeable with Rental Value of Improvements After Judgment Fixing Lien. — *Hardeman v. Turner*, (C. C. A.) 112 Fed. Rep. 41.

8. Lessee Not Entitled to Compensation for Improvements in Absence of Agreement Therefor. — *Guay v. Kehoe*, 70 N. H. 151.

**111.** 2. Allowance for Improvements May Be Made in Partition. — See *Pesqueira v. Kellogg*, (Ariz. 1903) 71 Pac. Rep. 915. See also the titles CONTRIBUTION AND EXONERATION, 358. 1 *et seq.*; PARTITION, 1172. 5.

Improvements Made by Tenants in Common in Reversion During Previous Life Estate. — *Shipman v. Shipman*, 65 N. J. Eq. 556. *Contra*, *Pulse v. Osborn*, (Ind. App. 1901) 60 N. E. Rep. 374; *Porter v. Osmun*, 135 Mich. 363.

**113.** 1. Assignment of Improved Portion Preferred When Practicable. — *Milligan v. Masden*,

(Ky. 1903) 74 S. W. Rep. 1049; *Bennett v. Bennett*, 84 Miss. 493; *Burford v. Aldridge*, 165 Mo. 419; *Polk v. Gunther*, 107 Tenn. 16; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235. See *Stith v. Carter*, (Ky. 1901) 60 S. W. Rep. 725.

**114.** 2. Not Necessary that Improvements Should Have Been Made in Good Faith. — See *Kesterson v. Bailey*, 35 Tex. Civ. App. 235.

**115.** 1. Other Cotenants May Be Required to Compensate One Who Made Improvements. — *Holt v. Couch*, 125 N. Car. 456, 74 Am. St. Rep. 648.

Improvements Made by Consent of Cotenants. — See *Turnbull v. Foster*, 116 Ga. 765.

2. Necessity for Claim of Exclusive Title. — *Sweet v. Stevens*, (Ky. 1901) 63 S. W. Rep. 41.

3. Must Have Been Made in Good Faith. — *Rippe v. Badger*, 125 Iowa 725, 106 Am. St. Rep. 336.

**116.** 6. Improvements Made by Tenants in Possession May Be Set Off Against Rents and Profits. — *Bennett v. Bennett*, 84 Miss. 493.

**117.** 2. Rents and Profits May Be Set Off Against Improvements. — *Eighmey v. Thayer*, 135 Mich. 682. See *Booth v. Booth*, 114 Iowa 78.

3. Improvements by Life Tenant Furnish No Ground for Compensation. — *Booth v. Booth*, 114 Iowa 78; *Schimpf v. Rhodewald*, 62 Neb. 105; *Trimmier v. Darden*, 61 S. Car. 220. See also *Ashby v. Ashby*, 59 N. J. Eq. 547.

**118.** 1. Holder of Determinable Estate. — *Wells v. Sweeney*, 16 S. Dak. 489, 102 Am. St. Rep. 713, wherein the rule was applied to a husband occupying a homestead after the death of his wife. See *Bloom v. Strauss*, 70 Ark. 483.

9. Belief in Absolute Ownership of Land. — *Bloom v. Strauss*, 70 Ark. 483.

**120. XVI. RULES CONCERNING IMPROVEMENTS BY MORTGAGORS OR MORTGAGEES IN POSSESSION — 2. By Mortgagees in Possession — a. IN THE UNITED STATES — (1) *General Rule Stated.* — See note 3.**

**(2) *When Compensation May Be Allowed* — (a) *Belief of Mortgagee that He Has Acquired Complete Title.* — See note 5.**

**121. (3) *Rents and Profits.* — See note 2.**

**122. XVII. RULES CONCERNING IMPROVEMENTS BY TRUSTEES AND OTHER FIDUCIARIES. — See note 1.**

**XVIII. RULES CONCERNING IMPROVEMENTS BY ONE SPOUSE ON LAND OF OTHER — 1. As Between the Parties — a. VIEW THAT NO COMPENSATION SHOULD BE ALLOWED. — See note 5.**

**123. b. VIEW THAT COMPENSATION SHOULD BE ALLOWED. — See note 1.**

**2. As Against Creditors. — See note 2.**

**IMPROVIDENCE. — See note 5.**

**IN. — See note 7.**

**124. See notes 1, 2.**

**125. See notes 1, 2, 3.**

**131. INADEQUATE. — See note 3.**

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**133. INCEPTION. — See note 1.**

**120. 3. Mortgagees in Possession Not Entitled to Compensation for Improvements. — American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155; McQueen v. Whetstone, 127 Ala. 417, 137 Ala. 301.**

**5. Mortgagee Who Believes that He Has Acquired Complete Title May Have Compensation for Improvements. — Pearson v. Gooch, 69 N. H. 571; Howard v. Clark, 72 Vt. 429.**

**121. 2. Rents and Profits Arising from Improvements Not to Be Charged Against Mortgagees. — American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155, 139 Ala. 183; Howard v. Clark, 72 Vt. 429.**

**122. 1. Allowance May Be Made for Improvements. — See the title TRUSTS AND TRUSTEES, 984. 1, 1029. 5 et seq., 1054. 6, 7.**

**5. Husband Not Entitled to Compensation. — Stroud v. Ross, (Ky. 1904) 82 S. W. Rep. 254; Snyder v. Elliott, 171 Mo. 362.**

**123. 1. View that Compensation Should Be Allowed. — Legg v. Legg, 34 Wash. 132.**

**2. Creditors May Follow Improvements if Made with Wife's Consent. — Brand v. Connerly, 132 Mich. 88.**

**5. Matter of Ferguson, (Surrogate Ct.) 41 Misc. (N. Y.) 465.**

**7. Chosen Freeholders v. Central R. Co., (N. J. 1904) 59 Atl. Rep. 307, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123.**

**In the City — Outside of Corporate Limits. — State v. Metropolitan St. R. Co., 161 Mo. 188.**

**124. 1. Chosen Freeholders v. Central R. Co., (N. J. 1904) 59 Atl. Rep. 307, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123 [124].**

**In the Sense of Within — Termination of Contract. — Ferree v. Moquin-Offerman Hessebuntel Coal Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 624.**

**In His Office, in regard to filing a petition with a clerk, means within the office and not with the clerk. Bishop v. People, 200 Ill. 330.**

**2. In and Across. — New York, etc., R. Co. v. Roll, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 321.**

**125. 1. At and In Synonymous. — Old Ladies Home v. Hoffman, 117 Iowa 716; Allen v. Allen, 114 Wis. 615.**

**2. Of. — Ivey v. State, 112 Ga. 175.**

**To Distinguished from In. — Scales v. Masonic Protective Assoc., 70 N. H. 490.**

**3. In Accordance with the Constitution, Etc. — See Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564.**

**In Case of or in Event of Decease. — Katzenberger v. Weaver, 110 Tenn. 620; Wescott v. Higgins, 42 N. Y. App. Div. 69.**

**In Front Of. — In State v. Bridges, 24 Wash. 363, the court said: "From a geometrical point of view *in front of* might include everything between the prescribed line and infinity, but as applied practically to measurements on the surface of the earth we believe it can only mean immediately *in front of* — that is adjoining."**

**In His Own Right. — Nash v. De Freville, (1900) 2 Q. B. 72.**

**In Pari Materia. — Sales v. Barber Asphalt Paving Co., 166 Mo. 671.**

**In Personam and In Rem. — Pacific Coast Steamship Co. v. Bancroft Whitney Co., (C. C. A.) 94 Fed. Rep. 180; McFarlane v. McFarlane, 43 Oregon 477; Snyder v. Murdock, 26 Utah 233.**

**In Trust. — Matter of Daniels, (Surrogate Ct.) 41 Misc. (N. Y.) 299; Darrah v. Darrah, 202 Pa. St. 492.**

**131. 3. Inadequate Price. — Stephens v. Ozbourne, 107 Tenn. 572.**

**4. Judgments. — See Davis v. Steuben School Tp., 19 Ind. App. 694; Richcreek v. Russell, sell, 34 Ind. App. 417.**

**133. 1. Inception of Lien. — Sullivan v. Texas Briquette, etc., Co., 94 Tex. 541.**

## INCEST.

**134. I. DEFINITION AND NATURE.** — See notes 1, 2.

**135.** Not a Crime at Common Law. — See note 1.

A Statutory Crime. — See note 2.

**II. ESSENTIAL ELEMENTS** — 1. **Concurrent Assent of Parties** — In Other Jurisdictions. — See note 5.

Consent of Female Inoperative as Defense. — See note 6.

**136.** 2. **The Act** — *a.* **SINGLE ACT SUFFICIENT** — Under Statute. — See note 1.

3. **The Relationship** — *a.* **IN GENERAL.** — See note 8.

**137.** Blood Relationship Not Essential. — See notes 5, 7.

Illegitimacy of One of the Parties. — See note 12.

**138.** *b.* **KNOWLEDGE OF RELATIONSHIP.** — See notes 1, 2.

**III. EVIDENCE** — 1. **Admissibility** — *a.* **TO PROVE THE ACT** — (1) *In General.* — See note 4.

(2) *Confessions.* — See note 5.

**139.** (3) *Other Acts of Familiarity or Illicit Intercourse* — (a) **Prior Acts Between the Parties** — Previous Acts of Lascivious Familiarity. — See note 1.

Previous Acts of Actual Intercourse. — See notes 2, 3.

**134. 1. Incestuous Marriage Defined.** — People *v.* Stratton, 141 Cal. 604; Brown *v.* State, 42 Fla. 184; David *v.* People, 204 Ill. 479; State *v.* De Hart, 109 La. 570; State *v.* Glindemann, 34 Wash. 221; Martin *v.* Martin, 54 W. Va. 301, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 134.

**2. Incest Without Marriage Defined.** — People *v.* Stratton, 141 Cal. 604; People *v.* Koller, 142 Cal. 621; Brown *v.* State, 42 Fla. 184; Taylor *v.* State, 110 Ga. 150; David *v.* People, 204 Ill. 479; State *v.* De Hart, 109 La. 570; State *v.* Glindemann, 34 Wash. 221.

**135. 1. Incest Not a Crime at Common Law.** — People *v.* Stratton, 141 Cal. 604.

**2. A Crime by Statute.** — Bolen *v.* People, 184 Ill. 338; David *v.* People, 204 Ill. 479; State *v.* De Hart, 109 La. 570.

**5. Jurisdictions Holding Consent of Both Parties Unnecessary to Constitute Incest.** — People *v.* Stratton, 141 Cal. 604; David *v.* People, 204 Ill. 479.

**6. Consent of Female Inoperative as Defense.** — Yother *v.* State, 120 Ga. 204.

**136. 1. Single Act of Intercourse Sufficient.** — Clifton *v.* State, 46 Tex. Crim. 18. But see David *v.* People, 204 Ill. 479.

**8. Incest Between Father and Daughter.** — Brown *v.* State, 42 Fla. 184; State *v.* Glindemann, 34 Wash. 221.

**137. 5. Stepfather and Stepdaughter.** — Taylor *v.* State, 110 Ga. 150.

**7. Effect of Death of Parent by Blood in Case of Intercourse Between Step-parent and Stepchild.** — Stanford *v.* State, 42 Tex. Crim. 343.

**12. Intercourse Between Father and Illegitimate Daughter.** — Brown *v.* State, 42 Fla. 184.

**138. 1. Affirmative Proof of Knowledge Unnecessary Where Statute Is Silent as to Knowledge** — People *v.* Koller, 142 Cal. 621; Bolen

*v.* People, 184 Ill. 338; State *v.* Glindemann, 34 Wash. 221, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138; State *v.* Zenner, 35 Wash. 249, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138.

**2. Ignorance of Relationship a Defense.** — State *v.* Glindemann, 34 Wash. 221, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138.

**4. Evidence Held to Be Relevant.** — The evidence of a daughter, with whom the incest was charged, is admissible to show frequent and repeated acts of sexual intercourse forced upon her by her father. People *v.* Stratton, 141 Cal. 604.

**Testimony of Medical Experts.** — On the trial of a father for incest with his daughter, the testimony of a physician that the daughter's sexual organs were in the condition of those of a married woman is competent, relevant, and material, to corroborate the daughter's statements as to frequent acts of intercourse. People *v.* Stratton, 141 Cal. 604.

**5. Admissibility of Confessions to Prove Act of Incest.** — Richardson *v.* State, 44 Tex. Crim. 211. See also State *v.* Demasters, 15 S. Dak. 580.

**139. 1. Admissibility of Previous Acts of Familiarity Between the Parties.** — People *v.* Koller, 142 Cal. 621; Smith *v.* Com., 109 Ky. 685; Henard *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 655.

**2.** People *v.* Koller, 142 Cal. 621; State *v.* Wood, 33 Wash. 290.

**3. Admissibility of Previous Acts of Actual Intercourse Between the Parties.** — People *v.* Koller, 142 Cal. 621, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; People *v.* Stratton, 141 Cal. 604; State *v.* De Hart, 109 La. 570, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; State *v.* De Masters, 15 S. Dak.

- 139.** Acts Barred by Statute of Limitations. — See note 4.  
 (b) Subsequent Acts Between the Parties. — See note 5.  
 (c) Sexual Acts with Third Parties — Of Prosecutrix. — See note 7.
- 140.** *b.* TO SHOW RELATIONSHIP. — (3) *Admissions of the Defendant.* — See note 5.  
*c.* TO SHOW CHARACTER — Character of Prosecutrix. — See note 6.
- 141.** **2. Sufficiency** — *a.* IN GENERAL. — See note 1.  
*c.* TESTIMONY OF PROSECUTRIX. — See notes 3, 4.
- 142.** **INCH.** — See note 5.  
**INCIDENT — INCIDENTAL.** — See note 7.
- 145.** **INCLOSE, INCLOSURE, ETC.** — See note 1.
- 146.** **INCLUDE — INCLUSIVE.** — See note 1.
- 147.** **INCOME.** — See note 2.
- 153.** **INCOMPETENCY — INCOMPETENT.** — See note 1.
- 154.** **INCONTINENCY.** — See note 2.
- 155.** **INCORPORATE — INCORPORATION.** — See note 1.

580, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; State v. Wood, 33 Wash. 290. See also Wiggins v. State, (Tex. Crim. 1905) 84 S. W. Rep. 821.

**139.** 4. Taylor v. State, 110 Ga. 150.

**5. Admissibility of Subsequent Acts Between Parties.** — People v. Koller, 142 Cal. 621, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; Smith v. Com., 109 Ky. 685. But see State v. De Masters, 15 S. Dak. 580.

**7. Sexual Acts of Female with Third Persons Inadmissible by Way of Mitigation.** — People v. Stratton, 141 Cal. 604; State v. De Hart, 109 La. 570, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139; Richardson v. State, 44 Tex. Crim. 211.

**140.** 5. The Admissions of a Father. — Brown v. State, 42 Fla. 184.

**6. Reputation of Prosecutrix for Chastity Inadmissible.** — People v. Stratton, 141 Cal. 604; Richardson v. State, 44 Tex. Crim. 211.

**141.** 1. Sufficiency Generally Question for Jury. — See Jennings v. State, (Tex. Crim. 1902) 66 S. W. Rep. 778.

**3. Testimony of Prosecutrix Not Consenting to Intercourse Sufficient to Convict.** — People v. Stratton, 141 Cal. 604; Schwartz v. State, 65 Neb. 196.

**4. Testimony of Prosecutrix Consenting to Intercourse Insufficient to Convict.** — People v. Stratton, 141 Cal. 604; People v. Koller, 142 Cal. 621; Solomon v. State, 113 Ga. 192; Yother v. State, 120 Ga. 204; Durden v. State, 120 Ga. 860; Ratliff v. State, (Tex. Crim. 1901) 60 S. W. Rep. 666; Tate v. State, (Tex. Crim. 1903) 77 S. W. Rep. 793; Clifton v. State, 46 Tex. Crim. 18. See also Whidby v. State, 121 Ga. 588.

The Corroborative Evidence must connect the accused with the perpetration of the offense, and evidence which merely casts a grave suspicion on the accused is not sufficient. Taylor v. State, 110 Ga. 150.

**Contra.** — In Florida a conviction may be had on the uncorroborated testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt. Brown v. State, 42 Fla. 184.

And a similar rule seems to obtain in Louisiana, the sufficiency of the testimony being for the jury. State v. De Hart, 109 La. 570.

**142.** 5. Inch of Water. — See Longmire v. Smith, 26 Wash. 439.

**7.** See Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183.

**Incidental Expenses.** — See F. C. Austin Mfg. Co. v. Twin Brooks Tp., 16 S. Dak. 126.

**Same — Of Counsel.** — Cohn v. Palmer, 78 N. Y. App. Div. 506; Matter of Waldheimer, 84 N. Y. App. Div. 366.

**Incidental Power.** — Burke v. Mead, 159 Ind. 252; Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413; Jackson v. Newman, 51 La. Ann. 833.

**145.** 1. Under a statute requiring railroads to provide suitable inclosures to protect freight of all kinds, stock pens have been held to be inclosures. Houston, etc., R. Co. v. Tramwell, 28 Tex. Civ. App. 312.

**Necessity of Fence.** — Peck v. Williams, 24 R. I. 583; Haynie v. State, 45 Tex. Crim. 204.

**146.** 1. Inclusive Legacy. — Matter of Goetz, 71 N. Y. App. Div. 275.

**147.** 2. Income. — Thorn v. de Breteuil, 86 N. Y. App. Div. 405.

**Estate for Life — Land Itself.** — Fogler v. Titcomb, 92 Me. 184; Kelly's Estate, 193 Pa. St. 45.

**Interest.** — Matter of Murphy, 80 N. Y. App. Div. 238.

**Profits and Income Distinguished.** — Matter of Murphy, 80 N. Y. App. Div. 238.

**Stock, Dividends, Surplus, Etc.** — Smith v. Hooper, 95 Md. 16; Lowry v. Farmers' L. & T. Co., 172 N. Y. 137; Chester v. Buffalo Car Mfg. Co., 70 N. Y. App. Div. 443. See Matter of Murphy, 80 N. Y. App. Div. 241.

**Salary.** — See Spencer v. Morris, 67 N. J. L. 500.

**153.** 1. Master and Servant. — Olsen v. North Pac. Lumber Co., (C. C. A.) 100 Fed. Rep. 384; Curran v. A. H. Stange Co., 98 Wis. 508.

**Incompetent and Incapable as Synonyms.** — See Matter of Daniels, 140 Cal. 335.

**154.** 2. Incontinency — Slander. — State v. Hewlin, 128 N. Car. 571.

**155.** 1. Incorporated Bank — Term Applied to Savings Banks. — Com. v. Warner, 173 Mass. 541.

**Incorporated Town.** — Phillips v. Scale Mound, 195 Ill. 353.



- 155. INCORPOREAL.** — See note 3.  
 [INCORRIGIBLE. — See note 3a.]
- 157. INCUMBENT.** — See note 3.
- 158. INCUMBRANCE — INCUMBER.** — See note 1.
- 161. INCUMBRANCER.** — See note 1.
- 162. INDEBTED — INDEBTEDNESS.** — See note 4.
- 165. INDECENT.** — See note 1.  
 INDEFINITE. — See note 3.
- 166. INDEMNITY.** — See note 2.

**155. 3. Incorporeal Hereditament.** — Hegan v. Pendennis Club, (Ky. 1901) 64 S. W. Rep. 464; Slingerland v. International Contracting Co., 43 N. Y. App. Div. 215.

**3a.** Under a state constitution providing a reformatory for youth "growing up in crime," a youth who is *incorrigible* may be properly committed thereto. Scott v. Flowers, 60 Neb. 675.

**157. 3. Incumbent.** — Darling v. Murphy, 70 N. J. L. 435.

**158. 1. In re Gerry,** 112 Fed. Rep. 958; Butler v. Butler, 67 S. Car. 216, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 158; Green v. Tidball, 26 Wash. 343, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 158.

**Other Definitions.** — *In re Gerry*, 112 Fed. Rep. 958; Stokes v. Maxson, 113 Iowa 122; Demars v. Koehler, 62 N. J. L. 203; Koezly v. Koezly, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 397; Gilham v. Real Estate Title, etc., Co., 203 Pa. St. 24.

**Dower.** — Compare Johnson v. Elmen, 94 Tex. 168.

**An Easement of Light** has been held to be an *incumbrance*. Denman v. Mentz, 63 N. J. Eq. 613.

**Judgment.** — De Voe v. Rundle, 33 Wash. 610.

**Party Wall.** — See Ensign v. Colt, 75 Conn. 111; Schaefer v. Blumenthal, 169 N. Y. 221.

**Voluntary and Involuntary.** — Fouts v. Millikan, 30 Ind. App. 298; Phenix Ins. Co. v. Smith, 9 Kan. App. 828.

**The Right of a City to Levy an Assessment** on land to pay cost of improvements in street is an *incumbrance*. Green v. Tidball, 26 Wash. 343.

**161. 1. De Voe v. Rundle,** 33 Wash. 610, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161.

**The Holder of a Judgment Is an Incumbrancer.** — De Voe v. Rundle, 33 Wash. 610.

**162. 4. Indebtedness.** — Matter of Rapid Transit R. Com'rs, 23 N. Y. App. Div. 472.

**Due or to Become Due.** — Sugar Notch Borough, 192 Pa. St. 349.

**Schools — Liability of Municipality for Teachers' Salaries.** — Hornbeck v. State, 33 Ind. App. 609.

**Unpaid Stock.** — See Guaranty Trust Co. v. Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311.

**165. 1. Postal Laws.** — See Timmons v. U. S., (C. C. A.) 85 Fed. Rep. 204.

**Indecently Acting.** — Folds v. State, 123 Ga. 167.

**3. Indefinite Failure of Issue.** — Cain v. Robertson, 27 Ind. App. 198.

**166. 2. Indemnity Lands.** — Altschul v. Clark, 39 Oregon 315.

**Insurance.** — See Frye v. Bath Gas, etc., Co., 97 Me. 241.

## INDEMNITY CONTRACTS.

**168. I. DEFINITION AND NATURE.** — See notes 1, 3.

II. WHAT CONSTITUTES. — See note 6.

**169. III. WHETHER WITHIN STATUTE OF FRAUDS.** — See note 2.

**168. 1. The Use of the Word "Indemnify"** shows the object and nature of the contract, to wit, to reimburse, or make whole, the assured against loss on account of the liability contemplated. Frye v. Bath Gas, etc., Co., 97 Me. 241, 94 Am. St. Rep. 500.

**3. Definition — Protection Against Liability.** — See Pickett v. Fidelity, etc., Co., 60 S. Car. 477.

**The Distinction Between Indemnity Against Liability and Agreement to Indemnify Against Actual Loss** is well settled. In the former there is a breach of the contract the moment the liability is imposed and a cause of action arises at once, while in the latter there is no breach of contract until the obligee has sustained dam-

age. Brown v. Mechanic's, etc., Bank, 43 N. Y. App. Div. 173; Henderson-Achert Lith. Co. v. John Shillito Co., 64 Ohio St. 236, 83 Am. St. Rep. 745.

**6. Contract an Original Promise, Not One of Indemnity.** — Hawk v. Barton, 130 Cal. 654.

**169. 2. Indemnity Contract Not Within Statute of Frauds.** — Week v. Widgeon, 23 Ind. App. 405; Esch v. White, 76 Minn. 220; Almond v. Hart, 46 N. Y. App. Div. 431; Manary v. Runyon, 43 Oregon 495; Nixon v. Jacobs, 22 Tex. Civ. App. 97; Faulkner v. Thomas, 48 W. Va. 148. See also Trulock v. Blair, 8 Okla. 345; Lessel v. Zillmer, 105 Wis. 334. And see the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), 912. 1.

**170.** See note 1.

IV. VALIDITY — 1. In General. — See note 2.

**171.** 2. Indemnity Against Consequences of Illegal Act — *a.* ACT KNOWN TO BE ILLEGAL. — See note 1.

**172.** 3. Indemnity to Bail. — See note 3.

V. Consideration — 1. Necessity. — See note 4.

2. Sufficiency. — See note 5.

**173.** See note 2.

VI. CONSTRUCTION — 1. In General. — See note 7.

**174.** See note 1.

**175.** Covenant of Indemnity Cannot Be Restricted by Recitals. — See note 2.

**176.** 2. To Whose Benefit Contract of Indemnity Inures. — See note 2.

3. Duration of the Contract. — See note 5.

VII. FULFILMENT AND BREACH OF THE CONTRACT — 2. Breach —

*a.* IN GENERAL. — See note 9.

**177.** See note 1.

*b.* JUDGMENTS BY DEFAULT, CONSENT, ETC. — See notes 3, 4.

*d.* VOLUNTARY PAYMENTS BY INDEMNITEE. — See note 8.

**170.** 1. Indemnity Contract Within Statute of Frauds. — *Gansey v. Orr*, 173 Mo. 532; *Hartley v. Sandford*, 66 N. J. L. 627, reversing 66 N. J. L. 40, distinguishing *Apgar v. Hiler*, 24 N. J. L. 812, and disapproving *Warren v. Abbett*, 65 N. J. L. 99, and other cases apparently or actually holding the contrary doctrine.

2. Indemnity Contracts Not Contrary to Public Policy. — *Kansas City, etc., R. Co. v. Southern R. News Co.*, 151 Mo. 373; *Wabash R. Co. v. Ordelleide*, 88 Mo. App. 589.

**171.** 1. Contract of Indemnity Against Consequences of Illegal Act Invalid. — See *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610.

**172.** 3. Prosecutor as Bail. — An agreement by a third person to indemnify a prosecutor for becoming bail for an accused person is against public policy. *Mayne v. Fidelity, etc., Co.*, 198 Pa. St. 490, reversing 8 Pa. Dist. 711.

4. Necessity for Consideration. — *Lane v. Richards*, 119 Iowa 24; *Chase v. Soule*, 76 Vt. 353.

5. Assumption of Liability Sufficient Consideration. — *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528; *Esch v. White*, 76 Minn. 220, second appeal 82 Minn. 462; *Warren v. Abbett*, 65 N. J. L. 99.

Acceptance of Goods. — See *James v. Libby*, 103 N. Y. App. Div. 256, reversing (Supm. Ct. App. T.) 44 Misc. (N. Y.) 210.

Given in Legal Proceeding by Order of Court. — See *Buffington v. Bronson*, 61 Ohio St. 231.

The Contingent Liability of a principal to the sureties upon his bond is a sufficient consideration to support a mortgage given to indemnify such sureties after execution and delivery of the bond, and before a breach. *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610.

**173.** 2. Damage to Indemnatee Sufficient Consideration. — *Manary v. Runyon*, 43 Oregon 495; *Stacy v. Rose*, (Tenn. Ch. 1900) 58 S. W. Rep. 1087.

Release of Property Seized under Process. — See *Foy v. Dawkins*, 138 Ala. 232.

7. Losses, Damages, and Liabilities Covered by Indemnity. — *Mitchell v. Southern R. Co.*, (Ky. 1903) 74 S. W. Rep. 216; *Gamble v. Cuneo*, 162 N. Y. 634, affirming 21 N. Y. App. Div.

413; *Cochran v. Selling*, 36 Oregon 333; *Flynn v. Philadelphia*, 199 Pa. St. 476; *Weightman v. Union Trust Co.*, 208 Pa. St. 449; *Morton v. Union Traction Co.*, 20 Pa. Super. Ct. 325; *Price v. Crozier*, 101 Va. 644. See also *Union Cent. L. Ins. Co. v. Prigge*, 90 Minn. 375.

**174.** 1. Losses, Damages, and Liabilities Not Covered by Indemnity. — *Central Trust Co. v. Louisville Trust Co.*, (C. C. A.) 100 Fed. Rep. 545; *Hall v. Chitwood*, 106 Mo. App. 568; *Flynn v. Philadelphia*, 199 Pa. St. 476.

**175.** 2. Indemnity Bond — Recitals Control. — *New York v. Sexton*, 96 N. Y. App. Div. 184.

**176.** 2. Deed by County Treasurer. — Where a county treasurer conveyed certain property to trustees to save harmless the sureties on his official bonds, who were liable as such sureties for the claims of persons having valid claims against the county at the time when the deed was executed, the deed was held to inure to the benefit of such claimants. *Jennings v. Taylor*, 102 Va. 191.

8. Payment of Premium in Advance. — A bond, not stipulating as to its duration, but covenanting that so long as it shall so remain an annual premium shall be paid in advance to the obligee, does not require the payment of the premium so as to continue the obligation, but leaves the obligee at liability to decline to make payment, and thus put a period to the contract. *Fidelity, etc., Co. v. Libby*, (Neb. 1904) 101 N. W. Rep. 994.

9. When Indemnatee's Right of Recovery Accrues. — *Fairfield v. Day*, 71 N. H. 63; *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745. See also *New York v. Sexton*, 96 N. Y. App. Div. 184.

**177.** 1. No Recovery Before Loss or Damage Suffered or Liability Incurred. — *Central Trust Co. v. Louisville Trust Co.*, (C. C. A.) 100 Fed. Rep. 545; *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745.

3. Judgment by Default. — *New York v. Sexton*, 96 N. Y. App. Div. 184.

4. Judgment by Consent. — *New York v. Sexton*, 96 N. Y. App. Div. 184.

8. Indemnatee Not Protected Against Loss Through Voluntary Payment. — *Beere v. Mayer*,

**178. e. WHETHER INDEMNITEE MUST HAVE SUFFERED ACTUAL LOSS OR DAMAGE**—(1) *Affirmative View*.—See note 2.

(3) *The Best Rule*—(a) *Rule Stated*.—See note 5.

**179.** See note 1.

**180. g. WHETHER NOTICE TO INDEMNITOR OF SUIT AGAINST INDEMNITEE IS NECESSARY**.—See note 2.

*h. EVIDENCE*—*Conclusive and Prima Facie Evidence*.—See notes 4, 5.

**181. VIII. MEASURE OF RECOVERY**—1. *In General*.—See note 2.

3. *Expenses of Litigation*—*a. COSTS*.—See note 7.

**182. b. ATTORNEY'S FEES**.—See note 2.

**IX. JOINT OR SEVERAL LIABILITY OF INDEMNITORS**—1. *Agreement Purporting to Be Joint*.—See note 4.

**X. DEFENSES**.—See note 8.

**183.** See note 2.

**XI. DISCHARGE OF INDEMNITOR**.—See note 4.

**XII. DEPOSITS FOR INDEMNITY**.—See note 6.

(N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 813. See also *Lane v. Richards*, 119 Iowa 24.

**178. 2. Actual Loss or Damage Must Be Shown**.—Central Trust Co. v. Louisville Trust Co., (C. C. A.) 100 Fed. Rep. 545; *Weightman v. Union Trust Co.*, 208 Pa. St. 449.

5. *When Actual Loss or Damage Is Necessary*.—*Frye v. Bath Gas, etc., Co.*, 97 Me. 241, 94 Am. St. Rep. 500; *Sherman v. Spalding*, 132 Mich. 249; *O'Connor v. Aetna L. Ins. Co.*, 67 Neb. 129; *Brown v. Mechanics, etc., Bank*, 43 N. Y. App. Div. 173; *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745; *Weightman v. Union Trust Co.*, 208 Pa. St. 449; *Pickett v. Fidelity, etc., Co.*, 60 S. Car. 477, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

*Effect of Judgment*.—The condition of a bond to "save and keep harmless" the obligee, from certain debts existing against him, is held in *New Jersey* not to be broken by the fact that the debts have passed into judgment against him. *Miller v. Fries*, 66 N. J. L. 377.

**179. 1. When Incurring of Liability Is Sufficient**.—*Fairfield v. Day*, 71 N. H. 63; *Brown v. Mechanics, etc., Bank*, 43 N. Y. App. Div. 173; *Henderson-Achert Lith. Co. v. John Shillito Co.*, 64 Ohio St. 236, 83 Am. St. Rep. 745; *Pickett v. Fidelity, etc., Co.*, 60 S. Car. 477, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed. 179. See also *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178, and holding that under the terms of the contract in the case at bar the recovery of a judgment against the indemnitee was sufficient without payment of such judgment; *Scott v. Conn.*, 75 N. Y. App. Div. 561.

**180. 2. Notice to Indemnitor of Action or Suit Against Indemnitee Not Necessary**.—*Great Northern R. Co. v. Akeley*, 88 Minn. 237, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180. See also *Detroit v. Grant*, 135 Mich. 626.

*When Notice Necessary*.—If a party to a suit may resort to another upon failing in the action, it is his duty to give full notice to his indemnitor of the suit, what he requires of him to do therein, and the consequences of his neglect to defend. Mere knowledge of the action is insufficient to bind him by judgment. *Hill v. Oswald*, 90 Ill. App. 120,

4. *When Judgment Against Indemnitee Is Conclusive upon Indemnitor*.—*American Surety Co. v. Ballman*, 104 Fed. Rep. 634; *Forster v. Gregory*, 107 Ill. App. 437; *Great Northern R. Co. v. Akeley*, 88 Minn. 237, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180; *Kansas City, etc., R. Co. v. Southern R. News Co.*, 151 Mo. 373. See also, under the *Montana* statute, *Butte v. Cook*, 29 Mont. 88.

5. *When Judgment Against Indemnitee Is Only Prima Facie Evidence Against Indemnitor*.—*Great Northern R. Co. v. Akeley*, 88 Minn. 237, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180. See also *Butte v. Cook*, 29 Mont. 88.

**181. 2. Indemnitee May Recover Amount of Loss Sustained or Liability Incurred**.—*Fairfield v. Day*, 71 N. H. 63; *Cassani v. Dunn*, 44 N. Y. App. Div. 248; *Cassidy v. Taylor Brewing, etc., Co.*, 79 N. Y. App. Div. 242; *Buffington v. Bronson*, 61 Ohio St. 231; *Cameron v. Barcus*, 31 Tex. Civ. App. 46.

7. *Indemnitee May Recover His Costs*.—*Cassidy v. Taylor Brewing, etc., Co.*, 79 N. Y. App. Div. 242.

**182. 2. Attorney's Fees**.—*U. S. Fidelity, etc., Co. v. Hittle*, 121 Iowa 352; *Cameron v. Barcus*, 31 Tex. Civ. App. 46. Compare *Fairfield v. Day*, 71 N. H. 63.

*Special Contract*.—In *Eddington v. Matthews*, (Tenn. Ch. 1899) 53 S. W. Rep. 1099, it was held that before attorney's fees can be allowed under bonds of indemnity they must be especially contracted for.

4. *Agreement by Partnership—Not Binding on Partner Who Did Not Authorize or Ratify*.—See *berger v. Wyman*, 108 Iowa 527.

8. *That the Indemnitee Has Not Performed His Part of the Contract a Good Defense*.—*Borgfeldt v. O'Neill*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 498, affirmed 81 N. Y. App. Div. 636.

**183. 2. No Defense that Indemnitee Might Have Avoided Loss by Pursuing Another Remedy**.—*Seaboard Air Line R. Co. v. Main*, 132 N. Car. 445.

4. *Appeal by Indemnitors—Payment of Judgment by Indemnitee*.—See *American Surety Co. v. Ballman*, 104 Fed. Rep. 634.

6. *Right to Retain Deposit*.—*Nourse v. Weitz*, 120 Iowa 708. See also *Meekins v. Sullivan County*, 154 Mo. 136; *Schlarman v. Kelley*, 74 Vt. 162 (bail—appearance of accused).

**183. XIII. INDEMNITY MORTGAGES — 1. In General. —** See note 9.

**184. 2. Description of Debt or Obligation Indemnified Against. —** See note 2.

**183. 9. Mortgage Runs with Land. —** Rowe v. Hamberger, 154 Ind. 604.

**Mortgages to Secure Future Liability as Surety** are not unusual, and constitute a continuing security for the time and to the amount fixed. When a particular advance or liability is incurred, and paid off wholly or in part, the mortgage, if so intended, will continue as a security

for new advances or new liabilities made within the limit fixed. *Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co.*, (C. C. A.) 101 Fed. Rep. 699.

**184. 2. Identification of Bond and Sureties by Parol Evidence. —** See Harlan County v. Whitney, 65 Neb. 105, 101 Am. St. Rep. 610.

## INDEPENDENT CONTRACTORS.

**187. I. WHO ARE INDEPENDENT CONTRACTORS — 1. General Definition. —** See note 1.

**2. Right to Control Work. —** See note 6.

**188. See note 2.**

**Contracts Reserving Control. —** See note 4.

**Surrender of Premises. —** See note 5.

**3. Supervision and Approval of Work. —** See note 6.

**189. Supervision by Architect. —** See note 1.

**4. Control as to Scope of Work. —** See note 3.

**5. Mode of Payment. —** See note 5.

**187. 1. Employer Represented as to Results.**

— Green v. Soule, 145 Cal. 96, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; Overhouser v. American Cereal Co., 118 Iowa 417; Kelleher v. Schmitt, etc., Mfg. Co., 122 Iowa 635; Francis v. Johnson, 127 Iowa 391; Scott v. Springfield, 81 Mo. App. 312; Kueckel v. Ryder, 54 N. Y. App. Div. 252, affirmed 170 N. Y. 562; Macdonald v. O'Reilly, 45 Oregon 589; Karl v. Juniata County, 206 Pa. St. 633.

**6. Employer's Right to Control Method of Work**

— California. — Green v. Soule, 145 Cal. 96, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; Louthan v. Hewes, 138 Cal. 116; Hedge v. Williams, 131 Cal. 455, 82 Am. St. Rep. 366.

Illinois. — Nelson v. Richardson, 108 Ill. App. 121, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; Chicago v. Murdock, 212 Ill. 9; Crudup v. Schreiner, 98 Ill. App. 337.

Indiana. — Parkhurst v. Swift, 31 Ind. App. 521.

Iowa. — Francis v. Johnson, 127 Iowa 391.

Kentucky. — Jahn v. McKnight, (Ky. 1904) 78 S. W. Rep. 862; Adams Express Co. v. Schofield, 111 Ky. 832.

Maine. — Keyes v. Second Baptist Church, 99 Me. 308.

Massachusetts. — Boomer v. Wilbur, 176 Mass. 482; Pearl v. West End St. R. Co., 176 Mass. 177, 79 Am. St. Rep. 302; Falardeau v. Boston Art Students' Assoc., 182 Mass. 405; Dutton v. Amesbury Nat. Bank, 181 Mass. 154; Eldred v. Mackie, 178 Mass. 1.

Michigan. — Lenderink v. Rockford, 135 Mich. 531; Wright v. Big Rapids Door, etc., Mfg. Co., 124 Mich. 91.

Minnesota. — Corrigan v. Elsinger, 81 Minn. 42; Aldritt v. Gillette-Herzog Mfg. Co., 85 Minn. 206; Klages v. Gillette-Herzog Mfg. Co., 86 Minn. 458.

Nebraska. — Omaha Bridge, etc., Co. v. Hargadine, (Neb. 1904) 98 N. W. Rep. 1071.

New York. — Dooley v. Healey, 95 N. Y. App. Div. 271.

Ohio. — Andrews Bros. Co. v. Burns, 12 Ohio Cir. Dec. 305, 22 Ohio Cir. Ct. 437.

Texas. — Southern Cotton Oil Co. v. Wallace, 23 Tex. Civ. App. 12; Taylor, etc., R. Co. v. Warner, (Tex. Civ. App. 1900) 60 S. W. Rep. 442.

Canada. — Saunders v. Toronto, 26 Ont. App. 265.

**188. 2. Exercise of Right of Control Unnecessary. —** O'Neill v. Blase, 94 Mo. App. 648.

**4. Municipal Contracts. —** Scott v. Springfield, 81 Mo. App. 312.

**5. Surrender of Premises. —** Butler v. Lewman, 115 Ga. 752; Anderson v. Moore, 108 Ill. App. 106; Richmond v. Sitterding, 101 Va. 354, 99 Am. St. Rep. 879.

**Surrender of the Part on Which Work Is Done Is Sufficient. —** Geist v. Rothschild, 90 Ill. App. 324.

**Surrender of Premises Immaterial. —** See Louthan v. Hewes, 138 Cal. 116.

**6. Right of Supervision. —** Lenderink v. Rockford, 135 Mich. 531; Omaha Bridge, etc., Co. v. Hargadine, (Neb. 1904) 98 N. W. Rep. 1071; Jaskoey v. Consolidated Gas Co., (Supm. Ct. App. T.) 33 Misc. (N. Y.) 790; Simonton v. Perry, (Tex. Civ. App. 1901) 62 S. W. Rep. 1090, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 188.

**189. 1. Supervision by Architect. —** Green v. Soule, 145 Cal. 96, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189; Geist v. Rothschild, 90 Ill. App. 324.

**3. Control as to Scope of Work. —** Green v. Soule, 145 Cal. 96, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180.

**5. O'Neill v. Blase, 94 Mo. App. 648.**

**190.** See note 1.

6. Liability to Discharge. — See notes 5, 6.

**191.** 9. Question of Law or Fact. — See note 6.

**192.** See note 2.

**II. EMPLOYER'S LIABILITY FOR CONTRACTOR'S ACTS — 1. General Rule.** — See note 5.

**194.** Injuries Arising in Connection with Real Property. — See note 13.

Liability for Acts of Subcontractors. — See note 14.

**195.** Injuries to Contractor's Servants. — See note 1.

2. Transfer of Employee. — See note 3.

**196.** Drivers of Vehicles. — See note 1.

3. Injury from Acts Contracted For. — See note 2.

**197.** Defective Plans and Specifications. — See note 1.

**190.** 1. Payment by Time. — *Karl v. Juniata County*, 206 Pa. St. 633; *Hanna v. Gresh*, 16 Montg. Co. Rep. (Pa.) 182.

5. Liability to Discharge. — *Adams Express Co. v. Schofield*, 111 Ky. 832.

6. Power to Discharge Held to Be Conclusive. — *Crudup v. Shreiner*, 98 Ill. App. 337.

**191.** 6. Question for Jury. — *Green v. Soule*, 145 Cal. 96; *Overhouser v. American Cereal Co.*, 118 Iowa 417, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 191.

**192.** 2. The Surrounding Circumstances Are to Be Considered in construing the contract. *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206; *Klages v. Gillette-Herzog Mfg. Co.*, 86 Minn. 458.

5. Recognized Rule — *United States*. — *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 192; *Toledo Brewing, etc., Co. v. Bosch*, (C. C. A.) 101 Fed. Rep. 530.

*Alabama*. — *Chattahoochee, etc., R. Co. v. Behrman*, 136 Ala. 508.

*California*. — *Louthan v. Hewes*, 138 Cal. 116; *Green v. Soule*, 145 Cal. 96.

*Georgia*. — *Ridgeway v. Downing Co.*, 109 Ga. 591.

*Illinois*. — *Geist v. Rothschild*, 90 Ill. App. 324.

*Iowa*. — *Hoff v. Shockley*, 122 Iowa 720.

*Kentucky*. — *Strauss v. Louisville*, 108 Ky. 155; *Jahn v. McKnight*, (Ky. 1904) 78 S. W. Rep. 862.

• *Maine*. — *Wilbur v. White*, 98 Me. 191.

*Maryland*. — See *Hearn v. Quillen*, 94 Md. 39.

*Massachusetts*. — *Boomer v. Wilbur*, 176 Mass. 482; *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154; *Falardeau v. Boston Art Students' Assoc.*, 182 Mass. 405; *Pearl v. West End St. R. Co.*, 176 Mass. 177, 79 Am. St. Rep. 302.

*Michigan*. — *Wright v. Big Rapids Door, etc., Mfg. Co.*, 124 Mich. 91; *Highway Overseer v. Pelton*, 129 Mich. 31.

*Minnesota*. — *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206.

*Nebraska*. — *Omaha Bridge, etc., Co. v. Hargadine*, (Neb. 1904) 98 N. W. Rep. 1071.

*New York*. — *Burke v. Ireland*, 166 N. Y. 305, reversing 47 N. Y. App. Div. 428; *Boss v. Jarmulowsky*, 81 N. Y. App. Div. 577; *Dooley v. Healey*, 95 N. Y. App. Div. 271; *Haughey v. Thatcher*, 89 N. Y. App. Div. 375; *Kueckel v. Ryder*, 54 N. Y. App. Div. 252, affirmed 170 N. Y. 562; *Callan v. Pugh*, 54 N. Y. App. Div.

545; *Hogan v. Arbuckle*, 73 N. Y. App. Div. 591; *Korn v. Weir*, (Supm. Ct. App. T.) 88 N. Y. Supp. 976.

*Oregon*. — *Macdonald v. O'Reilly*, 45 Oregon 589.

*Pennsylvania*. — *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106; *Connor v. Pennsylvania R. Co.*, 24 Pa. Super. Ct. 241; *Rubin v. Miller*, 30 Pittsb. Leg. J. N. S. (Pa.) 351; *Hanna v. Gresh*, 16 Montg. Co. Rep. (Pa.) 182.

*Texas*. — *White v. Green*, (Tex. Civ. App. 1904) 82 S. W. Rep. 329; *Proctor v. San Antonio St. R. Co.*, 26 Tex. Civ. App. 150.

*Virginia*. — *Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879.

*Canada*. — *Saunders v. Toronto*, 26 Ont. App. 265.

**194.** 13. Injuries Arising in Connection with Real Property. — See *Hoff v. Shockley*, 122 Iowa 720; *Boomer v. Wilbur*, 176 Mass. 482; *Wright v. Big Rapids Door, etc., Mfg. Co.*, 124 Mich. 91.

14. Acts of Subcontractors — Nonliability of Contractors. — *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378; *Green v. Soule*, 145 Cal. 96, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194; *Crudup v. Schreiner*, 98 Ill. App. 337.

**195.** 1. Injuries to Contractor's Servants. — *Butler v. Lewman*, 115 Ga. 752; *Kelleher v. Schmitt, etc., Mfg. Co.*, 122 Iowa 635; *Reilly v. Chicago, etc., R. Co.*, 122 Iowa 525; *Bush v. Grant*, (Ky. 1901) 61 S. W. Rep. 363; *Eldred v. Mackie*, 178 Mass. 1; *Lenderink v. Rockford*, 135 Mich. 531; *Omaha Bridge, etc., Co. v. Hargadine*, (Neb. 1904) 98 N. W. Rep. 1071; *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 325, 327; *Simonton v. Perry*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1090; *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591.

3. Transfer of Employee. — *Parkhurst v. Swift*, 31 Ind. App. 521.

**196.** 1. Drivers of Vehicles. — *Consolidated Plate Glass Co. v. Caston*, 29 Can. Sup. Ct. 624.

2. Injuries from Acts Contracted For. — *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196; *Chattahoochee, etc., R. Co. v. Behrman*, 136 Ala. 508; *Murray v. Arthur*, 98 Ill. App. 331; *Hoff v. Shockley*, 122 Iowa 720; *Braisted v. Brooklyn, etc., R. Co.*, 46 N. Y. App. Div. 204; *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581, affirmed 169 N. Y. 581.

**197.** 1. Defective Plans and Specifications. —

- 197.** Contract for Nuisance. — See note 2.
- 4. Legal Duties Not Transferable** — *a.* IN GENERAL. — See note 3.
- b.* MUNICIPAL CORPORATIONS. — See note 4.
- 199.** *c.* RAILROAD COMPANIES. — See note 4.
- f.* MASTER AND SERVANT. — See note 9.
- 200.** *g.* DUTY TO GUESTS. — See note 2.
- h.* LANDLORD AND TENANT. — See note 3.
- i.* ADJOINING OWNERS. — See note 6.
- 201.** Employer Not Liable. — See note 2.
- 5. Work Intrinsically Dangerous or Probably Injurious.** — See notes 3, 4.
- 202.** **6. Duties under License.** — See note 2.
- 203.** **7. Contract for Illegal Act.** — See note 1.
- 8. Violation of Ordinance.** — See note 3.
- 9. Delegation of Charter Powers.** — See note 4.
- In Illinois. — See note 5.
- 204.** **11. Incompetent Contractor.** — See note 4.
- Cloud County *v.* Vickers, 62 Kan. 25; Church of Holy Communion *v.* Paterson Extension R. Co., 68 N. J. L. 399.
- 197. 2. Contract for Nuisance.** — Chicago Bridge, etc., Co. *v.* La Montia, 112 Ill. App. 43; Young *v.* Trapp, (Ky. 1904) 82 S. W. Rep. 429; Thomas *v.* Harrington, 72 N. H. 45.
- 3. Legal Duties Not Transferable.** — Corrigan *v.* Elsinger, 81 Minn. 42.
- 4. Municipality Liable for Defective Streets.** — Deming *v.* Terminal R. Co., 49 N. Y. App. Div. 493, *affirmed* 169 N. Y. 1.
- 199. 4. Highway Crossings.** — Deming *v.* Terminal R. Co., 49 N. Y. App. Div. 493, *affirmed* 169 N. Y. 1.
- 9. Master's Duty to Furnish Safe Place for Work.** — Toledo Brewing, etc., Co. *v.* Bosch, (C. C. A.) 101 Fed. Rep. 530.
- 200. 2. Duty to Guests.** — Corrigan *v.* Elsinger, 81 Minn. 42; Sebeck *v.* Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 81 Am. St. Rep. 512. See also Texas State Fair *v.* Brittain, 56 C. C. A. 499; Texas State Fair *v.* Marti, 30 Tex. Civ. App. 132.
- No Liability Unless Injury Occurs on Premises.** — Geist *v.* Rothschild, 90 Ill. App. 324.
- 3. Landlord's Duty to Tenant.** — Anderson *v.* Moore, 108 Ill. App. 106.
- No Liability in Absence of Negligence.** — Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577.
- 6. Easement of Support.** — Davis *v.* Summerfield, 133 N. Car. 325.
- 201. 2. Employer Not Liable.** — Korn *v.* Weir, (Supm. Ct. App. T.) 88 N. Y. Supp. 976.
- 3. Dangerous or Injurious Work** — *England.* — Penny *v.* Wimbledon Urban Dist. Council, (1899) 2 Q. B. 72, *affirming* (1898) 2 Q. B. 212; The Snark, (1900) P. 105, *affirming* (1899) P. 74; Holliday *v.* National Telephone Co., (1899) 2 Q. B. 392, *affirming* (1899) 1 Q. B. 221.
- Illinois.* — Chicago *v.* Murdock, 212 Ill. 9, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201; Chicago *v.* Murdock, 113 Ill. App. 656, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201, *affirmed* 212 Ill. 9.
- Louisiana.* — Brady *v.* Jay, 111 La. 1071.
- Massachusetts.* — Wetherbee *v.* Partridge, 175 Mass. 185, 78 Am. St. Rep. 486.
- New York.* — Murphy *v.* Perlstein, 73 N. Y. App. Div. 256; Ann *v.* Herter, 79 N. Y. App. Div. 6; Mullins *v.* Siegel-Cooper Co., 95 N. Y. App. Div. 234; Johnston *v.* Phoenix Bridge Co., 44 N. Y. App. Div. 581, *affirmed* 169 N. Y. 581. See also Higgins *v.* Brooklyn, etc., R. Co., 54 N. Y. App. Div. 69.
- Ohio.* — Jacobs *v.* Fuller, etc., Co., 67 Ohio St. 70.
- South Dakota.* — McCarrier *v.* Hollister, 15 S. Dak. 366, 91 Am. St. Rep. 695, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.
- Texas.* — Cameron Mill, etc., Co. *v.* Anderson, 98 Tex. 156, *affirming* 34 Tex. Civ. App. 105. See also White *v.* Green, (Tex. Civ. App. 1904) 82 S. W. Rep. 329.
- 4. Distinguished from Other Work.** — Strauss *v.* Louisville, 108 Ky. 155; Boomer *v.* Wilbur, 176 Mass. 482; Koch *v.* Fox, 71 N. Y. App. Div. 288; Richmond *v.* Sitterding, 101 Va. 354, 99 Am. St. Rep. 879. See also Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577.
- New York Rule.** — In Davis *v.* Summerfield, 133 N. Car. 325, the New York rule was disapproved.
- 202. 2. Duties under License or Privilege.** — Deming *v.* Terminal R. Co., 49 N. Y. App. Div. 493, *affirmed* 169 N. Y. 1. See also Cameron Mill, etc., Co. *v.* Anderson, 98 Tex. 156, *affirming* 34 Tex. Civ. App. 105.
- 203. 1. Illegal Act.** — See Wilbur *v.* White, 98 Me. 191.
- 3. Violation of Ordinance.** — See *contra*. Rubin *v.* Miller, 30 Pittsb. L. J. N. S. (Pa.) 351.
- Object of Ordinance to Prevent Accidents.** — The Greater New York Charter, § 41, providing for the erection of a roped passageway over the sidewalk in front of a building in course of construction, is intended to prevent accidents, and not to fix liability therefor. Koch *v.* Fox, 71 N. Y. App. Div. 288.
- 4. Exercise of Power of Eminent Domain.** — See Chicago *v.* Murdock, 212 Ill. 9.
- 5. Illinois Cases.** — See Metropolitan West Side El. R. Co. *v.* Dick, 87 Ill. App. 40; Suburban R. Co. *v.* Balkwill, 94 Ill. App. 454, *affirmed* 105 Ill. 535.
- 204. 4. Incompetency of Contractor.** — Simon-ton *v.* Perry, (Tex. Civ. App. 1901) 62 S. W. Rep. 1090, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204, but holding that the rule applies only between the employer and those

- 205.** See note 1.  
     **12. Unsafe Premises.** — See note 5.  
     **Employment of Architect.** — See note 6.  
     **13. Defective Appliances.** — See note 7.
- 206.** **Unsafe Scaffolding.** — See note 2.  
     **Repair of Appliances.** — See note 4.  
     **14. Interference by Employer.** — See note 5.
- 207.** **16. Special Applications of Rule — a. EXCAVATIONS AND OBSTRUCTIONS IN STREETS.** — See note 4.
- 208.** See notes 1, 4.
- 209.** **III. CONTRACTOR'S LIABILITY — After Completion of Work.** — See note 8.
- 210.** **INDIAN.** — See note 4.

sustaining no relation of privity, contractual or otherwise, with him or with the contractor; *White v. Green*, (Tex. Civ. App. 1904) 82 S. W. Rep. 329.

**205. 1. Negligence in Selection.** — *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512.

**5. Unsafe Premises.** — *Rice v. Smith*, 171 Mo. 331.

**Contractor Liable to Subcontractor's Servant.** — *Butler v. Lewman*, 115 Ga. 752.

**Liable Only for Active Negligence.** — *Callan v. Pugh*, 54 N. Y. App. Div. 545.

**6. Employment of Architect.** — *Burke v. Ireland*, 166 N. Y. 305, reversing 47 N. Y. App. Div. 428.

**7. Defective Appliances.** — *Toledo Brewing, etc., Co. v. Bosch*, (C. C. A.) 101 Fed. Rep. 530; *Brady v. Jay*, 111 La. 1071, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205.

**If There Is No Obligation to Furnish Appliances** the rule does not apply. *Bush v. Grant*, (Ky. 1901) 61 S. W. Rep. 363.

**Employer Not Liable Unless Appliance Inherently Dangerous.** — *Southern Oil Co. v. Church*, 32 Tex. Civ. App. 325, 327.

**206. 2. Scaffold Constructed by Contractor Out of Lumber Furnished by Employer.** — Where the employer merely pointed out a pile of lumber from which the scaffold was constructed by the contractor, he was held not to be liable where it did not appear that all the lumber was unsuitable, although the contractor selected a defective piece. *Callahan v. Phillips Academy*, 180 Mass. 183. See also *Wingert v. Krakauer*, 92 N. Y. App. Div. 223.

**4. Repair of Appliances.** — See *Kelleher v. Schmitt, etc., Mfg. Co.*, 122 Iowa 635; *Central Coal, etc., Co. v. Bailey*, (Ky. 1903) 76 S. W. Rep. 842.

**5. Interference by Employer.** — *Louisville, etc., R. Co. v. Tow*, (Ky. 1901) 63 S. W. Rep. 27; *Appel v. Eaton, etc., Co.*, 97 Mo. App. 428; *James McNeil, etc., Co. v. Crucible Steel Co.*, 207 Pa. St. 493.

**207. 4. Employer Liable.** — *Penny v. Wimbledon Urban Dist. Council*, (1899) 2 Q. B. 72, affirming (1898) 2 Q. B. 212; *Thomas v. Harrington*, 72 N. H. 45; *McCarrier v. Hollister*, 15 S. Dak. 366, 91 Am. St. Rep. 695; *Cameron Mill, etc., Co. v. Anderson*, 98 Tex. 156.

**Rule Applied to Navigable Stream.** — *The Snark* (1900) P. 105, affirming (1899) P. 74.

**Building Contractor Liable for Negligence of Independent Contractor in Charge of Brickwork.** — *Young v. Trapp*, (Ky. 1904) 82 S. W. Rep. 429.

**208. 1. New York Decisions.** — *Mullins v. Siegel-Cooper Co.*, 95 N. Y. App. Div. 234.

**4. Rule of Nonliability.** — *Hoff v. Shockley*, 122 Iowa 720.

**209. 8. Injuries After Completion of Work** — *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378. See also *Cochran v. Seas*, 168 N. Y. 372.

**210. 4. Indian Tribes.** — *Montoya v. U. S.*, 180 U. S. 261.

**Indian Country.** — *Goodson v. U. S.*, 7 Okla. 117; *Matter of Ingram*, 12 Okla. 54.

**Indian Reservation and Indian Country.** — *Goodson v. U. S.*, 7 Okla. 117.

# INDIANS.

By E. G. CHILTON.

- 213. I. LEGAL STATUS OF INDIANS — 1. In Their Tribal Relations —**  
**a. GENERALLY** — Indian Tribes Domestic Dependent Nations. — See note 1.  
     Indians Wards of Nation. — See note 2.  
     Status of Particular Tribes. — See note 3.  
**214. b. POWER OF SELF-GOVERNMENT — (1) Generally.** — See note 1.  
     Judicial Notice of Tribal Laws. — See note 3.  
**215. (2) The Five Civilized Nations.** — See notes 1, 2.  
**c. ADOPTION OF WHITES.** — See notes 6, 7.  
**216. Marriage of Whites and Indians.** — See note 3.  
     2. As Individuals — *a.* IN GENERAL. — See note 6.

**213. 1. The Legal Position of the Indian Tribes.** — *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942; *Lowe v. U. S.*, 37 Ct. Cl. 413.

The Indians are not a portion of the political community known as the "people of the United States," but are regarded as distinct political communities. *Jones v. Meehan*, 175 U. S. 1.

See also, as to status of the Indians and Indian tribes, Choctaw, etc., *Nations v. U. S.*, 34 Ct. Cl. 17; *Hayt v. U. S.*, 38 Ct. Cl. 455; *U. S. v. Miller*, 105 Fed. Rep. 944; *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884.

**Regarded as Dependent Political Communities.** — *Stephens v. Cherokee Nation*, 174 U. S. 445; *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941.

**Indian Tribes Owe No Allegiance to States.** — *In re Lelah-Puc-Ka-Chee*, 98 Fed. Rep. 429.

**Indian Tribes Are Quasi-independent Nations.** — *State v. Columbia George*, 39 Oregon 127.

**2. Indians Wards of the Nation or State — United States.** — *Stephens v. Cherokee Nation*, 174 U. S. 445; *Jones v. Meehan*, 175 U. S. 1; *In re Lelah-Puc-Ka-Chee*, 98 Fed. Rep. 429; *Peters v. Malin*, 104 Fed. Rep. 849; *U. S. v. Logan*, 105 Fed. Rep. 240; *U. S. v. Miller*, 105 Fed. Rep. 944; *In re Blackbird*, 109 Fed. Rep. 139; *U. S. v. Kopp*, 110 Fed. Rep. 160; *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942; *Peters v. Malin*, 111 Fed. Rep. 244; *In re Lincoln*, 129 Fed. Rep. 247; *McKnight v. U. S.*, (C. C. A.) 130 Fed. Rep. 659; *U. S. v. Gardner*, (C. C. A.) 133 Fed. Rep. 285; Choctaw, etc., *Nations v. U. S.*, 34 Ct. Cl. 17; *Davidson v. U. S.*, 34 Ct. Cl. 169.

**Indian Territory.** — *U. S. v. Cohn*, 2 Indian Ter. 474; *Tuttle v. Moore*, 3 Ind. Ter. 712; *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941.

**Minnesota.** — *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108.

**New York.** — *Johnson v. Long Island R. Co.*, 162 N. Y. 462; *Shongo v. Miller*, 45 N. Y. App. Div. 339, affirmed 160 N. Y. 586; *Jameson v. Pierce*, 78 N. Y. App. Div. 6.

**Oregon.** — *Kalyton v. Kalyton*, 45 Oregon 116.

**Indians Cannot Voluntarily Sever Relation Between Them and Nation.** — *Lowe v. U. S.*, 37 Ct. Cl. 413.

**3. The Indians in Mexico.** — *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 188; *Hayt v. U. S.*, 38 Ct. Cl. 455.

**The Pueblo Indians**, until Mexico threw off the Spanish yoke, were considered wards of the Spanish government, but the United States has never assumed to reduce them to a state of tutelage. *Territory v. Delinquent Tax List*, (N. Mex. 1904) 76 Pac. Rep. 307.

**Choctaw Indians.** — See *U. S. v. Choctaw Nation*, 179 U. S. 494.

**214. 1. Indian Tribes May Regulate Their Internal Affairs.** — *McBean v. McBean*, 37 Oregon 195; *State v. Columbia George*, 39 Oregon 127. See also *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884.

**Indian Marriages.** — *Kalyton v. Kalyton*, 45 Oregon 116.

**Courts Do Not Sanction Adoption of Children by Tribal Custom.** — *Non-She-Po v. Wa-Win-Ta*, 37 Oregon 213, 82 Am. St. Rep. 749.

**3. Judicial Notice.** — *Hockett v. Alston*, (C. C. A.) 110 Fed. Rep. 910, reversing on other grounds 3 Indian Ter. 432; *Campbell v. Scott*, 3 Indian Ter. 462.

**215. 1. The Five Civilized Nations.** — *Stephens v. Cherokee Nation*, 174 U. S. 445; *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600; *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884; *Zevely v. Weimer*, (Ind. Ter. 1904) 82 S. W. Rep. 941.

**2. Ansley v. Ainsworth**, (Indian Ter. 1902) 69 S. W. Rep. 884.

**6. Adoption of Whites.** — *Crowell v. Young*, (Ind. Ter. 1902) 69 S. W. Rep. 829. See also *U. S. v. Higgins*, 110 Fed. Rep. 609.

**7. Whites Do Not Become Indians by Adoption.** — *U. S. v. Higgins*, 110 Fed. Rep. 609.

**216. 3. Right to Tribal Property.** — Under Act Cong. Aug. 9, 1888, a white man marrying a tribal Indian woman does not acquire any right to any tribal property, privilege, or interest. *McKnight v. U. S.*, (C. C. A.) 130 Fed. Rep. 659.

**6. Dawes Bill Declaring Indians to Be Citizens.**



**216.** *b.* RIGHT TO SUE AND BE SUED. — See notes 7, 8.

**217.** See note 1.

Laches. — See notes 2, 3.

*c.* RIGHT TO VOTE IN STATE ELECTIONS. — See note 6.

**II. WHO ARE INDIANS — Persons of Mixed Blood.** — See notes 8, 10.

**218.** Half-breeds. — See note 1.

**III. TREATIES WITH INDIANS.** — See notes 3, 4, 5.

Treaties Between States and Indians. — See note 6.

**219.** Treaties Construed Favorably to Indians. — See note 2.

**IV. CONTRACTS BETWEEN WHITES AND INDIANS — Ordinary Contracts.** —

See note 6.

**220.** **V. THE INDIAN COUNTRY — 1. Definition.** — See note 1.

**2. Indian Reservations.** — See notes 3, 4.

— *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108; *State v. Columbia George*, 39 Oregon 127.

**216.** **7. Indians May Sue in Federal Courts.** — *Y-Ta-Tah-Wah v. Rebeck*, 105 Fed. Rep. 257.

— *Indian May Sue as a Tribe*. — *Tuttle v. Moore*, 3 Indian Ter. 712.

**8. Right to Sue in State Courts.** — *Y-Ta-Tah-Wah v. Rebeck*, 105 Fed. Rep. 257; *Jameson v. Pierce*, 78 N. Y. App. Div. 9.

*The Indians in New York.* — *Johnson v. Long Island R. Co.*, 162 N. Y. 462.

**When Off the Reservation May Resort to State Courts.** — *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108.

**Suit in Equity to Recover Personalty Held Not Maintainable.** — *Onondaga Nation v. Thatcher*, 53 N. Y. App. Div. 563, *affirmed* 169 N. Y. 584.

**217.** **1. Indians May Be Sued in State Courts.** — *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215 [217].

**An Action Sounding in Tort may be maintained in the courts of New York against a tribal Indian.** *Bates v. Printeep*, (County Ct.) 31 Misc. (N. Y.) 17.

**2. No Laches Imputable to Tribal Indians.** — See *Schrimpscher v. Stockton*, 183 U. S. 290. But see *Y-Ta-Tah-Wah v. Rebeck*, 105 Fed. Rep. 257; *Dunbar v. Green*, 66 Kan. 560, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217, but *distinguishing* the case there cited and holding that the weight of authority is against the broad proposition announced thereby; *Pope v. Falk*, 66 Kan. 793.

**3. Acceptance of Allotments of Land.** — Indians are chargeable with laches when their tribal relations are dissolved by accepting allotments of land in severalty. *Schrimpscher v. Stockton*, 183 U. S. 290.

**6. U. S. v. Rickert, 106 Fed. Rep. 1; *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.**

**8. Mixed Blood.** — When in a convention with the Indians, half or mixed bloods are included, a person of white and Indian parentage is deemed to be of mixed blood, without regard to the source of the Indian blood. *Sloan v. U. S.*, 118 Fed. Rep. 283. See also *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

**The Indian Act of Canada defines an Indian as "any male person of Indian blood reputed to belong to a particular band."** *Reg. v. Howson*, 1 N. W. Ter. 492.

**Persons of More White than Indian Blood.** — See *U. S. v. Higgins*, 110 Fed. Rep. 609.

**10. Person of Mixed Blood Takes Condition of Father.** — *U. S. v. Hadley*, 99 Fed. Rep. 437; *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942; *Keith v. U. S.*, 8 Okla. 446.

**Exception to General Rule — Condition of Indian Mother Governs Where Abandoned by White Father.** — *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942; *U. S. v. Hadley*, 99 Fed. Rep. 437.

**Determination of Department Followed by Courts.** — *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

**218.** **1. Reg. v. Howson, 1 N. W. Ter. 492. In Canada a half-breed having taken treaty is an Indian within the meaning of the Indian Act. *Reg. v. Mellon*, 5 N. W. Ter. 301.**

**3. Treaties with Indian Tribes.** — *Stephens v. Cherokee Nation*, 174 U. S. 445; *Lone Wolf v. Hitchcock*, 187 U. S. 553; *Jackson v. U. S.*, 34 Ct. Cl. 441; *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884; *Shongo v. Miller*, 45 N. Y. App. Div. 339, *affirmed* 169 N. Y. 586; *Page v. Pierce County*, 25 Wash. 6.

**Any Provision of a Treaty May Be Superseded by a subsequent Act of Congress.** *Stephens v. Cherokee Nation*, 174 U. S. 445; *Lone Wolf v. Hitchcock*, 187 U. S. 553; *McBride v. Farrington*, 131 Fed. Rep. 797; *Tuttle v. Moore*, 3 Indian Ter. 712; *Fraer v. Washington*, (Indian Ter. 1902) 69 S. W. Rep. 835; *Shongo v. Miller*, 45 N. Y. App. Div. 339, *affirmed* 169 N. Y. 586.

**Treaty May Abrogate Act of Congress.** — *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884.

**4. Stephens v. Cherokee Nation, 174 U. S. 445; *Lone Wolf v. Hitchcock*, 187 U. S. 553.**

**5. Ansley v. Ainsworth, (Indian Ter. 1902) 69 S. W. Rep. 884; *Shongo v. Miller*, 45 N. Y. App. Div. 339, *affirmed* 169 N. Y. 586.**

**6. Treaties with States.** — *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941.

**219.** **2. The Clear Import of Words will not be disregarded.** *U. S. v. Choctaw Nation*, 179 U. S. 494.

**6. Light v. Conover, 10 Okla. 732.**

**220.** **1. Definition of Indian Country.** — *Hayt v. U. S.*, 38 Ct. Cl. 455.

**Under the Act of January 30, 1892, the term "Indian country" includes any Indian allotment while the title thereto shall be held in trust by the United States, or shall remain inalienable by the allottee.** *U. S. v. Kiya*, 126 Fed. Rep. 879.

**3. Reservations Established by Treaty, Statute,**

- 221. VI. GOVERNMENT OF INDIANS AND INDIAN COUNTRY — 1. Generally —**  
**a. GOVERNMENT VESTED IN UNITED STATES. —** See notes 2, 4.  
 Federal Authority Supreme. — See notes 6, 7.  
**222. Jurisdiction of Federal Courts in Indian Territory. —** See notes 3, 4.  
**b. STATE AND TERRITORIAL JURISDICTION. —** See notes 5, 6.  
**223. See note 1.**  
**2. In Criminal Cases — Federal Statutes —** By the Act of Congress of June 30, 1834. — See note 2.  
 Act of 1885. — See note 3.  
**224. See note 2.**  
 Crimes Committed on Reservation by Others than Indians. — See note 5.  
 Crimes Committed by Indian Outside of Indian Country. — See note 8.  
**225. 3. Protection of Indians. —** See note 4.  
**226. Right of United States to Sue. —** See note 2.  
 Protection of Indian Allottees. — See note 6.  
 Hunting. — See note 8.  
**227. Cutting Timber. —** See notes 2, 3.

or Executive Order. — *Gibson v. Anderson*, (C. C. A.) 131 Fed. Rep. 39; *Page v. Pierce County*, 25 Wash. 6.

**220. 4. Indian Reservations Are Indian Country. —** *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108.

**221. 2. Government of Indians Vested in Congress. —** *Lone Wolf v. Hitchcock*, 187 U. S. 553.

**5. Muskogee Nat. Telephone Co. v. Hall**, (C. C. A.) 118 Fed. Rep. 382.

**6. U. S. v. Kopp**, 110 Fed. Rep. 160; *Muskogee Nat. Telephone Co. v. Hall*, (C. C. A.) 118 Fed. Rep. 382; *U. S. v. Cohn*, 2 Indian Ter. 474; *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941; *Shongo v. Miller*, 45 N. Y. App. Div. 339, affirmed 160 N. Y. 586.

**Ownership of Land Immaterial. —** *Peters v. Malin*, 111 Fed. Rep. 244.

**7. State Legislature Cannot Interfere with Federal Authority Over Indians. —** *In re Blackbird*, 109 Fed. Rep. 139; *McBean v. McBean*, 37 Oregon 195.

**Property Not Within Operation of State Laws. —** *Y-Ta-Tah-Wah v. Rehock*, 105 Fed. Rep. 257.

**222. 3. Jurisdiction of Courts in Indian Territory. —** By Act Cong. June 7, 1897, jurisdiction was given to the federal courts in all civil cases, irrespective of the race of the parties. *Crowell v. Young*, (Indian Ter. 1902) 69 S. W. Rep. 820.

**4. Laws of Arkansas Made Applicable in Indian Territory. —** See *Sanders v. Thornton*, (C. C. A.) 97 Fed. Rep. 863.

The statute of Arkansas as to descents and distributions will be applied where a person dies intestate. *Nivens v. Nivens*, (Indian Ter. 1901) 64 S. W. Rep. 604.

**5. Indian Lands Included in Jurisdiction of State or Territory. —** *King v. McAndrews*, 104 Fed. Rep. 430, reversed on other grounds (C. C. A.) 111 Fed. Rep. 860.

**State Statutes Not Applicable unless Made So by Congress. —** *Peters v. Malin*, 111 Fed. Rep. 244.

**The Property of a Tribal Indian is not subject to the laws of the state. —** *Y-Ta-Tah-Wah v. Rehock*, 105 Fed. Rep. 257.

**6. Federal Authority on Reservation Exclusive**

**When So Reserved. —** *McBean v. McBean*, 37 Oregon 195. See also *King v. McAndrews*, 104 Fed. Rep. 430, reversed on other grounds (C. C. A.) 111 Fed. Rep. 860.

**223. 1. Indians Subject to State Laws. —** *U. S. v. Rickert*, 106 Fed. Rep. 1.

**Under the Dawes Bill of 1882**, an Indian to whom an allotment of land has been made becomes subject to the laws, both civil and criminal, of the state or territory in which he may reside. *State v. Columbia George*, 39 Oregon 127. See also *supra*, this title, 216. 6.

**2. United States Criminal Laws Extended Over Indian Country. —** *Matter of Ingram*, 12 Okla. 54; *State v. Columbia George*, 39 Oregon 127.

**3. Act of 1885. —** *U. S. v. Hadley*, 99 Fed. Rep. 437; *In re Blackbird*, 109 Fed. Rep. 139.

The act refers only to Indians who have not severed their tribal relations. *State v. Howard*, 33 Wash. 250.

**Not Intended to Relinquish Jurisdiction Over Crimes Committed Within Reservation. —** *State v. Columbia George*, 39 Oregon 127.

**The Effect of the Act is confined to acts of a criminal character committed by a tribal Indian within the limits of a reservation. —** *In re Nowge-zhuck*, 69 Kan. 410.

**224. 2. Peters v. Malin**, 111 Fed. Rep. 244.

**5. Jurisdiction of Oklahoma District Court. —** *Herd v. U. S.*, 13 Okla. 512.

**8. State Courts Have Jurisdiction of Crimes Committed by Tribal Indians Off Reservations. —** See *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

**225. 4. Duty of United States to Protect Indians. —** See *U. S. v. Choctaw Nation*, 179 U. S. 494.

**226. 2. United States May Sue on Behalf of Indians. —** *In re Celestine*, 114 Fed. Rep. 551, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226; *U. S. v. Higgins*, 110 Fed. Rep. 609.

**6. Indian Allottees Protected. —** *Indian Land, etc., Co. v. Shoenfelt*, (Indian Ter. 1904) 79 S. W. Rep. 134; *Shongo v. Miller*, 45 N. Y. App. Div. 339, affirmed 169 N. Y. 586.

**8. McCoy v. U. S.**, 38 Ct. Cl. 163.

**227. 2. U. S. v. Gardner**, (C. C. A.) 133 Fed. Rep. 285.

**227.** 4. Regulation of Commerce with Indians — *a.* GENERALLY — Congress Has Power to Regulate Commerce with Indian Tribes. — See notes 4, 5.

**228.** 5. Removal of Persons from Indian Country. — See notes 6, 7.

**229.** Employment of Military Forces. — See note 1.

Return After Removal. — See note 2.

**230.** VIII. INDIAN LANDS — 1. Nature of Indian Title. — See note 1.

United States May Dispose of Fee. — See note 2.

**231.** See note 1.

Title of the Five Civilized Tribes. — See note 3.

**232.** 3. Allotments in Severalty — Under Treaties. — See note 5.

**233.** Under Acts of Congress. — See note 1.

Homesteads. — See note 2.

4. Alienation of Indian Lands — *a.* BY INDIAN TRIBES. — See note 5.

**234.** *b.* BY INDIVIDUAL INDIANS — Conveyance in Contravention of Restraints on Alienation Void. — See notes 2, 4.

**235.** Effect of Citizenship of Allottee upon Restraints on Alienation. — See note 1.

**236.** 5. How Far Subject to State Laws — *c.* DESCENT. — See notes 1, 2.

**227.** 3. Authority to Remove Dead Timber. — *Hitchcock v. U. S.*, 22 App. Cas. (D. C.) 275.

4. Regulation of Commerce with Indians. — *Morris v. Hitchcock*, 194 U. S. 384; *In re Blackbird*, 109 Fed. Rep. 139.

Intercourse with Individuals. — The grant of authority in the Federal Constitution includes the power to regulate intercourse with the individual members of a given tribe of Indians. *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

5. *Cosier v. McMillan*, 22 Mont. 484.

**228.** 6. Removal of Persons from Indian Country. — *Quigley v. Stephens*, 3 Indian Ter. 265; *Buster v. Wright*, (Indian Ter. 1902) 69 S. W. Rep. 882; *U. S. v. Baker*, (Indian Ter. 1903) 76 S. W. Rep. 103.

1. *Buster v. Wright*, (Indian Ter. 1902) 69 S. W. Rep. 882; *Ex p. Carter*, (Indian Ter. 1903) 76 S. W. Rep. 102; *U. S. v. Baker*, (Indian Ter. 1903) 76 S. W. Rep. 103.

**229.** 1. Employment of Military Forces. — *U. S. v. Baker*, (Indian Ter. 1903) 76 S. W. Rep. 103.

2. Penalty Recoverable in Civil Action Only. — In *U. S. v. Baker*, (Indian Ter. 1903) 76 S. W. Rep. 103, it was held that the penalty provided by Rev. Stat. U. S., § 2148, was recoverable only in a civil action in the nature of an action of debt, and could not be enforced in a criminal proceeding.

**230.** 1. Indian Title a Mere Right of Occupancy. — *Jones v. Meehan*, 175 U. S. 1; *Lone Wolf v. Hitchcock*, 187 U. S. 553; *U. S. v. Logan*, 105 Fed. Rep. 240; *Lemmon v. U. S.*, (C. C. A.) 106 Fed. Rep. 650; *U. S. v. Kopp*, 110 Fed. Rep. 160; *U. S. v. Gardner*, (C. C. A.) 133 Fed. Rep. 285; *Johnson v. Long Island R. Co.*, 162 N. Y. 462; *Shongo v. Miller*, 45 N. Y. App. Div. 339, *affirmed* 169 N. Y. 586; *State v. Columbia George*, 39 Oregon 127; *Coey v. Low*, 36 Wash. 10.

The Treaty of 1783 Between England and the United States transferred the title to all lands described therein subject to the Indian right of occupancy. *Choctaw, etc., Nations v. U. S.*, 34 Ct. Cl. 17.

Evidence of Mere Desultory or Constructive Pos-

session is insufficient to establish an Indian title by aboriginal occupancy. *Choctaw, etc., Nations v. U. S.*, 34 Ct. Cl. 17.

2. United States May Dispose of Fee of Indian Lands. — *U. S. v. Kopp*, 110 Fed. Rep. 160. See also *U. S. v. Choctaw Nation*, 179 U. S. 494.

**231.** 7. *Jones v. Meehan*, 175 U. S. 1; *Lone Wolf v. Hitchcock*, 187 U. S. 553.

3. Title to Lands Granted to Certain Tribes in Fee Simple. — *Tuttle v. Moore*, 3 Indian Ter. 712; *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941.

*Cherokee Nation*. — See *Stephens v. Cherokee Nation*, 174 U. S. 445; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Sanders v. Thornton*, (C. C. A.) 97 Fed. Rep. 863.

**232.** 5. Individual Allotments under Treaties. — *U. S. v. Choctaw Nation*, 179 U. S. 494; *Lone Wolf v. Hitchcock*, 187 U. S. 553; *Bird v. Winyer*, 24 Wash. 269.

**233.** 1. Dawes Bill of 1887. — *State v. Columbia George*, 39 Oregon 127.

2. Indians May Take up Homesteads. — *U. S. v. Saunders*, 96 Fed. Rep. 268; *Frazee v. Spokane County*, 29 Wash. 278.

5. Conveyance of Land by Indian Tribe Void Unless Made by Treaty or Convention. — *Jones v. Meehan*, 175 U. S. 1; *Shongo v. Miller*, 45 N. Y. App. Div. 339, *affirmed* 169 N. Y. 586. See also *Reservation State Bank v. Holst*, 17 S. Dak. 240.

**234.** 2. Conveyances of Allotted Lands in Contravention of Restraints on Alienation Void. — *U. S. v. Zane*, (Indian Ter. 1902) 69 S. W. Rep. 842.

4. Approval of Conveyance After Execution Relates Back to Time of Execution. — *Lykins v. McGrath*, 184 U. S. 169.

**235.** 1. *State v. Columbia George*, 39 Oregon 127.

**236.** 1. Descent of Lands Cast According to Laws of Tribe. — *Jones v. Meehan*, 175 U. S. 1; *Nivens v. Nivens*, (Indian Ter. 1903) 76 S. W. Rep. 114.

In Indian Territory the statute of Arkansas as to descent applies where an Indian dies intestate. *Y-Ta-Tah-Wah v. Rebock*, 105 Fed. Rep. 257.

- 236.** *d. TAXATION.*—See notes 3, 4.  
**IX. OFFICERS OF INDIAN AFFAIRS.**—See note 7.  
**237.** See notes 1, 3.  
*Agents.*—See note 9.  
**X. INDIAN DEPREDACTIONS.**—See note 11.  
**238.** *Indians Must Be in Amity with United States.*—See note 1.  
*Claimant Must Be Citizen of United States.*—See note 2.

- 239.** *INDIGENT.*—See note 4.  
**240.** *INDIGNITY.*—See note 1.  
*INDIRECT.*—See note 2.  
*INDISPENSABLE PARTIES.*—See note 4.  
*INDIVIDUAL.*—See note 6.  
**241.** *INDUBITABLE.*—See note 3.  
**242.** *INEVITABLE ACCIDENT OR CASUALTY.*—See note 7.

**236. 2. Lands Held by Indians in Fee Simple Descend According to State Laws.**—*Finley v. Abner*, (C. C. A.) 129 Fed. Rep. 734; *U. S. v. Zane*, (Indian Ter. 1902) 69 S. W. Rep. 842; *Porter v. Parker*, (Neb. 1903) 94 N. W. Rep. 123; *McCauley v. Tyndall*, (Neb. 1903) 94 N. W. Rep. 813; *Jameson v. Pierce*, 78 N. Y. App. Div. 9; *McBean v. McBean*, 37 Oregon 195; *Kalyton v. Kalyton*, 45 Oregon 127.

**3. Indian Lands in General Not Subject to Taxation by State.**—*U. S. v. Rickert*, 188 U. S. 432; *Page v. Pierce County*, 25 Wash. 6.

**4. Territory v. Delinquent Tax List**, (N. Mex. 1904) 76 Pac. Rep. 307.

**7. Officers over Indian Affairs.**—*Buster v. Wright*, (Indian Ter. 1902) 69 S. W. Rep. 882; *Kalyton v. Kalyton*, 45 Oregon 116.

**237. 1. Gallegos v. U. S.**, 39 Ct. Cl. 86.

**3. Smith v. U. S.**, 37 Ct. Cl. 119.

**9. U. S. v. Miller**, 105 Fed. Rep. 944; *Zevely v. Weimer*, (Indian Ter. 1904) 82 S. W. Rep. 941.

**Not Authorized to Sue for Benefit of Indians.**—*In re Celestine*, 114 Fed. Rep. 551.

**Not Authorized to Pass on Validity of Lease of Indian's Land.**—*Quigley v. Stephens*, 3 Indian Ter. 265.

**11. Claims for Indian Depredations.**—*Price v. U. S.*, 174 U. S. 373; *Davidson v. U. S.*, 34 Ct. Cl. 169; *Stevens v. U. S.*, 34 Ct. Cl. 244; *Jackson v. U. S.*, 34 Ct. Cl. 441; *Luke v. U. S.*, 35 Ct. Cl. 15; *Thomison v. U. S.*, 35 Ct. Cl. 395; *Merchant v. U. S.*, 35 Ct. Cl. 403; *Jones v. U. S.*, 35 Ct. Cl. 36; *Vallejos v. U. S.*, 35 Ct. Cl. 489; *Ashbaugh v. U. S.*, 35 Ct. Cl. 554; *Allred v. U. S.*, 36 Ct. Cl. 280; *Jaramillo v. U. S.*, 37 Ct. Cl. 208; *Lowe v. U. S.*, 37 Ct. Cl. 413; *De Baca v. U. S.*, 37 Ct. Cl. 483; *Abrew v. U. S.*, 37 Ct. Cl. 510; *Wilson v. U. S.*, 38 Ct. Cl. 6; *Gagnon v. U. S.*, 38 Ct. Cl. 10, *affirmed* 193 U. S. 451; *Pino v. U. S.*, 38 Ct. Cl. 65; *McCoy v. U. S.*, 38 Ct. Cl. 163; *Butler v. U. S.*, 38 Ct. Cl. 167; *Hayt v. U. S.*, 38 Ct. Cl. 455; *Mayer v. U. S.*, 38 Ct. Cl. 553.

**The Term "Depredation" Implies one or more of the elements of force, trespass, violence, a physical taking by force from the actual or constructive possession of the owner or person entitled to possession, or a destruction of something valuable.** *Ayres v. U. S.*, 35 Ct. Cl. 26.

**The Measure of Damages under the statute is the actual value of the property at the time and**

place where the depredation was committed. *McKinzie v. U. S.*, 34 Ct. Cl. 278.

**The Appropriation of Logs floating into a reservation on high water is not within the Indian Depredation Act.** *Ayres v. U. S.*, 35 Ct. Cl. 26.

**238. 1. Indians Must Be in Amity with United States.**—*Montoya v. U. S.*, 180 U. S. 261; *Connors v. U. S.*, 180 U. S. 271; *Jackson v. U. S.*, 34 Ct. Cl. 441; *Thomison v. U. S.*, 35 Ct. Cl. 395; *Merchant v. U. S.*, 35 Ct. Cl. 403; *Vallejos v. U. S.*, 35 Ct. Cl. 489; *Allred v. U. S.*, 36 Ct. Cl. 280; *Lowe v. U. S.*, 37 Ct. Cl. 413; *Abrew v. U. S.*, 37 Ct. Cl. 510; *Pino v. U. S.*, 38 Ct. Cl. 65. See also *Davidson v. U. S.*, 34 Ct. Cl. 169.

**A Tribe Must Be Deemed in Amity during the whole of the day on which a treaty of peace was signed.** *Ashbaugh v. U. S.*, 35 Ct. Cl. 554.

**Evidence of Want of Amity.**—Want of amity may be shown circumstantially. *Luke v. U. S.*, 35 Ct. Cl. 15.

**2. Claimant Must Be Citizen of United States.**—*Jackson v. U. S.*, 34 Ct. Cl. 441; *Hernandez v. U. S.*, 34 Ct. Cl. 455; *Thomison v. U. S.*, 35 Ct. Cl. 395; *Merchant v. U. S.*, 35 Ct. Cl. 403; *De Baca v. U. S.*, 37 Ct. Cl. 483; *Gagnon v. U. S.*, 38 Ct. Cl. 10, *affirmed* 193 U. S. 451; *Mayer v. U. S.*, 38 Ct. Cl. 553. See also *McKinzie v. U. S.*, 34 Ct. Cl. 278.

**239. 4. A Statute.**—*Juneau County v. Wood County*, 109 Wis. 330.

**240. 1. Indignity to the Person.**—*Goodman v. Goodman*, 80 Mo. App. 274.

**2. Indirect Tax.**—*People v. Knight*, 174 N. Y. 475.

**4. Indispensable Parties.**—*Donovan v. Campion*, (C. C. A.) 85 Fed. Rep. 71.

**6. Natural and Artificial Persons.**—*In re United Button Co.*, 132 Fed. Rep. 378; *Primm v. Fort*, 23 Tex. Civ. App. 605.

**241. 3. Indubitable Proof.**—*Jermyn v. McClure*, 195 Pa. St. 245.

**242. 7. Inevitable Accident.**—*Dreyer v. People*, 188 Ill. 40.

**Unavoidable Accident and Inevitable Accident Synonymous.**—See *Dreyer v. People*, 188 Ill. 40.

**Navigation.**—*The Delta*, 125 Fed. Rep. 136, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242; *The Mary S. Blees*, 120 Fed. Rep. 44; *The Rebecca*, (C. C. A.) 122 Fed. Rep. 619; *The Fontana*, (C. C. A.) 119 Fed. Rep. 853; *The Ohio*, (C. C. A.) 91 Fed. Rep. 547.

## INFAMY AND INFAMOUS CRIMES.

**245.** I. DEFINITIONS — An Infamous Crime. — See note 2.

**246.** II. AS DISQUALIFICATION OF WITNESS — 1. What Crimes Are Infamous.

— See notes 2, 4.

**247.** See note 3.

**248.** 2. Infamy Determined by Crime and Not by Punishment. — See note 1.

3. Sentence or Judgment as Prerequisite to Disqualification. — See

note 4.

**249.** 4. Mode of Proof of Conviction. — See note 2.

**250.** Right of Witness to Refuse to Testify as to His Infamy. — See note 1.

6. Removal of Disqualification — a. PARDON — (1) *In General*. —

See note 4.

**252.** 7. Abolition of Common-law Rule by Statute. — See note 7:

**253.** VII. AS AFFECTING CRIMINAL PROCEDURE UNDER FEDERAL CONSTITUTION. — See note 6.

**245.** 2. Other Definitions. — *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47; *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849.

**246.** 2. *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47.

4. Commission of Felony as Disqualification of Witness. — *O'Connell v. Dow*, 182 Mass. 541; *Gulf, etc., R. Co. v. Johnson*,\* (Tex. Civ. App. 1905) 86 S. W. Rep. 34.

*Petit Larceny*. — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849; *Flournoy v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 902.

**False Returns to Tax Assessors.** — A conviction for making false returns to a tax assessor will not under the *Illinois* statute work infamy. *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134.

**247.** 3. *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246, 247.

**248.** 1. Infamy Determined by Crime and Not by Punishment. — *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47. See also *State v. Clark*, 60 Kan. 450.

4. The Sentence or Judgment as Prerequisite to Disqualification. — *Yates v. State*, 43 Fla. 177; *Gulf, etc., R. Co. v. Johnson*, 98 Tex. 76.

**249.** 2. Conviction and Sentence to Be Proved by Record in General. — *Gulf, etc., R. Co. v. Johnson*, 98 Tex. 76; *State v. Pearson*, 37 Wash. 405.

**250.** 1. Where Credit Only Is Attacked, Witness Compelled to Answer. — *State v. Henson*, 66 N. J. L. 601.

4. Pardon Incorrectly Stating Offense Effective — *Petty v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 917.

But where a witness was convicted in two cases and served sentence, and a pardon was produced restoring his rights in one case only, he is incompetent. *Miller v. State*, 46 Tex. Crim. 59.

**252.** 7. Abolition of Common-law Rule as to Disqualification by Infamy. — *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47; *Dixon v. State*, 116 Ga. 186; *Stone v. State*, 118 Ga. 705, 98 Am. St. Rep. 145; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134; *Martin v. Territory*, 14 Okla. 598; *Williams v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 837; *State v. Pearson*, 37 Wash. 405; *State v. Hatfield*, 48 W. Va. 561.

**In Kentucky.** — *Illinois Cent. R. Co. v. McMantus*, (Ky. 1904) 82 S. W. Rep. 399.

**Whether Other than Infamous Crimes Affect Credibility.** — See *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134.

**Under the Massachusetts Statutes** the common law governs the competency of a witness to subscribe a will, as attesting witness, and the statutes govern the competency of a witness generally. *O'Connell v. Dow*, 182 Mass. 541.

**253.** 6. Meaning of Infamous Crimes under Federal Constitution. — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849; *State v. Clark*, 60 Kan. 450.

**Larceny.** — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849.

# INFANTS.

By O. D. ESTEE.

**262. II. COMMENCEMENT AND DURATION OF INFANCY—2. When Majority Attained—***a. IN GENERAL—Statutory Changes.*—See notes 4, 5.

**3. Legislative Relief from Disabilities of Nonage.**—See note 10.

**265. IV. CAPACITY TO DISPOSE OF PROPERTY BY WILL—1. At Common Law—Personal Property.**—See note 4.

**2. Under Statutes—Real Property.**—See note 11.

**266. V. CAPACITY TO HOLD OFFICE—1. In General—Offices Purely Ministerial.**—See note 6.

**267. VI. CAPACITY TO TESTIFY AS WITNESSES—2. Examination as to Infant's Competency.**—See note 9.

**268. 3. Tests of Competency—Intelligence the Proper Test.**—See note 7.

**269.** See notes 1, 3.

**Necessity for Sense of Moral Responsibility.**—See notes 4, 5.

**270.** See note 1.

**Allowance Made for Nervous Agitation.**—See note 3.

**4. Instructing Witness as to Nature of Oath.**—See note 4.

**5. Competency a Matter for Discretion of Court.**—See note 6.

**262. 4. Where Females of Age at Eighteen.**—*Sayles v. Christie*, 187 Ill. 420.

**5. Where Married Infants Considered of Age.**—See *Grayson v. Lofland*, 21 Tex. Civ. App. 503.

**10. Removal of Disabilities Allowed by Statute.**—*Wilkinson v. Buster*, 124 Ala. 574; *Boykin v. Collins*, 140 Ala. 407; *Young v. Hiner*, 72 Ark. 299.

**The North Dakota Statute.**—Rev. Codes N. Dak. (1899), § 2703, permits an infant over eighteen years of age to contract in the same way as an adult, except that he can disaffirm his contracts within one year after becoming of age, upon restoring the consideration received or its equivalent. *Luce v. Jestrab*, 12 N. Dak. 548.

**265. 4. Capacity to Bequeath Personality at Common Law.**—*Major v. Hunt*, 64 S. Car. 97, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

**11. United States.**—*Major v. Hunt*, 64 S. Car. 97.

**266. 6. Appraiser.**—In *Kentucky* an infant can act as an appraiser of land which is to be sold on execution. *White v. Laurel Land Co.*, (Ky. 1904) 82 S. W. Rep. 571.

**267. 9. Court Must Examine Infant as to Competency.**—*State v. King*, 117 Iowa 484, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267; *Scroggins v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 232.

**268. 7. Intelligence, Not Age, the Proper Test—Alabama.**—*Eatman v. State*, 139 Ala. 67.

*California.*—*People v. Swist*, 136 Cal. 520.

*Illinois.*—*Shannon v. Swanson*, 208 Ill. 52, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268; *Sokol v. People*, 212 Ill. 238; *Featherstone v. People*, 194 Ill. 325.

*Iowa.*—*State v. King*, 117 Iowa 484.

*Texas.*—*Reyna v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 25; *Click v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1104; *Sancedo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 142.

*Utah.*—*State v. Blythe*, 20 Utah 378.

**269. 1. Where Infant Not Punishable for Perjury.**—*Com. v. Ramage*, 177 Mass. 349.

**8. Infants Incompetent from Lack of Intelligence.**—*North Texas Constr. Co. v. Bostick*, 98 Tex. 239.

**4. Ignorance of Nature of Oath.**—*Miller v. State*, 109 Ga. 512; *Croomes v. State*, 40 Tex. Crim. 672.

**5. Must Have Sense of Moral Responsibility.**—*White v. State*, 136 Ala. 58.

**Time of Comprehension of Oath.**—The *Indiana* statute making the testimony of children under ten years of age incompetent unless they understand the nature of an oath refers to the time when a person is offered as a witness, and not to the time of the transaction. *Foster v. Honan*, 22 Ind. App. 252.

**270. 1. Infants Competent Though Ignorant of God and the Bible.**—See *State v. King*, 117 Iowa 484.

**3. Allowance for Nervous Agitation of Witness.**—*Reyna v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 25.

**4. Witness May Be Instructed as to Nature of Oath.**—*State v. Todd*, 110 Iowa 631.

**6. Question for Discretion of Trial Judge.**—*People v. Swist*, 136 Cal. 520; *Shannon v. Swanson*, 208 Ill. 52, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270; *Com. v. Ramage*, 177 Mass. 349; *State v. Cracker*, 65 N. J. L. 410; *Burke v. Ellis*, 105 Tenn. 702; *Click v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1104; *State v. Blythe*, 20 Utah 378; *State v. Bailey*, 31 Wash. 80, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270.

**271.** See notes 1, 3.

6. Credibility a Question for Jury. — See note 4.

**275.** VII. LIABILITY UPON CONTRACTS — 3. Contracts Which Are Binding — c. CONTRACTS FOR NECESSARIES — (1) *Implied Contracts*. — See notes 8, 9.

**276.** (2) *Express Contracts* — Doctrine Permitting Action. — See note 7.

(3) *What Are Necessaries* — (b) General Considerations — aa. MUST SUPPLY PERSONAL WANTS — (aa) *In General*. — See note 10.

**277.** (bb) *Things for Infant's Estate* — Services of Attorney. — See note 5.

**278.** (dd) *Necessaries for Family*. — See note 1.

(c) Particular Considerations — aa. IN GENERAL — Things Supplying Physical and Intellectual Needs. — See notes 7, 9.

**279.** Maintenance of Personal Liberty and Legal Rights. — See note 4.

bb. SUITABILITY FOR INFANT'S CONDITION. — See note 6.

Illustrations. — See note 8.

**280.** cc. INFANT'S NEED OF IT — (aa) *Over-supply of Infant's Needs*. — See note 2.

**281.** (5) *Liability for Money Borrowed to Purchase Necessaries* — At Law. — See note 7.

**282.** 4. Contracts Which Are Voidable — a. IN GENERAL. — See notes 3, 4, 5.

b. ILLUSTRATIONS — (1) *Conveyances of Property* — (a) Sales of Real and Personal Property. — See note 7.

**283.** (b) Mortgages. — See note 2.

**285.** (3) *Contracts of Suretyship*. — See note 8.

**271.** 1. Ruling Not Disturbed Except for Manifest Abuse. — *People v. Swist*, 136 Cal. 520; *Shannon v. Swanson*, 208 Ill. 52, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271; *Com. v. Ramage*, 177 Mass. 349; *State v. Cracker*, 65 N. J. L. 410; *Click v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1104; *State v. Blythe*, 20 Utah 378; *State v. Bailey*, 31 Wash. 89, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270 [271].

3. Reversal for Abuse of Discretion. — *White v. State*, 136 Ala. 58; *North Texas Constr. Co. v. Bostick*, 98 Tex. 239, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 109.

4. Credibility a Question for Jury. — *Featherstone v. People*, 194 Ill. 325; *Sokol v. People*, 212 Ill. 238.

**275.** 8. Contract for Necessaries — Implied Contract. — *Shroyer v. Pittenger*, 31 Ind. App. 158; *Peck v. Cain*, 27 Tex. Civ. App. 38; *Jones v. Valentines' Telegraphy School*, 122 Wis. 318.

9. Reason of Rule. — *Goodman v. Alexander*, 165 N. Y. 289, per Vann, L., dissenting, citing 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 275.

**276.** 7. When Bound by Express Promise. — *Peck v. Cain*, 27 Tex. Civ. App. 38.

10. *Gray v. Sands*, 66 N. Y. App. Div. 572.

**277.** 5. An Agreement that Costs, as Between Solicitor and Client, Be Paid Out of the Estate, regardless of which party wins, is unenforceable, not being for the benefit of the infant making such agreement. *Prince v. Haworth*, 20 Times L. Rep. 313.

**278.** 1. Necessaries for Family. — *Peck v. Cain*, 27 Tex. Civ. App. 38.

7. Board for Infant. — *Cory v. Cook*, 24 R. I. 421, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.

9. A Common-school Education. — See *Cory v. Cook*, 24 R. I. 421, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.

**279.** 4. Bringing Action for Personal Injury.

— *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. Rep. 721.

6. Suitability for Infant's Condition. — *Cory v. Cook*, 24 R. I. 421, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 279.

8. What Are and What Are Not Necessaries — Bicycle. — *Clyde Cycle Co. v. Hargreaves*, 78 L. T. N. S. 296.

**280.** 2. *Brent v. Williams*, 79 Miss. 355.

**281.** 7. Liability for Money Borrowed to Purchase Necessaries — At Law. — See *Nottingham Permanent Ben. Bldg. Soc. v. Thurstan*, (1903) A. C. 6, 72 L. J. Ch. 134, 87 L. T. N. S. 529, 51 W. R. 273, 67 J. P. 129.

**282.** 3. Right to Disaffirm — Emancipated Infant. — In Georgia, if a parent permits an infant to engage in business, the infant is bound by all contracts entered into by him in the line of his business. *Jimmerson v. Lawrence*, 112 Ga. 340. See also *Ullmer v. Fitzgerald*, 106 Ga. 815.

4. Married Infant. — *Peck v. Cain*, 27 Tex. Civ. App. 38.

5. In Iowa. — *Beickler v. Guenther*, 121 Iowa 419.

7. Conveyances of Real Estate. — *Sayles v. Christie*, 187 Ill. 420; *Ingram v. Ison*, (Ky. 1904) 80 S. W. Rep. 787; *Ison v. Cornett*, 116 Ky. 92.

Infant's Voluntary Deed Voidable. — In Kentucky an infant's voluntary deed to his father was held to be voidable only. *Hiles v. Hiles*, (Ky. 1904) 82 S. W. Rep. 580.

**283.** 2. Mortgage of Real Estate. — *Hetterick v. Porter*, 11 Ohio Cir. Dec. 145, 20 Ohio Cir. Ct. 110. See also *Saunders v. Russell*, 9 British Columbia 321.

A Covenant in a Mortgage Deed is void in Ontario where the infant receives no benefit and is induced to enter into such covenant *per incuriam*. *Brown v. Grady*, 31 Ont. 73.

**285.** 8. Contract of Indemnity Voidable Only.

**285.** (4) *Contracts for Service.* — See note 13.

**286.** (5) *Awards and Compromises* — (b) *Compromise of Causes of Action* — *aa.* CLAIMS DUE INFANTS. — See notes 3, 4.

**287.** *c.* DISAFFIRMANCE AND AVOIDANCE — (1) *Right of Infants to Repudiate Their Contracts* — (2) *General Principles.* — See note 7.

**288.** (c) *Executed Contracts* — *aa.* IN GENERAL. — See note 1.

*bb.* SALES OF REAL AND PERSONAL PROPERTY — (*aa.*) *Recovery of Thing Sold.* —

See note 2.

**289.** (*bb.*) *Mode of Disaffirmance* — *aaa.* IN GENERAL. — See notes 1, 2.

*ccc.* Conveyances After Majority. — See note 5.

**290.** *Second Deed Must Be Inconsistent with First.* — See note 3.

*cc.* PURCHASES OF REAL OR PERSONAL PROPERTY — *Not Liable for Depreciation.* — See note 8.

*ee.* CONTRACTS OF SERVICE — *Recovering Value of Services After Avoidance.* —

See note 12.

**292.** (e) *Effect of Infant's Misrepresentations as to Age* — *aa.* AT LAW. — See note 1. *Statutes.* — See note 3.

*bb.* IN EQUITY. — See note 4.

**293.** (f) *Avoidance of Whole Transaction Necessary.* — See note 2. *Conveyance and Purchase-money Mortgage.* — See note 3.

— In *Beam v. Beatty*, 3 Ont. L. Rep. 345, it was held that an infant's contract to indemnify a third party against loss in purchasing certain stock from him was voidable only.

**285.** 13. *Infants' Contract for Service Voidable.* — *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490.

**286.** 3. *Compromise of Right of Action for Tort.* — *Lansing v. Michigan Cent. R. Co.*, 126 Mich. 663.

4. *Infant Cannot Submit Cause of Action to Arbitration.* — *Millsaps v. Estes*, 134 N. Car. 486.

**287.** 7. *Ison v. Cornett*, 116 Ky. 92, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 287 and approving the whole text paragraph.

**288.** 1. *Distinction Between Executed and Executory Contracts.* — An executed contract is binding on an infant until it is disaffirmed, but an executory contract is without binding force until it is confirmed by him, and consequently the defense of infancy may at all times be interposed to an executory contract without showing that the contract has been disaffirmed. *Nichols, etc., Co. v. Snyder*, 78 Minn. 502.

2. *Repudiation of Sale of Property.* — *Wilson v. Wilson*, (Ky. 1899) 50 S. W. Rep. 260; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464.

**289.** 1. *Mode of Disaffirmance.* — *Shroyer v. Pittenger*, 31 Ind. App. 158.

2. *Wise v. Loeb*, 15 Pa. Super. Ct. 601.

5. *Conveyance After Majority.* — *Shroyer v. Pittenger*, 31 Ind. App. 158; *Ison v. Cornett*, 116 Ky. 92, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289; *Shreeves v. Caldwell*, 135 Mich. 323, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289.

A Mortgage may be avoided by conveying the property to a party who is acquainted with all the facts and who pays full value for the property free from the mortgage. *Hetterick v. Porter*, 11 Ohio Cir. Dec. 145, 20 Ohio Cir. Ct. 110.

Title Bond. — In *Combs v. Hall*, (Ky. 1901) 60 S. W. Rep. 647, an infant who had given a title bond to certain land, sold the land to an-

other party after becoming of age. It was held that this amounted to a repudiation of the title bond.

**290.** 3. *Second Deed Must Be Inconsistent with First.* — *Shreeves v. Caldwell*, 135 Mich. 323, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 290.

8. *Infant Not Liable for Depreciation.* — *Compare Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703.

12. *Right to Recover for Value of Services.* — *Skinner v. Young*, 106 Mo. App. 615; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490.

**292.** 1. *Effect of Infant's Misrepresentations Estopped.* — *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464. But see *Damron v. Cum.*, 110 Ky. 268, 96 Am. St. Rep. 453.

3. *Statutes — Iowa and Kansas.* — *Beickler v. Guenther*, 121 Iowa 419.

4. *Fraudulent Misrepresentations as to Age — In Equity.* — An infant who made a deed representing himself as of full age cannot invoke the aid of equity to set it aside, especially where he appeared to be of full age at the time of making the deed. *Ingram v. Ison*, (Ky. 1904) 80 S. W. Rep. 787.

Mortgage Induced by False Representation as to Age. — Equity will not set aside a mortgage at the suit of an infant where the infant secured it by falsely representing that he was of age and where he does not offer to return the consideration that he received. *Ostrander v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426.

**293.** 2. *Avoidance of Whole Transaction Necessary.* — *Nottingham Permanent Ben. Bldg. Soc. v. Thurstan*, [1903] App. Cas. 6, affirming (1902) 1 Ch. 1, which modified [1901] 1 Ch. 88; *Drude v. Curtis*, 183 Mass. 317. And to the same effect as *MacGreal v. Taylor*, 167 U. S. 688, stated in the original note, see *U. S. Investment Corp. v. Ulrickson*, 84 Minn. 14, 87 Am. St. Rep. 326.

3. *Deed and Purchase-money Mortgage.* — *Ready v. Pinkham*, 181 Mass. 351.



**293.** (g) Restoration of the Consideration — *aa.* AT COMMON LAW — (*aa*) Statement of the Rule. — See note 5.

(*bb*) When the Consideration Has Passed Out of the Infant's Hands. — See note 8.

**294.** (*cc*) When the Infant Never Received the Consideration. — See note 2.

(*dd*) When the Infant Has All or Any Part of the Consideration. — See note 5. Contracts of Purchase. — See notes 6, 8.

**295.** Infant Not Liable for Depreciation in Property. — See note 2.

Contracts of Sale. — See note 4.

**296.** (*ee*) When the Nature of the Consideration Prevents Its Restoration — Payments for Rent. — See note 2.

*bb.* UNDER STATUTES. — See notes 3, 4.

(2) Who May Avail Himself of the Right — (a) Plea of Infancy a Personal Privilege. — See note 6.

**297.** (b) Heirs and Personal Representatives. — See note 4.

**298.** (3) When the Right May or Must Be Exercised — (a) Right to Avoid During Infancy — A Conveyance of Real Property. — See note 5.

Executory Contracts and Contracts Respecting Personalty. — See note 8.

**299.** (b) How Soon After Majority — *aa.* TIME LIMITED BY STATUTE OF LIMITATIONS. — See note 2.

When the Disabilities of Infancy and Coverture Concur. — See note 3.

**293.** 5. Restoration of Consideration. — Shipley v. Smith, 162 Ind. 526; Ison v. Cornett, 116 Ky. 92, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; Napier v. Chappell, (Ky. 1901) 62 S. W. Rep. 21; Simpson v. Prudential Ins. Co., 184 Mass. 348, 100 Am. St. Rep. 560.

8. When Consideration Has Passed Out of Infant's Hands. — Ison v. Cornett, 116 Ky. 92, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293; Drude v. Curtis, 183 Mass. 317; Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464; Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490; Bullock v. Sprowls, 93 Tex. 188, 77 Am. St. Rep. 849.

In Minnesota, where an infant has parted with the consideration, he may disaffirm the contract and recover what he parted with without returning the consideration therefor, unless the opposing party show the contract to have been reasonable, fair, and provident. Braucht v. Graves-May Co., 92 Minn. 116.

**294.** 2. Consideration Never Received. — Shroyer v. Pittenger, 31 Ind. App. 158.

5. When the Infant Retains the Consideration. — Sanger v. Hibbard, 2 Indian Ter. 547; Beickler v. Guenther, 121 Iowa 419; Braucht v. Graves-May Co., 92 Minn. 116; Ridgeway v. Herbert, 150 Mo. 606, 93 Am. St. Rep. 464; Zuck v. Turner Harness, etc., Co., 106 Mo. App. 566; Pierce v. Lee, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 870.

6. Restoration of Consideration upon Disaffirmance of Executory Contract. — Ison v. Cornett, 116 Ky. 92, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 293 [294]; Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490.

8. Revesting of Title in Vendor. — Sanger v. Hibbard, (C. C. A.) 104 Fed. Rep. 455.

**295.** 2. Infant Not Liable for Use of Property. — Gillis v. Goodwin, 180 Mass. 140.

4. Restoration as a Condition Precedent. — Jones v. Valentines' Telegraphy School, 122 Wis. 318, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295.

**296.** 2. Excess over Rental Value. — On disaffirming a lease, an infant may recover any

money that he has paid on the lease in excess of the rental value of the leased premises while he occupied them. Peck v. Cain, 27 Tex. Civ. App. 38.

3. California Statute. — Whyte v. Rcsencrantz, 123 Cal. 634, 69 Am. St. Rep. 90.

4. Indiana Statute. — Blair v. Whittaker, 31 Ind. App. 664.

6. Adult Bound by Contract with Infant. — Lansing v. Michigan Cent. R. Co., 126 Mich. 663; Phippen v. Mutual Ben. L. Ins. Co., 130 N. Car. 23; Union Cent. L. Ins. Co. v. Hilliard, 63 Ohio St. 478, 81 Am. St. Rep. 644; O'Rourke v. John Hancock Mut. L. Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643; Peck v. Cain, 27 Tex. Civ. App. 38.

**297.** 4. Heirs and Privies in Blood. — Sayles v. Christie, 187 Ill. 420.

Beneficiaries under Life-insurance Policy. — The plea of infancy may be set up by the beneficiary in a policy of life insurance on the life of an infant to defeat the defense of false warranties in the application set up by the insurance company. O'Rourke v. John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. Rep. 834, 91 Am. St. Rep. 643.

**298.** 5. Conveyance of Land by Infant Not Voidable During Infancy. — Shroyer v. Pittenger, 31 Ind. App. 158; Shreeves v. Caldwell, 135 Mich. 323.

8. Executory Contracts and Contracts Respecting Personal Property Voidable During Infancy. — Shipley v. Smith, 162 Ind. 526; Phippen v. Mutual Ben. L. Ins. Co., 130 N. Car. 23.

A Compromise Settlement of a Claim for Personal Injuries cannot be avoided during infancy. Lansing v. Michigan Cent. R. Co., 126 Mich. 663.

**299.** 2. Time After Majority Limited by Statute of Limitations. — Shipp v. McKee, 80 Miss. 741.

In Illinois an infant must disaffirm his conveyance of real estate within three years after reaching majority or it will be upheld. Sayles v. Christie, 187 Ill. 420.

3. Infancy and Coverture. — Linville v. Greer,

**299.** *bb.* DISAFFIRMANCE WITHIN REASONABLE TIME. — See note 6.

**301.** *d.* RATIFICATION AND CONFIRMATION — (i) *In General* — The Effect of the Ratification. — See note 1.

(3) *When Ratification May Be Made.* — See note 6.

**302.** (4) *Mode of Ratification* — (a) *Executory Contracts* — *aa.* EXPRESS RATIFICATION — (cc) *Necessity of Writing.* — See note 4.

(dd) *Ratification Must Be Voluntary.* — See note 5.

(ee) *Knowledge of Nonliability.* — See note 6.

**303.** (ff) *To Whom Made.* — See note 4.

**304.** *bb.* IMPLIED RATIFICATION — (aa) *Retention or Disposition of Consideration* — *Retention of Goods Purchased.* — See note 3.

*Sale of Property Purchased.* — See note 5.

(bb) *Part Payment of Debt.* — See note 6.

**305.** (b) *Executed Contracts* — *bb.* IMPLIED RATIFICATION — (aa) *In General.* — See note 8.

**307.** VIII. LIABILITY FOR TORTS — 1. *Pure Torts* — *a.* IN GENERAL. — See note 4.

**308.** *c.* LIABILITY FOR ACTS OF AGENT — *Authority to Commit Act Must Be Express.* — See note 5.

2. *Torts Connected with or Growing Out of Contracts* — *a.* IN GENERAL — *When Infant Is Not Liable.* — See note 8.

*Form of Action Not Material.* — See note 9.

**309.** *When Infant Is Liable.* — See note 2.

165 Mo. 380, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 299.

**299.** 6. *Disaffirmance Within Reasonable Time.* — *Beickler v. Guenther*, 121 Iowa 419; *McCullough v. Finley*, 69 Kan. 705; *Wise v. Loeb*, 15 Pa. Super. Ct. 601.

In *Weeks v. Wilkins*, 134 N. Car. 516, the court fixed three years as a reasonable time for an infant to disaffirm his deed after reaching majority.

**Kentucky Decisions — Conveyances by and to Infants.** — In *Locknane v. Hoskins*, (Ky. 1902) 69 S. W. Rep. 719, acquiescence with knowledge for three or four years after majority in a conveyance of property to the defendant during infancy was held to amount to an acceptance so as to validate attachments levied on the property for the defendant's debts. But in *Combs v. Noble*, (Ky. 1900) 58 S. W. Rep. 707, an action by a vendor to set aside a deed to land made by him during infancy was held to be barred in ten years after attaining majority, the statute of limitations being applied.

**Disability to Ratify.** — The rule requiring election within a reasonable time after majority has been held not to apply to a case where an infant girl becomes a resident of a foreign country by the laws of which she is incapable of making a valid ratification of the contract after becoming of age. *Viditz v. O'Hagan*, (1900) 2 Ch. 87, 69 L. J. Ch. 507.

**301.** 1. *Luce v. Jestrab*, 12 N. Dak. 548.

**6. No Ratification Binding During Infancy.** *Sanger v. Hibbard*, (C. C. A.) 104 Fed. Rep. 455.

**302.** 4. *Koerner v. Wilkinson*, 96 Mo. App. 510.

5. *Voluntary.* — *Ison v. Cornett*, 116 Ky. 92.

6. *Knowledge of Nonliability Necessary.* — *Sayles v. Christie*, 187 Ill. 420.

**303.** 4. *Promise to Party.* — *Sayles v. Christie*, 187 Ill. 420.

**304.** 3. *Retention of Goods Purchased.* — In *Missouri* the mere retention of goods purchased by an infant after he becomes of age does not constitute ratification; but if he refuses to deliver them to the owner upon request, he thereby ratifies the contract. *Koerner v. Wilkinson*, 96 Mo. App. 510.

5. *Koerner v. Wilkinson*, 96 Mo. App. 510.

6. *Part Payment of Debt.* — Rev. Stat. Mo. (1899), § 3423, provides that part payment after majority on a contract made during infancy amounts to a ratification of that contract. But the payment must be voluntary and made upon a debt which the party recognizes to be binding upon him. *Snyder v. Gericke*, 101 Mo. App. 647; *Koerner v. Wilkinson*, 96 Mo. App. 510.

**305.** 8. *Renting Land from Vendee.* — Where an infant conveys land and after becoming of age rents the same land from the vendee, he thereby ratifies the conveyance. *Ingram v. Ison*, (Ky. 1904) 80 S. W. Rep. 787.

**307.** 4. *Liability for Torts — In General.* — *Watson v. Wrightsman*, 26 Ind. App. 437, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 307; *Slayton v. Barry*, 175 Mass. 513; *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744.

**308.** 5. *Not Responsible for Acts Committed by Implied Authority.* — *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

8. *Torts Connected with or Growing Out of Contracts.* — *Caswell v. Parker*, 96 Me. 39; *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309 [308].

9. *Caswell v. Parker*, 96 Me. 39, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

**309.** 2. *Tort Subsequent to and Independent of Contract.* — *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309.

**310.** *b.* CONVERSION OF THINGS BAILED — *Hiring of Horses.* — See notes 1, 2, 3, 4.

**311.** *c.* FRAUD IN MAKING CONTRACTS — (2) *Fraud in Purchase of Property* — (b) *False Representations as to Age.* — See note 1.

**312.** IX. CRIMINAL RESPONSIBILITY AND PUNISHMENT OF INFANTS — 1. *Criminal Responsibility* — *a.* MENTAL CAPACITY — (2) *Age at Which Criminal Responsibility Begins.* — See notes 2, 5.

After a Child Has Reached the Age of Criminal Accountability. — See note 7.

**314.** (3) *Burden of Proof as to Capacity* — When upon Prosecution. — See notes 1, 2.

**315.** (5) *Evidence* — Circumstantial Evidence. — See note 4.

**317.** X. STATUTES FOR THE PROTECTION OF INFANTS — 4. *Admitting to Places of Amusement.* — See note 2.

INFERENCE. — See note 9.

**318.** INFERIOR COURTS. — See note 1.

**321.** INFORMALITY. — See note 4.

**310.** 1. *Immoderate or Unskilful Use of Horse.* — *Young v. Muhling*, 48 N. Y. App. Div. 617; *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309 [310].

2. *Young v. Muhling*, 48 N. Y. App. Div. 617; *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309 [310].

3. *Use of Horse for Different Purpose.* — *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309 [310].

4. *Lowery v. Cate*, 108 Tenn. 54, 91 Am. St. Rep. 744, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309 [310].

**311.** 1. *False Representations as to Age* — *Infant Not Liable.* — *Slayton v. Barry*, 175 Mass. 513.

*False Representations as to Compliance with Statute Removing Inability to Contract* — *Infant Not Liable.* — *Wilkinson v. Buster*, 124 Ala. 574.

**312.** 2. *At Common Law* — *Criminal Accountability Begins at Seven.* — *State v. Hicks*, 125 N. Car. 636; *State v. Davis*, 104 Tenn. 501.

5. *Arkansas.* — *Harrison v. State*, 72 Ark. 117.

7. *Infants Convicted of Murder.* — In *State v. Hicks*, 125 N. Car. 636, a girl under fourteen

years of age was convicted of murder in the second degree for burning a baby to death.

*Arson.* — In *State v. Jackson*, 3 Penn. (Del.) 15, an infant under fourteen years of age was convicted of arson for having set fire to a barn.

**314.** 1. *When Burden of Proof of Capacity Is Upon Prosecution.* — *Harrison v. State*, 72 Ark. 117; *State v. George*, 4 Penn. (Del.) 57; *State v. Hicks*, 125 N. Car. 636; *State v. Davis*, 104 Tenn. 501.

2. *Statutes.* — *People v. Squazza*, (Ct. Gen. Sess.) 40 Misc. (N. Y.) 71.

**315.** 4. *State v. George*, 4 Penn. (Del.) 57; *State v. Jackson*, 3 Penn. (Del.) 15.

**317.** 2. *Permitting Infants to Play at Pool or Billiards.* — In *Iowa* the statute prohibits the presence of infants in billiard rooms, beer saloons, or tenpin alleys. *State v. Johnson*, 108 Iowa 245.

9. *Whitehouse v. Bolster*, 95 Me. 458; *Cogdell v. Wilmington, etc., R. Co.*, 132 N. Car. 852.

*Distinguished from Presumed Fact.* — *Matter of Hopkins*, (Surrogate Ct.) 35 Misc. (N. Y.) 702.

**318.** 1. *Examples.* — *Wolf v. Hope*, 210 Ill. 50. *Inferior Tribunal.* — *Kirkwood v. Washington County*, 32 Oregon 568.

**321.** 4. *Judicial Sales.* — *Thibodeaux v. Thibodeaux*, 112 La. 906.

## INFORMERS.

- 323.** **II. RIGHT TO COMPENSATION** — 1. In General. — See note 2.  
 2. Out of What Fines or Forfeitures Informer's Share Allowed. — See note 4.  
**324.** 3. Constitutionality of Statutory Provision for Informers. — See note 11.  
**327.** **VI. ENFORCEMENT OF INFORMER'S RIGHTS.** — See note 9.  
**328.** See note 1.

**INHABIT — INHABITANT.** — See note 5.

**335. INHERIT — INHERITOR.** — See note 2.

**336. INHERITANCE.** — See notes 1, 2.

**323. 2. Right of Informer to Compensation in General.** — *Com. v. Houseman*, 11 Pa. Dist. 485, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 323.

Violations of Law Affecting Post-office Department — Rev. Stat. U. S., § 4059, Applies to Civil Cases Only. — *Leathers v. U. S.*, 127 Fed. Rep. 776, *affirmed* (C. C. A.) 133 Fed. Rep. 1021.

4. Information as to Fraud upon Customs Revenue. — *U. S. v. Queen*, 105 Fed. Rep. 269.

**324. 11. Constitutionality of Statutory Provision for Informers.** — *Meul v. People*, 198 Ill. 258; *Ex p. McMahon*, 26 Nev. 243; *Com. v. Houseman*, 11 Pa. Dist. 485.

**327. 9. No Right of Action on Part of Informer at Common Law.** — *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 845.

**328. 1. Statutory Right of Action in Informer.** — See *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 845.

5. Construed with Reference to Context and Subject matter. — *Wilson v. Lawrence*, 70 Ark. 545.

Temporary Residence. — *Wilson v. Lawrence*,

70 Ark. 545; *Givanovich's Succession*, 50 La. Ann. 625; *Matter of Colebrook*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 139.

**Inhabitant and Domicil.** — *Wallace v. Wallace*, 62 N. J. Eq. 509; *Matter of Bolte*, 97 N. Y. App. Div. 570.

**Inhabitant and Resident.** — *Wardner v. Pelkes*, 8 Idaho 333.

**Synonymous Terms.** — *Helle v. Deerfield Tp.*, 96 Ill. App. 643; *Ewing v. Mallison*, 65 Kan. 484. Compare *McFarlane v. Cornelius*, 43 Oregon 513.

**Inhabitant and Citizen.** — *Allen B. Wrisley Co. v. George E. Rouse Soap Co.*, (C. C. A.) 90 Fed. Rep. 5; *Dorsey v. Brigham*, 177 Ill. 250.

**Corporations.** — *Weller v. Pennsylvania R. Co.*, 113 Fed. Rep. 502.

**Infant.** — *Brown v. Rushing*, 70 Ark. 111.

**335. 2. Inherit.** — *Dohn v. Dohn*, 110 Ky. 884; *Donald v. Forger*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 16.

**336. 1. Glascott v. Bragg**, 111 Wis. 605.

**2. Including Personal Property.** — *Stolenburg v. Diercks*, 117 Iowa 25.

# INJUNCTIONS.

By E. C. ELLSBREE.

**342. I. DEFINITION.** — See note 1.

**II. CLASSES OF INJUNCTIONS** — 1. **Mandatory and Preventive Injunctions.** — See note 2.

**343.** See notes 1, 3.

Whether Granted on Interlocutory Application. — See notes 4, 5, 6.

**344.** See note 1.

**2. Perpetual or Interlocutory Injunctions** — *a.* **PERPETUAL INJUNCTIONS.** — See notes 6, 7, 8, 9.

**345. b. INTERLOCUTORY INJUNCTIONS** — (1) *Nature and Object.* — See notes 3, 4, 5, 6, 7.

**342. 1. Injunction Defined.** — *Wilson v. Boise City*, 7 Idaho 69; *Schubach v. McDonald*, 179 Mo. 163, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 342.

An injunction falls upon persons, not upon property or business. *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252.

**2. Jurisdiction of Equity to Compel Performance of Acts Recognized** — *England.* — *Jackson v. Normanby Brick Co.*, (1899) 1 Ch. 438; *Brocklebank v. Thompson*, (1903) 2 Ch. 344.

*California.* — *Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80.

*Illinois.* — *Hunt v. Sain*, 181 Ill. 372.

*Kentucky.* — Board of Health *v. Ward*, 107 Ky. 477; *Louisville v. Park Com'rs*, 112 Ky. 409; *Bennett v. Richards*, (Ky. 1904) 83 S. W. Rep. 154; *Mason v. Byrley*, (Ky. 1904) 84 S. W. Rep. 767.

*Ohio.* — *Toledo v. Northwestern Ohio Natural Gas Co.*, 8 Ohio Dec. 277, 6 Ohio N. P. 531.

*Pennsylvania.* — *Roberts v. Burke*, 15 Montg. Co. Rep. (Pa.) 109.

*Tennessee.* — *Condon v. Maloney*, 108 Tenn. 82.

*Texas.* — *Franklin Fireproofing Co. v. Dallas*, (Tex. Civ. App. 1902) 68 S. W. Rep. 820.

*Virginia.* — *Southern R. Co. v. Franklin*, etc., R. Co., 96 Va. 693.

Under the Georgia Code the court cannot issue a purely mandatory order, but it can grant an injunction, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may be incidentally required to perform some act. *Goodrich v. Georgia R., etc., Co.*, 115 Ga. 340; *Macon*, etc., R. Co. *v. Graham*, 117 Ga. 555.

**Not Matter of Right.** — *Springfield v. Springfield St. R. Co.*, 182 Mass. 41.

**May Compel Railroad to Give Impartial Service.** — *Louisville*, etc., R. Co. *v. Pittsburg*, etc., Coal Co., 111 Ky. 960.

**To Enforce Rights of Entryman.** — *Black v. Jackson*, 177 U. S. 349; *Harris v. McClung*, 10 Okla. 701.

**343. 1. Mandatory Injunctions Granted Only to Prevent Serious Damage.** — *Tobique Valley R. Co. v. Canadian Pac. R. Co.*, 2 N. Bruns. Eq. Rep. 195; *Lake Erie*, etc., R. Co. *v. Essington*,

27 Ind. App. 291; *Buettgenbach v. Gerbig*, (Neb. 1902) 90 N. W. Rep. 654; *Budd v. Camden Horse R. Co.*, 61 N. J. Eq. 543.

**3. Right to Injunction Not Affected by Completion of Work Before Application.** — *Stevens v. Salomon*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 159.

**4. View that Injunction Will Not Be Granted on Interlocutory Application.** — *Hunt v. Sain*, 181 Ill. 372.

**5. Contrary View.** — *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 570; *Owen v. Partridge*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343. See also *Alcorn v. Alcorn*, 76 Miss. 907.

**6. Issuance on Interlocutory Application.** — *New Iberia Rice Milling Co. v. Romero*, 105 La. 439; *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 570.

**Ordinarily Not Granted Pendente Lite.** — *West Side Electric Co. v. Consolidated Tel., etc., Co.*, 87 N. Y. App. Div. 550.

**344. 1. Preventing Maintenance of Nuisance.** — *New Iberia Rice Milling Co. v. Romero*, 105 La. 439.

**6. Defendant Must Be Before Court.** — *Jeffries-BaSom v. Nation*, 63 Kan. 247.

**7. Burden of Establishing Right to Injunction.** — *Hampson v. Adams*, 6 Ariz. 335.

**8. Temporary Injunction Not Prerequisite.** — *McHugh v. Louisville Bridge Co.*, (Ky. 1901) 65 S. W. Rep. 456.

**9. Merger of Preliminary Injunction.** — *Gage v. Parker*, 178 Ill. 455. Compare *Nicoll v. Weldon*, 130 Cal. 666.

**345. 3. Nature of Remedy** — *United States*. — *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. Rep. 693; *Stevens v. Missouri*, etc., R. Co., (C. C. A.) 106 Fed. Rep. 771; *Denver*, etc., R. Co. *v. U. S.*, (C. C. A.) 124 Fed. Rep. 156; *Harriman v. Northern Securities Co.*, 132 Fed. Rep. 464.

*Georgia.* — *Sims v. Sims*, 110 Ga. 283; *Lane v. Georgia L. & T. Co.*, 112 Ga. 702.

*Idaho.* — *Staples v. Rossi*, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

*Illinois.* — *Leigh v. National Hollow-Brake Beam Co.*, 104 Ill. App. 438,

**345.** (2) *Discretion of Court as to Issuance* — (a) *In General.* — See note 8.

*South Carolina.* — *Darlington Oil Co. v. Pee Dee Oil, etc., Co.*, 62 S. Car. 196.

*Wisconsin.* — *Linden Land Co. v. Milwaukee Electric R., etc., Co.*, 107 Wis. 493; *Consolidated Vinegar Works v. Brew*, 112 Wis. 610.

**Injunction Pending Appeal.** — A court of equity may restrain a change of the subject-matter of litigation pending an appeal. *People's Traction Co. v. Central Pass. R. Co.*, (N. J. Eq. 1904) 58 Atl. Rep. 597.

An independent action for an injunction in aid of a cause already pending is not maintainable where adequate relief may be had by motion in the original cause. *Carson v. Jansen*, 65 Neb. 423.

**The Code of Procedure of Quebec** has abolished the writ of injunction as a principal demand and has made of it a proceeding accessory to an ordinary action just as a writ of *arret-simple*, a writ of revendication, a writ of *saisie-gagerie*, are accessory to the action in which they are taken. Its object and mission are conservatory, as is theirs. It is allowed in order to prevent the destruction of the property or rights which the plaintiff by his action is claiming. *McArthur Bros. Co. v. Coupal*, 16 Quebec Super. Ct. 529.

**345. 4. Decision on Merits Unnecessary** — *United States.* — *Western Union Tel. Co. v. Philadelphia, etc., R. Co.*, 124 Fed. Rep. 974; *Lyon v. Tonawanda*, 98 Fed. Rep. 361; *Cartersville Light, etc., Co. v. Cartersville*, 114 Fed. Rep. 609.

*Alabama.* — *Coxe v. Huntsville Gas Light Co.*, 129 Ala. 496.

*Delaware.* — *Wilmington v. Addicks*, (Del. Ch. 1900) 47 Atl. Rep. 366.

*Idaho.* — *Staples v. Rossi*, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

*New York.* — *Sun Printing, etc., Assoc. v. Delaney*, 48 N. Y. App. Div. 623.

*Pennsylvania.* — *Rudy v. Myton*, 19 Pa. Super. Ct. 310.

*South Carolina.* — *Alston v. Limehouse*, 60 S. Car. 559; *Darlington Oil Co. v. Pee Dee Oil, etc., Co.*, 62 S. Car. 196.

**Where the Issue Appears to Be One of Law**, as to the rights of the parties, which is fully presented on the preliminary application, and no sufficient reason appears for delaying decision on the question until final hearing, a preliminary injunction may be granted. *Johnston v. Belmar*, 58 N. J. Eq. 354.

**5. Right to Preliminary Injunction Where Right to Relief Fails.** — *Sanitary Reduction Works v. California Reduction Co.*, 94 Fed. Rep. 693; *Harriman v. Northern Securities Co.*, 132 Fed. Rep. 464; *Coxe v. Huntsville Gas Light Co.*, 129 Ala. 496; *Staples v. Rossi*, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687; *Maloney v. King*, 25 Mont. 188; *Craver v. Stapp*, 26 Mont. 314; *Colusa Parrot Min., etc., Co. v. Barnard*, 28 Mont. 11. But see *Victor v. Lewis*, 38 N. Y. App. Div. 316; *Kerker v. Lederer*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 651.

An injunction will not be granted where, upon the hearing of the motion, it is not apparent that the ultimate determination of the

suit in favor of the complainant is reasonably probable. *Mitchell v. Colorado Fuel, etc., Co.*, 117 Fed. Rep. 723.

**6. Not Granted Except in Case of Pressing Necessity** — *United States.* — *Ahern v. Newton, etc.*, St. R. Co., 105 Fed. Rep. 702; *Stevens v. Missouri, etc., R. Co.*, (C. C. A.) 106 Fed. Rep. 771; *Miller v. Mutual Reserve Fund L. Assoc.*, 109 Fed. Rep. 278.

*Idaho.* — *Staples v. Rossi*, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345.

*Montana.* — *Boston, etc., Consol. Copper, etc., Min. Co. v. Montana Ore-Purchasing Co.*, 23 Mont. 557.

*New Jersey.* — *Schoenfeld v. American Can Co.*, (N. J. 1903) 55 Atl. Rep. 1044; *Becker v. Gilbert*, (N. J. 1905) 60 Atl. Rep. 29; *Ivins v. Jacob*, (N. J. 1904) 58 Atl. Rep. 941.

*New York.* — *Sun Printing, etc., Assoc. v. Delaney*, 48 N. Y. App. Div. 623.

*Pennsylvania.* — *Hicks v. American Natural Gas Co.*, 207 Pa. St. 570.

**7. Refused when Equivalent to Final Relief.** — *Staples v. Rossi*, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Beck v. New York, etc., R. Co.*, 74 N. Y. App. Div. 626; *Connolly v. Van Wyck*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 746; *Cohen v. United Garment Workers of America*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 748; *Consolidated Vinegar Works v. Brew*, 112 Wis. 610. See also *Weaver v. Toney*, 107 Ky. 419; *Collins v. Carr*, 112 Ga. 868.

**8. Discretion** — *United States.* — *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; *Proctor, etc., Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Paris Medicine Co. v. W. H. Hill Co.*, (C. C. A.) 102 Fed. Rep. 148; *Higginson v. Chicago, etc., R. Co.*, (C. C. A.) 102 Fed. Rep. 197; *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.*, (C. C. A.) 102 Fed. Rep. 890; *Lake Shore, etc., R. Co. v. Felton*, (C. C. A.) 103 Fed. Rep. 227; *Louisville Home Telephone Co. v. Cumberland Telephone, etc., Co.*, (C. C. A.) 111 Fed. Rep. 663; *Bartholomew v. Union Paper, etc., Co.*, (C. C. A.) 113 Fed. Rep. 289; *U. S. Gramophone Co. v. Seaman*, (C. C. A.) 113 Fed. Rep. 745; *Stearns-Roger Mfg. Co. v. Brown*, (C. C. A.) 114 Fed. Rep. 939; *Chickering v. Chickering*, (C. C. A.) 120 Fed. Rep. 69; *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (C. C. A.) 121 Fed. Rep. 973; *Rahley v. Columbia Phonograph Co.*, (C. C. A.) 122 Fed. Rep. 623; *Kerr v. New Orleans*, (C. C. A.) 126 Fed. Rep. 920; *Massie v. Buck*, (C. C. A.) 128 Fed. Rep. 27; *Coram v. Ingersoll*, (C. C. A.) 133 Fed. Rep. 226.

*California.* — *Allen v. Pedro*, 136 Cal. 1; *Einstein v. State Bank*, 137 Cal. 47.

*Connecticut.* — *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.

*Georgia.* — *Pollock v. National Bldg., etc., Assoc.*, 108 Ga. 755; *Dennis v. Lester*, 110 Ga. 268; *Sasser v. Sasser*, 110 Ga. 316; *Clyatt v. Barbour*, 111 Ga. 130; *Lamar v. Gardner*, 111 Ga. 850; *Cutliff v. Burks*, 111 Ga. 845; *Brooks v. Stroud*, 111 Ga. 875; *Small v. Slocumb*, 112

**346.** Discretion Defined. — See note 3.

**347.** See note 1.

(b) *Mandamus to Compel Issuance.* — See notes 2, 3.

(3) *Necessity of Caution in Issuance.* — See notes 4, 5, 6, 7, 8.

Ga. 279, 81 Am. St. Rep. 50; Lane v. Georgia L. & T. Co., 112 Ga. 702; Floyd v. Floyd, 113 Ga. 143; Finney v. Davis, 113 Ga. 364; McFarland v. Park Woolen Mills, 113 Ga. 1072; Hightower v. Lane, 114 Ga. 348; Carruth v. Wagener, 114 Ga. 740; Blats v. Blats, 117 Ga. 165; Leath v. Hinson, 117 Ga. 589; O'Neill Mfg. Co. v. Woodley, 118 Ga. 854; Steadman v. Dorminey-Price Lumber Co., 119 Ga. 616; Pittman v. Colbert, 120 Ga. 341; Gordon County v. Pyron, 120 Ga. 101; McLeod v. Reid, 120 Ga. 785.

*Idaho.* — Staples v. Rossi, 7 Idaho 618, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 345; Shields v. Johnson, 10 Idaho 454.

*Illinois.* — Kewanee v. Otley, 204 Ill. 402.

*Louisiana.* — State v. Rightor, 51 La. Ann. 1197; State v. Judge, 51 La. Ann. 1768.

*Minnesota.* — McGregor v. Case, 80 Minn. 214.

*Montana.* — Parrot Silver, etc., Co. v. Heinze, 24 Mont. 485, 25 Mont. 139, 87 Am. St. Rep. 386; Heinze v. Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 484.

*New York.* — Davis v. Rosenstein, 56 N. Y. App. Div. 220; Morris European, etc., Express Co. v. Merchants' European Express Co., 67 N. Y. App. Div. 616; Content v. Metropolitan St. R. Co., 73 N. Y. App. Div. 230; Rochester, etc., R. Co. v. Monroe County Electric Belt Line Co., 78 N. Y. App. Div. 38.

*North Dakota.* — Dickson v. Dows, 11 N. Dak. 404.

*Pennsylvania.* — Clark v. Luzerne, 196 Pa. St. 210; Mackintyre v. Jones, 9 Pa. Super. Ct. 543.

*South Dakota.* — Huron First Nat. Bank v. Crabtree, (S. Dak. 1904) 100 N. W. Rep. 744.

*Wisconsin.* — Ward v. Sweeney, 106 Wis. 44.

*Canada.* — South Shore R. Co. v. Grand Trunk R. Co., 12 Quebec K. B. 28.

On appeal from interlocutory orders granting an injunction whenever the questions of law or facts to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain and great if it is denied, while the loss to the opposing party will be comparatively small if it is granted, the appellate courts will not disturb the order of the court below. Dimick v. Shaw, (C. C. A.) 94 Fed. Rep. 266; Denver, etc., R. Co. v. U. S., (C. C. A.) 124 Fed. Rep. 156.

*Not Matter of Right.* — Atchison, etc., R. Co. v. Meyer, 62 Kan. 696.

*When Error to Refuse Injunction.* — Where an action is brought for the sole purpose of obtaining an injunction, and a temporary injunction is necessary to the assertion and preservation of a legal right, if established as alleged in the complaint, it is error of law to refuse a temporary injunction. D. W. Alderman, etc., Co. v. Wilson, 69 S. Car. 156; Riley v. Charleston Union Station Co., 67 S. Car. 84; Darlington Oil Co. v. Pee Dee Oil, etc., Co., 62 S. Car. 196; Jordan v. Wilson, 69 S. Car. 52. See also Cudd v. Calvert, 54 S. Car. 457.

*Rule Not Applicable Where No Discretion Ex-*

*ercised.* — Phenix Ins. Co. v. Perkins, (S. Dak. 1905) 101 N. W. Rep. 1110. See also Northern Securities Co. v. Harriman, (C. C. A.) 134 Fed. Rep. 331.

**346. 3. Reversal in Case of Errors of Law.** — Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 118 Ga. 255; De Pauw v. Oxley, 122 Wis. 656.

**347. 1.** Meyers v. New York, 58 N. Y. App. Div. 534; Reyburn v. Sawyer, 128 N. Car. 8.

**2. Mandamus to Compel Issuance of Injunction.** — State v. King, 105 La. 731. Compare State v. Sommerville, 104 La. 639.

**3. Mandamus to Compel Dissolution of Injunction.** — See Emery v. Ionia Circuit Judge, (Mich. 1904) 101 N. W. Rep. 801; State v. District Ct., 25 Mont. 202. Compare State v. Judge, 52 La. Ann. 1275; State v. Graves, 66 Neb. 17.

*Dissolution Seldom Compelled.* — Mactavish v. Kent Circuit Judge, 122 Mich. 242; Central Bitulithic Paving Co. v. Manistee Circuit Judge, 132 Mich. 126.

**4. Caution to Be Exercised.** — Parsons v. Weller, (Ky. 1903) 72 S. W. Rep. 273; Francis v. Taylor, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 187, affirmed 52 N. Y. App. Div. 631; Connolly v. Van Wyck, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 746; Johnson v. Board of Education, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 593.

*The Extent of the Necessity* marks the extent of the right to enjoin. Linden Land Co. v. Milwaukee Electric R., etc., Co., 107 Wis. 493.

*The Practice in the Federal Courts* is to refuse an injunction *pendente lite* unless the case shows beyond reasonable question the necessity for such intervention of the court. Paul Steam System Co. v. Paul, 129 Fed. Rep. 757.

**5. Rights Must Be Clear and Certain.** — Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. Rep. 20, affirmed 112 Fed. Rep. 4; Higginson v. Chicago, etc., R. Co., (C. C. A.) 102 Fed. Rep. 197; Stevens v. Missouri, etc., R. Co., (C. C. A.) 106 Fed. Rep. 771; Central Stock Yards Co. v. Louisville, etc., R. Co., 112 Fed. Rep. 823; Dady v. Georgia, etc., R. Co., 112 Fed. Rep. 838; Smith-Dixon Co. v. Stevens, 100 Md. 110; Ivins v. Jacob, (N. J. 1904) 58 Atl. Rep. 941; Morse v. Wheeler, 68 N. Y. App. Div. 428, affirmed 175 N. Y. 502, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 347; Hicks v. American Natural Gas Co., 207 Pa. St. 570; Wiener v. Peoples, 17 Lanc. L. Rev. 289.

**6. Rule Especially Applicable in Case of Ex Parte Hearings.** — New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co., (C. C. A.) 102 Fed. Rep. 890; Stearns-Roger Mfg. Co. v. Brown, (C. C. A.) 114 Fed. Rep. 939. See also State v. Judge, 51 La. Ann. 1768.

*Exception to Rule.* — An exception to the general rule exists where the function of the preliminary injunction is merely to maintain the *status quo* until final decree, and comparatively great injury would result from the withholding, and comparatively little from the granting of such injunction. Gring v. Chesapeake,

- 348.** 3. Common and Special Injunctions — A Special Injunction. — See notes 7, 8.  
 4. Cross Injunctions. — See note 9.  
**349.** III. RESTRAINING ORDERS. — See note 1.  
 The Purpose of a Restraining Order. — See notes 2, 3.  
**350.** IV. JURISDICTION — 3. Power of Federal Courts and Judges. — See note 6.  
**351.** 4. Power of State Supreme Courts and Judges. — See notes 3, 4, 5.  
 5. Jurisdiction as Affected by Amount Involved. — See note 8.  
**352.** Where Amount Involved Is Trifling. — See note 1.  
 V. VENUE. — See note 2.  
 VI. MATTERS TO BE CONSIDERED IN DETERMINING RIGHT TO INJUNCTION — 1. Adequacy of Remedy at Law — *a.* IN GENERAL. — See note 4.

etc., Canal Co., 129 Fed. Rep. 996; Jones v. Dimes, 130 Fed. Rep. 638.

**347.** 7. Teller v. U. S., (C. C. A.) 113 Fed. Rep. 463; Parsons v. Weller, (Ky. 1903) 72 S. W. Rep. 273. See also Macfarland v. Washington, etc., R. Co., 18 App. Cas. (D. C.) 456.

**8.** Facts of Each Case Must Be Considered. — Price v. Grice, 10 Idaho 443; Castle v. Bell Telephone Co., (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 38, affirmed 49 N. Y. App. Div. 437.

**348.** 7. Hearing Evidence in Support of Allegations. — Solomon v. Wilmington Sewerage Co., 133 N. Car. 144; Cobb v. Clegg, 137 N. Car. 153.

**8.** Solomon v. Wilmington Sewerage Co., 133 N. Car. 144.

**9.** Cross Injunctions. — Pine Tree Lumber Co. v. McKinley, 83 Minn. 419.

A defendant in a civil action is not entitled to the provisional remedy by injunction. This remedy is entirely a creature of statute and is awarded only to the plaintiff in a proper action. Forman v. Healey, 11 N. Dak. 563.

**349.** 1. Restraining Order Defined. — L. A. Thompson Scenic R. Co. v. Young, 90 Md. 278; Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co., 25 Mont. 135; Trester v. Pike, 60 Neb. 510; State v. Baker, 62 Neb. 840.

**2.** Purpose of Order. — L. A. Thompson Scenic R. Co. v. Young, 90 Md. 278.

What Sufficient for Plaintiff to Show. — Charles v. Marion, 98 Fed. Rep. 166.

Refused When Protection Can Be Otherwise Had. — Barstow v. Becket, 110 Fed. Rep. 826.

Not Granted Ex Parte Unless Immediate Necessity Shown. — Thurston v. Chott, 86 Ill. App. 543.

**3.** Duration of Order. — Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co., 25 Mont. 135.

**350.** 6. Where a Federal Court Cannot Grant the Ultimate Relief, it will not apply a provisional remedy. Davidson v. Calkins, 92 Fed. Rep. 230.

**351.** 3. Constitutional Authority. — Gilmer v. Hunnicutt, 57 S. Car. 166; Finlen v. Heinze, 27 Mont. 107.

**4.** Ohio. — The Supreme Court may, in an original action in quo warranto to determine the right of rival boards to exercise official functions, grant an ancillary injunction to protect those having a *prima facie* right from interference by other claimants during the pendency of such original action. State v. Deputy State Supervisors, 70 Ohio St. 341.

**5.** Necessity of Constitutional Authority. — State v. Deputy State Supervisors, 70 Ohio St. 341.

**8.** How Jurisdiction Determined. — Delaware, etc., R. Co. v. Frank, 110 Fed. Rep. 689; Amelia Milling Co. v. Tennessee Coal, etc., Co., 123 Fed. Rep. 811. See also Hutchinson v. Beckham, (C. C. A.) 118 Fed. Rep. 399.

**352.** 1. Tennessee. — If a suit involves a sum in excess of fifty dollars, a chancery court has jurisdiction. McAffrey v. Richards, (Tenn. Ch. 1900) 59 S. W. Rep. 1064.

**2.** Bringing Suit in County Where Judgment Was Rendered. — Hampton v. Mays, (Indian Ter. 1902) 69 S. W. Rep. 1115; Hawkeye Ins. Co. v. Huston, 115 Iowa 621; Brunk v. Moulton Bank, 121 Iowa 14; Adoue v. Wettermark, 22 Tex. Civ. App. 545; Smith v. Morgan, 28 Tex. Civ. App. 245; Aultman v. Higbee, 32 Tex. Civ. App. 502; Baker v. Briggs, 99 Va. 360.

When Provision Does Not Apply. — Davidson v. Hough, 165 Mo. 561; June v. Doke, 35 Tex. Civ. App. 240.

Provision May Be Waived. — Foust v. Warren, (Tex. Civ. App. 1903) 72 S. W. Rep. 404.

In the Absence of Such a Statutory Provision, the rule does not apply. Mactavish v. Kent Circuit Judge, 122 Mich. 242.

**4.** Injunction Does Not Lie Where Legal Remedy Adequate — England. — Jordeson v. Sutton, etc., Gas. Co., (1899) 2 Ch. 217; Metropolitan Electric Supply Co. v. Ginder, (1901) 2 Ch. 799; Cowper v. Laidler, (1903) 2 Ch. 337; Colls v. Home, etc., Stores, (1904) A. C. 179.

Canada. — Miller v. Campbell, 14 Manitoba 437; Cass v. Couture, 14 Manitoba 458. See also Moon v. Bullock, 6 Quebec Pr. 59.

United States. — Arkansas Bldg., etc., Assoc. v. Madden, 175 U. S. 269; Cruickshank v. Bidwell, 176 U. S. 73; Proctor, etc., Co. v. Mahin, 93 Fed. Rep. 875; Iowa, etc., Land Co. v. Temescal Water Co., 95 Fed. Rep. 320; A. B. Farquhar Co. v. National Harrow Co., 99 Fed. Rep. 160; Eureka, etc., R. Co. v. California, etc., R. Co., (C. C. A.) 109 Fed. Rep. 509.

Alabama. — Deegan v. Neville, 127 Ala. 471, 85 Am. St. Rep. 137; High v. Whitfield, 130 Ala. 444.

Alaska. — U. S. v. Northwest Trading Co., 1 Alaska 5.

Arkansas. — Myers v. Hawkins, 67 Ark. 413.

California. — Long Beach School Dist. v. Lutge, 129 Cal. 409.

Connecticut. — Botsford v. Wallace, 72 Conn. 195; White v. Strong, 75 Conn. 308.



**354.** See notes 1, 2.

*b.* REMEDIES PROVIDED BY STATUTE. — See notes 3, 6, 7.

**2. Inadequacy of Remedy at Law — The Remedy Must Be Plain.** — See note 8.

*Georgia.* — Moore *v.* Guyton, 110 Ga. 330; Beysiegel *v.* Rome Mut. Loan Assoc., 113 Ga. 1071; Johnson *v.* Gilmer, 113 Ga. 1146; Sharpe *v.* Hodges, 116 Ga. 795; Armour Packing Co. *v.* Lovell, 118 Ga. 164; Woodstock Iron Works *v.* Leake, 118 Ga. 642; Detwiler *v.* Bainbridge Grocery Co., 119 Ga. 981.

*Illinois.* — Baughman *v.* Heinselman, 180 Ill. 251; Field *v.* Western Springs, 181 Ill. 186; Pennsylvania Co. *v.* Chicago, 181 Ill. 289; Andel *v.* Starkel, 192 Ill. 206.

*Indiana.* — Wayne County *v.* Dickinson, 153 Ind. 682; Taylor *v.* Crawfordsville, 155 Ind. 403; Tackett *v.* Stevenson, 155 Ind. 407; Monroe County *v.* Conner, 155 Ind. 484; Wabash R. Co. *v.* Engleman, 160 Ind. 329; Christman *v.* Howe, 163 Ind. 330.

*Iowa.* — District Tp. *v.* Myles, 109 Iowa 541.

*Kentucky.* — Herr *v.* Central Kentucky Lunatic Asylum, 110 Ky. 282.

*Louisiana.* — Kansas City Southern R. Co. *v.* State R. Commission, 106 La. 583.

*Michigan.* — Atty.-Gen. *v.* Board of Education, 133 Mich. 681.

*Minnesota.* — Fajder *v.* Aitkin, 87 Minn. 445; Kerr *v.* Waseca, 88 Minn. 191; Vanderburgh *v.* Minneapolis, 93 Minn. 81.

*Missouri.* — Schuster *v.* Myers, 148 Mo. 422; State *v.* Withrow, 154 Mo. 397.

*Nebraska.* — Wabaska Electric Co. *v.* Wyomere, 60 Neb. 199; Brown *v.* Reed, (Neb. 1904) 100 N. W. Rep. 143.

*New Jersey.* — Jersey City Milling Co. *v.* Blackwell, 58 N. J. Eq. 122; New Jersey Junction R. Co. *v.* Woodward, 61 N. J. Eq. 1; Sperry, etc., Co. *v.* Vine, 66 N. J. Eq. 339.

*New York.* — Schulz *v.* Albany, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 51, *affirmed* 42 N. Y. App. Div. 437; Syracuse Rapid Transit R. Co. *v.* Salt Springs Nat. Bank, (Supm. Ct.) 28 Misc. (N. Y.) 619; Sage *v.* Gloversville, 43 N. Y. App. Div. 245; Hackett *v.* Northern Pac. R. Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 583; March *v.* New York, 69 N. Y. App. Div. 1; De Carvajal *v.* Young Men's Christian Assoc., (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 727; New Hartford Canning Co. *v.* Bulifant, 78 N. Y. App. Div. 6; Knickerbocker Ice Co. *v.* Forty-second St., etc., Ferry R. Co., 85 N. Y. App. Div. 530, *affirmed* 176 N. Y. 408; Interborough Rapid Transit Co. *v.* Gallagher, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 536, *affirmed* 96 N. Y. App. Div. 632.

*North Carolina.* — Puryear *v.* Sanford, 124 N. Car. 276; Kistler *v.* Weaver, 135 N. Car. 388.

*North Dakota.* — Burton *v.* Walker, 13 N. Dak. 149.

*Ohio.* — Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 9 Ohio Dec. 674, 7 Ohio N. P. 640; Toledo Electric St. R. Co. *v.* Toledo, etc., R. Co., 1 Ohio Dec. 33, 7 Ohio N. P. 211; Cincinnati *v.* Covington, etc., Bridge Co., 10 Ohio Cir. Dec. 792, 20 Ohio Cir. Ct. 396; State *v.* Chester Tp., 25 Ohio Cir. Ct. 424; Sipe *v.* Bartlett, 12 Ohio Cir. Dec. 226.

*Oklahoma.* — Marshall *v.* Homier, 13 Okla. 264.

*Oregon.* — Tomasini *v.* Taylor, 42 Oregon 576.

*Pennsylvania.* — Brower *v.* Kantner, 190 Pa. St. 182; O'Neil *v.* McKeesport, 201 Pa. St. 386; Mundy *v.* Brooks, 204 Pa. St. 232; Galbraith *v.* Rutter, 20 Pa. Super. Ct. 554; Hinkson *v.* Statzell, 7 Del. Co. Rep. (Pa.) 474; Leahy *v.* Tompkins, 31 Pittsb. Leg. J. N. S. (Pa.) 218.

*Texas.* — Riggins *v.* Thompson, 30 Tex. Civ. App. 242; Hahn *v.* Willis, 31 Tex. Civ. App. 643.

*Washington.* — Lawrence *v.* Times Printing Co., 22 Wash. 482; Thacker Wood, etc., Co. *v.* Mallory, 27 Wash. 670.

**Remedy by Ejectment.** — Lockhart *v.* Leeds, 10 N. Mex. 568; Hicks *v.* American Natural Gas Co., 207 Pa. St. 570; Graver *v.* Otto, 23 Pa. Co. Ct. 227.

**Federal Courts — Jurisdiction Not Dependent on Remedies Furnished by State Laws.** — Pokegama Sugar Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 96 Fed. Rep. 34.

**354. 1. Ground of Jurisdiction — United States.** — Cruickshank *v.* Bidwell, 176 U. S. 73; Hagge *v.* Kansas City St. R. Co., 104 Fed. Rep. 391; Pittsburg, etc., R. Co. *v.* Fiske, (C. C. A.) 123 Fed. Rep. 760.

*California.* — Mendelson *v.* McCabe, 144 Cal. 230.

*Colorado.* — Boglino *v.* Giorgetta, (Colo. App. 1904) 78 Pac. Rep. 612.

*Maryland.* — Townsend *v.* Epstein, 93 Md. 537, 86 Am. St. Rep. 441.

*Minnesota.* — Colliton *v.* Oxborough, 86 Minn. 361.

*Missouri.* — Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248; Schubach *v.* McDonald, 179 Mo. 163.

*Nebraska.* — Lynch *v.* Egan, 67 Neb. 541.

*New Jersey.* — Point Pleasant Electric Light, etc., Co. *v.* Bayhead, 62 N. J. Eq. 296.

*Pennsylvania.* — Greensboro Natural Gas Co. *v.* Fayette County Gas Co., 200 Pa. St. 388.

*South Carolina.* — Ragsdale *v.* Southern R. Co., 60 S. Car. 381.

*Texas.* — Sullivan *v.* Dooley, 31 Tex. Civ. App. 589.

*Wisconsin.* — Miller *v.* Hoeschler, 121 Wis. 558.

**2. Defense More Complicated and Difficult at Law.** — Arkansas Bldg., etc., Assoc. *v.* Madden, 175 U. S. 269; Baer *v.* Higson, 26 Utah 78, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354.

**3. No Relief in Equity Where Statutory Remedy Exists.** — Central Stock Yards Co. *v.* Louisville, etc., R. Co., 112 Fed. Rep. 823; Wayne County *v.* Dickinson, 153 Ind. 682; Brower *v.* Kantner, 190 Pa. St. 182; Beauregard *v.* Roxton Falls, 6 Quebec Pr. 155.

**6. Exceptions to Rule — Multiplicity of Suits.** — Cabbell *v.* Williams, 127 Ala. 320.

**7. Stevens v. Chown, (1901) 1 Ch. 894.**

**8. Where Remedy Doubtful.** — Ingle *v.* Bot-toms, 160 Ind. 73; Chesapeake, etc., Telephone Co. *v.* Baltimore, 89 Md. 689.

**355. It Must Be Adequate.**—See note 1.And **It Must Be Complete.**—See notes 2, 3, 5.**356. 3. Laches of Party Seeking Relief by Injunction**—*a.* **WHEN A BAR TO RELIEF.**—See notes 6, 7.**355. 1. Remedy Must Be Adequate**—*England.*—*Jordeson v. Sutton, etc., Gas Co.,* (1899) 2 Ch. 217.*United States.*—*Mutual Reserve Fund L. Assoc. v. Phelps,* 103 Fed. Rep. 515, *reversed* on other grounds (C. C. A.) 112 Fed. Rep. 453, 190 U. S. 147; *Hagge v. Kansas City St. R. Co.,* 104 Fed. Rep. 391; *Illinois Cent. R. Co. v. Caffrey,* 128 Fed. Rep. 770.*Alabama.*—*Roberts v. Vest,* 126 Ala. 355.*California.*—*Los Angeles v. Los Angeles City Water Co.,* 124 Cal. 368; *De Groot v. Peters,* 124 Cal. 406, 71 Am. St. Rep. 91.*Illinois.*—*Collins v. Kinnare,* 89 Ill. App. 236.*Indiana.*—*Ferris v. American Brewing Co.,* 155 Ind. 539; *Ingle v. Bottoms,* 160 Ind. 73.*Mississippi.*—*Tisdale v. Insurance Co. of North America,* 84 Miss. 709.*Missouri.*—*Sills v. Goodyear,* 80 Mo. App. 128; *Gordon v. Mansfield,* 84 Mo. App. 367; *Lytle v. James,* 98 Mo. App. 337.*Nebraska.*—*Reynolds v. Touzalin Imp. Co.,* 62 Neb. 236.*New York.*—*American Law Book Co. v. Edward Thompson Co.,* (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 396; *Bolivar v. Pittsburg, etc., R. Co.,* 88 N. Y. App. Div. 387, *affirmed* 179 N. Y. 523.*Texas.*—*Davidson v. Sadler,* 23 Tex. Civ. App. 600.*Virginia.*—*Southern R. Co. v. Franklin, etc., R. Co.,* 96 Va. 693.*Washington.*—*Phelan v. Smith,* 22 Wash. 397.**2. Remedy Must Be Complete.**—*Pine v. New York,* 103 Fed. Rep. 337, *affirmed* (C. C. A.) 112 Fed. Rep. 98; *Delaware, etc., R. Co. v. Frank,* 110 Fed. Rep. 689; *Brooks v. Stroud,* 111 Ga. 875; *Southern R. Co. v. Franklin, etc., R. Co.,* 96 Va. 693.**3. Mere Remedy at Law Insufficient**—*United States.*—*Pokegania Sugar Pine Lumber Co. v. Klamath River Lumber, etc., Co.,* 96 Fed. Rep. 34; *Southwest Missouri Light Co. v. Joplin,* 101 Fed. Rep. 23; *Rochester German Ins. Co. v. Schmidt,* 126 Fed. Rep. 998; *Williams v. Neely,* (C. C. A.) 134 Fed. Rep. 1.*Alabama.*—*Cabbell v. Williams,* 127 Ala. 320.*Indiana.*—*Simpson v. Pittsburgh Plate Glass Co.,* 28 Ind. App. 343; *Miller v. Bowers,* 30 Ind. App. 116; *Wabash R. Co. v. Engleman,* 160 Ind. 329; *Chappell v. Jasper County Oil, etc., Co.,* 31 Ind. App. 170; *Ingle v. Bottoms,* 160 Ind. 73; *Meyer v. Boonville,* 162 Ind. 165; *Staufer v. Cincinnati, etc., R. Co.,* 33 Ind. App. 356.*Massachusetts.*—*Driscoll v. Smith,* 184 Mass. 221.*Nebraska.*—*Carter v. Warner,* (Neb. 1902) 89 N. W. Rep. 747. See also *Nebraska Telephone Co. v. Cornell,* 58 Neb. 823.*Rhode Island.*—*Dowell v. Goodwin,* 22 R. I. 287, 84 Am. St. Rep. 842.*Virginia.*—*Baker v. Briggs,* 99 Va. 360.*Washington.*—*Ritterhoff v. Puget Sound Nat. Bank,* 37 Wash. 76, 107 Am. St. Rep. 693.But see *Safe Deposit, etc., Co. v. Anniston,* 96 Fed. Rep. 661, holding that if the remedy at law is adequate in theory, it deprives equity of jurisdiction, although practically it may be inadequate.**5. Damages Not Susceptible of Estimation**—*United States.*—*Delaware, etc., R. Co. v. Frank,* 110 Fed. Rep. 689.*Connecticut.*—*Camp v. Charles Thatcher Co.,* 75 Conn. 165.*Georgia.*—*Camp v. Dixon,* 112 Ga. 872.*Illinois.*—*Edwards v. Haeger,* 180 Ill. 99.*Indiana.*—*American Steel, etc., Co. v. Tate,* 33 Ind. App. 504.*New Jersey.*—*Johnson v. Hughes,* 58 N. J. Eq. 406.*New York.*—*Hale v. Burns,* 101 N. Y. App. Div. 101.*North Carolina.*—*Jolly v. Brady,* 127 N. Car. 142.*Pennsylvania.*—*Stewart Wire Co. v. Lehigh Coal, etc., Co.,* 203 Pa. St. 474, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Schmaltz v. York Mfg. Co.,* 204 Pa. St. 1, 93 Am. St. Rep. 782.*Rhode Island.*—*Battalion Westerly Rifles v. Swan,* 22 R. I. 333, 84 Am. St. Rep. 849.It is not a ground of equitable jurisdiction that, in case of a violation of a contract, the damages are uncertain. *Atty.-Gen. v. Board of Education,* 133 Mich. 681.**Inability to Prove Special Damages.**—*Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384, *reversing* 68 N. Y. App. Div. 88.**356. 6. Application Must Be Seasonably Made**—*United States.*—*Edwards v. Mercantile Trust Co.,* 121 Fed. Rep. 203.*Illinois.*—*Lowery v. Pekin,* 210 Ill. 575.*Indiana.*—*Wayne County v. Dickinson,* 153 Ind. 682.*Montana.*—*Mantle v. Speculator Min. Co.,* 27 Mont. 473, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.*New Jersey.*—*Mumford v. Ecuador Development Co.,* (N. J. 1901) 50 Atl. Rep. 476.*Pennsylvania.*—*Stewart Wire Co. v. Lehigh Coal, etc., Co.,* 203 Pa. St. 474, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Nesinger v. Clay, etc., Turnpike Co.,* 203 Pa. St. 265.*South Carolina.*—*Gilmer v. Hunnicutt,* 57 S. Car. 166.**A Taxpayer's Action** to enjoin dissipation of public funds is not usually barred by laches. *Storey v. Murphy,* 9 N. Dak. 115. See also *Manly Bldg. Co. v. Newton,* 114 Ga. 245.**7. Opposite Party Induced to Change His Position by Laches of Applicant**—*United States.*—See *New York City v. Pine,* 185 U. S. 93.*Georgia.*—*Holt v. Parsons,* 118 Ga. 895, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.*Kentucky.*—*Herr v. Central Kentucky Lunatic Asylum,* 110 Ky. 282, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Louisville, etc., R. Co. v. Smith,* (Ky. 1904) 78 S. W. Rep. 160, *quoting* 16 AM. AND ENG. ENCYC. OF LAW

**357.** See notes 1, 2.

Laches in Conjunction with Other Causes. — See note 6.

**358.** *b. WHEN NOT A BAR TO RELIEF.* — See note 4.

Delay from Attempt to Compromise. — See note 5.

**4. Certainty or Doubtfulness of Right Sought to Be Protected.** — See note 7.

**359.** See note 1.

**360.** See notes 1, 2, 3.

(2d ed.) 356; *Byron v. Louisville, etc., R. Co.*, (Ky. 1900) 59 S. W. Rep. 519.

*Montana.* — *Mantle v. Speculator Min. Co.*, 27 Mont. 473, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.

*New Jersey.* — *Scharr v. Camden*, (N. J. 1901) 49 Atl. Rep. 817; *Schoenfeld v. American Can Co.*, (N. J. 1903) 55 Atl. Rep. 1044.

*Ohio.* — *Defiance Water Co. v. Defiance*, 68 Ohio St. 520.

*Pennsylvania.* — *Stewart Wire Co. v. Lehigh Coal, etc., Co.*, 203 Pa. St. 474, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31; *Mackintyre v. Jones*, 9 Pa. Super. Ct. 543.

**357. 1. Party Left to Ordinary Legal Remedies.** — *Stewart Wire Co. v. Lehigh Coal, etc., Co.*, 203 Pa. St. 474, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.

**2. Where Granting of Injunction Will Operate Injurious to Public.** — *Herr v. Central Kentucky Lunatic Asylum*, 110 Ky. 282, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Louisville, etc., R. Co. v. Smith*, (Ky. 1904) 78 S. W. Rep. 160, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Fogarty v. Cincinnati*, 9 Ohio Dec. 753, 7 Ohio N. P. 100; *Stewart Wire Co. v. Lehigh Coal, etc., Co.*, 203 Pa. St. 474, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356; *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31.

**6. Effect of Threat to Take Proceedings.** — *Holt v. Parsons*, 118 Ga. 895, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 357.

**358. 4. Where Injury Is Serious and Permanent.** — See *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441.

**5. Attempt to Compromise.** — See *Lyon v. Tona-wanda*, 98 Fed. Rep. 361.

**7. Doubtful Right** — *United States.* — *Board of Trade v. C. B. Thomson Commission Co.*, 103 Fed. Rep. 902; *Dady v. Georgia, etc., R. Co.*, 112 Fed. Rep. 838; *Brooklyn Baseball Club v. McGuire*, 116 Fed. Rep. 782.

*Georgia.* — *Everett v. Tabor*, 119 Ga. 128.

*Indiana.* — *Loy v. Madison, etc., Gas Co.*, 156 Ind. 332.

*Indian Territory.* — *Munyo v. Filmore*, (Indian Ter. 1903) 76 S. W. Rep. 257.

*Louisiana.* — *Watson v. McGrath*, 111 La. 1097.

*Maryland.* — *Callaway v. Baltimore*, 99 Md. 315, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; *Gulick v. Fisher*, 92 Md. 353; *Smith-Dixon Co. v. Stevens*, 100 Md. 110.

*Mississippi.* — *North Lumber Co. v. Gary*, 83 Miss. 640.

*Missouri.* — *Powell v. Canaday*, (Mo. App. 1902) 69 S. W. Rep. 686; *Perkins v. Mason*, 105 Mo. App. 315.

*New Jersey.* — *Amos v. Norcross*, 58 N. J.

Eq. 256; *Roberts v. Scull*, 58 N. J. Eq. 396; *Naylor v. Corson*, (N. J. 1901) 49 Atl. Rep. 529; *Dobleman v. Gately, etc., Co.*, 64 N. J. Eq. 223; *Oliphant v. Richman*, (N. J. 1904) 59 Atl. Rep. 241.

*New York.* — *Blumenauer v. O'Connor*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 17, affirmed 62 N. Y. App. Div. 618; *Country Club Land Assoc. v. Lohbauer*, 56 N. Y. App. Div. 306; *Johnstown Min. Co. v. Butte, etc., Consol. Min. Co.*, 60 N. Y. App. Div. 344; *Connolly v. Van Wyck*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 746; *Cohen v. United Garment Workers of America*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 748; *Post v. Hudson River Telephone Co.*, 76 N. Y. App. Div. 621.

*Pennsylvania.* — *Stout v. Williams*, 203 Pa. St. 161; *Farr v. Mullen*, 5 Lack. Leg. N. (Pa.) 318; *Penn Iron Co. v. Lancaster*, 17 Lanc. L. Rev. 161.

*West Virginia.* — *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895.

**Rule Does Not Apply When Injury Irreparable.** — *Palmer v. Young*, 108 Ill. App. 252; *Sprenkle v. Thomas*, 13 York Leg. Rec. (Pa.) 89; *Verdolite Co. v. Richards*, 7 Northam. Co. Rep. (Pa.) 113.

**359. 1. Necessity of Establishing Right at Law** — *United States.* — *Lowndale v. Gray's Harbor Boom Co.*, 117 Fed. Rep. 983.

*Alabama.* — *Hamilton v. Brent Lumber Co.*, 127 Ala. 78.

*Illinois.* — *Toledo, etc., R. Co. v. St. Louis, etc., R. Co.*, 208 Ill. 623.

*Indiana.* — *Wabash R. Co. v. Engleman*, 160 Ind. 329.

*Iowa.* — *Currier v. Jones*, 121 Iowa 160.

*Kansas.* — *Harden v. Metz*, 10 Kan. App. 341, affirmed 62 Kan. 867, 63 Pac. Rep. 1126.

*Nebraska.* — *Stone v. Snell*, (Neb. 1903) 94 N. W. Rep. 325.

*New Jersey.* — *Oppenheim v. Loftus*, (N. J. 1901) 50 Atl. Rep. 795.

*West Virginia.* — *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895; *Crossland v. Crossland*, 53 W. Va. 108.

*Compare* *Springdale M. E. Church v. Shoop*, 30 Pittsb. Leg. J. N. S. (Pa.) 132; *Sprenkle v. Thomas*, 13 York Leg. Rec. (Pa.) 89.

**Insolvent Trespasser.** — A preliminary injunction may be granted against an insolvent trespasser, conditioned to become perpetual unless the trespasser brings an action to establish the title at law. *Sills v. Goodyear*, 80 Mo. App. 128.

**360. 1. Merchants' Coal Co. v. Billmeyer**, 54 W. Va. 1, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

**2. Conflict as to Facts on Which Right Depends.** — *Merchants' Coal Co. v. Billmeyer*, 54 W. Va. 1, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

**360. 5. Nature of Injury Against Which Relief Is Sought — a. SUBSTANTIAL INJURY NECESSARY.** — See note 4.

*b. IRREPARABLE INJURY NECESSARY.* — See note 5.

**361.** See notes 1, 2, 3.

**360. 3.** *Hagge v. Kansas City St. R. Co.*, 104 Fed. Rep. 391; *Robertson v. Meyer*, 59 N. J. Eq. 366; *Richmond v. Bennett*, 205 Pa. St. 470.

**4. Necessity of Substantial Injury — Connecticut.** — *Hunting v. Hartford St. R. Co.*, 73 Conn. 179.

*Indiana.* — *Hart v. Hildebrandt*, 30 Ind. App. 415; *Stauffer v. Cincinnati, etc., R. Co.*, 33 Ind. App. 356.

*Iowa.* — *James v. Bondurant*, (Iowa 1901) 86 N. W. Rep. 274.

*Nebraska.* — *Nebraska Telephone Co. v. Cornell*, 58 Neb. 823; *Van Every v. Sanders*, (Neb. 1903) 95 N. W. Rep. 870.

*Utah.* — *Tanner v. Nelson*, 25 Utah 226.

*Washington.* — *Rand v. Hartranft*, 29 Wash. 591, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360.

**Exception — Violation of Negative Covenants.** — *Andrews v. Kingsbury*, 212 Ill. 97.

**5. Injunction Refused Where Irreparable Injury Not Shown — United States.** — *Lowndale v. Gray's Harbor Boom Co.*, 117 Fed. Rep. 983; *Dady v. Georgia, etc., R. Co.*, 112 Fed. Rep. 838; *Morris v. Bean*, 123 Fed. Rep. 618.

*Alabama.* — *Deegan v. Neville*, 127 Ala. 471, 85 Am. St. Rep. 137.

*Colorado.* — *Smith v. Schlink*, 15 Colo. App. 325.

*Connecticut.* — *Empire Transp. Co. v. Johnson*, 76 Conn. 79.

*Iowa.* — *Minneapolis, etc., R. Co. v. Chicago, etc., R. Co.*, 116 Iowa 681.

*Maine.* — *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496.

*Missouri.* — *Schuster v. Myers*, 148 Mo. 422.

*Montana.* — *Haupt v. Independent Tel. Messenger Co.*, 25 Mont. 122; *Harley v. Montana Ore Purchasing Co.*, 27 Mont. 388; *King v. Mullins*, 27 Mont. 364.

*New Jersey.* — *Naylor v. Corson*, (N. J. 1901) 49 Atl. Rep. 529; *Oliphant v. Richman*, (N. J. 1904) 59 Atl. Rep. 241.

*New York.* — *Johnson v. Board of Education*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 593; *Jager v. New York*, 75 N. Y. App. Div. 258; *Glascow v. Willard*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 166.

*North Carolina.* — *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 127 N. Car. 130; *Reyburn v. Sawyer*, 128 N. Car. 8.

*Oregon.* — *Parker v. Furlong*, 37 Oregon 248; *Moore v. Halliday*, 43 Oregon 243, 99 Am. St. Rep. 724.

*Pennsylvania.* — *Stewart Wire Co. v. Lehigh Coal, etc., Co.*, 203 Pa. St. 474; *Duffy's Estate*, 9 Kulp (Pa.) 409.

*West Virginia.* — *Merriner v. Merriner*, 54 W. Va. 169.

*Wisconsin.* — *Glassbrenner v. Gronlik*, 110 Wis. 402; *Pewaukee v. Wisconsin Lakes Ice, etc., Co.*, 110 Wis. 67.

*Canada.* — *McDougall v. Grignon*, 15 Quebec Super. Ct. 535; *Montreal Park, etc., R. Co. v. St. Louis*, 17 Quebec Super. Ct. 545.

**In Idaho and Indiana Irreparable Injury Not Required.** — *Staples v. Rossi*, 7 Idaho 618; *Shields v. Johnson*, 10 Idaho 454; *Meyer v. Coeur d'Alene First Nat. Bank*, 10 Idaho 175; *Price v. Grice*, 10 Idaho 443; *Covert v. Bray*, 26 Ind. App. 671; *Chappell v. Jasper County Oil, etc., Co.*, 31 Ind. App. 170; *Hart v. Hildebrandt*, 30 Ind. App. 415. See also *Loy v. Madison, etc., Gas Co.*, 156 Ind. 332.

**361. 1. Injunction Granted Where Injury Irreparable — United States.** — *Northern Pac. R. Co. v. Cunningham*, 103 Fed. Rep. 708.

*Alabama.* — *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379.

*Georgia.* — *Jones v. Oemler*, 110 Ga. 202; *Murphey v. Harker*, 115 Ga. 77.

*Illinois.* — *Edwards v. Haeger*, 180 Ill. 99; *Jackson Union Telephone Co. v. Ava, etc., Telephone Co.*, 100 Ill. App. 535.

*North Carolina.* — *Jolly v. Brady*, 127 N. Car. 142.

*Ohio.* — *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183.

*Virginia.* — *Bristol Door, etc., Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783.

*West Virginia.* — *Moore v. Jennings*, 47 W. Va. 181; *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895.

*Wisconsin.* — *Marshfield Land, etc., Co. v. John Week Lumber Co.*, 108 Wis. 268.

**2. What Is Irreparable Injury.** — *Camp v. Dixon*, 112 Ga. 872, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Ocmulgee Lumber Co. v. Mitchell*, 112 Ga. 528; *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Sinsabaugh v. Dun*, 214 Ill. 70; *Lemmon v. Guthrie Center*, 113 Iowa 36; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782.

By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately repairable in damages. *Callaway v. Webster*, 98 Va. 790; *Haskell v. Sutton*, 53 W. Va. 206.

**3. Insolvency of Defendant — Georgia.** — *Ocmulgee Lumber Co. v. Mitchell*, 112 Ga. 528.

*Illinois.* — *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Jackson Union Telephone Co. v. Ava, etc., Telephone Co.*, 100 Ill. App. 535; *Alden Coal Co. v. Challis*, 103 Ill. App. 52, affirmed 200 Ill. 222.

*Indiana.* — See *Wabash R. Co. v. Engleman*, 160 Ind. 329.

*Iowa.* — *Lemmon v. Guthrie Center*, 113 Iowa 36.

*Maine.* — *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496.

*North Carolina.* — *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 127 N. Car. 130.

*Oregon.* — *Wheeler v. Lack*, 37 Oregon 238.

**361.** *c.* APPREHENDED INJURY INSUFFICIENT. — See notes 4, 5.

**362.** See note 1.

*d.* WHETHER RELIEF GRANTED AS TO PAST INJURIES. — See notes 2, 3.

**363.** 6. Criminality or Illegality of Act Which It Is Sought to Enjoin. — See note 1.

7. Absence of Precedent for Injunction Sought. — See note 4.

*Texas.* — *Peterson v. Smith*, 30 Tex. Civ. App. 139.

The mere insolvency of a defendant is never sufficient reason of itself for injunctive relief. *Parker v. Furlong*, 37 Oregon 248; *Moore v. Halliday*, 43 Oregon 243, 99 Am. St. Rep. 724.

**Nonresidence Not Equivalent to Insolvency.** — *Morgan v. Baxter*, 113 Ga. 144.

**361.** 4. Apprehended Injury Not Ground for Injunction — *United States*. — *Erie R. Co. v. Erie, etc.*, Valley R. Co., 100 Fed. Rep. 808. But see *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65.

*California.* — *Kredo v. Phelps*, 145 Cal. 526.

*Florida.* — *Tampa Gas Co. v. Tampa*, 44 Fla. 813.

*Illinois.* — *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 360, 361.

*Indiana.* — *Hart v. Hildebrandt*, 30 Ind. App. 415.

*Kansas.* — *Kansas City v. Hobbs*, 62 Kan. 866, 62 Pac. Rep. 324.

*Missouri.* — *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361.

*New Jersey.* — *Odlin v. Bingham Copper, etc.*, Min. Co., 64 N. J. Eq. 363.

*New York.* — *Dailey v. Nassau County R. Co.*, 52 N. Y. App. Div. 272; *Melody v. Goodrich*, 67 N. Y. App. Div. 368, affirmed 170 N. Y. 185.

*Pennsylvania.* — *Willow Grove, etc.*, Plank Road Co. v. Philadelphia, etc., R. Co., 17 Montg. Co. Rep. (Pa.) 66; *Plank-Road Co. v. Railroad Co.*, 14 York Leg. Rec. (Pa.) 187.

*Washington.* — *Tacoma v. Bridges*, 25 Wash. 221.

*Wisconsin.* — *Quin v. Havenor*, 118 Wis. 53.

**A Mere Possibility.** — *Lake Erie, etc.*, R. Co. v. Fremont, 92 Fed. Rep. 721, 34 C. C. A. 625.

**Present Intention to Neglect Future Duty.** — See *McBride v. Newlin*, 129 Cal. 36; *Barto v. San Francisco*, 135 Cal. 494; *Parsons v. Weller*, (Ky. 1903) 72 S. W. Rep. 273.

An injunction should only be granted to restrain present illegal or injurious acts or their threatened or anticipated future perpetration. *Sleicher v. Grogan*, 43 N. Y. App. Div. 213; *Sanford Dairy Co. v. Sanford*, 82 N. Y. App. Div. 641.

**Refused Where No Danger of Continuance.** — *Redley v. Greiner*, 117 Iowa 679.

**5. Reasonable Grounds for Apprehension Necessary.** — *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, 20 Times L. Rep. 88, 579; *Ryan v. Williams*, 100 Fed. Rep. 172; *Mendelson v. McCabe*, 144 Cal. 230; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Press Pub. Co. v. Holahan*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 684, affirmed 54 N. Y. App. Div. 638.

**In Case of Doubt Bill Should Be Retained.** — *Real Estate Trust Co. v. Hatton*, 194 Pa. St. 449.

**362.** 1. Threatened Injury with Power to Injure Sufficient. — *Leverich v. Mobile*, 110 Fed. Rep. 170; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361; *Joseph Schlitz Brewing Co. v. Superior*, 117 Wis. 297.

2. Usually Not Remedy for Past Injuries. — *Wilson v. Boise City*, 7 Idaho 69; *Heinl v. Terre Haute*, 161 Ind. 44; *McCurdy v. Lawrence*, 9 Kan. App. 883, 57 Pac. Rep. 1057; *Dixon v. Greene County*, 76 Miss. 794; *Carlin v. Wolff*, 154 Mo. 539.

**Proper Remedy for Past Injuries.** — *Stevenson v. Morgan*, 64 N. J. Eq. 219.

3. Relief Sometimes Granted as Incident to Injunction. — *Reese v. Wright*, 98 Md. 272; *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423; *Miller v. Edison Electric Illuminating Co.*, 66 N. Y. App. Div. 470; *Wright v. Weber*, 17 Pa. Super. Ct. 451; *Lonsdale Co. v. Woonsocket*, 25 R. I. 428. See also *Chester v. Smelting Corp.*, 85 L. T. N. S. 67.

**Under the Connecticut Practice Act** damages may be awarded for the injury already committed and an injunction may issue against its continuance. *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335.

**363.** 1. Criminal Acts — **Property Rights Violated** — *United States*. — *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102.

*Alabama.* — *Pike County Dispensary v. Brundidge*, 130 Ala. 193.

*Colorado.* — *People v. District Ct.*, 26 Colo. 386.

*Georgia.* — *English v. Jones*, 108 Ga. 123.

*Illinois.* — *Christie St. Commission Co. v. Board of Trade*, 92 Ill. App. 604; *Montreal Bank v. Waite*, 105 Ill. App. 373; *Alton Grain Co. v. Norton*, 105 Ill. App. 385; *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61.

*Indiana.* — *State v. O'Leary*, 155 Ind. 526.

*Kentucky.* — *Underhill v. Murphy*, (Ky. 1904) 78 S. W. Rep. 482.

*Missouri.* — *State v. Wood*, 155 Mo. 425.

*New Jersey.* — *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49.

*New York.* — *Mt. Vernon v. Seeley*, 74 N. Y. App. Div. 50.

*North Carolina.* — *Hargett v. Bell*, 134 N. Car. 394.

*Ohio.* — *State v. Capital City Dairy Co.*, 62 Ohio St. 123; *Shaw v. Inter-state Sav., etc., Co.*, 8 Ohio Dec. 510; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246.

*Wisconsin.* — *Milwaukee Electric R., etc., Co. v. Bradley*, 108 Wis. 467.

4. Novelty Not a Bar. — *Weber v. Rogers*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 662.

**363.** 8. Balance of Convenience. — See notes 6, 7, 9.

**364.** See note 1.

In Determining Which Way the Balance of Convenience Lies. — See notes 2, 3.

9. Whether Injunction Will Require Change of Possession. — See note 5.

**365.** VII. SECOND INJUNCTIONS. — See notes 2, 3, 4.

VIII. ACTIONS AT LAW — 1. Nature and Extent of Jurisdiction. — See notes 5, 7.

**366.** 2. Where Remedy at Law Is Adequate — *a.* STATEMENT OF RULE. — See notes 1, 3, 5.

**363.** 6. Balance of Convenience Considered. — *Ryan v. Williams*, 100 Fed. Rep. 172; *Cohen v. Delavina*, 104 Fed. Rep. 946; *Denver, etc., R. Co. v. U. S.*, (C. C. A.) 124 Fed. Rep. 156; *Sampson, etc., Co. v. Seaver-Radford Co.*, 129 Fed. Rep. 761; *Harriman v. Northern Securities Co.*, 132 Fed. Rep. 464; *Everett v. Tabor*, 119 Ga. 128. See also *Moon v. Bullock*, 6 Quebec Pr. 59.

7. Where Injury Is Wanton. — *Herr v. Central Kentucky Lunatic Asylum*, 110 Ky. 282. See also *Ives v. Edison*, 124 Mich. 402.

9. Refused When Injunction Would Produce More Injury than Refusal — *United States v. Amelia Milling Co. v. Tennessee Coal, etc., Co.*, 123 Fed. Rep. 811.

*Illinois*. — *Lloyd v. Catlin Coal Co.*, 210 Ill. 460.

*Indiana*. — See *Loy v. Madison, etc., Gas Co.*, 156 Ind. 332.

*Missouri*. — *Tanner v. Lindell R. Co.*, 180 Mo. 1, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363.

*New Jersey*. — *Grey v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642; *Mumford v. Ecuador Development Co.*, (N. J. 1901) 50 Atl. Rep. 476.

*New York*. — *Crocker v. Manhattan L. Ins. Co.*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 687, modified and affirmed 61 N. Y. App. Div. 226; *Backes v. Curran*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 492, reversed on other grounds 69 N. Y. App. Div. 188.

*Ohio*. — *Dissette v. Lowrie*, 9 Ohio Dec. 545, 6 Ohio N. P. 392.

*Pennsylvania*. — *Stout v. Williams*, 203 Pa. St. 161.

**364.** 1. *Tanner v. Lindell R. Co.*, 180 Mo. 1, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363.

2. Injury to Public. — *Tanner v. Lindell R. Co.*, 180 Mo. 1, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 363; *Scharr v. Camden*, (N. J. 1901) 49 Atl. Rep. 817; *Barney v. Rapid Transit R. Com'rs*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 549; *Barney v. New York*, 83 N. Y. App. Div. 237. See also *Grey v. Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642; *Pennsylvania Co. v. Ohio River Junction R. Co.*, 204 Pa. St. 356.

3. *Goddard v. American Queen*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 482, 44 N. Y. App. Div. 454; *Castle v. Bell Telephone Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 38, affirmed 49 N. Y. App. Div. 437; *Rogers v. Ashbridge*, 9 Pa. Dist. 195, 23 Pa. Co. Ct. 492.

5. Property Not Taken from One Party and Placed in Possession of Another. — *Black Point Syndicate v. Eastern Concessions*, 79 L. T. N. S. 658; *San Antonio Water Co. v. W. J. Boden-*

*hamer, etc., Water, etc., Co.*, 133 Cal. 248; *Minneapolis, etc., R. Co. v. Chicago, etc.*, R. Co., 116 Iowa 681; *State v. Graves*, 66 Neb. 17; *Dickson v. Dows*, 11 N. Dak. 404. See also *State v. Baker*, 62 Neb. 840.

**365.** 2. Not Granted on New Bill Containing Same Grounds. — *Savannah, etc., R. Co. v. Postal Tel.-Cable Co.*, 113 Ga. 916; *Buck v. Massie*, 109 La. 776; *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 26 Mont. 193, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365; *Maloney v. King*, 30 Mont. 414.

3. Second Injunction Not Granted While First in Force. — *Leverich v. Mobile*, 122 Fed. Rep. 549.

4. *Savannah, etc., R. Co. v. Postal Tel.-Cable Co.*, 113 Ga. 916; *Conwell v. Neal*, 118 Ga. 524; *Terre Haute, etc., R. Co. v. Peoria, etc., Union R. Co.*, 182 Ill. 501; *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 26 Mont. 193, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 365. See also *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477.

5. Injunction Does Not Operate on Courts or Judges. — *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. Rep. 681; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932.

7. Preventing Vexatious Use of Court of Law. — *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, 109 Fed. Rep. 681; *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932.

Injunction will not lie to restrain several actions at law where there is involved no general principle conclusive as to them all, or where the complainant has not already established his right at law. *Albert Lea v. Nielsen*, 80 Minn. 101, 81 Am. St. Rep. 242.

**366.** 1. Equity Will Not Enjoin Where Remedy at Law Is Adequate — *Alabama*. — *Rucker v. Morgan*, 122 Ala. 308; *German v. Browne*, 137 Ala. 429; *Norwood v. Tyson*, 138 Ala. 269; *Cox v. O'Neal*, (Ala. 1904) 37 So. Rep. 674.

*District of Columbia*. — *Waggaman v. George E. Keith Co.*, 23 App. Cas. (D. C.) 166.

*Georgia*. — *Winn v. Pittman*, 114 Ga. 862; *Conwell v. Neal*, 115 Ga. 421.

*Illinois*. — *Andel v. Starkel*, 192 Ill. 206; *Rogers Ballast Car Co. v. Perrin*, 88 Ill. App. 323; *Bard v. Jones*, 96 Ill. App. 370.

*Indiana*. — *Wayne County v. Dickinson*, 153 Ind. 682.

*Iowa*. — *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84.

*Maryland*. — *Peninsular Constr. Co. v. Merritt*, 90 Md. 589; *Roland Park Co. v. Hull*, 92 Md. 301.

*Massachusetts*. — *Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299.

**366.** *b.* APPLICATION OF RULE. — See note 7.

**367.** See note 4.

**3.** Where Remedy at Law Is Inadequate. — See notes 5, 6.

**4.** Where There Has Been Fraud, Accident, or Mistake — Statement of Rule by Judge Story. — See notes 11, 12.

**368.** This Statement Is Very Broad. — See note 3.

**5.** Confining Action to Original Forum. — See note 7.

**369.** **7.** To Prevent Inequitable Defenses. — See note 8.

Statute of Limitations. — See note 9.

**370.** **8.** Where Discovery Is Necessary to Defense. — See note 6.

**9.** Criminal Prosecutions — *a.* STATEMENT OF RULE. — See note 10.

**371.** See notes 1, 2, 5.

*b.* APPLICATIONS OF RULE. — See note 9.

**372.** *c.* EXCEPTIONS TO RULE. — See note 2.

*Mississippi.* — *Larson v. Larson*, 82 Miss. 116.  
*New Jersey.* — *Slater v. Schwegler*, (N. J. 1903) 54 Atl. Rep. 937; *United New Jersey R., etc., Co. v. McCulley*, (N. J. 1904) 59 Atl. Rep. 229.

*New York.* — *Hooker v. Rochester*, 57 N. Y. App. Div. 530, *affirmed* 172 N. Y. 665; *Weber v. Rogers*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 662.

*Texas.* — *McMickle v. Hardin*, 25 Tex. Civ. App. 222.

*West Virginia.* — *Gall v. Tygart's Valley Bank*, 50 W. Va. 597.

*Canada.* — *Miller v. Campbell*, 14 Manitoba 437.

**366.** **3.** *Morhey v. Chicago, etc., R. Co.*, 116 Iowa 84.

**5.** Rule in Code States. — *McCall v. Fry*, 120 Ga. 661.

**7.** Claims Not Well Founded. — See *Morhey v. Chicago, etc., R. Co.*, 116 Iowa 84.

**367.** **4.** Equitable Estoppel. — See *Given v. Times-Republican Printing Co.*, (C. C. A.) 114 Fed. Rep. 92; *Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647.

**5.** Where Legal Remedy Inadequate. — *Kidwell v. Godfrey*, 14 Hawaii 141, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Brooks v. Raiden*, 113 Ga. 86; *Blount v. Connolly*, 110 Mo. App. 603; *Weber v. Rogers*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 662; *Sloane v. Clauss*, 64 Ohio St. 125.

**6.** Adjustment of Complicated Accounts. — *Brown v. Schintz*, 109 Ill. App. 598.

**11.** Mistake. — See *Gregory v. Howell*, 118 Iowa 26.

**12.** Fraud. — *Kempson v. Kempson*, 58 N. J. Eq. 94; *Huettinger v. Huettinger*, (N. J. 1899) 43 Atl. Rep. 574. See also *Gregory v. Howell*, 118 Iowa 26.

**368.** **3.** Mere Fact that There Is a Remedy at Law Insufficient. — *Conner v. Groh*, 90 Md. 674.

**7.** Confining Action to Original Forum. — *Gregory v. Howell*, 118 Iowa 26.

**369.** **8.** May Enjoin Setting Up of Judgment. — *Brennan v. Berlin Iron-Bridge Co.*, 73 Conn. 412. See also *Streitwolf v. Streitwolf*, 181 U. S. 179.

**9.** Defense of Statute of Limitations. — *Wells v. Vansickle*, 112 Fed. Rep. 398, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Paul v. Fidelity, etc., Co.*, 186 Mass. 413, 104 Am.

St. Rep. 594; *Clark v. Augustine*, 62 N. J. Eq. 689.

**370.** **6.** Where Discovery May Be Had at Law, there is no ground for equitable relief by injunction. *Ducktown Sulphur, etc., Co. v. Fain*, 109 Tenn. 56.

**10.** Prosecution for Violation of Statutes. — *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *Arbuckle v. Blackburn*, (C. C. A.) 113 Fed. Rep. 616; *Brown v. Birmingham*, 140 Ala. 590, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370, 372; *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370; *Louisville, etc., R. Co. v. Barrall*, (Ky. 1904) 77 S. W. Rep. 1117; *Municipal Tel. Co. v. McCreary*, (Supm. Ct. Spec. T.) 77 N. Y. Supp. 409; *Greiner-Kelley Drug Co. v. Truett*, 97 Tex. 377. See also the concurring opinion of Walker, J., in *Paul v. Washington*, 134 N. Car. 363, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370.

**Does Not Apply to Prosecution under Invalid Law.** — *Southern Express Co. v. Ensley*, 116 Fed. Rep. 756.

**371.** **1.** Infraction of Municipal Ordinance. — *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 115 Fed. Rep. 537; *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421; *Brown v. Birmingham*, 140 Ala. 590, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370, 372; *Moultrie v. Patterson*, 109 Ga. 370; *Bainbridge v. Reynolds*, 111 Ga. 758; *Cavanaugh v. Cleveland*, 8 Ohio Dec. 329, 6 Ohio N. P. 423. See also *Morhey v. Chicago, etc., R. Co.*, 116 Iowa 84. But see *McFarlain v. Jennings*, 106 La. 541.

**2.** Prosecution by Indictment or Summary Process. — See concurring opinion of Walker, J., in *Paul v. Washington*, 134 N. Car. 363, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370, and *quoting* all of the text paragraph.

**5.** Void Ordinance. — *Brown v. Birmingham*, 140 Ala. 590, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370-372; *Orange City v. Thayer*, 45 Fla. 502. But see *Boyd v. Frankfort*, (Ky. 1903) 77 S. W. Rep. 669; *Cavanaugh v. Cleveland*, 8 Ohio Dec. 329, 6 Ohio N. P. 423.

**The Enforcement of an Ordinance Void in Part** may be enjoined so far as it is void. *Ignaz v. Knoxville*, 1 Tenn. Ch. App. 1.

**9.** Ordinances Relating to Liquor Traffic. — *Paul v. Washington*, 134 N. Car. 363.

**372.** **2.** Prosecution to Try Right under

**372.** Injury to Property Rights. — See note 5.

**373.** 11. Actions Relating to Real Property. — See note 7.

13. Necessity of Confessing Judgment. — See notes 11, 12.

**374.** IX. JUDGMENTS AND DECREES — 1. Necessity of Taking Advantage of Legal Remedies — *b.* FAILURE TO MAKE DEFENSE AT LAW — (1) *Defenses Purely Legal* — (a) Statement of Rule. — See note 5.

**375.** See notes 1, 3, 4, 6.

**377.** (2) *Defenses Cognizable Both at Law and in Equity.* — See notes 1, 2.

*c.* FAILURE TO TAKE ADVANTAGE OF REMEDY BY APPEAL, CERTIORARI, MOTION, OR SUPERSEDEAS. — See note 4.

**378.** See notes 3, 5.

2. *Defenses Not Available in Action at Law* — *Defense of Purely Equitable Character.* — See note 8.

**379.** See note 1.

3. *Judgments Obtained by Fraud* — *a.* STATEMENT OF GENERAL RULE. — See note 9.

*Consideration in Court of Equity.* — *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421.

**372.** 5. Injury to Property Rights. — *Dobbins v. Los Angeles*, 195 U.S. 223; *Daly v. Elton*, 195 U.S. 242; *Southern Express Co. v. Ensley*, 116 Fed. Rep. 756; *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421; *Georgia R., etc., Co. v. Atlanta*, 118 Ga. 486; *United Tractor Co. v. Watervliet*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392; *Sweeney v. Webb*, 33 Tex. Civ. App. 324; *Joseph Schlitz Brewing Co. v. Superior*, 117 Wis. 297. But see *Davis, etc., Mfg. Co. v. Los Angeles*, 115 Fed. Rep. 537.

*May Enjoin Enforcement of Unconstitutional Statute.* — *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121.

**373.** 7. Estoppel to Enforce Claim. — *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186.

11. Confession of Judgment. — *Henley v. Cottrell Real Estate, etc., Co.*, 101 Va. 70.

12. Where Party Has No Defense to Action at Law. — *Compare Haynes v. Lebanon Second Nat. Bank*, 106 Tenn. 425.

**374.** 5. Failure to Make Defense at Law — *Alabama.* — *Foshee v. McCreary*, 123 Ala. 493. *Arkansas.* — *Moore v. McCloy*, 70 Ark. 505. *Connecticut.* — *Allis v. Hall*, 76 Conn. 322.

*Georgia.* — *Fitzgerald v. Bowen*, 114 Ga. 691, 88 Am. St. Rep. 53.

*Iowa.* — *Murphy v. Cuddihy*, 111 Iowa 645.

*Mississippi.* — *Sintes v. Barber*, 78 Miss. 585.

*Nebraska.* — *Hess v. Lell*, (Neb. 1903) 94 N. W. Rep. 975.

*Oklahoma.* — *Herbein v. Moore*, 10 Okla. 317.

*Washington.* — *Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118.

*West Virginia.* — *Shay v. Nolan*, 46 W. Va. 299.

**375.** 1. Cases in Which Equity Will Relieve Enumerated. — *Dolton v. Dolton*, 201 Ill. 155; *Klinesmith v. Van Bramer*, 104 Ill. App. 384; *Crist v. Cosby*, 11 Okla. 635, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374; *Hoge v. Fidelity L. & T. Co.*, 103 Va. 1; *Demaris v. Barker*, 33 Wash. 200, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374, 375; *Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118. See also *Hockaday v. Jones*, 8 Okla. 156.

3. Immaterial that Judgment Is Wrong. — See *Crist v. Cosby*, 11 Okla. 635, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

4. Injustice and Hardship of Judgment. — See *Crist v. Cosby*, 11 Okla. 635, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

6. Ignorance of Defense. — *Polarek v. Gordon*, 102 Ill. App. 356; *Chapman v. Salfisberg*, 111 Ill. App. 102; *Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118.

**377.** 1. *Defenses Cognizable Both at Law and in Equity.* — *Hoge v. Fidelity L. & T. Co.*, 103 Va. 1.

2. *Hoge v. Fidelity L. & T. Co.*, 103 Va. 1.

4. Neglect of Remedy by Appeal. — *Dolton v. Dolton*, 201 Ill. 155; *Grampp v. McBrearty*, 109 Ill. App. 277; *Henion v. Pohl*, 113 Ill. App. 100; *Kyle v. Richardson*, 31 Tex. Civ. App. 101; *Aultman v. Higbee*, 32 Tex. Civ. App. 502; *Ward v. Rees*, 11 Wyo. 459.

**378.** 8. Neglect of Remedy by Certiorari. — *Johnson v. Driver*, 108 Ga. 595; *Reid v. Stock Yards Lumber, etc., Co.*, 88 Ill. App. 32; *Chapman v. Kane*, 97 Ill. App. 567; *Kyle v. Richardson*, 31 Tex. Civ. App. 101.

5. Neglect of Remedy by Motion — In Trial Court. — *Kitzman v. Minnesota Thresher Mfg. Co.*, 10 N. Dak. 26; *Sherman Steam-Laundry Co. v. Carter*, 24 Tex. Civ. App. 533.

8. Defense Purely Equitable. — *Polarek v. Gordon*, 102 Ill. App. 356. See also *Hockaday v. Jones*, 8 Okla. 156.

**379.** 1. Where No Attempt to Defend Is Made. — See *Hooper v. Birchfield*, 138 Ala. 423.

9. Judgments Obtained by Fraud — *United States.* — *Wood v. Davis*, 108 Fed. Rep. 130; *Holton v. Davis*, (C. C. A.) 108 Fed. Rep. 138; *National Surety Co. v. State Bank*, (C. C. A.) 120 Fed. Rep. 593.

*Connecticut.* — *Allis v. Hall*, 76 Conn. 322.

*Missouri.* — *Lee v. Harmon*, 84 Mo. App. 157. *Pennsylvania.* — *Mason v. Quinn*, 9 Kulp (Pa.) 543.

*Tennessee.* — *Williams v. Pile*, 104 Tenn. 273.

*Wisconsin.* — *Balch v. Beach*, 119 Wis. 77.

Remedy at Law Does Not Oust Jurisdiction. — *Williams v. Pile*, 104 Tenn. 273.

State Court May Enjoin Federal Judgment. — *Keith v. Alger*, (Tenn. 1905) 85 S. W. Rep. 71,



- 380.** See notes 1, 2, 3.  
 Fraud in Procurement of Judgment Necessary. — See note 5.
- 381.** Laches a Bar to Relief. — See note 2.  
 Necessity of Meritorious Defense. — See note 6.  
 Solvency of Defendant. — See note 9.  
*c.* LOSS OF DEFENSE OR REMEDY BY VIOLATION OF AGREEMENT.  
 — See note 11.
- 382.** See note 7.
- 383.** 5. Judgments Obtained Through Mistake — Mistake of Fact. — See note 4.  
 6. Judgments Obtained Through Accident. — See note 11.
- 385.** 8. Void Judgments — *a.* JUDGMENTS VOID FOR WANT OF JURISDICTION OF SUBJECT-MATTER. — See notes 7, 8.  
*b.* JUDGMENTS VOID FOR WANT OF JURISDICTION OF PERSON —  
 (1) *Want of Notice or Process.* — See note 10.
- 386.** See note 1.  
 Necessity of Showing Defense. — See note 5.
- 387.** See note 1.  
 Want of Notice or Knowledge Is Not Enough. — See note 2.  
 Effect of Adequate Remedy at Law on Right to Injunction. — See note 5.

Will Enjoin Judgments Subsequently Becoming Inequitable. — *Johnson v. Huber*, 106 Wis. 282.

Judgment Obtained on Fraudulent Service Enjoined. — *Dowell v. Goodwin*, 22 R. I. 287, 84 Am. St. Rep. 842.

**380.** 1. Meritorious Defense Prevented by Fraud. — *Polarek v. Gordon*, 102 Ill. App. 356; *Brooks v. Twitchell*, 182 Mass. 443, 94 Am. St. Rep. 662; *Truitt v. Darnell*, 65 N. J. Eq. 221; *Delaney v. Brown*, 72 Vt. 344.

2. Loss of Right to New Trial Through Fraud. — *Everett v. Tabor*, 119 Ga. 128.

3. Loss of Right to Appeal Through Fraud. — *Everett v. Tabor*, 119 Ga. 128.

5. Cause of Action Vitiating by Fraud Not Ground for Injunction. — *Loughren v. Bonniwell*, 125 Iowa 518.

**381.** 2. Party Should Be Free from Negligence. — *Weeks v. Holmes*, 101 Ill. App. 435.

6. Strict Proof of Fraud Necessary. — *Holton v. Davis*, (C. C. A.) 108 Fed. Rep. 138; *Wood v. Davis*, 108 Fed. Rep. 130. See also *Everett v. Tabor*, 119 Ga. 128.

9. Effect of Solvency of Defendant. — See *Everett v. Tabor*, 119 Ga. 128.

11. Violation of Agreement. — *Perry v. Johnston*, 95 Fed. Rep. 322; *Johnson v. Huber*, 106 Wis. 282.

**382.** 7. Agreement Not to Enforce Judgment. — *Delaney v. Brown*, 72 Vt. 344.

**383.** 4. Mistake Not Attributable to Party's Negligence. — *National Surety Co. v. State Bank*, (C. C. A.) 120 Fed. Rep. 593; *Williams v. Pile*, 104 Tenn. 273; *Weed v. Hunt*, 76 Vt. 212.

11. Accident Not Attributable to Neglect. — *National Surety Co. v. State Bank*, (C. C. A.) 120 Fed. Rep. 593; *Polarek v. Gordon*, 102 Ill. App. 356; *Williams v. Pile*, 104 Tenn. 273; *Weed v. Hunt*, 76 Vt. 212.

Only Where Enforcement Would Be Inequitable. — *Little Rock, etc., R. Co. v. Newman*, 73 Ark. 555.

**385.** 7. View that Injunction Does Not Lie. — *Birmingham R., etc., Co. v. Birmingham*

*Traction Co.*, 121 Ala. 475; *Hockaday v. Jones*, 8 Okla. 156.

8. View that Injunction Lies. — *Tucker v. Williams*, (Tex. Civ. App. 1900) 56 S. W. Rep. 585; *Harrison v. Lokey*, 26 Tex. Civ. App. 404.

10. View that Want of Jurisdiction Does Not Authorize Injunction. — See *Howlett v. Turner*, 93 Mo. App. 20.

**386.** 1. Power of Courts of Chancery to Enjoin — In General. — *Kochman v. O'Neill*, 202 Ill. 110; *Robberson v. Crow*, 3 Indian Ter. 174; *Combs v. Sewell*, (Ky. 1900) 59 S. W. Rep. 526; *Strowbridge v. Miller*, (Neb. 1903) 94 N. W. Rep. 825; *Dashner v. Wallace*, 29 Tex. Civ. App. 151; *August Kern Barber Supply Co. v. Freeze*, 96 Tex. 513. See also *McConkie v. Landt*, 126 Iowa 317.

5. View that Valid Defense Need Not Be Shown. — *Crippen v. X. Y. Irrigating Ditch Co.*, 32 Colo. 447.

Judgment Void on Its Face. — When the judgment is a nullity upon its face, it is not necessary, in seeking to enjoin its enforcement, to show a valid defense. *August Kern Barber Supply Co. v. Freeze*, 96 Tex. 513; *Harrison v. Lokey*, 26 Tex. Civ. App. 404; *Cooley v. Barker*, 122 Iowa 440; *Schiele v. Thede*, 126 Iowa 398.

**387.** 1. View that Valid Defense Must Be Shown. — *Regan v. Eads*, 101 Ill. App. 509; *True v. Mendenhall*, 67 Kan. 497, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387; *Strowbridge v. Miller*, (Neb. 1903) 94 N. W. Rep. 825; *Chambers v. Gallup*, 30 Tex. Civ. App. 424; *Foust v. Warren*, (Tex. Civ. App. 1903) 72 S. W. Rep. 404. See also *Tootle v. Ellis*, 63 Kan. 422, 88 Am. St. Rep. 246.

2. *True v. Mendenhall*, 67 Kan. 497, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387.

5. *Givens v. Delprat*, 28 Tex. Civ. App. 363; *Baer v. Higson*, 26 Utah 78, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 387. Compare *Smith v. Carroll*, 28 Tex. Civ. App. 330 (distinguishing *Galveston, etc., R. Co. v. Wars*, 74 Tex. 47, cited in the original note),

**389.** 9. Erroneous or Irregular Judgments — *a.* STATEMENT OF RULE. — See note 1.

**390.** *b.* APPLICATIONS OF RULE. — See note 12.

**391.** See note 1.

**392.** 11. Judgments Obtained Through Negligence, Incompetence, or Mistake of Attorney. — See note 3.

**393.** 12. Judgments by Default or Confession — Judgments by Default. — See notes 15, 17.

**394.** See notes 1, 2, 3.

**395.** 13. Judgments Based on Gaming Contracts. — See note 1.

14. Judgments Based on Usurious Contracts. — See note 6.

**396.** 16. Satisfied Judgments — View that Satisfied Judgment May Be Enjoined. — See note 9.

**397.** View that Satisfied Judgment Cannot Be Enjoined. — See note 1.

**398.** 19. Judgments or Decrees of Courts of Concurrent Jurisdiction. — See note 3.

**401.** 22. Injunction to Obtain Benefit of Set-off — Insolvency of Judgment Creditor. — See note 1.

**X. EXECUTIONS** — 1. Right to Levy and Sell in General. — See note 6.

2. Relief in General — Adequacy of Legal Remedy — By Motion or by Action. — See note 7.

**403.** 3. When Remedy at Law Inadequate. — See note 5.

4. Irregularities in Process or Proceedings Thereunder — *a.* RULE STATED. — See note 9.

**405.** *b.* APPLICATION OF RULE — (2) *Irregularity in Proceedings under Writ* — (b) Levy upon Exempt Property. — See note 3.

**389.** 1. Irregularities and Errors Not Ground for Injunction. — *Maher v. Title Guarantee, etc., Co.*, 95 Ill. App. 365; *Myers v. Jones*, 61 Kan. 191; *Hunter v. Kansas City Safe Deposit, etc., Bank*, 158 Mo. 262; *Mott v. Bernard*, 97 Mo. App. 265; *Henderson v. Moore*, 125 N. Car. 383.

**390.** 12. Rendering Excessive Judgment. — *Henderson v. Moore*, 125 N. Car. 383; *George v. Nowlan*, 38 Oregon 537.

**391.** 1. Irregularities in Service of Process. — *Off v. Title G., etc., Co.*, 87 Ill. App. 472.

**392.** 3. Negligence, Incompetence, or Mistake of Counsel. — *Patterson v. Yancey*, 97 Mo. App. 681.

**393.** 15. Judgments by Default Not Usually Relieved Against. — *Patterson v. Yancey*, 97 Mo. App. 681; *McHale v. Metz*, (Neb. 1903) 96 N. W. Rep. 1004; *Crist v. Cosky*, 11 Okla. 635.

17. Loss of Defense by Attorney's Neglect. — See *Kanape v. Reeves*, 127 Ala. 216.

**394.** 1. Necessity of Showing Meritorious Defense. — *Patterson v. Yancey*, 97 Mo. App. 681; *Dorwart v. Troyer*, (Neb. 1901) 96 N. W. Rep. 116; *Koehler v. Reed*, (Neb. 1901) 96 N. W. Rep. 380; *Meinert v. Harder*, 39 Oregon 609; *Sherman Steam Laundry Co. v. Carter*, 24 Tex. Civ. App. 533.

2. Inadequate Remedy at Law. — *Koehler v. Reed*, (Neb. 1901) 96 N. W. Rep. 380; *Meinert v. Harder*, 39 Oregon 609.

3. Absence of Negligence. — *Patterson v. Yancey*, 97 Mo. App. 681; *Dorwart v. Troyer*, (Neb. 1901) 96 N. W. Rep. 116; *Koehler v. Reed*, (Neb. 1901) 96 N. W. Rep. 380; *Meinert v. Harder*, 39 Oregon 609.

**395.** 1. Where Judgments Based on Gaming Contracts Void. — *Harris v. McDonald*, 79 Ill. App. 638.

6. Qualifications of Rule — Embarrassment and Difficulty in Legal Remedy. — *Huff v. Miller*, (Tenn. Ch. 1900) 58 S. W. Rep. 876.

**396.** 9. Injunction of Satisfied Judgment. — *Johnson v. Huber*, 106 Wis. 282.

**397.** 1. View that Equity Cannot Enjoin Satisfied Judgment. — *Pyle v. Crebs*, 112 Ill. App. 480.

**398.** 3. Judgments or Decrees of Courts of Concurrent Jurisdiction. — *Adoue v. Wettermark*, 22 Tex. Civ. App. 545; *Ellis v. Harrison*, 24 Tex. Civ. App. 13. But see *Allis v. Hall*, 76 Conn. 322.

Rule under Kentucky Code. — *Shackleford v. Patteson*, 110 Ky. 863.

**401.** 1. View that Insolvency of Judgment Creditor Sufficient. — *Dunham Lumber Co. v. Holt*, 124 Ala. 181; *Commercial State Bank v. Ketchum*, (Neb. 1901) 96 N. W. Rep. 614; *Norton v. Wochler*, 31 Tex. Civ. App. 522.

6. Satisfied Execution. — An injunction will not lie to restrain an officer from enforcing a satisfied execution. *Parker v. Oxendine*, 85 Mo. App. 212.

7. By Motion in Action. — *Hitchcock v. Culver*, 107 Ga. 184; *Cincinnati, etc., R. Co. v. Cathcart*, 111 Ga. 818, 81 Am. St. Rep. 81; *Rice v. Macon*, 117 Ga. 401; *Linville v. Brown*, 9 Kan. App. 747; *Ward v. Rees*, 11 Wyo. 459.

If Relief Denied Equity May Interfere. — *Eppinger v. Scott*, 130 Cal. 275.

**403.** 5. Remedy Inadequate. — *Eufaula Nat. Bank v. Pruett*, 128 Ala. 470; *Plummer v. Talbott*, (Ky. 1899) 50 S. W. Rep. 1097.

9. Void Process. — There is a concurrent remedy by injunction in a court of equity to enjoin void process. *Alexander v. Henderson*, 105 Tenn. 411.

**405.** 3. May Enjoin Sale of Property Ex-

**405.** Exemptions in Land — Homestead. — See note 5.

**406.** 5. Seizure of Property of Stranger to Writ — *a.* IN GENERAL. — See note 1.

*b.* REMEDY BY TRIAL OF RIGHT OF PROPERTY. — See note 4.

**407.** *d.* WHEN REMEDY AT LAW IS INADEQUATE — (1) *In General.* — See note 1.

Ordinary Legal Remedies Not Available. — See note 3.

(2) *Property of Peculiar Value to Owner.* — See note 6.

**408.** 6. To Prevent Cloud upon Title — *a.* POWER IN GENERAL. — See note 5.

*b.* CIRCUMSTANCES JUSTIFYING INTERFERENCE — (1) *Broad General Rule as to Void Sale.* — See notes 6, 8.

**409.** (2) *Conflict of Authority* — Levy upon Land of Stranger to Writ. — See note 3.

Prevention of Cloud Though Sale Would Be Void. — See note 5.

**410.** Relief Though Judgment Not a Lien. — See note 1.

**411.** XI. POWER OF FEDERAL COURTS TO ENJOIN PROCEEDINGS IN STATE COURTS — 1. Where State Court First Acquires Jurisdiction — In Construing This Statute. — See note 7.

**412.** The Prohibition Contained in the Statute. — See notes 3, 4.

empted by Agreement. — *Streeter v. Seigman*, (N. J. 1900) 45 Atl. Rep. 908.

**405.** 5. Homestead Exemptions. — *Wylde v. Capps*, 27 Tex. Civ. App. 112.

**406.** 1. Seizure of Stranger's Property — General Rule. — *Greenberg v. Holmes*, 100 Ill. App. 186; *White v. Smith*, (N. J. 1904) 58 Atl. Rep. 817; *Zanhizer v. Hefner*, 47 W. Va. 418.

That a portion of the personal property levied upon does not belong to the appellant affords him no ground for enjoining the sale under execution. *Corder v. Steiner*, (Tex. Civ. App. 1899) 54 S. W. Rep. 277.

4. Trial of Right of Property. — *Williams v. Farmers' Nat. Bank*, 22 Tex. Civ. App. 581.

**407.** 1. Remedy at Law Inadequate. — *Gale Mfg. Co. v. Sleeper*, (Kan. 1905) 79 Pac. Rep. 648; *Bean v. Everett*, (Ky. 1900) 56 S. W. Rep. 403; *Halley v. Ingersoll*, 14 S. Dak. 7.

3. Ordinary Remedies Not Available. — Where the sheriff levies on property but does not remove it, the defendant in the execution who still retains the goods cannot sustain replevin against the officer, and therefore an injunction will issue to prevent the sale of such property. *Owens v. Gascho*, 154 Ind. 225.

6. Property of Peculiar Value. — *Sloane v. Clauss*, 64 Ohio St. 125; *Zanhizer v. Hefner*, 47 W. Va. 418.

**408.** 5. Where Deed Would Be Set Aside. — *George v. Nowlan*, 38 Oregon 537; *Barrell v. Adams*, 26 Pa. Super. Ct. 635.

6. Void Sale — General Rule. — See *Chamberlain v. Baker*, 28 Tex. Civ. App. 499.

8. No Equity Where Complainant Shows Title in Himself. — Injunction lies to restrain the sale of land under an execution issued upon a void judgment where the defect does not appear on the face of the record, since the effect of such sale would be to create a cloud upon the title. *Henman v. Westheimer*, 110 Mo. App. 191.

**409.** 3. Levy upon Land of Stranger to Writ. — *Meyer v. Ives*, 28 Colo. 461; *Magoffin v. San Antonio Brewing Assoc.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 843.

5. Prevention of Cloud Though Sale Would Be Void. — *Einstein v. State Bank*, 137 Cal. 47; *Bean v. Everett*, (Ky. 1900) 56 S. W. Rep. 403.

**410.** 1. Where Judgment Not a Lien. — *Predohl v. O'Sullivan*, 59 Neb. 311.

**411.** 7. Statute Prohibits Interference with Proceedings Already Begun. — *U. S. v. Parkhurst-Davis Mercantile Co.*, 176 U. S. 317; *Mutual Reserve Fund L. Assoc. v. Phelps*, 190 U. S. 147; *Chicago, etc., R. Co. v. St. Joseph Union Depot Co.*, 92 Fed. Rep. 22; *Aultman, etc., Co. v. Brumfield*, 102 Fed. Rep. 7; *Oliver v. Parlin, etc., Co.*, (C. C. A.) 105 Fed. Rep. 272; *Phelps v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 112 Fed. Rep. 453, *affirmed* 190 U. S. 147; *Evans v. Gorman*, 115 Fed. Rep. 399; *Texas Cotton Products Co. v. Starnes*, 128 Fed. Rep. 183, *affirmed* (C. C. A.) 133 Fed. Rep. 1022.

The Circuit Court of the United States is without jurisdiction to enjoin a state from the enforcement of its own laws. *State v. Chicago, etc., R. Co.*, 61 Neb. 545, 62 Neb. 123.

Criminal Prosecutions in a police court for violation of a municipal ordinance are proceedings within the meaning of this section. *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421.

Corporation Commission of North Carolina. — Although the corporation commission of North Carolina is a court of record, it may be enjoined by a federal court as to acts not judicial. *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82.

The Court of Visitation of Kansas is not a court within the meaning of the section. *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

The State Railroad Commission is not a court within the meaning of the section. *Louisville, etc., R. Co. v. Brown*, 123 Fed. Rep. 946.

The Commissioners' Court of a Texas County is not a court within the meaning of the section. *Busch v. Webb*, 122 Fed. Rep. 655.

**412.** 3. Application of Statute to Courts, Officers, and Litigants. — *Cœur d'Alene R., etc.,*

**412.** Illustrations. — See notes 7, 8.

**413.** Where Property of Third Person Sold. — See note 2.  
Receivership. — See note 4.

**2.** Where Federal Court First Acquires Jurisdiction. — See note 12.

**414.** See note 2.

**3.** Where Suit Has Been Removed to Federal Court. — See note 5.

**4.** Under Bankruptcy Laws — *a.* UNDER ACT OF 1898 — (1) *Where Time After Which Petition May Be Filed Has Not Elapsed.* — See note 10.

**420.** XII. POWER OF STATE COURTS TO ENJOIN PROCEEDINGS IN FEDERAL COURTS. — See note 3.

**421.** XIII. POWER OF COURTS OF ONE STATE OR COUNTRY TO ENJOIN PROCEEDINGS IN ANOTHER STATE OR COUNTRY — **2.** Power to Enjoin Proceedings of Courts of Sister State — *a.* UNDER WHAT CIRCUMSTANCES INJUNCTION GRANTED — Statement of Rule. — See note 7.

**422.** Evasion of Domestic Laws. — See notes 1, 3, 6.

**423.** XIV. ENJOINING LEGISLATIVE OR EXECUTIVE ACTION. — See notes 3, 4.

**XV. MODIFICATION, DISSOLUTION, REINSTATEMENT, AND CONTINUANCE** — **1.** Modification of Injunction. — See notes 7, 9.

*Co. v. Spalding*, (C. C. A.) 93 Fed. Rep. 280; *Security Trust Co. v. Union Trust Co.*, 134 Fed. Rep. 301.

**412.** **4.** Application to All Steps Taken in Proceedings. — *Leathe v. Thomas*, (C. C. A.) 97 Fed. Rep. 136; *Security Trust Co. v. Union Trust Co.*, 134 Fed. Rep. 301.

**Does Not Apply to Threatened Proceedings.** — *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421.

**7.** Judgments of State Court. — *Compare National Surety Co. v. State Bank*, (C. C. A.) 120 Fed. Rep. 593.

**8.** Sales under Execution — Generally. — *Leathe v. Thomas*, (C. C. A.) 97 Fed. Rep. 136; *Mills v. Provident L. & T. Co.*, (C. C. A.) 100 Fed. Rep. 344.

**413.** **2.** View that Court Cannot Enjoin. — *Mills v. Provident L. & T. Co.*, (C. C. A.) 100 Fed. Rep. 344.

**4.** Issuance of Certificates by Receiver. — See *Phelps v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 112 Fed. Rep. 453, *affirmed* 190 U. S. 147.

**12.** Where Federal Courts First Acquire Jurisdiction. — *Riverdale Cotton Mills v. Alabama*, etc., Mfg. Co., 111 Fed. Rep. 431, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 413; *Iron Mountain R. Co. v. Memphis*, (C. C. A.) 96 Fed. Rep. 113; *Rodgers v. Pitt*, 96 Fed. Rep. 668; *James v. Central Trust Co.*, (C. C. A.) 98 Fed. Rep. 489; *Pitt v. Rodgers*, (C. C. A.) 104 Fed. Rep. 387; *Mercantile Trust, etc., Co. v. Roanoke*, etc., R. Co., 109 Fed. Rep. 3; *Starr v. Chicago*, etc., R. Co., 110 Fed. Rep. 3, *affirmed* 188 U. S. 537; *State Trust Co. v. Kansas City*, etc., R. Co., 110 Fed. Rep. 10; *Stewart v. Wisconsin Cent. R. Co.*, 117 Fed. Rep. 782; *Union L. Ins. Co. v. Riggs*, 123 Fed. Rep. 312, *reversed* on other grounds (C. C. A.) 129 Fed. Rep. 207; *Massie v. Buck*, (C. C. A.) 128 Fed. Rep. 27; *Julian v. Central Trust Co.*, 193 U. S. 93. See also *Phelps v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 112 Fed. Rep. 453, *affirmed* 190 U. S. 147.

**414.** **2.** *Rodgers v. Pitt*, 96 Fed. Rep. 668.

**5.** Where Cause Is Removed to Federal Court. — *Phelps v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 112 Fed. Rep. 453, *affirmed* 190 U. S. 147.

**10.** As to the powers of bankruptcy courts to stay proceedings in state courts, see the annotations to the title INSOLVENCY AND BANKRUPTCY, *passim*.

**420.** **3.** State Courts Cannot Enjoin Proceedings in Federal Courts. — *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 177 U. S. 51; *Johnstown Min. Co. v. Morse*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 504; *McCullough v. Hicks*, 63 S. Car. 542.

**Exception.** — A state court having jurisdiction over the party may restrain the prosecution of an action in a federal court, no federal question being involved, until he shall make such discovery of evidence as the rules of equity require. *Shaw v. Frey*, (N. J. 1905) 59 Atl. Rep. 811.

**421.** **7.** Power of Court of Equity to Enjoin. — *Biggs v. Colby*, (Indian Ter. 1902) 69 S. W. Rep. 910; *Margarum v. Moon*, 63 N. J. Eq. 586; *Locomobile Co. v. American Bridge Co.*, 80 N. Y. App. Div. 44.

**422.** **1.** Proceedings in Sister State to Evade Laws of Domestic State. — *Biggs v. Colby*, (Indian Ter. 1902) 69 S. W. Rep. 910.

**3.** Proceedings in Sister State to Subject Exempt Wages to Satisfaction of Claim. — *Galbraith v. Rutter*, 20 Pa. Super. Ct. 554.

**6.** Proceedings in Foreign State to Evade Domestic Insolvency Laws. — *Davis v. Butters Lumber Co.*, 132 N. Car. 233.

**423.** **3.** Enjoining Legislative Action. — *Wright v. People*, 31 Colo. 461; *Dailey v. Nassau County R. Co.*, 52 N. Y. App. Div. 272; *Kadderly v. Portland*, 44 Oregon 118; *State v. Superior Ct.*, 105 Wis. 651.

**May Enjoin Extension of Franchise by City.** — *Poppleton v. Moores*, 62 Neb. 851.

**4.** Enjoining Executive Action. — *Kirwan v. Murphy*, 189 U. S. 35; *People v. District Ct.*, 29 Colo. 182; *Kansas City Southern R. Co. v. State R. Commission*, 106 La. 583; *In re Gear*, 9 Ohio Dec. 299, 6 Ohio N. P. 312.

**7.** Power of Court to Modify Injunction. — *Denver, etc., R. Co. v. U. S.*, (C. C. A.) 124 Fed. Rep. 156.

**9.** Discretion of Court Not Lightly Disturbed. — *Christopher v. Condodgeorge*, 128 Cal. 581;

**424.** 2. Dissolution of Injunction — *a.* WHAT COURTS HAVE POWER TO DISSOLVE. — See note 2.

*b.* DISCRETION OF COURT IN DISSOLVING INJUNCTION. — See note 3.

**425.** Nature of Discretion. — See notes 1, 2, 3.

*d.* IPSO FACTO DISSOLUTION. — See notes 5, 6.

**426.** *g.* GROUNDS OF DISSOLUTION — (1) *Want of Jurisdiction to Issue.* — See notes 2, 3, 6.

**427.** (3) *Vagueness and Uncertainty of Writ.* — See note 2.

(4) *Laches in Prosecuting Cause.* — See note 3.

**428.** (6) *Defective Service of Process.* — See note 9.

**429.** (7) *Want of Notice of Application.* — See note 1.

(9) *Defective or Insufficient Bond* — (a) *In General.* — See notes 6, 7.

**430.** See note 1.

(b) *Requiring Additional Security* — Court May Require or Permit Additional Security — General Rule. — See note 4.

**431.** (12) *Misrepresentation or Suppression of Material Facts.* — See note 2.

Keogh v. Pittston, etc., St. R. Co., 195 Pa. St. 131.

**424.** 2. Dissolution by Court Other than That Granting Injunction. — A circuit judge should not dissolve an injunction granted by a district judge holding a Circuit Court. *Ide v. Crosby*, 104 Fed. Rep. 582.

3. Judicial Discretion in Dissolving Injunction — *United States.* — *Terre Haute v. Farmers' L. & T. Co.*, (C. C. A.) 99 Fed. Rep. 838.

*Alabama.* — *Mabel Min. Co. v. Pearson Coal, etc.*, Co., 121 Ala. 567; *Dunham Lumber Co. v. Holt*, 124 Ala. 181.

*Arizona.* — *Hampson v. Adams*, 6 Ariz. 335.

*California.* — *Einstein v. State Bank*, 137 Cal.

47.

*Florida.* — *Baya v. Lake City*, 44 Fla. 491; *Richardson v. Kittlewell*, 45 Fla. 551.

*Michigan.* — *Kelsey v. Wayne Circuit Judge*, 120 Mich. 457.

*Minnesota.* — *Stillwater Water Co. v. Farmer*, 92 Minn. 230.

*Mississippi.* — *Alcorn v. Alcorn*, 76 Miss. 907.

*Montana.* — *Craver v. Stapp*, 26 Mont. 314.

*New York.* — *Delaware, etc., R. Co. v. Syracuse, etc., R. Co.*, 43 N. Y. App. Div. 621; *Levy v. Rosenstein*, 56 N. Y. App. Div. 618.

*North Dakota.* — *Dickson v. Dows*, 11 N. Dak. 404.

*Pennsylvania.* — *Packard v. Thiel College*, 207 Pa. St. 280.

*West Virginia.* — *McEldowney v. Lowther*, 49 W. Va. 348.

*Wisconsin.* — *Milwaukee Electric R., etc., Co. v. Bradley*, 108 Wis. 467.

This rule applies notwithstanding the coming in of a sworn answer fully meeting the allegations of the bill. *Chicago, etc., R. Co. v. Kalamazoo Circuit Judge*, (Mich. 1904) 101 N. W. Rep. 525. See also *Price v. Grice*, 10 Idaho 443.

**425.** 1. Discretion Should Not Be Arbitrary. — *Marshfield Land, etc., Co. v. John Week Lumber Co.*, 108 Wis. 268.

2. Consideration of Balance of Convenience. — *Alcorn v. Alcorn*, 76 Miss. 907; *Gerken v. Hall*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 225, affirmed 65 N. Y. App. Div. 16.

3. *Ehrenreich v. Froment*, 54 N. Y. App. Div. 196. See also *State v. Judge*, 52 La. Ann. 1275.

5. Dismissal of Bill Dissolves Injunction. — *Lyons v. Green*, 68 Ark. 205; *Shackleford v. Williams*, (Ky. 1899) 51 S. W. Rep. 614; *South Carolina, etc., R. Co. v. American Telephone, etc., Co.*, 65 S. Car. 459.

An Amendment to the Bill bringing in new defendants operates *ipso facto* as a dissolution of an injunction previously granted. *Rogers v. Ashbridge*, 9 Pa. Dist. 105, 23 Pa. Co. Ct. 492.

Dissolved by Reversal of Order Making Injunction Perpetual. — *Gage v. Parker*, 178 Ill. 455.

6. Expiration of Time of Operation Does Not Dissolve. — *Bush v. Kirkbride*, 131 Ala. 405.

**426.** 2. Want of Jurisdiction to Issue. — *Pacific Invest. Co. v. Swan*, 2 N. W. Ter. 337.

3. Adequate Remedy at Law. — *Null v. Elliott*, 52 W. Va. 229.

6. Court Without Jurisdiction to Grant Injunction. — See also *Moore v. Bullock*, 5 Quebec Pr. 464.

**427.** 2. Uncertainty Renders Injunction Order Invalid. — *Regan v. Sorenson*, 13 N. Dak. 357. See also *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 55 N. Y. App. Div. 225.

3. Due Diligence in Prosecuting Cause Necessary. — *Gibbs v. Ward*, (N. J. 1901) 48 Atl. Rep. 243.

**428.** 9. Process Regularly Sued Out but Irregularly Served. — Service of a preliminary injunction order will not be set aside for failure of service of a copy of the undertaking required by such order where the merits of the case are with the plaintiffs. *Knudsen v. Friedery*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 98.

**429.** 1. When Want of Notice Ground to Dissolve. — *Minneapolis, etc., R. Co. v. Chicago, etc., R. Co.*, 116 Iowa 681.

6. Whether Sufficient Ground to Dissolve. — *Neumann v. Moretti*, 146 Cal. 31; *Speyrer v. Miller*, 108 La. 204; *Moore v. Bullock*, 6 Quebec Pr. 59. See also *Ingalls v. Merchants' Nat. Bank*, 51 N. Y. App. Div. 105.

7. Allowing Reasonable Time to File Sufficient Bond. — *Cotten v. Christen*, 110 La. 444.

**430.** 1. Where Complainant Would Be Immediately Entitled to Another Writ. — *Cotten v. Christen*, 110 La. 444.

4. Power of Court to Require Additional Security. — *Swope v. Seattle*, 35 Wash. 69.

**431.** 2. Misrepresentation or Concealment of

**431.** (14) *Where Injunction Has Become Useless.* — See note 8.

**432.** *h.* EFFECT OF DISSOLUTION. — See notes 1, 3.

**3. Continuance of Injunction** — *a.* JUDICIAL DISCRETION AS TO CONTINUANCE. — See notes 4, 5.

**433.** See note 1.

*b.* GROUNDS FOR CONTINUING INJUNCTION — Where Dissolution Would Amount to Denial of Relief. — See note 3.

Where Dissolution Would Work Greater Injury than Continuance. — See notes 5, 6.

**434.** Doubtful Cases. — See note 2.

Where Doubtful Questions of Law Are at Issue. — See note 3.

Where Answer Sets Up New Matter. — See note 7.

Effect of Final Judgment. — See note 8.

**435.** **4. Reinstatement or Revival of Injunction.** — See note 2.

**436.** **XVI. VIOLATION OF INJUNCTION** — **1. Duty to Obey and Consequences of Disobedience.** — See notes 1, 3, 4.

Violation Pending Appeal. — See note 5.

**2. What Constitutes Violation** — Knowledge of Injunction. — See notes

7, 8, 9.

**Material Facts.** — *Miller v. Campbell*, 14 Manitoba 437.

**431.** **8. Where Injunction No Longer Necessary.** — *Gibson v. Powell*, 96 Mo. App. 681, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 431.

**432.** **1. Where Further Proceedings Necessary for Relief.** — *Baya v. Lake City*, 44 Fla. 491; *Richardson v. Kittlewell*, 45 Fla. 551; *Baird v. Ellsworth Trust Co.*, 45 Fla. 187.

**3. Dissolution Leaving Nothing More to Be Decided.** — *Field v. Western Springs*, 181 Ill. 186; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19; *Goddard v. Chicago, etc.*, R. Co., 202 Ill. 362; *Hontros v. Chicago*, 113 Ill. App. 318; *Gulick v. Fisher*, 92 Md. 353; *Magoffin v. San Antonio Brewing Assoc.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 843.

**4. Discretion of Court.** — *Miller v. Campbell*, 14 Manitoba 437.

**A Stipulation that the Order Shall Be Continued until the final determination of the cause will be upheld.** *Maggs v. Morgan*, 30 Wash. 604.

**Continuance Pending Appeal.** — A circuit court has power in its final judgment or decree to continue in force an interlocutory injunction granted at the beginning of the cause pending an appeal therefrom to the Supreme Court. *State v. Dearing*, 180 Mo. 53.

**5. When Interference with Discretion Authorized.** — *Van Orden v. Ledwith*, 44 N. Y. App. Div. 580.

**433.** **1. Cases Free from Doubt.** — *Ferris v. Hoglan*, 121 Ala. 240.

**3. Where Dissolution Would Prevent Relief Sought.** — *Rochester v. Bell Telephone Co.*, 52 N. Y. App. Div. 6.

**5. Where Dissolution More Injurious than Continuance.** — *Robrecht v. Robrecht*, 46 W. Va. 738.

**6. Mabel Min. Co. v. Pearson Coal, etc., Co.**, 121 Ala. 567; *Milwaukee Electric R., etc., Co. v. Bradley*, 108 Wis. 467.

**434.** **2. Doubt as to Whether Equities Sufficiently Answered.** — *Raleigh, etc., R. Co. v. Aberdeen, etc., R. Co.*, 125 N. Car. 96; *Robrecht v. Robrecht*, 46 W. Va. 738.

**3. Important Questions of Law at Issue.** — *State v. Cuyahoga County*, 12 Ohio Cir. Dec. 328.

**7. New Matter Set Up by Answer.** — *Agee v. Louisville, etc., R. Co.*, (Ala. 1904) 37 So. Rep. 680; *Greensboro Natural Gas Co. v. Fayette County Gas Co.*, 200 Pa. St. 388.

**8. Effect of Final Judgment.** — *Sweeney v. Hanley*, (C. C. A.) 126 Fed. Rep. 97.

**435.** **2. Reinstatement of Injunction.** — *Steel-smith v. Fisher Oil Co.*, 47 W. Va. 391. See also *Kester v. Alexander*, 47 W. Va. 329.

**Order of Dissolution Prerequisite to Reinstatement.** — *Robertson v. Montgomery Baseball Assoc.*, 140 Ala. 320.

**A Temporary Restraining Order** issued by the clerk or other officer without notice is not an injunction that can be reinstated by a judge of the Court of Appeals, as provided by Code Ky. § 296. *Matthews v. Rogers*, 107 Ky. 236; *Jones v. Walker*, (Ky. 1902) 70 S. W. Rep. 191.

**When Denied.** — See *T. Bernard Coal Co. v. Pittsburg Coal Co.*, 112 Ky. 418; *Caille Co. v. Haager*, (Ky. 1899) 50 S. W. Rep. 244.

**436.** **1. Violation a Punishable Contempt.** — *U. S. v. Sweeney*, 95 Fed. Rep. 434; *Hydock v. State*, 59 Neb. 296; *Ashby v. Ashby*, 62 N. J. Eq. 618; *Matter of Ganz*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 666.

**3. When in Doubt, Construction Should Be Asked.** — *Callanan v. Friedman*, 101 Fed. Rep. 321; *Matter of Ganz*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 666.

**4. Violation Punishable by Fine or Imprisonment.** — *Frank v. Herold*, 64 N. J. Eq. 371; *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 51 N. Y. App. Div. 79, modified and affirmed 164 N. Y. 473.

**5. Supersedeas on Dissolution Revives Injunction.** — *State v. District Ct.*, 78 Minn. 464.

**Motion to Modify Does Not Authorize Violation.** — *Young v. Rothrock*, 121 Iowa 588.

**7. Actual Notice Sufficient** — *United States*. — *U. S. v. Sweeney* 95 Fed. Rep. 434; *In re Krinsky*, 112 Fed. Rep. 972; *Ex p. Richards*, 117 Fed. Rep. 658; *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 130 Fed. Rep. 735.

**437. The Violation of the Spirit of an Injunction.** — See notes 1, 2.

Acts Not Prohibited by Injunction. — See note 3.

4. Violation by Agents, Attorneys, and Servants. — See note 8.

5. Violation by Strangers. — See notes 9, 10.

**438. See note 1.**6. Matters in Excuse or Mitigation — *a.* IN GENERAL. — See notes 2, 5, 7, 8.*b.* ORDER ERRONEOUSLY OR IMPROVIDENTLY GRANTED. — See note 10.**439. See note 1.***c.* INVALIDITY OF ORDER. — See note 2.**XVII. BOND, DAMAGES, COSTS, AND EXPENSES — 1. The Bond —***a.* NECESSITY FOR — (1) *At Common Law* — Formerly Unnecessary. — See note 3.*Georgia.* — *Murphey v. Harker*, 115 Ga. 77.*Illinois.* — *Glady v. People*, 94 Ill. App. 598.*Iowa.* — *Hawks v. Fellows*, 108 Iowa 133. See also *Coffey v. Gamble*, 117 Iowa 545.*Missouri.* — *In re Coggs*, 100 Mo. App. 585.*New Jersey.* — *Kempson v. Kempson*, 61 N. J. Eq. 303, 63 N. J. Eq. 783, 92 Am. St. Rep. 682.*Texas.* — *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000.*West Virginia.* — *Wenger v. Fisher*, 55 W. Va. 13.Notice Binding Notwithstanding Misnomer. — *Dickerson v. Armstrong*, 94 Fed. Rep. 864.**436. 8. Knowledge from Any Source Sufficient.** — *Murphey v. Harker*, 115 Ga. 77.9. Acts Held Not Violation of Injunction. — Where an injunction is granted, but not to take effect until a bond is executed, acts done between the time of granting the injunction and the execution of the bond, which would be violative of the writ if fully operative, do not constitute a breach of the injunction. *Ex p. Miller*, 129 Ala. 130, 87 Am. St. Rep. 49.The distribution of circulars offering a certain article for sale is not of itself a violation of an injunction against the sale of such article. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. Rep. 736, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.Burden of Proving Violation. — *State v. Adcock*, (Tenn. Ch. 1898) 51 S. W. Rep. 952.**437. 1. Violation of Spirit of Injunction.** — *Ex p. Miller*, 129 Ala. 130, 87 Am. St. Rep. 49; *Alcorn v. Newark, etc., Traction Co.*, (N. J. 1901) 48 Atl. Rep. 235. See also *Maloney v. King*, 30 Mont. 414.2. Evasion on Technical Grounds. — *Ex p. Miller*, 129 Ala. 130, 87 Am. St. Rep. 49; *Alcorn v. Newark, etc., Traction Co.*, (N. J. 1901) 48 Atl. Rep. 235.Mere Technical Violation Not Sufficient. — *Boston, etc., Consol. Copper, etc., Min. Co. v. Montana Ore Purchasing Co.*, 24 Mont. 117.3. Acts Not Within Terms of Injunction. — *Amoskeag Mfg. Co. v. Shirley*, 69 N. H. 638.Language of Writ Should Not Be Stretched. — *Louisville, etc., R. Co. v. Miller*, 112 Ky. 464.8. Violation by Agents, Attorneys, and Servants. — *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 121 Fed. Rep. 562.9. Violation by Strangers. — *Stock v. Jefferson Tp.*, 132 Mich. 96.10. *Hawks v. Fellows*, 108 Iowa 133.**438. 1. In re Reese, 98 Fed. Rep. 984, *affirmed* (C. C. A.) 107 Fed. Rep. 942; *Harvey v. Smith*, 179 Mass. 592; *Rigas v. Livingston*, 178 N. Y. 20; *State v. Peterson*, 29 Wash. 571. See also *U. S. Playing-Card Co. v. Spalding*, 92 Fed. Rep. 368.**But that persons who seek to thwart the injunction are not immune although not named therein, see *In re Reese*, (C. C. A.) 107 Fed. Rep. 942; *W. B. Conkey Co. v. Russell*, 111 Fed. Rep. 417; *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Chisolm v. Caines*, 121 Fed. Rep. 397; *Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100; *In re Coggs*, 100 Mo. App. 585; *People v. Marr*, 88 N. Y. App. Div. 422, *modified* 181 N. Y. 463.2. Motive Immaterial. — *Young v. Rothrock*, 121 Iowa 588.5. Advice of Counsel No Excuse. — *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. Rep. 531; *Continental Nat. Bldg., etc., Assoc. v. Scott*, 41 Fla. 421; *Matter of Granz*, 78 N. Y. App. Div. 399; *Stolts v. Tuska*, 82 N. Y. App. Div. 81.7. Advice of Counsel as Mitigation of Punishment. — *Callanan v. Friedman*, 101 Fed. Rep. 321; *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. Rep. 531; *Coffey v. Gamble*, 117 Iowa 545; *Stolts v. Tuska*, 82 N. Y. App. Div. 81.8. Absence of Wilful Intent. — *Young v. Rothrock*, 121 Iowa 588.10. Disobedience of Erroneous Order a Punishable Contempt. — *People v. District Ct.*, 29 Colo. 182; *North v. Swartz*, 79 Ill. App. 557; *Glady v. People*, 94 Ill. App. 598; *St. Louis, etc., R. Co. v. Gray*, 100 Ill. App. 538; *Lake v. Wolfe*, 108 Iowa 184; *Ex p. Warfield*, 40 Tex. Crim. 413; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 1100; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932.**439. 1. Merits of Case Not Considered.** — *Kentucky Heating Co. v. Louisville Gas Co.*, 109 Ky. 428.2. Violation of Void Injunctions — Effect. — *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 439.3. Bonds Formerly Not Required. — *Hess v. German Baking Co.*, 37 Oregon 297; *Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co.*, 47 W. Va. 725.

- 439.** Resultant Injustice to Defendant Gave Rise to Practice of Requiring Bond. — See note 4.
- 440.** Requirement of Bond Discretionary at Common Law. — See notes 1, 2.  
Plaintiffs Liability Dependent on Bond in Absence of Malice. — See notes 3, 4.  
(2) *Under Statutes* — The Justice of Requiring Some Security. — See note 5.
- 441.** Statutes Mandatory. — See notes 1, 2.  
As Condition for Issuing Restraining Orders. — See note 5.
- 442.** (3) *When Unnecessary* — Injunction on Final Decree. — See note 1.
- 443.** (4) *Execution of Bond Requisite to Effectiveness of Order* — (a) General Rule. — See note 1.  
(b) Effect of Issuance Before Execution of Bond — Injunction Irregular and Not Void. — See note 3.  
b. PURPOSE OF BOND — In General. — See note 6.
- 446.** h. FORM AND CONDITIONS OF BOND — (1) *When Prescribed by Statute* — Generally. — See note 3.  
Statutory Provisions Must Be Complied With. — See note 6.
- 448.** i. AMOUNT OF BOND — In General. — See note 1.  
Probable Injury from Injunction to Be Considered. — See note 2.
- 450.** n. SURETIES — (3) *Liability of Sureties* — (b) Liability to Be Strictly Construed — bb. LIABILITY LIMITED BY EXPRESS TERMS OF BOND. — See note 3.
- 451.** (c) No Liability Beyond Statutory Requirements. — See notes 3, 4.  
(d) Extent of Liability for Damages and Costs — Damages Limited to Those Caused by Injunction. — See note 5.

**439.** 4. Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co., 47 W. Va. 725.

**440.** 1. Discretion as to Requiring Bond. — West v. East Coast Cedar Co., (C. C. A.) 113 Fed. Rep. 742; Briggs v. Neal, (C. C. A.) 120 Fed. Rep. 224; Greenberg v. Holmes, 100 Ill. App. 186.

2. Bond Usually Required. — Moon v. Bullock, 6 Quebec Pr. 59. See also Moore v. Bullock, 5 Quebec Pr. 464.

Good Cause Presumed. — Deemar v. Boyne, 103 Ill. App. 464.

3. Liability Dependent on Bond. — Scheck v. Kelly, 95 Fed. Rep. 941.

4. Exception — Action for Malicious Prosecution. — Jameson v. Bartlett, 63 Neb. 638; Burt v. Smith, 84 N. Y. App. Div. 47, reversed on other grounds 181 N. Y. 1; Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co., 47 W. Va. 725.

5. Bond Required by Statute. — Neumann v. Moretti, 146 Cal. 31; American Fine Art Co. v. Voigt, 103 Ill. App. 659; Speyrer v. Miller, 108 La. 204; Potter v. Potter, 59 N. Y. App. Div. 140.

**441.** 1. Statutes Mandatory. — Neumann v. Moretti, 146 Cal. 31; American Fine Arts Co. v. Voigt, 103 Ill. App. 659.

2. Courts Cannot Dispense with Bond Required by Statute. — Speyrer v. Miller, 108 La. 204; Roberts v. Pipkin, 63 S. Car. 252; Swope v. Seattle, 35 Wash. 69.

5. See Neumann v. Moretti, 146 Cal. 31; Price v. Grice, 10 Idaho 443.

**442.** 1. Injunction on Final Decree. — Davidson v. Hough, 165 Mo. 561.

**443.** 1. Injunction Inoperative Without Bond. — *Ex p.* Miller, 129 Ala. 130, 87 Am. St. Rep. 49.

3. State v. District Ct., 78 Minn. 464; Crouse v. Bedell, 11 Pa. Super. Ct. 598. But see Speyrer v. Miller, 108 La. 204.

6. Object of Bond. — Jameson v. Bartlett, 63 Neb. 638.

If an injunction is rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. Scott v. Frank, 121 Iowa 218; Gray v. Bremer, 122 Iowa 110.

**446.** 3. Representative Statutes — Missouri. — Under Rev. Stat. Mo. 1889, § 5498, as stated in the original note, any party interested in the subject-matter of the controversy has a right of action upon the bond. Helmkampf v. Wood, 85 Mo. App. 227.

6. Bond with Only One Surety Not Void. — Gyger v. Courtney, 59 Neb. 555.

**448.** 1. Amount Usually Discretionary with Court. — West v. East Coast Cedar Co., (C. C. A.) 113 Fed. Rep. 742; Swope v. Seattle, 35 Wash. 69.

Discretion Legal and Not Arbitrary. — Swope v. Seattle, 35 Wash. 69.

2. Probable Amount of Damages. — Mabel Min. Co. v. Pearson Coal, etc., Co., 121 Ala. 567.

**450.** 3. Surety Not Liable Beyond Terms of Bond. — Ridpath v. Merriam, 22 Wash. 311.

"In determining the liability of the parties to the bond, we must look to the instrument alone, and not to the order of the court in regard to its execution." Blankenship v. Ely, 98 Va. 359.

Under the Law of Louisiana, the liability of the obligor on a judicial bond depends on the law, and not on the form of the bond. Hays v. Fidelity, etc., Co., (C. C. A.) 112 Fed. Rep. 872.

**451.** 3. Not Liable Beyond Statutory Requirements. — Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497.

4. Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497.

5. Louisiana — Liable to Defendant Only. —



- 452.** (h) Operation of Bond as Estoppel on Sureties — General Rule. — See note 8.
- 453.** o. ACTION ON BOND — (1) *Right of Action* — (a) Merger of Common-law Remedy. — See note 7.
- 454.** (c) Necessity for Final Decree — aa. GENERAL RULE — Must Be Final Decree in Suit. — See note 4.
- 455.** See note 1.  
Right of Action on Bare Dissolution. — See note 2.
- 456.** bb. ACCRUAL OF RIGHT ON DISCONTINUANCE OR DISMISSAL — Order of Discontinuance Final Determination. — See notes 1, 2.  
Accrual of Right on Dismissal of Suit — In General. — See notes 3, 4.
- 457.** See note 2.
- 458.** (2) *Defenses to Action on Bond* — (a) General Rule as to Merits of Injunction Suit — Merits May Not Be Inquired Into. — See note 1.  
(c) Want of Jurisdiction. — See note 3.  
(d) Disobedience to Writ. — See note 6.
- 459.** 2. Damages — a. MANNER OF ASSESSING — (1) *At Common Law* — Prevailing Rule. — See note 6.
- 460.** (2) *Under Statutes* — Right of Court to Assess on Dissolution. — See notes 2, 3.

Hays v. Fidelity, etc., Co., (C. C. A.) 112 Fed. Rep. 872.

**452.** 8. Surety Estopped to Deny Recitals of Bond. — Blankenship v. Ely, 98 Va. 359.

**453.** 7. When Action for Malicious Prosecution Lies. — Burt v. Smith, 84 N. Y. App. Div. 47, reversed on other grounds 181 N. Y. 1; Anderson v. Provident Life, etc., Co., 26 Wash. 192; Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co., 47 W. Va. 725.

**454.** 4. Necessity of Final Decree. — Lacey v. Davis, 126 Iowa 675; Yazoo, etc., R. Co. v. Adams, 78 Miss. 977; Freifeld v. Sire, 96 N. Y. App. Div. 296. See also dissenting opinion of Tyson, J., in Jesse French Piano, etc., Co. v. Porter, 134 Ala. 302, 92 Am. St. Rep. 31, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 454.

No Action Lies Pending Appeal. — Tutty v. Ryan, (Wyo. 1904) 78 Pac. Rep. 657, rehearing denied (Wyo. 1905) 79 Pac. Rep. 920.

**455.** 1. Right Does Not Accrue on Dissolution. — See the dissenting opinion of Tyson, J., in Jesse French Piano, etc., Co. v. Porter, 134 Ala. 302, 92 Am. St. Rep. 31, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455.

Dissolution by Agreement Discharges Surety. — Cassem v. Ernst, 84 Ill. App. 70, affirmed 183 Ill. 137.

2. Right of Action on Dissolution Dependent on Wording of Bond. — Jesse French Piano, etc., Co. v. Porter, 134 Ala. 302, 92 Am. St. Rep. 31.

**456.** 1. Right of Action Accrues on Discontinuance. — See Freifeld v. Sire, 96 N. Y. App. Div. 296.

A Discontinuance or Dismissal for a Reason Subsequently Arising does not entitle the defendant to damages. Taylor Worsted Co. v. Beolchi, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 691.

2. Discontinuance or Dismissal by Stipulation Insufficient. — Compare Patterson v. Rinard, 81 Ill. App. 80.

3. Right of Action Accrues on Dismissal. — Landis v. Wolf, 206 Ill. 392; Lewis v. Jones, 65 S. Car. 157; Kelley v. Mead, (S. Dak. 1904) 101 N. W. Rep. 882; Haynes v. Lebanon Second Nat. Bank, 106 Tenn. 425.

4. Failure to Prosecute. — Humfeldt v. Moles, 63 Neb. 448; Madison v. Brower, 81 N. Y. App. Div. 116. See also Freifeld v. Sire, 96 N. Y. App. Div. 296.

**457.** 2. Voluntary Dismissal by Plaintiff — California. — Frahm v. Walton, 130 Cal. 396.

Colorado. — Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497.

Iowa. — Williams v. Ballinger, 125 Iowa 410.

Kansas. — Tullock v. Mulvane, 61 Kan. 650.

Minnesota. — Nielsen v. Albert Lea, 87 Minn. 285.

Missouri. — Price Baking Powder Co. v. Calumet Baking Powder Co., 82 Mo. App. 19.

Nebraska. — Gyger v. Courtney, 59 Neb. 555.

New York. — Perlman v. Bernstein, 83 N. Y. App. Div. 203; McGown v. Barnum, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 585, modified and affirmed 96 N. Y. App. Div. 626.

**458.** 1. Decree of Court Conclusive. — Terre Haute, etc., R. Co. v. Peoria, etc., Union R. Co., 182 Ill. 501.

3. Want of Jurisdiction Not a Defense. — Boise City v. Randall, 8 Idaho 119. See also Franke v. Alexander, 88 Mo. App. 35.

6. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623.

**459.** 6. View that Court of Equity Cannot Assess Damages. — Offerman, etc., R. Co. v. Waycross Air-Line R. Co., 112 Ga. 610, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459.

**460.** 2. Power of Court to Assess on Dissolution. — Dodge v. Cohen, 14 App. Cas. (D. C.) 582; Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623.

Illinois — Suggestion of Damages. — A suggestion of damages is in time if filed at the first term in which the court has power to take final action in the case. Grant v. Defenbaugh, 91 Ill. App. 618.

In Texas. — See Givens v. Delprat, 28 Tex. Civ. App. 363.

Court May Decide Whether Damages Shall Be Allowed. — West v. East Coast Cedar Co., (C. C. A.) 113 Fed. Rep. 742.

Motion to Assess May Be Filed on Affirmance of

**461.** *b.* ASSESSMENT AS PREREQUISITE TO ACTION ON BOND — Under Statute Authorizing Assessment. — See note 8.

**462.** *d.* RIGHT OF COURT DISSOLVING INJUNCTION TO ENFORCE PAYMENT — (2) *Rendition of Judgment Against Principal and Sureties.* — See note 5.

**463.** *f.* MEASURE OF DAMAGES — (1) *Only Proximate Damages Recoverable* — (a) General Rule. — See note 3.

Loss of Property or Diminution of Profits. — See note 4.

Remote or Speculative Damages Not Recoverable. — See note 5.

**464.** (c) Recovery of Damages on Partial Dissolution. — See note 2.

(d) Recovery of Exemplary Damages. — See note 4.

(2) *Amount of Recovery Limited by Bond.* — See note 5.

**466.** (6) *Damages on Dissolution of Injunction Restraining Sale or Disposal of Goods.* — See note 3.

(7) *Damages for Enjoining Sale of Property under Deed of Trust.* — See note 4.

**3. Costs and Expenses** — *a.* IN GENERAL. — See note 5.

**Judgment.** — *Wabash R. Co. v. Sweet*, 110 Mo. App. 100.

**460.** 3. Reference to Ascertain Damages. — *West v. East Coast Cedar Co.*, (C. C. A.) 113 Fed. Rep. 742; *Greenville v. Mauldin*, 64 S. Car. 438; *Kelley v. Mead*, (S. Dak. 1904) 101 N. W. Rep. 882; *Wisconsin M. & F. Ins. Co. Bank v. Durner*, 114 Wis. 369.

**461.** 8. Action Held Not Maintainable Without Assessment. — But an action may be maintained in a state court upon a bond given in a federal court, although no assessment of damages was made by the latter, since a federal court, sitting as a court of equity, has no power to assess damages. *Elliott v. Missouri*, etc., R. Co., 77 Mo. App. 652.

**462.** 5. Exception to Rule — Injunction Restraining Order of Seizure and Sale. — *Jourdan v. Garland*, 105 La. 486.

**463.** 3. Damages Must Be Proximate Result of Injunction — *Alabama.* — *Jesse French Piano*, etc., *Co. v. Porter*, 134 Ala. 302, 92 Am. St. Rep. 31; *Curry v. American Freehold Land Mortg. Co.*, 124 Ala. 614.

*California.* — *San José Fruit-Packing Co. v. Cutting*, 133 Cal. 237.

*Kentucky.* — *East Tennessee Telephone Co. v. Anderson County Telephone Co.*, 115 Ky. 488.

*Louisiana.* — *Elms v. Wright-Blodgett Co.*, 106 La. 19.

*Nebraska.* — *Trester v. Pike*, 60 Neb. 510.

*New York.* — *Youngs v. McDonald*, 56 N. Y. App. Div. 14, affirmed 166 N. Y. 639.

*South Dakota.* — *Edmison v. Sioux Falls Water Co.*, 14 S. Dak. 486.

*Tennessee.* — *South Penn Oil Co. v. Stone*, (Tenn. Ch. 1900) 57 S. W. Rep. 374.

*Washington.* — *Ridpath v. Merriam*, 22 Wash. 311.

*West Virginia.* — *State v. Corvin*, 51 W. Va. 19.

**Nominal Damages.** — *Chattanooga Fourth Nat. Bank v. Crescent Min. Co.*, (Tenn. Ch. 1897) 52 S. W. Rep. 1021; *Boyd v. Knox*, (Tenn. Ch. 1899) 51 S. W. Rep. 972.

**The Elements of Damage** upon the dissolution of an injunction are counsel fees, loss of time, and expenses incurred in attending the hearing of and resisting the application for such in-

junction. *Helmkampf v. Wood*, 85 Mo. App. 227.

**4.** Loss of Property or Diminution of Profits. — *Landis v. Wolf*, 206 Ill. 392, reversing 109 Ill. App. 44; *French v. McCready*, (Tex. Civ. App. 1900) 57 S. W. Rep. 894.

Where the injunction operates to suspend the owner's control of property, the amount recoverable is the loss in value of the property between the time the injunction was issued and the time it was dissolved, with lawful interest on the original value during the time. *Ridpath v. Merriam*, 22 Wash. 311.

**5. Remote or Speculative Damages.** — *Landis v. Wolf*, 206 Ill. 392; *Chicago Title*, etc., *Co. v. Chicago*, 209 Ill. 172; *Elms v. Wright-Blodgett Co.*, 106 La. 19; *State v. Corvin*, 51 W. Va. 19.

**464.** 2. Damages Recoverable on Partial Dissolution. — *Leflore County v. Allen*, 80 Miss. 208. But see *Vicksburg*, etc., *R. Co. v. Traylor*, 105 La. 748.

**4. View that Exemplary Damages May Be Recoverable.** — *Terry v. Robbins*, 122 Fed. Rep. 725; *South Penn Oil Co. v. Stone*, (Tenn. Ch. 1900) 57 S. W. Rep. 374. See also *Beach v. Williams*, (Iowa 1899) 79 N. W. Rep. 393.

**5. Limiting Recovery to Penalty Named in Bond.** — *Terry v. Robbins*, 122 Fed. Rep. 725.

**466.** 3. Sale or Disposal of Goods. — See *Slack v. Stephens*, 19 Colo. App. 538; *Chattanooga Fourth Nat. Bank v. Crescent Min. Co.*, (Tenn. Ch. 1897) 52 S. W. Rep. 1021.

**4. Mississippi Statute.** — Under Code Miss. 1892, § 572, five per cent. damages, for attorney's fees, may be allowed upon the dissolution of an injunction to stay a sale under a deed of trust or mortgage with power of sale. *Nixon v. Seal*, 78 Miss. 363.

**5. Necessary Costs and Expenses Generally Recoverable.** — *Williams v. Ballinger*, 125 Iowa 410; *Modisett v. National Bank*, 23 Tex. Civ. App. 589.

**Witness Fees** incurred in securing the dissolution of an injunction cannot be recovered. *Price Baking Powder Co. v. Calumet Baking Powder Co.*, 82 Mo. App. 19.

**Expenses Incurred in Taking Depositions** are not recoverable. *Williams v. Allen*, (Ky. 1900) 54 S. W. Rep. 720.

**467.** See note 1.

*b. RECOVERY OF COUNSEL FEES ON DISSOLUTION OF INJUNCTION — (2) In State Courts — (a) General Rule — Counsel Fees Recoverable as Damages.* — See notes 4, 5, 6.

**468.** See note 1.

*Recoverable for Services on Appeal.* — See note 3.

*Allowance of Counsel Fees on Final Hearing.* — See note 4.

**469.** *(b) Limitation of Recovery — Confined to Services Rendered in Procuring Dissolution.* — See notes 1, 2.

*No Recovery Where Injunction Defeated on Merits Without Motion for Dissolution.* — See note 3.

**467. 1. Costs Not Recoverable Where Injunction Merely Auxiliary.** — *Tarbell v. Ennis*, 10 Ohio Dec. 346, 7 Ohio N. P. 416.

**4. State Courts — View that Counsel Fees Not Recoverable.** — *Frantz v. Saylor*, 12 Okla. 39; *Wisecarver v. Wisecarver*, 97 Va. 452.

**5. Attorneys' Fees on Dissolution of Restraining Order.** — Where the hearing of an application for a temporary injunction has been unreasonably postponed, attorneys' fees necessarily incurred in effecting a dissolution of a restraining order are a proper element of damage, in case it is determined that the restraining order should not have been allowed, *Gyger v. Courtney*, 59 Neb. 555.

**Action in State Court on Bond Given in Federal Court.** — *Compare Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530, reversing 154 Mo. 300; *Tullock v. Mulvane*, 184 U. S. 497, reversing 61 Kan. 650.

**6. View that Counsel Fees Are Recoverable — Illinois.** — *Landis v. Wolf*, 206 Ill. 392, reversing 109 Ill. App. 44.

*Indiana.* — *Binford v. Grimes*, 26 Ind. App. 481.

*Mississippi.* — *Hinton v. Perry County*, 84 Miss. 536.

*Missouri.* — *Price Baking Powder Co. v. Calumet Baking Powder Co.*, 82 Mo. App. 19; *Elliott v. Missouri, etc., R. Co.*, 77 Mo. App. 652.

*Montana.* — *Montgomery v. Gilbert*, 24 Mont. 121.

*Nebraska.* — *Trester v. Pike*, 60 Neb. 510.

*New York.* — *Youngs v. McDonald*, 56 N. Y. App. Div. 14, affirmed 166 N. Y. 639; *Perlman v. Bernstein*, 93 N. Y. App. Div. 335, affirmed 179 N. Y. 531.

*West Virginia.* — *State v. Corvin*, 51 W. Va. 19.

*Wisconsin.* — *Wisconsin M. & F. Ins. Co. Bank v. Durner*, 114 Wis. 369.

**Where an Injunction Is the Remedy Sought,** counsel fees cannot be recovered in an action on the bond. *Bennett v. Lambert*, 100 Ky. 737; *Williams v. Allen*, (Ky. 1900) 54 S. W. Rep. 720; *Tyler v. Hamilton*, 108 Ky. 120.

**Effect of Voluntary Dismissal of Action.** — The plaintiff cannot by a voluntary dismissal of the action before any decision has been made upon the motion to dissolve the injunction, deprive the defendant of his right to recover counsel fees. *Frahm v. Walton*, 130 Cal. 396.

**Recovery Depends on Circumstances of Case.** — *Elms v. Wright-Blodgett Co.*, 106 La. 19.

**468. 1. Alabama.** — *Curry v. American Freehold Land Mortg. Co.*, 124 Ala. 614.

*Colorado.* — *Quinn v. Baldwin Star Coal Co.*,

19 Colo. App. 497; *Quinn v. Silka*, 19 Colo. App. 507.

*Illinois.* — *Landis v. Wolf*, 206 Ill. 392.

*Nebraska.* — *Trester v. Pike*, 60 Neb. 510; *Cunningham v. Finch*, 63 Neb. 189; *Jameson v. Bartlett*, 63 Neb. 638; *Harvard First Nat. Bank v. Hackett*, (Neb. 1902) 89 N. W. Rep. 412; *Barr v. Post*, (Neb. 1903) 93 N. W. Rep. 144.

*New York.* — *Bock v. Bohn*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 102; *Youngs v. McDonald*, 56 N. Y. App. Div. 14, affirmed 166 N. Y. 639.

*South Dakota.* — *Edmison v. Sioux Falls Water Co.*, 14 S. Dak. 486.

**3. Services on Appeal.** — *Jesse French Piano, etc., Co. v. Porter*, 134 Ala. 302, 92 Am. St. Rep. 31.

**4. Allowance on Final Hearing.** — See *Nielsen v. Albert Lea*, 87 Minn. 285.

**469. 1. Limited to Fees Paid in Securing Dissolution — Alabama.** — *Compare Bush v. Kirkbride*, 131 Ala. 405.

*Colorado.* — *Church v. Baker*, 18 Colo. App. 369.

*Illinois.* — *Milligan v. Nelson*, 188 Ill. 139. *Landis v. Wolf*, 206 Ill. 392; *Independent Medical College v. Zeigler*, 86 Ill. App. 360; *Chicago Veneered Door Co. v. Parks*, 79 Ill. App. 188.

*Louisiana.* — *Lever v. Sharpe*, 52 La. Ann. 599.

*Nebraska.* — *Jameson v. Bartlett*, 63 Neb. 638, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469; *Trester v. Pike*, 60 Neb. 510; *Harvard First Nat. Bank v. Hackett*, (Neb. 1902) 89 N. W. Rep. 412.

*Washington.* — *Anderson v. Provident Life, etc., Co.*, 26 Wash. 192.

**For an Unsuccessful Attempt to Procure Dissolution** attorneys' fees will not be allowed. *Cunningham v. Finch*, 63 Neb. 180.

**2. Discrimination as to Different Kinds of Services.** — *Church v. Baker*, 18 Colo. App. 369; *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 497; *Landis v. Wolf*, 206 Ill. 392.

**3. Injunction Defeated on Merits Without Motion to Dissolve.** — *Hocking Valley Coal Co. v. Climie*, (Iowa 1902) 92 N. W. Rep. 77; *Youngs v. McDonald*, 56 N. Y. App. Div. 14, affirmed 166 N. Y. 639. See also *Caillouet v. Coguenhem*, 111 La. 60.

**Services in Connection with Demurrer.** — Although no formal motion is made to dissolve an injunction, a demurrer to the bill reaches the injunction as effectively as a motion would have done, and therefore the services in connection with the demurrer are as much recoverable.

**469.** Fees Should Be Reasonable. — See note 4.

(c) Whether Actual Payment of Counsel Fees Necessary. — See note 6.

**470.** *INJURIA.* — See note 4.

erable as though they had been rendered in the presentation of a motion to dissolve. *Anderson v. Provident Life, etc., Co.*, 26 Wash. 192.

**469. 4.** Fees Should Be Reasonable. — *Jesse French Piano, etc., Co. v. Porter*, 134 Ala. 302, 52 Am. St. Rep. 31; *Chicago Veneered Door Co. v. Parks*, 79 Ill. App. 188; *Lomax v. Ragor*, 85 Ill. App. 79.

6. Actual Payment of Counsel Fees Unnecessary.

— *Patterson v. Rinard*, 81 Ill. App. 80; *National Bank v. Freeman*, 87 Ill. App. 622; *Anderson v. Provident Life, etc., Co.*, 26 Wash. 192; *State v. Corvin*, 5 W. Va. 19.

Contract of Hiring Need Not Be Shown. — *National Bank v. Freeman*, 87 Ill. App. 622.

**470. 4.** *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611.

## INJURIES TO ANIMALS BY RAILROADS.

By E. G. CHILTON.

**472. II. NECESSITY OF NEGLIGENCE ON PART OF RAILROAD COMPANY —**

1. No Presumption of Negligence at Common Law. — See note 2.

**473. 2. Statutes Creating Presumption of Negligence.** — See note 2.

**474.** See note 1.

To Rebut the Presumption of Negligence. — See note 3.

**472. 2. Necessity of Negligence at Common Law to Authorize Recovery.** — *Denver, etc., R. Co. v. Thompson*, 12 Colo. App. 1; *Burlington, etc., R. Co. v. Campbell*, (Colo. App. 1904) 78 Pac. Rep. 1072; *Chicago, etc., R. Co. v. Huggins*, (Indian Ter. 1902) 69 S. W. Rep. 845; *Grand Trunk R. Co. v. James*, 31 Can. Sup. Ct. 420, reviewing 1 Ont. L. Rep. 127. See also *State v. Foster*, 106 La. 425.

**473. 2. Statutory Presumption of Negligence.** — *Alabama.* — *Chattanooga Southern R. Co. v. Daniel*, 122 Ala. 362; *Southern R. Co. v. Reeves*, 129 Ala. 457.

*Arkansas.* — *St. Louis, etc., R. Co. v. Bragg*, 66 Ark. 248; *St. Louis, etc., R. Co. v. Landers*, 67 Ark. 514; *St. Louis Southwestern R. Co. v. Costello*, 68 Ark. 32; *St. Louis, etc., R. Co. v. Cline*, 69 Ark. 659, 65 S. W. Rep. 427. See also *Kansas City, etc., R. Co. v. Walker*, (Ark. 1903) 71 S. W. Rep. 660.

*Georgia.* — *Western, etc., R. Co. v. Robinson*, 114 Ga. 159; *Central of Georgia R. Co. v. McWhorter*, 121 Ga. 465; *Southern R. Co. v. Early*, 105 Ga. 512; *Macon, etc., R. Co. v. Cochran*, 107 Ga. 751; *Central of Georgia R. Co. v. Neidlinger*, 110 Ga. 329; *Georgia R., etc., Co. v. Churchill*, 113 Ga. 12; *Southern R. Co. v. Loughridge*, 114 Ga. 173; *Southern R. Co. v. Adkins*, 114 Ga. 135; *Southern R. Co. v. Hill*, 116 Ga. 470; *Seaboard Air-Line R. Co. v. Walthour*, 117 Ga. 427; *Macon, etc., R. Co. v. Revis*, 119 Ga. 332; *Central of Georgia R. Co. v. Weathers*, 120 Ga. 475; *Central of Georgia R. Co. v. Dich*, 121 Ga. 65; *Central of Georgia R. Co. v. Williams Buggy Co.*, 121 Ga. 293. See also *Central of Georgia R. Co. v. Woolsey*, 117 Ga. 838; *Southern R. Co. v. Harrell*, 119 Ga. 521.

*Iowa.* — *Norman v. Chicago, etc., R. Co.*, 110 Iowa 283.

*Kentucky.* — *Southern R. Co. v. Forsythe*, (Ky. 1901) 64 S. W. Rep. 506; *Felton v. Anderson*, (Ky. 1902) 66 S. W. Rep. 182.

*Louisiana.* — *State v. Foster*, 106 La. 425.

*Mississippi.* — *Alabama, etc., R. Co. v. Stacy*, (Miss. 1903) 35 So. Rep. 137; *Lowe v. Alabama, etc., R. Co.*, 81 Miss. 9.

*Montana.* — *Menard v. Montana Cent. R. Co.*, 22 Mont. 340.

*North Carolina.* — *Baker v. Roanoke, etc., R. Co.*, 133 N. Car. 31; *Davis v. Seaboard Air Line R. Co.*, 134 N. Car. 300.

*North Dakota.* — *Wright v. Minneapolis, etc., R. Co.*, 12 N. Dak. 159.

*South Dakota.* — *Keilbach v. Chicago, etc., R. Co.*, 11 S. Dak. 468.

*Texas.* — *Missouri, etc., R. Co. v. Kennedy*, 33 Tex. Civ. App. 445.

**There Must Be Proof that the Injury Was Done by the Train.** — *Galveston, etc., R. Co. v. Blau*, 31 Tex. Civ. App. 644.

**Admission that Train Caused Injury Raises Presumption of Negligence.** — *Louisville, etc., R. Co. v. Swann*, 120 Ga. 695.

**In the Case of Dogs killed or injured by passing trains the statutory presumption of negligence is not indulged.** *Moore v. Charlotte Electric R., etc., Co.*, 136 N. Car. 554; *Richardson v. Florida Cent., etc., R. Co.*, 55 S. Car. 334.

**474. 1. Statutory Presumption Not Applicable When Facts Are Known.** — *Macon, etc., R. Co. v. Revis*, 119 Ga. 332.

3. *Seaboard Air-Line R. Co. v. Walthour*, 117 Ga. 427; *Alabama, etc., R. Co. v. Stacy*, (Miss. 1903) 35 So. Rep. 137.

**474. III. STATUTES CREATING ABSOLUTE LIABILITY IRRESPECTIVE OF NEGLIGENCE OR DUTY TO FENCE.** — See note 4.

**IV. STATUTES AWARDING ATTORNEY'S FEES TO PERSONS RECOVERING JUDGMENT.** — See note 6.

**475.** The Constitutionality of Statutes Allowing the Plaintiff to Recover Attorney's Fees. — See notes 4, 5.

**476. V. CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE — 2. Right of Recovery Barred by Contributory Negligence.** — See notes 2, 3.

**477.** See note 1.

**478. 3. Whether Contributory Negligence to Allow Animals to Run at Large** — *a. IN ABSENCE OF SPECIAL STATUTE MAKING IT UNLAWFUL* — Jurisdictions Where Contributory Negligence. — See note 4.

**479.** Jurisdictions Where Not Contributory Negligence. — See note 1.

**474. 4. Statutes Creating Absolute Liability Unconstitutional.** — Denver, etc., R. Co. v. Thompson, 12 Colo. App. 1.

**Kentucky Statute Held Constitutional.** — Louisville, etc., R. Co. v. Kice, 109 Ky. 786.

**6. Statutes Allowing Attorney's Fees Against Railroads Injuring Animals.** — Florida East Coast R. Co. v. Hazel, 43 Fla. 263, 99 Am. St. Rep. 114; Rabbermann v. Pierce, 77 Ill. App. 405; Redmond v. Missouri, etc., R. Co., 104 Mo. App. 651. See also Florida Cent., etc., R. Co. v. Seymour, 44 Fla. 557.

**475. 4. Statutes Allowing Reasonable Attorney's Fee Against Railroads Held Constitutional.** — See Florida East Coast R. Co. v. Hazel, 43 Fla. 263, 99 Am. St. Rep. 114.

**5. Statutes Allowing Attorney's Fee Unconstitutional.** — Brown v. Missouri, etc., R. Co., 104 Mo. App. 691.

**476. 2. Facts Held to Show Contributory Negligence.** — Driving cattle across the track without looking and listening. McGill v. Minneapolis, etc., R. Co., 113 Iowa 358.

Leaving open a gate placed at a railroad right of way fence for the convenience of the plaintiff. Swanson v. Chicago, etc., R. Co., 79 Minn. 398.

Walking behind a wagon to the rear of which two cows were tied, when approaching a crossing, instead of remaining in the wagon and retaining control of the horses. Snell v. Minneapolis, etc., R. Co., 87 Minn. 253.

Driving stock across the track when a train was approaching and there was an unobstructed view of the track for sixteen hundred feet. Nolan v. Central R. Co., 67 N. J. L. 124.

Leaving open a gate near which a cow was standing. Clark v. Oregon Short-Line R. Co., 20 Utah 401.

Driving horses to within twenty or thirty feet of the track and leaving them standing there without tying, when plaintiff knew that it was the usual time for a fast train to pass. Silcock v. Rio Grande Western R. Co., 22 Utah 179.

**Facts Held Not to Amount to Contributory Negligence.** — Permitting animals to enter and remain upon the uninclosed lands of another. Texas, etc., R. Co. v. Seay, (Tex. Civ. App. 1902) 69 S. W. Rep. 177.

Leaving a pasture gate open, with knowledge that a cattle guard at a railroad crossing is defective. Herrell v. Chicago, etc., R. Co., 114 Wis. 605.

**3. Right to Recovery Barred by Contributory Negligence — Idaho.** — Haner v. Northern Pac. R. Co., 7 Idaho 305.

**Illinois.** — Rabberman v. Hunt, 88 Ill. App. 625.

**Indian Territory.** — St. Louis, etc., R. Co. v. Zachary, 2 Indian Ter. 536.

**Iowa.** — McGill v. Minneapolis, etc., R. Co., 113 Iowa 358.

**Minnesota.** — Swanson v. Chicago, etc., R. Co., 79 Minn. 398; Snell v. Minneapolis, etc., R. Co., 87 Minn. 253.

**Missouri.** — Dickinson v. Wabash R. Co., 103 Mo. App. 332.

**Montana.** — Beaudin v. Oregon Short Line R. Co., 31 Mont. 238.

**New Jersey.** — Nolan v. Central R. Co., 67 N. J. L. 124.

**North Dakota.** — Wright v. Minneapolis, etc., R. Co., 12 N. Dak. 159; West v. Northern Pac. R. Co., 13 N. Dak. 221.

**Texas.** — Texas Cent. R. Co. v. Harbison, (Tex. Civ. App. 1903) 75 S. W. Rep. 549; Ft. Worth, etc., R. Co. v. Roberts, (Tex. Civ. App. 1904) 83 S. W. Rep. 250.

**Utah.** — Clark v. Oregon Short-Line R. Co., 20 Utah 401; Silcock v. Rio Grande Western R. Co., 22 Utah 179.

**Washington.** — Curtis v. Oregon R., etc., Co., 36 Wash. 55.

**Wisconsin.** — Herrell v. Chicago, etc., R. Co., 114 Wis. 605; Perrault v. D. W. Alderman, etc., R. Co., 117 Wis. 520. See also May v. Chicago, etc., R. Co., 102 Wis. 673.

**When Question of Contributory Negligence for Jury.** — Choctaw, etc., R. Co. v. Ingram, 71 Ark. 394; Jarvis v. Bradford, 88 Ill. App. 685.

**477. 1. Where Contributory Negligence Not Sustained.** — Beall v. Chicago, etc., R. Co., 97 Mo. App. 111; Sauls v. D. W. Alderman, etc., Co., 55 S. Car. 395; Curtis v. Oregon R., etc., Co., 36 Wash. 55; May v. Chicago, etc., R. Co., 102 Wis. 673; Atkinson v. Chicago, etc., R. Co., 119 Wis. 176.

**478. 4. Jurisdictions Where Contributory Negligence to Allow Stock to Run at Large.** — Clark v. Oregon Short-Line R. Co., 20 Utah 401.

**479. 1. Jurisdiction Where Not Contributory Negligence to Allow Stock to Run at Large.** — Sauls v. D. W. Alderman, etc., Co., 55 S. Car. 395.

**479.** *b. CONTRIBUTORY NEGLIGENCE WHERE ANIMALS UNLAWFULLY AT LARGE.* — See note 3.

**480.** *4. Plaintiff's Negligence Must Proximately Contribute to Injury.* — See note 2.

*5. Defendant's Negligence After Discovering Animals on Track.* — See note 4.

**481.** *6. Where Doctrine of Comparative Negligence Prevails.* — See note 2.

**VI. LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES** — *1. General Character of These Statutes.* — See notes 4, 6.

**479.** *3. Illinois — Question for Jury.* — *Jarvis v. Bradford*, 88 Ill. App. 685; *Rabberman v. Hunt*, 88 Ill. App. 625.

**480.** *2. To Establish Defense Plaintiff's Negligence Must Proximately Contribute to Injury.* — *Sauls v. D. W. Alderman, etc., Co.*, 55 S. Car. 395. See also *Atkinson v. Chicago, etc., R. Co.*, 119 Wis. 176.

**4.** *Where Care Would Have Avoided Injury to Animal on Track* — *Alabama.* — *Central of Georgia R. Co. v. Dumas*, 131 Ala. 172; *Chattanooga Southern R. Co. v. Daniel*, 122 Ala. 362; *Chattanooga Southern R. Co. v. Wilson*, 124 Ala. 444; *Alabama G. S. R. Co. v. Boyd*, 124 Ala. 525; *Central of Georgia R. Co. v. Wood*, 129 Ala. 483; *Kansas City, etc., R. Co. v. Henson*, 132 Ala. 528; *Alabama G. S. R. Co. v. Hall*, 133 Ala. 362; *Kansas City, etc., R. Co. v. Childers*, 132 Ala. 611; *Southern R. Co. v. Hoge*, 141 Ala. 351; *Central of Georgia R. Co. v. Larkins*, (Ala. 1904) 37 So. Rep. 660. See also *Central of Georgia R. Co. v. Sport*, 141 Ala. 369.

*Arkansas.* — *St. Louis Southwestern R. Co. v. Costello*, 68 Ark. 32.

*Georgia.* — *Georgia R., etc., Co. v. Churchill*, 113 Ga. 12; *Southern R. Co. v. Cook*, 121 Ga. 416; *Western, etc., R. Co. v. Clark*, 121 Ga. 419. See also *Central of Georgia R. Co. v. McWhorter*, 121 Ga. 465.

*Illinois.* — *Chicago, etc., R. Co. v. Bunker*, 81 Ill. App. 616.

*Indian Territory.* — See *Chicago, etc., R. Co. v. Huggins*, (Indian Ter. 1902) 69 S. W. Rep. 845.

*Kentucky.* — *Louisville, etc., R. Co. v. Ricketts*, (Ky. 1899) 52 S. W. Rep. 939; *Illinois Cent. R. Co. v. Gholson*, (Ky. 1902) 66 S. W. Rep. 1022.

*Louisiana.* — *Mire v. Yazoo, etc., R. Co.*, 105 La. 462.

*Missouri.* — *Beall v. Chicago, etc., R. Co.*, 97 Mo. App. 111.

*South Dakota.* — See *Keilbach v. Chicago, etc., R. Co.*, 11 S. Dak. 468.

*Texas.* — *Houston, etc., R. Co. v. Hollingsworth*, (Tex. Civ. App. 1902) 68 S. W. Rep. 724; *San Antonio, etc., R. Co. v. Harris*, (Tex. Civ. App. 1904) 79 S. W. Rep. 841. See also *International, etc., R. Co. v. Erwin*, (Tex. Civ. App. 1902) 67 S. W. Rep. 466.

*Washington.* — *Curtis v. Oregon R., etc., Co.*, 36 Wash. 55.

*Liable for Wantonly Injuring Animal.* — *Spencer v. Missouri, etc., R. Co.*, 90 Mo. App. 91.

*Railroad Bound to Exercise Reasonable Care.* — *Beattyville, etc., R. Co. v. Maloney*, (Ky. 1899) 49 S. E. Rep. 545.

*Less Diligence Required in Case of Animal*

*Standing Near Track.* — *Southern R. Co. v. Reeves*, 129 Ala. 457.

**481.** *2. Comparative Negligence.* — *Willingham v. Macon, etc., R. Co.*, 113 Ga. 374.

*4. Purpose of Those Enactments.* — *Johnson v. Oregon Short-Line R. Co.*, 7 Idaho 355; *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 515.

*6. Where Both Duty to Fence Imposed and Recovery for Neglect Thereof Authorized by Statute* — *Florida.* — *Florida East Coast R. Co. v. Hazel*, 43 Fla. 263, 99 Am. St. Rep. 114; *Florida Cent., etc., R. Co. v. Seymour*, 44 Fla. 557.

*Illinois.* — *Stump v. Chicago, etc., R. Co.*, 84 Ill. App. 28.

*Iowa.* — *Craig v. Wabash R. Co.*, 121 Iowa 471; *Norman v. Chicago, etc., R. Co.*, 110 Iowa 283; *Cagwin v. Chicago, etc., R. Co.*, 113 Iowa 175; *Daily v. Chicago, etc., R. Co.*, 121 Iowa 254; *Boyer v. Chicago, etc., R. Co.*, 123 Iowa 248. See also *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587.

*Michigan.* — *Johnson v. Detroit, etc., R. Co.*, 135 Mich. 353.

*Missouri.* — *Atchison, etc., R. Co. v. Kavanaugh*, 163 Mo. 54; *Redmond v. Missouri, etc., R. Co.*, 104 Mo. App. 651; *Warden v. Missouri, etc., R. Co.*, 78 Mo. App. 664; *Meadows v. Chicago, etc., R. Co.*, 82 Mo. App. 83; *Rowen v. Chicago G. W. R. Co.*, 82 Mo. App. 24; *Glasscock v. Missouri, etc., R. Co.*, 82 Mo. App. 146; *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458; *Moore v. Omaha, etc., R. Co.*, 85 Mo. App. 512.

*Nebraska.* — *Chicago, etc., R. Co. v. Sevcek*, (Neb. 1904) 101 N. W. Rep. 981.

*New Jersey.* — *Hendrickson v. Philadelphia, etc., R. Co.*, 68 N. J. L. 612.

*Ohio.* — *Megrue v. Lennox*, 59 Ohio St. 479.

*Virginia.* — *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86.

*Wisconsin.* — See *Atkinson v. Chicago, etc., R. Co.*, 119 Wis. 176.

*Canada.* — *Grand Trunk R. Co. v. James*, 31 Can. Sup. Ct. 420, *reversing* 1 Ont. L. Rep. 127; *McKillar v. Canadian Pac. R. Co.*, 14 Manitoba 614. See also *Huot v. Quebec R. Light, etc., Co.*, 21 Quebec Super. Co. 427.

*Michigan — Yard Limits.* — Under the Michigan statute imposing the duty to fence and put in cattle guards, a railroad company is not bound to fence or guard its yard limits, but where it does fence such yard limits and put in a guard, a duty to repair arises, and it will be held liable for an injury occasioned by want of repair. *Hathaway v. Detroit, etc., R. Co.*, 124 Mich. 510.

482. See notes 1, 2.

2. Amount of Recovery under These Statutes — Recovery of Actual Damages Sustained. — See note 3.

483. See note 1.

Recovery of Amount in Excess of Actual Damages. — See note 2.

484. 3. Kind and Character of Debarments Required — *a*. KIND AND NATURE OF ANIMALS TO BE EXCLUDED — In General. — See notes 6, 7.

Sheep and Swine. — See note 8.

485. Dogs. — See note 3.

482. 1. Statutes Not Imposing Duty to Fence, but Authorizing Recovery in Absence of Fences — *Kansas*. — *Atchison*, etc., R. Co. *v.* *Ash*, 9 Kan. App. 889, 58 Pac. Rep. 235.

*Missouri*. — *Hillman v. Gray's Point Terminal R. Co.*, 99 Mo. App. 271.

*Montana*. — *Meuard v. Montana Cent. R. Co.*, 22 Mont. 340; *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238.

*Tennessee*. — *Mobile*, etc., R. Co. *v.* *Tiernan*, 102 Tenn. 704; *Louisville*, etc., R. Co. *v.* *Patton*, 104 Tenn. 40; *Jones v. Nashville*, etc., R. Co., 104 Tenn. 119.

*Texas*. — *Southern Kansas R. Co. v. McKay*, (Tex. Civ. App. 1898) 47 S. W. Rep. 479; *Missouri*, etc., R. Co. *v.* *Hanacek*, 93 Tex. 446; *Galveston R. Co. v. Reitz*, 27 Tex. Civ. App. 411; *San Antonio*, etc., R. Co. *v.* *Tamborello*, (Tex. Civ. App. 1902) 67 S. W. Rep. 926; *Missouri*, etc., R. Co. *v.* *Kennedy*, 33 Tex. Civ. App. 445.

*Wisconsin*. — *Cole v. Duluth*, etc., R. Co., 104 Wis. 460; *Herrell v. Chicago*, etc., R. Co., 114 Wis. 605; *Perrault v. Minneapolis*, etc., R. Co., 117 Wis. 520.

Under the Tennessee Statute a railroad company is not liable for failure to fence public highways, private ways, streets, alleys, sidewalks, public grounds, commons, and ways leading to burial places, churches, and school houses. *Greer v. Nashville*, etc., R., 104 Tenn. 242.

2. Where Only Duty to Fence Imposed by Statute, Recovery May Be Had for Neglect Thereof. — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Patrie v. Oregon Short Line R. Co.*, 6 Idaho 448; *Parish v. Louisville*, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 186; *Rubein v. Brooklyn Heights R. Co.*, 61 N. Y. App. Div. 478.

3. Actual Damages Recovered for Injuries Due to Defective Fences or Cattle Guards — *Georgia*. — *Western*, etc., R. Co. *v.* *Calhoun*, 104 Ga. 384.

*Idaho*. — *Haner v. Northern Pac. R. Co.*, 7 Idaho 305; *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355.

*Kentucky*. — *Louisville*, etc., R. Co. *v.* *Beauchamp*, 108 Ky. 47.

*Michigan*. — *Johnson v. Detroit*, etc., R. Co., 135 Mich. 353; *Clement v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 999.

*Montana*. — *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238.

*New York*. — *Connolly v. Central Vermont R. Co.*, 4 N. Y. App. Div. 221, affirmed 158 N. Y. 675; *Rubein v. Brooklyn Heights R. Co.*, 61 N. Y. App. Div. 478.

*Ohio*. — *Megrue v. Lennox*, 59 Ohio St. 479.

*South Dakota*. — See *Keilbach v. Chicago*, etc., R. Co., 11 S. Dak. 468.

*Tennessee*. — *Greer v. Nashville*, etc., R. Co., 104 Tenn. 242.

*Texas*. — *Texas*, etc., R. Co. *v.* *Schriener*, (Tex. Civ. App. 1899) 49 S. W. Rep. 649; *St. Louis Southwestern R. Co. v. Terry*, 22 Tex. Civ. App. 176; *Missouri*, etc., R. Co. *v.* *Hanacek*, 93 Tex. 446; *San Antonio*, etc., R. Co. *v.* *Tamborello*, (Tex. Civ. App. 1902) 67 S. W. Rep. 926; *Missouri*, etc., R. Co. *v.* *Kennedy*, 33 Tex. Civ. App. 445; *Houston*, etc., R. Co. *v.* *Wilson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 274; *Houston*, etc., R. Co. *v.* *McMillan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 296.

*Canada*. — *James v. Grank Trunk R. Co.*, 31 Ont. 672, 1 Ont. L. Rep. 127, reversed on other grounds 31 Can. Sup. Ct. 420.

483. 1. Florida Cent., etc., R. Co. *v.* *Seymour*, 44 Fla. 557; *Black v. Minneapolis*, etc., R. Co., 122 Iowa 32. See also *Redmond v. Missouri*, etc., R. Co., 104 Mo. App. 651.

2. Double Damages Authorized — *Florida*. — *Florida East Coast R. Co. v. Hazel*, 43 Fla. 263, 99 Am. St. Rep. 114.

*Iowa*. — *Cagwin v. Chicago*, etc., R. Co., 113 Iowa 175; *Enix v. Iowa Cent. R. Co.*, 114 Iowa 508; *Kling v. Chicago*, etc., R. Co., 115 Iowa 133; *Black v. Minneapolis*, etc., R. Co., 122 Iowa 32; *Boyer v. Chicago*, etc., R. Co., 123 Iowa 248; *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248.

*Missouri*. — *Atchison*, etc., R. Co. *v.* *Kavanaugh*, 163 Mo. 54; *Downey v. Mississippi River*, etc., R. Co., 94 Mo. App. 137; *Sappington v. Chicago*, etc., R. Co., 95 Mo. App. 387; *Kimball v. St. Louis*, etc., R. Co., 99 Mo. App. 335; *Redmond v. Missouri R. Co.*, 104 Mo. App. 651; *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458; *Huss v. Wabash R. Co.*, 84 Mo. App. 111; *Kirby v. Wabash R. Co.*, 85 Mo. App. 345; *Moore v. Omaha*, etc., R. Co., 85 Mo. App. 512; *Schlottzauer v. Missouri*, etc., R. Co., 89 Mo. App. 65; *Ellis v. Mississippi River*, etc., R. Co., 89 Mo. App. 241.

But a railroad company is not liable for double damages for injury to the harness on a horse which it has killed. *Huss v. Wabash R. Co.*, 84 Mo. App. 111.

484. 6. Statutes Specifying Classes of Animals. — *Colver v. Missouri Pac. R. Co.*, 93 Mo. App. 147; *Lee v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 111.

7. Debarments Must Be Sufficient to Exclude All Ordinary Live Stock. — *Sappington v. Chicago*, etc., R. Co., 95 Mo. App. 387.

8. Statute Providing that Fences Must Be Sufficient to Exclude Sheep and Swine. — *Chicago*, etc., R. Co. *v.* *Sevcek*, (Neb. 1904) 101 N. W. Rep. 981; *Lee v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 111.

485. 3. Fence Law Does Not Apply to Dogs.

**485.** *b. SUFFICIENCY OF DEBARMENTS TO ANSWER INTENDED PURPOSE* — (1) *What Is Sufficient Fence.* — See note 5.

**486.** See note 1.

(2) *What Are Sufficient Cattle Guards.* — See notes 2, 3, 4, 5.

**4.** *Whether Actual Contact Between Train and Animal Essential to Liability.* — See note 6.

**487.** See note 1.

**5. Liability as Between Owners and Operators** — *c. LESSORS AND LESSEES* — *Liability of Lessor or Owner.* — See note 6.

**488.** See note 1.

*Liability of Lessee.* — See note 3.

**489.** *d. TRACKS USED BY BOTH OWNER AND ANOTHER.* — See note 3.

*e. ROAD OPERATED BY RECEIVER.* — See note 8.

**6. Place of Entrance Rather than of Injury Governs Liability.** — See note 11.

— *Moore v. Charlotte Electric R., etc., Co.*, 136 N. Car. 554. See also *Strong v. Georgia R., etc., Co.*, 118 Ga. 515.

**485. 5. Fences Must Be Sufficient to Exclude Ordinary Stock.** — *Swanson v. Chicago, etc., R. Co.*, 79 Minn. 398; *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 515, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485.

*Gates and Gate Fastenings.* — *Kling v. Chicago, etc., R. Co.*, 115 Iowa 133; *Mooers v. Northern Pac. R. Co.*, 80 Minn. 24; *Greer v. Nashville, etc., R. Co.*, 104 Tenn. 242; *St. Louis Southwestern R. Co. v. Adams*, 24 Tex. Civ. App. 231.

*Gates forming parts of a fence must be as substantial as other portions of such fence for the purpose of keeping out stock.* *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

It is the duty of the railroad to keep gates closed. *Greer v. Nashville, etc., R. Co.*, 104 Tenn. 242. But see *Atchison, etc., R. Co. v. Kavanaugh*, 163 Mo. 54, wherein the railroad was held not liable where a third person left the gate open without the knowledge of the company. And to the same effect see *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

For a case wherein the facts were held not to disclose negligence on the part of the company, see *Cagwin v. Chicago, etc., R. Co.*, 113 Iowa 175.

**The Duty of Erecting and Maintaining Cattle Guards.** — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Chicago, etc., R. Co. v. Blair*, 75 Ill. App. 659; *Chicago, etc., R. Co. v. Brown*, 33 Ind. App. 603; *Herrell v. Chicago, etc., R. Co.*, 114 Wis. 605. See also *Louisville, etc., R. Co. v. Beauchamp*, 108 Ky. 47.

**Track, and Not Right of Way, to Be Fenced** — *Iowa Statute.* — *Cagwin v. Chicago, etc., R. Co.*, 113 Iowa 175.

**486. 1. Question of Sufficiency of Fence for Jury.** — *Kling v. Chicago, etc., R. Co.*, 115 Iowa 133. See also *Schlotzhauer v. Missouri, etc., R. Co.*, 89 Mo. App. 65; *Colyer v. Missouri Pac. R. Co.*, 93 Mo. App. 147.

**2. Cattle Guards Must Suffice to Turn Ordinary Stock.** — *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248.

**3. Where Cattle Guards Erected Insufficient.** — *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248; *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202.

**When Question of Sufficiency of Cattle Guard Is**

**for the Jury.** — *Meador v. Missouri Pac. R. Co.*, 62 Kan. 865, 61 Pac. Rep. 442; *Prather v. Kansas City, etc., R. Co.*, 84 Mo. App. 86; *Glasscock v. Missouri, etc., R. Co.*, 82 Mo. App. 146.

**4. Failure to Keep Cattle Guard in Repair.** — *Indiana, etc., R. Co. v. Drum*, 21 Ill. App. 331; *Pothast v. Chicago G. W. R. Co.*, 110 Iowa 458; *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248; *Louisville, etc., R. Co. v. Beauchamp*, 108 Ky. 47; *Hathaway v. Detroit, etc., R. Co.*, 124 Mich. 610; *James v. Grand Trunk R. Co.*, 31 Ont. 672, affirmed 1 Ont. L. Rep. 127. See also *Clement v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 979.

**5. Sufficient if Constructed as Required by Statute.** — *Clement v. Pere Marquette R. Co.*, (Mich. 1904) 100 N. W. Rep. 999.

**6. Actual Contact Held Necessary.** — *Stump v. Chicago, etc., R. Co.*, 84 Ill. App. 28; *Jones v. Nashville, etc., R. Co.*, 104 Tenn. 119; *McKellar v. Canadian Pac. R. Co.*, 14 Manitoba 614.

**487. 1. Actual Contact Held Not Necessary.** — *Carlos v. Missouri Pac. R. Co.*, 106 Mo. App. 574; *Doughty v. St. Louis, etc., R. Co.*, 92 Mo. App. 494. See also *Brown v. Missouri, etc., R. Co.*, 104 Mo. App. 601.

**6. Lessor or Owner Liable by Special Statute** — *Stoltz v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 514, 7 Ohio N. P. 129.

**488. 1. Little Rock, etc., R. Co. v. Daniels**, 68 Ark. 171.

**3. Lessees Liable in Absence of Statute.** — *Little Rock, etc., R. Co. v. Daniels*, 68 Ark. 171.

**489. 3. Liability of Owner.** — *Central of Georgia R. Co. v. Wood*, 129 Ala. 483.

**Repair of Track Prima Facie Evidence of Ownership.** — *Central of Georgia R. Co. v. Wood*, 129 Ala. 483.

**8. Receiver's Liability in Absence of Statute.** — See *Felton v. Munson*, (Ky. 1899) 49 S. W. Rep. 204.

**11. Place of Entry Rather than That of Injury Governs Liability.** — *Dickinson v. Wabash R. Co.*, 103 Mo. App. 332; *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202; *Redmond v. Missouri, etc., R. Co.*, 104 Mo. App. 651; *Sappington v. Chicago, etc., R. Co.*, 95 Mo. App. 387. See also *Chicago, etc., R. Co. v. Chipman*, 87 Ill. App. 292; *Wasson v. McCook*, 80 Mo. App. 483. But compare *Chicago, etc., R. Co. v. Blair*, 75 Ill. App. 659.



**490.** See note 1.

Presumption as to Place of Entry. — See note 3.

**7. Contributory Negligence under These Statutes — a. EFFECT REGULATED BY STATUTE.** — See note 6.

**b. WHERE STATUTES ARE SILENT AS TO EFFECT OF CONTRIBUTORY NEGLIGENCE** — See note 7.

**491.** See note 1.

**492. c. WILFUL ACT OF OWNER CONTRIBUTING TO INJURY A DEFENSE.** — See notes 3, 4.

**493. 9. Company's Notice of Defect as Affecting Its Liability.** — See notes 1, 2, 3.

**490. 1. Company Liable Though Fences Not Required at Place of Injury.** — *Sappington v. Chicago, etc., R. Co.*, 95 Mo. App. 387; *Davidson v. Grand Trunk R. Co.*, 5 Ont. L. Rep. 574. See also *Chicago, etc., R. Co. v. Chipman*, 87 Ill. App. 292.

**3. Presumption as to Place of Injury.** — *Johnson v. Oregon Short Line R. Co.*, 7 Idaho 355; *Chicago, etc., R. Co. v. Brown*, 33 Ind. App. 603; *Ellis v. Mississippi River, etc., R. Co.*, 89 Mo. App. 241.

**Sufficient to Show Defect at Any Nearby Point.** — *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

**6. Contributory Negligence No Defense — Iowa Statute.** — *Enix v. Iowa Cent. R. Co.*, 114 Iowa 508. But see *McGill v. Minneapolis, etc., R. Co.*, 113 Iowa 358.

**7. Jurisdictions Where Contributory Negligence Defense — Arkansas.** — *Choctaw, etc., R. Co. v. Ingram*, 71 Ark. 394.

*Illinois.* — *Rabberman v. Hunt*, 88 Ill. App. 625; *Jarvis v. Bradford*, 88 Ill. App. 685.

*Indian Territory.* — *St. Louis, etc., R. Co. v. Zachary*, 2 Indian Ter. 536.

*Minnesota.* — *Swanson v. Chicago, etc., R. Co.*, 79 Minn. 398; *Snell v. Minneapolis, etc., R. Co.*, 87 Minn. 253.

*Missouri.* — *Beall v. Chicago, etc., R. Co.*, 97 Mo. App. 111; *Dickinson v. Wabash R. Co.*, 103 Mo. App. 332.

*New Jersey.* — *Nolan v. Central R. Co.*, 67 N. J. L. 124.

*North Dakota.* — *Wright v. Minneapolis, etc., R. Co.*, 12 N. Dak. 159; *West v. Northern Pac. R. Co.*, 13 N. Dak. 221.

*South Carolina.* — *Sauls v. D. W. Alderman, etc., Co.*, 55 S. Car. 395.

*Texas.* — *Southern Kansas R. Co. v. McKay*, (Tex. Civ. App. 1898) 47 S. W. Rep. 479; *Texas, etc., R. Co. v. Seay*, (Tex. Civ. App. 1902) 69 S. W. Rep. 177; *Texas Cent. R. Co. v. Harbison*, (Tex. Civ. App. 1903) 75 S. W. Rep. 549; *Ft. Worth, etc., R. Co. v. Roberts*, (Tex. Civ. App. 1904) 83 S. W. Rep. 250.

*Utah.* — *Clark v. Oregon Short Line R. Co.*, 20 Utah 401; *Silcock v. Rio Grande Western R. Co.*, 22 Utah 179.

*Wisconsin.* — *May v. Chicago, etc., R. Co.*, 102 Wis. 673; *Cole v. Duluth, etc., R. Co.*, 104 Wis. 460; *Herrell v. Chicago, etc., R. Co.*, 114 Wis. 605; *Perrault v. Minneapolis, etc., R. Co.*, 117 Wis. 520.

**Idaho — Burden on Plaintiff to Prove Absence of Contributory Negligence.** — *Haner v. Northern Pac. R. Co.*, 7 Idaho 305.

**491. 1. Jurisdictions Where Contributory Negligence No Defense.** — *Missouri Pac. R. Co. v.*

*McCullough*, 65 Kan. 860, 70 Pac. Rep. 364; *Brunick v. Ann Arbor R. Co.*, 132 Mich. 219; *Balser v. Chicago, etc., R. Co.*, 9 Ohio Dec. 523, 7 Ohio N. P. 482.

**492. 3. Acts of Owner Defeating Liability of Railroad.** — See *Haner v. Northern Pac. R. Co.*, 7 Idaho 305.

**In Iowa, by Statute, "the Wilful Act of the Owner."** — The breaking down of a gate by the plaintiff's horse within two days before the stock in question passed through the gate upon the right of way is not a wilful act of the owner defeating a recovery. *Enix v. Iowa Cent. R. Co.*, 114 Iowa 508.

**4. Abandonment of Animals on Unfenced Railroad Track.** — *Ft. Worth, etc., R. Co. v. Roberts*, (Tex. Civ. App. 1904) 83 S. W. Rep. 250.

**493. 1. Necessity of Notice of Defect by Company.** — *Wirstlin v. Chicago, etc., R. Co.*, 124 Iowa 170; *Atchison, etc., R. Co. v. Kavanaugh*, 163 Mo. 54; *Kimball v. St. Louis, etc., R. Co.*, 99 Mo. App. 335; *Hendrickson v. Philadelphia, etc., R. Co.*, 68 N. J. L. 612. See also *Chicago, etc., R. Co. v. Chipman*, 87 Ill. App. 292.

**Company Entitled to Reasonable Time to Discover Defect.** — *Colyer v. Missouri Pac. R. Co.*, 93 Mo. App. 147.

**2. Must Repair or Rebuild Within Reasonable Time After Discovery — Iowa.** — *Wirstlin v. Chicago, etc., R. Co.*, 124 Iowa 170.

*Missouri.* — *Dietrich, etc., R. Co. v. Hannibal, etc., R. Co.*, 89 Mo. App. 36.

*Oklahoma.* — *Choctaw, etc., R. Co. v. Depegrade*, 12 Okla. 367.

*Texas.* — *International, etc., R. Co. v. Erwin*, (Tex. Civ. App. 1902) 67 S. W. Rep. 466; *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 515.

*Wisconsin.* — *Atkinson v. Chicago, etc., R. Co.*, 119 Wis. 176.

**Reasonable Care and Diligence.** — *Atchison, etc., R. Co. v. Kavanaugh*, 163 Mo. 54.

**Negligence of Railroad Company in Failing to Discover Defects Usually Question for Jury.** — *Hendrickson v. Philadelphia, etc., R. Co.*, 68 N. J. L. 612.

**Where a Gate Is Left Open by a Third Person,** the railroad company must use ordinary diligence to discover it. *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

**3. Notice of Defect Presumed from Lapse of Time.** — *Illinois.* — *Chicago, etc., R. Co. v. Chipman*, 87 Ill. App. 292.

*Iowa.* — *Wirstlin v. Chicago, etc., R. Co.*, 124 Iowa 170.

*Michigan.* — *Johnson v. Detroit, etc., R. Co.*, 135 Mich. 353.

**494.** 11. Company's Liability as Affected by Right of Cattle to Be at Large — Statutes Held to Avail Those Only Whose Cattle Rightfully on Adjoining Lands. — See note 4.

**495.** Cattle on Adjoining Land with Consent of Owner. — See note 1.

Statutes Avail All Whose Cattle Are Injured Through Company's Failure to Fence. — See note 2.

**496.** Effect of Special Statute Prohibiting Animals at Large. — See notes 1, 2.

Such Statutes Held to Relieve Railroad Company of Liability. — See note 3.

**498.** VII. NECESSITY OF STATUTE TO MAKE RAILROADS LIABLE MERELY BECAUSE OF NONEXISTENCE OF FENCES. — See note 4.

**499.** See note 1.

**INJURY — INJURE, ETC.** — See notes 2, 3.

**503.** INMATE. — See note 2.

**504.** INNOCENT PURCHASER. — See note 2.

*Missouri.* — *Atchison, etc., R. Co. v. Kavanaugh*, 163 Mo. 54; *Bumpas v. Wabash R. Co.*, 103 Mo. App. 202.

*New York.* — *Connolly v. Central Vermont R. Co.*, 4 N. Y. App. Div. 221, *affirmed* 158 N. Y. 675.

*Tennessee.* — *Greer v. Nashville, etc., R. Co.*, 104 Tenn. 242.

*Texas.* — *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 515, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495; *International, etc., R. Co. v. Erwin*, (Tex. Civ. App. 1902) 67 S. W. Rep. 466.

**494.** 4. Not Liable if Trespasser. — *Farmer's Bank v. Chicago, etc., R. Co.*, 109 Mo. App. 165; *Grand Trunk R. Co. v. James*, 31 Can. Sup. Ct. 420, *reversing* 1 Ont. L. Rep. 127.

*In Missouri.* — See *Payne v. Current River R. Co.*, 75 Mo. App. 14.

Horses Unlawfully at Large Deemed Trespassers. — *Wright v. Minneapolis, etc., R. Co.*, 12 N. Dak. 159.

**495.** 1. Rightfully on Adjoining Lands. — *Farmer's Bank v. Chicago, etc., R. Co.*, 109 Mo. App. 165; *Payne v. Current River R. Co.*, 75 Mo. App. 14; *Quebec Cent. Co. v. Pellerin*, 12 Quebec K. B. 152.

2. Liability Irrespective of Right of Cattle to Be at Place of Entrance — *Idaho.* — *Johnson v. Oregon Short-Line R. Co.*, 7 Idaho 355.

*Missouri.* — *Carlos v. Missouri Pac. R. Co.*, 106 Mo. App. 574.

*New York.* — *Rubein v. Brooklyn Heights R. Co.*, 61 N. Y. App. Div. 478.

*Texas.* — *International, etc., R. Co. v. Richmond*, 28 Tex. Civ. App. 515, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493.

*Vermont.* — *Quimby v. Boston, etc., R. Co.*, 71 Vt. 301.

*Virginia.* — *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86.

**496.** 1. Liability of Railway Even Where Special Law Against Animal Running at Large. — *Seaboard Air-Line R. Co. v. Collier*, 118 Ga. 463; *Rabberman v. Hunt*, 88 Ill. App. 625; *Houston, etc., R. Co. v. Hollingsworth*, (Tex. Civ. App. 1902) 68 S. W. Rep. 724.

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*Law.* — *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

2. Contributory Negligence Question for Jury. — *Jarvis v. Bradford*, 88 Ill. App. 685.

3. Texas Special Law — Liable Only When Actual Negligence Shown. — *Houston, etc., R. Co. v. Hollingsworth*, (Tex. Civ. App. 1902) 68 S. W. Rep. 724; *Texas, etc., R. Co. v. Huffman*, (Tex. Civ. App. 1903) 71 S. W. Rep. 779.

**498.** 4. No Obligation to Fence in Absence of Statute — Negligence in Operation Rendering Railroad Liable. — *Denver, etc., R. Co. v. Thompson*, 12 Colo. App. 1; *Georgia Southern, etc., R. Co. v. Wisenbaker*, 113 Ga. 604; *Missouri, etc., R. Co. v. Kennedy*, 33 Tex. Civ. App. 445.

**499.** 1. Railroad Not Liable When Not Guilty of Negligence. — *Denver, etc., R. Co. v. Thompson*, 12 Colo. App. 1; *Georgia Southern, etc., R. Co. v. Wisenbaker*, 113 Ga. 604; *Missouri, etc., R. Co. v. Kennedy*, 33 Tex. Civ. App. 445.

2. Injury. — *Hitch v. Edgecombe County*, 132 N. Car. 573; *Springer v. J. H. Somers Fuel Co.*, 196 Pa. St. 156.

3. Injure. — *State v. Associated Press*, 159 Mo. 410.

Unlawful Act Implied. — *State v. Moore*, 69 N. Y. 99. See also *Reynolds v. Plumber's Material Protective Assoc.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 709.

"Injury to the Person and Death of the Person Are Not Synonymous Terms. The one presumes a continuation of life though in an impaired state, the other the destruction or ending of life." *Northern Pac. R. Co. v. Adams*, (C. C. A.) 116 Fed. Rep. 327.

Public Officers. — *Basselin v. Pate*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 368.

Injury to Property. — See *Blocker v. Boswell*, 109 Ga. 230; *James v. Signell*, 60 N. Y. App. Div. 75.

Injury and Damage. — *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611.

**503.** 2. Inmate of Hospital — Application for Life Insurance — Warranty. — *Farrell v. Security Mut. L. Ins. Co.* (C. C. A.) 125 Fed. Rep. 684.

**504.** 2. Innocent Purchaser. — *Pugh v. Highley*, 152 Ind. 252.

# INNS AND INNKEEPERS.

By C. T. GREEN.

- 507. I. WHO ARE INNKEEPERS — 1. Definitions and Explanation of Terms**  
 — An Inn. — See note 1.  
**509. 2. Essential Characteristics — b. ACCOMMODATIONS FOR HORSES.**  
 — See notes 2, 3.  
**510. d. NECESSITY OF LICENSE. — See note 1.**  
**e. NECESSITY OF SIGN. — See note 4.**  
**511. 3. Distinctions — a. KEEPERS OF BOARDING HOUSES AND LODGING HOUSES. — See notes 1, 3.**  
**512. c. KEEPERS OF RESTAURANTS AND CAFES. — See note 1.**  
**513. 4. Evidence. — See note 1.**  
**514. II. STATUTORY REGULATION — 1. In General. — See note 3.**  
**2. License. — See notes 4, 5.**  
**515. See note 1.**  
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**516. 4. Provisions for Lodging Guests. — See note 1.**  
**III. WHO ARE GUESTS — 1. Definition. — See notes 3, 4.**  
**518. 3. What Constitutes the Relation — a. IN GENERAL — It Is Considered**  
**a Question of Fact. — See note 2.**

**507. 1. Inn Defined.** — *Bunn v. Johnson*, 77 Mo. App. 596. See also *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 99 Am. St. Rep. 571.

**509. 2. Accommodations for Horses Not Necessary.** — *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 99 Am. St. Rep. 571.

**3. Where Stabling Is Required**, it need not be within the curtilage of the inn. It is sufficient that stabling is convenient. *Moore v. Court of C. Pl.*, 68 N. J. L. 229.

**510. 1. License Tax — Pennsylvania.** — See *McClure v. Krumbholz*, 9 Pa. Dist. 544.

**4. Holding Out as Innkeeper Is Sufficient.** — *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 99 Am. St. Rep. 571.

**511. 1. Keeper of Boarding House Not an Innkeeper.** — *Bailey v. People*, 190 Ill. 34, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 511.

**3. The Distinction as to the Nature of the Occupation.** — See *Meacham v. Galloway*, 102 Tenn. 415, 73 Am. St. Rep. 886.

**512. 1. Keeper of Restaurant Not an Innkeeper.** — *Block v. Sherry*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 342.

**513. 1. Sign as Evidence that One Is an Innkeeper.** — See *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 99 Am. St. Rep. 571.

**514. 3. Regulation of Inns Regarded as Matter of Police Power.** — See *Bailey v. People*, 190 Ill. 34.

**What an "Enlargement" within Massachusetts Statute.** — *Murdock v. Swasey*, 183 Mass. 573.

**4. New Jersey — Time Application Must Be Made.** — *Cramer v. Sooy*, 67 N. J. L. 107.

**Contents and Form of Application.** — *Moore v. Court of C. Pl.*, 68 N. J. L. 229.

**Rejected Application — Right to Apply Again.** — *Cramer v. Sooy*, 67 N. J. L. 107.

**Failure to Obtain License — Defense.** — Where an innkeeper, being ill, directed his clerk to apply for a license, which was never issued because of the failure of the clerk to pay the license fee, it was held to be no defense in a prosecution for operating a hotel without a license, that the defendant thought the license fee had been paid. *Com. v. Keathley*, 82 S. W. Rep. 232, 26 Ky. L. Rep. 493.

**5. Who Authorized to Grant Licenses.** — See, as to the *New Jersey* statute, *Smith v. Hightstown*, 71 N. J. L. 276.

**515. 1. Power to License Inns Not a Property Right.** — *Smith v. Hightstown*, 71 N. J. L. 276.

**Power Is Administrative Rather than Judicial.** — *Smith v. Hightstown*, 71 N. J. L. 276.

**7. Fire Escapes — Statutory Regulations.** — See *Johnson v. Snow*, 102 Mo. App. 233.

**516. 1. Constitutionality of Laws Regulating Number of Persons in One Room.** — The *Illinois* statute of April 21, 1899, § 16, providing that it shall be unlawful for more than six persons to occupy the same room for sleeping purposes in a lodging house, is discriminatory and unconstitutional as an attempt to deprive of property without due process of law. *Bailey v. People*, 190 Ill. 34.

**3. Guest Defined.** — "A guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give." *Orchard v. Bush*, (1898) 2 Q. B. 284, 67 L. J. Q. B. 650, 78 L. T. N. S. 557, 46 W. R. 527.

**4. Overstreet v. Moser**, 88 Mo. App. 72, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 516.

**518. 2. Question of Fact.** — See *Haff v. Adams*, 6 Ariz. 395.

**518.** *b. NECESSITY OF PERSONAL PRESENCE — (2) Property Taken to Inn by Bailee of Owner.* — See note 5.

(3) *Inanimate Chattels Left at Inn by Owner.* — See note 6.

**520.** *c. NATURE OF ACCOMMODATIONS FURNISHED.* — See note 4.

**521.** *d. DURATION OF RELATION — (2) Termination — (a) By Guest — aa. DEPARTURE FROM INN — Leaving Baggage or Effects at Inn.* — See note 10.

**522.** See note 1.

**524.** *e. DISTINCTION BETWEEN GUESTS AND BOARDERS — (3) Contract Creating Relation.* — See note 1.

**IV. DUTIES, RIGHTS, AND LIABILITIES — 1. Receiving and Entertaining Guests — a. EXTENT OF DUTY.** — See note 3.

**526.** *c. LIABILITIES FOR IMPROPER REFUSAL — (1) Action by Party Injured — Measure of Damages.* — See note 3.

**528.** *3. Liability in Respect to Effects of Guests — c. EXCEPTIONS TO RULE — (1) Act of God or Public Enemy.* — See note 1.

(3) *Negligence of Guest — (b) What Constitutes Negligence.* — See note 4.

**529.** *Failure to Lock Door.* — See notes 6, 8.

**530.** *d. REQUISITES OF LIABILITY — (1) Existence of Relation of Innkeeper and Guest.* — See note 10.

**531.** See note 2.

**532.** *Keepers of Boarding Houses and Lodging Houses.* — See note 3.

**533.** *(2) Custody of Innkeeper.* — See notes 1, 3.

**518.** *5. Property Taken to Inn by Bailee of Owner.* — See *Chandler v. Haas*, 12 York Leg. Rec. (Pa.) 127.

**6. Owner Leaving Inanimate Chattel at Inn Not a Guest.** — *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 105 Am. St. Rep. 930.

**520.** *4. Person Going to Hotel in Order to Deposit Valuables Not a Guest.* — *Bunn v. Johnson*, 77 Mo. App. 596.

**521.** *10. Leaving Baggage Does Not Continue Relation.* — *Hoffman v. Roessle*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 787.

**Forwarding Baggage.** — Where an innkeeper, on the departure of a guest, promised to forward any letters or packages that should come for him, it was held that the innkeeper became liable as an ordinary bailee, and the burden of showing exoneration for the loss of any package subsequently arriving was on him. *Baehr v. Downey*, 133 Mich. 163, 10 Detroit Leg. N. 153.

**522.** *1. The Clerk of an Inn Has Authority* to bind the innkeeper by an agreement with a departing guest to forward letters or packages arriving subsequent to his departure. *Baehr v. Downey*, 133 Mich. 163, 10 Detroit Leg. N. 153.

**524.** *1. Special Contract Between Guest and Innkeeper Held Not to Affect Relation.* — *Polk v. Melenbacker*, 136 Mich. 611, 11 Detroit Leg. N. 130.

**3. Where Inn Is Full.** — Where a traveler demanded a bed of an innkeeper whose sleeping apartments were all assigned, it was held that the guest had no legal right to demand to pass a night in the public sitting room. *Browne v. Brandt*, (1902) 1 K. B. 606, 71 L. J. K. B. 367.

**526.** *3. No Recovery for Mental Anguish.* — *Malin v. McCutcheon*, 33 Tex. Civ. App. 387.

**528.** *1. Innkeeper Not Liable for Loss by Act of God or Public Enemy.* — *Clancy v. Barker*, (C. C. A.) 131 Fed. Rep. 161, *per* Thayer, J., *dissenting*, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 528.

**4. Negligence a Question of Fact.** — *Jefferson*

*Hotel Co. v. Warren*, (C. C. A.) 128 Fed. Rep. 565, holding that the circumstance of a guest having relied upon the statements of a clerk as to the extent of a fire was properly submitted to the jury.

**529.** *6. In the Absence of Notice of a Rule.* — See *Watson v. Loughran*, 112 Ga. 837, permitting recovery for jewels stolen from a room left unlocked, on evidence that servants of the hotel knew of the plaintiff's failure to lock the door, since in the exercise of the "extraordinary diligence" required by statute the loss might have been avoided by the servants of the defendant.

**8. Failure to Lock Door as Evidence of Negligence.** — *Hulbert v. Hartman*, 79 Ill. App. 289.

**530.** *10. Existence of Relation of Innkeeper Essential to Liability.* — *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 105 Am. St. Rep. 930, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530.

**531.** *2. Innkeeper Liable as Gratuitous Bailee of Goods Left by Departing Guest.* — *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 105 Am. St. Rep. 930, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530 [531].

**Surrender of Baggage on Forged Order.** — Where the defendant, an innkeeper, responsible only as a gratuitous bailee for the effects of a former guest, delivered a valise to a party who presented a forged order for the same and who had been seen in the company of the plaintiff several times by the defendant, it was held that the defendant was not guilty of gross negligence although he failed to compare the signature of the plaintiff presented with the one appearing on the hotel register. *Hoffman v. Roessle*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 787.

**532.** *3. Keepers of Boarding Houses and Lodging Houses Not Liable as Innkeepers.* — *Bailey v. People*, 190 Ill. 34, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530-532.

**533.** *1. Innkeeper Liable Only for Effects*

- 534.** Goods Constructively Infra Hospitium. — See note 2.
- 535.** *e.* NATURE AND EXTENT OF LIABILITY — (1) *Rule of Liability as Insurer.* — See note 5.
- 536.** (2) *Rule of Prima Facie Liability.* — See note 3.
- 538.** (3) *Conflict of Rules Considered.* — See note 2.
- 540.** *g.* LIMITING LIABILITY — (1) *By Contract* — Notice to a Guest. — See note 4.
- 542.** (2) *By Statute* — (b) *Mode of Effecting Limitation.* — See notes 2, 3.
- 543.** (c) *Extent of Limitation* — *cc.* PROPERTY CONTEMPLATED BY STATUTE. — See note 6.
- 544.** Rule as to Articles Carried for Personal Use. — See note 1.
- i.* MEASURE OF DAMAGES. — See note 6.
- The Cost. — See note 9.
- 545.** See note 1.
- j.* EVIDENCE — Presumption Arising from Loss. — See note 4.
- 546.** 4. Liability for Personal Injuries to Guests — *a.* IN GENERAL. — See note 1.
- b.* ASSAULT AND BATTERY — (2) *By Servant of Innkeeper* — It Is a General Rule. — See note 4.
- As to Innkeepers. — See notes 7, 8.

**Infra Hospitium.** — Bradley Livery Co. v. Snook, 66 N. J. L. 654.

**533.** 3. Custody of Innkeeper's Servants. — Carhart v. Wainman, 114 Ga. 632, 88 Am. St. Rep. 45.

Leaving Goods in the Room of the Guest is a delivery to the innkeeper, under Civ. Code Ga., § 2936. Watson v. Loughran, 112 Ga. 837.

**534.** 2. Delivery of a Baggage Check to the innkeeper is *prima facie* evidence of a delivery of the baggage. Carhart v. Wainman, 114 Ga. 632, 88 Am. St. Rep. 45.

**535.** 5. Cases Declaring Innkeepers Liable as Insurers. — Briggs v. Todd, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208.

The Georgia Statute provides that in case of loss the presumption is want of proper diligence in the landlord. Watson v. Loughran, 112 Ga. 837.

**536.** 3. Accidental Fires. — In Johnson v. Chadbourn Finance Co., 89 Minn. 310, 99 Am. St. Rep. 571, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536, the court modified the doctrine of Lusk v. Beloit, 22 Minn. 468, and laid down the rule as follows: "All losses of property incurred by guests at a public hotel or inn by fire are *prima facie* due to the negligence of the proprietor, but he may discharge or relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as fire originating upon premises over which he had no control, without fault or negligence on his part."

**538.** 2. Reason for Doctrine of Absolute Liability Questioned. — Johnson v. Chadbourn Finance Co., 89 Minn. 310, 99 Am. St. Rep. 571.

**540.** 4. Limitation of Liability by Notice to Guest. — See Harris v. Childs' Unique Dairy Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 260, holding that placards on the wall observed by a customer, and printed warnings on the bill of fare, operated to limit a restaurant keeper's liability for the customer's property.

Waiver of Limitation by Agent. — Where a notice on a bill of fare in a restaurant negated

liability for loss of wearing apparel, but a waiter took the plaintiff's coat and said that he would care for it, the restaurant keeper was held to be responsible. La Salle Restaurant, etc., House v. McMasters, 85 Ill. App. 677.

**542.** 2. Statutes Strictly Construed. — Briggs v. Todd, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208; Rains v. Maxwell House Co., 112 Tenn. 219.

**3.** Waiver of Statute. — The New York statute was held to be waived where the defendant's managing clerk suggested to a guest that her jewelry be left in the trunk in her room, which was done, and the keys to the trunk and the room were placed in the clerk's custody. Friedman v. Breslin, 51 N. Y. App. Div. 268, affirmed 169 N. Y. 574.

**543.** 6. Watches. — A watch and fob come within the Tennessee statute providing that wherever the proprietor of any hotel or inn furnishes a safe or other convenient place for the safe keeping of any money, jewels, or ornaments of guests, he shall not be liable for any loss. Rains v. Maxwell House Co., 112 Tenn. 219.

**544.** 1. Articles of Personal Use or Convenience. — See Rains v. Maxwell House Co., 112 Tenn. 219, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

**6.** Measure of Damages. — Watson v. Loughran, 112 Ga. 837.

**9.** Cost of Property Not Measure of Damages. — Watson v. Loughran, 112 Ga. 837.

**545.** 1. Cost as Evidence of Value. — Watson v. Loughran, 112 Ga. 837.

**4.** Negligence Presumed from Fact of Loss. — Hulbert v. Hartman, 79 Ill. App. 289.

**546.** 1. Liability for Personal Injuries to Guest — Calye's Case Doubted. — See Clancy v. Barker, (C. C. A.) 131 Fed. Rep. 161, per Thayer, J., dissenting, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 545.

**4.** What Is Negligence in Servant of Restaurant Keeper. — See Block v. Sherry, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 342.

**7.** Modern Rule — Innkeeper Liable for Assaults

**547.** (3) *By Other Guests and Strangers.* — See note 2.

**548.** 5. *Securing and Enforcing Right to Compensation* — *a. LIEN ON GOODS OF GUESTS* — (1) *The Right in General* — (a) *Innkeepers Proper.* — See notes 4, 5.

**549.** (b) *Boarding-house and Lodging-house Keepers.* — See note 3.

**550.** (2) *To What Lien Attaches* — (a) *Property Belonging to Guests* — *Wages of Guests.* — See note 5.

(b) *Property of Third Persons, in Possession of Guests.* — See note 7.

**551.** See notes 2, 3, 4.

**554.** *b. ACTION FOR PRICE OF ENTERTAINMENT.* — See note 4.

**555.** 7. *Criminal Liability of Guests.* — See note 7.

**by Servants.** — Where the plaintiff resorted to the defendant's public house for the purpose of partaking of a meal and awakening a friend who had a room in the hotel, it was held that the innkeeper was liable for a malicious assault upon him by a servant. *Overstreet v. Moser*, 88 Mo. App. 72.

**Tort Outside Scope of Employment.** — In *Clancy v. Barker*, (C. C. A.) 131 Fed. Rep. 161, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 546, 547, it was held that an innkeeper was not liable to a guest for a physical injury done to him by a servant of the innkeeper while acting outside the scope of his employment. See also *Stringfellow v. Grunewald*, 109 La. 187. But see *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440, where, on the same state of facts, the innkeeper was held to be liable.

In *California* an innkeeper is only liable for the torts of a servant committed within the scope of his authority. *Rahmel v. Lehdorff*, 142 Cal. 681, 100 Am. St. Rep. 154.

**546.** 8. *Applicability of Rule Governing Carriers of Passengers.* — In *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440, after considering the duties of a common carrier to its passengers, it was said that the reasoning applied with equal force to a hotel keeper as regards his duties to his guests.

But in *Clancy v. Barker*, (C. C. A.) 131 Fed. Rep. 161, which involved the same state of facts, it was held by the Circuit Court of Appeals that there was no analogy between the duties of a common carrier toward a passenger and those of an innkeeper toward a guest. And to the same effect see *Rahmel v. Lehdorff*, 142 Cal. 681, 100 Am. St. Rep. 154.

**547.** 2. *Innkeeper Liable for Trespasses of Third Persons.* — *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517.

**548.** 4. *Right to Lien on Effects of Guests.* — *Reg. v. Hollingsworth*, 2 Can. Crim. Cas. (N. W. Ter.) 291.

5. *Lien Authorized by Statute.* — *State v. Engle*, 156 Ind. 339.

**549.** 3. *Statutory Lien of Boarding-house and Lodging-house Keepers.* — *Shearman v. Iroquois Hotel, etc., Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 217, holding, however, that where by the terms of the lease between the plaintiff's husband and defendant, the former had the absolute right of use and occupation of the premises, and the defendant could enter only to make repairs and alterations, the relation of landlord and tenant was created, and not that of lodging-house keeper and lodger; *Barnett v. Walker*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 323.

**Common-law Lien Not Affected.** — *Polk v. Melenbacker*, 136 Mich. 611, 11 Detroit Leg. N. 130.

**550.** 5. *Innkeeper's Lien Extended by Statute to Wages of Guests.* — See *Liess v. Engard*, 15 Montg. Co. Rep. (Pa.) 173, 8 Pa. Dist. 608, 13 York Leg. Rec. (Pa.) 109.

7. *Property of Third Person in Possession of Guest.* — *Polk v. Melenbacker*, 136 Mich. 611, 11 Detroit Leg. N. 130, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 550.

**551.** 2. *Shearman v. Iroquois Hotel, etc., Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 217.

3. *Statutory Provisions.* — The *New York* statute, Laws N. Y. 1897, c. 118, § 71, amended by Laws N. Y. 1899, c. 380, provides that a hotel keeper or boarding-house keeper shall have a lien on the guest's property unless he knew when it was brought upon the premises that the guest's possession was wrongful. Under this statute it was held that no lien attached to a sewing machine in a boarder's possession, where the legal title and right of possession were in a third person. *Barnett v. Walker*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 323.

Under the *Quebec* statute the proprietor of a hotel or inn has a lien on the effects of a guest only, and none on those belonging to other persons and brought upon the premises by his guest. *Taylor v. O'Brien*, 24 Quebec Super. Ct. 407.

4. *Existence of Common-law Rule under American Constitutions Questioned.* — *Barnett v. Walker*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 323.

**554.** 4. *Action for the Price of Entertainment.* — *Baldwin v. Webb*, 121 Ga. 416 (boarding-house keeper).

**Who Can Recover for Entertainment.** — Under the *Kentucky* statute no person other than the keeper of a tavern or house of private entertainment may recover the value of such entertainment in the absence of an agreement for compensation; and the burden of proving status is on the claimant for compensation. *Ramsey v. Keith*, 76 S. W. Rep. 142, 25 Ky. L. Rep. 382.

**555.** 7. *Criminal Liability of Guests for Fraudulent Practices.* — *State v. Engle*, 156 Ind. 339.

**Fraudulent Intent in Removal of Baggage.** — Under the *Indiana* statute it has been held that intent to defraud is not essential in the removal of baggage, and that the constitutional provision prohibiting imprisonment for debt except in case of fraud is not violated, as the offense consists in the jeopardizing of the lien, and not

**556. INNUENDO.**—See note 1.  
**INOFFICIOUS WILL.**—See note 2.

in the failure to pay the debt. *State v. Engle*, 156 Ind. 339.

Under the *Pennsylvania* statute of April 20, 1876, fraud is shown where a surreptitious removal of baggage is accompanied with an intention to escape paying an accrued board bill. *Com. v. Billig*, 25 Pa. Super. Ct. 477.

**556. 1.** *Grand v. Dreyfus*, 122 Cal. 58; *Donahoe v. Star Pub. Co.*, 4 Penn. (Del.) 166; *Wallace v. Homestead Co.*, 117 Iowa 348; *Jones v. Roberts*, 73 Vt. 201.

**2.** *In re Willford*, (N. J. 1902) 51 Atl. Rep. 501.

## INSANITY.

**562. I. DEFINITIONS**—1. **Insanity Generally.**—See note 1.

**2. Idiocy.**—See note 2.

**563. 3. Lunacy.**—See note 1.

**5. Delusions and Hallucinations.**—See note 3.

**6. Imbecility.**—See notes 4, 5.

**7. Senile Dementia.**—See note 6.

**8. Delirium Tremens.**—See note 7.

**9. Moral Insanity—Irresistible Impulse—Emotional Insanity—Moral Insanity.**—See note 9.

**564. Emotional Insanity.**—See note 3.

**10. Monomania.**—See note 4.

**12. Kleptomania.**—See note 8.

**562. 1. Insanity Defined.**—In *Lowe v. State*, 118 Wis. 641, the following instruction was held correct: "Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control." See also *Butler v. State*, 102 Wis. 364.

**Power to Manage Estate.**—*Smith's Lunacy*, 12 Pa. Super. Ct. 649.

**2. Idiocy.**—*In re Anderson*, 132 N. Car. 243.

**563. 1. Lunacy.**—*In re Anderson*, 132 N. Car. 243, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 562.

**Lunatic Defined—Test.**—"A party who, from unsoundness of mind, is incapable of managing his affairs is a lunatic, although not totally incapable of taking care of himself. The unsoundness of mind is the test. A merely weak-minded person, if his condition be not abnormal, and he be not an idiot, is not a lunatic. It is not a question of strong intellect, of average intellect, or of weak intellect. It is a question of unsoundness of intellect and of abnormal condition of mind." *Smith's Case*, 22 Pa. Co. Ct. 487, affirmed 12 Pa. Super. Ct. 649.

**In New York by Statute** the term "lunacy" includes every kind of unsoundness of mind except idiocy. *Matter of Wells*, 175 N. Y. 139;

*Matter of Clark*, 57 N. Y. App. Div. 5, appeal dismissed 169 N. Y. 595.

**Distinction Between Lunatics and Idiots.**—Lunatics are distinguished from idiots by the fact that the former may have lucid intervals while the latter have no power of mind whatever. *Bicknell v. Spear*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 389.

**3. An Insane Delusion** exists whenever a person conceives something extravagant to exist which has no existence whatever, and he is incapable of being permanently reasoned out of that conception. *Bohler v. Hicks*, 120 Ga. 800.

**4. Imbecility.**—*In re Emswiler*, 11 Ohio Dec. 10, 8 Ohio N. P. 132.

**5. In re Emswiler**, 11 Ohio Dec. 10, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563.

**An Imbecile**, as the term is ordinarily used and understood, is one who is mentally weak, rather than insane. *Cagle v. Drew*, (Kan. 1904) 78 Pac. Rep. 427.

**6. Senile Dementia.**—*Pyott v. Pyott*, 90 Ill. App. 210, affirmed 191 Ill. 280.

As to the symptoms of senile dementia see *Matter of Preston*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 550.

**7. Delirium Tremens.**—*Parrish v. State*, 139 Ala. 16; *People v. Methever*, 132 Cal. 326.

**9. Moral Insanity No Excuse for Crime.**—*Sharp v. State*, 161 Ind. 288; *Lowe v. State*, 118 Wis. 641.

**564. 3. Emotional Insanity.**—*Lowe v. State*, 118 Wis. 641.

**4. Monomania.**—*Bohler v. Hicks*, 120 Ga. 800, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 564.

**8. Kleptomania.**—*Lowe v. State*, 44 Tex. Crim. 224.

**565.** II. JURISDICTION IN LUNACY — In England. — See note 11.

**566.** The Discussion Is, However, of Little Practical Importance. — See notes 5, 6.

**567.** III. THE INQUISITION — 3. Issuance of Commission Matter of Discretion. — See note 5.

4. Notice to and Attendance of Lunatic — Notice to Alleged Lunatic — General Rule. — See notes 11, 12.

**568.** See note 1.

Appearance — Effect as Waiver. — See notes 4, 5.

Notice to Next of Kin. — See note 7.

**569.** Lunatic's Right to Be Present. — See note 1.

**570.** 5. Powers and Duties of Commissioners — The Jurors — Compelling Attendance of Witnesses. — See note 1.

Number of Jurors. — See note 6.

Bias of Juror. — See note 8.

**571.** 6. Personal Examination of Lunatic — Exclusion of Spectators. — See note 3.

IV. COSTS AND DISBURSEMENTS — 1. In General. — See note 4.

2. Imposed upon Prosecutor. — See note 5.

3. Imposed upon Lunatic's Estate. — See note 7.

**572.** 4 Where Inquisition Fails or Is Set Aside — In England. — See notes 4, 5.

In the United States. — See notes 6, 7.

**574.** V. APPOINTMENT OF GUARDIAN — 2. Prior Adjudication of Insanity Requisite. — See note 3.

4. On Whose Nomination Appointment to Be Made. — See note 8.

**577.** 9. For Nonresident Lunatics. — See note 8.

**565.** 11. Jurisdiction — In England. — Yeomans v. Williams, 117 Ga. 800, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 565.

**566.** 5. Probate Courts. — Payne v. Burdette, 84 Mo. App. 332.

**6.** County Courts. — Matter of Bellenger, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 414.

**Ohio** — Common Pleas. — State v. South, 5 Ohio Dec. 588, 7 Ohio N. P. 442.

**Pennsylvania** — Common Pleas or Quarter Sessions. — Butler County v. Public Charities, 14 Pa. Super. Ct. 70.

**567.** 5. Discretion in Issuing Commission. — Com. v. Hays, 195 Pa. St. 270.

**Inquiry as to Mind of Temporary Resident.** — *In re* Burbidge, (1902) 1 Ch. 426.

**11.** Yeomans v. Williams, 117 Ga. 800, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 567.

**12.** Yeomans v. Williams, 117 Ga. 800, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 567; McGee v. Hayes, 127 Cal. 336, 78 Am. St. Rep. 57; Soules v. Robinson, (Ind. App. 1901) 60 N. E. Rep. 726; Hetrick's Case, 23 Pa. Co. Ct. 522; Brooke's Estate, 24 Pa. Super. Ct. 430.

**568.** 1. Effect of Lack of Notice. — McGee v. Hayes, 127 Cal. 336, 78 Am. St. Rep. 57; Jones v. Learned, 17 Colo. App. 76; Haines v. Cearlock, 95 Ill. App. 203; Kelley v. Gardner, (Ky. 1903) 76 S. W. Rep. 531; Taylor v. Moore, 112 Ky. 330; Arnett v. Owens, (Ky. 1901) 65 S. W. Rep. 151; Stewart v. Taylor, 111 Ky. 247.

**4.** Appearance as Waiver. — See Hendricks v. Settle, 107 Ky. 344.

**5.** McGee v. Hayes, 127 Cal. 336, 78 Am. St. Rep. 57.

**7.** Notice to Next of Kin Discretionary. — Brooke's Estate, 24 Pa. Super. Ct. 430.

**569.** 1. Right of Lunatic to Be Present. —

Taylor v. Moore, 112 Ky. 330; Arnett v. Owens, (Ky. 1901) 65 S. W. Rep. 151.

**570.** 1. Compelling Attendance of Witnesses. — Com. v. Bergstresser, 8 Pa. Dist. 721.

**6.** County Court Six — Circuit Court Twelve on Appeal. — Neely v. Shephard, 190 Ill. 637.

**8.** Matter of Nutting, 74 N. Y. App. Div. 468.

**571.** 3. Friends of Alleged Lunatic. — In Alvord v. Alvord, 109 Iowa 113, it was held no error for the court to refuse to order two lady friends, accompanying the defendant, from the room, where they were not shown to have been guilty of any misconduct, and it was appropriate because of defendant's age that they should be there with her.

**4.** Court Costs Not Cost of Counsel — Pennsylvania Act of April 16, 1849. — Com. v. O'Shea, 31 Pittsb. Leg. J. N. S. (Pa.) 348.

**Wisconsin Statute.** — *In re* Welch, 108 Wis. 387.

**5.** Wisconsin Statute — Costs Against Petitioner. — *In re* Welch, 108 Wis. 387.

**7.** Death of Lunatic Before Verdict. — *In re* Kaye, 6 British Columbia 61.

**572.** 4. Bouchard v. Bastien, 16 Quebec Super. Ct. 565, 19 Quebec Super. Ct. 507.

**5.** See *In re* Kaye, 6 British Columbia 61.

**6.** New York. — See Sander v. Lerner, 101 N. Y. App. Div. 167.

**7.** Indiana. — Costs are charged against the applicant. State v. Branyan, 30 Ind. App. 502.

**574.** 3. Finding of Insanity Requisite. — Martin v. Stewart, 67 Kan. 424.

**8.** Curator Removed — Family Meeting Convoked for Recommendation. — State v. King, 113 La. 905.

**577.** 8. Nonresident Lunatic. — Brown v. Wallis, 63 N. J. Eq. 791; Matter of Bartelme, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 131.



**578.** See note 1.

**579.** VI. MANAGEMENT OF ESTATE — GUARDIAN'S RIGHTS, DUTIES, AND LIABILITIES — 2. Control of Court. — See note 1.

**580.** 4. Expenditures for Lunatic — *b.* WHERE EXPENDITURES EXCEED INCOME. — See note 2.

**584.** 6. Sales, Transfers, and Incumbrances — *c.* OF REAL ESTATE — (1) *Power to Sell* — (a) General Rules — In the United States. — See note 3.

**587.** (6) *Mortgages*. — See notes 4, 5.

**589.** 8. Accounting — *a.* ANNUAL ACCOUNTS — (1) *Duty to Make*. — See note 6.

**590.** *b.* FINAL ACCOUNTING — (1) *For Property Received* — General Rule. — See note 5.

**591.** (3) *For Interest*. — See note 4.

*d.* ALLOWANCE OF ITEMS — (1) *For Support of Ward*. — See note 8.

**592.** (3) *For Counsel Fees*. — See notes 3, 4.

(4) *For Costs*. — See note 6.

**594.** 9. Compensation of Guardian — *b.* IN UNITED STATES — Compensation Allowed. — See note 6.

**595.** VII. TERMINATION OF GUARDIANSHIP — 1. Death of Ward — Effect upon Committee's Authority. — See note 4.

2. Recovery of Lunatic. — See note 7.

4. Removal of Committee. — See note 10.

**596.** VIII. HUSBAND'S LIABILITY FOR MAINTENANCE OF INSANE WIFE. — See note 8.

**598.** IX. RESTRAINT OF INSANE PERSONS — 4. Right to Writ of Habeas Corpus — *a.* IN GENERAL. — See note 4.

Upon the Return of Such Writ. — See note 7.

**599.** 6. Right to Notice and Hearing — Statute Conferring Arbitrary Powers upon Judge. — See note 1.

See also *Matter of Fidelity Trust Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 118.

**578.** 1. Appointment Has No Extraterritorial Force. — *New York Security, etc., Co. v. Keyser*, (1901) 1 Ch. 666.

**579.** 1. Control of Court. — *Wurster v. Armfield*, 175 N. Y. 256; *Forbell v. Denton*, 53 N. Y. App. Div. 402.

**580.** 2. *Spaulding v. Bullock*, 20 Pa. Super. Ct. 301.

**584.** 3. Statutes. — See *Mitchell v. Spaulding*, 20 Pa. Super. Ct. 296; *Spaulding v. Bullock*, 20 Pa. Super. Ct. 301.

**587.** 4. *Mortgages*. — *Corbin v. Dwyer*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 488, modified and affirmed 57 N. Y. App. Div. 630.

5. Power to Mortgage confers no authority to sell. *Reals v. Weston*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 67.

**589.** 6. Committee's Duty to Account. — *Spaulding v. Bullock*, 20 Pa. Super. Ct. 301.

**590.** 5. Investments. — *Matter of Chapman*, 43 N. Y. App. Div. 231, 162 N. Y. 456.

**591.** 4. Interest. — *In re Thomas*, 26 Colo. 110. See also *Jones v. Nolan*, 120 Ga. 588.

8. Manner of Lunatic's Maintenance. — See *Guardianship of Averill*, 133 Cal. xix, 66 Pac. Rep. 14. See also *Masters v. Jones*, 158 Ind. 647.

**592.** 3. Counsel Fees. — *Bradford v. MacKenzie*, 89 Md. 763, 43 Atl. Rep. 923.

Necessity for Counsel Must Be Shown. — *Grove v. Reynolds*, 100 Mo. App. 56.

Defending Application for Discharge. — *Matter of Lerner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 377.

4. *In re Brayer*, (County Ct.) 57 N. Y. Supp. 957.

6. Allowance of Costs. — *In re Brayer*, (County Ct.) 57 N. Y. Supp. 957.

**594.** 6. *In re Brayer*, (County Ct.) 57 N. Y. Supp. 957.

Effect of Allowance by Court. — *Gibson v. Wild*, 124 Iowa 152.

**595.** 4. Effect of Ward's Death upon Committee's Authority. — *Masters v. Jones*, 158 Ind. 647.

7. Recovery of Lunatic. — *In re Scheuer*, 31 Mont. 606.

Order of Court Restoring Lunatic to Capacity. — *State v. Prohate Ct.*, 83 Minn. 58.

10. Removal of Committee. — *Matter of Chapman*, 43 N. Y. App. Div. 231, 162 N. Y. 456; *In re Henry*, 24 Pa. Co. Ct. 79.

**596.** 8. Liability of Husband for Support of Insane Wife. — *Schelling v. Kankakee County*, 96 Ill. App. 432; *Tennessee Insane Hospital v. McReynolds*, 1 Tenn. Ch. App. 349.

**598.** 4. Habeas Corpus. — *State v. Lawrence*, 86 Minn. 310; *People v. Wendel*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 496.

7. Lunatic Not Discharged. — *In re Boyett*, 136 N. Car. 415. See *In re Palmer*, 26 R. I. 486.

**599.** 1. Constitutional Guaranty — Due Process — Unconstitutional Statute. — *Matter of Lambert*, 134 Cal. 626, 86 Am. St. Rep. 296;

**599.** 8. Right to Jury Trial. — See note 6.

**600.** 9. Detention After Acquittal upon Criminal Charge — But in the United States. — See note 4.

# **X. ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS —**

1. Lunatic's Right to Sue — *a.* BEFORE INQUISITION — Modern Rule — By Next Friend. — See note 9.

**601.** *b.* AFTER INQUISITION — By Committee or Guardian. — See notes 2, 3.

**602.** 2. Lunatic's Liability to Be Sued — *b.* ACTIONS AGAINST GUARDIAN — In General. — See note 6.

**603.** 3. Lunatic's Right to Allege His Own Insanity — Modern Rule. — See notes 4, 7.

# **XI. QUESTIONS OF LAW AND FACT — The General Rule. — See note 8.**

**604.** Where Evidence Clearly Insufficient. — See note 3.

But Where There Is Conflicting Evidence. — See note 4.

And in Courts of Chancery. — See note 5.

# **XII. PRESUMPTIONS — 1. Of Sanity. — See note 7.**

**605.** 2. Of Continuance of Insanity — *a.* OF PERMANENT NATURE. — See note 1.

People v. Wendel, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 496. See also *In re Boyett*, 136 N. Car. 415.

**599.** 6. Inquisition Not Within Constitutional Provision. — *In re Boyett*, 136 N. Car. 415, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599.

**600.** 4. *In re Boyett*, 136 N. Car. 415.

9. Modern Rule — Suits by Next Friend. — *Didisheim v. London*, etc., Bank, (1900) 2 Ch. 15; *Dent v. Merriam*, 113 Ga. 83; *Pyott v. Pyott*, 191 Ill. 280, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 600.

To Protect Estate of Lunatic. — *Roughan v. Morris*, 87 Ill. App. 642.

**601.** 2. After Inquisition — Suit by Guardian. — *Isle v. Cranby*, 199 Ill. 39, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Pyott v. Pyott*, 191 Ill. 280, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Palmer v. Sinickson*, 59 N. J. Eq. 530; *Wright v. Hayden*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 116.

3. Where Committee's Interests Adverse to Lunatic's. — *Isle v. Cranby*, 199 Ill. 39, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601; *Pyott v. Pyott*, 191 Ill. 280, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601.

**602.** 6. *Scott v. Bassett*, 194 Ill. 602, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602.

**603.** 4. Modern Rule. — *Robinson v. Kind*, 25 Nev. 261; *Feigenbaum v. Howe*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 514; *Cundall v. Haswell*, 23 R. I. 508; *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

Contracts Voidable. — *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539.

Deeds Voidable Only. — *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856.

7. *Cundall v. Haswell*, 23 R. I. 508, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 603.

8. Existence of Insanity Question of Fact — *Alabama*. — *Parrish v. State*, 139 Ala. 16.

*Colorado*. — *Shapter v. Pillar*, 28 Colo. 209.

*Indiana*. — *Sharp v. State*, 161 Ind. 288.

*Iowa*. — *State v. Geier*, 111 Iowa 706.

*Kentucky*. — *Shepherd v. Com.*, (Ky. 1905) 85 S. W. Rep. 191.

*Montana*. — *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579.

*Nebraska*. — *Bothwell v. State*, (Neb. 1904) 99 N. W. Rep. 669.

*New York*. — *People v. Egnor*, 175 N. Y. 419.

*Oklahoma*. — *Turner v. Territory*, 11 Okla. 660.

*Wisconsin*. — *Lowe v. State*, 118 Wis. 641.

**604.** 3. Civil Cases — Insufficiency of Evidence. — *State v. Morledge*, 164 Mo. 522.

4. Where Evidence Conflicting. — *In re Alexander*, 136 Mich. 518; *People v. Ferraro*, 161 N. Y. 365.

5. Illinois — Verdict Advisory Only. — *Pyott v. Pyott*, 191 Ill. 280.

7. Presumption of Sanity — *California*. — *People v. Suesser*, 142 Cal. 354.

*Delaware*. — *State v. Jack*, 4 Penn. (Del.) 470; *State v. Cole*, 2 Penn. (Del.) 344; *State v. Kavanaugh*, 4 Penn. (Del.) 131.

*Florida*. — *Davis v. State*, 44 Fla. 32; *Williams v. State*, 45 Fla. 128.

*Georgia*. — *Lee v. State*, 116 Ga. 563.

*Iowa*. — *Poulos v. Reed*, 121 Iowa 224.

*Missouri*. — *State v. Palmer*, 161 Mo. 152.

*New Jersey*. — *State v. Hill*, 65 N. J. L. 626.

*Ohio*. — *In re Shelleig*, 11 Ohio Dec. 81; *State v. Tyler*, 5 Ohio Dec. 588, 7 Ohio N. P. 443.

*Oklahoma*. — *Maas v. Territory*, 10 Okla. 714.

*Pennsylvania*. — *Com. v. Kilpatrick*, 204 Pa. St. 218.

*West Virginia*. — *McPeck v. Graham*, 56 W. Va. 200; *Eakin v. Hawkins*, 52 W. Va. 124.

The Burden of Proof of insanity in murder trials is with the defense from the beginning and never shifts. *Com. v. Heidler*, 101 Pa. St. 375.

**605.** 1. Habitual Insanity — Presumption of Continuance — *United States*. — *Kellogg v. U. S.*, (C. C. A.) 103 Fed. Rep. 200.

*California*. — *People v. Findley*, 132 Cal. 301.

*Delaware*. — *State v. Jack*, 4 Penn. (Del.) 470.

*Indian Territory*. — See *Binyon v. U. S.* (Indian Ter. 1903) 76 S. W. Rep. 265.

*Iowa*. — *State v. Robbins*, 109 Iowa 650.

*Kansas*. — *Lantis v. Davidson*, 60 Kan. 389.

*New York*. — *Wallace v. Frey*, (Supm. Ct.

- 606.** *b.* OF TEMPORARY NATURE. — See note 1.  
**XIII. EVIDENCE OF INSANITY** — 1. **Record of Inquisition** — *a.* IN GENERAL. — See note 2.
- 607.** *c.* COMMITMENT TO ASYLUM. — See note 4.  
 Records of Hospital. — See note 5.
- 608.** 2. **Nature of Act under Consideration** — *a.* CRIMINAL ACTS. — See note 1.  
*c.* SUICIDE. — See note 4.
- 609.** 3. **Absence of Motive.** — See note 3.
- 610.** 5. **Particular Facts and Circumstances Tending to Show Mental Aberration** — *a.* GENERAL CONDUCT AND APPEARANCE. — See note 6.  
*b.* IRRATIONAL ACTS AND BELIEFS. — See note 8.
- 611.** *c.* IRRITABILITY. — See note 4.  
*d.* DEPRAVITY. — See note 5.  
*e.* IMPROVIDENT BARGAINS AND HABITS. — See note 6.  
*g.* BELIEF IN SPIRITUALISM. — See note 9.
- 612.** 8. **General Reputation and Family Tradition** — *a.* TO PROVE HEREDITARY TAINT. — See note 4.  
*b.* TO PROVE INSANITY OF PARTY. — See note 7.
- 613.** 9. **Proof of Hereditary Taint** — *a.* INSANITY OF ANCESTORS. — See note 2.
- 614.** *d.* ADMITTED AS CUMULATIVE EVIDENCE. — See notes 1, 2, 3.
- Spec. T.) 27 Misc. (N. Y.) 29; Sander v. Savage, 75 N. Y. App. Div. 333.  
*West Virginia.* — Eakin v. Hawkins, 52 W. Va. 124.  
*Wisconsin.* — Hempton v. State, 111 Wis. 127. See also the title PRESUMPTIONS, vol. 22, p. 1241.
- 606.** 1. **In Cases of Temporary Insanity.** — Porter v. State, 135 Ala. 51; People v. Findley, 132 Cal. 301; State v. Jack, 4 Penn. (Del.) 470; McPeck v. Graham, 56 W. Va. 200, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 606.
2. **Record of Inquisition Presumptive Evidence** — *District of Columbia.* — Blandy v. Blandy, 20 App. Cas. (D. C.) 535.  
*Kansas.* — State v. McMurray, 61 Kan. 87.  
*New York.* — Hardy v. Berger, 76 N. Y. App. Div. 393.  
*Pennsylvania.* — Com. v. Harrold, 204 Pa. St. 154; Mitchell v. Spaulding, 20 Pa. Super. Ct. 296; Com. v. Patterson, 13 Pa. Super. Ct. 136.  
*Washington.* — State v. Champoux, 33 Wash. 339.  
*Wisconsin.* — Hempton v. State, 111 Wis. 127.
- Parole of Lunatic** — *Wisconsin Statutes.* — Under the statutes of Wisconsin after a person has been on parole continuously from the hospital for the insane for two years or more, the adjudication upon which he was committed to the hospital is no longer *prima facie* proof of insanity. Hempton v. State, 111 Wis. 127.
- 607.** 4. **Subsequent Prosecution** — **Record as Evidence.** — State v. McMurry, 61 Kan. 87; Hempton v. State, 111 Wis. 127.
5. **Hospital Records.** — Hempton v. State, 111 Wis. 127.
- 608.** 1. **Nature of Criminal Act as Evidence.** — Lowe v. State, 118 Wis. 641.
4. **Attempt to Commit Suicide.** — Com. v. Lutz, 10 Kulp (Pa.) 234.
- 609.** 3. **Motive.** — Lowe v. State, 118 Wis. 641. See also Hotema v. U. S., 186 U. S. 413.
- 610.** 6. **General Conduct and Appearance.** — State v. Wright, 112 Iowa 436; State v. Lyons, 113 La. 959; Berry v. Safe Deposit, etc., Co., 96 Md. 45; Cornell v. State, 104 Wis. 527; Lowe v. State, 118 Wis. 641.
- Circumstantial Evidence.** — Insanity is mainly provable by circumstantial evidence. Hempton v. State, 111 Wis. 127.
8. State v. Wright, 112 Iowa 436; State v. Marshall, 35 Oregon 265. See also People v. Truck, 170 N. Y. 203.
- 611.** 4. Schick v. Stuhr, 120 Iowa 396. See also Hardy v. Berger, 76 N. Y. App. Div. 393.
5. **Depravity.** — Bohler v. Hicks, 120 Ga. 800; Schick v. Stuhr, 120 Iowa 396.
6. **Improvident Habits.** — *In re Shelleig*, 11 Ohio Dec. 81.
9. See Hotema v. U. S., 186 U. S. 413.
- 612.** 4. **General Reputation and Family Tradition.** — Snell v. U. S., 16 App. Cas. (D. C.) 501.
7. Parrish v. State, 139 Ala. 16, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 612; Kimbrell v. State, 130 Ala. 40; Snell v. U. S., 16 App. Cas. (D. C.) 501; Biddle v. Jenkins, 61 Neb. 400; Navasota First Nat. Bank v. McGinty, 29 Tex. Civ. App. 539, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 612; Cannon v. State, 41 Tex. Crim. 467.
- 613.** 2. **Direct Proof of Insanity** — **Evidence of Insanity in Family.** — *Watts v. State*, 99 Md. 30.
- Insanity of Father** — **Corroborative Evidence.** — Com. v. Lutz, 10 Kulp (Pa.) 234.
- Insanity of Grandchildren No Proof of Insanity of Grandparent.** — *Hawley v. Griffin*, (Iowa 1900) 82 N. W. Rep. 905.
- 614.** 1. **Merely Cumulative Evidence** — **No Defense.** — Berry v. Safe Deposit, etc., Co., 96 Md. 45, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614.
- Corroboration.** — Com. v. Lutz, 10 Kulp (Pa.) 234.
2. Berry v. Safe Deposit, etc., Co., 96 Md. 45, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614.

**614.** 10. Competency of Evidence in Regard to Time — *a.* CONDITION AT TIME OF ACT IS POINT FOR DECISION. — See note 4.

*b.* EVIDENCE OF CONDITION BEFORE AND AFTER ACT ADMISSIBLE — (1) *To Prove Insanity at Time of Act.* — See note 5.

**615.** 11. Requisite Degree of Proof in Criminal Cases — *b.* VIEW THAT ACCUSED MUST PROVE INSANITY BEYOND REASONABLE DOUBT. — See note 4.

**616.** *c.* VIEW THAT ISSUE SHOULD BE DECIDED ACCORDING TO PREPONDERANCE OF EVIDENCE. — See note 1.

**617.** See note 1.

*d.* VIEW THAT PROSECUTION MUST PROVE SANITY BEYOND REASONABLE DOUBT. — See notes 2, 3.

**618.** XIV. LIABILITY FOR CRIMES — 1. In General. — See note 1.

Moral Insanity. — See note 6.

An Irresistible or Uncontrollable Impulse. — See note 7.

**619.** See note 1.

2. Right and Wrong Test. — See note 2.

**620.** 3. Rule in M'Naghten's Case. — See note 2.

**614.** 3. *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614.

4. Mental Condition at Time of Act. — *State v. Jack*, 4 Penn. (Del.) 470; *Hawley v. Griffin*, (Iowa 1900) 82 N. W. Rep. 905; *Queenan v. Territory*, 11 Okla. 261.

5. Evidence of Mental Condition Before and After Act — *Alabama*. — *Cawley v. State*, 133 Ala. 128. *Iowa*. — *State v. Wright*, 112 Iowa 436, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614. *Louisiana*. — *State v. Lyons*, 113 La. 959.

*New York*. — *Matter of Schrodt*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 540.

*Ohio*. — See *State v. Snell*, 5 Ohio Dec. 670. *Oklahoma*. — *Queenan v. Territory*, 11 Okla. 261, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 614.

*Texas*. — *Williams v. Sapieha*, (Tex. Civ. App. 1901) 62 S. W. Rep. 72.

*Wisconsin*. — *Hempton v. State*, 111 Wis. 127.

Verdict of Special Jury After Commission of Crime. — *State v. Champoux*, 33 Wash. 339.

**615.** 4. *Delaware*. — *State v. Cole*, 2 Penn. (Del.) 344; *State v. Jack*, 4 Penn. (Del.) 470.

**616.** 1. Preponderance of Evidence — *Alabama*. — *Lide v. State*, 133 Ala. 43; *Martin v. State*, 119 Ala. 1; *Porter v. State*, 135 Ala. 51; *Talbert v. State*, 140 Ala. 96. See also *Kroell v. State*, 139 Ala. 1.

*California*. — *People v. Suesser*, 142 Cal. 354; *People v. Hettick*, 126 Cal. 425; *People v. Methever*, 132 Cal. 326; *People v. Wells*, 145 Cal. 138.

*Georgia*. — *Minder v. State*, 113 Ga. 772.

*Iowa*. — *State v. Novak*, 109 Iowa 717; *State v. Robbins*, 109 Iowa 650; *State v. Humbles*, 126 Iowa 462; *State v. Thiele*, 119 Iowa 659.

*Maine*. — *State v. Parks*, 93 Me. 208.

*Missouri*. — *State v. Palmer*, 161 Mo. 152.

*Ohio*. — *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458; *State v. Austin*, 71 Ohio St. 317, 104 Am. St. Rep. 778; *Sharkey v. State*, 2 Ohio Cir. Dec. 443; *State v. Tyler*, 5 Ohio Dec. 588, 7 Ohio N. P. 443.

*Pennsylvania*. — *Com. v. Kilpatrick*, 204 Pa. St. 218; *Com. v. Lutz*, 10 Kulp (Pa.) 234; *Com. v. Heidler*, 191 Pa. St. 375.

*Texas*. — *Hurst v. State*, 40 Tex. Crim. 378.

See also *Gray v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 552.

*Virginia*. — *Longley's Case*, 99 Va. 814.

*Washington*. — *State v. Clark*, 34 Wash. 485.

**617.** 1. *Lide v. State*, 133 Ala. 43; *Martin v. State*, 119 Ala. 1; *State v. Shuff*, 9 Idaho 115; *State v. Thiele*, 119 Iowa 659.

2. Sanity Presumed Normal State of Mind. — *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529; *Maas v. Territory*, 10 Okla. 714.

3. Sanity to Be Proved Beyond Reasonable Doubt — *United States*. — *Hotema v. U. S.*, 186 U. S. 413; *German v. U. S.*, (C. C. A.) 120 Fed. Rep. 666.

*Michigan*. — *People v. Muste*, (Mich. 1904) 100 N. W. Rep. 455.

*Montana*. — *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529. See *State v. Brooks*, 23 Mont. 146.

*New York*. — *People v. Egnor*, 175 N. Y. 419.

*Oklahoma*. — *Maas v. Territory*, 10 Okla. 714.

*Texas*. — See *Dent v. State*, 46 Tex. Crim. 166.

**618.** 1. Admissibility of Evidence as to Capability of Forming Intent. — *Hempton v. State*, 111 Wis. 127.

6. Moral Insanity — General Rule. — *Sharp v. State*, 161 Ind. 288; *Bothwell v. State*, (Neb. 1904) 99 N. W. Rep. 669.

The doctrine of moral insanity, which consists of irresistible impulse coexistent with mental sanity, has no support either in psychology or law. *State v. Lyons*, 113 La. 959.

7. Irresistible Impulse. — *State v. McGruder*, 125 Iowa 741; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529.

**619.** 1. Irresistible Impulse, Etc. — *Cawley v. State*, 133 Ala. 128; *State v. Knight*, 95 Me. 467.

Doctrine Repudiated. — *Davis v. State*, 44 Fla. 32; *Williams v. State*, 45 Fla. 128; *State v. Lyons*, 113 La. 959; *State v. Dunn*, 179 Mo. 95; *State v. Berry*, 179 Mo. 377; *Bothwell v. State*, (Neb. 1904) 99 N. W. Rep. 669; *Cannon v. State*, 41 Tex. Crim. 467.

2. Knowledge of Right and Wrong. — *Com. v. Gearhardt*, 205 Pa. St. 387; *Com. v. Lutz*, 10 Kulp (Pa.) 234.

*Oklahoma Statute* — Sec. 1852, Laws of 1893. — *Queenan v. Oklahoma*, 190 U. S. 548.

**620.** 2. American Cases Following Rule in M'Naghten's Case. — *Davis v. State*, 44 Fla. 32;

**620.** 4. American Modification of Rule. — See note 3.

**621.** See notes 1, 2.

7. Irresponsibility Acquits — No Reduction of Degree of Crime. — See note 7.

**623.** XV. LIABILITY FOR TORTS — 1. In General. — See note 1.

5. Slander — Exception to Rule. — See notes 6, 7.

**624.** XVI. LIABILITY ON CONTRACTS — 1. In General — Present Rule. — See note 3.

The Test of Mental Capacity. — See note 4.

**625.** See note 1.

2. Bona Fide Executed Contracts. — See notes 3, 4.

3. Contracts for Necessaries — *a.* FOR LUNATIC. — See note 5.

**626.** 4. After Adjudication of Insanity — Contracts Void. — See note 4.

**628.** 5. Equitable Relief — Where Consideration Grossly Inadequate. — See note 1. Mere Weakness of Mind. — See note 3.

**629.** 6. Who May Avoid Lunatic's Contract. — See note 2.

*Williams v. State*, 45 Fla. 128; *Bothwell v. State*, (Neb. 1904) 99 N. W. Rep. 669.

**620.** 8. Cases Modifying Rule in *M'Naghten's Case* — *Delaware*. — *State v. Jack*, 4 Penn. (Del.) 470; *State v. Kavanaugh*, 4 Penn. (Del.) 131.

*Georgia*. — *Quattlebaum v. State*, 119 Ga. 433.

*Indiana*. — See *Hoover v. State*, 161 Ind. 348.

*Michigan*. — See *People v. Muste*, (Mich. 1904) 100 N. W. Rep. 455.

*Missouri*. — *State v. Palmer*, 161 Mo. 152; *State v. Speyer*, 182 Mo. 77.

*Ohio*. — *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458.

*Oklahoma*. — *Maas v. Territory*, 10 Okla. 714.

*Texas*. — *Cannon v. State*, 41 Tex. Crim. 467.

*Wisconsin*. — See *Butler v. State*, 102 Wis. 364.

**621.** 1. Capacity at Time of and with Respect to Act under Inquiry. — *Hotema v. U. S.*, 186 U. S. 413; *State v. Cole*, 2 Penn. (Del.) 344; *Lee v. State*, 116 Ga. 563; *State v. Knight*, 95 Me. 467; *State v. Tyler*, 5 Ohio Dec. 588, 7 Ohio N. P. 443; *State v. Kalb*, 5 Ohio Dec. 738, 7 Ohio N. P. 547; *Eckert v. State*, 114 Wis. 160; *Butler v. State*, 102 Wis. 364.

2. *People v. Hettick*, 126 Cal. 425; *State v. Cole*, 2 Penn. (Del.) 344; *Lee v. State*, 116 Ga. 563.

7. Temporary Insanity from Intoxication as Mitigation — *Texas Statute*. — *Edwards v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 589.

**623.** 1. Torts of Lunatics. — *Wolf's Case*, 9 Kulp (Pa.) 523; *Stanley v. Hayes*, 8 Ont. L. Rep. 81.

6. Slander. — *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

7. *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

**624.** 3. Present Rule. — *Hawley v. Griffin*, 121 Iowa 667, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624; *State v. Miller*, 5 Ohio Dec. 703, 7 Ohio N. P. 458. See also *Brooks v. Pratt*, (C. C. A.) 118 Fed. Rep. 725; *Dominick v. Randolph*, 124 Ala. 557.

4. The Test. — *Seawel v. Dirst*, 70 Ark. 166, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624; *Barlow v. Strange*, 120 Ga. 1015; *Ring v. Lawless*, 190 Ill. 520, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624; *Coffey v. Coffey*, 179 Ill. 283; *Pyott v. Pyott*, 90 Ill. App. 210,

*affirmed* 191 Ill. 280; *Hawley v. Griffin*, 121 Iowa 667; *Sander v. Savage*, 75 N. Y. App. Div. 333. See also *Paulus v. Reed*, 121 Iowa 224.

**625.** 1. Power of Attorney Void. — *Plaster v. Rigney*, (C. C. A.) 97 Fed. Rep. 12.

3. Bona Fide Executed Contracts. — *Feigenbaum v. Howe*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 514; *Cundall v. Haswell*, 23 R. I. 508, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; *Greeno v. Ellas*, 1 Tenn. Ch. App. 165, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; *Williams v. Sapieha*, (Tex. Civ. App. 1900) 59 S. W. Rep. 947. See also *Eldredge v. Palmer*, 185 Ill. 618, 76 Am. St. Rep. 59; *Brown v. Cory*, 9 Kan. App. 702; *Jamison v. Culligan*, 151 Mo. 410; *Hardy v. Berger*, 76 N. Y. App. Div. 393; *Gilgallon v. Bishop*, 46 N. Y. App. Div. 350.

4. *Cundall v. Haswell*, 23 R. I. 508, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625; *Greeno v. Ellas*, 1 Tenn. Ch. App. 165, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 625.

5. Contracts for Necessaries for Lunatic. — *Bicknell v. Spear*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 389; *Navasota First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539.

Implied Contract. — *Borum v. Bell*, 132 Ala. 85; *Dandurand v. Kankakee County*, 96 Ill. App. 464, *affirmed* 196 Ill. 537.

**626.** 4. After Inquisition. — *In re Walker*, (1905) 1 Ch. 160; *Payne v. Burdette*, 84 Mo. App. 332; *Sander v. Savage*, 75 N. Y. App. Div. 333. See also *Brooks v. Pratt*, (C. C. A.) 118 Fed. Rep. 725; *Schramek v. Shepeck*, 120 Wis. 643.

**628.** 1. *Furry v. Bartling*, (Iowa 1903) 94 N. W. Rep. 471; *Reason v. Jones*, 119 Mich. 672; *Sander v. Savage*, 75 N. Y. App. Div. 333.

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Ratification on Becoming Sane. — *Blinn v. Schwarz*, 63 N. Y. App. Div. 25, *affirmed* 177 N. Y. 252.

# INSOLVENCY AND BANKRUPTCY.

By W. H. CROW.

**636. I. DEFINITIONS**—Insolvency. — See note 2.

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**639. II. CONSTITUTIONALITY OF INSOLVENCY AND BANKRUPTCY LAWS**—

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**637. 1. Deficiency of Assets Not Necessary to Constitute Insolvency.**—See *Citizens' Bank, etc., Co. v. Union Min., etc., Co.*, 106 Fed. Rep. 100, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 636.

**2. A Partnership Is Insolvent** within the meaning of the Bankruptcy Act when all of the firm property together with the property of the individual partners is insufficient to pay partnership debts. *Davis v. Stevens*, 104 Fed. Rep. 235. See also *Citizens' Bank, etc., Co. v. Union Min., etc., Co.*, 106 Fed. Rep. 100, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 636.

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**639. 4. Uniformity Explained.**—*Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290.

**7. Power of States to Pass Bankruptcy Laws Declared.**—*Old Town Bank v. McCormick*, 96 Md. 341, 94 Am. St. Rep. 577; *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290; *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310.

**641. 5. Suspension of Operation Generally.**—See *Ellis v. L. Hays Saddlery, etc., Co.*, 65 Kan. 174.

**642. 3. The Provisions of the English Bankruptcy Act Specifying Acts of Bankruptcy Must Be Strictly Interpreted.**—*In re H. B.*, (1904) 1 K. B. 94.

**5. State Law Enacted While Federal Law Is in Force.**—*Old Town Bank v. McCormick*, 96 Md. 353, 94 Am. St. Rep. 577, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642.

**6. Suspension of State Statutes**—*United States*. — *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808; *In re Macon Sash, etc., Co.*, 112 Fed. Rep. 323; *Carling v. Seymour Lumber Co.*, (C. C. A.) 113 Fed. Rep. 483; *In re Storck Lumber Co.*, 114 Fed. Rep. 360; *In re Rogers*, 116 Fed. Rep. 435; *In re F. A. Hall Co.*, 121 Fed. Rep. 992.

*California*. — *R. H. Herron Co. v. Superior Ct.*, 136 Cal. 279, 89 Am. St. Rep. 124; *Key-stone Driller Co. v. Superior Ct.*, 138 Cal. 738. *Connecticut*. — *Ketcham v. McNamara*, 72 Conn. 709.

*Georgia*. — *Merry v. Jones*, 119 Ga. 643.

*Kentucky*. — *Downer v. Porter*, 116 Ky. 422.

*Maine*. — *Guilford First Nat. Bank v. Ware*, 95 Me. 388; *Littlefield v. Gay*, 96 Me. 422.

*Maryland*. — *Old Town Bank v. McCormick*, 96 Md. 353, 94 Am. St. Rep. 577.

**643.** See note 2.

c. PENDING PROCEEDINGS UNDER STATE LAWS. — See notes 5, 6.

**644.** 4. Territorial Operation. — See note 1.

**645.** IV. JURISDICTION — 2. In United States — a. UNDER NATIONAL BANKRUPTCY LAWS. — See note 2.

Locality as Affecting Jurisdiction. — See note 4.

*Massachusetts.* — *Hoague v. Cumner*, 187 Mass. 296.

*New Jersey.* — *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290.

*New Mexico.* — *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310.

*Pennsylvania.* — *Rees v. Boggs*, 26 Pa. Co. Ct. 285, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 642.

*Rhode Island.* — *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324.

*Texas.* — *Patty-Joiner, etc., Co. v. Cummins*, 93 Tex. 598.

**Contrary Holdings.** — In *In re Scholtz*, 106 Fed. Rep. 834, it was held that the state insolvency laws were not suspended and that proceedings under them were valid so long as no proceedings were instituted under the Bankruptcy Act. To the same effect, see *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

**642.** 7. State Law Suspended Only from Time Federal Law Takes Effect. — *Osborn v. Fender*, 88 Minn. 309.

**8. Only Conflicting Statutes Suspended** — *California.* — *R. H. Herron Co. v. Superior Ct.*, 136 Cal. 279, 89 Am. St. Rep. 124; *Keystone Driller Co. v. Superior Ct.*, 138 Cal. 738.

*Kentucky.* — *Downer v. Porter*, 116 Ky. 422.

*Maryland.* — *Old Town Bank v. McCormick*, 96 Md. 341, 94 Am. St. Rep. 577.

*New Jersey.* — *Singer v. National Bedstead Mfg. Co.*, 65 N. J. Eq. 290.

*New Mexico.* — *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310.

*Texas.* — *Patty-Joiner, etc., Co. v. Cummins*, 93 Tex. 598; *Patty-Joiner, etc., Co. v. Cummins*, (Tex. Civ. App. 1900) 59 S. W. Rep. 297.

*Wisconsin.* — *Duryea v. Muse*, 117 Wis. 399.

**643.** 2. Revival of State Statutes. — *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808.

**5. Pending Proceedings under State Laws.** — *Hood v. Blair State Bank*, (Neb. 1902) 91 N. W. Rep. 701; *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310.

**6. Pending Proceedings Saved by Bankruptcy Law of 1898.** — *Osborn v. Fender*, 88 Minn. 309; *Hood v. Blair State Bank*, (Neb. 1902) 91 N. W. Rep. 701.

**Insolvency Proceedings Must Actually Have Been Begun.** — *Guilford First Nat. Bank v. Ware*, 95 Me. 388.

**644.** 1. Insolvency and Bankruptcy Laws Not Operative Extraterritorially. — *In re Appel*, 103 Fed. Rep. 931; *Swift v. Winchester*, 96 Me. 480, 90 Am. St. Rep. 414.

**Waiver of Territorial Exemption.** — *Thum v. Pyke*, 8 Idaho 11.

**645.** 2. Bankruptcy Courts in United States. — *In re Reynolds*, 127 Fed. Rep. 760; *McNulty v. Feingold*, 129 Fed. Rep. 1001; *In re Brett*, 130 Fed. Rep. 981; *In re Hicks*, 133 Fed. Rep. 739; *Long v. Lockman*, 135 Fed. Rep. 197; *In re Drayton*, 135 Fed. Rep. 883.

**Jurisdiction of District Judges.** — See *In re Urban, etc., Realty Title Co.*, 132 Fed. Rep. 140.

**Exclusive Jurisdiction** — *United States.* — *In re Lengert Wagon Co.*, 110 Fed. Rep. 927; *In re Kersten*, 110 Fed. Rep. 929; *In re F. A. Hall Co.*, 121 Fed. Rep. 992; *In re Knight*, 125 Fed. Rep. 35; *In re Reynolds*, 127 Fed. Rep. 760; *In re Hicks*, 133 Fed. Rep. 739.

*Alabama.* — *Turrentine v. Blackwood*, 125 Ala. 436, 82 Am. St. Rep. 254.

*Kentucky.* — *Bonnie v. Perry*, (Ky. 1904) 78 S. W. Rep. 208; *Thompson v. Ragan*, (Ky. 1904) 78 S. W. Rep. 485.

*Maine.* — *Guilford First Nat. Bank v. Ware*, 95 Me. 388.

*Missouri.* — *Mishawaka Woolen Mfg. Co. v. Powell*, 98 Mo. App. 530; *Swartz v. Frank*, 183 Mo. 438.

*New York.* — *Bloch v. Bloch*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 278.

*Oregon.* — *Hibbard v. Henderson*, 44 Oregon 318.

**4. Locality as Affecting Jurisdiction under Law of 1898.** — *Ross Lewin v. Goold*, 211 Ill. 384.

**In the Case of a Corporation.** — *Dressel v. North State Lumber Co.*, 107 Fed. Rep. 255; *In re Magid Hope Silk Mfg. Co.*, 110 Fed. Rep. 352.

**In the Case of a Partnership.** — *Whitson v. Farber Bank*, 105 Mo. App. 605.

**What Is Principal Place of Business.** — See *In re Elmira Steel Co.*, 109 Fed. Rep. 456; *In re Mackey*, 110 Fed. Rep. 355.

**Residence in District for Two Months Not Sufficient.** — *In re Williams*, 120 Fed. Rep. 34.

**Where a Debtor Ceased Carrying on Business** in the district four months before the filing of the petition it was held that the District Court could not take jurisdiction. *In re Plotke*, (C. C. A.) 104 Fed. Rep. 964.

**Absconding to Avoid Arrest Will Not Defeat Jurisdiction.** — *In re Filer*, 108 Fed. Rep. 209. See also *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804.

**Residence Must Be Bona Fide.** — *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

**The Court Which First Acquires Jurisdiction**, in case the courts of different districts have concurrent jurisdiction, is exclusive of all others. *In re Elmira Steel Co.*, 109 Fed. Rep. 456; *In re Sears*, 112 Fed. Rep. 58; *In re Southwestern Bridge, etc., Co.*, 133 Fed. Rep. 568; *In re Tybo Min., etc., Co.*, 132 Fed. Rep. 697. See also *In re United Button Co.*, 132 Fed. Rep. 378.

**The Court of the Debtor's Domicil** is also given the right to retain jurisdiction as against the bankruptcy court of another jurisdiction. *In re Tybo Min., etc., Co.*, 132 Fed. Rep. 978.

**Question of Convenience.** — In *In re General Metals Co.*, 133 Fed. Rep. 84, the court decided that the court of the district in which the matters could be most conveniently litigated should retain jurisdiction. *Turner v. Fisher*, 133 Fed. Rep. 594.

**646.** *b.* UNDER STATE INSOLVENCY LAWS. — See note 1.

**V. WHO MAY APPLY FOR ADJUDICATION — 1. Voluntary Proceedings**

— *a.* AUTHORITY OF DEBTOR TO MAKE APPLICATION — The English Bankruptcy Law. — See note 2.

*b.* CIRCUMSTANCES AFFECTING RIGHT OF DEBTOR TO INSTITUTE PROCEEDING — (1) *In General.* — See note 5.

**647.** See note 1.

(3) *Character or Condition of Debtor — Partnerships.* — See note 10. Corporations. — See note 11.

**648.** 2. *Involuntary Proceedings* — *a.* IN GENERAL. — See notes 1, 3, 4.

*b.* CHARACTER OR KIND OF DEBTS. — See notes 5, 6.

**646.** 1. Jurisdiction Conferred on Local Courts by State Statutes. — *Keystone Driller Co. v. Superior Ct.*, 138 Cal. 738.

2. Voluntary Bankruptcy under English Statutes. — *In re Betts*, (1901) 2 K. B. 39.

A Voluntary Petition in Bankruptcy Was Allowed Notwithstanding It Was Filed After Judgment Summons Had Been Issued against the debtor. The judgment creditor was the sole creditor and there were some assets. *In re Archer*, 20 Times L. Rep. 390.

5. Pendency of Involuntary Proceedings. — *In re Stegar*, 113 Fed. Rep. 978.

The Failure of a Bankrupt to Appear in involuntary proceedings will not convert the proceedings into voluntary bankruptcy. *In re Taylor*, (C. C. A.) 102 Fed. Rep. 728.

Where Creditors Would Suffer voluntary bankruptcy will not be allowed. *In re Dwyer*, 112 Fed. Rep. 777.

**647.** 1. Effect of Prior Refusal to Discharge. — *In re Claff*, 111 Fed. Rep. 506.

A Refusal to Discharge under the Act of 1867 will not debar a debtor from filing his petition under the Act of 1898. *In re Herrman*, 102 Fed. Rep. 753, affirmed (C. C. A.) 106 Fed. Rep. 987.

Not Allowed on Same Facts. — *In re Fiegenbaum*, (C. C. A.) 121 Fed. Rep. 69.

10. Application by Individual Partner. — *In re Carleton*, 115 Fed. Rep. 246.

11. Corporations. — *Keystone Driller Co. v. Superior Ct.*, 138 Cal. 738.

Proceedings in Involuntary Bankruptcy based on a confession of insolvency by a corporation will not be considered as voluntary and therefore excluded by the Bankruptcy Act. *In re T. L. Kelley Dry-Goods Co.*, 102 Fed. Rep. 747.

**648.** 1. Stockholders or Directors of a Corporation may petition. *In re Rollins Gold, etc.*, Min. Co., 102 Fed. Rep. 982.

A Wife, having a provable debt, may file a petition in bankruptcy against her husband. *In re Novak*, 101 Fed. Rep. 800.

A Receiver Who Has Obtained an Assignment of a Judgment Debt Is a Creditor entitled to present a bankruptcy petition. *In re Macoun*, (1904) 2 K. B. 700.

3. Estoppel — Assent to General Assignment. — *Durham Paper Co. v. Seaboard Knitting Mills*, 121 Fed. Rep. 179; *Clark v. Henue*, (C. C. A.) 127 Fed. Rep. 288; *Moulton v. Coburn*, (C. C. A.) 131 Fed. Rep. 201; *In re Douglas Coal, etc., Co.*, 131 Fed. Rep. 769.

A Corporation is not estopped from joining in a petition of involuntary bankruptcy by the

agreement of an officer of the corporation to act as general assignee for the benefit of creditors. *In re Winston*, 122 Fed. Rep. 187.

4. Effect of Obtaining Preference. — *In re Schenkein*, 113 Fed. Rep. 421.

A Creditor Holding an Unsurrendered Preference acquired within four months of the instituting of the proceedings will not be allowed to join in the petition without agreeing to surrender his preference. *In re Fishplate Clothing Co.*, 125 Fed. Rep. 986; *In re Rogers' Milling Co.*, 102 Fed. Rep. 687; *In re Gillette*, 104 Fed. Rep. 769. See also *Buckingham v. Schuylkill Plush, etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 305. But see *In re Herzikopf*, 118 Fed. Rep. 101.

If the preferred creditor offers to surrender his preference, he may join in the petition. *In re Vastbinder*, 126 Fed. Rep. 417.

*In re Harnstein*, 122 Fed. Rep. 266, it was held that a preferred creditor would be allowed to join but that his claim would not be allowed until he surrendered the preference.

A Preference Received More than Four Months Before the institution of the proceedings will not disqualify. *In re Girard Glazed Kid Co.*, 129 Fed. Rep. 841.

5. One Having an Unliquidated Claim has been held not to be a creditor entitled to file a petition in bankruptcy. *In re Brinckmann*, 103 Fed. Rep. 65.

A Creditor Who Has Assigned His Claim is not entitled to petition. *In re Burlington Malting Co.*, 109 Fed. Rep. 777.

A Surety who has not yet taken up the obligation has no standing to petition for the bankruptcy of the obligor. *Phillips v. Dreher Shoe Co.*, 112 Fed. Rep. 404.

Facts Held to Show No Debt on Which to Found a Petition in Bankruptcy. — *In re Miller*, (1901) 1 Q. B. 51, 83 L. T. N. S. 545.

Judgment Creditor of Stock Exchange Members. — When a member of the London Stock Exchange is declared a defaulter and his contracts are dealt with by the official assignee of the Stock Exchange, the proceedings in that liquidation are not an accord and satisfaction of the member's debts, and do not bar his creditors from suing him at law for the balance of their claims after deducting the dividends received by them in that liquidation. and a creditor who has obtained judgment in such an action can maintain a petition in bankruptcy against the defaulter. *Mendelssohn v. Ratcliff*, (1904) A. C. 456.

6. Must Have Provable Debt When Act of Bankruptcy Committed. — *In re Callisen*, 130 Fed.



**649.** See notes 2, 3.

c. NUMBER OF CREDITORS AND AMOUNT OF DEBTS — In England. —

See note 6.

In the United States. — See note 7.

**653.** VII. HEARING AND DETERMINATION — 2. Mode of Trial. — See note 3.

3. Evidence — a. IN GENERAL. — See notes 4, 5.

The Insolvency of the Debtor May Be Proved. — See note 7.

**654.** b. BURDEN OF PROOF. — See note 1.

c. EXAMINATION OF DEBTOR. — See note 2.

**655.** 4. Adjudication. — See note 1.

Annulling or Setting Aside Adjudication. — See note 2.

Rep. 987. See also *In re Coburn*, 126 Fed. Rep. 218, *affirmed* (C. C. A.) 131 Fed. Rep. 201.**649.** 2. Assignment of Claims with intent to defeat the scheme of the statute is not allowable. *Leighton v. Kennedy*, (C. C. A.) 129 Fed. Rep. 737.3. Secured Claims. — *In re Vautin*, (1899) 2 Q. B. 549.6. Number and Amount of Petitioning Creditors under English Statute. — See *Re Shaw*, 83 L. T. N. S. 754.7. Number and Amount of Petitioning Creditors under Federal Bankruptcy Law. — *In re Brown*, 111 Fed. Rep. 979; *In re Coburn*, 126 Fed. Rep. 218, *affirmed* (C. C. A.) 131 Fed. Rep. 201; *Buckingham v. Schuykill Plush, etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 305.In Order that Less than Three Creditors may file a petition it must be shown that the number of all the creditors is less than twelve. *Moulton v. Coburn*, (C. C. A.) 131 Fed. Rep. 201.Assignment of Claim to Several. — A company which has procured the assignment of a claim from one of its creditors to several of its representatives in order to get the number of creditors necessary to file the petition, cannot thus evade the provisions of the act, and the petition will be dismissed. *In re Independent Thread Co.*, 113 Fed. Rep. 998. See also *In re Tribelhorn*, (C. C. A.) 137 Fed. Rep. 3.Ascertainment of Amount. — If the claim of one of the creditors joining in the petition is paid before the filing, the court will not take jurisdiction if his claim was necessary to complete the jurisdictional amount. *In re Whipple*, 129 Cal. 426. See also *In re Manhattan Ice Co.*, 114 Fed. Rep. 399.Creditors Subsequently Joining in the Petition. — *In re Mackey*, 110 Fed. Rep. 355; *In re Mammoth Pine Lumber Co.*, 109 Fed. Rep. 308; *In re Ryan*, 114 Fed. Rep. 373. But compare *In re Tribelhorn*, (C. C. A.) 137 Fed. Rep. 3.Creditors Who Have Consented to a General Assignment are not counted. *In re Miner*, 104 Fed. Rep. 520.**653.** 3. Trial by Jury under Act of 1898. — *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998.No One but the Bankrupt Himself can of right demand a jury trial of the question of the insolvency of the alleged bankrupt and the acts of bankruptcy alleged to have been committed by him. *In re Herzikopf*, (C. C. A.) 121 Fed. Rep. 544.In Its Discretion Court May Submit Issues to Jury. — *Oil Well Supply Co. v. Hall*, (C. C. A.) 128 Fed. Rep. 875.The Amount of an Attorney's Fee for obtaining the allowance of a creditor's claim may be determined by a jury in the discretion of the court. A jury trial is not a matter of right in such case. *In re Rude*, 101 Fed. Rep. 805.Where a Claim Is Contested by the Trustee the creditor is not entitled, as a matter of right, to demand a jury trial of the issues presented. *In re Christensen*, 101 Fed. Rep. 243.4. Evidence Confined to Acts Alleged. — *In re Lansaw*, 118 Fed. Rep. 365.5. Proof of Controverted Matters. — *In re Taylor*, (C. C. A.) 102 Fed. Rep. 728.7. Bankrupt's Wife as Witness. — Under the Act of 1898, previous to the amendment of 1903, the bankrupt's wife was a competent witness for or against her husband only when made so by the statutes of the state in which the proceedings were instituted. *In re Cohn*, 104 Fed. Rep. 328.By the amending act of Feb. 5, 1903, c. 487, provision was made for the examination of the wife "touching business transacted by her, or to which she is a party, and to determine the fact whether she had transacted or been a party to any business of the bankrupt." In such examination a certain degree of latitude must, of necessity, be allowed. *In re Worrell*, 125 Fed. Rep. 159.**654.** 1. Burden of Proof. — *In re Wooten*, 118 Fed. Rep. 670.2. Examination of Debtor. — *In re Coddington*, 118 Fed. Rep. 281; *In re Levin*, 131 Fed. Rep. 388; *In re Hess*, 136 Fed. Rep. 988; *Matter of Workmen's Pub. Assoc.*, 62 N. Y. App. Div. 604; *In re American Pub. Co.*, (Okla. 1905) 79 Pac. Rep. 762.Examination Allowed Before First Meeting of Creditors. — *In re Franklin Syndicate*, 101 Fed. Rep. 402.Cannot Be Compelled to Incriminate Himself. — *In re Hess*, 134 Fed. Rep. 109; *U. S. v. Goldstein*, 132 Fed. Rep. 789; *In re Nachman*, 114 Fed. Rep. 995; *In re Shera*, 114 Fed. Rep. 207; *In re Franklin Syndicate*, 114 Fed. Rep. 205; *In re Feldstein*, 103 Fed. Rep. 269. Compare *Mackel v. Rochester*, (C. C. A.) 102 Fed. Rep. 314.Must Object to Testimony When Offered. — *Burrell v. Montana*, 194 U. S. 572.**655.** 1. Bankruptcy Proceedings Considered Proceedings in Rem. — *In re Reynolds*, 127 Fed. Rep. 760.2. Annulling or Setting Aside Adjudication. — *In re Maples*, 105 Fed. Rep. 919; *In re Taylor*, (1901) 1 Q. B. 744.

**657. VIII. WHO MAY BE ADJUDGED BANKRUPTS OR INSOLVENTS —****3. Character of Debtor — a. ALIENS. —** See note 4.**b. MARRIED WOMEN. —** See note 8.**658. c. INFANTS. —** See note 2.**d. LUNATICS. —** See notes 5, 7.**659. e. CORPORATIONS — In the United States. —** See note 2.

**657. 4. The English Court of Bankruptcy Has No Jurisdiction to Make a Receiving Order Against a Foreigner Resident Abroad** who, without coming into the jurisdiction of the court, has had there a place of business, contracted debts, and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not a "debtor" within the meaning of the English Bankruptcy Act. *Cooke v. Charles A. Vogeler Co.*, (1901) A. C. 102. See also *In re A. B.*, (1900) 1 Q. B. 541.

**8. Married Women Subject to Bankruptcy in England. —** *In re Worsley*, (1901) 1 K. B. 309, approving *In re Dagnall*, (1896) 2 Q. B. 407, cited in the original article.

**Married Women Subject to Bankruptcy in United States. —** *MacDonald v. Tefft-Weller Co.*, (C. C. A.) 128 Fed. Rep. 381.

**658. 2. Infants Held Not Subject to Bankruptcy Laws. —** *In re Eidemiller*, 105 Fed. Rep. 595.

**5. Lunatics Held Subject to Bankruptcy. —** *In re Eisenberg*, 117 Fed. Rep. 786; *In re R. S. A.*, (1901) 2 K. B. 32.

**Involuntary Bankruptcy — Appointment of Guardian ad Litem. —** *In re Burka*, 107 Fed. Rep. 674.

**Insanity Occurring After Act of Bankruptcy. —** See *In re Miller*, 133 Fed. Rep. 1017.

**7. Lunatic Not Capable of Act of Bankruptcy. —** *In re Funk*, 101 Fed. Rep. 244. See also *In re Stein*, (C. C. A.) 127 Fed. Rep. 547.

**659. 2. Corporations Held Subject to Involuntary Bankruptcy — Corporation Engaged in Smelting Ores. —** *In re Tecopa Min., etc., Co.*, 110 Fed. Rep. 120.

**Company Building Houses and Bridges from Materials Furnished by Others. —** *In re Niagara Contracting Co.*, 127 Fed. Rep. 782.

**Corporation Engaged in Boarding Horses. —** *In re Morton Boarding Stables*, 108 Fed. Rep. 791.

**Incorporated Mercantile Agency. —** *In re Mutual Mercantile Agency*, 111 Fed. Rep. 152.

**Ice Company. —** *Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, 136 Fed. Rep. 466.

**Company Engaged in Building and Repairing Ships. —** *Columbia Ironworks v. National Lead Co.*, (C. C. A.) 127 Fed. Rep. 99.

**Corporation Engaged in Building and Equipping Boats. —** *In re Marine Constr., etc., Co.*, (C. C. A.) 130 Fed. Rep. 446.

**Laundry Company Engaged in Laundering Newly Manufactured Articles for the Market. —** *In re Troy Steam Laundering Co.*, 132 Fed. Rep. 266. *Contra*, when the business of the laundry is washing and ironing clothes for the wearers thereof. *In re White Star Laundry Co.*, 117 Fed. Rep. 570; *Philpot v. O'Brien*, (C. C. A.) 126 Fed. Rep. 167.

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**Bankruptcy — Carriers. —** *In re Philadelphia, etc., Transp. Co.*, 127 Fed. Rep. 896; *In re Philadelphia, etc., Transp. Co.*, 114 Fed. Rep. 403.

**Building and Loan Association. —** *In re New York Bldg.-Loan Banking Co.*, 127 Fed. Rep. 471.

**Incorporated Social Club. —** *In re Fulton Club*, 113 Fed. Rep. 997.

**Warehouse Company. —** *In re Pacific Coast Warehouse Co.*, 123 Fed. Rep. 749.

**Corporation Engaged in Soliciting Advertisements. —** *In re Snyder, etc., Co.*, 133 Fed. Rep. 806.

**Incorporated Circulating Library. —** *In re Parmelee Library*, (C. C. A.) 120 Fed. Rep. 235.

**Theatrical Company. —** *In re Oriental Soc.*, 104 Fed. Rep. 975.

**Corporation Carrying on Saloon and Restaurant Business. —** *In re Chesapeake Oyster, etc., Co.*, 112 Fed. Rep. 960.

**Laundry Company. —** *In re White Star Laundry Co.*, 117 Fed. Rep. 570. *Contra*, when the principal business of the laundry is the washing, etc., of new clothes for manufacturers to prepare them for the market. *In re Troy Steam Laundering Co.*, 132 Fed. Rep. 266.

**Irrigation Company. —** *In re Bay City Irrigation Co.*, 135 Fed. Rep. 850.

**Hotel Company. —** *In re U. S. Hotel Co.*, (C. C. A.) 134 Fed. Rep. 225.

**Corporation Engaged in Buying and Selling Stocks. —** *In re Surety, etc., Co.*, (C. C. A.) 121 Fed. Rep. 73.

**Bridge and Wharf Construction Company. —** *In re MacNichol Constr. Co.*, 134 Fed. Rep. 979.

**Mining Corporation. —** *In re Chicago-Joplin Lead, etc., Co.*, 101 Fed. Rep. 67; *In re Elk Park Min., etc., Co.*, 101 Fed. Rep. 422; *In re Rollins Gold, etc., Min. Co.*, 102 Fed. Rep. 982; *In re Woodside Coal Co.*, 105 Fed. Rep. 56; *In re Keystone Coal Co.*, 109 Fed. Rep. 872. But the amendment of Feb. 5, 1903, expressly subjects mining corporations to the operation of the Bankruptcy Act.

**The Appointment of a Receiver of a company** does not prevent the commission by it of an act of bankruptcy, and if a manufacturing company it may be put into involuntary bankruptcy. *In re C. Moench, etc., Co.*, (C. C. A.) 130 Fed. Rep. 685.

**The Dissolution of a Corporation** whose existence is by the laws of the state continued for a certain length of time after a formal dissolution will not make it incapable of involuntary bankruptcy. *White Mountain Paper Co. v. Morse*, (C. C. A.) 127 Fed. Rep. 643.

**"Principally Engaged."** — It must be proved that the corporation is engaged principally in the business mentioned in the act. *In re Chicago-Joplin Lead, etc., Co.*, 104 Fed. Rep. 67; *Philpot v. O'Brien*, (C. C. A.) 126 Fed. Rep. 167; *In re H. J. Quimby Freight Forwarding*

**659.** *f.* PARTNERSHIPS, AND OTHER CASES OF JOINT LIABILITY. — See note 4.

**660.** See note 1.

*In Case of a Joint and Several Liability Other than a Partnership.* — See note 2.

*i.* WAGE EARNERS AND FARMERS. — See note 6.

**661.** IX. ACTS OF BANKRUPTCY OR INSOLVENCY — 1. Fraudulent Conveyance or Transfer of Property. — See notes 1, 2.

2. Preference of Creditors — *a.* EFFECT AS ACT OF BANKRUPTCY OR INSOLVENCY. — See note 3.

**662.** *b.* WHAT CONSTITUTES PREFERENCE — (1) *Nature of Act* — (a) *In General.* — See note 1.

Co., 121 Fed. Rep. 139; *In re Minnesota, etc., Constr. Co.*, (Arizona 1900) 60 Pac. Rep. 881; *In re White Mountain Paper Co.*, 127 Fed. Rep. 180.

**An Authorization in the Charter** of a corporation to engage in one of the enumerated pursuits is not sufficient to stamp it as a company subject to involuntary bankruptcy under the act, where it has never actually engaged in such pursuit. *In re Tontine Surety Co.*, 116 Fed. Rep. 401.

**Unincorporated Companies** are by the terms of the Bankruptcy Act subject to involuntary bankruptcy. *In re Hercules Atkin Co.*, 133 Fed. Rep. 813.

**Term "Private Banker" Not Applicable to Corporation.** — *In re Surety, etc., Co.*, (C. C. A.) 121 Fed. Rep. 73.

**659.** 4. Partnerships Subject to Bankruptcy. — *Davis v. Stevens*, 104 Fed. Rep. 235.

**Proceedings in Bankruptcy Against the Individual Members** cannot effect the bankruptcy of the firm, but a separate proceeding against the firm is necessary. *In re Mercur*, (C. C. A.) 122 Fed. Rep. 384, *affirming* 116 Fed. Rep. 655.

**Effect of Insanity of Member.** — Since partnership is regarded as an entity by the Bankruptcy Act, the insanity of a member will not prevent the adjudication of the partnership a bankrupt. *In re Stein*, (C. C. A.) 127 Fed. Rep. 547.

**Where One Partner Died** and the other filed a petition in bankruptcy, both individually and as surviving partner, it was held that, although the partnership estate, together with the personal estate of the deceased partner, was in course of administration in the state court, the bankruptcy court had jurisdiction of the partnership estate provided the referee could obtain possession from the administrator without force. *In re Pierce*, 102 Fed. Rep. 977.

**660.** 1. Bankruptcy of Individual Partners. — To warrant proceedings against an individual as a member of a bankrupt firm, a partnership in fact must be shown, and not a mere holding out by which he may have become liable to creditors. *In re Beckwith*, 130 Fed. Rep. 475; *Lott v. Young*, (C. C. A.) 109 Fed. Rep. 798.

**The Individual Estates of the Partners** are brought under the jurisdiction of the bankruptcy court by the adjudication of the firm a bankrupt, although the individual partners are not adjudged bankrupts. *In re Green*, 106 Fed. Rep. 313.

**Where the Members of a Partnership Execute a General Assignment** each must be taken to have committed an act of bankruptcy. *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137.

**Secret Partner.** — Where a person carrying on a business was adjudicated a bankrupt and the whole proceedings were conducted on the basis that she was the only person interested in the business, it was held that distribution was properly made on that basis, notwithstanding subsequent testimony developed that another person was a secret partner. *In re Harris*, 108 Fed. Rep. 517.

**2. Joint Liability Other than Partnership.** — *Kimball v. E. A. Rosenham Co.*, (C. C. A.) 114 Fed. Rep. 85.

**6.** Wage Earners and Farmers Not Subject to Involuntary Bankruptcy. — *In re Drake*, 114 Fed. Rep. 229, *affirmed* (C. C. A.) 120 Fed. Rep. 493; *In re Pilger*, 118 Fed. Rep. 206; *Wulbern v. Drake*, (C. C. A.) 120 Fed. Rep. 493; *Couts v. Townsend*, 126 Fed. Rep. 251; *In re Yoder*, 127 Fed. Rep. 894; *In re Hoy*, 137 Fed. Rep. 175.

**Section Held to Apply to Natural Persons Only.** — *In re Lake Jackson Sugar Co.*, 129 Fed. Rep. 640.

**Who Deemed a Farmer.** — *Dearborn Bank v. Matney*, 132 Fed. Rep. 75; *In re Brown*, 132 Fed. Rep. 706; *In re Mackey*, 110 Fed. Rep. 355.

**Does Not Prevent Proceedings under State Laws.** — *Old Town Bank v. McCormick*, 96 Md. 341, 94 Am. St. Rep. 577.

**Stock-farmers Included.** — *In re Thompson*, 102 Fed. Rep. 287.

**Becoming Farmer After Act of Bankruptcy.** — One cannot defeat the Bankruptcy Act by engaging chiefly in farming after the alleged act of bankruptcy and before the filing of the petition. *In re Mackey*, 110 Fed. Rep. 355; *In re Luckhardt*, 101 Fed. Rep. 807.

**661.** 1. Fraudulent Conveyance or Transfer by Debtor an Act of Bankruptcy. — *In re Slobodinsky*, (1903) 2 K. B. 517; *In re White*, 135 Fed. Rep. 199.

**2. Existence of Fraudulent Intent.** — *Thompson v. Fairbanks*, 196 U. S. 516; *In re White*, 135 Fed. Rep. 199; *Rosenfeld v. Siegfried*, 91 Mo. App. 169.

**3. Preference of Creditors an Act of Bankruptcy.** — *Re Sharp*, 83 L. T. N. S. 416; *In re Jukes*, (1902) 2 K. B. 58.

**Not Applicable to Subsequent Creditors.** — *Brake v. Callison*, (C. C. A.) 129 Fed. Rep. 201.

**662.** 1. To Suffer or Permit the Obtaining of a Preference by Legal Proceedings, while the debtor is insolvent, without having such preference discharged or vacated at least five days before a sale or final disposition of any property affected by such preference, is made an act of bankruptcy by the Bankruptcy Act of 1898,

- 662.** (b) Payment of Money to Creditor. — See note 2.  
**663.** See note 2.

§ 3, subd. 3. *In re Storm*, 103 Fed. Rep. 618; *In re Thomas*, 103 Fed. Rep. 272; *In re Miller*, 104 Fed. Rep. 764; *In re Harper*, 105 Fed. Rep. 900; *In re Burlington Maltng Co.*, 109 Fed. Rep. 777; *Bogen v. Protter*, (C. C. A.) 129 Fed. Rep. 533; *Scheuer v. Smith*, etc., Book, etc., Co., (C. C. A.) 112 Fed. Rep. 407.

**Preference by Confession of Judgment.** — An order requiring payment by a trustee who has been removed because of his insolvency is not a judgment suffered or permitted to be obtained. *Fry v. Pennsylvania Trust Co.*, 195 Pa. St. 343.

**Voluntary Proceedings to Dissolve the Debtor Corporation** do not extinguish the liens of executions levied on the property of the corporation, and such proceedings do not amount to "having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." *In re Storm*, 103 Fed. Rep. 618.

**Where Proceedings Ineffectual to Obtain Preference.** — Where no preference has been obtained by the legal proceedings, the bankrupt's neglect to cause a release from the levy will not constitute an act of bankruptcy. *In re Belknap*, 129 Fed. Rep. 646.

**When Act of Bankruptcy Complete.** — Petitioning creditors need not wait until after sale, but it is sufficient if the bankrupt fails to discharge the liens until five days before the date of sale. *In re Elmira Steel Co.*, 109 Fed. Rep. 456. See also *Wilson v. Nelson*, 183 U. S. 191; *In re Harper*, 105 Fed. Rep. 900; *In re Vetterman*, 135 Fed. Rep. 443.

**There Must Be Some Act of Voluntary Acquiescence** on the part of a debtor, to the legal proceedings by which the creditor gains a preference. *Duncan v. Landis*, (C. C. A.) 106 Fed. Rep. 840.

**Appearing in Receivership Proceedings** whereby certain creditors obtained liens was held to be "suffering and permitting" such preferences under the Bankruptcy Act. *In re Kersten*, 110 Fed. Rep. 929.

**Consent to Appointment of Receiver.** — The consent by a partnership to the appointment of a receiver does not constitute an act of bankruptcy, within the meaning of the Act. *Davis v. Stevens*, 104 Fed. Rep. 235.

**The Preference May Be Through a Third Person**, as by the formation of a corporation for the purpose of receiving it. *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 53.

**"Being Insolvent."** — Where the act of the creditor is in itself the means of causing the insolvency of the debtor, his suffering or permitting a preference by such act cannot be an act of bankruptcy. *Chicago Title, etc., Co. v. John A. Roebling's Sons Co.*, 107 Fed. Rep. 71.

**Where a Person Who Has Misappropriated Trust Funds, on the Eve of His Bankruptcy Makes Good from His Own Property the Deficit in the Trust Funds**, the purpose of such act being to repair the wrong caused by his breach of trust, there is no "fraudulent preference" within the meaning of the English Bankruptcy Act of 1883. *In re Lake*, (1901) 1 K. B. 710.

**662. 2. Preference by Payment of Money to**

**Creditor.** — *In re Christensen*, 101 Fed. Rep. 801; *Sloan*, 102 Fed. Rep. 116; *In re Fixen*, (C. C. A.) 102 Fed. Rep. 295; *In re Keller*, 109 Fed. Rep. 118; *In re Bashline*, 109 Fed. Rep. 965; *In re Waterbury Furniture Co.*, 114 Fed. Rep. 255; *Boyd v. Lemon, etc., Co.*, (C. C. A.) 114 Fed. Rep. 647; *Mills v. Lewis*, (C. C. A.) 110 Fed. Rep. 512; *In re Meyer*, 115 Fed. Rep. 997; *In re Colton Export, etc., Co.*, (C. C. A.) 121 Fed. Rep. 663; *In re George M. Hill Co.*, (C. C. A.) 130 Fed. Rep. 315; *Rex Buggy Co. v. Hearick*, (C. C. A.) 132 Fed. Rep. 310; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; *Torrance v. Winfield Nat. Bank*, 66 Kan. 177; *Chism v. Citizens Bank*, 77 Miss. 599; *Landry v. Andrews*, 22 R. I. 597; *Crittenden v. Barton*, 59 N. Y. App. Div. 555; *Cannon v. James M. Bell Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 734.

**Payment of Check Indorsed to Bank.** — The payee of a check given by a bankrupt continues to be a creditor after he has indorsed the check to a bank, and the payment to the bank by the bankrupt of the check constitutes a preference of the payee. *In re Lyon*, (C. C. A.) 121 Fed. Rep. 723.

**Money Paid by a Third Person** upon the debt of the bankrupt does not constitute a preference. *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531.

**A Payment by the Bankrupt's Wife** out of her separate property of the bankrupt's debts is not a preference by the bankrupt. *Goode v. Elwood Lodge No. 166*, 160 Ind. 251.

**Deposit with Bank.** — A deposit of money in a bank does not constitute a preference, since it simply creates the relation of debtor and creditor, and does not operate to diminish the bankrupt's estate, and it cannot be considered a transfer of property with intent to prefer the bank. *New York County Nat. Bank v. Massey*, 192 U. S. 138; *In re George M. Hill Co.*, (C. C. A.) 130 Fed. Rep. 315; *In re Scherzer*, 130 Fed. Rep. 631; *Habegger v. St. Paul First Nat. Bank*, (Minn. 1905) 103 N. W. Rep. 216; *Mt. Sterling Nat. Bank v. Priest*, 111 Ky. 886. But see *In re Stege*, (C. C. A.) 116 Fed. Rep. 342.

**Payment of Interest in Advance** in order to secure an extension of time does not constitute a preference. *In re Keller*, 110 Fed. Rep. 348.

**Date of Preference.** — The discounting of a note given by the bankrupt on account of a debt should be regarded as a payment of money on the day of such discount. *In re Wiessner*, 115 Fed. Rep. 421.

The date of payment of a note given by the bankrupt to the creditor should be taken as the date of preference, and not the time when the note was given. *In re Wolf*, 122 Fed. Rep. 127.

**Relation of Debtor and Creditor Must Exist.** — *Keegan v. Hamilton Nat. Bank*, 163 Ind. 216.

**663. 2. Payment of Percentage on Part of Debts.** — *In re Henry C. King Co.*, 113 Fed. Rep. 110; *In re Harpke*, (C. C. A.) 116 Fed. Rep. 295; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A.) 117 Fed. Rep. 1.

Where payment is made on a note to the

**663.** Exception. — See note 3.(c) Transferring Property or Giving Security to Debtor — *aa.* GENERAL RULE. —

See note 4.

**664.** *bb.* ACTS DONE UNDER PREVIOUS AGREEMENT. — See notes 3, 4.**665.** *dd.* EXCHANGE OF VALUES — Not a Preference. — See note 6.

What Constitutes an Exchange. — See note 7.

holder by the bankrupt maker, a preference is given to the indorsers, if the payment was so intended to operate. *Landry v. Andrews*, 22 R. I. 597.

**663.** 3. The Ohio Insolvency Act does not include the payment of debts in defining preferences. *National Bank of Commerce v. Gettinger*, 68 Ohio St. 389.

4. Preference by Transfer of Property to Creditor — *United States*. — *In re Shapiro*, 106 Fed. Rep. 495; *In re Grant*, 106 Fed. Rep. 496; *In re Steiner Mercantile Co.*, (C. C. A.) 107 Fed. Rep. 669; *Githens v. Shiffer*, 112 Fed. Rep. 505; *In re Ed. W. Wright Lumber Co.*, 114 Fed. Rep. 1011; *In re Belding*, 116 Fed. Rep. 1016; *In re Jones*, 118 Fed. Rep. 673; *In re Busby*, 124 Fed. Rep. 469; *Johnston v. Huff, etc., Co.*, (C. C. A.) 133 Fed. Rep. 704; *In re Moody*, 134 Fed. Rep. 628.

*Massachusetts*. — *Allen v. French*, 178 Mass. 539.

*Montana*. — *Stewart v. Hoffman*, 31 Mont. 184.

*Nebraska*. — *Hackney v. Hargreaves*, (Neb. 1902) 92 N. W. Rep. 626, (Neb. 1904) 99 N. W. Rep. 695.

*Texas*. — *McWilliams v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 596.

*Vermont*. — *Coolidge v. Ayets*, 76 Vt. 405.

Returning Goods to Seller a Preference. — *In re Klingaman*, 101 Fed. Rep. 691.

Preference by Giving Security to Creditor. — *In re Ball*, 123 Fed. Rep. 164; *In re Pease*, 129 Fed. Rep. 446; *In re Riggs Restaurant Co.*, (C. C. A.) 130 Fed. Rep. 691; *In re Edelman*, (C. C. A.) 130 Fed. Rep. 700; *In re O'Donnell*, 131 Fed. Rep. 150; *In re Ewald*, 135 Fed. Rep. 168; *Whitson v. Farber Bank*, 105 Mo. App. 605; *Sebring v. Wellington*, 63 N. Y. App. Div. 498.

The Giving of Security to a Third Person, in return for money advanced which it was understood would be applied to the settlement of an existing debt, constitutes a preference. *In re Beerman*, 112 Fed. Rep. 663.

Transfer Need Not Be to Debtor. — *Western Tie, etc., Co. v. Brown*, (C. C. A.) 129 Fed. Rep. 728. See also *Goldberg v. Harlan*, 33 Ind. App. 465.

Preference by Transferring Book Accounts. — *In re McGee*, 105 Fed. Rep. 895.

Paying Part of a Debt by Services does not constitute a preference by transferring property. *In re Abraham Steers Lumber Co.*, 110 Fed. Rep. 739, *affirmed* (C. C. A.) 112 Fed. Rep. 406.

Payment of Money Constitutes a Transfer of Property. — See the cases cited *supra*. 662. 2.

Consent to the Appointment of a Receiver does not constitute a fraudulent transfer of property. *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 179; *In re Burrell*, (C. C. A.) 123 Fed. Rep. 414; *In re Henry Zeltner Brewing Co.*, 117 Fed. Rep. 799.

The Dissolution of a Partnership, whereby the property became vested in the individual partners, thus operating to defeat the right of firm creditors to priority, is an act of bankruptcy, as a transfer of property with intent to create a preference. *In re Head*, 114 Fed. Rep. 489. But see *In re Varick Bank*, 119 Fed. Rep. 991, *affirmed* (C. C. A.) 123 Fed. Rep. 414.

A Surety who has taken up notes must be held to have received a preference. *Crandall v. Coats*, 133 Fed. Rep. 966.

If a Creditor of a Debtor Takes the Whole, or Substantially the Whole, of the Property of His Debtor in Payment of a Past Debt, and knowing that there are other creditors, he cannot be said to be acting in good faith. *In re Jukes*, (1902) 2 K. B. 58.

**664.** 3. Acts Done under Previous Agreement Held Valid. — *Mercer v. Mercer*, (Ky. 1903) 74 S. W. Rep. 285.

4. Transfers, etc., Pursuant to Previous Agreement Held Invalid. — *Pollock v. Jones*, (C. C. A.) 124 Fed. Rep. 163; *In re Dismal Swamp Contracting Co.*, 135 Fed. Rep. 415; *In re Ronk*, 111 Fed. Rep. 154; *Torrance v. Winfield Nat. Bank*, 66 Kan. 177; *Elmore v. Symonds*, 183 Mass. 321.

**665.** 6. Exchange of Values — *United States*. *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526; *In re Topliff*, 114 Fed. Rep. 323; *Githens v. Shiffer*, 112 Fed. Rep. 505; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A.) 114 Fed. Rep. 447; *Jaquith v. Alden*, 118 Fed. Rep. 270, *affirmed* 189 U. S. 78; *In re Sagor*, (C. C. A.) 121 Fed. Rep. 658; *In re Nicholas*, 122 Fed. Rep. 299; *In re Manning*, 123 Fed. Rep. 181; *In re Filer*, 125 Fed. Rep. 261; *Crim v. Woodford*, (C. C. A.) 136 Fed. Rep. 34.

*Indiana*. — *Goode v. Elwood Lodge No. 166*, 160 Ind. 251; *Sellers v. Hayes*, 163 Ind. 422.

*Kansas*. — *John S. Brittain Dry Goods Co. v. Bertenshaw*, 68 Kan. 734.

*Kentucky*. — *Mt. Sterling Nat. Bank v. Priest*, 111 Ky. 886.

*Montana*. — *Schilling v. Curran*, 30 Mont. 370.

*New York*. — *Perry v. Booth*, 67 N. Y. App. Div. 235; *Engel v. Union Square Bank*, 94 N. Y. App. Div. 244, *affirmed* 182 N. Y. 544.

*Texas*. — *Eason v. Garrison*, 36 Tex. Civ. App. 574.

7. Substitution of Securities. — *Stewart v. Hoffman*, 31 Mont. 190.

Renewal of Existing Security. — *Deland v. Miller, etc., Bank*, 119 Iowa 368.

Substitution of Proceeds After Sale of Securities. — *In re Filer*, 125 Fed. Rep. 261.

Giving Renewal Mortgage does not constitute a preference. *Deland v. Miller, etc., Bank*, 119 Iowa 368.

There Must Be an Actual Exchange of Securities. — *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, 125 Fed. Rep. 974.

**666.** See notes 1, 2.

Raising Funds to Defray Expenses of Bankruptcy Proceedings. — See note 3.

In Cases of a Mixed Character. — See note 5.

**667.** (2) *Time as Affecting Consequences of Act.* — See note 1.

(3) *Circumstances of Debtor.* — See note 2.

**668.** (4) *Intent to Create Preferences.* — See note 4.

**666.** 1. *Security for Loans, Advances, Etc.* — *Young v. Upson*, 115 Fed. Rep. 192; *In re Hull*, 115 Fed. Rep. 858; *Farmers' Bank v. Carr*, (C. C. A.) 127 Fed. Rep. 690; *Crim v. Woodford*, (C. C. A.) 136 Fed. Rep. 34; *In re Clifford*, 136 Fed. Rep. 475; *Mt. Sterling Nat. Bank v. Priest*, 111 Ky. 886; *Kennedy v. Pierce's Loan Co.*, 100 Mo. App. 269; *Perry v. Booth*, 67 N. Y. App. Div. 235.

Payment of a Claim Secured by Lien is not a preference where such lien is unassailable under the provisions of the Bankruptcy Act. *In re Riddle*, 122 Fed. Rep. 559.

Giving of Property in Satisfaction of a Mortgage which was amply secured does not constitute a preference, since the estate of the bankrupt is not thereby diminished. *Posey v. McManis*, 28 Tex. Civ. App. 452; *Eason v. Garrison*, 36 Tex. Civ. App. 574.

2. *Paying Cash on the Purchase of Goods.* — *Brinkley v. Smithwick*, 126 Fed. Rep. 686; *Schilling v. Curran*, 30 Mont. 370; *Eason v. Garrison*, 36 Tex. Civ. App. 574.

Payments Made on Open Account. — Payments by the bankrupt, where he receives goods from time to time on credit under an open account, which go to increase the value of his estate, do not constitute preferences. *Jaquith v. Alden*, 189 U. S. 78.

A payment of money in ordinary course of business, although made within four months of the bankruptcy proceedings, is not a preference unless the debtor was, to the knowledge of the creditor, insolvent at the time of such payment. *In re Alexander*, 102 Fed. Rep. 464.

A Sale on Credit of ten or thirty days cannot be considered as a sale for present value. *In re Morrow*, 134 Fed. Rep. 686.

3. *Mortgage or Sale to Pay Attorney's Fees and Other Expenses.* — *Swartz v. Frank*, 183 Mo. 438.

5. *Security for Past Debt Coupled with Present Advance.* — *In re Dismal Swamp Contracting Co.*, 135 Fed. Rep. 415.

**667.** 1. *Time as Affecting Consequences of Act.* — *Citizens' Bank v. W. C. De Pauw Co.*, (C. C. A.) 105 Fed. Rep. 926.

That Preferences Are Not Recoverable if Not Made Within Four Months, see *In re Kindt*, 101 Fed. Rep. 107; *Dean v. Plane*, 195 Ill. 495; *Murphy v. Murphy*, 126 Iowa 57; *Joseph v. Raff*, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611; *Pratt v. Christie*, 95 N. Y. App. Div. 282; *Dutton v. Cloar*, 26 Tex. Civ. App. 547.

How Time Computed. — *Whitley Grocery Co. v. Roach*, 115 Ga. 918.

Failure to Record. — Where the transfer of property was completed over six months before the filing of the petition by the delivery of the deed, though not recorded until one month before the petition was filed, it was held not to be a preference which could be avoided by the trustee. *Miller v. Shriver*, 107 Pa. St. 191.

Renewal of Pledge Within Statutory Period. —

*Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. Rep. 755.

2. *Circumstances of Debtor* — *United States.* — *In re Alexander*, 102 Fed. Rep. 464; *In re Miller*, 104 Fed. Rep. 764; *Simpson v. Van Etten*, 108 Fed. Rep. 199; *In re Wittenberg Veneer, etc., Co.*, 108 Fed. Rep. 593, affirmed (C. C. A.) 116 Fed. Rep. 276; *In re Union Feather, etc., Mfg. Co.*, (C. C. A.) 112 Fed. Rep. 774; *In re Shoemith, (C. C. A.)* 135 Fed. Rep. 684; *In re Clifford*, 136 Fed. Rep. 475.

*Iowa.* — *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432; *Ferguson v. Lederer*, (Iowa 1905) 103 N. W. Rep. 794.

*Maine.* — *Kimball v. Dresser*, 98 Me. 519.

*Missouri.* — *Edwards v. Carondelet Milling Co.*, 108 Mo. 275.

*Montana.* — *Schilling v. Curran*, 30 Mont. 370.

*New York.* — *Martin v. Bigelow*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 298; *Joseph v. Raff*, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611.

*Utah.* — *Wilkinson v. Anderson-Taylor Co.*, 28 Utah 346.

What Property Included in Determining Debtor's Status. — Under the Bankruptcy Act of 1898, property fraudulently transferred or concealed by the debtor is not included in determining the question of his solvency. See *supra*, 636. 2.

A Mortgage Given Without Fraudulent Intent is to be counted as assets in determining the question of the debtor's solvency. *Posey v. McManis*, 28 Tex. Civ. App. 452.

Property Transferred in Payment of a Just Debt will not be excluded. *In re Doscher*, 120 Fed. Rep. 408.

Time of Determining Debtor's Status. — *Upson v. Mt. Morris Bank*, 103 N. Y. App. Div. 367.

**668.** 4. *Intention of Debtor to Give Preference* — *United States.* — *In re Smoke*, 104 Fed. Rep. 289; *In re Gilbert*, 112 Fed. Rep. 951; *McNair v. McIntyre*, (C. C. A.) 113 Fed. Rep. 113; *In re Ewing*, (C. C. A.) 115 Fed. Rep. 707; *Clark v. Henne*, (C. C. A.) 127 Fed. Rep. 288; *In re Pease*, 129 Fed. Rep. 446. *California.* — *Gabriel v. Tonner*, 138 Cal. 63; *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

*Iowa.* — *Ferguson v. Lederer*, (Iowa 1905) 103 N. W. Rep. 794.

*Kentucky.* — *Crouch v. Crouch*, (Ky. 1900) 56 S. W. Rep. 804.

*Massachusetts.* — *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 53.

*Minnesota.* — *Bradley v. Benson*, 93 Minn. 91.

*Mississippi.* — *Thompson v. Jackson First Nat. Bank*, 84 Miss. 54.

*Pennsylvania.* — *Peck v. Connell*, 21 Pa. Super. Ct. 22.

*Vermont.* — *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899.

- 669.** Evidence of Intent to Prefer. — See note 1.  
 The Debtor May Testify. — See note 3.  
 (5) *Creditor's Knowledge as to Circumstances and Intent of Debtor.*  
 — See note 4.
- 3.** Assignment for Benefit of Creditors. — See note 6.
- 670.** See notes 1, 2.
- 4.** Departure of Debtor or Concealment of Person. — See note 7.
- 671.** **5.** Removal or Concealment of Property. — See note 3.  
**7.** Seizure of Goods under Legal Process. — See note 7.
- 673.** **9.** Admitting Insolvency. — See notes 2, 3.

But see *Benedict v. Deshel*, 177 N. Y. 1, reversing 77 N. Y. App. Div. 276.

**No Intent Necessary.** — *White v. Bradley Timber Co.*, 119 Fed. Rep. 989, affirmed (C. C. A.) 121 Fed. Rep. 779.

**669. 1. Intent Inferred from Fact of Preference** — *United States*. — *Western Tie, etc., Co. v. Brown*, 196 U. S. 502; *In re Bloch*, (C. C. A.) 109 Fed. Rep. 790; *In re Gilbert*, 112 Fed. Rep. 951; *In re Head*, 114 Fed. Rep. 489; *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 180; *In re Mero*, 128 Fed. Rep. 631; *In re Pease*, 129 Fed. Rep. 446; *Western Tie, etc., Co. v. Brown*, (C. C. A.) 129 Fed. Rep. 728; *Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co.*, (C. C. A.) 131 Fed. Rep. 215; *Rex Buggy Co. v. Hearick*, (C. C. A.) 132 Fed. Rep. 310.

*California*. — *Gabriel v. Tonner*, 138 Cal. 63.

*Massachusetts*. — *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 53.

*Mississippi*. — *Chism v. Citizens' Bank*, 77 Miss. 599.

*New York*. — *Benedict v. Deshel*, 177 N. Y. 1, reversing 77 N. Y. App. Div. 276.

*Pennsylvania*. — *Crawford v. Rumpf*, 205 Pa. St. 154.

**3. Debtor May Testify as to Intent.** — *In re Bloch*, (C. C. A.) 109 Fed. Rep. 790; *Suplee v. Hall*, 75 Conn. 17, 96 Am. St. Rep. 188.

**4. Knowledge of Creditor Not Material.** — *In re Sloan*, 102 Fed. Rep. 116; *In re Flick*, 105 Fed. Rep. 503; *In re Seckler*, 106 Fed. Rep. 484; *Goldberg v. Harlan*, 33 Ind. App. 465.

**6. Assignment for Benefit of Creditors an Act of Bankruptcy.** — *Wheatley v. Wheatley*, 85 L. T. N. S. 491; *Bryan v. Bernheimer*, 181 U. S. 188; *Randolph v. Scruggs*, 190 U. S. 533; *Clark v. American Mfg., etc., Co.*, (C. C. A.) 101 Fed. Rep. 962; *In re Green*, 106 Fed. Rep. 313; *In re Grant*, 106 Fed. Rep. 496; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137; *Stern v. Louisville Trust Co.*, (C. C. A.) 112 Fed. Rep. 501; *Day v. Beck, etc., Hardware Co.*, (C. C. A.) 114 Fed. Rep. 834; *In re Slomka*, (C. C. A.) 122 Fed. Rep. 630; *In re Knight*, 125 Fed. Rep. 35; *Couts v. Townsend*, 126 Fed. Rep. 249; *Ketcham v. McNamara*, 72 Conn. 709.

**An Assignment Made Directly to the Creditors**, and not to an assignee for their benefit, does not constitute an act of bankruptcy. *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, 125 Fed. Rep. 974.

**Consent by a Partnership to the Appointment of a Receiver** does not constitute a general assignment. *In re Gilbert*, 112 Fed. Rep. 951.

**An Assignment by a Debtor for the Benefit of His Trade Creditors Only** is not an act of bankruptcy under a clause of the English Bank-

ruptcy Act making it an act of bankruptcy for a debtor to make a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. *In re Phillips*, (1900) 2 Q. B. 329.

**670. 1. Insolvency Not Material.** — *Bryan v. Bernheimer*, 181 U. S. 188; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137; *Day v. Beck, etc., Hardware Co.*, (C. C. A.) 114 Fed. Rep. 834; *Couts v. Townsend*, 126 Fed. Rep. 249.

**2. Must Be Voluntary Common-law Assignment.** — *Vaccaro v. Security Bank*, (C. C. A.) 103 Fed. Rep. 436.

**7. A Married Woman** who, while carrying on a business separately from her husband, leaves her place of business without paying her creditors or notifying her change of address, commits an act of bankruptcy by absenting herself with intent to delay or defeat her creditors within the meaning of the Bankruptcy Act, 1883, even though she leaves at her husband's request in order to live with him elsewhere. *In re Worsley*, (1901) 1 K. B. 309.

**671. 3. Removal or Concealment of Property Under Present Act.** — *In re Filer*, 108 Fed. Rep. 209.

**What Constitutes Removal or Concealment.** — *Vaccaro v. Security Bank*, (C. C. A.) 103 Fed. Rep. 436.

**Removal by Creditor in Debtor's Absence.** — If the removal was accomplished by a creditor during the bankrupt's absence, the neglect of the bankrupt to recover the property cannot be considered an act of bankruptcy. *In re Belknap*, 129 Fed. Rep. 646.

**7. For Cases under the Bankruptcy Act of 1898**, see *supra*, 662. 1.

**673. 2. A Statement by a Debtor that He Is Unable to Pay His Debts in Full** is not by itself an act of bankruptcy within the meaning of the English Bankruptcy Act making it an act of bankruptcy for the debtor to give notice that he has suspended, or that he is about to suspend, payment of his debts. *In re Reis*, (1904) 2 K. B. 769.

**3. Bankruptcy Law of United States.** — *Brinkley v. Smithwick*, 126 Fed. Rep. 686; *In re C. Moench, etc., Co.*, (C. C. A.) 130 Fed. Rep. 685; *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57.

**Admissions by Corporations.** — *In re Rollins, Gold, etc., Min. Co.*, 102 Fed. Rep. 982; *In re Mutual Mercantile Agency*, 111 Fed. Rep. 152; *In re C. Moench, etc., Co.*, 123 Fed. Rep. 965, affirmed (C. C. A.) 130 Fed. Rep. 685; *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 179.

**673.** [10. Appointment of Receiver or Trustee under State Laws. — See note 3a.]

[11. Noncompliance with Bankruptcy Notice Requiring Debtor to Pay a Judgment Debt. — See note 3b.]

[12. Admissibility of Evidence to Prove Acts of Bankruptcy. — See note 3c.]

**X. DEBTS AND CLAIMS AGAINST ESTATE** — 1. Proof and Allowance — a. NECESSITY OF PROOF IN GENERAL. — See note 4.

**674.** c. BY WHOM PROVABLE. — See note 1.

The Assignee of a Claim. — See note 2.

d. AMOUNT ALLOWABLE — (1) *In General*. — See note 3.

**676.** (3) *Set-off*. — See note 2.

**673. 3a. The Amendment of Feb. 5, 1903, c. 487, § 2,** provides an additional act of bankruptcy in the words, "or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state." *Lowenstein v. Henry McShane Mfg. Co.*, 130 Fed. Rep. 1007; *In re Douglas Coal, etc., Co.*, 131 Fed. Rep. 769; *In re Spalding*, 134 Fed. Rep. 507.

**Provision Not Retroactive.** — *Seaboard Steel Casting Co. v. William R. Trigg Co.*, 124 Fed. Rep. 75.

**3b. Noncompliance with Bankruptcy Notice.** — Under the English Bankruptcy Act a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him a bankruptcy notice under this act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and if he does not within seven days after service of the notice either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the action was discharged. *Re A Debtor*, 91 L. T. N. S. 321; *In re G. E. B.*, (1903) 2 K. B. 340; *Ex p. Mendelssohn*, (1903) 1 K. B. 216; *In re O. C. S.*, (1904) 2 K. B. 161; *In re Smith*, (1903) 1 K. B. 33.

Where a bankruptcy notice has been complied with by the debtor giving security for the judgment debt to the satisfaction of the creditor, which security by its terms is not to be realized till a future day, the creditor cannot issue a fresh bankruptcy notice in respect to the same judgment debt during the pendency of the security, notwithstanding a term providing that the judgment is still to be in full force. *In re Smith*, (1903) 1 K. B. 33.

**"Final Judgment."** — An order made upon a petition under the English Patents, Designs, and Trade Marks Act, 1883, ordering that letters patent be revoked and that the defendant pay the plaintiff's costs, is not a "final judgment" within the meaning of those words as used in the English Bankruptcy Act, 1883, and a bankruptcy notice therefore cannot be issued upon it in respect of the costs ordered to be paid. *Re Owen*, 83 L. T. N. S. 572.

**3c. Admissibility of Evidence to Prove Acts of Bankruptcy.** — Upon the hearing of a bankruptcy

petition the books of a debtor are admissible to prove the act of bankruptcy, and the debtor may himself be called for the same purpose. *In re X. Y.*, (1902) 1 K. B. 98.

**4. When Any One Claims to Prove in Bankruptcy He Must Show a Prima Facie Case.** — *In re Cronmire*, (1901) 1 K. B. 480.

**Proof Held Insufficient** to establish a claim for goods sold. *In re Kaldenberg*, 105 Fed. Rep. 232.

**674. 1. By Whom Proof May Be Made in United States.** — *In re Sumner*, 101 Fed. Rep. 224; *In re Dresser*, (C. C. A.) 135 Fed. Rep. 495.

**A Corporation Becoming a Member of a Partnership** cannot later claim that the act was *ultra vires* and be allowed to prove a claim against the partnership in bankruptcy. *In re Ervin*, 109 Fed. Rep. 135, affirmed (C. C. A.) 112 Fed. Rep. 124.

**Wife's Claim Arising Out of Invalid Contract Not Provable.** — *In re Kaufmann*, 104 Fed. Rep. 768.

**Executor or Administrator.** — *In re Woods*, 133 Fed. Rep. 82.

**County May Prove Claim.** — *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808.

**The Equitable Owner of a note** may prove the claim. *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808.

**2. A Receiver Appointed to Enforce Stockholders' Liability** under the statutes of Minnesota was held to be a "duly authorized agent" of the creditors he represented, to prove their claim against an insolvent stockholder's estate. *Dight v. Chapman*, 44 Oregon 265.

**3. Whole Amount Provable.** — Where at the date of the bankruptcy the debtor owed £16,500 to one of his creditors on account of moneys advanced to him on his depositing a transfer of shares which turned out to be a forgery, and subsequently a third person who was formerly a partner of the debtor, whilst repudiating all liability for the fraud of the debtor, voluntarily, and without the debtor's knowledge, paid £6,500 for the loss thereby sustained, it was held that the payment was not made on account of either the debt or the debtor, and that the creditor could prove for the full amount of the debt without deducting the £6,500. *In re Rowe*, (1904) 2 K. B. 483.

**676. 2. Set-off of Mutual Debts and Credits — England.** — *In re Daintrey*, (1900) 1 Q. B. 546.

**United States.** — *New York County Nat. Bank v. Massey*, 192 U. S. 138; *Western Tie, etc., Co.*



**676.** (4) *Secured Claims.* — See notes 4, 5, 6.

**677.** If a Secured Creditor Does Not Disclose the Security. — See note 3.

**678.** See note 2.

*e.* TIME OF FILING CLAIMS. — See notes 3, 4.

*Extension of Time.* — See note 5.

*f.* ALLOWANCE OF CLAIMS. — See note 7.

**679.** *g.* CONTEST OF CLAIMS. — See note 1.

*v. Brown*, 196 U. S. 502; *In re Little*, 110 Fed. Rep. 621; *In re Shults*, 132 Fed. Rep. 573; *In re Morrow*, 134 Fed. Rep. 686; *In re Philip Semmer Glass Co.*, (C. C. A.) 135 Fed. Rep. 77. *Compare In re Meyer*, 106 Fed. Rep. 828. *Massachusetts.* — *Morgan v. Wordell*, 178 Mass. 350.

*New York.* — *Frank v. Mercantile Nat. Bank*, 100 N. Y. App. Div. 449, *affirmed* 182 N. Y. 264. *Pennsylvania.* — *Tredway v. Kaufman*, 21 Pa. Super. Ct. 256.

*Deduction of New Credits.* — The Bankruptcy Act of 1898, § 60c, provides that "if a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." The decisions as to whether this section applies to a voluntary surrender on proof of claim by a preferred creditor, or is limited to cases where the trustee sues, are in hopeless conflict. The weight of authority holds that the section applies to voluntary surrenders. *McKey v. Lee*, (C. C. A.) 105 Fed. Rep. 923; *In re Ryan*, 105 Fed. Rep. 760; *In re Seckler*, 106 Fed. Rep. 484; *In re Soldosky*, 111 Fed. Rep. 511; *In re Southern Overalls Mfg. Co.*, 111 Fed. Rep. 518; *In re Dickson*, (C. C. A.) 111 Fed. Rep. 726; *Peterson v. Nash*, (C. C. A.) 112 Fed. Rep. 311; *In re Thompson*, 112 Fed. Rep. 651; *In re Topliff*, 114 Fed. Rep. 323; *C. S. Morey Mercantile Co. v. Schiffer*, (C. C. A.) 114 Fed. Rep. 447; *Gans v. Ellison*, (C. C. A.) 114 Fed. Rep. 734; *Kahn v. Cone Export, etc., Co.*, (C. C. A.) 115 Fed. Rep. 290.

But there have been a number of decisions holding that the section applies only to cases where suit is brought by the trustee. *In re Christensen*, 101 Fed. Rep. 802; *In re Arndt*, 104 Fed. Rep. 234; *In re Keller*, 109 Fed. Rep. 118; *In re Olivei*, 109 Fed. Rep. 784; *In re Abraham Steers Lumber Co.*, 110 Fed. Rep. 738, *affirmed* (C. C. A.) 112 Fed. Rep. 406. See also *In re Ratliff*, 107 Fed. Rep. 80.

*When Set-off Not Allowed.* — When the property for which the new credit was given was acquired by the bankrupt from a person other than the preferred creditor and before the preference was given, it was held that the preferred creditor was not entitled to a set-off under section 60c. *Carleton Dry Goods Co. v. Rogers*, (C. C. A.) 120 Fed. Rep. 14.

*Voidable Preference Not Allowed as Set-off.* — *Western Tie, etc., Co. v. Brown*, (C. C. A.) 129 Fed. Rep. 728.

*Where Claim Assigned for Purpose of Securing Set-off.* — Claims assigned to a creditor for the sole purpose of securing the benefit of the pro-

vision permitting set-off, and thereby obtaining an unlawful preference, will not give the assignee a right of set-off. *In re Shults*, 132 Fed. Rep. 573.

*Cash Payments Made Within Four Months* cannot be included in determining the balance due the creditors under section 68a, providing for set-off in case of mutual debts and credits. *In re Ryan*, 105 Fed. Rep. 760.

**676.** 4. Under Minnesota Insolvent Act. — *Mankato First Nat. Bank v. Pope*, 85 Minn. 436.

5. *Surrender of Security* — Proof for Whole Debt. — *Sellers v. Hayes*, 163 Ind. 422; *Mankato First Nat. Bank v. Pope*, 85 Minn. 433.

6. *Proving for Balance After Deducting Value of Security.* — *Bassett v. Thackara*, (N. J. 1905) 60 Atl. Rep. 39.

**677.** 3. *Waiver of Security.* — *In re Wilder*, 101 Fed. Rep. 104; *Mankato First Nat. Bank v. Pope*, 85 Minn. 436, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677.

*Neglecting to Interfere at Sale Held a Waiver.* — *In re Klapholz*, 113 Fed. Rep. 1002.

*Waiver under Mistake* — *Reinstatement.* — *Hutchinson v. Otis*, (C. C. A.) 115 Fed. Rep. 937; *In re Swift*, 111 Fed. Rep. 503.

**678.** 2. *Court May Permit Amendment.* — See *In re Wilder*, 101 Fed. Rep. 104.

*In a Case of Inadvertence Merely* an amendment will not be allowed. *In re Rowe*, (1904) 2 K. B. 489.

3. *Time of Filing Claims.* — *In re Rhodes*, 105 Fed. Rep. 231; *Santa Rosa Bank v. White*, 139 Cal. 703.

4. *Effect of Nonpresentation.* — *In re Leibowitz*, 108 Fed. Rep. 617; *In re Lane*, 125 Fed. Rep. 772; *Santa Rosa Bank v. White*, 139 Cal. 703.

*Insufficient Notice* will not excuse nonpresentation. *In re Muskoka Lumber Co.*, 127 Fed. Rep. 886.

*Limitation Not Binding on United States.* — *In re Stoeve*, 127 Fed. Rep. 394.

*The Right to Amend* will not be permitted to extend the time. *In re Moebius*, 116 Fed. Rep. 47; *In re Thompson*, 123 Fed. Rep. 174; *In re McCallum*, 127 Fed. Rep. 768.

*The Fact of a Composition Having Been Made* will not operate to extend the time. *In re Brown*, 123 Fed. Rep. 336; *In re Lane*, 125 Fed. Rep. 772.

5. *Permitting Claim to Be Filed After Time Limited.* — *State v. Bank of Commerce*, 61 Neb. 22.

*Assignee's Claim for Services.* — *In re Levitt*, 126 Fed. Rep. 889.

*Where Filing Prevented by Fraud.* — *In re Towne*, 122 Fed. Rep. 313.

7. *Allowance as Matter of Course.* — *In re Shaw*, 109 Fed. Rep. 780.

**679.** 1. *Contest of Claims.* — *In re Sumner*, 101 Fed. Rep. 224; *Atkins v. Wilcox*, (C. C. A.) 105 Fed. Rep. 595.

**679.** *h. EFFECT OF PROVING CLAIMS — (3) Right of Creditor to Sue.* — See notes 4, 6.

**680.** See note 1.

(4) *Foreign Insolvency or Bankruptcy Proceeding.* — See note 4.

**2. What Debts and Claims Are Provable — a. IN GENERAL — Debt Recoverable in Law or Equity. — See note 5.**

**681.** See note 1.

Fraud — Illegality. — See note 3.

**682.** Sureties, Indorsers, Etc. — See note 3.

If a Husband Becomes Indebted to His Wife. — See note 6.

**683.** Alimony. — See notes 6, 7.

*b. CLAIMS ACCRUING AFTER COMMENCEMENT OF PROCEEDINGS.*

— See note 9.

Only Those Creditors Whose Claims Have Been Allowed may contest. *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531.

A Fraudulent Attempt to Secure Fictitious Items will debar a creditor from proof in any amount. *In re Flick*, 105 Fed. Rep. 503.

Right to Contest May Be Lost by Laches. — *In re Hamilton Furniture Co.*, 116 Fed. Rep. 115.

**679.** 4. Proof of Debt Held Not Waiver of Right to Sue. — *In re Lewensohn*, 99 Fed. Rep. 73, affirmed (C. C. A.) 104 Fed. Rep. 1006; *Standard Sewing Machine Co. v. Alexander*, 68 S. Car. 506.

6. Debts Not Affected by Discharge. — *Tallant v. Stedman*, 176 Mass. 460; *Frey v. Torrey*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 216, affirmed 70 N. Y. App. Div. 166.

**680.** 1. Waiver Affects Bankrupt Only. — See *Priesing v. Crampton*, 181 Mass. 492.

4. Proving Claim in Foreign Proceedings — Waiver of Extraterritorial Immunity. — *Gerding v. East Tennessee Land Co.*, 185 Mass. 380.

Where No Part of the Creditor's Claim Has Been Paid in a foreign insolvency proceeding, he may sue and recover judgment upon the debt. *New Albany Mfg. Co. v. Sulzer*, 29 Ind. App. 89.

5. A Judgment for a Fine was held not provable in *In re Moore*, 111 Fed. Rep. 145.

Corporate Bonds properly issued constitute a provable claim. *In re Waterloo Organ Co.*, (C. C. A.) 134 Fed. Rep. 345. But it is otherwise when the issuance of the bonds is *ultra vires*. *In re Waterloo Organ Co.*, (C. C. A.) 134 Fed. Rep. 341.

An Administrator's Bond, the amount of which has been determined and ordered to be paid over in proper probate proceedings, is provable. *Hibberd v. Bailey*, (C. C. A.) 129 Fed. Rep. 575.

A Penal Bond given by the bankrupt to secure payment of an annuity is provable. *Cobb v. Overman*, (C. C. A.) 109 Fed. Rep. 65.

Notes Illegally Discounted by a bank officer in excess of the legal limitation are nevertheless provable against the estate of a bankrupt indorser. *In re Edson*, 119 Fed. Rep. 487.

Where Doubtful that Balance Will Be Due to Creditor. — One owing the bankrupt such a large sum that there is doubt whether there will be a balance due will not be allowed to prove his claim. *In re Gerson*, 105 Fed. Rep. 893.

Debts Due from a Married Woman are provable against her, when enforceable under the laws of the state. *MacDonald v. Tefft-Weller Co.*, (C. C. A.) 128 Fed. Rep. 381.

A Debt Due to a Married Woman is provable where, under the state law, it is enforceable in equity. *MacDonald v. Tefft-Weller Co.*, (C. C. A.) 128 Fed. Rep. 381.

A Claim Against Brokers for Margins Advanced was held not provable in the absence of proof of gains by rise in the market. *In re Knott*, 109 Fed. Rep. 626.

A Claim for Conversion is provable, as founded upon a contract. *Crawford v. Burke*, 195 U. S. 176.

**681.** 1. A Penalty Provided for in a Contract, to be paid by the party in default in case of a breach, is not provable where no damage was sustained by the breach. *Northwest Fixture Co. v. Kilbourne, etc., Co.*, (C. C. A.) 128 Fed. Rep. 256.

3. Illegality or Fraud. — *In re Browne*, (1904) 2 K. B. 133.

Notes Given by a Corporation in Payment for Its Own Stock are not provable. *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 618.

**682.** 3. Right of Sureties to Indemnity Not a Provable Debt. — *McIntire v. Cottrell*, 185 Mass. 178; *Swarts v. Siegel*, 114 Fed. Rep. 1001 (accommodation maker).

If Surety Pays the Debt. — *Crandall v. Coats*, 133 Fed. Rep. 966.

Though a surety pays a debt, yet if the creditor has received a preference, the surety is subrogated to the creditor's disability and cannot prove without surrendering the preference. *Morgan v. Wordell*, 178 Mass. 350.

6. Proof of Claims by Wife Against Husband. — *In re Cronmire*, (1901) 1 K. B. 480; *In re Neiman*, 109 Fed. Rep. 113; *In re Nickerson*, 116 Fed. Rep. 1003; *In re Miner*, 117 Fed. Rep. 953; *In re Domenig*, 128 Fed. Rep. 146; *James v. Gray*, (C. C. A.) 131 Fed. Rep. 401; *In re Winkels*, 132 Fed. Rep. 590. But see *In re Talbot*, 110 Fed. Rep. 924, and compare *In re Tucker*, 131 Fed. Rep. 647.

**683.** 6. Alimony Held a Provable Debt under Act of 1898. — *Arrington v. Arrington*, 131 N. Car. 143, 92 Am. St. Rep. 769.

7. Alimony Held Not Provable under Act of 1898. — *Audubon v. Shufeldt*, 181 U. S. 575; *Turner v. Turner*, 108 Fed. Rep. 785; *Arrington v. Arrington*, 132 Fed. Rep. 200; *Lemert v. Lemert*, 72 Ohio St. 364, 106 Am. St. Rep. 621; *Maisner v. Maisner*, 62 N. Y. App. Div. 286.

9. Debts Accruing After Filing of Petition Not Provable under United States Statute. — *In re*

**684.** Rent and Other Periodical Payments. — See notes 1, 2.

c. CLAIMS BARRED BY STATUTE OF LIMITATIONS. — See note 3.

**685.** See note 2.

d. CONTINGENT AND UNLIQUIDATED CLAIMS. — See note 3.

**686.** See notes 2, 3. \*

Burka, 104 Fed. Rep. 326; *In re Stern*, (C. C. A.) 116 Fed. Rep. 604; *In re Adams*, 130 Fed. Rep. 381; *In re Pettingill*, 137 Fed. Rep. 143. See also *In re Swift*, 105 Fed. Rep. 493.

**Damages for Breach of a Covenant for Quiet Enjoyment** are not provable where the breach has not occurred before the institution of the bankruptcy proceedings. *In re Pennewell*, (C. C. A.) 119 Fed. Rep. 139.

**A Collection Fee**, to be allowed if a note should not be paid, is not a provable debt, where no proceedings for collection have been instituted before the bankruptcy proceedings are begun. *In re Garlington*, 115 Fed. Rep. 999; *In re Keeton*, 126 Fed. Rep. 426, 429.

But it is otherwise where proceedings for collection have been begun before the filing of the petition. *Merchants' Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306.

**Wife's Interest in Husband's Personality Before Divorce.** — A wife, prosecuting an action for a divorce under the *Arkansas* statute providing that after divorce is granted she "shall be entitled to one-third of the husband's personal property absolutely," has no provable claim prior to the granting of the divorce. *Hawk v. Hawk*, 102 Fed. Rep. 679.

**Where Bankruptcy Operates as a Breach of Contract**, the damages for such breach are provable. *In re Pettingill*, 137 Fed. Rep. 143; *In re Adams*, 130 Fed. Rep. 381; *In re Stern*, (C. C. A.) 116 Fed. Rep. 604; *In re Swift*, 105 Fed. Rep. 493. *affirmed* (C. C. A.) 112 Fed. Rep. 315.

**A Contract of Employment** for a year is broken when the employer makes a trust deed for the benefit of creditors and the trustee discharges the employee before the end of the year without cause. Therefore, the latter's claim for damages is provable against the employer's estate although the year has not elapsed. *In re Silverman*, 101 Fed. Rep. 219.

**A Note Indorsed by the Bankrupt** is provable under § 63a, subd. 4, although the note has not matured when the petition is filed. *In re Gerson*, 105 Fed. Rep. 891 [*overruling In re Schaefer*, 104 Fed. Rep. 973]; *Moch v. Market St. Nat. Bank*, (C. C. A.) 107 Fed. Rep. 897.

**684. 1. Periodical Payments.** — *In re Arnstein*, 101 Fed. Rep. 706; *In re Hinckel Brewing Co.*, 123 Fed. Rep. 942; *Wilder v. McDonald*, 63 Ohio St. 383.

**2. Rents Accruing After Bankruptcy — Rule under United States Statute.** — *In re Arnstein*, 101 Fed. Rep. 706; *In re Mahler*, 105 Fed. Rep. 428; *In re Hays, etc., Co.*, 117 Fed. Rep. 879; *Watson v. Merrill*, (C. C. A.) 136 Fed. Rep. 359; *Bernhardt v. Curtis*, 109 La. 171, 94 Am. St. Rep. 445.

As to the rights of the landlord in general, see *Atkins v. Wilcox*, (C. C. A.) 105 Fed. Rep. 595; *Wilson v. Pennsylvania Trust Co.*, (C. C. A.) 114 Fed. Rep. 742; *In re Wiessner*, 116 Fed. Rep. 68; *In re Duble*, 117 Fed. Rep. 794; *In re Hinckel Brewing Co.*, 123 Fed. Rep. 942;

*In re Shaffer*, 124 Fed. Rep. 111; *Keyser v. Wessel*, (C. C. A.) 128 Fed. Rep. 281; *In re Hayward*, 130 Fed. Rep. 720; *In re Miller*, 132 Fed. Rep. 414; *In re Adams*, 134 Fed. Rep. 142; *Watson v. Merrill*, (C. C. A.) 136 Fed. Rep. 359; *Summerville v. Kelliher*, 144 Cal. 155; *Hamilton v. McCroskey*, 112 Ga. 651; *Sioux City First Nat. Bank v. Flynn*, 117 Iowa 493; *Moore v. Thompson*, 93 Mo. App. 336; *Tierney v. Peerless Shoe Co.*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 803; *Witthaus v. Zimmermann*, 91 N. Y. App. Div. 202; *Walton v. Stafford*, 162 N. Y. 558.

**3. Claims Barred by Statute of Limitations.** — *In re Wooten*, 118 Fed. Rep. 670; *In re Lafferty*, 122 Fed. Rep. 558; *Dacovich v. Schley*, (C. C. A.) 134 Fed. Rep. 72; *In re Farmer*, 116 Fed. Rep. 763; *Mason v. Taft*, 23 R. I. 394, *citing* 6 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684. But see *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A.) 122 Fed. Rep. 232.

**What Statute of Limitations Governs.** — *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A.) 122 Fed. Rep. 232.

**685. 2. Right of Redemption Not Extended.** — *In re Goldman*, 102 Fed. Rep. 122.

**3. Rule as to Contingent and Unliquidated Claims in England.** — See *In re Miller*, (1901) 1 K. B. 51.

**686. 2. Proof of Unliquidated Claims.** — *In re Frederick L. Grant Shoe Co.*, (C. C. A.) 130 Fed. Rep. 881; *In re Hilton*, 104 Fed. Rep. 981; *Leader v. Mattingly*, 140 Ala. 444; *Biela v. Urbanczyk*, (Tex. Civ. App. 1905) 85 S. W. Rep. 451.

**Provision for Liquidation.** — The Bankruptcy Act of 1898, § 63b, provides for proof of unliquidated claims only after they have been liquidated in such manner as the court shall direct. *In re E. T. Kenney Co.*, 136 Fed. Rep. 451.

**Application to Court for Direction as to Manner of Liquidation.** — See *In re Silverman*, 101 Fed. Rep. 219; *In re Morales*, 105 Fed. Rep. 761.

**Amount Established by Jury Trial.** — *In re Frederic L. Grant Shoe Co.*, 125 Fed. Rep. 576, *affirmed* (C. C. A.) 130 Fed. Rep. 881.

**Claim Must Be of Nature Provable After Liquidation.** — *In re Hirschman*, 104 Fed. Rep. 69. See also *Watertown Carriage Co. v. Hall*, 75 N. Y. App. Div. 201, *affirmed* 176 N. Y. 313.

**A Claim Against a Surety on an Administrator's Bond** is provable against the estate of the surety where breaches have occurred prior to the filing of the petition. *Harmon v. McDonald*, 187 Mass. 578.

**3. A Claim Against a Bankrupt as Surety** is not provable where his principal's liability has not yet been fixed. *In re Wiseman*, 123 Fed. Rep. 185, *affirmed* (C. C. A.) 129 Fed. Rep. 575.

**The Liability of a Bankrupt as Principal on a Bond** to obtain the return of replevied property is too contingent to be a provable claim while the replevin action is still pending. *Clemmons*

- 686.** The State Insolvency Laws. — See notes 4, 5.  
 Claims Arising Out of Torts. — See note 6.  
 Election Between Tort and Contract. — See note 8.
- 687.** *e.* JOINT AND SEVERAL DEBTS. — See note 3.  
 In Case the Debtors Are Partners. — See notes 5, 6, 7, 8.
- 688.** *f.* SECURED CLAIMS. — See notes 2, 3.
- 689.** See notes 1, 2.

*v.* Brinn, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 157.

A Surety of the Bankrupt cannot prove his contingent claim in his own name. If he proves at all it must be in the name of the creditor to whose rights he has been subrogated. *Inley v. Garside*, (C. C. A.) 121 Fed. Rep. 699.

An Accommodation Indorser for the bankrupt is a creditor even before payment, and hence has a provable claim. *In re O'Donnell*, 131 Fed. Rep. 150.

**686. 4. Proof of Contingent Claims under State Insolvency Laws.** — *McDermott v. Hall*, 177 Mass. 224.

**5. Proof Limited by State Laws to Debts "Absolutely Due."** — *McIntire v. Cottrell*, 185 Mass. 178.

**6. Claims Arising Out of Mere Torts Not Provable.** — *In re Hirschman*, 104 Fed. Rep. 69; *In re Yates*, 114 Fed. Rep. 365.

**8. Election Between Tort and Contract.** — *In re Filer*, 125 Fed. Rep. 261.

**687. 3. Proof of Claim Against Several Bankrupts.** — *Robinson v. Marietta First Nat. Bank*, 98 Tex. 184.

Sureties, Indorsers, Etc. — *In re Swift*, 106 Fed. Rep. 65.

**5. Partnership Debts Provable Against Partnership Estate.** — *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605; *Merchant's Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306; *In re Groetzinger*, (C. C. A.) 127 Fed. Rep. 814.

Partner Cannot Prove Claim in Competition with Firm Creditors. — *Wallerstein v. Ervin*, (C. C. A.) 112 Fed. Rep. 124; *In re Denning*, 114 Fed. Rep. 219.

But where there are no partnership assets a member of the firm may prove his claim against another partner's estate in bankruptcy. *In re Green*, 116 Fed. Rep. 118.

The Interest of a Silent Partner must be clearly established in order to debar him from proving his claim as a general creditor. *In re Clark*, 111 Fed. Rep. 893.

An Indorsement by a Partner of a Firm Note must be taken to be a firm indorsement and the claim must be proved against the partnership. *Lamoille County Nat. Bank v. Stevens*, 107 Fed. Rep. 245.

**6. Proof of Partnership Debts Against Individual Partners.** — *In re Stevens*, 104 Fed. Rep. 323; *In re Conrader*, 118 Fed. Rep. 676; *Conrader v. Cohen*, (C. C. A.) 121 Fed. Rep. 801; *In re Janes*, 128 Fed. Rep. 527, (C. C. A.) 133 Fed. Rep. 912.

If There Are No Firm Assets the partnership creditors cannot compete with the creditors of an individual partner where the assets of his estate are only sufficient to cover individual claims. *In re Janes*, (C. C. A.) 133 Fed. Rep. 912. See also *In re Lehigh Lumber Co.*, 101 Fed. Rep. 216.

**7. Claims Against Both Firm and Individual**

Partner. — *Buckingham v. Chicago First Nat. Bank*, (C. C. A.) 131 Fed. Rep. 192; *Matter of Levin*, 139 Cal. 350; *Gray v. Brunold*, 140 Cal. 615.

**8. Individual Claim Against Partner Not Provable Against Partnership Estate.** — *Strause v. Hooper*, 105 Fed. Rep. 590; *In re Jones*, 116 Fed. Rep. 431. See also *Hibberd v. McGill*, (C. C. A.) 129 Fed. Rep. 590; *In re Weisenberg*, 131 Fed. Rep. 517.

Land Purchased with Firm Money and treated by the firm as firm property, is to be regarded as such as between the firm creditors and a member of the firm in whose name the title was taken, and such land should be applied to the firm indebtedness and not to the individual indebtedness of the member holding the legal title. *In re Groetzinger*, 110 Fed. Rep. 366, affirmed 127 Fed. Rep. 814.

**688. 2. Deduction of Value of Security or Amount Realized Therefrom.** — *Re Cooksey*, 83 L. T. N. S. 435; *In re Matthews*, 132 Fed. Rep. 274; *Bell, etc., Co. v. Kentucky Glass Works Co.*, (Ky. 1901) 65 S. W. Rep. 802; *Union, etc., Bank v. Duncan*, 84 Miss. 467; *Kahout v. Chaloupka*, (Neb. 1903) 96 N. W. Rep. 173.

Who Are Secured Creditors. — *Garman v. Wright*, (C. C. A.) 136 Fed. Rep. 164.

City Having Lien for Taxes Not a Secured Creditor. — *In re Harvey*, 122 Fed. Rep. 745.

Proving an Unsecured Debt does not debar the later reliance by the creditor upon the security given under another debt, or prevent his proving for the balance. *In re Ball*, 123 Fed. Rep. 164.

Fictitious Realization of Securities. — A creditor will not be allowed to effect a realization of securities by a fictitious sale at which he is himself the purchaser, and an attempt to avoid the intended effect of the act in this manner will forfeit such creditor's right to share in the estate. *In re Mertens*, 134 Fed. Rep. 101.

That the Security Is upon Exempt Property will not entitle the creditor to prove his claim for the whole amount. *In re Lantzenheimer*, 124 Fed. Rep. 716; *In re Little*, 110 Fed. Rep. 621.

Effect of Fraudulently Withholding Security from Record. — A mortgage creditor who by withholding his mortgage from record has assisted the debtor to secure advances from another creditor will be postponed to the latter under the general equitable principles of the bankruptcy court. *In re Ewald*, 135 Fed. Rep. 168.

**3. Surrender of Security.** — *In re Worcester County*, (C. C. A.) 102 Fed. Rep. 808; *In re Little*, 110 Fed. Rep. 621.

As to waiver of security through mistake, see *supra*, 677. 3.

**689. 1. Relying Exclusively on Security.** — *In re Goldsmith*, 118 Fed. Rep. 767.

**690. g. JUDGMENTS.** — See notes 1, 2, 3.

The Fact that the Judgment Was Rendered After Commencement of the Bankruptcy Proceeding. — See note 4.

**h. ASSIGNED CLAIMS.** — See note 8.**i. PREFERRED CLAIMS.** — See note 9.

**689. 2. Proof Affected Only by Security on Property of Debtor.** — Matter of Levin, 139 Cal. 350.

**690. 1. A Judgment for Breach of Promise of Marriage is provable.** *In re McCauley*, 101 Fed. Rep. 223.

The Court Will Go Behind a Judgment in determining whether the debt evidenced by the judgment is provable. *Turner v. Turner*, 108 Fed. Rep. 785.

**2. Judgment in Criminal Proceedings Not Provable.** — *In re Moore*, 111 Fed. Rep. 145.

**3. Debt Provable Notwithstanding Judgment.** — *In re Anson*, 101 Fed. Rep. 698.

**4. Judgment Rendered After Bankruptcy Held Provable.** — *In re Fife*, 109 Fed. Rep. 880.

**8. No Particular Form of Assignment Necessary.** — *In re Sweetser*, 131 Fed. Rep. 567.

**9. Preferred Claims — Surrender of Preference — United States.** — *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; *Western Tie, etc., Co. v. Brown*, 196 U. S. 502; *In re Fixen*, (C. C. A.) 102 Fed. Rep. 295; *In re Teslow*, 104 Fed. Rep. 229; *In re Arndt*, 104 Fed. Rep. 235; *In re Gillette*, 104 Fed. Rep. 769; *In re Seckler*, 106 Fed. Rep. 484; *In re Keller*, 109 Fed. Rep. 118, 109 Fed. Rep. 306; *In re Owings*, 109 Fed. Rep. 623; *In re Oliver*, 109 Fed. Rep. 784; *In re Bashline*, 109 Fed. Rep. 965; *In re Kellar*, 110 Fed. Rep. 348; *Mills v. Lewis*, (C. C. A.) 110 Fed. Rep. 512; *In re Jones*, 110 Fed. Rep. 736; *In re Abraham Steers Lumber Co.*, 110 Fed. Rep. 738, *affirmed* (C. C. A.) 112 Fed. Rep. 406; *In re Bailey*, 110 Fed. Rep. 928; *In re Dickson*, (C. C. A.) 111 Fed. Rep. 727; *In re Greth*, 112 Fed. Rep. 978; *In re Gaylord*, 113 Fed. Rep. 131; *In re Henry C. King Co.*, 113 Fed. Rep. 110; *In re Waterbury Furniture Co.*, 114 Fed. Rep. 255; *In re Lyon*, 114 Fed. Rep. 326, *affirmed* (C. C. A.) 121 Fed. Rep. 723; *In re Metzger Toy, etc., Co.*, 114 Fed. Rep. 957; *In re Chaplin*, 115 Fed. Rep. 162; *In re Wiessner*, 115 Fed. Rep. 421; *In re Meyer*, 115 Fed. Rep. 997; *In re Harpke*, (C. C. A.) 116 Fed. Rep. 295; *In re Stege*, (C. C. A.) 116 Fed. Rep. 342; *Swarts v. St. Louis Fourth Nat. Bank*, 117 Fed. Rep. 1; *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13; *In re Graff*, 117 Fed. Rep. 343; *Livingstone v. Heineman*, (C. C. A.) 120 Fed. Rep. 787; *In re Colton Export, etc., Co.*, (C. C. A.) 121 Fed. Rep. 663; *In re Thompson*, 121 Fed. Rep. 607; *In re Jones*, 123 Fed. Rep. 128; *In re Flynn*, 126 Fed. Rep. 422; *In re George M. Hill Co.*, (C. C. A.) 130 Fed. Rep. 315; *In re Douglas Coal, etc., Co.*, 131 Fed. Rep. 769; *In re Privett*, 132 Fed. Rep. 592; *In re Morrow*, 134 Fed. Rep. 686; *In re Ewald*, 135 Fed. Rep. 168; *In re Andrews*, 135 Fed. Rep. 599.

*Maine.* — *Partridge, Appellant*, 96 Me. 52.

*New York.* — *Buckingham v. Schuykill Plash, etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 305.

*Tennessee.* — *Harris v. Jackson Second Nat. Bank*, 110 Tenn. 239. As to what constitutes a preference see *supra*, 662 et seq.

**Time of Receiving Preference.** — Before the amendment of Feb. 5, 1903, all preferences received while the debtor was insolvent were required to be surrendered, no matter how long before the institution of the bankruptcy proceedings. *In re Busby*, 124 Fed. Rep. 469; *In re Delling*, 124 Fed. Rep. 852. But since that amendment only preferences received within four months previous to the filing of the petition need be surrendered. *In re Scherzer*, 130 Fed. Rep. 631; *In re Goodhile*, 130 Fed. Rep. 471.

The date of actual transfer, and not the date when the transferee took possession, is regarded as the time at which the preference was given. *Little v. Holley-Brooks Hardware Co.*, (C. C. A.) 133 Fed. Rep. 874.

**If Full Payment Is Made to All Unpreferred Creditors**, creditors who have innocently secured preferences and neglected to surrender them are entitled to have the remaining assets applied to their claims as against the bankrupt. *In re Morton*, 118 Fed. Rep. 908.

**What Constitutes Surrender.** — *In re Flick*, 105 Fed. Rep. 503; *Dickinson v. Security Bank*, (C. C. A.) 110 Fed. Rep. 353.

**Surrender of Judgment — Proof of Original Debt.** — *Hutchinson v. Otis*, 190 U. S. 552.

**Mortgage Creditor of Individual Partner Not Required to Surrender Lien Before Proving Against Firm.** — Matter of Levin, 139 Cal. 350.

**A Guarantor of the Bankrupt who pays the debt and is subrogated to the rights of the creditor must surrender any preference which the creditor would have been required to surrender.** *In re Schmechel Cloak, etc., Co.*, 104 Fed. Rep. 64.

**An Indorsee of a Negotiable Instrument taken bona fide in the ordinary course of business is not prevented from proving his claims against the maker's estate by the fact that the indorser, who was also the payee thereof, has received a preference.** *In re Wyly*, 116 Fed. Rep. 38; *In re Levi*, 121 Fed. Rep. 108.

**Payment to Assignee of Note Not Preference of Assignor.** — *In re Bullock*, 116 Fed. Rep. 667.

**Fictitious Entries in the books of the bankrupt indicating a preference, when no value actually passed from the bankrupt, will not debar the creditor from proving his claim as an unsecured creditor.** *In re Steam Vehicle Co.*, 121 Fed. Rep. 939.

**Preference of One Debt Bars Proof of All.** — *In re Rogers Milling Co.*, 102 Fed. Rep. 687; *In re Dickson*, (C. C. A.) 111 Fed. Rep. 727; *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A.) 117 Fed. Rep. 1; *Dunn v. Gans*, (C. C. A.) 129 Fed. Rep. 750.

**Where Debts Are Separate and Independent, the creditor will not be required to surrender a payment which entirely discharged one debt, before being allowed to prove another distinct debt.** *In re Wolf*, 122 Fed. Rep. 127; *In re Seay*, 113 Fed. Rep. 969, *affirmed* (C. C. A.) 125 Fed. Rep. 1005; *In re Abraham Steers Lum-*

**691.** *j.* COSTS AND EXPENSES — (2) *Rule in United States.* — See notes 5, 6.

**692.** Compensation for Services Rendered for the Benefit of the Estate. — See note 5.

The Costs and Expenses of the Bankruptcy Proceeding. — See note 6.

**3.** Priorities. — *a.* IN GENERAL — The Principle of Equality. — See note 7.

**694.** *b.* TAXES AND DEBTS DUE THE GOVERNMENT — Debts Due the United States. — See note 2.

**695.** Taxes Due to a State, County, District, or Municipality. — See notes 1, 2.

*c.* COSTS AND EXPENSES. — See notes 3, 4, 6.

ber Co., 110 Fed. Rep. 738, *affirmed* (C. C. A.) 112 Fed. Rep. 406.

Power to Adjust Equities. — *In re Siegel-Hillman Dry Goods Co.*, 111 Fed. Rep. 980.

Burden of Proving Preference on Party Alleging It. — *In re Hickey*, 112 Fed. Rep. 287.

**691.** 5. Rule as to Costs in United States — Judgment Perfected Before Bankruptcy. — *Coe v. Waters*, 16 Colo. App. 311.

6. Costs under Bankruptcy Law of 1898. — *In re Marcus*, 104 Fed. Rep. 331.

**692.** 5. Fees of Officers in State Insolvency Proceedings Not Allowable. — *In re Rogers*, 116 Fed. Rep. 435.

Necessary Expenses of Reference Allowed. — *In re Daniels*, 130 Fed. Rep. 597.

A General Assignee, who has actually rendered services beneficial to and effective in preserving the estate, will be allowed compensation. *In re Klein*, 116 Fed. Rep. 523; *Summers v. Abbott*, (C. C. A.) 122 Fed. Rep. 36. Compare *In re Mays*, 114 Fed. Rep. 600; *Abbott v. Summers*, 116 Fed. Rep. 687, (C. C. A.) 122 Fed. Rep. 36; *In re Tatum*, 112 Fed. Rep. 50.

6. Costs and Expenses of Bankruptcy Proceeding. — *In re Adams Sartorial Art Co.*, 101 Fed. Rep. 215; *In re Mayer*, 101 Fed. Rep. 695; *In re Tebo*, 101 Fed. Rep. 419; *In re Peter Paul Book Co.*, 104 Fed. Rep. 786; *In re Salaberry*, 107 Fed. Rep. 95; *In re Smith*, 108 Fed. Rep. 39; *In re Tatum*, 112 Fed. Rep. 50; *In re Worth*, 130 Fed. Rep. 927.

Attorneys' Fees. — *In re Deeben*, 101 Fed. Rep. 110; *In re Ruzinsky*, 101 Fed. Rep. 229; *In re Little River Lumber Co.*, 101 Fed. Rep. 558; *In re Rude*, 101 Fed. Rep. 805; *In re Roche*, (C. C. A.) 101 Fed. Rep. 956; *In re Anderson*, 103 Fed. Rep. 854, *reversed* on other grounds (C. C. A.) 113 Fed. Rep. 115; *In re Brundin*, 112 Fed. Rep. 306; *In re Carr*, 116 Fed. Rep. 556; *In re Carr*, 117 Fed. Rep. 572; *In re Evans*, 117 Fed. Rep. 574; *In re Connell*, 120 Fed. Rep. 846; *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579; *Liddon v. Smith*, (C. C. A.) 135 Fed. Rep. 43.

7. Landlord's Lien. — See *In re Mackenzie*, (1899) 2 Q. B. 566.

**694.** 2. Debts Due United States. — *In re Stoever*, 127 Fed. Rep. 394.

**695.** 1. Priority of Taxes Due State, County, District, or Municipality. — *In re Sims*, 118 Fed. Rep. 356; *Swarts v. Hammer*, (C. C. A.) 120 Fed. Rep. 256, *affirmed* 194 U. S. 441; *In re Harvey*, 122 Fed. Rep. 745; *Waco v. Bryan*, (C. C. A.) 127 Fed. Rep. 79; *In re Prince*, 131 Fed. Rep. 546; *In re Flynn*, 134 Fed. Rep. 145. See also *Cooper Grocery Co. v. Bryan*, (C. C. A.) 127 Fed. Rep. 815.

Taxes Need Not Be Proved. — *In re Prince*, 131 Fed. Rep. 546.

License Fees imposed upon a corporation have been held not to be within the act. *In re Danville Rolling Mill Co.*, 121 Fed. Rep. 432.

When Mortgagee Should Pay Tax. — A tax which is a lien upon property mortgaged by the bankrupt for more than its value should be paid by the mortgagee and not from the assets held for the creditors. *In re Veitch*, 101 Fed. Rep. 251.

Where Property Is Sold Subject to the Claim of a City for Taxes, and the proceeds are insufficient to cover both a mortgage debt thereon and taxes, the city has no claim of priority against the bankrupt's estate. *In re Stalker*, 123 Fed. Rep. 961.

Where Taxes a Lien on Lessor's Property. — A claim for taxes which the bankrupt contracted to pay as lessee will not be given priority, such taxes being a lien upon the property of lessor. *In re Broom*, 123 Fed. Rep. 639.

2. Taxes Given Priority by State Insolvency Laws. — Matter of Ripsom, etc., *Fur Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 56.

3. Costs and Expenses of Bankruptcy Proceeding. — *In re Tebo*, 101 Fed. Rep. 419; *In re Daniels*, 110 Fed. Rep. 745.

4. The Claim of an Assignee for the Benefit of Creditors for moneys expended and for services before the filing of the petition is not entitled to priority on the ground of being a necessary cost of preserving the estate subsequent to the filing of the petition. *Stearns v. Flick*, 103 Fed. Rep. 919.

A General Assignee has a lien on property in his possession for disbursements and services rendered necessary to preserve the estate, and has the right to assert such a lien after delivery of the property to the trustee in bankruptcy. *In re Chase*, (C. C. A.) 124 Fed. Rep. 753; *Randolph v. Scruggs*, 190 U. S. 533.

But it is otherwise where the services resulted in no benefit to the estate. *In re Congdon*, 129 Fed. Rep. 478.

6. Attorney's Fees. — *Smith v. Cooper*, (C. C. A.) 120 Fed. Rep. 230; *In re Connell*, 120 Fed. Rep. 846; *In re Rosenthal*, 120 Fed. Rep. 848; *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579; *In re Morris*, 125 Fed. Rep. 841; *In re Lang*, 127 Fed. Rep. 755; *In re McCracken*, 129 Fed. Rep. 621; *Pratt v. Bothe*, (C. C. A.) 130 Fed. Rep. 670; *In re Covington*, 132 Fed. Rep. 884; *Virginia Iron, etc., Co. v. Staake*, (C. C. A.) 133 Fed. Rep. 717; *In re Hay*, 137 Fed. Rep. 175.

But such fees will be allowed priority only where the services rendered were of benefit to the estate. *In re Zier*, 127 Fed. Rep. 399; *In re Byerly*, 128 Fed. Rep. 637.

Expenditures Made by the Trustee were held not to be "costs of administration" in *In re Bourlier Cornice, etc., Co.*, 133 Fed. Rep. 958.

**695.** Costs of Attachments. — See note 7.

**696.** *d.* WAGES OR SALARIES OF LABORERS, CLERKS, ETC. — In the United States. — See note 3.

Nature and Extent of Right. — See notes 5, 6.

**697.** See note 1.

*e.* CLAIMS GIVEN PRIORITY BY STATE LAWS. — See note 3.

**XI. OPERATION AND EFFECT OF INSOLVENCY AND BANKRUPTCY PROCEEDINGS** — 1. Exemption of Debtor from Arrest on Civil Process. — See note 4.

**698.** 2. Control of Property — *a.* IN GENERAL. — See notes 5, 7.

**699.** Possession Pending Appointment of Assignee. — See note 3.

Protection of Interests Pending Appointment of Assignee. — See note 4.

*b.* PROPERTY ACQUIRED PENDING BANKRUPTCY PROCEEDINGS. —

See notes 5, 6.

**700.** *c.* SURPLUS REMAINING AFTER TERMINATION OF PROCEEDING. — See note 1.

3. Partnerships. — See note 2.

**701.** 5. Actions by Debtor — *a.* RIGHT OF ACTION IN GENERAL. — See note 3.

**702.** Actions Affecting Exempt Property. — See note 2.

*b.* PROSECUTION OF PENDING ACTIONS. — See notes 3, 4, 5.

**695.** 7. Costs of Attachments Vacated by Commencement of Proceeding. — *In re* Beaver Coal Co., 107 Fed. Rep. 98.

**696.** 3. Priority of Wages, etc., under Bankruptcy Law of United States. — *In re* Tebo, 101 Fed. Rep. 419; *In re* Anson, 101 Fed. Rep. 698; *In re* Campbell, 102 Fed. Rep. 686; *In re* Flick, 105 Fed. Rep. 503; *In re* Shaw, 109 Fed. Rep. 782; *In re* Lawler, 110 Fed. Rep. 135; *In re* Slomka, 117 Fed. Rep. 688, *reversed* (C. C. A.) 122 Fed. Rep. 630; *In re* Harmon, 128 Fed. Rep. 170; *In re* Burton Bros. Mfg. Co., 134 Fed. Rep. 157.

5. Claim Must Be for Wages or Salary. — *In re* Mayer, 101 Fed. Rep. 227; *In re* Flick, 105 Fed. Rep. 503.

Remuneration Due for Piecework Held Wages. — *In re* Gurewitz, (C. C. A.) 121 Fed. Rep. 982.

6. Salesman in Store a "Clerk." — *In re* Flick, 105 Fed. Rep. 503.

**697.** 1. One Advancing Money to Pay Wages will not be subrogated to the laborers' priority in the absence of agreement or assignment of the laborers' claims. *In re* North Carolina Car Co., 127 Fed. Rep. 178; *In re* General Automobile, etc., Co., (C. C. A.) 133 Fed. Rep. 525.

3. Priority under State Laws Preserved by Bankruptcy Law. — *In re* Worcester County, (C. C. A.) 102 Fed. Rep. 808; *In re* Hoover, 113 Fed. Rep. 136; *In re* Crow, 116 Fed. Rep. 110.

Not Applicable to Provisions Giving Priority to Wages. — *In re* Slomka, (C. C. A.) 122 Fed. Rep. 630.

4. Exemption of Bankrupt from Arrest on Civil Process. — *In re* Chandler, 135 Fed. Rep. 893.

The bankruptcy court has no power under section 9b of the Act of 1898 to issue a warrant for the arrest of a debtor who left the state before the bankruptcy proceedings were begun. *In re* Hassenbusch, (C. C. A.) 108 Fed. Rep. 35.

**698.** 5. Bankrupt Considered Civiliter Mortuus. — *Scheidt v. Goldsmith*, 103 Ill. App. 623.

7. No Right to Dispose of Property Pending Bankruptcy Proceedings. — *In re* Corbett, 104 Fed. Rep. 872; *Muschel v. Austern*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 352.

**699.** 3. Bankrupt in Possession Regarded as Trustee. — See *Leatham, etc., Lumber Co. v. Nalty*, 109 La. 325.

Possession of Property Considered as in Court of Bankruptcy. — *Rand v. Sage*, 94 Minn. 344.

4. Protection of Interests Pending Appointment of Assignee. — *In re* Keller, 109 Fed. Rep. 118.

5. Property Acquired Pending Bankruptcy Proceedings. — *In re* Woods, 133 Fed. Rep. 82.

6. After-acquired Property Not Liable for Debts Previously Incurred. — *In re* Woods, 133 Fed. Rep. 82.

**700.** 1. Surplus Reverts Without Any Formal Act. — *Mankato First Nat. Bank v. Pope*, 85 Minn. 436.

2. Dissolution of Partnerships. — *Heyman v. Heyman*, 210 Ill. 538, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700.

**701.** 3. Rule that Only Assignee or Trustee Can Sue. — *Rand v. Sage*, 94 Minn. 344.

May Sue on Causes Arising Prior to Bankruptcy. — See *Pease v. McQuillin*, 180 Mass. 135.

Trover may be brought by the trustee against one who has received a transfer of property from the bankrupt within four months of the bankruptcy proceedings. *Lyon v. Clark*, 129 Mich. 381.

**702.** 2. Actions Affecting Exempt Property. — *Griffin v. Mutual L. Ins. Co.*, 119 Ga. 664.

3. Bankruptcy of Plaintiff — Right of Assignee to Prosecute Action. — *Griffin v. Mutual L. Ins. Co.*, 119 Ga. 664; *Brunnemer v. Cook, etc., Co.*, 89 N. Y. App. Div. 406, *affirmed* 180 N. Y. 188. See also *Friedman v. Verchofsky*, 105 Ill. App. 414.

4. Action Not Abated by Bankruptcy of Plaintiff. — *Griffin v. Mutual L. Ins. Co.*, 119 Ga. 664.

5. Right of Bankrupt to Proceed with Action. — See *Atwood v. Bailey*, 184 Mass. 133.

**703. 6. Actions Against Debtor** — *a. ACTIONS BROUGHT AFTER COMMENCEMENT OF PROCEEDING.* — See notes 1, 2.

*b. ACTIONS PENDING AT COMMENCEMENT OF PROCEEDING.* — See note 7.

**704. Stay of Proceedings.** — See note 1.

*Actions Involving Title to Property.* — See note 2.

*Actions on Debts Not Dischargeable in Bankruptcy.* — See note 3.

**705. 7. Liens on Debtor's Property** — *a. LIENS NOT OBTAINABLE PENDING INSOLVENCY OR BANKRUPTCY PROCEEDINGS.* — See note 4.

*b. LIENS EXISTING AT COMMENCEMENT OF PROCEEDING* — (1) *General Rule.* — See note 5.

**706. (2) Existing Liens Dissolved by Proceeding** — (a) *Liens Created by Act of Parties.* — See note 1.

**703. 1. Creditors Made Parties to Proceeding.** — *In re Beerman*, 112 Fed. Rep. 662.

**2. Right to Sue Bankrupt — Effect of Recovery.** — The Bankruptcy Act of 1898, § 67f, provides that judgments obtained within four months before the filing of the petition shall be null and void in case the bankrupt is discharged. See *St. Cyr v. Daignault*, 103 Fed. Rep. 854; *Lacy v. Gunn*, 144 Cal. 511; *Standard Sewing Mach. Co. v. Alexander*, 68 S. Car. 506.

**7. Assignee's Title Not Affected by Judgment Against Insolvent.** — *Irwin v. Lloyd*, 65 Ohio St. 55; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

**704. 1. Stay of Proceedings in Pending Actions.** — *In re Ball*, 118 Fed. Rep. 672; *In re Hilton*, 104 Fed. Rep. 981; *In re Martin*, 105 Fed. Rep. 753; *In re Franklin*, 106 Fed. Rep. 666; *In re Neely*, 108 Fed. Rep. 371; *In re Kleinhans*, 113 Fed. Rep. 107; *Beach v. Macon Grocery Co.*, (C. C. A.) 116 Fed. Rep. 143; *In re Goldberg*, 117 Fed. Rep. 692.

**Court of Bankruptcy May Stay Action Pending in State Court** — *United States*. — *In re Russell*, (C. C. A.) 101 Fed. Rep. 248; *In re Emslie*, (C. C. A.) 102 Fed. Rep. 291; *Wagner v. U. S.*, (C. C. A.) 104 Fed. Rep. 133; *Carling v. Seymour Lumber Co.*, (C. C. A.) 113 Fed. Rep. 483; *In re Gutman*, 114 Fed. Rep. 1009; *In re Tune*, 115 Fed. Rep. 906; *In re Miller*, 118 Fed. Rep. 361; *In re Hornstein*, 122 Fed. Rep. 266; *In re De Lany*, 124 Fed. Rep. 280; *In re Knight*, 125 Fed. Rep. 35; *In re Eastern Commission, etc., Co.*, 129 Fed. Rep. 847; *In re Mertens*, 131 Fed. Rep. 507; *In re Vastbinder*, 132 Fed. Rep. 718; *In re Hicks*, 133 Fed. Rep. 739; *In re Lines*, 133 Fed. Rep. 803. See also *In re Flanders*, 121 Fed. Rep. 936.

*Iowa*. — *Sioux City First Nat. Bank v. Flynn*, 117 Iowa 493.

*Missouri*. — *St. Louis World Pub. Co. v. Rialto Grain, etc., Co.*, 108 Mo. App. 479.

*Nebraska*. — *McIntyre v. Malone*, (Neb. 1902) 91 N. W. Rep. 246.

**Referee Has No Power to Stay Proceedings in State Court.** — *In re Siebert*, 133 Fed. Rep. 781.

**Actions on Debts Not Provable in Bankruptcy** will not be stayed. *In re Cole*, 106 Fed. Rep. 837.

**Foreclosure Proceedings.** — *In re San Gabriel Sanatorium Co.*, (C. C. A.) 111 Fed. Rep. 892, *reversing* (C. C. A.) 102 Fed. Rep. 313, the court refused to enjoin foreclosure proceedings in the state court pending the determination of the validity of the mortgage lien in the bankruptcy court. But compare *In re Gerdes*,

102 Fed. Rep. 318; *In re Porter*, 109 Fed. Rep. 111.

**When Enforcement of Mechanics' Liens Not Restrained.** — *In re Horton*, (C. C. A.) 102 Fed. Rep. 986.

**Proceedings Against Exempted Property.** — Attachment proceedings against exempt property upon which the bankrupt has waived his exemption, such waiver being allowable by the law of the state, will not be enjoined. *B. F. Roden Grocery Co. v. Bacon*, (C. C. A.) 133 Fed. Rep. 515.

**Usually Vacated as Matter of Course After Discharge.** — *In re Rosenthal*, 108 Fed. Rep. 368.

**2. Actions Involving Bankrupt's Title to Property.** — *In re Ward*, 104 Fed. Rep. 985; *In re Seebold*, (C. C. A.) 105 Fed. Rep. 910; *In re Wells*, 114 Fed. Rep. 222.

As to the jurisdiction of a bankruptcy court under the Act of 1898 to enjoin proceedings in the state court for the recovery of property in the possession of the bankruptcy court, see *infra*, 754. 3.

**3. Actions for Debts Not Dischargeable in Bankruptcy.** — *In re Neely*, (C. C. A.) 113 Fed. Rep. 210; *In re Wollock*, 120 Fed. Rep. 516; *Mackel v. Rochester*, 135 Fed. Rep. 904.

**705. 4. No Lien Obtainable After Commencement of Proceeding.** — *In re Roebert*, (C. C. A.) 121 Fed. Rep. 449; *Kinmouth v. Braeutigam*, 63 N. J. Eq. 103; *Garretson v. Clark*, (N. J. 1904) 57 Atl. Rep. 414. See *Crane Co. v. Pneumatic Signal Co.*, 182 N. Y. 545, *affirming* 94 N. Y. App. Div. 53.

**5. Existing Liens Not Affected in Absence of Special Provisions.** — *Stickney, etc., Coal Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408; *Hurlbut v. Brown*, 72 N. H. 235.

**Unrecorded Liens** are not valid under the Act of 1898, § 67a. See *In re Wright*, 107 Fed. Rep. 428.

**706. 1. Liens Created by Act of Parties** — *United States*. — *In re Browne*, 104 Fed. Rep. 762; *City Nat. Bank v. Bruce*, (C. C. A.) 109 Fed. Rep. 69; *In re Sanderlin*, 109 Fed. Rep. 857; *In re Davidson*, 109 Fed. Rep. 882; *In re Soudan Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 804; *In re Durham*, 114 Fed. Rep. 750; *Stedman v. Monroe Bank*, (C. C. A.) 117 Fed. Rep. 237; *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605; *Farmers' Bank v. Carr*, (C. C. A.) 127 Fed. Rep. 690; *In re Sawyer*, 130 Fed. Rep. 384; *In re Prince*, 131 Fed. Rep. 546.

*New Jersey*. — *Asbury Park Bldg., etc., Assoc. v. Shepherd*, (N. J. 1901) 50 Atl. Rep. 65.



**706.** (b) Liens Created by Statute. — See notes 2, 3.

(c) Liens Acquired by Legal Proceedings — *aa.* RULE UNDER ENGLISH BANKRUPTCY LAW. — See note 4.

*bb.* RULE UNDER BANKRUPTCY LAW OF UNITED STATES. — See note 5.

**707.** See note 1.

**709.** (3) *Circumstances Affecting Dissolution of Existing Liens* — In General. — See notes 1, 2, 3.

*New York.* — Phillips v. Kahn, 96 N. Y. App. Div. 166.

Under the Act of 1898, § 67*e*, liens given within four months of the filing of the petition with intent to hinder, delay, or defraud creditors are null and void. *In re* Platts, 110 Fed. Rep. 126; *Egan State Bank v. Rice*, (C. C. A.) 119 Fed. Rep. 107; *In re Goldberg*, 121 Fed. Rep. 578; *Cullinane v. State Bank*, (Iowa 1902) 91 N. W. Rep. 783.

**Effect of Recording Acts on Validity of Liens.** — *In re* Lillingston Lumber Co., 132 Fed. Rep. 886; *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, (C. C. A.) 136 Fed. Rep. 396; *In re Thorp*, 130 Fed. Rep. 371; *In re Cannon*, 121 Fed. Rep. 582; *Guras v. Porter*, 118 Fed. Rep. 668; *In re H. G. Andrae Co.*, 117 Fed. Rep. 561; *In re Jones*, 116 Fed. Rep. 431; *In re Josephson*, 116 Fed. Rep. 404; *Arnold v. Eastin*, 116 Ky. 686; *Babbitt v. Kelley*, 96 Mo. App. 529; *Holdrege First Nat. Bank v. Johnson*, (Neb. 1903) 94 N. W. Rep. 837; *Asbury Park Bldg., etc., Assoc. v. Shepherd*, (N. J. 1901) 50 Atl. Rep. 65; *Gove v. Morton Trust Co.*, 96 N. Y. App. Div. 177; *Skilton v. Codrington*, 86 N. Y. App. Div. 166; *Texas Brewing Co. v. Mallette*, 28 Tex. Civ. App. 461.

**706. 2. Liens Created by Statute.** — *In re Georgia Handle Co.*, (C. C. A.) 109 Fed. Rep. 632; *In re Oconee Milling Co.*, (C. C. A.) 109 Fed. Rep. 866; *Duplan Silk Co. v. Spencer*, (C. C. A.) 115 Fed. Rep. 689; *In re Mitchell*, 116 Fed. Rep. 87; *In re Mero*, 128 Fed. Rep. 631. See also *In re City Trust Co.*, (C. C. A.) 121 Fed. Rep. 706; *Holland v. Cunliff*, 96 Mo. App. 67.

**3.** *In re Roeber*, (C. C. A.) 121 Fed. Rep. 449.

**4. Rule as to Attachments and Executions under English Statute.** — *In re Ford*, (1900) 1 Q. B. 264; *Re Pollock*, 87 L. T. N. S. 238.

**5. Judicial Liens Dissolved by Bankruptcy Proceedings under Law of 1898** — *United States.* — *In re Kemp*, 101 Fed. Rep. 689; *In re Engle*, 105 Fed. Rep. 893; *In re Moore*, 107 Fed. Rep. 234; *In re Lesser*, 108 Fed. Rep. 201; *In re D. H. Dougherty Co.*, 109 Fed. Rep. 480; *In re Wilkes*, 112 Fed. Rep. 975; *In re Ball*, 123 Fed. Rep. 164; *In re Baird*, 126 Fed. Rep. 845, *affirmed* 133 Fed. Rep. 717; *In re Weinger*, 126 Fed. Rep. 875; *In re Hymes Buggy, etc., Co.*, 130 Fed. Rep. 977; *In re Tiffany*, 133 Fed. Rep. 709; *Clarke v. Larremore*, 188 U. S. 486; *Thompson v. Fairbanks*, 196 U. S. 516.

*Georgia.* — *Armour Packing Co. v. Wynn*, 119 Ga. 683; *Mohr v. Mattox*, 120 Ga. 962.

*Indiana.* — *Severin v. Robinson*, 27 Ind. App. 55.

*Kentucky.* — *Wood v. Carr*, 115 Ky. 303; *Thompson v. Ragan*, (Ky. 1904) 78 S. W. Rep. 485.

*Minnesota.* — *Watschke v. Thompson*, 85 Minn. 105; *Cavanaugh v. Fenley*, (Minn. 1905) 103 N. W. Rep. 711.

*New York.* — *Hardt v. Schuylkill Plush, etc., Co.*, 69 N. Y. App. Div. 90; *De Graff v. Lang*, 92 N. Y. App. Div. 564.

*Ohio.* — *Rodgers v. Forbes*, 23 Ohio Cir. Ct. 438.

*Rhode Island.* — *Schmilovitz v. Bernstein*, 22 R. I. 330; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324.

*Texas.* — *Kosches v. Libowitz*, (Tex. Civ. App. 1900) 56 S. W. Rep. 613.

*Vermont.* — *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899.

**707. 1. Paragraph f Applies to Both Voluntary and Involuntary Bankruptcy.** — *In re McCartney*, 109 Fed. Rep. 621; *McKenney v. Cheney*, 118 Ga. 387; *Mohr v. Mattox*, 120 Ga. 962; *Cavanaugh v. Fenley*, (Minn. 1905) 103 N. W. Rep. 711; *Mencke v. Rosenberg*, 202 Pa. St. 131, 90 Am. St. Rep. 618. See also *Wallace v. Camp*, 200 Pa. St. 220.

**Repugnancy of Provisions.** — *In re Tune*, 115 Fed. Rep. 906.

**If Lien Was Obtained Within Period Named.** — *In re Darwin*, (C. C. A.) 117 Fed. Rep. 407; *National Bank, etc., Co. v. Spencer*, 53 N. Y. App. Div. 547; *In re Kaupisch Creamery Co.*, 107 Fed. Rep. 93.

**Where the Lien Has Actually Been Enforced** the creditor's right to retain the proceeds is not affected by section 67*f*. *Greene v. Montana Brewing Co.*, 28 Mont. 380; *Levor v. Seiter*, 69 N. Y. App. Div. 33.

**Statutory Liens Not Within Paragraph f.** — *In re Laird*, (C. C. A.) 109 Fed. Rep. 555.

**As Between the Creditor and the Bankrupt** the lien is not affected by section 67*f*, which is held to invalidate the lien only as against the bankrupt's creditors. *McKenney v. Cheney*, 118 Ga. 387; *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391; *Boyce v. Johnson*, 72 N. H. 41; *Hutchins v. Cantu*, (Tex. Civ. App. 1902) 66 S. W. Rep. 138.

**Judgment Itself Not Discharged.** — *Davis v. Jewett*, 17 S. Dak. 410.

**That the Debt on Which the Judgment Is Based Was Not Dischargeable** does not prevent the lien of the judgment from being void. *Matter of Benedict*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 230.

**That the Debtor Was Insolvent** at the time the lien was secured is conclusively established by the adjudication of the bankruptcy court to that effect, and the question cannot be retried in an action by the trustee to recover from the creditor who enforced the lien. *De Graff v. Lang*, 92 N. Y. App. Div. 564.

**Lien Against Firm Not Affected by Bankruptcy of Partner.** — *McNair v. McIntyre*, (C. C. A.) 113 Fed. Rep. 113.

**709. 1. Necessity of Proceeding under Statute.** — *Murray v. Beal*, 23 Utah 548; *Snyder v. Smith*, 185 Mass. 58.

**710.** If the Property Attached Is Not Subject to the Bankruptcy Law. — See note 5.  
Effect of Judgment in Attachment Suit. — See note 8.  
A Sale under an Attachment. — See note 9.

**713. XII. ASSIGNEE OR TRUSTEE — 1. Appointment and Tenure — a. HOW SELECTION IS MADE — (1) Election by Creditors — (b) Meeting of Creditors — dd. CONDUCT OF MEETING — A Meeting May Be Adjourned. — See note 7.**

(c) Right to Vote — aa. IN GENERAL. — See note 9.

**714.** Partnerships. — See note 1.

dd. POWER OF ATTORNEY. — See note 9.

**715.** ee. POSTPONING PROOF OR ALLOWANCE OF CLAIMS. — See note 2.

(d) Votes Necessary to Elect. — See note 4.

**716.** In Computing the Number of Creditors. — See note 6.

**717.** (e) Confirmation of Election — bb. GROUNDS FOR REFUSING — Confirmation Has Been Refused. — See note 1.

(2) Appointment by Court. — See note 9.

**709. 2. Bankruptcy Proceeding Operates Ex Proprio Vigore.** — *Clarke v. Larremore*, 188 U. S. 486.

**3. Liens Not Obtained Within Period Designated by Statute — United States.** — *Metcalf v. Barker*, 187 U. S. 165; *In re Blair*, 108 Fed. Rep. 529; *In re Beaver Coal Co.*, (C. C. A.) 113 Fed. Rep. 889; *Owen v. Brown*, (C. C. A.) 120 Fed. Rep. 812; *In re English*, 122 Fed. Rep. 113, (C. C. A.) 127 Fed. Rep. 940; *In re Snell*, 125 Fed. Rep. 154; *In re Vastbinder*, 132 Fed. Rep. 718.

*California.* — *Perkins v. Maier, etc.*, *Brewery*, 133 Cal. 496.

*Missouri.* — *Pepperdine v. Seymour Bank*, 100 Mo. App. 387.

*Nebraska.* — *Grandin v. First Nat. Bank*, (Neb. 1904) 98 N. W. Rep. 70.

*New Hampshire.* — *Hurlbutt v. Brown*, 72 N. H. 235.

*New York.* — *Hillyer v. Le Roy*, 179 N. Y. 369; *Iselin v. Goldstein*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 489.

*Pennsylvania.* — *Mencke v. Rosenberg*, 202 Pa. St. 131, 90 Am. St. Rep. 618.

*Rhode Island.* — *Tucker v. Denico*, 26 R. I. 560; *Doyle v. Heath*, 22 R. I. 213.

*Texas.* — *Eason v. Garrison*, 36 Tex. Civ. App. 574.

*Utah.* — *Murray v. Beal*, 23 Utah 548.

**Judgments Entered After the Bankruptcy Proceedings** have been begun are not within section 67f. *In re Engle*, 105 Fed. Rep. 893; *Kinmouth v. Braeutigam*, 65 N. J. L. 165.

**In the Computation of Time.** — *Jones v. Stevens*, 94 Me. 582.

**710. 5. A Lien on Property Exempted by the Bankruptcy Act** has been held not to be affected by the bankruptcy. *McKinney v. Cheney*, 118 Ga. 387; *Smith v. Zachry*, 121 Ga. 467; *Jewett v. Huffman*, (N. Dak. 1905) 103 N. W. Rep. 408.

**3. Judgment in Attachment Suit Before Commencement of Bankruptcy Proceeding.** — *Clarke v. Larremore*, 188 U. S. 486.

**9. Sale of Attached Property — Assignee in Bankruptcy Entitled to Proceeds.** — *Clarke v. Larremore*, 188 U. S. 486; *In re Kenney*, (C. C. A.) 105 Fed. Rep. 897.

**713. 7. Adjournment to Agree on Trustee.** — *In re Nice*, 123 Fed. Rep. 987.

**9. Must Be Present in Person or by Attorney in**  
3 Supp. E. of L. — 41

**Order to Vote.** — *In re Mackellar*, 116 Fed. Rep. 547.

**714. 1. Right of Individual Creditors to Vote** — Though all of the assets are partnership property the creditors of one partner are entitled to vote for the election of the trustee in his individual bankruptcy. *In re Beck*, 110 Fed. Rep. 140.

**9. Necessity of Power of Attorney.** — *In re Richards*, 103 Fed. Rep. 849; *In re Scully*, 108 Fed. Rep. 372; *In re Lazoris*, 120 Fed. Rep. 716. See also *In re Cooper*, 135 Fed. Rep. 196.

But an attorney at law should be counted in computing the number of creditors present, since he represents his client at the meeting, though he has no sufficient power of attorney to admit his vote. *In re Henschel*, (C. C. A.) 113 Fed. Rep. 443.

**Referee May Inquire into Powers of Attorney.** — *In re McGill*, (C. C. A.) 106 Fed. Rep. 65.

**Instrument Must Be Produced.** — *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619.

**715. 2. Creditors with Doubtful Claims Not Allowed to Vote.** — *In re Malino*, 118 Fed. Rep. 368.

**4. Majority Must Be of All Claims Proved or Allowed.** — *In re Henschel*, 109 Fed. Rep. 861, modified 114 Fed. Rep. 968.

**716. 6. Claims Assigned by Several Creditors to a Trustee** form the basis for a single vote only. *In re E. T. Kenney Co.*, 136 Fed. Rep. 451.

**717. 1. Election by Influence or in Interest of Bankrupt.** — See *Falter v. Reinhard*, 104 Fed. Rep. 292; *In re Rekersdres*, 108 Fed. Rep. 206; *In re Dayville Woolen Co.*, 114 Fed. Rep. 674.

**9. Appointment in Default of Election.** — *In re Richards*, 103 Fed. Rep. 849; *In re Newton*, (C. C. A.) 107 Fed. Rep. 429; *Clark v. Pidcock*, (C. C. A.) 129 Fed. Rep. 745; *In re Cohen*, 131 Fed. Rep. 391. See also *In re Hare*, 119 Fed. Rep. 246.

**Only Where Creditors Fail to Elect.** — *In re Mangan*, 133 Fed. Rep. 1000; *In re Mackellar*, 116 Fed. Rep. 547. See also *In re Nice*, 123 Fed. Rep. 987.

**Where There Are No Assets Except Exempt Property** no trustee need be appointed. *Smalley v. Laugenour*, 30 Wash. 307. But if assets are subsequently discovered the court should appoint a trustee. *Rand v. Iowa Cent. R. Co.*, 96 N. Y. App. Div. 413.

**718.** *b. WHO MAY BE APPOINTED.* — See notes 8, 10, 11a.

**719.** *e. TERMINATION OF OFFICE* — (1) *Discharge After Completion of Duties.* — See notes 8, 9.

**720.** (2) *Removal* — *The State Insolvency Laws.* — See note 2:  
Grounds of Removal. — See note 6.

**721.** See note 2.

(3) *Death of Debtor.* — See note 3.

(4) *Death of Assignee or Trustee.* — See note 4.

2. *What Passes to Assignee or Trustee* — *a. GENERAL RULE.* — See

note 7.

**723.** *Property of Bankrupt's Wife.* — See notes 1, 2.

*An Interest Accruing under a Will.* — See note 5.

*The Good Will of a Business.* — See note 6.

*b. LEASES.* — See note 7.

**718.** 8. *Agent or Attorney of Creditor Not Disqualified.* — *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619. But see *In re Gordon Supply, etc., Co.*, 129 Fed. Rep. 622.

10. *Stockholder.* — *In re Lazoris*, 120 Fed. Rep. 716.

11a. *Incurring Hostility of Bankrupt No Disqualification.* — *In re Mangan*, 133 Fed. Rep. 1000.

**719.** 8. *Termination of Trustee's Office.* — *In re Paine*, 127 Fed. Rep. 246.

9. *Under the Act of 1898* the creditors must elect a new trustee when the bankrupt's estate is reopened, and the court cannot appoint unless the creditors fail to elect. *In re Newton*, (C. C. A.) 107 Fed. Rep. 429.

**720.** 2. *Removal under State Insolvency Laws.* — *Markell v. Hill*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 133, reversed on other grounds 64 N. Y. App. Div. 191; *Matter of Sheldon*, 72 N. Y. App. Div. 625, affirmed 173 N. Y. 287.

6. *Instances of Neglect and Misconduct.* — *Becoming a bankrupt.* *In re Newman*, (1899) 2 Q. B. 587.

**721.** 2. *Selection of Improper Person.* — *Long v. Campbell*, 133 Ala. 353.

3. *Death of Debtor.* — *In re Spalding*, 134 Fed. Rep. 507.

4. *Death of Assignee or Trustee.* — *In re Morton*, 118 Fed. Rep. 908; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698.

*A Successor Will Not Be Appointed* solely to make a conveyance to quiet the title to property inadequately conveyed by the deceased assignee. *In re Haskell*, 134 Fed. Rep. 309.

7. *All Property of Bankrupt or Insolvent Passes to Assignee* — *United States.* — *In re Stoner*, 105 Fed. Rep. 752; *Pickens v. Dent*, (C. C. A.) 106 Fed. Rep. 653; *In re Mosier*, 112 Fed. Rep. 138; *In re Hull*, 115 Fed. Rep. 858; *In re Carr*, 117 Fed. Rep. 572; *In re Martin-Vernon Music Co.*, 132 Fed. Rep. 983.

*Maine.* — *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414.

*Massachusetts.* — *Elmore v. Symonds*, 183 Mass. 321.

*New Jersey.* — *Loucheim v. Casperson*, 61 N. J. Eq. 529.

*New York.* — *New Jersey Steel, etc., Co. v. Robinson*, 74 N. Y. App. Div. 481, reversed 178 N. Y. 632; *Pearsall v. Nassau Nat. Bank*, 74 N. Y. App. Div. 89; *Freeman v. Freeman*, 86 N. Y. App. Div. 110.

*North Carolina.* — *Hallyburton v. Slagle*, 130 N. Car. 482.

*Property Stolen from the Bankrupt* passes to the trustee. *Lord v. Seymour*, 85 N. Y. App. Div. 617, affirmed 177 N. Y. 525.

*Books and Papers*, relating to the bankrupt's business and owned by him, will pass. *In re Hess*, 134 Fed. Rep. 109.

*Merchandise Received on Conditional Sale.* — Where merchandise sold on a conditional contract, with the understanding that it is to be dealt with in the same manner as other property owned by the vendee, is, by the state law, subject to seizure by the vendee's creditors, such merchandise in the hands of a bankrupt vendee passes to the trustee. *In re Howland*, 109 Fed. Rep. 869.

*Interest in Mortgaged Lands.* — Where foreclosure of a mortgage on the bankrupt's land has been begun in a state court before the bankruptcy proceedings and the court has ordered a sale, the title to the property vests in the trustee subject to the decree of the state court. The balance after the discharge of the liens should be paid to him. *In re Gerdes*, 102 Fed. Rep. 318.

**723.** 1. *Estates by the Curtesy.* — *Elmore v. Symonds*, 183 Mass. 321.

*Income from Wife's Lands.* — *In re Rooney*, 109 Fed. Rep. 601.

2. *Purchase in Husband's Name with Wife's Means.* — Where the title was taken by the husband in his own name without the wife's knowledge or consent, it was held that she was not estopped to assert her interest in the land as against the husband's creditors. *In re Garner*, 110 Fed. Rep. 123.

5. *Interests Accruing under Wills.* — *Watkins v. Bigelow*, 93 Minn. 361.

6. *Good Will as Assets in Bankruptcy.* — *Freeman v. Freeman*, 86 N. Y. App. Div. 114, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273 [723].

7. *Rule that Leaseholds Pass to Assignee or Trustee.* — *In re Baker*, (1901) 2 K. B. 628; *In re Adams*, 134 Fed. Rep. 142; *Watson v. Merrill*, (C. C. A.) 136 Fed. Rep. 359.

*Liability of Guarantor of Disclaimed Lease.* — Where a lessee for a term of years becomes bankrupt, and his trustee disclaims the lease under the English Bankruptcy Act, 1883, § 55, a guarantor of the payment of the rent under the lease is under no liability under the guaran-

**724 c. FRANCHISES AND LICENSES — Patent Rights. — See note 1.**

**Liquor Licenses. — See note 2.**

**f. CHOSSES IN ACTION — (1) In General. — See note 7.**

**725. See notes 1, 3, 6, 7.****726. (2) Contracts to Purchase Land. — See notes 2, 3.**

(3) *Shares or Memberships in Corporations and Exchanges. — See note 4.*

**Memberships in Exchanges. — See note 5.**

(4) *Liabilities of Stockholders. — See note 7.*

(5) *Insurance Policies. — See notes 9, 11.*

tee for any rent after the date of the disclaimer. *Stacey v. Hill*, 69 L. J. Q. B. 796.

**724. 1. Patent Rights**, granted to the bankrupt after the adjudication, do not pass to the assignee, though the application for the patent was pending at that time. *In re McDonnell*, 101 Fed. Rep. 239; *In re Dann*, 129 Fed. Rep. 495.

**Copyrights** in which the bankrupt holds the record title pass to the assignee. *In re Howley-Dresser Co.*, 132 Fed. Rep. 1002.

**2. Liquor Licenses. —** *Fisher v. Cushman*, (C. C. A.) 103 Fed. Rep. 860; *In re Olewine*, 125 Fed. Rep. 840; *In re McArdle*, 126 Fed. Rep. 442; *Keyser v. Wessel*, (C. C. A.) 128 Fed. Rep. 281; *In re McGowan*, 134 Fed. Rep. 498.

**Where Liquor Licenses Are Mere Personal Privileges** and not transferable, they will not pass to the assignee. *Bonnie v. Perry*, (Ky. 1904) 78 S. W. Rep. 208.

**License to Occupy Stall. —** *In re Emrich*, 101 Fed. Rep. 231.

**7. Choses in Action. —** *Re Hopkins*, 86 L. T. N. S. 676; *Pickens v. Dent*, (C. C. A.) 106 Fed. Rep. 653; *Fuller v. New York F. Ins. Co.*, 184 Mass. 12; *Cleland v. Anderson*, 66 Neb. 252; *Lasater v. Jacksboro First Nat. Bank*, 96 Tex. 345.

**A Right to Establish and Enforce a Mechanic's Lien** passes to the trustee. *Held v. New York*, 83 N. Y. App. Div. 509.

**An Interest in a Pending Action** passes to the trustee, where, under the law of the state, such interest is assignable although the right of action before suit brought is not assignable. *Cleland v. Anderson*, 66 Neb. 252.

**Claim for Alimony Does Not Pass. —** *In re Le Claire*, 124 Fed. Rep. 654.

**Action by Bankrupt for Breach of Contract of Service Occurring After Commencement of Bankruptcy. —** An undischarged bankrupt, employed under a contract of service — for example as a traveler — made before the bankruptcy, is entitled, if the trustee in the bankruptcy has not intervened, to maintain an action against his employers for wrongful dismissal occurring after the commencement of the bankruptcy. *Bailey v. Thurston*, (1903) 1 K. B. 137.

**As to Equities to Which Choses in Action Are Subject. —** A trustee in bankruptcy, being under the bankruptcy laws only statutory assignee of the bankrupt's choses in action subject to all equities existing therein at the date of the commencement of the bankruptcy, cannot obtain priority over a good equitable mortgagee thereof for value merely by giving notice before the mortgagee. *In re Wallis*, (1902) 1 K. B. 719.

**725. 1. Compensation for Services Rendered by Bankrupt. —** See *Rand v. Sage*, (Minn. 1905) 102 N. W. Rep. 864.

**3. Usurious Interest Paid by Bankrupt. —** *Lasater v. Jacksboro First Nat. Bank*, 96 Tex. 345.

**6. Substantial Damage Must Have Been Done** to the property in order for the right of action to pass to the trustee in bankruptcy. *Rose v. Buckett*, (1901) 2 K. B. 449.

**7. Personal Torts Not Assets. —** *Cleland v. Anderson*, (Neb. 1904) 98 N. W. Rep. 1075. See also *Rose v. Buckett*, (1901) 2 K. B. 449.

**726. 2. Contracts to Purchase Land. —** *In re Clark*, 118 Fed. Rep. 358; *Duffield v. Dosh*, 124 Iowa 286.

**Purchaser from Trustee May Compel Specific Performance. —** *Harriman v. Tyndale*, 184 Mass. 534.

**3. Forfeiture of Contract Before Bankruptcy. —** *Harriman v. Tyndale*, 184 Mass. 534.

**4. Shares in Corporations. —** See also *In re Hooley*, (1899) 2 Q. B. 579.

**5. Membership in Exchange, Etc. —** Page *v. Edmunds*, 187 U. S. 596; *In re Page*, 102 Fed. Rep. 746, affirmed (C. C. A.) 107 Fed. Rep. 89; *In re Page*, (C. C. A.) 107 Fed. Rep. 89, affirmed 187 U. S. 596; *In re Gaylord*, 111 Fed. Rep. 717; *In re Neimann*, 124 Fed. Rep. 738; *In re Hurlbutt*, (C. C. A.) 135 Fed. Rep. 504.

**7. Liability of Stockholders for Unpaid Subscriptions. —** *Commercial Bank v. Warthen*, 119 Ga. 990; *Rathbone v. Ayer*, 84 N. Y. App. Div. 186.

**9. Insurance on Debtor's Life. —** *United States. — In re Boardman*, 103 Fed. Rep. 783; *In re Welling*, (C. C. A.) 113 Fed. Rep. 189; *In re Holden*, (C. C. A.) 114 Fed. Rep. 650; *Gould v. New York L. Ins. Co.*, 132 Fed. Rep. 927; *In re Coleman*, (C. C. A.) 136 Fed. Rep. 818.

*Georgia. —* *Traders Ins. Co. v. Mann*, 118 Ga. 381.

*Kentucky. —* *Burnsides v. National Bank*, (Ky. 1901) 64 S. W. Rep. 520.

*Maine. —* *Pulsifer v. Hussey*, 97 Me. 434.

*New York. —* *Waldron v. Becker*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 182.

*Pennsylvania. —* *Carr v. Myers*, 211 Pa. St. 349.

**Fire Insurance Policies. —** *Fuller v. New York F. Ins. Co.*, 184 Mass. 12.

**If the Policy Has No Surrender Value**, it will not pass to the assignee. *In re Slingluff*, 106 Fed. Rep. 154; *In re Josephson*, 121 Fed. Rep. 142, affirmed (C. C. A.) 124 Fed. Rep. 734; *Morris v. Dodd*, 110 Ga. 606, 78 Am. St. Rep. 129.

**11. Insurance for Benefit of Bankrupt's Family. —** *In re Mertens*, 131 Fed. Rep. 972; *Pulsifer v. Hussey*, 97 Me. 434. See also *In re Harrison*, (1900) 2 Q. B. 710.

**727.** *g.* **CONDITIONAL, CONTINGENT, AND DEFEASIBLE INTERESTS.** — See notes 6, 7, 8.

**728.** See note 1.

*h.* **TRUSTS AND EQUITABLE INTERESTS — (1) Property Held in Trust by Debtor.** — See note 4.

**729.** **In the Case of Money Held in Trust.** — See notes 3, 4, 5.

**730.** **A Factor or Commission Merchant or Other Agent.** — See note 1.

(2) *Property Held in Trust for Debtor.* — See notes 7, 8.

(3) *Equities and Rights of Redemption.* — See note 9.

**731.** See note 1.

**The Liability of the Insurer Against Injuries to Employees** passes to the trustee *Moses v. Travellers Ins. Co.*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663.

**727. 6. Contingent Claims.** — *In re Hoadley*, 101 Fed. Rep. 233; *In re Wetmore*, 102 Fed. Rep. 290, *affirmed* (C. C. A.) 108 Fed. Rep. 520; *In re Gardner*, 106 Fed. Rep. 670; *In re Ehle*, 109 Fed. Rep. 625.

**7. Possibilities Coupled with Interest.** — *In re St. John*, 105 Fed. Rep. 234; *In re Shenberger*, 102 Fed. Rep. 978; *In re Twaddell*, 110 Fed. Rep. 145; *In re Haslett*, 116 Fed. Rep. 681; *Loomer v. Loomer*, 76 Conn. 522.

**A Vested Remainder** passes to the trustee. *Woods v. Little*, (C. C. A.) 134 Fed. Rep. 229; *In re McHarry*, (C. C. A.) 111 Fed. Rep. 498.

**8. Income Not Subject to Debts till Actually Paid.** — A beneficiary for life under a will, providing that the income shall not be subject to debts until actually paid to him, has not such an interest as will pass under the will. *Munroe v. Dewey*, 176 Mass. 184, 79 Am. St. Rep. 304.

**728. 1. Cases Holding that Title to Property Held under Unrecorded Conditional Sale Passes to Trustee — United States.** — *In re Tatem*, 110 Fed. Rep. 519; *In re Kellogg*, 112 Fed. Rep. 52, *affirmed* 118 Fed. Rep. 1017; *In re Garcewich*, (C. C. A.) 115 Fed. Rep. 87; *In re Fraizer*, 117 Fed. Rep. 746; *In re Rabenau*, 118 Fed. Rep. 472; *Chesapeake Shoe Co. v. Seldner*, (C. C. A.) 122 Fed. Rep. 593; *In re Carpenter*, 125 Fed. Rep. 831; *In re Tweed*, 131 Fed. Rep. 355; *In re Butterwick*, 131 Fed. Rep. 371; *In re Smith*, 132 Fed. Rep. 301; *In re Ducker*, (C. C. A.) 134 Fed. Rep. 43, *affirming* 133 Fed. Rep. 771; *In re Press-Post Printing Co.*, 134 Fed. Rep. 998; *Dolle v. Cassell*, (C. C. A.) 135 Fed. Rep. 52; *In re Rasmussen*, 136 Fed. Rep. 704.

*Massachusetts.* — *Haskell v. Merrill*, 179 Mass. 120.

*Nebraska.* — *Logan v. Nebraska Moline Plow Co.*, (Neb. 1902) 92 N. W. Rep. 129, (Neb. 1903) 93 N. W. Rep. 1128.

The trustee must offer to pay the balance of the purchase price before he can have the conditional vendor enjoined from removing the property. *In re Smith*, 119 Fed. Rep. 1004.

**Cases Holding that Title to Property Held under Unrecorded Conditional Sale Does Not Pass to Trustee.** — *In re Hinsdale*, 111 Fed. Rep. 502; *In re Sewell*, 111 Fed. Rep. 791; *In re Burkle*, 116 Fed. Rep. 766; *In re Wise*, 121 Iowa 359.

*In Hewit v. Berlin Mach. Works*, 194 U. S. 296, it was held that where the statute required

recording only as against "subsequent purchasers, pledgees, or mortgagees in good faith," title did not pass to the trustee.

**4. Assignee Not Entitled to Trust Property.** — *In re Upson*, 123 Fed. Rep. 807; *In re Spencer*, 128 Fed. Rep. 654. See also *King v. Hutton*, (1900) 2 Q. B. 504; *In re Drucker*, (1902) 2 K. B. 237.

**Rescission of Sale for Fraud.** — *In re Hamilton Furniture, etc., Co.*, 117 Fed. Rep. 774; *In re Patterson*, 125 Fed. Rep. 562. See also *In re Mertens*, 131 Fed. Rep. 507.

**If the Debtor Has a Lien Against the Trust Property** for expenses incurred it passes to the trustee in bankruptcy. *Jennings v. Mather*, (1902) 1 K. B. 1.

**729. 3. Rules as to Trust Funds Stated.** — *In re Marsh*, 116 Fed. Rep. 396; *In re Mulligan*, 116 Fed. Rep. 715; *In re Wilkesbarre Furniture Mfg. Co.*, 130 Fed. Rep. 796; *Bank Com'rs v. Security Trust Co.*, 70 N. H. 536. See also *In re Graff*, 117 Fed. Rep. 343. But see *In re Lake*, (1901) 1 K. B. 710.

**4. Right of Cestui Que Trust to Lien on General Estate.** — *In re Marsh*, 116 Fed. Rep. 396; *In re Mulligan*, 116 Fed. Rep. 715; *Bills v. Schliep*, (C. C. A.) 127 Fed. Rep. 103; *In re Gaskill*, 130 Fed. Rep. 235; *Winston v. Miller*, 139 Ala. 259. See also *In re Oliver*, 132 Fed. Rep. 589.

**5. Burden of Proof.** — *In re Marsh*, 116 Fed. Rep. 396; *In re Mulligan*, 116 Fed. Rep. 715.

**730. 1. Factors, Commission Merchants, Etc.** — *In re Watson*, (1904) 2 K. B. 753; *In re Woods*, 121 Fed. Rep. 599; *In re Taft*, (C. C. A.) 133 Fed. Rep. 511.

**7. Property Held in Trust for Debtor.** — *Loomer v. Loomer*, 76 Conn. 522; *Brown v. Barker*, 68 N. Y. App. Div. 592. See also *In re Tiffany*, 133 Fed. Rep. 799.

**Deposit in Bank Held in Trust.** — A bank, receiving a deposit, knowing of the insolvency of the depositor, and that the fund was ultimately to be appropriated for the benefit of all creditors, cannot set off the amount against a claim against the debtor, but must turn over the sum to the trustee. *Lynam v. Belfast Nat. Bank*, 98 Me. 448.

**8. Assignee Precluded by Terms of Trust.** — Where the right to surplus proceeds of an express trust cannot be transferred, it has been held not to pass to the trustee under the provisions of the Bankruptcy Act. *Butler v. Baudouine*, 84 N. Y. App. Div. 215, *affirmed* 177 N. Y. 530.

**9. Equities and Rights of Redemption.** — *In re Novak*, 111 Fed. Rep. 161; *In re Bacon*, 132 Fed. Rep. 158; *Sowles v. Lewis*, 75 Vt. 59.

**731. 1. Encumbered Property.** — *In re Kel-*

**731.** *i.* UNDIVIDED INTERESTS — (1) *Partnership Property*. — See note 5.

*j.* PROPERTY TRANSFERRED BY DEBTOR — (1) *In General*. — See note 7.

**732.** (2) *Fraudulent Conveyances*. — See note 1.

**733.** (3) *Assignments for Benefit of Creditors*. — See notes 3, 5.

logg, 113 Fed. Rep. 120, *affirmed* (C. C. A.) 121 Fed. Rep. 333; *In re Goldsmith*, 118 Fed. Rep. 767; *In re Nicholas*, 122 Fed. Rep. 301; *John P. Kane Co. v. Kinney*, 174 N. Y. 69.

**Mortgaged Personalty**, with a power of sale in the bankrupt, passes to the assignee. *In re Hull*, 115 Fed. Rep. 858.

**731. 5. Assignee of One Partner Not Entitled to Deal with Joint Property.** — *In re Kindt*, 101 Fed. Rep. 107; *Ludowici Roofing Tile Co. v. Pennsylvania Blind Inst.*, 116 Fed. Rep. 661; *In re Mercur*, 116 Fed. Rep. 655, (C. C. A.) 122 Fed. Rep. 384; *Moses v. Pond*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 406; *Houston Ice, etc., Co. v. Fuller*, 26 Tex. Civ. App. 239.

**After Transfer of Firm Assets to Individual.** — Where, on dissolution of the firm, the partnership property passed to one of the members, money thereafter paid out of such partnership property in fraud of the firm creditors may be recovered by the trustee of the individual partner to whom such assets passed. *Hodgskin v. Heim*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 548.

**7. Property Transferred Before Bankruptcy.** — *Friedman v. Verchofsky*, 105 Ill. App. 414; *Myers v. Fultz*, 124 Iowa 437; *Clarke v. Sherman*, (Iowa 1905) 103 N. W. Rep. 982; *Skillin v. Maibrunn*, 75 N. Y. App. Div. 588, *affirmed* 176 N. Y. 588; *Piedmont Sav. Bank v. Levy*, 138 N. Car. 274.

**Failure to Record a Chattel Mortgage.** — *In re H. G. Andrae Co.*, 117 Fed. Rep. 561.

**732. 1. Assignees in Insolvency May Avoid Fraudulent Conveyances** — *England.* — *In re Slobodinsky*, (1903) 2 K. B. 517. See also *Re Ely*, 82 L. T. N. S. 501.

*United States.* — *In re Mullen*, 101 Fed. Rep. 413; *In re Schenck*, 116 Fed. Rep. 554; *In re Toothaker*, 128 Fed. Rep. 187.

*Alabama.* — *Andrews v. Mather*, 134 Ala. 365, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732.

*Arkansas.* — *Wiley v. McBride*, (Ark. 1905) 85 S. W. Rep. 84.

*California.* — *In re Strock*, 128 Cal. 658.

*Connecticut.* — *Unmack v. Douglass*, 75 Conn. 633.

*Florida.* — *Beasley v. Coggins*, (Fla. 1904) 37 So. Rep. 213.

*Illinois.* — *Hoffman v. Chicago Title, etc., Co.*, 198 Ill. 452; *Friedman v. Verchofsky*, 105 Ill. App. 414.

*Iowa.* — *Ferguson v. Lederer*, (Iowa 1905) 103 N. W. Rep. 794.

*Kansas.* — *Sherman v. Luckhardt*, 67 Kan. 682.

*Kentucky.* — *Bonnie v. Perry*, (Ky. 1904) 78 S. W. Rep. 208.

*Maine.* — *Annis v. Butterfield*, 99 Me. 181.

*Minnesota.* — *Oliver v. Hilgers*, 88 Minn. 35; *Schmitt v. Dahl*, 88 Minn. 506; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98.

*Mississippi.* — *Holloway, etc., Co. v. Brame*, 83 Miss. 335.

*Missouri.* — *Buder v. Columbia Distilling Co.*, 96 Mo. App. 558.

*Nebraska.* — *Sheldon v. Parker*, 66 Neb. 610.

*New Jersey.* — *Wimpfheimer v. Perrine*, (N. J. 1901) 50 Atl. Rep. 356.

*New York.* — *Creteau v. Foote, etc.*, Glass Co., 54 N. Y. App. Div. 168; *Hodgskin v. Heim*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 548; *Gans v. Weinstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 209, *reversed* on other grounds 83 N. Y. App. Div. 358; *Barker v. Franklin*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 292; *Skillen v. Endelman*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 261; *Hillyer v. LeRoy*, 84 N. Y. App. Div. 129, *modified* 179 N. Y. 369; *Brunner v. Cook, etc., Co.*, 89 N. Y. App. Div. 406, 180 N. Y. 188; *Saxton v. Sebring*, 96 N. Y. App. Div. 570.

*North Carolina.* — *Hallyburton v. Slagle*, 130 N. Car. 482; *Cox v. Wall*, 132 N. Car. 730.

*Oregon.* — *Moore, Schafer Shoe Mfg. Co. v. Billings*, (Oregon 1905) 80 Pac. Rep. 422.

*Washington.* — *Nelson v. Nelson Bennett Co.*, 31 Wash. 116.

*Wisconsin.* — *Crocker v. Huntzicker*, 113 Wis. 181.

**Right to Sue Lost by Laches.** — *Swartz v. Frank*, 183 Mo. 438.

**Burden of Proving Bona Fides on Defendant.** — *Wick v. Hickey*, (Iowa 1905) 103 N. W. Rep. 469.

**Trustee May Proceed by Bill in Equity.** — *Thompson v. Jackson First Nat. Bank*, 84 Miss. 54.

**The Discharge of the Bankrupt** will not affect the right of the trustee to recover property fraudulently transferred. *In re Pierce*, 103 Fed. Rep. 64.

**Conveyances Must Be Such as Bankrupt Could Have Avoided.** — *In re Mullen*, 101 Fed. Rep. 413.

**Expenditures for Necessaries Not Recoverable.** — *Gray v. Brunold*, 140 Cal. 615.

**Where a Solicitor Received from a Client a Lump Sum under a Verbal Contract to Act for Him in His Bankruptcy Proceedings**, it was held that the amount so paid must be repaid to the trustee, less costs incurred to the date of the receiving order, as the payment was in a legal sense a fraud under the English Bankruptcy Act. *Re Mander*, 86 L. T. N. S. 234.

**733. 3. Assignments for Benefit of Creditors.** — *Randolph v. Scruggs*, 190 U. S. 533.

**5. Assignments Held Merely Voidable.** — *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310; *Crooks v. People's Nat. Bank*, 177 N. Y. 68, *affirming* 72 N. Y. App. Div. 331; *Patty-Joiner, etc., Co. v. Cummings*, 93 Tex. 598; *Hilliard v. Burlington Shoe Co.*, 76 Vt. 57.

**734.** See note 1.

(4) *Preferences* — Time Limitation in the Statutes. — See notes 2, 3.

**735.** Void — Voidable. — See note 1.

The Term "Creditor." — See note 2.

Intent of Debtor. — See notes 3, 4.

**736.** Creditor's Knowledge as to Circumstances and Intent of Debtor. — See note 1.

**734. 1. Assignments Void under Act of 1898.** — *Randolph v. Scruggs*, 190 U. S. 533; *In re Thompson*, 122 Fed. Rep. 174, *affirmed* (C. C. A.) 128 Fed. Rep. 575.

**An Assignment Made More than Four Months Before the bankruptcy is not voidable.** *Hoague v. Cumner*, 187 Mass. 296; *McIntire v. Jennings*, 38 Wash. 119. See also *In re Manning*, 123 Fed. Rep. 179.

**2. Preferences — Recovery by Trustee.** — *In re Warren*, (1900) 2 Q. B. 138; *In re Haynes*, 123 Fed. Rep. 1001; *Little v. Holley-Brooks Hardware Co.*, (C. C. A.) 133 Fed. Rep. 874; *Rothschild v. Knight*, 176 Mass. 48; *Marden v. Sugden*, 71 N. H. 274; *Johnson v. Cohn*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 189.

**Where Property Is Purchased by Creditors at less than half its value in fraud of other creditors, the trustee may recover the balance of the real value of such property and need not restore the amount already paid.** *Stern v. Louisville Trust Co.*, (C. C. A.) 112 Fed. Rep. 501.

**Can Only Recover Specific Property.** — *Russell v. Powell*, 38 Wash. 651.

**When a Debtor with Bankruptcy Impending Pays a Creditor in the Honest Belief, on Reasonable Grounds, that He Is Legally Bound to Make the Payment, it is not a fraudulent preference even although the debtor is in fact under no legal obligation to make the payment.** *In re Vautin*, (1900) 2 Q. B. 325.

**Money Paid by a Debtor to Satisfy a Gambling Debt, payment being made subsequent to the commission of an act of bankruptcy by the debtor but prior to a receiving order against him, can, under the English Bankruptcy Act, be recovered by the trustee in bankruptcy, though the money was received *bona fide* and without notice of the act of bankruptcy.** *Ward v. Fry*, 85 L. T. N. S. 394.

**When a Mortgage Is Granted on a Ship After the Mortgagor Has Committed an Act of Bankruptcy, in respect of which he is subsequently adjudicated a bankrupt, the mortgage is protected by the English Bankruptcy Act, 1883, § 49, if the mortgagee had no notice of the act of bankruptcy at the date of the mortgage, notwithstanding the fact that the ship remains in the possession of the mortgagor up to the date of the receiving order.** *The Ruby*, 83 L. T. N. S. 438.

**3. Preferences Forbidden by State Insolvency Laws.** — *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 53.

**735. 1. Preferences Impeachable Only in Proceedings under Insolvency and Bankruptcy Law.** — *Lewis v. Portland First Nat. Bank*, (Oregon 1904) 78 Pac. Rep. 990.

**Waiver of Right to Avoid.** — *O'Neil v. International Trust Co.*, 183 Mass. 32.

**2. Creditor Defined.** — See *In re Blackpool Motor Car Co.*, (1901) 1 Ch. 77.

**3. Intent of Debtor.** — *Stevenson v. Milliken Tomlinson Co.*, 99 Me. 320; *Gans v. Weinstein*, 83 N. Y. App. Div. 358.

**4. Assignment of Claim to Nonresident.** — *Dean v. Plane*, 195 Ill. 495; *Stratton v. Lawson*, 27 Wash. 310.

**736. 1. Creditor's Knowledge Material under Act of 1898 — United States.** — *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; *In re Blair*, 102 Fed. Rep. 987; *In re Alexander*, 102 Fed. Rep. 464; *In re Oliver*, 109 Fed. Rep. 784; *In re Graham*, 110 Fed. Rep. 133; *In re Dundas*, 111 Fed. Rep. 500; *McNair v. McIntyre*, (C. C. A.) 113 Fed. Rep. 113; *In re Mandel*, 127 Fed. Rep. 863; *Allen v. Hollander*, 128 Fed. Rep. 159; *In re Moody*, 134 Fed. Rep. 628; *In re Andrews*, 135 Fed. Rep. 599; *Thomas v. Adelman*, 136 Fed. Rep. 973.

*California.* — *Gabriel v. Tonner*, 138 Cal. 63; *Gray v. Brunold*, 140 Cal. 615; *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

*Illinois.* — *Dean v. Plane*, 195 Ill. 495.

*Indiana.* — *Capital Nat. Bank v. Wilkerson*, (Ind. App. 1904) 72 N. E. Rep. 247.

*Iowa.* — *Boudinot v. Hamann*, 117 Iowa 22; *Deland v. Miller, etc., Bank*, 119 Iowa 368; *Bardes v. Hawarden First Nat. Bank*, 122 Iowa 443; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432; *Ferguson v. Lederer*, (Iowa 1905) 103 N. W. Rep. 794.

*Kansas.* — *Sherman v. Luckhardt*, 65 Kan. 610; *Laundry v. Junction City First Nat. Bank*, 66 Kan. 759.

*Michigan.* — *Harmon v. Feldheim*, 131 Mich. 470.

*Mississippi.* — *Thompson v. Jackson First Nat. Bank*, 84 Miss. 54.

*Missouri.* — *Lampkin v. Peoples' Nat. Bank*, 98 Mo. App. 239; *Whitson v. Farber Bank*, 105 Mo. App. 605; *Swartz v. Frank*, 183 Mo. 438; *Edwards v. Carondelet Milling Co.*, 108 Mo. App. 275.

*Montana.* — *Greene v. Montana Brewing Co.*, 28 Mont. 380; *Schilling v. Curran*, 30 Mont. 370.

*Nebraska.* — *Hackney v. Lincoln First Nat. Bank*, (Neb. 1903) 94 N. W. Rep. 805; *Johnson v. Anderson*, (Neb. 1903) 97 N. W. Rep. 339.

*New Jersey.* — *Congleton v. Schreihofer*, (N. J. 1903) 54 Atl. Rep. 144.

*New York.* — *Crittenden v. Barton*, 59 N. Y. App. Div. 555; *Crooks v. People's Nat. Bank*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 450, *reversed* 72 N. Y. App. Div. 331; *North v. Taylor*, 61 N. Y. App. Div. 253; *Cannon v. James M. Bell Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 734; *Stackhouse v. Holden*, 66 N. Y. App. Div. 423; *Brown v. Guichard*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 78, *affirmed* 77 N. Y. App. Div. 642; *Pearsall v. Nassau Nat. Bank*, 74 N. Y. App. Div. 89; *Upson v. Mt. Morris Bank*, 103 N. Y. App. Div. 367; *Benedict v. Dëshel*, 177 N. Y. 1.

**736. Reasonable Cause to Believe that a Debtor Is Insolvent. — See note 2.**

Evidence. — See note 4.

Knowledge of Agent Imputed to Principal. — See note 5.

**738. 1. PROPERTY ACQUIRED AFTER COMMENCEMENT OF PROCEEDINGS — In England. — See notes 3, 4, 6.**

*Pennsylvania.* — *Crawford v. Rumpf*, 205 Pa. St. 154; *Gamble v. Elkin*, 205 Pa. St. 226; *Peck v. Connell*, 21 Pa. Super. Ct. 22.

*South Carolina.* — *Ex p. Chase*, 62 S. Car. 353; *Sirrine v. Stover-Marshall Co.*, 64 S. Car. 457; *Townes v. Alexander*, 69 S. Car. 23.

*Texas.* — *McWilliams v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 596; *Galveston Dry Goods Co. v. Frenkel*, (Tex. Civ. App. 1905) 86 S. W. Rep. 949.

*Utah.* — *Wilkinson v. Anderson-Taylor Co.*, 28 Utah 346.

*Vermont.* — *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899.

**736. 2. What Constitutes Reasonable Cause to Believe Debtor to Be Insolvent — United States.** — *In re Eggert*, (C. C. A.) 102 Fed. Rep. 735; *In re Mandel*, 127 Fed. Rep. 863; *Turner v. Fisher*, 133 Fed. Rep. 594; *In re Moody*, 134 Fed. Rep. 628; *In re Pettingill*, 135 Fed. Rep. 218; *In re Andrews*, 135 Fed. Rep. 599.

*California.* — *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

*Indiana.* — *Capital Nat. Bank v. Wilkerson*, (Ind. App. 1904) 72 N. E. Rep. 247.

*Iowa.* — *Bardes v. Hawarden First Nat. Bank*, 122 Iowa 443; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432.

*Maine.* — *Stevenson v. Milliken, Tomlinson & Co.*, 99 Me. 320.

*Massachusetts.* — *Brown v. Case*, 180 Mass. 45; *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 53.

*Michigan.* — *Harmon v. Walker*, 131 Mich. 540; *Lyon v. Clark*, 129 Mich. 381.

*Missouri.* — *Lampkin v. People's Nat. Bank*, 98 Mo. App. 239; *Atkinson v. Elmore*, 103 Mo. App. 403; *Mason v. Perkins*, 180 Mo. 702; *Swartz v. Frank*, 183 Mo. 438; *Edwards v. Carondelet Milling Co.*, 108 Mo. App. 275.

*Nebraska.* — *Hackney v. Lincoln First Nat. Bank*, (Neb. 1903) 94 N. W. Rep. 805; *Farmer's, etc., Bank v. Wilson*, (Neb. 1903) 95 N. W. Rep. 609.

*New Jersey.* — *Gnichtel v. Hightstown First Nat. Bank*, (N. J. 1904) 57 Atl. Rep. 508; *Hastings v. Fithian*, 71 N. J. L. 311.

*New York.* — *Crittenden v. Barton*, 59 N. Y. App. Div. 555; *Sebring v. Wellington*, 63 N. Y. App. Div. 498; *Brown v. Guichard*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 78, *affirmed* 77 N. Y. App. Div. 642; *Crooks v. People's Nat. Bank*, 177 N. Y. 68, *affirming* 72 N. Y. App. Div. 331, which *reversed* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 450.

*Pennsylvania.* — *Crawford v. Rumpf*, 205 Pa. St. 154.

*South Carolina.* — *Townes v. Alexander*, 69 S. Car. 23.

*South Dakota.* — *Christopherson v. Oleson*, (S. Dak. 1905) 102 N. W. Rep. 685.

*Tennessee.* — *Harris v. Jackson Second Nat. Bank*, 110 Tenn. 239.

*Texas.* — *McWilliams v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 596.

*Virginia.* — *Johnston v. George D. Witt Shoe Co.*, 103 Va. 611.

*Washington.* — *Stratton v. Lawson*, 27 Wash. 310; *Dunlop v. Thomas*, 28 Wash. 521.

**Actual Belief Not Necessary.** — *Crittenden v. Barton*, 59 N. Y. App. Div. 555.

**Knowledge that the Debtor Is Behind in the Prompt Payment of His Debts** is not of itself sufficient to put a creditor upon inquiry. *In re Eggert*, (C. C. A.) 102 Fed. Rep. 735; *In re Goodhile*, 130 Fed. Rep. 471.

**The Burden of Proving Knowledge on the Part of the Creditor** rests on the trustee seeking to recover the preference. *Capital Nat. Bank v. Wilkerson*, (Ind. App. 1904) 72 N. E. Rep. 247.

**4. Circumstances of Creditor.** — *Empire State Trust Co. v. William F. Fisher Co.*, 67 N. J. Eq. 88.

**5. Knowledge of Agent Imputed to Principal.** — *Atkinson v. Elmore*, 103 Mo. App. 403; *Cannon v. James M. Bell Co.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 734; *Crooks v. People's Nat. Bank*, 72 N. Y. App. Div. 331, *affirmed* 177 N. Y. 68; *Pearsall v. Nassau Nat. Bank*, 74 N. Y. App. Div. 89; *Dight v. Chapman*, 44 Oregon 265.

**Agent Must Have Acted in Very Matter of Receiving Preference.** — *Whitson v. Farber Bank*, 105 Mo. App. 605.

**738. 3. Money Won at Gambling.** — The defendant, a professional billiard player, who was then an undischarged bankrupt, agreed to play a match at billiards with another billiard player for one hundred pounds a side, and each party deposited the amount with stakeholders. The defendant won the match, and thereupon both the defendant and the plaintiff, his trustee in bankruptcy, claimed the stakes. The stakeholders interpleaded, and, the money having been paid into court, an issue was directed to try whether the plaintiff or the defendant was entitled to the money, which was decided in favor of the plaintiff. *Shoolbred v. Roberts*, (1900) 2 Q. B. 497.

**Proceeds of Business Carried on by an Undischarged Bankrupt Prior to a Second Adjudication in Bankruptcy** but subsequent to the first adjudication, such carrying on of business being with the knowledge of the trustee under the first adjudication, belong to the trustee under the second adjudication. *Re Burr*, 84 L. T. N. S. 327. *Compare Re Adie*, 84 L. T. N. S. 508, where the business was not carried on with the knowledge of the trustee under the first adjudication.

**All Personal Earnings of the Bankrupt** between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family. *In re Roberts*, (1900) 1 Q. B. 122.

**4. Exception in Case of Real Estate.** — In London, etc., *Contracts v. Tallack*, 51 W. R. 408, it was held that the principle laid down in *Cohen v. Mitchell*, 25 Q. B. D. 262, that is, that until the trustee in bankruptcy intervenes



**738.** In the United States. — See note 8.

**739.** *m.* EXEMPTIONS AND ALLOWANCES — In the United States. — See note 5.

all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, and whether with or without knowledge of the bankruptcy, are valid as against the trustee, does not apply to real estate.

**738.** 6. Right of Bankrupt to Make Transfers. — *Re Burr*, 84 L. T. N. S. 327.

8. Property Acquired After Adjudication — Assignees or Trustees Not Entitled. — *In re McDonnell*, 101 Fed. Rep. 239; *In re Parish*, 122 Fed. Rep. 553; *In re West*, 128 Fed. Rep. 205.

**739.** 5. Exemptions under United States Bankruptcy Law — United States. — Page *v.* Edmunds, 187 U. S. 596; *Holden v. Stratton*, 198 U. S. 202; *In re Beauchamp*, 101 Fed. Rep. 106; *In re Waxelbaum*, 101 Fed. Rep. 228; *In re Wilson*, 101 Fed. Rep. 571; *In re Hatch*, 102 Fed. Rep. 280; *In re Myers*, 102 Fed. Rep. 869; *In re Buckingham*, 102 Fed. Rep. 972; *In re Tobias*, 103 Fed. Rep. 68; *In re Tollett*, 105 Fed. Rep. 427; *In re White*, 103 Fed. Rep. 774; *In re Libby*, 103 Fed. Rep. 776; *In re Odeirkirk*, 103 Fed. Rep. 779; *In re Hopkins*, 103 Fed. Rep. 781; *In re Terrill*, 103 Fed. Rep. 781; *In re Gibbs*, 103 Fed. Rep. 782; *In re Anderson*, (C. C. A.) 113 Fed. Rep. 115, *reversing* 103 Fed. Rep. 854; *In re Durham*, 104 Fed. Rep. 231; *In re Black*, 104 Fed. Rep. 289; *In re Hindman*, (C. C. A.) 104 Fed. Rep. 331; *In re Osborn*, 104 Fed. Rep. 780; *Richardson v. Woodward*, (C. C. A.) 104 Fed. Rep. 873; *Woodruff v. Cheeves*, (C. C. A.) 105 Fed. Rep. 611; *In re Wells*, 105 Fed. Rep. 762; *In re Moran*, 105 Fed. Rep. 901; *In re Turnbull*, 106 Fed. Rep. 667; *In re Tallett*, (C. C. A.) 106 Fed. Rep. 866; *In re Meriwether*, 107 Fed. Rep. 102; *In re Steed*, 107 Fed. Rep. 682; *In re Wilson*, 108 Fed. Rep. 197; *In re Bolinger*, 108 Fed. Rep. 374; *In re Schuller*, 108 Fed. Rep. 591; *In re Carmichael*, 108 Fed. Rep. 789; *In re Rhodes*, 109 Fed. Rep. 117; *In re Carpenter*, (C. C. A.) 109 Fed. Rep. 558; *In re White*, 109 Fed. Rep. 635; *In re Haskin*, 109 Fed. Rep. 789; *In re Stout*, 109 Fed. Rep. 794; *In re Dinglehoef*, 109 Fed. Rep. 866; *In re Falconer*, (C. C. A.) 110 Fed. Rep. 111; *In re Fly*, 110 Fed. Rep. 141; *In re Little*, 110 Fed. Rep. 621; *In re Demarest*, 110 Fed. Rep. 638; *In re Morrison*, 110 Fed. Rep. 734; *In re Oleson*, 110 Fed. Rep. 796; *In re Ellithorpe*, 111 Fed. Rep. 163; *In re Collier*, 111 Fed. Rep. 503; *Moran v. King*, (C. C. A.) 111 Fed. Rep. 730; *In re Mosier*, 112 Fed. Rep. 138; *In re Moore*, 112 Fed. Rep. 289; *In re Swords*, 112 Fed. Rep. 661; *In re Manning*, 112 Fed. Rep. 948; *McGahan v. Anderson*, (C. C. A.) 113 Fed. Rep. 115; *In re Hoover*, 113 Fed. Rep. 136; *In re Holden*, (C. C. A.) 113 Fed. Rep. 141; *In re Williamson*, 114 Fed. Rep. 190; *In re Stephens*, 114 Fed. Rep. 192; *In re Boarstin*, 114 Fed. Rep. 696; *In re Garner*, 115 Fed. Rep. 200; *In re Gordon*, 115 Fed. Rep. 445; *In re Tune*, 115 Fed. Rep. 906; *In re Thompson*, 115 Fed. Rep. 924; *In re Reese*, 115 Fed. Rep. 993; *Huenergardt v. John S. Brittain Dry Goods Co.*, (C. C. A.) 116 Fed. Rep. 31; *In re Stone*, 116

Fed. Rep. 35; *In re Jackson*, 116 Fed. Rep. 46; *In re Talbott*, 116 Fed. Rep. 417; *In re West*, 116 Fed. Rep. 767; *In re Evans*, 116 Fed. Rep. 909; *In re Staunton*, 117 Fed. Rep. 507; *In re Flannagan*, 117 Fed. Rep. 695; *In re Hines*, 117 Fed. Rep. 790; *In re Seydel*, 118 Fed. Rep. 207; *In re Johnson*, 118 Fed. Rep. 312; *In re Duffy*, 118 Fed. Rep. 926; *Bashinski v. Talbott*, (C. C. A.) 119 Fed. Rep. 337; *White v. Thompson*, (C. C. A.) 119 Fed. Rep. 868; *In re Butler*, 120 Fed. Rep. 100; *Cannon v. Dexter Broom, etc., Co.*, (C. C. A.) 120 Fed. Rep. 657; *In re Irvin*, (C. C. A.) 120 Fed. Rep. 733; *In re Boyd*, 120 Fed. Rep. 999; *Fenley v. Poor*, (C. C. A.) 121 Fed. Rep. 739; *In re Wilson*, (C. C. A.) 123 Fed. Rep. 20; *In re Manning*, 123 Fed. Rep. 180; *In re Campbell*, 124 Fed. Rep. 417; *In re Lucius*, 124 Fed. Rep. 455; *In re Le Claire*, 124 Fed. Rep. 654; *In re Lantzenheimer*, 124 Fed. Rep. 716; *In re Neimann*, 124 Fed. Rep. 738; *In re Olewine*, 125 Fed. Rep. 840; *Ingram v. Wilson*, (C. C. A.) 125 Fed. Rep. 913; *In re Le Vay*, 125 Fed. Rep. 990; *In re Coddington*, 126 Fed. Rep. 891; *In re Kane*, (C. C. A.) 127 Fed. Rep. 552; *In re Holden*, 127 Fed. Rep. 980; *In re White*, 128 Fed. Rep. 513; *In re Brumbaugh*, 128 Fed. Rep. 971; *In re Joyce*, 128 Fed. Rep. 985; *In re Shaffer*, 128 Fed. Rep. 986; *In re Reinhart*, 129 Fed. Rep. 510; *In re Everleth*, 129 Fed. Rep. 620; *In re Stein*, 130 Fed. Rep. 629, *affirmed* (C. C. A.) 134 Fed. Rep. 235; *In re Prince*, 131 Fed. Rep. 546; *In re Nye*, (C. C. A.) 133 Fed. Rep. 33; *B. F. Roden Grocery Co. v. Bacon*, (C. C. A.) 133 Fed. Rep. 515; *In re Wunder*, 133 Fed. Rep. 821; *Burrow v. Grand Lodge, etc.*, (C. C. A.) 133 Fed. Rep. 708; *Lipman v. Stein*, (C. C. A.) 134 Fed. Rep. 235; *Burke v. Guarantee Title, etc., Co.*, (C. C. A.) 134 Fed. Rep. 562; *In re Allen*, 134 Fed. Rep. 620; *In re Schultz*, 135 Fed. Rep. 228; *In re Van Kerm*, 135 Fed. Rep. 447; *In re Sloan*, 135 Fed. Rep. 873; *Randolph v. White*, 135 Fed. Rep. 875.

*California*. — *Gray v. Brunold*, 140 Cal. 615.

*Georgia*. — *Dozier v. McWhorter*, 113 Ga. 584; *Evans v. Rounsaville*, 115 Ga. 684; *McKenney v. Cheney*, 118 Ga. 387; *Camp v. Young*, 119 Ga. 981; *Bell v. Dawson Grocery Co.*, 120 Ga. 628; *Wright v. Horne*, 123 Ga. 86.

*Indian Territory*. — *In re Grayson*, 3 Indian Ter. 497.

*Maine*. — *Pulsifer v. Hussey*, 97 Me. 434.

*North Dakota*. — *Powers Dry Goods Co. v. Nelson*, 10 N. Dak. 580.

*Oregon*. — *Groves v. Osburn*, (Oregon 1905) 79 Pac. Rep. 500.

*Pennsylvania*. — *Claster v. Sable*, 22 Pa. Super. Ct. 631.

*Vermont*. — *Laird v. Perry*, 74 Vt. 454.

*Washington*. — *Smalley v. Langenour*, 30 Wash. 307; *McKinley v. Morgan*, 36 Wash. 561.

**Doubtful Exemptions Pass to Trustee.** — Where the exemption is a homestead, the boundaries of which are uncertain, the title will be considered as passing to the trustee subject to the actual determination of the exemption. *In re Mayer*, (C. C. A.) 108 Fed. Rep. 599.

**740.** [n. PROPERTY OF WHICH DEBTOR IS THE REPUTED OWNER. — See note 2a.]

**3. Title of Assignee or Trustee — a. QUANTITY OF TITLE.** — See notes 3, 4.

**741. b. WHEN TITLE VESTS.** — See notes 5, 6, 7, 8.

The Constitutional Requirement of Uniformity of the bankrupt law throughout the United States is not violated by the provision allowing exemptions in accordance with the state laws. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181.

**Partnership Property** which by transfer becomes the individual property of one of the partners becomes subject to the state exemption laws. *In re Rudnick*, 102 Fed. Rep. 750.

**Exemptions Allowed by the State Insolvency Law** will not be recognized. *In re Anderson*, 110 Fed. Rep. 141.

**Insurance Policies** having a cash surrender value, being expressly provided for by the Act of 1898, § 70, subd. 5, pass to the trustee, although exempted by the state laws. *In re Scheld*, (C. C. A.) 104 Fed. Rep. 870; *In re Holden*, (C. C. A.) 114 Fed. Rep. 650. *Contra*, *Steele v. Buel*, (C. C. A.) 104 Fed. Rep. 968.

**Right to Exemption Forfeited by Fraudulent Transfer.** — *In re Taylor*, 114 Fed. Rep. 607; *In re Yost*, 117 Fed. Rep. 792; *In re Long*, 116 Fed. Rep. 113; *In re Coddington*, 126 Fed. Rep. 891.

**Bona Fide Transfer Not a Forfeiture.** — *In re Duffy*, 118 Fed. Rep. 926.

**A Neglect by the Bankrupt to Account for All of His Assets** will not debar him from his right to exemptions. And if the exempt property has been sold he may have the proceeds set aside for him. *In re Park*, 102 Fed. Rep. 602.

**A Waiver of Exemptions** contained in notes or other promises to pay made by the bankrupt cannot be enforced by the bankruptcy court in favor of the creditors holding such obligation. The title to property exempted by the state laws remains in the bankrupt, and such a waiver must be enforced in a state tribunal. *Lockwood v. Exchange Bank*, 190 U. S. 294; *Woodruff v. Cheeves*, (C. C. A.) 105 Fed. Rep. 607.

**Exemption Must Be Properly Set Aside.** — *In re Hoyt*, 119 Fed. Rep. 987.

**Method of State Courts Not Followed.** — *In re Lynch*, 101 Fed. Rep. 579.

**740. 2a. Property of Which Debtor Is Reputed Owner.** — All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, pass under the English Bankruptcy Act to the trustee in bankruptcy. See *In re Keen*, (1902) 1 K. B. 555; *In re Weibking*, [1902] 1 K. B. 713; *Re Elliott*, 84 L. T. N. S. 325; *Re Crouch*, 83 L. T. N. S. 746; *Sharman v. Mason*, (1899) 2 Q. B. 679; *Re Dixon*, 83 L. T. N. S. 433.

**3. Assignee Takes Title Subject to Equities Against Debtor** — *United States*. — *Thompson v. Fairbanks*, 196 U. S. 516; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. Rep. 755; *Bush v. Export Storage Co.*, 136 Fed. Rep. 918.

*Colorado*. — *Clark v. Bright*, 30 Colo. 199.

*Iowa*. — *Wick v. Hickey*, (Iowa 1905) 103 N. W. Rep. 469.

*Massachusetts*. — *Silby v. Boston, etc., R. Co.*, 176 Mass. 158; *Harvey v. Smith*, 179 Mass. 592.

*New York*. — *Mathews v. Hardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 653, *affirmed* 79 N. Y. App. Div. 570; *Pickert v. Eaton*, 81 N. Y. App. Div. 423; *Hunt v. Osborn*, 86 N. Y. App. Div. 464, *affirmed* 180 N. Y. 508. *Compare* *Crane Co. v. Pneumatic Signal Co.*, 94 N. Y. App. Div. 53, *reversing* (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 338.

*Texas*. — *Eason v. Garrison*, 36 Tex. Civ. App. 574.

*Washington*. — *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94.

**Property Passing Subject to Bankrupt's Equitable Assignment.** — *In re Hanna*, 105 Fed. Rep. 587.

**One Who Has Pledged Property with the Bankrupt** may recover from the trustee the proceeds of a sale of the pledged property over and above the amount of the debt secured thereby. *In re Swift*, 108 Fed. Rep. 212, *affirmed* (C. C. A.) 113 Fed. Rep. 202.

**4. Liens Valid as Against Assignee or Trustee** — *United States*. — *In re New York Economical Printing Co.*, (C. C. A.) 110 Fed. Rep. 514; *In re Standard Laundry Co.*, 112 Fed. Rep. 126; *Duplan Silk Co. v. Spencer*, (C. C. A.) 115 Fed. Rep. 689; *Chauncey v. Dyke*, (C. C. A.) 119 Fed. Rep. 11; *In re Roeber*, 121 Fed. Rep. 444; *New Kensington First Nat. Bank v. Pennsylvania Trust Co.*, (C. C. A.) 124 Fed. Rep. 968; *In re Oliver*, 132 Fed. Rep. 588; *In re Dunn Hardware, etc., Co.*, 132 Fed. Rep. 719; *In re Grissler*, (C. C. A.) 136 Fed. Rep. 754; *Bush v. Export Storage Co.*, 136 Fed. Rep. 918.

*New Jersey*. — *South End Imp. Co. v. Harden*, (N. J. 1902) 52 Atl. Rep. 1127.

*New York*. — *John P. Kane Co. v. Kinney*, 174 N. Y. 69.

*Texas*. — *Eason v. Garrison*, 36 Tex. Civ. App. 574.

**Mortgaged Property, the Mortgage on Which Was Unrecorded**, but of which the bankrupt had notice, will be subject to the mortgage.

**An Unrecorded Mortgage** of which the bankrupt had notice is good against the trustee. *In re Standard Laundry Co.*, (C. C. A.) 116 Fed. Rep. 476.

**741. 5. Trustee's Title Vests at Time of Appointment.** — Between the adjudication and the time the trustee is appointed the title to the property remains in the bankrupt, but it is a title liable to be divested by the trustee's appointment and one on which no permanent lien can be acquired. *In re Engle*, 105 Fed. Rep. 893.

**6. Relation of Trustee's Title in England.** — *In re Lawford*, (1902) 2 K. B. 445.

**7. Relation of Trustee's Title in United States.** — *In re Kellogg*, 113 Fed. Rep. 120, *affirmed* (C. C. A.) 121 Fed. Rep. 333; *In re Gutman*, 114 Fed. Rep. 1009; *Bush v. Export Storage Co.*, 136 Fed. Rep. 918; *Gray v. Chase*, 184

**741.** *c.* HOW TITLE IS DIVESTED. — See note 11.

**742.** 4. Powers, Duties, and Liabilities — *a.* GENERAL PRINCIPLES — Power to Bind Estate. — See notes 4, 5, 6.

Good Faith and Diligence. — See note 7.

**743.** Personal Liability to Creditors. — See note 3.

*b.* COLLECTION OF ASSETS — (1) *In General.* — See notes 4, 5.

**744.** See note 1.

(2) *Property Claimed or Held Adversely.* — See note 3.

*Property Held under Judicial Process.* — See note 4.

*Where Property Is in the Possession of a Receiver.* — See note 6.

**745.** See note 1.

Mass. 444; *Glidden v. Massachusetts Hospital L. Ins. Co.*, 187 Mass. 538; *W. C. Belcher Land Mortg. Co. v. Bush*, (Tex. Civ. App. 1902) 67 S. W. Rep. 444.

**741.** 8. Relation of Trustee's Title under Act of 1867. — See *In re McKenzie*, 132 Fed. Rep. 986.

11. Title Divested by Discharge of Assignee or Trustee. — *Mankato First Nat. Bank v. Pope*, 85 Minn. 436.

**742.** 4. Trustee an Officer of the Court. — *In re Howard*, 130 Fed. Rep. 1004.

5. Trustee Must Decide Necessity for Attorney's Employment. — *In re Abram*, 103 Fed. Rep. 272.

6. Acceptance of Leases. — *Summerville v. Kelliher*, 144 Cal. 160, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 742.

An Assignee Accepting a Lease Is Liable Therefor in his representative capacity, but not individually. *Man v. Katz*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 645.

7. Right of Trustee to Apply to Court for Advice. — See *In re Baber*, 119 Fed. Rep. 520.

**743.** 3. Failure to Reserve Funds for Undetermined Claims. — *Marden v. Sugden*, 71 N. H. 274.

4. Duty to Collect Assets Prescribed. — *Ripon Knitting Works v. Schreiber*, 101 Fed. Rep. 810; *In re Greenberg*, 106 Fed. Rep. 496; *In re Levin*, 113 Fed. Rep. 498; *Wooster v. Trowbridge*, 115 Fed. Rep. 722, affirmed (C. C. A.) 120 Fed. Rep. 667; *In re Waterloo Organ Co.*, 118 Fed. Rep. 904; *In re Gerstel*, 123 Fed. Rep. 166. See also *Wayne Knitting Mills v. Nugent*, 104 Fed. Rep. 530.

Order to Pay over Money or Deliver Property to Trustee. — *Mueller v. Nugent*, 184 U. S. 1; *In re Emrich*, 101 Fed. Rep. 231; *In re Rosser*, (C. C. A.) 101 Fed. Rep. 562; *Ripon Knitting Works v. Schreiber*, 101 Fed. Rep. 810; *In re Schlesinger*, (C. C. A.) 102 Fed. Rep. 117; *In re Anderson*, (C. C. A.) 113 Fed. Rep. 115, reversing 103 Fed. Rep. 854; *Fisher v. Cushman*, (C. C. A.) 103 Fed. Rep. 860; *In re Scheld*, (C. C. A.) 104 Fed. Rep. 870; *In re Miller*, 105 Fed. Rep. 57; *In re De Gottardi*, 114 Fed. Rep. 328; *In re Wilson*, 116 Fed. Rep. 419; *In re Shachter*, 119 Fed. Rep. 1010; *In re Leinweber*, 128 Fed. Rep. 641; *In re Henderson*, 130 Fed. Rep. 385; *In re Herskowitz*, 136 Fed. Rep. 950. See also *In re Felson*, 124 Fed. Rep. 288.

The bankrupt will not be committed for disobedience of such an order until he has been granted an opportunity to explain his noncompliance, and if he shows that he is unable to obey the order the court will not imprison him.

*In re Taylor*, 114 Fed. Rep. 607; *Boyd v. Glucklich*, (C. C. A.) 116 Fed. Rep. 131; *In re Hausman*, (C. C. A.) 121 Fed. Rep. 984; *In re Kane*, 125 Fed. Rep. 984; *American Trust Co. v. Wallis*, (C. C. A.) 126 Fed. Rep. 464; *In re Adler*, 129 Fed. Rep. 502; *In re Goldfarb*, 131 Fed. Rep. 643.

Imprisonment for disobedience of such an order does not violate a statute abolishing imprisonment for debt. *In re Schlesinger*, (C. C. A.) 102 Fed. Rep. 117; *Schweer v. Brown*, (C. C. A.) 130 Fed. Rep. 328.

It is improper to leave to the discretion of the referee the question of committing the bankrupt for contempt, since the power of commitment is vested in the court. *Smith v. Belford*, (C. C. A.) 106 Fed. Rep. 658.

A person other than the bankrupt cannot be compelled by contempt proceedings to surrender money or property belonging to the bankrupt's estate. *In re Nugent*, 184 U. S. 1, reversing (C. C. A.) 105 Fed. Rep. 581.

5. May Sue Without Leave of Court. — *Callahan v. Israel*, 186 Mass. 383.

**744.** 1. Assignee or Trustee as Representative of Creditors — *United States.* — *In re Rodgers*, (C. C. A.) 125 Fed. Rep. 169; *In re Carpenter*, 125 Fed. Rep. 831; *In re Baird*, 126 Fed. Rep. 845; *In re Thorp*, 130 Fed. Rep. 371; *In re Butterwick*, 131 Fed. Rep. 371; *In re Merrow*, 131 Fed. Rep. 993; *In re Bacon*, 132 Fed. Rep. 158; *In re Smith*, 132 Fed. Rep. 301; *Virginia Iron, etc., Co. v. Staake*, (C. C. A.) 133 Fed. Rep. 717.

*Nebraska.* — *Logan v. Nebraska Moline Plow Co.*, (Neb. 1903) 93 N. W. Rep. 1128.

*New Jersey.* — *Watson v. Rowley*, 63 N. J. Eq. 195.

*New York.* — *Gove v. Morton Trust Co.*, 96 N. Y. App. Div. 177.

*North Carolina.* — *Cox v. Wall*, 132 N. Car. 730; *Lance v. Tainter*, 137 N. Car. 249.

*Texas.* — *W. C. Belcher Land Mortg. Co. v. Bush*, (Tex. Civ. App. 1902) 67 S. W. Rep. 444.

3. Removal Enjoined in Case of Doubt. — *In re Smith*, 113 Fed. Rep. 993.

4. Remand to State Court to Settle Right to Property. — *White v. Thompson*, (C. C. A.) 119 Fed. Rep. 868.

6. Receiver Appointed Before Petition in Bankruptcy. — *Ross-Meeham Foundry Co. v. Southern Car, etc., Co.*, 124 Fed. Rep. 403; *In re English*, (C. C. A.) 127 Fed. Rep. 941.

After Petition Has Been Filed. — *In re Knight*, 125 Fed. Rep. 35.

**745.** 1. Receiver's Title Impeachable under

**745.** *c.* ABANDONMENT OF PROPERTY. — See note 6.

**746.** See notes 1, 2, 3.

*d.* SETTING ASIDE FRAUDULENT OR PREFERENTIAL TRANSFERS.

— See notes 4, 5, 6.

**747.** See notes 1, 2.

Distinction Between Preferences and Fraudulent Conveyances. — See notes 3, 4.

*e.* CONTINUING BUSINESS. — See note 7.

**748.** *f.* SALE OF PROPERTY — (1) *Authority to Sell* — (a) *In General*. — See note 1.

(b) *Leave or Approval of Court* — The Bankruptcy Law of the United States. —

See note 3.

**749.** (2) *Property Subject to Sale*. — See note 1.

**Bankruptcy Law.** — Where, by the state law, a receiver gets title only from the time of filing the order of appointment, the trustee is entitled to possession as against a receiver who has not filed the order of appointment. *In re Tyler*, 104 Fed. Rep. 778.

**745. 6. Abandonment of Onerous Property** — *England*. — *In re Bastable*, (1901) 2 K. B. 518.

*United States*. — *Meyers v. Josephson*, (C. C. A.) 124 Fed. Rep. 734. See also *Equitable Loan, etc., Co. v. Moss*, (C. C. A.) 125 Fed. Rep. 609. *California*. — *Summerville v. Kelliher*, 144 Cal. 155.

*Maine*. — *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414.

*Ohio*. — *Wilder v. McDonald*, 63 Ohio St. 383.

*Pennsylvania*. — *Provident Life, etc., Co. v. Fidelity Ins., etc., Co.*, 203 Pa. St. 82.

**746. 1. Abandonment of Encumbered Property.** — *Halloway, etc., Co. v. Brame*, 83 Miss. 335.

**2. Title to Abandoned Property Remains in Bankrupt.** — *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414.

**After Abandonment Trustee Cannot Take Property from Bankrupt.** — *Meyers v. Josephson*, (C. C. A.) 124 Fed. Rep. 734.

**3. Reasonable Time Allowed for Making Election.** — *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414.

**4. Setting Aside Fraudulent or Preferential Conveyances** — *United States*. — *Thomas v. Adelman*, 136 Fed. Rep. 973.

*Florida*. — *Beasley v. Coggins*, (Fla. 1904) 37 So. Rep. 213.

*Kentucky*. — *Bonnie v. Perry*, (Ky. 1904) 78 S. W. Rep. 208.

*Minnesota*. — *Schmitt v. Dahl*, 88 Minn. 506; *Sharood v. Jordan*, 90 Minn. 249.

*Mississippi*. — *Chism v. Friar's Point Bank*, (Miss. 1900) 27 So. Rep. 610; *Chism v. Citizens' Bank*, 77 Miss. 599.

*Missouri*. — *Buder v. Columbia Distilling Co.*, 96 Mo. App. 558.

*Nebraska*. — *Hood v. Blair State Bank*, (Neb. 1902) 91 N. W. Rep. 701; *Schreck v. Hanlon*, 66 Neb. 451; *Sheldon v. Parker*, 66 Neb. 610.

*New York*. — *Frank v. Mushiner*, 76 N. Y. App. Div. 616; *Joseph v. Raff*, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611.

*North Carolina*. — *Cox v. Wall*, 132 N. Car. 730.

*Wisconsin*. — *Mueller v. Bruss*, 112 Wis. 406; *Crocker v. Huntzicker*, 113 Wis. 181.

**Defendant's Right to Set Off.** — *Bonnie v. Perry*, (Ky. 1904) 78 S. W. Rep. 208; *Davis v. Lohsen*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 769; *Harris v. Jackson Second Nat. Bank*, 110 Tenn. 239.

**Cannot Recover from Purchaser for Value and Without Notice.** — *Hackney v. Lincoln First Nat. Bank*, (Neb. 1904) 98 N. W. Rep. 412.

**5. Insufficiency of Assets in Hand.** — *Deland v. Miller, etc., Bank*, 119 Iowa 368; *Livor v. Seiter*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 382, 69 N. Y. App. Div. 33; *Mueller v. Bruss*, 112 Wis. 406.

**6. Discretion to Avoid Preferences.** — *In re Knight*, 123 Fed. Rep. 35; *Andrews v. Mather*, 134 Ala. 365, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 746.

**Right to Require Security for Costs from Creditors.** — *In re Baird*, 112 Fed. Rep. 960.

**747. 1. Action Held Not Maintainable by Creditors.** — *Creteau v. Foote, etc., Glass Co.*, 54 N. Y. App. Div. 168; *Patten v. Carley*, 69 N. Y. App. Div. 423; *Hibbard v. Henderson*, 44 Oregon 318; *Moore, Schafer Shoe Mfg. Co. v. Billings*, (Oregon 1905) 80 Pac. Rep. 422.

**Cannot Sue to Set Aside Fraudulent Conveyance After Bankrupt's Discharge.** — *Barnes Mfg. Co. v. Norden*, 67 N. J. L. 493.

**2. Action Held Maintainable by Creditors.** — *Hillyer v. Le Roy*, 179 N. Y. 369; *Matter of Garver*, 176 N. Y. 386.

**3. Fraudulent Conveyances — Avoidance by Creditors.** — *Markell v. Hill*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 133, reversed on other grounds 64 N. Y. App. Div. 191.

**4. Fraudulent Conveyances — Avoidance by Vendee of Assignee or Trustee.** — *Bryan v. Madden*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 638.

**7. Continuing Debtor's Business.** — *Cooper v. Lankford*, (Ky. 1904) 78 S. W. Rep. 197.

**748. 1. Authority to Sell under Act of 1867.** — *Hallyburton v. Slagle*, 130 N. Car. 482.

**3. Approval by Court Required by Statute of United States.** — *In re Fisher*, 135 Fed. Rep. 223; *Davis v. Ives*, 75 Conn. 611. Compare *James v. Koy*, (Tex. Civ. App. 1900) 99 S. W. Rep. 295.

**749. 1. Encumbered Property.** — *In re Gerry*, 112 Fed. Rep. 957; *In re Muhlhäuser*, (C. C. A.) 121 Fed. Rep. 669; *In re Cogley*, 107 Fed. Rep. 73.

**Property Subject to Landlord's Lien.** — A landlord who, after notice and without objection, has permitted a sale of the property subject to his lien, cannot later assert his lien against

- 749.** (3) *Manner and Terms of Sale* — The General Rule. — See note 3.  
Auction or Private Sale. — See note 5.
- 750.** If the Property Is Encumbered. — See note 2.  
(4) *Who May Purchase*. — See note 3.  
The Bankrupt. — See note 7.
- 751.** (5) *Title and Rights of Purchasers*. — See note 5.  
(6) *Setting Aside Sale*. — See note 8.
- 752.** g. ARBITRATION AND COMPROMISE. — See note 3.  
h. ACTIONS — (1) *Actions by Assignee or Trustee* — (a) *Right to Maintain*. — See note 4.  
(b) *Evidence of Official Character*. — See note 5.  
(2) *Actions Against Assignee or Trustee*. — See notes 6, 7.
- 754.** (4) *Jurisdiction* — (a) *Under Former Statutes*. — See note 2.

the proceeds of all the property sold, where the proceeds of the particular property are not traceable. *In re Smith*, 123 Fed. Rep. 188, affirmed (C. C. A.) 128 Fed. Rep. 281.

If the Value of a Homestead Exceeds the Homestead Exemption to which the debtor is entitled, the trustee may, by order of the referee, proceed to sell the property, reserving to the bankrupt the amount of his exemption in money. *In re Oderkirk*, 103 Fed. Rep. 779. See also *In re Hopkins*, 103 Fed. Rep. 781.

Where Property Has Been Sold Subject to Taxes, the purchaser has no claim against the trustee for the amount from the personal estate of the debtor. *In re Brinker*, 128 Fed. Rep. 634.

**749.** 3. Power of Court to Regulate Manner of Sale. — *In re Union Trust Co.*, (C. C. A.) 122 Fed. Rep. 937; *Shoe, etc.*, Reporter, Petitioners, (C. C. A.) 129 Fed. Rep. 588.

5. Private Sale May Be Ordered by Court. — *In re Hawkins*, 125 Fed. Rep. 633; *In re Edes*, 135 Fed. Rep. 595; *Peele v. Ohio, etc.*, Oil Co., 158 Ind. 374.

**750.** 2. Sale Free from Incumbrances. — *In re Shaeffer*, 105 Fed. Rep. 352; *In re Waterloo Organ Co.*, 118 Fed. Rep. 904; *George Carroll, etc.*, Co. v. Young, (C. C. A.) 119 Fed. Rep. 576; *In re Union Trust Co.*, (C. C. A.) 122 Fed. Rep. 937; *In re Keet*, 128 Fed. Rep. 651; *In re Saxton Furnace Co.*, 136 Fed. Rep. 697.

Tax Lien Not Discharged. — *In re Keller*, 109 Fed. Rep. 131.

3. Assignee, etc., Not Permitted to Purchase. — *In re Hawley*, 117 Fed. Rep. 364; *Nabours v. McCord*, 97 Tex. 526.

A Commissioner cannot sell to a corporation in which he is a stockholder. *McCullough Export Lumber, etc.*, Co. v. National Bank, 111 Ga. 132.

7. Purchase by Bankrupt. — *Hallyburton v. Slagle*, 130 N. Car. 482.

**751.** 5. Purchaser Acquires No Better Title than Bankrupt Had. — *In re Muhlhauser*, (C. C. A.) 121 Fed. Rep. 669; *In re Shea*, (C. C. A.) 126 Fed. Rep. 153.

A Purchaser Offering a Lump Sum for the property, whose offer is accepted, cannot later claim a reduction because the bankrupt secured the property at fifty per cent. of the price at which the trustee had invoiced it. *Owens v. Bruce*, (C. C. A.) 109 Fed. Rep. 72.

Purchaser of Contract to Convey Land Has Same Right to Specific Performance that Bankrupt Had. — *Harriman v. Tyndale*, 184 Mass. 534.

8. Setting Aside Sale in General. — *In re Shea*,

122 Fed. Rep. 742, affirmed 126 Fed. Rep. 153; *Matter of Sheldon*, 72 N. Y. App. Div. 625, affirmed 173 N. Y. 287.

Inadequacy of Price. — *Helena Coal Co. v. Sibley*, 132 Ala. 651; *Lacy v. Gunn*, 144 Cal. 511.

Mere Irregularities, working no hardship, will not justify a setting aside of the sale. *Peele v. Ohio, etc.*, Oil Co., 158 Ind. 374.

Who May Petition to Set Sale Aside. — One who was not a party and whose rights are not affected by the sale has no standing to file a petition to set the sale aside. *In re Muhlhauser*, (C. C. A.) 121 Fed. Rep. 669.

A sale, regularly conducted and not prejudicial to any creditors, will not be set aside at the instance of a prospective purchaser at the resale. *In re Belden*, 120 Fed. Rep. 524.

**752.** 3. Arbitration and Compromise. — *In re Heyman*, 108 Fed. Rep. 207.

4. Actions by Trustee or Assignee. — *Traders Ins. Co. v. Mann*, 118 Ga. 381; *McLanahan v. Blackwell*, 119 Ga. 64; *Smith v. Belden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 113.

May Sue Without Leave of Court. — *Chism v. Citizens' Bank*, 77 Miss. 599; *Chism v. Friars Point Bank*, (Miss. 1900) 27 So. Rep. 610.

An Action on the Bond of a Preceding Trustee must be brought in the name of the United States. *Alexander v. Union Surety, etc., Co.*, 89 N. Y. App. Div. 3.

A Judgment Creditor Is Not a Necessary Party to a suit by the trustee to recover the surplus of a trust fund. *Smith v. Belden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 113.

5. Certified Copy of Order Approving Bond. — *Pace v. Roberts, etc.*, *Shoe Co.*, 103 Mo. App. 662.

6. Actions for Accounting. — *Welch v. Polley*, 177 N. Y. 117.

Recovery of Goods Secured by Fraud of Bankrupt. — If a creditor has been induced by false representation of the bankrupt to sell him goods, he can recover them though the false representations were not the sole reason for his extending the credit. *In re Gany*, 103 Fed. Rep. 930.

Specific Performance may be enforced against the trustee in bankruptcy of a vendor of property, and, if the property is leasehold, he cannot disclaim the contract without disclaiming the lease. *Pearce v. Bastable*, (1901) 2 Ch. 122.

7. Leave of Court Not Necessary. — See *In re Smith*, 121 Fed. Rep. 1014.

**754.** 2. Jurisdiction of State Courts Declared. — *French v. R. P. Smith, etc., Co.*, 81 Minn.

**754.** (b) Jurisdiction under Act 1898 — *aa.* DISTRICT COURTS OF UNITED STATES. — See note 3.

345, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753, [754].

**754. 3. District Courts — Statute Construed by Supreme Court.** — The rule as laid down in *Bardes v. Hawarden First Nat. Bank*, 178 U. S. 524, has been *approved and followed* by the following cases:

*United States.* — *Wall v. Cox*, 181 U. S. 244; *Pickens v. Roy*, 187 U. S. 177; *Jaquith v. Rowley*, 188 U. S. 620; *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, 198 U. S. 280; *In re Baudouine*, (C. C. A.) 101 Fed. Rep. 574; *In re Ward*, 104 Fed. Rep. 985; *In re Tollett*, 105 Fed. Rep. 425; *In re Nugent*, 184 U. S. 1, *reversing* (C. C. A.) 105 Fed. Rep. 581; *Woodruff v. Cheeves*, (C. C. A.) 105 Fed. Rep. 601; *In re Seebold*, (C. C. A.) 105 Fed. Rep. 910; *J. B. McFarlan Carriage Co. v. Salanas*, (C. C. A.) 106 Fed. Rep. 145; *Pickens v. Dent*, (C. C. A.) 106 Fed. Rep. 653; *Smith v. Belford*, (C. C. A.) 106 Fed. Rep. 658; *In re Sheinbaum*, 107 Fed. Rep. 247; *Blumberg v. Bryan*, (C. C. A.) 107 Fed. Rep. 673; *In re Green*, 108 Fed. Rep. 616; *In re Nixon*, 110 Fed. Rep. 633; *In re San Gabriel Sanatorium Co.*, (C. C. A.) 111 Fed. Rep. 892; *In re Shoemaker*, 112 Fed. Rep. 648; *Real Estate Trust Co. v. Thompson*, 112 Fed. Rep. 945; *In re Wells*, 114 Fed. Rep. 222; *Stelling v. G. W. Jones Lumber Co.*, (C. C. A.) 116 Fed. Rep. 261; *In re Michie*, 116 Fed. Rep. 749; *In re Baird*, 116 Fed. Rep. 765; *Havens, etc., Co. v. Pierek*, (C. C. A.) 120 Fed. Rep. 244.

*Minnesota.* — *French v. R. P. Smith, etc., Co.*, 81 Minn. 341.

*Nebraska.* — *McIntyre v. Malone*, (Neb. 1902) 91 N. W. Rep. 246.

*New York.* — *Bloch v. Bloch*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 278.

In *Bryan v. Bernheimer*, 181 U. S. 188, it was held that the District Court had jurisdiction in summary proceedings to determine the title of one who, with notice of the bankruptcy proceedings, purchased from the general assignee after the filing of the petition, but before the appointment of the trustee.

In *Louisville Trust Co. v. Comingor*, 184 U. S. 18, the court held that jurisdiction would not be taken to decide the validity of a claim by the general assignee to retain funds of the bankrupt's estate to cover disbursements and commissions, since the claim was adverse and not merely colorable, and the assignee had not consented to the jurisdiction of the bankruptcy court.

**"Consent of the Proposed Defendant" — What Constitutes.** — An appearance in the bankruptcy proceedings and contesting the questions arising therein upon their merits has been held to be a consent to the jurisdiction of the District Court. *Sinsheimer v. Simonson*, 106 Fed. Rep. 870; *In re Steuer*, 104 Fed. Rep. 976; *In re Riker*, 107 Fed. Rep. 96; *Boonville Nat. Bank v. Blakey*, (C. C. A.) 107 Fed. Rep. 891; *In re Riker*, (C. C. A.) 109 Fed. Rep. 63; *Philips v. Turner*, (C. C. A.) 114 Fed. Rep. 726; *In re Durham*, 114 Fed. Rep. 750; *Chauncey v. Dyke*, (C. C. A.) 119 Fed. Rep. 1; *In re Hadden Rodee Co.*, 135 Fed. Rep. 887.

Proof of the debt in bankruptcy proceedings, which is the basis of an action in the state court, does not operate as a consent to the jurisdiction of the United States court, so as to deprive the state court of jurisdiction. *Pickens v. Roy*, 187 U. S. 177.

Neglect of the claimant to abandon other claims against property not in the possession of the bankruptcy court will not be such a consent as will give jurisdiction to the District Court. *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, 198 U. S. 280.

Consent by appearing and contesting does not go to the method of procedure, and where that does not amount to due process of law, the appearance does not constitute a consent within the meaning of the act. *Sinsheimer v. Simonson*, (C. C. A.) 107 Fed. Rep. 898.

An appearance by a defendant to a rule to show cause issuing from the District Court will not bar his later objecting to its jurisdiction. *In re Hemby-Hutchinson Pub. Co.*, 105 Fed. Rep. 909.

**Jurisdiction of District Courts Extended by Amendment of 1903.** — By the amendment of Feb. 5, 1903, district courts are given concurrent jurisdiction with the state courts of suits in equity to set aside voidable transfers made by the bankrupt within four months of the bankruptcy. *Johnston v. Forsyth Mercantile Co.*, 127 Fed. Rep. 845; *McNulty v. Feingold*, 129 Fed. Rep. 1001; *Horskins v. Sanderson*, 132 Fed. Rep. 415; *Lawrence v. Lowrie*, 133 Fed. Rep. 995; *Doroshov v. Ott*, (C. C. A.) 134 Fed. Rep. 740.

A court of bankruptcy has power since the amendment of 1903 to determine the title to property which a claimant, as rescinding vendor under an alleged fraudulent agreement, elects to demand after institution of bankruptcy proceedings. *In re Mertens*, 131 Fed. Rep. 507.

The amendment does not confer upon the bankruptcy court a right to pass upon the title to property claimed adversely by, and in the possession of, a third person; but such rights must be determined in the state court or in the district court by consent of the defendant in a plenary proceeding. *In re Teschmacher*, 127 Fed. Rep. 728.

The amendment has been held to cover rights of action arising previous to its passage. *Pond v. New York Nat. Exch. Bank*, 124 Fed. Rep. 992.

The amendment does not authorize an order requiring a state sheriff claiming property adversely to deliver it to the bankruptcy court. *In re Andre*, (C. C. A.) 135 Fed. Rep. 736.

The amendment merely extends the jurisdiction of the bankruptcy court over the recovery of fraudulent conveyances and does not give jurisdiction over the persons of the defendants without their consent. *Gregory v. Atkinson*, 127 Fed. Rep. 184.

**The Bankruptcy Court, Having Possession of the Property,** will take jurisdiction to determine rights therein and will enjoin any proceedings in the state courts relative thereto. *In re Whitener*, (C. C. A.) 105 Fed. Rep. 180; *White v. Schloerb*, 178 U. S. 542; *In re Kellogg*, 113

**755.** See note 4.

*bb.* CIRCUIT COURTS OF UNITED STATES. — See note 5.

*cc.* STATE COURTS. — See note 7.

**756.** (5) *Limitation of Actions* — The Period of Limitation. — See note 7.

Fed. Rep. 120, *affirmed* (C. C. A.) 121 Fed. Rep. 333; *In re Kleinhans*, 113 Fed. Rep. 107; *In re Klein*, 116 Fed. Rep. 523; *Chauncey v. Dyke*, (C. C. A.) 119 Fed. Rep. 1; *In re Kellogg*, (C. C. A.) 121 Fed. Rep. 333; *In re Rodgers*, (C. C. A.) 125 Fed. Rep. 169; *Burleigh v. Foreman*, (C. C. A.) 125 Fed. Rep. 217; *In re Knight*, 125 Fed. Rep. 35; *In re Reynolds*, 127 Fed. Rep. 760; *In re Leeds Woolen Mills*, (C. C. A.) 134 Fed. Rep. 221, 67 C. C. A., 149, *reversing* 129 Fed. Rep. 922; *In re McBride*, 132 Fed. Rep. 285. See also *supra*, **704. 1.**

A state sheriff cannot take the property from the custody of the bankruptcy court on a writ of replevin. *Mishawaka Woolen Mfg. Co. v. Powell*, 98 Mo. App. 530.

In its discretion the bankruptcy court may permit the holder of a chattel mortgage on goods of the bankrupt to test the validity of his mortgage lien in a state court. *In re Johnson*, 127 Fed. Rep. 619.

**Where Property Is in the Custody of an Adverse Claimant**, the bankruptcy court will not take jurisdiction in summary proceedings to order the delivery to it of the property, but will leave the matter with the state court. *In re Adams*, 130 Fed. Rep. 788; *In re Scherber*, 131 Fed. Rep. 121; *In re Rochford*, (C. C. A.) 124 Fed. Rep. 182; *In re Flynn*, 126 Fed. Rep. 422; *In re New York Car Wheel Works*, 132 Fed. Rep. 203; *Hinds v. Moore*, (C. C. A.) 134 Fed. Rep. 221; *In re Knickerbocker*, 121 Fed. Rep. 1004.

**Where the Adverse Claim Is Merely Colorable**, the bankruptcy court may require the property to be surrendered upon summary order. Whether the claim is colorable is a question to be decided before the summary order is granted. *In re Waterloo Organ Co.*, 118 Fed. Rep. 904; *In re Davis*, 119 Fed. Rep. 950; *White v. Schloerb*, 178 U. S. 542; *In re Tune*, 115 Fed. Rep. 906; *In re Breslauer*, 121 Fed. Rep. 910; *In re Weinger*, 126 Fed. Rep. 875; *In re Kane*, 131 Fed. Rep. 386; *In re Briskman*, 132 Fed. Rep. 201; *In re Andre*, (C. C. A.) 135 Fed. Rep. 736. See also *Mueller v. Nugent*, 184 U. S. 1.

**Where Necessary to the Preservation of the Estate**, property in the possession of an adverse claimant will be taken into custody by the bankruptcy court. *In re Moody*, 131 Fed. Rep. 525.

**Where Property Is in the Possession of a State Court**, under its regular process, an injunction staying proceedings will not be granted by the bankruptcy court. *Metcalf v. Barker*, 187 U. S. 165; *Ross-Meeham Foundry Co. v. Southern Car, etc., Co.*, 124 Fed. Rep. 403; *Tennessee Producer Marble Co. v. Grant*, (C. C. A.) 135 Fed. Rep. 322; *In re Shoemaker*, 112 Fed. Rep. 648.

**Controversies Properly a Part of the Bankruptcy Proceedings** are within the jurisdiction of the District Court. Thus the court will take jurisdiction of an action by the trustee on the bond of his predecessor. *U. S. v. Union Surety, etc., Co.*, 118 Fed. Rep. 482. Or of a proceeding to

enforce unpaid stock subscriptions against stockholders of a bankrupt corporation. *In re Miller Electrical Maintenance Co.*, 111 Fed. Rep. 515. Or of a controversy between two trustees in bankruptcy appointed in proceedings before the same court as to property claimed by each. *In re Rosenberg*, 116 Fed. Rep. 403.

**755. 4. Jurisdiction of District Courts Held Not Limited by Section 23.** — *Wall v. Cox*, (C. C. A.) 101 Fed. Rep. 403; *Hall v. Kincell*, (C. C. A.) 102 Fed. Rep. 301; *Wayne Knitting Mills v. Nugent*, 104 Fed. Rep. 530.

**5. Jurisdiction of Circuit Courts.** — *T. B. McFarlan Carriage Co. v. Solanas*, (C. C. A.) 106 Fed. Rep. 145; *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 804.

**7. Jurisdiction of State Courts — United States.** — *In re Russell*, (C. C. A.) 101 Fed. Rep. 249; *Wall v. Cox*, (C. C. A.) 101 Fed. Rep. 403; *In re Baudouine*, (C. C. A.) 101 Fed. Rep. 574; *In re Reynolds*, 133 Fed. Rep. 585.

*Alabama.* — *Andrews v. Mather*, 134 Ala. 365.

*Georgia.* — *Wilson v. Parr*, 115 Ga. 629.

*Iowa.* — *Boudinot v. Hamann*, 117 Iowa 22.

*Kentucky.* — *Vance v. Lane*, (Ky. 1904) 82 S. W. Rep. 297.

*Michigan.* — *Lyon v. Clark*, 124 Mich. 105.

*Minnesota.* — *French v. R. P. Smith, etc., Co.*, 81 Minn. 341.

*Missouri.* — *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641; *Swartz v. Frank*, 183 Mo. 438.

*Nebraska.* — *Sheldon v. Parker*, 66 Neb. 610.

*New Hampshire.* — *Truda v. Osgood*, 71 N. H. 185; *Weeks v. Fowler*, 71 N. H. 518.

*New Jersey.* — *Bindseil v. Smith*, 61 N. J. Eq. 645.

*New York.* — *Jones v. Schermerhorn*, 53 N. Y. App. Div. 494; *Frank v. McDams*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 512; *Silberstein v. Stahl*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 353, *affirmed* 63 N. Y. App. Div. 614; *Small v. Muller*, 67 N. Y. App. Div. 143; *Buckingham v. Schuylkill Plush, etc., Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 305; *Rathbone v. Ayer*, 84 N. Y. App. Div. 186; *Alexander v. Union Surety, etc., Co.*, 89 N. Y. App. Div. 3; *Bloch v. Bloch*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 278; *Stern v. Mayer*, 99 N. Y. App. Div. 427. See also *Levi v. Goldberg*, 76 N. Y. App. Div. 210.

*Pennsylvania.* — *Furth v. Stahl*, 205 Pa. St. 439; *Breckons v. Snyder*, 211 Pa. St. 176.

*Washington.* — *State v. Superior Ct.*, 28 Wash. 53, 92 Am. St. Rep. 826.

*Wisconsin.* — *Mueller v. Bruss*, 112 Wis. 406.

**Trover Lies in State Court.** — *In re Spitzer*, (C. C. A.) 130 Fed. Rep. 879.

**756. 7. Period of Limitation under Act of 1898.** — The limitation does not apply where the bankrupt's estate has been reopened for further administration. *Bilafsky v. Abraham*, 183 Mass. 401.

**Bankruptcy Proceedings Are Deemed to Be Begun** at the time the petition is filed. *In re Appel*, 103 Fed. Rep. 931.

- 756.** 5. Accounting — *a.* DUTY TO ACCOUNT. — See note 8.  
*b.* ALLOWANCES TO ASSIGNEE OR TRUSTEE — (1) *Compensation* — The English Statute. — See note 9.  
**757.** In the United States and Canada. — See note 1.  
 (2) *Expenses.* — See note 3.  
**758.** XIV. COMPOSITIONS — 1. Authority to Make Compositions. — See note 5.  
 When Proposal May Be Made. — See note 6.  
**759.** See note 1.  
 2. Composition Meetings — *c.* RIGHT TO VOTE. — See note 10.  
**760.** *d.* NUMBER AND AMOUNT OF CONSENTING CREDITORS — The Bankruptcy Law of the United States. — See note 2.  
 4. Confirmation of Composition — *a.* NECESSITY. — See note 5.  
**761.** *b.* GROUNDS FOR REFUSING CONFIRMATION — Prejudice to Creditors. — See note 1.

**756.** 8. Duty to Account. — Matter of Dwight, 61 N. Y. App. Div. 357; Matter of Thoesen, 62 N. Y. App. Div. 87; Matter of MacFarlane, 65 N. Y. App. Div. 93, *affirmed* 169 N. Y. 608.

Right to Inspect Trustee's Books and Papers. — *In re* Saur, 122 Fed. Rep. 101.

9. Compensation under English Statute. — *In re* Christie, (1900) 1 Q. B. 5.

**757.** 1. Compensation in United States — United States. — *In re* Smith, 108 Fed. Rep. 39; *In re* Epstein, 109 Fed. Rep. 878; *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731; *In re* Hinkel Brewing Co., 124 Fed. Rep. 702; *In re* George Halbert Co., (C. C. A.) 134 Fed. Rep. 236; *In re* Cambridge Lumber Co., 136 Fed. Rep. 983; *In re* Anders Push Button Telephone Co., 136 Fed. Rep. 995. See also *In re* Richards, 127 Fed. Rep. 772.

Kentucky. — *Mitchell v. Stoddard County Bank*, (Ky. 1900) 58 S. W. Rep. 605; *Pickerell v. Thompson*, 109 Ky. 498; *Dunlap v. Fible, etc.*, Distilling Co., (Ky. 1903) 77 S. W. Rep. 173.

Maryland. — National Bank v. Dulaney, 96 Md. 159.

New York. — Matter of MacFarlane, 65 N. Y. App. Div. 93, *affirmed* 169 N. Y. 608; Matter of Bostwick, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 17.

South Dakota. — *Woodcock v. Reilly*, 16 S. Dak. 198.

West Virginia. — *Beecher v. Foster*, 51 W. Va. 605.

If There Are No Assets, so that there will be no compensation, the trustee cannot be compelled to serve. *In re* Levy, 101 Fed. Rep. 247.

No Extra Compensation for Legal Services Rendered by Trustee. — *In re* George Halbert Co., (C. C. A.) 134 Fed. Rep. 236. And see *Morris v. Ellis*, (Tenn. Ch. 1901) 62 S. W. Rep. 250.

3. Allowance for Expenses. — National Surety Co. v. Arterburn, 110 Ky. 832; Matter of Bowlby, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311; *Morris v. Ellis*, (Tenn. Ch. 1901) 62 S. W. Rep. 250.

Expenses Allowable — *Attorney's Fees.* — *Mattingly v. Mattingly*, (Ky. 1903) 72 S. W. Rep. 802.

But such fees are not allowable where the question involves simply business judgment. Matter of Bowlby, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311.

*Auctioneer's Charges.* — Matter of Bowlby, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311.

*Hire of Clerks.* — Matter of Bowlby, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311.

*Publishing Notice of Appointment.* — Matter of Bowlby, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 311.

**758.** 5. Section 23 of the English Bankruptcy Act of 1890 May Be Excluded from a Scheme of Arrangement under section 3 of such Act where the creditors consent to the arrangement and it is approved by the court. *In re* Nepean, (1903) 1 K. B. 794.

6. When Proposal May Be Made in England. — See *In re* Beer, (1903) 1 K. B. 628.

**759.** 1. When Proposal May Be Made in the United States. — *In re* Hilborn, 104 Fed. Rep. 866.

10. Creditors Executing Releases of Their Debts have no right to vote under the English Bankruptcy Act. *Re* Baines, 86 L. T. N. S. 691.

Conditional Withdrawal of Proof Relating to Right to Vote Pending an Appeal Against Admission of Proof. — A creditor claiming to hold security for part of his debt, and who makes a proof for the unsecured balance for the purpose of voting on a composition proposed by the debtor, which proof is admitted for voting by the official receiver, will not, while an appeal against the decision of the official receiver is pending, be allowed to withdraw the proof conditionally; but leave may be given to the creditor to amend the proof by revaluing his security. *In re* Clark, (1901) 1 K. B. 655.

**760.** 2. Assignee of Several Claims Regarded as One Creditor. — *In re* Messengill, 113 Fed. Rep. 366.

5. Confirmation Required. — City Nat. Bank v. Doolittle, (C. C. A.) 107 Fed. Rep. 236; *Adler v. Jones*, (C. C. A.) 109 Fed. Rep. 967; *In re* Frear, 120 Fed. Rep. 978. See also *In re* Pilling, (1903) 2 K. B. 50.

Annuling Bankruptcy After Confirmation. — The court, upon approving a composition or scheme under section 23 of the Bankruptcy Act, 1883, after the debtor has been adjudged bankrupt, will not, as a matter of course, annul the bankruptcy. The court has a discretion in such a case. *In re* Sullivan, 20 Times L. Rep. 393.

**761.** 1. Approval Has Been Refused where it appeared that there would be more than



**761.** Debtor Not Entitled to Discharge. — See note 2.

**762.** Want of Good Faith, Etc. — See note 1.

[Failure to Provide Reasonable Security for Partial Payment of All Unsecured Provable Debts. — See note 3a.]

**764.** 6. Effect of Composition. — See note 2.

7. Secret Agreements with and Preference of Creditors. — See notes 5, 6.

**765.** 8. Setting Aside Compositions — *b*. WHO MAY MOVE. — See notes 4, 5.

*c*. GROUNDS FOR SETTING ASIDE COMPOSITION — Fraud. — See

note 6.

**766.** XV. DISCHARGE OF DEBTOR — 1. Right to Discharge — *a*. IN GENERAL. — See notes 6, 7.

*b*. SURRENDER OF ALL PROPERTY. — See note 8.

enough assets, after recovery of property wrongfully conveyed, to pay all the creditors in full, *Adler v. Jones*, (C. C. A.) 109 Fed. Rep. 967; where the composition was not in accordance with the provisions of the statute, *In re Frear*, 120 Fed. Rep. 978; where the composition agreement failed to include the costs, *In re Harris*, 117 Fed. Rep. 575; where, upon the objection of a dissenting creditor, it appeared that the composition might debar creditors from the right to proceed against stockholders, *In re Woodend*, 133 Fed. Rep. 593; where it appeared that the bankrupt, with fraudulent intent, failed to keep books of account, *In re Olman*, 134 Fed. Rep. 681; *In re Godwin*, 122 Fed. Rep. 111.

The Court Will Confirm the Composition where it appears to be for the best interests of the creditors. *In re H. J. Arrington Co.*, 113 Fed. Rep. 498; *In re Kahn*, 121 Fed. Rep. 412.

Right of Appeal from Order. — The bankrupt and opposing creditors have the right to appeal from order of confirmation or refusal of composition. *U. S. v. Hammond*, (C. C. A.) 104 Fed. Rep. 862. Compare *In re Adler*, 103 Fed. Rep. 449.

Where Part of a Scheme of Arrangement Submitted by a Debtor under the English Bankruptcy Act of 1890, § 3, Is that Certain Creditors Withdraw Their Debts, the court will not refuse its sanction to the scheme merely on the ground that the withdrawals are on terms giving those creditors an advantage over the other creditors, provided that the withdrawals have not been obtained by the debtor himself, or by any person with the knowledge and on behalf of the debtor. *In re E. A. B.*, (1902) 1 K. B. 457.

**761.** 2. Debtor Not Entitled to Discharge. — *In re Olman*, 134 Fed. Rep. 681.

**762.** 1. Misconduct Sufficient to Justify the Court in Refusing to Sanction a Scheme under the English Bankruptcy Act of 1890, § 3, subsec. 9, must have been such as would make it against public policy to sanction the scheme, that is, the misconduct must have been of a gross character. It is not sufficient that the debtor has been guilty of rash and hazardous speculations leading to his insolvency. *In re E. A. B.*, (1902) 1 K. B. 457.

3a. Failure to Provide Reasonable Security — Date When Debts Provable. — The expression "debts provable" in the English Bankruptcy Act, 1890 — which requires that a scheme of arrangement shall, as a condition for its approval by the court, provide reasonable security for payment of not less than 7s. 6d. in the

pound "on all unsecured debts provable against the debtor's estate" — means "debts provable," not at the date of the receiving order, but at the time when the scheme comes before the court for approval, and, therefore, does not include debts which may have previously been withdrawn or released. *In re E. A. B.*, (1902) 1 K. B. 457.

**764.** 2. Effect of Composition as a Discharge. — *In re J. C. Winship Co.*, (C. C. A.) 120 Fed. Rep. 93; *Glover Grocery Co. v. Dorne*, 116 Ga. 216; *Mandell v. Levy*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 147; *Taylor v. Skiles*, 113 Tenn. 288.

5. Promise to Pay Creditor More than Proportionate Amount Held Void. — *In re Chaplin*, 115 Fed. Rep. 162.

6. Recovery of Money Paid. — *In re Chaplin*, 115 Fed. Rep. 162.

**765.** 4. Application by Any Person Interested. — The fact that a creditor has begun legal proceedings against the bankrupt will not prevent his petitioning to set aside a composition. *In re Roukous*, 128 Fed. Rep. 648.

A Creditor Who Has Assigned His Claim has no standing to set aside a composition. *In re Allen B. Wrisley Co.*, (C. C. A.) 133 Fed. Rep. 388.

5. Loss or Waiver of Right. — See *In re Levy*, 110 Fed. Rep. 744.

6. Fraud a Ground for Setting Aside Compositions. — *In re Roukous*, 128 Fed. Rep. 645.

A Deed or Arrangement with Creditors Which Reserves a Benefit to the Debtor or Intentionally Excludes from Its Operation Some of the Creditors is not on that account void under 13 Eliz., c. 5, as tending to delay creditors, where it is intended to give effect to a *bona fide* scheme of arrangement for the benefit of creditors. *Maskelyne v. Smith*, (1903) 1 K. B. 671.

**766.** 6. Rule as to Granting Discharges in England. — *Re Marley*, 82 L. T. N. S. 692.

7. Rule as to Granting Discharges in United States. — *In re McCarty*, 111 Fed. Rep. 151; *In re Waukesha Water Co.*, 116 Fed. Rep. 1009; *In re Miller*, 133 Fed. Rep. 1017.

Corporations Entitled to Discharge. — *In re Marshall Paper Co.*, (C. C. A.) 102 Fed. Rep. 872.

The Court May Withhold the Discharge in order to give a creditor a chance to resort to the state court to establish his right. *Bell v. Dawson Grocery Co.*, 120 Ga. 628.

8. Surrender of All Unexempt Property Essential to Discharge. — *In re Fleishman*, 120 Fed. Rep. 960.

**768.** *a.* DEATH OF DEBTOR. — See note 3.

**769.** *2.* Effect of Discharge — *a.* CONCLUSIVENESS IN GENERAL. — See note 1.

*b.* EFFECT AS TO DEBTOR — (1) *Release from Debts* — (*a*) In General. — See note 2.

**770.** See notes 1, 2.

**771.** Extinguishment of Debt or Liability. — See note 1.

Pending Actions. — See note 3.

(*b*) Alimony and Maintenance of Children. — See notes 4, 5, 6.

**768.** *3.* Discharge Not Prevented by Death of Debtor. — *In re Hicks*, 107 Fed. Rep. 910; *In re Newton*, 122 Fed. Rep. 103; *In re McKenzie*, 132 Fed. Rep. 986.

**769.** *1.* Not Conclusive that All Property Accounted for. — *Rand v. Iowa Cent. R. Co.*, 96 N. Y. App. Div. 413.

*2.* Discharge as Release from Debts — General Rule — *England*. — *Ford v. Stewart*, 35 N. Bruns. 568.

*United States*. — *Klipstein v. Allen-Miles Co.*, (C. C. A.) 136 Fed. Rep. 385.

*Georgia*. — *Graham v. Richerson*, 115 Ga. 1002.

*Illinois*. — *Rush v. Flood*, 105 Ill. App. 182.

*Massachusetts*. — *McDermott v. Hall*, 177 Mass. 224; *Harmon v. McDonald*, 187 Mass. 578.

*Minnesota*. — *Leitch v. Northern Pac. R. Co.*, (Minn. 1905) 103 N. W. Rep. 704.

*New York*. — *Smith v. Wheeler*, 55 N. Y. App. Div. 170.

*Texas*. — *Blackwell v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1903) 76 S. W. Rep. 454; *Imhoff v. Whittle*, (Tex. Civ. App. 1904) 81 S. W. Rep. 814.

*Washington*. — *Delta County Bank v. McGranahan*, 37 Wash. 307.

If a Creditor Has Not Been Given the Statutory Notice, and has not actual notice, his debt will not be barred by the discharge. *Reynolds v. Whittemore*, 99 Me. 108.

**770.** *1.* Discharge of Debts Provable but Not Proved. — *Harmon v. McDonald*, 187 Mass. 578.

*2.* Discharge of Debts Not Scheduled. — *Santa Rosa Bank v. White*, 139 Cal. 703; *Zimmerman v. Ketchum*, 66 Kan. 98; *Harmon v. McDonald*, 187 Mass. 578; *Matter of David*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 516; *Delta County Bank v. McGranahan*, 37 Wash. 307. See also *Ross-Lewin v. Gooldd*, 211 Ill. 384.

Under the Act of 1898, unscheduled debts are not discharged unless the creditors had notice or actual knowledge of the bankruptcy proceedings.

*United States*. — *In re Monroe*, 114 Fed. Rep. 398.

*Alabama*. — *Karter v. Fields*, 140 Ala. 352.

*Kentucky*. — *Jones v. Walter*, 115 Ky. 556.

*Michigan*. — *Wineman v. Fisher*, 135 Mich. 604.

*New York*. — *Columbia Bank v. Birkett*, 174 N. Y. 112; *Tyrrel v. Hammerstein*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 505; *Collins v. McWalters*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 648; *Columbia Bank v. Birkett*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 391, affirmed 65 N. Y. App. Div. 615; *Sutherland v. Lasher*, (Supm.

Ct. Spec. T.) 41 Misc. (N. Y.) 249, affirmed 87 N. Y. App. Div. 633; *Feldmark v. Weinstein*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 329; *Bernheim v. Bloch*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 581; *Woodward v. Schaefer*, (Supm. Ct. App. T.) 91 N. Y. Supp. 104; *Graber v. Gault*, 103 N. Y. App. Div. 511.

*Texas*. — *Fields v. Rust*, 36 Tex. Civ. App. 350; *Biela v. Urbanczyk*, (Tex. Civ. App. 1905) 85 S. W. Rep. 451.

Where the Creditor's Name Was, Through a Clerical Error, Misspelled in the schedule it was held that the creditor was not barred by the discharge. *Liesum v. Kraus*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 376.

Failure to Give the Creditor's Correct Address, where it is not known by the bankrupt, will not except a debt otherwise properly scheduled from discharge. *Steele v. Thalheimer*, (Ark. 1905) 86 S. W. Rep. 305.

**Burden of Proof.** — The burden is on the plaintiff, after the defendant has set up his discharge, to show his debt was not scheduled and that he did not have notice. *Laffoon v. Kerner*, 138 N. Car. 281. But see *Armstrong v. Sweeney*, (Neb. 1905) 103 N. W. Rep. 436.

**Immaterial Variances**, where the creditor had notice of the proceedings, will not save the creditor's claim from being barred. *Grosso v. Marx*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 500.

**771.** *1.* Debts Not Extinguished by Discharge. — *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233; *Collins v. McWalters*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 648; *Bank of Commerce v. Elliott*, 109 Wis. 648.

*3.* Since Trover Involves Title Simply and not debt, it has been held that the discharge in bankruptcy cannot be set up to bar such an action. *Berry v. Jackson*, 115 Ga. 196, 90 Am. St. Rep. 102.

*4.* Claims for Alimony Not Released by Discharge. — *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; *Wetmore v. Markoe*, 196 U. S. 68; *Deen v. Bloomer*, 191 Ill. 416; *Welty v. Welty*, 105 Ill. 335, 88 Am. St. Rep. 208; *People v. Grell*, (Supm. Ct. Spec. T.) 65 N. Y. Supp. 522; *Young v. Young*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 335.

**Judgment for Alimony Held Released.** — *Fite v. Fite*, 110 Ky. 197.

*5.* Annuity under Separation Agreement. — *Dunbar v. Dunbar*, 190 U. S. 340.

*6.* Order for Support of Infant Children Not Released by Discharge. — *Rush v. Flood*, 105 Ill. App. 182. See also *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 223.

**Sealed Contract to Support Wife and Child.** — *Dunbar v. Dunbar*, 180 Mass. 170, 94 Am. St. Rep. 623.

- 771.** (c) Judgments. — See note 8.  
**772.** See note 1.  
 Judgments Rendered After the Commencement of a Proceeding. — See note 4.  
**773.** See note 1.  
 Judgments Rendered After the Discharge. — See note 5.  
 If the Original Debt Was Not Dischargeable. — See note 7.  
**774.** See note 3.  
 The Costs. — See note 4.  
 (d) Lien Debts. — See note 5.  
**775.** See notes 2, 6.  
 (e) Contingent Liabilities. — See note 8.  
**776.** See note 1.  
 (f) Continuing Contracts. — See note 2.  
**777.** Rents Accruing After the Discharge. — See notes 1, 3.  
**779.** (h) Taxes and Other Debts Due the Government — In the United States. — See note 1.  
 (i) Partnership Debts — In the United States. — See notes 4, 5.  
**780.** (j) Fiduciary Debts — *aa.* STATUTORY PROVISIONS. — See note 1.

**771.** 8. Judgments Barred by Discharge. — *Coe v. Waters*, 16 Colo. App. 311; *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 606; *Burnham v. Pidcock*, 58 N. Y. App. Div. 273; *Aiken v. Haskins*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 505; *Finnegan v. Hall*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 773; *Matter of Arkell*, 65 N. Y. App. Div. 130; *Disler v. McCauley*, 66 N. Y. App. Div. 42; *Grosso v. Marx*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 500; *Imhoff v. Whittle*, (Tex. Civ. App. 1904) 81 S. W. Rep. 814.

**772.** 1. Execution Issued After Discharge. — *Barnes Mfg. Co. v. Norden*, 67 N. J. L. 493.

**4.** Judgments Rendered Pending Bankruptcy Proceeding Held to Be Barred. — *Cavanaugh v. Fenley*, (Minn. 1905) 103 N. W. Rep. 711; *Hussey v. Judson*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 370; *Lent v. Farnsworth*, 94 N. Y. App. Div. 99, affirmed 180 N. Y. 503.

**773.** 1. Judgments Rendered Pending Bankruptcy Proceeding Held Not to Be Barred. — *Aiken v. Haskins*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 505. See also *Howe v. Noyes*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 338.

**5.** Judgment by Consent After Discharge Not Barred. — *Stevens v. Meyers*, 72 N. Y. App. Div. 128.

**7.** Judgment for Non-dischargeable Debt Held to Be Barred. — *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 606.

**774.** 3. Fiduciary Debts Held Not Barred. — *Cooke v. Plaisted*, 181 Mass. 82.

**4.** Costs of Judgment. — Where costs are included in a judgment rendered after bankruptcy proceedings were begun, they will not be barred. *Aiken v. Haskins*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 505.

**5.** Liens Not Released by Discharge. — *Georgia*. — *Evans v. Rounsaville*, 115 Ga. 684; *McCall v. Herring*, 116 Ga. 235; *Philemon v. Marshall*, 116 Ga. 811; *Camp v. Young*, 119 Ga. 981.

*Illinois*. — *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233.

*Minnesota*. — *Leitch v. Northern Pac. R. Co.*, (Minn. 1905) 103 N. W. Rep. 704.

*Nebraska*. — *Paxton v. Scott*, 66 Neb. 385.

*New Jersey*. — *Bassett v. Thackara*, (N. J. 1905) 60 Atl. Rep. 39.

*North Dakota*. — *Powers Dry Goods Co. v. Nelson*, 10 N. Dak. 580.

*Texas*. — *Pinkard v. Willis*, 24 Tex. Civ. App. 69.

**775.** 2. Judgment Liens Not Released. — *Pinkard v. Willis*, 24 Tex. Civ. App. 69.

**6.** Mechanics' Liens. — *Holland v. Cunliff*, 96 Mo. App. 67; *In re Emslie*, (C. C. A.) 102 Fed. Rep. 291.

**8.** Stockholder's Liability. — *Elsbree v. Burt*, 24 R. I. 322. Compare *Dight v. Chapman*, 44 Oregon 265.

**Director's Statutory Liability Not Barred.** — *Old Colony Boot, etc., Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557.

**776.** 1. Liabilities Dependent Upon Continuances. — *Dunbar v. Dunbar*, 180 Mass. 170, 94 Am. St. Rep. 623.

**2.** Continuing Contracts. — *Bernhardt v. Curtis*, 109 La. 178, 94 Am. St. Rep. 445, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776.

**777.** 1. Future Rents Not Affected by Discharge. — *Bernhardt v. Curtis*, 109 La. 178, 94 Am. St. Rep. 445, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777.

**3.** Lease Held Not Terminated by Discharge. — *Witthaus v. Zimmermann*, 91 N. Y. App. Div. 202.

**779.** 1. Debts Due a State Not Barred by Discharge. — *Olds v. Forrester*, 126 Iowa 456.

**4.** English Rule Followed in United States. — *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. Rep. 249; *In re Kaufman*, 136 Fed. Rep. 262; *Young v. Stevenson*, 73 Ark. 480; *Loomis v. Wallblom*, (Minn. 1905) 102 N. W. Rep. 1114. But see *In re Hale*, 107 Fed. Rep. 432.

**5.** Absence of Proceedings by or Against Firm. — *Dodge v. Kaufman*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 248.

**780.** 1. Fiduciary Debts Not Discharged. — *United States*. — *Bracken v. Milner*, 104 Fed. Rep. 522.

*Minnesota*. — *Gee v. Gee*, 84 Minn. 384.

*Missouri*. — *Harrington v. Herman*, (Mo. 1903) 72 S. W. Rep. 546.

*Nebraska*. — *Gerner v. Yates*, 61 Neb. 100.

- 780.** *bb.* WHAT CONSTITUTES FIDUCIARY RELATION — Technical Trusts. — See notes 2, 4.
- 781.** Implied Trusts. — See notes 1, 6, 7.
- 782.** (k) Debts Contracted by Fraud. — See note 3.  
Actual, Positive Fraud. — See note 4.
- 783.** (1) Liabilities Arising Out of Torts — Judgments for Wilful and Malicious Injuries. — See note 11.

*New York.* — Watertown Carriage Co. v. Hall, 176 N. Y. 313.

*South Dakota.* — Shipley v. Platts, 17 S. Dak. 357.

*Utah.* — Warren v. Robinson, 21 Utah 429.

*Vermont.* — Stickney v. Parmenter, 74 Vt. 58.

Debts Created by Defalcation, etc., of Public Officers Not Discharged. — J. L. Mott Iron Works v. Toumey, 94 N. Y. App. Div. 216.

The Word "Officer" in the Act of 1898 is held to apply to an officer of a private corporation, *In re Harper*, 133 Fed. Rep. 970.

Exception Limited to Public Officers and Fiduciaries. — Crawford v. Burke, 195 U. S. 176. See also Matter of Bullis, 68 N. Y. App. Div. 508, affirmed 171 N. Y. 689. But see Frey v. Torrey, 70 N. Y. App. Div. 166, affirmed 175 N. Y. 501; Hyde v. Lesser, 93 N. Y. App. Div. 320; Morse v. Kaufman, 100 Va. 218.

Judgment Including Claim for Moneys Embezzled. — A judgment made up of various items and including a claim for moneys embezzled, the amount of which was not found separately in the verdict, was held to be released by the discharge of the debtor. *Cooke v. Plaisted*, 181 Mass. 82.

**780. 2.** What Constitutes Fiduciary Relation — Existence of Technical Trust. — *In re Harper*, 133 Fed. Rep. 970; *Gee v. Gee*, 84 Minn. 384; *Harrington v. Herman*, (Mo. 1903) 72 S. W. Rep. 546; *Stickney v. Parmenter*, 74 Vt. 58.

Effect of Implied Agreement to Hold in Trust. — *Reeves v. McCracken*, (N. J. 1905) 60 Atl. Rep. 332.

4. Executors and Administrators. — *Stickney v. Parmenter*, 74 Vt. 58, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 780.

**781. 1.** Partners are not in a fiduciary relation within the meaning of the Act. *Gee v. Gee*, 84 Minn. 384.

6. Brokers, Factors, and Commission Merchants. — *Crawford v. Burke*, 195 U. S. 176; *Gee v. Gee*, 84 Minn. 384; Matter of Benedict, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 230.

7. Trust or Confidence in Popular Sense. — *Bracken v. Milner*, 104 Fed. Rep. 522.

**782. 3.** Debts Created by Fraud Not Discharged. — *Forsyth v. Vehmeyer*, 177 U. S. 177; *Bullis v. O'Beirne*, 195 U. S. 606; *Bracken v. Milner*, 104 Fed. Rep. 522; *In re Wollock*, 120 Fed. Rep. 516; *Crawford v. Burke*, 201 Ill. 581; *Frey v. Torrey*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 216, affirmed 70 N. Y. App. Div. 166; Matter of Bullis, 68 N. Y. App. Div. 508, affirmed 171 N. Y. 689; *Frey v. Torrey*, 70 N. Y. App. Div. 166, affirmed 175 N. Y. 501; *Predmore v. Torrey*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 127; *Morse v. Kaufman*, 100 Va. 218.

Capacity of Parties Immaterial. — *In re Butts*, 120 Fed. Rep. 966.

The Bankruptcy Court Will Not Go Behind a Judgment, gained more than ten years before, to discover fraud which was not shown in the original action. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A.) 122 Fed. Rep. 232.

The Burden of Proof is on the party seeking to show fraud. *Culver v. Torrey*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 793.

An Overpayment by Mistake which the debtor fails to return is not a debt created by fraud. *Wilcoxon v. Chicago*, etc., R. Co., 116 Fed. Rep. 444.

A Judgment on a Note cannot be brought within the excepted class, on the ground that the note was founded on fraud, since the holder is estopped by his election to sue on the contract. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. Rep. 361, affirmed (C. C. A.) 122 Fed. Rep. 232.

A Judgment for Conversion of Property, not being founded on fraud, is discharged. *Crosby v. Miller*, 25 R. I. 172. See also *Bryant v. Kinyon*, 127 Mich. 152.

A Judgment for Costs in a Criminal Proceeding is not a debt contracted by fraud. *Olds v. Forrester*, 126 Iowa 456.

4. Only Positive Fraud Contemplated by Exception. — *Bullis v. O'Beirne*, 195 U. S. 606; *Barnes Mfg. Co. v. Norden*, 67 N. J. L. 493; *Culver v. Torrey*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 793; *Collins v. McWalters*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 648; *Crosby v. Miller*, 25 R. I. 172.

**783. 11.** Judgments for Wilful and Malicious Injuries. — *In re Colaluca*, 133 Fed. Rep. 255; *Sanderson v. Hunt*, 116 Ky. 435; *Burnham v. Pidcock*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 65, affirmed 58 N. Y. App. Div. 273; *Colwell v. Tinker*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 330, affirmed 65 N. Y. App. Div. 20; *Watertown Carriage Co. v. Hall*, 66 N. Y. App. Div. 84; *Stefanini v. Sroka*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 614.

A Judgment for Breach of Promise is not barred where the plaintiff was seduced by the bankrupt and a child had been born. *Disler v. McCauley*, 66 N. Y. App. Div. 42, reversing (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 411.

Where there is no seduction proved or malice or injury to character a judgment for breach of promise is barred. *Finnegan v. Hall*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 773.

Judgment for Seduction of Plaintiff's Daughter Not Barred. — *In re Freche*, 109 Fed. Rep. 620.

Where Seduction is a Criminal Offense, a judgment for damages for seduction is not barred by the discharge. *In re Maples*, 105 Fed. Rep. 919.

Judgment for Criminal Conversation Not Barred. — *Tinker v. Colwell*, 193 U. S. 473, 169 N. Y. 531.

**784.** (m) Extraterritorial Effect of Discharge — *bb.* 'DISCHARGE UNDER STATE INSOLVENCY LAWS — Nonresidence of Creditors. — See note 6.

**787.** Abandonment of Extraterritorial Immunity. — See note 2.

(2) *Exemption from Arrest and Imprisonment.* — See note 3.

**789.** (3) *New Promise to Pay Debt Released.* — See note 2.

**790.** An Express, Positive, and Unconditional Promise. — See note 2.

**791.** A Written Promise. — See note 5.

**792.** See note 1.

The Question Whether the New Promise Is the Real Cause of Action. — See note 3.

*c.* EFFECT AS TO PERSONS LIABLE WITH DEBTOR — Co-obligors' Liability to Creditors. — See note 5.

**793.** Co-obligors' Claim for Reimbursement. — See notes 1, 2.

Contribution Between Bankrupt and His Co-obligor. — See note 4.

**794.** See notes 1, 2.

Set-off of Claim for Contribution or Reimbursement. — See note 5.

3. Opposition to Discharge — *a.* WHO MAY OPPOSE. — See note 7.

A Judgment for Libel has been held not a dischargeable debt. *McDonald v. Brown*, 23 R. I. 546, 91 Am. St. Rep. 659.

A Judgment for Malicious Prosecution is not discharged. *Mason v. Perkins*, 180 Mo. 702.

Claim for Conversion Held Not Barred. — *Watertown Carriage Co. v. Hall*, 75 N. Y. App. Div. 201, affirmed 176 N. Y. 313.

**784.** 6. Debts Due Nonresidents Not Discharged. — *Swift v. Winchester*, 96 Me. 480, 90 Am. St. Rep. 414.

**787.** 2. Debt of Nonresident Included in Schedule. — *In re Claiborne*, 109 Fed. Rep. 74.

3. Exemption from Arrest. — *In re Dresser*, 124 Fed. Rep. 915; *People v. Erlanger*, 132 Fed. Rep. 883.

As to Debts Not Dischargeable, see *In re Marcus*, (C. C. A.) 105 Fed. Rep. 907.

Arrest Enjoined Pending Discharge in Bankruptcy. — *Knott v. Putnam*, 107 Fed. Rep. 907.

**789.** 2. Debtor Bound by New Promise to Pay Discharged Debts. — *Brooks v. Payne*, (Ky. 1903) 77 S. W. Rep. 190; *Gruenberg v. Treanor*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 232; *Sundling v. Willey*, (S. Dak. 1905) 103 N. W. Rep. 38; *Taylor v. Skiles*, 113 Tenn. 288. See also *In re Sweetser*, 128 Fed. Rep. 165, affirmed 130 Fed. Rep. 103.

Time of Making Promise. — *Dacovich v. Schley*, (C. C. A.) 134 Fed. Rep. 72.

It must appear that the new promise was made both after the discharge was granted and before suit was brought. *Thornton v. Nichols*, 119 Ga. 50.

Where the Discharge Is by Virtue of an Order Affirming a Composition, the original debt is extinguished and no cause of action will arise upon a subsequent promise without consideration. *Taylor v. Skiles*, 113 Tenn. 288.

May Proceed Both in Bankruptcy and on New Promise. — *Dowse v. Hammond*, (C. C. A.) 130 Fed. Rep. 103, affirming 128 Fed. Rep. 165.

**790.** 2. Express Promise Required. — *Mandell v. Levy*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 147.

Unconditional Promise Required. — *Brooks v. Paine*, (Ky. 1903) 77 S. W. Rep. 190; *International Harvester Co. v. Lyman*, 90 Minn. 275; *Sundling v. Willey*, (S. Dak. 1905) 103 N. W. Rep. 38.

Positive and Unequivocal Promise Required. —

*Thornton v. Nichols*, 119 Ga. 50; *Smith v. Stanchfield*, 84 Minn. 343.

**791.** 5. Writing Not Required. — *Thornton v. Nichols*, 119 Ga. 50; *Smith v. Stanchfield*, 84 Minn. 343.

**792.** 1. Writing Expressly Required by Statute. — *Gruenberg v. Treanor*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 232; *Bair v. Hilbert*, 84 N. Y. App. Div. 621; *Mandell v. Levy*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 147.

3. Old Debt Regarded as the Cause of Action. — *Gruenberg v. Treanor*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 232; *Sundling v. Willey*, (S. Dak. 1905) 103 N. W. Rep. 38.

5. Liability of Co-obligors Not Affected by Discharge. — *Leader v. Mattingly*, 140 Ala. 444; *Holland v. Cunliff*, 96 Mo. App. 67; *St. Louis World Pub. Co. v. Rialto Grain, etc., Co.*, 108 Mo. App. 479; *Witthaus v. Zimmermann*, 91 N. Y. App. Div. 202; *Pinkard v. Willis*, 24 Tex. Civ. App. 69.

Rule Limited to Provable Obligations. — *Klipstein v. Allen-Miles Co.*, (C. C. A.) 136 Fed. Rep. 385.

A Judgment Against a Garnishee, Before the Discharge of the Principal Debtor in Bankruptcy, is not discharged by the discharge of the principal debtor. *Marx v. Hart*, 166 Mo. 503.

**793.** 1. If the Claim of the Surety Was Not Provable. — *Bernhardt v. Curtis*, 109 La. 171, 94 Am. St. Rep. 445.

2. Right of Surety if Creditor Neglects to Prove. — *Smith v. Wheeler*, 55 N. Y. App. Div. 170.

4. Discharge of Surety Debts. — If the claim on the note was proved in the bankruptcy proceedings by the holder, the surety is bound by the discharge. *Hayer v. Comstock*, 115 Iowa 187.

**794.** 1. Claim for Contribution Arising After Discharge. — *Goding v. Rosenthal*, 180 Mass. 43.

2. Claim for Contribution Arising Before Discharge. — *Smith v. Wheeler*, 55 N. Y. App. Div. 170.

5. Set-off of Claim for Contribution or Reimbursement. — *Morgan v. Wordell*, 178 Mass. 350.

7. Opposition by Creditors or Other Persons Interested. — *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965; *In re Conroy*, 134 Fed. Rep. 764.

The Trustee may be "a party in interest." *In re Levey*, 133 Fed. Rep. 572.

**795.** *b.* EVIDENCE. — See note 2.

**796.** *d.* GROUNDS FOR REFUSING DISCHARGE — (1) *In General* — In the United States. — See note 5.

Only Statutory Grounds Available. — See notes 6, 7, 9.

(2) *Offenses Against Statute*. — See note 11.

**797.** (3) *Fraud*. — See note 2.

(4) *Concealment of or False Statements as to Assets and Liabilities* — The Bankruptcy Law of the United States. — See notes 7, 8.

In Involuntary Bankruptcy, an attaching creditor of the alleged bankrupt may resist the adjudication. *In re C. Moench, etc., Co.*, 123 Fed. Rep. 977.

Right to Oppose Discharge May Be Lost by Laches. — *Kentucky Nat. Bank v. Carley*, (C. C. A.) 121 Fed. Rep. 822.

**795.** 2. Burden of Proof. — In *In re Logan*, 102 Fed. Rep. 876, it was held that the specifications in opposition to the discharge could not be taken as confessed because of the debtor's failure to answer them.

**796.** 5. Insanity of the Debtor will not bar his discharge. *In re Miller*, 133 Fed. Rep. 1017.

Where a Probable Showing of Opposition Is Made, the court may refuse to grant the discharge pending an investigation. *In re Steed*, 107 Fed. Rep. 682.

6. Opposition Only on Statutory Grounds. — *In re Goodale*, 109 Fed. Rep. 783; *In re Waukesha Water Co.*, 116 Fed. Rep. 1009; *In re Blalock*, 118 Fed. Rep. 679.

The Motive of the Bankrupt in Filing a Voluntary Petition in order to avoid a judgment of a creditor against him, will not affect his right to a discharge. *Finnegan v. Hall*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 773.

Giving a False Report to a Mercantile Agency is not a ground for discharge. *In re Steed*, 107 Fed. Rep. 682.

7. Want of Jurisdiction by reason of the fact that the debtor has not resided six months in the district cannot be raised for the first time in opposition to the bankrupt's discharge. *In re Clisdell*, 101 Fed. Rep. 246.

9. Refusal of a Discharge under the Act of 1867 will not prevent the discharge, under the Act of 1898, of a debt which has been kept alive by judgment. *In re Herrman*, 134 Fed. Rep. 566.

11. See *In re Solomons*, (1904) 1 K. B. 106.

**797.** 2. Fraud Not Specified in Bankruptcy Law of United States. — *Paxton v. Scott*, 66 Neb. 385.

Where the fraud consists of acts within the knowledge of the trustee and not objected to by him, it cannot be made the basis for revoking the discharge. *In re Hansen*, 107 Fed. Rep. 252.

7. Making False Oath Ground for Refusing Discharge. — *In re Lowenstein*, 106 Fed. Rep. 51; *Bauman v. Feist*, (C. C. A.) 107 Fed. Rep. 83; *In re Lesser*, (C. C. A.) 114 Fed. Rep. 83, reversing 108 Fed. Rep. 205; *In re Gammon*, 109 Fed. Rep. 312; *In re Eaton*, 110 Fed. Rep. 731; *In re Bullwinkle*, 111 Fed. Rep. 364; *In re Gaylord*, (C. C. A.) 112 Fed. Rep. 668; *In re Salisbury*, 113 Fed. Rep. 833; *In re Miner*, 114 Fed. Rep. 998; *In re Semmel*, 118 Fed. Rep. 487;

*In re Breiner*, 129 Fed. Rep. 155; *In re Conroy*, 134 Fed. Rep. 764; *Barton v. Texas Produce Co.*, (C. C. A.) 136 Fed. Rep. 355; *In re Herrman*, (C. C. A.) 136 Fed. Rep. 767.

False Oath Must Be Made Knowingly and Fraudulently. — *In re Beebe*, 116 Fed. Rep. 48; *In re Patterson*, 121 Fed. Rep. 921; *Kentucky Nat. Bank v. Carley*, (C. C. A.) 127 Fed. Rep. 686.

False Oath Must Be Made in the Bankruptcy Proceedings. — *In re Blalock*, 118 Fed. Rep. 679; *In re Goldsmith*, 101 Fed. Rep. 570; *In re Marx*, 102 Fed. Rep. 676.

Slight Inaccuracies Not Fatal. — *In re Miner*, 114 Fed. Rep. 998.

The Burden of Proof to establish the making of the false oath is on the creditors. *In re Gaylord*, 106 Fed. Rep. 833, affirmed (C. C. A.) 112 Fed. Rep. 668.

8. Concealment, etc. — Refusal of Discharge under Law of United States. — *In re Dews*, 101 Fed. Rep. 549; *In re Morgan*, 101 Fed. Rep. 982; *In re Mendelsohn*, 102 Fed. Rep. 119; *In re McGurn*, 102 Fed. Rep. 743; *In re Logan*, 102 Fed. Rep. 876; *In re Hoffmann*, 102 Fed. Rep. 979; *In re Lewin*, 103 Fed. Rep. 852; *In re Adams*, 104 Fed. Rep. 72; *In re Bemis*, 104 Fed. Rep. 672; *In re Heyman*, 104 Fed. Rep. 677; *In re Howell*, 105 Fed. Rep. 594; *In re Becker*, 106 Fed. Rep. 54, affirmed (C. C. A.) 110 Fed. Rep. 1020; *In re Lesser*, (C. C. A.) 114 Fed. Rep. 83, reversing 108 Fed. Rep. 205; *In re Feldstein*, 108 Fed. Rep. 794, affirmed (C. C. A.) 115 Fed. Rep. 259; *In re Wilcox*, (C. C. A.) 109 Fed. Rep. 628; *In re Bullwinkle*, 111 Fed. Rep. 364; *In re Grossman*, 111 Fed. Rep. 507; *In re Stoddart*, 114 Fed. Rep. 486; *In re Holstein*, 114 Fed. Rep. 794; *Osborne v. Perkins*, (C. C. A.) 112 Fed. Rep. 127; *In re Royal*, 112 Fed. Rep. 135; *In re Otto*, 115 Fed. Rep. 860; *Hudson v. Mercantile Nat. Bank*, (C. C. A.) 119 Fed. Rep. 346; *In re Leslie*, 119 Fed. Rep. 406; *In re Breiner*, 129 Fed. Rep. 155; *E. H. Godshalk Co. v. Sterling*, (C. C. A.) 129 Fed. Rep. 580; *In re Milgraum*, 129 Fed. Rep. 827; *In re Breitling*, (C. C. A.) 133 Fed. Rep. 146. See also *In re Fitchard*, 103 Fed. Rep. 742.

A discharge will be withheld from a bankrupt where he has not accounted for assets approximating \$50,000 shown to have been in his possession one year before. *In re Finkelstein*, 101 Fed. Rep. 418.

Omissions from Schedule of Property Fraudulently Conveyed. — *In re Schenck*, 116 Fed. Rep. 554; *In re House*, 103 Fed. Rep. 616.

Property Alleged to Be Concealed Must Be Shown to Belong to Bankrupt. — *Fellows v. Freudenthal*, (C. C. A.) 102 Fed. Rep. 731; *In re Locks*, 104 Fed. Rep. 783; *In re Ferris*, 105 Fed. Rep. 356; *In re Countryman*, 119 Fed.

**798.** The English Statute. — See note 1.

The Fraudulent Intent. — See note 6.

**799.** (6) *Failure to Keep, Concealment, or Destruction of Books of Account* — Failure to Keep Books of Account. — See note 8.

**800.** Destruction or Concealment of Books. — See note 1.

What Are "Proper" Books. — See note 3.

Time of Acts or Omissions. — See note 5.

**801.** Intent of Debtor. — See note 2.

**802.** (10) *Previous Bankruptcy or Insolvency*. — See note 6.

Rep. 639; *In re Dauchy*, 122 Fed. Rep. 688, affirmed (C. C. A.) 130 Fed. Rep. 532.

**Fact of Concealment of Assets Must Be Affirmatively Established.** — *In re Lesser*, (C. C. A.) 114 Fed. Rep. 83; *In re Baernkopf*, 117 Fed. Rep. 975.

**A Fair Preponderance of Evidence** is sufficient to establish the fact of concealment. *In re Leslie*, 119 Fed. Rep. 406; *In re Dauchy*, 122 Fed. Rep. 688, affirmed (C. C. A.) 130 Fed. Rep. 532.

**Continued Concealment Ground for Preventing Discharge.** — *In re Quackenbush*, 102 Fed. Rep. 282.

**798. 1. Provision of English Statute.** — See *In re Taylor*, (1901) 1 K. B. 744.

**6. Omissions Without Fraudulent Intent.** — *In re Dews*, 101 Fed. Rep. 549; *Fellows v. Freudenthal*, (C. C. A.) 102 Fed. Rep. 731; *In re McGurn*, 102 Fed. Rep. 743; *In re Pierce*, 103 Fed. Rep. 64; *In re Fitchard*, 103 Fed. Rep. 742; *In re Adams*, 104 Fed. Rep. 72; *In re Bryant*, 104 Fed. Rep. 789; *In re Meyers*, 105 Fed. Rep. 353; *In re Slingluff*, 105 Fed. Rep. 502; *In re Conn*, 108 Fed. Rep. 525; *In re Marsh*, 109 Fed. Rep. 602; *In re Goodale*, 109 Fed. Rep. 783; *In re Eaton*, 110 Fed. Rep. 731; *In re Howden*, 111 Fed. Rep. 723; *In re Todd*, 112 Fed. Rep. 315; *In re Miner*, 114 Fed. Rep. 998; *Fields v. Karter*, (C. C. A.) 115 Fed. Rep. 951; *In re Blalock*, 118 Fed. Rep. 679; *In re Patterson*, 121 Fed. Rep. 921; *In re Brumbaugh*, 128 Fed. Rep. 971; *In re Boyden*, 132 Fed. Rep. 991; *In re Hamilton*, 133 Fed. Rep. 823; *Woods v. Little*, (C. C. A.) 134 Fed. Rep. 229; *In re Neely*, 134 Fed. Rep. 667; *In re Taplin*, 135 Fed. Rep. 861. See also *Smith v. Keegan*, (C. C. A.) 111 Fed. Rep. 157.

**Omitting Exempt Property Not Fraudulent.** — *In re Semmel*, 118 Fed. Rep. 487; *In re Le Claire*, 124 Fed. Rep. 654.

**Property Which Does Not Vest in Trustee.** — An omission to list a claim for alimony held by the bankrupt against her husband is not fraudulent, such claim not being assignable. *In re Le Claire*, 124 Fed. Rep. 654.

The omission to schedule a part of a monthly salary due, since the claim did not pass to the trustee, was held not to be such a concealment of property as would prevent a discharge. *In re Doherty*, 135 Fed. Rep. 432.

**799. 8. Failure to Keep, Concealing, or Destroying Books of Account** — *United States*. — *In re Morgan*, 101 Fed. Rep. 982; *In re Cashman*, 103 Fed. Rep. 67; *In re Spear*, 103 Fed. Rep. 779; *In re Bragasa*, 103 Fed. Rep. 936; *In re Bemis*, 104 Fed. Rep. 672; *Bragassa v. St. Louis Cycle*, (C. C. A.) 107 Fed. Rep. 77; *In re Corn*, 106 Fed. Rep. 143; *In re Feldstein*, 108 Fed. Rep. 794, affirmed (C. C. A.) 115 Fed.

Rep. 259; *In re Kenyon*, 112 Fed. Rep. 658; *In re Greenberg*, 114 Fed. Rep. 773; *In re McBachron*, 116 Fed. Rep. 783; *In re Patterson*, 121 Fed. Rep. 921; *In re Stein*, 130 Fed. Rep. 629, affirmed (C. C. A.) 134 Fed. Rep. 235; *In re Alvord*, 135 Fed. Rep. 236.

*California*. — *Matter of Clark*, 128 Cal. 147; *Matter of Sullivan*, 139 Cal. 257.

**Failure to Keep Books After Cessation of Business.** — The fact that at the time of the filing of the petition, two years after a general assignment and the cessation of business by the bankrupt, he did not keep any books, does not constitute a valid ground for refusing the discharge. *In re Prager*, 134 Fed. Rep. 1006.

**Right of Trustees to Books of Account.** — See *In re Burnand*, (1904) 2 K. B. 68.

**800. 1. Destruction or Concealment of Books.** — *In re Brice*, 102 Fed. Rep. 114; *In re Mendelsohn*, 102 Fed. Rep. 119; *Ablowich v. Stursberg*, (C. C. A.) 105 Fed. Rep. 751; *In re Conley*, 120 Fed. Rep. 42; *In re Studebaker*, (C. C. A.) 127 Fed. Rep. 951, reversing 124 Fed. Rep. 945.

**Mutilating the Books** of a company in which the bankrupt has no interest will not prevent his discharge. *Bauman v. Feist*, (C. C. A.) 107 Fed. Rep. 83.

**3. What Are "Proper" Books.** — *In re Morgan*, 101 Fed. Rep. 982; *Matter of Sullivan*, 139 Cal. 257.

**5. Failure to Keep, or Destruction of, Books Before Passage of Law.** — *In re Marx*, 102 Fed. Rep. 676.

**801. 2. Intent Made Material by Statute of United States.** — *In re Morgan*, 101 Fed. Rep. 982; *In re Brice*, 102 Fed. Rep. 114; *In re Marx*, 102 Fed. Rep. 676; *In re Cashman*, 103 Fed. Rep. 67; *In re Bragasa*, 103 Fed. Rep. 936; *In re Spear*, 103 Fed. Rep. 779; *In re Wilson*, 107 Fed. Rep. 83; *In re Corn*, 106 Fed. Rep. 143; *In re Lafleche*, 109 Fed. Rep. 307; *In re Kenyon*, 112 Fed. Rep. 658; *In re Feldstein*, (C. C. A.) 115 Fed. Rep. 259; *In re Blalock*, 118 Fed. Rep. 679; *In re Chamberlain*, 125 Fed. Rep. 629; *In re Studebaker*, (C. C. A.) 127 Fed. Rep. 951; *Van Ingen v. Schöphofen*, (C. C. A.) 129 Fed. Rep. 352; *In re Mackenzie*, 132 Fed. Rep. 114; *In re Halsell*, 132 Fed. Rep. 562; *In re Hamilton*, 133 Fed. Rep. 823; *In re Keefer*, 135 Fed. Rep. 885.

**The Fraud of One Partner** in keeping the books of the firm cannot be imputed to an innocent copartner so as to prevent his discharge. *In re Schultz*, 109 Fed. Rep. 264.

**802. 6. Previous Bankruptcy or Insolvency.** — By the amendment of Feb. 5, 1903, a discharge will not be granted when the bankrupt has within six years been granted a discharge in voluntary proceedings. *In re Carleton*, 131

**802.** [(11) *Obtaining Property on Credit by False Statement in Writing.* — See note 6a.]

[(12) *Fraudulent Transfer, Removal, Destruction, or Concealment of Property.* — See note 6b.]

**803.** 4. *Setting Aside or Impeaching Discharge* — a. **DIRECT ATTACK** —

(1) *Authority to Set Aside or Annul Discharge.* — See note 1.

(2) *Who May Make Application.* — See notes 2, 3.

(3) *Grounds of Relief.* — See note 6.

**804.** (4) *Time of Application.* — See note 2.

b. **COLLATERAL ATTACK** — (1) *Liability to Collateral Attack* —

(a) *Rule under National Bankruptcy Law.* — See note 4.

**806.** (2) *Grounds of Attack.* — See note 2.

**XVI. OFFENSES AGAINST INSOLVENCY AND BANKRUPTCY LAWS** —

1. *Creation of Offenses.* — See note 3.

**807.** **XVII. INSOLVENT DECEDENTS' ESTATES** — *Statutory Provisions.* — See note 1

*Declaration of Insolvency.* — See note 2.

Fed. Rep. 146; *In re Seaholm*, (C. C. A.) 135 Fed. Rep. 144.

**Amendment Not Retroactive.** — *In re Neely*, 134 Fed. Rep. 667.

**802.** 6a. *The Amendment of 1903 makes it a ground for refusing a discharge that the applicant has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."* *In re Soott*, 126 Fed. Rep. 981; *In re Goodhile*, 130 Fed. Rep. 782; *State v. White*, 77 Vt. 241.

6b. *The Transfer, Removal, Destruction, or Concealment of Property by the petitioner, or his permitting it to be removed, destroyed, or concealed, within four months preceding the filing of the petition, with intent to hinder, delay, or defraud any of his creditors, is made a ground for refusing the discharge by the amendment of 1903.* *In re Miller*, 135 Fed. Rep. 591; *Mackel v. Rochester*, 135 Fed. Rep. 904; *In re Gift*, 130 Fed. Rep. 230.

**803.** 1. *Statutory Remedy Exclusive.* — *In re Peacock*, 101 Fed. Rep. 560; *In re Adams*, 104 Fed. Rep. 72; *Strause v. Hooper*, 105 Fed. Rep. 590.

2. *Who May Attack Discharge.* — *In re Columbia Real Estate Co.*, (C. C. A.) 112 Fed. Rep. 643. See also *Arrington v. Arrington*, 132 Fed. Rep. 200.

*The Fact that the Claim of the Creditor Has Been Barred by the lapse of one year after the date of the adjudication does not debar him from moving to vacate the discharge, since, if his petition be granted, he will become a party in interest.* *In re Bimberg*, 121 Fed. Rep. 942.

3. *Failure to Oppose Discharge.* — *In re Roosa*, 119 Fed. Rep. 542; *In re Oliver*, 133 Fed. Rep. 832.

*Creditor May Be Barred by Laches.* — *In re Upson*, 124 Fed. Rep. 980.

6. *Fraud Must Have Been Means of Securing Discharge.* — *In re Hoover*, 105 Fed. Rep. 354.

**804.** 2. *Time of Application.* — *In re Ives*, 111 Fed. Rep. 495, *affirmed* (C. C. A.) 113 Fed. Rep. 911.

*The court has no power to grant a discharge after the six months following the expiration*

*of the year beginning with the adjudication.* *In re Fahy*, 116 Fed. Rep. 239.

**Right to Set Aside Discharge Lost by Delay.** — *In re Oleson*, 110 Fed. Rep. 796.

4. *Discharge under National Bankruptcy Law Not Subject to Collateral Attack.* — *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965; *Young v. Stevenson*, 73 Ark. 480; *Delta County Bank v. McGranahan*, 37 Wash. 307.

*That the plaintiff made a false oath in bankruptcy, so that he could have been denied discharge, cannot be set up as a defense in a collateral action.* *Wilsey v. Jewett*, 122 Iowa 315.

**What Not Collateral Attack.** — A collateral attack is not made by a creditor who simply contends that his debt was not barred by the discharge because of fraudulent scheduling. *Sutherland v. Lasher*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 249, *affirmed* 87 N. Y. App. Div. 633.

**806.** 2. *Omissions without Fraudulent Intent.* — *Hewins v. Whitney*, 99 Me. 37.

3. *Creation of Offenses.* — *Rex v. Wiseman*, 85 L. T. N. S. 791; *In re Howes*, (1902) 2 K. B. 290; *Rex v. Turner*, (1904) 1 K. B. 181; *Rex v. Humphris*, (1904) 2 K. B. 89; *U. S. v. Lowenstein*, 126 Fed. Rep. 884; *U. S. v. Lake*, 129 Fed. Rep. 499; *U. S. v. Goldstein*, 132 Fed. Rep. 789; *Field v. U. S.*, (C. C. A.) 137 Fed. Rep. 6.

**An Intention to Defraud Is the Essence of the Offenses Relating to the Nondisclosure by a Bankrupt of His Property under the English Debtors' Act, 1869, § 11.** *Rex v. Wiseman*, 85 L. T. N. S. 791; *In re Dunn*, (1902) 1 K. B. 107.

**807.** 1. *Effect of Bankrupt's Death under Act of 1898.* — Where pending the proceedings the bankrupt dies, the widow and children are entitled to "all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." See the following cases: *In re Slack*, 111 Fed. Rep. 523; *In re Parschen*, 119 Fed. Rep. 976; *In re Newton*, 122 Fed. Rep. 103; *In re McKenzie*, 132 Fed. Rep. 986.

2. *Suggestion or Declaration of Insolvency.* — *Gray v. Chase*, 184 Mass. 444; *Grimmett v. Midgett*, (Tenn. Ch. 1899) 57 S. W. Rep. 399.



**808. INSPECT — INSPECTION — INSPECTION LAWS.** — See notes 3, 4.

**808. 3.** *Armour v. Brazeau*, 191 Ill. 117.  
**Inspection — Copying.** — *Marsh v. Sanders*, 110 La. 726.

**4. Same — Laws — Constitutionality.** — *Papasco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345.

**INSPECTION AND PHYSICAL EXAMINATION.**

BY J. E. BRADY.

**811. II. IN ACTIONS FOR PERSONAL INJURIES — 1. When Not Authorized by Statute — a. VIEW THAT NO POWER EXISTS TO COMPEL SUBMISSION TO EXAMINATION — In England.** — See note 4.

**In the United States.** — See note 6.

**812. b. VIEW THAT COURTS MAY COMPEL SUBMISSION TO EXAMINATION.** — See notes 2, 3, 4.

**813. 3. Discretion of Court as to Making Order for Examination.** — See notes 6, 7.

**814.** See notes 2, 3.

**4. Application for Order for Examination — Time of Making Application.** — See notes 6, 7, 8.

**5. What Must Be Shown to Entitle Party to Order — Examination Must Be Indispensable.** — See note 10.

**811. 4. Compulsory Examination in Personal Action Not Permissible in England.** — See *Austin*, R. Co. v. Cluck, 97 Tex. 172, 104 Am. St. Rep. 863.

**6. Illinois.** — *Pittsburgh, etc., R. Co. v. Story*, 104 Ill. App. 132.

**Massachusetts.** — *Stack v. New York, etc., R. Co.*, 177 Mass. 155, 83 Am. St. Rep. 269.

**New York.** — *French v. Brooklyn Heights R. Co.*, 57 N. Y. App. Div. 204.

**Oklahoma.** — *Kingfisher v. Altizer*, 13 Okla. 121.

**Texas.** — *Austin, etc., R. Co. v. Cluck*, 97 Tex. 172, 104 Am. St. Rep. 863; *International, etc., R. Co. v. Butcher*, (Tex. Civ. App. 1904) 81 S. W. Rep. 819; *St. Louis, etc., R. Co. v. Lindsey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 87; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 807; *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776. But see *Gulf, etc., R. Co. v. Gibbs*, 33 Tex. Civ. App. 214.

**812. 2. View that Courts May Order Examination — Indiana.** — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200.

**Kansas.** — *Atchison, etc., R. Co. v. Palmore*, 68 Kan. 545; *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232.

**Kentucky.** — *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152; *Louisville, etc., R. Co. v. Simpson*, 111 Ky. 754.

**North Dakota.** — *Brown v. Chicago, etc., R. Co.*, 12 N. Dak. 61, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 810 [812].

**Washington.** — *Myrberg v. Baltimore, etc., Min., etc., Co.*, 25 Wash. 364.

**3. Under What Circumstances Examination Ordered.** — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200; *Atchison, etc., R. Co. v. Palmore*, 68 Kan. 545; *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152.

**4. Reasons for Rule — Implied Agreement to Make Necessary Disclosure.** — *Brown v. Chicago, etc., R. Co.*, 12 N. Dak. 61.

**813. 6. Discretion of Court as to Making Order — Georgia.** — *Macon R., etc., Co. v. Vining*, 120 Ga. 511.

**Indiana.** — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200.

**Kansas.** — *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232.

**Kentucky.** — *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152; *Louisville, etc., R. Co. v. McClain*, 66 S. W. Rep. 391, 23 Ky. L. Rep. 1878.

**Missouri.** — *Paul v. Omaha, etc., R. Co.*, 82 Mo. App. 500.

**Texas.** — *Gulf, etc., R. Co. v. Gibbs*, 33 Tex. Civ. App. 214.

**7. No Interference Except in Case of Abuse of Discretion.** — *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232; *Louisville, etc., R. Co. v. McClain*, 66 S. W. Rep. 391, 23 Ky. L. Rep. 1878; *Louisville, etc., R. Co. v. Simpson*, 111 Ky. 754; *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152.

**814. 2. Discretion Reviewable in Case of Abuse.** — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200; *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232; *Louisville, etc., R. Co. v. Simpson*, 111 Ky. 754; *Brown v. Chicago, etc., R. Co.*, 12 N. Dak. 61.

**3. When Refusal Will Operate to Reverse.** — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200; *Louisville, etc., R. Co. v. Simpson*, 111 Ky. 754; *Brown v. Chicago, etc., R. Co.*, 12 N. Dak. 61. See also *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232.

**6. Macon R., etc., Co. v. Vining, 120 Ga. 511; *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200.**

**7. Application After Close of Plaintiff's Evidence.** — *Myrberg v. Baltimore, etc., Min., etc., Co.*, 25 Wash. 364.

**814. 8. Application on Second Day of Trial.** — *Paul v. Omaha, etc., R. Co.*, 82 Mo. App. 500.

**10. Examination Must Be Indispensable.** —

**816.** 7 Manner of Conducting Examination. — See notes 4, 5, 6, 7.

10. Effect of Refusal to Obey Order for Examination. — See notes 12, 13.

**817.** 11. Exhibition of Injuries to Jury — *a.* VOLUNTARY EXHIBITION. — See note 3.

*b.* COMPULSORY EXHIBITION. — See note 6.

**818.** III. IN CRIMINAL PROSECUTIONS — 2. Examination and Inspection of Person of Witness. — See note 9.

**819.** 4. Inspection of Infant in Filiation Cases. — See notes 1, 2.

IV. IN PROCEEDINGS FOR DIVORCE — 1. Power of Courts to Order Inspection and Examination. — See notes 5, 7.

**822.** INSTEAD OF. — See note 2.

INSTITUTE. — See note 4.

**823.** INSTITUTION. — See note 1.

**824.** INSTRUCTIONS. — See note 1.

INSTRUMENT. — See note 3.

**828.** INSUFFICIENCY — INSUFFICIENT. — See note 2.

*Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232; *Louisville, etc., R. Co. v. McClain*, 66 S. W. Rep. 391, 23 Ky. L. Rep. 1878; *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152.

Where an examination would throw no light upon the question in issue it should not be ordered. *Vierling v. Binder*, 113 Iowa 337.

**816.** 4. Infliction of Pain, etc., to Be Avoided. — *Atchison, etc., R. Co. v. Palmore*, 68 Kan. 545.

5. Examination Dangerous to Health Refused. — *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152. See also *Atchison, etc., R. Co. v. Palmore*, 68 Kan. 545.

6. Submission to Painful Test Not Required. — *Louisville R. Co. v. Hartlege*, 74 S. W. Rep. 742, 25 Ky. L. Rep. 152.

7. Examination Requiring Use of Drugs Allowable. — *Atchison, etc., R. Co. v. Palmore*, 68 Kan. 545.

12. Where the Court Is Without Power to Order an Examination, the refusal of a party to submit to such examination at the request of the opposite party may be considered by the jury. *International, etc., R. Co. v. Butcher*, (Tex. Civ. App. 1904) 81 S. W. Rep. 819; *Austin, etc., R. Co. v. Cluck*, 97 Tex. 172, 104 Am. St. Rep. 863; *Kingfisher v. Altizer*, 13 Okla. 121.

13. Dismissal of Action for Refusal to Obey Order. — *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200.

**817.** 3. Exhibition of Injuries to Jury. — *Faivre v. Manderscheid*, 117 Iowa 724; *Lacs v. James Everard's Breweries*, 61 N. Y. App. Div. 431, reversed on other grounds 170 N. Y. 444. See also *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200; *City of Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232.

6. View that Plaintiff Cannot Be Compelled to Show Injuries to Jury. — See *Lacs v. James Everard's Breweries*, 61 N. Y. App. Div. 431, reversed on other grounds 170 N. Y. 444.

**818.** 9. In Prosecution for Rape. — It was held in *People v. Harlan*, 133 Cal. 16, that the court properly refused to compel the prosecutrix to assume, in the presence of the jury, the position into which she had been forced at the time the crime was committed.

**819.** 1. Exhibiting Infant to Jury in Bastardy Cases. — *Kelly v. State*, 133 Ala. 195, 91 Am. St. Rep. 25; *State v. Saidell*, 70 N. H. 174, 85 Am. St. Rep. 627.

2. See *State v. Brathovde*, 81 Minn. 501.

Age of Child as Criterion. — A child under two years of age should not be exhibited to the jury for the purpose of establishing a resemblance between the child and its putative father. *State v. Harvey*, 112 Iowa 416, 84 Am. St. Rep. 350.

5. Examination of Person in Divorce Cases. — See *Austin, etc., R. Co. v. Cluck*, 97 Tex. 172, 104 Am. St. Rep. 863.

7. Breach of Promise. — In an action upon breach of a promise to marry, where the defendant set up the physical condition of the plaintiff to show that no contract could have been made, it was proper to refuse a request for a physical examination, since no facts would have been thereby adduced relevant to the issue, which related to the question of the existence of a contract only. *Vierling v. Binder*, 113 Iowa 337.

**822.** 2. Instead Of. — *Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N.Y.) 401.

4. Institute — Filing Complaint. — *Zanesville v. Zanesville Telephone, etc., Co.*, 64 Ohio St. 67.

**823.** 1. In the Sense of Establishment. — *United R., etc., Co. v. Baltimore*, 93 Md. 630.

**824.** 1. Instructions. — *Pagels v. Meyer*, 193 Ill. 172; *Boggs v. U. S.*, 10 Okla. 424.

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3. Instrument. — *State v. Phillips*, 157 Ind. 481, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824.

A Mechanics' Lien Notice has been held to be an instrument within a recording act. *State v. Phillips*, 157 Ind. 481.

Instrument in the Sense of Written Instrument. — *State v. Phillips*, 157 Ind. 481; *Abbott v. Campbell*, (Neb. 1903) 95 N. W. Rep. 591.

**828.** 2. Insufficiency in Pleading. — *Hill v. Fair Haven, etc., R. Co.*, 75 Conn. 177.

An insufficient undertaking on appeal must be construed as one having some efficiency but not enough to meet necessary requirements. *Pirrie v. Moule*, (Mont. 1905) 81 Pac. Rep. 390.

# INSURANCE.

BY M. G. BEAMAN.

**838. I. INTRODUCTION — 1. Definition —** In Its More Limited and Technical Sense. — See note 2.

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**840. 5. Property Insurance Contract of Indemnity. —** *Steinmeyer v. Steinmeyer*, 64 S. Car. 413, 92 Am. St. Rep. 809, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 840; *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 68 Ohio St. 469.

**6. Ursula Bright Steamship Co. v. Amsinck**, 115 Fed. Rep. 242, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 840. See also dissenting opinion of Cobb, J., in *Word v. Southern Mut. Ins. Co.*, 112 Ga. 585, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 840.

**843. 3. Insurance a Personal Contract. —** *Lyford v. Connecticut F. Ins. Co.*, 99 Me. 273; *State v. Amazon Ins. Co.*, 24 Ohio Cir. Ct. 387; *Steinmeyer v. Steinmeyer*, 64 S. Car. 413, 92 Am. St. Rep. 809, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843; *Hartford F. Ins. Co. v. Ransom*, (Tex. Civ. App. 1901) 61 S. W. Rep. 144.

**844. 2. Deming Invest. Co. v. Dickerman**, 63 Kan. 728, 88 Am. St. Rep. 265, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844.

**846. 1. Necessity of Insurable Interest — Property Insurance. —** *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63, 104 Am. St. Rep. 983, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846 and quoting the whole text paragraph.

**4. Insured Must Have Interest in Property at**

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**5. Cessation or Diminution of Interest Does Not Affect Life Insurance. —** *Chamberlain v. Butler*, 61 Neb. 730, 87 Am. St. Rep. 478, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 846.

**848. 3. Negligence of Insured. —** *Scottish Union, etc., Ins. Co. v. Strain*, (Ky. 1902) 70 S. W. Rep. 274.

**849. 2. Inferred from Circumstances. —** *Southern Ins. Co. v. Hannah*, (Miss. 1904) 37 So. Rep. 506.

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**6. Agreement upon Terms of Contract. —** *Manchester F. Assur. Co. v. Insurance Co.*, 91 Ill. App. 609; *Cotton v. Southwestern Mut. L. Ins. Co.*, 115 Iowa 729; *Gauntlett v. Sea Ins. Co.*, 127 Mich. 504; *Keystone Mattress, etc., Co. v. Pittsburg Underwriters*, 21 Pa. Super. Ct. 38; *Brink v. Merchant's, etc., United Mut. Ins. Assoc.*, 17 S. Dak. 235; *Bell v. Peabody Ins. Co.*, 49 W. Va. 437.

**850. 3. Offer Not Binding till Accepted. —** *Mohrstadt v. Mutual L. Ins. Co.*, (C. C. A.) 115 Fed. Rep. 81; *Travis v. Nederland L. Ins. Co.*, 43 C. C. A. 653; *Kilcullen v. Metropolitan L.*

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Ins. Co., 108 Mo. App. 61; Pennsburg Mfg. Co. v. Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91; Baldwin v. Pennsylvania F. Ins. Co., 20 Pa. Super. Ct. 238. See also German Ins. Co. v. Downman, (C. C. A.) 115 Fed. Rep. 481.

**850.** 4. Retention of Premium by Company. — Coulter v. Equity F. Ins. Co., 7 Ont. L. Rep. 180.

**851.** 1. Acceptance of Application. — Armstrong v. Provident Sav. L. Assur. Soc., 2 Ont. L. Rep. 777.

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2. Approval by Home Office. — Miller v. Northwestern Mut. L. Ins. Co., (C. C. A.) 111 Fed. Rep. 465; Pace v. Provident Sav. L. Assur. Soc., (C. C. A.) 113 Fed. Rep. 113; Cooksey v. Mutual L. Ins. Co., 73 Ark. 117; Chamberlain v. Prudential Ins. Co., 109 Wis. 4, 83 Am. St. Rep. 851.

3. St. Paul F. & M. Ins. Co. v. Kelley, (Neb. 1902) 89 N. W. Rep. 997.

5. Delay Not Equivalent to Acceptance. — St. Paul F. & M. Ins. Co. v. Kelley, (Neb. 1902) 89 N. W. Rep. 997; Brink v. Merchant's, etc., United Mut. Ins. Assoc., 17 S. Dak. 235. But see Robinson v. U. S. Benevolent Soc., 132 Mich. 695, 102 Am. St. Rep. 436.

Failure to Reject Within Stipulated Time and Retention of Premium. — Where the company reserved the right to terminate the policy at any time within ninety days, and it was provided that if the company should accept the risk a permanent policy should be made out, and the company took no action at the end of the ninety days, but retained the premium, it was held that the permanent policy was in force thereafter, although not delivered to the insured. Keen v. Mutual L. Ins. Co., 131 Fed. Rep. 559.

6. Travis v. Nederland L. Ins. Co., 43 C. C. A. 653; Johnson v. G. & G. Flewelling Mfg. Co., 36 N. Bruns. 397.

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3. Binding Slip Evidences Valid Contract. — Kerr v. Union Marine Ins. Co., 124 Fed. Rep. 835, reversing (C. C. A.) 130 Fed. Rep. 415; J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co., 68 N. J. L. 674; Belt v. American Cent. Ins. Co., 29 N. Y. App. Div. 546, affirmed 163 N. Y. 555.

4. Oral Contract of Insurance Not Within Statute of Frauds. — German-American Ins. Co. v. Yellow Poplar Lumber Co., (Ky. 1905) 84 S. W. Rep. 551.

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Kentucky. — Fidelity, etc., Co. v. Ballard, 105 Ky. 253; National F. Ins. Co. v. Rawe, (Ky. 1899) 49 S. W. Rep. 422; Klein v. Liverpool, etc., Ins. Co., (Ky. 1900) 57 S. W. Rep. 250; Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624; Mattingly v. Springfield F. & M. Ins. Co., (Ky. 1904) 83 S. W. Rep. 577.

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Oral Contract with Agent of Two Companies Invalid if Company Not Specified. — Hartford F. Ins. Co. v. Trimble, (Ky. 1904) 78 S. W. Rep. 462.

**853.** 1. Power of Agents to Bind Insurer by Parol. — J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co., 68 N. J. L. 674, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 853.

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Power of Agent Must Clearly Appear. — Keystone Mattress, etc., Co. v. Pittsburg Underwriters, 21 Pa. Super. Ct. 38.

2. Conditions of Regular Policy Govern. — Hicks v. British America Assur. Co., 162 N. Y. 284; Young v. St. Paul F. & M. Ins. Co., 68 S. Car. 387, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 853.

**853.** *cc.* ENFORCEMENT OF CONTRACT — Action at Law. — See note 4.

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**855.** (c) Policy — *bb.* VALIDITY — (*dd.*) Delivery and Acceptance — *aaa.* Necessity of. — See notes 5, 6.

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**856.** The Delivery of the Policy to the Broker. — See note 4.

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**857.** *f.* CONSIDERATION — PREMIUM — (2) Payment — (a) Necessity of — *aa.* IN GENERAL. — See note 3.

**853.** 3. J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co., 68 N. J. L. 674.

**4. Actions at Law.**—Kerr v. Union Marine Ins. Co., 124 Fed. Rep. 835, reversing (C. C. A.) 130 Fed. Rep. 415; Fire Ins. Co. v. Sinsabaugh, 101 Ill. App. 55; Continental Ins. Co. v. Roller, 101 Ill. App. 77.

**5. Suit in Equity.**—Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, reversing 101 Fed. Rep. 33. See also Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30.

**6.** See Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, reversing 101 Fed. Rep. 33.

**855. 5. When Delivery of Policy Not Essential.**—Commercial Union Assur. Co. v. Urbansky, 113 Ky. 624; Pennsburg Mfg. Co. v. Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91; Fidelity Mut. L. Assoc. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813; Elson v. North American L. Assur. Co., 9 British Columbia 474.

**6. When Delivery Essential.**—Hartford F. Ins. Co. v. Wilson, 187 U. S. 467; Kerr v. Milwaukee Mechanics' Ins. Co., (C. C. A.) 117 Fed. Rep. 442; Kilcullen v. Metropolitan L. Ins. Co., 108 Mo. App. 61; Girard v. Metropolitan L. Ins. Co., 20 Quebec Super. Ct. 532. See also Mutual L. Ins. Co. v. Sinclair, (Ky. 1903) 71 S. W. Rep. 853.

**7. Delivery of Policy.**—See Stringham v. Mutual L. Ins. Co., 44 Oregon 447.

**8. What Is Delivery.**—Manchester F. Ins. Co. v. Plato, 23 Ohio Cir. Ct. 35, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855; Young v. St. Paul F. & M. Ins. Co., 68 S. Car. 387, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855.

**856. 4. Delivery to Broker Sufficient.**—Holmes v. Thomason, 25 Tex. Civ. App. 389.

Otherwise if Broker Agrees Not to Deliver to Insured until Company Passes on Risk.—Hartford F. Ins. Co. v. Wilson, 187 U. S. 467.

**5. Acceptance by Applicant.**—Armstrong v. Mutual L. Ins. Co., 121 Iowa 362.

**6. Merger of Preliminary Agreement.**—United States.—Glass v. Masons Fraternal Acc. Assoc., 112 Fed. Rep. 495; Home L. Ins. Co. v. Myers, (C. C. A.) 112 Fed. Rep. 846.

*California.*—Blunt v. Fidelity, etc., Co., 145 Cal. 268, 104 Am. St. Rep. 34.

*Colorado.*—Northwestern L. Assur. Co. v. Tietze, 16 Colo. App. 205.

*Louisiana.*—Arguimbau v. Germania Ins. Co., 106 La. 139.

*Missouri.*—Ijams v. Provident Sav. L. Assur. Soc., 185 Mo. 466; Graham v. Mercantile Town Mut. Ins. Co., 110 Mo. App. 95; Gillum v. Philadelphia Fire Assoc., 106 Mo. App. 673.

*Oklahoma.*—Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co., 11 Okla. 579, 585.

*Oregon.*—Stringham v. Mutual L. Ins. Co., 44 Oregon 447, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856.

*South Carolina.*—Young v. St. Paul F. & M. Ins. Co., 68 S. Car. 387, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856.

**Policy Retained by Agent Not Conforming to Agreement.**—Where the agent omits to attach a lightning clause to the policy, according to agreement, and does not deliver the policy to the insured, he may attach such clause after the loss, and the agreement is not merged in the policy. McLaughlin v. American F. Ins. Co., 126 Iowa 149, 106 Am. St. Rep. 344.

**9. United States.**—Mutual L. Ins. Co. v. Kelly, (C. C. A.) 114 Fed. Rep. 268.

*Georgia.*—Johnson v. White, 120 Ga. 1010.

*Michigan.*—See Rauch v. Michigan Millers' Mut. F. Ins. Co., 131 Mich. 281.

*Missouri.*—Overton v. American Cent. Ins. Co., 79 Mo. App. 1.

*New York.*—Wilson v. National L. Ins. Co., (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 403, affirmed 56 N. Y. App. Div. 624.

*Ohio.*—Union Cent. L. Ins. Co. v. Hook, 62 Ohio St. 256; Kehm v. German Mut. Ins. Co., 11 Ohio Dec. 739; Richards v. Hale, 24 Ohio Cir. Ct. 468.

*Oklahoma.*—Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co., 11 Okla. 585.

*Pennsylvania.*—Moore v. Niagara F. Ins. Co., 199 Pa. St. 49, 85 Am. St. Rep. 771; Miller v. Interstate Casualty Co., 17 Pa. Super. Ct. 360. See also Schofield v. Hayes, 17 Pa. Super. Ct. 110.

*Texas.*—Hartford F. Ins. Co. v. Post, 25 Tex. Civ. App. 428; Keller v. Liverpool, etc., Ins. Co., 27 Tex. Civ. App. 102.

*Wisconsin.*—Bostwick v. Mutual L. Ins. Co., 116 Wis. 408, reversing 116 Wis. 392.

*Canada.*—Provident Sav. L. Assur. Soc. v. Mowat, 32 Can. Sup. Ct. 147, reversing 27 Ont. App. 675.

**Contra if Insured Could Not Read.**—Dryer v. Security F. Ins. Co., (Iowa 1900) 82 N. W. Rep. 494.

**Or if There Is Fraud or Mistake.**—Gwaltney v. Provident Sav. L. Assur. Soc., 132 N. Car. 925.

**Ignorance of the Insured that He Is Signing a Note** is immaterial if he fails to read it. Graham v. Mercantile Town Ins. Co., 110 Mo. App. 95.

**857. 3. Payment of Premium Not Necessary.**—Mutual L. Ins. Co. v. Allen, 212 Ill. 134,

**857.** *bb.* WHEN CONDITION OF POLICY REQUIRES — (*aa*) *Validity of Requirement.* — See note 7.

**858.** (*bb*) *Waiver of Condition.* — See note 1.

*Unconditional Delivery of Policy.* — See note 2.

*Power of Agent to Waive.* — See note 3.

**859.** See note 1.

*affirming* 113 Ill. App. 89; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77; *Swander v. Northern Cent. L. Ins. Co.*, 25 Ohio Cir. Ct. 3; *Pacific Nat. Bank v. Aetna Indemnity Co.*, 33 Wash. 428, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 857.

**857. 7. When Policy Requires Payment — United States.** — *Mutual Reserve Fund L. Assoc. v. Simmons*, 46 C. C. A. 393; *Schmertz v. U. S. Life Ins. Co.*, (C. C. A.) 118 Fed. Rep. 250; *Union Cent. L. Ins. Co. v. Berlin*, 41 C. C. A. 592. See also *Manhattan L. Ins. Co. v. Wright*, (C. C. A.) 126 Fed. Rep. 82.

*California.* — *Cayford v. Metropolitan L. Ins. Co.*, 144 Cal. 763.

*Delaware.* — *Mauck v. Merchants, etc., F. Ins. Co.*, 4 Penn. (Del.) 325; *Weisman v. Commercial F. Ins. Co.*, 3 Penn. (Del.) 224.

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*Illinois.* — *Roberts v. Aetna L. Ins. Co.*, 101 Ill. App. 313, *affirmed* 212 Ill. 382; *Kearney v. Aetna L. Ins. Co.*, 109 Ill. App. 609.

*Indiana.* — *Tibbitts v. Mutual Ben. L. Ins. Co.*, 159 Ind. 671, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 857.

*Kentucky.* — *Mutual L. Ins. Co. v. Lucas*, (Ky. 1904) 79 S. W. Rep. 279; *Letzler v. Pacific Mut. L. Ins. Co.*, (Ky. 1905) 85 S. W. Rep. 177.

*Louisiana.* — *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474.

*Missouri.* — *Brown v. Pacific Mut. L. Ins. Co.*, 109 Mo. App. 137.

*Nebraska.* — *German Ins. Co. v. Shader*, 1 Neb. (unofficial) 704, 96 N. W. Rep. 604; *Farmer's, etc., Ins. Co. v. Graff*, 1 Neb. (unofficial) 790, 96 N. W. Rep. 605.

*New York.* — *Hewitt v. American Union L. Ins. Co.*, 66 N. Y. App. Div. 80; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656.

*Oregon.* — *Stringham v. Mutual L. Ins. Co.*, 44 Oregon 447.

*Pennsylvania.* — *Brown v. Pennsylvania Casualty Co.*, 207 Pa. St. 609; *Sydnor v. Metropolitan L. Ins. Co.*, 26 Pa. Super. Ct. 521.

*Texas.* — *Union Cent. L. Ins. Co. v. Hughes*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1010.

*Wisconsin.* — *Tomsecek v. Travelers' Ins. Co.*, 113 Wis. 114, 90 Am. St. Rep. 846.

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**858. 1. Waiver of Condition — United States.** — *Modern Woodmen of America v. Tevis*, (C. C. A.) 111 Fed. Rep. 113.

*California.* — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57.

*District of Columbia.* — *United Security L. Ins., etc., Co. v. Bond*, 16 App. Cas. (D. C.) 579.

*Illinois.* — *Aetna L. Ins. Co. v. Sanford*, 200

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*Indiana.* — *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 20; *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531.

*Iowa.* — *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311.

*Kansas.* — *Bingler v. Mutual Ben. L. Ins. Co.*, 10 Kan. App. 6.

*Missouri.* — *Suess v. Imperial L. Ins. Co.*, 86 Mo. App. 10.

*Pennsylvania.* — *Snyder v. Nederland L. Ins. Co.*, 202 Pa. St. 161.

*Tennessee.* — *Aetna L. Ins. Co. v. Fallow*, 110 Tenn. 720.

*Texas.* — *Northwestern L. Assur. Co. v. Sturdivant*, 24 Tex. Civ. App. 331; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131.

**Acceptance of Overdue Premiums** is a waiver even though the assured signs a statement to the effect that this shall not establish a precedent. *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 615.

**2. Unconditional Delivery of Policy.** — *Weisman v. Commercial F. Ins. Co.*, 3 Penn. (Del.) 224; *Northwestern L. Assur. Co. v. Schulz*, 94 Ill. App. 156; *Germania F. Ins. Co. v. Muller*, 110 Ill. App. 190; *Kollitz v. Equitable Mut. F. Ins. Co.*, 92 Minn. 234; *German Ins. Co. v. Shader*, (Neb. 1903) 93 N. W. Rep. 972; *Healy v. Pennsylvania Ins. Co.*, 50 N. Y. App. Div. 327; *Cross v. Security Trust, etc., Co.*, 58 N. Y. App. Div. 602, *affirmed* 171 N. Y. 671.

**No Liability unless Insured Liable for Premium.** — *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68.

**3. Power of Agent.** — *National L. Ins. Co. v. Twiddell*, (Ky. 1900) 58 S. W. Rep. 699; *Mallette v. British American Assur. Co.*, 91 Md. 471; *Tooker v. Security Trust Co.*, 26 N. Y. App. Div. 372, *affirmed* 165 N. Y. 608; *Genung v. Metropolitan L. Ins. Co.*, 60 N. Y. App. Div. 424; *Peck v. Washington L. Ins. Co.*, 91 N. Y. App. Div. 597, *affirmed* 181 N. Y. 585. See also *Aetna L. Ins. Co. v. Hartley*, (Ky. 1902) 67 S. W. Rep. 19, 68 S. W. Rep. 1081. *Contra*, *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95.

**Subagent Cannot Extend Credit.** — *Pennsylvania Casualty Co. v. Bacon*, (C. C. A.) 133 Fed. Rep. 907.

**859. 1. U. S. Life Ins. Co. v. Lesser, 126 Ala. 568; *Westerfeld v. New York L. Ins. Co.*, 129 Cal. 68; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30. *Contra*, *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656; *Hewitt v. American Union L. Ins. Co.*, 85 N. Y. App. Div. 279; *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256; *Nixon v. Travellers' Ins. Co.*, 25 Wash. 254.**

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**859.** (b). *Mode of Payment* — *aa. PAYMENT IN CASH.* — See note 2.

*bb. PAYMENT BY NOTE.* — See note 3.

*cc. PAYMENT BY AGENT INDIVIDUALLY.* — See note 5.

**860.** See note 1.

*Application of Debt Due by Agent.* — See note 2.

(c) *To Whom Made* — *aa. PAYMENT TO AGENT.* — See note 4.

*If an Unauthorized Person Solicits an Application.* — See note 6.

*bb. PAYMENT TO BROKER* — *But if the Insurer Keeps an Account with the Broker.*

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**861.** (3) *Suspension of Policy for Nonpayment of Premium Note* —

(a) *Insurer Not Liable During Default.* — See note 3.

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**862.** (4) *Forfeiture of Policy for Nonpayment of Premium Note.* — See note 2.

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**859.** 2. *Folb v. Firemen's Ins. Co.*, 133 N. Car. 179; *Tomsecek v. Travelers' Ins. Co.*, 113 Wis. 114, 90 Am. St. Rep. 846.

*Agent May Exercise Discretion as to Mode of Payments.* — *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531.

*Payment by Check May Be Agreed to by Conduct.* — *Traveler's Ins. Co. v. Brown*, 138 Ala. 526.

*Payment in Stock Valid if Ratified by Company.* — *Cameron v. Mutual Life, etc., Co.*, 121 Iowa 477.

*Payment by Draft.* — *MacMahon v. U. S. Life Ins. Co.*, (C. C. A.) 128 Fed. Rep. 388.

3. *Harrigan v. Home L. Ins. Co.*, 128 Cal. 531; *Mauck v. Merchants', etc., F. Ins. Co.*, 4 Penn. (Del.) 325; *Penn Mut. L. Ins. Co. v. Norcross*, 163 Ind. 379; *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87; *Thum v. Wolstenholme*, 21 Utah 446; *York v. Railway Officials, etc., Acc. Assoc.*, 51 W. Va. 38, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859.

5. *Nonpayment of Note Given to Agent Individually.* — *Union L. Ins. Co. v. Parker*, 66 Neb. 395.

**860.** 1. *Even if Company Proves Insolvent.* — *Hudson v. Compere*, 94 Tex. 449.

2. *Agreement Good if Agent Actually Pays Company.* — *Herring v. American Ins. Co.*, 123 Iowa 533.

4. *Payment to Agent.* — *Weisman v. Commercial F. Ins. Co.*, 3 Penn. (Del.) 224; *Mauck v. Merchants', etc., F. Ins. Co.*, 4 Penn. (Del.) 325; *Murphy v. Mechanics, etc., Town Mut. F. Ins. Co.*, 83 Mo. App. 481.

*Giving Note to Agent Is Payment if Such Custom Followed by Company.* — *Mutual Ins. Co. v. Allen*, 212 Ill. 134.

*Immaterial that Policy Provides for Payment at Home Office, if Premium Retained.* — *Pulaski Mut. F. Ins. Co. v. Dawson*, 87 Ill. App. 514.

6. *Weisman v. Commercial F. Ins. Co.*, 3 Penn. (Del.) 224; *Mauck v. Merchants', etc., F. Ins. Co.*, 4 Penn. (Del.) 325.

8. *Mannheim Ins. Co. v. Chipman*, 124 Fed. Rep. 950; *Globe, etc., F. Ins. Co. v. Robbins, etc., Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 65.

**861.** 3. *Suspension of Policy for Nonpayment of Premium Note.* — *Palmer v. Continental Ins. Co.*, (Cal. 1900) 61 Pac. Rep. 784; *Hill v.*

*Farmers' Mut. F. Ins. Co.*, 129 Mich. 141; *Mooney v. Home Ins. Co.*, 80 Mo. App. 192; *Houston v. Farmers', etc., Ins. Co.*, 64 Neb. 138; *Hooker v. Continental Ins. Co.*, (Neb. 1903) 96 N. W. Rep. 663; *York v. Railway Officials, etc., Acc. Assoc.*, 51 W. Va. 38, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861.

4. *Waiver of Stipulation.* — *Continental Ins. Co. v. Browning*, 114 Ky. 183; *Walls v. Home Ins. Co.*, 114 Ky. 611; *Johnston v. Phelps County Farmers Mut. Ins. Co.*, 63 Neb. 21.

5. *Waiver by General Agent Valid.* — *Mudd v. German Ins. Co.*, (Ky. 1900) 56 S. W. Rep. 977.

**862.** 2. *Forfeiture of Policy for Nonpayment of Premium Note.* — *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335; *Fidelity Mut. L. Ins. Co. v. Price*, (Ky. 1903) 77 S. W. Rep. 384; *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95; *Antes v. State Ins. Co.*, 61 Neb. 55; *Sharpe v. New York L. Ins. Co.*, (Neb. 1904) 98 N. W. Rep. 66; *Ohio Farmers' Ins. Co. v. Wilson*, 70 Ohio St. 354; *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012; *Wood v. Confederation L. Ins. Co.*, 2 N. Bruns. Eq. Rep. 217.

*Sickness of Insured No Excuse.* — *Home Ins. Co. v. Wood*, (Ky. 1903) 73 S. W. Rep. 15.

*Such Provision Does Not Apply to Notes of Other than Insured.* — *Galvin v. Union, etc., L. Ins. Co.*, 115 Ky. 547.

*Provision in Premium Note Valid.* — *Ressler v. Fidelity Mut. L. Ins. Co.*, 110 Tenn. 411.

3. *Waiver of Forfeiture.* — *Palmer v. Continental Ins. Co.*, 132 Cal. 68.

*Attempt to Collect Note Is Waiver.* — *Union Cent. L. Ins. Co. v. Moreland*, (Ky. 1900) 56 S. W. Rep. 653.

*Failure to Return Note Not Waiver.* — *New York L. Ins. Co. v. Warren Deposit Bank*, (Ky. 1903) 75 S. W. Rep. 234.

5. *Subsequent Receipt of Payment on Note.* — *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658.

7. *Contra, if Note Retained and Sought to Be Enforced.* — *Union Cent. L. Ins. Co. v. Spinks*, (Ky. 1904) 83 S. W. Rep. 615.

*Suing on Note a Waiver.* — *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012.

**862. 3. Interpretation and Construction — a. GENERAL PRINCIPLES —**(1) *Interpretation to Be Made by Court.* — See note 8.(2) *General Rules of Construction.* — See note 9.*Interpretation of Terms Used.* — See note 11.**863. See note 1.***Conditions Prescribing Forfeitures Strictly Construed.* — See note 2.(3) *When Terms Admit of Two Constructions.* — See note 3.**862. 8.** *Hubbard v. Mutual Reserve Fund L. Assoc.*, 40 C. C. A. 665; *Union L. Ins. Co. v. Jameson*, 31 Ind. App. 28.**9. General Rules of Construction.** — *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482; *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612; *Fuller v. New York F. Ins. Co.*, 184 Mass. 12; *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253; *Nelson v. Traders' Ins. Co.*, 86 N. Y. App. Div. 66, *affirmed* 181 N. Y. 472; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529.**11. Interpretation of Terms Used.** — *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. Rep. 268.**863. 1.** *Delaware Ins. Co. v. Greer*, (C. C. A.) 120 Fed. Rep. 916; *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111; *London, etc., F. Ins. Co. v. Davis*, (Tex. Civ. App. 1904) 84 S. W. Rep. 260.**Alleged Custom Cannot Vary Express Terms of Contract.** — *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612.**2. Forfeitures Not Favored — United States.** — *Nederland L. Ins. Co. v. Meinert*, (C. C. A.) 127 Fed. Rep. 651.*Alabama.* — *U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568.*Indian Territory.* — *Fidelity, etc., Co. v. Brown*, (Indian Ter. 1902) 69 S. W. Rep. 915. *Iowa.* — *McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa 371.*Kansas.* — *Queen Ins. Co. v. Excelsior Milling Co.*, 69 Kan. 114.*Kentucky.* — *Mutual Ben. L. Ins. Co. v. Louisville First Nat. Bank*, (Ky. 1902) 69 S. W. Rep. 1, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863.*Louisiana.* — *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87.*Minnesota.* — *Strambach v. Fidelity Mut. L. Ins. Co.*, (Minn. 1905) 102 N. W. Rep. 731.*Missouri.* — *Loesch v. Union Casualty, etc., Co.*, 176 Mo. 654.*Nebraska.* — *Woodmen Acc. Assoc. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777; *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338; *German Ins. Co. v. Shader*, (Neb. 1903) 93 N. W. Rep. 972; *Henton v. Farmers, etc., Ins. Co.*, (Neb. 1901) 95 N. W. Rep. 670.*New York.* — *Meech v. National Acc. Soc.*, 50 N. Y. App. Div. 144.*Ohio.* — *Swander v. Northern Cent. L. Ins. Co.*, 25 Ohio Cir. Ct. 3.*Texas.* — *Ætna Ins. Co. v. Fitze*, 34 Tex. Civ. App. 214; *London, etc., F. Ins. Co. v. Davis*, (Tex. Civ. App. 1904) 84 S. W. Rep. 260; *Pacific Mut. L. Ins. Co. v. Terry*, (Tex. Civ. App. 1904) 84 S. W. Rep. 656; *Philadelphia F. Assoc. v. American Cement Plaster Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1115.**No Presumption Against Forfeiture.** — *Denver Tp. Mut. F. Ins. Co. v. Resor*, 95 Ill. App. 197.**Court Must Give Fair Construction to Language Used.** — *Behling v. Northwestern Nat. L. Ins. Co.*, 117 Wis. 24.**3. Doubts Resolved in Favor of Insured — United States.** — *Royal Ins. Co. v. Martin*, 192 U. S. 149; *Liverpool, etc., Ins. Co. v. Kearney*, 180 U. S. 132; *McMaster v. New York L. Ins. Co.*, 183 U. S. 25; *Pennsylvania F. Ins. Co. v. Hughes*, 47 C. C. A. 459; *American Steamship Co. v. Indemnity Mut. Marine Ins. Co.*, 108 Fed. Rep. 421, *affirmed* (C. C. A.) 118 Fed. Rep. 1014; *Kelley v. Mutual L. Ins. Co.*, 109 Fed. Rep. 56; *American Credit Indemnity Co. v. Champion Coated Paper Co.*, 43 C. C. A. 340; *American Bonding Co. v. Spokane Bldg., etc., Soc.*, (C. C. A.) 130 Fed. Rep. 737.*Alabama.* — *Robinson v. Ætna Ins. Co.*, 128 Ala. 477; *Mutual Ben. L. Ins. Co. v. Lehman*, 132 Ala. 640; *New York L. Ins. Co. v. Smith*, 139 Ala. 393.*Colorado.* — *Northwestern L. Assur. Co. v. Tietze*, 16 Colo. App. 205.*Delaware.* — *Schilansky v. Merchants', etc., F. Ins. Co.*, 4 Penn. (Del.) 293.*Florida.* — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.*Georgia.* — *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99.*Illinois.* — *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224; *Farmers' Mut. F., etc., Ins. Co. v. Lecroy*, 91 Ill. App. 41; *Northwestern L. Assur. Co. v. Schulz*, 94 Ill. App. 156; *National Acc. Soc. v. Ralstin*, 101 Ill. App. 192.*Iowa.* — *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311.*Kansas.* — *Queen Ins. Co. v. Excelsior Milling Co.*, 69 Kan. 114.*Kentucky.* — *Mutual Ben. L. Ins. Co. v. Louisville First Nat. Bank*, (Ky. 1902) 69 S. W. Rep. 1, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; *Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co.*, 115 Ky. 863; *Continental Ins. Co. v. Daniel*, (Ky. 1904) 78 S. W. Rep. 866.*Massachusetts.* — *Ferguson v. Union Mut. L. Ins. Co.*, 187 Mass. 8.*Minnesota.* — *Robson v. United Order of Foresters*, 93 Minn. 24.*Missouri.* — *Cunningham v. Union Casualty, etc., Co.*, 82 Mo. App. 607; *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575.*Nebraska.* — *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338.*New Jersey.* — *Brooks v. Metropolitan L. Ins. Co.*, 70 N. J. L. 36.*New York.* — *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25; *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143; *Banyer v. Albany Ins. Co.*, 85 N. Y. App. Div. 122, *affirmed* 179 N. Y. 554; *Sullivan v. Fraternal Societies Co-operative Indemnity Union*, (Supm. Ct. Tr. T.) 36



**864.** (4) *Construction of Printed and Written Parts.* — See notes 2, 3.

**865.** (6) *Memorandum Construed as Part of Policy* — *An Indorsement on the Back of a Policy.* — See note 1.

*b.* **CONSTRUING CONTENTS OF OTHER INSTRUMENTS AS PART OF CONTRACT** — (1) *Application and Survey* — *Statutes.* — See note 6.

Misc. (N. Y.) 578; *Cole v. Preferred Acc. Ins. Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 260, *affirmed* 92 N. Y. App. Div. 612; *Tooker v. Security Trust Co.*, 26 N. Y. App. Div. 372, *affirmed* 165 N. Y. 608; *Fitzgerald v. Supreme Council, etc.*, 39 N. Y. App. Div. 251, *affirmed* 167 N. Y. 568.

*Ohio.* — *Swander v. Northern Cent. L. Ins. Co.*, 25 Ohio Cir. Ct. 3.

*Oregon.* — *Stringham v. Mutual L. Ins. Co.*, 44 Oregon 447.

*Tennessee.* — *Westchester F. Ins. Co. v. McAdoo*, (Tenn. Ch. 1899) 57 S. W. Rep. 409.

*Texas.* — *Sovereign Camp Woodmen of the World v. Grey*, 26 Tex. Civ. App. 457; *Home Mut. Ins. Co. v. Tompkins*, 30 Tex. Civ. App. 404; *Phoenix Assur. Co. v. Stenson*, 34 Tex. Civ. App. 471; *London, etc., F. Ins. Co. v. Davis*, (Tex. Civ. App. 1904) 84 S. W. Rep. 260.

*Vermont.* — *Frink v. Brotherhood Acc. Assoc.*, 75 Vt. 249.

*Washington.* — *Remington v. Fidelity, etc., Co.*, 27 Wash. 429.

*West Virginia.* — *Cleavenger v. Franklin F. Ins. Co.*, 47 W. Va. 595.

*Canada.* — *Shera v. Ocean Acc., etc., Corp.*, 32 Ont. 411, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863.

**Interpretation Must Be Reasonable.** — *Hubbard v. Mutual Reserve Fund L. Assoc.*, 40 C. C. A. 665; *Woodmen Acc. Assoc. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777.

**Distinction Between Different Conditions of Policy.** — "A well-defined distinction exists between two classes of conditions found in insurance policies. Those which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability of the insurer depends, and are to receive a fair construction according to the intention of the parties; while, as to those prescribing formal requisites by which the previously vested right is made available, a rigid construction is not allowed." *Employers Liability Assur. Corp. v. Light, etc., Co.*, 28 Ind. App. 437.

**Liberal Construction of Conditions to Be Performed After Loss.** — *Porter v. Traders' Ins. Co.*, 164 N. Y. 504.

**864. 2. Effect to Be Given to All Parts of Policy.** — *Sharp v. Scottish Union, etc., Ins. Co.*, 136 Cal. 542; *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462; *A. A. Griffing Iron Co. v. Liverpool, etc., Ins. Co.*, 68 N. J. L. 368.

**3. Written Part Controls Printed Part.** — *Hagan v. Scottish Ins. Co.*, 186 U. S. 423; *Moore v. Lichtenberger*, 26 Pa. Super. Ct. 268.

**865. 1. Indorsements.** — *Northwestern L. Assur. Co. v. Schulz*, 94 Ill. App. 156.

**6. Iowa Statute.** — *Stork v. Supreme Lodge, etc.*, 113 Iowa 724; *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. Rep. 268.

**Sufficiency of Copy.** — *Corson v. Iowa Mut. F. Ins. Assoc.*, 115 Iowa 485.

The copy must be of the whole application, and not merely of a part. *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

**Premium Note Must Be Attached.** — *Summers v. Des Moines Ins. Co.*, 116 Iowa 593.

**Kentucky Statute.** — *Metropolitan L. Ins. Co. v. Moore*, (Ky. 1904) 79 S. W. Rep. 219; *Provident Sav. L. Assur. Soc. v. Puryear*, 109 Ky. 381; *Manhattan L. Ins. Co. v. Myers*, 109 Ky. 372; *Provident Sav. L. Assur. Soc. v. Beyer*, (Ky. 1902) 67 S. W. Rep. 827; *Griffin v. Equitable Assur. Soc.*, (Ky. 1905) 84 S. W. Rep. 1164; *Western, etc., L. Ins. Co. v. Galvin*, (Ky. 1902) 68 S. W. Rep. 655; *Grand Lodge, etc., v. Edwards*, (Ky. 1905) 85 S. W. Rep. 701.

**Application of Statute.** — Ky. Stat. 1903, § 679, requiring the application to be attached to the policy and to be printed in a certain size of type, has no application to old-line insurance companies. *Letzler v. Pacific Mut. L. Ins. Co.*, (Ky. 1905) 85 S. W. Rep. 177.

**Massachusetts** — *Statute Only Applies to Contracts Made in Massachusetts.* — *Johnson v. Mutual L. Ins. Co.*, 180 Mass. 407.

**Sufficiency of Copy.** — The copy must not omit a material statement in the application. *Manhattan L. Ins. Co. v. Albro*, (C. C. A.) 127 Fed. Rep. 281.

**Minnesota.** — In Minnesota the application, to be considered a part of the contract, must be incorporated into the policy in full. *Kollitz v. Equitable Mut. F. Ins. Co.*, 92 Minn. 234; *Coleman v. Retail Lumber-Men's Ins. Assoc.*, 77 Minn. 31.

**Ohio Statute.** — A copy must be returned with the policy to the insured. *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614.

**Pennsylvania Statute.** — *Moore v. Bestline*, 23 Pa. Super. Ct. 6.

**Effect of Statute.** — The effect of the statute is absolutely to prevent the insurer from relying on statements in the application. *Connell v. Metropolitan L. Ins. Co.*, 8 Del. Co. Rep. (Pa.) 184.

**Application of Statute.** — An accident policy, which insures against loss of life arising from accident, is a "life insurance" policy, within the meaning of the statute. *Zimmer v. Central Acc. Ins. Co.*, 207 Pa. St. 472.

**Sufficiency of Copy.** — Where the plaintiff offers in evidence the policy with the copy attached, and does not restrict the offer to any part of the paper, neither party can claim that the copy is not a true copy. *Holleran v. Life Assur. Co. of America*, 18 Pa. Super. Ct. 573.

The copy need not contain a part of the application not signed by the insured, and which is merely the report of the medical examiner. *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599.

**Photographic Copy Sufficient.** — *Arter v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 130 Fed. Rep. 768.

**866.** Effect of Construction as One Contract. — See note 4.

**867.** (2) Conditions of Premium Note. — See note 5.

(3) Charter and By-laws of Mutual Insurance Companies. — See note 7.

**868.** 4. Modification of Contract. — See note 2.

5: Renewal of Policy — *a.* IN GENERAL. — See note 3

Power of Agent to Renew. — See note 7.

*b.* HOW EFFECTED. — See note 9.

**869.** Terms and Conditions. — See note 1.

Mode of Renewal. — See note 5.

6. Reformation of Policy — *a.* POWER OF EQUITY TO REFORM. —

See note 9.

**870.** The Fact that the Insured Did Not Read the Policy. — See note 1.

*b.* MISTAKE MUST BE MUTUAL. — See note 3.

*c.* EVIDENCE TO SUPPORT — Measure of Proof. — See note 5.

**866.** 4. Application Construed to Be Part of Contract — *United States.* — *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. Rep. 268; *Hubbard v. Mutual Reserve Fund L. Assoc.*, 40 C. C. A. 665.

*Connecticut.* — *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494.

*Illinois.* — *Treat v. Merchants' L. Assoc.*, 198 Ill. 431; *Blasingame v. Royal Circle*, 111 Ill. App. 202.

*Kansas.* — *Hoover v. Royal Neighbors of America*, 65 Kan. 616.

*Missouri.* — *Van Cleave v. Union Casualty, etc., Co.*, 82 Mo. App. 668; *Keller v. Home L. Ins. Co.*, 95 Mo. App. 627.

*New Hampshire.* — *Dwyer v. Mutual L. Ins. Co.*, 72 N. H. 572.

*New Jersey.* — *Finn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 17.

*New York.* — *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656.

*Texas.* — *Kansas Mut. L. Ins. Co. v. Pinson*, 94 Tex. 553; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537; *Flippen v. State L. Ins. Co.*, 30 Tex. Civ. App. 362.

**Letter Construed as Part of Application.** — Where the agent forwards two policies to his company in order that it may select one, and accompanies them with a letter fully explaining the facts, the letter will be construed to be a part of the application. *Ætna L. Ins. Co. v. Frierson*, (C. C. A.) 114 Fed. Rep. 56.

**867.** 5. So as to Receipt for Premium Note. — *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335.

7. *Clark v. Mutual Reserve Fund L. Assoc.*, 14 App. Cas. (D. C.) 154; *Wilson v. Union Mut. F. Ins. Co.*, 77 Vt. 28. See also *Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414.

**868.** 2. As to Modification by Waiver, see *infra*; 935. 4, 5.

3. Renewal Held Not New Contract. — *Agricultural Sav., etc., Co. v. Liverpool, etc., Ins. Co.*, 32 Ont. 369, *affirmed* 33 Can. Sup. Ct. 94.

7. Insured Must Show Authority of Agent to Bind Company Contrary to Terms of Policy. — *Kearney v. Ætna L. Ins. Co.*, 109 Ill. App. 609.

9. Agreements in Respect to Renewal. — *Doherty v. Millers, etc., Ins. Co.*, 4 Ont. L. Rep. 303, *affirmed* 6 Ont. L. Rep. 78.

Deposit of Acceptance in Mail Enough. — *Pennsylvania Lumberman's Mut. F. Ins. Co. v. Meyer*, 126 Fed. Rep. 352.

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**869.** 1. Terms and Conditions of Renewal Contract. — *Mallette v. British American Assur. Co.*, 91 Md. 471.

5. *Baldwin v. Phoenix Ins. Co.*, 107 Ky. 356, 92 Am. St. Rep. 362; *Klein v. Liverpool, etc., Ins. Co.* (Ky. 1900) 57 S. W. Rep. 250; *Squier v. Hanover F. Ins. Co.*, 162 N. Y. 552, 76 Am. St. Rep. 349.

9. Reformation of Policy — *Illinois.* — *Gray v. Merchants Ins. Co.*, 113 Ill. App. 537.

*Iowa.* — *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa 65; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa 377; *Dalton v. Agricultural Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 125; *Dalton v. Westchester F. Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 125; *Dalton v. Providence Washington Ins. Co.*, (Iowa 1905) 102 N. W. Rep. 126.

*Kansas.* — *Hartford F. Ins. Co. v. McCarthy*, 69 Kan. 555.

*Louisiana.* — *Arguimbau v. Germania Ins. Co.*, 106 La. 139, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 869.

*Nebraska.* — *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756.

*New York.* — *Trenton Potteries Co. v. Title, etc., Co.*, 176 N. Y. 65; *McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 N. Y. App. Div. 416, *affirmed* 169 N. Y. 590; *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471, *reversing* 62 N. Y. App. Div. 133; *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 N. Y. App. Div. 562. See also *Wilson v. National Ins. Co.*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 403, *affirmed* 56 N. Y. App. Div. 624.

*South Dakota.* — *Epiphany Roman Catholic Church v. German Ins. Co.*, 16 S. Dak. 17.

**870.** 1. Taylor v. Glens Falls Ins. Co., 44 Fla. 273.

3. Mistake Must Be Mutual. — *Arguimbau v. Germania Ins. Co.*, 106 La. 139, *citing* 15 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *Dougherty v. Lion F. Ins. Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 285, *affirmed* 95 N. Y. App. Div. 618; *Boyce v. Hamburg-Bremen F. Ins. Co.*, 24 Pa. Super. Ct. 589; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146; *Underwriters' F. Assoc. v. Henry*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072.

5. Measure of Proof. — *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565; *Arguimbau v. Germania Ins. Co.*, 106 La. 139, *citing* 16 AM. AND ENG.

**871. 7. Cancellation and Rescission — a. BY ACT OF PARTIES THEMSELVES — (1) Cancellation of Valid Policies — (a) Right to Cancel in General —** See note 1.

(b) Cancellation by Mutual Agreement — aa. IN GENERAL. — See note 2.

But an Agent Employed by the Assured to Procure Insurance. — See note 3.

bb. MODE OF CANCELLATION. — See note 5.

**872. cc. CONDITIONAL AGREEMENTS. —** See note 3.

**873. (c) Cancellation by Right Reserved to Insurer — bb. MODE OF CANCELLATION — (aa) Conditions Must Be Strictly Complied With. —** See note 2.

(bb) Notice of Cancellation — aaa. Necessity of. — See note 5.

bbb. Form of Notice. — See note 8.

**874. See note 1.**

ccc. Authority of Agent to Accept Notice — Authority of Agent Procuring Insurance. —

See note 2.

But if the Agent's Authority Is General. — See note 5.

**875. ddd. Time of Notice. —** See note 2.

(cc) Return of Unearned Premium — aaa. Necessity of. — See notes 3, 4.

ENCYC. OF LAW (2d ed.) 870; Dougherty v. Lion F. Ins. Co., (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 285, 95 N. Y. App. Div. 618; Moore v. Western Assur. Co., 103 Va. 391.

**871. 1. Without Some Stipulation Authorizing It,** the company cannot cancel without the assent of the insured. *Per* Dent, J., in *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

**Amount of Insurance Cannot Be Reduced Without Notice to Insured.** — *McLean v. American Mut. F. Ins. Co.*, 122 Iowa 355.

**Mere Soliciting Agent Has No Power to Cancel Policy at Request of Insured.** — *Phoenix Ins. Co. v. Radford*, (Neb. 1903) 93 N. W. Rep. 1000.

**2. Cancellation by Mutual Agreement.** — *Sea Ins. Co. v. Johnston*, 44 C. C. A. 477.

**3. Ratification by Insured.** — *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166.

**5. Citizens' Ins. Co. v. Henderson Elevator Co.**, (Ky. 1905) 84 S. W. Rep. 580; *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344.

**Cancellation Inferred from Conduct.** — *Hamburg-Bremen F. Ins. Co. v. Browning*, 102 Va. 890.

**Surrender and Cancellation by Mistake.** — Where the insured by mistake surrenders for cancellation the wrong one of two policies, he cannot hold the insurer liable on such policy, in the absence of fraud or mutual mistake. *Birnstein v. Stuyvesant Ins. Co.*, 83 N. Y. App. Div. 436.

**An Offer to Cancel by Insured Must Be Accepted by Insurer, or Latter Is Still Bound.** — *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146.

**872. 3. Edwards v. Sun Ins. Co.**, 101 Mo. App. 45.

**873. 2. Reservation of Right to Cancel Strictly Construed.** — *Bradshaw v. Fire Ins. Co.*, 89 Minn. 334, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873; *Baldwin v. Pennsylvania F. Ins. Co.*, 206 Pa. St. 248.

**5. Notice of Cancellation.** — *Fowler Cycle Works v. Western Ins. Co.*, 111 Ill. App. 631; *Cassville Roller Milling Co. v. Aetna Ins. Co.*, 105 Mo. App. 146.

**8. Form of Notice.** — *Schwarzschild v. Phoenix Ins. Co.*, (C. C. A.) 124 Fed. Rep. 52.

**Notice Ineffectual Unless Communicated to In-**

**sured.** — *Yoshimi v. Fidelity F. Ins. Co.*, 99 N. Y. App. Div. 69.

**874. 1. Sufficient Notice.** — Where the agent, in accordance with his instruction, wrote to the insured that the policy was canceled because of a certain clause therein, and added his opinion that the company would remain on the risk if this clause should be eliminated, it was held that this was an effective cancellation. *Colonial Assur. Co. v. National F. Ins. Co.*, 110 Ill. App. 471.

**2. Authority of Agent Procuring Insurance — United States.** — *Kerr v. Milwaukee Mechanics' Ins. Co.*, (C. C. A.) 117 Fed. Rep. 442.

*District of Columbia.* — *Wilson v. Hartford F. Ins. Co.*, 187 U. S. 467, reversing 17 App. Cas. (D. C.) 14.

*Kentucky.* — *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624.

*Missouri.* — *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45.

*New York.* — *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 N. Y. App. Div. 519, affirmed 162 N. Y. 597; *Healy v. Pennsylvania Ins. Co.*, 50 N. Y. App. Div. 327; *Yoshimi v. Fidelity F. Ins. Co.*, 99 N. Y. App. Div. 69.

*Ohio.* — *Johnson v. North British, etc., Ins. Co.*, 66 Ohio St. 6.

*Tennessee.* — *Martin v. Palatine Ins. Co.*, 106 Tenn. 523.

**5. When Agent's Authority Is General.** — *Hamm Realty Co. v. New Hampshire F. Ins. Co.*, 84 Minn. 336; *Hamm Realty Co. v. New Hampshire F. Ins. Co.*, 80 Minn. 139; *Edwards v. Home Ins. Co.*, 100 Mo. App. 695.

**Authority Question of Fact.** — *Snyder v. Commercial Union Assur. Co.*, 67 N. J. L. 7.

**875. 2. Time of Notice.** — *Continental Ins. Co. v. Daniel*, (Ky. 1904) 78 S. W. Rep. 866.

**Notice Necessary.** — *Wicks v. Scottish Union, etc., Ins. Co.*, 107 Wis. 606.

**3. Return of Unearned Premium — Necessity of.** — See the dissenting opinion of Dent, J., in *Miller v. Fireman's Ins. Co.*, 54 W. Va. 344, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 875.

**4. "Return of Premium on Surrender of Policy" — Tender Not Condition Precedent.** — *Schwarzschild, etc., Co. v. Phoenix Ins. Co.*, (C. C. A.)

**875.** bbb. Actual Tender Must Be Made. — See note 6.

**877.** (e) Cancellation under Right Conferred by Statute — *The New York Insurance Law*. — See note 2.

When the Request Is Sent by Mail. — See note 5.

(2) *Rescission of Policies Tainted with Fraud* — (a) When Fraud Affects Interest of Assured. — See note 6.

(b) When Fraud Affects Insurer Only. — See note 9.

**878.** b. BY COURTS OF EQUITY. — See note 1.

III. THE INSURER — 2. Who May Insure. — See note 4.

3. Insurance Companies — a. SEVERAL KINDS OF INSURANCE COMPANIES — (3) *Mutual Companies*. — See note 8.

**879.** b. ORGANIZATION. — See note 8.

**880.** See note 1.

**884.** d. REGULATION — (1) *Power of State to Regulate* — (a) Police Power — See note 2.

**885.** (2) *Regulations Prescribed in Exercise of Power*. — See notes 3, 4, 12.

**886.** e. TAXATION — (1) *State*. — See note 6.

124 Fed. Rep. 52; El Paso Reduction Co. v. Hartford F. Ins. Co., 121 Fed. Rep. 937.

**875.** 6. Actual Tender Must Be Made. — Peterson v. Hartford F. Ins. Co., 87 Ill. App. 567, reversed on other grounds 187 Ill. 395.

**877.** 2. Similar Statute in Nebraska. — State Ins. Co. v. Farmers' Mut. Ins. Co., 65 Neb. 34. 5. Skillings v. Royal Ins. Co., 6 Ont. L. Rep. 401, affirming 4 Ont. L. Rep. 123.

Request Takes Effect from Time of Receipt by Insurer. — Farmers' Mut. Ins. Co. v. Phoenix Ins. Co., 65 Neb. 14, (Neb. 1903) 95 N. W. Rep. 3.

6. Insured Not Estopped by Failure to Avail Himself of Means of Ascertaining Truth unless Inexcusably Negligent. — Equitable L. Assur. Soc. v. Maverick, (Tex. Civ. App. 1904) 78 S. W. Rep. 560.

9. Contra. — Bennett v. Massachusetts Mut. L. Ins. Co., 107 Tenn. 371.

Application by Wife in Husband's Name. — Metropolitan L. Ins. Co. v. Asmus, (Ky. 1904) 78 S. W. Rep. 204.

**878.** 1. Equity Will Not Act After Loss. — Schuermann v. Union Central L. Ins. Co., 165 Mo. 641.

4. Confined by Statute. — Weed v. Cuming, 12 Pa. Super. Ct. 412, affirmed 198 Pa. St. 442.

Receipt of Premiums Creates No Equitable Estoppel. — Weed v. Cumming, 198 Pa. St. 442.

8. See Stockley v. Riebenack, 12 Pa. Super. Ct. 169.

**879.** 8. Deposit of Sum as Security. — Kelsey v. Cogswell, 112 Fed. Rep. 599; Stevens v. Reeves, 138 Cal. 678; State v. Matthews, 64 Ohio St. 419.

**880.** 1. Stevens v. Reeves, 138 Cal. 678.

**884.** 2. Right to Regulate Insurance Companies under Police Power. — North American Ins. Co. v. Yates, 214 Ill. 272; State v. Beardsley, 88 Minn. 20.

Statute Allowing Plaintiff Reasonable Sum for Attorney's Fees Constitutional. — Fidelity Mut. L. Assoc. v. Mettler, 185 U. S. 308; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335; Tillis v. Liverpool, etc., Ins. Co., (Fla. 1903) 35 So. Rep. 171; Hartford F. Ins. Co. v. Redding, (Fla. 1904) 37 So. Rep. 62; Alliance Cooperative Ins.

Co. v. Corbett, 69 Kan. 564; German Ins. Co. v. Allen, 69 Kan. 729; Farmers' Mut. Ins. Co. v. Cole, (Neb. 1903) 93 N. W. Rep. 730; Sun L. Ins. Co. v. Phillips, (Tex. Civ. App. 1902) 70 S. W. Rep. 603.

Extra Damages Against Company Refusing in Bad Faith to Pay Loss. — Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151, 105 Am. St. Rep. 916.

**885.** 3. Statements and Conditions in Policies. — See Opinion of Justices, 97 Me. 590.

4. Discrimination Forbidden. — Metropolitan L. Ins. Co. v. People, 209 Ill. 42; Franklin L. Ins. Co. v. People, 103 Ill. App. 554, affirmed 200 Ill. 619; Equitable L. Assur. Soc. v. Com., 113 Ky. 126; State L. Ins. Co. v. Strong, 127 Mich. 346; Bankers' L. Ins. Co. v. Howland, 73 Vt. 1.

12. Examination into Affairs of Companies. — Burns' Rev. Stat. Ind. 1901, § 4925, authorizing an examination into the affairs of insurance companies, applies only to foreign companies, and not to domestic ones. State v. Commercial Ins. Co., 158 Ind. 680.

**886.** 6. In Louisiana the license on the business of insurance is based on the gross annual amount of premiums, and not on the number of agencies within the state. State v. Philadelphia Underwriters, 112 La. 47, 50.

Michigan. — Comp. Stat. Mich., § 3834, providing for the determination of the amount of liability of insurance companies by the insurance commissioner, is constitutional. Michigan Mut. L. Ins. Co. v. Hartz, 129 Mich. 104.

New York Statutes Construed. — People v. Thames, etc., Marine Ins. Co., 176 N. Y. 531; People v. Miller, 179 N. Y. 227, reversing 88 N. Y. App. Div. 218.

Laws N. Y. 1903, c. 530, imposing a tax on foreign fire insurance companies, is limited to the contracts of insurance made within the state. Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479.

A Tax on Premiums is not a property tax, but a tax on business. Aachen, etc., F. Ins. Co. v. Omaha, (Neb. 1904) 101 N. W. Rep. 3.

Canadian Statute Construed. — Stat. No. 82 of Unconsolidated Acts of 1888 authorizes the col-

- 887.** (2) *Municipal*. — See note 1.  
 (3) *Property Liable to Taxation — Unearned Premiums*. — See note 2.  
**888.** (4) *Exemptions* — (e) *Exemption of Bona Fide Debts*. — See note 2.  
 f. *POWERS* — (1) *In General*. — See note 3.  
**889.** (3) *Power to Make By-laws*. — See note 3.  
**891.** (4) *Power to Contract* — (c) *Power to Make Loans and Investments*. — See note 2.  
*Company Cannot Take Stock in nor Advance Money to Other Corporations*. — See note 4.  
*Construction of Particular Powers*. — See note 5.  
**893.** (6) *Power to Insure Property in Foreign State*. — See note 1.  
**894.** g. *DISSOLUTION AND FORFEITURE OF CHARTER* — (2) *Involuntary Dissolution and Forfeiture of Charter* — (b) *By Statute* — aa. *AT SUIT OF CREDITOR OR STOCKHOLDER*. — See note 2.  
 bb. *UPON PETITION OF OFFICER DESIGNATED BY STATUTE* — (bb) *Constitutionality*. — See note 7.  
**896.** (3) *Rights and Duties of Receivers*. — See note 2.  
**897.** h. *FOREIGN COMPANIES* — (1) *Authority to Transact Business* — (b) *In United States* — aa. *RULE STATED*. — See note 1.  
**898.** See note 1.

lection of the tax from the company only when the agent fails to pay. *Dowler v. Union Assur. Soc.*, 9 British Columbia 196.

**887.** 1. *Ordinance Taxing Premiums*. — An ordinance laying a tax on every \$100 "of premiums received on business done in the city," means premiums on new policies, and not premiums received on policies previously issued. *Metropolitan L. Ins. Co. v. Darenkamp*, (Ky. 1902) 66 S. W. Rep. 1125.

*Missouri Statute*. — Under Rev. Stat. Mo. 1899, § 5508, certain cities may impose a license tax on foreign insurance companies, notwithstanding § 8043, authorizing a tax on premiums. *St. Joseph v. Metropolitan L. Ins. Co.*, (Mo. App. 1904) 84 S. W. Rep. 97.

Under Rev. Stat. Mo., §§ 8043, 8048, the company and agent may both be taxed. *Kansas City v. Oppenheimer*, 100 Mo. App. 527; *Farmington v. Rutherford*, 94 Mo. App. 328.

Under Mo. Rev. Stat. 1899, §§ 5857 and 8043, a city of the third class may require a license tax of foreign insurance corporations. *Springfield v. Hubbel*, 89 Mo. App. 379.

**2. Premiums Refunded on Canceled Policies**. — A tax on the gross amount of premiums received does not include the unearned premiums actually refunded on canceled policies. *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410.

**888.** 2. *Reinsurance-reserve Fund Not Debt*. — *People v. Feitner*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 433, affirmed 54 N. Y. App. Div. 633.

**3. Powers of Insurance Companies**. — *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673.

**889.** 3. *Quintance v. Farmers' Mut. Aid Assoc.*, (Ky. 1904) 77 S. W. Rep. 1121.

**891.** 2. *License to Foreign Company to Transact Business Does Not Include Lending Money in State*. — *State v. Union Cent. L. Ins. Co.*, 8 Idaho 240.

**4. Power Given by Statute**. — *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673.

**5. Statutory Limitation**. — *New Haven Trust Co. v. Doherty*, 74 Conn. 468.

**893.** 1. *See Toronto Bank v. St. Lawrence F. Ins. Co.*, 19 Quebec Super. Ct. 434.

**894.** 2. *Statutes for Winding Up*. — *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

**7. No Deprivation of Property Without Due Process of Law**. — *Monumental Mut. L. Ins. Co. v. Wilkinson*, 100 Md. 31.

**896** 2. *Power to Contest and Compromise Claims*. — *In re United States Mut. F. Ins. Co.*, 22 R. I. 108.

**897.** 1. *Rule in United States — United States*. — *Corley v. Travelers' Protective Assoc.*, (C. C. A.) 105 Fed. Rep. 854; *Union Cent. L. Ins. Co. v. Skipper*, (C. C. A.) 115 Fed. Rep. 69. *Illinois*. — *North American Ins. Co. v. Yates*, 214 Ill. 272.

*Kentucky*. — *Prewitt v. Security Mut. L. Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 611.

*Maine*. — See Opinion of Justices, 97 Me. 590.

*Nebraska*. — *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063.

*New York*. — *Hunter v. Mutual Reserve L. Ins. Co.*, 97 N. Y. App. Div. 222.

*North Carolina*. — *Biggs v. Mutual Reserve Fund L. Assoc.*, 128 N. Car. 5.

*Ohio*. — *State v. Aetna L. Ins. Co.*, 69 Ohio St. 317.

*Tennessee*. — *State v. Connecticut Mut. L. Ins. Co.*, 106 Tenn. 282; *North British, etc., Ins. Co. v. Craig*, 106 Tenn. 621; *D'Arcy v. Connecticut Mut. L. Ins. Co.*, 108 Tenn. 567.

*Wisconsin*. — *Equitable L. Assur. Soc. v. Host*, 124 Wis. 657.

**Regulation Must Be by Statute Duly Passed**. — *Phenix Ins. Co. v. Perkins*, (S. Dak. 1905) 101 N. W. Rep. 1110.

**898.** 1. *Presumption under Law of Comity in Absence of Statutory Prohibition*. — *U. S. Fidelity, etc., Co. v. Linehan*, (N. H. 1904) 58 Atl. Rep. 956; *State v. Aetna L. Ins. Co.*, 69 Ohio St. 317.

**898.** *bb.* CONSTITUTIONALITY OF STATUTES IMPOSING CONDITIONS UPON RIGHT TO TRANSACT BUSINESS — (*aa.*) *Such Statutes Do Not Regulate Commerce.* — See note 3.

**899.** *cc.* VARIOUS CONDITIONS PRESCRIBED — (*bb.*) *License and What Is Required to Obtain It.* — See notes 1, 2, 5, 6, 7.

**900.** See notes 2, 3, 4, 8.

**901.** (*dd.*) *Retaliatory Legislation.* — See note 3.

**902.** (*e.*) What Constitutes Doing Business Within Meaning of Statutes — Issuing Policy in One State on Property Situated in Another. — See note 1.

The Delivering of Policies and the Taking of Premium Notes. — See note 3.

Business Not in Line of Insurance Not Prohibited. — See note 4.

**903.** (*f.*) Effect upon Contracts of Noncompliance with Conditions — *aa.* CONTRACTS VOID IN HANDS OF COMPANY. — See note 2.

**905.** *dd.* COMPANY ESTOPPED TO ALLEGE WANT OF AUTHORITY. — See note 2.

(*g.*) Revocation of License to Transact Business. — See notes 3, 5.

Immaterial that Charter Authorizes Other Business than Insurance if Statute Complied With. — *U. S. Fidelity, etc., Co. v. Linehan*, 70 N. H. 395.

**898.** 3. Statutes Imposing Conditions Do Not Violate Commerce Clause of Federal Constitution. — *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217.

**899.** 1. License or Certificate of Authority to Transact Business. — *North American Ins. Co. v. Yates*, 214 Ill. 272; *Jones v. Horn*, 104 Mo. App. 705; *State v. Amazon Ins. Co.*, 24 Ohio Cir. Ct. 387; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1; *Virginia Acc. Ins. Co. v. Dawson*, 53 W. Va. 619.

2. License Fee. — *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350.

5. Company Required to File Copy of Charter. — *North American Ins. Co. v. Yates*, 214 Ill. 272; *Hartman v. Hollowell*, 126 Iowa 643; *State v. Vorys*, 69 Ohio St. 56; *North British, etc., Ins. Co. v. Craig*, 106 Tenn. 621; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

6. Filing of Statement of Financial Condition Required. — *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

7. Deposit with State for Security of Policy Holders. — *Western Assur. Co. v. Halliday*, 110 Fed. Rep. 259, *affirmed* (C. C. A.) 126 Fed. Rep. 257; *Jones v. Horn*, 104 Mo. App. 705; *Babcock Printing Press Mfg. Co. v. Ranous*, 164 N. Y. 440.

Annual Bond Exacted. — *Union Cent. L. Ins. Co. v. Skipper*, (C. C. A.) 115 Fed. Rep. 69.

**900.** 2. Appointment of Agent or Attorney to Receive Process. — *North American Ins. Co. v. Yates*, 214 Ill. 272.

Must Authorize Auditor of State to Accept Service. — *Hartman v. Hollowell*, 126 Iowa 643.

Delaware Statute. — The insurance commissioner cannot be the agent of the company to receive service of process in Delaware. *Equitable L. Assur. Soc. v. Fowler*, 125 Fed. Rep. 88.

Appointment Irrevocable as Long as Liability Exists Within State. — *Hunter v. Mutual Reserve L. Ins. Co.*, 97 N. Y. App. Div. 222; *Birch v. Mutual Reserve L. Ins. Co.*, 91 N. Y. App. Div. 384, *affirmed* 181 N. Y. 583; *Johnston v. Mutual Reserve L. Ins. Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 316, *affirmed* 104 N. Y. App. Div. 544; *Collier v. Mutual Reserve Fund L. Assoc.*, 119 Fed. Rep. 617; *Equity L. Assoc. v. Gammon*, 119 Ga. 271; *Mutual Reserve Fund*

*L. Assoc. v. Scott*, 136 N. Car. 157; *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217; *Biggs v. Mutual Reserve Fund L. Assoc.*, 128 N. Car. 5; *D'Arcy v. Connecticut Mut. L. Ins. Co.*, 108 Tenn. 567. But see *Millan v. Mutual Reserve Fund L. Assoc.*, 103 Fed. Rep. 764.

3. Appointment Irrevocable as Long as Liabilities Outstanding, Although License Revoked. — *Magoffin v. Mutual Reserve Fund L. Assoc.*, 87 Minn. 260, 94 Am. St. Rep. 699; *Home Ben. Soc. v. Muehl*, 109 Ky. 479; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295.

4. State v. Vorys, 69 Ohio St. 56.

8. Possession of Certain Amount of Capital. — *Hartman v. Hollowell*, 126 Iowa 643; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

Must Possess Assets Equal to Outstanding Liabilities. — *Bankers' L. Ins. Co. v. Fleetwood*, 76 Vt. 297.

**901.** 3. Statutes Constitutional. — *State v. Insurance Co. of North America*, (Neb. 1904) 100 N. W. Rep. 405.

**902.** 1. Issuing Policy Is "Doing Business" even if Property Is Without State. — *North American Ins. Co. v. Yates*, 214 Ill. 272.

Issuing Policy Outside State on Property Within State Held to Be Doing Business. — *State v. Amazon Ins. Co.*, 24 Ohio Cir. Ct. 387.

Receipt of Premiums in Another State Not Doing Business. — *State v. Connecticut Mut. L. Ins. Co.*, 106 Tenn. 282.

3. Delivering Policies and Taking Premium Notes. — See *Johnston v. Mutual Reserve L. Ins. Co.*, (N. Y. City Ct. Tr. T.) 43 Misc. (N. Y.) 251.

Issuing and Delivering Policies Is Enough. — *Hartman v. Hollowell*, 126 Iowa 643.

4. *O'Connor v. Aetna L. Ins. Co.*, 67 Neb. 122; *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756.

Collecting Debt from Agent Not Doing Business. *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350.

**903.** 2. In Action on Policy Company Must Set Up Illegality of Its Doing Business as Affirmative Defense. — *Abraham v. Mutual Reserve Fund L. Assoc.*, 183 Mass. 116.

**905.** 2. Estoppel to Deny Want of Authority. — *Compare Baldwin v. Connecticut Mut. L. Ins. Co.*, 182 Mass. 389.

3. Revocation of License. — *North British, etc., Ins. Co. v. Craig*, 106 Tenn. 621.

5. License Revoked if Company Removes Suit to Federal Court — Statute Constitutional. — *Prewitt*

**906.** (h) Penalties Imposed for Transacting Business Without Complying with Statutory Requirements. — See notes 2, 3.

**907.** (2) *Obligations and Liabilities of Companies That Have Become Domesticated.* — See note 1.

**IV. INSURANCE AGENTS—1. Who Are Insurance Agents—***a.* IN GENERAL—(1) *At Common Law.* — See note 2.

**908.** See note 1.

The Medical Examiner of an Insurance Company. — See note 3.

(2) *By Statute.* — See note 4.

**909.** *c.* SUBAGENTS. — See note 1.

**2. Insurer's Agent Not Agent of Insured—***a.* RULE STATED. — See note 5.

**910.** See notes 1, 2.

Agent of Insurer Procuring Policies from Other Insurers. — See notes 4, 5.

*v.* Security Mut. L. Ins. Co., (Ky. 1904) 83 S. W. Rep. 611.

**906.** 2. Statutes Making It Criminal or Penal Offense to Transact Business Without Complying with Statutory Requirements. — *Sims v. Com.*, 114 Ky. 827; *State v. Beardsley*, 88 Minn. 20; *Jones v. Horn*, 104 Mo. App. 705; *Crichton v. Columbia Ins. Co.*, 81 N. Y. App. Div. 614. See also *Hartman v. Hollowell*, 126 Iowa 643.

Company Enjoined from Doing Business. — *North American Ins. Co. v. Yates*, 214 Ill. 272.

3. Revocation of License of Agent. — Under the *Kansas* statutes the license of an authorized resident agent cannot be revoked by the superintendent of insurance for the reason that he divided commissions with a nonresident agent who placed with the *Kansas* agent insurance on property situated in *Kansas*. *Maxwell v. Church*, 62 Kan. 487.

Refusal of License. — An agent who has done business without a license may be refused a license thereafter, under the *Ohio* statute. *Vorys v. State*, 67 Ohio St. 15.

**907.** 1. *People v. Van Cleave*, 187 Ill. 125; *Rothschild v. New York L. Ins. Co.*, 97 Ill. App. 547; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Franklin Ins. Co. v. Villeneuve*, 25 Tex. Civ. App. 356.

2. What Is Essential to Establish Agency. — *National Mut. Church Ins. Co. v. M. E. Church*, 105 Ill. App. 143; *Bell v. Peabody Ins. Co.*, 49 W. Va. 437.

**908.** 1. Holding Out or Recognition as Agent. — *U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568.

Must Be Some Evidence to Bind Company. — *Bell v. Peabody Ins. Co.*, 49 W. Va. 437.

3. Medical Examiner. — *Caruthers v. Kansas Mut. L. Ins. Co.*, 108 Fed. Rep. 487; *John Hancock Mut. L. Ins. Co. v. Houtp*, 113 Fed. Rep. 572.

4. Statutory Provisions — *United States.* — *McMaster v. New York L. Ins. Co.*, 183 U. S. 25.

*Iowa.* — *Hartman v. Hollowell*, 126 Iowa 643. *Michigan.* — *Pollock v. German F. Ins. Co.*, 127 Mich. 460; *Bliss v. Potomac F. Ins. Co.*, 134 Mich. 212.

*Minnesota.* — *Webster v. Ferguson*, (Minn. 1905) 102 N. W. Rep. 213.

*South Carolina.* — *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358.

*Wisconsin.* — *Wicks v. Scottish Union, etc., Ins. Co.*, 107 Wis. 606; *Speiser v. Phoenix Mut.*

*L. Ins. Co.*, 119 Wis. 530; *Welch v. Philadelphia F. Assoc.*, 120 Wis. 456.

**909.** 1. Subagents. — *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30; *Citizens' Ins. Co. v. Crist*, (Ky. 1900) 56 S. W. Rep. 658; *Otte v. Hartford L. Ins. Co.*, 88 Minn. 423, 97 Am. St. Rep. 532; *Mutual L. Ins. Co. v. Herron*, 79 Miss. 381; *Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720.

Contra as to Local Agents. — *Canadian F. Ins. Co. v. Robinson*, 31 Can. Sup. Ct. 488.

5. Agent of Insurer Not Agent of Insured. — *Philadelphia County F. Ins. Co. v. Sinsabaugh*, 101 Ill. App. 55; *Metropolitan L. Ins. Co. v. Larson*, 85 Ill. App. 143; *Citizens' Ins. Co. v. Crist*, (Ky. 1900) 56 S. W. Rep. 658; *Robinson v. U. S. Benevolent Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909. *Contra*, *Leonard v. State Mut. L. Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698.

Agency in Regard to Other Matters. — The agent may become the agent of the insured in regard to other matters, such as making payments of premiums for him. *Parker v. Knights Templars, etc., L. Indemnity Co.*, (Neb. 1903) 97 N. W. Rep. 281.

**910.** 1. Agency in Preparing Application or in Making Representations in Regard Thereto. — *Otte v. Hartford L. Ins. Co.*, 88 Minn. 423, 97 Am. St. Rep. 532; *Phoenix Ins. Co. v. Owens*, 81 Mo. App. 201; *Nute v. Hartford F. Ins. Co.*, 109 Mo. App. 585; *Bushnell v. Farmers' Mut. Ins. Co.*, 110 Mo. App. 223; *Mead v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 282, affirmed 179 N. Y. 537, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909. *Contra*, *Biggar v. Rock L. Assur. Co.*, (1902) 1 K. B. 516.

Limitation on Authority Printed in Small Type Has No Effect. — *Foster v. Pioneer Mut. Ins. Assoc.*, 37 Wash. 288.

2. Stipulations in Application. — *Fidelity, etc., Co. v. Oehne*, 94 Ill. App. 117; *Robinson v. U. S. Benevolent Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 910.

4. Procuring Policies from Other Insurers. — *Marsh Oil Co. v. Ætna Ins. Co.*, 79 Mo. App. 21; *J. C. Smith, etc., Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674.

5. Receipt of Premium Ratifies Acts of Agent and Constitutes Him Agent of Insurer. — *Queen Ins. Co. v. Union Bank, etc., Co.*, (C. C. A.)

**910.** *b.* EFFECT OF PROVISIONS IN APPLICATION OR POLICY. — See note 6.

**911.** 3. Statutory Regulation of Agents. — See note 2.

4. Powers, Rights, Duties, and Liabilities of Agent — *a.* IN RESPECT TO PRINCIPAL — (1) *Powers and Rights* — (a) *In General*. — See notes 3, 4.

(b) *Right to Compensation* — *Additional Insurance Secured by Another Agent*. — See note 7.

**912.** (2) *Duties and Liabilities* — (a) *In General*. — See note 6.

(b) *Liability for Writing Insurance Contrary to Instructions*. — See note 7.

**913.** See note 1.

(c) *Liability for Neglect to Cancel Policies*. — See note 2.  
The Measure of Damages. — See note 9.

**914.** (e) *Liability of Sureties on Agents' Bonds*. — See note 3.

*b.* IN RESPECT TO ASSURED — (1) *Power to Bind Principal* — (a) *In General*. — See notes 9, 10.

**915.** (b) *Nature and Extent of Authority* — *aa.* REAL AUTHORITY — (*aa*) *General Agents*. — See notes 1, 2.

111 Fed. Rep. 697; *Germania Ins. Co. v. Wingfield*, (Ky. 1900) 57 S. W. Rep. 456; *Pollock v. German F. Ins. Co.*, 127 Mich. 460.

**910.** 6. Provisions in Application or in Policy. — *Rielly v. Empire L. Ins. Co.*, 99 N. Y. App. Div. 535.

*Rule Applied to Medical Examiner*. — *Sternaman v. Metropolitan L. Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625.

**911.** 2. Cannot Recover Commissions Unless License Obtained. — *Black v. Security Mut. L. Assoc.*, 95 Me. 35.

3. *Currier v. Mutual Reserve Fund L. Assoc.*, 47 C. C. A. 651, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911; *Leviness v. Kaplan*, 99 Md. 683, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911.

4. *Terms of Express Contract Will Govern*. — *Currier v. Mutual Reserve Fund L. Assoc.*, 47 C. C. A. 651, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911; *State L. Ins. Co. v. Schwarzkopf*, 109 Mo. App. 383.

7. *So Where the First Application Is Refused*, and a new application for an increased amount is secured by another agent. *Leviness v. Kaplan*, 99 Md. 683, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 911.

**912.** 6. *Duties and Liabilities of Agents to Principal*. — *Halsey v. Adams*, 64 N. J. L. 724; *Franklin F. Ins. Co. v. Bradford*, 201 Pa. St. 32, 88 Am. St. Rep. 770; *Norwich Union F. Ins. Soc. v. McAlister*, 35 N. Bruns. 691.

*Company Cannot Recover Where It Pays Loss with Knowledge of Fraud*. — *New York L. Ins. Co. v. Hord*, (Ky. 1904) 78 S. W. Rep. 207.

*Not Liable for Acts of Clerk Outside of Apparent Authority*. — *Bradford v. Hanover F. Ins. Co.*, 43 C. C. A. 310.

7. *Liability for Writing Insurance in Disobedience of Instructions*. — *Continental Ins. Co. v. Clark*, 126 Iowa 274.

**913.** 1. *Ratification by Principal*. — *Mechanics*, etc., *Ins. Co. v. Rion*, (Tenn. Ch. 1901) 62 S. W. Rep. 44.

2. *Liability for Neglect to Cancel Policies*. — *Germania F. Ins. Co. v. Harraden*, 90 Ill. App. 250. See also *Halsey v. Adams*, 64 N. J. L. 721.

9. *Measure of Damages*. — *Continental Ins.*

*Co. v. Clark*, 126 Iowa 274. See also *Halsey v. Adams*, 64 N. J. L. 724.

**914.** 3. *Ignorance of Extent of Obligation Assumed No Defense*. — *Foster v. Franklin L. Ins. Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 91.

9. *Agent's Knowledge of Facts* — *Florida*. — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

*Illinois*. — *National Mut. Church Ins. Co. v. M. E. Church*, 105 Ill. App. 143; *Mystic Workers of the World v. Troutman*, 113 Ill. App. 84.

*Indiana*. — *German-American Ins. Co. v. Yeagley*, 163 Ind. 651.

*Iowa*. — *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa 547.

*Kansas*. — *Queen Ins. Co. v. Straughan*, 70 Kan. 186.

*Kentucky*. — *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546.

*Maine*. — *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39.

*Missouri*. — *De Soto v. American Guaranty Fund Mut. F. Ins. Co.*, 102 Mo. App. 1.

*Nebraska*. — *Hunt v. State Ins. Co.*, 66 Neb. 121; *German Ins. Co. v. Shader*, (Neb. 1903) 93 N. W. Rep. 972.

*New Hampshire*. — *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441.

*South Carolina*. — *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358.

*South Dakota*. — *Vesey v. Commercial Union Assur. Co.*, (S. Dak. 1904) 101 N. W. Rep. 1074.

*Washington*. — *Foster v. Pioneer Mut. Ins. Assoc.*, 37 Wash. 288.

10. *Notice to Agent Binds Company*. — *Metropolitan L. Ins. Co. v. Sullivan*, 112 Ill. App. 500; *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565; *Southern Ins. Co. v. Stewart*, (Miss. 1901) 30 So. Rep. 755; *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559; *Modern Woodmen of America v. Colman*, (Neb. 1903) 94 N. W. Rep. 814.

**915.** 1. *Powers of General Agent Stated*. — *Squier v. Hanover F. Ins. Co.*, 162 N. Y. 552, 76 Am. St. Rep. 349.

2. *Waiver of Conditions*. — *Scottish Union, etc., Ins. Co. v. Brown*, 24 Ohio Cir. Ct. 52; *Fraser v. Home L. Ins. Co.*, 71 Vt. 482.



**916.** *bb.* OSTENSIBLE AUTHORITY — (*aa*) *In General.* — See note 12.

**917.** See note 1.

(*bb*) *Effect of Private Instructions to Agent.* — See note 2.

(*cc*) *Acts Done After Termination of Agency.* — See note 3.

*cc.* WAIVER OF LIMITATION AND RATIFICATION OF ACTS. — See note 4.

**918.** (2) *Personal Liability* — (b) *Liability for Neglect to Effect Insurance.* — See note 5.

(d) *Where Agency Is of Foreign Company Not Authorized to Do Business.* — See note 8.

**919.** 5. *Termination of Agency* — *a.* HOW IT MAY BE TERMINATED — The Exceptions to This Rule as Concerns the Right of the Principal to Revoke the Agency. — See note 5.

*b.* EFFECT OF TERMINATION — (2) *Right to Commissions on Renewal Policies.* — See note 7.

**V. FORFEITURE AND AVOIDANCE** — 1. *Ground of Forfeiture* — *b.* WARRANTIES — (1) *Definition.* — See note 9.

**916.** 12. *Agent's Ostensible Authority* — *Alabama.* — *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451; *Robinson v. Aetna Ins. Co.*, 128 Ala. 477; *Schloss v. Westchester F. Ins. Co.*, 141 Ala. 566.

*Arkansas.* — *State Mut. Ins. Co. v. Latourette*, 71 Ark. 242, 100 Am. St. Rep. 63.

*Florida.* — *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

*Illinois.* — *Philadelphia County F. Ins. Co. v. Sinsabaugh*, 101 Ill. App. 55.

*Kansas.* — *Moulton v. Masonic Mut. Ben. Soc.*, 64 Kan. 56.

*Kentucky.* — *National L. Ins. Co. v. Twiddell*, (Ky. 1900) 58 S. W. Rep. 699; *Halle v. New York L. Ins. Co.*, (Ky. 1900) 58 S. W. Rep. 822; *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, (Ky. 1905) 84 S. W. Rep. 551.

*Michigan.* — See *Morgan v. Illinois Ins. Co.*, 130 Mich. 427.

*Minnesota.* — *Ames-Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346.

*Mississippi.* — *Mutual L. Ins. Co. v. Herron*, 79 Miss. 381.

*Missouri.* — *Van Cleave v. Union Casualty, etc., Co.*, 82 Mo. App. 668; *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616.

*Nebraska.* — *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749.

*South Carolina.* — *Cave v. Home Ins. Co.*, 57 S. Car. 347.

*Tennessee.* — *Aetna L. Ins. Co. v. Fallow*, 110 Tenn. 720.

*Texas.* — *Insurance Co. of North America v. Bell*, 25 Tex. Civ. App. 129; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607; *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494.

*Vermont.* — *Fraser v. Home L. Ins. Co.*, 71 Vt. 482.

*So by Statute in Massachusetts as to Agents of Foreign Companies.* — *Stuart v. Reliance Ins. Co.*, 179 Mass. 434.

**917.** 1. *Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739; *Western Assur. Co. v. Pharand*, 11 Quebec K. B. 144, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916.

2. *Effect of Instructions to Agents.* — *Georgia*

*Home Ins. Co. v. Allen*, 128 Ala. 451; *Going v. Mutual Ben. L. Ins. Co.*, 58 S. Car. 201.

3. *Acts Done After Termination of Agency.* — *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614; *Merchants Ins. Co. v. Oberman*, 99 Ill. App. 357.

4. *Ratification of Unauthorized Acts.* — *Cameron v. Mutual Life, etc., Co.*, 121 Iowa 477; *Younghoe v. Grain Shippers' Mut. F. Ins. Assoc.*, 126 Iowa 374; *Fraser v. Home L. Ins. Co.*, 71 Vt. 482.

**918.** 5. *Failure to Procure Policy.* — *Everett v. O'Leary*, 90 Minn. 154.

8. *Agent of Foreign Company.* — *Hartman v. Hollowell*, 126 Iowa 643; *Burges v. Jackson*, 18 N. Y. App. Div. 296, affirmed 162 N. Y. 632. *Contra*, *Jones v. Horn*, 104 Mo. App. 705.

*So by Statute in Texas.* — *Price v. Garvin*, (Tex. Civ. App. 1902) 69 S. W. Rep. 985.

*Insured May Recover Premiums.* — *Barrett v. Elliott*, 10 British Columbia 461.

*No Liability unless Insured Is Deceived.* — *Webster v. Ferguson*, (Minn. 1905) 102 N. W. Rep. 213.

*Agent Not Liable When License Revoked After Issue of Policy.* — *Hudson v. Compere*, 94 Tex. 449.

*Pennsylvania Statute Construed.* — Act Pa., May 1, 1876, § 48, providing for the personal liability of any agent of a foreign insurance company which has not complied with the laws of Pennsylvania, is confined to policies issued on property within the state. *Rothschild v. Adler-Weinberger Steamship Co.*, 130 Fed. Rep. 866.

**919.** 5. *Contract Right to Commissions on Renewals.* — *Andrews v. Travelers' Ins. Co.*, (Ky. 1902) 70 S. W. Rep. 43.

7. *Commissions on Renewals After Termination of Agency.* — *King v. Raleigh*, (Mo. App. 1902) 70 S. W. Rep. 251.

9. *Warranties Defined.* — *Rice v. Fidelity, etc., Co.*, 43 C. C. A. 270; *L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co.*, 55 W. Va. 238, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 910.

A stipulation that the company shall not be liable for loss from certain specified causes is not a warranty. *Conner v. Manchester Assur. Co.*, (C. C. A.) 130 Fed. Rep. 743.

- 920.** (2) *Kinds of Warranties.* — See notes 1, 2, 3.  
 (3) *Nature of Warranties* — (b) *Materiality* — *General Rule.* — See note 5.  
**921.** *Statutory Provisions as to Materiality.* — See note 2.  
*Construction and Effect of Statutes.* — See notes 3, 4, 5.  
**922.** (c) *Good Faith of Warrantor.* — See note 1.

**920. 1. Affirmative and Promissory Warranties Defined.** — *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580.

**2.** *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co.*, 55 W. Va. 238, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920.

**False Warranty of Fact Within Knowledge of Insured Avoids Policy.** — *Finn v. Metropolitan L. Ins. Co.*, 70 N. J. L. 255, affirming 67 N. J. L. 17; *Henn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 310.

**3.** *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co.*, 55 W. Va. 238, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920.

**5. Materiality of Facts Warranted** — *United States.* — *McClain v. Provident Sav., etc., Assur. Soc.*, 105 Fed. Rep. 834.

*Colorado.* — *Webb v. Bankers' L. Ins. Co.*, 19 Colo. App. 456.

*Iowa.* — *Banco De Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. Rep. 232.

*Louisiana.* — *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341.

*Missouri.* — *Van Cleave v. Union Casualty, etc., Co.*, 82 Mo. App. 668.

*Nebraska.* — *Royal Neighbors of America v. Wallace*, 66 Neb. 543, modifying 64 Neb. 330.

*New York.* — *Schane v. Metropolitan L. Ins. Co.*, 76 N. Y. App. Div. 271, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 920; *Fitzgerald v. Supreme Council, etc.*, 39 N. Y. App. Div. 251, affirmed 167 N. Y. 568; *Crosby v. Security Mut. L. Ins. Co.*, 86 N. Y. App. Div. 89.

*Texas.* — *Flippen v. State L. Ins. Co.*, 30 Tex. Civ. App. 362; *Pacific Mut. L. Ins. Co. v. Terry*, (Tex. Civ. App. 1904) 84 S. W. Rep. 656.

*Virginia.* — *Metropolitan L. Ins. Co. v. Rutherford*, 98 Va. 195.

**921. 2. Constitutionality of Statutes Relating to Materiality.** — *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916. See also *Jenkins v. Covenant Mut. L. Ins. Co.*, 171 Mo. 375.

**Does Not Apply Where Forfeiture Incurred Before Passage of Statute.** — *Elliott v. Farmer's Ins. Co.*, 114 Iowa 154.

**3. Effect of Statutes** — *United States.* — *McClain v. Provident Sav. L. Assur. Soc.*, (C. C. A.) 110 Fed. Rep. 80. See also *Fidelity Mut. L. Assoc. v. Jeffords*, 46 C. C. A. 377.

*Arkansas.* — *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73.

*Georgia.* — *Supreme Conclave, etc., v. Wood*, 120 Ga. 328.

*Iowa.* — *Johnson v. Farmers' Ins. Co.*, 126 Iowa 565.

*Kentucky.* — *Citizens Ins. Co. v. Crist*, (Ky. 1900) 56 S. W. Rep. 658; *Home Ins. Co. v.*

*Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

*Maryland.* — *Maryland Casualty Co. v. Gehrmann*, 96 Md. 634.

*Minnesota.* — *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

*Missouri.* — *Schuermann v. Union Cent. L. Ins. Co.*, 165 Mo. 641; *Summers v. Metropolitan L. Ins. Co.*, 90 Mo. App. 691.

*North Carolina.* — *McCarty v. Imperial Ins. Co.*, 126 N. Car. 820.

*Ohio.* — *Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160; *North American Acc. Ins. Co. v. Sickles*, 23 Ohio Cir. Ct. 594.

*Pennsylvania.* — *Murphy v. Prudential Ins. Co.*, 205 Pa. St. 444.

*Tennessee.* — *Light v. Greenwich Ins. Co.*, 105 Tenn. 480; *Hartford L. Ins. Co. v. Stallings*, 110 Tenn. 1; *Nashville First Nat. Bank v. U. S. Fidelity, etc., Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765.

*Texas.* — *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494.

**The Missouri Statute Includes Misrepresentations warranted to be true.** *Deane v. Southwestern Mut. L. Assoc.*, 86 Mo. App. 459. But it does not avoid warranties material to the risk. *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666.

**Ohio Statute.** — *Rev. Stat. Ohio*, § 3625, has no application to conditions contained in the policy itself. *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204.

**4.** *Kern v. Supreme Council, etc.*, 167 Mo. 471, overruling *Ashford v. Metropolitan L. Ins. Co.*, 80 Mo. App. 638; *Ashford v. Metropolitan L. Ins. Co.*, 98 Mo. App. 505.

**5. Massachusetts Statute.** — *Dolan v. Mutual Reserve Fund L. Assoc.*, 182 Mass. 413.

**Pennsylvania Act June 23, 1883**, applies to warranties in the application and not to the express covenants of the policy. *Connell v. Metropolitan L. Ins. Co.*, 8 Del. Co. Rep. (Pa.) 184.

**922. 1. Effect of Warrantor's Good Faith** — *General Rule* — *United States.* — *Standard L., etc., Ins. Co. v. Sale*, (C. C. A.) 121 Fed. Rep. 664; *McClain v. Provident Sav., etc., Assur. Soc.*, 105 Fed. Rep. 834.

*Georgia.* — *Supreme Conclave, etc., v. Wood*, 120 Ga. 328.

*Michigan.* — *Shelden v. Michigan, etc., Mut. F. Ins. Co.*, 124 Mich. 303.

*Missouri.* — *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666.

*New York.* — *Fitzgerald v. Supreme Council, etc.*, 39 N. Y. App. Div. 251, affirmed 167 N. Y. 568.

*Pennsylvania.* — *Dinan v. Supreme Council, etc.*, 201 Pa. St. 363; *Connell v. Metropolitan L. Ins. Co.*, 8 Del. Co. Rep. (Pa.) 184.

*Rhode Island.* — *Leonard v. State Mut. L. Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698.

- 922.** (4) *Warranties Distinguished from Representations.* — See note 6.
- 923.** (5) *What Constitutes Warranty* — (a) *In General.* — See note 1.
- (b) *Warranties Not Created or Extended by Construction.* — See note 2.
- (c) *Warranties Not Favored.* — See notes 4, 5.
- 924.** (d) *Form or Language of Statements.* — See notes 1, 2.
- (e) *Statements Incorporated in Policy.* — See note 8.
- 925.** See notes 1, 2.
- (f) *Incorporation of Application in Policy — By Express Reference.* — See note 5.
- 927.** (6) *Construction of Warranties — Parol Evidence in Aid of Construction.* — See note 4.
- Strictly Construed. — See notes 7, 8, 9.
- 928.** (7) *Effect of Breach of Warranty.* — See note 5.

*Texas.* — National Fraternity v. Karnes, 24 Tex. Civ. App. 607; Ash v. Fidelity Mut. L. Assoc., 26 Tex. Civ. App. 501.

*Wisconsin.* — Fraser v. Aetna L. Ins. Co., 114 Wis. 510.

**922.** 6. *Distinction Between Warranties and Representations.* — Rice v. Fidelity, etc., Co., 43 C. C. A. 270; Van Cleave v. Union Casualty, etc., Co., 82 Mo. App. 668; Royal Neighbors of America v. Wallace, 66 Neb. 543, modifying 64 Neb. 330.

**923.** 1. *Representations Expressly Declared to Be Warranties.* — Germier v. Springfield F. & M. Ins. Co., 109 La. 341; National Fraternity v. Karnes, 24 Tex. Civ. App. 607. See also Peterson v. Des Moines L. Assoc., 115 Iowa 668.

*Contra* if Such Construction Would Defeat Obvious Purpose of Parties. — Royal Neighbors of America v. Wallace, 64 Neb. 330.

2. *Warranties Not Extended by Construction.* — A clause in a policy that "it shall be null and void \* \* \* if any of the statements or declarations in the application for membership and upon the faith of which this certificate was issued, shall be found in any respect untrue," is a warranty only of those representations which lead the insurer to issue the policy. Sovereign Camp Woodmen of the World v. Gray, 26 Tex. Civ. App. 457.

4. *Fidelity Mut. L. Assoc. v. Jeffords*, 46 C. C. A. 377; Fuller v. New York F. Ins. Co., 184 Mass. 12; Fitzgerald v. Supreme Council, etc., 39 N. Y. App. Div. 251, affirmed 167 N. Y. 568.

5. *Statements of Doubtful Character Construed to Be Representations.* — McClain v. Provident Sav. L. Assur. Soc., (C. C. A.) 110 Fed. Rep. 80; Northwestern L. Assur. Co. v. Tietze, 16 Colo. App. 205; Royal Neighbors of America v. Wallace, 66 Neb. 543, modifying 64 Neb. 330; Aetna L. Ins. Co. v. Rehlaender, (Neb. 1903) 94 N. W. Rep. 129.

**924.** 1. *Form or Language of Statements.* — Delaware Ins. Co. v. Harris, 26 Tex. Civ. App. 537.

2. *Use of Word "Warranty" Not Conclusive.* — Provident Sav. L. Assur. Soc. v. Pruett, 141 Ala. 688.

8. *Warranties Must Be Embraced in Policy.* — Fitzgerald v. Supreme Council, etc., 39 N. Y. App. Div. 251, affirmed 167 N. Y. 568; Sullivan v. Fraternal Societies' Co-operative Indemnity Union, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 578. See also Conner v. Manchester Assur. Co., (C. C. A.) 130 Fed. Rep. 743; Keller v. Liverpool, etc., Ins. Co., 27 Tex. Civ. App. 102.

**925.** 1. *Mutual Ben. L. Ins. Co. v. Lehman*, 132 Ala. 640, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 924; Northwestern L. Assur. Co. v. Tietze, 16 Colo. App. 205; Van Cleave v. Union Casualty, etc., Co., 82 Mo. App. 668; Dime Sav. Inst. v. American Surety Co., 68 N. J. L. 440.

*Contra.* — Leonard v. State Mut. L. Assur. Co., 24 R. I. 7, 96 Am. St. Rep. 698.

2. *Statements Held to Be Representations Notwithstanding Incorporation in Policy.* — Brignac v. Pacific Mut. L. Ins. Co., 112 La. 574.

5. *Mode of Incorporating Application in Policy — United States.* — Mutual L. Ins. Co. v. Kelly, (C. C. A.) 114 Fed. Rep. 268.

*Colorado.* — Webb v. Bankers' L. Ins. Co., 19 Colo. App. 456.

*Connecticut.* — Fell v. John Hancock Mut. L. Ins. Co., 76 Conn. 494.

*Illinois.* — Blasingame v. Royal Circle, 111 Ill. App. 202.

*New Jersey.* — Dimick v. Metropolitan L. Ins. Co., 69 N. J. L. 384.

*New York.* — Schane v. Metropolitan L. Ins. Co., 76 N. Y. App. Div. 271; Crosby v. Security Mut. L. Ins. Co., 86 N. Y. App. Div. 89; Wynn v. Provident Life, etc., Co., 99 N. Y. App. Div. 103; Robinson v. Supreme Commandery, etc., (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 97, affirmed 77 N. Y. App. Div. 215; Hook v. Michigan Mut. L. Ins. Co., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 478.

**927.** 4. *Parol Evidence to Aid Interpretation.* — Phetteplace v. British, etc., Marine Ins. Co., 23 R. I. 26.

7. *Warranties Strictly Construed.* — Newton v. Southwestern Mut. L. Assoc., 116 Iowa 311; Louis v. Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659.

8. *Warranties of Correctness of Answers Restricted to Answers Given.* — Federal L. Assoc. v. Smith, 86 Ill. App. 427; Triple Link Mut. Indemnity Assoc. v. Froebe, 90 Ill. App. 299; Farmers' Mut. F., etc., Ins. Co. v. Lecroy, 91 Ill. App. 41; Fitzgerald v. Supreme Council, etc., 39 N. Y. App. Div. 251, affirmed 167 N. Y. 568.

9. *Partial Answers.* — Robinson v. Supreme Commandery, etc., (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 97, affirmed 77 N. Y. App. Div. 215.

**928.** 5. *Breach of Warranty — Effect.* — Traders' Mut. L. Ins. Co. v. Johnson, 200 Ill. 359; Swedish-American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382; Hunt v. State Ins. Co., 66 Neb. 121; German Ins. Co. v. Shader, (Neb. 1903) 93 N. W. Rep. 972.

*Louisiana Doctrine.* — "When the situation is

**929.** See note 1.

(8) *Breach of Warranties* — (a) *General Rule*. — See note 5.

**932.** c. *REPRESENTATIONS* — (1) *Definition*. — See note 8.

(2) *Falsity of Representations*. — See note 11.

**933.** (3) *Representations to Avoid Policy Must Be Material*. — See notes 1, 2, 3, 4.

(4) *Good Faith of Insured Immaterial*. — See note 5.

(5) *Materiality of Representations* — (a) *General Rule*. — See note 6.

**934.** (b) *Materiality Question of Fact*. — See notes 1, 2.

such as will, as a matter of law, carry with it a forfeiture as a penalty, that result will follow, whether it has been expressly declared or stipulated for or not." *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574.

**929.** 1. *Effect of Breach Declared by Policy*. — *Mutual Reserve Fund L. Assoc. v. Cotter*, 72 Ark. 620; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.*, (Mich. 1904) 100 N. W. Rep. 442; *Ohio Farmers' Ins. Co. v. Wilson*, 70 Ohio St. 354; *Philadelphia F. Assoc. v. American Cement Plaster Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1115.

5. *Literal Compliance Required*. — *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244.

**932.** 8. *Representations Defined*. — *Rice v. Fidelity, etc., Co.*, 43 C. C. A. 270; *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139.

11. *Substantial Truth of Representations*. — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25; *Van Cleave v. Union Casualty, etc., Co.*, 82 Mo. App. 668; *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244; *Royal Neighbors of America v. Wallace*, 66 Neb. 543, *modifying* 64 Neb. 330; *Nashville First Nat. Bank v. U. S. Fidelity, etc., Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765. See also *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139.

**933.** 1. *Materiality of Representations* — *United States*. — *McClain v. Provident Sav. L. Assur. Soc.*, (C. C. A.) 110 Fed. Rep. 80.

*Alabama*. — *Providence Sav. L. Assur. Soc. v. Pruett*, 141 Ala. 688.

*Colorado*. — *Northwestern L. Assur. Co. v. Tietze*, 16 Colo. App. 205.

*Illinois*. — *Supreme Council, etc., v. Beggs*, 110 Ill. App. 139.

*Kentucky*. — *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354.

*Nebraska*. — *Ætna L. Ins. Co. v. Rehlaender*, (Neb. 1903) 94 N. W. Rep. 129.

*New York*. — *Fitzgerald v. Supreme Council, etc.*, 39 N. Y. App. Div. 251, 167 N. Y. 568; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, *affirmed* 172 N. Y. 659.

*Texas*. — *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537.

2. *Stipulations as to Materiality*. — *Farrell v. Security Mut. L. Ins. Co.*, (C. C. A.) 125 Fed. Rep. 684; *Dwyer v. Mutual L. Ins. Co.*, 72 N. H. 572.

3. *Webb v. Security Mut. L. Ins. Co.*, (C. C. A.) 126 Fed. Rep. 635; *Hoover v. Royal Neighbors of America*, 65 Kan. 616.

4. *Representations Not Made Warranties by Stipulation as to Materiality*. — See *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25; *Metropolitan L. Ins. Co. v. Larson*, 85 Ill. App. 143.

5. *Good Faith in Respect to Representations Not Material* — *United States*. — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 115 Fed. Rep. 77, *affirmed* (C. C. A.) 124 Fed. Rep. 25; *Provident Sav. L. Assur. Soc. v. Hadley*, 43 C. C. A. 25. See also (C. C. A.) 130 Fed. Rep. 415, *reversing* *Kerr v. Union Marine Ins. Co.*, 124 Fed. Rep. 835.

*Kentucky*. — *Warren Deposit Bank v. Fidelity, etc., Co.*, 116 Ky. 38.

*Maryland*. — *Bankers' L. Ins. Co. v. Miller*, 100 Md. 1, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

*Michigan*. — *New Era Assoc. v. Mactavish*, 133 Mich. 68.

*Minnesota*. — *Mattson v. Modern Samaritans*, 91 Minn. 434, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

*Nebraska*. — See *Farmers' Mut. Ins. Co. v. Cole*, (Neb. 1903) 93 N. W. Rep. 730.

*New York*. — *Sullivan v. Fraternal Societies' Co-operative Indemnity Union*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 578.

*North Carolina*. — *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.

*Canada*. — *Smith v. Dominion of Canada Acc. Ins. Co.*, 36 N. Bruns. 300.

*Good Faith Material if Misrepresentation in Response to Question Calling for Mere Expression of Opinion or Belief*. — *Royal Neighbors of America v. Wallace*, (Neb. 1904) 99 N. W. Rep. 256; *Ætna L. Ins. Co. v. Rehlaender*, (Neb. 1903) 94 N. W. Rep. 129.

*Rule Adopted on Ground that There Is in Every Contract of Insurance Implied Warranty of Truth of Material Representations*. — *Evans v. Columbia F. Ins. Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 316.

6. *What Representations Are Material* — *Illinois*. — *Metropolitan L. Ins. Co. v. Moravec*, 214 Ill. 186, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933.

*Kentucky*. — *Champion Ice Mfg., etc., Co. v. American Bonding, etc., Co.*, 115 Ky. 863.

*Louisiana*. — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574.

*Maine*. — *Jeffrey v. United Order of the Golden Cross, etc.*, 97 Me. 176.

*Minnesota*. — *Mattson v. Modern Samaritans*, 91 Minn. 434.

*Pennsylvania*. — *Murphy v. Prudential Ins. Co.*, 205 Pa. St. 444.

*Washington*. — *Dunham v. Citizens' Ins. Co.*, 34 Wash. 205.

*West Virginia*. — *Tyree v. Virginia F. & M. Ins. Co.*, 55 W. Va. 63, 104 Am. St. Rep. 983.

**934.** 1. *Materiality Question of Fact* — *United States*. — *Provident Sav. L. Assur. Soc. v. Hadley*, 43 C. C. A. 25.

**934. 2. Waiver and Estoppel**—*a. GENERAL STATEMENT.*—See notes 3, 4.

*b. WHAT CONSTITUTES WAIVER OR ESTOPPEL*—(1) *In General.*—See note 5.

**935.** See note 1.

**Waiver and Estoppel Interchangeable Terms.**—See notes 2, 3.

**Parol Waiver.**—See notes 4, 5.

*Maryland.*—*Maryland Casualty Co. v. Gehrman*, 96 Md. 634.

*Minnesota.*—*Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

*Missouri.*—See *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152.

*New York.*—*Brooks v. Erie F. Ins. Co.*, 76 N. Y. App. Div. 275, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 934, affirmed 177 N. Y. 572; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659; *Porter v. Traders' Ins. Co.*, 164 N. Y. 504.

*Ohio.*—*Northwestern Mut. L. Ins. Co. v. Risley*, 12 Ohio Cir. Dec. 186, 22 Ohio Cir. Ct. 160.

*Canada.*—*Smith v. Dominion of Canada Acc. Ins. Co.*, 36 N. Bruns. 300.

**Court May Declare Representations Material in Clear Case.**—*Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 115 Fed. Rep. 77, affirmed (C. C. A.) 124 Fed. Rep. 25; *Bankers' L. Ins. Co. v. Miller*, 100 Md. 1; *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666; *Royal Neighbors of America v. Wallace*, 64 Neb. 330; *Fidelity Mut. L. Assoc. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813.

**934. 2. Stipulation as to Materiality.**—*Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25; *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *Rupert v. Supreme Ct., etc.*, (Minn. 1905) 102 N. W. Rep. 715; *Dwyer v. Mutual L. Ins. Co.*, 72 N. H. 572.

**3. General Application of Waiver or Estoppel to Forfeitures of Insurance Policies.**—*Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39; *Baltimore L. Ins. Co. v. Howard*, 95 Md. 244; *Royal Neighbors of America v. Wallace*, 66 Neb. 543, modifying 64 Neb. 330.

**Doctrine of Waiver Applies to Warranties and Representations Alike.**—*National Fraternity v. Karnes*, 24 Tex. Civ. App. 607.

**4. Waiver Favored**—*Alabama.*—*U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568; *Travelers' Ins. Co. v. Brown*, 138 Ala. 526.

*Colorado.*—*Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191.

*Indiana.*—*National Masonic Acc. Assoc. v. McBride*, 162 Ind. 379; *Germania F. Ins. Co. v. Pitcher*, 160 Ind. 392; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651.

*Iowa.*—See *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

*Kentucky.*—*Continental Ins. Co. v. Brown*, 114 Ky. 183; *Home Ins. Co. v. Holder*, (Ky. 1903) 74 S. W. Rep. 267. See also *Ætna L. Ins. Co. v. Hartley*, (Ky. 1902) 67 S. W. Rep. 19, 68 S. W. Rep. 1081.

*Missouri.*—*Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111.

*Oregon.*—*Frasier v. New Zealand Ins. Co.*, 39 Oregon 342.

*Tennessee.*—*Westchester F. Ins. Co. v. McAdoo*, (Tenn. Ch. 1899) 57 S. W. Rep. 409.

*Virginia.*—*Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236.

**Insured Must Show Some Reasonable Ground.**—*Gonder v. Lancaster County Mut. F. Ins. Co.*, 17 Pa. Super. Ct. 119.

**5. No New Consideration Necessary.**—*Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57.

**Written Consent to Breach.**—*Phenix Ins. Co. v. Lindley*, 111 Ill. App. 266.

**935. 1. Waiver Inferred from Acts.**—*Union Cent. L. Ins. Co. v. Spinks*, (Ky. 1904) 83 S. W. Rep. 615; *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654; *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557; *Westchester F. Ins. Co. v. McAdoo*, (Tenn. Ch. 1899) 57 S. W. Rep. 409.

**2. Implied Waiver Not Technical Estoppel.**—*Cassimus v. Scottish Union, etc., Ins. Co.*, 135 Ala. 256; *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Hennessy v. Metropolitan L. Ins. Co.*, 74 Conn. 699; *Modern Woodmen of America v. Lane*, 62 Neb. 89; *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559; *Frasier v. New Zealand Ins. Co.*, 39 Oregon 342; *Westchester F. Ins. Co. v. McAdoo* (Tenn. Ch. 1899) 57 S. W. Rep. 409.

**Waiver and Estoppel Not Interchangeable Terms.**—*Welch v. Philadelphia F. Assoc.*, 120 Wis. 456.

**3. Waiver and Estoppel Identical in This Connection.**—See *Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935.

**4. Parol Waiver Valid.**—*Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57.

**5. Parol Waiver Valid in Spite of Express Restriction.**—*United States.*—*Ætna L. Ins. Co. v. Frierson*, (C. C. A.) 114 Fed. Rep. 56.

*Alabama.*—*U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568.

*Illinois.*—*Phenix Ins. Co. v. Caldwell*, 187 Ill. 73; *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439.

*Indiana.*—*Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30.

*Iowa.*—See *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

*Kentucky.*—*German-American Ins. Co. v. Yellow Poplar Lumber Co.*, (Ky. 1905) 84 S. W. Rep. 551; *Mattingly v. Springfield F. & M. Ins. Co.*, (Ky. 1904) 83 S. W. Rep. 577.

*Missouri.*—*Thompson v. Traders' Ins. Co.*, 169 Mo. 12.

*Ohio.*—*Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739.

*Texas.*—*Home Mut. Ins. Co. v. Nichols*, (Tex. Civ. App. 1903) 72 S. W. Rep. 440.

**935.** (2) *Issuance of Policy Without Objection to Known Grounds of Forfeiture*—(a) *In General*.—See note 6.

**936.** See notes 1, 3.

(b) *Effect of Constructive Knowledge*.—See notes 4, 5.

**937.** (c) *Failure to Examine or Inquire as to Existing Facts*.—See notes 1, 2.

(d) *Omission or Imperfect Answer Appearing on Face of Application*.—See note 3.

(3) *Acts After Issuance of Policy but Prior to Forfeiture*.—See note 4.

**935. 6. Issuance of Policy Without Objection to Known Grounds of Forfeiture—United States.**—Queen Ins. Co. v. Union Bank, etc., Co., (C. C. A.) 111 Fed. Rep. 697; Foster v. Preferred Acc. Ins. Co., 125 Fed. Rep. 536.

*Alabama*.—Pope v. Glens Falls Ins. Co., 130 Ala. 356.

*Arkansas*.—Franklin L. Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; State Mut. Ins. Co. v. Latourette, 71 Ark. 242, 100 Am. St. Rep. 63.

*California*.—Allen v. Home Ins. Co., 133 Cal. 29.

*Colorado*.—American Cent. Ins. Co. v. Donlon, 16 Colo. App. 416.

*Illinois*.—Danvers Mut. F. Ins. Co. v. Schertz, 95 Ill. App. 656.

*Iowa*.—Independent School Dist. v. Fidelity Ins. Co., 113 Iowa 65; Born v. Home Ins. Co., 120 Iowa 299; Gurnett v. Atlas Mut. Ins. Co., 124 Iowa 547.

*Kansas*.—Hartford F. Ins. Co. v. McCarthy, 69 Kan. 555.

*Kentucky*.—Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; Standard L., etc., Ins. Co. v. Hollaway, (Ky. 1903) 72 S. W. Rep. 796.

*Maine*.—Bigelow v. Granite State F. Ins. Co., 94 Me. 39.

*Michigan*.—Moore v. Mutual Reserve Fund L. Assoc., 133 Mich. 526. See also Duby v. Farmers' Mut. F. Ins. Co., 133 Mich. 661.

*Minnesota*.—Hartley v. Pennsylvania F. Ins. Co., 91 Minn. 382; Andrus v. Maryland Casualty Co., 91 Minn. 358.

*Mississippi*.—Southern Ins. Co. v. Stewart, (Miss. 1901) 30 So. Rep. 755; Phoenix Ins. Co. v. Randle, 81 Miss. 720.

*Missouri*.—Ross-Langford v. Mercantile Town Mut. Ins. Co., 97 Mo. App. 79; Millis v. Scottish Union, etc., Ins. Co., 95 Mo. App. 211; O'Brien v. Greenwich Ins. Co., 95 Mo. App. 301; Carr v. Pacific Mut. L. Ins. Co., 100 Mo. App. 602.

*New Hampshire*.—Spalding v. New Hampshire F. Ins. Co., 71 N. H. 441.

*New York*.—Bear v. Atlanta Home Ins. Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613; Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 88 Am. St. Rep. 625; McElwain v. Metropolitan L. Ins. Co., 50 N. Y. App. Div. 63; Brooks v. Erie F. Ins. Co., 76 N. Y. App. Div. 275, affirmed 177 N. Y. 572; Stage v. Home Ins. Co., 76 N. Y. App. Div. 509; Benjamin v. Palatine Ins. Co., 80 N. Y. App. Div. 260, affirmed 177 N. Y. 588; Lewis v. Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, affirmed 181 N. Y. 392, 106 Am. St. Rep. 557.

*North Carolina*.—Cowell v. Phoenix Ins. Co., 126 N. Car. 684; Strause v. Palatine Ins. Co., 128 N. Car. 64; Gerringer v. North Carolina Home Ins. Co., 133 N. Car. 407.

*Ohio*.—Kehm v. German Mut. Ins. Co., 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935; Herbert v. Standard L., etc., Ins. Co., 23 Ohio Cir. Ct. 225.

*Pennsylvania*.—Brumbaugh v. Home Mut. F. Ins. Co., 20 Pa. Super. Ct. 144. See also Moore v. Niagara F. Ins. Co., 199 Pa. St. 49, 85 Am. St. Rep. 771.

*Rhode Island*.—O'Rourke v. John Hancock Mut. L. Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643.

*Texas*.—Continental Ins. Co. v. Cummings, 98 Tex. 115; Sun L. Ins. Co. v. Phillips, (Tex. Civ. App. 1902) 70 S. W. Rep. 603. See also Hartford F. Ins. Co. v. Post, 25 Tex. Civ. App. 428.

*Virginia*.—Virginia F. & M. Ins. Co. v. Richmond Mica Co., 102 Va. 429, 102 Am. St. Rep. 846.

*Wisconsin*.—Speiser v. Phoenix Mut. L. Ins. Co., 119 Wis. 530; Welch v. Fire Assoc. of Philadelphia, 120 Wis. 456.

**Contra if Notice Is Only of Intention to Commit Forfeiture.**—Orient Ins. Co. v. Prather, 25 Tex. Civ. App. 446.

**936. 1. Insurer Put on Notice.**—Skinner v. Norman, 165 N. Y. 565, 80 Am. St. Rep. 776, reversing 18 N. Y. App. Div. 609.

**3. Knowledge at Time of Issuance No Waiver.**—Hammel v. Pennsylvania Ins. Co., 24 Ohio Cir. Ct. 101.

**4. Constructive Knowledge of Facts Material to Risk Not Binding on Company.**—Pope v. Glenn Falls Ins. Co., 136 Ala. 670; Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527.

**5. See an Intimation to the Contrary in Home Ins. Co. v. Hancock, 106 Tenn. 513.**

**937. 1. Waiver by Failure to Inquire as to Existing Facts.**—Sharp v. Scottish Union, etc., Ins. Co., 136 Cal. 542; Allesina v. London, etc., Ins. Co., 45 Oregon 441, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936; Union Assur. Soc. v. Nalls, 101 Va. 613, 99 Am. St. Rep. 923. See also Ritchey v. Home Ins. Co., 104 Mo. App. 146; Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595.

**2. Failure to Inquire Does Not Create Estoppel**—Continental Ins. Co. v. Cummings, 98 Tex. 115; Bartlett v. British America Assur. Co., 35 Wash. 525.

**3. Waiver or Omission Appearing on Face of Application.**—Callies v. Modern Woodmen of America, 98 Mo. App. 521.

**4. Waiver After Issuance of Policy but Prior to Forfeiture—United States.**—MacMahon v. U. S. Life Ins. Co., (C. C. A.) 128 Fed. Rep. 388.

*Alabama*.—Travelers Ins. Co. v. Brown, 138 Ala. 526.

*California*.—Nielsen v. Provident Sav. L. Assur. Soc., 139 Cal. 332, 96 Am. St. Rep. 146.

**937.** Assertion of Specific Breach. — See notes 5, 6, 7.

**938.** (4) Conduct After Forfeiture — (a) In General. — See note 2.

*District of Columbia.* — United Security L. Ins., etc., Co. v. Bond, 16 App. Cas. (D. C.) 579.

*Illinois.* — Gray v. Merchants Ins. Co., 113 Ill. App. 537.

*Iowa.* — Lutz v. Anchor F. Ins. Co., 120 Iowa 136, 98 Am. St. Rep. 349.

*Kansas.* — Bingler v. Mutual Ben. L. Ins. Co., 10 Kan. App. 6. See also Union Casualty, etc., Co. v. Bragg, 63 Kan. 291.

*Kentucky.* — Home Ins. Co. v. Holder, (Ky. 1903) 74 S. W. Rep. 267; Mattingly v. Springfield F. & M. Ins. Co., (Ky. 1904) 83 S. W. Rep. 577.

*Missouri.* — Thompson v. Traders' Ins. Co., 169 Mo. 12.

*New York.* — Meeder v. Provident Sav. L. Assur. Soc., 58 N. Y. App. Div. 80, affirmed 171 N. Y. 432; Peters v. Empire L. Ins. Co., (Supm. Ct. App. T.) 90 N. Y. App. Div. 296.

*North Carolina.* — Hollowell v. Virginia L. Ins. Co., 126 N. Car. 398.

*Tennessee.* — Ætna L. Ins. Co. v. Fallow, 110 Tenn. 720.

*Texas.* — Insurance Co. of North America v. Bell, 25 Tex. Civ. App. 129.

*Virginia.* — Farmers' Benev. F. Ins. Assoc. v. Kinsey, 101 Va. 236.

*Wisconsin.* — Frels v. Little Black Farmers' Mut. Ins. Co., 120 Wis. 590.

**Otherwise if Insured Not Misled.** — Cassimus v. Scottish Union, etc., Ins. Co., 135 Ala. 256.

**937. 5. Denial of Liability for Specific Breach as Waiver of Subsequent Breach.** — Pennsylvania F. Ins. Co. v. Hughes, 47 C. C. A. 459; Banco De Sonora v. Bankers' Mut. Casualty Co., (Iowa 1903) 95 N. W. Rep. 232; Continental Ins. Co. v. Waugh, 60 Neb. 348.

**Rule Applicable Only Where Denial of Liability Is Put on Ground that Policy Is Not in Force.** — Western Travelers' Acc. Assoc. v. Tomson, (Neb. 1904) 101 N. W. Rep. 341.

6. Georgia Home Ins. Co. v. Allen, 128 Ala. 451.

**7. Waiver of Preliminary Proofs by Denial of Liability** — United States. — Royal Ins. Co. v. Martin, 192 U. S. 149.

*Arkansas.* — Greenwich Ins. Co. v. State, (Ark. 1905) 84 S. W. Rep. 1025.

*Colorado.* — American Cent. Ins. Co. v. Donlon, 16 Colo. App. 416.

*Florida.* — Taylor v. Glens Falls Ins. Co., 44 Fla. 273; Indian River State Bank v. Hartford F. Ins. Co., (Fla. 1903) 35 So. Rep. 228.

*Illinois.* — American Cent. Ins. Co. v. Henninger, 87 Ill. App. 440; Colonial Mut. F. Ins. Co. v. Ellinger, 112 Ill. App. 302.

*Indiana.* — Germania F. Ins. Co. v. Pitcher, 160 Ind. 392; Ohio Farmers' Ins. Co. v. Vogel, (Ind. App. 1905) 73 N. E. Rep. 612.

*Iowa.* — Banco De Sonora v. Bankers' Mut. Casualty Co., (Iowa 1903) 95 N. W. Rep. 232.

*Kentucky.* — Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295; Home Ins. Co. v. Koob, 113 Ky. 360, 101 Am. St. Rep. 354; Continental Ins. Co. v. Daniel, (Ky. 1904) 78 S. W. Rep. 866.

*Maryland.* — Leftwich v. Royal Ins. Co., 91

Md. 596; Prudential Ins. Co. v. Devoe, 98 Md. 584.

*Michigan.* — Morgan v. Illinois Ins. Co., 130 Mich. 427.

*Missouri.* — Vining v. Franklin F. Ins. Co., 89 Mo. App. 311; Welsh v. Chicago Guaranty Fund L. Soc., 81 Mo. App. 30; Keller v. Home L. Ins. Co., 95 Mo. App. 627; Winter v. Supreme Lodge, etc., 96 Mo. App. 1; Hayes v. Continental Casualty Co., 98 Mo. App. 410.

*Nebraska.* — Lansing v. Commercial Union Assur. Co., (Neb. 1903) 93 N. W. Rep. 756; Modern Brotherhood of America v. Cummings, (Neb. 1903) 94 N. W. Rep. 144.

*New Hampshire.* — Seely v. Manhattan L. Ins. Co., 72 N. H. 49.

*New York.* — Dobson v. Hartford F. Ins. Co., 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557; Cole v. Preferred Acc. Ins. Co., (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 260, affirmed 92 N. Y. App. Div. 612.

*North Carolina.* — Gerringer v. North Carolina Home Ins. Co., 133 N. Car. 407.

*Ohio.* — Eureka F. & M. Ins. Co. v. Baldwin, 62 Ohio St. 368; Stacy v. Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67.

*Pennsylvania.* — White v. Metropolitan L. Ins. Co., 22 Pa. Super. Ct. 501.

*Texas.* — Merchants' Ins. Co. v. Nowlin, (Tex. Civ. App. 1900) 56 S. W. Rep. 198; Connecticut F. Ins. Co. v. Hibbant, (Tex. Civ. App. 1903) 73 S. W. Rep. 558; Ætna Ins. Co. v. Fitze, 34 Tex. Civ. App. 214; Metropolitan L. Ins. Co. v. Gibbs, 34 Tex. Civ. App. 131; Woodall v. Pacific Mut. L. Ins. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1090.

*West Virginia.* — Cleavenger v. Franklin F. Ins. Co., 47 W. Va. 595; Medley v. German Alliance Ins. Co., 55 W. Va. 342.

*Canada.* — Fowlie v. Ocean Acc., etc., Corp., 4 Ont. L. Rep. 146, affirmed 33 Can. Sup. Ct. 253.

**Otherwise if It Does Not Appear on What Grounds Liability Was Denied.** — Philadelphia Fire Assoc. v. Yeagley, 34 Ind. App. 387.

**Rule Not Applicable Where Refusal to Pay First Made in Answer to Plaintiff's Suit.** — Dezell v. Fidelity, etc., Co., 176 Mo. 253.

**938. 2. Waiver by Acts Subsequent to Forfeiture** — United States. — De Farconnet v. Western Ins. Co., 110 Fed. Rep. 405, affirmed (C. C. A.) 122 Fed. Rep. 448.

*Alabama.* — U. S. Life Ins. Co. v. Lesser, 126 Ala. 568; Georgia Home Ins. Co. v. Allen, 128 Ala. 451; Cassimus v. Scottish Union, etc., Ins. Co., 135 Ala. 256.

*Connecticut.* — Hennessy v. Metropolitan L. Ins. Co., 74 Conn. 699.

*Florida.* — Tillis v. Liverpool, etc., Ins. Co., (Fla. 1903) 35 So. Rep. 171.

*Illinois.* — Traders' Mut. L. Ins. Co. v. Johnson, 200 Ill. 359, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938; Orient Ins. Co. v. McKnight, 197 Ill. 190; Bennett v. Union Cent. L. Ins. Co., 203 Ill. 439.

*Indiana.* — Penn Mut. L. Ins. Co. v. Norcross, 163 Ind. 379; Rutherford v. Prudential Ins. Co., 34 Ind. App. 531.

**939.** Conduct Relied on as Forfeiture Not Intended Nor Understood as Such.— See note 1.

Knowledge Necessary.— See notes 2, 3.

(b) Mere Silence or Nonaction.— See note 5.

**940.** See notes 1, 2.

(c) Acceptance of Payment of Premium.— See note 4.

*Iowa*.— *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

*Kansas*.— *Swedish American Ins. Co. v. Knutson*, 67 Kan. 71, 100 Am. St. Rep. 382; *German Ins. Co. v. Allen*, 69 Kan. 729.

*Kentucky*.— *Walls v. Home Ins. Co.*, 114 Ky. 611; *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546.

*Massachusetts*.— *Stuart v. Reliance Ins. Co.*, 179 Mass. 434.

*Michigan*.— *Rauch v. Michigan Millers' Mut. F. Ins. Co.*, 131 Mich. 281.

*Missouri*.— *Thompson v. Traders' Ins. Co.*, 169 Mo. 12; *Millis v. Scottish Union, etc., Ins. Co.*, 95 Mo. App. 211.

*Nebraska*.— *Modern Woodmen of America v. Lane*, 62 Neb. 89; *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21; *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 599; *Nebraska Mercantile Mut. Ins. v. Sasek*, 64 Neb. 17; *Huht v. State Ins. Co.*, 66 Neb. 121.

*New York*.— *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, affirmed 179 N. Y. 557; *Bear v. Atlanta Home Ins. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 613.

*Ohio*.— *Kehm v. German Mut. Ins. Co.*, 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938.

*Pennsylvania*.— See *Bowman v. Mutual F. Ins. Co.*, 203 Pa. St. 150; *Sitler v. Spring Garden Mut. F. Ins. Co.*, 18 Pa. Super. Ct. 148.

*South Dakota*.— *Norris v. Equitable F. Assoc.*, (S. Dak. 1905) 102 N. W. Rep. 306.

*Tennessee*.— *Westchester F. Ins. Co. v. McAdoo*, (Tenn. Ch. 1899) 57 S. W. Rep. 409.

*Texas*.— *Couch v. Home Protective F. Ins. Co.*, 32 Tex. Civ. App. 44; *Order of Columbus v. Fuqua*, (Tex. Civ. App. 1901) 60 S. W. Rep. 1020.

**939.** 1. *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510.

**Express Agreements that Acts Shall Not Constitute Waiver.**— *London Guarantee, etc., Co. v. Siwy*, (Ind. App. 1903) 66 N. E. Rep. 481.

**2. Necessity of Knowledge of Forfeiture to Create Waiver**— *United States*.— *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, reversing (C. C. A.) 111 Fed. Rep. 19; *Home L. Ins. Co. v. Myers*, (C. C. A.) 112 Fed. Rep. 846; *Fireman's Fund Ins. Co. v. McGreevy*, (C. C. A.) 118 Fed. Rep. 415; *Chicago-Coulterville Coal Co. v. Fidelity, etc., Co.*, 130 Fed. Rep. 957.

*Arkansas*.— *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47.

*Kansas*.— *Cottom v. National F. Ins. Co.*, 65 Kan. 511.

*Maine*.— *Bigelow v. Granite State F. Ins. Co.*, 94 Me. 39.

*Michigan*.— *Gauntlett v. Sea Ins. Co.*, 127 Mich. 504; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.*, (Mich. 1904) 100 N. W. Rep. 442;

*Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526.

*Missouri*.— *Callies v. Modern Woodmen of America*, 98 Mo. App. 521.

*Nebraska*.— *U. S. Fidelity, etc., Co. v. Ridgley*, (Neb. 1903) 97 N. W. Rep. 836.

*New York*.— See *Babcock v. Pacific Mut. L. Ins. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 306.

*North Dakota*.— *Thompson v. Travelers' Ins. Co.*, 11 N. Dak. 274; *Thompson v. Travelers' Ins. Co.*, 13 N. Dak. 444.

*Oregon*.— *Stringham v. Mutual L. Ins. Co.*, 44 Oregon 447.

*Texas*.— *Mutual Reserve Fund L. Assoc. v. Lovenberg*, 24 Tex. Civ. App. 355; *Hartford F. Ins. Co. v. Ransom*, (Tex. Civ. App. 1901) 61 S. W. Rep. 144.

**Breach Cannot Be Waived by Agent unless with Knowledge.**— *Rundell v. Anchor F. Ins. Co.*, (Iowa 1904) 101 N. W. Rep. 517.

**3. Waiver of One Ground Does Not Bar Insistence on Another.**— *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136; *Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526.

**5. Mere Silence or Nonaction Not Waiver**— *Iowa*.— *Rundell v. Anchor F. Ins. Co.*, (Iowa 1904) 101 N. W. Rep. 517.

*Kentucky*.— *Crutchfield v. Union Cent. L. Ins. Co.*, 113 Ky. 53.

*Michigan*.— *Hill v. Farmers' Mut. F. Ins. Co.*, 129 Mich. 141.

*New York*.— *Meech v. National Acc. Soc.*, 50 N. Y. App. Div. 144; *Allen v. Dutchess County Mut. Ins. Co.*, 95 N. Y. App. Div. 86.

*Pennsylvania*.— *Moore v. Niagara F. Ins. Co.*, 199 Pa. St. 49, 85 Am. St. Rep. 771.

*Wisconsin*.— *Keith v. Royal Ins. Co.*, 117 Wis. 531; *Behling v. Northwestern Nat. L. Ins. Co.*, 117 Wis. 24.

**940.** 1. See *Glasscock v. Des Moines Ins. Co.*, 125 Iowa 170.

**2. Notice of Intention to Violate Condition.**— *Lutz v. Anchor F. Ins. Co.*, 120 Iowa 136, 98 Am. St. Rep. 349.

**4. Waiver by Acceptance of Payment of Premium**— *England*.— *Hemmings v. Sceptre L. Assoc.*, (1905) 1 Ch. 365.

*Canada*.— *Elson v. North American L. Assur. Co.*, 9 British Columbia 474.

*United States*.— *Aetna L. Ins. Co. v. Friereson*, (C. C. A.) 114 Fed. Rep. 56; *Proctor Coal Co. v. U. S. Fidelity, etc., Co.*, 124 Fed. Rep. 424.

*Florida*.— *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62.

*Illinois*.— *Metropolitan L. Ins. Co. v. Sullivan*, 112 Ill. App. 500.

*Indiana*.— *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940; *Philadelphia F. Assoc. v. Yeagley*, 34 Ind. App. 387.



**941. Insured Must Understand Payment as Waiver.** — See note 2.

Where the Premium Is Earned Before the Forfeiture. — See note 3.

**A Mere Demand for Payment Which Is Refused.** — See note 4.

(d) Requiring Proofs of Loss. — See note 5.

**942. But a Distinction Has Been Drawn by Some of the Authorities.** — See notes 1, 5.**c. BY WHOM WAIVER MAY BE MADE** — (1) *President or Vice-President of Company.* — See note 6.**943. (3) Agents** — (b) *General Agent.* — See note 1.**Issuance of Policy with Knowledge of Existing Ground of Forfeiture.** — See note 2.*Iowa.* — *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311.*Kentucky.* — *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546.*Maryland.* — *Baltimore L. Ins. Co. v. Howard*, 95 Md. 244.*Massachusetts.* — *White v. McPeck*, 185 Mass. 451.*Michigan.* — *Pollock v. German F. Ins. Co.*, 127 Mich. 460.*Mississippi.* — *Western Assur. Co. v. Phelps*, 77 Miss. 625; *Mechanics', etc., Ins. Co. v. Smith*, 79 Miss. 142. See also *Lewis v. Mutual Reserve Fund L. Assoc.*, (Miss. 1900) 27 So. Rep. 649.*Missouri.* — *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616; *Bushnell v. Farmers' Mut. Ins. Co.*, 110 Mo. App. 223.*Nebraska.* — *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21; *German Ins. Co. v. Shader*, (Neb. 1903) 93 N. W. Rep. 972; *Modern Woodmen of America v. Colman*, (Neb. 1903) 94 N. W. Rep. 814; *Farmers', etc., Ins. Co. v. Mickel*, (Neb. 1904) 100 N. W. Rep. 130.*New Jersey.* — See *Commercial Assur. Co. v. New Jersey Rubber Co.*, 61 N. J. Eq. 446.*New York.* — *Magner v. Mutual L. Assoc.*, 17 N. Y. App. Div. 13, *affirmed* 162 N. Y. 657; *Peck v. Washington L. Ins. Co.*, 91 N. Y. App. Div. 597, *affirmed* 181 N. Y. 585.*North Carolina.* — *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.*Oregon.* — *Fraser v. New Zealand Ins. Co.*, 39 Oregon 342, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940.*Texas.* — *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494; *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70 S. W. Rep. 603.*Vermont.* — *Fraser v. Home L. Ins. Co.*, 71 Vt. 482.**Retention of Premium After Knowledge of Breach.** — *Metropolitan L. Ins. Co. v. Moore*, (Ky. 1904) 79 S. W. Rep. 219; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623; *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 580. But see *Robinson v. Aetna F. Ins. Co.*, 135 Ala. 650.**Otherwise if Breach Is of Promissory Warranty.** — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.**No Waiver if Retention Not with Intent to Retain Permanently.** — *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510.**Rule Not Applicable Where by Term of Policy It Is to Be Void if Certain Contingency Occurs, and Premiums Forfeited.** — *Dickerson v. Northwestern Mut. L. Ins. Co.*, 200 Ill. 270.**941. 2. Fidelity Mut. L. Ins. Co. v. Price**, (Ky. 1903) 77 S. W. Rep. 384.**3. Receipt of Premium Earned Before Forfeiture.** — *Texas F. Ins. Co. v. Knights of Tabor Lodge*, 32 Tex. Civ. App. 328.**4. Cowen v. Equitable L. Assur. Soc.**, (Tex. Civ. App. 1905) 84 S. W. Rep. 404.**5. Waiver by Requiring Proofs of Loss** — *Arkansas.* — *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136.*District of Columbia.* — *Brown v. Commercial F. Ins. Co.*, 21 App. Cas. (D. C.) 325.*Illinois.* — *Traders' Mut. L. Ins. Co. v. Johnson*, 200 Ill. 359, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941.*Iowa.* — *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.*Missouri.* — *Dolan v. Missouri Town Mut. F. Ins. Co.*, 88 Mo. App. 666.*Nebraska.* — *Fidelity Mut. F. Ins. Co. v. Murphy*, (Neb. 1903) 95 N. W. Rep. 702; *German Ins. Co. v. Stiner*, (Neb. 1902) 96 N. W. Rep. 122.*South Carolina.* — *Norris v. Hartford F. Ins. Co.*, 57 S. Car. 358.*Tennessee.* — *North German Ins. Co. v. Morton-Scott-Robertson Co.*, 108 Tenn. 384; *Westchester F. Ins. Co. v. McAdoo*, (Tenn. Ch. 1899) 57 S. W. Rep. 409.*Texas.* — *Couch v. Home Protective F. Ins. Co.*, 32 Tex. Civ. App. 44.*Canada.* — *Mutchmor v. Waterloo Mut. F. Ins. Co.*, 4 Ont. L. Rep. 606.**942. 1. See American Cent. Ins. Co. v. Nunn**, 98 Tex. 191, *reversing* (Tex. Civ. App. 1904) 79 S. W. Rep. 88.**5. Insured Informed that Forfeiture Not Waived.** — *Fletcher v. Minneapolis F. & M. Mut. Ins. Co.*, 80 Minn. 152; *Loesch v. Union Casualty, etc., Co.*, 176 Mo. 654; *Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co.*, 100 Mo. App. 504; *Meech v. National Acc. Soc.*, 50 N. Y. App. Div. 144; *Matthie v. Globe F. Ins. Co.*, 174 N. Y. 489, *affirming* 68 N. Y. App. Div. 239.**So Where Provision in Policy that Demanding Proofs of Loss Is Not Waiver.** — *Curlee v. Texas Home F. Ins. Co.*, 31 Tex. Civ. App. 471, 472; *Hayes v. U. S. Fire Ins. Co.*, 132 N. Car. 702.**6. Waiver by President of Company.** — *Brumbaugh v. Home Mut. F. Ins. Co.*, 20 Pa. Super. Ct. 144.**943. 1. Waiver by General Agent** — *Hewitt v. American Union L. Ins. Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 738, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942; *Snyder v. Nederland L. Ins. Co.*, 202 Pa. St. 161.**2. Effect of General Agent's Knowledge of**

**943. Waiver of Conditions to Be Performed in Future. — See note 3.**

Waiver After Issuance of Policy. — See note 4.

(c) Soliciting Agent — *aa.* IN GENERAL — Waiver at Time of Issuance of Policy.

— See note 5.

**944. Waiver of Conditions as to Future Conduct. — See note 1.**

Waiver After Issuance of Policy. — See note 3.

**945. See notes 1, 2.***bb.* INSERTION OF FALSE STATEMENTS IN APPLICATION. — See notes 3, 4.**Ground of Forfeiture at Time of Issuance of Policy.**— *United States.* — *Queen Ins. Co. v. Union Bank, etc., Co., (C. C. A.)* 111 Fed. Rep. 697. But see *Northern Assur. Co. v. Grand View Bldg. Assoc.,* 183 U. S. 308.*Arkansas.* — *State Mut. Ins. Co. v. Latourette,* 71 Ark. 242, 100 Am. St. Rep. 63.*Kentucky.* — *Standard L., etc., Ins. Co. v. Holloway, (Ky. 1903)* 72 S. W. Rep. 796.*Mississippi.* — *Western Assur. Co. v. Phelps,* 77 Miss. 625.*Missouri.* — *Hackett v. Philadelphia Underwriters,* 79 Mo. App. 16; *Flournoy v. Traders Ins. Co.,* 80 Mo. App. 655; *Chamberlain v. British-American Assur. Co.,* 80 Mo. App. 589; *De Soto v. American Guaranty Fund Mut. F. Ins. Co.,* 102 Mo. App. 1.*New York.* — *Genung v. Metropolitan L. Ins. Co.,* 60 N. Y. App. Div. 424; *Blass v. Agricultural Ins. Co.,* 18 N. Y. App. Div. 481, *affirmed* 162 N. Y. 639; *Wells v. Metropolitan L. Ins. Co.,* 19 N. Y. App. Div. 18, *affirmed* 163 N. Y. 572; *Ames v. Manhattan L. Ins. Co.,* 31 N. Y. App. Div. 180, *affirmed* 167 N. Y. 584.*North Carolina.* — *McCarty v. Imperial Ins. Co.,* 126 N. Car. 820; *Clapp v. Farmers' Mut. F. Ins. Assoc.,* 126 N. Car. 388; *Strause v. Palatine Ins. Co.,* 128 N. Car. 64.*Texas.* — *National Fraternity v. Karnes,* 24 Tex. Civ. App. 607; *Continental F. Assoc. v. Norris,* 30 Tex. Civ. App. 299.*Utah.* — *Osborne v. Phenix Ins. Co.,* 23 Utah 428.**943. 3. Power of General Agent to Waive Conditions as to Future Action.** — *Gillum v. Philadelphia F. Assoc.,* 106 Mo. App. 673.**4. Power of General Agent to Waive After Issuance of Policy.** — *Robinson v. Aetna Ins. Co.,* 128 Ala. 477; *Continental F. Ins. Co. v. Brooks,* 131 Ala. 614; *Citizens' Ins. Co. v. Stoddard,* 197 Ill. 330, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943; *Merchants Ins. Co. v. Oberman,* 99 Ill. App. 357; *German Ins. Co. v. Allen,* 69 Kan. 729; *Union Trust Co. v. Provident Washington Ins. Co.,* 79 Mo. App. 362; *Purcell v. Land Title Guarantee Co.,* 94 Mo. App. 5; *Kehm v. German Mut. Ins. Co.,* 11 Ohio Dec. 739, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943.**5. Waiver by Soliciting Agent at Time of Issuance of Policy** — *United States.* — *Palatine Ins. Co. v. McElroy,* 40 C. C. A. 441.*Alabama.* — *Pope v. Glens Falls Ins. Co.,* 130 Ala. 356; *Cassimus v. Scottish Union, etc., Ins. Co.,* 135 Ala. 256.*Indiana.* — *German-American Ins. Co. v. Yeagley,* 163 Ind. 651, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942, 943.*Iowa.* — *Independent School Dist. v. Fidelity Ins. Co.,* 113 Iowa 65; *McKibban v. Des Moines Ins. Co.,* 114 Iowa 41.*Kentucky.* — *Citizens' Ins. Co. v. Crist, (Ky. 1900)* 56 S. W. Rep. 658; *Germania Ins. Co. v. Wingfield, (Ky. 1900)* 57 S. W. Rep. 456; *Germania Ins. Co. v. Ashby,* 112 Ky. 303, 99 Am. St. Rep. 295.*Minnesota.* — *Otte v. Hartford L. Ins. Co.,* 88 Minn. 423, 97 Am. St. Rep. 532.*Missouri.* — *Rickey v. German Guarantee Town Mut. F. Ins. Co.,* 79 Mo. App. 485; *Montgomery v. Lebanon Town Mut. F. Ins. Co.,* 80 Mo. App. 500; *Bush v. Missouri Town Mut. Ins. Co.,* 85 Mo. App. 155; *Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co.,* 98 Mo. App. 371.*New York.* — *Mead v. Saratoga, etc., F. Ins. Co.,* 81 N. Y. App. Div. 282, *affirmed* 179 N. Y. 537, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943.*Ohio.* — *Kehm v. German Mut. Ins. Co.,* 11 Ohio Dec. 739, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 943.*Texas.* — *Northwestern L. Assoc. v. Findley,* 29 Tex. Civ. App. 494. But see *Hartford F. Ins. Co. v. Walker,* 94 Tex. 473.**Contra as to Medical Examiner.** — *John Hancock Mut. L. Ins. Co. v. Houpt,* 113 Fed. Rep. 572.**944. 1. Waiver by Soliciting Agent of Conditions as to Future Conduct.** — *Cornelius v. Farmers Ins. Co.,* 113 Iowa 183; *Sowers v. Mutual F. Ins. Co.,* 113 Iowa 551; *Rundell v. Anchor F. Ins. Co., (Iowa 1904)* 101 N. W. Rep. 517; *Kehm v. German Mut. Ins. Co.,* 11 Ohio Dec. 739, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944; *Orient Ins. Co. v. Prather,* 25 Tex. Civ. App. 446; *Maupin v. Scottish Union, etc., Ins. Co.,* 53 W. Va. 557, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944. See also *Hartford F. Ins. Co. v. Post,* 25 Tex. Civ. App. 428.**3. Soliciting Agent Unauthorized to Make Waiver After Issuance of Policy.** — *American Ins. Co. v. Walston,* 111 Ill. App. 133; *Elliott v. Farmers Ins. Co.,* 114 Iowa 154; *Barry, etc., Lumber Co. v. Citizens' Ins. Co.,* 136 Mich. 42; *Kehm v. German Mut. Ins. Co.,* 11 Ohio Dec. 739, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944; *Union Cent. L. Ins. Co. v. Hook,* 62 Ohio St. 256; *Eureka F. & M. Ins. Co. v. Baldwin,* 62 Ohio St. 368. See also *Travelers' Ins. Co. v. Myers,* 62 Ohio St. 529.**945. 1. Robinson v. Aetna Ins. Co.,** 128 Ala. 477; *Cassimus v. Scottish Union, etc., Ins. Co.,* 135 Ala. 256.**2. Lippman v. Aetna Ins. Co.,** 120 Ga. 247; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co., (Mich. 1904)* 100 N. W. Rep. 442, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944.**3. False Statements Inserted by Agent in Application** — *Arkansas.* — *Franklin L. Ins. Co. v. Galligan,* 71 Ark. 295, 100 Am. St. Rep. 73.

**946. Applicant's Ignorance of False Statements.** — See notes 1, 2, 3, 5.

Where the Agent, on His Own Responsibility, Writes an Answer, Though with the Knowledge and Assent of the Applicant. — See note 6.

Effect of Stipulation in Application that Insurer Shall Be Bound by Written Statements Only. — See note 8.

**947. Provision that Solicitor Shall Be Agent of Applicant.** — See note 2.

Where There Is Fraud or Collusion. — See note 3.

(d) Adjuster. — See notes 6, 7, 8.

*California.* — *Parrish v. Rosebud Min., etc.*, Co., 140 Cal. 635.

*Illinois.* — *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167, *affirming* 92 Ill. App. 326; *Provident Sav. L. Assur. Soc. v. Cannon*, 201 Ill. 260; *Metropolitan L. Ins. Co. v. Larson*, 85 Ill. App. 143; *Fidelity, etc., Co. v. Oehne*, 94 Ill. App. 117; *Prudential Ins. Co. v. Haley*, 91 Ill. App. 363, *affirmed* 189 Ill. 317.

*Iowa.* — *Parno v. Iowa Merchants Mut. Ins. Co.*, 114 Iowa 132; *Taylor v. Anchor Mut. F. Ins. Co.*, 116 Iowa 625, 93 Am. St. Rep. 261; *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652.

*Minnesota.* — *Otte v. Hartford L. Ins. Co.*, 88 Minn. 423, 97 Am. St. Rep. 532.

*Missouri.* — *Gibson v. German-American Town Mut. Ins. Co.*, 85 Mo. App. 41; *Fuller Bros. Toll Lumber, etc., Co. v. Fidelity, etc., Co.*, 94 Mo. App. 490; *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 97 Mo. App. 79; *Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co.*, 98 Mo. App. 371.

*Nebraska.* — *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749.

*New York.* — *Mead v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 282, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 945, *affirmed* 179 N. Y. 537; *Fay v. Prudential Ins. Co.*, 80 N. Y. App. Div. 350; *Hayes v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 287, *affirmed* 179 N. Y. 535; *Carmichael v. John Hancock Mut. L. Ins. Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 597; *Blass v. Agricultural Ins. Co.*, 18 N. Y. App. Div. 481, *affirmed* 162 N. Y. 639; *Tooker v. Security Trust Co.*, 26 N. Y. App. Div. 372, *affirmed* 165 N. Y. 608.

*Ohio.* — *North American Acc. Ins. Co. v. Sickles*, 23 Ohio Cir. Ct. 594.

*Pennsylvania.* — *Carnes v. Farmers' F. Ins. Co.*, 20 Pa. Super. Ct. 634. See also *Sitler v. Spring Garden Mut. F. Ins. Co.*, 18 Pa. Super. Ct. 148.

*Tennessee.* — *Home Ins. Co. v. Hancock*, 106 Tenn. 513.

*Texas.* — *Order of Columbus v. Fuqua*, (Tex. Civ. App. 1901) 60 S. W. Rep. 1020.

*Washington.* — *Foster v. Pioneer Mut. Ins. Assoc.*, 37 Wash. 288.

**Medical Examiner.** — *Sternaman v. Metropolitan L. Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625; *Ames v. Manhattan L. Ins. Co.*, 31 N. Y. App. Div. 180, *affirmed* 167 N. Y. 584; *Bennett v. Massachusetts Mut. L. Ins. Co.*, 107 Tenn. 371.

**Contra.** — *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643.

*If Application Makes Agent of Insurer Rule in Text Applies.* — *Leonard v. New England Mut. L. Ins. Co.*, 22 R. I. 519.

**945. 4. Metropolitan L. Ins. Co. v. Larson**, 85 Ill. App. 143.

**946. 1. Applicant Ignorant of False Statement.** — *Metropolitan L. Ins. Co. v. Larson*, 85 Ill. App. 143.

**2. Applicant Unable to Read and Write.** — *Lewis v. Mutual Reserve Fund L. Assoc.*, (Miss. 1900) 27 So. Rep. 649.

**3. Signing Without Reading.** — *Metropolitan L. Ins. Co. v. Larson*, 85 Ill. App. 143; *Mead v. Saratoga, etc., F. Ins. Co.*, 81 N. Y. App. Div. 282, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946, *affirmed* 179 N. Y. 537; *Jacobs v. Northwestern L. Assur. Co.*, 30 N. Y. App. Div. 285, *affirmed* 164 N. Y. 582; *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916. See also *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342. *Contra*, *Kniseley v. British America Assur. Co.*, 32 Ont. 376.

**Failure to Read Inexcusable Negligence Barring Recovery.** — *Biggar v. Rock L. Assur. Co.*, (1902) 1 K. B. 516.

**No Estoppel if Copy of Application Attached to Policy and Delivered to Insured.** — *Hook v. Michigan Mut. L. Ins. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 478.

**5. False Statements Inserted After Applicant Has Signed.** — *Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co.*, 105 Mo. App. 143.

**6. Agent Misinforming Applicant.** — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 115 Fed. Rep. 77, *affirmed* (C. C. A.) 124 Fed. Rep. 25; *American Ins. Co. v. Walston*, 111 Ill. App. 133; *Montgomery v. Lebanon Town Mut. F. Ins. Co.*, 80 Mo. App. 500; *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70 S. W. Rep. 603. See also *McMaster v. New York L. Ins. Co.*, 183 U. S. 25.

**8. Provisions that Verbal Statements Not Binding.** — *Dimick v. Metropolitan L. Ins. Co.*, 69 N. J. L. 384; *Fidelity Mut. L. Assoc. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537. *Contra*, *Parno v. Iowa Merchants Mut. Ins. Co.*, 114 Iowa 132; *Sternaman v. Metropolitan L. Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625.

**947. 2. Contra**, *Reilly v. Empire L. Ins. Co.*, 99 N. Y. App. Div. 535.

**3. Effect of Collusion Between Agent and Assured.** — *Mattson v. Modern Samaritans*, 91 Minn. 534.

**6. Contra**, *Couch v. Home Protection F. Ins. Co.*, 32 Tex. Civ. App. 44.

**7. Germania F. Ins. Co. v. Pitcher, 160 Ind. 392; *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427; *Roberts v. Insurance Co. of America*, 94 Mo. App. 142; *Strause v. Palatine Ins. Co.*, 128 N. Car. 64; *Western Assur. Co. v. Pharand*, 11 Quebec K. B. 144, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947. See also *Lancashire Ins. Co. v. Barnard*, (C. C. A.) 111 Fed. Rep. 702.**

**948.** (e) Collector. — See note 1.

(f) Effect of Agent's Knowledge Acquired Outside of Agency. — See note 2.

Notice After Issuance of Policy. — See note 4.

Knowledge Acquired as Agent of Other Insurer. — See note 5.

(g) Limitations of Authority — *bb. LIMITATIONS ON FACE OF POLICY* — (*bb*) *Clauses Prohibiting Waiver by Agents* — Effect on Agent's Authority At or Before Issuance of Policy. — See note 8.

**949.** Effect on Agent's Authority After Issuance of Policy — Soliciting Agent. — See note 1.

General Agent. — See notes 2, 3.

(*cc*) *Limitations as to Mode of Waiver* — *aaa. Effect on Agent's Authority At or Before Issuance of Policy.* — See note 4.

**950.** *bbb. Effect on Agent's Authority After Issuance of Policy.* — See notes 2, 3, 4.

**947.** 8. *Georgia Home Ins. Co. v. Allen*, 128 Ala. 451; *Dobson v. Hartford F. Ins. Co.*, 86 N. Y. App. Div. 115, *affirmed* 179 N. Y. 557; *Western Assur. Co. v. Pharand*, 11 Quebec K. B. 144, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947. See also *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa 641.

**948.** 1. Otherwise When Agent Also Solicitor. — *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616.

2. Agent's Knowledge Acquired Outside of Agency. — *Sergeant v. Liverpool, etc., Ins. Co.*, 66 N. Y. App. Div. 46; *Sitler v. Spring Garden Mut. F. Ins. Co.*, 18 Pa. Super. Ct. 139; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

Company Liable if Transactions Merely Contemporaneous. — *Rickey v. German Guarantee Town Mut. F. Ins. Co.*, 79 Mo. App. 485.

4. *Union Trust Co. v. Provident Washington Ins. Co.*, 79 Mo. App. 362. See also *Moore v. Niagara F. Ins. Co.*, 199 Pa. St. 49, 85 Am. St. Rep. 771.

5. Rule Applied to Soliciting Agent. — *Turner v. Providence-Washington Ins. Co.*, 86 Mo. App. 387.

8. Agent's Powers Before Issuance Not Affected by Clauses in Policy Not Known to Insured. — *Andrus v. Maryland Casualty Co.*, 91 Minn. 358; *Westchester F. Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 948. But see *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99.

Where the policy provided that no person should have power to waive any of the conditions of "this contract," it was held that this referred to the policy as delivered, and not to the blank form. *State Ins. Co. v. Hale*, (Neb. 1901) 95 N. W. Rep. 473.

Restriction in Policy on Agent's Authority Cannot Relate Back to Period Prior to Delivery of Policy. — *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749.

**949.** 1. Prohibition of Waiver by Soliciting Agent After Issuance. — *London Guarantee, etc., Co. v. Missouri, etc., Coal Co.*, 103 Mo. App. 530; *Legnard v. Standard L., etc., Ins. Co.*, 81 N. Y. App. Div. 320; *Hewitt v. American Union L. Ins. Co.*, 85 N. Y. App. Div. 279; *Travelers Ins. Co. v. Myers*, 62 Ohio St. 529; *Pigott v. Employers' Liability Assur. Corp.*, 31 Ont. 666.

Statutory Modification. — In *Iowa* it is provided by statute that all agents shall be held to have authority to transact all business within the scope of their employment, notwithstanding any clause in the application, policy, etc. *Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, 126 Iowa 225.

2. General Agent. — *Porter v. Home Friendly Soc.*, 114 Ga. 937.

3. General Agent of Foreign Company. — *Gwaltney v. Provident, etc., L. Assur. Soc.*, 132 N. Car. 925; *Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720; *Philadelphia F. Assoc. v. Masterson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 49.

4. Authority At or Before Issuance — Mode of Waiver — *Alabama*. — *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356.

*Maryland*. — See *Mallette v. British American Assur. Co.*, 91 Md. 471.

*Missouri*. — *Rickey v. German Guarantee Town Mut. F. Ins. Co.*, 79 Mo. App. 485; *Flournoy v. Traders' Ins. Co.*, 80 Mo. App. 655; *Bush v. Missouri Town Mut. Ins. Co.*, 85 Mo. App. 155; *Wolf v. Dwelling-House Ins. Co.*, 86 Mo. App. 580.

*New York*. — *Stage v. Home Ins. Co.*, 76 N. Y. App. Div. 509; *Benjamin v. Palatine Ins. Co.*, 80 N. Y. App. Div. 260, *affirmed* 177 N. Y. 588; *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776, *reversing* 18 N. Y. App. Div. 609.

*South Dakota*. — *Vesey v. Commercial Union Assur. Co.*, (S. Dak. 1904) 101 N. W. Rep. 1074.

*Texas*. — *Westchester F. Ins. Co. v. Wagner*, 24 Tex. Civ. App. 140; *Continental F. Assoc. v. Norris*, 30 Tex. Civ. App. 299.

*Virginia*. — *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846.

*West Virginia*. — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 949.

*Wisconsin*. — *Welch v. Philadelphia F. Assoc.*, 120 Wis. 456.

*Contra*. — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308; *Mutual Reserve Fund L. Assoc. v. Stephens*, 115 Ga. 192; *Mutual L. Ins. Co. v. Clancy*, 111 Ga. 865; *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482; *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585.

**950.** 2. Though Waiver Required to Be Indorsed, Parol Waiver Valid. — *Orient Ins. Co. v. McKnight*, 197 Ill. 190; *Pollock v. German*

- 951.** Verbal Consent of Soliciting Agent Where Policy Requires Writing. — See note 1. Prohibition of Parol Waiver by Officers and Agents Generally. — See notes 3, 4, 5. Under Statute Adopting Standard Form of Policy. — See note 7.

**952.** (*dd*) Application of Limitations to Waiver of Conditions to Be Performed After Loss. — See note 1.

## VI. LIABILITY FOR PREMIUMS — 1. Liability of Assured for Premiums

— *a.* WHEN POLICY IS VOID. — See note 2.

**953.** *c.* WHEN LIABILITY ON POLICY IS SUSPENDED. — See note 8.

**954.** 2. Liability of Insurer for Return of Premiums — *b.* WHEN RISK HAS NEVER ATTACHED — (1) *Insurer Must Return Premiums.* — See note 2.

Effect of Estoppel upon Company. — See note 3.

(2) *Misrepresentation, Concealment, or False Warranty by Assured.* — See note 4.

F. Ins. Co., 127 Mich. 460; Kotwicki v. Thuringia Ins. Co., 134 Mich. 82; Kehm v. German Mut. Ins. Co., 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; Home Mut. Ins. Co. v. Nichols, (Tex. Civ. App. 1903) 72 S. W. Rep. 440; Aetna Ins. Co. v. Eastman, (Tex. Civ. App. 1904) 80 S. W. Rep. 255. See also Cove v. Home Ins. Co., 57 S. Car. 347.

**950.** 3. Verbal Waiver of General Agent Binding. — Continental F. Ins. Co. v. Brooks, 131 Ala. 614; Blass v. Agricultural Ins. Co., 18 N. Y. App. Div. 481, affirmed 162 N. Y. 639; Northam v. International Ins. Co., 45 N. Y. App. Div. 177, affirmed 165 N. Y. 666.

**4.** Failure to Indorse Not Chargeable to Insured. — Queen Ins. Co. v. Straugham, 70 Kan. 186.

If Policy Not Produced by Assured No Waiver. — Northam v. Dutchess County Mut. Ins. Co., 166 N. Y. 319, 82 Am. St. Rep. 655.

**951.** 1. Oral Waiver of Mere Soliciting Agent Where Policy Requires Written Consent. — Nixon v. Travellers' Ins. Co., 25 Wash. 254. See also Hunt v. State Ins. Co., 66 Neb. 121.

**3.** General Provision Held Inoperative. — Phenix Ins. Co. v. Caldwell, 187 Ill. 73; Union Cent. L. Ins. Co. v. Whetzel, 29 Ind. App. 658; German-American Ins. Co. v. Yellow-Poplar Lumber Co., (Ky. 1905) 84 S. W. Rep. 551; Thompson v. Traders' Ins. Co., 169 Mo. 12; Montgomery v. Lebanon Town Mut. F. Ins. Co., 80 Mo. App. 500; Ross-Langford v. Mercantile Town Mut. Ins. Co., 97 Mo. App. 79; Kehm v. German Mut. Ins. Co., 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 951; Aetna L. Ins. Co. v. Fallow, 110 Tenn. 720. See also Binger v. Mut. Ben. L. Ins. Co., 10 Kan. App. 6.

Such Condition Precludes Only Express Waiver, and Not Waiver by Conduct. — Metropolitan L. Ins. Co. v. Sullivan, 112 Ill. App. 500.

**4.** Held Valid. — Iowa L. Ins. Co. v. Lewis, 187 U. S. 335; Atlas Reduction Co. v. New Zealand Ins. Co., 121 Fed. Rep. 929; Pennsylvania Casualty Co. v. Bacon, (C. C. A.) 133 Fed. Rep. 907; Hartford F. Ins. Co. v. Landfare, 63 Neb. 559; Wheeler v. U. S. Casualty Co., 71 N. J. L. 396; Kehm v. German Mut. Ins. Co., 11 Ohio Dec. 739, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 951; Union Cent. L. Ins. Co. v. Hook, 62 Ohio St. 256; Ritchie County Bank v. Fireman's Ins. Co., 55 W. Va. 261.

**5.** Northern Assur. Co. v. Grand View Bldg. Assoc., 183 U. S. 308; Crutchfield v. Union Cent. L. Ins. Co., 113 Ky. 53.

**7.** Under Standard Policy. — Hicks v. British America Assur. Co., 162 N. Y. 284.

**952.** 1. Limitations Held Inapplicable to Conditions to Be Performed After Loss. — Indian River State Bank v. Hartford F. Ins. Co., (Fla. 1903) 35 So. Rep. 228; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 952; Ohio Farmers' Ins. Co. v. Vogel, (Ind. App. 1905) 73 N. E. Rep. 612; Perpetual Bldg., etc., Assoc. v. U. S. Fidelity, etc., Co., 118 Iowa 729; Partridge v. Milwaukee Mechanics' Ins. Co., 13 N. Y. App. Div. 519, affirmed 162 N. Y. 597; Strause v. Palatine Ins. Co., 128 N. Car. 64; Stacy v. Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 952; Medley v. German Alliance Ins. Co., 55 W. Va. 342. See also Wheeler v. U. S. Casualty Co., 71 N. J. L. 396. But see Graham v. Niagara F. Ins. Co., 106 Ga. 840; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529.

**2.** Insured May Waive Fraud and Become Liable on Note. — National Life, etc., Co. v. Omans, (Mich. 1904) 100 N. W. Rep. 595.

**953.** 8. When Liability upon Policy Is Suspended. — Economic L. Assoc. v. Spinney, 116 Iowa 385; Rundell v. Anchor F. Ins. Co., (Iowa 1904) 101 N. W. Rep. 517; Houston v. Farmers, etc., Ins. Co., 64 Neb. 138; Home L. Assoc. v. Walsh, 36 Nova Scotia 73.

**954.** 2. When Risk Has Never Attached. — Griffin v. Equitable Assur. Soc., (Ky. 1905) 84 S. W. Rep. 1164; McCann v. Metropolitan L. Ins. Co., 177 Mass. 280; Stilwell v. Covenant Mut. L. Ins. Co., 83 Mo. App. 215; Vining v. Franklin F. Ins. Co., 89 Mo. App. 311; American Union L. Ins. Co. v. Wood, (Tex. Civ. App. 1900) 57 S. W. Rep. 685; Anderson v. New York L. Ins. Co., 34 Wash. 616; Summers v. Mutual L. Ins. Co., 12 Wyo. 369, 107 Am. St. Rep. 952. *Contra*, Thompson v. Travelers' Ins. Co., 11 N. Dak. 274.

No Recovery if Contract Illegal and Against Public Policy. — Work v. American Mut. L. Ins. Co., 31 Ind. App. 153.

**3.** See Bennett v. Massachusetts Mut. L. Ins. Co., 107 Tenn. 371; McElwain v. Metropolitan L. Ins. Co., 50 N. Y. App. Div. 63.

**4.** Fay v. Prudential Ins. Co., 80 N. Y. App. Div. 350. See also Brophy v. North American L. Assur. Co., 32 Can. Sup. Ct. 261.

**954.** *c.* WHEN RISK HAS ATTACHED — (1) *Forfeiture of Insurance by Acts of Assured.* — See note 5.

(2) *Wrongful Cancellation by Insurer.* — See note 6.

*d.* ENTIRE AND DIVISIBLE CONTRACTS. — See notes 7, 8.

**955.** VII. EVIDENCE — 1. Burden of Proof — *a.* IN GENERAL. — See note 1.

*c.* CONDITIONS, REPRESENTATIONS, AND WARRANTIES. — See note 9.

**956.** See notes 1, 2.

**957.** See note 1.

*d.* ESTOPPEL AND WAIVER. — See notes 6, 7.

*e.* CAUSE OF LOSS OR INJURY. — See note 8.

**958.** See notes 3, 4, 8.

By statute in *Missouri* no defense based on misrepresentations can be set up unless the premiums paid be deposited in court. *Lavin v. Empire L. Ins. Co.*, 101 Mo. App. 434.

If Company Comes into Equity It Must Repay Premiums. — *North American L. Assur. Co. v. Brophy*, 2 Ont. L. Rep. 559.

**954.** 5. When Risk Has Attached. — *Economic L. Assoc. v. Spinney*, 116 Iowa 385, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

*Bishop v. Covenant Mut. L. Ins. Co.*, 85 Mo. App. 302. *Contra*, *Clifford v. Protective L. Assoc.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 287.

7. See *Fitzgerald v. Atlanta Home Ins. Co.*, 61 N. Y. App. Div. 350, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

8. Otherwise if Premium Paid in Lump Sum. — *Miller v. Insurance Co. of North America*, 106 Mo. App. 205.

**955.** 1. Making of Contract. — *Coffin v. New York L. Ins. Co.*, (C. C. A.) 127 Fed. Rep. 555; *Brink v. Merchants, etc., United Mut. Ins. Assoc.*, 17 S. Dak. 235.

9. Breach of Conditions — *Colorado*. — *U. S. Casualty Co. v. Hanson*, (Colo. App. 1904) 79 Pac. Rep. 176.

*Florida*. — *Tillis v. Liverpool, etc., Ins. Co.*, (Fla. 1903) 35 So. Rep. 171; *Indian River State Bank v. Hartford F. Ins. Co.*, (Fla. 1903) 35 So. Rep. 228.

*Illinois*. — *Federal L. Assoc. v. Smith*, 86 Ill. App. 427.

*Iowa*. — *Schaeffer v. Anchor Mut. F. Ins. Co.*, 113 Iowa 652.

*Michigan*. — *Barker v. Citizens' Mut. F. Ins. Co.*, 136 Mich. 626. See also *N. & M. Friedman Co. v. Atlas Assur. Co.*, 133 Mich. 212.

*Minnesota*. — *Taylor v. Security Mut. F. Ins. Co.*, 88 Minn. 231.

*Missouri*. — *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111.

*New York*. — *Porter v. Traders' Ins. Co.*, 164 N. Y. 504.

*Pennsylvania*. — *Cobb v. Metropolitan L. Ins. Co.*, 19 Pa. Super. Ct. 228.

*Texas*. — *Hubbard First Nat. Bank v. Cleland*, 36 Tex. Civ. App. 478.

Burden of Proof as to Promissory Warranties Is on Insured, if Breach Pleaded by Insurer. — *L. Rosenthal Clothing, etc., Co. v. Scottish Union, etc., Ins. Co.*, 55 W. Va. 238.

**956.** 1. Misstatements and Misrepresentations. — *Mutual L. Ins. Co. v. Allen*, 212 Ill.

134; *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167, affirming 92 Ill. App. 326; *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 592; *Parno v. Iowa Merchants' Mut. Ins. Co.*, 114 Iowa 132; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354; *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574; *McCarty v. Imperial Ins. Co.*, 126 N. Car. 820.

2. Warranties and Representations Subject to Different Rules. — *Hennessy v. Metropolitan L. Ins. Co.*, 74 Conn. 699; *Murray v. Supreme Lodge, etc.*, 74 Conn. 715; *Fell v. Hancock Mut. L. Ins. Co.*, 76 Conn. 494; *Fuller v. New York F. Ins. Co.*, 184 Mass. 12; *Leonard v. State Mut. L. Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698.

**957.** 1. Same Rule Applicable in Case of Warranties and Representations. — *Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526; *Dimich v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367; *Holleran v. Life Assur. Co. of America*, 18 Pa. Super. Ct. 573.

6. *Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526.

7. *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584, 77 Am. St. Rep. 136; *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47; *Westerfield v. New York L. Ins. Co.*, 129 Cal. 68; *Lippman v. Aetna Ins. Co.*, 120 Ga. 247; *Cotton v. National F. Ins. Co.*, 65 Kan. 511.

8. Exceptions in Policy. — *Phenix Ins. Co. v. Luce*, (C. C. A.) 123 Fed. Rep. 257; *Denver L. Ins. Co. v. Price*, 18 Colo. App. 30; *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99.

**958.** 3. Suicide — *United States*. — *Fidelity, etc., Co. v. Love*, (C. C. A.) 111 Fed. Rep. 773; *Standard L., etc., Ins. Co. v. Thornton*, 40 C. C. A. 564; *Union Mut. L. Ins. Co. v. Payne*, 45 C. C. A. 193.

*District of Columbia*. — *National Union v. Bennett*, 20 App. Cas. (D. C.) 527.

*Iowa*. — *Metzdrat v. Modern Brotherhood of America*, 112 Iowa 522.

*Minnesota*. — *Sartell v. Royal Neighbors of America*, 85 Minn. 369.

*Nebraska*. — *Modern Woodmen of America v. Kozak*, 63 Neb. 146.

*New York*. — *Harms v. Metropolitan L. Ins. Co.*, 67 N. Y. App. Div. 139; *Seybold v. Supreme Tent, etc.*, 86 N. Y. App. Div. 195.

*South Carolina*. — *Latimer v. Sovereign Camp, etc.*, 62 S. Car. 145.

*Texas*. — *Equitable L. Assur. Soc. v. Liddell*, 32 Tex. Civ. App. 252.

- 959.** *f.* PAYMENT OF PREMIUMS. — See note 1.  
*h.* NOTICE AND PROOFS OF LOSS. — See notes 4, 5.  
*j.* AMOUNT OF LOSS. — See notes 8, 9.
- 960.** 2. Evidence as to Particular Issues — *d.* PAYMENT OF PREMIUMS — Receipt or Acknowledgment of Payment. — See note 17.
- 961.** See note 1.
- 962.** *c.* MATTERS MATERIAL TO RISK — (1) *Property Insurance.* — See note 3.  
 (2) *Life Insurance.* — See notes 4, 5.
- 965.** *i.* AMOUNT OF LOSS — *Accounts and Inventories.* — See notes 6, 9.
- 966.** 3. Particular Classes of Evidence — *a.* POLICY AND APPLICATION. — See notes 4, 7.  
*b.* PAROL EVIDENCE. — See note 9.
- 967.** See notes 1, 3.
- 968.** *c.* DECLARATIONS BY INSURED OR BENEFICIARY. — See note 4.  
*d.* ADMISSIONS BY INSURER'S REPRESENTATIVES. — See notes 5, 6.
- 958.** 4. Marine Insurance. — *Reilly v. Home Ins. Co.*, 81 N. Y. App. Div. 314.
- 8.** Exposure to Danger. — *Payne v. Fraternal Acc. Assoc.*, 119 Iowa 342.
- 959.** 1. Payment of Premiums. — *Compare Thomas v. Northwestern Mut. L. Ins. Co.*, 142 Cal. 79.
- 4.** Notice or Proofs of Loss. — *Home L. Assoc. v. Randall*, 30 Can. Sup. Ct. 97.
- 5.** German-American Ins. Co. *v.* Paul, (Indian Ter. 1904) 83 S. W. Rep. 60.
- 8.** Amount of Loss. — *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341; *De Soto v. American Guaranty Fund Mut. F. Ins. Co.*, 102 Mo. App. 1; *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575.
- 9.** Change in Interest of Insured Waived by Insurer. — If after the issuance of the policy the interest of the insured is changed from a fee simple to a life estate, and the company waives the forfeiture, the burden is on the latter to show that the life estate is worth less than the face of the policy. *Continental Ins. Co. v. Thomasson*, (Ky. 1905) 84 S. W. Rep. 546.
- 960.** 17. Receipt Prima Facie Evidence. — *Robison v. Wolf*, 27 Ind. App. 683.
- 961.** 1. Acknowledgment of Payment in Policy. — *Harrigan v. Home L. Ins. Co.*, 128 Cal. 531; *Palmer v. Continental Ins. Co.*, 132 Cal. 68; *Union L. Ins. Co. v. Winn*, 87 Ill. App. 257; *Grier v. Mutual L. Ins. Co.*, 132 N. Car. 542.
- The California Civil Code**, § 2598, applies only to policies containing a stipulation that it shall not be binding until the premium is actually paid. *Palmer v. Continental Ins. Co.*, (Cal. 1900) 61 Pac. Rep. 784.
- Possession of Policy Prima Facie Evidence.** — *Page v. Virginia L. Ins. Co.*, 131 N. Car. 115.
- Insurer Not Estopped to Show Note Given for Premium Not Paid.** — *Mooney v. Home Ins. Co.*, 80 Mo. App. 192.
- If a Note Is Taken for the First Premium** and the policy provides for forfeiture if any premium note is not paid when due, this provision will be enforced even though the policy may acknowledge receipt of the first premium. *Leeper v. Franklin L. Ins. Co.*, 93 Mo. App. 602.
- 962.** 3. Custom of Particular Company Inadmissible. — *New Era Assoc. v. Mactavish*, 133 Mich. 68.
- 4. Life Insurance — Matters Material to Risk.** — See *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659.
- 5.** *Murphy v. Prudential Ins. Co.*, 205 Pa. St. 444.
- 965.** 6. Parol Evidence as to Inventory. — *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152.
- 9.** Schedule or Invoice Made After Fire. — *Greenwich Ins. Co. v. State*, (Ark. 1905) 84 S. W. Rep. 1025.
- Admissible as Record in Detail of Things as to Which Witness Has Testified.** — *Cheever v. Scottish Union, etc., Ins. Co.*, 86 N. Y. App. Div. 328.
- 966.** 4. Application Not Attached to Policy. — *Moore v. Bestline*, 23 Pa. Super. Ct. 6.
- 7.** Application Not Signed. — See *Cleavenger v. Franklin F. Ins. Co.*, 47 W. Va. 595.
- 9.** Parol Evidence to Vary Policy — *United States*. — *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.
- Louisiana.* — *Arguimbau v. Germania Ins. Co.*, 106 La. 139, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966.
- New Hampshire.* — *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253.
- New Jersey.* — *Dimick v. Metropolitan L. Ins. Co.*, 69 N. J. L. 384.
- Ohio.* — *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256; *Richards v. Hale*, 24 Ohio Cir. Ct. 468.
- Oklahoma.* — *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 579, 585.
- Pennsylvania.* — *Hood v. Prudential Ins. Co.*, 26 Pa. Super. Ct. 527.
- Texas.* — *Orient Ins. Co. v. Prather*, 25 Tex. Civ. App. 446; *Keller v. Liverpool, etc., Ins. Co.*, 27 Tex. Civ. App. 102.
- Wisconsin.* — *Johnston v. Charles Abresch Co.*, 123 Wis. 130, 107 Am. St. Rep. 890.
- 967.** 1. Explanation of Description. — *Fidelity Mut. F. Ins. Co. v. Murphy*, (Neb. 1903) 95 N. W. Rep. 702.
- 3.** Technical Words and Phrases. — *Thompson v. Thorne*, 83 Mo. App. 241.
- 968.** 4. Admission in Proofs. — *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 592.
- 5.** Admissions by Officers and Agents. — *Insurance Co. of North America v. Thornton*, 130 Ala. 222, 89 Am. St. Rep. 30; *Knarston v. Man-*

**968.** *e.* PROOFS OF LOSS. — See note 7.

**969.** Secondary Evidence. — See note 5.

Evidence Contradictory of Proofs. — See note 6.

*f.* PROCEEDINGS BEFORE CORONER. — See note 7.

hattan L. Ins. Co., 140 Cal. 57; Prussian Nat. Ins. Co. v. Empire Catering Co., 113 Ill. App. 67; Penn Mut. L. Ins. Co. v. Norcross, 163 Ind. 379; Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654; Steinbach v. Prudential Ins. Co., 62 N. Y. App. Div. 133, reversed on other grounds 172 N. Y. 471. See also Thuringia Ins. Co. v. Goldsmith, (C. C. A.) 132 Fed. Rep. 456.

**968.** 6. Admissions After Event. — Standard L., etc., Ins. Co. v. Holloway, (Ky. 1903) 72 S. W. Rep. 796; Brown v. Dutchess County Mut. Ins. Co., 64 N. Y. App. Div. 9.

7. Proofs Admissible for Limited Purpose Only.

— Rosenberg v. Fireman's Fund Ins. Co., 209 Pa. St. 336.

**969.** 5. Contra. — Underwriters F. Assoc. v. Henry, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072.

6. Proofs Not Conclusive Against Insured. — Hassencamp v. Mutual Ben. L. Ins. Co., (C. C. A.) 120 Fed. Rep. 475.

7. Proceedings Before Coroner. — Metzradt v. Modern Brotherhood of America, 112 Iowa 522. Contra, Ætna L. Ins. Co. v. Milward, (Ky. 1904) 82 S. W. Rep. 364; Ætna L. Ins. Co. v. Kaiser, 115 Ky. 539; Boehme v. Sovereign Camp, etc., 98 Tex. 376.

## INSURANCE BROKERS.

BY M. G. BEAMAN.

**971.** I. DEFINITION — Distinguished from Insurance Agents. — See note 1.

II. AGENCY OF BROKER — 1. In General — *a.* ORDINARILY AGENT OF INSURED. — See notes 2, 3, 4.

**972.** See note 1.

**973.** 2. When Employed Only to Procure Policy. — See notes 1, 2.

**974.** 3. When Authorized to Represent Principal in All Insurance Matters. — See notes 2, 3.

IV. RIGHTS, DUTIES, AND LIABILITIES OF BROKERS — 1. Lien upon Policy and Moneys Received Thereon — *a.* IN GENERAL. — See note 7.

**975.** 2. Duty and Liability to Principal — *a.* IN GENERAL. — See note 6.

**979.** INTEND. — See note 3.

**971.** 1. Brokers Distinguished from Insurance Agents. — Leviness v. Kaplan, 99 Md. 683.

2. Broker Not Agent of Insurer. — Mahon v. Royal Union Mut. L. Ins. Co., (C. C. A.) 134 Fed. Rep. 732; Bradley v. German-American Ins. Co., 90 Mo. App. 369; Northrup v. Piza, 43 N. Y. App. Div. 284, affirmed 167 N. Y. 578; Virginia F. & M. Ins. Co. v. Cummings, (Tex. Civ. App. 1904) 78 S. W. Rep. 716.

Knowledge of Broker Not Imputed to Insurer. — McGrath v. Home Ins. Co., 88 N. Y. App. Div. 153; Philadelphia F. Assoc. v. American Cement Plaster Co., (Tex. Civ. App. 1905) 84 S. W. Rep. 1115.

3. Insurance Broker Agent of Insured. — Mannheim Ins. Co. v. Hollander, 112 Fed. Rep. 549.

4. Broker Cannot Bind Insured by Departing from His Instructions. — Maryland Casualty Co. v. Peoples, 26 Pa. Super. Ct. 142.

**972.** 1. Broker's Status Not Changed by Receiving Compensation from Insurer. — Northrup v. Piza, 43 N. Y. App. Div. 284, affirmed 167 N. Y. 578.

**973.** 1. Broker Employed to Obtain Additional Insurance Has No Power to Cancel Existing Insurance. — Fowler Cycle Works v. Western Ins. Co., 111 Ill. App. 631.

2. Notice to Broker of Cancellation Not Notice to Insured. — Wilson v. Hartford F. Ins. Co., 17 App. Cas. (D. C.) 14; Edwards v. Home Ins. Co., 100 Mo. App. 695; Healy v. Pennsylvania Ins. Co., 50 N. Y. App. Div. 327; Martin v. Palatine Ins. Co., 106 Tenn. 523; Wisconsin, etc., R. Co. v. Phoenix Ins. Co., 123 Wis. 313.

**974.** 2. Question of Fact. — Snyder v. Commercial Union Assur. Co., 67 N. J. L. 7.

3. Edwards v. Home Ins. Co., 100 Mo. App. 695, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 974; Hamm Realty Co. v. New Hampshire F. Ins. Co., 80 Minn. 139.

7. Broker Cannot Maintain Action for Premiums. — Cortis v. Van Derveer, (Supm. Ct. App. T.) 91 N. Y. Supp. 743.

**975.** 6. Duty to Principal — Liability for Negligence. — Mallery v. Frye, 21 App. Cas. (D. C.) 105; Burges v. Jackson, 18 N. Y. App. Div. 296, affirmed 162 N. Y. 632; Landusky v. Beirne, 80 N. Y. App. Div. 272, affirmed 178 N. Y. 551; Baxter v. Jones, 6 Ont. L. Rep. 360, affirming 4 Ont. L. Rep. 541.

Diligence and Good Faith Enough. — Veley v. Clinger, 18 Pa. Super. Ct. 125.

**979.** 3. Intends to Remove — Attachment. — See Greeley v. Greeley, 12 Okla. 659.



**980. INTENT—INTENTION.**—See note 2.

**982. INTENTIONAL.**—See note 1.

**983. INTERESSE TERMINI.**—See note 2.

**980. 2. Intent—Intention.**—Spalding v. People, 172 Ill. 40; State v. Conly, 130 N. Car. 683; Perugi v. State, 104 Wis. 230.

**Intent and Intention.**—State v. Broussard, 107 La. 189; State v. Hearsey, 50 La. Ann. 373.

**Intention and Act—Bankruptcy Act.**—Wilson v. Nelson, 183 U. S. 191.

**Intent and Motive Distinguished.**—People v. Molineux, 168 N. Y. 264.

**Intent and Attempt.**—State v. Daly, 41 Ore-gon 515.

**Same—Murder.**—State v. Hager, 50 W. Va. 370.

**Same—Rape.**—Hollister v. State, 156 Ind. 255.

**982. 1. Intentional Injuries—Life Insurance.**—See Orr v. Traveler's Ins. Co., 120 Ala. 647.

**Wilfully Synonymous with Intentionally—**Chicago City R. Co. v. Olis, 192 Ill. 514.

**983. 2. Morrison v. Chicago, etc., R. Co.,** 117 Iowa 587.

## INTEREST.

By J. E. BRADY.

**991. I. DEFINITIONS—1. Interest Generally.**—See note 1.

**II. ORIGIN AND HISTORY OF INTEREST—2. Rule of Early Common Law.**—See note 8.

**992.** See note 1.

**993. 4. Evolution and Development of Laws of Interest—d. REVIEW OF AMERICAN AUTHORITIES—(1) General Outline.**—See note 7.

**994.** See note 2.

(2) *Interest on Unliquidated Demands.*—See notes 3, 4.

(3) *Limits of Rule.*—See notes 5, 6, 8.

**995. e. RULE UNDER MODERN STATUTES—(1) English Statutes—Act 3 and 4 Wm. IV.**—See note 2.

(2) *Enactments of the Several States—(b) Doctrine that Interest Is Solely Creature of Statute.*—See note 6.

**991. 1. Interest Defined.**—Close v. Riddle, 40 Oregon 596, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990, 991; Waller v. Kingston Coal Co., 191 Pa. St. 193; Parks v. Lubbock, 92 Tex. 635.

**Statutory Definition.**—Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

**8. Taking of Interest Prohibited by Early Common Law.**—Goss Printing Press Co. v. Daily States Pub. Co., 109 La. 761, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 991; Wittenberg v. Mollyneaux, 59 Neb. 203; New Home Sewing Mach. Co. v. Seago, 128 N. Car. 158, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 991; Louisville, etc., R. Co. v. Fort, 112 Tenn. 432.

Judgments did not bear interest at common law. Schroeder v. Boyce, 127 Mich. 35.

**992. 1. Rule of Ecclesiastical Law.**—Goss Printing Press Co. v. Daily States Pub. Co., 109 La. 761, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

**993. 7. Interest Regarded with More Favor in United States than in England.**—Woerz v. Schumacher, 161 N. Y. 530.

**994. 2. Interest as Damages.**—Weber v. Hearn, 49 N. Y. App. Div. 213.

**3. Interest Formerly Not Allowable on Unliquidated Demands.**—Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 106 Am. St. Rep. 493.

**4. Rule Allowing Interest on Unliquidated Demands.**—Missouri, etc., Trust Co. v. Clark, 60 Neb. 406; Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 106 Am. St. Rep. 493; Nichols v. Coleman, 96 N. Y. App. Div. 353; Texas, etc., R. Co. v. Smissen, 31 Tex. Civ. App. 549. See also Remington v. Eastern R. Co., 109 Wis. 154.

**5. Limits of Rule—Demands Capable of Exact Computation.**—Missouri, etc., Trust Co. v. Clark, 60 Neb. 406; Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 106 Am. St. Rep. 493; Sloan v. Baird, 162 N. Y. 327; Weber v. Hearn, 49 N. Y. App. Div. 213. See also Remington v. Eastern R. Co., 109 Wis. 154.

**6. Amount Due Not Ascertainable by Party to Be Charged.**—Weber v. Hearn, 49 N. Y. App. Div. 213.

**8. Damages for Injury to Property.**—Lack v. Brecht, 166 Mo. 242; Missouri, etc., Trust Co. v. Clark, 60 Neb. 406.

Where the damages are unliquidated interest is not allowed. Lester v. Highland Boy Gold Min. Co., 27 Utah 470.

**995. 2. What Is Time Certain under Statute.**—See Sinclair v. Preston, 31 Can. Sup. Ct. 408.

**6. Doctrine that Interest Is Solely Creature of Statute.**—Graves v. Saline County, (C. C. A.) 104 Fed. Rep. 61; Patten v. American Nat. Bank, 15 Colo. App. 479; Pieser v. Minkota

**996.** See notes 1, 2.

(c) Actions under Special Statutes Making No Provision for Interest. — See notes 3, 6, 9.

**997.** The Reason of the Rule. — See note 2.

(d) Provision as to Unreasonable and Vexatious Delay. — See notes 3, 4, 5.

(e) Moneys Due on Instruments of Writing. — See note 7.

**998.** (3) *Construction and Operation* — (a) General Rules of Construction Applicable. — See note 4.

(4) *Constitutionality*. — See note 8.

**999.** III. GROUNDS OF ALLOWANCE OF INTEREST — 1. In General. — See notes 2, 3.

2. Doctrine that Equity Follows the Law. — See note 5.

**1000.** IV. CONTRACTS TO PAY INTEREST — 2. Express Contracts — a. IN GENERAL. — See note 1.

b. WRITTEN CONTRACTS — (1) *In General*. — See note 2.

Milling Co., 94 Ill. App. 595; *Sanguinett v. Webster*, 153 Mo. 343; *Siff v. Forbes*, (Supm. Ct. App. T.) 84 N. Y. Supp. 169. See also *New Home Sewing Machine Co. v. Seago*, 128 N. Car. 158.

**Liability of Municipality.** — In the absence of agreement interest is not recoverable on claims against municipal corporations. *Danville v. Danville Water Co.*, 180 Ill. 235.

**996. 1. Right to Contract for Interest Independently of Statute.** — See *Siff v. Forbes*, (Supm. Ct. App. T.) 84 N. Y. Supp. 169; *Hurlburt v. Dusenbery*, 26 Colo. 240.

**2. Distinction Between Interest *Eo Nomine* and Interest as Damages.** — See *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

**3. Actions under Special Statutes.** — *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 516, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996, modified 175 N. Y. 328; *St. Louis Southwestern R. Co. v. Chambliss*, 93 Tex. 62.

**In an Action to Recover Compensation Allowed by the Constitution for the Taking of Land for Public Use** interest should be allowed on damages assessed against a railroad, which had taken possession of the plaintiff's property for the construction of its road, from the time of the taking. *Miller v. St. Louis, etc., R. Co.*, 162 Mo. 424.

**Gaming Contract.** — In a recovery of money paid for the purchase of shares on a margin, where the recovery was allowed by the constitution, it was held that interest should not be allowed. *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56.

**6. Interest on Value of Stock Killed.** — *St. Louis Southwestern R. Co. v. Chambliss*, 93 Tex. 62.

**9. Statutory Penalties — Foreign Corporations.** — *Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996, modified 175 N. Y. 328.

**997. 2. Double and Treble Damages.** — *Blair v. Sioux City, etc., R. Co.*, 109 Iowa 369.

**3. Unreasonable and Vexatious Delay.** — *Houghteling v. Walker*, 100 Fed. Rep. 253, affirmed (C. C. A.) 107 Fed. Rep. 619; *Pieser v. Minkota Milling Co.*, 94 Ill. App. 595.

**Defending an Action** does not constitute unreasonable or vexatious delay. *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, reversed on other grounds 205 Ill. 77.

**Dispute as to Proper Payee.** — A delay in payment arising from a dispute as to the proper payee does not constitute unreasonable and vexatious delay. *Mueller v. Northwestern University*, 195 Ill. 236, 88 Am. St. Rep. 194.

**Erroneous Instruction.** — An instruction to the jury to allow interest for unreasonable and vexatious delay in a suit for unliquidated damages sustained by failure to convey property according to an agreement is erroneous. *Palmer v. Bennett*, 96 Ill. App. 281.

**4. Mere Delay Not Sufficient.** — *Pieser v. Minkota Milling Co.*, 94 Ill. App. 595.

**5. Delay Both Unreasonable and Vexatious.** — *Pieser v. Minkota Milling Co.*, 94 Ill. App. 595.

**Demand Necessary.** — *Houghteling v. Walker*, 100 Fed. Rep. 253, affirmed (C. C. A.) 107 Fed. Rep. 619.

**7. Instruments of Writing.** — *National Bank v. Greenlaw*, 134 Cal. 673; *Midland Fuel Co. v. Schuessler*, 18 Colo. App. 386.

**998. 4. Expressio Unius Est Exclusio Alterius.** — *Hurlburt v. Dusenbery*, 26 Colo. 240. Compare *Lack v. Brecht*, 166 Mo. 242.

**Application of Statutes to Counties, Etc.** — General statutes in regard to the allowance of interest do not apply to municipal bodies unless specifically provided. *Graves v. Saline County*, (C. C. A.) 104 Fed. Rep. 61.

**8. Constitutional Prohibition Against Local or Special Law Fixing the Rate of Interest.** — *Seaboard Nat. Bank v. Woesten*, 176 Mo. 49.

**999. 2. Grounds of Allowance — Contract — Damages.** — *Weber v. Hearn*, 49 N. Y. App. Div. 213; *Close v. Riddle*, 40 Oregon 596; *Ex p. Stockman*, 70 S. Car. 31, 106 Am. St. Rep. 741; *Texarkana Water Co. v. Kizer*, (Tex. Civ. App. 1901) 63 S. W. Rep. 913.

**In the Absence of a Statute Allowing It**, interest is not recoverable except under an express or implied contract. *Siff v. Forbes*, (Supm. Ct. App. T.) 84 N. Y. Supp. 169.

**3. Interest for Fraud, Delinquency, or Injustice.** — *Mathewson v. Davis*, 191 Ill. 391.

**5. Doctrine that Equity Follows Law.** — Courts of equity, in the allowance of interest, are not restricted to cases where interest would be given at law. *Woertz v. Schumacher*, 161 N. Y. 530.

**1000. 1. Express Contracts.** — *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

**2. Written Contracts by Statute.** — *Stewart v.*

- 1001.** (4) *Construction* — (a) *In General*. — See notes 2, 3, 5.
- 1002.** (c) *Parol Evidence*. — See note 3.  
(d) *When Interest Payable*. — See note 4.  
c. *VERBAL CONTRACTS*. — See note 9.
- 1003.** 3. *Implied Contracts* — a. *IN GENERAL*. — See note 1.  
b. *HOW IMPLIED CONTRACT MAY ARISE* — (i) *General Usage or Custom* — (a) *In General*. — See note 3.
- 1004.** *General Custom* — *Particular Usage*. — See note 4.  
(b) *Mercantile Instruments*. — See note 5.
- 1005.** (2) *Custom or Course of Dealings of Parties* — (a) *In General*. — See notes 1, 2.  
(3) *Particular Acts of Parties or Terms of Particular Contract* — (a) *In General*. — See note 7.
- 1006.** (4) *Breach of Contract to Pay Money*. — See note 4.
- 1007.** See note 1.
- V. *INTEREST AS DAMAGES FOR BREACH OF CONTRACT* — 1. *Contracts to Pay Money* — b. *EXPRESS CONTRACTS TO PAY MONEY* — (i) *In General*. — See note 4.
- 1009.** (2) *Several Sorts of Contracts* — (c) *Penal Bonds* — aa. *IN GENERAL*. — See note 1.  
bb. *INTEREST IN EXCESS OF PENALTY* — (aa) *In General*. — See notes 5, 6.
- 1010.** (e) *Debts of Decedents* — *Where the Claim Is Not Interest-bearing Ex Contractu*. — See note 3.

Slocumb, 120 Ga. 762; Bunker v. Barron, 93 Me. 87. See also Smith v. Butler, 176 Mass. 38.

**1001.** 2. *General Rules of Construction*. — Larrabee v. Southard, 95 Me. 385.

3. *Manifest Intent to Govern*. — Levy v. Shellsey, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 789.

5 *Construction Against Payor*. — See Buffalo Third Nat. Bank v. Spring, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 9, reversed on other grounds 50 N. Y. App. Div. 66.

**1002.** 3. *Parol Evidence*. — Levy v. Shellsey, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 789.

4. *When Interest Payable* — *Rule Stated*. — Guckian v. Newbold, 23 R. I. 556.

9. *Oral Agreement Valid for Legal Rate*. — Sanguinett v. Webster, 153 Mo. 343.

**1003.** 1. *Implied Contracts for Interest*. — *In re Drax*, (1903) 1 Ch. 781; Braun v. Hess, 187 Ill. 283, 79 Am. St. Rep. 221; Woerz v. Schumacher, 161 N. Y. 530.

*Implied Contract to Pay Interest on Money Borrowed*. — Secor v. Gray, 3 Ont. L. Rep. 34.

3. *General Usage or Custom*. — Smith v. Butler, 176 Mass. 38.

**1004.** 4. *Actual Knowledge of Particular Usage*. — Smith v. Butler, 176 Mass. 38.

5. *Mercantile Instruments*. — See Baldwin Coal Co. v. Davis, 15 Colo. App. 371.

**1005.** 1. *Custom or Course of Dealings of Parties*. — *In re Anglesey*, (1901) 2 Ch. 548, 70 L. J. Ch. 810, 85 L. T. N. S. 179, 49 W. R. 708.

2. *Interest on Merchants' Accounts*. — *In re Anglesey*, (1901) 2 Ch. 548, 70 L. J. Ch. 810, 85 L. T. N. S. 179, 49 W. R. 708; Braun v. Hess, 187 Ill. 283, 79 Am. St. Rep. 221.

7. *Particular Acts or Terms of Particular Contracts*. — *In re Dixon*, (1900) 2 Ch. 561; Woerz v. Schumacher, 161 N. Y. 530.

**1006.** 4. *Breach of Contract for Money*. — Bell v. Mendenhall, 78 Minn. 57.

**1007.** 1. *Interest as Damages*. — *Ex p. Stockman*, 70 S. Car. 31, 106 Am. St. Rep. 741.

4. *General Rule as Now Existing* — *United States*. — *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 94 Fed. Rep. 454.

*California*. — *Ryland v. Heney*, 130 Cal. 426. *Connecticut*. — *Curtis v. Smith*, 75 Conn. 429; *Loomis v. Gillett*, 75 Conn. 298.

*Kentucky*. — *Brown v. Lapp*, (Ky. 1903) 77 S. W. Rep. 194.

*Missouri*. — *Nelson v. Hirsch*, etc., *Iron*, etc., Co., 102 Mo. App. 498.

*Nebraska*. — *Mullally v. Dingman*, 62 Neb. 702.

*New York*. — *Weber v. Hearn*, 49 N. Y. App. Div. 213.

*Oregon*. — *Close v. Riddle*, 40 Oregon 596.

*South Carolina*. — *Computing Scales Co. v. Long*, 66 S. Car. 379; *Ex p. Stockman*, 70 S. Car. 31, 106 Am. St. Rep. 741.

*Texas*. — See *Houston v. Lubbock*, 35 Tex. Civ. App. 106.

**1009.** 1. *Rule by Statute*. — *In New York*, by Code Civ. Pro., § 1915, if a bond is conditioned for the performance of an act, interest is not allowed on the penalty. *Sachs v. American Surety Co.*, 72 N. Y. App. Div. 60, affirmed 177 N. Y. 551.

By statute in *North Carolina* penal bonds are not allowed to draw interest. *New Home Sewing Mach. Co. v. Seago*, 128 N. Car. 158.

5. *English Cases Allowing Interest Beyond Penalty*. — *In re Dixon*, (1900) 2 Ch. 561.

6. *Rule of Weight of Authority in United States*. — *Pennell v. Card*, 96 Me. 392; *Omaha Carpet Co. v. Clapp*, (Neb. 1902) 89 N. W. Rep. 246; *Camden v. Ward*, 67 N. J. L. 558.

**1010.** 3. *Effect of Presentment*. — *Ryans v. Hospes*, 167 Mo. 342.

*Rule by Statute*. — *Guill v. Corinth Deposit Bank*, (Ky. 1902) 68 S. W. Rep. 870.

- 1010.** (r) *Liquidated Damages*. — See note 6.
- 1011.** c. IMPLIED CONTRACTS TO PAY MONEY — (3) *Money Paid for Use of Another*. — See note 4.
- 1012.** (4) *Money Fraudulently or Wrongfully Obtained*. — See note 1.  
 (5) *Money Wrongfully or Unlawfully Withheld*. — See notes 2, 3.  
 (6) *Money Had and Received* — (a) *General Rule*. — See note 4.
- 1013.** Where Receipt of Money Fraudulently Concealed. — See note 1.  
 (7) *Conversion of Money — Misapplication of Funds*. — See note 4.  
 d. INTEREST AS MEASURE OF DAMAGES. — See note 5.
- 1015.** 2. *Requisites to Recovery* — b. AMOUNT TO BE PAID — (1) *In General*. — See note 1.  
 (2) *Rule as to Unliquidated Demands* — (a) *In General*. — See note 3.
- 1016.** (b) *Modification of Rule*. — See notes 7, 8.  
 (c) *Where Amount Capable of Ascertainment*. — See note 9.  
 (d) *Amount in Dispute*. — See note 10.
- 1017.** (3) *Accounts* — (a) *Unliquidated Accounts*. — See note 2.
- 1018.** (b) *Liquidated Accounts*. — See note 1.  
 (c) *Interest by Agreement of Parties*. — See note 4.
- 1019.** c. TIME FOR PAYMENT. — See note 1.

**1010.** 6. *Doctrine that Interest Allowable*. — Chicago, etc., R. Co. v. McEwen, (Ind. App. 1904) 71 N. E. Rep. 926.

**1011.** 4. *Money Paid for Another's Use*. — Bull v. Rich, 92 Minn. 483, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011.

**1012.** 1. *Money Fraudulently or Wrongfully Obtained*. — Johnson v. Regem, (1904) A. C. 817. See also Boys' Home v. Lewis, 3 Ont. L. Rep. 208.

**2.** *Money Wrongfully or Unlawfully Withheld*. — Thorp v. Thorp, 75 Vt. 34; Boyce v. Boyce, 124 Mich. 696.

**3.** *Presumption as to Profits*. — Thorp v. Thorp, 75 Vt. 34.

**4.** *Money Had and Received — General Rule*. — York v. Farmers Bank, 105 Mo. App. 127; Graham v. Merchant, 43 Oregon 294; Rice v. Ashland County, 114 Wis. 130.

*Money Received by Agent*. — Interest may be recovered by a principal upon money used by his agent. Beugnot v. Tremoulet, 52 La. Ann. 454.

*By Statute in Missouri* interest is allowed upon "money recovered for the use of another and retained without the owner's knowledge of the receipt." Lack v. Brecht, 166 Mo. 242.

**1013.** 1. *Fraudulent Concealment*. — See Thorp v. Thorp, 75 Vt. 34.

**4.** Blakeney v. Wyland, 115 Iowa 607; St. Paul Trust Co. v. Strong, 85 Minn. 1; Leary v. Corvin, 181 N. Y. 222, 106 Am. St. Rep. 542. See also James Reynolds Elevator Co. v. Merchants' Nat. Bank, 55 N. Y. App. Div. 1; Pendleton v. Patrick, (Ky. 1900) 57 S. W. Rep. 464.

**5.** *Interest as Measure of Damages*. — Loomis v. Gillett, 75 Conn. 298.

**1015.** 1. *Amount to Be Paid — General Rule*. — Macomber v. Bigelow, 123 Cal. 532; Brownell Imp. Co. v. Critchfield, 197 Ill. 71, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; Bull v. Rich, 92 Minn. 483; Delafield v. Westfield, 41 N. Y. App. Div. 24, affirmed 169 N. Y. 582; Mayes v. Connolly, 35 N. Bruns. 701.

**3.** *Unliquidated Demands — General Rule*. — Dwyer v. U. S., (C. C. A.) 93 Fed. Rep. 616;

Macomber v. Bigelow, 123 Cal. 532; Swanson v. Andrus, 83 Minn. 505; Bull v. Rich, 92 Minn. 483; Trimble v. Kansas City, etc., R. Co., 180 Mo. 587, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1015; Wittenberg v. Mollyneaux, 59 Neb. 203; Excelsior Terra Cotta Co. v. Harde, 90 N. Y. App. Div. 4, affirmed 181 N. Y. 11; New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co., 180 N. Y. 280, reversing 92 N. Y. App. Div. 427; Sloan v. Baird, 162 N. Y. 327; Delafield v. Westfield, 41 N. Y. App. Div. 24, affirmed 169 N. Y. 582; J. I. Case Plow Works v. Niles, etc., Co., 107 Wis. 9.

**1016.** 7. *Interest from Demand*. — Trimble v. Kansas City, etc., R. Co., 180 Mo. 587; Riola v. New York Cent., etc., R. Co., 100 N. Y. App. Div. 509.

**8.** *Interest from Institution of Suit*. — Trimble v. Kansas City, etc., R. Co., 180 Mo. 587; Riola v. New York Central, etc., R. Co., 100 N. Y. App. Div. 509.

**9.** *Amount Ascertainable by Computation*. — Swanson v. Andrus, 83 Minn. 505; Sloan v. Baird, 162 N. Y. 327; Weber v. Hearn, 49 N. Y. App. Div. 213; Riola v. New York Cent., etc., R. Co., 100 N. Y. App. Div. 509.

**10.** *Dispute as to Amount*. — Florence, etc., R. Co. v. Tennant, 32 Colo. 71.

**1017.** 2. *Interest on Unliquidated Accounts*. — Hefferlin v. Karlman, 29 Mont. 139; Spencer v. Hall, (County Ct.) 30 Misc. (N. Y.) 75, affirmed 51 N. Y. App. Div. 623; Corralitos Co. v. Mackay, 31 Tex. Civ. App. 316; Hart v. Hart, 117 Wis. 639.

*Allowed on Annual Balances*. — Holt v. Howard, 77 Vt. 49; Hammond v. Hammond, 76 Vt. 437.

**1018.** 1. *Liquidated Accounts*. — Gregory v. New Home Sewing Mach. Co., (Ky. 1905) 86 S. W. Rep. 529. See also Bell v. Mendenhall, 78 Minn. 57; Hefferlin v. Karlman, 29 Mont. 139.

**4.** *Interest by Agreement*. — Smith v. Butler, 176 Mass. 38.

**1019.** 1. *Time for Payment*. — Sinclair v. Preston, 13 Manitoba 228; Mayes v. Connolly, 35 N. Bruns. 701.

*Payments on Architects' Certificates*. — Where a

**1020.** *d. NECESSITY FOR DEFAULT — (2) Default in Liquidating Debt.*  
 — See note 1.

(3) *Liability of Mere Depositary.* — See note 2.

**1021.** *e. DEMAND — (1) General Rule.* — See note 1.

**1022.** (3) *Requisites of Demand — (a) In General.* — See note 7.

**1023.** (b) *Excessive Demand.* — See note 1.

(5) *Institution of Suit as Demand — (a) In General.* — See note 5.

**1024.** (6) *When Demand Unnecessary.* — See note 2.

And Where It Is the Duty of a Party to Pay Over Money Within a Reasonable

Time. — See note 3.

(7) *Demands under Particular Statutes.* — See note 5.

**3. Contracts Other than to Pay Money — a. GENERAL RULE.** —

See note 6.

**1025.** *b. EXCEPTIONS TO GENERAL RULE — (1) Where Amount Ascertainable by Computation.* — See note 1.

(2) *Market Values.* — See note 2.

Where No Market Value. — See note 4.

(3) *Contracts to Deliver Personality.* — See note 6.

**1026.** Where the Purchase Money or Consideration Has Been Paid. — See note 1.

Where the Consideration Has Not Been Paid. — See note 2.

contract provided for payments on architects' certificates, interest is not recoverable unless such certificates are produced. *Excelsior Terra Cotta Co. v. Harde*, 90 N. Y. App. Div. 4, affirmed 181 N. Y. 11.

**1020.** 1. *Defaults in Liquidating Debt.* — *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316.

2. *Rule as to Depositaries.* — *Denver v. Hayes*, 28 Colo. 110; *Patten v. American Nat. Bank*, 15 Colo. App. 479; *Mathewson v. Davis*, 191 Ill. 391.

*Holder of Security.* — *Delafield v. Westfield*, 41 N. Y. App. Div. 24, affirmed 169 N. Y. 582.

*Sale and Repurchase.* — One who has purchased property with the privilege of reselling to the vendor at the end of a specified time cannot, upon exercising his right of resale, recover interest upon the purchase price paid by him. *Kildea v. Washington Liquor Co.*, 22 Wash. 385.

**1021.** 1. *Necessity for Demand — General Rule — United States.* — See *Dwyer v. U. S.*, (C. C. A.) 93 Fed. Rep. 616.

*Colorado.* — *Patten v. American Nat. Bank*, 15 Colo. App. 479.

*Florida.* — *Ross v. Walker*, 44 Fla. 704.

*Montana.* — *Hefferlin v. Karlman*, 29 Mont. 139.

*New York.* — *Richmond County Soc., etc., v. New York*, 73 N. Y. App. Div. 607; *James v. Post*, 40 N. Y. App. Div. 162; *Excelsior Terra Cotta Co. v. Harde*, 90 N. Y. App. Div. 4, affirmed 181 N. Y. 11.

*Oregon.* — *Baker v. Williams, etc., Banking Co.*, 42 Oregon 222, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021.

*Wisconsin.* — *Remington v. Eastern R. Co.*, 109 Wis. 154; *Rice v. Ashland County*, 114 Wis. 130; *Lowe v. Ring*, 123 Wis. 370.

*Canada.* — *Mayes v. Connolly*, 35 N. Bruns. 701.

Where There Had Been No Agreement for Interest upon money loaned, interest thereon was held not recoverable, no demand having been made. *Ehrlich v. Brucker*, 121 Wis. 495.

**1022.** 7. *Requisites of Demand.* — See *Weber v. Hearn*, 49 N. Y. App. Div. 213.

**1023.** 1. *Excessive Demand.* — *Excelsior Terra Cotta Co. v. Harde*, 90 N. Y. App. Div. 4, affirmed 181 N. Y. 11.

5. *Suit as Demand.* — *Dwyer v. U. S.*, (C. C. A.) 93 Fed. Rep. 616; *Mulligan v. Smith*, 32 Colo. 404; *Trimble v. Kansas City, etc., R. Co.*, 180 Mo. 587; *Hefferlin v. Karlman*, 29 Mont. 139; *Roussel v. Mathews*, 62 N. Y. App. Div. 1, affirmed 171 N. Y. 634; *Remington v. Eastern R. Co.*, 109 Wis. 154.

**1024.** 2. *That a Demand Would Be Useless* does not dispense with the necessity for it. *Patten v. American Nat. Bank*, 15 Colo. App. 479.

3. *Misapplication of Funds — No Demand Necessary.* — *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 N. Y. App. Div. 1.

5. *Debts of Decedents.* — See *Kentucky Title Co. v. English*, (Ky. 1899) 50 S. W. Rep. 968.

6. *Contracts Other than to Pay Money — General Rule.* — *Poppleton v. Jones*, 42 Oregon 33, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024; *Sloan v. Baird*, 162 N. Y. 327.

**1025.** 1. *Amount Ascertainable by Computation.* — *J. I. Case Plow Works v. Niles, etc., Co.*, 107 Wis. 9. See also *Sloan v. Baird*, 162 N. Y. 327.

2. *Market Values.* — See *Sloan v. Baird*, 162 N. Y. 327; *J. I. Case Plow Works v. Niles, etc., Co.*, 107 Wis. 9.

4. *Where No Established Market Price.* — *Sloan v. Baird*, 162 N. Y. 327.

6. *Contracts to Deliver Personality.* — *Connor v. S. Blaisdell, Jr. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989.

*Breach of Warranty.* — *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

**1026.** 1. *Where Consideration Has Been Paid.* — *Connor v. S. Blaisdell, Jr. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890.

2. *Where Consideration Has Not Been Paid.* — *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989.

**1026.** (4) *Warranties*. — See note 3.

**1027.** VI. INTEREST AS DAMAGES FOR TORT — 1. In General. — See note 2.

2. Torts to Property — *a.* IN GENERAL. — See note 3.

*b.* INJURIES TO OR DESTRUCTION OF PROPERTY. — See note 4.

**1029.** This Rule Is Obviously Just. — See note 1.

When Interest Is Given upon Such Theory. — See note 2.

*c.* DEPRIVATION OF USE. — See note 3.

*d.* INTEREST EO NOMINE. — See note 4.

**1030.** Consideration of Lapse of Time Since Injury. — See note 2.

*f.* PROPERTY HAVING ASCERTAINABLE PECUNIARY VALUE. —

See note 4.

**1031.** *g.* DOCTRINE THAT INTEREST NOT RECOVERABLE. — See note 1.

*h.* INTEREST IN NEGLIGENCE CASES. — See note 2.

*i.* EXEMPLARY DAMAGES. — See note 4.

**1032.** 3. Torts to Person. — See notes 1, 2.

**1026.** 3. Warranties. — *Ash v. Beck*, (Tex. Civ. App. 1902) 68 S. W. Rep. 53.

**1027.** 2. Interest on Damages for Torts — Common-law Rule. — *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.

Not Allowed Where Claim Unliquidated. — *Lester v. Highland Boy Gold Min. Co.*, 27 Utah 470.

3. Modification of Common-law Rule. — *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027; *Lack v. Brecht*, 166 Mo. 242.

4. Torts to Property — When Interest Allowed — *United States*. — *New Dunderberg Min. Co. v. Old*, (C. C. A.) 97 Fed. Rep. 150.

*Georgia*. — *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *Midville, etc., R. Co. v. Bruhl*, 117 Ga. 329.

*Illinois*. — *Janeway v. Burton*, 201 Ill. 78.

*Iowa*. — *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32.

*Massachusetts*. — *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500; *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386.

*Nebraska*. — *Missouri, etc., Trust Co. v. Clark*, 60 Neb. 406.

*New York*. — *Lakeside Paper Co. v. State*, 45 N. Y. App. Div. 112.

*Rhode Island*. — *Lonsdale Co. v. Woonsocket*, 25 R. I. 428.

*Tennessee*. — *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027.

*Texas*. — *St. Louis Southwestern R. Co. v. Dolan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 393; *Texas, etc., R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447; *Gulf, etc., R. Co. v. Shepherd*, (Tex. Civ. App. 1903) 76 S. W. Rep. 800; *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837; *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549.

*Wisconsin*. — *Shaw v. Gilbert*, 111 Wis. 165.

**1029.** 1. Rationale of Rule. — *Lakeside Paper Co. v. State*, 45 N. Y. App. Div. 112; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029; *Western Union Tel. Co. v. Garner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 433.

2. Party Injured Entitled to Compensation as of Time of Injury. — *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029; *Western Union Tel. Co. v. Garner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 433.

Interest from Time of Filing of Claim in Action Against State. — *Lakeside Paper Co. v. State*, 45 N. Y. App. Div. 112.

3. Deprivation of Use. — *Coan v. Brownstown Tp.*, 126 Mich. 626, 8 Detroit Leg. N. 160; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029.

4. Interest Not Recoverable Eo Nomine. — *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32; *Leavenworth v. Duffy*, 10 Kan. App. 124; *San Antonio, etc., R. Co. v. Addison*, 96 Tex. 61; *Western Union Tel. Co. v. Garner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 433.

**1030.** 2. Consideration of Lapse of Time. — *Davis v. Bowers Granite Co.*, 75 Vt. 285. See also *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32; *Shaw v. Gilbert*, 111 Wis. 165.

4. Property Having Ascertainable Value. — *Lack v. Brecht*, 166 Mo. 242; *Missouri, etc., Trust Co. v. Clark*, 60 Neb. 406.

**1031.** 1. Doctrine that Interest Not Recoverable. — *Union Pac. R. Co. v. Holmes*, 68 Kan. 810; *Lester v. Highland Boy Gold Min. Co.*, 27 Utah 470.

2. Negligence Cases. — *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580.

4. Double and Treble Damages. — Interest is not allowable on treble damages recoverable against a railroad company for unjust discrimination. *Blair v. Sioux City, etc., R. Co.*, 109 Iowa 369.

**1032.** 1. Torts to Person. — *Burrows v. Lownsdale*, (C. C. A.) 133 Fed. Rep. 250. See also *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

Death by Wrongful Act. — Damages assessed for the death of a child caused by the negligence of a railroad were held to bear interest from judgment. *Ortolano v. Morgan's Louisiana, etc., R., etc., Co.*, 109 La. 902.

2. Reason of Rule. — *Burrows v. Lownsdale*, (C. C. A.) 133 Fed. Rep. 250. See also *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

**1032. VII. INTEREST AS MERE INCIDENT OF PRINCIPAL OR INTEGRAL PART OF DEBT**—1. General Observations.— See note 4.

**1033.** See notes 1, 2.

2. Effect of Payment of Principal—*a.* INTEREST DUE BY CONTRACT.— See note 3.

**1034.** *b.* INTEREST RECOVERABLE AS DAMAGES—(1) *In General*.— See note 1.

(2) *Payment Pending Suit*.— See note 3.

**1036. VIII. COMPUTATION OF INTEREST**—2. Partial Payments—*a.* WHERE COMPOUND INTEREST NOT ALLOWED.— See note 2.

**1037.** *c.* INTEREST ON PAYMENTS.— See note 3.

**1038.** 3. Mistake in Computation—*b.* REMITTITUR OF INTEREST ERRONEOUSLY ALLOWED.— See notes 3, 5.

**1039. IX. TIME FROM WHICH COMPUTED**—2. Interest by Contract—*a.* WHERE DATE EXPRESSLY FIXED—(1) *In General*.— See note 4.

**1041.** 3. Interest as Damages—*a.* FOR BREACH OF CONTRACT—(1) *General Rule*—*From Date of Breach*.— See notes 1, 2.

(2) *Contracts to Pay Money*—(a) *Express Contracts*—*aa.* GENERAL RULE.— See note 4.

**1032.** 4. Interest Regarded as Mere Incident of Debt.—*Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

**1033.** 1. Correct Statement of Rule.—*Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474.

2. Interest Payable by Contract.—*Cooper v. Hill*, (C. C. A.) 94 Fed. Rep. 582.

3. Payment of Principal.— See *Waller v. Kingston Coal Co.*, 191 Pa. St. 193.

**1034.** 1. Payment of Principal as Bar to Interest.—*Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474; *Bronx Gas, etc., Co. v. New York*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 402; *Waller v. Kingston Coal Co.*, 191 Pa. St. 193.

3. Payment under Judgment.— The plaintiff, in an action to recover for electric lighting furnished, severed the action and accepted judgment for the sum admitted to be due in the answer. It was held that such acceptance waived the right to interest by way of damages. *Bronx Gas, etc., Co. v. New York*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 402.

**1036.** 2. Partial Payments Where Compound Interest Is Not Allowed.—*McQueen v. Whetstone*, 127 Ala. 417; *Call v. Moll*, 89 Mo. App. 386; *Rawlings v. Anheuser-Busch Brewing Assoc.*, (Neb. 1903) 94 N. W. Rep. 1001; *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085.

**1037.** 3. Computation of Interest on Payments Not Allowed.— See *Hopper v. Williams*, 95 Md. 734; *Foley v. Comstock*, 122 Mich. 349.

**1038.** 3. Option to Remit Interest.—*Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580; *Feller v. McKillip*, 109 Mo. App. 61; *Meyer v. Phoenix Ins. Co.*, 95 Mo. App. 721; *Wittenberg v. Mollyneux*, 59 Neb. 203; *Rawlings v. Anheuser-Busch Brewing Assoc.*, (Neb. 1903) 94 N. W. Rep. 1001; *South Omaha v. Ruthjen*, (Neb. 1904) 99 N. W. Rep. 240; *Gulf, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 47; *Davis v. Bowers Granite Co.*, 75 Vt. 286.

5. Remand for Correction in Trial Court—Where Only Error Is in Allowing Interest.—*Cooke v. Clark*, (Ky. 1899) 51 S. W. Rep. 316. See

also *Howard v. Perrin*, (Ariz. 1904) 76 Pac. Rep. 460.

**1039.** 4. Note Payable on Demand After Specified Date.—*Larrabee v. Southard*, 95 Me. 385.

**1041.** 1. Interest as Damages for Breach of Contract—Computation from Date of Breach.—*Sun v. Makainai*, 14 Hawaii 495, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041; *Omaha Carpet Co. v. Clapp*, (Neb. 1902) 89 N. W. Rep. 246; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Toronto v. Toronto R. Co.*, 7 Ont. L. Rep. 78.

2. Accrual of Right of Action.—*Sun v. Makainai*, 14 Hawaii 495, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041; *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926; *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386.

4. Interest from Time for Payment of Principal—*United States*.—*Yellow Poplar Lumber Co. v. Daniel*, (C. C. A.) 109 Fed. Rep. 39.

*California*.—*Knowles v. Baldwin*, 125 Cal. 224.

*Connecticut*.—*Loomis v. Gillett*, 75 Conn. 298.

*Indiana*.—*Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926.

*Kentucky*.—*Gregory v. New Home Sewing Mach. Co.*, (Ky. 1905) 86 S. W. Rep. 529; *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

*Louisiana*.—*In re Immanuel Presb. Church*, 112 La. 348.

*Missouri*.—*Huston v. De Zeng*, 78 Mo. App. 522.

*New York*.—*Sans v. New York*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 559; *Randall v. Grant*, 59 N. Y. App. Div. 485; *Weber v. Hearn*, 49 N. Y. App. Div. 213.

*South Carolina*.—*Dyson v. Jones*, 65 S. Car. 308; *Computing Scales Co. v. Long*, 66 S. Car. 379.

*Texas*.—*Howard v. Emerson*, (Tex. Civ. App. 1901) 65 S. W. Rep. 382.

Interest upon Coupons Is Computed from Their Maturity.—*Kentucky Title Co. v. English*, (Ky. 1899) 50 S. W. Rep. 968.

- 1042.** Date Ascertainable by Implication. — See note 1.  
Accounts. — See note 4.
- 1043.** Penal Bonds. — See note 3.  
cc. CONTRACTS TO PAY ON CONDITION. — See note 6.  
dd. DEBTS DUE "ON DEMAND" — Interest from Date. — See note 8.  
Interest from Demand. — See note 9.
- 1044.** Where Demand in Fact Necessary to Default. — See note 1.  
(b) Implied Contracts — cc. IMPLICATION TO PAY ON DEMAND. — See note 4.
- 1045.** (c) Under Special Statutes. — See note 1.  
(3) Interest from Institution of Suit. — See note 2.
- 1046.** Institution of Suit as Setting Interest Running When Demand Would Not. — See note 2.  
(4) Contracts to Do Something Other than to Pay Money. — See note 3.  
b. FOR TORT — (1) In General — Thus, Where Money Has Been Converted by the Defendant. — See note 7.
- 1047.** And Where the Conversion Is of Property Other than Money. — See note 1.  
(2) Injuries to Property — (a) Interest from Date of Injuries. — See note 3.

**1042.** 1. Goods Sold and Delivered — Interest from Delivery. — *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691; *Howard v. Emerson*, (Tex. Civ. App. 1901) 65 S. W. Rep. 382.

Services and Materials Furnished — Interest from Completion of Work. — *Sullivan v. Nicoulin*, 113 Iowa 76.

4. Accounts. — Mine, etc., *Supply Co. v. Parke*, etc., Co., (C. C. A.) 107 Fed. Rep. 881; *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316; *Momsen v. Atkins*, 105 Wis. 557. See also *Spencer v. Hall*, (County Ct.) 30 Misc. (N. Y.) 75, affirmed 51 N. Y. App. Div. 623.

Partnership Accounts. — *Hart v. Hart*, 117 Wis. 639.

Unliquidated Accounts. — *Bell v. Mendenhall*, 78 Minn. 57.

Account Between Cotenants. — *Boyce v. Boyce*, 124 Mich. 696.

**1043.** 3. Interest on Penalty of Bond — Computation from Time of Breach. — *Omaha Carpet Co. v. Clapp*, (Neb. 1902) 89 N. W. Rep. 246.

6. Contracts to Pay on Condition. — *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285; *Follett Wool Co. v. Utica Trust, etc., Co.*, 84 N. Y. App. Div. 151.

8. Interest from Date. — *Curtis v. Smith*, 75 Conn. 429; *Bennett v. Taylor*, (Neb. 1903) 96 N. W. Rep. 669.

9. Interest from Demand. — *Cooke v. Clark*, (Ky. 1899) 51 S. W. Rep. 316. See also *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371.

**1044.** 1. Services Rendered. — A claim for services rendered bears interest from demand only. *Lowe v. Ring*, 123 Wis. 370.

4. Implication to Pay on Demand. — *Ross v. Walker*, 44 Fla. 704; *York v. Farmers Bank*, 105 Mo. App. 127.

**1045.** 1. Interest on Claim for Services. — *Coughlin v. New York*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 448.

Unliquidated Claims. — *Trimble v. Kansas City, etc., R. Co.*, 180 Mo. 587.

2. Interest from Institution of Suit — *United States*. — *Dwyer v. U. S.*, (C. C. A.) 93 Fed. Rep. 616.

*California*. — *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692.

*Kansas*. — *Pine v. Western Nat. Bank*, 63 Kan. 462.

*Kentucky*. — *Brown v. Lapp*, (Ky. 1903) 77 S. W. Rep. 194; *Travelers' Ins. Co. v. Henderson Cotton Mills*, (Ky. 1905) 85 S. W. Rep. 1090.

*Missouri*. — *Trimble v. Kansas City, etc., R. Co.*, 180 Mo. 587.

*Montana*. — *Hefferlin v. Karlman*, 29 Mont. 139.

*New York*. — *Roussel v. Mathews*, 62 N. Y. App. Div. 1, affirmed 171 N. Y. 634. See also *De Crano v. Moore*, 50 N. Y. App. Div. 361.

*Wisconsin*. — *Remington v. Eastern R. Co.*, 109 Wis. 154.

**1046.** 2. Speirs v. Union Drop Forge Co., 180 Mass. 87, citing '16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046.

3. Contracts to Deliver Property. — *Connor v. S. Blaisdell, Jr. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 890; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *J. I. Case Plow-Works v. Niles, etc., Co.*, 107 Wis. 9. See also *Dubuque Lumber Co. v. Kimball*, 111 Iowa 48.

7. Conversion of Money. — *Cooper v. Hill*, (C. C. A.) 94 Fed. Rep. 582.

**1047.** 1. Conversion of Property Other than Money — *United States*. — *New Dunderberg Min. Co. v. Old*, (C. C. A.) 97 Fed. Rep. 150. *Arkansas*. — *Fordyce v. Dempsey*, 72 Ark. 471.

*Georgia*. — *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

*Illinois*. — See also *Janeway v. Burton*, 201 Ill. 78.

*Massachusetts*. — *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500.

*New York*. — *Einstein v. Dunn*, 61 N. Y. App. Div. 195, affirmed 171 N. Y. 648.

*Texas*. — *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837.

*Trover*. — *Woodworth v. Gorsline*, 30 Colo. 186.

3. Interest from Date of Injuries. — *Texas, etc., R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447;



**1047.** (b) Interest from Institution of Suit. — See note 4.

(c) Interest from Judgment. — See note 5.

**1048.** X. TO WHAT TIME COMPUTED — 2. Interest as Damages. — See note 1.

XI. RATE OF INTEREST — 2. Rate by Contract — a. EXPRESS CONTRACTS FOR RATE — (2) *Contracts Increasing Rate* — (c) *Stipulation for Higher Rate After Maturity* — bb. DOCTRINE THAT HIGHER RATE RECOVERABLE — (aa) *In General*. — See note 5.

**1050.** See note 1.

(bb) *Waiver of Higher Rate by Acceptance of Lower*. — See note 3.

dd. INTEREST FROM DATE IF NOT PAID AT MATURITY. — See note 6.

**1051.** (3) *Contracts Reducing Rate*. — See note 1.

b. IMPLIED CONTRACTS FOR RATE — (1) *In General*. — See note 5.

(2) *Contract for Interest Without Expressing Rate*. — See note 7.

**1052.** 3. Rate as Damages — a. GENERAL RULE — *Legal Rate*. — See note 3.

**1053.** b. EXCEPTIONS TO GENERAL RULE. — See note 1.

4. Rate After Maturity — a. IN GENERAL. — See note 3.

**1055.** c. WHERE CONTRACT RATE HIGHER THAN LEGAL RATE — (1) *Legal Rate After Maturity*. — See note 4.

Gulf, etc., R. Co. v. Sheperd, (Tex. Civ. App. 1903) 76 S. W. Rep. 800.

Interest from Filing of Claim. — Lakeside Paper Co. v. State, 45 N. Y. App. Div. 112.

Interest Is Not Recoverable for the death of or injury to an animal from the date of loss. International, etc., R. Co. v. Barton, (Tex. Civ. App. 1899) 54 S. W. Rep. 797; Gulf, etc., R. Co. v. Jackson, (Tex. Civ. App. 1905) 86 S. W. Rep. 47.

**1047.** 4. Interest from Institution of Action. — Lonsdale Co. v. Woonsocket, 25 R. I. 428.

5. Death by Wrongful Act. — Damages recovered for the death of a child should draw interest from the date of judgment. Ortolano v. Morgan's Louisiana, etc., R., etc., Co., 109 La. 902.

**1048.** 1. Interest as Damages — Computation to Rendition of Judgment. — See Hilton v. State, 60 Neb. 421.

5. Stipulation for Higher Rate Held Valid. — McKay v. Belknap Sav. Bank, 27 Colo. 50; Holmes v. Dewey, 66 Kan. 441; Sanford v. Litchenberger, 62 Neb. 501; Mutual Ben. L. Ins. Co. v. Daniels, 67 Neb. 91; Dusenberry v. Abbott, (Neb. 1901) 95 N. W. Rep. 466; Close v. Riddle, 40 Oregon 596, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049.

**1050.** 1. Stipulation for Increased Rate Liquidation of Damages. — McKay v. Belknap Sav. Bank, 27 Colo. 50; Close v. Riddle, 40 Oregon 596, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1050.

Not a Penalty for Default. — Eccles v. Herrick, 15 Colo. App. 350; Parks v. Lubbock, 92 Tex. 635.

3. Waiver of Higher Rate by Acceptance of Lower. — Abrey v. Schellenberg, 125 Mich. 42, 7 Detroit Leg. N. 441.

6. Contrary Doctrine. — McKay v. Belknap Sav. Bank, 27 Colo. 50; Brown v. Cory, 9 Kan. App. 702.

**1051.** 1. Contracts Reducing Rate of Interest. — A note, which was extended at a lower rate

than that named in the note, will draw interest at the original rate after the expiration of the extended time. Sedgwick v. Sanborn, 63 Kan. 884, 65 Pac. Rep. 661; Mutual Ben. L. Ins. Co. v. Daniels, 67 Neb. 91.

Release of Payment of Contract Rate. — Abrey v. Schellenberg, 125 Mich. 42, 7 Detroit Leg. N. 441.

5. Rate of Interest Fixed by Custom or Usage. — In re Henry, (1901) 2 Ch. 548.

7. Contract for Interest Without Expressing Rate. — In re Immanuel Presb. Church, 112 La. 348; Gay v. Berkey, (Mich. 1904) 100 N. W. Rep. 920, 11 Detroit Leg. N. 428.

**1052.** 3. Rate of Interest as Damages — Arkansas. — Clarke v. Taylor, 69 Ark. 612.

Connecticut. — Curtis v. Smith, 75 Conn. 429.

Louisiana. — Beugnot v. Tremoulet, 52 La. Ann. 454.

Massachusetts. — Pearson v. Treadwell, 179 Mass. 462.

New York. — De Crano v. Moore, 50 N. Y. App. Div. 361.

South Carolina. — Ex p. Stockman, 70 S. Car. 31, 106 Am. St. Rep. 741.

**1053.** 1. Money Invested by Agent. — Where an agent has invested money at a certain rate of interest, it will be presumed that such rate has continued, in the absence of a showing to the contrary, and interest at that rate is recoverable up to the time of demand. De Crano v. Moore, 50 N. Y. App. Div. 361.

3. Rate After Maturity — Conflict of Authority Noticed. — Palmer v. Laberee, 23 Wash. 419, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1053.

**1055.** 4. Legal Rate After Maturity. — Farmers' L. & T. Co. v. Northern Pac. R. Co., 94 Fed. Rep. 454; Thomas v. Bruce, (Ky. 1899) 50 S. W. Rep. 63.

Payment of Contract Rate After Maturity under Mistake of Law. — Stewart v. Ferguson, 31 Ont. 112.

- 1056.** (2) *Contract Rate After Maturity*. — See note 2.
- 1059.** *e. RULE UNDER SPECIAL STATUTES — (1) In General*. — See note 2.
- 1060.** (2) *Judgments and Decrees*. — See notes 2, 3.
- 5. Statutes Changing Rate — a. IN GENERAL**. — See note 4.
- 1061.** *b. INTEREST DUE BY CONTRACT — (1) In General*. — See note 1.
- 1062.** (3) *Contract for Money with No Stipulation for Interest*. — See note 3.
- c. INTEREST RECOVERABLE AS DAMAGES*. — See note 5.
- 1063.** *d. JUDGMENTS — Rule that Interest on Judgments Follows Fluctuations of Law*. — See note 3.
- 1064.** **XII. SUSPENSION OF INTEREST — 2. By Act or Omission of Creditor — a. IN GENERAL**. — See notes 2, 3.
- 1067.** *g. TENDER — (1) Generally*. — See note 1.
- Tender Considered as Payment*. — See note 2.
- (2) *What Is Sufficient Tender — (a) Mere Readiness to Pay*. — See note 3.
- (b) *Tender of Less Sum than Due*. — See note 4.
- (c) *Offer to Pay on Condition*. — See notes 5, 6.
- 1068.** (3) *Doctrine that Technical Tender Unnecessary*. — See note 1.

**1056.** 2. *Contract Rate After Maturity*. — *Greenhaw v. Holmes*, (Ariz. 1902) 68 Pac. Rep. 537; *Palmer v. Laberee*, 23 Wash. 419.

*Bonds Declared Due Before Maturity*. — *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 94 Fed. Rep. 454.

**1059.** 2. *Rate After Maturity Fixed by Statute — California*. — See *Casey v. Gibbons*, 136 Cal. 368.

**1060.** 2. *Rule that Judgments Draw Legal Rate of Interest*. — *East Tennessee Land Co. v. Leeson*, 183 Mass. 37; *Palmer v. Laberee*, 23 Wash. 419.

**3. Rule that Judgments Draw Contract Rate of Interest — Arizona**. — *Greenhaw v. Holmes*, (Ariz. 1902) 68 Pac. Rep. 537.

*Kansas*. — *Whitman v. Citizens' Bank*, (C. C. A.) 110 Fed. Rep. 503, (construing the *Kansas* statute).

*Nebraska*. — *Trompen v. Hammond*, 61 Neb. 446; *Connecticut Mut. L. Ins. Co. v. Westenhoff*, 58 Neb. 379, 76 Am. St. Rep. 101.

**4. Prospective Operation of Statutes**. — *Hoffman v. H. M. Loud, etc., Lumber Co.*, (Mich. 1904) 100 N. W. Rep. 1010, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060. See also *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

**1061.** 1. *Contract at Rate of Interest Not Reduced by Subsequent Statute*. — See *Graham v. Merchant*, 43 Oregon 294.

**1062.** 3. *A Contract Stipulating for Legal Interest will draw interest at the legal rate until payment notwithstanding a subsequent change in the rate made by statute*. *Graham v. Merchant*, 43 Oregon 294.

**5. Interest as Damages**. — *Thompson v. Hibbs*, 45 Oregon 141; *Graham v. Merchant*, 43 Oregon 294.

**1063.** 3. *Fluctuations of Rate*. — *Stanford v. Coram*, 28 Mont. 288.

**1064.** 2. *Interest Suspended by Acts or Omissions of Creditor*. — *Cunnius v. Reading School Dist.*, 25 Pa. Co. Ct. 17, affirmed 21 Pa. Super. Ct. 340.

*Not Suspended by Dispute as to Proper Payee*. — *Elkhorn Valley Lodge v. Hudson*, 59 Neb. 672.

**3. Creditor Absenting or Concealing Himself**. — *Cunnius v. Reading School Dist.*, 25 Pa. Co. Ct. 17, affirmed 21 Pa. Super. Ct. 340.

*Mere Nonresidence Not Sufficient*. — *Adams v. Greig*, 126 Mich. 582.

**1067.** 1. *Effect of Tender on Interest*. — *Ferreá v. Tubbs*, 125 Cal. 687; *Lamprey v. St. Paul, etc., R. Co.*, 89 Minn. 187; *Reitz v. Hayward*, 100 Mo. App. 216; *Chapman v. Wagner*, (Neb. 1901) 96 N. W. Rep. 412; *Hughes v. Antill*, 23 Pa. Super. Ct. 290. See also *Frey v. Fitzpatrick-Cromwell Co.*, 108 La. 125.

**2. Keeping Tender Good — Woodland Cemetery Co. v. Ellison, (Ky. 1904) 80 S. W. Rep. 169; *Lloyd v. O'Rear*, 59 S. W. Rep. 483, 22 Ky. L. Rep. 1000.**

*Need Not Deposit Tender in Court*. — *Ferreá v. Tubbs*, 125 Cal. 687; *Frey v. Fitzpatrick-Cromwell Co.*, 108 La. 125.

**3. Mere Readiness to Pay Held Not Sufficient**. — *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729; *Frey v. Fitzpatrick-Cromwell Co.*, 108 La. 125.

*Tender Before Maturity* does not stop the running of interest. *Kelly v. Collins*, (Tex. Civ. App. 1900) 56 S. W. Rep. 997.

*Tender and Refusal Must Be Shown*. — *Adams v. Greig*, 126 Mich. 582.

**4. Tender of Less Sum than Due**. — *Wood v. Howland*, 127 Iowa 394; *Kelly v. Collins*, (Tex. Civ. App. 1900) 56 S. W. Rep. 997; *San Antonio v. Campbell*, (Tex. Civ. App. 1900) 56 S. W. Rep. 130.

**5. Requiring Receipt**. — *Ferreá v. Tubbs*, 125 Cal. 687.

**6. A Tender Requiring the Surrender of Collateral** to which the debtor had no right did not stop the running of interest. *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168, 3 Va. Super. Ct. 101.

**1068.** 1. *Formal Tender Necessary*. — *Czech v. Bean*, (County Ct.) 35 Misc. (N. Y.) 729,

- 1071.** XIII. ANNUAL AND PERIODIC INTEREST — 1. Generally. — See note 4.  
2. Periodic Interest Due Only by Contract — *a.* GENERAL RULE. —

See note 5.

3. How Contracted for — Terms of Contract. — See note 7.

- 1073.** 5. Interest on Annual or Periodic Interest. — See note 2.

XIV. COMPOUND INTEREST AND INTEREST ON INTEREST — 1. General Rule Against. — See note 3.

- 1074.** Explanatory. — See note *a.*

- 1075.** 2. Allowance in Special Cases — *b.* COUPONS. — See notes 1, 2.

- 1076.** 3. Where Contracted for — *a.* IN GENERAL. — See note 2.

**1078.** *b.* EXPRESS CONTRACTS — (2) *Contract for Compound Interest Before Principal Interest Due.* — See note 2.

(3) *Contract for Interest on Interest After Interest Due.* — See note 3.

- 1080.** 4. Compound Interest as Damages — *a.* IN GENERAL. — See note 5.

**1082.** 6. Simple Interest on Interest of Principal — *b.* AS DAMAGES — (1) *General Rule.* — See note 3.

**1085.** XV. WHAT LAW GOVERNS, AND CONFLICT OF LAWS — 1. Interest by Contract — *b.* EXPRESS CONTRACTS — (1) *Law of Place with Reference to Which Contract Made.* — See note 4.

- 1086.** Place Where Contract Entered into — Place of Performance. — See note 1.

**1087.** (2) *Place Where Contract Entered into* — A Contract for the Payment of Interest, if Valid Where Made. — See note 1.

(3) *Place Where Contract to Be Performed* — (a) In General. — See note 2.

- 1091.** 2. Interest as Damages — *b.* DAMAGES FOR TORT. — See note 4.

**1071.** 4. *Guckian v. Newbold*, 23 R. I. 556, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1071.

5. *Contract for Periodic Payments of Interest.* — *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

7. *Contract for Interest at Specified Rate per Annum.* — *Guckian v. Newbold*, 23 R. I. 556.

**1073.** 2. *Interest on Periodic Interest.* — Semiannual interest draws interest from the day on which it is due. *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

3. *Compound Interest Not Favored.* — *Lake County v. Linn*, 29 Colo. 446. See also *Gay v. Berkey*, (Mich. 1904) 100 N. W. Rep. 920, 11 Detroit Leg. N. 428.

**1074.** *a.* *Provision for Payment of Interest on Interest Held Not Compounding Interest.* — *Williams v. Carroll County*, 167 Mo. 9, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074.

**1075.** 1. *Interest on Coupons Allowed.* — *Ouray County v. Geer*, (C. C. A.) 108 Fed. Rep. 478; *Lake County v. Linn*, 29 Colo. 446.

*Allowed When Contracted for.* — *Dusenberry v. Abbott*, (Neb. 1901) 95 N. W. Rep. 466.

*In the Absence of Contract* interest is not allowed on coupons of county bonds. *Graves v. Saline County*, (C. C. A.) 104 Fed. Rep. 61.

2. *Interest on Coupons Held Not Allowable.* — *Klein v. East River Electric Light Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 596.

**1076.** 2. *Doctrine Allowing Compound Interest When Contracted.* — *Dusenberry v. Abbott*, (Neb. 1901) 95 N. W. Rep. 466; *Wajd v. Greer*, (Tenn. Ch. 1900) 56 S. W. Rep. 1029. See also *Sanguinett v. Webster*, 153 Mo. 343.

*Express Contract.* — An agreement for com-

pound interest until the maturity of a note does not warrant the computing of compound interest after maturity. *Carpenter v. Rice*, (Ky. 1904) 78 S. W. Rep. 458.

**1078.** 2. *Contract for Compound Interest Before Principal Interest Accrues Held Invalid.* — *Gay v. Berkey*, (Mich. 1904) 100 N. W. Rep. 920, 11 Detroit Leg. N. 428.

3. *Contract After Interest Due.* — *Gay v. Berkey*, (Mich. 1904) 100 N. W. Rep. 920, 11 Detroit Leg. N. 428.

**1080.** 5. *Interest on Interest Not Allowed as Damages.* — *Parker v. Simpson*, 180 Mass. 334.

*Compound Interest as Damages Allowed in Equity.* — *Mathewson v. Davis*, 191 Ill. 391.

**1082.** 3. *Interest on Interest as Damages.* — *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343; *Ruloff v. Hazen*, 124 Mich. 570.

**1085.** 4. *Place with Reference to Which Contract Is Made.* — *In re Immanuel Presb. Church*, 112 La. 348.

*A Contract for the Loan of Money Made in One State and Secured by Property in Another State* is governed by the interest laws of the latter state. *Faison v. Grandy*, 128 N. Car. 438, 83 Am. St. Rep. 693.

**1086.** 1. *Provision of Contract as to What Law Shall Govern.* — *McKay v. Belknap Sav. Bank*, 27 Colo. 50.

**1087.** 1. *Contract Enforced if Valid Where Made.* — *Eccles v. Herrick*, 15 Colo. App. 350; *McKay v. Belknap Sav. Bank*, 27 Colo. 50.

2. *Law of Place of Performance.* — *Clarke v. Taylor*, 69 Ark. 612.

**1091.** 4. *Damages for Tort.* — *Frounfelker v. Delaware, etc., R. Co.*, 73 N. Y. App. Div. 350.

**1092. 3. Foreign Judgments — a. LAW OF JURISDICTION WHERE JUDGMENT RENDERED.** — See note 1.

**1093. 4. Proof of Interest Law of Foreign Jurisdiction — b. FOREIGN INTEREST LAW NOT SUBJECT OF JUDICIAL NOTICE.** — See note 3.

**1095. d. CONSEQUENCES OF FAILURE OF PROOF — (2) Interest by Law of Forum.** — See note 2.

(3) *Interest According to Rule of Common Law.* — See note 3.

**1096. XVI. DISCRETIONARY INTEREST, AND INTEREST AS MATTER OF RIGHT — 2. Interest by Contract.** — See note 2.

**3. Interest as Damages — a. IN GENERAL.** — See note 5.

**1097. b. DAMAGES FOR BREACH OF CONTRACT — (2) Contracts to Pay Money — (a) Interest as of Right.** — See note 3.

(b) *Interest in Discretion of Jury.* — See note 4.

**1098. c. DAMAGES FOR TORT — (1) In General.** — See note 5.

**1099. (2) Torts to Property — (a) Interest as of Right.** — See note 3.

*Injuries to Real or Personal Property.* — See note 4.

(b) *Interest in Discretion of Jury.* — See note 5.

**1100. 4. When Jury May Be Instructed to Give Interest.** — See note 2.

*Where Interest Discretionary.* — See note 4.

**1101. Where Interest Not Recoverable.** — See note 1.

**5. Rule under Particular Statutes.** — See note 3.

*Unreasonable and Vexatious Delay.* — See note 4.

**1092. 1. Interest According to Jurisdiction Where Suit Brought.** — In an action on a foreign judgment the judgment will be presumed, in the absence of contrary proof, to have drawn interest at the same rate as a judgment rendered in the jurisdiction where suit is brought. *Murphy v. Murphy*, 145 Cal. 482.

**1093. 3. Proof of Foreign Interest Law Required.** — *Thomas v. Bruce*, (Ky. 1899) 50 S. W. Rep. 63; *Schroeder v. Boyce*, 127 Mich. 35.

**1095. 2. Judgments.** — *Murphy v. Murphy*, 145 Cal. 482.

**3. As the Common Law Is Presumed to Be in Force.** — *Schroeder v. Boyce*, 127 Mich. 35, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095.

**1096. 2. Interest by Contract Recoverable as of Right.** — *New Dunderberg Min. Co. v. Old*, (C. C. A.) 97 Fed. Rep. 150.

**5. Discretion of Jury to Allow or Disallow Interest as Damages.** — *Vermillion v. Le Clare*, 89 Mo. App. 55; *Feller v. McKillip*, 109 Mo. App. Div. 69; See also *Cooper v. Hill*, (C. C. A.) 94 Fed. Rep. 582.

**In Discretion of Equity Court.** — *Gribble v. Ford*, (Tenn. Ch. 1898) 52 S. W. Rep. 1007.

**1097. 3. Contracts to Pay Money — Interest as Legal Measure of Damages.** — *Coughlin v. New York*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 448, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097; *McAfee v. Dix*, 101 N. Y. App. Div. 69; *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

**4. Computation to Be Made by Jury.** — *Dawson v. Wombles*, 111 Mo. 532.

**1098. 5. Damages for Torts — Interest in Discretion of Jury.** — *Nichols v. Coleman*, 96 N. Y. App. Div. 353.

**1099. 3. Interest as of Right in Trover and Conversion.** — *Einstein v. Dunn*, 61 N. Y. App. Div. 195, affirmed 171 N. Y. 648.

**Interest as of Right in Action for Deceit.** — *Shaw v. Gilbert*, 111 Wis. 165.

**4. Injury to or Destruction of Property — Interest as Part of Compensation.** — See *New Dunderberg Min. Co. v. Old*, (C. C. A.) 97 Fed. Rep. 150.

**5. Interest Held Discretionary in Actions for Damages to Property.** — *Southern Pac. R. Co. v. Arnett*, (C. C. A.) 126 Fed. Rep. 75; *Vermillion v. Le Clare*, 89 Mo. App. 55; *Feller v. McKillip*, 109 Mo. App. 61; *Meyer v. Phoenix Ins. Co.*, 95 Mo. App. 721; *Nichols v. Coleman*, 96 N. Y. App. Div. 353; *Lance v. Butler*, 135 N. Car. 419; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

**Discretion of Court.** — *Burrows v. Lownsdale*, (C. C. A.) 133 Fed. Rep. 250; *Harrison v. Hughes*, 119 Fed. Rep. 997.

**1100. 2. When Jury May Be Instructed to Give Interest.** — *Midville, etc., R. Co. v. Bruhl*, 117 Ga. 329; *Lusk v. Throop*, 189 Ill. 127; *Missouri, etc., R. Co. v. Truskett*, 2 Indian Ter. 633; *Einstein v. Dunn*, 61 N. Y. App. Div. 195, affirmed 171 N. Y. 648; *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549.

**In an Action for Wages** it was held proper to instruct the jury to allow interest according to the legal rate. *Mullally v. Dingman*, 62 Neb. 702.

**4. Where Interest Discretionary.** — *Meyer v. Phoenix Ins. Co.*, 95 Mo. App. 721; *Feller v. McKillip*, 109 Mo. App. 61; *Vermillion v. Le Clare*, 89 Mo. App. 55.

*Where interest is discretionary* it is proper to so instruct the jury. *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432.

**1101. 1. Where Interest Is Not Recoverable** it is error to instruct the jury to allow interest. *International, etc., R. Co. v. Barton*, (Tex. Civ. App. 1899) 54 S. W. Rep. 797.

**3. Rule under Particular Statutes — Missouri.** — *Feller v. McKillip*, 109 Mo. App. 61.

*South Dakota.* — *Hollister v. Donahoe*, 16 S. Dak. 206.

**4. Unreasonable and Vexatious Delay.** — *Sey-*

**1102. INTEREST—INTERESTED.**—See note 2.

*mour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, *reversed* on other grounds 205 Ill. 77.

**1102. 2.** Methodist Protestant Church *v.* Young, 130 N. Car. 8, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1102.

**Interest and Title.**—*Wm. Skinner, etc., Ship-Bldg., etc., Co. v. Houghton*, 92 Md. 68; *Wolf v. Theresa Village Mut. F. Ins. Co.*, 115 Wis. 402.

**Reversions and Remainders**—*McDonald v. Bayard Sav. Bank*, 123 Iowa 413; *Methodist Protestant Church v. Young*, 130 N. Car. 8.

**Mortgage or Judgment Lien.**—*Dalrymple v. Security L. & T. Co.*, 9 N. Dak. 306.

**Pecuniary Interest.**—See *Nuckols v. Lyle*, 8 Idaho 589.

**Witnesses.**—*Byerer v. Smith*, 55 N. Y. App. Div. 405; *Putnam v. Lincoln Safe Deposit Co.*, 87 N. Y. App. Div. 13.

**Judge.**—*Adams v. Minor*, 121 Cal. 372; *Higgins v. San Diego*, 126 Cal. 303; *State v. Sutton*, 74 Vt. 12.

**Contest of Will.**—*Lockard v. Stephenson*, 120 Ala. 641.

**Establishing Will.**—See *Donlon v. Kimball*, 61 N. Y. App. Div. 31.

**Interested in a Bargain or Contract.**—See *Northport v. Northport Townsite Co.*, 27 Wash. 543.

## INTERFERENCE WITH CONTRACT RELATIONS.

**1109. I. INTRODUCTORY**—Precedents on Which Grounded.—See notes 1, 2.

**1110.** *Lumley v. Gye.*—See note 4.

**1111. II. INDUCING BREACH OF EXISTING CONTRACT**—1. General Statement.—See note 1.

2. The Contract Broken—Nature of Contract.—See note 5.

Whether Enforceable Contract Essential.—See note 7.

**1112. 3. Malice.**—See notes 2, 4, 5.

**1113.** See notes 4, 6.

4. Means Employed to Induce Breach.—See note 7.

**1114.** See note 2.

**1109. 1. Enticement of Servants Actionable.**—See *Leicester v. Hoadley*, 66 Kan. 174, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109; *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 260, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109.

2. Slander of Title.—See *Leicester v. Hoadley*, 66 Kan. 174, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109.

**1110. 4.** *Quinn v. Leatham*, (1901) A. C. 495, *affirming* *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216, *cited* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110.

**1111. 1.** *Morehouse v. Terrill*, 111 Ill. App. 460; *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289; *J. S. Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453; *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914.

**Malice Held Not Essential.**—*Glamorgan Coal Co. v. South Wales Miners Federation*, (1903) 2 K. B. 545, *reversing* (1903) 1 K. B. 118.

5. Applied in Various Classes of Contracts.—*Morehouse v. Terrill*, 111 Ill. App. 460 (contract for sale of land); *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 260 (breach of covenant not to engage in same business on sale of good will); *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914 (contract in restraint of trade).

7. Binding Contract of Service Essential.—*Caldwell v. O'Neal*, 117 Ga. 775.

Under the Penal Code of South Carolina, making

it an offense to entice away a laborer under contract with another entered into between the parties, enticing away a child whose father had contracted his labor is not an offense. *State v. Rhody*, 67 S. Car. 287; *State v. Aye*, 63 S. Car. 460.

**1112. 2. Malice Defined.**—Read *v. Friendly Soc., etc.*, (1902) 2 K. B. 732. See *Leicester v. Hoadley*, 66 Kan. 174, *citing* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1112.

4. Procuring Violation of Right Is Wrongful.—*Quinn v. Leatham*, (1901) A. C. 495; Read *v. Friendly Soc., etc.*, (1902) 2 K. B. 732. See also *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392.

5. Notice Held to Imply Malice.—*Quinn v. Leatham*, (1901) A. C. 495; Read *v. Friendly Soc., etc.*, (1902) 2 K. B. 732.

**1113. 4. Malicious Interference Actionable—Motive.**—Holder *v. Cannon Mfg. Co.*, 135 N. Car. 392; *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914. See also *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

6. Motive Cannot Render Unlawful an Act Otherwise Lawful.—*Bonsall v. Reagan*, 7 Del. Co. Rep. (Pa.) 645; *Lancaster v. Hamburger*, 70 Ohio St. 156; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895; *Quinn v. Leatham*, (1901) A. C. 495.

7. See *Temple Iron Co. v. Carmanoskie*, 10 Kulp (Pa.) 37, 7 Northam. Co. Rep. (Pa.) 258.

**1114. 2. Malicious Use of Any Means Action-**

**1114.** Whether Combination or Conspiracy Is Per Se Unlawful. — See note 3.

**5. Damages Produced by Breach.** — See note 4.

**III. PREVENTING FORMATION OR INDUCING TERMINATION OF CONTRACT.** — See note 8.

**1115.** See note 1.

**IV. WHAT IS JUSTIFICATION.** — See note 4.

**1116.** See note 1.

Whether the Fact that a Combination of Persons Is the Actor. — See note 4.

**1117.** [INTERLOCKING SIGNAL SYSTEM. — See note 3a.]

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**1118.** INTERMEDIATE. — See note 2.

**1119.** INTERNAL IMPROVEMENTS. — See note 3.

able. — See *Moran v. Dunphy*, 177 Mass. 485, 85 Am. St. Rep. 289.

**1114. 3.** See *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

**4. Special Damage.** — See *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914.

**8.** *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

**Procuring Termination of Contract.** — *London Guarantee, etc., Co. v. Horn*, 206 Ill. 493, 99 Am. St. Rep. 185.

**1115. 1. Meaning of "Maliciously."** — *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392.

**4.** *London Guarantee, etc., Co. v. Horn*, 206 Ill. 493, 99 Am. St. Rep. 185; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

**1116. 1.** See *Quinn v. Leatham*, (1901) A. C. 495.

**What Not Justification.** — *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 2 K. B. 545, reversing (1903) 1 K. B. 118.

**4. Effect of Combination on Justification.** — *Glamorgan Coal Co. v. South Wales Miners'*

*Federation*, (1903) 2 K. B. 545, reversing (1903) 1 K. B. 118. See also *Quinn v. Leatham*, (1901) A. C. 495; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895.

**1117. 3a. Interlocking Signal System on Railroads.** — For a description of same see *Jersey City, etc., R. Co. v. New York, etc., R. Co.*, (N. J. 1902) 53 Atl. Rep. 709.

**4.** *Matter of Sullivan*, 36 Wash. 222, quoting 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1117. **Same — Judgments.** — *Breed v. Ruoff*, 173 N. Y. 340; *Leonard v. Sibley*, 76 Vt. 254.

**Same — Interlocutory Order.** — *Keifer v. Reichert*, 93 Md. 97; *Breed v. Ruoff*, 173 N. Y. 340. See *Matter of Sullivan*, 36 Wash. 222.

**1118. 2. Intermediate Order.** — *People v. Priori*, 163 N. Y. 99.

**1119. 3. Internal Improvements.** — *State v. Froehlich*, 115 Wis. 32.

**A Levee held an internal improvement.** *State v. Froehlich*, 115 Wis. 32.

**An Irrigation Canal is a work of public character and an internal improvement.** *Kearney v. Woodruff*, (C. C. A.) 115 Fed. Rep. 90; *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 16.

## INTERNATIONAL LAW.

By H. N. ELDRIDGE.

**1125. I. GENERAL PRINCIPLES — 3. International Law as Part of Law of Land.** — See note 4.

**1130. II. RIGHTS AND OBLIGATIONS IN TIME OF PEACE — 1. Territorial Property of State — a. ACQUISITION OF TERRITORY — (2) Cession and Conquest — Effect of Cession.** — See note 6.

**1143. III. MUTUAL RIGHTS AND DUTIES OF BELLIGERENTS — 6. Effect on Intercourse of Individuals — a. IN GENERAL.** — See note 6.

**1146. 7. Enemy Character — a. OF PERSONS — (1) Rendition of Assistance to Enemy.** — See note 3.

(2) *Effect of Domicil.* — See note 5.

**1125. 4. Municipal Law Subordinated to International Law.** — *The Ship Rose*, 36 Ct. Cl. 290; *The Schooner Jane*, 37 Ct. Cl. 29.

**1130. 6. Continuance of Pre-existing Laws.** — *Philippine Sugar Estates Development Co. v. U. S.*, 39 Ct. Cl. 225.

**1143. 6. Property Engaged in Enemy Trade Liable to Seizure.** — See *The Benito Estenger* 176 U. S. 568.

**1146. 3. Rendition of Assistance to Enemy.** — See also *The Benito Estenger*, 176 U. S. 568.

**5. Domicil Controlling as to Person's Enemy**

**1149.** *b.* OF PROPERTY — (4) *Vessels Sailing under Enemy Flag or Pass.* — See note 2.

(5) *Vessels Carrying Enemy License.* — See note 3.

**1150.** (10) *Transfers of Belligerent Property to Neutrals* — (a) *In General.* — See note 4.

**1151.** (11) *Rights of Neutral or Friendly Lienors.* — See note 3.

**1154.** 9. *Rights of War as Against Enemy Property* — *c.* PROPERTY AT SEA. — See note 4.

**1155.** *Suggested Exemption from Capture.* — See note 1.

**1156.** *Enemy Vessels in Port or Bound for Port at Beginning of War.* — See note 2.

**1160.** IV. *RIGHTS AND DUTIES OF NEUTRAL STATES* — 1. *General Duty Not to Give Aid.* — See note 4.

**1161.** 2. *Furnishing Munitions of War.* — See note 4.

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**1168.** V. *RIGHTS AND LIABILITIES OF NEUTRAL SUBJECTS* — 2. *Neutral Commerce.* — See note 5.

**1169.** *The Declaration of the Congress of Paris.* — See note 4.

**1170.** *Neutral Goods in Armed Vessel of Enemy.* — See note 2.

3. *Contraband of War* — *a.* DEFINITION AND GENERAL CHARACTER. — See note 5.

**1171.** *b.* ARMS AND MUNITIONS OF WAR. — See note 2.

*c.* ARTICLES NOT INTRINSICALLY OF WARLIKE CHARACTER — (2) *Provisions.* — See note 4.

**1172.** (3) *Materials of Naval Construction.* — See note 3.

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**1173.** (9) *Miscellaneous.* — See note 3.

*d.* DESTINATION OF VESSEL OR GOODS. — See note 4.

**1174.** *e.* PENALTY FOR CARRYING CONTRABAND. — See notes 4, 6, 8.

*Character.* — The *Benito Estenger*, 176 U. S. 571.

**1149.** 2. *Vessels under Enemy Flag or Pass.* — The *Pedro*, 175 U. S. 354.

3. *Enemy License.* — The *Pedro*, 175 U. S. 354; The *Adula*, 176 U. S. 361.

**1150.** 4. *Transfers to Neutrals Not Favored.* — The *Benito Estenger*, 176 U. S. 568.

**1151.** 3. *Secret Liens Not Recognized.* — The *Carlos F. Roses*, 177 U. S. 655.

**1154.** 4. *Enemy Property Liable to Seizure at Sea.* — See The *Panama*, 176 U. S. 535.

**1155.** 1. *Exemption of Private Property at Sea Favored.* — The *Buena Ventura*, 175 U. S. 388.

**1156.** 2. *Enemy Vessels in Port or Bound for Port.* — The *Pedro*, 175 U. S. 354; The *Buena Ventura*, 175 U. S. 384.

**1160.** 4. *General Duty Not to Give Aid.* — See The *Brig Happy Return*, 37 Ct. Cl. 262.

**1161.** 4. *Sales by Subjects of Neutral State.* — *Pearson v. Parson*, 108 Fed. Rep. 461, *quoting* 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1161.

**1167.** 3. *Intent.* — The *Laurada*, (C. C. A.) 98 Fed. Rep. 983, *affirming* 85 Fed. Rep. 760.

**1168.** 5. *A Presumption Exists* that goods on board an enemy's ship are the enemy's property, unless a distinctly neutral character is impressed upon them by accompanying documents. The *Carlos F. Roses*, 177 U. S. 655.

**1169.** 4. *Policy of United States.* — See The *Carlos F. Roses*, 177 U. S. 655.

**1170.** 2. *Neutral Goods in Armed Vessel of*

*Enemy.* — See The *Brig Sea Nymph*, 36 Ct. Cl. 369.

5. *Contraband of War.* — The *Brig Juno*, 38 Ct. Cl. 465; The *Schooner Atlantic*, 39 Ct. Cl. 193, 37 Ct. Cl. 17.

**1171.** 2. *Arms and Munitions of War.* — In The *Panama*, 176 U. S. 545, it is said: "Generally speaking, arms and ammunition are contraband of war."

4. *Provisions.* — The *Panama*, 176 U. S. 535; The *Benito Estenger*, 176 U. S. 568; The *Carlos F. Roses*, 177 U. S. 675.

**1172.** 3. *Position of United States.* — See also The *Schooner Bird*, 38 Ct. Cl. 228.

7. *Horses* belong to that disputable class of merchandise which may or may not be contraband, according to the circumstances of a case. The *Brig Lucy*, 37 Ct. Cl. 100. See also The *Brig Juno*, 38 Ct. Cl. 465; The *Schooner Atlantic*, 39 Ct. Cl. 193, 37 Ct. Cl. 23; The *Brig Betsey*, 39 Ct. Cl. 452.

By Treaty with France in 1778 the United States without reservation or qualification declares horses to be contraband. The *Brig Lucy*, 37 Ct. Cl. 97.

**1173.** 3. *Miscellaneous Articles.* — Sulphur is a contraband of war. See The *Styria v. Morgan*, 186 U. S. 1.

4. *Destination.* — See The *Pedro*, 175 U. S. 354.

**1174.** 4. The *Schooner Bird*, 38 Ct. Cl. 228.

6. *Vessel Belonging to Owner of Contraband Cargo.* — The *Schooner Bird*, 38 Ct. Cl. 228; The *Sloop Ralph*, 39 Ct. Cl. 204; The *Brig Lucy*, 39 Ct. Cl. 221, 37 Ct. Cl. 97.

- 1175.** *f.* BEGINNING AND END OF OFFENSE. — See notes 5, 6.  
**1177.** **5.** Blockade — *a.* DEFINITION AND GENERAL PRINCIPLES. — See note 6.  
**1178.** *b.* BLOCKADE MUST BE ACTUAL AND EFFECTIVE. — See note 3.  
**1179.** Conditions of Effectiveness. — See note 1.  
*c.* NOTICE OF BLOCKADE. — See note 5.  
**1180.** *d.* TERMINATION OR SUSPENSION OF BLOCKADE — (4) *By Capture of Blockaded Port.* — See note 9.  
**1181.** *e.* WHAT CONSTITUTES VIOLATION — (1) *In General.* — See note 1.  
 (2) *Approach for Inquiry or to Procure License.* — See note 4.  
**1182.** (4) *Case of Necessity.* — See note 2.  
 (5) *Ultimate Destination of Cargo.* — See note 3.  
**1183.** *f.* DURATION OF DELICTUM. — See notes 4, 6.  
**1184.** **6.** Visit and Search — *a.* RIGHT IN GENERAL. — See notes 4, 6.  
*c.* OF MAIL VESSELS. — See note 9.  
*d.* OF VESSELS UNDER CONVOY. — See notes 11, 12.  
**1185.** *f.* RESISTANCE TO SEARCH — (1) *In General.* — See note 8.

**Owner Privy to Carriage of Cargo.** — The Schooner *Atlantic*, 39 Ct. Cl. 193, 37 Ct. Cl. 23.

**1174. 8. False Papers and Destination.** — The Schooner *Betsey* and *Polly*, 38 Ct. Cl. 30; The Sloop *Ralph*, 39 Ct. Cl. 204; The Brig *Lucy*, 39 Ct. Cl. 221, 37 Ct. Cl. 97; The Brig *Betsey*, 39 Ct. Cl. 452.

**1175. 5. Termination of Offense.** — The Sloop *Ralph*, 39 Ct. Cl. 204.

**6.** The Brig *Lucy*, 39 Ct. Cl. 221, 37 Ct. Cl. 97; The Sloop *Ralph*, 39 Ct. Cl. 204.

**1177. 6. Blockade.** — See also The *Adula*, 176 U. S. 361.

**1178. 3. Blockade Must Be Actual and Effective.** — The *Adula*, 176 U. S. 361.

**1179. 1. Size of Blocking Force Immaterial.** — The *Newfoundland*, 176 U. S. 97.

**5. Notice of Blockade Necessary.** — The *Adula*, 176 U. S. 361.

**1180. 9. Capture of Blockaded Port.** — See also The *Adula*, 176 U. S. 361.

**1181. 1. Sailing with Intent to Break Blockade.** — The *Adula*, 176 U. S. 361.

**4. Approach for Inquiry.** — See also The *Adula*, 176 U. S. 361.

**1182. 2.** The *Adula*, 176 U. S. 361.

**3. Ultimate Destination of Cargo.** — See The *Pedro*, 175 U. S. 354.

**1183. 4. Duration of Delictum.** — The Ship *Galen*, 37 Ct. Cl. 89.

**6.** The Ship *Galen*, 37 Ct. Cl. 89.

**1184. 4. Right of Visit and Search.** — The Schooner *Mary*, 37 Ct. Cl. 33; The Brig *Sally*, 37 Ct. Cl. 74; The Ship *Galen*, 37 Ct. Cl. 89; The Schooner *Nancy*, 37 Ct. Cl. 401. See The Ship *Rose*, 36 Ct. Cl. 290.

**Object of Search.** — In The Schooner *Jane*, 37 Ct. Cl. 29, the court said: "The detention of a neutral vessel is to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral. The object of searching ostensible neutrals is to get evidence as to the fact of neutrality, and if the cargo be not enemy's property; or if neutral, whether they are carrying contraband; or whether the vessels are in the service of the enemy in the way of carrying military persons or dispatches

or sailing in prosecution of an intent to break blockade. It is sometimes necessary to examine papers and inspect the vessels as well as the cargoes and persons on board, and the question as to the propriety of the capture of each vessel is a mixed question of law and fact."

**Force May Be Used in Exercising Right of Search.** — The Brig *Sea Nymph*, 36 Ct. Cl. 369.  
**6. Nonexistent in Time of Peace.** — See The Ship *Rose*, 36 Ct. Cl. 290.

**9. Mail Vessels.** — See The *Panama*, 176 U. S. 535.

**11.** See The Brig *Sea Nymph*, 36 Ct. Cl. 369.

**12. The United States. — A Neutral Vessel Which Has Separated from a Belligerent Convoy,** whether it does so voluntarily or involuntarily, is not subject to capture and condemnation. The Ship *Galen*, 37 Ct. Cl. 89.

**1185. 8. Resistance to Search.** — The Schooner *Mary*, 37 Ct. Cl. 33; The Ship *Galen*, 37 Ct. Cl. 89.

**The Right Given by a Domestic Statute to Oppose and Defend Against any Search** must give way to the international rule stated in the text. The Schooner *Jane*, 37 Ct. Cl. 29.

**Effect of Constructive Resistance to Search.** — In The Brig *Sea Nymph*, 36 Ct. Cl. 369, it is said that it is not yet settled by judicial authority whether constructive resistance to search raises a conclusive presumption against the vessel or only presents suspicious circumstances susceptible of explanation.

**A Greater or Less Determined Resistance** with greater or less loss of life and injury does not change or affect the law relating to resistance to search. The Ship *Amazon*, 36 Ct. Cl. 378.

**Extreme Violence Threatened by a Belligerent Grossly Abusing His Commission.** — The general rule is that forcible resistance is good ground for condemnation. There is an exception, however, in a case where a neutral is justified in defending against extreme violence threatened by a belligerent grossly abusing his commission. The Ship *Rose*, 36 Ct. Cl. 290.

**Grave Apprehension of Illegal Condemnation** will not justify a neutral vessel in resisting the right of search by a belligerent. The Ship *Rose*, 36 Ct. Cl. 290.



**1186.** *h. CAPTURE — (3) Effect of Rescue.* — See note 8.

*i. SHIP'S PAPERS — (1) General Requirements.* — See note 9.

**1187.** *j. DUTIES AND LIABILITIES OF CAPTORS — (1) As to Persons and Property on Board.* — See notes 5, 6.

**1188.** (3) *Sending in Vessel for Adjudication.* — See note 2.

(6) *Capture Without Probable Cause.* — See note 11.

**1186.** 8. *Rescue.* — The Schooner *Mary*, 37 Ct. Cl. 33.

9. *Ship's Papers.* — See The Brig *Juno*, 38 Ct. Cl. 465.

*Ship Should Carry Documents Establishing Neutrality of Commerce.* — The Schooner *Betsey*, 36 Ct. Cl. 256.

*Effect of Failure of Ship to Carry Document.* — A neutral vessel should be furnished with documents requisite to support her neutral character and the neutral character of the cargo; yet the want of any one of them is not conclusive against her. The Schooner *Hazard*, 39 Ct. Cl. 376.

*Treaties Have Sometimes Prescribed the Evidence that Ship's Papers Should Show* as to nationality and neutrality of vessel and cargo. Thus a treaty between France and the United States in 1778 contained provisions regarding the evidence which American and French vessels should carry. See The Brig *Dolphin*, 36 Ct. Cl. 248.

**1187.** 5. *Duties of Captors.* — The Schooner

*Nancy*, 37 Ct. Cl. 401; The Brigantine *Speedwell*, 39 Ct. Cl. 34.

6. *As to Persons on Board.* — The Schooner *Maria*, 39 Ct. Cl. 147; The Schooner *Nancy*, 37 Ct. Cl. 401.

*The Master of the Captured Vessel Has the Right to an Opportunity to Appear and Defend the Ship and its cargo against the alleged illegality of the voyage.* The Brig *Sally*, 37 Ct. Cl. 74.

**1188.** 2. *Duty to Send in Vessel.* — The Schooner *Nancy*, 37 Ct. Cl. 401.

*Adjudication and Not Seizure Confers Right of Property in Seized Property.* — The Brig *Sally*, 37 Ct. Cl. 74. See also The Ship *Galen*, 37 Ct. Cl. 89.

11. *Capture Without Probable Cause.* — A belligerent seizing a neutral vessel on the high seas upon mere suspicion is responsible for the act, and for the consequence, and for the vessel, and is excusable for a loss only where it is caused by an unavoidable casualty. The Ship *Tom*, 39 Ct. Cl. 290.

# INTERPRETATION AND CONSTRUCTION.

By H. O'B. COOPER.

**2. III. OBJECT AND SCOPE OF INTERPRETATION.** — See note 6.

**3.** See note 1.

**4.** See notes 1, 2.

Interpretation Only When Ambiguity Exists. — See notes 3, 4.

**5. IV. CONSIDERATION OF DIFFERENT PARTS OF INSTRUMENT** — **1. Instrument to Be Considered as a Whole.** — See note 1.

**2. 6. Intention of Parties to Contracts Generally** — *United States*. — *Fox v. Tyler*, (C. C. A.) 109 Fed. Rep. 258; *Hull Coal, etc., Co. v. Empire Coal, etc., Co.*, (C. C. A.) 113 Fed. Rep. 256; *Fitzgerald v. Rapid City First Nat. Bank*, (C. C. A.) 114 Fed. Rep. 474; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609. See also *Norton v. Shields*, 132 Fed. Rep. 873.

*California*. — *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

*Idaho*. — *Porter v. Allen*, 8 Idaho 358.

*Illinois*. — *Skinner v. Osgood*, 83 Ill. App. 454, *reversed* on other grounds 186 Ill. 491; *Whalen v. Stephens*, 92 Ill. App. 235, *affirmed* 193 Ill. 121; *People v. Harrison*, 191 Ill. 257; *Pease v. Rand, etc., Desk Co.*, 100 Ill. App. 244; *Sexton v. Barrie*, 102 Ill. App. 586; *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510; *Cochran v. Vermilion County*, 113 Ill. App. 140; *Wheaton v. Bartlett*, 105 Ill. App. 326.

*Kansas*. — *Garden City v. Heller*, 61 Kan. 767.

*Kentucky*. — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734; *Crane v. Williamson*, 111 Ky. 271.

*Louisiana*. — *Losecco v. Gregory*, 108 La. 648; *Lozes v. Segura Sugar Co.*, 52 La. Ann. 1844.

*Missouri*. — *O'Neill v. Webb*, 78 Mo. App. 1; *Hax v. Hax*, 84 Mo. App. 306; *McFarland v. Missouri, etc., R. Co.*, 94 Mo. App. 336.

*Nebraska*. — *Garrett v. Republican Pub. Co.*, 61 Neb. 541.

*New Mexico*. — *Blain v. Staab*, 10 N. Mex. 743.

*New York*. — *Cohen v. Berlin, etc., Envelope Co.*, 166 N. Y. 292; *Gorse v. Lynch*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 150; *Toher v. Schaefer*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 618.

*Oklahoma*. — *American Soda Fountain Co. v. Gerrer's Bakery*, 14 Okla. 258.

*Vermont*. — *Rioux v. Ryegate Brick Co.*, 72 Vt. 148.

**Intention of Parties to Deeds** — *Colorado*. — *Daum v. Conley*, 27 Colo. 56.

*Georgia*. — *Peterson v. Atlantic, etc., R. Co.*, 120 Ga. 967.

*Kentucky*. — *Pettit v. Norman*, (Ky. 1904) 82 S. W. Rep. 622.

*Maine*. — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

*Maryland*. — *Hopper v. Smyser*, 90 Md. 363.

*Michigan*. — *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264.

*New York*. — *Van Schaick v. Lese*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 610.

*Pennsylvania*. — *Snowden v. Cavanaugh*, 10 Kulp (Pa.) 1.

*West Virginia*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106; *Gibney v. Fitzsimmons*, 45 W. Va. 334.

**3. 1. Intention Sought Is That Expressed.** — *Pierpont v. Lanphere*, 104 Ill. App. 232; *Cameron v. Sexton*, 110 Ill. App. 381, *reversed* on other grounds 212 Ill. 146; *Rector v. Hartford Deposit Co.*, 190 Ill. 380; *Hudson v. Columbian Transfer Co.*, (Mich. 1904) 100 N. W. Rep. 402; *Dunbar v. Aldrich*, 79 Miss. 698; *Missouri Edison Electric Co. v. Bry*, 88 Mo. App. 135; *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1.

**4. 1. Meaning of Words Used.** — *Western Hardware, etc., Co. v. Bancroft-Charnley Steel Co.*, (C. C. A.) 116 Fed. Rep. 176; *Cameron v. Sexton*, 110 Ill. App. 381, *reversed* on other grounds 173 N. Y. 303; *New York L. Ins., etc., Miss.* 608.

**2. Adams v. O'Connor**, 6 Ariz. 404; *Dunbar v. Aldrich*, 79 Miss. 698.

**3. No Room for Construction in Absence of Ambiguity.** — *United States*. — *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240; *Moore v. U. S.*, 38 Ct. Cl. 590, *reversed* on other grounds 196 U. S. 157.

*Illinois*. — *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

*Missouri*. — *Missouri Edison Electric Co. v. Bry*, 88 Mo. App. 135.

*New York*. — *Kinney v. McBride*, 88 N. Y. App. Div. 92; *Molaney v. Iroquois Brewing Co.*, 63 N. Y. App. Div. 454, *reversed* on other grounds 173 N. Y. 303; *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1.

*Ohio*. — *Cincinnati v. Cincinnati St. R. Co.*, 9 Ohio Dec. 235, 6 Ohio N. P. 140.

*Oregon*. — *Howell v. Johnson*, 38 Oregon 571.

*Wisconsin*. — *Hart v. Hart*, 117 Wis. 639; *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 88 Am. St. Rep. 949.

**4. Ambiguous Character Determined by Whole Instrument.** — *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 88 Am. St. Rep. 949.

**5. 1. Instrument to Be Considered as a Whole.** — *United States*. — *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

6. Applications of Rule. — See note 1.  
Rule of *Ejusdem Generis*. — See notes 4, 5.
7. General Words Preceding Particular Words. — See notes 1, 2.  
2. Every Part to Be Given Effect. — See note 3.
8. 3. Repugnant Clauses in Deed. — See note 1.  
The Same Principle. — See note 6.
9. 4. Transaction Incorporated in Several Writings. — See note 1.

*Georgia*. — *Peterson v. Atlantic, etc., R. Co.*, 120 Ga. 967.

*Idaho*. — *Burke Land, etc., Co. v. Wells*, 7 Idaho 42.

*Illinois*. — *Reeves v. Chandler*, 113 Ill. App. 167; *Ingraham v. Mariner*, 194 Ill. 269; *Foster v. Chicago*, 197 Ill. 264; *Wheaton v. Bartlett*, 105 Ill. App. 326; *McCoy v. Fahrney*, 182 Ill. 60.

*Indiana*. — *Ingle v. Bottoms*, 160 Ind. 73, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 5; *Indiana Natural Gas, etc., Co. v. Grainger*, 33 Ind. App. 559.

*Iowa*. — *Wallace v. Homestead Co.*, 117 Iowa 348, citing 16 AM. AND ENG. ENCYC. OF LAW (2d ed.) 5; *Beedy v. Finney*, 118 Iowa 276.

*Kentucky*. — *Hunt v. Hunt*, (Ky. 1904) 82 S. W. Rep. 998.

*Louisiana*. — *Lozes v. Segura Sugar Co.*, 52 La. Ann. 1844; *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769; *Prentiss v. Lyons*, 105 La. 382.

*Massachusetts*. — *Morrill, etc., Constr. Co. v. Boston*, 186 Mass. 217.

*Mississippi*. — *Hardie Tynes Foundry, etc., Co. v. Glen Allen Oil Mill*, 84 Miss. 259.

*Missouri*. — *Maginn v. Lancaster*, 100 Mo. App. 116. See also *McFarland v. Missouri, etc., R. Co.*, 94 Mo. App. 336.

*New York*. — *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1.

*Tennessee*. — *Perry v. Clift*, (Tenn. Ch. 1899) 54 S. W. Rep. 121.

*Utah*. — *McKay v. Barnett*, 21 Utah 239.

*Washington*. — *Carstens v. Earles*, 26 Wash. 676.

*West Virginia*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106; *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402.

*Wisconsin*. — *Mayer v. Goldberg*, 116 Wis. 96.

*Canada*. — *Ottawa Electric Co. v. St. Jacques*, 1 Ont. L. Rep. 73, reversed on other grounds 31 Can. Sup. Ct. 636.

6. 1. Description in Deed. — *Gibney v. Fitzsimmons*, 45 W. Va. 334.

4. Rule of *Ejusdem Generis*. — *Erickson v. U. S.*, 107 Fed. Rep. 204; *Cleveland, etc., R. Co. v. Bergschicker*, 162 Ind. 108, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6; *Wallace v. Homestead Co.*, 117 Iowa 348, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.

5. Not Applicable if Contrary to Intent. — *Gage v. Cameron*, 212 Ill. 146; *Wallace v. Homestead Co.*, 117 Iowa 348, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.

7. 1. General Words Preceding Particular Words. — *Wallace v. Homestead Co.*, 117 Iowa 348, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7; *Chew v. Zweib*, 29 Tex. Civ. App. 311.

2. Intention Controlling. — *Wallace v. Homestead Co.*, 117 Iowa 348, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7.

3. Every Clause or Word to Be Given Effect if Possible — *California*. — *Flinn v. Mowry*, 131 Cal. 481.

*Florida*. — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

*Illinois*. — *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510; *Reeves v. Chandler*, 113 Ill. App. 167; *Cochran v. Vermilion County*, 113 Ill. App. 140; *Gage v. Cameron*, 212 Ill. 146; *Mueller v. Northwestern University*, 95 Ill. App. 258, affirmed 195 Ill. 236, 88 Am. St. Rep. 194.

*Indiana*. — *Ingle v. Bottoms*, 160 Ind. 73, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7; *Indiana Natural Gas, etc., Co. v. Grainger*, 33 Ind. App. 559.

*Kentucky*. — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734.

*Louisiana*. — *Prentiss v. Lyons*, 105 La. 382.

*Maine*. — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

*Nebraska*. — *McGavock v. Omaha Nat. Bank*, 64 Neb. 440; *State v. Mortensen*, (Neb. 1903) 95 N. W. Rep. 831; *Lawton v. Fonner*, 59 Neb. 214.

*Pennsylvania*. — *Abbott's Estate*, 198 Pa. St. 493; *Hads v. Tiernan*, 25 Pa. Super. Ct. 14.

*Utah*. — *McKay v. Barnett*, 21 Utah 239.

*West Virginia*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 7.

*Wisconsin*. — *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 88 Am. St. Rep. 949.

8. 1. Rule that Prior Clause Prevails. — *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 665; *Blackwell v. Blackwell*, 124 N. Car. 269. See also *Beedy v. Finney*, 118 Iowa 276.

But the Granting Clause. — *Dunbar v. Aldrich*, 79 Miss. 698.

6. Grant Cannot Be Restricted or Diminished by Subsequent Clause. — See *Welch v. Welch*, 183 Ill. 237.

9. 1. Transaction Incorporated in Several Writings — *United States*. — *Stadler v. Missouri River Power Co.*, 133 Fed. Rep. 314; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168.

*California*. — *Meyer v. Weber*, 133 Cal. 681; *Flinn v. Mowry*, 131 Cal. 481.

*Illinois*. — *Friedrich v. Wombacher*, 204 Ill. 72; *Gould v. Magnolia Metal Co.*, 207 Ill. 172; *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 92 Ill. App. 366, affirmed 190 Ill. 404, 83 Am. St. Rep. 138; *Clarke v. Hunter*, 83 Ill. App. 100, affirmed 184 Ill. 158, 75 Am. St. Rep. 160; *Mathews v. Mathews*, 86 Ill. App. 654.

*Kentucky*. — *Early v. Douglass*, 110 Ky. 818, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9; *Hacker v. Hoover*, (Ky. 1902) 66 S. W. Rep. 382; *Price v. Price*, (Ky. 1902) 66 S. W. Rep. 529; *Shuttleworth v. Kentucky Coal, etc., Co.*, (Ky. 1901) 60 S. W. Rep. 534.

*Louisiana*. — *Lawler v. Bradford*, 113 La. 415.

**10.** See notes 1, 2, 3, 4.

Separate Writing Expressly Referred to. — See note 8.

**11.** See note 1.

**V. MEANING OF WORDS AND PHRASES — 1. Ordinary Meaning Generally to Be Given.** — See note 2.

**12.** 2. Arbitrary Meaning Given by Parties. — See note 1.

3. Peculiar Meaning Given by Usage. — See note 3.

**13.** 4. Technical Terms and Expressions. — See notes 2, 3.

Legal Terms. — See notes 4, 5.

**14.** VI. LANGUAGE CONSTRUED MOST STRONGLY AGAINST USER THEREOF. — See note 1.

*Nebraska.* — *Rice v. McCague*, 61 Neb. 861.

**10.** 1. Need Not Bear Same Date. — *Early v. Douglass*, 110 Ky. 818, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9, notes 1-4.

2. Need Not Be Absolutely Contemporaneous. — *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 92 Ill. App. 366, affirmed 190 Ill. 404, 83 Am. St. Rep. 138.

3. Writing Must Be Between Same Parties. — *Stadler v. Missouri River Power Co.*, 133 Fed. Rep. 314; *Early v. Douglass*, 110 Ky. 818, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9; *Rice v. McCague*, 61 Neb. 861.

4. Must Relate to Same Subject-matter. — *Stadler v. Missouri River Power Co.*, 133 Fed. Rep. 314; *Flinn v. Mowry*, 131 Cal. 481; *Chicago Trust, etc., Bank v. Chicago Title, etc., Co.*, 92 Ill. App. 366, affirmed 190 Ill. 404, 83 Am. St. Rep. 138; *Gould v. Magnolia Metal Co.*, 207 Ill. 172; *Early v. Douglass*, 110 Ky. 818, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9; *Rice v. McCague*, 61 Neb. 861.

8. Writings Expressly Referred to. — *Epworth League Training Assembly v. Olney*, 136 Mich. 50; *Fire Extinguisher Co. v. Mooresville Cotton Mills*, 132 N. Car. 424; *Utah Lumber Co. v. James*, 25 Utah 434.

**11.** 1. Reference for Certain Purposes Only. — *Young v. Borzone*, 26 Wash. 4.

2. Ordinary Meaning — *England.* — *North Eastern R. Co. v. Hastings*, (1900) A. C. 260.

*United States.* — *Francis v. Heine Safety-Boiler Co.*, 112 Fed. Rep. 899; *Fitzgerald v. Rapid City First Nat. Bank*, (C. C. A.) 114 Fed. Rep. 474; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524.

*California.* — *Adams v. Hopkins*, 144 Cal. 19. See also *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

*Illinois.* — *Cameron v. Sexton*, 110 Ill. App. 381, reversed on other grounds 212 Ill. 146.

*Indiana.* — *Ohio Farmers' Ins. Co. v. Vogel*, (Ind. App. 1905) 73 N. E. Rep. 612.

*Iowa.* — *Wood v. Allen*, 111 Iowa 97.

*Kentucky.* — *Louisville, etc., R. Co. v. Louisville Southern R. Co.*, 100 Ky. 690; *Pettit v. Norman*, (Ky. 1904) 82 S. W. Rep. 622.

*Louisiana.* — *Lozes v. Segura Sugar Co.*, 52 La. Ann. 1844.

*Missouri.* — *McFarland v. Missouri, etc., R. Co.*, 94 Mo. App. 336; *Missouri Edison Electric Co. v. Bry*, 88 Mo. App. 135; *Maginn v. Lancaster*, 100 Mo. App. 116; *St. Louis Trust Co. v. York*, 81 Mo. App. 342.

*Nebraska.* — *Horton v. Rohlff*, (Neb. 1903) 95 N. W. Rep. 36.

*Ohio.* — *M. E. Church v. Ashtabula Water Co.*, 10 Ohio Cir. Dec. 648, 20 Ohio Cir. Ct. 578.

*Pennsylvania.* — *Abbott's Estate*, 198 Pa. St. 493.

*West Virginia.* — *Williams v. South Penn Oil Co.*, 52 W. Va. 181; *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402. See also *Waldron v. Taylor*, 52 W. Va. 284.

*Wisconsin.* — *Hart v. Hart*, 117 Wis. 639.

"It must be assumed, in the absence of any showing to the contrary, that the grantor selected language adapted to express his meaning." *Beedy v. Finney*, 118 Iowa 276.

The Character "&" means "and." *Beedy v. Finney*, 118 Iowa 276.

**12.** 1. Arbitrary Meaning May Be Given to Words. — *Lull v. Anamosa Nat. Bank*, 110 Iowa 537; *Wood v. Allen*, 111 Iowa 97.

3. Trade Usage as to Meaning of Terms. — *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168; *Wilcox v. Baer*, 85 Mo. App. 587; *Seymour v. Armstrong*, 62 Kan. 720. See also *Grasmier v. Wolf*, (Iowa 1902) 90 N. W. Rep. 813; *Glenn v. Strickland*, 21 Pa. Super. Ct. 88.

**13.** 2. Technical Terms and Expressions. — *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524; *Bragg v. State*, 134 Ala. 165, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13; *Kelly v. Fejervary*, 111 Iowa 693; *Seymour v. Armstrong*, 62 Kan. 720.

Technical Words are to be interpreted as usually understood by persons in the business or profession to which they relate. *Peterson v. Modern Brotherhood of America*, 125 Iowa 562.

The California Statute, providing that "technical words are to be interpreted as usually understood by persons in the profession or business to which they relate," applies only to words exclusively technical, or that are shown to be used in a technical sense. *Adams v. Hopkins*, 144 Cal. 19.

3. Technical Meaning Gives Way to Manifest Intention. — *Bragg v. State*, 134 Ala. 165, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

4. Legal Terms. — *Harrington v. Gibson*, 109 Ky. 752; *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1.

5. Legal Terms Yield to Intent. — *Fullagar v. Stockdale*, (Mich. 1904) 101 N. W. Rep. 576; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

**14.** 1. Construction Fortius Contra Proferentem — In Case of Deeds. — *Adams v. Hopkins*, 144 Cal. 19; *Rankin v. Rankin*, 111 Ill. App. 403;

**15.** See note 3.

**16.** See notes 1, 2, 3, 6.

**17.** Promisee's Understanding of Contract. — See note 2.

**VII. CONSTRUCTION IN FAVOR OF INSTRUMENT** — 1. Validity of Instrument. — See note 4.

**18.** 2. Legality of Instrument. — See note 1.

3. Effectiveness of Instrument. — See note 2.

4. Avoidance of Forfeiture. — See note 3.

**VIII. REASONABLE AND EQUITABLE CONSTRUCTION PREFERRED.** — See note 4.

Chicago, etc., *R. Co. v. Hogan*, 105 Ill. App. 136, *reversed* on other grounds 202 Ill. 206; *Hunt v. Hunt*, (Ky. 1904) 82 S. W. Rep. 998; *Cochran v. Missouri*, etc., R. Co., 94 Mo. App. 469. See also *Williams v. South Penn Oil Co.*, 52 W. Va. 181.

The Reason of the Rule is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them, rather than he who only accepts them. *Gillet v. Bank of America*, 160 N. Y. 549.

**Intent Controls.** — *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264.

**15. 3. In Contracts — United States.** — *Edgar, etc., Foundry, etc., Works v. U. S.*, 34 Ct. Cl. 205; *Moore v. U. S.*, 38 Ct. Cl. 590, *reversed* on other grounds 196 U. S. 157.

*Arkansas.* — *Allen-West Commission Co. v. People's Bank*, (Ark. 1905) 84 S. W. Rep. 1041; *Leslie v. Bell*, 73 Ark. 338.

*California.* — *Laidlaw v. Marye*, 133 Cal. 170.

*Georgia.* — *McLelland v. Singletary*, 113 Ga. 601. See also *Singer v. Grand Rapids Match Co.*, 117 Ga. 86.

*Illinois.* — *Mueller v. Northwestern University*, 95 Ill. App. 258, *affirmed* 195 Ill. 236, 88 Am. St. Rep. 194; *Kohlsaat v. Illinois Trust, etc., Bank*, 102 Ill. App. 110; *Harlev v. Sanitary Dist.*, 107 Ill. App. 546.

*Louisiana.* — *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769.

*New York.* — *Gillet v. Bank of America*, 160 N. Y. 549.

**16. 1. Insurance Contract.** — *Holmes v. Phoenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240; *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462. See also *Brooks v. Metropolitan L. Ins. Co.*, 70 N. J. L. 36.

**2. Bill or Note.** — See *Gillet v. Bank of America*, 160 N. Y. 549.

**3. Contracts of Guaranty.** — *Bowser v. Patrick*, (Ky. 1901) 65 S. W. Rep. 824.

**6. Rule One of Last Resort.** — *Losecco v. Gregory*, 108 La. 648; *Negaunee Iron Co. v. Iron Cliff Co.*, 134 Mich. 264.

**17. 2. Promisor's Knowledge of Promisee's Understanding of Contract.** — *Laidlaw v. Marye*, 133 Cal. 170; *Wood v. Allen*, 111 Iowa 97; *People's Bldg., etc., Assoc. v. Klauber*, (Neb. 1901) 95 N. W. Rep. 1072; *Carlson v. Holm*, (Neb. 1901) 95 N. W. Rep. 1125; *Gillet v. Bank of America*, 160 N. Y. 549; *American Soda Fountain Co. v. Gerrer*, 14 Okla. 258.

**4. Construed So as to Avoid Invalidity.** — *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Horton v. Rohlff*, (Neb. 1903)

95 N. W. Rep. 36; *Union Trust Co. v. Owen*, 77 N. Y. App. Div. 60; *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200; *Durand v. Heney*, 33 Wash. 38; *Loper v. Sheldon*, 120 Wis. 26.

**18. 1. Instrument to Be Construed So as to Avoid Illegality.** — *Adams v. Hopkins*, 144 Cal. 19; *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Horton v. Rohlff*, (Neb. 1903) 95 N. W. Rep. 36; *Brien v. Stone*, 82 N. Y. App. Div. 450.

**2. Construction in Favor of Effectiveness — United States.** — *Columbus Constr. Co. v. Crane Co.*, (C. C. A.) 98 Fed. Rep. 946.

*District of Columbia.* — *Kelly v. Moore*, 22 App. Cas. (D. C.) 9, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 18.

*Florida.* — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

*Illinois.* — *Wheaton v. Bartlett*, 105 Ill. App. 326; *Rankin v. Rankin*, 111 Ill. App. 403.

*Iowa.* — *Peterson v. Modern Brotherhood of America*, 125 Iowa 562.

*Kentucky.* — *Hunt v. Hunt*, (Ky. 1904) 82 S. W. Rep. 998.

*Michigan.* — *Fullagar v. Stockdale*, (Mich. 1904) 101 N. W. Rep. 576.

*Nebraska.* — *Horton v. Rohlff*, (Neb. 1903) 95 N. W. Rep. 36; *McGavock v. Omaha Nat. Bank*, 64 Neb. 440.

**Will Construed as Deed.** — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734.

**Unconditional Contracts Favored.** — *McFadden v. Henderson*, 128 Ala. 221.

**3. Construction So as to Avoid Forfeiture.** — *Harley v. Sanitary Dist.*, 107 Ill. App. 546; *Rankin v. Rankin*, 111 Ill. App. 403.

**4. Reasonable and Equitable Construction to Be Adopted — United States.** — *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

*California.* — *Adams v. Hopkins*, 144 Cal. 19. See also *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

*Florida.* — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

*Illinois.* — *Rankin v. Rankin*, 111 Ill. App. 403.

*Indiana.* — *Ingle v. Bottoms*, 160 Ind. 73, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 18.

*New York.* — See *Ulster, etc., Bluestone Co. v. Carlin*, 69 N. Y. App. Div. 426, *appeal dismissed* 171 N. Y. 678.

*Vermont.* — *Rioux v. Ryegate Brick Co.*, 72 Vt. 148.

*Virginia.* — *Allemong v. Augusta Nat. Bank*, 107 Va. 243.

**Intent to Operate Retrospectively Not Pre-**

**19. IX. VERBAL AND CLERICAL MISTAKES — 1. In General. — See note 1.****2. Words Omitted May Be Supplied. — See note 2.****3. Repugnant Words May Be Rejected. — See note 3.****20. 4. Substitution of Words. — See note 1.****5. False Grammar. — See note 2.****X. PUNCTUATION. — See notes 6, 7.****21. See note 1.****XI. WRITTEN MATTER CONTROLS PRINTED. — See notes 2, 3.****XII. SURROUNDING CIRCUMSTANCES. — See note 4.**

sumed. — *Bartlett v. Wheeler*, 96 Ill. App. 342, affirmed 195 Ill. 445.

**19. 1. Verbal and Clerical Mistakes.** — *Pressed Steel Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609; *Whalen v. Stephens*, 92 Ill. App. 235, affirmed 193 Ill. 121; *Church of Christ v. Christian Church*, 193 Ill. 144; *Noe v. Witbeck*, 105 Ill. App. 502; *Garden City v. Heller*, 61 Kan. 767; *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734.

**2. Words Supplied to Effectuate Intention.** — *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240; *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734; *White v. Rio Grande Western R. Co.*, 25 Utah 346, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 19.

**3. Repugnant Words May Be Rejected.** — *Cochran v. Vermilion County*, 113 Ill. App. 140; *Prentiss v. Lyons*, 105 La. 382; *Morrill, etc., Constr. Co. v. Boston*, 186 Mass. 217; *Weed v. Woods*, 71 N. H. 581; *Abbott's Estate*, 198 Pa. St. 493; *Brantford Electric, etc., Co. v. Brantford Starch Works*, 3 Ont. L. Rep. 118.

**Description in Deed.** — *Cowen v. Truefitt*, (1899) 2 Ch. 309; *Maryland Constr. Co. v. Kuper*, 90 Md. 529; *Schmidtke v. Keller*, 44 Oregon 23; *Gibney v. Fitzsimmons*, 45 W. Va. 334.

**Word or Clause Harmonized if Possible.** — A word or clause will not be treated as redundant if a meaning consistent with the other parts can be given to it. *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402. See also *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

**Intention of Parties Not to Be Defeated.** — *Ricketts v. Buckstaff*, 64 Neb. 851.

**20. 1. Substitution of Words.** — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734; *Sease v. Sease*, 64 S. Car. 216; *White v. Rio Grande Western R. Co.*, 25 Utah 346, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20. See also *Louisville, etc., R. Co. v. Louisville Southern R. Co.*, 100 Ky. 690.

**2. Grammatical Inaccuracy Immaterial.** — *Jacoby v. Nichols*, (Ky. 1901) 62 S. W. Rep. 734.

**6. Punctuation — When Resorted to.** — *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240.

**An Uncertain Aid.** — *Abbott's Estate*, 198 Pa. St. 493.

**7. Ineffective as Against Plain Meaning.** — *Holmes v. Phenix Ins. Co.*, (C. C. A.) 98 Fed. Rep. 240.

**21. 1. Punctuation Marks May Be Inserted.** — *Flynn v. Holman*, 119 Iowa 731, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20.

**2. Written Matter Controls Printed.** — *Daly v. Busk Tunnel R. Co.*, (C. C. A.) 129 Fed. Rep.

513, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21; *Seaver v. Thompson*, 189 Ill. 158; *Bennett v. Giles*, 111 Ill. App. 428; *Sprague Electric Co. v. Hennepin County*, 83 Minn. 262; *Eager v. Mathewson*, 27 Nev. 220; *Collins v. Knuth*, 51 N. Y. App. Div. 188. See also *Ottawa Electric Co. v. St. Jacques*, 1 Ont. L. Rep. 73, reversed on other grounds 31 Can. Sup. Ct. 636.

**3. Written and Printed Matter Reconciled if Possible.** — *Hardie-Tynes Foundry, etc., Co., v. Glen Allen Oil Mill*, 84 Miss. 259, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 21; *Eager v. Mathewson*, 27 Nev. 220.

**4. Surrounding Circumstances — England.** — *Krell v. Henry*, (1903) 2 K. B. 740; *Livingstone v. Ross*, (1901) A. C. 327.

**United States.** — *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

**California.** — See *Parrish v. Rosebud Min., etc., Co.*, (Cal. 1903) 71 Pac. Rep. 694.

**Colorado.** — *Daum v. Conley*, 27 Colo. 56.

**Florida.** — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

**Idaho.** — *Burke Land, etc., Co. v. Wells*, 7 Idaho 42; *Givens v. Keeney*, 7 Idaho 335.

**Illinois.** — *Davenport First Nat. Bank v. Rothschild*, 107 Ill. App. 133; *Cameron v. Sexton*, 110 Ill. App. 381, reversed on other grounds *sub nom. Gage v. Cameron*, 212 Ill. 146; *Bennett v. Morris*, 111 Ill. App. 150; *Wheaton v. Bartlett*, 105 Ill. App. 326; *Rector v. Hartford Deposit Co.*, 190 Ill. 380; *People v. Harrison*, 191 Ill. 257; *Elgin City Banking Co. v. Center*, 83 Ill. App. 405, affirmed 185 Ill. 534.

**Kansas.** — *Durand v. Higgins*, 67 Kan. 110.

**Kentucky.** — *Crane v. Williamson*, 111 Ky. 271.

**Louisiana.** — *Watson v. Barber*, 105 La. 456; *Losecco v. Gregory*, 108 La. 648.

**Maine.** — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

**Maryland.** — *Hopper v. Smyser*, 90 Md. 363. **Michigan.** — *Fullagar v. Stockdale*, (Mich. 1904) 101 N. W. Rep. 576.

**Missouri.** — *Missouri Edison Electric Co. v. Bry*, 88 Mo. App. 135; *Del Bondio v. Jacob Dold Packing Co.*, 79 Mo. App. 465; *St. Louis Trust Co. v. York*, 81 Mo. App. 342.

**Nebraska.** — *Rice v. McCague*, 61 Neb. 861.

**New Hampshire.** — *Weed v. Woods*, 71 N. H. 581.

**New York.** — *Gillet v. Bank of America*, 160 N. Y. 549; *Union Nat. Bank v. Leary*, 77 N. Y. App. Div. 332; *Cohen v. Berlin, etc., Envelope Co.*, 166 N. Y. 292; *Wirth v. Kahlenberg*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 803. See

**22.** See notes 1, 2, 3.

**23.** See notes 1, 2.

**24.** XIII. CONSTRUCTION BY PARTIES. — See note 1.

also *Van Schaick v. Lese*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 610.

*North Carolina*. — *Fire Extinguisher Co. v. Mooresville Cotton Mills*, 132 N. Car. 424.

*Oklahoma*. — *American Soda Fountain Co. v. Gerrer's Bakery*, 14 Okla. 258.

*Oregon*. — See *North Pac. Lumber Co. v. Spore*, 44 Oregon 462.

*Pennsylvania*. — *Easton Power Co. v. Sterlingworth R. Supply Co.*, 22 Pa. Super. Ct. 538.

*Vermont*. — *Rioux v. Ryegate Brick Co.*, 72 Vt. 148.

*West Virginia*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

*Wisconsin*. — *Loper v. Sheldon*, 120 Wis. 26; *Mayer v. Goldberg*, 116 Wis. 96.

**22. 1. Relation of Parties** — *United States*. — *Kauffman v. Raeder*, (C. C. A.) 108 Fed. Rep. 171; *Fox v. Tyler*, (C. C. A.) 109 Fed. Rep. 258; *Francis v. Heine Safety-Boiler Co.*, 112 Fed. Rep. 899; *Hull Coal, etc., Co. v. Empire Coal, etc., Co.*, (C. C. A.) 113 Fed. Rep. 256; *Fitzgerald v. Rapid City First Nat. Bank*, (C. C. A.) 114 Fed. Rep. 474; *Western Hardware, etc., Co. v. Bancroft-Charnley Steel Co.*, (C. C. A.) 116 Fed. Rep. 176; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524. See also *Norton v. Shields*, 132 Fed. Rep. 873.

*Florida*. — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

*Illinois*. — *Elgin City Banking Co. v. Center*, 83 Ill. App. 405, affirmed 185 Ill. 534; *Gage v. Cameron*, 212 Ill. 146.

*Maine*. — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

*Massachusetts*. — *Scalpen v. Blanchard*, 187 Mass. 73.

*Michigan*. — *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264; *Fullagar v. Stockdale*, (Mich. 1904) 101 N. W. Rep. 576.

*Missouri*. — *St. Louis Trust Co. v. York*, 81 Mo. App. 342.

*New York*. — *Wirth v. Kahlenberg*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 803.

*Pennsylvania*. — *Snowden v. Cavanaugh*, 10 Kulp (Pa.) 1.

*West Virginia*. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

*Wisconsin*. — *Mayer v. Goldberg*, 116 Wis. 96.

**2. Nature and Situation of Subject-matter** — *United States*. — *Kauffman v. Raeder*, (C. C. A.) 108 Fed. Rep. 171; *Fox v. Tyler*, (C. C. A.) 109 Fed. Rep. 258; *Hull Coal, etc., Co. v. Empire Coal, etc., Co.*, (C. C. A.) 113 Fed. Rep. 256; *Francis v. Heine Safety-Boiler Co.*, 112 Fed. Rep. 899; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524. See also *Norton v. Shields*, 132 Fed. Rep. 873.

*Florida*. — *L'Engle v. Scottish Union, etc., F. Ins. Co.*, (Fla. 1904) 37 So. Rep. 462.

*Maine*. — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

*Michigan*. — *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264.

*Nebraska*. — *Rice v. McCague*, 61 Neb. 861.

*Pennsylvania*. — *Snowden v. Cavanaugh*, 10 Kulp (Pa.) 1.

*Wisconsin*. — *Mayer v. Goldberg*, 116 Wis. 96.

**3. Purpose of Instrument or Contract**. — *Kauffman v. Raeder*, 108 Fed. Rep. 171; *Fox v. Tyler*, (C. C. A.) 109 Fed. Rep. 258; *Hull Coal, etc., Co. v. Empire Coal, etc., Co.*, (C. C. A.) 113 Fed. Rep. 256; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609; *Durand v. Higgins*, 67 Kan. 110; *Union Nat. Bank v. Leary*, 77 N. Y. App. Div. 332; *Carson v. West Branch Hosiery Co.*, 15 Pa. Super. Ct. 476.

**23. 1. Circumstances Considered Only in Case of Ambiguity**. — *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510; *Fisher v. Hall*, (Ky. 1901) 63 S. W. Rep. 287.

**2. Court Stands in Place of Parties** — *United States*. — *Fitzgerald v. Rapid City First Nat. Bank*, (C. C. A.) 114 Fed. Rep. 474; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

*Idaho*. — *Burke Land, etc., Co. v. Wells*, 7 Idaho 42.

*Illinois*. — *Rector v. Hartford Deposit Co.*, 190 Ill. 380, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23; *Reeves v. Chandler*, 113 Ill. App. 167. See also *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

*Missouri*. — *L. Bauman Jewelry Co. v. Ber-tig*, 81 Mo. App. 393.

*New Hampshire*. — *Weed v. Woods*, 71 N. H. 581.

*West Virginia*. — *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402.

**24. 1. Construction by Parties** — *United States*. — *Housekeeper Pub. Co. v. Swift*, (C. C. A.) 97 Fed. Rep. 290; *Lyman v. Kansas City, etc., R. Co.*, 101 Fed. Rep. 636; *State Trust Co. v. Duluth*, 104 Fed. Rep. 632; *Fitzgerald v. Rapid City First Nat. Bank*, (C. C. A.) 114 Fed. Rep. 474; *Manhattan L. Ins. Co. v. Wright*, (C. C. A.) 126 Fed. Rep. 82.

*Arkansas*. — *Humphreys v. Ft. Smith Trac-tion, etc., Co.*, 71 Ark. 152.

*California*. — *Williams v. Ashurst Oil, etc., Co.*, 144 Cal. 619.

*Illinois*. — *Rector v. Hartford Deposit Co.*, 190 Ill. 380, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24; *Davenport First Nat. Bank v. Rothschild*, 107 Ill. App. 133; *W. H. Purcell Co. v. Sage*, 200 Ill. 342; *Merrifield v. Canal Com'rs*, 212 Ill. 456; *Clark v. State University*, 103 Ill. App. 261; *Ingraham v. Mariner*, 194 Ill. 269; *Whalen v. Stephens*, 92 Ill. App. 235, affirmed 193 Ill. 121; *Western R. Equipment Co. v. Missouri Malleable Iron Co.*, 91 Ill. App. 28.

*Indiana*. — *Ralya v. Atkins*, 157 Ind. 331, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24; *Fulton County v. Gibson*, 158 Ind. 471.

*Kansas*. — *Enterprise Carriage Mfg. Co. v. Cruzan*, 63 Kan. 411; *Baxter Springs v. Baxter Springs Light, etc., Co.*, 64 Kan. 591.

*Kentucky*. — See *Huff v. Miniard*, (Ky. 1903) 73 S. W. Rep. 1036.

*Louisiana*. — *Linehan R. Transfer Co. v. New*

**25.** See notes 1, 3.

**XIV. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.** — See note 5.

**26.** **XV. IMPLIED TERMS.** — See note 1.

**Existing Law Part of Contract.** — See note 2.

Orleans, etc., R. Co., 107 La. 645; *Watson v. Barber*, 105 La. 456.

*Maine.* — *Lewiston, etc., R. Co. v. Grand Trunk R. Co.*, 97 Me. 261.

*Michigan.* — *Negaunee Iron Co. v. Iron Cliffs Co.*, 134 Mich. 264.

*Missouri.* — *Laing v. Holmes*, 93 Mo. App. 231; *Williams v. Kansas City Suburban Belt R. Co.*, 85 Mo. App. 103; *Del Bondio v. Jacob Dold Packing Co.*, 79 Mo. App. 465.

*Nebraska.* — *Williams v. Auten*, (Neb. 1903) 93 N. W. Rep. 943; *Lawton v. Fonner*, 59 Neb. 214; *Rice v. McCague*, 61 Neb. 861; *State v. Cass County*, 60 Neb. 566.

*New York.* — *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 264. See also *Kinney v. McBride*, 88 N. Y. App. Div. 92.

*Ohio.* — *Kling v. Bordner*, 65 Ohio St. 86; *Creed v. Henkel*, 9 Ohio Cir. Dec. 861, 18 Ohio Cir. Ct. 883; *Cincinnati v. Cincinnati St. R. Co.*, 9 Ohio Dec. 235, 6 Ohio N. P. 140; *M. E. Church v. Ashtabula Water Co.*, 10 Ohio Cir. Dec. 648, 20 Ohio Cir. Ct. 578.

*Oklahoma.* — *American Soda Fountain Co. v. Gerrer's Bakery*, 14 Okla. 258.

*Oregon.* — See *Howell v. Johnson*, 38 Oregon 571.

*Pennsylvania.* — *Gillespie v. Iseman*, 210 Pa. St. 1; *Easton Power Co. v. Sterlingworth R. Supply Co.*, 22 Pa. Super. Ct. 538.

*Texas.* — *Citizens' Electric Light, etc., Co. v. Gonzales Water Power Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 577; *Gulf, etc., R. Co. v. Schawe*, 22 Tex. Civ. App. 599.

*Utah.* — *Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783.

*West Virginia.* — *Clark v. Sayers*, 55 W. Va. 512.

*Wisconsin.* — *Loper v. Sheldon*, 120 Wis. 26.

**25. 1. Construction by Parties Ineffective in Absence of Ambiguity.** — *North Eastern R. Co. v. Hastings*, (1900) A. C. 260; *Merrifield v. Canal Com'rs*, 212 Ill. 456; *Western Railway Equipment Co. v. Missouri Malleable Iron Co.*, 91 Ill. App. 28; *Ralya v. Atkins*, 157 Ind. 331, citing

17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 25; *Citizens' Electric Light, etc., Co. v. Gonzales Water Power Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 577.

**Practical Construction of contracts is that given to agreements by the parties themselves by acts subsequently done with reference to the contracts.** *Clark v. Sayers*, 55 W. Va. 512.

**3. "The Acts and Conduct of the Parties, and not some vague general conversation between them in regard to what they meant by the contract, must be looked to in order to determine its meaning."** *Ingraham v. Mariner*, 194 Ill. 269.

**5. Expressio Uniu Est Exclusio Alterius.** — *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769; *Norfolk, etc., Hosiery Co. v. Arnold*, 64 N. J. L. 254.

**26. 1. Implied Terms in Contract** — *England.* — *Ogdens v. Nelson*, (1905) A. C. 109, affirming (1904) 2 K. B. 410, which affirmed (1903) 2 K. B. 287.

*United States.* — *Holmes v. Phenix Ins. Co.*; (C. C. A.) 98 Fed. Rep. 240; *Fox v. Tyler*, (C. C. A.) 109 Fed. Rep. 258.

*Minnesota.* — *Dow v. State Bank*, 88 Minn. 355.

*North Carolina.* — *Fire Extinguisher Co. v. Mooresville Cotton Mills*, 132 N. Car. 424.

*Utah.* — *McKay v. Barnett*, 21 Utah 239.

*Vermont.* — *Rioux v. Ryegate Brick Co.*, 72 Vt. 148.

**An Injection of Words not appearing in a contract may be required when evidently necessary to work out its probable purpose, and to thus avoid unreasonable and unjust conclusions; but it is never required and cannot be permitted, where the injection of additional phraseology narrows the apparent general purpose, and defeats what, except for the addition, would be both a reasonable and just result.** *Ingersoll v. Coram*, 127 Fed. Rep. 418.

**2. Brooks v. Metropolitan L. Ins. Co.**, 70 N. J. L. 36, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *Cochran v. Vermilion County*, 113 Ill. App. 140; *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.



## INTERPRETERS.

**28. II. IN JUDICIAL PROCEEDINGS — 1. Right and Duty of Court to Appoint** — *a. IN GENERAL — (1) At Common Law.* — See note 1.

*b. WHAT WITNESSES MAY TESTIFY THROUGH INTERPRETER — (1) Foreigners.* — See note 8.

**29. c. NECESSITY OF APPOINTMENT QUESTION FOR COURT.** — See note 6.

**30.** See note 1.

**2. Interpreter Must Be Sworn as Witness.** — See notes 2, 3.

**3. Competency — a. AS RELATING TO BIAS OF PERSON APPOINTED** — *(1) Discretion of Trial Court.* — See note 6.

*(2) Witness as Interpreter.* — See note 8.

**31. (3) Relation of Interpreter to Party.** — See note 1.

*b. AS RELATING TO ABILITY OF PERSON TO INTERPRET.* — See note 4.

**4. Impeachment of Interpreter's Testimony.** — See note 8.

**32. INTERRUPT — INTERRUPTION.** — See note 6.

**INTERSECT.** — See note 7.

**28. 1. Right and Duty of Court to Appoint Interpreter.** — *Menella v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 5, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28.

**8. Witness Speaking Language Not Understood by Court or Jury.** — See *Com. v. Greason*, 204 Pa. St. 64; *Brown v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1118.

**29. 6. Question of Necessity Generally for Judgment of Trial Court.** — *People v. Morine*, 138 Cal. 626; *Brzozowski v. National Box Co.*, 104 Ill. App. 341, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29; *Kozlowski v. Chicago*, 113 Ill. App. 513.

**30. 1.** See *Brzozowski v. National Box Co.*, 104 Ill. App. 341.

**2. Interpreter Must Be Sworn as Witness.** — *People v. Lem Deo*, 132 Cal. 201, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30. See also *Menella v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 5.

**3. The Interpreter Is a Witness.** — *People v. Lem Deo*, 132 Cal. 201, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30 (appearance before grand jury).

**6. Discretion of Court Reviewed Only When**

**Abused.** — See *Brown v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1118.

In *Tores v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 880, it was held that a prosecuting attorney may properly be appointed an interpreter in the absence of anything showing partiality.

**8. Witness as Interpreter.** — *Brown v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1118.

**31. 1. Friendship Between Interpreter and Party.** — See *Menella v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 5.

**4. Ability of Interpreter a Question for Court.** — *Fennen v. State*, 24 Ohio Cir. Ct. 583.

**Reading but Not Speaking Language Sufficient.** — The fact that an interpreter cannot read English, though he can speak and understand it, will not disqualify him. *Central R. Co. v. Joseph*, 125 Ala. 313.

**8. Weight to Be Given to Interpreter's Testimony for Jury.** — *People v. Lem Deo*, 132 Cal. 201, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.

**32. 6. Prescription.** — *Smith v. Baxter*, (1900) 2 Ch. 138.

**7. Intersect — Railroads.** — See *Atchison, etc., R. Co. v. Kansas City, etc., R. Co.*, 67 Kan. 569.

# INTERSTATE COMMERCE.

BY BASIL JONES.

**41. I. INTRODUCTORY—STATE OF DECISIONS.**—See note 4.

**42. II. REGULATION OF INTERSTATE COMMERCE—1. Power of Congress—**

*a. IN GENERAL.*—See note 1.

*b. EXCLUSIVENESS OF POWER—(1) Statement of Rule.*—See note 4.

**43.** See note 4.

**44.** See notes 1, 2, 3, 4.

*(2) National Subjects Requiring Uniformity of Regulation.*—See note 5.

**41. 4 Line Between Power of Congress and of States Drawn as Each Case Arises.**—See *Kavanaugh v. Southern R. Co.*, 120 Ga. 62; *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599.

**42. 1. Uniformity of Regulation Object of Commerce Clause.**—*State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741. See also *Wall v. Norfolk, etc.*, R. Co., 52 W. Va. 485.

**4. Power of Congress Is Exclusive—United States.**—*Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Caldwell v. North Carolina*, 187 U. S. 622; *Lottery Case*, 188 U. S. 321; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785; *J. Rosenbaum Grain Co. v. Chicago, etc.*, R. Co., 130 Fed. Rep. 46, *affirmed* (C. C. A.) 130 Fed. Rep. 110. See also *Northern Securities Co. v. U. S.*, 193 U. S. 197, *affirming* 120 Fed. Rep. 721.

*District of Columbia.*—*Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49.

*Georgia.*—*Kehrer v. Stewart*, 117 Ga. 969; *Kavanaugh v. Southern R. Co.*, 120 Ga. 62.

*Kentucky.*—*Com. v. Hogan, etc.*, Co., 74 S. W. Rep. 737, 25 Ky. L. Rep. 41.

*Massachusetts.*—*Com. v. Petranich*, 183 Mass. 217.

*New York.*—*People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622.

*North Carolina.*—*Wrought Iron Range Co. v. Campen*, 135 N. Car. 506.

*Ohio.*—*State v. Yanders*, 5 Ohio Dec. 575, 7 Ohio N. P. 659.

*West Virginia.*—*Wall v. Norfolk, etc.*, R. Co., 52 W. Va. 485.

**As to the Extent of the Power**, see *Lottery Case*, 188 U. S. 321.

**43. 4. Northern Securities Co. v. U. S.**, 193 U. S. 197, *affirming* 120 Fed. Rep. 721.

**44. 1. Local Police Laws Not Deemed Regulations of Commerce—United States.**—*Austin v. Tennessee*, 179 U. S. 343; *Caldwell v. North Carolina*, 187 U. S. 622; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144; *Duluth Brewing, etc.*, Co. v. Superior, (C. C. A.) 123 Fed. Rep. 353.

*Illinois.*—*Chicago, etc.*, R. Co. v. Carlinville, 200 Ill. 314, 93 Am. St. Rep. 190.

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*Iowa.*—*Willfong v. Omaha, etc.*, R. Co., 116 Iowa 548.

*Kansas.*—*State v. Hickox*, 64 Kan. 650; *Missouri, etc.*, R. Co. v. Simonson, 64 Kan. 802.

*Kentucky.*—*Com. v. Read Phosphate Co.*, 113 Ky. 32; *Louisville v. Wehmhoff*, 116 Ky. 812, 116 Ky. 845.

*New York.*—*Crossman v. Lurman*, 171 N. Y. 329, 98 Am. St. Rep. 599; *People v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, *affirmed* 173 N. Y. 629; *People v. Prillen*, 73 N. Y. App. Div. 207, *reversed* on other grounds 173 N. Y. 67; *People v. Booth*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; *People v. Bishopp*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 12.

*North Carolina.*—*State v. Hunt*, 129 N. Car. 686, 85 Am. St. Rep. 758.

*Pennsylvania.*—*Com. v. Keary*, 198 Pa. St. 500; *Newcastle v. Cutler*, 15 Pa. Super. Ct. 612.

*South Carolina.*—*Lowe v. Seaboard Air Line R. Co.*, 63 S. Car. 248, 90 Am. St. Rep. 678.

*Texas.*—*Houston, etc.*, R. Co. v. Mayes, 36 Tex. Civ. App. 606.

*Virginia.*—*Southern Express Co. v. Goldberg*, 101 Va. 619; *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599.

*Washington.*—*Hathaway v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889.

**2.** See *Crossman v. Lurman*, 192 U. S. 189.

**3. Affecting Without Regulating Commerce.**—*Louisville, etc.*, R. Co. v. Kentucky, 183 U. S. 503; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Northern Securities Co. v. U. S.*, 193 U. S. 197 (dissenting opinion of White, J.) *affirming* 120 Fed. Rep. 721; *Louisville v. Wehmhoff*, 116 Ky. 845; *Com. v. Keary*, 198 Pa. St. 500.

**4. State Laws Dealing Directly with Interstate Commerce.**—*J. Rosenbaum Grain Co. v. Chicago, etc.*, R. Co., 130 Fed. Rep. 46, *affirmed* (C. C. A.) 130 Fed. Rep. 110; *Com. v. Petranich*, 183 Mass. 217; *Lowe v. Seaboard Air Line R. Co.*, 63 S. Car. 248, 90 Am. St. Rep. 678; *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599; *Wall v. Norfolk, etc.*, R. Co., 52 W. Va. 485.

**5. Exclusive Power of Congress in Matters National in Character and Requiring Uniformity of Regulation.**—*Caldwell v. North Carolina*, 187

- 44.** The Failure of Congress to Act. — See note 6.
- 45.** See note 1.  
Interstate or Foreign Commerce Is National in Its Character — See note 3.
- 46.** *c.* EXTENT OF POWER—(1) *In General*—Constitutional Limitations. — See note 4.
- 47.** Commerce Wholly Within State. — See note 1.  
(2) *Subjects of Regulation* — (a) *Summary Statement*. — See note 4.
- 48.** (c) Railroads — Construction. — See note 4.  
Operation of Trains. — See note 5.  
Freight Rates. — See note 8.  
(d) Telegraph Companies. — See note 9.
- 49.** See note 1.
- 50.** (f) Shipping and Navigation — In General. — See notes 4, 5.
- 51.** Pilots and Engineers. — See note 1.
- 52.** (h) Trusts and Monopolies. — See note 11.
- 53.** (i) Manufacture. — See note 6.
- 54.** *d.* DELEGATION OF POWER — Wilson Law. — See note 5.
- 55.** *e.* MEANS EMPLOYED — Injunction. — See note 1.
- 2** Power of States — *a.* LOCAL POLICE REGULATIONS — (1) *Validity in General*. — See notes 3, 4.

U. S. 622; Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160; Buttfield v. Stranahan, 192 U. S. 470; Southern Express Co. v. Goldberg, 101 Va. 619.

**44.** 6. Failure of Congress to Act Equivalent to Declaration that Commerce Shall Be Free. — Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92; State v. Yanders, 5 Ohio Dec. 575, 7 Ohio N. P. 659; Southern Express Co. v. Goldberg, 101 Va. 619; Wall v. Norfolk, etc., R. Co., 52 W. Va. 485.

**45.** 1. Southern Express Co. v. Goldberg, 101 Va. 619; Wall v. Norfolk, etc., R. Co., 52 W. Va. 485.

**3.** Common Law Principles Control. — Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92.

**46.** 4. Limited Only by Constitution. — Lottery Case, 188 U. S. 321; Buttfield v. Stranahan, 192 U. S. 470; Northern Securities Co. v. U. S., 193 U. S. 197, affirming 120 Fed. Rep. 721.

Constitution Does Not Define Legitimate Regulation of Interstate Commerce — Lottery Case, 188 U. S. 321.

**47.** 1. Purely Internal Commerce of State. — Northwestern Mut. L. Ins. Co. v. Lewis and Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572. See also Northern Securities Co. v. U. S., 193 U. S. 197.

**4.** May Prohibit Commerce in Lottery Tickets. — Lottery Case, 188 U. S. 321.

**48.** 4. Construction Across States and Territories. — See Muskogee Nat. Telephone Co. v. Hall, (C. C. A.) 118 Fed. Rep. 382.

**5.** Automatic Car Coupler Acts. — As to what constitutes interstate commerce within the meaning of the federal statutes requiring trains engaged in interstate commerce to be equipped with automatic car coupling, see the title COUPLING CARS, 1049. r, and also the following cases: Chicago, etc., R. Co. v. Voelker, (C. C. A.) 129 Fed. Rep. 522; Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; Malott v. Hood, 201 Ill. 202.

**8.** Freight Rates May Be Regulated. — North-

ern Securities Co. v. U. S., 193 U. S. 197 (dissenting opinion of White, J.), affirming 120 Fed. Rep. 721.

**9.** May Regulate Telegraph Companies. — Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92.

**49.** 1. Authorizing and Aiding Construction of Telegraph Lines. — See Muskogee Nat. Telephone Co. v. Hall, (C. C. A.) 118 Fed. Rep. 382.

**50.** 4. Power to Regulate Commerce Includes Navigation and Its Incidents. — Williams v. Fears, 110 Ga. 584.

**5.** Power Includes Control of Navigable Waters. — Richardson v. U. S., 100 Fed. Rep. 714; Handel v. Chaplin, 111 Ga. 800; State v. Corson, 67 N. J. L. 178; Morgan v. Com., 98 Va. 812.

Power of State Where Congress Has Not Acted. — Handel v. Chapin, 111 Ga. 800.

**51.** 1. Qualifications of Pilots and Engineers. — People v. Prillen, 73 N. Y. App. Div. 207, reversed on other grounds 173 N. Y. 67.

**52.** 11. Anti-trust Laws. — Montague v. Lowry, 193 U. S. 38; Northern Securities Co. v. U. S., 193 U. S. 197, affirming 120 Fed. Rep. 721.

**53.** 6. No Power to Regulate Manufacture. — Ellis v. Inman Co., (C. C. A.) 131 Fed. Rep. 182.

**54.** 5. Wilson Law Not Delegation of Power Nor Adoption of State Laws. — See also Corbin v. McConnell, 71 N. H. 350.

**55.** 1. Injunction. — Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599.

**3.** State May Legislate on Local Subjects. — Field v. Barber Asphalt Paving Co., 194 U. S. 618; Handel v. Chaplin, 111 Ga. 800; Willfong v. Omaha, etc., R. Co., 116 Iowa 548; State v. Moody, 70 S. Car. 56; Houston, etc., R. Co. v. Mayes, 36 Tex. Civ. App. 606; Atlantic Coast Line R. Co. v. Com., 102 Va. 599; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889. See also *In re* Davenport, 102 Fed. Rep. 540.

- 55.** Legislation Which Is a Mere Aid to Commerce. — See note 5.  
**56.** Nature and Source of Power. — See notes 1, 2, 3.  
**57.** (2) *When Invalid.* — See notes 1, 3, 4.  
**58.** *b.* EFFECT OF NON-ACTION BY CONGRESS. — See notes 1, 2, 3.  
*c.* EFFECT OF ACTION BY CONGRESS — In General. — See note 4.  
**59.** Partial Regulation by Congress. — See note 4.

**55. 4. State May Act Only in Absence of Regulation by Congress.** — Chicago, etc., *R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *In re Abel*, 10 Idaho 288; Missouri, etc., *R. Co. v. Simonson*, 64 Kan. 802.

**5. Legislation in Aid of Commerce.** — Louisville, etc., *R. Co. v. Kentucky*, 183 U. S. 503; Louisville, etc., *R. Co. v. Eubank*, 184 U. S. 27; Pennsylvania *R. Co. v. Hughes*, 191 U. S. 477; Kavanaugh *v. Southern R. Co.*, 120 Ga. 62; Chicago, etc., *R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; Willfong *v. Omaha*, etc., *R. Co.*, 116 Iowa 548; Missouri, etc., *R. Co. v. Simonson*, 64 Kan. 802; Currie *v. Raleigh*, etc., *R. Co.*, 135 N. Car. 535; Galveston, etc., *R. Co. v. Fales*, 33 Tex. Civ. App. 457.

**56. 1. Source of Power** — *United States*. — Austin *v. Tennessee*, 179 U. S. 343; Caldwell *v. North Carolina*, 187 U. S. 622; Pennsylvania *R. Co. v. Hughes*, 191 U. S. 477; Crossman *v. Lurman*, 192 U. S. 189; Field *v. Barber Asphalt Paving Co.*, 194 U. S. 618; Pabst Brewing Co. *v. Crenshaw*, 120 Fed. Rep. 144; *In re Davenport*, 102 Fed. Rep. 540; Duluth Brewing, etc., *Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353.

*Kansas*. — State *v. Hickox*, 64 Kan. 650.

*Kentucky*. — Com. *v. Read Phosphate Co.*, 113 Ky. 32; Louisville *v. Wehmhoff*, 116 Ky. 812, 116 Ky. 845.

*New York*. — Crossman *v. Lurman*, 57 N. Y. App. Div. 393, affirmed 171 N. Y. 329, 98 Am. St. Rep. 599; People *v. Prillen*, 73 N. Y. App. Div. 207, reversed on other grounds 173 N. Y. 67; People *v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629; People *v. Booth*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321.

*Pennsylvania*. — Com. *v. Keary*, 198 Pa. St. 500; New Castle *v. Cutler*, 15 Pa. Super. Ct. 612.

*Virginia*. — Southern Express Co. *v. Goldberg*, 101 Va. 619; Atlantic Coast Line R. Co. *v. Com.*, 102 Va. 599.

*Washington*. — Hathaway *v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889.

**2.** Caldwell *v. North Carolina*, 187 U. S. 622; *In re Davenport*, 102 Fed. Rep. 540.

**3. Police Laws Incidentally Affecting Interstate Commerce Are Valid** — *United States*. — Louisville, etc., *R. Co. v. Kentucky*, 183 U. S. 503; Caldwell *v. North Carolina*, 187 U. S. 622; Pennsylvania *R. Co. v. Hughes*, 191 U. S. 477; Field *v. Barber Asphalt Paving Co.*, 194 U. S. 618; Pabst Brewing Co. *v. Crenshaw*, 120 Fed. Rep. 144; *In re Davenport*, 102 Fed. Rep. 540.

*Georgia*. — Central of Georgia R. Co. *v. Murphy*, 116 Ga. 863.

*Illinois*. — Chicago, etc., *R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190.

*Iowa*. — Willfong *v. Omaha*, etc., *R. Co.*, 116 Iowa 548.

*Kansas*. — State *v. Hickox*, 64 Kan. 650; Missouri, etc., *R. Co. v. Simonson*, 64 Kan. 802.

*Kentucky*. — Com. *v. Read Phosphate Co.*, 113 Ky. 32; Louisville *v. Wehmhoff*, 116 Ky. 812.

*New York*. — Crossman *v. Lurman*, 57 N. Y. App. Div. 393, affirmed 171 N. Y. 329, 98 Am. St. Rep. 599; People *v. Prillen*, 73 N. Y. App. Div. 207, reversed on other grounds 173 N. Y. 67; People *v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629; People *v. Booth*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; People *v. Bishopp*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 12.

*North Carolina*. — State *v. Hunt*, 129 N. Car. 686, 85 Am. St. Rep. 758.

*Pennsylvania*. — Com. *v. Keary*, 198 Pa. St. 500; New Castle *v. Cutler*, 15 Pa. Super. Ct. 612.

*South Carolina*. — Lowe *v. Seaboard Air Line R. Co.*, 63 S. Car. 248, 90 Am. St. Rep. 678.

*Texas*. — Houston, etc., *R. Co. v. Mayes*, 36 Tex. Civ. App. 606.

*Virginia*. — Southern Express Co. *v. Goldberg*, 101 Va. 619; Atlantic Coast Line R. Co. *v. Com.*, 102 Va. 599.

*Washington*. — Hathaway *v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889.

**57. 1. Police Regulation Must Be Such in Fact.** — *In re Davenport*, 102 Fed. Rep. 540; Smith *v. Lowe*, (C. C. A.) 121 Fed. Rep. 753; Duluth Brewing, etc., *Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353.

**3.** Smith *v. Lowe*, (C. C. A.) 121 Fed. Rep. 753; Com. *v. Read Phosphate Co.*, 113 Ky. 32; Com. *v. Petranich*, 183 Mass. 217; People *v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622; Wrought Iron Range Co. *v. Campen*, 135 N. Car. 506; State *v. Yanders*, 5 Ohio Dec. 575, 7 Ohio N. P. 659; State *v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741.

**4. Unnecessary Regulation.** — Smith *v. Lowe*, (C. C. A.) 121 Fed. Rep. 753; Com. *v. Petranich*, 183 Mass. 217; Wrought Iron Range Co. *v. Campen*, 135 N. Car. 506.

**58. 1. Inaction by Congress Not Inhibition of State Action.** — Pennsylvania R. Co. *v. Hughes*, 191 U. S. 477; Olsen *v. Smith*, 195 U. S. 332; Wall *v. Norfolk*, etc., *R. Co.*, 52 W. Va. 485.

**2. Non-action by Congress Adopts State Laws.** — Reid *v. Colorado*, 187 U. S. 137; Olsen *v. Smith*, 195 U. S. 332. See also Pittman *v. Pacific Express Co.*, 24 Tex. Civ. App. 595; Wall *v. Norfolk*, etc., *R. Co.*, 52 W. Va. 485.

**3. Mere Grant of Commercial Power Not Prohibition of State Action.** — Reid *v. Colorado*, 187 U. S. 137; Pennsylvania R. Co. *v. Hughes*, 191 U. S. 477; Atlantic Coast Line R. Co. *v. Com.*, 102 Va. 599. See also Olsen *v. Smith*, 195 U. S. 332.

**4. Regulation by Congress Precludes State Regulation.** — Muskogee Nat. Telephone Co. *v. Hall*, (C. C. A.) 118 Fed. Rep. 382.

**59. 4. Supplementary State Laws.** — Reid *v. Colorado*, 187 U. S. 137.

**59.** State Law Suspended but Not Repealed. — See note 5.

**60.** *d.* TONNAGE DUTIES. — See note 3.

*e.* IMPORT OR EXPORT DUTIES. — See note 4.

**61.** 3. What Constitutes Regulation. — See note 1.

**III. WHAT CONSTITUTES INTERSTATE COMMERCE — 1. Definition and Nature** — "Commerce" in a General Sense. — See note 2.

Interstate Commerce. — See notes 3, 4.

**62.** See note 1.

Transportation. — See note 3.

Transportation Across State Line. — See note 4.

Continuous Voyage. — See note 7.

**63.** Temporary Interruption of Voyage. — See note 1.

Commerce Wholly Confined to One State. — See notes 2, 4.

**59.** 5. State Law Not Repealed. — See Corbin *v. McConnell*, 71 N. H. 350.

**60.** 3. Tonnage Duties Prohibited. — *Way v. New Jersey Steamboat Co.*, 133 Fed. Rep. 188.

4. Import and Export Duties Prohibited. — *State v. Allgeyer*, 110 La. 839.

Burden of Proving that Shipment Is Domestic. — *Gulf, etc., R. Co. v. Fort Grain Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 419.

**61.** 1. Regulation of Transportation. — *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785.

2. Commerce Defined. — *U. S. v. Slater*, 123 Fed. Rep. 115; *Com. v. Hogan, etc.*, Co., 74 S. W. Rep. 737, 25 Ky. L. Rep. 41. See also *Williams v. Fears*, 179 U. S. 270; *U. S. v. Swift*, 122 Fed. Rep. 529, modified 196 U. S. 375; *Northern Securities Co. v. U. S.*, 193 U. S. 197 (dissenting opinion of White, J.), affirming 120 Fed. Rep. 721.

3. Interstate Commerce Defined. — *U. S. v. Swift*, 122 Fed. Rep. 529, modified 196 U. S. 375.

Term Applicable to Commerce Between State and Territory. — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617.

"Among the Several States." — Commerce among the states embraces navigation, intercourse, communication, traffic, transit of persons, and the transmission of messages by telegraph. *Lottery Case*, 188 U. S. 321.

4. Commerce in Its Constitutional Sense. — *In re Bergen*, 115 Fed. Rep. 339; *Com. v. Hogan, etc.*, Co., 74 S. W. Rep. 737, 25 Ky. L. Rep. 41.

Emigrant Agents. — A statute is not obnoxious to this clause of the Federal Constitution which does not directly affect commerce, as thus defined. The business of procuring contracts for personal labor to be performed out of the state is not a commodity of commerce, and any transportation of persons that might result from such contract is so remote and incidental as not to be deemed within the protection or meaning of the law of interstate commerce. *State v. Napier*, 63 S. Car. 60; *Williams v. Fears*, 179 U. S. 270; *State v. Hunt*, 129 N. Car. 686, 85 Am. St. Rep. 758.

The Acquisition and Ownership of Stock in Competing Railroads, organized under state laws by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. *Northern Securities Co. v. U. S.*, 193 U. S. 390 (dissenting opinion of White, J.), affirming 120 Fed. Rep. 721.

Instrumentalities of Interstate Commerce Included. — *Northern Securities Co. v. U. S.*, 193

U. S. 392 (dissenting opinion of White, J.), affirming 120 Fed. Rep. 721.

Interstate Commerce and Its Attendant Incidents to Be Distinguished. — *Williams v. Fears*, 179 U. S. 270.

Vehicles of Commerce Included. — See *Wrinkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80.

**62.** 1. Not Limited to Trade and Traffic. — *In re Bergen*, 115 Fed. Rep. 339; *U. S. v. Swift*, 122 Fed. Rep. 529, modified 196 U. S. 375.

Statute Prohibiting Driving Infected Cattle a Valid Exercise of Power to Regulate Commerce. — *U. S. v. Slater*, 123 Fed. Rep. 116.

3. Transportation Is Part of Interstate Commerce. — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 727, 25 Ky. L. Rep. 41; *People v. Miller*, 178 N. Y. 194; *Lowe v. Seaboard Air Line R. Co.*, 63 S. Car. 248, 90 Am. St. Rep. 678.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 619.

4. Transportation Across State Line Constitutes Interstate Commerce. — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *Williams v. Fears*, 110 Ga. 584; *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814; *Foppiano v. Speed*, 113 Tenn. 167; *Southern Express Co. v. Goldberg*, 101 Va. 619.

Place Where Title to Shipment Was Acquired by Shipper Immaterial. — *Gulf, etc., R. Co. v. Fort Grain Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 419.

Transportation of Live Stock — State Laws Superseded. — *Reid v. Colorado*, 187 U. S. 146.

7. Continuous Voyage. — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617. See also *Southern Express Co. v. Goldberg*, 101 Va. 619.

Intent Governs. — *Gulf, etc., R. Co. v. Fort Grain Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 845.

**63.** 1. Temporary Interruption of Voyage. — *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522; *State v. San Antonio, etc., R. Co.*, 32 Tex. Civ. App. 58. See also *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

2. Commerce Confined to One State. — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *In re Pooling Freights*, 115 Fed. Rep. 588.

, Freight Billed from Another State. — Where the carriage is wholly within a state, it does

**63. 2. Particular Transactions Constituting Interstate Commerce — a. CARRIAGE OF FREIGHT AND PASSENGERS.** — See note 7.

**64. Fares and Freights.** — See note 2.

c. INSURANCE. — See note 10.

**65. d. GRAIN ELEVATORS.** — See note 1.

f. PRODUCTION AND MANUFACTURE. — See note 3.

i. SALE OF GOODS — (1) *In General.* — See note 10.

**66. The Right to Sell Any Article Imported.** — See notes 2, 4, 5.

(2) *By Agents.* — See notes 7, 8, 9.

not constitute interstate commerce, although it was billed from a point in another state. *Louisville, etc., R. Co. v. Vancleave*, 110 Ky. 968.

**63. 4. Route Partly in Another State.** — U. S. v. *Lehigh Valley R. Co.*, 115 Fed. Rep. 373.

**Telegram.** — Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company and concerns only citizens of that state, the message is a domestic message; and its character in that respect is not altered by the circumstance that the line passes in part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state. *Western Union Tel. Co. v. Reynolds*, 100 Va. 459, 93 Am. St. Rep. 971.

**7. Transportation of Freight and Passengers.** — *Williams v. Fears*, 110 Ga. 584.

**64. 2. Southern Express Co. v. Goldberg**, 101 Va. 619. See also *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, 130 Fed. Rep. 46, *affirmed* (C. C. A.) 130 Fed. Rep. 110; *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785.

**10. Insurance Is Not Commerce.** — *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217.

**65. 1. Grain Elevators Not Engaged in Interstate Commerce.** — See *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452.

**3. Production or Manufacture Is Not Commerce.** — *Diamond Glue Co. v. U. S. Glue Co.*, 103 Fed. Rep. 838.

**10. Contracts for Sale and Transportation to Another State** — *United States*. — *Stockard v. Morgan*, 185 U. S. 27; *Caldwell v. North Carolina*, 187 U. S. 622; *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441; *U. S. v. Swift*, 122 Fed. Rep. 529, *modified* 196 U. S. 375; *Kessler v. Perilloux*, 127 Fed. Rep. 1011.

*District of Columbia.* — *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49.

*Georgia.* — *Stone v. State*, 117 Ga. 292; *Kehrer v. Stewart*, 117 Ga. 969.

*Idaho.* — *In re Kinyon*, 9 Idaho 642.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*Iowa.* — *State v. Hanaphy*, 117 Iowa 15.

*Kansas.* — *State v. Hickox*, 64 Kan. 650.

*Kentucky.* — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41.

*North Carolina.* — *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506.

*Pennsylvania.* — *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

*Tennessee.* — *Kimmell v. State*, 104 Tenn. 184.

*Texas.* — *Turner v. State*, 41 Tex. Crim. 545, (Tex. Crim. 1900) 55 S. W. Rep. 835.

*Wyoming.* — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

*Sales "C. O. D."* — *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441; *State v. Hanaphy*, 117 Iowa 15.

**66. 2. Right to Sell Imported Articles.** — *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

**4. Sale in Original Package.** — *New Castle v. Cutler*, 15 Pa. Super. Ct. 612. See also *In re Pringle*, 67 Kan. 364.

**5. Right Limited to First Sale.** — *In re Pringle*, 67 Kan. 364; *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157; *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

**7. Right to Sell by Agent** — *United States*. — *Stockard v. Morgan*, 185 U. S. 27; *Caldwell v. North Carolina*, 187 U. S. 622; *In re Bergen*, 115 Fed. Rep. 339. See also *Kessler v. Perilloux*, 127 Fed. Rep. 1011.

*District of Columbia.* — *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49.

*Georgia.* — *Racine Iron Co. v. McCommons*, 111 Ga. 536; *Stone v. State*, 117 Ga. 292; *Kehrer v. Stewart*, 117 Ga. 969.

*Idaho.* — *In re Kinyon*, 9 Idaho 642.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*Iowa.* — *State v. Hanaphy*, 117 Iowa 15.

*Kansas.* — *State v. Hickox*, 64 Kan. 650.

*Kentucky.* — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41.

*Michigan.* — *People v. Bunker*, 128 Mich. 160.

*Nebraska.* — *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020.

*North Carolina.* — *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506.

*Pennsylvania.* — *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

*Texas.* — *Turner v. State*, 41 Tex. Crim. 545; *Harkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 26; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

*Wyoming.* — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

**8. Nonresident Selling by Agent Is Engaged in Interstate Commerce** — *United States*. — *Stockard v. Morgan*, 185 U. S. 27; *Caldwell v. North Carolina*, 187 U. S. 622; *In re Bergen*, 115 Fed. Rep. 339; *Kessler v. Perilloux*, 127 Fed. Rep. 1012.

*District of Columbia.* — *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49.

*Georgia.* — *Racine Iron Co. v. McCommons*, 111 Ga. 536; *Stone v. State*, 117 Ga. 292; *Kehrer v. Stewart*, 117 Ga. 969.

*Idaho.* — *In re Kinyon*, 9 Idaho 642.

*Illinois.* — *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557.

*Iowa.* — *State v. Hanaphy*, 117 Iowa 15.

*Kansas.* — *State v. Hickox*, 64 Kan. 650.

**67.** See notes 1, 3, 4.

**3. Subjects of Interstate Commerce — a. LAWFUL SUBJECTS OF BARTER AND SALE.** — See note 5.

**68.** See notes 1, 2.

*Cigarettes.* — See note 9.

*Intoxicating Liquors.* — See note 10.

*Lottery Tickets.* — See note 11.

**69.** *Natural Gas.* — See note 2.

*c. POWER TO DETERMINE — Power of Congress.* — See note 6.

*Articles Inherently Unfit for Commerce.* — See note 9.

**70.** **4. When Protection of Commerce Clause Attaches.** — See notes 3, 4, 5, 6, 7, 8.

**5. When Protection of Commerce Clause Ceases — a. INCORPORATION WITH MASS OF PROPERTY OF STATE — Statement of Rule.** — See note 9.

*Kentucky.* — *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 377, 25 Ky. L. Rep. 41.

*Michigan.* — *People v. Bunker*, 128 Mich. 160.

*Nebraska.* — *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020.

*North Carolina.* — *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506.

*Pennsylvania.* — *New Castle v. Cutler*, 15 Pa. Super. Ct. 612.

*Tennessee.* — *Kimmell v. State*, 104 Tenn. 184.

*Texas.* — *Turner v. State*, 41 Tex. Crim. 545; *Harkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 26. See also *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

*Wyoming.* — *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948.

**66. 9. Sale After Arrival in State.** — *In re Kinyon*, 9 Idaho 642. See also *Collier v. Burgin*, 130 N. Car. 632.

**67. 1. Situation of Goods Immaterial as to Vendor.** — See *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020. *Compare Collier v. Burgin*, 130 N. Car. 632.

**3.** See *Camp v. State*, 42 Tex. Crim. 499; *Stone v. State*, 117 Ga. 292.

**4. Commission Merchants Selling Consignments.** — *Croy v. Obion County*, 104 Tenn. 525, 78 Am. St. Rep. 931. See also *American Steel, etc., Co. v. Speed*, 192 U. S. 500; *Muskegon v. Zeeryp*, 134 Mich. 181; *Kimmel v. State*, 104 Tenn. 184.

A person who takes orders from samples for goods which he engages to deliver, and which are to be shipped into the state from another state, is not engaged in interstate commerce, when such orders are not transmitted to such other state, or filled there, but are filled from goods, not in the original package of importation, sent to him in bulk, C. O. D., from such other state. *In re Pringle*, 67 Kan. 364.

**5. Lawful Subjects of Sale or Exchange.** — *State v. Hickox*, 64 Kan. 650; *People v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629.

**68. 1. Unsound or Infectious Articles.** — *State v. Hickox*, 64 Kan. 650; *People v. Niagara Fruit Co.*, 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629.

**2. Original Package No Protection.** — *Crossman v. Lurman*, 57 N. Y. App. Div. 393, affirmed 171 N. Y. 329, 98 Am. St. Rep. 599.

**9. Contrary View.** — *Austin v. Tennessee*, 179 U. S. 343.

**10. Intoxicating Liquors.** — *State v. Hanaphy*, 117 Iowa 15; *State v. Hickox*, 64 Kan. 650; *State v. Intoxicating Liquors*, 94 Me. 335; *Corbin v. McConnell*, 71 N. H. 350; *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741. See also *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68; *State v. Moody*, 70 S. Car. 56.

**11. Lottery Tickets** are subject to traffic and therefore subject to commerce, and the regulation of the carriage of such tickets from state to state by independent carriers is a regulation of commerce among the several states. *Lottery Case*, 188 U. S. 321.

**69. 2. Natural Gas.** — *Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co.*, 155 Ind. 545.

**6. Butfield v. Stranahan**, 192 U. S. 470.

**9. Right to Exclude Noncommercial Articles.** — *Hathaway v. McDonald*, 27 Wash. 659, 91 Am. St. Rep. 889.

**70. 3. Diamond Match Co. v. Ontonagon**, 188 U. S. 82; *State v. Intoxicating Liquors*, 94 Me. 335; *New Castle v. Cutler*, 15 Pa. Super. Ct. 612; *State v. International, etc., R. Co.*, 31 Tex. Civ. App. 219.

**4. When Final Movement Begins.** — *American Steel, etc., Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814.

**5. Preparation for Shipment Not Sufficient.** — *American Steel, etc., Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814.

**6. Actual Delivery to Carrier Necessary.** — *Diamond Match Co. v. Ontonagon*, 188 U. S. 82. See also *American Steel, etc., Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814.

**7. Intent to Export Insufficient.** — *Diamond Match Co. v. Ontonagon*, 188 U. S. 82. See also *American Steel, etc., Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814.

**8. American Steel, etc., Co. v. Speed**, 110 Tenn. 524, 100 Am. St. Rep. 814.

**9. Property a Subject of Interstate Commerce until Mingled with Property of State** — *United States*. — *Austin v. Tennessee*, 179 U. S. 343; *American Steel, etc., Co. v. Speed*, 192 U. S. 500; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258.

*Georgia.* — *Kehrer v. Stewart*, 117 Ga. 969.

*Illinois.* — *In re Pitkin*, 193 Ill. 268.

*Kentucky.* — See *Com. v. Read Phosphate Co.*, 113 Ky. 32.

*New Jersey.* — *Gerdan v. Davis*, 67 N. J. L. 88.

**71.** See note 1.

*b.* WHEN INCORPORATION TAKES PLACE—(1) *In General*—The First Sale.—See note 6.

Necessity of Sale.—See notes 7, 8.

**72.** (2) *Original Packages*—(a) *Statement of Rule*.—See note 1.  
Right to Sell.—See note 2.

**73.** (b) What Constitutes Original Package—Original Package Defined.—See notes 3, 4.

A Package Need Not Be Covered.—See note 5.

Small Packages Inclosed in Larger Ones.—See notes 6, 7.

**74.** Small Pasteboard Slide Boxes Containing Ten Cigarettes.—See note 2.

Packages Suited to Retail Trade.—See note 4.

Packages Adapted for Unlawful Trade.—See note 6.

Original Package for Purpose of Taxation.—See note 7.

(d) *Wilson Law*.—See note 10.

*North Carolina*.—Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

*North Dakota*.—In re Lipschitz, (N. Dak. 1903) 95 N. W. Rep. 157.

*Pennsylvania*.—New Castle v. Cutler, 15 Pa. Super. Ct. 612.

*Texas*.—Gulf, etc., R. Co. v. State, 97 Tex. 274.

**71. 1. Protection Against Discriminating State Legislation.**—Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

**6. Sale Destroys Character as Import.**—Kehrer v. Stewart, 117 Ga. 969; Wrought Iron Range Co. v. Campen, 135 N. Car. 506; New Castle v. Cutler, 15 Pa. Super. Ct. 612.

**7. Sale Necessary to Destroy Character as Import.**—Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

**8. Arrival at Final Destination and Exposure for Sale or Use.**—Racine Iron Co. v. McCommons, 111 Ga. 536; Kehrer v. Stewart, 117 Ga. 969; Gerdan v. Davis, 67 N. J. L. 88; In re Lipschitz, (N. Dak. 1903) 95 N. W. Rep. 157; Croy v. Obion County, 104 Tenn. 525, 78 Am. St. Rep. 931. See also American Steel, etc., Co. v. Speed, 192 U. S. 500; Kimmell v. State, 104 Tenn. 184.

**Not until Delivery or Sale.**—Gulf, etc., R. Co. v. State, 97 Tex. 274.

**72. 1. Original Package in Hands of Importer Protected from State Interference.**—May v. New Orleans, 178 U. S. 496; New Castle v. Cutler, 15 Pa. Super. Ct. 612. See also Gulf, etc., R. Co. v. State, 97 Tex. 274.

**Imports Stored in Government Warehouse in Original Package Not Subject to State Regulation.**—Siegfried v. Raymond, 190 Ill. 424.

**2. Right to Sell in Original Package.**—Racine Iron Co. v. McCommons, 111 Ga. 536; New Castle v. Cutler, 15 Pa. Super. Ct. 612.

**73. 3. Original Package Defined.**—Austin v. Tennessee, 179 U. S. 343; Cook v. Marshall County, 119 Iowa 384, 104 Am. St. Rep. 283. See also Croy v. Obion County, 104 Tenn. 525, 78 Am. St. Rep. 931.

**4. Identical Package Delivered to Carrier at Point of Shipment.**—Gerdan v. Davis, 67 N. J. L. 88; Kimmell v. State, 104 Tenn. 184. See also Croy v. Obion County, 104 Tenn. 525, 78 Am. St. Rep. 931; Saulsbury v. State, 43 Tex. Crim. 90, 96 Am. St. Rep. 837; Austin v. Tennessee, 179 U. S. 343.

**5. Covering Unnecessary.**—Cook v. Marshall County, 119 Iowa 384, 104 Am. St. Rep. 283. See also Austin v. Tennessee, 179 U. S. 343.

**6. Outside Receptacle Constitutes Original Package.**—May v. New Orleans, 178 U. S. 496; Austin v. Tennessee, 179 U. S. 343; U. S. v. Slater, 123 Fed. Rep. 115; Com. v. Leslie, 20 Pa. Super. Ct. 529, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73; Kimmell v. State, 104 Tenn. 184; Croy v. Obion County, 104 Tenn. 525, 78 Am. St. Rep. 931.

**7. Separate Wrapping and Labeling of Small Packages.**—May v. New Orleans, 178 U. S. 496; Com. v. Leslie, 20 Pa. Super. Ct. 529, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73.

**74. 2. Packages of Ten Cigarettes.**—Contra, Austin v. Tennessee, 179 U. S. 343, affirming 101 Tenn. 563, 70 Am. St. Rep. 703, cited in 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) p. 74, note 2; Cook v. Marshall County, 119 Iowa 384, 104 Am. St. Rep. 283.

**4. Cook v. Marshall County,** 119 Iowa 384, 104 Am. St. Rep. 283.

**6. Austin v. Tennessee,** 179 U. S. 343; Cook v. Marshall County, 119 Iowa 384, 104 Am. St. Rep. 283. See also Com. v. Leslie, 20 Pa. Super. Ct. 529; Kimmell v. State, 104 Tenn. 184.

**7. Determination of Internal Revenue Department Not Conclusive.**—Austin v. Tennessee, 179 U. S. 343, affirming 101 Tenn. 563, 70 Am. St. Rep. 703.

**10. Wilson Law.**—Pabst Brewing Co. v. Crenshaw, 120 Fed. Rep. 144; State v. Bengsch, 170 Mo. 81; Harrell v. Speed, 113 Tenn. 224, 106 Am. St. Rep. 814; Foppiano v. Speed, 113 Tenn. 167. See also State v. Hickox, 64 Kan. 650; State v. Bixman, 162 Mo. 1.

**Law Not Applicable to Shipments in Transit.**—State v. Intoxicating Liquors, 94 Me. 335.

**When Wilson Law Applies.**—Southern R. Co. v. Heymann, 118 Ga. 616.

**Operation of Statute.**—Where liquor has been transported into the state to the place of its ultimate destination and remains there in storage awaiting the orders of the consignee, its transportation as an article of interstate commerce has ceased, and it has arrived within the state so as to be subject to the operation of the laws of the state within the meaning of the provision of the Wilson Law. State v. Intoxicating Liquors, 96 Me. 415.



**75. IV. STATE STATUTES AFFECTING INTERSTATE COMMERCE — 1. In General — General Rule.** — See note 1.

Direct Burdens on Commerce. — See note 3.

Purpose of Law Immaterial. — See notes 5, 6.

**76. 2. Construction of Statutes — a. CONSTRUCTION TO SUSTAIN STATUTE — (1) General Rule.** — See notes 1, 2, 3.

(2) *Partial Invalidity.* — See notes 4, 5, 6.

**77. b. FOLLOWING CONSTRUCTION OF STATE COURT.** — See note 1.

**3. Discrimination Against Products and Citizens of Other States.** — See notes 3, 4.

**78. 4. Inspection Laws — a. VALIDITY — (1) In General.** — See note 3.

Power Recognized in Constitution. — See note 4.

**79. Paramount Power of Congress.** — See note 1.

Inspection in Transit. — See note 2.

(2) *Discriminations.* — See note 3.

**b. WHAT ARE INSPECTION LAWS — (1) General Principles — Must Be Such in Fact.** — See note 5.

**81. c. INSPECTION CHARGES — Reasonable and Excessive Charges.** — See note 8.

**82.** See notes 1, 2.

The Wilson Law did not confer power on the states to interfere with or regulate interstate commerce in intoxicating liquors by passage of laws purporting to have an extraterritorial effect. *Corbin v. McConnell*, 71 N. H. 350.

**75. 1. General Rule as to Validity of State Statutes.** — Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503. See also Louisville, etc., R. Co. v. Eubank, 184 U. S. 27.

State Statute Providing a Special Limitation for Actions Founded on Instruments Executed Out of the State Not an Interference with Interstate Commerce. — *Higgins v. Graham*, 143 Cal. 131.

**3. Statutes Imposing Direct Burdens on Interstate Commerce Void.** — *In re Bergen*, 115 Fed. Rep. 339.

**5. Bona Fide Purpose Immaterial.** — *State v. Northern Pac. Express Co.*, 27 Mont. 422.

**6. Effect Alone Considered.** — Louisville, etc., R. Co. v. Eubank, 184 U. S. 27.

**76. 1. Construction Sustaining Statute Adopted.** — *John Deere Plow Co. v. Wyland*, 69 Kan. 255, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 76; *Com. v. Keary*, 198 Pa. St. 500; *Com. v. Vandyke*, 13 Pa. Super. Ct. 484; *Com. v. McCann*, 14 Pa. Super. Ct. 221, affirmed 198 Pa. St. 509; *Johnstown v. Central Dist.*, etc., Tel. Co., 23 Pa. Super. Ct. 381.

**2. Limiting Statute to Internal Traffic.** — *People v. Roberts*, 36 N. Y. App. Div. 597, affirmed 167 N. Y. 617; *Johnstown v. Central Dist.*, etc., Tel. Co., 23 Pa. Super. Ct. 381. See also *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49.

**3. Statutes Held Applicable Only to Internal Commerce.** — *Beitzell v. District of Columbia*, 21 App. Cas. (D. C.) 49; *People v. Roberts*, 36 N. Y. App. Div. 597, affirmed 167 N. Y. 617; *Com. v. Vandyke*, 13 Pa. Super. Ct. 484; *Com. v. McCann*, 14 Pa. Super. Ct. 221 affirmed 198 Pa. St. 509; *Johnstown v. Central Dist.*, etc., Co., 23 Pa. Super. Ct. 381. See also *State v. Northern Pac. Express Co.*, 27 Mont. 422.

**4. Statute Void in Part and Valid in Part.** — *Com. v. Petranich*, 183 Mass. 217. See also

*In re Abel*, 10 Idaho 288; *State v. Northern Pac. Express Co.*, 27 Mont. 422.

**5. Enforced Where Void Part Is Severable.** — *Com. v. Petranich*, 183 Mass. 217. See also *In re Abel*, 10 Idaho 288.

**6. Whole Act Void Where Void Part Not Separable.** — *Com. v. Petranich*, 183 Mass. 217. See also *State v. Northern Pac. Express Co.*, 27 Mont. 422.

**77. 1. Construction by State Court of Last Resort Followed.** — Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503; Louisville, etc., R. Co. v. Eubank, 184 U. S. 27.

**3. Failure to Discriminate Not Conclusive of Validity.** — *Caldwell v. North Carolina*, 187 U. S. 622; *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**4. Discriminating Statute Void.** — *Com. v. Petranich*, 183 Mass. 217; *People v. Coler*, 166 N. Y. 144; *State v. Yanders*, 5 Ohio Dec. 575, 7 Ohio N. P. 659; *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741.

**Statute Permitting Carrier to Discriminate Unconstitutional.** — *State v. Omaha*, etc., R. Co., 113 Iowa 30, 86 Am. St. Rep. 357.

**78. 3. Bona Fide Inspection Laws Valid.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144; *State v. Bixman*, 162 Mo. 1.

**4. Constitution Recognizes Power.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**79. 1. Power of State Subordinate to Power of Congress.** — *Austin v. Tennessee*, 179 U. S. 343.

**2. Inspection of Goods in Transit.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**3. Discriminating Statute Void.** — *State v. Bixman*, 162 Mo. 1.

**5. Adaptation of Means to Ends.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**81. 8. Reasonable Inspection Charge Valid.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**82. 1. Unreasonable Charge Is Void.** — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**2. Excess Showing Purpose to Evade Constitu-**

**82.** Power to Determine Reasonableness. — See note 4.

Discrimination. — See note 6.

**5. Quarantine and Sanitary Laws — a. VALIDITY IN GENERAL —**  
Power of State. — See notes 7, 8, 9.

**83.** Limit of Power. — See notes 1, 2, 3.

Effect of Congressional Regulation. — See note 4.

**84.** **6. Exclusion of Imports — a. LAWFUL SUBJECTS OF COMMERCE. —**  
See notes 1, 2

**b. ADULTERATED, UNSOUND, OR INFECTIOUS ARTICLES. —** See  
note 3.

**85.** Food Products. — See notes 1, 2.

Regulations to Secure Purity. — See note 3.

Fraudulent Articles. — See note 4.

**8. Sale of Goods. —** See notes 7, 8.

Fraudulent Goods. — See note 11.

**86.** Goods Made by Convict Labor. — See note 2.

**87.** **15. Cigarettes. —** See note 7.

**16. Oleomargarine — Prohibiting Importation and Sale. —** See notes 9, 10.

**88.** Preventing Deception in Sale. — See notes 2, 3.

tional Limitations. — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**82. 4. Power of Congress. —** See *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**6. Exemption from Inspection of Beer Manufactured in State for Export Not Discrimination. —**  
*Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144.

**7. Quarantine and Sanitary Laws Valid. —**  
*Rasmussen v. Idaho*, 181 U. S. 198; *Smith v. St. Louis, etc., R. Co.*, 181 U. S. 248; *Compagnie Francaise, etc., v. Louisiana State Board of Health*, 186 U. S. 380; *Reid v. Colorado*, 187 U. S. 147; *Smith v. Lowe, (C. C. A.)* 121 Fed. Rep. 753.

**8. Uniformity of Regulation Not Required. —**  
*Compagnie Francaise, etc., v. Louisiana State Board of Health*, 186 U. S. 380.

**9. Compagnie Francaise, etc., v. Louisiana State Board of Health, 186 U. S. 380.**

**83. 1. Necessity the Limit of Power. —**  
*Smith v. Lowe, (C. C. A.)* 121 Fed. Rep. 753.

**2. Rasmussen v. Idaho, 181 U. S. 198; Smith v. St. Louis, etc., R. Co., 181 U. S. 248.**

**3. Smith v. St. Louis, etc., R. Co., 181 U. S. 248, 45 U. S. (L. ed.) 847. See also Smith v. Lowe, (C. C. A.) 121 Fed. Rep. 753.**

**4. Power of Congress Is Paramount. — Reid v. Colorado, 187 U. S. 137.**

**84. 1. State Cannot Prevent Importation of Legitimate Articles of Commerce. — Austin v. Tennessee, 179 U. S. 343; In re Davenport, 102 Fed. Rep. 540; People v. Buffalo Fish Co., 164 N. Y. 93, 79 Am. St. Rep. 622; People v. Booth, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889.**

**2. People v. Booth, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321.**

**3. State May Prohibit Importation of Infectious Articles. — Crossman v. Lurman, 192 U. S. 189. See also People v. Bishopp, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 12.**

**85. 1. Crossman v. Lurman, 192 U. S. 189; People v. Bishopp, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 12.**

**2. Crossman v. Lurman, 192 U. S. 189; Peo-**

**ple v. Buffalo Fish Co., 164 N. Y. 93, 79 Am. St. Rep. 622; People v. Booth, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 321; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889.**

**3. Total Exclusion Not Permitted. — Arbuckle v. Blackburn, (C. C. A.) 113 Fed. Rep. 616. See also Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599.**

**4. Fraudulent Articles May Be Excluded. — Crossman v. Lurman, 192 U. S. 189; Arbuckle v. Blackburn, (C. C. A.) 113 Fed. Rep. 616; State v. Rogers, 95 Me. 94; Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889.**

**7. Burdens on Sale in Original Package. — Stockard v. Morgan, 185 U. S. 27.**

**8. Sheppard v. Dowling, 127 Ala. 1, 85 Am. St. Rep. 68.**

**11. Sale of Fraudulent Articles May Be Prohibited. — Arbuckle v. Blackburn, (C. C. A.) 113 Fed. Rep. 616; People v. Niagara Fruit Co., 75 N. Y. App. Div. 11, affirmed 173 N. Y. 629.**

**86. 2. Statute Prohibiting Sale of Goods Made by Convict Labor Unconstitutional. — State v. Yanders, 5 Ohio Dec. 575, 7 Ohio N. P. 659.**

**87. 7. State Cannot Prohibit, Tax, or Burden Sale of Cigarettes in Original Package. — Austin v. Tennessee, 179 U. S. 343.**

**9. Oleomargarine Cannot Be Excluded by State. — McAllister v. State, 94 Md. 290.**

**10. Coloring Oleomargarine Pink. — State v. Bruce, 55 W. Va. 384.**

**88. 2. State May Prevent Fraudulent Imitation of Butter. — McAllister v. State, 94 Md. 290; State v. Rogers, 95 Me. 94; Com. v. Vandye, 13 Pa. Super. Ct. 484, 9 Pa. Dist. 41; Com. v. McCann, 14 Pa. Super. Ct. 221, affirmed 198 Pa. St. 509. See also Capital City Dairy Co. v. Ohio, 183 U. S. 238.**

A state statute regulating the manufacture and sale within the state of oleomargarine by a domestic corporation does not constitute an interference with interstate commerce. *Capital City Dairy Co. v. Ohio, 183 U. S. 238.*

**3. Coloring in Imitation of Butter. — State v. Rogers, 95 Me. 94. See also Capital City Dairy Co. v. Ohio, 183 U. S. 238.**

- 90.** 22. *Telegraphs and Telephones* — *d. TAXATION.* — See note 2.  
*e. CHARGE FOR POLES IN STREET.* — See note 4.
- 91.** *i. GRANTING ONE COMPANY A MONOPOLY.* — See note 8.
- 92.** *j. EFFECT OF CONGRESSIONAL LEGISLATION.* — See notes 1, 2.  
 25. *Liens.* — See note 9.
- 93.** 31. *Natural Gas.* — See note 3.
- 94.** 35. *Suppression of Gambling.* — See note 3.  
 40. *Manufacture.* — See note 9.
- 95.** 42. *Railroads and Other Carriers* — *a. IN GENERAL.* — See note 1.  
*Police Regulations.* — See notes 3, 4.
- 96.** *c. DISCRIMINATION — In Rates or Facilities Furnished.* — See notes 7, 8.
- 97.** *e. CONTRACTS OF CARRIAGE — Form of Contract.* — See note 6.  
*Exemption from Liability of Common Carrier.* — See note 7.
- 98.** *Limiting Liability to Its Own Lines.* — See note 1.
- 99.** *g. RUNNING OF TRAINS — Speed of Trains.* — See note 5.
- 100.** *j. TICKETS AND MILEAGE BOOKS — Sale by Authorized Agents.* — See note 7.
- 101.** *k. RATES OF CARRIAGE — State Cannot Regulate.* — See notes 3, 4.

**90.** 2. *Property Tax Valid.* — *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412; *Taylor v. Postal Tel. Cable Co.*, 202 Pa. St. 583.

**4.** *Municipality May Charge for Each Pole in Street.* — *Western Union Tel. Co. v. New Hope*, 187 U. S. 419; *Postal Tel. Cable Co. v. Newport*, 76 S. W. Rep. 159, 25 Ky. L. Rep. 635; *Taylor v. Postal Tel. Cable Co.*, 202 Pa. St. 583; *Norwood v. Western Union Tel. Co.*, 25 Pa. Super. Ct. 406; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306. See also *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125.

**91.** 8. *Exclusive Franchise to Conduct Intrastate Service Valid.* — *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

**92.** 1. *State Legislation Superseded.* — See *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

**2.** *Grant of Monopoly Void.* — See *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

**9.** *Maritime Liens.* — *The Robert Dollar*, 115 Fed. Rep. 218; *The Energia*, 124 Fed. Rep. 842.

**93.** 3. *Preventing Piping of Natural Gas into Other States.* — *Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co.*, 155 Ind. 545.

**94.** 3. *Transmitting Information to Pool Rooms.* — *Louisville v. Wehmhoff*, 116 Ky. 845.

**9.** *Manufacture May Be Regulated or Prohibited by State.* — *Capital City Dairy Co. v. Ohio*, 183 U. S. 238.

**95.** 1. *Georgia Statute Requiring Carriers to Trace Freight Not an Interference with Interstate Commerce.* — *Central of Georgia R. Co. v. Murphy*, 116 Ga. 863.

*A Statute Imposing a Penalty for a Failure to Pay Damages Within a Certain Time is not an interference with interstate commerce.* *Porter v. Charleston, etc., R. Co.*, 63 S. Car. 169, 90 Am. St. Rep. 670.

*Statute Imposing Penalty for Diverting Shipment from Specified Route Not Constitutional as to Interstate Shipments.* — *Lowe v. Seaboard Air Line R. Co.*, 63 S. Car. 248, 90 Am. St. Rep. 678.

*Statute Imposing Penalty for Failure to Furnish Cars upon Request of Shipper Not an Interference with Interstate Commerce.* — *Houston, etc., R. Co. v. Mayes*, 36 Tex. Civ. App. 606.

**3.** *Burdens on Transportation Void.* — *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Willfong v. Omaha, etc., R. Co.*, 116 Iowa 548.

**4.** *Police Laws Not Regulations of Commerce.* — *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Willfong v. Omaha, etc., R. Co.*, 116 Iowa 548.

**96.** 7. *State Statute Forbidding Discrimination Void.* — *Louisville, etc., R. Co. v. Eubank*, 184 U. S. 27.

*Statute Preventing Discrimination by Carrier Against Other Carriers Not a Regulation of Interstate Commerce.* — *Adams Express Co. v. State*, 161 Ind. 328.

*Statute Imposing a Penalty for Refusal to Receive Freight Not an Interference with Interstate Commerce.* — *Currie v. Raleigh, etc., R. Co.*, 135 N. Car. 535.

**8.** *Statute Limited to Internal Traffic.* — *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503; *Louisville, etc., R. Co. v. Eubank*, 184 U. S. 27.

**97.** 6. *Form of Contract May Be Regulated by State.* — *Western Sash, etc., Co. v. Chicago, etc., R. Co.*, 177 Mo. 641; *Galveston, etc., R. Co. v. Fales*, 33 Tex. Civ. App. 457.

**7.** *Prohibiting Contracts for Exemption from Liability as Common Carrier.* — *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595.

**98.** 1. *Form of Contract Limiting Liability May Be Regulated.* — *Western Sash, etc., Co. v. Chicago, etc., R. Co.*, 177 Mo. 641.

**99.** 5. *Speed in Neighborhood of Towns, Crossings, Curves, Etc.* — *Erb v. Morasch*, 177 U. S. 584; *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190.

**100.** 7. *Sale by "Scalpers" May Be Prohibited.* — *Com. v. Keary*, 198 Pa. St. 500.

**101.** 3. *State Regulation of Rates for Interstate Transportation Void.* — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785; *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, 130

**102.** The Failure of Congress to Make Regulations. — See note 2.

By the Interstate Commerce Act. — See note 5.

Regulation Limited to Internal Transportation. — See notes 6, 7.

**103.** Increasing Rates After Acceptance for Transportation. — See note 1.**104.** *p.* LIABILITY FOR INJURIES HAPPENING WITHIN STATE — In General. — See notes 3, 4.*r.* CONNECTING CARRIERS. — See note 9.*u.* GARNISHMENT. — See note 13.**105.** *w.* EFFECT OF INTERSTATE COMMERCE ACT. — See note 2.

## See notes 5, 6, 7, 8.

**106.** *b.* WHAT CONSTITUTES "DOING BUSINESS IN STATE." — See note 1.*c.* KNOWN PLACE OF BUSINESS AND AUTHORIZED AGENT. — See note 3.*d.* TAXATION AND LICENSE. — See notes 5, 6, 7.

Fed. Rep. 46, *affirmed* (C. C. A.) 130 Fed. Rep. 110; *Southern Express Co. v. Goldberg*, 101 Va. 619.

**101. 4. Power of State Railroad Commissioners.** — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, 130 Fed. Rep. 46, *affirmed* (C. C. A.) 130 Fed. Rep. 110.

**102. 2. Absence of Congressional Regulation Does Not Authorize State Regulation.** — *Southern Express Co. v. Goldberg*, 101 Va. 619.

**5. Effect of Interstate Commerce Act.** — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785.

**6. Transportation Wholly Within State.** — *Railroad Com'r v. Wabash R. Co.*, 123 Mich. 669; *Southern Express Co. v. Goldberg*, 101 Va. 619.

**7. Regulation of Part of Through Transportation Within State.** — *Southern Express Co. v. Goldberg*, 101 Va. 619.

**103. 1. Forbidding Increase of Rates Pending Transportation.** — *Currie v. Raleigh, etc., R. Co.*, 135 N. Car. 535.

**104. 3. Statute Regulating Liability Not a Regulation of Commerce.** — *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477; *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222, 97 Am. St. Rep. 713.

**State Statute Prohibiting Limitation of Liability for Loss of Baggage Not a Regulation of Commerce.** — *Mexican Nat. R. Co. v. Ware*, (Tex. Civ. App. 1900) 60 S. W. Rep. 343.

**4. Liability for Malfeasance or Nonfeasance Determined by State Law.** — *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222, 97 Am. St. Rep. 713.

**9. Requiring Railroads to Draw Cars of Other Roads.** — See *Adams Express Co. v. State*, 161 Ind. 328.

**State May Require Establishment of Track Connections and Transfer Facilities.** — *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287.

**Liability of Connecting Carriers.** — *Kavanaugh v. Southern R. Co.*, 120 Ga. 62.

**13. Attachment of Cars.** — A car sent loaded with freight from one state into a second state and to be returned loaded to the former, in the transaction of interstate commerce, cannot be levied on under an attachment in the latter state; nor will another carrier having such car

in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of having received possession of the car from another carrier against which an attachment was issued, as such attachment would be in violation of the commerce clause of the constitution and of the Interstate Commerce Act. *Wall v. Norfolk, etc., R. Co.*, 52 W. Va. 485.

**105. 2. Sheldon v. Wabash R. Co.**, 105 Fed. Rep. 785.

**5. Limitation on Power of State.** — *Kessler v. Perilloux*, 127 Fed. Rep. 1012, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *John Deere Plow Co. v. Wyland*, 69 Kan. 255.

**6. Cannot Exclude Foreign Corporation Engaged in Interstate Commerce.** — *Kessler v. Perilloux*, 127 Fed. Rep. 1012, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *John Deere Plow Co. v. Wyland*, 69 Kan. 255; *Com. v. Read Phosphate Co.*, 113 Ky. 32; *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217.

**7. Kessler v. Perilloux**, 127 Fed. Rep. 1012, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *John Deere Plow Co. v. Wyland*, 69 Kan. 255; *Com. v. Read Phosphate Co.*, 113 Ky. 32. See also *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217.

**8. Corporations Equally with Individuals Protected by Commerce Clause Against State Burdens.** — *Kessler v. Perilloux*, 127 Fed. Rep. 1012, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *John Deere Plow Co. v. Wyland*, 69 Kan. 255; *Com. v. Read Phosphate Co.*, 113 Ky. 32. See also *Fisher v. Traders' Mut. L. Ins. Co.*, 136 N. Car. 217.

**106. 1. Interstate Commerce Does Not Constitute "Doing Business Within" State.** — *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441; *Havens, etc., Co. v. Diamond*, 93 Ill. App. 557; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 106; *Com. v. Hogan, etc., Co.*, 74 S. W. Rep. 737, 25 Ky. L. Rep. 41. See also *Northwestern Mut. L. Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572.

**3. Contrary View.** — *State v. American Book Co.*, 65 Kan. 847.

**5. Tax on Capital Stock or Amount of Business.** — *People v. Roberts*, 36 N. Y. App. Div. 597, *affirmed* 167 N. Y. 617.

**6. Taxation for Privilege of Doing Business.** —

**107.** See note 1.

*e.* RIGHT TO BUY AND SELL — A Foreign Corporation Has the Right to Sell. — See notes 3, 4, 5.

**108.** *g.* RIGHT TO SUE. — See note 1.

**44.** State Taxation — *a.* VALIDITY IN GENERAL — (1) *Statement of Rule.* — See note 4.

**109.** (2) *What Constitutes Tax on Commerce* — Mode of Collection Immaterial. — See note 7.

Compensation for Facilities Furnished. — See note 8.

**110.** Tax on Incidents of Commerce. — See note 1.

Taxation of Business Transacted in State. — See note 3.

(3) *Separation of Interstate from Intrastate Commerce.* — See note 7.

**111.** See note 1.

Allen *v.* Pullman's Palace Car Co., 191 U. S. 171; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., (C. C. A.) 118 Fed. Rep. 239; State *v.* Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459; Northwestern Mut. L. Ins. Co. *v.* Lewis and Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572; People *v.* Roberts, 36 N. Y. App. Div. 597, affirmed 167 N. Y. 617; Lacy *v.* Armour Packing Co., 134 N. Car. 567; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 86 Am. St. Rep. 877.

**106.** 7. License Tax Valid Except as Applied to Business of Interstate Commerce. — Allen *v.* Pullman's Palace Car Co., 191 U. S. 171; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., (C. C. A.) 118 Fed. Rep. 239; State *v.* Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459; Pullman Palace Car Co. *v.* Adams, 78 Miss. 814, 84 Am. St. Rep. 647; Lacy *v.* Armour Packing Co., 134 N. Car. 567; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 86 Am. St. Rep. 877.

**107.** 1. Exclusion under Guise of License Tax. — *In re* Kinyon, 9 Idaho 642; Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 86 Am. St. Rep. 877.

3. Foreign Corporation Has Right to Sell in State. — *In re* Kinyon, 9 Idaho 642.

4. Sales by Agents and Correspondence. — *In re* Kinyon, 9 Idaho 642.

5. Compliance with State Regulations Not Necessary. — *In re* Kinyon, 9 Idaho 642.

**108.** 1. Right to Sue Without Compliance with State Requirements. — See John Deere Plow Co. *v.* Wyland, 69 Kan. 255.

4. Interstate Commerce Cannot Be Taxed by State. — *United States.* — Stockard *v.* Morgan, 185 U. S. 27; Caldwell *v.* North Carolina, 187 U. S. 622; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160; Allen *v.* Pullman's Palace Car Co., 191 U. S. 171; Norfolk, etc., R. Co. *v.* Sims, 191 U. S. 441; New York *v.* Knight, 192 U. S. 21; American Steel, etc., Co. *v.* Speed, 192 U. S. 500; St. Clair County *v.* Interstate Sand, etc., Transfer Co., 192 U. S. 454; *Ex p.* Green, 114 Fed. Rep. 959; Southern Express Co. *v.* Ensley, 116 Fed. Rep. 756.

Georgia. — Williams *v.* Fears, 110 Ga. 584.

Idaho. — *In re* Kinyon, 9 Idaho 642.

Michigan. — People *v.* Bunker, 128 Mich. 160.

Mississippi. — Adams *v.* Mississippi Lumber Co., 84 Miss. 23; Pullman Palace Car Co. *v.* Adams, 78 Miss. 814, 84 Am. St. Rep. 647.

Nebraska. — Menke *v.* State, (Neb. 1904) 97 N. W. Rep. 1020.

New York. — People *v.* Roberts, 36 N. Y. App. Div. 597, affirmed 167 N. Y. 617; People *v.* Miller, 178 N. Y. 194.

Pennsylvania. — Johnstown *v.* Central Dist., etc., Tel. Co., 23 Pa. Super. Ct. 381; New Castle *v.* Cutler, 15 Pa. Super. Ct. 612.

South Dakota. — State *v.* Zophy, 14 S. Dak. 119, 86 Am. St. Rep. 741.

**109.** 7. Test of Constitutionality. — Kehrer *v.* Stewart, 117 Ga. 969; People *v.* Bunker, 128 Mich. 160; Wrought Iron Range Co. *v.* Campen, 135 N. Car. 506; New Castle *v.* Cutler, 15 Pa. Super. Ct. 612.

8. Charge for Facilities Furnished Valid. — Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160; Taylor *v.* Postal Tel. Cable Co., 202 Pa. St. 583; Norwood *v.* Western Union Tel. Co., 25 Pa. Super. Ct. 406. See also Western Union Tel. Co. *v.* Wakefield, (Neb. 1903) 95 N. W. Rep. 659; New Hope *v.* Western Union Tel. Co., 16 Pa. Super. Ct. 306.

Tax for Police Supervision of Property and Instrumentalities of Telegraph Company Valid. — Norwood *v.* Western Union Tel. Co., 25 Pa. Super. Ct. 406.

**110.** 1. An Independent Local Service, preliminary or subsequent to any interstate transportation, may be taxed by the state. New York *v.* Knight, 192 U. S. 21.

3. Tax on Business Within State. — Williams *v.* Fears, 110 Ga. 584; People *v.* Miller, 178 N. Y. 194.

7. Taxation of Carriers Engaged in Both Interstate and Intrastate Business. — State *v.* Northern Pac. Express Co., 27 Mont. 422, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110; State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394.

**111.** 1. Partial Invalidity — *United States.* — New York *v.* Knight, 192 U. S. 21.

Alabama. — Nashville, etc., R. Co. *v.* Alabama City, 134 Ala. 414.

Georgia. — Kehrer *v.* Stewart, 117 Ga. 969.

Mississippi. — See Pullman Co. *v.* Adams, 78 Miss. 814, 84 Am. St. Rep. 647.

Montana. — State *v.* Northern Pac. Express Co., 27 Mont. 422, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111; State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394.

Nebraska. — Western Union Tel. Co. *v.* Wakefield, (Neb. 1903) 95 N. W. Rep. 659.

New York. — People *v.* Roberts, 36 N. Y. App. Div. 597, affirmed 167 N. Y. 617.

- 111.** (4) *Discrimination*. — See note 2.  
*b. PROPERTY TAX* — (1) *Instrumentalities of Commerce*. — See note 6.  
**112.** See notes 1, 2.  
**113.** (3) *Bridges*. — See note 4.  
 (4) *Imports, Interstate and Foreign*. — See note 6.  
**114.** See notes 1, 2, 3.  
*Discrimination*. — See notes 4, 6.  
 (5) *Exports*. — See note 8.  
**115.** See notes 1, 5.  
 (6) *Goods in Transit*. — See note 6.  
*Temporary Interruption of Transit in State*. — See notes 9, 10.  
**116.** *c. TRAVELERS AND IMMIGRANTS*. — See note 4.  
*d. CARRIERS* — (2) *Passengers* — In General. — See note 7.

*North Carolina*. — Lacy v. Armour Packing Co., 134 N. Car. 567.

*Pennsylvania*. — Johnstown v. Central Dist., etc., Tel. Co., 23 Pa. Super. Ct. 381.

*Virginia*. — See Postal Tel. Cable Co. v. Norfolk, 101 Va. 125.

**111. 2. Discriminating Tax Void.** — Com. v. Petranich, 183 Mass. 217; Adams v. Mississippi Lumber Co., 84 Miss. 23; New Castle v. Cutler, 15 Pa. Super. Ct. 612; State v. Zophy, 14 S. Dak. 119, 86 Am. St. Rep. 741.

**6. Instrumentalities of Commerce Having Situs in State May Be Taxed.** — Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160; Western Union Tel. Co. v. Missouri, 190 U. S. 412; Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379; Southern R. Co. v. Mitchell, 139 Ala. 629; *In re Kinyon*, 9 Idaho 642; *In re Abel*, 10 Idaho 288; Louisville, etc., Ferry Co. v. Com., 108 Ky. 717; Postal Tel. Cable Co. v. Norfolk, 101 Va. 125.

**112. 1. Property Not Having Situs in State.** — Williams v. Fears, 110 Ga. 584.

**2. Tax on Property Because Used in Interstate or Foreign Commerce Void.** — Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160.

**113. 4. Tax on Bridge Used for Interstate Commerce Valid.** — Southern R. Co. v. Mitchell, 139 Ala. 629.

**6. Tax on Goods Transported.** — Norfolk, etc., R. Co. v. Sims, 191 U. S. 441; American Steel, etc., Co. v. Speed, 192 U. S. 500; Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

**114. 1. Imports May Be Taxed After Mingling with Mass of Property of State.** — May v. New Orleans, 178 U. S. 496; Norfolk, etc., R. Co. v. Sims, 191 U. S. 441; American Steel, etc., Co. v. Speed, 192 U. S. 500; Kehr v. Stewart, 117 Ga. 969; Wrought Iron Range Co. v. Campen, 135 N. Car. 506; New Castle v. Cutler, 15 Pa. Super. Ct. 612.

**2. Goods in Original Packages Cannot Be Taxed.** — May v. New Orleans, 178 U. S. 496; Caldwell v. North Carolina, 187 U. S. 622; American Steel, etc., Co. v. Speed, 192 U. S. 500; Siegfried v. Raymond, 190 Ill. 424; *In re Pitkin*, 193 Ill. 268; *In re Doane*, 197 Ill. 376; Gerdan v. Davis, 67 N. J. L. 88; Wrought Iron Range Co. v. Campen, 135 N. Car. 506; New Castle v. Cutler, 15 Pa. Super. Ct. 612.

**Goods Stored until Distribution May Be Taxed.** — American Steel, etc., Co. v. Speed, 192 U. S. 500.

**Storage of Beer in Original Packages — Wilson Law.** — See People v. Voorhis, 131 Mich. 398.

**3. Merchandise in Original Package Once Sold.** — Kehr v. Stewart, 117 Ga. 969; Wrought Iron Range Co. v. Campen, 135 N. Car. 506; New Castle v. Cutler, 15 Pa. Super. Ct. 612. See also Caldwell v. North Carolina, 187 U. S. 622.

**Original Package Opened for Sale Subject to Taxation.** — May v. New Orleans, 178 U. S. 508.

**4. Discriminating Tax Void.** — Caldwell v. North Carolina, 187 U. S. 622; Kehr v. Stewart, 117 Ga. 969; Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

**6. Tax Because of Foreign Origin Void as a Tax on Commerce.** — Caldwell v. North Carolina, 187 U. S. 622; Wrought Iron Range Co. v. Campen, 135 N. Car. 506.

**8. Goods Intended for Export.** — State v. Allgeyer, 110 La. 839; Adams v. Mississippi Lumber Co., 84 Miss. 23.

**115. 1. A License Tax on Grain Elevators** is valid, though they are used for storing grain intended for interstate shipment. W. W. Car-gill Co. v. Minnesota, 180 U. S. 452.

**5. A Mass of Coal, Partly Intended for Shipment Within the State,** may be levied on for taxes though shipments are also made therefrom outside of the state. Pioneer Fuel Co. v. Molloy, 131 Mich. 465.

**6. Tax on Goods in Transit Is Void.** — Kelley v. Rhoads, 188 U. S. 1.

**Sheep Being Driven Across a State for the Purpose of Shipment** are exempt. Kelley v. Rhoads, 188 U. S. 1.

**Logs Cut in the State and Being Floated for Shipment by Rail, Subject to Taxation.** — Diamond Match Co. v. Ontonagon, 188 U. S. 82.

**9. Temporary Interruption for Separation and Assortment.** — Kelley v. Rhoads, 188 U. S. 1. See also State v. San Antonio, etc., R. Co., 32 Tex. Civ. App. 58.

**10. Delay for Reshipment.** — See State v. San Antonio, etc., R. Co., 32 Tex. Civ. App. 58.

**Indefinite Delay Subjects Property to Taxation.** — Kelley v. Rhoads, 188 U. S. 1; Diamond Match Co. v. Ontonagon, 188 U. S. 82.

**116. 4. Tax on Transit Passengers Void.** — Caldwell v. North Carolina, 187 U. S. 622; Williams v. Fears, 110 Ga. 584.

**7. Transportation of Passengers Cannot Be Taxed.** — New York v. Knight, 192 U. S. 21.

- 117.** (3) *Rolling Stock* — General Rule. — See notes 5, 6, 7.
- 118.** Cars *Habitually Used Within State*. — See note 1.
- (4) *Gross Receipts* — (a) Receipts from Interstate and Foreign Transportation. — See note 4.
- (b) Receipts from Internal Transportation. — See notes 4, 5.
- 120.** (5) *Taxation by Unit Rule*. — See notes 2, 3, 4.
- 121.** *e.* FRANCHISE TAX ON CORPORATIONS. — See notes 1, 2.
- Franchise Granted by United States. — See note 4.
- f.* INCORPORATION CHARGES. — See note 5.
- g.* SALES WITHIN STATE — Sale of Goods in Other States. — See note 8.
- 122.** *h.* STAMP TAX — On Bills of Lading. — See note 4.
- k.* LIVE STOCK GRAZED IN STATE. — See note 9.
- 123.** V. INTERSTATE COMMERCE ACT — 1. Nature, Purpose, and Constitutionality — "The Principal Objects of the Interstate Commerce Act." — See note 2.
2. Rules of Construction — *b.* STRICT OR LIBERAL CONSTRUCTION. — See note 10.
- 126.** 3. Organization, Powers, and Duties of Commission — *d.* ESTABLISHMENT OF RATES OF CARRIAGE. — See notes 2, 3, 4, 5, 6
- 127.** See notes 1, 2.

*Intrastate Transportation.* — Wherever a separation in fact exists between transportation service wholly within the state and that between the states a like separation may be recognized between the control of the state and that of the nation. *Pennsylvania R. Co. v. Knight*, 192 U. S. 27.

**117.** 5. Means of Interstate Transportation Cannot Be Taxed. — *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171.

6. Rolling Stock of Foreign Railroad Company Cannot Be Taxed. — *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171.

7. Mere Employment in Interstate Transportation No Exemption from Taxation. — See *Pullman Co. v. Adams*, 189 U. S. 420.

**118.** 1. Cars Habitually Used Within State. — *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171. See also *Pullman Co. v. Adams*, 189 U. S. 420; *New York v. Knight*, 192 U. S. 21.

4. Tax on Receipts from Interstate and Foreign Transportation. — See *People v. Miller*, 178 N. Y. 194.

**119.** 4. Gross Earnings Within State May Be Taxed. — *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379; *People v. Miller*, 94 N. Y. App. Div. 587.

5. Construction to Sustain Statute. — *People v. Miller*, 94 N. Y. App. Div. 587.

**120.** 2. Taxation by Unit Rule Valid. — *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897; *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Cumberland, etc., R. Co. v. State*, 92 Md. 668.

3. *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897.

4. Tax on Property Within State. — *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897.

**121.** 1. Franchise Taxes Valid. — *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412. See also *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171.

2. Franchise Tax on Domestic Corporations. — See *Louisville, etc., Ferry Co. v. Com.*, 108 Ky. 717; *Pullman Co. v. Adams*, 178 Miss. 314, 84 Am. St. Rep. 647.

4. Federal Franchise Cannot Be Taxed. — *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160. See also *Western Union Tel. Co. v. Missouri*, 190 U. S. 412.

5. Incorporation Charges Valid. — *State v. American Book Co.*, 65 Kan. 847.

Charging a Fee for Filing Charter, in accordance with statutory requirements, does not constitute an interference with interstate commerce, though it is the intention of the corporation to engage in interstate commerce. *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611.

8. Sale by Sample of Goods in Other States — *Racine Iron Co. v. McCombs*, 111 Ga. 536.

**122.** 4. Rule Applies to Federal Government Also. — *Fairbank v. U. S.*, 181 U. S. 283.

9. Sheep Grazed in State While Being Driven Through for Shipment Not Subject to Tax. — *Kelley v. Rhoads*, 188 U. S. 1.

**123.** 2. Principal Object and Purpose of Act. — *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226; *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222, 97 Am. St. Rep. 713.

10. Provisions of Penal Nature. — *Ratican v. Terminal R. Assoc.*, 114 Fed. Rep. 666.

**126.** 2. No Power to Fix Rates. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

Establishment of Through Rate by Carrier Does Not Authorize Commission to Fix Rate to Intermediate Point. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

3. Mandamus or Injunction to Enforce Rate Fixed by Commission. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

4. Courts Have No Power to Fix Rates. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

5. Power to Fix Rates Legislative and Not Administrative or Judicial. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

6. *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

**127.** 1. Carriers May Fix Rates in First In-

- 128.** 4. Carriers Subject to Act — *a.* IN GENERAL. — See note 1.  
*b.* TRANSPORTATION WHOLLY WITHIN ONE STATE. — See notes 5, 6.  
**129.** See note 1.  
*c.* CARRIERS UNDER "COMMON CONTROL, MANAGEMENT, OR ARRANGEMENT." — See notes 2, 3, 4, 5.  
**131.** 5. Just and Reasonable Charges — *a.* IN GENERAL. — See note 6.  
*b.* WHAT CONSTITUTES — (1) *A Question of Fact.* — See note 7.  
**132.** (2) *Circumstances to Be Considered* — IN GENERAL. — See notes 1, 3.  
**133.** Competition Between Carriers. — See note 3.  
(3) *Comparison of Rates* — IN GENERAL. — See note 6.  
Where an Advance Is Made. — See note 8.  
A Reduction in Rates. — See note 9.  
**134.** Average Cost of Carriage on Entire System. — See note 3.  
Long and Short Hauls. — See notes 4, 5.  
6. Unjust Discrimination — *a.* IN GENERAL — The Statutory Provision. — See note 6.  
**135.** Common Law and Statute Contrasted. — See notes 4, 5.

stance. — *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

**127.** 2. *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

**128.** 1. What Carriers Are Subject to Act. — *In re Pooling Freights*, 115 Fed. Rep. 588.

5. Operations Wholly Within One State. — *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617; *In re Pooling Freights*, 115 Fed. Rep. 588.

6. Traffic Beginning and Ending in the State. — *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 128.

**129.** 1. *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

2. Necessity of Common Control or Arrangement. — *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

3. What Constitutes Common Control, Management, or Arrangement. — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 613.

4. Participation in Through Rates and Through Bills of Lading. — *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

Through Bill of Lading Held Not Essential, see *Gulf, etc., R. Co. v. Fort Grain Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 419.

5. Through Carriage Without Prior Arrangement. — *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 129.

**131.** 6. Charges Must Be Just and Reasonable. — *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 186 U. S. 320.

7. Reasonableness a Question of Fact. — *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934.

Burden of Proof on Complainant. — *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934.

**132.** 1. Considerations Affecting Reasonableness of Rates. — *Interstate Commerce Commis-*

*sion v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934.

Movement of Traffic. — Where the movement of traffic in a certain direction is greatly in excess of the movement in another, or where the tonnage runs largely in one direction, these circumstances may be considered in determining whether or not the charges are reasonable. *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 613.

3. Interests of Carrier, Shipper, and Public to Be Considered. — *Interstate Commerce Commission v. Southern R. Co.*, 105 Fed. Rep. 703; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 613.

**133.** 3. Competition as Affecting Reasonableness of Rates. — *Interstate Commerce Commission v. Southern R. Co.*, 105 Fed. Rep. 703.

6. Comparison Must Be General and Not Limited to Rates to a Few Points. — *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934.

8. Effect of Advance in Rates. — *Allen v. Oregon, etc., Co.*, 106 Fed. Rep. 265.

9. Effect of Reduction in Rates. — *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 186 U. S. 320.

**134.** 3. Failure of One Line of System to Earn Expenses Does Not Warrant Unjust Discrimination. — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 613.

4. Charge for Longer Haul May Be Considered. — See *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

5. Higher Short Haul Rate Not Necessarily Unreasonable. — See *Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

6. Discrimination in Rates Between Shippers Forbidden. — *U. S. v. Michigan Cent. R. Co.*, 122 Fed. Rep. 544. See also *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226.

**135.** 4. Rule at Common Law. — *Lundquist v. Grand Trunk Western R. Co.*, 121 Fed. Rep. 915.

The Interstate Commerce Act, in so far as it prohibits carriers from imposing unjust or unreasonable rates, is an express adoption of the



- 135.** *b. WHAT CONSTITUTES — (1) In General — Definition.* — See note 8.
- 136.** *Not All Discriminations Illegal.* — See note 1.
- 139.** *c. PARTICULAR INSTANCES — Carload Rates.* — See note 4.
- 143.** *7. Undue Preference or Advantage — b. WHAT CONSTITUTES — (1) In General — Definition.* — See note 5.
- Preference or Advantage Not Necessarily Unlawful. — See notes 6, 7.
- 144.** See notes 1, 2.
- (2) *Circumstances to Be Considered.* — See notes 6, 7.
- 146.** *Competition Between Rival Lines.* — See notes 2, 3.
- c. PARTICULAR INSTANCES — Conditions for Benefit of Carrier.* — See note 5.
- 147.** *Party-rate Ticket.* — See note 4.
- 148.** *Long and Short Hauls.* — See note 4.
- Furnishing Cars to Shippers. — See note 5.
- Use of Shippers' Cars. — See note 8.
- 149.** *8. Facilities for Interchange of Traffic — a. DUTY TO AFFORD EQUAL FACILITIES — Three Carriers Involved.* — See note 6.
- Reasonable and Proper Facilities. — See notes 7, 8.
- 150.** *The Term "Facilities."* — See note 6.
- 151.** *Use of Tracks and Terminal Facilities.* — See note 1.

principles of the common law on this subject, and the special remedies afforded by this Act were intended to supplement and not to supplant the existing remedies. *Tift v. Southern R. Co.*, 123 Fed. Rep. 789.

**135.** *5. Common Law Changed.* — *Lundquist v. Grand Trunk Western R. Co.*, 121 Fed. Rep. 915.

**8. Discrimination in Fact Essential — Offer Not Enough. — *Lehigh Valley R. Co. v. Rainey*, 112 Fed. Rep. 487.**

**136.** *1. Only Unjust and Unreasonable Discriminations Illegal.* — *U. S. v. Norfolk, etc., R. Co.*, 109 Fed. Rep. 831.

**139.** *4. Reduced Carload Rates Unlawful.* — *Lundquist v. Grand Trunk Western R. Co.*, 121 Fed. Rep. 915.

**143.** *5. Where the cost and transportation of coal sold by a carrier dealing in coal to a corporation to which it is indebted is less than the price charged to other parties for delivering the coal at the same point, there is a violation of the third section of the statute.* *Interstate Commerce Commission v. Chesapeake, etc., R. Co.*, 128 Fed. Rep. 59.

**6. Preference or Advantage Not Necessarily Unlawful. — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.**

**7. All Discrimination Not Prohibited. — *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 124 Fed. Rep. 624; *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.**

**144.** *1. Discrimination Must Be Undue or Unreasonable.* — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.

**2. Substantially Similar Circumstances and Conditions. — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.**

**6. Business Considerations. — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.**

**7. Interstate Commerce Commission v. Cincinnati, etc., R. Co.**, 124 Fed. Rep. 624; *U. S.*

*v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.

**146.** *2. Competition Must Be Considered.* — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 124 Fed. Rep. 624.

**3. Reason for Rule. — See *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 124 Fed. Rep. 624.**

**5. Conditions for Benefit of Carrier. — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.**

**147.** *4. Party-rate Tickets Not an Undue Preference or Advantage.* — *U. S. v. Chicago, etc., R. Co.*, 127 Fed. Rep. 785, 62 C. C. A. 465.

**148.** *4. Charges Valid under Third Section Held Valid under Fourth Section.* — *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 934.

**5. Cars Must Be Furnished Equally to All Shippers. — *U. S. v. Norfolk, etc., R. Co.*, 109 Fed. Rep. 831, holding that where there is a shortage of equipment, cars should be distributed *pro rata*.**

**Manner of Ascertaining Proper Basis of Distribution. — *U. S. v. West Virginia Northern R. Co.*, 125 Fed. Rep. 252; *affirmed* (C. C. A.) 134 Fed. Rep. 198.**

**8. Shipper Cannot Have Exclusive Use of Special Cars. — *U. S. v. Norfolk, etc., R. Co.*, 109 Fed. Rep. 831.**

**149.** *6. Carrier May Prefer Itself.* — *Central Stock Yards Co. v. Louisville, etc., R. Co.*, 192 U. S. 568.

**7. Only Reasonable and Proper Facilities Need Be Furnished. — *Central Stock Yards Co. v. Louisville, etc., R. Co.*, 192 U. S. 568.**

**8. Interest of Road to Be Considered. — *Central Stock Yards Co. v. Louisville, etc., R. Co.*, 192 U. S. 568.**

**150.** *6. "Facilities" Does Not Include Car Equipment.* — *Central Stock Yards Co. v. Louisville, etc., R. Co.*, 192 U. S. 568.

**151.** *1. Use of Tracks and Terminal Facilities Not Granted.* — *Central Stock Yards Co. v. Louisville, etc., R. Co.*, 192 U. S. 568.

**151.** *b.* DUTY TO ARRANGE FOR JOINT THROUGH TRANSPORTATION — *In General.* — See note 6.

**153.** 9. Long and Short Hauls — *b.* EQUAL CHARGE FOR LONGER AND SHORTER HAULS. — See note 7.

**154.** Group Rates. — See note 3.

*c.* DISSIMILARITY OF CIRCUMSTANCES AND CONDITIONS — (1) *As Justifying Greater Rate for Shorter Haul.* — See note 4.

Degree of Dissimilarity. — See note 5.

**155.** See note 1.

(2) *What Constitutes* — *aa.* IN GENERAL — Presumption and Burden of Proof.

— See note 5.

**156.** See note 1.

Circumstances to Be Considered. — See note 2.

*bb.* COMPETITION BETWEEN RIVAL LINES — *In General.* — See note 3.

**157.** See note 1.

Nature and Sufficiency of Competition. — See note 4.

**158.** See note 1.

**160.** 10. Filing and Publishing Schedules — *a.* DUTY TO ESTABLISH AND PUBLISH — Statutory Provision. — See note 2.

**161.** *b.* DUTY TO FILE SCHEDULE — Duty to File Copies of Joint Tariffs of Rates, Fares, and Charges. — See note 3.

*d.* CONTRACTS PRESUMED TO BE WITH REFERENCE TO SCHEDULE — *In General.* — See notes 6, 7.

**162.** Schedule Rate Payable Though Lower Rate Given by Mistake. — See note 1.

**151.** 6. Carriers Cannot Be Compelled to Enter into Arrangements for Joint Through Transportation. — *Central Stock Yards Co. v. Louisville, etc., R. Co.,* 192 U. S. 568; *Interstate Commerce Commission v. Southern R. Co.,* (C. C. A.) 122 Fed. Rep. 800.

**153.** 7. Equality of Charges for Long and Short Hauls Not Illegal. — *Allen v. Oregon R., etc., Co.,* 106 Fed. Rep. 265.

**154.** 3. Group Rates Not Illegal. — *East Tennessee, etc., R. Co. v. Interstate Commerce Commission,* 181 U. S. 1.

**4.** Dissimilar Circumstances and Conditions Take Case Out of Statute. — *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 190 U. S. 273; *Interstate Commerce Commission v. Southern R. Co.,* 105 Fed. Rep. 703; *Interstate Commerce Commission v. Nashville, etc., R. Co.,* (C. C. A.) 120 Fed. Rep. 934; *Interstate Commerce Commission v. Southern R. Co.,* (C. C. A.) 122 Fed. Rep. 800, *affirming* 117 Fed. Rep. 741.

**5.** Substantial Dissimilarity Eliminates Fourth Section of Statute. — *Interstate Commerce Commission v. Southern R. Co.,* (C. C. A.) 122 Fed. Rep. 800, *East Tennessee, etc., R. Co. v. Interstate Commerce Commission,* 181 U. S. 18.

**155.** 1. Charge May Be Invalid under Other Sections. — *Interstate Commerce Commission v. Southern R. Co.,* (C. C. A.) 122 Fed. Rep. 800, *affirming* 117 Fed. Rep. 741.

**5.** No Presumption Against Carrier. — *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 190 U. S. 273.

**156.** 1. Interstate Commerce Commission *v. Louisville, etc., R. Co.,* 190 U. S. 283.

**2.** Interests of Public, Shippers, and Carriers to Be Considered. — *East Tennessee, etc., R. Co. v. Interstate Commerce Commission,* 181 U. S. 1;

*Interstate Commerce Commission v. Louisville, etc., R. Co.,* 118 Fed. Rep. 613.

**3.** Competition Must Be Considered. — *East Tennessee, etc., R. Co. v. Interstate Commerce Commission,* 181 U. S. 1; *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 190 U. S. 273; *Interstate Commerce Commission v. Southern R. Co.,* 105 Fed. Rep. 703; *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 118 Fed. Rep. 613; *Interstate Commerce Commission v. Southern R. Co.,* (C. C. A.) 122 Fed. Rep. 800.

**157.** 1. Interstate Commerce Commission *v. Southern R. Co.,* 105 Fed. Rep. 703.

**4.** Competition Must Be Real and Substantial. — *East Tennessee, etc., R. Co. v. Interstate Commerce Commission,* 181 U. S. 1; *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 190 U. S. 273. The fact that the competition is wholly between carriers who are subject to the Act is not material. *Interstate Commerce Commission v. Southern R. Co.,* 105 Fed. Rep. 703.

**158.** 1. Competition of Markets. — *Interstate Commerce Commission v. Louisville, etc., R. Co.,* 118 Fed. Rep. 613.

**160.** 2. Statutory Requirement of Publication. — *Atlanta, etc., R. Co. v. Horne,* 106 Tenn. 73.

**161.** 3. Filing Presumed. — *Atlanta, etc., R. Co. v. Horne,* 106 Tenn. 73.

**6.** Burden of Proving Compliance on Carrier. — *Atlanta, etc., R. Co. v. Horne,* 106 Tenn. 73.

**7.** Presumption that Shipper Contracted with Reference to Schedule Rates. — *Interstate Commerce Commission v. Chesapeake, etc., R. Co.,* 128 Fed. Rep. 59.

**162.** 1. Schedule Rate Payable, Notwithstanding Contract for Lower Rate. — *Interstate*

- 162.** Joint Tariff Rates to Be Collected by Delivering Lines. — See note 2.
- 163.** 12. Pooling Contracts. — See note 3.
- 164.** 14. Enforcement of Act — *a.* ELECTION OF TRIBUNAL — (2) *Jurisdiction of State Courts.* — See note 8.
- 165.** *b.* PROCEEDINGS BEFORE COMMISSION — (1) *Jurisdiction* — (b) *Extent of Jurisdiction* — *aa.* JURISDICTION STRICTLY STATUTORY. — See note 3.
- (2) *Function of Commission* — (a) *In General.* — See note 8.
- 167.** (6) *Right to Require Attendance of Witnesses, Production of Books, Papers, etc.* — (a) *In General.* — See note 3.
- (b) *Enforcement of Order* — *bb.* RIGHT TO INVOKE AID OF UNITED STATES COURT — (aa) *Statutory Provision.* — See note 6.
- Issuance of Order by Federal Court.* — See note 7.
- 168.** (bb) *Nature and Object of Proceeding under Provision.* — See note 1.
- (cc) *Grounds of Defense in Such Proceedings.* — See notes 3, 4.
- 170.** (9) *Order of Commission* — (c) *Requisites of Order* — *Order Should Be Definite.* — See note 2.
- (e) *Manner of Enforcing Orders of Commission.* — See notes 9, 10.
- 172.** *c.* PROCEEDINGS IN FEDERAL COURTS — (1) *Without Prior Application to Commission* — (a) *Application by Commission to Enforce Provisions and Punish Violations* — *aa.* *IN GENERAL.* — See notes 1, 2.
- (b) *Application by Persons Injured by Violation of Act* — *aa.* *ACTIONS FOR DAMAGES* — *Jurisdiction of Court.* — See note 6.

Commerce Commission *v.* Chesapeake, etc., R. Co., 128 Fed. Rep. 59; Southern R. Co. *v.* Wilcox, 99 Va. 394. Compare Atlanta, etc., R. Co. *v.* Horne, 106 Tenn. 73.

**Contract Not Validated by Subsequent Reduction of Published Rates.** — Southern R. Co. *v.* Wilcox, 99 Va. 394.

**162.** 2. *Contract of Initial Carrier.* — The failure of a connecting carrier to comply with the requirement as to the publication of the rates does not affect the validity of the contract made by an initial carrier who has complied with the acts in which the latter guarantees a particular rate of freight over the entire route, even though in fixing the rates the initial carrier, by mistake and without intent to violate the law, gave a rate over a connecting carrier less than that published. Virginia Coal, etc., Co. *v.* Louisville, etc., R. Co., 98 Va. 776.

**163.** 3. *What Pools Prohibited by Statute.* — *In re* Pooling Freights, 115 Fed. Rep. 588.

**What Constitutes a Pooling Contract Within the Prohibition of this Section.** — Interstate Commerce Commission *v.* Southern Pac. R. Co., 132 Fed. Rep. 830.

**"Freights" Defined.** — Interstate Commerce Commission *v.* Southern Pac. R. Co., 132 Fed. Rep. 830.

**That the Pooling Contract Is Intended to Prevent Unlawful Rebates** is no justification. Interstate Commerce Commission *v.* Southern Pac. R. Co., 132 Fed. Rep. 830; Interstate Commerce Commission *v.* Southern Pac. R. Co., 123 Fed. Rep. 597.

**164.** 8. *State Courts Have No Jurisdiction.* — Gulf, etc., R. Co. *v.* Moore, 98 Tex. 302.

**165.** 3. *Jurisdiction Over Transportation by Carriers.* — Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

**8. Duty to Enforce Provisions of Act.** — Interstate Commerce Commission *v.* Southern Pac. R. Co., 132 Fed. Rep. 830.

**167.** 3. *May Require Attendance and Testimony of Witnesses and Production of Books and Papers.* — *In re* Pooling Freights, 115 Fed. Rep. 588.

**6. May Invoke Aid of United States Court in Case of Disobedience to Subpoena.** — Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

**7. Issuance of Order by Federal Court.** — See Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

**168.** 1. *Enforcement of Act a Judicial Function.* — Interstate Commerce Commission *v.* Southern Pac. R. Co., 132 Fed. Rep. 830.

**3. Amendment of Act.** — Interstate Commerce Commission *v.* Baird, 194 U. S. 25; *In re* Pooling Freights, 115 Fed. Rep. 588.

**4. Amendment Removes Constitutional Objection.** — Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

**170.** 2. *Order Too Indefinite to Be Basis of Decree of Federal Court.* — Southern Pac. Co. *v.* Colorado Fuel, etc., Co., (C. C. A.) 101 Fed. Rep. 779.

**9. Enforceable Only in Federal Courts.** — Tift *v.* Southern R. Co., 123 Fed. Rep. 789.

**10. Commission Without Authority to Enforce.** — Tift *v.* Southern R. Co., 123 Fed. Rep. 789.

**172.** 1. *Power of Government to Institute Suit at Request of Commission under Act of Feb. 19, 1903.* — Missouri Pac. R. Co. *v.* U. S., 189 U. S. 274.

**2. Preliminary Proceedings Before Commission Unnecessary.** — Tift *v.* Southern R. Co., 123 Fed. Rep. 789.

**6. Actions for Damages in Federal Courts.** — Ratican *v.* Terminal R. Assoc., 114 Fed. Rep. 666; U. S. *v.* Michigan Cent. R. Co., 122 Fed. Rep. 544.

**Limitation of Action.** — Ratican *v.* Terminal R. Assoc., 114 Fed. Rep. 666.

**173.** (2) *Proceedings to Enforce Orders of Commission* — (a) *Jurisdiction of Federal Courts* — *aa. IN GENERAL.* — See note 1.

*bb. JURISDICTION INDEPENDENT OF CITIZENSHIP OF PARTIES.* — See note 2.

*cc. NO OBJECTION THAT COMPLAINANT BEFORE COMMISSION HAD NO REAL GRIEVANCE.* — See note 3.

(b) *Parties* — *aa. WHO MAY APPLY* — (*aa*) *Generally.* — See note 5.

(*bb*) *Capacity of Commission to Sue as Body Corporate.* — See note 6.

**174.** *bb. PARTIES DEFENDANT* — (*aa*) *Carrier Jointly Concerned with Defendant, Proper but Not Necessary Party.* — See note 1.

**175.** (d) *Evidence* — *aa. FINDINGS OF FACT — EFFECT AS EVIDENCE* — (*aa*) *Statutory Provisions.* — See note 1.

(*bb*) *Construction of Findings.* — See note 3.

*bb. RIGHT TO CONSIDER TESTIMONY USED BEFORE COMMISSION AND HEAR ADDITIONAL PROOF* — *Court Not Concluded by Findings or Conclusions of Commission.* — See note 6.

**176.** (e) *Decision upon Application* — *aa. GENERAL PRINCIPLES CONTROLLING* — (*aa*) *Orders Which Should Be Enforced* — *Orders Forbidding Discrimination in Rates.* — See note 4.

(*bb*) *When Enforcement Properly Refused* — *Orders Resting upon Erroneous Principles.* — See note 8.

**177.** (*cc*) *Duty to Remand Case to Commission.* — See note 1.

(f) *Enforcement of Order* — *aa. IN GENERAL.* — See note 4.

(g) *Appeal* — *aa. TO WHAT COURT TAKEN.* — See note 6.

**178.** *bb. REVERSAL AND REMAND IN CIRCUIT COURT OF APPEALS.* — See note 1.

(3) *Criminal Proceedings.* — See note 5.

**179. INTERVENE.** — See note 3.

**173. 1. Equitable Jurisdiction under Elkins Act.** — *U. S. v. Michigan Cent. R. Co.*, 122 Fed. Rep. 544.

**2. Jurisdiction Independent of Citizenship of Parties.** — *Tift v. Southern R. Co.*, 123 Fed. Rep. 789. See also *Sheldon v. Wabash R. Co.*, 105 Fed. Rep. 785.

**3.** That the complainant before the commission was there with unclean hands does not bar release upon the application where the commission was for the enforcement of its rulings in the case. *Interstate Commerce Commission v. Southern Pac. R. Co.*, 132 Fed. Rep. 830.

**5. Right of Federal Government to Bring Suit.** — *U. S. v. Michigan Cent. R. Co.*, 122 Fed. Rep. 544.

**6. Commission a Body Corporate with Capacity to Sue.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 124 Fed. Rep. 624.

**174. 1. Carrier Jointly Concerned Proper but Not Necessary Party.** — *Interstate Commerce Commission v. Southern Pac. R. Co.*, 123 Fed. Rep. 597.

**175. 1. Findings of Fact Merely Prima Facie Evidence.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 102 Fed. Rep. 709; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 613; *Interstate Commerce Commission v. Southern Pac. R. Co.*, 123 Fed. Rep. 597.

**3. Findings Liberally Construed.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 102 Fed. Rep. 709. See also *Interstate Commerce Commission v. Southern Pac. R. Co.*, 123 Fed. Rep. 597.

**6. Court Not Concluded by Findings of Commission.** — *Interstate Commerce Commission v. Southern Pac. R. Co.*, 132 Fed. Rep. 830.

**176. 4. Orders Forbidding Discrimination.** —

*Southern Pac. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779.

**8. Orders Resting on Erroneous Principles.** — *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 186 U. S. 320.

**177. 1. Duty to Remand Case to Commission.** — *East Tennessee, etc., R. Co. v. Interstate Commerce Commission*, 181 U. S. 1; *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 186 U. S. 320; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 190 U. S. 283; *Interstate Commerce Commission v. Southern R. Co.*, 105 Fed. Rep. 703.

**4. Enforcement by Injunction.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 102 Fed. Rep. 709; *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; *Interstate Commerce Commission v. Southern Pac. R. Co.*, 132 Fed. Rep. 830.

**6. Appeal from Circuit to Supreme Court under Act of Feb. 19, 1903.** — *Interstate Commerce Commission v. Baird*, 194 U. S. 25.

**178. 1. Reversal and Remanding to Commission for Failure to Consider Facts.** — See also *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29.

**5. Violation of Provisions of Act Indictable as a Misdemeanor.** — *U. S. v. Michigan Cent. R. Co.*, 122 Fed. Rep. 544.

**Indictment Lies Against Carrier and Officers Individually.** — *In re Pooling Freights*, 115 Fed. Rep. 588.

**For Falsely Billing Transportation — When Offense Is Complete.** — *Davis v. U. S.*, (C. C. A.) 104 Fed. Rep. 136.

**179. 3.** See *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 417.

# INTERVENTION.

By H. N. ELDRIDGE.

**180. I. DEFINITION.** — See note 1.

**181. III. RIGHT TO INTERVENE — 1. In General — a. UNDER STATUTES.**

— See notes 1, 2.

**182.** Under the New York Statute. — See notes 3, 4, 5.

**183. b. IN EQUITY.** — See note 2.

But in a Suit In Rem. — See note 5.

**184. Cestuis Que Trust.** — See note 3.

Persons Interested in Fund under Control of Court. — See note 5.

**185. 2. Existence of Another Remedy Does Not Affect the Right.** — See note 2.

**3. Exercise of Right Optional.** — See note 3.

**4. Right May Be Waived.** — See note 4.

**IV. RIGHTS, DUTIES, AND LIABILITIES OF INTERVENER — 1. Right to Have Claims Adjudicated.** — See note 5.

**3. Limits of Intervener's Rights.** — See notes 8, 15.

**180. 1. Term Defined.** — "Intervention in modern practice is the proceeding taken by a person not a party by which he obtains induction into a pending action between other parties against their will." *Draper v. Pratt*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 407.

**181. 1. Interest in the Matter in Litigation Warrants Intervention.** — *Henry v. Vineland Irrigation Dist.*, 140 Cal. 376; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 292; *Bank of Commerce v. Timbrell*, 113 Iowa 713; *A. E. Johnson Co. v. White*, 78 Minn. 48; *McNamara v. Crystal Min. Co.*, 23 Wash. 26.

**The Extent of the Interest in the matter in litigation is immaterial.** *Dennis v. Kolm*, 131 Cal. 91; *Muhlenberg v. Tacoma*, 25 Wash. 36.

**2. Character of Interest Required.** — *Clarke v. Eureka County Bank*, 116 Fed. Rep. 537, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 181; *Vanmeter v. Fidelity Trust, etc., Co.*, 107 Ky. 108; *Dickson v. Dows*, 11 N. Dak. 407, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180 [181].

**In Texas.** — See *Bangs v. Sullivan*, 33 Tex. Civ. App. 30.

**182. 3. Rule under the New York Statute.** — *Montague v. Jewelers, etc., Co.*, 44 N. Y. App. Div. 224; *Denike v. Denike*, 44 N. Y. App. Div. 621, affirmed 167 N. Y. 585; *Hasberg v. Moses*, 81 N. Y. App. Div. 199; *Hosmer v. Darrh*, 85 N. Y. App. Div. 485; *Feinburg v. American Surety Co.*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 458.

**In an Action in Which Only a Money Judgment Is Sought** and in which the title to no real, specific, or tangible property is involved, intervention does not lie. *Draper v. Pratt*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 408; *Bauer v. Dewey*, 166 N. Y. 402.

**A Creditor of a Defendant in an Action to Foreclose a Mortgage on Real Property** is not, by virtue of such relation, entitled to intervene in

the action. *Bouden v. Long Acre Square Bldg. Co.*, 92 N. Y. App. Div. 325.

**4. Draper v. Pratt**, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 406; *Kinney v. Reid Ice Cream Co.*, 57 N. Y. App. Div. 207.

**5. Right Absolute.** — *Draper v. Pratt*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 406.

**183. 2. Who May Intervene.** — See also *Clarke v. Wheatley*, 113 Ga. 1074.

**5. Intervention in Suits In Rem.** — *Eck v. Warner*, 25 Tex. Civ. App. 339, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

**184. 3. Intervention by Cestuis Que Trust.** — *Doke v. Williams*, 45 Fla. 248; *Muhlenberg v. Tacoma*, 25 Wash. 36.

**5. Persons Having Interest in Fund under Control of Court.** — *U. S. v. Northern Securities Co.*, 128 Fed. Rep. 808; *Doke v. Williams*, 45 Fla. 248.

**185. 2. Right Not Affected by the Existence of Another Remedy.** — *Dennis v. Kolm*, 131 Cal. 91.

**3. Exercise of Right of Intervention Is Optional.** — See *Hunt v. O'Leary*, 78 Minn. 281.

**4. If Person Seeking Intervention Is Guilty of Laches** the right to intervene may be denied by the court or granted upon terms. *Draper v. Pratt*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 406.

**After the Issues Between the Original Parties Are Practically Determined** an intervention will not be permitted. *Pinkard v. Willis*, 24 Tex. Civ. App. 69.

**A Motion to Intervene Made After Judgment** is properly overruled. *Morton v. Supreme Council, etc.*, 100 Mo. App. 76.

**Intervention Rarely Allowed After Entry of Final Decree.** — *U. S. v. Northern Securities Co.*, 128 Fed. Rep. 808.

**5. Compare Henry v. Vineland Irrigation Dist.**, 140 Cal. 376.

**8. Charleston, etc., R. Co. v. Pope**, 122 Ga.

**186. V. EFFECT OF JUDGMENT ON INTERVENER'S RIGHTS.** — See note 4.

**INTESTATE.** — See note 6.

**188. INTOXICATE—INTOXICATED—INTOXICANTS.** — See note 1.

577, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185.

**Intervener Does Not Become a Defendant in the Suit.** — St. Charles St. R. Co. v. Fidelity, etc Co., 109 La. 491.

**185. 15. Intervener Cannot Delay Trial of Action.** — Hibernia Sav., etc., Soc. v. Churchill, 128 Cal. 633, 79 Am. St. Rep. 73; Ringen Stove Co. v. Bowers, 109 Iowa 175.

**186. 4. Effect of Judgment.** — Frellsen v. Strader Cypress Co., 110 La. 877.

**6. Intestate.** — The word *intestate* signi-

fies a person who died without leaving a valid will. Matter of Cameron, 47 N. Y. App. Div. 120; Messmarm v. Egenberger, 46 N. Y. App. Div. 46.

**Intestate — Intestacy.** — See Matter of Haughian, (Surrogate Ct.) 37 Misc. (N. Y.) 457.

**188. 1. Intoxicated.** — Sapp v. State, 116 Ga. 182; Lafler v. Fisher, 121 Mich. 60.

**Intoxicated Synonymous with Drunk.** — Sapp v. State, 116 Ga. 182. And see *infra*, INTOXICATION.

# INTOXICATING LIQUORS.

By J. H. SMITH.

**197. I. DEFINITION.** — See note 1.

**198. II. WHAT LIQUORS AND COMPOUNDS THEREOF ARE WITHIN PROHIBITIONS OF STATUTES** — 1. Alcohol. — See notes 1, 3.

2. Whiskey. — See notes 6, 7, 8.

3. Brandy. — See note 11.

**199.** See note 1.

6. Wine. — See notes 8, 9, 10, 14.

**200. 7. Beer.** — See notes 4, 9, 10, 11.

**201.** See notes 1, 3, 4, 5.

**197. 1. Definition.** — *Ex p. Gray*, (Tex. Crim. 1904) 83 S. W. Rep. 828. See also *Reg. v. Wotton*, 34 Can. L. J. 746; *Reg. v. McLean*, 35 Can. L. J. 241.

The expression "drank in reasonable quantities" is not equivalent to saying "when drank in such quantities as may practically be drank." *Murry v. State*, 46 Tex. Crim. 128.

**Liquor or Liquors.** — The words "any description of liquor whatever" in a liquor law do not include non-intoxicating liquors. *Reg. v. St. John*, 36 Can. L. J. 30.

**Spirituos, Vinous, and Malt Liquors Are Intoxicating.** — *State v. Reily*, 66 N. J. L. 399.

**Malt Liquors.** — See *State v. Gill*, 89 Minn. 502; *State v. Story*, 87 Minn. 5; *State v. Kauffman*, 68 Ohio St. 635.

Courts cannot know judicially whether all malt liquors are intoxicating. *Eaves v. State*, 113 Ga. 749.

**198. 1. Wood Alcohol**, or methyl alcohol, is not an intoxicating liquor. *Fabor v. Green*, 72 Vt. 117.

**3. Contrary View.** — *State v. Reily*, 66 N. J. L. 399; *Sebastian v. State*, 44 Tex. Crim. 508; *Greiner-Kelley Drug Co. v. Truett*, (Tex. Civ. App. 1903) 75 S. W. Rep. 536.

**6. Whiskey a Spirituous Liquor.** — *Hodge v. State*, 116 Ga. 852; *Pedigo v. Com.*, (Ky. 1902) 70 S. W. Rep. 659; *State v. Pritchard*, 16 S. Dak. 166.

**7. A Distilled Liquor.** — *State v. Lager Beer*, 70 N. H. 454.

**8. An Intoxicating Liquor.** — *Peterson v. State*, 63 Neb. 251; *State v. Pritchard*, 16 S. Dak. 166; *Douthitt v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 404.

**11. Brandy Spirituous and Intoxicating.** — *Pedigo v. Com.*, (Ky. 1902) 70 S. W. Rep. 659. **Brandy a Distilled Spirit.** — *U. S. v. Ridenour*, 119 Fed. Rep. 411.

**199. 1. Judicial Knowledge of Spirituous Property.** — *Pedigo v. Com.*, (Ky. 1902) 70 S. W. Rep. 659.

**8. Definition of Wine.** — *Hinton v. State*, 132 Ala. 29.

9 *Hinton v. State*, 132 Ala. 29.

**10. Wine a Vinous or Alcoholic Liquor.** — *Hinton v. State*, 132 Ala. 29; *Caldwell v. State*, 43 Fla. 550.

**14. Judicial Knowledge of Intoxicating Properties.** — *Caldwell v. State*, 43 Fla. 550, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199.

**200. 4. Beer — A Malt and Fermented Liquor Containing More or Less Alcohol.** — *Williams v. State*, 72 Ark. 19.

**9. Lager Beer — Whether Intoxicating, Question for Jury.** — *State v. Lager Beer*, 70 N. H. 454.

**10. Judicial Knowledge that Lager Beer Is Intoxicating Malt Liquor.** — *Pedigo v. Com.*, 68 S. W. Rep. 1113, 24 Ky. L. Rep. 535, affirmed (Ky. 1902) 70 S. W. Rep. 659; *State v. Morehead*, 22 R. I. 272.

**Lager Beer Is Malt Liquor.** — *Johnson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 552.

**11. Judicial Knowledge that Lager Beer Is Intoxicating.** — *State v. Morehead*, 22 R. I. 272.

**201. 1. View that Word "Beer" Does Not Import Intoxicating Liquor.** — *DuVall v. Augusta*, 115 Ga. 813; *Matter of Hunter*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 389, affirmed 59 N. Y. App. Div. 626; *State v. Ritzman*, 8 Ohio Dec. 685; *Cassens v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 229; *Sullivan v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 150; *Harris v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 763.

**Depends on Amount of Alcohol.** — *Ex p. Gray*, (Tex. Crim. 1904) 83 S. W. Rep. 828.

**3. View that Beer Imports a Malt and Intoxicating Liquor.** — *Williams v. State*, 72 Ark. 19; *Pedigo v. Com.*, 68 S. W. Rep. 1113, 24 Ky. L. Rep. 535, affirmed (Ky. 1902) 70 S. W. Rep. 659; *Locke v. Com.*, 74 S. W. Rep. 654, 25 Ky. L. Rep. 76; *Peterson v. State*, 63 Neb. 251; *Sothman v. State*, 66 Neb. 302; *State v. Currie*, 8 N. Dak. 545.

**4. Judicial Knowledge that Beer Is Intoxicating.** — *Williams v. State*, 72 Ark. 19; *Peterson v. State*, 63 Neb. 251; *Sothman v. State*, 66 Neb. 302; *State v. Currie*, 8 N. Dak. 545.

**Use of Word "Beer" by Witnesses.** — *Pedigo v. Com.*, 24 Ky. L. Rep. 535, 68 S. W. Rep. 1113, affirmed (Ky. 1902) 70 S. W. Rep. 659; *Locke v. Com.*, 74 S. W. Rep. 654, 25 Ky. L. Rep. 76.

**Use of Word "Beer" in Indictment.** — *Ex p. Handler*, 176 Mo. 383.

**5. Burden on Defendant to Show that Beer Sold Is Not Intoxicating.** — *State v. Currie*, 8 N. Dak. 545.

**203.** 10. Cider. — See notes 5, 6, 11.

**204.** 11. Liquors Used for Preserving Fruits and in Culinary Preparations. — See note 4.

12. Medicinal and Toilet Preparations Containing Alcohol. — See note 5.

Question for Jury. — See note 6.

Evidence. — See note 7.

**205.** The Test Laid Down by a Number of Decisions. — See notes 2, 4, 5.

**206.** Statutes under Which Tests Not Applicable. — See note 3.

III. CONSTITUTIONALITY OF LIQUOR LAWS — 1. Statutes Prohibiting Manufacture and Sale of Intoxicating Liquors. — See note 4.

**207.** See note 2.

Specific Objections. — See notes 4, 6.

**208.** 2. Statutes Regulating Sale of Intoxicating Liquors. — See notes 3, 4.

Sufficient Evidence. — *Johnson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 552.

Charge that All Lager Beer Is Intoxicating Held Erroneous. — *Smith v. State*, 113 Ga. 758.

"Hop Tonic." — It is a question for the jury whether or not a liquid called hop tonic is intoxicating. *Cockerell v. Com.*, 115 Ky. 296.

**203.** 5. Construction of Statutes Containing Words "Fermented Cider." — *People v. Kinney*, 124 Mich. 486.

6. Cider Is a Strong Drink. — *Pikeville v. Huffman*, 112 Ky. 360.

11. *Hewitt v. People*, 87 Ill. App. 367, affirmed 186 Ill. 336.

**204.** 4. Extract of Lemon. — *Walker v. Dailey*, 101 Ill. App. 575.

5. When Intoxicating Properties a Question for Court. — *Pearce v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 234, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204. See also *Mackall v. District of Columbia*, 16 App. Cas. (D. C.) 301.

6. When Intoxicating Properties a Question for Jury. — *State v. Piche*, 98 Me. 348.

7. Evidence That May Be Considered in Determining Intoxicating Properties. — *State v. Piche*, 98 Me. 348; *Pearce v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 234, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204.

**205.** 2. Test in Determining Whether Preparation Within Prohibition of Statutes. — *Pearce v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 234, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205, and quoting the whole text paragraph.

4. See *U. S. v. Bray*, 113 Fed. Rep. 1008.

5. When Within Prohibition. — *U. S. v. Bray*, 113 Fed. Rep. 1008.

**206.** 3. Decisions under Certain Statutes. — In *Vermont* it is held that where essence of peppermint is sold for an intoxicating beverage, and it contains fifty per cent. of alcohol, although it is manufactured for medicinal purposes, there is a violation of the statute prohibiting the sale of "spirituous or intoxicating liquors, or mixed liquor, of which a part is spirituous or intoxicating." *State v. Kezer*, 74 Vt. 50.

In *Georgia*, under a statute prohibiting the sale of malt liquors, it need not be shown that they are intoxicating. *Eaves v. State*, 113 Ga. 749.

In the *District of Columbia* it was held that a statute prohibiting the sale of intoxicating liquors did not apply to a medical preparation

which was not used or intended to be used as an intoxicant. *Mackall v. District of Columbia*, 16 App. Cas. (D. C.) 301.

Question Whether Certain Liquor Is a Vinous, Spirituous, Malt, or Brewed Liquor Is for Jury. — *Com. v. Beldham*, 15 Pa. Super. Ct. 33; *Com. v. Wenzel*, 24 Pa. Super. Ct. 467.

4. Power to Prohibit Manufacture and Sale of Intoxicating Liquor — *United States*. — *Busch v. Webb*, 122 Fed. Rep. 655.

*Alabama*. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68.

*Connecticut*. — *Malmö's Appeal*, 73 Conn. 232.

*Illinois*. — *People v. Griesbach*, 211 Ill. 39, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206.

*Indiana*. — *Jordan v. Evansville*, 163 Ind. 512.

*Kansas*. — *State v. Durein*, 70 Kan. 1.

*Missouri*. — See *State v. Finney*, 178 Mo. 385.

*Montana*. — *In re O'Brien*, 29 Mont. 530.

*Nevada*. — See *Wallace v. Reno*, 27 Nev. 71.

*New Jersey*. — *Hoboken v. Goodman*, 68 N. J. L. 217.

*North Carolina*. — *Bailey v. Raleigh*, 130 N. Car. 209.

*Oregon*. — *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642.

*South Dakota*. — *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

*Tennessee*. — *Webster v. State*, 110 Tenn. 506.

*Virginia*. — *Danville v. Hatcher*, 101 Va. 523.

Legislature Can Prohibit Sale of Malt Liquor Whether or Not Intoxicating. — *Feibelman v. State*, 130 Ala. 122.

**207.** 2. Extent of Police Power. — *People v. Griesbach*, 211 Ill. 39, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207.

4. Not a Taking of Property Without Due Process of Law. — *Busch v. Webb*, 122 Fed. Rep. 655.

6. Not an Abridgment of Immunities and Privileges. — *Jordan v. Evansville*, 163 Ind. 512; *Hoboken v. Goodman*, 68 N. J. L. 217; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642; *Webster v. State*, 110 Tenn. 506.

**208.** 3. Constitutionality of Statutes Regulating Sales — *Connecticut*. — *Malmö's Appeal*, 73 Conn. 232.

*Illinois*. — *People v. Griesbach*, 211 Ill. 39.

*Indiana*. — *Jordan v. Evansville*, 163 Ind. 512.

*Kansas*. — *State v. Durein*, 70 Kan. 1.



**208.** 3. License Laws — *a.* IN GENERAL. — See note 5.

**209.** An Exercise of Police Power. — See note 3.

Regulating Conditions upon Which Licenses Granted. — See notes 4, 12.

**210.** *b.* STATUTES RESTRICTING TO CERTAIN CLASSES OF PERSONS THE RIGHT TO SELL — Residents, Male Persons, Citizens, Etc. — See note 6.

Persons of Good Moral Character. — See note 8.

Druggists, Physicians, Etc. — See note 9.

**211.** *c.* STATUTES REQUIRING APPLICANT TO GIVE BOND. — See note 1.

*d.* STATUTES REQUIRING CONSENT OF PERSONS LIVING IN VICINITY OF PROPOSED SALOON. — See note 7.

**212.** See notes 1, 2, 3, 4.

*e.* STATUTES PROHIBITING SALES OR GIFTS TO CERTAIN CLASSES OF PERSONS. — See notes 6, 10, 11, 12.

*f.* STATUTES PROHIBITING SALES AND REQUIRING CLOSING OF SALOONS AT CERTAIN TIMES. — See note 15.

**213.** *g.* STATUTES PROHIBITING EMPLOYMENT OF WOMEN AND CHILDREN IN SALOONS. — See notes 7, 10, 11.

*Louisiana.* — *New Orleans v. Machee*, 112 La. 559.

*Nevada.* — See *Wallace v. Reno*, 27 Nev. 71.

*New Jersey.* — *Hoboken v. Goodman*, 68 N. J. L. 217.

*Oregon.* — *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642.

*South Dakota.* — *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

*Tennessee.* — *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814; *Webster v. State*, (Tenn. 1903) 75 S. W. Rep. 1020.

**208.** 4. Power of Legislature to Regulate Manner of Conducting Traffic. — *Lofton v. Collins*, 711 Ga. 434; *Cullinan v. Burkard*, 93 N. Y. App. Div. 31.

A Statute Making the Place of Delivery the Place of Sale was upheld in *State v. Patterson*, 134 N. Car. 612.

5. Constitutionality of Statutes Requiring License. — *State v. Barber*, (S. Dak. 1904) 101 N. W. Rep. 1078.

**209.** 3. Licensing Sales an Exercise of Police Power. — *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642; *State v. Barber*, (S. Dak. 1904) 101 N. W. Rep. 1078.

4. Imposing Conditions upon Which License Granted. — *Adams v. Cronin*, 29 Colo. 499; *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112; *State v. Barber*, (S. Dak. 1904) 101 N. W. Rep. 1078; *Webster v. State*, 110 Tenn. 506, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209.

12. Permitting Liquor to Be Drunk on Premises. — A state may prohibit liquors from being drank at the place of business of druggists by whom sold; and the fact that a druggist is also a practicing physician does not entitle him to prescribe liquor for his patients and allow them to drink it in his store. *State v. Finney*, 178 Mo. 385.

**210.** 6. Statutes Limiting Right to Sell, to Citizens of United States. — See *Adams v. Cronin*, 29 Colo. 499, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210 *et seq.*

8. Statutes Restricting Right of Sale, to Persons of Good Character. — *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

9. Statutes Restricting Right to Sell, to Druggists. — *Carthage v. Carlton*, 99 Ill. App. 338.

Not Class Legislation. — See *Carthage v. Carlton*, 99 Ill. App. 338.

**211.** 1. Constitutionality of Statutes Requiring Bond. — *Cullinan v. Burkard*, 93 N. Y. App. Div. 31.

7. Statutes Requiring Consent of Persons Living in Vicinity Valid. — *People v. Griesbach*, 211 Ill. 39, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211; *Martens v. People*, 186 Ill. 314; *Boomershine v. Uline*, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

Provisions Held Valid. — An ordinance requiring a petition of two-thirds of the freeholders in the block where the saloon is to be located to accompany the application for a license. *Martens v. People*, 186 Ill. 314.

**212.** 1. Not in Violation of Fourteenth Amendment. — *Boomershine v. Uline*, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

2. Not a Delegation of Legislative Power. — *Boomershine v. Uline*, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

3. Not in Violation of Interstate Commerce Clause. — *Boomershine v. Uline*, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

4. Not in Restraint of Trade. — *Boomershine v. Uline*, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212.

6. Sales to Minors. — *Stephens v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 797.

10. Sales to Students. — *Peacock v. Limburger*, (Tex. Civ. App. 1902) 67 S. W. Rep. 518.

11. Not Class Legislation, Nor in Violation of Due Process of Law. — *Peacock v. Limburger*, (Tex. Civ. App. 1902) 67 S. W. Rep. 518.

12. Not in Violation of State Constitutions. — *Peacock v. Limburger*, (Tex. Civ. App. 1902) 67 S. W. Rep. 518.

15. Statutes Prohibiting Sales on Sunday Valid. — *Ex p. Brown*, (Tex. Crim. 1901) 61 S. W. Rep. 396.

**213.** 7. Prohibiting Employment of Women in Saloons. — *Hoboken v. Goodman*, 68 N. J. L. 217.

**213.** *h.* SCREEN LAWS. — See note 12.

**214.** *i.* STATUTES PROHIBITING SALES IN CERTAIN LOCALITIES. — See note 11.

**215.** *j.* STATUTES AUTHORIZING REVOCATION OF LICENSE. — See notes 7, 9, 12.

**216.** 4. Statutes Declaring What Liquors Shall Be Deemed Intoxicating. — See note 6.

5. Statutes Discriminating Against Liquors of Other States and Countries — In Respect to Right of Sale. — See notes 7, 8.

Violation of Interstate Commerce Clause. — See note 9.

Denial of Immunities and Privileges of Citizens. — See note 11.

**217.** In Respect to Taxation. — See notes 1, 3.

Construction of Statutes Unconstitutional in Part. — See note 5.

6. Statutes Forbidding Gifts of Liquors. — See note 6.

**218.** 10. Statutes Imposing Fine and Imprisonment for Violation of Liquor Laws. — See note 7.

**219.** 12. Statutes Providing for Forfeiture of Liquors Illegally Kept. — See note 3.

Right to Trial by Jury. — See note 6.

**213.** 10. Statutes Not Objectionable for Discrimination. — *Hoboken v. Goodman*, 68 N. J. L. 217.

11. Ordinance Prohibiting Admission of Women to Winery for Purpose of Obtaining Liquor. — *Cronin v. Adams*, 192 U. S. 108, *affirming* 29 Colo. 488; *Cronin v. Denver*, 192 U. S. 115, *affirming* 29 Colo. 503.

12. Statutes Prohibiting Obstructions During Times When Sales Forbidden Upheld. — *Washington v. Gallagher*, 5 Ohio Dec. 562, 7 Ohio N. P. 511. See also *People v. White*, 127 Mich. 428, 8 Detroit Leg. N. 397.

**214.** 11. Prohibition of Sales Near Schools. — *Webster v. State*, (Tenn. 1903) 75 S. W. Rep. 1020.

**215.** 7. Statutes Providing for Revocation of License. — *Webster v. State*, 110 Tenn. 506, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

9. *Newman v. Lake*, 70 Kan. 848; *Wallace v. Reno*, 27 Nev. 71.

12. Not a Taking of Property Without Due Process of Law. — *Wallace v. Reno*, 27 Nev. 71.

**216.** 6. Legislature Cannot Make That Intoxicating Which Is in Fact Not Intoxicating. — *State v. O'Connell*, 99 Me. 61.

7. Statutes Prohibiting Sales of Foreign Liquors — View that They Are Constitutional. — *Douthitt v. State*, 98 Tex. 344.

8. View that They Are Unconstitutional. — *Com. v. Petranich*, 183 Mass. 217; *State v. Scampini*, 77 Vt. 92.

9. Statutes Held to Violate Interstate Commerce Clause. — *Com. v. Petranich*, 183 Mass. 217.

11. Statutes Held to Violate Fourteenth Amendment. — *State v. Scampini*, 77 Vt. 92.

**217.** 1. Discriminative Taxation Against Foreign Liquors. — *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741.

3. Statutes Held to Violate Interstate Commerce Clause. — *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741.

Particular Statutes Held Unconstitutional. —

A statute which imposes a license fee for wholesaling brewed or malt liquors, manufactured in another state, is void if no such license is required of persons who manufacture in the state and pay a manufacturer's license. *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741.

5. Construction of Statutes Unconstitutional in Part. — *Wallace v. Cubanola*, 70 Ark. 395; *Ex p. Federwitz*, 130 Cal. xviii, 62 Pac. Rep. 935; *Com. v. Petranich*, 183 Mass. 217; *State v. Scampini*, 77 Vt. 92.

6. Constitutionality of Statutes Forbidding Gifts of Liquors. — *Litch v. People*, 19 Colo. App. 421.

**218.** 7. Statutes Held Constitutional. — A provision fixing the punishment for violation of the closing laws at a fine of not less than one hundred nor more than five hundred dollars or imprisonment for not less than six nor more than eighteen months, or by both, at the discretion of the court, is not unconstitutional. *Cardillo v. People*, 26 Colo. 355.

An ordinance providing a punishment by fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the city jail for not less than ten nor more than sixty days, for violation of an ordinance that prohibits the permitting of females in their places of business by persons maintaining saloons, etc., is not unconstitutional. *State v. Nelson*, 10 Idaho 522.

A fine of three hundred dollars is not so disproportionate to the offense of keeping intoxicating liquor for sale without a license as to justify the court in questioning the action of the legislature in prescribing it. *State v. Constantino*, 76 Vt. 192.

**219.** 3. Statutes Providing for Forfeiture of Liquors Illegally Kept. — *Ferguson v. Josey*, 70 Ark. 94; *Sothman v. State*, 66 Neb. 302.

6. Not Violation of Right to Jury Trial. — *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25; *Sothman v. State*, 66 Neb. 302.

Right to Appeal to Court of Last Resort. — See *Sothman v. State*, 66 Neb. 302.

**220.** 14. Statutes Forbidding Recovery for Liquors Illegally Sold and Authorizing Recovery Back of Money Paid Therefor. — See notes 1, 2.

15. Statutes Declaring Places for Manufacture and Sale Nuisances. — See note 3.

**221.** See note 2.

21. Town Agent System of License and Sales — [Dispensary Acts]. — See note 9a.

**223.** 24. Statutes Authorizing Taxes or License Fees — License Fees Not Taxes. — See notes 1, 2, 3.

Must Be Uniform. — See note 8.

**224.** See notes 2, 3.

25. Statutes Delegating Legislative Power. — See notes 5, 6.

These Statutes Are Complete in Themselves. — See note 7.

**225.** See note 2.

Illustrations. — See notes 4, 6.

**220.** 1. Provisions Held Constitutional. — A statute providing that no action shall be maintained for intoxicating liquors purchased out of the state for sale therein in violation of law, is constitutional. *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

2. *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

Does Not Violate Obligation of Contracts When Not Retroactive in Effect. — *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

Does Not Deny Equal Protection of Laws. — *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

3. Constitutionality of Laws in Regard to Liquor Nuisances. — *State v. McManus*, 65 Kan. 720.

**221.** 2. Right to Jury Trial. — *Kirkland v. State*, 72 Ark. 171, 105 Am. St. Rep. 25.

9a. Dispensary Acts Held Constitutional under Police Power. — *Farmville v. Walker*, 101 Va. 323, 99 Am. St. Rep. 870.

Not a Revenue Measure. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68; *Farmville v. Walker*, 101 Va. 323, 99 Am. St. Rep. 870.

Does Not Create a Monopoly. — *Garsed v. Greensboro*, 126 N. Car. 159; *Guy v. Cumberland County*, 122 N. Car. 471.

Is Not Class or Unequal Legislation. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68.

Unconstitutional Delegation of Legislative Powers. — *Mitchell v. State*, 133 Ala. 65, 134 Ala. 392.

Does Not Violate Provision of Bill of Rights. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68.

Pecuniary Interest of Commissioners Not Allowable. — *Mitchell v. State*, 133 Ala. 65, 134 Ala. 392.

Provision that Corporations Shall Not Engage in Business Not Authorized by Charter. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68.

Not a Violation of Interstate Commerce Clause. — *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68.

Act Unconstitutional in Part. — *Garsed v. Greensboro*, 126 N. Car. 159; *Bennett v. Swain County*, 125 N. Car. 468.

Alabama Act Held Unconstitutional. — *Harlan v. State*, 136 Ala. 150.

Power of Municipality to Establish Dispensary. — *Lofton v. Collins*, 117 Ga. 434; *Barnesville v. Murphy*, 113 Ga. 779.

General Statutes Not Repealed by Dispensary Act. — *State v. Smith*, 126 N. Car. 1057.

Local Option Law Does Not Repeal or Modify Dispensary Act. — *Butler v. Merritt*, 113 Ga. 238.

Notice of Establishment Necessary. — *Burroughs School v. Board of Control*, 62 S. Car. 68.

Illegal Dispensary Not a Blind Tiger. — *Cannon v. Merry*, 116 Ga. 291.

Illegal Dispensary Not a Nuisance. — *Pike County Dispensary v. Brundidge*, 13 Ala. 193.

Division of Profits Not Interfered with by Equity. — *Clarke County v. Herrington*, 113 Ga. 237.

Sales to Dispensary on Credit. — *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

**223.** 1. License Fees Not Taxes. — *Scalzo v. Sackett*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 543.

2. *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *Ristine v. Clements*, 31 Ind. App. 338.

3. Size of Fee Does Not Make It a Tax. — *Duluth Brewing, etc., Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353.

8. Principle of Uniformity Explained. — *State v. Bengsch*, 170 Mo. 115, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223.

**224.** 2. Legislature May Classify Different Kinds of Dealers. — *Webster v. State*, 110 Tenn. 506.

3. Legislature May Exempt Manufacturers. — *Webster v. State*, 110 Tenn. 506.

5. Delegating Authority. — *Malmö's Appeal*, 73 Conn. 232; *In re O'Brien*, 29 Mont. 530; *Hoboken v. Goodman*, 68 N. J. L. 217; *State v. Barber*, (S. Dak. 1904) 101 N. W. Rep. 1078. See also *McConnell's License*, 24 Pa. Super. Ct. 642.

6. Enactment of Law to Take Effect upon Contingency Valid. — *In re O'Brien*, 29 Mont. 530.

7. The Law Itself Prohibits Sale Unless Required Conditions are Complied with. — *State v. Barber*, (S. Dak. 1904) 101 N. W. Rep. 1078.

**225.** 2. Making Repeal of Statute Dependent upon Vote. — *McConnell's License*, 24 Pa. Super. Ct. 642.

4. *Hoop v. Affleck*, 162 Ind. 564; *Wilcox v. Bryant*, 156 Ind. 379.

6. Power Cannot Be Conferred on Sanitary District. — *In re Werner*, 129 Cal. 567.

A Dispensary Act Delegating the Power to Com-

- 225.** 26. Statutes Prescribing Rules of Evidence. — See notes 7, 9.  
**226.** See notes 2, 6.  
 27. Statutes Prescribing Rules of Pleading. — See note 10.  
**227.** 28. Title and Subject-matter of Statutes — *b.* APPLICATION OF CONSTITUTIONAL PROVISIONS — (1) *What Enactments Valid under Title "To Regulate" or "Restrain"* — Statutes Held Valid. — See note 8.  
**229.** (3) *Miscellaneous* — Regulating Elections. — See note 6.  
**230.** 29. Who May Question Validity of Statute. — See note 1.  
 IV. LICENSE LAWS — 1. Definition of License. — See note 2.  
 3. Nature and Effect of License — *a.* IN GENERAL. — See notes 6, 7.  
**231.** *b.* RIGHTS OF PARTNERS UNDER LICENSE. — See notes 5, 7.  
*c.* RIGHT OF LICENSEE TO SELL BY AGENT. — See notes 10, 11, 12.  
**232.** See notes 1, 4.

missioners to determine whether the liquor traffic should be absolutely prohibited or not is unconstitutional. *Mitchell v. State*, 133 Ala. 65.

**225.** 7. Possession Presumptive Evidence of Violation. — *Parsons v. State*, 61 Neb. 244.

Statute Making Possession Evidence of Illegal Intent Valid. — *State v. Sheppard*, 64 Kan. 451.

9. Presumption from Presence of People in Saloon During Prohibited Days. — *McNulty v. Toof*, 116 Ky. 202.

Presence of People in Saloon After Closing Hour Prima Facie Evidence of Permitting Them to Remain. — *Cardillo v. People*, 26 Colo. 355.

**226.** 2. Presumption from Sale or Keeping that Sale or Keeping Is Illegal. — *State v. Sheppard*, 64 Kan. 451.

6. Does Not Deny Defendant Fair Jury Trial. — *Parsons v. State*, 61 Neb. 244.

Not Repugnant to Guaranty of Trial by Jury. — *State v. Sheppard*, 64 Kan. 451.

Does Not Violate Provision Against Incriminating Evidence. — *Parsons v. State*, 61 Neb. 244.

Not Repugnant to Guaranty of Due Process of Law. — *State v. Sheppard*, 64 Kan. 451.

10. Statute Requiring Verified Answer. — A provision that, unless the liquor tax certificate holder, by filing a verified answer, raises an issue as to a material fact, in a proceeding for the revocation of the certificate, the certificate shall be canceled, is unconstitutional, as it is a taking of property without due process of law, and it compels the holder to confess his guilt. *Matter of Cullinan*, 82 N. Y. App. Div. 445; *Matter of Cullinan*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 423. See also *Matter of Peck*, 167 N. Y. 391.

A provision that an unverified answer may be filed makes the provision constitutional, but if the licensee does not file an answer the certificate cannot be revoked except upon sufficient proof of violation of the law. *Matter of Cullinan*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 392, affirmed 89 N. Y. App. Div. 613.

**227.** 8. Where the Title of an Act Is "An Act Relating to Intoxicating Liquors." — *State v. Owens*, 9 Kan. App. 595.

**229.** 6. Titles Held Insufficient to Cover Provisions of Statute. — *In re Werner*, 129 Cal. 567; *State v. Davis*, 130 Ala. 148, 89 Am. St. Rep. 23.

Titles Held Sufficient to Cover Provisions of Statute. — *State v. Sheppard*, 64 Kan. 451; *Wilson v. Herink*, 64 Kan. 607; *St. Anthony v.*

*Brandon*, 10 Idaho 205; *Brass v. State*, 45 Fla. 1.

**230.** 1. Who May Question Validity of Statute. — *State v. Donovan*, 10 N. Dak. 203.

2. License Defined. — *Carbondale v. Wade*, 106 Ill. App. 654; *Feigenspan v. Mulligan*, 63 N. J. Eq. 179.

License Not Property. — *Carbondale v. Wade*, 106 Ill. App. 654.

License Not an Office. — *Hargett v. Bell*, 134 N. Car. 394.

License Not a Franchise. — *Martens v. People*, 186 Ill. 314; *Hargett v. Bell*, 134 N. Car. 394.

License Not a Contract. — *Carbondale v. Wade*, 106 Ill. App. 654; *State v. Harrison*, 162 Ind. 542.

License Not Letters Patent. — *Hargett v. Bell*, 134 N. Car. 394.

6. Conditions on Which Granted. — See *Adams v. Cronin*, 29 Colo. 499; *Carbondale v. Wade*, 106 Ill. App. 654; *Barnett v. Pemiscot County*, 111 Mo. App. 693; *Parrent v. Little*, 72 N. H. 566.

7. Licenses Subject to Modification or Revocation by Legislature. — *McConkie v. Remley*, 119 Iowa 512; *Barnett v. Pemiscot County Ct.*, 111 Mo. App. 693.

Connecticut — License Subject to Attachment and Execution. — *Quinnipiac Brewing Co. v. Hackbarth*, 74 Conn. 392.

**231.** 5. License May Be Granted to Firm. — See *State v. Scott*, 96 Mo. App. 620; *Ward v. Taylor County Ct.*, 51 W. Va. 102.

The Expression "A Male Person over the Age," etc., does not include a partnership. *State v. Golding*, 28 Ind. App. 233.

7. License to One Member No Protection to Other Members. — *Plisson v. Skinner*, 5 N. W. Ter. 391.

10. License Protects Agent. — *Smith v. State*, 109 Ga. 227; *State v. Barnett*, 111 Mo. App. 688. See also *State v. Dudley*, 33 Ind. App. 640.

11. Licensee May Sell by Agent. — *Smith v. State*, 109 Ga. 227; *State v. Dudley*, 33 Ind. App. 640; *State v. Russell*, 99 Mo. App. 373; *State v. Hammack*, 93 Mo. App. 521.

12. Sales Must Be Within Scope of License. — *State v. Lucas*, 94 Mo. App. 117.

**232.** 1. Removal of Licensee from County. — Compare *State v. Dudley*, 33 Ind. App. 640.

4. Sales Must Be at Place Authorized by License. — *U. S. v. Powers*, 1 Alaska 180; *Bonnie v. Perry*, 78 S. W. Rep. 208, 25 Ky. L. Rep. 1560.

**232.** *d.* LICENSE DOES NOT PASS TO PERSONAL REPRESENTATIVES. — See note 5.

*e.* RIGHT TO ASSIGN OR TRANSFER LICENSE — (1) *License Not Assignable Without Statutory Authority Therefor.* — See notes 7, 8.

**233.** See notes 2, 3.

(2) *Under Statutes Authorizing Assignment — In Pennsylvania.* — See notes 4, 5.

**234.** See note 3.

*In Connecticut.* — See note 4.

*New York.* — See notes 6, 8, 9, 10.

[*Kentucky.* — See note 10a.]

**235.** (3) *Transfer of License to Other Place or Building.* — See note 1. Right of Transfer to Other Premises under Pennsylvania Statute. — See note 3.

*f.* RIGHT TO MORTGAGE LICENSE. — See note 5.

*g.* DURATION OF TERM OF LICENSE. — See note 6.

**236.** 4. Right to License Not Absolute Right. — See note 5.

5. License Subject to Laws in Force When Granted. — See note 8.

**237.** 6. Number of Licenses Required — *a.* DIFFERENT PLACES OF BUSINESS. — See notes 2, 3.

**232.** 5. Right of Personal Representatives to Conduct Business under License. — *McGinnis v. Medway*, 176 Mass. 67.

7. License Not Assignable in Absence of Statute. — *Young v. Stevenson*, (Ark. 1905) 86 S. W. Rep. 1000; *State v. Dudley*, 33 Ind. App. 640; *Sawyer v. Sanderson*, 113 Mo. App. 233; *Mitchell v. Branham*, 104 Mo. App. 480; *Feigenspan v. Mulligan*, 63 N. J. Eq. 179, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 232; *Walsh v. Walper*, 3 Ont. L. Rep. 158.

8. License a Personal Privilege — *Indiana.* — *State v. Dudley*, 33 Ind. App. 640.

*Kentucky.* — *Bonnie v. Perry*, 78 S. W. Rep. 208, 25 Ky. L. Rep. 1560.

*Massachusetts.* — *McGinnis v. Medway*, 176 Mass. 67.

*Missouri.* — *Sawyer v. Sanderson*, 113 Mo. App. 233.

*Nebraska.* — *In re Tierney*, (Neb. 1904) 99 N. W. Rep. 518; *In re Krug*, (Neb. 1904) 101 N. W. Rep. 242.

*Oklahoma.* — *Watkins v. Grieser*, 11 Okla. 302.

**233.** 2. Agreement to Assign License Void. — *Mitchell v. Branham*, 104 Mo. App. 480.

3. A Creditor to Whom a License Has Been Assigned Is Not Liable for Its Value to a Trustee in Bankruptcy. *Bonnie v. Perry*, 78 S. W. Rep. 208, 25 Ky. L. Rep. 1560.

4. Pennsylvania Statute. — See *Cronin v. Sharp*, 16 Pa. Super. Ct. 76.

5. Transfer Allowed in Proper Case. — *Beese's License*, 28 Pa. Co. Ct. 353.

**234.** 3. May Be Transferred Before Taken Out. — *Keifer's License*, 21 Pa. Super. Ct. 512.

4. Connecticut Statute — Appeal from Decision of Commissioners Allowing Transfer of License. — *Wakeman's Appeal*, 74 Conn. 313.

6. License Transferable. — *Niles v. Mathusa*, 162 N. Y. 546, affirming 20 N. Y. App. Div. 483; *McNeeley v. Welz*, 166 N. Y. 124.

8. Certificate Has Status of Property. — *Niles v. Mathusa*, 162 N. Y. 546; *Matter of Lyman*, 59 N. Y. App. Div. 217; *Matter of Cullinan*, 94 N. Y. App. Div. 445; *Matter of Cullinan*, 82 N. Y. App. Div. 445. See also *Sealzo v.*

*Sackett*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 543; *People v. Lyman*, 59 N. Y. App. Div. 172.

Certificate a Mere Chose in Action. — *Niles v. Mathusa*, 162 N. Y. 546; *Knapp v. Scanlin*, (County Ct.) 36 Misc. (N. Y.) 756; *McNeeley v. Welz*, 166 N. Y. 124.

9. Assignment Paramount to Claim of Judgment Creditor. — *Niles v. Mathusa*, 162 N. Y. 546.

10. Right of Assignee to Rebate. — *Matter of Lyman*, 59 N. Y. App. Div. 217; *People v. Cullinan*, 168 N. Y. 258; *People v. Lyman*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 243; *People v. Lyman*, 59 N. Y. App. Div. 172; *People v. Hilliard*, 81 N. Y. App. Div. 71, affirmed 178 N. Y. 582; *Matter of Cullinan*, 87 N. Y. App. Div. 47.

Filing an Assignment. — *Niles v. Mathusa*, 162 N. Y. 546, affirming 20 N. Y. App. Div. 483.

Right of Assignee to Intervene. — *Matter of Cullinan*, 94 N. Y. App. Div. 445.

10a. Kentucky Statute. — By Ky. Stat. 1903, § 4198, when the owner of a license dies, or sells his stock or place of business, the authorities may renew the license, but cannot be required to. *Bonnie v. Perry*, 78 S. W. Rep. 208, 25 Ky. L. Rep. 1560.

**235.** 1. Transfer of License to Other Place or Building. — *Kellar's Petition*, 9 Pa. Dist. 340.

3. See *Kellar's Petition*, 9 Pa. Dist. 340.

5. Mortgage of License. — See *Niles v. Mathusa*, 162 N. Y. 546, affirming 20 N. Y. App. Div. 483.

Construction of Mortgage. — *McNeeley v. Welz*, 166 N. Y. 124, affirming 20 N. Y. App. Div. 566.

6. Term of License Usually One Year. — See *People v. Mount*, 186 Ill. 560; *Hensley v. Metcalfe County Ct.*, 115 Ky. 810.

**236.** 5. No Vested Right to License. — *Busch v. Webb*, 122 Fed. Rep. 655; *Malmö's Appeal*, 72 Conn. 1; *Jordan v. Evansville*, 163 Ind. 512; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642. See also *Fanning's License*, 23 Pa. Super. Ct. 622.

8. *Hoboken v. Greiner*, 68 N. J. L. 592.

**237.** 2. Separate License Required for Each

- 237.** *b.* DIFFERENT KINDS OF BUSINESS. — See note 4.  
*c.* LICENSES REQUIRED BY DIFFERENT JURISDICTIONS. — See note 5.
- 238.** See note 2.  
 Federal License No Protection in Violating State Laws. — See note 7.
- 239.** 7. What Places May Be Licensed. — See note 5.  
 8. Eligibility of Applicant for License — Residence, Citizenship, Etc. — See note 6.
- 240.** Corporations and Partnerships. — See note 4.  
 9. Fitness and Moral Qualifications of Applicant. — See notes 5, 6.  
 Other Immorality than Habit of Becoming Intoxicated. — See note 8.
- 241.** Violation of Liquor Laws. — See notes 4, 6, 7, 8.  
 10. Power to Grant Licenses — *a.* IN GENERAL. — See note 10.
- 242.** See notes 1, 3.

Place of Business. — *Matter of Lyman*, 59 N. Y. App. Div. 217.

**237.** 3. What Is Sale at Place of Manufacture. — *Crass v. Com.*, (Ky. 1900) 56 S. W. Rep. 981.

License to Sell at Specified Place Does Not Authorize Peddling. — *Teoli v. Nardolillo*, 23 R. I. 87.

Right of Agent to Sell at Places Other than That Occupied by Principal. — See *State v. Jones*, 88 Minn. 27.

4. In Delaware a manufacturer of beer is not required to secure a license to sell if he already has a manufacturer's license. *In re Biederman*, 3 Penn. (Del.) 284.

5. Several Licenses Required by Different Jurisdictions. — *Los Angeles County v. Eikenberry*, 131 Cal. 461.

Sale on Steamboat. — A person selling liquor on a steamboat at a port within the state is subject to a license imposed by the state, although the boat is owned by a corporation of another state, and is engaged in traffic between the two states. *Foppiano v. Speed*, 113 Tenn. 167; *affirmed* 199 U. S. 501; *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814.

**238.** 2. Municipal Licenses — Necessity of County License. — *Los Angeles County v. Eikenberry*, 131 Cal. 461.

7. Applications of Rule. — Selling liquor by the drink at the bar of a steamer is not interstate commerce. *Foppiano v. Speed*, 113 Tenn. 167; *affirmed* 199 U. S. 501; *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814.

**239.** 5. A Place in Which Grocery or Other Mercantile Business Is Carried On cannot be granted a license to sell by the drink in *New Jersey*. *Peer v. Excise Com'rs*, 70 N. J. L. 496.

Pennsylvania. — No License in Place of Amusement. — *Martz's License*, 12 Pa. Super. Ct. 521.

Eating Houses, Restaurants, and Saloons. — The sale of soda water and ice cream in a drug store does not prevent a permit to sell liquor under a statute providing that such a permit shall not be granted to keepers of eating houses, restaurants, and saloons. *Matter of Henery*, 124 Iowa 358.

License at Place Other than That of Manufacture. — A corporation authorized by the laws of Pennsylvania to engage in the brewing business may be granted a license to sell its product,

as a wholesale dealer, at a location not the place of manufacture. *Pittsburg Brewing Co.'s License*, 12 Pa. Super. Ct. 129.

6. Must Be Continuous Resident of Township. — *State v. Dudley*, 33 Ind. App. 640.

A Wholesale License to Sell Liquors Will Not Be Granted to a Hotelkeeper in Delaware. — *In re Mundy*, 3 Penn. (Del.) 282.

"Real Resident Holder and Occupier" — English Beerhouse Act. — See *Nix v. Justices*, (1899) 2 Q. B. 294; *Reg. v. Justices*, (1899) 1 Q. B. 571.

**240.** 4. *In re Krug*, (Neb. 1904) 101 N. W. Rep. 242; *Ward v. Taylor County Ct.*, 51 W. Va. 102.

Indiana — Partnership Not a "Male Person." — *State v. Golding*, 28 Ind. App. 233.

Understanding that Grantee Will Select Person to Conduct Business. — License cannot be granted to a person or corporation on the understanding that such person or corporation will select a person to conduct the business under the license. *In re Tierney*, (Neb. 1904) 99 N. W. Rep. 518.

5. Law Does Not Limit Causes for Remonstrance to Those Enumerated in Statute. — *Watkins v. Grieser*, 11 Okla. 302.

6. Must Be of Respectable Character and Standing. — *Watkins v. Grieser*, 11 Okla. 302.

8. Must Be Fit Person to Be Intrusted with Sale and Handling of Intoxicants. — *Watkins v. Grieser*, 11 Okla. 302.

**241.** 4. Single Violation of Liquor Laws. — *Compare Watkins v. Grieser*, 11 Okla. 302.

Compromise of Suit Brought for Violation of Law Has Same Effect as Conviction Would Have. — *Matter of Thoma*, 117 Iowa 275; *Matter of Wilhelm*, 124 Iowa 380.

6. Selling Liquor Without License. — *Caudill's Appeal*, 66 S. W. Rep. 723, 23 Ky. L. Rep. 2139.

7. Selling to Minors. — *Caudill's Appeal*, 66 S. W. Rep. 723, 23 Ky. L. Rep. 2139.

8. Pharmacist Must Lawfully Conduct Pharmacy Six Months Before Hearing. — *Matter of Henery*, 124 Iowa 358.

10. What Authorities Have Power to License. — See *Moynihan's Appeal*, 75 Conn. 358; *Pittsburg Brewing Co.'s License*, 12 Pa. Super. Ct. 176.

**242.** 1. As to Personal Qualifications of Applicant. — *Burns's Appeal*, 76 Conn. 395.

3. As to Payment of License Fee. — *Ristine v. Clements*, 31 Ind. App. 338.

**243.** 12. Petition or Application for License — *a.* NECESSITY FOR APPLICATION OR PETITION. — See note 1.

*b.* NECESSARY ALLEGATIONS — In General. — See notes 3, 4.  
Description of Premises. — See note 6.

**244.** Qualifications of Applicant. — See notes 1, 2, 3.

**245.** *d.* FILING OF APPLICATION OR PETITION. — See note 2.

*e.* NOTICE OF APPLICATION OR PETITION — (1) *Necessity and Object of Notice.* — See notes 5, 6.

(2) *Requirements of Notice.* — See note 7.

**246.** Description of Place. — See note 1.

(4) *Publication of Notice.* — See notes 4, 5.

**247.** 13. Recommendation of Petition or Application — *a.* NECESSITY OF RECOMMENDATION. — See notes 4, 5, 7.

**243.** 1. Necessity for Petition or Application. — State *v.* Higgins, 84 Mo. App. 531; Watkins *v.* Grieser, 11 Okla. 302; Forst's License, 208 Pa. St. 578.

Adjournment of Court Which Grants Licenses to Another Term Does Not Operate as Dismissal of Application Proceedings. — Cox *v.* Burnham, 120 Iowa 43.

Amendment of Petition. — Forst's License, 208 Pa. St. 578. *Contra*, Fislser's License, 26 Pa. Co. Ct. 381.

Verification by Affidavit of the Applicant Not Required. — State *v.* Seibert, 97 Mo. App. 212.

A Transfer of an Application Is Not a Transfer of a License and Is Not Operative. — Keiper's License, 21 Pa. Super. Ct. 512.

3. All Jurisdictional Facts Must Appear on Face of Proceedings. — State *v.* Bennett, 102 Mo. App. 247; State *v.* Fort, 107 Mo. App. 328; State *v.* Seibert, 97 Mo. App. 212.

Pennsylvania — Petition by Corporation. — Pittsburgh Brewing Co.'s License, 14 Pa. Super. Ct. 188.

Defective Petition. — State *v.* Tullock, 108 Mo. App. 32.

Requirements of Partnership Application. — State *v.* Scott, 96 Mo. App. 620.

The License Bond Is Not Invalidated by the omission of necessary allegations from the application. Castellano *v.* Marks, (Tex. Civ. App. 1904) 83 S. W. Rep. 729; Cox *v.* Thompson, (Tex. Civ. App. 1905) 85 S. W. Rep. 34.

4. How Defective Petition Cured. — State *v.* Fort, 107 Mo. App. 328.

6. Describing Location of Premises. — Cramer's License, 23 Pa. Super. Ct. 596.

Sufficient Description Where Houses Not Numbered. — Green *v.* Southard, 94 Tex. 470; Douthit *v.* State, 36 Tex. Civ. App. 396.

Stating Name of Owner of Premises. — See Miller's License, 13 Pa. Super. Ct. 272.

Description Held Sufficient. — Walker's License, 24 Pa. Super. Ct. 90.

Error in Stating Number of Place. — Cullinan *v.* Fidelity, etc., Co., (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 119.

Indiana — Insufficient Description of Room. — Mace *v.* Smith, 164 Ind. 152.

**244.** 1. Qualifications of Applicant. — *In re* Tierney, (Neb. 1904) 99 N. W. Rep. 519; Walsh's License, 24 Pa. Super. Ct. 87.

Qualifications of Members of Partnership. — State *v.* Scott, 96 Mo. App. 620.

Licensing Board Cannot Delegate Power of Pass-

ing upon Character and Standing of Applicant. — *In re* Tierney, (Neb. 1904) 99 N. W. Rep. 519.

2. Character and Habits of Petitioner. — See Sauers's License, 23 Pa. Super. Ct. 463.

3. Qualification as to Residence. — See Brewing Co.'s License, 14 Pa. Super. Ct. 188.

**245.** 2. Necessity of Filing Petition. — Cooper *v.* Hunt, 103 Mo. App. 9; State *v.* Seibert, 97 Mo. App. 212; Keiper's License, 21 Pa. Super. Ct. 512.

5. Object of Notice. — Goodwine *v.* Flint, 28 Ind. App. 36; Moran *v.* Creagan, 27 Ind. App. 659.

6. Notice Jurisdictional Process. — Goodwine *v.* Flint, 28 Ind. App. 36; Watkins *v.* Grieser, 11 Okla. 302; Smith *v.* Young, 13 Okla. 134; Keiper's License, 21 Pa. Super. Ct. 512.

7. Clerical Error in Description of Notice. — *Ex p.* Clayton, 63 J. P. 788.

**246.** 1. Notice Held Sufficient. — Moran *v.* Creagan, 27 Ind. App. 659.

4. Good Faith No Excuse for Not Complying with Statute. — Watkins *v.* Grieser, 11 Okla. 302; Smith *v.* Young, 13 Okla. 134.

5. Authority of Licensing Board to Designate Paper. — Watkins *v.* Grieser, 11 Okla. 302.

Applicant Should Make Own Selection of Newspapers, as This Is Not County Clerk's Duty. — Watkins *v.* Grieser, 11 Okla. 302; Smith *v.* Young, 13 Okla. 134.

Competent Proof of Publication Must Be Made Before Application Is Considered. — Watkins *v.* Grieser, 11 Okla. 302.

Notice Held Sufficient. — Perdue *v.* Gill, (Ind. App. 1905) 73 N. E. Rep. 844.

Notice Held Insufficient. — Goodwine *v.* Flint, 28 Ind. App. 36.

**247.** 4. Number of Signers Required by Statute Must Be Obtained. — Bachman *v.* Phillipsburg, 68 N. J. L. 552; Forst's License, 208 Pa. St. 578.

Iowa — Thirty Resident Freeholders. — Somers *v.* Vlazney, 64 Neb. 383.

When Signatures Should Not Be Counted. — State *v.* Scott, 96 Mo. App. 620.

5. License Without Required Recommendation Void. — Martens *v.* People, 85 Ill. App. 66, affirmed 186 Ill. 314.

Prescribed Number of Signatures Necessary to Confer Jurisdiction to Grant License. — Bachman *v.* Phillipsburg, 68 N. J. L. 552.

7. Only Persons Designated by Statute Can Recommend Application. — Forst's License, 23 Pa. Super. Ct. 600.

**247.** *b.* WHO IS QUALIFIED TO SIGN RECOMMENDATION. — See note 9.

**248.** See note 2.

Women and Minors. — See note 3.

*c.* MISCELLANEOUS — Right to Withdraw Signature. — See note 5.

What Signing Is Sufficient. — See note 7.

Amendments. — See notes 8, 9.

**249.** 14. Consent of Resident Property Owners, or Freeholders Living in Vicinity. — See notes 1, 6.

**250.** See note 2.

Measurement of Distances. — See notes 3, 4.

15. Remonstrances or Counter Petitions — *a.* RIGHT TO REMONSTRATE. — See notes 5, 6, 7.

**247.** 9. Who Are Assessed Taxpaying Citizens. — State *v.* Kingsbury, 105 Mo. App. 22.

Taxpaying Citizens Owning Property. — Scarritt *v.* Jackson County Ct., 89 Mo. App. 585.

**248.** 2. Persons to Whom Land Is Conveyed. — Bennett *v.* Otto, (Neb. 1903) 94 N. W. Rep. 807; Colglazier *v.* McClary, (Neb. 1904) 98 N. W. Rep. 670; Bachman *v.* Phillipsburg, 68 N. J. L. 552.

"Citizens" Confined to Qualified Voters. — Wray *v.* Harrison, 116 Ga. 93.

A Tenant in Common signs only as the representative of his proportionate interest in the property according to the frontage thereof. People *v.* Griesbach, 211 Ill. 39.

3. Minor Not to Be Counted. — People *v.* Griesbach, 211 Ill. 39; Thompson *v.* Egan, (Neb. 1903) 97 N. W. Rep. 247. See also Theurer *v.* People, 211 Ill. 302.

Incompetents Not Qualified to Sign Recommendation. — People *v.* Griesbach, 211 Ill. 39.

5. Signatures Cannot Be Withdrawn. — Harlan *v.* State, 136 Ala. 150; Bordwell *v.* Dills, 70 Ark. 179, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248; Bachman *v.* Phillipsburg, 68 N. J. L. 552. But see Theurer *v.* People, 211 Ill. 302.

7. Signature Must Be in Person's Own Handwriting. — Fakes *v.* Wilder, 70 Ark. 449.

8. Addition of Names After Filing Petition. — Thompson *v.* Egan, (Neb. 1903) 97 N. W. Rep. 247.

9. Amending Petition After Hearing — View that Amendment Will Not Be Permitted. — Bachman *v.* Phillipsburg, 68 N. J. L. 552; Forst's License, 208 Pa. St. 578.

**249.** 1. Consent a Condition Precedent to Issuance of License. — Boomershine *v.* Uline, 159 Ind. 502, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 249; Landt *v.* Remley, 113 Iowa 555.

Consent Which Is Purchased Is Void. — Theurer *v.* People, 211 Ill. 302.

Consent May Be Signed by Authorized Agent. — Theurer *v.* People, 211 Ill. 302.

Authority to Give Consent Need Not Be in Writing. — Matter of Cowles, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 447.

Consents Cannot Be Filed Nunc Pro Tunc. — Matter of Lord, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 223.

Change in Ownership of Premises Does Not Invalidate Consent Given by Previous Owner. — Matter of Cowles, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 447.

A Park Frontage must be taken into con-

sideration in determining the amount of frontage for which the signatures of owners must be obtained. Theurer *v.* People, 211 Ill. 302; Dexter *v.* Sprague, 22 R. I. 324.

Park Commissioners Have Power to Sign Consent for Park Property. — Theurer *v.* People, 211 Ill. 302.

When Consent May Be Withdrawn. — Matter of Adriance, 59 N. Y. App. Div. 440; Kane *v.* Grady, 123 Iowa 260.

Operation of Statutes. — See Matter of Kessler, 163 N. Y. 205, reversing 44 N. Y. App. Div. 635; Matter of Pierson, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 293; Matter of Loper, 53 N. Y. App. Div. 576, affirmed 165 N. Y. 618; Matter of Hawkins, 165 N. Y. 188; Matter of Brewster, 85 N. Y. App. Div. 235; People *v.* Brush, 179 N. Y. 93; Matter of Klevesahl, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 361; *In re* Harper, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 663; Matter of Moulton, 59 N. Y. App. Div. 25, affirmed 168 N. Y. 645; Matter of Haight, (County Ct.) 33 Misc. (N. Y.) 544, affirmed 59 N. Y. App. Div. 626.

"Continuously" Defined. — People *v.* Brush, 179 N. Y. 93; Matter of Hawkins, 165 N. Y. 188.

6. What Is a Dwelling House. — Matter of Veeder, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 569; Matter of Rasquin, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 693.

What Is a Hotel. — Matter of Ireland, (County Ct.) 41 Misc. (N. Y.) 425.

**250.** 2. Who Must Sign Consent. — Harrison *v.* People, 195 Ill. 466.

Building Used for Business Purposes. — Matter of Ireland, (County Ct.) 41 Misc. (N. Y.) 425.

Buildings Erected for the Purpose of Requiring the Consent of the owner may be disregarded in ascertaining the necessary number of consents. Matter of Vail, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 392; Matter of Patterson, (County Ct.) 43 Misc. (N. Y.) 498.

3. Distances to Be Measured in Straight Line. — Matter of Veeder, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 569; Matter of McMonagle, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 407.

What Is "Nearest Entrance." — Matter of Veeder, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 569; *In re* Saunderson, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 375; *In re* McMonagle, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 407.

4. How Distance Measured. — Matter of Cheney, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 508.

5. Granting License Not Conclusive on Subse-



- 250.** *b.* FILING OF REMONSTRANCE — Before Whom Filed. — See note 10.
- 251.** Time of Filing. — See note 1.
- c.* FORM AND ALLEGATIONS OF REMONSTRANCE. — See notes 6, 7.
- 252.** *d.* WITHDRAWAL OF REMONSTRANCE. — See notes 1, 2.
- 16. Hearing of Application and Remonstrance — a. TIME OF HEARING.** — See note 3.
- b.* EVIDENCE. — See notes 8, 9, 10.
- Fitness of Applicant. — See notes 11, 12.
- 253.** See note 1.
- Proof of New Matter. — See note 2.
- Necessity for License. — See notes 3, 12.
- 254.** **17. Discretion in Granting and Refusing Licenses — a. IN GENERAL.** — See notes 2, 3, 4.

quent Applications. — *Pittsburg Brewing Co.'s License*, 16 Pa. Super. Ct. 215.

**6. Applications of Rule.** — *Shaffer v. Stern*, 160 Ind. 375; *Moran v. Creagan*, 27 Ind. App. 659.

In Arkansas any citizen may file a remonstrance. *Whissen v. Furth*, 73 Ark. 366.

In Indiana all legal voters may remonstrate. *White v. Furgeson*, 29 Ind. App. 144; *Shaffer v. Stern*, 160 Ind. 375.

**Nebraska — Not Confined to Residents of Ward or Village.** — *Somers v. Vlazney*, 64 Neb. 383.

In Oklahoma any person, without limitation as to residence or place, may file a remonstrance. *Swan v. Wilderson*, 10 Okla. 547; *Watkins v. Grieser*, 11 Okla. 302.

**7. Remonstrant May Act Through Attorney.** — *Ludwig v. Cory*, 158 Ind. 582; *White v. Furgeson*, 29 Ind. App. 144; *Fried v. Nelson*, 30 Ind. App. 1; *Boomershine v. Uline*, 159 Ind. 500; *Ragle v. Mattox*, 159 Ind. 584; *Shaffer v. Stern*, 160 Ind. 375; *James v. Nugent*, 31 Ind. App. 697; *Hoop v. Affleck*, 162 Ind. 564; *Arderly v. Smith*, (Ind. App. 1905) 73 N. E. Rep. 840. But see *Cochell v. Reynolds*, 156 Ind. 14.

**10. Remonstrance by Mail Sufficient.** — *Moore v. State*, (Neb. 1903) 96 N. W. Rep. 225.

**251. 1. How Time Computed.** — *Shaffer v. Stern*, 160 Ind. 375. See also *Sexton v. Goodwine*, 33 Ind. App. 329.

**Remonstrance Filed to Prevent Granting of License at One Session Remains Effective to Prevent Granting at Subsequent Session.** — *McLaughlin v. Wisler*, 28 Ind. App. 61.

**Remonstrance May Be Directed Against Person Who at Filing Thereof Has Not Given Notice.** — *McLaughlin v. Wisler*, 28 Ind. App. 61.

**6. Alleging Qualifications of Remonstrants.** — *Bryan v. DeMoss*, 34 Ind. App. 473.

**The Majority of Voters in a Ward.** — *Abbott v. Inman*, (Ind. App. 1904) 72 N. E. Rep. 284.

**7. Grounds Need Not Be Stated.** — *Boomershine v. Uline*, 159 Ind. 502.

**252. 1. Ludwig v. Cory, 158 Ind. 582; *Sexton v. Goodwine*, 33 Ind. App. 329; *Davis v. Affleck*, 34 Ind. App. 572. See also *Bachman v. Phillipsburg*, 68 N. J. L. 552.**

**2. Withdrawal After Expiration of Time for Filing Not Permissible.** — *Sexton v. Goodwine*, 33 Ind. App. 329, 331. See also *Bachman v. Phillipsburg*, 68 N. J. L. 552.

**3. Necessity of Fixing Time for Hearing.** — *Moore v. State*, (Neb. 1903) 96 N. W. Rep. 225; *Swan v. Wilderson*, 10 Okla. 547.

**Reasonable Time to Produce Testimony** must be

given. *Bachman v. Phillipsburg*, 68 N. J. L. 552.

**Evidence Must Be Heard and Issues Determined.** — *Swan v. Wilderson*, 10 Okla. 547; *Watkins v. Grieser*, 11 Okla. 302.

**Time When Board Must Convene.** — *Swan v. Wilderson*, 10 Okla. 547.

**Proceeding to Obtain License a Judicial Proceeding, in Nature of Civil Action.** — *Ludwig v. Cory*, 158 Ind. 582; *White v. Furgeson*, 29 Ind. App. 145; *Bryan v. De Moss*, 34 Ind. App. 473.

**8. Burden on Petitioner to Show Jurisdictional Facts.** — *Mason v. Ratcliff*, 27 Ind. App. 290; *Watkins v. Grieser*, 11 Okla. 302; *Smith v. Young*, 13 Okla. 134. See also *Foreman's License*, 20 Pa. Super. Ct. 98.

**9. Mason v. Ratcliff, 27 Ind. App. 290.**

**10. Burden of Proving Publication of Notice.** — *Watkins v. Grieser*, 11 Okla. 302; *Smith v. Young*, 13 Okla. 134.

**Burden of Showing that Applicant a Merchant, Etc.** — *Hodges v. Metcalf County Ct.*, (Ky. 1904) 78 S. W. Rep. 177.

**Rules of Evidence Same as in Civil Cause.** — *Watkins v. Grieser*, 11 Okla. 302.

**11. Personal Fitness of Applicant.** — *Watkins v. Grieser*, 11 Okla. 302. See also *Keiper's License*, 21 Pa. Super. Ct. 512.

**12. Burden of Proving Fitness.** — *Whissen v. Furth*, 73 Ark. 366, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252; *Mason v. Ratcliff*, 27 Ind. App. 290; *Watkins v. Grieser*, 11 Okla. 302.

**253. 1. What Evidence Competent on Question of Fitness.** — *Watkins v. Grieser*, 11 Okla. 302.

**The Mere Appearance of the Applicant May Be Sufficient to Show that He Is Not a Fit Person**, and the court may take notice of this. *Cramer's License*, 23 Pa. Super. Ct. 596.

**What Is Good Character.** — *Whissen v. Furth*, 73 Ark. 366.

**What Evidence Competent on Question of Character.** — *Watkins v. Grieser*, 11 Okla. 302.

**2. Burden on Remonstrants to Prove New Matter Alleged.** — *Colglazier v. McClary*, (Neb. 1904) 98 N. W. Rep. 670; *Watkins v. Grieser*, 11 Okla. 302.

**3. Proving Necessity for License.** — See *Keiper's License*, 21 Pa. Super. Ct. 512.

**12. Question of Necessity Peculiarly Within Discretion of Court.** — *Matter of Henery*, 124 Iowa 358.

**254. 2. Right to Exercise Discretion** — *Connecticut*. — *Malmo's Appeal*, 73 Conn. 232;

**255.** Nature and Extent of Discretion. — See notes 1, 3, 4, 7.

**256.** *b.* WHAT CONSTITUTES ABUSE OF DISCRETION. — See notes 1, 5.  
It Is Not an Abuse of Discretion, — See notes 7, 9, 14.

**257.** See notes 1, 2.

**18. Review of Action of Licensing Authorities — a. APPEAL — How Authorized.** — See notes 3, 5.

Wakeman's Appeal, 74 Conn. 313. See also Moynihan's Appeal, 75 Conn. 358.

*Illinois.* — Harrison v. People, 195 Ill. 466.

*Michigan.* — People v. White, 127 Mich. 428, 8 Detroit Leg. N. 397.

*Missouri.* — State v. McCammon, 111 Mo. App. 626.

*New York.* — People v. Lyman, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 243.

**Board Acts in Administrative Capacity.** — Hewitt's Appeal, 76 Conn. 685; Moynihan's Appeal, 75 Conn. 358. See also Malmo's Appeal, 73 Conn. 238.

**Right to Exercise Discretion Cannot Be Delegated.** — State v. Stiff, 104 Mo. App. 685; *In re Tierney*, (Neb. 1904) 99 N. W. Rep. 518; *In re Krug*, (Neb. 1904) 101 N. W. Rep. 242.

**254. 3. Right to Exercise Discretion Exists — Arkansas.** — *Ex p.* Clark, 69 Ark. 435; Whissen v. Furth, 73 Ark. 366.

*Connecticut.* — Malmo's Appeal, 72 Conn. 1; Moynihan's Appeal, 75 Conn. 358; Burns's Appeal, 76 Conn. 395.

*Iowa.* — *In re* Gillham, (Iowa 1904) 99 N. W. Rep. 179.

*Kansas.* — Newman v. Lake, 70 Kan. 848.

*Kentucky.* — Caudill's Appeal, 66 S. W. Rep. 723, 23 Ky. L. Rep. 2139; Riley v. Rowe, 112 Ky. 817; Hodges v. Metcalfe County Ct., 116 Ky. 524.

*Missouri.* — State v. Stiff, 104 Mo. App. 685; State v. Higgins, 84 Mo. App. 531.

*Nebraska.* — State v. Alliance, 65 Neb. 524; Halverstadt v. Berger, (Neb. 1904) 100 N. W. Rep. 934.

*North Carolina.* — Barnes v. Wilson County, 135 N. Car. 27.

*Pennsylvania.* — Weaver's License, 20 Pa. Super. Ct. 95; Cramer's License, 23 Pa. Super. Ct. 596.

*South Dakota.* — Britton v. Guy, 17 S. Dak. 588.

**4. Board Acts in Judicial Capacity — Connecticut.** — Malmo's Appeal, 72 Conn. 1; Burns's Appeal, 76 Conn. 395.

*Indiana.* — Goodwine v. Flint, 28 Ind. App. 36.

*Minnesota.* — State v. Northfield, (Minn. 1904) 101 N. W. Rep. 1063.

*Missouri.* — Cooper v. Hunt, 103 Mo. App. 9; State v. Fort, 107 Mo. App. 328; Weber v. Lane, 99 Mo. App. 69; State v. Higgins, 84 Mo. App. 531.

*Nebraska.* — State v. Alliance, 65 Neb. 524.

*New Hampshire.* — Sargent v. Little, 72 N. H. 555.

**255. 1. View that Discretion Is Absolute.** — State v. Northfield, (Minn. 1904) 101 N. W. Rep. 1063.

**8. View that Discretion Cannot Be Exercised Arbitrarily — Arkansas.** — Whissen v. Furth, 73 Ark. 366.

*Connecticut.* — Malmo's Appeal, 73 Conn. 232; Moynihan's Appeal, 75 Conn. 358.

*Kentucky.* — Hodges v. Metcalfe County Ct.,

116 Ky. 524; George v. Winchester, (Ky. 1904) 80 S. W. Rep. 1158.

*Louisiana.* — State v. New Orleans, 113 La. 371.

*Nebraska.* — State v. Alliance, 65 Neb. 524.

*North Carolina.* — Barnes v. Wilson County, 135 N. Car. 27.

*Pennsylvania.* — Winder's License, 24 Pa. Co. Ct. 90; Venango County Liquor Licenses, 28 Pa. Co. Ct. 209.

**4. Discretion Must Not Be Result of Mere Caprice or Prejudice.** — Hodges v. Metcalfe County Ct., 116 Ky. 524.

**7. Cannot Arbitrarily Refuse All Applications.** — Riley v. Rowe, 112 Ky. 817; George v. Winchester, (Ky. 1904) 80 S. W. Rep. 1158.

**256. 1. Refusal on Objection of Minority Property Owners.** — State v. New Orleans, 113 La. 371.

**5. Refusal for Want of Necessity.** — State v. New Orleans, 113 La. 371.

**7. Unfitness of Applicant.** — Brown's License, 18 Pa. Super. Ct. 409; Burke v. Collins, (S. Dak. 1904) 99 N. W. Rep. 1112; McCormick v. Pfeiffer, (S. Dak. 1905) 103 N. W. Rep. 31.

**Determination of Suitableness of Applicant a Matter of Discretion.** — *Ex p.* Clark, 69 Ark. 435; Riley v. Rowe, 112 Ky. 817; Burns's Appeal, 76 Conn. 395.

**A Refusal Without Putting on the Record the Reason for Refusal is not an abuse of discretion.** Kilgore's License, 13 Pa. Super. Ct. 543.

**9. Unsuitableness of Place.** — *Ex p.* Clark, 69 Ark. 435; Moynihan's Appeal, 75 Conn. 358; Burns's Appeal, 76 Conn. 395; Hewitt's Appeal, 76 Conn. 685; Riley v. Rowe, 112 Ky. 817.

**14. Not Abuse of Discretion to Refuse License to One Who Had Sold Without License and to Minors.** — Caudill's Appeal, 66 S. W. Rep. 723, 23 Ky. L. Rep. 2139.

**257. 1. Premises Subject to Covenant Against Sale of Liquor.** — Fanning's License, 23 Pa. Super. Ct. 622.

**2. A license is properly refused where a remonstrance, signed by a majority of the legal voters, and good for two years, has been filed, and such period has not expired.** Wilcox v. Bryant, 156 Ind. 379.

**3. Jurisdictions Where Appeal Allowed — England.** — Evans v. Justices, (1900) 2 Q. B. 224; Reg. v. Justices, (1900) 2 Q. B. 576; Reg. v. Winder, (1900) 2 Q. B. 666; Rex v. Justices, (1902) 2 K. B. 101; Raven v. Justices, (1904) 1 K. B. 430; Rex v. Justices, (1904) 1 K. B. 545; Rex v. Recorder, (1904) 2 K. B. 570; Bushell v. Hammond, (1904) 2 K. B. 563; Stevenson v. Hunter, Sc. Ct. of Sess. 5 F. 761.

*Arkansas.* — Whissen v. Furth, 73 Ark. 366.

*Connecticut.* — Malmo's Appeal, 72 Conn. 1; Malmo's Appeal, 73 Conn. 232; Wakeman's Appeal, 74 Conn. 313; Moynihan's Appeal, 75 Conn. 358; Hewitt's Appeal, 76 Conn. 685.

*Iowa.* — Matter of Smith, 126 Iowa 128.

*Kentucky.* — Caudill's Appeal, 66 S. W. Rep.

**257.** Who Is Entitled to Appeal. — See note 6.

**258.** The Hearing. — See note 4.

Presumptions on Appeal. — See notes 6, 7.

Effect of Appeal. — See notes 8, 9, 11.

*b.* CERTIORARI. — See notes 12, 13.

**259.** See notes 1, 2, 4.

**260.** *c.* MANDAMUS. — See notes 1, 2, 3, 4.

**261.** 19. Enjoining or Prohibiting Grant of License. — See notes 1, 2.

20. Prosecution of Licensing Authorities for Wrongfully Granting or Refusing License. — See note 7.

21. Civil Actions Based on Refusal to Issue or on Revocation of License. — See notes 8, 9.

723, 23 Ky. L. Rep. 2139; *Hensley v. Metcalfe County Ct.*, 115 Ky. 810.

*Oklahoma.* — *Swan v. Wilderson*, 10 Okla. 547.

In Connecticut the conclusion of the Superior Court as to the suitability of person and place is not reviewable. *Burns's Appeal*, 76 Conn. 395; *Hewitt's Appeal*, 76 Conn. 685.

In Nebraska an appeal is allowed to the District Court, but their decision is not reviewable by appeal. *Halverstadt v. Berger*, (Neb. 1904) 100 N. W. Rep. 934. See also *Bennett v. Otto*, (Neb. 1903) 94 N. W. Rep. 807.

In Kentucky it is held that on appeal the case is not to be tried *de novo*, but the court must act on the evidence before the licensing board. *Hensley v. Metcalfe County Ct.*, 115 Ky. 810; *Meredith v. Com.*, 76 S. W. Rep. 8, 25 Ky. L. Rep. 455; *Hodges v. Metcalfe County Ct.*, 116 Ky. 524.

An appeal bond is required except where the appeal is taken by the county attorney. *Hamilton v. McKinney*, 65 S. W. Rep. 2, 23 Ky. L. Rep. 1341.

In Pennsylvania the appeal provided for is merely a substitute for certiorari. *Weaver's License*, 20 Pa. Super. Ct. 95.

**257.** 5. *Cooper v. Hunt*, 103 Mo. App. 9. See also *State v. Siebert*, 97 Mo. App. 212.

**6.** Persons Not Parties Cannot Appeal. — *Holford v. Kirkland*, 71 Ark. 84.

Applicants or Remonstrants. — In *Arkansas* the losing party in remonstrance proceedings may appeal. *Whissen v. Furth*, 73 Ark. 366.

In *Oklahoma* either an applicant or a remonstrant may appeal from the decision of the board of commissioners to the District Court. *Swan v. Wilderson*, 10 Okla. 547; *Watkins v. Grieser*, 11 Okla. 302.

**258.** 4. Decisions on Questions of Fact. — *Malmö's Appeal*, 72 Conn. 1; *Malmö's Appeal*, 73 Conn. 238; *Wakeman's Appeal*, 74 Conn. 313; *Moynihan's Appeal*, 75 Conn. 358; *Hewitt's Appeal*, 76 Conn. 685; *Persinger v. Miller*, (Neb. 1902) 90 N. W. Rep. 242; *Weaver's License*, 20 Pa. Super. Ct. 95.

Decision on Suitability of Person and Place Not Reviewable. — *Burns's Appeal*, 76 Conn. 395.

No Objections Considered Unless Raised Below. — *Persinger v. Miller*, (Neb. 1902) 90 N. W. Rep. 242.

**6.** Presumptions on Appeal. — *Miller's License*, 13 Pa. Super. Ct. 272; *Kilgore's License*, 13 Pa. Super. Ct. 543; *Pittsburg Brewing Co.'s License*, 14 Pa. Super. Ct. 188; *Brown's License*, 18 Pa. Super. Ct. 409; *Chamber's License*, 18 Pa. Super. Ct. 412; *Weaver's License*, 20 Pa.

Super. Ct. 95; *Foreman's License*, 20 Pa. Super. Ct. 98; *Chuya's License*, 20 Pa. Super. Ct. 410; *Sauers's License*, 23 Pa. Super. Ct. 463; *Cramer's License*, 23 Pa. Super. Ct. 596.

**7.** A Wrong Reason Given for Refusal to Grant a License will not avoid the decision refusing the license. *Wilcox v. Bryant*, 156 Ind. 379.

**8.** Effect of Appeal. — See *State v. Sopher*, 157 Ind. 360.

**9.** *Swan v. Wilderson*, 10 Okla. 547; *Watkins v. Grieser*, 11 Okla. 302.

Appeal Cannot of Itself Effect a Revocation of License. — *Swan v. Wilderson*, 10 Okla. 547.

**11.** If the Appeal Is Not Perfected Within the Statutory Time, then the license should be issued. *Swan v. Wilderson*, 10 Okla. 547.

**12.** Special Statutory Provisions. — See *People v. Hamilton*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 465.

*Missouri* — When Certiorari Granted. — *State v. Wilson*, 90 Mo. App. 154.

**13.** Question of Fact Not Reviewable on Certiorari. — *Cooper v. Hunt*, 103 Mo. App. 9.

**259.** 1. Questions of Law Reviewable. — *State v. Tullock*, 108 Mo. App. 32; *Cooper v. Hunt*, 103 Mo. App. 9.

**2.** Jurisdiction of Subject-matter. — See *State v. Tullock*, 108 Mo. App. 32.

**4.** Only Errors on Face of Record Reviewable. — *Brown's License*, 18 Pa. Super. Ct. 409.

**260.** 1. Action of Board Not Controlled by Mandamus. — *State v. Northfield*, (Minn. 1904) 101 N. W. Rep. 1063; *State v. Stiff*, 104 Mo. App. 685; *State v. Higgins*, 84 Mo. App. 531; *Barnes v. Wilson County*, 135 N. Car. 27. See also *State v. McCammon*, 111 Mo. App. 626.

**2.** Except in Case of Abuse of Discretion. — *State v. Alliance*, 65 Neb. 524; *Barnes v. Wilson County*, 135 N. Car. 27.

**3.** *George v. Winchester*, (Ky. 1904) 80 S. W. Rep. 1158; *State v. New Orleans*, 113 La. 371. See also *New Orleans v. Macheca*, 112 La. 559.

**4.** *Com. v. McClure*, 204 Pa. St. 196.

Mandamus Lies to Compel Granting of License. — *Harlan v. State*, 136 Ala. 150; *State v. McCammon*, 111 Mo. App. 626.

**261.** 1. *State v. Fort*, 107 Mo. App. 328.

Injunction Not Granted When Certiorari May Be Exercised or Finding Cannot Be Reviewed. — *Cooper v. Hunt*, 103 Mo. App. 9.

**2.** *Hawk's Nest v. Fayette County Ct.*, 55 W. Va. 689.

**7.** Corrupt or Wilful Granting of License. — *Com. v. Wood*, 116 Ky. 748.

**8.** Refusal to Issue License. — *Weber v. Lane*, 99 Mo. App. 69.

**262. 22. Form and Requisites of License — b. DESCRIPTION OF PREMISES.** — See note 8.

**263. 23. Revocation of License — a. POWER TO REVOKE — (1) In General.** — See notes 1, 2, 5.

(2) *By Repeal of Statute.* — See note 6.

*b. JURISDICTION TO REVOKE LICENSES.* — See note 8.

**264.** See note 1.

*c. GROUNDS FOR REVOKING LICENSES.* — See note 4.

**Violations of Liquor Law — Keeping Disorderly Place.** — See notes 6, 9.

**261. 9. Liability of Licensing Board.** — Weber v. Lane, 99 Mo. App. 69.

**262. 8. Sale at One Place Only — Description of Premises.** — State v. Barge, 82 Minn. 256.

**Where Houses Not Numbered, Sufficient to Name City and County.** — Green v. Southard, 94 Tex. 470.

**263. 1. Licenses Mere Temporary Permits Which Are Revocable — Connecticut.** — See Malmo's Appeal, 72 Conn. 1.

*Illinois.* — Carbondale v. Wade, 106 Ill. App. 654.

*Indiana.* — Ristine v. Clements, 31 Ind. App. 338; State v. Harrison, 162 Ind. 542.

*Iowa.* — West v. Bishop, 110 Iowa 410; McConkie v. Remley, 119 Iowa 512.

*Louisiana.* — Compare Shreveport v. Draiss, 111 La. 511.

*Missouri.* — Higgins v. Talty, 157 Mo. 280; Barnett v. Pemiscot County Ct., 111 Mo. App. 693.

*Montana.* — In re O'Brien, 29 Mont. 530.

*Nevada.* — Wallace v. Reno, 27 Nev. 71.

*New York.* — See Matter of Lyman, 59 N. Y. App. Div. 217; Matter of Cullinan, 82 N. Y. App. Div. 445.

**Refusal to Cancel Not Bar to New Application by Different Person.** — Matter of McCusker, 47 N. Y. App. Div. 111.

**2. Conditions Implied in Grant of License.** — See Adams v. Cronin, 29 Colo. 499; Barnett v. Pemiscot County Ct., 111 Mo. App. 693; Parent v. Little, 72 N. H. 566; Carbondale v. Wade, 106 Ill. App. 654.

**5. Not Deprivation of Property Without Due Process of Law.** — Wallace v. Reno, 27 Nev. 71; Matter of Lyman, 46 N. Y. App. Div. 387, affirmed 163 N. Y. 552.

**Revocation by Vote of Electors.** — In re O'Brien, 29 Mont. 530; Matter of Harper, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 663.

**Revocation by Court Order.** — Viefhaus v. State, 71 Ark. 419.

**6. Revocation by Repeal.** — Carbondale v. Wade, 106 Ill. App. 654; West v. Bishop, 110 Iowa 410.

**8. Board Issuing License May Revoke.** — Wallace v. Reno, 27 Nev. 71.

**Issuing Board Cannot Revoke After Adjourning.** — R. I. Perkins Horseshoe Co. v. License Com'rs, (R. I. 1895) 46 Atl. Rep. 1063. But compare McAloon v. License Com'rs, 22 R. I. 191.

**264. 1. Power to Revoke Cannot Be Delegated.** — Carbondale v. Wade, 106 Ill. App. 654.

**4. Grounds of Revocation — In General.** — Jefferson County v. Mayr, 31 Colo. 173; Higgins v. Talty, 157 Mo. 280; Wallace v. Reno, 27 Nev. 71; Matter of Lyman, 59 N. Y. App. Div. 217; McLaughlin's License, 24 Pa. Co. Ct. 92.

**Ignorance of Violations No Defense.** — Gordon's Case, 16 Montg. Co. Rep. (Pa.) 25.

**New York. — Material False Statements in the application for the liquor tax certificate are ground for revocation.** Matter of Barnard, 48 N. Y. App. Div. 423; Matter of Lyman, 46 N. Y. App. Div. 387, affirmed 163 N. Y. 552; Matter of Flanagan, 49 N. Y. App. Div. 99; Matter of Tonatio, 49 N. Y. App. Div. 84; Matter of Harper, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 663; Matter of Auerbach, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 44; Matter of Veeder, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 569; Matter of Pierson, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 293; People v. Lyman, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 243; Matter of Haight, (County Ct.) 33 Misc. (N. Y.) 544, affirmed 59 N. Y. App. Div. 626; Matter of Lyman, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 296; Matter of Rasquin, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 693; Matter of Cullinan, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 646; People v. Hilliard, 81 N. Y. App. Div. 71, affirmed 178 N. Y. 582; Matter of Ryon, 85 N. Y. App. Div. 621; Matter of McMonagle, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 407; Matter of Patterson, (County Ct.) 43 Misc. (N. Y.) 498.

**What False Statements Will Justify Revocation.** — Matter of Kessler, 163 N. Y. 205; Matter of Moulton, 59 N. Y. App. Div. 25, affirmed 168 N. Y. 645; Matter of Lyman, 163 N. Y. 536; Matter of Harper, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 663; People v. Lyman, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 243.

**A Subsequent Compliance with the Statute Will Not Avoid the Revocation,** where the statements in the application for a license were false when they were made. Matter of McMonagle, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 407.

**Revocation of Assigned License.** — Nieland v. McGrath, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 682.

**Violations by Servants and Others.** — Matter of Cullinan, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 641, affirmed 84 N. Y. App. Div. 642. See also Cullinan v. Parker, (Supm. Ct. T.) 39 Misc. (N. Y.) 446, affirmed 84 N. Y. App. Div. 296.

It is no defense that sales were made by a bartender contrary to instructions. Matter of Cullinan, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 636, affirmed 85 N. Y. App. Div. 621.

**Person Holding Several Licenses — All Revocable for One Violation.** — Matter of Lyman, 59 N. Y. App. Div. 217.

**6. Sunday Sales.** — Matter of Cullinan, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 3, affirmed 93 N. Y. App. Div. 427; McLaughlin's License, 24 Pa. Co. Ct. 92.

**9. Sales to Intoxicated Persons.** — Gordon's Case, 16 Montg. Co. Rep. (Pa.) 25.

**265.** See notes 1, 2, 3, 5, 6, 7.

License Secured Improvidently or Not in Conformity with Law. — See note 10.

**266.** A License Issued in Violation of a Statute. — See note 10.

*d. PROCEEDINGS TO REVOKE LICENSES — (1) Nature of Proceedings.* — See notes 11, 13.

**267.** Quo Warranto. — See note 1.

Mandamus. — See note 2.

Formal Proceeding Necessary. — See note 3.

(2) *Who May Institute.* — See note 6.

(3) *Complaint.* — See notes 9, 10.

**268.** Verification. — See note 3.

(4) *Notice to Licensee of Proceedings.* — See notes 4, 8.

**269.** (5) *Hearing, Findings, and Judgment.* — See notes 1, 2.

**265.** 1. Sales to Persons of Known Intemperate Habits. — *McLaughlin's License*, 24 Pa. Co. Ct. 92.

2. Sales to Minors. — The license may be revoked although the sales were made by an agent or servant. *Gordon's Case*, 16 Montg. Co. Rep. (Pa.) 25.

3. Closing a Saloon Temporarily and Conducting the Business at Another Place Without Transferring the License will not forfeit the right to conduct business again at the place specified in the license. *McLeod v. State*, 33 Tex. Civ. App. 170.

5. Violation of Screen Laws. — Blinds on the premises or panes of opaque glass do not constitute a violation of the law, provided outsiders may still have a full view of the inside of the premises. *Matter of Plass*, 71 N. Y. App. Div. 488, affirmed 175 N. Y. 524.

6. Permitting Disorderly Assemblages. — *Gerwer's Case*, 7 Northam. Co. Rep. (Pa.) 382; *McLaughlin's License*, 24 Pa. Co. Ct. 92.

7. Permitting Gambling. — *Whissen v. Furth*, 73 Ark. 366; *Matter of Cullinan*, 88 N. Y. App. Div. 6.

The Fact that the Gambling Was Permitted by an Agent without the knowledge or consent of the licensee, and his absence, does not constitute a defense. *Matter of Cullinan*, 88 N. Y. App. Div. 6.

10. Failure to Perform Conditions Precedent to Obtaining License. — *State v. Scott*, 96 Mo. App. 620.

Required Consents Not Filed. — *Matter of Washburn*, (County Ct.) 32 Misc. (N. Y.) 303.

Failure to Obtain Necessary Consents. — *Lyman v. Murphy*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 349.

Jurisdictional Facts Must Appear in Record of Proceedings Granting License, or License Will Be Revoked. — *State v. Page*, 107 Mo. 213.

**266.** 10. License to Sell at Place Within Prohibited Distance of Church. — *Matter of McCusker*, 47 N. Y. App. Div. 111.

What Is a Building Used "Exclusively" as a Church. — *Matter of McCusker*, 47 N. Y. App. Div. 111; *Matter of Vail*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 392.

11. Statutes under Which Conviction Renders License Void. — See *Whissen v. Furth*, 73 Ark. 366.

Kansas — How Druggist's Permit Revoked. — *Newman v. Lake*, 70 Kan. 848.

Proceedings Not Judicial. — *Barnett v. Pemiscot*

County Ct., 111 Mo. App. 693; *Higgins v. Talty*, 157 Mo. 280.

13. Conviction of Violation of Law Unnecessary in Order to Revoke License. — *Higgins v. Talty*, 157 Mo. 280; *Matter of Halbran*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 515; *Matter of Halbran*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 517. See also *Jefferson County v. Mayr*, 31 Colo. 173.

Conviction in Nolo Contendere Not Evidence of Guilt. — *White v. Creamer*, 175 Mass. 567.

**267.** 1. Statutes Authorizing Quo Warranto to Test Validity of License. — *Martens v. People*, 186 Ill. 314.

2. Mandamus to Revoke License. — *Swan v. Wilderson*, 10 Okla. 547.

Revocation Not Compellable by Prohibition. — *Hawk's Nest v. Fayette County Ct.*, 55 W. Va. 689.

3. Mode of Revocation When Prescribed Must Be Followed. — *Carbondale v. Wade*, 106 Ill. App. 654.

6. New York — Need Not Be Taxpayer. — *Matter of Halbran*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 515; *Matter of Halbran*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 517.

9. Appellate Court Cannot Amend Petition to Conform to Proof. — *Matter of Plass*, 71 N. Y. App. Div. 488, affirmed 175 N. Y. 524.

10. Precision Required in Stating Grounds for Revocation. — *Matter of Halbran*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 515.

**268.** 3. May Be on Information and Belief. — *Matter of Cullinan*, 76 N. Y. App. Div. 362, affirmed 173 N. Y. 610. And see *Matter of Peck*, 167 N. Y. 391.

4. Notice of Proceedings to Revoke — Statutes Requiring Notice. — *Carbondale v. Wade*, 106 Ill. App. 654.

8. Revocation on Conviction of Violating Liquor Laws. — *Wallace v. Reno*, 27 Nev. 71.

**269.** 1. Reference. — *Matter of Cullinan*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 646, 93 N. Y. App. Div. 540, 97 N. Y. App. Div. 122, affirmed 181 N. Y. 527.

2. Right to Jury Trial. — *Matter of Lyman*, 46 N. Y. App. Div. 387, affirmed 163 N. Y. 552; *Matter of Lyman*, 59 N. Y. App. Div. 217.

Stay of Proceedings. — *Matter of Lyman*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 210, affirmed 59 N. Y. App. Div. 217; *Matter of Auerbach*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 46; *Matter of Washburn*, (County Ct.) 32 Misc. (N. Y.) 303.

Discharge of Certificate Holder on Criminal

**269.** *e.* REVIEW. — See note 4.

Methods of Obtaining. — See note 7.

**270.** 24. License Fees — *b.* FIXING AMOUNT OF FEES. — See note 6.

**271.** Reasonableness of Amount. — See note 1.

*c.* PAYMENT OF FEES. — See notes 2, 4.

**272.** *d.* COLLECTION OF FEES. — See note 1.

*e.* DISPOSITION OF FEES. — See notes 4, 5, 9.

**273.** *f.* RECOVERY BACK OF FEES ON REFUSAL OR REVOCATION OF LICENSE. — See notes 2, 3.

*g.* RECOVERY BACK OF ILLEGAL OR EXCESSIVE FEES. — See notes 6, 8.

**274.** 25. License Bonds — *a.* NECESSITY AND OBJECT OF BOND. — See note 1.

*b.* FORM AND REQUIREMENTS OF BOND — To Whom Bond Should Run. — See note 4.

Imposing Additional Conditions. — See note 8.

**275.** Effect of Various Omissions, Irregularities, and Errors Considered. — See notes 4, 7, 11.

**Prosecution Not Defense to Revocation Proceedings.** — Matter of Schuyler, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 221.

**Expiration of License Subsequent to Institution of Revocation Proceedings Not a Bar.** — Matter of Schuyler, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 221.

**269. 4. Revocation Proceedings Reviewable.** — See *Barriett v. Pemiscot County Ct.*, 111 Mo. App. 693; *State v. Kirk*, 112 Mo. App. 447.

**7. Certiorari.** — *Croot v. Manitou*, (Colo. App. 1904) 78 Pac. Rep. 313.

**Prohibition Will Not Lie Against Excise Commissioner to Prohibit Him from Revoking License.** — *Higgins v. Talty*, 157 Mo. 280.

**270. 6. Enactment to Fix Amount of License Fee Should Be an Ordinance and Not a Resolution.** — *People v. Mount*, 186 Ill. 560.

**271. 1. Fee of Thirteen Dollars a Month Held Reasonable.** — *Los Angeles County v. Eikenberry*, 131 Cal. 461.

**One Thousand Dollars a Year Held Reasonable.** — *Ex p. Hinkle*, 104 Mo. App. 104.

**2. Payment of Fee Before Issuance of License Necessary.** — *Ristine v. Clements*, 31 Ind. App. 338; *Backhaus v. People*, 87 Ill. App. 173. See also *People v. Mount*, 186 Ill. 560.

**Assessment Valid Though Liquor Traffic Illegal.** — *Conwell v. Sears*, 65 Ohio St. 49.

**4. License Fees Usually Payable in Money.** — *Meyer-Marx Co. v. Ensley*, 141 Ala. 602; *Ristine v. Clements*, 31 Ind. App. 338.

**Why Notes Are Void.** — *Ristine v. Clements*, 31 Ind. App. 338.

**272. 1. Civil Action to Recover Usually Does Not Lie.** — *Ristine v. Clements*, 31 Ind. App. 338.

**Civil Action for Payment of License Tax Cannot Be Maintained Against Agent.** — *Swords v. Le Blanc*, 111 La. 416.

**4. Control of Legislature over Disposition of Fees.** — See *State v. Seattle*, 31 Wash. 149.

**5. Municipal Corporations.** — *People v. Williams*, 162 N. Y. 240, *affirming* (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 463; *Hunt v. New York*, 47 N. Y. App. Div. 295; *Krzykwa v. Croninger*, 200 Pa. St. 359; *Allentown v. Hartman*, 22 Pa. Super. Ct. 400; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Winneconne v. Winneconne*, 122

Wis. 348. See also *Lehigh County v. Gossler*, 24 Pa. Super. Ct. 406.

**Pennsylvania — Duty of Borough Treasurer.** — *Kittanning v. Mast*, 15 Pa. Super. Ct. 51.

**9. Mandamus Will Lie to Compel Payment of Tax by County Treasurer to Proper Town Officer.** — *Krzykwa v. Croninger*, 200 Pa. St. 359.

**273. 2. Right to Rebate in New York.** — *People v. Cullinan*, 168 N. Y. 258, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 404; *People v. Lyman*, 67 N. Y. App. Div. 446, *affirmed* 173 N. Y. 605; *People v. Lyman*, 59 N. Y. App. Div. 172, *affirming* Matter of Seitz, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 108; *Lyman v. Cheever*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 100, *affirmed* 52 N. Y. App. Div. 635.

**3. On Revocation of a license no part of the license can be recovered.** *Taber v. New Bedford*, 177 Mass. 197; *McGinnis v. Medway*, 176 Mass. 67; *Parrent v. Little*, 72 N. H. 566; *Toman v. Westfield*, 70 N. J. L. 610.

**Not Recoverable Although No License Issued.** — *Johnson v. Atkins*, 44 Fla. 185; *Scalzo v. Sackett*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 543.

**Excessive Fee Not Recoverable by Mandamus.** — *Davis v. Patterson*, 12 Pa. Super. Ct. 479.

**6. Voluntary Payments Not Recoverable.** — *Sargent v. Little*, 72 N. H. 555.

**8. A License Fee Paid under a Mistake of Law to a board not authorized to receive it, where the license is not void, cannot be recovered.** *Taber v. New Bedford*, 177 Mass. 197.

**274. 1. Necessity of Bond.** — *State v. Schreiner*, 86 Minn. 253; *State v. Bennett*, 102 Mo. App. 247.

**4. Bond for Excessive Amount Not Void.** — *Meador v. Adams*, 33 Tex. Civ. App. 167.

**8. Bonds Imposing Additional Restraints to Those Imposed by Statute.** — See *State v. Wharton*, 26 Tex. Civ. App. 262.

**275. 4. Partnership Bond, in Which Only One Partner Bound, Invalid.** — *State v. Harper*, (Tex. Civ. App. 1905) 85 S. W. Rep. 294.

**7. Failure to Designate House Does Not Invalidate.** — *Morris v. Mills*, (Tex. Civ. App. 1904) 82 S. W. Rep. 334.

**11. Bond Signed by Only One Surety Invalid.** — *Hillman v. Mayher*, (Tex. Civ. App. 905) 85 S. W. Rep. 818.

**276.** *c.* APPROVAL OF BOND—(1) *In General.*—See notes 4, 5, 11.

**277.** *d.* WHO MAY BE SURETIES.—See note 1.

*e.* WHAT OPERATES AS DISCHARGE OF SURETIES.—See note 3.

*f.* WHAT CONSTITUTES BREACH.—See notes 6, 8, 9, 10, 11, 13.

**278.** See note 1.

*h.* ACTIONS ON BOND—Who May Maintain.—See note 3.

Estoppel to Deny Validity of License.—See note 7.

**279.** See note 1.

**281.** V. MUNICIPAL CONTROL OF LIQUOR TRAFFIC—1. *In General.*—

See notes 2, 3.

**276.** 4. Action of Board Not Reviewable Unless Discretion Abused.—*Divine v. Lakeview*, 121 Mich. 433; *Briggs v. McKinley*, 131 Mich. 154, 9 Detroit Leg. N. 273.

Proper Exercise of Discretion Illustrated.—See *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

5. Arbitrary Exercise of Discretion Improper.—*Farr v. Anderson*, 135 Mich. 485, 10 Detroit Leg. N. 843.

11. Approval Compelled by Mandamus.—*Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

**277.** 1. Manufacturer of Spirituous, Vinous, Malt, or Brewed Liquor May Be Surety.—*Schuykill Co. Licenses*, 24 Pa. Co. Ct. 571.

3. Change of Place of Business Discharges Sureties.—*Carter v. Nicol*, 116 Iowa 519; *Saffroi v. Coburn*, 32 Tex. Civ. App. 79.

False Statements in the Application for the License avoid the license, and sureties are not liable on a bond for sales made under it. *Lyman v. Schermerhorn*, 167 N. Y. 113.

Surrender of the Bond does not release the liability so long as the traffic continues. *Lyman v. Cheever*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 100, *affirmed* 52 N. Y. App. Div. 635.

Liability Continues During Life of Certificate.—*Cullinan v. Kuch*, 177 N. Y. 303, *affirming* 84 N. Y. App. Div. 642; *Cullinan v. Fidelity, etc., Co.*, 84 N. Y. App. Div. 296, *affirmed* 177 N. Y. 573.

6. An Illegal Sale by an Agent makes the principal and sureties liable on a bond although the agent violated his instructions. *Cullinan v. Burkard*, 93 N. Y. App. Div. 31.

Sales on Sunday.—*Cullinan v. Rorphuro*, 93 N. Y. App. Div. 200.

8. Sales to Minors.—*Coburn v. Gill*, (Tex. Civ. App. 1901) 60 S. W. Rep. 974; *Green v. Southard*, 94 Tex. 470; *Findley v. Holly*, (Tex. Civ. App. 1905) 85 S. W. Rep. 24. See also *McLeod v. State*, 33 Tex. Civ. App. 170; *Dickson v. Holt*, 30 Tex. Civ. App. 297; *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823.

Permitting Gift to Minor.—See *Holly v. Simmons*, (Tex. Civ. App. 1905) 85 S. W. Rep. 325.

9. Allowing Minors on Premises.—*Coburn v. Gill*, (Tex. Civ. App. 1901) 60 S. W. Rep. 974; *Cox v. Thompson*, 32 Tex. Civ. App. 572; *Minter v. State*, 33 Tex. Civ. App. 182; *Douthit v. State*, 36 Tex. Civ. App. 396; *Gibreath v. State*, (Tex. Civ. App. 1904) 82 S. W. Rep. 807; *Douthit v. State*, 98 Tex. 344; *Krick v. Dow*, (Tex. Civ. App. 1904) 84 S. W. Rep. 245; *Findlay v. Holly*, (Tex. Civ. App. 1905) 85 S. W. Rep. 24. See also *State v. Dittfurth*, (Tex. Civ. App. 1904) 79 S. W. Rep. 52.

Otherwise Where Minor Emancipated.—*State v. Jordan*, 23 Tex. Civ. App. 136.

10. Sale to Student—Knowledge of Purchaser Being a Student Immaterial.—*Peacock v. Limburger*, 95 Tex. 258.

11. *Haney v. Mann*, (Tex. Civ. App. 1904) 81 S. W. Rep. 66.

13. Failure to Keep Quiet House.—*State v. Golding*, 28 Ind. App. 233; *Cunningham v. Porchet*, 23 Tex. Civ. App. 80. See also *Hamp-ton v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 526.

Permitting Premises to Become Disorderly.—*Cullinan v. Fidelity, etc., Co.*, 84 N. Y. App. Div. 292, *affirmed* 177 N. Y. 574. See also *Cullinan v. Fidelity, etc., Co.*, 84 N. Y. App. Div. 296, *affirmed* 177 N. Y. 573.

**278.** 1. Keeping Slot Machine for Gambling.—*Lyman v. Kurtz*, 166 N. Y. 274.

3. Who May Sue on Bond.—*Cunningham v. Porchet*, 23 Tex. Civ. App. 80.

Judgment Cannot Be Compromised.—*Adams v. Cox*, 80 Miss. 561.

Fines and Penalties Cannot Be Recovered for Offenses Committed After Surrender of Liquor-tax Certificate for Cancellation and Rebate.—*Lyman v. Cheever*, 168 N. Y. 43.

Recourse May Be Had to Penalty in Bond, Instead of Fine or Penalty Prescribed for Violation of Law.—*Lyman v. Perlmutter*, 166 N. Y. 410.

Each Violation Incurs Separate Penalty.—*Coburn v. Gill*, (Tex. Civ. App. 1901) 60 S. W. Rep. 974; *Jones v. State*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1010; *Douthit v. State*, 98 Tex. 344.

7. Estoppel to Deny Validity of Licenses.—*State v. Golding*, 28 Ind. App. 233.

Estoppel to Deny Validity of Bond.—See *Jones v. State*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1010.

**279.** 1. Nature and Extent of Liability.—See *State v. Larson*, 83 Minn. 124; *Cullinan v. Burkard*, 93 N. Y. App. Div. 31; *Lyman v. Schermerhorn*, 53 N. Y. App. Div. 32, *affirmed* 167 N. Y. 113.

**281.** 2. Power of Legislature to Delegate.—*Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68; *Jefferson County v. Mayr*, 31 Colo. 173; *Malmo's Appeal*, 73 Conn. 232; *Bailey v. Raleigh*, 130 N. Car. 209; *Danville v. Hatcher*, 101 Va. 523.

Cannot Delegate Power to Sanitary Districts.—*In re Werner*, 129 Cal. 567.

Ordinances Held Reasonable Exercise of Power to Regulate.—*State v. Barge*, 82 Minn. 256; *Paul v. Washington*, 134 N. Car. 363; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642.

3. *Jordan v. Evansville*, 163 Ind. 512.

- 282.** 2. Grant to Municipality of Exclusive Power of Control. — See note 2.  
 3. Concurrent Powers of Control by State and Municipality. — See notes 6, 7, 9.  
**283.** 4. Constitutional Limitations on Delegative Power of Legislature. — See note 1.  
 5. Constitutional Limitations on Power to Pass Ordinances. — See note 2.  
 6. Power to Require and Grant Licenses — *a.* IN GENERAL. — See note 7.  
**284.** *b.* WHAT STATUTES GIVE POWER. — See notes 2, 4, 8, 11.  
**285.** 7. Power to Impose and Fix Amount of License Fees. — See notes 2, 4, 10.  
**286.** See note 1.  
 9. Power to Prohibit Traffic in Intoxicating Liquors. — See notes 8, 9.  
**287.** See notes 1, 3.  
 10. Power to Prohibit Keeping Liquors for Unlawful Sale. — See notes 4, 5.  
 11. Power to Revoke Licenses. — See note 6.  
 12. Power to Make Purchase of Liquor Punishable. — See note 7.

**282.** 2. The Power Must Be Exercised by Ordinance and not by resolution. *People v. Mount*, 186 Ill. 560.

6. State License No Protection for Selling Without Municipal License. — *State v. McAdams*, 106 La. 720.

7. Sales Punishable under General Law May Be Made Punishable under Ordinance. — *Jordan v. Nicolin*, 84 Minn. 367.

9. *Jordan v. Nicolin*, 84 Minn. 367.

**283.** 1. *Danville v. Hatcher*, 101 Va. 523.  
 2. Ordinances Inconsistent with Constitution Void. — *Kehr v. Com.*, (Ky. 1904) 83 S. W. Rep. 633.

7. Statutory Authorization Necessary. — *Walker v. McNelly*, 121 Ga. 114; *Hamel v. St. Jean Deschailions*, 20 Quebec Super. Ct. 301.

**284.** 2. Authority to License Inns and Taverns. — *Conover v. Gregson*, (N. J. 1905) 60 Atl. Rep. 31.

4. Power to "License, Regulate, and Control Places Where Intoxicating Liquors Are Sold." — *Houck v. Ashland*, 40 Oregon 117.

8. Under a General Welfare Clause a municipality may impose a license tax on persons engaged in selling cider. *Pikeville v. Huffman*, 112 Ky. 360.

11. Doctrine Overruled. — *Stokes v. Schlacter*, 66 N. J. L. 247, reversing 63 N. J. L. 138, cited in the original note.

**285.** 2. Under Statutes Fixing Minimum and Maximum Fee. — *Kehr v. Com.*, (Ky. 1904) 83 S. W. Rep. 633. See also *Hamel v. St. Jean Deschailions*, 20 Quebec Super. Ct. 301.

4. Imposition of Fees Amounting to Prohibition Not Permissible. — See *State v. McCammon*, 111 Mo. App. 626, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 285.

10. License Fees Held Not Prohibitory. — A license fee of one thousand dollars a year, *Ex p. Hinkle*, 104 Mo. App. 104; a license fee of thirteen dollars per month, *Los Angeles County v. Eikenberry*, 131 Cal. 461.

**286.** 1. Passage of Annual Ordinance Fixing Amount of Fee Not Necessary. — *People v. Mount*, 186 Ill. 560.

8. Power to Prohibit Not Included in Power to

Regulate. — *Shreveport v. Draiss*, 111 La. 511; *Houck v. Ashland*, 40 Oregon 117. See also *State v. McCammon*, 111 Mo. App. 626, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286.

9. Power to Prohibit Not Included in Power to License. — *Brownrigg v. Livingston*, 126 Ala. 93. See also *State v. McCammon*, 111 Mo. App. 626, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286.

**287.** 1. Power to License, Regulate, and Control Does Not Confer Power to Prohibit. — *Houck v. Ashland*, 40 Oregon 117.

3. Authority to "License, Prohibit, or Regulate." *Strauss v. Galesburg*, 203 Ill. 234.

Such authority does not authorize an ordinance arbitrarily prohibiting persons engaged in the dry goods business from engaging in the liquor business, when such business is not prohibited generally, or in the district where it is carried on. *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93.

Power to License and Regulate Includes Power to Prohibit Without License. — *State v. Gill*, 89 Minn. 502.

4. *Reese v. Newnan*, 120 Ga. 198; *Robinson v. Americus*, 121 Ga. 180.

5. Such an ordinance is not in conflict with the Georgia General Domestic Wine Act of 1877. *Osburn v. Marietta*, 118 Ga. 53.

6. Power of Municipality to Revoke Licenses. — *Hoboken v. Goodman*, 68 N. J. L. 217. See also *Paul v. Washington*, 134 N. Car. 363.

Legislature May Delegate Power to Revoke License. — *Jefferson County v. Mayr*, 31 Colo. 173.

Forfeiture Cannot Be Imposed Without Express Authority. — *Shreveport v. Draiss*, 111 La. 511.

Municipality Having Power to Grant Licenses May Revoke Them at Any Time. — *Melton v. Moultrie*, 114 Ga. 462.

A Power to Fine, including methods for its enforcement, will not permit a city to issue a license on condition of forfeiture for a violation of the regulation ordinance. *Shreveport v. Draiss*, 111 La. 511.

7. Ordinance Void Where Penalties Prescribed Not Within Limits Fixed by Legislature. — *Assaria v. Wells*, 68 Kan. 787.



**288.** 13. Ordinances Prohibiting Sales on Sundays and Election Days. — See note 1.

14. Ordinances Requiring Closing of Saloons on Certain Days and During Certain Hours. — See notes 4, 5.

Ordinance Must Be Reasonable. — See note 6.

**289.** 15. Ordinances Prohibiting Sales in Particular Localities. — See note 1.

18. Ordinances Requiring Consent of Adjacent Property Owners. — See note 6.

**290.** 21. Ordinances Good in Part and Bad in Part. — See note 3.

23. Repeal of Ordinances. — See note 6.

The Repeal, Pending a Prosecution Thereunder, of an Ordinance. — See note 8.

**VI. INTERSTATE AND FOREIGN TRAFFIC IN INTOXICATING LIQUORS AS AFFECTED BY STATE LIQUOR LAWS** — 1. Importations of Intoxicating Liquors from Foreign Countries — *a.* WHO MAY SELL IN ORIGINAL PACKAGES. — See note 10.

**291.** *b.* SALES IN ORIGINAL PACKAGES ONLY PERMISSIBLE. — See note 2.

**294.** *c.* WILSON ACT — (4) *Operation and Effect.* — See notes 2, 4, 5, 6. Receiving for His Own Use. — See note 7.

**296.** VII. LAWS AGAINST ADULTERATION OF INTOXICATING LIQUORS. — See note 7.

**288.** 1. Sunday Law Constitutional. — See *Edis v. Butler*, 11 Ohio Dec. 245, 8 Ohio N. P. 183.

4. Ordinance Requiring Closing of Saloons. — *Danville v. Hatcher*, 101 Va. 523.

5. Laws Held to Delegate Power to Require Closing on Sunday — *Power to "Tax, License, Regulate, Restrain, and Prohibit."* — *Cranor v. Albany*, 43 Oregon 147, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

*Power to Prohibit or License under Prescribed Regulations.* — *Danville v. Hatcher*, 101 Va. 523.

*Power to Provide for Safety, Health, Order, and Comfort.* — *Lovilia v. Cobb*, 126 Iowa 557.

Laws Held to Delegate Power to Require Closing at Certain Hours — *Power to Pass Ordinances for Peace, Good Government, Health, and Welfare.* — *McNulty v. Toof*, 116 Ky. 202.

6. Ordinance Must Be Reasonable. — *Newbern v. McCann*, 105 Tenn. 159.

Ordinances Held Reasonable. — *Paul v. Washington*, 134 N. Car. 363; *McNulty v. Toof*, 116 Ky. 202.

Ordinance Held Unreasonable. — *Newbern v. McCann*, 105 Tenn. 159.

An Ordinance Prohibiting Druggists to Sell at Certain Times is not a reasonable exercise of the police power. *McNulty v. Toof*, 116 Ky. 202.

Power Must Be Exercised in Good Faith. — *Danville v. Hatcher*, 101 Va. 523.

**289.** 1. Statutes Delegating Power in Express Terms. — *Gorrell v. Newport*, 1 Tenn. Ch. App. 120.

6. An Ordinance Requiring the Consent of Two-thirds Majority of a Whole City to a license is in the nature of prohibition and is void for unreasonableness. *State v. McCammon*, 111 Mo. App. 626.

**290.** 3. Enforceability of Ordinance Valid in Part. — *Houck v. Ashland*, 40 Oregon 117; *McNulty v. Toof*, 116 Ky. 202.

6. Repeal by Implication. — See *Sparta v. Boorum*, 129 Mich. 555, 8 Detroit Leg. N. 1100.

8. State Law and Municipal Charter to Be Construed Together. — *Moore v. Kelley*, 136 Mich. 139.

10. Right of Importer to Sell in Original Packages. — *Pabst Brewing Co. v. Terre Haute*, 98 Fed. Rep. 330.

**291.** 2. Right of Importer Restricted to Sale in Original Package. — *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814.

**294.** 2. Applies Only to License under Police Powers. — *Pabst Brewing Co. v. Terre Haute*, 98 Fed. Rep. 330.

4. No New Powers Conferred on States. — *In re Bergen*, 115 Fed. Rep. 339; *State v. Bengsch*, 170 Mo. 115; *Harrell v. Speed*, 113 Tenn. 224, 106 Am. St. Rep. 814.

Provision Against Discrimination by States Not Abrogated. — *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258.

5. Importer Can Sell Only on Terms Prescribed by Statute. — *Stevens v. State*, 61 Ohio St. 597.

6. Importation Subject to State Laws Only on Delivery to Consignee. — *American Express Co. v. Iowa*, 196 U. S. 133, reversing 118 Iowa 447; *Adams Express Co. v. Iowa*, 196 U. S. 147; *Pabst Brewing Co. v. Terre Haute*, 98 Fed. Rep. 330; *In re Bergen*, 115 Fed. Rep. 339; *Southern R. Co. v. Heymann*, 118 Ga. 616; *Southern Express Co. v. State*, 114 Ga. 226; *State v. Intoxicating Liquors*, 94 Me. 335; *State v. Intoxicating Liquors*, 95 Me. 140; *State v. Intoxicating Liquors*, 96 Me. 415. See also *State v. Hickox*, 64 Kan. 650. Compare *Latta v. U. S. Express Co.*, (Iowa 1902) 92 N. W. Rep. 68.

7. Consignee May Receive for His Own Use Regardless of State Laws. — *State v. Hickox*, 64 Kan. 650.

**296.** 7. Oath and Bond Not to Adulterate Liquors. — *State v. Meyer*, 94 Mo. App. 201.

The Burden of Proof is on the defendant to show compliance with the statute. *State v. Meyer*, 94 Mo. App. 201.

A License from the Federal Government to Run

**297. VIII. WHAT CONSTITUTES SALE — 1. In General — Agreement to Sell.** — See notes 2, 4, 6.

**Agreement to Pay Necessary.** — See note 7.

**298. Sale of Liquor Business.** — See note 3.

**Giving or Furnishing as Act of Hospitality.** — See note 8.

**[C. O. D. Shipments from Other States.** — See note 9a.]

**2. Barter, Loan, or Exchange — Held Not to Be Sales.** — See note 11.

**299. Held to Be Sales.** — See notes 2, 3, 4.

**3. Devices or Subterfuges to Evade Liquor Laws.** — See note 5.

**300. IX. WHAT IS PLACE OF SALE — 1. Where Goods Sold Are Unascertained.** — See note 1.

a **Distillery** is not a defense to a prosecution for noncompliance with these regulations. *State v. Meyer*, 94 Mo. App. 201.

**297. 2. Agreement to Sell.** — *Clancey v. People*, 99 Ill. App. 303. See also *Stephenson v. Rogers*, 80 L. T. N. S. 193.

An **Agreement to Sell May Be Established** by circumstances raising an implied sale. *Roach v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 586.

**Every Delivery of Intoxicating Liquor Not Amounting to a Pure Gratuity** is held in *Quebec* to constitute a sale for the purposes of the license law. *Merchant's Club v. Recorder's Ct.*, 16 Quebec Super. Ct. 52.

**4. Sales on Credit.** — *Lupo v. State*, 118 Ga. 759.

**Money Consideration Not Necessary.** — *Ford v. State*, 45 Tex. Crim. 288. See also *Johnsen v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 968.

**Cancellation of Sale on Credit Does Not Relieve from Liability for Violation of Statute.** — *Lupo v. State*, 118 Ga. 759.

**No Violation of Law if Sale Rescinded.** — *White v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 9.

**6. Absence of Profit to Seller.** — *Treadaway v. State*, 42 Tex. Crim. 466.

**7. Agreement to Pay Necessary.** — See *Mills v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 1045.

**298. 3. Sale of Saloon Business.** — *Hagerty v. Tuxbury*, 181 Mass. 126.

**8. Furnishing of Liquor at Meals by Boarding-house Keeper for Pay Constitutes Sale.** — *State v. Lotti*, 72 Vt. 115. See also *State v. Wenzel*, 72 N. H. 396.

**9a. Delivery C. O. D. Package to Third Person Held a Sale.** — *Cantwell v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 18, 19; *Ashley v. State*, 46 Tex. Crim. 471. See also *Beall v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 334.

**Sale by Consignee.** — *Treadaway v. State*, 42 Tex. Crim. 466; *Bills v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1047; *Dunn v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 326; *Sliger v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 243. See also *Young v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 567.

**Evidence Held to Show Sale.** — *State v. Cohen*, 65 Kan. 849; *Corzine v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 85; *Goldwater v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 221; *Taylor v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 221.

**Evidence Held Not to Show Sale.** — *Blasingame v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 275; *Alexander v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 763; *Crawford v. State*, (Tex. Crim.

1900) 58 S. W. Rep. 1006; *Dorsett v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1003; *Kirby v. State*, 46 Tex. Crim. 584.

**11. Loan.** — *Huby v. State*, 111 Ga. 842; *Ray v. State*, 46 Tex. Crim. 176.

**299. 2. Exchange.** — *Stanley v. State*, 43 Tex. Crim. 270.

**8. Liquor in Payment of Rent a Sale.** — *Griffin v. State*, 115 Ga. 577.

**4. In Payment of Services Rendered.** — *Friedman v. Com.*, (Ky. 1904) 83 S. W. Rep. 1040.

**5. Devices to Evade Liquor Laws — Florida.** — *Caldwell v. State*, 43 Fla. 550.

*Georgia.* — *Mack v. State*, 116 Ga. 546.

*Kansas.* — *State v. Peak*, 66 Kan. 701.

*Kentucky.* — *Teal v. Com.*, (Ky. 1900) 57 S.

W. Rep. 464; *Com. v. Hurst*, 62 S. W. Rep.

1024, 23 Ky. L. Rep. 365; *Penner v. Com.*, 111

Ky. 604; *Baker v. Com.*, 64 S. W. Rep. 637, 23

Ky. L. Rep. 898; *Hinkle v. Com.*, 66 S. W.

Rep. 1020, 23 Ky. L. Rep. 1979; *Griffin v. Com.*,

66 S. W. Rep. 817, 23 Ky. L. Rep. 1992; *Rowe*

*v. Com.*, 70 S. W. Rep. 407, 24 Ky. L. Rep.

974.

*Michigan.* — *People v. Luders*, 126 Mich.

440, 8 Detroit Leg. N. 81.

*Mississippi.* — *Harper v. State*, 85 Miss. 338,

*North Carolina.* — *State v. Holder*, 133 N.

Car. 709.

*Virginia.* — *McKeever v. Com.*, 98 Va. 862.

*West Virginia.* — See *Cohen v. King Knob*

*Club*, 55 W. Va. 108.

**Illustrations of Unsuccessful Devices — Giving Away Intoxicating Liquors with Other Articles Purchased constitutes a sale of the liquor and a violation of the law.** *Caldwell v. State*, 43 Fla. 550.

**Receiving Whiskey and Leaving Money.** — *Dixon v. State*, 67 Ark. 495.

**Sales in Bulk and Delivery in Small Quantities.** — *Griffin v. Com.*, (Ky. 1902) 66 S. W. Rep. 817; *People v. Luders*, 126 Mich. 440, 8 Detroit Leg. N. 81; *McKeever v. Com.*, 98 Va. 862.

**Not Limited to Mechanical Devices.** — *Rowe v. Com.*, 70 S. W. Rep. 407, 24 Ky. L. Rep. 974.

**Question for Jury Whether Sale of Nonintoxicants, with Simultaneous Gift of Liquor, Is Device to Evade Laws.** — *Turner v. State*, 121 Ga. 154.

**300. 1. Sale of Unascertained Goods.** — *U. S. v. Chevallier*, (C. C. A.) 107 Fed. Rep. 434; *State v. Shields*, 110 La. 547. See also *Walker v. Walker*, 90 L. T. N. S. 88.

**Where Guest at Unlicensed Restaurant Has Waiter Get Him Liquor from Licensed Saloon in Neighborhood — Held a Sale.** — *Pasquier v. Neale*, (1902) 2 K. B. 287.

**300.** 2. Where Goods Are Delivered to Carrier on Purchaser's Order. — See notes 2, 3.

**301.** 3. Where Goods Are Shipped C. O. D. — See notes 1, 2.

4. Where Goods Are Sold on Order of Agent Subject to Principal's Approval. — See notes 3, 4

5. Where Goods Are Delivered by Seller in Person or by Agent. — See note 5.

**302.** See notes 2, 3, 4.

**X. PROPERTY AND CONTRACT RIGHTS AS AFFECTED BY LIQUOR LAWS**  
— 1. Intoxicating Liquors as Property — *a.* IN GENERAL — Liquors Lawfully Acquired and Kept. — See note 7.

**305.** 2. Right to Recover Price of Liquors Illegally Sold — *a.* STATEMENT AND APPLICATION OF RULE. — See notes 5, 6.

**300.** 2. Delivery to Carrier on Order of Purchaser — As Affecting Criminal Liability. — *Carthage v. Duvall*, 202 Ill. 238, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *Clancey v. People*, 99 Ill. App. 303; *Jones v. People*, 99 Ill. App. 305; *State v. American Express Co.*, 118 Iowa 449, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *James v. State*, 45 Tex. Crim. 592, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *Harris v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 284.

**Statute Fixing Place of Sale.** — *State v. Patterson*, 134 N. Car. 612; *James v. State*, 45 Tex. Crim. 592.

**3.** As Affecting Validity of Contract. — *J. & J. Eager Co. v. Burke*, 74 Conn. 534; *Carthage v. Duvall*, 202 Ill. 238, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300; *State v. American Express Co.*, 118 Iowa 449, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300. See also *State v. Patterson*, 134 N. Car. 612.

**301.** 1. Rule that Sale Is Not Complete till Delivery to Purchaser. — *State v. American Express Co.*, 118 Iowa 449, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; *State v. Cairns*, 64 Kan. 786, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300. But see *Carthage v. Duvall*, 202 Ill. 238, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300.

**2.** Rule that Sale Is Complete on Delivery to Carrier — *United States*. — *U. S. v. Lackey*, 120 Fed. Rep. 577; *U. S. v. Adams Express Co.*, 119 Fed. Rep. 240.

*Illinois*. — *Carthage v. Duvall*, 202 Ill. 238, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300. See also *Carthage v. Munsell*, 203 Ill. 474.

*Iowa*. — See *State v. American Express Co.*, 118 Iowa 449, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301.

*Kansas*. — *State v. Cairns*, 64 Kan. 786, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 300.

*Kentucky*. — See *Teal v. Com.*, (Ky. 1900) 57 S. W. Rep. 464.

*Maine*. — *State v. Intoxicating Liquors*, 98 Me. 464.

*Pennsylvania*. — *Ceraline Mfg. Co. v. Anthracite Beer Co.*, 25 Pa. Super. Ct. 94.

*Texas*. — *Weathered v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 876; *Treadaway v. State*, 42 Tex. Crim. 466; *Sedgwick v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 813; *Parker v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1155; *Taggart v. State*, (Tex. Crim. 1905) 85 S. W.

Rep. 1155; *Joseph v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 326; *Luster v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 326; *Otto v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 698.

**3.** When Orders Must Be Approved by Principal — *England*. — *Stephenson v. Rogers*, 80 L. T. N. S. 193; *Strickland v. Whittaker*, 90 L. T. N. S. 445; *Hewitt v. Jervis*, 68 J. P. 54.

*United States*. — *U. S. v. Chevallier*, (C. C. A.) 107 Fed. Rep. 434.

*Connecticut*. — *J. & J. Eager Co. v. Burke*, 74 Conn. 534.

*Iowa*. — *Sachs v. Garner*, 111 Iowa 424.

*Texas*. — *Sims v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 689, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 301; *Merriweather v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 332; *Novich v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 332.

**4.** Where Order Not Subject to Principal's Approval. — See *Cocker v. McMullen*, 81 L. T. N. S. 784; *Strickland v. Whittaker*, 90 L. T. N. S. 445.

**5.** Delivery by Seller or Agent. — *Glass v. State*, 68 Ark. 266; *Swift v. State*, 108 Tenn. 610; *Davidson v. State*, 44 Tex. Crim. 586; *Bogle v. State*, 42 Tex. Crim. 389. Compare *Ceraline Mfg. Co. v. Anthracite Beer Co.*, 25 Pa. Super. Ct. 94.

**302.** 2. Violation of Local Option Laws. — *Davidson v. State*, 44 Tex. Crim. 586; *Bogle v. State*, 42 Tex. Crim. 389.

**3.** Sales in Territory Not Covered by License. — *Glass v. State*, 68 Ark. 266; *Swift v. State*, 108 Tenn. 610.

**4.** Locus of Sale Governed by Contract. — *Owens v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 794.

**7.** Liquors Lawfully Acquired and Kept. — See *State v. McMaster*, 13 N. Dak. 53.

**305.** 5. Contracts in Violation of Statute Void. — *Kelly v. Burke*, 132 Ala. 235.

**Not Applicable to Sales Made in Another State.** — *J. & J. Eager Co. v. Burke*, 74 Conn. 534.

**6.** Sales Without License. — *Dreyfus v. Goss*, 67 Kan. 57; *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751; *Brown v. Moore*, 32 Can. Sup. Ct. 93, affirming 33 Nova Scotia 381; *Indian Head Wine Liquor Co. v. Skinner*, 39 Can. L. J. 125; *Plisson v. Skinner*, 5 N. W. Ter. 391.

**License Issued to Agent.** — See *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751.

**Not Applicable to Sale or Contract Made in**

**306.** See notes 1, 2, 4, 8.

Sales by Agent. — See note 11.

c. EVIDENCE. — See note 13.

**307.** 3. Status of Notes Given for Price of Liquors Illegally Sold —  
a. RIGHTS OF PAYEE — (1) *Where Liquors Are Sole Consideration for Note.*  
— See note 2.

**308.** See note 5.

(2) *Where Liquors Are Partial Consideration for Note.* — See notes 9, 10.

**309.** 4. Status of Mortgage to Secure Price of Liquors. — See note 7.

**310.** 5. Right to Recover Back Money Paid for Liquors Illegally Sold —  
a. RECOVERY BY DIRECT ACTION — Under Statutes. — See note 2.

**311.** b. RECOVERY BY WAY OF SET-OFF OR COUNTERCLAIM. — See note 4.

**312.** 7. Status of Contracts of Sale Made in Another State — a. IN GENERAL. — See notes 1, 2.

b. EFFECT OF KNOWLEDGE OF PURPOSE TO RESELL ILLEGALLY AND ASSISTANCE THEREIN — (1) *General Rule.* — See note 6.

**313.** See notes 1, 2.

Sale with "View" to Illegal Resale. — See note 4.

**314.** (2) *Under Special Statutory Provisions.* — See note 3.

8. Status of Executory Contracts of Sale of Liquors. — See note 6.

Another State. — *Shiretzki v. Kessler*, (Ala. 1904) 37 So. Rep. 422.

**306.** 1. Sales to Insane Persons. — *Kelly v. Burke*, 132 Ala. 235.

2. Sales to Enable Purchaser to Resell Illegally. — *Fuller v. Hunt*, 182 Mass. 299.

A Knowledge of the Intention to Sell Illegally, where the seller is indifferent as to whether the purchaser does so or not, will not invalidate the sale so that the seller cannot recover. *Fuller v. Hunt*, 182 Mass. 299.

4. Cash Sales Required. — *Mitchell v. Branhams*, 104 Mo. App. 480.

8. Sales in Violation of Prohibition Law. — *Dreyfus v. Goss*, 67 Kan. 57.

11. Sales by Agent. — *Ruenmeli v. Cravens*, 13 Okla. 342. *Contra*, *Hertzler v. Geigley*, 196 Pa. St. 419, 79 Am. St. Rep. 724.

13. Burden on Defendant to Show Illegality. — *Overstreet v. Brubaker*, 98 Mo. App. 75.

**307.** 2. Rights of Payee. — *Wagner v. Scherer*, 89 N. Y. App. Div. 202; *In re Lemercise*, 73 Vt. 304.

**308.** 5. Sales on Credit. — *Wagner v. Scherer*, 89 N. Y. App. Div. 202.

9. Where Part of Consideration Is Intoxicating Liquors. — *Douthart v. Congdon*, 197 Ill. 356, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

10. Illegal Consideration Taints Whole Note. — *Douthart v. Congdon*, 197 Ill. 356, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

**309.** 7. Mortgages and Notes, given to secure money loaned to build a place for the sale of liquors in violation of the law, will not be enforced. *Falk v. Ferd Heim Brewing Co.*, 10 Kan. App. 248.

**310.** 2. Recovery Back of Money Paid for Liquors Illegally Sold. — See *Gorman v. Keough*, 22 R. I. 47.

Iowa — Demand Made Condition Precedent to Bringing Suit. — See *Foley v. Leisy Brewing Co.*, 116 Iowa 176.

Sales Made Outside of State. — *Brown v. Wieland*, 116 Iowa 711.

Money Advanced Recoverable Before Sale Consummated. — *Stansfield v. Kunz*, 62 Kan. 797.

**311.** 4. Set-off or Counterclaim. — *Gorman v. Keough*, 22 R. I. 47.

Iowa — Demand Sufficient in Case of Counterclaim if Made Before Plead. — *Brown v. Wieland*, 116 Iowa 711.

**312.** 1. Validity Determined by Laws of State Where Made. — *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751. See also *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

2. Contracts Valid in State Where Made. — See *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

6. *Bluthenthal v. McWhorter*, 131 Ala. 648, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 312, 136 Ala. 568, 96 Am. St. Rep. 43; *Williams v. Davidson*, 64 Kan. 707; *Graves v. Johnson*, 179 Mass. 53, 88 Am. St. Rep. 355. See also *Fuller v. Hunt*, 182 Mass. 299.

**313.** 1. Participation in Unlawful Act of Purchaser. — *Bluthenthal v. McWhorter*, 131 Ala. 648, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

2. Purchase to Use Illegally in Another State. — *Bluthenthal v. McWhorter*, 131 Ala. 648, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313.

4. Sales with "View" to Illegal Resale. — *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131. See also *Fuller v. Hunt*, 182 Mass. 299.

**314.** 3. *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 141; *Pollard v. Allen*, 96 Me. 455.

6. Executory Contracts. — *Sandefur-Julian Co. v. State*, 72 Ark. 11; *Stansfield v. Kunz*, 62 Kan. 797.

**314.** 9. Status of Judgment for Price of Liquors. — See note 7.

**315.** 13. Liability of Liquors to Attachment and Execution. — See note 5.

**316.** 16. Conditions in Deeds Prohibiting Sales on Premises Conveyed. —

See note 4.

**317.** 18. Other Contracts as Affected by Liquor Laws. — See note 7.

**318.** XI. LIQUOR NUISANCES — 1. What Constitutes Nuisance at Common Law. — See note 1.

2. What Constitutes Nuisance under Statutes — Selling in Violation of Law.

— See notes 3, 4, 5.

**319.** Keeping for Unlawful Sale. — See notes 3, 7, 9.

Keeping Open on Sunday. — See note 12.

**320.** 3. Constitutionality of Statutes. — See notes 1, 3, 5.

**314.** 7. Judgment Will Not Be Disturbed. — *Wempen v. Girard*, 84 Ill. App. 130.

**315.** 5. Unfinished Beer in the State of Intermediate Fermentation Is Not Leviable under an Execution. — *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708.

**316.** 4. Legality of Condition Prohibiting Sales of Intoxicating Liquors. — *Fanning's License*, 23 Pa. Super. Ct. 622.

What Not Waiver of Conditions. — *Haines v. Einwachter*, (N. J. 1903) 55 Atl. Rep. 38.

**317.** 7. Contracts in Restraint of Trade. — *Mitchell v. Branham*, 104 Mo. App. 480. But compare *Sullivan v. Kohlenberg*, 31 Ind. App. 215.

A Bill for a Copartnership Accounting will not lie where the copartnership business was carried on in violation of the liquor laws. *Teoli v. Mardolillo*, 23 R. I. 87.

Rent Cannot Be Recovered for premises leased for the purpose of illegal traffic in liquors. *Gorman v. Keough*, 22 R. I. 47.

Consent as Consideration for Note. — A note for which the consideration is the consent to the establishment of a saloon is void. *Greer v. Severson*, 119 Iowa 84.

In an Action on an Agreement Not to Sell Liquors in the same city as the plaintiff, made at the time defendant sold his dramshop to the plaintiff, it was held that the plaintiff could not recover damages for sales made while he conducted his business without a license. *Mitchell v. Branham*, 104 Mo. App. 480.

Transfer of License. — Where a license is part of a bill of sale of a saloon business and there is an understanding that the saloon shall be conducted in the name of the seller, there is a violation of a statute prohibiting the transfer of a license, which makes the whole contract void. *Sawyer v. Sanderson*, 113 Mo. App. 233.

**318.** 1. Sale of Liquors Not Nuisance. — *Pike County Dispensary v. Brundidge*, 130 Ala. 193.

3. Places Where Liquor Is Sold Unlawfully — *Georgia*. — *Walker v. McNelly*, 121 Ga. 114.

*Indiana*. — *Kissel v. Lewis*, 156 Ind. 233.

*Iowa*. — *Carter v. Fred Miller Brewing Co.*, 111 Iowa 457; *State v. Gifford*, 111 Iowa 648.

*Kansas*. — *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251; *State v. Peak*, 66 Kan. 701.

*Maine*. — *Wright v. O'Brien*, 98 Me. 196.

*New Hampshire*. — *State v. Strickford*, 70 N. H. 297; *State v. Piper*, 70 N. H. 282.

*North Dakota*. — *State v. McGruer*, 9 N. Dak. 566; *State v. Donovan*, 10 N. Dak. 203; *State v. Nelson*, 13 N. Dak. 122.

*Rhode Island*. — *State v. Morehead*, 22 R. I. 272.

*South Dakota*. — *Britton v. Guy*, 17 S. Dak. 588.

*Virginia*. — *Farmville v. Walker*, 101 Va. 323, 99 Am. St. Rep. 870.

*West Virginia*. — *Cohen v. King Knob Club*, 55 W. Va. 108.

Nuisance Distinct Offense from Illegal Selling. — *State v. Turner*, 63 Kan. 714; *State v. Morehead*, 22 R. I. 272.

Keeping of Place Where Nuisance Is Constitutes Offense. — *State v. Thoemke*, 11 N. Dak. 388; *State v. Nelson*, 13 N. Dak. 122.

"Blind Tiger" a Nuisance. — *Legg v. Anderson*, 116 Ga. 401; *State v. Tabler*, 34 Ind. App. 393, 107 Am. St. Rep. 209.

*Maine*. — All Drinking Places Declared Nuisances. — *Davis v. Auld*, 96 Me. 559.

What May Be Declared Nuisance. — *Laugel v. Bushnell*, 197 Ill. 20.

4. Sales Without License. — *Walker v. McNelly*, 121 Ga. 114; *Britton v. Guy*, 17 S. Dak. 588.

Illegal Sale on Sunday. — *State v. Morehead*, 22 R. I. 272.

5. Sales Not Authorized by License. — *Kissel v. Lewis*, 156 Ind. 233; *State v. McGruer*, 9 N. Dak. 566; *State v. Donovan*, 10 N. Dak. 203; *State v. Erickson*, (N. Dak. 1905) 103 N. W. Rep. 389; *State v. Morehead*, 22 R. I. 272.

**319.** 3. Keeping for Unlawful Sale. — *State v. Lewis*, 63 Kan. 265; *State v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251; *State v. Nelson*, 13 N. Dak. 122; *State v. Erickson*, (N. Dak. 1905) 103 N. W. Rep. 389.

Meaning of "Place." — *State v. Nelson*, 13 N. Dak. 122.

Liquor Must Be Intoxicating. — *State v. Turner*, 63 Kan. 714.

7. Proof of Actual Sales Not Necessary. — *State v. Dominisse*, (Iowa 1904) 99 N. W. Rep. 561; *State v. Lewis*, 63 Kan. 265.

9. Series of Sales Held Necessary. — *State v. McIntosh*, 98 Me. 397.

12. License Will Not Protect Nuisance. — *Reaves v. Territory*, 13 Okla. 396.

**320.** 1. Not in Violation of Due Process of Law. — *Topeka v. Raynor*, 60 Kan. 860, 58 Pac. Rep. 557, 61 Kan. 10. And see the title DUE PROCESS OF LAW, 303. 3.

3. Not Violation of Right to Jury Trial. — *Reaves v. Territory*, 13 Okla. 396. See also *Davis v. Auld*, 96 Me. 559.

5. Not Enforcement of Criminal Law by Civil Action. — *Davis v. Auld*, 96 Me. 559.

**321. 4. Criminal Responsibility for Maintaining Liquor Nuisance** — *a. PARTIES RESPONSIBLE FOR MAINTAINING NUISANCES.* — See notes 1, 3, 8.

*b. EFFECT OF FORMER ACQUITTAL OR CONVICTION OF SIMILAR OFFENSE.* — See notes 9, 11.

**5. Injunction and Abatement of Liquor Nuisance** — *a. INJUNCTION* — (1) *In General.* — See note 12.

**322.** When Illegal Use Must Exist. — See notes 3, 4.

Extent of Closing Required. — See note 7.

(2) *Against Whom Injunction Is Operative.* — See note 8.

**323.** See notes 2, 6.

*b. ABATEMENT.* — See notes 7, 8, 9.

**324. c. WHO MAY MAINTAIN PROCEEDINGS FOR INJUNCTION AND ABATEMENT.** — See note 2.

*d. PROCEEDINGS FOR CONTEMPT IN VIOLATING INJUNCTION.* — See note 8.

**326. 6. Evidence in Criminal Prosecutions and in Proceedings for Injunction and Abatement** — *a. COMPETENCY.* — See notes 4, 5, 6, 9.

**321. 1. Meaning of Word "Keeper."** — State *v. Nelson*, 13 N. Dak. 122.

**3. Ownership of Liquors Unlawfully Sold Immaterial; Possession All That Is Necessary.** — State *v. Stevens*, 119 Iowa 675.

**8. Intention to Violate Law Immaterial.** — Daxanbeklar *v. People*, 93 Ill. App. 553.

**Druggist Having Permit May Be Convicted of Keeping Nuisance.** — State *v. Engborg*, 63 Kan. 853.

**9. Conviction of Unlawful Sale Not Bar to Conviction for Maintaining Nuisance.** — State *v. Nelson*, 13 N. Dak. 122.

**11. Effect of Conviction of Maintaining Nuisance on Prosecution for Unlawful Selling.** — State *v. Wold*, 96 Me. 401. See also State *v. Morehead*, 22 R. I. 272.

**12. Georgia — "Blind Tiger" May Be Enjoined.** — Legg *v. Anderson*, 116 Ga. 401.

**Place Must Be Particularly Identified in Order to Abate.** — State *v. Thoenke*, 11 N. Dak. 388; State *v. Nelson*, 13 N. Dak. 122.

**Effect of Previous Injunctions.** — Where the defendants are enjoined from selling liquors illegally, and a building in another place is also declared a nuisance, if this building is removed to the defendant's property this place may be enjoined and abated. Hill *v. Dunn*, (Iowa 1902) 90 N. W. Rep. 705.

**322. 3. Nuisance Must Exist at Beginning of Suit.** — State *v. Strickford*, 70 N. H. 297. See also Wright *v. O'Brien*, 98 Me. 196; Patterson *v. Nicol*, 115 Iowa 283.

**Otherwise Where Object Punishment and Not Injunction.** — State *v. Gulley*, 41 Oregon 318.

**Presumption of Continuance.** — McCoy *v. Clarke*, (Iowa 1899) 81 N. W. Rep. 159.

**4. Cessation of Nuisance Near Time of Trial.** — Ohbrogg *v. District Ct.*, 126 Iowa 247.

**7. Extent of Injunction.** — State *v. Massey*, 72 Vt. 210.

**Building Partly Used for Illegal Purpose.** — State *v. Nelson*, 13 N. Dak. 122.

**8. Owner's Knowledge and Consent to Unlawful Use Necessary.** — State *v. Nelson*, 13 N. Dak. 122; State *v. Massey*, 72 Vt. 210.

**Knowledge of Agent Imputable to Principal.** — State *v. Collins*, 74 Vt. 43; State *v. Lundergan*, 74 Vt. 48.

**323. 2. Sales by Trespasser Without Owner's Knowledge.** — State *v. Nelson*, 13 N. Dak. 122.

**6. Injunction Not Issued Against Persons Not Parties.** — State *v. Strickford*, 70 N. H. 297.

**Owner and All Persons Interested.** — State *v. Collins*, 74 Vt. 43. See also State *v. Strickford*, 70 N. H. 297.

**Mortgagee Without Control Not Enjoined.** — State *v. Massey*, 72 Vt. 210.

**Person Not an Owner.** — State *v. Strickford*, 70 N. H. 297.

**7. Abatement — Destruction of Liquors.** — State *v. McMaster*, 13 N. Dak. 58.

**Cause Does Not Survive Against Keeper's Administrator.** — State *v. McMaster*, 13 N. Dak. 58.

**8. Necessity of Abatement When Injunction Granted.** — See State *v. Engborg*, 63 Kan. 853; State *v. Lee*, 65 Kan. 698.

**9. Action in Rem.** — In North Dakota the proceeding is not *in rem*. State *v. McMaster*, 13 N. Dak. 58.

**324. 2. Action by Citizen — Nature and Effect.** — The citizen may employ his own attorney to bring the action in the name of the state, and need not first seek authority from the state's attorney. State *v. Bradley*, 10 N. Dak. 157.

**Effect of Suit by One Citizen on Action Brought by Another.** — Brennan *v. Roberts*, 125 Iowa 615.

**Private Person Cannot Maintain Action in Own Name to Abate.** — State *v. Stark*, 63 Kan. 529, 88 Am. St. Rep. 251.

**8. Nature of Proceeding.** — Brennan *v. Roberts*, 125 Iowa 615.

**326. 4. Evidence of Sales in Building Alleged to Be Maintained as Nuisance.** — State *v. Morehead*, 22 R. I. 272.

**Record of Sales Kept by Druggist.** — State *v. Donovan*, 10 N. Dak. 203.

**Any Act or Conduct of Defendant Occurring Within Statutory Period Which Tends to Establish Keeping of Nuisance Is Admissible.** — State *v. Miller*, 63 Kan. 62.

**5. Evidence of Sales Other than Those Designated in Complaint Admissible.** — State *v. Green*, 61 S. Car. 12.

**Payment of a United States Special Tax Admissible to Prove a Nuisance.** — State *v. Lincoln*, 73 Vt. 221.

**327.** See notes 2, 3, 6.

*b.* SUFFICIENCY. — See note 12.

**328.** See note 1.

**XII. OFFENSES AGAINST LIQUOR LAWS AND PROSECUTIONS THEREUNDER** — 1. Sales Without License — *a.* IN GENERAL — Sales Exempted from Operation of License Laws. — See note 5.

Single Sale Constitutes Offense. — See note 6.

**329.** *b.* SALES BEFORE ISSUANCE OF LICENSE. — See notes 2, 4.

*c.* SALES AFTER EXPIRATION OR REVOCATION OF LICENSE. —

See note 7.

*d.* EFFECT OF IMPOSSIBILITY OF OBTAINING LICENSE. — See notes 8, 9.

**330.** Effect of Wrongful Refusal of License. — See note 2.

*e.* BURDEN OF PROVING LICENSE OR NO LICENSE. — See note 6.

**331.** Reason for Rule. — See note 2.

2. Sales under Void Licenses. — See note 5.

**332.** See notes 3, 6.

**326. 6. Finding Liquor on Premises.** — *State v. Stevens*, 119 Iowa 675; *State v. Green*, 61 S. Car. 12.

9. Evidence that Persons Were Noisy when coming away from the premises is admissible. *State v. Marchbanks*, 61 S. Car. 17.

**327. 2. Conviction of Illegal Sales.** — *State v. Nelson*, 13 N. Dak. 122.

3. A Conviction upon a Search and Seizure Process is admissible to show the intent with which the liquors were kept. *State v. Wold*, 96 Me. 401.

An Acquittal upon a Search and Seizure Process is not admissible on behalf of the defendant. *State v. Wold*, 96 Me. 401.

6. Other Evidence to Show Ownership or Control. — See *State v. Green*, 61 S. Car. 12.

12. Payment of the United States Special Tax as a Liquor Seller is sufficient evidence to warrant a finding that the premises kept by the licensee are a nuisance. *State v. Lincoln*, 73 Vt. 221.

Evidence of Possession of Liquor Not Sufficient. — *State v. McMaster*, 13 N. Dak. 58.

**328. 1. For Other Decisions in Which the Evidence Was Held Sufficient** to show the maintenance of a nuisance, see *State v. Dominisse*, (Iowa 1904) 99 N. W. Rep. 561; *State v. Donovan*, 10 N. Dak. 203; *State v. Thoenke*, 11 N. Dak. 386.

For a Case in Which the Evidence Was Held Insufficient, see *State v. Nelson*, 13 N. Dak. 122.

5. For a Construction of These Provisions, see *Com. v. Petranich*, 183 Mass. 217; *Com. v. Boyden*, 183 Mass. 1.

A Person Keeping Intoxicating Liquors for Home Consumption cannot sell or keep them for sale without a license. *Holt v. State*, 62 Neb. 134.

6. Single Sale Constitutes Offense. — *Wilson v. State*, 136 Ala. 114; *Ex p. Fedderwitz*, 130 Cal. xviii, 62 Pac. Rep. 935.

Each Separate Sale or Furnishing Constitutes an Offense. — *State v. Darling*, 77 Vt. 67.

The Holding of a Government License is admissible to prove that the defendant was engaged in the business of selling intoxicating liquors. *Fruide v. State*, 66 Neb. 244.

Proof of Sales After the Return of the Indictment should not be admitted. *Doner v. People*, 92 Ill. App. 43.

As Tending to Show a Specific Sale the prose-

cution may show that liquor was kept in large quantities, and that large amounts were sold. *State v. Lewis*, 86 Minn. 174.

Evidence Held Sufficient to Show Selling Without License. — *Bower v. State*, 68 Ark. 621, 57 S. W. Rep. 800; *State v. Wheeler*, 87 Mo. App. 580.

Evidence Held Insufficient to Convict. — *Blankinship v. State*, 112 Ga. 402.

**329. 2. License Has No Retroactive Effect.** — *Ristine v. Clements*, 31 Ind. App. 338; *State v. Brooks*, 94 Mo. App. 57.

4. Bond Approved and License Voted. — *Jordan v. Bespalec*, 86 Minn. 441.

Execution of Bond and Having License Drawn Up. — *State v. Totman*, 82 Mo. App. 56.

7. Revocation of License. — *Melton v. Moultrie*, 114 Ga. 462; *McGehee v. State*, 114 Ga. 833.

8. Impossibility of Obtaining License. — *Houck v. Ashland*, 40 Oregon 117.

9. That License Could Not Be Legally Granted. — *Hodge v. State*, 116 Ga. 852; *Houck v. Ashland*, 40 Oregon 117.

Sale in Local Option District. — *Houck v. Ashland*, 40 Oregon 117.

**330. 2. Sales Where License Has Been Wrongfully Refused.** — *Compare Koch v. Com.*, (Ky. 1905) 84 S. W. Rep. 533.

6. Burden on Defendant to Show License — *Georgia*. — *McGehee v. State*, 114 Ga. 833.

*Kansas*. — *State v. Goff*, 10 Kan. App. 286, reversed on other grounds 62 Kan. 104.

*Missouri*. — *State v. Quinn*, 94 Mo. App. 59. *North Carolina*. — *State v. Bradley*, 132 N. Car. 1060.

*Pennsylvania*. — *Com. v. Wenzel*, 24 Pa. Super. Ct. 467.

*West Virginia*. — *State v. Horner*, 52 W. Va. 374, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 330; *Cohen v. King Knob Club*, 55 W. Va. 108.

**331. 2.** *State v. Horner*, 52 W. Va. 374.

5. License Issued in District Where Sale Is Unlawful. — *State v. Doss*, 70 Ark. 312; *Strickland v. Knight*, (Fla. 1904) 36 So. Rep. 363, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 331.

**332. 3. License Granted Without Petition of**

**332.** 3. Sales Not Protected by License. — See notes 11, 13.

**333.** See note 4.

4. Selling, Giving, or Furnishing to Minors — *a.* GENERAL SCOPE OF PROHIBITORY STATUTES. — See notes 5, 6, 7.

**334.** What Classes of Persons Prohibited from Making Sales to Minors. — See note 7.

*b.* CONSENT OF PARENT OR GUARDIAN — When Consent Authorized by Statute. — See note 9.

Nature of Order Required to Protect Seller. — See note 11.

**335.** See note 1.

*c.* KNOWLEDGE OR IGNORANCE OF MINORITY AS AFFECTING RESPONSIBILITY — (1) *View that Ignorance of Minority Is Immaterial.* — See note 4.

**336.** (2) *View that Knowledge of Minority Is Element of Offense.* — See note 2.

Diligence Required in Ascertaining Age of Minor. — See notes 4, 5.

*d.* PURCHASE FOR MINOR BY ADULT — (1) *Liability of Seller.* — See notes 8, 9.

Voters. — *Com. v. Elmore*, 58 S. W. Rep. 369, 22 Ky. L. Rep. 510.

**332.** 6. Licenses Issued by Unauthorized Officers. — *Walker v. McNelly*, 121 Ga. 114. See also *Hugonin v. Adams*, (Miss. 1903) 33 So. Rep. 497.

License Granted by Municipality Without Power. — *Backhaus v. People*, 87 Ill. App. 173.

11. Sales at Prohibited Time Are Not Protected by License. — *Rooney v. Augusta*, 117 Ga. 709.

13. Sales at Places Not Authorized by License — *Iowa*. — *Carter v. Nicol*, 116 Iowa 519.

*Missouri*. — *State v. Blands*, 101 Mo. App. 618.

*North Dakota*. — *State v. Hilliard*, 10 N. Dak. 436.

*Pennsylvania*. — *Com. v. Francis*, 24 Pa. Co. Ct. 186.

*Tennessee*. — *Swift v. State*, 108 Tenn. 610.

*Texas*. — *Saffroi v. Cobun*, 32 Tex. Civ. App. 79.

**333.** 4. Federal License No Protection for Sales Without State License. — *State v. Blands*, 101 Mo. 618.

5. Adoption of Local Option Law Suspends Law Prohibiting Sales of Intoxicants to Minors. — *Tracy v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1056; *Atkinson v. State*, 46 Tex. Crim. 229.

Adoption of Local Option Law Does Not Suspend Law Prohibiting Gift of Intoxicants to Minors. — *Stephens v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 797.

6. Sale to Minors of Liquors in Corked and Sealed Vessels Excepted. — *Brooks v. Mason*, (1902) 2 K. B. 743. See also *Mitchell v. Crawshaw*, (1903) 1 K. B. 701.

7. Sales to Students — Lack of Knowledge that the Purchaser Was a Student was held to be no defense in an action for the violation of a condition in a bond not to sell to a student. *Peacock v. Limburger*, 95 Tex. 258.

**334.** 7. Corporation Not Liable. — *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. 601.

Giving Liquor as Act of Hospitality Not an Offense. — *People v. Bird*, (Mich. 1904) 100 N. W. Rep. 1003.

9. Saloonkeeper Must Have Written Consent at Time of Sale. — *Patton v. State*, 42 Tex. Crim. 496.

Consent Covers Sale Made by Clerk. — *Smith v. State*, 132 Ala. 38.

Consent by Stepfather Sufficient. — *Jones v. State*, 46 Tex. Crim. 517.

A Permit to Enable a Minor to Get Beer for a Parent will not protect a sale to the minor of liquor bought for himself, and drunk on the seller's premises. *Supernant v. People*, 100 Ill. App. 121.

11. General Authority Sufficient. — *Smith v. State*, 132 Ala. 38.

**335.** 1. Invalidity of General Permit. — *Harmer v. People*, 205 Ill. 570; *Supernant v. People*, 100 Ill. App. 121; *Pressly v. State*, (Tenn. 1905) 86 S. W. Rep. 378.

4. Statutes Omitting "Knowingly" — View that Defendant Sells at His Peril. — *People v. Curtis*, 129 Mich. 1, 8 Detroit Leg. N. 832; *State v. Larson*, 83 Minn. 124; *People v. Werner*, 174 N. Y. 132; *State v. Gulley*, 41 Oregon 318. See also *State v. Bradley*, 15 S. Dak. 148.

Where a Statute Provides that a Sale to a Minor Shall Be Prima Facie Evidence. — *State v. Bradley*, 15 S. Dak. 148; *State v. Sanford*, 15 S. Dak. 153.

**336.** 2. Statutes Containing Word "Knowingly" — Knowledge Element of Offense. — *Groom v. Grimes*, 89 L. T. N. S. 129; *Loeffler v. District of Columbia*, 15 App. Cas. (D. C.) 329; *Cleveland v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 550; *Gray v. State*, 44 Tex. Crim. 470; *Cox v. Thompson*, 32 Tex. Civ. App. 572; *Tinkle v. Sweeney*, (Tex. Civ. App. 1904) 78 S. W. Rep. 248; *Menzing v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 935; *State v. Dittfurth*, (Tex. Civ. App. 1904) 79 S. W. Rep. 52; *Jones v. State*, 46 Tex. Crim. 517; *Tracy v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1056.

4. Youthful Appearance Should Put Seller on Notice. — *Patton v. State*, 42 Tex. Crim. 496.

5. Reliance on Minor's Appearance. — *Com. v. Terry*, 15 Pa. Super. Ct. 608.

8. Treating Minor — Statute Prohibiting Sale Only. — *Perkins v. Brais*, 20 Quebec Super. Ct. 536; *Perkins v. Choinière*, 20 Quebec Super. Ct. 537, note.

9. Treating Minors — Statute Prohibiting Selling, or in Any Way Dealing or Trafficking in, or



**337.** Purchasing as Agent for Minor. — See note 3.

**338.** *e.* PURCHASE FOR OTHERS BY MINOR — Purchase for Disclosed Principal. — See note 2.

If a Minor Purchases for Another Minor. — See note 5.

*f.* AIDING AND ABETTING IN SALE. — See note 7.

**339.** *h.* EVIDENCE — (1) *Seller's Ignorance or Knowledge of Purchaser's Minority* — Burden of Proof. — See note 2.

Personal Appearance of Minor. — See notes 3, 4.

Other Evidence to Show Guilty Knowledge or Want of It. — See note 6.

Question for Jury. — See note 7.

**340.** (2) *Consent of Parent*. — See note 2.

(3) *Minority of Purchaser*. — See notes 4, 10.

(4) *Other Matters of Evidence* — Proof of Sales. — See note 12.

**341.** See note 2.

5. *Allowing Minors to Enter and Remain on Premises*. — See notes

4, 5.

**342.** 6. *Sales to Intoxicated Persons, Persons of Intemperate Habits, Habitual Drunkards, Etc.* — *b.* SALES TO PERSONS OF INTEMPERATE HABITS, HABITUAL DRUNKARDS, ETC. — (1) *In General*. — See note 5.

(2) *Knowledge or Ignorance of Purchaser's Habits as Affecting Liability of Seller*. — See note 10.

*Giving Away*. — *Nelson v. State*, 111 Wis. 394, 87 Am. St. Rep. 881.

**337.** 3. *Sale Without Notice that Liquor Is for Minor*. — *Huber v. People*, 87 Ill. App. 120.

**338.** 2. *View that Seller Is Not Guilty of Offense*. — *Short v. People*, 96 Ill. App. 638.

5. *A Minor Purchasing for Another Minor* is guilty of causing intoxicating liquor to be sold to a minor, even though he does not disclose his principal, and it is equally immaterial that the seller would be amenable for the sale to the buyer. *Vincent v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 819.

7. *To Cause to Be Given Is an Offense*. — *Parker v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 822.

**339.** 2. *When on Seller*. — *Com. v. Terry*, 15 Pa. Super. Ct. 608.

3. *The Jury Is to Determine Whether Appearance Indicated Minority*. — *Com. v. Terry*, 15 Pa. Super. Ct. 608.

4. *What Evidence Competent as to Age, Appearance, Etc.* — *Earl v. State*, 44 Tex. Crim. 467; *Dittfurth v. State*, 46 Tex. Crim. 424.

6. *Evidence in Behalf of State*. — *Gray v. State*, 44 Tex. Crim. 470.

*Evidence of Other Sales Is Not Competent to show knowledge of the purchaser's minority*. *Dittfurth v. State*, 46 Tex. Crim. 424.

7. *Sufficiency of Evidence to Show Guilty Knowledge* — *Evidence Held Sufficient*. — *Earl v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 839; *Smith v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 780; *Eckert v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 682; *Carwile v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 376; *Menzing v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 935.

*Evidence Held Insufficient*. — *Cleveland v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 550; *Sinclair v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 218; *State v. Dittfurth*, (Tex. Civ. App. 1904) 79 S. W. Rep. 52.

**340.** 2. *Consent of Parent* — Burden of Proof. — *Graham v. State*, 121 Ga. 590.

*Insufficient Showing of Execution of Consent*. — *Patton v. State*, 42 Tex. Crim. 496.

4. *Comparison by Having Other Minors of About Same Age Testify as to Their Age Not Allowable*.

— *Poyner v. Holzgraf*, 35 Tex. Civ. App. 233.

10. *McCollum v. State*, 119 Ga. 308, 100 Am. St. Rep. 171.

12. *Evidence of Other Sales* — Competency. — *People v. Andrus*, 74 N. Y. App. Div. 542.

*Proof of a Contemporaneous Sale* is admissible as a part of the *res gestæ*. *Vincent v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 819.

**341.** 2. *Sufficiency of Evidence to Show Sale*. — See *State v. Bach Liquor Co.*, 67 Ark. 163.

*Proof of Sale Not Sufficient to Sustain Count for Unlawfully Furnishing to Minor*. — *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. 601.

4. *Bona Fide Mistake No Defense*. — *Cox v. Thompson*, 32 Tex. Civ. App. 572; *Minter v. State*, 33 Tex. Civ. App. 182; *State v. Dittfurth*, (Tex. Civ. App. 1904) 79 S. W. Rep. 52; *Gilbreath v. State*, (Tex. Civ. App. 1904) 82 S. W. Rep. 807.

*Permitting a Minor on the Premises to Repair a Lamp* is a violation of the statute. *Douthitt v. State*, 36 Tex. Civ. App. 396.

*Evidence Held Insufficient to Show Violation*. — *Dickson v. Holt*, 30 Tex. Civ. App. 297; *Krick v. Dow*, (Tex. Civ. App. 1904) 84 S. W. Rep. 245.

5. *There Must Be Both Entering and Remaining*. — *Cox v. Thompson*, 32 Tex. Civ. App. 572; *Minter v. State*, 33 Tex. Civ. App. 182; *Tinkle v. Sweeney*, 97 Tex. 190; *Ghio v. Stephens*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1084; *Tinkle v. Sweeney*, (Tex. Civ. App. 1904) 78 S. W. Rep. 248.

*Whether or Not There Is Remaining, Question of Fact for Jury*. — *Cox v. Thompson*, 32 Tex. Civ. App. 572.

**342.** 5. *Where Procuring Is Offense, Delivery Not Necessary*. — *Jenkins v. State*, 82 Miss. 500.

10. *Where Statute Does Not Expressly Make Knowledge an Element*. — *Jenkins v. State*, 82 Miss. 500; *State v. Donovan*, 10 N. Dak. 203.

- 343.** See notes 2, 3.  
 (3) *Notice to Seller of Purchaser's Intemperate Habits.* — See note 5.  
 (5) *Evidence.* — See notes 8, 9.  
*Proof of Intemperate Habits.* — See note 12.
- 344.** *Seller's Knowledge of Purchaser's Intemperate Habits.* — See notes 6, 7.  
 8. *Sales to Indians and Introducing Intoxicating Liquor into Indian Country.* — See note 11.
- 345.** See notes 2, 3, 6, 7.
- 346.** 9. *Sales to Informers.* — See note 3.  
 11. *Sales, Gifts, or Keeping Open on Prohibited Days* — *a.* *SALES OR GIFTS ON SUNDAY.* — See note 8.  
*License No Protection.* — See note 9.
- 347.** *The Question What Persons Are Within the Prohibition.* — See note 1.  
*b.* *SALES OR GIFTS ON ELECTION DAY* — *What Hours Included in Election Day.* — See note 2.  
*Ownership of Liquors.* — See note 11.
- 348.** [*Evidence.* — See note 1a.]  
*c.* *KEEPING OPEN ON SUNDAY.* — See notes 2, 4.  
*Sale Not Necessary Element.* — See note 5.  
*Keeping Open and Selling Distinct Offenses.* — See notes 6, 7.  
*d.* *KEEPING OPEN ON ELECTION DAY.* — See note 8.
- 349.** *Invalidity of Election.* — See note 1.

**343.** 2. *Seller Must Have Knowledge of Intemperate Habits.* — *McCormack v. State*, 133 Ala. 202.

3. *Statute Making It Offense "Knowingly" to Sell.* — *State v. Alderton*, 50 W. Va. 101.

5. *That the Person Is Not in the Habit of Getting Intoxicated* does not excuse a sale after notice given. *State v. Donovan*, 10 N. Dak. 203.

8. *Proof of Sale Necessary.* — *McCormack v. State*, 133 Ala. 202.

9. *Proof of Intemperate Habits Necessary.* — *McCormack v. State*, 133 Ala. 202.

12. *Evidence Held Competent.* — *McCormack v. State*, 133 Ala. 202.

**344.** 6. *Burden of Proving Ignorance of Intemperate Habits.* — *Haney v. Mann*, (Tex. Civ. App. 1904) 81 S. W. Rep. 66.

7. *Evidence Held Competent.* — *McCormack v. State*, 133 Ala. 202.

11. *An Indian Is Amenable to the statute prohibiting any person to furnish liquors to Indians.* *U. S. v. Miller*, 105 Fed. Rep. 944.

**345.** 2. *Constitutionality of Statutes Prohibiting Sale or Gift to Indians.* — *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

*Intent to Violate Law Immaterial.* — *U. S. v. Miller*, 105 Fed. Rep. 944.

3. *Knowledge of Seller that Person to Whom Liquor Was Sold Was an Indian Not Necessary.* — *U. S. v. Stofello*, (Ariz. 1904) 76 Pac. Rep. 611.

6. *Indians Who Are Citizens.* — *U. S. v. Kopp*, 110 Fed. Rep. 160. See also *U. S. v. Logan*, 105 Fed. Rep. 240. But see *Farrell v. U. S.*, (C. C. A.) 110 Fed. Rep. 942.

7. *No Defense that Indian Not on Reservation.* — *U. S. v. Miller*, 105 Fed. Rep. 944.

**346.** 3. *Sales to Informers.* — *People v. Chipman*, 31 Colo. 90; *Boehner v. State*, 25 Ind. App. 597; *State v. Quinn*, 170 Mo. 176, *affirming* 94 Mo. App. 59; *State v. Lucas*, 94 Mo. App. 117.

8. *Each Sale a Separate Violation.* — *State v. Heard*, 107 La. 60.

*Not Necessary to Prove that Sale Was Made in Pursuance of Regular Business of Seller.* — *State v. Lucas*, 94 Mo. App. 117; *State v. Bearden*, 94 Mo. App. 134.

9. *Sunday Sale Not Protected by License.* — *Crabb v. State*, (Fla. 1904) 36 So. Rep. 169.

**347.** 1. *Persons Prohibited from Selling Intoxicating Liquor* — *Owner or Proprietor.* — *Casey v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 415.

*Employee.* — *Burnett v. State*, 42 Tex. Crim. 600; *Pigford v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 323.

2. *Offense to Give Away but Not to Sell.* — *State v. Edwards*, 134 N. Car. 636.

11. *Ownership of Liquors.* — *Brownlow v. State*, 112 Ga. 405.

**348.** 1a. *Evidence Held Insufficient to Sustain Conviction.* — *Emerson v. State*, 45 Tex. Crim. 413.

2. *An Agent Need Not Have Control over the Business in order to be liable for keeping open on Sunday.* *Ramey v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 126.

4. *Evidence to Show Offense.* — *Ramey v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 126.

5. *Sale Not Element of Offense of Keeping Open.* — *Lehman v. District of Columbia*, 19 App. Cas. (D. C.) 217; *Sullivan v. District of Columbia*, 20 App. Cas. (D. C.) 29; *Tobin v. District of Columbia*, 22 App. Cas. (D. C.) 482.

6. *Selling and Keeping Open Distinct Offenses.* — *State v. Bearden*, 94 Mo. App. 134.

7. *Uncertainty of Description in the License of the room where the liquor was sold is not a defense to an action for keeping open on Sunday.* *State v. Sodini*, 84 Minn. 444.

8. *Evidence.* — On a prosecution for keeping open on election day, evidence may be given of a gift of whiskey. *Knox v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 13.

**349.** 1. *Invalidity of Election* — *Effect on Responsibility.* — *Compare Reuter v. State*, 43

**349.** *e.* SELLING OR KEEPING OPEN ON LEGAL HOLIDAY — What Are Legal Holidays. — See notes 5, 6.

**350.** *f.* WHAT CONSTITUTES KEEPING OPEN ON PROHIBITED DAYS — (1) *In General.* — See notes 1, 2, 3, 10.

(2) *What Rooms Are Within Prohibition* — (a) *Adjoining or Disconnected Rooms Used for Drinking.* — See note 13.

**351.** *g.* SELLING OR KEEPING OPEN ON SUNDAY BY PUBLICANS, INN-KEEPERS, ETC. — Statute Forbidding Worldly Employment. — See note 1.

Statutes Prohibiting Sales Except to Guests or Travelers. — See notes 3, 4, 6.

Statutes Forbidding Keeping Open. — See note 13.

**352.** *h.* EVIDENCE — (1) *In Prosecutions for Sunday Sales or Gifts.* — See note 1.

Sufficiency of Evidence. — See note 4.

(2) *In Prosecutions for Keeping Open on Sunday* — Competency. — See note 5.

Sufficiency. — See note 6.

**353.** 12. Selling or Keeping Open for Sale During Prohibited Hours. — See notes 1, 2, 3.

Tex. Crim. 572. See also *Miller v. State*, 44 Tex. Crim. 99.

**349.** 5. Holidays Created After the Enactment of a Statute are within its application. *People v. Kriesel*, 136 Mich. 80.

6. Fourth of July. — *Brennan v. Roberts*, 125 Iowa 615.

**350.** 1. Rule in Other Jurisdictions. — *State v. Donaldson*, 12 S. Dak. 259.

Passing Liquor Through Broken Glass in Door. — *Wallis v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 231.

2. Intent Immaterial. — *People v. Kriesel*, 136 Mich. 80; *Knox v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 13.

Erroneous Instruction. — *Blalock v. State*, 108 Tenn. 185.

3. Opening to Do Work Pertaining to Place. — *Martin v. State*, 112 Tenn. 582.

10. It Is Not a Violation where the keeper's only means of ingress and egress is through the saloon. *Tobin v. District of Columbia*, 22 App. Cas. (D. C.) 482.

13. Keeping Open Rooms Connected with Saloon. — *Kitchens v. State*, 44 Tex. Crim. 216. See also *Tobin v. District of Columbia*, 22 App. Cas. (D. C.) 482; *Atkinson v. State*, 33 Ind. App. 8.

Where a Barroom Is Partitioned Off and the two parts are connected by a door so as to evade the law, the part partitioned off is part of the barroom and must be kept closed on Sunday. *Sullivan v. District of Columbia*, 20 App. Cas. (D. C.) 29.

Keeping Open Restaurant Adjoining Saloon. — *Blalock v. State*, 108 Tenn. 185.

**351.** 1. In the District of Columbia keepers of duly licensed hotels having a barroom license are not prevented from selling intoxicating liquors on Sunday by Act of Congress of March 3, 1899. *District of Columbia v. Reuter*, 15 App. Cas. (D. C.) 237.

3. Guests Are Persons Served in Good Faith with a Meal. — Matter of Cullinan, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 3, affirmed 93 N. Y. App. Div. 427; Matter of Schuyler, 63 N. Y. App. Div. 206.

4. Burden of Proof on Defendant to Show Sales Were Made to Guests. — *Lehman v. District of*

*Columbia*, 19 App. Cas. (D. C.) 217; *Com. v. Regan*, 182 Mass. 22; *Cullinan v. O'Connor*, 100 N. Y. App. Div. 142.

6. Guests Merely for Purpose of Procuring Liquor. — *Com. v. Regan*, 182 Mass. 22; *Cullinan v. O'Connor*, 100 N. Y. App. Div. 142.

13. Boarding Houses and Hotels Amenable. — One who permits his saloon to be open on Sunday for purposes of traffic violates the law, even though he has a boarding house or hotel open at the same time. *Hofheintz v. State*, 45 Tex. Crim. 117.

**352.** 1. Evidence that Defendant Was Dramshop Keeper. — *State v. Barnett*, 111 Mo. App. 688; *State v. Mulloy*, 111 Mo. App. 679; *State v. Reppetto*, 66 Mo. App. 251.

License Best Evidence. — *State v. Barnett*, 110 Mo. 592.

Admission of Possession of License. — *State v. Barnett*, 110 Mo. App. 584.

4. Circumstantial Evidence Is Allowable to show an illegal sale. *State v. McCabe*, 94 Mo. App. 122.

Evidence Held Inadmissible. — *State v. Pierce*, 111 Mo. App. 216.

Evidence Held Sufficient to Convict. — *State v. Pierce*, 111 Mo. App. 216; *People v. Clark*, 61 N. Y. App. Div. 500; *Pigford v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 323; *Tackaberry v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 384.

5. Proper to Show Dispensing of Drinks. — *State v. Sodini*, 84 Minn. 444; *Herod v. State*, 41 Tex. Crim. 597.

6. Opening Presumed to Be for Purpose of Sale. — *Lehman v. District of Columbia*, 19 App. Cas. (D. C.) 217.

Evidence Held Sufficient to Convict. — *State v. Gillespie*, 104 Mo. App. 400.

Evidence Held Insufficient to Convict. — *Beane v. State*, 72 Ark. 368; *Tobin v. District of Columbia*, 22 App. Cas. (D. C.) 482; *People v. Ryan*, 86 N. Y. App. Div. 524.

**353.** 1. "Keeping Open" under English Statute. — *Jeffrey v. Weaver*, (1899) 2 Q. B. 449. See also *Police Comr. v. Roberts*, (1904) 1 K. B. 369; *Lloyd v. Barnett*, 82 L. T. N. S. 804.

Burden of Showing that Defendant Was Licensee

**353.** 13. *Illegal Sales by Wholesale Dealers.* — See note 6.

14. *Illegal Manufacture and Sales by Manufacturer.* — See note 7.

**354.** See note 3.

*Retail Sales.* — See note 5.

15. *Illegal Sales by Tavern Keeper, Hotel Keeper, and Innkeeper.* —

See note 9.

**355.** 16. *Violations of Liquor Laws by Druggists and Drug Clerks* —  
a. *ILLEGAL SALES IN GENERAL* — (1) *Necessity for License or Permit and Strict Compliance Therewith.* — See notes 1, 2.

(2) *Necessity for Physician's Prescription.* — See note 5.

**356.** See note 2.

(3) *Requisites and Sufficiency of Prescription.* — See notes 4, 5, 6, 8, 9, 10, 12, 13, 16, 17.

**357.** (4) *Legality of Sales as Affected by Element of Intent.* — See note 1.

*Evidence.* — See notes 5, 6.

*Is on Prosecutor.* — Reg. v. Davidson, 4 N. W. Ter. 425.

**353.** 2. *When Saloon Is Considered "Closed."* — See People v. Lundell, 136 Mich. 303; State v. Clemmensen, 92 Minn. 191.

*Motive or Purpose Which Actuated Owner in Opening and Entering Immaterial.* — McCarty v. Atlanta, 121 Ga. 365.

3. *Evidence Held Sufficient to Convict.* — Matter of Lyman, 62 N. Y. App. Div. 616.

6. *Liability of Brewing Company to Pay Tax in Different Counties.* — Smith v. State, 109 Ga. 227; Acme Brewing Co. v. Fletcher, 109 Ga. 463.

*Wholesaler's Liability for Illegal Sales Made by Retailer.* — Webster v. State, 110 Tenn. 506.

*License Authorizes Sale in Another County.* — State v. Wheat, 48 W. Va. 259.

7. *Who Is a Manufacturer.* — State v. Bohnenkamp, 88 Mo. App. 172.

**354.** 3. *Sale Without License — When Illegal.* — Michels v. State, 115 Wis. 43; Joseph Schlitz Brewing Co. v. Superior, 117 Wis. 297.

6. *Retail Sales by Manufacturer.* — State v. Schmultach Brewing Co., 56 W. Va. 333.

*Manufacturer Need Not Have Wholesaler's License.* — In re Biederman, 3 Penn. (Del.) 284.

9. *Sale at What Time Authorized.* — Com. v. Kelley, 177 Mass. 221.

**355.** 1. *Druggists Amenable to Local Option and General Liquor Laws.* — People v. Congdon, (Mich. 1904) 100 N. W. Rep. 266; Anderson v. Van Buren Circuit Judge, 130 Mich. 697.

*Local Option and Drug Store Laws Coexistent.* — State v. Russell, 99 Mo. App. 373.

*Michigan — Druggist May Sell in Any Quantities.* — People v. Longwell, 136 Mich. 302.

2. *Sales by Unlicensed Druggists Held Illegal.* — Com. v. Powell, 62 S. W. Rep. 19, 22 Ky. L. Rep. 1932.

5. *Statutes Making Prescriptions Necessary.* — State v. Ham, 64 N. J. L. 49; McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

*Statutes Limiting Sales to Physicians — Right of Druggists to Sell.* — Powell v. Com., 66 S. W. Rep. 818, 23 Ky. L. Rep. 2167.

**356.** 2. *Burden of Showing Prescription.* — State v. Gregory, 110 Iowa 624; McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

4. *Conformity to Statutory Provisions Necessary.* — State v. Gregory, 110 Iowa 624; State v. Hammack, 93 Mo. App. 521.

*Necessary to State Residence of Purchaser, When Statute So Provides.* — State v. Harris, 122 Iowa 78; State v. Swallum, 111 Iowa 37.

*Numbering of Prescription Need Not Precede Its Filing.* — State v. Hammack, 93 Mo. App. 521. *Certificate upon Honor Required.* — McLain v. State, 43 Tex. Crim. 213.

*Must State that Person Was "Personally" Examined.* — McLain v. State, 43 Tex. Crim. 213.

5. *Written Prescription Necessary.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

*Should Contain Directions as to Use.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

6. *Necessity of Addressing Prescription.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

8. *Name of Person for Whom Prescription Is Written.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

9. *Signature and Date.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

10. *Statement that Liquor Prescribed Is Necessary Remedy.* — State v. Manning, 107 Mo. App. 51; State v. Hammack, 93 Mo. App. 521.

*"P. N. R." Not Equivalent to "Prescribed as a Necessary Remedy."* — State v. Manning, 107 Mo. App. 51.

12. *Statement of Quantity and Purpose of Furnishing.* — State v. Swallum, 111 Iowa 37.

13. *Prescription Obtained from One Not Regularly Licensed Physician.* — State v. Morgan, 96 Mo. App. 343.

16. *Sale Before Prescription.* — State v. Hensley, 94 Mo. App. 151.

17. *Must Be Issued at Request of Purchaser.* — State v. Hensley, 94 Mo. App. 151.

*Parol Evidence that Sale Was Made on Prescription Not Admissible.* — McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

**357.** 1. *Good Faith in Making Sales Necessary.* — State v. Gregory, 110 Iowa 624.

*Oversight, Forgetfulness, or Mistake Will Not Excuse Violations of Law.* — State v. Swallum, 111 Iowa 37.

5. *Good Faith Question for Jury.* — State v. Gregory, 110 Iowa 624; Rowe v. Com., 70 S. W. Rep. 407, 24 Ky. L. Rep. 974.

6. *Defendant Must Show Legality of Sale.* — State v. Gregory, 110 Iowa 624; McBean v. Sears, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

**357.** *b.* SALES TO MINORS. — See note 7.

**358.** *c.* OTHER OFFENSES — [Allowing Drinking on Premises]. — See note 1*a*.

*d.* ILLEGAL SALES BY DRUG CLERKS — Liability of Clerks. — See note 2

Liability of Employer. — See note 5.

*e.* SALE OF WHAT LIQUORS PROHIBITED. — See note 8.

17. Sales by Physicians. — See notes 10, 11.

**359.** Giving False Prescriptions. — See note 3.

18. Sales by Persons Who Are Both Physicians and Druggists. — See notes 4, 5, 7.

19. Sales for Medicinal Purposes. — See note 8.

**360.** See note 1.

20. Furnishing of Intoxicating Liquors by Social Clubs — *a.* SALES BY CLUBS ORGANIZED TO EVADE LAW. — See notes 3, 5.

Who Punishable. — See note 6.

**361.** *c.* FURNISHING OF LIQUORS BY BONA FIDE SOCIAL CLUBS TO MEMBERS — (1) *Where There Is No Legislation Specially Mentioning Clubs* — (a) View that Clubs May Furnish Members with Liquor. — See notes 1, 3.

(b) View that Clubs Cannot Furnish Liquor to Members. — See note 5.

**362.** See note 4.

**357.** 7. Where Statute Requires Consent of Parent. — Compare *Atkinson v. State*, 46 Tex. Crim. 229.

**358.** 1*a.* Allowing Drinking on Premises. — Under Rev. Stat. Mo. 1889, c. 58, prescribing a penalty for a druggist allowing intoxicating liquors to be drunk at his place of business, the druggist must be registered in order to be amenable to the act. *State v. Kampman*, 81 Mo. App. 205.

2. Liability of Clerks. — *State v. Russell*, 99 Mo. App. 373; *State v. Hammack*, 93 Mo. App. 521.

5. Not Liable for Unauthorized Sale by Clerk. — *State v. Neal*, 133 N. Car. 689.

8. *State v. Gregory*, 110 Iowa 624, holding it to be a question for the jury whether the compound is a beverage or not.

10. Right to Sell When Statute Requires Permit. — *Holt v. State*, 62 Neb. 134.

11. Sales Made in Good Faith Protected. — See *Blakely v. State*, 73 Ark. 218.

**359.** 3. What Must Be Shown to Convict. — *Williams v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1209.

It Is Not an Illegal Sale to give an illegal prescription for intoxicating liquor. *Stephens v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1056; *Williams v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 783, (Tex. Crim. 1904) 81 S. W. Rep. 1209, *overruling* *McLain v. State*, 43 Tex. Crim. 213.

Good Faith a Defense. — *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553, wherein the question of good faith was held to be one for the jury.

Not an Offense to Give Prescription to One's Self. — *Hawk v. State*, 44 Tex. Crim. 560; *Stephens v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1056.

Evidence Held Insufficient to Convict. — *Mullins v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 272.

4. Sale by Physician on His Own Prescription — View that Sale Is Illegal. — See *McBean v. Sears*, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

5. View that Sale Is Legal. — *State v. Manning*, 107 Mo. App. 51; *Walker v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1052.

7. *State v. Manning*, 107 Mo. App. 51; *State v. Hensley*, 94 Mo. App. 151; *McBean v. Sears*, 11 Ohio Dec. 269, 8 Ohio N. P. 189.

8. View that Sales May Be Made for Medicinal Purposes Without License. — *Parker v. State*, 31 Ind. App. 650; *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 565.

**360.** 1. View that Sale for Medicinal Purposes Cannot Be Made Without License. — *Colwell v. State*, 112 Ga. 75.

3. Clubs Organized to Evade Liquor Laws — Sales Without License. — *Sothman v. State*, 66 Neb. 302; *Com. v. Pefferman*, 12 Pa. Super. Ct. 202; *Cohen v. King Knob Club*, 55 W. Va. 108. See also *Harper v. State*, 85 Miss. 338.

5. Evasion of Prohibition Law. — *State v. Peak*, 66 Kan. 701.

6. Who Are Punishable for Making Sales. — *Rex v. Cavicchi*, 8 Can. Crim. Cas. (Nova Scotia) 78. See also *O'Neil v. State*, 116 Ga. 839.

**361.** 1. Furnishing to Members Not Within License Laws. — *Sothman v. State*, 66 Neb. 302; *Com. v. Pefferman*, 12 Pa. Super. Ct. 202. Compare *National Sporting Club v. Cope*, 82 L. T. N. S. 352.

3. Not Within Statute Requiring Payment of Privilege Tax. — Compare *Nashville Hermitage Club v. Shelton*, 104 Tenn. 101.

Procuring of United States Revenue License Prima Facie Evidence of Liability to Privilege Tax. — *Nashville Hermitage Club v. Shelton*, 104 Tenn. 101.

5. Sales Held in Violation of License Law. — *People v. Law, etc.*, Club, 203 Ill. 127; *Rex v. Lightburne*, 4 Can. Crim. Cas. (Ont.) 358; *Merchants Club v. Recorder's Ct.*, 16 Quebec Super. Ct. 52. See also *Cohen v. King Knob Club*, 55 W. Va. 108.

**362.** 4. Federal Statute. — *U. S. v. Alexios Club*, 98 Fed. Rep. 725.

**362.** (2) *Under Statutes Containing Provisions Specially Mentioning Clubs.* — See note 8.

**21. Sales Within Prohibited Distance of Churches, Schools, Etc.** — **a. CHURCHES AND SCHOOLS.** — See note 10.

**363.** *Schools.* — See note 4.

**366.** **26. Selling Without Having Paid Occupation Tax or Posted Receipt.** — See note 7.

**367.** **27. Violation of Statute Requiring Keeping of Statement and Making Report of Manufacture and Sale.** — See notes 1, 4.

**29. Giving Away Intoxicating Liquor.** — See note 8.

**368.** See notes 2, 3.

**30. Maintaining Place, Building, Tenement, etc., for Unlawful Keeping or Sale of Intoxicating Liquors** — **a. MAINTAINING PLACE OR BUILDING FOR UNLAWFUL KEEPING OR SALE.** — See note 4.

**369.** **c. EVIDENCE** — (1) *Competency.* — See note 17.

**370.** See note 8.

**371.** (2) *Sufficiency* — *To Sustain Conviction.* — See note 2.

**34. Permitting Drunkenness.** — See note 6.

**373.** **37. Keeping Intoxicating Liquors for Unlawful Sale** — **a. NATURE AND ELEMENTS OF OFFENSE** — *What Constitutes Offense.* — See notes 9, 10.

**374.** **b. EVIDENCE** — (1) *Competency* — (a) *Evidence in Behalf of Prosecution.* — See notes 2, 6, 11, 12.

**375.** See notes 9, 10, 12.

**362.** **8. Compare** *Davies v. Burnett*, (1902) 1 K. B. 666.

**10. Liquor Sold Need Not Be Property of Defendant.** — *Winter v. State*, 133 Ala. 176; *Gilmore v. State*, 125 Ala. 59.

*Specific Intent to Violate Statute Unnecessary.* — *Gilmore v. State*, 125 Ala. 59.

*Tennessee* — *Within Four Miles of Schoolhouse.* — *Brinkley v. State*, 108 Tenn. 475.

*North Carolina* — *Distance Measured Beyond County Limits.* — *State v. Knotts*, 131 N. Car. 705.

**363.** **4. Knowledge of the Illegal Traffic** is necessary to render liable the person in possession or control of the house where it is carried on. *Hinkle v. Com.*, 75 S. W. Rep. 231, 25 Ky. L. Rep. 313.

**366.** **7. Proof that Tax Was Levied on the Occupation Must Be Given.** — *Scott v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 656.

**It Is No Defense** that the goods are not owned by the defendant alone, but by a partnership of which he is a member. *Scott v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 656.

**367.** **1. Statute Applies to Local Option Districts.** — *Lawson v. Com.*, 66 S. W. Rep. 1010, 23 Ky. L. Rep. 1983.

**4. Michigan** — *Sufficient Compliance.* — *People v. Remus*, 135 Mich. 629, 10 Detroit Leg. N. 907.

**8. Local Option Law Does Not Apply to Gifts.** — *Bottoms v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 16; *Stephens v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 1056.

**368.** **2. Gift by Traveling Salesman a Violation.** — *State v. Jones*, 88 Minn. 27.

**3. An Offense to Give Away for Purpose of Inducing Trade.** — *Meadows v. State*, 121 Ga. 362.

**4. A Druggist Is Liable** for keeping a place where liquor is sold unlawfully. *Anderson v. Van Buren Circuit Judge*, 130 Mich. 697; *People v. Congdon*, (Mich. 1904) 100 N. W. Rep. 266.

**369.** **17. Evidence of Sales by Agent Without Consent or Authorization Competent.** — *State v. Stockman*, 9 Kan. App. 888, 58 Pac. Rep. 1006.

**370.** **8. Other Evidence to Connect Defendant with Keeping of Tenement.** — *Topeka v. Chesney*, 66 Kan. 480.

**371.** **2. Proof of Single Sale Not Enough.** — *People v. Remus*, (Mich. 1904) 100 N. W. Rep. 403.

**6. Refusal to Quit Premises by Person Requested to Leave.** — *Dallimore v. Tutton*, 78 L. T. N. S. 469. *Compare Sealey v. Tandy*, (1902) 1 K. B. 296, 85 L. T. N. S. 459.

**373.** **9. Knowledge of Intoxicating Properties Unnecessary.** — *Peters v. District Ct.*, 114 Iowa 207.

**10. Ownership of Liquor Unnecessary.** — *State v. Gruner*, 25 R. I. 129.

**374.** **2. Evidence of Sales.** — *Rooney v. Augusta*, 117 Ga. 709; *Reese v. Newman*, 120 Ga. 198; *Robinson v. Americus*, 121 Ga. 180; *Com. v. Coughlin*, 182 Mass. 558; *State v. La Rose*, 71 N. H. 435.

**6. Action of Clerk upon Seeing Officer.** — *State v. La Rose*, 71 N. H. 435.

**11. A Prescription Seemingly Filed in the Regular Course of Business** calling for sherry wine is admissible to show that it had been filled. *Com. v. Duprey*, 180 Mass. 523.

**12. Payment of Liquor Tax by Defendant.** — *Colby v. Fitzgerald*, (Iowa 1903) 94 N. W. Rep. 491; *State v. La Rose*, 71 N. H. 435.

**375.** **9. Amount of Liquors on Hand.** — *State v. La Rose*, 71 N. H. 435.

**10. Evidence that Defendant Pleaded Nolo Contendere when Charged with Similar Offense Not Admissible.** — *State v. La Rose*, 71 N. H. 435.

**12. An Admission by the Defendant** that he previously kept liquor illegally is not admissible to show intent, where the offense was enlarged from a misdemeanor to a felony. *State v. Wenzel*, 72 N. H. 396.

- 375.** (b) Evidence in Behalf of Defendant. — See note 13.  
 (2) Probative Force and Sufficiency of Evidence. — See notes 16, 17.
- 376.** See notes 1, 10.
- 378.** 38. Being Common Seller — *d.* SUFFICIENCY OF EVIDENCE. — See note 12.
- 379.** *f.* EFFECT OF ACQUITTAL OR CONVICTION OF OTHER OFFENSE INVOLVING SAME SALE. — See note 7.
39. Engaging in or Pursuing Business of Selling Intoxicating Liquors Without License. — See note 11.
- 380.** See note 2.
40. Illegal Transportation — Transporting for Unlawful Sale. — See note 4.
- 381.** 41. Breach of Screen Laws. — See notes 5, 7.
- 382.** See notes 1, 2.
42. Employment of Women in Saloons. — See note 9.
43. Keeping Wine Room for Women. — See note 11.
- [43a. Other Offenses. — See note 12a.]

**375.** 13. Evidence in Defendant's Behalf Held Incompetent. — State *v.* Hitchcock, 68 N. H. 244.

16. Proof of Illegal Sale Conclusively Shows Illegal Keeping. — Rooney *v.* Augusta, 117 Ga. 709; Reese *v.* Noonan, 120 Ga. 198.

17. Robinson *v.* Americus, 121 Ga. 180.

**376.** 1. Evidence of Finding Intoxicating Liquors on Premises. — State *v.* Intoxicating Liquors, 109 Iowa 145; Peterson *v.* State, 64 Neb. 875, 63 Neb. 251.

10. Evidence Held Sufficient to Sustain Conviction. — Com. *v.* Tate, 178 Mass. 121; Com. *v.* Foster, 182 Mass. 276; Peterson *v.* State, 64 Neb. 875.

Evidence Held Insufficient to Sustain Conviction. — Erwin *v.* Cartersville, 120 Ga. 150.

Direct Proof of Actual Sales Not Necessary to Convict. — State *v.* Schoenthaler, 63 Kan. 148.

Possession of Whiskey Does Not Make Person Guilty of Keeping It Unlawfully. — State *v.* Blackman, 134 N. Car. 683.

Burden of Proving License — See Com. *v.* Regan, 182 Mass. 22; Com. *v.* Coughlin, 182 Mass. 558.

**378.** 12. Payment of the United States Special Tax as a liquor seller is sufficient evidence to warrant a finding that the person paying it is a common seller. State *v.* Lincoln, 73 Vt. 221.

**379.** 7. State *v.* Morehead, 22 R. I. 272.

11. Evidence Held Insufficient to Convict. — Barnes *v.* State, 44 Tex. Crim. 473.

**380.** 2. Crime Not Complete Without Sale. — Gambill *v.* Schmuck, 131 Ala. 321.

4. Massachusetts Statute Applies Only to Carriers and Express Companies. — Com. *v.* Beck, 187 Mass. 15.

**381.** 5. Applies to Licensed Dealers Only. — State *v.* Bradford, 13 S. Dak. 201.

7. What Are Obstructions. — People *v.* Locy, 124 Mich. 180; Matter of Plass, 71 N. Y. App. Div. 488, affirmed 175 N. Y. 524.

**382.** 1. Partial Obstruction of View. — See People *v.* Locy, 124 Mich. 180.

Indiana — Whole of Room Must Be Visible from Street. — State *v.* Harrison, 162 Ind. 542.

2. Obstruction Existing When License Granted. — People *v.* White, 127 Mich. 428, 8 Detroit Leg. N. 397.

9. Constitutionality Upheld. — See Adams *v.* Cronin, 29 Colo. 499.

Ordinances Prohibiting absolutely the entry of women into saloons have been held invalid as being unreasonable and as an unnecessary interference with individual liberty. Gastenau *v.* Com., 108 Ky. 473, 94 Am. St. Rep. 386; State *v.* Nelson, 10 Idaho 522. But a city may by ordinance prohibit females from entering places where intoxicating liquors are sold, for immoral purposes. State *v.* Nelson, 10 Idaho 522.

11. Adams *v.* Cronin, 29 Colo. 499; Denver *v.* Domedian, 15 Colo. App. 36.

12a. Iowa — Business Must Be Conducted in Single Room. — Under Code Iowa, § 2448, the selling or keeping for sale must be carried on in a single room having but one entrance or exit, and that opening upon a public business street. The maintenance of a second room in connection with the saloon violates the statute. State *v.* Bussamus, 108 Iowa 11; Garrett *v.* Bishop, 113 Iowa 23; Thomas *v.* Arie, 122 Iowa 538; Atkinson *v.* State, 33 Ind. App. 8.

A Cellar having an entrance from the street and used for storing liquor violates the law. Powers *v.* Klatt, 111 Iowa 357.

A Second Entrance is prohibited, although it is used only by the proprietor and his employees, and leads into a room where he stores liquor, and through which he carries liquor to the saloon. State *v.* Gifford, 111 Iowa 648.

But an opening into a refrigerating room, which cannot be used either as a passageway or as a place for buying or drinking liquor, is not prohibited. State *v.* Donahue, 120 Iowa 154.

Intention to Break Law Immaterial. — State *v.* Gifford, 111 Iowa 648.

Booths or Inclosures in Saloons are sometimes forbidden. State *v.* Barge, 82 Minn. 256; State *v.* McGregor, 88 Minn. 74.

Allowing Musical Instruments to be used in a dramshop is forbidden by Rev. Stat. Mo. 1899, § 3018. State *v.* Barnett, 110 Mo. 592.

Maintaining Bowling Alley. — The running of a bowling alley in connection with a saloon or hotel is an offense under Crim. Code Neb., § 221. Koepke *v.* State, (Neb. 1903) 93 N. W. Rep. 1129.

Sales in Prohibited Quantities. — Where an ordinance provides that it shall be an offense to sell certain liquors in quantities less than one gallon, and that the amount sold shall not be contained in separate bottles, a sale of one

**383.** 45. Jurisdiction of Prosecutions under Liquor Laws. — See note 3.

**384.** 47. Liability as Affected by Ignorance of Intoxicating Properties of Liquors. — See note 2.

48. Effect of Prior Conviction or Acquittal of Same or Similar Offense. — See note 3.

What Amounts to Conviction or Acquittal. — See notes 7, 8.

**385.** XIII. CIVIL AND CRIMINAL LIABILITY ARISING OUT OF AGENCY, MARRIAGE, ETC. — 1. Liability of Employer for Violations of Liquor Laws by Servant or Agent — *a.* CIVIL LIABILITY. — See note 2.

*b.* CRIMINAL LIABILITY — (1) *For Authorized Violations of Law.* — See note 4.

**386.** The Rule Applies to All Illegal Sales. — See notes 1, 5.

(2) *For Violations of Law Unauthorized and Against Instructions* —

(a) View that Employer Is Not Liable — Statement of Rule. — See notes 7, 8.

**387.** See note 1.

(b) View that Employer Is Liable — Statement of Rule. — See notes 12, 13.

gallon in four bottles of one quart each is a violation of the ordinance. *Paola v. Williford*, 65 Kan. 859, 69 Pac. Rep. 331.

*Intention to Violate Immaterial.* — *Paola v. Williford*, 65 Kan. 859, 69 Pac. Rep. 331.

"Blind Tigers." — See *Cannon v. Merry*, 116 Ga. 291; *Legg v. Anderson*, 116 Ga. 401; *Smith v. State*, 42 Tex. Crim. 414.

**383.** 3. Justices' Courts have jurisdiction over prosecutions for selling without a license. *State v. Back*, 99 Mo. App. 34.

Police Courts cannot by agreement be given jurisdiction of a matter within the exclusive jurisdiction of the Circuit Court. *Bailey v. Com.*, 64 S. W. Rep. 995, 23 Ky. L. Rep. 1223.

*Circuit Courts.* — See *Bailey v. Com.*, 64 S. W. Rep. 995, 23 Ky. L. Rep. 1223.

*New York Court of Special Sessions.* — *People v. Bagley*, (Ct. Spec. Sess.) 41 Misc. (N. Y.) 97. *Mayor's Court.* — See *Morianna v. Vincent*, 68 Ark. 244.

*Recorder's Court.* — *Williams v. Augusta*, 111 Ga. 849.

**384.** 2. Ignorance of Intoxicating Properties. — *Peters v. District Ct.*, 114 Iowa 207; *State v. Eaton*, 97 Me. 289; *Allen v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 264; *Penn v. State*, 43 Tex. Crim. 608; *Williams v. State*, 45 Tex. Crim. 477; *Scott v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 656.

3. A Suit to Condemn Intoxicating Liquors is barred by an acquittal on the charge of wrongfully keeping intoxicating liquors for sale. *State v. Cobb*, 123 Iowa 626.

7. Where Evidence of All Sales Made Within a Certain Period Is Admitted, a conviction for one illegal sale will bar a prosecution for another sale made during the same period. *Bryant v. State*, 72 Ark. 419.

8. Former Acquittal or Conviction of Similar Offense — Effect. — *State v. Nelson*, 13 N. Dak. 122.

**385.** 2. Liability for Damages Arising from Sales of Liquor by Servant. — *Walker v. Dailey*, 101 Ill. App. 575.

4. Employer Liable for Authorized Sales. — *Hogg v. Davidson*, Sc. Ct. of Just. 3 F. 49; *Reg. v. Learmont*, 31 Nova Scotia 387; *Rooney v. Augusta*, 117 Ga. 709; *Locke v. Com.*, 113 Ky. 864; *Ellison v. Com.*, 69 S. W. Rep. 765, 24 Ky. L. Rep. 657; *State v. McAdams*, 106 La.

720; *Moncla v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 548.

Liability of "Occupant" for Sale Made by Another on Premises. — *Rex v. Conrod*, 35 Nova Scotia 79.

**386.** 1. Sales in Violation of Sunday Laws. — *Moncla v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 548.

5. Sales in Violation of Local Option Laws. — *Locke v. Com.*, 113 Ky. 864; *Ellison v. Com.*, 69 S. W. Rep. 765, 24 Ky. L. Rep. 657.

7. Employer Not Criminally Liable for Unauthorized Acts of Servant. — *Beane v. State*, 72 Ark. 368; *Thurman v. Adams*, 82 Miss. 204; *Cullinan v. Burkhard*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 325, reversed 93 N. Y. App. Div. 31, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *Com. v. Titlow*, 28 Pa. Co. Ct. 341.

8. Liability for Illegal Sales of Intoxicating Liquors by Servant. — *Emary v. Nolloth*, (1903) 2 K. B. 264; *Conlon v. Muldowney*, (1904) 2 Ir. R. 498; *Beane v. State*, 72 Ark. 368; *Rosenbaum v. State*, 24 Ind. App. 510; *Thurman v. Adams*, 82 Miss. 204; *Moore v. State*, 64 Neb. 557; *Cullinan v. Burkhard*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 325, 93 N. Y. App. Div. 31, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386; *State v. Neal*, 133 N. Car. 689. See also *Moncla v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 548.

Application of Rule — *Sunday Sales.* — *Beane v. State*, 72 Ark. 368; *Rosenbaum v. State*, 24 Ind. App. 510. See also *Moncla v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 548.

*Sales Not Within Scope of License.* — *State v. Neal*, 133 N. Car. 689.

*Sales to Habitual Drunkards.* — *Com. v. Titlow*, 28 Pa. Co. Ct. 341.

*Sales to Minors.* — See *Emary v. Nolloth*, (1903) 2 K. B. 264; *Conlon v. Muldowney*, (1904) 2 Ir. R. 498.

*Sales in Violation of Prohibition Law.* — *Thurman v. Adams*, 82 Miss. 204.

**387.** 1. Instructions Must Be Made in Good Faith. — *Moore v. State*, 64 Neb. 557.

Finding by Jury that Instructions Were Not Made in Good Faith Is Conclusive. — *State v. Terry*, 105 Mo. 428.

12. Statutes Prohibiting All Dramshops Opening on Sunday. — *Lehman v. District of Columbia*, 19 App. Cas. (D. C.) 217.



**388.** (c) Evidence in Prosecutions for Violation of Law by Servant or Agent — Questions for Jury. — See note 10.

**389.** 2. Personal Liability of Servant or Agent for Violations of Liquor Laws — *a.* TO WHAT EXTENT PROTECTED BY EMPLOYER'S LICENSE — Sales Within Scope of License. — See note 4.

Sales Not Within Scope of License. — See note 6.

*b.* SELLING LIQUORS OF ANOTHER ON ONE'S OWN LICENSE. — See note 9.

*c.* SELLING WITHOUT LICENSE FOR ONE WHO HAS NO LICENSE — Independently of Any Statutory Provision. — See note 10.

**390.** Under Statutes Specially Affecting Responsibility. — See note 10.

*d.* OTHER VIOLATIONS OF LIQUOR LAWS — Violation of Local Option Laws. — See note 11.

**391.** *e.* WHAT CONSTITUTES SERVANT OR AGENT. — See notes 4, 5.

*f.* SEVERAL LIABILITY OF EMPLOYER AND SERVANT OR AGENT. — See note 6.

3. Criminal Liability of Purchaser — *a.* WHEN PURCHASING FOR HIS OWN CONSUMPTION. — See note 8.

**392.** *b.* WHEN PURCHASING FOR ANOTHER'S CONSUMPTION — Purchase as Agent of Buyer. — See notes 1, 2, 3.

**387.** 13. Application of Rule — *Keeping Open on Sunday.* — *Lehman v. District of Columbia*, 19 App. Cas. (D. C.) 217; *People v. Possing*, (Mich. 1904) 100 N. W. Rep. 396, 11 Detroit Leg. N. 249.

*Keeping Open During Prohibited Hours.* — *People v. Lundell*, 136 Mich. 303.

*Keeping Open on Holiday.* — *People v. Kriesel*, 136 Mich. 80.

**388.** 10. Consent Question for Jury. — *Beane v. State*, 72 Ark. 368.

**389.** 4. Sales Within Scope of License. — *Smith v. State*, 109 Ga. 227; *State v. Dudley*, 33 Ind. App. 640; *State v. Russell*, 99 Mo. App. 373; *State v. Barnett*, 111 Mo. App. 688; *State v. Hammack*, 93 Mo. App. 521.

6. Sales Not Within Scope of License. — *State v. Lucas*, 94 Mo. App. 117.

9. Sale of Another's Liquors by One Holding License — *Contra.* — *Ruemmeli v. Cravens*, 13 Okla. 342.

10. Servant or Agent Liable Independently of Statutory Provisions. — *State v. Brown*, 93 Mo. App. 543.

An Employee of a Person Who Has Not Taken the Oath Not to Adulterate and given the required bond is criminally liable for a sale of intoxicating liquors. *State v. Brown*, 93 Mo. App. 543. See also *Swords v. Le Blanc*, 111 La. 416.

**390.** 10. Sales on Prohibited Days. — See *Burnett v. State*, 42 Tex. Crim. 600.

*Keeping Open on Prohibited Days.* — *Ramey v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 126.

11. Sales in Violation of Local Option Law. — *Leak v. Com.*, 64 S. W. Rep. 521, 23 Ky. L. Rep. 932; *Loeb v. State*, 115 Ga. 241.

**391.** 4. Who Not Servant or Agent. — *Black v. State*, 112 Ga. 29.

5. One Employed in Any Manner an Employee. — *Burnett v. State*, 42 Tex. Crim. 600. See also *Pigford v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 323.

6. Agent Not Liable for License Tax. — *Swords v. Le Blanc*, 111 La. 416.

8. Purchaser Not Guilty of Violation of Law. — *Whitmore v. State*, 72 Ark. 14; *Baehner v.*

*State*, 25 Ind. App. 597; *Creasy v. Com.*, (Ky. 1903) 76 S. W. Rep. 509. See also *Leak v. Com.*, 64 S. W. Rep. 521, 23 Ky. L. Rep. 932.

The Purchaser Is Not an Accomplice within the rule requiring corroboration of an accomplice's testimony. *Terry v. State*, 46 Tex. Crim. 75.

**392.** 1. Purchasing as Agent for Another Generally Not Liable — *Alabama.* — *Bonds v. State*, 130 Ala. 117; *Maples v. State*, 130 Ala. 121; *Banks v. State*, 136 Ala. 106; *Maxwell v. State*, 140 Ala. 131.

*Arkansas.* — *Taylor v. State*, 68 Ark. 468; *Whitmore v. State*, 72 Ark. 14.

*Kentucky.* — *Baker v. Com.*, 64 S. W. Rep. 657, 23 Ky. L. Rep. 898; *Wilson v. Com.*, 76 S. W. Rep. 1077, 25 Ky. L. Rep. 1085; *Skidmore v. Com.*, (Ky. 1900) 57 S. W. Rep. 468. See also *Creasy v. Com.*, (Ky. 1903) 76 S. W. Rep. 509.

*Mississippi.* — *Compare Wortham v. State*, 80 Miss. 205.

*Texas.* — *Crawford v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 576; *Chote v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 377; *Blasingame v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 275; *Washington v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 801. See also *Burrell v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 914.

Purchase Money Need Not Be Paid in Advance. — *Whitmore v. State*, 72 Ark. 14; *Chote v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 377.

Evidence Held Not to Show that Defendant Was Agent of Purchaser. — *Latham v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 182; *Sebastian v. State*, 44 Tex. Crim. 508.

2. One Who Procures Others to Join with Him in Purchasing a Quantity of Liquor. — *Whitmore v. State*, 72 Ark. 14. See also *Leak v. Com.*, 64 S. W. Rep. 521, 23 Ky. L. Rep. 932; *Creasy v. Com.*, (Ky. 1903) 76 S. W. Rep. 509; *Miller v. Com.*, 76 S. W. Rep. 515, 25 Ky. L. Rep. 848; *Wilson v. Com.*, 76 S. W. Rep. 1077, 25 Ky. L. Rep. 1085.

Good Faith of Agent Governs. — *Whitmore v. State*, 72 Ark. 14.

**392.** Purchase as Agent of Seller. — See notes 4, 5.

**4. Liability of Husband and Wife for Violation of Liquor Laws —**  
**a. LIABILITY OF WIFE FOR HER OWN ACTS — Acts Done in Husband's Presence.** — See note 6.

**393. b. LIABILITY OF HUSBAND FOR ACTS OF WIFE.** — See notes 8, 12.

**394. 5. Liability of Partners.** — See note 6.

**395. 6. Liability of Owner or Lessor for Violations of Law on Leased Premises — a. CRIMINAL LIABILITY.** — See note 4.

**397. c. LIABILITY OF PREMISES FOR FINES ASSESSED AGAINST OCCUPANT.** — See notes 1, 2.

**392. 3. Mere Device to Evade Law.** — Reese v. Newnan, 120 Ga. 198; Mack v. State, 116 Ga. 546.

**4. Acting as Agent of Seller — Liability.** — Skidmore v. Com., (Ky. 1900) 57 S. W. Rep. 468.

**5. Recompense Immaterial.** — Skidmore v. Com., (Ky. 1900) 57 S. W. Rep. 468. See also Rex v. Cavicchi, 8 Can. Crim. Cas. (Nova Scotia) 78.

**6. Acts Done in Husband's Presence.** — Com. v. Dwyer, 29 Pa. Co. Ct. 73.

**393. 8. Acts Committed in Husband's Presence.** — State v. Rozum, 8 N. Dak. 548; State v. Leonard, 72 Vt. 102.

**12. State v. Rozum, 8 N. Dak. 548.**

**Premises Rented by Wife.** — State v. Ekanger, 8 N. Dak. 559.

**394. 6. Sales by One Partner with Other's Knowledge and Consent.** — Ellison v. Com., 69 S. W. Rep. 765, 24 Ky. L. Rep. 657.

**395. 4. Ordinance Making Owner of Premises Liable Held Unconstitutional.** — Campbellsburg v. Odewalt, 72 S. W. Rep. 314, 24 Ky. L. Rep. 1717, 1739.

**397. 1. Statutory Provisions.** — Stat. Ky. 1903, § 2557.

**No Lien on Property unless Created by Statute.** — Com. v. Duncan, (Ky. 1905) 84 S. W. Rep. 526.

**2. Knowledge Necessary.** — Com. v. Duncan, (Ky. 1905) 84 S. W. Rep. 526.

## INTOXICATION.

By J. H. SMITH.

**399. I. DEFINITION.** — See note 1.

**II. INTOXICATION AS AFFECTING CONTRACTUAL LIABILITY — 1. Where Contract Is Express — a. EFFECT OF INTOXICATION IN ABSENCE OF FRAUD OF OTHER CONTRACTING PARTY — (1) In General.** — See note 3.

**400.** See note 2.

**401. (2) Degree of Intoxication Necessary.** — See note 2.

**402. (3) Whether Contract Void or Merely Voidable.** — See notes 3, 4.

**403. III. INTOXICATION AS AFFECTING RESPONSIBILITY FOR CRIME — 1. Voluntary Intoxication No Excuse for Crime — a. IN GENERAL.** — See note 5.

**399. 1. Intoxication Defined.** — Ring v. Ring, 112 Ga. 858, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399.

**3. Rule that Excessive Intoxication Avoids Responsibility.** — Fowler v. Meadow Brook Water Co., 208 Pa. St. 473; Burnham v. Burnham, 119 Wis. 509, 100 Am. St. Rep. 895.

**Rule in New Jersey.** — See Waldron v. Angleman, 71 N. J. L. 166.

**400. 2. Law Considers State of Mind, Not Producing Causes.** — Waldron v. Angleman, 71 N. J. L. 166, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; Fowler v. Meadow Brook Water Co., 208 Pa. St. 473.

**401. 2. Intoxication Which Deprives Party of Understanding Necessary.** — Wright v. Waller, 127 Ala. 557; Curtis v. Kirkpatrick, 9 Idaho 629; Waldron v. Angleman, 71 N. J. L. 166; Burnham v. Burnham, 119 Wis. 509, 100 Am. St. Rep. 895.

**402. 3. Party Must Rescind in Reasonable**

**Time.** — Fowler v. Meadow Brook Water Co., 208 Pa. St. 473.

**4. Must Restore Consideration.** — Fowler v. Meadow Brook Water Co., 208 Pa. St. 473.

**403. 5. Voluntary Intoxication No Excuse for Crime — Alabama.** — Bell v. State, 140 Ala. 57.

**Delaware.** — State v. Kavanaugh, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; State v. Di Guglielmo, 4 Penn. (Del.) 336; State v. Snow, 3 Penn. (Del.) 259.

**District of Columbia.** — Lanckton v. U. S., 18 App. Cas. (D. C.) 348.

**Florida.** — Cook v. State, (Fla. 1903) 35 So. Rep. 665.

**Georgia.** — Cribb v. State, 118 Ga. 316.

**Idaho.** — State v. Rigley, 7 Idaho 292.

**Illinois.** — Bruen v. People, 206 Ill. 417.

**Iowa.** — State v. Pasnau, 118 Iowa 501; State v. Roan, 122 Iowa 136.

**404.** See note 3.

**A Person Becomes Voluntarily Intoxicated.** — See note 4.

**Voluntary Intoxication for Purpose of Committing Crime.** — See note 6.

**405.** Unreasonable Belief of Danger Generated by Drunkenness. — See note 1.

**Constitutional Infirmary Rendering Person Unusually Susceptible to Influence of Liquor.** — See note 2.

**b. TEMPORARY INSANITY CAUSED BY VOLUNTARY INTOXICATION.** — See note 3.

**c. VOLUNTARY INTOXICATION RENDERING PARTY UNCONSCIOUS OF HIS ACTS.** — See note 5.

**406. 2. Under What Circumstances and for What Purposes Evidence of Voluntary Intoxication Admissible — a. CRIMES IN WHICH SPECIFIC INTENT IS NECESSARY ELEMENT — (1) Statement of Rule.** — See note 3.

**407.** See notes 1, 2.

(2) *Necessity for Caution in Applying Rule.* — See note 5.

(3) *What Degree of Intoxication Will Merit Consideration.* — See note 7.

*Kentucky.* — *Wright v. Com.*, 72 S. W. Rep. 340, 24 Ky. L. Rep. 1838; *Henderson v. Com.*, 72 S. W. Rep. 781, 24 Ky. L. Rep. 1985; *Seaborn v. Com.*, 80 S. W. Rep. 223, 25 Ky. L. Rep. 2203.

*Louisiana.* — *State v. Haab*, 105 La. 230.

*Minnesota.* — *State v. Corrivau*, 93 Minn. 38.

*Missouri.* — *State v. Clevenger*, 156 Mo. 190; *State v. West*, 157 Mo. 309; *State v. Brown*, 181 Mo. 192.

*North Carolina.* — *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756.

*Texas.* — *Little v. State*, 42 Tex. Crim. 554; *Cleland v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 189.

*Virginia.* — *Longley v. Com.*, 99 Va. 807, 2 Va. Sup. Ct. 660.

*Wisconsin.* — *Collins v. State*, 115 Wis. 596.

*Wyoming.* — *Gustavenson v. State*, 10 Wyo. 323.

**Intoxication Caused by Drugged or Adulterated Liquor.** — The courts will not enter upon an inquiry as to whether the intoxicating liquor was impure, or, by reason of drugs or adulteration, peculiarly calculated to affect the mind of the defendant. *Cribb v. State*, 118 Ga. 316.

**404. 3. State v. Kavanaugh**, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 404.

**4. Liquor Furnished by Deceased.** — *Com. v. Dudash*, 204 Pa. St. 124.

**6. Voluntary Intoxication for Purpose of Committing Crime.** — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665. See also *State v. Davis*, 52 W. Va. 224.

**405. 1. Drunkenness Causing Unreasonable Belief of Danger.** — *State v. Roan*, 122 Iowa 136.

**2. Constitutional Infirmities Rendering Person Unusually Liable to Influence of Liquor.** — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

**3. Temporary Insanity No Excuse for Crime — Alabama.** — *Porter v. State*, 140 Ala. 87. See also *Bell v. State*, 140 Ala. 57.

*Delaware.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

*Kentucky.* — *Wright v. Com.*, 72 S. W. Rep. 340, 24 Ky. L. Rep. 1838.

*Louisiana.* — *State v. Haab*, 105 La. 230.

*Missouri.* — *State v. Clevenger*, 156 Mo. 190.

*Texas.* — *Little v. State*, 42 Tex. Crim. 554.

*Wyoming.* — *Gustavenson v. State*, 10 Wyo. 323.

**5. Intoxication to Degree of Unconsciousness.** — *State v. Haab*, 105 La. 230.

**406. 3. Intoxication as Affecting Intent — Delaware.** — *State v. Snow*, 3 Penn. (Del.) 259; *State v. Di Guglielmo*, 4 Penn. (Del.) 336. See also *State v. Kavanaugh*, 4 Penn. (Del.) 131, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412.

*Florida.* — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665.

*Illinois.* — *Bruen v. People*, 206 Ill. 417.

*Indiana.* — *Booher v. State*, 156 Ind. 447.

*Iowa.* — *State v. Desmond*, 109 Iowa 72; *State v. Pasnau*, 118 Iowa 501; *State v. Roan*, 122 Iowa 136.

*Kentucky.* — *Seaborn v. Com.*, 80 S. W. Rep. 223, 25 Ky. L. Rep. 2203.

*Minnesota.* — *State v. Corrivau*, 93 Minn. 38.

*Pennsylvania.* — *Com. v. Ault*, 10 Pa. Super. Ct. 651. See also *Com. v. Dudash*, 204 Pa. St. 124.

*Virginia.* — *Longley v. Com.*, 99 Va. 807, 2 Va. Sup. Ct. 660.

*West Virginia.* — *State v. Davis*, 52 W. Va. 224; *State v. Hertzog*, 55 W. Va. 74.

*Wisconsin.* — *Hampton v. State*, 111 Wis. 127; *Collins v. State*, 115 Wis. 596.

*Wyoming.* — *Gustavenson v. State*, 10 Wyo. 323.

**407. 1. Crime Not Committed if Drunkenness Excludes Intent.** — *State v. Kavanaugh*, 4 Penn. (Del.) 131, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *Cook v. State*, (Fla. 1903) 35 So. Rep. 665.

**2. See State v. Kavanaugh**, 4 Penn. (Del.) 131, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412.

**5. Caution Necessary in Applying Doctrine.** — *State v. Kavanaugh*, 4 Penn. (Del.) 131, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412.

**7. Degree of Intoxication Necessary.** — *Booher v. State*, 156 Ind. 447.

**407.** (4) *Capacity to Form Intent Question for Jury.* — See note 8.

**408.** See notes 1, 2, 3.

(5) *Competency and Sufficiency of Evidence to Prove Intoxication.* —

See note 4.

(6) *Intoxicated Person May Be Capable of Forming Intent.* — See notes 8, 10, 11.

**409.** (7) *Applications of Rule in Prosecutions for Particular Offenses* —

(a) *Homicide.* — See notes 1, 3, 4.

**410.** *What Degree of Intoxication May Be Considered.* — See notes 5, 7.

**411.** (b) *Assaults* — *Assault with Intent to Kill.* — See notes 2, 4.

*Assault with Intent to Commit Rape.* — See note 6.

*Assault with Intent to Do Great Bodily Harm.* — See note 7.

**412.** (c) *Other Offenses* — *Larceny.* — See notes 2, 3, 4.

*Robbery.* — See note 5.

*Burglary.* — See note 9.

**413.** *Forgery.* — See note 2.

**407.** 8. *Capacity to Form Intent Question of Fact for Jury.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 407; *Booher v. State*, 156 Ind. 447. See also *State v. Kavanaugh*, 4 Penn. (Del.) 131, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412.

**408.** 1. *Not Question of Fact to Which Witness May Testify.* — *Compare Dozier v. State*, 130 Ala. 57.

2. *No Degree of Intoxication Conclusive as to Incapacity to Form Intent.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403-412.

3. *Evidence to Be Received with Caution.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408; *Booher v. State*, 156 Ind. 447.

4. *Intoxication Need Not Be Proved Beyond a Reasonable Doubt in Order to Be a Defense.* — *Gustavson v. State*, 10 Wyo. 323.

8. *Intoxicated Person May Be Capable of Criminal Intent.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting (entire paragraph) 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 808; *Booher v. State*, 156 Ind. 447.

10. *Intent Formed Before Intoxication.* — *Booher v. State*, 156 Ind. 447; *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408.

11. *Presumption as to Intent of Person Capable of Conceiving Design.* — See *State v. Kavanaugh*, 4 Penn. (Del.) 131, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408.

**409.** 1. *Homicide* — *Evidence of Intoxication Competent to Show Absence of Premeditation* — *Florida.* — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665.

*Indiana.* — *Booher v. State*, 156 Ind. 447.

*Kentucky.* — *Wright v. Com.*, 72 S. W. Rep. 340, 24 Ky. L. Rep. 1838; *Henderson v. Com.*, 72 S. W. Rep. 781, 24 Ky. L. Rep. 1985.

*Minnesota.* — *State v. Corrivau*, 93 Minn. 38.

*Virginia.* — *Longley v. Com.*, 99 Va. 807, 2 Va. Sup. Ct. 660.

*West Virginia.* — *State v. Davis*, 52 W. Va. 224; *State v. Hertzog*, 55 W. Va. 74.

*Wisconsin.* — *Hempton v. State*, 111 Wis. 127.

*Wyoming.* — *Gustavson v. State*, 10 Wyo. 323, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

*In Missouri.* — *State v. Brown*, 181 Mo. 192; *State v. Clevenger*, 156 Mo. 190.

3. *Intoxication May Reduce to Murder in Second Degree.* — *Longley v. Com.*, 99 Va. 807, 2 Va. Sup. Ct. 660; *State v. Davis*, 52 W. Va. 224.

4. *Reduction of Offense to Manslaughter.* — *State v. Corrivau*, 93 Minn. 38; *Longley v. Com.*, 99 Va. 807, 2 Va. Sup. Ct. 660.

**410.** 5. *Degree of Intoxication Insufficient to Reduce Grade of Crime.* — "If reason, notwithstanding the intoxication or other disturbing cause, be not so completely dethroned, so to speak, but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause." *Hempton v. State*, 111 Wis. 127. See also *State v. Rigley*, 7 Idaho 292.

7. *Intoxication Must Deprive of Power to Form Guilty Intent.* — *State v. Pasnau*, 118 Iowa 501.

**411.** 2. *Assault with Intent to Kill* — *Intoxication May Be Considered.* — *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *Booher v. State*, 156 Ind. 447, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 411; *State v. Pasnau*, 118 Iowa 501.

4. *Acquittal Authorized.* — *State v. Pasnau*, 118 Iowa 501.

6. *Assault with Intent to Rape* — *Competency of Evidence of Intoxication.* — *State v. Desmond*, 109 Iowa 72.

7. *Assault with Intent to Do Bodily Harm.* — *State v. Pasnau*, 118 Iowa 501.

**412.** 2. *Larceny* — *Mere Trespass Not Crime.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

3. *Evidence of Intoxication Admissible to Show Absence of Intent.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131; *Com. v. Ault*, 10 Pa. Super. Ct. 651; *Collins v. State*, 115 Wis. 596.

4. *Taking Not Criminal in Absence of Larcenous Intent.* — *State v. Kavanaugh*, 4 Penn. (Del.) 131; *Collins v. State*, 115 Wis. 596.

5. *Robbery* — *Evidence of Intoxication Competent.* — In *Missouri* the rule is contrary, and intoxication would be no defense. *State v. West*, 157 Mo. 309.

9. *Evidence of Intoxication Admissible.* — See *People v. Dowell*, 141 Cal. 493.

**413.** 2. *Forgery* — *What Degree of Intoxi-*

**413.** *b.* CASES IN WHICH SPECIFIC INTENT IS NOT ELEMENT OF CRIME — See notes 6, 9, 10.

**414.** 4. Responsibility for Crime of Persons Mentally Diseased from Use of Intoxicants — *a.* PERSONS AFFLICTED WITH FIXED INSANITY FROM USE OF INTOXICANTS. — See note 6.

*b.* PERSONS AFFLICTED WITH DELIRIUM TREMENS. — See note 7.

**415.** See note 1.

Evidence. — See notes 2, 3, 4.

**417.** INTRUSTED. — See note 3.

INURE. — See note 4.

INVALID. — See note 5.

**418.** INVALIDATED. — See note 1.

**419.** INVENTED WORD. — See note 1.

INVENTORY. — See note 3.

cation Defense. — See *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756.

**413.** 6. Cases in Which Specific Intent Is Not Element of Crime. — *Little v. State*, 42 Tex. Crim. 554; *Gustavenson v. State*, 10 Wyo. 323.

"Intoxication does not excuse or mitigate any degree of unlawful homicide except murder in the first degree, unless as a result of such intoxication there be a fixed or settled frenzy or insanity, either permanent or intermittent." *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161. See also *Bell v. State*, 140 Ala. 57.

Carrying Concealed Weapon. — *Fielding v. State*, 135 Ala. 56.

9. Murder in Second Degree. — *Little v. State*, 42 Tex. Crim. 554; *Gustavenson v. State*, 10 Wyo. 323.

10. Manslaughter. — *Gustavenson v. State*, 10 Wyo. 323.

**414.** 6. Irresponsibility of Person Permanently Insane from Intoxication. — See *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161.

7. Irresponsibility of Person Afflicted with Delirium Tremens. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

**415.** 1. Delirium Tremens Distinguished from Ordinary Drunkenness. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

2. Defendant Has Burden of Proof to Show Delirium Tremens. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

3. To Be Defense, Must Exist at Time Act Committed. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

4. No Presumption of Continued Insanity. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

**417.** 3. Trustee Process. — *Avery v. Monroe*, 172 Mass. 132.

4. In construing a statute providing that a grant to operate waterworks should *inure* for a term of not more than twenty-five years, the court said: "The word *inure* in the sense here employed is defined to take or have effect, to operate (Anderson's Law Dict.)." *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234.

5. Invalid. — See *Rich v. Chicago*, 187 Ill. 396; *Kuester v. Chicago*, 187 Ill. 21.

**418.** 1. Invalidated. — *Scottish Union, etc., Ins. Co. v. Field*, 18 Colo. App. 68.

**419.** 1. Invented Word. — *Christy v. Tipper*, (1905) 1 Ch. 1; *In re Linotype Co.'s Trade Mark*, (1900) 2 Ch. 238.

3. Inventory. — *Southern F. Ins. Co. v. Knight*, 111 Ga. 630.

Invoice and Inventory Distinguished. — *Southern F. Ins. Co. v. Knight*, 111 Ga. 630.

Inventory — Fire Insurance. — *Southern F. Ins. Co. v. Knight*, 111 Ga. 622; *Philadelphia F. Assoc. v. Calhoun*, 28 Tex. Civ. App. 409.

## INVESTMENTS.

By G. W. WALSH.

**426.** II. THE DUTY TO INVEST — 1. In General. — See note 1.

**427.** Exceptional Circumstances. — See note 1.

**428.** III. DETERMINATION AS TO NATURE OF INVESTMENTS — 1. Provisions of Instrument Creating Trust — *a.* EXPRESS DIRECTIONS — (1) *Rule Stated.* — See note 4.

**426.** 1. General Duty to Invest. — See *Mathewson v. Davis*, 191 Ill. 391.

**427.** 1. Where a Deposit Was Too Small to invest readily at six per cent. it was held erroneous to charge the trustee at that rate, he having actually realized only three and a half

per cent. *Matter of Wiley*, 98 N. Y. App. Div. 93.

**428.** 4. See *Ovey v. Ovey*, (1900) 2 Ch. 524, 69 L. J. Ch. 804, 83 L. T. N. S. 311, 49 W. R. 45 (*In re Wedderburn*, 9 Ch. D. 112, 47 L. J. Ch. 743, not followed).

**429.** Investments Expressly Forbidden. — See note 1.

(2) *When Directions May Be Departed From.* — See note 2.

**431.** 2. Statutory Provisions. — See note 1.

**432.** 3. Supervision of Courts — *a.* IN GENERAL. — See note 4.

*b.* RIGHT OF FIDUCIARIES TO APPLY FOR DIRECTIONS. — See note 5.

**434.** *d.* PROTECTION AFFORDED BY ORDER OF COURT — Order Obtained by Fraud. — See note 1.

4. Discretion of Fiduciary. — See note 2.

Whether Discretionary Powers Conferred by Instrument Creating Trust Are Personal or Attach to Office. — See note 4.

**435.** IV. REQUIREMENTS OF GOOD FAITH AND SOUND JUDGMENT — 1. Rule Stated. — See notes 1, 2.

**436.** See note 1.

**437.** 2. Measure of Diligence Required. — See notes 3, 4.

**438.** See notes 1, 2.

V. CONSTRUCTION OF PARTICULAR DIRECTIONS OR POWERS — 1. To Invest in Government or Public Securities. — See note 5.

**442.** VI. PROPRIETY OF PARTICULAR INVESTMENTS — 2. Government or Public Securities — *a.* A PROPER INVESTMENT. — See notes 1, 2.

**445.** 3. Real Securities — *a.* A PROPER INVESTMENT. — See note 3.

**447.** *b.* CARE IN SELECTING SECURITY. — See note 2.

*c.* MARGIN OF SECURITY — (2) *English "Two-thirds Rule."* — See 10 c 10.

Only When an Emergency Arises is it proper for the court to authorize a departure from the strict terms of the trust. *In re Tollemache*, (1903) 1 Ch. 955, 72 L. J. Ch. 539, 88 L. T. N. S. 670, 51 W. R. 597.

**429.** 1. Doctrine under Lord St. Leonard's Act, 1860. — See *Ovey v. Ovey*, (1900) 2 Ch. 524, 69 L. J. Ch. 804, 83 L. T. N. S. 311.

2. Where Departure from Directions Is for Benefit of Beneficiaries. — *Weld v. Weld*, 23 R. I. 311.

**431.** 1. Statutory Provisions. — *Aydelott v. Breeding*, 111 Ky. 847; *In re Allis*, 123 Wis. 223.

**432.** 4. Courts Cannot Abrogate Directions Contained in Trust Instrument. — *Ovey v. Ovey*, (1900) 2 Ch. 524, 69 L. J. Ch. 804, 83 L. T. N. S. 311, 49 W. R. 45 (*In re Wedderburn*, 9 Ch. D. 112, 47 L. J. Ch. 743, not followed).

5. Right to Apply for Directions as to Investments. — *In re Allis*, 123 Wis. 223.

**434.** 1. Order Obtained by Fraud. — See *Derr's Estate*, 203 Pa. St. 96.

2. Discretion of Fiduciaries. — *Hart's Estate*, 203 Pa. St. 480; *Weld v. Weld*, 23 R. I. 311.

4. Grant to Trustees of Power to Select Investments at Discretion Personal and Not Incident to Office. — *Dillingham v. Martin*, 61 N. J. Eq. 276.

Powers Held Attached to Office. — See *Mercer v. Safe Deposit, etc., Co.*, 91 Md. 102; *Snyder v. Safe Deposit, etc., Co.*, 93 Md. 226; *Myers v. McCullagh*, 63 N. Y. App. Div. 321.

**435.** 1. Requirement of Good Faith. — *Thayer v. Dewey*, 185 Mass. 68.

2. Requirement of Sound Business Judgment and Proper Care. — *Thayer v. Dewey*, 185 Mass. 68; *Matter of Hall*, 164 N. Y. 196; *Hart's Estate*, 203 Pa. St. 480.

Acting Honestly Not Sufficient to Relieve Trustee Where Act Is Not Reasonable. — *Chap-*

*man v. Browne*, (1902) 1 Ch. 785, 71 L. J. Ch. 465, 86 L. T. N. S. 744.

**436.** 1. The Courts Regard Safety as Paramount to Profit. — *Hart's Estate*, 203 Pa. St. 480.

**437.** 3. Measure of Diligence Required. — *Chapman v. Browne*, (1902) 1 Ch. 785, 71 L. J. Ch. 465, 86 L. T. N. S. 744; *In re De Pothonnier*, (1900) 2 Ch. 529, 69 L. J. Ch. 773, 83 L. T. N. S. 220, *distinguishing* *Field v. Field*, (1894) 1 Ch. 425, 63 L. J. Ch. 233; *Davis*, Appellant, 183 Mass. 499; *Gouldsey's Estate*, 10 Pa. Dist. 216, *affirmed* 201 Pa. St. 491; *Hart's Estate*, 203 Pa. St. 480.

4. All Speculations, etc., Excluded. — *Matter of Reed*, 45 N. Y. App. Div. 196; *Matter of Hall*, 164 N. Y. 196, *affirming* 48 N. Y. App. Div. 488.

**438.** 1. Rule Excludes Whatever Does Not Take into View the Nature and Object of the Trust. — *Hart's Estate*, 203 Pa. St. 480.

2. Consequences of a Mistake Must Be Considered. — *Hart's Estate*, 203 Pa. St. 480.

5. Loans on Mortgages of Real Estate Precluded by Direction to Invest in Public Funds. — *Dunklee v. Butler*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 58.

**442.** 1. Government or Public Funds or Securities a Proper Investment. — *Penn v. Fogler*, 182 Ill. 76.

2. Under the Trustee Act 1893 an investment in the stock of a municipal borough having a population of over fifty thousand dollars is a proper investment. *In re Druiitt*, (1903) 1 Ch. 446, 72 L. J. Ch. 441, 88 L. T. N. S. 483, 67 J. P. 99, 1 Local Gov. Rep. 353.

**445.** 3. Loans on Real Securities a Proper Investment. — *Penn v. Fogler*, 182 Ill. 76.

**447.** 2. Hazardous or Speculative Securities to Be Avoided. — *Simes's Estate*, 9 Pa. Dist. 31.

10. Statutory Rule Should Be Adhered to in

**448.** (4) *Depreciation of Property After Loan Is Made Thereon.* — See note 4.

*d.* RULE AS TO JUNIOR MORTGAGES. — See notes 6, 7.

**449.** 4. Loans on Personal Security — *a.* PREVAILING DOCTRINE AS TO IMPROPRIETY. — See note 2.

*b.* VIEW THAT SUCH LOANS MAY BE MADE. — See note 6.

**450.** 5. Employment in Business or Speculation. — See note 3.

6. Corporate Stock — *a.* VIEW THAT INVESTMENT THEREIN IS IMPROPER. — See note 4.

**451.** *b.* VIEW THAT SUCH INVESTMENT IS NOT NECESSARILY IMPROPER. — See note 5.

**452.** 7. Corporate Bonds. — See note 2.

**453.** 9. Purchase of Real Estate. — See notes 5, 6, 7.

**454.** 11. Rule as to Investments Made by Creator of Trust. — See note 3.

**455.** VII. SITUUS OF INVESTMENTS. — See notes 1, 2, 3.

VIII. SEPARATE INVESTMENT OF FUNDS HELD ON DIFFERENT TRUSTS.

— See note 5.

**456.** IX. DESIGNATION OF FIDUCIARY CAPACITY IN WHICH INVESTMENTS ARE HELD — 1. Rule Stated. — See note 1.

**459.** X. INCOME TO BENEFICIARIES — 3. Rights as Between Life Tenants and Remaindermen. — See note 1.

Investment in Bonds at a Premium. — See note 4.

**XI. CHANGE OF INVESTMENTS** — 1. General Rule — *a.* RULE STATED. — See note 5.

**460.** 2. Express Power to Vary Investments — *b.* BY PROVISIONS OF TRUST INSTRUMENT. — See note 8.

Every Case. — See *Waite v. Parkinson*, 85 L. T. N. S. 456.

**448.** 4. *Depreciation of Property.* — *Gouldsey's Estate*, 10 Pa. Dist. 216, *affirmed* 201 Pa. St. 491.

6. Investment on Junior Mortgages Improper. — *Mulford v. Mulford*, (N. J. 1902) 53 Atl. Rep. 79; *Giesenkamp's Estate*, 3 Pittsb. Leg. J. N. S. (Pa.) 356.

7. Second Mortgages Not Necessarily Improper. — *Taft v. Smith*, 186 Mass. 31.

**449.** 2. Loans on Personal Security Not Proper Investments. — *Simes's Estate*, 9 Pa. Dist. 31.

6. Trustees Having Power to Loan on Personal Security with the Consent of the Tenant for Life may make advances on the personal security of such tenant for life. *In re Laing*, (1899) 1 Ch. 593, 68 L. J. Ch. 230, 80 L. T. N. S. 228, 47 W. R. 311, *discussing* *Keays v. Lane*, Ir. R. 3 Eq. 1.

**450.** 3. Employment in Business or Speculation Improper. — *Penn v. Fogler*, 182 Ill. 76; *Matter of Hall*, 48 N. Y. App. Div. 488, *modified* 164 N. Y. 196.

4. For the course of decisions on the subject of investment in private corporation stocks, *pro* and *con*, mostly in exposition of statutes, see *Aydellott v. Breeding*, 111 Ky. 847.

**451.** 5. Investment in Stock of Private Corporation Not Improper. — *Davis*, Appellant, 183 Mass. 499.

**452.** 2. Investments in Corporate Bonds Proper. — *Davis*, Appellant, 183 Mass. 499; *Green v. Crapo*, 181 Mass. 55.

**453.** 5. Resale of Real Estate Wrongfully Purchased — Power to Give Good Title. — *In re Jenkins*, (1903) 2 Ch. 362, 72 L. J. Ch. 693, 88 L. T. N. S. 628; *Power v. Banks*, (1901) 2 Ch.

487, 70 L. J. Ch. 700, 85 L. T. N. S. 376, 49 W. R. 679, 66 J. P. 21, *following* *In re Patten*, etc., *Union*, 52 L. J. Ch. 787.

6. Investment in Real Estate Without Order of Court Therefor Improper. — See *Derr's Estate*, 203 Pa. St. 96.

7. Cases Holding Investment in Real Estate Proper. — *Smith v. Keteltas*, 62 N. Y. App. Div. 174. See also *Pine v. White*, 175 Mass. 585.

**454.** 3. What Investments Made by Creator of Trust May Be Retained. — *Beardsley v. Bridgeport Protestant Orphan Asylum*, 76 Conn. 560; *Green v. Crapo*, 181 Mass. 55; *Duncklee v. Butler*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 58.

**455.** 1. General Rule as to Situs of Investments. — *Matter of Reed*, 45 N. Y. App. Div. 196.

2. Rule Subject to Exceptions. — *Thayer v. Dewey*, 185 Mass. 68; *Gouldsey's Estate*, 201 Pa. St. 491.

3. Rule Applies Only Where Fiduciary Has Freedom of Choice. — *Matter of Reed*, 45 N. Y. App. Div. 196.

5. Separate Investment of Funds Held on Different Trusts. — *Fanning v. Main*, 77 Conn. 94.

**456.** 1. Investment or Deposit in Individual Name of Fiduciary Improper. — *Carr's Estate*, 24 Pa. Super. Ct. 369.

**459.** 1. Rights of Remainderman Must Be Considered. — *Hart's Estate*, 203 Pa. St. 480.

4. Trustee May Hold Back Interest on Bonds to Make Good Premium Paid. — See *In re Allis*, 123 Wis. 223. Compare *Boyer v. Chauncey*, 12 Pa. Super. Ct. 526.

5. Changes of Investment Not Favored. — *Penn v. Fogler*, 182 Ill. 76.

**460.** 8. Power Not Exhausted by a Single

**462. XII. LIABILITIES OF FIDUCIARIES — 1. For Failure to Invest —**

*a.* **EXISTENCE OF LIABILITY.** — See note 2.

*b.* **EXTENT OF LIABILITY — (1) For Failure to Invest — Generally**

— (*b.*) **Interest.** — See note 4.

**464. 2. For Losses on Investments — *a.* GENERAL RULE.** — See note 2.

**465.** See note 1.

**466. *b.* LOSSES ON UNAUTHORIZED INVESTMENTS.** — See note 1.

**468. 3. For Commingling Trust Funds with Individual Funds.** — See note 5.

See note 1.

**470. 4. For Using Trust Funds in Business or Speculation — *b.* RIGHT OF BENEFICIARY TO PROFITS REALIZED BY FIDUCIARY.** — See note 2.

**471. Beneficiary Must Elect.** — See note 5.

**472. 6. For Misconduct of Co-Fiduciaries.** — See notes 2, 3.

*7. For Misconduct of Agents.* — See note 4.

**473. 8. Interest — *b.* RATE.** — See notes 1, 2.

*c.* **SIMPLE OR COMPOUND INTEREST.** — See notes 2, 4.

**475. 9. Option of Beneficiary as to Adopting Improper Investments — *a.* RULE STATED.** — See note 1.

**476. 10. Effect of Beneficiary's Consent to or Acquiescence in Improper Investment — *a.* RULE STATED.** — See notes 2, 3.

**Exercise.** — *Owsley v. Eads*, (Ky. 1900) 57 S. W. Rep. 225.

**A Power to Sell Includes the Power to Exchange.**

— *Brace v. Van Eps*, 13 S. Dak. 452.

**462. 2. Liability for Failure to Invest.** — See *Mathewson v. Davis*, 191 Ill. 391.

**Liability for Failure to Change Investment.** — When a trustee does not receive or hold any money but receives merely shares of stock standing in the name of an executor, he is not bound to change the investment and is not liable for the loss of said shares and the interest thereon. *Hill v. Campbell*, 15 Quebec Super. Ct. 125.

**4. Liability for Interest.** — *Martin v. Martin*, 43 Oregon 119. See also *Mathewson v. Davis*, 191 Ill. 391.

**464. 2. Responsibility for Losses Resulting from Bad Faith, Unsound Judgment, or Negligence.** — *Hitchcock v. Cosper*, (Ind. App. 1904) 69 N. E. Rep. 1029; *Whittingham v. Schofield*, 67 S. W. Rep. 846, 23 Ky. L. Rep. 2444; *Davis*, Appellant, 183 Mass. 499; *Brigham v. Morgan*, 185 Mass. 27; *Matter of Olmstead*, 52 N. Y. App. Div. 515, affirmed 164 N. Y. 571; *Mansfield's Estate*, 19 Pa. Super. Ct. 26.

**465. 1. No Responsibility for Losses Not Attributable to Bad Faith, Unsound Judgment, or Negligence.** — *Pine v. White*, 175 Mass. 585; *Green v. Crapo*, 181 Mass. 55; *Taft v. Smith*, 186 Mass. 31; *Gouldsey's Estate*, 201 Pa. St. 491.

**466. 1. Absolute Liability for Losses on Improper and Unauthorized Investments.** — *Scott v. Reeves*, 131 Ala. 612; *Rogers v. Dickey*, 117 Ga. 819; *Hitchcock v. Cosper*, (Ind. App. 1904) 69 N. E. Rep. 1029; *Aydelott v. Breeding*, 111 Ky. 847; *Simes's Estate*, 9 Pa. Dist. 31.

**468. 5. Responsibility for Fund Commingled.** — *Matter of Dow*, 133 Cal. 446.

**469. 1. Liability for Interest.** — *Matter of Dow*, 133 Cal. 446; *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Erie School Dist. v. Griffith*, 203 Pa. St. 123. See also *Mathewson v. Davis*, 191 Ill. 391.

**470. 2. A Trustee Cannot Make Any Incidental Profits for Himself.** — *In re Davis*, (1902) 2 Ch. 314, 71 L. J. Ch. 539, 86 L. T. N. S. 523, 51 W. R. 8; *Rogers v. Dickey*, 117 Ga. 819.

**471. 5.** See *In re Davis* (1902) 2 Ch. 314, 71 L. J. Ch. 539, 86 L. T. N. S. 523, 51 W. R. 8.

**472. 2. All Fiduciaries Responsible for Misconduct of One.** — *Jackson v. Dickinson*, (1903) 1 Ch. 947, 72 L. J. Ch. 761, 88 L. T. N. S. 507. See also *Colburn v. Grant*, 16 App. Cas. (D. C.) 107, affirmed 181 U. S. 601.

*3.* See *Re McLatchie*, 30 Ont. 179.

**4. Fiduciaries Responsible for Loss Caused by Agent.** — *Wyman v. Paterson*, (1900) A. C. 271, 82 L. T. N. S. 473.

**473. 1. Legal Rate of Interest the Proper Charge.** — *Owsley v. Owsley*, 77 S. W. Rep. 394, 25 Ky. L. Rep. 1194.

**English Rule — Five Per Cent Allowed Where Fiduciary Makes Use of Money.** — *In re Davis*, (1902) 2 Ch. 314, 71 L. J. Ch. 539, 86 L. T. N. S. 523, 51 W. R. 8.

**2. Highest Legal Interest Should Be Charged Against Fiduciary Guilty of Wilfulness or Bad Faith.** — *Brigham v. Morgan*, 185 Mass. 27; *Matter of Reed*, 45 N. Y. App. Div. 196.

**474. 2. Simple Interest Only Charged Where There Has Been Mere Negligence.** — *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1; *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

**4. Compound Interest Charged in Cases of Wilfulness or Bad Faith.** — *Matter of Dow*, 133 Cal. 446; *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

**475. 1. Option of Beneficiary to Adopt or Reject Improper Investment.** — *Rogers v. Dickey*, 117 Ga. 819; *Carr's Estate*, 24 Pa. Super. Ct. 369.

**476. 2. No Liability for Losses on Investments Made at Request or with Assent of Beneficiary.** — *Phillips v. Burton*, (Ky. 1899) 52 S. W. Rep. 1064; *Newton v. Rebenack*, 90 Mo. App. 650; *Matter of Hall*, 164 N. Y. 196.

**3. Acquiescence of Beneficiary May Relieve Fiduciary from Liability.** — *Phillips v. Burton*,



**477. c. BENEFICIARY MUST HAVE BEEN FULLY INFORMED.** — See note 2.

*e. BURDEN OF PROOF.* — See note 5.

**11. Effect of Provision in Trust Instrument Exonerating Fiduciary from Liability for Losses.** — See note 9.

**478. INVITATION — INVITE.** — See note 4.

**INVOICE.** — See note 5.

**479. INVOLUNTARY.** — See note 1.

**481. IRON.** — See note 2.

**IRREGULAR — IRREGULARITY.** — See note 3.

**483. IRREPARABLE INJURY.** — See note 4.

**484. IRREVOCABLE.** — See note 4.

(Ky. 1899) 52 S. W. Rep. 1064; *James v. Aller*, 66 N. J. Eq. 69.

**Effect of Acquiescence by Cestui Que Trust.** — *Aydelott v. Breeding*, 111 Ky. 847.

**477. 2. Beneficiary Must Have Been Fully Informed.** — *Hitchcock v. Cosper*, (Ind. App. 1904) 69 N. E. Rep. 1029; *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Newton v. Rebenack*, 90 Mo. App. 650; *James v. Aller*, 66 N. J. Eq. 69; *Matter of Reed*, 45 N. Y. App. Div. 196. See also *Penn v. Fogler*, 182 Ill. 76.

**Acquiescence in Reliance on Judgment of Trustees Insufficient.** — *Henderson v. Henderson*, Sc. Ct. of Sess. 2 F. 1295.

**5. Burden of Proof.** — *Newton v. Rebenack*, 90 Mo. App. 650; *Hart's Estate*, 203 Pa. St. 480.

**9. Liability for Losses Due to Negligence.** — *Matter of Olmstead*, 52 N. Y. App. Div. 515, *affirmed* 164 N. Y. 571.

**478. 4. Invitation — Invite.** — *Sesler v. Ralfe Coal, etc., Co.*, 51 W. Va. 318.

**5. Invoice.** — *Merchants' Exch. Co. v. Weisman*, 132 Mich. 353.

**Invoice and Inventory Distinguished.** — *Southern F. Ins. Co. v. Knight*, 111 Ga. 630.

**Invoice and Proceeds Distinguished.** — *Tradesmen's Nat. Bank v. National Surety Co.*, 169 N. Y. 563.

**479. 1. Compulsory and Involuntary.** — *In re Murray*, 96 Fed. Rep. 600.

**Involuntary and Unintentional.** — See *Smouse v. Iowa State Traveling Men's Assoc.*, 118 Iowa 436.

**Involuntary Nonsuit.** — See *Deeley v. Heintz*, 169 N. Y. 129.

**In the Sense of Accidental.** — In construing an accident policy excepting an accident or death resulting from voluntary or *involuntary* taking of poison the court held that *involuntary* was an antonym of voluntary and therefore included accidental, and covered the case of an overdose of medicine accidentally taken. *Kennedy v. Aetna L. Ins. Co.*, 31 Tex. Civ. App. 509.

**481. 2. Iron Bars and Box Iron Synonymous — Tariff Act.** — *Milne v. U. S.*, 115 Fed. Rep. 410.

**3. Irregularity.** — *McCain v. Des Moines*, 174 U. S. 168; *Chase v. Trout*, 146 Cal. 360, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481; *Bronk v. State*, 43 Fla. 461; *State v. Wear*, 145 Mo. 162; *State v. Norton*, 69 S. Car. 459, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481.

**Irregularity and Illegality Distinguished.** — *State v. Norton*, 69 S. Car. 459, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 482 [481].

**Irregular Judgments.** — *McKenna's Estate*, 60 Neb. 995; *Stafford v. Gallops*, 123 N. Car. 19.

**483. 4. Camp v. Dixon, 112 Ga. 872; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210.**

**484. 4. Irrevocable Powers.** — *Mutual Reserve Fund L. Assoc. v. Boyer*, 62 Kan. 31.

## IRRIGATION.

By F. G. BAMMAN.

**487. II. IRRIGATION AT COMMON LAW — 1. Right to Use Water of Natural Stream.** — See note 3.

**2. Use Must Be Reasonable.** — See notes 4, 5, 7.

**488. 3. What Constitutes Reasonable Use.** — See note 4.

**487. 3. Right of Riparian Owner to Use Water of Stream for Irrigation.** — *Meng v. Coffee*, 67 Neb. 500; *McCook's Irrigation, etc., Co. v. Crews*, (Neb. 1903) 96 N. W. Rep. 996; *Robinson v. Davis*, 47 N. Y. App. Div. 405, *affirmed* 169 N. Y. 577; *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499; *Jones v. Conn*, 30 Oregon 30, *rehearing denied* 39 Oregon 46, 87 Am. St. Rep. 634., *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487. See also the title **WATERS AND WATERCOURSES**, §60. 8.

**4. Robinson v. Davis, 47 N. Y. App. Div. 405, *affirmed* 169 N. Y. 577.**

**5. Right to Use Water for Irrigation Limited.** — *Meng v. Coffee*, 67 Neb. 500; *Crawford Co. v. Hathaway*, 67 Neb. 325.

**7. Water May Not Be Unreasonably Used to Injury of Lower Proprietor.** — *Meng v. Coffee*, 67 Neb. 500, 93 N. W. Rep. 713, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

**488. 4. What Is Reasonable Use Dependent upon Circumstances.** — *Meng v. Coffee*, 67 Neb. 500; *McCook Irrigation, etc., Co. v. Crews*,

**488.** Reasonableness of Use as Determined by Quantity of Water Consumed. — See note 7. Total Consumption Unreasonable. — See note 8.

**489.** 4. Use of Water for Irrigation as Natural or Artificial Want. — See notes 2, 3, 5.

**490.** III. IRRIGATION IN ARID STATES — IN GENERAL — The Necessity for Irrigation Is a Matter of Common Knowledge. — See note 2.

IV. STATE CONTROL OF IRRIGATION — 1. Water as Public Property. — See note 3.

2. Use of Water for Irrigation as Public Use. — See notes 4, 5, 9.

**491.** 3. Use of Water Subject to State Control. — See note 1.

V. DOCTRINE OF RIPARIAN RIGHTS — 1. To What Extent in Force. — See notes 3, 4.

**492.** 2. Nature and Extent — *a.* IN GENERAL. — See note 1.

General Statement of Doctrine. — See note 2.

No Ownership in Corpus of Water. — See note 4.

*b.* MEASURE OF RIGHT. — See notes 6, 7.

(Neb. 1903) 96 N. W. Rep. 996. See also *Jones v. Conn*, 39 Oregon 30, 87 Am. St. Rep. 634.

**488.** 7. Partial Consumption of Water for Irrigation Not Necessarily Unreasonable. — *Meng v. Coffee*, 67 Neb. 500.

8. Total Consumption of Water by One Proprietor Unreasonable. — *Meng v. Coffee*, 67 Neb. 500. See also *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. Dak. 519.

**489.** 2. See *Robinson v. Davis*, 47 N. Y. App. Div. 405, *affirmed* 169 N. Y. 577.

3. See *Hall v. Carter*, 33 Tex. Civ. App. 230; *Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339.

Classification Criticised. — *Meng v. Coffee*, 67 Neb. 500

5. In Texas. — In *Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339, the doctrine of reasonable use was laid down, and the court criticised the dicta in earlier cases, which gave color to the impression that the use of water for agricultural purposes was considered in Texas to be a natural use.

**490.** 2. Necessity for Irrigation Subject of Judicial Notice. — *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

3. Water Declared Property of State. — *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 98.

4. Constitutional Declarations that Use of Water for Irrigation Is Public Use. — *Boise City Irrigation, etc., Co. v. Clark*, (C. C. A.) 131 Fed. Rep. 415, interpreting the constitution and statutes of Idaho.

5. Distribution by Irrigation Companies. — *Stanislaus County v. San Joaquin, etc., Canal, etc., Co.*, 192 U. S. 201; *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598; *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126; *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125; *Fresno Canal, etc., Co. v. Park*, 129 Cal. 437; *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309, *rehearing denied* 130 Cal. 315; *Lake Koen Nav., etc., Co. v. Klein*, 63 Kan. 484; *Albuquerque Land, etc., Co. v. Gutierrez*, 10 N. Mex. 177; *Borden v. Trespacios Rice, etc., Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 461,

*citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 490.

9. Compare *Lake Koen Nav., etc., Co. v. Klein*, 63 Kan. 484, holding that it is for the court to determine whether the use in question is a public use.

**491.** 1. Use of Water for Irrigation Subject to State Control. — *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918.

Stream Crossing State Boundary. — In *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, it was held that the state had jurisdiction to determine water rights, although part of the land on which it was used was located in another state and the stream flowed in both states. See also *Conant v. Deep Creek, etc., Irrigation Co.*, 23 Utah 627, 90 Am. St. Rep. 721.

3. Doctrine of Riparian Rights. — *California Pastoral, etc., Co. v. Enterprise Canal, etc., Co.*, 127 Fed. Rep. 741; *Crawford Co. v. Hathaway*, 67 Neb. 325; *Meng v. Coffee*, 67 Neb. 500. See also *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286.

4. Doctrine of Riparian Rights Repudiated. — *Crippen v. White*, 28 Colo. 298; *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

**492.** 1. Common-law Rule as Affected by Necessity of Irrigation. — *Meng v. Coffee*, 67 Neb. 500.

2. Extent of Riparian Owners' Rights. — *California Pastoral, etc., Co. v. Enterprise Canal, etc., Co.*, 127 Fed. Rep. 741; *Southern California Invest. Co. v. Wilshire*, 144 Cal. 68; *Jones v. Conn*, 39 Oregon 30, *rehearing denied* 39 Oregon 46, 87 Am. St. Rep. 634. See also *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499; *Cox v. Bernard*, 39 Oregon 53; *Mace v. Mace*, 40 Oregon 586, *rehearing denied* 40 Oregon 591.

4. No Ownership in Corpus of Water of Stream. — *Boise Irrigation, etc., Co. v. Stewart*, 10 Idaho 38; *Crawford Co. v. Hathaway*, 67 Neb. 325. See also *Barneich v. Mercy*, 136 Cal. 205; *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927.

6. Southern California. Invest. Co. v. Wilshire, 44 Cal. 68.

**493.** *c.* RIGHT ANNEXED TO SOIL.—See notes 2, 3.

*d.* DIVERSION OF WATER TO NONRIPARIAN LANDS.—See notes

4, 5, 6.

**494.** VI. APPROPRIATION OF WATER—1. Right of Appropriation.—See notes 5, 6, 7.

Right Acquired by Appropriation a Vested Right.—See note 9.

**495.** 2. Origin of Doctrine of Appropriation.—See note 1.

3. To What Lands Applicable.—See notes 3, 6.

**496.** No Right of Appropriation Against Riparian Owner.—See notes 1, 2.

4. What Water May Be Appropriated—*b.* PERCOLATING WATERS AND SUB-SURFACE STREAMS.—See notes 7, 8.

**497.** 5. Who May Make Appropriation—Indians.—See note 2.

6. What Constitutes Appropriation—*a.* IN GENERAL.—See note 7

**492.** 7. Relative Rights of Different Proprietors.—*Barneich v. Mercy*, 136 Cal. 205; *Rose v. Mesmer*, 142 Cal. 322; *Campbell v. Grimes*, 62 Kan. 503.

**493.** 2. Riparian Rights Annexed to Soil.—*Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402; *Leonard v. St. John*, 101 Va. 752. See also *Southern California Invest. Co. v. Wilshire*, 144 Cal. 68; *Crawford Co. v. Hathaway*, 67 Neb. 325; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 711.

3. See *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927.

4. No Right to Divert to Nonriparian Lands.—*Crawford Co. v. Hathaway*, 67 Neb. 325; *Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339.

5. Mere Contiguity Cannot Extend a Riparian Right.—*Crawford Co. v. Hathaway*, 67 Neb. 325. See also *Jones v. Conn*, 39 Oregon 30, rehearing denied 39 Oregon 46, 87 Am. St. Rep. 634; *Southern California Invest. Co. v. Wilshire*, 144 Cal. 68.

6. Land Beyond Watershed Not Riparian.—*Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339. See also *Jones v. Conn*, 39 Oregon 30, 87 Am. St. Rep. 634.

**494.** 5. Right of Appropriation Conferred by Statute.—*Boise Irrigation, etc., Co. v. Stewart*, 10 Idaho 38; *Crawford Co. v. Hathaway*, 67 Neb. 325; *Longmire v. Smith*, 26 Wash. 439; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

6. Constitutional Provisions.—*Mohl v. Lamar Canal Co.*, 128 Fed. Rep. 776, a case arising in Colorado.

"The Nebraska statute of 1895 [Laws 1895, p. 244, c. 69] is substantially an adoption of the Wyoming system." *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286.

7. See *Miller v. Rickey*, 127 Fed. Rep. 573.

9. Right Acquired by Appropriation a Vested Right.—*Longmire v. Smith*, 26 Wash. 439. See also *Mohl v. Lamar Canal Co.*, 128 Fed. Rep. 776; *Crawford Co. v. Hathaway*, 67 Neb. 325; *Farmers Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286; *Albuquerque Land, etc., Co. v. Gutierrez*, 10 N. Mex. 177; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918.

**495.** 1. Origin and Recognition of Doctrine of Appropriation.—See *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, affirming

10 N. Mex. 177; *Meng v. Coffee*, 67 Neb. 500, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939. See also *Mohl v. Lamar Canal Co.*, 128 Fed. Rep. 776.

3. *Cave v. Tyler*, 133 Cal. 566.

6. Burden of Proof on Appropriator.—*Cave v. Tyler*, 133 Cal. 566.

**496.** 1. No Appropriation Against Riparian Owner.—See *Crawford Co. v. Hathaway*, 67 Neb. 325; *McCook Irrigation, etc., Co. v. Crews*, (Neb. 1903) 96 N. W. Rep. 996.

2. *Crawford Co. v. Hathaway*, 67 Neb. 325.

7. Percolating Waters.—*Howard v. Perrin*, (Ariz. 1904) 76 Pac. Rep. 460; *Herriman Irrigation Co. v. Keel*, 25 Utah 96. See also *Boyce v. Cupper*, 37 Oregon 256; *Ogilvy Irrigating, etc., Co. v. Insinger*, 19 Colo. App. 380. And see generally the title WATERS AND WATER-COURSES, § 11. 6 *et seq.*

In California the rule seems to be settled by recent decisions that an action is maintainable for depriving the plaintiff of water previously appropriated by him from springs fed by percolation. *Cohen v. La Canada Land, etc., Co.*, 142 Cal. 437, citing *Katz v. Walkinshaw*, 141 Cal. 116, 138, 99 Am. St. Rep. 35, and *McClinstock v. Hudson*, 141 Cal. 275.

And in New York it was held, where a city sunk wells, and used pumps so powerful that the percolating waters for miles around were diverted, to the injury of crops, that such use was unreasonable and would be enjoined with the consequent damages. *Forbell v. New York*, 164 N. Y. 522, 79 Am. St. Rep. 666.

8. *Howcroft v. Union, etc., Irrigation Co.*, 25 Utah 311. See also *Howard v. Perrin*, (Ariz. 1904) 76 Pac. Rep. 460.

**497.** 2. See *Biggs v. Utah Irrigation Ditch Co.*, (Ariz. 1901) 64 Pac. Rep. 494.

7. What Amounts to Appropriation—In General.—*Rodgers v. Pitt*, 129 Fed. Rep. 932; *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692; *Carter v. Wakeman*, 42 Oregon 147; *Beers v. Sharpe*, 44 Oregon 386. See also *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701.

"To perfect such an appropriation two things are essential—the ownership or possession of land, and the application thereon of public water to a beneficial use." *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598, followed in *Salt River Valley Canal Co. v. Slosser*,

**498.** *b.* NOTICE OF APPROPRIATION — Rights Acquired by Actual Diversion Without Posting Notice. — See note 5.

*c.* DIVERSION OF WATER — (1) *Must Be Diverted Within Reasonable Time.* — See note 8.

**499.** (4) *Use of Natural Ravine or Channel.* — See note 9.

**500.** (6) *Change of Point or Means of Diversion.* — See notes 5, 6.

*d.* APPLICATION OF WATER TO BENEFICIAL USE — (1) *In General* — Water Must Be Used Within Reasonable Time. — See note 10.

**501.** What Constitutes a Reasonable Time. — See note 1.

(2) *Gradual Application* — Increased Area of Cultivation. — See note 3.

(3) *Place of Application* — Change of Place of Use. — See note 7.

*Use on Wrong Land by Mistake.* — See note 8.

**502.** *e.* DOCTRINE OF RELATION. — See notes 1, 3.

7. *Extent of Right* — *a.* IN GENERAL. — See notes 6, 7.

**503.** See note 1.

*Carrying Capacity of Ditch as Determining Extent of Right.* — See note 3.

*b.* WATER MUST BE USED REASONABLY. — See note 4.

*c.* APPROPRIATION OF ENTIRE FLOW OF STREAM. — See note 7.

**504.** *d.* SURPLUS WATER. — See note 3.

(Ariz. 1904) 76 Pac. Rep. 1125, and in Salt River Valley Canal Co. v. Van Fossen, (Ariz. 1904) 76 Pac. Rep. 1126.

**498.** 5. Actual Appropriation Without Notice Valid. — See Pyke v. Burnside, 8 Idaho 487.

8. Water Must Be Diverted Within a Reasonable Time. — New Loveland, etc., Irrigation, etc., Co. v. Consolidated Home Supply Ditch, etc., Co., 27 Colo. 525; Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692.

**499.** 9. Right to Water Turned into Natural Stream. — Herriman Irrigation Co. v. Keel, 25 Utah 96. See also Buckers Irrigation, etc., Co. v. Farmers' Independent Ditch Co., 31 Colo. 62.

**500.** 5. Change of Point of Diversion. — Hard v. Boise City Irrigation, etc., Co., 9 Idaho 589. See also Byers v. Colonial Irrigation Co., 134 Cal. 553; New Cache La Poudre Irrigation Co. v. Water Supply, etc., Co., 29 Colo. 469.

6. Point of Diversion Cannot Be Changed to Injury of Another. — Handy Ditch Co. v. Loudon Irrigating Canal Co., 27 Colo. 515.

10. Water Must Be Actually Used Within Reasonable Time. — See Miller v. Rickey, 127 Fed. Rep. 573; New Loveland, etc., Irrigation Co. v. Consolidated Home Supply Ditch, etc., Co., 27 Colo. 525; Wellington v. Beck, 30 Colo. 409; Millheiser v. Long, 10 N. Mex. 99.

**501.** 1. Reasonable Time a Question of Fact. — Rodgers v. Pitt, 129 Fed. Rep. 932.

3. Water May Be Applied Gradually to Beneficial Use. — Rodgers v. Pitt, 129 Fed. Rep. 932; Hall v. Blackman, 8 Idaho 272; Elliot v. Whitmore, 23 Utah 342, 90 Am. St. Rep. 700; Longmire v. Smith, 26 Wash. 439.

7. Changing Place of Use. — Biggs v. Utah Irrigating Ditch Co., (Ariz. 1901) 64 Pac. Rep. 494; Hard v. Boise City Irrigation, etc., Co., 9 Idaho 589. See also New Cache La Poudre Irrigation Co. v. Water Supply, etc., Co., 29 Colo. 469.

8. Senior v. Anderson, 138 Cal. 716.

**502.** 1. Right of Appropriator Relates Back to Commencement of Work. — See Rodgers v.

Pitt, 129 Fed. Rep. 932; Whalon v. North Platte Canal, etc., Co., 11 Wyo. 313.

3. Compliance with Statutes. — See Pyke v. Burnside, 8 Idaho 487.

Failure to File Application Properly. — The doctrine of relation will not be applied where the appropriator has failed to file his application required by statute. Whalon v. North Platte Canal, etc., Co., 11 Wyo. 313.

6. Appropriator Entitled to Sufficient Water to Irrigate His Land. — Moe v. Harger, 10 Idaho 302; Longmire v. Smith, 26 Wash. 439.

7. Appropriator Limited to Amount of Appropriation. — Stenger v. Tharp, (S. Dak. 1903) 94 N. W. Rep. 402.

**503.** 1. Appropriator Limited to Amount of Water Actually Used or Necessary for Irrigation of His Land. — Gotelli v. Cardelli, 26 Nev. 382; Glaze v. Frost, 44 Oregon 29; Bolter v. Garrett, 44 Oregon 304; Stenger v. Tharp, (S. Dak. 1903) 94 N. W. Rep. 402.

3. Capacity of Ditch. — Browning v. Lewis, 39 Oregon 11. See also Glaze v. Frost, 44 Oregon 29; Stenger v. Tharp, (S. Dak. 1903) 94 N. W. Rep. 402.

4. Under the British Columbia Statute the privilege of irrigating with foreign water is not meant by the legislature to be imperative, and is not intended to exclude all right of action by neighboring proprietors for injury done to their lands, save in the case where such injury is occasioned by the negligence of the irrigator. Canadian Pac. R. Co. v. Parke, (1899) A. C. 535, reversing on other grounds 5 British Columbia 507.

7. Appropriator May Use Entire Flow of Stream. — Moe v. Harger, 10 Idaho 302; Elliot v. Whitmore, 23 Utah 342, 90 Am. St. Rep. 700. See also Wellington v. Beck, 30 Colo. 409; Durning v. Waltz, 42 Oregon 109; Bolter v. Garrett, 44 Oregon 304; Howcroft v. Union, etc., Irrigation Co., 25 Utah 311.

**504.** 3. Appropriator Acquires No Right to Surplus Water. — Bolter v. Garrett, 44 Oregon 304; Boyce v. Copper, 37 Oregon 256.

**504.** Point of Return of Surplus. — See note 6.

Right of Subsequent Appropriator Limited to Surplus Water. — See note 7.

*e.* ENLARGEMENT OF ORIGINAL USE. — See note 8.

**505.** *f.* USE OF WATER AT CERTAIN PERIODS — Apportionment by Periods Between Riparian Owners. — See note 1.

*g.* RIGHT TO FLOW OF TRIBUTARIES. — See notes 2, 5.

Stream Issuing from Lake. — See note 6.

*h.* RIGHT TO BED AND BANKS OF STREAM. — See note 8.

**VII. DOCTRINE OF PRIORITY** — 1. Priority of Right Acquired by Priority of Appropriation. — See note 9.

**506.** 3. Priorities under Acts of Congress — Appropriation of Water on Public Lands — Act of Congress of 1866. — See notes 4, 5.

**507.** Patents from United States Subject to Vested Water Rights. — See note 7.

**508.** No Rights by Appropriation as Against Prior Grantee of Land. — See note 1.

Acts of Congress Applicable as Between Appropriators Residing in Different States. — See note 2.

**4. Adjudication of Priorities and Water Rights** — Determination of Water Rights by Courts. — See notes 3, 4.

**509.** The Judgment or Decree. — See notes 1, 2.

**504.** 6. See *Durning v. Waltz*, 42 Oregon 109.

7. *Mabee v. Platte Land Co.*, 17 Colo. App. 476.

**8. Appropriator May Not Enlarge Use of Water to Injury of Subsequent Appropriator.** — See *Stenger v. Tharp*, (S. Dak. 1903) 94 N. W. Rep. 402.

The Burden of Proving Enlarged User is not discharged by establishing merely the fact of increased acreage, where it appears that the defendants have conserved a certain amount of water by seepage and have also an independent appropriation. *Platte Valley Irrigation Co. v. Central Trust Co.*, 32 Colo. 102.

**505.** 1. Apportionment by Periods. — See *Craig v. Crafton Water Co.*, 141 Cal. 178.

2. Right to Flow of Upper Tributaries. — *Medano Ditch Co. v. Adams*, 29 Colo. 317; *Bucker's Irrigation, etc., Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62; *Tonkin v. Winzell*, 27 Nev. 88.

5. See *Ryan v. Tutty*, (Wyo. 1904) 78 Pac. Rep. 661.

6. Stream Issuing from Lake. — *Cole v. Richards Irrigation Co.*, 27 Utah 205, 101 Am. St. Rep. 962.

8. Riparian Proprietor May Enjoin Change in Banks of Stream. — A riparian proprietor has a right to maintain the banks of a stream in their natural condition, and may enjoin any change therein which affects the natural flow. *Cox v. Bernard*, 39 Oregon 53.

9. Constitutional Provisions as to Priority — *United States*. — *Mohl v. Lamar Canal Co.*, 128 Fed. Rep. 776.

*California*. — *Patterson v. Mills*, (Cal. 1902) 68 Pac. Rep. 1034.

*Colorado*. — *Wellington v. Beck*, 30 Colo. 409; *Handy Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 515.

*Idaho*. — *Moe v. Harger*, 10 Idaho 302.

*Nebraska*. — *Farmers', etc., Irrigation Co. v. Cozard Irrigation Co.*, 65 Neb. 3.

*Oregon*. — *Mattis v. Hosmer*, 37 Oregon 523, affirmed 37 Oregon 533; *Browning v. Lewis*, 39 Oregon 11.

*Utah*. — *Howcroft v. Union, etc., Irrigation Co.*, 25 Utah 311.

*Wyoming*. — *Farm Invest. Co. v. Carpenter*, 5 Wyo. 110, 87 Am. St. Rep. 918; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939.

**506.** 4. Act of Congress Recognition of Pre-existing Rights. — See *Crawford Co. v. Hathaway*, 67 Neb. 325.

5. See *Crawford Co. v. Hathaway*, 67 Neb. 325.

**507.** 7. Government Patents Subject to Vested Water Rights. — *Meng v. Coffee*, 67 Neb. 500.

**508.** 1. Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. Dak. 519.

2. Appropriators in Different States. — *Morris v. Bean*, 123 Fed. Rep. 618.

3. Adjudication of Water Rights — Equity Jurisdiction. — See *Crawford Co. v. Hathaway*, 67 Neb. 325.

A court may not determine the right of priority between the defendant and appropriators not parties to the action. *Brown v. Baker*, 39 Oregon 66.

4. Statutory Provisions. — *Stickney v. Hanrahan*, 7 Idaho 424; *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918. See also *Crippen v. White*, 28 Colo. 298; *Crawford Co. v. Hathaway*, 67 Neb. 325.

District Extending into Two or More Counties — Jurisdiction. — *Last Chance Water-Ditch Co. v. Emigrant Ditch Co.*, 129 Cal. 277.

The Point of Diversion Is Not the Determining Factor of Jurisdiction, and where the land to be irrigated is in another state the court will not have jurisdiction. *Lamson v. Vailes*, 27 Colo. 201.

**509.** 1. Decree Must Be Definite and Certain. — *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692; *Sander v. Wilson*, 34 Wash. 659. See also *Wallace v. Farmers' Ditch Co.*, 130 Cal. 578.

A decree is insufficient which fails to direct that the water be measured at the point of diversion. *Stickney v. Hanrahan*, 7 Idaho 424.

2. Decree for Water Sufficient to Irrigate Certain

**509.** Elements to Be Considered. — See notes 5, 7.

Measurement of Water. — See note 9.

**510.** VIII. IRRIGATING DITCHES — 1. Right to Construct Ditches — *a.* CONDEMNATION OF RIGHT OF WAY — (1) *In General.* — See notes 1, 2.

**511.** (2) *Assessment of Damages.* — See note 4.

*b.* DITCHES ON PUBLIC DOMAIN. — See note 6.

*c.* RIGHT OF ENTRY FOR CONSTRUCTION OR MAINTENANCE OF DITCH. — See note 8.

**512.** 2. Damages from Construction and Maintenance — No Liability for Damage Arising from Mere Existence of Ditch. — See note 1.

Ditch Owner Liable When Negligent. — See notes 2, 4.

No Liability in Absence of Negligence. — See note 5.

Bridging Ditches Crossing Public Highways. — See note 7.

**513.** Contributory Negligence of Party Injured. — See note 2.

3. Use of Same Ditch by Several Appropriators — *a.* IN GENERAL. — See note 4.

*b.* AS TENANTS IN COMMON. — See notes 5, 7, 8.

**514.** 4. Ditches as Property. — See note 3.

IX. STORAGE OF WATER FOR IRRIGATION PURPOSES. — See note 5.

X. WATER RIGHTS CONSIDERED AS PROPERTY — 1. In General. — See note 9.

**515.** 2. Conveyance of Water Rights. — See note 1.

Mode of Conveyance. — See notes 3, 4, 5, 6.

**Acresage.** — *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692.

**509.** 5. Elements to Be Considered in Determining Amount. — See *Lamson v. Vailes*, 27 Colo. 201; *Hall v. Carter*, 33 Tex. Civ. App. 230.

7. System of Irrigation in Vogue. — *Rodgers v. Pitt*, 129 Fed. Rep. 932.

9. Flow of Water Must Be Measured with Substantial Accuracy. — See *Lamson v. Vailes*, 27 Colo. 201.

**510.** 1. Condemnation of Right of Way for Irrigating Ditches, Etc. — *Andrews v. Lillian Irrigation Dist.*, 66 Neb. 458; *Albuquerque Land, etc., Co. v. Gutierrez*, 10 N. Mex. 177; *Borden v. Trespalacios Rice, etc., Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 461; *Nash v. Clark*, 27 Utah 158, 101 Am. St. Rep. 953; *Weed v. Goodwin*, 36 Wash. 31.

2. Condemnation Statutes Constitutional. — *Nash v. Clark*, 27 Utah 158, 101 Am. St. Rep. 953. See also *Lake Koen Nav., etc., Co. v. Klein*, 63 Kan. 484; *Weed v. Goodwin*, 36 Wash. 31.

**511.** 4. Assessment of Damages. — *Weed v. Goodwin*, 36 Wash. 31.

6. Ditches on Public Domain. — See *Miller v. Douglas*, (Ariz. 1900) 60 Pac. Rep. 722.

8. Secondary Easements. — *State Agricultural College v. Hutchinson*, (Oregon 1905) 78 Pac. Rep. 1028. See also *Blankenship v. Whaley*, 142 Cal. 566.

**512.** 1. No Damages Recoverable for Mere Lawful Maintenance of Ditch. — See *Messenger v. Gordon*, 15 Colo. App. 429; *Barnett v. Matagorda Rice, etc., Co.*, 98 Tex. 355.

2. Liability for Damage Caused by Negligence in Construction or Maintenance of Ditch. — *Stuart v. Noble Ditch Co.*, 9 Idaho 765; *State Agricultural College v. Hutchinson*, (Oregon 1905) 78 Pac. Rep. 1028.

4. Neglect to Dispose of Surplus Water. — See *Stuart v. Noble Ditch Co.*, 9 Idaho 765.

5. No Liability in Absence of Negligence. — See *Messenger v. Gordon*, 15 Colo. App. 429.

7. Bridging Ditches Crossing Highways. — *State v. Lake Koen Nav., etc., Co.*, 63 Kan. 394.

**513.** 2. Contributory Negligence. — *Emison v. Owyhee Ditch Co.*, 37 Oregon 577.

4. Different Priorities Among Several Users from Same Ditch. — See *Mattis v. Hosmer*, 37 Oregon 523, *affirmed* 37 Oregon 533.

5. Appropriation by Several Persons in Common. — *Miller v. Lake Irrigation Co.*, 27 Wash. 447. See also *Mattis v. Hosmer*, 37 Oregon 523, *affirmed* 37 Oregon 533.

7. *Hall v. Blackman*, 8 Idaho 272.

The continued use of the water by one tenant in common is presumed to be in maintenance of the rights of his cotenants. *Beers v. Sharpe*, 44 Oregon 386.

8. Actions by Cotenants Against Strangers. — *Miller v. Rickey*, 127 Fed. Rep. 573; *Rodgers v. Pitt*, 129 Fed. Rep. 932.

**514.** 3. Ownership of Ditch Distinct from Right to Water. — See *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598, *followed* in *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126; *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125.

5. Storage of Water for Irrigation Purposes. — *New Loveland, etc., Irrigation, etc., Co. v. Consolidated Home Supply Ditch, etc., Co.*, 27 Colo. 525.

9. Water Rights Considered Real Estate. — *Gutheil Park Invest. Co. v. Montclair*, 32 Colo. 420; *Conant v. Deep Creek, etc., Irrigation Co.*, 23 Utah 627, 90 Am. St. Rep. 721.

**515.** 1. Water Rights Transferable. — *Biggs v. Utah Irrigating Ditch Co.*, (Ariz. 1901) 64 Pac. Rep. 494; *Hall v. Blackman*, 8 Idaho 272. See also *Beers v. Sharpe*, 44 Oregon 386.

3. Conveyance of Water Right by Deed. — See

**516. 3. Contracts Affecting Water Rights.**—See note 2.

Parol Contracts.—See note 5.

**4. Abandonment and Nonuser — a. WATER RIGHT MAY BE LOST BY ABANDONMENT.**—See note 7.**517. b. WHAT CONSTITUTES ABANDONMENT.**—See notes 1, 2.

Abandonment Question of Intention.—See notes 4, 5.

c. CLEAR PROOF REQUIRED.—See note 12.

**518. d. ABANDONMENT OF DITCH WITHOUT ABANDONMENT OF WATER RIGHT.**—See note 1.

e. ABANDONMENT AND NONUSER DISTINGUISHED.—See note 2.

5. Adverse User.—See notes 3, 4, 6, 7, 8.

**519.** See notes 1, 2.

Whalon v. North Platte Canal, etc., Co., 11 Wyo. 313.

**515. 4. Ditch or Land and Water Right May Be Separately Conveyed.**—Crippen v. Comstock, 17 Colo. App. 89; Bessemer Irrigating Ditch Co. v. Wolley, 32 Colo. 437, 105 Am. St. Rep. 91; Hard v. Boise City Irrigation, etc., Co., 9 Idaho 589.**5. Water Rights Appurtenant to Land.**—Hall v. Blackman, 8 Idaho 272.**6. Water Right Passes by Deed Conveying Land unless Expressly Reserved.**—Senior v. Anderson, 138 Cal. 716; American Nat. Bank v. Hoeffer, 18 Colo. App. 53; King v. Ackroyd, 28 Colo. 488. See also George v. Robison, 23 Utah 79.**A Conveyance of a Ditch — In Colorado.**—Bessemer Irrigating Ditch Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91.**516. 2. Contracts for Water Rights.**—See Moore-Cortes Canal Co. v. Gyle, 36 Tex. Civ. App. 442.**The Measure of Damages** in an action by a lessee of land against an owner of an irrigation ditch for failure to deliver water according to contract is the difference between the rental value of the land with and without water for irrigation. Pallett v. Murphy, 131 Cal. 192.**5. Parol License to Use Water Irrevocable When Acted On.**—Maple Orchard Grove, etc., Co. v. Marshall, 27 Utah 215.**7. Water Right Lost by Abandonment.**—Brockman v. Grand Canal Co., (Ariz. 1904) 76 Pac. Rep. 602; Rutherford v. Lucerne Canal, etc., Co., 12 Wyo. 299.**517. 1. Mere Nonuser Not Abandonment.**—Platte Valley Irrigation Co. v. Central Trust Co., 32 Colo. 102; Butterfield v. O'Neill, 19 Colo. App. 7; Farmers' Irrigation Dist. v. Frank, (Neb. 1904) 100 N. W. Rep. 286; Promontory Ranch Co. v. Argile, 28 Utah 398.

2. See Butterfield v. O'Neill, 19 Colo. App. 7.

**4. Abandonment Question of Intention.**—Gould v. Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598; Salt River Valley Canal Co. v. Van Fossen, (Ariz. 1904) 76 Pac. Rep. 1126; Salt River Valley Canal Co. v. Slosser, (Ariz. 1904) 76 Pac. Rep. 1125; Farmers' Irrigation Dist. v. Frank, (Neb. 1904) 100 N. W. Rep. 286; Promontory Ranch Co. v. Argile, 28 Utah 398.**5. Nonuser and Intent to Abandon Must Concur.**—See Stufflebeam v. Adelsbach, 135 Cal. 221.**12. Burden on Party Asserting Abandonment.**—Platte Valley Irrigation Co. v. Central Trust Co., 32 Colo. 102.**518. 1. Abandonment of Ditch Without Abandoning Water Right.**—Gould v. Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598; Salt River Valley Canal Co. v. Van Fossen, (Ariz. 1904) 76 Pac. Rep. 1126; Salt River Valley Canal Co. v. Slosser, (Ariz. 1904) 76 Pac. Rep. 1125; Bolter v. Garrett, 44 Oregon 304.

Where the plaintiff allowed the defendant to fill in a ditch under an agreement by which the latter was to build another in place thereof, and the ditch was accordingly filled, but the defendant failed to build another according to agreement, it was held that the plaintiff had not abandoned his ditch, but might clean it out. Stufflebeam v. Adelsbach, 135 Cal. 221.

**2. Abandonment and Nonuser Distinguished.**—Farmers' Irrigation Dist. v. Frank, (Neb. 1904) 100 N. W. Rep. 286.**3. Water Right Acquired by Adverse User.**—Clements v. Watkins Land, etc., Co., 36 Tex. Civ. App. 339. See also State Agricultural College v. Hutchinson, (Oregon 1905) 78 Pac. Rep. 1028.

The extent of the right claimed by prescription will not exceed the use creating such right. Hall v. Carter, 33 Tex. Civ. App. 230.

**4. User Must Be Adverse.**—Rose v. Mesmer, 142 Cal. 322; Richey v. East Redlands Water Co., 141 Cal. 221; Strong v. Baldwin, 137 Cal. 432; Hall v. Blackman, 8 Idaho 272; Brossard v. Morgan, 7 Idaho 215; Beers v. Sharpe, 44 Oregon 386; Harrington v. Demaris, (Oregon 1904) 77 Pac. Rep. 603; Mattis v. Hosmer, 37 Oregon 523, affirmed 37 Oregon 533; Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192. See also Salem Flouring Mills Co. v. Lord, 42 Oregon 82, 103.**6. Use by Sufferance Not Adverse.**—Hall v. Blackman, 8 Idaho 272.**7. Right of Owner Must Be Invaded.**—Boyce v. Cupper, 37 Oregon 256; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927. See also Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192.**8. No Adverse User Where Water Is Sufficient for All Parties.**—Meng v. Coffee, 67 Neb. 500; Boyce v. Cupper, 37 Oregon 256. See also Clements v. Watkins Land, etc., Co., 36 Tex. Civ. App. 339.**519. 1. Interrupted User.**—Rose v. Mesmer, 142 Cal. 322; Bree v. Wheeler, 129 Cal. 145; Patterson v. Mills, (Cal. 1902) 68 Pac. Rep. 1034; Rice v. Meiners, 136 Cal. 292.**2. Acknowledgment of Superior Right.**—Rose

**519.** Prescription as Against Riparian Owner. — See notes 3, 4.

6. Loss of Water Right by Estoppel. — See note 9.

**520.** See note 1.

8. Action for Interference with Water Rights — *a.* IN GENERAL. —

See note 5.

*b.* WHEN AND BY WHOM ACTION MAY BE MAINTAINED. — See

note 6.

**521.** See note 3.

*c.* PROOF OF DAMAGES — An Action for Damages. — See note 11.

Action for Injunction. — See note 12.

**522.** XI. IRRIGATION COMPANIES — 1. In General. — See note 1.

2. Private Irrigation Companies — *a.* IN GENERAL. — See note 4.

Ditch Companies Public Carriers. — See notes 6, 7, 9.

**523.** The Relation Between an Irrigation Corporation and Its Members. — See note 1.

Ditch Company May Maintain Action on Behalf of Stockholders. — See note 2.

*v.* Mesmer, 142 Cal. 322; Wasatch Irrigation Co. *v.* Fulton, 23 Utah 466.

**519.** 3. Acquisition of Water Right by Prescription as Against Riparian Owners. — Southern California Invest. Co. *v.* Wilshire, 144 Cal. 68; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701. See also Rice *v.* Meiners, 136 Cal. 292.

4. Upper Riparian Owners. — Cave *v.* Tyler, 133 Cal. 566; Crawford Co. *v.* Hathaway, 67 Neb. 325; Beers *v.* Sharpe, 44 Oregon 386.

9. Loss of Water Right by Estoppel. — Biggs *v.* Utah Irrigating Ditch Co., (Ariz. 1901) 64 Pac. Rep. 494. See also Leonard *v.* St. John, 101 Va. 752.

Where the plaintiffs had not complained for thirty years of the maintenance of a dam, whereby water was diverted from one branch of a stream to another, not on their lands, it was held that they had lost the right to change the flow back to the old channel. Matheson *v.* Ward, 24 Wash. 407, 85 Am. St. Rep. 955.

**520.** 1. No Estoppel by Mere Acquiescence in Abridgment of Right. — Bolter *v.* Garrett, 44 Oregon 304.

6. Action for Interference with or Injury to Water Rights — *United States.* — Morris *v.* Bean, 123 Fed. Rep. 618; California Pastoral, etc., Co. *v.* Enterprise Canal, etc., Co., 127 Fed. Rep. 741.

*California.* — Cohen *v.* La Canada Land, etc., Co., 142 Cal. 437; Smith *v.* Stearns Rancho Co., 129 Cal. 58.

*Colorado.* — Bessemer Irrigating Ditch Co. *v.* Woolley, 32 Colo. 437, 105 Am. St. Rep. 91; Gutheil Park Invest. Co. *v.* Montclair, 32 Colo. 420; Medano Ditch Co. *v.* Adams, 29 Colo. 317.

*Nebraska.* — Crawford Co. *v.* Hathaway, 67 Neb. 325; Farmers', etc., Irrigation Co. *v.* Cozad Irrigation Co., 65 Neb. 3; McCook Irrigation, etc., Co. *v.* Crews, (Neb. 1903) 96 N. W. Rep. 996.

*New York.* — See Rider *v.* Amsterdam, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 375; Reisert *v.* New York, 69 N. Y. App. Div. 302, reversed on other grounds 174 N. Y. 196.

*Oregon.* — State Agricultural College *v.* Hutchinson, (Oregon 1905) 78 Pac. Rep. 1028; Mace *v.* Mace, 40 Oregon 585, rehearing denied 40 Oregon 591.

*Utah.* — Cole *v.* Richards Irrigation Co., 27 Utah 205, 101 Am. St. Rep. 962.

*Virginia.* — See Leonard *v.* St. John, 101 Va. 752.

*Wyoming.* — See Stoner *v.* Mau, 11 Wyo. 366, rehearing denied 11 Wyo. 384.

Prevention of Waste by Upper Riparian Proprietor. — A lower riparian proprietor may enjoin the diversion of waters by an upper riparian proprietor who does not use the water, but permits it to go to waste. Campbell *v.* Grimes, 62 Kan. 503.

6. Who May Maintain Action. — North Point Consol. Irrigation Co. *v.* Utah, etc., Canal Co., 23 Utah 199.

**521.** 3. No Action Where Water Diverted Would Not Have Reached Plaintiff's Land. — See Tonkin *v.* Winzell, 27 Nev. 88.

11. Proof of Injury Necessary in Action for Damages. — Crawford Co. *v.* Hathaway, 67 Neb. 325.

12. Injunction Granted Without Proof of Actual Damages. — California Pastoral, etc., Co. *v.* Enterprise Canal, etc., Co., 127 Fed. Rep. 741. See also Jones *v.* Conni, 39 Oregon 30, 87 Am. St. Rep. 634.

**522.** 1. Necessity for Irrigation Companies. — Albuquerque Land, etc., Co. *v.* Gutierrez, 10 N. Mex. 177. See also Borden *v.* Trespalacios Rice, etc., Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 461.

4. Private Irrigation Companies. — See Hildreth *v.* Montecito Creek Water Co., 139 Cal. 22, reversing (Cal. 1902) 70 Pac. Rep. 672.

6. Ditch Companies Public or Quasi-public Carriers. — Gutierrez *v.* Albuquerque Land, etc., Co., 188 U. S. 545; Gould *v.* Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598; Salt River Valley Canal Co. *v.* Van Fossen, (Ariz. 1904) 76 Pac. Rep. 1126; Salt River Valley Canal Co. *v.* Slosser, (Ariz. 1904) 76 Pac. Rep. 1125; Borden *v.* Trespalacios Rice, etc., Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 461. See also Crescent Canal Co. *v.* Montgomery, 143 Cal. 248.

7. Ditch Company Subject to State Control. — Gutierrez *v.* Albuquerque Land, etc., Co., 188 U. S. 545.

9. See Wright *v.* Platte Valley Irrigation Co., 27 Colo. 322.

**523.** 1. Relation Between Irrigation Company and Members. — See Richey *v.* East Redlands Water Co., 141 Cal. 221.

2. Action by Ditch Company on Behalf of Stock-



**523. b. ACQUISITION OF WATER RIGHTS.** — See notes 3, 4.

Title and Interest of Irrigation Companies. — See note 7.

c. BY-LAWS AND REGULATIONS. — See notes 8, 9.

d. DUTY TO FURNISH WATER TO CONSUMERS — Ditch Company Bound to Furnish Water to Consumers. — See notes 10, 11.

**524.** See note 1.

Insufficiency of Water Supply as Defense to Action to Compel Delivery. — See note 2.

Delay in Making Application for Water. — See note 6.

e. CONTRACTS FOR WATER. — See notes 7, 8.

holders. — *Randall v. Rocky Ford Ditch Co.*, 29 Colo. 430. See also *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209.But a ditch company is not a proper party to an action seeking to force consumers of one class to prorate for the benefit of another class. *Farmers' High Line Canal, etc., Co. v. White*, 32 Colo. 114.**523. 3. Appropriation by Ditch Companies.** — *Albuquerque Land, etc., Co. v. Gutierrez*, 10 N. Mex. 177.The appropriation of a canal company is exclusive in its character, and a subsequent application for an appropriation of the surplus waters from the same stream, for the purpose of irrigating the same land, should be refused. *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286.**4. Condemnation of Water Rights.** — *Crawford Co. v. Hathaway*, 67 Neb. 325. See also *Castle Rock Irrigation Canal, etc., Co. v. Jurisch*, 67 Neb. 377.**7. Canal Company Not Proprietor of Water Diverted by It.** — *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598; *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126; *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125; *Wright v. Platte Valley Irrigation Co.*, 27 Colo. 322. See also *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286.**8. Right to Make Reasonable By-laws.** — See *Borden v. Trespacios Rice, etc., Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 461.**9. By-laws Contrary to Laws of State.** — *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598, followed in *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125, and in *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126.**10. Duty of Irrigation Company to Furnish Water to Consumers.** — *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309, rehearing denied 130 Cal. 315. See also *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598; *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126; *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125; *Borden v. Trespacios Rice, etc., Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 461.**Effect of Refusal to Supply Water.** — Under the *Colorado* statute an irrigation company which refuses to deliver water to a *bona fide* consumer is guilty of a misdemeanor.**11. Mandamus to Compel Delivery of Water.** — *Bay City Irrigation Co. v. Sweeney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 545. See also *Bardsly v. Boise Irrigation, etc., Co.*, 8 Idaho 155.**524. 1. Damages for Failure to Furnish Water.** — See *Houston River Canal Co. v. Kopke*, 106 La. 609; *Carr v. Miller-Morris Canal, etc., Co.*, 105 La. 239; *Ford v. Calcasieu River Irrigation Co.*, 110 La. 982; *Cotton v. Jennings Irrigation Co.*, 108 La. 4.**Limiting Liability.** — Where the relation between an irrigation company and a consumer is purely one of contract, a clause therein limiting the company's liability for damages resulting from failure to supply sufficient water is valid. *Moore-Cortes Canal Co. v. Gyle*, 36 Tex. Civ. App. 442.**"The Proper Measure of Damages** in a case like this is the difference between the rental value of the land with water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted." *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309, rehearing denied 130 Cal. 315.Other rules as to the measure of damages are laid down in *Raywood Rice, etc., Co. v. Wells*, 33 Tex. Civ. App. 545; *Lutcher v. Stoddard*, (Tex. Civ. App. 1900) 56 S. W. Rep. 608.**2. Insufficiency of Water as a Defense.** — *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598, followed in *Salt River Valley Canal Co. v. Van Fossen*, (Ariz. 1904) 76 Pac. Rep. 1126, and in *Salt River Valley Canal Co. v. Slosser*, (Ariz. 1904) 76 Pac. Rep. 1125.Where the defendant company retains the consideration, it is no defense to an action for failure to supply water for irrigation according to its contract that an injunction is in force restraining the defendant from diverting the waters of the stream from which its supply arises. *Sample v. Fresno Flume, etc., Co.*, 129 Cal. 222.But in *Landers v. Garland Canal Co.*, 52 La. Ann. 1465, it was held that where the bayou which supplied the water was dry because of lack of rain the company could not be held to respond in damages for failure to deliver water according to its contract, the drought being an act of God.**6. Bardsly v. Boise Irrigation, etc., Co.**, 8 Idaho 155.**7. Contracts for Water.** — *Fresno Canal, etc., Co. v. Park*, 129 Cal. 437; *Wright v. Platte Valley Irrigation Co.*, 27 Colo. 322. See also *Ferre Canal Co. v. Burgin*, 106 La. 309.**An Oral Contract** with an irrigation company through its agent to irrigate certain land leased by it to the plaintiff may be specifically enforced. *Bay City Irrigation Co. v. Sweeney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 546.**8. Contracts with Irrigation Company — Con-**

**525. f. RATES FOR USE OF WATER — Regulation of Water Rates by State Statutes.** — See note 5.

**526. Rates Fixed by Law Must Be Reasonable.** — See note 2.

**Exaction of Royalty.** — See note 4.

**g. TRANSFER OF STOCK.** — See notes 5, 6.

**527. Stock Not Appurtenant to Land.** — See note 1.

**3. Irrigation Districts.** — See notes 2, 3.

**Irrigation Districts Public Corporations.** — See notes 4, 5, 6.

**528. See note 1.**

**Liability of District to Be Sued.** — See note 3.

**struction and Effect.** — *Souther v. San Diego Flume Co.*, 121 Fed. Rep. 347, 57 C. C. A. 561, *affirming* 112 Fed. Rep. 228; *Richter v. Union Land, etc., Co.*, 129 Cal. 367; *Sample v. Fresno Flume, etc., Co.*, 129 Cal. 222. See also *Purser v. Baker*, 129 Cal. 607; *Wright v. Platte Valley Irrigation Co.*, 27 Colo. 322; *Carr v. Miller-Morris Canal, etc., Co.*, 105 La. 239; *Landers v. Garland Canal Co.*, 52 La. Ann. 1465; *Houston River Canal Co. v. Kopke*, 106 La. 609; *Bay City Irrigation Co. v. Sweeney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 545.

**525. 5. Regulation of Water Rates by County Commissioners.** — *Stanislaus County v. San Joaquin, etc., Canal, etc., Co.*, 192 U. S. 201; *San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, *affirming* 110 Fed. Rep. 702. See also *Boise City Irrigation, etc., Co. v. Clark*, (C. C. A.) 131 Fed. Rep. 415; *Fresno Canal, etc., Co. v. Park*, 129 Cal. 437.

**526. 2. Rates Fixed Must Be Reasonable.** — See *San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, *affirming* 110 Fed. Rep. 702; *Stanislaus County v. San Joaquin, etc., Canal, etc., Co.*, 113 Fed. Rep. 930, *reversed* on other grounds 192 U. S. 201.

**4. Exaction of Royalty.** — *Boise City Irrigation, etc., Co. v. Clark*, (C. C. A.) 131 Fed. Rep. 415. See also *Schneider v. People*, 30 Colo. 493.

**Compelling Payment of Prior Indebtedness.** — Under the *California* constitution and statutes an irrigation company may not make it a condition precedent to the right to receive water that all dues and claims for previous supplies should first be paid. *Crow v. San Joaquin, etc., Canal, etc., Co.*, 130 Cal. 309, *rehearing denied* 130 Cal. 315. Compare the decisions as to other public-service corporations in the titles GAS COMPANIES, 931. 2 *et seq.*; WATERWORKS AND WATER COMPANIES, 420. 1.

**5. Transfer of Stock.** — See *Biggs v. Utah Irrigating Ditch Co.* (Ariz. 1901) 64 Pac. Rep. 494.

**6. Distinction Between Ownership of Stock and Ownership of Water Right.** — See *Butterfield v. O'Neill*, 19 Colo. App. 7; *Biggs v. Utah Irrigating Ditch Co.* (Ariz. 1901) 64 Pac. Rep. 494.

**527. 1. Water Stock Personal Property.** — *George v. Robinson*, 23 Utah 79.

**2. Irrigation Districts.** — As to the organization of irrigation districts under the statute see *Rothchild v. Rollinger*, 32 Wash. 307.

**Confirmation Act — Issue of Bonds.** — See *Marra*

*v. San Jacinto, etc., Irrigation Dist.*, 131 Fed. Rep. 780; *Leeman v. Perris Irrigation Dist.*, 140 Cal. 540; *Stimson v. Alessandro Irrigation Dist.*, 135 Cal. 389; *Merchants Nat. Bank v. Escondido Irrigation Dist.*, 144 Cal. 329; *Pioneer Irrigation Dist. v. Campbell*, 10 Idaho 159; *Baltes v. Farmers Irrigation Dist.*, 60 Neb. 310. See *Kinkade v. Witherop*, 29 Wash. 10.

**As to Actions on Such Bonds** see *Sechrest v. Rialto Irrigation Dist.*, 129 Cal. 640; *Baxter v. Vineland Irrigation Dist.*, 136 Cal. 185.

**Assessments.** — See *Riverside County v. Thompson*, (C. C. A.) 122 Fed. Rep. 860; *Escondido High School Dist v. Escondido Seminary*, 130 Cal. 128; *Boskowitz v. Thompson*, 144 Cal. 724; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho 310, 101 Am. St. Rep. 201; *Andrews v. Lillian Irrigation Dist.*, 66 Neb. 458.

**As to assessments against irrigation districts** see *Mara v. San Jacinto, etc., Irrigation Dist.*, 131 Fed. Rep. 780.

A district organized for drainage and agricultural purposes may make special assessments to pay for the improvements made. *Barton v. Minnie Creek Drainage Dist.*, 112 Ill. App. 640.

**The Superintendent of Irrigation.** — See *Chapman v. Phillips County*, 17 Colo. App. 236; *Chew v. Fremont County*, 18 Colo. App. 162.

**3. Acts Providing for Irrigation Districts Constitutional.** — *Tulare Irrigation Dist. v. Shepard*, 185 U. S. 1; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho 310, 101 Am. St. Rep. 201. See also *Little Walla Walla Irrigation Dist. v. Preston*, (Oregon 1904) 78 Pac. Rep. 982.

**4. Irrigation District Not Municipal Corporation.** — *Merchants Nat. Bank v. Escondido Irrigation Dist.*, 144 Cal. 329.

**5. Irrigation Districts Public Corporations.** — *Merchants Nat. Bank v. Escondido Irrigation Dist.*, 144 Cal. 329; *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477; *Lincoln, etc., County Irrigation Dist. v. McNeal*, 60 Neb. 613; *Little Walla Walla Irrigation Dist. v. Preston*, (Oregon 1904) 78 Pac. Rep. 982. See also *Barton v. Minnie Creek Drainage Dist.*, 112 Ill. App. 640.

**6. Organization of Irrigation District Not Subject to Collateral Attack.** — Compare *People v. Perris Irrigation Dist.*, 142 Cal. 601.

**528. 1. Tulare Irrigation Dist. v. Shepard, 185 U. S. 1.**

**3. Power to Sue and Be Sued.** — See *Nevada Nat. Bank v. Poso Irrigation Dist.*, 140 Cal. 344.

# ISLANDS.

By W. B. ROBINSON.

**530. II. TITLE TO ISLANDS — 1. In Navigable Waters — a. RULE STATED.**  
— See note 3.

**531.** See note 1.

*b. WHAT WATERS ARE NAVIGABLE.* — See notes 3, 4.

**532. 2. In Unnavigable Waters — Prima Facie.** — See notes 5, 6.

**534. III. How TITLE Is ACQUIRED — 2. By Grant — a. IN GENERAL —**  
But a Grant of Land Bounded upon Navigable Waters. — See note 4.

**535. b. GRANTS BY STATE — The Meander Lines of Governmental Subdivisions.** —  
— See note 4.

**536. IV. RIGHTS PERTAINING TO OWNERSHIP OF ISLANDS — 2. Right to Accretions.** — See note 8.

**537.** See note 1.

Riparian Proprietors Cannot Be Excluded from Access to River. — See note 2.

**ISSUE.** — See note 4.

**539.** See notes 2, 3.

**530. 3. Rule in United States.** — *Glassell v. Hansen*, 135 Cal. 547; *Holman v. Hodges*, 112 Iowa 714, 84 Am. St. Rep. 367; *McBaine v. Johnson*, 155 Mo. 191; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504.

**531. 1. Islands Arising on Soil Owned by Individual.** — *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *McBaine v. Johnson*, 155 Mo. 191.

**3. Actual Navigability Test in Some States.** — *Baldwin v. Erie Shooting Club*, 127 Mich. 659, 8 Detroit Leg. N. 535. And see the title **NAVIGABLE WATERS, 425. 1 et seq.**

**4. In Tennessee.** — *Webster v. Harris*, 111 Tenn. 668.

**A Stream Capable of Floating Logs** is held in some states to be navigable. *Watkins v. Dorris*, 24 Wash. 636; *Dawson v. McMillan*, 34 Wash. 269; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905; *Willow River Club v. Wade*, 100 Wis. 86. See also the title **NAVIGABLE WATERS, 428. 5, 6.**

**532. 5. The Thread of a Stream.** — *State v. Burton*, 106 La. 732.

**6. Island Made by Change of Stream.** — *De Lassus v. Faherty*, 164 Mo. 361.

**534. 4. Where a Grant Runs to and Is Bounded upon a Lake.** — See *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274.

**A Conveyance of Land Bounded upon a Navigable River in Wisconsin** carries with it as inci-

dent to the shore all unsurveyed islands to the centre of the stream. *Franzini v. Layland*, 120 Wis. 72. See also *Goff v. Cogle*, 118 Mich. 307.

**535. 4. Meander Lines.** — *McBride v. Whitaker*, 65 Neb. 137. See also *Goff v. Cogle*, 118 Mich. 307.

**536. 8. Title to Accretions.** — *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295; *Glassell v. Hansen*, 135 Cal. 547; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269; *Holman v. Hodges*, 112 Iowa 714, 84 Am. St. Rep. 367; *East Omaha Land Co. v. Hanson*, 117 Iowa 96; *Moore v. Farmer*, 156 Mo. 33, 79 Am. St. Rep. 504.

**537. 1. Where Accretions Come in Contact with Another Island or with Mainland.** — *Glassell v. Hansen*, 135 Cal. 547. See also *Holman v. Hodges*, 112 Iowa 714, 84 Am. St. Rep. 367.  
**2. See** *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295.

**4. People v. Slauson**, 85 N. Y. App. Div. 166.  
**Questions Arising on Motion.** — *McDermott v. Halleck*, 65 Kan. 403; *State v. District Ct.*, 28 Mont. 227.

**539. 2. Corning v. Meade County**, (C. C. A.) 102 Fed. Rep. 57.

**3. Delivery — County Bonds.** — *Perkins County v. Graff*, (C. C. A.) 114 Fed. Rep. 441.

**Issue of Process.** — *Oskaloosa Cigar Co. v. Iowa Cent. R. Co.*, (Iowa 1902) 89 N. W. Rep. 1065.

# ISSUE (DESCENDANTS).

By H. N. ELDRIDGE.

**543. I. DEFINITION** — When a Word of Purchase. — See note 2.

**544.** See note 1.

*Bastards, Adopted Children, Stepchildren.* — See notes 5, 6.

**545. II. ISSUE CONSTRUED CHILDREN** — **1. In General, Issue Explained by Children; Form of Peculiar Expressions.** — See note 2.

**546.** Issue Explained by Children. — See note 3.

**547. 2. Issue Correlative with Parent.** — See note 1.

**548. III. WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION** — **1. In Deeds and Marriage Articles.** — See note 1.

**2. In Wills** — **a. GENERAL PRINCIPLE** — ISSUE COMPARED WITH HEIRS OF THE BODY. — See note 3.

**549.** Word of Purchase. — See note 1.

**555. IV. DYING WITHOUT ISSUE** — **WHEN REFERRED TO PRIOR OBJECTS** — **1. In Default of Such Issue** — Real Property. — See note 3.

**558. V. DYING WITHOUT ISSUE** — **DEFINITE AND INDEFINITE FAILURE OF ISSUE** — **1. General Rule.** — See note 2.

**560.** See note 1.

*Intention Prevails.* — See notes 2, 3.

**561.** Personal Property. — See note 2.

**543. 2. Issue as a Word of Purchase Coextensive with Descendants.** — *Hilliker v. Bast*, 64 N. Y. App. Div. 552; *Emmet v. Emmet*, 67 N. Y. App. Div. 183; *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348; *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18; *Wilson v. Wilson*, 76 N. Y. App. Div. 232; *Bacon's Estate*, 202 Pa. St. 535. See also *Travers v. Wallace*, 93 Md. 507.

**"Issue" in Insurance Policy Held to Include Lineal Descendants.** — *Hemenway v. Draper*, 91 Minn. 235.

**544. 1. Issue Held to Include Children.** — *Crawford v. Clark*, 110 Ga. 729; *Gannon v. Peterson*, 193 Ill. 372; *Emmet v. Emmet*, 67 N. Y. App. Div. 183; *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348; *McCann v. McCann*, 197 Pa. St. 452; *Logan v. Cassidy*, (S. Car. 1905) 30 S. E. Rep. 794. See also *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18.

**5. Illegitimates Included.** — *Cherry v. Mitchell*, 108 Ky. 1.

The term "issue" may include illegitimates where such appears to have been the intent of the testator. *In re Smilter*, (1903) 1 Ch. 198.

**6. Adopted Children Included in the Term "Issue."** — *Matter of Winchester*, 140 Cal. 468. See also *Glasco v. Bragg*, 111 Wis. 605.

**545. 2. Issue Construed Children.** — *Wright v. Mercein*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 417, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 545; *Bacon's Estate*, 202 Pa. St. 535. See also *Wilson v. Wilson*, 76 N. Y. App. Div. 232.

**546. 3. Issue Explained by Children.** — *Crawford v. Clark*, 110 Ga. 729; *Emmet v. Emmet*, 67 N. Y. App. Div. 183.

**547. 1. Issue Correlative with Parents.** — See *Heberton v. McClain*, 135 Fed. Rep. 226.

**Many Cases Have Criticised.** — See *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18.

**548. 1. Issue a Word of Purchase in Deed.** — *Bonner v. Bonner*, 28 Ind. App. 147; *Bacon's Estate*, 202 Pa. St. 535.

**3. Prima Facie a Word of Limitation.** — *Hilliker v. Bast*, 64 N. Y. App. Div. 552; *Harrison v. McAdam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18; *Stouch v. Zeigler*, 196 Pa. St. 489; *McCann v. McCann*, 197 Pa. St. 452; *Hill v. Giles*, 201 Pa. St. 215; *Graham v. Abbott*, 208 Pa. St. 68. See also *Black v. Webb*, 72 Ark. 336; *Gilkie v. Marsh*, 186 Mass. 336.

**549. 1. A Word of Purchase.** — *Hilliker v. Bast*, 64 N. Y. App. Div. 552; *McCann v. McCann*, 197 Pa. St. 452; *Hill v. Giles*, 201 Pa. St. 215.

**555. 3. Real Property.** — See *Crawford v. Clark*, 110 Ga. 729; *Travers v. Wallace*, 93 Md. 507.

**558. 2. Indefinite Failure of Issue.** — *Caulk v. Caulk*, 3 Penn. (Del.) 528; *Stone v. Bradlee*, 183 Mass. 165; *Gilkie v. Marsh*, 186 Mass. 336; *Stouch v. Zeigler*, 196 Pa. St. 489; *Graham v. Abbott*, 208 Pa. St. 68.

**560. 1. Definite and Indefinite Failure of Issue Distinguished.** — *Cain v. Robertson*, 27 Ind. App. 198; *Woodlief v. Duckwall*, 10 Ohio Cir. Dec. 686.

**2. Intent.** — *Stone v. Bradlee*, 183 Mass. 165. See also *Cain v. Robertson*, 27 Ind. App. 198.

**3. Definite Failure Favored.** — See *Yocum v. Sifer*, 160 Mo. 281.

**561. 2. Court Not So Strictly Bound by the Rule.** — See *Graham v. Abbott*, 208 Pa. St. 68.

**561.** 2. Without Having Issue — Before He Has Any Issue — Without Children — Issue Alive, Surviving, or Who Shall Attain Twenty-one. — See note 4.

**564.** 3. Without Leaving Issue — Without Leaving Issue Behind Him. — See note 1.

**571.** 14. Gift Over for Life. — See note 2.

**572.** 19. Statutory Changes. — See note 3.

**573.** VI. DYING WITHOUT ISSUE REFERRED TO DEATH IN LIFETIME OF TESTATOR. — See note 1.

**574.** See note 1.

**575.** VII. EFFECT OF LIMITATION OVER UPON PRECEDING LIMITATION — 1. Where Failure of Issue Is Indefinite. — See note 1.

**577.** ITEM. — See note 4.

**578.** ITINERANT. — See note 2.

**579.** JAPANESE. — See note 2.

**561.** 4. Issue Surviving. — Hill v. Giles, 201 Pa. St. 215.

**564.** 1. Real Property — Definite Failure of Issue. — Metzen v. Schopp, 202 Ill. 275.

**571.** 2. Gift Over for Life — Definite Failure of Issue. — Stone v. Bradlee, 183 Mass. 165.

**572.** 3. Statutes — Definite Failure of Issue Implied. — Harvey v. Bell, (Ky. 1904) 81 S. W. Rep. 671; Middlesex Banking Co. v. Field, 84 Miss. 646; Yocum v. Siler, 160 Mo. 281; Gannon v. Albright, 183 Mo. 239. See also Smith v. Ballard, (Ky. 1903) 77 S. W. Rep. 714.

**573.** 1. Dying Without Issue Referred to Death in Lifetime of Testator. — Teal v. Richardson, 160 Ind. 119.

**574.** 1. Not Referred to Death in Lifetime of Testator. — Cooksey v. Hill, 106 Ky. 297; Lewis v. Shropshire, (Ky. 1902) 68 S. W. Rep. 426.

**Other Contingency.** — King v. King, 215 Ill. 113, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574.

**575.** 1. Where the Failure of Issue Is In-

definite. — Cain v. Robertson, 27 Ind. App. 198; Stouch v. Zeigler, 196 Pa. St. 489; Graham v. Abbott, 208 Pa. St. 68.

**577.** 4. Wills. — Oetjen v. Dienimer, 115 Ga. 1005.

**Appropriation Bill.** — In a state constitution giving the executive authority to select such of the many *items* of a general appropriation bill as he desires and veto them, the word *item* signifies a specific sum appropriated to a specific purpose and not a fractional part of said sum thus appropriated. Com. v. Barnett, 199 Pa. St. 161.

**578.** 2. Itinerant Vendor. — See West v. Mt. Sterling, (Ky. 1901) 65 S. W. Rep. 120.

**Residence in State.** — State v. Foster, 22 R. I. 163.

**Itinerant Doctor.** — A dentist is not an *itinerant* doctor, physician, or surgeon within a statute taxing such. Cherokee v. Perkins, 118 Iowa 405.

**579.** 2. Japanese. — Matter of Yamashita, 30 Wash. 234.

## JEOPARDY.

BY F. G. BAMMAN.

**581.** I. DEFINITION. — See note 1.

**582.** IV. TO WHAT CLASSES OF OFFENSES THE DOCTRINE IS APPLIED — 1. In General. — See note 5.

2. Applicability to Actions for the Recovery of Statutory Penalties. — See notes 7, 9.

**583.** 6. Not Applicable to Provisions for Cumulative Punishment. — See note 4.

7. Exemplary Damages as Affected by Doctrine. — See note 5.

**584.** V. EFFECT OF JEOPARDY ATTACHING — 2. The State Cannot Secure a New Trial. — See note 6.

**581.** 1. Jeopardy Defined. — State v. Manning, 168 Mo. 418.

**582.** 5. Applied to Action for Malicious Prosecution. — Schrieber v. Clapp, 13 Okla. 215.

7. Action Criminal Though Civil in Form. — Portland v. Erickson, 39 Oregon 1.

9. Doctrine Not Applicable to Actions for Re-

covery of Statutory Penalties. — Memphis v. Smythe, 104 Tenn. 702.

**583.** 4. Cumulative Punishment. — McDonald v. Massachusetts, 180 U. S. 311.

5. Punitive Damages. — See Latshaw v. State, 156 Ind. 194.

**584.** 6. State Cannot Secure a New Trial

**584. VI. WHAT CONSTITUTES A JEOPARDY — 1. General Rule Stated.** — See note 10.

**585.** See note 1.

**586. A Preliminary Examination Before a Committing Magistrate.** — See note 2.

Where Magistrate May Either Try or Commit. — See note 3.

Order upon Preliminary Examination No Bar to a Second Preliminary Examination. — See note 4.

Nor Is the Pendency of One Indictment. — See note 6.

**587. 2. Essential Elements under the Rule.**—*a.* A COURT OF COMPETENT JURISDICTION. — See note 1.

Justice of the Peace or Police Court. — See notes 2, 3.

Incompetency of Judge. — See note 7.

**588. Acquittal to Bar Prosecution Must Be in the County in Which the Offense Was Committed.** — See note 1.

The Crime of Larceny. — See note 2.

*b.* A VALID INDICTMENT OR INFORMATION. — See note 4.

Where the Grand Jury. — See note 5.

**589. Indictment or Information Defective in Form or Substance.** — See note 1.

Indictment Describing No Offense Known to the Law. — See note 2.

Variance. — See note 3.

Quashal or Dismissal of Indictment. — See note 5.

**590.** See note 1.

**After Jeopardy Has Attached.** — Portland *v.* Erickson, 39 Oregon 1.

**584. 10. When Jeopardy Attaches — General Rule.** — State *v.* Brown, 110 La. 591; State *v.* Taylor, 171 Mo. 465, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 548 [584]; Schrieber *v.* Clapp, 13 Okla. 215. See also Mahany *v.* People, 31 Colo. 365.

**585. 1. Rendition of Valid Verdict Essential to a Jeopardy.** — People *v.* Smith, 172 N. Y. 210.

**586. 2. Preliminary Examination Before Committing Magistrate.** — Spraggins *v.* State, 139 Ala. 93; Mooney *v.* People, 96 Ill. App. 622; Van Buren *v.* State, 65 Neb. 223; State *v.* Belden, 69 N. H. 647; State *v.* Munroe, (R. I. 1904) 57 Atl. Rep. 1057, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; Campbell *v.* State, 111 Wis. 152. See also People *v.* Harber, 100 N. Y. App. Div. 317.

**3. Where Justice Has Jurisdiction Either to Try or to Commit Accused.** — State *v.* Munroe, (R. I. 1904) 57 Atl. Rep. 1057, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; Donaldson *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 826.

**4. One Preliminary Examination No Bar to Another.** — Sharp *v.* State, 61 Neb. 187.

**6. Pendency of One Indictment No Bar to Another.** — Irwin *v.* State, 117 Ga. 706; State *v.* Goddard, 162 Mo. 198; State *v.* Vinso, 171 Mo. 576; Roby *v.* State, 61 Neb. 218. See also People *v.* Bissert, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643.

**587. 1. No Jeopardy Unless Court Has Jurisdiction of Offense.** — Paulsen *v.* People, 195 Ill. 507, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587; State *v.* Jackson, 106 La. 413, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587; Ogle *v.* State, 43 Tex. Crim. 219, 96 Am. St. Rep. 860, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586, 587.

**2. Justice of the Peace.** — People *v.* Smith, 143 Cal. 597; State *v.* Goetz, 65 Kan. 125; Cook

*v.* State, 77 Miss. 800; Gibson *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 1119. See also Crowder *v.* State, 69 Ark. 330; Reese *v.* State, 73 Ark. 235.

**3. Police Court.** — State *v.* Belden, 69 N. H. 647.

**7. Judge Incompetent by Reason of Relationship to Defendant.** — See *Ex p.* Graham, 43 Tex. Crim. 463.

**588. 1. Acquittal to Wrong County.** — State *v.* Bacon, 170 Mo. 161; Homer *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 371. See also State *v.* Spayde, 110 Iowa 726; *Ex p.* Moore, 46 Tex. Crim. 417.

**2. Larceny.** — Van Buren *v.* State, 65 Neb. 223.

**4. Valid Indictment or Information Essential to Jeopardy.** — People *v.* Terrill, 133 Cal. 120. See also Reese *v.* State, 73 Ark. 235.

**5. Incompetent Grand Jury.** — Ogle *v.* State, 43 Tex. Crim. 219, 96 Am. St. Rep. 860, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

**589. 1. Fatal Defect in Form or Substance.** — State *v.* Brown, 110 La. 591; State *v.* Holton, 88 Minn. 171; State *v.* Manning, 168 Mo. 418; Hogue *v.* State, 23 Ohio Cir. Ct. 567, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588, 589; Com. *v.* Allen, 24 Pa. Co. Ct. 65.

**2. Where Indictment Describes No Offense Known to the Law.** — State *v.* Holton, 88 Minn. 171; State *v.* Riley, 36 Wash. 441. See also State *v.* Bogard, 25 Ind. App. 123.

**3. Material Variances.** — See State *v.* Holton, 88 Minn. 171.

**5. Quashal or Dismissal of Invalid Indictment.** — People *v.* Smith, 143 Cal. 597; State *v.* Taylor, 171 Mo. 465; Guinn *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 376. See also Fain *v.* Com., 109 Kv. 545.

**590. 1. Dismissal of Valid Indictment Without Defendant's Consent.** — Turk *v.* State, 140 Ala. 110.

**590. Nolle Prosequi.** — See note 2.

Where a Demurrer to an Indictment Is Sustained. — See note 4.

**591. Acquittal or Verdict and Judgment a Bar Regardless of Validity of Indictment.** — See note 3.

Arrest of Judgment for Defect in Indictment. — See note 5.

**592. c. ISSUE JOINED.** — See note 3.

A Plea of Former Jeopardy. — See note 8.

d. A LEGALLY CONSTITUTED JURY IMPANELED AND SWORN. —

See notes 9, 10.

**593. 3. Explanations and Qualifications of the Rule — b. UNFORESEEN OCCURRENCE MAKING IMPOSSIBLE THE RENDITION OF A VALID VERDICT.** — See note 2.

c. ACQUITTAL OR CONVICTION FRAUDULENTLY PROCURED —

(2) *Conviction.* — See note 7.**595. 5. Statutes Not Unconstitutional as Putting Twice in Jeopardy —**

a. STATUTE AUTHORIZING RESSENTENCE AFTER REVERSAL FOR ERROR SUBSEQUENT TO VERDICT. — See note 1.

6. Effect of a Nolle Prosequi. — See note 4.

**596. See note 2.****VII. IDENTITY OF OFFENSES — 1. In General.** — See notes 5, 6.**590. 2. Entry of Nolle Prosequi.** — McNish v. State, (Fla. 1904) 36 So. Rep. 175.**4. Demurrer to Indictment Sustained.** — Brown v. State, 109 Ga. 570. See also People v. Lee Look, 143 Cal. 216; People v. Krivitzky, 60 N. Y. App. Div. 307, affirmed 168 N. Y. 182.

Under Statutes in Several States. — People v. Bissert, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643.

Granting a Motion to Direct a Verdict for the defendant before the introduction of any evidence has the same effect as sustaining a demurrer to the indictment. State v. Sherman, 71 Ark. 349.

**591. 3. Acquittal.** — Tufts v. State, 41 Fla. 663.**5. A Writ of Prohibition** has the same effect as an arrest of judgment. People v. Terrill, 132 Cal. 497.**592. 3. Prince v. State,** 140 Ala. 158.**8. Plea of Former Jeopardy.** — State v. Ellsworth, 131 N. Car. 773, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592.**9. Legally Constituted Jury.** — State v. Bates, 22 Utah 65, 83 Am. St. Rep. 768.

Where the Defendant Cannot Waive a Trial by Jury a conviction by a judge without a jury does not constitute a jeopardy. State v. Jackson, 106 La. 413.

**10. Jury Impaneled and Sworn.** — Schrieber v. Clapp, 13 Okla. 215; Tomasson v. State, 112 Tenn. 596.**593. 2. No Jeopardy Where Valid Verdict Impossible.** — Com. v. Gabor, 209 Pa. St. 201; People v. Hutchings, (Mich. 1904) 100 N. W. Rep. 753, 11 Detroit Leg. N. 367; Woodward v. State, 42 Tex. Crim. 188. See also Com. v. Lutz, 200 Pa. St. 226.

No Jeopardy Where Jury Discharged for Misconduct. — In re Ascher, 130 Mich. 540, 9 Detroit Leg. N. 129.

Mistrial Erroneously Declared — Jeopardy. — Oliveros v. State, 120 Ga. 237.

**7. No Jeopardy from Conviction Fraudulently**

Procured. — Caldwell v. State, 69 Ark. 322, 70 Ark. 74; De Bord v. People, 27 Colo. 377, 83 Am. St. Rep. 89; State v. Moore, 136 N. Car. 581. See also Peters v. Koepke, 150 Ind. 35.

**595. 1. See Murphy v. Massachusetts,** 177 U. S. 155.**4. Entry of Nolle Prosequi Before Jeopardy Attaches.** — See State v. Goddard, 162 Mo. 198.**596. 2. See Com. v. Kohl,** 17 Lanc. L. Rev. 159.**5. Both Act and Crime Must Be Identical — United States.** — Bliss v. U. S., 105 Fed. Rep. 508, 44 C. C. A. 324; In re Stubbs, 133 Fed. Rep. 1012. See also Carter v. McClaughry, 183 U. S. 365.

California. — See People v. Devlin, 143 Cal. 128.

Delaware. — State v. Day, (Del. 1904) 58 Atl. Rep. 946.

Florida. — Wallace v. State, 41 Fla. 547.

Kentucky. — See Mann v. Com., 80 S. W. Rep. 438, 25 Ky. L. Rep. 2281.

Mississippi. — Carroll v. State, 80 Miss. 349; Huffman v. State, 84 Miss. 479.

Missouri. — State v. Gustin, 152 Mo. 108. See also State v. Laughlin, 180 Mo. 342.

New York. — See People v. Satchwell, 61 N. Y. App. Div. 314.

South Carolina. — State v. Switzer, 65 S. Car. 187.

Texas. — Hunt v. State, (Tex. Crim. 1901) 60 S. W. Rep. 965; Miller v. State, (Tex. Crim. 1903) 72 S. W. Rep. 856; Griffey v. State, (Tex. Crim. 1900) 56 S. W. Rep. 52. See also Taylor v. State, 41 Tex. Crim. 564; Ford v. State, (Tex. Crim. 1900) 56 S. W. Rep. 918; Keaton v. State, 41 Tex. Crim. 621; Adams v. State, (Tex. Crim. 1901) 62 S. W. Rep. 1059.

**6. Same in Law and Fact.** — People v. Kerrick, 144 Cal. 46; Gully v. State, 116 Ga. 527, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 596; Miller v. State, 33 Ind. App. 509; State v. Taylor, 133 N. Car. 755; State v. Hankins, 136 N. Car. 621.

- 597.** Gambling and Keeping a Gambling House Distinct Crimes. — See note 1.  
 2. Test of Identity. — See note 3.
- 598.** That Evidence Tending to Establish the Guilt of the Accused. — See note 1.  
 Effect of Variance in the Facts Alleged in the Two Indictments. — See note 5.  
 3. Where One Crime Includes Another — *a.* PROSECUTION FOR HIGHER AS BAR TO PROSECUTION FOR LOWER. — See note 7.
- 599.** Murder and Manslaughter. — See note 2.  
 Murder and Assault. — See notes 3, 4.  
*b.* PROSECUTION FOR LOWER AS BAR TO PROSECUTION FOR HIGHER. — See note 7.
- 600.** Assault and Higher Offenses Comprehending It. — See notes 4, 5.  
 Conviction for Assault, Death Supervening, No Bar to Prosecution for Murder or Manslaughter. — See note 6.
- 601.** Commission of Crime and Conspiracy to Commit It. — See notes 2, 3.  
*c.* CONVICTION OF LOWER ON PROSECUTION FOR HIGHER. — See note 4.

**597.** 1. Gaming and Keeping Gaming House. — State *v.* White, 123 Iowa 425.

3. Usual Test of Identity — *United States*. —

See Carter *v.* McClaghry, 183 U. S. 365.

Alabama. — Hall *v.* State, 134 Ala. 90.

Connecticut. — See State *v.* Vandemark, 77 Conn. 201.

Florida. — See Wallace *v.* State, 41 Fla. 547.

Georgia. — Gully *v.* State, 116 Ga. 527, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597. See also McIntosh *v.* State, 116 Ga. 543.

Indiana. — Miller *v.* State, 33 Ind. App. 509, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 596 [597]. See also State *v.* Rosenbaum, 23 Ind. App. 236, 77 Am. St. Rep. 432.

Iowa. — State *v.* White, 123 Iowa 425.

Kentucky. — Cawein *v.* Com., 110 Ky. 273.

Louisiana. — State *v.* Heard, 107 La. 60.

New York. — People *v.* Satchwell, 61 N. Y. App. Div. 314, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597.

North Carolina. — See State *v.* Hankins, 136 N. Car. 621.

Pennsylvania. — Com. *v.* Hazlett, 14 Pa. Super. Ct. 352.

South Carolina. — State *v.* Switzer, 65 S. Car. 187, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597.

South Dakota. — See State *v.* Caddy, 15 S. Dak. 167, 91 Am. St. Rep. 666.

In Texas. — Stevens *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 96; Keaton *v.* State, 41 Tex. Crim. 621. See also Taylor *v.* State, 41 Tex. Crim. 564.

Acquittal of Crime No Bar to Prosecution for Alleged Perjury in Denying Its Commission. —

State *v.* Vandemark, 77 Conn. 201; People *v.* Albers, (Mich. 1904) 100 N. W. Rep. 908, 11 Detroit Leg. N. 441; Wadlington *v.* Com., 59 S. W. Rep. 851, 22 Ky. L. Rep. 1108.

**598.** 1. Criminating Evidence at Trial for Another Offense. — Hohn *v.* Baker, 105 La. 373.

5. When Variance Will Prevent Former Prosecution from Being a Bar. — Gallagher *v.* People, 211 Ill. 158, affirming O'Donnell *v.* People, 110 Ill. App. 250; Riffe *v.* Com., (Ky. 1900) 56 S. W. Rep. 265; Carter *v.* Com., 76 S. W. Rep. 337, 25 Ky. L. Rep. 688; State *v.* Council, 58 S. Car. 368; Sapp *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 436; Lovelace *v.* State, 45 Tex.

Crim. 261. See also McNish *v.* State, (Fla. 1904) 36 So. Rep. 176; Gully *v.* State, 116 Ga. 527.

7. Prosecution for Higher Degree Bars Prosecution for Lower. — See Pat *v.* State, 116 Ga. 92. Compare Pickett *v.* State, 43 Tex. Crim. 1.

**599.** 2. Prosecution for Murder Bars Indictment for Manslaughter. — See Turner *v.* State, 41 Tex. Crim. 329.

3. Acquittal for Murder as Bar to Prosecution for Assault. — See Richardson *v.* State, 79 Miss. 289.

4. State *v.* Caddy, 15 S. Dak. 167, 91 Am. St. Rep. 666.

7. Prosecution for Lower Bar to Prosecution for Higher. — Storrs *v.* State, 129 Ala. 101; Flynn *v.* State, 43 Tex. Crim. 407.

**600.** 4. Aggravated Assault. — State *v.* Blewins, 134 Ala. 213, 92 Am. St. Rep. 22; State *v.* Fagg, 125 N. Car. 609. See also State *v.* Gustin, 152 Mo. 108; Heinen *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 776.

Conviction of Aggravated Assault a Bar to Indictment for Assault with Intent to Kill. — People *v.* McDaniels, 137 Cal. 192, 92 Am. St. Rep. 81.

Assault and Robbery. — See Keaton *v.* State, 41 Tex. Crim. 621.

A Conviction of Assault and Battery Before a Justice is held in Mississippi to be no bar to a prosecution for felonious assault, where the justice has no jurisdiction over the latter offense. Huffman *v.* State, 84 Miss. 479.

A Conviction for an Affray is not a bar to a prosecution for an aggravated assault. Stepp *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 787.

5. Assault and Mayhem. — State *v.* Durbin, 32 Wash. 389, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599-601.

6. Prosecution for Murder or Manslaughter After Conviction for Assault and Death of Injured Person. — McNulty *v.* State, 110 Tenn. 482.

**601.** 2. Prosecution for Conspiracy to Commit Crime No Bar to Prosecution for Commission of Crime. — Wallace *v.* State, 41 Fla. 547.

3. Conviction of Crime No Bar to Prosecution for Conspiracy to Commit It. — Ferguson *v.* State, 141 Ala. 20; Bailey *v.* State, 43 Tex. Crim. 289.

4. Conviction of Lesser Offense on Prosecution for Higher. — *Ex p.* Moore, 46 Tex. Crim. 417.



- 601.** Thus a Conviction for Manslaughter on an Indictment for Murder. — See note 5.  
So a Conviction of Murder in the Second Degree. — See note 6.  
*d.* WHERE HIGHER CRIME IS A FELONY AND LOWER A MISDEMEANOR. — See note 9.
- 602.** See note 1.  
*4.* Where One Act Includes Several Crimes. — See note 2.
- 603.** Acts Closely Connected in Point of Time. — See note 1.  
*5.* Several Prosecutions for Single Crime Prohibited — *a.* RULE STATED. — See note 2.  
*b.* RULE APPLIED TO CONTINUING OFFENSES. — See note 3.  
Continuous Keeping of a Gaming or Disorderly House. — See note 6.
- 604.** A Conviction for Making a Sale on Sunday. — See note 1.  
Desertion. — See note 2.
- 605.** *8.* One Act Violating Both a State Law and a Municipal Ordinance. — See note 2.  
*9.* One Act Violating Both a Military and General Law. — See note 3.  
VIII. WAIVER OF OBJECTION TO A SECOND JEOPARDY — *1.* In General. — See note 4.  
*2.* Motion to Quash Indictment. — See note 5.  
*3.* Acquittal Directed at Defendant's Request for Defect in Indictment. — See note 6.
- 606.** *6.* Failure to Have Defective Verdict Perfected. — See note 1.  
*7.* Waiver After Verdict — *a.* IN GENERAL. — See note 2.

See also *People v. McDaniels*, 137 Cal. 192, 92 Am. St. Rep. 81.

**601.** *5.* Conviction of Manslaughter on Indictment for Murder. — See *Powers v. State*, 83 Miss. 691; *People v. McFarlane*, 138 Cal. 481.

*6.* Conviction of Murder in Second Degree on Indictment for Murder in First Degree. — See *Coleman v. State*, 43 Tex. Crim. 280.

*9.* *Huffman v. State*, 84 Miss. 479; *Gibson v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1119. See also *Cook v. State*, 77 Miss. 800. But see *Jackson v. State*, 136 Ala. 96.

**602.** *1.* Prosecution for Felony — Conviction for Misdemeanor. — See *State v. Armstrong*, 29 Wash. 57.

*2.* Prosecution for a Crime No Bar to Prosecution for Another Crime Embraced in Same Act. — *Hall v. State*, 134 Ala. 90; *McIntosh v. State*, 116 Ga. 543; *State v. Wold*, 96 Me. 401.

Where a Murder and an Assault Were Committed at one and the same time, on different persons, an acquittal of the former will not bar a prosecution for the latter. *Kelley v. State*, 43 Tex. Crim. 40.

**603.** *1.* Acts Closely Connected in Point of Time. — *Mann v. Com.*, 80 S. W. Rep. 438, 25 Ky. L. Rep. 2281, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 603; *Dunn v. State*, 43 Tex. Crim. 25. See also *Pilcher v. U. S.*, (C. C. A.) 113 Fed. Rep. 248.

*2.* Single Crime Cannot Be Prosecuted in Parts. — *State v. Rosenbaum*, 23 Ind. App. 236, 77 Am. St. Rep. 432; *Carman v. Com.*, 76 S. W. Rep. 1078, 25 Ky. L. Rep. 1048; *Cawein v. Com.*, 110 Ky. 273; *State v. Moore*, 86 Minn. 422; *Com. v. Allegheny Valley R. Co.*, 21 Pa. Super. Ct. 188.

*3.* Continuing Offenses. — *Bryant v. State*, 72 Ark. 419; *McWilliams v. State*, 110 Ga. 290; *Cawein v. Com.*, 110 Ky. 273; *State v. Martin*, 23 R. I. 146, citing 17 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 603, 604. See also *State v. Broeder*, 90 Mo. App. 169.

Conviction for Engaging in Business Without License. — *State v. Roberson*, 136 N. Car. 591.

*6.* House of Ill Fame. — See *Hohn v. Baker*, 105 La. 373.

**604.** *1.* Making Sales on Sunday. — See *State v. Heard*, 107 La. 60.

*2.* Conviction for Desertion Bar to Subsequent Prosecution for Same Desertion. — *State v. Miller*, 90 Mo. App. 131. See also *Com. v. Pickett*, 10 Kulp (Pa.) 68.

**605.** *2.* *State v. Muir*, 164 Mo. 610; *State v. Taylor*, 133 N. Car. 755; *State v. Sanders*, 68 S. Car. 192. See also *Respass v. Com.*, 107 Ky. 139; *Lucas v. Com.*, 82 S. W. Rep. 440, 26 Ky. L. Rep. 740.

*3.* Act Criminal Both by Military and General Law. — *In re Stubbs*, 133 Fed. Rep. 1012, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604, 605.

*4.* Consent to Try Before Inferior Court — Act Regulating Such Trials Binding. — *Mahany v. People*, 31 Colo. 365, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605.

*5.* Waiver Implied from Motion to Quash Indictment. — *Miller v. State*, 33 Ind. App. 509.

*6.* Acquittal Directed at Defendant's Request. — *State v. Sherman*, 71 Ark. 349; *State v. Holton*, 88 Minn. 171.

**606.** *1.* Waiver Implied from Failure to Have Defective Verdict Perfected. — *Mahany v. People*, 31 Colo. 365, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Waddle v. State*, 112 Tenn. 556.

*2.* When a Waiver Will Be Implied After Verdict — *Georgia*. — *Taylor v. State*, 110 Ga. 150.

*Kentucky*. — *Fain v. Com.*, 109 Ky. 545.

*Mississippi*. — See *Powers v. State*, 83 Miss. 691.

*New York*. — *People v. Wheeler*, 79 N. Y.

**607.** But Where the Court on Its Own Motion. — See note 2.

**608.** *b.* EFFECT OF ARREST OF JUDGMENT — (2) *In Jurisdictions Where the Judgment Cannot Be Reversed.* — See note 2.

*c.* LIMITATION OF THE WAIVER — (2) *Where Verdict Acquits in Part and Convicts in Part* — Conviction under Some Counts and Acquittal under Others. — See note 4.

(3) *Where Verdict Is Silent as to Part of Offenses Charged.* — See note 7.

**609.** [JERKING. — See note 1a.]

**613.** JEWEL — JEWELRY. — See note 7.

**614.** JOIN. — See note 4.

**615.** JOINT — JOINTLY. — See note 1.

App. Div. 396. See also *People v. Shields*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 256.

*Texas.* — *Brown v. State*, 43 Tex. Crim. 272; *Harvey v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1039; *Chambers v. State*, 44 Tex. Crim. 61. See also *Coleman v. State*, 43 Tex. Crim. 280.

*Virginia.* — See *Watts v. Com.*, 99 Va. 872.

**607.** 2. Court Acting of Its Own Motion. — *State v. Parish*, 43 Wis. 395.

**608.** 2. Effect of Arrest in Jurisdictions Where the Judgment Cannot Be Reversed. — See *People v. Mooney*, 132 Cal. 13.

4. Conviction on Some Counts and Acquittal on Others. — Where a finding of guilty on the second count is inconsistent with a finding of not guilty on the first, the defendant cannot be again tried on the second count, as he is deemed to be acquitted on both counts. *State v. Headrick*, 179 Mo. 300.

Same Offense Charged in Several Counts. — *State v. Balsley*, 159 Ind. 395, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 608.

7. Guilty of Some Offenses and Silent as to Residue. — *George v. State*, 59 Neb. 163. See also *McGuire v. State*, 2 Ohio Cir. Dec. 318.

**609.** 1a. "By Jerking a Car In is meant giving it a jerk with the engine and letting it run without the engine being attached to it." *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746.

**613.** 7. Revenue Laws. — *Bader v. U. S.*, 116 Fed. Rep. 541.

**614.** 4. Husband and Wife. — *Nolan v. Moore*, 96 Tex. 341.

**615.** 1. The Joint Heirs of two persons named in a trust deed are the heirs of both at the death of the survivor. *Gardiner v. Fay*, 182 Mass. 492.

## JOINT EXECUTORS AND ADMINISTRATORS.

BY ALFRED PIZEY.

**617.** II. GENERAL PRINCIPLES — 1. Unity of Person. — See note II.

**618.** 2. Unity of Estate. — See notes 4, 5.

**619.** See note 1.

III. BONDS — 1. Joint Bonds — *a.* WHEN ALLOWABLE. — See note 3.

*b.* EFFECT OF JOINT BOND. — See note 5.

**620.** 2. Separate Bonds. — See notes 2, 3.

IV. POWERS AND LIABILITIES — 1. Administrative Acts in General. — See notes 4, 5.

**617.** 11. Joint Executors Constitute but One Person in Law. — *Cross v. Long*, 66 Kan. 293; *Hosch Lumber Co. v. Weeks*, 123 Ga. 336.

**618.** 4. Doctrine of Survivorship — Death of Corepresentative. — Matter of Steencken, 51 N. Y. App. Div. 417, 30 Civ. Pro. (N. Y.) 329; Matter of Trask, (Surrogate Ct.) 27 Civ. Pro. (N. Y.) 7; *Fitzgerald v. Standish*, 102 Tenn. 383; *Terrill v. McCown*, 91 Tex. 231.

5. Renunciation by Coexecutor. — See *Jewett v. Turner*, 172 Mass. 496.

**619.** 1. Removal of Corepresentative. — *Gilmore v. Gilmore*, 59 Kan. 19; *Hatt v. Rich*, 59 N. J. Eq. 492; *Knight v. Hamaker*, 33 Oregon 154.

3. Right to Give Joint Bonds — Discretion of

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Court. — *Chamberlain v. Anthony*, 21 R. I. 331.

5. Joint Bond — Parties Liable as Sureties for Each Other. — *Yakel v. Yakel*, 96 Md. 240; *Speise's Estate*, 21 Lanc. L. Rev. 185; *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890.

**620.** 2. Separate Bonds Allowable Though Not Expressly Authorized by Statute. — But in *Rhode Island* the usual practice is to give joint and several bonds. *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890.

3. Joint and Several Bonds — Actions Inter Se. — *Municipal Ct. v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890.

4. Each Representative Has Full Power Over Estate. — *In re Houghton*, (1904) 1 Ch. 622.

**621.** See notes 1, 2, 4, 5.

**623.** Distinction Between Acts Done as Executor and Those Done as Trustee. — See note 2.

4. Sale of Real Estate under Order of Court. — See notes 6, 7.

**624.** 6. Waiver of Statute of Limitations — *c.* ACKNOWLEDGMENT OF OR PROMISE TO PAY DEBTS — (1) *Rule in England.* — See note 7.

(2) *Rule in United States.* — See note 9.

**625.** See note 2.

8. Liability of One for Acts of Others — *a.* GENERAL RULE. — See note 6.

**626.** See note 1.

*b.* EXCEPTIONS TO GENERAL RULE — (1) *Putting Corepresentative in Possession of Assets.* — See note 2.

**Employment of Attorney by One of Several Executors.** — *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, *affirmed* without opinion 49 N. Y. App. Div. 636, 176 N. Y. 551.

**620.** 5. Statutory Provisions — *New York.* — *Matter of Hoagland*, 51 N. Y. App. Div. 347, *affirmed* without opinion 164 N. Y. 573; *Matter of Bodkin*, 88 N. Y. App. Div. 33; *Matter of Stein*, (Surrogate Ct.) 33 Misc. (N. Y.) 542. And see *Matter of Freligh*, (Surrogate Ct.) 42 Misc. (N. Y.) 11.

**621.** 1. Collection of Assets. — *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, *affirmed* without opinion 49 N. Y. App. Div. 636, 176 N. Y. 551.

2. Compositions — Claim of Coexecutor. — *In re Houghton*, (1904) 1 Ch. 622.

4. Pledge to Secure Individual Debts. — *Schell v. Deperven*, 198 Pa. St. 591, 600.

5. Power to Dispose of Assets. — *Arkenburgh v. Arkenburgh*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 760, *affirmed* without opinion 49 N. Y. App. Div. 636, 176 N. Y. 551.

Where a Joint Account Is Opened at a Bank by three executors, two of them have no authority to pay out such funds against the protest of the third. *Allen v. Louisiana Nat. Bank*, 50 La. Ann. 366.

A Deed Executed by One Executor Only is void where all have qualified and are acting. *Brown v. Doherty*, 93 N. Y. App. Div. 190; *Mohn v. King*, 41 N. Y. App. Div. 611. See also *Hosch Lumber Co. v. Weeks*, 123 Ga. 336.

**623.** 2. Distinction Between Acts Done as Executor and Those Done as Trustee. — *Hosch Lumber Co. v. Weeks*, 123 Ga. 336.

6. Sales under Orders of Court — Joint Action Required. — *Kreider's Estate*, 17 Lanc. L. Rev. 201.

7. Joint Action Held Not Necessary. — *Broom's Estate*, 17 Lanc. L. Rev. 404, 14 York Leg. Rec. (Pa.) 95.

**624.** 7. Effect of Promise, etc., by One Executor or Administrator Regulated by Statute. — See *Astbury v. Astbury*, (1898) 2 Ch. 111.

9. In New York. — But see *Matter of Bradley*, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* 42 N. Y. App. Div. 301.

Although a part payment is made by one of two corepresentatives without the consent of the other, it will save the obligation from the operation of the statute of limitations up to that time. *Hamlin v. Smith*, 72 N. Y. App. Div.

601, quoting *Heath v. Grenell*, 61 Barb. (N. Y.) 190.

**625.** 2. Promise by One Held Binding on Others. — See *Hewes v. Hurff*, 69 N. J. L. 263.

6. One Not Ordinarily Liable for Acts or Omissions of Others — *New Jersey.* — *King v. Foerster*, 61 N. J. Eq. 584.

*New York.* — *Farmers' L. & T. Co. v. Pendleton*, 179 N. Y. 486, *reversing* judgment 90 N. Y. App. Div. 607, which *affirmed* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 256; *Matter of Smith*, 46 N. Y. App. Div. 318, *affirmed* on opinion below 166 N. Y. 620; *Matter of Adams*, 51 N. Y. App. Div. 619, *modifying* (Surrogate Ct.) 30 Misc. (N. Y.) 184, *affirmed* without opinion 166 N. Y. 623; *Matter of Barrett*, 58 N. Y. App. Div. 45; *Palmer v. Ward*, 91 N. Y. App. Div. 449; *Matter of Hunt*, (Surrogate Ct.) 38 Misc. (N. Y.) 613, *reversed* on other grounds 88 N. Y. App. Div. 52; *Matter of Johnson*, (Surrogate Ct.) 42 Misc. (N. Y.) 651. See also *Matter of Campbell*, (Surrogate Ct.) 21 Misc. (N. Y.) 133.

*Pennsylvania.* — *Myer v. Myer*, 187 Pa. St. 247, 42 W. N. C. (Pa.) 445; *Mueller's Estate*, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601; *Graham's Estate*, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540; *Ripple's Estate*, 9 Kulp (Pa.) 66, 112.

In Tennessee corepresentatives are jointly liable for a devastavit committed by one of them, but the one who receives the assets and is guilty is primarily liable. *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763, *citing* *Adams v. Gleaves*, 10 Lea (Tenn.) 367.

An Executor Is Not Chargeable with Interest for delay in distributing funds for a period during which the funds were in the custody and control of his coexecutor, whether with or without his consent; but only from the time when they came into his possession. *In re Starr*, 190 Pa. St. 162, *citing* *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676.

**626.** 1. Executor Not Acting as Such. — *Matter of Hoagland*, 79 N. Y. App. Div. 56; *Matter of Hunt*, (Surrogate Ct.) 38 Misc. (N. Y.) 613, *reversed* on other grounds 88 N. Y. App. Div. 52; *Bickley's Estate*, 13 Pa. Dist. 323.

Acts Not Constituting Receipt of Funds. — *Matter of Provost*, 87 N. Y. App. Div. 86. See also *Matter of Johnson*, (Surrogate Ct.) 42 Misc. (N. Y.) 651.

2. Contributing to Devastavits — Enabling Rep-

**627.** If Good Reasons Exist. — See note 2.

**628.** Merely Passive Conduct. — See note 4.

Representative Not Assuming to Act. — See note 5.

**629.** (2) *Acquiescence in or Negligence Contributing to Breach of Trust.* — See note 2.

**630.** (3) *Effect of Giving Joint Receipts.* — See note 2.

(4) *Effect of Making Joint Inventory.* — See note 3.

c. JOINT ACTS. — See note 5.

e. REMEDY OF REPRESENTATIVE CHARGED WITH ANOTHER'S

DEFAULT. — See note 7.

**631.** 9. ACTIONS BY AND AGAINST THIRD PERSONS — (1) *At Law.* — See notes 2, 3.

Where the Action Is Against Executors or Administrators. — See note 5.

(2) *In Equity.* — See note 7.

**632.** See note 1.

b. ACTIONS INTER SE — *At Law.* — See notes 3, 4, 5.

**representative in Default to Obtain Possession of Assets.** — *Grundy v. Drye*, 104 Ky. 825; *Meldon v. Devlin*, 31 N. Y. App. Div. 146, *affirmed* 167 N. Y. 573; *Matter of Provost*, 87 N. Y. App. Div. 86; *Matter of Johnson*, (Surrogate Ct.) 42 Misc. (N. Y.) 651; *Matter of Dougherty*, (Surrogate Ct.) 43 Misc. (N. Y.) 468; *Lowe v. Shields*, (1902) 1 Ir. R. 320.

**Representatives Assuming Joint Control of Assets.** — Where the assets of the estate have once come into the joint possession of the executors, it is the duty of each to see that such assets are applied to their proper purpose. *Matter of Hunt*, 88 N. Y. App. Div. 52, *reversing* (Surrogate Ct.) 38 Misc. (N. Y.) 613, and *citing Bruen v. Gillet*, 115 N. Y. 10, 12 Am. St. Rep. 764.

**627.** 2. Good Reasons for Turning Over Assets. — *Compare Langley v. Langley*, 121 Ala. 70, quoting from *King v. Shackelford*, 6 Ala. 423.

Where an executrix died, and at the time of her death the law made no provision for a voluntary accounting of her administration by her legal representative, her estate is not liable for the misappropriation by her coexecutor of assets which she had turned over to him. *Matter of Smith*, 46 N. Y. App. Div. 319, *affirmed* on opinion below 166 N. Y. 620.

**628.** 4. Merely Passive Conduct. — *Matter of Hoagland*, 79 N. Y. App. Div. 56; *Matter of Provost*, 87 N. Y. App. Div. 86; *Matter of Johnson*, (Surrogate Ct.) 42 Misc. (N. Y.) 651. *Compare Bickley's Estate*, 13 Pa. Dist. 323.

5. Representative Not Assuming to Act. — *King v. Foerster*, 61 N. J. Eq. 584; *Matter of Hoagland*, 79 N. Y. App. Div. 56; *Matter of Hunt*, (Surrogate Ct.) 38 Misc. (N. Y.) 613, *reversed* on other grounds 88 N. Y. App. Div. 52.

**629.** 2. Acquiescence in or Negligence Respecting Conduct of Corepresentative. — *Matter of Peck*, 31 N. Y. App. Div. 407, *appeal dismissed* 161 N. Y. 655; *Sinkler's Estate*, 10 Pa. Dist. 399, 25 Pa. Co. Ct. 417.

**630.** 2. Present Rule as to Joint Receipts — *Prima Facie Liability.* — *Matter of Provost*, 87 N. Y. App. Div. 86.

3. Joint Inventory. — *Auer's Estate*, 14 Pa. Dist. 273. *Compare Matter of Hunt*, 88 N. Y. App. Div. 52, *reversing* (Surrogate Ct.) 38 Misc.

(N. Y.) 613, and *citing Matter of Myers*, 131 N. Y. 409.

5. Joint Liability for Joint Acts. — *Palmer v. Ward*, 91 N. Y. App. Div. 449; *Auer's Estate*, 14 Pa. Dist. 273, 31 Pa. Co. Ct. 77; *Irvine's Estate*, 203 Pa. St. 602.

**Joint Conveyance of Real Estate.** — An executor is not liable for loss incurred by his coexecutor in selling real estate, by joining in the deed of conveyance, where he received none of the proceeds of the sale. *King v. Foerster*, 61 N. J. Eq. 584.

7. Subrogation to Rights of Estate. — See *Wehrle's Estate*, 205 Pa. St. 62, *affirming* 32 Pittsb. Leg. J. N. S. (Pa.) 233.

**631.** 2. Actions Generally Required to Be Brought in Names of All. — *French v. Peters*, 177 Mass. 568; *Kaulbach v. Mader*, 35 Nova Scotia 219.

3. Severance as to Representatives Unwilling to Act. — *French v. Peters*, 177 Mass. 568.

**One May Appeal.** — *Hammond v. Frazer*, (Mich. 1905) 103 N. W. Rep. 996, 12 Detroit Leg. N. 254.

5. Actions Against Executors, etc. — Rule Requiring All to Be Made Defendants. — *Montgomery v. Boyd*, 78 N. Y. App. Div. 64. See also *Hanschell v. Swan*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 304.

**Presentation of Claim Against Estate.** — *Cross v. Long*, 66 Kan. 293.

**Joint Executors May Plead Different Pleas.** — *French v. Peters*, 177 Mass. 568.

7. An Executor Interested Adversely to the Estate is not a proper party plaintiff, but is properly made a codefendant in his individual capacity. *Quillian v. Johnson*, 122 Ga. 49.

**632.** 1. Rule that Joint Representatives Must Be Sued Jointly. — A failure to serve process on one of two joint executors, if error at all, renders a judgment against them voidable merely and not void. *Ross v. Drouilhet*, 34 Tex. Civ. App. 327.

3. Cannot Ordinarily Sue Each Other at Law. — *Langley v. Langley*, 121 Ala. 70; *Ely v. Ely*, (N. J. 1901) 50 Atl. Rep. 657, *affirmed* on opinion below 64 N. J. Eq. 790; *Sharpless's Estate*, 13 Pa. Dist. 33, 19 Montg. Co. Rep. (Pa.) 120, *affirmed* 209 Pa. St. 69.

**Claims Against Estate.** — One of two or more executors or administrators having a claim

**632.** In Equity. — See note 6.

**633.** 11. Removal. — See note 3.

**V. COMPENSATION** — Special Compensation for Extra Services. — See note 7.  
Division of Commissions. — See notes 9, 10, 11.

**634.** See notes 1, 2, 3.

**VI. ACCOUNTING** — Separate Accounts. — See notes 5, 6.

Joint Accounts. — See notes 7, 8, 9.

**635.** See note 1.

against the estate, may present it to the others for allowance, and on its rejection sue on it. *Gallivan v. Jones*, (C. C. A.) 102 Fed. Rep. 423 (construing California law).

**632. 4. Termination of Joint Administration.** — *Langley v. Langley*, 121 Ala. 70; *Gilmore v. Gilmore*, 59 Kan. 19.

**5. Express Promise to Pay Coexecutor.** — Where one of several executors purchases property from the estate and gives a judgment therefor to all the executors, the judgment will not subsequently be opened on the mere technicality that a party cannot be both plaintiff and defendant. *Sullivan v. Sweeney*, 189 Pa. St. 474.

**6. One May Sue Other in Equity.** — *Ely v. Ely*, (N. J. 1901) 50 Atl. Rep. 657, affirmed on opinion below 64 N. J. Eq. 790.

**Instance Where Resort to Equity Is Unnecessary.** — *Langley v. Langley*, 135 Ala. 383.

**633. 3. Application by One for Removal of Other.** — *Sharpless's Estate*, 13 Pa. Dist. 33, 19 Montg. Co. Rep. (Pa.) 120, affirmed 209 Pa. St. 69. See also *Matter of Wheaton*, (Surrogate Ct.) 37 Misc. (N. Y.) 184.

**7. Allowance of Special Compensation to One Not Conclusive Against Right of Other.** — *Glover v. Check*, (Ky. 1903) 72 S. W. Rep. 302, modifying on rehearing 71 S. W. Rep. 438, 24 Ky. L. Rep. 1281, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633.

**9. Rate of Commissions Not Affected by Number of Executors or Administrators.** — *Griswold v. Smith*, 214 Ill. 323, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633; *Matter of Franklin*, (Surrogate Ct.) 26 Misc. (N. Y.) 107.

Under the present *New York* statute (Code Civ. Pro. N. Y., § 2730), where there are not more than three representatives, and the value of the personal property over all debts is one hundred thousand dollars or more, each is entitled to full commissions. *Matter of Johnson*, 170 N. Y. 139, affirming 57 N. Y. App. Div. 494; *Matter of Meyer*, 95 N. Y. App. Div. 443, affirmed on opinion below 181 N. Y. 562; *Matter of Lawrence*, (Surrogate Ct.) 37 Misc. (N. Y.) 702; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386.

**10. Division of Commissions — General Rule.** — *Griswold v. Smith*, 214 Ill. 323, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633; *Matter of Arnton*, 106 N. Y. App. Div. 326.

**Even Though One Executor Did All the Work.** — *Couchman v. Bush*, (Ky. 1904) 83 S. W. Rep. 1030, 1136.

**Discretion of Court.** — *Matter of Carter*, 132 Cal. 113, modified on other grounds (Cal. 1901) 64 Pac. Rep. 484.

**11. No Absolute Right to Equal Division of Commissions.** — *Matter of Carter*, 132 Cal. 113, modified on other grounds (Cal. 1901) 64 Pac.

Rep. 484; *Griswold v. Smith*, 214 Ill. 323, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 633; *Kernan's Succession*, 105 La. 592.

**634. 1. Commissions Apportioned According to Services.** — *Matter of Meyer*, 95 N. Y. App. Div. 443, affirmed on opinion below 181 N. Y. 562; *Matter of Franklin*, (Surrogate Ct.) 26 Misc. (N. Y.) 107; *Matter of McCormick*, (Surrogate Ct.) 46 Misc. (N. Y.) 386 (discussing history of New York statutory law on the subject); *Munhall's Estate*, 33 Pittsb. Leg. J. N. S. (Pa.) 45; *Ex p. Hilton*, 64 S. Car. 201, 92 Am. St. Rep. 800.

**Where One of Several Executors Dies Pending the Administration**, his estate is entitled to commissions only on such sums as he received and paid out during his lifetime. *Matter of Whipple*, (Surrogate Ct.) 81 N. Y. App. Div. 589.

**Where One of Two Administrators Is Prevented by the Other from sharing in the performance of the duties of the administration**, it is proper to divide the commissions equally between them. *Matter of Dudley*, 123 Cal. 256.

**2. Apportionment Not to Be Made by Court of Law.** — *McManus's Estate*, 212 Pa. St. 267, distinguishing *Wickersham's Appeal*, 64 Pa. St. 67.

**3. Agreement as to Division of Duties and Compensation.** — The existence of such a contract, or its validity after being made, if disputed, are matters of no interest to the estate, and cannot be heard and determined in the probate court. *Matter of Carter*, 132 Cal. 113, modified on other grounds (Cal. 1901) 64 Pac. Rep. 485.

**5. Where the Representative Dies before having settled his accounts** it may be done by his executor or administrator. *Cunnington v. Cunningham*, 2 Ont. L. Rep. 511.

**6. Settlement of Corepresentative After Resignation.** — *Langley v. Langley*, 121 Ala. 70.

**7. Death of Representative Pending Joint Accounting.** — *Matter of Koch*, (Surrogate Ct.) 33 Misc. (N. Y.) 672; *Matter of Steencken*, 51 N. Y. App. Div. 417.

**8. Joint Account Required — Undivided Possession of Estate.** — See *Matter of Smith*, (Surrogate Ct.) 40 Misc. (N. Y.) 331.

**9. Effect of Joint Account — Each Party Liable for Others.** — *Matter of Dougherty*, (Surrogate Ct.) 43 Misc. (N. Y.) 468.

For the rule now established in *New Jersey*, see the next following note.

An account purporting to be a joint account, settled before the time for filing claims against the estate, and distribution had thereon, has expired, will be set aside at the suit of one of the executors who had no notice or knowledge of the proceedings, where the bond is joint. *Yakel v. Yakel*, 96 Md. 240.

**635. 1. Rule of Prima Facie Liability.** — *King v. Foerster*, 61 N. J. Eq. 584, citing *Wey-*

**635.** Right to Call Each Other to Account. — See note 3.

man *v.* Thompson, 52 N. J. Eq. 263, which *reversed* 50 N. J. Eq. 8; Mueller's Estate, 8 Pa. Dist. 70, *affirmed* 190 Pa. St. 601. See also Auer's Estate, 14 Pa. Dist. 273, 31 Pa. Co. Ct. 77.

**635.** 3. Representatives Not Accountable to Each Other. — *Contra*, McManus's Estate, 212 Pa. St. 267.

The personal representative of a deceased executor is properly made a party to the accounting of a surviving co-executor, on the

petition of the latter, for the purpose of determining the extent of the deceased executor's responsibility in the event of a decree against the accountant. Owens *v.* Owens, 84 Miss. 673.

The Coexecutor of a Deceased Executor may compel the executor of the latter to account for property of the first decedent coming into his possession. Matter of Kreischer, 30 N. Y. App. Div. 313.

In *Equity*. — *Contra*, Linthicum *v.* Polk, 93 Md. 84.

## JOINT-STOCK COMPANIES.

By G. W. WALSH.

**636.** I. DEFINITION, GENERAL NATURE, AND DISTINCTIONS — 1. Definition and General Nature. — See note 1.

**637.** See note 1.

2. Distinguished from Ordinary Partnerships. — See note 2.

**638.** See note 1.

3. Distinguished from Corporations — *a.* IN GENERAL. — See note 6.

**639.** See note 2.

*c.* FOR PURPOSES OF TAXATION. — See notes 4, 7.

**641.** II. STATUTORY REGULATION — 1. In England — Statutes — The Bubble Act. — See note 4.

III. POWERS, RIGHTS, AND LIABILITIES OF MEMBERS — 1. As to Public. — See note 10.

**642.** 2. As Between Themselves. — See note 1.

**643.** IV. POWER TO TAKE AND CONVEY REAL PROPERTY. — See note 1.

**636.** 1. Definition. — Adams Express Co. *v.* Schofield, 111 Ky. 836, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 637.

**637.** 1. Generally Considered as Partnerships. — Adams Express Co. *v.* Schofield, 111 Ky. 836, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 636; Matter of Jones, 69 N. Y. App. Div. 237, *reversed* on other grounds 172 N. Y. 575; Carter *v.* Producers' Oil Co., 200 Pa. St. 579; Wehrman *v.* McFarlan, 9 Ohio Dec. 400, 6 Ohio N. P. 333.

2. Distinguished from Partnerships. — Lane *v.* Albertson, 78 N. Y. App. Div. 607; Carter *v.* Producers' Oil Co., 200 Pa. St. 579.

**638.** 1. Every Member of a Joint-stock Association Is Personally Liable. — Raymond *v.* Colton, (C. C. A.) 104 Fed. Rep. 219; Laney *v.* Fickel, 83 Mo. App. 60; Wahrman *v.* McFarlan, 9 Ohio Dec. 400, 6 Ohio N. P. 333; Samuel *v.* Sivanger, 7 Del. Co. Rep. (Pa.) 446.

6. Distinguished from Corporations. — Lane *v.* Albertson, 78 N. Y. App. Div. 607; Colton *v.* Raymond, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 580. See also Atty-Gen. *v.* McVichie, (Mich. 1904) 101 N. W. Rep. 552, 11 Detroit Leg. N. 591.

In Canada joint-stock companies are by statute made corporations. Maple Leaf Rubber Co. *v.* Brodie, 18 Quebec Super. Ct. 352.

**639.** 2. See Lane *v.* Albertson, 78 N. Y.

App. Div. 607; Matter of Jones, 172 N. Y. 575, *reversing* 69 N. Y. App. Div. 237.

4. "Individual Responsibility of the Shareholder for the debts of the association is no longer incompatible with the corporate idea." Matter of Jones, 69 N. Y. App. Div. 246, *per* O'Brien, J., *dissenting*, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 639. Judgment of Appellate Division *reversed* 172 N. Y. 575.

7. Transfer Tax — New York. — Matter of Jones, 172 N. Y. 575, *reversing* 69 N. Y. App. Div. 237.

**641.** 4. See *In re* Euphrates, etc., Steam Nav. Co., (1904) 1 Ch. 360, 73 L. J. Ch. 175, 90 L. T. N. S. 56, 11 Manson 93.

10. What Necessary to Establish Liability. — See Laney *v.* Fickel, 83 Mo. App. 60.

Canada — Surrender of Certificates. — Union Bank *v.* Morris, 27 Ont. App. 396, *affirmed* 31 Can. Sup. Ct. 594.

Shareholder Cannot Avoid Liability by Setting up Defect in Organization. — Common *v.* McArthur, 29 Can. Sup. Ct. 239, *reversing* 8 Quebec Q. B. 128.

**642.** 1. Relations of Members as Between Themselves. — That the general law of partnership controls in the absence of any specific provision to the contrary, see Laney *v.* Fickel, 83 Mo. App. 60.

**643.** 1. Powers as to Real Estate. — See Mat-

**644. V. ACTIONS BY AND AGAINST JOINT-STOCK COMPANIES — 1. In Local Jurisdiction** — Personal Judgment. — See note 3.

An Action Against the Members Is Regarded as Supplementary. — See note 6.

**2. In Foreign Jurisdictions** — Service of Process. — See note 9.

**645. VI. DISSOLUTION — 2. By Equitable Proceedings.** — See note 3.

ter of Jones, 172 N. Y. 575, reversing 69 N. Y. App. Div. 237.

**644. 3. Personal Judgment Against Members.** — Peckner v. Webb, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 291.

**6. Peckner v. Webb,** (Supm. Ct. App. T.) 35 Misc. (N. Y.) 291.

**9. Process.** — Adams Express Co. v. Schofield, 111 Ky. 836, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 644.

**645. 3. By Decree in Equity.** — Colton v. Raymond, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 580.

## JOINT TENANTS AND TENANTS IN COMMON.

By H. O'B. COOPER.

**649. II. NATURE AND INCIDENTS OF ESTATES IN COTENANCY — 1. Joint Tenancy** — *a. IN GENERAL.* — See note 4.

Unity of Possession. — See note 5.

**650. b. RIGHT OF SURVIVORSHIP — (1) In General.** — See note 1.

(2) *Doctrine of Survivorship Abolished by Statute.* — See note 6.

Joint Tenancies Not Necessarily Abolished. — See notes 9, 10, 11.

**651. Statutes Not Applicable to Estates by Entireties.** — See note 1.

**2. Tenancy in Common** — *a. IN GENERAL.* — See notes 2, 5.

*b. EQUALITY OF INTEREST.* — See note 8.

**652. III. ESTATES IN COTENANCY DISTINGUISHED FROM EACH OTHER AND FROM SIMILAR ESTATES — 1. From Each Other.** — See note 1.

**3. From Tenancies by Entireties.** — See note 3.

**649. 4. Nature of Joint Tenancy.** — *In re Livingstone*, 2 Ont. L. Rep. 381; *Myers v. Rupert*, 8 Ont. L. Rep. 668; *Colson v. Baker*, (County Ct.) 42 Misc. (N. Y.) 407.

**Homestead.** — The Widow and Minor Children are not tenants in common in the homestead estate, but their rights are more in the nature of that of joint tenants. *Gore v. Riley*, 161 Mo. 238.

**5. Ricks v. Pope**, 129 N. Car. 52.

**650. 1. Right of Survivorship.** — *Norris v. Hall*, 124 Mich. 170; *Greenbrier Bank v. Effingham*, 51 W. Va. 267. See also *Steinway v. Steinway*, 163 N. Y. 183.

**Creation Question of Intent.** — *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24.

**6. Doctrine of Survivorship Abolished.** — *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *McCallister v. Folden*, 110 Ky. 732; *Norris v. Hall*, 124 Mich. 170; *Lemmons v. Reynolds*, 170 Mo. 227; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616.

**Virginia Statute — Death of Tenant Before Estate Vests.** — *Lockhart v. Vandyke*, 97 Va. 356.

**In West Virginia** though the common-law rule of joint tenancy has been changed, it is expressly provided that such change shall not apply "when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to" the survivor. *Greenbrier Bank v. Effingham*, 51 W. Va. 267.

**9. Joint Tenancies Not Abolished by Statutes**

**Abolishing Survivorship.** — *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

**10. Right of Survivorship Given by Express Terms of Conveyance.** — *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24.

**11. Equitable Loan, etc., Co. v. Waring**, 117 Ga. 599, 97 Am. St. Rep. 177, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

**651. 1. Estates by Entireties.** — *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616.

**2. Nature of Tenancy in Common.** — See *Harrison v. McReynolds*, 183 Mo. 533; *Steinway v. Steinway*, 163 N. Y. 183; *Allred v. Smith*, 135 N. Car. 443.

**Joint Occupancy of Family — Title in One — No Tenancy in Common.** — *Straughan v. Tysor*, 124 N. Car. 229.

**5. Parties Owning Distinct Interests in Same Property Not Tenants in Common.** — *Ricks v. Pope*, 129 N. Car. 52.

**Owners of Separate Stories of House.** — *Badger Lumber Co. v. Knights of Pythias*, 157 Mo. 366.

**8. Interests of Tenants in Common Prima Facie Equal.** — *Jackson v. Moore*, 94 N. Y. App. Div. 504, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651.

**652. 1. See Redemptorist Fathers v. Lawler**, 205 Pa. St. 24.

**3. Cotenancies Distinguished from Tenancies by**

**652.** 4. From Partnerships. — See note 4.

**653.** IV. CREATION OF ESTATES IN COTENANCY — 1. At Common Law —  
a. GENERAL RULE OF CONSTRUCTION — Joint Tenancies Favored by Early Common Law. — See note 2.

The Reason of This Rule. — See note 4.

**654.** b. JOINT TENANCY — (1) *In General*. — See note 4.

(2) *By Deed or Will*. — See notes 6, 8.

**655.** (3) *By Disseizin*. — See notes 1, 2.

c. TENANCY IN COMMON — (1) *In General — By Deed or Will* — At Common Law. — See note 3.

Intention Governs. — See note 4.

**656.** In the Case of Wills. — See notes 1, 2.

**657.** (2) *By Destruction of Joint Estates*. — See note 1.

2. Under Modern Practice and Statutes — a. IN GENERAL — In the United States. — See note 4.

b. CONSTITUTIONALITY OF STATUTES. — See note 5.

**658.** c. JOINT TENANCY — (1) *Creation by Express Terms*. — See note 2.

**659.** Illustrations. — See note 4.

(2) *Conveyance to Cotrustees* — Effect of Statutes Abolishing *Jus Accrescendi*. — See note 9.

**660.** d. TENANCY IN COMMON — (1) *In General*. — See note 1.

**Entireties.** — *McCallister v. Folden*, 110 Ky. 732; *Pease v. Whitman*, 182 Mass. 363; *Messing v. Messing*, 64 N. Y. App. Div. 125; *Spruill v. Branning Mfg. Co.*, 130 N. Car. 42; *Ray v. Long*, 132 N. Car. 891; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616; *Wallace v. St. John*, 119 Wis. 585, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652. See also *Kron v. Kron*, 195 Ill. 181; *Harrison v. McReynolds*, 183 Mo. 533; *Price v. Pestka*, 54 N. Y. App. Div. 59.

**652.** 4. Difference Between Partnership and Cotenancy. — See *Garside v. Norval*, 1 Alaska 19; *Logan v. Oklahoma Mill Co.*, 14 Okla. 402.

**653.** 2. Joint Tenancies Formerly Favored at Common Law. — *In re Livingstone*, 2 Ont. L. Rep. 381. See also *Colson v. Baker*, (County Ct.) 42 Misc. (N. Y.) 407.

4. Joint Tenancies Not Favored in Modern Law. — See *Colson v. Baker*, (County Ct.) 42 Misc. (N. Y.) 407.

**654.** 4. Created by Specific Act of Parties. — *Norris v. Hall*, 124 Mich. 170; *Colson v. Baker*, (County Ct.) 42 Misc. (N. Y.) 407; *Lockhart v. Vandyke*, 97 Va. 356.

6. Joint Tenancy Created Where There Is No Intention to Sever. — *Owen v. Gibbons*, (1902) 1 Ch. 636; *Pickett v. Garrard*, 131 N. Car. 195; *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24; *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 93 Am. St. Rep. 976; *Lockhart v. Vandyke*, 97 Va. 356; *Wallace v. St. John*, 119 Wis. 585.

8. Gift to One and His Children. — *Combs v. Eversole*, (Ky. 1901) 64 S. W. Rep. 524.

No Children at Time of Devise. — Under a devise to a person and his children, he having no children at the time of the devise, neither a joint tenancy nor a tenancy in common between the parent and the after-born children is created, unless by some other part of the will it appears that the testator so intended. *Martin v. Martin*, 52 W. Va. 381.

**655.** 1. Joint Tenancy Created by Disseizin. — See *Fleming v. Katahdin Pulp, etc., Co.*, 93 Me. 110.

2. *Myers v. Ruport*, 8 Ont. L. Rep. 668, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

3. Creation of Tenancy in Common at Common Law. — *Myers v. Ruport*, 8 Ont. L. Rep. 668, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 655.

4. Conveyance of Definite Number of Acres Out of Tract. — *Hodge v. Bennett*, 78 Miss. 868, 84 Am. St. Rep. 652.

**656.** 1. Devise to Several Persons to Be Divided Between Them Creates Tenancy in Common. — *Humason v. Andrews*, 72 Conn. 595; *Osgood v. Rogers*, 186 Mass. 238; *Loomis v. Gorham*, 186 Mass. 444.

2. Words of Survivorship Create Joint Tenancy. — *Mustain v. Gardner*, 203 Ill. 284.

**657.** 1. *Messing v. Messing*, 64 N. Y. App. Div. 125. See generally *infra*, this title, **708**, 9 *et seq.*

4. Common Law as to Joint Tenancies and Tenancies in Common Changed by Statute. — *Binswanger v. Henninger*, 1 Alaska 509.

5. Statutes Not Retroactive. — *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41.

**658.** 2. Joint Tenancies Created by Express Terms. — *Colson v. Baker*, (County Ct.) 42 Misc. (N. Y.) 407.

**659.** 4. *Norris v. Hall*, 124 Mich. 170.

9. *Norris v. Hall*, 124 Mich. 170; *Lemmons v. Reynolds*, 170 Mo. 227. See generally the title TRUSTS AND TRUSTEES, **939**, 6 *et seq.*

**660.** 1. Conveyances, etc., to Several Persons Create Tenancies in Common. — *Matter of Hittell*, 141 Cal. 432; *Mustain v. Gardner*, 203 Ill. 284; *Tyer v. Lilly*, 81 Miss. 606; *Lemmons v. Reynolds*, 170 Mo. 227; *Nalle v. Parks*, 173 Mo. 616; *Steinway v. Steinway*, 163 N. Y. 183; *Jones v. Hand*, 78 N. Y. App. Div. 56, affirmed 175 N. Y. 519; *Matter of De Rycke*, 99 N. Y. App. Div. 596; *Steenberge v. Low*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 285 (devise to husband and wife); *McPhillips v. Fitzgerald*, 76 N.



**661.** Conveyance of Several Interests. — See note 1.

(a) *By Descent*. — See note 3.

(3) *Certain Cases Considered* — (a) Purchase of Undivided Interest in Property. — See note 8.

**663.** Conveyance by Acreage. — See note 2.

Reservation of Interest in Deed. — See note 5.

(b) Production of Property on Shares — Raising Crops on Shares. — See note 9.

**665.** (g) Miscellaneous Cases — Where Land Is Patented to Two or More Persons. — See note 13.

**668.** VI. WHAT PROPERTY MAY BE HELD IN COTENANCY — Mining and Water Rights. — See note 8.

**669.** VII. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF COTENANTS INTER SE — 1. In General. — See note 1.

Entry and Possession of One for Benefit of All. — See note 2.

**672.** 2. Rights and Powers — c. CONTRACTS RESPECTING COMMON PROPERTY — (1) *With Each Other*. — See notes 2, 3.

(2) *With Third Persons* — (a) In General. — See notes 9, 10.

**673.** See note 3.

(b) *Leasing Common Property*. — See notes 4, 5.

Y. App. Div. 15, *affirmed* 177 N. Y. 543; *Walter v. Ham*, 68 N. Y. App. Div. 381; *Gallagher v. Rhode Island Hospital Trust Co.*, 22 R. I. 141 (as to real estate). See also *Levine v. Goldsmith*, 83 N. Y. App. Div. 399.

**661.** 1. Designation of Particular Part as Individual Share. — *McNally v. McNally*, 23 R. I. 180.

3. Creation of Tenancy in Common by Descent. — *McCann v. Welch*, 106 Wis. 142.

8. Purchaser of Undivided Interest Tenant in Common with Other Cotenants. — *Messing v. Messing*, 64 N. Y. App. Div. 125.

**663.** 2. Conveyance of Undivided Interest by Acreage. — *Chapman v. Mill Creek Coal, etc., Co.*, 54 W. Va. 205, *per* Poffenbarger, J., *dis-senting*, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 663.

5. *Smith v. Furbish*, 68 N. H. 123.

9. Raising Crops on Shares. — *Curtner v. Lyndon*, 128 Cal. 35. And see the title CROPS, 325. 2.

**665.** 13. *Garside v. Norval*, 1 Alaska 19.

**668.** 8. Mining and Water Rights. — *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28; *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841.

**669.** 1. *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28; *Merchants Bank v. Foster*, 124 Ala. 696; *Cheney v. Ricks*, 87 Ill. App. 388, *affirmed* 187 Ill. 171; *Smith v. Smith*, 98 Me. 597, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668; *Hendricks v. Musgrove*, 183 Mo. 300; *Funk v. Seehorn*, 99 Mo. App. 587; *Yarwood v. Johnson*, 29 Wash. 643; *Justice v. Lawson*, 46 W. Va. 163; *Weaver v. Akin*, 48 W. Va. 456; *Allen v. Allen*, 114 Wis. 615.

2. Entry and Possession of One Cotenant That of All — *United States*. — *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28.

*Alabama*. — *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82.

*California*. — *Faubel v. McFarland*, 144 Cal. 717.

*Iowa*. — *Crawford v. Meis*, 123 Iowa 610, 101 Am. St. Rep. 337, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669.

*Missouri*. — *Stevens v. Martin*, 168 Mo. 407.

*New York*. — See *Zapf v. Carter*, 70 N. Y. App. Div. 395, *appeal dismissed* 176 N. Y. 576.

*North Carolina*. — *Tharpe v. Holcomb*, 126 N. Car. 365; *Conkey v. John L. Roper Lumber Co.*, 126 N. Car. 499; *Roscoe v. John L. Roper Lumber Co.*, 124 N. Car. 42.

*Oregon*. — *Mattis v. Hosmer*, 37 Oregon 523.

*Pennsylvania*. — *Beam v. Gardner*, 18 Pa. Super. Ct. 245; *Wells v. Becker*, 24 Pa. Super. Ct. 174.

*Texas*. — *Newcomb v. Cox*, 27 Tex. Civ. App. 583.

*Washington*. — *Yarwood v. Johnson*, 29 Wash. 643.

*West Virginia*. — *Talbott v. Woodford*, 48 W. Va. 449.

*Wyoming*. — *Gilland v. Union Pac. R. Co.*, 6 Wyo. 185.

Where There Has Been an Actual Ouster of the cotenant, or some act equivalent thereto, the rule has no application. *Beal v. McMenemy*, 63 Neb. 70, 93 Am. St. Rep. 427.

**672.** 2. Cotenants May Contract with Each Other Concerning Common Property. — *In re Journey*, 7 Del. Ch. 1; *Smith v. Smith*, 98 Me. 597.

Division of Realty. — See *Ralph v. Ward*, 109 Ga. 363.

3. Tenant May Contract with Cotenant for Exclusive Use of Property. — *Smith v. Smith*, 98 Me. 597; *Schmidt v. Constans*, 82 Minn. 347, 83 Am. St. Rep. 437.

9. *Wagoner v. Silva*, 139 Cal. 559; *Mayfield v. McKnight*, (Tenn. Ch. 1899) 56 S. W. Rep. 42.

10. Acts of One Tenant in Common Not Binding on Cotenants. — *Smith v. Hogle*, 116 Iowa 645; *Wilcox v. Gould*, (Ky. 1900) 56 S. W. Rep. 526; *Hawkins v. Collins*, 61 S. Car. 537; *Mayfield v. McKnight*, (Tenn. Ch. 1899) 56 S. W. Rep. 42; *Strickley v. Hill*, 22 Utah 257.

**673.** 3. Sale or Incumbrance of Individual Interest of One Cotenant Cannot Affect Rights of Others. — *Webb v. Winter*, (Cal. 1901) 65 Pac. Rep. 1028; *Jolliffe v. Maxwell*, (Neb. 1902) 91 N. W. Rep. 563.

4. Lease of Entire Property by One Cotenant

**674.** See notes 1, 2, 3.

**675.** *d.* PURCHASE OF OUTSTANDING TITLE OR INCUMBRANCE — (1) *General Rule — Purchase by One Inures to Benefit of All.* — See note 1. Rule Qualified as to Tenants in Common. — See note 2.

**676.** (2) *Purchase of Property at Forced Sale — (a) At Judicial Sale.* — See note 4.

(b) *At Tax Sale.* — See notes 6, 8.

**677.** (3) *Purchase of Tax Title.* — See notes 2, 3.

**679.** (8) *Contribution by Cotenants.* — See note 7.

*He Has a Reasonable Time.* — See note 8.

**680.** *e.* ASSAILING COMMON TITLE. — See notes 2, 5.

*f.* SALE OR CONVEYANCE OF COMMON PROPERTY — (1) *Of Whole Property.* — See notes 6, 7, 8.

**681.** See note 1.

(2) *Of One's Own Interest — (a) As Undivided Share.* — See note 5.

**682.** (b) *By Metes and Bounds — No Power to Convey by Metes and Bounds.* — See note 8.

**684.** *How Far Good Against Other Cotenants.* — See note 6.

(3) *Grant of Specific Right or Easement.* — See note 9.

**Not Binding on Others.** — *Jackson v. O'Rorke*, (Neb. 1904) 98 N. W. Rep. 1068; *Snyder v. Harding*, 34 Wash. 286.

**673.** 5. *Schwartz v. McQuaid*, 214 Ill. 357, 105 Am. St. Rep. 112.

**674.** 1. *Lease by Cotenant of His Own Interest.* — *Smith v. Smith*, 98 Me. 597; *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841.

*Specific Performance.* — See *Hexter v. Pearce*, (1900) 1 Ch. 341.

2. *Forman v. Saunders*, 92 Minn. 370, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674.

3. *Cecil v. Clark*, 49 W. Va. 459.

**675.** 1. *Purchase of Outstanding Title by One Cotenant Inures to Benefit of All.* — *Ryason v. Dunten*, 164 Ind. 85; *Boynton v. Veldman*, 131 Mich. 555; *Nalle v. Parks*, 173 Mo. 616; *United New Jersey R., etc., Co. v. Consolidated Fruit Jar Co.*, (N. J. 1903) 55 Atl. Rep. 46; *Whitehead v. Jones*, 197 Pa. St. 511; *Parker v. Brast*, 45 W. Va. 399; *Morris v. Roseberry*, 46 W. Va. 24; *Allen v. Allen*, 114 Wis. 615, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675. See also *Whitaker v. Whitaker*, 157 Mo. 342; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, declaring the rule, but holding it to be inapplicable in the case at bar for the reason that the relation of tenants in common did not exist.

2. *Rule Qualified as to Tenants in Common.* — *Boynton v. Veldman*, 131 Mich. 555. See also *Allen v. Allen*, 114 Wis. 615.

**676.** 4. *Purchase of Property by One Cotenant at Judicial Sale.* — *Ladd v. Kuhn*, 27 Ind. App. 535; *Wyatt v. Wyatt*, 81 Miss. 219.

6. *Purchase by One Cotenant at Tax Sale.* — *Fields v. Farmers, etc., Bank*, 110 Ky. 256; *Hake v. Lee*, 106 La. 482; *Bossier v. Herwig*, 112 La. 539; *Sleight v. Roe*, 125 Mich. 585; *Crawford v. O'Connell*, 39 Oregon 153; *Parker v. Brast*, 45 W. Va. 399. See also *Alexander v. Light*, 112 La. 925.

8. *Crawford v. O'Connell*, 39 Oregon 153.

**677.** 2. *Purchase of Tax Title by One Cotenant Inures to Benefit of All.* — *Blumenthal v. Culver*, 116 Iowa 326; *Gass v. Waterhouse*, (Tenn. Ch.

1900) 61 S. W. Rep. 450; *Hake v. Lee*, 106 La. 482; *Bossier v. Herwig*, 112 La. 539; *Boynton v. Veldman*, 131 Mich. 555; *Parker v. Brast*, 45 W. Va. 399.

3. *Hake v. Lee*, 106 La. 482; *Bossier v. Herwig*, 112 La. 539. See also *Alexander v. Light*, 112 La. 925.

**679.** 7. *Contribution to Purchase of Outstanding Title.* — *Craven v. Craven*, (Neb. 1903) 94 N. W. Rep. 604; *Allen v. Allen*, 114 Wis. 615. And see the title CONTRIBUTION AND EXONERATION, 354. 1 *et seq.*

8. *Cotenant Must Elect to Take Advantage of Purchase Within Reasonable Time.* — *Asher v. Howard*, (Ky. 1902) 70 S. W. Rep. 277, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 679. See also *Ryason v. Dunten*, 164 Ind. 85.

**680.** 2. *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841.

5. *Title by Adverse Possession.* — *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676.

6. *Sale of Entire Property by One Tenant Void as to Other Tenants.* — *Kenoye v. Brown*, 82 Miss. 607, 100 Am. St. Rep. 645; *Beers v. Sharpe*, 44 Oregon 386; *Gurley v. Dickason*, 19 Tex. Civ. App. 203; *Parker v. Brast*, 45 W. Va. 399.

*Deed Voidable.* — *Kimball v. Commonwealth Ave. St. R. Co.*, 173 Mass. 152.

7. *Sale by Authority.* — *Beers v. Sharpe*, 44 Oregon 386.

8. *Ratification of Sale.* — *Whitaker v. Hicks*, 123 Iowa 733.

**681.** 1. *Sale of Entire Property by One Cotenant Valid as Against Him.* — *McElroy v. McLeay*, 71 Vt. 396.

5. *Conveyance of Undivided Interest to Stranger.* — *Messing v. Messing*, 64 N. Y. App. Div. 125; *Croasdale v. Van Boyneburgk*, 195 Pa. St. 377.

**682.** 8. *One Tenant Cannot Convey Specific Part of Common Property to Prejudice of Cotenants.* — *Jolliffe v. Maxwell*, (Neb. 1902) 91 N. W. Rep. 563.

**684.** 6. *Kenoye v. Brown*, 82 Miss. 607, 100 Am. St. Rep. 645, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 684, and supporting the whole text paragraph.

9. *Grant by One Tenant of Specific Right or*

**685. 3. Duties and Liabilities — a. AS TO LIENS AND INCUMBRANCES —**(1) *In General.* — See notes 5, 6.**686. b. AS TO EXPENSES FOR CARE AND MANAGEMENT — (1) *In General.*** — See notes 2, 3.(2) *Taxes* — Cotenant Paying Taxes Entitled to Contribution. — See notes 9, 11, 12.**687.** See note 1.*Taxes Must Have Been Paid in Interest of Other Cotenants.* — See note 2.(3) *Expense of Litigation.* — See notes 5, 6.**688. (5) *Improvements* — Lien for Improvements.** — See note 2.(6) *Personal Services.* — See note 5.**c. AS TO RENTS AND PROFITS — (1) *In General* — By the Common Law.** — See note 8.**689. Statutory Liability Between Cotenants.** — See note 1.**690. (2) *Where Premises Are Occupied by One Cotenant* — (a) *Where There Is No Agreement to Pay Rent.*** — See note 3.*The Prevailing Doctrine.* — See note 4.**691. Occupying Tenant Accountable for Use and Occupation.** — See note 3.**Easement in Common Property Void as Against Cotenants.** — *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699; *Beers v. Sharpe*, 44 Oregon 386. See also *Burt, etc., Lumber Co. v. Clay City Lumber Co.*, 111 Ky. 725.**Dedication of Highway — Defense to Trespass Against Municipality.** — See *Harris v. Ansonia*, 73 Conn. 359.**685. 5. *Rippe v. Badger***, 125 Iowa 725, 106 Am. St. Rep. 336; *Arthur v. Arthur*, 76 N. Y. App. Div. 330 (interest on mortgage); *Green v. Walker*, 22 R. I. 14; *Grove v. Grove*, 100 Va. 556. See also *Case v. Case*, 103 Ill. App. 177; *Funk v. Seehorn*, 99 Mo. App. 587.**6. Cotenants Severally Liable for Entire Debt.** — See *Dougherty v. Kubat*, 67 Neb. 269.**686. 2. *Merchants Bank v. Foster***, 124 Ala. 696; *Morris v. Roseberry*, 46 W. Va. 24.**Adverse Possession.** — A joint owner who does not represent his co-owner, but holds the property adversely to him, cannot legally insure the entire property from loss by fire and charge any part of the insurance to his co-owner, against his consent. *Gilroy v. Richards*, 26 Tex. Civ. App. 355.3. See *Bowman v. Pettit*, 68 Ark. 126.**Insurance — One Tenant Excluded.** — See *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502.**9. Cotenants Must Contribute Towards Payment of Taxes.** — *McClintock v. Fontaine*, 119 Fed. Rep. 448; *Glos v. Clark*, 97 Ill. App. 609, dismissed 199 Ill. 147; *Plant v. Fate*, 114 Iowa 283; *Montgomery v. Montgomery*, (Ky. 1904) 78 S. W. Rep. 465; *Hake v. Lee*, 106 La. 482; *Burnes v. Porter*, 82 Mo. App. 66; *Arthur v. Arthur*, 76 N. Y. App. Div. 330; *Morris v. Roseberry*, 46 W. Va. 24. See also *Wilson v. Sanger*, 57 N. Y. App. Div. 323.**11. Interest.** — *Morris v. Roseberry*, 46 W. Va. 24. See also *Glos v. Clark*, 97 Ill. App. 609, dismissed 199 Ill. 147.**12. Reimbursement for Taxes Secured by Lien.** — *McClintock v. Fontaine*, 119 Fed. Rep. 448; *Bennett v. Bennett*, 84 Miss. 493; *Burnes v. Porter*, 82 Mo. App. 66.**687. 1. *Blackaby v. Blackaby***, 185 Ill. 94; *Armijo v. Neher*, 11 N. Mex. 645.2. *Booth v. Booth*, 114 Iowa 78; *Downey v. Strouse*, 101 Va. 226.**5. Expense of Litigation — Kentucky Statute.** — *Francis v. Million*, (Ky. 1904) 80 S. W. Rep. 486.6. *McClintock v. Fontaine*, 119 Fed. Rep. 448; *Bowman v. Pettit*, 68 Ark. 126.**688. 2. Lien for Improvements.** — *Ward v. Ward*, 50 W. Va. 517.**5. No Allowance for Services in Care and Management of Property.** — *Dunavant v. Fields*, 68 Ark. 534; *Anderson v. Northrop*, 44 Fla. 472; *Gay v. Berkey*, (Mich. 1904) 100 N. W. Rep. 920; *Switzer v. Switzer*, 57 N. J. Eq. 421. See also *Boyce v. Boyce*, 124 Mich. 696.**8. No Action for Rents and Profits at Common Law Between Cotenants.** — *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44; *Armijo v. Neher*, 11 N. Mex. 645, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 688.**689. 1. Tenant in Common Liable to Cotenant under Statutes.** — *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502; *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44; *Armijo v. Neher*, 11 N. Mex. 645, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 688; *Messing v. Messing*, 64 N. Y. App. Div. 125.**690. 3. Statutes Not Applicable Where Tenant Occupies Premises for His Own Benefit.** — *Cheney v. Ricks*, 187 Ill. 171; *Solomon v. Rogers*, 13 Pa. Super. Ct. 70; *Wells v. Becker*, 24 Pa. Super. Ct. 174; *Keller v. Lamb*, 10 Kulp (Pa.) 246.**4. Tenant in Possession Not Liable for Occupation Rent.** — *Ryason v. Dunten*, 164 Ind. 85; *Willes v. Loomis*, 94 N. Y. App. Div. 67; *Biglow v. Biglow*, 75 N. Y. App. Div. 98; *Cosgriff v. Dewey*, 164 N. Y. 1, 79 Am. St. Rep. 620; *Solomon v. Rogers*, 13 Pa. Super. Ct. 70. See also *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502.**Leasehold Estate.** — See *Wells v. Becker*, 24 Pa. Super. Ct. 174.**691. 3. Statutory Liability of Cotenant for Use and Occupation.** — *Cheney v. Ricks*, 187 Ill. 171; *Lancaster v. Flowers*, 208 Pa. St. 199; *Keller v. Lamb*, 10 Kulp (Pa.) 246.*The Pennsylvania statute does not apply to*

- 693.** (b) *Where There Is an Agreement to Pay Rent.* — See notes 3, 4.  
*Lessee Holding Over.* — See note 7.
- 694.** (3) *Where Premises Are Leased to Stranger.* — See notes 1, 2.  
*Where Several Cotenants Unite in Leasing.* — See note 4.  
 (4) *Where Cotenant Has Been Ousted.* — See notes 5, 6, 7, 8.
- 695.** (5) *Measure of Accountability* — *Express Agreement.* — See note 4.
- 697.** (7) *Statute of Limitations* — *Interest.* — See notes 1, 2.  
 (8) *Lien for Rents and Profits.* — See notes 4, 5.
- 698.** d. *AS TO LOSS, INJURY, OR DESTRUCTION OF PROPERTY* —  
 (2) *Waste.* — See notes 5, 6.  
*What Constitutes Waste.* — See note 7.
- 699.** *Cutting Timber.* — See note 1.  
*Removal of Ore or Other Mineral.* — See notes 3, 4.
- VIII. ACTIONS BETWEEN COTENANTS** — 1. *Actions at Law* — a. *IN GENERAL.* — See note 7.
- 700.** d. *REPLEVIN.* — See note 3.  
 e. *TRESPASS QUARE CLAUSUM.* — See notes 4, 5.

tenants under a lease for years, but was intended to affect such owners of real estate as were joint tenants or tenants in common at common law. *Wells v. Becker*, 24 Pa. Super. Ct. 174.

**693.** 3. *Cotenant Liable for Occupation Rent by Agreement.* — See *Turnbull v. Foster*, 116 Ga. 765.

4. *Chapman v. Duffy*, (Colo. App. 1905) 79 Pac. Rep. 746.

7. *Cotenant Not Ordinarily Presumed to Hold Over under Lease.* — *Valentine v. Healey*, 178 N. Y. 391.

**694.** 1. *Tenant in Common Liable to Cotenant for Rent Received from Stranger.* — *Cheney v. Ricks*, 87 Ill. App. 388, affirmed 187 Ill. 171; *Thompson v. Sanders*, 113 Ga. 1024; *Eighmey v. Thayer*, 135 Mich. 682; *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44.

*Credits* — *Payment of Rent to Widow.* — See *Switzer v. Switzer*, 57 N. J. Eq. 421.

2. *Switzer v. Switzer*, 57 N. J. Eq. 421.

4. *Gedney v. Gedney*, 160 N. Y. 471, affirming 19 N. Y. App. Div. 407.

5. *Tenant in Common Who Has Ousted Cotenant Liable for Rents and Profits.* — *Anderson v. Northrop*, 44 Fla. 472; *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44; *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194; *Stephens v. Hewitt*, (Tex. Civ. App. 1903) 77 S. W. Rep. 229.

6. *Fact that No Rents or Profits Were Received Immaterial.* — *Rippe v. Badger*, 125 Iowa 725, 106 Am. St. Rep. 336.

7. *Cecil v. Clark*, 49 W. Va. 459.

8. See *Anderson v. Northrop*, 44 Fla. 472.

**695.** 4. *Estoppel.* — See *Lancaster v. Flowers*, 208 Pa. St. 199.

**697.** 1. *Statute of Limitations Does Not Run as Between Cotenants.* — *Ela v. Ela*, 70 N. H. 163; *Armijo v. Neher*, 11 N. Mex. 645, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 697; *Parker v. Brast*, 45 W. Va. 399.

2. *Interest.* — Where a tenant came into possession and held possession adversely to his cotenants, under a claim of title, it was held that no demand was necessary to start the running of interest. *Armijo v. Neher*, 11 N. Mex. 645.

4. *No Lien for Rents and Profits.* — *Dunavant v. Fields*, 68 Ark. 534.

5. *Lien for Rents and Profits* — *Mississippi.* — *Bennett v. Bennett*, 84 Miss. 493.

**698.** 5. *Statutory Liability of Tenants in Common for Waste.* — *Thompson v. Sanders*, 113 Ga. 1024; *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 94 Am. St. Rep. 388; *Proctor v. Proctor*, 182 Mass. 415; *Cosgriff v. Dewey*, 164 N. Y. 1, 79 Am. St. Rep. 620.

6. *State v. Judge*, 52 La. Ann. 103.

7. *What Constitutes Waste.* — *Cosgriff v. Dewey*, 164 N. Y. 1, 79 Am. St. Rep. 620.

**699.** 1. *Cutting of Timber Waste.* — *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 94 Am. St. Rep. 388.

3. *Removal of Coal or Other Mineral.* — *Cosgriff v. Dewey*, 164 N. Y. 1, 79 Am. St. Rep. 620.

4. *Abbey v. Wheeler*, 170 N. Y. 122.

*May Waive Tort and Require Accounting.* — *Cecil v. Clark*, 49 W. Va. 459.

7. *No Actions at Law Between Cotenants as General Rule.* — *Biglow v. Biglow*, 75 N. Y. App. Div. 98.

**700.** 3. *One Cotenant Cannot Maintain Replevin Against Another.* — *Bain v. Trixler*, 24 Ind. App. 246; *Smith-McCord Dry-Goods Co. v. Burke*, 63 Kan. 740; *Miller v. Crigler*, 83 Mo. App. 395.

*Maintainable Where One Repudiates Other's Interest.* — *Cornett v. Hall*, 103 Mo. App. 353, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700-702.

*Maintainable Where Property Severable.* — *Schwartz v. Stock*, 26 Nev. 128, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700.

4. *Tenant in Common Cannot Maintain Trespass Quare Clausum Against Cotenant.* — *Sullivan v. Sherry*, 111 Wis. 476, 87 Am. St. Rep. 890.

5. *Rule Otherwise in Case of Ouster or Destruction of Property.* — *Harford v. Taylor*, 181 Mass. 266; *Avera v. Williams*, 81 Miss. 714, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700; *Reep v. Wagner*, 21 Pa. Super. Ct. 268; *Sullivan v. Sherry*, 111 Wis. 476, 87 Am. St. Rep. 890, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700. See also *Sweeney v. Hanley*, (C. C. A.) 126 Fed. Rep. 97.

**700.** *f.* TROVER — General Rule. — See note 7.

**701.** Enjoyment of Common Property Rendered Impossible. — See note 2.

**702.** Sale of Property as Conversion. — See note 4.

**703.** Rule Where Property Is Severable in Nature. — See note 3.  
Measure of Recovery. — See note 6.

*g.* ACTION ON CASE. — See note 8.

**704.** *i.* ASSUMPSIT. — See note 5.

**705.** 2. Suits in Equity — Modern Statutes. — See note 2.

Bill for Accounting. — See note 5.

Injunction. — See notes 7, 8.

**707.** IX. RIGHTS AND LIABILITIES OF COTENANTS AND THIRD PERSONS —  
2. Liabilities of Cotenants to Strangers — *b.* EXECUTION AND ATTACHMENT OF  
INTEREST OF COTENANT — General Rule. — See note 4.

Manner of Levy. — See note 7.

**708.** Sale of Entire Property by Sheriff as Conversion. — See note 2.

**713.** JOURNAL. — See note 1.

**700.** 7. No Action of Trover Against Cotenant for Exclusive Appropriation of Property. — Moore *v.* Walker, 124 Ala. 199; Miller *v.* Crigler, 83 Mo. App. 395; Schwartz *v.* Stock, 26 Nev. 155, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 700; Sullivan *v.* Sherry, 111 Wis. 476, 87 Am. St. Rep. 890. See also Gates *v.* Bowers, 169 N. Y. 14, 88 Am. St. Rep. 530.

**701.** 2. Cotenant Liable for Conversion of Property. — Moore *v.* Walker, 124 Ala. 199; Schwartz *v.* Stock, 26 Nev. 155, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 701; Sullivan *v.* Sherry, 111 Wis. 476, 87 Am. St. Rep. 890. See also Gates *v.* Bowers, 169 N. Y. 14, 88 Am. St. Rep. 530.

**702.** 4. Sale of Property by One Cotenant Constitutes Conversion. — Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 94 Am. St. Rep. 388; Leader *v.* Plante, 95 Me. 343; Ferris *v.* Nelson, 60 N. Y. App. Div. 430.

**703.** 3. Conversion of Divisible Property. — Gates *v.* Bowers, 169 N. Y. 14, 88 Am. St. Rep. 530. See also Cornett *v.* Hall, 103 Mo. App. 353 (replevin).

6. Value of Property with Interest from Conversion. — See Cecil *v.* Clark, 49 W. Va. 459.

8. For Use and Occupation. — See *In re* Journey, 7 Del. Ch. 1.

**704.** 5. Advances for Repairs and Improvements. — Ward *v.* Ward, 50 W. Va. 517.

**705.** 2. Equitable Jurisdiction Where Remedy

at Law Is Inadequate. — Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134; Hollahan *v.* Sowers, 111 Ill. App. 263; Moreira *v.* Schwan, 113 La. 643.

5. No Equity Jurisdiction Where Remedy at Law Adequate and Complete. — Garside *v.* Norval, 1 Alaska 19.

Accounting by Tenant Out of Possession — Title Must Be Determined at Law. — Swearingen *v.* Barnsdall, 210 Pa. St. 84.

7. Injunction Restraining Waste. — Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134; Binswanger *v.* Henninger, 1 Alaska 509; State *v.* Judge, 52 La. Ann. 103; Leatherbury *v.* McInnis, 85 Miss. 160, 107 Am. St. Rep. 226; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41.

8. Cutting Timber. — Cotten *v.* Christen, 110 La. 444.

Appropriation of Proceeds of Property. — Binswanger *v.* Henninger, 1 Alaska 509.

**707.** 4. Interest of Cotenant Subject to Execution. — Spalding *v.* Allred, 23 Utah 354.

7. Sheriff May Take Possession of Whole Property. — Spalding *v.* Allred, 23 Utah 354.

**708.** 2. Liability of Officer for Wrongfully Selling Entire Property. — Spalding *v.* Allred, 23 Utah 354.

**713.** 1. Journal. — See Montgomery Beer Bottling Works *v.* Gaston, 126 Ala. 425.

# JUDGE.

By C. T. GREEN.

**716. I. DEFINITION.**— See notes 1, 2.

**717.** "Judge" and "Court" Used Synonymously.— See note 1.

**II. POWERS AND DUTIES IN GENERAL**— 1. Nature— Judicial Functions

Personal and Not to Be Delegated.— See notes 2, 3.

2. Legislative Authority over Powers and Duties— *a.* POWER TO IMPOSE NONJUDICIAL DUTIES— View that Only Judicial Functions Can Be Imposed.— See note 5.

View that Ministerial or Executive Duties May Be Imposed.— See note 9.

**718. 3. Power to Review Decisions of Other Judges of Co-ordinate Jurisdiction**— General Rule.— See notes 3, 4.

**719. III. POWERS AND DUTIES IN MATTERS OF PRACTICE**— 1. Powers and Duties During Trial— *b.* ATTENDANCE ON TRIALS— (1) *Duty of Presiding Judge to Be Present*— General Rule.— See note 1.

Reason of Rule.— See note 2.

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**716. 1. Whether an Official Holds a Court** is to be determined from the functions which he is empowered to perform. *Steele v. Queen*, 67 N. J. L. 99.

2. **Court Commissioners.**— The words "United States judge" in section 6 of the Chinese Exclusion Act of May 5, 1892, include a United States commissioner. *Chin Bak Kan v. U. S.*, 186 U. S. 193.

The Surrogate Acts Judicially in probating a will. *Steele v. Queen*, 67 N. J. L. 99.

**717. 1. Term "Court" Used Synonymously with "Judge."**— *Porter v. Flick*, 60 Neb. 773. Compare *Cleveland v. State*, 114 Ga. 110.

2. **As to Rendition of Sentence by a Judge Other than the One Who Presided at the trial**, see the title SENTENCE AND PUNISHMENT, 293. 4 *et seq.*

A Judge Has No Judicial Power Outside of the Court in which he officiates. *Nester v. Carney Bros. Co.*, 98 Ill. App. 630.

3. **May Not Delegate Power.**— *Durden v. People*, 192 Ill. 504.

5. **Legislature May Not Impose Nonjudicial Functions.**— *In re Weston*, 28 Mont. 207.

9. **Imposition of Extrajudicial Duties.**— See *Clark v. Finley*, 93 Tex. 171.

**718. 3. May Not Review Action of Judge of Co-ordinate Jurisdiction.**— *H. B. Claffin Co. v. Furtick*, 119 Fed. Rep. 429; *Plattner Implement Co. v. International Harvester Co.*, (C. C. A.) 133 Fed. Rep. 376; *Columbia Mut. Bldg., etc., Assoc. v. Mittnacht*, 62 N. Y. App. Div. 425, *appeal dismissed* 170 N. Y. 569; *Platt v. New York, etc., R. Co.*, 170 N. Y. 451; *Moore v. Moore*, 131 N. Car. 371; *Harrigan v. Gilchrist*, 121 Wis. 127. See also *Lee v. State*, 118 Ga. 5; *Kane v. Hutkoff*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 678; *Pratt v. Timmerman*, 69 S. Car. 186.

**Duty of Court to Vacate Its Own Improvident Orders.**— See *Chicago, etc., R. Co. v. Har-*

*lington*, 192 Ill. 9; *Green v. McCarter*, 64 S. Car. 290.

**Right of Successor in Office to Correct Judge's Action.**— *Shepherd v. Gove*, 26 Wash. 452.

4. **Remedy by Appeal or Writ of Error.**— *H. B. Claffin Co. v. Furtick*, 119 Fed. Rep. 429; *Platt v. New York, etc., R. Co.*, 170 N. Y. 451; *Columbia Mut. Bldg., etc., Assoc. v. Mittnacht*, 62 N. Y. App. Div. 425, *appeal dismissed* 170 N. Y. 569; *Harrigan v. Gilchrist*, 121 Wis. 127. See also *Moore v. Moore*, 131 N. Car. 371.

**719. 1. Duty of Judge to Be Present.**— *Stokes v. State*, 71 Ark. 112; *Graves v. People*, 32 Colo. 127, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719; *Durden v. People*, 192 Ill. 504; *Wells v. O'Hare*, 209 Ill. 627; *Starr v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 105; *State v. Hammer*, 116 Iowa 284; *Carney v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 7.

2. **Judge Essential to Constitute Court.**— *Stokes v. State*, 71 Ark. 112, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720; *Graves v. People*, 32 Colo. 127; *Starr v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 105; *Scott v. State*, 43 Tex. Crim. 591; *Bateson v. State*, 46 Tex. Crim. 34.

5. **Duty to Be Present During Argument.**— *Graves v. People*, 32 Colo. 127; *Starr v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 105; *Goodman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 196; *Carney v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 7; *Bateson v. State*, 46 Tex. Crim. 34. See also *Stokes v. State*, 71 Ark. 112.

**Under Code Civ. Pro. N. Y.**, § 46, as amended in 1897, judges of the Court of Appeals and Appellate Division may take part in the decision of a question although absent on the oral argument. *Wittleder v. Citizens' Electric Illuminating Co.*, 47 N. Y. App. Div. 543.

6. **Must Hear Proceedings in Order to Review Same on Motion for New Trial.**— *Graves v. People*, 32 Colo. 127.

**719.** Presence Construed. — See notes 7, 9.

**720.** (2) *Effect of Absence* — (a) In Criminal Trials — View that Objection May Be Waived. — See notes 2, 3.

View that Objection May Not Be Waived. — See note 4.

(c) In Civil Trials — *aa.* ABSENCE WITHOUT CONSENT AS GROUND FOR NEW TRIAL — Absence Not Ground for New Trial Where No Objection Made. — See note 9.

**721.** (3) *Change of Judges During Trial*. — See note 5.

c. RIGHT TO QUESTION WITNESSES — General Rule. — See note 6.

Right to Put Leading Questions. — See note 7.

**722.** 3. Duty with Regard to Bills of Exceptions and Statements of Fact on Appeal — *a.* SETTLEMENT AND SIGNATURE OF BILLS OF EXCEPTIONS — Settlement. — See notes 2, 4.

Signature. — See note 7.

**723.** 4. Duty to Hear Motion for New Trial. — See note 3.

5. Power of Adjournment — In General. — See note 5.

Power of Judge to Reopen Court Adjourned by Officers. — See note 6.

**719.** 7. Requirement Construed. — *Stokes v. State*, 71 Ark. 112; *Graves v. People*, 32 Colo. 127; *Starr v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 105; *Bateson v. State*, 46 Tex. Crim. 34. What Does Not Constitute Absence. — *Rutter v. Territory*, 11 Okla. 454.

9. Judge Must Be in a Position to Respond to Call for Exercise of His Authority. — *Stokes v. State*, 71 Ark. 112; *Graves v. People*, 32 Colo. 127; *Starr v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 105; *State v. Hammer*, 116 Iowa 284.

**720.** 2. Harmless Error Where No Objection Made. — *State v. Hammer*, 116 Iowa 284.

3. It Must Be Shown that Injury Resulted to Losing Party. — *State v. Hammer*, 116 Iowa 284.

4. Presence of Judge Essential in Criminal Cases. — *Graves v. People*, 32 Colo. 127; *Bateson v. State*, 46 Tex. Crim. 34, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720; *Evans v. State*, 46 Tex. Crim. 476.

Absence Must Be Shown Affirmatively. — *Ermlick v. State*, (Miss. 1900) 28 So. Rep. 847.

9. Objection Must Have Been Made and Harm Resulted to Losing Party. — *Wells v. O'Hare*, 209 Ill. 627; *Dehougne v. Western Union Tel. Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1066, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720.

**721.** 5. Change During Trial. — *Durden v. People*, 192 Ill. 504, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

6. Judge May Question Witness. — *Cline v. State*, 25 Ind. App. 331; *State v. Knowles*, 185 Mo. 147; *McTurck v. Foussadier*, 51 N. Y. App. Div. 218; *Howard v. Territory*, (Okla. 1905) 79 Pac. Rep. 773; *State v. Hargroves*, 104 Tenn. 112. Compare *Barlow Bros. Co. v. Parsons*, 73 Conn. 696; *Nightingale v. State*, 62 Neb. 371; *Leo v. State*, 63 Neb. 723.

For a Full Treatment of this matter see the title EXAMINATION OF WITNESSES, 8 ENCYC. OF PL. AND PR. 71 *et seq.*, and the Supplement thereto.

7. Right to Put Leading Questions. — See *State v. Crotts*, 22 Wash. 245, holding leading questions by the judge to be improper where counsel would not be permitted to ask them; and see generally the title EXAMINATION OF WITNESSES, 8 ENCYC. OF PL. AND PR. 72, and the Supplement thereto.

Leading Questions in Violation of Statute. — See *Jaques v. State*, 111 Ga. 832.

**722.** 2. Duty to Settle Bills of Exceptions. — *Miller v. Enterprise Canal, etc., Co.*, 142 Cal. 208, 100 Am. St. Rep. 115; *Carr v. Noah*, 28 Ind. App. 105; *Patterson v. Yancey*, 97 Mo. App. 681.

A Judicial Act. — *Nester v. Carney Bros. Co.*, 98 Ill. App. 630.

Extensions of Time for Making and Serving the Case Made must be granted by the judge in possession of the office at the time of the extension. *Wallace v. Caldwell*, 9 Kan. App. 538. Compare *Farleigh v. Kelly*, 24 Mont. 369.

4. New Trial Ordered for Failure to Settle. — See *Patterson v. Yancey*, 97 Mo. App. 681.

7. Judge Whose Rulings Excepted to Must Sign. — *Miller v. Enterprise Canal, etc., Co.*, 142 Cal. 208, 100 Am. St. Rep. 115; *Brineger v. Louisville, etc., R. Co.*, 72 S. W. Rep. 783, 24 Ky. L. Rep. 1973; *Paterson v. Yancey*, 97 Mo. App. 681; *Storrie v. Shaw*, 96 Tex. 618. See also *Woods v. Beaton*, 1 Alaska 344.

Where the Statute Permits Allowance and Signing of Bill of Exceptions by Another Judge, when the judge before whom the cause was tried is "by reason of sickness, death, or other disability" unable to allow and sign, mere absence from the district is not a disability within the statute. *Western Dredging, etc., Co. v. Heldmaier*, (C. C. A.) 111 Fed. Rep. 123.

**723.** 3. Duty of Judge Hearing Cause to Decide Motion for New Trial. — *Banks v. Wilson*, 1 Alaska 241. Compare *Bailey v. Coe*, 106 Mo. App. 653.

The Successor to a Deceased Judge may hear a motion for a new trial. *Union Pac. R. Co. v. Lotway*, 2 Neb. (unofficial) 348, 96 N. W. Rep. 527.

Successor with Power to Sign Bill of Exceptions. — In *Missouri* it is held that the statute giving power to the successor of a judge to sign a bill of exceptions carries with it the coincident power to pass upon a motion for a new trial. *Fehlhauser v. St. Louis*, 178 Mo. 635.

When Motion May Not Be Heard in Vacation. — *Wood v. Wiley Mfg. Co.*, 117 Ga. 517.

5. Power to Adjourn Court Limited by Statute. — *Martin v. Scott*, 118 Ga. 149.

6. Adjournment of the Court Without Day ends its power over the business and records

**723. IV. POWERS AT CHAMBERS — 2. Jurisdiction Incidental to Jurisdiction of Court — a. IN GENERAL. —** See note 10.

**724. 3. Powers Regulated by Statute. —** See note 3.

**V. JUDGES AS WITNESSES — 1. When Essential Members of Court —** General Rule. — See note 5.

**725. 3. Cases in Which Judge May Be Witness — To Prove Testimony of Witness. —** See note 6.

**VI. LIABILITY OF JUDGES FOR ACTS AND OPINIONS — 1. Judicial Acts and Opinions — a. ACTS AND OPINIONS WITHIN JURISDICTION — (1) General Rule. —** See note 9.

**726. —** See note 1.

Liability for Fraud and Corruption. — See note 3.

**727. —** See notes 1, 2.

Liability for Conspiracy. — See note 4.

(2) Reason for Rule. — See note 5.

(3) To What Judges Rule Applicable — Application to All Judges. — See notes 6, 7, 8.

**728. Application to All Persons Acting in Judicial Capacity. —** See note 1.

(4) What Are Judicial Acts Within Rule — Illustrations. — See notes 4, 8.

of the term. See *State v. Hindman*, 159 Ind. 586.

**723. 10. Merits of Case Must Not Be Involved. —** *Ex p. Rountree*, 57 S. Car. 75.

**724. 3. Powers Regulated by Statute —** *Colorado*. — *People v. District Ct.*, 28 Colo. 485; *People v. Hebel*, (Colo. App. 1904) 76 Pac. Rep. 550.

*Georgia*. — *Wiggins v. Tyson*, 114 Ga. 64; *Nisbet v. Tindall*, 115 Ga. 374; *Mitchell v. Turner*, 117 Ga. 958.

*Missouri*. — *State v. Eggers*, 152 Mo. 485; *State v. Woodson*, 161 Mo. 444; *Oliver v. Snider*, 176 Mo. 63.

*Nebraska*. — *McCarty v. Hopkins*, 61 Neb. 550; *Conover v. Wright*, (Neb. 1902) 91 N. W. Rep. 545; *Hartsuff v. Huss*, (Neb. 1901) 95 N. W. Rep. 1070.

*New York*. — *People v. Stillings*, 76 N. Y. App. Div. 143.

*Oklahoma*. — *Gundry v. Gundry*, 11 Okla. 423. *South Carolina*. — *Murchison v. Miller*, 64 S. Car. 425.

*Texas*. — *Accousi v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 1104. *Washington*. — *Kalb v. German Sav., etc.*, Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

*Wyoming*. — *Mau v. Stoner*, 12 Wyo. 478.

**Entry of Orders in Vacation Must Be Expressly Authorized.** — *Haskens v. State*, 114 Ga. 837; *McLane v. Mackey*, (Tex. Civ. App. 1900) 59 S. W. Rep. 944. See also *Mills v. Geer*, 111 Ga. 275; *Young v. Rann*, 111 Iowa 253; *Hurst v. Nicola Bros. Co.*, 65 S. W. Rep. 364, 23 Ky. L. Rep. 1406; *State v. Eyermann*, 172 Mo. 2944; *Coger v. Coger*, 48 W. Va. 135.

**The Parties May by Consent Confer Jurisdiction** upon a judge at chambers. *Landt v. Remley*, 113 Iowa 555.

**The Distinction Between Term Time and Vacation** is not abolished by the *Georgia* statutes. *Webb v. Hicks*, 117 Ga. 335.

**5. Judge Essential to Trial Should Not Be Examined as Witness.** — *State v. De Maio*, 69 N. J. L. 590. But see *State v. Houghton*, 45 Oregon 119.

**725. 6. To Prove Testimony of Witness. —** *State v. Houghton*, 45 Oregon 110.

**9. No Liability for Judicial Acts or Opinions Within Jurisdiction.** — *Roth v. Shupp*, 94 Md. 55; *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 258.

**726. 1. Motive Immaterial.** — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 258.

**3. No Liability in Case of Fraud and Corruption.** *English v. Ralston*, 112 Fed. Rep. 272.

**727. 1. Liability for Malice or Corruption.** — *Reed v. Taylor*, (Ky. 1904) 78 S. W. Rep. 892.

**2. Remedy by Indictment or Impeachment.** — *English v. Ralston*, 112 Fed. Rep. 272.

**Exemption Confined to Civil Liability.** — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

**4. Liability for Conspiracy.** — See *Reed v. Taylor*, (Ky. 1904) 78 S. W. Rep. 892.

**5. Rule for Benefit of Public.** — *Roth v. Shupp*, 94 Md. 55; *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 258; *Nienaber v. Tarvin*, 9 Ohio Dec. 561, 9 Ohio N. P. 110; *Comstock v. Eagleton*, 11 Okla. 487; *Webb v. Fisher*, 109 Tenn. 701, 97 Am. St. Rep. 863.

**6. Probate Judges.** — *Comstock v. Eagleton*, 11 Okla. 487.

**7. Applies to Equity Judges.** — *Webb v. Fisher*, 109 Tenn. 701, 97 Am. St. Rep. 863.

**8. Justices of the Peace.** — *Roth v. Shupp*, 94 Md. 55.

**728. 1. Police Commissioners.** — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 258, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727 [728].

**4. Commitment for Contempt.** — *Comstock v. Eagleton*, 11 Okla. 487.

**8. Requirement or Failure to Require Security from Guardian.** — In *Kentucky*, where the statute provides that if a court accepts unsatisfactory persons as sureties on the bond of a guardian, the judge so in default shall be liable for damages, it was held that the judge was required to exercise only reasonable diligence. *Best v. Robinson*, 114 Ky. 11.



**728.** *b.* ACTS AND OPINIONS NOT WITHIN JURISDICTION — (1) *Judges of Courts of Superior or General Jurisdiction* — (a) Acts in Excess of Jurisdiction. — See note 10.

**729.** (b) Acts in Absence of Jurisdiction. — See note 6.

**730.** (2) *Judges of Inferior Courts* — (a) View that Judges Are Liable for Acts in Absence or Excess of Jurisdiction — *aa.* STATEMENT OF RULE — Judge Acting Without Jurisdiction Liable as Trespasser. — See note 1.

*bb.* APPLICATION OF RULE — Liability for Want of Jurisdiction over Person, Process, and Subject-matter. — See note 3.

**731.** (b) View that Judges Are Not Liable for Acts in Excess of Jurisdiction — Good Faith Held Proper Test. — See note 7.

**732.** VII. DISQUALIFICATION OF JUDGES — 1. General Principle — No Man May Act as Judge in His Own Cause. — See note 8.

**733.** Rule Intended to Remove All Suspicion of Fairness and Integrity of Judge. — See note 2.

2. Grounds of Disqualification — *a.* AT COMMON LAW — (1) *General Rule.* — See note 3.

(2) *Nature of Interest* — Personal Interest or Interest Disqualifying as Witness. — See notes 4, 5.

Relationship No Ground of Disqualification. — See notes 6, 7.

No Disqualification for Having Acted as Counsel. — See note 9.

**734.** *b.* STATUTORY PROVISIONS — (1) *In General.* — See note 1.

(2) *Illustrations* — (a) Provision as to Interest — *aa.* IN GENERAL. — See note 2.

*bb.* DISQUALIFICATION BY REASON OF INTEREST AS STOCKHOLDER — In General. — See note 3.

**735.** Relationship to Stockholder. — See note 4.

**728.** 10. No Liability for Acts in Excess of Jurisdiction. — English *v.* Ralston, 112 Fed. Rep. 272; Nienaber *v.* Tarvin, 9 Ohio Dec. 561, 7 Ohio N. P. 110; Webb *v.* Fisher, 109 Tenn. 701, 97 Am. St. Rep. 863, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728.

**729.** 6. Exercise of Usurped Authority. — Mitchell *v.* Galen, 1 Alaska 339.

**730.** 1. Liability for Acting Without Jurisdiction. — Mitchell *v.* Galen, 1 Alaska 339.

3. Liability for Want of Jurisdiction over Person, Process, and Subject-matter. — Reed *v.* Taylor, (Ky. 1904) 78 S. W. Rep. 892.

**731.** 7. Good Faith Proper Test. — Roth *v.* Shupp, 94 Md. 55.

**732.** 8. No Man May Act as Judge in His Own Cause. — State *v.* Pitts, 139 Ala. 152; State *v.* Lynn, 3 Penn. (Del.) 316; Winters *v.* Coons, 162 Ind. 26; King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 571, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732; Walters *v.* Wiley, (Neb. 1901) 95 N. W. Rep. 486; State *v.* Mack, 26 Nev. 430.

**733.** 2. Object of Rule. — Crook *v.* Newborg, 124 Ala. 479, 82 Am. St. Rep. 190; Winters *v.* Coons, 162 Ind. 26.

3. Interest Ground of Disqualification. — King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 579, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732 [733].

4. Personal Interest. — Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

5. Interest Disqualifying Witness. — Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

6. Relationship No Disqualification. — See *In re Eatonton Electric Co.*, 120 Fed. Rep. 1010.

7. Favor Not Presumed in Judge. — See Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733.

9. In the Absence of a Statute forbidding an attorney to conduct a cause before a court of which he is an associate member, such conduct, while violating sound professional ethics, furnishes no ground for a legal objection. French *v.* Waterbury, 72 Conn. 435.

**734.** 1. Statutes Construed. — State *v.* Woodson, 86 Mo. App. 253; State *v.* Mack, 26 Nev. 430.

In Florida the statutes have been construed to establish a different rule for determining the qualifications of judges from that applied to jurors. Bryan *v.* State, 41 Fla. 643.

2. Judge May Not Act in Cause in Which He Is Interested. — *In re Eatonton Electric Co.*, 120 Fed. Rep. 1010; Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108; State *v.* Mack, 26 Nev. 430; Forest Coal Co. *v.* Doolittle, 54 W. Va. 210.

3. Disqualification by Reason of Interest as Stockholder. — State *v.* Mack, 26 Nev. 430.

Where the Interests of the Corporation Were Not Involved it was held that a judge was not disqualified for the reason that he and one of the parties were stockholders in the same corporation. Hyde Park Lumber Co. *v.* Sheppardson, 72 Vt. 188.

**735.** 4. Relation to Stockholder Held to Disqualify. — Rapid City First Nat. Bank *v.* McCarthy, 13 S. Dak. 356.

**735.** *dd.* DISQUALIFICATION AS RESIDENT OR TAXPAYER — On Ground of Interest. — See notes 7, 8.

**736.** Express Statutory Authorization. — See note 1.

(b) Where Judge Is a Party. — See note 2.

(c) Disqualification by Reason of Relationship — *aa.* IN GENERAL. — See note 3.

**737.** *bb.* DEGREE OF RELATIONSHIP NECESSARY TO DISQUALIFY. — See notes 2, 3.

*cc.* CONSTRUCTION OF TERM "PARTY" — IN GENERAL. — See note 4.

**738.** *dd.* DISQUALIFICATION FOR AFFINITY REMOVED BY DEATH. — See note 1.

(d) Disqualification for Prejudice — IN GENERAL. — See notes 3, 5, 6.

**735.** 7. Interest as Resident or Taxpayer. — Los Angeles *v.* Pomeroy, 133 Cal. 529; State *v.* Lynn, 3 Penn. (Del.) 316; Huntington County Line, 14 Pa. Super. Ct. 571; Oak Cliff *v.* State, 97 Tex. 391.

8. Judge Disqualified. — See Higgins *v.* San Diego, 126 Cal. 303, *distinguishing* Meyer *v.* San Diego, 121 Cal. 102, cited in the original note.

**736.** 1. Statutory Provision. — State *v.* Call, 41 Fla. 442, 79 Am. St. Rep. 189.

2. Judge Disqualified by Reason of Being Party. — Younger *v.* Superior Ct., 136 Cal. 682, holding further that where a judge is made a party to a partition suit on the ground that he is interested, he cannot arbitrarily determine that he is not a proper party or that he is not interested.

3. Disqualification of Judge by Reason of Relationship. — *In re* Eatonton Electric Co., 120 Fed. Rep. 1010, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 736; *In re* Nevitt, (C. C. A.) 117 Fed. Rep. 448; Berry *v.* State, 117 Ga. 15.

**737.** 2. Degrees of Relationship Which Disqualify — Third Degree. — Gresham *v.* State, 43 Tex. Crim. 466.

Fourth Degree. — *In re* Eatonton Electric Co., 120 Fed. Rep. 1010; Crook *v.* Newborg, 124 Ala. 479, 82 Am. St. Rep. 190; State *v.* Pitts, 139 Ala. 152; Bivins *v.* Richland Bank, 109 Ga. 342; Savage *v.* Oliver, 110 Ga. 636; Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108; Walters *v.* Wiley, (Neb. 1901) 95 N. W. Rep. 486; *In re* Taber, 13 S. Dak. 62; Vine *v.* Jones, 13 S. Dak. 54.

Sixth Degree. — Truesdell *v.* Winne, (County Ct.) 44 Misc. (N. Y.) 452; *Ex p.* Kreps, 61 S. Car. 29; *Ex p.* Hilton, 64 S. Car. 201, 92 Am. St. Rep. 800.

Ninth Degree. — State *v.* Wall, 41 Fla. 463, 79 Am. St. Rep. 195.

3. Husbands of Two Sisters Are Brothers-in-law within the meaning of the Louisiana statute. State *v.* Foster, 112 La. 533.

Husbands of an Aunt and Niece have been held to be within the prohibited degrees. State *v.* Wall, 41 Fla. 463, 79 Am. St. Rep. 195.

Where the Judge's Grandfather and the Defendant's Grandmother Were Brother and Sister this was held to disqualify. Gresham *v.* State, 43 Tex. Crim. 466.

Relationship Too Remote. — Such relationship as arises from the fact that the judge's brother and brother-in-law had married sisters of the plaintiff's father is too remote to affect the judge's qualifications. Sparks *v.* Colson, 109 Ky. 711.

4. Term "Party" Not Confined to Parties to Record by Name. — Crook *v.* Newborg, 124 Ala. 479, 82 Am. St. Rep. 190; Roberts *v.* Roberts,

115 Ga. 259, 90 Am. St. Rep. 108; Smith *v.* Amis, 30 Ind. App. 530.

Judge Must Be Related to One Actually a Party. — Hundley *v.* State, (Fla. 1904) 36 So. Rep. 362.

Relationship to Attorney or Agent of Party Sufficient to Disqualify. — Roberts *v.* Roberts, 115 Ga. 259, 90 Am. St. Rep. 108; Vine *v.* Jones, 13 S. Dak. 54. See also Knickerbocker *v.* Worthing, (Mich. 1904) 101 N. W. Rep. 540, 11 Detroit Leg. N. 545; *In re* Taber, 13 S. Dak. 62.

Disqualification for Relationship to Mere Surety. — Crook *v.* Newborg, 124 Ala. 479, 82 Am. St. Rep. 190.

Immaterial that Litigant Is Suing in Mere Representative Capacity. — State *v.* Foster, 112 La. 533.

Judge's Son Appearing as Attorney No Disqualification. — Allison *v.* Southern R. Co., 129 N. Car. 336.

Where a Relative of the Judge Was Defeated in an Election by the Defendant, this was held to be no disqualification. People *v.* Findley, 132 Cal. 301.

Where the Judge Was a Mere Formal Party to an application to contest the validity of a local-option law, he was held not to be disqualified from trying a defendant charged with violating the law the validity of which was contested. Truesdale *v.* State, 43 Tex. Crim. 544. See also Burrell *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 914.

**738.** 1. Disqualification Not Assumed to Continue. — Ehrhardt *v.* Breeland, 57 S. Car. 142.

3. Prejudice or Bias No Ground in Absence of Statute. — Bryan *v.* State, 41 Fla. 643; *In re* Weston, 28 Mont. 207; People *v.* Jerome, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 258; Truesdell *v.* Winne, (County Ct.) 44 Misc. (N. Y.) 452.

5. Special or Substitute Judge Cannot Be Thus Disqualified. — State *v.* Woodson, 86 Mo. App. 253; Gerhart Realty Co. *v.* Weiter, 108 Mo. App. 248; Blanchard *v.* Haseltine, 79 Mo. App. 248.

Only the Presiding Judge against whom the affidavit is filed can be so disqualified. State *v.* Gardner, 88 Minn. 130; Endaley *v.* Kansas City, etc., R. Co., 186 Mo. 399.

In Montana five judges may be disqualified. State *v.* Clancy, 30 Mont. 529, holding the statute not to be unconstitutional. See also State *v.* District Ct., 30 Mont. 547.

Kansas — Prejudice Must Clearly Appear. — State *v.* Stark, 63 Kan. 529, 88 Am. St. Rep. 251.

Prejudice Must Be Against Party to Cause. — State *v.* Parmenter, 70 Kan. 513. See also Keen *v.* Brown, (Fla. 1903) 35 So. Rep. 401.

**739. (e) Exhibition of Partisan Feeling or Unnecessary Expression of Opinion.**— See note 1.

(f) **Disqualification as Former Counsel**— *aa. GENERAL RULE.*— See notes 3, 4.

**740. cc. APPLICATION OF RULE**— **Not Limited to Case Actually Pending When Services Invoked.**— See notes 2, 3.

**Immaterial that No Fee Is Charged.**— See note 4.

**No Application Where Party Represented Is No Longer Before Court.**— See note 5.

*dd. EXTENT OF DISQUALIFICATION.*— See note 6.

(g) **Disqualification as Judge in Court Below.**— See note 7.

Where an application for a change of venue in a trial for perjury was based upon the action of the judge in directing the detention of the defendant after his testimony, at the instance of the county attorney, it was held that no disqualification was shown. *State v. Brownfield*, 67 Kan. 627.

**There Should Be Legal Evidence of the facts constituting prejudice or bias.** *State v. De Maio*, 69 N. J. L. 590.

**738. 8. Affidavit that Party Cannot Have a Fair Trial by Reason of Judge's Bias or Prejudice.**— *Chenault v. Spencer*, 68 S. W. Rep. 128, 24 Ky. L. Rep. 141. See also *Isenhart v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451.

**Judge Has No Discretion When Proper Affidavit Made.**— *Cox v. U. S.*, (C. C. A.) 100 Fed. Rep. 293; *Smith v. Amis*, 30 Ind. App. 530; *State v. Gardner*, 88 Minn. 130; *State v. Woodson*, 86 Mo. App. 253; *State v. Gray*, 100 Mo. App. 98; *Eudaley v. Kansas City, etc., R. Co.*, 186 Mo. 399; *State v. Clancy*, 30 Mont. 529; *Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233; *Orcutt v. Conrad*, 10 N. Dak. 431; *Lincoln v. Territory*, 8 Okla. 546.

**May Arrange with Other Judge to Hold Court.**— *Chicago, etc., R. Co. v. Harrington*, 90 Ill. App. 638. See also *Chicago, etc., R. Co. v. Harrington*, 192 Ill. 9.

**That the Judge Has Presided at a Previous Trial of the same case and, without a jury, given judgment against the party applying, does not constitute prejudice.** *Doll v. Stewart*, 30 Colo. 320.

**Must Try Truth of Facts Alleged.**— *State v. De Maio*, 70 N. J. L. 220.

**Determination Left to Judge.**— Where the question of disqualification has been left to the opinion of the presiding judge his opinion must be followed with reference to the settled principles intended to secure absolute impartiality of trial and judgment. *In re Eatonton Electric Co.*, 120 Fed. Rep. 1010. See also *Talbot v. Pirkey*, 139 Cal. 326; *State v. Hawkins*, 23 Wash. 289.

**739. 1. Exhibition of Feeling or Unnecessary Expression of Opinion.**— *People v. Findley*, 132 Cal. 301; *Nicholls v. Barrick*, 27 Colo. 432; *Bryan v. State*, 41 Fla. 643; *State v. Grinstead*, 62 Kan. 593; *State v. Morrison*, 67 Kan. 144; *Chenault v. Spencer*, 68 S. W. Rep. 128, 24 Ky. L. Rep. 141; *Bismark v. State*, 45 Tex. Crim. 54.

**Misconduct of Judge Reversible Error.**— Where an affidavit alleged, and the judge did not deny, misconduct on his part while off the bench with an employee of a defendant corporation, it was held in the absence of proof to the contrary that such misconduct constituted reversible error. *Finlen v. Heinze*, 28 Mont. 548.

**3. Disqualification by Reason of Relationship of Attorney and Client**— *Georgia.*— *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108.

*Idaho.*— *Stevens v. Hall*, 8 Idaho 549.

*Nevada.*— *Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233.

*New York.*— *Keeffe v. Syracuse Third Nat. Bank*, 177 N. Y. 305.

*Texas.*— *Graham v. State*, 43 Tex. Crim. 110; *Harrison v. Lokey*, 26 Tex. Civ. App. 404; *Woody v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 155; *Gaines v. Hindman*, (Tex. Civ. App. 1903) 74 S. W. Rep. 583.

*Wisconsin.*— *Richter v. Leiby*, 107 Wis. 404.

*Wyoming.*— *State v. Ausherman*, 11 Wyo. 410.

**A Judge May Not Settle or Sign a Bill of Exceptions in a case in which he was attorney.** *Winters v. Coons*, 162 Ind. 26.

**4. Judge Who Drew Indictment Not Disqualified.**— *Kirby v. State*, 78 Miss. 175, 84 Am. St. Rep. 622.

**Statutes Prohibiting Judges from Practicing.**— See *Perry v. Bush*, (Fla. 1903) 35 So. Rep. 225; *Beecher v. Long Island R. Co.*, 53 N. Y. App. Div. 324; *State v. Hidy*, 61 Ohio St. 549; *Nichols v. Oregon Short Line R. Co.*, 28 Utah 319; *Bliss v. State*, 117 Wis. 596; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101. And see the title ATTORNEY AND CLIENT, 320. 1.

**740. 2. The Sending of a Letter by a justice of the peace to a debtor stating that the claim in question had been placed in his hands for collection has been held not to be sufficient to disqualify him from sitting in the cause.** *Wagner v. Hoffman*, 19 Pa. Super. Ct. 414.

**3. Relation Once Established Continues.**— *Woody v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 155.

**What Not Sufficient to Disqualify.**— *Baines v. State*, 43 Tex. Crim. 490; *Conyers v. Ford*, 111 Ga. 754.

**4. Immaterial that No Fee Is Charged.**— *Simon-ton v. State*, 44 Fla. 289; *Graham v. State*, 43 Tex. Crim. 110.

**5. Disqualification Removed.**— See *Richter v. Leiby*, 107 Wis. 404.

**6. No Disqualification Where Issues Essentially Different.**— *Keeffe v. Syracuse Third Nat. Bank*, 177 N. Y. 305. See also *Stevens v. Hall*, 8 Idaho 549; *Blackwell v. Farmers, etc., Nat. Bank*, 97 Tex. 445.

**7. Having Presided in Courts Below.**— *State v. Hartley*, 75 Conn. 104; *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108.

**Otherwise in Texas.**— *Galveston, etc., Invest. Co. v. Grymes*, 94 Tex. 609.

**Judge Disqualified Below.**— In *Illinois* it was held that, where a judge who had been disquali-

**740.** (3) *Constitutional or Statutory Grounds Exclusive* — In General. — See note 8.

**741.** 3. Degree and Nature of Disqualifying Interest — *b. NATURE OF DISQUALIFYING INTEREST* — Interest Must Be Direct and Immediate. — See note 3.

Such Interest in Subject-matter as Naturally to Influence Held Sufficient. — See note 4.

Pecuniary or Property Interest. — See notes 5, 6.

**742.** Interest in Subject-matter of Suit. — See notes 1, 2.

4. Effect of Judgment by Disqualified Judge — *a. AT COMMON LAW* — In General. — See notes 3, 4.

*b. UNDER STATUTES* — (1) *General Rule* — Judgment by Disqualified Judge Void. — See notes 7, 8.

**743.** (2) *Such Judgment Voidable Only* — Generally. — See note 1.

fied from trying a cause sat in the appellate court to which the cause was taken, this was not prejudicial error, the two remaining judges being qualified. *Biggins v. Lambert*, 213 Ill. 625.

Conducting a Preliminary Committal Trial does not disqualify the judge from presiding at the regular trial of the accused. *Cochran v. State*, 113 Ga. 736.

The Temporary Designation of a Supreme Court Justice to the Appellate Division, in *New York*, does not deprive him permanently of jurisdiction to decide questions legally before him for decision after his service in the Appellate Division has come to an end. *Irving Nat. Bank v. Moynihan*, 78 N. Y. App. Div. 141; *Kane v. Hutkoff*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 678.

**740.** 8. Statutory Provisions Exclusive. — *Truesdell v. Winne*, (County Ct.) 44 Misc. (N. Y.) 452, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740; *Galveston, etc., Invest. Co. v. Grymes*, 94 Tex. 609.

**741.** 3. Remote, Uncertain, or Speculative Interest Insufficient. — *State v. Pitts*, 139 Ala. 152; *Los Angeles v. Pomeroy*, 133 Cal. 529.

4. Such Interest as Would Naturally Influence Sufficient. — *State v. Pitts*, 139 Ala. 152.

Interest in Suppressing Crime. — In a prosecution for maintaining a disorderly house, the judge is not disqualified by having taken part in a meeting called for the purpose of devising ways and means for the suppression of gaming and disorderly houses. *Dailey v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 821.

Where a Judge Was a Candidate for Re-election he was held to be disqualified from determining the validity of a protest against placing on the official ballot nominations of the party on whose ticket he was a candidate. *Phillips v. Curley*, 28 Colo. 34; *MacMillan v. Spencer*, 28 Colo. 80.

5. Pecuniary or Property Interest. — *State v. Lynn*, 3 Penn. (Del.) 316; *State v. Call*, 41 Fla. 442, 79 Am. St. Rep. 189; *Bryan v. State*, 41 Fla. 643; *State v. Gardner*, 88 Minn. 130; *State v. Sutton*, 74 Vt. 12.

6. Where a Defendant Was Charged with Defaming the Supreme Court, it was held that a judge of that court was not disqualified from presiding in the cause. *State v. Sutton*, 74 Vt. 12.

Where a Judge Was a Member of the Town Council, which body had appropriated money to

pay for expenses incurred in the prosecution of violations of the liquor laws, it was held that he was not disqualified from presiding at the trial of a defendant charged with an illegal sale. *State v. Collins*, 24 R. I. 242.

Inducing Litigants to Compromise. — A judge is not disqualified to try a case by reason of the fact that he has tried to induce the parties to compromise. *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448.

**742.** 1. Must Be Interest in Subject-matter of Litigation. — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *Barnes v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1124; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210.

In *Texas* a district judge is disqualified by being "interested in the cause," while judges of the Supreme Court and Court of Civil Appeals are disqualified by an interest in the question to be determined. *New Odorless Sewerage Co. v. Wisdom*, 30 Tex. Civ. App. 224.

2. Interest in Question of Law Insufficient. — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448.

A Judge's Interest in a Controversy in Which Similar Questions May Arise does not prevent him from disposing of other questions in which he is disinterested. *Middletown Nat. Bank v. Toledo, etc., R. Co.*, 105 Fed. Rep. 547.

3. Judgment Voidable Merely. — *State v. Hartley*, 75 Conn. 104.

4. Ground for Error or Appeal. — *State v. Hartley*, 75 Conn. 104.

7. Judgment of Disqualified Judge Void. — *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *Walters v. Wiley*, (Neb. 1901) 95 N. W. Rep. 486; *State v. Mack*, 26 Nev. 430; *Graham v. State*, 43 Tex. Crim. 110; *Harrison v. Lokey*, 26 Tex. Civ. App. 404; *Gresham v. State*, 43 Tex. Crim. 466; *Woody v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 155.

Cannot Be Validated by Consent or Waiver. — *Rapid City First Nat. Bank v. McGuire*, 12 S. Dak. 226, 76 Am. St. Rep. 598; *Gresham v. State*, 43 Tex. Crim. 466.

Successful Litigant Not Deprived of Costs. — *Meyer v. San Diego*, 132 Cal. 35.

8. Prohibition Intended in Interests of Justice. — *Gresham v. State*, 43 Tex. Crim. 466. See also *State v. Hartley*, 75 Conn. 104.

**743.** 1. Judgment Voidable and Not Void. — *State v. Hartley*, 75 Conn. 104, overruling *Keeler v. Stead*, 56 Conn. 501, 7 Am. St. Rep. 320; *State v. Collins*, 24 R. I. 242; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210.

**743.** (3) *Waiver of Objection — By Consent.* — See note 2.

Waiver by Implication. — See note 3.

5. Collateral Attack on Such Judgment. — See notes 5, 6.

**744.** 6. Powers of Disqualified Judge — *a.* POWER TO MAKE FORMAL ORDERS, ETC. — See notes 2, 4, 5.**745.** 7. Right of Disqualified Judge to Retire of His Own Motion. — See notes 1, 2.

8. Mandamus to Compel Transfer of Cause. — See note 3.

**IX. SPECIAL OR SUBSTITUTE JUDGES — 1. Definition.** — See notes 6, 7.

**746.** 2. Constitutional Provisions — Statutes Providing for Special Judges Held Constitutional. — See note 3.

Effect of Constitutional Provision for Substitution of Judges. — See note 7.

Constitutional Provision as to Mode of Selection Exclusive. — See note 8.

**747.** 3. When Special Judges Can Act — Where Special Judge Disqualified as to a Certain Action. — See note 9.

**743.** 2. Waiver by Consent. — *Oakland v. Hart*, 129 Cal. 98; *State v. Hartley*, 75 Conn. 104. In *Nebraska* the waiver must be in writing. *Walters v. Wiley*, (Neb. 1901) 95 N. W. Rep. 486.

**3. Implied Waiver.** — *Coltrane v. Templeton*, (C. C. A.) 106 Fed. Rep. 370; *Buena Vista Loan, etc., Bank v. Grier*, 114 Ga. 398; *Du Quoin Water-Works Co. v. Parks*, 207 Ill. 46; *Smith v. Amis*, 30 Ind. App. 530; *Goodrich v. Strangland*, 155 Ind. 279; *Ex p. Hilton*, 64 S. Car. 201, 92 Am. St. Rep. 800. See also *Brown v. Holland*, 111 Ga. 817; *Wagner v. Hoffman*, 19 Pa. Super. Ct. 414.

**By Going Through Trial Without Objection.** — *Berry v. State*, 117 Ga. 15. *Compare State v. Hartley*, 75 Conn. 104.

**By Consent to Appointment of Referee.** — *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451.

**Laches in Presenting Application.** — *Nicholls v. Barrick*, 27 Colo. 432. See also *Eberville v. Leadville Tunneling, etc., Co.*, 28 Colo. 241; *Stevens v. Hall*, 8 Idaho 549.

**5. Judgment Void and Open to Collateral Attack.** *Walters v. Wiley*, (Neb. 1901) 95 N. W. Rep. 486.

**6. Voidable Judgments Not Open to Collateral Attack.** — *In re Taber*, 13 S. Dak. 62.

**744.** 2. Mere Ministerial Acts Involving No Discretion. — *Savage v. Oliver*, 110 Ga. 636.

**4. May Make Formal Orders.** — *Coltrane v. Templeton*, (C. C. A.) 106 Fed. Rep. 370.

**5. The Arrangement of the Calendar or the Regulation of the Order of Business may be made by a disqualified judge.** *State v. District Ct.*, 30 Mont. 547.

**An Order Granting a Change of Venue may be made by a disqualified judge.** *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451.

**May Receive Indictment.** — *State v. Goddard*, 162 Mo. 198.

**Cannot Receive Verdict.** — *State v. Finder*, 12 S. Dak. 423.

**745.** 1. Judge May Retire of His Own Motion. — *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190; *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451; *State v. Gray*, 100 Mo. App. 98; *State v. Smith*, 176 Mo. 90; *State v. Woodson*, 86 Mo. App. 253.

**2. Should Not Wait for Objection of Parties.** — *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190; *State v. Gilham*, 97 Mo. App. 296; *State v. Gray*, 100 Mo. App. 98.

**Change of Venue Awarded Without Application.** — *State v. Mack*, 26 Nev. 430; *State v. Woodson*, 86 Mo. App. 253. See also *Anaheim Water Co. v. Jurupa Land, etc., Co.*, 128 Cal. 568.

**3. Mandamus to Compel Transfer of Cause.** — *Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233.

**To Compel a Judge to Certify His Incompetency** mandamus will lie. *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190.

**Determination of Disqualification may be compelled by mandamus.** *Vine v. Jones*, 13 S. Dak. 54.

**6. Appointment by Governor.** — *Powers v. State*, 83 Miss. 691.

**Exercise of Discretion by Regular Judge.** — *Kissel v. Lewis*, 156 Ind. 233.

**7. A Substitute Judge Is a Judge of Another Court.** — *Simonton v. State*, 44 Fla. 289; *Glenn-Tucker v. Clayton*, (Indian Ter. 1902) 70 S. W. Rep. 8; *State v. Fort*, 178 Mo. 518. See also *Seay v. Shrader*, (Neb. 1903) 95 N. W. Rep. 690.

**746.** 3. Statutes Authorizing Special Judges Not Unconstitutional. — *Grayson v. Bagby*, 115 Ky. 651.

**Constitutionality Attacked upon the Ground of Granting Extraterritorial Jurisdiction.** — See *Simonton v. State*, 44 Fla. 289.

**7. Special Legislation.** — In *Missouri* a statute vesting jurisdiction in a judge of the Criminal Court to try civil cases in another county when called upon by the judge of that county has been declared to be unconstitutional as special legislation. *Ashbrook v. Schaub*, 160 Mo. 107.

**Selection by Clerk Held to Be Constitutional.** — See *Bivens v. Richland Bank*, 109 Ga. 342.

**8. Constitutional Provision as to Mode of Selection and Causes Therefor Exclusive.** — *In re Weston*, 28 Mont. 207.

**When Provision Not Exclusive.** — A constitutional provision that when a judge is disqualified the parties may by consent appoint a proper person is not violated by a statutory provision for a governmental appointment in case of disqualification. *Kruegel v. Nash*, (Tex. Civ. App. 1903) 72 S. W. Rep. 601.

**A Statute Allowing Selection by the Bar** is authorized by a constitutional provision that the legislature may provide for special judges. *Merrill v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 979.

**747.** 9. Special Judge Disqualified in an Action. — *State v. Gilham*, 97 Mo. App. 296.

**747.** Right of Special Judges to Act in Criminal Cases. — See note 11.

**748.** 4. When Special Judges Cannot Act. — See note 1.

5. Oath of Special Judge. — See note 6.

Oath of Same Import as Statutory Form Sufficient. — See note 8.

6. Powers — Powers Same as Those of Regular Judge. — See note 9.

**749.** Judgment That of Court. — See note 1.

No Power Outside of Case for Which Selected. — See note 3.

Duration of Power. — See note 4.

Authority of Judge Ends with Beginning of Subsequent Term. — See note 5.

**Disqualification or Failure to Attend.** — *State v. Newman*, 49 W. Va. 724. See also *Fordyce v. State*, 115 Wis. 608; *State v. Carter*, 49 W. Va. 709.

**Duty of Special Judge to Vacate Bench.** — *Terry v. Baker*, 67 S. W. Rep. 258, 23 Ky. L. Rep. 2406.

**Power of Reappointment in Regular Judge.** — *State v. Gillham*, 174 Mo. 671; *State v. Huds-peth*, 159 Mo. 178; *State v. Goddard*, 162 Mo. 198.

**747. 11. Applicable to Criminal Cases.** — *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382; *State v. Downs*, 164 Mo. 471; *State v. Gilham*, 97 Mo. App. 296; *State v. Gillham*, 174 Mo. 671; *Greer v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1075; *Franklin v. Vanderwort*, 50 W. Va. 412.

**Consent of Counsel to Have Attorney Preside Binds Client.** — *State v. Downs*, 164 Mo. 471. But it is otherwise where the statute provides for election of a special judge in a specified manner. *State v. Burnett*, 47 W. Va. 731.

**748. 1. Appointment Unnecessary Where Judge with Concurrent Powers Is Present.** — *State v. Woodson*, 86 Mo. App. 253.

**Where Statute Provides for Judge of Another District.** — *Kelly v. State*, 79 Miss. 168.

**Where Regular Judge Not Disqualified.** — *Ivey v. State*, 112 Ga. 175; *Ladd v. Forsee*, 163 Mo. 506. But see *Smith v. Sullivan*, 33 Wash. 30.

**What Disability Contemplated by Nebraska Statute.** — *Keeley Institute v. Riggs*, (Neb. 1904) 99 N. W. Rep. 833.

**Where All the Judges of a Court Became Disqualified from acting in a cause, and the attorneys for the parties failed to select a member of the bar to act as special judge, it was held that an election ordered without the consent of the attorneys was invalid.** *State v. Flourney*, 160 Mo. 324.

**6. Judgment Not Invalid for Failure to Take Oath.** — *Tower v. Whip*, 53 W. Va. 158.

**Failure to Take Oath — Judgments Voidable.** — *In re Hewes*, 62 Kan. 288.

**Objection Must Be Seasonably Taken.** — *Snohomish First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828.

**8. Statutory Provisions as to Oath.** — See *State v. Burnett*, 47 W. Va. 731.

**9. Powers Same as Those of Regular Judge — California.** — *Gardner v. Jones*, 126 Cal. 614.

**Florida.** — *Simonton v. State*, 44 Fla. 289.

**Missouri.** — *State v. Gilham*, 97 Mo. App. 296; *State v. Gillham*, 174 Mo. 671; *State v. Fort*, 178 Mo. 518.

**Montana.** — *Farleigh v. Kelly*, 24 Mont. 369.

**South Dakota.** — *State v. Finder*, 12 S. Dak. 423.

**Tennessee.** — *Low v. State*, 111 Tenn. 81.

**Washington.** — *Smith v. Sullivan*, 33 Wash. 30; *Demaris v. Barker*, 33 Wash. 200.

**May Sign Bills of Exceptions After Term Time.** — *Patterson v. Yancey*, 97 Mo. App. 681.

**749. 1. Judgment That of Court.** — See *In re Weston*, 28 Mont. 207.

Where an injunction granted by a special judge was violated it was held that the contempt was not of the judge, but of the court. *Kissel v. Lewis*, 27 Ind. App. 302.

**3. No Power at Subsequent Term.** — *Goodbar Shoe Co. v. Stewart*, 70 Ark. 407; *Crane v. Brooke*, 109 Ky. 647; *Low v. State*, 111 Tenn. 81; *Fordyce v. State*, 115 Wis. 608.

**Power to Hold Special Term.** — *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *Missouri, etc., R. Co. v. Huff*, (Tex. Civ. App. 1903) 78 S. W. Rep. 249; *St. Louis Southwestern R. Co. v. Swinney*, 34 Tex. Civ. App. 219; *Missouri, etc., R. Co. v. Stinson*, 34 Tex. Civ. App. 285.

**Where a Special Judge's Term Is About to Expire, and with it all his judicial power, mandamus will not be issued to compel him to try a cause.** *Terry v. Baker*, 67 S. W. Rep. 258, 23 Ky. L. Rep. 2406.

**4. Powers Will Not Cease until Final Termination of Cause.** — *Fisher v. Puget Sound Brick, etc., Co.*, 34 Wash. 578; *Patterson v. Yancey*, 97 Mo. App. 681. See also *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819.

**Termination of Cause or Appointment of Successor.** — *Rumsey v. Lindsey*, 207 Pa. St. 262. See also *Jones v. Peters*, 28 Ind. App. 383; *Kissel v. Lewis*, 27 Ind. App. 302; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819.

**Florida — Powers Limited to Particular Matters Submitted.** — *Simonton v. State*, 44 Fla. 289.

**Return of Regular Judge Vacates Office.** — *State v. Carter*, 49 W. Va. 709. See also *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127. But see *Bohannon v. Tabbin*, 76 S. W. Rep. 46, 25 Ky. L. Rep. 515.

**Where the Regular Judge Died, and the special judge, who had been appointed to occupy the bench during the illness of the former, was appointed his successor, it was held that there was no hiatus, and that the successor being the same person who had tried the case, the term was not ended by the death.** *Franklin v. Vandervort*, 50 W. Va. 412.

**End of Term Before Decision of Motion.** — Where the term of office of a judge who had tried the case expired before his decision of a motion for a new trial, it was held he was properly appointed judge *pro tem.* under the *Washington* statute. *Nelson v. Seattle Traction Co.*, 25 Wash. 602.

**5. Regular Judge Disqualified During Trial**

**750. 7. Proof of Authority** — Record Should Show Affirmatively Selection and Appointment. — See note 1.

Necessity of Setting Out Disability of Regular Judge. — See note 4.

Presumption as to Performance of Prerequisites by Special Judge. — See note 7.

Presumption in Case of Second Appointment. — See note 9.

Presumption as to Consent. — See note 11.

**Before Judge Pro Tempore.** — *Butler v. State*, 112 Ga. 76.

Where the Regular Judge of a Circuit Court Ordered an Adjourned Term, but was unable to attend on account of his holding a regular term in another county, it was held that the adjourned term came to an end and that the decisions of a special judge selected by the attorneys were of no effect. *Caldwell v. Barrett*, 71 Ark. 310.

But in *Indiana* an adjourned term is not terminated by the commencement of a regular term in the same circuit. *Wheeler v. State*, 158 Ind. 687.

And in *Texas* it was held that where on the day appointed for the beginning of a special term, the regular judge was absent holding a term of his court in another county, the election of a special judge to preside over the special term was valid. *St. Louis Southwestern R. Co. v. Swinney*, 34 Tex. Civ. App. 219.

**750. 1. Record Should Show Election or**

**Appointment** — *Goodbar Shoe Co. v. Stewart*, 70 Ark. 407; *Low v. State*, 111 Tenn. 81.

**4. Setting Out Disability of Regular Judge.** — *Com. v. Scouton*, 20 Pa. Super. Ct. 503; *Low v. State*, 111 Tenn. 81.

**Reasons Need Not Be Shown.** — *State v. Hunter*, 171 Mo. 435. See also *Merrell v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 979.

**7. Presumption as to Performance of Prerequisites.** — *Means v. Stow*, 29 Colo. 80; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819.

In *Tennessee* it has been held that the authority of the judge to preside must appear in all criminal cases and should not be left to presumption. *Low v. State*, 111 Tenn. 81.

**9. Presumption as to Second Appointment.** — *State v. Newman*, 49 W. Va. 724.

**11. Objection Presumed to Be Waived Where Not Made Below.** — *Ripley v. Mutual Home, etc., Assoc.*, 154 Ind. 155; *Crawford v. Lawrence*, 154 Ind. 288; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819.

## JUDGMENT NOTES.

**752. I. DEFINITION.** — See notes 1, 2.

**753. III. IN WHOSE FAVOR JUDGMENT MAY BE CONFESSED** — Transferees. — See note 5.

**754. IV. WHETHER NOTE MUST BE MATURE.** — See notes 1, 2.

When the Warrant Is Silent as to the Time When Confession May Be Made. — See note 3.

**752. 1. Louisiana — Effect of Waiving Citation and Confessing Judgment.** — *Kiernan v. Jackson*, 111 La. 645.

**A Judgment Note Need Not Be under Seal.** — *Hazeltan Nat. Bank v. Kintz*, 24 Pa. Super. Ct. 456.

**2. Various Stipulations Contained in Judgment Notes.** — See *National Exch. Bank v. Wiley*, (Neb. 1902) 92 N. W. Rep. 582; *Krantz v. Kazenstein*, 22 Pa. Super. Ct. 275.

**753. 5. Warrant in Favor of Holder of Note.**

— *National Exch. Bank v. Wiley*, (Neb. 1902) 92 N. W. Rep. 582.

**754. 1. Judgment by Confession Authorized Before Maturity of Note.** — *Port Huron Engine, etc., Co. v. Clements*, 113 Wis. 249.

**2. Warrant Not Authorizing Judgment Before Maturity.** — See *National Exch. Bank v. Wiley*, (Neb. 1902) 92 N. W. Rep. 582.

**3. Warrant Silent — No Jurisdiction to Render Judgment Before Maturity.** — *McGahan v. People*, 191 Ill. 493.

# JUDGMENTS AND DECREES.

By E. C. ELLSBREE.

**762. I. DEFINITIONS AND GENERAL CONSIDERATIONS — 1. Definitions.** — See note 1.

Under the Codes. — See note 8.

**763. 2. Kinds of Judgments and Decrees — b. FINAL AND INTERLOCUTORY JUDGMENTS DISTINGUISHED.** — See note 3.

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**d. DISTINCTION BETWEEN JUDGMENTS IN REM AND IN PERSONAM.** — See note 8.

**3. Whether a Judgment Is a Contract.** — See note 10.

**764.** See note 1.

**765. II. REQUISITES OF VALID JUDGMENT — 2. Judgments by Confession — b. UNDER STATUTES — (1) In General.** — See note 5.

(2) *For What Claims Confession May Be Made* — (b) *Debts Not Due.* — See note 9.

**766. (3) By and for Whom Confession May Be Made — Married Women.** — See note 7.

**767. (4) Statement and Affidavit.** — See note 1.

(6) *Time and Place of Making Confession.* — See note 5.

**768. 3. Judgments by Default.** — See note 1.

**III. ENTRY OF JUDGMENTS.** — See notes 4, 5.

**IV. OPERATION AND EFFECT — 2. As Lien — a. ORIGIN AND HISTORY OF LIEN — (1) In General.** — See note 12.

**762. 1. Judgment Defined.** — *Levison v. Blumenthal*, 10 Pa. Dist. 413, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 762.

For Other Definitions, see *Goldreyer v. Cronan*, 76 Conn. 113; *In re Beck*, 63 Kan. 60.

**8. Code Definition.** — *Spokane, etc., Lumber Co. v. Stanley*, 25 Wash. 653.

**763. 3. Salyer v. Arnett.** (Ky. 1901) 62 S. W. Rep. 1031; *McDaniel v. Stum*, (Ky. 1901) 65 S. W. Rep. 800; *Leonard v. Sibley*, 76 Vt. 254. See also *Shannon v. Turgeon*, 4 Quebec Pr. 49.

When a Judgment, Apparently Interlocutory, Really Decides the Contestation between the parties it has been held to be a final judgment. *Singster v. Lacroix*, 14 Quebec Super. Ct. 89.

**4. Orders.** — *Carter v. White*, 134 N. Car. 470, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 763.

**8. Judgment in Rem Defined.** — See *Mulcahey v. Dow*, 131 Cal. 73.

**10. Judgments Held to Be Contracts.** — *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246.

**Judgment by Consent Is in Nature of Contract.** — *Stites v. McGee*, 37 Oregon 574.

**764. 1. Judgments Regarded as Specialties.** — *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246.

**765. 5. Statutory Confession of Judgment Without Action.** — *Desnoyers Shoe Co. v. Litchfield First Nat. Bank*, 188 Ill. 312.

**9. Confession of Judgment Before Maturity of**

**Debt.** — *St. John Woodworking Co. v. Smith*, 82 N. Y. App. Div. 348, affirmed 178 N. Y. 629.

**766. 7. Capacity of Married Woman under Statute to Confess Judgment.** — *Crosby v. Washburn*, 66 N. J. L. 494.

**767. 1. Statement and Affidavit.** — *Desnoyers Shoe Co. v. Litchfield First Nat. Bank*, 188 Ill. 312; *People v. Whitehead*, 90 Ill. App. 614; *Kleeman v. Baltz Brewing Co.*, 70 N. J. L. 202.

**Not Essential Where Judgment Shows Waiver of Service.** — *Smith v. Ridley*, 30 Tex. Civ. App. 158.

**Authority to Confess Judgment Must Be Strictly Pursued.** — *Mayer v. Pick*, 192 Ill. 561, 85 Am. St. Rep. 352; *Weber v. Powers*, 213 Ill. 370.

**5. Time and Place of Making Confession.** — *Desnoyers Shoe Co. v. Litchfield First Nat. Bank*, 188 Ill. 312, affirming 89 Ill. App. 579.

**768. 1. Judgment by Default Defined.** — *National Exch. Bank v. McElfish Clacy Mfg. Co.*, 48 W. Va. 406.

**4. Goldreyer v. Cronan**, 76 Conn. 113; *Christie v. Iowa L. Ins. Co.*, 111 Iowa 177; *King v. Dickson*, 114 Iowa 160.

**5. Lindquist v. Maurepas Land, etc., Co.**, 112 La. 1030; *Young v. Young*, 165 Mo. 624, 88 Am. St. Rep. 440; *Marstiller v. Ward*, 52 W. Va. 84, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 768.

**12. Judgments Inoperative as Liens at Common Law.** — *Taylor v. McGrew*, 29 Ind. App. 324.



- 770.** *b.* NATURE OF THE LIEN. — See notes 5, 6.  
Legislative Control over Lien. — See note 7.
- 771.** *c.* PREREQUISITES AS TO JUDGMENT OR DECREE — (1) *In General* — Judgments at Law. — See notes 3, 7, 8.
- 772.** (2) *Docketing or Recording* — (a) *In General*. — See note 4.
- 773.** See notes 1, 4.
- 774.** (b) Effect of Actual Notice of Undocketed Judgment. — See note 1.  
(d) Justice's Judgments. — See notes 4, 6.  
(3) *Indexing*. — See note 7.
- 775.** See notes 2, 3.  
(4) *Irregularities in Docketing or Indexing* — (a) *In General*. — See notes 4, 5, 6.  
(b) Omission or Mistake as to Name of Party to Judgment. — See note 7.  
Omission of Christian Name. — See notes 8, 9.
- 776.** Mistake in Christian Name. — See note 2.  
Abbreviation of Christian Name. — See note 3.  
Omission of Middle Initial. — See note 4.  
Misspelling of Surname. — See notes 6, 7.
- 777.** See note 1.
- 770.** 5. Judgments General and Not Specific Liens. — *Glen Morris-Glyndon Supply Co. v. McColgan*, 100 Md. 479.  
6. State v. District Ct., 85 Minn. 283.  
7. Legislative Control over Judgment Liens. — *Taylor v. McGrew*, 29 Ind. App. 324; *Halmes v. Dovey*, 64 Neb. 122.
- 771.** 3. *Rodgers v. Appleton City First Nat. Bank*, 82 Mo. App. 377.
7. Judgment Must Be for Definite Sum of Money. — See *Dickinson v. Rahn*, 98 Ill. App. 245.
- Must Be for Present Payment of Money. — *Barry v. Niessen*, 114 Wis. 256.  
8. See *Barry v. Niessen*, 114 Wis. 256.
- 772.** 4. Statutes Requiring Judgments to Be Docketed. — *Bernstein v. Schoenfeld*, 81 N. Y. App. Div. 171; *Wilson v. Beaufort County Lumber Co.*, 131 N. Car. 163; *Western Loan, etc., Co. v. Currey*, 39 Oregon 407; *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288; *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895.
- 773.** 1. Necessity of Docketing as Against Subsequent Purchaser. — *Sweetland v. Buell*, 164 N. Y. 541; *Bernstein v. Schoenfeld*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 610, affirmed 81 N. Y. App. Div. 171; *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895.  
4. *Wicks v. Scull*, 102 Va. 290.
- 774.** 1. *Sweetland v. Buell*, 164 N. Y. 541.
4. Requirement that Justice's Judgment Be Recorded. — *State Ins. Co. v. Prestage*, 116 Iowa 466.  
6. Necessity of Issuance of Execution Prior to Filing of Transcript. — *Brockway v. Trinity M. E. Church*, 205 Ill. 238.
7. Jurisdictions Requiring Judgments to Be Indexed. — *State Ins. Co. v. Prestage*, 116 Iowa 466; *German Nat. Bank v. Atherton*, 64 Neb. 610; *Valentine v. Britton*, 127 N. Car. 57; *Pennsylvania Sav. Fund, etc., Assoc. v. George*, 201 Pa. St. 43; *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288; *Corbett v. Redwood*, (Tex. Civ. App. 1900) 58 S. W. Rep. 550; *Fulkerson v. Taylor*, 100 Va. 426.
- 775.** 2. Actual Notice as Substitute for Indexing. — *Butts v. Cruttenden*, 14 Pa. Super. Ct. 449.
3. *Virginia*. — The ruling in *Old Dominion Granite Co. v. Clarke*, 28 Gratt. (Va.) 617, cited in the original, has been changed by statutory provision. *Fulkerson v. Taylor*, 100 Va. 426.
4. Statutes Requiring Docketing and Indexing to Be Substantially Followed. — *Western Loan, etc., Co. v. Currey*, 39 Oregon 407.  
Failure to Show Date of Docketing Fatal to Lien. — *Western Loan, etc., Co. v. Currey*, 39 Oregon 407; *Wood v. Fisk*, 45 Oregon 276.
5. *Pennsylvania Sav. Fund, etc., Assoc. v. George*, 201 Pa. St. 43, affirming 24 Pa. Co. Ct. 100; *Delaney v. Becker*, 14 Pa. Super. Ct. 392; *Rusterholtz v. Brown*, 10 Pa. Dist. 21.
6. *Butts v. Cruttenden*, 14 Pa. Super. Ct. 449.
7. Failure to Add "Junior" to Name Immaterial. — Compare *Rusterholtz v. Brown*, 10 Pa. Dist. 21.
8. Effect of Omission of Christian Name. — *Pennsylvania Sav. Fund, etc., Assoc. v. George*, 201 Pa. St. 43. See also *Dickerson v. Kelley*, 3 Penn. (Del.) 69.
9. Omission of Name of Owner of Judgment Renders It Insufficient to Create Lien. — *Travis v. Rhodes*, (Ala. 1904) 37 So. Rep. 804.
- 776.** 2. Name of Married Woman. — A judgment docketed against Mrs. W. A. N. is not notice to a subsequent mortgagee of property which is in the name of Nancy A. N. *Pennsylvania Sav. Fund, etc., Assoc. v. George*, 24 Pa. Co. Ct. 100. See also *Bankers Loan, etc., Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914.  
Christian Name Designated as Being Fictitious. — *Bernstein v. Schoenfeld*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 610, affirmed 81 N. Y. App. Div. 171.
3. Effect of Abbreviation of Christian Name. — *Green v. Meyers*, 98 Mo. App. 438; *Valentine v. Britton*, 127 N. Car. 57.
4. Omission of Middle Initial of Defendant in Index. — See *Butts v. Cruttenden*, 14 Pa. Super. Ct. 449.
6. Effect of Misspelling of Defendant's Surname. — *Delaney v. Becker*, 14 Pa. Super. Ct. 392.
7. *Delaney v. Becker*, 14 Pa. Super. Ct. 392. But see *Green v. Meyers*, 98 Mo. App. 438.
- 777.** 1. *Green v. Meyers*, 98 Mo. App. 438.

**777.** Effect of Failure to Enter Name of One of Several Defendants. — See note 2.

*d.* INTERESTS SUBJECT TO LIEN — (1) *Real Estate* — (a) *In General*.

— See note 7.

**778.** (b) *Naked Legal Estate*. — See notes 3, 4.

(c) *Equitable Interest Generally* — *Apart from Statutory Provision*. — See note 8.

**779.** But under Statute. — See note 2.

**780.** (e) *Equity of Redemption*. — See note 2.

(g) *Interest of Vendor*. — See note 8.

**781.** See notes 1, 2, 3.

**783.** (i) *Estates for Life*. — See note 1.

(j) *Leaseholds*. — See notes 4, 5.

(k) *Remainders and Reversionary Interests*. — See note 8.

**784.** (m) *Devises*. — See note 5.

(n) *Lands in Hands of Fraudulent Grantee*. — See note 7.

**787.** (u) *Subsequently Acquired Realty*. — See note 5.

**788.** (2) *Personal Estate* — (b) *Choses in Action*. — See note 2.

*f.* TERRITORIAL EXTENT — (1) *Judgments in State Courts*. — See

note 10.

**790.** *g.* COMMENCEMENT AND PRECEDENCE OF LIEN — (1) *In General*.

— See note 5.

**792.** Effect of Release or Waiver of Lien on One Parcel. — See note 7.

*Compare Delaney v. Becker*, 14 Pa. Super. Ct. 392.

**777.** 2. *Separate Indexing for Each Judgment*. — Where a cross index has but one entry and refers to a certain page in the docket book, and there are two judgments against the same judgment debtor on that page, only the first judgment becomes a lien on the debtor's property. *Valentine v. Britton*, 127 N. Car. 57.

**7.** *Judgments as Liens on Real Estate in General*. — *Barlow v. Cooper*, 109 Ill. App. 375; *People's Sav. Bank v. McCarthy*, 119 Iowa 586.

*Real Interest of Debtor Subject to Lien*. — *Hulshoff v. Bowman*, 10 Ohio Cir. Dec. 343, 19 Ohio Cir. Ct. 554.

*Unpatented Mining Claim Subject to Lien*. — *Butte Hardware Co. v. Frank*, 25 Mont. 344.

*Lien Does Not Extend to Growing Crops*. — *Gaston v. Marengo Imp. Co.*, 139 Ala. 465.

**778.** 3. *Judgment Not a Lien on Naked Legal Estate*. — *Fleming v. Wilson*, 92 Minn. 303. See also *A. R. Beck Lumber Co. v. Rupp*, 188 Ill. 562, 80 Am. St. Rep. 190.

**4.** *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65.

**8.** *Judgments Not Liens on Equitable Interests Apart from Statute*. — *Flint v. Chaloupka*, (Neb. 1904) 99 N. W. Rep. 825.

**779.** 2. *Judgments as Statutory Liens on Equitable Interests*. — *Barlow v. Cooper*, 109 Ill. App. 375.

**780.** 2. *Judgment as Lien on Equity of Redemption under Statute*. — *O'Connor v. Georgia R. Bank*, 121 Ga. 88; *Martin v. Berry*, 159 Ind. 566.

**8.** *Judgment as Lien on Vendor's Interest*. — *Falls City First Nat. Bank v. Edgar*, 65 Neb. 340; *Doe v. Startzer*, 62 Neb. 718; *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65.

**781.** 1. *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65.

**2.** *Effect of Judgment Against Vendor After Payment of Entire Purchase Money*. — *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65.

**3.** *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65.

**783.** 1. *During the Life of the Wife a husband has no interest in her lands which is subject to a lien*. *Bankers Loan, etc., Co. v. Blair*, 99 Va. 606, 86 Am. St. Rep. 914.

**4.** *Leasehold Not Subject to Lien at Common Law*. — *Summerville v. Stockton Milling Co.*, 142 Cal. 529, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703 [783]; *Lefever v. Armstrong*, 15 Pa. Super. Ct. 565.

**5.** *Leasehold Subject to Lien under Statute*. — *Ives v. Beecher*, 75 Conn. 564.

**8.** *Lien on Vested Remainder or Reversion*. — *Moll v. Gardner*, 214 Ill. 248; *Wilson v. Langhorne*, 102 Va. 631.

**784.** 5. *Judgment as Lien on Lands by Devise or Descent*. — *Martinovitch v. Marsicano*, 137 Cal. 354.

**7.** *Judgments as Liens on Property Fraudulently Conveyed*. — *Compare Matter of David*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 516.

**787.** 5. *Prevailing Rule that Judgment is Lien on After-acquired Realty*. — *Glen Morris-Glyndon Supply Co. v. McColgan*, 100 Md. 479; *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875; *Coad v. Cowhick*, 9 Wyo. 316, 87 Am. St. Rep. 953. See also *Western Loan, etc., Co. v. Currey*, 39 Oregon 407.

**788.** 2. *Judgment Not a Lien on Chose in Action*. — *Armour Packing Co. v. Wynn*, 119 Ga. 683.

**10.** *Lien of Judgments in State Courts Restricted to Jurisdiction of Court*. — *Jordan v. Nashville, etc., R. Co.*, 131 Ala. 219; *Hollahan v. Sowers*, 111 Ill. App. 263; *Barlow v. Cooper*, 109 Ill. App. 375; *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288.

**790.** 5. *Commencement of Lien Held to Date from Docketing or Recording*. — *Taylor v. McGrew*, 29 Ind. App. 324. See also *Boyer v. Webber*, 22 Pa. Super. Ct. 35.

**792.** 7. *Wilson v. Beaufort County Lumber Co.*, 131 N. Car. 163.

**793.** (2) *Doctrine of Relation.* — See notes 4, 5, 6, 9, 10.

**794.** See note 1.

(3) *Priority by Fractional Part of Day* — Judgments Entered on the Same Day. — See note 5.

**795.** (4) *Priority as Affected by Issuance of Execution.* — See note 7.

As Between Two or More Judgments. — See note 9.

**797.** (5) *Priority of Lien in Some Specific Instances* — (a) Against Equitable Interests — Contest Between Judgment Creditors. — See note 3.

(b) Against Lands Fraudulently Conveyed. — See note 8.

As Against Bona Fide Purchaser from Fraudulent Grantee. — See note 9.

**798.** (6) *Superior Rights of Third Persons* — (a) In General. — See note 9.

**799.** See note 1.

(b) Lands Instantaneously Seized — Judgment Debtor as Mere Conduit to Pass Title. — See note 4.

**800.** (c) Effect of Nunc Pro Tunc Entry of Judgment. — See note 7.

**801.** *h. EXPIRATION OR EXTINGUISHMENT OF LIEN* — (2) *Expiration of Statutory Period* — (a) In General. — See note 1.

**802.** (b) *Extension of Lien* — *aa. ISSUANCE OF EXECUTION.* — See note 5.

**803.** *bb. PROCEEDINGS OPERATING TO STAY EXECUTION* — (*bb*) *Judgment Entered with Stay of Execution.* — See note 6.

(*cc*) *Appeal or Writ of Error.* — See notes 8, 9.

**793.** 4. *Doctrine of Relation.* — *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

5. *Relation Back of Judgment Lien to Commencement of Term.* — *Doe v. Startzer*, 62 Neb. 718; *National Bank v. Tennessee Coal, etc., Co.*, 62 Ohio St. 564; *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

6. See *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

9. *Cramer v. Iler*, 63 Kan. 579; *National Bank v. Tennessee Coal, etc., Co.*, 62 Ohio St. 564; *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

10. *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

**794.** 1. *National Bank v. Tennessee Coal, etc., Co.*, 62 Ohio St. 564; *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

5. *View that Judgments on the Same Day Share Pro Rata.* — *Wheatland v. Wheatland*, 16 Montg. Co. Rep. (Pa.) 153.

**795.** 7. See *Andrus v. Burke*, 61 N. J. Eq. 297.

9. *Under Statute in New Jersey.* — *Andrus v. Burke*, 61 N. J. Eq. 297.

In *Kansas.* — *Cramer v. Iler*, 63 Kan. 579.

In *Ohio* the failure of a senior judgment creditor to issue execution within one year defeats the priority of his lien. *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 707.

**797.** 3. *Judgments Held to Be Liens Against Equitable Interests According to Priority in Point of Time.* — *Max Meadows Land, etc., Co. v. McGavock*, 98 Va. 411.

8. *View that Priority Is Acquired by Filing Bill Against Lands Fraudulently Conveyed.* — See *Matter of David*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 516.

9. *Gordon v. Cox*, 110 Tenn. 306, 100 Am. St. Rep. 812.

**798.** 9. *Limitation of Lien to Actual Interest of Judgment Debtor.* — *Glen Morris-Glyndon Supply Co. v. McColgan*, 100 Md. 479; *Matter*

*of David*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 516; *Dalrymple v. Security L. & T. Co.*, 11 N. Dak. 65. See also *Walker v. Downs*, (Tex. Civ. App. 1901) 64 S. W. Rep. 682.

**799.** 1. See *Glen Morris-Glyndon Supply Co. v. McColgan*, 100 Md. 479.

4. *Gordon v. Cox*, 110 Tenn. 306, 100 Am. St. Rep. 812.

**800.** 7. *Effect of Affirmance of Judgment on Appeal — Lien Relates Back to Rendition of Judgment.* — *Cook v. Martin*, (Ark. 1905) 87 S. W. Rep. 625.

**801.** 1. *Expiration of Statutory Period for Continuance of Judgment Lien — Delaware.* — *Maxwell v. Devalinger*, 2 Penn. (Del.) 504.

*Indiana.* — *Taylor v. McGrew*, 29 Ind. App. 324.

*Kansas.* — *Cramer v. Iler*, 63 Kan. 579.

*North Carolina.* — *Wilson v. Beaufort County Lumber Co.*, 131 N. Car. 163.

*South Dakota.* — *Ruth v. Wells*, 13 S. Dak. 482.

*Texas.* — *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288.

*Washington.* — *Whitworth v. McKee*, 32 Wash. 83.

*Wisconsin.* — *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895.

*Duration of Lien of Justice's Judgment.* — The lien expires ten years from the rendition of the judgment. *Sullivan v. Miles*, 117 Wis. 576.

**802.** 5. *Execution Within Specified Time Required for Continuance of Lien During Statutory Period.* — *Holmes v. Dovey*, 64 Neb. 122; *Crockett First Nat. Bank v. Adams*, 31 Tex. Civ. App. 413; *Johnson v. Weatherford*, 31 Tex. Civ. App. 180; *Pfeuffer v. Werner*, 27 Tex. Civ. App. 288. See also *Cramer v. Iler*, 63 Kan. 579.

**803.** 6. See *Wenham v. International Packing Co.*, 213 Ill. 397.

8. *Statute of Limitations Held to Be Suspended by Writ of Error.* — See *Taylor v. McGrew*, 29 Ind. App. 324.

**803.** (*dd*) *Injunction*. — See note 10.

**804.** *dd*. DEATH OF JUDGMENT DEBTOR. — See notes 6, 7.

*ff*. REVIVOR OF JUDGMENT — Effect as Between Parties to Judgment. — See note 9.

**805.** Revival After Dormancy or Expiration of Lien. — See note 4.

(3) *Release*. — See note 7.

**806.** (8) *Appeal or Writ of Error*. — See note 11.

**807.** Effect of Appeal from Justice's Judgment. — See note 3.

**808.** (11) *Reversal or Cancellation of Judgment*. — See note 1.

(12) *Merger* — Recovery of New Judgment. — See note 3.

**809.** V. DIRECT ATTACK BY APPEAL OR WRIT OF ERROR — 2. Effect of Reversal — *a*. IN GENERAL. — See notes 1, 3, 4, 5.

**803.** 9. Statute of Limitations Held Not to Be Suspended by Appeal Apart from Express Provision. — *Sublette v. St. Louis, etc., R. Co.*, 96 Mo. App. 113.

10. Suspension of Statute of Limitation by Injunction. — *Taylor v. McGrew*, 29 Ind. App. 324.

**804.** 6. *Bowers v. Rineard*, 209 Pa. St. 545; *Biesecker v. Cobb*, 13 Pa. Super. Ct. 56.

7. *Bowers v. Rineard*, 209 Pa. St. 545. See also *Roberts v. Powell*, 210 Pa. St. 594.

9. Extension of Statutory Period as Between Parties by Revivor of Judgment. — *Holmes v. Dovey*, 64 Neb. 122.

**805.** 4. Revival After Expiration of Statutory Period Ineffectual to Extend Lien. — *Holmes v. Dovey*, 64 Neb. 122.

7. See *Huntington First Nat. Bank v. Simms*, 49 W. Va. 442.

**806.** 11. Lien Not Discharged by Appeal. — See *Brown v. Schintz*, 109 Ill. App. 598.

Opening Judgment — Lien Not Discharged. — *Van Cott v. Webb-Miller*, 25 Pa. Super. Ct. 51.

**807.** 3. View that Lien of Justice's Judgment Is Not Destroyed by Appeal. — Compare *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565.

**808.** 1. *Halpin v. Coleman*, 66 N. Y. App. Div. 37.

3. Lien Lost by Recovery of New Judgment. — *McKenna v. Van Blarcom*, 109 Wis. 271, 83 Am. St. Rep. 895. *Contra*, *Springs v. Pharr*, 131 N. Car. 192, 92 Am. St. Rep. 775.

After the Death of the Judgment Debtor a judgment recovered against his personal representative was held not to merge the first lien. *Matter of Wiley*, 138 Cal. 301.

**809.** 1. Reversal Effects Complete Vacation or Annulment of Judgment. — *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369; *Goodman v. Turner*, 94 Ill. App. 530; *Chicago, etc., R. Co. v. Adams*, 26 Ind. App. 443; *Hall v. Calhoun Circuit Judge*, 123 Mich. 555.

3. Reversal Leaves Parties to Proceed as Though No Judgment Had Been Entered. — *Burch v. Swift*, 116 Ga. 595; *Goodman v. Turner*, 94 Ill. App. 530; *Chicago, etc., R. Co. v. Adams*, 26 Ind. App. 443.

4. Direction by Appellate Court as to Proceedings to Be Had or Judgment to Be Rendered in Trial Court — *United States*. — *Barber v. Coit*, (C. C. A.) 118 Fed. Rep. 272.

*Colorado*. — *Leffingwell v. Miller*, (Colo. App. 1905) 79 Pac. Rep. 327.

*Florida*. — *Philadelphia Underwriters' Ins. Co. v. Bigelow*, (Fla. 1904) 37 So. Rep. 210; *Geiger v. Henry*, 44 Fla. 208.

*Illinois*. — *Wenham v. International Packing Co.*, 213 Ill. 397; *Papke v. G. H. Hammond Co.*, 192 Ill. 631.

*Indiana*. — *Bedford Quarries Co. v. Thomas*, 29 Ind. App. 85.

*Iowa*. — *Rew v. Independent School Dist.*, 125 Iowa 28, 106 Am. St. Rep. 282.

*Massachusetts*. — *Whipple v. Rich*, 180 Mass. 477.

*Missouri*. — *Meffert v. Dyer*, 107 Mo. App. 462.

*Nebraska*. — *Story v. Robertson*, (Neb. 1904) 98 N. W. Rep. 825; *Chicago, etc., R. Co. v. Yost*, 61 Neb. 530.

*New York*. — *Matter of Lerner*, 170 N. Y. 7; *Hartmann v. Hoffman*, 76 N. Y. App. Div. 449; *Denton v. Bennett*, 102 N. Y. App. Div. 454; *Howell v. New York Cent., etc., R. Co.*, 69 N. Y. App. Div. 409.

*North Carolina*. — *Wilson v. Rankin*, 129 N. Car. 447.

*North Dakota*. — *Avery Mfg. Co. v. Smith*, (N. Dak. 1905) 103 N. W. Rep. 410.

*Pennsylvania*. — *Hoyt v. Kingston Coal Co.*, 203 Pa. St. 509.

*Tennessee*. — *Stratton v. McKinnie*, (Tenn. Ch. 1900) 62 S. W. Rep. 636; *Johnson v. Murphy*, 107 Tenn. 558.

*Texas*. — *Underwood v. Jones*, 95 Tex. 121; *Clawson v. Williams*, 27 Tex. Civ. App. 130; *Stewart v. Polk*, 26 Tex. Civ. App. 565; *Marshall v. San Antonio*, (Tex. Civ. App. 1901) 63 S. W. Rep. 138.

*West Virginia*. — *McClain v. Batton*, 50 W. Va. 121; *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

*Wisconsin*. — *Muenchow v. Theo. Zschetzsche, etc., Co.*, 113 Wis. 8; *Muench v. Heinemann*, 119 Wis. 441; *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

5. Rendition of Final Judgment by Appellate Court — *Alabama*. — *Guttery v. Boshell*, 132 Ala. 596.

*Illinois*. — *Iroquois Furnace Co. v. Elphicke*, 200 Ill. 411.

*Missouri*. — *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. Rep. 703; *Wood v. Flanery*, 89 Mo. App. 632.

*Nebraska*. — *Chicago, etc., R. Co. v. Yost*, 61 Neb. 530.

*New Jersey*. — *National Bank v. Berrall*, 70 N. J. L. 757.

*New York*. — *Niemoller v. Duncombe*, 59 N. Y. App. Div. 614, affirmed 172 N. Y. 621; *Lazarus v. Rosenberg*, 70 N. Y. App. Div. 105; *Munch v. New York*, (Supm. Ct. App. T.) 47

**810. b. RIGHTS OF THIRD PERSONS.** — See notes 1, 2.

Voluntary Purchases from Party. — See note 3.

**c. WHERE PROPERTY HAS BEEN TAKEN UNDER THE JUDGMENT.**

— See notes 4, 6.

**811. 4. Effect of Affirmance or Dismissal of Appeal or Writ of Error.** — See note 2.

Damages. — See note 6.

**812. 5. Costs.** — See notes 1, 2.**813. The Universal Custom.** — See notes 1, 2.**814. VI. CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED** — 1. In General — Power to Amend, Open, or Vacate. — See note 1.Misc. (N. Y.) 128. See also *Roosevelt v. Nussbaum*, 75 N. Y. App. Div. 117.*Pennsylvania*. — *Witman v. Smeltzer*, 16 Pa. Super. Ct. 285.*Texas*. — *Thomson v. Hubbard*, (Tex. Civ. App. 1902) 70 S. W. Rep. 572; *Harris-Hearin Fountain Co. v. Pressler*, 35 Tex. Civ. App. 360; *Wells, etc., Express v. Waites*, 29 Tex. Civ. App. 560; *Galveston v. Brown*, 28 Tex. Civ. App. 274.*Washington*. — *Johnston v. Gerry*, 34 Wash. 524.*West Virginia*. — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.**810. 1. Rights of Third Persons Not Affected by Reversal of Judgment.** — *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698.**2. Rule Applies Though Third Person Knew that Appeal Was Pending or Contemplated.** — *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698.**3. Rule Does Not Apply to Voluntary Purchases from Party.** — *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698.**4. Right of Owner of Property Taken under Judgment to Have It Returned.** — *Chicago, etc., R. Co. v. Adams*, 26 Ind. App. 443.**6. Owner of Property May Recover Value.** — *Florence Cotton, etc., Co. v. Louisville Banking Co.*, 138 Ala. 588, 100 Am. St. Rep. 50.**811. 2. Effect of Affirmance.** — *Dunton v. McCook*, 120 Iowa 444. See also *Gammon v. Bunnell*, 22 Utah 421.**6. Awarding of Damages Against Unsuccessful Party.** — *Southern R. Co. v. Lassetter*, 115 Ga. 689.**812. 1. Statutory Regulation as to Costs.** — *Olson v. Rushfeldt*, 81 Minn. 381.**2. Discretion of Appellate Court in Regard to Costs.** — *Porter v. Trompen*, (Neb. 1901) 96 N. W. Rep. 226; *Ellis v. Barron County*, 111 Wis. 576.**813. 1. Costs Usually Adjudged to Prevailing Party.** — *McQueeney v. Norcross*, 75 Conn. 382; *State v. Miller*, 109 La. 240; *Thomas v. Thomas*, 98 Me. 184; *Ellis v. Barron County*, 111 Wis. 576.**2. Requirement that Appellant Obtain More Favorable Judgment.** — *Rose v. Wells*, 92 N. Y. App. Div. 75; *Custer City First Nat. Bank v. Calkins*, 16 S. Dak. 445; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111.**814. 1. Control of Court over Judgments and Decrees During Term at Which Rendered — United States.** — *Mahler v. Animarium Co.*, (C. C. A.) 129 Fed. Rep. 897; *U. S. v. 1621 Pounds Fur Clippings*, (C. C. A.) 106 Fed. Rep. 161;*Interstate Commerce Commission v. Louisville, etc., R. Co.*, 101 Fed. Rep. 146.*Arizona*. — *National Metal Co. v. Greene Consol. Copper Co.*, (Ariz. 1905) 80 Pac. Rep. 397; *Matter of Zeckendorf*, 7 Ariz. 328.*Connecticut*. — *Goldreyer v. Cronan*, 76 Conn. 113.*Georgia*. — *Lewis v. Forehand*, 117 Ga. 798, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *Bowen v. Wyeth*, 119 Ga. 687; *Union Compress Co. v. Leffler*, 122 Ga. 640; *Perkins v. Castleberry*, 119 Ga. 702.*Illinois*. — *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Kloeckner v. Schafer*, 110 Ill. App. 391.*Iowa*. — *Streeter v. Gleason*, 120 Iowa 703; *Hull v. Eby*, 123 Iowa 257; *Hartley v. Bartruff*, 112 Iowa 592.*Kansas*. — *In re Beck*, 63 Kan. 60, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816.*Kentucky*. — *Forest Hill Bldg., etc., Assoc. v. McEvoy*, (Ky. 1902) 66 S. W. Rep. 1031; *Pennsylvania F. Ins. Co. v. Young*, (Ky. 1904) 78 S. W. Rep. 127.*Maryland*. — See *Maryland Steel Co. v. Marney*, 91 Md. 360.*Missouri*. — *Hesse v. Seypp*, 88 Mo. App. 66; *Woodward v. Woodward*, 84 Mo. App. 328; *Williams v. Walton*, 84 Mo. App. 433; *Hulbert v. Tredway*, 159 Mo. 665.*Nebraska*. — *Horton v. State*, 63 Neb. 34; *Colby v. Maw*, (Neb. 1901) 95 N. W. Rep. 677; *Coxe v. Omaha Coal, etc., Co.*, (Neb. 1903) 94 N. W. Rep. 519; *Enyart v. Moran*, 64 Neb. 401; *Eager v. Blake*, (Neb. 1901) 96 N. W. Rep. 74.*New York*. — *Weston v. Citizens' Nat. Bank*, 88 N. Y. App. Div. 330.*North Carolina*. — *Hardy v. Hardy*, 128 N. Car. 178.*Ohio*. — *Manguno, etc., Co. v. Clymonts*, 10 Ohio Cir. Dec. 427, 19 Ohio Cir. Ct. 237; *Bates v. State*, 63 Ohio St. 11. But see *In re Blake*, 14 Ohio Dec. 89, where it was held that the probate court being a court of limited jurisdiction had no such power in the absence of statute.*Oregon*. — *Brand v. Baker*, 42 Oregon 426.*Pennsylvania*. — *Kellett v. Freeman*, 19 Pa. Super. Ct. 155.*Texas*. — *Raley v. Sweeney*, 24 Tex. Civ. App. 620.*Washington*. — *Coyle v. Seattle Electric Co.*, 31 Wash. 184, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813.*Wisconsin*. — *Smith v. Milwaukee Electric R., etc., Co.*, 119 Wis. 336.

**815. 2. To What Cases the Power Extends.** — See note 1.

**3. What Errors May Be Corrected.** — See note 3.

**4. When Power Will Not Be Exercised.** — See note 5.

**6. Duration of Term.** — See note 8.

**7. Proceedings Commenced During Term but Continued to Subsequent Term.** — See note 9.

**816. VII. AMENDMENT AFTER TERM AT WHICH RENDERED** — 1. As to Matters of Substance — *a. GENERAL RULE STATED.* — See note 1.

**817. b. TO WHAT JUDGMENTS THE RULE APPLIES.** — See note 1.

**818.** See note 1.

**2. As to Matters of Form** — *a. GENERAL RULE.* — See notes 3, 4.

**Courts of Continuous Session.** — See *Coyle v. Seattle Electric Co.*, 31 Wash. 184.

**Judgment Entered in Vacation.** — *McConnell v. Avey*, 117 Iowa 282.

**Notice of Application Necessary.** — *Ellis v. Remley*, 115 Iowa 381.

**815. 1. Power Extends to Criminal as Well as Civil Cases.** — *People v. Ward*, 141 Cal. 628.

**3. Erroneous Decision May Be Corrected.** — *Manguno, etc., Co. v. Clymonts*, 10 Ohio Cir. Dec. 427, 19 Ohio Cir. Ct. 237.

**5. Power Will Not Be Exercised so as to Enable Party to Take Advantage of His Own Negligence or Misconduct.** — *Moore v. Kelly, etc., Co.*, 108 Ga. 798.

**8. Every Term Continues until Commencement of Next Term, unless Court Has Previously Adjourned Sine Die.** — See *Beale v. Bucher*, 13 Pa. Super. Ct. 474.

**9. Proceedings May Be Continued to Subsequent Term.** — *Van Dyke v. Van Dyke*, 120 Ga. 987, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Hartman v. Viera*, 113 Ill. App. 216; *Donaldson v. Copeland*, 101 Ill. App. 252, affirmed 201 Ill. 540; *Trapp v. Aldridge*, (Ky. 1902) 67 S. W. Rep. 834; *Suddarth v. Empire Lime Co.*, 79 Mo. App. 585; *Houston v. Thompson*, 87 Mo. App. 63; *Harkness v. Jarvis*, 182 Mo. 231; *Ward v. Western Union Tel. Co.*, 62 S. Car. 274.

**816. 1. Judgment Cannot Be Amended as to Matters of Substance After Term at Which Rendered** — *United States*. — *Lynah v. U. S.*, 106 Fed. Rep. 121.

*Alabama*. — *Chamblee v. Cole*, 128 Ala. 649; *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268.

*California*. — *Matter of Potter*, 141 Cal. 424.

*Connecticut*. — *Goldreyer v. Cronan*, 76 Conn. 113.

*Georgia*. — *Thompson v. American Mortg. Co.*, 122 Ga. 39.

*Illinois*. — *Pisa v. Rezek*, 206 Ill. 344; *Fitzgerald v. Gore*, 105 Ill. App. 242; *Finch v. Finch*, 111 Ill. App. 481; *Donaldson v. Copeland*, 201 Ill. 540; *Schmelzer v. Chicago Ave. Sash, etc., Mfg. Co.*, 85 Ill. App. 596; *Schmidt v. Rehwinkel*, 86 Ill. App. 267; *Stitt v. Kurtenbach*, 85 Ill. App. 38.

*Kansas*. — *In re Beck*, 63 Kan. 60, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816.

*Kentucky*. — *Com. v. Ratcliff*, (Ky. 1905) 84 S. W. Rep. 1147; *Jett v. Farmers' Bank*, (Ky. 1903) 76 S. W. Rep. 385.

*Missouri*. — *Burnside v. Wand*, 170 Mo. 531.

*New York*. — See *Matter of Silliman*, 79 N. Y. App. Div. 98, reversing (Surrogate Court)

38 Misc. 226; *Dunscumb v. Poole*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 335, affirmed 87 N. Y. App. Div. 632; *Morrison v. Metropolitan El. R. Co.*, 60 N. Y. App. Div. 180.

*Texas*. — *Abbott v. Foster*, (Tex. Civ. App. 1901) 62 S. W. Rep. 121; *Smallwood v. Love*, (Tex. Civ. App. 1904) 78 S. W. Rep. 400.

**817. 1. Rule Applies Only to Final Judgments.** — *Salver v. Arnett*, (Ky. 1901) 62 S. W. Rep. 1031.

**818. 1. Rule Does Not Apply to Interlocutory Judgment.** — *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Salver v. Arnett*, (Ky. 1901) 62 S. W. Rep. 1031.

**3. Inherent Power of Court.** — *Indianapolis, etc., Rapid Transit Co. v. Andis*, 33 Ind. App. 625; *Stern v. Bennington*, 100 Md. 344; *Ricaud v. Alderman*, 132 N. Car. 62.

**4. Entry May Be Amended or Corrected so as to Conform to Judgment Actually Rendered** — *United States*. — *Lynah v. U. S.*, 106 Fed. Rep. 121; *Ex p. Marks*, (C. C. A.) 136 Fed. Rep. 168; *Groton Bridge, etc., Co. v. Clark Pressed Brick Co.*, (C. C. A.) 136 Fed. Rep. 27.

*Alabama*. — *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268.

*California*. — *Matter of Willard*, 139 Cal. 501; *Homeseekers Loan Assoc. v. Gleeson*, 133 Cal. 312; *Galvin v. Palmer*, 134 Cal. 426; *Canadian, etc., Mortg., etc., Co. v. Clarita Land, etc., Co.*, 140 Cal. 672.

*Colorado*. — *People v. District Ct.*, 33 Colo. 77.

*Connecticut*. — *Goldreyer v. Cronan*, 76 Conn. 113.

*Georgia*. — *Thompson v. American Mortg. Co.*, 122 Ga. 39; *Dennis v. Colley*, 112 Ga. 114.

*Illinois*. — *Harris v. Schilling*, 108 Ill. App. 116, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821; *Consolidated Coal Co. v. Oeltjen*, 91 Ill. App. 123, affirmed 189 Ill. 85; *Denhard v. Dunbar*, 98 Ill. App. 266; *McDonald v. Patterson*, 190 Ill. 121; *Channel v. Merrifield*, 206 Ill. 278, reversing on other grounds 106 Ill. App. 244; *Pisa v. Rezek*, 206 Ill. 344.

*Indiana*. — *Indianapolis, etc., Rapid Transit Co. v. Andis*, 33 Ind. App. 625.

*Kansas*. — *First State Bank v. Stevenson*, 65 Kan. 816; *Edinburgh Lombard Invest. Co. v. Walsh*, 70 Kan. 899.

*Kentucky*. — *Boro v. Holtzhauer*, (Ky. 1902) 67 S. W. Rep. 30.

*Maine*. — *Thomas v. Thomas*, 98 Me. 184.

*Missouri*. — *Williams v. Walton*, 84 Mo. App. 433; *Wand v. Ryan*, 166 Mo. 646; *Bishop v. Seal*, 92 Mo. App. 167.

*Nebraska*. — *Ackerman v. Ackerman*, 61 Neb.

**820.** *b. APPLICATIONS OF THE RULE — (1) Natural Applications.* — See notes 1, 2, 3, 5.

**Mistake in Date.** — See note 6.

**Mistake in Amount.** — See note 7.

**821.** See note 1.

**Mistake as to Parties.** — See notes 2, 3, 4.

**822.** *Erroneous or Omitted Description of Land.* — See note 1.

(2) *Strained Application in the Interest of Justice* — (a) *In General.* — See note 2.

**3. Evidence to Procure Amendment.** — See notes 4, 5.

**823.** *4. Notice.* — See notes 1, 3.

72; *Fisk v. Osgood*, (Neb. 1901) 96 N. W. Rep. 237.

*New York.* — *Matter of Robertson*, 51 N. Y. App. Div. 117, *affirmed* 165 N. Y. 675; *Cooper v. Cooper*, 51 N. Y. App. Div. 595, *appeal dismissed* 164 N. Y. 576, 577; *Morrison v. Metropolitan El. R. Co.*, 60 N. Y. App. Div. 180.

*Texas.* — *Texas, etc., R. Co. v. Walker*, (Tex. Civ. App. 1905) 87 S. W. Rep. 194.

*Washington.* — *Sivyer v. Lawyer*, 25 Wash. 360.

*Wisconsin.* — *Bostwick v. Van Vleck*, 106 Wis. 387.

**820. 1. Correction of Clerical Errors or Mistakes.** — *United States.* — *Ex p. Marks*, (C. C. A.) 136 Fed. Rep. 168; *Groton Bridge, etc., Co. v. Clark Pressed Brick Co.*, (C. C. A.) 136 Fed. Rep. 27.

*Alabama.* — *Chamblee v. Cole*, 128 Ala. 649.

*California.* — *Fay v. Stubenrauch*, 141 Cal. 573.

*Colorado.* — *People v. District Ct.*, 33 Colo. 77.

*Georgia.* — *Thompson v. American Mortg. Co.*, 122 Ga. 39.

*Illinois.* — *Harris v. Schilling*, 108 Ill. App. 116; *McDonald v. Patterson*, 190 Ill. 121.

*Kansas.* — *Edinburgh Lombard Invest. Co. v. Walsh*, 70 Kan. 399.

*Kentucky.* — *Binion v. Woolery*, (Ky. 1904) 78 S. W. Rep. 898; *Boro v. Holtzhauer*, (Ky. 1902) 67 S. W. Rep. 30.

*Missouri.* — *Bishop v. Seal*, 92 Mo. App. 167; *Wand v. Ryan*, 166 Mo. 646.

*New York.* — *Morrison v. Metropolitan El. R. Co.*, 60 N. Y. App. Div. 180.

*Wisconsin.* — *Bostwick v. Van Vleck*, 106 Wis. 387.

**2. Striking Out Erroneous Entries.** — *McDonald v. Patterson*, 190 Ill. 121; *Boro v. Holtzhauer*, (Ky. 1902) 67 S. W. Rep. 30; *Texas, etc., R. Co. v. Walker*, (Tex. Civ. App. 1905) 87 S. W. Rep. 194.

**3. Supplying Omissions.** — *Lynah v. U. S.*, 106 Fed. Rep. 121; *Denhard v. Dunbar*, 98 Ill. App. 266; *Thomas v. Thomas*, 98 Me. 184. See also *Indianapolis, etc., Rapid Transit Co. v. Andis*, 33 Ind. App. 625.

**Making Judgment Conform with Pleadings.** — *Dennis v. Colley*, 112 Ga. 114.

**5. Clause May Be Inserted to Give Effect to Judgment.** — *Homeseekers Loan Assoc. v. Gleeson*, 133 Cal. 312; *Matter of Robertson*, 51 N. Y. App. Div. 117, *affirmed* 165 N. Y. 675.

**6. Mistake in Date.** — *Harris v. Schilling*, 108 Ill. App. 116, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821.

**7. Mistake in Amount of Judgment.** — *George v. Nowlan*, 38 Oregon 541, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 820.

**Amendment so as to Correct Unauthorized Allowance to Counsel.** — *Cooper v. Cooper*, 51 N. Y. App. Div. 595, *appeal dismissed* 164 N. Y. 576, 577.

**821. 1. Mistake in Calculation.** — *Ex p. Marks*, (C. C. A.) 136 Fed. Rep. 168; *Brown v. Woodward*, 75 Conn. 254; *Harris v. Schilling*, 108 Ill. App. 116, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821; *Dils v. Hatcher*, (Ky. 1903) 76 S. W. Rep. 514; *Williams v. Walton*, 84 Mo. App. 433.

**2. Mistake in Name of Party.** — *Harris v. Schilling*, 108 Ill. App. 116, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821. *Compare Bernstein v. Schoenfeld*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 610, *affirmed* 81 N. Y. App. Div. 171.

**Where the Names in the Judgment Conform to the Names in the Pleadings and process, the judgment cannot be amended by inserting a different name.** *Thompson v. American Mortg. Co.*, 122 Ga. 39.

**3. Name Improperly Entered May Be Struck Out.** — *Harris v. Schilling*, 108 Ill. App. 116, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821.

**4. Names of Parties Improperly Omitted May Be Inserted.** — *Denhard v. Dunbar*, 98 Ill. App. 266.

**822. 1. Erroneous or Omitted Description of Land.** — *Harris v. Schilling*, 108 Ill. App. 116, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Morrison v. Metropolitan El. R. Co.*, 60 N. Y. App. Div. 180.

**2. Amendment of Judgment in Interest of Justice.** — See *Lynah v. U. S.*, 106 Fed. Rep. 121; *Cooper v. Cooper*, 51 N. Y. App. Div. 595, *appeal dismissed* 164 N. Y. 576, 577.

**4. Amendment May Be Based on Any Satisfactory Evidence.** — See *Groton Bridge, etc., Co. v. Clark Pressed Brick Co.*, (C. C. A.) 136 Fed. Rep. 27.

**5. Amendment Should Be Based on Evidence Contained in the Record.** — *People v. Ward*, 141 Cal. 628; *Page v. Shields*, 102 Ill. App. 575; *Schmelzer v. Chicago Ave. Sash, etc., Mfg. Co.*, 85 Ill. App. 596; *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Denhard v. Dunbar*, 98 Ill. App. 266; *Jett v. Farmers' Bank*, (Ky. 1903) 76 S. W. Rep. 385; *Crenshaw v. Crenshaw*, (Ky. 1902) 69 S. W. Rep. 711; *Williams v. Walton*, 84 Mo. App. 433; *Burnes v. Sullivan*, 90 Mo. App. 1. See also *Bishop v. Seal*, 92 Mo. App. 167.

**823. 1. Notice Not Necessary Where Cause for Correction Appears in Record.** — *Compare Page v. Shields*, 102 Ill. App. 575.

**824.** 5. Effect of Amendment as to Third Persons. — See note 2.

**VIII. OPENING AND VACATION AFTER TERM AT WHICH RENDERED —**

1. General Rule Against Opening or Vacation. — See note 3.

**825.** 2. Grounds upon Which Judgments May Be Opened or Vacated —

b. JUDGMENT VOID — LACK OF JURISDICTION. — See notes 2, 3.

**826.** Invalidity Not Apparent on Face of Record. — See note 1.

**823.** 3. Notice Necessary Where Correction Is Based upon Evidence Adduced Aliunde. — Page v. Shields, 102 Ill. App. 575; Stitt v. Kurtenbach, 85 Ill. App. 38; Browne v. Kiel, 117 Iowa 316.

**824.** 2. Rights of Third Persons Protected Without Express Reservation. — Powers v. Carter Coal, etc., Co., 100 Va. 450. See also Thompson v. American Mortg. Co., 122 Ga. 39; Denhard v. Dunbar, 98 Ill. App. 266.

3. Court Cannot Open or Vacate Judgment After Term at Which Rendered — United States. — Tubman v. Baltimore, etc., R. Co., 190 U. S. 38; Manning v. German Ins. Co., (C. C. A.) 107 Fed. Rep. 52; Brown v. Arnold, 127 Fed. Rep. 387, reversed on other grounds (C. C. A.) 131 Fed. Rep. 723; U. S. v. 1621 Pounds Fur Clippings, (C. C. A.) 106 Fed. Rep. 161; Green v. Fitchburg R. Co., 116 Fed. Rep. 928.

Alabama. — Ex p. Payne, 130 Ala. 189; Wilmerding v. Corbin Banking Co., 126 Ala. 268; Chamblee v. Cole, 128 Ala. 649.

Alaska. — Banks v. Wilson, 1 Alaska 241.

Arizona. — National Metal Co. v. Greene Consol. Copper Co., (Ariz. 1905) 80 Pac. Rep. 397; Matter of Zeckendorf, 7 Ariz. 328.

California. — O'Brien v. O'Brien, 130 Cal.

Colorado. — Smith v. Mock, 33 Colo. 154.

Georgia. — Baker v. Baker, 113 Ga. 378; Cauley v. Wadley Lumber Co., 119 Ga. 648.

Illinois. — Chicago v. Nodeck, 202 Ill. 257; Peterson v. Metropolitan Nat. Bank, 88 Ill. App. 190; Doremus v. Chicago, 212 Ill. 513; Schmidt v. Rehwinkel, 86 Ill. App. 267; Rich v. Chicago, 187 Ill. 396; Finch v. Finch, 111 Ill. App. 481; Pisa v. Rezek, 108 Ill. App. 198, affirmed 206 Ill. 344; Fitzgerald v. Gore, 105 Ill. App. 242; Leavitt v. Bolton, 102 Ill. App. 582; Chicago v. Nicholes, 192 Ill. 489; Schmelzer v. Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596; Utley v. Cameron, 87 Ill. App. 71; Ernst Tosetti Brewing Co. v. Koehler, 200 Ill. 369.

Kentucky. — Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co., (Ky. 1902) 66 S. W. Rep. 734; McDaniel v. Stum, (Ky. 1901) 65 S. W. Rep. 800.

Missouri. — Bishop v. Seal, 92 Mo. App. 167.

Nebraska. — Sherman County v. Nichols, 65 Neb. 250; Bastian v. Adams, (Neb. 1903) 97 N. W. Rep. 231; Schuyler Bldg., etc., Assoc. v. Fulmer, 61 Neb. 68.

North Dakota. — Compare Martinson v. Marzolf, (N. Dak. 1905) 103 N. W. Rep. 937.

Ohio. — Bates v. State, 63 Ohio St. 11.

Oregon. — Stites v. McGee, 37 Oregon 574; Hoover v. Hoover, 39 Oregon 456.

Tennessee. — Vaughn v. Tealey, (Tenn. Ch. 1899) 58 S. W. Rep. 487.

Texas. — Abbott v. Foster, (Tex. Civ. App. 1901) 62 S. W. Rep. 121.

West Virginia. — Childers v. Loudin, 51 W. Va. 559; Morgantown Second Nat. Bank v. Ralphsnyder, 54 W. Va. 231; Seiler v. Union Mfg. Co., 50 W. Va. 208; State v. Boner, (W. Va. 1905) 49 S. E. Rep. 944.

Wisconsin. — Dufur v. Home Invest. Co., 122 Wis. 470; State v. Circuit Ct., 108 Wis. 77.

**825.** 2. Void Judgment May Be Vacated —

Alabama. — Chamblee v. Cole, 128 Ala. 649.

Arizona. — National Metal Co. v. Greene Consol. Copper Co., (Ariz. 1905) 80 Pac. Rep. 397.

California. — Crossman v. Vivienda Water Co., 136 Cal. 571.

Hawaii. — Gouveia v. Nakamura, 13 Hawaii 452, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

Illinois. — Peterson v. Metropolitan Nat. Bank, 88 Ill. App. 190; Parker v. Macoy, 91 Ill. App. 313; McIntyer v. Houseman, 108 Ill. App. 276. See also Leavitt v. Bolton, 102 Ill. App. 582.

Iowa. — Spencer v. Berns, 114 Iowa 126.

Minnesota. — Phelps v. Heaton, 79 Minn. 476; Stai v. Selden, 87 Minn. 271.

New Jersey. — McLaughlin v. Cross, 68 N. J. L. 599, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

New York. — O'Connell v. Gallagher, 104 N. Y. App. Div. 492; Elmira Realty Co. v. Gibson, 103 N. Y. App. Div. 140.

Oregon. — White v. Ladd, 41 Oregon 324, 93 Am. St. Rep. 732.

Washington. — Sturgiss v. Dart, 23 Wash. 244; Morrison v. Berlin, 37 Wash. 600; Scott v. Le Ballister, (Wash. 1905) 79 Pac. Rep. 481; Dane v. Daniel, 28 Wash. 155.

Contra, Vaughn v. Tealey, (Tenn. Ch. 1899) 58 S. W. Rep. 487.

Court May Vacate on Its Own Motion. — Winrod v. Wolters, 141 Cal. 399.

3. Judgment Rendered Without Jurisdiction —

Alabama. — Chamblee v. Cole, 128 Ala. 649.

Arizona. — National Metal Co. v. Greene Consol. Copper Co., (Ariz. 1905) 80 Pac. Rep. 397.

California. — Parsons v. Weis, 144 Cal. 410.

Idaho. — Kerns v. McAulay, 8 Idaho 558.

Illinois. — Chicago v. Nodeck, 202 Ill. 257, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825; McIntyer v. Houseman, 108 Ill. App. 276.

Iowa. — Spencer v. Berns, 114 Iowa 126.

Kansas. — Osborne v. Schlichenmeier, 68 Kan. 421.

Maryland. — Tyrrell v. Hilton, 92 Md. 176.

Nebraska. — Aldrich v. Steen, (Neb. 1904) 100 N. W. Rep. 311. But see McCormick Harvesting Mach. Co. v. Stires, (Neb. 1903) 94 N. W. Rep. 629.

New York. — Matter of Armstrong, 72 N. Y. App. Div. 286.

Oklahoma. — Foster v. Cimarron Valley Bank, 14 Okla. 24.

Washington. — Dane v. Daniel, 28 Wash. 155; Sturgiss v. Dart, 23 Wash. 244.

**826.** 1. Invalidity Not Apparent on Face of Record. — National Metal Co. v. Greene Consol. Copper Co., (Ariz. 1905) 80 Pac. Rep. 397; Drake v. Brown Mfg. Co., 121 Ga. 550; Scott



**827.** Judgment Entered by Consent. — See note 1.

*c.* FRAUD OR COLLUSION. — See note 2.

**828.** What Fraud Will Afford Ground for Vacating Judgment. — See note 1.

Perjury. — See note 2.

Fraud or Collusion Must Be Clearly Shown. — See note 3.

*d.* IRREGULARITIES. — See note 4.

**830.** See notes 2, 3.

Errors or Irregularities as to Costs. — See note 4.

Presumption of Regularity. — See note 5.

*v. Le Ballister*, (Wash. 1905) 79 Pac. Rep. 481. See also *Parsons v. Weis*, 144 Cal. 410; *White v. Ladd*, 41 Oregon 324, 93 Am. St. Rep. 732. But see *Dane v. Daniel*, 28 Wash. 155.

**Judgment by Confession for Immoral Obligation Will Be Vacated.** — *Fields v. Brown*, 188 Ill. 111.

**827. 1. Judgment Entered by Consent.** — See *Steiner v. Lenz*, 110 Iowa 49; *Miller Sons' Carriage Co. v. Miller, etc., Co.*, 11 Ohio Cir. Dec. 455, 21 Ohio Cir. Ct. 207.

**2. Judgment May Be Vacated for Fraud or Collusion** — *United States*. — *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801.

*California*. — *Anderson v. Lassen County Bank*, 140 Cal. 695; *Parsons v. Weis*, 144 Cal. 410.

*Illinois*. — *Chicago v. Nodeck*, 202 Ill. 257, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 827.

*Indiana*. — *State v. Hindman*, 159 Ind. 589, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 828, 829.

*Iowa*. — *Beck v. Juckett*, 111 Iowa 339.

*Kentucky*. — *McDaniel v. Stum*, (Ky. 1901)

65 S. W. Rep. 800. See also *Martin v. Spurlock*, (Ky. 1902) 68 S. W. Rep. 396.

*Minnesota*. — *McMurren v. Bourne*, 81 Minn. 515.

*Nebraska*. — *Klabunde v. Byron-Reed Co.*, (Neb. 1904) 98 N. W. Rep. 182; *Secord v. Powers*, 61 Neb. 615, 87 Am. St. Rep. 474.

*New Hampshire*. — *Reed v. Prescott*, 70 N. H. 88.

*New York*. — *Kubie v. Miller*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 460; *Ludwin v. Siano*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 537.

*North Carolina*. — *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515.

*Pennsylvania*. — *Given v. Given*, 25 Pa. Super. Ct. 467.

**828. 1. What Fraud Will Afford Ground for Vacating Judgment.** — *Parsons v. Weis*, 144 Cal. 410; *Wabash R. Co. v. Mirrieles*, 182 Mo. 126; *Pelz v. Bollinger*, 180 Mo. 252; *Keith v. Alger*, (Tenn. 1905) 85 S. W. Rep. 71.

**2. Perjury.** — *Miller v. Miller*, (Neb. 1903) 95 N. W. Rep. 1010; *Secord v. Powers*, 61 Neb. 615, 87 Am. St. Rep. 474; *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680. Compare *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515.

**Not Set Aside Where No Injury.** — *Maryland Steel Co. v. Marney*, 91 Md. 360.

**3. Fraud or Collusion Must Be Clearly Shown.** — *Mulcahey v. Dow*, 131 Cal. 73; *Johnson v. Nash-Wright Co.*, 121 Iowa 173; *Maryland Steel Co. v. Marney*, 91 Md. 360; *Sigle v. Seigley*, 9 Kulp (Pa.) 471; *Gazzam v. Reading*, 202 Pa. St. 231.

**Evidence Insufficient to Warrant Vacating Judgment on Ground of Fraud.** — *McCormick v. McCormick*, 109 Iowa 700; *Brown v. Stegemann*, (Iowa 1900) 81 N. W. Rep. 450; *State Ins. Co. v. Prestage*, 116 Iowa 466; *Hilton v. Tyrrell*, 93 Md. 657.

**4. Judgment May Be Set Aside for Irregularity or Improper Conduct** — *Alabama*. — *Exp. Haynes*, 140 Ala. 196.

*Delaware*. — *Baums Castorine Co. v. Kimpel*, (Del. 1904) 58 Atl. Rep. 1035.

*Georgia*. — *Union Compress Co. v. Leffler*, 122 Ga. 640.

*Illinois*. — *Silverman v. Childs*, 107 Ill. App. 522.

*Iowa*. — *Durand v. Northwestern L., etc., Co.*, 112 Iowa 296; *Sitzer v. Fenzloff*, 112 Iowa 491.

*Kansas*. — *Seeds v. American Bridge Co.*, 68 Kan. 522.

*Minnesota*. — *Schuler v. Wood*, 81 Minn. 372.

*Missouri*. — *Fidelity, etc., Co. v. Schuchman*, 189 Mo. 468; *Bishop v. Seal*, 92 Mo. App. 167; *Reed v. Nicholson*, 93 Mo. App. 29.

*Nebraska*. — *Gavin v. Reed*, (Neb. 1905) 102 N. W. Rep. 455; *Becker v. Breen*, (Neb. 1903) 94 N. W. Rep. 614; *Shelby v. St. James Orphan Asylum*, 66 Neb. 40.

*New York*. — *Matter of Armstrong*, 72 N. Y. App. Div. 286; *Galligan v. Galligan*, 73 N. Y. App. Div. 71.

*North Carolina*. — *Becton v. Dunn*, 137 N. Car. 559; *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515.

*North Dakota*. — *State v. Donovan*, 10 N. Dak. 203; *Martinston v. Marzolf*, (N. Dak. 1905) 103 N. W. Rep. 937; *Prondzinski v. Garbutt*, 9 N. Dak. 239.

*Pennsylvania*. — *Hickey v. Conley*, 24 Pa. Super. Ct. 388; *Com. v. Krause*, 198 Pa. St. 391.

*Washington*. — *State v. Huston*, 32 Wash. 154.

**What Constitutes "Irregularity."** — *Woodward v. Woodward*, 84 Mo. App. 328; *Reed v. Nicholson*, 93 Mo. App. 29.

**830. 2. Mere Technicality Will Not Avail to Set Aside Judgment.** — *Hull v. Canandaigua Electric Light, etc., Co.*, 55 N. Y. App. Div. 419, appeal dismissed 166 N. Y. 598; *Wheeler v. Castor*, 11 N. Dak. 347.

**3. Irregularity or Improper Conduct Must Not Have Been Waived or Cured.** — *Baums Castorine Co. v. Kimpel*, (Del. 1904) 58 Atl. Rep. 1035; *Tietjen v. Merchants' Nat. Bank*, 117 Ga. 501.

**4. Errors or Irregularities as to Costs Not Sufficient Ground for Opening or Vacation.** — *East Tennessee Land Co. v. Leeson*, 185 Mass. 4; *Field v. Heckman*, 118 Wis. 461.

**5. Presumption of Regularity.** — *Foster v. Weber*, 110 Ill. App. 5; *Whitfield v. Howard*,

**830.** *e.* MISTAKE, SURPRISE, OR EXCUSABLE NEGLIGENCE — (1) *Mistake*. — See note 6.

**831.** The Mistake Must Be One of Fact. — See note 1.

(2) *Surprise*. — See note 2.

(3) *Excusable Neglect* — *Inadvertence*. — See note 3.

**833.** (4) *Party Who Was Represented by Counsel May Have Relief*. — See note 1.

12 S. Dak. 355. See also *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268..

**830.** 6. Judgment May Be Opened or Vacated on Ground of Mistake — *United States*. — *Manning v. German Ins. Co.*, (C. C. A.) 107 Fed. Rep. 52. *California*. — *Winchester v. Black*, 134 Cal. 125; *Levy v. Superior Ct.*, 139 Cal. 590.

*Iowa*. — *Barto v. Sioux City Electric Co.*, 119 Iowa 179.

*Kansas*. — *Schuler v. Fowler*, 63 Kan. 98.

*Montana*. — *Greene v. Montana Brewing Co.*, 32 Mont. 102.

*Nebraska*. — *Omaha L. & T. Co. v. Walenz*, 64 Neb. 89.

*New Jersey*. — *Lutz v. Alkazin*, (N. J. 1903) 55 Atl. Rep. 1041; *Western Nat. Bank v. Paul*, (N. J. 1901) 49 Atl. Rep. 830.

*New York*. — *Galligan v. Galligan*, 73 N. Y. App. Div. 71.

*North Carolina*. — *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515.

*North Dakota*. — *Fargo v. Keeney*, 11 N. Dak. 484; *Braseth v. Bottineau County*, 13 N. Dak. 344.

*Washington*. — *Williams v. Breen*, 25 Wash. 666; *Spokane, etc., Lumber Co. v. Stanley*, 25 Wash. 653.

*Wisconsin*. — *Bloor v. Smith*, 112 Wis. 340.

Instances of Mistakes Held Not Sufficient to Warrant Opening or Vacating Judgment. — *Dean v. Noel*, (Ky. 1902) 70 S. W. Rep. 406; *Hunt v. Burbank*, 73 Vt. 273.

**831.** 1. No Relief Against Mistake of Law. — *Mantle v. Casey*, 31 Mont. 408; *Riley v. Ryan*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 152; *Keenan v. Daniels*, (S. Dak. 1904) 99 N. W. Rep. 853; *Plano Mfg. Co. v. Murphy*, 16 S. Dak. 380, 102 Am. St. Rep. 692. See also *Wilmerding v. Corbin Banking Co.*, 136 Ala. 268.

2. Surprise a Sufficient Ground for Opening or Vacating Judgment — *California*. — *City St. Imp. Co. v. Emmons*, 138 Cal. 297; *Levy v. Superior Ct.*, 139 Cal. 590.

*New Jersey*. — *Pike v. Henderson*, (N. J. 1901) 48 Atl. Rep. 551; *Bradley v. McPherson*, (N. J. 1903) 56 Atl. Rep. 303.

*New York*. — *Carlisle v. Barnes*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 6.

*North Carolina*. — *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515; *Clement v. Ireland*, 129 N. Car. 220.

*Oregon*. — *Durham v. Commercial Nat. Bank*, 45 Oregon 385.

3. Judgment May Be Opened or Vacated on Ground of Excusable Neglect or Inadvertence of Defendant — *California*. — *Levy v. Superior Ct.*, 139 Cal. 590; *Winchester v. Black*, 134 Cal. 125.

*Georgia*. — *Tower v. Ellsworth*, 112 Ga. 460.

*Indiana*. — *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175; *Syfers v. Keiser*, 31 Ind. App. 6; *Knowlton v. Smith*, 163 Ind. 294.

*Kentucky*. — *Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co.*, (Ky. 1902) 66 S. W. Rep. 734.

*Montana*. — *Greene v. Montana Brewing Co.*, 32 Mont. 102.

*Nebraska*. — *Klabunde v. Byron-Reed Co.*, (Neb. 1904) 98 N. W. Rep. 182.

*New Mexico*. — *Lasswell v. Kitt*, 11 N. Mex. 459.

*North Carolina*. — *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515; *Clement v. Ireland*, 129 N. Car. 220.

*South Carolina*. — *Farmers, etc., Mercantile, etc., Co. v. Smith*, 70 S. Car. 160.

*Washington*. — *Spokane, etc., Lumber Co. v. Stanley*, 25 Wash. 653; *Williams v. Breen*, 25 Wash. 666.

Instances of Neglect Held Not Excusable — *Colorado*. — *Barra v. People*, 18 Colo. App. 16.

*Georgia*. — *Deering Harvester Co. v. Thompson*, 116 Ga. 418; *Brucker v. O'Connor*, 115 Ga. 95; *Ingalls v. Lamar*, 115 Ga. 296; *Morris v. Wofford*, 114 Ga. 935.

*Iowa*. — *Johnson v. Nash-Wright Co.*, 121 Iowa 173.

*North Carolina*. — *Pepper v. Clegg*, 132 N. Car. 312; *Osborn v. Leach*, 133 N. Car. 427.

*Oklahoma*. — *Savage v. Dinkler*, 12 Okla. 463.

*Oregon*. — *Brand v. Baker*, 42 Oregon 426.

*Texas*. — *Texas F. Ins. Co. v. Berry*, 33 Tex. Civ. App. 228; *White v. Powell*, (Tex. Civ. App. 1905) 84 S. W. Rep. 836.

*Washington*. — *Moody v. Reichow*, 38 Wash. 303; *Swanson v. Hoyle*, 32 Wash. 169.

Instances of Facts Constituting Such "Excusable Neglect" as to Justify Opening or Vacating Judgment — *California*. — *Santa Rosa Sav. Bank v. Schell*, 142 Cal. 505.

*Indiana*. — *Knowlton v. Smith*, 163 Ind. 294; *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175.

*Montana*. — *Greene v. Montana Brewing Co.*, 32 Mont. 102.

*North Carolina*. — *Clement v. Ireland*, 129 N. Car. 220.

*Pennsylvania*. — *Lockard v. Keyser*, 18 Pa. Super. Ct. 172.

*South Carolina*. — *Farmers, etc., Mercantile, etc., Co. v. Smith*, 70 S. Car. 160.

*Texas*. — *Scottish Union Ins. Co. v. Tomkies*, 28 Tex. Civ. App. 157.

*Utah*. — *Western Loan, etc., Co. v. Berg*, 24 Utah 278.

*Washington*. — *Williams v. Breen*, 25 Wash. 666.

"Excusable Neglect" Has No Fixed Legal Meaning, but depends upon the particular facts in each case. *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175. It is a conclusion of law. *Morris v. Liverpool, etc., Ins. Co.*, 131 N. Car. 212.

**833.** 1. Party Represented by Counsel May

**833.** (5) *What Mistake or Neglect of Attorney May Afford Ground for Relief.* — See notes 2, 3, 4.

**834.** See notes 1, 2.

Unavoidable Absence of Counsel. — See note 3.

Misunderstanding Between Parties and Attorneys. — See note 4.

*f.* CASUALTY OR MISFORTUNE. — See note 7.

**835.** *g.* SICKNESS OF PARTY OR ATTORNEY. — See note 1.

*h.* NEWLY DISCOVERED EVIDENCE. — See note 3.

*i.* WANT OF NOTICE. — See notes 4, 6.

*j.* JUDGMENT CONTRARY TO AGREEMENT. — See note 8.

**836.** *k.* UNAUTHORIZED APPEARANCE BY ATTORNEY. — See notes 2, 3.

Distinction Depending upon Whether or Not Attorney Is Solvent. — See note 4.

**837.** *m.* DISABILITIES OF DEFENDANT. — See note 2.

*Have Relief.* — *O'Brien v. Leach*, 139 Cal. 220; *White v. Gurney*, 92 Minn. 271; *Lenz v. Rowe*, 66 N. J. L. 131.

**833.** 2. No Relief for Mistake or Neglect of Attorney unless Such as Would Be Excusable if Attributable to Client — *California*. — *Alferitz v. Cahen*, 145 Cal. 397.

*Georgia.* — See *Moore v. Kelly, etc., Co.*, 109 Ga. 798.

*Illinois.* — *Eggleston v. Royal Trust Co.*, 205 Ill. 170; *Staunton Coal Co. v. Menk*, 197 Ill. 369; *Brunswick-Balke-Collender Co. v. O'Donnell*, 101 Ill. App. 533; *Pitzele v. Lutkins*, 85 Ill. App. 662.

*Indiana.* — *Baltimore, etc., R. Co. v. Ryan*, 31 Ind. App. 597; *Carr v. Jeffersonville First Nat. Bank*, (Ind. App. 1905) 73 N. E. Rep. 947.

*Iowa.* — *McCormick v. McCormick*, 109 Iowa 700.

*Missouri.* — *Welch v. Mastin*, 98 Mo. App. 273.

*New York.* — *Brooks v. Delaware, etc., R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 961.

Cases Holding Negligence of Counsel Sufficient Ground for Relief. — *Cabanne v. Macadaras*, 91 Mo. App. 70.

3. Erroneous Advice of Counsel Not Ground for Relief. — *Early v. Bard*, 93 N. Y. App. Div. 476; *Keenan v. Daniels*, (S. Dak. 1904) 99 N. W. Rep. 853. See also *Noblesville v. Noblesville Gas, etc., Co.*, 157 Ind. 162.

4. No Relief Where Attorney Neglected to File Pleading in Due Time. — *Brunswick-Balke-Collender Co. v. O'Donnell*, 101 Ill. App. 533; *Considine v. Lee*, 105 Ill. App. 246. Compare *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175; *Walsh v. Boyle*, (Minn. 1905) 103 N. W. Rep. 506.

**834.** 1. Abandonment of the Case by the Attorney Without Notice to the Defendant is ground for vacating the judgment. *Sinclair v. Narragansett Lead, etc., Co.*, 87 Mo. App. 268. But see *Brown v. Huber*, 103 N. Y. App. Div. 134.

2. Reasonable Belief that Case Would Not Be Tried. — *Scottish Union Ins. Co. v. Tomkies*, 28 Tex. Civ. App. 157.

3. Judgment May Be Opened or Vacated on Account of Unavoidable Absence of Counsel. — *People v. Brett*, 79 N. Y. App. Div. 631; *Hopkins v. Meyer*, 76 N. Y. App. Div. 365.

Judgment Not Vacated Where Absence of Attorney Voluntary and Not Unavoidable. — *Pitzele v. Lutkins*, 85 Ill. App. 662; *Greenberg v. Angerman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 244.

4. Judgment Obtained Through Misunderstanding Between Party and Counsel. — *Barto v. Sioux City Electric Co.*, 119 Iowa 179; *Barton v. Harker*, 69 N. J. L. 603; *Pike v. Henderson*, (N. J. 1901) 48 Atl. Rep. 551. But see *Home Loan Assoc. v. Foard*, 3 Penn. (Del.) 165.

7. Unavoidable Casualty or Misfortune May Afford Ground for Relief. — *Snelling v. Lewis*, (Ky. 1904) 78 S. W. Rep. 1124; *Anthony v. Karbach*, 64 Neb. 509; *Boyd v. Williams*, 70 N. J. L. 185.

A Judgment by Consent cannot be vacated on the ground of unavoidable casualty and misfortune. *Mains v. Des Moines Nat. Bank*, 113 Iowa 395.

**835.** 1. Sickness of Party a Sufficient Ground for Opening or Vacating Judgment. — *Kapner v. Samuels*, (Supm. Ct. App. T.) 84 N. Y. Supp. 195.

3. Judgment May Be Set Aside Because of Newly Discovered Evidence. — See *Fitzgerald v. Compton*, 28 Tex. Civ. App. 202.

Not Set Aside for Misconduct or Cumulative Evidence. — *Turner v. Davis*, 132 N. Car. 187.

Only in Cases of Manifest Injustice. — *Turner v. Davis*, 132 N. Car. 187.

4. Evidence Insufficient to Show Want of Notice. — *Turner v. J. I. Case Threshing Mach. Co.*, 133 N. Car. 381.

6. Judgment Rendered Without Personal Service or Actual Notice May Be Opened. — *Aldrich v. Crump*, 128 Fed. Rep. 984. See also *Smothers v. Meridian Fertilizer Factory*, 137 Ala. 166. Compare *Abbett v. Blohm*, 54 N. Y. App. Div. 422.

8. Judgment Contrary to Agreement. — *McMurrin v. Bourne*, 81 Minn. 515; *Durham v. Commercial Nat. Bank*, 45 Oregon 385; *Batzle v. Trumbower*, 22 Pa. Super. Ct. 487; *Whittaker v. Warren*, 14 S. Dak. 611; *McBride v. McGinley*, 31 Wash. 573. See also *Martin v. Spurlock*, (Ky. 1902) 68 S. W. Rep. 396; *Rabinowitz v. Haimowitz*, (Supm. Ct. App. T.) 91 N. Y. Supp. 11.

**836.** 2. Want of Authority Must Be Clearly Shown. — *Heath v. Miller*, 117 Ga. 854; *Patterson v. Yancey*, 97 Mo. App. 681.

3. Judgment Rendered on Unauthorized Appearance of Attorney May Be Vacated. — *Patterson v. Yancey*, 97 Mo. App. 681.

4. Distinction Depending upon Whether or Not Attorney Is Solvent. — *Abbett v. Blohm*, 54 N. Y. App. Div. 422.

**837.** 2. Judgment Against Person under Disability May Be Opened or Vacated. — *Bloor v. Smith*, 112 Wis. 340.

**837.** *o.* UNAUTHORIZED ENTRY. — See note 5.

**838.** *p.* ERROR. — See note 1.

*q.* DEFENSES AVAILABLE AT TRIAL. — See note 3.  
Counterclaim. — See note 4.

3. Submission of Parties to Jurisdiction. — See note 5.

**839.** 4. Who May Apply for Opening or Vacation — *a.* GENERAL RULE.  
— See notes 2, 3.

*b.* LIMITATIONS OF THE RULE. — See notes 4, 5.

**840.** See note 1.

5. Time for Applying — *a.* UNDER STATUTES — (1) *In General.* —  
See notes 4, 5.

**841.** See note 1.

**837.** 5. Judgment Entered Without Authority May Be Opened or Vacated. — See dissenting opinion of Aldrich, J., in *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 814, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837.

**838.** 1. Judgment Cannot Be Opened or Vacated on Ground of Error — *United States.* — U. S. v. 1621 Pounds Fur Clippings, (C. C. A.) 106 Fed. Rep. 161.

*Alabama.* — *Wilmdering v. Corbin Banking Co.*, 126 Ala. 268.

*Georgia.* — *Baker v. Baker*, 113 Ga. 378.

*Indiana.* — *Dorsey v. Dorsey*, 29 Ind. App. 248; *Stone v. Stone*, 158 Ind. 628.

*Iowa.* — *Graham Paper Co. v. Wohlwend*, 116 Iowa 358.

*Missouri.* — *Bishop v. Seal*, 92 Mo. App. 167.

*North Dakota.* — *State v. Donovan*, 10 N. Dak. 203.

*Ohio.* — *Bates v. State*, 63 Ohio St. 11.

*South Carolina.* — *McMahon v. Pugh*, 62 S. Car. 506.

*Washington.* — *Coyle v. Seattle Electric Co.*, 31 Wash. 184.

3. Judgment Not Opened or Vacated to Let in Defenses Available on First Trial — *Colorado.* — *Barra v. People*, 18 Colo. App. 16.

*Georgia.* — *Moore v. Kelley, etc., Co.*, 109 Ga. 798.

*Illinois.* — *Simon v. Hengels*, 107 Ill. App. 174.

*Kentucky.* — *Roseberry v. Wilson*, (Ky. 1902) 68 S. W. Rep. 417; *Farris v. Hoskins*, (Ky. 1901) 63 S. W. Rep. 577; *Overstreet v. Brown*, (Ky. 1901) 62 S. W. Rep. 885; *Johnson v. Bush*, (Ky. 1901) 64 S. W. Rep. 628.

*Louisiana.* — *Lindquist v. Maurepas Land, etc., Co.*, 112 La. 1030.

*Missouri.* — *Hoffman v. Loudon*, 96 Mo. App. 184.

*North Carolina.* — *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515.

*Texas.* — *Calvert, etc., R. Co. v. Driskill*, 31 Tex. Civ. App. 200; *Bankers' Union of the World v. Nabors*, 36 Tex. Civ. App. 38.

4. Judgment Not Opened to Let in Counterclaim. — *Cooke v. Edwards*, 15 Pa. Super. Ct. 412.

5. Voluntary Submission to Jurisdiction at Subsequent Term. — *National Home, etc., v. Overholser*, 64 Ohio St. 517.

**839.** 2. Application Can Be Made Only by Party Injuriouly Affected. — *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232.

3. Stranger to Record Cannot Apply for Opening or Vacation. — *Jones v. Smith*, 120 Ga. 642;

*Mullany's Adoption*, 25 Pa. Co. Ct. 563, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467; *Smith v. Parkersburg Co-Operative Assoc.*, 48 W. Va. 232; *Pier v. Oneida County*, 124 Wis. 398.

4. Person Not a Party May Apply for Opening at Vacation of Judgment Injuriouly Affecting His Rights. — *Crossman v. Vivienda Water Co.*, 136 Cal. 571; *Crippen v. X. Y. Irrigating Ditch Co.*, 32 Colo. 461, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839; *McLaughlin v. Cross*, 68 N. J. L. 599, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839.

5. Stockholders of a Corporation May Move to Vacate. — *Crossman v. Vivienda Water Co.*, 136 Cal. 571.

**840.** 1. Assignee of Interest of Defendant May Apply. — *Brown v. Massey*, 13 Okla. 670.

Receiver of Judgment Debtor May Apply. — *Kubie v. Miller*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 460.

4. Limitation of Time for Application to Open or Vacate Judgments on Statutory Grounds — *Arizona.* — *National Metal Co. v. Greene Consol. Copper Co.*, (Ariz. 1905) 80 Pac. Rep. 397.

*California.* — *People v. Davis*, 143 Cal. 673; *Canadian, etc., Mortg., etc., Co. v. Clarita Land, etc., Co.*, 140 Cal. 672; *Levy v. Superior Ct.*, 139 Cal. 590.

*Delaware.* — *McDaniel v. Townsend*, 4 Penn. (Del.) 359; *Woolley v. Roe*, 3 Penn. (Del.) 501.

*Florida.* — *Dudley v. White*, 44 Fla. 264.

*Georgia.* — *Walker v. Equitable Mortg. Co.*, 114 Ga. 862.

*North Carolina.* — *Clement v. Ireland*, 129 N. Car. 220; *Mutual Reserve Fund L. Assoc. v. Scott*, 136 N. Car. 157, affirmed 137 N. Car. 515; *Becton v. Dunn*, 137 N. Car. 559.

*Ohio.* — *Wohlgemuth v. Taylor*, 25 Ohio Cir. Ct. 271.

*South Dakota.* — *Judd v. Patton*, 13 S. Dak. 648.

*Washington.* — *Scott v. Le Ballister*, (Wash. 1905) 79 Pac. Rep. 481.

*Wisconsin.* — *Bloor v. Smith*, 112 Wis. 340; *Buchan v. Nelson*, 114 Wis. 234.

Double Time Allowed When Notice of Entry of Judgment Sent by Mail. — *Atkinson v. Abraham*, 78 N. Y. App. Div. 498.

5. Limitations Not Applicable to Applications Based on Grounds Not Statutory. — *Fidelity, etc., Co. v. Schuchman*, 189 Mo. 468; *Riley v. Ryan*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 151; *Becton v. Dunn*, 137 N. Car. 559; *Martinson v. Marzolf*, (N. Dak. 1905) 103 N. W. Rep. 937.

**841.** 1. Statutes Limiting Time for Applica-

**841.** Application for Relief Must Be Made Within the Time Limited. — See note 2.

(2) *When Statutory Period Begins to Run.* — See note 5.

*b.* IN THE ABSENCE OF STATUTE — (1) *Requirement of Diligence.*

— See note 6.

(2) *What Delay Will Bar Relief.* — See note 7.

**842.** *c.* RULE AS TO VOID JUDGMENTS. — See note 2.

6. Jurisdiction to Open or Vacate. — See note 3.

**843.** 7. Notice. — See note 2.

8. Burden of Proof. — See notes 4, 5.

**844.** 9. Discretion of Court. — See note 1.

*tion on Grounds Not Statutory.* — *Buchan v. Nelson*, 114 Wis. 234.

**841.** 2. Application Must Be Made Within Time Limited. — *National Metal Co. v. Greene Consol. Copper Co.*, (Ariz. 1905) 80 Pac. Rep. 397; *Woolley v. Roe*, 3 Penn. (Del.) 501; *Carpenter v. Judge*, 126 Mich. 8; *Petley v. Wayne Circuit Judge*, 124 Mich. 14; *McKenna v. McCormick*, 60 Neb. 595; *Health Dept. v. Babcock*, (Supm. Ct. App. T.) 84 N. Y. Supp. 604; *Judd v. Patton*, 13 S. Dak. 648; *Bean v. Dove*, 33 Tex. Civ. App. 377.

Where the Judgment Is Procured by Fraud, a motion to set it aside need not be filed within the statutory period. *Beck v. Juckett*, 111 Iowa 339.

5. Limitation Running from Notice of Judgment. — *McMurrin v. Bourne*, 81 Minn. 515; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. Dak. 16; *Bloor v. Smith*, 112 Wis. 340.

6. *Becton v. Dunn*, 137 N. Car. 559, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 841.

7. Delay Sufficient to Bar Relief. — *Nicoll v. Weldon*, 130 Cal. 666; *Seaman v. Clarke*, 75 N. Y. App. Div. 345; *Coast Land, etc., Co. v. Oregon Pac. Colonization Co.*, 44 Oregon 483; *Rehm v. Frank*, 16 Pa. Super. Ct. 175.

*Fifty-nine Years.* — *Given v. Given*, 25 Pa. Super. Ct. 467.

*Sixty Years.* — *Sheehan v. Osborn*, 138 Cal. 512.

*Nine Years.* — *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801; *Fry v. Morgan*, 23 Pa. Co. Ct. 662.

*Five Years.* — *Saunders v. Baldwin*, 23 Pa. Co. Ct. 10, 6 Lack. Leg. N. (Pa.) 47; *E. T. Burrowes Co. v. Cambridge Springs Co.*, 26 Pa. Super. Ct. 315; *Wagg-Anderson Woolen Co. v. Finkelstein*, 105 Wis. 589; *Scott v. Le Ballister*, (Wash. 1905) 79 Pac. Rep. 481.

*Four Years.* — *Fryberger v. Motter*, 24 Pa. Super. Ct. 317.

*Three Years.* — *Gall v. Gall*, 58 N. Y. App. Div. 97.

*Eighteen Months.* — *Deagan v. King*, 83 N. Y. App. Div. 428.

*Fourteen Months.* — *Moody v. Reichow*, 38 Wash. 303.

*One Year.* — *Conant v. American Rubber Tire Co.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 129.

**842.** 2. Delay Does Not Deprive of Right to Have Void Judgment Set Aside. — *People v. Davis*, 143 Cal. 673; *Bailey v. Hood*, 38 Wash. 700. See also *McConnell v. Avey*, 117 Iowa 282; *Given v. Given*, 25 Pa. Super. Ct. 467.

3. Judgment Can Be Opened or Vacated Only by Court Which Rendered It. — *Indianapolis, etc.,*

*Rapid Transit Co. v. Andis*, 33 Ind. App. 625; *Hutchinson v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 1011. See also *McConnell v. Avey*, 117 Iowa 282; *Holdredge v. McCombs*, 63 Kan. 889, 66 Pac. Rep. 1048.

Court May Set Aside Judgments on Own Motion. — *State v. Jehlik*, 66 Kan. 301.

**843.** 2. Necessity for Notice. — *Porter v. Orient Ins. Co.*, 72 Conn. 519; *Stitt v. Kurtenbach*, 85 Ill. App. 38; *Vincent v. Benzie Circuit Judge*, (Mich. 1905) 102 N. W. Rep. 369; *Hoover v. Hoover*, 39 Oregon 456; *Spokane, etc., Lumber Co. v. Stanley*, 25 Wash. 653.

Notice to Attorney Sufficient. — *Phelps v. Heaton*, 79 Minn. 476; *Dane v. Daniel*, 28 Wash. 155.

Notice of Vacation of Void Judgment Unnecessary. — *Morrison v. Berlin*, 37 Wash. 600.

New York — Municipal Court. — Under the practice in the municipal court the order of the court opening a default need not be served upon the defendant. *Greenberg v. Laeov*, (Supm. Ct. App. T.) 84 N. Y. Supp. 930.

4. Burden of Proof. — *Turner v. J. I. Case Threshing Mach. Co.*, 133 N. Car. 381; *Deering Harvester Co. v. Streeper*, 16 Montg. Co. Rep. (Pa.) 41; *Charles D. Kaier Co. v. O'Brien*, 202 Pa. St. 153; *Given v. Given*, 25 Pa. Super. Ct. 467; *Lockard v. Keyser*, 18 Pa. Super. Ct. 172; *Whitfield v. Howard*, 12 S. Dak. 355; *Tinsley v. Corbett*, 27 Tex. Civ. App. 633; *Briseno v. International, etc., R. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 579.

5. Applicant Should Receive Benefit of Doubt. — *Merchants Ad-Sign Co. v. Los Angeles Bill-Posting Co.*, 128 Cal. 619; *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175.

**844.** 1. Discretion of Court — *United States.* — *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801; *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 439.

*Alabama.* — *Colley v. Spivey*, 127 Ala. 109.

*California.* — *Nicoll v. Weldon*, 130 Cal. 666; *Langford v. Langford*, 136 Cal. 507; *O'Brien v. Leach*, 139 Cal. 220; *Merchants Ad-Sign Co. v. Los Angeles Bill-Posting Co.*, 128 Cal. 619; *Alferitz v. Cahen*, 145 Cal. 397; *Winchester v. Black*, 134 Cal. 125.

*Colorado.* — *Donald v. Bradt*, 15 Colo. App. 414.

*Georgia.* — *Brucker v. O'Connor*, 115 Ga. 95; *Ingalls v. Lamar*, 115 Ga. 296; *Tower v. Ellsworth*, 112 Ga. 460; *Moore v. Kelly, etc., Co.*, 109 Ga. 798.

*Illinois.* — *Rust v. Baird*, 109 Ill. App. 41; *Pitzele v. Lutkins*, 85 Ill. App. 662; *Holliday v. Tuthill*, 94 Ill. App. 424; *Hartman v. Viera*, 113 Ill. App. 216; *Considine v. Lee*, 195 Ill.

**845.** See notes 1, 2, 3.

App. 246; Brunswick-Balke-Collender Co. v. O'Donnell, 101 Ill. App. 533; Goodwillie v. Schaub, 93 Ill. App. 311; Germania F. Ins. Co. v. Muller, 110 Ill. App. 190.

*Indiana*.—Masten v. Indiana Car, etc., Co., 25 Ind. App. 175.

*Iowa*.—Klepfer v. Keokuk, 126 Iowa 592; Foley v. Leisy Brewing Co., 116 Iowa 176; Barto v. Sioux City Electric Co., 119 Iowa 179.

*Kentucky*.—Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co., (Ky. 1902) 66 S. W. Rep. 734.

*Minnesota*.—McClure v. Clark, (Minn. 1904) 101 N. W. Rep. 951; Locke v. Osborne-McMillan Elevator Co., 80 Minn. 22; White v. Gurney, 92 Minn. 271. Compare Bogart v. Kiene, 85 Minn. 261.

*Missouri*.—Feurt v. Caster, 174 Mo. 289, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 844; Welch v. Mastin, 98 Mo. App. 273; Cabanne v. Macadaras, 91 Mo. App. 70; Sinclair v. Narragansett Lead, etc., Co., 87 Mo. App. 268; Hesse v. Seyp, 88 Mo. App. 66; Harkness v. Jarvis, 182 Mo. 231.

*Montana*.—Greene v. Montana Brewing Co., 32 Mont. 102; Greene v. Rowan, 29 Mont. 263.

*Nebraska*.—Miller v. Fitz Gerald Dry-Goods Co., 62 Neb. 270.

*New Jersey*.—Meyers v. Conover, 65 N. J. L. 187; Smith v. Livesey, 67 N. J. L. 269.

*New Mexico*.—Lasswell v. Kitt, 11 N. Mex. 459.

*North Carolina*.—Hardy v. Hardy, 128 N. Car. 178; Koch v. Porter, 129 N. Car. 132; Clement v. Ireland, 129 N. Car. 220.

*North Dakota*.—Minnesota Thresher Mfg. Co. v. Holz, 10 N. Dak. 16; Fargo v. Keeney, 11 N. Dak. 484; Wheeler v. Castor, 11 N. Dak. 47.

*Oregon*.—Nye v. Bill Nye Gold Min., etc., Co., (Oregon 1905) 80 Pac. Rep. 94.

*Pennsylvania*.—McMahon v. McMahon, 203 Pa. St. 16; Woodward v. Carson, 208 Pa. St. 144; Whitecar v. Supreme Castle, etc., 18 Pa. Super. Ct. 631; Rehm v. Frank, 16 Pa. Super. Ct. 175; Green v. Boyd, 13 Pa. Super. Ct. 651; Com. v. Mellet, 196 Pa. St. 243; Zartman v. Spangler, 21 Pa. Super. Ct. 647; O'Brien v. Sylvester, 12 Pa. Super. Ct. 408; Duffy v. Kaufman, 18 Pa. Super. Ct. 362; Lockard v. Keyser, 18 Pa. Super. Ct. 172; Howie v. Lewis, 14 Pa. Super. Ct. 232; McDonough v. Sheridan, 16 Pa. Super. Ct. 361; Shannon v. Castner, 21 Pa. Super. Ct. 294; Philadelphia v. Allen, 20 Pa. Super. Ct. 209; Charles D. Kaier Co. v. O'Brien, 202 Pa. St. 153; Hirschlan v. Krechman, 20 Pa. Super. Ct. 227; Miller v. Miller, 209 Pa. St. 511.

*South Carolina*.—Empire Min. Co. v. Propeller Towboat Co., 60 S. Car. 457; Farmers', etc., Mercantile, etc., Co. v. Smith, 70 S. Car. 160.

*South Dakota*.—Meade County Bank v. Decker, (S. Dak. 1905) 102 N. W. Rep. 597; Minnehaha Nat. Bank v. Hurley, 13 S. Dak. 18.

*Texas*.—Scottish Union Ins. Co. v. Tomkies, 28 Tex. Civ. App. 157; Watts v. Bruce, 31 Tex. Civ. App. 347; El Paso, etc., R. Co. v. Kelly, (Tex. Civ. App. 1904) 83 S. W. Rep. 855.

*Washington*.—Moody v. Reichow, 38 Wash.

303; Walton v. Hartman, 38 Wash. 34; Woodham v. Anderson, 32 Wash. 500; McCord v. McCord, 24 Wash. 529. See also Dalgardno v. Trumbull, 25 Wash. 362.

*Wisconsin*.—Bloor v. Smith, 112 Wis. 340; Rogers v. Fate, 113 Wis. 364.

**When Vacation Is Matter of Right, Court Has No Discretion.**—Fisfield v. Norton, 79 Minn. 264; American Audit Co. v. Industrial Federation of America, 84 N. Y. App. Div. 304.

**Discretion Exists Only When Excusable Neglect Shown.**—Morris v. Liverpool, etc., Ins. Co., 131 N. Car. 212.

**845. 1. Appeal**—*California*.—Hibernia Sav., etc., Soc. v. Cochran, 134 Cal. xix, 66 Pac. Rep. 732.

*Colorado*.—Donald v. Bradt, 15 Colo. App. 414.

*Iowa*.—Barto v. Sioux City Electric Co., 119 Iowa 179.

*Missouri*.—Feurt v. Caster, 174 Mo. 289, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845.

*Nebraska*.—McKenna v. McCormick, 60 Neb. 595; Browne v. Palmer, 66 Neb. 287.

*New York*.—Lawson v. Hilton, 89 N. Y. App. Div. 303.

*Pennsylvania*.—Com. v. Mellet, 196 Pa. St. 243.

*Wisconsin*.—Bloor v. Smith, 112 Wis. 340. **Order Vacating Judgment Not Appealable.**—Nelson v. Denny, 26 Wash. 327.

**2. Action May Be Reversed**—*Georgia*.—Brucker v. O'Connor, 115 Ga. 95; Ingalls v. Lamar, 115 Ga. 296; Moore v. Kelly, etc., Co., 109 Ga. 798.

*Illinois*.—Pitzel v. Lutkins, 85 Ill. App. 662.

*Iowa*.—Barto v. Sioux City Electric Co., 119 Iowa 179.

*Minnesota*.—McClure v. Clark, (Minn. 1904) 101 N. W. Rep. 951; Walsh v. Boyle, (Minn. 1905) 103 N. W. Rep. 506.

*Montana*.—Greene v. Montana Brewing Co., 32 Mont. 102.

*New York*.—Rabinowitz v. Haimowitz, (Supm. Ct. App. T.) 91 N. Y. Supp. 11.

*North Dakota*.—Minnesota Thresher Mfg. Co. v. Holz, 10 N. Dak. 16.

*Ohio*.—French Wax Figure Co. v. Jupp Baxter Co., 12 Ohio Cir. Dec. 76, 21 Ohio Cir. Ct. 764.

*Pennsylvania*.—Cooke v. Edwards, 15 Pa. Super. Ct. 412.

*Texas*.—Scottish Union Ins. Co. v. Tomkies, 28 Tex. Civ. App. 157.

*Washington*.—Moody v. Reichow, 38 Wash. 303; Nolan v. Arnot, 36 Wash. 101.

**3. Exercise of Discretion Not Disturbed unless Abuse Clearly Appears**—*United States*.—Metropolitan St. R. Co. v. Davis, (C. C. A.) 112 Fed. Rep. 633; Dexter v. Kellas, (C. C. A.) 113 Fed. Rep. 48.

*Arizona*.—Copper King v. Johnson, (Ariz. 1904) 76 Pac. Rep. 594.

*California*.—O'Brien v. Leach, 139 Cal. 220; Winchester v. Black, 134 Cal. 125; Ukiah Bank v. Reed, 130 Cal. xviii, 63 Pac. Rep. 68; Nicoll v. Weldon, 130 Cal. 666; Alferitz v. Cahen, 145 Cal. 397; Merchants' Ad-Sign Co. v. Los Angeles Bill-Posting Co., 128 Cal. 619.

**846. 10. Existence of Meritorious Defense Must Be Shown.**—See notes 1, 2.

**Colorado.**—Donald v. Bradt, 15 Colo. App. 414.

**Georgia.**—Tower v. Ellsworth, 112 Ga. 460; Berendt v. Ripps, 120 Ga. 228; Southern Bell Telephone, etc., Co. v. Parker, 119 Ga. 721; Bowen v. Wyeth, 119 Ga. 687; Roberts v. Kuhrt, 119 Ga. 704; Moore v. Kelly, etc., Co., 109 Ga. 798.

**Illinois.**—Holliday v. Tuthill, 94 Ill. App. 424; Hartford L., etc., Ins. Co. v. Rossiter, 196 Ill. 277; Germania F. Ins. Co. v. Muller, 110 Ill. App. 190; Rust v. Baird, 109 Ill. App. 41; Eggleston v. Royal Trust Co., 205 Ill. 170; Goodwillie v. Schaub, 93 Ill. App. 311; Pitzele v. Lutkins, 85 Ill. App. 662; Hartman v. Viera, 113 Ill. App. 216; Brunswick-Balke-Collender Co. v. O'Donnell, 101 Ill. App. 533.

**Indiana.**—Syfers v. Keiser, 31 Ind. App. 6; Masten v. Indiana Car, etc., Co., 25 Ind. App. 175.

**Iowa.**—Woodward v. Norris, (Iowa 1902) 91 N. W. Rep. 1064; Carver v. Seever, 126 Iowa 669; Klepfer v. Keokuk, 126 Iowa 592; Foley v. Leisy Brewing Co., 116 Iowa 176.

**Kentucky.**—Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co., (Ky. 1902) 66 S. W. Rep. 734.

**Minnesota.**—Hoyt v. Lightbody, 93 Minn. 249; White v. Gurney, 92 Minn. 271; Peru Plow, etc., Co. v. King, 90 Minn. 517; Locke v. Osborne-McMillan Elevator Co., 80 Minn. 22.

**Missouri.**—Feurt v. Caster, 174 Mo. 289, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 845; Hoffman v. Loudon, 96 Mo. App. 184; Hesse v. Seyp, 88 Mo. App. 66; Hulbert v. Tredway, 159 Mo. 665; Sinclair v. Narragansett Lead, etc., Co., 87 Mo. App. 268; Cabanne v. Macadaras, 91 Mo. App. 70.

**Montana.**—Greene v. Rowan, 29 Mont. 263; Hegaas v. Hegaas, 28 Mont. 266.

**Nebraska.**—Eager v. Blake, (Neb. 1901) 96 N. W. Rep. 74.

**New Jersey.**—Smith v. Livesey, 67 N. J. L. 269.

**New York.**—See O'Meara v. Interurban St. R. Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 405.

**North Carolina.**—Koch v. Porter, 129 N. Car. 132; Morris v. Liverpool, etc., Ins. Co., 131 N. Car. 212.

**North Dakota.**—Wheeler v. Castor, 11 N. Dak. 347; Fargo v. Keeney, 11 N. Dak. 484; Minnesota Thresher Mfg. Co. v. Holz, 10 N. Dak. 16.

**Oregon.**—Nye v. Bill Nye Gold Min., etc., Co., (Oregon 1905) 80 Pac. Rep. 94.

**Pennsylvania.**—Blauvelt v. Kemon, 196 Pa. St. 128; Lockard v. Keyser, 18 Pa. Super. Ct. 172; Green v. Boyd, 13 Pa. Super. Ct. 651; Shannon v. Castner, 21 Pa. Super. Ct. 294; Given v. Given, 25 Pa. Super. Ct. 467; O'Brien v. Sylvester, 12 Pa. Super. Ct. 408; Whitecar v. Supreme Castle, etc., 18 Pa. Super. Ct. 631.

**South Carolina.**—Empire Min. Co. v. Propeller Towboat Co., 60 S. Car. 457.

**South Dakota.**—Minnehaha Nat. Bank v. Hurley, 13 S. Dak. 18; Meade County Bank v. Decker, (S. Dak. 1905) 102 N. W. Rep. 597.

**Texas.**—Fitzgerald v. Compton, 28 Tex. Civ. App. 202; El Paso, etc., R. Co. v. Kelly, (Tex. Civ. App. 1904) 83 S. W. Rep. 855.

**Washington.**—McCord v. McCord, 24 Wash. 529; Swanson v. Hoyle, 32 Wash. 169.

**Wisconsin.**—Stoll v. Pearl, 122 Wis. 619; Rogers v. Fate, 113 Wis. 364.

The appellate court is less apt to interfere with the discretion of the trial court where the judgment is set aside than where it is not. Harkness v. Jarvis, 182 Mo. 231.

In New York the Appellate Division may reverse an order of the special term denying a motion to open a judgment, though no abuse of discretion is found. Lawson v. Hilton, 89 N. Y. App. Div. 303.

**846. 1. Necessity of Showing a Meritorious Defense.**—**Colorado.**—Donald v. Bradt, 15 Colo. App. 414.

**Georgia.**—McCall v. Miller, 120 Ga. 262; Jewell v. Martin, 121 Ga. 325.

**Illinois.**—Hartford L., etc., Ins. Co. v. Rossiter, 196 Ill. 277; Eggleston v. Royal Trust Co., 205 Ill. 170; Gilchrist Transp. Co. v. Northern Grain Co., 204 Ill. 510; Gage v. Chicago, 211 Ill. 109; Pitzele v. Lutkins, 85 Ill. App. 662; Whalen v. Billings, 104 Ill. App. 281; Rust v. Baird, 109 Ill. App. 41; Germania F. Ins. Co. v. Muller, 110 Ill. App. 190; Foster v. Weber, 110 Ill. App. 5.

**Iowa.**—McCormick v. McCormick, 109 Iowa 700; Johnson v. Nash-Wright Co., 121 Iowa 173; Culbertson v. Salinger, 122 Iowa 12; Hawley v. Griffin, 121 Iowa 691; Tschohl v. Machinery Mut. Ins. Assoc., 126 Iowa 211.

**Kansas.**—Schuler v. Fowler, 63 Kan. 98.

**Kentucky.**—Wireman v. Wireman, (Ky. 1905) 87 S. W. Rep. 319.

**Maryland.**—Maryland Steel Co. v. Marney, 91 Md. 360; Tyrell v. Hilton, 92 Md. 176.

**Minnesota.**—See Crane, etc., Co. v. Sauntry, 90 Minn. 301.

**Missouri.**—Wabash R. Co. v. Mirrieles, 182 Mo. 126.

**Nebraska.**—Childs v. Ferguson, (Neb. 1903) 93 N. W. Rep. 409; Waters v. Raker, (Neb. 1901) 96 N. W. Rep. 78; Delaney v. Updike Grain Co., (Neb. 1904) 99 N. W. Rep. 660.

**New Jersey.**—Pike v. Henderson, (N. J. 1901) 48 Atl. Rep. 551.

**North Carolina.**—Scott v. Mutual Reserve Fund L. Assoc., 13 N. Car. 515.

**North Dakota.**—Braseth v. Bottineau County, 13 N. Dak. 344.

**Ohio.**—French Wax Figure Co. v. Jupp Baxter Co., 12 Ohio Cir. Dec. 76, 21 Ohio Cir. Ct. 764.

**Oregon.**—Egan v. North American Sav., etc., Co., 45 Oregon 131.

**South Dakota.**—Minnehaha Nat. Bank v. Hurley, 13 S. Dak. 18.

**Texas.**—Tinsley v. Corbett, 27 Tex. Civ. App. 633; Chambers v. Gallup, 30 Tex. Civ. App. 424; El Paso, etc., R. Co. v. Kelly, (Tex. Civ. App. 1904) 83 S. W. Rep. 855.

**Washington.**—Williams v. Breen, 25 Wash. 666.

**Wisconsin.**—Port Huron Engine, etc., Co. v. Clements, 113 Wis. 249.

**Meritorious Defense Will Not Avail When Party Guilty of Laches.**—Turner v. J. I. Case Threshing Mach. Co., 133 N. Car. 381; Osborn v. Leach, 133 N. Car. 427.

**847.** Where the Judgment Is Void. — See note 1.

11. Imposition of Terms. — See note 2.

**848.** See note 1.

Imposition of Terms Not Necessary. — See note 2.

12. Appeal. — See note 3.

**IX. COLLATERAL ATTACK** — Definition. — See note 4.

Fraud — Attack by Parties or Privies. — See note 6.

**849.** By Stranger. — See notes 1, 2, 3.

**850.** **XI. ARREST OF JUDGMENT** — 2. Grounds of Arrest — *a.* ERRORS APPARENT ON FACE OF RECORD. — See note 4.

Existence of Meritorious Defense Not Conclusive Cause for Vacating Default. — *Welch v. Mastin*, 98 Mo. App. 273.

Affidavit Need Not Disclose Facts of Defense. — *Rauer's Law, etc., Co. v. Gilleran*, 138 Cal. 352.

When No Affidavit Necessary. — *American Audit Co. v. Industrial Federation of America*, 84 N. Y. App. Div. 304.

**846.** 2. Technical Defense Not Sufficient. — *Culbertson v. Salinger*, 122 Iowa 12; *Van Every v. Sanders*, (Neb. 1903) 95 N. W. Rep. 870; *Hunter v. Forsyth*, 205 Pa. St. 466.

**847.** 1. No Defense Need Be Shown When Judgment Void. — *Crippen v. X. Y. Irrigating Ditch Co.*, 32 Colo. 461, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 847; *Mosher v. McDonald*, (Iowa 1905) 102 N. W. Rep. 837; *Baldwin v. Burt*, (Neb. 1902) 96 N. W. Rep. 401; *Heinemann v. Pier*, 110 Wis. 185.

Where It Appears from the Records and Papers that the moving party has a good defense on the merits, the necessity of an affidavit of merits is a question for the trial court. *Crane, etc., Co. v. Sauntry*, 90 Minn. 301.

2. Court May Impose Terms on Opening or Vacating Judgment — *California*. — *Nicoll v. Welton*, 130 Cal. 666.

*Illinois*. — *Chicago v. English*, 97 Ill. App. 594, affirmed 198 Ill. 211.

*Minnesota*. — *Geisberg v. O'Laughlin*, 88 Minn. 431.

*New York*. — *Long Branch Pier Co. v. Crossley*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 249; *Marcus v. Pomeranz*, 98 N. Y. App. Div. 619.

*Rhode Island*. — *Densereau v. Saillant*, 22 R. I. 500.

*Virginia*. — *Powers v. Carter Coal, etc., Co.*, 100 Va. 450.

*Washington*. — *Walton v. Hartman*, 38 Wash. 34.

**848.** 1. Action in Reference to Imposing Terms Not Disturbed Unless Discretion Clearly Abused. — See *Rosenberg v. Hassett*, (Supm. Ct. App. T.) 86 N. Y. Supp. 865.

Imposition of Terms Modified by Appellate Court. — *De Marco v. Mass*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 827; *Marcus v. Pomeranz*, 98 N. Y. App. Div. 619.

2. Imposition of Terms Not Necessary. — *Powers v. Carter Coal, etc., Co.*, 100 Va. 450.

3. Appeal Will Lie. — *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801; *Gouveia v. Nakamura*, 13 Hawaii 452, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848; *Health Dept. v. Babcock*, (Supm. Ct. App. T.) 84 N. Y. Supp. 604; *Meade County Bank v. Decker*, 17 S. Dak. 590.

Appeal Will Not Lie Where No Substantial

Right Affected. — *Thompson v. Robbins*, 32 Wash. 149.

In Summary Proceedings an Appeal Does Not Lie from an order denying a motion to open a default judgment of the Municipal Court of the City of New York. *Mooney v. McGuirk*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 744.

*New York*. — Under Laws N. Y. 1902, p. 1486, c. 580, § 257, no appeal lies from an order opening a default. An appeal can only be taken from the judgment. *Long Branch Pier Co. v. Crossley*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 249.

Under Laws N. Y. 1902, p. 1563, c. 580 an order denying a motion to open a default is appealable. *Schrenkeisen v. Kroll*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1072.

4. Collateral Attack Defined. — *Parsons v. Weis*, 144 Cal. 410; *Harter v. Shull*, 17 Colo. App. 162; *Kapiolani v. Atcherly*, 14 Hawaii 651, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 848; *Spencer v. Spencer*, 31 Ind. App. 321, 99 Am. St. Rep. 260; *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325.

6. Judgment Not Subject to Collateral Attack by Parties — *Alabama*. — *Dial v. Gambrel*, 126 Ala. 151.

*California*. — *People v. Perris Irrigation Dist.*, 132 Cal. 289; *Kochler v. Holt Mfg. Co.*, 146 Cal. 335.

*Colorado*. — *Harter v. Shull*, 17 Colo. App. 162.

*Georgia*. — *Porter v. Rountree*, 111 Ga. 369.

*Missouri*. — *Reed v. Nicholson*, 158 Mo. 624; *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325.

*Montana*. — *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839.

*Nebraska*. — *Cezek v. Cezek*, (Neb. 1903) 96 N. W. Rep. 657.

*New Jersey*. — *Podesta v. Binns*, (N. J. 1905) 60 Atl. Rep. 815.

*South Dakota*. — *Weiland v. Ashton*, (S. Dak. 1904) 100 N. W. Rep. 737.

*Texas*. — *Moor v. Moor*, (Tex. Civ. App. 1901) 63 S. W. Rep. 347.

**849.** 1. Collateral Attack by Stranger. — Safe Deposit, etc., *Co. v. Wright*, (C. C. A.) 105 Fed. Rep. 155; *Williams v. Lancaster*, 113 Ga. 1020; *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325; *Covey v. Wheeler*, 23 Pa. Co. Ct. 467. See also *Smith v. McDermott*, 5 Ont. L. Rep. 515.

2. Attack by Defrauded Creditor. — *Chandler v. Thompson*, (C. C. A.) 120 Fed. Rep. 940.

3. Fraud upon Judgment Debtor Insufficient to Warrant Attack. — Safe Deposit, etc., *Co. v. Wright*, (C. C. A.) 105 Fed. Rep. 155.

**850.** 4. Error or Defect Apparent on Face of



**851.** *b.* ERROR WHICH WOULD BE FATAL ON DEMURRER. — See note 2.

*c.* DEFECT IN PLEADINGS. — See note 3.

**852.** See notes 1, 2.

**853.** See notes 1, 2.

*d.* VARIANCE. — See note 3.

**854.** See note 1.

*e.* OBJECTIONS AS TO JURISDICTION. — See note 3.

*g.* OBJECTIONS TO THE JURY. — See notes 5, 6, 7.

**Record** — *United States*. — *Clary v. Hardee-ville Brick Co.*, 100 Fed. Rep. 915; *U. S. v. M'Knight*, 112 Fed. Rep. 982.

*Georgia*. — *Regopoulos v. State*, 115 Ga. 232; *Leffler v. Union Compress Co.*, 121 Ga. 40.

*Louisiana*. — *State v. Washington*, 104 La. 443, 81 Am. St. Rep. 141; *State v. Smith*, 104 La. 464; *State v. Evans*, 104 La. 343; *State v. Colomb*, 108 La. 253; *State v. Kline*, 109 La. 603; *State v. Brown*, 111 La. 170.

*Maine*. — *State v. Henry*, 98 Me. 561.

*Missouri*. — *State v. Patton*, 94 Mo. App. 32; *McGammon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 94 Am. St. Rep. 778.

*North Carolina*. — *State v. Jarvis*, 129 N. Car. 698.

*Vermont*. — *Montpelier, etc., R. Co. v. Macchi*, 74 Vt. 403.

**The True Record, Not False One, Controls.** — *State v. Smith*, 99 Me. 164.

**851. 2. Error Such as Would Have Been Fatal on General Demurrer.** — See *Himrod Coal Co. v. Clark*, 197 Ill. 514, *affirming* 99 Ill. App. 332.

**Objections Previously Raised by Demurrer Cannot Be Raised on Motion in Arrest of Judgment.** — *Leathe v. Thomas*, 109 Ill. App. 434. *Compare* *Decatur v. Simpson*, 115 Iowa 348; *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428.

**Exceptions Which Might Have Been Taken on Demurrer.** — *Chicago v. Smith*, 95 Ill. App. 335; *Price v. Art Printing Co.*, 112 Ill. App. 1.

**3. Judgment May Be Arrested Where Complaint States No Cause of Action** — *Colorado*. — *Messenger v. Woge*, (Colo. App. 1904) 78 Pac. Rep. 314.

*Georgia*. — *Hill v. Nelms*, 122 Ga. 572; *Kelly v. Strouse*, 116 Ga. 872; *O'Connor v. Brucker*, 117 Ga. 451.

*Illinois*. — *Himrod Coal Co. v. Clark*, 197 Ill. 514.

*Indiana*. — *Nichols v. State*, 28 Ind. App. 674.

*Iowa*. — *Alexander v. Grand Lodge, etc.*, 119 Iowa 519; *Lacey v. Davis*, 126 Iowa 675.

*Nebraska*. — *Smith v. State*, (Neb. 1903) 94 N. W. Rep. 106.

*New York*. — *People v. Wiechers*, 94 N. Y. App. Div. 19, *affirmed* 179 N. Y. 459.

*Tennessee*. — *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428; *Southern R. Co. v. Maxwell*, 113 Tenn. 464.

*Vermont*. — *Baker v. Sherman*, 73 Vt. 26.

**852. 1. Formal Defect in Pleadings** — *United States*. — *U. S. v. Dimmick*, 112 Fed. Rep. 352; *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163.

*District of Columbia*. — *Chandler, etc., Co. v. Norwood*, 14 App. Cas. (D. C.) 357.

*Georgia*. — *Martin v. State*, 115 Ga. 255; *Battle v. State*, 122 Ga. 575; *Hill v. Nelms*, 122 Ga. 572.

*Illinois*. — *Young v. People*, 193 Ill. 236; *Markee v. People*, 103 Ill. App. 347; *Garibaldi v. O'Connor*, 112 Ill. App. 53, *affirmed* 210 Ill. 284. See also *N. K. Fairbank Co. v. Bahre*, 213 Ill. 636.

*Iowa*. — *Williams v. Ballinger*, 125 Iowa 410.

*Kansas*. — *State v. Clough*, 70 Kan. 510.

*Maryland*. — *Charles County v. Mandanyohl*, 93 Md. 150.

*Massachusetts*. — *Com. v. Mackey*, 177 Mass. 345; *Dean v. Ross*, 178 Mass. 397.

*Missouri*. — *Compare State v. Jones*, 168 Mo. 398.

*New Jersey*. — *State v. Goldman*, 65 N. J. L. 394.

*North Carolina*. — *State v. Jarvis*, 129 N. Car. 698; *State v. Peak*, 130 N. Car. 711.

*Rhode Island*. — *Bowen v. White*, 26 R. I. 68.

*South Carolina*. — *State v. Lark*, 64 S. Car. 350.

*Texas*. — *Worthan v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 526.

**Where an Indictment Failed to State that it was made by the grand jurors on their oath, it was held that the judgment would be arrested.** *State v. Sanders*, 158 Mo. 610, 81 Am. St. Rep. 330.

**2. Duplicity in Pleadings Not Ground for Motion in Arrest.** — *Pooler v. U. S.*, (C. C. A.) 127 Fed. Rep. 509.

**853. 1. Misjoinder of Courts** — *Illinois*. — *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462.

**2. Judgment Not Arrested Because of Defective Count Where Declaration Contains a Good Count.** — *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9; *Garibaldi v. O'Connor*, 112 Ill. App. 53, *affirmed* 210 Ill. 284; *Zellers v. Missouri Water, etc., Co.*, 92 Mo. App. 107; *Dean v. Cass*, 73 Vt. 314.

**3. Variance Between Allegations and Proof Not Sufficient.** — *Donley v. Dougherty*, 97 Ill. App. 544; *State v. Jarvis*, 129 N. Car. 698; *State v. Nelson*, (R. I. 1905) 60 Atl. Rep. 589.

**854. 1. Variance Between Writ and Declaration Not Sufficient.** — *Swindell v. Harper*, 51 W. Va. 381.

**Variance Between Complaint and Information Sufficient.** — *Harrison v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1058.

**3. Lack of Jurisdiction over Subject-matter.** — *State v. Tully*, 31 Mont. 365. See also *Dean v. Ross*, 178 Mass. 397.

**5. Jury Illegally Constituted.** — *Naylor v. Chinn*, 82 Mo. App. 160; *State v. Edwards*, 68 S. Car. 318.

**6. Irregularities in Summoning and Impaneling Jury.** — *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799; *State v. Colomb*, 108 La. 253; *State v. Vincent*, 91 Md. 718; *State v. Parker*, 132

**855.** See note 1.

*h.* DEFECT IN VERDICT. — See notes 2, 4.

*m.* OTHER OBJECTIONS. — See note 13.

**856.** See notes 3, 4, 5.

**857.** See note 1.

*n.* STATUTORY GROUNDS. — See note 2.

**858.** 4. Time for Moving in Arrest. — See note 1.

5. Effect of Arrest. — See notes 2, 3, 4.

**XII. SATISFACTION AND DISCHARGE** — 1. Payment to Whom — *a.* IN

GENERAL. — See note 6.

**860.** *f.* OFFICERS AUTHORIZED BY LAW TO RECEIVE PAYMENT — Clerk of Court. — See notes 6, 7.

**861.** 2. Medium of Payment — *a.* WHERE PAYMENT TO JUDGMENT CREDITOR — The Taking of Collateral Security. — See note 4.

Payment by Negotiable Instrument. — See note 6.

**862.** 4. Effect of Payment — *a.* WHEN MADE BY ONE PRIMARILY LIABLE — (1) *Absolute Satisfaction.* — See note 11.

**863.** Cannot Be Restored or Kept Alive. — See note 1.

(2) *Where Several Joint Debtors.* — See note 2.

N. Car. 1014; *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 502.

**854.** 7. Objections to Qualification or Competency of Jurors. — *Hopkins v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 986; *Thomas v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 801.

**855.** 1. Misconduct of Jury. — *U. S. v. McKnight*, 112 Fed. Rep. 982.

2. Verdict Not Conforming to Indictment or Pleadings. — *Hogan v. State*, 42 Fla. 562; *State v. De Witt*, 186 Mo. 61.

Repugnant Part Rejected as Surplusage. — *State v. Henry*, 98 Me. 561.

Not Proper Remedy for Wrong Verdict. — *Mathis v. State*, 45 Fla. 46.

4. Verdict Insufficient to Support a Judgment. — *State v. De Witt*, 186 Mo. 61; *Com. v. Hanley*, 15 Pa. Super. Ct. 271.

Failure of Court to Make Findings Is Ground for Arrest of Judgment. — *Grimes v. Sprague*, 86 Mo. App. 245.

13. Matters of Form. — *Williams v. State*, 44 Tex. Crim. 235.

**856.** 3. Judgment Cannot Be Arrested on Account of Defects or Irregularities Which Are Cured by the Verdict. — *State v. Patton*, 94 Mo. App. 32; *State v. Lewis*, 181 Mo. 235; *State v. Brown*, 181 Mo. 192; *Hollar v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 961.

4. A Plea of Not Guilty is not a waiver of an objection that the grand jury was illegally constituted. *State v. Edwards*, 68 S. Car. 318.

5. Objections to Evidence. — *Clary v. Hardeville Brick Co.*, 100 Fed. Rep. 915; *State v. Coates*, 130 N. Car. 701; *Com. v. Mock*, 23 Pa. Super. Ct. 51.

Insufficiency of Evidence Not Ground for Arrest. — *Com. v. Wickett*, 20 Pa. Super. Ct. 350; *Com. v. Schollenberger*, 17 Pa. Super. Ct. 218; *Com. v. Mock*, 23 Pa. Super. Ct. 51. See also *Montpelier*, etc., R. Co. *v. Macchi*, 74 Vt. 403.

**857.** 1. Irregular Impanelment of Grand Jury Not Ground for Arrest. — *Harris v. State*, 155 Ind. 265.

2. Statutes and Local Rules Governing Grounds

of Arrest. — *Charles County v. Mandanyohl*, 93 Md. 150; *Lane v. Holcomb*, 182 Mass. 360; *People v. Cox*, 67 N. Y. App. Div. 344.

**858.** 1. Proper Time for Moving in Arrest. — *Sanders v. State*, 129 Ala. 69; *Hampton v. State*, 133 Ala. 180; *State v. Rosenblatt*, 185 Mo. 114.

2. Arrest of Judgment Puts an End to Action. — *Hill v. Nelms*, 122 Ga. 572.

3. New Action Not Barred. — *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171.

4. Defendant Cannot Escape New Prosecution. — *Hill v. Nelms*, 122 Ga. 572.

6. To Creditor or Authorized Agent. — *Osborne v. Gatewood*, (Tex. Civ. App. 1903) 74 S. W. Rep. 72.

**860.** 6. Clerk May Receive Payment. — *Matusevitz v. Hughes*, 26 Mont. 214, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 860.

7. No Authority in Clerk — Payment Not a Satisfaction. — *Milburn-Stoddard Co. v. Stickney*, (N. Dak. 1905) 103 N. W. Rep. 752; *Whitesboro v. Diamond*, (Tex. Civ. App. 1903) 75 S. W. Rep. 540.

**861.** 4. Taking Different Security in Lieu of Judgment divests the judgment creditor of his interest in the judgment. *Branch v. Wilkens*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1083.

6. Negotiable Instrument No Satisfaction Unless So Agreed. — *Colby v. Maw*, (Neb. 1901) 95 N. W. Rep. 677.

**862.** 11. Payment by One Primarily Liable. — *Plattsouth First Nat. Bank v. Gibson*, 60 Neb. 767; *Ebel v. Stringer*, (Neb. 1905) 102 N. W. Rep. 466; *Storz v. Boyce*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 279; *Dunn v. Beaman*, 126 N. Car. 764.

**863.** 1. Judgment Cannot Be Kept Alive. — *Plattsouth First Nat. Bank v. Gibson*, 60 Neb. 767; *Storz v. Boyce*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 279.

2. Payment by One of Joint Debtors. — *Somerville First Nat. Bank v. Hoffman*, 68 N. J. L. 245; *Storz v. Boyce*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 279; *Dunn v. Beaman*, 126 N. Car. 764.

- 863.** Effect of Releasing One Joint Debtor. — See note 3.  
Under Statutes in Some States. — See note 4.  
(3) *Cumulative Judgments* — (a) *Against Same Person for Same Cause.* — See note 5.
- 864.** (b) *Against Different Persons for Same Cause.* — See note 1.  
5. *Effect of Part Payment* — *a.* COMMON-LAW RULE. — See note 6.
- 865.** *b.* WHEN RULE NOT APPLICABLE — *Additional Consideration.* — See note 2.
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- 866.** 7. *Presumption of Satisfaction from Lapse of Time* — *a.* ARISES AFTER TWENTY YEARS. — See note 7.
- 867.** See note 2.  
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*b.* PRESUMPTION NOT CONCLUSIVE. — See note 5.  
*c.* EVIDENCE IN REBUTTAL — (1) *In General* — *The Burden of Proving.* — See note 7.  
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- 868.** *d.* QUESTION FOR COURT OR JURY. — See note 7.  
*e.* WHERE LESS THAN TWENTY YEARS HAVE ELAPSED — (1) *Mere Lapse of Time.* — See note 9.  
(2) *Lapse of Time in Connection with Other Circumstances.* — See note 10.
- 869.** 10. *Proceedings After Satisfaction in Fact* — *a.* COMPELLING ENTRY OF SATISFACTION — (1) *Power of Court to Compel.* — See note 7.  
In Minnesota and Montana. — See note 10.
- 870.** (2) *Grounds for Compelling* — *A Tender.* — See note 9.
- 863.** 3. *Express Release of One Only Not Release of All.* — *Hadley v. Bryan*, 70 Ark. 197; *Barnum v. Cochrane*, 139 Cal. 494.
4. *Release of One Debtor Allowed by Statute.* — *Smith v. Richards*, 129 N. Car. 267.
5. *Cumulative Judgments Against Same Person for Same Cause.* — *Barth v. Loeffelholz*, 108 Wis. 562.
- 864.** 1. *Several Judgments for Same Cause Against Different Persons.* — *Dicken v. Balbach*, 9 Pa. Dist. 449.
6. *Part Payment Not Satisfaction in Full.* — *Marshall v. Bullard*, 114 Iowa 462. See also *Smith v. Richards*, 129 N. Car. 267.
- 865.** 2. *Part Payment by Third Party — Satisfaction in Full.* — *Marshall v. Bullard*, 114 Iowa 462.
6. *Entry Cannot Be Questioned by Subsequent Assignee.* — *Blythe v. Cordingly*, (Colo. App. 1905) 80 Pac. Rep. 495.
- 866.** 7. *Presumption of Payment After Twenty Years* — *Connecticut.* — *Barber v. International Co.*, 74 Conn. 652, 92 Am. St. Rep. 246.
- Delaw. re.* — *Maxwell v. Devalinger*, 2 Penn. (Del.) 504.
- Missouri.* — *Wencker v. Thompson*, 96 Mo. App. 59.
- Pennsylvania.* — *Roberts v. Powell*, 210 Pa. St. 594; *Hummel v. Lilly*, 16 Pa. Super. Ct. 327; *Miller v. Overseers of Poor*, 17 Pa. Super. Ct. 159; *Hitchcock v. Washburn*, 9 Pa. Dist. 272.
- Time Does Not Run Pending Suit on Judgment.* — *St. Francis Mill Co. v. Sugg*, 169 Mo. 130.
- 867.** 2. *Not Applicable to Judgment for Possession.* — See *Moore v. Williams*, 129 Ala. 329.
4. *Statutes Declaratory of the Common Law.* — *Jones v. Stockgrowers Nat. Bank*, 17 Colo. App. 79.
- Such Statutes Not Retroactive.* — *Wencker v. Thompson*, 96 Mo. App. 59.
5. *Presumption Rebuttable.* — *Maxwell v. Devalinger*, 2 Penn. (Del.) 504; *Imgard v. Ashley*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 857. See also *Moore v. Williams*, 129 Ala. 329; *Miller v. Overseers of Poor*, 17 Pa. Super. Ct. 159.
7. *Burden of Proof on Party Seeking Payment.* — *Maxwell v. Devalinger*, 2 Penn. (Del.) 504; *Miller v. Overseers of Poor*, 17 Pa. Super. Ct. 159.
8. *Any Evidence Showing Continuing Indebtedness.* — *Anderson v. Baughman*, 69 S. Car. 38.
9. *Chiles v. School Dist.*, 103 Mo. App. 240. See also *Miller v. Overseers of Poor*, 17 Pa. Super. Ct. 159.
- 868.** 7. *Question of Payment for Jury.* — *McFaul v. Haley*, 166 Mo. 69, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868.
9. See *Imgard v. Ashley*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 857, where a presumption of payment was held to have arisen after a lapse of seventeen years.
10. *McFaul v. Haley*, 166 Mo. 69, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868; *Woodward v. Carson*, 208 Pa. St. 144.
- 869.** 7. *Court Has Power to Compel Entry.* — *Warren v. Ward*, 91 Minn. 254.
10. *Minnesota.* — *Warren v. Ward*, 91 Minn. 254.
- 870.** 9. *Tender Must Include Costs Although Not Inserted in Judgment.* — *Stakke v. Chapman*, 13 S. Dak. 269.

**870.** Grounds Antedating Rendition of Judgment. — See note 10.

**871.** *b.* VACATING ENTRY OF SATISFACTION — (1) *Power to Vacate.* — See notes 2, 3.

*Power Inherent.* — See note 5.

(3) *Grounds for Vacating.* — See note 10.

**872.** See note 2.

**XIII. ASSIGNMENT OF JUDGMENTS — 1. What Judgments Assignable —**

*a.* ASSIGNABILITY AT COMMON LAW — *Legal Title Does Not Pass.* — See note 8.

**873.** Right to Use Assignor's Name. — See notes 2, 4.

*b.* ASSIGNABILITY UNDER STATUTES. — See note 7.

**874.** See note 1.

*c.* JUDGMENT FOR TORT. — See note 3.

*d.* FUTURE JUDGMENT — (1) *Where Cause Not Assignable.* — See note 5.

*e.* PARTIAL ASSIGNMENT — (1) *Necessity for Judgment Debtor's Consent.* — See note 9.

**875.** 2. Who May Assign — *a.* IN GENERAL — *Person Having Beneficial Interest.* — See note 6.

**877.** 3. Method and Form of Assignment — *a.* STATUTORY ASSIGNMENTS — (2) *Statutes Cumulative Only.* — See note 1.

*b.* EQUITABLE ASSIGNMENTS — (1) *No Particular Form Necessary.* — See note 2.

*Intent of the Parties.* — See note 4.

*Irregularities or Informalities.* — See note 6.

**878.** An Executory Agreement to Assign. — See note 3.

(2) *May Be by Parol.* — See note 5.

(3) *Necessity to Record Assignment.* — See note 6.

**870.** 10. Grounds Antedating Rendition of Judgment. — *McDonald v. Holdom*, 208 Ill. 128; *Holdom v. Salomon*, 108 Ill. App. 449, *affirmed* 208 Ill. 128, 146.

**871.** 2. Court of Law Can Vacate. — *Wilmer v. Brice*, 91 Md. 71; *Wand v. Ryan*, 166 Mo. 646; *Philadelphia v. Simon*, 12 Pa. Super. Ct. 159.

3. Correct Entry Nunc Pro Tunc. — *Wand v. Ryan*, 166 Mo. 646.

5. Power Inherent. — See *Wand v. Ryan*, 166 Mo. 646.

10. Mistake. — *Wilmer v. Brice*, 91 Md. 71; *Philadelphia v. Simon*, 12 Pa. Super. Ct. 159. See also *Wand v. Ryan*, 166 Mo. 646.

**872.** 2. Misrepresentation or Fraud. — *Pannell v. Pannell*, 100 Mo. App. 133; *Fox v. State*, 63 Neb. 185; *Philadelphia v. Simon*, 12 Pa. Super. Ct. 159.

8. Legal Title Not Assignable at Common Law. — *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250; *Pearson v. Luecht*, 199 Ill. 475; *Price v. Clevenger*, 99 Mo. App. 536; *Stewart v. Lee*, 70 N. H. 181.

Assignment Not Purchase of Litigious Rights. — *Wilson v. Lemonde*, 2 Quebec Pr. 156.

**873.** 2. May Use Assignor's Name to Collect Judgment. — *Stewart v. Lee*, 70 N. H. 181.

4. May Sue in an Assignor's Name. — *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45.

7. Assignee May Proceed in Own Name. — *Martin v. Wilson*, (C. C. A.) 120 Fed. Rep. 202 (declaring the law of Kansas); *Curtin v. Kowalsky*, 145 Cal. 431; *Price v. Clevenger*, 99 Mo. App. 536.

**874.** 1. Scire Facias to Revive Judgment. —

*School Dist. No. 34 v. Kountze*, (Neb. 1902) 92 N. W. Rep. 597.

3. Judgment for Tort Assignable. — *Williams v. West Chicago St. R. Co.*, 199 Ill. 57, *affirming* 101 Ill. App. 291.

5. Assignment of Verdict Does Not Pass Title. — *Williams v. West Chicago St. R. Co.*, 199 Ill. 57, *affirming* 101 Ill. App. 291.

Rights of Creditor of Assignor. — *Compare Williams v. West Chicago St. R. Co.*, 199 Ill. 57, *affirming* 101 Ill. App. 291.

9. Consent of Judgment Debtor Necessary. — *Lewis v. Third St., etc., R. Co.*, 26 Wash. 28.

**875.** 6. A Joint Owner of a Judgment may assign his undivided interest therein. *Hunter v. Manseau*, 91 Minn. 124.

**877.** 1. Statutes Not Exclusive of Equitable Assignment. — *Price v. Clevenger*, 99 Mo. App. 536.

2. No Particular Form Necessary. — *Rufe v. Commercial Bank*, (C. C. A.) 99 Fed. Rep. 650. See also *Smith v. Peck*, 128 Cal. 527.

4. Constructive Assignment. — *Rufe v. Commercial Bank*, (C. C. A.) 99 Fed. Rep. 650; *Harris v. Hazlehurst Oil Mill, etc., Co.*, 78 Miss. 603. See also *Smith v. Peck*, 128 Cal. 527.

6. Intent Controls. — *Harris v. Hazlehurst Oil Mill, etc., Co.*, 78 Miss. 603.

**878.** 3. Delivery Essential to Validity of Assignment. — *Williams v. West Chicago St. R. Co.*, 85 Ill. App. 305.

5. May Be by Parol. — *Smith v. Peck*, 128 Cal. 527; *Price v. Clevenger*, 99 Mo. App. 536.

6. Recording Not Necessary. — *Curtin v. Kowalsky*, 145 Cal. 431.

- 879.** 4. **Notice of Assignment** — *a.* NECESSITY FOR. — See notes 5, 6.  
*b.* RIGHTS OF JUDGMENT DEBTOR BEFORE NOTICE. — See notes 7, 8.
- 880.** *c.* EFFECT OF NOTICE TO JUDGMENT DEBTOR. — See notes 6, 7, 8.  
*d.* WHAT CONSTITUTES NOTICE TO JUDGMENT DEBTOR. — See note 10.
- 881.** Effect of Assignment on Record. — See note 1.
- 882.** 5. **Effect of Assignment** — *c.* WHAT RIGHTS PASS WITH ASSIGNMENT. — See notes 4, 5, 7.  
 Assignor Loses Control of Judgment. — See note 10.
- 883.** See notes 2, 3.  
*e.* ASSIGNEE'S TITLE NO BETTER THAN ASSIGNOR'S. — See notes 6, 7.
- 884.** *g.* PURCHASE FOR LESS THAN FACE VALUE. — See notes 2, 3.  
*h.* ASSIGNEE TAKING SUBJECT TO EQUITIES — (1) *General Rule.* — See note 4.

**879.** 5. **Notice Necessary to Complete Assignment.** — Price *v.* Clevenger, 99 Mo. App. 536.

**6.** **To Protect Assignee Against Acts of Parties.** — Richardson *v.* Prall, 26 Pa. Super. Ct. 110; Work *v.* Prall, 26 Pa. Super. Ct. 104. See also Curtin *v.* Kowalsky, 145 Cal. 431.

**Notice Held Unnecessary as Against Creditor of Assignor.** — Williams *v.* West Chicago St. R. Co., 199 Ill. 57.

**7.** **Debtor Not Bound Before Notice.** — Work *v.* Prall, 26 Pa. Super. Ct. 104; Richardson *v.* Prall, 26 Pa. Super. Ct. 110.

**8.** **Payment to Assignor Before Notice Valid.** — Vance *v.* Hickman, 95 Ill. App. 554; Price *v.* Clevenger, 99 Mo. App. 536; Richardson *v.* Prall, 26 Pa. Super. Ct. 110; Work *v.* Prall, 26 Pa. Super. Ct. 104.

**880.** 6. **Assignee Protected Against Acts of Parties.** — Pearson *v.* Luecht, 199 Ill. 475; Stewart *v.* Lee, 70 N. H. 181.

**7.** **Payment to Assignor Not Valid Against Assignee.** — Pearson *v.* Luecht, 199 Ill. 475.

**8.** **Release by Judgment Creditor Invalid.** — Howard *v.* Graybehl, 16 Colo. App. 80.

**10.** **Notice Must Be Clearly Proven.** — Vance *v.* Hickman, 95 Ill. App. 554.

**881.** 1. **Assignment of Record Not Constructive Notice.** — Work *v.* Prall, 26 Pa. Super. Ct. 104; Richardson *v.* Prall, 26 Pa. Super. Ct. 110.

**882.** 4. **Passes All Assignable Rights and Remedies of Assignor** — *United States.* — Rufe *v.* Commercial Bank, (C. C. A.) 99 Fed. Rep. 650.  
*California.* — Heisen *v.* Smith, 138 Cal. 216, 94 Am. St. Rep. 39; Curtin *v.* Kowalsky, 145 Cal. 431.

*Colorado.* — Blythe *v.* Cordingly, (Colo. App. 1905) 80 Pac. Rep. 495.

*Illinois.* — Rogers *v.* Dimon, 106 Ill. App. 201, 203 Ill. 464.

*Missouri.* — Campbell *v.* Harrington, 93 Mo. App. 315.

*New Jersey.* — Wimpfheimer *v.* Perrine, 61 N. J. Eq. 126.

*North Carolina.* — Ricaud *v.* Alderman, 132 N. Car. 62.

*Washington.* — Lewis *v.* Third St., etc., R. Co., 26 Wash. 28.

**Passes Right to Redeem from a Prior Lien.** — Hunter *v.* Mauseau, 91 Minn. 124.

**5.** **Carries Debt on Which Judgment Rendered.**

— Rufe *v.* Commercial Bank, (C. C. A.) 99 Fed. Rep. 650.

**7.** **Appeal Bond.** — Lewis *v.* Third St., etc., R. Co., 26 Wash. 28.

**10.** **Creditors Bound to Same Extent as Assignor.** — Williams *v.* West Chicago St. R. Co., 199 Ill. 57, affirming 101 Ill. App. 291.

**883.** 2. **Cannot Pass Title by Subsequent Assignment.** — Curtin *v.* Kowalsky, 145 Cal. 431.

**3.** **Lack of Notice No Aid to Subsequent Assignee.** — Curtin *v.* Kowalsky, 145 Cal. 431.

**6.** **Assignee Succeeds Only to Rights of Assignor** — *California.* — Curtin *v.* Kowalsky, 145 Cal. 431.

*Colorado.* — Blythe *v.* Cordingly, (Colo. App. 1905) 80 Pac. Rep. 495.

*Kentucky.* — Jones *v.* Dulaney, (Ky. 1905) 86 S. W. Rep. 547.

*New Jersey.* — Brady *v.* Carteret Realty Co., (N. J. 1905) 60 Atl. Rep. 938.

*Ohio.* — Wright *v.* Snell, 12 Ohio Cir. Dec. 308, 22 Ohio Cir. Ct. 86.

*Pennsylvania.* — Work *v.* Prall, 26 Pa. Super. Ct. 104; Richardson *v.* Prall, 26 Pa. Super. Ct. 110.

*Wisconsin.* — Fischbeck *v.* Mielenz, 119 Wis. 27.

**7.** **Assignor Can Convey No Better Title than His Own.** — Curtin *v.* Kowalsky, 145 Cal. 431.

**884.** 2. **Consideration Unnecessary.** — Curtin *v.* Kowalsky, 145 Cal. 431.

**3.** **When Part Payment Only.** — Where a judgment debtor furnishes money to a third person to buy up the judgment and he does so at less than its face value, the creditor not knowing the facts, it amounts to a part payment only of the judgment. Dickerson *v.* Campbell, (Fla. 1904) 35 So. Rep. 986.

**4.** **Assignee Takes Subject to Equities** — *Illinois.* — Pearson *v.* Luecht, 199 Ill. 475.

*Indiana.* — Anthony *v.* Masters, 28 Ind. App. 239; Frankel *v.* Garrard, 160 Ind. 209.

*Kentucky.* — Jones *v.* Dulaney, (Ky. 1905) 86 S. W. Rep. 547.

*North Carolina.* — Ricaud *v.* Alderman, 132 N. Car. 62.

*North Dakota.* — Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. Dak. 16.

*Pennsylvania.* — Richardson *v.* Prall, 26 Pa. Super. Ct. 110; Work *v.* Prall, 26 Pa. Super. Ct. 104.

**885.** (2) *What Equities Not Within the Rule* — (b) *Secret Equities of Third Persons.* — See note 5.

i. *EFFECT OF REVERSAL OR VACATION AFTER ASSIGNMENT — Parties Restored to Original Positions.* — See notes 9, 10.

**886.** *JUDICIAL.* — See note 5.

**887.** *Judicial Act.* — See note 1.

**888.** *Judicial and Ministerial.* — See note 1.

*Judicial and Legislative.* — See note 2.

*Examples.* — See note 3.

**891.** *JUDICIALLY.* — See note 1.

*Wisconsin.* — *Fischbeck v. Mielenz*, 119 Wis. 27.

**885.** 5. *Not Applicable to Secret Equities of Third Persons.* — *Wright v. Snell*, 12 Ohio Cir. Dec. 308, 22 Ohio Cir. Ct. 86.

9. *After Reversal and New Trial* the assignee's right under the assignment attaches to the new judgment. *Rufe v. Commercial Bank*, (C. C. A.) 99 Fed. Rep. 650.

10. *May Be Vacated in Assignee's Hands.* — See *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698.

**886.** 5. *Judicial Discretion.* — *Marsh v. Griffin*, 123 N. Car. 660.

*Judicial Power.* — *State v. Thorne*, 112 Wis. 81.

**887.** 1. *Judicial Act.* — *Baltimore v. Bonaparte*, 93 Md. 156; *Robey v. Prince George's County*, 92 Md. 150; *Armstrong v. Murphy*, 65 N. Y. App. Div. 126; *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

**888.** 1. *Ministerial and Judicial Distinguished.* — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

*Ministerial Acts Performed by Judicial Officer.*

— *State v. Thorne*, 112 Wis. 81, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 888.

2. *Judicial and Legislative.* — *Zanesville v. Zanesville Telephone, etc., Co.*, 63 Ohio St. 442; *Tanner v. Nelson*, 25 Utah 226.

3. *Appointment and Removal from Office — Police and Fire Officials.* — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

*Injunction Granting Not Judicial.* — *State v. Bradley*, 134 Ala. 549.

*The Act of a Notary Public* in taking an acknowledgment is ministerial and not judicial. *Read v. Toledo Loan Co.*, 68 Ohio St. 280.

*Probate.* — *Wicks-Nease v. James*, 31 Tex. Civ. App. 151.

*A Refusal of a Police Commissioner to Grant a Theatrical License* is not a judicial act. *Armstrong v. Murphy*, 65 N. Y. App. Div. 126.

**891.** 1. *Judicially Notified.* — In *Schwartz v. Lake*, 109 La. 1081, the court said: "The term *judicially* notified must be understood to mean *judicially* notified by means of a citation, for this is the only mode recognized by our law for interrupting prescription *judicially*."

## JUDICIAL NOTICE.

BY JOHN SIMPSON.

**894.** I. *DEFINITION.* — See note 1.

**895.** III. *GENERAL RULE* — 1. *Statement of Terms.* — See note 1.

**894.** 1. *Definition.* — *Viemeister v. White*, 179 N. Y. 235, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894.

**895.** 1. *General Rule — Statement of Terms — United States.* — *The Mary*, 123 Fed. Rep. 609. See also *U. S. v. Rio Grande Dam, etc.*, Co., 174 U. S. 690.

*Florida.* — *State v. Atlantic Coast Line R. Co.*, (Fla. 1904) 37 So. Rep. 652.

*Illinois.* — *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433.

*Indiana.* — *Consumers' Gas Trust Co. v. Litter*, 162 Ind. 320.

*Iowa.* — *Heaton v. Ainley*, 108 Iowa 112.

*Kansas.* — *Quinton v. Hornby*, 8 Kan. App. 856, 56 Pac. Rep. 127.

*Louisiana.* — *Youree v. Vicksburg, etc., R. Co.*, 110 La. 791, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 895.

*Nebraska.* — *Redell v. Moores*, 63 Neb. 219, 93 Am. St. Rep. 431,

*New York.* — *Viemeister v. White*, 179 N. Y. 235, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894; *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350.

*Oregon.* — *Scott v. Astoria R. Co.*, 43 Oregon 26, 99 Am. St. Rep. 710.

*Texas.* — *Hall v. Rushing*, 21 Tex. Civ. App. 631.

*Utah.* — *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821; *State v. Bates*, 22 Utah 65, 83 Am. St. Rep. 768.

*Virginia.* — *Richmond Union Pass. R. Co. v. Richmond, etc., R. Co.*, 96 Va. 670.

*Powers of State Conventions as Political Party Organizations.* — *State v. Lindahl*, 11 N. Dak. 320.

*Land Never Assessed for Purposes of Taxation at Its Real Cash Value.* — *Wray v. Knoxville, etc., R. Co.*, 113 Tenn. 544; *State v. Savage*, 65 Neb. 714.

*Common Beliefs.* — *Viemeister v. White*, 179 N. Y. 235;

- 895.** Courts Will Extend the Scope of Judicial Knowledge. — See note 3.  
Function to Be Exercised with Caution. — See note 4.
- 896.** 2. Judicial Notice in Appellate Court. — See notes 1, 2.  
3. Current Terms, Names, Words, Phrases, and Abbreviations —
- b.* CURRENT PHRASES AND EPITHETS. — See note 4.  
*c.* WORDS — FLUCTUATIONS OF LANGUAGE. — See note 5.
- 897.** *d.* ABBREVIATIONS. — See notes 2, 3, 6*a*.  
Names in Foreign Language. — See note 7.
- 898.** 4. Elections — *a.* GENERAL ELECTIONS. — See note 2.  
5. Census and Population. — See note 5.
- 899.** See note 1.  
State or Federal Census. — See note 2.
- 900.** 9. Mortality Tables. — See note 5.
- 901.** 11. Nature and Characteristics of Domestic Animals. — See note 1.  
IV. NECESSITY FOR ACTUAL KNOWLEDGE — 1. In General. — See note 3.  
2. Resort to Sources of Information. — See note 4.

**895.** 3. Practice as Dependent on Particular Circumstances. — *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350.

4. Function Exercised with Caution. — *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433; *Doyle v. New York*, 58 N. Y. App. Div. 588; *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350; *Lyon v. Plankinton Bank*, 15 S. Dak. 400.

**896.** 1. Appellate Courts will judicially notice what may be judicially noticed by the court below. *Tischner v. Rutledge*, 35 Wash. 285. See also *Harvey v. Territory*, 11 Okla. 156.

2. Judicial Knowledge of Trial Court Presumed Correct. — *Bosworth v. Union R. Co.*, 26 R. I. 309.

In *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350, the court, following *Walton v. Stafford*, 14 N. Y. App. Div. 310, affirmed 162 N. Y. 558, refused, on appeal from a referee's report, to take judicial notice of facts material to the issue, which might have been, but were not, included in the agreed statement presented to the referee.

4. Current Phrases and Epithets. — *Martin v. Eagle Development Co.*, 41 Oregon 448, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 896; *Pedigo v. Com.*, (Ky. 1902) 70 S. W. Rep. 659.

5. *Martin v. Eagle Development Co.*, 41 Oregon 448, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 896.

"Beer." — *Locke v. Com.*, (Ky. 1903) 74 S. W. Rep. 654.

"Waterstone." — The court cannot take judicial notice that "waterstone" is the same as "cobblestone." *Doyle v. New York*, 58 N. Y. App. Div. 588.

Rule by Statute. — In *Oregon*, under Hill's Annot. Laws, § 708, subd. 1, it is only the ordinary meaning of current words and phrases of which the court will take judicial notice; and any peculiar meaning, confined to a particular locality or industry, will not be judicially noticed. *Martin v. Eagle Development Co.*, 41 Oregon 448.

**897.** 2. Abbreviations in Common Use — "Acct." for "Account." — *Heaton v. Ainley*, 108 Iowa 112.

"F. O. B. Cars." — *Vogt v. Schienebeck*, 122 Wis. 491.

3. Christian Names. — *Goodell v. Hall*, 112 Ga. 435.

Corruption of Names. — The issue and delivery of a lease in the name "Reedy" to a person named "Reeder," will be judicially noticed. *Stokes v. Riley*, 29 Tex. Civ. App. 373.

6*a.* "Eliza" for "Elizabeth." — *Goodell v. Hall*, 112 Ga. 435.

7. Names in Foreign Language. — A Texas court will not judicially notice the pronunciation of Spanish names. *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893.

**898.** 2. Result of Election. — *Matter of Denny*, 156 Ind. 104, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898; *Oglesby v. State*, 121 Ga. 602.

5. Returns of Official Census. — *Whitley County v. Garty*, 161 Ind. 464; *Evansville v. Frazer*, 24 Ind. App. 628; *State v. May*, 168 Mo. 122; *State v. Evans*, 166 Mo. 347; *Adams v. Elwood*, 176 N. Y. 106, affirming 61 N. Y. App. Div. 622, 72 N. Y. App. Div. 632; *Union College v. New York*, 65 N. Y. App. Div. 553, affirming 173 N. Y. 38, 93 Am. St. Rep. 569; *Stratton v. Oregon City*, 35 Oregon 409.

**899.** 1. Population of County. — *Whitley County v. Garty*, 161 Ind. 464; *State v. Evans*, 166 Mo. 347.

Population of a City. — *State v. Page*, 107 Mo. App. 213.

2. State or Federal Census. — *Stratton v. Oregon City*, 35 Oregon 409.

**900.** 5. Mortality Tables. — *Nelson v. Branford Lighting, etc., Co.*, 75 Conn. 548, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900; *Western, etc., R. Co. v. Hyer*, 113 Ga. 776, dissenting opinions of Simmons, C. J., and Lewis, J., citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900; *Jones v. McProud*, 62 Kan. 870, 64 Pac. Rep. 602.

*Carlisle Tables*. — *Jones v. McProud*, 62 Kan. 870, 64 Pac. Rep. 602.

**901.** 1. That Mules Are of Treacherous and Vicious Nature. — *Borden v. Falk Co.*, 97 Mo. App. 566.

3. Actual Knowledge Unnecessary. — *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350.

4. Resort to Sources of Information. — *Jones v. McProud*, 62 Kan. 870, 64 Pac. Rep. 602; *Vie-*

**901.** But the Mere Circumstance that Facts Are Stated in Encyclopædias. — See note 5.

**902.** V. WHETHER JUDICIAL NOTICE CONCLUSIVE — 2. Though Evidence Unnecessary, Admission Not Error. — See note 3.

**903.** VI. FACTS OF USUAL OR UNIFORM OCCURRENCE. — See note 1.

Course of Husbandry. — See note 2.

VII. COURSE OF TIME, NATURE, AND NATURAL PHENOMENA — 1. In General. — See note 3.

2. Coincidence of Days of Week and Month. — See note 4.

**904.** See note 2.

4. Course of Heavenly Bodies. — See note 6.

VIII. GEOGRAPHICAL FACTS — 1. In General. — See note 7.

*meister v. White*, 179 N. Y. 235; *North Hempstead v. Gregory*, 53 N. Y. App. Div. 350; *Lendle v. Robinson*, 53 N. Y. App. Div. 140; *Scott v. Astoria R. Co.*, 43 Oregon 26, 99 Am. St. Rep. 710; *Richmond Union Pass. R. Co. v. Richmond, etc.*, R. Co., 96 Va. 670. See also *State v. Magers*, 35 Oregon 520.

**Resort to Almanacs.** — *Montenes v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 493.

**Map of a City.** — *Wainwright v. Lake Shore, etc.*, R. Co., 11 Ohio Cir. Dec. 530.

**901. 5. Requisites, Etc.** — *North Hempstead v. Gregory*, 53 N. Y. App. Div. 359.

**902. 3. Reception of Evidence Not Error.** — See *Jones v. McProud*, 62 Kan. 870, 64 Pac. Rep. 602.

**903. 1. Nature and Character of Cigarettes.** — In *Austin v. Tennessee*, 179 U. S. 343, it was held that the court could not take judicial notice that tobacco is more noxious in the form of cigarettes than in any other.

**What Vaccination Is.** — *Com. v. Pear*, 183 Mass. 242.

**Canceling a Word.** — That the usual way of erasing or canceling a word is by drawing a line through it. *Samberg v. American Express Co.*, 136 Mich. 639.

**Health and Disease.** — That the manufacture of wearing apparel in improperly ventilated, unsanitary, and overcrowded apartments will likely promote the spread of disease. *State v. Hyman*, 98 Md. 596.

That the public health is deeply concerned in the reclamation of swamp and overflowed lands. *Leovy v. U. S.*, 177 U. S. 621.

That swamps are detrimental to public health. *Applegate v. Franklin*, 109 Mo. App. 293.

**That Gas** no longer exists within a certain territory in quantities sufficient for heating purposes for the city of Indianapolis. *State v. Indianapolis Gas Co.*, 163 Ind. 48.

**Investments and Interest.** — That the return on safe investments has been continually diminishing for many years. *Collins v. Wardell*, 63 N. J. Eq. 371.

That in 1895 the current rate of interest on moneyed securities exceeded one and three-fourths per cent. *New Haven Trust Co. v. Doherty*, 74 Conn. 468.

**That a Glass** of whiskey sold for ten cents must contain less than three gallons. *State v. Blands*, 101 Mo. App. 618.

**The Distinction** between a wholesale dealer and a manufacturer. *Kansas City v. Butt*, 88 Mo. App. 237.

**That Municipal Departments** sold bonds at a

premium, and the amount of the premium. *Guckenberger v. Dexter*, 8 Ohio Dec. 530.

**That Lands of a Municipal Corporation** were leased many years ago at much less than their present value. *Ludlow v. Brewster*, 2 Ohio Cir. Dec. 47.

**The Course of Exchange** affecting New York will be judicially noticed by the courts of the state. *Citizens' State Bank v. Cowles*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 571, affirmed 89 N. Y. App. Div. 281.

**The Court** cannot take judicial notice, as being a matter of common knowledge, that the rights of way of railroad companies are fenced as the track is constructed. *Chicago, etc., Electric R. Co. v. Diver*, 213 Ill. 26.

**2. Course of Husbandry.** — *Burwell v. Brodie*, 134 N. Car. 540; *Payne v. McCormick Harvesting Mach. Co.*, 11 Okla. 318; *Barr v. Cardiff*, 32 Tex. Civ. App. 495.

**Products of Soil.** — That certain fruits, trees, and crops are not, in certain latitudes, spontaneous products of the soil, will be judicially noticed. *Meyers v. Menter*, 63 Neb. 427.

**3. Course of Nature.** — *The Mary*, 123 Fed. Rep. 609; *Scott v. Astoria R. Co.*, 43 Oregon 26, 99 Am. St. Rep. 710.

**Period of Gestation.** — *Erickson v. Schmill*, 62 Neb. 368.

But not that the possible period is more than three hundred days. *Erickson v. Schmill*, 62 Neb. 368.

**Effect of Time and Use** on the asphalt on the streets of a city. *Wordin's Appeal*, 71 Conn. 531.

**4. Coincidence of Days of Week with Month.** — *Dorough v. Equitable Mortg. Co.*, 118 Ga. 178; *Ryer v. Prudential Ins. Co.*, 85 N. Y. App. Div. 7; *Warren v. Fountain Square Theater Co.*, 5 Ohio Dec. 559, 7 Ohio N. P. 538.

**904. 2. That Particular Day of Month Was Sunday.** — *Jordan v. Chicago, etc.*, R. Co., 92 Mo. App. 84; *Warren v. Fountain Square Theater Co.*, 5 Ohio Dec. 559, 7 Ohio N. P. 538.

**Legal Holiday — Election Day.** — *Dime Deposit, etc., Bank v. Arnold*, 6 Lack. Leg. N. (Pa.) 210.

**6. Course of Heavenly Bodies.** — *Cincinnati, etc.*, R. Co. v. *Worthington*, 30 Ind. App. 663, 96 Am. St. Rep. 355; *Montenes v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 493; *Lendle v. Robinson*, 53 N. Y. App. Div. 140; *State v. Magers*, 35 Oregon 520.

**7. Geographical Facts.** — *The Mary*, 123 Fed. Rep. 609; *Hall v. Rushing*, 21 Tex. Civ. App. 631.

**Grain Fields.** — It is a proper matter of judicial



**905.** 2. Location, Nature, and Navigability of Waters and Watercourses. — See note 1.

The Navigability of Rivers or Other Bodies of Water. — See note 3.

3. Distances. — See note 4.

**906.** Time Consumed in Travel Between Particular Points. — See note 2.

4. Foreign and Domestic Towns and Cities. — See notes 3, 4, 5.

**907.** IX. HISTORICAL EVENTS — 1. General Rule. — See note 1.

Matters of Private Nature. — See note 2.

2. Facts Relating to Land Titles. — See note 3.

3. War—Existence, History, and Related Transactions. — See notes 4, 5.

**908.** See note 3.

notice that the great grain fields of the country lie west of the Hudson river. *Soper v. Tyler*, 77 Conn. 104.

**Date of Opening** of a new railroad has been judicially noticed as a geographical fact. *Knowlton v. New York, etc., R. Co.*, 72 Conn. 188.

**905.** 1. Location and Character of Rivers. — *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550; *Harvey v. Territory*, 11 Okla. 156.

3. Navigable Waters. — *State v. Jones*, 11 Ohio Cir. Dec. 496; *Lockwood v. Charleston Bridge Co.*, 60 S. Car. 492.

**Also of Extent of Navigability.** — But it was doubted in *U. S. v. Rio Grande Dam, etc., Co.*, 174 U. S. 690, whether the courts could take judicial notice of where the navigability of a river ceased.

4. Distances. — *Williams v. Brown*, 53 N. Y. App. Div. 486.

**Distances Between Places in Same County.** — The Supreme Court of Oklahoma will take judicial notice of the fact that a place eight miles southeast of Lexington in Cleveland county, Okla., is in the said county. *Harvey v. Territory*, 11 Okla. 156.

**906.** 2. Usual Course of the Mails. — The court will judicially notice the usual course of the mails. *Morel v. Stearns*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 486; *National Masonic Acc. Assoc. v. Seed*, 95 Ill. App. 43.

**And in New York** judicial notice has been taken of the relative geographical positions of the borough of Manhattan, New York city, and Perth Amboy, N. J., and the time for railroad travel and for the transmission of mails between these places. *Williams v. Brown*, 53 N. Y. App. Div. 486.

The court will take judicial notice that within a few days an affidavit could be forwarded from New Orleans to New York. *Bouden v. Long Acre Square Bldg. Co.*, 92 N. Y. App. Div. 325.

3. Rule Stated. — *Lyon v. Plankinton Bank*, 15 S. Dak. 400, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906; *Baily v. Birkhofer*, 123 Iowa 59; *Harvey v. Territory*, 11 Okla. 156; *Com. v. McMichael*, 22 Pa. Co. Ct. 182, 8 Pa. Dist. 157.

4. Foreign Cities. — *Lyon v. Plankinton Bank*, 15 S. Dak. 400, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 906; *State v. Buralli*, 27 Nev. 41.

5. Situation of Town in Other State. — *McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533.

**Commercial Centres.** — *Williams v. Brown*, 53 N. Y. App. Div. 486.

**That City Is Out of State.** — The court will judicially notice that Philadelphia, Pa., is out of the state of Ohio. *Thomas v. Forest City Bank*, 4 Ohio Dec. (Reprint) 32, Cleve. L. Rec. 37.

**907.** 1. Historical Events — General Rule. — *The Mary*, 123 Fed. Rep. 609; *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 78 Am. St. Rep. 288; *Hopewell v. State*, 22 Ind. App. 489; *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539; *Blethen v. Bonner*, (Tex. Ct. App. 1899) 52 S. W. Rep. 571; *Hilton v. Roy-lance*, 25 Utah 129, 95 Am. St. Rep. 821.

**History of the State.** — *McCarty v. Johnson*, 20 Tex. Civ. App. 184.

**Political History of the State.** — *Porter v. Flick*, 60 Neb. 773.

**The Legislative History of the State** will be judicially noticed in construing a statute. *Reddell v. Moores*, 63 Neb. 219, 93 Am. St. Rep. 431.

**The Mormon Church Doctrine.** — *Hilton v. Roy-lance*, 25 Utah 129, 95 Am. St. Rep. 821.

**The Historical Development of Savings Banks.** — *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246.

**Mexican Law** — The court will take notice as a matter of history that the civil law is the foundation of Mexican jurisprudence, but it will not take notice of the application of the law to details. *Banco de Sonora v. Bankers' Mut. Casualty Co.*, (Iowa 1903) 95 N. W. Rep. 232.

2. Local Communities. — Judicial notice of the historical events connected with a strike will be presumed to have been taken by the trial court where there is nothing in the record or the decision to show that they were ignored. *Bosworth v. Union R. Co.*, 26 R. I. 309.

3. The Colonial and earlier laws bearing on questions of title. *Townsend v. Brookhaven*, 97 N. Y. App. Div. 316.

**The "Las Vegas Grant."** — *Maese v. Herman*, 183 U. S. 572.

**Title of Government.** — That the United States is the source of title of the lands of Illinois will be judicially noticed. *Chicago, etc., R. Co. v. Keegan*, 185 Ill. 70.

4. Judicial Notice of War. — *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539.

5. Rule Stated. — The course of the insurrection in the Philippine Islands. *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539.

**908.** 3. The Accession of Foreign Territory will be judicially noticed. *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539.

**The Occupation and Control of the Island of**

**909. X. MATTERS OF ART AND SCIENCE** — 1. General Rule. — See notes 1, 2. Illustrations. — See notes 3, 3a.

**911. XII. BOUNDARIES — TERRITORIAL EXTENT — CIVIL AND POLITICAL DIVISIONS** — 1. General Rule. — See note 1.

Precise Boundaries of Local Subdivisions. — See note 2.

2. State Boundaries. — See note 3.

3. Division of States into Counties — a. IN GENERAL. — See note 6.

**912. b. CORPORATE EXISTENCE — NAMES** — The Character of County Organizations. — See note 3.

c. DATE OF ORGANIZATION. — See note 5.

4. County Boundaries — a. IN GENERAL. — See notes 6, 7.

b. PLACES WITHIN COUNTY. — See note 8.

**Cuba.** — Neely v. Henkel, 180 U. S. 109; Neely v. Henkel, 180 U. S. 126.

**909. 1. Matters of Art and Science.** — Lamson Consol. Service Co. v. Siegel-Cooper Co., 106 Fed. Rep. 734; Beck, etc., Lithographing Co. v. Evansville Brewing Co., 25 Ind. App. 662; Poor v. Watson, 92 Mo. App. 89; Viemeister v. White, 179 N. Y. 235.

**Intoxicating Properties of Liquor.** — That whiskey is a spirituous liquor. Hodge v. State, 116 Ga. 852.

That whiskey is an intoxicant. Loveless v. State, (Tex. Crim. 1899) 49 S. W. Rep. 602; Aston v. State, (Tex. Crim. 1899) 49 S. W. Rep. 385; Peterson v. State, 63 Neb. 251.

That beer is an intoxicant. Sothman v. State, 66 Neb. 302; Peterson v. State, 63 Neb. 251.

That gin is an intoxicating liquor. The Kawaiiani, (C. C. A.) 128 Fed. Rep. 879.

That Jamaica ginger is intoxicating. Mitchell v. Com., 106 Ky. 602.

That wine is intoxicating. Caldwell v. State, 43 Fla. 545.

That buck beer or common beer is a malt liquor. Pedigo v. Com., (Ky. 1902) 70 S. W. Rep. 659.

The court cannot judicially know whether all malt liquors are intoxicating. Eaves v. State, 113 Ga. 749.

**Prior Art in Patent Cases.** — Cushman Paper Box Mach. Co. v. Goddard, (C. C. A.) 95 Fed. Rep. 664; Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. Rep. 594, reversed on other grounds (C. C. A.) 127 Fed. Rep. 691.

**Art of Teaching.** — The courts will take judicial notice that the methods of instruction have materially changed in the last quarter of a century, and that those who were competent to teach then would not necessarily be qualified now. People v. Maxwell, 87 N. Y. App. Div. 391.

**2. Must Be of Requisite Notoriety.** — Judicial knowledge of the state of art cannot extend to a single patent, relating to a particular fact in a limited art. Parsons v. Seelye, (C. C. A.) 100 Fed. Rep. 452.

**3. Nature and Power of Explosives Judicially Noticed.** — Fitz Simons, etc., Co. v. Braun, 199 Ill. 390, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909; Chicago v. Murdock, 212 Ill. 9, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

**That Storage of Explosive Fireworks Increases Risk of Fire.** — Betcher v. Capital F. Ins. Co., 78 Minn. 240.

**3a. Generation of Gas in Coal Mines Judicially Noticed.** — Poor v. Watson, 92 Mo. App. 89.

**Plumbing.** — Judicial notice may be taken of what is meant by a "circulation pipe" in plumbing, and that none is ordinarily used in plumbing a house. Jones, etc., Co. v. Davenport, 74 Conn. 418.

**Ascertaining Existence of Natural Gas or Oil.** — Also, that there is no generally acknowledged way of ascertaining whether or not gas or oil exists in paying quantities, other than putting down a well. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320.

**911. 1. Boundaries — Civil and Political Divisions.** — Gunning v. People, 189 Ill. 165, 82 Am. St. Rep. 433; Zimmerman v. Brooks, (Ky. 1904) 80 S. W. Rep. 443.

**2. Precise Boundaries of Local Subdivisions.** — Baker v. State, (Tex. Crim. 1904) 83 S. W. Rep. 1122.

The courts will take judicial notice that the United States government holds certain land for military purposes by private purchase, but not of its extent by metes and bounds. Baker v. State, (Tex. Crim. 1904) 83 S. W. Rep. 1122.

**3. State Boundaries.** — Harvey v. Territory, 11 Okla. 156.

**The Character of a River Forming the Boundary.** — Harvey v. Territory, 11 Okla. 156.

**6. Division of States into Counties.** — Garfield Tp. v. Samuel Dodsworth Book Co., 9 Kan. App. 752; Zimmerman v. Brooks, (Ky. 1904) 80 S. W. Rep. 443; State v. Burali, 27 Nev. 41; Cope v. Braden, 11 Okla. 291; Com. v. McMichael, 22 Pa. Co. Ct. 182, 8 Pa. Dist. 157.

**912. 3. Geographical Position.** — Bowling v. Mobile, etc., R. Co., 128 Ala. 550; Lewis v. Rasp, 14 Okla. 69.

**5. Date of Organization.** — Moseley v. Stucken, 26 Tex. Civ. App. 290.

**6. County Boundaries.** — Parker v. Burton, 172 Mo. 85, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 912; Bowling v. Mobile, etc., R. Co., 128 Ala. 550; Zimmerman v. Brooks, (Ky. 1904) 80 S. W. Rep. 443; Harvey v. Territory, 11 Okla. 156.

**7. Division of Foreign State into Counties.** — Lyon v. Plankinton Bank, 15 S. Dak. 400.

**8. Places Within County.** — St. Louis, etc., R. Co. v. Cady, 67 Ark. 512; Anderson v. Com., 100 Va. 860.

**Exception.** — That a military reservation is within the county may be judicially noticed. State v. Tully, 31 Mont. 365.

- 913.** 5. Division of Counties into Townships or Towns. — See notes 1, 2, 3.  
6. Public Surveys. — See notes 4, 5.
- 914.** See note 1.  
Direction from Principal Meridian. — See note 2.
- XIII. PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT — 1. Generally.** — See notes 4, 7.
- 915.** The Executive — Acts and Proclamations. — See note 1.  
2. Departmental Regulations, Proceedings, Records. — See notes 6, 7, 8.
- 916.** 3. Public Institutions, Commissions, Administrative Boards, etc. — See note 2.  
4. Public Officers — *a.* IN GENERAL. — See note 3.  
*b.* PARTICULAR OFFICERS — (3) *Notaries Public.* — See notes 5, 6.  
Where a Notary Acts in Discharge of His Common-law Functions. — See note 7.
- 918.** *c.* POWERS, DUTIES, AND QUALIFICATIONS. — See note 2.
- 913.** 1. Subdivisions of Counties. — *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433; *Sandy Lake v. Sandy Lake, etc.*, Gas Co., 16 Pa. Super. Ct. 234.  
Incorporation of County into Township. — The court will take judicial notice of the incorporation of a county into a township and its liability for the debts of the county. *Garfield Tp. v. Samuel Dodsworth Book Co.*, 9 Kan. App. 752.  
2. That Certain Township Not in Particular County. — *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123.  
3. Contra in Illinois. — *Phillips v. Scales Mound*, 195 Ill. 353; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433; *Jones v. Lake View*, 151 Ill. 663.  
4. Public Surveys. — *Parker v. Burton*, 172 Mo. 85, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913; *Ledbetter v. Borland*, 128 Ala. 418; *Scheuer v. Kelly*, 121 Ala. 323; *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443; *Albert v. Salem*, 39 Oregon 456; *Hall v. Rushing*, 21 Tex. Civ. App. 631.  
5. County Boundaries — Government Surveys. — *Parker v. Burton*, 172 Mo. 85, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913; *Zimmerman v. Brooks*, (Ky. 1904) 80 S. W. Rep. 443.
- 914.** 1. Rule Stated. — *Parker v. Burton*, 172 Mo. 85, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913; *Scheuer v. Kelly*, 121 Ala. 323; *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458.  
2. *Scheuer v. Kelly*, 121 Ala. 323.  
4. Officers of State. — *New York v. Vanderveer*, 91 N. Y. App. Div. 303, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914.  
7. Notice of State Executive. — *Powers v. Com.*, 110 Ky. 386.
- 915.** 1. Public Acts of the Executive Department. — These include a government survey. *Albert v. Salem*, 39 Oregon 466.  
6. Rules Prescribed by Secretary of Interior. — *U. S. v. Gumm*, 9 N. Mex. 611.  
7. *New York v. Vanderveer*, 91 N. Y. App. Div. 303, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914; *Zevely v. Weinier*, (Indian Ter. 1904) 82 S. W. Rep. 941, following *Caha v. U. S.*, 152 U. S. 221; *Larson v. Pender First Nat. Bank*, 66 Neb. 595; *Whitney v. Spratt*, 25 Wash. 62, 87 Am. St. Rep. 738.  
8. Regulations of Internal Revenue Commis-
- sioner. — *Wilkins v. U. S.*, (C. C. A.) 96 Fed. Rep. 837.  
Regulations of the Post-office Department. — *Grady v. U. S.*, (C. C. A.) 98 Fed. Rep. 238.  
Regulations of Lighthouse Board. — *Smith v. Shakopee*, (C. C. A.) 103 Fed. Rep. 240, overruling (C. C. A.) 97 Fed. Rep. 974.
- 916.** 2. Courts Have Refused to Recognize Judicially the following matter in this connection:  
*Rules and Regulations of Civil Service Commissioners of City of New York.* — *People v. Dalton*, 46 N. Y. App. Div. 264.  
*Health Department.* — *Health Dept. v. City Real Property-Investing Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 18.  
3. General Rule as to Public Officers. — *Abrams v. State*, 121 Ga. 170; *Marsee v. Middlesborough Town Lands Co.*, (Ky. 1901) 65 S. W. Rep. 118; *State v. State Canvassers*, 32 Mont. 13; *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391.  
It has been held that the district court should take official notice that the clerk of the county court of the county in which it is sitting is a public officer of the county. *Goodwin v. Harrison*, 28 Tex. Civ. App. 7.  
Register of Land Office. — *State v. Cooper*, (Tenn. Ch. 1899) 53 S. W. Rep. 391.  
Mayor. — *Bristol v. Fischel*, 81 Mo. App. 367.  
Election Commissioners. — *Louisville v. Park Com'rs*, 112 Ky. 409.  
Taxing Officers. — Courts will take judicial notice that officers exercising the various functions of levying a tax and performing the duties of a taxing officer under the statute are at least *de facto* officers for that purpose. *New York v. Vanderveer*, 91 N. Y. App. Div. 305, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 914 et seq.
- 917.** 5. Notaries Public — General Rule Stated. — *Russell v. Huntsville R., etc., Co.*, 137 Ala. 627; *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32; *Wiley v. Carson*, 15 S. Dak. 298.  
6. Official Term, Signature, Powers. — *Russell v. Huntsville R., etc., Co.*, 137 Ala. 627; *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32.  
7. Performance of Common-law Functions. — *Wiley v. Carson*, 15 S. Dak. 298.
- 918.** 2. *Whaley v. Lawton*, 57 S. Car. 256.  
United States Deputy Consul. — *Barber v. International Co.*, 73 Conn. 587.

**918.** *d.* SIGNATURES, SEALS, ETC. — See note 4.

**919.** *f.* DEPUTY OFFICERS. — See notes 1, 2.

**920.** XIV. COURTS, COURT OFFICERS, SEALS, RECORDS, AND PROCEEDINGS —

1. In General. — See note 2.

2. Federal Courts — State Courts. — See note 5.

3. Courts of Sister States. — See note 6.

**921.** 4. Jurisdiction. — See notes 1, 2.

Jurisdictional Facts. — See note 3.

An Appellate Court Judicially Knows. — See note 4.

5. Terms — Judges — Practice and Procedure. — See note 5.

Appellate Courts Will as a Rule. — See note 8.

**922.** See note 1.

Distinction Between Beginning and Ending of Terms. — See note 3.

Judges of Lower Courts. — See notes 4, 5.

**923.** Rules of Lower Courts — Practice and Procedure. — See note 2.

6. Court Officers — *a.* IN GENERAL. — See note 3.

**924.** Thus an Indictment Signed by a "Special Prosecuting" Attorney. — See note 2.

*c.* OFFICERS OF OTHER COURTS. — See note 7.

**918.** 4. Signatures and Official Seals. — Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32; Marsee *v.* Middlesborough Town Lands Co., (Ky. 1901) 65 S. W. Rep. 118; Powers *v.* Com., 110 Ky. 386; Goodwin *v.* Harrison, 28 Tex. Civ. App. 7.

**919.** 1. Deputy Attorney-General. — Crawford *v.* State, 155 Ind. 694, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919.

2. Deputy District Attorney. — State *v.* Guglielmo, (Oregon 1905) 79 Pac. Rep. 577.

**920.** 2. Existence of Inferior Tribunals. — Natrona County *v.* Shaffner, 10 Wyo. 181.

5. The Federal Courts will not judicially notice the rules of the state courts. Randall *v.* New England Order of Protection, 118 Fed. Rep. 782.

6. Courts of Sister States. — Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132.

**921.** 1. Jurisdiction. — Cook *v.* State, 81 Miss. 146.

2. Circuit Court. — State *v.* Pope, 110 Mo. App. 520.

Of Where the District Court is required to be held. Natrona County *v.* Shaffner, 10 Wyo. 181.

3. Jurisdictional Facts. — The court will take notice that a suspensive appeal was filed too late. Wegmann's Succession, 110 La. 930.

Judicial knowledge of a fact is but a rule of evidence, and cannot affect the question of the jurisdiction of the court attaching upon the filing of the petition. Neville *v.* Kenney, 125 Ala. 149, 82 Am. St. Rep. 230.

4. Jurisdiction of Justices and Inferior Courts. — St. Louis, etc., R. Co. *v.* Magness, 68 Ark. 289; Cook *v.* State, 81 Miss. 146; Barnwell *v.* Marion, 58 S. Car. 459; Texas Land, etc., Co. *v.* Hemphill County, (Tex. Civ. App. 1901) 61 S. W. Rep. 333.

5. Sessions — Beginning — Duration. — Hadley *v.* Bernero, 97 Mo. App. 314.

8. Terms of Inferior Courts. — Ledbetter *v.* U. S., (C. C. A.) 108 Fed. Rep. 52; McCarver *v.* Herzberg, 120 Ala. 523; Moss *v.* Sugar Ridge Tp., 161 Ind. 417; Taylor *v.* Canaday, 155 Ind. 671; Tromble *v.* Hoffman, 130 Mich. 676; Hadley *v.* Bernero, 97 Mo. App. 314; Barnwell *v.* Marion, 58 S. Car. 459; Accousi *v.* G. A.

Stowers Furniture Co., (Tex. Civ. App. 1904) 83 S. W. Rep. 1104; Emery *v.* League, 31 Tex. Civ. App. 474; Natrona County *v.* Shaffner, 10 Wyo. 181.

The Appellate Court of the District of Columbia is bound to notice judicially the terms of the Supreme Court of the District. Lanckton *v.* U. S., 18 App. Cas. (D. C.) 348.

**922.** 1. Beginning, Duration, Ending of Terms. — Moss *v.* Sugar Ridge Tp., 161 Ind. 417; Taylor *v.* Canaday, 155 Ind. 671; Barnwell *v.* Marion, 58 S. Car. 459; Emery *v.* League, 31 Tex. Civ. App. 474.

3. Illustration. — Hadley *v.* Bernero, 97 Mo. App. 314.

4. Judges of Lower Courts. — Ledbetter *v.* U. S., (C. C. A.) 108 Fed. Rep. 52; McCarver *v.* Herzberg, 120 Ala. 523; Means *v.* Stow, 29 Colo. 80; Perry *v.* Bush, (Fla. 1903) 35 So. Rep. 225; Fisher *v.* Chicago, 213 Ill. 268; Indianapolis St. R. Co. *v.* Lawn, 30 Ind. App. 515; Barnwell *v.* Marion, 58 S. Car. 459; Natrona County *v.* Shaffner, 10 Wyo. 181.

Election and Qualification of Judges. — Barnwell *v.* Marion, 58 S. Car. 459.

5. Identity of Name — Individuality — *Contra.* — The court will judicially notice that the person who, as attorney for a party, presents a motion to the court is the presiding judge of a district of the state. Perry *v.* Bush, (Fla. 1903) 35 So. Rep. 225.

**923.** 2. Rules of Lower Court — Practice and Procedure. — The federal courts will not judicially notice the rules of the state courts. Randall *v.* New England Order of Protection, 118 Fed. Rep. 782; Yarnell *v.* Felton, 104 Fed. Rep. 161; State *v.* Arbuno, 105 La. 719; Dunn *v.* Bozarth, 59 Neb. 244.

3. Deputy Attorney-Generals. — In Crawford *v.* State, 155 Ind. 692, it was held that courts would not take judicial notice of the official character of the deputies or assistants of the attorney-general. See also *supra*, this title, **919.** 1. *Public Officers — Deputy Officers.*

**924.** 2. Signatures of Court Officials. — Zug *v.* Forgan, (Neb. 1902) 90 N. W. Rep. 1129.

7. District Court and County Court Clerk. —

- 924.** But an Appellate Court, in Reviewing a Judgment of a Lower Court. — See note 8.  
 7. Court Seals. — See note 9.
- 925.** 8. Records and Proceedings — *a.* IN GENERAL. — See note 2.  
*b.* PROCEEDINGS IN SAME CASE — (1) *In General.* — See note 3.
- 926.** (4) *Rule in Garnishment Cases.* — See note 5.  
*c.* PROCEEDINGS IN OTHER CAUSES. — See note 6.
- 927.** Branches of Same Proceeding. — See note 3.  
 A Few Other Cases. — See note 5.
- 928.** XVI. LAWS AND STATUTES — 1. In General. — See note 4.  
 2. Public Statutes — *a.* IN GENERAL. — See note 5.

It has been held that the district court should judicially notice the clerk of the county court of the county where it is sitting. *Goodwin v. Harrison*, 28 Tex. Civ. App. 7.

**924.** 8. Rule in Review of Judgment of Lower Court. — *Ledbetter v. U. S.*, (C. C. A.) 108 Fed. Rep. 52; *Marsee v. Middlesborough Town Lands Co.*, (Ky. 1901) 65 S. W. Rep. 118; *Natrona County v. Shaffner*, 10 Wyo. 181.

9. Seals of Courts — Rule Stated — *Contra.* — *Winham v. Kline*, 77 Mo. App. 36.

**925.** 2. Court Records — Genuineness and Authenticity. — *McNish v. State*, (Fla. 1904) 36 So. Rep. 176, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925; *In re Osborne*, (C. C. A.) 115 Fed. Rep. 1; *Cushman Paper Box Mach. Co. v. Goddard*, (C. C. A.) 95 Fed. Rep. 664; *Zug v. Forgan*, (Neb. 1902) 90 N. W. Rep. 1129.

3. Records and Proceedings in Same Case — Rule Stated — *United States*. — U. S. v. *Greene*, 113 Fed. Rep. 683.

*California.* — *Gay v. Gay*, 146 Cal. 237.

*Florida.* — *McNish v. State*, (Fla. 1904) 36 So. Rep. 176, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925.

*Illinois.* — *Bailey v. Kerr*, 180 Ill. 412; *Montreal Bank v. Taylor*, 86 Ill. App. 388.

*Minnesota.* — *S. E. Olson Co. v. Brady*, 76 Minn. 8.

*Mississippi.* — *McGuire v. State*, 76 Miss. 504.

*Missouri.* — *Bristol v. Fischel*, 81 Mo. App. 367; *Dinkins v. Crunden Martin Woodenware Co.*, 99 Mo. App. 316.

*Nebraska.* — *Stewart v. Rosengren*, 66 Neb. 445; *George v. State*, 59 Neb. 163.

*Oregon.* — *Mill's Estate*, 40 Oregon 424.

*Texas.* — *Jeffries v. Smith*, 31 Tex. Civ. App. 582; *Crosby v. Bonnowsky*, 29 Tex. Civ. App. 455; *Richardson v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 282.

*Utah.* — *State v. Bates*, 22 Utah 65, 83 Am. St. Rep. 768; *Warren v. Robinson*, 21 Utah 429.

*Washington.* — *Doremus v. Root*, 23 Wash. 710; *State v. Jones*, 20 Wash. 576.

**Former Appeals.** — *World's Columbian Exposition Co. v. Lehigh*, 94 Ill. App. 433, reversed on other grounds 196 Ill. 612; *Wood v. Cahill*, 21 Tex. Civ. App. 38.

**Signature of Party.** — The court will take judicial notice of the signature of a defendant who has appeared in an action to acceptances of service of notices and motions. *Tischner v. Rutledge*, 35 Wash. 285.

**An Appellate Court Will Not** judicially notice mortality tables published by the official reporter of the court in an appendix to the offi-

cial reports. *Western, etc., R. Co. v. Hyer*, 113 Ga. 776, *Simmons, C. J.*, and *Lewis, J.*, dissenting.

**926.** 5. Rule in Garnishment Cases. — *S. E. Olson Co. v. Brady*, 76 Minn. 8.

6. Records and Proceedings in Other Causes. — *Hall v. Cole*, 71 Ark. 601; *McNish v. State*, (Fla. 1904) 36 So. Rep. 176, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925; *Montreal Bank v. Taylor*, 86 Ill. App. 388; *Bennett v. McDonald*, 60 Neb. 47; *Amundson v. Wilson*, 11 N. Dak. 193, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 926.

**An Appellate Court** cannot take judicial notice of the records of the District Court. *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451.

In *Matter of Transfer Penalty Cases*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 579, it was held that the court might take judicial notice of the records in other cases between the same parties.

**927.** 3. Branches of the Same Proceeding. — *Avvocato v. Dell' Arz*, (Tex. Civ. App. 1904) 84 S. W. Rep. 444.

**Other Proceedings** in the same court bearing generally upon the same subject. *Gay v. Gay*, 146 Cal. 237.

A district court may take judicial notice, in an auxiliary proceeding, of the records of the prior proceeding in the case held at another place within the county. *Ferguson v. Wheeler*, 126 Iowa 111.

5. **Citizenship Claim.** — The court will take judicial notice of its own records showing that it has passed adversely on a claim to citizenship on which a party relies for his defense. *Crawford v. Duckworth*, 3 Indian Ter. 10.

**An Appellate Court** will judicially notice the reversal of a case pending its appeal. *Hennessy v. Tacoma Smelting, etc., Co.*, (C. C. A.) 129 Fed. Rep. 40.

**928.** 4. Judicial Notice of Colonial Laws. — The colonial and earlier laws bearing on the title to real property may be judicially noticed in a suit as to the exercise of ownership thereover. *Townsend v. Brookhaven*, 97 N. Y. App. Div. 316.

**Ecclesiastical Laws.** — The recognition by the Civil Code of *Quebec* of certain impediments to marriage does not oblige the courts of the province to take judicial notice of the ecclesiastical laws which establish such impediments, and, therefore, the existence of such laws should be alleged and proved by those who wish to rely upon them. *De Grandmont v. La Société des Artisans, etc.*, 16 Quebec Super. Ct. 532, affirming 15 Quebec Super. Ct. 147.

5. **General Rule as to Public Statutes** — *United States*. — *The Mary*, 123 Fed. Rep. 609; *Ran-*

**929.** See note 1.

**930.** *b.* LEGISLATIVE JOURNALS. — See note 1.

**3. What Are Public Statutes Within Rule of Judicial Notice — a.** IN GENERAL. — See note 3.

*b.* STATUTES DECLARED TO BE PUBLIC. — See note 4.

**931.** *c.* MAY BE LOCAL IN APPLICATION. — See note 1.

**4. Execution of Public Statutes.** — See note 4.

**5. Private Statutes.** — See note 5.

**932.** **6. Constitutional Provisions.** — See note 3.

**7. Common Law.** — See notes 6, 7.

**933.** See note 1.

**8. International Law.** — See note 2.

dall *v.* New England Order of Protection, 118 Fed. Rep. 782; Barry *v.* Snowden, 106 Fed. Rep. 571.

*Alabama.* — Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 928; Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487.

*Arkansas.* — St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295.

*Delaware.* — Downs *v.* Smyrna, 2 Penn. (Del.) 132.

*Idaho.* — Stein *v.* Morrison, 9 Idaho 426.

*Illinois.* — Vance *v.* Rankin, 194 Ill. 625, 88 Am. St. Rep. 173; Pittsburgh, etc., R. Co. *v.* Moore, 110 Ill. App. 304.

*Indiana.* — Moss *v.* Sugar Ridge Tp., 161 Ind. 417.

*Maine.* — State *v.* Webb's River Imp. Co., 97 Me. 559.

*Maryland.* — Chesapeake, etc., Canal Co. *v.* Western Maryland R. Co., 99 Md. 570.

*Missouri.* — Shively *v.* Lankford, 174 Mo. 535; Kirby *v.* Wabash R. Co., 85 Mo. App. 345; Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62.

*Nebraska.* — State *v.* Frank, 61 Neb. 679.

*New York.* — Shaw *v.* New York Cent., etc., R. Co., 85 N. Y. App. Div. 137.

*Oklahoma.* — Lewis *v.* Rasp, 14 Okla. 69; Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353.

*Oregon.* — Portland *v.* Yick, 44 Oregon 439, 102 Am. St. Rep. 633, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 928; State *v.* Banfield, 43 Oregon 287.

*Texas.* — International, etc., R. Co. *v.* Hall, 35 Tex. Civ. App. 545; Overton *v.* McCabe, 35 Tex. Civ. App. 133.

*Vermont.* — Metropolitan Stock Exch. *v.* Lyndonville Nat. Bank, 76 Vt. 303; State *v.* Scampini, 77 Vt. 92.

*Wisconsin.* — Davey *v.* Janesville, 111 Wis. 628.

**929. 1. The Time When a Public Statute Takes Effect.** — Moss *v.* Sugar Ridge Tp., 161 Ind. 417; Portland *v.* Yick, 44 Oregon 439, 102 Am. St. Rep. 633, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929; State *v.* Scampini, 77 Vt. 92.

The court will take notice of a decision of the United States Supreme Court declaring unconstitutional a state law as to a certain class of cases. State *v.* Bates, 22 Utah 65, 83 Am. St. Rep. 768.

**930. 1. Rule as to Legislative Journals.** — State *v.* Mason, 155 Mo. 486; State *v.* Frank, 61 Neb. 679, 60 Neb. 327; Portland *v.* Yick,

44 Oregon 439, 102 Am. St. Rep. 633, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 728, 729; Dane County *v.* Reindahl, 104 Wis. 302.

**3. Public Statutes — Judicial Notice.** — An act authorizing the condemnation of property of a canal company, in which the state is financially interested, and requiring a plat of the railroad for which the property is to be taken to be filed with the secretary of state, is so far a public act that it will be judicially noticed. Chesapeake, etc., Canal Co. *v.* Western Maryland R. Co., 99 Md. 570.

**4. Louisville *v.* Park Com'rs**, 112 Ky. 409.

**Amendments to Public Acts.** — An amendment of the charter of a municipal corporation will be judicially noticed, though made by ordinance. Davey *v.* Janesville, 111 Wis. 628.

**931. 1. Statutes Local in Application.** — Davis *v.* State, 141 Ala. 84; International, etc., R. Co. *v.* Hall, 35 Tex. Civ. App. 545.

**4. Execution of Public Statutes.** — State *v.* Burkett, 83 Miss. 301.

**5. Private Statutes.** — Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132; Kirby *v.* Wabash R. Co., 85 Mo. App. 345; State *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 97; Jersey City *v.* Jersey City, etc., R. Co., 70 N. J. L. 360; Boston *v.* Abraham, 91 N. Y. App. Div. 417.

**Judicial Notice by Statute.** — Woolley *v.* Louisville, 114 Ky. 556.

**932. 3. Judicial Notice of State Constitution.** — Stein *v.* Morrison, 9 Idaho 426.

**6. Common Law in Federal Courts.** — Crandall *v.* Great Northern R. Co., 83 Minn. 190, 85 Am. St. Rep. 458.

**Judicial Notice of Common Law.** — Hilton *v.* Roylance, 25 Utah 129, 95 Am. St. Rep. 821.

**Of What Words Constitute Slander.** — Simpson *v.* Press Pub. Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228.

**7. Rush *v.* Landers**, 107 La. 549; Columbian Bldg., etc., Assoc. *v.* Rice, 68 S. Car. 236.

**933. 1. Common Law of Foreign Country — Contra.** — The courts of Louisiana will judicially notice what the common law of Indiana is. Rush *v.* Landers, 107 La. 549.

The court will take judicial notice that the common law is not, and never was, in force in France. Matter of Hall, 61 N. Y. App. Div. 266.

**General Principles of Equity.** — The courts will judicially notice the general principles of equity, and will look to the decisions of the courts of other states to ascertain the application of them there. Babcock *v.* Marshall, 21 Tex. Civ. App. 145.

**2. International Law.** — The Canadian Act of

**933.** 9. Law Merchant. — See note 3.

**935.** XVII. PRIVATE CORPORATIONS. — See note 1.

General Incorporation Laws. — See note 4.

Foreign Corporations. — See note 6.

**936.** XVIII. MUNICIPAL CORPORATIONS — 1. In General. — See note 1.

**937.** 2. Municipal Powers. — See notes 2, 5.

3. Ordinances. — See note 8.

**938.** See notes 1, 2.

On Appeal from the Decision of a Mayor or a City Court. — See notes 3, 4.

5. Limits and Subdivisions. — See note 7.

1886, regulating navigation, which is in material particulars identical with the Act of Congress of 1885, will be judicially noticed. *The New York*, 175 U. S. 187.

**933.** 3. Law Merchant. — *Edelstein v. Schuler*, (1902) 2 K. B. 144; *Cameron v. Orleans*, etc., R. Co., 108 La. 83.

**935.** 1. State v. Haddonfield, etc., Turnpike Co., 65 N. J. L. 97.

4. By-law of Association. — *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. Car. 195.

6. Foreign Corporations. — In *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, it was held that the court could not take judicial notice that a railroad corporation was chartered in another state and had not been domesticated under the laws of Tennessee.

**936.** 1. Municipal Corporations — *Alabama*. — *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922.

*Delaware*. — *Downs v. Smyrna*, 2 Penn. (Del.) 132.

*Indiana*. — *Evansville v. Frazer*, 24 Ind. App. 628; *Hopewell v. State*, 22 Ind. App. 489.

*Indian Territory*. — *Arnold v. Campbell*, 3 Indian Ter. 550.

*Missouri*. — *State v. Nolle*, 96 Mo. App. 524.

*New York*. — *Union College v. New York*, 65 N. Y. App. Div. 553, affirmed 173 N. Y. 38, 93 Am. St. Rep. 569.

*Oregon*. — *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936.

*Washington*. — *Seattle v. Turner*, 29 Wash. 515; *Green v. Tidball*, 26 Wash. 338.

*Wisconsin*. — *Davey v. Janesville*, 111 Wis. 628.

**937.** 2. Municipal Powers. — *Downs v. Smyrna*, 2 Penn. (Del.) 132; *Hubbel v. Maryville*, 85 Mo. App. 165.

The court will take judicial notice that an electric lighting company could not erect and maintain poles, lights, and wires without authority from the city so to do. *Nelson v. Naragansett Electric Lighting Co.*, 26 R. I. 258, 106 Am. St. Rep. 711.

5. Power to Improve Streets. — The courts will take judicial notice of the statutory duty of a village, under the general statutes providing for the incorporation of villages, to maintain its streets and public grounds in good repair for public use. *Peterson v. Cokato*, 84 Minn. 205.

8. Municipal Ordinances — *Arkansas*. — *Strickland v. Little Rock*, 68 Ark. 483.

*Georgia*. — *Taylor v. Sandersville*, 118 Ga. 63; *Moore v. Jonesboro*, 107 Ga. 704.

*Illinois*. — *Stott v. Chicago*, 205 Ill. 281,

quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937; *Munson v. Fenno*, 87 Ill. App. 655.

*Kentucky*. — *Horne v. Mehler*, (Ky. 1901) 64 S. W. Rep. 918.

*Louisiana*. — *State v. Judge*, 105 La. 758; *State v. Marmouget*, 104 La. 1.

*Massachusetts*. — *East Tennessee Land Co. v. Leeson*, 185 Mass. 4.

*Missouri*. — *Tarkio v. Loyd*, 179 Mo. 600.

*New York*. — *Boston v. Abraham*, 91 N. Y. App. Div. 417; *Barrett v. Smith*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 825.

*Ohio*. — *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937.

*Texas*. — *International, etc., R. Co. v. Hall*, 35 Tex. Civ. App. 545; *Hall v. International, etc., R. Co.*, 98 Tex. 100.

Rule under Statute. — Under section 2775, Kentucky Stat., enacting that the court shall take judicial notice of ordinances of cities, the court will take judicial knowledge of them and of their regularity, although they are not filed. *Woolley v. Louisville*, 114 Ky. 556.

An Amendment of the charter of a municipal corporation will be judicially noticed, though adopted by an ordinance. *Davey v. Janesville*, 111 Wis. 628.

**938.** 1. Judicial Notice by City Court. — *Taylor v. Sandersville*, 118 Ga. 63; *Scranton v. Dannenbaum*, 109 Iowa 95; *State v. Judge*, 105 La. 758; *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938; *Portland v. Yick*, 44 Oregon 439, 102 Am. St. Rep. 633.

2. Judicial Notice of Ordinance by Mayor. — *Taylor v. Sandersville*, 118 Ga. 63; *Akerman v. Lima*, 8 Ohio Dec. 430.

3. Judicial Notice on Appeal from Mayor or City Court. — *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938; *Scranton v. Danenbaum*, 109 Iowa 95; *State v. Judge*, 105 La. 758; *Akerman v. Lima*, 8 Ohio Dec. 430; *Portland v. Yick*, 44 Oregon 439, 102 Am. St. Rep. 633.

But a recorder, on appeal from a city court, is not bound to take judicial notice of an ordinance. *State v. Judge*, 105 La. 758.

4. Where Trial on Appeal De Novo. — *Portland v. Yick*, 41 Oregon 439, 102 Am. St. Rep. 633.

7. Boundaries Established by General Law. — *Gunning v. People*, 86 Ill. App. 676, reversed on other points 189 Ill. 165, 82 Am. St. Rep. 433; *Bang v. McAvoy*, 52 N. Y. App. Div. 501; *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 938.

**939.** See note 1.

6. Streets. — See notes 2, 3.

**940.** See notes 1, 2.

7. Location. — See notes 4, 6.

**941.** See note 1.

8. Organization under General Law. — See notes 4, 5.

9. Cities in Other States. — See note 6.

**942. XIX. RAILROADS — INCORPORATION, CONSTRUCTION, OPERATION, AND RELATED FACTS — 1. In General.** — See note 1.

General Features of Railroad Business — Ordinary Incidents of Travel. — See note 2.

2. Incorporation and Corporate Existence — On the Other Hand, the Doctrine Has Been Declared. — See note 5.

**943. 3. Construction.** — See note 2.

**939. 1. Location of City Lots** cannot be judicially noticed. *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, reversing 86 Ill. App. 676.

**Numbering of Houses, Etc.** — The courts cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certain lots and blocks. *State v. Rogers*, 31 Mont. 1.

**2. Municipal Streets.** — *Stealey v. Kansas City*, 179 Mo. 400.

**In Iowa** the courts do not take judicial notice of the names of streets and public places in towns and cities of the state. *Baily v. Birkhofer*, 123 Iowa 59.

**3. Disputed Boundaries.** — The court will not take judicial notice that the street line and the house line on a street are the same. *New York v. Childs*, (Supm. Ct. App. T.) 84 N. Y. Supp. 164.

**940. 1. Streets Established by Ordinance — Dedication.** — *Coe College v. Cedar Rapids*, 120 Iowa 541, 95 N. W. Rep. 267, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 939.

**2. That City Streets Are Public Highways.** — But not that a public highway outside of the corporate limits is within five miles thereof. *Stealey v. Kansas City*, 179 Mo. 400.

**4. Rule Stated — Location.** — *St. Louis, etc., R. Co. v. Magness*, 68 Ark. 289; *Gunning v. People*, 86 Ill. App. 676, reversed on other grounds 189 Ill. 165, 82 Am. St. Rep. 433; *Quinton v. Hornby*, 8 Kan. App. 856, 56 Pac. Rep. 1127; *Bishop v. Covenant Mut. L. Ins. Co.*, 85 Mo. App. 302; *Green v. Paul*, 60 Neb. 7.

**6. City in Particular County.** — *St. Louis, etc., R. Co. v. Magness*, 68 Ark. 289; *Gunning v. People*, 86 Ill. App. 676, reversed on other grounds 189 Ill. 165, 82 Am. St. Rep. 433; *Quinton v. Hornby*, 8 Kan. App. 856, 56 Pac. Rep. 1127; *Johnson v. Hutchinson*, 81 Mo. App. 299; *Green v. Paul*, 60 Neb. 7.

That a village is within a certain county will be judicially noticed. *Moon v. Missouri Pac. R. Co.*, 83 Mo. App. 458.

**941. 1. Judicial Notice of County Seat.** — *Flynt v. Eagle Pass Coal, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 831; *Hall v. Rushing*, 21 Tex. Civ. App. 631.

The court will judicially notice that the county seats are not always situated in the largest towns and centres of population. *Mari-copa County v. Burnett*, (Ariz. 1903) 71 Pac. Rep. 908.

**Classification of Cities.** — That a city of the state is of the first class will be judicially noticed. *Ft. Scott v. Elliott*, 68 Kan. 805.

Courts will not judicially notice grade or classification of cities. *Akerman v. Lima*, 8 Ohio Dec. 430, 7 Ohio N. P. 92.

**4. Rule Stated.** — *Shively v. Lankford*, 174 Mo. 535; *Contra, Evansville v. Frazer*, 24 Ind. App. 628; *Hopewell v. State*, 22 Ind. App. 489; *Shaw v. New York Cent., etc., R. Co.*, 85 N. Y. App. Div. 137.

**5. Bessette v. People**, 193 Ill. 334; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 650.

**6. Lyon v. Plankinton Bank**, 15 S. Dak. 400, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 941.

**942. 1. Date of Opening of a new railroad.** *Knowlton v. New York, etc., R. Co.*, 72 Conn. 188.

**2. Illustrations.** — Courts will judicially notice the custom of railroad companies to carry, as belonging to commercial travelers, sample trunks belonging to their employers, but they will not notice the conditions under which this is done. *McKibbin v. Great Northern R. Co.*, 78 Minn. 232.

That comparatively few travelers exercise or claim any of those privileges of unlimited railroad tickets which are denied by the limited tickets. *Edson v. Southern Pac. R. Co.*, 144 Cal. 182.

That the live-stock traffic increases yearly. *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576.

The existence of a rule requiring railroad conductors to eject passengers without tickets, who will not or cannot pay fare. *Galveston, etc., R. Co. v. Scott*, 34 Tex. Civ. App. 501.

The court cannot take judicial notice of a railroad company's net earnings. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737.

**5. Railroad Charter Private Act — Not Judicially Noticed.** — *Mobile v. Louisville, etc., R. Co.*, 124 Ala. 132; *Kirby v. Wabash R. Co.*, 85 Mo. App. 345; *Jersey City v. Jersey City, etc., R. Co.*, 70 N. J. L. 360.

Where there is evidence of the incorporation of a railroad company on a certain date, the court will not take judicial notice of its existence or incorporation before that date. *Purdy v. Erie R. Co.*, 162 N. Y. 42.

**943. 2. Crossings.** — Judicial notice will be taken that the maintenance of gates and a flagman at the crossing of railroad and street railway tracks diminishes the danger. *Richmond*



- 944.** 4. Location. — See notes 2, 3.  
 5. Operation — *a.* IN GENERAL. — See note 4.  
**945.** XX. GENERAL AND PARTICULAR CUSTOMS. — See notes 3, 4.  
**946.** XXI. JUDICIAL NOTICE BY STATUTE. — See note 3.  
 XXII. MISCELLANEOUS — 1. Things Judicially Noticed. — See note 9.  
**947.** 2. Things Not Judicially Noticed. — See notes 2, 5.

### JUDICIAL RECORD. — See note 6.

Union Pass. R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670.

**944.** 2. Locality — Where Matter of General Notoriety. — Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302.

Railroad Track Within City Limits. — Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

3. Route Between Designated Points. — The court will judicially notice what railroad company is authorized to make a particular location for a railroad. Hunt *v.* Card, 94 Me. 386.

4. Operation of Railroads — Rule Stated. — McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529.

Operation of Cable Cars. — Pryor *v.* Metropolitan St. R. Co., 85 Mo. App. 367.

Telegraph Lines — Necessity in Operating Railroad. — Youree *v.* Vicksburg, etc., R. Co., 110 La. 791.

Sparks from Engine. — Judicial notice will be taken of the fact that no engine can be so constructed that some sparks will not escape. White *v.* New York Cent., etc., R. Co., 90 N. Y. App. Div. 356, affirmed 181 N. Y. 577.

**945.** 3. General Customs and Usages. — Edelstein *v.* Schuler, (1902) 2 K. B. 144, 71 L. J. K. B. 572; Butler *v.* Good Enough Min. Co., 1 Alaska 246; State *v.* Metcalf, (S. Dak. 1904) 100 N. W. Rep. 923; John O'Brien Lumber Co. *v.* Wilkinson, 123 Wis. 272.

The Custom or Practice of Irrigation. — Crawford Co. *v.* Hathaway, 67 Neb. 325.

4. Particular Customs. — Tranter *v.* Hibbard, 108 Ky. 265; McCorkle *v.* Driskell, (Tenn. Ch. 1900) 60 S. W. Rep. 172.

**946.** 3. Creelman Lumber Co. *v.* Lesh, 73 Ark. 16.

9. Relative Values. — That the relative values of a street railroad in *statu quo* and dismantled are different. Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673.

Choctaw Nation. — That part of the Choctaw Nation is in the Western District. Gardner *v.* U. S., (Indian Ter. 1904) 82 S. W. Rep. 704.

Minister's Social Relation. — Of the relation in which a minister stands to his church and the community so far as personal morality is concerned. Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95.

Bicycles. — The extent to which bicycles are employed as a means of conveyance. Rochester, etc., Turnpike-Road Co. *v.* Joel, 41 N. Y. App. Div. 43.

Nature of a Mercantile Agency. — Ernst *v.* Cohn, (Tenn. Ch. 1900) 62 S. W. Rep. 186.

Human Vision. — That a railroad frog was plainly discernible in time for a decedent to have avoided it. Jones *v.* Flint, etc., R. Co., 127 Mich. 198.

Credit. — Of the ability of a man, whose property the court knows, to raise cash without

embarrassment. Templeton *v.* Templeton, 126 Mich. 44.

A Telegraph Company's Duty to keep its wires out of the way of travelers along public roads. Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217.

Value of Attorney's Fees. — Judges are presumed to know something of the value of attorney's fees and can find such value in the absence of evidence. Pearce *v.* Albright, (N. Mex. 1904) 76 Pac. Rep. 286.

That Ordinary Storm Doors are not dangerous appliances. Dolan *v.* Callender, etc., Co., 26 R. I. 198.

**947.** 2. "Laws of the Catholic Church." — Katzer *v.* Milwaukee, 104 Wis. 16.

The Authority of Vestrymen of a church in their parish. Hill Estate Co. *v.* Whittlesey, 21 Wash. 142.

"Christian Science." — Evans *v.* State, 9 Ohio Dec. 222.

5. Aridity of Land. — The courts will not take judicial notice that a particular piece of land is arid, and must be irrigated to be of use for particular purposes. Slattery *v.* Harley, 58 Neb. 575.

Electric Car — Power to Stop — It is not a matter of common knowledge that an electric car can be stopped within less than one hundred and fifty feet. Kotila *v.* Houghton County St. R. Co., 134 Mich. 314.

Sack Raft. — A court will not judicially notice what a "sack raft" is, it not being defined by statute nor generally known within the state. The Mary, 123 Fed. Rep. 609.

Artificial Legs — Weight. — The court cannot take judicial notice of the weight of artificial legs. Carrow *v.* Barre R. Co., 74 Vt. 176.

Nationality. — That a defendant is a resident of Austria because he affixes to his name a title of nobility. De Tolna *v.* De Tolna, 135 Cal. 575.

That a Disease Is Hereditary. — That the disease of inflamed eyes might be hereditary. Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262.

Effect of Swallowing Coal or Wood. — That coal or wood would not, if taken into the stomach of an animal, tend to produce death. Sprankle *v.* Bart, 25 Ind. App. 681.

Color of Natural Butter. — People *v.* Hillman, 58 N. Y. App. Div. 571.

Natural Appearance of Oleomargarine. — People *v.* Meyer, 44 N. Y. App. Div. 1.

Heat of a City. — McCorkle *v.* Driskell, (Tenn. Ch. 1900) 60 S. W. Rep. 172.

Arrival and Departure of Trains. — Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302.

Space Required for the repair of a railroad telegraph. Youree *v.* Vicksburg, etc., R. Co., 110 La. 791.

6. See Morgan *v.* Betterton, 109 Tenn. 84.

# JUDICIAL SALES.

- By O. D. ESTEE.

- 953.** I. DEFINITION AND NATURE. — See notes 1, 2, 3, 4.  
**954.** What Sales Are Judicial. — See note 8.  
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*g.* PRESUMPTION THAT PROPER NOTICE WAS GIVEN. — See notes 11, 13.  
**971.** *i.* EFFECT OF FAILURE TO GIVE PROPER NOTICE. — See notes 5, 6, 8, 9.

**953.** 1. Definition. — Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. Rep. 391; McAllister *v.* Harman, 101 Va. 17.

2. Sale Becomes Absolute Only upon Confirmation by the Court. — Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. Rep. 391; Klapneck *v.* Keltz, 50 W. Va. 331.

3. A Sale Pendente Lite. — Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. Rep. 391; McAllister *v.* Harman, 101 Va. 17.

4. Court the Real Vendor — Person Appointed to Make Sale a Mere Agent of Court. — Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. Rep. 391.

**954.** 8. Sale by Trustee in Bankruptcy. — *In re Harvey*, 122 Fed. Rep. 745, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954.

**956.** 6. Court Must Have Had Jurisdiction. — Buchanan *v.* Edmisten, (Neb. 1901) 95 N. W. Rep. 620; Albers *v.* Kozeluh, (Neb. 1903) 94 N. W. Rep. 521; Isham *v.* Sienknecht, (Tenn. Ch. 1900) 59 S. W. Rep. 779; Waldron *v.* Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959.

**957.** 1. Sale May Be Ordered When Necessary to Preserve Interest of Parties. — Crawford *v.* Woodward, 1 Tenn. Ch. 274.

**961.** 3. Any Person May Be Appointed to Make Sale. — Goodin *v.* Wilson, 114 Ky. 716.

A Sheriff or His Deputy May Sell Land under a Decree. — Scottish-American Mortg. Co. *v.* Nye, 58 Neb. 661; U. S. National Bank *v.* Hanson, (Neb. 1901) 95 N. W. Rep. 364.

**963.** 1. Parties May Become Purchasers. — Blake *v.* Wolfe, 111 Ky. 840, 98 Am. St. Rep.

434; Campbell *v.* Gawlewicz, (Neb. 1902) 91 N. W. Rep. 569.

**966.** 10. Directions Must Be Followed. — Wilson *v.* Ford, 190 Ill. 614; Quick *v.* Collins, 197 Ill. 391.

**967.** 10. Improper Posting. — Wilson *v.* Ford, 190 Ill. 614; Quick *v.* Collins, 197 Ill. 391.

**968.** 10. Property Should Be Described. — Morrison *v.* Lincoln Sav. Bank, etc., Co., (Neb. 1901) 96 N. W. Rep. 230.

**969.** 4. Amount of Decree. — Dederick *v.* Gillespie, 63 Neb. 422.

6. Thirty Days' Notice Required. — Cuyler *v.* Tate, 67 Neb. 317.

In Louisiana immovable property must be advertised for thirty days, and these thirty days include Sundays and legal holidays. Schenck *v.* Schenck, 52 La. Ann. 2102.

**970.** 2. Publication in Weekly Paper Sufficient. — Cuyler *v.* Tate, 67 Neb. 317.

11. Presumption of Proper Notice. — Wilson *v.* Ford, 190 Ill. 614.

13. Where Report States that Sale Was Advertised as Required by Judgment. — Wigginton *v.* Nehan, (Ky. 1903) 76 S. W. Rep. 196; Laidley *v.* Jasper, 49 W. Va. 526.

**971.** 5. Irregularity in Notice Renders Sale Voidable Merely, Not Void. — Nevada Nickel Syndicate *v.* National Nickel Co., 103 Fed. Rep. 391.

6. Failure to Give Proper Notice a Sufficient Reason for Refusal to Confirm Sale. — Quick *v.* Collins, 107 Ill. 391.

8. Sale Will Not Be Set Aside After Confirma-

- 971.** 2. Time — *a.* HOW DETERMINED. — See note 11.  
**973.** 3. Place — *a.* HOW DETERMINED. — See note 17.  
**975.** 4. Mode of Sale — *b.* PUBLIC OR PRIVATE SALE. — See note 6.  
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Discretion of Court. — See note 4.  
Discretion of Officer Making Sale. — See notes 6, 7.  
**977.** (2) *Order of Selling Different Lots.* — See note 2.  
(3) *When Sale En Masse Is Proper.* — See note 5.  
**978.** 5. Bids — *d.* REJECTION OF BIDS. — See notes 7, 10.  
**979.** 8. Resale upon Failure of Successful Bidder to Comply with Bid. — See note 9.  
**980.** 11. Suppression of Competition or Chilling Bidding. — See note 6.  
**981.** Lawful Combinations to Purchase — See note 2.  
**982.** X. TERMS OF SALE — 3. Requiring Deposit. — See note 4.  
**983.** XI. PURCHASE MONEY — 1. To Whom Payment Should Be Made — *a.* OFFICER MAKING SALE. — See notes 4, 6.  
**984.** *b.* PAYMENT TO PERSON NOT AUTHORIZED TO RECEIVE IT. — See notes 2, 3.

tion Because of Want of Proper Notice. — See Nevada Nickel Syndicate v. National Nickel Co., 103 Fed. Rep. 391.

Sale Will Not Be Set Aside After a Lapse of Two Years. — See Quick v. Collins, 197 Ill. 391.

**971.** 9. Sale Confirmed Though Notice Irregular. — Polhemus v. Priscilla, (N. J. 1903) 54 Atl. Rep. 141.

11. Immediate Sale. — In Cochran v. Fidelity Trust, etc., Co., (Ky. 1901) 62 S. W. Rep. 1038, it was held that the court did not abuse its discretion in ordering an immediate sale of the property.

**973.** 17. Place for Holding Judicial Sales Prescribed by Statute. — Godchaux v. Morris, (C. C. A.) 121 Fed. Rep. 482.

**975.** 6. Power of Court to Direct Either Public or Private Sale. — Klapneck v. Keltz, 50 W. Va. 331, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 975.

**976.** 1. Presumption that Best Price Will Be Obtained by Sale in Parcels. — Palmour v. Roper, 119 Ga. 10, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976.

2. Sale Should Be in Parcels When Practicable. — Palmour v. Roper, 119 Ga. 10, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976.

3. Statutory Requirement of Sale in Parcels. — See Mays v. Carman, (Ky. 1902) 66 S. W. Rep. 1019.

4. Discretion of Court. — Palmour v. Roper, 119 Ga. 10, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976.

Order of Court Must Be Followed. — Smith v. Sparks, 162 Ind. 270.

6. Discretion of Officer — Palmour v. Roper, 119 Ga. 10, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976.

7. Officer Must Sell in Manner Calculated to Produce Best Price. — Palmour v. Roper, 119 Ga. 10, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 976.

**977.** 2. Discretion of Officer. — *Ex p.* Cooley, 69 S. Car. 143.

5. Sale May Be Made En Masse Where Value Would Be Impaired by Division. — Booher v. Louisville, (Ky. 1903) 76 S. W. Rep. 18.

Where property is accurately described in the pleadings, the court may use its discretion in deciding whether the value of the property would be impaired by selling it in parcels. Wigginton v. Nehan, (Ky. 1903) 76 S. W. Rep. 196.

Illustrative Cases in Which Sales En Masse Have Been Held Proper. — O'Kane v. Vinnedge, 108 Ky. 34.

**978.** 7. All Bids Should Be Accepted. — Carter v. Carter, (Ky. 1902) 66 S. W. Rep. 624.

In Ohio the court may reject a bid of less than two-thirds the appraised value of the property, however small the deficiency may be. Thus, a deficiency of one-third of a cent has been held sufficient to justify rejecting the bid. *In re Specker*, 5 Ohio Dec. 586.

10. Officer May Demand Immediate Compliance with Terms of Sale, and in Default Thereof Resell Property at Once. — Carter v. Carter, (Ky. 1902) 66 S. W. Rep. 624.

**979.** 9. Resale on Failure of Successful Bidder to Comply with Bid. — Duchesne v. Collins, 16 Quebec Super. Ct. 277.

**980.** 6. Sale May Be Set Aside. — See Ryan v. Wilson, (N. J. 1902) 52 Atl. Rep. 993.

**981.** 4. Lawful Combination. — Jolly v. Mutual L. Ins. Co., (Ky. 1901) 65 S. W. Rep. 440.

All parties interested may unite to chill the bidding for the reason that there is no person left to be defrauded. *Fairy v. Kennedy*, 68 S. Car. 250.

**982.** 4. Deposit by Purchaser. — Green v. Diezel, (Neb. 1902) 92 N. W. Rep. 1004.

**983.** 4. Authority of Officer to Collect Purchase Money. — Pulliam v. Tompkins, 99 Va. 602.

6. In Nebraska the sheriff who conducts a judicial sale is required by statute to be the custodian of the purchase price until the confirmation of the sale. *Craw v. Abrams*, (Neb. 1903) 94 N. W. Rep. 639.

**984.** 2. Purchaser Not Relieved from Liability by Payment to Unauthorized Person. — *Craw v. Abrams*, (Neb. 1903) 94 N. W. Rep. 639.

3. Payment to Commissioner or Receiver Who

**985. 2. Method of Payment** — *a. IN GENERAL* — But the Court May Allow a Bid to Be Discharged in This Manner. — See note 5.

**3. Bond or Security for Purchase Money** — *a. IN GENERAL*. — See note 9.

**986.** See note 1.

**988. 8. Purchaser Acquires No Title or Right to Deed until Compliance with Terms of Sale.** — See note 3.

**989. 9. Abatement of Price** — *b. FOR OUTSTANDING TAXES OR OTHER LIENS*. — See note 6.

**XII. CONFIRMATION** — 1. Necessity For. — See note 8.

**990.** Cases Holding Confirmation Not Necessary. — See note 2.

**991. 2. Who May Proceed for Confirmation.** — See notes 2, 3.

**4. Time for Confirmation.** — See note 9.

**992. 6. Discretion of Court.** — See notes 2, 3, 4.

**993. 9. Effect of Confirmation** — *a. COMPLETING SALE*. — See note 4.

*b. RETROACTION*. — See note 7.

*c. CURING OF IRREGULARITIES*. — See note 8.

**994. XIII. OBJECTIONS AND SETTING ASIDE** — 1. Policy of Upholding Judicial Sales. — See note 3.

**996. 2. Who May Object** — *b. EFFECT OF FAILURE TO OBJECT TO CONFIRMATION*. — See notes 2, 3.

*c. EFFECT OF CLAIMING PROCEEDS OF SALE*. — See note 4.

**4. Grounds of Objection** — *b. FRAUD*. — See note 10.

**Has Not Given Required Bond.** — *Tompkins v. Deyerle*, 102 Va. 219.

**985. 5. When Bid May Be Satisfied by Discharging Liens.** — *Campbell v. Gawlewicz*, (Neb. 1902) 91 N. W. Rep. 569.

**9. Purchaser May Be Required to Give Bond.** — *Carter v. Carter*, (Ky. 1902) 66 S. W. Rep. 624.

**986. 1. Judgment Creditors.** — A judicial sale will not be set aside because a judgment creditor who purchased the property failed to furnish a bond for a sum not exceeding the amount of his judgment debt. *Davidson v. Dishman*, (Ky. 1900) 59 S. W. Rep. 326.

**988. 3. Purchaser Acquires No Title or Rights to Deed until Terms of Sale Are Complied With.** — *Lamaire v. Filiatrault*, 16 Quebec Super. Ct. 334.

**989. 6. Tennessee Rule.** — In *Brown v. Timmons*, 110 Tenn. 148, it was held that the taxes due on land sold at a judicial sale should be paid out of the purchase price, and that such payment might be made either before or after the confirmation of the sale.

**8. Necessity for Confirmation.** — *Goodin v. Wilson*, 114 Ky. 716.

**990. 2. When Confirmation Not Necessary.** — See *Crawford v. Woodward*, 1 Tenn. Ch. 274.

**991. 2. Parties May Proceed for Confirmation.** — See *Coltrane v. Baltimore Bldg., etc., Assoc.*, 126 Fed. Rep. 839.

**3. Successful Bidder May Proceed for Confirmation.** — *Coltrane v. Baltimore Bldg., etc., Assoc.*, 126 Fed. Rep. 839; *Hazlewood v. Chrisman*, (Tenn. Ch. 1901) 62 S. W. Rep. 39.

A purchaser at a judicial sale may appeal from an order confirming or refusing to confirm the sale. *Turnbull v. Mann*, 99 Va. 41.

**9. An Order of Confirmation May Be Made at an Adjourned Term.** — Mere delay in having a sale confirmed will not affect the power of the court to confirm it, where the rights of third parties are not involved. *Hazlewood v. Chrisman*, (Tenn. Ch. 1901) 62 S. W. Rep. 39.

**992. 2. Discretion of Court.** — *Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. Rep. 391; *Wilson v. Ford*, 190 Ill. 614; *Townsend v. Johnson*, 10 Kan. App. 547.

**3. Court Must Exercise Not an Arbitrary but a Sound Legal Discretion.** — *Wilson v. Ford*, 190 Ill. 614; *Townsend v. Johnson*, 10 Kan. App. 547.

**4. Discretion Governed by Established Rules of Practice and Principles of Law.** — *Wilson v. Ford*, 190 Ill. 614.

**993. 4. Confirmation Completes Sale.** — *Cobe v. Ricketts*, 111 Mo. App. 105.

**7. Retroactive Effect of Confirmation.** — *Tennessee Coal, etc., R. Co. v. Gardner*, 131 Ala. 599; *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

**8. Confirmation Cures Irregularities.** — *Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. Rep. 391; *Klapneck v. Keltz*, 50 W. Va. 331.

**994. 3. Public Policy Requires Stability in Judicial Sales.** — *Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. Rep. 391; *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993.

**996. 2. Effect of Failure to Object to Confirmation.** — *Wigginton v. Nehan*, (Ky. 1903) 76 S. W. Rep. 196; *Snyder v. McLanahan*, 203 Pa. St. 55; *Klapneck v. Keltz*, 50 W. Va. 331; *Radke v. M. Winter Lumber Co.*, 114 Wis. 444.

**3. Where Purchaser Was Prevented from Objecting in Due Time by Fraud, Etc.** — *Potvin v. Denny Hotel Co.*, 26 Wash. 309, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; *Klapneck v. Keltz*, 50 W. Va. 331.

**4. Effect of Claiming Proceeds of Sale.** — *Potvin v. Denny Hotel Co.*, 26 Wash. 309, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996.

**10. Fraud in Appraisal of Property.** — A judicial sale will not be set aside because the property was appraised below its real value unless the difference between the real value and

- 997.** See note 1.  
**998.** *c. SURPRISE, ACCIDENT, OR MISTAKE.* — See notes 1, 2, 3.  
**999.** See note 1.  
*d. IRREGULARITIES.* — See note 3.  
*e. MISCONDUCT OF OFFICER.* — See note 6.  
**1000.** *f. DEFECT OF TITLE.* — See note 2.  
*g. INCUMBRANCES.* — See note 4.  
**1001.** *j. INADEQUACY OF PRICE* — (1) *General Rule.* — See note 1.  
**1002.** (2) *Gross Inadequacy.* — See notes 1, 2.  
**1003.** (3) *Inadequacy of Price in Connection with Other Circumstances.*  
 — See note 2.

the appraised value of the property was so great as to raise the presumption of fraud. *Green v. Paul*, 60 Neb. 7.

**997. 1. Sale May Be Set Aside for Fraud** — *United States.* — *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133.

*Alabama.* — *Helena Coal Co. v. Sibley*, 132 Ala. 651, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997.

*Illinois.* — *Wilson v. Ford*, 190 Ill. 614.

*Nebraska.* — *Kampman v. Nicewaner*, 60 Neb. 208.

*New Jersey.* — *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993.

*West Virginia.* — *Springston v. Morris*, 47 W. Va. 50.

**998. 1. Surprise.** — *Helena Coal Co. v. Sibley*, 132 Ala. 651, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *Wilson v. Ford*, 190 Ill. 614; *Springston v. Morris*, 47 W. Va. 50.

**2. Accident.** — *Helena Coal Co. v. Sibley*, 132 Ala. 651, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133; *Kampman v. Nicewaner*, 60 Neb. 208.

**3. Mistake.** — *Helena Coal Co. v. Sibley*, 132 Ala. 651, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133; *Wilson v. Ford*, 190 Ill. 614; *Kampman v. Nicewaner*, 60 Neb. 208; *Ex p. Cooley*, 69 S. Car. 143.

**999. 1. No Relief from Consequences of Inexcusable Neglect.** — *Helena Coal Co. v. Sibley*, 132 Ala. 651, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999.

**3. Confirmation May Be Refused on Ground of Irregularities.** — *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993.

**6. Sale May Be Set Aside for Misconduct of Officer.** — *Smith v. Sparks*, 162 Ind. 270, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999; *Wilson v. Ford*, 190 Ill. 614.

In *Lee v. Texas*, etc., R. Co., 22 Tex. Civ. App. 501, the sheriff who conducted the sale was closely connected in his official capacity with the purchaser. The sheriff held the sale thirty minutes before the customary time, thus preventing the agent for the creditor from bidding on the property. The property sold for an inadequate price, and it was held that the sale should be set aside.

**1000. 2. Sale Will Not Be Set Aside After Confirmation.** — *Fox v. McGoodwin*, (Ky. 1900) 56 S. W. Rep. 515.

**4. Sale Not Set Aside in Absence of False Representations as to Title or Other Fraud or Imposition.**

— *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222.

**1001. 1. Sale Will Not Be Set Aside on Account of Mere Inadequacy of Price** — *United States.* — *Blanks v. Farmers' L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 849, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001; *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133.

*Alabama.* — *Helena Coal Co. v. Sibley*, 132 Ala. 651.

*Georgia.* — *Palmour v. Roper*, 119 Ga. 10.

*Illinois.* — *Wilson v. Ford*, 190 Ill. 614; *Quick v. Collins*, 197 Ill. 391.

*Kansas.* — *Cowles v. Phoenix Mut. L. Ins. Co.*, 63 Kan. 883, 65 Pac. Rep. 217.

*Kentucky.* — *Carter v. Carter*, (Ky. 1902) 66 S. W. Rep. 624; *Jolly v. Mutual L. Ins. Co.*, (Ky. 1901) 65 S. W. Rep. 440; *Booher v. Louisville*, (Ky. 1903) 76 S. W. Rep. 18.

*New Jersey.* — *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993; *Porch v. Agnew Co.*, 66 N. J. Eq. 232.

*South Carolina.* — *Ex p. Cooley*, 69 S. Car. 143, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1001.

*West Virginia.* — *Schmertz v. Hammond*, 51 W. Va. 408.

**1002. 1. Sale May Be Set Aside Where Inadequacy So Gross as to Shock Conscience.** — *Blanks v. Farmers' L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 849, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002; *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133; *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993; *Porch v. Agnew Co.*, 66 N. J. Eq. 232; *Schmertz v. Hammond*, 51 W. Va. 408.

**2. Sale May Be Set Aside Where Inadequacy So Gross as to Raise Presumption of Fraud, Etc.** — *Georgia.* — *Palmour v. Roper*, 119 Ga. 10.

*Illinois.* — *Quick v. Collins*, 197 Ill. 391; *Wilson v. Ford*, 190 Ill. 614.

*New Jersey.* — *Ryan v. Wilson*, (N. J. 1902) 52 Atl. Rep. 993.

*West Virginia.* — *Schmertz v. Hammond*, 51 W. Va. 408.

**1003. 2. Inadequacy of Price, in Connection with Other Circumstances, May Cause Setting Aside of Sale** — *United States.* — *Blanks v. Farmers' L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 849.

*Illinois.* — *Wilson v. Ford*, 190 Ill. 614.

*Kansas.* — *Cowles v. Phoenix Mut. L. Ins. Co.*, 63 Kan. 883, 65 Pac. Rep. 217.

*Kentucky.* — *Rosenham v. Pottinger*, (Ky. 1901) 60 S. W. Rep. 370; *Shuck v. Price*, (Ky. 1901) 60 S. W. Rep. 487; *B'Hymer v. Lund*, (Ky. 1902) 69 S. W. Rep. 1079.

**1005.** *m.* OBJECTIONS TO JUDGMENT OR PROCEEDINGS LEADING UP TO ORDER OF SALE. — See notes 4, 5.

5. Time for Objecting. — See note 6.

**1006.** 6. Whether Offer of Advance Price Is Necessary. — See note 3.

**1008.** 8. Offer of Advance Price as a Ground for Opening Biddings — *b.* IN THE UNITED STATES — (3) *What Advance Will Cause Biddings to Be Opened.* See note 1.

**1010.** XIV. RIGHTS AND LIABILITIES OF PURCHASERS — 1. Title Acquired — *a.* AS AGAINST PARTIES. — See note 5.

*b.* AS AGAINST THIRD PERSONS. — See note 6.

**1011.** 2. Caveat Emptor. — See notes 1, 4.

**1012.** 3. Rules Concerning Liens and Incumbrances. — See note 5.

**1016.** 8. Liability on Bid. — See note 2.

9. Protection Afforded by Judgment or Decree of Sale — *a.* GENERAL RULE. — See notes 3, 4.

**1017.** See note 2.

**1018.** *b.* WHEN THE RULE DOES NOT APPLY — (1) *Defect of Parties.* — See note 3.

**1020.** 10. Appreciation or Depreciation in Value of Property Between Time of Sale and Confirmation. — See notes 1, 2.

11. As to Application of Proceeds of Sale. — See note 4.

*South Carolina.* — *Ex p. Cooley*, 69 S. Car. 143, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1003.

*Texas.* — *Lee v. Texas*, etc., R. Co., 22 Tex. Civ. App. 501.

**1005.** 4. Sale Cannot Be Set Aside Because Judgment or Order Erroneous. — *Barnhart v. Edwards*, 128 Cal. 572.

In *West Virginia* it is provided by statute that "if a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchasers at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled." *Frederick v. Cox*, 47 W. Va. 14.

5. Objections Tending to Impeach Validity of Judgment or Decree or Regularity of Proceedings Leading Up to Order of Sale Not Admissible. — *May v. Ball*, (Ky. 1901) 60 S. W. Rep. 722.

6. Objections Must Be Made Promptly. — *Rothchild v. Memphis*, etc., R. Co., (C. C. A.) 113 Fed. Rep. 476. See also *Henderson v. Kibbie*, 211 Ill. 556.

**1006.** 3. When Advance Price Should Be Offered or Guaranty Against Loss or Resale Given. — *Wilson v. Ford*, 190 Ill. 614; *Porch v. Agnew Co.*, 66 N. J. Eq. 232; *Schmertz v. Hammond*, 51 W. Va. 408, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1006.

**1008.** 1. Whether Biddings Shall Be Opened Is Within Discretion of Court to Which Advance Offer Is Made. — *Auerbach v. Wolf*, 22 App. Cas. (D. C.) 538.

**1010.** 5. All the Title of Parties Passes. — *Leet v. Armbruster*, 143 Cal. 663; *Goodin v. Wilson*, 114 Ky. 716.

6. The Purchaser Is Conclusively Held to Have Notice. — But one who buys land at a judicial sale is protected by the recording act against a deed of whose existence he had neither actual nor constructive notice. *Koch v. West*, 118

Iowa 468, 96 Am. St. Rep. 394; *Ousley v. Bailey*, 111 Ga. 783.

**1011.** 1. No Warranty in Judicial Sales. — *Calvert v. Ash*, 47 W. Va. 480.

4. Rule of Caveat Emptor Applies to Judicial Sales. — *Buchanan v. Edmisten*, (Neb. 1901) 95 N. W. Rep. 620; *Flanary v. Kane*, 102 Va. 547.

**1012.** 5. Purchaser of Land Sold Subject to Certain Liens at a Judicial Sale Is Estopped to Deny Validity of Those Liens. — *Cottle v. Erie County*, 57 N. Y. App. Div. 443, affirmed 173 N. Y. 591.

**1016.** 2. Liability on Bid. — *Files v. Brown*, (C. C. A.) 124 Fed. Rep. 133; *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511; *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222.

3. Purchaser Chargeable with Notice Whether Court Had Jurisdiction. — *Buchanan v. Edmisten*, (Neb. 1901) 95 N. W. Rep. 620.

4. Purchaser Protected by Judgment or Decree. — *Godchaux v. Morris*, (C. C. A.) 121 Fed. Rep. 482; *Haaf's Interdiction*, 52 La. Ann. 249; *Wilson v. Hoffman*, (N. J. 1901) 50 Atl. Rep. 592.

**1017.** 2. Reversal or Vacation of Judgment Does Not Invalidate Sale nor Divest Title of Purchaser. — *Blake v. Wolfe*, 111 Ky. 840, 98 Am. St. Rep. 434; *Talbott v. Campbell*, (Ky. 1902) 67 S. W. Rep. 53; *Klapneck v. Keltz*, 50 W. Va. 331; *Frederick v. Cox*, 47 W. Va. 14.

**1018.** 3. Rule Does Not Apply Where There Has Been a Defect of Parties. — *Havens v. Pope*, 10 Kan. App. 299; *Thornton v. Thornton*, (Ky. 1901) 64 S. W. Rep. 524.

**1020.** 1. Purchaser Entitled to Benefit of Appreciation in Value. — *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

2. Purchaser Must Bear Loss in Case of Depreciation. — *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

4. Purchaser Not Bound to See to Proper Disposition of Proceeds. — *Turnbull v. Mann*, 99 Va. 41.

**1021.** 12. Circumstances Entitling Purchaser to Be Relieved from Purchase — *f.* DEFICIENCY IN QUANTITY OF LAND SOLD. — See note 5.

**1022.** *g.* DEFECT IN TITLE OR INCUMBRANCES — (2) *In the United States.* — See notes 4, 5.

**1023.** *i.* IRREGULARITIES. — See note 9.

**1024.** 13. Rights upon Setting Aside of Sale — *a.* REIMBURSEMENT. — See notes 2, 3, 5.

*b.* COMPENSATION FOR IMPROVEMENTS. — See note 7.

**1025.** 14. Liabilities upon Setting Aside of Sale. — See note 1.

**1026.** XV. ENFORCEMENT OF BID — 2. Resale at Bidder's Risk — *a.* IN GENERAL. — See note 2.

**1028.** 3. Attachment for Contempt. — See note 9.

**1029.** 4. Independent Action to Recover Amount of Bid. — See notes 1, 3.

XVI. THE DEED — 1. Necessity For. — See notes 5, 7.

**1031.** 4. Time for Making Deed. — See notes 5, 6.

**1033.** XVII. COLLATERAL IMPEACHMENT — General Rule. — See notes 6, 7.

**1021.** 5. Deficiency in Quantity of Land. — *Fox v. McGoodwin*, (Ky. 1900) 56 S. W. Rep. 515.

**1022.** 4. Purchaser May Be Relieved from Compliance with Bid on Account of Defect in Title or Incumbrances — *District of Columbia.* — *McCaffrey v. Little*, 20 App. Cas. (D. C.) 116. *Louisiana.* — *Getman v. Harrison*, 112 La. 435.

*New York.* — *New York Security, etc., Co. v. Schoenberg*, 87 N. Y. App. Div. 262, *affirmed* 177 N. Y. 556; *Stephens v. Flammer*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 278.

Objection to Title Must Be Substantial. — *McCaffrey v. Little*, 20 App. Cas. (D. C.) 116; *Woolverton v. Stevenson*, 52 La. Ann. 1147; *Lenahan v. St. Francis Xavier College*, 51 N. Y. App. Div. 535.

In Kentucky the rule of caveat emptor applies to judicial sales of real property. *Fox v. McGoodwin*, (Ky. 1900) 56 S. W. Rep. 515.

5. No Relief if Purchaser Knew or Was Chargeable with Notice of True State of Title. — *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222.

**1023.** 9. Irregularities Not Entitling to Relief. — *Sproule v. Davies*, 171 N. Y. 277.

**1024.** 2. Right of Purchaser to Return of Purchase Money. — *Hall v. Dineen*, (Ky. 1904) 83 S. W. Rep. 120; *Isham v. Sienknecht*, (Tenn. Ch. 1900) 59 S. W. Rep. 779. See also *Calvert v. Ash*, 47 W. Va. 480.

When Owner Cannot Be Required to Refund Purchase Money to Purchaser. — *Buchanan v. Edmisten*, (Neb. 1901) 95 N. W. Rep. 620.

8. Interest on Purchase Money. — *Hall v. Dineen*, (Ky. 1904) 83 S. W. Rep. 120.

5. Purchaser Is Entitled to Be Reimbursed What He Has Paid for Taxes. — *Hall v. Dineen*, (Ky. 1904) 83 S. W. Rep. 120.

7. Right to Compensation for Improvements. — *Hall v. Dineen*, (Ky. 1904) 83 S. W. Rep. 120.

**1025.** 1. Purchaser Liable for Rents and Profits. — *Hall v. Dineen*, (Ky. 1904) 83 S. W. Rep. 120.

**1026.** 2. Resale at Bidder's Risk. — *Shirley v. Shewmaker*, (Ky. 1901) 63 S. W. Rep. 11; *Rowley v. Feldman*, 84 N. Y. App. Div. 400; *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

In *Oakley v. Howison*, 131 Ala. 505, it was

held that if the highest bidder at a judicial sale entirely defaulted with his bid, the court might order a resale of the property without giving him notice and he would still be liable for any loss, but that if he attempted to comply with his bid by furnishing sureties who subsequently proved worthless, he was entitled to notice of the proceedings in order to fasten liability upon him.

**1028.** 9. Attachment for Contempt. — *Rowley v. Feldman*, 84 N. Y. App. Div. 400; *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

**1029.** 1. Independent Action. — *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511.

3. Action for Damages. — *Murphy v. Hardee*, 12 Ohio Cir. Dec. 837, 22 Ohio Cir. Ct. 511; *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222.

5. *Goodin v. Wilson*, 114 Ky. 716, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029.

7. Only Equitable Title Prior to Execution of Deed. — *Goodin v. Wilson*, 114 Ky. 716, *quoting* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029; *International Wood Co. v. National Assur. Co.*, 99 Me. 415, 105 Am. St. Rep. 288.

In *Cobe v. Ricketts*, 111 Mo. App. 185, it was held that a conveyance after the confirmation of a judicial sale was necessary to pass the legal title to real estate, but that the title to personal property might pass by delivery after the confirmation of the sale.

**1031.** 5. Deed Made After Sale Reported and Confirmed. — The sheriff cannot compel a purchaser at a judicial sale to accept a deed until the sale is confirmed. *Polhemus v. Priscilla*, (N. J. 1903) 54 Atl. Rep. 141.

6. Executed Only After Purchase Money Paid. — *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222.

**1033.** 6. Collateral Attack Permissible Where Jurisdiction Lacking. — *Albers v. Kozeluh*, (Neb. 1903) 94 N. W. Rep. 521; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.

7. Rule Against Collateral Impeachment. — *Fisher v. Lefferts*, 105 Fed. Rep. 711; *Cobe v. Ricketts*, 111 Mo. App. 105; *Dryden v. Parrotte*, 61 Neb. 339; *Killough v. Warren*, (Tenn. Ch. 1899) 58 S. W. Rep. 898; *Johnson v. Evans*, 1 Tenn. Ch. App. 603.

**1034. XVIII. REDEMPTION — 1. Right of Redemption Based on Statute. —**

See note 2.

**1035. 4. Who May Redeem — Classes upon Whom the Right Is Conferred. —** See note 8.**1036. 7. Effect of Redemption. —** See note 5.**JUNCTION. —** See note 11.**1037. JUNIOR. —** See note 1.**1038. [JUNK — JUNK DEALER. —** See note *a*.]**JUNK SHOP. —** See note 1.**1034. 2. Law in Force at Time of Sale Governs. —** *Leet v. Armbruster*, 143 Cal. 663, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1034.**1035. 8. To Whom Right of Redemption Extends. —** *Smith v. Sparks*, 162 Ind. 270.**1036. 5. Effect of Redemption. —** *Leet v. Armbruster*, 143 Cal. 663.**11. The Junction of Two Streets** was held to include in a general sense the open space made where these highways met as it would appear to one on the ground there, and not to mean a fixed mathematical point. *Wood v. Stafford Springs*, 74 Conn. 437.**1037. 1. No Part of Name. —** *Dauids v. People*, 192 Ill. 176; *Bonardo v. People*, 182 Ill.411; *State v. Dankwardt*, 107 Iowa 704; *Hunt v. Searcy*, 167 Mo. 158; *Windom v. State*, 44 Tex. Crim. 514; *Wesley v. State*, 45 Tex. Crim. 64.**Indictment. —** *Wesley v. State*, 45 Tex. Crim. 64.**1038. a. Junk — Second-hand Bottles Not Junk under Tariff Act. —** *Carberry v. U. S.*, 116 Fed. Rep. 773.**A Junk Dealer** is one who deals in old metals, ropes, rags, etc., but one who buys to sell again from carriage manufacturers odds and ends of new iron left over is not a *junk dealer*. *Com. v. Ringold*, 182 Mass. 308.**1. License. —** *Com. v. Ringold*, 182 Mass. 308, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1038.

## JURISDICTION.

BY E. C. ELLSBREE.

**1041. I. DEFINITION. —** See note 2.**1042. III. EFFECT OF POSSESSION AND WANT OF JURISDICTION —****1. General Rules — Effect of Possession of Jurisdiction. —** See note 6.**1041. 2. Approved Definition. —** *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109; *Spencer v. Spencer*, 31 Ind. App. 321, 99 Am. St. Rep. 260; *Myers v. Pedigo*, (Ky. 1903) 72 S. W. Rep. 734.**Complete Jurisdiction** includes not only the power to hear and determine, but the power to enforce the determination. *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309.**1042. 6. When There Is Jurisdiction Judgments May Not Be Collaterally Attacked. —** *United States. —* *Haug v. Great Northern R. Co.*, (C. C. A.) 102 Fed. Rep. 74; *Phelps v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 112 Fed. Rep. 453, affirmed 190 U. S. 147; *Hatcher v. Hendrie, etc., Mfg., etc., Co.*, (C. C. A.) 133 Fed. Rep. 267; *Groton Bridge, etc., Co. v. Clark Pressed Brick Co.*, (C. C. A.) 136 Fed. Rep. 27. *Alabama. —* *Logan v. Central Iron, etc., Co.*, 139 Ala. 548.*Arkansas. —* *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.*California. —* *People v. Perris Irrigation Dist.*, 132 Cal. 289; *Crane v. Cummings*, 137 Cal. 201; *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125; *Howe v. Southrey*, 144 Cal. 767; *Koehler v. Holt Mfg. Co.*, 146 Cal. 335.*Colorado. —* *Venner v. Denver Union Water Co.*, 15 Colo. App. 495; *Harter v. Shull*, 17 Colo. App. 162; *People v. McKelvey*, 19 Colo. App. 131; *Powell v. National Bank of Commerce*, 19 Colo. App. 57.*Georgia. —* *Milner v. Neel*, 114 Ga. 118; *Heath v. Miller*, 117 Ga. 854.*Illinois. —* *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223; *James White Memorial Home v. Price*, 195 Ill. 279; *Thompson v. People*, 207 Ill. 334; *Brown v. Schintz*, 109 Ill. App. 598; *Kanorowski v. People*, 113 Ill. App. 468.*Indiana. —* *Winslow v. Green*, 155 Ind. 368; *Baltimore, etc., R. Co. v. Jackson County*, 156 Ind. 260; *Lee v. McClelland*, 157 Ind. 84; *Soules v. Robinson*, 158 Ind. 97, 92 Am. St. Rep. 301; *Emerick v. Miller*, 159 Ind. 317; *Oster v. Broe*, 161 Ind. 113; *Spencer v. Spencer*, 31 Ind. App. 321, 99 Am. St. Rep. 260; *Godfrey v. White*, 32 Ind. App. 265; *Ellison v. Branstator*, 34 Ind. App. 410.*Iowa. —* *English v. Otis*, 125 Iowa 555.*Kansas. —* *Clevenger v. Figley*, 68 Kan. 699.*Kentucky. —* *Bitzer v. Mercke*, 111 Ky. 209; *Myers v. Pedigo*, (Ky. 1903) 72 S. W. Rep. 734; *Bohannon v. Tabb*, (Ky. 1903) 76 S. W. Rep. 46; *Cumberland Bank v. Simpson*, (Ky. 1903) 77 S. W. Rep. 695.*Michigan. —* *Morley v. Stringer*, 133 Mich. 690.



**1046.** Effect of Want of Jurisdiction. — See note 2.

**1050.** 4. Foreign Judgments. — See notes 5, 6.

5. Proceedings by Attachment. — See notes 7, 8.

**1051.** 6. Garnishment Proceedings. — See note 2.

*Minnesota.* — Schmitt *v.* Dahl, 88 Minn. 506.  
*Missouri.* — State *v.* Brandhorst, 156 Mo. 457,  
79 Am. St. Rep. 538; *In re* Judy, 166 Mo. 13;  
Van Stewart *v.* Miles, 105 Mo. App. 242; Bren-  
nan *v.* Maule, 108 Mo. App. 336; Wilson *v.*  
Coleman, 88 Mo. App. 564.

*Nebraska.* — Dryden *v.* Parrotte, 61 Neb.  
339; Fraaman *v.* Fraaman, 64 Neb. 472, 97 Am.  
St. Rep. 650; Toggood *v.* Russell, (Neb. 1902)  
91 N. W. Rep. 249; Miles *v.* Ballantine, (Neb.  
1903) 93 N. W. Rep. 708; Cizek *v.* Cizek,  
(Neb. 1903) 96 N. W. Rep. 657; Banking House  
*v.* Dukes, (Neb. 1903) 97 N. W. Rep. 805;  
Bussing *v.* Taggart, (Neb. 1905) 103 N. W.  
Rep. 430.

*New Jersey.* — Podesta *v.* Binns, (N. J. 1905)  
60 Atl. Rep. 815.

*North Carolina.* — Earp *v.* Minton, 138 N.  
Car. 202.

*North Dakota.* — Nichols, etc., Co. *v.* Paul-  
son, 10 N. Dak. 440.

*Ohio.* — Gaw *v.* Glassboro Novelty Glass Co.,  
11 Ohio Cir. Dec. 32, 20 Ohio Cir. Ct. 416.

*Oklahoma.* — Smith *v.* Finger, (Okla. 1905)  
79 Pac. Rep. 759.

*Pennsylvania.* — Plains Tp.'s Appeal, 206 Pa.  
St. 556; Haines *v.* Hall, 209 Pa. St. 104;  
Toomey *v.* Rosansky, 11 Pa. Super. Ct. 506.

*South Carolina.* — McCullough *v.* Hicks, 63  
S. Car. 542.

*South Dakota.* — Green *v.* Sabin, 12 S. Dak.  
496.

*Tennessee.* — Killough *v.* Warren, (Tenn. Ch.  
1899) 58 S. W. Rep. 898.

*Texas.* — Burns *v.* Barker, 31 Tex. Civ. App.  
82; Hartford F. Ins. Co. *v.* King, 31 Tex. Civ.  
App. 636; Floyd *v.* Watkins, 34 Tex. Civ. App.  
3; Scudder *v.* Cox, 35 Tex. Civ. App. 416;  
Campbell *v.* Upson, (Tex. Civ. App. 1904) 81  
S. W. Rep. 358.

*Virginia.* — Turnbull *v.* Mann, 99 Va. 41.

*Washington.* — Noerdlinger *v.* Huff, 31 Wash.  
360; Budlong *v.* Budlong, 32 Wash. 672.

*West Virginia.* — St. Lawrence Boom, etc.,  
Co. *v.* Holt, 51 W. Va. 352.

*Wisconsin.* — Harrigan *v.* Gilchrist, 121 Wis.  
127.

**Default Judgment.**—Where the court has juris-  
diction to enter a default, a judgment on de-  
fault is as conclusive against collateral attack  
as any other form of judgment. Ruppin *v.*  
McLachlan, 122 Iowa 343.

**1046.** 2. Judgments and Decrees Without  
Jurisdiction Void in All Courts.—*United States.*  
— Ritchie *v.* Sayers, 100 Fed. Rep. 520; Phoenix  
Bridge Co. *v.* Castleberry, (C. C. A.) 131 Fed.  
Rep. 175.

*California.* — Parsons *v.* Weis, 144 Cal. 410.

*Colorado.* — Venner *v.* Denver Union Water  
Co., 15 Colo. App. 495.

*Georgia.* — Heath *v.* Miller, 117 Ga. 854;  
Jones *v.* Smith, 120 Ga. 642.

*Illinois.* — Desnoyers Shoe Co. *v.* Litchfield  
First Nat. Bank, 188 Ill. 312.

*Indiana.* — Spencer *v.* Spencer, 31 Ind. App.  
321, 99 Am. St. Rep. 260.

*Iowa.* — Thornily *v.* Prentice, 121 Iowa 89,  
100 Am. St. Rep. 317; Beeman *v.* Kitzman, 124  
Iowa 86.

*Kansas.* — Bowman *v.* Hazen, 69 Kan. 682.

*Louisiana.* — Decuir *v.* Decuir, 105 La. 481.

*Maine.* — Winslow *v.* Troy, 97 Me. 130.

*Missouri.* — Caffery *v.* Choctaw Coal, etc.,  
Co., 95 Mo. App. 174; Jewett *v.* Boardman,  
181 Mo. 647.

*Montana.* — Burke *v.* Inter-State Sav., etc.,  
Assoc., 25 Mont. 315, 87 Am. St. Rep. 416.

*Nebraska.* — Fogg *v.* Ellis, 61 Neb. 829; Ald-  
rich *v.* Steen, (Neb. 1904) 100 N. W. Rep.  
311; Omaha Nat. Bank *v.* Robinson, (Neb.  
1905) 102 N. W. Rep. 613.

*New York.* — Berridge *v.* Shults, (Supm. Ct.  
Spec. T.) 32 Misc. (N. Y.) 444.

*Ohio.* — Bailey *v.* Young, 11 Ohio Cir. Dec.  
257, 20 Ohio Cir. Ct. 546.

*Pennsylvania.* — See dissenting opinion of  
Mestrezat, J., in *Com. v. Barnett*, 199 Pa. St.  
161, citing 17 AM. AND ENG. ENCYC. OF LAW  
(2d ed.) 1046.

*South Carolina.* — McCullough *v.* Hicks, 63  
S. Car. 542.

*Texas.* — Moore *v.* Perry, (Tex. Civ. App.  
1900) 56 S. W. Rep. 120; Missouri, etc., R. Co.  
*v.* Chenault, 24 Tex. Civ. App. 481; Newman  
*v.* Mackey, (Tex. Civ. App. 1904) 83 S. W.  
Rep. 31.

*West Virginia.* — Waldron *v.* Harvey, 54  
W. Va. 608, 102 Am. St. Rep. 959.

*Wisconsin.* — Harrigan *v.* Gilchrist, 121 Wis.  
127.

**In Order to Make a Judgment Void Collaterally,**  
either legal organization of the tribunal, or  
jurisdiction over the subject-matter, or juris-  
diction over the person must be wanting.  
Wood *v.* Mobile, 99 Fed. Rep. 615, *affirmed* (C.  
C. A.) 107 Fed. Rep. 846. See also State *v.*  
Cloudt, (Tex. Civ. App. 1904) 84 S. W. Rep. 415.

**1050.** 5. Wood *v.* Mobile, 99 Fed. Rep.  
615, *affirmed* (C. C. A.) 107 Fed. Rep. 846;  
Harter *v.* Shull, 17 Colo. App. 162; American  
Mut. L. Ins. Co. *v.* Mason, 159 Ind. 15;  
American Trading, etc., Co. *v.* Gottstein, 123  
Iowa 267; Longueville *v.* May, 115 Iowa 709;  
Coveney *v.* Phiscator, 132 Mich. 258; Garvey  
*v.* U. S. Fidelity, etc., Co., 77 N. Y. App. Div.  
391.

6. Phoenix Bridge Co. *v.* Castleberry, (C. C.  
A.) 131 Fed. Rep. 175; Cooper *v.* Brazelton,  
(C. C. A.) 135 Fed. Rep. 476; Clark *v.* Ogilvie,  
111 Ky. 181; Boyle *v.* Musser-Sauntry Land,  
etc., Co., 88 Minn. 456, 97 Am. St. Rep. 538;  
Commonwealth Mut. F. Ins. Co. *v.* Hayden, 61  
Neb. 454; Matter of Norton, (Surrogate Ct.)  
32 Misc. (N. Y.) 224.

**7. Judgments in Attachment Suits.** — Rogers  
*v.* Ingersoll, 103 N. Y. App. Div. 490; Schlosser  
*v.* Beemer, 40 Oregon 412.

8. Duxbury *v.* Dahle, 78 Minn. 427, 79 Am.  
St. Rep. 408.

**1051.** 2. Cleveland Co-operative Stove Co.  
*v.* Mehling, 11 Ohio Cir. Dec. 400, 21 Ohio  
Cir. Ct. 60.

- 1051.** 7. Proceedings in Execution. — See note 7.  
**1052.** 8. Bankruptcy and Insolvency Proceedings. — See notes 5, 6, 7.  
 10. Foreclosure Proceedings. — See note 9.  
 11. Eminent Domain Proceedings. — See note 13.  
**1053.** 12. Tax Proceedings. — See notes 2, 3, 4, 6, 7, 8, 9.  
 13. Orders and Decrees of Probate Courts — Same — With Jurisdiction,  
 — See notes 11, 13, 14, 15.  
**1054.** See notes 1, 2, 4, 5, 7.  
**1055.** Same — Without Jurisdiction. — See notes 1, 3.  
 14. Guardians' Sales. — See note 8.  
 16. Justices' Courts. — See note 12.

**1051.** 7. Same — Effect of Errors or Irregularities in the Execution Proceedings. — Howard v. Corey, 126 Ala. 283; Trowbridge v. Cunningham, 63 Kan. 847; Christy v. Springs, 11 Okla. 710; Bludworth v. Poole, 21 Tex. Civ. App. 551; Smith v. Olsen, 23 Tex. Civ. App. 458; Fulkerson v. Taylor, 102 Va. 314.

**1052.** 5. Roberts v. Fernald, 72 N. H. 198.  
 6. Young v. Stevenson, 73 Ark. 480; J. I. Case Threshing Mach. Co. v. Sires, 21 Wash. 322.

7. German American Bank v. Powell, 121 Wis. 575.

9. Decrees of Mortgage Foreclosure. — Hager v. Astorg, 145 Cal. 548, 104 Am. St. Rep. 68; Clevenger v. Figley, 68 Kan. 699; Barrett v. Eastham, 28 Tex. Civ. App. 189; Rohrer v. Snyder, 29 Wash. 199.

13. Decisions and Judgments in Eminent Domain Proceedings. — South Chicago City R. Co. v. Chicago, 196 Ill. 490; Weiland v. Ashton, (S. Dak. 1904) 100 N. W. Rep. 737; Davidson v. Texas, etc., R. Co., 29 Tex. Civ. App. 54; Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715.

**1053.** 2. Assessment of Taxes. — Flint Land Co. v. Godkin, 136 Mich. 668; Warren v. Manwarring, 173 Mo. 21; Matter of Adler, 76 N. Y. App. Div. 571.

3. Action of State Board of Equalization. — State v. Western Union Tel. Co., 165 Mo. 502. But see Hart v. Smith, 159 Ind. 182.

4. Judgments in Tax Proceedings. — Munroe v. Winegar, 128 Mich. 369; Tromble v. Hoffman, 130 Mich. 676; Stevenson v. Black, 168 Mo. 549; Neely v. Buchanan, (Tenn. Ch. 1899) 54 S. W. Rep. 995.

6. Arbuckle v. Matthews, 73 Ark. 27.

7. Warren v. Auditor-Gen., 131 Mich. 263.

8. Hart v. Smith, 159 Ind. 182.

9. Tromble v. Hoffman, 130 Mich. 676; Condon v. Galbraith, 106 Tenn. 14; Green v. Robertson, 30 Tex. Civ. App. 236.

11. Decrees Admitting Wills to Probate. — Morrison v. Fletcher, (Ky. 1905) 84 S. W. Rep. 548; Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922; Leslie v. Maxey, (Ky. 1902) 67 S. W. Rep. 839; Ward v. Logan County, 12 Okla. 267; Laufer v. Powell, 30 Tex. Civ. App. 604.

12. Decrees Setting Aside Wills. — Bohannon v. Tabbin, (Ky. 1903) 76 S. W. Rep. 46.

14. Decrees Granting Letters Testamentary or of Administration — Alabama. — Bromberg v. Sands, 127 Ala. 411.

Illinois. — Salomon v. People, 191 Ill. 290.

Iowa. — Beresford v. American Coal Co., 124 Iowa 34.

Kansas. — Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299.

Michigan. — Ormsbee v. Piper, 123 Mich. 265.

New York. — Van Gaasbeek v. Staples, 85 N. Y. App. Div. 271, affirmed 177 N. Y. 524.

Pennsylvania. — Ubil v. Miller, 16 Pa. Super. Ct. 497.

South Carolina. — In re Mayo, 60 S. Car. 401.

Tennessee. — Kendrick v. Mason, (Tenn. Ch. 1901) 62 S. W. Rep. 359.

15. Orders or Decrees Directing Sale of Decedent's Property — Arkansas. — Washington v. Govatt, 73 Ark. 612.

Georgia. — Adams v. Adams, 113 Ga. 824.

Illinois. — Frothingham v. Petty, 197 Ill. 418; Reinhardt v. Seaman, 208 Ill. 448.

Indiana. — Watkins v. Lewis, 153 Ind. 648.

Nebraska. — Haight v. Hayes, (Neb. 1902) 92 N. W. Rep. 297.

New Jersey. — Hohokus Tp. v. Erie R. Co., 65 N. J. L. 353.

North Carolina. — Smith v. Huffman, 132 N. Car. 600.

Texas. — Boslet v. Thomas, 35 Tex. Civ. App. 144.

**1054.** 1. Davis v. Martin, (C. C. A.) 113 Fed. Rep. 6.

2. Orders Allowing or Disallowing Claims Against Estate of Decedent. — James v. Gibson, 73 Ark. 440.

4. Orders Allowing Settlement by and Discharging Executors or Administrators. — Bonner v. Gorman, 71 Ark. 480.

5. Decrees Appointing or Removing Guardians. — Flynn v. Hancock, 35 Tex. Civ. App. 395.

7. Orders and Decrees of Probate Generally. — Stambach v. Emerson, (Cal. 1902) 69 Pac. Rep. 856, 139 Cal. 282; Tobin v. Larkin, 187 Mass. 279; State v. Shipman, 37 Mo. App. 569; Colby v. Toledo, 12 Ohio Cir. Dec. 347, 22 Ohio Cir. Ct. 732; Lawrey v. Sterling, 41 Oregon 518; Hines v. Givens, 29 Tex. Civ. App. 517.

**1055.** 1. Decrees and Orders of Probate Courts Without Jurisdiction. — Winslow v. Troy, 97 Me. 130.

3. Decrees Granting Letters of Administration. — Nash v. Sawyer, 114 Iowa 742.

8. Greer v. Ford, 31 Tex. Civ. App. 389.

12. Brush v. Smith, 141 Cal. 466; Cole v. Potter, 135 Mich. 326, 106 Am. St. Rep. 398; Purdy v. Law, 132 Mich. 622; Livingston v. Allen, 83 Mo. App. 294; Rankin v. Hooks, (Tex. Civ. App. 1904) 81 S. W. Rep. 1005; Noerdlinger v. Huff, 31 Wash. 360.

**1056.** 18. Proceedings of Courts Martial. — See notes 4, 5.

19. Special Tribunals. — See notes 6, 9.

20. Land Officers' Rulings and Decisions. — See note 14.

**1057.** 22. Adoption Proceedings. — See note 2.

23. Partition Proceedings. — See notes 5, 6.

24. Divorce Proceedings. — See note 7.

**1058.** 27. As Affecting the Right to a Writ of Prohibition. — See note 6.

28. As Affecting the Right to Enjoin the Collection of a Judgment. —

See note 10.

**1059.** 31. As Affecting the Liability of Officers Levying Executions. — See note 3.

32. As Affecting the Liability for Contempt. — See note 9.

33. As Affecting the Right to a Writ of Habeas Corpus. — See notes

12, 13.

**1060.** IV. ESSENTIAL CONSTITUENTS OF JURISDICTION—1. In General. — See notes 1, 2.

**1056.** 4. *In re Brodie*, (C. C. A.) 128 Fed. Rep. 665.

5. *McClaghry v. Deming*, 186 U. S. 49.

6. **Special Tribunals.** — *Green v. Shanklin*, 24 Ind. App. 608; *Heman v. Allen*, 156 Mo. 534.

9. *San Mateo County v. Coburn*, (Cal. 1900) 63 Pac. Rep. 78; *Helmes v. Bell*, 155 Ind. 502; *Illinois Cent. R. Co. v. Swalm*, 83 Miss. 631; *Kelley v. State*, 46 Tex. Crim. 23.

14. *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Paterson v. Ogden*, 141 Cal. 43, 99 Am. St. Rep. 31; *Small v. Rakestraw*, 28 Mont. 413; *Graham v. Great Falls Water Power, etc., Co.*, 30 Mont. 393.

**1057.** 2. **Decrees of Adoption.** — *Matter of McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80; *Crocker v. Balch*, 104 Tenn. 6.

5. *Mesnager v. De Leonis*, 140 Cal. 402.

6. *Decuir v. Decuir*, 105 La. 481.

7. **Decrees of Divorce.** — *France v. France*, 79 N. Y. App. Div. 291.

**1058.** 6. *Finley v. Moose*, (Ark. 1905) 85 S. W. Rep. 238; *Schubach v. McDonald*, 179 Mo. 163, 101 Am. St. Rep. 452.

10. *Helmes v. Bell*, 155 Ind. 502; *Davis v. Osborn*, 156 Ind. 86; *Harrison v. Lokey*, 26 Tex. Civ. App. 404.

**1059.** 3. *Marshall v. Hunt*, 89 Ill. App. 634. 9. *Ex p. Stone*, (Tex. Crim. 1903) 72 S. W. Rep. 1000.

12. *United States*. — *Chow Loy v. U. S.*, (C. C. A.) 112 Fed. Rep. 354; *In re Lewis*, 114 Fed. Rep. 963; *In re Nevitt*, (C. C. A.) 117 Fed. Rep. 448; *Iowa v. Jones*, 128 Fed. Rep. 626.

*Arkansas*. — *Ex p. Brady*, 70 Ark. 376.

*California*. — *In re Reed*, 143 Cal. 634, 101 Am. St. Rep. 138.

*District of Columbia*. — *U. S. v. Davis*, 18 App. Cas. (D. C.) 280.

*Florida*. — *Bronk v. State*, 43 Fla. 461.

*Illinois*. — *People v. Murphy*, 202 Ill. 493; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296.

*Indiana*. — *Winslow v. Green*, 155 Ind. 368; *Gillespie v. Rump*, 163 Ind. 457.

*Kansas*. — *Ex p. Terry*, (Kan. 1905) 80 Pac. Rep. 586.

*Nebraska*. — *Kellar v. Davis*, (Neb. 1903) 95 N. W. Rep. 1028; *State v. Shrader*, (Neb. 1905) 103 N. W. Rep. 276.

*New York*. — *People v. Flynn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 90; *People v. State Reformatory*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 92; *People v. City Prison*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 635; *People v. Hayes*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 163.

*North Dakota*. — *State v. Beaverstad*, 12 N. Dak. 527.

*Oregon*. — *Ex p. Stacey*, 45 Oregon 85.

*Texas*. — *Ex p. Beeler*, 41 Tex. Crim. 240.

*Washington*. — *Matter of Casey*, 27 Wash. 686.

*Wyoming*. — *Miskimmins v. Shaver*, 8 Wyo. 392.

13. *United States*. — *In re Reese*, 98 Fed. Rep. 984, affirmed (C. C. A.) 107 Fed. Rep. 942; *Jamison v. Wimbish*, 130 Fed. Rep. 351; *Cuyler v. Atlantic, etc., R. Co.*, 131 Fed. Rep. 95.

*Florida*. — *Bronk v. State*, 43 Fla. 461.

*Georgia*. — *Moore v. Wheeler*, 109 Ga. 62;

*McFarland v. Donaldson*, 115 Ga. 567.

*Illinois*. — *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296.

*Kansas*. — *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255; *In re Nolan*, 68 Kan. 796; *In re Jewett*, 69 Kan. 830.

*Maine*. — *Tuttle v. Lang*, (Me. 1905) 60 Atl. Rep. 892.

*Michigan*. — *Ex p. Allen*, (Mich. 1905) 103 N. W. Rep. 209.

*Wyoming*. — *Bandy v. Hehn*, 10 Wyo. 167.

The invalidity of a court martial may be raised on habeas corpus. *McClaghry v. Deming*, 186 U. S. 49.

**1060.** 1. **Jurisdiction of the Subject-matter Essential to Jurisdiction.** — *Munger v. Doolan*, 75 Conn. 656; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *Davison v. Hough*, 165 Mo. 561, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

2. **Jurisdiction of the Person Essential to Jurisdiction in Personal Actions.** — *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *Davison v. Hough*, 165 Mo. 561, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060; *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

**1060.** 2. Jurisdiction of the Subject-matter. — See note 4.

3. Jurisdiction of the Person. — See note 5.

V. SOURCES AND MODES OF ACQUIRING JURISDICTION — 1. Jurisdiction over the Subject-matter. — See note 7.

**1061.** 2. Effect of Consent to Give Jurisdiction — *a.* GENERAL RULE. — See note 1.

*b.* APPELLATE COURTS. — See note 2.

**1062.** See notes 1, 2.

3. Waiver of Defects of Jurisdiction. — See note 3.

**1063.** 5. Contracts to Deprive Courts of Jurisdiction. — See note 3.

**1060.** 4. Definition of Jurisdiction of the Subject-matter. — *Eckule v. Wood*, 95 Mo. App. 378. *Hadley v. Bernero*, 103 Mo. App. 549; *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

5. Definition of Jurisdiction of the Person. — *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

7. Sources of Jurisdiction over the Subject-matter. — *Figge v. Rowlen*, 185 Ill. 234; *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1060.

**1061.** 1. Rule Against Jurisdiction of Subject-matter by Consent — *Alaska*. — *Myers v. Swineford*, 1 Alaska 10.

*Colorado*. — *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382.

*Illinois*. — *Hammond v. Leavitt*, 181 Ill. 416; *Parsons v. Millar*, 189 Ill. 107.

*Iowa*. — *Porter v. Welsh*, 117 Iowa 144.

*Missouri*. — *Davidson v. Hough*, 165 Mo. 561, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058 [1061]; *Klingelhoefer v. Smith*, 171 Mo. 455.

*Nebraska*. — *Armstrong v. Mayer*, 60 Neb. 423; *Crawford Co. v. Hathaway*, 61 Neb. 317; *Boales v. Ferguson*, (Neb. 1901) 96 N. W. Rep. 337; *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252; *Cizek v. Cizek*, (Neb. 1904) 99 N. W. Rep. 28.

*New Hampshire*. — *Burgess v. Burgess*, 71 N. H. 293.

*New Jersey*. — *Chosen Freeholders v. Central R. Co.*, (N. J. 1904) 59 Atl. Rep. 303.

*New York*. — *Albany Brewing Co. v. Barckley*, 70 N. Y. App. Div. 260; *Midler v. Lese*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 637.

*Ohio*. — *Wilson v. Swigart*, 1 Ohio Dec. 418.

*Oklahoma*. — *Hobbs v. German-American Doctors*, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061.

*Tennessee*. — *Baker v. Mitchell*, 105 Tenn. 610.

*Texas*. — *Mercer v. Woods*, 33 Tex. Civ. App. 642.

*West Virginia*. — *Yates v. Taylor County Ct.*, 47 W. Va. 376; *Freer v. Davis*, 52 W. Va. 1, 94 Am. St. Rep. 895.

A Court Martial composed of men detailed as members in direct violation of the statute on the subject, which prohibits their sitting, can obtain no jurisdiction over the subject-matter or the person even by the consent of the defendant. *McClaghry v. Deming*, 186 U. S. 49.

2. Same — Application of the Rule to Appellate

Courts. — *Perry v. Bozarth*, 198 Ill. 328, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061; *Baily v. Birkhofer*, 123 Iowa 59.

**1062.** 1. Same — Appellate Jurisdiction Cannot Be Extended by Consent. — *Home Sav., etc., Co. v. District Ct.*, 121 Iowa 1.

2. Same — Original Jurisdiction Cannot Be Given by Consent. — *Ballou v. Farnsworth*, 4 Ohio Dec. (Reprint) 88, 1 Cleve. L. Rep. 17.

3. Want of Jurisdiction of the Subject-matter Cannot Be Waived — *Illinois*. — *Demilly v. Grosrenaud*, 201 Ill. 272; *Hammond v. Leavitt*, 181 Ill. 416.

*Iowa*. — *Wedgewood v. Parr*, 112 Iowa 514.

*Missouri*. — *Klingelhoefer v. Smith*, 171 Mo. 455.

*Ohio*. — *Wilson v. Swigart*, 1 Ohio Dec. 418.

*Oklahoma*. — *Hobbs v. German-American Doctors*, 14 Okla. 236.

*Tennessee*. — *Baker v. Mitchell*, 105 Tenn. 610; *Board of Directors v. Bodkin*, 108 Tenn. 700.

*Utah*. — *Davidson v. Munsey*, 27 Utah 87.

**1063.** 3. Illegality of Contracts Ousting Courts of Jurisdiction — *England*. — See Consolidated Exploration, etc., *Co. v. Musgrave*, (1900) 1 Ch. 37.

*Canada*. — *Dahme v. La Cour Supreme, etc.*, 21 Quebec Super. Ct. 439. See also Consolidated Exploration, etc., *Co. v. Musgrave*, (1900) 1 Ch. 37.

*United States*. — *Mitchell v. Dougherty*, (C. C. A.) 90 Fed. Rep. 639; *Connors v. U. S.*, 130 Fed. Rep. 609.

*Connecticut*. — See *McGuiness v. Court Elm City, etc.*, (Conn. 1905) 60 Atl. Rep. 1023.

*Illinois*. — *Sanitary Dist. v. McMahon, etc.*, *Co.*, 110 Ill. App. 510.

*Kentucky*. — *Ison v. Wright*, (Ky. 1900) 55 S. W. Rep. 202. See also *Hagar v. Shuck*, (Ky. 1905) 87 S. W. Rep. 300.

*Louisiana*. — *State v. North American Land, etc., Co.*, 106 La. 621, 87 Am. St. Rep. 309.

*Maine*. — *Fisher v. Merchants' Ins. Co.*, 95 Me. 486, 85 Am. St. Rep. 428.

*Massachusetts*. — *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314. See also *Mittenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404.

*Minnesota*. — *Fidelity, etc., Co. v. Crays*, 76 Minn. 450.

*Montana*. — *Wortman v. Montana Cent. R. Co.*, 22 Mont. 266.

*Nebraska*. — *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584; *Hartford F. Ins. Co. v. Hon*, 66 Neb. 555.

*New Jersey*. — *Wolff v. Liverpool, etc., F. Ins. Co.*, 10 N. J. L. J. 325.

*New York*. — *Buel v. Baltimore, etc., R. Co.*,

**1064.** 6. Jurisdiction of the Person — *a.* IN GENERAL. — See note 1.

*b.* JURISDICTION BY CONSENT AND WAIVER OF OBJECTIONS TO JURISDICTION. — See notes 2, 3.

**1066.** VI. ERRORS, IRREGULARITIES, AND JURISDICTIONAL DEFECTS — 1. In General — Test to Determine Character of Defect. — See note 3.

2. Defects in Jurisdiction over the Particular Case. — See note 4.

Exceeding Jurisdictional Amount. — See note 5.

3. Disqualification of Judge. — See note 8.

**1067.** See note 1.

4. Service of Process — *a.* IN GENERAL. — See note 2.

*b.* WANT OF SERVICE. — See notes 3, 4.

(Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 646; National Contracting Co. v. Hudson River Water-Power Co., 67 N. Y. App. Div. 620, affirming (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 652; Benson v. Eastern Bldg., etc., Assoc., 67 N. Y. App. Div. 319, reversed on the ground that the contract did not oust the court of jurisdiction 174 N. Y. 83; National Contracting Co. v. Hudson River Water-Power Co., 170 N. Y. 349.

Ohio. — Myers v. Jenkins, 63 Ohio St. 101, 81 Am. St. Rep. 613.

Pennsylvania. — Healy v. Eastern Bldg., etc., Assoc., 17 Pa. Super. Ct. 385.

South Dakota. — Seim v. Krause, 13 S. Dak. 530.

West Virginia. — Savage v. People's Bldg., etc., Assoc., 45 W. Va. 275.

Wisconsin. — Montgomery v. American Cent. Ins. Co., 108 Wis. 146.

**Exemption from Liability for Wrongful Distraint.** — A contract between landlord and tenant that in the event of distraint the landlord should be free from all liability for damages to the tenant's crops, from whatever cause claimed, or from any personal liability arising therefrom in any wise whatsoever, is contrary to public policy, since it renders the court powerless to redress wrongs flowing from the abuse of the process by the landlord. Watson v. Boswell, 25 Tex. Civ. App. 379.

**1064. 1. Modes of Acquiring Jurisdiction of the Person.** — Rothschild v. Knight, 176 Mass. 48; Hobbs v. German-American Doctors, 14 Okla. 236; Gorman v. Stillman, 25 R. I. 55, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064.

**2. Consent May Give Jurisdiction of the Person.** — Davison v. Hough, 165 Mo. 561, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1058-9 (1064); Scott Hardware Co. v. Riddle, 84 Mo. App. 275; Hobbs v. German-American Doctors, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064; Yates v. Taylor County Ct., 47 W. Va. 376; Mathews v. Tyree, 53 W. Va. 298, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064; Wilson v. Postle, 2 Ont. L. Rep. 203; Ritter v. Fairfield, 32 Ont. 350.

**Consent Prior to Obtaining of Jurisdiction of Proceeding by Court.** — A waiver of the issue and service of, a citation or a consent to judgment executed prior to the time that the court obtains jurisdiction of the proceeding which may be contemplated is unavailing to confer jurisdiction. Matter of Graham, (Surrogate Ct.) 39 Misc. (N. Y.) 226.

**3. Waiver of Jurisdictional Defects — Illinois.**

— Adamski v. Wieczorek, 93 Ill. App. 357; Peters v. Darling, 107 Ill. App. 301.

Indiana. — American Mut. L. Ins. Co. v. Mason, 159 Ind. 15.

Kentucky. — Illinois Cent. R. Co. v. Glover, (Ky. 1903) 71 S. W. Rep. 630.

Michigan. — Thayer v. Gibbs, (Mich. 1905) 103 N. W. Rep. 526.

Missouri. — Haseltine v. Messmore, 184 Mo. 298.

New York. — Huber v. Ehlers, 76 N. Y. App. Div. 602.

Oklahoma. — Hobbs v. German-American Doctors, 14 Okla. 236, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1064.

Where parties voluntarily, and without objection, submit to a court having jurisdiction of the subject-matter of their controversy, and the cause proceeds therein regularly to trial and final judgment, they will be held to have waived their right to object to the jurisdiction of that court, even though the cause had been taken into it by an appeal from an inferior court which had not jurisdiction of the subject-matter. Matter of Crawford, 68 Ohio St. 58, 96 Am. St. Rep. 648.

**1066. 3. Amendability as a Test of Validity** — Rogers v. Ingersoll, 103 N. Y. App. Div. 490.

**4. Lack of Jurisdiction of Particular Question in Issue.** — Where a court has jurisdiction of the person and the subject-matter, but lacks jurisdiction of the particular question which it assumes to decide, its judgment is a nullity and subject to collateral attack. Banking House v. Dukes, (Neb. 1903) 97 N. W. Rep. 805.

**5. Amount of Suit Larger than Jurisdictional Limit.** — Western Union Tel. Co. v. Campbell, 36 Tex. Civ. App. 276.

8. Wagner v. Hoffman, 19 Pa. Super. Ct. 414.

**Judgment Void When Incompetency Appears from Record.** — Killough v. Warren, (Tenn. Ch. 1899) 58 S. W. Rep. 898.

**1067. 1.** Where there is a statutory prohibition against a judge sitting in a case, a judgment given by him in a case in which he is disqualified is void, and subject to collateral attack. Walters v. Wiley, (Neb. 1901) 95 N. W. Rep. 486.

**2. Distinction Between Want of Service and Irregular Service.** — Muchmore v. Guest, (Neb. 1901) 96 N. W. Rep. 194; Kalb v. German Sav., etc., Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

**3. Personal Judgment Void Without Service of Process — United States.** — In re Elmira Steel Co., 109 Fed. Rep. 456.

Indiana. — Davis v. Osborne, 156 Ind. 86,

**1068.** *c.* IRREGULAR SERVICE. — See note 1.

*d.* SERVICE BY PUBLICATION. — See note 4.

**1069.** 5. Irregularities in Return. — See note 1.

6. Irregular Process. — See notes 4, 5.

7. Defects in the Pleadings, Form and Manner of Procedure — *a.* IN GENERAL. — See note 7.

*b.* DEFECTS IN PLEADINGS. — See note 9.

**1070.** See note 3.

*d.* TRIAL WITHOUT A JURY. — See note 5.

*f.* DEATH OF PARTY. — See note 11.

*g.* INSANITY OF PARTY. — See note 13.

**1071.** *h.* INFANCY OF PARTY. — See note 1.

*i.* COVERTURE OF PARTY. — See note 4.

*Missouri.* — Talbot *v.* Roe, 171 Mo. 421; Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1.

*Nebraska.* — Muchmore *v.* Guest, (Neb. 1901) 96 N. W. Rep. 194; Baldwin *v.* Burt, (Neb. 1902) 96 N. W. Rep. 401.

*New Jersey.* — Elmendorf *v.* Elmendorf, 58 N. J. Eq. 113.

*New York.* — Korman *v.* Grand Lodge, etc., (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 564.

*Pennsylvania.* — English *v.* English, 19 Pa. Super. Ct. 586.

*South Carolina.* — Wren *v.* Johnson, 62 S. Car. 533.

**1067.** 4. Appearance by Guardian Ad Litem. — Penn *v.* Case, 36 Tex. Civ. App. 4.

*Contra.* — Holmes *v.* Columbia Nat. Bank, (Neb. 1903) 97 N. W. Rep. 26.

**1068.** 1. Judgment Not Void Because of Merely Irregular Service — *Iowa.* — Longueville *v.* May, 115 Iowa 709; Ostby *v.* Secor, (Iowa 1903) 94 N. W. Rep. 571; Thornily *v.* Prentice, 121 Iowa 89, 100 Am. St. Rep. 317.

*Missouri.* — Crooker Shoe Co. *v.* Fry, 104 Mo. App. 134; Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1.

*Montana.* — Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 87 Am. St. Rep. 416.

*Nebraska.* — Muchmore *v.* Guest, (Neb. 1901) 96 N. W. Rep. 194.

*Washington.* — Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

4. Effect of Mere Irregularity in Publication. — Clay *v.* Bilby, 72 Ark. 101.

**1069.** 1. Effect of Irregularities in Return. — Jones *v.* Danforth, (Neb. 1904) 99 N. W. Rep. 495.

4. Newman *v.* Mackey, (Tex. Civ. App. 1904) 83 S. W. Rep. 31.

5. Effect of Radical Irregularities in the Process. — Rosenberger *v.* Gibson, 165 Mo. 16.

7. Irregularities in Pleadings, Form and Manner of Procedure — *California.* — Matter of Sutro, 143 Cal. 487, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069, note 7.

*Indiana.* — Maynard *v.* Waidlich, 156 Ind. 562.

*Montana.* — Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 87 Am. St. Rep. 416, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

*Nebraska.* — See dissenting opinion of Sullivan, C. J., in State *v.* Dickinson, 63 Neb. 869, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.)

1069; Miles *v.* Ballantine, (Neb. 1903) 93 N. W. Rep. 708.

*Texas.* — Crosby *v.* Bonnowsky, 29 Tex. Civ. App. 455.

*Washington.* — Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

9. *California.* — Crane *v.* Cummings, 137 Cal. 201; Brush *v.* Smith, 141 Cal. 466.

*Minnesota.* — Kubesh *v.* Hanson, 93 Minn. 259, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

*Missouri.* — Schubach *v.* McDonald, 179 Mo. 163, 101 Am. St. Rep. 452.

*Nebraska.* — Dryden *v.* Parrotte, 61 Neb. 339, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069; Howell *v.* Ross, (Neb. 1903) 94 N. W. Rep. 955; Logan County *v.* Carnahan, 66 Neb. 685.

*Washington.* — Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 87 Am. St. Rep. 757.

**1070.** 3. Sutherland *v.* St. Lawrence County, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 38, reversed on other grounds 101 N. Y. App. Div. 299.

The failure to permit the defendant to plead to the indictment does not render the judgment void. Winslow *v.* Green, 155 Ind. 368.

5. Objections to Mode of Trial. — Horton *v.* Simon, (Neb. 1903) 97 N. W. Rep. 604; Lyon *v.* Gombert, 63 Neb. 630; Bahnard *v.* Duncan, 65 Neb. 179.

11. Death of the Defendant — *California.* — Todhunter *v.* Klemmer, 134 Cal. 60.

*Georgia.* — Lofton *v.* Collins, 117 Ga. 434.

*Illinois.* — Pfirsching *v.* Heitner, 91 Ill. App. 407.

*Missouri.* — Shea *v.* Shea, 154 Mo. 599, 77 Am. St. Rep. 779.

*Texas.* — Campbell *v.* Upson, (Tex. Civ. App. 1904) 81 S. W. Rep. 358.

*Virginia.* — Robinett *v.* Mitchell, 101 Va. 762, 99 Am. St. Rep. 928.

*Contra.* — Kager *v.* Vickery, 61 Kan. 342, 78 Am. St. Rep. 318.

Death Before Suit Brought. — But a judgment in a suit begun and prosecuted against a dead man, though in due form and good on its face, is a nullity. Weller Mfg. Co. *v.* Eaton, 81 Mo. App. 657.

13. Insanity of Defendant. — Judd *v.* Gray, 156 Ind. 278.

**1071.** 1. Infancy of Defendant. — Weeks *v.* McPhail, 128 N. Car. 130.

4. Maynard *v.* Waidlich, 156 Ind. 562.

**1072. 9. Errors or Irregularities in the Judgment — Erroneous Judgment.** — See note 1.

Irregular Entry of Judgment. — See note 2.

Premature Entry of Judgment. — See note 3.

**1073. Irregularity in Form of Judgment.** — See note 1.

Entry Outside of Term. — See note 3.

**1074. VII. PRESUMPTION OF JURISDICTION — 1. Domestic Courts — a. COURTS OF GENERAL JURISDICTION — (1) Cases Involving Exercise of General Powers — (a) Rule Stated.** — See note 1.

**1075.** See notes 1, 3.

**1076.** See note 1.

**1072. 1. Erroneous Judgment.** — *Rich v. Chicago*, 187 Ill. 396; *Bedford v. Skyes*, 168 Mo. 8; *Talbot v. Roe*, 171 Mo. 421; *Kelly v. Gebhart*, 180 Mo. 588; *Howell v. Ross*, (Neb. 1903) 94 N. W. Rep. 955; *Horton v. Simon*, (Neb. 1903) 97 N. W. Rep. 604; *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698.

**2. Irregularity in Entry of Judgment.** — *Alter v. State*, 62 Neb. 239.

**3. Effect of Premature Entry of Judgment.** — *Winslow v. Green*, 155 Ind. 368; *Rice v. Bolton*, (Iowa 1904) 100 N. W. Rep. 634; *Reed v. Nicholson*, 158 Mo. 624; *Bokhoof v. Stewart*, (Neb. 1902) 89 N. W. Rep. 759.

**1073. 1. Judgment of Irregular Form.** — *Rhodes v. Spears*, 63 Kan. 218.

**3. Entry of Judgment in Vacation — Contra.** — *Bracken v. Milner*, 99 Mo. App. 187.

**1074. 1. Presumption in Favor of Courts of General Jurisdiction — United States.** — *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157; *Eltonhead v. Allen*, (C. C. A.) 119 Fed. Rep. 126.

*Alabama.* — *White v. Simpson*, 124 Ala. 238. *Arkansas.* — *Kelley v. Laconia Levee Dist.*, (Ark. 1905) 85 S. W. Rep. 249; *Ingram v. Sherwood*, (Ark. 1905) 87 S. W. Rep. 435.

*California.* — *Mesnager v. De Leonis*, 140 Cal. 402; *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125; *Grannis v. Superior Ct.*, 143 Cal. 630; *Parsons v. Weis*, 144 Cal. 410. *Florida.* — *Finley v. Chamberlin*, (Fla. 1903) 35 So. Rep. 1.

*Illinois.* — *Figge v. Rowlen*, 185 Ill. 234.

*Indiana.* — *Delaware Tp. v. Ripley County*, 26 Ind. App. 97; *Soules v. Robinson*, 158 Ind. 97, 92 Am. St. Rep. 301; *Old Wayne Mut. L. Assoc. v. Flynn*, 31 Ind. App. 473.

*Kansas.* — *Gille v. Emmons*, 61 Kan. 217; *National Bank of America v. Home Security Co.*, 65 Kan. 642.

*Missouri.* — *Talbot v. Roe*, 171 Mo. 421; *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496; *Hadley v. Bernero*, 103 Mo. App. 549.

*Montana.* — *Beach v. Spokane Ranch, etc.*, Co., 25 Mont. 379.

*Nebraska.* — *Nehawka Bank v. Ingersoll*, (Neb. 1902) 89 N. W. Rep. 618; *Horton v. Simon*, (Neb. 1903) 97 N. W. Rep. 604; *Banking House v. Dukes*, (Neb. 1903) 97 N. W. Rep. 805.

*New York.* — *Matter of Norton*, (Surrogate Ct.) 32 Misc. (N. Y.) 224; *Sisco v. Martin*, 61 N. Y. App. Div. 502.

*Oregon.* — *Rutenic v. Hamakar*, 40 Oregon 444.

*South Dakota.* — *Phillips v. Phillips*, 13 S. Dak. 231; *Stearns v. Wright*, 13 S. Dak. 544.

*Tennessee.* — *Crocker v. Balch*, 104 Tenn. 6; *Wilkins v. McCorkle*, 112 Tenn. 688.

*Texas.* — *Warren v. Foust*, 36 Tex. Civ. App. 59.

*Washington.* — *Bird v. Winyer*, 24 Wash. 269, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073; *Kalb v. German Sav., etc., Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757.

*West Virginia.* — *Empire Coal, etc., Co. v. Hull Coal, etc., Co.*, 51 W. Va. 474.

*Canada.* — *Ritz v. Froese*, 12 Manitoba 346.

**1075. 1. Presumption as to Finding of Jurisdictional Facts Generally — California.** — *Galvin v. Palmer*, 134 Cal. 426.

*Georgia.* — *Stuckey v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47; *Jones v. Smith*, 120 Ga. 642.

*Kentucky.* — *Berry v. Foster*, (Ky. 1900) 58 S. W. Rep. 709; *McNew v. Martin*, (Ky. 1901) 60 S. W. Rep. 412; *Jones v. Patterson*, (Ky. 1902) 66 S. W. Rep. 377.

*Nebraska.* — *Parsons v. State*, 61 Neb. 244.

*Texas.* — *Endel v. Norris*, 93 Tex. 540; *Hodges v. Brice*, 32 Tex. Civ. App. 358.

**3. Presumption as to Service of Process or Appearance — Indiana.** — *Godfrey v. White*, 32 Ind. App. 265.

*Kansas.* — *National Bank of America v. Home Security Co.*, 65 Kan. 642.

*Kentucky.* — *Berry v. Foster*, (Ky. 1900) 58 S. W. Rep. 709; *Miller v. Farmers' Bank*, (Ky. 1903) 75 S. W. Rep. 218; *Northington v. Reid*, (Ky. 1903) 75 S. W. Rep. 206.

*South Dakota.* — *Phillips v. Phillips*, 13 S. Dak. 231; *Stearns v. Wright*, 13 S. Dak. 544.

*Texas.* — *Mills v. Terry*, 22 Tex. Civ. App. 277; *Campbell v. Upson*, (Tex. Civ. App. 1904) 81 S. W. Rep. 358.

**1076. 1. Presumption as to Authority of Attorney to Enter Appearance.** — *Heath v. Miller*, 117 Ga. 854; *Berry v. Foster*, (Ky. 1900) 58 S. W. Rep. 709; *Health Dept. v. Babcock*, (Supm. Ct. App. T.) 84 N. Y. Supp. 604.

**Presumption as to Authority of Attorney to Compromise.** — *Hartford F. Ins. Co. v. King*, 31 Tex. Civ. App. 636.

**Authority to Make Appearance Open to Proof.** — While the judgment concludes the question of the attorney's appearance, the question of his authority to make the appearance is open to proof on behalf of the defendant wherever the judgment is sought to be availed of. *Korman v. Grand Lodge, etc.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 564.

**1076.** Courts of Probate. — See note 5.

**1077.** (b) Record Recitals as to Jurisdictional Facts. — See note 5.

**1078.** (c) Persons Not Within Territorial Limits of Jurisdiction — When Service by Publication Is Authorized. — See note 5.

**1079.** (2) *Cases Involving Exercise of Special Statutory Powers* — (a) Presumption of Jurisdiction Generally. — See note 1.

(b) Proceedings According to Course of Common Law. — See note 2.

(c) Proceedings Not According to Course of Common Law. — See note 3.

**1080.** (3) *Conclusiveness of Presumption*. — See note 5.

**1081.** Jurisdiction Appearing of Record. — See note 2.

**1076.** 5. Courts of Probate Held Courts of General Jurisdiction — *Georgia*. — *Stuckey v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47; *Jones v. Smith*, 120 Ga. 642.

*Idaho*. — *Clark v. Rossier*, 10 Idaho 348.

*Illinois*. — *Salomon v. Wincocx*, 104 Ill. App. 277.

*Kansas*. — *J. B. Watkins Land-Mortg. Co. v. Mullen*, 62 Kan. 1.

*Minnesota*. — *Hadley v. Bourdeaux*, 90 Minn. 177.

*Missouri*. — *In re Davison*, 100 Mo. App. 263.  
*New Jersey*. — *Hohokus Tp. v. Erie R. Co.*, 65 N. J. L. 353.

*Ohio*. — *Woodward v. Curtis*, 10 Ohio Cir. Dec. 400, 19 Ohio Cir. Ct. 15.

*Oklahoma*. — *Greer v. McNeal*, 11 Okla. 519.

*Texas*. — *Hines v. Givens*, 29 Tex. Civ. App. 517; *Dutton v. Wright*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1025.

**1077.** 5. No Presumption Where Record Shows Want of Jurisdiction — *Georgia*. — *Jones v. Smith*, 120 Ga. 642.

*Indiana*. — *Old Wayne Mut. L. Assoc. v. Flynn*, 31 Ind. App. 473.

*Nebraska*. — *Banking House v. Duke*, (Neb. 1903) 97 N. W. Rep. 805; *Cizek v. Cizek*, (Neb. 1904) 99 N. W. Rep. 28.

*New York*. — *Bowler v. Ennis*, 46 N. Y. App. Div. 309.

*Oregon*. — *Harris v. Sargeant*, 37 Oregon 41.

*Rhode Island*. — *Providence County Sav. Bank v. Hughes*, 26 R. I. 73, 106 Am. St. Rep. 682.

*South Dakota*. — *Stearns v. Wright*, 13 S. Dak. 544.

*Texas*. — *Earnest v. Glaser*, 32 Tex. Civ. App. 378.

**1078.** 5. Recital of Publication — Presumption of Regularity — *Alabama*. — *White v. Simpson*, 124 Ala. 238.

*Arkansas*. — *Clay v. Bilby*, 72 Ark. 101; *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

*California*. — *McHatton v. Rhodes*, 143 Cal. 275, 101 Am. St. Rep. 125.

*Illinois*. — *Hereford v. People*, 197 Ill. 222.

*Missouri*. — *Vincent v. Means*, 184 Mo. 327.

*Ohio*. — *Cleveland Co-operative Stove Co. v. Mehling*, 11 Ohio Cir. Dec. 400, 21 Ohio Cir. Ct. 60.

*South Dakota*. — *Bunker v. Taylor*, 13 S. Dak. 433.

*In Texas*. — See *Galloway v. State Nat. Bank*, (Tex. Civ. App. 1900) 56 S. W. Rep. 236.

**1079.** 1. Exercise of Special Statutory Powers — Presumption of Jurisdiction Generally. — *Van Wagenen v. Carpenter*, 27 Colo. 444; *Chesa-*

*peake, etc.*, *R. Co. v. Washington, etc.*, *R. Co.*, 99 Va. 715.

2. Statutory Powers Exercised According to Course of Common Law. — *Chesapeake, etc.*, *R. Co. v. Washington, etc.*, *R. Co.*, 99 Va. 715.

3. Statutory Powers Not Exercised According to Course of Common Law. — *Glos v. Woodard*, 202 Ill. 480; *Roberts v. Fernald*, 72 N. H. 198.

**1080.** 5. Evidence Aliunde Generally Held Not Admissible to Rebut Presumption — *Alabama*. — *White v. Simpson*, 124 Ala. 238.

*Arizona*. — *Allen v. Evans*, 7 Ariz. 354.

*California*. — *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207; *Galvin v. Palmer*, 134 Cal. 426.

*Colorado*. — *Venner v. Denver Union Water Co.*, 15 Colo. App. 495.

*Idaho*. — *McCornick v. Friedman*, 7 Idaho 686.

*Illinois*. — *Bennett v. Roys*, 212 Ill. 232.

*Montana*. — *Burke v. Inter-State Sav., etc., Assoc.*, 25 Mont. 315, 87 Am. St. Rep. 416; *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839.

*South Dakota*. — *Phillips v. Phillips*, 13 S. Dak. 231.

*Tennessee*. — *Wilkins v. McCorkle*, 112 Tenn. 688.

*Texas*. — *Iiams v. Root*, 22 Tex. Civ. App. 413; *Greenway v. De Young*, 34 Tex. Civ. App. 583; *Kelley v. State*, 46 Tex. Crim. 23; *Dutton v. Wright*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1025.

*West Virginia*. — *St. Lawrence Boom, etc., Co. v. Holt*, 51 W. Va. 352.

**1081.** 2. Effect of Finding Jurisdictional Facts — *United States*. — *W. B. Conkey Co. v. Russell*, 111 Fed. Rep. 417.

*California*. — *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207; *McKibbin v. McKibbin*, 139 Cal. 448.

*Illinois*. — *Figge v. Rowlen*, 185 Ill. 234; *Frothingham v. Petty*, 197 Ill. 418; *Bermudez Asphalt Paving Co. v. Gibson*, 106 Ill. App. 6.

*Indiana*. — *Bruce v. Osgood*, 154 Ind. 375.

*Oklahoma*. — *Crist v. Crosby*, 11 Okla. 635.

*Oregon*. — *George v. Nowlan*, 38 Oregon 537.

*Texas*. — *Cooper v. Mayfield*, (Tex. Civ. App. 1900) 57 S. W. Rep. 48; *Moor v. Moor*, (Tex. Civ. App. 1901) 63 S. W. Rep. 347; *Burns v. Barker*, 31 Tex. Civ. App. 82.

*Washington*. — *Peyton v. Peyton*, 28 Wash. 278.

**Recital Presumptive Proof Only.** — Under Code Civ. Pro. N. Y., § 2473, "the fact that the parties were duly cited is presumptively proved by a recital to that effect in the decree." *Mott v. Ft. Edward Water Works Co.*, 79 N. Y. App. Div. 179.



**1082.** See note 2.

*b. COURTS OF SPECIAL OR INFERIOR JURISDICTION — (1) No Presumption of Jurisdiction.* — See note 4.

**1084.** See note 1.

(2) *What Are Courts of Special or Inferior Jurisdiction.* — See note 3.

*Justices' Courts.* — See note 4.

*Courts of Probate.* — See note 5.

**1085.** (3) *Recital of Jurisdictional Facts — (a) Jurisdiction Dependent on Collateral Matters.* — See note 1.

(b) *Jurisdiction Involving Gist of Proceeding.* — See notes 2, 3.

**1082. 2. Finding Contradicted by Record.** — *Figge v. Rowlen*, 185 Ill. 234; *Sibley v. Miller*, 3 Indian Ter. 688; *Feurt v. Caster*, 174 Mo. 289; *Holmes v. Columbia Nat. Bank*, (Neb. 1903) 97 N. W. Rep. 26.

**4. No Presumption in Favor of Jurisdiction of Inferior Courts — United States.** — *McClaghry v. Deming*, 186 U. S. 49.

*Alabama.* — *Chamblee v. Cole*, 128 Ala. 649.

*Alaska.* — *Hackleman v. Geise*, 1 Alaska 568.

*Illinois.* — *Glos v. Woodard*, 202 Ill. 480;

*Garrett v. Murphy*, 102 Ill. App. 65.

*Indiana.* — *Davis v. Bickel*, 25 Ind. App. 378.

*Kentucky.* — *Taylor v. Moore*, 112 Ky. 330.

*Michigan.* — *Purdy v. Law*, 132 Mich. 622.

*Missouri.* — *Warden v. Missouri, etc.*, R. Co., 78 Mo. App. 664; *Vickery v. Omaha, etc.*, R. Co., 93 Mo. App. 1.

*New York.* — *Matter of Baker*, 173 N. Y. 249; *Tyroler v. Gummersbach*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 151; *Perlus v. Spiess*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 761; *Wolf v. Ritt*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 769; *Bang v. McAvoy*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 768; *White v. Holding*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 762;

*Price v. Eisen*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 769; *Currier v. Roseff*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 767; *Wilson v. Hogan*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 763; *Bristor v. Flaherty*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 111; *Steiner v. Block*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 779; *Rosenberg v. McMichael*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 780; *Rankin v. Ginsberg*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 801; *Hitt v. Simon*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 803; *Duncan v. Conforti*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 799; *Sophian v. Henig*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 759; *Howell v. Wright Dairy Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 755; *Giallorenzi v. Caggiano*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 785; *Janos v. Samstag*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 790; *Meuthen v. Eyelis*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 792; *Consolidated Copalquin Mines Co. v. Broadway Realty Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 783; *Rose v. Brady*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 791; *Matter of Norton*, (Surrogate Ct.) 32 Misc. (N. Y.) 224; *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 264.

*North Dakota.* — *Phelps v. McCollam*, 10 N. Dak. 536, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082.

*Pennsylvania.* — *Leighton v. Smith*, 9 Pa. Dist. 428.

*Texas.* — *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247.

*West Virginia.* — *Yates v. Taylor County Ct.*, 47 W. Va. 376.

*Canada.* — *Rex v. Finlay*, 13 Manitoba 383; *Jack v. Bonnell*, 35 N. Bruns. 323.

**1084. 1. Limitation of Rule — Jurisdiction of Person.** — *Matter of Sutor*, 143 Cal. 487, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; *Davis v. Bickel*, 25 Ind. App. 378; *McDougle v. Filmer*, 82 Miss. 200; *Matter of Baker*, 173 N. Y. 249, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 (1084). See also *Rhyne v. Manchester Assur. Co.*, 14 Okla. 555.

**3. Quasi-judicial Bodies.** — *Helms v. Bell*, 155 Ind. 502; *Matter of Hayes*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 264, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084.

**4. Justices' Courts Held Courts of Inferior Jurisdiction.** — *Davis v. Bickel*, 25 Ind. App. 378; *Phelps v. McCollam*, 10 N. Dak. 536; *Rhyne v. Manchester Assur. Co.*, 14 Okla. 555.

**Rule Contra in Texas.** — *Smith v. Ridley*, 30 Tex. Civ. App. 158; *Burns v. Barker*, 31 Tex. Civ. App. 82; *Warren v. Foust*, 36 Tex. Civ. App. 59.

**5. Courts of Probate Sometimes Held Courts of Inferior Jurisdiction.** — *Chamblee v. Cole*, 128 Ala. 649; *Snow v. Russell*, 93 Me. 362; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649 (declaring the law as established in *Connecticut*). See also *Providence County Sav. Bank v. Hughes*, 26 R. I. 73, 106 Am. St. Rep. 682.

**1085. 1. Recital of Jurisdictional Facts Not Involving Merits.** — *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

**2. Jurisdictional Facts Involving Merits.** — *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

**3. Findings Contradicted by Record.** — *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, dictation. — *Garrett v. Murphy*, 102 Ill. App. 65; quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1085.

# JURY AND JURY TRIAL.

By A. W. VARIAN.

**1095. I. NATURE AND CLASSIFICATION OF JURIES.** — See note 1.

**1097. II. RIGHT TO JURY TRIAL.** — See note 1.

**III. WAIVER AND LOSS OF RIGHT TO JURY TRIAL** — 1. Power to

Waive Trial by Jury — *a. CIVIL CASES.* — See note 2.

*b. CRIMINAL PROCEEDINGS.* — See notes 3, 4.

**1098.** See note 1.

Different Degrees of Crime. — See notes 2, 3, 4.

**2. Power to Waive Legal Number of Jurors** — *a. CIVIL CASES.* —

See note 6.

*b. CRIMINAL PROCEEDINGS.* — See notes 8, 9.

**1099.** See note 1.

**3. Mode of Waiver** — *a. IN GENERAL.* — See note 2.

Statutory Provisions. — See notes 4, 5.

**1095. 1. Definition of Jury.** — *State v. Stentz*, 30 Wash. 134, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095.

"Jury" Means Twelve Men. — *Capital Traction Co. v. Hof*, 174 U. S. 1; *State v. Mott*, 29 Mont. 292; *Lovings v. Norfolk*, etc., R. Co., 47 W. Va. 582. See also *Florida Fertilizer*, etc., Co. v. *Boswell*, 45 Fla. 301; *Dennet v. McCoy*, (Indian Ter. 1902) 69 S. W. Rep. 860.

**1097. 1. In Ontario**, by statute, the plaintiff in an action against a municipality for injuries occasioned by a breach of duty owed by the latter to the former is entitled to a jury trial if the injuries were due to an act of misfeasance, but not if they were caused by the non-repair of a highway. *Clemens v. Berlin*, 7 Ont. L. Rep. 33; *Kirk v. Toronto*, 7 Ont. L. Rep. 36.

**2. Waiver in Civil Proceedings** — *Illinois.* — *Brewster v. People*, 183 Ill. 143.

*Minnesota.* — *Poppitz v. German Ins. Co.*, 85 Minn. 118.

*Missouri.* — *Monett Bank v. Howell*, 79 Mo. App. 318.

*New Jersey.* — *Condon v. Royce*, 68 N. J. L. 222.

*Washington.* — *State v. Neterer*, 33 Wash. 535, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1097.

*West Virginia.* — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

**So in Condemnation Proceedings.** — *Wabash R. Co. v. Coon Run Drainage*, etc., Dist., 194 Ill. 310.

**Bastardy Proceedings** are civil proceedings, and a trial by jury may be waived in such cases. *Kanorowski v. People*, 113 Ill. App. 468.

**3. No Right of Waiver.** — *Thompson v. Utah*, 170 U. S. 343; *Brewster v. People*, 183 Ill. 143; *State v. Simons*, 61 Kan. 752; *Michaelson v. Beemer*, (Neb. 1904) 101 N. W. Rep. 1007.

**Contrary Decisions.** — *Lovilia v. Cobb*, 126 Iowa 557. See also *Schick v. U. S.*, 195 U. S. 65.

**4. Absence of Statute.** — *Brewster v. People*, 183 Ill. 143; *Paulsen v. People*, 195 Ill. 507.

**1098. 1. Statute Authorizing Waiver.** — *Brewster v. People*, 183 Ill. 143; *State v. Wells*, 69 Kan. 792.

**2. Felonies and Misdemeanors** — *Georgia.* — *Hollis v. State*, 118 Ga. 760.

*Illinois.* — *Brewster v. People*, 183 Ill. 143; *Hamel v. People*, 97 Ill. App. 527; *Dallman v. People*, 113 Ill. App. 507.

*Kansas.* — *State v. Wells*, 69 Kan. 792.

*Louisiana.* — *State v. Thompson*, 104 La. 167.

*Ohio.* — *Evans v. State*, 23 Ohio Cir. Ct. 103.

See also *Hillier v. State*, 26 Ohio Cir. Ct. 777.

*Oklahoma.* — *Queenan v. Territory*, 11 Okla. 261.

**Indictable Offenses** must be tried by jury in *Illinois.* *Paulsen v. People*, 195 Ill. 507.

**3. Michaelson v. Beemer**, (Neb. 1904) 101 N. W. Rep. 1007.

**4. Minor Offenses.** — *Evans v. State*, 23 Ohio Cir. Ct. 103. See also *Schick v. U. S.*, 195 U. S. 65.

In *Louisiana* the accused cannot waive a trial by jury if the crime is one necessarily punishable at hard labor. *State v. Jackson*, 106 La. 189; *State v. Thompson*, 104 La. 167. See also *State v. Ned*, 105 La. 696.

**6. Waiver of Legal Number.** — *Hall v. Hall*, 131 N. Car. 187, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1098.

**8. Waiver as to Number in Criminal Proceedings.** — *People v. Lane*, 124 Mich. 271.

**9. No Power of Waiver.** — *Thompson v. Utah*, 170 U. S. 343; *State v. Ned*, 105 La. 696; *State v. Ellis*, 22 Wash. 129.

**1099. 1. Felonies and Misdemeanors.** — *State v. Wells*, 69 Kan. 792; *State v. Simons*, 61 Kan. 752; *Queenan v. Territory*, 11 Okla. 261.

**2. Presumption Against Waiver.** — *Wittenberg v. Onsgard*, 78 Minn. 342; *Poppitz v. German Ins. Co.*, 85 Minn. 118; *Allworth v. Interstate Consol. R. Co.*, (R. I. 1905) 60 Atl. Rep. 834.

**4. Statutory Modes of Waiver Exclusive.** — *Brewster v. People*, 183 Ill. 143; *Chessman v. Hale*, 31 Mont. 577; *Griffith v. Cromley*, 58 S.

- 1100.** *c.* NONAPPEARANCE AT TRIAL. — See notes 6, 9.  
*d.* CONSENT IN CIVIL CASES — (1) *In General*. — See note 11.
- 1101.** See note 2.  
 Oral Agreement in Open Court. — See note 4.  
 Entry of Record. — See note 5.
- 1102.** *e.* REFERENCE OF CAUSE. — See notes 3, 4.  
*f.* LEGAL AND EQUITABLE ISSUES AND PROCEEDINGS. — See notes 5, 6, 7.
- 1103.** Agreeing to Trial in Equity. — See notes 4, 5.  
*g.* REQUESTING DIRECTION OF VERDICT. — See note 6.
- 1104.** *i.* FAILURE TO DEMAND JURY — (1) *In General*. — See notes 1, 2, 3.
- 1105.** (2) *Sufficiency of Demand*. — See notes 1, 2.
- 1106.** (3) *Time of Demand*. — See notes 3, 5.

Car. 448; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1099.

**1099.** 5. *Contrary Decisions*. — *Pottitz v. German Ins. Co.*, 85 Minn. 118; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440.

**1100.** 6. *Failure to Appear at Trial*. — *Cerussite Min. Co. v. Anderson*, 19 Colo. App. 307; *Frank v. Bauer*, 19 Colo. App. 445; *Chessman v. Hale*, 31 Mont. 577; *Griffith v. Cromley*, 58 S. Car. 448; *State v. Neterer*, 33 Wash. 535.

9. *Previous Demand and Payment for Jury*. — *Fitzgerald v. Wygal*, 24 Tex. Civ. App. 372.

11. *Consent in Civil Cases*. — *Brewster v. People*, 183 Ill. 143; *Chessman v. Hale*, 31 Mont. 577; *Kerr v. Hicks*, 129 N. Car. 141; *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425; *Pinckney v. Green*, 67 S. Car. 309; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

**1101.** 2. *Stipulation in Writing*. — *Chessman v. Hale*, 31 Mont. 577; *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576; *Hahn v. Brinson*, 133 N. Car. 7; *State v. Neterer*, 33 Wash. 535.

4. *Oral Agreement in Open Court*. — *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.

5. *Entry of Record*. — *Chessman v. Hale*, 31 Mont. 577; *Hahn v. Brinson*, 133 N. Car. 7; *State v. Neterer*, 33 Wash. 535; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

**1102.** 3. *Consent to Reference*. — *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 N. Y. App. Div. 88; *Griffith v. Cromley*, 58 S. Car. 448, holding by a divided court that consent to a reference to a master to take and report testimony constituted a waiver of a jury; *Williams v. Weeks*, 70 S. Car. 1.

4. *Failure to Object to Reference*. — *Kerr v. Hicks*, 129 N. Car. 141.

5. *Joinder of Legal and Equitable Causes of Action*. — *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.

6. *Effect of Bringing Equitable Action*. — *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.

7. *Interposing a Counterclaim* to an equitable action does not waive the right to have the issues thereby raised tried by a jury. *Herb v. Metropolitan Hospital, etc.*, 80 N. Y. App. Div. 145.

**1103.** 4. *Failure to Object*. — *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 488.

5. *Both Legal and Equitable Issues Involved*. — *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440.

6. *Request for Direction of Verdict*. — *Poppitz v. German Ins. Co.*, 85 Minn. 118; *Bernheimer v. Adams*, 70 N. Y. App. Div. 114, *affirmed* 175 N. Y. 472; *Winter v. Williamsburgh Sav. Bank*, 68 N. Y. App. Div. 193; *Westervelt v. Phelps*, 171 N. Y. 212; *Sigua Iron Co. v. Brown*, 171 N. Y. 488.

**1104.** 1. *Failure to Demand Jury* — *Alabama*. — *Moore v. Crosthwait*, 135 Ala. 272.

*Georgia*. — *Miller v. Georgia R. Bank*, 120 Ga. 17; *Heard v. Kennedy*, 116 Ga. 36; *Waterman v. Glisson*, 115 Ga. 773.

*Maine*. — *Davis v. Auld*, 96 Me. 559.

*Michigan*. — *In re Cox*, 129 Mich. 635.

*Nebraska*. — *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440; *Horton v. Simon*, (Neb. 1903) 97 N. W. Rep. 604.

*New Jersey*. — *Condon v. Royce*, 68 N. J. L. 222.

*New York*. — *People v. Halwig*, (County Ct.) 41 Misc. (N. Y.) 227; *Steuerwald v. Gill*, 85 N. Y. App. Div. 605; *Hawkins v. Mapes-Reeve Constr. Co.*, 82 N. Y. App. Div. 72, *affirmed* 178 N. Y. 236.

*North Carolina*. — *Stancill v. Spain*, 133 N. Car. 76.

*Ohio*. — *Evans v. State*, 23 Ohio Cir. Ct. 103.

*Tennessee*. — *Taylor v. Sledge*, 108 Tenn. 719.

*Utah*. — *State v. Cherry*, 22 Utah 1.

*Wisconsin*. — *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 454.

2. *Validity of Statutes*. — *Lemon v. Ward*, 3 Ariz. 219; *McKay v. Fair Haven, etc.*, R. Co., 75 Conn. 608; *In re Cox*, 129 Mich. 635; *Condon v. Royce*, 68 N. J. L. 222.

3. *Regulation by Courts*. — *State v. Cherry*, 22 Utah 1.

**1105.** 1. *Sufficiency of Demand*. — *Goble v. Swobe*, 64 Neb. 838.

2. *Statutory Requirements to Be Followed*. — *McKay v. Fair Haven, etc.*, R. Co., 75 Conn. 608; *State v. Cherry*, 22 Utah 1.

**1106.** 3. *When Cause Is Set Down for Trial*. — *Waterman v. Randlett*, (Iowa 1000) 84 N. W. Rep. 680; *State v. Cherry*, 22 Utah 1.

*Before Call of Docket*. — *Heard v. Kennedy*, 116 Ga. 36.

**1106.** Demand After Beginning of Trial. — See notes 10, 11, 12.

**1107.** (4) *Withdrawal of Demand.* — See note 1.

*J. NONPAYMENT OF JURY FEES.* — See notes 3, 4.  
Subsequent Trial. — See note 10.

**1108.** The Record on Appeal. — See note 3.

4. Effect of Waiver — *b.* CHANGE OF ISSUES. — See note 6.

*c.* SUBSEQUENT TERM OR TRIAL. — See notes 10, 11.

*d.* DISREGARD OF WAIVER BY COURT. — See note 12.

**1109.** 5. Withdrawal of Waiver. — See notes 1, 2.

6. Presumption of Waiver on Appeal. — See notes 3, 5.

**1110.** VI. PROCURING ATTENDANCE OF MEMBERS OF PANEL. — See note 8.

**1111.** VII. CHALLENGES TO THE ARRAY — 1. General Considerations. —  
See note 1.

2. Grounds — *b.* IRREGULARITIES IN SELECTING LIST OR DRAWING PANEL. — See note 10.

On Calling of Docket. — *Lemon v. Ward*, 3 Ariz. 219.

One Clear Day Previous to Trial. — By statute in *New Brunswick* an application for a jury must be made one clear day previous to the trial; and a demand made after a trial has been commenced, and adjourned at the request of the defendant before any substantial progress has been made, is too late. *Temperance, etc., L. Assur. Co. v. Ingraham*, 35 N. Bruns. 558.

**1106.** 5. Within Fixed Time After Joinder of Issue. — *McKay v. Fair Haven, etc., R. Co.*, 75 Conn. 608.

When Issue Is Joined. — *Hartmann v. Hoffman*, 65 N. Y. App. Div. 443, modified 76 N. Y. App. Div. 449.

10. When Allowed After Commencement of Trial. — The defendant in an equitable action may demand a jury to assess the damages after the commencement of the trial, where the court permits a recovery of damages beyond those properly presented by the issues in the proceeding. *Ackerman v. True*, 56 N. Y. App. Div. 54.

11. Inquiry into Merits. — *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.

12. After Testimony Is Taken. — *Whitcomb v. Stringer*, 160 Ind. 82; *Terry v. State*, 12 Ohio Cir. Dec. 274, 22 Ohio Cir. Ct. 16.

**1107.** 1. Withdrawal of Demand. — *Sherwood v. New York Telephone Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 102; *Taylor v. Sledge*, 108 Tenn. 719. But see *Moore v. Crosthwait*, 135 Ala. 272.

3. Payment of Jury Fees. — *Delaney v. Police Ct.*, 167 Mo. 667; *Story v. Walker*, 71 N. J. L. 256, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1107; *Condon v. Royce*, 68 N. J. L. 222; *Pinckney v. Green*, 67 S. Car. 309, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1107; *State v. Neterer*, 33 Wash. 535, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1107.

4. Rule of Court. — *Naphtaly v. Rovegno*, 130 Cal. 639. *Contra*, *Randall v. Kelsey*, 7 Idaho 168.

As to the Power of a Justice. — *Story v. Walker*, 71 N. J. L. 256.

In the Absence of Statute the court cannot require payment of jury fees as a condition to a trial by jury. *Pinckney v. Green*, 67 S. Car. 309.

10. Subsequent Trial. — See *Lemon v. Ward*, 3 Ariz. 219.

**1108.** 3. *Naphtaly v. Rovegno*, 130 Cal. 639.

6. Change of Issues. — *Osgood v. Skinner*, 186 Ill. 491; *Reese v. Baum*, 83 N. Y. App. Div. 550; *Levy v. Roossin*, 93 N. Y. App. Div. 387.

10. In *New York* a waiver of a jury cannot be retracted, but remains good during the life of the litigation. *Tracy v. Falvey*, 102 N. Y. App. Div. 585.

11. Subsequent Trial. — *Guyer v. Caldwell*, 98 Ill. App. 232; *Osgood v. Skinner*, 186 Ill. 491; *Wittenberg v. Onsgard*, 78 Minn. 342; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440; *Freifeld v. Sire*, 13 N. Y. Annot. Cas. 359. See also *Wittenberg v. Onsgard*, 78 Minn. 342.

In Appellate Court. — A right to a trial by jury in an appellate court upon a trial *de novo* is not lost by the fact that a jury trial was waived in the court of first instance. *Dennet v. McCoy*, (Indian Ter. 1902) 69 S. W. Rep. 860.

12. Disregard of Waiver. — *Knapp v. Order of Pendo*, 36 Wash. 601. See also *Wood v. Rio Grande Western R. Co.*, 28 Utah 351.

**1109.** 1. Withdrawal of Waiver. — *Camp v. Carroll*, 73 Conn. 247; *Osgood v. Skinner*, 186 Ill. 491; *Wittenberg v. Onsgard*, 78 Minn. 342. After the Testimony Is All In it is too late to withdraw the waiver. *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61.

2. No Right of Withdrawal. — *Tracy v. Falvey*, 102 N. Y. App. Div. 585.

3. Statutory Requirement. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1109.

5. Absence of Objection Below. — *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360, 19 Ohio Cir. Ct. 425.

**1110.** 8. Procuring Attendance of Jurors. — *Com. v. Haines*, 27 Pa. Co. Ct. 81, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1110.

**1111.** 1. Challenge to Array. — *Thompson v. State*, 109 Ga. 272.

10. Irregularities in Selecting List or Drawing Panel — *California*. — *People v. Enwright*, 134 Cal. 527.

*Kansas*. — *State v. Edwards*, 64 Kan. 455.

*Louisiana*. — *State v. Love*, 106 La. 658. See also *State v. Kellogg*, 104 La. 580.

*New York*. — *People v. Schmidt*, 168 N. Y. 568.

**1112.** *c.* BIAS OR MISCONDUCT OF SUMMONING OFFICER. — See notes 1, 5.

*e.* EXCLUSIVE STATUTORY GROUNDS. — See note 7.

**1113.** *f.* EXCUSING JURORS. — See note 1.

*g.* CAUSE AFFECTING PART OF PANEL. — See notes 3, 4.

**3.** Waiver of Right of Challenge. — See notes 5, 9.

**1114.** See notes 2, 4.

**1115.** VIII. FORMATION OF TRIAL JURY — 2. Challenges and Exclusion for Cause — *a.* RIGHT AND POWER IN GENERAL. — See notes 5, 7.

Principal Challenges and Challenges to Favor. — See notes 8, 9.

Mode of Trial of Challenges. — See note 10.

**1116.** *b.* CAUSES OF GENERAL CHARACTER — (2) *Disqualification by Reason of Age.* — See notes 7, 9.

**1117.** (3) *Physical Incapacity.* — See note 1.

(4) *Mental Defects.* — See notes 5, 6, 7.

(5) *Ignorance of English Language.* — See note 12.

(6) *Lack of Education.* — See note 15.

*Texas.* — Ray *v.* State, 46 Tex. Crim. 176; White *v.* State, 45 Tex. Crim. 597; Brown *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 812.

*Virginia.* — Jones *v.* Com., 100 Va. 842.

*The Misnomer of Veniremen.* — Longmire *v.* State, 130 Ala. 66; Kimbrell *v.* State, 130 Ala. 40; Beard *v.* State, 41 Tex. Crim. 173.

In Oregon a challenge to the panel has been abolished by statute. State *v.* Savage, 36 Oregon 191.

**1112.** 1. *Partiality or Irregular Action of Summoning Officer.* — People *v.* Oliveria, 127 Cal. 376; Thompson *v.* State, 109 Ga. 272. See also State *v.* Savage, 36 Oregon 191. Compare Whipple *v.* Preece, 24 Utah 364.

**5.** *Persons Not Summoned.* — Watkins *v.* State, 133 Ala. 88; Caddell *v.* State, 129 Ala. 57; Davis *v.* State, 126 Ala. 44; Collins *v.* State, 137 Ala. 50; Stewart *v.* State, 137 Ala. 33; Thomas *v.* State, 124 Ala. 48; State *v.* Barker, 68 N. J. L. 19; State *v.* Woods, 66 N. J. L. 458; Com. *v.* Payne, 205 Pa. St. 101; Beard *v.* State, 41 Tex. Crim. 173. See also Taylor *v.* State, (Miss. 1901) 30 So. Rep. 657.

*Summoning the Wrong Party Through Mistake* is not ground for quashing the venire. Gregory *v.* State, 140 Ala. 16.

**7.** *Exclusive Statutory Grounds.* — State *v.* Kellogg, 104 La. 580. But see Texas, etc., R. Co. *v.* Pullen, 33 Tex. Civ. App. 143.

**1113.** 1. *Excusing Juror.* — Thomas *v.* State, 124 Ala. 48; Com. *v.* Payne, 205 Pa. St. 101.

**3.** *Causes Affecting Part of Panel.* — Teal *v.* State, 119 Ga. 102; Thompson *v.* State, 109 Ga. 272; Humphries *v.* State, 100 Ga. 260; Nixon *v.* State, 121 Ga. 144; Taylor *v.* State, 121 Ga. 348; State *v.* Barker, 68 N. J. L. 19; State *v.* Beetsa, 71 N. J. L. 322.

**4.** *Same Cause Affecting Individual Members.* — Thompson *v.* State, 109 Ga. 272; Young *v.* State, 90 Md. 579.

**5.** *Statutory Time for Challenging Array.* — See People *v.* Oliveria, 127 Cal. 376; Com. *v.* Cressinger, 193 Pa. St. 326.

**9.** *Challenge to Array Before Challenge to Polls.* — State *v.* Everson, 63 Kan. 66.

**1114.** 2. *Challenge Before Swearing.* —

Longmire *v.* State, 130 Ala. 66; St. Louis, etc., R. Co. *v.* Union Trust, etc., Bank, 209 Ill. 459.

**4.** *Objection After Verdict.* — Birdsong *v.* State, 120 Ga. 850; Cochran *v.* State, 113 Ga. 736.

**1115.** 5. *Right to Challenge for Cause.* — Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310.

**7.** *Legislature Cannot Impair Right.* — Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310.

**8.** *Principal Challenge and Challenges to the Favor.* — Turner *v.* State, 114 Ga. 421; East St. Louis Electric R. Co. *v.* Snow, 88 Ill. App. 660; O'Fallon Coal, etc., Co. *v.* Laquet, 89 Ill. App. 13, affirmed 198 Ill. 125; O'Donnell *v.* Weiler, (N. J. 1905) 59 Atl. Rep. 1055.

**9.** See Turner *v.* State, 114 Ga. 421; O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125.

**10.** *Mode of Trial of Challenges.* — Turner *v.* State, 114 Ga. 421; East St. Louis Electric R. Co. *v.* Snow, 88 Ill. App. 660; O'Fallon Coal Co. *v.* Laquet, 89 Ill. App. 13, affirmed 198 Ill. 125; State *v.* Vick, 132 N. Car. 995.

**1116.** 7. *Juror Must Be of Full Age.* — Russell *v.* State, 62 Neb. 512.

**9.** Bullock *v.* State, 65 N. J. L. 557, 86 Am. St. Rep. 668; State *v.* Beetsa, 71 N. J. L. 322.

*Time to Which Statute Relates.* — It is sufficient if the juror is of the proper age at the time when the jury is impeached. Funk *v.* U. S., 16 App. Cas. (D. C.) 478.

**1117.** 1. *Defective Hearing.* — See Cameron *v.* Ottawa Electric R. Co., 32 Ont. 24.

**5.** *Mental Defects.* — See State *v.* Hatfield, 48 W. Va. 561.

**6.** Burik *v.* Dundee Woolen Co., 66 N. J. L. 420.

*Time of Existence.* — The defect should be shown to exist at the time of the trial. Gott *v.* People, 187 Ill. 249.

**7.** *Knowledge of Law.* — "The law does not contemplate that a juror should be learned in the law." San Antonio, etc., R. Co. *v.* Belt, 24 Tex. Civ. App. 281.

**12.** Clark *v.* U. S., 19 App. Cas. (D. C.) 295; Parman *v.* Kansas City, 105 Mo. App. 691.

**15.** *Lack of Education.* — State *v.* Stockman, 9 Kan. App. 422.

- 1118.** See note 1.  
 (7) *Criminality or Immorality*. — See notes 6, 7.
- 1119.** (10) *Lack of Household Qualification*. — See note 18.
- 1120.** (11) *Nonpayment of Taxes*. — See note 1.  
 Name on Assessment Roll. — See note 3.
- 1121.** (13) *Disqualification by Nonresidence*. — See note 6.  
 Citizenship and Residence in State. — See notes 10, 11.
- 1122.** (14) *Occupancy of Public Office*. — See notes 2, 3, 6, 7.  
 (15) *Previous Service as Juror*. — See notes 12, 14, 15.
- 1123.** Place and Time of Previous Service. — See note 5.  
 Actual Service. — See note 8.  
 (16) *Party to Pending Suit*. — See note 13.  
 In North Carolina. — See note 16.
- 1124.** c. CAUSES PECULIAR TO PARTICULAR CASE — (1) *Prejudice as Regards Parties or Persons Interested in Case* — (a) *Relationship* — aa. GENERAL RULE OF EXCLUSION. — See notes 5, 6, 9, 10, 11, 13.
- 1125.** bb. RELATIONSHIP BY MARRIAGE. — See notes 2, 3, 4, 6.
- 1118.** 1. Statutory Provisions. — King v. State, (Tex. Crim. 1901) 64 S. W. Rep. 245.
- 6.** Conviction or Accusation of Crime. — Charles-ton v. State, 133 Ala. 118; Com v. Wong Chung, 186 Mass. 231; Queenan v. Territory, 11 Okla. 261.
- A Record of Thirty-six Prosecutions, most of which resulted in conviction, was held to show that a juror was not of good moral character, and sufficient to authorize a new trial. Manning v. Boston El. R. Co., 187 Mass. 496.
- 7.** Desertion from the Army is a ground for challenge in Massachusetts, but a legal adjudication of guilt is first essential in order to disqualify. Com. v. Wong Chung, 186 Mass. 231.
- 1119.** 18. Head of Family. — McArthur v. State, 41 Tex. Crim. 635.
- 1120.** 1. Bankruptcy of a juror at the time of trial, he thereby ceasing to be a taxpayer, does not authorize the granting of a new trial. Gückian v. Newbold, 23 R. I. 553, 594.
- Poll Tax. — In Texas, where it is not possible to obtain the requisite qualified jurors who have paid their poll tax the court may dispense with that qualification, but the possibility of obtaining them is a question of fact in each case. Taylor v. State, (Tex. Crim. 1904) 81 S. W. Rep. 933.
- 3.** Name on Assessment Roll. — State v. Arnstein, 9 Kan. App. 697.
- 1121.** 6. Challenge to Individual Jurors. — Jackson v. State, 131 Ala. 21. See also People v. McFarlane, 138 Cal. 481.
- 10.** Statutory Provisions as to Length of Residence. — See Russell v. State, 62 Neb. 512.
- 11.** Persons Leaving State. — Hughes v. State, 109 Wis. 397.
- 1122.** 2. State v. Carter, 106 La. 407; State v. Lewis, 31 Wash. 75.
- 8.** Statutory Disqualification. — Terrell v. State, 69 Ark. 449.
- 6.** Deputy of Prosecuting Attorney. — See State v. Lewis, 31 Wash. 75, holding that a justice of the peace was not absolutely disqualified because subject to the occasional advice of the prosecuting attorney.
- 7.** Sheriff's Employee. — See State v. Carter, 106 La. 407 (constable); State v. Forbes, 111 La. 473 (deputy sheriff).
- 12.** Previous Service as Juror. — Jordan v. State, 119 Ga. 443; McFarlin v. State, 121 Ga. 329; Kansas City v. Kirkham, 9 Kan. App. 236; Coil v. State, 62 Neb. 15; Randolph v. State, 65 Neb. 520; Figg v. Donahoo, (Neb. 1903) 95 N. W. Rep. 1020; Knights of Pythias v. Steele, 107 Tenn. 1.
- Previous Service as Juror at Former Trial of Same Cause. — See Dunsmuir v. Lowenberg, 34 Can. Sup. Ct. 228.
- 14.** Statute Applicable to Talesmen. — Figg v. Donahoo, (Neb. 1903) 95 N. W. Rep. 1020; Coil v. State, 62 Neb. 15.
- 15.** See Hughes v. State, 109 Wis. 397.
- 1123.** 5. Previous Service at Same Term. — See Michigan City v. Phillips, 163 Ind. 449.
- 8.** Actual Service Necessary. — Randolph v. State, 65 Neb. 520.
- 13.** Actual Trial Unnecessary. — Chicago, etc., R. Co. v. Downey, 85 Ill. App. 175.
- 16.** State v. Spivey, 132 N. Car. 989.
- 1124.** 5. Relationship. — Roberts v. Roberts, 115 Ga. 261, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1124.
- 6.** Thomas v. State, 133 Ala. 139; Danzey v. State, 126 Ala. 15; Mono County v. Flanigan, 130 Cal. 105; Texas, etc., R. Co. v. Elliott, 22 Tex. Civ. App. 31.
- 9.** Roberts v. Roberts, 115 Ga. 261, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1124.
- 10.** Statutory Provision. — Mono County v. Flanigan, 130 Cal. 105; Bradt v. Peck, 81 N. Y. App. Div. 295; Texas, etc., R. Co. v. Elliott, 22 Tex. Civ. App. 31.
- 11.** South Carolina Rule. — State v. Brock, 61 S. Car. 141.
- 13.** Objection by Related Party. — Downing v. State, 114 Ga. 30.
- 1125.** 2. Statutory Provisions. — Thomas v. State, 133 Ala. 139; Danzey v. State, 126 Ala. 15. See also Mono County v. Flanigan, 130 Cal. 105.
- 3.** Marriage of Kinsmen Insufficient. — Danzey v. State, 126 Ala. 15; North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125; Baldwin v. State, 120 Ga. 188; Smith v. Smith, 119 Ga. 239,

- 1125.** Termination of Disqualification. — See note 7.  
*cc.* RELATIONSHIP TO PERSON INTERESTED BUT NOT PARTY. — See note 9.
- 1126.** In Criminal Cases. — See note 5.  
*dd.* RELATIONSHIP TO COUNSEL. — See note 9.
- 1127.** See note 1.  
 (b) Business Relations in General. — See note 5.
- 1128.** (d) Relation of Landlord and Tenant. — See note 2.  
 (e) Friendship or Hostility to Party. — See notes 8, 9, 10.  
 (f) Sympathy with Party. — See note 11.
- 1129.** (h) Prejudice as to Party's Business. — See note 1.
- 1130.** (j) Bias For or Against Counsel. — See note 1.  
 Relation of Attorney and Client — See notes 6, 7.
- 1131.** (1) Race Prejudice. — See note 5.  
 (2) Interest and Prejudice as Regards Matters Involved — (a) Direct Pecuniary Interest. — See note 17.
- 1132.** (b) Membership in Corporate Party or Association. — See note 13.
- 1133.** (c) Residence in Municipality Interested in Suit. — See notes 2, 4, 6, 7.
- 1125.** 4. Discretion of Court. — North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125.  
 6. See Mono County v. Flanigan, 130 Cal. 105.  
 7. Death of Consort Without Issue. — Stringfellow v. State, 42 Tex. Crim. 588, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125.  
 9. Relationship to Party in Interest. — Mono County v. Flanigan, 130 Cal. 105; Roberts v. Roberts, 115 Ga. 261, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125; Texas, etc., R. Co. v. Elliott, 22 Tex. Civ. App. 31.  
 Relationship to One Indicted for the Same Offense is sufficient to disqualify. Thomas v. State, 133 Ala. 139.
- 1126.** 5. Relative of Prosecutor. — Compare Atkinson v. State, 112 Ga. 411.
- 9.** Relationship to Counsel. — Roberts v. Roberts, 115 Ga. 261, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1126; Kelso v. Kuehl, 116 Wis. 495.
- 1127.** 1. To Prosecuting Attorney. — Stringfellow v. State, 42 Tex. Crim. 588. But see State v. Brock, 61 S. Car. 141.
- 5.** Family Physician. — That one of the parties is the family physician of one called as a juror is no ground for rejecting him. Chesapeake, etc., R. Co. v. Smith, 103 Va. 326.
- 1128.** 2. Juror Tenant of Party. — Compare Arnold v. Producers' Fruit Co., 141 Cal. 738.
- 8.** Friendship to Party. — Decker v. Laws, (Ark. 1905) 85 S. W. Rep. 425; Chesapeake, etc., R. Co. v. Smith, 103 Va. 326. Compare Cameron v. Ottawa Electric R. Co., 32 Ont. 24.
- 9.** Friendship of Families. — One who states on his *voir dire* that his friendship for the brother of the defendant would influence him in reaching a conclusion is properly excluded on the challenge of the state. State v. Faulkner, 185 Mo. 673. See also Texas Cent. R. Co. v. Blanton, 36 Tex. Civ. App. 307.
- 10.** Hostility to Party. — Billmeyer v. St. Louis Transit Co., 108 Mo. App. 6.  
 Bias For or Against Trade Unions is a basis for a challenge for cause in a case arising out of the enforcement of the rules of such a union.
- Gatzow v. Buening, 106 Wis. 1, 80 Am. St. Rep. 17.
- 11.** Sympathy with Party. — Compare Davey v. Janesville, 111 Wis. 628.
- 1129.** 1. Prejudice Against Particular Business. — Smith v. State, 24 Ind. App. 688.
- 1130.** 1. Bias Towards Counsel. — State v. Boyce, 24 Wash. 514.  
 Good Opinion of Counsel. — Tolles v. Meyers, 65 Neb. 704.
- 6.** Relation of Attorney and Client. — Similar statutes are in force in Indian Territory, Brown v. McNair, (Indian Ter. 1904) 82 S. W. Rep. 677; and in Washington, State v. Boyce, 24 Wash. 514.  
 The Washington statute making the relationship of attorney and client between a juror and one of the parties a ground for challenge has been construed as not disqualifying a juror who was a client of the attorney of one of the parties. McCorkle v. Mallory, 30 Wash. 632. But under a very similar statute the contrary was held in Idaho. State v. McGraw, 6 Idaho 635.
- 7.** State v. Carter, 121 Iowa 135. But see Hall v. Graziana, (Ky. 1903) 74 S. W. Rep. 670.
- 1131.** 5. Prejudice Against Race. — Where a juror states on his *voir dire* that he would not and could not give to a negro an impartial trial for killing a white man, but that he could do so where a negro killed another negro, it is not improper to retain such juror where a negro is being tried for the killing of another negro. State v. Mayfield, 104 La. 173.
- 17.** Pecuniary Interest. — A deputy sheriff is not competent to serve as a juror where the sheriff's fees are dependent on a conviction. Gaff v. State, 155 Ind. 277, 80 Am. St. Rep. 235.
- 1132.** 13. Corporation Interested in Suit. — Martin v. Farmers' Mut. F. Ins. Co., (Mich. 1905) 102 N. W. Rep. 656; State v. Thompson, 24 Utah 314.
- 1133.** 2. Members or Citizens of Municipality. — Davey v. Janesville, 111 Wis. 628.
- 4.** Resident Taxpayers. — Kansas City v. Kirkham, 9 Kan. App. 236.
- 6.** Resident Taxpayer Competent. — Detroit v. Detroit R. Co., 134 Mich. 11. See also Davey v. Janesville, 111 Wis. 628.

**1134.** Cases Where Rule of Exclusion Inapplicable. — See note 1.

(d) Prejudice Against Capital Punishment. — See note 9.

**1135.** See notes 1, 3.

**1136.** Character of Prejudice. — See note 1.

(e) Prejudice Against Circumstantial Evidence. — See notes 2, 4.

Even in Cases Not Punishable with Death. — See note 6.

(f) Membership in Society to Suppress Crime. — See notes 7, 9, 12.

**1137.** (g) Abstract Moral and Legal Opinions — *bb.* PREJUDICE AGAINST PARTICULAR CLASS OF ACTIONS. — See note 7.

**1138.** *dd.* LEGAL OPINION. — See note 1.

*ff.* AVERSION TO PLEA OF INSANITY. — See note 12.

**1139.** (h) Pecuniary Interest in Same or Similar Question. — See note 4.

(3) *Knowledge or Opinion as to Case* — (a) *Opinion as to Merits of Case* — *aa.* AS GROUND OF CHALLENGE AND EXCLUSION IN GENERAL. — See note 10.

**1140.** Opinion *Prima Facie* Cause for Disqualification. — See note 9.

*bb.* NATURE OF OPINION — (*aa.*) *General Considerations.* — See notes 10, 12, 13, 14, 15, 16.

**1141.** Light and Transient Impressions. — See notes 1, 2.

**1133. 7. Objection by Municipality.** — Compare *Kansas City v. Kirkham*, 9 Kan. App. 236.

**1134. 1. Benefit from Payment of Fine.** — A resident of a county is not disqualified to act as a juror in a suit where the defendant may be obligated to pay a fine which will inure to the county. *State v. Lynn*, 3 Penn. (Del.) 316.

**9. Prejudice Against Capital Punishment.** — *Funk v. U. S.*, 16 App. Cas. (D. C.) 478; *State v. Vick*, 132 N. Car. 995, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1134; *Martin v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 390; *State v. Shaw*, 73 Vt. 149.

**1135. 1. Statutory Provisions.** — *Thayer v. State*, 138 Ala. 39; *Brewer v. State*, 72 Ark. 145; *People v. Cebulla*, 137 Cal. 314; *Coppenhaver v. State*, 160 Ind. 540; *Hill v. State*, 42 Neb. 503; *Rhea v. State*, 63 Neb. 461; *Dinsmore v. State*, 61 Neb. 418.

**3. Accused Not Entitled to Object.** — *Villereal v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 715.

**1136. 1. Opposition to Policy.** — *Rhea v. State*, 63 Neb. 461.

**2. Objections to Circumstantial Evidence.** — *People v. Amaya*, 134 Cal. 531; *State v. Miller*, 156 Mo. 76; *Martin v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 390.

**4. Case Dependent Only on Direct Testimony.** — *People v. Amaya*, 134 Cal. 531.

**6. Cases Not Capital.** — See *Johnson v. State*, 44 Tex. Crim. 332.

**7. Membership in Society to Suppress Crime.** — *Guy v. State*, 96 Md. 692.

9. See *Guy v. State*, 96 Md. 692.

**12.** In *Missouri* a member of an organization, the object of which was to prosecute violations of the liquor laws, was held to be incompetent to sit as a juror in a prosecution for such violation. *State v. Fullerton*, 90 Mo. App. 411.

**1137. 7. Prejudice Against Particular Class of Actions.** — *Quill v. Southern Pac. R. Co.*, 140 Cal. 268. See also *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254.

**Prejudice Against Suits by Nonresidents** is a proper ground of challenge for cause. *Naylor v. Metropolitan St. R. Co.*, 66 Kan. 407.

**1138. 1. Opinion of Question of Law.** — *Johnson v. Park City*, 27 Utah 420.

**12. Aversion to Plea of Insanity.** — *People v. Sowell*, 145 Cal. 292; *Cannon v. State*, 41 Tex. Crim. 467.

A prejudice against a defense of insanity, where the insanity arises from causes not claimed to be involved in the case, is not ground for challenge. *Gammons v. State*, 85 Miss. 103.

**1139. 4. Dissimilar Claim Against Same Defendant.** — *San Antonio v. Diaz*, (Tex. Civ. App. 1901) 62 S. W. Rep. 549.

**10. Opinion Ground for Exclusion.** — *State v. Otto*, 61 Kan. 58; *State v. Giron*, 52 La. Ann. 491; *Ward v. State*, 102 Tenn. 724; *State v. Morgan*, 23 Utah 212.

**1140. 9. People v. Flaherty, 162 N. Y. 532.**

**10. Particular Descriptions of Opinion.** — *State v. Morrison*, 64 Kan. 669; *State v. Hebert*, 104 La. 227.

**12. McCue v. Com.**, 103 Va. 870.

**13. Brady v. Territory**, 7 Ariz. 12; *Caldwell v. State*, 69 Ark. 322; *State v. Giron*, 52 La. Ann. 491; *Gammons v. State*, 85 Miss. 103; *Russell v. State*, 62 Neb. 512; *State v. Kornstett*, 62 Kan. 221 ("fixed and positive"); *State v. Morrison*, 67 Kan. 144 ("positive and fixed"); *State v. Simas*, 25 Nev. 432 ("fixed and settled").

**14. Gillespie v. State**, 92 Md. 171; *Lindsay v. State*, 24 Ohio Cir. Ct. 1; *State v. Mott*, 29 Mont. 292 ("fixed and unqualified").

**15. Fugate v. State**, 82 Miss. 189.

**16. Presumption of Innocence.** — *People v. Quimby*, 134 Mich. 625.

**1141. 1. Light and Transient Impressions** — *Arizona*. — *Brady v. Territory*, 7 Ariz. 12. *California*. — See *People v. Ochoa*, 142 Cal. 268.

*Kansas*. — *State v. Morrison*, 67 Kan. 144, 64 Kan. 669; *State v. Kornstett*, 62 Kan. 221.

*Louisiana*. — *State v. Hebert*, 104 La. 227.

*Nebraska*. — *Dinsmore v. State*, 61 Neb. 418.



- 1141.** Opinion or Impression. — See note 5.  
 Strength and Source of Opinion. — See note 6.  
 The Real Question. — See note 8.

- 1142.** See note 1.  
 "Unqualified" Opinion. — See note 2.  
 Necessity of Malice. — See note 3.

- 1143.** (bb) Conditional and Hypothetical Opinions. — See note 3.  
 (cc) Source of Information on Which Based — aaa. Rumor, Hearsay, and Newspaper

Reports. — See note 5.

- 1144.** See notes 1, 2.

- 1145.** Hearsay. — See note 1.

bbb. Juror's Direct Knowledge of Facts. — See note 3.

ccc. Information from Person Having Direct Knowledge. — See notes 4, 5.

An Opinion Based on a Statement by a Party. — See note 6.

An Opinion Based on Statements by Witnesses. — See notes 7, 8.

*Ohio.* — *Lindsay v. State*, 24 Ohio Cir. Ct. 1.  
*Washington.* — *State v. Riley*, 36 Wash. 441;  
*State v. Royse*, 24 Wash. 440; *State v. Farris*,  
 26 Wash. 205.

- 1141. 2. Abiding Bias.** — See *Gammons v. State*, 85 Miss. 103.

**5. Opinion and Impression Distinguished.** —  
*State v. Morrison*, 64 Kan. 669; *Lindsey v. State*, 69 Ohio St. 215; *State v. Royse*, 24 Wash. 440. But see *State v. Otto*, 61 Kan. 58.

**6. Strength and Not Source of Opinion Chiefly Considered.** — *State v. Morrison*, 64 Kan. 669.

**8. Ability to Act Impartially Is Real Question.** —  
*State v. Hudson*, 110 Iowa 663; *Gammons v. State*, 85 Miss. 103; *Parker v. State*, 45 Tex. Crim. 334; *Tellis v. State*, 42 Tex. Crim. 574.

**1142. 1. Statutory Provisions.** — *State v. Crofford*, 121 Iowa 395; *State v. Savage*, 36 Oregon 191.

**2. "Unqualified" Opinion.** — *Brady v. Territory*, 7 Ariz. 12; *State v. John*, 124 Iowa 230; *State v. Mott*, 29 Mont. 292; *State v. Simas*, 25 Nev. 432.

**3. Malice or Ill Will.** — See *Vowell v. State*, 72 Ark. 158.

**1143. 3. Hypothetical Opinion.** — *State v. Hebert*, 104 La. 227; *Gammons v. State*, 85 Miss. 103; *Dinsmore v. State*, 61 Neb. 418; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158; *McCue v. Com.*, 103 Va. 870.

**5. Rumors and Newspaper Reports** — *United States*. — *Dolan v. U. S.*, (C. C. A.) 116 Fed. Rep. 578, affirmed (C. C. A.) 123 Fed. Rep. 52. See also *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569.

*Arkansas.* — *Vowell v. State*, 72 Ark. 158; *Taylor v. State*, 72 Ark. 613; *Caldwell v. State*, 69 Ark. 322.

*California.* — *People v. Sowell*, 145 Cal. 292.  
*Connecticut.* — *State v. Laudano*, 74 Conn. 638.

*Iowa.* — *State v. Crofford*, 121 Iowa 395.  
*Kansas.* — *State v. Kornstett*, 62 Kan. 221; *State v. Morrison*, 67 Kan. 144, 64 Kan. 669.

*Louisiana.* — *State v. Giron*, 52 La. Ann. 491.  
*Maryland.* — *Gillespie v. State*, 92 Md. 171.  
*Michigan.* — *People v. Quimby*, 134 Mich. 625.

*Missouri.* — *State v. Gartrell*, 171 Mo. 489; *State v. Craft*, 164 Mo. 631; *State v. McGinnis*, 158 Mo. 105.

*Nebraska.* — *Dinsmore v. State*, 61 Neb. 418; *Rottman v. State*, 63 Neb. 648; *Russell v. State*, 62 Neb. 512.

*Nevada.* — *State v. Simas*, 25 Nev. 432.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 559.

*Ohio.* — *Lindsay v. State*, 24 Ohio Cir. Ct. 1.  
*Oregon.* — *State v. Armstrong*, 43 Oregon 207.

*Tennessee.* — *State v. Robinson*, 106 Tenn. 204; *Ward v. State*, 102 Tenn. 724; *Wilson v. State*, 109 Tenn. 167.

*Texas.* — *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956; *Tellis v. State*, 42 Tex. Crim. 574; *Parker v. State*, 45 Tex. Crim. 334.

*Washington.* — *State v. Boyce*, 24 Wash. 514; *State v. Croney*, 31 Wash. 122.

*West Virginia.* — *State v. Johnson*, 49 W. Va. 684.

*Wisconsin.* — *Hughes v. State*, 109 Wis. 397.

**1144. 1.** *State v. Crofford*, 121 Iowa 395; *McCue v. Com.*, 103 Va. 870.

**2. Fixed or Settled Opinion** — *Iowa.* — *State v. Crofford*, 121 Iowa 395.

*Kansas.* — *State v. Morrison*, 64 Kan. 669.

*Louisiana.* — See *State v. Giron*, 52 La. Ann. 491.

*Mississippi.* — *Fugate v. State*, 82 Miss. 189.  
*New York.* — *People v. Miller*, 81 N. Y. App. Div. 255.

*Tennessee.* — *Ward v. State*, 102 Tenn. 724.

*Washington.* — *State v. Riley*, 36 Wash. 441.

*West Virginia.* — *State v. Johnson*, 49 W. Va. 684; *State v. Hatfield*, 48 W. Va. 561.

**1145. 1. Opinions on Hearsay.** — *State v. Armstrong*, 43 Oregon 207; *Turner v. State*, 111 Tenn. 593; *State v. Robinson*, 106 Tenn. 204; *Wilson v. State*, 109 Tenn. 167; *Tellis v. State*, 42 Tex. Crim. 574; *State v. Royse*, 24 Wash. 440.

**3. Opinion Based on One's Own Knowledge Disqualifies.** — *Wilson v. State*, 109 Tenn. 167; *State v. Stentz*, 30 Wash. 134. See also *Turner v. State*, 111 Tenn. 593.

**4. Knowledge of Informant.** — *Caldwell v. State*, 69 Ark. 322.

**5. People v. Cebulla, 137 Cal. 314; *State v. Otto*, 61 Kan. 58; *Ward v. State*, 102 Tenn. 724.**

**6. Conversation with Party.** — See *State v. Neel*, 23 Utah 541.

**7. Statements of Witnesses.** — *Caldwell v. State*, 69 Ark. 322.

**1146.** *ddd. Evidence on Former Trial or Proceeding — Previous Trial on Merits.* — See notes 1, 4.

*Effect of Statute.* — See note 6.

**1147.** *Prosecution of Accomplice or Codefendant.* — See note 1.

*Previous Prosecution of Same Defendant.* — See note 4.

*(dd) Opinions Removable Only by Evidence.* — See notes 5, 7, 8.

**1148.** See note 1.

*(ee) Opinion as to Particular Elements of Case.* — See notes 3, 5, 8.

*Under an Iowa Statute.* — See note 11.

*Matters Not Controverted.* — See note 12.

*(ff) Opinions on Extraneous Matters.* — See note 14.

**1149.** *cc. EXPRESSION OF OPINION — (bb) Particular Statements Indicating Bias.* — See notes 4, 5, 7, 9.

**1150.** *dd. STATEMENTS BY JUROR ON VOIR DIRE — (aa) Effect as Showing Opinion in General.* — See notes 3, 4, 5.

State, 69 Ark. 322; Klyce v. State, 79 Miss. 652; Shepprie v. State, 79 Miss. 740; Turner v. State, 111 Tenn. 593; Wilson v. State, 109 Tenn. 167. See also Wilkerson v. State, (Tex. Crim. 1899) 57 S. W. Rep. 956. *Contra*, State v. Bone, 114 Iowa 537.

**1145.** 8. State v. Hebert, 104 La. 227.

**1146.** 1. *Opinion Based on Evidence in Former Trial.* — Dolan v. U. S., (C. C. A.) 123 Fed. Rep. 52; State v. Morrison, 64 Kan. 669; State v. McGinnis, 158 Mo. 105; Ward v. State, 102 Tenn. 724; Goble v. State, 42 Tex. Crim. 501. See also Schallman v. Royal Ins. Co., 94 Ill. App. 364.

4. *Partial or Incorrect Report.* — State v. Prins, 117 Iowa 505. See also State v. King, 174 Mo. 647.

6. Thompson v. People, 26 Colo. 496.

**1147.** 1. See Dolan v. U. S., (C. C. A.) 123 Fed. Rep. 52, *overruling* 116 Fed. Rep. 578. *Compare* Hawkins v. U. S., (C. C. A.) 116 Fed. Rep. 569.

4. *Opinion on Evidence on Other Prosecution.* — Goble v. State, 42 Tex. Crim. 501.

5. *Necessity of Evidence to Remove Opinion Does Not Disqualify* — *United States*, — Hawkins v. U. S., (C. C. A.) 116 Fed. Rep. 569.

*Arizona.* — Brady v. Territory, 7 Ariz. 12.

*Arkansas.* — Taylor v. State, 72 Ark. 613; Caldwell v. State, 69 Ark. 322.

*Connecticut.* — State v. Laudano, 74 Conn. 638.

*Iowa.* — State v. Bone, 114 Iowa 537; State v. Hudson, 110 Iowa 663.

*Michigan.* — People v. Quimby, 134 Mich. 625.

*Mississippi.* — Gammons v. State, 85 Miss. 103.

*Nebraska.* — Dinsmore v. State, 61 Neb. 418.

*Ohio.* — Lindsay v. State, 24 Ohio Cir. Ct. 1.

*Oregon.* — State v. Armstrong, 43 Oregon 207.

*Tennessee.* — State v. Robinson, 106 Tenn. 204.

*Texas.* — Parker v. State, 45 Tex. Crim. 334.

7. *Effect of Statute.* — Jahnke v. State, (Neb. 1903) 94 N. W. Rep. 158; State v. Ekanger, 8 N. Dak. 559.

8. *Necessity of Evidence to Remove Opinion Disqualifies.* — State v. Otto, 61 Kan. 58; State v. Stentz, 30 Wash. 134; State v. Riley, 36 Wash. 441. See also State v. Morrison, 64 Kan. 669; State v. Johnson, 49 W. Va. 684; Dolan v. U. S., (C. C. A.) 123 Fed. Rep. 52, *overruling* 116 Fed. Rep. 578.

**1148.** 1. *New York Cases.* — See People v. Miller, 81 N. Y. App. Div. 255.

3. *Opinion as to Immaterial Matter.* — State v. Morrison, 67 Kan. 144; Lake Shore, etc., R. Co. v. Reynolds, 11 Ohio Cir. Dec. 701, 21 Ohio Cir. Ct. 402.

5. *Belief that Crime Was Committed.* — Gillespie v. State, 92 Md. 171; State v. Haworth, 24 Utah 408, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1148.

8. *Opinion on Essential Point.* — State v. Otto, 61 Kan. 58. See also Tellis v. State, 42 Tex. Crim. 574; Clark v. State, 44 Tex. Crim. 536.

11. *Compare* State v. John, 124 Iowa 230, wherein, on a trial for perjury in giving false testimony on the defendant's former trial for murder, which testimony tended to prove an alibi, it was held that one holding an unqualified opinion that the defendant committed the murder was disqualified from sitting as a juror.

12. *Matters Not Controverted.* — State v. Morrison, 67 Kan. 144; Lake Shore, etc., R. Co. v. Reynolds, 11 Ohio Cir. Dec. 701, 21 Ohio Cir. Ct. 402.

14. Hawkins v. U. S., (C. C. A.) 116 Fed. Rep. 569. But see Dolan v. U. S., (C. C. A.) 123 Fed. Rep. 52, *overruling* 116 Fed. Rep. 578.

**1149.** 4. State v. Wright, 112 Iowa 436; Ellis v. Territory, 13 Okla. 633; State v. Morgan, 23 Utah 212.

5. Hughes v. State, (Tex. Crim. 1900) 60 S. W. Rep. 562. See also Williams v. State, 45 Tex. Crim. 240.

7. *Statements as to Proper Penalty.* — Collins v. People, 194 Ill. 506.

9. *Statement in Jest or by Way of Gossip.* — Allen v. State, 44 Tex. Crim. 205.

**1150.** 3. *Particular Statements on Voir Dire Indicative of Disqualifying Opinion.* — Klyce v. State, 79 Miss. 652; People v. Flaherty, 162 N. Y. 532.

4. *Effect of Appearance and Manner.* — Jarvis v. State, 138 Ala. 17; State v. Hudson, 110 Iowa 663; Gammons v. State, 85 Miss. 103; State v. Mott, 29 Mont. 292; State v. Farris, 26 Wash. 205. See also Dolan v. U. S., (C. C. A.) 116 Fed. Rep. 578.

5. *Whole Examination to Be Considered.* — State v. Daugherty, 63 Kan. 473; State v. Royse, 24 Wash. 440; State v. Farris, 26 Wash. 205; State v. Harras, 22 Wash. 57. See also

**1150.** Statutory Provisions. — See note 7.

**1151.** See notes 1, 2.

Under a New York Statute. — See notes 5, 6.

**1152.** See note 2.

(bb) *Conclusiveness of Statement as to Impartiality.* — See note 3.

**1153.** See note 1.

(b) *Member of Grand Jury Indicting Defendant.* — See note 2.

**1154.** (c) *Witness in Case.* — See note 3.

It Is Sometimes Provided by Statute. — See note 6.

(d) *Previous Jury Service in Same Case.* — See note 11.

**1155.** (f) *Service as Juror in Case Involving Same Facts — aa. IN GENERAL.* — See notes 2, 3, 4.

*State v. Morrison*, 67 Kan. 144; *Rhea v. State*, 63 Neb. 461.

**1150.** 7. *Statutory Provisions as to Opinions on Rumor and Newspaper Reports.* — *Barker v. State*, (Neb. 1905) 103 N. W. Rep. 71; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158; *State v. Ekanger*, 8 N. Dak. 559; *Carano v. State*, 24 Ohio Cir. Ct. 93; *Lindsey v. State*, 69 Ohio St. 215; *State v. Armstrong*, 43 Oregon 207; *Ward v. State*, 102 Tenn. 724; *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956.

**1151.** 1. *Statutory Provisions as to Declaration by Juror.* — *People v. Quimby*, 134 Mich. 625; *Klyce v. State*, 79 Miss. 652; *Fugate v. State*, 82 Miss. 189; *Barker v. State*, (Neb. 1905) 103 N. W. Rep. 71; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158; *People v. Flaherty*, 162 N. Y. 532; *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956.

2. *Constitutionality of Statute.* — *Klyce v. State*, 79 Miss. 652.

5. *New York Statute.* — *People v. Miller*, 81 N. Y. App. Div. 255.

8. *People v. Flaherty*, 162 N. Y. 532.

**1152.** 2. *People v. Miller*, 81 N. Y. App. Div. 255.

3. *Statement by Juror that He Can Act Impartially — United States.* — *Dimmick v. U. S.*, (C. C. A.) 121 Fed. Rep. 638; *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569. And see *Dolan v. U. S.*, (C. C. A.) 123 Fed. Rep. 52.

*Alabama.* — *Jarvis v. State*, 138 Ala. 17. See also *Ragsdale v. State*, 134 Ala. 24.

*Arizona.* — *Brady v. Territory*, 7 Ariz. 12.

*Connecticut.* — *State v. Laudano*, 74 Conn. 638.

*Iowa.* — *State v. Bone*, 114 Iowa 537; *State v. Hudson*, 110 Iowa 663; *State v. Williams*, 115 Iowa 97; *State v. Prins*, 117 Iowa 505.

*Louisiana.* — *State v. Hebert*, 104 La. 227; *State v. Kellogg*, 104 La. 580.

*Maryland.* — *Gillespie v. State*, 92 Md. 171; *Guy v. State*, 96 Md. 692.

*Michigan.* — *People v. Quimby*, 134 Mich. 625.

*Mississippi.* — See *Gammons v. State*, 85 Miss. 103.

*Missouri.* — *State v. Craft*, 164 Mo. 631; *State v. Gartrell*, 171 Mo. 489.

*Montana.* — *State v. Howard*, 30 Mont. 518.

*Nebraska.* — *Dinsmore v. State*, 61 Neb. 418; *Rottman v. State*, 63 Neb. 648.

*Ohio.* — *Lindsay v. State*, 24 Ohio Cir. Ct. 1. *Oregon.* — *State v. Armstrong*, 43 Oregon 207.

*Tennessee.* — *State v. Robinson*, 106 Tenn. 204.

*Texas.* — *Tardy v. State*, 46 Tex. Crim. 214;

*Parker v. State*, 45 Tex. Crim. 334; *Tellis v. State*, 42 Tex. Crim. 574; *Smith v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 186.

*Utah.* — *State v. Haworth*, 24 Utah 408.

*Washington.* — See *Denham v. Washington Water Power Co.*, 38 Wash. 354. But see *State v. Royse*, 24 Wash. 440.

But see *Dolan v. U. S.*, (C. C. A.) 123 Fed. Rep. 52, *overruling* 116 Fed. Rep. 578.

**1153.** 1. *Juror's Opinion as to Ability to Act Fairly Sometimes Immaterial — United States.* — *Dolan v. U. S.*, (C. C. A.) 123 Fed. Rep. 52.

*Arkansas.* — *Caldwell v. State*, 69 Ark. 322.

*Iowa.* — *State v. Crofford*, 121 Iowa 395; *State v. John*, 124 Iowa 230; *State v. Smith*, 124 Iowa 334.

*Kansas.* — *State v. Morrison*, 64 Kan. 669; *State v. Otto*, 61 Kan. 58.

*Louisiana.* — *State v. McCoy*, 109 La. 682.

*Mississippi.* — *Klyce v. State*, 79 Miss. 652; *Gammons v. State*, 85 Miss. 103; *Fugate v. State*, 82 Miss. 189.

*Missouri.* — *State v. King*, 174 Mo. 647.

*Nevada.* — *State v. Roberts*, 27 Nev. 449.

*Tennessee.* — *Turner v. State*, 111 Tenn. 593.

*Texas.* — *Choctaw, etc., R. Co. v. True*, 35 Tex. Civ. App. 309.

*Virginia.* — See *McCue v. Com.*, 103 Va. 870.

*Washington.* — *State v. Riley*, 36 Wash. 441; *State v. Stentz*, 30 Wash. 134.

*West Virginia.* — *State v. Johnson*, 49 W. Va. 684.

2. *Member of Grand Jury Finding Indictment.* — *Denmark v. State*, 43 Fla. 182. See also *Britt v. State*, 112 Ga. 583.

**1154.** 3. *Witness Incompetent as Juror.* — See *State v. Stentz*, 30 Wash. 134.

As to the Competency of Jurors as Witnesses see the title WITNESSES, 933. 2 *et seq.*

6. *Statutory Provision.* — *Mundine v. Pauls*, 28 Tex. Civ. App. 46.

11. *Different Issue.* — *Carano v. State*, 24 Ohio Cir. Ct. 93.

**1155.** 2. *Service on Trial of Person Charged with Same Offense.* — *People v. Mol*, (Mich. 1904) 100 N. W. Rep. 913. See also *Turner v. State*, 114 Ga. 421.

3. *Similar Issues on Same Facts.* — *People v. Mol*, (Mich. 1904) 100 N. W. Rep. 913; *Clark v. State*, 44 Tex. Crim. 536.

**Bribery—Perjury.** — A juror who sat in a trial of a bribery case is not disqualified to sit in a trial for perjury which arose from testimony given in another bribery case arising from the same conspiracy. *People v. Albers*, (Mich. 1904) 100 N. W. Rep. 908.

**1155.** (g) Knowledge Without Opinion. — See note 12.

**1156.** See note 1.

*d. GENERAL POWER OF COURT TO EXCLUDE JUROR — (1) Action by Court of Its Own Motion.* — See note 2.

(2) *Discretion as to Grounds.* — See note 5.

**1157.** See notes 1, 3.

(3) *For Reasons Personal to Juror.* — See note 6.

**1158.** See notes 3, 4.

*Illness of Venireman.* — See note 5.

**1159.** Public Officers. — See note 2.

(4) *Time of Exercising Power.* — See notes 3, 6.

**1160.** *e. WAIVER OF OBJECTION TO JUROR — (1) Failure to Challenge Before Acceptance of Juror.* — See notes 1, 3, 4.

(2) *Failure to Challenge Before Swearing of Juror.* — See note 5.

**1161.** See notes 1, 2, 3, 4.

(3) *Failure to Challenge Before Verdict — (a) Previous Knowledge of Disqualification.* — See note 5.

**1155.** 4. Similar Issues on Similar Facts. — *State v. Van Waters*, 36 Wash. 358.

12. Knowledge Without Opinion. — *State v. Geier*, 111 Iowa 706. See also *State v. Riddle*, 179 Mo. 287.

But the juror may be shown to have such knowledge of the circumstances of the case as clearly to indicate that he is not impartial. *Nelson v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 107.

**1156.** 1. Evidence Heard at Previous Trial. — *State v. Riddle*, 179 Mo. 287.

2. Exclusion Without Challenge. — *Scott v. State*, 133 Ala. 112; *Peaden v. State*, (Fla. 1903) 35 So. Rep. 204; *Barnes v. Com.*, 110 Ky. 348; *State v. Vick*, 132 N. Car. 995; *Cochran v. U. S.*, 14 Okla. 108. See also *Keady v. People*, 32 Colo. 57; *Givens v. State*, 103 Tenn. 648; *State v. Hatfield*, 48 W. Va. 561.

5. Discretion in Excluding Jurors. — *Peaden v. State*, (Fla. 1903) 35 So. Rep. 204; *Barnes v. Com.*, (Ky. 1902) 70 S. W. Rep. 827; *Brennan v. O'Brien*, 121 Mich. 491; *State v. Taylor*, 171 Mo. 465; *Toledo R., etc., Co. v. Ward*, 25 Ohio Cir. Ct. 399; *Cochran v. U. S.*, 14 Okla. 108; *Com. v. Payne*, 205 Pa. St. 101.

Statutory Grounds Not Exclusive. — *Scott v. State*, 133 Ala. 112.

**1157.** 1. Discretion in Excluding for Bias. — *Scott v. State*, 133 Ala. 112.

3. Alabama Decisions. — See *Scott v. State*, 133 Ala. 112.

6. Excusing for Reasons Personal to Juror. — *Ellis v. State*, 114 Ga. 36; *Com. v. Payne*, 205 Pa. St. 101.

**1158.** 3. Excusing Before Case Called for Trial. — *Thomas v. State*, 124 Ala. 48; *Com. v. Payne*, 205 Pa. St. 101.

May Be Excused Prior to Term of Court. — *State v. Bates*, 25 Utah 1.

4. Excusing in Absence of Juror. — *Tarver v. State*, 137 Ala. 29.

5. Illness of Juror. — *Thomas v. State*, 124 Ala. 48; *Com. v. Payne*, 205 Pa. St. 101; *Collins v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 806.

**1159.** 2. Public Officers. — See *Tarver v. State*, 137 Ala. 29.

3. Excluding Juror After Acceptance. — *State*

*v. Vick*, 132 N. Car. 995; *Cochran v. U. S.*, 14 Okla. 108.

6. After Swearing of Juror and Before Completion of Impaneling. — *Dorman v. State*, (Fla. 1904) 37 So. Rep. 561.

**1160.** 1. Effect of Acceptance of Juror. — *Coil v. State*, 62 Neb. 15; *Black v. State*, 46 Tex. Crim. 590; *Cornell v. State*, 104 Wis. 527.

3. Withdrawal of Acceptance. — *Brewer v. State*, 72 Ark. 145; *State v. Vick*, 132 N. Car. 995; *Monson v. State*, 45 Tex. Crim. 426.

4. Acceptance in Ignorance of Disqualification. — *Black v. State*, 46 Tex. Crim. 590. *Contra*, *Coil v. State*, 62 Neb. 15.

But it seems to be necessary to show that the juror was unfair or impartial even where ground for challenge was based upon the acquaintance with the deceased and the failure to challenge was caused by an inadvertent misstatement by the juror on his *voir dire*. *Andrews v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 918.

5. Challenge to Be Interposed Before Swearing. — *U. S. v. Davis*, 103 Fed. Rep. 457; *Mooring v. State*, 129 Ala. 66; *Thompson v. State*, 109 Ga. 272; *Young v. State*, 90 Md. 579; *Coil v. State*, 62 Neb. 15; *State v. Davis*, 126 N. Car. 1007; *Rex v. Barsalou*, 10 Quebec K. B. 180.

**1161.** 1. Statutory Provision. — *People v. Boren*, 139 Cal. 210; *Coil v. State*, 62 Neb. 15.

2. Interposition When Jurors Come to the Book. — *Dunn v. Wilmington, etc., R. Co.*, 131 N. Car. 446.

3. *U. S. v. Davis*, 103 Fed. Rep. 457.

4. Allowing Challenge After Swearing of Juror. — *People v. Boren*, 139 Cal. 210; *State v. Crea*, 10 Idaho, 88, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160 [1161]; *State v. Ames*, 91 Minn. 365; *Hughes v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 562.

5. Disqualifications Known to Party Waived by Failure to Object — *United States*. — *Queenan v. Oklahoma*, 190 U. S. 548.

*Florida*. — *McNish v. State*, (Fla. 1904) 36 So. Rep. 176.

*Georgia*. — *Sapp v. State*, 116 Ga. 182; *Hadden v. Thompson*, 118 Ga. 207.

*Iowa*. — *Pfeiffer v. Dubuque*, (Iowa 1903) 94 N. W. Rep. 492; *State v. Pray*, 126 Iowa 249.

**1162.** Applications of Rule. — See notes 2, 4, 6.

**1163.** (b) Previous Ignorance of Disqualification — *aa.* NEW TRIAL NOT GRANTED. — See notes 1, 2.

Applications of Rule. — See note 3.

**1164.** See notes 2, 7, 8.

**1165.** *bb.* NEW TRIAL GRANTED. — See note 2.

Applications of Rule. — See note 8.

**1166.** Distinction as to Character of Disqualification. — See note 3.

**1167.** (c) Constructive Knowledge — *aa.* IGNORANCE RESULTING FROM NEGLIGENCE. — See notes 1, 2.

**1168.** Applications of Rule. — See notes 1, 2, 3, 4, 5.

*Mississippi.* — *Fulcher v. State*, 82 Miss. 630.  
*Oklahoma.* — *Queenan v. Territory*, 11 Okla. 261, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1161.

*South Carolina.* — *State v. Rafe*, 56 S. Car. 379.

*Tennessee.* — *Thomas v. State*, 109 Tenn. 684.

*Texas.* — *Garcia v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 309; *Templeton v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 831.

*Virginia.* — *Doyle v. Com.*, 100 Va. 808.

*West Virginia.* — *Wagoner v. Jaeger*, 49 W. Va. 61.

**1169.** 2. Relationship. — *Hadden v. Thompson*, 118 Ga. 207; *State v. Pray*, 126 Iowa 249; *Hersey v. Hutchins*, 70 N. H. 130; *Templeton v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 831; *Doyle v. Com.*, 100 Va. 808.

In *New York*, by statute, the party related must object to the juror before the case is opened, but the other party may raise the question any time within six months after verdict. *Bradt v. Peck*, 81 N. Y. App. Div. 295.

4. Mental Defect. — *Pfeiffer v. Dubuque*, (Iowa 1903) 94 N. W. Rep. 492.

*Alien.* — See *Fulcher v. State*, 82 Miss. 630.

*Ex-Convict.* — See *Queenan v. Territory*, 11 Okla. 261, affirmed 190 U. S. 548.

6. Formation or Expression of Opinion. — *Thomas v. State*, 109 Tenn. 684; *Doyle v. Com.*, 100 Va. 808.

**1163.** 1. Ignorance of Disqualification Immaterial. — *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337; *Denmark v. State*, 43 Fla. 182; *Hersey v. Hutchins*, 70 N. H. 130; *State v. Rafe*, 56 S. Car. 379; *International, etc., R. Co. v. Woodward*, 26 Tex. Civ. App. 389.

2. Cases Not Referring to Question of Knowledge. — *People v. MacFarlane*, 138 Cal. 481; *Jordan v. State*, 110-Ga. 443; *Hall v. Graziana*, (Ky. 1903) 74 S. W. Rep. 670 (client of party); *Dickerson v. North Jersey St. R. Co.*, 68 N. J. L. 45 (ignorance of English language); *State v. Coleman*, 17 S. Dak. 594; *Cubine v. State*, 45 Tex. Crim. 108; *McDaniel v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 768.

3. Previous Service on Grand Jury. — *Denmark v. State*, 43 Fla. 182.

**1164.** 2. Infancy as a disqualification of a juror is not available after verdict. *Givens v. State*, 103 Tenn. 648.

7. Nonresidence of Jurors Not Ground for New Trial. — *People v. MacFarlane*, 138 Cal. 481; *International, etc., R. Co. v. Woodward*, 26 Tex. Civ. App. 389.

8. Person Not Freeholder or Householder. —

*Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.

**1165.** 2. Disqualification if Unknown May Be Taken Advantage of After Verdict. — *State v. Wright*, 112 Iowa 436. See also *Gaff v. State*, 155 Ind. 277, 80 Am. St. Rep. 235; *State v. Rafe*, 56 S. Car. 379.

8. Relationship Unknown, Ground for New Trial. — See *Cameron v. Ottawa Electric R. Co.*, 32 Ont. 24.

**1166.** 3. Distinction as to Disqualifications as Ground for New Trial. — *James v. State*, 68 Ark. 464; *Coil v. State*, 62 Neb. 15; *Knights of Pythias v. Steele*, 107 Tenn. 1.

**1167.** 1. Ignorance of Disqualification Arising from Negligence — *Arkansas.* — *Vowell v. State*, 72 Ark. 158.

*Georgia.* — *Britt v. State*, 112 Ga. 583; *Sapp v. State*, 116 Ga. 182.

*Indiana.* — *Cleveland, etc., R. Co. v. Osgeod*, (Ind. App. 1905) 73 N. E. Rep. 285.

*Iowa.* — *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

*New Hampshire.* — *Hersey v. Hutchins*, 70 N. H. 130.

*South Carolina.* — *State v. Rafe*, 56 S. Car. 379.

*Virginia.* — *Doyle v. Com.*, 100 Va. 808.

*West Virginia.* — *Wagoner v. Jaeger*, 49 W. Va. 61.

2. Failure to Question Juror — *United States.* — *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.

*Florida.* — *Denmark v. State*, 43 Fla. 182; *McNish v. State*, (Fla. 1904) 36 So. Rep. 176;

*Webster v. State*, (Fla. 1904) 36 So. Rep. 584.

*Georgia.* — *Crew v. State*, 113 Ga. 645.

*Iowa.* — *State v. Greenland*, 125 Iowa 141; *State v. Carpenter*, 124 Iowa 5.

*Louisiana.* — *State v. Keziah*, 110 La. 11.

*Montana.* — *State v. Mott*, 29 Mont. 292.

*Nebraska.* — See *Coil v. State*, 62 Neb. 15.

*Texas.* — *Templeton v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 831; *Corley v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1073; *Russell v. State*, 44 Tex. Crim. 465; *Herrington v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 562. But see *Hughes v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 562.

**1168.** 1. Juror on Previous Trial. — See *Russell v. State*, 44 Tex. Crim. 465.

2. Freeholder or Householder. — *Corley v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1073.

Accused of Crime. — See *State v. Keziah*, 110 La. 11.

3. Member of Grand Jury. — *Sapp v. State*, 116 Ga. 182.

**1168.** A Misstatement or Fraudulent Concealment. — See note 6.

**1169.** See note 1.

*bb.* KNOWLEDGE OF COUNSEL. — See note 2.

*f.* NEW TRIAL FOR DISQUALIFICATION OF JUROR—(1) *Necessity of Prejudice.* — See note 3.

**1170.** (2) *Quantum of Evidence Necessary.* — See notes 1, 2.

Single Witness as to Opinion Insufficient. — See note 3.

(3) *Discretion of Court.* — See note 4.

**1171.** *g.* ARREST OF JUDGMENT FOR DISQUALIFICATION OF JUROR. — See note 1.

*h.* CONCLUSIVENESS OF DECISION AS TO ACCEPTANCE OR EXCLUSION OF JUROR — (1) *Decision by Court* — (a) *In General.* — See notes 3, 4.

**1168.** 4. Ignorance of Language. — *Denmark v. State*, 43 Fla. 182; *State v. Greenland*, 125 Iowa 141.

5. Opinions That Might Have Been Discovered. — *Vowell v. State*, 72 Ark. 158; *Crew v. State*, 113 Ga. 645; *State v. Carpenter*, 124 Iowa 5; *Doyle v. Com.*, 100 Va. 808.

6. Active Concealment by Juror — *Iowa.* — *State v. Wright*, 112 Iowa 436.

*Louisiana.* — *State v. Keziah*, 110 La. 11; *State v. Giron*, 52 La. Ann. 491.

*Mississippi.* — *Shepprie v. State*, 79 Miss. 740; *Davis v. Searcy*, 79 Miss. 292.

*New York.* — *People v. Bishop*, 66 N. Y. App. Div. 415.

*Tennessee.* — *Knights of Pythias v. Steele*, 107 Tenn. 1.

*Texas.* — *Hughes v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 562.

*Utah.* — *State v. Mickle*, 25 Utah 179, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168; *State v. Thompson*, 24 Utah 314; *State v. Morgan*, 23 Utah 212; *Tarpey v. Madsen*, 26 Utah 294.

*Washington.* — *Heasley v. Nichols*, 38 Wash. 485.

**1169.** 1. Knowledge of Falsity of Statements. — *State v. Keziah*, 110 La. 11. See also *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1905) 73 N. E. Rep. 285.

2. Knowledge of Counsel. — See *Clerke v. Commercial Tribune Co.*, 10 Ohio Dec. 176; *Garcia v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 309; *Wagoner v. Jaeger*, 49 W. Va. 61.

3. Necessity of Showing of Prejudice. — *State v. Rafe*, 56 S. Car. 379; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *Dodd v. State*, 44 Tex. Crim. 480; *Martinez v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 838; See also *Vowell v. State*, 72 Ark. 158.

**1170.** 1. Presumption of Competency After Trial. — *Thomas v. State*, 109 Tenn. 684.

2. Degree of Proof on Motion for New Trial. — *Thomas v. State*, 109 Tenn. 684; *State v. Mickle*, 25 Utah 179, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1170.

The Burden of Proof is on the party claiming incompetency. *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.

3. Single Witness as to Opinion Insufficient. — *Turner v. State*, 111 Ga. 217; *Ogle v. State*, 43 Tex. Crim. 219. See also *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.

4. New Trial in Discretion of Court. — *Turner v. State*, 114 Ga. 421; *Hensley v. Com.*, (Ky. 1904) 82 S. W. Rep. 456; *Manning v. Boston*

*El. R. Co.*, 187 Mass. 496; *State v. Davis*, 126 N. Car. 1007. See also *Bliss v. State*, 117 Wis. 596.

**1171.** 1. Motion in Arrest of Judgment Does Not Lie. — *State v. Davis*, 126 N. Car. 1007; *Ogle v. State*, 43 Tex. Crim. 219.

3. Review of Legal Questions. — *Turner v. State*, 114 Ga. 421; *State v. Vick*, 132 N. Car. 995.

4. Conclusiveness of Decision of Trial Court on Questions of Fact — *United States.* — *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569; *U. S. v. Davis*, 103 Fed. Rep. 457.

*Alabama.* — *Schieffelin v. Schieffelin*, 127 Ala. 14; *Jarvis v. State*, 138 Ala. 17.

*Arizona.* — *Brady v. Territory*, 7 Ariz. 12.

*California.* — *Graybill v. De Young*, 146 Cal. 421; *Mono County v. Flanigan*, 130 Cal. 105; *People v. Sowell*, 145 Cal. 292.

*Colorado.* — *Thompson v. People*, 26 Colo. 496.

*Connecticut.* — *State v. Laudano*, 74 Conn. 638.

*Florida.* — *Williams v. State*, 45 Fla. 128.

*Georgia.* — *Turner v. State*, 114 Ga. 421; *Bowdoin v. State*, 113 Ga. 1150.

*Illinois.* — *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134.

*Indiana.* — *Tipton Light, etc., Co. v. Newcomer*, 33 Ind. App. 42; *Smith v. State*, 24 Ind. App. 688.

*Iowa.* — *State v. Williams*, 115 Iowa 97; *In re Goldthorp*, 115 Iowa 430; *State v. Smith*, 124 Iowa 334; *State v. Hudson*, 110 Iowa 663.

*Louisiana.* — *State v. Michel*, 111 La. 434.

*Mississippi.* — *Gammons v. State*, 85 Miss. 103.

*Missouri.* — *State v. Lewis*, 181 Mo. 235; *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70; *State v. Jackson*, 167 Mo. 291.

*Nebraska.* — *Dinsmore v. State*, 61 Neb. 418; *Coil v. State*, 62 Neb. 15; *Rhea v. State*, 63 Neb. 461; *Felsch v. Babb*, (Neb. 1904) 101 N. W. Rep. 1011; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

*Nevada.* — *State v. Simas*, 25 Nev. 432.

*New Mexico.* — *Wilburn v. Territory*, 10 N. Mex. 402.

*North Carolina.* — *State v. Vick*, 132 N. Car. 995; *Perry v. Western North Carolina R. Co.*, 129 N. Car. 333; *State v. Register*, 133 N. Car. 746; *State v. Davis*, 126 N. Car. 1007; *State v. Kinsauls*, 126 N. Car. 1095.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 559.

*Oregon.* — *State v. Lauth*, (Oregon 1905) 80

**1172.** See note 1.

**1173.** Error Not Prejudicial. — See note 1.  
Disqualification of Juror by Opinion. — See note 4.

**1174.** See note 1.

Decision on Motion for New Trial. — See note 2.

(b) Exclusion of Juror. — See note 3.

**1175.** See note 1.

(2) *Decision by Triers.* — See note 2.

**3. Exemptions from Jury Service** — *a.* IN GENERAL. — See notes 3, 4.

**1176.** See notes 1, 2.

Pac. Rep. 660; *State v. Armstrong*, 43 Oregon 207; *State v. Savage*, 36 Oregon 191.

*South Carolina.* — *State v. Brock*, 61 S. Car. 141; *State v. Milam*, 65 S. Car. 321; *State v. Hayes*, 69 S. Car. 295.

*Texas.* — Galveston, etc., R. Co. v. Manns, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *Allen v. State*, 44 Tex. Crim. 205.

*Virginia.* — *McCue v. Com.*, 103 Va. 870.

*Washington.* — *State v. Farris*, 26 Wash. 205.

*Wisconsin.* — *Hughes v. State*, 109 Wis. 397.

*Wyoming.* — *Keffer v. State*, 12 Wyo. 49.

**Statutes Precluding Appeal.** — *Alderson v. Com.*, (Ky. 1903) 74 S. W. Rep. 679.

**1172. 1. Abuse of Discretion or Manifest Error Necessary for Reversal** — *United States.* — *Missouri*, etc., R. Co. v. Elliott, (C. C. A.) 102 Fed. Rep. 96.

*Alabama.* — *Jarvis v. State*, 138 Ala. 17.

*Arizona.* — *Brady v. Territory*, 7 Ariz. 12.

*California.* — *Mono County v. Flanigan*, 130 Cal. 105.

*Colorado.* — *Thompson v. People*, 26 Colo. 496.

*Florida.* — *Mathis v. State*, 45 Fla. 46.

*Georgia.* — *Bowdoin v. State*, 113 Ga. 1150.

*Indiana.* — *Smith v. State*, 24 Ind. App. 688.

*Iowa.* — *State v. Smith*, 124 Iowa 334.

*Mississippi.* — *Gammons v. State*, 85 Miss. 103.

*Missouri.* — *State v. Jackson*, 167 Mo. 201; *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70; *State v. Lewis*, 181 Mo. 235.

*Nebraska.* — *Coil v. State*, 62 Neb. 15; *Rhea v. State*, 63 Neb. 461; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

*Nevada.* — *State v. Simas*, 25 Nev. 432.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 559.

*Oregon.* — *State v. Lauth*, (Oregon 1905) 80 Pac. Rep. 660; *State v. Armstrong*, 43 Oregon 207; *State v. Savage*, 36 Oregon 191.

*Texas.* — *Allen v. State*, 44 Tex. Crim. 205.

*Wyoming.* — *Keffer v. State*, 12 Wyo. 49.

**1173. 1. Harmless Error.** — *State v. Michel*, 111 La. 434; Galveston, etc., R. Co. v. Manns, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *Choctaw*, etc., R. Co. v. True, 35 Tex. Civ. App. 309.

**4. Preconceived Opinions** — *Alabama.* — *Jarvis v. State*, 138 Ala. 17.

*Arizona.* — *Brady v. Territory*, 7 Ariz. 12.

*Connecticut.* — *State v. Laudano*, 74 Conn. 638.

*Florida.* — *Mathis v. State*, 45 Fla. 46.

*Georgia.* — *Bowdoin v. State*, 113 Ga. 1150.

*Iowa.* — *State v. Hudson*, 110 Iowa 663; *State v. Smith*, 124 Iowa 334.

*Mississippi.* — *Gammons v. State*, 85 Miss. 103.

*Nevada.* — *State v. Simas*, 25 Nev. 432.

*North Dakota.* — *State v. Ekanger*, 8 N. Dak. 559.

*Washington.* — *State v. Farris*, 26 Wash. 205.

*Wisconsin.* — *Hughes v. State*, 109 Wis. 397.

**1174. 1. Statute Vesting Discretion in Court.** — *Gammons v. State*, 85 Miss. 103; *State v. Savage*, 36 Oregon 191; *State v. Milam*, 65 S. Car. 321; *State v. Williamson*, 65 S. Car. 242.

**2. Decision on Motion for New Trial.** — *Perry v. State*, 117 Ga. 719; *Jones v. State*, 117 Ga. 710; *Buchanan v. State*, 118 Ga. 751; *Bowdoin v. State*, 113 Ga. 1150; *State v. Mott*, 29 Mont. 292; *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316; *Thomas v. State*, 109 Tenn. 684; *Louder v. State*, 46 Tex. Crim. 121; *Schissler v. State*, 122 Wis. 365.

But a reversal was ordered where the evidence showed the deliberate perjury of a venireman made upon his *voir dire* in order to get upon the jury so as to secure a conviction of the defendant. *People v. Bishop*, 66 N. Y. App. Div. 415.

**3. Wrongful Exclusion of Juror Not Ground for Reversal** — *United States.* — *Marande v. Texas*, etc., R. Co., (C. C. A.) 124 Fed. Rep. 42.

*Arkansas.* — *Decker v. Laws*, (Ark. 1905) 85 S. W. Rep. 425.

*California.* — *People v. Amaya*, 134 Cal. 531.

*Florida.* — *Peaden v. State*, (Fla. 1903) 35 So. Rep. 204.

*Idaho.* — *State v. McGraw*, 6 Idaho 635.

*Louisiana.* — *State v. Kellogg*, 104 La. 580; *State v. Breaux*, 104 La. 540.

*Michigan.* — *Commercial Bank v. Chatfield*, 121 Mich. 641.

*Nebraska.* — *Felsch v. Babb*, (Neb. 1904) 101 N. W. Rep. 1011. See also *Rhea v. State*. 63 Neb. 461.

*North Carolina.* — *Perry v. Western North Carolina R. Co.*, 129 N. Car. 333.

*Texas.* — Galveston, etc., R. Co. v. Manns, (Tex. Civ. App. 1904) 84 S. W. Rep. 254.

*Virginia.* — *Fishburne v. Com.*, 103 Va. 1023.

**1175. 1. Wrongful Exclusion Ground for Reversal.** — *State v. Hammond*, 14 S. Dak. 545.

**2. Conclusiveness of Finding by Triers.** — See *Turner v. State*, 114 Ga. 421.

**3. Persons Over Certain Age.** — *State v. Tulip*, 9 Kan. App. 454.

**4. Public Officers.** — *State v. Tulip*, 9 Kan. App. 454; *State v. Carter*, 106 La. 407; *State v. Forbes*, 111 La. 473; *State v. Lewis*, 31 Wash. 75.

**1176. 1. Members of Militia.** — *Jarvis v. State*, 138 Ala. 17; *State v. Barker*, 68 N. J. L. 19.

**1176.** Previous Service as Juror. — See note 9.

**1177.** c. EXEMPTION NOT CAUSE FOR CHALLENGE. — See note 4.

4. Service by Person Not on Panel. — See note 8.

**1178.** 5. Peremptory Challenges — a. DEFINITION AND NATURE. — See note 6.

**1179.** Right Is to Reject, Not to Select. — See note 1.

b. GENERAL RULES — (1) *In Criminal Cases* — (b) Rights of State. — See note 7.

**1180.** See note 2.

(2) *In Civil Cases*. — See notes 3, 5.

c. POWER OF LEGISLATURE. — See note 7.

**1181.** d. NUMBER ALLOWED — (1) *In General*. — See notes 2, 3, 5, 6. The Maximum Punishment. — See note 7.

**1182.** Where a Conviction of Murder in the Second Degree. — See note 3.

**1176.** 2. Members of Fire Companies. — *Ex p. Krupp*, 41 Tex. Crim. 355.

9. Ministers. — See *State v. Tulip*, 9 Kan. App. 454.

**1177.** 4. Exemption Not Cause for Challenge. — *State v. McIntosh*, 109 Iowa 209; *State v. Tulip*, 9 Kan. App. 454; *State v. Carter*, 106 La. 407; *State v. Forbes*, 111 La. 473; *State v. Barker*, 68 N. J. L. 19; *State v. Lewis*, 31 Wash. 75.

8. Grant of New Trial. — *Com. v. Baturin*, 24 Pa. Co. Ct. 181; *Cameron v. Ottawa Electric R. Co.*, 32 Ont. 24.

**1178.** 6. Peremptory Challenges. — *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569; *Nicholson v. People*, 31 Colo. 53; *State v. Hunter*, 118 Iowa 686; *State v. Lyons*, 70 N. J. L. 635; *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67.

**1179.** 1. Right Is to Reject and Not to Select — *United States*. — *U. S. v. Davis*, 103 Fed. Rep. 457.

*Colorado*. — *Nicholson v. People*, 31 Colo. 53. *Indian Territory*. — *National Bank v. Schuffelt*, (Indian Ter. 1903) 82 S. W. Rep. 927.

*Louisiana*. — *State v. Breaux*, 104 La. 540; *State v. Kellogg*, 104 La. 580.

*New Jersey*. — *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67.

*North Carolina*. — *Dunn v. Wilmington*, etc., R. Co., 131 N. Car. 446, wherein Douglas, J., dissenting, cited 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1178; *Perry v. Western North Carolina R. Co.*, 129 N. Car. 333; *State v. Register*, 133 N. Car. 746.

*Pennsylvania*. — *Com. v. Brown*, 23 Pa. Super. Ct. 470.

*Rhode Island*. — *Stevens v. Union R. Co.*, 26 R. I. 90.

*South Carolina*. — *State v. Weaver*, 58 S. Car. 106.

7. Challenge by State. — See *Com. v. Brown*, 23 Pa. Super. Ct. 470.

**1180.** 2. Statutes Giving Challenges to State. — See *Com. v. Brown*, 23 Pa. Super. Ct. 470.

3. Civil Cases. — *Gordon v. Chicago*, 201 Ill. 623; *East St. Louis Electric R. Co. v. Snow*, 88 Ill. App. 660; *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67; *Waggoner v. Dodson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 813.

5. Summary Proceedings. — The decision in *People v. Hamilton*, 39 N. Y. 107, cited in the original note, has been modified by subsequent

legislation, and peremptory challenges are now allowed in *New York* in summary proceedings. *Lasher v. Curry*, (County Ct.) 9 N. Y. Annot. Cas. 260.

7. Legislative Power to Confer Right of Challenge. — *Ward v. State*, 102 Tenn. 724.

**1181.** 2. Number Allowed. — See *Stevens v. Union R. Co.*, 26 R. I. 90.

3. State Statutory Provisions — *United States*. *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569. *Alabama*. — *Hudson v. State*, 137 Ala. 60.

*California*. — *People v. Sullivan*, 132 Cal. 93. *Colorado*. — *Carpenter v. People*, 31 Colo. 284.

*Illinois*. — *Illinois*, etc., R. Co. *v. Freeman*, 210 Ill. 270.

*Iowa*. — *State v. Hunter*, 118 Iowa 686.

*Kansas*. — *State v. Davidson*, (Kan. 1905) 80 Pac. Rep. 945.

*Minnesota*. — *Swanson v. Mendenhall*, 80 Minn. 56.

*Missouri*. — *State v. May*, 168 Mo. 122.

*New Jersey*. — *State v. Cannon*, (N. J. 1905) 60 Atl. Rep. 177; *State v. Lyons*, 70 N. J. L. 635; *State v. MacQueen*, 69 N. J. L. 522; *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67.

*North Carolina*. — *State v. Hunt*, 128 N. Car. 584.

*Ohio*. — *Stevenson v. State*, 70 Ohio St. 11.

*Oklahoma*. — *Cochran v. U. S.*, 14 Okla. 108.

*Rhode Island*. — *Stevens v. Union R. Co.*, 26 R. I. 90.

*South Carolina*. — *State v. Anderson*, 59 S. Car. 229.

*Texas*. — *Waggoner v. Dodson*, 36 Tex. 6.

*Vermont*. — *State v. Shaw*, 73 Vt. 149.

5. Capital Offenses. — *People v. Smith*, 134 Cal. 453; *State v. Hunt*, 128 N. Car. 584; *Cochran v. U. S.*, 14 Okla. 108.

6. Crimes Punishable by Life Imprisonment. — *People v. Sullivan*, 132 Cal. 93.

7. Maximum or Minimum Punishment. — That the statute names a minimum punishment only does not entitle the defendant to the number of challenges allowed in the case of capital offenses. *People v. Sullivan*, 132 Cal. 93, following *People v. Clough*, 59 Cal. 438, stated in the original note.

**1182.** 3. Retrial After Conviction of Murder in Second Degree. — *People v. Smith*, 134 Cal. 453.



**1182.** (2) *Joint Parties* — (a) *In Civil Actions*. — See notes 4, 5, 6.  
Consolidation of Actions. — See note 7.

**1183.** (b) *In Criminal Prosecutions* — *aa. RIGHTS OF DEFENDANTS*. — See notes 1, 4, 5, 6.

*bb. RIGHTS OF STATE*. — See note 13.

**1184.** (3) *Several Counts in Indictment*. — See note 7.

(4) *Substitution of Jurors During Trial*. — See notes 8, 9.

**1185.** (5) *United States Courts*. — See note 1.

*In the Territories*. — See note 2.

*e. IMPAIRMENT OF RIGHT*. — See notes 4, 5, 6, 7, 8, 9.

**1186.** *f. WAIVER OF RIGHT*. — See notes 2, 4, 5, 6, 7.

**1182. 4. Joint Parties in Civil Actions.** — Illinois, etc., *R. Co. v. Freeman*, 210 Ill. 270; *Gordon v. Chicago*, 201 Ill. 623; *Cumberland Telephone, etc., Co. v. Ware*, 115 Ky. 581; *Waggoner v. Dodson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 813, 96 Tex. 6; *St. Louis Southwestern R. Co. v. Barnes*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1041; *Hall v. Hargadine-McKittrick Dry Goods Co.*, 23 Tex. Civ. App. 149; *Watts v. Dubois*, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; *Bruce v. Weatherford First Nat. Bank*, 25 Tex. Civ. App. 295.

**5. Severance in Pleading.** — *Waggoner v. Dodson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 813.

**6. Antagonistic Defenses.** — *Cuero First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201; *Waggoner v. Dodson*, 96 Tex. 6.

**7. Consolidation of Actions.** — *Waggoner v. Dodson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 813; *Texas, etc., R. Co. v. Stell*, (Tex. Civ. App. 1901) 61 S. W. Rep. 980.

**A Sole Plaintiff** is entitled to as many peremptory challenges as all the defendants. *Connecticut Mut. L. Ins. Co. v. Hillmon*, (C. C. A.) 107 Fed. Rep. 834.

**1183. 1. Each Defendant Entitled to Full Number of Challenges.** — *Hudson v. State*, 137 Ala. 60; *Booth v. Territory*, (Ariz. 1905) 80 Pac. Rep. 354; *Carpenter v. People*, 31 Colo. 284; *State v. Dreany*, 65 Kan. 292.

**4. Carpenter v. People**, 31 Colo. 284.

**5. Both Defendants Restricted to Challenges of One.** — *State v. Wolf*, 112 Iowa 458; *State v. Rackman*, 68 N. J. L. 120; *State v. MacQueen*, 69 N. J. L. 522; *Cochran v. U. S.*, 14 Okla. 108.

**6. State v. Rachman**, 68 N. J. L. 120.

**13. Proportion of Number Allowed to Accused.** — *Contra, State v. Dreany*, 65 Kan. 292.

**1184. 7. Trial of Several Indictments Consolidated.** — Where several indictments are tried together, the accused is entitled to the full number of peremptory challenges to which he would be entitled were he tried separately on each indictment. *Betts v. U. S.*, (C. C. A.) 132 Fed. Rep. 228.

**8. Challenges on Substitution of Juror.** — *People v. Zeigler*, 135 Cal. 462; *West v. State*, 42 Fla. 244.

**9. See Cochran v. U. S.**, 14 Okla. 108.

**1185. 1. United States Statute.** — See *Considine v. U. S.*, (C. C. A.) 112 Fed. Rep. 342; *Tyler v. U. S.*, (C. C. A.) 106 Fed. Rep. 137.

**Misdemeanors.** — On trial for an offense declared by statute to be a misdemeanor, the defendant is entitled to only three peremptory challenges. *Jewett v. U. S.*, (C. C. A.) 100 Fed. Rep. 832.

**2. In Alaska** the number of peremptory challenges is regulated by section 135 of the Criminal Code provided for Alaska by Act Cong. March 3, 1899, 30 U. S. Stat. at L. 1299, 1 Fed. Stat. Annot. 360. *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569.

**4. Impairment of Right.** — *State v. Hunter*, 118 Iowa 686; *Dunn v. Wilmington, etc., R. Co.*, 131 N. Car. 446, *per Douglas, J., dissenting*, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1185. See also *Ward v. State*, 102 Tenn. 724.

**5. As Cause for Reversal.** — *Betts v. U. S.*, (C. C. A.) 132 Fed. Rep. 228; *State v. Hunter*, 118 Iowa 686; *Swanson v. Mendenhall*, 80 Minn. 56.

**6. Chicago City R. Co. v. Fetzer**, 113 Ill. App. 280; *Strehmann v. Chicago*, 93 Ill. App. 206; *Swanson v. Mendenhall*, 80 Minn. 56. See also *Com. v. Evans*, 25 Pa. Super. Ct. 239; *Ward v. State*, 102 Tenn. 724.

**7. Exhaustion of Challenges Allowed.** — *Wells v. Houston*, 29 Tex. Civ. App. 619.

**8. Waggoner v. Dodson**, (Tex. Civ. App. 1902) 68 S. W. Rep. 813.

**9. Stevens v. Union R. Co.**, 26 R. I. 90. *Contra, Waggoner v. Dodson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 813.

**The Improper Allowance** of a peremptory challenge is ground for reversal where the opposite party has exhausted his peremptory challenges. *Dunn v. Wilmington, etc., R. Co.*, 131 N. Car. 446. But not where the peremptory challenges are not exhausted. *U. S. v. Davis*, 103 Fed. Rep. 457.

**1186. 2. Waiver of Right.** — *Nicholson v. People*, 31 Okla. 53; *Mathis v. State*, 45 Fla. 46; *State v. Hunter*, 118 Iowa 686; *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67; *Com. v. Brown*, 23 Pa. Super. Ct. 470; *State v. Williams*, 49 W. Va. 220.

**4. Challenge Before Swearing.** — *U. S. v. Davis*, 103 Fed. Rep. 457; *Mathis v. State*, 45 Fla. 46; *Myers v. State*, 43 Fla. 500; *State v. Lyons*, 70 N. J. L. 635; *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67. See also *State v. Hunter*, 118 Iowa 686.

**5. Challenge After Swearing.** — *State v. Crea*, 10 Idaho 88.

**6. Effect of Acceptance of Juror.** — *Dunn v. Wilmington, etc., R. Co.*, 131 N. Car. 446; *Com. v. Brown*, 23 Pa. Super. Ct. 470; *Black v. State*, 46 Tex. Crim. 590.

One does not lose the right to challenge merely by turning the proposed juror over to his adversary for cross-examination on his *voir dire*. *Com. v. Evans*, 25 Pa. Super. Ct. 239.

**7. U. S. v. Davis**, 103 Fed. Rep. 457; *State*

**1187.** *h. RIGHT OF PEREMPTORY CHALLENGE AS CURING ERRONEOUS RULINGS* — (1) *Wrongful Acceptance of Juror.* — See note 2.

**1188.** *The Converse Rule.* — See note 1.

*Objectionable Juror Must Be Impaneled.* — See note 2.

**1189.** *Reversal Though Challenges Not Exhausted.* — See note 1.

*Exhaustion of Challenges Not Considered.* — See note 2.

*Additional Challenges.* — See note 6.

(2) *Wrongful Exclusion of Juror.* — See note 7.

**1190.** See note 1.

**6. Standing Jurors Aside** — *b. PRACTICE IN UNITED STATES.* —

See note 5.

*d. IN WHAT CASES RIGHT EXISTS.* — See note 10.

*v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529. See also *State v. Vance*, 29 Wash. 435.

**1187.** *2. Peremptory Challenge Not Exhausted* — *United States.* — *Hawkins v. U. S.*, (C. C. A.) 116 Fed. Rep. 569; *U. S. v. Davis*, 103 Fed. Rep. 457.

*Arkansas.* — *Caldwell v. State*, 69 Ark. 322.

*Colorado.* — *Blackman v. Edsall*, 17 Colo. App. 429.

*Florida.* — *Mathis v. State*, 45 Fla. 46; *Peaden v. State*, (Fla. 1903) 35 So. Rep. 204.

*Idaho.* — *Knollin v. Jones*, 7 Idaho 466.

*Illinois.* — *Matthews v. Granger*, 196 Ill. 164, affirming 96 Ill. App. 536; *Gott v. People*, 187 Ill. 249.

*Indiana.* — *Terre Haute Electric Co. v. Watson*, 33 Ind. App. 124; *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138.

*Indian Territory.* — *National Bank v. Schufelt*, (Indian Ter. 1903) 82 S. W. Rep. 927; *Binyon v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 265.

*Iowa.* — *State v. Tyler*, 122 Iowa 125; *State v. Wright*, 112 Iowa 436; *State v. McIntosh*, 109 Iowa 209. See also *State v. Pray*, 126 Iowa 249.

*Kansas.* — *State v. Stockman*, 9 Kan. App. 422.

*Louisiana.* — *State v. Fourchy*, 51 La. Ann. 228.

*Michigan.* — *Martin v. Farmers' Mut. F. Ins. Co.*, (Mich. 1905) 102 N. W. Rep. 656; *Stowell v. Standard Oil Co.*, (Mich. 1905) 102 N. W. Rep. 227.

*Nebraska.* — *Chicago, etc., R. Co. v. Krayenbuhl*, (Neb. 1904) 98 N. W. Rep. 44; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

*North Carolina.* — *State v. Register*, 133 N. Car. 746; *State v. Kinsauls*, 126 N. Car. 1095.

*Pennsylvania.* — *Com. v. Fry*, 198 Pa. St. 379.

*Rhode Island.* — See *Stevens v. Union R. Co.*, 26 R. I. 90.

*South Carolina.* — *State v. Hayes*, 69 S. Car. 295; *State v. Weaver*, 58 S. Car. 106.

*South Dakota.* — *State v. Hammond*, 14 S. Dak. 545.

*Tennessee.* — *Madden v. State*, (Tenn. 1901) 67 S. W. Rep. 74.

*Texas.* — *Yecker v. San Antonio Traction Co.*, 33 Tex. Civ. App. 239; *Hubbard v. State*, 43 Tex. Crim. 564; *Taylor v. State*, 44 Tex. Crim. 547; *Carter v. State*, 45 Tex. Crim. 430; *Norsworthy v. State*, 45 Tex. Crim. 339; *Mancillas v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 469; *Brown v. State*, (Tex. Crim. 1904) 78 S.

W. Rep. 507; *Cannon v. State*, 41 Tex. Crim. 467.

*Washington.* — *State v. Champoux*, 33 Wash. 339.

**1188.** *1. Exhaustion of Peremptory Challenges.* — *Dolan v. U. S.*, (C. C. A.) 116 Fed. Rep. 578; *Caldwell v. State*, 69 Ark. 322, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1188; *State v. Fourchy*, 51 La. Ann. 228; *State v. McCoy*, 109 La. 682; *Gammons v. State*, 85 Miss. 103; *Ward v. State*, 102 Tenn. 724; *State v. Stentz*, 30 Wash. 134.

*2. Objectionable Juror Must Be Forced on Party through Want of Peremptory Challenge.* — *Caldwell v. State*, 69 Ark. 322, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1188; *Graff v. People*, 208 Ill. 312, affirming 108 Ill. App. 168; *National Bank v. Schufelt*, (Indian Ter. 1903) 82 S. W. Rep. 927; *Knights of Pythias v. Steele*, 108 Tenn. 624; *Rocha v. State*, 43 Tex. Crim. 169; *Brown v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 507; *Villereal v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 715; *St. Louis Southwestern R. Co. v. Barnes*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1041; *Connell v. State*, 45 Tex. Crim. 142; *Norsworthy v. State*, 45 Tex. Crim. 339; *Mancillas v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 469; *Carter v. State*, 45 Tex. Crim. 430.

**1189.** *1. New York Rule.* — *People v. Decker*, 157 N. Y. 186; *People v. Lammerts*, 164 N. Y. 137.

*2. Decision Not Referring to Exhaustion of Challenges.* — *Caldwell v. State*, 69 Ark. 322, quoting 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

*6. Cure of Error in Overruling Challenge for Cause.* — *Brewer v. State*, 72 Ark. 145; *People v. Amaya*, 134 Cal. 531.

*7. Erroneous Exclusion of Juror.* — *U. S. v. Davis*, 103 Fed. Rep. 457; *State v. McGraw*, 6 Idaho 635; *State v. Breaux*, 104 La. 540; *State v. Harris*, 107 La. 196; *Commercial Bank v. Chatfield*, 121 Mich. 641. See also *Glenn v. State*, 71 Ark. 86.

**1190.** *1. To the Same Effect as the Texas Decisions* see *State v. Hammond*, 14 S. Dak. 545.

*8. Abolished in Pennsylvania.* — By Pub. Laws 16 and 629 of 1901, the right to stand jurors aside was abolished in Pennsylvania. *Com. v. Brown*, 23 Pa. Super. Ct. 470.

*10. Prosecutions for Felony.* — *Com. v. Kay*, 14 Pa. Super. Ct. 376; *Com. v. Llewellyn*, 14 Pa. Super. Ct. 214.

- 1191.** See note 1.  
*f.* ASSIGNMENT OF CAUSE OF CHALLENGE. — See note 5.  
**7.** Talesmen and Additional Jurors — *a.* IN GENERAL. — See note 8.
- 1192.** *b.* STATUTORY ENLARGEMENT OF POWERS OF COURT. — See note 3.
- 1193.** *c.* CONDITIONS WHICH WILL AUTHORIZE — (2) *Exhaustion of Panel.* — See note 2.
- 1194.** Exhaustion Generally Necessary. — See note 2.  
 (5) *Quashal of Venire.* — See note 7.
- 1195.** *d.* ANTICIPATION OF REQUIREMENT. — See note 1.  
*e.* NUMBER OF TALESMEN OR ADDITIONAL JURORS. — See note 3.  
*f.* QUALIFICATIONS. — See note 6.
- 1196.** IX. SPECIAL AND STRUCK JURIES — 1. In England. — See note 2.  
 2. In the United States. — See notes 3, 4, 5.
- 1197.** Under a New York Statute. — See note 3.  
 4. Application. — See note 12.
- 1198.** 5. Discretion in Granting. — See notes 2, 3.  
 6. Mode of Striking Jury. — See note 4.
- 1199.** X. CUSTODY AND CONDUCT OF JURY — 1. Custody of Officer —  
*a.* NECESSITY. — See note 2.
- 1200.** *b.* WHO MAY BE CUSTODIAN — Prejudice of Officer. — See note 1.  
*c.* OATH OF CUSTODIAN. — See notes 5, 6.  
 General Oath by Officer. — See note 9.
- 1201.** See note 1.  
 Waiver of Objection. — See note 2.
- 1202.** *d.* CONDUCT OF CUSTODIAN — (1) *In General* — Punishment. — See note 3.
- 1191.** 1. Misdemeanors. — Com. v. Kay, 14 Pa. Super. Ct. 376; Com. v. Llewellyn, 14 Pa. Super. Ct. 214.  
 5. Assignment of Cause of Challenge. — Com. v. Kay, 14 Pa. Super. Ct. 376.  
 8. Drawn in Conformity with Statute. — Talesmen must be procured in the manner provided for by statute, and where the statute provides that they be drawn from the body of the county they cannot be procured from panels in other courts. Gulf, etc., R. Co. v. Gilvin, (Tex. Civ. App. 1900) 55 N. W. Rep. 985.
- 1192.** 3. Statutory Enlargement of Powers of Court. — State v. Edwards, 64 Kan. 455.
- 1193.** 2. Exhaustion of Regular Panel. — State v. Riggs, 110 La. 509; Bates v. State, 43 Tex. Crim. 589. But see State v. Edwards, 64 Kan. 455.
- 1194.** 2. Previous Venire Need Not Be Exhausted. — Elias v. Territory, (Ariz. 1904) 76 Pac. Rep. 605; People v. Wong Bin, 139 Cal. 60.  
 7. Quashal of Venire. — Waldron v. State, 41 Fla. 265.
- 1195.** 1. Anticipation of Requirement. — State v. Bordelon, 113 La. 690; State v. Watkins, 106 La. 380.  
 3. Discretion of Judge. — See Com. v. Payne, 205 Pa. St. 101.  
 6. In Justice's Court. — In Michigan a talesman in a justice's court need not be a taxpayer. Reed v. Peacock, 123 Mich. 244, 81 Am. St. Rep. 194.
- 1196.** 2. See Eckrich v. St. Louis Transit Co., 176 Mo. 621, 98 Am. St. Rep. 517.  
 3. Special and Struck Juries in United States. — Welsh v. State, 60 Neb. 101.  
 4. To Obtain Persons Acquainted with Particular Class of Matters. — Eckrich v. St. Louis Transit Co., 176 Mo. 621, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1196.  
 5. See Waldron v. State, 41 Fla. 265.
- 1197.** 3. A Murder Trial has been held to be an "important" case within the New York statute. People v. Hall, 169 N. Y. 184.  
 12. See Farrar v. State, 44 Tex. Crim. 236.
- 1198.** 2. Discretion of Court. — Southern R. Co. v. Oliver, 102 Va. 710.  
 3. Recall of Grant. — See Bullock v. State, 65 N. J. L. 557, 86 Am. St. Rep. 668.
- 1199.** 2. Requirement of Custody of Officer. — Dreyer v. People, 188 Ill. 40.  
**1200.** 1. Officer Who Is Witness in Case. — State v. Rosencrans, 9 N. Dak. 163.  
 5. Necessity of Oath. — Dreyer v. People, 188 Ill. 40; State v. Lashell, 9 Kan. App. 887.  
 6. Omission Not Fatal in Absence of Prejudice. — U. S. v. Davis, 103 Fed. Rep. 457 (a case arising in Tennessee); Johnson v. State, 68 Ark. 401; Reed v. Com., 98 Va. 817.  
 Not Statutory Ground for New Trial. — See Territory v. Dooley, 3 Ariz. 60.  
 9. General Oath Sufficient. — U. S. v. Davis, 103 Fed. Rep. 457; Reed v. Com., 98 Va. 817.
- 1201.** 1. Swearing Once During Trial Sufficient. — Reed v. Com., 98 Va. 817. Contra, Dreyer v. People, 188 Ill. 40.  
 2. Waiver of Objection. — Johnson v. State, 68 Ark. 401; Dreyer v. People, 188 Ill. 40; State v. Crilly, 69 Kan. 802.
- 1202.** 3. Punishment for Improper Conduct

- 1203.** (3) *Presence in Jury Room.* — See notes 4, 5.  
 (4) *Communicating with Jury.* — See notes 7, 8.
- 1204.** *Statements as to Effect of Disagreement.* — See note 4.  
**2. Misconduct of Jury** — *a. GENERAL CONSIDERATIONS* — (2) *Necessity of Prejudice.* — See note 14.
- 1206.** (3) *Presumptions* — (b) *Of Prejudice.* — See note 2.  
 (4) *Waiver of Objections.* — See note 3.
- 1208.** *Application of General Rule.* — See notes 2, 3, 6, 7, 8.  
*Knowledge of Counsel.* — See note 12.
- 1209.** (5) *Conclusiveness of Decision of Lower Court.* — See notes 3, 4, 6.  
*Conflicting Evidence.* — See note 7.
- 1210.** (6) *Punishment for Misconduct.* — See notes 1, 2.  
*b. COMMUNICATIONS WITH OUTSIDERS* — (1) *In General* — *Punishment for Holding Communication.* — See notes 5, 6.

— *Interference in Deliberations.* — *Wilkerson v. State*, 78 Miss. 356.

**1203.** 4. *Not Ground for New Trial.* — *Shular v. State*, 160 Ind. 300.

5. *New Trial Occasionally Granted.* — *Cooney v. State*, 61 Neb. 342.

7. *Communications with Jury.* — *Coolman v. State*, 163 Ind. 503; *Otto v. Young*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 628, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203, and applying the rule there laid down to a court stenographer.

*Making a Statement as to the Law of the Case* is misconduct. *Wilkerson v. State*, 78 Miss. 356.

8. *Presumption of Prejudice.* — *Coolman v. State*, 163 Ind. 503; *Shaw v. State*, 79 Miss. 577; *Wilkerson v. State*, 78 Miss. 356.

**1204.** 4. *Communications as to Length of Confinement.* — *Shaw v. State*, 79 Miss. 577. See also *Coolman v. State*, 163 Ind. 503.

14. *Necessity of Prejudice.* — *Gamble v. State*, 44 Fla. 429; *Gott v. People*, 187 Ill. 249; *Caldwell v. Nashua*, 122 Iowa 179; *Wilberding v. Dubuque*, 111 Iowa 484; *Drake v. Drake*, 107 Ky. 32; *Pierce v. Brennan*, 83 Minn. 422; *State v. Andre*, 14 S. Dak. 215; *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198; *State v. Clark*, 51 W. Va. 457.

**1206.** 2. *Presumption of Prejudice.* — *Frame v. State*, 73 Ark. 501; *Gamble v. State*, 44 Fla. 429; *Central of Georgia R. Co. v. Hammond*, 109 Ga. 383; *Coolman v. State*, 163 Ind. 503; *State v. Morgan*, 23 Utah 212; *State v. Cotts*, 49 W. Va. 615.

3. *Waiver of Objections* — *Connecticut.* — *State v. Tucker*, 75 Conn. 201.

*Georgia.* — *Medlock v. Road*, etc., Com'rs, 115 Ga. 337.

*Indiana.* — *Ellis v. Hammond*, 157 Ind. 267; *Aurora*, etc., *Turnpike Co. v. Niebruggee*, 25 Ind. App. 567.

*Kentucky.* — *Drake v. Drake*, 107 Ky. 32.

*Louisiana.* — *State v. Gianfala*, 113 La. 463, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206.

*Maine.* — *Belcher v. Estes*, 99 Me. 314.

*Nebraska.* — *Parkins v. Missouri Pac. R. Co.*, (Neb. 1903) 93 N. W. Rep. 197.

*New York.* — *Werner v. Interurban St. R. Co.*, 99 N. Y. App. Div. 592; *People v. Priori*, 164 N. Y. 459.

*Pennsylvania.* — *Jejorek v. Nanticoke*, 9 Kulp (Pa.) 501.

*South Carolina.* — *Lloyd v. Rawl*, 63 S. Car. 219.

*Texas.* — *Olivares v. San Antonio*, etc., R. Co., (Tex. Civ. App. 1904) 84 S. W. Rep. 248. *Vermont.* — *McKinstry v. Collins*, 74 Vt. 147. *Washington.* — *State v. Shuck*, 38 Wash. 270.

*The Improper Separation of the Jury.* — *State v. Shuck*, 38 Wash. 270.

**1208.** 2. *Prompt Objection Necessary* — *Taking Papers to Jury Room.* — *State v. Tucker*, 75 Conn. 201.

3. *Taking Articles to Jury Room.* — *People v. Priori*, 164 N. Y. 459 (legal books).

6. *Wrongful Communications.* — *State v. Kinsauls*, 126 N. Car. 1095; *Texarkana*, etc., R. Co. v. *Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; *McKinstry v. Collins*, 74 Vt. 147.

7. *Improper Remarks in Presence of Jurors.* — *Ellis v. Hammond*, 157 Ind. 267.

8. *Juror Sleeping.* — *Lloyd v. Rawl*, 63 S. Car. 219.

12. *Knowledge of Counsel.* — *Drake v. Drake*, 107 Ky. 32.

**1209.** 3. *Discretion of Lower Court.* — *Sanders v. State*, 131 Ala. 1; *Hamburger v. Rinkel*, 164 Mo. 398; *Watts v. South Bound R. Co.*, 60 S. Car. 67.

80 in *Case of Improper Separation.* — *Hooker v. State*, (Ark. 1905) 86 S. W. Rep. 846; *May v. State*, 120 Ga. 497.

4. *Review for Palpable Error.* — *Siemens v. Oakland*, etc., *Electric R. Co.*, 134 Cal. 494; *State v. Walls*, 52 La. Ann. 1002; *State v. Lauth*, (Oregon 1905) 80 Pac. Rep. 660, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209; *Mix v. North American Co.*, 209 Pa. St. 636.

6. *Decision on Motion for New Trial Not Reviewable.* — *Sanders v. State*, 131 Ala. 1.

7. *Finding on Conflicting Evidence.* — *Frame v. State*, 73 Ark. 501; *Missouri Pac. R. Co. v. Bowman*, 68 Kan. 489; *Russell v. State*, 66 Neb. 497; *Texarkana*, etc., R. Co. v. *Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 77 Vt. 294, 107 Am. St. Rep. 668. See also *Hydinger v. Chicago*, etc., R. Co., 126 Iowa 222.

**1210.** 1. *Punishment for Misconduct.* — *Butts v. Union R. Co.*, 21 R. I. 505.

2. *As for Contempt.* — *In re Odum*, 133 N. Car. 250.

5. *Punishment of Juror.* — *In re Gorham*, 129 N. Car. 481.

**1211.** (2) *Necessity of Prejudice.* — See notes 1, 2.

Oral Messages on Personal Matters. — See notes 3, 4.

(3) *Communications Concerning Case.* — See note 5.

**1212.** See note 1.

So Statements by Jurors. — See note 3.

Statements by Juror as to Verdict. — See notes 6, 7.

(4) *Presumptions.* — See notes 8, 9.

**1213.** See note 1.

(5) *Communications by and with Prevailing Party* — (a) *In General.*

— See notes 3, 4.

**1214.** *Mere Casual Communications.* — See note 1.

(b) *By and with Counsel.* — See notes 7, 8.

**1215.** (a) *By and with Partisans.* — See notes 1, 2, 3.

(6) *Communications by and with Witnesses.* — See note 5.

(7) *Communications by Judge.* — See note 8.

**1216.** See notes 1, 3.

(8) *Delivery of Letters to Jurors.* — See notes 4, 7.

c. *SEPARATION OF JURORS* — (1) *Criminal Cases* — (a) *Separation*

*Generally Allowed.* — See notes 8, 9.

**1210.** 6. *Punishment of Outsider.* — *Drady v. District Ct.*, 126 Iowa 345; *In re Gorham*, 129 N. Car. 481. See also *In re Odum*, 133 N. Car. 250.

**1211.** 1. *Absence of Prejudice.* — *Sanders v. State*, 13 Ala. 1; *Werner v. Interurban St. R. Co.*, 99 N. Y. App. Div. 592; *State v. Clark*, 51 W. Va. 457.

2. *Communications upon Extraneous Matters.* — *Vowell v. State*, 72 Ark. 158; *Gamble v. State*, 44 Fla. 429; *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284; *Marzen v. People*, 190 Ill. 88; *Taylor v. State*, (Miss. 1901) 30 So. Rep. 657; *Reg. v. McClung*, 1 N. W. Ter. 379.

3. *Personal Messages.* — *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284.

4. *Gamble v. State*, 44 Fla. 429. See also *State v. Cotts*, 49 W. Va. 615.

5. *Prejudicial Communications Ground for New Trial.* — *Briggs v. Rowley*, 10 Ohio Dec. 177; *Larson v. Levy*, (Tex. Civ. App. 1900) 57 S. W. Rep. 52.

**1212.** 1. *Source of Communication Immaterial.* — *Briggs v. Rowley*, 10 Ohio Dec. 177.

3. *Statements by Juror.* — *Drake v. Drake*, 107 Ky. 32.

6. See *Drake v. Drake*, 107 Ky. 32.

7. *Betting as to Result.* — See *Butts v. Union R. Co.*, 21 R. I. 505.

8. *Presumption of Prejudice.* — *Vowell v. State*, 72 Ark. 158; *Coolman v. State*, 163 Ind. 503; *State v. Clark*, 51 W. Va. 457; *Hempton v. State*, 111 Wis. 127. See also *Palm v. Chermowsky*, 28 Tex. Civ. App. 405.

9. *Contrary Decisions.* — *Baizley v. Welsh*, 71 N. J. L. 471; *State v. Wine*, 58 S. Car. 94.

**1213.** 1. *Rebuttal of Presumption.* — *Vowell v. State*, 72 Ark. 158; *State v. Cotts*, 49 W. Va. 615.

3. *Communications with Prevailing Party.* — *Larson v. Levy*, (Tex. Civ. App. 1900) 57 S. W. Rep. 52.

4. *No Inquiry as to Prejudice.* — *Larson v. Levy*, (Tex. Civ. App. 1900) 57 S. W. Rep. 52.

**1214.** 1. *Casual Conversations.* — *Werner v. Interurban St. R. Co.*, 99 N. Y. App. Div.

592; *Vowell v. Issaquah Coal Co.*, 31 Wash. 103.

7. *Communications by Counsel.* — *Pritchard v. Roe*, 3 Penn. (Del.) 128, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1214.

8. *Nonprejudicial Association.* — *Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Playing Cards with Counsel.* — It has been held not to be misconduct for a juror to play cards with counsel for one of the parties during a recess. *Feary v. Metropolitan St. R. Co.*, 162 Mo. 75.

**1215.** 1. *Communications by Partisans.* — *Briggs v. Rowley*, 10 Ohio Dec. 177; *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92. See also *State v. Burton*, 65 Kan. 704.

2. *Knowledge or Consent of Party.* — *Briggs v. Rowley*, 10 Ohio Dec. 177.

3. *Actual Influence Need Not Be Shown.* — *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92.

5. *Communications Not Ground for New Trial.* — *Chicago Junction R. Co. v. McGrath*, 203 Ill. 511.

6. *Communications by Judge.* — *State v. Bland*, 9 Idaho 796; *Coolman v. State*, 163 Ind. 503; *Lasher v. Curry*, (County Ct.) 9 N. Y. Annot. Cas. 260; *Hudson v. Stearns*, (County Ct.) 75 N. Y. Supp. 735; *State v. Kiefer*, 16 S. Dak. 180.

**1216.** 1. *Judge Should Not Enter Jury Room.* — *State v. Bland*, 9 Idaho 796.

But it has been held that the judge may go into the jury room for the purpose of withdrawing an erroneous instruction. *Martin v. Petty*, (Tex. Civ. App. 1904) 79 S. W. Rep. 878.

3. *Consent by Parties.* — *Lasher v. Curry*, (County Ct.) 9 N. Y. Annot. Cas. 260.

4. *Delivery of Letters to Jurors.* — *State v. Bland*, 9 Idaho 796.

7. *Possibility of Prejudicial Matter.* — *State v. Bland*, 9 Idaho 796. But see *State v. Wine*, 58 S. Car. 94.

8. *Separation — Former Rule.* — *State v. Cotts*, 49 W. Va. 615.

9. *State v. Antoine*, 52 La. Ann. 488. But see *State v. Harris*, 22 Wash. 57.

**1217.** See note 1.

Capital Crimes and Other Felonies. — See notes 2, 3, 4.

**1218.** See note 1.

(b) Separation Without Prejudice. — See note 2.

**1219.** See notes 1, 2.

Presumption of Prejudice. — See note 4.

**1220.** See notes 1, 2, 3.

Distinction as to Character of Crime. — See note 4.

**1221.** See note 1.

The Affidavit of a Juror. — See notes 2, 3.

**1217. 1. Discretion of Court.** — *Daxanbeklar v. People*, 93 Ill. App. 553; *State v. Antoine*, 52 La. Ann. 488; *State v. Nelson*, 91 Minn. 143.

**2. Crimes — Separation Not Allowed — Capital.** — *U. S. v. Davis*, 103 Fed. Rep. 457; *Gott v. People*, 187 Ill. 249; *Waller v. People*, 209 Ill. 284; *Daxanbeklar v. People*, 93 Ill. App. 553; *State v. Scanlan*, 52 La. Ann. 2058; *State v. Antoine*, 52 La. Ann. 488; *State v. Schaeffer*, 172 Mo. 335; *Hempton v. State*, 111 Wis. 127.

**3. Effect of Consent.** — *State v. Craighead*, 114 La. 84.

**4. Capital Crimes — Separation Allowed.** — *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284; *State v. Burton*, 65 Kan. 704.

**Discretion of Court.** — *State v. Nelson*, 91 Minn. 143.

**1218. 1. Felonies — Separation Not Allowed.** — *Gamble v. State*, 44 Fla. 429; *Carter v. State*, 78 Miss. 348; *State v. Schaeffer*, 172 Mo. 335; *State v. Cotts*, 49 W. Va. 615.

In *Virginia* it is provided by statute that the jurors may separate in felony cases, unless otherwise directed by the judge, except when the punishment may be death or imprisonment for more than ten years. Under this statute it is held that a separation cannot be allowed upon a trial under an indictment charging two separate offenses, the aggregate punishment of which may be in excess of ten years' imprisonment. *Johnson v. Com.*, 102 Va. 927.

**2. Necessity of Prejudice — United States.** — *U. S. v. Davis*, 103 Fed. Rep. 457.

*Arkansas.* — *Frame v. State*, 73 Ark. 501; *Johnson v. State*, 68 Ark. 401.

*California.* — See *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

*Florida.* — *Gamble v. State*, 44 Fla. 429.

*Georgia.* — *Bowdoin v. State*, 113 Ga. 1150. See also *May v. State*, 120 Ga. 497.

*Illinois.* — *Gott v. People*, 187 Ill. 249; *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284; *Flanagan v. People*, 214 Ill. 170; *Marzen v. People*, 190 Ill. 88.

*Kentucky.* — *Thacker v. Com.*, (Ky. 1901) 63 S. W. Rep. 737.

*Louisiana.* — *State v. Antoine*, 52 La. Ann. 488; *State v. Veillon*, 105 La. 411.

*Missouri.* — *State v. Schaeffer*, 172 Mo. 335. *Nebraska.* — *Iowa Sav. Bank v. Frink*, (Neb. 1901) 92 N. W. Rep. 916.

*Pennsylvania.* — *Com. v. Gearhardt*, 205 Pa. St. 387.

*West Virginia.* — *State v. Clark*, 51 W. Va. 457; *State v. Cotts*, 49 W. Va. 615; *State v. Cottrill*, 52 W. Va. 363.

**1219. 1. Capital Cases — Arkansas.** — *Frame v. State*, 73 Ark. 501.

*Illinois.* — *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284; *Gott v. People*, 187 Ill. 249; *Marzen v. People*, 190 Ill. 88; *Waller v. People*, 209 Ill. 284.

*Louisiana.* — *State v. Veillon*, 105 La. 411.

*Missouri.* — *State v. Schaeffer*, 172 Mo. 335.

*Pennsylvania.* — *Com. v. Williams*, 209 Pa. St. 329; *Com. v. Gearhardt*, 205 Pa. St. 387.

*Texas.* — *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198.

*West Virginia.* — *State v. Clark*, 51 W. Va. 457; *State v. Cottrill*, 52 W. Va. 363.

**2. Momentary Separation.** — *U. S. v. Davis*, 103 Fed. Rep. 457; *State v. White*, 52 La. Ann. 206; *Shivers v. Territory*, 13 Okla. 466; *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198; *State v. Cottrill*, 52 W. Va. 363.

**4. Presumption of Prejudice — United States.** — See *U. S. v. Davis*, 103 Fed. Rep. 457.

*Arkansas.* — *Frame v. State*, 73 Ark. 501; *Johnson v. State*, 68 Ark. 401.

*California.* — *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

*Florida.* — *Gamble v. State*, 44 Fla. 429.

*Kentucky.* — *Thacker v. Com.*, (Ky. 1901) 63 S. W. Rep. 737.

*Louisiana.* — *State v. Craighead*, 114 La. 84.

*Mississippi.* — *Carter v. State*, 78 Miss. 348.

*Missouri.* — *State v. Schaeffer*, 172 Mo. 335.

*West Virginia.* — *State v. Clark*, 51 W. Va. 457; *State v. Cottrill*, 52 W. Va. 363; *State v. Cotts*, 49 W. Va. 615.

*Wisconsin.* — *Hempton v. State*, 111 Wis. 127.

**1220. 1. Opportunity for Exercise of Influence.** — *Johnson v. State*, 68 Ark. 401; *Griffey v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 335; *Hempton v. State*, 111 Wis. 127.

**2. Rebuttal of Presumption.** — *U. S. v. Davis*, 103 Fed. Rep. 457 (a case arising in *Tennessee*); *Frame v. State*, 73 Ark. 501; *Gamble v. State*, 44 Fla. 429; *State v. Schaeffer*, 172 Mo. 335; *Com. v. Gearhardt*, 205 Pa. St. 387; *State v. Cottrill*, 52 W. Va. 363; *State v. Clark*, 51 W. Va. 457; *State v. Cotts*, 49 W. Va. 615.

**3. Burden of Showing Prejudice.** — *Johnson v. State*, 68 Ark. 401; *Waller v. People*, 209 Ill. 284; *Flanagan v. People*, 214 Ill. 170; *State v. Veillon*, 105 La. 411. See also *Iowa Sav. Bank v. Frink*, (Neb. 1901) 92 N. W. Rep. 916.

**4. Capital Cases.** — *Gamble v. State*, 44 Fla. 429. In *Louisiana.* — *State v. Craighead*, 114 La. 84; *State v. Antoine*, 52 La. Ann. 488.

**1221. 1. Felonies.** — See *Carter v. State*, 78 Miss. 348.

**2. Sufficiency of Juror's Affidavit.** — *Hempton*

- 1221.** (c) *Manner and Purpose of Separation* — *bb. SEPARATION IN CHARGE OF OFFICER.* — See notes 6, 8, 9.
- 1222.** *cc. SLEEPING ACCOMMODATIONS.* — See note 1.  
*dd. GOING TO MEALS.* — See notes 4, 6.  
*ee. SEPARATION FOR NECESSARY PURPOSE.* — See note 7.
- 1223.** See note 1.  
 (a) *Time of Separation* — *aa. BEFORE COMPLETION OF JURY.* — See notes 3, 5.  
*bb. AFTER SUBMISSION OF CASE TO JURY.* — See note 6.
- 1224.** *Resulting Prejudice.* — See notes 2, 4.  
*Effect of Statute.* — See note 6.
- 1225.** *cc. AFTER AGREEMENT ON VERDICT.* — See notes 1, 2.
- 1226.** (e) *Consent to Separation.* — See notes 2, 3.  
*The Court Should Not Ask Counsel.* — See notes 6, 7.  
 (f) *Remedy for Improper Separation.* — See note 10.
- 1227.** (2) *Civil Cases* — (a) *In General.* — See notes 1, 2.  
 (b) *After Submission of Cause to Jury.* — See note 6.
- 1228.** See note 1.

*v. State*, 111 Wis. 127. But see *State v. Clark*, 51 W. Va. 457.

**1221.** 3. See *State v. Cotts*, 49 W. Va. 615.

**6. Separation in Charge of Officer.** — *U. S. v. Davis*, 103 Fed. Rep. 457; *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284; *Shivers v. Territory*, 13 Okla. 466; *Griffey v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 335; *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198; *State v. Cotts*, 49 W. Va. 615. See also *May v. State*, 120 Ga. 497.

**Juror in Sight and Hearing of Officer.** — *State v. Cotts*, 49 W. Va. 615.

**8. Juror Out of Sight of Officer.** — *Marzen v. People*, 190 Ill. 88, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1221.

**9. Part of Jury Left in Jury Room.** — *State v. Gregory*, 158 Mo. 139.

**1222.** 1. *Sleeping Accommodations.* — *Contra*, *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

**4. Separation in Dining Room.** — *Louder v. State*, 46 Tex. Crim. 121.

**6. Unauthorized Separation.** — *Hempton v. State*, 111 Wis. 127.

**7. Separation for Necessary Purpose** — *United States*. — *U. S. v. Davis*, 103 Fed. Rep. 457.

*Alabama*. — *Sanders v. State*, 131 Ala. 1.  
*California*. — See *Matter of McKenna*, 143 Cal. 580.

*Florida*. — *State v. Scanlan*, 52 La. Ann. 2058.

*Illinois*. — *Marzen v. People*, 190 Ill. 88, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1222.

*Louisiana*. — *State v. Callian*, 109 La. 346; *State v. Veillon*, 105 La. 411.

*Missouri*. — *State v. Shipley*, 171 Mo. 544; *State v. Gregory*, 158 Mo. 139.

*Oklahoma*. — *Shivers v. Territory*, 13 Okla. 466.

*South Carolina*. — *Watts v. South Bound R. Co.*, 60 S. Car. 67.

*Texas*. — *Jones v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 198; *Griffey v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 335.

*West Virginia*. — *State v. Clark*, 51 W. Va. 457.

**1223.** 1. *Juror Out of Officer's Sight.* —

*Griffey v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 335.

**3. Capital Cases.** — *Gerald v. State*, 128 Ala. 6; *Bell v. State*, 140 Ala. 57. *Contra*, *State v. Craighead*, 114 La. 84.

**5. Absence of Prejudice.** — *Carlson v. Holm*, (Neb. 1901) 95 N. W. Rep. 1125. See also *Stiles v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 511.

**6. No Separation After Submission.** — *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92; *Mix v. North American Co.*, 209 Pa. St. 636.

**1224.** 2. *Necessity of Prejudice.* — *Liverpool, etc., Ins. Co. v. Friedman Co.*, (C. C. A.) 133 Fed. Rep. 713; *Gott v. People*, 187 Ill. 249; *State v. Antoine*, 52 La. Ann. 488. See also *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

**4. Presumption of Prejudice.** — *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92. But see *Liverpool, etc., Ins. Co. v. Friedman Co.*, (C. C. A.) 133 Fed. Rep. 713.

**6. Absence of Prejudice.** — *Davis v. Searcy*, 79 Miss. 292; *State v. Hatfield*, 48 W. Va. 561. See also *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

**1225.** 1. *Prescott v. Augusta*, 118 Ga. 549.

**2. Separation After Agreement.** — *State v. Boyce*, 24 Wash. 514.

**1226.** 2. *Separation Not Justified by Consent.* — *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92.

**3. Capital Cases.** — *State v. Craighead*, 114 La. 84.

**6. Asking Consent in Presence of Jury.** — *State v. Veillon*, 105 La. 411; *State v. Parker*, 25 Wash. 405.

**7.** *State v. Veillon*, 105 La. 411.

**10. Not Ground for Discharge of Accused.** — *Gerald v. State*, 128 Ala. 6.

**1227.** 1. *Civil Cases.* — *Central of Georgia R. Co. v. Hall*, 109 Ga. 367.

**2. Necessity of Prejudice.** — *Medlock v. Road, etc.*, Com'rs, 115 Ga. 337.

**6. New Trial.** — *Compare Matter of McKenna*, 143 Cal. 580.

**1228.** 1. *Absence of Prejudice.* — *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92; *Watts v. South Bound R. Co.*, 60 S. Car. 67.

**1228.** That the Statute Requires the Jurors to Be Kept Together. — See note 2.

**1229.** (3) *Admonition on Separation.* — See notes 4, 7.

*A Presumption of Injury.* — See note 9.

**1230.** Failure to Object. — See note 3.

*d. BRIBERY AND CONFERRING OF FAVORS — Conferring of Favor.* —

See notes 7, 11.

*e. REMARKS AND DISCUSSIONS IN HEARING OF JURY.* — See

note 12.

**1231.** See notes 1, 2.

*f. OUTSIDER IN JURY ROOM.* — See notes 4, 7.

*g. REFRESHMENTS FOR JURY — (1) Food — (a) Early Doctrine.* —

See note 8.

**1232.** (b) *Modern Doctrine — Jurors Cannot Be Starved into Agreement.* — See note 6.

(2) *Intoxicating Liquors — (a) In General.* — See notes 9, 10.

**1234.** (b) *Use for Medicinal Purposes.* — See note 3.

(c) *Intoxication and Excessive Use.* — See notes 4, 8.

*Presumptions.* — See note 10.

**1235.** *Waiver of Objections.* — See note 1.

(3) *Refreshments Furnished by or in Behalf of Prevailing Party*

— (a) *In General.* — See notes 2, 4.

**1236.** (b) *Entertainment by Counsel.* — See note 7.

(c) *Entertainment by Partisans.* — See note 8.

**1237.** *h. RECEIVING EVIDENCE OUT OF COURT — (1) In General.* —

See note 1.

**1228.** 2. *Effect of Statute.* — *Walton v. Wild Goose Min., etc., Co., (C. C. A.)* 123 Fed. Rep. 209.

**1229.** 4. *Admonition upon Separation.* — *Johnson v. State,* 68 Ark. 401.

*It Is Not Necessary to Repeat the Admonition upon each separation of the jury.* *State v. Stockhammer,* 34 Wash. 262.

7. *New Trial.* — *Johnson v. State,* 68 Ark. 401.

9. *Presumption of Injury.* — *Johnson v. State,* 68 Ark. 401.

**1230.** 3. *Johnson v. State,* 68 Ark. 401.

7. *Conferring of Favor.* — Where the jurors in a murder trial were provided with sleeping accommodations at the house of a relative of the deceased it was held that a new trial should be granted. *Hensley v. Com., (Ky. 1903)* 74 S. W. Rep. 677.

*The Conferring of a Favor After the Termination of the Trial will not authorize a reversal.* *Larson v. Levy, (Tex. Civ. App. 1900)* 57 S. W. Rep. 52.

11. *Act of Common Courtesy.* — *Barker v. Stewart,* 110 Ga. 854; *Missouri Pac. R. Co. v. Bowman,* 68 Kan. 489.

12. *Remarks in Hearing of Jury.* — *Montgomery v. Hanson,* 122 Iowa 222.

**1231.** 1. *Remarks by a Party calculated to prejudice the jury, and made in their hearing, will authorize a new trial.* *Grand Trunk R. Co. v. Davis,* 76 Vt. 187.

2. *Remarks Not Actually Heard.* — See *McKinstry v. Collins,* 74 Vt. 147.

4. *Outsiders in Jury Room.* — *Cooney v. State,* 61 Neb. 342.

7. *Court Reporter Reading Testimony in Jury Room.* — *Otto v. Young, (Supm. Ct. App. T.)* 43 Misc. (N. Y.) 628.

8. *Food and Drink — Early Doctrine.* — *Russell v. State,* 66 Neb. 497.

**1232.** 6. *Jury Cannot Be Starved into Agreement.* — *Fairbanks v. Weeber,* 15 Colo. App. 268. See also *Russell v. State,* 66 Neb. 497.

9. *Contra.* — *Bernier v. Anderson,* 8 Idaho 675.

10. *Use of Intoxicating Liquor Not Ground for New Trial.* — *Gamble v. State,* 44 Fla. 429; *State v. Salverson,* 87 Minn. 40; *Ankeny v. Rawhouser, (Neb. 1901)* 95 N. W. Rep. 1053; *State v. Andre,* 14 S. Dak. 215; *Brown v. State,* 45 Tex. Crim. 139. *Contra, Bernier v. Anderson,* 8 Idaho 675.

**1234.** 3. *Use for Medicinal Purposes.* — *Gorham v. Sioux City Stock Yards Co.,* 118 Iowa 749; *State v. Salverson,* 87 Minn. 40.

4. *Intoxication Ground for Setting Aside Verdict.* — *State v. Ned,* 105 La. 696; *State v. Salverson,* 87 Minn. 40; *Hedican v. Pennsylvania F. Ins. Co.,* 21 Wash. 488.

8. *Hedican v. Pennsylvania F. Ins. Co.,* 21 Wash. 488.

10. *Presumption of Injury from Drinking.* — *State v. Salverson,* 87 Minn. 40; *Hempton v. State,* 111 Wis. 127. See also *Gamble v. State,* 44 Fla. 429; *Hedican v. Pennsylvania F. Ins. Co.,* 21 Wash. 488.

**1235.** 1. *State v. Salverson,* 87 Minn. 40.

2. *Refreshments Furnished by Prevailing Party.* — *Mann v. State, (Tex. Crim. 1904)* 83 S. W. Rep. 195; *Gulf, etc., R. Co. v. Matthews,* 28 Tex. Civ. App. 92.

4. *Intoxicating Liquors.* — *Palm v. Chernowsky,* 28 Tex. Civ. App. 405.

**1236.** 7. *Not Cause for New Trial.* — *Pritchard v. Roe,* 3 Penn. (Del.) 128.

8. *Refreshments Furnished by Other Persons.* — *Compare Central of Georgia R. Co. v. Hammond,* 109 Ga. 383; *Gulf, etc., R. Co. v. Matthews,* 28 Tex. Civ. App. 92.

**1237.** 1. *Reception of Evidence Out of Court.* — *Belcher v. Estes,* 99 Me. 314; *Falls City v.*



**1237.** (2) *Testimony of Jurors.* — See notes 3, 4, 5, 6.

*Necessity of Prejudice.* — See note 7.

**1238.** See notes 1, 2, 4.

(3) *Private Examination of Witnesses.* — See note 8.

(4) *Unauthorized View of Locus in Quo.* — See note 9.

**1239.** See note 1.

*Waiver of Objection.* — See note 3.

(6) *Making Experiments.* — See note 7.

**1240.** i. PAPERS IN JURY ROOM — (1) *Papers in Evidence.* — See note 2.

Sperry, (Neb. 1903) 94 N. W. Rep. 529; Forsyth v. Central Mfg. Co., 103 Tenn. 497; Blocker v. State, (Tex. Crim. 1901) 61 S. W. Rep. 391. See also Flanders v. Mullin, 73 Vt. 276.

**1237. 3. Communication of Facts by Juror.** — De Gray v. New York, etc., Telephone Co., 68 N. J. L. 454; Blocker v. State, (Tex. Crim. 1901) 61 S. W. Rep. 391.

**A Mere Suggestion of Undisclosed Knowledge** on the part of one juror to his fellow jurors will not require the verdict to be set aside. Irvine v. State, 104 Tenn. 132.

**Statements Must Be Prejudicial.** — In *Kansas* it is held that the testimony of jurors sufficient to overthrow the verdict must be statements of prejudicial matters of fact outside the evidence, based upon the personal knowledge or claimed personal knowledge of the juror making such statement. Hulett v. Hancock, 66 Kan. 519.

**4. Ground for New Trial — Iowa.** — Douglass v. Agne, 125 Iowa 67; Hydinger v. Chicago, etc., R. Co., 126 Iowa 222.

*Kansas.* — State v. Burton, 65 Kan. 704; State v. Duncan, 70 Kan. 883.

*Nebraska.* — Falls City v. Sperry, (Neb. 1903) 94 N. W. Rep. 529.

*Tennessee.* — Forsyth v. Central Mfg. Co., 103 Tenn. 497; Jackson, etc., St. R. Co. v. Simmons, 107 Tenn. 392.

*Texas.* — Lankster v. State, 43 Tex. Crim. 298; Buessing v. State, 43 Tex. Crim. 85; Crow v. State, (Tex. Crim. 1904) 82 S. W. Rep. 1033; Hopkins v. State, (Tex. Crim. 1902) 68 S. W. Rep. 986; Hardiman v. State, (Tex. Crim. 1899) 53 S. W. Rep. 121; Favro v. State, (Tex. Crim. 1900) 59 S. W. Rep. 885.

*Washington.* — State v. Parker, 25 Wash. 405.

**5. Statements as to Credibility of Witnesses.** — Blalock v. State, (Tex. Crim. 1901) 62 S. W. Rep. 571; Dixon v. State, 46 Tex. Crim. 154; Riley v. State, (Tex. Crim. 1904) 81 S. W. Rep. 711.

**Discussing Failure of the Accused to Testify** may be ground for a new trial. State v. Rambo, 69 Kan. 777; Adams v. State, (Tex. Crim. 1901) 64 S. W. Rep. 1055; Beard v. State, (Tex. Crim. 1901) 65 S. W. Rep. 905; Rogers v. State, (Tex. Crim. 1900) 55 S. W. Rep. 817; Doulton v. State, (Tex. Crim. 1903) 73 S. W. Rep. 395; Parker v. State, 43 Tex. Crim. 526; Fine v. State, 45 Tex. Crim. 290; Buessing v. State, 42 Tex. Crim. 85.

But the mere mention in the jury room that the defendant failed to testify, further consideration of which is immediately suppressed, is not ground for a new trial. State v. Goff, 62

Kan. 104; State v. Rambo, 69 Kan. 777; Mason v. State, (Tex. Crim. 1904) 81 S. W. Rep. 718.

**Considering the Result of a Prior Trial** may result in overthrowing the verdict. State v. Burton, 65 Kan. 704; Lankster v. State, 43 Tex. Crim. 298; Hughes v. State, 43 Tex. Crim. 511, 44 Tex. Crim. 296; Hefner v. State, 44 Tex. Crim. 441.

**6. Statements as to Character.** — State v. Lowe, 67 Kan. 183; Ysaguirre v. State, 42 Tex. Crim. 253; Marm v. State, (Tex. Crim. 1904) 83 S. W. Rep. 195; Crow v. State, (Tex. Crim. 1904) 82 S. W. Rep. 1033; Sims v. State, (Tex. Crim. 1902) 70 S. W. Rep. 90.

**7. Presumption of Prejudice.** — State v. Burton, 65 Kan. 704; Jackson, etc., St. R. Co. v. Simmons, 107 Tenn. 392. See also State v. Lowe, 67 Kan. 183.

**1238. 1. Absence of Prejudice.** — Montgomery v. Hanson, 122 Iowa 222.

**2.** See State v. Druxinman, 34 Wash. 257.

**4. Statements as to Character Not Prejudicial.** — Hulett v. Hancock, 66 Kan. 519.

**8. Reviewing Evidence from Stenographer's Notes.** — Having the court stenographer read his notes of the testimony to the jury in the jury room and in the absence of counsel, is ground for a new trial. Otto v. Young, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 628. See also *infra*, this title, 1243. 11.

**9. Unauthorized View of Locus in Quo.** — Siemsen v. Oakland, etc., Electric R. Co., 134 Cal. 494; Twaddle v. Mendenhall, 80 Minn. 177; Pierce v. Brennan, 83 Minn. 422; Falls City v. Sperry, (Neb. 1903) 94 N. W. Rep. 529; Nelson v. State, (Tex. Crim. 1900) 58 S. W. Rep. 107.

**1239. 1. Absence of Prejudice.** — People v. Rowell, 133 Cal. 39; Siemsen v. Oakland, etc., Electric R. Co., 134 Cal. 494.

**A Mere Casual Inspection** is not sufficient to authorize the setting aside of the verdict. Rush v. St. Paul City R. Co., 70 Minn. 8; Lyons v. Dee, 88 Minn. 490.

**3. Olivares v. San Antonio, etc., R. Co.** (Tex. Civ. App. 1904) 84 S. W. Rep. 248.

**7. Ground for New Trial.** — Wilson v. U. S., (C. C. A.) 116 Fed. Rep. 484, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1239; Falls City v. Sperry, (Neb. 1903) 94 N. W. Rep. 529; Bronk v. Binghamton R. Co., 79 N. Y. App. Div. 269.

**1240. 2. Modern Rule.** — State v. Tucker, 75 Conn. 201; Chicago, etc., R. Co. v. Spence, 213 Ill. 220; Williams v. Carterville, 97 Ill. App. 160; Standard Starch Co. v. McMullen, 100 Ill. App. 82; Krauss v. Cope, 180 Mass. 22; Com. v. Stanley, 19 Pa. Super. Ct. 58;

- 1240.** Applications of Rule. — See notes 4, 6, 8, 10, 12.
- 1241.** Discretion of Court. — See notes 2, 3.  
(2) *Depositions*. — See notes 6, 9.
- 1242.** Prejudice Necessary for New Trial. — See note 4.  
(3) *Papers Not in Evidence or Record* — (a) *In General*. — See note 8.  
(b) *Exceptions to Rule of Exclusion*. — See note 9.
- 1243.** See note 1.  
(c) *Papers Partly in Evidence*. — See note 3.  
(d) *Notes by Jurors*. — See notes 6, 7.  
(e) *Judge's Minutes*. — See note 11.  
(4) *Pleadings*. — See note 13.
- 1244.** See notes 1, 2, 3.  
(5) *Written Instructions*. — See notes 7, 8.  
(6) *Records and Papers in Previous Proceedings*. — See notes 11, 14.
- 1245.** A Former Verdict. — See notes 3, 4.

Houston, etc., R. Co. v. Wilson, (Tex. Civ. App. 1904) 84 S. W. Rep. 274; State v. Champoux, 33 Wash. 339.

**1240. 4. A Replevin Writ and the Officer's Return Thereon** have been held to be properly taken by the jury. Samuels v. Burnham, 61 Pac. Rep. 755, 10 Kan. App. 574, mem.

6. See Houston, etc., R. Co. v. Wilson, (Tex. Civ. App. 1904) 84 S. W. Rep. 274.

8. *Account Books*. — Com. v. Stanley, 19 Pa. Super. Ct. 58.

10. *Photographs*. — Chicago, etc., R. Co. v. Spence, 213 Ill. 220 (X-ray photograph); State v. Shaw, 73 Vt. 149.

12. *The Report of a Special Jury on the Insanity of the Accused* was held to be properly taken by the jury to its room. State v. Champoux, 33 Wash. 339.

**1241. 2. Discretion of Court.** — Boston Dairy Co. v. Mulliken, 175 Mass. 447; Krauss v. Cope, 180 Mass. 22; Russell v. State, 66 Neb. 497; Beaufort First Presb. Church v. Elliott, 65 S. Car. 251; Wunderlich v. Palatine F. Ins. Co., 104 Wis. 382.

*The Illinois Statute.* — Williams v. Carterville, 97 Ill. App. 160.

3. *Review.* — Compare Krauss v. Cope, 180 Mass. 22, holding that no exceptions would lie to a refusal to permit the jury to take papers admitted in evidence.

6. *Depositions.* — Shedden v. Stiles, 121 Ga. 637, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1241; Louisville, etc., R. Co. v. Morgan, (Ky. 1901) 62 S. W. Rep. 736; Com. v. Stanley, 19 Pa. Super. Ct. 58.

9. *Entire Evidence Reduced to Writing.* — Shedden v. Stiles, 121 Ga. 637.

**1242. 4. New Trial.** — Shedden v. Stiles, 121 Ga. 637, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1242.

8. *Papers Not in Evidence.* — Alaska Commercial Co. v. Dinkelspiel, (C. C. A.) 121 Fed. Rep. 318, affirmed (C. C. A.) 126 Fed. Rep. 164; Gildea v. Hill, 115 Ga. 136; Carman v. Montana Cent. R. Co., 32 Mont. 137.

*Brief.* — That a brief of one of the parties is taken accidentally to the jury room is not ground for a new trial in the absence of prejudice. Louisville, etc., R. Co. v. Sides, 129 Ala. 399.

9. *Statement of Claim.* — Tridell v. Munhall, 124 Fed. Rep. 802.

**1243. 1. Calculations and Estimates.** — Rickeman v. Williamsburg City F. Ins. Co., 120 Wis. 655.

3. *Papers Partly in Evidence.* — Rich v. Hayes, 97 Me. 293.

6. *Notes by Jurors.* — See U. S. v. Davis, 103 Fed. Rep. 457.

7. *Compare* Padgett v. Moll, etc., R. Co., 159 Mo. 143, 81 Am. St. Rep. 347.

11. *The Stenographic Minutes* taken during the trial should not be read to the jurors after they have retired to deliberate. Padgett v. Moll, etc., R. Co., 159 Mo. 143, 81 Am. St. Rep. 347. See also *supra*, this title, 1238. 7.

13. *Pleadings in Jury Room.* — Kansas City, etc., R. Co. v. Eagan, 64 Kan. 421; Blackmore v. Missouri Pac. R. Co., 162 Mo. 455.

*An Indictment* containing the indorsement of the verdict in a previous trial should not go to the jury room. Ogden v. U. S., (C. C. A.) 112 Fed. Rep. 523.

**1244. 1. Necessity of Prejudice.** — See Kansas City, etc., R. Co. v. Eagan, 64 Kan. 421.

2. *Discretion of Court.* — Tridell v. Munhall, 124 Fed. Rep. 802.

3. *Pleadings May Go to Jury Room.* — State v. Tucker, 75 Conn. 201; North Peoria v. Rogers, 98 Ill. App. 355; Mayo v. Halley, 124 Iowa 675; Bowles v. Com., 103 Va. 816.

*Pleadings Eliminated by Demurrer* should not be permitted to go to the jury. North Peoria v. Rogers, 98 Ill. App. 355. Nor should a pleading containing withdrawn counts be given to the jury. West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314, affirmed 200 Ill. 260.

7. *Usually Allowed to Go Out.* — Cone v. Bright, 68 Ohio St. 543; Bowles v. Com., 103 Va. 816.

8. *Verdict Not Disturbed.* — Jones v. Austin, 26 Ind. App. 407, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1244.

11. *Preliminary Proceedings.* — See Swadling v. Barneson, 21 Wash. 699.

14. *Indictment with Indorsement of Former Verdict.* — See Ogden v. U. S., (C. C. A.) 112 Fed. Rep. 523.

**1245. 3. Former Verdict in Same Case.** — Ogden v. U. S., (C. C. A.) 112 Fed. Rep. 523; Hjeronymus v. State, (Tex. Crim. 1904) 83 S. W. Rep. 708.

4. *Objection to Be Promptly Made.* — State v. Gonzales, 107 La. 216. See also State v. Tucker, 75 Conn. 201.

- 1245.** The Record of a Previous Action. — See note 5.  
 (7) *Effect of Papers Improperly in Jury Room.* — See note 6.  
 Absence of Prejudice. — See note 7.
- 1246.** Papers Not Read. — See notes 5, 6.
- 1247.** *j.* BOOKS IN JURY ROOM — (1) *Legal Works.* — See notes 2, 4, 6.  
 (2) *Other Books.* — See note 7.  
*k.* OBJECTS AND ARTICLES IN JURY ROOM. — See note 11.
- 1248.** See notes 2, 3.  
*l.* READING OF NEWSPAPERS. — See notes 4, 5, 6, 8, 10.
- 1249.** Statement as to Former Verdict. — See note 1.
- 1251.** 3. Illness of Juror — Care and Medical Attendance. — See note 8.
- XI. DISCHARGE OF JURY AND JURORS — 1. Power to Discharge —**  
*a.* IN GENERAL. — See note 12.
- 1252.** See notes 1, 2, 3.
- 1253.** 2. Grounds Authorizing Discharge — *a.* IN GENERAL. — See notes 5, 7.  
 Showing in Record. — See note 8.
- 1254.** *f.* MISCONDUCT OF JURY. — See note 7.
- 1255.** *g.* INABILITY TO AGREE — (1) *In General.* — See notes 1, 2, 5.
- 1256.** Proof of Inability to Agree. — See note 1.
- 1245.** 5. Previous Action Between Same Parties. — See *Golden Georgia v. McManus*, 113 Ga. 982.
- 6.** Papers Improperly in Jury Room. — *Alaska Commercial Co. v. Dinkelspiel*, (C. C. A.) 121 Fed. Rep. 318, *affirmed* (C. C. A.) 126 Fed. Rep. 164; *Gildea v. Hill*, 115 Ga. 136.
- 7.** Necessity of Prejudice. — *Langan v. People*, 32 Colo. 414; *Southern R. Co. v. Coursey*, 115 Ga. 602; *Stanley v. Thomas*, (Iowa 1900) 82 N. W. Rep. 325; *Karnes County v. Ray*, (Tex. Civ. App. 1900) 57 S. W. Rep. 76; *Swadling v. Barneson*, 21 Wash. 699.
- 1246.** 5. Papers Not Read or Considered. — *Louisville, etc., R. Co. v. Sides*, 129 Ala. 399.
- 6.** Presumption of Reading. — *Ogden v. U. S.*, (C. C. A.) 112 Fed. Rep. 523.
- 1247.** 2. Legal Works. — *Henson v. State*, 110 Tenn. 47.
- 4.** May Not Go to Jury. — *People v. Priori*, 164 N. Y. 459; *Henson v. State*, 110 Tenn. 47.
- 6.** Absence of Prejudice. — *People v. Priori*, 164 N. Y. 459. See also *Gustavenson v. State*, 10 Wyo. 300.
- 7.** Atlas. — *De Wulf v. Dix*, 110 Iowa 553.
- 11.** Articles Introduced in Evidence. — *Russell v. State*, 66 Neb. 497; *Wunderlich v. Palatine F. Ins. Co.*, 104 Wis. 382.
- Photographs. — See *supra*, this title, **1240.** 10.
- 1248.** 2. Effect of Statute. — *Contra*, *State v. Crea*, 10 Idaho 88.
- 3.** Absence of Prejudice. — *Chicago, etc., R. Co. v. Spence*, 213 Ill. 220; *De Wulf v. Dix*, 110 Iowa 553; *People v. Gallagher*, 75 N. Y. App. Div. 39, *affirmed* 174 N. Y. 505.
- 4.** Reading of Newspapers. — *State v. Veillon*, 105 La. 411.
- 5.** References to Case. — *Copeland v. Wabash R. Co.*, 175 Mo. 650.
- 6.** Statements Calculated to Influence Verdict. — *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337; *U. S. v. Ogden*, 105 Fed. Rep. 371; *People v. Chin Non*, 146 Cal. 561; *West Chicago St. R. Co. v. Grenell*, 90 Ill. App. 30; *Hempton v. State*, 111 Wis. 127.
- 8.** Presumption of Reading. — *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.
- 10.** Objection to Be Made Promptly. — *Compare Morse v. Montana Ore-Purchasing Co.*, 105 Fed. Rep. 337.
- 1249.** 1. Statement as to Previous Verdict. — *Copeland v. Wabash R. Co.*, 175 Mo. 650.
- 1251.** 8. Isolation of Sick Juror. — *Marzen v. People*, 190 Ill. 88.
- 12.** Early Doctrine. — *Dreyer v. People*, 188 Ill. 40.
- 1252.** 1. Jury May Be Discharged. — *U. S. v. Jim Lee*, 123 Fed. Rep. 741; *State v. Gamble*, 2 Penn. (Del.) 368; *Dreyer v. People*, 188 Ill. 40; *State v. Tyson*, 138 N. Car. 627.
- 2.** Capital Cases. — *Dreyer v. Illinois*, 187 U. S. 71; *Dreyer v. People*, 188 Ill. 40; *State v. Tyson*, 138 N. Car. 627.
- 3.** *State v. Allen*, 59 Kan. 758. See also *Com. v. Lutz*, 10 Kulp (Pa.) 231.
- 1253.** 5. Discharge Only in Cases of Extreme Necessity. — *Oliveros v. State*, 120 Ga. 237; *Dreyer v. People*, 188 Ill. 40; *State v. Allen*, 59 Kan. 758; *State v. Tyson*, 138 N. Car. 627.
- 7.** *U. S. v. Jim Lee*, 123 Fed. Rep. 741.
- 8.** Showing in Record. — *State v. Tyson*, 138 N. Car. 627.
- 1254.** 7. Misconduct of Jury. — *State v. Tyson*, 138 N. Car. 627 (intoxication of a juror).
- 1255.** 1. Discharge on Nonagreement of Jury. — *Dreyer v. Illinois*, 187 U. S. 71, *affirming* 188 Ill. 40; *U. S. v. Jim Lee*, 123 Fed. Rep. 741; *State v. Gamble*, 2 Penn. (Del.) 368.
- 2.** Statutory Provision. — *State v. Klauer*, 70 Kan. 384; *State v. McMillen*, 69 Ohio St. 247; *State v. Costello*, 29 Wash. 366.
- 5.** Power to Be Cautiously Exercised. — *Dreyer v. Illinois*, 187 U. S. 71; *State v. Allen*, 59 Kan. 758.
- 1256.** 1. Statements of Jury. — See *U. S. v. Jim Lee*, 123 Fed. Rep. 741.

- 1256.** Showing the Record. — See note 3.  
Discretion of Court. — See notes 4, 6.  
(2) *Time for Deliberations of Jury.* — See note 7.
- 1257.** See note 1.
- 1258.** *i.* ILLNESS OR DEATH — (1) *Of Juror.* — See notes 1, 3, 4.  
Character of Illness. — See note 7.  
(2) *In Juror's Family.* — See note 8.
- 1259.** *j.* CONCLUSIVENESS OF DECISION OF TRIAL COURT. — See notes 4, 5.
- 1260.** See notes 1, 2.  
3. Discharge and Substitution of Individual Jurors. — See note 4.
- 1261.** See note 1.  
4. Effect of Consent. — See notes 4, 5.  
5. Effect of Discharge — Effect of Unauthorized Discharge. — See note 8.
- 1262.** XII. GRAND JURIES — 1. Power of Court to Summon or Impanel Grand Jury — Inherent Power of Court. — See note 1.
- 1263.** 2. Qualifications, Grounds of Challenge, and Exemptions — *a.* IN GENERAL — General and Special Grounds of Disqualification and Exception. — See note 1.  
Disregard of Society, Sect, or Denomination. — See note 2.  
*b.* STATUTORY PROVISIONS. — See note 5.
- 1264.** See notes 1, 2.
- 1256.** 3. Showing in Record. — State *v.* Klauer, 70 Kan. 384.  
4. Discretion of Court. — Dreyer *v.* Illinois, 187 U. S. 71; U. S. *v.* Jim Lee, 123 Fed. Rep. 741; State *v.* Gamble, 2 Penn. (Del.) 368; Jones *v.* State, 117 Ga. 710; Dreyer *v.* People, 188 Ill. 40; State *v.* Allen, 59 Kan. 758; Russell *v.* State, 66 Neb. 497; State *v.* Costello, 29 Wash. 366.  
6. State *v.* Costello, 29 Wash. 366.  
7. Time for Deliberation. — State *v.* Hager, 61 Kan. 504.
- 1257.** 1. Decisions as to Length of Time — Sufficient Time. — Two hours and forty minutes. State *v.* McMillen, 69 Ohio St. 247.  
Seventeen and a half hours. Dreyer *v.* Illinois, 187 U. S. 71, affirming 188 Ill. 40.  
Insufficient Time. — Nineteen hours. State *v.* Costello, 29 Wash. 366.
- 1258.** 1. Illness or Death of Juror. — West *v.* State, 42 Fla. 244; People *v.* Hutchings, (Mich. 1904) 100 N. W. Rep. 753, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1258; State *v.* Ronk, 91 Minn. 419; People *v.* Smith, 172 N. Y. 210. See also Pfeiffer *v.* Dubuque, (Iowa 1903) 94 N. W. Rep. 492.  
3. Substitution of Jurors. — Lindsey *v.* Tioga Lumber Co., 108 La. 468, 92 Am. St. Rep. 384. See also State *v.* Williams, 49 W. Va. 220.  
4. Substitution or Discharge of Whole Jury. — State *v.* Allen, 59 Kan. 758; People *v.* Hutchings, (Mich. 1904) 100 N. W. Rep. 753, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1258.  
7. Judge's Observation Sufficient. — State *v.* Ronk, 91 Minn. 419.  
8. Illness or Death in Juror's Family. — Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862; Chamber of Commerce Bldg. Co. *v.* Klussman, 25 Ohio Cir. Ct. 728.
- 1259.** 4. Discretion of Trial Court. — U. S. *v.* Jim Lee, 123 Fed. Rep. 741; Driver *v.* State, 112 Ga. 229; Dreyer *v.* People, 188 Ill. 40; State *v.* Hager, 61 Kan. 504; State *v.* Tyson, 138 N. Car. 627.
5. No Right of Review. — U. S. *v.* Jim Lee, 123 Fed. Rep. 741.
- 1260.** 1. Discretion Must Be Abused. — Driver *v.* State, 112 Ga. 229.  
2. Presumption in Favor of Action of Lower Court. — People *v.* Hutchings, (Mich. 1904) 100 N. W. Rep. 753, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1258; State *v.* Williams, 49 W. Va. 220.  
4. Substitution of Juror. — State *v.* Williams, 49 W. Va. 220.
- 1261.** 1. Discharge of Jury. — See Raleigh, etc., R. Co. *v.* Bradshaw, 113 Ga. 862.  
4. Assent by Implication. — State *v.* Williams, 49 W. Va. 220.  
5. Rhodes *v.* State, 122 Ga. 568.  
8. Effect of Improper Discharge. — *Ex p.* Glenn, 111 Fed. Rep. 257; Oliveros *v.* State, 120 Ga. 237; State *v.* Klauer, 70 Kan. 384; State *v.* Allen, 59 Kan. 758; Schrieber *v.* Clapp, 13 Okla. 215. See also Dreyer *v.* People, 188 Ill. 40.
- 1262.** 1. Moran *v.* Territory, 14 Okla. 544; Smith *v.* Territory, 14 Okla. 518.
- 1263.** 1. See U. S. *v.* Mitchell, 136 Fed. Rep. 896.  
2. Race should not be disregarded. Carter *v.* Texas, 177 U. S. 442; Smith *v.* State, 42 Tex. Crim. 220.  
5. Statutory Qualifications and Grounds of Challenge. — State *v.* Nicholas, 109 La. 84; State *v.* Hoffman, 71 N. J. L. 285; State *v.* Carlson, 39 Oregon 19.  
Must Be Able to Read and Write English Language. — State *v.* Greenland, 125 Iowa 141.  
A Conviction of Felony in one state does not disqualify a person from serving as a grand juror in another if the crime would not have amounted to a felony in the latter state. State *v.* Davis, 8 Ohio Dec. 680.
- 1264.** 1. None but Statutory Grounds of Disqualification. — Peoples *v.* State, (Fla. 1903) 35 So. Rep. 223.

- 1264.** *c.* INFANTS. — See note 7.  
**1265.** *e.* RESIDENTS OF STATE. — See note 2.  
*f.* RESIDENTS OF COUNTY. — See note 3.  
*g.* QUALIFIED ELECTORS. — See note 4.  
*i.* FREEHOLDERS OR HOUSEHOLDERS. — See note 6.  
**1266.** *j.* PRIOR JURY SERVICE. — See note 2.  
*k.* IMPARTIALITY—PRIOR KNOWLEDGE OR OPINION—(2) *Prosecutor or Complainant—Victim of Crime.* — See note 6.  
**1267.** See note 1.  
*(4) Prior Knowledge or Opinion of Guilt.* — See notes 3, 4, 5.  
*l.* EXEMPTIONS — (1) *Statutory Provisions.* — See note 6.  
**1268.** (2) *Exemption Not Disqualification.* — See note 2.  
*m.* EFFECT OF DISQUALIFICATION OF ONE OR MORE GRAND JURORS — (1) *In General.* — See note 4.  
**1269.** (2) *Objections Waived.* — See note 2.  
*n.* PRESUMPTION AS TO QUALIFICATION—BURDEN OF PROOF. — See notes 3, 4.  
**1270.** 3. Number of Grand Jurors Impaneled—*b.* IN UNITED STATES. — See note 1.  
**1271.** *d.* NUMBER OF GRAND JURORS INSUFFICIENT. — See note 1.

**1264.** 2. None but Statutory Grounds of Challenge.—U. S. *v.* Mitchell, 136 Fed. Rep. 896.

7. Infants and Aged Persons. — In *New Jersey* a grand juror is disqualified if he is over sixty-five or under twenty-one years of age. *State v. Hoffman*, 71 N. J. L. 285.

**1265.** 2. *State v. Carlson*, 39 Oregon 19.

3. Residents of County. — *State v. Hoffman*, 71 N. J. L. 285. See also *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345.

4. Qualified Electors. — It is not necessary that the grand juror should have voted or that his name appear on the pollbooks. *State v. Harris*, 122 Iowa 78.

6. Need Not Be Freeholder unless Required by Statute. — *State v. Hoffman*, 71 N. J. L. 285.

**1266.** 2. Prior Jury Service. — U. S. *v.* Mitchell, 136 Fed. Rep. 896; *Phillips v. Brown*, 122 Ga. 571; *McFarlin v. State*, 121 Ga. 329. The Florida statute is construed as merely exempting the juror, and not disqualifying him. *Yates v. State*, 43 Fla. 177.

6. Victim of Crime. — *Yates v. State*, 43 Fla. 177.

**1267.** 1. Relative of Victim of Crime. — See *Simpson v. State*, 110 Ga. 249;

3. Prior Knowledge or Opinion Immaterial. *Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473; *People v. Breen*, 130 Cal. 72; *People v. District Ct.*, 29 Colo. 83.

4. *People v. Hanstead*, 135 Cal. 149.

5. *Terrill v. Superior Ct.*, 127 Cal. xviii, 60 Pac. Rep. 38, rehearing denied (Cal. 1900) 60 Pac. Rep. 516; *People v. Landis*, 139 Cal. 426; *State v. Bullard*, 127 Iowa 168.

6. Illustrations — *Members of School Board.* — *State v. Rasberry*, 113 La. 651.

**1268.** 2. Exemption Not Disqualification. — *Yates v. State*, 43 Fla. 177; *State v. Rasberry*, 113 La. 651.

4. Effect of Disqualification of One or More Grand Jurors. — *Crowley v. U. S.*, 194 U. S. 461; *McFarlin v. State*, 121 Ga. 329. But see *State v. Reed*, 162 Mo. 312. Compare *State v. Carlson*, 39 Oregon 19.

**1269.** 2. Disqualification and Grounds of Challenge Waived — *Colorado.* — See *People v. District Ct.*, 29 Colo. 83.

*Florida.* — *Yates v. State*, 43 Fla. 177.

*Georgia.* — *Phillips v. Brown*, 122 Ga. 571; *McFarlin v. State*, 121 Ga. 329; *Davis v. State*, 120 Ga. 843.

*Idaho.* — *State v. Corcoran*, 7 Idaho 220.

*Louisiana.* — *State v. Rasberry*, 113 La. 651.

*Minnesota.* — *State v. Ames*, 90 Minn. 183.

*New Jersey.* — *State v. Hoffman*, 71 N. J. L. 285.

*New York.* — *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345; *People v. Borgstrom*, 178 N. Y. 254.

*Pennsylvania.* — *Com. v. Craig*, 19 Pa. Super. Ct. 81.

*South Carolina.* — *State v. Boyd*, 56 S. Car. 382; *State v. Berkeley*, 64 S. Car. 194.

*Texas.* — *Cubine v. State*, 45 Tex. Crim. 108, affirming as to this point 44 Tex. Crim. 596.

For a Full Discussion of the effect on indictments of disqualification of grand jurors and of objections on the ground of such disqualification see the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 354. 1 *et seq.*, 402. 4 *et seq.*

3. Presumption as to Qualifications. — *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345.

4. Burden of Proving Disqualification. — *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345.

**1270.** 1. Number of Grand Jurors in United States. — *State v. Gee*, 104 La. 247; *State v. Vincent*, 91 Md. 718; *Williams v. Hert*, 110 Fed. Rep. 166, a case arising in *Indiana*.

**1271.** 1. *State v. Vincent*, 91 Md. 718.

In the Province of British Columbia it is imperative that thirteen jurors should be summoned for service on the grand jury, although seven of those appearing are sufficient to constitute a grand jury; and where the sheriff summoned only twelve and omitted to summon the thirteenth because he was informed that the latter had become demented, seven of them were held

- 1271.** Waiver of Objection to Insufficiency of Number. — See note 4.  
**4.** Foreman of Grand Jury — *a.* NECESSITY FOR APPOINTMENT OF FOREMAN. — See note 5.  
*b.* BY WHOM FOREMAN APPOINTED. — See notes 7, 8.  
**1272.** *d.* TEMPORARY FOREMAN. — See note 1.  
*e.* POWERS AND DUTIES OF FOREMAN. — See note 2.  
**6.** Charge of Court to Grand Jury — In General. — See note 4.  
Discretion of Court. — See note 7.  
Substance of Charge to Grand Jury. — See note 8.  
**1273.** Invasion of Province of Grand Jury. — See note 2.  
**1274.** **7.** General Control of Court over Grand Jury — Power of Court to Inspect and Revise Indictments. — See note 1.  
Coercion of Grand Jury by Court. — See note 2.  
**9.** Excusal of Grand Jurors — *b.* POWER OF COURT TO EXCUSE GRAND JURORS — (1) *In General.* — See note 7.  
**1275.** *c.* DISCRETION OF COURT. — See note 1.  
*d.* GROUNDS OF EXCUSAL. — See note 3.  
*e.* PRESUMPTIONS AS TO EXCUSAL — Presumption as to Sufficiency of Cause for Excusal. — See note 9.  
**10.** Power of Court to Fill Vacancies. — See note 11.  
**1276.** **11.** Terms of Court and Sessions of Grand Jury — *a.* IN GENERAL. — See note 2.  
*c.* POWER OF COURT TO POSTPONE ATTENDANCE OF GRAND JURY. — See note 4.  
**1277.** *d.* ADJOURNMENTS — (3) *Expiration of Term of Court* — Grand Jury Sitting at Subsequent Term — *De Facto* Grand Jury. — See note 1.  
**1278.** **13.** Powers of Grand Juries — *a.* IN GENERAL — Power to Accuse or Try Offenders. — See notes 2, 3.  
*b.* WHAT CRIMES THEY MAY INVESTIGATE — Jurisdiction Coextensive with Jurisdiction of Court. — See notes 6, 7, 8.

not to be competent to find an indictment. *Rex v. Hayes*, 39 Can. L. J. 759.

**1271.** **4.** *State v. Vincent*, 91 Md. 718.

**5.** Necessity for Appointment of Foreman. — *Ferrell v. State*, 45 Fla. 26.

**7.** Appointment of Foreman by Court. — *State v. Vincent*, 91 Md. 718.

**8.** Appointment of Foreman by Grand Jurors. — *Ferrell v. State*, 45 Fla. 26.

**1272.** **1.** *Ferrell v. State*, 45 Fla. 26.

**2.** *Ferrell v. State*, 45 Fla. 26; *Denton v. State*, 155 Ind. 307.

**4.** Propriety of Charge to Grand Jury. — *People v. Glen*, 64 N. Y. App. Div. 167, *affirmed* 173 N. Y. 395.

**7.** Discretion of Court in Charging Grand Jury. — *Fuller v. State*, 85 Miss. 199; *People v. Glen*, 64 N. Y. App. Div. 167, *affirmed* 173 N. Y. 395.

**8.** Scope of Court's Charge. — *Fuller v. State*, 85 Miss. 199; *People v. Glen*, 173 N. Y. 395.

**1273.** **2.** Invasion of Province of Grand Jury Improper. — *Blau v. State*, 82 Miss. 514, *citing* 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1273; *Fuller v. State*, 85 Miss. 199.

**1274.** **1.** Power of Court to Inspect and Revise Indictments. — *Compare* *Blau v. State*, 82 Miss. 514.

**2.** Court Has No Power to Coerce Grand Jury. — *Blau v. State*, 82 Miss. 514.

**7.** Power of Court to Excuse Grand Jurors. — *U. S. v. Mitchell*, 136 Fed. Rep. 896; *State v. Gee*, 104 La. 247.

**1275.** **1.** Discretion of Court as to Excusal of Grand Juror. — *U. S. v. Mitchell*, 136 Fed. Rep. 896; *State v. Strait*, (Minn. 1905) 102 N. W. Rep. 913.

**3.** Excusal or Discharge of Disqualified Grand Juror. — *State v. Gee*, 104 La. 247.

**9.** Presumption as to Sufficiency of Cause for Excusal. — *U. S. v. Mitchell*, 136 Fed. Rep. 896; *Posey v. State*, (Miss. 1905) 38 So. Rep. 324. See also *State v. Gee*, 104 La. 247.

**11.** Power of Court to Fill Vacancies. — *Posey v. State*, (Miss. 1905) 38 So. Rep. 324; *State v. Thomas*, 61 Ohio St. 444.

**1276.** **2.** Statutory Provisions. — See *State v. Vincent*, 91 Md. 718.

**4.** Court May Postpone Attendance of Grand Jury. — See *State v. Phillips*, (Iowa 1902) 89 N. W. Rep. 1092.

The Court May Temporarily Excuse the Grand Jury from attendance. *State v. Phillips*, 119 Iowa 652.

**1277.** **1.** *De Facto* Grand Jury. — *People v. Morgan*, 133 Mich. 550.

**1278.** **2.** *State v. Tucker*, 36 Oregon 291. See also *People v. Glen*, 173 N. Y. 395.

**3.** Grand Jury Accusing Tribunal Only. — *State v. Tucker*, 36 Oregon 291.

After Finding an Indictment the grand jury has no power to make further investigations for the purpose of obtaining evidence to insure a conviction. *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**6.** *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**1278.** Crimes over Which Court Has No Jurisdiction. — See note 10.

**1279.** *c.* INQUISITORIAL POWERS — (1) *In General*. — See notes 1, 2.

**1280.** *e.* MAKING PRESENTMENTS — ACTING ON ITS OWN KNOWLEDGE. — See note 4.

*f.* PENDING PRELIMINARY EXAMINATION OR OTHER PROCEEDINGS — Before or Pending Preliminary Examination. — See notes 6, 7.

**1281.** *h.* OUSTER OF JURISDICTION OF OTHER TRIBUNALS. — See note 3.

*i.* TERMINATION OF POWERS. — See note 4.

**1282.** 15. Notice to Accused — Presence Before Grand Jury — Right of Accused to Appear Before Grand Jury. — See note 2.

16. Evidence Before Grand Juries — *a.* ADMISSIBILITY OR COMPETENCY OF EVIDENCE — (1) *In General* — Application of Ordinary Rules of Evidence. — See note 5.

(2) *Statutory Provisions*. — See note 9.

**1283.** (4) *Evidence in Behalf of Accused Persons* — Right of Defendant to Be Heard. — See note 3.

(5) *Submission of Doubtful Questions to Court*. — See note 6.

(6) *Effect of Reception of Inadmissible or Incompetent Evidence*. —

See note 7.

**1284.** *b.* WEIGHT AND SUFFICIENCY OF EVIDENCE — (1) *Requisite Evidence upon Which to Base Indictment* — The Rule Now Prevailing. — See note 2. Statutory Provisions. — See note 3.

**1278.** 7. *People v. Craven-Fair*, 137 Cal. 222; *People v. McCarthy*, 59 N. Y. App. Div. 231, affirmed 168 N. Y. 549.

Violations of Municipal Ordinances. — It is not the province of the grand jury to inquire into violations of municipal ordinances. *Finnical v. Cadiz*, 61 Ohio St. 494.

8. *People v. McCarthy*, 59 N. Y. App. Div. 231, affirmed 168 N. Y. 549.

10. See *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**1279.** 1. *Matter of Gardiner*, (Ct. Gen. Sess.) 31 Misc. (N. Y.) 364.

2. Grand Jury Has No Inquisitorial Powers. — *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**1280.** 4. Power to Make Presentments. — *Oglesby v. State*, 121 Ga. 602.

*In New York*. — See *Matter of Jones*, 101 N. Y. App. Div. 55, appeal dismissed 181 N. Y. 389.

Cannot Probe for Crime. — A grand jury may not institute or prosecute an inquiry on chance or speculation that some crime may be discovered. *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

6. Necessity for Preliminary Examination. — *State v. Brown*, 62 S. Car. 374.

7. Pendency of Preliminary Examination Immaterial. — *State v. Brown*, 62 S. Car. 374.

**1281.** 3. *People v. McCarthy*, 59 N. Y. App. Div. 231, affirmed 168 N. Y. 549.

4. Termination of Power. — *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**1282.** 2. *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

Appearance to Make Challenge. — In *Missouri* the accused has the right to be present before the grand jury for the purpose of making a challenge to the panel or to its members. *State v. Warner*, 165 Mo. 399, 88 Am. St. Rep. 422.

5. May Disregard Technical Rules of Evidence.

— *People v. Sexton*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 312, appeal dismissed 94 N. Y. App. Div. 614. See also *McGregor v. U. S.*, (C. C. A.) 134 Fed. Rep. 187.

9. Statutory Provisions as to Admissibility of Evidence. — In *New York* the grand jury has *People v. Bills*, (County Ct.) 44 Misc. (N. Y.) 348.

**1283.** 3. Defendant Has No Right to Be Heard. — *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

6. Determination by Court of Admissibility of Evidence. — In *New York* the grand jury has the same power to determine the competency of witnesses as the court has. *People v. Sexton*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 312, appeal dismissed 94 N. Y. App. Div. 614.

7. Reception of Incompetent or Illegal Evidence Immaterial. — *McGregor v. U. S.*, (C. C. A.) 134 Fed. Rep. 187; *People v. Sexton*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 312, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1283, appeal dismissed 94 N. Y. App. Div. 614.

That a wife's testimony was used by the grand jury in finding an indictment against the husband is not ground for setting it aside. *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799.

Under *New York Statute*. — *People v. Bills*, (County Ct.) 44 Misc. (N. Y.) 348; *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664. See also *People v. Glen*, 173 N. Y. 395.

**1284.** 2. Grand Jury Must Have Evidence of Guilt. — *People v. Stern*, (Ct. Gen. Sess.) 33 Misc. (N. Y.) 455; *People v. Glen*, 173 N. Y. 395.

3. Statutory Provisions as to Requisite Evidence. — See *People v. Craven-Fair*, 137 Cal. 222; *People v. Bills*, (County Ct.) 44 Misc. (N. Y.) 348; *People v. Sexton*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 312, appeal dismissed 94 N. Y. App. Div. 614.

**1284.** (2) *Indictment on Knowledge of Grand Jury.* — See note 4.

**1285.** (4) *Review of Sufficiency of Evidence.* — See note 6.

**1286.** See note 1.

(5) *Disregard by Grand Jury of Sufficient Evidence.* — See note 2.  
c. MINUTES OF EVIDENCE. — See note 4.

Right of Accused to Inspect or Copy Minutes. — See note 8.

**1287.** See note 1.

**17. Witnesses Before Grand Juries — b. HOW AND BY WHOM SUMMONED — The Proper Process for Witnesses.** — See note 4.

c. OATH OF WITNESSES — Necessity to Swear Witnesses. — See note 6.

**1288.** e. SELF-CRIMINATION — (1) *In General.* — See notes 6, 7, 8, 9.

**1289.** (2) *Voluntary Self-crimination.* — See note 1.

(3) *Statutory Immunity of Witnesses.* — See note 2.

(4) *Use of Self-criminating Testimony on Trial.* — See note 3.

f. CONTROL OF COURT OVER WITNESSES — (1) *In General.* —

See note 4.

(3) *Punishment of Contempt — Power of Court to Punish Witnesses for Contempt.* — See notes 6, 7.

Power of Grand Jury to Punish Witness for Contempt. — See note 8.

**1290.** 19. Number of Grand Jurors That Must Concur in Finding Indictment — In United States. — See note 4.

**1291.** 20. Secrecy as to Proceedings of Grand Juries — a. PENDING PROCEEDINGS IN JURY ROOM — (1) *In General.* — See note 3.

**1284.** 4. *Indictment on Knowledge of Grand Jury.* — *Oglesby v. State*, 121 Ga. 602; *State v. Comer*, 157 Ind. 611, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1284.

**1285.** 6. *No Inquiry into Sufficiency of Evidence Permissible.* — *U. S. v. Cobban*, 127 Fed. Rep. 713; *State v. Faulkner*, 185 Mo. 673; *People v. Sexton*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 312, appeal dismissed 94 N. Y. App. Div. 614. See also *Radford v. U. S.*, (C. C. A.) 129 Fed. Rep. 49, holding that insufficiency of the evidence to sustain the indictment will not be considered after verdict. See generally the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 395. 2 *et seq.*, 402. 4 *et seq.*

**1286.** 1. *In New York.* — *People v. Bills*, (County Ct.) 44 Misc. (N. Y.) 348; *People v. Steinhardt*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 252.

2. See *Blau v. State*, 82 Miss. 514.

**4. Statutes Require Minutes of Evidence.** — *People v. Steinhardt*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 252.

**8. Accused Has No Right to Copy or Inspect Minutes.** — *People v. Steinhardt*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 252. But see *People v. Foody*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 357.

**1287.** 1. *Discretionary Power of Court to Allow Inspection of Minutes.* — *People v. Steinhardt*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 252; *People v. Proskey*, (Ct. Gen. Sess.) 32 Misc. (N. Y.) 367.

**4. The Grand Jury has power in New York to summon or compel the attendance of witnesses.** *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**6. Failure to Swear a Witness before the grand jury is held in some jurisdictions not to be sufficient ground for quashing the indictment.** *State v. Easton*, 113 Iowa 516, 86 Am. St. Rep. 389; *People v. Sexton*, (Supm. Ct. Tr. T.) 42

Misc. (N. Y.) 312, appeal dismissed 94 N. Y. App. Div. 14.

**1288.** 6. *Witness Cannot Be Required to Incriminate Himself.* — *State v. Comer*, 157 Ind. 611; *State v. Gardner*, 88 Minn. 130; *State v. Faulkner*, 185 Mo. 673; *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**7. Accused Person Incompetent as Witness.** — See *State v. Gardner*, 88 Minn. 130.

**8.** See *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**9.** *State v. Comer*, 157 Ind. 611; *State v. Faulkner*, 185 Mo. 673. See also *Lindsay v. State*, 24 Ohio Cir. Ct. 1. But see *State v. Gardner*, 88 Minn. 130.

**1289.** 1. *Witness May Voluntarily Incriminate Himself.* — *State v. Comer*, 157 Ind. 611; *State v. Faulkner*, 185 Mo. 673; *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664; *Lindsay v. State*, 24 Ohio Cir. Ct. 1.

**2. Statutes Exempting Witnesses from Prosecution.** — *Murphy v. State*, 124 Wis. 635.

**3.** *Wisdom v. State*, 42 Tex. Crim. 579; *Grimsinger v. State*, 44 Tex. Crim. 1. See also *State v. Faulkner*, 185 Mo. 673.

**4. Control of Court over Witnesses.** — *State v. Comer*, 157 Ind. 611.

**6. Power of Court to Punish Witnesses for Contempt.** — *In re Rogers*, 129 Cal. 468; *Matter of Morse*, (Ct. Gen. Sess.) 42 Misc. (N. Y.) 664.

**7. Report by Grand Jury to Court.** — *In re Rogers*, 129 Cal. 468. See also *In re Archer*, 134 Mich. 408.

**8. Grand Jury Has No Power to Punish Witness.** — *In re Archer*, 134 Mich. 408.

**1290.** 4. *Number of Grand Jurors That Must Concur in United States.* — *Nash v. State*, 73 Ark. 399; *Hooker v. State*, 98 Md. 145.

**1291.** 3. *Proceedings of Grand Jury Secret.* — *Nash v. State*, 73 Ark. 399; *Miller v. State*, 42 Fla. 266; *State v. Sullivan*, 110 Mo. App. 75.



**1291.** Criminal Liability of Grand Jurors Who Violate Rule of Secrecy. — See note 4.

**1292.** (2) *Presence and Advice of Persons Not Members of Grand Jury* — (a) *Outsiders in General.* — See notes 1, 2.

(e) *Prosecuting and Other Attorneys — The Attorney-General.* — See note 4.  
*The Prosecuting Attorney.* — See notes 5, 6.

**1293.** *The Assistant Prosecuting Attorney.* — See note 3.

*A Private Prosecutor.* — See note 4.

(d) *Stenographers.* — See note 6.

**1294.** (e) *Sheriff or Bailiff.* — See note 1.

(f) *Presence of One Witness During Examination of Another.* — See note 2.

*b. EVIDENCE AS TO WHAT OCCURRED IN GRAND JURY ROOM —*  
 (1) *In General.* — See note 3.

*Discretion of Court.* — See note 4.

*Secrecy Not for Benefit of Witnesses.* — See note 5.

*Rule as to Prosecuting Attorneys, Clerks, and Witnesses.* — See note 7.

**1295.** (2) *Statutory Provisions Permitting Grand Jurors to Testify — Exclusiveness of Statute.* — See note 1.

(4) *Impeachment of Indictment.* — See note 3.

(5) *As to How Grand Jurors Voted.* — See note 4.

**1296.** (6) *As to Number of Grand Jurors Concurring.* — See note 2.

**1291.** 4. *Criminal Liability of Grand Jurors Who Violate Rule of Secrecy.* — *Nash v. State*, 73 Ark 399; *People v. Steinhardt*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 252.

**1292.** 1. *Presence of Strangers.* — *State v. Sullivan*, 110 Mo. App. 75. See also *State v. Wood*, 112 Iowa 484.

*Interpreters.* — An interpreter may be present in the grand jury room during the examination of witnesses where his services are required. *People v. Lem Deo*, 132 Cal. 199.

2. *Quashal of Indictment.* — *Miller v. State*, 42 Fla. 266; *People v. Scannell*, (Supm. Ct. Crim. T.) 36 Misc. (N. Y.) 40.

4. *The District Attorney*, in *Utah*, although not the prosecuting attorney, may be present, he being an attorney for the state. *State v. Mickel*, 23 Utah 507.

5. *Presence of Prosecuting Attorney.* — *Miller v. State*, 42 Fla. 266; *People v. Scannell*, (Supm. Ct. Crim. T.) 36 Misc. (N. Y.) 40.

6. See *U. S. v. Mitchell*, 136 Fed. Rep. 896. *Missouri Statute.* — *State v. Sullivan*, 110 Mo. App. 75.

**1293.** 3. *Presence of Assistant Prosecuting Attorney in Jury Room.* — *U. S. v. Colban*, 127 Fed. Rep. 713; *Miller v. State*, 42 Fla. 266; *State v. Tyler*, 122 Iowa 125; *Regent v. People*, 96 Ill. App. 189; *People v. Scannell*, (Supm. Ct. Crim. T.) 36 Misc. (N. Y.) 40.

*A Special Prosecuting Attorney*, appointed by reason of the prosecuting attorney's refusal to act, may appear before the grand jury. *Taylor v. State*, (Fla. 1905) 38 So. Rep. 380.

*Special Counsel*, employed by the district attorney, have no right to be present before the grand jury. *People v. Scannell*, (Supm. Ct. Crim. T.) 36 Misc. (N. Y.) 40.

4. *Private Prosecutor May Attend Grand Jury.* — *State v. Wood*, 112 Iowa 484.

6. *Stenographer.* — *State v. Sullivan*, 110 Mo. App. 75.

**1294.** 1. *Presence of Sheriff or Bailiff.* — *State v. Wood*, 112 Iowa 484.

2. *Contra*; *State v. Wood*, 112 Iowa 484.

3. *Grand Jurors May Testify in Furtherance of Justice.* — See *Pritchett v. Frisby*, 112 Ky. 629.

4. *Discretion of Court as to Examination of Grand Juror.* — *State v. McPherson*, 114 Iowa 499, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294. See also *Pritchett v. Frisby*, 112 Ky. 629.

5. *Secrecy Not for Benefit of Witnesses.* — *State v. McPherson*, 114 Iowa 499, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294; *Wisdom v. State*, 42 Tex. Crim. 579, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294. See also *Pritchett v. Frisby*, 112 Ky. 629.

*Contempt Proceedings.* — A grand jury may present to the court the refusal of a witness to testify without infringing the rule as to secrecy. *In re Archer*, 134 Mich. 408.

7. *Clerk and Witnesses May Not Testify Where Grand Juror May Not.* — *State v. McPherson*, 114 Iowa 499, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1294.

**1295.** 1. *Statutory Provisions Exclusive.* — *Pritchett v. Frisby*, 112 Ky. 629. See also *Nash v. State*, 73 Ark. 399.

3. *Grand Jurors Cannot Impeach Indictment.* — *Hall v. State*, 134 Ala. 90; *Taylor v. State*, (Fla. 1905) 38 So. Rep. 380, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1295; *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147; *Gilmore v. People*, 87 Ill. App. 128; *State v. Comer*, 157 Ind. 611; *State v. Faulkner*, 185 Mo. 673. See also *U. S. v. Cobban*, 127 Fed. Rep. 713.

4. *Grand Jurors Will Not Be Heard to Say How They Voted.* — *Hall v. State*, 134 Ala. 90, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1295; *Hooker v. State*, 98 Md. 145, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1295.

**1296.** 2. *No Inquiry as to Number of Grand Jurors Concurring Permitted.* — *Nash v. State*, 73 Ark. 399; *Hooker v. State*, 98 Md. 145, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1296. See also *State v. Faulkner*, 185 Mo. 673.

**1296.** (7) *Admissions and Confessions Made Before Grand Jury.* — See note 3.

(8) *On Prosecution for Perjury of Witness Before Grand Jury.* — See notes 5, 6, 7.

**1297.** (9) *Testimony of Grand Jurors to Impeach Witnesses* — In General. — See note 1.

**1298.** 22. *Discharge of Grand Juries* — Power of Court to Reassemble Discharged Grand Jury. — See note 2.

23. *Effect of Investigation of Offense by Grand Jury* — *a.* RESUBMISSION OF CHARGE TO GRAND JURY — (1) *After Return of Ignoramus.* — See note 3.

(2) *After Quashal of Indictment.* — See note 4.

*b.* POWER OF GRAND JURY TO BRING IN INDICTMENT PENDING ANOTHER. — See note 5.

**1299.** 24. *Record as to Grand Juries and Their Proceedings* — *b.* AS TO IMPANELMENT OF GRAND JURY — (2) *How Impanelment Shown* — Sufficiency of Recitals in Indictment. — See note 7.

**1300.** *c.* NUMBER OF GRAND JURORS. — See note 1.

*f.* AS TO GRAND JURORS BEING SWORN — (1) *Necessity to Show that Grand Jurors Were Sworn.* — See note 6.

**1301.** *j.* CONCLUSIVENESS OF RECORD. — See note 8.

**1302.** *k.* SUPPLYING LOST RECORD. — See note 2.

**1296.** 3. *Grand Juror May Testify as to Defendant's Confessions.* — *Wisdom v. State*, 42 Tex. Crim. 579, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1296.

Where the giving of evidence to a grand jury is made by statute a bar to an indictment founded on such evidence, the fact that such evidence was given may be shown by the testimony of the grand jurors. *Murphy v. State*, 124 Wis. 635.

5. *Testimony of Grand Juror Before Subsequent Grand Jury as to Perjury.* — *Wisdom v. State*, 42 Tex. Crim. 579, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1296.

6. *Grand Jurors May Testify on Trial of Witness for Perjury.* — *Wisdom v. State*, 42 Tex. Crim. 579, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1296.

7. *Statutory Provisions.* — *Pritchett v. Frisby*, 112 Ky. 629.

**1297.** 1. *Testimony of Grand Juror to Impeach Witness.* — *State v. McPherson*, 114 Iowa 492; *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799; *Wisdom v. State*, 42 Tex. Crim. 579, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1297.

**1298.** 2. *Power of Court to Reassemble Discharged Grand Jury.* — *Matthews v. State*, 42 Tex. Crim. 31.

3. *Effect of Return of Ignoramus* — Submission of New Bill. — See *Ex p. Johnson*, 71 Ark. 47; *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799. In the absence of pressing and adequate necessity a fresh bill should not be referred to another grand jury after a return of ignoramus. *Com. v. Whitaker*, 25 Pa. Co. Ct. 42; *Com. v. Priestly*, 24 Pa. Co. Ct. 543.

*Leave of the Court Is Necessary in New York* before a bill may be resubmitted. *People v. Bissert*, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643.

4. *Second Indictment upon Quashal of First.* — *Com. v. Swanger*, 108 Ky. 579; *State v. Holton*,

88 Minn. 171; *People v. Scannell*, (Supm. Ct. Crim. T.) 36 Misc. (N. Y.) 40.

*Nolle Prosequi as to First Indictment.* — *State v. Goddard*, 162 Mo. 198; *State v. Ford*, 16 S. Dak. 228.

*Unless Merely Formal Matters Are to Be Corrected*, resubmission should not be to the same grand jury. *People v. Hanstead*, 135 Cal. 149; *Terrill v. Superior Ct.*, 127 Cal. xviii, 60 Pac. Rep. 38. See also *State v. Bullard*, 127 Iowa 168.

5. *One Indictment Not a Bar to Another.* — *People v. Breen*, 130 Cal. 72; *Smith v. State*, 42 Fla. 236; *Irwin v. State*, 117 Ga. 706; *State v. Melvin*, 166 Mo. 565; *Carter v. State*, 44 Tex. Crim. 312. See *State v. Michel*, 111 La. 434.

Where a second indictment is presented and the court orders that the second supersede the first, and it subsequently appears that the second is absolutely void, the first becomes reinstated, and the defendant may be tried thereunder. *People v. Mosier*, 73 N. Y. App. Div. 5.

*Where a Court Has Acquired Jurisdiction* by plea from the defendant another indictment cannot be found for the same offense pending the determination of the first. *People v. Bissert*, 71 N. Y. App. Div. 118, affirmed 172 N. Y. 643.

**1299.** 7. *Record as to Finding of Indictment and Recitals in Indictment Sufficient.* — See *Berkenfield v. People*, 92 Ill. App. 400, reversed on other grounds 191 Ill. 272.

**1300.** 1. *Record Must Show Legal Number.* — *Ogle v. State*, 43 Tex. Crim. 219.

6. *Record Must Show that Grand Jurors Were Sworn.* — *Contra*, *State v. Guglielmo*, (Oregon 1905) 79 Pac. Rep. 577.

**1301.** 8. *Conclusiveness of Record.* — *State v. Comer*, 157 Ind. 611; *Hooker v. State*, 98 Md. 145, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1301; *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345.

**1302.** 2. *Supplying Lost Record.* — *Roberson v. State*, 45 Fla. 94; *Com. v. Becker*, 14 Pa. Super. Ct. 430.

**1303.** 28. Constitutional Law as Affecting Grand Juries — *a.* NECESSITY FOR INDICTMENT OR PRESENTMENT BY GRAND JURY — (4) *In State Courts* — (a) Provisions Modeled After Magna Charta. — See notes 5, 6.

**1304.** (b) Provisions Dispensing with Grand Jury. — See note 1.

(c) Applicability of United States Constitution to States — *aa.* FIFTH AMENDMENT. — See note 2.

*bb.* FOURTEENTH AMENDMENT. — See note 3.

(5) *In Territorial Courts.* — See note 6.

**1305.** (6) *Offenses to Which Constitutions Apply* — (b) Capital or Otherwise Infamous Offenses — The Words "Or Otherwise Infamous Crime." — See note 5.

(c) Misdemeanors. — See note 6.

(d) Quasi-criminal Offenses. — See note 8.

**1306.** *b.* REQUISITES OF GRAND JURY — NUMBER, QUALIFICATIONS OF GRAND JURORS, ETC. — (1) *In General.* — See note 3.

**1307.** (3) *Qualifications of Grand Jurors.* — See note 4.

*d.* RESTRICTION UPON RIGHT OF CHALLENGE AND APPEAL. —

See note 9.

**1308.** *h.* POWER OF COURT TO AMEND INDICTMENT WITHOUT CONCURRENCE OF GRAND JURY. — See note 6.

Authority Is Inherent in the court. *State v. Paul*, 87 Mo. App. 47.

Manner of Substitution. — The substitution must be made in the manner authorized by statute. *Carter v. State*, 41 Tex. Crim. 608.

**1303.** 5. Constitutional Provisions Requiring Indictment by Grand Jury. — *Paulsen v. People*, 195 Ill. 507; *Ogle v. State*, 43 Tex. Crim. 219.

6. Unconstitutional Statutes. — See *State v. Twining*, 71 N. J. L. 388.

**1304.** 1. Constitutions Dispensing with Grand Juries — *Idaho.* — *Davis v. Burke*, 179 U. S. 399.

*Indiana.* — *Williams v. Hert*, 110 Fed. Rep. 166.

*Missouri.* — *State v. Rudolph*, 187 Mo. 67; *State v. Neibekier*, 184 Mo. 211; *State v. Jones*, 168 Mo. 398.

*Nebraska.* — *Coil v. State*, 62 Neb. 15; *Dinsmore v. State*, 61 Neb. 418.

*Oregon.* — *State v. Guglielmo*, (Oregon 1905) 79 Pac. Rep. 577.

*Utah.* — *State v. Imlay*, 22 Utah 156.

*Vermont.* — *State v. Leach*, 77 Vt. 166.

2. Fifth Amendment Inapplicable to States. — *Davis v. Burke*, 179 U. S. 399; *Williams v. Hert*, 110 Fed. Rep. 166; *State v. Rudolph*, 187 Mo. 67; *State v. Jones*, 168 Mo. 398; *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345; *State v. Guglielmo*, (Oregon 1905) 79 Pac. Rep. 577.

3. Fourteenth Amendment. — *Williams v. Hert*, 110 Fed. Rep. 166; *State v. Moore*, 2 Penn. (Del.) 299; *State v. Rudolph*, 187 Mo. 67; *State v. Tucker*, 36 Oregon 291.

6. Territorial Statute Dispensing with Grand Jury Unconstitutional. — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849.

**1305.** 5. Crime Punishable by Imprisonment in Penitentiary Is Infamous. — *Paulsen v. People*, 195 Ill. 507; *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 849; *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345.

6. State Constitution Inapplicable to Misdemeanors. — *Fröst v. State*, 124 Ala. 71; *Witt v. State*, 130 Ala. 129; *Turner v. State*, 114 Ga. 421; *Brewster v. People*, 183 Ill. 111; *People v. Scannell*, (Ct. Gen. Sess.) 37 Misc. (N. Y.) 345; *Finnical v. Cadiz*, 61 Ohio St. 494.

8. Violations of Municipal Ordinances may be punished without indictment by a grand jury. *Finnical v. Cadiz*, 61 Ohio St. 494.

**1306.** 3. Grand Jury Must Have Proper Number. — A conviction upon an indictment by a grand jury consisting of more or less than the constitutional number is void. *Ex p. Ogle*, (Tex. Crim. 1901) 61 S. W. Rep. 122.

**1307.** 4. Race or Color. — Excluding persons from the grand jury by reason of their race or color violates the Fourteenth Amendment of the United States Constitution, and is a ground for quashing an indictment found by such grand jury. *Carter v. Texas*, 177 U. S. 442; *Rogers v. Alabama*, 192 U. S. 226; *Castleberry v. State*, 69 Ark. 346, 86 Am. St. Rep. 197; *Binyon v. U. S.*, (Indian Ter. 1903) 76 S. W. Rep. 265; *State v. Peoples*, 131 N. Car. 784; *State v. Brownfield*, 60 S. Car. 509; *Kipper v. State*, 42 Tex. Crim. 613; *Whitney v. State*, 43 Tex. Crim. 197; *Smith v. State*, 44 Tex. Crim. 90; *Collins v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 42; *Smith v. State*, 45 Tex. Crim. 405; *Whitney v. State*, 42 Tex. Crim. 283; *Smith v. State*, 42 Tex. Crim. 220. And see generally the titles CIVIL RIGHTS, 81. 1 *et seq.*; CONSTITUTIONAL LAW, 971. 3.

But the mere absence of negroes from the panel invades no constitutional right. *Eastling v. State*, 69 Ark. 189.

There must be a showing that there was an intentional discrimination. *Parker v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1066.

9. Court Cannot Curtail Right of Challenge. — The court cannot deprive the accused of the constitutional right to challenge the grand jurors for the causes permitted by statute. *State v. Warner*, 165 Mo. 399, 88 Am. St. Rep. 422.

**1308.** 6. Court Cannot Amend Indictment in Matter of Substance. — *State v. Kern*, 51 N. J. L. 259; *State v. Twining*, 71 N. J. L. 388.

Constitution Permitting Prosecution Without Indictment. — Where the constitution permits an offense to be prosecuted without indictment, the court may, under statutory authority, amend an indictment. *Fillinger v. Conley*, 163 Ind. 584; *People v. Brown*, 110 Mich. 168.

**2. JUST.** — See note 1.

**2. 1. Just Compensation.** — Commissioners' Ct. v. Street, 116 Ala. 28; Waterbury v. Platt, 76 Conn. 435; Phillips v. Scales Mound, 195 Ill. 353; Butler Hard Rubber Co. v. Newark, 61 N. J. L. 32 (water rights); Rome, etc., R. Co. v. Gleason, 42 N. Y. App. Div. 530.

**Just and Equitable.** — *In re* Farmer's United, (1900) 2 Ch. 442, 69 L. J. Ch. 684.

**Just Cause Equivalent to Probable Cause** —

**Malicious Prosecution.** — Bregman v. Kress, 83 N. Y. App. Div. 1.

**Just Title.** — U. S. v. Conway, 175 U. S. 60.

**Just and True Account — Mechanics' Liens.** — Landan v. Cottrill, 159 Mo. 308; Turner v. St. John, 8 N. Dak. 245.

**Just Valuation — Taxation.** — State v. Smith, 158 Ind. 559.

**JUSTICES OF THE PEACE.**

By JOHN SIMPSON.

**8. I. DEFINITION.** — See note 1.

**10. IV. NATURE OF OFFICE — 1. Whether Judicial or Ministerial.** — See note 4.

**2. Whether County, Township, or City Office.** — See note 6.

**11. See note 1.**

**VI. ELIGIBILITY — RIGHT TO HOLD TWO OFFICES.** — See note 12.

**12. VII. NUMBER OF JUSTICES.** — See note 7.

**13. VIII. ELECTION AND APPOINTMENT — 1. Laws Governing Election.** — See notes 1, 2.

**2. Appointment.** — See notes 5, 7.

**14. 3. Commission.** — See notes 1, 2.

**IX. OATH AND BOND — Before Entering upon Duties of Office.** — See note 3. **Effect of Not Taking Oath or Giving Bond — De Facto Officer.** — See notes 7, 8.

**X. CONSTITUTIONAL LIMITATIONS OF OFFICE — 1. Conformity to Constitution in Legislation.** — See note 9.

**8. 1. An Inferior Judicial Officer.** — Mitchell v. Galen, 1 Alaska 339.

**A Coroner Is Not a Justice of the Peace** within the meaning of the Quebec Crim. Code, § 687. Reg. v. Graham, 8 Quebec Q. B. 167.

**10. 4. Justice of Peace Is Judicial Officer.** — Mitchell v. Galen, 1 Alaska 339; McVeigh v. Ripley, 77 Conn. 136; Grainger County v. State, 111 Tenn. 234; Love v. Liddle, 26 Utah 62.

**6. Justices of Peace Are County Officers.** — Grainger County v. State, 111 Tenn. 234; Johnston v. Hunter, 50 W. Va. 52.

**11. 1. Township or Precinct Office.** — State v. Vineyard, 9 Idaho 134; Love v. Liddle, 26 Utah 62.

**Whether County or City Office.** — People v. Cobb, 133 Cal. 74.

**12. Offices Held Compatible — City Clerk.** — Baltimore, etc., R. Co. v. Whiting, 161 Ind. 228.

**Recorder.** — Adams v. Kelly, 44 Oregon 66.

**12. 7. Increasing Number of Justices.** — Alford v. State, 69 Ark. 436; *Ex p.* Fedderwitz, 130 Cal. xviii, 62 Pac. Rep. 935; People v. Cobb, 133 Cal. 74; State v. Vineyard, 9 Idaho 134; State v. Allen, (Tenn. Ch. 1900) 57 S. W. Rep. 182; State v. Cates, 105 Tenn. 441; Grainger County v. State, 111 Tenn. 234; Trogman v. Grover, 109 Wis. 393.

**13. 1. Election by Cities and Towns.** — People v. Kent, 83 N. Y. App. Div. 554; State v. Allen, (Tenn. Ch. 1900) 57 S. W. Rep. 182; Trogman v. Grover, 109 Wis. 393.

**2. Election by Counties.** — Johnston v. Hunter, 50 W. Va. 52.

**Election by Precincts.** — State v. Vineyard, 9 Idaho 134.

**5. Appointment by Governor.** — Abrams v. State, 121 Ga. 170; Daugherty v. Arnold, 110 Ky. 1.

**7. Chicago Justices of the Peace.** — Kaufman v. People, 185 Ill. 113.

**14. 1. Commission of Justice of the Peace.** — Humer v. Cumberland County, 22 Pa. Co. Ct. 541, 8 Pa. Dist. 528.

**2. Validity of Election — Collateral Attack.** — Anderson v. Morton, 21 App. Cas. (D. C.) 444; Humer v. Cumberland County, 22 Pa. Co. Ct. 541, 8 Pa. Dist. 528; Deuster v. Zillmer, 119 Wis. 402.

**3. Barnett v. Hart,** 112 Ky. 728; Trogman v. Grover, 109 Wis. 393.

**7. Mandamus Will Not Lie** to compel acceptance of the bond of an elected justice of the peace after the date when his term of office begins. Barnett v. Hart, 112 Ky. 728.

**8. Failure to Comply with All Formalities.** — A justice of the peace who, in good faith, exercises his function is *de facto* competent to act though he has not complied with all the formalities relative to his qualification. Hogle v. Rockwell, 20 Quebec Super. Ct. 309.

**9. Legislation Must Conform to Constitution.** — Lantz v. Galpin, (County Ct.) 44 Misc. (N. Y.) 356. See also Johnston v. Hunter, 50 W. Va. 52.

**15. Where Constitution Contains No Restrictions.** — See note 3.**2. Uniformity of Jurisdiction.** — See notes 4, 5.**3. Local and Special Laws.** — See notes 7, 8.**16. 4. Abolishment of Office.** — See note 1.**Conferring Jurisdiction on Other Courts.** — See note 2.**5. Act Attempting to Alter Jurisdiction.** — See note 3.**7. Act Attempting to Alter Method of Election, Appointment, or Term of Office.** — See note 6.**17. XI. JURISDICTION — 1. Statutory and Limited.** — See note 1.**2. Jurisdiction Not Extended by Implication.** — See note 3.

**15. 3. Regulating Jurisdiction.** — *Lantz v. Galpin*, (County Ct.) 44 Misc. (N. Y.) 356; *Heller v. Clarke*, 121 Wis. 71; *Shaffel v. State*, 97 Wis. 377.

**4. Act Conferring Special Jurisdiction.** — See *Matthews v. Cotton*, 83 Miss. 472.

**An Act Delegating** to a city power to confer on the justices of the city jurisdiction over offenses against its ordinances is not an unlawful delegation of power. *State v. Nohl*, 113 Wis. 15.

**5. Uniformity of Jurisdiction Throughout State.** — *Matthews v. Cotton*, 83 Miss. 472; *Watkins v. Schlechter*, 9 Ohio Dec. 590, 7 Ohio N. P. 42; *Love v. Liddle*, 26 Utah 62.

**7. Special Laws.** — *Love v. Liddle*, 26 Utah 62.

**8. Adams v. Kelly**, 44 Oregon 66; *Love v. Liddle*, 26 Utah 62.

**16. 1. Abolishment of Office.** — Townships may be abolished and a new judicial township created in their place. *Proulx v. Graves*, 143 Cal. 243.

**The Legislature Has the Right** to redistrict a county, and abolish the offices of justices of the peace in the civil districts extinguished thereby. *State v. Aikin*, 112 Tenn. 603.

The office of city justice of the peace, not being established by the constitution, but being purely statutory, may be abolished by the legislature. *State v. Howell*, 26 Utah 53.

Where there is no constitutional restriction or limitation of such power, the legislature may alter, change or abolish the precincts at will. *State v. Sawyer*, 139 Ala. 138.

**Precincts May Be Abolished by Being Merged into One**, and the offices of the justices of the peace of such precincts are thereby abolished. *Nystrom v. Clark*, 27 Utah 186.

**The Constitutional Abolishment of a District** will have the effect of abolishing the office of justice of the peace thereof. *Grainger County v. State*, 111 Tenn. 234.

**2. Conferring Jurisdiction on Mayor or City Court.** — *Heller v. Clarke*, 121 Wis. 71; *Shaffel v. State*, 97 Wis. 377.

**Conferring Jurisdiction on Town Clerk.** — *Baltimore, etc., R. Co. v. Whiting*, 161 Ind. 228.

**3. Legislation Altering Jurisdiction Is Void.** — *Trogman v. Grover*, 109 Wis. 393.

**6. Changing Term of Office.** — *Trogman v. Grover*, 109 Wis. 393.

**17. 1. Jurisdiction Purely Statutory** — *England*. — *Polley v. Fordham*, 91 L. T. N. S. 525.

*Alabama*. — *Hall v. State*, 130 Ala. 139.

*Colorado*. — *Brewer v. Mock*, 14 Colo. App.

454.

*Delaware*. — *Lewis v. White*, 4 Penn. (Del.) 288.

*Georgia*. — *Ormond v. Ball*, 120 Ga. 916; *Scoville v. Varner*, 121 Ga. 669.

*Illinois*. — *Garrett v. Murphy*, 102 Ill. App. 65.

*Indiana*. — *Davis v. Osborn*, 156 Ind. 86; *Davis v. Bickel*, 25 Ind. App. 378.

*Kansas*. — *Sims v. Kennedy*, 67 Kan. 383, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17; *H. Parker Grain Co. v. Chicago, etc., R. Co.*, 70 Kan. 168; *Vincent v. Donnell*, 10 Kan. App. 554.

*Kentucky*. — *Stephens v. Wilson*, 115 Ky. 27.

*Maryland*. — *State v. Chaney*, 93 Md. 71.

*Missouri*. — *Carr v. Pennsylvania R. Co.*, 108 Mo. App. 388; *Dennis v. Bailey*, 104 Mo. App. 638; *Brownfield v. Thompson*, 96 Mo. App. 340; *Heimberger v. Harrison*, 83 Mo. App. 544.

*Montana*. — *State v. Justice Ct.*, 31 Mont. 258; *Oppenheimer v. Regan*, 32 Mont. 110.

*Nebraska*. — *Armstrong v. Mayer*, 60 Neb. 423.

*North Carolina*. — *Pasterfield v. Sawyer*, 133 N. Car. 42.

*North Dakota*. — *Phelps v. McCollam*, 10 N. Dak. 536.

*Ohio*. — *Collins v. Parker*, 63 Ohio St. 16.

*Oklahoma*. — *Rhyné v. Manchester Assur. Co.*, 14 Okla. 555; *Hobbs v. German-American Doctors*, 14 Okla. 236.

*Oregon*. — *Pierce v. Rock Creek Min. Co.*, 37 Oregon 342.

*Pennsylvania*. — *Merritt v. Whitlock*, 200 Pa. St. 50; *Com. v. May*, 24 Pa. Co. Ct. 546; *Ferriday v. Reinbold*, 8 Pa. Dist. 637; *Murry v. Besore*, 16 Lanc. L. Rev. 374; *Ketchledge v. Wyoming County*, 24 Pa. Co. Ct. 7.

*Texas*. — *Stacks v. Simmons*, (Tex. Civ. App. 1900) 58 S. W. Rep. 958.

*Vermont*. — *State v. Wilson*, 74 Vt. 323.

*Washington*. — *State v. Schaffer*, 31 Wash. 305.

*West Virginia*. — *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

*Wisconsin*. — *Heller v. Clarke*, 121 Wis. 71; *Griswold v. Nichols*, 111 Wis. 344; *State v. Childs*, 109 Wis. 233; *Martin v. Eastman*, 109 Wis. 286; *Shaffel v. State*, 97 Wis. 377.

**Reducing Charge of Unlawful Wounding to One of Common Assault.** — Justices of the peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction. *Reg. v. Lee*, 2 Can. Crim. Cas. (Ont.) 233.

**3. Jurisdiction Not Implied.** — *Sims v. Ken-*

**17. 3. Jurisdiction by Consent — Jurisdiction by Consent Outside of County or Town.** — See note 6.

**18. 4. Concurrent Jurisdiction of Other Courts — a. IN CIVIL CASES — When Jurisdiction Concurrent.** — See note 1.

**Exclusive Jurisdiction.** — See note 3.

**b. IN CRIMINAL CASES — Concurrent Jurisdiction of Other Courts.** — See note 5.

**19.** See note 1.

**6. Jurisdiction as Dependent on Nature of Subject-matter — a. CONTRACTS.** — See note 6.

**20. Breach of Contract — Actions Ex Delicto — Damages.** — See note 6.

**Action on the Case.** — See note 7.

**21. b. BONDS.** — See notes 1, 2, 3.

**22. c. PENALTIES IMPOSED BY STATUTE.** — See notes 1, 2.

**d. TORTS — (1) Jurisdiction Limited — Reasons for Withholding Jurisdiction of Torts.** — See notes 5, 7.

**23. (2) Injuries to Person and Reputation.** — See note 1.

**24. e. ACTIONS INVOLVING TITLE TO REAL ESTATE.** — See notes 3, 4.

nedy, 67 Kan. 383, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17; Kuker v. Bein-dorff, 63 Neb. 91; Crate v. Pettepher, 112 Wis. 252.

**Statutes Strictly Construed.** — State v. Chaney, 93 Md. 71.

**17. 6. Porter v. Welsh,** 117 Iowa 144.

**18. 1. Jurisdiction Concurrent with Other Courts.** — Sullivan v. Johnston, 10 Pa. Dist. 73; Timmony v. Salt Lake City, 28 Utah 302.

**3. Exclusive Jurisdiction.** — Armstrong v. Mayer, 60 Neb. 423. See also Timmony v. Salt Lake City, 28 Utah 302.

**5. Jurisdiction Concurrent with District Court.** — Davis v. State, 141 Ala. 84.

**Jurisdiction Concurrent with Circuit Court.** — Drake v. State, 68 Ala. 510.

**19. 1. Justices of Peace with Exclusive Jurisdiction.** — State v. Holcomb, 63 S. Car. 22; Ex p. Brown, 43 Tex. Crim. 45.

**6. Contracts.** — Katch v. Benton Coal Co., 19 Pa. Super. Ct. 476; Murphy v. Thall, 17 Pa. Super. Ct. 500; Richmond v. Henderson, 48 W. Va. 389.

**Claim to Property Levied on.** — A justice's court has jurisdiction of a claim interposed to a levy upon personality under an execution issued from such court. Everett v. Brown, 117 Ga. 342.

**20. 6. Breach of Contract — Unliquidated Damages.** — Gruell v. Clark, 4 Penn. (Del.) 321; Croskey v. Wallace, 22 Pa. Super. Ct. 112.

**Failure to Deliver Goods — Common Carrier.** — Wilkes-Barre Bottling Works v. Lehigh Valley R. Co., 10 Kulp (Pa.) 218.

**7. Action on the Case — Pennsylvania.** — Stambaugh v. Baker, 10 Pa. Dist. 79; Metzger v. Jackson, 16 Mont. Co. Rep. (Pa.) 180. See also Gingrich v. Sheaffer, 18 Lanc. L. Rev. 153.

**21. 1. Ohio — Official Bond.** — A justice of the peace has no jurisdiction of an action on the official bond of a defaulting justice against him and his sureties. Collins v. Parker, 63 Ohio St. 16.

**2. Jurisdiction Determined from Amount of Damages Claimed.** — Hail v. Tunstall, 21 Tex. Civ. App. 593.

**3. Jurisdiction Determined from Amount of**

**Penalty.** — Richland Tp. v. Cliff, 131 Mich. 628.

**22. 1. Jurisdiction to Enforce Statutory Penalties.** — Dwyer v. Smelter City State Bank, 30 Colo. 315; Herman v. Highway Com'rs, 197 Ill. 94; McQuade v. Manchester, 70 N. H. 576; Stokes v. Schlacter, 66 N. J. L. 247; State v. Childs, 109 Wis. 233.

**2. Action of Debt.** — Dwyer v. Smelter City State Bank, 30 Colo. 315; State v. Trilling, (Tex. Civ. App. 1901) 62 S. W. Rep. 788.

**5. No Jurisdiction of Actions in Tort.** — Gingrich v. Schaeffer, 17 Lanc. L. Rev. 143; Chandler v. Haas, 12 York Leg. Rec. (Pa.) 127.

**7. Georgia.** — Jordan v. Glover, 111 Ga. 806; McLendon v. Griswold, 111 Ga. 806; Hamer v. White, 110 Ga. 300; Elson v. Saul, 110 Ga. 299; Berger v. Saul, 109 Ga. 240.

**No Jurisdiction of Action of Trover.** — McHenry v. Mays, 110 Ga. 299; Watson v. Pearre, 110 Ga. 320; Sing Wah v. Singer, 110 Ga. 299.

**Indiana.** — Justices of the peace have jurisdiction in actions of tort where the sum claimed or the value of the property sought to be recovered does not exceed two hundred dollars. Everett Piano Co. v. Bash, 31 Ind. App. 498.

**Missouri.** — Meyer v. Phoenix Ins. Co., 184 Mo. 481.

**North Carolina.** — Thomas v. Cooksey, 130 N. Car. 148.

**Oklahoma.** — A tort by the taking of several chattels at one time cannot be split by bringing separate suits so as to give the justice's court jurisdiction. Hesser v. Johnson, 13 Okla. 747.

**Pennsylvania.** — Murphy v. Thall, 17 Pa. Super. Ct. 500; Gingrich v. Sheaffer, 18 Lanc. L. Rev. 153; Keoshinski v. Yanofski, 10 Kulp (Pa.) 219; Gallagher v. Kudlich, 10 Kulp (Pa.) 220.

**23. 1. Assault and Battery.** — Compare Calvert v. Hendricks, 155 Ind. 592.

**24. 3. No Jurisdiction of Actions Involving Title to Real Estate — California.** — King v. Kutner-Goldstein Co., 135 Cal. 65.

**Louisiana.** — State v. Mayer, 52 La. Ann. 255.

**Michigan.** — Reynolds v. Maynard, (Mich. 1904) 100 N. W. Rep. 174; Parkinson v. Moulds, 125 Mich. 325.

**25. 7. Jurisdiction as Dependent on Form of Action — b. ACTIONS ON ACCOUNTS — ACCOUNTING — Jurisdiction of Balance of Account. — See note 4.**

**Mutual Accounts. — See note 5.**

**26. d. ATTACHMENT AND GARNISHMENT. — See note 2.**

**e. BASTARDY PROCEEDINGS — Preliminary Examinations. — See notes 3, 4.**

**27. f. CONTEMPT. — See note 3.**

**g. FORCIBLE ENTRY AND DETAINER. — See notes 5, 8.**

*Missouri.* — *Adams v. Ellis*, 86 Mo. App. 343; *Coleman v. Clark*, 80 Mo. App. 339.

*Nebraska.* — *Holmes v. Seaman*, (Neb. 1904) 101 N. W. Rep. 1030, (Neb. 1904) 100 N. W. Rep. 417; *Dold v. Knudsen*, (Neb. 1903) 97 N. W. Rep. 482.

*New York.* — *Matter of Jacquet*, (Surrogate Ct.) 40 Misc. (N. Y.) 575; *Barnard v. Clark*, (County Ct.) 33 Misc. (N. Y.) 330; *Wilgus v. Wilkinson*, 50 N. Y. App. Div. 1, *affirmed* 167 N. Y. 618.

*North Carolina.* — *Smith v. Garris*, 131 N. Car. 34; *Vinson v. Knight*, 137 N. Car. 408.

*Ohio.* — *Carlile v. Cain*, 9 Ohio Dec. 464; *Schaupp v. Jones*, 10 Ohio Dec. 597, 8 Ohio N. P. 151.

*Pennsylvania.* — *Garrett v. Henry*, 24 Pa. Co. Ct. 523; *Perhune v. Raugh*, 10 Kulp (Pa.) 86. *Vermont.* — *Heath v. Robinson*, 75 Vt. 133; *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943.

*Wisconsin.* — See *Abbott v. Cremer*, 118 Wis. 377.

**Does Not Apply to Criminal Cases. — State v. Holcomb**, 63 S. Car. 22.

**Where Title Not Involved. —** The title to real estate is not involved in an action by the holder of the legal title under a sheriff's deed, who has never obtained possession, to recover the rents paid by the tenant to his landlord, in possession under a tax deed. *Phoenix Ins. Co. v. Hoyt*, (Neb. 1902) 91 N. W. Rep. 186.

**An Action for Damages for Breach of a Covenant in a warranty deed against incumbrances does not involve title to real estate.** *Dafoe v. Kepingler*, (Neb. 1901) 95 N. W. Rep. 674.

**Where the Freehold is Only Incidentally Involved** a justice of the peace has jurisdiction in an action to recover a statutory penalty. *Herman v. Highway Com'rs*, 197 Ill. 94.

**24. 4. Actions Involving Possession Alone. —** *Armour Packing Co. v. Howe*, 62 Kan. 587; *Westport v. Hauk*, 92 Mo. App. 364; *Armstrong v. Mayer*, 60 Neb. 423; *Pasterfield v. Sawyer*, 133 N. Car. 42; *Erie R. Co. v. Furry*, 9 Ohio Cir. Dec. 850, 18 Ohio Cir. Ct. 880; *Pierce v. Rock Creek Gold Min. Co.*, 37 Oregon 342; *Renfro v. Harris*, 28 Tex. Civ. App. 58.

**Actions Between Landlord and Tenant. — State v. Mayer**, 52 La. Ann. 255.

**25. 4. Balance of Account Is Amount in Controversy. —** *Froelich v. Christie*, 115 Wis. 549.

**5. New York. —** *Rosenfeld v. Marcus*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 772.

**26. 2. Jurisdiction in Attachment —** *Alabama.* — *Stephens v. Cox*, 124 Ala. 448.

*Alaska.* — *Moody v. Skagway First Nat. Bank*, 1 Alaska 104.

*Arkansas.* — *Davis v. Choctaw, etc.*, R. Co., 73 Ark. 120.

*Colorado.* — *Paul v. Rooks*, 16 Colo. App. 44.

*Georgia.* — *E. E. Forbes Piano Co. v. Owens*, 120 Ga. 449.

*Idaho.* — *Kimball v. Raymond*, 9 Idaho 176.

*Illinois.* — *Garrett v. Murphy*, 102 Ill. App. 65.

*Indiana.* — *Davis v. Bickel*, 25 Ind. App. 378.

*Kansas.* — *Sorensen v. Wellman*, 69 Kan. 637; *Sims v. Kennedy*, 67 Kan. 383; *Holyoke Envelope Co. v. Heagler*, 10 Kan. App. 572.

*Michigan.* — *Harris v. Doyle*, 130 Mich. 470; *Freer v. Hamilton*, 127 Mich. 381; *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19.

*Missouri.* — *Harris v. Meredith*, 106 Mo. App. 586; *Kansas, etc., Coal Co. v. Adams*, 99 Mo. App. 474; *Brownfield v. Thompson*, 96 Mo. App. 340; *Belshe v. Lamp*, 91 Mo. App. 477.

*Nebraska.* — *Westover v. Van Dorn Iron-works Co.*, (Neb. 1903) 97 N. W. Rep. 598; *Rhodes v. Samuels*, 67 Neb. 1.

*North Dakota.* — *Searl v. Shanks*, 9 N. Dak. 204.

*Ohio.* — *Squire v. Wheeling, etc.*, R. Co., 25 Ohio Cir. Ct. 30; *Rogers v. Prushansky*, 23 Ohio Cir. Ct. 271; *Collins v. Bingham*, 12 Ohio Cir. Dec. 825, 22 Ohio Cir. Ct. 533; *Watkins v. Schlechter*, 9 Ohio Dec. 590, 7 Ohio N. P. 42. *Pennsylvania.* — *Sullivan v. Johnston*, 10 Pa. Dist. 73.

*South Carolina.* — *Bird v. Sullivan*, 58 S. Car. 50; *Burckhalter v. Jones*, 58 S. Car. 89.

*Tennessee.* — *Grainger County v. State*, 111 Tenn. 234.

*Texas.* — *Brandt v. Moore*, (Tex. Civ. App. 1902) 65 S. W. Rep. 1124; *McFarland v. Wilder*, (Tex. Civ. App. 1899) 54 S. W. Rep. 267.

*Wisconsin.* — *Krueger v. Cone*, 106 Wis. 522.

**3. Jurisdiction of Preliminary Proceedings in Bastardy. —** *Moonney v. People*, 96 Ill. App. 622; *State v. Chaney*, 93 Md. 71; *In re Walker*, 61 Neb. 803; *Simis v. Alwang*, 61 N. Y. App. Div. 426.

**4. Recognizance for Appearance. — In re Walker, 61 Neb. 803.**

**27. 3. Power to Punish for Contempt. —** *Ormond v. Ball*, 120 Ga. 916; *Robertson v. Hale*, 68 N. H. 538.

**5. Jurisdiction of Actions of Forcible Entry and Detainer —** *Alabama.* — *Fearn v. Beirne*, 129 Ala. 435.

*California.* — *Ivory v. Brown*, 137 Cal. 603; *Hohan v. Ryan*, 130 Cal. 96.

*District of Columbia.* — *Brown v. Slater*, 23 App. Cas. (D. C.) 51.

*Illinois.* — *Moore v. Richardson*, 197 Ill. 437; *Rehm v. Halverson*, 197 Ill. 378.

*Iowa.* — *Herkimer v. Keeler*, 109 Iowa 680.

*Kansas.* — *Armour Packing Co. v. Howe*, 62 Kan. 587.

*Missouri.* — *Graham v. Conway*, 91 Mo. App. 391; *Hadley v. Bernero*, 97 Mo. App. 314.

*Nebraska.* — *Armstrong v. Mayer*, 60 Neb. 423.

**27.** Limitation of Amount in Controversy. — See note 9.

**28.** *h.* REPLEVIN. — See note 1.

*j.* SET-OFF, COUNTERCLAIM, AND RECOUPMENT — Nature and Amount of Set-off or Counterclaim. — See notes 7, 8.

**29.** See note 1.

**8. Jurisdiction as Dependent on Character of Parties — a. PUBLIC OFFICERS — Misconduct in Office.** — See note 4.

**- 30. c. CORPORATIONS.** — See notes 6, 8.

*d.* MARRIED WOMEN. — See note 9.

**31. 9. Equity Jurisdiction — a. JURISDICTION IN ABSENCE OF STATUTE — Powers of Court of Equity Not Conferred on Justices of Peace.** — See notes 1, 3, 5, 6.

Equitable Defenses — Loss of Jurisdiction. — See note 9.

*Oklahoma.* — *Anderson v. Ferguson*, 12 Okla. 307.

*Oregon.* — *McAnish v. Grant*, 44 Oregon 57; *Heiney v. Heiney*, 43 Oregon 577.

*South Dakota.* — Chicago, etc., R. Co. v. Nield, 16 S. Dak. 370.

*Texas.* — *Renfro v. Harris*, 28 Tex. Civ. App. 58; *Stacks v. Simmons*, (Tex. Civ. App. 1900) 58 S. W. Rep. 958.

**27. 8. Justices Having Jurisdiction Concurrent with Other Courts.** — *Fearn v. Beirne*, 129 Ala. 435; *Ivory v. Brown*, 137 Cal. 603; *Hoban v. Ryan*, 130 Cal. 96.

**9. Jurisdiction Not Affected by Amount in Controversy.** — *Compare Hoban v. Ryan*, 130 Cal. 96.

**28. 1. Jurisdiction in Replevin — Colorado.** — *Robinson v. Bonjour*, 16 Colo. App. 458; *Miller v. Graf*, 14 Colo. App. 167.

*Iowa.* — *Rust v. Olson*, 113 Iowa 571; *Wedgewood v. Parr*, 112 Iowa 514.

*Maryland.* — *Darrell v. Biscoe*, 94 Md. 684.

*Michigan.* — *Barlow v. Riker*, (Mich. 1904) 101 N. W. Rep. 820; *Clute v. Everhart*, (Mich. 1904) 100 N. W. Rep. 124.

*Mississippi.* — *Ball v. Sledge*, 82 Miss. 749; *Matthews v. Cotton*, 83 Miss. 472.

*Missouri.* — *Hopper v. Hopper*, 84 Mo. App. 117; *Dennis v. Bailey*, 104 Mo. App. 638.

*Nebraska.* — *Selby v. McQuillan*, 59 Neb. 158.

*North Carolina.* — *Pasterfield v. Sawyer*, 133 N. Car. 42.

*South Carolina.* — *Cromer v. Watson*, 59 S. Car. 488; *Jones v. Brown*, 57 S. Car. 14.

*Tennessee.* — *Grainger County v. State*, 111 Tenn. 234; *Duane v. Richardson*, 106 Tenn. 80.

*Texas.* — *Hail v. Tunstall*, 21 Tex. Civ. App. 593.

*Wisconsin.* — *Griswold v. Nichols*, 111 Wis. 344; *Olson v. Peabody*, 121 Wis. 675; *Deuster v. Zillmer*, 119 Wis. 402.

**7. Set-off or Counterclaim Must Be Within Jurisdiction of Justice.** — *Vidger v. Nolin*, 10 N. Dak. 353; *Corley v. Evans*, 69 S. Car. 520; *Brigman v. Aultman*, (Tex. Civ. App. 1900) 55 S. W. Rep. 509; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389; *Clark v. Smith*, 29 Tex. Civ. App. 363; *Rylie v. Elam*, (Tex. Civ. App. 1900) 58 S. W. Rep. 51, (Tex. Civ. App. 1904) 79 S. W. Rep. 326; *Smith v. Dye*, 21 Tex. Civ. App. 662; *Williamson v. Bodan Lumber Co.*, 36 Tex. Civ. App. 446; *Martin v. Eastman*, 109 Wis. 286. See also *Thompson v. Stone*, 63 Kan. 881, 64 Pac. Rep. 969.

*8. Martin v. Eastman*, 109 Wis. 286.

**29. 1. Corley v. Evans**, 69 S. Car. 520.

Where an alleged overpayment and damages for wrongful sequestration, claimed by the defendant, are separately within the jurisdiction of the justice, they cannot be added in determining the jurisdiction. *Rhodes Haverty Furniture Co. v. Henry*, (Tex. Civ. App. 1902) 67 S. W. Rep. 340.

**4. Misconduct in Office.** — *Collins v. Parker*, 63 Ohio St. 16.

**30. 6. Actions Against Corporations.** — *McLean v. Prudential Ins. Co.*, 130 Mich. 591; *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19; *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

**8. Jurisdiction Allowed.** — *Action Against County Court.* — *Taylor County Ct. v. Holt*, 53 W. Va. 532.

**9. Action Against Married Women.** — *Harvey v. Johnson*, 133 N. Car. 352.

**31. 1. No Equity Jurisdiction — Colorado.** — *Rosengrave v. Clelland*, 16 Colo. App. 474, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.

*Indiana.* — *Frankel v. Garrard*, 160 Ind. 209.

*Iowa.* — *Erret v. Pritchard*, 121 Iowa 496.

*Missouri.* — *Johnson v. Stephens*, 107 Mo. App. 629; *Caffery v. Choctaw Coal, etc., Co.*, 95 Mo. App. 174.

*Montana.* — *Shea v. Regan*, 29 Mont. 308.

*North Carolina.* — *Fidelity, etc., Co. v. Jordan*, 134 N. Car. 236; *Harvey v. Johnson*, 133 N. Car. 352; *Patterson v. Freeman*, 132 N. Car. 357.

*South Carolina.* — *Cromer v. Watson*, 59 S. Car. 488.

**3. Reformation of Instruments.** — *Rosengrave v. Clelland*, 16 Colo. App. 474, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.

**5. Partnership Accounting.** — *Thornton v. Barber*, 48 N. Y. App. Div. 298; *Wise v. Wright*, 24 Pa. Co. Ct. 528, 10 Pa. Dist. 152.

Where No General Adjustment of partnership affairs is necessary, a justice court may have jurisdiction of an action growing out of partnership transactions. *Erret v. Pritchard*, 121 Iowa 496.

**6. Distribution of Trust Funds.** — *Smith v. Taylor*, 34 Ind. App. 194.

**9. No Jurisdiction Where an Equitable Defense Is Interposed.** — *Rosengrave v. Clelland*, 16 Colo. App. 474, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.



**31.** *c.* ACTIONS TO RECOVER TAXES AND SPECIAL ASSESSMENTS. — See note 15.

**32.** See note 1.

*e.* FORECLOSURE OF LIENS — (1) *No Jurisdiction in Absence of Statute* — Jurisdiction Not Inferred. — See note 4.

(2) *Statutory Jurisdiction.* — See note 5.

(3) *Mechanics' Liens* — Jurisdiction to Foreclose. — See notes 6, 8.

**33.** (4) *Chattel Mortgages.* — See notes 1, 2.

**34.** 10. Territorial Jurisdiction — *b.* MODERN STATUTORY JURISDICTION — (1) *Coextensive with County.* — See notes 2, 3, 4.

(2) *Coextensive with Township or City.* — See note 6.

**35.** (3) *Process Served in Other Counties.* — See note 1.

(4) *In Criminal Cases* — *Coextensive with Civil Jurisdiction.* — See note 2.

**36.** *c.* LOCATION OF COURT AND RESIDENCE. — See notes 1, 2.

**37.** 11. Criminal Jurisdiction — *b.* JURISDICTION AS DERIVED FROM CONSTITUTIONS AND STATUTES. — See note 1.

Construction of Statutes Relating to Jurisdiction. — See note 3.

**31.** 15. Taxes. — *Westport v. Hauk*, 92 Mo. App. 364. But see *State v. Trilling*, (Tex. Civ. App. 1901) 62 S. W. Rep. 788.

*State Taxes a Moneyed Demand.* — A justice of the peace has jurisdiction of an action to recover state taxes on land, as being a moneyed demand. *Willis v. Ruddock Cypress Co.*, 108 La. 255.

*Road Taxes.* — A justice of the peace has jurisdiction in an action for road taxes. *Creswell v. Montgomery*, 13 Pa. Super. Ct. 87.

**32.** 1. Ordinances to Enforce Taxes. — A justice has no jurisdiction in an action for the recovery of a borough head tax voluntarily paid by the plaintiff. *Murry v. Besore*, 16 Lanc. L. Rev. 374.

4. *Shea v. Regan*, 29 Mont. 308.

*Taxes — Enforcement of Liens on Real Estate.* — *Smith v. Carroll*, 28 Tex. Civ. App. 330.

5. *Liens Secured by Attachment.* — On logs and lumber. *Harris v. Doyle*, 130 Mich. 470.

6. *No Jurisdiction to Foreclose Mechanics' Lien.* — *O'Brien v. Gooding*, 194 Ill. 466; *Herry v. Benoit*, (Tex. Civ. App. 1902) 70 S. W. Rep. 359.

8. *Jurisdiction Conferred by Statute.* — *Allen v. Glover*, 27 Tex. Civ. App. 483.

**33.** 1. *Value of Property.* — *Houston Ice, etc., Co. v. North Galveston Imp. Co.*, 29 Tex. Civ. App. 40; *Rhodes Haverty Furniture Co. v. Henry*, (Tex. Civ. App. 1902) 67 S. W. Rep. 240.

2. *De Vaughn v. Byrom*, 110 Ga. 904.

**34.** 2. *Miller v. Graf*, 14 Colo. App. 167.

3. *Jurisdiction Throughout State — Texas.* — *Valdez v. Cohen*, 23 Tex. Civ. App. 475.

4. *Jurisdiction Throughout County.* — *Robinson v. Missouri Pac. R. Co.*, 67 Kan. 278; *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481; *Rogers v. Prushansky*, 23 Ohio Cir. Ct. 271; *Baker v. Irvine*, 61 S. Car. 114; *Johnston v. Hunter*, 50 W. Va. 52; *Stanton-Belmont Co. v. Case*, 47 W. Va. 779. See also *Grainger County v. State*, 111 Tenn. 234.

6. *Township or Precinct.* — *Lewis v. White*, 4 Penn. (Del.) 288; *Jones v. Brown*, 57 S. Car. 14; *Aspermont Drug Co. v. J. W. Crowds Drug Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 258; *Ex p. Brown*, 43 Tex. Crim. 45.

In Iowa. — *Baily v. Birkhofer*, 123 Iowa 59;

*Thompson v. Thompson*, 117 Iowa 65; *Porter v. Welsh*, 117 Iowa 144.

In Missouri. — *Warden v. Missouri, etc., R. Co.*, 78 Mo. App. 664; *Ellis v. Mississippi River, etc., R. Co.*, 89 Mo. App. 241; *Hale v. St. Louis, etc., R. Co.*, 88 Mo. App. 567.

Action must be brought in the township of the defendant's residence, or any adjoining township, or in that where the plaintiff resides or the defendant may be found. *Harris v. Meredith*, 106 Mo. App. 586.

New York. — *People v. Miller*, 97 N. Y. App. Div. 35; *People v. Haskell*, 47 N. Y. App. Div. 225.

As to what constitutes an adjoining town see *People v. Miller*, 97 N. Y. App. Div. 35.

Texas. — If there is no qualified justice in the county of the defendant's residence, suit may be brought before the nearest justice. *Aspermont Drug Co. v. J. W. Crowds Drug Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 258.

**35.** 1. *Summons and Writs May Be Served in Other Counties.* — *Meyer v. Phoenix Ins. Co.*, 184 Mo. 481; *Pierce v. Rock Creek Gold Min. Co.*, 37 Oregon 342; *Brown v. Brown*, 12 S. Dak. 21; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602.

2. *Jurisdiction Throughout County.* — *Drake v. State*, 68 Ala. 510; *Pritchett v. Cox*, 154 Ind. 108; *Ex p. Brown*, 43 Tex. Crim. 45.

**36.** 1. *Must Reside and Hold Court Within His District.* — *Mitchell v. Galen*, 1 Alaska 339; *State v. Hemsworth*, 112 Iowa 1; *Grainger County v. State*, 111 Tenn. 234; *Briscoe v. Rich*, 20 Utah 349; *Johnston v. Hunter*, 50 W. Va. 52, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36; *Stanton-Belmont Co. v. Case*, 47 W. Va. 779.

Utah — *City Precinct.* — A justice of the peace elected for a precinct within a city may, under statute, hold his court anywhere within the city. *Briscoe v. Rich*, 20 Utah 349.

2. *May Act Judicially Throughout County.* — *Johnston v. Hunter*, 50 W. Va. 52, citing 17 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36.

**37.** 1. *Jurisdiction by Constitution.* — *State v. Holcomb*, 63 S. Car. 22.

3. *Statutes Strictly Construed.* — *Ex p. Dolan*, 128 Cal. 460; *Heller v. Clarke*, 121 Wis. 71,

**37.** *d.* AS DETERMINED BY NATURE OF CRIME. — See note 8.

**38.** Nature of Crime as Determined from Complaint and Evidence. — See note 1.

*e.* AS DETERMINED BY EXTENT OF PENALTY — Fine or Imprisonment. — See notes 3, 6.

Test of Maximum Penalty. — See note 8.

**39.** Jurisdiction to Fine Only. — See note 2.

**40.** XII. MISCELLANEOUS DUTIES AND POWERS — 5. Power to Appoint Special Constable. — See note 4.

**41.** XIII. DISQUALIFICATIONS AS JUDICIAL OFFICER — 2. Interest in Suit. — See notes 1, 2.

**42.** 3. Relationship to Either Party — Consanguinity or Affinity. — See note 5.

**43.** See note 2.

4. Attorney or Agent for Either Party. — See note 3.

5. Waiver of Disqualification. — See note 7.

**44.** XIV. LIABILITIES — 1. For Ministerial Acts. — See note 2.

**45.** Judicial Acts Enumerated. — See notes 4, 7.

Ministerial Acts Enumerated. — See note 13.

**46.** 2. For Judicial Acts — Exemption from Civil Actions for Damages. — See note 2.

Effect of Malice or Fraud. — See note 5.

Mistakes and Errors of Law. — See note 7.

**47.** Liability Where Justice Acts Without Jurisdiction. — See note 10.

**48.** Error in Determining Jurisdictional Fact. — See note 4.

**37.** 8. Criminal Libel, though a misdemeanor, is not included, as the prosecution therefor must be by indictment. *Wallowa County v. Oakes*, (Oregon 1904) 78 Pac. Rep. 892.

**38.** 1. Determined from Allegations in Complaint. — *People v. State Reformatory*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 233, 241, 243, affirmed 80 N. Y. App. Div. 448.

3. Fine Not Exceeding Certain Amount. — *Pritchett v. Cox*, 154 Ind. 108; *Ex p. Brown*, 43 Tex. Crim. 45.

6. Fine or Imprisonment. — *State v. Holcomb*, 63 S. Car. 22.

8. *State v. Babcock*, 112 Iowa 250.

**39.** 2. *Pritchett v. Cox*, 154 Ind. 108.

**40.** 4. Power to Appoint Special Constables. — *Brewer v. Mock*, 14 Colo. App. 454; *Mysenburg v. Leisure*, 63 Neb. 239; *People v. Hochstim*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 562; *Cromer v. Watson*, 59 S. Car. 488.

**41.** 1. Where Justice Is a Party, He Has No Jurisdiction. — *Harrison v. Lokey*, 26 Tex. Civ. App. 404.

2. *Ex p. Fedderwitz*, 130 Cal. xviii, 62 Pac. Rep. 935.

**42.** 5. Relationship to Party. — *Savage v. Oliver*, 110 Ga. 636.

**43.** 2. Within Fourth Degree. — *Savage v. Oliver*, 110 Ga. 636; *Walters v. Wiley*, (Neb. 1901) 95 N. W. Rep. 486.

3. Acting as Attorney for Either Party in Other Proceedings. — *Harrison v. Lokey*, 26 Tex. Civ. App. 404.

Justice Acting as Collection Agent. — See *Wagner v. Hoffman*, 19 Pa. Super. Ct. 414.

7. Objection Waived if Not Made at Trial. — *People v. Kuney*, (Mich. 1904) 100 N. W. Rep. 596. See also *Wagner v. Hoffman*, 19 Pa. Super. Ct. 414.

**44.** 2. Failure to Perform Ministerial Act. — *Collins v. Parker*, 63 Ohio St. 16.

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**45.** 4. Granting or Refusing Appeal. — *Frohlichstein v. Jordan*, 138 Ala. 310.

7. Taxing Costs. — *Henning v. Martin*, 13 Pa. Super. Ct. 540.

13. Issuing Execution. — See *Frohlichstein v. Jordan*, 138 Ala. 310.

**46.** 2. No Liability for Judicial Acts — *Connecticut*. — *McVeigh v. Ripley*, 77 Conn. 136.

*Kansas*. — *Sorensen v. Wellman*, 69 Kan. 637, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46.

*Kentucky*. — *Dixon v. Cooper*, 109 Ky. 29.

*Michigan*. — *Gardner v. Couch*, (Mich. 1904) 100 N. W. Rep. 673, 101 N. W. Rep. 802.

*New Hampshire*. — *Robertson v. Hale*, 68 N. H. 538.

*New York*. — *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

*South Dakota*. — *Smith v. Jones*, 16 S. Dak. 337.

Corrupt Falsification of His Record renders a justice of the peace liable both civilly and criminally. *Reddish v. Shaw*, 111 Ill. App. 337.

Negligence. — A justice of the peace is not liable for negligence in the performance of his official duties. *McGuckin v. Wilkins*, 75 N. Y. App. Div. 167.

5. *Sorensen v. Wellman*, 69 Kan. 637, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46; *Dixon v. Cooper*, 109 Ky. 29.

7. No Liability for Errors of Law. — *Dixon v. Cooper*, 109 Ky. 29.

**47.** 10. No Jurisdiction — Justice Liable for Void Proceedings. — *Mitchell v. Galen*, 1 Alaska 339; *Stacks v. Simmons*, (Tex. Civ. App. 1900) 58 S. W. Rep. 958; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29; *Heller v. Clarke*, 121 Wis. 71.

**48.** 4. Liable for Error in Determining Juris-

**48. 3. Of Sureties on Official Bond — Conditions of Bond. — See note 7.**

Liability of Sureties for Ministerial Acts. — See note 10.

**49. Money Collected on Void Judgment. — See note 7.****50. 4. Criminal Liability. — See note 4.**

**XV. ABSENCE OR DISABILITY OF JUSTICE — Substitute Justice. — See note 6.**

**51. XVI. COMPENSATION. — See note 1.**

Where No Costs Are Allowed by Law — Services Without Compensation. — See note 2.

**52. XVII. TERM OF OFFICE — 2. As Fixed by Constitutions and Statutes. — See notes 7, 8, 9, 10.**

**3. Right to Hold Over. — See note 12.**

**53. 4. Vacancy — How Occasioned. — See notes 1, 2, 3, 4, 5, 7.**

Failure to Elect Successor. — See note 9.

**dictionary Fact. — See** *Murfina v. Sauv , 19 Quebec Super. Ct. 51.*

**48. 7. Conditions of Bond. —** *Crosthwait v. Pitts, 139 Ala. 421.*

**10. Sureties Are Liable — For a False Certificate of Acknowledgment of a mortgage by the wife of the mortgagor.** *Crosthwait v. Pitts, 139 Ala. 421.*

*For Money Collected in Official Capacity and not paid over. See* *Collins v. Parker, 63 Ohio St. 16.*

*For Destruction of Property instead of seizing it and holding it as security for a debt sued for, and for imprisoning the debtor.* *Ramsey v. Burns, 27 Mont. 154.*

**49. 7. No Liability for Money Collected Unlawfully. —** *Snyder v. Gross, (Neb. 1903) 95 N. W. Rep. 636.*

**50. 4. Falsification of Record. —** *Reddish v. Shaw, 111 Ill. App. 337.*

**Failure to Make a Return** will not render a justice indictable where the duty is not imposed by statute. *Green v. State, 42 Tex. Crim. 549.*

**6. Absence of Justice. —** *Grainger County v. State, 111 Tenn. 234.*

**A Justice Acting in the Illness or Absence or at the Request of a Police Magistrate Should Be Designated as So Acting, in warrants or other process, otherwise the latter will be invalid.** *Reg. v. Lyons, 2 Can. Crim. Cas. (Ont.) 218.*

**51. 1. Fees and Costs of Justices of Peace — Construction of Statutes —** *Arizona. — Maricopa County v. Burnett, (Ariz. 1903) 71 Pac. Rep. 908.*

*California. — McCauley v. Culbert, 144 Cal. 276; Tucker v. Barnum, 144 Cal. 266; Burce v. Jack, 135 Cal. 535.*

*Georgia. — McMichael v. Southern R. Co., 117 Ga. 518.*

*Idaho. — Kimball v. Raymond, 9 Idaho 176.*

*Illinois. — Smith v. McCandless, 101 Ill. App. 143.*

*Louisiana. — State v. Foster, 109 La. 587.*

*Maryland. — Herbert v. Baltimore County, 97 Md. 639.*

*Michigan. — Hutchinson v. Ionia County, 130 Mich. 62.*

*Nebraska. — Courier Printing, etc., Co. v. Leese, 65 Neb. 581; Stewart v. Doering, 64 Neb. 298.*

*New Jersey. — Nowrey v. Ivins, 68 N. J. L. 203.*

*New York. — Riley v. Pagan, 44 N. Y. App. Div. 16.*

*Oregon. — Wallowa County v. Oakes, (Oregon 1904) 78 Pac. Rep. 892.*

*Pennsylvania. — Kelly's Impeachment, 17 Pa. Super. Ct. 344; Henning v. Martin, 13 Pa. Super. Ct. 540.*

*Utah. — Timmony v. Salt Lake City, 28 Utah 302.*

*Vermont. — Fay v. Barber, 72 Vt. 55.*

*West Virginia. — Gillespy v. Ohio County, 48 W. Va. 269.*

**2. Statutes Strictly Construed. —** *State v. Foster, 109 La. 587; Courier Printing, etc., Co. v. Leese, 65 Neb. 581; Fay v. Barber, 72 Vt. 55.*

**52. 7. Commencement and Duration of Term. —** *People v. Cobb, 133 Cal. 74; People v. Kent, 83 N. Y. App. Div. 554; People v. Treacy, 46 N. Y. App. Div. 216; Deuster v. Zillmer, 119 Wis. 402.*

**8. People v. Treacy, 46 N. Y. App. Div. 216.**

**9. Shortening Term. —** *People v. Treacy, 46 N. Y. App. Div. 216.*

**10. Act Extending Term of Office. —** *People v. Cobb, 133 Cal. 74.*

**12. Holding Over. —** *Kaufman v. People, 185 Ill. 113; People v. Kent, 83 N. Y. App. Div. 554. See also Deuster v. Zillmer, 119 Wis. 402.*

A justice was held not entitled to hold over where a successor was elected but failed to qualify. *Campbell v. Dotson, 111 Ky. 125; Olmstead v. Augustus, 112 Ky. 365, where the successor died after his election but before qualification.*

**53. 1. Acceptance of Incompatible Office. —** See *De Zur v. Provost, 99 N. Y. App. Div. 14.*

**2. Failure to Qualify. —** *Barnett v. Hart, 112 Ky. 728; Campbell v. Dotson, 111 Ky. 125.*

**3. Change of Boundary Line. —** *Grainger County v. State, 111 Tenn. 234; State v. Akin, 112 Tenn. 603; Nystrom v. Clark, 27 Utah 186.*

**Abolishment of the Precinct. —** *State v. Sawyer, 139 Ala. 138.*

**By Abolishing Two Townships and Creating a New Township** including their territory a vacancy may be created. *Proulx v. Graves, 143 Cal. 243.*

**4. Abandonment of Office. —** *Grainger County v. State, 111 Tenn. 234.*

**5. Resignation. —** See *De Zur v. Provost, 99 N. Y. App. Div. 14.*

**7. Death of Incumbent. —** *Olmstead v. Augustus, 112 Ky. 365.*

**9. Tie Vote — Justice Holds Over. —** See *Deuster*

- 53.** Absence from State. — See note 11.  
**5.** Appointment to Fill Vacancy. — See notes 12, 13.  
**54.** XVIII. REMOVAL — The Causes for Removal. — See note 4.  
**55.** JUSTIFIABLE HOMICIDE. — See note 1.  
 [KEEL. — See note 3a.]  
**56.** KEEP, KEEPER, ETC. — See notes 1, 2.  
**59.** KICKING CARS. — See note 7.

*v. Zillmer*, 119 Wis. 402. But see *Keller v. Hoffman*, 17 Lanc. L. Rev. 238.

**53.** 11. Absence from District. — State *v. Hemsworth*, 112 Iowa 1; *Keeley Institute v. Riggs*, (Neb. 1904) 99 N. W. Rep. 833.

**12.** Until Next Election. — *Traynor v. Beckham*, 116 Ky. 27; *Olmstead v. Augustus*, 112 Ky. 365; *Daugherty v. Arnold*, 110 Ky. 1; *Keller v. Hoffman*, 17 Lanc. L. Rev. 238.

**13.** By County Commissioners. — *People v. Cobb*, 133 Cal. 74; *Campbell v. Dotson*, 111 Ky. 125.

Tennessee — By Special Election. — State *v. Allen*, (Tenn. Ch. 1900) 57 S. W. Rep. 182.

**54.** 4. Violation of Election Law. — Matter of *Harris*, 64 N. Y. App. Div. 623.

**55.** 1. Palmour *v. State*, 116 Ga. 269; *Lane v. State*, 44 Fla. 105; *State v. Yokum*, 11 S. Dak. 544.

3a. Keel Distinguished from Keelson — Patent

Law. — See *Stetson v. Herreshoff Mfg. Co.*, 113 Fed. Rep. 952.

**56.** 1. Keep the Old Stock Good. — See *Turnbow v. Beckstead*, 25 Utah 468.

Keeping Disorderly House — Continuous Offense. — In *Rex v. Keeping*, 34 Nova Scotia 442, it was held that a continuous offense was indicated by a charge against the defendant as being "the keeper of a disorderly house."

2. *State v. Rozum*, 8 N. Dak. 548.

Prohibiting the "Keeping" of Hazardous Articles on Insured Premises. — *Springfield F. & M. Ins. Co. v. Wade*, 95 Tex. 598.

Keep as a Synonym of Retain. — See *Deans v. Gay*, 132 N. Car. 227.

Keeping a Dog — Liability for Damages. — *Jenkinson v. Coggins*, 123 Mich. 7; *Plummer v. Ricker*, 71 Vt. 114.

**59.** 7. Kicking Cars. — See *Gulf, etc., R. Co. v. Holland*, 27 Tex. Civ. App. 397.

## KIDNAPPING.

**60.** I. DEFINITION. — See note 3.

**61.** II. THE CONSTITUENT ELEMENTS — 2. Want of Consent. — See note 4.

**63.** 4. The Unlawful Taking Away — *b.* UNDER STATUTES DEFINING THE OFFENSE — (3) *Intent to Conceal from Parent or to Steal from Child.* — See note 1.

**64.** KIND. — See note 1.

**65.** [KITING CHECKS. — See note 2a.]

KNOW — KNOWING — KNOWINGLY. — See note 6.

**68.** KNOWLEDGE. — See notes 1, 3.

**69.** KNOWN. — See note 2.

**71.** LABOR — LABORER. — See notes 2, 4.

**60.** 3. Kidnapping for the Purpose of Securing a Ransom is made a crime in *Iowa* by statute. Under this statute it is immaterial how long the person kidnapped is detained. *State v. Leuth*, (Iowa 1905) 103 N. W. Rep. 345.

**61.** 4. Child of Tender Years Incapable of Giving Consent. — *State v. Rhoades*, 29 Wash. 61.

Under Georgia Code. — *Sutton v. State*, 122 Ga. 159, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61.

**63.** 1. The Offense May Be Committed by a Parent in *Kansas* if the legal custody of the child is in another. *In re Peck*, 66 Kan. 693.

**64.** 1. Kind Construed to Mean Kin. — When used in the expression "all my blood kind." *Lusby v. Cobb*, 80 Miss. 715.

**65.** 2a. As to What Constitutes Kiting Checks

see *Johnson v. Levy*, 109 La. 1036; *Wood v. American Nat. Bank*, 100 Va. 306.

**6.** Guilty Knowledge. — *State v. McBarron*, 66 N. J. L. 680.

**68.** 1. Knowledge and Belief. — *Ohio Valley Coffin Co. v. Goble*, 28 Ind. App. 362.

Information. — *Downing North Denver Land Co. v. Burns*, 30 Colo. 283.

**3.** Knowledge and Notice. — *Merrill v. Pacific Transfer Co.*, 131 Cal. 582; *Kirkham v. Moore*, 30 Ind. App. 549.

**69.** 2. Known Course of a Stream. — *Medano Ditch Co. v. Adams*, 29 Colo. 317; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747.

**71.** 2. Other Definitions. — *Dixon v. People*, 168 Ill. 179.

4. *Krebs v. Nicholson*, 118 Iowa 134; *State v.*

**72.** See notes 1, 2.

Land, 108 La. 514, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71; *Meands v. Park*, 95 Me. 527; *Kansas City v. McDonald*, 80 Mo. App. 444; *Moore v. American Industrial Co.*, 138 N. Car. 304.

**Laborer and Employee Used Synonymously.** — *Cochran v. A. S. Baker Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 48; *Farmer v. St. Croix Powder Co.*, 117 Wis. 76.

**One Who Traveled with a Stallion Used for Breeding Purposes is a laborer** within an exemption from execution statute. *Krebs v. Nicholson*, 118 Iowa 134.

**72. 1. Terms Labor and Laborer Confined to Manual Labor.** — *Kline v. Russell*, 113 Ga. 1085; *Stuart v. Poole*, 112 Ga. 818; *Meands v. Park*, 95 Me. 527; *Moore v. American Industrial Co.*, 138 N. Car. 304.

**2. A Bartender who also keeps books as a part of his duties is a laborer** and entitled to a lien for wages. *Lowenstein v. Meyer*, 114 Ga. 709.

**Business and Labor.** — See *Moore v. American Industrial Co.*, 138 N. Car. 304.

**A Chinese Prostitute is a Chinese laborer** within the Exclusion Act. *Lee Ah Yin v. U. S.*, (C. C. A.) 116 Fed. Rep. 614.

**Clerk or Bookkeeper.** — A bookkeeper held not

a laborer under an act giving preference to laborers' wages of insolvent corporation. *Cochran v. A. S. Baker Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 48.

**Conductor of Street Railroad a laborer** within a garnishment statute. *Stuart v. Poole*, 112 Ga. 818.

**Contract Not Labor.** — *Holden v. O'Brien*, 86 Minn. 297.

**Contractor Not a Laborer — Garnishment.** — *Pike v. Sutton*, 115 Ga. 688; *Stuart v. Poole*, 112 Ga. 818.

**Same — Teamster.** — *Fidelity, etc., Co. v. Parkinson*, (Neb. 1903) 94 N. W. Rep. 120.

**Same — Same — Logging.** — *Littlefield v. Morrill*, 97 Me. 505.

**Dancer and Contortionist not a laborer.** *Wirth v. Calhoun*, 64 Neb. 316.

**Engineer.** — *State v. Land*, 108 La. 512 (locomotive engineer); *Gulf, etc., R. Co. v. Berry*, 31 Tex. Civ. App. 408 (civil engineer).

**Foreman.** — *Meands v. Park*, 95 Me. 527.

**Lawyer.** — *Latta v. Lonsdale*, (C. C. A.) 107 Fed. Rep. 585.

**Superintendent — Superintendent Not a Laborer.** — *Moore v. American Industrial Co.*, 138 N. Car. 304.

## LABOR COMBINATIONS.

BY JOHN SIMPSON.

**81. II. RIGHT OF LABORERS TO COMBINE, AND LEGAL EFFECT OF COMBINATION — 1. Criminality of Combination — The Authority of This Case Has Been Questioned.** — See note 4.

**82. 2. Combination as an Element of Civil Damage.** — See note 2.

**III. LEGALITY OF OBJECTS OF LABOR COMBINATIONS — 1. Lawfulness of Coercion in General — Coercion by Combination Unlawful.** — See notes 4, 5.

**84. 2. Compelling Advance in Wages — Labor Unions Excepted.** — See note 1.

**3. Strengthening Union by Compelling Workmen to Join.** — See notes

2, 3, 4.

**81. 4. Combination Not Criminal Per Se.** — *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648; *Foster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *State v. Van Pelt*, 136 N. Car. 633.

**82. 2. Combination No Element of Tort.** — *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648; *State v. Van Pelt*, 136 N. Car. 633. Compare *Quinn v. Leathem*, (1901) A. C. 495.

**4. Coercion by Combination Criminal.** — *U. S. v. Weber*, 114 Fed. Rep. 950; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28; *Erdman v. Mitchell*, 207 Pa. St. 79.

**5. Business Is Property.** — *U. S. v. Haggerty*, 116 Fed. Rep. 510; *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477; *Frank v. Herold*, 63 N. J. Eq. 443.

**84. 1. Labor Combinations Not Opposed to Public Policy.** — *Wabash R. Co. v. Hanahan*, 121 Fed. Rep. 563; *State v. Stockford*, 77 Conn.

227, 107 Am. St. Rep. 28; *Martin v. McFall*, 65 N. J. Eq. 91. See also *U. S. v. Moore*, 129 Fed. Rep. 630.

**In Pennsylvania** the right of laborers to join unions and refuse to work has been recognized by statute, Act May 8, 1869, and Act June 14, 1872. *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779.

**2. Action to Compel Workmen to Join.** — *Wabash R. Co. v. Hannahan*, 121 Fed. Rep. 563; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Gray v. Building Trades Council*, 91 Minn. 171; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648; *People v. McFarlin*, (County Ct.) 43 Misc. (N. Y.) 591. See also *U. S. v. Weber*, 114 Fed. Rep. 950; *Erdman v. Mitchell*, 207 Pa. St. 79.

**3. Erdman v. Mitchell**, 207 Pa. St. 79.

**4. U. S. v. Weber, 114 Fed. Rep. 950; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep.**

**84. IV. LEGALITY OF MEANS EMPLOYED TO EFFECT OBJECTS — 1. Intentional Infliction of Damage as a Ground of Criminal Liability — b. MODE OF INFLICTING DAMAGE — (1) Violence or Intimidation — (a) Intimidation of Employer. — See note 6.**

**85. (b) Intimidation of Workmen. — See notes 2, 4.**

**(c) Intimidation of Customers. — See note 5.**

**(2) Annoyance of Employer, Workmen, or Customers. — See note 7.**

**86. Picketing. — See notes 1, 2.**

**(3) Exercise of Legal Rights — (b) Strikes. — See note 5.**

**87. (c) Persuasion. — See note 4.**

28; *Beattie v. Callanan*, 82 N. Y. App. Div. 7, 67 N. Y. App. Div. 14.

**8. 6. 4W. P. Davis Mach. Co. v. Robinson**, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 329.

**85. 2. Intimidation of Workmen. — Union Pac. R. Co. v. Ruef**, 120 Fed. Rep. 102; *U. S. v. Haggerty*, 116 Fed. Rep. 510; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Otis Steel Co. v. Local Union No. 218*, 110 Fed. Rep. 698; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28; *Ideal Mfg. Co. v. Donovan*, (Mich. 1905) 102 N. W. Rep. 372; *Breeland v. State*, 79 Miss. 527; *Frank v. Herold*, 63 N. J. Eq. 443; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; *Herzog v. Fitzgerald*, 74 N. Y. App. Div. 110; *Master Horseshoers' Protective Assoc.*, 83 N. Y. App. Div. 459; *Beattie v. Callanan*, 67 N. Y. App. Div. 14.

Section 168 of the Penal Code of *New York* makes it a crime to conspire to prevent another from exercising a lawful trade or calling. *People v. McFarlin*, (County Ct.) 43 Misc. (N. Y.) 591.

**4. Actual Violence Not Necessary. — Knudsen v. Benn**, 123 Fed. Rep. 636; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. Rep. 49; *Otis Steel Co. v. Local Union No. 218*, 110 Fed. Rep. 698; *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.

A combination of third persons to induce employees to strike by means of threats, intimidation, or other similar methods is an illegal and malicious interference with the employer's business, which may be enjoined. *U. S. v. Haggerty*, 116 Fed. Rep. 510.

**5. Intimidation of Customers and Patrons. — U. S. v. Weber, 114 Fed. Rep. 950; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.**

Injunction will not lie to restrain employees from sending circulars to the customers of their employers notifying them of the controversies existing between the employers and employees and requesting them not to deal with the employers unless the controversies are adjusted, such circulars not amounting to threats or intimidations. *Cohen v. United Garment Workers of America*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 748.

**7. Annoyance from Boycott. — Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.**

**Essentials of Boycott. —** Intimidation, coercion, or threats of injury are essential elements of a boycott, but what would constitute acts of that character must depend upon the facts of each particular case. *Gray v. Building Trades Council*, 91 Minn. 171.

**86. 1. Picketing Not Unlawful Per Se. —**

*Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. Rep. 49; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28; *W. & A. Fletcher Co. v. International Machinists Assoc.*, (N. J. 1903) 55 Atl. Rep. 1077; *Foster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *Levy v. Rosenstein*, (Supm. Ct. Spec. T.) 66 N. Y. Supp. 101; *Krebs v. Rosenstein*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 661, affirmed 56 N. Y. App. Div. 619; *Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605. See also *George Jonas Glass Co. v. Glass Blowers Assoc.*, 64 N. J. Eq. 644.

**2. United States. — Knudsen v. Benn**, 123 Fed. Rep. 636; *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. Rep. 49; *Otis Steel Co. v. Local Union No. 218*, 110 Fed. Rep. 698.

*Connecticut. — State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28.

*Illinois. — Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61; *Beaton v. Tarrant*, 102 Ill. App. 124.

*Indiana. — Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100.

*Michigan. — Ideal Mfg. Co. v. Donovan*, (Mich. 1905) 102 N. W. Rep. 372; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.

*New Jersey. — W. & A. Fletcher Co. v. International Machinists Assoc.*, (N. J. 1903) 55 Atl. Rep. 1077.

*New York. — Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605; *Foster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *Herzog v. Fitzgerald*, 74 N. Y. App. Div. 110.

**5. Strikes Not Unlawful Per Se. — Wabash R. Co. v. Hannahan**, 121 Fed. Rep. 563; *State v. Stockford*, 77 Conn. 227; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; *Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605; *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648.

While holding that trades unions may cease to work, it was held in *Erdman v. Mitchell*, 207 Pa. St. 79, that their combination to prevent others from obtaining work by threats of a strike, or to prevent an employer from employing others by threats of a strike, is a combination for an unlawful purpose, although not now punishable by indictment, and cannot be classed as peaceable persuasion.

**87. 4. Persuasion. — George Jonas Glass Co.**

**87.** (d) *Boycott.* — See notes 5, 6.

**88.** 2. *Intentional Infliction of Damage as a Ground of Civil Liability* —  
b. *BY BREACH OF CONTRACT* — *Inducing Breaches of Contract.* — See note 2.

c. *BY EXERCISE OF LEGAL RIGHT* — (1) *Gives No Right of Action* —  
— *Allen v. Flood.* — See note 7.

**89.** *Other Concurring Decisions.* — See note 4.

(2) *Contrary Doctrine.* — See note 5.

**90.** See notes 1, 2, 3.

**91.** V. *INJUNCTIONS AGAINST UNLAWFUL ACTS* — 2. *Inadequacy of Remedy at Law.* — See note 4.

**92.** 3. *Criminality of Acts No Bar to Injunction.* — See note 1.

*v. Glass Blowers Assoc.*, 64 N. J. Eq. 644. But in *Knudsen v. Benn*, 123 Fed. Rep. 636, it was said that mere persuasion was unlawful.

The act of persuasion must not come within the rule against conspiracies to injure the property of another. *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264.

**87.** 5. *Origin of Term "Boycott."* — *Gray v. Building Trades Council*, 91 Minn. 171.

**6.** *Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605; *Foster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *People v. Radt*, (Ct. Gen. Sess.) 15 N. Y. Crim. 174. See also *People v. Chandler*, 54 N. Y. App. Div. 111; *State v. Van Pelt*, 136 N. Car. 633.

But see *Martin v. McFall*, 65 N. J. Eq. 91, where it was held to be unlawful for a member of a labor union to attempt to compel an employer to accede to the demands of the union by persuading or inducing other persons not to deal with him.

The use of threats and intimidation directed against the customers will make a boycott illegal and criminal. *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28.

As to the definition and illegality of boycotts see *Gray v. Building Trades Council*, 91 Minn. 171.

**88.** 2. *Inducing Breach.* — See *Southern R. Co. v. Machinists' Local Union*, 111 Fed. Rep. 49.

**7.** *Cases Modifying, Explaining, and Distinguishing Allen v. Flood*, (1898) A. C. 1. — *Giblan v. National Amalgamated Labourers' Union*, (1903) 2 K. B. 600, 72 L. J. K. B. 907, 89 L. T. N. S. 386; *Quinn v. Leatham*, (1901) A. C. 495, 70 L. J. P. C. 76, 85 L. T. N. S. 289, 50 W. R. 139, 65 J. P. 708; *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 732, 71 L. J. K. B. 994, 87 L. T. N. S. 493, 51 W. R. 115, 66 J. P. 822.

**89.** 4. *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648; *Beattie v. Callanan*, 82 N. Y. App. Div. 7; *Foster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *Wunch v. Shankland*, 59 N. Y. App. Div. 482, *appeal dismissed* 170 N. Y. 573.

While a strike ordered for the purpose of increasing wages may be lawful, a strike having for its object merely injury to the business of the employer, without any pecuniary advantage to the persons combining to strike, may be unlawful. *W. P. Davis Mach. Co. v. Robinson*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 329.

**5.** *Massachusetts Doctrine.* — *Berry v. Donovan*, 188 Mass. 353.

**90.** 1. In *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, it was held that a combination to cause a strike for the purpose of injuring the business or property of an employer is unlawful and criminal.

**2.** *Right to Quit Employment Absolute.* — *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648; *Wunch v. Shankland*, 59 N. Y. App. Div. 482, *appeal dismissed* 170 N. Y. 573.

**3.** *Right to Control His Own Labor.* — *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *Wabash R. Co. v. Hannahan*, 121 Fed. Rep. 563.

**Employer Has Right to Choose His Own Labor.** — An employer having a right to stipulate that his employees shall join no union, injurious interference by third parties by attempts to entice such employees to join a union will be enjoined. *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779.

A statute providing that a person who attempts to keep an employee from joining or belonging to any lawful labor organization, by discharge or threats of discharge, shall be guilty of a misdemeanor, has been held unconstitutional. *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176; *Coffeyville Vitriified Brick, etc., Co. v. Perry*, 69 Kan. 297. See also *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246.

The right of an employer to choose his laborers was the ground of the decision in *State v. Kreutzberg*, 114 Wis. 530, 91 Am. St. Rep. 934, where it was held that a statute providing that no person or corporation shall discharge an employee because he is a member of a labor combination is void, as imposing a restraint on individual freedom.

A contract compelling an employer to employ only union labor has been held to be void as against public policy. *Jacobs v. Cohen*, 99 N. Y. App. Div. 481.

**91.** 4. *Irreparable Injury.* — *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497; *Atkins v. W. A. Fletcher Co.*, 65 N. J. Eq. 658; *Frank v. Herold*, 63 N. J. Eq. 443.

**92.** 1. *Criminality of Acts No Bar to Injunction.* — *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. Rep. 40; *Underhill v. Murphy*, (Ky. 1904) 78 S. W. Rep. 482.

**92. 4. What Acts Equity Will and Will Not Enjoin — b. ACTS OF VIOLENCE AND INTIMIDATION.** — See note 5.

**93. d. NUISANCE.** — See note 2.

**VI. CONTEMPT OF COURT.** — See notes 3, 4.

**92. 5. Enjoining Acts of Violence and Intimidation — United States.** — *Knudson v. Benn*, 123 Fed. Rep. 636; *Wabash R. Co. v. Hannahan*, 121 Fed. Rep. 563; *Union Pac. R. Co. v. Ruef*, 120 Fed. Rep. 102; *U. S. v. Haggerty*, 116 Fed. Rep. 510; *U. S. v. Weber*, 114 Fed. Rep. 950; *Reinecke Coal Min. Co. v. Wood*, 112 Fed. Rep. 477; *Southern R. Co. v. Machinists' Local Union*, 112 Fed. Rep. 49; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264; *Otis Steel Co. v. Local Union No. 218*, 110 Fed. Rep. 698.

*Illinois.* — *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61.

*Indiana.* — *Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100.

*Michigan.* — *Ideal Mfg. Co. v. Donovan*, (Mich. 1905) 102 N. W. Rep. 372; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.

*New Jersey.* — *George Jonas Glass Co. v.*

*Glass Blowers Assoc.*, 64 N. J. Eq. 640; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; *Frank v. Herold*, 63 N. J. Eq. 443.

*New York.* — *Herzog v. Fitzgerald*, 74 N. Y. App. Div. 110; *Poster v. Retail Clerks' International Protective Assoc.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 48; *Master Horseshoers' Protective Assoc. v. Quinlivan*, 83 N. Y. App. Div. 459; *Beattie v. Callanan*, 82 N. Y. App. Div. 7, 67 N. Y. App. Div. 14.

*Enjoining Boycott.* — *Gray v. Building Trades Council*, 91 Minn. 171.

**93. 2. When Acts Constitute a Nuisance.** — *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497.

*Preventing Access to Street.* — *Christiansen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61.

**3. Contempt of Court.** — *U. S. v. Weber*, 114 Fed. Rep. 950.

**4. U. S. v. Weber**, 114 Fed. Rep. 950.

## LACHES.

By F. G. BAMMAN.

**97. I. DEFINITION — Laches.** — See note 1.

*Stale Claim.* — See note 2.

**II. RATIONALE OF DOCTRINE.** — See notes 3, 4.

**97. 1. Laches Defined — United States.** — *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593.

*Alabama.* — See *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81.

*California.* — *Cahill v. Superior Ct.*, 145 Cal. 42, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97.

*Illinois.* — *Wright v. Simpson*, 200 Ill. 56, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97. See also *Ring v. Lawless*, 190 Ill. 520.

*Maryland.* — *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223.

*Massachusetts.* — *Sawyer v. Cook*, 188 Mass. 163.

*New Mexico.* — See *Patterson v. Hewitt*, 11 N. Mex. 1.

*New York.* — *Treadwell v. Clark*, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97.

*South Carolina.* — *Hellams v. Prior*, 64 S. Car. 296, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97. See also *Wagner v. Sanders*, 62 S. Car. 73.

*West Virginia.* — See *Cresap v. Cresap*, 54 W. Va. 581.

**Inexcusable Negligence and Inattention to One's Interests.** — *Allis v. Hall*, 76 Conn. 322.

**2. Stale Claim.** — See *Gatewood v. Gatewood*, 70 S. W. Rep. 284, 24 Ky. L. Rep. 931.

**3. Reynolds, etc., Estate Mortg. Co. v. Martin**, 116 Ga. 495; *Davidson v. Mayhew*, 169 Mo.

258; *Lutjen v. Lutjen*, 64 N. J. Eq. 773; *Tozier v. Brown*, 202 Pa. St. 359. See also *New York Phonograph Co. v. Edison*, 136 Fed. Rep. 600; *Vermilion County Children's Home v. Varner*, 192 Ill. 594.

**Maxim Applied.** — See *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39; *Morris v. Parry*, 110 Mo. App. 675.

**4. This Disturb Has Met with General Approval — United States.** — *Guarantee Trust, etc., Co. v. Delta, etc., Co.*, 104 Fed. Rep. 5, 43 C. C. A. 396; *Calivada Colonization Co. v. Hays*, 119 Fed. Rep. 202; *American St. Car Advertising Co. v. Jones*, 122 Fed. Rep. 803; *Socrates Quicksilver Mines v. Carr Realty Co.*, (C. C. A.) 130 Fed. Rep. 293.

*California.* — *Jones v. Police Com'rs*, 141 Cal. 96.

*Georgia.* — *Wilkes v. Phillips*, 120 Ga. 728.

*Illinois.* — *Fitch v. Miller*, 200 Ill. 170.

*Indiana.* — *Ryason v. Dunten*, 164 Ind. 85; *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310.

*Indian Territory.* — *Hanks v. Hendricks*, 3 Indian Terr. 415.

*Kentucky.* — *Smith v. Holtheide*, 74 S. W. Rep. 718, 25 Ky. L. Rep. 125; *Smick v. Beswick*, 113 Ky. 439.

*Missouri.* — *Overstiner v. Britton*, 169 Mo. 352, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97; *Davidson v. Mayhew*, 169 Mo. 258, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d



**98.** The Doctrine Is Based upon Grounds of Public Policy. — See note 1.

**III. ACQUIESCENCE AND LACHES DISTINGUISHED** — In General. — See notes 3, 4.

**99.** See note 1.

Knowledge Essential. — See note 4.

And It May Fairly Be Deduced from All the Authorities. — See note 6.

**IV. ESSENTIAL ELEMENTS** — 1. Delay — a. EFFECT OF MERE DELAY — Cases Holding Delay a Bar. — See note 7.

**100.** On the Other Hand. — See note 1.

So Where the Delay Is Satisfactorily Explained. — See note 2.

ed.) 97; *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490.

*New Mexico*. — *Patterson v. Hewitt*, 11 N. Mex. 1.

*Pennsylvania*. — *Derr's Estate*, 203 Pa. St. 96.

*South Carolina*. — *Ex p. Baker*, 67 S. Car. 74.

*Tennessee*. — *Madison v. Ducktown Sulphur, etc.*, Co., 113 Tenn. 331.

*West Virginia*. — *Shields v. Tarleton*, 48 W. Va. 343.

In Many Cases a Similar Doctrine Has Been Enunciated, Although Stated in Different Language — *United States*. — *Eames v. Manly*, (C. C. A.) 117 Fed. Rep. 387; *Potts v. Alexander*, 118 Fed. Rep. 885.

*Georgia*. — *Wilkes v. Phillips*, 120 Ga. 728; *Holt v. Parsons*, 118 Ga. 895; *Reynolds, etc., Estate Mortg. Co. v. Martin*, 116 Ga. 495.

*Idaho*. — *Ryan v. Woodin*, 9 Idaho 525.

*Illinois*. — *Vermilion County Children's Home v. Varner*, 192 Ill. 594; *Ferns v. Chapman*, 211 Ill. 597; *Evans v. Woodsworth*, 213 Ill. 404.

*Nebraska*. — *Hayden v. Huff*, 62 Neb. 375.

*Rhode Island*. — *Dispeau v. Pawtucket First Nat. Bank*, 24 R. I. 508.

*Utah*. — *Scott v. Crouch*, 24 Utah 377.

*Virginia*. — *Nelson v. Triplett*, 99 Va. 421.

*West Virginia*. — *McPeck v. Graham*, 56 W. Va. 200; *Holsberry v. Harris*, 56 W. Va. 320; *Phillips v. Piney Coal, etc., Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1040.

**98.** 1. Grounded upon Public Policy — *United States*. — *Moore v. Nickey*, (C. C. A.) 133 Fed. Rep. 289.

*Illinois*. — *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261.

*Indiana*. — *Ryason v. Dunten*, 164 Ind. 85, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

*Kentucky*. — *McArthur v. Preston*, 61 S. W. Rep. 365, 22 Ky. L. Rep. 1769.

*Missouri*. — *Davidson v. Mayhew*, 169 Mo. 258.

*New Mexico*. — *Patterson v. Hewitt*, 11 N. Mex. 1.

*Pennsylvania*. — *Wehrle's Estate*, 205 Pa. St. 62.

*Utah*. — *Scott v. Crouch*, 24 Utah 377.

*West Virginia*. — *Phillips v. Pirley Coal, etc., Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1040.

**3.** *Ryason v. Dunten*, 164 Ind. 85, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**4.** Terms Not Synonymous. — *Matthews v. Wilson*, 31 Ind. App. 90; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370.

**9.** 1. *Treadwell v. Clark*, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**4.** Knowledge of Infringement of Rights Necessary. — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370. See also *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867; *Rowell v. Smith*, 123 Wis. 510.

**6.** Summary. — See *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370; *Gaines v. Whyte Grocery, etc., Co.*, 107 Mo. App. 507.

**7.** Mere Delay Held a Bar. — *Male v. Chapman*, 134 Mich. 511; *Lutjen v. Lutjen*, 64 N. J. Eq. 773. See also *Wainwright v. Massenburg*, 129 N. Car. 46; *Ohio River R. Co. v. Johnson*, 50 W. Va. 499.

**100.** 1. Delay Held Not a Bar. — See *Hoerr's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 337; *Wagner v. Sanders*, 62 S. Car. 73; *Pethtel v. McCullough*, 49 W. Va. 520.

In a suit for the infringement of a patent it was said: "Simple laches without more \* \* \* is not sufficient to interfere with a complainant's right to injunctive relief, though it may affect his right to damages for past infringement." *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357.

**2.** When Delay Explained — *England*. — *Johnson v. Johnson*, (1901) P. 193, 84 L. T. N. S. 725.

*United States*. — *Hendryx v. Perkins*, 114 Fed. Rep. 801, 52 C. C. A. 435. See also *American St. Car Advertising Co. v. Jones*, 122 Fed. Rep. 803.

*Alabama*. — *Walling v. Thomas*, 133 Ala. 426. See also *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39.

*California*. — *Cahill v. Superior Ct.*, 145 Cal. 42, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100; *Parsons v. Weis*, 144 Cal. 410.

*Connecticut*. — *Allis v. Hall*, 76 Conn. 322. See also *Sullivan County R. Co. v. Connecticut River Lumber Co.*, 76 Conn. 464.

*Kentucky*. — See *Greer v. Simrall*, 59 S. W. Rep. 759, 22 Ky. L. Rep. 1037.

*Massachusetts*. — *Sawyer v. Cook*, 188 Mass. 163.

*Michigan*. — See *Hicks v. Steel*, 126 Mich. 408.

*Minnesota*. — *State v. Duluth St. R. Co.*, 88 Minn. 158.

*Missouri*. — See *Kelsey v. Farmers, etc., Bank*, 166 Mo. 157.

*New Hampshire*. — See *Douglass v. Concord, etc., R. Co.*, 72 N. H. 26.

*New Jersey*. — *Flaherty v. Cramer*, 62 N. J. Eq. 758.

*South Carolina*. — *Hellams v. Prior*, 64 S. Car. 296.

**100. Substantial Justice Prevented. — See note 3.**

Staleness Proper, or Great Lapse of Time Unexplained. — See note 4.

Delay Creating Presumption of Abandonment. — See note 5.

**101. See note 1.***South Dakota.* — Sioux Falls Sav. Bank v. Lien, 14 S. Dak. 410.*West Virginia.* — Holsberry v. Harris, 56 W. Va. 320; Cresap v. Cresap, 54 W. Va. 581; Newberger v. Wells, 51 W. Va. 624.*Wisconsin.* — Fleming v. Ellison, 124 Wis. 36.**Excuse for Delay Must Be Shown — United States.** — Sharp v. Behr, 117 Fed. Rep. 864; Kessler v. Ensley Land Co., 123 Fed. Rep. 546; Edwards v. Mercantile Trust Co., 124 Fed. Rep. 381; *In re* Milgraum, 133 Fed. Rep. 802.*Alabama.* — Elrod v. Smith, 130 Ala. 212.*Arkansas.* — James v. Gibson, 73 Ark. 440.*Georgia.* — Wilkes v. Phillips, 120 Ga. 728.*Idaho.* — Ryan v. Woodin, 9 Idaho 525.*Illinois.* — Vermilion County Children's Home v. Varner, 192 Ill. 594; Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250; Graham v. Brock, 212 Ill. 579; Wilcoxon v. Wilcoxon, 199 Ill. 244; Fitch v. Miller, 200 Ill. 170.*Indiana.* — Hitchcock v. Cosper, (Ind. App. 1904) 69 N. E. Rep. 1029.*Kentucky.* — Gatewood v. Gatewood, 70 S. W. Rep. 284, 24 Ky. L. Rep. 931. See also Moore v. Hemp, 68 S. W. Rep. 1, 24 Ky. L. Rep. 121; Kelley v. Culver, 116 Ky. 241.*Massachusetts.* — Tetrault v. Fournier, 187 Mass. 58.*Missouri.* — Hand v. St. Louis, 158 Mo. 204. See also Manley v. Crescent Novelty Mfg. Co., 103 Mo. App. 135.*New Jersey.* — Glovi v. Police Com'rs, (N. J. 1905) 60 Atl. Rep. 47; Barker v. Barker, 63 N. J. Eq. 593; Quairol v. Italian Beneficial Soc., 64 N. J. Eq. 205.*New Mexico.* — Patterson v. Hewitt, 11 N. Mex. 1.*Pennsylvania.* — See Derr's Estate, 203 Pa. St. 96.*South Carolina.* — See Wagner v. Sanders, 62 S. Car. 73.*Texas.* — Swilley v. Watson, 36 Tex. Civ. App. 583.*Virginia.* — See Nelson v. Triplett, 99 Va. 421.*Washington.* — Snipes v. Kelleher, 31 Wash. 386.*West Virginia.* — Shields v. Tarleton, 48 W. Va. 343; Phillips v. Piney Coal, etc., Co., 53 W. Va. 543, 97 Am. St. Rep. 1040; McPeck v. Graham, 56 W. Va. 200; Richardson v. McConaughy, 55 W. Va. 546.**100. 3. Where Delay Prevents Doing of Substantial Justice — Arkansas.** — Ayers v. McRae, 71 Ark. 209.*Illinois.* — Dempster v. Rosehill Cemetery Co., 206 Ill. 261.*Louisiana.* — Kuhn v. Bercher, 114 La. 602.*New Jersey.* — See Schoenfeld v. American Can Co., (N. J. 1903) 55 Atl. Rep. 1044.*New York.* — Treadwell v. Clark, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.*Utah.* — Scott v. Crouch, 24 Utah 377.*Virginia.* — Nelson v. Triplett, 99 Va. 421.*West Virginia.* — See Cresap v. Cresap, 54 W. Va. 581; Ohio River R. Co. v. Johnson, 50 W. Va. 499.**4. Staleness Proper — United States.** — Hendryx v. Perkins, 114 Fed. Rep. 801, 52 C. C. A. 435; Wenger v. Chicago, etc., R. Co., 105 Fed. Rep. 796; Kessler v. Ensley Land Co., 123 Fed. Rep. 546; Socrates Quicksilver Mines v. Carr Realty Co., (C. C. A.) 130 Fed. Rep. 293; Nichols v. Southern Oregon Co., 135 Fed. Rep. 232.*Alabama.* — Dean v. Oliver, 131 Ala. 634.*Colorado.* — See Ogilvy Irrigating, etc., Co. v. Insinger, 19 Colo. App. 380; Fairplay v. Park County, 29 Colo. 57.*Florida.* — Johnson v. McKinnon, 45 Fla. 388.*Georgia.* — Wilkes v. Phillips, 120 Ga. 728.*Illinois.* — See Coolidge v. Rhodes, 199 Ill. 24; Parmelee v. Price, 105 Ill. App. 271, affirmed 208 Ill. 544.*Iowa.* — See Stubblefield v. Gadd, 112 Iowa 681.*Kentucky.* — McArthur v. Preston, 61 S. W. Rep. 365, 22 Ky. L. Rep. 1769. See also Gatewood v. Gatewood, 70 S. W. Rep. 284, 24 Ky. L. Rep. 931; Marion County v. Louisville, etc., R. Co., 78 S. W. Rep. 437, 25 Ky. L. Rep. 1600.*Maryland.* — See Sinclair v. Auxiliary Realty Co., 99 Md. 223.*Massachusetts.* — Tetrault v. Fournier, 187 Mass. 58; Doane v. Preston, 183 Mass. 569.*Missouri.* — Morris v. Parry, 110 Mo. App. 675. See also State v. Mansfield, 99 Mo. App. 146.*New Jersey.* — Quairol v. Italian Beneficial Soc., 64 N. J. Eq. 205.*Oregon.* — Wilson v. Wilson, 41 Oregon 459.*Vermont.* — See Gleason v. Carpenter, 74 Vt. 399.*Washington.* — Snipes v. Kelleher, 31 Wash. 386.*West Virginia.* — Newberger v. Wells, 51 W. Va. 624; Stewart v. Tennant, 52 W. Va. 559; Phillips v. Piney Coal, etc., Co., 53 W. Va. 543, 97 Am. St. Rep. 1040; Holsberry v. Harris, 56 W. Va. 320; Richardson v. McConaughy, 55 W. Va. 546; Bailey v. Calfee, 49 W. Va. 630. See also Maxwell v. Wilson, 54 W. Va. 495.**Mississippi — Statute of Limitations Applies in Equity.** — "It has been decided that there is no such thing as a stale claim, properly so called, in this state; and, by positive law, the statute of limitations is to be applied in our courts of equity as in our courts of law." Houston v. National Mut. Bldg., etc., Assoc., 80 Miss. 31.**5. As Evidence.** — Ryason v. Dunten, 164 Ind. 85, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100; Lamberton v. Youmans, 84 Minn. 109; Bailey v. Calfee, 49 W. Va. 630; Phillips v. Piney Coal, etc., Co., 53 W. Va. 543, 97 Am. St. Rep. 1040; Shields v. Tarleton, 48 W. Va. 343. See also Barth v. Loeffelholz, 108 Wis. 562; Rowell v. Smith, 123 Wis. 510.**101. 1. Presumption of Abandonment —**

**101.** Where Relative Positions Unaltered. — See note 4.

Where Delay Will Not Bar Legal Remedy. — See note 5.

**102.** *b.* DEGREE OF DELAY WHEN VALUES ARE FLUCTUATING. — See notes 1, 2, 5, 6.

*Indiana.* — *Ryason v. Duntun*, 164 Ind. 85, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 100.

*Kentucky.* — *Mutual Life Ins. Co. v. O'Neil*, 116 Ky. 742; *Kelley v. Culver*, 116 Ky. 241.

*Missouri.* — See *Gaines v. Whyte Grocery, etc., Co.*, 107 Mo. App. 507; *Graham v. Stafford*, 171 Mo. 692.

*New York.* — *Huntington v. Titus*, 169 N. Y. 579, 50 N. Y. App. Div. 468.

*Virginia.* — *Tidball v. Shenandoah Nat. Bank*, 109 Va. 741.

*Washington.* — *Gay v. Havermale*, 27 Wash. 390.

*West Virginia.* — *Shields v. Tarleton*, 48 W. Va. 343. See also *Bailey v. Calfee*, 49 W. Va. 630.

**101. 4. No Prejudices to Defendant** — *United States.* — *Shea v. Nilina*, (C. C. A.) 133 Fed. Rep. 209, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593; *Fletcher v. McArthur*, (C. C. A.) 117 Fed. Rep. 393.

*Alabama.* — *Pratt Land, etc., Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35.

*Arkansas.* — See *Black v. Baskins*, (Ark. 1905) 87 S. W. Rep. 647.

*Colorado.* — *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256. See also *Keely v. East Side Imp. Co.*, 16 Colo. App. 265.

*Indiana.* — *Earl v. Van Natta*, 29 Ind. App. 532.

*Iowa.* — *Luke v. Koenen*, 120 Iowa 103.

*Missouri.* — *State v. Smith*, 172 Mo. 618.

*Nebraska.* — *Nisley v. Spencer*, (Neb. 1901) 95 N. W. Rep. 798.

*New Hampshire.* — *Douglass v. Concord, etc., R. Co.*, 72 N. H. 26.

*New York.* — *Treadwell v. Clark*, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *People v. Grant*, 61 N. Y. App. Div. 238. See also *Slayback v. Raymond*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 601, affirmed 93 N. Y. App. Div. 326.

*Oregon.* — *Wilson v. Wilson*, 41 Oregon 459.

*Pennsylvania.* — *Bower's Estate*, 17 Pa. Super. Ct. 59.

*South Carolina.* — *Hellams v. Prior*, 64 S. Car. 296, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101.

*Utah.* — *Felkner v. Deely*, 27 Utah 350.

*Vermont.* — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

*Wisconsin.* — *Fleming v. Ellison*, 124 Wis. 36. See also *Isaacs v. Bardon*, 114 Wis. 142.

**5. When Corresponding Legal Remedy Not Barred** — *United States.* — *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 657; *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723, reversing (C. C. A.) 127 Fed. Rep. 387; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546, 129 Fed. Rep. 397; *Idle v. Troricht, etc., Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137.

*Alabama.* — *Bailey v. Butler*, 138 Ala. 153; *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134.

*California.* — See *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 100; *Ludwig v. Murphy*, 143 Cal. 473.

*District of Columbia.* — *Washington L. & T. Co. v. Darling*, 21 App. Cas. (D. C.) 132.

*Illinois.* — See *Vermilion County Children's Home v. Varner*, 192 Ill. 594.

*Indiana.* — *West Muncie, etc., Co. v. Slack*, 164 Ind. 21.

*Iowa.* — *Burns v. Cole*, 117 Iowa 262. See also *Stubblefield v. Gadd*, 112 Iowa 681; *Sioux City, etc., R. Co. v. O'Brien County*, 118 Iowa 582.

*Kentucky.* — *Barrett v. Mutual L. Ins. Co.*, (Ky. 1905) 85 S. W. Rep. 749.

*Massachusetts.* — *Moore v. Dick*, 187 Mass. 207.

*Michigan.* — *Hanna v. Chalker*, 136 Mich. 8. *Mississippi.* — *Houston v. National Mut. Bldg., etc., Assoc.*, 80 Miss. 31.

*Missouri.* — See *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469.

*Nebraska.* — *Michigan Trust Co. v. Red Cloud*, (Neb. 1902) 92 N. W. Rep. 900.

*New Hampshire.* — *Ross v. Leavitt*, 70 N. H. 602.

*New Jersey.* — *Burne v. Partridge*, 61 N. J. Eq. 434. See also *Tucker v. Linn*, (N. J. 1904) 57 Atl. Rep. 1017.

*New York.* — *People v. Sturgis*, 82 N. Y. App. Div. 580.

*Oregon.* — *Wilson v. Wilson*, 41 Oregon 459.

*Tennessee.* — *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

*Texas.* — *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621; *Darrow v. Summerkill*, 24 Tex. Civ. App. 208; *Watson v. Texas, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 830.

*Virginia.* — See *Redford v. Clarke*, 100 Va. 115, 4 Va. Supm. Ct. 36.

*Washington.* — *Gay v. Havermale*, 27 Wash. 390.

*West Virginia.* — *Waldron v. Harvey*, 54 W. Va. 617.

*Wisconsin.* — *Rowell v. Smith*, 123 Wis. 510; *Ludington v. Patton*, 111 Wis. 208.

"When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show either from the face of the bill or by his answer that extraordinary circumstances exist, which require the immediate application of the doctrine of laches." *Boynnton v. Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 301.

**102. 1. When Property of a Speculative Character.** — *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546. See also *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327; *Nerve Food Co. v. Robertson*, 199 Pa. St. 486; *Isaacs v. Bardon*, 114 Wis. 142.

**102.** 2. Knowledge. — See note 7.

**103.** See note 1.

3. Prejudice to Other Persons. — See note 2.

**104.** See note 1.

**102.** 2. Rule Applied to Mining Property. — *Socrates Quicksilver Mines v. Carr Realty Co.*, (C. C. A.) 130 Fed. Rep. 293; *Moore v. Mickey*, (C. C. A.) 133 Fed. Rep. 289; *Patterson v. Hewitt*, 11 N. Mex. 1; *Smith v. Detroit, etc.*, Gold Min. Co., 17 S. Dak. 413. See also *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 299; *Mantle v. Speculator Min. Co.*, 27 Mont. 473; *Scott v. Crouch*, 24 Utah 377.

5. *Dickman v. Dryden*, 90 Minn. 244; *Wall v. Beedy*, 161 Mo. 625.

6. *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed. Rep. 280, 48 C. C. A. 363; *Findley v. Koch*, 126 Iowa 131.

7. Knowledge Necessary — *United States*. — *Encyclopædia Britannica Co. v. American Newspaper Assoc.*, 130 Fed. Rep. 460; *Werner Co. v. Encyclopædia Britannica Co.*, (C. C. A.) 134 Fed. Rep. 831; *Devlin v. McLeod*, 135 Fed. Rep. 164.

*Colorado*. — See *Murto v. Lemon*, 19 Colo. App. 314; *Keely v. East Side Imp. Co.*, 16 Colo. App. 365.

*Illinois*. — *Bishop v. Thompson*, 196 Ill. 206. See also *Lewis v. McGrath*, 191 Ill. 401.

*Michigan*. — See *Olmstead v. Taylor*, 126 Mich. 316.

*Minnesota*. — *Wall v. Meilke*, 89 Minn. 232; *Lamherton v. Youmans*, 84 Minn. 109.

*Missouri*. — *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370; *Gaines v. Whyte Grocery, etc., Co.*, 107 Mo. App. 507. See also *Wall v. Beedy*, 161 Mo. 625.

*South Carolina*. — *Wagner v. Sanders*, 62 S. Car. 73.

*West Virginia*. — *Cresap v. Cresap*, 54 W. Va. 581.

*Wisconsin*. — *Kickbusch v. Corwith*, 108 Wis. 634. See also *Isaacs v. Bardon*, 114 Wis. 142.

"These two elements — knowledge and delay — are the essential elements of the defense," *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

**103.** 1. Opportunity for Knowledge. — *Thorn-ton v. Natchez*, 63 C. C. A. 526, 129 Fed. Rep. 84; *Wall v. Meilke*, 89 Minn. 232; *Cresap v. Cresap*, 54 W. Va. 581. See also *Hicks v. Steele*, 126 Mich. 408; *Batty v. Hastings*, 63 Neb. 26.

Where the Plaintiff Is Not Guilty of Any Negligence in being ignorant of the facts, laches may not be imputed to him. *Keely v. East Side Imp. Co.*, 16 Colo. App. 365.

Laches of Next Friend of Imbecile. — It is no defense to an action by a next friend for an imbecile that the former had knowledge of the cause of action long before and is guilty of laches in instituting suit. *Kidder v. Houston*, (N. J. 1900) 47 Atl. Rep. 336.

Fraud Generally Known. — Where a fact is a matter of general knowledge in the community it is apparent that the plaintiff knew of such fact. *Morris v. Parry*, 110 Mo. App. 675.

2. Prejudice to Others — *United States*. — *Ward v. Sherman*, 192 U. S. 168; *O'Brien v. Wheelock*, 184 U. S. 450.

*Connecticut*. — See *Fisk v. Ley*, 76 Conn. 295; *Lewis v. Lewis*, 76 Conn. 586.

*Georgia*. — *Holt v. Parsons*, 118 Ga. 895.

*Indiana*. — *Earl v. Van Natta*, 29 Ind. App. 532.

*Iowa*. — *Stubblefield v. Gadd*, 112 Iowa 681; *Long v. Olson*, 115 Iowa 388; *Loesche v. Goerdts*, 123 Iowa 55; *Hurley v. Hurley*, 117 Iowa 621.

*Kentucky*. — *Byron v. Louisville, etc., R. Co.*, 59 S. W. Rep. 519, 22 Ky. L. Rep. 1007. See also *Kelley v. Culver*, 116 Ky. 241.

*Missouri*. — *Wall v. Beedy*, 161 Mo. 625; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370.

*Montana*. — *Mantle v. Speculator Min. Co.*, 27 Mont. 473.

*Nebraska*. — See *Chapman v. Wagner*, (Neb. 1901) 96 N. W. Rep. 412.

*New Jersey*. — *International Silver Co. v. William H. Rogers Corp.*, 66 N. J. Eq. 140; *Coward v. Bayonne*, 67 N. J. L. 470. See also *Mumford v. Ecuador Development Co.*, (N. J. 1901) 50 Atl. Rep. 476; *Budd v. Camden*, 69 N. J. L. 193; *Allen v. Chosen Freeholders*, (N. J. 1905) 60 Atl. Rep. 36.

*New York*. — *Treadwell v. Clark*, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103; *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 181 N. Y. 80. See also *People v. Marsh*, 82 N. Y. App. Div. 571, affirmed in 178 N. Y. 618.

*North Carolina*. — *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

*Pennsylvania*. — *Hinnershitz v. United Traction Co.*, 206 Pa. St. 91; *Bradford v. New York, etc., Telephone, etc., Co.*, 206 Pa. St. 582; *Nesinger v. Clay, etc., Turnpike Co.*, 203 Pa. St. 265.

*Rhode Island*. — *Gorham v. Sayles*, 23 R. I. 449.

It Is a Familiar Principle of Equity. — *Cushing v. Schoeneman*, (Neb. 1901) 96 N. W. Rep. 346; *McConnell v. Rowland*, 48 W. Va. 276.

Balance of Justice. — *Ryason v. Duntun*, 164 Ind. 85; *State v. Mansfield*, 99 Mo. App. 146; *Keeling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31.

Claim Supported by Documentary Evidence. — See *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

**104.** 1. *Stearns-Roger Mfg. Co. v. Brown*, (C. C. A.) 114 Fed. Rep. 939; *Treadwell v. Clark*, 73 N. Y. App. Div. 473, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103; *Williams v. Starkweather*, 24 R. I. 512; *Felkner v. Dooly*, 27 Utah 350. See also *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194; *Slaughter v. Coke County*, 34 Tex. Civ. App. 598.

Laches Is Not Mere Delay, but Delay That Works Disadvantage to Another — *United States*. — *O'Brien v. Wheelock*, 184 U. S. 450; *American St. Car Advertising Co. v. Jones*, 122 Fed. Rep. 803; *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593; *Ide v. Trolicht, etc., Car-pet Co.*, (C. C. A.) 115 Fed. Rep. 137.

**105.** 4. Loss of Evidence — Death of Parties and Witnesses. — See note 2.

**106.** See note 1.

**V. CIRCUMSTANCES OF EXCUSE OR EXPLANATION — 1. Legal Disabilities**

— *a.* INFANCY. — See notes 3, 6.

**107.** *b.* COVERTURE — At Common Law. — See notes 1, 2.

Separate Property of Married Women. — See note 7.

*Arkansas.* — *La Fayette v. Merchants' Bank*, 73 Ark. 561.

*California.* — *Cahill v. Superior Ct.*, 145 Cal. 42.

*Colorado.* — See *Farris v. Wirt*, 16 Colo. App. 1.

*Connecticut.* — *Allis v. Hall*, 76 Conn. 322.

*Illinois.* — *Hahn v. Gates*, 102 Ill. App. 385; *Wright v. Simpson*, 200 Ill. 56.

*Indiana.* — *Ryason v. Dunten*, 164 Ind. 85.

*Iowa.* — *Luke v. Koenen*, 120 Iowa 103.

*Maryland.* — *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223.

*Missouri.* — *Weir v. Cordz-Fisher Lumber Co.*, 186 Mo. 388; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370. See also *Kelsay v. Farmers', etc., Bank*, 166 Mo. 157; *State v. Smith*, 172 Mo. 618.

*Nebraska.* — *Westervelt v. Baker*, (Neb. 1901) 95 N. W. Rep. 793; *Nisley v. Spencer*, (Neb. 1901) 95 N. W. Rep. 798. See also *Carter v. Leonard*, 65 Neb. 670.

*New Jersey.* — *Kinhead v. Ryan*, 64 N. J. Eq. 454.

*New York.* — *People v. Grant*, 61 N. Y. App. Div. 238.

*Rhode Island.* — *Gorham v. Sayles*, 23 R. I. 449.

*South Carolina.* — *Hellams v. Prior*, 64 S. Car. 296.

*Tennessee.* — *Madison v. Ducktown Sulphur, etc., Co.*, 113 Tenn. 331.

*Virginia.* — *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

*Washington.* — *Gay v. Havermale*, 27 Wash. 390.

*Wisconsin.* — *Quayle v. Bayfield County*, 114 Wis. 108. See also *Barth v. Loeffelholz*, 108 Wis. 562.

**105.** 2. Loss of Evidence — Death of Parties, Etc. — *United States.* — *Eames v. Manly*, (C. C. A.) 117 Fed. Rep. 387; *Socrates Quicksilver Mines v. Carr Realty Co.*, (C. C. A.) 130 Fed. Rep. 293.

*Illinois.* — *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261.

*Iowa.* — See *Stubblefield v. Gadd*, 112 Iowa 681.

*Kentucky.* — *Smick v. Beswick*, 113 Ky. 439, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *McArthur v. Preston*, 61 S. W. Rep. 365, 22 Ky. L. Rep. 1769.

*Louisiana.* — *Kuhn v. Bercher*, 114 La. 602.

*Missouri.* — *Morris v. Parry*, 110 Mo. App. 675.

*New Jersey.* — *In re Myer*, 67 N. J. Eq. 560; *Lozier v. Hill*, (N. J. 1904) 59 Atl. Rep. 234. See also *Lutjen v. Lutjen*, 64 N. J. Eq. 773.

*New Mexico.* — *Patterson v. Hewitt*, 11 N. Mex. 1.

*Oregon.* — *Wilson v. Wilson*, 41 Oregon 459.

*Pennsylvania.* — *Wehrle's Estate*, 205 Pa. St. 62; *Reisher v. Reisher*, 14 York Leg. Rec. (Pa.) 139.

*Rhode Island.* — *Dispeau v. Pawtucket First Nat. Bank*, 24 R. I. 508.

*South Carolina.* — *Ex p. Baker*, 67 S. Car. 74.

*Tennessee.* — *Kelly v. Kelly*, (Tenn. Ch. 1900) 58 S. W. Rep. 870.

*Utah.* — *Scott v. Crouch*, 24 Utah 377.

*Virginia.* — *Redford v. Clarke*, 100 Va. 115; *Nelson v. Triplett*, 99 Va. 421. See also *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

*Washington.* — *Snipes v. Kelleher*, 31 Wash. 386.

*West Virginia.* — *Holsberry v. Harris*, 56 W. Va. 320; *Ohio River R. Co. v. Johnson*, 50 W. Va. 499.

*Wisconsin.* — *Havenor v. Pipher*, 109 Wis. 108.

**As to Effect of Death of Parties or Witnesses**, see further the following cases:

*Arkansas.* — *Wallace v. Swepston*, (Ark. 1905) 86 S. W. Rep. 398.

*Illinois.* — *Ferns v. Chapman*, 211 Ill. 597.

*Kentucky.* — *Moore v. Hemp*, 68 S. W. Rep. 1, 24 Ky. L. Rep. 121.

*Maryland.* — *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223.

*Missouri.* — *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490; *Davidson v. Mayhew*, 169 Mo. 258.

*New Jersey.* — *Atty.-Gen. v. Central R. Co.*, (N. J. 1904) 59 Atl. Rep. 348.

*Rhode Island.* — *Eddy v. Campbell*, 23 R. I. 192.

*Utah.* — *Scott v. Crouch*, 24 Utah 377.

*West Virginia.* — *McPeck v. Graham*, 56 W. Va. 200; *Pethel v. McCullough*, 49 W. Va. 520.

*Wisconsin.* — *Fleming v. Ellison*, 124 Wis. 36.

**106.** 1. *Smick v. Beswick*, 113 Ky. 439, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *Nelson v. Triplett*, 99 Va. 421.

3. *Infancy.* — *Stewart v. Tennant*, 52 W. Va. 559.

6. *Stehn v. Hayssen*, 124 Wis. 583. See also *Lewis v. McGrath*, 191 Ill. 401; *Derr's Estate*, 203 Pa. St. 96.

**107.** 1. *Coverture at Common Law.* — *Waldron v. Harvey*, 54 W. Va., 617, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107. See also *Hunt v. Reilly*, 23 R. I. 471; *Darrow v. Summerhill*, 24 Tex. Civ. App. 208; *Phillips v. Piney Coal, etc., Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1940.

2. *A Divorced Woman* is not under disability and will be precluded by her laches from bringing an action based upon the fraud of the husband, committed during coverture, and thirty years before the action was brought. *Kelly v. Kelly*, (Tenn. Ch. 1900) 58 S. W. Rep. 870.

7. *Separate Property of Married Women.* — *Dickman v. Dryden*, 90 Minn. 244; *Phillips v. Piney Coal, etc., Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1940, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107; *McPeck v. Graham*, 56 W. Va. 200, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 107.

- 107.** *c.* **INSANITY.** — See note 9.  
**108.** See note 1.  
*d.* **TRIBAL INDIANS.** — See note 3.  
**3. Bankruptcy and Poverty.** — See note 9.  
**109.** See notes 2, 4.  
**4. Absence from Jurisdiction.** — See notes 7, 9.  
**110.** See note 1.  
**6. Pendency of Suit.** — See notes 5, 6, 7.  
**111.** **7. Negligence or Error of Attorney.** — See notes 3, 4, 5.  
**8. Recognition of Plaintiff's Right.** — See note 6.  
**9. Delay by Agreement of Parties.** — See notes 7, 8.

**107.** **9. Insane Persons.** — Walling *v.* Thomas, 133 Ala. 426; Kidder *v.* Houston, (N. J. 1900) 47 Atl. Rep. 336.

**108.** **1. Kidder v. Houston,** (N. J. 1900) 47 Atl. Rep. 336; Fox *v.* Robbins, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

**3. Tribal Indians.** — But it has been held that a complete bar to a charge of laches is not shown by the fact that one is a tribal Indian, although that is an excusatory matter to be considered in applying the doctrine of laches. Dunbar *v.* Green, 66 Kan. 557, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 108; Pope *v.* Falk, 66 Kan. 793; Chouteau *v.* Klapmeyer, 68 Kan. 829.

**9. Insolvency.** — Equitable L. Assur. Soc. *v.* Warren Deposit Bank, (Ky. 1903) 76 S. W. Rep. 391.

**109.** **2. Poverty Rebutting Tacit Admission of Want of Merit.** — See Barker *v.* Barker, 63 N. J. Eq. 593.

**4. Hellams v. Prior,** 64 S. Car. 296.

**7. De Roux v. Girard,** (C. C. A.) 112 Fed. Rep. 89.

**9. Where nonresidents brought suit within eight months after the cause of action arose it was held that the doctrine of laches could not be invoked to defeat their claim.** Grace *v.* Noel Mill Co., (Tenn. Ch. 1901) 63 S. W. Rep. 246.

**110.** **1. Absence in Connection with Other Circumstances.** — In an action to review proceedings had under an act concerning roads the court said: "No notice by advertisement or otherwise was given to the prosecutor of the proceeding, and he was and is a nonresident of this state. We therefore conclude that he was not guilty of any laches in applying for his writ which should deprive him of his right to a review." Pursell *v.* Edison Portland Cement Co., 65 N. J. L. 541.

**5. Suit Pending in Regard to the Matter.** — Wyman *v.* Bowman, (C. C. A.) 127 Fed. Rep. 257; Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 657; Williams *v.* Neely, (C. C. A.) 134 Fed. Rep. 1; Hartwig *v.* Clark, 138 Cal. 668; Burns *v.* Cole, 117 Iowa 262; Felkner *v.* Dooly, 27 Utah 350. See also Stevens *v.* Grand Cent. Min. Co., (C. C. A.) 133 Fed. Rep. 28.

The owner of a patent is not under a duty to sue every infringer at the same time and is not chargeable with laches after three years, where, during the time, he has been prosecuting other infringers. Timolat *v.* Franklin Boiler Works Co., 122 Fed. Rep. 69, 58 C. C. A. 405; U. S. Mitis Co. *v.* Detroit Steel, etc., Co., (C. C. A.) 122 Fed. Rep. 863; Stearns-Roger Mfg. Co. *v.* Brown, (C. C. A.) 114 Fed. Rep. 939.

**Failure to Pursue All Remedies Concurrently.** — "The fact that the complainant was pursuing one of the several remedies he had against his mortgagor, when he might have pursued all of his remedies concurrently, does not \* \* \* excuse his delay, nor will it relieve him from the imputation of laches." Elrod *v.* Smith, 130 Ala. 212.

**6. Test Case.** — People *v.* Sturgis, 82 N. Y. App. Div. 580. See also Young *v.* Snell, 115 Iowa 32; Murphy *v.* Keller, 61 N. Y. App. Div. 145.

**7. Where Institution of Suit — Delay in Prosecution.** — *In re* Koenig, 127 Fed. Rep. 891, affirmed in Cuero First Nat. Bank *v.* Peavy, (C. C. A.) 133 Fed. Rep. 1019; *Ex p.* Baker, 67 S. Car. 74; Swilley *v.* Watson, 36 Tex. Civ. App. 583. See also Penfield *v.* Potts, (C. C. A.) 126 Fed. Rep. 475; Cahill *v.* Superior Ct., 145 Cal. 42; Merced Bank *v.* Price, 145 Cal. 436; New York *v.* Cody, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 270, 95 N. Y. App. Div. 632; Gibbons *v.* Bush Co., 98 N. Y. App. Div. 283; Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741.

Slow progress of the suit will not deprive the complainant of relief, if he is not solely accountable for the delay. London, etc., Bank *v.* Horton, (C. C. A.) 126 Fed. Rep. 593.

**111.** **3. Negligence of Counsel.** — Wilson *v.* Smith, 117 Fed. Rep. 707, affirmed (C. C. A.) 126 Fed. Rep. 916. See also Tetrault *v.* Fournier, 187 Mass. 58.

**4. Erroneous Legal Advice.** — See Sioux Falls Sav. Bank *v.* Lien, 14 S. Dak. 410.

**5.** See St. Louis Safe Deposit, etc., Bank *v.* Kennett Estate, 101 Mo. App. 370; Harrison *v.* McReynolds, 183 Mo. 533.

**6. Where Defendant Recognized Plaintiff's Right.** — Grayson *v.* Bowlin, 70 Ark. 145; Madison *v.* Madison, 206 Ill. 534, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111; Maher *v.* Aldrich, 205 Ill. 242; Hellams *v.* Prior, 64 S. Car. 296, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111. See also Humes *v.* Scott, 130 Ala. 281; Haney *v.* Legg, 129 Ala. 619, 87 Am. St. Rep. 81; Snipes *v.* Kelleher, 31 Wash. 386.

**7. Delay by Agreement of Parties.** — Walling *v.* Thomas, 133 Ala. 426; Brooks *v.* Twitchell, 182 Mass. 443, 94 Am. St. Rep. 662; State *v.* Duluth St. R. Co., 88 Minn. 158; Hellams *v.* Prior, 64 S. Car. 296, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111. See also Yates *v.* Goodwin, 96 Me. 90; Kelsay *v.* Farmers, etc., Bank, 166 Mo. 157; Loughran *v.* Hickory, 129 N. Car. 281; Brown *v.* Johnson, 115 Wis. 430.

**8. Jackson v. Lemler,** 83 Miss. 37; Hellams

**111.** 10. Delay Caused by Act of Defendant. — See note 9.

**112.** See note 1.

11. Negotiation for Compromise. — See notes 2, 3.

**113.** 14. Right of Action Immature. — See notes 1, 2.

15. Prudential Reasons. — See note 3.

16. Relationship of Parties. — See notes 4, 5.

18. Ignorance of Facts — General Rule. — See note 9.

**114.** Must Show Reasons for Remaining Ignorant, Etc. — See note 1.

Knowledge Obtainable upon Inquiry. — See note 2.

**115.** Matters of Public Record. — See note 1.

Whatever Is Notice Enough to Excite Attention. — See note 2.

Defendant under Obligation to Disclose. — See note 3.

*v. Prior*, 64 S. Car. 296, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111.

**111.** 9. Where Defendant Responsible for Delay. — *Stuart v. Harmon*, 72 S. W. Rep. 365, 24 Ky. L. Rep. 1829; *Upton v. Dennis*, 133 Mich. 238, 10 Detroit Leg. N. 132; *Chance v. Jennings*, 159 Mo. 544; *Fleming v. Ellison*, 124 Wis. 36. See also *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593; *Pennsylvania Min. Co. v. Martin*, 210 Pa. St. 53.

**112.** 1. *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815. See also *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160.

2. Attempts to Compromise. — *Welch v. Welch*, 181 Mass. 37; *Hellams v. Prior*, 64 S. Car. 296, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110-112. See also *Merced Bank v. Price*, 145 Cal. 436.

3. *Stuart v. Harmon*, 72 S. W. Rep. 365, 24 Ky. L. Rep. 1829; *Hellams v. Prior*, 64 S. Car. 296, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110-112. See also *New York Phonograph Co. v. Edison*, 136 Fed. Rep. 600; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160.

An executor may excuse his delay by showing it to have occurred through a desire to avoid litigation. *Pearson v. Treadwell*, 179 Mass. 462.

The Assurance of an Agent that litigation was useless and unnecessary was held to relieve the principal from the imputation of laches. *Cushing v. Schoeneman*, (Neb. 1901) 96 N. W. Rep. 346.

**113.** 1. Where Right of Action Immature. — *Lewis v. Lewis*, 76 Conn. 586; *Ring v. Lawless*, 190 Ill. 520; *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366; *Hunt v. Reilly*, 23 R. I. 471; *McAnulty v. Ellison*, (Tex. Civ. App. 1903) 71 S. W. Rep. 670; *Stewart v. Conrad*, 100 Va. 128, 4 Va. Supm. Ct. 49. See also *Heinemann v. Pier*, 110 Wis. 185.

If an action is commenced substantially as soon as the necessity therefor has developed, no laches may be imputed to the plaintiff. *Quayle v. Bayfield County*, 114 Wis. 108.

Until there has been a breach of trust no right of action exists and laches therefore cannot be invoked. *White v. Costigan*, 138 Cal. 564.

Remaundersmen. — *Graham v. Stafford*, 171 Mo. 692.

2. May Not Postpone Action Indefinitely. — See *Baker v. Bailey*, 204 Pa. St. 524.

3. *Ryason v. Dunten*, 164 Ind. 85.

4. Relationship of Parties. — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81; *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256; *Madison v. Madison*, 206 Ill. 534. See also *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

5. *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256; *Madison v. Madison*, 206 Ill. 534.

9. Ignorance. — *Fletcher v. McArthur*, (C. C. A.) 117 Fed. Rep. 393; *Devlin v. McLeod*, 135 Fed. Rep. 164; *Coolidge v. Rhodes*, 199 Ill. 24; *Belinski v. National Brewing Co.*, 109 Ill. App. 647; *Olmstead v. Taylor*, 126 Mich. 316. See also *Lewis v. McGrath*, 191 Ill. 401; *Harrison v. McReynolds*, 183 Mo. 533.

**114.** 1. Reasons for Ignorance. — *Edwards v. Mercantile Trust Co.*, 124 Fed. Rep. 381; *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. Rep. 553; *Reynolds, etc., Estate Mortg. Co. v. Martin*, 116 Ga. 495; *Phillips v. Piney Coal, etc., Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1046. See also *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94; *Redford v. Clarke*, 100 Va. 115; *Glenwood Mfg. Co. v. Syme*, 109 Wis. 355.

2. Facts Sufficient to Put One on Inquiry. — *Evans v. Duke*, 140 Cal. 22; *Mason v. Odum*, 210 Ill. 471, 102 Am. St. Rep. 180; *Coolidge v. Rhodes*, 199 Ill. 24; *Hurley v. Hurley*, 117 Iowa 621; *Kelsay v. Farmers', etc., Bank*, 166 Mo. 157.

**115.** 1. Public Records. — *United States*. — *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546; *Potts v. Alexander*, 118 Fed. Rep. 885; *Socrates Quicksilver Mines v. Carr Realty Co.*, (C. C. A.) 130 Fed. Rep. 293.

*Alabama*. — See *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81.

*Idaho*. — *Ryan v. Woodin*, 9 Idaho 525.

*Illinois*. — *Fitch v. Miller*, 200 Ill. 170; *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250.

*Iowa*. — *Stubblefield v. Gadd*, 112 Iowa 681.

*Nebraska*. — See *Carter v. Leonard*, 65 Neb. 670; *Shelby v. Creighton*, 65 Neb. 485; *Batty v. Hastings*, 63 Neb. 26.

*Texas*. — *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94.

*West Virginia*. — *Edgell v. Smith*, 50 W. Va. 349.

*Wisconsin*. — *Kickbusch v. Corwith*, 108 Wis. 634.

2. Extent of Inquiry. — *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. Rep. 553.

3. *Arkins v. Arkins*, (Colo. App. 1904) 77

**115.** 19. Fraud — Ignorance of Fraud. — See note 4.

**116.** Presumption of Innocence. — See note 1.

Character of Fraud. — See note 2.

**117.** See note 2.

Delay After Discovery of Fraud. — See notes 3, 4.

**118.** 20. Mistake. — See notes 5, 6.

**119.** VI. HOW APPLICATION OF DOCTRINE CONTROLLED BY CIRCUMSTANCES — 1. General Statement. — See note 1.

2. Summary of Circumstances to Be Considered. — See note 2.

Pac. Rep. 256; *Joy v. Ft. Worth Compress Co.*, 24 Tex. Civ. App. 94.

**115.** 4. Ignorance of Fraud — *United States*. — *Anthony v. Campbell*, 112 Fed. Rep. 212, 50 C. C. A. 195; *Alger v. Keith*, 105 Fed. Rep. 105, 44 C. C. A. 371; *Reavis v. Reavis*, 103 Fed. Rep. 813; *Stanwood v. Wishard*, 134 Fed. Rep. 959; *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536. See also *Kessler v. Ensley Land Co.*, 129 Fed. Rep. 397.

*Arkansas*. — *La Fayette v. Merchants' Bank*, 73 Ark. 561.

*District of Columbia*. — *McGee v. Welch*, 18 App. Cas. (D. C.) 177.

*Illinois*. — *Coolidge v. Rhodes*, 199 Ill. 24; *Bishop v. Thompson*, 196 Ill. 206; *Walker v. Shepard*, 210 Ill. 100.

*Iowa*. — *Campbell v. Spears*, 120 Iowa 670.

*Missouri*. — *Gaines v. Whyte Grocery, etc.*, Co., 107 Mo. App. 507.

*New Jersey*. — *Kidder v. Houston*, (N. J. 1900) 47 Atl. Rep. 336.

*New York*. — See *Slayback v. Raymond*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 601, affirmed 93 N. Y. App. Div. 326.

*Texas*. — *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815. See also *Watson v. Texas, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 830.

*Wisconsin*. — *Maldaner v. Beurhaus*, 108 Wis. 25.

**116.** 1. Clear Case Must Be Made Out. — See *Smith v. Holtheide*, 74 S. W. Rep. 718, 25 Ky. L. Rep. 125; *Becht v. Becht*, 168 Mo. 525; *Bailey v. Calfee*, 49 W. Va. 630.

**2. Nature of Fraud.** — *Horne v. Perty*, 112 Fed. Rep. 906; *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469; *Gaines v. Whyte Grocery, etc.*, Co., 107 Mo. App. 507; *Newberger v. Wells*, 51 W. Va. 624.

**117.** 2. *Lutjen v. Lutjen*, 64 N. J. Eq. 773; *Newberger v. Wells*, 51 W. Va. 624; *Bailey v. Calfee*, 49 W. Va. 630.

**3. Effect of Delay After Discovery** — *United States*. — *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732; *Eames v. Manly*, (C. C. A.) 117 Fed. Rep. 387; *De Roux v. Girard*, (C. C. A.) 112 Fed. Rep. 89.

*Alabama*. — *Dean v. Oliver*, 131 Ala. 634.

*California*. — *Evans v. Duke*, 140 Cal. 22.

*Georgia*. — *Wilkes v. Phillips*, 120 Ga. 728, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117.

*Illinois*. — *Ferns v. Chapman*, 211 Ill. 597; *Evans v. Woodsworth*, 213 Ill. 404; *Wilcox v. Wilcox*, 199 Ill. 244.

*Iowa*. — *Stubblefield v. Gadd*, 112 Iowa 631;

*German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737.

*Missouri*. — *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469; *Overshiner v. Britton*, 169 Mo. 352. See also *Becht v. Becht*, 168 Mo. 525.

*Nebraska*. — *Shelby v. Creighton*, 65 Neb. 485.

*Pennsylvania*. — *Mann v. Salsberg*, 17 Pa. Super. Ct. 280.

*Tennessee*. — *Kelly v. Kelly*, (Tenn. Ch. 1900) 58 S. W. Rep. 870.

*Texas*. — *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63. See also *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

*West Virginia*. — *Bailey v. Calfee*, 49 W. Va. 630; *Edgell v. Smith*, 50 W. Va. 349.

4. *Kansas City Southern R. Co. v. Stevenson*, 135 Fed. Rep. 553; *Kessler v. Ensley Land Co.*, 123 Fed. Rep. 546; *Dean v. Oliver*, 131 Ala. 634; *Evans v. Duke*, 140 Cal. 22; *Wilkes v. Phillips*, 120 Ga. 728, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117; *Reynolds, etc., Estate Mortg. Co. v. Martin*, 116 Ga. 495; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469; *Frost v. Busch*, 6 Lack. Leg. N. (Pa.) 156; *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63; *Edgell v. Smith*, 50 W. Va. 349.

**118.** 5. Rule as to Mistake. — *Allis v. Hall*, 76 Conn. 322; *Hoops v. Fitzgerald*, 204 Ill. 325; *Earl v. Van Natta*, 29 Ind. App. 532; *Ludington v. Patton*, 111 Wis. 208. See also *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273.

6. *Sharp v. Behr*, 117 Fed. Rep. 864; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Davidson v. Mayhew*, 169 Mo. 258. See also *Silliman v. Taylor*, 35 Tex. Civ. App. 490.

Long delay and acquiescence will defeat an action to correct an alleged mistake in a deed of trust. *In re Ricards*, 97 Md. 608.

**119.** 1. No Fixed Rules — *United States*. — *O'Brien v. Wheelock*, 184 U. S. 450; *New York Phonograph Co. v. Edison*, 136 Fed. Rep. 600; *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593.

*Indiana*. — *Ryason v. Dunten*, 164 Ind. 85.

*Maryland*. — *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223.

*Missouri*. — See *State v. Gibson*, 187 Mo. 536.

*New Mexico*. — *Patterson v. Hewitt*, 11 N. Mex. 1.

*Oregon*. — *Smith's Estate*, 43 Oregon 600; *Wilson v. Wilson*, 41 Oregon 459.

*South Carolina*. — See *Wagner v. Sanders*, 6a S. Car. 73.

*Virginia*. — *Nelson v. Triplett*, 99 Va. 421.

2. What Circumstances to Be Considered. —



**120.** See note 1.

**3. Unreasonable Delay in Absence of Fraud.** — See note 2.

**121. VII. PARTICULAR INSTANCES CONSIDERED — 2. Executed and Executory Interests.** — See notes 1, 2.

**3. Continuing Obligations and Wrongs.** — See note 4.

**122. Submission to Injury — Release — Accord and Satisfaction.** — See note 1.  
Nuisance. — See notes 3, 4.

**123. 5. Accounting — In General.** — See notes 6, 7.

**124. Limiting Period for Which Account Decead.** — See note 2.

Principal and Agent. — See note 4.

**6. Quieting Title and Removing Cloud — By Party in Possession.** — See note 10.

*Cahill v. Superior Ct.*, 145 Cal. 42; *Madison v. Ducktown Sulphur, etc., Co.*, 113 Tenn. 331. See also *Jackson v. Boyd*, (Ark. 1905) 87 S. W. Rep. 126; *Wilson v. Wilson*, 41 Oregon 459.

**Discretion of Chancellor.** — *Evans v. Woodsworth*, 213 Ill. 404.

**120. 1. Laches, Unlike Limitations, Not Mere Matter of Time — United States.** — *Ward v. Sherman*, 192 U. S. 168; *Encyclopædia Britannica Co. v. American Newspaper Assoc.*, 130 Fed. Rep. 460.

*Alabama.* — *Pratt Land, etc., Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35.

*California.* — *Cahill v. Superior Ct.*, 145 Cal. 42.

*Colorado.* — *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256.

*Indiana.* — *Earl v. Van Natta*, 29 Ind. App. 532; *Ryason v. Dunten*, 164 Ind. 85.

*New Mexico.* — *Patterson v. Hewitt*, 11 N. Mex. 1.

*South Carolina.* — *Wagner v. Sanders*, 62 S. Car. 73.

*Washington.* — *Gay v. Havermale*, 27 Wash. 390.

*Wisconsin.* — *Fleming v. Ellison*, 124 Wis. 36.

**2. Unreasonable Delay — United States.** — *Supreme Council, etc., v. McAlarney*, (C. C. A.) 135 Fed. Rep. 72.

*Arkansas.* — *James v. Gibson*, 73 Ark. 440.

*Illinois.* — *McMillan v. DeTamble*, 93 Ill. App. 65.

*Indiana.* — *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310.

*Kentucky.* — *New York L. Ins. Co. v. Warren Deposit Bank*, 75 S. W. Rep. 234, 25 Ky. L. Rep. 325; *Equitable L. Assur. Soc. v. Warren Deposit Bank*, (Ky. 1903) 76 S. W. Rep. 391; *Mutual L. Ins. Co. v. O'Neil*, 116 Ky. 742.

*Louisiana.* — *State v. Police Board*, 107 La. 162.

*Massachusetts.* — *Doane v. Preston*, 183 Mass. 569.

*Missouri.* — *Ready v. Smith*, 170 Mo. 163; *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135; *World Pub. Co. v. Hull*, 81 Mo. App. 277.

*Nebraska.* — *State v. Holmes*, (Neb. 1902) 91 N. W. Rep. 175.

*New Jersey.* — *Glori v. Police Com'rs*, (N. J. 1905) 60 Atl. Rep. 47.

*North Carolina.* — *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

*Pennsylvania.* — *Nerve Food Co. v. Robertson*, 199 Pa. St. 486.

**121. 1. Executed and Executory Interests.** —

See *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327; *Betzer v. Goff*, 35 Tex. Civ. App. 406.

**2. Whisler v. Cornelson**, 34 Tex. Civ. App. 511.

Laches will not be imputed to one seeking to enjoin the execution of a void judgment because of inaction before an attempt to enforce it is made. *Cooley v. Barker*, 122 Iowa 440.

**4. Continuing Wrong.** — *Stearns-Roger Mfg. Co. v. Brown*, (C. C. A.) 114 Fed. Rep. 939; *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 104 Am. St. Rep. 703.

**122. 1. McHugh v. Louisville Bridge Co.**, 65 S. W. Rep. 456, 23 Ky. L. Rep. 1546.

**3. St. Louis Safe Deposit, etc., Bank v. Kennett**, 101 Mo. App. 370; *Scheurich v. Southwest Missouri Light Co.*, 109 Mo. App. 409. See also *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621.

**4. Scheurich v. Southwest Missouri Light Co.**, 109 Mo. App. 409; *Madison v. Ducktown Sulphur, etc., Co.*, 113 Tenn. 331. See also *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621.

**123. 6. Action for Accounting.** — *N. K. Fairbank Co. v. Luckel, etc., Soap Co.*, 106 Fed. Rep. 498; *International Silver Co. v. William H. Rogers Corp.*, 66 N. J. Eq. 140; *Lutjen v. Lutjen*, 64 N. J. Eq. 773; *Wilson v. Wilson*, 41 Oregon 459; *Tozier v. Brown*, 202 Pa. St. 359; *Person v. Fort*, 64 S. Car. 502. See also *Griffin v. Caldwell*, 72 Ark. 451; *Sawyer v. Cook*, 188 Mass. 163; *Phillips v. Yon*, 61 S. Car. 426.

**7. American St. Car Advertising Co. v. Jones**, 122 Fed. Rep. 803; *Felkner v. Dooly*, 27 Utah 350. See also *Maher v. Aldrich*, 205 Ill. 242; *Petty v. Haas*, 122 Iowa 257; *Gaines v. Whyte Grocery, etc., Co.*, 107 Mo. App. 507.

**124. 2. Burne v. Partridge**, 61 N. J. Eq. 434.

**4. Agency.** — *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256.

**10. Quieting Title — Removing Cloud — Possession.** — *Belinski v. National Brewing Co.*, 100 Ill. App. 647; *Brumback v. Brumback*, 198 Ill. 66; *Ackley v. Croucher*, 203 Ill. 530; *A. R. Beck Lumber Co. v. Rupp*, 188 Ill. 562, 80 Am. St. Rep. 190; *Hays v. Marsh*, 123 Iowa 81; *Eakle v. Hagan*, (Md. 1905) 60 Atl. Rep. 615, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 124; *Batty v. Hastings*, 63 Neb. 261; *Waldron v. Harvey*, 54 W. Va. 617. See also *Farmers' L. & T. Co. v. Denver, etc., R. Co.*, 126 Fed. Rep. 46, 60 C. C. A. 588; *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28; *Black v. Baskins*, (Ark. 1905) 87 S. W. Rep. 647; *Nordman v. Meyer*, 118 Iowa 508.

**125.** See notes 1, 2, 3.

By Party Out of Possession. — See notes 4, 6, 7, 8.

7. Equitable Titles — Delay of Party in Possession. — See note 9.

**126.** Delay of Party Out of Possession. — See notes 1, 3.

**127.** See note 2.

8. Doctrine in Courts of Admiralty. — See notes 4, 5, 6, 8.

**128, LAID UP.** — See note 3.

**125.** 1. O'Neill v. Wilcox, 115 Iowa 15.

2. Tax Sales. — Jackson v. Boyd, (Ark. 1905) 87 S. W. Rep. 126; Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388. See also Carter v. Cernansky, 126 Iowa 506; Auditor Gen. v. Calkins, 136 Mich. 1; Bending v. Auditor Gen., (Mich. 1904) 100 N. W. Rep. 777, 11 Detroit Leg. N. 370; Miller v. Pierce County, 28 Wash. 110.

Where the plaintiff has exercised no acts of ownership over land for nearly thirty years he will be estopped by his laches from attacking a void tax sale. Long v. Olson, 115 Iowa 388.

3. Forged Deed. — See Wilkes v. Phillips, 130 Ga. 728; Van Auken v. Mizner, (Neb. 1902) 90 N. W. Rep. 637.

4. Party Out of Possession. — Guarantee Trust, etc., Co. v. Delta, etc., Co., 104 Fed. Rep. 5, 43 C. C. A. 396; Long v. Olson, 115 Iowa 388; Shehan v. Stuart, 117 Iowa 207; Young v. Snell, 115 Iowa 32; McConnell v. Rowland, 48 W. Va. 276. See also Griffin v. Caldwell, 72 Ark. 451; Thorne v. Foley, (Mich. 1904) 100 N. W. Rep. 905.

6. Higgins Oil, etc., Co. v. Snow, 113 Fed. Rep. 433, 51 C. C. A. 267. See also McFarlane v. Grober, 70 Ark. 371, 91 Am. St. Rep. 84; Sawyer v. Cook, 188 Mass. 163.

"It is now well settled that, when the title asserted by a plaintiff is sufficient to sustain an action of trespass to try title, it matters not whether such title be legal or equitable, the defense of stale demand is not available, and the plaintiff's right of recovery in such case is barred only when the defendant shows adverse possession under the statute of limitation of actions for the recovery of land." Lyster v. Leighton, 36 Tex. Civ. App. 62. See also Craig v. Conover, 72 S. W. Rep. 2, 24 Ky. L. Rep. 1682; Betzer v. Goff, 35 Tex. Civ. App. 406.

7. Bland v. Windsor, 187 Mo. 108. See also Penrose v. Doherty, 70 Ark. 256.

8. See Penrose v. Doherty, 70 Ark. 256.

9. Equitable Title — Party in Possession — Alabama. — Jones v. McNealy, 139 Ala. 379, 101 Am. St. Rep. 38.

Arkansas. — Grayson v. Bowlin, 70 Ark. 145. District of Columbia. — Brainard v. Buck, 16 App. Cas. (D. C.) 595.

Illinois. — Brumback v. Brumback, 198 Ill. 66; Sheldon v. Dunbar, 200 Ill. 490; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210.

New Jersey. — Flaherty v. Cramer, 62 N. J. Eq. 758.

Texas. — See Houston, etc., R. Co. v. Charwaine, 30 Tex. Civ. App. 633.

**126.** 1. Party Out of Possession. — Potts v. Alexander, 118 Fed. Rep. 885; De Roux v. Girard, (C. C. A.) 112 Fed. Rep. 89; Peck v. Haley, 21 App. Cas. (D. C.) 224; Pope v. Falk, 66 Kan. 793; Phillips v. Piney Coal, etc., Co., 53 W. Va. 543, 97 Am. St. Rep. 1040. See also Mason v. Stevens, 91 Ill. App. 623; Lozier v. Hill, (N. J. 1904) 59 Atl. Rep. 234; Frost v. Bush, 6 Lack. Leg. J. N. S. (Pa.) 156; Eddy v. Campbell, 23 R. I. 192; Person v. Fort, 64 S. Car. 502; Stipe v. Shirley, 27 Tex. Civ. App. 97; Havenor v. Pipher, 109 Wis. 108.

Parties Obtaining Wrongful Possession. — Messi v. Frechède, 113 La. 679.

3. See Havenor v. Pipher, 109 Wis. 108.

**127.** 2. See Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81.

4. Rule in Admiralty. — Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778; Northwestern Commercial Co. v. Bartels, (C. C. A.) 131 Fed. Rep. 25. See also The Slingsby, (C. C. A.) 120 Fed. Rep. 748, affirming 116 Fed. Rep. 227.

5. Case Depends on Circumstances. — Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778.

6. Where there has been delay on the part of the complainant he may not enforce his claim to the prejudice of an innocent third party in a court of admiralty. Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778.

8. The Southwark, 128 Fed. Rep. 149. See also Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778; Donald v. Guy, 135 Fed. Rep. 429.

**128.** 3. "To Be Laid Up for Repairs means, as I think, no more than this: The boat must be at rest having some damage made good that in a material degree impairs her ability to pursue the voyage as a yacht; and it does not seem to me to make any difference that while such injuries are being repaired the libellant may continue to eat and sleep and to entertain his friends on board." Dahlgren v. Whitaker, 124 Fed. Rep. 695.

# LAKES AND PONDS.

By O. D. ESTEE.

**130. II. RIGHTS IN LAKES AND PONDS — 1. Property in the Soil under the Water — c. IN THE UNITED STATES — (1) In General.** — See note 10.

**132. In Minnesota.** — See note 2.

**In New Hampshire.** — See notes 7, 8, 9.

**In Wisconsin.** — See note 11.

**135. 2. Right to the Use of the Water — a. IN PRIVATE LAKES AND PONDS — (1) Right of Riparian Owners.** — See note 2.

**3. Riparian Owner's Right of Access to Navigable Water.** — See note 5.

**138. III. HOW RIGHTS IN LAKES AND PONDS ARE ACQUIRED — 2. By Prescription or Adverse Possession — b. PUBLIC RIGHTS CANNOT BE ACQUIRED BY PRESCRIPTION.** — See note 6.

**139. IV. LIABILITY FOR INJURIES TO RIGHTS IN LAKES AND PONDS — 1. Unlawful Diversion of the Water.** — See note 2.

**3. Interference with Navigation.** — See note 8.

**140. LAND.** — See note 8.

**141.** See notes 1, 2.

**130. 10. In Iowa** the title to the bed of a pond which has dried up belongs to the state, and the riparian owners own the fee to the high-water mark of the pond. *Carr v. Moore*, 119 Iowa 152, 97 Am. St. Rep. 292.

**¶ 32. 2. Rule in Minnesota as to Lakes Non-navigable in Fact.** — *Scheifert v. Briegel*, 90 Minn. 125, 101 Am. St. Rep. 399.

**7. Rule in New Hampshire.** — *Dolbeer v. Suncook Water-works Co.*, 72 N. H. 562.

**8. Dolbeer v. Suncook Water-works Co.**, 72 N. H. 562.

**9. Dolbeer v. Suncook Water-works Co.**, 72 N. H. 562.

**11. Rule in Wisconsin.** — *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905.

**135. 2. Right of Riparian Owners to Use the Waters of Private Lakes and Ponds.** — *Robinson v. Davis*, 169 N. Y. 577.

**Cutting Ice for Commercial Purposes.** — In *Sanborn v. People's Ice Co.*, 82 Minn. 43, 83 Am. St. Rep. 401, it was held that an ice company had no right to take ice from a lake to such an extent as to reduce the water level.

**5. Right of Wharfing Out.** — *Dolbeer v. Suncook Waterworks Co.*, 72 N. H. 562.

**138. 6. A private citizen cannot obtain the title to land underneath a lake by adverse possession where the title to such land is in the state.** *Carr v. Moore*, 119 Iowa 152, 97 Am. St. Rep. 292; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905.

**139. 2. Damages May Be Recovered for Unlawful Diversion.** — *Davis v. Fry*, 14 Okla. 340.

**8. Non-navigable Lake.** — In *Smolter v. Boyd*, 209 Pa. St. 146, reversing 10 Kulp (Pa.) 199, it was held that a party who owns the fee in a non-navigable lake has the right to maintain a boom thereon, even though it interferes with the boating of a riparian owner.

**140. 8. Coke's Definition.** — *Higgins Oil, etc., Co. v. Snow*, (C. C. A.) 113 Fed. Rep. 432.

**Blackstone's Definition.** — *Higgins Oil, etc., Co. v. Snow*, (C. C. A.) 113 Fed. Rep. 433.

**141. 1. Comprehensiveness of Term.** — *Higgins Oil, etc., Co. v. Snow*, (C. C. A.) 113 Fed. Rep. 433; *Crawford Co. v. Hathaway*, 67 Neb. 325.

**Cujus Est Solum Ejus Est Usque ad Cælum.** — *Hilton, etc., Lumber Co. v. Murray*, 47 N. Y. App. Div. 289.

**2. Buildings, Houses, Structures.** — *Missouri, etc., R. Co. v. Miami County*, 67 Kan. 434.

**Easement.** — *State v. Superior Ct.*, 31 Wash. 445.

**Hereditament.** — *In re Clutherbuck*, (1901) 2 Ch. 285; *Hegan v. Pendennis Club*, (Ky. 1901) 64 S. W. Rep. 464.

**Same — Statute.** — *Matter of Ehrsam*, 37 N. Y. App. Div. 272.

**An Immediate Interest in the Income of Land is land** within the Mortmain and Charitable Uses Act. *In re Ryland*, (1903) 1 Ch. 467.

**Improvements.** — *Missouri, etc., R. Co. v. Miami County*, 67 Kan. 434.

**A Reversionary Interest in Land is not land** within the Mortmain and Charitable Uses Act. *In re Ryland*, (1903) 1 Ch. 467.

**Right of Way.** — *Indianapolis, etc., R. Co. v. Capital Paving, etc., Co.*, 24 Ind. App. 114.

**Trees.** — *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117; *Fox v. Pearl River Lumber Co.*, 80 Miss. 1.

**Water.** — See *Conant v. Deep Creek, etc., Irrigation Co.*, 23 Utah 627.

**Same — Land Covered by Water.** — *Hampton Urban Dist. Council v. Southwark, etc., Water Co.*, (1900) A. C. 3.

# LANDLORD AND TENANT.

BY BRISCOE B. CLARK.

- 163. I. DEFINITIONS** — Landlord. — See note 2.
- 164. II. CREATION OF RELATION OF LANDLORD AND TENANT** — 1. In General — Rent. — See note 5.
2. Relation Arising by Implication — *a.* IN GENERAL. — See note 6.
- 165. *b.* RELATION ARISING FROM OCCUPATION.** — See note 1.
- c.* UNLAWFUL ENTRY. — See notes 7, 8.
- 166.** See note 1.
- d.* IMPLICATION OF TENANCY FROM PAYMENT OF RENT. — See note 3.
3. Joint Tenants and Tenants in Common. — See note 5.
4. Vendor and Vendee — *a.* IN GENERAL. — See note 6.
- 167. *b.* AGREEMENT FOR PURCHASE EXECUTED DURING EXISTENCE OF TENANCY.** — See note 4.
- 168. *e.* RESCISSION OF CONTRACT OF SALE.** — See note 3.
- f.* STIPULATION AS TO CHARACTER OF VENDEE'S POSSESSION — (1) *In General.* — See note 5.
- 169. (3) Lease with Option to Purchase.** — See note 1.
- (5) *Stipulation for Payment of Rent on Default.* — See note 4.
5. Grantor and Grantee. — See note 6.

**163. 2. Landlord.** — State *v.* Elmore, 68 S. Car. 140.

**164. 5. Payment or Liability for Rent Not Essential.** — Kaufman *v.* Liggett, 209 Pa. St. 87.

6. Relation Arising by Implication. — Hammond *v.* Blue, 132 Ala. 337; Squire *v.* Ferd Heim Brewing Co., 90 Mo. App. 462; Van Arsdale *v.* Buck, 82 N. Y. App. Div. 383; Twiss *v.* Boehmer, 39 Oregon 359.

**165. 1. Occupation under Invalid Lease.** — Van Arsdale *v.* Buck, 82 N. Y. App. Div. 383.

7. Unlawful Entry. — Sims *v.* Price, 123 Ga. 97; Hill *v.* Coal Valley Min. Co., 103 Ill. App. 41; Cummings *v.* Smith, 114 Ill. App. 35; Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 569, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 165; Janouch *v.* Pence, (Neb. 1903) 93 N. W. Rep. 217.

The fact that the land owner notified the persons in possession that if they continued in possession they would be required to pay rent at a certain rate is not of itself sufficient to create the relation of landlord and tenant. Biglow *v.* Biglow, 75 N. Y. App. Div. 98.

8. Smith *v.* Coker, 110 Ga. 650; Van Brunt *v.* Wallace, 88 Minn. 116.

**166. 1. Blankenship *v.* Blackwell,** 124 Ala. 355, 82 Am. St. Rep. 175; Hill *v.* Coal Valley Min. Co., 103 Ill. App. 41; Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 569, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 166. See, however, Gillespie *v.* Hendren, 98 Mo. App. 622.

3. Tenancy Implied from Payment of Rent. — Smith *v.* Coker, 110 Ga. 650; Cummings *v.* Smith, 114 Ill. App. 35; Van Brunt *v.* Wallace, 88 Minn. 116; Decker *v.* Hartshorn, 65 N. J. L.

680; Weinhaner *v.* Eastern Brewing Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 354.

5. Cotenants. — See also Smith *v.* Smith, 98 Me. 597; Biglow *v.* Biglow, 75 N. Y. App. Div. 98.

6. Vendor and Vendee. — Griffith *v.* Collins, 116 Ga. 420; Brown *v.* Randolph, 26 Tex. Civ. App. 66; Irving *v.* Mouchamps, 3 Quebec Pr. 430; Picaud *v.* Renaud, 15 Quebec Super. Ct. 358; Winslow *v.* Nugent, 36 N. Bruns. 356.

Entry with Permission of Owner under Option to Purchase. — Henry *v.* Perry, 110 Ga. 630.

**167. 4. Burden on Tenant to Prove Change of Relation.** — Bemis *v.* Allen, 110 Iowa 160.

**168. 3. Rescission of Contract of Sale.** — Fernside *v.* Rood, 73 Conn. 83.

5. Stipulations as to Character of Vendee's Possession. — Davis *v.* Williams, 130 Ala. 530, 89 Am. St. Rep. 55; New York Bldg. Loan Banking Co. *v.* Keency, 56 N. Y. App. Div. 538.

A provision in a contract of sale that in case of default in payments the vendee shall hold the premises as tenant at sufferance of the vendor is not sufficient to change the relation of the parties on default into that of landlord and tenant. Hill *v.* Sidie, 116 Wis. 602, 96 Am. St. Rep. 1011, following Diggle *v.* Boulten, 48 Wis. 477, and overruling Wright *v.* Roberts, 22 Wis. 161.

**169. 1. Lease with Option to Purchase.** — Couch *v.* Welsh, 24 Utah 45, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169.

4. Stipulation for Rent on Default. — Patterson *v.* Folmar, 125 Ala. 130; British, etc., Mortg. Co. *v.* Cody, 135 Ala. 622.

6. Invalid Conveyance — Ultra Vires. — Pittsburgh, etc., R. Co. *v.* Dodd, 115 Ky. 176.

- 170.** 6. Mortgagor and Mortgagee. — See notes 3, 4.  
 7. Licensee Distinguished from Tenant. — See note 6.
- 171.** See notes 1, 2.  
 8. Master and Servant — *b.* OCCUPATION INCIDENTAL TO EMPLOYMENT — (1) *In General.* — See note 5.  
**172.** See notes 2, 3.  
 (2) *Rule Not Confined to Menials.* — See note 4.
- 173.** 9. Occupancy on Shares — *b.* FARMING ON SHARES — (1) *In General.* — See note 3.  
 (2) *General Rules for Determining Character of Agreement* —
- (b) Intention of Parties. — See note 2.  
**175.** (f) Reservation as Rent *Eo Nomine.* — See note 5.  
 (g) Use of Technical Words of Demise. — See note 7.
- 176.** (h) Right of Possession. — See note 2.
- 177.** III. DIFFERENT KINDS OF TENANCIES — 1. Tenancy at Sufferance —
- a.* IN GENERAL. — See note 3.  
*b.* PARTICULAR INSTANCES IN WHICH TENANCY ARISES. —
- (3) *Holding Over After Termination of Preceding Estate* — (a) *Holding Over After Termination of Tenancy.* — See note 6.
- 179.** Subtenants Holding Over. — See note 1.

**170.** 3. Contracts Creating Relation of Landlord and Tenant. — Hamilton Bldg., etc., Assoc. v. Patton, 105 Tenn. 407; Pegg v. Supreme Ct., etc., 1 Ont. L. Rep. 97.

An Agreement on the Foreclosure of a mortgage that the mortgagor shall remain in possession for two years paying rent, with right to redeem at the expiration of such time, creates the relation of landlord and tenant. Eldridge v. Hoefler, 45 Oregon 239.

4. Sprague Nat. Bank v. Erie R. Co., 22 N. Y. App. Div. 526.

6. Licensees Distinguished from Tenant. — Lowe v. Adams, (1901) 2 Ch. 598, 70 L. J. Ch. 783; Duxbury v. Sandiford, 80 L. T. N. S. 552; Asher v. Johnson, (Ky. 1904) 82 S. W. Rep. 300; Roberts v. Lynn Ice Co., 187 Mass. 402; Sterling v. Heiman, 108 Mo. App. 40; Janouch v. Pence, (Neb. 1903) 93 N. W. Rep. 217.

A tenancy does not necessarily imply a right to complete and exclusive possession. The landlord may reserve to himself the right of possession for all purposes not inconsistent with the privileges granted to the tenant. Jordan v. Indianapolis Water Co., 159 Ind. 337.

Right to Advertising Space. — Wilson v. Tavener, (1901) 1 Ch. 578, 70 L. J. Ch. 263.

171. 1. Mining Privileges. — Arnold v. Bennett, 92 Mo. App. 156.

Oil and Gas Privileges. — Brown v. Fowler, 65 Ohio St. 507.

2. Timber Privileges. — Glenwood Lumber Co. v. Phillips, (1904) A. C. 405.

5. Occupation Incidental to Employment. — Davis v. Williams, 130 Ala. 530, 89 Am. St. Rep. 55; Mead v. Pollock, 99 Ill. App. 151; Hefelfinger v. Fulton, 25 Ind. App. 33; Vincent v. Crane, 134 Mich. 700; Presby v. Benjamin, 169 N. Y. 377; Schreiber v. Goldsmith, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 45.

172. 2. Occupation Independent of Service — Janitor Renting Room in Building. — Anderson v. Steinreich, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 845.

3. Mead v. Pollock, 99 Ill. App. 151.

4. Cook v. Klenk, 142 Cal. 416.

173. 3. Farming on Shares. — Hancock v. Boggus, 111 Ga. 884, following Appling v. Odom, 46 Ga. 583; Robson v. Cofield, 113 Ga. 1153; Gifford v. Meyers, 27 Ind. App. 348; Kenney v. Apley, (Mich. 1905) 102 N. W. Rep. 854; Shoemaker v. Crawford, 82 Mo. App. 487; Culley v. Taylor, 62 Neb. 651; Reeves v. Hannan, 65 N. J. L. 249; Gray v. Reynolds, 67 N. J. L. 169; Webb v. Garrett, 30 Tex. Civ. App. 240, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 171-176; Kelly v. Rummerfield, 117 Wis. 620, 98 Am. St. Rep. 951; Taylor v. Donahoe, (Wis. 1905) 103 N. W. Rep. 1099. See, however, De Loach v. Delk, 119 Ga. 884; Alexander v. Zeigler, 84 Miss. 560, following Schlicht v. Callicott, 76 Miss. 487.

Alabama Statute. — Hunt v. Matthews, 132 Ala. 286.

174. 2. Intention of the Parties. — Cockerline v. Fisher, (Mich. 1905) 103 N. W. Rep. 522.

175. 5. Reservation as Rent *Eo Nomine.* — Neal v. Brandon, 70 Ark. 79; Reeves v. Hannan, 65 N. J. L. 249.

7. Use of Technical Words of Demise. — Reeves v. Hannan, 65 N. J. L. 249; Rowlands v. Voechting, 115 Wis. 352.

176. 2. Right of Possession. — Neal v. Brandon, 70 Ark. 79; Reeves v. Hannan, 65 N. J. L. 249; Rowlands v. Voechting, 115 Wis. 352; Taylor v. Donahoe, (Wis. 1905) 103 N. W. Rep. 1099.

177. 3. Tenancy at Sufferance. — Willis v. Harrell, 118 Ga. 906, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177; Reccius v. Columbia Finance, etc., Co., (Ky. 1905) 86 S. W. Rep. 1113.

178. 6. Holding Over After Expiration of Tenancy. — Willis v. Harrell, 118 Ga. 906; Salas v. Davis, 120 Ga. 95; Wood v. Page, 24 R. I. 594.

179. 1. Subtenant Holding Over. — Washington Real Estate Co. v. Roger Williams Silver Co., 25 R. I. 483.

**179.** Occupation by Tenant at Will After Termination of Tenancy. — See note 6.

*c.* CHANGE OF CHARACTER OF TENANCY. — See note 11.

**180.** See note 1.

*d.* LIABILITY FOR RENT — Statutory Provisions. — See note 8.

*e.* TERMINATION OF TENANCY — NOTICE TO QUIT — At Common

Law. — See note 9.

**181.** Statutory Provisions. — See note 6.

**182.** Tenancy at Will — *a.* IN GENERAL. — See notes 1, 2.

Reservation of Rent. — See note 3.

Necessity for Entry by Lessee. — See note 5.

*b.* HOW CREATED. — See note 7.

**183.** See note 4.

Negative Consent. — See note 6.

*c.* PARTICULAR INSTANCES IN WHICH TENANCY ARISES — (1)

*Permissive Occupation Without Payment of Rent.* — See note 7.

**184.** (2) *Leases for Uncertain Terms.* — See notes 1, 2.

(3) *Possession under Invalid Conveyance or Contract for Sale.* —

See note 4.

(4) *Occupation under Invalid Lease.* — See note 7.

**185.** (5) *Occupation Pending Negotiations for Lease.* — See note 1.

(7) *Occupation under Agreement for Lease.* — See note 5.

**186.** *d.* CHANGE OF CHARACTER OF TENANCY. — See note 3.

*e.* TERMINATION OF TENANCY AT WILL — (1) *In General.* — See

note 4.

**179.** 6. Alienation by Lessor at Will. — Dixon v. Smith, 181 Mass. 218.

11. Tenancy at Sufferance Changed into Tenancy at Will. — It takes very little to convert a tenancy at sufferance into a tenancy at will. Receipt of rent, demand for rent, or anything that indicates the permission of the landlord for the tenant to remain in possession will have this effect. Willis v. Harrell, 118 Ga. 906.

**180.** 1. Changed into Periodical Tenancy. — Washington Real Estate Co. v. Roger Williams Silver Co., 25 R. I. 483.

8. Statutory Provisions. — Martin v. Allen, 67 Kan. 758; Dixon v. Smith, 181 Mass. 218.

Penalty of Double Rent. — Willis v. Harrell, 118 Ga. 906.

9. Termination of Tenancy — Notice to Quit Not Necessary. — Willis v. Harrell, 118 Ga. 906, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 180; Wamsganz v. Wolff, 86 Mo. App. 205; Guvernator v. Kenin, 66 N. J. L. 114.

**181.** 6. In New Jersey this rule is changed by Laws 1898, p. 556, § 109, and three months' notice to quit is required. Guvernator v. Kenin, 66 N. J. L. 114.

**182.** 1. Tenancy at Will. — Willis v. Harrell, 118 Ga. 906.

2. At Will of One Party, at Will of Both. — Reese v. Zinn, 103 Fed. Rep. 97; Tennessee Oil, etc., Co. v. Brown, (C. C. A.) 131 Fed. Rep. 701, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 182; Beauchamp v. Runnels, 35 Tex. Civ. App. 212; Eclipse Oil Co. v. South Penn. Oil Co., (W. Va. 1899) 34 S. E. Rep. 923.

Option to Surrender. — Where a lease is granted for a definite term the fact that it contains an option giving the lessee the right to surrender at any time does not render the tenancy one at will. Brown v. Fowler, 65 Ohio St. 507.

3. Reservation of Rent. — Wood v. Husted, 83

N. Y. App. Div. 178, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 182.

5. Entry Necessary to Create Tenancy at Will. — Nichols v. Swift, 118 Ga. 922, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 182.

7. Must Arise Out of Contract. — Center Creek Min. Co. v. Frankenstein, 179 Mo. 564.

**183.** 4. Walker Ice Co. v. American Steel, etc., Co., 185 Mass. 463.

6. Center Creek Min. Co. v. Frankenstein, 179 Mo. 564.

7. Occupation Without Payment of Rent. — St. Louis, etc., R. Co. v. Hall, 71 Ark. 302.

**184.** 1. Leases for Uncertain Terms. — Van Brunt v. Wallace, 88 Minn. 116; Chapman v. Tiffany, 70 N. H. 249; Lyons v. Philadelphia, etc., R. Co., 209 Pa. St. 552, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

2. Lyons v. Philadelphia, etc., R. Co., 209 Pa. St. 552, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

4. Invalid Conveyances. — Rogers v. Hill, 3 Indian Ter. 562.

7. Occupation under Invalid Lease. — Goodwin v. Perkins, 134 Cal. 564; Nicholes v. Swift, 118 Ga. 922; Goodwin v. Clover, 91 Minn. 438; Bay St. Louis v. Hancock County, 80 Miss. 364; Walter v. Transue, 17 Pa. Super. Ct. 94, 22 Pa. Super. Ct. 617; Matthews v. Hipp, 66 S. Car. 162; Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943; Arbenz v. Exley, 52 W. Va. 476.

**185.** 1. Occupation Pending Negotiations for Lease. — Maher v. James Hanley Brewing Co., 23 R. I. 323; Re Grant, 8 Ont. L. Rep. 207.

5. Occupation under Agreement for Lease. — Carteri v. Roberts, 140 Cal. 164.

**186.** 3. Lyons v. Philadelphia, etc., R. Co., 209 Pa. St. 552, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 186.

4. Guvernator v. Kenin, 66 N. J. L. 114; Beauchamp v. Runnels, 35 Tex. Civ. App. 212.

**187.** (2) *Termination by Implication of Law.* — See note 3.

**188.** (5) *Notice to Quit.* — See note 7.

**189.** See note 1.

*f.* INCIDENTS ATTACHED TO TENANCIES AT WILL — (2) *Emblements.* — See note 5.

**190.** (4) *Assignment of Tenancy at Will.* — See note 3.

(6) *Rights of Tenant with Respect to Removal of His Property and Family.* — See note 8.

**191.** 3. *Periodical Tenancies* — *a.* IN GENERAL — *Origin.* — See note 2.

*b.* CONTINUITY OF TENANCY. — See note 3.

*c.* CREATION OF PERIODICAL TENANCIES — (1) *By Express Contract.* — See note 4.

**192.** (2) *By Implication* — (a) *Lease for Indefinite Period* — *aa.* IN GENERAL. — See notes 5, 6.

**193.** *Statutory Provisions.* — See notes 1, 2, 4.

*bb.* GENERAL OCCUPANCY AND PAYMENT OF PERIODICAL RENT. — See notes 6, 7.

*Rebutting Presumption of Periodical Tenancy.* — See note 8.

**194.** *cc.* OCCUPATION UNDER LEASES RESERVING PERIODICAL RENTS. — See note 2.

**187.** 3. *Alienation by Landlord.* — Perry v. Rockland, etc., Lime Co., 94 Me. 325; Dixon v. Smith, 181 Mass. 218; Roberts v. McFadden, 32 Tex. Civ. App. 57, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.

This is not true when the statute requires a specified notice to quit to terminate a tenancy at will. German State Bank v. Herron, 111 Iowa 25.

**188.** 7. *Notice to Quit.* — Barnewell v. Stephens, (Ala. 1905) 38 So. Rep. 662; Carteri v. Roberts, 140 Cal. 164; Nicholes v. Swift, 118 Ga. 922; German State Bank v. Herron, 111 Iowa 25; Wiley v. Boston, 181 Mass. 233; Simons v. Detroit Twist Drill Co., 136 Mich. 592; Paget v. Electrical Engineering Co., 82 Minn. 244; Van Brunt v. Wallace, 88 Minn. 116; Goodwin v. Clover, 91 Minn. 438; Chapman v. Tiffany, 70 N. H. 249; Weinhaner v. Eastern Brewing Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 354; Wheeler v. Wheeler, 77 Vt. 177.

*Provision in Lease for Notice.* — Where the lease creating a tenancy at will expressly provides for the length of notice necessary to terminate the tenancy, the statutory provision in regard to the length of notice required to terminate such tenancy does not apply. B. Roth Tool Co. v. Champ Spring Co., 93 Mo. App. 530.

**189.** 1. The fact that in a tenancy at will the tenant is expressly given the privilege to terminate the lease and vacate the premises at any time does not enable the tenant to terminate the lease without giving the statutory notice. Paget v. Electrical Engineering Co., 82 Minn. 244.

5. *Growing Grass.* — A tenant at will has the right to cut the growing grass. St. Louis, etc., R. Co. v. Hall, 71 Ark. 302.

**190.** 3. *Recognition of Assignee as Tenant.* — Walker Ice Co. v. American Steel, etc., Co., 185 Mass. 463.

8. *Right of Egress for Removal of Goods.* — Goodwin v. Perkins, 134 Cal. 564; Lyons v. Philadelphia, etc., R. Co., 209 Pa. St. 550. See also Smith v. Boyle, 66 Neb. 823; Eldridge v. Hoefer, 45 Oregon 239.

**191.** 2. *Common-law Principles of Periodical Tenancies as of Force in United States.* — Hately v. Myers, 96 Ill. App. 217.

3. *Nature of Tenancy as Regards Continuity.* — Hull v. Sherrod, 97 Ill. App. 298; Ward v. Hinkleman, 37 Wash. 375. See, however, Donk Bros. Coal, etc., Co. v. Leavitt, 109 Ill. App. 385, citing Borman v. Sandgren, 37 Ill. App. 160.

4. *By Express Contract.* — Burrows v. Mickelson, 14 Manitoba 739.

**192.** 5. *Jump v. Payne*, 68 L. J. Q. B. 607.

6. *Alworth v. Gordon*, 81 Minn. 445.

**193.** 1. *Indiana Statute.* — Michigan City v. Leeds, 24 Ind. App. 271.

2. *Willis v. Harrell*, 118 Ga. 906; *Albey v. Weingart*, 71 N. J. L. 92; *Bernstein v. Lightstone*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 193 (the fact that rent is paid monthly is immaterial); *Stein v. Sutherland*, (Supm. Ct. App. T.) 92 N. Y. Supp. 314.

A grant of a "monthly lease" is a grant for a definite term, to which the New York statute does not apply. *Vernon v. Gilbert*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 112.

The New York statute (Laws 1896, c. 546, § 202) in relation to tenancies in New York city has no application where the term is fixed by the month. *Olson v. Schevlovitz*, 91 N. Y. App. Div. 405.

4. *Missouri Statute.* — Koken Iron Works v. Kinealy, 86 Mo. App. 199; *Berner v. Gebhardt*, 87 Mo. App. 409; *Squire v. Ferd Heim Brewing Co.*, 90 Mo. App. 462; *Sterling v. Heiman*, 108 Mo. App. 40; *Gerhart Realty Co. v. Weiter*, 108 Mo. App. 248.

*Connecticut Statute.* — *Frederick v. Daniels*, 74 Conn. 710.

6. *General Occupancy and Payment of Periodical Rent.* — *Decker v. Hartshorne*, 65 N. J. L. 87.

7. *Determination of Recurring Periods* — *General Rule.* — *Decker v. Hartshorne*, 65 N. J. L. 87.

*Monthly Rent* — *Tenancy from Month to Month.* — *Corheil v. Marleau*, 14 Quebec Super. Ct. 201.

8. *Pusey v. Presbyterian Hospital*, (Neb. 1903) 97 N. W. Rep. 475, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

**194.** 2. *Quarterly Rent* — *Tenancy from*

- 194.** (b) *Occupation under Invalid Leases* — *aa. IN GENERAL.* — See note 4.  
*bb. LEASES INVALID UNDER STATUTE OF FRAUDS.* — See note 5.
- 196.** *cc. PROVISIONS IN INVALID LEASE AS AFFECTING TERMS OF TENANCY.* — See notes 1, 2, 3, 4.  
*ff. RECURRING PERIODS OF TENANCY.* — See note 9.
- 197.** See note 1.  
 (c) *Periodical Tenancies Arising from Holding Over* — *aa. IN GENERAL.* — See note 2.
- 198.** *bb. TERMINATION.* — See notes 2, 3, 5.  
*cc. REBUTTING PRESUMPTION OF PERIODICAL TENANCY.* — See note 7.
- 199.** See note 1.  
*dd. TERMS OF TENANCY AS AFFECTED BY TERMS OF PRECEDING TENANCY* — (*aa*) *In General.* — See note 10.

*Quarter to Quarter.* — Soames v. Nicholson, (1902) 1 K. B. 157, 71 L. J. K. B. 24.

*Monthly Rent — Tenancy from Month to Month.* — Albey v. Weingart, 71 N. J. L. 92.

**194.** 4. Snyder v. Harding, 38 Wash. 666, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.

**5. Occupation under Leases Within Statute of Frauds** — *Michigan.* — Steketee v. Pratt, 122 Mich. 80.

*Missouri.* — Cunningham v. Roush, 157 Mo. 336; Butts v. Fox, 96 Mo. App. 437.

*Nebraska.* — Humphrey Hardware Co. v. Herrick, (Neb. 1904) 99 N. W. Rep. 233.

*New York.* — Bent v. Renken, (Supm. Ct. App. T.) 86 N. Y. Supp. 110.

*North Dakota.* — Merchants State Bank v. Ruettell, 12 N. Dak. 519.

*Ohio.* — Moore v. Harter, 67 Ohio St. 250.

*Pennsylvania.* — Walter v. Transue, 17 Pa. Super. Ct. 94, 22 Pa. Super. Ct. 617.

*South Carolina.* — Matthews v. Hipp, 66 S. Car. 162.

*Vermont.* — Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943.

*West Virginia.* — Arbenz v. Exley, 52 W. Va. 476, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194.

**196.** 1. *Terms of Tenancy Established by Reference to Invalid Lease.* — Moore v. Harter, 67 Ohio St. 250; Arbenz v. Exley, 52 W. Va. 476. Compare Deuster v. Mittag, 105 Wis. 459 (covenant by lessor to make improvement broken in first year does not continue alive as to subsequent years).

2. Moore v. Harter, 67 Ohio St. 250.

3. Barlum v. Berger, 125 Mich. 504; Ryan v. Mills, 129 Mich. 170, following Teft v. Hinchman, 76 Mich. 672; Butts v. Fox, 96 Mo. App. 437.

In *EQUITABLE L. ASSUR. SOC. v. SCHUM*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 657, where an agreement for hiring for one year was signed only by the lessee, who entered into possession, and the landlord elected to treat such agreement as a lease, it was held that the lessee could not claim that he was a tenant from month to month and not a tenant for a year so as to prevent him from being ousted at the expiration of the year.

4. *Rent.* — See Sutton v. Graham, 80 Miss. 636 (rent under invalid lease with option to purchase intended as a contract of sale).

9. *Yearly Rent.* — Steketee v. Pratt, 122 Mich. 80, following *Huntington v. Parkhurst*, 87 Mich.

38, 24 Am. St. Rep. 146; *Arbenz v. Exley*, 52 W. Va. 476, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 196.

**197.** 1. Bent v. Renken, (Supm. Ct. App. T.) 86 N. Y. Supp. 110.

2. *Holding Over* — *Illinois.* — Hatley v. Myers, 96 Ill. App. 217.

*Indiana.* — Ridgeway v. Hannum, 29 Ind. App. 124.

*Kansas.* — Martin v. Hamersky, 63 Kan. 360.

*Maine.* — See Perry v. Rockland, etc., Lime Co., 94 Me. 325.

*Maryland.* — Biggs v. Stueler, 93 Md. 100.

*Nebraska.* — West v. Lungren, (Neb. 1905) 103 N. W. Rep. 1057, following *Critchfield v. Remaley*, 21 Neb. 178.

*New Jersey.* — Yetter v. King Confectionery Co., 66 N. J. L. 491; Dolton v. Sickel, 66 N. J. L. 160; Baker v. Kenny, 69 N. J. L. 180.

*Ohio.* — Moore v. Harter, 67 Ohio St. 250.

*Oregon.* — Parker v. Page, 41 Oregon 579.

*Rhode Island.* — Washington Real Estate Co. v. Roger Williams Silver Co., 25 R. I. 483.

*Virginia.* — King v. Wilson, 98 Va. 259;

*Baltimore Dental Assoc. v. Fuller*, 101 Va. 627.

*Washington.* — See *Mounts v. Goranson*, 29 Wash. 261.

Under the *Iowa* statute a tenant holding over with consent of his landlord becomes a tenant at will. *German State Bank v. Herron*, 111 Iowa 25.

**Holding Over by Private Corporation — Tenancy from Year to Year Held Not to Arise.** — *Garland Mfg. Co. v. Northumberland Paper, etc., Co.*, 31 Ont. 40.

**198.** 2. *Notice to Quit Necessary.* — Hatley v. Myers, 96 Ill. App. 217.

3. See *Mounts v. Goranson*, 29 Wash. 261.

5. *Stiles v. Himmelwright*, 16 Pa. Super. Ct. 649.

7. *Rebutting Presumption of Periodical Tenancy.* — *Pusey v. Presbyterian Hospital*, (Neb. 1903) 97 N. W. Rep. 475; *West v. Lungren*, (Neb. 1905) 103 N. W. Rep. 1057, following *Montgomery v. Willis*, 45 Neb. 435; *Idington v. Douglas*, 6 Ont. L. Rep. 266.

**Acceptance by Landlord of Rent in Arrears** for the expired term does not entitle the lessee to claim a tenancy from year to year arising out of his holding over. *Vanderford v. Foreman*, 129 N. Car. 217.

**199.** 1. Biggs v. Stueler, 93 Md. 100; *Hutzel v. Draper*, (Neb. 1904) 99 N. W. Rep. 263.

10. *Terms of Tenancy as Affected by Terms of*



**200.** (*bb*) *Change in Terms of Original Lease* — *Notice of Change in Terms of Original Lease*. — See notes 5, 6.

**201.** *cc. ASSENT OF LANDLORD TO HOLDING OVER.* — See note 1.

*ff. RECURRING PERIODS.* — See note 5.

**202.** See note 2.

*d. TERMINATION OF PERIODICAL TENANCY* — (2) *Effect of Death of Parties.* — See note 9.

**203.** (6) *Notice to Quit* — (a) *In General.* — See notes 2, 3, 4.

(b) *Length of Notice* — *bb. IN ABSENCE OF CUSTOM OR AGREEMENT* — *Tenancies from Year to Year.* — See note 8.

**204.** See note 1.

*Tenancies for Shorter Periods.* — See note 8.

**205.** (c) *Notice to Quit Must Expire on Terminal Day.* — See note 1.

(e) *Statutory Regulations.* — See note 7.

**206.** See note 1.

*Notice Must Be with Respect to Terminal Day.* — See note 2.

**Preceding Tenancy.** — *Mulligan v. Hollingsworth*, 99 Fed. Rep. 216; *Hately v. Myers*, 96 Ill. App. 217; *Ridgeway v. Hannum*, 29 Ind. App. 124; *Kennedy v. Iowa State Ins. Co.*, 119 Iowa 29; *German State Bank v. Herron*, 111 Iowa 25; *Mason v. Howes*, 122 Mich. 329 (covenant of lessor to repair); *Moore v. Harter*, 67 Ohio St. 250; *King v. Wilson*, 98 Va. 259.

The rule that, "when a tenant, with the consent of the landlord, express or implied, holds over his term, the law implies a continuation of the original tenancy upon the same terms and conditions," does not obtain, as regards rent, in a case where rent reserved in the original lease for the most part consists of the performance by the tenant of labor on the premises of such a nature that, being once performed during the original term, it becomes incapable of further performance by the tenant while holding over. *Martin v. Hamersky*, 63 Kan. 360.

**200.** 5. *Notice of Change of Terms in Original Lease.* — *Moore v. Harter*, 67 Ohio St. 250.

6. *Moore v. Harter*, 67 Ohio St. 250.

**201.** 1. *Hately v. Myers*, 96 Ill. App. 217; *Yetter v. King Confectionery Co.*, 66 N. J. L. 491; *Dolton v. Sichel*, 66 N. J. L. 160.

5. *Quarterly or Monthly Rent.* — *Baker v. Kenny*, 69 N. J. L. 186, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261; *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483; *Eastman v. Richards*, 29 Can. Sup. Ct. 438; *Marsden v. Hughes*, 17 Quebec Super. Ct. 1.

**202.** 2. See *Batlin v. Berger*, 125 Mich. 504.

9. *Compare Decker v. Hartshorne*, 65 N. J. L. 87.

**203.** 2. *Roberson v. Simons*, 109 Ga. 360.

3. *Necessity for Notice to Quit.* — *Cunningham v. Roush*, 157 Mo. 336; *McCaw v. Cox*, (Neb. 1905) 103 N. W. Rep. 76; *Decker v. Hartshorne*, 65 N. J. L. 87; *Bent v. Renken*, (Supm. Ct. App. T.) 86 N. Y. Supp. 110; *Walter v. Transue*, 22 Pa. Super. Ct. 617; *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943; *Arbenz v. Exley*, 52 W. Va. 476.

4. *Horman v. Cargill*, 100 Mo. App. 466; *Durfee v. United Stores*, 24 R. I. 254; *Arbenz v. Exley*, 57 W. Va. 580.

8. *Tenancies from Year to Year* — *Half Year's Notice.* — A lease of shooting privileges from

year to year does not require six months' notice to quit to terminate tenancy. *Lowe v. Adams*, (1901) 2 Ch. 598.

**204.** 1. *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943.

In *Arkansas* it has been held that in case of the tenancy of a store from year to year, a ten days' notice to quit was, as a matter of law, unreasonable and insufficient to terminate the tenancy. *Bromley v. Aday*, 70 Ark. 351.

8. *Monthly Tenancy* — *Month's Notice.* — *Baker v. Kenney*, 69 N. J. L. 180; *Bent v. Renken*, (Supm. Ct. App. T.) 86 N. Y. Supp. 110; *Burrows v. Mickelson*, 14 Manitoba 739; *Eastman v. Richard*, 29 Can. Sup. Ct. 438.

Where a lease is for a definite time, reserving monthly payments of rent, the fact that for the convenience of the lessee the lessor permits him to pay quarterly in advance does not change the lease to a quarterly tenancy so as to require a quarter's notice to quit in order that the lessor may terminate the tenancy. *London, etc., Bank v. Curtis*, 27 Wash. 656.

**205.** 1. *Notice Must Expire on Terminal Day.* — *Dixon v. Bradford, etc., Coal Supply Co.*, (1904) 1 K. B. 444, 73 L. J. K. B. 136; *Baker v. Kenney*, 69 N. J. L. 180.

7. *Hately v. Myers*, 96 Ill. App. 217; *Seitman v. Seitman*, 106 Ill. App. 628; *Horman v. Cargill*, 100 Mo. App. 466; *Walter v. Transue*, 22 Pa. Super. Ct. 617; *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125; *Baltimore Dental Assoc. v. Fuller*, 101 Va. 627; *Arbenz v. Exley*, 57 W. Va. 580.

**206.** 1. *Barlum v. Berger*, 125 Mich. 504; *Landsberg v. Tivoli Brewing Co.*, 132 Mich. 651; *Koken Iron Works v. Kinealy*, 86 Mo. App. 199; *Berner v. Gebhardt*, 87 Mo. App. 409; *Schreiner v. Stanton*, 26 Wash. 563.

Where the letting is "by the month," to continue for an indefinite period according to the wishes of the contracting parties, the tenancy can only be terminated at the end of the monthly term then pending on the statutory notice being duly given. *Wilson v. Wood*, 84 Miss. 728.

*More than Twenty Days.* — *Teater v. King*, 35 Wash. 138.

2. *Berner v. Gebhardt*, 87 Mo. App. 409; *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125; *Arbenz v. Exley*, 57 W. Va. 580.

**207.** *e.* TERMINAL DAYS — Time of Entry. — See note 2.

*f.* INCIDENTS OF PERIODICAL TENANCIES. — See note 9.

**208.** 4. Tenancy for Years — *a.* IN GENERAL — Reservation of Rent. — See note 2.

*b.* CERTAINTY OF DURATION OF TERM. — See notes 3, 4.

Certainty Determined by Matter *ex Post Facto*. — See note 5.

**209.** Term Determinable upon Contingency. — See note 2.

*c.* TENANCY FOR YEARS — HOW CREATED — To Begin in Futuro. —

See note 7.

**210.** *e.* NATURE OF TENANT'S INTEREST. — See notes 2, 3.

*g.* TERMINATION OF TENANCY. — See note 5.

**211.** *h.* EMBLEMENTS. — See note 3.

*i.* INTERESSE TERMINI. — See note 4.

**212.** Trespass Quare Clausum Fregit. — See note 1.

Ejectment. — See notes 10, 11.

**213.** 5. Tenancy for Life. — See note 3.

**214.** 7. Emphyteutic Leases. — See note 10.

**215.** IV. REPAIRS TO AND INJURIES ARISING FROM DEFECTS IN AND USE OF DEMISED PREMISES — 1. Liability of Landlord — *a.* TO TENANT — (1) *In General* — (a) No Implied Obligation to Repair. — See note 4.

**207.** 2. Where, under a monthly tenancy, the tenant entered on the sixth of the first month and paid rent to the first of the next month, it was held that the tenancy was from the first of one month to the first of the next. *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257.

**9.** Right of Way-going Tenant to Growing Crop. — *Whorley v. Karper*, 20 Pa. Super. Ct. 347.

**208.** 2. Rent Not Necessarily Payable in Money. — *Wilcox v. Bostick*, 57 S. Car. 151.

**3.** Certainty of Duration of Tenancy Required. — *Collier v. Hyatt*, 110 Ga. 317; *Pope v. Miller*, 24 Ohio Cir. Ct. 640.

**4.** *Adams v. Cairns*, 85 L. T. N. S. 10.

**5.** Certainty Determined by Matter *ex Post Facto*. — *Wilcox v. Bostick*, 57 S. Car. 151.

**209.** 2. Term Determinable upon Contingency. — *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

**7.** To Begin in Futuro. — *Dopovan v. Schoenhofen Brewing Co.*, 92 Mo. App. 341.

**210.** 2. Nature of Tenant's Estate. — *Broadwell v. Banks*, 134 Fed. Rep. 470; *Shipley v. Smith*, 162 Ind. 526; *Faxon v. Ridge*, 87 Mo. App. 299; *Westchester Trust Co. v. Hobby Bottling Co.*, 102 N. Y. App. Div. 464.

**Judgment Liens.** — *Teater v. King*, 35 Wash. 138.

**3.** *Rickard v. Dana*, 74 Vt. 74.

Under the Ohio Statute a term for years renewable forever passes to the heirs or devisees of the lessee and not to his personal representative. *Broadwell v. Banks*, 134 Fed. Rep. 470.

**5.** *Lautman v. Miller*, 158 Ind. 382; *Mastin v. Metzinger*, 99 Mo. App. 613; *Dickson v. Wood*, 209 Pa. St. 345.

A tenant whose wife is seriously ill at the expiration of the lease is entitled to a reasonable time in which to vacate the premises without unnecessary risk to her life. *Preiser v. Wielandt*, 48 N. Y. App. Div. 569.

Where a building is placed on the leased

premises which the lessee has the right to remove, his sale of such building does not terminate the tenancy. *Rickard v. Dana*, 74 Vt. 74.

**211.** 3. Emblements. — See *Reeves v. Hannan*, 65 N. J. L. 249.

**4.** Interesse Terminii. — *Morrison v. Chicago, etc.*, R. Co., 117 Iowa 587; *Bunch v. Elizabeth City Lumber Co.*, 134 N. Car. 116; *Wilcox v. Bostick*, 57 S. Car. 151.

**212.** 1. Trespass Quare Clausum Fregit. — *Morrison v. Chicago, etc.*, R. Co., 117 Iowa 587.

**10.** Ejectment. — See *Wilcox v. Bostick*, 57 S. Car. 151.

**11.** See *Barson v. Mulligan*, 66 N. Y. App. Div. 486, holding that a lessor may maintain ejectment against an adverse claimant in order to give possession to the lessee. *Maheir v. James Hanley Brewing Co.*, 23 R. I. 343.

**213.** 3. *Budlong v. Budlong*, 31 Wash. 228.

**214.** 10. *Price v. Le Blond*, 30 Can. Sup. Ct. 539.

**215.** 4. No Implied Obligation upon Landlord to Repair — *United States*. — *Schwalbach v. Shinkle, etc.*, Co., 97 Fed. Rep. 483; *Dyer v. Robinson*, 110 Fed. Rep. 99.

*Alabama*. — *Murphy v. Farley*, 124 Ala. 279; *Bullock-McCall-McDonnell Electric Co. v. Coleman*, 136 Ala. 613, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

*Connecticut*. — *Gallagher v. Button*, 73 Conn. 172.

*Georgia*. — *Stack v. Harris*, 111 Ga. 149.

*Illinois*. — *Quinn v. Crowe*, 88 Ill. App. 191; *Robinson v. Henaghan*, 92 Ill. App. 620; *Hull v. Sherrod*, 97 Ill. App. 298; *Watson v. Moulton*, 100 Ill. App. 560; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Borggard v. Gale*, 205 Ill. 511, affirming 107 Ill. App. 128; *Fowler Cycle Works v. Fraser*, 110 Ill. App. 126; *Sunasack v. Morey*, 196 Ill. 569; *Carpenter v. Stone*, 112 Ill. App. 155; *Lazarus v. Parmly*, 113 Ill. App. 624.

*Indiana*. — *Roehrs v. Timmons*, 28 Ind. App. 578; *La Plante v. La Zear*, 31 Ind. App. 433.

*Iowa*. — *Flaherty v. Nieman*, 125 Iowa 546.

**216.** See notes 1, 2, 3, 4.

**217.** (d) Duty to Protect Premises from Excavations on Adjoining Lots. — See note 8.  
(e) Character of Repairs. — See note 10.

**218.** Inherent Defects in Construction. — See note 3.

(2) *Where Part of Premises Is Leased to Tenant* — (a) Repair of Retained Portion — *aa. IN GENERAL* — View that Landlord Need Not Repair. — See note 7.

*Kentucky.* — Thomas *v.* Conrad, 114 Ky. 841; Franklin *v.* Tracy, (Ky. 1904) 77 S. W. Rep. 1113, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215; Altscheler *v.* Conrad, (Ky. 1904) 82 S. W. Rep. 257.

*Maine.* — Shackford *v.* Coffin, 95 Me. 69; Bennett *v.* Sullivan, (Me. 1905) 60 Atl. Rep. 886.

*Maryland.* — Smith *v.* State, 92 Md. 518; Bonaparte *v.* Thayer, 95 Md. 548; Serio *v.* Murphy, 99 Md. 545, 105 Am. St. Rep. 316.

*Massachusetts.* — Daly *v.* Demmon, 181 Mass. 543; Pratt *v.* Grafton Electric Co., 182 Mass. 180; Kearnes *v.* Cullen, 183 Mass. 298; Roth *v.* Adams, 185 Mass. 341; Galvin *v.* Beals, 187 Mass. 250; Phelan *v.* Fitzpatrick, 188 Mass. 237; Cummings *v.* Ayer, (Mass. 1905) 74 N. E. Rep. 336.

*Michigan.* — Rhoades *v.* Seidel, (Mich. 1905) 102 N. W. Rep. 1025; Cooper *v.* Lawson, (Mich. 1905) 103 N. W. Rep. 168, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

*Minnesota.* — Beneteau *v.* Stubler, 79 Minn. 259.

*Missouri.* — Roberts *v.* Cottey, 100 Mo. App. 500; McGinley *v.* Alliance Trust Co., 168 Mo. 257; Mayer *v.* Schruppf, 111 Mo. App. 54.

*Montana.* — Landt *v.* Schneider, 31 Mont. 15.

*New Hampshire.* — Towne *v.* Thompson, 68 N. H. 317; Cate *v.* Blodgett, 70 N. H. 316.

*New Jersey.* — Lyon *v.* Buerman, 70 N. J. L. 620.

*New York.* — Kennedy *v.* Fay, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 776; Watson *v.* Almiral, 61 N. Y. App. Div. 429; Steefel *v.* Rothschild, 64 N. Y. App. Div. 293; Klausner *v.* Herter, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 869; Golob *v.* Pasinsky, 72 N. Y. App. Div. 176; Castagnette *v.* Nicchia, 76 N. Y. App. Div. 371; Spero *v.* Levy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 24; Margolius *v.* Muldberg, (Supm. Ct. App. T.) 88 N. Y. Supp. 1048; Hirschfield *v.* Alsberg, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141; Weber *v.* Lieberman, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 593.

*Oklahoma.* — Tucker *v.* Bennett, (Okla. 1905) 81 Pac. Rep. 423, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

*Pennsylvania.* — Frey *v.* Zabinski, 10 Kulp (Pa.) 36.

*Rhode Island.* — Whitehead *v.* Comstock, 25 R. I. 423; Sheldon *v.* Hamilton, 22 R. I. 230.

*Tennessee.* — Olmstead *v.* Tennessee Fixture, etc., Co., 1 Tenn. Ch. App. 653.

*West Virginia.* — Arbenz *v.* Exley, 52 W. Va. 476.

*Wisconsin.* — Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447.

**216.** 1. Repairs Needed at Time of Demise. — Fish *v.* Ryan, 88 Ill. App. 524; Borggard *v.* Gale, 107 Ill. App. 128, affirmed 205 Ill. 511; Fowler Cycle Works *v.* Fraser, 110 Ill. App. 126; Franklin *v.* Tracy, (Ky. 1904) 77 S. W. Rep. 1113, quoting 18 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 216; Whiteley *v.* McLaughlin, 183 Mo. 160; Towne *v.* Thompson, 68 N. H. 317.

**2. Landlord Not Liable for Cost of Repairs by Tenant.** — Jones *v.* Felker, 72 Ark. 405 (rebuilding boundary fences destroyed by rains); Thompson *v.* Clemens, 96 Md. 196, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216; Bonaparte *v.* Thayer, 95 Md. 548; Ashby *v.* Ashby, 59 N. J. Eq. 547; Campbell *v.* Luck, 25 Ohio Cir. Ct. 359, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216; Riggs *v.* Gray, 31 Tex. Civ. App. 268.

**The Landlord Is Not Liable to Third Persons** making repairs at request of tenant. Read *v.* Bolger, 62 N. Y. App. Div. 411.

**3. Injuries to Tenant's Property from Want of Repairs.** — Fowler Cycle Works *v.* Fraser, 110 Ill. App. 126; Thompson *v.* Clemens, 96 Md. 196, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216; Klausner *v.* Herter, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 869.

**4. Personal Injuries to Tenant — England.** — Tredway *v.* Machin, 91 L. T. N. S. 310, 53 W. R. 136.

*Maine.* — Shackford *v.* Coffin, 95 Me. 69.

*Maryland.* — Thompson *v.* Clemens, 96 Md. 196, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

*Massachusetts.* — O'Malley *v.* Twenty-Five Associates, 178 Mass. 555; Kearnes *v.* Cullen, 183 Mass. 298.

*Missouri.* — Roberts *v.* Cottey, 100 Mo. App. 500; Whiteley *v.* McLaughlin, 183 Mo. 160.

*New Jersey.* — Land *v.* Fitzgerald, 68 N. J. L. 28.

*New York.* — Anderson *v.* Steinreich, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 237, reversed (Supm. Ct. App. T.) 32 Misc. (N. Y.) 680, on the ground that the relation existing between the parties was that of master and servant and not that of landlord and tenant. See, however, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 845.

*Ohio.* — Shinkle, etc., Co. *v.* Birney, 68 Ohio St. 328.

*Rhode Island.* — Whitehead *v.* Comstock, 25 R. I. 423.

**217.** 8. No Duty on Part of Landlord to Protect Tenant from Danger of Excavation on Adjoining Lot. — Serio *v.* Murphy, 99 Md. 545, 105 Am. St. Rep. 316.

**10. Repairs Required by Authorities under Police Power.** — Pratt *v.* Grafton Electric Co., 182 Mass. 180.

The lessor is not required to make such repairs. Steefel *v.* Rothschild, 64 N. Y. App. Div. 293.

**218.** 3. Defects in Original Construction. — Towne *v.* Thompson, 68 N. H. 317; Smith *v.* Donnelly, 93 N. Y. App. Div. 569.

**7. Part of Building Demised — Landlord Not Required to Keep Balance in Repair.** — Flaherty *v.* Nieman, 125 Iowa 546; McGinley *v.* Alliance

**219.** See note 2.

View that Landlord Bound to Repair. — See note 3.

Injuries from Accidental Defects. — See note 4.

bb. ACTIVE INTERVENTION OF LANDLORD. — See notes 5, 8.

**220.** (b) Repair of Portion Leased to Plaintiff. — See note 2.

(d) Liability of Landlord for Use of Premises by Other Tenants. — See note 4.

(3) *Appurtenances Used in Common by Several Tenants of Building*

— (a) In General. — See note 7.

**221.** Common Passageways and Approaches. — See notes 1, 2, 3.

Trust Co., 168 Mo. 257; *Steeffel v. Rothschild*, 64 N. Y. App. Div. 293; *Golob v. Pasinsky*, 72 N. Y. App. Div. 176; *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 218. See also *Goldberg v. Besdine*, 76 N. Y. App. Div. 451. See, however, *Leonard v. Gunther*, 47 N. Y. App. Div. 194; *Rubenstein v. Hudson*, (Supm. Ct. App. T.) 86 N. Y. Supp. 750.

The landlord is not required to repair defects in a part of premises not demised, existing at the time of the demise. *Rogers v. Sorell*, 14 Manitoba 450, distinguishing *Miller v. Hancock*, (1893) 2 Q. B. 177.

**219. 2. Must Repair Roof in Case of Wear and Tear.** — See *Golob v. Pasinsky*, 178 N. Y. 458. See, however, *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447.

3. *Kneeland v. Beare*, 11 N. Dak. 233 (water leaders).

**Repairs of Roof.** — *Johns v. Eichelberger*, 109 Ill. App. 35.

4. **Accidental Defects.** — *Weinkrantz v. Callahan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 715.

5. **Negligent Use of Premises Retained by Lessor.** — *Sheridan v. Forsee*, 106 Mo. App. 495; *Hohly v. Sheely*, 11 Ohio Cir. Dec. 678, 21 Ohio Cir. Ct. 484.

8. **Liability Based on Negligence.** — *Weinkrantz v. Callahan*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 715.

**220. 2. Repair of Portion Demised.** — *Franklin v. Tracey*, (Ky. 1904) 78 S. W. Rep. 1112; *Phelan v. Fitzpatrick*, (Mass. 1905) 74 N. E. Rep. 326; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220; *Golob v. Pasinsky*, 72 N. Y. App. Div. 176; *Margolius v. Muldberg*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1048 (repair of roof of extension leased); *Garrett v. Somerville*, 98 N. Y. App. Div. 206; *Kushes v. Ginsburg*, 99 N. Y. App. Div. 417; *Boden v. Scholtz*, 101 N. Y. App. Div. 1.

**No Liability for Fire Caused by Defective Flue.** — *Cooper v. Lawson*, (Mich. 1905) 103 N. W. Rep. 168.

4. **Landlord Not Liable to Tenant for Improper Use of Building by Another Tenant.** — *Gallagher v. Button*, 73 Conn. 172; *Cooper v. Lawson*, (Mich. 1905) 103 N. W. Rep. 168, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220.

The rule that the obligation of ordinary care on the part of the landlord does not extend to damage created by the tenants themselves, does not apply to the negligent obstruction by one tenant of the building of appurtenances used in common by the other tenants so as to prevent a recovery by the latter on the negligent failure of the landlord to remove obstructions placed

by such other tenant. *Wesener v. Smith*, 89 N. Y. App. Div. 211.

7. **Must Keep in Repair Appurtenances Used in Common — Connecticut.** — *Gallagher v. Button*, 73 Conn. 172.

*Indiana.* — *La Plante v. La Zear*, 31 Ind. App. 433, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220.

*Michigan.* — *Cooper v. Lawson*, (Mich. 1905) 103 N. W. Rep. 168.

*Missouri.* — *McGinley v. Alliance Trust Co.*, 168 Mo. 257, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220.

*New York.* — *Wessel v. Gerken*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 221; *Harris v. Boardman*, 68 N. Y. App. Div. 436 (water-closet); *Wesener v. Smith*, 89 N. Y. App. Div. 211; *Keating v. Mott*, 92 N. Y. App. Div. 156; *Clarke v. Welsh*, 93 N. Y. App. Div. 393; *Golob v. Pasinsky*, 178 N. Y. 458.

*Pennsylvania.* — *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

In *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, the court adopted the rule that the liability of the tenant with regard to the repair and appurtenances used in common by several tenants of the building was only to keep them in the condition in which they were at the time of the letting. In this case the court disapproved the stricter rule laid down in *Lynch v. Swan*, 167 Mass. 510.

**Negligent Maintenance of Elevator.** — *Bogendoerfer v. Jacobs*, 97 N. Y. App. Div. 355.

**Negligent Maintenance of Dumb-waiter.** — *Hirtenstein v. Farrell*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 515.

**Leaders from Roof.** — In *Levine v. Baldwin*, 87 N. Y. App. Div. 150, it was held that the pipes conveying the water from the roof to a sewer were in the nature of an appurtenance of demised premises which remained under the charge and control of the landlord for the benefit of the several tenants of the building, and that the landlord was therefore liable in damages to a tenant injured through the negligence of the landlord in keeping such pipes in repair.

**221. 1. General Rule — Duty to Repair Common Passageways.** — *La Plante v. La Zear*, 31 Ind. App. 433, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 220; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221; *Flood v. Huff*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 351; *Hoag v. Williamsburg Sav. Bank*, 75 N. Y. App. Div. 306 (ice in passageway formed from leakage of defective water-closet).

**Holes in Stairway Carpet.** — *Kenney v. Rhineland*, 163 N. Y. 576, affirming 28 N. Y. App. Div. 246; *Lendle v. Robinson*, 53 N. Y. App. Div. 140.

**221.** Duty of Landlord to Light Passageways. — See note 4.

**222.** (b) Liability Based on Negligence. — See note 4.

Want of Notice of Defects. — See note 5.

(c) Contributory Negligence of Tenant. — See note 7.

**223.** See note 1.

(4) *Liability with Regard to Water Brought upon Premises* — Waterwork in Buildings. — See note 2.

Repair of Waterworks. — See note 4.

Liability Based on Negligence. — See note 5.

Exemption from Liability by Contract. — See note 6.

Negligent Use of Waterworks by One Tenant. — See notes 7, 9.

**224.** Negligent Use of Waterworks by Stranger. — See note 1.

(5) *Duty of Landlord with Regard to Concealed Defects in Premises* — (a) In General. — See notes 4, 5.

**Steps of Double House.** — Where the owner of a double house, the doors of which open on a common stairway or steps, leases the building to different tenants, each has possession and control of the steps leading to their respective doors, and the landlord is not liable for injuries to the tenants due to the defective condition of the steps on the theory that he retains control thereof for the use in common by the tenants, and the fact that the landlord subsequently voluntarily makes repairs to the steps does not impose any liability on him. *Kearnes v. Cullen*, 183 Mass. 298.

**221. 2. Common Passageways — Landlord Not Bound to Keep in Repair.** — *Harrison v. Jelly*, 175 Mass. 292; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

**3. La Plante v. La Zear**, 31 Ind. App. 433, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221.

**4. Statutory Duty to Light Passageways.** — *Gillick v. Jackson*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 627.

**Liability on Breach of Statutory Duty to Light.** — *Ziegler v. Brennan*, 75 N. Y. App. Div. 584.

**222. 4. Liability Based on Negligence.** — *Golob v. Pasinsky*, 72 N. Y. App. Div. 176.

**Negligence in Ascertaining Condition of Appurtenances.** — *Levine v. Baldwin*, 87 N. Y. App. Div. 150.

**Sufficiency of Evidence to Show Negligence.** — *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

**Negligence of Independent Contractor Making Repairs in obstructing passageway does not render the lessor liable.** *Boss v. Jarmulowsky*, 81 N. Y. App. Div. 577.

**5. Necessity for Notice of Defects.** — *Joshua v. Breithaupt*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1053, following *Boss v. Jarmulowsky*, 81 N. Y. App. Div. 577.

**Negligence in Ascertaining Condition of Appurtenances Is Sufficient Without Actual Knowledge.** — *Udden v. O'Reilly*, 180 Mo. 650; *Flood v. Huff*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 351.

**7. Contributory Negligence.** — *Gallagher v. Button*, 73 Conn. 172; *Kenney v. Rhinelander*, 163 N. Y. 576, affirming 28 N. Y. App. Div. 246; *Keating v. Mott*, 92 N. Y. App. Div. 156.

**223. 1. Kenney v. Rhinelander**, 163 N. Y. 576, affirming 28 N. Y. App. Div. 246 (intoxication); *Wesener v. Smith*, 89 N. Y. App. Div. 211; *Clarke v. Welsh*, 93 N. Y. App. Div. 393

(leaning over rail of balcony); *Garrett v. Somerville*, 98 N. Y. App. Div. 206.

**Burden of Proving Freedom from Contributory Negligence.** — *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

**2. In Maintaining.** — *Harris v. Boardman*, 68 N. Y. App. Div. 436; *Rubenstein v. Hudson*, (Supm. Ct. App. T.) 86 N. Y. Supp. 750.

**Gas.** — Where a landlord rents only a part of a building, and pipes the building for natural gas for his own benefit solely, he is required, as regards the tenant of the other part, to use reasonable care to prevent the escape of gas from the pipes in such quantities as to become dangerous to the tenant. *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651, 95 Am. St. Rep. 330.

**4. Whitehead v. Comstock**, 25 R. I. 423.

**5. Negligence Not Inferred from Leakage.** — *Becker v. Bullowa*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 524.

**6. The provision in a lease that the landlord "shall not be liable for any damage or injury by water which may be sustained by the said tenant or other persons, or for any other damage or injury from the carelessness, negligence, or improper conduct on the part of any other tenant," does not afford the landlord protection from his own negligent use of waterworks in the building.** *Levin v. Habicht*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 381.

**7. Negligent Use of Waterworks by Tenant of Another Part of Building.** — *Sheridan v. Fofsee*, 106 Mo. App. 495; *Becker v. Bullowa*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 524; *Beaulieu v. Beaudry*, 16 Quebec Super. Ct. 475.

**8. See Levy v. Korn**, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 199. Compare *Becker v. Bullowa*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 524.

**224. 1. Negligent Use of Waterworks by Landlord renders him liable to tenant.** *Levin v. Habicht*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 381.

**4. Landlord Must Disclose Concealed Defects** — *Alabama*. — *Bullock-McCall-McDonnell Electric Co. v. Coleman*, 136 Ala. 615, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

*Connecticut*. — *Gallagher v. Button*, 73 Conn. 172.

*Illinois*. — *Sunasack v. Morey*, 196 Ill. 559, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224; *Borgard v. Gale*, 205 Ill. 511, affirming 107 Ill. App. 128, citing 18 AM. AND ENG.

**225.** (b) *Liability Not Limited to Injuries to Tenant.* — See note 1.

(c) *Landlord's Knowledge of Defects.* — See notes 2, 3.

(d) *Apparent Defects.* — See notes 5, 6.

*Stench.* — See note 7.

(e) *Subsequent Defects.* — See note 8.

(f) *Duty of Tenant upon Discovery of Defects.* — See note 9.

(g) *Right of Landlord to Enter to Repair.* — See note 10.

**226.** *Stipulation for Right to Enter.* — See note 3.

(7) *Agreement of Landlord to Repair* — (a) *In General.* — See notes

7, 8, 9.

ENCYC. OF LAW (2d ed.) 224; Fowler Cycle Works v. Fraser, 110 Ill. App. 126, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224; Lazarus v. Parmly, 113 Ill. App. 624.

*Indiana.* — Roehrs v. Timmons, 28 Ind. App. 578.

*Kansas.* — Moore v. Parker, 63 Kan. 52.

*Maine.* — Shackford v. Coffin, 95 Me. 69.

*Massachusetts.* — O'Malley v. Twenty-Five Associates, 178 Mass. 555.

*New Hampshire.* — Cate v. Blodgett, 70 N. H. 316.

*New York.* — Steefel v. Rothschild, 179 N. Y. 273, reversing 85 N. Y. App. Div. 620.

*Ohio.* — Shinkle, etc., Co. v. Birney, 68 Ohio St. 328.

*Rhode Island.* — Whitehead v. Comstock, 25 R. I. 423; Davis v. Smith, 26 R. I. 129, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224. See, however, Land v. Fitzgerald, 68 N. J. L. 28.

**Contract Restricting Liability.** — A landlord may by express contract relieve himself from liability for injuries from concealed defects in the premises known to him but unknown to the tenant. Bullock-McCall-McDonnell Electric Co. v. Coleman, 136 Ala. 610.

**Fraudulent Representations.** — Caldwell v. McCallum, Sc. Ct. of Sess. 4 F. 371; Harrington v. Douglas, 181 Mass. 178; Clogston v. Martin, 182 Mass. 469.

**224. 5. House Infected with Contagious Disease.** — Schwalbach v. Shinkle, etc., Co., 97 Fed. Rep. 483; Dyer v. Robinson, 110 Fed. Rep. 99; Borggard v. Gale, 107 Ill. App. 128, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224, affirmed 205 Ill. 511; Davis v. Smith, 26 R. I. 129.

**225. 1. Liability of Landlord Not Limited to Injuries to Tenant.** — Borggard v. Gale, 107 Ill. App. 128, affirmed 205 Ill. 511; Moore v. Parker, 63 Kan. 52; Davis v. Smith, 26 R. I. 129, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224; Patterson v. Jos. Schlitz Brewing Co., 16 S. Dak. 33; Waterhouse v. Jos. Schlitz Brewing Co., 16 S. Dak. 592. See, however, Lovitt v. Creekmore, (Ky. 1904) 80 S. W. Rep. 1184.

**2. Landlord's Knowledge of Defects.** — Schwalbach v. Shinkle, etc., Co., 97 Fed. Rep. 483; Dyer v. Robinson, 110 Fed. Rep. 99; Rhoades v. Seidel, (Mich. 1905) 102 N. W. Rep. 1025; O'Malley v. Twenty-Five Associates, 178 Mass. 555; Kennedy v. Fay, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 776; Kushes v. Ginsberg, 99 N. Y. App. Div. 417; Boden v. Scholtz, 101 N. Y. App. Div. 1; Smith v. Donnelly, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 447; Shinkle, etc., Co. v. Birney, 68 Ohio St. 328; Davis v. Smith, 26 R. I. 129.

There is no liability on the landlord if he was not negligent in discovering the defects. Whiteley v. McLaughlin, 183 Mo. 160.

**3. Actual Knowledge Not Required.** — Smith v. Donnelly, 93 N. Y. App. Div. 569; Shinkle, etc., Co. v. Birney, 23 Ohio Cir. Ct. 525; Patterson v. Jos. Schlitz Brewing Co., 16 S. Dak. 33; Waterhouse v. Jos. Schlitz Brewing Co., 16 S. Dak. 592. See, however, King v. Creekmore, (Ky. 1903) 77 S. W. Rep. 689; Franklin v. Tracy, (Ky. 1904) 77 S. W. Rep. 1113, disapproving Hines v. Willcox, 96 Tenn. 148, 100 Tenn. 538; Bennett v. Sullivan, (Me. 1905) 60 Atl. Rep. 886; Shinkle, etc., Co. v. Birney, 58 Ohio St. 328, disapproving Hines v. Willcox, 96 Tenn. 148.

**5. Apparent Defects.** — Borggard v. Gale, 107 Ill. App. 128, affirmed 205 Ill. 511; Shackford v. Coffin, 95 Me. 69; Rhoades v. Seidel, (Mich. 1905) 102 N. W. Rep. 1025; Cate v. Blodgett, 70 N. H. 316; Land v. Fitzgerald, 68 N. J. L. 28.

**6. Schwalbach v. Shinkle, etc., Co., 97 Fed. Rep. 483; Borggard v. Gale, 107 Ill. App. 128, affirmed 205 Ill. 511; Cate v. Blodgett, 70 N. H. 316; Shinkle, etc., Co. v. Birney, 23 Ohio Cir. Ct. 525.**

**7. Noxious Odors.** — Davis v. Smith, 26 R. I. 129. See, however, Sunasack v. Morey, 196 Ill. 569.

**8. Subsequent Defects.** — Lyon v. Buerman, 70 N. J. L. 620.

**9. Gallagher v. Button, 73 Conn. 172.**

**10. No Implied Right to Enter to Repair.** — Roehrs v. Timmons, 28 Ind. App. 578; Lieberthal v. Montgomery, 121 Mich. 369; McGinley v. Alliance Trust Co., 168 Mo. 257, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 225. See also De Donato v. Morrison, 160 Mo. 581.

**Fumigating After Contagious Disease under Orders of Board of Health** held not to be an eviction of the tenant. Beakes v. Haas, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 796.

**Repairs Required by Building Departments.** — Campbell v. Porter, 46 N. Y. App. Div. 628, following White v. Thurber, 55 Hun (N. Y.) 447; Markham v. David Stevenson Brewing Co., 169 N. Y. 593, affirming 51 N. Y. App. Div. 463.

**226. 3. Construction of Provision for Entry to Repair.** — Rosenbloom v. Finch, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 818.

**7. An independent agreement on the part of the landlord to repair, collateral to the lease, though oral, is valid, though the lease was in writing and under seal.** Daly v. Piza, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 608.

**Provision for Suspension of Rent.** — A provision

**227.** See note 1.

**Making Gratuitous Repairs.** — See note 3.

(b) **Agreement to Repair Made During Term.** — See note 4.

**228.** (c) **Agreement of Landlord to Pay for Repairs.** — See note 1.

(d) **Construction of Landlord's Agreement to Repair.** — See notes 4, 5, 6.

**Construction with Regard to Condition of Premises at Time of Letting.** — See

note 8.

**229.** **Premises Destroyed by Fire or Other Casualty.** — See note 1.

(e) **Notice of Need of Repairs and Time of Making Them** — *bb. REPAIRS DURING TERM.* — See note 9.

in a lease suspending the tenant's liability for rent in case the premises become untenable does not impose an obligation upon the landlord to rebuild in case of the total destruction of the building. *Gavan v. Norcross*, 117 Ga. 356.

**226. 8. Reservation of Right to Enter to Repair.** — *Gavan v. Norcross*, 117 Ga. 356.

**9. Agreement for Specific Repairs by Tenant.** — *Thomas v. Conrad*, 114 Ky. 841; *Castagnette v. Nicchia*, 76 N. Y. App. Div. 371; *Olmstead v. Tennessee Fixture, etc., Co.*, 1 Tenn. Ch. App. 653; *Arbenz v. Exley*, 52 W. Va. 476, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226.

An agreement by the tenant "to do all inside repairs after the house is put in order" does not require the lessor to make repairs necessary to put the house in order. *Frey v. Zabinski*, 10 Kulp (Pa.) 36.

**227. 1. Exempting Tenant from Duty to Repair.** — *Whitehead v. Comstock*, 25 R. I. 423.

**3. Making Gratuitous Repairs.** — *Finnigan v. Biehl*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 735, reversing (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1116; *Watson v. Almirall*, 61 N. Y. App. Div. 429; *Whitehead v. Comstock*, 25 R. I. 423.

**4. Subsequent Promise to Repair Nudum Pactum** — *Alabama.* — *Morningstar v. Querens*, (Ala. 1904) 37 So. Rep. 825.

*Illinois.* — *Quinn v. Crowe*, 88 Ill. App. 191; *Watson v. Moulton*, 100 Ill. App. 560; *Borggard v. Gale*, 107 Ill. App. 128, affirmed 205 Ill. 511; *Fowler Cycle Works v. Fraser*, 110 Ill. App. 126.

*Indiana.* — *Roehrs v. Timmons*, 28 Ind. App. 578.

*Kentucky.* — *Altsheler v. Conrad*, (Ky. 1904) 82 S. W. Rep. 257.

*Maine.* — *Bennett v. Sullivan*, (Me. 1905) 60 Atl. Rep. 886.

*Michigan.* — *Rhoades v. Seidel*, (Mich. 1905) 102 N. W. Rep. 1025.

*New York.* — *Hall v. Beston*, 165 N. Y. 632, affirming 26 N. Y. App. Div. 105; *Sherlock v. Rushmore*, 99 N. Y. App. Div. 598.

*Oklahoma.* — *Tucker v. Bennett*, (Okla. 1905) 81 Pac. Rep. 423, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227.

Where the premises demised were destroyed by fire the agreement of the landlord to make certain repairs in consideration of the tenant making other repairs is supported by a certain consideration and binding upon the landlord. *Frey v. Vignier*, 145 Cal. 251.

**An Agreement to Repair in Consideration of the Lessee Remaining in Possession** is binding on the lessor. *Neglia v. Lielouka*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 707; *Beakes v. Holzman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 384, fol-

lowing *Rauth v. Davenport*, 60 Hun (N. Y.) 70; *Bronner v. Walter*, 15 N. Y. App. Div. 295.

**Monthly Tenancy.** — In case of monthly tenancy an agreement on the part of the landlord to repair, made after the commencement of the tenancy, in consideration of the lessee's remaining in possession, is binding upon the lessor. *Ehinger v. Bahl*, 208 Pa. St. 250.

**228. 1. Agreement to Pay for Repairs.** — *Trathen v. Kipp*, 15 Colo. App. 426; *Pierce v. Hedden*, 105 La. 294; *Everson v. Heffernan*, 59 N. Y. App. Div. 533.

**Consummation of Agreement.** — *Everson v. Heffernan*, 59 N. Y. App. Div. 533.

**A Parol Contract**, when the cost exceeds fifty dollars, is not provable. *Caron v. Gaudet*, 6 Quebec Pr. 23.

**4. Bennett v. Sullivan**, (Me. 1905) 60 Atl. Rep. 886.

Where the tenant before the renewal of a lease of the premises of which the tenant had been in occupation for about ten years objected to the condition of the banisters of the porches, but made no objection to the condition of the floors of the porches, the agreement of the landlord to fix the porch was restricted to fixing the banisters. *Roberts v. Cottey*, 100 Mo. App. 500.

Where in the case of a lease for a month the landlord agrees to put the premises in repair and fails to do so, his liability is restricted solely to a failure to repair for the term of the lease, and he incurs no liability by reason of his failure to repair as regards the subsequent periods due to the holding over of the tenant. *Frederick v. Daniels*, 74 Conn. 710.

**5.** A general covenant on the part of the landlord to put the premises into a habitable condition and make the same ready for occupancy by a certain time, qualified by the following phrase, "Meaning and intending hereby that the boards covering the windows and doors of the dwelling-house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling-house put in condition for occupancy," merely requires the landlord to make the specific repairs specified in such phrase. *Rubens v. Hill*, 213 Ill. 528.

**6. Exterior Repairs.** — *May v. Ennis*, 78 N. Y. App. Div. 552.

**8. Covenant Construed with Reference to Purpose of Lease.** — *Piper v. Fletcher*, 115 Iowa 263.

**229. 1. Duty to Rebuild in Case of Destruction.** — See *Gavan v. Norcross*, 117 Ga. 356.

**A Covenant to Keep the Roof in Repair** does not require the landlord to rebuild in case of the destruction of the building. *Arbenz v. Exley*, 52 W. Va. 476.

**9. Notice of Need of Repairs.** — *Channel v. Mer-*

**230. Actual Knowledge of Need of Repairs.** — See note 1.

Reasonable Time After Notice. — See note 2.

(f) **Tenant's Acceptance of Possession Without Objection** — Effect on Covenant to Put in Repair. — See note 4.(g) **Effect of Failure to Repair on Liability of Tenant for Rent** — The Landlord's General Covenant to Keep the Premises in Repair. — See note 5.**231. (h) Remedies for Breach of Agreement to Repair** — *aa. IN GENERAL.* — See notes 6, 7.*bb. ABANDONING PREMISES.* — See notes 9, 10.**232. See note 2.***cc. REPAIRS BY TENANT AT COST OF LANDLORD.* — See note 5.**233. (i) By and Against Whom Landlord's Agreement to Repair Enforceable.** — See note 1.(k) **Damages for Breach of Agreement to Repair** — *aa. GENERAL RULE.* — See note 6.*bb. LOSS FROM INABILITY TO SUBLET* — If, However, the Premises Were Let for the Purpose of Being Sublet by the Tenant. — See note 8.**234. cc. INJURIES TO PROPERTY OF TENANT.** — See note 1.**Contributory Negligence.** — See note 3.*dd. LOSS OF PROFITS OF BUSINESS.* — See note 5.*ee. PERSONAL INJURIES TO TENANT.* — See note 7.

rifield, 106 Ill. App. 246, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 229, *reversed* on other grounds 206 Ill. 278; Thompson v. Clemens, 96 Md. 196, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 229; Galvin v. Beals, 187 Mass. 250; Cummings v. Ayer, (Mass. 1905) 74 N. E. Rep. 336; Forrest v. Buchanan, 203 Pa. St. 454. See also Sternberg v. Burke, (Supm. Ct. App. T.) 84 N. Y. Supp. 862.

**230. 1. Actual Knowledge of Need of Repairs.** — See Lovejoy v. Townsend, 25 Tex. Civ. App. 385.

**2. Reasonable Time After Notice for Making Repairs.** — Thompson v. Clemens, 96 Md. 196, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230; Forrest v. Buchanan, 203 Pa. St. 454.

4. Piper v. Fletcher, 115 Iowa 263.

**5. Failure to Repair Does Not Forfeit Rent.** — Arbenz v. Exley, 52 W. Va. 476, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 230.

**231. 6. Piper v. Fletcher, 115 Iowa 263.**

**7. Action of Tort for Failure to Repair Not Maintainable.** — Hirsch v. Olmesdahl, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 757; Spero v. Levy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 24; Stelz v. Van Dusen, 93 N. Y. App. Div. 358; Boden v. Scholtz, 101 N. Y. App. Div. 1; Davis v. Smith, 26 R. I. 129, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 231. See, however, Thompson v. Clemens, 96 Md. 196.

**9. Abandoning Possession.** — Johns v. Eichelberger, 109 Ill. App. 35; Piper v. Fletcher, 115 Iowa 263; Thompson v. Clemens, 96 Md. 196; Spero v. Levy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 24.

**Resiliation of Lease.** — Cote v. Cantin, 21 Quebec Super. Ct. 432.

**10. Need of Repairs Not Rendering Premises Untenantable.** — Todd v. Bowie, Sc. Ct. of Sess. 4 F. 435 (failure to repair fences); Arbenz v. Exley, 52 W. Va. 476, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 231.

**232. 2. Acorn v. Hill, 34 Nova Scotia 508.**

**5. Right of Tenant to Repair at Cost of Landlord.**

— Piper v. Fletcher, 115 Iowa 263; Thompson v. Clemens, 96 Md. 196; Spero v. Levy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 24; Beakes v. Holzman, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 384.

The fact that the landlord has assigned the rents separate from the reversion is immaterial. Hamaker v. Manheim Light, etc., Co., 25 Pa. Super. Co., 484.

**233. 1. Covenant to Repair — Burden Passes to Grantee of Reversion.** — Piper v. Fletcher, 115 Iowa 263.

**6. Difference in Rental Values.** — Godfrey v. India Wharf Brewing Co., 87 N. Y. App. Div. 123; Saffer v. Levy, (Supm. Ct. App. T.) 88 N. Y. Supp. 144; Beakes v. Holzman, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 384.

**8. Lease of Hotel or Boarding House.** — Daly v. Piza, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 608, *following* Hexter v. Knox, 63 N. Y. 561.

**234. 1. Injuries to Tenant's Property.** — Ehinger v. Bahl, 208 Pa. St. 250; Lovejoy v. Townsend, 25 Tex. Civ. App. 385. See, however, Huber v. Ryan, 57 N. Y. App. Div. 34.

**3. Negligent Exposure of Property to Injury.** — Huber v. Ryan, 57 N. Y. App. Div. 34; Klausner v. Herter, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 869; Hirsch v. Olmesdahl, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 757; Margolius v. Muldberg, (Supm. Ct. App. T.) 88 N. Y. Supp. 1048. Compare Mason v. Howes, 122 Mich. 329.

**5. Loss of Profits.** — Godfrey v. India Wharf Brewing Co., 87 N. Y. App. Div. 123; Saffer v. Levy, (Supm. Ct. App. T.) 88 N. Y. Supp. 144; Ehinger v. Bahl, 208 Pa. St. 250.

**7. Personal Injuries to Tenant.** — Hedekin v. Gillespie, 33 Ind. App. 650; Shackford v. Coffin, 95 Me. 69; Thompson v. Clemens, 96 Md. 196, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 234; Folsom v. Parker, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 348; Kennedy v. Fay, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 776; Dood v.



**235.** See note 2.

*ff.* DUTY OF TENANT TO REPAIR TO AVOID INJURY. — See notes 4, 7.

(8) *Statutory Obligation to Repair* — In General. — See note 9.

**236.** See note 1.

(9) *Negligence of Landlord in Making Repairs* — (a) In General. —

See note 2.

**237.** Repairs Without Authority. — See note 2.

(b) *Repairs Gratuitously Undertaken.* — See note 3.

Rothschild, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 721; Golob *v.* Pasinsky, 72 N. Y. App. Div. 176; Frank *v.* Mandel, 76 N. Y. App. Div. 413; Spero *v.* Levy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 24; Stelz *v.* Van Dusen, 93 N. Y. App. Div. 358; Kushes *v.* Ginsberg, 99 N. Y. App. Div. 417. See, however, Stillwell *v.* South Louisville Land Co., (Ky. 1900) 58 S. W. Rep. 696 (death of child of tenant).

**Damages for Injury to Health from want of obvious repairs are not recoverable.** Hanson *v.* Cruse, 155 Ind. 176.

**235. 2. Contributory Negligence of Tenant.** — Shackford *v.* Coffin, 95 Me. 69; Thompson *v.* Clemens, 96 Md. 196 (remaining on premises after knowledge of defective condition).

**4. Duty of Tenant to Repair to Avoid Injury.** — Beakes *v.* Holzman, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 384.

7. The tenant is under no duty to make the repairs when the landlord forbids him to do so. Park *v.* Ensign, 10 Kan. App. 173.

9. Pierce *v.* Hedden, 105 La. 294.

**Georgia — Liability of Landlord Based on Negligence.** — Gavan *v.* Norcross, 117 Ga. 356 (roof destroyed by fire, landlord is entitled to reasonable time to repair).

**Landlord Must Have Notice of Need of Repairs.** — Stack *v.* Harris, 111 Ga. 149; Ocean Steamship Co. *v.* Hamilton, 112 Ga. 901.

**Duty to Examine for Needed Repairs.** — Where the tenant is in the exclusive possession and control of the rented premises, the landlord is under no duty to examine them with a view to ascertaining whether or not repairs are needed, unless requested so to do. Ocean Steamship Co. *v.* Hamilton, 112 Ga. 901.

**Extraordinary Patent Defects.** — Aikin *v.* Perry, 119 Ga. 263, following Driver *v.* Maxwell, 56 Ga. 11; White *v.* Montgomery, 58 Ga. 204.

**Building Totally Destroyed, Landlord Need Not Rebuild.** — Gavan *v.* Norcross, 117 Ga. 356.

**Landlord with Notice Liable for Personal Injuries to Tenant.** — Stack *v.* Harris, 111 Ga. 149.

**Contributory Negligence of Tenant.** — Stack *v.* Harris, 111 Ga. 149; Gavan *v.* Norcross, 117 Ga. 356.

**Duty of Tenant to Use Diligence to Lessen Injury.** — Aikin *v.* Perry, 119 Ga. 263.

**Liability of Assignee of Reversion.** — Aikin *v.* Perry, 119 Ga. 263.

**Louisiana — Building Destroyed — Landlord Need Not Rebuild.** — Jackson *v.* Doll, 109 La. 230.

**Landlord Liable for Personal Injuries to Tenant or His Family.** — Schoppel *v.* Daly, 112 La. 201.

**Montana.** — The Montana statute (Civ. Code, §§ 2620-2621) providing that where a building

leased is intended for the use and occupation of human beings the lessor must, in the absence of an agreement to the contrary, put it in a condition fit for occupation and must repair all dilapidations, etc., applies to property used for dwelling-house purposes, and is not applicable to business property. Landt *v.* Schneider, 31 Mont. 15.

**North Dakota — The Tenant Cannot Recoup Damages.** — Torreson *v.* Walla, 11 N. Dak. 481.

**Making Sewer Connection** is not required by North Dakota statute requiring landlord to make repairs and remedy all dilapidations and deteriorations. Torreson *v.* Walla, 11 N. Dak. 481.

**Oklahoma.** — The Oklahoma statute (Wilson's Rev. & Annot. Stat. 1903, § 863) providing that the lessee of a building "intended for the occupation of human beings" must, in the absence of any agreement to the contrary, put the building in a "condition fit for such occupation, and repair all subsequent dilapidations," etc., does not apply to a lease of the second story of a store building which is intended to be used by the lessee for printing and publishing a newspaper. Tucker *v.* Bennett, (Okla. 1905) 81 Pac. Rep. 423.

**Quebec.** — Ligget *v.* Viau, 14 Quebec Super. Ct. 396, 18 Quebec Super. Ct. 201; Cantin *v.* Belleau, 15 Quebec Super. Ct. 286; Pelletier *v.* Boyce, 21 Quebec Super. Ct. 513; Cartier *v.* Durocher, 22 Quebec Super. Ct. 255.

**Landlord's Knowledge of Defects.** — The fact that the landlord had no knowledge of the defective condition of the premises does not as a matter of law relieve him from liability. He must inspect the premises from time to time to see if gross reparations are required. The lessee is not required to acquire knowledge of need of such repairs, and notify the lessor thereof. Troude *v.* Meldrum, 21 Quebec Super. Ct. 75. See also Vineberg *v.* Foster, 24 Quebec Super. Ct. 258.

**236. 1. Tenant May Vacate for Want of Repair.** — Thomas *v.* Conrad, 114 Ky. 841; Campbell *v.* Luck, 25 Ohio Cir. Ct. 356.

**2. Negligence of Landlord in Making Repairs.** — Aldag *v.* Ott, 28 Ind. App. 542; Rice *v.* Whitley, 115 Iowa 748; Holmes *v.* Feist, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 808; Collier *v.* Collins, 58 N. Y. App. Div. 550, reversed 172 N. Y. 99 on other grounds; Holmes *v.* Feist, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 863, affirming (Supm. Ct. App. T.) 33 Misc. (N. Y.) 808; Blumenthal *v.* Prescott, 70 N. Y. App. Div. 560.

**237. 2. Nahm *v.* Register Newspaper Co.,** (Ky. 1905) 87 S. W. Rep. 296.

**3. Repairs Gratuitously Undertaken.** — Aldag *v.* Ott, 28 Ind. App. 542; Mann *v.* Fuller, 63 Kan. 664; Peerless Mfg. Co. *v.* Bagley, 126

**237.** (c) Negligence of Independent Contractor — Landlord Not Responsible. — See note 4.

**238.** Landlord Responsible. — See note 1.

*b.* TO THIRD PERSONS — (1) *In General.* — See notes 4, 5.

**239.** See notes 1, 2, 3.

(2) *Dangerous Condition of Premises Existing at Time of Letting*—

(a) *General Rule.* — See note 6.

Mich. 225, 86 Am. St. Rep. 537; Rhoades v. Seidel, (Mich. 1905) 102 N. W. Rep. 1025. See, however, Phelan v. Fitzpatrick, 188 Mass. 237.

**237. 4. Landlord Must Not Be Negligent Personally.**—Campbell v. Porter, 46 N. Y. App. Div. 628; Boss v. Jarmulowsky, 81 N. Y. App. Div. 577.

**238. 1.** *Nahm v. Register Newspaper Co.*, (Ky. 1905) 87 S. W. Rep. 296; Peerless Mfg. Co. v. Bagley, 126 Mich. 225 (landlord agreeing to make improvements was held liable for negligence of contract). See also Blumenthal v. Prescott, 70 N. Y. App. Div. 560.

**4. Injuries to Third Persons.**—Hull v. Sherrod, 97 Ill. App. 298. Compare Helbig v. Slaughter, 95 Ill. App. 623.

**5. Liability to Persons on Premises at Invitation of Tenant.**—*United States.*—Schwalbach v. Shinkle, etc., Co., 97 Fed. Rep. 483; Dyer v. Robinson, 110 Fed. Rep. 99.

*Illinois.*—Borggard v. Gale, 107 Ill. App. 128, affirmed 205 Ill. 511.

*Indian Territory.*—De Graffenried v. Wallace, 2 Indian Ter. 657.

*Iowa.*—Burner v. Higman, etc., Co., 127 Iowa 580.

*Kansas.*—De Tarr v. Ferd. Heim Brewing Co., 62 Kan. 188.

*Kentucky.*—King v. Creekmore, (Ky. 1903) 77 S. W. Rep. 689; Lovitt v. Creekmore, (Ky. 1904) 80 S. W. Rep. 1184.

*Maryland.*—Smith v. State, 92 Md. 518.

*Massachusetts.*—Roche v. Sawyer, 176 Mass. 71; O'Malley v. Twenty-Five Associates, 178 Mass. 555; Jordan v. Sullivan, 181 Mass. 348; Phelan v. Fitzpatrick, 188 Mass. 237; Cummings v. Ayer, (Mass. 1905) 74 N. E. Rep. 336.

*Michigan.*—Brady v. Klein, 133 Mich. 422.

*Missouri.*—Mayer v. Schrupf, 111 Mo. App. 54.

*New Hampshire.*—Towne v. Thompson, 68 N. H. 317.

*New York.*—Dood v. Rothschild, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 721; Frank v. Mandel, 76 N. Y. App. Div. 413; Leaux v. New York, 87 N. Y. App. Div. 398; Hirschfield v. Alsberg, (Supm. Ct.-App. T.) 47 Misc. (N. Y.) 141.

*Washington.*—Ward v. Hinkleman, 37 Wash. 375, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238.

*Canada.*—Marshall v. Industrial Exhibition Assoc., 1 Ont. L. Rep. 319.

See also McKee v. McCardell, 22 R. I. 71. See, however, May v. Ennis, 78 N. Y. App. Div. 552; Patterson v. Jos. Schlitz Brewing Co., 16 S. Dak. 33; Waterhouse v. Jos. Schlitz Brewing Co., 16 S. Dak. 592.

**The Rule Applies Where a Part of a Building Is Leased** in so far as regards injuries from the defective condition of the part leased. West

Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 85 Am. St. Rep. 327.

**Sham Lease.**—Where the lease is merely a sham, the lessee being in fact the agent of the lessor, the lessor may be held liable for injuries to third persons due to the defective condition of the premises. Oriental Invest. Co. v. Barclay, 25 Tex. Civ. App. 543.

**239. 1. Building to Be Used for Public Purposes.**—Dyer v. Robinson, 110 Fed. Rep. 99.

**2. Unsafe Condition of Premises for Purposes Let.**—See May v. Ennis, 78 N. Y. App. Div. 552 (lease of hotel—defective porches); Ward v. Hinkleman, 37 Wash. 375, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239.

**3. Premises Let for Public Entertainment.**—Fox v. Buffalo Park, 163 N. Y. 559. See also Smith v. State, 92 Md. 518.

**Lease of Public Toboggan Slide.**—So also where the owner of a toboggan slide to be used by the public leases the same, he remains liable for injuries to third persons caused by the improper construction of the toboggan slide. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310.

The lessor of a building to be used for public entertainment is not liable for injuries to persons attending the entertainment, caused by the defective construction of the building, if the defects were not discoverable by inspection, and were unknown to the lessor. Eckman v. Atlantic Lodge, 68 N. J. L. 10.

**6. Condition of Premises at Time of Letting Dangerous to Third Persons.**—*United States.*—Schwalbach v. Shinkle, etc., Co., 97 Fed. Rep. 483; Dyer v. Robinson, 110 Fed. Rep. 99.

*Illinois.*—West Chicago Masonic Assoc. v. Cahn, 192 Ill. 210, 85 Am. St. Rep. 327, reversing 94 Ill. App. 333.

*Maine.*—Carrigan v. Stillwell, 97 Me. 247.

*Maryland.*—Smith v. State, 92 Md. 518.

*Minnesota.*—Isham v. Broderick, 89 Minn. 397.

*Missouri.*—Stoetzele v. Swearingen, 90 Mo. App. 588.

*South Dakota.*—Waterhouse v. Joseph Schlitz Brewing Co., 16 S. Dak. 592, 12 S. Dak. 397; Patterson v. Joseph Schlitz Brewing Co., 16 S. Dak. 33.

In Donk Bros. Coal, etc., Co. v. Leavitt, 109 Ill. App. 385, a landlord leasing premises on which at the time of letting there was a cistern in a dangerous condition was held liable for the death of a child who went on the premises, fell into the cistern and was drowned.

This rule does not, however, impose any liability on the landlord for injuries to members of the lessee's family from defects existing at the time of the letting which are not in the nature of a public nuisance, such as a hole in the flooring of a building. Borggard v. Gale, 107 Ill. App. 128, affirmed 205 Ill. 511.

**239.** Defective Sidewalks. — See note 8.

**240.** Leaders of House Discharging Water on Sidewalk. — See note 1.

(b) Agreement of Tenant to Repair. — See note 4.

(3) *Dangerous Condition of Premises Arising After Letting.* — See note 5.

**241.** Defective Sidewalks. — See note 2.

Defective Building or Structures Overhanging Public Highway. — See note 3.

Fall of Accumulations of Ice or Snow from Roof. — See note 4.

(4) *Effect of Agreement of Landlord to Repair.* — See notes 6, 7.

**242.** (7) *Under Statutory Obligation to Repair.* — See note 7.

(8) *Burden of Proof as to When Premises Became Dangerous.* —

See note 8.

**243.** (9) *Liability of Landlord for Acts of Tenant* — (a) *In General.* — See note 1.

(b) *Misuse of Premises by Tenant.* — See notes 3, 4.

(c) *Nuisances* — *aa. NUISANCE CREATED BY TENANT.* — See note 5.

**Defective Eaves Overhanging Sidewalk.** — Keeler v. Lederer Realty Corp., 26 R. I. 524, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531.

**239. 8. Defective Sidewalks.** — Collier v. Hyatt, 110 Ga. 317; Stoetzel v. Swearingen, 90 Mo. App. 588; Brogan v. Hanan, 55 N. Y. App. Div. 92; Spaine v. Stiner, 168 N. Y. 666, affirming 51 N. Y. App. Div. 481; Matthews v. New York, 78 N. Y. App. Div. 422; Kirchner v. Smith, 207 Pa. St. 431.

**240. 1.** Isham v. Broderick, 89 Minn. 397.  
4. Isham v. Broderick, 89 Minn. 397; Keeler v. Lederer Realty Corp., 26 R. I. 524.

**5. Premises Becoming Dangerous After Letting.** — Hull v. Sherrod, 97 Ill. App. 298; Munroe v. Carlisle, 176 Mass. 199; Walter v. Dennehy, 93 Mo. App. 7; Leaux v. New York, 87 N. Y. App. Div. 398; Frolich v. Cranker, 11 Ohio Cir. Dec. 592; Keeler v. Lederer Realty Corp., 26 R. I. 524; Ward v. Hinkleman, 37 Wash. 375, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 240.

**241. 2. Sidewalk.** — West Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 85 Am. St. Rep. 327, reversing 94 Ill. App. 333; Fehlauer v. St. Louis, 178 Mo. 635; Finnigan v. Biehl, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 735, reversing (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1116; Matthews v. New York, 78 N. Y. App. Div. 422; Duffin v. Dawson, 211 Pa. St. 593.

In Memphis v. Miller, 78 Mo. App. 67, the landlord was held liable for injuries to a third person caused by the defective condition of an excavation in the sidewalk, though it was in proper condition at the time of the letting. This decision was based, however, on the ground that the excavation was of itself a nuisance.

**3. Fall of Building.** — Munroe v. Carlisle, 176 Mass. 199; Uggla v. Brokaw, 77 N. Y. App. Div. 310.

**Gate Constructed by Lessee so as to Overhang Sidewalk.** — Hull v. Sherrod, 97 Ill. App. 298.

**4. Fall of Snow from Roof.** — Atwill v. Blatz, 118 Wis. 226. See, however, Jackson v. Vanier, 18 Quebec Super. Ct. 244.

**6. Agreement of Landlord to Repair.** — Brady v. Klein, 133 Mich. 422; Brogan v. Hanan, 55 N. Y. App. Div. 92; Frank v. Mandel, 76 N. Y. App. Div. 413; May v. Ennis, 78 N. Y. App. Div. 552; Sherlock v. Rushmore, 99 N. Y. App.

Div. 598; Kushes v. Ginsberg, 99 N. Y. App. Div. 417; Davis v. Smith, 26 R. I. 129 (personal injuries to child of tenant).

**7. Landlord Agreeing to Keep in Repair — Landlord Responsible.** — Schwandt v. Metzger Linseed Oil Co., 93 Ill. App. 365 (held liable to child of tenant); West Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 85 Am. St. Rep. 327, reversing 94 Ill. App. 333.

**Failure to Heat Building.** — In O'Donnell v. Rosenthal, 110 Ill. App. 225, where the landlord leased an apartment to be occupied by the lessee and his family as a residence, and covenanted to furnish heat, he was held liable for the death of a child of the lessee caused by his failure to furnish heat.

**242. 7.** See Ocean Steamship Co. v. Hamilton, 112 Ga. 901 (servant of lessee).

**8. Burden of Proof.** — Munroe v. Carlisle, 176 Mass. 199; Ward v. Hinkleman, 37 Wash. 375, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242.

**243. 1. Landlord Not Liable for Negligent Acts of Tenant.** — Rider v. Clark, 132 Cal. 382; Ault Woodenware Co. v. Baker, 26 Ind. App. 374; De Graffenried v. Wallace, 2 Indian Ter. 657; Dood v. Rothschild, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 721; Seminary of Foreign Missions v. Kieffer, 11 Quebec K. B. 173, reversing 14 Quebec Super. Ct. 325.

**3. Misuse of Premises by Tenant.** — Fehlauer v. St. Louis, 178 Mo. 635; Mayer v. Schruppf, 111 Mo. App. 54; Duffin v. Dawson, 211 Pa. St. 593; Atwill v. Blatz, 118 Wis. 226.

Where the lessor in an oil lease reserved no control of the premises or right to direct the manner of drilling, etc., he is not liable to the owner of adjoining property to which oil escapes solely through the negligence of the lessee. Langabaugh v. Anderson, 68 Ohio St. 131.

**4. Failure to Cover Coal Hole in Sidewalk.** — West Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 85 Am. St. Rep. 327, reversing 94 Ill. App. 333.

**5. Nuisances Created by Tenant Without Consent of Landlord.** — Gardner v. Rhodes, 114 Ga. 929 (accumulation of ice on sidewalk); Fehlauer v. St. Louis, 178 Mo. 635; Board of Health v. Eastlack, 68 N. J. L. 585; Louisville, etc., Terminal Co. v. Jacobs, 109 Tenn. 727.

**244.** *bb.* NUISANCE EXISTING AT TIME OF LETTING. — See note 1.

*cc.* NUISANCE CONTEMPLATED AT TIME OF LETTING. — See note 3.

(10) *Time of Letting—Periodical Leases.* — See note 5.

**245.** (11) *Part of Premises Retained under Control of Landlord* — (a) In General. — See notes 1, 2.

(b) *Appurtenances Used in Common by Tenants.* — See notes 3, 4.

**246.** 2. *Liability of Tenant* — *a.* TO LANDLORD — (1) *Implied Obligation with Regard to Repairs and Care of Demised Property* — (a) In General. — See notes 1, 3.

**247.** (c) *Destruction of or Injury to Building through Negligence of Tenant.* — See note 4.

*Burden of Proof with Regard to Negligence.* — See note 8.

**248.** (2) *Agreement of Tenant to Repair* — (a) In General. — See note 2.

(b) *Construction of and Liabilities on Covenants to Repair* — *aa.* IN GENERAL. —

See note 9.

**244.** 1. *Nuisances Existing at Time of Letting.* — *Schwalbach v. Shinkle, etc., Co.*, 97 Fed. Rep. 483; *West Chicago Masonic Assoc. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, *reversing* 94 Ill. App. 333; *Smith v. State*, 92 Md. 518; *Isham v. Broderick*, 89 Minn. 397; *Leonard v. Gunther*, 47 N. Y. App. Div. 194; *Holroyd v. Sheridan*, 53 N. Y. App. Div. 14, *appeal dismissed* 166 N. Y. 634; *Louisville, etc., Terminal Co. v. Jacobs*, 109 Tenn. 727.

3. *Leonard v. Gunther*, 47 N. Y. App. Div. 194.

5. *Periodical Tenancies.* — *Hull v. Sherrod*, 97 Ill. App. 298; *Ward v. Hinkleman*, 37 Wash. 375, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 244. See, however, *Donk Bros. Coal, etc., Co. v. Leavitt*, 109 Ill. App. 385, *citing* *Borman v. Sandgren*, 37 Ill. App. 160.

**245.** 1. *Landlord's Responsibility for Part Retained.* — *Boyce v. Snow*, 187 Ill. 181; *Helbig v. Slaughter*, 95 Ill. App. 623. *Compare* *Dalin v. Worcester Consol. St. R. Co.*, (Mass. 1905) 74 N. E. Rep. 597.

*Elevators.* — *Khodius v. Johnson*, 24 Ind. App. 401; *Burner v. Higman, etc., Co.*, 127 Iowa 580; *Wright v. Perry*, 188 Mass. 268; *Griffen v. Manice*, 166 N. Y. 188, *reversing* 47 N. Y. App. Div. 70; *Wagner v. Welling*, (Supm. Ct. App. T.) 84 N. Y. Supp. 979; *Bogendoerfer v. Jacobs*, 97 N. Y. App. Div. 355, *following* *Grifhahn v. Kreizer*, 62 N. Y. App. Div. 413, *affirmed* 171 N. Y. 661.

The liability of the landlord who retains control of and operates an elevator in the building, for injuries to an employee of a tenant, is not affected by provisions in the lease of which the employee has no knowledge. *Springer v. Ford*, 88 Ill. App. 529, *affirmed* 189 Ill. 430, 82 Am. St. Rep. 464.

2. *Duty to Public.* — *Sturmwald v. Schreiber*, 69 N. Y. App. Div. 476.

*Fall of Snow Accumulating on Roof.* — *Jackson v. Vanier*, 18 Quebec Super. Ct. 244.

*Negligent Failure of Tenant to Guard Coal Hole in Sidewalk*, control of which was retained by landlord, subjects the landlord to liability to third person injured thereby. *Anderson v. Caulfield*, 60 N. Y. App. Div. 560.

3. *Appurtenances Used in Common by Tenants.* — *Washington Market Co. v. Claggett*, 19 App. Cas. (D. C.) 12 (obstructions in aisle of market); *Schwandt v. Metzger Linseed Oil Co.*, 93

Ill. App. 365 (held liable to child of tenant); *McGinley v. Alliance Trust Co.*, 163 Mo. 257 (family of tenant); *Wessel v. Gerken*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 221.

*Elevator.* — *Weinberger v. Kratzenstein*, 71 N. Y. App. Div. 155.

*Contributory Negligence.* — The fact that the plaintiff descended the stairs in the dark without lighting the gas, knowing that the carpet on the stairs was in a defective condition, does not, as a matter of law, show contributory negligence on her part. *Lee v. Ingraham*, 106 N. Y. App. Div. 167, *following* *Peil v. Reinhart*, 127 N. Y. 381.

4. *No Duty to Light Halls.* — *Brancato v. Kors*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 776.

**246.** 1. *Implied Obligation to Repair.* — *Smith v. Chappell*, 25 Pa. Super. Ct. 81.

3. *Smith v. Chappell*, 25 Pa. Super. Ct. 81.

**247.** 4. *Negligent Destruction of Buildings.* — *Wilder v. Moffat*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 777; *Burland v. Munyon's Homeopathic Home Remedy Co.*, 14 Quebec Super. Ct. 411.

8. *Burden of Proof with Regard to Negligence* — *Quebec.* — *Ligget v. Viau*, 14 Quebec Super. Ct. 396, 18 Quebec Super. Ct. 201. See, however, *Ford v. Phillips*, 21 Quebec Super. Ct. 1, 22 Quebec Super. Ct. 296.

**248.** 2. *Agreement by Tenant to Repair.* — *Parker v. Brown House Co.*, 117 Ga. 1013.

9. *Duty of Tenant to Make Repair Ordered by Building Department.* — *Markham v. David Stevenson Brewing Co.*, 104 N. Y. App. Div. 420.

*Tenant Not Required to Erect Fire Escapes.* — *Kalman v. Cox*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 589.

*General Agreement to Repair Followed by Specifications of Repairs.* — In *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, where a general covenant by the lessee "to keep the plant and buildings in repair during the term of this lease" was followed by the words, which were separated from it only by a semicolon, "That it will replace at its own expense all glass broken during its tenancy; that any damage caused by the bursting of water pipes, from failure to turn off water in cold weather, will be repaired at the expense of the lessee; that it will leave the property in good repair," it was held that the meaning of the general covenant was restricted by the more specific and

- 249.** *bb.* ACCIDENTAL INJURIES TO AND DESTRUCTION OF PREMISES. — See note 2.  
**Destruction of Premises — Duty to Rebuild.** — See note 3.  
**Cause of Destruction.** — See note 5.
- 250.** *cc.* STATE OF REPAIR REQUIRED — (*aa*) *In General.* — See note 7.
- 251.** (*ee*) *Repairs as Regards Condition of Premises at Time of Letting.* — See note 8.
- 252.** **To Keep in Repair.** — See note 2.  
*dd.* OF WHAT THINGS REPAIR REQUIRED. — See notes 9, 13.
- 253.** *ff.* EXCEPTIONS CONTAINED IN TENANT'S AGREEMENT TO REPAIR. — See note 7.
- 254.** **Damages by Elements.** — See note 6.
- 255.** *hh.* BY AND AGAINST WHOM AGREEMENT ENFORCEABLE — (*aa*) *Against Whom Enforceable* — Assignee. — See note 3.  
*(bb)* *By Whom Enforceable.* — See note 10.  
**Covenant Broken Before Assignment of Reversion.** — See note 12.
- 256.** *ii.* DAMAGES — (*aa*) *Action Brought During Continuance of Term* — **Cost of Repairs Made by Landlord.** — See note 7.  
*(bb)* *Action Brought After Expiration of Term.* — See note 9.
- 257.** **Loss of Use of Premises During Repair.** — See note 2.
- 258.** *b.* TO THIRD PERSONS — (*i*) *In General.* — See notes 1, 2.

particular description of the subject to which it applied, and that, therefore, the lessee was not required to rebuild in case of the accidental destruction of the buildings.

**249. 2. Cause of Dilapidation Immaterial.** — *Barnhart v. Boyce*, 102 Ill. App. 172; *Ashby v. Ashby*, 59 N. J. Eq. 547.

**3. Covenant to Repair Requires Rebuilding.** — *Gettysburg Electric R. Co. v. Electric Light, etc., Co.*, 200 Pa. St. 372; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 3 Va. Sup. Ct. 152. *Compare Ducker v. Del Genovese*, 93 N. Y. App. Div. 575.

**5. Cause of Destruction Immaterial.** — See *Alan v. Fortier*, 20 Quebec Super. Ct. 50.

**250. 7. Wear and Tear.** — *Wright v. Lawson*, 68 J. P. 34; *Street v. Central Brewing Co.*, 101 N. Y. App. Div. 3, *following Ducker v. Del Genovese*, 93 N. Y. App. Div. 575.

Where a lessee covenants to keep the premises in the same condition of repair as at the time of the letting, he is bound to keep them in such condition and not merely to keep them in such reasonable repair as ordinarily prudent persons would. *Vincent v. Crane*, 134 Mich. 700.

**Covenant to Keep from Deterioration.** — *Barnhart v. Boyce*, 102 Ill. App. 172.

**251. 8. Repairs as Regards Condition of Premises at Time of Letting.** — *Foss v. Stanton*, 76 Vt. 365.

**252. 2. To Keep in Good or Tenantable Repair.** — *Lehmaier v. Jones*, 100 N. Y. App. Div. 498, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 252. See, however, *Foss v. Stanton*, 76 Vt. 365.

**Covenant to Keep Machinery in Good Repair.** — *Simkins v. Cordele Compress Co.*, 113 Ga. 1050.

**9. What Things to Be Repaired.** — *Levine v. Baldwin*, 87 N. Y. App. Div. 150; *Estey v. Corn*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 270 (elevator).

**13. Things Not Included in Demise.** — *Wagner v. Welling*, (Supm. Ct. App. T.) 84 N. Y. Supp. 970 (elevator).

**253. 7. Exception Qualifying Several Covenants.** — *Thomas v. Conrad*, 114 Ky. 841.

Where a lease provided in an earlier clause that the lessee would deliver up the premises at the end of the term in the same good order and condition in which he received them, reasonable wear and tear and damages by accidental fire alone excepted, and in a later clause provided that all repairs were to be made by the lessee, and that the lessor should be relieved from all liability for repairs, it was held that the exception in the earlier clause as to wear and tear and damage by accidental fire qualified also the later clause as regards repairs by the tenant. *Allen v. Fisher*, 66 N. J. L. 261.

**254. 6. Damages by Elements.** — See *Porter v. Allen*, 8 Idaho 358, 369.

**255. 3. Assignee of Leasehold Estate.** — *Lehmaier v. Jones*, 100 N. Y. App. Div. 495.

**10. Grantee of Reversion.** — *Northern Pac. R. Co. v. McClure*, 9 N. Dak. 73; *Foss v. Stanton*, 76 Vt. 365.

**12. Covenant Broken Before Assignment of Reversion.** — *Foss v. Stanton*, 76 Vt. 365.

**256. 7. Cost of Repairs by Landlord.** — *Markham v. David Stevenson Brewing Co.*, 104 N. Y. App. Div. 420.

**9. Action Brought After Transaction of Lease — Cost of Repairs.** — *Lehmaier v. Jones*, 100 N. Y. App. Div. 495; *Darlington v. DeWald*, 194 Pa. St. 305; *Loughlin v. Carey*, 21 Pa. Super. Ct. 477.

**257. 2. Loss of Use of Premises Pending Repairs.** — *Loughlin v. Carey*, 21 Pa. Super. Ct. 477.

**258. 1. Liability of Tenant to Third Persons.** — *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188; *Frolich v. Cranker*, 11 Ohio Cir. Dec. 592.

**Part of Premises Retained under Control of Landlord.** — A tenant of part of a building is not liable to a third person by reason of the defective condition of part of the premises retained under the control of the landlord and used as a common appurtenance by the several tenants of the building, such as an elevator. *Weinberger v. Kratzenstein*, 71 N. Y. App. Div. 155.

**Effect of Landlord's Agreement to Repair.** — A lessee may become liable to a stranger for

**258.** Defective Sidewalks. — See note 4.

(2) *Negligent Use of Premises*. — See notes 6, 7.

*Negligent Use of Waterworks*. — See note 9.

(3) *To Licensees of Tenant*. — See note 10.

**259.** See note 2.

(4) *Nuisances*. — See notes 3, 5.

3. *Merger in Written Lease of Oral Agreement to Repair*. — See note 9.

**260.** V. RENT — 1. Definition. — See note 2.

**261.** 2. *Reservation of Rent — What May Be Reserved as Rent*. — See note 3.

To Whom Reserved. — See notes 7, 8.

3. *Agreement to Pay Rent* — a. IN GENERAL. — See note 9.

**263.** c. IMPLIED CONTRACT TO PAY RENT — (1) *In General*. — See note 2.

Relationship of Parties. — See note 4.

**264.** (2) *Necessity for Existence of Relation of Landlord and Tenant* — (a) *In General*. — See note 1.

**266.** (b) *Wrongful Possession by Defendant — Subsequent Recognition of Owner's Title*. — See note 3.

**268.** (f) *Entry Pending Negotiations for Lease*. — See note 7.

negligently suffering the demised premises to become dangerous. This liability is independent of any contract between the lessor and lessee. It results from the fact that the lessee is in the control and possession of the premises, and for that reason he is liable, if, by negligently permitting them to become dilapidated and unsafe, third persons are injured. *Weber v. Lieberman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 593, quoting *Odell v. Solomon*, 99 N. Y. 635.

**258.** 2. *Defects Existing at Time of Letting*. — *Dyer v. Robinson*, 110 Fed. Rep. 99; *McCord Rubber Co. v. St. Joseph Rubber Co.*, 181 Mo. 678 (injuries to adjoining property from water pipes bursting).

4. *Defective Sidewalks*. — *Weber v. Lieberman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 593.

6. *Negligent Use of Premises by Tenant*. — *Hirschfield v. Alsberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141.

7. *Tenants of Parts of Same Building*. — *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340; *McCormick v. Anistaki*, 66 N. J. L. 211.

*Obstructing Passageways — Shutting Off Escape from Fire*. — *Cohn v. May*, 210 Pa. St. 615, 105 Am. St. Rep. 840.

9. *Negligent Use of Waterworks*. — *Olin P. Ely Co. v. Rhoads*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 111; *Miller v. Benoit*, 164 N. Y. 590, affirming 29 N. Y. App. Div. 252; *Aschenbach v. Keene*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 600.

10. *Licensee of Tenant*. — *Dyer v. Robinson*, 110 Fed. Rep. 99; *Marshall v. Industrial Exhibition Assoc.*, 1 Ont. L. Rep. 319.

**259.** 2. *Dyer v. Robinson*, 110 Fed. Rep. 99.

3. *Nuisances Maintained by Tenant*. — *Wixon v. Bruce*, 187 Mass. 232.

*Setting Back Surface Water*. — *Kieffer v. Le Séminaire de Québec*, (1903) A. C. 85.

5. *Keeler v. Lederer Realty Corp.*, 26 R. I. 524.

9. *Roehrs v. Timmons*, 28 Ind. App. 578.

**260.** 2. *Definition of Rent*. — *Ocean Grove Camp Meeting Assoc. v. Sanders*, 67 N. J. L. 1; *Wegner v. Lubenow*, 12 N. Dak. 95.

*Lease of Land Together with Personal Chattels*. — *Welch v. Ashby*, 88 Mo. App. 400.

*Certainty*. — *Ocean Grove Camp Meeting Assoc. v. Sanders*, 67 N. J. L. 1.

**261.** 3. *Rent Need Not Be Moneys*. — *King v. Bosserman*, 13 Pa. Super. Ct. 480.

*Agreement to Pay Taxes as Rent*. — *Knight v. Orchard*, 92 Mo. App. 466; *Woolsey v. Abbett*, 65 N. J. L. 253.

7. Where the agents of the landowner enter into the lease as lessors without disclosing their principal they may recover the rent stipulated therefor in their own name. *Hunter v. Adoue*, (Tex. Civ. App. 1905) 86 S. W. Rep. 622.

8. *Kennedy v. Duggan*, 23 Pa. Co. Ct. 625, 200 Pa. St. 284.

9. Where a lease to a city provides that the city shall incur no liability for rent unless an appropriation therefor is made by the city council, no recovery can be had unless such appropriation is made. *Marsh v. Bridgeport*, 75 Conn. 495.

**263.** 2. *Not Implied Contrary to Intention of Parties*. — *Tower v. Blessing*, 55 N. Y. App. Div. 634. See, however, *Gillespie v. Hendren*, 98 Mo. App. 622.

4. *Stepfather Occupying Premises of Stepdaughter*. — *Story v. McCormick*, 70 Kan. 323.

**264.** 1. *Relation of Landlord and Tenant Must Exist*. — *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41; *Janouch v. Pence*, (Neb. 1903) 93 N. W. Rep. 217; *Biglow v. Biglow*, 75 N. Y. App. Div. 98; *Brown v. Randolph*, 26 Tex. Civ. App. 66; *Hart v. Hart*, 117 Wis. 649, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 263. See also *Murphy v. Hopcroft*, 142 Cal. 43; *Cambridge Lodge No. 9 v. Routh*, 163 Ind. 1; *Rosenberg v. Sprecher*, (Neb. 1905) 103 N. W. Rep. 1045; *Benedict v. Jennings*, (Supm. Ct. App. T.) 93 N. Y. Supp. 464.

**266.** 3. *Negotiations Between Trespasser and Owner*. — *Hill v. Coal Valley Min. Co.*, 103 Ill. App. 41.

**268.** 7. *Entry Pending Negotiations for Lease*. — See *Herbert v. Gallatin*, 163 N. Y. 575, affirming 22 N. Y. App. Div. 623.

- 268.** (g) *Invalid Leases.* — See note 10.  
**269.** See note 1.  
**4. Where Rent Is Payable.** — See note 10.  
**270.** **5. Time of Payment** — *a. IN ABSENCE OF EXPRESS AGREEMENT* — (1) *In General.* — See notes 4, 5, 6.  
**271.** (2) *Rent Payable in Kind.* — See notes 1, 3.  
*b. AGREEMENT IN LEASE AS TO TIME OF PAYMENT* — (1) *In General.* — See notes 4, 5.  
(2) *What Constitutes Reservation of Yearly, Quarterly, or Other Periodical Rent.* — See note 8.  
**272.** (5) *Accelerating Payments.* — See note 4.  
(6) *Parol Evidence of Time of Payment.* — See note 7.  
**273.** *c. CHANGE OF TIME OF PAYMENT.* — See note 1.  
**6. Amount of Rent** — *a. IN GENERAL.* — See note 9.  
**274.** *Share in Crops.* — See notes 5, 7, 8.  
**275.** *b. CONTEMPORANEOUS PAROL AGREEMENTS.* — See note 6.

**268.** **10. Invalid Leases.** — *Merchants State Bank v. Ruettell*, 12 N. Dak. 519.

**269.** **1. Merchants State Bank v. Ruettell**, 12 N. Dak. 519; *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375.

**10. Rent Payable on Premises.** — *Wilkes v. Home L. Assoc.*, 8 Ont. L. Rep. 93, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 269.

**270.** **4. Rent Payable at End of Term.** — *King v. Bosserman*, 13 Pa. Super. Ct. 480. See also *Hubenka v. Vach*, 64 Neb. 170.

Where the lease makes a portion of the rent payable at fixed periods but provides no time for the payment of the balance, such balance is payable at the expiration of the term. *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

Where a lease for a term of five years provides for the sale of the increase of certain live stock, one-half of the amount received therefor to go to the lessors and one-half to the lessee, the lessors are entitled to receive their portion whenever such live stock is sold. *Price v. Grice*, 10 Idaho 443.

**5. Periodical Rents.** — *Dauchy Iron Works v. McKim Gasket, etc., Co.*, 85 Ill. App. 584; *Kistler v. McBride*, 65 N. J. L. 553; *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206. See also *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893, 58 C. C. A. 79.

**6.** *Kistler v. McBride*, 65 N. J. L. 553 (distress).

**271.** **1. Rent Payable in Kind.** — *King v. Bosserman*, 13 Pa. Super. Ct. 480. And see *Price v. Grice*, 10 Idaho 443.

**3. Crops Not Harvested.** — *Holt v. Licette*, 111 Ga. 810.

**4. Agreements for Payment of Rent in Advance.** — *Kistler v. McBride*, 65 N. J. L. 553; *Kendall v. Clarke*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 814; *Sickels v. Shaw*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 601.

An agreement in a lease, commencing on the fifteenth day of a month, to pay an annual rent of fifteen hundred dollars, payable in equal monthly instalments on the first day of each and every month during the term, is not an agreement to pay such instalments in advance, but to pay on the first of each month for the rent accrued on the preceding month. *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206.

**5. For the Construction of Particular Agreements.** — *Ellis v. Rice*, 195 Pa. St. 42.

**8. What Constitutes Reservation of Periodical Rent.** — *Doxey v. Service*, 30 Ind. App. 174.

**272.** **4. Accelerating Payments.** — *Dinner v. McAndrews*, 10 Pa. Dist. 221, 7 Northam. Co. Rep. (Pa.) 414; *Langley v. Meir*, 25 Ont. App. 372; *Lazier v. Henderson*, 29 Ont. 673; *Tew v. Toronto Sav., etc., Co.*, 30 Ont. 76.

A stipulation in a lease that the rent for the whole term shall become due and collectible at the lessee's removal or attempt at removal from the premises, is valid. *McAnniny v. Miller*, 19 Pa. Super. Ct. 406.

**7.** See *Kistler v. McBride*, 65 N. J. L. 553.

**273.** **1.** See *Harloe v. Lambie*, 132 Cal. 133 (time of payment in written lease cannot be changed by parol agreement).

**9. Construction of Leases with Regard to Amount of Rent.** — *In re Luckenbill*, 127 Fed. Rep. 984; *Church v. Standard R. Signal Co.*, 52 N. Y. App. Div. 407, 60 N. Y. App. Div. 613; *O'Brien v. Jaffe*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1009; *Gerry v. Siebrecht*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034.

**Rent Fixed by Amount of Tillable Land — Ascertainment of Such Amount.** — *Turner v. Meier*, (Tex. Civ. App. 1902) 70 S. W. Rep. 984.

**Abatement of Rent — Shortness in Acreage.** — *McVea v. Vance*, 110 La. 998.

**274.** **5.** *Cammack v. Rogers*, 32 Tex. Civ. App. 125; *Dunsford v. Webster*, 14 Manitoba 529.

**7.** *Gore v. Gardner*, (Tex. Civ. App. 1902) 68 S. W. Rep. 520.

**8. Seed of Cotton Crop.** — A landlord entitled to a share of a cotton crop as rent is entitled to half of the seed as well as half of the lint. *McBride v. Puckett*, (Tex. Civ. App. 1901) 66 S. W. Rep. 242.

**Fodder as Part of "Corn."** — Where a tenant renting land to be cultivated in corn agreed to pay as rent two-fifths of the corn, it was held that the landlord was also entitled to two-fifths of the shock fodder. *Black v. Scott*, 104 Mo. App. 37, following *Moser v. Lower*, 48 Mo. App. 85.

**Division of Crops — Presence of Lessor Is Not Essential.** — *Raney v. Thomas*, 94 Mo. App. 315.

**275.** **6.** *In re Luckenbill*, 127 Fed. Rep. 984.

- 275.** *c.* AGREEMENTS CHANGING AMOUNT OF RENT. — See note 9.
- 276.** Leases under Seal Changed by Parol Agreements. — See note 4.  
Necessity for Consideration. — See notes 5, 8.
- 277.** *d.* AGREEMENTS FOR FIXING RENT BY REVALUATION OR REAPPRAISEMENT. — See note 1.
- 278.** 7. Interest on Rent. — See note 1.  
8. Who Liable for Rent — In General. — See notes 5, 6.  
Lease to One Partner — Occupation by Firm. — See note 7.
- 279.** Liability of Husband on Lease to Wife. — See note 5.  
Assignees of Term. — See note 6.  
Death of Tenant. — See note 7.
- 280.** 9. To Whom Payable — *b.* TRANSFER OF REVERSION — (1) *Rent to Accrue* — (a) In General. — See note 2.
- 281.** Rent Payable in Kind. — See note 5.  
(b) Legal Conveyance of Reversion Required. — See note 6.
- 282.** (c) Mortgages — *aa.* MORTGAGE SUBJECT TO LEASE — General Rule. — See note 2.

Minority Rules. — See note 5.

*bb.* LEASE SUBJECT TO MORTGAGE. — See notes 7, 8.

**275.** 9. Change in Amount of Rent During Term. — *Andre v. Graebner*, 126 Mich. 116; *Post v. Blankenstein*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 796; *Ireland v. Hyde*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 546; *Evans v. Lincoln Co.*, 204 Pa. St. 448.

Continuance in Possession by the Tenant has been held a sufficient consideration for reduction of rent. *Bowman v. Wright*, 65 Neb. 661.

**276.** 4. *Bowman v. Wright*, 65 Neb. 661.

5. *Nudum Pactum*. — *Kaven v. Chrystie*, (Supm. Ct. App. T.) 84 N. Y. Supp. 470.

8. *Bowman v. Wright*, 65 Neb. 661. See also *Pittsburgh, etc., R. Co. v. Dodd*, 115 Ky. 176; *Bowman v. Wright*, 65 Neb. 666.

**Conditional Remittance.** — Where a landlord agreed to reduce the rent for the first two years of the tenancy provided the lessees would perform the conditions of the lease, and the lessees after the expiration of such two years abandoned the lease, the landlord was held entitled to recover the amount of rent remitted. *Brown v. Cairns*, 63 Kan. 693.

**277.** 1. Basis upon Which Valuation Is to Be Fixed. — *Springer v. Borden*, 210 Ill. 518, affirming 112 Ill. App. 168.

**Effect of Lease on Value.** — In appraising the value of the property the effect of the lease on the value of the fee, if any, should not be taken into consideration, but the premises should be treated as vacant property with a clear title in fee simple. *Columbia Theatre Amusement Co. v. Adsit*, 211 Ill. 122, following *Springer v. Borden*, 210 Ill. 518.

**Failure of Appraisers to Fix Rent.** — *Springer v. Borden*, 210 Ill. 518, affirming 112 Ill. App. 168.

**Extra Cost of Night Work** is not to be included in estimating cost of building, the rental of which is fixed at a percentage of its cost. *Bradley v. Metropolitan Music Co.*, 89 Minn. 516.

**Notice of Appraisement.** — *Wilson v. Lunt*, 17 Colo. App. 48.

**278.** 1. Rent in Arrear Bears Interest. — *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932.

**Rent Payable in Kind — Interest on Value of Articles.** — *Watson v. Mirike*, 25 Tex. Civ. App. 527.

5. *Linam v. Jones*, 134 Ala. 570.

6. *Lavolette v. Toupin*, 21 Quebec Super. Ct. 538.

7. *Campbell's Estate*, 21 Pa. Super. Ct. 424.

**279.** 5. A Wife is not liable for rent on a lease to her husband. *Fludder v. Vaughan*, 24 R. I. 471.

6. **Liability of Assignee of Leasehold Estate.** — *Tyler v. Giesler*, 85 Mo. App. 278.

7. **Liability of Heirs of Lessee.** — *Mackin v. Haven*, 187 Ill. 480.

Though under the *Ohio* statute a lease renewable forever passes to the heirs or devisees of the lessee upon the latter's death, still the estate of the lessee remains liable for rents to accrue under an express covenant on the lessee's part to pay them. *Broadwell v. Banks*, 134 Fed. Rep. 470.

**280.** 2. **Grantee of Reversion.** — *Broadwell v. Banks*, 134 Fed. Rep. 470; *Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404; *Bordereaux v. Walker*, 85 Ill. App. 86; *Graham v. Le Sourd*, 99 Ill. App. 223 (quitclaim); *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427; *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381; *Bly v. Bliss*, 123 Mich. 195; *Sullivan v. Lueck*, 105 Mo. App. 199; *Allen v. Hall*, 66 Neb. 84.

**281.** 5. **Rent Payable in Kind.** — *Graham v. Le Sourd*, 99 Ill. App. 223 (quitclaim).

6. **The Vendee in a Contract to Convey** is not entitled to receive rents which will accrue after the execution of the contract. *Mohr v. Quigley*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 753.

**282.** 2. **Effect of Payments to Mortgagor.** — *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

5. *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

7. **Lease by Mortgagor Subject to Mortgage.** — See *Butler v. Burt*, 136 Cal. xix, 68 Pac. Rep. 973; *Goodnow v. Pope*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 475.

8. *Mason v. Lenderoth*, 88 N. Y. App. Div. 38.



**283.** See note 1.

(d) *Overleases.* — See note 8.

**284.** (e) *Judicial Sales.* — See note 1.

**285.** (j) *Reservation of Rent on Grant of Reversion.* — See note 3.

(k) *Grant of Part of Reversion.* — See note 8.

(2) *Accrued Rents.* — See note 10.

**286.** (3) *How Far Tenant Protected in Payment to Lessor.* — See notes 2, 3, 5.

*c. ASSIGNMENT OF RENT.* — See note 6.

**287.** *Accrued Rents.* — See notes 2, 5.

*d. ATTORNMENT — Necessity for Attornment.* — See note 8.

**288.** *What Constitutes Attornment.* — See notes 1, 2.

*At the Present Time the Provisions.* — See note 8.

*After an Attornment by the Tenant.* — See note 9.

*Code Provisions for Action in Name of Real Party in Interest.* — See note 10.

**289.** *e. APPORTIONMENT OF RENT — (1) In Respect of Estate.* — See notes 1, 2.

**290.** (2) *In Respect of Time — Statutory Change.* — See note 4.

**283.** 1. *Compare Pelton v. Place*, 71 Vt. 430.  
**8. Overleases.** — *Bordereaux v. Walker*, 85 Ill. App. 86; *Root v. Trapp*, 10 Kan. App. 575. See, however, *Cohen v. Suckno*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 689.

**284.** 1. *Execution Sales.* — *King v. Bosserman*, 13 Pa. Super. Ct. 480.

**285.** 3. *Reservation of Rent on Grant of Reversion.* — *Shea v. McCauliff*, 186 Mass. 569; *Allen v. Hall*, 66 Neb. 84; *Iowa Sav. Bank v. Frink*, (Neb. 1901) 92 N. W. Rep. 916.

**8. The Grantee of an Undivided Interest in a Reversion** may join with the lessor in an action for rent. *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25.

**10. Rents Accrued.** — *Bordereaux v. Walker*, 85 Ill. App. 86; *Broadwell v. Banks*, 134 Fed. Rep. 470; *Wise v. Pfaff*, 98 Md. 576.

**286.** 2. *How Far Tenant Protected in Payments to Lessor.* — *Indiana Natural Gas, etc., Co. v. Lee*, 34 Ind. App. 119.

**3. Payments in Advance.** — See, however, *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

**5. Bradley v. Peabody Coal Co.**, 99 Ill. App. 427.

**6. Assignments of Rents.** — *Bennett v. McKee*, (Ala. 1905) 38 So. Rep. 129; *Curtner v. Lyndon*, 128 Cal. 35; *Armstrong v. Heath*, 115 Ga. 458; *Keeley Brewing Co. v. Mason*, 104 Ill. App. 241; *Grossman v. Sanders*, 114 La. 958; *Brownson v. Roy*, 133 Mich. 617; *Iowa Sav. Bank v. Frink*, (Neb. 1901) 92 N. W. Rep. 916; *Woolsey v. Abbett*, 65 N. J. L. 253; *Stevens v. Sessa*, 50 N. Y. App. Div. 547; *Thomson v. Ludlum*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 801; *Merchants' State Bank v. Ruettel*, 12 N. Dak. 519; *Ramsey v. Johnson*, 8 Wyo. 476, 80 Am. St. Rep. 948.

While the lessee may show in defense an assignment of the rents by the lessor, the burden of proving such assignment is on him. *Gates v. Max*, 125 N. Car. 139.

**The Assignee of Rents Takes Subject to the Defenses** available against the landlord. *Maxwell v. Urban*, 22 Tex. Civ. App. 565.

**Priority and Rights Between Assignee of Rents and Prior Mortgagee of Leasehold.** — *Bredell v. Fair Grounds Real Estate Co.*, 95 Mo. App. 676.

**Provision in Bond Secured by Mortgage on Leased Premises for Assignment of Rents.** — *Thomson v. Erskine*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 202.

**287.** 2. *Accrued Rents.* — *Maxwell v. Urban*, 22 Tex. Civ. App. 565.

**5. Indianapolis Natural Gas Co. v. Pierce**, 25 Ind. App. 116.

**8. Common-law Doctrine Requiring Attornment.** — *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427; *Moshassuck Encampment No. 2 v. Arnold*, 25 R. I. 65.

**288.** 1. *What Constitutes Attornment.* — *Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404; *Wood v. Custer*, 16 Montg. Co. Rep. (Pa.) 118; *Pelton v. Place*, 71 Vt. 430.

**2. Payment of Rent.** — *Bordereaux v. Walker*, 85 Ill. App. 86; *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

**8. Re-enactment of Provisions of Statute 4 Anne.** — *Bordereaux v. Walker*, 85 Ill. App. 86; *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427; *Keeley Brewing Co. v. Mason*, 102 Ill. App. 381; *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17; *Northern Pac. R. Co. v. McClure*, 9 N. Dak. 73.

**9. Winestine v. Ziglatzki-Marks Co.**, 77 Conn. 404.

**10. Code Provisions for Action in Name of Real Party in Interest.** — *Broadwell v. Banks*, 134 Fed. Rep. 470.

**289.** 1. *Apportionment of Rent with Respect to Estate.* — *Chairs v. Coats*, 77 Miss. 846, 78 Am. St. Rep. 546; *Gribbie v. Toms*, 70 N. J. L. 525, *affirmed* (N. J. 1905) 59 Atl. Rep. 1117, and *following Farley v. Craig*, 11 N. J. L. 262, *explaining Ryerson v. Quackenbush*, 26 N. J. L. 236, and *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289; *Stern v. Sawyer*, (Vt. 1905) 61 Atl. Rep. 36.

**Consent of Tenant to Apportionment Not Required.** — *Gribbie v. Toms*, (N. J. 1905) 59 Atl. Rep. 1117, *affirming* 70 N. J. L. 522.

**2. Manner of Apportionment.** — *Gribbie v. Toms*, 70 N. J. L. 522 (apportionment is made according to value and area of the several portions).

**290.** 4. *Appointment Where Lease Is Termi-*

**291.** 10. Deposits and Securities by Tenant for Rent. — See note 2.

11. Defenses in Actions for Rent — *a.* DISCHARGE OF LIABILITY FOR RENT IN GENERAL — (1) *By Payment.* — See note 3.

**292.** (2) *By Accord and Satisfaction.* — See note 1.

(4) *By Release.* — See note 3.

**293.** (9) *Effect of Discharge in Insolvency or Bankruptcy.* — See note 5.

(10) *Effect of Assignment of Lease by Tenant* — (a) *Express Agreement to Pay Rent.* — See notes 6, 7, 8.

**294.** *b.* EFFECT OF SURRENDER ON LIABILITY FOR RENT — (1) *Rent to Accrue.* — See note 3.

**295.** See note 1.

nated by Lessee's Exercise of Option to Purchase. — *Withington v. Nichols*, 187 Mass. 575.

**291.** 2. Forfeiture of Lease — Tenant Held Entitled to Recover Balance After Payment of Accrued Rents. — *Hecklau v. Hauser*, 71 N. J. L. 478; *Michaels v. Fishel*, 51 N. Y. App. Div. 274, 31 Civ. Pro. (N. Y.) 29, *affirmed* 169 N. Y. 381; *D'Appuzzo v. Albright*, (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654; *Prince v. Jacobs*, 80 N. Y. App. Div. 243; *Cesar v. Robinson*, 174 N. Y. 492; *Goldberg v. Freeman*, (Supm. Ct. App. T.) 92 N. Y. Supp. 237.

Where a lease provided with regard to a deposit as security that such deposit was to be held "during the continuance of" the lease, in case the lessor ousts the lessee by summary proceedings his right to retain the deposit ceases. *Yannuzzi v. Grape*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 559.

**Forfeiture of Deposit** will not be enforced as liquidated damages for mere failure to pay rent. *Cesar v. Robinson*, 174 N. Y. 492. See also *D'Appuzzo v. Albright*, (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654; *Lesser v. Stein*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 349; *Adler v. Kramer*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 642; *Longobardi v. Yuliano*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 472.

**Set-off of Claim of Lessor Against Recovery of Deposit.** — *Sabinson v. Herter*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 439.

**Interest on Deposit.** — *Levy v. Shellsey*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 789.

**The Eviction of the Tenant** by the foreclosure of a prior mortgage entitles the tenant to a return of the deposit. *Degnario v. Sire*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 163.

**On Surrender of the Term**, the lessee is entitled to recover back a deposit made as security for the rent. *Carson v. Arvantes*, 27 Colo. 77.

**Right of Tenant to Require Application of Deposit to Rent in Arrear.** — *Brill v. Schlosser*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 247.

**3. Note as Payment of Rent.** — *Mulligan v. Hollingsworth*, 99 Fed. Rep. 216; *Spiro v. Barkin*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 87; *Macaulay v. Teller*, 15 Pa. Super. Ct. 527.

**Payment by Note of Sublessee.** — *Crow v. Burgin*, (Miss. 1905) 38 So. Rep. 625.

**Acceptance of Note for Rent Not Prima Facie Payment.** — *Price v. Coblitz*, 12 Ohio Cir. Dec. 34, 21 Ohio Cir. Ct. 732.

**Right of Tenant to Demand Receipt.** — *Plamondon v. Mathieu*, 16 Quebec Super. Ct. 32.

**Burden of Proving Payment Is on Tenant.** — *Montgomery v. Leuwer*, (Minn. 1905) 102 N. W. Rep. 367.

**292.** 1. **Accord and Satisfaction.** — *Talbott v. English*, 156 Ind. 299; *Stevens v. Beardsley*, 134 Mich. 506.

**3. Release — Not Presumed from Failure to Demand Rent.** — *Smith v. Heldman*, 93 Md. 343.

**293.** 5. See *Woodworth v. Harding*, 75 N. Y. App. Div. 54.

**6. Effect of Assignment by Lessee on Express Contract.** — *Laird v. Mantonya*, 83 Ill. App. 327; *Springer v. DeWolf*, 93 Ill. App. 260, *affirmed* 194 Ill. 218, 88 Am. St. Rep. 155; *Baltimore v. Peat*, 93 Md. 696; *Thompson's Estate*, 205 Pa. St. 555; *Stanford Land Co. v. Steidle*, 28 Wash. 72.

**7. Acceptance of Rent from Assignee.** — *Laird v. Mantonya*, 83 Ill. App. 327; *Hoerd v. Hahne*, 91 Ill. App. 514; *Hartford Deposit Co. v. Rector*, 92 Ill. App. 175, *affirmed* 190 Ill. 380; *Bradley v. Walker*, 93 Ill. App. 609; *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554.

**8. Assent of Lessor to Assignment.** — *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554.

**294.** 3. **Surrender Discharges Rent to Accrue — United States.** — *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. Rep. 639, 52 C. C. A. 335; *In re Winfield Mfg. Co.*, 137 Fed. Rep. 984.

*Arkansas.* — *Hayes v. Goldman*, 71 Ark. 251.

*Colorado.* — *Carson v. Arvantes*, 27 Colo. 77. *District of Columbia.* — *Okie v. Person*, 23 App. Cas. (D. C.) 170.

*Michigan.* — *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220.

*Minnesota.* — *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268.

*New York.* — *Ireland v. U. S. Mortgage, etc., Co.*, 72 N. Y. App. Div. 95, *affirmed* 175 N. Y. 491; *Crane v. Edwards*, 80 N. Y. App. Div. 333; *Ewing v. Barnard*, (Supm. Ct. App. T.) 84 N. Y. Supp. 137; *Vogel v. Hemming*, (Supm. Ct. App. T.) 84 N. Y. Supp. 473; *Isaacson v. Wolfensohn*, (Supm. Ct. App. T.) 84 N. Y. Supp. 555; *Morris v. Dayton*, (Supm. Ct. App. T.) 86 N. Y. Supp. 172; *Fleischmann Realty, etc., Co. v. Morison*, (Supm. Ct. App. T.) 88 N. Y. Supp. 128.

**Lease of Personalty.** — Under a lease pure and simple, of personalty, the return of the property during the term does not release the lessee from liability for the balance of rent due under the lease. *Nulton v. Campbell*, 15 Pa. Super. Ct. 151.

**295.** 1. **Surrender Between Rent Days.** — *Okie v. Person*, 23 App. Cas. (D. C.) 183, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d

**295.** (2) *Accrued Rents.* — See notes 3, 4.

Express Contract to Excuse Payment of Rent. — See note 7.

(3) *Surrender of Part of Premises.* — See note 9.**296.** See note 1.(4) *Effect of Surrender by Lessee on Liability of Subtenant.* — See notes 2, 3.

## c. EFFECT OF EVICTION UPON TENANT'S LIABILITY FOR RENT

— (1) *Total Eviction* — (a) *By Landlord.* — See note 8.**298.** (d) *Constructive Eviction.* — See note 5.(2) *Partial Eviction* — (a) *By Landlord.* — See note 6.**299.** (b) *Under Paramount Title.* — See note 1.**300.** (d) *Abandonment of Premises on Eviction from Part.* — See note 2.(3) *Deprivation of Easements.* — See note 3.(5) *Effect of Eviction upon Accrued Rent.* — See note 6.*Rent Payable in Advance.* — See note 7.ed.) 295; *Ireland v. U. S. Mortgage, etc., Co.*, 72 N. Y. App. Div. 95, *affirmed* 175 N. Y. 491.**295. 3. Accrued Rents Not Discharged by Surrender.** — *Forgotton v. Becker*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 816.**4. Rents Payable in Advance.** — *Okie v. Person*, 23 App. Cas. (D. C.) 183, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; *Kahn v. Rosenheim*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 192.**7. Express Contract to Discharge Accrued Rents.** — *Miller v. Dennis*, 68 N. J. L. 320.**9. Surrender of Part of Premises.** — See *Nichol v. McDonald*, 69 Ark. 341.**296. 1.** *Hewitt v. Hornbuckle*, 97 Ill. App. 97.2. *McDonald v. May*, 96 Mo. App. 236.**3. Effect of Surrender by Lessee on Liability of Subtenant.** — *McDonald v. May*, 96 Mo. App. 236, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296.**8. Eviction by Landlord Suspends Rent.** — *In re Mahler*, 105 Fed. Rep. 428; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Rappaport v. Miller*, 107 Ill. App. 350; *Osmer v. Furey*, 32 Mont. 581, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296; *Weiler v. Pancoast*, 71 N. J. L. 414; *Vogel v. Hemming*, (Supm. Ct. App. T.) 84 N. Y. Supp. 473; *Eschmann v. Atkinson*, (Supm. Ct. App. T.) 91 N. Y. Supp. 319. See also *Diocese of Montreal v. Kelly*, 20 Quebec Super. Ct. 19.A surety for the payment of rent is discharged as to future accruing rents. *Starkweather v. Maginnis*, 98 Ill. App. 143, *affirmed* 106 Ill. 274.**298. 5.** *Dennick v. Ekdahl*, 102 Ill. App. 199, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298; *Rubens v. Hill*, 213 Ill. 523; *Talbott v. English*, 156 Ind. 299; *Beakes v. Haas*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 706; *George A. Fuller Co. v. Manhattan Constr. Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219. See also *Silverman v. Lurie*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 734; *Coope v. Kollstade*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 113; *Marks v. Dellaglio*, 56 N. Y. App. Div. 299; *Seigel v. Neary*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297; *Hirsch v. Olmesdahl*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 757; *Butler v. Newhouse*, (Supm. Ct. App. T.) 85 N. Y. Supp.373; *Hall v. Irvin*, 78 N. Y. App. Div. 107, *reversing* (Supm. Ct. App. T.) 38 Misc. (N. Y.) 123.The fact that the lessor brought a suit in ejectment against a tenant, which was subsequently discontinued, will not prevent his recovery for rent subsequently accruing. *McCardell v. Miller*, 22 R. I. 96.**6. Partial Eviction by Landlord Suspends Entire Rent.** — *New York Dry Goods Store v. Pabst Brewing Co.*, 112 Fed. Rep. 381, 50 C. C. A. 295; *Okie v. Person*, 23 App. Cas. (D. C.) 170; *Talbott v. English*, 156 Ind. 299; *Moore v. Mansfield*, 182 Mass. 302; *Dolton v. Sickel*, 66 N. J. L. 160; *Sirey v. Braems*, 65 N. Y. App. Div. 472; *Hall v. Irvin*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 123, 78 N. Y. App. Div. 107; *Perniciaro v. Veniero*, (Supm. Ct. App. T.) 90 N. Y. Supp. 369, *following* *Hamilton v. Graybill*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 521. See also *Diocese of Montreal v. Kelly*, 20 Quebec Super. Ct. 19.**Effect of Subsequent Payment of Rent.** — *Seigel v. Neary*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297.**Minority Rule.** — *Anderson v. Winton*, 136 Ala. 422.**299. 1. Eviction by Grantee of Lessor.** — Where the lessor conveys a part of the reversion in the demised premises an eviction of the lessee by his grantee will not deprive the lessor of the right to recover rent according to apportionment for the part of the reversion to which he retains title. *Gribbie v. Toms*, (N. J. 1905) 59 Atl. Rep. 1117, *affirming* 70 N. J. L. 522.**Partial Eviction by Paramount Title.** — *Wood v. Sala y Fabrigas*, 105 La. 1.**Partial Eviction through Foreclosure of Trust Deed.** — *Cheairs v. Coats*, 77 Miss. 846, 78 Am. St. Rep. 546.**300. 2. Abandonment of Possession on Partial Eviction.** — *Anderson v. Winton*, 136 Ala. 422.3. See *Hall v. Irvin*, 78 N. Y. App. Div. 107, *reversing* 38 Misc. (N. Y.) 123.**6. Eviction Does Not Discharge Accrued Rent.** — *George A. Fuller Co. v. Manhattan Constr. Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219.**7. Rent Payable in Advance.** — *Sheehan v. Coyle*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 766.**Recovery of Rent Paid in Advance.** — *Mallette v. Hillyard*, 117 Ga. 423.

**301. d. FORFEITURE OF TERM DECLARED BY LESSOR — (1) In General.**  
— See note 6.

Provision for Continued Liability for Rent. — See notes 9, 10, 11.

**302. Accrued Rents.** — See note 1.

(2) *Dispossession of Tenant by Summary Proceedings.* — See notes 3, 4.

**303. e. CONDEMNATION OF PROPERTY UNDER POWER OF EMINENT DOMAIN — (4) Part of Demised Premises Taken.** — See notes 2, 3.

g. ABANDONMENT OF PREMISES BY TENANT — (1) *In General.* — See note 7.

**305. (3) Reletting Abandoned Premises.** — See notes 2, 4.

A Provision in a Lease. — See note 5.

h. EFFECT OF TENANT'S LOSS OF BENEFICIAL USE OF PROPERTY — (1) *In General.* — See note 6.

**301. 6. Enforcement of Forfeiture Discharges Subsequent Rents.** — *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. Rep. 639, 52 C. C. A. 335; *Weeks v. International Trust Co.*, 125 Fed. Rep. 370, 60 C. C. A. 236; *Watson v. Merrill*, (C. C. A.) 136 Fed. Rep. 359.

**9. Agreement in Lease for Continued Liability of Tenant.** — *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. Rep. 639, 52 C. C. A. 335; *Richardson v. Gordon*, (Mass. 1905) 74 N. E. Rep. 344; *McCready v. Lindenborn*, 172 N. Y. 400; *Baylies v. Ingram*, 181 N. Y. 518, *affirming* 84 N. Y. App. Div. 360; *Michaels v. Fishel*, 169 N. Y. 381.

**Duty to Relet.** — Where the lease provides that upon certain contingencies the lessor may re-enter and relet the premises at the risk of the lessee, in order that the lessor may hold the lessee for future rents after re-entry he must show an election to hold the premises and relet them at the risk of the lessee, and where the lessor re-enters and makes no attempt to relet the premises he cannot hold the lessee liable for subsequent rents. *Weeks v. International Trust Co.*, (C. C. A.) 125 Fed. Rep. 370, *reversing* 116 Fed. Rep. 898.

**10. Vogel v. Piper**, (N. Y. City Ct. Spec. T.) 89 N. Y. Supp. 431; *Woodbury v. Sparrell Print*, 187 Mass. 426.

**11. Credit for Amount Received on Reletting.** — *Law v. Uhrlaub*, 104 Ill. App. 263, *following* *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Evans v. Lincoln Co.*, 204 Pa. St. 448.

**302. 1. Accrued Rent Not Affected by Forfeiture.** — *Michaels v. Fishel*, 169 N. Y. 381.

**Rent Payable in Advance.** — *Ellis v. Rowbotham*, (1900) 1 Q. B. 740.

**Rent Paid in Advance** is not recoverable by the lessee in case of subsequent forfeiture. *Forgotton v. Brafman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 237.

**3. Summary Proceedings.** — *Michaels v. Fishel*, 169 N. Y. 381; *Adler v. Kramer*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 642.

**4. Rents to Accrue.** — *Michaels v. Fishel*, 51 N. Y. App. Div. 274, 169 N. Y. 381.

A provision in a lease authorizing the lessor to relet and hold the lessee for any deficiency of rents, etc., is valid and renders the lessee liable after summary proceedings. *Baylies v. Ingram*, 84 N. Y. App. Div. 360.

A mere demand for overdue rent, and notice to quit, required as a preliminary to the insti-

tution of summary proceedings to oust a tenant, does not of itself terminate the lease and release the lessee from liability for subsequent rents, where the summary proceedings are abandoned. *Woodworth v. Harding*, 75 N. Y. App. Div. 54.

A provision in a lease authorizing a tenant to "resume possession" in certain cases, and relet the premises for the remainder of the term on the tenant's account, he to remain liable for any deficiency in the rent, renders the tenant liable for such deficiency where the landlord gained possession by summary proceedings. *Landesman v. Hauser*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 603, *distinguishing* *Michaels v. Fishel*, 169 N. Y. 381. See also *Anzalone v. Paskusz*, 96 N. Y. App. Div. 188, *explaining* *Michaels v. Fishel*, 169 N. Y. 381.

**303. 2. Part of Premises Taken — Minority Rule.** — *McCardell v. Miller*, 22 R. I. 96.

**3.** Though only a part of the premises are taken under the power of eminent domain, still if the remaining portions are of no value to the lessee he may abandon such portions and escape further liability for rent. *Uhler v. Cowen*, 199 Pa. St. 316.

**7. Abandonment of Possession by Tenant.** — *McElroy v. Brooke*, 104 Ill. App. 220; *Weiner v. Baldwin*, 9 Kan. App. 772; *Bickford v. Kirwin*, 30 Mont. 1; *Landt v. Schneider*, 31 Mont. 15; *Dixon v. Silberblatt*, (Supm. Ct. App. T.) 86 N. Y. Supp. 262; *Frey v. Zabinski*, 10 Kulp (Pa.) 36; *McLean v. Caldwell*, 107 Tenn. 138.

**Rent Conditioned on Occupation and Use of Premises.** — *Ladd v. Hawkes*, 41 Oregon 247.

**305. 2. Reletting by Landlord.** — *Hayes v. Goldman*, 71 Ark. 251; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 75 Am. St. Rep. 181, *affirming* 83 Ill. App. 338; *Brown v. Cairns*, 63 Kan. 584; *Jodoin v. Demers*, 24 Quebec Super. Ct. 189.

**Permitting Third Persons to Occupy Abandoned Premises Temporarily Rent Free** is not a rescission of the lease. *Hardison Whisky Co. v. Lewis*, 114 Ga. 602.

**4. Gaffney v. Paul**, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 642.

**5. McElroy v. Brooke**, 104 Ill. App. 220; *Jones v. Rushmore*, 67 N. J. L. 157; *James v. Rubino*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 452; *Schwartz v. Brucato*, 57 N. Y. App. Div. 202; *Vogel v. Piper*, (N. Y. City Ct. Spec. T.) 89 N. Y. Supp. 431.

**6. Loss of Use of Premises.** — *Thomas v. Conrad*,

**306.** See notes 2, 4.

(2) *Accidental Destruction of Buildings* — (a) *In General*. — See note 7.

**307.** See note 2.

Inherent Defects. — See note 4.

**308.** (d) *Exception to Common-law Rule — Lease of Apartments*. — See note 8.

**309.** See note 1.

Rent Paid in Advance. — See note 2.

(f) *Unauthorized Entry by Landlord to Rebuild*. — See note 4.

(3) *Provisions in Lease with Regard to Subsequent Injuries to Premises* — (a) *In General*. — See note 5.

**310.** (b) *Construction of Provisions* — *bb. CONSTRUCTION OF PARTICULAR TERMS — "Untenantable" or Uninhabitable*. — See notes 6, 7.

**311.** *cc. NECESSITY FOR SURRENDER OF POSSESSION*. — See notes 4, 5.

**312.** *cc. RENT PAID IN ADVANCE*. — See note 5.

*gg. PROVISION FOR SUSPENSION OF RENT — LANDLORD REPAIRING*. — See note 8.

**313.** (4) *Statutes for Relief of Tenants* — (a) *In General*. — See note 1.

*Statutory Relief from Liability to Rebuild*. — See note 2.

(c) *"Otherwise Expressly Provided"*. — See note 9.

114 Ky. 841; *Sherman v. Ludin*, 79 N. Y. App. Div. 37; *Landau v. O. J. Gude Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 672 (inability of lessee of wall for advertising to put up particular kind of sign); *Diehl v. Watson*, 89 N. Y. App. Div. 445.

Where the lease of a building contains a covenant that the lessee shall use it for purposes of a saloon, the adoption of a local option law in the county in which the building is situated does not release the lessee from liability for rent for the balance of the term. *Houston Ice, etc., Co. v. Keenan*, (Tex. 1905) 88 S. W. Rep. 197. See also *San Antonio Brewing Assoc. v. Brents*, (Tex. Civ. App. 1905) 88 S. W. Rep. 368.

**Lease of Dam.** — Loss of beneficial use through commissioner's removal of gates, the dam being unsafe for want of repairs, is no defense to liability for rent. *Pratt v. Grafton Electric Co.*, 182 Mass. 180.

**306. 2. Premises Becoming Unfit for Habitation.** — *Watson v. Moulton*, 100 Ill. App. 560.

4. *Roth v. Adams*, 185 Mass. 341.

**7. Accidental Destruction of Buildings.** — *Gavan v. Norcross*, 117 Ga. 356; *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363; *Moran v. Bergin*, 111 Ill. App. 313; *Lieberthal v. Montgomery*, 121 Mich. 369; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 3 Va. Sup. Ct. 152; *Arbenz v. Exley*, 52 W. Va. 476, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306.

**307. 2. Destruction by Fire.** — *Stautz v. Protzman*, 84 Ill. App. 434; *Moran v. Bergin*, 111 Ill. App. 313; *Roberts v. Lynn Ice Co.*, 187 Mass. 402; *Lieberthal v. Montgomery*, 121 Mich. 369; *Schloss v. Schloss*, (Mich. 1904) 100 N. W. Rep. 392; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32; *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378.

**4. Inherent Defects in Building.** — *Watson v. Moulton*, 100 Ill. App. 560.

**308. 8. Lease of Apartments.** — *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363; *Jones v. J. W. Fowler Drug Co.*, (Ky. 1905) 85 S. W. Rep. 721, explaining *Helburn v. Mofford*, 7 Bush (Ky.) 169, and quoting 18 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 308; *Lieberthal v. Montgomery*, 121 Mich. 369; *Arbenz v. Exley*, 52 W. Va. 476, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 308.

**309. 1.** *Jones v. J. W. Fowler Drug Co.*, (Ky. 1905) 85 S. W. Rep. 721, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309.

**2. Rent Paid in Advance.** — *Compare Lieberthal v. Montgomery*, 121 Mich. 369.

**4. Rebuilding with Consent of Lessee.** — *Schloss v. Schloss*, (Mich. 1904) 100 N. W. Rep. 392.

**5. Construction of Particular Provisions in Lease.** — *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

**310. 6. Untenantable.** — *Block v. Katz*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 778; *Bowen v. Shackter*, (N. J. 1905) 60 Atl. Rep. 1111.

**7.** *Goetschius v. Shapiro*, (Supm. Ct. App. T.) 88 N. Y. Supp. 171.

**311. 4. Necessity for Tenant's Surrender of Possession.** — See *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

**5.** *American Bicycle Co. v. Hoyt*, 118 Wis. 273, approving *Kip v. Merwin*, 52 N. Y. 542.

Where a lease provides in case of destruction of premises by fire so as to render them untenable that the rent shall be suspended until the landlord repairs, the tenant is not required to surrender possession in order to claim a release from rent until repairs are made by the landlord. *Weinberg v. Savitzky*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 132.

**312. 5. Recovery of Rent Paid in Advance.** — *Werner v. Padula*, 167 N. Y. 611, affirming 49 N. Y. App. Div. 135.

**8. Landlord Repairing — Liability for Rent Reattaches.** — *Field v. Surpluss*, 83 N. Y. App. Div. 268.

**313. 1. Statutes.** — *May v. Gillis*, 169 N. Y. 330, reversing 53 N. Y. App. Div. 393; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 289, 3 Va. Sup. Ct. 152.

**2. Statute Relieving Tenant from Liability to Rebuild.** — *Arbenz v. Exley*, 52 W. Va. 476.

**8. "Otherwise Expressly Provided"** — *New York Statute.* — *May v. Gillis*, 53 N. Y. App.

**314.** See note 1.

(d) Cause of Destruction or Injury — Ordinary Repairs. — See note 4.

**315.** Condition Existing at Time of Letting. — See note 1.

Destruction or Injury through Fault of Tenant. — See note 3.

(e) Necessity for Surrender of Possession. — See note 4.

(f) What Constitutes Untenantable Condition. — See notes 5, 6.

**316.** (g) Effect upon Liability for Accrued Rents. — See note 2.

i. ILLEGALITY OF LEASE. — See notes 7, 8.

**317.** Prostitution. — See note 2.

Illegal Traffic. — See note 6.

Mere Knowledge of Intended Illegal Use. — See note 8.

**318.** Knowledge Acquired After Letting. — See note 1.

j. FRAUD OF LESSOR IN PROCUREMENT OF LEASE. — See notes

6, 7, 8.

**319.** Recoupment or Counterclaim. — See note 2.

Div. 393, reversed on other grounds 169 N. Y. 330; *Lehmeyer v. Moses*, 67 N. Y. App. Div. 531, affirming 174 N. Y. 518; *Roman v. Taylor*, 93 N. Y. App. Div. 449; *Weinberg v. Savitzky*, (Supm. Ct. App. T.) 47 Misc. N. Y. 132.

**314. 1. Effect of Covenant to Repair.** — See, however, *May v. Gillis*, 169 N. Y. 330, reversing 53 N. Y. App. Div. 393 (where the lessee covenanted to make all inside and outside repairs); *Markham v. David Stevenson Brewing Co.*, 104 N. Y. App. Div. 420.

Where the lease contained a general covenant by the lessee to repair, excepting therefrom, however, injuries from wear and tear and accidental destruction by fire, it was held that such covenant by the lessee did not take the lease out of the operation of the statute as regards repairs rendered necessary by the actual destruction of a part of the premises by fire. *Allen v. Fisher*, 66 N. J. L. 261.

**4. Failure to Make Ordinary Repairs.** — *Sherman v. Ludin*, 79 N. Y. App. Div. 37; *Prahar v. Tousey*, 93 N. Y. App. Div. 507; *Olmstead v. Tennessee Fixture, etc., Co.*, 1 Tenn. Ch. App. 653.

**315. 1. Condition Existing at Time of Letting.** — *Sherman v. Ludin*, 79 N. Y. App. Div. 37; *Prahar v. Tousey*, 93 N. Y. App. Div. 507.

**3. Making of Repairs by Lessor as Proof that Injuries Were Not Caused by the Negligence of Tenant.** — *Weeber v. Hayes*, 80 Minn. 476.

**4. Possession Must Be Surrendered by Tenant.** — *Lieberthal v. Montgomery*, 121 Mich. 369; *May v. Gillis*, 169 N. Y. 330; *Ernst v. Wheatley*, (Supm. Ct. App. T.) 93 N. Y. Supp. 1116; *Campbell v. Luck*, 25 Ohio Cir. Ct. 356.

In New Jersey the statute releases the lessee from liability to pay rent where the premises are injured by fire without the fault of the lessee, unless the landlord shall repair the same as speedily as possible, and the lessee where the lessor fails to repair promptly may remain in possession without liability for rent. *Allen v. Fisher*, 66 N. J. L. 261.

**5. Question for Jury.** — *May v. Gillis*, 169 N. Y. 330.

**6. Effect of Lessee's Continuance in Possession.** — *Ernst v. Wheatley*, (Supm. Ct. App. T.) 93 N. Y. Supp. 1116.

**316. 2. Werner v. Padula**, 167 N. Y. 611, affirming 49 N. Y. App. Div. 135.

**7. No Recovery of Rent on Illegal Lease.** —

*Shedlinsky v. Budweiser Brewing Co.*, 163 N. Y. 437.

**Recovery of Possession.** — The fact that the lease is illegal on grounds of public policy does not prevent the lessor from recovering possession after the termination of the lease. *Sittel v. Wright*, (C. C. A.) 122 Fed. Rep. 434.

A lease taken for the purpose of using the premises for an illegal purpose is void and the lessor may recover possession before the expiration of the term demised, and the occupation by the tenant and payment of rent periodically will not enable him to claim any rights as a periodical tenant so as to entitle him to notice to quit. *Berni v. Boyer*, 90 Minn. 469.

**Opening Judgment by Confession under Warrant of Attorney to Let in Defense of Illegality of Lease.** — *Fields v. Brown*, 188 Ill. 111.

**8. Lease for Use for Illegal Purpose.** — A lease providing for the unlawful occupancy of a portion of a sidewalk is illegal so as to prevent the recovery of rent thereon. *Heineck v. Grosse*, 99 Ill. App. 441.

**Lease of Building for Hotel Not Complying with Requirements of Law.** — *Hickey v. Sciutto*, 10 British Columbia 187.

**317. 2. Prostitution.** — *Demartini v. Anderson*, 127 Cal. 33; *Fields v. Brown*, 188 Ill. 111, reversing 89 Ill. App. 287; *Berni v. Boyer*, 90 Minn. 469.

**6. Illegal Traffic.** — *Gorman v. Keough*, 22 R. I. 47.

**8. Knowledge of Intended Unlawful Use.** — The mere fact that the lessor had knowledge that the lessee "wanted" to use the premises for an illegal purpose will not defeat a recovery for rent. *Frank v. McDonald*, 86 Ill. App. 336.

**318. 1. Knowledge Acquired After Letting.** — *Bannerman v. Consumers' Cordage Co.*, 14 Quebec Super. Ct. 75.

**6. Rescission for Fraud.** — *Haines v. Downey*, 86 Ill. App. 373; *Bauer v. Taylor*, (Neb. 1903) 96 N. W. Rep. 268; *Vogel v. Hemming*, (Supm. Ct. App. T.) 84 N. Y. Supp. 473.

**7. Forgiven v. Becker, (Supm. Ct. App. T.) 39 Misc. N. Y. 816.**

**8. Delay After Discovery of Fraud.** — *Oppenheimer v. Clunie*, 142 Cal. 313.

**319. 2. Recoupment or Counterclaim.** — *Van Brunt v. Wallace*, 88 Minn. 116; *Bauer v. Taylor*, (Neb. 1904) 98 N. W. Rep. 29, modify-

**321.** *k.* SET-OFF, RECOUPMENT, COUNTERCLAIM, AND FAILURE OF CONSIDERATION — (2) *In Actions to Recover Rent* — (b) *Recoupment* — *aa.* IN GENERAL. — See note 5.

**322.** *cc.* EFFECT OF PAYMENT OF INSTALMENTS OF RENT AFTER BREACH. — See note 3.

**323.** (c) *Counterclaim*. — See note 2.

(l) *BREACH BY LANDLORD OF STIPULATIONS IN LEASE* — (i) *Independent Stipulations*. — See note 4.

*Repairs*. — See note 5.

**324.** *Improvements*. — See note 1.

*Performance by Landlord Rendered Impossible by Act of Tenant*. — See note 4.

(2) *Dependent Agreements*. — See note 5.

*Abandonment of Premises*. — See note 7.

**325.** *m.* NECESSITY FOR ENTRY AND POSSESSION BY TENANT — (i) *In General*. — See note 2.

(2) *Possession Withheld by Landlord* — (a) *In General*. — See notes 6, 7.

**326.** (b) *Possession of Part of Premises Withheld*. — See notes 1, 4.

*In New York*. — See note 5.

*Use and Occupation*. — See note 7.

(3) *Possession Withheld by Third Person*. — See note 9.

**327.** VI. LANDLORD'S LIEN — 1. *At Common Law*. — See note 2.

2. *Lien Created by Agreement of Parties* — *a.* IN GENERAL. — See

note 4.

*mg Bauer v. Taylor*, (Neb. 1903) 96 N. W. Rep. 268.

**321.** 5. *Murphy v. Farley*, 124 Ala. 279; *Rubens v. Hill*, 213 Ill. 523; *Douglas v. Chesebrough Bldg. Co.*, 56 N. Y. App. Div. 403; *Saffer v. Levy*, (Supm. Ct. App. T.) 88 N. Y. Supp. 144; *Murst v. Benson*, 27 Tex. Civ. App. 227 (wrongful distress), (Tex. Civ. App. 1902) 71 S. W. Rep. 417 (wrongful distress); *Arbenz v. Exley*, 52 W. Va. 476; *Deuster v. Mittag*, 105 Wis. 459.

**322.** 3. See *French v. Burns*, 19 Pa. Super. Ct. 333.

**323.** 2. *Counterclaim*. — *Harmont v. Sullivan*, (Iowa 1905) 103 N. W. Rep. 951; *Hirsch v. Olmesdahl*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 757; *Beakes v. Holzman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 384; *Hurst v. Benson*, 27 Tex. Civ. App. 227.

*Tort*. — Counterclaim for tort by lessor cannot be interposed against recovery for rent. *George A. Fuller Co. v. Manhattan Constr. Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219.

In an action for rent the tenant may counterclaim for damages suffered by the negligence of the landlord in making repairs gratuitously undertaken. *Mann v. Fuller*, 63 Kan. 664.

**4.** *Breach by Lessor of Independent Stipulations*. — *Rohrer v. Babcock*, 126 Cal. 222; *Arbenz v. Exley*, 52 W. Va. 476.

Where a lease provides that the landlord shall furnish heat to render the premises comfortable, for a sum in addition to rent, he cannot recover for heat furnished if he fails to furnish a sufficient amount of heat to render the premises comfortable. *Filkins v. Steele*, 124 Iowa 742.

**5.** *Breach of Landlord's Agreement to Repair*. — *Rubens v. Hill*, 213 Ill. 523; *Piper v. Fletcher*, 115 Iowa 263; *Jefferson Real Estate Co. v. Hiller*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 784.

**324.** 1. *Improvements*. — *Morningstar v.*

*Querens*, (Ala. 1904) 37 So. Rep. 825; *Malick v. Kellogg*, 118 Wis. 405 (breach of agreement to make improvements).

**4.** *Metropolitan L. Ins. Co. v. Standard Nat. Bank*, 44 N. Y. App. Div. 319, *affirming* (Supm. Ct. Tr. T.) 57 N. Y. Supp. 797.

**5.** *Breach by Lessor of Dependent Agreements*. — *Lincoln Trust Co. v. Nathan*, 175 Mo. 32.

**7.** *Right of Tenant to Abandon Premises*. — *Rogers v. Babcock*, (Mich. 1905) 102 N. W. Rep. 636.

*Failure to Heat Premises*. — *Filkins v. Steele*, 124 Iowa 742 (failure to heat); *Butler v. Newhouse*, (Supm. Ct. App. T.) 85 N. Y. Supp. 373.

**325.** 2. *Hudson v. Stewart*, 110 Ga. 37; *Jordan v. Indianapolis Water Co.*, 159 Ind. 337.

**6.** See *Moore v. Guardian Trust Co.*, 173 Mo. 218.

**7.** *Murphy v. Farley*, 124 Ala. 279.

**326.** 1. *Moore v. Mansfield*, 182 Mass. 302.

**4.** *Rieger v. Welles*, 110 Mo. App. 166.

**5.** *Sullivan v. Schmitt*, 93 N. Y. App. Div. 469; *Smith v. Barber*, 96 N. Y. App. Div. 236.

**7.** *Moore v. Mansfield*, 182 Mass. 302.

**9.** *Smith v. Barber*, 96 N. Y. App. Div. 236.

**327.** 2. *No Landlord's Lien at Common Law*. — *Morse v. Morrison*, 16 Colo. App. 449; *Springer v. Lipsis*, 110 Ill. App. 109, *affirmed* 209 Ill. 261; *Rowlands v. Voelching*, 115 Wis. 352.

**4.** *Lien Reserved in Lease*. — *Faxon v. Ridge*, 87 Mo. App. 299.

Where a lease expressly gives the landlord a lien on the crops and contains no explicit authority to him to sell and collect the proceeds, the mere recital that "cotton crop to be sold at the most profitable market and Z.'s (the landlord) part to be paid over to the person he may direct," does not deprive the landlord of his lien. *Zapp v. Davidson*, 21 Tex. Civ. App. 566.

*Property Affected by Lien*. — *Brown v. Neilson*, 61 Neb. 765, 87 Am. St. Rep. 525.

- 328.** *c.* RESERVATION OF TITLE TO CROPS. — See note 7.  
*d.* NATURE OF LIEN. — See note 9.
- 329.** *e.* PROPERTY SUBJECT TO LIEN — Future-acquired Property. — See note 6.
- 330.** *f.* AGAINST WHOM LIEN WILL BE ENFORCED — Recording. — See note 4.
- 331.** See note 5.  
*h.* ENFORCEMENT OF LIEN. — See note 9.
- 332.** Remedy on Sale by Tenant. — See note 3.  
 By Whom Enforced. — See note 4.
- 3.** Statutory Liens — *a.* LIEN FOR RENT — (1) *In General* — Lien on Chattels. — See note 5.  
 Lien on Crops. — See note 6.
- 333.** See note 1.  
 Crops of Subtenants. — See note 5.
- 335.** (4) *When Lien Attaches.* — See note 3.  
 (5) *Lien Independent of Remedy for Enforcement.* — See note 5.  
 (6) *Indebtedness Secured by Lien* — (a) *In General.* — See note 6.
- 336.** See notes 1, 2, 5.

**328.** 7. Reservation of Title to Crops. — *Summerville v. Stockton Milling Co.*, 142 Cal. 529; *Tuohy v. Linder*, 144 Cal. 790.

Record of Lease. — See, however, *Kelley v. Goodwin*, 95 Me. 538; *McNeal v. Rider*, 79 Minn. 153, 79 Am. St. Rep. 437.

9. In Nature of Chattel Mortgage. — *Faxon v. Ridge*, 87 Mo. App. 299.

**329.** 6. Property Does Not Include Future-acquired Property. — *Downey v. Chicago Title, etc., Co.*, 86 Ill. App. 664.

**330.** 4. Necessity for Recording Lease. — *Wilkinson v. Thorp*, 128 Cal. 221; *Kelley v. Goodwin*, 95 Me. 538.

**331.** 5. *Holmes v. Holifield*, 97 Ill. App. 185.  
 9. In enforcing a lien the court need not retain more of the crops than is necessary to satisfy the claim for rent. *Momrich v. Schwartz*, (Neb. 1903) 96 N. W. Rep. 636.

**332.** 3. No Action Against Purchaser for Price. — *Compare Sowles v. Martin*, 76 Vt. 180.

4. Lien Enforceable by Assignee of Rent. — *Ramsey v. Johnson*, 8 Wyo. 476, 80 Am. St. Rep. 948, denying rehearing 7 Wyo. 392.

5. Lien on Chattels. — *Becker v. Dalby*, (Iowa 1901) 86 N. W. Rep. 314; *Staber v. Collins*, 124 Iowa 543; *Villere v. Shaw*, 108 La. 71; *Allard v. Charlebois*, 15 Quebec Super Ct. 517.

The *Colorado* statute (Mills's Annot. Stat., § 2854) giving the keeper of any hotel, tavern, or boarding house, or any person who rents furnished or unfurnished rooms, a lien on the baggage and furniture of their guests and tenants for such boarding, lodging, or rent, does not give to a lessor of a room in an office building a lien. *Morse v. Morrison*, 16 Colo. App. 449.

6. Lien on Crops. — *Stadel v. Aikins*, 65 Kan. 82; *Harvey v. Hampton*, 108 Ill. App. 501; *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. Rep. 654; *Dunlap v. Dunseth*, 81 Mo. App. 17; *Lane v. Pollard*, 88 Mo. App. 326; *Wright v. Davis*, (Tex. Civ. App. 1902) 68 S. W. Rep. 181; *Edwards v. Anderson*, 36 Tex. Civ. App. 611.

Hay. — A landlord may have a lien on hay under a statute giving a lien on crops. *State v. Crook*, 132 N. Car. 1053.

Lease of Homestead. — Under the *Arizona* statute providing that "every landlord shall have a lien on the crops grown or growing upon homestead premises for rent thereof," the landlord is only entitled to a lien where the premises demised constitute a homestead. *Hoopes v. Brier*, (Ariz. 1905) 80 Pac. Rep. 327.

**333.** 1. Lien Extends to Whole of Crop. — *Shealy v. Clark*, 117 Ga. 794; *Harvey v. Hampton*, 108 Ill. App. 501; *Nessley v. Taylor*, 63 Kan. 674.

5. Crops of Subtenants. — *Hudson v. Stewart*, 110 Ga. 37; *Rousey v. Mattox*, 111 Ga. 883; *Barlow v. Jones*, 117 Ga. 412; *State v. Crook*, 132 N. Car. 1053; *Edwards v. Anderson*, 36 Tex. Civ. App. 611. See also *Hatchell v. Chandler*, 62 S. Car. 380.

Where a tenant sublets a part of the demised premises and the landlord accepts from the subtenant payment of rent for the part so sublet, it has been held that he could not enforce a lien for the rent of the balance of the premises against the crops of the subtenant. *Smith v. Price*, 22 Tex. Civ. App. 296.

Landlord's Consent to Subletting No Estoppel to Claim of Lien. — *Trout v. McQueen*, (Tex. Civ. App. 1901) 62 S. W. Rep. 928.

**335.** 3. Lien on Crops. — *Dunlap v. Dunseth*, 81 Mo. App. 17.

5. *Harvey v. Hampton*, 108 Ill. App. 501.

6. Lien for Rent Only. — *Miller v. Newbauer*, (Tex. Civ. App. 1901) 61 S. W. Rep. 974. *Compare In re Mercier*, 3 Quebec Pr. 483.

Arrears of Rent on Prior Lease Not Covered by Lien. — *Sioux City First Nat. Bank v. Flynn*, 117 Iowa 493.

Unpaid Rent of Prior Year. — Lien on crops of one year is subject under the *Alabama* statute to lien for unpaid rent of prior year. *Bush v. Willis*, 130 Ala. 395.

**336.** 1. The Phrase "Other Obligations of the Lease." — *Harvey v. Hampton*, 108 Ill. App. 501.

2. Crop Lien Restricted to Current Year. — *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. Rep. 654.

5. Limited to One Year. — Where there are in-



**336.** (b) *Rent Payable in Kind or in Cash.* — See note 6.

(f) *Rents to Accrue.* — See note 11.

**337.** (7) *Property Subject to Lien* — (a) *In General.* — See note 4.  
*Insurance Money.* — See note 6.

(c) *Property of Third Persons.* — See note 13.

**338.** *In Louisiana.* — See note 4.

**339.** (8) *Who May Enforce Lien* — *Assignee of Rent Note.* — See note 9.

**340.** See note 1.

(g) *Waiver and Loss of Lien* — (a) *In General* — *By Express Agreement.*

— See notes 2, 3.

**341.** *The Recovery of a Judgment by the Landlord for Rent.* — See note 2.

(b) *Estoppel.* — See notes 4, 5, 6, 7.

(a) *Taking Special Security for Rent.* — See note 9.

**342.** (f) *Abandonment of Distress or Attachment Proceedings.* — See note 5.

dependent yearly leases, the lien for the rent of one year does not cover rent in arrears from prior year. *Church v. Bloom*, 111 Iowa 319.

**336.** 6. *Rent in Cash or in Kind.* — *Harvey v. Hampton*, 108 Ill. App. 501.

11. *Rent to Accrue — Tenancy at Will.* — *German State Bank v. Herron*, 111 Iowa 25.

**337.** 4. *Property Subject to Lien.* — *Becker v. Dalby*, (Iowa 1901) 86 N. W. Rep. 314; *Miller v. Newbauer*, (Tex. Civ. App. 1901) 61 S. W. Rep. 974.

*Exempt Property Left on Premises After Termination of Tenancy.* — *Bacon v. Carr*, 112 Iowa 193.

*Buildings.* — *Union Water Power Co. v. Chabot*, 93 Me. 339.

*Proceeds of Hotel License — Landlord Has No Lien Thereon.* — *Cusson v. Vaillancourt*, 5 Quebec Pr. 88.

*A License to Sell Liquor* not being subject to distress, the landlord has no lien thereon in *Pennsylvania*. *In re Myers*, 102 Fed. Rep. 869.

6. *Vaughan v. Pelletier*, 15 Quebec Super. Ct. 123.

13. *Property Must Belong to Tenant.* — *Lupton v. Hughes*, 2 Penn. (Del.) 515.

**338.** 4. *Goods of a Sublessee.* — *Allard v. Charlebois*, 15 Quebec Super. Ct. 517; *Hamilton v. Dwyer*, 16 Quebec Super. Ct. 469.

**339.** 9. *Lien Enforced in Equity.* — *Hatchett v. Miller*, (Tex. Civ. App. 1899) 53 S. W. Rep. 357, *distinguishing* *Manis v. Flood*, 19 Tex. Civ. App. 591.

**340.** 1. *Statutes Giving Assignee Remedies of Landlord.* — *Bennett v. McKee*, (Ala. 1905) 38 So. Rep. 129; *Grossman v. Sanders*, 114 La. 958.

*In Camp v. West*, 113 Ga. 304, it was held that where a landlord assigned rent notes before his lien for rent had attached, his assignee could not enforce a lien to secure payment of the notes after eviction of the tenant by title paramount.

2. *Waiver of Lien.* — *Trout v. McQueen*, (Tex. Civ. App. 1901) 62 S. W. Rep. 928.

Where the lease provides that the tenant shall market the crops and pay the rent from the proceeds, the landlord waives his lien. *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300.

*Consideration for Waiver.* — *Fishbaugh v. Spunangle*, 118 Iowa 337.

3. *British, etc., Mortg. Co. v. Cody*, 135 Ala. 622; *Dreyfus v. Gage*, 84 Miss. 219; *Alexander v. Zeigler*, 84 Miss. 560.

*Consideration* is not essential to validity of waiver as against third persons. *Wimp v. Early*, 104 Mo. App. 85.

*Waiver of Lien Need Not Be in Writing.* — *Wimp v. Early*, 104 Mo. App. 85.

*Right of Assignee of Mortgage to Claim Waiver.* — *Nealey v. Phillips*, 70 Ark. 90.

**341.** 2. *Recovery of Judgment — Lien Held to Have Been Waived.* — *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45, *citing* previous Texas decisions.

4. *Estoppel.* — See *Sammis v. Poole*, 89 Ill. App. 118, *affirmed* 188 Ill. 396.

*Permitting Tenant to Appropriate Part of Crop Not Waiver of Lien on Balance.* — *Johnston v. Kleinsmith*, 33 Tex. Civ. App. 236.

*Estoppel Against Holder of Rent Notes.* — *Dreyfus v. Gage*, 84 Miss. 219.

5. *Consent of Landlord to Removal and Sale of Property.* — *Wimp v. Early*, 104 Mo. App. 85; *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300; *Fishbaugh v. Spunangle*, 118 Iowa 337; *Randall v. Ditch*, 123 Iowa 582.

The mere fact, however, that the lessor permitted the tenant to make other sales of other crops in another market and to other purchasers is not a waiver of his lien on the balance of the crops. *Sanger v. McGee*, 29 Tex. Civ. App. 397.

6. *Failure to Object.* — *Johnson v. Kincaid*, (Tex. Civ. App. 1904) 81 S. W. Rep. 536.

This rule does not, of course, apply where the lessor had no knowledge of the intended sale by the tenant. *Villere v. Shaw*, 108 La. 71.

7. *Ratifying Appropriations to Tenant's Creditors.* — *The Receipt of a Part of the Proceeds of crops sold by the tenant is a waiver of the lien.* *Planters' Compress Co. v. Howard*, 35 Tex. Civ. App. 300.

*Ignorance of Source of Money — Lien Not Waived.* — *Noe v. Layton*, 69 Ark. 551.

9. *Taking Special Security for Rent.* — *Wimp v. Early*, 104 Mo. App. 85.

**342.** 5. *Abandonment of Proceedings to Enforce Lien.* — *Jackson v. Corley*, 30 Tex. Civ. App. 417. See also *McBride v. Puckett*, (Tex. Civ. App. 1901) 66 S. W. Rep. 242. See, however, *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45, *applying* *Wise v. Old*, 57 Tex. 514.

- 342.** (g) Removal of Goods from Premises. — See note 7.  
 (h) Expiration of Term. — See note 10.
- 343.** (10) *Against Whom Lien Will Be Enforced — Priorities* — (a) In General. — See note 3.
- 344.** Illustrations of Doctrine. — See notes 2, 3, 5, 6.
- 345.** (b) Purchasers with Notice. — See notes 1, 2, 3.  
 (c) Bona Fide Purchasers Without Notice. — See notes 4, 5.
- 346.** (d) Purchasers of Property Kept by Tenant for Sale. — See note 2.  
 (e) Incumbrances Prior to Attachment of Landlord's Lien. — See note 5.  
 Conveyance and Lease After Mortgage. — See note 6.  
 Renewing Lease. — See note 7.
- 347.** Property Mortgaged and Placed on Premises After Lease Thereof. — See note 1.  
 (f) Property Shipped Out of State. — See note 2.  
 (g) Necessity for First Pursuing Property Retained by Tenant. — See note 5.

**342. 7. Landlord Consenting to Removal No Waiver.**—American Cotton Co. v. Phillips, 31 Tex. Civ. App. 79 (lien may be enforced within thirty days after removal).

10. Harvey v. Hampton, 108 Ill. App. 501; Villere v. Shaw, 108 La. 71.

**343. 3. Superiority of Landlord's Lien.**—Bigham v. Cross, 69 Ark. 581; Barlow v. Jones, 117 Ga. 412; Staber v. Collins, 124 Iowa 543.

**Laborer's Lien.**—In *Georgia* a landlord's lien has, it seems, priority over the lien of a laborer helping tenant make the crop. Rousey v. Mattox, 111 Ga. 883.

But in *Iowa* the employees of the tenant have a lien on the crops which is superior to the landlord's lien. Stuart v. Twining, 112 Iowa 154.

**A Lien for Advances** is inferior to the landlord's lien. Goodwin v. Mitchell, (Miss. 1905) 38 So. Rep. 657.

**344. 2. Mortgagees.**—Bigham v. Cross, 69 Ark. 581; Staber v. Collins, 124 Iowa 543; Dunlap v. Dunseth, 81 Mo. App. 17; Auxvasse Milling Co. v. Cornet, 85 Mo. App. 251; Lane v. Pollard, 88 Mo. App. 326.

**Mortgage to Secure Advances to Tenant.**—British, etc., Mortg. Co. v. Cody, 135 Ala. 622.

**3. Preference Limited to Rent to Become Due During the Current Year.**—*In re* Bulmer, 22 Quebec Super. Ct. 46.

**5. Attaching Creditors.**—Beattyville Coal Co. v. Moore, (Ky. 1900) 55 S. W. Rep. 911.

**6. Judgment and Execution Creditors.**—Staber v. Collins, 124 Iowa 543; Nessley v. Taylor, 63 Kan. 674; Irion v. Bexar County, 26 Tex. Civ. App. 527.

**345. 1. Purchasers with Notice.**—Harvey v. Hampton, 108 Ill. App. 501; Staber v. Collins, 124 Iowa 543; Aikins v. Stadell, 9 Kan. App. 298; Hardy v. Mathews, 101 Mo. App. 708.

**2. Notice of Facts Which Ought to Put Purchaser on Inquiry.**—Pape v. Steward, 69 Ark. 306; Judge v. Curtis, 72 Ark. 132; Stadell v. Aikins, 65 Kan. 82, *approving* Scully v. Porter, 57 Kan. 322; Villere v. Shaw, 108 La. 71.

**Misrepresentation by the Tenant to a purchaser as to the payment of rent** does not affect the landlord's lien. Williams v. De Lisle Store Co., 104 Mo. App. 567.

**3. Notice that Crops Were Raised on Leased Premises.**—Bush v. Willis, 130 Ala. 395; Pape v. Steward, 69 Ark. 306; Noe v. Layton, 69

Ark. 551; Belshe v. Batdorf, 98 Mo. App. 627; Harvey v. Hampton, 108 Ill. App. 501; Stadell v. Aikins, 65 Kan. 82.

But notice merely that the vendor of crops lived on rented property, without knowledge that the crops sold were grown thereon, is not sufficient to charge the purchaser with notice of the right of the landlord to a lien on the crops for rent. Castleman v. Harris, 86 Mo. 270.

**4. Purchasers Without Notice Not Protected.**—Fishbaugh v. Spunaugle, 118 Iowa 337; Staber v. Collins, 124 Iowa 543; Ball v. Sledge, 82 Miss. 749, 100 Am. St. Rep. 654; Jackson v. Corley, 30 Tex. Civ. App. 417; American Cotton Co. v. Phillips, 31 Tex. Civ. App. 79, *following* Mathews v. Burke, 32 Tex. 434.

**5. Purchasers Without Notice Protected.**—Lupton v. Hughes, 2 Penn. (Del.) 515; Castleman v. Harris, 86 Mo. App. 270.

**Notice Before Payment.**—If the purchaser has notice of the landlord's lien before he has paid the purchase price he will not be entitled to protection. Pape v. Steward, 69 Ark. 306.

**346. 2. Merchandise Kept for Sale.**—Liggett v. Viau, 18 Quebec Super. Ct. 201 (*sale en bloc* of merchandise injured by fire).

**5. Incumbrances Prior to Attachment of Landlord's Lien.**—Gasnick v. Steffensen, 112 Iowa 688.

**Unrecorded Mortgage Held Inferior to Landlord's Lien.**—Liquid Carbonic Acid Mfg. Co. v. Lewis, 32 Tex. Civ. App. 481, *following* Austin v. Welch, 31 Tex. Civ. App. 526.

6. See Staber v. Collins, 124 Iowa 543.

**Mortgage on Crops to Be Planted Thereafter.**—Shows v. Brantley, 127 Ala. 352.

**7. Renewing Lease.**—The fact that the lease provides for the renewal at the option of the tenant does not change the rule. Gasnick v. Steffensen, 112 Iowa 688.

**Quasi Renewal by Failure to Terminate Tenancy at Will.**—German State Bank v. Herron, 111 Iowa 25, *approving* Thorpe v. Fowler, 57 Iowa 541.

**347. 1. Union Water Power Co. v. Chabot,** 93 Me. 339 (lien on building under Mass. Stat.). See also Allen v. Brunner, 33 Tex. Civ. App. 128.

**2. Notice or Want of Notice.**—Ball v. Sledge, 82 Miss. 749, 100 Am. St. Rep. 654, *following* Millsaps v. Tate, 75 Miss. 150.

**5. Compare** Dermidy v. Interstate Grain Co., (Iowa 1901) 86 N. W. Rep. 30.

- 347.** (h) *Tenant's Right of Sale Subject to Lien.* — See note 6.  
 (11) *Enforcement and Protection of Lien* — (a) *In General.* — See notes 8, 9.
- 348.** (b) *Enforcement by Attachment.* — See note 1.  
*Exclusiveness of Remedy by Attachment.* — See note 3.  
 (c) *Enforcement by Distress.* — See note 5.  
 (e) *Enforcement by Suit to Foreclose.* — See note 7.
- 349.** (f) *Injunction.* — See note 1.  
 (g) *Landlord's Title to and Right to Possession of Property Subject to Lien, and Remedies Incident Thereto* — *aa. IN GENERAL.* — See notes 2, 4.
- 350.** *bb. RIGHTS OF LANDLORD AGAINST PERSON RECEIVING PROPERTY FROM TENANT* — (aa) *In General.* — See note 1.  
*Assumpsit.* — See notes 5, 6.  
*(bb) Action on Case.* — See note 7.
- 351.** (cc) *Statutory Action.* — See note 3.  
*b. LIEN FOR ADVANCES* — (1) *In General.* — See note 13.
- 352.** (2) *Advances Must Be Made by Landlord.* — See note 2.

**347.** 6. *Compare* *Leverett v. Meeks*, (Tex. Civ. App. 1902) 68 S. W. Rep. 302.

**8. Lien Must Be Enforced by Process of Law.** — *Hall v. McGaughey*, 114 Ga. 405; *Knowles v. Stegall*, 120 Ga. 451; *Auxvasse Milling Co. v. Cornet*, 85 Mo. App. 251.

**9.** *Hall v. McGaughey*, 114 Ga. 405; *Dunlap v. Dunseth*, 81 Mo. App. 17.

**348.** 1. *Attachment.* — *Southern R. Co. v. Sarratt*, 58 S. Car. 98.

**3. Remedy by Attachment Not Exclusive.** — *Staber v. Collins*, 124 Iowa 543.

**5. Distress Before Rent Due.** — A chattel mortgage given by the tenant on the crops is not a sale within the *Illinois* statute authorizing distress before rent is due. The sale contemplated by the statute is an absolute one, that carries with it the landlord's right of possession and removal from the premises and one in which such right of removal is or is about to be effectuated. *Hill v. Coats*, 109 Ill. App. 266.

**7. Suit in Equity.** — *Cardwell v. Masterson*, 27 Tex. Civ. App. 591; *Jackson v. Corley*, 30 Tex. Civ. App. 417; *Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45.

**349.** 1. *Injunction.* — *Wallin v. Murphy*, 117 Iowa 640.

*Injunction Against Feeding Crops* as well as removal granted. *Gray v. Bremer*, 122 Iowa 110.

**2. No Right to Take Possession of Property.** — *Hilman v. Brigham*, 117 Iowa 70. But see *Wester v. Long*, 63 Kan. 876.

**4. Replevin by Landlord.** — But see *Nessley v. Taylor*, 63 Kan. 674, holding that the landlord may maintain replevin by virtue of his lien.

**350.** 1. *No Action Founded on Right of Possession or Property.* — But when the landlord is constructively in possession of property subject to his lien, he may sue in replevin, if the tenant removes it. *Abington v. Steinberg*, 86 Mo. 639 (replevin).

**5. Assumpsit on an Implied Contract** may be maintained where the purchaser had notice of the landlord's lien. *Crane v. Murray*, 106 Mo. App. 697.

**6.** *Shealy v. Clark*, 117 Ga. 794.

**7. Action on Case — England.** — *Wren v. Stokes*, (1902) 1 Ir. R. 167.

*Alabama.* — *King v. Henderson*, (Ala. 1905) 38 So. Rep. 118; *Baker v. Cotney*, (Ala. 1905) 38 So. Rep. 131.

*Arkansas.* — *Judge v. Curtis*, 72 Ark. 132.

*Illinois.* — *Harvey v. Hampton*, 108 Ill. App. 501.

*Iowa.* — *Church v. Bloom*, 111 Iowa 319; *Dermidy v. Interstate Grain Co.*, (Iowa 1901) 86 N. W. Rep. 30; *Staber v. Collins*, 124 Iowa 543.

*Mississippi.* — *Ball v. Sledge*, 82 Miss. 749, 100 Am. St. Rep. 654.

*Missouri.* — *Hopper v. Hays*, 82 Mo. App. 494.

*South Carolina.* — *Parks v. Laurens Cotton Mills*, 70 S. Car. 274.

*Texas.* — *Cardwell v. Masterson*, 27 Tex. Civ. App. 591; *Wright v. Davis*, (Tex. Civ. App. 1902) 68 S. W. Rep. 181; *Jackson v. Corley*, 30 Tex. Civ. App. 417; *Mensing v. Cardwell*, 33 Tex. Civ. App. 16, following *Zapp v. Johnson*, 87 Tex. 641.

**351.** 3. *Statutory Action.* — *Stadel v. Aikins*, 65 Kan. 82; *Aikins v. Stadel*, 9 Kan. App. 298; *Darby v. Jorndt*, 85 Mo. App. 274; *Castleman v. Harris*, 86 Mo. App. 270; *Belshe v. Batdorf*, 98 Mo. App. 627; *Williams v. De Lisle Store Co.*, 104 Mo. App. 567.

*Rights Between Tenant and Purchaser.* — *Hardy v. Mathews*, 101 Mo. App. 708.

**13. Statutory Lien for Advances.** — *Neal v. Brandon*, 70 Ark. 79; *Vaughn v. Strickland*, 108 Ga. 659; *Argo v. Fields*, 112 Ga. 677; *Thomsen v. Tilton*, (Ky. 1900) 59 S. W. Rep. 485; *Powell v. Perry*, 127 N. Car. 22; *Groesbeck v. Evans*, (Tex. Civ. App. 1904) 83 S. W. Rep. 430.

*Necessity for Relation of Landlord and Tenant.* — *Noe v. Layton*, 69 Ark. 551 (under cropping contract owner has lien for advances); *Saterfield v. Moore*, 110 Ga. 514.

*Sublessor Entitled to Lien as a Landlord.* — *Perry v. Perry*, 127 N. Car. 23.

*Constitutional Law* — *South Carolina Statute Held Constitutional.* — *State v. Elmore*, 68 S. Car. 140.

**352.** 2. *Supplies Must Be Furnished by Landlord.* — Where a rent contract is made with A, "trustee," as landlord, he may foreclose a

**352.** (3) *Indebtedness Covered by Lien.* — See notes 6, 7.

**353.** *Advances for Preceding Years.* — See note 2.

(4) *Priority of Lien.* — See note 4.

(5) *Advances by Third Persons.* — See note 6.

VII. TERMINATION OF TENANCY IN GENERAL — 2. By Merger. — See

note 10.

**354.** 3. By Abandonment. — See note 2.

**355.** 7. By Destruction of Demised Premises. — See note 9.

VIII. SURRENDER — 1. Definition. — See note 15.

**356.** 2. To Whom to Be Made. — See note 2.

Agent. — See note 7.

**357.** 3. By Whom to Be Made. — See note 2.

Colessee. — See note 5.

Agent. — See note 6.

4. How Made — a. SURRENDER IN FACT — (1) *In General.* — See notes 8, 10.

Agreement to Surrender. — See note 12.

lien in his own name for money furnished the tenant, as landlord, with which to make the crop, though the land and such money belonged to another whom he represented in the transaction. *Fargason v. Ford*, 119 Ga. 343.

The Supplies Need Not Be Furnished Directly by the Landlord, but if they are furnished on his credit they are an "advancement" by him and entitled to the protection of the landlord's lien under the *North Carolina* statute. *Powell v. Perry*, 127 N. Car. 22.

**352.** 6. Items for Pasturage of Stock or Hire of Teams, not used in cultivation of crop, are not advances for which the landlord may claim a lien. *Tucker v. Thomas*, 35 Tex. Civ. App. 499.

7. Mules. — The lien does not cover a sum agreed to be paid by the tenant in case of the death of mules furnished to the tenant. *Bush v. Willis*, 130 Ala. 395.

**353.** 2. In Alabama the Balance Unpaid in Any Year. — *Bush v. Willis*, 130 Ala. 395, construing Civ. Code Ala. (1896), § 2705, following *Cockburn v. Watkins*, 76 Ala. 486.

4. Priority of Lien. — *Neal v. Brandon*, 70 Ark. 79; *Perry v. Perry*, 127 N. Car. 23 (mortgage of crop).

6. Advances by Third Persons. — The assignment by the landlord of the rents to accrue under a lease does not create the relation of landlord and tenant between the assignee and the tenant, and therefore such assignee is not entitled to a landlord's lien for advances to the tenant. *State v. Elmore*, 68 S. Car. 140.

The Assignee of a Rent Note is not entitled to a landlord's lien for advances, though the tenant promised to recognize him as landlord. *Coker v. Britt*, 78 Miss. 583.

10. *Tolsma v. Adair*, 32 Wash. 383.

**354.** 2. Abandonment by Tenant. — *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696; *Marshall v. Forest Oil Co.*, 198 Pa. St. 83.

Recovery of Damages by Landlord. — *McCready v. Lindenborn*, 63 N. Y. App. Div. 106, affirmed 172 N. Y. 400.

**355.** 9. *Gavan v. Norcross*, 117 Ga. 356; *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

A Partial Destruction of the building without the destruction of the apartment leased does not terminate the tenancy, but the lessee is entitled to continue in the occupancy of the apartment. *Jones v. J. W. Fowler Drug Co.*, (Ky. 1905) 85 S. W. Rep. 721.

15. Definition of Surrender. — *Hayes v. Goldman*, 71 Ark. 251, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; *Hoerd v. Hahne*, 91 Ill. App. 514.

**356.** 2. To Whom Surrender May Be Made. — *Hoerd v. Hahne*, 91 Ill. App. 514.

7. Surrender to Agent. — *Robinson v. Henaghan*, 92 Ill. App. 620; *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268; *Dodge v. Pritchard*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 542; *Morris v. Dayton*, (Supm. Ct. App. T.) 86 N. Y. Supp. 172; *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206; *Commercial Hotel Co. v. Brill*, 123 Wis. 638.

Authority to Collect Rents and Direct Repairs. — *Ex p. Bramwell*, 40 Can. L. J. 42 (husband).

**357.** 2. A Leasehold Constituting a Homestead cannot be surrendered by the husband (lessee) as against his wife's interests. *Beranek v. Beranek*, 113 Wis. 272.

5. Colessees. — *Harford v. Taylor*, 181 Mass. 266.

6. The President of a Corporation has not necessarily power to surrender a lease running to the corporation containing an option to purchase. *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247.

8. Surrender in Fact. — *Ledsinger v. Burke*, 113 Ga. 74.

10. *Wray-Austin Machinery Co. v. Flower*, (Mich. 1905) 103 N. W. Rep. 873.

12. Agreement to Surrender. — In case of an agreement to surrender in futuro on a breach of the agreement by the lessee, the landlord cannot maintain summary proceedings to recover possession. *Fish v. Thompson*, 129 Mich. 313.

Agreement to Accept Surrender on the happening of certain contingencies such as the subsequent renting of the premises to a permanent tenant is not operative to work a surrender unless the premises have been so rented. *Price v. Coblitz*, 12 Ohio Cir. Dec. 34.

**358.** (2) *Statute of Frauds*. — See notes 3, 4, 6.

**359.** *b. SURRENDER BY OPERATION OF LAW* — (1) *In General*. — See notes 1, 3.

(2) *Acceptance by Tenant of New Lease* — (a) *In General*. — See note 5.

**360.** (b) *Character of New Lease*. — See note 1.

*Voidable Lease*. — See note 2.

*Parol Lease*. — See note 3.

*Lease to Commence in Futuro*. — See note 6.

(c) *Intention of Parties*. — See note 12.

**361.** (3) *Relletting to Third Persons and Substitution of Tenants* — (a) *Relletting*. — See note 4.

(b) *Substitution of Tenants*. — See note 5.

**362.** *What Constitutes Substitution of Tenants*. — See notes 2, 3, 4.

(4) *Creation of Inconsistent Relation*. — See notes 6, 9.

(5) *Delivery and Resumption of Possession* — (a) *In General*. — See note 10.

**358.** 3. *Common Law*. — *Heller v. Dailey*, 28 Ind. App. 555.

4. *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554.

6. See *Heller v. Dailey*, 28 Ind. App. 555.

**359.** 1. *Surrender by Operation of Law*. — *Ledsinger v. Burke*, 113 Ga. 74.

The fact that a lease provides that there shall be no surrender unless accepted by the landlord in writing does not prevent the operation of a surrender by operation of law. *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206.

*Surrender of Part of Leased Premises*. — *Hewitt v. Hornbuckle*, 97 Ill. App. 97.

3. *Leases under Seal*. — *Hewitt v. Hornbuckle*, 97 Ill. App. 97.

5. *Acceptance by Tenant of New Lease*. — *Fenner v. Blake*, (1900) 1 Q. B. 426; *Knight v. Williams*, (1901) 1 Ch. 256; *Heller v. Dailey*, 28 Ind. App. 566, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 358; *Michigan City v. Leeds*, 24 Ind. App. 271; *Bowman v. Wright*, 65 Neb. 661; *Reading Trust Co. v. Jackson*, 22 Pa. Super. Ct. 69; *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378.

**360.** 1. *New Lease Must Be Valid*. — *Knight v. Williams*, (1901) 1 Ch. 256.

2. *Voidable Lease*. — *McCaw v. Cox*, (Neb. 1905) 103 N. W. Rep. 76.

3. *Acceptance of Parol Lease*. — *Michigan City v. Leeds*, 24 Ind. App. 271. See also *Andre v. Graebner*, 126 Mich. 116.

6. If the new lease is to commence after the term of the existing lease the latter is not terminated. *Ely v. Collins*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 255.

12. In *New Jersey* it is held that where a lessee accepts a lease of the same premises for the same term containing additional restrictions on the use of the property and omitting an option to purchase contained in the first lease, but retains in his possession the first lease, this will not operate as a surrender of the first lease. *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247, approving *Van Rensselaer v. Penniman*, 6 Wend. (N. Y.) 569.

**361.** 4. *Weiner v. Baldwin*, 9 Kan. App. 772; *Cooley v. Collins*, 186 Mass. 507; *Drew v. Billings-Drew Co.*, 132 Mich. 65; *Squire v. Ferd. Heim Brewing Co.*, 90 Mo. App. 462; *James v. Coe*, (N. Y. City Ct. Gen. T.) 61 N. Y.

Supp. 1099; *Commercial Hotel Co. v. Brill*, 123 Wis. 638.

If the tenant is induced by fraud to accept a new lease, equity may rehabilitate the lease surrendered. *Powell v. F. C. Linde Co.*, 49 N. Y. App. Div. 286.

5. *Substitution of Tenants*. — *Carson v. Arvantes*, 27 Colo. 77; *Hoerdt v. Hahne*, 91 Ill. App. 514; *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375.

**362.** 2. *What Constitutes Substitution of Tenants*. — *Golding v. Brennan*, 183 Mass. 286; *Woodworth v. Harding*, 75 N. Y. App. Div. 54.

3. *Detroit Pharmacal Co. v. Burt*, 124 Mich. 220.

4. *Hoerdt v. Hahne*, 91 Ill. App. 514; *Heller v. Dailey*, 28 Ind. App. 555; *Ely v. Winans*, (Supm. Ct. App. T.) 88 N. Y. Supp. 929.

6. *Relation of Vendor and Vendee*. — See *Miner v. Boynton*, 129 Mich. 585, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 362.

9. A redemise of the tenant to the landlord of a part of the premises for an indefinite time does not operate as a surrender with regard to the part demised. *Tolsma v. Adair*, 32 Wash. 383.

10. *Resumption of Possession by Landlord* — *Georgia*. — *Ledsinger v. Burke*, 113 Ga. 74.

*Illinois*. — *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 102 Ill. App. 554; *Channel v. Merrifield*, 206 Ill. 278.

*Louisiana*. — *Jackson v. Doll*, 109 La. 230.

*Minnesota*. — *Buckingham Apartment House Co. v. Dafeo*, 78 Minn. 268; *Paget v. Electrical Engineering Co.*, 85 Minn. 311.

*Nebraska*. — *Boyd v. George*, (Neb. 1902) 89 N. W. Rep. 271.

*New Jersey*. — *Miller v. Dennis*, 68 N. J. L. 320.

*New York*. — *Crane v. Edwards*, 80 N. Y. App. Div. 333; *Ewing v. Barnard*, (Supm. Ct. App. T.) 84 N. Y. Supp. 137; *Krumdieck v. Ebbs*, (Supm. Ct. App. T.) 84 N. Y. Supp. 525; *Goldsmith v. Schroeder*, 93 N. Y. App. Div. 206.

*Rhode Island*. — *White v. Berry*, 24 R. I. 74.

*Wisconsin*. — *Commercial Hotel Co. v. Brill*, 123 Wis. 638.

The fact that the lease is under seal is immaterial. *Bloomquist v. Johnson*, 107 Ill. App. 154.

- 363.** See notes 1, 2, 3.  
 (b) **Abandonment by Tenant** — *aa. IN GENERAL.* — See note 4.  
**364.** See note 4.  
*bb. LANDLORD TAKING POSSESSION.* — See notes 5, 7, 8, 9.  
*cc. ACCEPTANCE OF KEYS BY LANDLORD.* — See note 11.  
**365.** See notes 1, 2, 3, 4.  
*dd. RELETTING BY LANDLORD.* — See note 6.  
**366.** Time of Surrender. — See note 1.

**363. 1. Express Agreement for Surrender Unnecessary.** — *Hayes v. Goldman*, 71 Ark. 251; *Gold v. Ross*, 70 British Columbia 80.

A Conditional Acceptance of Surrender is not operative to effect a surrender if the lessee fails to perform the condition. *Dodge v. Pritchard*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 542.

The Issuance of a Notice to Quit or Pay Rent in Arrears is preliminary to summary proceedings, and the delivery of possession in pursuance of such notice will operate as a surrender, but in such a case the tenant must vacate in accordance with the notice. *Morris v. Dayton*, (Supm. Ct. App. T.) 86 N. Y. Supp. 172.

**2. Necessity for Landlord's Acceptance of Possession.** — *Stekete v. Pratt*, 122 Mich. 80; *Ludington v. Seaton*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 736 (making repairs with the consent of tenant does not operate as a surrender); *Griffin v. Martel*, 77 Vt. 19.

**3. Consent of Landlord to Tenant's Vacating.** — *Faseler v. Kothman*, (Tex. Civ. App. 1902) 70 S. W. Rep. 321.

**4. Abandonment of Possession by Tenant.** — *Biggs v. Stueler*, 93 Md. 100.

**364. 4. Acceptance of Surrender Held a Question of Fact for the Jury.** — *Van Brunt v. Wallace*, 88 Minn. 116.

**5. Landlord Taking Possession on Abandonment by Tenant.** — *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. Rep. 639, 52 C. C. A. 335; *Hayes v. Goldman*, 71 Ark. 251, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa 723, 93 Am. St. Rep. 270, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364; *Biggs v. Stueler*, 93 Md. 100; *White v. Berry*, 24 R. I. 74.

**7. Care of Premises by Landlord.** — *Hayes v. Goldman*, 71 Ark. 251; *Lewis v. Scanlan*, 3 Penn. (Del.) 238; *Oldewurtel v. Wiesenfeld*, 97 Md. 165; *Dodge v. Pritchard*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 542. See also *Fitzhugh v. Baird*, 134 Cal. 570.

**8. Making Necessary Repairs.** — *Biggs v. Stueler*, 93 Md. 100; *Oldewurtel v. Wiesenfeld*, 97 Md. 165; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25.

**9. The lease of a building and appurtenances reserved to the landlord permission to make such repairs or alterations in the demised premises as should be necessary for the preservation thereof. During the term demised the tenant abandoned the premises, and subsequently the landlord entered and remodeled the building, making extensive alterations beyond any necessity for preservation. It was held that such acts constituted a surrender by act and operation of law.** *Meeker v. Spalsbury*, 66 N. J. L. 60.

**11. Delivery and Acceptance of Keys.** — *Lewis v. Scanlan*, 3 Penn. (Del.) 238; *Ledsinger v. Burke*, 113 Ga. 74; *McElroy v. Brooke*, 104 Ill. App. 220; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25; *Dodge v. Pritchard*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 542.

**365. 1. Oldewurtel v. Wiesenfeld**, 97 Md. 165.

**2. Landlord Taking Charge of Key Abandoned by Tenant.** — *Landt v. Schneider*, 31 Mont. 15.

**3. Leaving Key at Landlord's Office or Residence.** — *Dodge v. Pritchard*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 542; *Durfee v. United Stores*, 24 R. I. 254.

**4. Sending Key to Landlord.** — *Biggs v. Stueler*, 93 Md. 100; *White v. Berry*, 24 R. I. 74.

**6. Reletting — General Rule — United States.** — *In re Mahler*, 105 Fed. Rep. 428.

*Arkansas.* — *Hayes v. Goldman*, 71 Ark. 251.

*Maryland.* — *Biggs v. Stueler*, 93 Md. 100.

*New York.* — *Gaffney v. Paul*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 642; *Bacon v. Combes*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 704; *Krundiack v. Ebbs*, (Supm. Ct. App. T.) 84 N. Y. Supp. 525; *Fleischmann Realty, etc., Co. v. Morrison*, (Supm. Ct. App. T.) 88 N. Y. Supp. 128; *Gutman v. Conway*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 363, following *Gray v. Kaufman Dairy, etc., Co.*, 162 N. Y. 388, 76 Am. St. Rep. 327, and *distinguishing Underhill v. Collins*, 132 N. Y. 269.

*Vermont.* — *Pelton v. Place*, 71 Vt. 430.

*Wisconsin.* — *Eimmermann v. Nathan*, 116 Wis. 124.

See also *Oakford v. Nirdlinger*, 196 Pa. St. 162. But see *Bradley v. Walker*, 93 Ill. App. 609; *Brown v. Cairns*, 63 Kan. 584; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25.

It is otherwise if the reletting is with the consent and acquiescence of the tenant. *Dolton v. Sickel*, 66 N. J. L. 160.

A provision in a lease that if the premises become vacant during the term the landlord should be authorized to relet them and apply the rent to the payment of expenses of reletting and of the rent due, is valid, and the reletting by the landlord, in pursuance of such provision does not operate as a surrender. *Jones v. Rushmore*, 67 N. J. L. 157.

In *Maryland* it has been held that where a tenant abandons the premises, and the lessor expressly refuses to accept the surrender and notifies the tenant that he will rent the premises on his account and hold him for deficiencies in the rent, such a reletting by the lessor does not operate as a surrender. *Oldewurtel v. Wiesenfeld*, 97 Md. 165.

**366. 1. Time of Surrender.** — *Isaacson v. Wolfensohn*, (Supm. Ct. App. T.) 84 N. Y. Supp. 555.

**366.** Attempting to Relet. — See notes 2, 3.

5. Effect of Surrender. — See notes 5, 6, 7.

**367.** Rights of Third Persons Acquired under Lessee. — See note 1.

**IX. FORFEITURE** — 1. By Disclaimer of Landlord's Title — *a.* IN GENERAL. — See note 2.

**370.** 3. Breach of Covenants or Agreements by Lessee. — See notes 1, 4, 7.

**371.** 4. Provisions for Forfeiture and Power of Re-entry — *a.* IN GENERAL. — See note 8.

*b.* GENERAL CONSTRUCTION OF FORFEITURE CLAUSES. — See note 12.

**372.** See notes 1, 2.

*c.* FORFEITURE FOR BREACH OF PARTICULAR COVENANTS —

(i) *In General.* — See note 4.

**366.** 2. Attempting to Relet. — *Lewis v. Scanlan*, 3 Penn. (Del.) 238; *Bradley v. Walker*, 93 Ill. App. 609; *Weiner v. Baldwin*, 9 Kan. App. 772; *Dorrance v. Bonesteel*, 51 N. Y. App. Div. 129.

3. Putting up "To Let" Sign. — *Oldewurtel v. Wiesenfeld*, 97 Md. 165.

5. The lessee after surrender has still the right to retain possession of his copy of the lease. *Knight v. Williams*, (1901) 1 Ch. 256, 70 L. J. Ch. 92.

The fact that the lessee after the surrender of the term reassumes possession of the leased premises does not revive the surrendered lease. *Carson v. Arvantes*, 27 Colo. 77.

6. *Hobson v. Silva*, 137 Cal. xix, 70 Pac. Rep. 619; *Carson v. Arvantes*, 27 Colo. 77; *Hewitt v. Hornbuckle*, 97 Ill. App. 97; *Cohen v. Wittemann*, 100 N. Y. App. Div. 338; *Geddis v. Folliott*, 16 S. Dak. 610. See also *Jackson v. Doll*, 109 La. 230.

7. *Hobson v. Silva*, 137 Cal. xix, 70 Pac. Rep. 619.

**367.** 1. Estate of Sublessee Not Affected by Surrender. — *Morrison v. Sohn*, 90 Mo. App. 76; *Oshinsky v. Greenberg*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 342.

The lessor in case of a surrender cannot hold the sublessee liable as tenant against his will. *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448.

A lessor accepting the surrender of the leasehold from the lessee cannot thereafter recover rent from a subtenant where the latter has not attorned to him, but if the sublessee attorns to the lessor after the surrender, he is liable to the lessor for rent for the full term of the sublease. *McDonald v. May*, 96 Mo. App. 236.

A Sublessee Becomes the Tenant of the Lessor on acceptance of the surrender by the lessee. *Simmons v. Pope*, (Supm. Ct. App. T.) 84 N. Y. Supp. 973.

Liability of Lessor on Covenants of Sublessor. — *Littlejohn v. Soper*, 1 Ont. L. Rep. 172.

2. *Barnewell v. Stephens*, (Ala. 1905) 38 So. Rep. 662, following *Dahm v. Barlow*, 93 Ala. 120; *Wildy Lodge No. 21 v. Paris*, 31 Tex. Civ. App. 632. See also *Snyder v. Harding*, 34 Wash. 286.

**370.** 1. Breach of Covenants or Agreements in Lease. — *In re Pennewell*, (C. C. A.) 119 Fed. Rep. 139, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Ocean Grove Camp Meeting Assoc. v. Sanders*, 68 N. J. L. 631; *Michaels v. Fishel*, 169 N. Y. 381.

4. Covenants to Pay Rent. — *Marshall v. Forest Oil Co.*, 198 Pa. St. 83.

7. Covenants Against Assigning and Subletting. — *In re Pennewell*, (C. C. A.) 119 Fed. Rep. 139, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369. But see *Wray-Austin Machinery Co. v. Flower*, (Mich. 1905) 103 N. W. Rep. 873.

**371.** 8. Provisions for Forfeiture. — A demand for the performance of stipulations has been held unnecessary to enable the lessor to enforce a forfeiture. *Walker v. Dowling*, (Ky. 1902) 68 S. W. Rep. 135.

12. Forfeiture Clauses Strictly Construed. — *Boston El. R. Co. v. Grace*, etc., Co., 112 Fed. Rep. 279, 50 C. C. A. 239; *In re Pennewell*, 119 Fed. Rep. 139, 55 C. C. A. 571; *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932; *McConnell v. Pierce*, 210 Ill. 627; *Cole v. Johnson*, 120 Iowa 667; *Lent v. Curtis*, 24 Ohio Cir. Ct. 592.

**372.** 1. Implied Covenants. — A general provision for re-entry for conditions broken does not authorize re-entry for breach of implied covenants. *Somers v. Loose*, 127 Mich. 77.

"Covenants to Be Performed." — A right of re-entry reserved, should the lessee "make default of or in the performance of all or any of the covenants hereinbefore contained which on his part are or ought to be performed," was held not to authorize re-entry for breach of negative covenants. *Harman v. Ainslie*, (1903) 2 K. B. 241.

In *Harman v. Ainslie*, (1904) 1 K. B. 698, a provision for re-entry "if the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed," was held to authorize a re-entry for breach of a covenant not to sublet.

Short Form Lease Act. — The right of re-entry respecting short forms of lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave. *McMahon v. Coyle*, 5 Ont. L. Rep. 618.

2. Intention of Parties. — *West Shore R. Co. v. Wenner*, 70 N. J. L. 233, affirmed 71 N. J. L. 682.

4. Voluntary Liquidation of Company. — *Horsley v. Steiger*, (1899) 2 Q. B. 79; *Fryer v. Ewart*, (1902) A. C. 187, 71 L. J. Ch. 433; *Ewart v. Fryer*, 82 L. T. N. S. 416, affirmed 83 L. T. N. S. 551.

Covenant Not to Sell Produce of Farm. — *Vincent v. Crane*, 134 Mich. 700.

- 373.** (2) *Nonrepair.* — See note 5.  
 (3) *Breach of Covenant to Pay Taxes.* — See notes 7, 8, 9, 10.
- 374.** (4) *Assignments.* — See note 2.  
 (5) *Subletting.* — See note 7.  
 (7) *Nonpayment of Rent* — (a) *In General.* — See note 11.
- 375.** (b) *Demand for Rent* — *aa. IN GENERAL.* — See note 8.
- 376.** See notes 1, 2.  
*bb. PLACE OF DEMAND.* — See note 7.
- 377.** *cc. TIME OF DEMAND.* — See note 4.
- 378.** 5. *Statutory Provisions for Forfeiture* — *a. IN GENERAL.* — See notes 6, 7.
- 379.** *b. NONPAYMENT OF RENT.* — See notes 1, 2.  
*c. USE OF PREMISES FOR ILLEGAL PURPOSES.* — See note 5.  
*Statutory Provisions.* — See notes 9, 10.
- 380.** 6. *Provisions for Forfeiture for Benefit of Lessor.* — See note 9.
- 373.** 5. *Notice to Tenant to Repair Not Required.* — *Foss v. Stanton*, 76 Vt. 365.
7. *Effect of Payment of Taxes After Breach.* — *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248.
8. *Covenant to "Promptly Pay When Due."* — *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248.
9. *Forfeiture for Nonpayment of Water Rent.* — *Carpenter v. Wilson*, 100 Md. 13, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 373.
10. *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248.
- 374.** 2. *Assignments to Work Forfeiture.* — *Marvin v. Hartz*, 130 Mich. 26; *West Shore R. Co. v. Wenner*, 70 N. J. L. 233.
7. *Zeigler v. Lichten*, 205 Pa. St. 104.
11. *Forfeiture for Nonpayment of Rent.* — *Holidge v. Moriarty*, 17 App. Cas. (D. C.) 520; *Gunning v. Sorg*, 113 Ill. App. 332, affirmed 214 Ill. 616; *Ocean Grove Camp Meeting Assoc. v. Sanders*, 68 N. J. L. 631; *Reams v. Fye*, 24 Pa. Co. Ct. 671, 10 Pa. Dist. 242.
- A tender of the rent due is effectual to prevent a forfeiture for nonpayment of rent. *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 439.
- Forfeiture for Nonpayment of Taxes.* — *Knight v. Orchard*, 92 Mo. App. 466.
- 375.** 8. *Demand for Rent Required.* — *Lamson Consol. Store Service Co. v. Bowland*, (C. C. A.) 114 Fed. Rep. 639, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932; *Cole v. Johnson*, 120 Iowa 669, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 375; *Carpenter v. Wilson*, 100 Md. 13; *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439.
- 376.** 1. *Necessity for Demand Waived by Agreement.* — *McCroskey v. Hamilton*, 108 Ga. 640, 75 Am. St. Rep. 79; *Cochran v. Philadelphia Mortg., etc., Co.*, (Neb. 1903) 96 N. W. Rep. 1051.
2. *Strict Construction of Waiver Provision.* — A provision in a lease that on the nonpayment of rent at the time the same becomes due the lease "shall at once terminate," does not dispense with the necessity for a demand for rent in order to terminate the lease. *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439.
7. *Place of Demand.* — *Cole v. Johnson*, 120 Iowa 667.
- 377.** 4. *Time of Demand.* — *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. Rep. 639, 52 C. C. A. 335; *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932; *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439; *Cole v. Johnson*, 120 Iowa 667.
- 378.** 6. *Statutory Provisions for Forfeiture* — See, generally, *Drew v. Mosbarger*, 104 Ill. App. 635; *Waller v. Cockfield*, 111 La. Ann. 595; *Byrket v. Gardner*, 35 Wash. 668.
- Assignment.* — *Gentle v. Faulkner*, 68 L. J. Q. B. 848.
- Subletting in Violation of Covenant in Lease.* — *Mulligan v. Hollingsworth*, 99 Fed. Rep. 216; *Harloe v. Lambie*, 132 Cal. 133; *Wood v. Garrison*, (Ky. 1901) 62 S. W. Rep. 728; *Murphy v. Century Bldg. Co.*, 90 Mo. App. 621; *Brown v. Pope*, 27 Tex. Civ. App. 225.
- Failure to Perform Covenants After Notice — Notice Held Insufficient.* — *Byrket v. Gardner*, 35 Wash. 668.
- Grantee of Lessor Cannot Enforce Forfeiture.* — *Ackerman v. Thompson*, 10 Ohio Dec. 361.
7. *Statute Strictly Construed.* — *Cole v. Johnson*, 120 Iowa 667; *Ackerman v. Thompson*, 10 Ohio Dec. 361, 7 Ohio N. P. 598.
- 379.** 1. *Nonpayment of Rent.* — *Cockerline v. Fisher*, (Mich. 1905) 103 N. W. Rep. 522; *Ocean Grove Camp Meeting Assoc. v. Sanders*, 67 N. J. L. 1.
2. *Demand for Rent.* — *Byrket v. Gardner*, 35 Wash. 668.
5. *Use of Premises for Illegal Purposes — Common-law Rule.* — *Schwartz v. McQuaid*, 214 Ill. 357, 105 Am. St. Rep. 112.
9. *Gambling.* — *Ackerman v. Thompson*, 10 Ohio Dec. 361, 12 Ohio Cir. Dec. 456, 21 Ohio Cir. Ct. 740.
10. *Prostitution.* — *Sullivan v. Schatzel*, (Supm. Ct. App. T.) 88 N. Y. Supp. 352; *Provident Trust, etc., Co. v. Chapleau*, 12 Quebec K. B. 451.
- 380.** 9. *Forfeiture Provisions for Benefit of Lessor* — *United States.* — *Adams v. Shirk*, 104 Fed. Rep. 54, 43 C. C. A. 407, 105 Fed. Rep. 659, 44 C. C. A. 653.
- Illinois.* — *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17; *Channel v. Merrifield*, 206 Ill. 278, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380-382.
- Kansas.* — *Brown v. Cairns*, 63 Kan. 584; *Weiner v. Baldwin*, 9 Kan. App. 772.



**381.** See note 2.

The Reason. — See note 3.

The Tenancy Will Therefore Continue. — See note 4.

**382.** 7. Waiver of Forfeiture — *b.* ACTS CONSTITUTING WAIVER — (1) In General. — See note 5.**383.** (3) Delay in Enforcement of Forfeiture. — See note 3.**384.** (8) Demand for Rent. — See note 9.**385.** (10) Receipt or Acceptance of Rent — (a) Rent Accruing After Forfeiture — *aa.* IN GENERAL. — See note 5.**386.** *bb.* INTENTION OF LESSOR. — See note 4.

*cc.* IGNORANCE OF CAUSE OF FORFEITURE. — See note 5.

**387.** (b) Rent Accrued Before Forfeiture — *aa.* IN GENERAL. — See note 3.

*bb.* FORFEITURE FOR NONPAYMENT OF RENT. — See note 5.

(c) Receipt of Rent After Institution of Ejectment. — See note 9.

**388.** *d.* CONTINUING AND NONCONTINUING CAUSES OF FORFEITURE — (1) Noncontinuing Causes of Forfeiture. — See note 5.

(2) Continuing Causes of Forfeiture. — See note 12.

**389.** See note 5.

*e.* UPON WHOM WAIVER BINDING. — See note 6.

**8.** Relief from Forfeiture — *a.* FOR NONPAYMENT OF RENT. — See notes 7, 8, 9.

*Maine.* — Small *v.* Clark, 97 Me. 304, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380.  
*Maryland.* — Morrison *v.* Smith, 90 Md. 76.  
*Montana.* — Bickford *v.* Kirwin, 30 Mont. 1.  
*Nebraska.* — Godwin *v.* Harris, (Neb. 1904) 98 N. W. Rep. 439.

*New Jersey.* — Ocean Grove Camp Meeting Assoc. *v.* Sanders, 68 N. J. L. 631.

*New York.* — Tate *v.* Neary, 52 N. Y. App. Div. 78; S. Liebmann's Sons Brewing Co. *v.* Lauter, 73 N. Y. App. Div. 183; Roulaine *v.* Simpson, (Supm. Ct. App. T.) 84 N. Y. Supp. 875.

*Pennsylvania.* — English *v.* Yates, 205 Pa. St. 106.

*Washington.* — Spencer *v.* Commercial Co., 30 Wash. 520.

**381.** 2. Small *v.* Clark, 97 Me. 304 (statutory forfeiture), citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 381.

**3.** Reasons for Rule. — Brown *v.* Cairns, 63 Kan. 584.

**4.** Continuance of Tenancy After Cause of Forfeiture. — Boston El. R. Co. *v.* Grace, etc., Co., 112 Fed. Rep. 279, 50 C. C. A. 239; Johnson *v.* Lehigh Valley Traction Co., 130 Fed. Rep. 932; Small *v.* Clark, 97 Me. 304, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 381; Ocean Grove Camp Meeting Assoc. *v.* Sanders, 68 N. J. L. 631; S. Liebmann's Sons Brewing Co. *v.* Lauter, 73 N. Y. App. Div. 183; Spencer *v.* Commercial Co., 30 Wash. 520. But see Walker *v.* Dowling, (Ky. 1902) 68 S. W. Rep. 135.

Taking Possession of the Premises is a sufficient exercise of the option to forfeit the lease. Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248.

**382.** 5. Recognition of Continuance of Tenancy. — McConnell *v.* Pierce, 210 Ill. 627.

**383.** 3. Delay in Enforcement of Forfeiture. — Morrison *v.* Smith, 90 Md. 76.

**384.** 9. Demand for Rent. — See McCroskey *v.* Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79.

**385.** 5. Receipt of Rent Accruing After

Cause of Forfeiture. — Jacob *v.* Down, (1900) 2 Ch. 156; Johnson *v.* Lehigh Valley Traction Co., 130 Fed. Rep. 932; Stromberg *v.* Western Telephone Constr. Co., 86 Ill. App. 270; Koehler *v.* Brady, 163 N. Y. 565, affirming 22 N. Y. App. Div. 624; Garcewich *v.* Woods, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 201; Roulaine *v.* Simpson, (Supm. Ct. App. T.) 84 N. Y. Supp. 875; Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48, 586. See, however, Fleming *v.* Fleming Hotel Co., (N. J. 1905) 61 Atl. Rep. 157 (receipt of rent from receiver).

**386.** 4. Intention of Lessor Immaterial. — See Soper *v.* Littlejohn, 31 Can. Sup. Ct. 572.

**5.** Ignorance of Cause of Forfeiture. — Mulligan *v.* Hollingsworth, 99 Fed. Rep. 216; West Shore R. Co. *v.* Wenner, 71 N. J. L. 682, affirming 70 N. J. L. 233.

**387.** 3. Rent Accrued Before Cause of Forfeiture. — Johnson *v.* Lehigh Valley Traction Co., 130 Fed. Rep. 932; Robbins *v.* Conway, 92 Ill. App. 173; Morrison *v.* Smith, 90 Md. 76; Cochran *v.* Philadelphia Mortg., etc., Co., (Neb. 1903) 96 N. W. Rep. 1051. See also Soper *v.* Littlejohn, 31 Can. Sup. Ct. 572.

**5.** Forfeiture for Nonpayment of Rent — Subsequent Acceptance. — See Morrison *v.* Smith, 90 Md. 76.

**9.** Receipt of Rent After Institution of Ejectment. — Granite Bldg. Corp. *v.* Greene, 25 R. I. 586.

**388.** 5. Forfeiture by Assignment. — See North Chicago St. R. Co. *v.* Le Grand Co., 95 Ill. App. 435.

**12.** Continuing Causes of Forfeiture. — Jacob *v.* Down, (1900) 2 Ch. 156; Mulligan *v.* Hollingsworth, 99 Fed. Rep. 216; Robbins *v.* Conway, 92 Ill. App. 173 (nonpayment of rent); Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388.

**389.** 5. Restrictions upon Use of Premises. — Granite Bldg. Assoc. *v.* Greene, 25 R. I. 48.

6. McConnell *v.* Pierce, 210 Ill. 627.

7. Relief from Forfeiture for Nonpayment of

**390.** *b. FOR CAUSES OTHER THAN NONPAYMENT OF RENT — (1) In General.* — See note 13.

**391.** See notes 2, 6, 8.

(2) *Fraud, Accident, or Mistake.* — See notes 11, 12.

(3) *Statutory Provisions.* — See note 14.

**392.** 9. *Effect of Forfeiture — Upon Rights of Third Persons.* — See notes 5, 8.

10. *Who May Enforce Forfeiture — Lessor.* — See notes 10, 11.

**393.** *Statutory Provisions.* — See notes 1, 2.

**X. NOTICE TO QUIT — 1. Necessity for Notice to Terminate Tenancy — Tenancies for Definite Terms. — See note 6.**

**394.** 2. *By Whom Notice to Be Given — Agents.* — See note 7.

**395.** See note 1.

*Grantee of Reversion.* — See note 4.

3. *To Whom Notice to Be Given.* — See note 8.

**396.** 4. *Form of Notice — a. NECESSITY FOR WRITING.* — See notes 2, 3.

**Rent.** — *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932; *Carpenter v. Wilson*, 100 Md. 13, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; *Gordon v. Richardson*, 185 Mass. 492; *Fleming v. Fleming Hotel Co.*, (N. J. 1905) 61 Atl. Rep. 157; *Pyle v. Henderson*, 55 W. Va. 125, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389.

**389.** 8. *Forfeiture for Nonpayment of Taxes.* — *Webb v. King*, 21 App. Cas. (D. C.) 141; *Carpenter v. Wilson*, 100 Md. 13 (water rent); *Knight v. Orchard*, 92 Mo. App. 466. But see *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248.

In *Gordon v. Richardson*, 185 Mass. 492, the court refused to relieve against the forfeiture of a lease for nonpayment of taxes where the estate had been sold by reason of such nonpayment.

9. *Compare Ellis v. Rice*, 195 Pa. St. 42.

**390.** 13. *Forfeiture for Causes Other than Nonpayment of Rent.* — *Gordon v. Richardson*, 185 Mass. 492.

**391.** 2. *Eastern Tel. Co. v. Dent*, (1899) 1 Q. B. 835.

6. *Forfeiture for Failure to Repair.* — *Gordon v. Richardson*, 185 Mass. 492.

8. *Covenant to Insure.* — *Gordon v. Richardson*, 185 Mass. 492.

11. *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248; *Pyle v. Henderson*, 55 W. Va. 122, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389.

12. *Gordon v. Richardson*, 185 Mass. 492.

14. *English Statute for Relief of Tenants.* — *Pannell v. London Brewery Co.*, (1900) 1 Ch. 496; *Gray v. Bonsall*, (1904) 1 K. B. 601, 73 L. J. K. B. 515.

**Relief of Sublessee.** — *London Bridge Bldg. Co. v. Thomson*, 89 L. T. N. S. 50; *Ewart v. Fryer*, 86 L. T. N. S. 676, 70 L. J. Ch. 138 (1901) 1 Ch. 499, *affirmed* (1902) A. C. 187.

**392.** 5. *Rights of Third Persons Acquired from Tenant.* — *Rees v. Andrews*, 169 Mo. 177.

Where a lease covenants that in the event of a re-entry by the lessor for nonpayment of rent, any machinery placed on the premises by the tenant shall be forfeited to the lessor, the lessor will succeed to such title only as the tenant himself had. *Webster v. Bates Mach. Co.*, 61 Neb. 306.

8. *Sublessees.* — *Ewart v. Fryer*, 82 L. T. N.

S. 415, *affirmed* 83 L. T. N. S. 551; *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448.

10. *A Colessor*, it seems, can enforce a forfeiture only to the extent of his interest, and a notice by him of forfeiture without authority from his colessor will not terminate the entire tenancy. *Updegraff v. Lesem*, 15 Colo. App. 297.

11. *Small v. Clark*, 97 Me. 304.

**393.** 1. *Statutory Provisions.* — *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248. See also *Drew v. Mosbarger*, 104 Ill. App. 635.

**Grantee of Reversion by Way of Mortgage Cannot Enforce Forfeiture.** — *Matthews v. Usher*, (1900) 2 Q. B. 535.

2. *Small v. Clark*, 97 Me. 304; *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439.

6. *Tenancies for Definite Terms.* — *Lautman v. Miller*, 158 Ind. 382; *Millington v. O'Dell*, (Ind. App. 1905) 73 N. E. Rep. 949; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185; *Berner v. Gebhardt*, 87 Mo. App. 409; *Mastin v. Metzinger*, 99 Mo. App. 613; *McClave v. McAlinsh*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 776; *Cox v. Sammis*, 57 N. Y. App. Div. 173; *Stiles v. Himmelwright*, 16 Pa. Super. Ct. 649; *Wheeler v. Wheeler*, 77 Vt. 177.

**Delaware Statute.** — *Lewis v. Scanlan*, 3 Penn. (Del.) 238.

**394.** 7. *Notice by Agent.* — *Earl Orchard Co. v. Fava*, 138 Cal. 76; *Fitzgerald v. Union Sav. Bank, etc., Co.*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 608; *Pope v. Miller*, 24 Ohio Cir. Ct. 640; *Bond v. Chapman*, 34 Wash. 606; *Burrows v. Mickelson*, 14 Manitoba 739.

**395.** 1. *Ratification of Notice by Unauthorized Agent.* — *Barnewell v. Stephens*, (Ala. 1905) 38 So. Rep. 662.

4. *Grantee of Reversion.* — *Wordsley Brewery Co. v. Halford*, 90 L. T. N. S. 89; *Fitzgerald v. Union Sav. Bank, etc., Co.*, 10 Ohio Cir. Dec. 49, 18 Ohio Cir. Ct. 608; *Maher v. James Hanley Brewing Co.*, 23 R. I. 343.

8. *Agent.* — *Prendergast v. Searle*, 81 Minn. 291.

**396.** 2. *Notice in Writing Not Necessary.* — *Landsberg v. Tivoli Brewing Co.*, 132 Mich. 651; *Gubernurator v. Kenin*, 66 N. J. L. 114.

**Abandonment of Premises as Notice to Quit.** — *Roberson v. Simons*, 109 Ga. 360.

3. *Waiver of Necessity for Written Notice.* — *Marson v. Hughes*, 17 Quebec Super. Ct. 1.

**396.** *b.* STATEMENT WITH REGARD TO TERMINATION OF TENANCY — Notice from Landlord. — See note 4.

**397.** Notice from Tenant. — See note 1.

*d.* DESCRIPTION OF DEMISED PREMISES. — See notes 5, 8.

*e.* STATEMENT REGARDING TIME OF QUITTING. — See notes 9, 10, 11.

**398.** In Order to Avoid Any Question. — See note 3.

5. Service of Notice — *b.* NOTICE BY LANDLORD. — See note 9.

**399.** Leaving Notice on Demised Premises. — See note 1.

Leaving Notice Off Demised Premises at Tenant's Residence or Place of Business. —

See note 2.

**400.** 6. Computing Time of Notice. — See note 8.

7. Waiver — *a.* OF NECESSITY FOR NOTICE. — See notes 9, 11.

*b.* OF DEFECTS IN NOTICE. — See note 14.

**401.** *c.* OF TENANT'S RIGHT TO NOTICE BY DISCLAIMER OF TENANCY. — See note 3.

**402.** *d.* OF EFFECT OF NOTICE TO TERMINATE TENANCY. — See notes 2, 3.

Second Notice. — See notes 5, 6.

Payment of Rent. — See notes 7, 8.

**403.** XI. HOLDING OVER — 1. General Duty of Tenant to Redeliver Possession. — See notes 1, 2.

Holding Over by Sublessee. — See note 6.

**396.** 4. Notice to Quit or Make Repairs Is Insufficient. — *Baltimore Dental Assoc. v. Fuller*, 101 Va. 627.

**397.** 1. Abandonment of Possession. — See *Arbenz v. Exley*, 57 W. Va. 580, *disapproving Betz v. Maxwell*, 48 Kan. 142; *Adams v. Cohoes*, 127 N. Y. 175.

5. Substantial Accuracy Sufficient. — *Alworth v. Gordon*, 81 Minn. 445.

8. Notice to Quit Part of Premises. — *Alworth v. Gordon*, 81 Minn. 445.

9. Time of Quitting to Be Stated. — *Waggoner v. Preston*, 83 Minn. 336; *Mitchell v. Matheson*, 23 Wash. 723.

10. *Burrows v. Mickelson*, 14 Manitoba 739.

11. *Berner v. Gebhardt*, 87 Mo. App. 409. But see *Ivory v. Brown*, 137 Cal. 603.

In *Sarle v. Powell*, 89 Minn. 278, it was held that while it is proper to notify a tenant from month to month to remove on the day his monthly term expires, still a notice to quit is not insufficient or defective because it notifies him to vacate the premises on the following day.

In *Harris v. Halverson*, 23 Wash. 779, where the tenancy terminated on the last day of April, a notice to quit at the expiration of said month "ending May 1st," was held sufficient.

**398.** 3. General Statement as to Time of Quitting. — *Wride v. Dyer*, (1900) 1 Q. B. 23.

9. Service Sufficient if Notice Actually Received. — *Earl Orchard Co. v. Fava*, 138 Cal. 76; *Ewing v. O'Malley*, 108 Mo. App. 117.

Service by Mail. — *Alworth v. Gordon*, 81 Minn. 445; *Van Grutten v. Trevenen*, (1902) 2 K. B. 82, 71 L. J. K. B. 544.

**399.** 1. Leaving Notice on Demised Premises. — *Gerhart Realty Co. v. Weiter*, 108 Mo. App. 248.

2. Service by Leaving Off Premises at Tenant's Residence. — *Foss v. Stanton*, 76 Vt. 365.

**400.** 8. Computing Time with Respect to Notice. — *Baker v. Kenney*, 69 N. J. L. 180.

Week's Notice — What Not Sufficient. — *Weston v. Fidler*, 88 L. T. N. S. 769.

9. Notice to Quit May Be Waived. — *Cornelius v. Rosen*, 111 Mo. App. 619; *Snyder v. Porter*, (Neb. 1903) 95 N. W. Rep. 1009; *Lapsley v. Fifth Ave. Nat. Bank*, 30 Pittsb. Leg. J. N. S. (Pa.) 271; *Eimermann v. Nathan*, 116 Wis. 124.

11. Waiver by Provision in Lease. — *Sizer v. Russett*, 11 Pa. Super. Ct. 108.

14. Waiver of Defects in Notice. — *Baltimore Dental Assoc. v. Fuller*, 101 Va. 627; *Marson v. Hughes*, 17 Quebec Super. Ct. 1. See, however, *Mitchell v. Matheson*, 23 Wash. 723 (defective notice as to time of quitting).

**401.** 3. Disclaimer of Landlord's Title Waives Notice to Quit. — *Cook v. Penrod*, 111 Mo. App. 128, *following Lyon v. La Master*, 103 Mo. 612.

**402.** 2. Recognition of Continuance of Tenancy. — *Brown v. Montgomery*, 21 Pa. Super. Ct. 262.

3. Permitting Tenant to Remain in Possession. — See *Channel v. Merrifield*, 106 Ill. App. 246, *citing 18 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 402, *reversed* on other grounds 206 Ill. 278.

5. Giving Second Notice. — *Ewing v. O'Malley*, 108 Mo. App. 117.

6. *Ewing v. O'Malley*, 108 Mo. App. 117.

7. Payment of Rent. — *Stromberg v. Western Telephone Constr. Co.*, 86 Ill. App. 270.

8. *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, *affirmed* (C. C. A.) 123 Fed. Rep. 33.

**403.** 1. Implied Obligation to Surrender Possession. — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 369, *citing 18 AM. AND ENG. ENCYC. OF LAW* (2d ed.) 403, *affirmed* (C. C. A.) 123 Fed. Rep. 33.

Holding Over by Stranger. — *Ketcham v. Ochs*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 470.

2. Damages for Holding Over. — *Butterfield v. Kirtley*, 115 Iowa 207.

6. Holding Over by Sublessee. — *Treadwell v.*

**404. Encroachments.** — See note 2.

**2. Elective Rights of Landlord**—*a.* To TREAT OVERHOLDING TENANT AS TRESPASSER. — See notes 3, 5.

**405. c. RIGHT OF LANDLORD TO HOLD TENANT FOR SECOND TERM** — (1) *United States Rule.* — See note 2.

**406.** See notes 1, 2.

To Constitute a Holding Over. — See notes 3, 4, 5.

The Length of Time. — See note 6.

**407. (2) English Rule.** — See note 3.

Torbert, 133 Ala. 508, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 403; Coleman v. Fitzgerald Bros. Brewing Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 349; Dodd v. Hart, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 459; Sullivan v. Ringler, 59 N. Y. App. Div. 184, affirmed 171 N. Y. 693; Morgenthau v. Beaton, (Supm. Ct. App. T.) 88 N. Y. Supp. 359; Lindsay v. Robertson, 30 Ont. 229. Compare Ketcham v. Ochs, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 470.

**404. 2. Encroachment by Tenant.** — Rosenberg v. Sprecher, (Neb. 1905) 103 N. W. Rep. 1045.

**3. Overholding Tenant as a Trespasser.** — Pusheck v. Frances E. Willard N. T. H. Assoc., 94 Ill. App. 192; Peck v. Christman, 94 Ill. App. 435; Chicago Theological Seminary v. Chicago Veneer Co., 94 Ill. App. 492; Rosenbaum v. Pendleton, 9 Ohio Dec. 642, 7 Ohio N. P. 364; Parker v. Page, 41 Oregon 579; Stevens v. Stoner, (Tex. Civ. App. 1900) 54 S. W. Rep. 934.

**5. What Constitutes Consent.** — Mastin v. Metzinger, 99 Mo. App. 613.

Where the Landlord Elects to Treat a Tenant Holding Over as a Tenant for Another Term, he cannot subsequently treat him as a trespasser for wrongfully holding over. Chicago Theological Seminary v. Chicago Veneer Co., 94 Ill. App. 492; Parker v. Page, 41 Oregon 583, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 404.

**Consent of Lessor to Holding Over.** — Kelso v. Crilly, 85 Ill. App. 568; Furman v. Galanopulo, (Supm. Ct. App. T.) 92 N. Y. Supp. 730; Parker v. Page, 41 Oregon 579, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 404.

Under the Kentucky Statute the failure of the landlord for ninety days to take proceedings to oust the tenant holding over entitles the tenant to hold for another year. Asher v. Johnson, (Ky. 1904) 82 S. W. Rep. 300.

**405. 2. Right to Hold Overholding Tenant for Second Period** — *Connecticut.* — Byxbee v. Blake, 74 Conn. 607, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

*Illinois.* — Pusheck v. Frances E. Willard N. T. H. Assoc., 94 Ill. App. 192; Chicago Theological Seminary v. Chicago Veneer Co., 94 Ill. App. 492; Chicago v. Peck, 98 Ill. App. 434, affirmed 196 Ill. 260.

*Indiana.* — Alleman v. Vink, 28 Ind. App. 142, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 405.

*Nebraska.* — Rosenberg v. Sprecher, (Neb. 1905) 103 N. W. Rep. 1045.

*New York.* — Macklin v. McNetton, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 749; Sullivan v. Ringler, 59 N. Y. App. Div. 184, affirmed 171

N. Y. 693; Ketcham v. Ochs, 74 N. Y. App. Div. 626, affirming (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 470; Flcmerfelt v. Dillon, (Supm. Ct. App. T.) 88 N. Y. Supp. 132; Morgenthau v. Beaton, (Supm. Ct. App. T.) 88 N. Y. Supp. 359; Stein v. Sutherland, (Supm. Ct. App. T.) 92 N. Y. Supp. 314.

*North Dakota.* — Merchants State Bank v. Ruettell, 12 N. Dak. 519.

*Ohio.* — Rosenbaum v. Pendleton, 9 Ohio Dec. 642, 7 Ohio N. P. 364.

*Oregon.* — Parker v. Page, 41 Oregon 579.

*Pennsylvania.* — Gilbert v. Price, 18 Pa. Super. Ct. 359.

*Texas.* — Abeel v. McDonnell, (Tex. Civ. App. 1905) 87 S. W. Rep. 1066.

**Original Tenancy for Less than a Year.** — Schneider v. Curran, 10 Ohio Cir. Dec. 239, 19 Ohio Cir. Ct. 224; Ketcham v. Ochs, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 470.

**Holding Over by Assignee of Term.** — Fulmer v. Crossman, 8 Del. Co. Rep. (Pa.) 78.

Where a Landlord Elects to Treat an Overholding Tenant as a Trespasser, he cannot subsequently elect to hold him as a tenant for another term, and the bringing of a suit against the tenant for the penalty fixed by the terms of the lease for wrongful holding over is such an election. Peck v. Christman, 94 Ill. App. 435.

**Statutory Modification.** — Stees v. Bergmeier, 91 Minn. 513; Quade v. Fitzloff, 93 Minn. 115.

**406. 1. Overholding Need Not Be Wilful.** — Sullivan v. Ringler, 59 N. Y. App. Div. 184, affirmed 171 N. Y. 693. But see Ketcham v. Ochs, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 470.

**Accidental Detention of Keys Not a Holding Over.** — Brennan v. New York, 80 N. Y. App. Div. 251.

**Effect of Illness.** — Preiser v. Wielandt, 48 N. Y. App. Div. 569.

**Overholding by Reason of Subtenancy.** — Sullivan v. Ringler, 171 N. Y. 693, affirming 59 N. Y. App. Div. 184.

**2. Overholding Caused by Act of Lessor.** — Davis v. Brown, (Miss. 1900) 29 So. Rep. 172.

**3. Leaving Property upon Premises.** — Byxbee v. Blake, 74 Conn. 607.

**4.** See Ketcham v. Ochs, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 470 (leaving mortgaged property on premises).

**5. Leaving Rubbish.** — Brennan v. New York, 80 N. Y. App. Div. 251.

**6. Length of Time Immaterial.** — Sullivan v. Ringler, 59 N. Y. App. Div. 184, affirmed 171 N. Y. 693.

**407. 3. American Courts Following English Rule.** — Ambrose v. Hyde, 145 Cal. 555; Perry v. Rockland, etc., Lime Co., 94 Me. 325; Abeel

**407.** (3) *Holding Over with Consent of Landlord.* — See notes 4, 5.

(4) *Provisions in Lease Fixing Liability of Overholding Tenant.* — See note 6.

(6) *Terms of New Tenancy.* — See note 8.

**408.** *Notice by Landlord of New Conditions.* — See notes 3, 4.

**3. Penalty of Double Rent or Value — a. STATUTORY PENALTY —**

(1) *In General.* — See note 5.

**409.** (3) *Notice and Demand for Possession.* — See note 6.

(5) *Holding Over.* — See note 12.

**410.** See note 2.

**411.** *b. PROVISIONS IN LEASES.* — See note 2.

**XII. ESTOPPEL TO DENY LANDLORD'S TITLE — 1. In General.** — See

note 3.

*v. McDonnell*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1066.

**407.** 4. *Kassel v. Snead*, (Ky. 1899) 52 S. W. Rep. 1058; *Landsberg v. Tivoli Brewing Co.*, 132 Mich. 651; *Bon v. Fenlon*, 88 N. Y. App. Div. 612.

*Parker v. Page*, 41 Oregon 583, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 407.

6. See *Peck v. Christman*, 94 Ill. App. 435.

**8. Holding on Terms of Original Tenancy —**  
*Illinois.* — *Pusheck v. Frances E. Willard N. T. H. Assoc.*, 94 Ill. App. 192; *Chicago v. Peck*, 98 Ill. App. 434, affirmed 196 Ill. 260; *Slack v. Knox*, 213 Ill. 190, reversing decree 114 Ill. App. 435.

*Indiana.* — *Ridgeway v. Hannum*, 29 Ind. App. 124.

*Iowa.* — *Dubuque Lumber Co. v. Kimball*, 111 Iowa 48.

*Nebraska.* — *Rosenberg v. Sprecher*, (Neb. 1905) 103 N. W. Rep. 1045.

*New York.* — *Macklin v. McNetton*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 749; *Pierson v. Hughes*, (Supm. Ct. App. T.) 87 N. Y. Supp. 223; *Flomerfelt v. Dillon*, (Supm. Ct. App. T.) 88 N. Y. Supp. 132; *Baylies v. Ingram*, (N. Y. 1905) 73 N. E. Rep. 1119, affirming 84 N. Y. App. Div. 360.

*North Dakota.* — *Merchants State Bank v. Ruettell*, 12 N. Dak. 519.

*Ohio.* — *Rosenbaum v. Pendleton*, 9 Ohio Dec. 642, 7 Ohio N. P. 364.

*Pennsylvania.* — *Stiles v. Himmelwright*, 16 Pa. Super. Ct. 649.

*Texas.* — *Woodward v. Ft. Worth, etc., R. Co.*, 35 Tex. Civ. App. 14.

**Forfeiture for Nonpayment of Rent.** — *Faxon v. Jones*, 176 Mass. 138.

**Agreement by Landlord to Put in Repair.** — *Frederick v. Daniels*, 74 Conn. 710.

**408.** 3. *Notice by Landlord of New Conditions.* — *Kelso v. Crilly*, 85 Ill. App. 568; *Stees v. Bergmeier*, 91 Minn. 513, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 408; *Moore v. Harter*, 67 Ohio St. 250.

4. *Moore v. Harter*, 67 Ohio St. 250.

**5. Statutory Penalty for Holding Over by Tenant for Years.** — *Driver v. Edrington*, (Ark. 1905) 84 S. W. Rep. 783; *Hadley v. Bernero*, 97 Mo. App. 314.

**409.** 6. *Demand for Possession Condition Precedent.* — *Willis v. Harrell*, 118 Ga. 906.

12. The mere fact, however, that the tenant could not quit without working severe injury to his business will not relieve him from the pen-

alty of double rent by reason of his holding over. *Driver v. Edrington*, (Ark. 1905) 84 S. W. Rep. 783.

**410.** 2. *Holding Over by Subtenant.* — See *Fletcher v. Fletcher*, 123 Ga. 470.

**411.** 2. *Waiver by Acceptance of Single Rent.* — *Chicago Theological Seminary v. Chicago Veneer Co.*, 94 Ill. App. 492.

**3. Tenant Estopped to Deny Landlord's Title —**  
*United States.* — *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, affirmed (C. C. A.) 23 Fed. Rep. 33; *Sittel v. Wright*, 122 Fed. Rep. 434, 58 C. C. A. 416; *Piper v. Cashell*, 122 Fed. Rep. 614, 58 C. C. A. 396; *Fraer v. Washington*, 125 Fed. Rep. 280, 60 C. C. A. 194.

*Alabama.* — *Blankenship v. Blackwell*, 124 Ala. 355, 82 Am. St. Rep. 175; *Davis v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55; *Hammond v. Blue*, 132 Ala. 337.

*Georgia.* — *Grizzard v. Roberts*, 110 Ga. 41; *Johnson v. Thrower*, 117 Ga. 1007.

*Illinois.* — *Mackin v. Haven*, 187 Ill. 480, 88 Ill. App. 434; *Owen v. Brookport*, 208 Ill. 35; *Fields v. Brown*, 89 Ill. App. 287, reversed on other grounds 188 Ill. 111; *Knefel v. Daly*, 91 Ill. App. 321; *Born v. Stafford*, 93 Ill. App. 10; *Barkman v. Barkman*, 107 Ill. App. 332; *Merki v. Merki*, 113 Ill. App. 518, affirmed 212 Ill. 121.

*Indiana.* — *Cambridge Lodge No. 9 v. Routh*, 163 Ind. 1.

*Indian Territory.* — *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, affirmed 118 Fed. Rep. 430; *Ikard v. Minter*, (Indian Ter. 1902) 69 S. W. Rep. 852; *Turner v. Gilliland*, (Indian Ter. 1903) 76 S. W. Rep. 253.

*Kansas.* — *Johnson v. Woodbury Trust Co.*, 63 Kan. 880; *Fry v. Boman*, 67 Kan. 531.

*Kentucky.* — *Mefford v. Franklin County*, (Ky. 1900) 58 S. W. Rep. 993; *Pittsburg, etc., R. Co. v. Dodd*, 115 Ky. 176.

*Louisiana.* — *Harvin v. Blackman*, 108 La. 426; *Morgan City v. Dalton*, 112 La. 9; *Harvin v. Blackman*, 112 La. 24.

*Massachusetts.* — *Fitch v. Windram*, (Mass. 1903) 67 N. E. Rep. 965.

*Michigan.* — *Sherman v. Fisher*, (Mich. 1904) 101 N. W. Rep. 572.

*Missouri.* — *Stewart v. Miles*, 166 Mo. 174.

*Nebraska.* — *Allen v. Hall*, 64 Neb. 256; *Wilson v. Lyons*, (Neb. 1903) 94 N. W. Rep. 636.

*New York.* — *Schreiber v. Goldsmith*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 45; *Van Vleck*

**413.** See notes 1, 2, 3, 4, 7, 8, 9.

**414.** *The Tenant Cannot Assert a Paramount Title in Himself.* — See note 1.

*Attornment to Owner of Paramount Title.* — See note 3.

*Property Not Included in Description in Lease.* — See note 9.

*Character of Lessor.* — See note 13.

**415.** *3. Effect of Lessee's Possession Prior to Lease — a. IN GENERAL.* — See note 3.

**416.** *c. EFFECT OF FRAUD, MISREPRESENTATION, OR MISTAKE.* — See note 7.

**417.** See note 1.

**4. Against Whom Estoppel May Be Asserted.** — See note 7.

*v. White*, 66 N. Y. App. Div. 14; *Steele v. Gil-mour Mfg. Co.*, 77 N. Y. App. Div. 199; *George A. Fuller Co. v. Manhattan Constr. Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219.

*North Carolina.* — *Stewart v. Keener*, 131 N. Car. 486; *Pool v. Lamb*, 128 N. Car. 1.

*North Dakota.* — *Wadge v. Kittleson*, 12 N. Dak. 452.

*Pennsylvania.* — *Mineral R., etc., Co. v. Flaherty*, 24 Pa. Super. Ct. 236.

*Rhode Island.* — *Ayotte v. Johnson*, 25 R. I. 403.

*Tennessee.* — *Whitaker v. Whitaker*, (Tenn. Ch. 1900) 62 S. W. Rep. 664.

*Texas.* — *Alford v. Carver*, 31 Tex. Civ. App. 607; *Cobb v. Robertson*, (Tex. 1905) 86 S. W. Rep. 746.

*West Virginia.* — *Wheeling First English Evangelical Lutheran Church v. Arkle*, 49 W. Va. 92; *Stover v. Davis*, 57 W. Va. 196.

*Canada.* — *Charpentier v. Quebec Bank*, 21 Quebec Super. Ct. 296.

The estoppel applies in the Indian Territory in an action by an Indian lessor against white men holding as lessees. *Ellis v. Fitzpatrick*, (C. C. A.) 118 Fed. Rep. 430.

Where a person's name appears in the lease as colessor, the lessee is not estopped in an action by him to recover a share of the rents to show that he was not in fact a lessor, and therefore was not in fact entitled to any of the rent. *Acklin v. McCalmont Oil Co.*, 201 Pa. St. 257, following *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202, 63 Am. St. Rep. 791.

**Estoppel Recognized in Equity.** — *Davis v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55.

**413.** *1. Lease by Unauthorized Agent.* — See *Rowland v. Dillingham*, 83 N. Y. App. Div. 156.

**2. Lease by Agent of Undisclosed Principal.** — *Fargason v. Ford*, 119 Ga. 343; *Taylor v. White*, 86 Mo. App. 526.

**3. Lease by Receiver.** — *Fields v. Brown*, 89 Ill. App. 287, reversed on other grounds 188 Ill. 111.

**4. Void Lease.** — *Grizzard v. Roberts*, 110 Ga. 41.

**7. Lease of Building Without Land.** — *Pool v. Lamb*, 128 N. Car. 1.

**8.** The rule applies, though the landlord did not have even color of title. *Johnson v. Thrower*, 117 Ga. 1007.

**Want of Possession of Lessor at Time of Lease.** — *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, affirmed 118 Fed. Rep. 430.

**9.** The estoppel does not extend to property not included in the demise, such as machinery on the demised premises. *Decatur Land Co. v. Cook*, (Ala. 1900) 27 So. Rep. 559.

**414.** *1. Hammond v. Blue*, 132 Ala. 337; *Grizzard v. Roberts*, 110 Ga. 41; *Barkman v. Barkman*, 107 Ill. App. 332; *MacKinn v. Haven*, 187 Ill. 480; *Thomas v. Sass*, 3 Indian Ter. 545; *Morgan City v. Dalton*, 112 La. 9. See *Matter of McCormick*, (City Ct.) 30 Misc. (N. Y.) 285 (where the lease expressly provided that no covenant for quiet enjoyment should be implied).

**3. Stover v. Davis**, 57 W. Va. 196.

**9. Compare Swift v. Dixon**, 131 N. Car. 42.

**13. Lease from Slave.** — *Rowland v. Dillingham*, 83 N. Y. App. Div. 156.

**Lease by Executors.** — *Shell v. West*, 130 N. Car. 171.

**415.** *3. Prior Possession by Tenant Held Not to Affect Estoppel.* — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. Rep. 362, affirmed (C. C. A.) 123 Fed. Rep. 33; *Piper v. Cashell*, (C. C. A.) 122 Fed. Rep. 614; *Grizzard v. Roberts*, 110 Ga. 41; *Johnson v. Thrower*, 117 Ga. 1007, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415; *Willis v. Harrell*, 118 Ga. 906, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415; *Barkman v. Barkman*, 107 Ill. App. 332; *Allen v. Hall*, 66 Neb. 84; *Jones v. Reilly*, 174 N. Y. 97; *Van Vleck v. White*, 66 N. Y. App. Div. 14; *Sturges v. Van Orden*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 499, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 415; *Stover v. Davis*, 57 W. Va. 196. But see *Blankenship v. Blackwell*, 124 Ala. 355, 82 Am. St. Rep. 175.

Where, pending a suit by a grantor in possession to set aside a deed, she agrees to pay rent to the lessor pending the suit without prejudice to her rights, she is not estopped to deny the grantee's title. *Sartwell v. Young*, 126 Mich. 304.

**416.** *7. Fraud.* — *Simon Newman Co. v. Lassing*, 141 Cal. 174; *Jones v. Reilly*, 174 N. Y. 97.

**Duress.** — *Harvin v. Blackman*, 108 La. 426.

**417.** *1. Mistake.* — *Reg. v. Hall*, 6 Can. Exch. 145.

**7. Estoppel Applies to Persons Entering under Tenant — United States.** — *Fleming v. Mills*, 182 Ill. 464; *Kepley v. Scully*, 185 Ill. 52; *Mackin v. Haven*, 187 Ill. 480, 88 Ill. App. 434; *Owen v. Brookport*, 208 Ill. 35.

*Indian Territory.* — *Sass v. Thomas*, 3 Indian Ter. 536; *Ikard v. Minter*, (Indian Ter. 1902) 69 S. W. Rep. 852.

*Minnesota.* — *Weide v. St. Paul Boom Co.*, 92 Minn. 76.

*Missouri.* — *Stewart v. Miles*, 166 Mo. 174; *Taylor v. White*, 86 Mo. App. 526.

**418.** Adverse Claimants. — See notes 1, 2.

**419.** 5. In Whose Favor Estoppel May Be Asserted. — See notes 2, 4, 5, 6.

6. In What Actions Estoppel May Be Asserted — *a.* IN GENERAL. —

See note 9.

**420.** *b.* ACTIONS TO RECOVER RENT. — See notes 1, 2.

**421.** See note 2.

*c.* ACTIONS TO RECOVER POSSESSION. — See note 6.

7. Duration of Estoppel. — See note 12.

**422.** See note 1.

8. Effect of Termination or Expiration of Landlord's Title — *a.* IN GENERAL. — See note 2.

**423.** *b.* PURCHASE BY TENANT OF LANDLORD'S TITLE — General Rule. —

See note 3.

**424.** 9. Purchase of Adverse Title by Tenant. — See notes 1, 2, 3.

*North Carolina.* — *Stewart v. Keener*, 131 N. Car. 486.

*Virginia.* — *Neff v. Ryman*, 100 Va. 521.

*West Virginia.* — *Stover v. Davis*, 57 W. Va. 196.

Heirs or Representatives of Tenant Entering under His Right. — *Jones v. Reilly*, 174 N. Y. 97.

**418.** 1. Adverse Claimants. — *Stewart v. Keener*, 131 N. Car. 486.

2. Adverse Claimants Acquiring Possession from Tenant by Collusion. — *Kepley v. Scully*, 185 Ill. 52.

**419.** 2. Persons Deriving Title from Lessor. — *James v. Smith*, 3 Indian Ter. 447 (administrator of landlord); *McLean v. McCormick*, (Neb. 1903) 93 N. W. Rep. 697.

4. Remainderman — Lease by Life Tenant. — See *Barson v. Mulligan*, 66 N. Y. App. Div. 486.

5. In an action between a landlord and a third person involving the title to land, where the landlord claims title by adverse possession, and in order to prove such possession relies on the occupancy of his tenant, the tenant is not estopped to deny that he held in subjection to his landlord's title. *South v. Deaton*, 113 Ky. 312.

6. See *Goodnow v. Pope*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 475.

9. Estoppel in Equity. — *South v. Deaton*, 113 Ky. 312, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 419; *Whitaker v. Whitaker*, (Tenn. Ch. 1900) 62 S. W. Rep. 664.

Specific Performance. — A tenant cannot maintain a suit in equity to compel specific performance of a contract of sale by the landlord, executed prior to the tenancy, without first surrendering possession. *Davis v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55.

**420.** 1. Actions to Recover Rent. — *Pearce v. Pearce*, 83 Ill. App. 77, affirmed 184 Ill. 289; *Allen v. Hall*, 64 Neb. 256; *Pool v. Lamb*, 128 N. Car. 1; *Shell v. West*, 130 N. Car. 171; *Cross v. Freeman*, 22 Tex. Civ. App. 299; *Alford v. Carver*, 31 Tex. Civ. App. 607.

2. Action for Use and Occupation. — *Mineral R., etc., Co. v. Flaherty*, 24 Pa. Super. Ct. 236.

**421.** 2. Tenant Taking Lease of His Own Land. — See *Matter of McCormick*, (City Ct.) 30 Misc. (N. Y.) 285.

6. Summary Proceedings. — *Dilks v. Kelsey*, (N. J. 1905) 59 Atl. Rep. 897.

12. Estoppel Continues until Surrender of Possession. — *Sittel v. Wright*, 122 Fed. Rep. 434, 58 C. C. A. 416, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 421; *Davis v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55; *Grizzard v. Roberts*, 110 Ga. 41.

**422.** 1. Estoppel Expires with Surrender of Possession. — *De Coursey v. De Coursey*, (Ky. 1901) 64 S. W. Rep. 912; *Stewart v. Miles*, 166 Mo. 174; *Talbott v. Butte City Water Co.*, 29 Mont. 17 (surrender of possession during term).

Estoppel Not Defeated by Mere Offer to Surrender Written Lease. — *Mackin v. Haven*, 88 Ill. App. 434, affirmed 187 Ill. 480.

2. Tenant May Show Termination of Expiration of Lessor's Title. — *Hammond v. Blue*, 132 Ala. 337; *Born v. Stafford*, 93 Ill. App. 10; *Fry v. Bowman*, 67 Kan. 531; *Sherman v. Fisher*, (Mich. 1904) 101 N. W. Rep. 572; *Allen v. Hall*, 66 Neb. 84.

Landlord's Title Cut Off by Tax Sale. — *Sherman v. Spalding*, 126 Mich. 561. But see *Kepley v. Scully*, 185 Ill. 52.

Tax Sale Prior to Lease. — *Johnson v. Woodbury Trust Co.*, 63 Kan. 880, 64 Pac. Rep. 1030.

**423.** 3. Tenant Acquiring Landlord's Title. — *Hammond v. Blue*, 132 Ala. 337; *Moston v. Stow*, 91 Mo. App. 554.

Tax Sales. — *Brown v. Atlanta Nat. Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 403; *Smith v. Newman*, 62 Kan. 318; *Crosby v. Bonnowsky*, 29 Tex. Civ. App. 455. See also *Dixon v. Ludington*, 130 Mich. 269.

**424.** 1. Purchasing Incumbrances. — Where the lessee of a life tenant purchases a mortgage covering the fee, he may, in an action by the remainderman at the death of the life tenant to recover possession, set up in defense the mortgage so purchased. *Barson v. Mulligan*, 66 N. Y. App. Div. 486.

2. Tenant Must Surrender Possession Before Asserting Adverse Title. — *Grizzard v. Roberts*, 110 Ga. 41; *Barkman v. Barkman*, 107 Ill. App. 332; *Morgan City v. Dalton*, 112 La. 9; *Willis v. McKinnon*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 386, 79 N. Y. App. Div. 249, affirmed 178 N. Y. 451; *Pool v. Lamb*, 128 N. Car. 1. Compare *Willis v. McKinnon*, 165 N. Y. 612, reversing 35 N. Y. App. Div. 131 (purchase of interest of cotenant).

3. *De Coursey v. De Coursey*, (Ky. 1901) 64 S. W. Rep. 912.

- 425.** 10. Effect of Eviction of Tenant by Title Paramount. — See notes 1, 2.  
**426.** 12. Effect of Public Policy on Estoppel. — See note 4.

**XIII. REMEDIES FOR RECOVERY OF RENT — 2. Action of Debt — a. IN**

GENERAL. — See note 7.

- 429.** 4. Action for Use and Occupation — a. IN GENERAL. — See note 1.  
**430.** 5. Suits in Equity. — See note 2.  
 6. Attachment for Rent — a. IN GENERAL. — See note 6.  
**431.** Landlord's Attachment Distinct from Ordinary Attachment. — See note 1.  
 b. PROPERTY SUBJECT TO ATTACHMENT. — See note 6.  
 c. GROUNDS FOR ATTACHMENT. — See notes 7, 8, 9.  
**432.** d. WHO ENTITLED TO REMEDY. — See notes 1, 3.  
 e. WRONGFUL ATTACHMENT. — See note 5.  
 7. Time of Bringing Actions for Rent. — See notes 6, 8, 9.

**425.** 1. Eviction of Tenant by Title Paramount. — Johnson v. Sackrison, 78 Minn. 107.

The rule that a tenant cannot dispute the title of his landlord does not have the effect to prevent the state from obtaining actual possession of its lands by means of a lease to the tenant. State v. Griftnr, 61 Ohio St. 201.

**2. Unauthorized Attornment to Owner of Paramount Title.** — Grizzard v. Roberts, 110 Ga. 41; Terry v. Terry, (Ky. 1902) 66 S. W. Rep. 1024; Pool v. Lamb, 128 N. Car. 1; Messinger v. Union Warehouse Co., 39 Oregon 546; Alford v. Carver, 31 Tex. Civ. App. 607.

**426.** 4. Want of Corporate Authority to Hold Land. — Wheeling First English Evangelical Lutheran Church v. Arkle, 49 W. Va. 92.

**7. Power of Attorney.** — The power of attorney contained in a lease to confess judgment for rent due and interest is valid. Agnew v. Sexton, 86 Ill. App. 274.

**429.** 1. Benedict v. Everard, 73 Conn. 157; Rubens v. Hill, 213 Ill. 523; Sherman v. Ludin, 84 N. Y. App. Div. 579. See also Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268.

Where part of the leased premises were taken under the power of eminent domain the landlord may maintain an action for use and occupation to recover rent for the portion of the premises not condemned. McCardell v. Miller, 22 R. I. 96.

**Rent Payable in Kind.** — Pearce v. Pearce, 83 Ill. App. 77, affirmed 184 Ill. 289; Conable v. Van Housen, 11 Pa. Super. Ct. 497.

Rent payable in cotton is not recoverable in assumpsit, no breach of the contract to deliver the cotton being shown. Linam v. Jones, 134 Ala. 570.

**Overholding Tenant Liable to Action for Use and Occupation.** — Benton v. Beakey, (Kan. 1905) 81 Pac. Rep. 196.

**430.** 2. Where in a lease by cotenants one of the leasing cotenants is both a lessor and a joint lessee, a suit in equity will lie to recover the rent because an action at law could not be maintained thereon, such cotenant being on both sides of the record. Pelton v. Place, 71 Vt. 430.

**6. Attachment for Rent.** — Blankenship v. Blackwell, 124 Ala. 355; 82 Am. St. Rep. 175; Smeaton v. Cole, 120 Iowa 368; Brown v. Cairns, 63 Kan. 584; Milot v. Conrad, 112 La. 928; McDermott v. Dwyer, 91 Mo. App. 185; Greeley v. Greeley, 12 Okla. 659.

**431.** 1. Landlord's Attachment and General Attachment Differ. — Greeley v. Greeley, 12 Okla. 659.

The statutes authorizing attachment by landlords for rent are more favorably construed in favor of the landlords than the statute authorizing general attachment in favor of the parties resorting to such remedy. Ward v. Grigsby, (Ky. 1900) 55 S. W. Rep. 436; O'Bryan v. Shipp, (Ky. 1899) 53 S. W. Rep. 1034.

**6. Blankenship v. Blackwell,** 124 Ala. 355, 82 Am. St. Rep. 175; Greeley v. Greeley, 12 Okla. 659.

**7. McDermott v. Dwyer,** 91 Mo. App. 185.

**8. Removal of Property.** — Abington v. Steinberg, 86 Mo. App. 639; Jackson v. Corley, 30 Tex. Civ. App. 417; Allen v. Brunner, 33 Tex. Civ. App. 128; Chasse v. Desmarteau, 14 Quebec Super. Ct. 65.

**Motive of Removal Immaterial.** — Harmon v. Payton, 68 Kan. 67.

**9. Kassel v. Snead,** (Ky. 1899) 52 S. W. Rep. 1058; Raney v. Thomas, 94 Mo. App. 315.

Where the lessee without the consent of the lessor removes and continues to remove, from the leased premises, property which, under the law, is pledged for the rent due and to become due, the question whether the lessor is sufficiently secured by that which is left is one which he has the privilege of determining for himself, and which the lessee has no right to determine for him, and if the lessor believes that he is not sufficiently secured he may seize for his rent, whether due or to become due. Millot v. Conrad, 112 La. 928.

**Reasonable Apprehension of Loss of Rent.** — Ward v. Grigsby, (Ky. 1900) 55 S. W. Rep. 436.

**432.** 1. See Coker v. Britt, 78 Miss. 583 (statute authorizing proceedings by the lessor, his administrator, or assigns).

**Assignee of Reversion May Maintain Attachment.** — Blankenship v. Blackwell, 124 Ala. 355, 82 Am. St. Rep. 175.

**3. Blankenship v. Blackwell,** 124 Ala. 355, 82 Am. St. Rep. 175; Irving v. Mouchamps, 3 Quebec Pr. Rep. 430.

**5. Wrongful Attachment.** — Weber v. Vernon, 2 Penn. (Del.) 359.

**6. Abandonment of Premises.** — Though the tenant abandons the rented premises before the expiration of the term and notifies the landlord that he will no longer abide by the lease, the landlord has no right of action for the rent



**432. XIV. REMEDIES OF LANDLORD FOR RECOVERY OF POSSESSION — 1. Entry by Landlord Without Process of Law — Tenant Not in Possession.** — See note 10.

**433. Possession Retained by Tenant.** — See note 2.

**Entry by Force.** — See note 6.

**434. See note 3.**

**2. Suits in Equity.** — See note 5.

**435. 7. Summary Proceedings — a. IN GENERAL.** — See note 2.

stipulated in the lease until the same falls due thereunder. *Nicholes v. Swift*, 118 Ga. 922.

**Limitation of Actions.** — *Roller v. Zundelowitz*, 32 Tex. Civ. App. 165 (recovery of rent for period tenant holds over).

**432. 8. Marshall v. John Grosse Clothing Co.**, 184 Ill. 421, 75 Am. St. Rep. 181; *Harding v. Austin*, 93 N. Y. App. Div. 564; *Stiles v. Himmelwright*, 16 Pa. Super. Ct. 649.

*9. Stiles v. Himmelwright*, 16 Pa. Super. Ct. 649.

**10. Entry by Lessor upon Vacant Premises.** — *Hollidge v. Moriarty*, 17 App. Cas. (D. C.) 520; *Mead v. Pollock*, 99 Ill. App. 151; *Cock-erline v. Fisher*, (Mich. 1905) 103 N. W. Rep. 522; *Ish v. Marsh*, (Neb. 1901) 96 N. W. Rep. 58.

**433. 2. Peaceable Entry into Premises in Possession of Tenant.** — *Mead v. Pollock*, 99 Ill. App. 151.

**6. Use of Force Necessary to Eject Tenant — General Rule.** — See *Wamsganz v. Wolff*, 86 Mo. App. 205; *Murphy v. Century Bldg. Co.*, 90 Mo. App. 621.

**434. 3. Minority Rule.** — *Kerr v. O'Keefe*, 138 Cal. 415; *Spencer v. Commercial Co.*, 30 Wash. 520.

**5. Forfeiture.** — Equity will not enforce forfeiture. *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932.

**435. 2. Summary Proceedings — England.** — *Reg. v. Hopkins*, 64 J. P. 454.

*Canada.* — *Re Snure*, 4 Ont. L. Rep. 82; *In re Warbrick*, 6 Ont. L. Rep. 430; *In re Dewar*, 8 Ont. L. Rep. 141; *In re Sutherland*, 12 Manitoba 543; *Canadian Pac. R. Co. v. Lechtzier*, 14 Manitoba 566; *McColl v. Boreham*, 40 Can. L. J. 399.

*Alabama.* — *Patterson v. Folmar*, 125 Ala. 130; *Spann v. Torbert*, 130 Ala. 541.

*California.* — *Ivory v. Brown*, 137 Cal. 603.

*Georgia.* — *Fletcher v. Collins*, 111 Ga. 253; *Vaughan v. Vaughan*, 111 Ga. 807; *Smith v. Wynn*, 111 Ga. 884; *Johnson v. Thrower*, 117 Ga. 1007; *Willis v. Harrell*, 118 Ga. 906; *Stephenson v. Warren*, 119 Ga. 504.

*Illinois.* — *Merki v. Merki*, 113 Ill. App. 518, affirmed 212 Ill. 121.

*Indiana.* — *Ward v. Pittsburgh, etc.*, R. Co., 25 Ind. App. 405.

*Indian Territory.* — *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, affirmed 118 Fed. Rep. 430; *Rogers v. Hill*, 3 Indian Ter. 562; *Hill v. Watkins*, (Indian Ter. 1902) 69 S. W. Rep. 837.

*Kentucky.* — *Dieckman v. Weirich*, (Ky. 1903) 73 S. W. Rep. 1119.

*Maine.* — *Eveleth v. Gill*, 97 Me. 315.

*Michigan.* — *Chapman v. Nehman*, 128 Mich. 295.

*Minnesota.* — *Berryhill v. Healey*, 89 Minn. 444.

*Mississippi.* — *Bowles v. Dean*, 84 Miss. 376.

*Missouri.* — *Hadley v. Bernero*, 97 Mo. App. 314; *State v. Rainey*, 99 Mo. App. 218; *Walter Commission Co. v. Gilleland*, 98 Mo. App. 584; *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257.

*New Jersey.* — *Jones v. Rushmore*, 67 N. J. L. 157.

*New York.* — *Neusberger v. Brodejefsky*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 749; *O'Callaghan v. Hennessy*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 760; *Case v. Porterfield*, 54 N. Y. App. Div. 109; *Cohen v. Brossevitch*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 600; *Woods v. Garcewich*, 67 N. Y. App. Div. 53; *Engel, etc., Co. v. Henry Elias Brewing Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 480; *Cram v. Dietrich*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 790; *Jones v. Reilly*, 174 N. Y. 97; *Equitable L. Assur. Soc. v. Schum*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 657; *Loft v. Kaziz*, (Supm. Ct. App. T.) 84 N. Y. Supp. 228; *Maneely v. Mayers*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 380; *Eaton v. Hall*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 153; *Simmons v. Pepe*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 661; *Weinhandler v. Eastern Brewing Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 584.

*Pennsylvania.* — *Rowan v. Gates*, 9 Pa. Dist. 564 (requirements of the statute to be strictly followed); *Juergen v. Allegheny County*, 204 Pa. St. 501; *Seidel v. Sperry*, 26 Pa. Super. Ct. 649.

*Rhode Island.* — *McCrillis v. Benoit*, 26 R. I. 421.

*Washington.* — *Quandt v. Smith*, 28 Wash. 664.

*Wisconsin.* — *Brauchle v. Nothhelfer*, 107 Wis. 457.

**Due Process of Law.** — *Morris v. Healy Lumber Co.*, 33 Wash. 451, following *State v. Prather*, 19 Wash. 336, 67 Am. St. Rep. 729.

**Separate Summary Proceedings** are maintainable at the same time for recovery of separate premises. *Schumann Piano Co. v. Mark*, 208 Ill. 282.

**Prior Possession of Tenant.** — The landlord may maintain such proceedings though the tenant was in possession at the time of the leasing. *Willis v. Harrell*, 118 Ga. 906.

**Bond by Tenant.** — *Whipp v. Casey*, 21 R. I. 506.

**Liability on Retention Bond.** — *Brooks v. Buie*, 71 Ark. 44.

**Limitation of Actions.** — *Willis v. Harrell*, 118 Ga. 906; *Alworth v. Gordon*, 81 Minn. 445; *Donahoe v. Mitchem*, 13 Okla. 383.

**Right to Jury Trial.** — *Story v. Walker*, 71 N. J. L. 256; *Whitaker v. Bliss*, 23 R. I. 313.

**Summons.** — *Powers v. De O*, 64 N. Y. App. Div. 373.

**Service of Summons.** — *Eckerson v. Ellis*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 794;

**436.** See note 1.

**437.** *b.* BY AND AGAINST WHOM PROCEEDINGS MAY BE MAINTAINED

— (1) *Necessity for Relation of Landlord and Tenant.* — See note 1.

**438.** (2) *Persons Entering under Tenant.* — See notes 7, 8, 9.

**439.** (3) *Assignee of Reversion.* — See notes 1, 3.

**440.** *Assignees in Law.* — See note 2.

(4) *Subsequent Lessee.* — See note 5.

(5) *Assignee of Rent.* — See note 6.

(6) *Agent of Landlord.* — See note 7.

Engel, etc., Co. v. Henry Elias Brewing Co., (Supm. Ct. App. T.) 37 Misc. (N. Y.) 480.

**Affidavit — Sufficiency of Description of Premises.** — *Newing v. Stilwell*, 67 N. J. L. 96.

**Verification of Petition by Agent of Foreign Corporation.** — *Stuyvesant Real Estate Co. v. Sherman*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 205.

**Review on Certiorari.** — *Gray v. Reynolds*, 67 N. J. L. 169.

**Appeal.** — *Reardon v. Barr*, 13 Colo. App. 385; *Towle v. Weise*, 64 Kan. 760; *Slaughter v. Crouch*, (Ky. 1901) 64 S. W. Rep. 968; *Harvey v. Clark*, 81 Miss. 166; *Tiernan v. Davenport*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 186.

**Costs.** — *Lauria v. Capobianco*, (N. Y. City Ct. Tr. T.) 39 Misc. (N. Y.) 441.

**Strangers to Proceedings Cannot Intervene.** — *Heuser v. Antonius*, (Supm. Ct. App. T.) 84 N. Y. Supp. 580.

**Adverse Claimants** are not proper parties defendant to such proceeding. *Grizzard v. Roberts*, 110 Ga. 41.

**Injunction to Stay Summary Proceedings.** — *Johnson v. Thrower*, 117 Ga. 1007; *Brown v. Watson*, 115 Ga. 592; *Potter v. Potter*, 59 N. Y. App. Div. 140; *Rubino v. Mariano*, 65 N. Y. App. Div. 314; *Asbyll v. Haims*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 578; *Natkins v. Wetterer*, 76 N. Y. App. Div. 93; *Kazis v. Loft*, 80 N. Y. Supp. 1015, 81 N. Y. App. Div. 636.

**Injunction Against Summary Proceedings.** — *Kaufmann v. Liggett*, 209 Pa. St. 87.

**436. 1. A Quasi-public Corporation**, such as an electric light company, may be evicted by summary proceedings. *Bodwell Water Power Co. v. Old Town Electric Co.*, 96 Me. 117.

**437. 1. Relation of Landlord and Tenant Must Exist** — *Georgia.* — *Henry v. Perry*, 110 Ga. 630; *Robson v. Cofield*, 113 Ga. 1153; *Griffith v. Collins*, 116 Ga. 420.

*Iowa.* — *Gray v. Bremer*, 122 Iowa 110 (rent must be due).

*Kentucky.* — *Colored Homestead, etc., Assoc. v. Harvey*, (Ky. 1901) 64 S. W. Rep. 676.

*Mississippi.* — *Bowles v. Dean*, 84 Miss. 376.

*Missouri.* — *Taylor v. White*, 86 Mo. App. 526; *Berner v. Gebhardt*, 87 Mo. App. 409; *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257.

*New Jersey.* — *Gray v. Reynolds*, 67 N. J. L. 169.

*New York.* — *McLaughlin v. Steurwald*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 103; *Dodin v. Dodin*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 208; *Schreiber v. Goldsmith*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 45; *Schlauch v. Blum*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 225.

*Oregon.* — *Twiss v. Boehmer*, 39 Oregon 359.

*Texas.* — *Willis v. Roan*, (Tex. Civ. App. 1900) 58 S. W. Rep. 966.

*Vermont.* — *Wheeler v. Wheeler*, 77 Vt. 177.

*Canada.* — *Winslow v. Nugent*, 36 N. Bruns. 356.

**If the Owners in Severalty of Separate Tracts of Land Jointly Lease** them, either owner, as landlord, may alone institute and sustain a summary proceeding to dispossess the tenant from his tract for a holding over after expiration of the term. *New York, etc., Telephone Co. v. De Gray*, 65 N. J. L. 156.

**438. 7. Terry v. Terry, (Ky. 1902) 66 S. W. Rep. 1024; *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396; *Alworth v. Gordon*, 81 Minn. 445; *Twiss v. Boehmer*, 39 Oregon 359.**

Proceedings, however, cannot be maintained against one who is in possession of only a part of the premises, the original lessee being in possession of the balance. *Hammel v. Atkinson*, 82 Miss. 465.

**Joinder of Person Entering under Lessee.** — *Butterfield v. Kirtley*, 114 Iowa 520.

**8. Subtenants.** — *Rehm v. Halverson*, 197 Ill. 378.

It is not essential where the lessee holds over after the expiration of his term to make his sublessees of part of the premises parties to the proceedings. *Tucker v. McClenney*, 103 Mo. App. 318.

**9. Assignee of Term.** — *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 456, 21 Ohio Cir. Ct. 740.

An assignee of the term who has reassigned and surrendered possession to his assignee prior to the service of notice to quit is not liable to be proceeded against in such proceeding. *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619.

**439. 1. Assignee of the Reversion.** — *Willis v. Harrell*, 118 Ga. 906; *Drew v. Mosbarger*, 104 Ill. App. 635; *Alworth v. Gordon*, 81 Minn. 445; *Sullivan v. Lueck*, 105 Mo. App. 199.

**Grantee of Reversion Need Not Exhibit Deed to Tenant.** — *Tucker v. McClenney*, 103 Mo. App. 318.

**3. Attornment Not Required.** — See *Berner v. Gebhardt*, 87 Mo. App. 409.

**440. 2. Heirs.** — Heirs to whom a tenant has attorned may maintain such proceedings. *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396.

**5. Subsequent Lessee.** — *Harris v. Halverson*, 23 Wash. 779, following *Capital Brewing Co. v. Crosbie*, 22 Wash. 269.

**6. Assignee of Rent.** — *Markin v. Whitaker*, 26 Ind. App. 211.

**7. Agent of Landlord.** — *Powers v. De O*, 64 N. Y. App. Div. 373.

An agent of the lessors may maintain summary proceedings to oust a partnership lessee;

**440.** (7) *Effect of Assignment of Reversion on Landlord's Right to Maintain Proceedings.* — See note 8.

**441.** See note 1.

c. WHEN PROCEEDINGS ARE AUTHORIZED — (1) *Character of Tenancy.* — See note 2.

(2) *Overholding Tenants* — (a) *In General.* — See note 6.

**442.** (b) *Term Must Expire by Efflux of Time* — *Expiration of Term by Forfeiture.* — See notes 3, 4.

*Expiration by Surrender.* — See note 5.

*Option in Lessor to Terminate Lease.* — See note 6.

(3) *Nonpayment of Rent* — (a) *In General.* — See note 7.

**443.** See note 1.

(b) *Effect of Breach of Agreements by Landlord.* — See note 3.

**444.** *Ejection.* — See note 2.

though one of the members of the partnership is also a co-owner and colessor of the property. *Case v. Porterfield*, 54 N. Y. App. Div. 109.

**440.** 8. *Holliday v. Chism*, 25 Ind. App. 1. *Reservation of Right of Possession.* — *Tucker v. McConney*, 103 Mo. App. 318.

**441.** 1. *Bowles v. Dean*, 84 Miss. 376; *Twiss v. Boehmer*, 39 Oregon 359; *Schreiner v. Stanton*, 26 Wash. 563.

2. *Tenancy for Life.* — *Foss v. Stanton*, 76 Vt. 365.

6. *Overholding Tenants* — *United States.* — *Ellis v. Fitzpatrick*, 118 Fed. Rep. 430, 55 C. C. A. 260; *Fraer v. Washington*, 125 Fed. Rep. 280, 60 C. C. A. 194.

*California.* — *Odell v. Buttrick*, 126 Cal. 551; *Earl Orchard Co. v. Fava*, 138 Cal. 76.

*Kentucky.* — *Reccius v. Columbia Finance, etc., Co.*, (Ky. 1905) 86 S. W. Rep. 1113.

*Missouri.* — *Frick Co. v. Marshall*, 86 Mo. App. 463; *Tucker v. McClenney*, 103 Mo. App. 318; *Barado-Ghio Real Estate Co. v. Heidbrink*, 112 Mo. App. 429.

*Nebraska.* — *Armstrong v. Meyer*, (Neb. 1901) 95 N. W. Rep. 483; *Pusey v. Presbyterian Hospital*, (Neb. 1903) 97 N. W. Rep. 475.

*New York.* — *Cox v. Sammis*, 57 N. Y. App. Div. 173.

*Washington.* — *Yesler v. Orth*, 24 Wash. 483; *Stanford Land Co. v. Steidle*, 28 Wash. 72.

*Canada.* — *Canadian Pac. Co. v. Lechtzier*, 39 Can. L. J. 798.

*Overholding by Subtenant.* — *Fletcher v. Fletcher*, 123 Ga. 470.

*Demand for Possession Not Necessary.* — *Bierkenkamp v. Bierkenkamp*, 88 Mo. App. 445.

*Time.* — The proceedings must be brought within thirty days after the termination of the tenancy. *McClelland v. Wiggins*, 109 Iowa 673.

**442.** 3. *Tenancy Terminated by Forfeiture.* — *Kelly v. Varnes*, 52 N. Y. App. Div. 190; *McMahon v. Howe*, (County Ct.) 40 Misc. (N. Y.) 546. But see *Andrews v. Erwin*, (Ky. 1904) 78 S. W. Rep. 902.

*Conditional Limitation of Lease.* — *Martin v. Crossley*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 254.

4. *Drew v. Mosharger*, 104 Ill. App. 635; *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, affirmed 118 Fed. Rep. 430; *Towle v. Weise*, 64 Kan. 760; *Walker v. Dowling*, (Ky. 1902) 68 S. W.

Rep. 135; *Marvin v. Hartz*, 130 Mich. 26; *Berryhill v. Healey*, 89 Minn. 444; *Cochran v. Philadelphia Mortg., etc., Co.*, (Neb. 1903) 96 N. W. Rep. 1051; *Foss v. Stanton*, 76 Vt. 365. And see *Preston v. Stover*, (Neb. 1903) 97 N. W. Rep. 812, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 442, and explaining *Stevenson v. Brodahl*, 49 Neb. 703.

5. *Ryan v. Turner*, 14 Manitoba 624.

6. *Ronginsky v. Grantz*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 347.

7. *Nonpayment of Rent.* — *Lacrabere v. Wise*, (Cal. 1903) 71 Pac. Rep. 175; *Cambridge Lodge No. 9 v. Routh*, 163 Ind. 1; *Welch v. Ashby*, 88 Mo. App. 400; *Hutzel v. Draper*, (Neb. 1904) 99 N. W. Rep. 263; *Brown v. Hess*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 750; *Lasher v. Curry*, (County Ct.) 9 N. Y. Annot. Cas. 260, affirmed 62 N. Y. App. Div. 631; *Belding v. Blum*, (Supm. Ct. App. T.) 88 N. Y. Supp. 178; *Lyons v. Gayin*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 659; *Peabody v. Long Acre Square Bldg. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 629.

*Nonpayment of Taxes.* — See *Crosby v. Jarvis*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 436; *Sipp v. Reich*, (Supm. Ct. App. T.) 88 N. Y. Supp. 960.

*Insufficient Property Subject to Distress.* — *Wilson v. Wood*, 84 Miss. 728.

*Effect of Garnishment.* — The fact that the tenant has been summoned as garnishee at the suit of creditors of the landlord is a defense to summary proceedings based on the nonpayment of rent. *O'Connor v. White*, 124 Mich. 22.

*Burden of Proving Nonpayment of Rent.* — *Brill v. Norgett*, (Supm. Ct. App. T.) 84 N. Y. Supp. 142.

*Nonpayment of Rent in Advance as Required by Lease.* — *Ingalls v. Bissot*, 25 Ind. App. 130.

The institution of an action to recover rent payable in advance is not a defense to summary proceedings on account of such nonpayment. *Schumann Piano Co. v. Mark*, 208 Ill. 282.

**443.** 1. *Hunter v. Porter*, 10 Idaho 72; *Crosby v. Jarvis*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 436; *Fleishauer v. Bell*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 240, disapproving *McMahon v. Howe*, (County Ct.) 40 Misc. (N. Y.) 546.

3. *Malick v. Kellogg*, 118 Wis. 405 (breach of agreement to make improvements).

**444.** 2. *Sirey v. Braems*, 65 N. Y. App.

**444.** (c) Effect of Counterclaim by Tenant. — See note 4.

(d) Demand for Rent. — See note 6.

(e) Notice to Quit. — See note 10.

**445.** (f) Waiver of Right to Institute Proceedings. — See notes 1, 3.

(g) Redemption from Forfeiture. — See notes 8, 9.

(h) Insufficient Property Subject to Distress. — See note 10.

**446.** (5) Breach of Agreements in Lease. — See note 1.

d. NOTICE TO QUIT AND DEMAND FOR POSSESSION. — See notes

3, 5, 6, 7.

Form of Demand. — See note 9.

**447.** e. DEFENSES — (i) In General. — See note 3.

Div. 472; Seigel v. Neary, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297.

**444.** 4. Hunter v. Porter, 10 Idaho 72; Liebmann's Sons Brewing Co. v. De Nicolo, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 268. See Case v. Porterfield, 54 N. Y. App. Div. 109.

**Statutory Provision for Counterclaim.** — Flegenhimer v. Dreyer, 72 N. Y. App. Div. 589; Castagnette v. Nichia, 76 N. Y. App. Div. 371; Jefferson Real Estate Co. v. Hiller, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 784; Fritztuskie v. Wauroski, 83 N. Y. App. Div. 150; Sage v. Crosby, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 117.

**6. Demand Required by Statute.** — Lacrabere v. Wise, 141 Cal. 554; Cambridge Lodge No. 9 v. Routh, 163 Ind. 1; Wilson v. Wood, 84 Miss. 728; Welch v. Ashby, 88 Mo. App. 400; McMahon v. Howe, (County Ct.) 40 Misc. (N. Y.) 546; Miller v. Lowe, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 343; Byrnett v. Gardner, 35 Wash. 668.

**Sufficiency of Demand.** — Hunter v. Porter, 10 Idaho 72; Lacrabere v. Wise, (Cal. 1903) 71 Pac. Rep. 175.

**Demand and Notice by Agent Held Sufficient.** — Powers v. De O, 64 N. Y. App. Div. 373.

**Proof of Service of Notice by Affidavit Not Allowable.** — Lacrabere v. Wise, 141 Cal. 554.

10. McCrillis v. Benoit, 26 R. I. 421.

**445.** 1. A Demand for Rent After Notice to Quit for Nonpayment is not as a matter of law a waiver of such notice as a basis for summary proceedings. Bantjo v. Clark, (Supm. Ct. App. T.) 88 N. Y. Supp. 135.

3. See Spiro v. Barkin, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 87.

8. See Seigel v. Neary, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 297.

9. Bateman v. Superior Ct., 139 Cal. 140; Hunter v. Porter, 10 Idaho 72; Walter Commission Co. v. Gilleland, 98 Mo. App. 584; Koppel v. Tilyou, (Municipal Ct.) 31 Civ. Pro. N. Y.) 185; Asbyll v. Haims, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 578; Flewellin v. Lent, 91 N. Y. App. Div. 430; McMichael v. McFalls, 17 Lanc. L. Rev. 279; Hickey v. Conley, 24 Pa. Super. Ct. 388.

10. McMichael v. McFalls, 17 Lanc. L. Rev. 279; Hickey v. Conley, 24 Pa. Super. Ct. 388.

**446.** 1. Byrnett v. Gardner, 35 Wash. 668. But see Sipp v. Reich, (Supm. Ct. App. T.) 88 N. Y. Supp. 960.

3. Gossett v. Fox, (Supm. Ct. App. T.) 90 N. Y. Supp. 477.

5. Notice to Quit or Demand for Possession. — Barnewell v. Stephens, (Ala. 1905) 38 So. Rep.

662; Schnittger v. Rose, 139 Cal. 656 (proceedings based on breach of agreements in lease); Simmons v. Pope, (Supm. Ct. App. T.) 84 N. Y. Supp. 973; Miller v. Lowe, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 343; McMichael v. McFalls, 17 Lanc. L. Rev. 279; Re Grant, 8 Ont. L. Rep. 297.

**Demand Is Not Necessary** unless required by statute. Earl Orchard Co. v. Fava, 138 Cal. 76 (overholding tenant); Millington v. O'Dell, (Ind. App. 1905) 73 N. E. Rep. 949; Andrews v. Erwin, (Ky. 1904) 78 S. W. Rep. 1902 (tenant holding over); Barado-Ghio Real Estate Co. v. Heidbrink, 112 Mo. App. 429; Bowles v. Dean, 84 Miss. 376 (overholding tenant); Morris v. Healy Lumber Co., 33 Wash. 451 (overholding tenant); Mounts v. Goranson, 29 Wash. 261.

No notice is necessary to maintain proceedings against a tenant holding over after a term for years. Stanford Land Co. v. Steidle, 28 Wash. 72.

**"More than Twenty Days"** — Washington Statute. — McGinnis v. Genss, 25 Wash. 490.

Under such statute the notice may be served more than twenty days before the expiration of the period; it need not be served exactly twenty days before. Ferguson v. Hoshi, 25 Wash. 664.

**No Omission of Sunday in Computing Three Days' Notice.** — Beaudry v. Hannigan, 23 Quebec Super. Ct. 232, overruling judgment of Lange-lier, J., 19 Quebec Super. Ct. 421.

6. Beauchamp v. Runnels, 35 Tex. Civ. App. 212.

7. Cheek v. Preston, 34 Ind. App. 343.

9. Durie v. McLish, 2 Indian Ter. 610.

Verbal notice to quit is sufficient where the statute does not require the notice to be in writing. Guvernator v. Kenin, 66 N. J. L. 114.

**447.** 3. Equitable Defense Not Allowed. — Patrick v. Cobb, 122 Ga. 80; Cottrell v. Moran, (Mich. 1904) 101 N. W. Rep. 561; Clark v. Bourgeois, (Miss. 1905) 38 So. Rep. 187; Carmack v. Drum, 27 Wash. 382; Bond v. Chapman, 34 Wash. 606. See, however, Simon Newman Co. v. Lassing, 141 Cal. 174.

**Equitable Defense Allowed.** — Schlaich v. Blum, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 225.

**A Counterclaim** for breach of agreement in the lease by lessor cannot be set up. Carmack v. Drum, 27 Wash. 382.

**Pendency of Condemnation Proceedings.** — Morris v. Healy Lumber Co., 33 Wash. 451.

**Injunction Against Summary Proceedings.** — Denny v. Fronheiser, 207 Pa. St. 174.

**447.** (2) *Estoppel to Deny Landlord's Title.* — See notes 5, 9.

**448.** (3) *Extension of Lease.* — See note 1.

(4) *Abandonment of Possession.* — See note 4.

f. DAMAGES RECOVERABLE BY LANDLORD. — See notes 5, 6, 7, 8.

g. WRONGFUL DISPOSSESSION — Recovery of Damages by Tenant. — See note 10.

If the Eviction Was under an Order Issued Without Jurisdiction. — See note 12.

**449.** XV. ESTOVERS. — See note 1.

**450.** XVI. LANDLORD'S RIGHT OF ENTRY UPON DEMISED PREMISES. — See notes 1, 2, 4.

XVII. LIABILITY OF THIRD PERSONS TO LANDLORD — 1. For Injuries to Demised Premises. — See note 8.

**451.** See notes 1, 4.

**447.** 5. *Estoppel to Deny Landlord's Title* — *Georgia.* — *Johnson v. Thrower*, 117 Ga. 1007; *Patrick v. Cobb*, 122 Ga. 80.

*Indian Territory.* — *Sass v. Thomas*, 3 Indian Ter. 536; *Thomas v. Sass*, 3 Indian Ter. 545; *Hill v. Watkins*, (Indian Ter. 1902) 69 S. W. Rep. 837.

*Kansas.* — *Fry v. Boman*, 67 Kan. 531.

*Kentucky.* — *Mefford v. Franklin County*, (Ky. 1900) 58 S. W. Rep. 993; *Slaughter v. Crouch*, (Ky. 1901) 64 S. W. Rep. 968; *Russell v. Van Fleet*, (Ky. 1902) 68 S. W. Rep. 396.

*Nebraska.* — *Wilson v. Lyons*, (Neb. 1903) 94 N. W. Rep. 636.

*New Jersey.* — *Dilks v. Kelsey*, (N. J. 1905) 59 Atl. Rep. 897.

*New York.* — *Rowland v. Dillingham*, 83 N. Y. App. Div. 156.

*West Virginia.* — *Wheeling First English Evangelical Lutheran Church v. Arkle*, 49 W. Va. 92; *Stover v. Davis*, 57 W. Va. 196.

9. *Fry v. Boman*, 67 Kan. 531.

**448.** 1. *Renewal of Lease.* — *Schweikert v. Seavey*, 130 Cal. xviii, 62 Pac. Rep. 600; *Schuck v. Schwab*, (Supm. Ct. App. T.) 84 N. Y. Supp. 896.

*Right to Renewal as a Defense.* — *Platt v. Cutler*, 75 Conn. 183; *Ferguson v. Jackson*, 180 Mass. 557.

4. See *Simmons v. Pepe*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 661 (destruction of premises).

The remedy of unlawful detainer lies only against the party in possession, and therefore a tenant who unlawfully puts a stranger in possession of his landlord's property after the expiration of the term cannot be joined with such stranger in an action of unlawful detainer. The tenant must do more than unlawfully put a third person in possession to render him liable. *St. Louis Brewing Assoc. v. Neiderluecke*, 102 Mo. App. 303.

5. *Stelle v. Creamer*, 69 N. Y. App. Div. 296; *Hickey v. Conley*, 24 Pa. Super. Ct. 388.

6. *Keyes v. Moy Jin Mun*, 136 Cal. 129; *Nolan v. Hentig*, 138 Cal. 281; *Lautman v. Miller*, 158 Ind. 382; *Millington v. O'Dell*, (Ind. App. 1905) 73 N. E. Rep. 949; *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, *affirmed* 118 Fed. Rep. 430; *Fallon v. Murray*, (Indian Ter. 1901) 64 S. W. Rep. 753; *Schellenberg v. Frank*, (Mich. 1905) 102 N. W. Rep. 644; *Hadley v. Bernero*, 97 Mo. App. 314; *Walter Commission Co. v. Gilleland*, 98 Mo. App. 584; *Ferguson v.*

*Hoshi*, 25 Wash. 664; *Quandt v. Smith*, 28 Wash. 664; *Bond v. Chapman*, 34 Wash. 606; *State v. Pittenger*, 37 Wash. 384.

*Damages for Waste.* — *Champ Spring Co. v. Roth Tool, etc., Co.*, 103 Mo. App. 103.

7. *Sullivan v. Lueck*, 105 Mo. App. 199.

8. *Moston v. Stow*, 91 Mo. App. 554.

10. *Small v. Clark*, 97 Me. 304; *Hong Sing v. Wolf Fein*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 608; *Burwell v. Brodie*, 134 N. Car. 540; *O'Neal v. Sneeringer*, 12 York Leg. Rec. (Pa.) 141; *Leese v. Horne*, 30 Pittsb. Leg. L. N. S. (Pa.) 316.

12. *Damages Recoverable Against Landlord.* — *Gaertner v. Bues*, 109 Wis. 165.

*Liability of Officer Executing Writ.* — See *Gaertner v. Bues*, 109 Wis. 165.

**449.** 1. *Estovers.* — *Anderson v. Cowan*, 125 Iowa 259, 106 Am. St. Rep. 303, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 448; *Smellie v. Watson*, 7 Ont. L. Rep. 635.

*Clearing for Cultivation.* — *Warren County v. Gans*, 80 Miss. 76.

**450.** 1. *Landlord Has No General Right to Enter on Leased Premises.* — *J. B. Sanborn Co. v. Marquette Bldg. Co.*, 86 Ill. App. 681; *W. T. Wilton, etc., Land Co. v. Philips*, 90 Ill. App. 573; *Tobin v. French*, 93 Ill. App. 18; *Roehrs v. Timmons*, 28 Ind. App. 578; *State v. DeBaillon*, 113 La. 572; *Maney v. Lamphere*, (Mich. 1905) 102 N. W. Rep. 974; *Benedict v. International Banking Corp.*, 88 N. Y. App. Div. 488; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535.

*Entry to Post "To Let" Sign.* — *Crane v. Edwards*, 80 N. Y. App. Div. 333.

*Destruction of Growing Crops.* — *Scanland v. Musgrove*, 91 Ill. App. 184.

2. In *Markham v. David Stevenson Brewing Co.*, 169 N. Y. 593, *affirming* 51 N. Y. App. Div. 463, it was held that where the tenant covenants to make repairs and refuses to make repairs ordered by the building department of the municipality, the landlord can enter and make such repairs, and in case of such an entry the tenant has no right to abandon the premises on the ground of eviction so as to escape liability for future rent.

4. *A Reservation of the Right to Re-enter and Sow Crops* is assignable to a succeeding tenant. *Brewster v. Gracey*, 65 Kan. 137.

8. *Trespass Quare Clausum Fregit.* — *Perry v. Bailey*, 94 Me. 50.

**451.** 1. *Case for Injury to Reversionary In-*

**452.** Tearing Down Fences. — See note 6.

Injuries Solely to Possession. — See notes 8, 10, 11.

**453.** 2. For Disturbing and Driving Away Tenants. — See note 1.

**XVIII. LIABILITY OF THIRD PERSONS TO TENANT** — For Injuries to and Trespasses upon Demised Premises. — See notes 3, 4, 5, 6.

**454.** See note 1.

**XIX. CRIMINAL PROSECUTIONS** — Against Tenants and Third Persons — Removal of Crops Subject to Landlord's Lien. — See notes 5, 6.  
Cutting Timber. — See note 7.

terest. — *Perry v. Bailey*, 94 Me. 50; *Arnold v. Bennett*, 92 Mo. App. 156; *Watson v. Harrigan*, 112 Wis. 278.

**Obstructing Way.** — *Taylor v. Wright*, 51 N. Y. App. Div. 97.

**Effect of Liability of Lessee.** — *Vance v. San Antonio Gas Co.*, (Tex. Civ. App. 1900) 60 S. W. Rep. 317.

**451.** 4. Injury to House. — *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378.

**452.** 6. *Taylor v. Wright*, 51 N. Y. App. Div. 97.

8. Injuries to Possession of Tenant. — *Coney v. Brunswick, etc., Steamboat Co.*, 116 Ga. 222; *Southern R. Co. v. State*, 116 Ga. 276; *Van Siclen v. New York*, 64 N. Y. App. Div. 437, modified 172 N. Y. 504; *Peck v. Cain*, 27 Tex. Civ. App. 38; *Watson v. Harrigan*, 112 Wis. 278.

10. Injury to Sod. — *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302.

11. *Younggreen v. Shelton*, 101 Ill. App. 89; *Neal v. Ohio River R. Co.*, 47 W. Va. 316.

**453.** 1. Disturbing and Driving Away Tenants. — *Mahoney v. McNeill*, 77 Miss. 406.

Enticing Away and Employing Tenant. — *Wagner v. Ellis*, 85 Miss. 422; *Petty v. Leggett*, (Miss. 1905) 38 So. Rep. 549.

3. Rights of Tenant Prior to Entry. — *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 453.

4. *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943.

5. *Bass v. West*, 110 Ga. 698; *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587; *McPhillips v. Fitzgerald*, 177 N. Y. 543, affirming 76 N. Y. App. Div. 15; *Dale v. Southern R. Co.*, 132 N. Car. 705.

**Negligent Destruction of or Injuries to Buildings on Demised Premises.** — *Le Salg v. Dougherty*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 455; *McPhillips v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed 177 N. Y. 543.

**Injuries to Crops.** — The tenant may maintain an action for injuries to crops though the landlord has a lien thereon for rent and advances.

*Parker v. Hale*, (Tex. Civ. App. 1903) 78 S. W. Rep. 555.

The tenant may recover the full damages for injuries to his crops, caused by a breach of a third person's contract to harvest the same, though he is to pay as rent a part of the crops. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232.

**Injury to Growing Grass.** — *St. Louis, etc., R. Co. v. Hall*, 71 Ark. 302 (tenant at will held entitled to recover therefor).

**Nuisances Causing Injury to Tenant.** — *Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 1.

**Continuance of Nuisance Existing at Time of Letting.** — *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587; *Dumois v. New York*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 614.

**Injuries Prior to Lease.** — Where water is drawn from land by the establishment of a pumping station, a tenant subsequently renting the land cannot maintain an action for damages therefrom. *Sposato v. New York*, 178 N. Y. 583, affirming 75 N. Y. App. Div. 304.

6. *Coney v. Brunswick, etc., Steamboat Co.*, 116 Ga. 222.

**454.** 1. See *Dumois v. New York*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 614.

5. Prosecution Against Renter or Share Cropper for Leaving. — *Hendricks v. State*, 79 Miss. 368.

6. *Smith v. State*, 139 Ala. 115; *State v. Bell*, 136 N. Car. 674; *State v. Hoskins*, 106 Tenn. 430.

**Counterclaim Against Landlord.** — *State v. Neal*, 129 N. Car. 692.

**The Motive or Intent of the Lessee** with regard to the removal of property is immaterial. *State v. Neal*, 129 N. Car. 692; *State v. Crook*, 132 N. Car. 1053.

**Lessee Held Liable for Removal of Crop by Sublessee.** — *State v. Crook*, 132 N. Car. 1053.

7. **Injuring House.** — *State v. Godwin*, 138 N. Car. 582.

**Cropper Leaving Farm.** — *Ex p. Harris*, 85 Miss. 4.

**Enticing Away and Employing Tenant.** — *Haney v. State*, (Miss. 1905) 38 So. Rep. 284.

# LARCENY.

BY BENJAMIN TRAPNELL.

**459. I. DEFINITION** — At Common Law. — See note 1.

**460. II. DIFFERENT KINDS OF LARCENY** — 1. With Respect to Act of Taking — *c.* COMPOUND LARCENY — (2) *Instances of Compound Larceny* — (a) Larceny from the Person — Robbery. — See note 8.

**461.** Larceny from the Person Other than Robbery. — See notes 5, 6.

**462.** (b) Larceny from House or Other Building, Etc. — *bb.* CASES OTHER THAN BURGLARY — (*bb.*) *American Statutes.* — See note 9.

**463.** See note 1.

**464. 2. With Respect to Value or Nature of Subject** — *a.* GRAND LARCENY — (1) *Value of Subject.* — See note 1.

(2) *Nature of Subject* — (a) In General. — See note 3.

(b) Things Designated by Statute — Domestic Animals. — See note 6.

**465.** Crops in Field. — See note 5.

(3) *Situs of Subject.* — See note 8.

**459. 1. Larceny Defined** — *Delaware.* — State *v.* Stevens, 2 Penn. (Del.) 486; State *v.* Conlan, 3 Penn. (Del.) 218; State *v.* Kavanaugh, 4 Penn. (Del.) 131; State *v.* Carr, 4 Penn. (Del.) 523.

*Illinois.* — Watts *v.* People, 204 Ill. 233.

*Indiana.* — Stillwell *v.* State, 155 Ind. 552.

*Mississippi.* — Reed *v.* Greenville, 83 Miss. 192.

*Missouri.* — State *v.* Murphy, 90 Mo. App. 548; State *v.* Waghalter, 177 Mo. 676.

*Wisconsin.* — Fetkenhauer *v.* State, 112 Wis. 491.

**460. 8. Robbery Is Larceny** with the element of force or intimidation added. People *v.* Clark, 145 Cal. 727. See generally the title ROBBERY, 992, 9, 10. Compare Smith *v.* State, 117 Ga. 320, 97 Am. St. Rep. 165.

**461. 5. Statutes in United States** — Any Taking from the Person. — In State *v.* Wilson, 107 La. 344, it was held that in Louisiana there is no distinction between larceny from the person and larceny otherwise than from the person; so that a secret theft from the person is to be prosecuted and punished as a simple larceny, and not as an attempt to rob, which necessarily implies violence or putting in fear.

**6. Under the Texas Statute.** — Harris *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 921.

**462. 9. Statutes in United States Affecting Larceny in House, Etc.** — Jefferson *v.* State, 117 Ga. 710; Heard *v.* State, 120 Ga. 848.

**Larceny from Burning Building.** — The Michigan statute (Comp. Laws Mich., § 11551) makes special provision for larceny from a building which is on fire. People *v.* Klammer, (Mich. 1904) 190 N. W. Rep. 600.

**Church, Schoolhouse, or Public Building.** — Fletcher *v.* Com., (Ky. 1904) 80 S. W. Rep. 1089.

**463. 1. Goods under Protection of House.** — The theft of goods from a passenger car, which is under the shed of a union passenger depot, is held in Georgia to be larceny from the house, and to be a felony, where the

value of the goods exceeds fifty dollars, notwithstanding the fact that Pen. Code Ga., § 185, makes it a misdemeanor to enter and steal from a railroad car. Bone *v.* State, 121 Ga. 147.

**464. 1. Aggregate Value of Stolen Articles.** — Weaver *v.* Com., (Ky. 1905) 86 S. W. Rep. 551; State *v.* Montgomery, 17 S. Dak. 500; Flynn *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 206.

**Where Property Belongs to Different Persons** and is located at different places, though all are within the same "wagon-yard," each theft constitutes a different offense though they are committed in rapid succession; and if the value of the property stolen from any one place is not sufficient to constitute the offense of grand larceny, the aggregate value cannot be considered in order to sustain a conviction thereof. State *v.* Maggard, 160 Mo. 469, 83 Am. St. Rep. 484. See *infra*, this title, 469, 1, 2.

**3. No Value Required to Be Shown.** — Quinn *v.* People, 32 Colo. 135.

**6. Stealing Domestic Animals Made Grand Larceny by Statute.** — Miller *v.* Territory, (Ariz. 1905) 80 Pac. Rep. 321; Quinn *v.* People, 32 Colo. 135; State *v.* Gouvernale, 112 La. 956; Beard *v.* State, 45 Tex. Crim. 522; State *v.* Bates, 25 Utah 1; State *v.* Washing, 36 Wash. 485; State *v.* Klein, 38 Wash. 475.

Although under Gen. Stat. Conn. (1902), § 1207, the penalty for stealing chattels not exceeding fifteen dollars in value is a fine of seven dollars, one who steals a horse of less than fifteen dollars in value is subject to imprisonment under section 1204, which expressly requires the imprisonment of whomsoever steals a horse. McVeigh *v.* Ripley, 77 Conn. 136.

**"Mare" Includes Female Colt.** — Miller *v.* Territory, (Ariz. 1905) 80 Pac. Rep. 321.

**465. 5. Stealing Baled Cotton** is a felony under Pen. Code Ga., § 186, without regard to the value of the cotton. Hall *v.* State, 120 Ga. 142.

**8. Larceny from Person, Building, Etc. —**

- 466.** *e. PROOF OF VALUE.* — See note 16.  
**467.** **3. Acts Made Larceny by Statute.** — See note 8.  
**468.** **III. ELEMENTS OF LARCENY — 1. The Taking — a. CHARACTER OF ACT IN GENERAL** — (1) "*Taking*" *Defined and Explained.* — See notes 6 7.  
**469.** **Taking Several Articles at the Same Time and Place.** — See note 1.  
 (2) *Wrongful Nature of Act — Trespass.* — See notes 4, 5.  
**470.** (4) *Taking by Fraud.* — See note 1.  
**471.** See note 1.  
 (6) *Taking with Consent of Owner.* — See note 4.  
**472.** See notes 1, 2.

In *Alabama*, under sections 5049, 5050, of the code, a theft from a dwelling-house, store-house, or warehouse is grand larceny only where the value of the property stolen is five dollars or more, though prior to the adoption of the code such a theft was grand larceny without regard to the value of the property. *Storrs v. State*, 129 Ala. 101.

**466.** **10. Necessity of Proving Value to Determine Grade of Crime.** — *Howell v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 185. *Compare* *State v. Coston*, 113 La. 717.

By Value Is Meant market value. *Filson v. Territory*, 11 Okla. 351; *Baden v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 769. See also *State v. Robertson*, 111 La. 809.

Where the Things Stolen Have No Marketable Value, the owner may testify to their actual value without regard to market value. *State v. Maggard*, 160 Mo. 469, 83 Am. St. Rep. 484.

**467.** **8. Receiving Deposits by Officer of Insolvent Bank Declared Larceny.** — *Paulsen v. People*, 195 Ill. 507; *State v. Clements*, 82 Minn. 434.

**468.** **6. Actual or Constructive Possession** is necessary to constitute a taking. *Et p. Thrasher*, (Tex. Crim. 1904) 80 S. W. Rep. 1142.

**7. Taking by the Hand of Another.** — *Rice v. State*, 118 Ga. 48, 98 Am. St. Rep. 99; *Carroll v. State*, 121 Ga. 197.

One who conspires with another to steal a chattel may be convicted of larceny, though there may a doubt as to which of them actually took it. *Huskey v. State*, 129 Ala. 94.

Where one, with felonious intent, sells a horse, and the purchaser takes possession thereof, such taking is the act of the seller, and he is guilty of larceny. *Walls v. State*, 43 Tex. Crim. 70.

**469.** **1. Taking at Same Time Articles Belonging to Different Persons Held Single Larceny.** — *State v. Mickel*, 23 Utah 507; *State v. Blay*, 77 Vt. 56.

**4.** **Taking Must Amount to Trespass.** — *Lane v. State*, 113 Ga. 1040, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469; *State v. Anderson*, 186 Mo. 25; *State v. Edwards*, 51 W. Va. 225, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469.

**5. Fraud May Supply Place of Force.** — *State v. Edwards*, 51 W. Va. 220, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 469.

**470.** **1. Possession Obtained by Fraud** — *Georgia.* — *Cutrinegin v. State*, 118 Ga. 125.

*Indiana.* — *Stillwell v. State*, 155 Ind. 552.

*Missouri.* — *State v. Copeman*, 186 Mo. 108; *State v. Buck*, 186 Mo. 15; *State v. Murphy*, 90 Mo. App. 548.

*New York.* — *People v. Sumner*, 161 N. Y. 652, affirming 33 N. Y. App. Div. 338; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546; *People v. Walker*, 85 N. Y. App. Div. 556, affirmed 178 N. Y. 563.

*Oklahoma.* — *Flohr v. Territory*, 14 Okla. 477.

*Oregon.* — *State v. Meldrum*, 41 Oregon 380. *Texas.* — *Harris v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 921.

**Inducing a Person to Bet.** — *Hindman v. State*, 72 Ark. 516.

**471.** **1. Inducing Servant of Owner to Sell.** — *State v. Koplan*, 167 Mo. 298.

**4.** **Taking with Consent or by Procurement of Owner.** — *Lowe v. State*, 44 Fla. 449; *State v. Waller*, 174 Mo. 518.

But it was held in *People v. Mills*, 178 N. Y. 274, that where the property of the state is delivered by any one, under any circumstances, to any person for the purpose of having him steal it, and he takes it into his possession with intent to steal it, there is a trespass and the attempt is a crime.

**Consent of Owner's Agent.** — *Fetkenhauer v. State*, 112 Wis. 491.

**Consent of One Joint Owner Sufficient.** — *Tyler v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 750.

**Evidence of Nonconsent.** — In *Texas* the rule now is that the want of consent of the owner to the taking must be proved by positive testimony where this is obtainable; and where the owner is examined, but does not state in terms that he did not consent, circumstantial evidence of nonconsent, no matter how strong, will not suffice. *Sparks v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 533.

**Circumstantial Evidence.** — *Jones v. People*, 33 Colo. 161; *Wiegrefe v. State*, 66 Neb. 23; *Van Syoc v. State*, (Neb. 1903) 96 N. W. Rep. 266; *Palmer v. State*, (Neb. 1903) 97 N. W. Rep. 235; *Filson v. Territory*, 11 Okla. 351; *Atkins v. State*, 44 Tex. Crim. 291; *Taylor v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 35; *State v. Wong Quong*, 27 Wash. 93.

**472.** **1. Permitting Intended Larceny in Order to Capture Thief.** — *Lowe v. State*, 44 Fla. 449.

**2. Taking by Procurement or at Solicitation of Owner.** — *State v. Waghalter*, 177 Mo. 676.

Where a detective inaugurates a thieving enterprise in order to entrap a third person, if he has the consent of the owner, express or implied, or if such third person reasonably believes that he has such consent, the taking by the latter is not larceny. *McGee v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 562. *Compare* *Slaughter v. State*, 113 Ga. 284, 84 Am. St. Rep. 242, in which case it was held that one who



- 473.** *b.* GOODS IN POSSESSION OF OWNER. — See note 1.
- 474.** *c.* GOODS IN POSSESSION OF TAKER — (2) *Possession Distinguished from Mere Custody* — (a) *Statement of Principle*. — See note 1.
- 475.** (b) *Effect of Delivery as Giving Possession or Mere Custody* — *aa.* MASTER AND SERVANT — *Servants Authorized to Sell*. — See notes 6, 7.
- 476.** *bb.* SPECIAL OR QUALIFIED DELIVERY — *Money to Be Applied to Special Purposes*. — See notes 2, 3.
- Delivery of Money to Be Changed*. — See note 4.
- 477.** *cc.* BAILMENT — (*aa*) *Rule that Bailment Passes Possession*. — See note 1.
- Delivery of Money*. — See note 3.
- 478.** (*bb*) *Exceptions to Rule* — *aaa.* *Possession Obtained with Fraudulent Intent*. — See note 3.
- 479.** See note 1.
- 480.** (*cc*) *Statutory Rule as to Bailees*. — See note 6.
- 481.** *ee.* DELIVERY BY MISTAKE. — See notes 4, 5.
- ff.* DELIVERY WITH INTENT TO TRANSFER TITLE. — See note 6.
- 482.** See note 8.

solicited and procured the promise of a reward from a merchant for the detection of an employee who, as he alleged, was systematically robbing the merchant, and then induced an employee of the merchant to steal merchandise and deliver it to such detective, who thereupon surrendered it to the owner and claimed the reward, was guilty of larceny.

**473.** 1. *Constructive Possession*. — Where personal property is taken and retained by one who, by reason of infancy or imbecility, is incapable of committing a crime, it is still in the custody of the owner, and one who takes it from such irresponsible agent with intent to convert it is guilty of larceny. *Rice v. State*, 118 Ga. 48, 98 Am. St. Rep. 99.

*Possession of Owner's Servant, Agent, or Bailee*. — *Allen v. State*, 134 Ala. 159.

**474.** 1. *Possession Distinguished from Mere Custody*. — *Currier v. State*, 157 Ind. 114; *State v. Teller*, 45 Oregon 571.

**475.** 6. *Unauthorized Sale with Fraudulent Intent*. — Fish taken at sea are in the possession of the owner of the smack by which they are taken, and where the master of the smack sells them before the completion of the voyage and converts the price, he is guilty of larceny. *Rex v. Mallison*, 86 L. T. N. S. 600, 66 J. P. 503.

7. *Purchaser with Knowledge of Servant's Want of Authority*. — *Compare Bismark v. State*, 45 Tex. Crim. 54.

**476.** 2. *Money to Be Applied to Special Purposes*. — *Walker v. State*, 117 Ga. 260. See also *People v. Hackett*, 82 N. Y. App. Div. 86, affirmed 175 N. Y. 503.

3. *State v. Edwards*, 51 W. Va. 220, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 476.

4. *Delivery of Money to Be Changed*. — *Verberg v. State*, 137 Ala. 73; *Fitzgerald v. State*, 118 Ga. 855.

Where a coin is delivered to a person with instructions to exchange it for bills, to enclose the bills in a letter delivered to him at the same time and to post the letter, and he makes the exchange and puts the bills in the letter, but then keeps both letter and bills with intent to convert the latter to his own use, he is guilty of larceny. *State v. Walker*, 65 Kan. 92.

**477.** 1. *Conversion by Bailee Not Larceny*. —

*Finlayson v. State*, (Fla. 1903) 35 So. Rep. 203; *Bismark v. State*, 45 Tex. Crim. 54.

3. *Money for Keeping or Investment*. — *People v. Thomas*, 83 N. Y. App. Div. 226.

**478.** 3. *Exceptions to Rule — Possession Obtained by Fraud with Intent to Steal*. — *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34; *Finlayson v. State*, (Fla. 1903) 35 So. Rep. 203; *Johnson v. State*, 119 Ga. 563; *People v. Sumner*, 161 N. Y. 652, affirming 33 N. Y. App. Div. 338; *Flohr v. Territory*, 14 Okla. 477; *State v. Blay*, 77 Vt. 56; *State v. Skilbrick*, 25 Wash. 555, 87 Am. St. Rep. 784; *State v. Edwards*, 51 W. Va. 220, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478.

A physician who procures antitoxin free of charge from the city on his certificate that it is to be dispensed to a patient who is unable to pay for it is guilty of larceny where he sells such antitoxin and receives and appropriates the payment therefor, he knowing that the patient was able to pay, and intending to exact payment, when he procured the drug. *People v. Lavin*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 53.

**479.** 1. *Fraudulent Intent a Question for Jury*. — *State v. Blay*, 77 Vt. 56.

**480.** 6. *Statutory Larceny by Bailees*. — *Quinn v. People*, 32 Colo. 135; *Young v. People*, 193 Ill. 236; *Com. v. McDonald*, 187 Mass. 581; *State v. Humphreys*, 43 Oregon 44; *Smith v. State*, 45 Tex. Crim. 251; *McCarty v. State*, 45 Tex. Crim. 510; *State v. Maines*, 26 Wash. 160.

**481.** 4. *Delivery by Mistake*. — *Cooper v. Com.*, 110 Ky. 123, 96 Am. St. Rep. 426.

5. *Intent to Appropriate Formed After Discovery of Mistake*. — *Cooper v. Com.*, 110 Ky. 123, 96 Am. St. Rep. 426.

6. *Obtaining Money or Goods by Fraudulent Practices Generally*. — *Foster v. State*, 117 Ga. 39; *State v. Buck*, 186 Mo. 15; *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546, *distinguishing* *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589.

*The Statutes*. — *State v. Edwards*, 51 W. Va. 220.

**482.** 8. *On the Other Hand*. — *State v. Skilbrick*, 25 Wash. 555, 87 Am. St. Rep. 784. *Compare Hindman v. State*, 72 Ark. 516.

- 483.** *d. EVIDENCE* — (1) *Proof of Fact of Taking*. — See note 3.  
*Circumstantial Evidence*. — See note 5.  
 (2) *Proof of Taking by Accused* — (a) *Resort to Presumptive Evidence Generally Necessary*. — See note 6.  
 (b) *Possession of Stolen Goods as Evidence of Guilt* — *aa. RULE STATED*. — See note 7.  
**484.** See note 1.  
**485.** See note 1.  
*Presumption of Fact*. — See note 2.  
**486.** See notes 1, 2, 3.  
*Possession Not Evidence of Corpus Delicti*. — See note 5.  
**487.** *bb. PARTICULAR APPLICATIONS OF RULE* — (*aa. Possession of Stolen Money* — *The Identification of Current Money*. — See note 6.  
*bb. Possession of Part of Stolen Goods*. — See note 7.  
**488.** *cc. NATURE AND REQUISITES OF POSSESSION* — (*aa. What Constitutes Possession Generally* — *The Possession of a Third Person in the Presence of the Accused*. — See note 3.

**483.** 3. *Proof of Corpus Delicti Without Testimony of Owner of Stolen Goods*. — *Jones v. People*, 33 Colo. 161.

5. *Circumstantial Evidence to Prove Corpus Delicti*. — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *State v. Knolle*, 90 Mo. App. 238; *Van Syoc v. State*, (Neb. 1903) 96 N. W. Rep. 266.

*Thus, the Disappearance of Property*. — *Murray v. State*, (Miss. 1904) 36 So. Rep. 541; *Smith v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 298.

6. *For Instances of circumstances tending to connect the accused with the crime, see Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21; *People v. Taylor*, 136 Cal. xix, 69 Pac. Rep. 292.

7. *Recent Possession Held Presumptive Evidence of Guilt*. — *State v. Briscoe*, 3 Penn. (Del.) 7; *State v. Carr*, 4 Penn. (Del.) 523; *State v. Sanford*, 8 Idaho 187; *Watts v. People*, 204 Ill. 233; *State v. King*, 122 Iowa 1; *State v. Herron*, 64 Kan. 363; *Murray v. State*, (Miss. 1904) 36 So. Rep. 541; *Palmer v. State*, (Neb. 1903) 97 N. W. Rep. 235.

**484.** 1. *Recent Possession Held Sufficient Evidence to Support Conviction*. — *State v. Briscoe*, 3 Penn. (Del.) 7; *Jackson v. State*, 118 Ga. 780; *Hudson v. State*, 121 Ga. 147; *Stafford v. State*, 121 Ga. 169; *Flanagan v. People*, 214 Ill. 170; *State v. Gillespie*, 62 Kan. 469, 84 Am. St. Rep. 411; *Van Syoc v. State*, (Neb. 1903) 96 N. W. Rep. 266; *Palmer v. State*, (Neb. 1903) 97 N. W. Rep. 235; *Bynum v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 844.

*Recent Possession and False Statement*. — *Recent possession of stolen goods, coupled with the false statement of the accused as to the person from whom he had obtained them, will sustain a conviction of larceny. Scott v. State*, 119 Ga. 425.

**485.** 1. *Recent Possession Alone Held Not Sufficient to Support Conviction*. — *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21; *State v. Enbank*, 33 Wash. 293.

2. *Presumption of Fact Only*. — *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21; *State v. Spencer*, 4 Penn. (Del.) 92; *State v. Herron*, 64 Kan. 363; *State v. Hoshaw*, 89 Minn. 307; *State v. Sally*, 41 Oregon 366; *State v. Harras*, 25 Wash. 416; *State v. Bliss*, 27 Wash. 463; *Younger v. State*, 12 Wyo. 24.

**486.** 1. *Weight of Evidence for Exclusive Determination of Jury*. — *State v. Hoshaw*, 89 Minn. 307; *Palmer v. State*, (Neb. 1903) 97 N. W. Rep. 235; *State v. Lax*, 71 N. J. L. 386.

2. *Court May Not Instruct as to Strength of Presumption*. — *State v. Hoshaw*, 89 Minn. 307; *State v. Bliss*, 27 Wash. 463; *Roberts v. State*, 11 Wyo. 66; *Younger v. State*, 12 Wyo. 24.

It is error for the court to charge the jury that recent possession of stolen goods, if unexplained, is conclusive evidence of guilty possession. *State v. Deuel*, 63 Kan. 811. *Compare State v. Collett*, 9 Idaho 608, in which case an instruction that recent possession is a "strong criminating circumstance tending to show guilt" was approved.

3. *Instructing Jury as to Their Province*. — *Compare Neblett v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 17.

5. *Corpus Delicti Not Proved by Unexplained Possession*. — *Stringer v. State*, 135 Ala. 60.

*Identity of Goods*. — *Hodnett v. State*, 117 Ga. 705; *Williams v. State*, 119 Ga. 564; *Watson v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 514. See also *People v. Nunley*, 142 Cal. 441.

*Statutory Modification of Rule*. — By statute in *Washington* (2 Ball. Annot. Codes and Stat. Wash. (1897), § 7114), the burden of explaining possession of an animal alleged to have been stolen is thrown on the accused, where it is shown that such animal had been permitted by its owner to run on the range. *Distinguishing State v. Walters*, 7 Wash. 246; *State v. Eu-bank*, 33 Wash. 293.

**487.** 6. *Identification by Circumstantial Evidence*. — *State v. Newhouse*, 115 Iowa 173; *State v. Coover*, 69 Kan. 382; *State v. Johnson*, 36 Wash. 294.

7. *Possession of Part of Stolen Goods*. — *Barnes v. State*, (Fla. 1903) 35 So. Rep. 227. *Compare Winchester v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1073.

**488.** 3. *Possession of Third Person in Presence of Accused*. — Where it is shown that another person aided the defendant in the theft of an animal, the fact that the skin of the animal was afterwards found in the possession of the former is admissible against the defendant. *Norsworthy v. State*, 45 Tex. Crim. 339.

- 488.** (bb) *Recent Possession.* — See notes 4, 5.  
**489.** *Province of Court and Jury.* — See note 6.  
 (cc) *Exclusive Personal Possession.* — See note 8.  
**490.** See notes 2, 3.  
 (dd) *Claim of Ownership.* — See note 4.  
*dd. REBUTTING PRESUMPTION ARISING FROM RECENT POSSESSION — (aa) In General.*  
 — See note 5.  
 (bb) *Explaining or Accounting for Possession* — aaa. Rule Stated. — See note 11.  
**491.** bbb. *Requisites of Explanation.* — See notes 2, 3.  
**492.** *Reasonableness and Credibility a Question for Jury.* — See note 1.  
*Satisfactory Explanation Not Required.* — See note 3.  
**493.** ccc. *Mode of Proof — It Is as a Part of the Res Gestæ.* — See note 2.  
*Statements by Third Persons.* — See note 7.  
**494.** cc. *POSSESSION OF STOLEN GOODS OTHER THAN THOSE CHARGED IN INDICTMENT — And Where Other Goods Stolen at the Same Time.* — See note 1.  
 (e) *Declarations and Admissions.* — See notes 4, 5.  
*Admissions by Conduct or Acts.* — See notes 8, 9.  
**495.** (e) *Pecuniary Circumstances.* — See note 12.  
 (f) *Other Thefts.* — See note 13.

**488.** 4. *Possession Must Be Recent.* — *Turner v. State*, 114 Ga. 45.

5. *Presumption Stronger as Possession Is More Recent.* — *Turner v. State*, 114 Ga. 45.

**489.** 6. *Recent Possession Generally a Question of Fact for Jury.* — *State v. Eubank*, 33 Wash. 293.

8. *Necessity of Exclusive Personal Possession.* — *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; *State v. Drew*, 179 Mo. 315, 101 Am. St. Rep. 474. See also *Beard v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 824.

The possession must be personal and exclusive, or it must be the possession of a third person by the consent and will of the accused; and in either case the possession must involve a distinct and conscious assertion of possession by the accused. *People v. Warren*, 130 Cal. 683.

**490.** 2. *Place Accessible to Other Persons.* — *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489; *State v. Drew*, 179 Mo. 315, 101 Am. St. Rep. 474.

3. *Possession to Be Considered Though Not Exclusive.* — *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489.

4. *Assertion of Property.* — *People v. Warren*, 130 Cal. 683.

5. *Rebutting Presumption — Facts Inconsistent with Guilt.* — *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489 et seq., and supporting the whole text paragraph.

11. *Presumption Rebutted by Reasonable and Credible Explanation.* — *State v. Seymour*, 10 Idaho 699; *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489 et seq.; *State v. King*, 122 Iowa 1; *Younger v. State*, 12 Wyo. 24. See also *Smotherman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 838.

**491.** 2. *Explanation Must Be Reasonable and Credible.* — *Watts v. People*, 204 Ill. 233, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 489 et seq.

3. *Burden of Proving Falsity of Explanation.* — *State v. Carr*, 4 Penn. (Del.) 523.

**492.** 1. *Reasonableness and Credibility for Determination of Jury.* — *State v. Ireland*, 9 Idaho 686; *State v. King*, 122 Iowa 1.

3. *Explanation Need Not Satisfy Jury.* — *State v. Lax*, 71 N. J. L. 386; *Eastland v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 267.

**493.** 2. *Declarations Admissible as Part of Res Gestæ.* — *Martin v. State*, 44 Tex. Crim. 538; *State v. White*, 77 Vt. 241.

*Declarations Made After Disposing of Property Inadmissible.* — *Smith v. Territory*, 14 Okla. 518.

7. *Statements by Third Persons.* — See *Gilford v. State*, (Tex. Crim. 1903) 78 S. W. Rep. 692.

**494.** 1. *Possession of Other Goods Stolen at Same Time.* — See *People v. Nunley*, 142 Cal. 105.

4. *Confessions.* — *Gibson v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1119.

An extrajudicial confession of a defendant charged with larceny may be considered in connection with proper corroborative evidence in determining whether the *corpus delicti* has been proved, though it is not alone sufficient to prove it. *Griffiths v. State*, 163 Ind. 555.

*The Expression of a Desire to Plead Guilty*, when made out of court, is in effect a confession of guilt, and is admissible in evidence. *Abrams v. State*, 121 Ga. 170.

5. *Offer to Compromise Held an Admission.* — *Collins v. State*, 115 Wis. 596.

8. *Admissions by Conduct or Acts.* — The conduct of the accused while the search warrant was read to him, and during the search, which resulted in finding the stolen goods, is admissible in evidence. *Gilford v. State*, (Tex. Crim. 1903) 78 S. W. Rep. 692.

*The Silence of the Defendant*, when he is charged with theft, is a circumstance to go to the jury on the question of his guilt or innocence. *State v. Major*, 70 S. Cal. 387.

9. *Flight of Accused.* — *Viberg v. State*, 138 Ala. 100, 100 Am. St. Rep. 22; *State v. Williams*, 118 Iowa 494; *State v. Connor*, 118 Iowa 490.

**495.** 12. *Pecuniary Circumstances of Accused.* — *People v. Kelly*, 132 Cal. 430.

13. *Other Thefts Not Evidence of Taking.* —

**496. 2. Carrying Away** — *a. NECESSITY AS CONSTITUENT ELEMENT OF LARCENY.* — See note 4.

**497. *b.* WHAT CONSTITUTES CARRYING AWAY** — (1) *Actual Change of Position.* — See notes 1, 2.

**498. (3) Severance of Thing Attached to Person, Etc.** — See note 3.  
**3. Goods of Another** — *a. IN GENERAL.* — See note 6.

**499. *b.* TAKING BY GENERAL OWNER FROM PERSON HAVING SPECIAL PROPERTY.** — See notes 4, 6.

**500. 4. Intent in Larceny** — *a. IN GENERAL.* — See note 3.

**501. Existence of Felonious Intent** — *Province of Court and Jury.* — See note 4.

**502. *b.* NATURE OF INTENT** — (1) *Deprivation of Rightful Owner* — (a) *Deprivation Essential Element.* — See note 2.

(b) *Extent of Deprivation.* — See notes 5, 6.

**504. (c) What Constitutes Deprivation** — *cc. HOLDING FOR REWARD.* — See note 4.

(2) *Appropriation to Taker's Own Use* — (a) *Purpose to appropriate Held Necessary* — *aa. RULE STATED.* — See note 8.

**505. *bb.* WHAT CONSTITUTES APPROPRIATION** — (*aa*) *In General* — *Pecuniary Gain Not Essential.* — See note 5.

**506. *c.* TIME WHEN INTENT MUST EXIST** — (2) *Intent at Time of Taking.* — See note 6.

State v. King, 122 Iowa 1; State v. Lee, (Oregon 1905) 79 Pac. Rep. 577. See generally the title **PROOF OF OTHER CRIMES.**

**496. 4. Asportation an Essential Element of Larceny.** — State v. Carr, 4 Penn. (Del.) 523; State v. Boatright, 182 Mo. 33.

**497. 1. Removal from Place Previously Occupied.** — Where one assumes to sell to another property which does not belong to the seller, conveys it by bill of sale, and points out the property to the purchaser, but makes no actual delivery thereof, there is no such asportation as to constitute larceny on the part of the seller. Long v. State, 44 Fla. 134.

**2. Where the Larceny Is from the Person,** carrying away is not necessary to complete the offense, under Pen. Code Cal., § 484, subdiv. 2. People v. Lonnen, 139 Cal. 634.

There is no larceny from the person where one merely thrusts his hand into the pocket of another and touches money therein, but does not seize or secure it. Tarrango v. State, 44 Tex. Crim. 385.

**498. 3. Things Attached to Person or Premises** — *Severance Necessary.* — An attempt to unscrew a diamond stud from the shirt front of another does not constitute larceny from the person, where the would-be thief is captured without his having detached the stud. Rodriguez v. State, (Tex. Crim. 1903) 71 S. W. Rep. 596.

**6. Party in Possession Regarded as Owner.** — Bryant v. Com., (Ky. 1902) 68 S. W. Rep. 846; Barnes v. State, 46 Tex. Crim. 513. Compare Merritt v. State, 73 Ark. 32.

**499. 4. Larceny by General Owner from Person Having Special Property.** — See Com. v. Dingman, 26 Pa. Super. Ct. 615.

**6. Larceny by Owner of Goods in Possession of Third Person under Lien.** — Tumatly v. Parker, 100 Ill. App. 382.

**500. 3. Felonious Intent a Necessary Element.** — State v. Main, 75 Conn. 55; Long v. State, 44 Fla. 134; Bird v. State, (Fla. 1904) 37 So. Rep. 525; James v. State, 114 Ga. 96; State v. Waller, 174 Mo. 518; Dobson v. State, 61

Neb. 584; Womack v. State, (Tex. Crim. 1905) 86 S. W. Rep. 1015; Fetkenhauer v. State, 112 Wis. 491.

**501. 4. Existence of Felonious Intent to Be Determined by Jury.** — See Miller v. Territory, (Ariz. 1905) 80 Pac. Rep. 321.

**502. 2. Deprivation an Essential Element.** — State v. Main, 75 Conn. 55; State v. Shepherd, 63 Kan. 545; Leland v. State, 82 Miss. 132; Steil v. Territory, 12 Okla. 377.

**5. Temporary Deprivation Not Sufficient** — Stillwell v. State, 155 Ind. 552; State v. Shepherd, 63 Kan. 545.

**6. Temporary Use.** — Stillwell v. State, 155 Ind. 552; Leland v. State, 82 Miss. 132; Parr v. Loder, 97 N. Y. App. Div. 218, appeal dismissed 182 N. Y. 509. See also Conley v. State, 69 Ark. 454.

**504. 4. Taking and Holding for Reward.** — Slaughter v. State, 113 Ga. 284, 84 Am. St. Rep. 242; Martin v. State, 44 Tex. Crim. 540, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 504. Compare Currier v. State, 157 Ind. 114, holding that it is larceny to deprive another of his property with intent to compel him to pay a claim which he does not owe, or to perform work which he is under no obligation to perform, in order to avoid the loss of his property.

**8. Lucri Causa Held an Essential Element of Larceny.** — State v. Palmer, 4 Penn. (Del.) 126; State v. Carr, 4 Penn. (Del.) 523; State v. Littrell, 170 Mo. 13.

**505. 5. Conversion of Thing Taken to Use of Third Person.** — In Texas the offense is complete even though the thief had no purpose to appropriate the thing stolen to his own use, where it was his intent permanently to deprive the owner of his property and to vest the ownership in a third person. Lopez v. State, (Tex. Crim. 1904) 80 S. W. Rep. 1016, 1197.

**506. 6. Felonious Intent at Time of Taking Essential** — *Bailment.* — People v. Jackson, 138 Cal. 462; State v. Palmer, 4 Penn. (Del.) 126; Abrams v. State, 121 Ga. 170, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506; State v. Riggs, 8 Idaho 630; Stillwell v. State, 155 Ind.

**507.** See note 2.

(3) *Intent Formed After Taking* — If the Original Taking Was a Trespass. — See note 7.

**508.** See note 2.

*d.* EVIDENCE OF INTENT — (2) *Attendant Circumstances* — Incapacity to Form Intent. — See notes 8, 9.

**509.** (3) *Conduct of Accused* — Thus, Secrecy in Acquiring the Goods. — See note 9.

**510.** See note 2.

Concealment or False Denial of Possession. — See note 5.

**511.** (5) *Other Thefts*. — See note 5.

**512.** IV. WHO MAY COMMIT LARCENY — 5. Husband and Wife — *a.* RULE AS TO HUSBAND. — See note 8.

*b.* RULE AS TO WIFE. — See note 9.

**513.** V. SUBJECTS OF LARCENY — 1. General Principles — Things of Value. — See notes 9, 13.

**514.** 2. Classification of Subjects — *a.* PERSONAL PROPERTY IN GENERAL. — See note 5.

*b.* ANIMALS — Domestic Animals. — See note 11.

Animals *Ferae Naturæ*. — See note 12.

**515.** *c.* DOCUMENTS AND RECORDS — (1) *Rule at Common Law*. — See notes 1, 2.

(2) *Rule by Statute*. — See note 5.

**516.** See notes 3, 5.

552; *State v. Meldrum*, 41 Oregon 380. See also *People v. Miller*, 169 N. Y. 339, 88 Am. St. Rep. 546.

**507.** 2. Taking Up Estrays. — See *Veasley v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 274.

7. Subsequent Intent Held Sufficient Where Taking Was Trespass. — *Dozier v. State*, 130 Ala. 57, distinguishing *Beckham v. State*, 100 Ala. 15; *Abrams v. State*, 121 Ga. 170, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507.

**508.** 2. Conversion After Wrongful Taking as Evidence of Existing Intent. — *Abrams v. State*, 121 Ga. 170, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

8. Proof of Insanity. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

Kleptomania. — See *State v. McCullough*, 114 Iowa 532, 89 Am. St. Rep. 382.

9. Evidence of Intoxication Held Admissible to Disprove Intent. — *Collins v. State*, 115 Wis. 596. See also *Com. v. McDonald*, 187 Mass. 581.

**509.** 9. Exculpatory Tendency of Open Taking. — *Fletcher v. Com.*, (Ky. 1904) 80 S. W. Rep. 1089.

**510.** 2. Open Taking Considered in Connection with Other Facts. — *Fletcher v. Com.*, (Ky. 1904) 80 S. W. Rep. 1089.

5. False Denials of Possession. — See *People v. Cole*, 141 Cal. 88.

**511.** 5. Related Acts. — *Com. v. Clancy*, 187 Mass. 191.

**512.** 8. Statutes Making It Larceny for Husband to Take Wife's Goods. — *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

9. Under the English Married Woman's Property Act of 1882 (31 & 32 Vict., c. 75), § 16, the wife may be indicted for the theft of her husband's goods. *Reg. v. Streeter*, (1900) 2 Q. B. 601, 69 L. J. Q. B. 915, 83 L. T. N. S. 288, 48 W. R. 702.

The Stealing by the Wife of the Goods of Her Husband When About to Leave or Desert Him is made larceny by statute in *England*. See *Rex v. James*, (1902) 1 K. B. 540.

**513.** 9. Only Things of Value Subjects of Larceny. — *Lane v. State*, 113 Ga. 1040; *Woodring v. Territory*, 14 Okla. 250.

13. Evidence from Which Value May Be Inferred Held Sufficient. — Where it is shown that the things stolen were current coins of the United States, no further proof of value is required. *Ector v. State*, 120 Ga. 543.

**514.** 5. Money Won by Gaming and in the exclusive possession of the winner may be the subject of larceny. *Fay v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 744, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 514.

11. Dogs Subjects of Larceny by Statute. — *Rockwell v. Oakland Circuit Judge*, 133 Mich. 11.

12. Stealing Fish. — Fish caught in a net set in a lake are subjects of larceny, there being such capture and confinement by the owners of the net as to give them property in the fish. *State v. Shaw*, 67 Ohio St. 157.

So fish taken at sea are the subject of larceny. *Rex v. Mallison*, 86 L. T. N. S. 600.

Stealing Fish Made Larceny by Statute — *Oysters*. — *Ragazine v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 832.

**515.** 1. Bills and Notes and Other Writings Not Subjects of Larceny at Common Law. — *Young v. People*, 193 Ill. 236.

2. Valid Instrument Not Subject of Larceny as Piece of Paper or Parchment. — *Young v. People*, 193 Ill. 236.

5. Bonds, Bills, Notes, etc., for Payment of Money. — *Young v. People*, 193 Ill. 236. See also *State v. Morgan*, 109 Tenn. 157.

**516.** 3. Instruments Evidencing Right or Title to Property. — A deed of land is expressly

**517.** Books of Account. — See note 2.

As to Public Records. — See note 4.

**518.** *d.* THINGS RELATING TO REAL ESTATE — (1) *Rule at Common Law.* — See notes 3, 4.

Severance from Freehold. — See note 6.

**519.** (2) *Rule by Statute.* — See note 5.

**520.** VI. LARCENY BY FINDER OF LOST GOODS — 1. Appropriation by Finder May Be Larceny. — See note 2.

**521.** 2. What Constitutes Larceny by Finder — *a.* TAKING MUST BE OF GOODS ACTUALLY LOST — (2) *When Goods Are Lost* — *Estrays.* — See note 3.

*b.* APPROPRIATION. — See note 5.

*c.* KNOWLEDGE AS TO OWNER. — See note 6.

**522.** The Finder Has Means of Knowing. — See note 8.

**523.** *d.* INTENT AT TIME OF TAKING. — See note 2.

Evidence of Intent. — See note 4.

VII. TAKING GOODS UNDER CLAIM OF RIGHT. — See note 11.

**524.** See note 2.

Taking by Authority of Third Person. — See note 5.

**525.** Evidence. — See notes 3, 4, 5.

declared to be personalty by Code Miss. (1892), § 1513, and hence it is a subject of larceny. *State v. Hughes*, 80 Miss. 609.

**516.** 5. Instruments Constituting Personal Property. — *State v. Scanlon*, 89 Minn. 244.

**517.** 2. Any Valuable Writing. — A county warrant may be the subject of larceny. *State v. Morgan*, 109 Tenn. 157.

4. Stealing Records Made Larceny by Statute. — *People v. Mills*, 91 N. Y. App. Div. 331, affirmed 178 N. Y. 274.

**518.** 3. Things Annexed to Realty Not Subjects of Larceny at Common Law. — Oysters or clams which are planted under public water in a bed where they do not exist naturally, and which bed is set off or enclosed by stakes or otherwise sufficiently to show private possession, are not a part of the realty, but are chattels, and are a subject of larceny. *People v. Wanzer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 136.

4. Constructive Annexation. — Where one erects a wire fence on public land, intending to use the land for pasture so long as he shall be unmolested, and then to remove the fence, the wire remains personal property, and is at all times the subject of larceny. *Junod v. State*, (Neb. 1905) 102 N. W. Rep. 462.

6. Lubricators fastened to machinery which is a part of the freehold are subjects of larceny. *Farris v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 140.

**519.** 5. Statutes in United States — All Things Attached to or Growing on Land Made Subjects of Larceny. — *People v. Wanzer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 136.

**520.** 2. Conversion of Lost Property to the Use of the Finder does not alone make him, as a matter of law, guilty of theft. "Much would depend upon the description of goods found, the place of finding, the time elapsing between the finding and the conversion, the probability of the owner being discovered, the manner of dealing with the goods, the effort or want of effort made to discover the owner." *Reg. v. Slavin*, 35 N. Bruns. 388.

**521.** 3. Larceny of Estrays — Intent at Time

of Taking. — *Crockford v. State*, (Neb. 1905) 102 N. W. Rep. 70.

5. Denial of Possession. — *State v. Stevens*, 2 Penn. (Del.) 486.

6. Knowledge or Means of Knowledge of Owner. — *State v. Stevens*, 2 Penn. (Del.) 486; *State v. Briscoe*, 3 Penn. (Del.) 7; *Flemister v. State*, 121 Ga. 146; *State v. Hoshaw*, 89 Minn. 307.

**522.** 8. Marks as Means of Identifying Owner. — *State v. Stevens*, 2 Penn. (Del.) 486.

**523.** 2. Intent Must Exist at Time of Taking. — *State v. Stevens*, 2 Penn. (Del.) 486; *Flemister v. State*, 121 Ga. 146.

4. Raising a Temporary Loan on a thing found does not necessarily, as a conclusion of law, constitute theft, though it may be evidence warranting the jury to find theft. *Reg. v. Slavin*, 35 N. Bruns. 388.

11. Taking under Bona Fide Claim of Right Not Larceny. — *State v. Main*, 75 Conn. 55; *State v. Pullen*, 3 Penn. (Del.) 184; *Higginbotham v. State*, 42 Fla. 573; *State v. Wasson*, 126 Iowa 320; *Hull v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 380; *Young v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 808; *Brokaw v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 801. See also *Miller v. Territory*, (Ariz. 1905) 80 Pac. Rep. 321.

There Must Be an Honest Belief. — *Jackson v. State*, 137 Ala. 96; *Currier v. State*, 157 Ind. 114.

**524.** 2. Bona Fides of Claim a Question for Jury. — See *Miller v. Territory*, (Ariz. 1905) 80 Pac. Rep. 321; *State v. Eubank*, 33 Wash. 293.

5. Taking by Authority of Third Person. — *People v. Hoagland*, 138 Cal. 338.

**525.** 3. Burden of Proof Not on Defendant. — *State v. Weckert*, 17 S. Dak. 202, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525.

4. Reasonable Doubt as to Ownership. — *State v. Weckert*, 17 S. Dak. 202, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525.

5. Reasonable Doubt as to Good Faith of Claim. — *Higginbotham v. State*, 42 Fla. 573; *State v. Weckert*, 17 S. Dak. 202, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 525; *Reese v. State*, 43 Tex. Crim. 539.

**526.** VIII. BRINGING STOLEN GOODS FROM ANOTHER COUNTRY OR STATE — 3. Doctrine in United States — *a.* BY STATUTE. — See notes 1, 2, 3.

**527.** *b.* IN ABSENCE OF STATUTE — Opposed. — See note 3.

IX. ATTEMPTS TO COMMIT LARCENY — 2. What Constitutes an Attempt — *a.* IN GENERAL. — See note 13.

**528.** X. DOCTRINE AS TO ACCESSORIES AND ACCOMPLICES — 1. Grades of Offense Which Admit of Accessories — *b.* PETIT LARCENY. — See note 5.

**530.** XI. DOCTRINE OF FORMER JEOPARDY — 3. Specific Applications of Doctrine and Test to Prosecutions for Larceny and Other Offenses — *d.* LARCENY AND RECEIVING STOLEN GOODS. — See note 4.

*e.* GRAND AND PETIT LARCENY. — See note 9.

**531.** *g.* LARCENY AND BURGLARY. — See note 3.

*h.* LARCENY OF SEVERAL ARTICLES AT SAME TIME — (1) *Where Articles Belong to One Person.* — See note 6.

(2) *Where Articles Belong to Different Persons.* — See note 8.

**534.** XII. RECOVERY AND RESTITUTION OF STOLEN GOODS — 2. Voluntary Restitution by Thief. — See notes 6, 7.

**537.** LARGE — AT LARGE. — See note 1.

LAST. — See note 4.

**539.** LATE. — See note 2.

**526.** 1. Bringing Stolen Goods into State Punishable as Larceny. — *State v. De Wolfe*, 29 Mont. 415; *Beard v. State*, 45 Tex. Crim. 522.

2. Criminality Determined by Law of Place of Original Taking. — *Beard v. State*, 45 Tex. Crim. 522.

3. Criminality Determined by Law of State to Which Goods Were Carried. — *Barclay v. U. S.*, 11 Okla. 503.

**527.** 3. Bringing Stolen Goods from Another State or Country Held Larceny. — See *State v. Bouton*, 26 Nev. 34.

13. Mere Preparation Not an Attempt. — *Compare People v. Mills*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195, in which case it was held that the mere solicitation of another to commit a theft with the intent that a theft shall be committed is an attempt to commit larceny within Pen. Code N. Y., § 34, which defines an attempt as "an act done with intent to commit a crime, and tending \* \* \* to effect its commission."

**528.** 5. No Accessories in Petit Larceny. — *Slaughter v. State*, 113 Ga. 284, 84 Am. St. Rep. 242.

An accessory before the fact is treated as a principal. *Reed v. Greenville*, 83 Miss. 192.

**530.** 4. Acquittal for Larceny No Bar to Prosecution for Receiving Stolen Goods. — *State v. Fink*, 186 Mo. 50.

9. *Storrs v. State*, 129 Ala. 101.

**531.** 3. When Acquittal or Conviction for Burglary Will Not Bar Prosecution for Larceny. — See *Sharp v. State*, 61 Neb. 187.

6. Several Articles Stolen from the Same Person — American Rule. — *State v. Moore*, 86 Minn. 424, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 531.

Where the defendant was indicted jointly with another for the larceny of specified articles and is acquitted because there was no evidence that he took any of them, such acquittal is not a bar to a prosecution for the theft of another article at the same time and from the same

person, even though evidence of the taking of such article had been offered under the former indictment for the purpose of showing a conspiracy to steal. *State v. Hankins*, 136 N. Car. 621.

8. Larceny of Articles Belonging to Different Persons — One Prosecution Will Not Bar Another — *Carter v. Com.*, (Ky. 1903) 76 S. W. Rep. 337.

Receiving Deposits in Insolvent Bank. — A former conviction of a banker, under the *Pennsylvania Act of May 9, 1889* (P. L. 145), of receiving a deposit, knowing that he was insolvent at the time, will not bar a prosecution for receiving on the same day a deposit from another person than the one stated in the former indictment. *Com. v. Hazlett*, 14 Pa. Super. Ct. 352.

**534.** 6. Offense Not Purged by Voluntary Restitution. — See *State v. Minck*, (Minn. 1904) 102 N. W. Rep. 207.

7. Voluntary Restitution as Matter of Mitigation. — See *Ware v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1065.

**537.** 1. Large Stone — Used in a Relative Sense. — *Vincennes v. Spees*, (Ind. App. 1905) 74 N. E. Rep. 277.

4. The Words Last Publication in a statute providing that the printer shall receive no pay unless an affidavit of publication is transmitted, within six days after the last publication of the statement and notice of a tax sale, refer to the last issue of the paper in which the statement and notice were legally published and not to the completed period of publication. *Chippewa River Land Co. v. J. L. Gates Land Co.*, 118 Wis. 356; *Pinkerton v. J. L. Gates Land Co.*, 118 Wis. 514.

Last Sickness. — See *Rice v. Waddill*, 168 Mo. 99.

**539.** 2. Late Not Used in Sense of Last. — *Hoffman v. Fleming*, 66 Ohio St. 143.

Formerly. — *Hoffman v. Fleming*, 66 Ohio St. 143.

# LATERAL AND SUBJACENT SUPPORT.

By G. W. WALSH.

**542. II. RIGHT TO LATERAL SUPPORT — 1. Of Land from Land — a. IN GENERAL.** — See note 1.

*b. LIABILITY OF ADJOINING OWNER FOR REMOVAL OF SUPPORT*

— (1) *In General* — Excavator Liable Absolutely for Removal of Lateral Support of Soil. — See note 3.

**543.** The Actionable Wrong. — See note 2.

When Right of Action Accrues. — See note 7.

**544.** (2) *Measure of Damages.* — See notes 1, 4.

Future Damages. — See note 6.

(3) *Remedy by Injunction.* — See note 8.

**545.** 2. Of Buildings from Land — a. IN GENERAL. — See note 2.

**546.** *b. ACQUISITION OF RIGHT TO SUPPORT — (2) By Prescription* — In Several United States Cases. — See note 3.

But the Overwhelming Weight of Authority. — See note 4.

*c. LIABILITY OF ADJOINING OWNER FOR REMOVAL OF SUPPORT*

— (1) *In General* — Where No Right to Support Acquired. — See note 7.

**547.** Ohio Rule. — See note 3.

(2) *Excavator Liable When Negligent* — Rule Stated. — See note 4.

**542. 1. Right to Support of Soil, Natural Right.** — Pullan v. Stallman, 70 N. J. L. 10; Gillies v. Eckerson, 97 N. Y. App. Div. 153; Matulys v. Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70; Jones v. Greenfield, 25 Pa. Super. Ct. 315; Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613. See also White v. Nassau Trust Co., 168 N. Y. 149.

**3. Adjoining Owner Liable for Removal of Support of Soil.** — Trinidad Asphalt Co. v. Amhard, (1899) A. C. 594, 68 L. J. P. C. 114; Carpenter v. Reliance Realty Co., 103 Mo. App. 480; Davis v. Summerfield, 131 N. Car. 352, 92 Am. St. Rep. 781; Matulys v. Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70.

**Injury to Lands Not Immediately Adjacent.** — The liability of an excavator is not limited to the injury done to the adjacent owner, but includes any injury to any owner of land within the zone of support. Murray v. Pannaci, 64 N. J. Eq. 147.

**543. 2. No Cause of Action for Excavation Without Injury.** — Kansas City Northwestern R. Co. v. Schwake, 70 Kan. 141.

**7. When Cause of Action Accrues.** — Kansas City Northwestern R. Co. v. Schwake, 70 Kan. 141.

**544. 1. Measure of Damages Diminution in Value of Land.** — Joliet v. Schroeder, 92 Ill. App. 68, affirmed 189 Ill. 48; Pullan v. Stallman, 70 N. J. L. 10.

**4.** Jones v. Greenfield, 25 Pa. Super. Ct. 315; Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613. See also Pullan v. Stallman, 70 N. J. L. 10.

**6.** Kansas City Northwestern R. Co. v. Schwake, 70 Kan. 141.

**8. Injunction.** — Trinidad Asphalt Co. v. Am-

bard, (1899) A. C. 594, 68 L. J. P. C. 114; Gillies v. Eckerson, 97 N. Y. App. Div. 153.

**545. 2. No Natural Right of Support for Buildings.** — Kramer v. Northern Hotel Co., 185 Ill. 612; Carpenter v. Reliance Realty Co., 103 Mo. App. 480; Korn v. Weir, (Supm. Ct. App. T.) 88 N. Y. Supp. 976; Davis v. Summerfield, 131 N. Car. 352, 92 Am. St. Rep. 781; Jones v. Greenfield, 25 Pa. Super. Ct. 315; Matulys v. Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70. See also White v. Nassau Trust Co., 168 N. Y. 149.

**546. 3.** See Payne v. Moore, 31 Ind. App. 360.

**4. American Doctrine — No Prescriptive Right to Lateral Support for Buildings.** — Carpenter v. Reliance Realty Co., 103 Mo. App. 480.

**7. No Liability for Injury to Buildings by Removal of Lateral Support in Absence of Negligence or Want of Skill.** — Davis v. Summerfield, 131 N. Car. 352, 92 Am. St. Rep. 781.

**Injury to Person.** — A person standing on the land and injured by the caving in of the land cannot recover. "For an injury resulting to anything which has been placed upon the land, produced by the removal of the soil of the adjacent land, the owner of the adjacent land is not legally responsible, unless such removal has been done in a negligent manner." Pullan v. Stallman, 70 N. J. L. 10.

**547. 3.** Volk v. Board of Education, 10 Ohio Dec. 35, 7 Ohio N. P. 164.

**4. Excavator Liable for Injuries to Adjacent Buildings Due to His Negligence or Want of Skill.** — Serio v. Murphy, 99 Md. 545, 105 Am. St. Rep. 316; Carpenter v. Reliance Realty Co., 103 Mo. App. 480; Matulys v. Philadelphia, etc., Coal, etc., Co., 201 Pa. St. 70. See also Fisher v. Seaboard Air Line R. Co., 102 Va. 363.



**548.** Degree of Care Required. — See notes 1, 4.

**549.** (3) *Duty to Give Notice of Intended Excavation* — Conflict of Opinion. — See note 1.

In Populous Cities. — See note 2.

Excavations Deeper than Level of Foundation of Adjoining Building. — See note 3.

Expenditures by Excavator. — See note 7.

**550.** Manner of Notice. — See note 1.

No Notice Required Where Adjoining Owner Has Knowledge of Intended Excavation. — See note 2.

Duty to Use Ordinary Care Not Abrogated by Notice. — See note 3.

(4) *Duty to Protect Adjoining Buildings* — Excavator Not Ordinarily Bound to Protect Adjoining Buildings. — See note 6.

Statutory Duty of Excavator to Protect Adjoining Buildings — It Is Provided by Statute in New York. — See note 7.

**552.** (7) *Liability Where Work Is Done by Contractor*. — See note 8.

**553.** (8) *Measure of Damages*. — See note 1.

**3. Of Buildings from Buildings** — *c.* LIABILITY FOR REMOVAL OF SUPPORT — Where Right to Support Exists. — See note 7.

**554.** 4. Liability of Municipality in Improving Streets — General Rule — Municipal Corporation Not Liable for Removal of Lateral Support. — See note 5.

**555.** III. RIGHT TO SUBJACENT SUPPORT — 1. In General. — See note 5.

**556.** See note 1.

Due Care and Skill No Defense. — See note 3.

**548.** 1. Only Reasonable Care Required in Making Excavations. — *Serio v. Murphy*, 99 Md. 545, 105 Am. St. Rep. 316. See also *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480.

4. *Compare Davis v. Summerfield*, 131 N. Car. 352, 92 Am. St. Rep. 781.

**549.** 1. *Duty of Excavator to Give Notice*. — *Bass v. West*, 110 Ga. 698; *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580; *Davis v. Summerfield*, 131 N. Car. 352, 92 Am. St. Rep. 781. See also *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480.

2. *Serio v. Murphy*, 99 Md. 545, 105 Am. St. Rep. 316.

3. *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580. See also *Davis v. Summerfield*, 131 N. Car. 352, 92 Am. St. Rep. 781.

Rule Applicable to Municipal Corporations. — In *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580, the court said: "There is no good reason why this rule should not be applied to municipal corporations and their contractors as well as to other persons."

7. That the Excavator May Recover from the adjoining owner the amount that such adjoining owner compels him to pay to protect the existing building, see *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480, following *Eads v. Gains*, 58 Mo. App. 586, stated in the original note.

**550.** 1. Sufficiency of Notice. — See *Nippert v. Warneke*, 128 Cal. 501.

2. Knowledge Dispenses with Notice. — *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580.

3. Excavator Must Use Reasonable Care Notwithstanding Notice. — *Bass v. West*, 110 Ga. 698.

6. *Delaney v. Bowman*, 82 Mo. App. 252.

7. Statutory Duty to Protect Adjoining Buildings — *New York City*. — *Korn v. Weir*, (Supm.

Ct. App. T.) 88 N. Y. Supp. 976; *Blanchard v. Savarese*, 97 N. Y. App. Div. 58.

*Pennsylvania*. — Act Pa. June 8, 1893, § 8 (P. L. 360), regulates the construction, maintenance, and inspection of buildings in Philadelphia as follows: "Should any owner or owners desire to excavate to a depth of more than ten feet, he or they shall protect and underpin the wall of an adjoining structure at his or their own expense; provided, however, that this section shall not apply to buildings now erected or to dwelling houses." *Wadasz v. Arcade Real Estate Co.*, 206 Pa. St. 539.

A Municipal Ordinance imposing on one who excavates below a certain depth the duty of protecting adjoining buildings has been held in *Missouri* to be invalid as beyond the city's legislative power and within the province of the state legislature alone. *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480.

**552.** 8. *Where Work Is Being Done by Independent Contractor*. — See *Korn v. Weir*, (Supm. Ct. App. T.) 88 N. Y. Supp. 976.

**553.** 1. *Measure of Damages*. — *Gerst v. St. Louis*, 185 Mo. 191, 105 Am. St. Rep. 580.

7. *Liability for Removal*. — See *Payne v. Moore*, 31 Ind. App. 360.

**554.** 5. *City Held Liable for Removal of Lateral Support in Grading Streets*. — *Joliet v. Schroeder*, 92 Ill. App. 68, affirmed 189 Ill. 48.

**555.** 5. *Natural Right to Subjacent Support*. — *Noonan v. Pardee*, 200 Pa. St. 474, 86 Am. St. Rep. 722.

**556.** 1. *Surface Owner Entitled to Subjacent Support from Minerals*. — *Catlin Coal Co. v. Lloyd*, 109 Ill. App. 122; *Chicago, etc., R. Co. v. Brandau*, 81 Mo. App. 1; *Noonan v. Pardee*, 200 Pa. St. 474, 86 Am. St. Rep. 722.

3. *Due Care and Skill Not Sufficient*. — *Noonan v. Pardee*, 200 Pa. St. 474, 86 Am. St. Rep. 722.

**556.** No Right to Injure Surface Acquired by Custom or Prescription. — See note 4.

**2. Effect of Grants Severing Surface and Mineral Estates — General Rule**  
— Right to Support Retained or Granted with Surface. — See note 6.

**556:** 4. See *Youghiogheny River Coal Co. v. Hopkins*, 30 Pittsb. Leg. J. N. S. (Pa.) 421.

6. Right of Support Where Minerals Are Granted

and Surface Is Reserved. — *New Marlston Collieries Co. v. Westmorland*, 82 L. T. N. 725; *Chicago, etc., R. Co. v. Brandau*, 81 M App. 1.

## LATERAL OR BRANCH RAILROADS.

**560. I. DEFINITION.** — See notes 1, 2.

**561. II. LATERAL RAILROADS GENERALLY — 1. Right to Construct and to Take Land for the Purpose — a. ACQUIRED ONLY BY GRANT FROM THE STATE**  
— See note 3.

Power of President and Directors of Company. — See note 4.

**562. b. CONSTRUCTION OF LEGISLATIVE GRANTS.** — See notes 1, 4

**563. Construction of Particular Provisions of Charters and General Statutes.**  
note 2.

**564. 2. Duty to Maintain and Operate.** — See note 1.

**565. III. SPURS TO PRIVATE ESTABLISHMENTS — 1. Right to Construct, and to Take Land for the Purpose — b. ACQUISITION OF RIGHT BY OWNERS OF PRIVATE ESTABLISHMENTS.** — See note 4.

**566. 2. Duty to Furnish and Operate.** — See notes 2, 4.

In Some Jurisdictions There Are Constitutional Provisions or Statutes. — See note 5.

**560. 1. The Usual and Ordinary Meaning of "Branch Road,"** as applied to railroads, is a road connected with the main line, but not a mere incident of it, or construed simply to facilitate the business of the chief railway, but designed to have a business of its own for the transportation of persons and property to and from places not reached by the principal route. *Grey v. Greenville, etc., R. Co.*, 59 N. J. Eq. 372.

2. *Com. v. Erie, etc., R. Co.*, 3 Dauphin Co. Rep. (Pa.) 189.

**561. 3. General Statutes.** — *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

**Finding by Judge of Superior Court — Existing Franchise.** — Chapter 166 of the Public Acts of *Connecticut* of 1889, p. 97, requiring a finding by a judge of the Superior Court that the construction of a branch is a public convenience and necessity, abridges no special franchises previously granted. *Hartford, etc., R. Co. v. Wagner*, 73 Conn. 506.

**4. Discretion of President and Directors.** — *Com. v. Erie, etc., R. Co.*, 3 Dauphin Co. Rep. (Pa.) 189; *Price v. Pennsylvania R. Co.*, 209 Pa. St. 81, the latter case holding that where the statute provides for the making of such lateral railroads or branches "as the president and directors may deem advantageous and suited to promote the convenience" of the inhabitants of the county and the interests of the company, the courts cannot review such discretion exercised in good faith.

**562. 1. Grants Strictly Construed.** — *Brooklyn, etc., R. Co. v. Long Island R. Co.*, 72 N. Y.

App. Div. 496. See also *Waycross Air-Line R. Co. v. Southern Pine Co.*, 111 Ga. 233.

4. *Price v. Pennsylvania R. Co.*, 209 Pa. St. 81.

**563. 2. Railroads Passing Through County.** — Where a statute gives to a railroad the privilege of constructing and operating branches within the limits of any county "through which said road may 'pass,' it applies, although the whole railroad is within the limits of one county. *Grey v. Greenville, etc., R. Co.*, 59 N. J. Eq. 372.

**New System — Fundamental Changes.** — Under a charter giving to a street railway company the privilege of making branches and extensions, it may construct a new system, which fundamentally changes its business. *Laconia St. Railway Petition*, 71 N. H. 355.

**564. 1. Forfeiture of Franchise.** — *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

**565. 4. Private Sidings Not Part of Railway.** — *Cowan v. North British R. Co.*, 11 R. & Can. T. Cas. 96.

**566. 2. Railroad Companies Not Required to Furnish and Operate Spurs to Private Establishments.** — *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

**4. Right to Discontinue Delivery at Private Siding.** — See *Cowan v. North British R. Co.*, 11 R. & Can. T. Cas. 96.

**5. For the Construction of the English Statute of 1845 (8 & 9 Vict., c. 20), § 78,** see *Lancashire Brick, etc., Co. v. Lancashire, etc., R. Co.*, 71 L. J. K. B. 431, (1902) 1 K. B. 651, 86 L. T. N. S. 176, 11 R. & Can. T. Cas. 138.

**567. 3. Right of the Public to Use.**— See note 3.

**IV. SIDINGS, SWITCHES, AND SIMILAR APPENDAGES.**— See note 6.

**569. LAW.**— See note 9.

**573. LAWFUL—LAWFULLY.**— See note 2.

**576. LAWFUL ISSUE.**— See note 1.

**567. 3. Ulmer v. Lime Rock R. Co.,** 98 Me. 579.

**6. Right to Construct Sidings, Switches, and Similar Appendages.**— "One who, in general terms, grants to a railroad company, chartered for the purpose of constructing and operating a railroad for public use, a right of way for its railroad over the lands of the grantor, does not thereby grant a right of way for any and every temporary and private spur-track, or branch road, which the railroad company may see fit to construct from its railroad across such lands." *Waycross Air-Line R. Co. v. Southern Pine Co.*, 111 Ga. 233.

**A Siding Belongs to a Railway Company** where such siding is on the company's land, was built by the company, and is used, maintained, and repaired by the company. *Girardot v. Great Eastern R. Co.*, 11 R. & Can. T. Cas. 244.

**Right to Communicate with Sidings of Another Railway.**— See *Richard v. Great Western R. Co.*, 11 R. & Can. T. Cas. 133.

**569. 9. Other Definitions.**— *Hill v. Mynatt*, (Tenn. Ch. 1900) 59 S. W. Rep. 163.

**Act, Law, Statute—Law in the Sense of Statute.**— *Daggs v. Phoenix Nat. Bank*, 5 Ariz. 409; *State v. Tingey*, 24 Utah 225.

**Decisions of Courts Not Law, But Merely Evidence of What the Laws Are.**— *U. S. Savings, etc., Co. v. Harris*, 113 Fed. Rep. 27; *Falconer v. Simmons*, 51 W. Va. 172.

**Ordinances.**— *McMurray v. Wright*, 19 Colo. App. 17.

**Resolution of State Senate.**— *Chicago, etc., Pac. R. Co. v. Chicago*, 174 Ill. 439; *Altamont v. Baltimore, etc., R. Co.*, 184 Ill. 47.

**Unconstitutional Act of Legislature.**— *Dodge v. Mission Tp.*, (C. C. A.) 107 Fed. Rep. 827; *State v. Davidson*, 114 Wis. 563.

**Law of the Case.**— *Standard Sewing Mach. Co. v. Leslie*, (C. C. A.) 118 Fed. Rep. 557; *Phelps County Farmers' Mut. Ins. Co. v. Johnston*, 66 Neb. 590.

**Law of State.**— The term *law* as used in a penal statute refers to the *law* of the state. *People v. Martin*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 71.

**573. 2. Lawfully Administered.**— *People v. Martin*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 71.

**The Term Lawful Claims**, in a covenant to warrant title against the *lawful* claims of all persons, contemplates claims to the title conveyed and not mere charges, which may or may not be established as liens thereon. *Cemansky v. Fitch*, 121 Iowa 186.

**Lawful Currency—Money.**— *State v. Neilon*, 43 Oregon 168.

**Same—Tender.**— *Perry v. State*, 42 Tex. Crim. 540.

**Lawful Possession.**— *Milligan v. Brooklyn Warehouse, etc., Co.*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 55.

**Lawful Process.**— *Healey v. George F. Blake Mfg. Co.*, 180 Mass. 270.

**Lawful Purpose.**— *State v. Robison*, 61 S. Car. 106.

**Lawfully Begotten.**— *Watson v. Williamson*, 129 Ala. 362.

**576. 1. Lawful Issue.**— *Morrow v. McMahon*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 348.

## LAW OF THE ROAD.

BY R. N. CHAFFEE.

**577. I. MUTUAL RIGHTS AND DUTIES OF TRAVELERS IN GENERAL.**— See notes 1, 2.

**578.** See note 1.

**577. 1. Duty to Avoid Injury to Others.**— *Gilbert v. Burque*, 72 N. H. 521; *Nead v. Roscoe Lumber Co.*, 54 N. Y. App. Div. 621.

**Right to Stop.**— One using a vehicle upon a highway has a right to stop, and allow his vehicle to remain a reasonable time by the roadside for his own convenience, if thereby he does not interfere with others using the highway. *Birdsell Mfg. Co. v. Loughman*, 26 Ind. App. 359. And see generally the title **STREETS AND SIDEWALKS**, 167. 4 *et seq.*

**2. Ordinary Care to Be Exercised.**— *Ford v. Whiteman*, 2 Penn. (Del.) 355; *Dunn v. Moratz*, 92 Ill. App. 477; *Gilbert v. Burque*, 72 N. H. 521; *Nead v. Roscoe Lumber Co.*, 54 N.

Y. App. Div. 621; *Henning v. Rothschild*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 773; *Freel v. Wanamaker*, 208 Pa. St. 279.

**Degree Dependent on Character of Horse.**— The degree of care which is required of one driving a horse that has a reputation for running away is greater than that required of a driver of a horse which is known to be gentle and reliable. *Lynch v. Kineth*, 36 Wash. 368.

**578. 1. Reliance on Care by Others.**— *Scofield v. Myers*, 27 Ind. App. 375; *Nead v. Roscoe Lumber Co.*, 54 N. Y. App. Div. 621; *Henning v. Rothschild*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 773;

**578.** Duty to Look. — See note 16.

**579.** Contributory Negligence. — See note 1.

**II. MEETING VEHICLES** — 1. General Rule to Keep to Right. — See notes 4, 5, 6.

Extent of Road to Be Given. — See note 9.

**580.** Reliance on Other's Observance of Rule. — See note 1.

2. Rule Not Decisive of Liability. — See notes 8, 9, 11, 12.

**581.** 3. Travel Need Not Be on Right Side. — See note 1.

4. Justification for Nonobservance of Rule. — See note 9.

**582.** 5. Character of Transportation Subject to Rule — Different Classes of Vehicles. — See note 1.

As Between Vehicles and Pedestrians. — See note 4.

Bicycles. — See note 5.

6. Locations Subject to Rule — Street and Road Crossings. — See note 8.

**III. VEHICLES MOVING IN SAME DIRECTION** — 1. Duties in General. — See note 10.

**583.** 2. Passing Vehicles. — See note 4.

The Driver of the Foremost Vehicle. — See notes 7, 9.

**584.** **IV. VEHICLES AND PERSONS ON FOOT** — 1. General Considerations — Duty as to Persons Crossing Street. — See notes 3, 4.

**578.** 16. Starting Without Looking. — *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406.

**579.** 1. Contributory Negligence. — *Lee v. Foley*, 113 La. 663.

4. Meeting Vehicles — English Rule. — *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579; *Wright v. Fleischman*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 533, modified 94 N. Y. App. Div. 547; *Stout v. Adams*, 35 N. Bruns. 118.

5. American Rule. — *Lee v. Foley*, 113 La. 663; *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579; *Buxton v. Ainsworth*, (Mich. 1904) 101 N. W. Rep. 817; *Wright v. Fleischmann*, 99 N. Y. App. Div. 547.

Both Vehicles on Same Side of Highway. — The rule covers the case of vehicles passing on the same side of roads and streets so wide that there is no necessity to go to the right of the centre of the road in order to pass safely. *Wright v. Fleischman*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 533, modified 99 N. Y. App. Div. 547.

6. Statutory Provisions. — *Diehl v. Roberts*, 134 Cal. 161; *Dunn v. Moratz*, 92 Ill. App. 477; *Neal v. Rendall*, 98 Me. 69; *Perlstein v. American Express Co.*, 177 Mass. 530; *Wright v. Fleischman*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 533, modified 99 N. Y. App. Div. 547; *Pick v. Thurston*, 25 R. I. 36.

9. *Buxton v. Ainsworth*, (Mich. 1904) 101 N. W. Rep. 817, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579.

**580.** 1. Reliance on Other's Observance of Rule. — *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579, 580.

8. Not Conclusive of Liability — *Stout v. Adams*, 35 N. Bruns. 118; *Brownstein v. Imperial Electric Light Co.*, 17 Quebec Super. Ct. 202.

9. Rule Not Always to Be Followed. — *Streeter v. Marshalltown*, 123 Wis. 449.

11. Presumption of Negligence. — *Vonder-*

*horst Brewing Co. v. Amrhine*, 98 Md. 406, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 580, as to the doctrines in the several jurisdictions, but holding that in the case at bar the question was for the jury; *Buxton v. Ainsworth*, (Mich. 1904) 101 N. W. Rep. 817.

12. Evidence of Negligence. — *Neal v. Rendall*, 98 Me. 69.

**581.** 1. May Generally Travel on Any Part of Highway. — *Neal v. Rendall*, 98 Me. 69; *Foot v. American Product Co.*, 195 Pa. St. 190, 78 Am. St. Rep. 806.

9. Avoidance of Obstructions. — *Indianapolis St. R. Co. v. Slifer*, (Ind. App. 1905) 72 N. E. Rep. 1055.

**582.** 1. Character of Vehicle. — See *Lee v. Foley*, 113 La. 663.

4. Rule Does Not Apply in Favor of Pedestrians. — But in taking the wrong side of a street, one takes the risk of consequences which may arise from his inability to get out of the way of vehicles. *Fahrney v. O'Donnell*, 107 Ill. App. 608.

5. Bicycles. — *Fahrney v. O'Donnell*, 107 Ill. App. 608; *Foot v. American Product Co.*, 195 Pa. St. 190, 78 Am. St. Rep. 806.

8. Vehicles Meeting at Street Crossings. — *Gilbert v. Burque*, 72 N. H. 521.

10. Vehicles Traveling in Same Direction. — *Ennis v. Ross*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 160.

**583.** 4. Vehicle at Rest. — *Odom v. Schmidt*, 52 La. Ann. 2129.

7. Duty of Driver in Front. — Where an automobile approaching from the rear frightens the plaintiff's horse, by reason of which he is thrown out, he must show that he used ordinary care to avoid being injured. *Nadeau v. Sawyer*, (N. H. 1904) 59 Atl. Rep. 369.

9. May Travel on Any Part of Highway. — *Scofield v. Myers*, 29 Ind. App. 375.

**584.** 3. Street Crossings. — *Douglas v. Faust*, 112 La. 1050; *Dieter v. Zbaren*, 81 Mo. App. 612.

4. Pedestrian Not on Crosswalk. — *Thies v.*

**584.** Duties as to Persons Behind or Beside Vehicle. — See note 5.

**585.** 3. Pedestrians Crossing Highways. — See note 2.

The Degree of Care. — See notes 3, 4.

Failure to Look. — See notes 5, 6.

Knowledge of Approaching Vehicle. — See notes 7, 8, 9.

**586.** Right to Cross at Any Point. — See notes 1, 2.

4. Laborers in Highways. — See note 3.

5. Negligence Generally Question for Jury. — See notes 6, 7.

**587.** V. VEHICLES ENTITLED TO PECULIAR PRIVILEGES. — See note 2.

VI. RATE OF SPEED — 1. In General. — See notes 5, 6, 8.

**588.** VII. HORSE ESCAPING FROM CONTROL — 1. Liability Only in Case of Negligence. — See notes 1, 3.

Thomas, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276.

**584.** 5. Persons Not in Front of Vehicle. — It is not the duty of a driver to keep a lookout behind so as to know whether children or adults are riding on the rear end of the vehicle. *Hebard v. Mabie*, 98 Ill. App. 543.

**585.** 2. No Priority of Rights at Crossing. — *Stroub v. Meyer*, 132 Mich. 95; *Schwartz v. London*, (Supm. Ct. App. T.) 90 N. Y. Supp. 449.

3. Requirements Not Same as at Railroad Crossing. — *Green v. Eden*, 24 Ind. App. 583; *Burt v. Staffeld*, 121 Mich. 390.

4. Care Must Be Exercised. — *Wolfskill v. Los Angeles R. Co.*, 129 Cal. 114; *Douglas v. Faust*, 112 La. 1050; *O'Brien v. Hudner*, 182 Mass. 381.

Only Ordinary Care Required. — *Groom v. Kavanagh*, 97 Mo. App. 362.

5. Duty to Look. — *Burt v. Staffeld*, 121 Mich. 390. See also *Scofield v. Myers*, 27 Ind. App. 375.

Failure to Look Second Time. — Where a pedestrian crosses a street after having looked up and down, but fails to look again, he is not negligent as a matter of law. *Rush v. Joseph H. Bauland Co.*, 82 N. Y. App. Div. 506.

6. *Lieberman v. Stanley*, (Supm. Ct. App. T.) 88 N. Y. Supp. 360. See also *Wolfskill v. Los Angeles R. Co.*, 129 Cal. 114.

7. Knowledge of Approaching Vehicle. — *McCrohan v. Davison*, 187 Mass. 466; *Stroub v. Meyer*, 132 Mich. 75; *Schwartz v. London*, (Supm. Ct. App. T.) 90 N. Y. Supp. 449.

8. Assumption as to Speed. — *Schwartz v. London*, (Supm. Ct. App. T.) 90 N. Y. Supp. 449.

A pedestrian is entitled to assume that the driver will approach at a reasonable rate of speed. *Stroub v. Meyer*, 132 Mich. 75.

9. Mistake in Estimate of Time. — Foot travelers should not attempt to cross a thoroughfare, ahead of a vehicle of any kind, upon a nice calculation of chances of injuries. *Douglas v. Faust*, 112 La. 1050.

**586.** 1. Pedestrian May Cross at Any Point. — *Augusta v. Tharpe*, 113 Ga. 152; *Louisville v. Johnson*, (Ky. 1902) 69 S. W. Rep. 803.

2. *Augusta v. Tharpe*, 113 Ga. 152.

3. Laborers in Highway. — *Ford v. Whiteman*, 2 Penn. (Del.) 355.

6. Contributory Negligence for Jury — *Massachusetts*. — *Drew v. Farnsworth*, 186 Mass. 365; *Dorr v. Schenck*, 187 Mass. 542.

*Michigan*. — *Burt v. Staffeld*, 121 Mich. 390;

*Stroub v. Meyer*, 132 Mich. 75; *Graham v. Evening Press Co.*, 135 Mich. 298.

*New York*. — *Nead v. Roscoe Lumber Co.*, 54 N. Y. App. Div. 621; *Dehmann v. Beck*, 61 N. Y. App. Div. 505; *Manthey v. Rauenbuehler*, 71 N. Y. App. Div. 173; *Connaughton v. Sun Printing, etc., Assoc.*, 73 N. Y. App. Div. 316; *Thies v. Thomas*, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; *Rush v. Joseph H. Bauland Co.*, 82 N. Y. App. Div. 506; *Schwartz v. London*, (Supm. Ct. App. T.) 90 N. Y. Supp. 449. See also *Shoenblum v. New York*, 58 N. Y. App. Div. 285.

*Wisconsin*. — *Morgan v. Pleshek*, 120 Wis. 306.

7. Negligence of Driver for Jury — *Kentucky*. — *Wathen v. Pool*, (Ky. 1904) 80 S. W. Rep. 439.

*Massachusetts*. — *Drew v. Farnsworth*, 186 Mass. 365.

*Michigan*. — *Stroub v. Meyer*, 132 Mich. 75; *Graham v. Evening Press Co.*, 135 Mich. 298.

*Missouri*. — *Dieter v. Zbaren*, 81 Mo. App. 612.

*New York*. — *Nead v. Roscoe Lumber Co.*, 54 N. Y. App. Div. 621; *Shoenblum v. New York*, 58 N. Y. App. Div. 285; *Dehmann v. Beck*, 61 N. Y. App. Div. 505; *Connaughton v. Sun Printing, etc., Assoc.*, 73 N. Y. App. Div. 316; *Rush v. Joseph H. Bauland Co.*, 82 N. Y. App. Div. 506; *Schwartz v. London*, (Supm. Ct. App. T.) 90 N. Y. Supp. 449.

*Pennsylvania*. — *Freel v. Wanamaker*, 208 Pa. St. 279.

*Wisconsin*. — *Morgan v. Pleshek*, 120 Wis. 306.

Whether Persons Coasting Down a Hill Were Negligent is for the jury. *Burt v. Staffeld*, 121 Mich. 390.

**587.** 2. See *Muhs v. Fire Ins. Salvage Corp.*, 89 N. Y. App. Div. 389.

5. Speed to Be Considered. — *Freel v. Wanamaker*, 208 Pa. St. 279.

6. Rapid Speed Is Negligence. — *Ford v. Whiteman*, 2 Penn. (Del.) 355; *Lahne v. Seach*, 83 N. Y. App. Div. 636.

8. Frightening Horses. — Where one running an automobile knows or by reasonable care ought to know that his machine has excited another's horse so as to render him unmanageable, it is his duty to stop the automobile. *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 240.

**588.** 1. Horses Escaping from Control. — *Ford v. Whiteman*, 2 Penn. (Del.) 355; *Cunningham v. Belknap*, (Ky. 1901) 60 S. W. Rep. 837.

**589. VIII. LEAVING HORSE UNFASTENED AND UNATTENDED.** — See notes 4, 5.

Person in Attendance. — See note 8.

**590.** Presumption of Negligence. — See note 2.

LAY — LAYING OUT. — See note 6.

**591.** LEADING QUESTION. — See note 3.

**592.** LEAK — LEAKAGE. — See note 1.

**588. 3. No Presumption of Negligence.** — *Compare Snee v. Durkie*, Sc. Ct. of Sess. 6 F. 42.

**Duty to Inspect Vehicle.** — A person driving on the highway should exercise due care to keep his vehicle in a roadworthy condition; and if from want of such care the vehicle breaks, causing the horses to run away, the driver is liable for injuries caused thereby to other persons. *Birdsall Mfg. Co. v. Loughman*, 26 Ind. App. 359.

**589. 4. Horse Left Unfastened in Street.** — *Laflamme v. Staines*, 18 Quebec Super. Ct. 105; *Becker v. Schutte*, 85 Mo. App. 57; *Manthey v. Rauenbuehler*, 71 N. Y. App. Div. 173.

**Not Negligence as Matter of Law.** — *Belles v. Killner*, 67 N. J. L. 255.

**5. Generally Question for Jury.** — *Haywood v. Hamm*, 77 Conn. 158; *Groom v. Kavanagh*, 97 Mo. App. 362; *Belles v. Kellner*, 66 N. J. L. 561; *Sondheim v. Nassau Brewing Co.*, 60 N. Y. App. Div. 463.

It is also a question for the jury whether the defendant in hitching his horse exercised ordinary care. *Becker v. Schutte*, 85 Mo. App. 57; *Thompson v. Plath*, 44 N. Y. App. Div. 291.

**8. Person in Attendance.** — *Belles v. Kellner*, 67 N. J. L. 255, 91 Am. St. Rep. 429.

**590. 2. Presumption of Negligence.** — *Howley v. Kraemer*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 190; *Kelly v. Adelman*, 72 N. Y. App. Div. 590; *Brand v. Borden's Condensed Milk Co.*, 89 N. Y. App. Div. 188; *Gorsuch v. Swan*, 109 Tenn. 36, 97 Am. St. Rep. 836.

**6. Laying Out Highway.** — *Peabody v. Boston, etc., R. Corp.*, 181 Mass. 76.

**Same — Acceptance and Dedication.** — See *Valentine v. Hagerstown*, 86 Md. 486; *Sindall v. Baltimore*, 93 Md. 526.

**591. 3. Leading Question.** — *Idaho Mercantile Co. v. Kalanquin*, 8 Idaho 101.

**592. 1.** See *The Nellie Floyd*, 116 Fed. Rep. 80.

# LEASES.

BY BRISCOE B. CLARK.

**597. I. DEFINITION.** — See note 1.

**II. AGREEMENTS TO LEASE — 1. Consummation of Agreement.** — See notes 2, 3.

**598.** See note 1.

**Acceptance of Offer.** — See note 2.

**2. Distinction Between Lease and Agreement to Lease — a. NECESSITY FOR DISTINCTION.** — See notes 8, 9.

**599.** See notes 1, 2, 3, 4.

**b. INTENTION OF PARTIES.** — See note 5.

**600. c. WORDS OF DEMISE.** — See note 2.

**d. PROVISION FOR EXECUTING FURTHER LEASE.** — See note 9.

**601.** See note 1.

**3. Terms of Lease to Be Executed.** — See note 2.

**597. 1. Definition of Lease.** — Bruckman v. Dry Goods Co., 91 Mo. App. 464, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597; Ward v. American Health Food Co., 119 Wis. 23, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 597. See also Ault Woodenware Co. v. Baker, 26 Ind. App. 374.

**Assignment of Reversion — Effect on Liability of Lessor.** — Stuart v. Joy, (1904) 1 K. B. 362.

**2.** See Fiske v. Ernst, (N. Y. City Ct. Gen. T.) 62 N. Y. Supp. 429.

**3. Negotiations for a Lease.** — Laroussini v. Werlein, 52 La. Ann. 424, 78 Am. St. Rep. 350; Aquelina v. Provident Realty Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 1014; Foster v. Clifford, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 496; Gramm v. Sterling, 8 Wyo. 527.

**598. 1. Agreements to Lease Invalid for Uncertainty.** — Charlton v. Columbia Real Estate Co., 64 N. J. Eq. 631; Jenkelson v. Ruff, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 276; Scottish-American Mortg. Co. v. Taylor, (Tex. Civ. App. 1903) 74 S. W. Rep. 564.

**Description of Premises.** — Boston Clothing Co. v. Solberg, 28 Wash. 262.

**Duration of Term.** — An agreement to give a lease for "one or more years" was held sufficiently certain as entitling the lessee to a term for two years. Boston Clothing Co. v. Solberg, 28 Wash. 262.

**2. Acceptance of Offer to Lease.** — Lautman v. Miller, 158 Ind. 382.

**8. Necessity for Distinction Between Lease and Agreements to Lease.** — Donovan v. P. Schoenhofen Brewing Co., 92 Mo. App. 341; McLoughlin v. Steurwald, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 103; Schlumpf v. Sasake, 38 Wash. 278.

**9. Agreement to Lease Conveys No Estate.** — Franke v. Hewitt, 56 N. Y. App. Div. 497; Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422.

**599. 1. Compare A. H. Pugh Printing Co. v. Dexter, 8 Ohio Dec. 557.**

**2. Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257.**

Where a tenant goes into possession with the understanding that a certain lease shall be signed, the law implies a verbal contract of similar import with the written lease, though it was never executed. Bonaparte v. Thayer, 95 Md. 548.

**3.** See Parsons v. Frank, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 756; American Security, etc., Co. v. Walker, 23 App. Cas. (D. C.) 583; A. H. Pugh Printing Co. v. Dexter, 8 Ohio Dec. 557.

**4.** Goldberg v. Wood, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 327; Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422; Schlumpf v. Sasake, 38 Wash. 278.

**5. Intention of Parties.** — Donovan v. P. Schoenhofen Brewing Co., 92 Mo. App. 341; St. Louis Brewing Assoc. v. Niederluecke, 102 Mo. App. 303; Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257.

**600. 2.** Budd-Scott v. Daniell, (1902) 2 K. B. 351, 71 L. J. K. B. 706; Acorn v. Hill, 34 Nova Scotia 508; St. Louis Brewing Assoc. v. Niederluecke, 102 Mo. App. 303. See also Zimble v. Abrahams, (1903) 1 K. B. 577; Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257. See, however, Goldberg v. Wood, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 327.

**9. Provision for Executing Further Instrument of Demise.** — Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257; Arnold v. R. Rothschild's Sons Co., 164 N. Y. 562, affirming 37 N. Y. App. Div. 564; Franke v. Hewitt, 56 N. Y. App. Div. 497; Foster v. Clifford, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 496.

**601. 1.** Bradley v. Metropolitan Music Co., 89 Minn. 516.

**Possession under Parol Agreement Contemplating Written Lease.** — Coffee v. Smith, 109 La. 440; Laroussini v. Werlein, 52 La. Ann. 424, 78 Am. St. Rep. 350.

**2. Terms of Lease to Be Executed.** — Donovan v. P. Schoenhofen Brewing Co., 102 Mo. App. 427.

- 601.** Usual Covenants and Provisions. — See note 3.  
Covenants Held Usual. — See note 13.
- 602.** Provisions for Re-entry. — See note 13.
- 603.** 5. Remedies for Breach — *a.* BREACH BY LESSOR — Action for Damages. — See note 8.  
Specific Performance. — See note 9.
- 604.** See note 3.  
*b.* BREACH BY LESSEE. — See note 5.  
6. Damages Recoverable for Breach. — See note 9.
- 605.** III. THE LEASE — EXECUTION AND FORMAL PARTS — 1. Technical Forms Not Required. — See note 1.  
5. Designation of Term. — See note 9.
- 606.** 6. Description of Premises. — See notes 1, 2.  
7. Signing — By Lessor. — See note 4.  
By Lessee. — See notes 9, 10, 11.
- 607.** 8. Delivery of Lease. — See notes 1, 2.  
9. Recording Lease. — See note 5.  
10. Attestation and Acknowledgment. — See notes 6, 7.

**601.** 3. *In re Canadian Pac. R. Co.*, 27 Ont. App. 54.

13. *In re Canadian Pac. R. Co.*, 5 Ont. L. Rep. 717. See also *Canadian Pac. R. Co. v. Toronto*, 4 Ont. L. Rep. 134; *In re Canadian Pac. R. Co.*, 27 Ont. App. 54.

**602.** 13. See *In re Canadian Pac. R. Co.*, 5 Ont. L. Rep. 717 (nonpayment of taxes).

**603.** 8. Sufficiency of Evidence to Show Breach. — *Vogeler v. Devries*, 98 Md. 302.  
Measure of Damages. — *Scottish-American Mortg. Co. v. Taylor*, (Tex. Civ. App. 1903) 74 S. W. Rep. 564 (difference between rent reserved and rental value).

9. Specific Performance. — *Pittsburgh Amusement Co. v. Ferguson*, 100 N. Y. App. Div. 453.

Enforcement Against Purchaser from Lessor. — *Boston Clothing Co. v. Solberg*, 28 Wash. 262.

**604.** 3. See *Walsh v. Brooke*, 21 Quebec Super. Ct. 394.

5. Action for Damages. — *Bacon v. Combes*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 704.

Measure of Damages. — *Silva v. Bair*, 141 Cal. 599; *Weinberg v. Greenberger*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 117.

9. Lessor Wrongfully Refusing to Give Lease — *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Birch v. Wood*, 111 Ill. App. 336.

**605.** 1. Technical Forms Not Required. — *Duxbury v. Sandiford*, 80 L. T. N. S. 552; *Merki v. Merki*, 113 Ill. App. 518, *affirmed* 212 Ill. 121; *Asher v. Johnson*, (Ky. 1904) 82 S. W. Rep. 300; *Roberts v. Lynn Ice Co.*, 187 Mass. 402; *Baer v. Minock*, 128 Mich. 676; *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125.

9. *Cunningham v. Roush*, 157 Mo. 336; *Wood v. Husted*, 83 N. Y. App. Div. 174, *citing* 112 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; *Kuntz v. Mahrenholz*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1002; *Bunch v. Elizabeth City Lumber Co.*, 134 N. Car. 116.

**Habendum Clause.** — The length of time for which a lease is made may be provided for in the habendum clause. It need not necessarily be stated in the granting clause. *Brown v. Fowler*, 65 Ohio St. 507.

**606.** 1. Description of Demised Premises. — *Dixon v. Finnegan*, 182 Mo. 111; *Kuntz v. Mahrenholz*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1002; *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375. See also *Thurlough v. Dresser*, 98 Me. 161; *Deluise v. Long Island R. Co.*, 65 N. Y. App. Div. 487, *affirmed* 174 N. Y. 516.

Description of Lease of Oyster Beds Held Sufficiently Certain. — *Fraser v. State*, 112 Ga. 13.  
"Zeringue Landing, under Nine-mile Point," may be sufficient description. *Wood v. Fabrigas*, 105 La. 1.

Omission from Body of Lease of State and County held not to render the lease void for insufficient description. *Gex v. Dill*, (Miss. 1905) 38 So. Rep. 193.

2. *Indianapolis Natural Gas Co. v. Pierpe*, 25 Ind. App. 116.

Parol Evidence is not admissible to aid or help an inherently insufficient description. *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375.

4. In *West Virginia*, where the name of a lessor does not appear in the body of the lease as a party thereto it is not binding on him, though he signs and acknowledges it as his deed. *Barnsdall v. Boley*, 119 Fed. Rep. 191.

9. Signature by Lessee. — *Land Com'rs v. Carpenter*, 16 Colo. App. 436; *Baltimore, etc., R. Co. v. Winslow*, 18 App. Cas. (D. C.) 438; *Braman v. Dodge*, (Me. 1905) 60 Atl. Rep. 799.

10. *Woodruff v. Butler*, 75 Conn. 679; *Doxey v. Service*, 30 Ind. App. 174; *Noland v. Cincinnati Cooperage Co.*, (Ky. 1904) 82 S. W. Rep. 627.

11. Acceptance by Lessee Need Not Be in Writing. — *Pittsburgh Mfg. Co. v. Fidelity Title, etc., Co.*, 207 Pa. St. 223.

**607.** 1. Delivery of Lease. — *Ver Steeg v. Becker-Moore Paint Co.*, 106 Mo. App. 257.

2. *Lawrence v. Bell*, 132 Ala. 308.

5. See *Westchester Trust Co. v. Hobby Bottling Co.*, 102 N. Y. App. Div. 464.

6. Attestation of Leases. — *Langmede v. Weaver*, 65 Ohio St. 17.

7. Acknowledgment. — *Jokinisky v. Miller*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 239.



- 607.** 11. Stamps — Revenue Laws. — See note 8.  
IV. PARTIES TO LEASES — 1. In General. — See notes 9, 10.
- 608.** See notes 1, 3, 4.
- 609.** 2. Infants — *b.* INFANT LESSEES. — See notes 4, 5.
- 610.** 4. Coverture — *a.* LEASES BY AND TO MARRIED WOMEN. — See note 1.  
Enabling Statutes. — See note 2.  
6. Corporations. — See note 13.
- 611.** 8. Trustees. — See note 2.  
9. Executors and Administrators. — See note 3.  
10. Agents. — See note 4.  
V. TERMS FOR WHICH LEASES MAY BE GRANTED — By Constitutional Provision in New York. — See note 13.
- 612.** [By Statute in Other States. — See note 1a.]  
V. IMPLIED COVENANTS OR WARRANTIES — 1. On the Part of the Lessor — *a.* COVENANT FOR QUIET ENJOYMENT. — See notes 2, 4.
- 613.** See note 2.  
*b.* CONDITION OF PREMISES — (1) *In General.* — See note 3.
- 607.** 8. See *Britenbaker v. Hatler*, 24 Pa. Co. Ct. 585, 7 Lack. Leg. N. (Pa.) 24.  
Presumption as to Time of Affixing Stamps. — *M'Geary v. Raymond*, 17 Pa. Super. Ct. 308.
9. Priority Between Dower Rights and Rights of Lessee of Husband. — *Allan v. Rever*, 4 Ont. L. Rep. 309.
10. *McPhillips v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed 177 N. Y. 543.
- 608.** 1. Lease by Life Tenant. — *Olden v. Sassman*, 67 N. J. Eq. 239.
3. Iowa Sav. Bank *v.* Frink, (Neb. 1901) 92 N. W. Rep. 916; *Geneva Mineral Spring Co. v. Coussey*, 45 N. Y. App. Div. 268, rehearing denied 47 N. Y. App. Div. 634.
4. Lease of Lands Held Adversely. — See *Cohen v. Suckno*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 689.
- 609.** 4. *Peck v. Cain*, 27 Tex. Civ. App. 38.
5. Infant Lessee Enjoying Possession Liable for Rent. See *Peck v. Cain*, 27 Tex. Civ. App. 38.
- 610.** 1. National Bank. — *Weeks v. International Trust Co.*, 125 Fed. Rep. 370, 60 C. C. A. 236.
2. *Shipley v. Smith*, 162 Ind. 526; *Winestine v. Ziglitzki-Marks Co.*, 77 Conn. 404.
13. Corporations. — *Tate v. Neary*, 52 N. Y. App. Div. 78, holding that a lease by a corporation is valid, though the lease extends beyond the life of the corporation.
- 611.** 2. Trustees. — See *Weir v. Barker*, 104 N. Y. App. Div. 112.
3. Executors and Administrators. — *Ashley v. You*, 70 Miss. 129.
4. Agents. — *Golecki v. Appelbaum*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 203; *Freschi v. Molony*, 65 N. Y. App. Div. 516; *Durkee v. Carr*, 18 Oregon 189; *Pittsburg Mfg. Co. v. First Nat. Title, etc., Co.*, 207 Pa. St. 223.
- Husband as Agent for Wife. — *Van Brunt v. Wallace*, 38 Minn. 116, following *Sanford v. Johnson*, 24 Minn. 172.
- Ratification of Unauthorized Lease by Agent. — *Anderson v. Conner*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 384; *Hassard v. Tomkins*, 108 Wis. 186.
- Estoppel. — *Western New York, etc., R. Co. v. Rea*, 83 N. Y. App. Div. 576 (lease by husband in his own name of wife's land).
13. Lease for Mining Purposes. — *Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360.
- 612.** 1a. The North Dakota Statute (Rev. Stat. 3310) declares invalid all leases of agricultural lands which are made for a longer period than ten years in which "rent" or service is reserved. *Wegner v. Lubenow*, 12 N. Dak. 95.
- Lease by Indians. — *Thomas v. Sass*, 3 Indian Ter. 545 (restricted to one year).
- Effect of Covenant for Renewal. — *Sass v. Thomas*, 3 Indian Ter. 536.
2. Covenant for Quiet Enjoyment Implied. — *Budd-Scott v. Daniell*, (1902) 2 K. B. 351, 71 L. J. K. B. 706; *Jordan v. Indianapolis Water Co.*, 159 Ind. 337; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (unofficial) 340, 96 N. W. Rep. 487.
- Implied Agreement for Consent to Liquor License. — *Kellogg v. Lowe*, 38 Wash. 293.
- Consent of Lessor to Issuance of Liquor License to Lessee. — *Guth v. Mehling*, 84 N. Y. App. Div. 586.
4. Statutory Provision Against Implication of Covenants in Conveyances. — See *Koeber v. Somers*, 103 Wis. 497, overruling *Shaft v. Carey*, 107 Wis. 273; *Hunter v. Hathaway*, 108 Wis. 620, following *Koeber v. Somers*, 108 Wis. 497.
- 613.** 2. Effect of Restricted Express Covenant. — *Gallagher v. Button*, 72 Conn. 172.
3. No Implied Covenant or Warranty as to Physical Condition of Premises — *United States v. Schwalbach v. Shinkle, etc., Co.*, 97 Fed. Rep. 483.
- Georgia.* — *Stack v. Harris*, 111 Ga. 149.
- Illinois.* — *Watson v. Moulton*, 100 Ill. App. 560; *Sunasack v. Morey*, 196 Ill. 569; *Carpenter v. Stone*, 112 Ill. App. 155; *Lazarus v. Parmly*, 113 Ill. App. 624.
- Indiana.* — *La Plante v. La Zear*, 31 Ind. App. 433.
- Iowa.* — *Flaherty v. Nieman*, 125 Iowa 546.
- Kentucky.* — *Franklin v. Tracy*, (Ky. 1904) 77 S. W. Rep. 1113.

**614.** See note 3.(2) *Leases of Buildings under Construction.* — See notes 4, 5.(3) *Leases of Furnished Houses.* — See note 6.**615.** (4) *Restriction to Particular Use.* — See note 6.

c. TO GIVE POSSESSION. — See note 8.

**616.** *Extent of Covenant.* — See note 3.*Remedy of Lessee.* — See note 6.*Damages Recoverable.* — See notes 10, 12, 13.**617.** See notes 1, 2, 3.2. *On the Part of the Lessee* — [In General]. — See note 4a.*Maine.* — *Bennett v. Sullivan*, (Me. 1905) 60 Atl. Rep. 886.*Massachusetts.* — *O'Malley v. Twenty-Five Associates*, 178 Mass. 555; *Roth v. Adams*, 185 Mass. 341.*Montana.* — *Landt v. Schneider*, 31 Mont. 15.*New Hampshire.* — *Towne v. Thompson*, 68 N. H. 317; *Cate v. Blodgett*, 70 N. H. 316.*New Jersey.* — *Land v. Fitzgerald*, 68 N. J. L. 28.*New York.* — *Watson v. Almirall*, 61 N. Y. App. Div. 429; *Steeffel v. Rothschild*, 64 N. Y. App. Div. 293; *Castagnette v. Nicchia*, 76 N. Y. App. Div. 371; *Sherman v. Ludin*, 79 N. Y. App. Div. 37; *Diehl v. Watson*, 89 N. Y. App. Div. 445; *Prahar v. Tousey*, 93 N. Y. App. Div. 507; *Ducker v. Del Genovese*, 93 N. Y. App. Div. 575; *Smith v. Donnelly*, 93 N. Y. App. Div. 569; *Lyons v. Gavin*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 659; *Flannery v. Simons*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 123 (lease of apartment).*Rhode Island.* — *Whitehead v. Comstock*, 25 R. I. 423.*Wisconsin.* — *Hunter v. Hathaway*, 108 Wis. 620.**Lease of Part of Building.** — This rule applies with equal force where the lease is of a part of a building as where the leased premises constitute an entire building. *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447.**Representations as to the Condition of Premises** at the time of the letting may amount to an express warranty to the same extent as in case of a sale of a chattel. *De Lassalle v. Guilford*, (1901) 2 K. B. 215, 70 L. J. K. B. 533.**614. 3.** In *Blum v. Ansley*, 64 J. P. 184, where the lease of a licensed public house was granted to commence after the expiration of an existing lease which contained a covenant to use the house as a licensed public house so long as the license could be obtained, it was held that there was no implied condition or covenant that the premises should be licensed when the lease to commence after the existing lease came into operation.**1. Buildings under Construction.** — See *Pough v. Ceimedo*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 216.**5.** See *Hunter v. Porter*, 10 Idaho 72.**6. Leases of Furnished Houses.** — *Rubens v. Hill*, 213 Ill. 523.**615. 6. Restrictions to Particular Use of Premises.** — *Hunter v. Porter*, (Idaho 1904) 77 Pac. Rep. 434. *Compare Lyons v. Gavin*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 659.**8. Implied Covenant to Give Possession.** — *Rieger v. Welles*, 110 Mo. App. 166; *Sullivan v.**Schmitt*, 93 N. Y. App. Div. 469; *Meyers v. Liebeskind*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 272; *Harris v. Greenberger*, 50 N. Y. App. Div. 439; *Larivière v. Vinet*, 25 Quebec Super. Ct. 338 (holding over by prior tenant). See *Palmer v. Young*, 108 Ill. App. 252; *Mirsky v. Horowitz*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 257.**616. 3. Extent of Covenant to Give Possession.** — *Mirsky v. Horowitz*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 257.**6. Action for Damages.** — *Bernhard v. Curtis*, 75 Conn. 476; *Albey v. Weingart*, 71 N. J. L. 92; *McFarland v. Owens*, 94 Tex. 650, 63 S. W. Rep. 530; *McFarland v. Owens*, (Tex. Civ. App. 1901) 64 S. W. Rep. 229.**10.** *Griesheimer v. Bothman*, 105 Ill. App. 585; *Birch v. Wood*, 111 Ill. App. 336; *Shoemaker v. Crawford*, 82 Mo. App. 487.**12.** *Bartram v. Hering*, 18 Pa. Super. Ct. 395; *Gross v. Heckert*, 120 Wis. 314.**13. Wrongful Withholding of Possession by Lessor** — *Alabama.* — *Lawrence v. Bell*, 132 Ala. 308.*Connecticut.* — *Bernhard v. Curtis*, 75 Conn. 476.*New Jersey.* — *Albey v. Weingart*, 71 N. J. L. 92.*New York.* — *Goldman v. Gainey*, 67 N. Y. App. Div. 330; *Williamson v. Stevens*, 84 N. Y. App. Div. 518; *Rosenblum v. Riley*, (Supm. Ct. App. T.) 84 N. Y. Supp. 884; *Belding v. Blum*, (Supm. Ct. App. T.) 88 N. Y. Supp. 178.*Pennsylvania.* — *Bartram v. Hering*, 18 Pa. Super. Ct. 395.*Washington.* — *Engstrom v. Merriam*, 25 Wash. 73.*Wisconsin.* — *Serfling v. Andrews*, 106 Wis. 78; *Gross v. Heckert*, 120 Wis. 314.**617. 1.** *Gross v. Heckert*, 120 Wis. 314.**Depreciation in Value of Goods.** — *Bernhard v. Curtis*, 75 Conn. 476.**2.** *Gross v. Heckert*, 120 Wis. 314.**3. Prospective Profits.** — *Drishman v. McManemin*, 68 N. J. L. 337; *Deluise v. Long Island R. Co.*, 174 N. Y. 516, affirming 65 N. Y. App. Div. 487; *Engstrom v. Merriam*, 25 Wash. 73; *Gross v. Heckert*, 120 Wis. 314.**4a. To Prevent Forfeiture.** — A tacit condition is annexed by law to all tenancies that the lessee will not by his unlawful act cause a forfeiture of the lessor's estate or by such act create an enforceable lien on the landlord's interest in such premises. *Thompson v. Ackerman*, 12 Ohio Cir. Dec. 456.**To Enter into Possession.** — Though the premises are leased for a particular purpose there is still no implied obligation on the part of the

**617. VII. GENERAL CONSTRUCTION OF LEASES—1. In General.**—See note 7.

Intention. — See note 8.

Instrument to Be Considered as a Whole. — See notes 9, 10.

Construction by Parties. — See note 12.

Lessee Favored. — See note 13.

**618. Popular Interpretation of Words.**—See note 1.

Surrounding Circumstances. — See note 2.

Printed and Written Clauses. — See notes 4, 5.

2. Parol or Extrinsic Evidence to Vary Written Lease. — See note 9.

tenant to enter into possession. *Moore v. Guardian Trust Co.*, 173 Mo. 218.

**617.** 7. *Jones v. Gammon*, 123 Ga. 47; *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197.

**Agreement to Pay for Steam Heat.**—Library Bureau *v. Lothrop Pub. Co.*, 180 Mass. 372.

**"Active Working" of Mill.**—A covenant by the lessee to keep a watchman at the mill demised, during the active working thereof, requires, where the mill is operated in the daytime and fires banked at night, a watchman to be kept during the night. *Porter v. Allen*, 8 Idaho 358.

**An Agreement to Indemnify the Lessee** has been held not to include indemnification against the maintenance of a public nuisance. *Lebanon Carriage, etc., Co. v. Faulkner*, (Ky. 1903) 76 S. W. Rep. 1083.

**Construction of Written Lease Is for the Court.**—*Hewitt v. Hornbuckle*, 97 Ill. App. 97; *Staats v. Simpson*, 19 Pa. Super. Ct. 164; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586.

**Covenant for Insurance Protection.**—*King v. Murphy Varnish Co.*, 188 Mass. 66.

**8. Intention of Parties.**—*Hobson v. Silva*, 137 Cal. xix, 70 Pac. Rep. 619; *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363; *Barnhart v. Boyce*, 102 Ill. App. 172; *Upton v. Hosmer*, 70 N. H. 493; *Anzolone v. Paskusz*, 96 N. Y. App. Div. 188; *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197.

**9. Construction of Instrument as a Whole.**—*Illinois.*—*Barnhart v. Boyce*, 102 Ill. App. 172.

*Maine.*—*Union Water Power Co. v. Lewiston*, 95 Me. 171.

*Missouri.*—*Metropolitan Land Co. v. Manning*, 98 Mo. App. 248.

*New York.*—*Niederstein v. Cusick*, 83 N. Y. App. Div. 36, reversed on other grounds 178 N. Y. 543.

*Pennsylvania.*—*Wright v. Milne*, 9 Pa. Dist. 170; *French v. Burns*, 19 Pa. Super. Ct. 333.

*Texas.*—*Zapp v. Davidson*, 21 Tex. Civ. App. 566.

*Virginia.*—*Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 3 Va. Sup. Ct. 152.

*Wisconsin.*—*American Bicycle Co. v. Hoyt*, 118 Wis. 273.

**Qualifications—Certain to Prevail over Uncertain Provisions.**—*Brown v. Fowler*, 65 Ohio St. 507.

**Rejecting Clause as False Demonstration.**—*Brantford Electric, etc., Co. v. Brantford Starch Works*, 2 Ont. L. Rep. 118.

10. *Murphy v. Farley*, 124 Ala. 279; *Rubens v. Hill*, 213 Ill. 534, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619; *John Polhemus Printing Co. v. Hallenbeck*, 46 N. Y. App. Div.

563 (bond for performance of covenant of renewal).

Where two leases between the same parties are executed at the same time and relate to the same subject-matter, both are to be construed together as one instrument. *Cook County Brick Co. v. Labahn Brick Co.*, 92 Ill. App. 526.

**Lease of Separate Tracts.**—Where two leases are entered into between the same parties at different times, demising separate tracts, the parties at the time of executing the first lease not contemplating a second lease, the two leases are not to be construed together. *Anderson v. Winton*, 136 Ala. 422.

**12. Construction by Parties.**—*Wood v. Edison Electric Illuminating Co.*, 184 Mass. 523; *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

**13. Lessee Favored.**—*Ingle v. Bottoms*, 160 Ind. 80, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617; *Henderson v. Schuykill Valley Clay Mfg. Co.*, 24 Pa. Super. Ct. 422; *Kaufmann v. Liggett*, 209 Pa. St. 87 (covenant for renewal); *Watson v. Sparrow*, 16 Quebec Super. Ct. 459.

**618. 1. Popular Meaning of Particular Words.**—*Union Water Power Co. v. Lewiston*, 95 Me. 171; *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197.

**Technical Terms in Lease Drawn by Lawyer.**—*Michaels v. Fishel*, 169 N. Y. 381.

Though technical words used in the lease are great aids in determining the meaning of the instrument, still the use of such terms will not prevail over the real intention when clearly ascertained from the four corners of the instrument. *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

**2. Surrounding Circumstances.**—*Swigert v. Hartzell*, 20 Pa. Super. Ct. 56; *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375.

**Lease Prepared but Not Signed Held Admissible as to Terms on Which Tenant Held Over.**—*Pusheck v. Frances E. Willard N. T. H. Assoc.*, 94 Ill. App. 192.

**4. Printed and Written Clauses.**—*Seaver v. Thompson*, 189 Ill. 158.

5. *Seaver v. Thompson*, 189 Ill. 158.

The rule that the printed clauses in a lease must give way to written clauses does not prevail where the various provisions of the lease, although apparently inconsistent, can be reconciled and all given effect. *Allen v. Fisher*, 66 N. J. L. 261.

**9. United States.**—*In re Luckenbill*, 127 Fed. Rep. 984.

*Illinois.*—*Rector v. Hartford Deposit Co.*,

**619.** Collateral Agreements. — See note 1.

Lease Only Purporting to Show Contract of One Party. — See note 2.

Custom. — See note 3.

Ambiguities. — See note 5.

Subsequent Modification. — See note 7.

3. Dependent and Independent Agreements and Covenants. — See note 10.

**620.** Necessity for Distinction. — See note 1.

Illustrations of Dependency and Independency of Covenants. — See notes 4, 7.

**621.** VIII. CONSTRUCTION OF LEASE WITH REGARD TO COMMENCEMENT AND DURATION OF TERM — Construction in Favor of Tenant. — See notes 4, 6, 7.**622.** Parol Evidence to Vary Written Lease. — See note 1.

## IX. CONSTRUCTION OF LEASE WITH REGARD TO WHAT PASSES TO LESSEE — 1. Boundaries. — See note 3.

2. What Passes by Use of Particular Words. — See note 10.

190 Ill. 380; *Knefel v. Daly*, 91 Ill. App. 321; *Robbins v. Conway*, 92 Ill. App. 173; *Hartford Deposit Co. v. Rector*, 92 Ill. App. 175, *affirmed* 190 Ill. 380; *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554; *Borggard v. Gale*, 107 Ill. App. 128, *affirmed* 205 Ill. 511.

*Iowa*. — See *Sioux City First Nat. Bank v. Flynn*, 117 Iowa 493, holding that parol evidence is admissible to show the elements entering into rent reserved.

*New Jersey*. — *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190; *Kistler v. McBride*, 65 N. J. L. 553; *Drischman v. McManemin*, 68 N. J. L. 337.

*New York*. — *James v. Coe*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1099.

*North Dakota*. — *Deacon v. Mattison*, 11 N. Dak. 190; *Johnson v. Kindred State Bank*, 12 N. Dak. 336.

*Pennsylvania*. — *Wright v. Milne*, 9 Pa. Dist. 170.

*Rhode Island*. — *Watkins v. Greene*, 22 R. I. 34.

*Texas*. — *De Vitt v. Kaufman County*, 27 Tex. Civ. App. 332; *Greenhill v. Hunton*, (Tex. Civ. App. 1902) 69 S. W. Rep. 440.

*Vermont*. — *Rickard v. Dana*, 74 Vt. 74; *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375.

*Canada*. — *Yuill v. White*, 5 N. W. Ter. 275. Where a written lease fails to state the length of the term parol evidence is admissible to show such fact. *Brincefield v. Allen*, 25 Tex. Civ. App. 258.

**Extrinsic Evidence Changing Rent Reserved Inadmissible.** — *Merchants' State Bank v. Ruet-tell*, 12 N. Dak. 519.

**619. 1. Warranty as to Condition of Drains.** — *De Lassalle v. Guildford*, (1901) 2 K. B. 215.

**Agreement to Oust Tenants of Adjoining Premises.** — *Stearns v. Lichtenstein*, 49 N. Y. App. Div. 636, denying leave to appeal from 48 N. Y. App. Div. 498.

**2. Lease Only Purporting to Show Contract of One Party.** — *Murphy v. Farley*, 124 Ala. 279.

**3. Usages and Customs.** — *Whorley v. Karper*, 20 Pa. Super. Ct. 347. *Compare* *Watkins v. Greene*, 22 R. I. 34.

Where the evidence is conflicting as to the term of an oral lease, the lessor cannot show in support of his testimony his custom with regard to similar lettings. *Majestic Hotel Co. v. Bigelow*, 50 N. Y. App. Div. 444.

**Custom of Length of Term.** — *Brincefield v. Allen*, 25 Tex. Civ. App. 258.

**5. Latent Ambiguities.** — *Johns v. Eichelberger*, 109 Ill. App. 35; *Myers v. Sea Beach R. Co.*, 43 N. Y. App. Div. 573, *affirmed* 167 N. Y. 581.

**7. Lease under Seal Cannot Be Modified by Parol Agreement.** — *Knefel v. Daly*, 91 Ill. 321.

**10. Rubens v. Hill**, 213 Ill. 523, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619.

**620. 1. Necessity for Distinction Between Dependent and Independent Agreements.** — *Rubens v. Hill*, 213 Ill. 533, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619.

**4. Covenant to Repair and to Pay Rent.** — *Rubens v. Hill*, 213 Ill. 533, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

**7. Covenant of Lessor to Rebuild and of Lessee to Pay Rent Held Dependent.** — *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619 *et seq.*, as to general rules for determining whether agreements are dependent or independent.

**621. 4. Construction in Favor of Tenant.** — See *Rhodes v. Purvis*, (Ark. 1905) 85 S. W. Rep. 235; *Brown v. Fowler*, 65 Ohio St. 507.

**6. Provisions of Lease Construed as a Whole.** — *Spring v. Lorimer*, 25 Pa. Super. Ct. 340.

**7. Lease Providing for Commencement After Particular Improvements Are Finished.** — *Hoffmann v. Cockrell*, 112 Iowa 141.

**622. 1. Parol Evidence to Vary Written Lease.** — *Rhodes v. Purvis*, (Ark. 1905) 85 S. W. Rep. 235.

**3. Highway as Boundary.** — *Mappin v. Liberty*, (1903) 1 Ch. 118, 72 L. J. Ch. 63.

**10. Building.** — Where a building is rented without any language indicating that only the building itself is leased as distinguished from the subjacent land, both the building and the land pass under the lease. *Nashville, etc., R. Co. v. Heikens*, 112 Tenn. 378. See also *A. H. Pugh Printing Co. v. Dexter*, 8 Ohio Dec. 557.

**Provision for Furnishing Power.** — A provision in the lease that the lessor shall furnish sufficient power to propel a particular amount of machinery to be operated by the lessee, relates to the quantity of power and does not restrict

- 622.** Demised by Street Number. — See note 11.  
**623.** Room or Floor. — See notes 4, 6, 7.  
 6. Appurtenances and Easements. — See note 14.  
**624.** See note 2.  
 7. Exceptions and Reservations. — See notes 4, 7, 11.  
**625. X. COVENANT FOR QUIET ENJOYMENT — 2. Breach of Covenant —**  
*a.* EVICTION — By Lessor. — See note 3.  
 By Paramount Title. — See note 4.  
*c.* UNASSERTED OUTSTANDING PARAMOUNT TITLE. — See note 8.  
*d.* TORTIOUS ACTS OF THIRD PERSONS. — See note 9.

its use to the precise machinery specified. *Chase v. Traitel Marble Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 376.

**622. 11. Description by Street Number.** — *Okie v. Person*, 23 App. Cas. (D. C.) 170.

Where there is nothing to indicate an intention to limit the possession to buildings, and city premises are described by street numbers, the lessee takes an interest in the yard, garden, and appurtenances, and subjacent land, and retains the right to possession after the buildings have been destroyed, subject to the duty to pay rent for the balance of the term. *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363.

**623. 4. Lease of Rooms or Floor of Building.** — *Rhein v. Miller*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 816.

**Right of Lessor to Demolish Upper Floor of Building, Lower Floor of Which Is Leased.** — *Haskins v. George A. Fuller Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 38.

**6. Outer Walls.** — See *Fuller v. Rose*, 110 Mo. App. 344; *Oehme v. Shotland*, 99 N. Y. App. Div. 173.

**7.** In *Fuller v. Rose*, 110 Mo. App. 344, where a room in an office building was leased, and it was agreed in the lease that the lessee was to be denied the use of any of the walls of the building in advertising his business, the lessee has no right to restrain the landlord from painting signs on the walls of the building.

**14. Easements and Appurtenances.** — *Snook, etc., Furniture Co. v. Steiner*, 117 Ga. 363; *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587; *Cummings v. Perry*, 177 Mass. 407 (use of freight elevator held not to pass); *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (unofficial) 340, 96 N. W. Rep. 487; *Finnigan v. Biehl*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 735, reversing (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1116; *Towsand v. Ford*, 72 N. Y. App. Div. 621 (stone in old foundation); *Benedict v. International Banking Corp.*, 88 N. Y. App. Div. 488; *Shaft v. Carey*, 107 Wis. 273; *Ross v. Henderson*, 8 British Columbia 5.

**Light and Air.** — *White v. Harrow*, 86 L. T. N. S. 4. 50 W. R. 259; *Stevens v. Salomon*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 159 (lease of rooms); *Solomon v. Fantozzi*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 61.

**Right to Show Window in Lease of a Portion of a Store.** — *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688.

**Way of Access.** — *Miller v. Fitz Gerald Dry-Goods Co.*, 62 Neb. 270 (lease of upper floor); *Ward v. Hinkleman*, 37 Wash. 375.

**Water-closets Contiguous to Rented Rooms in**

**Office Building as Appurtenance.** — *Hall v. Irvin*, 78 N. Y. App. Div. 107.

**Platted Streets.** — *Thousand Island Park Assoc. v. Tucker*, 173 N. Y. 203.

**Regulations as to Office Building.** — Landlords of office buildings may make reasonable regulations as to use of stairways, etc., by tenants, such as that all bulky packages shall be removed by the freight elevator. *Walsh v. The Bourse*, 15 Pa. Super. Ct. 219.

**Electric Light.** — *Parish v. Vance*, 110 Ill. App. 50.

**Water.** — Where a house is fitted with pipes and fixtures for distribution of water, the tenant is not entitled as an appurtenance to require that the landlord furnish the water. *Sheldon v. Hamilton*, 22 R. I. 230, 84 Am. St. Rep. 839.

**Right to Cut Ice.** — *Oliphant v. Richman*, 67 N. J. Eq. 280.

**624. 2. Watkins v. Greene, 22 R. I. 34 (steam and forced air held not to be appurtenances).**

**4. Stebbins v. Demorest, (Mich. 1904) 101 N. W. Rep. 528.**

**7. Ingle v. Bottoms, 160 Ind. 80, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624.**

**11. Reservations.** — *Walker Ice Co. v. American Steel, etc., Co.*, 185 Mass. 463.

**Reservation of Right to Sell Part of Lands for Building Sites Held Not to Include Sale for Small-pox Hospital.** — *English v. Tynemouth Corp.*, 67 J. P. 239.

**625. 3. Partial Eviction.** — *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (unofficial) 340, 96 N. W. Rep. 487; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 688.

The consent of a sublessor to a judgment enforcing a forfeiture for subletting has been held breach of his covenant for quiet enjoyment "without interruption by [him] or any person lawfully claiming through him." *Cohen v. Tannar*, (1900) 2 Q. B. 609.

**4. Eviction by Owner of Paramount Title.** — *Pabst Brewing Co. v. Thorley*, 127 Fed. Rep. 439. Compare *Jones v. Lavington*, (1903) 1 K. B. 253 (implied covenant).

**8. Unasserted Paramount Title.** — *Mason v. Lenderoth*, 88 N. Y. App. Div. 38.

**9. Tortious Acts of Third Persons.** — *Jaeger v. Mansions Consol. Limited*, 87 L. T. N. S. 690; *Newell v. Magee*, 30 Ont. 550; *Talbott v. English*, 156 Ind. 299; *Bright v. Bell*, 113 La. 1078; *Tucker v. Du Puy*, 210 Pa. St. 461; *Thomas v. Brin*, (Tex. Civ. App. 1905) 85 S. W. Rep. 842.

**Wrongful Eviction by Grantee of Lessor.** — *Stiger v. Monroe*, 109 Ga. 457.

**626.** *e.* ACTS OF LESSOR NOT AMOUNTING TO EVICTION.—See notes 2, 3.

**627.** *f.* FAILURE TO DELIVER POSSESSION.—See note 3.

*g.* EVICTION THROUGH TERMINATION OF LESSOR'S ESTATE—  
And in Iowa.—See note 9.

**628.** *i.* INTERFERENCE THROUGH STATUTORY AUTHORITY.—See note 1.

3. By and Against Whom Enforceable.—See note 4.

4. Damages—Eviotion.—See note 9.

**629.** See notes 1, 2, 3.

Action for Tort.—See note 7.

**630.** XI. OPTIONS TO TERMINATE LEASES—1. In General.—See notes 2, 3.

**626. 2. Trespasses Not Amounting to Eviction.**

—Talbot v. English, 156 Ind. 299; Greenwood v. Wetterau, (Supm. Ct. App. T.) 84 N. Y. Supp. 287; Haas v. Ketcham, (Supm. Ct. App. T.) 87 N. Y. Supp. 411; George A. Fuller Co. v. Manhattan Constr. Co., (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219.

3. Tebb v. Cave, (1900) 1 Ch. 642, 69 L. J. Ch. 282 (building on adjoining property so as to cause tenants' chimneys to smoke).

**627. 3.** See Stiger v. Monroe, 109 Ga. 457.

9. Foreclosure of Prior Mortgage.—Degnario v. ... (Supm. Ct. App. T.) 34 Misc. (N. Y.) 163.

**628. 1. Condemnation under Power of Eminent Domain.**—Pabst Brewing Co. v. Thorley, 12 Fed. Rep. 439.

4. Assignee of Reversion.—Compare Davis v. To n Properties Invest. Corp., (1903) 1 Ch. 797, affirming (1902) 2 Ch. 635.

9. Value of Term Lost.—Bass v. West, 110 Ga. 698; Griesheimer v. Bothman, 105 Ill. App. 585, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 628; Shoemaker v. Crawford, 82 Mo. App. 487; Salzgeber v. Mickel, 37 Oregon 216; Campbell v. Howerton, (Tex. Civ. App. 1905) 87 S. W. Rep. 370; Freeman v. Slay, (Tex. Civ. App. 1905) 88 S. W. Rep. 404.

Rent Paid Before Eviction Not Recoverable.—Prochaska v. Fox, (Mich. 1904) 100 N. W. Rep. 746.

Cropping Contract.—Rogers v. McGuffey, 96 Tex. 565; Rogers v. McGuffey, (Tex. Civ. App. 1903) 75 S. W. Rep. 817.

**629. 1.** Bass v. West, 110 Ga. 698; Griesheimer v. Bothman, 105 Ill. App. 585, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 629; Brincefield v. Allen, 25 Tex. Civ. App. 258.

2. Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (unofficial) 340, 96 N. W. Rep. 487.

3. Goldstein v. Asen, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 251.

7. Action of Tort.—Connecticut.—Dawson v. Marsh, 74 Conn. 498.

Massachusetts.—Harford v. Taylor, 181 Mass. 266.

Missouri.—Gildersleeve v. Overstolz, 90 Mo. App. 518; Murphy v. Century Bldg. Co., 90 Mo. App. 621.

Nebraska.—Karbach v. Fogel, 63 Neb. 601. New York.—Myers v. Sea Beach R. Co., 43 N. Y. App. Div. 573, affirmed 167 N. Y. 581.

Pennsylvania.—Gallagher v. Burke, 13 Pa. Super. Ct. 244.

Texas.—Williams v. Yoe, 22 Tex. Civ. App. 446.

Vermont.—Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943.

Washington.—Wusthoff v. Schwartz, 32 Wash. 337.

Exemplary Damages.—Waller v. Cockfield, 111 La. 595.

**630. 2. Option to Lessee to Terminate Lease.**

—Channel v. Merrifield, 206 Ill. 278; Small v. Clark, 97 Me. 304; Henderson v. Schuylkill Valley Clay Mfg. Co., 24 Pa. Super. Ct. 422; Brown v. Fowler, 65 Ohio St. 507.

In Reese v. Zinn, 103 Fed. Rep. 97, a lease authorizing the lessee to terminate it at will was held invalid for want of mutuality.

3. Reservation to Lessor of Option to Terminate—Maine.—Small v. Clark, 97 Me. 304.

New York.—Woodbridge Co. v. Charles E. Hires Co., 163 N. Y. 563, affirming 19 N. Y. App. Div. 128; Rosenbloom v. Chittick, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 766; Dierig v. Callahan, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 30, reversing (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 218; Ronginsky v. Grantz, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 347; Childs v. Skillin, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 825; Foley v. Constantino, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 91; Schwoerer v. Connolly, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 222.

Pennsylvania.—Matthews v. Rising, 31 Pittsb. Leg. J. N. S. (Pa.) 163.

Canada.—Langlois v. Dubray, 17 Quebec Super. Ct. 328; Reg. v. Poirier, 30 Can. Sup. Ct. 36; Lunbers v. Gold Medal Furniture Mfg. Co., 30 Can. Sup. Ct. 55.

Termination in Event of Sale by Lessor.—Davis v. Schweikert, 130 Cal. 143; Hickox v. Seegner, 123 Wis. 128.

Leased Premises Taken under Power of Eminent Domain.—Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115.

Effect on Sublessee.—Where the lease contained a provision for its cancellation on certain contingencies, all rights of sublessees are terminated on such cancellation. Bruder v. Geisler, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 370; Bove v. Coppola, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 636.

Lease Within Statute of Frauds.—Where a lessee enters into possession under a lease invalid under the statute of frauds, he does not hold subject to a provision in the lease conferring upon the lessor an option to terminate the lease in a specified manner, but the lease can only be terminated by a notice to quit required by the statute for the termina-

- 630.** 2. By Whom Privilege of Termination May Be Enforced. — See note 5.  
3. Conditions to Exercise of Option. — See note 7.

**631.** See note 3.

**XII. PRIVILEGE TO LESSEE OF PURCHASE** — 1. In General. — See notes 7, 8, 9.

**632.** See notes 1, 3.

Certainty. — See note 4.

2. Operation of Option. — See notes 5, 6.

3. Exercise of Option — *a.* IN GENERAL — To Be Exercised in Entirety. — See note 6*a*.

*b.* BY AND AGAINST WHOM ENFORCEABLE — Against Whom Enforced. — See note 9.

By Whom Enforced. — See note 10.

**633.** *c.* CONDITIONS TO EXERCISE OF OPTION — (1) In General. — See note 3.

tion of tenancies at will. *Goodwin v. Clover*, 91 Minn. 438.

**Unreasonable Delay on Part of Lessee in Vacating.** — *Browning v. Garvin*, 48 N. Y. App. Div. 140.

**630.** 5. Assignee of Leasehold. — *Hadley v. Bernero*, 97 Mo. App. 314.

7. Compliance with Conditions of Privilege. — *Small v. Clark*, 97 Me. 304; *Bunch v. Williams*, (Ark. 1905) 88 S. W. Rep. 588.

**631.** 3. Notice by Mail Is Sufficient. — *Bloom v. Wanner*, (Ky. 1904) 77 S. W. Rep. 930.

7. Provision for Credit of Rent Towards Purchase Price. — *Freeman v. Stewart*, 36 N. Bruns. 465.

**Statutory Provisions for Redemption of Ground Rents.** — In *Maryland*, the statute provides that in case of leases for longer periods than fifteen years, the lessee may redeem the lease upon the payment of a certain amount based on the rent reserved, and this applies to leases both of improved and unimproved land. *Swan v. Kemp*, 97 Md. 686.

8. Alternate Stipulations. — *De Vitt v. Kaufman County*, 27 Tex. Civ. App. 332.

9. Option to Purchase. — *Butler v. Threlkeld*, 117 Iowa 116; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598; *Yuill v. White*, 5 N. W. Ter. 275; *Wellmaker v. Wheatley*, 123 Ga. 201; *Rankin v. Rankin*, 216 Ill. 132.

A provision in a lease giving the lessee the option to purchase after the expiration of fifteen years and within the term is not invalid as a suspension of the power of alienation (Cal. Civ. Code, § 716), nor does such a provision create a contingent remainder on a term of years within the prohibition of section 776. *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120.

**632.** 1. *King v. Raab*, 123 Iowa 632; *McCormick v. Stephany*, 61 N. J. Eq. 208.

**Damages Recoverable for Breach by Lessor.** — *Thuemler v. Brown*, 18 Pa. Super. Ct. 117.

3. Consideration. — *Walker v. Edmundson*, 111 Ga. 454; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598; *Frank v. Stratford-Handcock*, (Wyo. 1904) 77 Pac. Rep. 134; *Yuill v. White*, 5 N. W. Ter. 275.

4. Contract Held Sufficiently Certain. — *Walker v. Edmundson*, 111 Ga. 454; *McCormick v.*

*Stephany*, 61 N. J. Eq. 208; *Heyward v. Willmarth*, 87 N. Y. App. Div. 125, affirming (Supm. Ct. Spec. T.) 78 N. Y. Supp. 347.

**Failure to Fix Purchase Price.** — An option given the lessee to purchase "at a price not to exceed three thousand dollars" is not invalid for uncertainty as for a failure to fix the purchase price, as the right to purchase at the full sum of three thousand dollars is absolute. *Heyward v. Willmarth*, 87 N. Y. App. Div. 125.

An option to purchase "at a fair valuation by appraisement," is sufficiently certain, and the specific performance thereof may be enforced. *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247.

5. Relation of Parties Prior to Exercise of Option. — See *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

**Liability for Rent.** — A tenant is liable for all rent that accrues prior to the exercise of the option to purchase though such rent is payable for a period in advance and the conveyance in pursuance of the exercise of the option was made before the expiration of the period to be covered by such advance rent. *Granger v. Riggs*, 118 Ga. 164.

**Eviction by Summary Proceedings.** — *Colored Homestead, etc., Assoc. v. Harvey*, (Ky. 1901) 64 S. W. Rep. 676.

6. Relation After Exercise of Option. — *Walker v. Edmundson*, 111 Ga. 454.

**Liability for Rent After Election to Purchase.** — *Hill v. Allen*, 185 Mass. 25.

6*a.* Exercise of Option Must Be in Terms of the Option; attaching additional conditions is not a valid exercise of the option. *Tilton v. Sterling, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

9. Assignee of Reversion. — *Yuill v. White*, 5 N. W. Ter. 275.

10. Assignee of Leasehold. — *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120; *Sowles v. Butler*, 71 Vt. 271.

A lease providing that the lessee "but no other person \* \* \* shall \* \* \* have the option of purchasing the land," does not run with the land so as to enable an assignee of the lease to enforce the option. *Myers v. Stone*, (Iowa 1905) 102 N. W. Rep. 507.

**633.** 3. Conditions Precedent to Exercise of Option. — *Frank v. Stratford-Handcock*, (Wyo. 1904) 77 Pac. Rep. 134.

**633.** (2) *Time Within Which Option Must Be Exercised.* — See note 6.

*In Computing the Time.* — See note 11.

**634.** (3) *Forfeiture of Term.* — See note 1.

**XIII. RESTRICTIONS UPON USE OF DEMISED PREMISES** — 1. In Absence of Express Restrictions. — See notes 4, 5.

**635.** 2. Express Restrictions upon Use — a. POWER TO RESTRICT USE. — See notes 1, 2.

b. CONSTRUCTION OF RESTRICTIVE CLAUSES — (1) *General Restrictive Clauses* — Shop or Retail Shop. — See note 12.

Dwelling House. — See notes 13, 14.

**636.** "Offensive" Trade, Business, or Act, Etc. — See note 4.

(2) *Particular Restrictive Clauses.* — See note 9.

**637.** c. ENFORCEMENT OF RESTRICTIONS — (1) *By and Against Whom Enforceable* — By Whom Enforced. — See note 8.

Against Whom Enforced. — See note 10.

(2) *Remedy for Enforcement.* — See notes 13, 16.

**638.** XIV. CULTIVATION OF LAND — 1. In Absence of Express Agreement. — See note 3.

Manure. — See notes 6, 7.

**639.** 2. Express Stipulations Relating to Cultivation. — See notes 1, 6.

**633.** 6. Time of Exercising Option. — *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

11. *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

**634.** 1. Effect of Forfeiture of Term. — See *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. Rep. 972.

4. Use of Premises Not Restricted. — *Presby v. Benjamin*, 169 N. Y. 377.

5. *Smith v. Chappell*, 25 Pa. Super. Ct. 81.

**635.** 1. Restrictions upon Use of Premises. — *Independent Steam Fire Engine Co. v. Richland Lodge*, 70 S. Car. 572.

A covenant that the leased premises shall be used for no other purpose than for a saloon is not broken by the lessee failing to use them for a saloon, provided no other business is carried on therein. *McCormick v. Stephany*, 57 N. J. Eq. 257.

**Blacksmith Shop.** — A prohibition against the use of the premises as a blacksmith shop prohibits their use for the trade of a farrier. *Heidorn v. Wright*, 6 Ohio Dec. 315, 4 Ohio N. P. 235.

**Publican.** — A covenant against carrying on the business or trade of a publican does not prohibit trading as a licensed spirit grocer. *In re Cullen*, (1904) 1 Ir. R. 206.

2. *Weil v. Abrahams*, 53 N. Y. App. Div. 313. A provision in the lease, "It is understood that the building is leased to the lessee for the purpose of conducting a first-class saloon," does not restrict the lessee's use of the premises to such purpose alone. *San Antonio Brewing Assoc. v. Brents*, (Tex. Civ. App. 1905) 88 S. W. Rep. 368.

12. See *Weil v. Abrahams*, 53 N. Y. App. Div. 313.

13. **Private Dwelling.** — *Presby v. Benjamin*, 169 N. Y. 377.

14. "Private Dwelling or Residence Only" restricts letting of rooms to lodgers. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183.

**636.** 4. Fish-Frying Business Held an Offensive Trade. — *Devonshire v. Brookshaw*, 81 L. T. N. S. 83.

9. A lessee's refusal to pay a gate fee, during meetings conducted by lessor, for admission to the grounds of the lessor on which the buildings of the lessees are situated, the same as charged to all other persons, is a breach of the covenant that the lessees "during all meetings would be subject to the rules and regulations of said meeting." *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183.

**637.** 8. Assignee of Reversion. — *Manchester Brewery Co. v. Coombs*, 82 L. T. N. S. 347.

10. Assignee of Leasehold. — *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. Rep. 619, 54 U. S. App. 416; *Heidorn v. Wright*, 6 Ohio Dec. 315, 4 Ohio N. P. 235; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586.

13. Change in Character of Neighborhood Not Ground for Denying Injunction. — *Craig v. Greer*, (1899) 1 Ir. R. 258.

16. Breach by Sublessee Held to Render Lessee Liable. — *Mumford v. Walker*, 85 L. T. N. S. 518, 71 L. J. K. B. 19.

What Acts of Sublessee Constitute Breach of Covenant. — *Wilson v. Twamley*, 88 L. T. N. S. 803, affirmed (1904) 2 K. B. 99.

**638.** 3. Implied Obligation to Cultivate in Accordance with Good Husbandry. — *Dunsford v. Webster*, 14 Manitoba 529; *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696.

6. Manure. — *Roberts v. Jones*, 71 S. Car. 404.

7. *Nason v. Tobey*, 182 Mass. 314, 94 Am. St. Rep. 659, holding that where such manure is mixed with other which the tenant is not entitled to remove, he is entitled to a proportionate amount.

**639.** 1. Measure of Damages for Breach of Covenant to Cultivate in Workmanlike Manner. — *Cullev v. Taylor*, 62 Neb. 651.

6. *Snetzing v. Leitch*, 32 Opt. 440.



**639. XV. IMPROVEMENTS UPON LEASEHOLD PREMISES — 1. Tenant's Right of Removal as Regards Fixtures.** — See note 13.

**2. Right of Lessee to Compensation for Improvements — a. IN ABSENCE OF AGREEMENT.** — See note 14.

**641. Equitable Right to Compensation.** — See note 2.

**b. AGREEMENT BY LESSOR TO PAY FOR IMPROVEMENTS — (1) In General.** — See note 5.

**642. Alternate Stipulations for Compensation.** — See notes 5, 6.

**(2) Improvements Included in Agreement for Compensation.** — See note 12.

**643. See note 1.**

**(3) Loss and Waiver of Right to Compensation — Effect of Renewal or Execution of New Lease.** — See note 6.

**Forfeiture of Term.** — See note 7.

**644. Performance by Lessee of Conditions Precedent.** — See note 1.

**Relief in Equity.** — See note 3.

**639. 13. See the title FIXTURES, 639. 1 et seq.** See also the following cases:

*United States.* — *Little Falls Water Power Co. v. Hausdorf*, 127 Fed. Rep. 442.

*California.* — *Goodwin v. Perkins*, 134 Cal. 564.

*Iowa.* — *Daly v. Simonson*, 126 Iowa 716.

*Missouri.* — *St. Louis v. Nelson*, 108 Mo. App. 210.

*Nebraska.* — *Smith v. Boyle*, 66 Neb. 823.

*New York.* — *Hayes v. Schultz*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 137; *Miller v. Hennessy*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 403.

*Pennsylvania.* — *Farmakis v. Boyle*, 8 Pa. Dist. 696 (street awning); *Linden Oil Co. v. Jennings*, 207 Pa. St. 524.

*Texas.* — *Miller v. Gray*, 29 Tex. Civ. App. 183; *Walker v. Patterson*, 33 Tex. Civ. App. 650.

*Vermont.* — *Allen v. Gates*, 73 Vt. 222.

**14. No Implied Right to Compensation for Improvements.** — *Marshall v. Harber*, (Iowa 1902) 91 N. W. Rep. 774; *Bodwell Water Power Co. v. Old Town Electric Co.*, 96 Me. 117; *Guay v. Kehoe*, 70 N. H. 151; *Hart v. Hart*, 117 Wis. 639.

Where a lease, invalid under the statute of frauds, provides for the erection of a building on the premises by the lessee and payment therefor by retaining rent, the lessee, in case of a voluntary abandonment of the premises by him, cannot recover the value of the building erected; but he may, in an action by the landlord for use and occupation, set off the value of the building against such claim. *Forbus v. Watkins*, (Tenn. Ch. 1901) 62 S. W. Rep. 36.

**Improvements by Tenant at Will.** — *Guthrie v. Guthrie*, (Ky. 1904) 78 S. W. Rep. 474.

**641. 2. Equitable Right to Compensation.** — *Walter v. Transue*, 17 Pa. Super. Ct. 94.

**5. Agreements by Lessor to Pay for Improvements.** — *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, affirming 88 Ill. App. 485; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314; *Chamberlain v. Monkhouse*, 67 Kan. 836; *Schoellkopf v. Coatsworth*, 55 N. Y. App. Div. 331, affirmed 166 N. Y. 77; *Wright v. Milne*, 9 Pa. Dist. 170; *Farley v. Sanson*, 7 Ont. L. Rep. 639.

**Exercise of Election to Remove Buildings or to**

**Require Payment by Lessor.** — *Allen v. Gates*, 73 Vt. 222.

**Agreement for Compensation Conditional on Nonrenewal of Lease** for rent to be agreed upon by the parties entitles a lessee to compensation though he does not desire to renew. *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

**642. 5. Alternative Stipulations.** — *Pocasset v. Pierce*, 103 Va. 526; *Ward v. 100070. 23* Ont. 729, affirmed 26 Ont. App. 225; *Ward v. Hall*, 34 N. Bruns. 600. See also *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

Where a lease required the lessor to pay for the improvements, the lessor cannot be required to pay for improvements erected by the lessee after a renewal. *King v. Wilson*, 98 Va. 259.

**Lessor to Pay for Improvements unless Lease Is "Continued" — Holding Over by Lessee.** — *Paiker v. Page*, 41 Oregon 579.

**6. See Farley v. Sanson, 5 Ont. L. Rep. 105.**

**12. Smyth v. Stoddard, 203 Ill. 424, 96 Am. St. Rep. 314.**

A provision in a lease that the tenant should be "credited on the rent with all improvements and repairs" should be construed to refer to permanent improvements and repairs and not to those which the tenant would be bound by law to make. *Windon v. Stewart*, 48 W. Va. 488.

**643. 1. "Good and Fitting Buildings, Suitable to Location."** — *In re Building Lease*, 5 Ohio Dec. 556, 7 Ohio N. P. 666.

**6. Renewals.** — *Schoellkopf v. Coatsworth*, 166 N. Y. 77.

**7. Forfeiture of Term.** — See *Knight v. Orchard*, 92 Mo. App. 466; *Lent v. Curtis*, 24 Ohio Cir. Ct. 592.

**644. 1. Where a lease provided for compensation by the landlord to the tenant for improvements erected by him, if the lessee delivered possession to the landlord at the termination of the lease, the tenant is entitled to such compensation upon delivery of the possession to the grantee of the lessor.** *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314.

**Waiver of Breach of Covenant.** — *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

**3. Palmer v. Meriden Britannia Co., 188 Ill. 508.**

**644.** (4) *Against Whom Agreement for Compensation May Be Enforced.* — See notes 4, 6.

Death of Lessor. — See note 8.

**645.** (5) *By Whom Agreement for Compensation May Be Enforced.* — See note 3.

(6) *Enforcement of Claim for Compensation* — (a) *In General.* — See note 7.

**646.** (c) *Right of Lessee to Retain Possession until Paid for Improvements.* — See notes 1, 2, 3, 5.

Liability for Rent While Retaining Possession. — See note 8.

(d) *Estimating Value of Improvements* — *aa. VALUATION BY APPRAISERS.* — See note 10.

**647.** *Interest.* — See note 4.

*bb. VALUATION BY JURY OR COURT.* — See notes 8, 9.

*c. STATUTORY PROVISIONS FOR COMPENSATION TO TENANTS.* — See note 10.

**648.** See note 3.

*d. CLAIM FOR BETTERMENTS AGAINST PARAMOUNT OWNER.* — See note 4.

**3. Agreements by Lessor to Make Improvements.** — See note 6.

**649.** See notes 1, 2, 3.

**4. Agreements by Lessee to Make Improvements.** — See note 6.

*Remedy for Breach of Agreement by Lessee.* — See note 7.

**644. 4. Assignee of Reversion — Assignees Not Named.** — *Matter of Henshaw*, (Surrogate Ct.) 37 Misc. (N. Y.) 536; *Ovington Bros. Co. v. Henshaw*, (Supm. Ct. Spec. T.) 47 Misc. (N. Y.) 167, *distinguishing* *Schoellkopf v. Coatsworth*, 166 N. Y. 77; *Cicalla v. Miller*, 105 Tenn. 255. See also *Bell v. Bitner*, 33 Ind. App. 6. See, however, *Northern Pac. R. Co. v. McClure*, 9 N. Dak. 73.

**6. Assignees Named.** — *Schoellkopf v. Coatsworth*, 166 N. Y. 77.

**8. Transfer of Reversion.** — The lessor cannot, by the transfer of the reversion, release himself from liability on his covenant to pay for improvements erected by the lessee. *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130.

**645. 3. Assignee of Leasehold.** — *Schoellkopf v. Coatsworth*, 166 N. Y. 77.

**7. Action at Law.** — *Hollidge v. Moriarty*, 17 App. Cas. (D. C.) 520.

**646. 1. No Right to Possession until Compensation Is Made.** — *Van Beuren v. Wotherspoon*, 164 N. Y. 368; *Lent v. Curtis*, 24 Ohio Cir. Ct. 592; *Carmack v. Drum*, 27 Wash. 382 (summary proceedings). See, however, *Knight v. Orchard*, 92 Mo. App. 466.

**Tender of Value of Improvements.** — *Fraer v. Washington*, (C. C. A.) 125 Fed. Rep. 280.

**2. Bodwell Water Power Co. v. Oldtown Electric Co.**, 96 Me. 117, *distinguishing* *Franklin Land, etc., Co. v. Card*, 84 Me. 528.

**3. Stipulation for Retention of Possession by Lessee.** — *Moshassuck Encampment No. 2 v. Arnold*, 25 R. I. 65.

**5. Van Beuren v. Wotherspoon**, 74 N. Y. App. Div. 123; *Conger v. Ensler*, 85 N. Y. App. Div. 564.

**8. Van Beuren v. Wotherspoon**, 74 N. Y. App. Div. 123; *Conger v. Ensler*, 85 N. Y. App. Div. 564.

**10. Appraiser's Prerequisite to Action.** — *Bales v. Gilbert*, 84 Mo. App. 675.

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**647. 4. Interest Allowed under Agreement During Time of Appraisal.** — *Toronto Gen. Trusts Corp. v. White*, 5 Ont. L. Rep. 21.

**8. Basis of Valuation.** — *Ladd v. Hawkes*, 41 Oregon 247.

**9. In re Building Lease**, 5 Ohio Dec. 556, 7 Ohio N. P. 666.

**10. Agricultural Holdings Act.** — *In re Pearson*, (1899) 2 Q. B. 618; *Mears v. Callender*, (1901) 2 Ch. 388, 70 L. J. Ch. 621.

**648. 3. Market Gardeners' Compensation Act Not Retrospective.** — *Smith v. Callender*, (1901) A. C. 297, 70 L. J. P. C. 53.

**4. Casteel v. McNeely**, 4 Indian Ter. 1 (improvements on Indian lands).

**6. Counterclaim in Action for Rent.** — *Douglas v. Chesebrough Bldg. Co.*, 56 N. Y. App. Div. 403.

**No Implied Obligation on Lessor to Make Improvements.** — *Torreson v. Walla*, 11 N. Dak. 481.

**Specific Performance of Agreement to Make Improvements.** — *Re Murray*, 4 Ont. L. Rep. 418.

**Measure of Damages.** — *Oliver v. Bredl*, 25 Pa. Super. Ct. 653; *Gorman v. Miller*, 27 Pa. Super. Ct. 62; *Berry v. Burnett*, 23 Tex. Civ. App. 558; *Deuster v. Mittag*, 105 Wis. 459.

**Effect of Paying Rent — Waiver of Breach.** — *Oliver v. Bredl*, 25 Pa. Super. Ct. 653. See also *Gorman v. Miller*, 27 Pa. Super. Ct. 62.

**649. 1.** See *McCready v. Lindenborn*, 165 N. Y. 630, *affirming* 37 N. Y. App. Div. 425.

**2.** *Deuster v. Mittag*, 105 Wis. 459.

**3.** See *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185.

**6. Time for Erection of Improvements.** — *Mortimer v. Hannah*, 82 Miss. 645.

**7. Waiver of Claim for Damages.** — *Jones v. Daly*, 73 N. Y. App. Div. 220, *affirmed* 175 N. Y. 520.

**Improvements by Lessor at Cost of Lessee.** — *Barnhart v. Boyce*, 102 Ill. App. 172.

**650.** XVI. LIABILITY FOR AND AGREEMENTS RELATING TO TAXES — 1. In General. — See notes 1, 3, 4.

Water Rates. — See note 6.

**651.** See note 1.

2. Covenant by Lessee to Pay Taxes, etc. — *a.* IN GENERAL. — See note 4.

**652.** See note 1.

*b.* WHAT TAXES, CHARGES, AND ASSESSMENTS INCLUDED IN COVENANT — (1) *As Affected by Time of Levy or Assessment.* — See notes 5, 6.

(2) *As Affected by Character of Tax, Charge, or Assessment.* — See note 7.

**653.** See note 3.

**654.** See note 2.

3. Breach of Covenant — *b.* REMEDY FOR BREACH. — See notes 11, 12.

**655.** 4. By and Against Whom Covenant Enforceable. — See notes 3, 5.

XVII. COVENANT BY LESSEE TO INSURE — 1. In General. — See notes

7, 8, 9.

**656.** 2. Remedy for Enforcement — Action for Damages. — See note 6.

3. By and Against Whom Enforceable. — See note 8.

**650.** 1. Tenant Not Bound to Pay Taxes. — *Brown v. Atlanta Nat. Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 403; *Clinton v. Shugart*, 126 Iowa 179; *Sherman v. Spalding*, 126 Mich. 561; *Crosby v. Bonnowsky*, 29 Tex. Civ. App. 455; *Hart v. Hart*, 117 Wis. 639. See, however, *Canadian Pac. R. Co. v. Toronto*, 4 Ont. L. Rep. 134.

3. Taxes Collected from Tenant. — *Woodruff v. Oswego Starch Factory*, 70 N. Y. App. Div. 481, *affirmed* 177 N. Y. 23; *Hart v. Hart*, 117 Wis. 639.

4. *Hart v. Hart*, 117 Wis. 639.

6. Meter Charges. — *Sheldon v. Hamilton*, 22 R. I. 230, 84 Am. St. Rep. 839, *approving* *Leighton v. Ricker*, 173 Mass. 564.

**651.** 1. See *Hobson v. Silva*, 137 Cal. xix, 70 Pac. Rep. 619.

4. Lease of Portion of House. — *Stimson v. Crosby*, 180 Mass. 296.

Covenant to Pay Water Rates. — *Bristol v. Hammacher*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 426.

**652.** 1. Tithe — Rent — Charge. — *Ludlow v. Pike*, (1904) 1 K. B. 531.

5. Taxes Not in Default until After Term. — *Ogden v. Getty*, 100 N. Y. App. Div. 430.

6. See *Lumby v. Faupel*, 88 L. T. N. S. 562.

7. Construction of Agreement with Regard to Character of Tax — *Farlow v. Stevenson*, (1900) 1 Ch. 128; *Shepherd v. Barber*, 67 J. P. 238; *Valpy v. St. Leonard's Wharf Co.*, 67 J. P. 402; *Moore v. Todd*, 68 J. P. 43; *Scott v. Brown*, 68 J. P. 181; *Lumby v. Faupel*, 68 J. P. 265; *Foulger v. Arding*, (1902) 1 K. B. 700, *reversing* (1901) 2 K. B. 151, 70 L. J. K. B. 580; *Surtees v. Woodhouse*, (1903) 1 K. B. 396; *Stockdale v. Ascherberg*, (1903) 1 K. B. 873; *In re Warriner*, (1903) 2 Ch. 367; *Harris v. Hickman*, (1904) 1 K. B. 13, 73 L. J. K. B. 31; *Stockdale v. Ascherberg*, (1904) 1 K. B. 447, 73 L. J. K. B. 206; *Goldstein v. Hollingsworth*, (1904) 2 K. B. 578, 73 L. J. K. B. 826; *Morris v. Beal*, (1904) 2 K. B. 585, 73 L. J. K. B. 830;

*Weld v. Clayton-le-Moors Urban Dist. Council*, 86 L. T. N. S. 584; *George v. Coates*, 88 L. T. N. S. 48; *Security Trust Co. v. Liberty Bldg. Co.*, 96 N. Y. App. Div. 436; *Woodruff v. Oswego Starch Factory*, 70 N. Y. App. Div. 481, *affirmed* 177 N. Y. 23.

Invalid Taxes. — *Scott v. Russian Israelites Soc.*, 59 Neb. 571.

Increase in Taxes. — *Gridley v. Einbigler*, 98 N. Y. App. Div. 160, *affirmed* 182 N. Y. 506.

**653.** 3. Not Included in Term "Assessments." — See *Wix v. Rutson*, (1899) 1 Q. B. 474.

**654.** 2. See *Wix v. Rutson*, (1899) 1 Q. B. 474.

11. *Dunlop v. James*, 70 N. Y. App. Div. 71, *affirmed* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 708; *Campbell v. Luek*, 25 Ohio Cir. Ct. 356.

12. *Broadwell v. Banks*, 134 Fed. Rep. 470; *Richardson v. Gordon*, 188 Mass. 279.

**655.** 3. *Peck v. Christman*, 94 Ill. App. 435; *Dunlop v. James*, 70 N. Y. App. Div. 71, *affirming* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 708; *Lehmaier v. Jones*, 100 N. Y. App. Div. 495.

5. *Broadwell v. Banks*, 134 Fed. Rep. 470.

7. No Implied Duty to Insure. — *Hart v. Hart*, 117 Wis. 639.

Where the Lessor Insures the Premises for His Own Benefit, the lessee acquires no right to any money received by the lessor on account of such insurance. *Roesch v. Johnson*, 69 Ark. 30.

8. Right of Tenant to Premium Refunded to Landlord. — *Benard v. Prefontaine*, 6 Quebec Pr. 327.

9. Breach of Covenant. — See *Johnson v. Kindred State Bank*, 12 N. Dak. 336.

**656.** 6. Recovery of Premiums Paid by Lessor. — If the insurance taken out by the lessor for failure of the lessee to perform his covenant to insure is invalid, the lessor cannot recover the amount of the premiums paid. *Shirk v. Adams*, (C. C. A.) 130 Fed. Rep. 441.

8. Assignee of Term. — *Northern Trust Co. v. Snyder*, 76 Fed. Rep. 34, 46 U. S. App. 179;

**657. XVIII. ASSIGNMENTS OF LEASEHOLD ESTATE—1. What Constitutes Assignment**—*a. IN GENERAL—Form of Transfer Immaterial.*—See notes 4, 6.

**658. *b. SUBLETTING.***—See note 4.

Reservation of Rent and Power of Re-entry.—See note 8.

**659. 2. General Right to Assign Leasehold Estates—*a. IN ABSENCE OF EXPRESS RESTRICTIONS.***—See notes 5, 6.

**660. Renting on Shares.**—See note 1.

*b. CONTRACT RESTRICTIONS ON RIGHT TO ASSIGN—(1) In General.*—See note 4.

Construction of Restrictive Agreement.—See notes 12, 13.

(2) *Breach of Covenant Against Assignment—(a) In General.*—See note 16.

**661.** See note 4.

**A Mortgage.**—See note 7.

(b) *Involuntary Assignments.*—See notes 11, 13.

**662. (e) Reassignments.**—See notes 8, 9.

**663. (4) Consent to Assignment.**—See note 3.

Withholding Assent to Assignment.—See note 6.

West Virginia Cent., etc., *R. Co. v. McIntire*, 44 W. Va. 210.

**657. 4. Lease for Unexpired Term.**—Mulligan v. Hollingsworth, 99 Fed. Rep. 216.

**6. Benedict v. Jennings, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 134.**

**658. 4. Subletting.**—Koppel v. Tilyou, (Municipal Ct.) 31 Civ. Pro. (N. Y.) 185; Schenkel v. Lischinsky, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 423.

**What Constitutes Subletting.**—Boston El. R. Co. v. Grace, 112 Fed. Rep. 279, 50 C. C. A. 239.

**8. Reservation of Rent.**—Shirk v. Adams, (C. C. A.) 130 Fed. Rep. 441.

**659. 5. Leasehold Estates Assignable at Common Law.**—*In re Doyle*, (1899) 1 Ir. R. 113; Martin v. Sexton, 112 Ill. App. 199; Pierce v. Meadows, (Ky. 1905) 86 S. W. Rep. 1127; Moore v. Guardian Trust Co., 173 Mo. 218; Simpson v. Moorhead, 65 N. J. Eq. 623; Wildey Lodge No. 21 v. Paris, 31 Tex. Civ. App. 632.

**6. Upton v. Hosmer, 70 N. H. 493; Crowe v. Riley, 63 Ohio St. 1; Rickard v. Dana, 74 Vt. 74.**

**660. 1. Renting on Shares—Oregon Rule.**—Meyer v. Livesley, 45 Oregon 487, 106 Am. St. Rep. 667.

**4. Right to Assign May Be Restricted by Contract.**—Adams v. Shirk, 117 Fed. Rep. 801, 55 C. C. A. 25.

**12. Restrictions on Right to Assign Strictly Construed.**—Crouse v. Michell, 130 Mich. 347, 97 Am. St. Rep. 479; Upton v. Hosmer, 70 N. H. 493; Presby v. Benjamin, 169 N. Y. 377.

**13. Restriction Against Underletting Does Not Prevent Assignment.**—*In re Doyle*, (1899) 1 Ir. R. 113; West Shore R. Co. v. Wenner, 70 N. J. L. 233.

**16. Assignment Requires Transfer of Legal Estate.**—*In re Bush*, 126 Fed. Rep. 878.

**A Declaration of Trust.**—Gentle v. Faulkner, (1900) 2 Q. B. 267, 69 L. J. Q. B. 777.

**Injunction Against Unauthorized Assignment.**—McEacharn v. Colton, (1902) A. C. 104.

**661. 4. See McMahon v. Coyle, 5 Ont. L. Rep. 618.**

**7. Crouse v. Michell, 130 Mich. 347, 97 Am. St. Rep. 479, citing 18 AM. AND ENG. ENCYC.**

OF LAW (2d ed.) 661; West Shore R. Co. v. Wenner, 71 N. J. L. 682, affirming 70 N. J. L. 233; Dunlop v. Mulry, 85 N. Y. App. Div. 498, affirming (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 131.

**11. Bankruptcy and Insolvency.**—*In re Bush*, 126 Fed. Rep. 878, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; Fleming v. Fleming Hotel Co., (N. J. 1905) 61 Atl. Rep. 157.

**Voluntary Bankruptcy.**—*In re Riggs*, (1901) 2 K. B. 16, 70 L. J. K. B. 541.

**13. Crouse v. Michell, 130 Mich. 347, 97 Am. St. Rep. 479, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; Dunlop v. Mulry, 85 N. Y. App. Div. 498, affirming (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 131. See, however, West Shore R. Co. v. Wenner, 70 N. J. L. 233, affirmed 71 N. J. L. 682.**

**662. 8. McEacharn v. Colton, (1902) A. C. 104, 71 L. J. P. C. 20.**

**9. Springer v. Chicago Real Estate L. & T. Co., 202 Ill. 17, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662.**

**663. 3. Adams v. Shirk, 117 Fed. Rep. 801, 55 C. C. A. 25; Dierig v. Callahan, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 30; Prevost v. Holland, 15 Quebec Super. Ct. 298. See also Harrington v. Hall, 126 Mich. 704.**

Where the lessor consents to an assignment, he cannot afterwards object that the lease was not assignable. Cleveland, etc., *R. Co. v. Wood*, 189 Ill. 352.

**Estoppel to Deny Assent to Assignments.**—Warner v. Cochrane, 128 Fed. Rep. 553, 63 C. C. A. 207.

**Proof of Assent—Acceptance of Rent from Assignee.**—Garcewich v. Woods, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 201; Koehler v. Brady, 163 N. Y. 565, affirming 22 N. Y. App. Div. 624.

**Acceptance of Rent from Assignee Without Notice of Assignment.**—Upton v. Hosmer, 70 N. H. 493.

**Lease by Corporation—Consent of Lessors as Stockholders of Corporation.**—Littlejohn v. Soper, 31 Can. Sup. Ct. 572, reversing 1 Ont. L. Rep. 172.

**6. Springer v. Chicago Real Estate L. & T.**

**663.** *c.* STATUTORY RESTRICTIONS ON RIGHT TO ASSIGN. — See notes 7, 8, 9.

Effect of Assignment. — See note 10.

**664.** See note 1.

**3.** Liability of Lessee to Lessor After Assignment — *a.* IN GENERAL. — See notes 5, 6.

*b.* LIABILITY FOR RENT. — See note 15.

**665.** Acceptance of Rent and Consent to Assignment. — See notes 2, 3.

**666.** **4.** Liability of Lessee to Assignee. — See note 11.

Quiet Enjoyment or Warranty. — See note 13.

**667.** **5.** Liability of Assignee to Lessee. — See notes 5, 6, 8.

**668.** Covenant to Indemnify. — See note 3.

Co., 202 Ill. 17, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 663.

In England. — Where the covenant prohibits a subletting without the consent of the landlord, and further provides that such consent shall not be unreasonably withheld, if the tenant sublets without requesting consent of the landlord there is a breach of the covenant, though the landlord could not rightfully have withheld his consent. *Eastern Tel. Co. v. Dent*, (1899) 1 Q. B. 835.

Responsible and Satisfactory Persons. — *Adams v. Shirk*, (C. C. A.) 104 Fed. Rep. 54.

**663.** **7.** *Moore v. Guardian Trust Co.*, 173 Mo. 218; *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530.

A lease for one year with the privilege of renewing from year to year for five additional years is not a lease for two years or less within the meaning of the *Missouri* statute (Rev. Stat. 1899, § 4107) prohibiting the assignment of leases for two years or less. *Jones v. Kansas City Board of Trade*, 99 Mo. App. 433, following *Donovan v. P. Schoenhoeffen Brewing Co.*, 92 Mo. App. 341.

Sufficiency of Consent of Lessor to Assignment. — *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530.

**8.** *Slaughter v. Coke County*, 34 Tex. Civ. App. 598.

The Lessor May Waive the Forfeiture for violation of the statutory provision. *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

Waiver by Acquiescence in Assignment. — *Wilkey Lodge No. 21 v. Paris*, 31 Tex. Civ. App. 632.

**9.** *Bass v. West*, 110 Ga. 698.

**10** Assignment Good Between Parties. — *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

**664.** **1.** Trespasser. — The landlord may treat the assignee as a mere intruder subject to be summarily ousted. *Bass v. West*, 110 Ga. 698.

**5.** Lessor Liable to Lessee for Breach of Covenant Prior to Assignment. — *Cleveland, etc., R. Co. v. Wood*, 189 Ill. 352.

**6.** Liability on Express Covenants Continued. — *Heller v. Dailey*, 28 Ind. App. 555; *Holliday v. Noland*, 93 Mo. App. 403.

**15.** Liability on Express Covenant to Pay Rent. — *Brosnan v. Kramer*, 135 Cal. 36; *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 92 Ill. App. 175, 102 Ill. App. 554; *Hoerdt v. Hahne*, 91 Ill. App. 514; *Springer v. De Wolf*, 93 Ill. App. 260, affirmed 194 Ill. 218, 88 Am. St. Rep. 155; *Baltimore v. Peat*, 93 Md. 696; *Hol-*

*iday v. Noland*, 93 Mo. App. 403; *Crowley v. Gormley*, 59 N. Y. App. Div. 256; *Thompson's Estate*, 205 Pa. St. 555; *Weil v. Witte*, (Supm. Ct. App. T.) 90 N. Y. Supp. 287; *Shand v. McCloskey*, 27 Pa. Super. Ct. 260.

Sureties. — The assignment of a lease by the lessee does not affect the liability of his sureties on the covenants in the lease. *Bradley v. Walker*, 93 Ill. App. 609.

Bankruptcy Proceedings Against Lessee. — *Woodworth v. Harding*, 75 N. Y. App. Div. 54.

**665.** **2.** Acceptance of Rent from Assignee. — *Weiner v. Baldwin*, 9 Kan. App. 772; *Bradley v. Walker*, 93 Ill. App. 609; *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554; *Heller v. Dailey*, 28 Ind. App. 555; *Hartz v. Eddy*, (Mich. 1905) 103 N. W. Rep. 852.

Receipt of Money from a Third Person Found in Possession. — *Wood v. Welz*, 167 N. Y. 570, affirming 40 N. Y. App. Div. 202.

**3.** Express Assent to Assignment. — *Jordan v. Indianapolis Water Co.*, 159 Ind. 337; *Weiner v. Baldwin*, 9 Kan. App. 772. See, however, *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375.

Assignment Authorized by Lease. — *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554, 92 Ill. App. 175, affirmed 190 Ill. 380.

**666.** **11.** Mortgage of Leasehold. — Where a lessee assigns the leasehold by way of mortgage, the assignee (mortgagee), in case of the failure of the lessee to pay rent and taxes, for which failure the lessor would be entitled to re-enter and forfeit the lease, may make such payments to prevent the forfeiture and recover the amount paid from the lessee. *Dunlop v. James*, 174 N. Y. 411.

**13.** Of course the lessee cannot himself intrude on his assignee. *Simpson v. Moorhead*, 65 N. J. Eq. 623.

**667.** **5.** Liability of Assignee to Lessee. — *Brosnan v. Kramer*, 135 Cal. 36; *Woodruff v. Baldwin*, 72 Conn. 439; *Doxey v. Service*, 30 Ind. App. 174; *Jordan v. Indianapolis Water Co.*, 159 Ind. 337; *Walton v. Stafford*, 162 N. Y. 558 (no liability for rents in arrears, though payable for future period).

Statute of Frauds. — The liability of the assignee is not affected by the statute of frauds. *Collins v. Pratt*, 181 Mass. 345.

**6.** Liability of Assignee to Indemnify Lessee. — *Baltimore v. Peat*, 93 Md. 696; *Crowley v. Gormley*, 59 N. Y. App. Div. 256.

**8.** *Baltimore v. Peat*, 93 Md. 696.

**668.** **3.** Covenant to Indemnify Lessee. — *Harris v. Boots Cash Chemists*, (1904) 2 Ch. 376, 73 L. J. Ch. 708.

**668. 6. Liability of Assignee to Lessor — a. IN GENERAL.** — See note 9.

**669. Particular Covenants.** — See notes 3, 5, 6, 10.

*b. LIABILITY OF ASSIGNEE FOR RENT.* — See note 13.

**670.** See note 1.

*Rents in Arrear.* — See note 2.

**671. c. LIABILITY ON COVENANTS BROKEN PRIOR TO ASSIGNMENT.** — See notes 1, 2.

*d. COVENANTS NOT AFFECTING DEMISED PREMISES.* — See note 4.

*f. RESTRICTIONS ON RIGHT TO ASSIGN.* — See note 7.

*g. ACTUAL ASSIGNMENT NECESSARY.* — See note 10.

**672. Acceptance of Assignment.** — See note 3.

*Statute of Frauds.* — See note 4.

*h. NECESSITY FOR ENTRY AND OCCUPATION BY ASSIGNEE.* — See note 6.

**668. 9. Personal Liability of Assignee to Lessor.**

— *Horsey Estate v. Steiger*, (1899) 2 Q. B. 79; *Shirk v. Adams*, (C. C. A.) 130 Fed. Rep. 441; *Peck v. Christman*, 94 Ill. App. 435; *Consolidated Coal Co. v. Peers*, 97 Ill. App. 188, *affirmed* 205 Ill. 531; *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668; *Heller v. Dailey*, 28 Ind. App. 555; *Kennedy v. Iowa State Ins. Co.*, 119 Iowa 29; *Dunlop v. James*, 174 N. Y. 411; *Oil Creek, etc., Petroleum Co. v. Stanton Oil Co.*, 23 Pa. Co. Ct. 153, 30 Pittsb. Leg. J. N. S. (Pa.) 286; *Stoné v. Marshall Oil Co.*, 188 Pa. St. 614; *McClaren v. Citizens' Oil, etc., Co.*, 14 Pa. Super. Ct. 167.

Agreements between the lessor and the lessee not embodied in the lease are not binding on the assignee. *Granite Bldg. Corp. v. Greene*, 25 R. I. 586.

**Agreements Between Lessor and Assignee.** — *Pond v. Torrey*, 180 Mass. 226.

**All Defenses Available to the Lessee** are available to the assignee against whom a claim under the lease is sought to be enforced. *Thomas v. Conrad*, (Ky. 1903) 74 S. W. Rep. 1084.

**669. 3. Covenants to Repair.** — *Peck v. Christman*, 94 Ill. App. 435; *Lehmaier v. Jones*, 100 N. Y. App. Div. 495.

**5. Covenant Restricting Use of Premises.** — *Crowe v. Riley*, 63 Ohio St. 1; *Granite Bldg. Corp. v. Greene*, 25 R. I. 586.

**6. Covenant to Pay Taxes.** — *Peck v. Christman*, 94 Ill. App. 435; *Tyler Estate v. Giesler*, 85 Mo. App. 278; *Dunlop v. James*, 70 N. Y. App. Div. 71, 174 N. Y. 411, *affirming* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 708.

**10. Covenant Not to Assign or Underlet.** — *West Shore R. Co. v. Wenner*, 71 N. J. L. 682, *affirming* 70 N. J. L. 233.

**13. Assignee Personally Liable for Rent — United States.** — *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25.

*California.* — *Baker v. J. Maier, etc., Brewery*, 140 Cal. 530; *Summerville v. Kelliher*, 144 Cal. 155, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669.

*Connecticut.* — *Benedict v. Everard*, 73 Conn. 157.

*Georgia.* — *Mallette v. Hillyard*, 117 Ga. 423. *Illinois.* — *Mackin v. Haven*, 187 Ill. 480; *Springer v. De Wolf*, 93 Ill. App. 260, *affirmed*

194 Ill. 218, 88 Am. St. Rep. 155; *Peck v. Christman*, 94 Ill. App. 435.

*Maryland.* — *Baltimore v. Peat*, 93 Md. 696. *Minnesota.* — *Weide v. St. Paul Boom Co.*, 92 Minn. 76.

*Missouri.* — *Tyler Estate v. Giesler*, 85 Mo. App. 278.

*Nebraska.* — *Hogg v. Reynolds*, 61 Neb. 758.

*New York.* — *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584; *Tate v. Neary*, 52 N. Y. App. Div. 78; *Crowley v. Gormley*, 59 N. Y. App. Div. 256; *Mead v. Madden*, 85 N. Y. App. Div. 10.

*Pennsylvania.* — *McClaren v. Citizens' Oil, etc., Co.*, 14 Pa. Super. Ct. 167.

**Apportionment of Rent as to Time — Assignment Between Rent Days.** — *Glass v. Patterson*, (1902) 2 Ir. R. 660 (Apportionment Act 1870).

**670. 1. Benedict v. Everard, 73 Conn. 157.**

**2. Rents in Arrear.** — *Walton v. Stafford*, 162 N. Y. 558 (rents in arrears payable for future period).

**671. 1. Breaches Prior to Assignment.** — *Allison v. Luhrig Coal Co.*, 12 Ohio Cir. Dec. 504, 22 Ohio Cir. Ct. 489.

**2. Noncontinuing Covenants.** — *Heller v. Dailey*, 28 Ind. App. 555.

**4. Covenants Collateral to Lease.** — *Dunlop v. James*, 70 N. Y. App. Div. 615.

**7. Prohibition Against Assignments.** — *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25; *Oil Creek, etc., Petroleum Co. v. Stanton Oil Co.*, 23 Pa. Co. Ct. 153, 30 Pittsb. Leg. J. N. S. (Pa.) 286.

**10. Legal Assignment Required.** — *Ramage v. Womack*, (1900) 1 Q. B. 116; *Bartlett v. Amberg*, 92 Ill. App. 377, *appeal dismissed* 190 Ill. 15; *Heller v. Dailey*, 28 Ind. App. 555; *Blum v. Flanagan*, (Supm. Ct. App. T.) 84 N. Y. Supp. 146.

**Estoppel to Deny Validity of Assignment.** — *Baker v. J. Maier, etc., Brewery*, 140 Cal. 530; *Mead v. Madden*, 85 N. Y. App. Div. 10.

**672. 3. Acceptance of Assignment.** — *Canale v. Copello*, 137 Cal. 22 (holding delivery and acceptance to be essential though the alleged assignee actually took possession).

**4. Statute of Frauds.** — *Mead v. Madden*, 85 N. Y. App. Div. 10.

**6. Entry into Possession by Lessee Not Required.** — *Benedict v. Everard*, 73 Conn. 157; *Collins v. Pratt*, 181 Mass. 345, *citing* 18 AM. AND ENG.

**673.** *i.* ASSIGNMENTS OF PART INTERESTS IN LEASEHOLDS. — See notes 1, 3.

*j.* EFFECT OF REASSIGNMENT BY ASSIGNEE — (1) *In General.* — See note 7.

**674.** Object of Reassignment Immaterial. — See note 3.

(2) *Continued Possession After Reassignment.* — See note 5.

(3) *Consent of Lessor to Reassignment.* — See note 8.

(4) *Actual Reassignment Required.* — See note 11.

**675.** (6) *Liability on Breaches Prior to Assignment.* — See note 5.

(7) *Express Assumption by Assignee of Obligations of Lease.* — See note 6.

*k.* PARTICULAR CLASSES OF ASSIGNEES — (1) *Purchasers at Judicial Sales.* — See note 10.

**676.** (2) *Assignees by Way of Mortgage.* — See notes 2, 5, 6.

**677.** (5) *Assignees in Insolvency and Bankruptcy, and for Creditors.* — See note 7.

*l.* PROOF OF ASSIGNMENT — *Presumption in Favor of Assignment.* — See note 10.

**678.** See note 2.

7. Rights of Assignee Acquired by Assignment. — See notes 7, 8, 9.

ENCYC. OF LAW (2d ed.) 672. See, however, *Blum v. Flanagan*, (Supm. Ct. App. T.) 84 N. Y. Supp. 146; *McLean v. Caldwell*, 107 Tenn. 138.

**673.** 1. Assignee of Part of Premises. — *Hogg v. Reynolds*, 61 Neb. 758.

3. Liability for Proportionate Rent. — *Hogg v. Reynolds*, 61 Neb. 758.

7. Assignee Discharged by Reassignment — *Illinois.* — *Springer v. De Wolf*, 194 Ill. 218, 88 Am. St. Rep. 155, affirming 93 Ill. App. 260. *Indiana.* — *Heller v. Dailey*, 28 Ind. App. 555. *Maryland.* — *Baltimore v. Peat*, 93 Md. 696. *Missouri.* — *Tyler Estate v. Giesler*, 85 Mo. App. 278.

*New York.* — *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584; *Dassori v. Zarek*, 71 N. Y. App. Div. 538; *Dresner v. Fredericks*, 91 N. Y. App. Div. 224, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 673.

*Pennsylvania.* — *McClaren v. Citizens' Oil, etc.*, Co., 14 Pa. Super. Ct. 167.

*Tennessee.* — *McLean v. Caldwell*, 107 Tenn. 138.

*Canada.* — *Jamieson v. London, etc., Loan, etc.*, Co., 30 Can. Sup. Ct. 14.

**674.** 3. Object of Reassignment Immaterial — *McLean v. Caldwell*, 107 Tenn. 138.

5. Continued Possession After Assignment. — *Dresner v. Fredericks*, 91 N. Y. App. Div. 229, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 673.

8. In *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17, it was held that where the original lease prohibited an assignment without the consent of the lessor, and the lessor consented to the assignment subject to the condition, however, that the assignee should not assign without the lessor's consent, the assignee could not by reassignment without the lessor's consent escape liability.

11. Contract to Reassign. — *Baltimore v. Peat*, 93 Md. 696; *McClaren v. Citizens' Oil, etc.*, Co., 14 Pa. Super. Ct. 167.

Abandonment of Premises. — *McLean v. Caldwell*, 107 Tenn. 138.

**675.** 5. Liability on Breaches Prior to Reassignment. — *Heller v. Dailey*, 28 Ind. App. 555; *McClaren v. Citizens' Oil, etc.*, Co., 14 Pa. Super. Ct. 167; *McLean v. Caldwell*, 107 Tenn. 138.

6. Express Assumption by Assignee of Obligations of Lessee. — *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25; *Wilson v. Lunt*, 17 Colo. App. 48; *Springer v. DeWolf*, 194 Ill. 218, 88 Am. St. Rep. 155, affirming 93 Ill. App. 260; *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17.

What Constitutes Assumption of Obligations of Lease. — *Dassori v. Zarek*, 71 N. Y. App. Div. 538.

10. Personal Liability of Purchaser at Judicial Sale. — *West Shore R. Co. v. Wenner*, 70 N. J. L. 233; *McLean v. Caldwell*, 107 Tenn. 138.

**676.** 2. Mortgagee of Leasehold. — *Glass v. Patterson*, (1902) 2 Ir. R. 660; *Benedict v. Everard*, 73 Conn. 157.

5. Mortgages Treated as Security Merely. — *Ireland v. U. S. Mortgage, etc.*, Co., 175 N. Y. 491, affirming 72 N. Y. App. Div. 95.

6. Possession as Agent of Lessee. — *Ireland v. U. S. Mortgage, etc.*, Co., 72 N. Y. App. Div. 95, affirmed 175 N. Y. 491. Compare *Mackin v. Haven*, 187 Ill. 480.

**677.** 7. — See *Mead v. Madden*, 85 N. Y. App. Div. 10 (assignee for benefit of creditors).

10. Presumption in Favor of Assignment. — *Weide v. St. Paul Boon Co.*, 92 Minn. 76; *Weinhandler v. Eastern Brewing Co.*, (Supm. Ct. App. T.) 89 N. Y. Supp. 16, following *Frank v. New York, etc., R. Co.*, 122 N. Y. 197; *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483. See, however, *Heller v. Daley*, 28 Ind. App. 555.

Proof of Assignment as Against Lessor. — *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530.

**678.** 2. *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483.

7. *Holloway v. Hill*, (1902) 2 Ch. 612, 71 L. J. Ch. 818; *Warner v. Cochrane*, (C. C. A.) 128 Fed. Rep. 553, citing 18 AM. AND ENG.

**679. 9. Form of Assignment.** — See notes 8, 9, 10.

Statute of Frauds. — See note 11.

Recording. — See note 14.

**680. XIX. SUBLETTING — 2. General Right to Sublet — a. IN ABSENCE OF EXPRESS RESTRICTIONS.** — See note 2.*b. STATUTORY RESTRICTIONS ON RIGHT TO SUBLET.* — See note 5.*c. CONTRACT RESTRICTIONS ON RIGHT TO SUBLET — (2) General Construction of Restriction.* — See notes 8, 9.**681. (3) Breach of Covenant Against Subletting.** — See notes 1, 2, 5.

Letting Lodgings. — See note 6.

License. — See note 8.

Permitting Joint Occupation. — See note 9.

Subletting with Consent of Lessor. — See note 12.

ENCYC. OF LAW (2d ed.) 678; *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530 (covenant by lessor to furnish power held enforceable by assignee).

Though the lease was not assignable without the consent of the lessor, the leasehold interest passes to the lessee by the assignment, subject, of course, to the rights of the lessor arising by virtue of the breach of the restriction against assignment. *S. Liebmann's Sons Brewing Co. v. Lauter*, 73 N. Y. App. Div. 183.

**Covenant in Lease of Hotel for Stoppage of Trains for Meals.** — *Cleveland, etc., R. Co. v. Mitchell*, 84 Ill. App. 206.

**Assignment Absolute on Its Face, but Intended as Security** merely, does not deprive the lessee of the right to recover against the lessor for breach of the lease. *Gross v. Heckert*, 120 Wis. 314.

**678. 8.** See *Dierig v. Callahan*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 30.

**9.** *Thomas v. Sass*, 3 Indian Ter. 545; *Price v. Le Blond*, 30 Can. Sup. Ct. 539.

**Right of Sublessee as Against Assignee.** — *Teater v. King*, 35 Wash. 138.

**679. 8. Necessity of Delivery and Acceptance of Assignment.** — *Canale v. Copello*, 137 Cal. 22.

**Acknowledgment — Vermont Statute.** — *Rickard v. Dana*, 74 Vt. 74. And see the title ACKNOWLEDGMENTS.

**9.** *Springer v. De Wolf*, 93 Ill. App. 260, affirmed 194 Ill. 218, 88 Am. St. Rep. 155.

**10.** *Springer v. De Wolf*, 194 Ill. 218, 88 Am. St. Rep. 155.

**Validity of Assignment in Blank.** — *Cleveland, etc., R. Co. v. Wood*, 189 Ill. 352.

**11.** *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530.

A lessor cannot attack an assignment by his lessee on the ground that it is within the statute of frauds. *B. Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530.

**14.** *Crouse v. Michell*, 130 Mich. 347, 97 Am. St. Rep. 479.

**680. 2. Common-law Right to Sublet.** — *Hudson v. Stewart*, 110 Ga. 37; *Martin v. Sexton*, 112 Ill. App. 199; *Moore v. Guardian Trust Co.*, 173 Mo. 218; *Simpson v. Moorhead*, 65 N. J. Eq. 623; *Schenkel v. Lischinsky*, (Supm. Ct. App. T.) 115 Misc. (N. Y.) 423.

**5. Statutory Restrictions.** — *Hudson v. Stewart*, 110 Ga. 37; *Gartrell v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 487; *Waggoner v. Snody*,

36 Tex. Civ. App. 514; *Wright v. Henderson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 799.

A statutory provision prohibiting assignments without the consent of the landlord does not prohibit subletting. *Moore v. Guardian Trust Co.*, 173 Mo. 218.

The landlord may forfeit the lease for subletting in violation of the statute. *Markowitz v. Greenwall Theatrical Circuit Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 317.

**Creditor of Sublessee** cannot attack validity of sublease. *Moore v. Graham*, 29 Tex. Civ. App. 235.

**Liability for Subletting in Violation of Statute.**

— If a tenant sublets without the consent of the landlord, the landlord may elect to make the subtenant his own tenant. *Barlow v. Jones*, 117 Ga. 412; *Fountain v. Whitehead*, 119 Ga. 241.

Or the landlord may, at his option, treat the sublessee as a mere intruder. *Bass v. West*, 110 Ga. 698; *Brown v. Pope*, 27 Tex. Civ. App. 225.

**8. Contract Restrictions Strictly Construed.** — *Presby v. Benjamin*, 169 N. Y. 377; *Spencer v. Commercial Co.*, 30 Wash. 520.

**9. Restrictions Against Assignments.** — *West Shore R. Co. v. Wenner*, 70 N. J. L. 233; *Presby v. Benjamin*, 169 N. Y. 377. See also *Moore v. Guardian Trust Co.*, 173 Mo. 218.

**681. 1. Giving Possession under Contract for Assignment.** — *Horsev. Steiger*, (1899) 2 Q. B. 79.

**2.** *Presby v. Benjamin*, 169 N. Y. 377.

**Giving Possession of Building to Servant.** — *Vincent v. Crane*, 134 Mich. 700.

**5.** *Grove v. Portal*, (1902) 1 Ch. 727, 71 L. J. Ch. 299; *Presby v. Benjamin*, 169 N. Y. 377; *Spencer v. Commercial Co.*, 30 Wash. 520 (covenant not to sublet the "whole of said premises").

**6.** *Colletterette v. Bassinet*, 24 Quebec Super. Ct. 372.

**8.** *Grove v. Portal*, (1902) 1 Ch. 727, 71 L. J. Ch. 299; *Daly v. Edwardes*, 82 L. T. N. S. 372, 83 L. T. N. S. 548, 49 W. R. 244; *Edwardes v. Barrington*, 85 L. T. N. S. 650.

**9. Employment of Agent to Conduct Business** is not a subletting. *Markowitz v. Greenwall Theatrical Circuit Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 74, 317.

**12. Presumption as to Consent.** — *Berryhill v. Healey*, 89 Minn. 444.



- 682.** (4) *Remedy of Lessor — Damages.* — See note 4.  
*Proof of Subletting.* — See note 7.  
 3. *Liability of Sublessee to Lessor.* — See notes 8, 9.
- 683.** *Statutory Provisions.* — See note 5.  
 4. *General Rights Acquired by Sublessee.* — See note 6.  
*Restraining Breach of Restrictive Covenants.* — See note 10.  
*Forfeiture by Sublessor — Effect on Sublessee's Rights.* — See note 11.
- 684.** 5. *Effect of Subletting as Between Lessor and Lessee.* — See notes 2, 3.  
 6. *Liability Between Sublessor and Sublessee.* — See note 6.  
 XX. **RENEWALS** — 1. *Right to Renewal in General.* — See note 7.  
 See note 1.  
 2. *Covenant to Renew* — *a.* IN GENERAL. — See notes 5, 7.  
**686.** *b.* FORM OF COVENANT. — See notes 1, 2, 3.  
*c.* CERTAINTY REQUIRED WITH REGARD TO COVENANT TO RE-  
 NEW. — See notes 5, 6, 7, 9.

**682.** 4. *Increased Insurance Rates Held Recoverable.* — *Rouaine v. Simpson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 875.

*Waiver of Right to Damages.* — *Rouaine v. Simpson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 875.

7. *Presby v. Benjamin*, 169 N. Y. 377.

8. *Sublessee Not Personally Liable to Lessor* — *Georgia.* — *Hudson v. Stewart*, 110 Ga. 37.

*Indiana.* — But see *Jordan v. Indianapolis Water Co.*, 159 Ind. 337.

*Michigan.* — *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682; *Wray-Austin Machinery Co. v. Flower*, (Mich. 1905) 103 N. W. Rep. 873.

*Mississippi.* — *Ashley v. Young*, 79 Miss. 129.

*Missouri.* — *McDonald v. May*, 96 Mo. App. 236.

*New York.* — *Ely v. Winans*, (Supm. Ct. App. T.) 88 N. Y. Supp. 929.

*Pennsylvania.* — *Campbell's Estate*, 21 Pa. Super. Ct. 424; *James v. Kurtz*, 23 Pa. Super. Ct. 304.

*Rhode Island.* — *Washington Real Estate Co. v. Roger Williams Silver Co.*, 25 R. I. 483.

*Texas.* — But see *Robbins v. Voss*, (Tex. Civ. App. 1901) 64 S. W. Rep. 313.

9. *Crowe v. Riley*, 63 Ohio St. 1; *Oil Creek, etc., Petroleum Co. v. Stanton Oil Co.*, 23 Pa. Co. Ct. 153, 30 Pittsb. Leg. J. N. S. (Pa.) 286; *Missouri, etc., R. Co. v. Keahey*, (Tex. Civ. App. 1904) 83 S. W. Rep. 1102.

**683.** 5. *Hudson v. Stewart*, 110 Ga. 37.

6. *Rights Acquired by Sublessee.* — *Bruder v. Geisler*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 370.

*Lessor Not Liable for Breach of Contract by Sublessor.* — *Purdum v. Brussels*, (Ky. 1902) 66 S. W. Rep. 22.

10. *Peer v. Wadsworth*, 67 N. J. Eq. 191.

11. *Williams v. Michigan Cent. R. Co.*, 133 Mich. 448.

**684.** 2. *Subletting Has No Effect on Lessee's Liability.* — *Baker v. J. Maier, etc., Brewery*, 140 Cal. 530; *Weiner v. Baldwin*, 9 Kan. App. 772.

*Breach by Subtenant — Liability of Assignee.* — *Crowe v. Riley*, 63 Ohio St. 1.

3. *Decker v. Hartshorne*, 65 N. J. L. 87; *Ely v. Winans*, (Supm. Ct. App. T.) 88 N. Y. Supp. 929.

This is true though the lessor accepts rent from the sublessee. *Brosnan v. Kramer*, 135 Cal. 36.

6. *Sublessor Held Liable in Damages to Sublessee Where Former Induces Lessor to Evict Latter for Want of Consent of Lessor to Subletting.* — *Calvert v. Hobbs*, 107 Mo. App. 7.

7. *No Implied Right to Renewal.* — *McDonald v. Fiss*, 54 N. Y. App. Div. 489.

*Overpayment of Rent by Mistake* does not entitle a tenant to a renewal to the extent of such overpayment. *Sizer v. Russett*, 11 Pa. Super. Ct. 108.

**685.** 1. Where it was the custom of a corporation leasing unimproved property on which the lessees were to erect improvements to renew the leases to tenants who had before been in possession and were the owners of buildings, such probability of a renewal may be taken into consideration in estimating damages recoverable by the lessee for negligent injuries by third person to buildings erected on the demised premises. *McPhillips v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed 177 N. Y. 543.

5. *Covenant to Renew.* — *Baltimore, etc., R. Co. v. Winslow*, 18 App. Cas. (D. C.) 438; *Niederstein v. Cusick*, 178 N. Y. 543, reversing 83 N. Y. App. Div. 36.

7. *Lessee Not Bound to Accept Renewal.* — *Andrews v. Marshall Creamery Co.*, 118 Iowa 595.

**686.** 1. *Privilege of Rerenting.* — *Western New York, etc., R. Co. v. Rea*, 83 N. Y. App. Div. 576.

2. *"Refusal."* — *Howard v. Tomicich*, 81 Miss. 703. See, however, *Drinkard v. Heptinstall*, 55 W. Va. 320.

3. *Holloway v. Schmidt*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 747.

5. *Uncertainty in Covenant for Removal.* — *Howe v. Larkin*, 119 Fed. Rep. 1005; *Cammack v. Rogers*, 32 Tex. Civ. App. 125.

*Failure to Fix Term of Renewal.* — *Howard v. Tomicich*, 81 Miss. 703 (lease for one year "with privilege of longer"). See *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56.

6. *Failure to Fix Rent.* — See *Gilbert v. Price*, 18 Pa. Super. Ct. 359.

7. *Preference to Lessee as to Renewal.* — *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, affirming 88 Ill. App. 485.

9. *Fixing Rent by Appraisers.* — *Wurster v. Armfield*, 175 N. Y. 256, reversing 67 N. Y. App.

**687.** *d.* TERMS OF RENEWAL LEASE. — See note 1.

*e.* PERPETUAL RENEWALS. — See notes 4, 5, 6.

**688.** See notes 2, 3.

*f.* ALTERNATIVE STIPULATIONS. — See notes 4, 6.

*g.* QUALIFIED COVENANTS TO RENEW. — See note 9.

**689.** See notes 1, 4.

**4. Election with Regard to Option to Renew — a. IN GENERAL —**  
Time of Election. — See note 13.

**690.** *b.* EFFECT OF HOLDING OVER — Right of Lessor to Hold Lessee for Renewal. — See notes 1, 2, 3, 4.

**691.** Right of Lessee to Claim Renewal. — See note 1.

**5. Waiver and Loss of Right and Conditions of Renewal — a. IN GENERAL.** — See note 6.

*b.* CONDITIONS PRECEDENT TO RIGHT TO RENEW — (1) *In General.* — See note 11.

Div. 158; *In re Geddes*, 3 Ont. L. Rep. 75; *Geddes v. Garde*, 32 Ont. 262.

**Improvements by the Tenant.** — *Allen v. Nasmith*, 27 Ont. App. 536.

**Failure of Arbitrators to Agree.** — *Kaufmann v. Liggett*, 209 Pa. St. 87.

**Death of Appraiser.** — *Weir v. Barker*, 104 N. Y. App. Div. 112.

**687. 1. Implication with Regard to Renewal upon Terms of Old Lease.** — *Andrews v. Marshall Creamery Co.*, 118 Iowa 595; *Towle v. Weise*, 64 Kan. 760; *Howard v. Tomicich*, 81 Miss. 703; *Western New York, etc., R. Co. v. Rea*, 83 N. Y. App. Div. 576; *Gilbert v. Price*, 18 Pa. Super. Ct. 359.

**4. Single Renewal Only Required.** — *Hegan Mantel Co. v. Cook*, (Ky. 1900) 57 S. W. Rep. 929; *King v. Wilson*, 98 Va. 259; *Powell v. Pierce*, 103 Va. 526.

**Option as to Term of Renewal.** — *Perry v. Rockland, etc.*, *Lime Co.*, 94 Me. 325.

**5. Winslow v. Baltimore, etc., R. Co.**, 188 U. S. 646; *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687.

**6. Construction for Perpetual Renewals Not Favored.** — *Winslow v. Baltimore, etc., R. Co.*, 188 U. S. 646; *Tischner v. Rutledge*, 35 Wash. 285.

**688. 2. Provisions for Perpetual Renewals Upheld.** — See *Tischner v. Rutledge*, 35 Wash. 285.

**3. In Tischner v. Rutledge**, 35 Wash. 285, a lease for one year "with the privilege at the same rate and terms each year thereafter from year to year" was held not to entitle the lessee to a perpetual renewal. In this case the court laid some stress upon the fact that the original lease contained only covenants applicable to a short term.

**4. Alternative Stipulations.** — *Niederstein v. Cusick*, 178 N. Y. 543, reversing 83 N. Y. App. Div. 36.

**6. Niederstein v. Cusick**, 178 N. Y. 543, reversing 83 N. Y. App. Div. 36; *Matter of Coatsworth*, 160 N. Y. 114, reversing 39 N. Y. App. Div. 656.

**9. Notice from Lessor.** — *Werlein v. Janssen*, 112 La. 31.

**689. 1. Premises Desired by Lessor for Building Purposes.** — *Seaver v. Thompson*, 189 Ill. 158.

**Premises Desired by Lessor for Her Own Purpose.** — *Werlein v. Janssen*, 112 La. 31.

**4. Hausauer v. Dahlman**, 163 N. Y. 567, affirming 18 N. Y. App. Div. 475.

In *Muller v. Trafford*, (1901) 1 Ch. 54, it was held that where a lessee sublet covenanting to renew the sublease if he obtained a renewal from the lessor, and afterwards assigned his leasehold, the sublessee was not entitled to a renewal as against the assignee who, in his own name, obtained a renewal from the original lessor.

**13. Time for Election.** — *McClintock v. Joyner*, 77 Miss. 678, 78 Am. St. Rep. 541.

**690. 1. Lessor May Hold Overholding Tenant as for Renewal.** — *Hayes v. Goldman*, 71 Ark. 251; *American Security, etc., Co. v. Walker*, 23 App. Minn. (D. C.) 583; *Spangler v. Rogers*, 123 Iowa 724, following *Andrews v. Marshall Creamery Co.*, 118 Iowa 595; *Quade v. Fitzloff*, 93 Minn. 115, following *Caley v. Thornquist*, 89 Minn. 348; *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584; *Gilbert v. Price*, 18 Pa. Super. Ct. 359; *Henderson v. Schuykill Valley Clay Mfg. Co.*, 24 Pa. Super. Ct. 422. See, however, *Lindsay v. Robertson*, 30 Ont. 229. *Compare Crystal Ice Co. v. Morris*, 160 Ind. 651.

**Effect of Minnesota Statute.** — *Quade v. Fitzloff*, 93 Minn. 115.

**Holding Over by Assignee** — *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584.

**2. Immaterial that Notice of Election Is Required.** — *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584.

**3. Gerhart Realty Co. v. Brecht**, 109 Mo. App. 25.

**4. Holding Over under New Agreement with Lessor.** — *Crystal Ice Co. v. Morris*, 160 Ind. 651; *Burckle v. Adams Bros. Co.*, 59 N. Y. App. Div. 109.

**691. 1. Cusack v. Gunning System**, 109 Ill. App. 588; *Perry v. Rockland, etc., Lime Co.*, 94 Me. 325; *Caley v. Thornquist*, 89 Minn. 348; *Kelly v. Varnes*, 52 N. Y. App. Div. 100; *Schuck v. Schwab*, (Supm. Ct. App. T.) 84 N. Y. Supp. 896.

**6. The Insolvency of the Lessee** does not entitle the lessor to have the agreement for renewal cancelled by a court of equity. *Olden v. Sassman*, 67 N. J. Eq. 239.

**11. Conditions Precedent to Right to Renewal.** — *Hussey v. Donville*, (1903) 1 Ir. R. 265.

**Renewal "At the Costs of the Lessee."** — *Mostyn*

- 692.** (2) *Performance by Lessee of Agreements in Lease.* — See notes 3, 5.  
 (3) *Notice of Election to Renew.* — See notes 6, 7.

- 693.** See note 3.

Privilege of Extension. — See note 4.

**6.** By and Against Whom Right of Renewal Enforceable — By Whom Enforceable. — See notes 7, 8.

- 694.** Against Whom Right Enforceable. — See note 3.

7. Remedies of Lessee — *a.* ACTION FOR DAMAGES. — See note 8.

- 695.** *b.* RIGHT TO RENEWAL AS DEFENSE IN EJECTMENT OR SUMMARY PROCEEDINGS. — See notes 1, 2, 4.

*c.* SPECIFIC PERFORMANCE. — See notes 6, 7, 9.

- 696.** 9. Implied Trusts Arising Out of Renewals — *a.* IN GENERAL. — See note 2.

- 698.** XXI. COVENANTS BY LESSEE RELATING TO REDELIVERY OF POSSESSION — 1. Implied Obligation. — See notes 3, 5, 8.

*v.* Fitzsimmons, (1903) 1 K. B. 349, *reversing* (1902) 1 K. B. 512; *Fitzsimmons v. Mostyn*, (1904) A. C. 46.

Payment of Rent for Renewed Term in Advance. — *Kemp v. Jennings*, 4 Indian Ter. 64.

Condition Requiring Lessee to Furnish a Good Surety. — *Piper v. Levy*, 114 La. 544.

**692.** 3. Failure of Lessor to Enforce Forfeiture. — *Swift v. Occidental Min., etc., Co.*, 141 Cal. 161.

Accident, Mistake, etc. — Relief in Equity. — *Cusack v. Gunning System*, 109 Ill. App. 588.

5. Waiver of Strict Compliance. — *Palmer v. Meriden Britannia Co.*, 188 Ill. 508.

6. Notice of Election to Renew. — *Bard v. Jones*, 96 Ill. App. 370; *Perry v. Rockland, etc.*, 103 Me. 185; *Sheppard v. Rosenkrans*, 109 Wis. 58, 83 Am. St. Rep. 886. See, however, *Perry v. Rockland, etc.*, 103 Me. 325; *Swigert v. Hartzell*, 20 Pa. Super. Ct. 56. Compare *Brewer v. Conger*, 27 Ont. App. 10.

Statute of Frauds. — Where a lease is for a certain time with the privilege of extending the lease for four years longer, the statute of frauds does not require that the notice of election to extend be in writing. *Sheppard v. Rosenkrans*, 109 Wis. 58, 83 Am. St. Rep. 886. See also *Caley v. Thornquist*, 89 Minn. 348.

7. Gerhart Realty Co. *v.* Brecht, 109 Mo. App. 25; *Denny v. Fronheiser*, 207 Pa. St. 174.

**693.** 3. Waiver of Necessity for Notice. — *Wood v. Edison Electric Illuminating Co.*, 184 Mass. 523; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25; *Schuck v. Schwab*, (Supm. Ct. App. T.) 84 N. Y. Supp. 896; *Sheppard v. Rosenkrans*, 109 Wis. 58, 83 Am. St. Rep. 886.

4. *Cusack v. Gunning System*, 109 Ill. App. 588; *Brown v. Samuels*, (Ky. 1902) 70 S. W. Rep. 1047.

7. Assignee of Leasehold. — *Warner v. Cochran*, 128 Fed. Rep. 553, 63 C. C. A. 207, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693; *McClintock v. Joyner*, 77 Miss. 678, 78 Am. St. Rep. 541; *Blount v. Connolly*, 110 Mo. App. 603, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693; *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584; *Whitaker v. Hughes*, 14 Okla. 510. Compare *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435.

8. *Upton v. Hosmer*, 70 N. H. 493.

But the lessor may be estopped by his conduct to object to an assignment of the lease by

the lessee and the right of the assignee to demand a renewal. *Warner v. Cochran*, (C. C. A.) 128 Fed. Rep. 553.

**694.** 3. Grantee of Reversion. — *A. G. Corre Hotel Co. v. Wells-Fargo Co.*, 128 Fed. Rep. 587, 63 C. C. A. 23.

8. Action for Damages. — *McClintock v. Joyner*, 77 Miss. 678, 78 Am. St. Rep. 541.

Measure of Damages. — *Walcott v. McNew*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

**695.** 1. *St. Louis v. Nelson*, 108 Mo. App. 210. But see *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584.

2. *Cusack v. Gunning System*, 109 Ill. App. 588; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185; *Sheppard v. Rosenkrans*, 109 Wis. 58, 83 Am. St. Rep. 886. See, however, *Perry v. Rockland, etc.*, 103 Me. 325.

4. Summary Proceedings. — *Platt v. Cutler*, 75 Conn. 183; *Denny v. Fronheiser*, 207 Pa. St. 174. See *Bard v. Jones*, 96 Ill. App. 370; *Ferguson v. Jackson*, 180 Mass. 557; *Schuck v. Schwab*, (Supm. Ct. App. T.) 84 N. Y. Supp. 896.

6. Specific Performance. — *Niederstein v. Cusick*, 178 N. Y. 543; *Wurster v. Armfield*, 67 N. Y. App. Div. 158, *reversed* on other grounds, 175 N. Y. 256; *Kaufmann v. Liggett*, 209 Pa. St. 87.

7. *Kaufmann v. Liggett*, 209 Pa. St. 87.

9. Insolvency of Lessee. — See *Olden v. Sassman*, 67 N. J. Eq. 239.

**696.** 2. Implied Trusts Arising Out of Renewals. — *McDonald v. Fiss*, 54 N. Y. App. Div. 489; *Koehler v. Kennedy*, 65 N. Y. App. Div. 611.

**698.** 3. Implied Obligation to Redeliver Possession. — *Waller v. Cockfield*, 111 La. 595; *Harvin v. Blackman*, 112 La. 24; *Myers v. Hussenbuth*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 717; *Rosenbaum v. Pendleton*, 9 Ohio Dec. 642, 7 Ohio N. P. 364.

5. Duty to Remove Rubbish. — *Boardman v. Howard*, 90 Minn. 273, 101 Am. St. Rep. 409.

No Duty to Remove Advertisements from Space Let for Advertising Purposes. — *Goldman v. New York Advertising Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 133.

8. No Duty to Remove Debris of Fire. — See *Boardman v. Howard*, 90 Minn. 273, 101 Am. St. Rep. 409.

**698. 2. Express Covenant to Redeliver Possession—***a. IN GENERAL—Discharge of Covenant.*—See notes 10, 12.

*Liability of Assignee of Term.*—See note 13.

**699. Assignee of Reversion.**—See note 1.

*b. COVENANTS TO SURRENDER IN PARTICULAR CONDITION.*—See notes 2, 3, 7, 9, 10.

**700. 4. Damages for Breach.**—See note 3.

**698. 10. Lazarus v. Ludwig,** 45 N. Y. App. Div. 486. *Compare Boardman v. Howard,* 90 Minn. 273, 101 Am. St. Rep. 409.

**12. Allowing the Tenant to Hold Over** as a monthly tenant is not a waiver of the tenant's agreement to surrender the premises in a particular condition. *Lazarus v. Ludwig,* 45 N. Y. App. Div. 486.

**13. Assignee of Leasehold.**—*Peck v. Christman,* 94 Ill. App. 435.

**699. 1. Northern Pac. R. Co. v. McClure,** 9 N. Dak. 73.

But where the assignment by the reversioner is only to the extent of the unexpired term of the leasehold, the reversion is not assigned so as to authorize the assignee to maintain an action for the breach of the covenant for a return of the premises. *Bordereaux v. Walker,* 85 Ill. App. 86.

**2. Covenant to Redeliver Possession in Particular Condition.**—*Reed v. Harrison,* 196 Pa. St. 337.

**3. In Repair or Good Repair.**—*Lehmaier v. Jones,* 100 N. Y. App. Div. 495.

**Restoring Buildings Destroyed by Fire.**—*Gettysburg Electric R. Co. v. Electric Light, etc., Co.,* 200 Pa. St. 372.

**7. Reasonable Wear and Tear.**—*Hawkins v. Ringler,* 47 N. Y. App. Div. 262; *Browning v. Garvin,* 48 N. Y. App. Div. 140.

**9. "Accidents by Fire."**—*Ford v. Phillips,* 22 Quebec Super. Ct. 296.

**Elements.**—The term "elements" in a provision for the return of the property in as good condition as it was received, damage by the elements excepted, does not include the destruction of the premises by fire started from fires maintained on the premises. *Porter v. Allen,* 8 Idaho 358.

**10. Destruction of Buildings.**—*Porter v. Allen,* 8 Idaho 358; *Daggett v. Webb,* 30 Tex. Civ. App. 415.

**700. 3. Willoughby v. Atkinson Furnishing Co.,** 93 Me. 185; *Darlington v. De Wald,* 194 Pa. St. 305; *Daggett v. Webb,* 30 Tex. Civ. App. 415.

Where a lease contained a covenant to repair and a further covenant to deliver up the premises in good repair, and during the term damages were recovered by the landlord for breach of the covenant to repair, the true measure of damages for failure to deliver up the premises in good repair was held to be the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the term less the sum recovered by the landlord during the term for breach of the covenant to repair. *Ebbets v. Conquest,* 82 L. T. N. S. 560.

## LEGACIES AND DEVISES.

By J. E. BRADY.

**709. I. DEFINITIONS AND GENERAL PRINCIPLES—A Legacy.**—See note 1.

**710.** See notes 2, 5, 6.

**711. A Devise.**—See note 1.

*Bequest or Devise of Income, Rents, Etc.*—See note 4.

**II. CLASSES OF LEGACIES AND DEVISES AND INCIDENTS THEREOF—**

**1. General Legacies—***a. DEFINITION.*—See note 7.

**709. 1. Legacy Defined.**—*Matter of Campbell,* 27 Utah 361.

**710. 2. Provision for "Sufficient Clothing."**—*White's Estate,* 23 Pa. Super. Ct. 552, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710.

**5. Legacy Synonymous with Bequest.**—*Matter of Campbell,* 27 Utah 361.

**6. "Legacy" Primarily Applicable to Personality Only.**—*Matter of Campbell,* 27 Utah 361.

**711. 1. Devise Defined.**—*Matter of Dailey,* (Surrogate Ct.) 43 Misc. (N. Y.) 552; *Matter of Campbell,* 27 Utah 361.

**4. Devise of Rents, Profits, and Income of Land.**—*Mayes v. Karn,* 115 Ky. 264; *Gidley v. Lovenberg,* 35 Tex. Civ. App. 203, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711.

**A Devise of the "Use and Occupation"** of real estate carries with it the title to the property itself. *Mayer v. Mayer,* 78 S. W. Rep. 883, 25 Ky. L. Rep. 1823.

**7. General Legacy Defined.**—*New Albany Trust Co. v. Powell,* 29 Ind. App. 494, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711; *Crawford v. McCarthy,* 159 N. Y. 514; *Matter of Fisher,* 93 N. Y. App. Div. 186; *Martin for Opinion,* 25 R. I. 1; *Rogers v. Rogers,* 67 S. Car. 168, 100 Am. St. Rep. 721, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 711.

**A General Legacy Is Payable Out of the Personal Estate Only,** in the absence of a contrary expression of desire on the part of the testator. *Matter of Grotrian,* (Surrogate Ct.) 30

**712.** *c.* INSTANCES OF GENERAL LEGACIES — Pecuniary Legacies. — See note 8.

A Bequest of Goods and Chattels. — See note 12.

**713.** Where Stocks, Bonds, or Other Securities. — See notes 1, 2, 3.

A Bequest of All the Testator's Property. — See note 7.

Devise or Bequest of Residue. — See notes 8, 9, 10.

**714.** 2. Specific Legacies and Devises — *a.* DEFINITION. — See note 1.

*b.* CHARACTERISTICS AND INCIDENTS — Accessions. — See note 5.

Exoneration from Charges and Incumbrances. — See note 8.

**715.** See note 1.

Ownership by Testator. — See note 3.

Construction of Legacies as Specific Not Favored. — See notes 7, 8.

*c.* INSTANCES OF SPECIFIC LEGACIES AND DEVISES — (1) *Specific Property in General.* — See note 9.

**716.** Enumeration of Specific Articles in Residuary Clause. — See notes 4, 5.

Misc. (N. Y.) 23. For a full discussion of this subject, see the title MARSHALING DECEDENTS' ESTATES, vol. 19, p. 1349 *et seq.*

**712.** 8. Pecuniary Legacies. — Rexford v. Bacon, 195 Ill. 81; Adair v. Adair, 11 N. Dak. 175; Martin for Opinion, 25 R. I. 1. See also Matter of Fisher, 93 N. Y. App. Div. 186; Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

Annuities. — Turner v. Mather, 86 N. Y. App. Div. 172, affirmed 179 N. Y. 581.

12. Goods and Chattels of Designated Quantity or Amount. — Kingsland v. Kingsland, 60 N. J. Eq. 65.

**713.** 1. Bequest of Stocks, Bonds, and Other Securities. — Slade v. Talbot, 182 Mass. 256; Blair v. Scribner, 65 N. J. Eq. 498; Spencer v. De Witt C. Hay Library Assoc., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 393; Martin for Opinion, 25 R. I. 1, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713. See also Matter of Lyle, (Surrogate Ct.) 41 Misc. (N. Y.) 596.

2. Ownership of Securities of Kind Bequeathed. — Martin for Opinion, 25 R. I. 1, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713.

3. Ownership of Exact Number of Shares Bequeathed. — Martin for Opinion, 25 R. I. 1, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713.

7. Bequest of Proportionate Part. — Blakeslee v. Pardee, 76 Conn. 263.

A Bequest of the Contents of a Deposit Vault to different legatees in certain proportions, where the contents consisted of stocks, bonds, etc., and were incapable of a proper division without first being turned into money, was held to be a general legacy. Matter of Fisher, 93 N. Y. App. Div. 186.

8. Devise or Bequest of Residue Held General. — Martin for Opinion, 25 R. I. 1.

9. Enumeration of Particular Articles in Residuary Clause. — Martin for Opinion, 25 R. I. 1.

10. Legacies Given Out of Residuum. — See Adair v. Adair, 11 N. Dak. 175.

**714.** 1. Specific Legacy or Devise Defined — England. — Barr v. Androssan Castle, Curling Club, (Sc. Ct. of Sess.) 3 F. 903.

Canada. — See *In re Mackey*, 6 Ont. L. Rep. 294, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

Illinois. — Rexford v. Bacon, 195 Ill. 81,

citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714; Daul v. Arnold, 201 Ill. 579.

Indiana. — New Albany Trust Co. v. Powell, 29 Ind. App. 494, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

Missouri. — Waters v. Hatch, 181 Mo. 262, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

New Jersey. — Kingsland v. Kingsland, 60 N. J. Eq. 65.

New York. — Matter of Fisher, 93 N. Y. App. Div. 186.

North Dakota. — Adair v. Adair, 11 N. Dak. 175.

Rhode Island. — Martin for Opinion, 25 R. I. 1; *In re Tillinghast*, 23 R. I. 121.

South Carolina. — Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

Utah. — Matter of Campbell, 27 Utah 361.

5. Accessions. — See Southgate v. Continental Trust Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

8. Municipal Assessments. — Where real property was left in trust to pay the income to the beneficiary for life it was held that an assessment for street improvements should be paid from the body of the estate and not from the income. Peltz v. Learned, 70 N. Y. App. Div. 312.

**715.** 1. Devisee Must Pay a Mortgage on Real Property Devised to Him where the property was mortgaged at the time the will was made. Jackson v. Bevins, 74 Conn. 96.

3. Subject of Specific Legacy Must Be Part of Testator's Estate. — Hosea v. Skinner, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653.

7. Construction of Legacies as Specific Not Favored. — Blair v. Scribner, 65 N. J. Eq. 498; Cramer v. Cramer, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 17; Martin for Opinion, 25 R. I. 1.

8. Intent of Testator Governs. — New Albany Trust Co. v. Powell, 29 Ind. App. 494; Blair v. Scribner, 65 N. J. Eq. 498; Cramer v. Cramer, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 17; Martin for Opinion, 25 R. I. 1; *In re Bradley*, 73 Vt. 253.

9. Bequest of Specific Chattel. — Matter of Campbell, 27 Utah 361. See also Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

**716.** 4. Enumeration of Specific Things in

**716.** Personalty Identified by Location. — See note 9.

**717.** (2) *Money*. — See notes 1, 2, 3, 5, 7.

**718.** A Bequest of the Residue of a Specific Fund. — See note 2.

(3) *Stocks, Bonds, and Other Securities*. — See notes 5, 6.

Descriptive Words Indicative of Intent. — See note 7.

**719.** See note 1.

The Fact that the Testator Owned Securities of the Kind and Amount Bequeathed. —

See notes 6, 7.

Where the Bequest Is of a Certain Sum of Designated Stocks. — See note 8.

**720.** See note 1.

**721.** 3. Demonstrative Legacies — *a*. DEFINITION. — See note 5.

*b*. CHARACTERISTICS AND INCIDENTS. — See notes 6, 7, 8.

**722.** *c*. INSTANCES OF DEMONSTRATIVE LEGACIES. — See notes 4, 5.

Residuary Bequest. — Martin for Opinion, 25 R. I. 1.

**716.** 5. Enumerated Articles Distinguished from Residue. — Daul v. Arnold, 201 Ill. 579, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 716.

9. Personalty Identified by Location. — Page v. Eldredge Public Library, 60 N. H. 575.

Bequest of "My Personal Property of Which I May Die Possessed." — Currier v. Currier, 70 N. H. 145.

A Bequest of the Income of the proceeds of real estate to the beneficiary for life, the principal to go to others after his death, is specific. Martin for Opinion, 25 R. I. 1.

**717.** 1. Specific Bequest of Money. — See Martin for Opinion, 25 R. I. 1.

2. Bequest of Debt Due Testator. — *In re Granger*, (1900) 2 Ch. 756, 60 L. J. Ch. 789, 83 L. T. N. S. 209, 48 W. R. 673, 49 W. R. 197; Angus v. Noble, 73 Conn. 56. See also Blair v. Scribner, 65 N. J. Eq. 498; Adair v. Adair, 11 N. Dak. 175.

A Bequest of "Claims of Every Kind and Description" and "All Interest" in a Certain Estate is specific. Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

3. Bequest of Specified Fund. — *In re Tillinghast*, 23 R. I. 121.

"All Cash Moneys Whatsoever Now Belonging to Me." — Gilchrist's Estate, 9 Pa. Dist. 249, 23 Pa. Co. Ct. 602.

5. Money Deposited in Particular Bank. — See Adair v. Adair, 11 N. Dak. 175.

7. Proceeds of a Certain Bond or Mortgage. — See Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

**718.** 2. Residue Given Subject to Payment of Specific Gifts. — Barrett's Estate, 22 Pa. Super. Ct. 75, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718, and quoting the entire text paragraph.

5. Specific Bequest of Stocks, Bonds, Etc. — *District of Columbia*. — Douglass v. Douglass, 13 App. Cas. (D. C.) 21.

*Illinois*. — Rexford v. Bacon, 195 Ill. 81.

*Indiana*. — New Albany Trust Co. v. Powell, 29 Ind. App. 494.

*Missouri*. — Waters v. Hatch, 181 Mo. 262.

*New Jersey*. — Blair v. Scribner, 65 N. J. Eq. 498.

*New York*. — Hosea v. Skinner, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653; Matter of Robinson, (Surrogate Ct.) 37 Misc. (N. Y.)

336; Cramer v. Cramer, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 17.

*Rhode Island*. — Martin for Opinion, 25 R. I. 1.

6. Reduction of Notes. — Where a note has been reduced by payments the legatee takes the note as it stands at the testator's death. Martin for Opinion, 25 R. I. 1.

7. Descriptive Words Indicative of Intent. — Martin for Opinion, 25 R. I. 1.

**719.** 1. Words Showing Intent in General. — A legacy of a number of shares of stock, a portion of which were referred to as being "now pledged as collateral," was held to be specific. Matter of Lyle, (Surrogate Ct.) 41 Misc. (N. Y.) 596.

6. Ownership by Testator Alone of Shares Sufficient to Satisfy Legacies. — New Albany Trust Co. v. Powell, 29 Ind. App. 494, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 715 [719].

7. Separation of Bequests into Stocks and Money. — New Albany Trust Co. v. Powell, 29 Ind. App. 494, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 715 [719].

8. Bequest of Stock Estimated in Money. — Piper v. Adair, (Ky. 1901) 64 S. W. Rep. 645; Blair v. Scribner, 65 N. J. Eq. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

**720.** 1. Bequest of Money Payable Out of Designated Stock. — See Blair v. Scribner, 65 N. J. Eq. 498.

**721.** 5. Demonstrative Legacy Defined. — Matter of Fisher, 93 N. Y. App. Div. 186; Matter of Warner, (Surrogate Ct.) 39 Misc. (N. Y.) 432; Baptist Female University v. Borden, 132 N. Car. 476; Adair v. Adair, 11 N. Dak. 175; Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721.

6. Similarity Between Demonstrative and Specific Legacies. — Matter of Fisher, 93 N. Y. App. Div. 186; Baptist Female University v. Borden, 132 N. Car. 476; Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

7. Demonstrative Legacy Abatable as to Amount Unpaid After Exhausting Fund Designated. — Matter of Warner, (Surrogate Ct.) 39 Misc. (N. Y.) 432.

8. Demonstrative Legacies Not Subject to Ademption. — Baptist Female University v. Borden, 132 N. Car. 476; Adair v. Adair, 11 N. Dak. 175; Rogers v. Rogers, 67 S. Car. 168, 100 Am. St. Rep. 721.

**722.** 4. Income of Specified Fund. — Angus v. Noble, 73 Conn. 56.

**723.** 4. **Residuary Legacies and Devises** — *a.* DEFINITION. — See note 3.  
*b.* WHAT CONSTITUTES RESIDUARY LEGACY OR DEVISE. — See notes 4, 5, 6.

**724.** **Bequests Made After Residuary Clause.** — See note 3.

*c.* WHAT PASSES BY RESIDUARY BEQUEST. — See note 4.

**725.** See notes 2, 4.

**726.** 5. **Cumulative and Repeated or Substituted Bequests** — *b.* RULES OF CONSTRUCTION — (1) *Intention of Testator.* — See note 5.

(2) *Ascertainment of Intention* — (a) **Internal Evidence** — *bb.* LANGUAGE EXPRESSING INTENT. — See note 7.

**727.** See note 4.

**729.** (b) **Extrinsic Evidence** — *bb.* LEGACIES OF QUANTITY GIVEN BY SAME INSTRUMENT — (aa) *Legacies Equal in Amount.* — See note 7.

(bb) *Legacies Unequal in Amount.* — See note 9.

**730.** *cc.* LEGACIES OF QUANTITY GIVEN BY DIFFERENT INSTRUMENTS. — See note 1.

*c.* INCIDENTS OF CUMULATIVE AND SUBSTITUTED BEQUESTS. — See note 10.

**731.** 6. **Substitutional Bequests (with Respect to Persons).** — See note 3.

The Incidents. — See note 5.

**722.** 5. **Bequest of Money Out of Stock, Etc.** — *Olcott v. Oesowski*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 376. See also *Matter of Fisher*, 93 N. Y. App. Div. 186; *Rogers v. Rogers*, 67 S. Car. 168, 100 Am. St. Rep. 721.

**723.** 3. **Definition.** — *Prison Assoc. v. Russell*, 103 Va. 563; *In re Bradley*, 123 Wis. 186.

There May Be in the Same Will Two Good Residuary Devises, the One Limited to Freeholds, the Other Limited to Copyholds. — *In re Mason*, (1901) 1 Ch. 619, affirmed (1903) A. C. 1.

4. **No Particular Form of Words Required.** — *Prison Assoc. v. Russell*, 103 Va. 563; *Lynch v. Spicer*, 53 W. Va. 426, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723.

5. **Presumption in Favor of Residuary Legatee.** — *Prison Assoc. v. Russell*, 103 Va. 563.

6. **Use of Word "Residue," etc., Not Necessary to Constitute Residuary Clause.** — *Prison Assoc. v. Russell*, 103 Va. 563.

**724.** 3. **Bequests Made After Residuary Clause.** — *Prison Assoc. v. Russell*, 103 Va. 563.

4. **What Passes under Residuary Clause** — *In General.* — *Matter of Grannis*, 142 Cal. 1; *Langley v. Westchester Trust Co.*, 180 N. Y. 326; *Wood's Estate*, 209 Pa. St. 16; *Martin for Opinion*, 25 R. I. 1; *Prison Assoc. v. Russell*, 103 Va. 563.

A gift of "the rest of my plate and household effects" passes to the legatee title to wines which were in the house. *Brinckerhoff v. Farias*, 52 N. Y. App. Div. 256, affirmed 170 N. Y. 427.

Where a testator sold stocks which he had bequeathed and invested the proceeds in other securities the latter passed under the residuary clause. *Hosea v. Skinner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 653.

**725.** 2. **Liberal Construction to Prevent Intestacy.** — *Matter of Grannis*, 142 Cal. 1; *Davis v. Davis*, 62 Ohio St. 411, 78 Am. St. Rep. 725; *Prison Assoc. v. Russell*, 103 Va. 563.

4. *Fiske v. Fiske*, 26 R. I. 509, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725.

**726.** 5. **Intention of Testator the Rule of Construction.** — *Rexford v. Bacon*, 195 Ill. 81; *Sondheim v. Fechenbach*, (Mich. 1904) 100 N. W. Rep. 586; *Adair v. Adair*, 11 N. Dak. 175.

See also *Blakeslee v. Pardee*, 76 Conn. 263; *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

7. **Where Codicil Revokes First Legacy.** — *Rexford v. Bacon*, 195 Ill. 81.

**727.** 4. **Intent to Make Legacies Cumulative.** — *Blakeslee v. Pardee*, 76 Conn. 263.

**729.** 7. **Legacies of Equal Amount** — **Repetition Presumed.** — *Waters v. Hatch*, 181 Mo. 262. See also *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

9. **Legacies of Unequal Amount Presumed to Be Cumulative.** — *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150. See also *Blakeslee v. Pardee*, 76 Conn. 263.

Where There Are Not Sufficient Assets to pay both legacies together with the other bequests made in the will the second legacy though different in amount from the first and given by a different instrument will be regarded as taking the place of the first. *Sondheim v. Fechenbach*, (Mich. 1904) 100 N. W. Rep. 586.

**730.** 1. **Legacies Given by Different Instruments Held Prima Facie Cumulative.** — *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

10. **Substituted and Added Legacies Subject to Same Conditions as First or Primary Legacy.** — *Rexford v. Bacon*, 195 Ill. 81, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 730.

**731.** 3. **Legacies Held Substitutional with Respect to Persons.** — *De Haven's Estate*, 207 Pa. St. 147.

**Lapsed Gift — Codicil.** — Where a gift to a corporation lapsed by reason of the corporation consolidating with another corporation and thereby changing its corporate identity, a codicil which did not refer to the gift, though made after the consolidation, was held not to substitute the new corporation as beneficiary. *Gladning v. St. Matthew's Church*, 25 R. I. 628, 105 Am. St. Rep. 904.

5. **Substitutional Bequest Subject to Same Con-**

**731.** 7. Vested or Contingent Bequests. — See note 6.

**732.** 8. Conditional Bequests — *a.* DEFINITION. — See note 2.

*b.* CONDITION PRECEDENT. — See note 3.

Illustrations of Precedent Conditions. — See notes 5, 6, 7.

**733.** *c.* CONDITION SUBSEQUENT. — See note 1.

Illustrations of Subsequent Conditions. — See note 4.

*d.* VALIDITY OF CONDITIONS. — See note 7.

*e.* PERFORMANCE — (1) *In General.* — See note 9.

**734.** (2) *Time for Performance.* — See note 2.

(4) *Effect of Impossibility of Performance* — *In Respect to Conditions Subsequent.* — See note 6.

**735.** IV. WHAT PROPERTY MAY BE DEVISED OR BEQUEATHED. — See note 1.

V. WHO MAY BE DEVISEES OR LEGATEES — 1. *In General.* — See note 2.

**736.** 4. Paramours and Illegitimate Children — *Paramour or Concubine.* — See note 9.

**738.** 5. Attesting Witnesses — *Gift to Attesting Witness Void.* — See notes 2, 3.

ditions as Primary Bequest. — *De Haven's Estate*, 207 Pa. St. 147.

**731.** 6. Distinction Between Vested and Contingent Legacies. — *Taylor v. Taylor*, 118 Iowa 407; *Rudd v. Cornell*, 58 N. Y. App. Div. 207, affirmed 177 N. Y. 114; *Mulvey v. Reilly*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 10; *Lewis v. Howe*, 174 N. Y. 340; *Clark v. Cammann*, 160 N. Y. 315; *Haug v. Schumacher*, 166 N. Y. 506; *Allison v. Allison*, 101 Va. 537; *In re Moran*, 118 Wis. 177.

**732.** 2. Condition May Be Either Precedent or Subsequent. — *Shuman v. Heldman*, 63 S. Car. 474.

3. Condition Precedent Such as Precedes Vesting. — *Shuman v. Heldman*, 63 S. Car. 474.

5. That Donee Live with Testator's Widow. — *Shuman v. Heldman*, 63 S. Car. 474.

6. If Donee Attain Age of Twenty-one Years. — *Compare Re Dennis*, 5 Ont. L. Rep. 46.

7. Learning of Trade. — *Colby v. Dean*, 70 N. H. 591.

**733.** 1. Condition Which May Accompany or Follow Vesting. — *Shuman v. Heldman*, 63 S. Car. 474. See also *In re Ross*, 7 Ont. L. Rep. 493.

4. Provision for Support of Another. — See *Roberts v. Crume*, 173 Mo. 572.

Provision for Preservation of a Residence and Pictures It Contained. — *Matter of Woods*, (Surrogate Ct.) 33 Misc. (N. Y.) 12, affirmed 61 N. Y. App. Div. 587.

Legacy to Church on Condition that Its Officers Care for and Annually Visit Testatrix's Grave. — *Congregational Church v. Cutler*, 76 Vt. 338.

7. Condition that Devisee Be Heard from Within Ten Years. — *Connor v. Sheridan*, 116 Wis. 666.

A Condition Against Remarriage by a Widow is not in contravention of public policy. *Overton v. Lea*, 108 Tenn. 505.

Condition that Donee Secure a Divorce. — A testator left property in trust for his daughter, the will providing that the trust should end upon the daughter's obtaining a divorce from her husband. It was held that the condition was not void on the ground that its object was to incite the daughter to secure a separation by divorce. *Ellis v. Birkhead*, 30 Tex. Civ. App. 529.

9. Condition that Donees Have a Useful Trade — Fulfilled by Becoming Schoolteacher, Bookkeeper, and Typewriter. — *Colby v. Dean*, 70 N. H. 591.

Condition that Beneficiary Be Christened and Known by a Specified Name. — *Smith v. Smith*, 64 Neb. 563.

Condition that Legatee "Be Living with Me at the Time of My Death." — *Kuhn's Estate*, 203 Pa. St. 17.

Condition of Payment of Legacies. — Where a residuary devise is conditioned upon the payment of certain legacies, no time being stated, the mere fact that they have not been paid does not constitute a breach of a condition subsequent such as will forfeit the estate. *Moore v. Moore*, 69 N. H. 420.

**734.** 2. Condition Must Be Performed Within a Reasonable Time. — *Colby v. Dean*, 70 N. H. 591; *Moore v. Moore*, 69 N. H. 420.

6. Legatee May Show Intention. — In an action by a legatee to recover a bequest upon a condition subsequent the legatee may show what his intention is in regard to the performance of the condition. *Congregational Church v. Cutler*, 76 Vt. 338.

**735.** 1. Insurance on the Life of a Testator may be bequeathed to a person having no insurable interest in the testator's life. *Fletcher v. Williams*, (Tex. Civ. App. 1902) 66 S. W. Rep. 860.

2. Slaves. — *Jervis v. Lewellyn*, 130 N. Car. 616.

**736.** 9. Gifts to Paramour or Concubine Valid. — See *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150; *In re Dries*, (N. J. 1903) 55 Atl. Rep. 314.

**738.** 2. Effect of Codicil. — A gift was made by a will to one of the attesting witnesses thereto; but a codicil, not attested by the beneficiary, was subsequently made affirming the gift. It was held that he thereby became entitled to the gift, and that his right was not affected by his acting as witness to a second codicil affirming the will and first codicil. *In re Trotter*, (1899) 1 Ch. 764, 68 L. J. Ch. 363, 80 L. T. N. S. 647, 47 W. R. 477.

3. Gift to Attesting Witness Void. — *Clark v. Miller*, 65 Kan. 726; *Martineau v. Simonson*,



**738.** Devise or Legacy Must Be Beneficial and Direct to Be Avoided. — See note 4.

**739.** A Gift to the Husband or Wife of a Subscribing Witness. — See note 6.

**740.** See note 3.

**742.** 9. Voluntary Unincorporated Associations — Charitable Devises to Unincorporated Associations. — See note 5.

**743.** VI. ACCEPTANCE AND REFUSAL — 1. Of Devises — *a.* IMPLIED ACCEPTANCE OF A DEVISE APPARENTLY BENEFICIAL — (1) *Rule Stated.* — See note 8.

**744.** *b.* ACCEPTANCE BY ACT OF THE DEVISEE. — See note 6.

**745.** 2. Of Legacies — *a.* ACCEPTANCE — (1) *In General.* — See note 2.

**746.** 3. Obligations and Estoppels Resulting from Acceptance of Legacies or Devises — *a.* IN GENERAL. — See note 1.

*b.* LEGACIES OR DEVISES BURDENED WITH A CONDITION. — See notes 4, 5.

**748.** VIII. LAPSED, VOID, REVOKED, AND REFUSED LEGACIES AND DEVISES — 2. When Legacy or Devise Will Lapse — *a.* DEATH OF BENEFICIARY — (1) *General Rule Stated.* — See note 2.

**749.** See note 1.

But a Legacy Given in Payment of a Debt. — See note 5.

59 N. Y. App. Div. 100; *In re Maybee*, 8 Ont. L. Rep. 601.

A Legacy under a Nuncupative Will is not rendered void by the legatee's giving evidence essential to the establishment of the will. *Smith v. Crotty*, 112 Ga. 905.

A Gift to an Attesting Witness Without Whose Evidence the Will Can Be Proved is valid. *Morse v. Tilden*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 560, modified 74 N. Y. App. Div. 132; *Matter of Owen*, 48 N. Y. App. Div. 507.

A Witness Attesting a Codicil does not thereby lose a gift given by the will where the codicil was not proved and did not benefit the attesting beneficiary. *Matter of Johnson*, (Surrogate Ct.) 37 Misc. (N. Y.) 334.

**738.** 4. Gift Must Be Beneficial. — See *Matter of Johnson*, (Surrogate Ct.) 37 Misc. (N. Y.) 334.

**739.** 6. Gift to Spouse of Witness. — Section 15 of the English Wills Act, 1837, provides that a devise to the wife of an attesting witness shall, so far as concerns such wife, be utterly null and void. *Aplin v. Stone*, (1904) 1 Ch. 543.

**740.** 3. Express Statute. — *Floore v. Green*, 83 S. W. Rep. 133, 26 Ky. L. Rep. 1073.

**742.** 5. Devises Held Invalid. — *Murray v. Miller*, 85 N. Y. App. Div. 414, affirmed 178 N. Y. 316.

**743.** 8. Law Presumes Acceptance of Devise Apparently Beneficial. — *Marshall v. Hartzfelt*, 98 Mo. App. 178.

**744.** 6. Entering into Possession of the Property Devised. — *Crumpler v. Barfield, etc., Co.*, 114 Ga. 570.

**745.** 2. Question for Jury. — Whether the beneficiary has accepted or refused a legacy is a question for the jury and in making such determination the words and actions of the legatee may be taken into consideration. *Wonsetler v. Wonsetler*, 23 Pa. Super. Ct. 321.

**746.** 1. One Accepting Benefit under Will Must Conform to Its Provisions — *Illinois*. — *Buchanan v. McLennan*, 192 Ill. 480; *Friederich v. Wombacher*, 204 Ill. 72.

*Kentucky*. — *Schaeffer v. Voght*, 113 Ky. 41; *Morrison v. Fletcher*, (Ky. 1905) 84 S. W. Rep.

548; *Chamberlain v. Berry*, (Ky. 1900) 56 S. W. Rep. 659; *Green v. Ponder*, 58 S. W. Rep. 605, 22 Ky. L. Rep. 716; *Bennett v. Bennett*, 65 S. W. Rep. 12, 23 Ky. L. Rep. 1281.

*New York*. — *Beetsen v. Stoops*, 31 N. Y. App. Div. 185.

*Pennsylvania*. — *Boileau's Estate*, 201 Pa. St. 493; *M'Kibbin's Estate*, 21 Pa. Super. Ct. 578.

*Texas*. — *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

*Canada*. — *McKean v. McKean*, 33 Nova Scotia 310.

4. Acceptance of Conditional Legacy or Devise. — *Ashman v. Harriman*, 72 N. H. 559.

5. Where Condition Is Performance of an Act. — *Jacoby's Estate*, 7 Northam. Co. Rep. (Pa.) 163.

**748.** 2. Death of Legatee or Devisee Before Testator — *California*. — *Matter of Sutro*, 139 Cal. 87.

*Connecticut*. — *Miller v. Metcalf*, 77 Conn. 176.

*Illinois*. — *Thornley v. Kershaw*, 109 Ill. App. 113, affirmed 204 Ill. 266; *Lash v. Lash*, 209 Ill. 595; *Dorsey v. Dodson*, 203 Ill. 32.

*Indiana*. — See *Ballard v. Camplin*, 161 Ind. 16.

*New Hampshire*. — *Page v. Eldredge Public Library*, 69 N. H. 575.

*New Jersey*. — *Reichle v. Steitz*, 64 N. J. Eq. 789.

*New York*. — *Matter of Woolley*, (Surrogate Ct.) 38 Misc. (N. Y.) 353, modified 78 N. Y. App. Div. 224; *Matter of Riches*, (Surrogate Ct.) 37 Misc. (N. Y.) 464; *Matter of Whiting*, (Surrogate Ct.) 33 Misc. (N. Y.) 274; *Langley v. Westchester Trust Co.*, 180 N. Y. 326.

*Ohio*. — See *Eaker v. Carpenter*, 69 Ohio St. 15.

*Pennsylvania*. — *Gregg v. Keenan*, 9 Pa. Dist. 262, 30 Pittsb. Leg. J. N. S. 345.

*Rhode Island*. — *Fiske v. Fiske*, 26 R. I. 509.

**749.** 1. Death After Testator but Before Interest Has Vested. — *Gillett v. Gillett*, 109 Ill. App. 75, affirmed 208 Ill. 473, 100 Am. St. Rep. 234.

5. Legacy Given in Payment of a Debt. — See *Ballard v. Camplin*, 161 Ind. 16.

- 750.** (2) *Death After Vesting of Interest.* — See notes 1, 2.  
*b. DISSOLUTION OF CORPORATION OR ASSOCIATION.* — See note 4.  
*c. NO ONE IN EXISTENCE CAPABLE OF TAKING.* — See note 5.  
**751.** *d. CHANGE OF SITUATION.* — See note 1.  
*f. CONDITIONAL OR CONTINGENT GIFT.* — See note 4.  
*g. IN THE CASE OF A GIFT TO SEVERAL PERSONS* — (1) *Distributively.* — See note 6.  
(2) *As a Class.* — See note 8.  
**752.** *Gift to a Class as Tenants in Common.* — See note 1.  
*3. What Interest Lapses.* — See note 5.  
*Thus, Where a Life Tenant Dies Before the Testator.* — See note 6.  
**753.** *Legacy Charged on Land Devised.* — See note 2.  
*4. Prevention of Lapses* — *a. BY TESTAMENTARY DIRECTIONS* — (1) *Power of Testator.* — See notes 4, 5.  
(2) *Provision for Substitution or Succession.* — See note 6.  
**754.** *The Use of the Term "or."* — See notes 1, 2.  
(3) *Effect of Words of Limitation.* — See note 5.  
**755.** *b. BY STATUTORY PROVISIONS* — (1) *General Review of Statutes.* — See notes 1, 2, 3, 4, 5, 6.

**750. 1. No Lapse After Legacy or Devise Has Vested.** — *Ballard v. Camplin*, 161 Ind. 16, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 750.

**2. Death Before Time of Payment.** — *Dorsey v. Dodson*, 203 Ill. 32; *Ballard v. Camplin*, 161 Ind. 16, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 750.

**4. Dissolution of Corporation or Association.** — *Gladding v. St. Matthew's Church*, 25 R. I. 628, 105 Am. St. Rep. 904.

**5. No One Capable of Taking.** — *Spencer v. De Witt C. Hay Library Assoc.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 393.

**Where the Will Does Not Name a Beneficiary** and where, at the death of the testator, there is no one who could take under the clause of the will making the bequest, the bequest will fail. *Lehnhoff v. Theine*, 184 Mo. 346.

**751. 1. Change of Situation.** — A testator left his property to his wife, directing that upon her death his slaves should be freed, and provided that each slave should receive a pecuniary legacy. It was held that the emancipation of the slaves during the life of the widow did not take away the slaves' rights as legatees. *Miller v. Wilson*, 66 S. W. Rep. 755, 23 Ky. L. Rep. 2130.

A bequest was made to be divided equally among the school districts of a certain town. After the execution of the will the number of districts was reduced, such change being known to the testator. It was held that the bequest should go to the districts existing at the death of the testator and should be divided between them proportionately to the number of pupils in each. *Westgate v. Haverhill*, 68 N. H. 593.

**4. Contingent Gift.** — *Henning v. Maclean*, 2 Ont. L. Rep. 169, affirmed 4 Ont. L. Rep. 666.

**6. Gift to Several Taking Distributively.** — *Langley v. Westchester Trust Co.*, 180 N. Y. 326.

**8. Gift to Several as a Class.** — *Martineau v. Simonson*, 59 N. Y. App. Div. 100. See also *Rudolph v. Rudolph*, 207 Ill. 274; *Baker v. Carpenter*, 69 Ohio St. 15.

**752. 1. Gift to a Class as Tenants in Common.** — *Magnuson v. Magnuson*, 197 Ill. 496. See also *Martineau v. Simonson*, 59 N. Y. App. Div. 100.

**5. Only the Interest of the Person Dying Lapses.** — *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

**6. Estate in Remainder Not Extinguished.** — *Fiske v. Fiske*, 26 R. I. 509.

**753. 2. Legacy Charged on Devise Does Not Fail When Devise Lapses.** — *Gilroy v. Richards*, 26 Tex. Civ. App. 355.

**4. Testator May Prevent Lapse.** — *Ballard v. Camplin*, 161 Ind. 16, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**Codicil.** — A bequest to a corporation which ceases to exist during the life of the testator is not revived by a codicil subsequently made which makes no reference to the bequest. *Gladding v. St. Matthew's Church*, 25 R. I. 628, 105 Am. St. Rep. 904.

**5. Lapse Prevented by Implication.** — *Ballard v. Camplin*, 161 Ind. 16, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

**Under a California Statute** providing that a gift lapses unless a contrary intention on the part of the testator appears, the fact that a legacy was given in reparation of a wrong done to the legatee will not prevent its lapse. *Matter of Sutro*, 139 Cal. 87.

**6. No Lapse Where Substitution or Succession Provided For.** — *Miller v. Metcalf*, 77 Conn. 176; *Jones v. Hand*, 78 N. Y. App. Div. 56, affirmed 175 N. Y. 519.

**754. 1. Term "or" Implies Substitution.** — *Zabriskie v. Huyler*, 62 N. J. Eq. 697.

**2. Legacy or Devise to a Person "or His Heirs" Will Not Lapse.** — *Zabriskie v. Huyler*, 62 N. J. Eq. 697.

**A Legacy to a Person or His Legal Representatives** does not lapse if the beneficiary dies leaving children. *Miller v. Metcalf*, 77 Conn. 176.

**5. Words of Limitation Will Not Prevent Lapse.** — *Zabriskie v. Huyler*, 62 N. J. Eq. 697.

**755. 1. Statute Exists in Ontario.** — See *In re Hunt*, 5 Ont. L. Rep. 197.

**756.** (2) *Construction and Effect of Statutes* — (a) Who Are Children or Other Descendants of Testator. — See notes 1, 5.

(b) Who Are Relations of Testator. — See note 9.

**757.** (e) Children of Legatee or Devisee Take Directly from Testator — Debts Due Testator by Original Legatee or Devisee. — See note 9.

(f) Application to Legacies or Devises to a Class — In the United States. — See note 10.

(g) Retroactive Effect. — See note 15.

**758.** (i) Statute Cannot Control if Inconsistent with Will. — See notes 2, 3.

**5. What Legacies or Devises Are Void** — *b. GIFT TO DEAD PERSON* — (1) *General Rule*. — See note 6.

**760.** 6. *Adeemption and Revocation* — *c. CONVEYANCE OF LAND DEVISED*. — See note 2.

*d. REALIZING ON SECURITIES*. — See note 4.

**8. Devolution** — *a. WHERE THERE IS NO RESIDUARY CLAUSE*. — See note 9.

**761.** *b. WHERE THERE IS A RESIDUARY CLAUSE* — (1) *Legacies* — (a) *Rule Stated*. — See note 2.

**755.** 2. *The Illinois Statute*. — Rudolph v. Rudolph, 207 Ill. 274.

3. *Statutes Applying to Children or Other Descendants*. — Ballard v. Camplin, 161 Ind. 16; Matter of Hafner, 45 N. Y. App. Div. 549; People's Trust Co. v. Flynn, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 6.

4. *The New Jersey Statute*. — Canfield v. Canfield, 62 N. J. Eq. 578; Reichle v. Steitz, 64 N. J. Eq. 789.

*The Pennsylvania Statute*. — Phillips's Estate, 17 Pa. Super. Ct. 103; Harrison's Estate, 18 Pa. Super. Ct. 588, affirmed 202 Pa. St. 331.

5. *Statutes Extending to Children or Any Other Relatives*. — Matter of Sutor, 139 Cal. 87; Matter of Ross, 140 Cal. 282; Baker v. Carpenter, 69 Ohio St. 15.

6. *Statutes Extending to All Beneficiaries*. — Matter of Nicholson, 115 Iowa 493, 91 Am. St. Rep. 175; Stockwell v. Bowman, 67 S. W. Rep. 379, 23 Ky. L. Rep. 2304; Newton v. Southern Baptist Theological Seminary, 115 Ky. 414.

**756.** 1. *A Legacy to an Adopted Child* is not kept from lapsing by the Pennsylvania statute. Phillips's Estate, 17 Pa. Super. Ct. 103.

5. *Legacy to Son-in-Law Will Lapse*. — See Ballard v. Camplin, 161 Ind. 16.

9. *Legacy or Devise to Husband or Wife*. — Canfield v. Canfield, 62 N. J. Eq. 578.

**757.** 9. *Ohio*. — Baker v. Carpenter, 69 Ohio St. 15.

10. *Legacy or Devise to Several as a Class*. — Rudolph v. Rudolph, 207 Ill. 274, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757; People's Trust Co. v. Flynn, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 6.

*Where Member Dead When Will Executed*. — The statute does not apply in a case where a member of a class, to which a gift was made, was dead at the time the will was executed. Matter of Nicholson, 115 Iowa 493, 91 Am. St. Rep. 175.

15. *Statute Does Not Apply Where Legatee or Devisee Died Before Passage Thereof*. — Reichle v. Steitz, 64 N. J. Eq. 789.

**758.** 2. *Statute Does Not Control When Opposed to Testator's Intention*. — Rudolph v. Ru-

dolph, 207 Ill. 274, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757, 758.

3. *Burden of Proof—Showing Insufficient to Prevent Application of Statute*. — Rudolph v. Rudolph, 207 Ill. 274, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757, 758.

6. *Gift Lapses*. — Matter of Nicholson, 115 Iowa 493, 91 Am. St. Rep. 175.

**760.** 2. *Revocation by Conveyance*. — See the annotations to the title ADEEMPTION OF LEGACIES, vol. 1, pp. 623-627.

*Legacy Charged on Devise*. — A conveyance by a testator during his lifetime to a devisee of real estate, of the land devised to him, annuls a legacy charged upon the devise. Marshall v. Hartzfelt, 98 Mo. App. 178.

4. *Collection of Notes*. — Martin for Opinion, 25 R. I. 1.

9. *Lapsed or Void Gifts as in Case of Intestacy Where Will Contains No Residuary Clause*. — Clark v. Cammann, 160 N. Y. 315; Matter of Riches, (Surrogate Ct.) 37 Misc. (N. Y.) 464.

*The Devolution Act of Ontario Does Not Apply Where a Testator Fails to Dispose of His Residuary Estate*. — In re Harrison, 2 Ont. L. Rep. 217.

**761.** 2. *Lapsed and Void Legacies Pass under Residuary Clause—Illinois*. — Dorsey v. Dodson, 203 Ill. 32.

*Massachusetts*. — Dexter v. Harvard College, 176 Mass. 192.

*Missouri*. — Dozier v. Dozier, 183 Mo. 137. *New York*. — Ward v. Stanard, 82 N. Y. App. Div. 386; Spencer v. De Witt C. Hay Library Assoc., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 393; Cramer v. Cramer, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 17; Matter of Whiting, (Surrogate Ct.) 33 Misc. (N. Y.) 274; Langley v. Westchester Trust Co., 180 N. Y. 326. See also Gallavan v. Gallavan, 57 N. Y. App. Div. 320; Matter of Woolley, 78 N. Y. App. Div. 224.

*Pennsylvania*. — Wood's Estate, 209 Pa. St. 16; Conway's Estate, 18 Lanc. L. Rev. 129.

*Rhode Island*. — Fiske v. Fiske, 26 R. I. 509.

*Texas*. — Lenz v. Sens, 27 Tex. Civ. App. 442.

*Virginia*. — Prison Assoc. v. Russell, 103 Va. 563.

*Canada*. — In re Smith, 7 Ont. L. Rep. 619;

Walsh v. Fleming, 10 Ont. L. Rep. 226,

**762.** See note 2.

Residue of Particular Fund. — See note 3.

(b) When Lapsed or Void Legacies Are Excluded from Residuary Clause. — See note 4.

**763.** (2) *Devisees* — (a) Common-law Rule. — See note 4.

**764.** Distinction Between Lapsed and Void Devise. — See note 4.

(b) Modern Rule. — See note 5.

**765.** See note 1.

c. WHERE RESIDUARY GIFT FAILS. — See notes 3, 4.

**766.** A Revoked Bequest or Devise. — See note 1.

d. LEGACY CHARGED ON DEVISE. — See note 4.

**767.** Legacy Excepted from Devise. — See note 1.

e. VOID LIMITATION OVER OR PRECEDENT ESTATE. — See notes

2, 3.

**768.** IX. CONTRACTS AND COMPROMISES BETWEEN LEGATEES AND DEVISEES. — See note 2.

**769.** X. SATISFACTION — 1. Satisfaction of Claim by Legacy or Devise to Creditor — b. STATEMENT OF RULE. — See note 5.

**770.** c. RULE ONE OF CONSTRUCTION — (1) *Intention of Testator Governs*. — See notes 5, 6, 7.

Kentucky Statute — Lapsed Legacy Does Not Pass to Residuary Legatee. — Schroeder v. Bohlsner, 84 S. W. Rep. 535, 27 Ky. L. Rep. 188.

**762.** 2. Reason of Rule. — Dorsey v. Dodson, 203 Ill. 32; Wood's Estate, 209 Pa. St. 16; Prison Assoc. v. Russell, 103 Va. 563.

3. Rights of Residuary Legatee of Particular Fund. — See Davis v. Davis, 62 Ohio St. 411, 78 Am. St. Rep. 725.

4. Testator May Exclude Lapsed and Void Legacies from Residuary Clause. — Lenz v. Sens, 27 Tex. Civ. App. 442; Walsh v. Fleming, 10 Ont. L. Rep. 226.

**763.** 4. Heirs at Law and Not Residuary Devisees Entitled to Lapsed or Void Devises. — See Gallavan v. Gallavan, 57 N. Y. App. Div. 320; Holton v. Jones, 133 N. Car. 399.

**764.** 4. Distinction Denied. — Gallavan v. Gallavan, 57 N. Y. App. Div. 320.

5. Lapsed or Void Devise Passes to General Residuary Devisee. — Gallavan v. Gallavan, 57 N. Y. App. Div. 320.

**765.** 1. Contrary Intent of Testator. — Holton v. Jones, 133 N. Car. 399.

3. Where Residuary Bequest or Devise Lapses or Is Void. — Lyman v. Coolidge, 176 Mass. 7; Spencer v. De Witt C. Hay Library Assoc., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 393. See also Magnuson v. Magnuson, 197 Ill. 496; Prison Assoc. v. Russell, 103 Va. 563.

4. Lapse or Invalidity as to One of Several Residuary Legatees or Devisees — *Illinois*. — Dorsey v. Dodson, 203 Ill. 32; Magnuson v. Magnuson, 197 Ill. 496.

*Kentucky*. — Stockwell v. Bowman, 67 S. W. Rep. 379, 23 Ky. L. Rep. 2304.

*Massachusetts*. — Lyman v. Coolidge, 176 Mass. 7.

*New Jersey*. — Canfield v. Canfield, 62 N. J. Eq. 578.

*New York*. — Matter of Woolley, 78 N. Y. App. Div. 224.

*Pennsylvania*. — Conway's Estate, 18 Lanc. L. Rev. 129.

*Virginia*. — See Prison Assoc. v. Russell, 103 Va. 563.

Lapse of General Legacy to One of Several Residuary Legatees. — Where a general legacy to one of several residuary legatees lapses by the death of the beneficiary, the legacy passes under the residuary clause, but the deceased legatee's share of that legacy as residuary legatee passes to the testator's next of kin. Matter of Whiting, (Surrogate Ct.) 33 Misc. (N. Y.) 274.

**766.** 1. Revoked Bequest or Devise. — Magnuson v. Magnuson, 197 Ill. 496.

4. Lapsed Legacy Sinks into Devise on Which Charged. — Ward v. Stanard, 82 N. Y. App. Div. 386, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

**767.** 1. Lapse of Legacy Excepted from Devise Does Not Inure to Benefit of Devisee. — Ward v. Stanard, 82 N. Y. App. Div. 386, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766.

2. Void Limitation Over. — A void devise in trust, subject to a life estate, passes to the heirs of the testator subject to the life estate. Murray v. Miller, 85 N. Y. App. Div. 414, affirmed 178 N. Y. 316.

3. Where Precedent Estate Lapses. — Fiske v. Fiske, 26 R. I. 509.

Precedent Estate Disclaimed. — Faulkner v. Tucker, 83 S. W. Rep. 579, 26 Ky. L. Rep. 1130.

**768.** 2. Void Contract. — A contract by a legatee to pay a bequest made in a will to another legatee is unenforceable. Mitchell v. Mitchell, 132 N. Car. 350.

**769.** 5. General Rule as to Satisfaction. — Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552; Stewart v. Conrad, 100 Va. 128, 4 Va. Sup. Ct. 49.

**770.** 5. Bequest to Creditor Not Conclusive Evidence of Satisfaction. — Egan's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 261.

6. Intention Controls. — Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552. See also Rubert v. Rubert, 126 Mich. 589.

- 770.** (3) *Direction to Pay Debts, or Debts and Legacies.* — See note 10.
- 772.** *d. RULE NOT REGARDED WITH FAVOR.* — See note 7.
- 773.** *e. EXCEPTIONS TO RULE* — (1) *In General.* — See note 2.
- 774.** (2) *Based on Nature of Indebtedness* — (e) *Debts Evidenced by Negotiable Instruments.* — See note 2.
- (3) *Based on Nature of Donation* — (a) *In General.* — See note 3.
- (b) *Legacy Less than Debt.* — See note 4.
- 775.** (d) *Legacy Contingent.* — See notes 4, 6.
- (e) *Legacy Payable at Time Different from Debt.* — See note 8.
- 776.** (4) *Based on Relation of Beneficiary to Testator* — (a) *Servant.* — See note 2.
- (b) *Parent and Child — Husband and Wife.* — See note 4.
- 777.** 2. *Release of Debt by Legacy or Devise to Debtor* — *a. STATEMENT OF RULE.* — See note 3.
- 778.** *d. DIRECTIONS FOR DEDUCTION OR RELEASE OF DEBT* — (1) *In General.* — See note 4.
- 779.** (6) *Recitals Designating Persons Whose Debts Are Released.* — See note 5.
- (7) *Recitals Designating Debts Released.* — See note 8.
- 781.** *e. APPLICATION OF LEGACY TO SATISFACTION OF DEBT* — (1) *In General.* — See note 2.
- 783.** *f. INTEREST ON LEGATEE'S INDEBTEDNESS* — (1) *When Will Contains No Directions.* — See note 4.
- (2) *When Will Directs Deduction of Debts.* — See notes 5, 6.
- g. EXTRINSIC EVIDENCE TO SHOW TESTATOR'S INTENTION.* — See note 8.

**770.** 7. *Intent Must Appear by Language or by Fair Inference.* — *Matter of Dailey, (Surrogate Ct.)* 43 Misc. (N. Y.) 552.

10. *Direction to Pay Debts and Legacies.* — *Smith v. Park, (Ky. 1905)* 84 S. W. Rep. 304; *Matter of Spear, 90 N. Y. App. Div. 564; Matter of Dailey, (Surrogate Ct.)* 43 Misc. (N. Y.) 552.

**772.** 7. *Rule Not Favored.* — *Stewart v. Conrad, 100 Va. 128, 4 Va. Sup. Ct. 49.*

**773.** 2. *Rule Subject to Well-established Exceptions.* — *Stewart v. Conrad, 100 Va. 128, 4 Va. Sup. Ct. 49.*

**774.** 2. *Negotiable Instruments.* — See *Matter of Cramer, (Surrogate Ct.)* 43 Misc. (N. Y.) 494.

A debt evidenced by a negotiable instrument is not satisfied by a legacy for an equal amount payable four years after the death of the testator. *In re Roberts, 50 W. R. 469.*

3. *Different Legatee.* — Legacies given to the wife and daughter of a creditor of the testator do not affect the creditor's claim. *Bugh's Estate, 23 Pa. Co. Ct. 660, 9 Pa. Dist. 276.*

4. *Legacy Less than Debt.* — *Smith v. Park, (Ky. 1905)* 84 S. W. Rep. 304.

**775.** 4. *Legacy Contingent.* — *Smith v. Park, (Ky. 1905)* 84 S. W. Rep. 304; *Stewart v. Conrad, 100 Va. 128, 4 Va. Sup. Ct. 49.*

6. *Time of Payment Uncertain.* — See *Smith v. Park, (Ky. 1905)* 84 S. W. Rep. 304.

8. *Legacy Payable at Different Time.* — *Baptist Female University v. Borden, 132 N. Car. 476.*

*Legacy Payable Four Years After Testator's Death.* — *In re Roberts, 50 W. R. 469.*

**776.** 2. *Not Applicable to Requests to Ser-*

*vants.* — See *Matter of Dailey, (Surrogate Ct.)* 43 Misc. (N. Y.) 552.

4. *Husband and Wife.* — See *Matter of Spear, 90 N. Y. App. Div. 564.*

**777.** 3. *Sharp v. Wightman, 205 Pa. St. 285.* Where the *Intention of the Testator* appears to have been that a debt should not be deducted from a gift made in his will to his debtor, no deduction will be made. *Bigelow v. Pierce, 179 Mass. 331.*

**778.** 4. *De Haven's Estate, 207 Pa. St. 147.*

**779.** 5. *Release of Husband's Obligations — Debt of Wife.* — The testatrix bequeathed to one R. any debts which he might owe her at her death. She then advanced money to R. to pay a certain debt, taking at the same time a bond and mortgage from R's wife. It was held that the bequest did not pay off the mortgage since the wife and not R. was the debtor. *Dibble v. Richardson, (Supm. Ct. Spec. T.)* 33 Misc. (N. Y.) 494, *affirmed* 64 N. Y. App. Div. 520.

8. *Recital that Gift Should Be "Free from His Present or Future Debts."* — *Sharp v. Wightman, 205 Pa. St. 285.*

**781.** 2. *Retainer of Legacy in Satisfaction of Debt.* — *Matter of Warner, (Surrogate Ct.)* 39 Misc. (N. Y.) 432.

**783.** 4. *Interest in Absence of Provision in Will.* — *Cochran v. Cochran, 3 Penn. (Del.)* 526, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 783.

5. *Direction in Will to Deduct Debt — Intent of Testator Governs as to Interest.* — *Cochran v. Cochran, 3 Penn. (Del.)* 526.

6. *Debt Evidenced by Interest-bearing Security.* — *Cochran v. Cochran, 3 Penn. (Del.)* 526.

8. *Extrinsic Evidence of Testator's Intent.* — *Sharp v. Wightman, 205 Pa. St. 285.*

**784. 3. Satisfaction of Legacies by Gifts Inter Vivos — b. WHEN TESTATOR DOES NOT STAND IN LOCO PARENTIS — (1) Intention of Testator Governs. —** See note 2.

(2) *No Presumption as to Intention.* — See note 3.

**785. (4) Parol Evidence Admissible to Show Intent. — See note 3.**

**XI. PAYMENT — 2. Subordination of Legacies to Debts.** — See note 8.

**788. 3. Assent of Personal Representative — c. LEGACY TO EXECUTOR — (1) In General. — See note 1.**

**789. 4. Taking Security from Legatee — b. SECURITY GIVEN BY FIRST TAKER OF PARTICULAR ESTATE — Legatee for Life. — See note 10.**

**792. 7. Time of Payment. — See notes 4, 7.**

**793. Legacy to Infant Payable at Specified Time — Effect of Infant's Death on Legacy Payable at Twenty-one. — See note 1.**

**8. Interest — a. GENERAL LEGACIES — (1) In General. — See note 4.**

(2) *Where No Time of Payment of Legacy Is Specified.* — See note 5.

**795. (3) Where Time of Payment of Legacy Is Fixed by Will. — See notes 3, 4.**

(4) *Where Time for Interest to Begin Is Fixed.* — See note 6.

**796. (5) Legacy Chargeable on Land — Legacy Charged upon Person of Devisee.** — See note 5.

(6) *Annuities.* — See note 6.

**784. 2. Intention of Testator Governs.** — See *Swinebroad v. Bright*, 110 Ky. 616.

**When Legacy Satisfied.** — "Where a legacy is given for a particular purpose specified in the will, and the testator during his lifetime accomplishes the same purpose, or furnishes the intended legatee or beneficiary with money for that purpose, the legacy is satisfied." *Johnson's Estate*, 201 Pa. St. 513.

**3. Intention Must Be Alleged.** — *Swinebroad v. Bright*, 110 Ky. 616.

**785. 3. Parol Evidence Admissible to Show Intent.** — See *Swinebroad v. Bright*, 110 Ky. 616.

**8. Debts Take Precedence of Legacies.** — *Blakeslee v. Pardee*, 76 Conn. 263; *Martin* for Opinion, 25 R. I. 1. See also *Baptist Female University v. Borden*, 132 N. Car. 476.

**788. 1. The Fact that a Universal Legatee Has Claimed from an Insurance Company the Benefits Due to the Heirs of the Testator does not imply the acceptance of his legacy if he is at the same time executor of the will.** *Renouf v. Turner*, 24 Quebec Super. Ct. 194.

**789. 10. When Life Tenant Not Required to Give Security in General.** — *Matter of Ungrich*, 48 N. Y. App. Div. 594, *affirmed* 166 N. Y. 618.

**792. 4. General Rule as to When Legacies Are Payable.** — *Redd v. Redd*, 58 S. W. Rep. 428, 22 Ky. L. Rep. 505.

**Payment Within Reasonable Time.** — *Moore v. Moore*, 69 N. H. 420.

**Presumption of Payment.** — Twenty years after a legacy is payable a presumption arises that the legacy has been paid. *Congregational Church v. Benedict*, 59 N. J. Eq. 136.

**Annuity.** — An annuity bequeathed in a will commences at the death of the testator. *In re Eichelberger*, 11 York Leg. Rec. (Pa.) 1.

**7. Payment Postponed by Terms of Will.** — See *Re Dunn*, 7 Ont. L. Rep. 560.

**Payment at Majority.** — Where a devise was, by the will, to be apportioned between the two legatees upon their becoming of age, it was held

that the older devisee was entitled to his share upon reaching majority and that it was not necessary for him to wait until the younger was also twenty-one. *Quinn v. Fidelity Title, etc., Co.*, 31 Pittsburg Leg. J. N. S. (Pa.) 85.

**793. 1. Effect of Infant's Death on Legacy Payable at Majority.** — *Savin v. Webb*, 96 Md. 504, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793.

**4. General Rule as to Payment of Interest on General Legacies.** — *Miller v. Metcalf*, 77 Conn. 176; *Graham v. Whitridge*, 99 Md. 248; *Gray v. Case School*, 62 Ohio St. 1.

**5. From What Time General Legacies Draw Interest in Absence of Direction in Will.** — *Redd v. Redd*, 58 S. W. Rep. 428, 22 Ky. L. Rep. 505; *Graham v. Whitridge*, 99 Md. 248; *Daniels v. Benton*, 180 Mass. 559; *Ensley v. Ensley*, 105 Tenn. 107.

**Interest on Legacy Begins to Run One Year After Appointment of Administrator.** — *Goodwin v. Crooks*, 58 N. Y. App. Div. 464.

**One Year from Notice of Executor's Appointment.** — *Gray v. Case School*, 62 Ohio St. 1.

**795. 3. Where Time of Payment Is Fixed by Will.** — *Miller v. Metcalf*, 77 Conn. 176; *Webb v. Webb*, 92 Md. 101, 84 Am. St. Rep. 499; *Lyons v. Steinhardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 628; *In re Follett*, 23 R. I. 409.

**4. Where Fund Is Severed from Testator's Death.** — *Ensley v. Ensley*, 105 Tenn. 107; *Catron's Estate*, 82 Mo. App. 416.

**6. Where the Will Directs that Interest Shall Not Be Computed** in ascertaining the amount of a legacy, and directs further that the legacy shall be paid at any time before distribution in the discretion of the executors, such legacy does not bear interest. *Brooks v. Hanna*, 10 Ohio Cir. Dec. 480, 19 Ohio Cir. Ct. 216.

**796. 5. A Legacy Charged on Land** in the hands of devisees bears interest from the bringing of an action, the suit constituting a demand. *Dunham v. Deraismes*, 166 N. Y. 607.

**6. Arrears of an Annuity Given by a Will** do not

**797.** (8) *Legacy to Widow* — *Legacy in Lieu of Dower*. — See note 7.

**798.** (9) *Legacy to Child*. — See notes 1, 3.

**799.** *b. SPECIFIC LEGACIES*. — See notes 5, 6.

*c. RESIDUARY LEGACIES*. — See note 8.

**800.** *d. RATE OF INTEREST*. — See notes 2, 4.

**XII. REMEDIES** — 1. *Actions of Legatees to Recover Assets* —

*a. GENERAL RULE*. — See note 11.

**801.** *b. EXCEPTIONS TO RULE* — (1) *In General*. — See note 2.

**802.** 2. *Actions by Legatees to Enforce Payment of Legacies* — *a. AGAINST THE EXECUTOR* — (1) *At Law* — (a) *In General* — *aa. RULE AT COMMON LAW*. — See note 1.

**803.** (2) *In Equity*. — See note 6.

**804.** (3) *Within What Time Suit Must Be Brought* — (a) *Statute of Limitations*. — See note 1.

**805.** (b) *Presumption of Payment of Very Stale Demands*. — See note 1.

**806.** 4. *Remedies of Creditors* — *b. OF LEGATEE OR DEVISEE* — (2) *Before Payment or Distribution* — (a) *By Attachment or Garnishment*. — See note 3.

(b) *By Creditor's Bill*. — See note 9.

**807.** (d) *As Affected by Provisions of Will*. — See note 3.

as a rule carry interest. *Hiscoe v. Waite*, 71 L. J. Ch. 347.

**797.** 7. See *Overton v. Lea*, 108 Tenn. 505.

**798.** 1. *When Interest on Legacy to Infant Child Begins*. — *In re Bowlby*, (1904) 2 Ch. 685; *Webb v. Webb*, 92 Md. 101, 84 Am. St. Rep. 499. See also *Savin v. Webb*, 96 Md. 504.

*Only Where Testator Stands in Loco Parentis*. — *Lyons v. Steinhardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 628.

3. *Legacy to Person to Whom Testator Stands in Loco Parentis*. — *Webb v. Webb*, 92 Md. 101; *Lyons v. Steinhardt*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 628.

**799.** 5. *The Interest Accruing on a Specific Legacy* is part of the legacy itself. *Gaston v. Hayden*, 98 Mo. App. 683.

6. *Specific Legatee Entitled to Increment*. — *Piper v. Adair*, (Ky. 1901) 64 S. W. Rep. 645. See also *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

8. *No Interest in Case of Residuary Legacy*. — *Phelps v. Fitch*, 178 Mass. 442.

**800.** 2. *Rate of Interest Allowable*. — *Gray v. Case School*, 62 Ohio St. 1.

4. *Interest at Rate at Which Fund Was Drawing Interest at Testator's Death*. — *Southgate v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 415, modified 74 N. Y. App. Div. 150.

11. *Generally a Legatee Cannot Sue to Recover Assets*. — *Jester v. Gustin*, 158 Ind. 287, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800.

**801.** 2. *Where There Are No Debts and No Executor or Other Person Entitled to Recover*. — *Jester v. Gustin*, 158 Ind. 287.

**802.** 1. *Action Against One Not Executor*. — An action cannot be brought by a legatee against one other than the executor, as "it is only through the medium of the personal representative that courts of law will interfere in the administration of a deceased person's estate." *Mitchell v. Mitchell*, 132 N. Car. 350.

**803.** 6. *Remedy in Equity*. — *Congregational Church v. Cutler*, 76 Vt. 338. See also *Zabriske v. Huyler*, 62 N. J. Eq. 697.

*Sufficient Assets*. — A legatee who files a bill to recover a legacy must allege and prove that there are assets applicable to the legacy sufficient to pay it. *McKee v. Young*, (Tenn. Ch. 1900) 57 S. W. Rep. 200.

**804.** 1. *Executor Cannot Plead Statute of Limitations*. — See *Bickel's Estate*, 9 Pa. Dist. 129.

*Time Before Which Suit Cannot Be Brought*. — A statute providing that an action on a legacy cannot be brought until one year after the granting of letters testamentary does not apply to a suit against one other than an executor. *Leonard v. Harney*, 63 N. Y. App. Div. 294, modified 173 N. Y. 352.

*Laches*. — Where an annuitant under a will waited three years after the last payment to her before suing for unpaid sums it was held that she had not thereby been guilty of laches so as to preclude a recovery. *Gee v. Gee*, 204 Ill. 588.

Where a legatee brings a bill to collect a legacy nine years after the refusal of the executor to pay it, the executor having by that time distributed the estate, the legatee is guilty of laches and his bill will be dismissed. *Wilson v. Smith*, 117 Fed. Rep. 707, affirmed (C. C. A.) 126 Fed. Rep. 916.

**805.** 1. *Presumption of Payment After Twenty Years*. — *Congregational Church v. Benedict*, 59 N. J. Eq. 136.

**806.** 3. *A Creditor of an Heir Indebted to the Estate* can acquire no greater right in the estate than the heir himself has. *Boyer v. Robinson*, 26 Wash. 117.

*Devise in Trust*. — Where real property was devised in trust for a beneficiary, the latter to receive the income therefrom, it was held that undistributed income held by the trustees was not subject to attachment by the creditors of the beneficiary. *Hays's Estate*, 201 Pa. St. 301.

9. *Bill in Equity*. — A creditor of a legatee may bring an action against an executor before the executor has accounted. Gen. Laws R. I. c. 218, §§ 15, 29, do not apply to suits brought by a legatee's creditor. *Gorman v. Stillman*, 24 R. I. 264.

**807.** 3 *Provisions that Devise Shall Not Be*

**807. LEGAL.** — See note 7.

**813. LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, REPRESENTATIVES, ETC.** — See note 2.

**815.** See note 1.

**820.** See note 1.

**821. LEGATEE.** — See note 1.

**822. LEGISLATIVE POWER.** — See note 3.

**825. [LEGITIMATE CAUSE.** — See note 1a.]

**826. LESION.** — See note 2.

**827. LESSEES — LESSORS.** — See note 1.

**Subject to Creditor's Claims.** — *La Banque Jacques-Cartier v. Tozer*, 10 Quebec K. B. 81.

**807. 7. Legal Assets.** — *Kinmonth v. White*, 61 N. J. Eq. 358.

**Legal Claim.** — *People v. Woodruff*, 57 N. Y. App. Div. 542.

**Legal Debt.** — *Guilford v. Walter*, 182 Mass. 225.

**Legal Duty.** — See *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44.

**Legal Interest.** — *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709; *American Mut. Bldg., etc., Assoc. v. Harn*, (Tex. Civ. App. 1901) 62 S. W. Rep. 74.

**Legal Residence.** — *Paddock v. Lewis*, 59 N. Y. App. Div. 430.

**Legal Residence and Legal Settlement Synonymous.** — *Louriston v. Swift County*, 89 Minn. 91.

**Legal Right.** — *Colson v. Com.*, 110 Ky. 233.

**Legal Settlement.** — *In re Bigelow*, 17 S. Dak. 331.

**Legal Proceedings — Bankruptcy.** — *In re Emslie*, (C. C. A.) 102 Fed. Rep. 291.

**Legal and Actual Service Distinguished — Mechanic's Lien Law.** — *Smith v. Collyot*, 69 N. J. L. 365.

**813. 2. Primary Meaning Executors and Administrators.** — *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 942, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *Gruenewald v. Neu*, 215 Ill. 141, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 813; *People v. Petrie*, 191 Ill. 497; *Preston v. Connecticut Mut. L. Ins. Co.*, 95 Md. 101; *Leonard v. Harney*, 63 N. Y. App. Div. 294; *Griffin v. Brower*, 21 Pa. Co. Ct. 188.

**Same — Life Insurance Policy.** — *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939.

**815. 1. Broad Sense.** — *Gruenewald v. Neu*, 215 Ill. 141, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 814, 815; *Thayer v. Pressey*, 175 Mass. 225; *Alford v. Consolidated F. & M. Ins. Co.*, 88 Minn. 478, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 815; *Casey v. Lockwood*, 24 R. I. 72.

**Assign — Assigner.** — *Thayer v. Pressey*, 175 Mass. 225.

**Assignee in Bankruptcy.** — *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939.

**Devisees.** — *Gruenewald v. Neu*, 215 Ill. 141.

**Heirs.** — *State Fair Assoc. v. Townsend*, 69 Ark. 215; *Blakeman v. Sears*, 74 Conn. 516; *Connecticut Trust, etc., Co. v. Hollister*, 74 Conn. 228; *Gruenewald v. Neu*, 215 Ill. 141; *Thayer v. Pressey*, 175 Mass. 225; *Allen v. Stovall*, 94 Tex. 618.

**Husband.** — *Lesieur's Estate*, 205 Pa. St. 119.

**Next of Kin.** — *Greene v. Huntington*, 73 Conn. 106; *Howell v. Gifford*, 64 N. J. Eq. 180.

**Partners — Surviving Partner.** — *Lasater v. Jacksboro First Nat. Bank*, (Tex. Civ. App. 1902) 72 S. W. Rep. 1054.

**Receivers.** — *Alford v. Consolidated F. & M. Ins. Co.*, 88 Minn. 478.

**Widow.** — *Leonard v. Harney*, 63 N. Y. App. Div. 294.

**820. 1. Intent Governs.** — *Gruenewald v. Neu*, 215 Ill. 141, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816, 820; *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77; *Howell v. Gifford*, 64 N. J. Eq. 180; *Leonard v. Harney*, 63 N. Y. App. Div. 294; *Casey v. Lockwood*, 24 R. I. 72.

**821. 1. Legatee Including Devise in Will.** — *Weigel v. Green*, 218 Ill. 239, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821.

"A Legatee is one who receives a legacy. The ordinary popular meaning of a legacy, and its usual legal signification, is a gift or gratuity, not the payment of a debt or a provision to pay a debt." *Pentz's Estate*, 200 Pa. St. 2.

**Legates Interpreted Strictly in Statute.** — *Matter of Ross*, 140 Cal. 282.

"The terms *legatee* and 'devisee' are more strictly interpreted as referring, the one to personality, and the other to realty, in the construction of statutes than in the construction of wills and deeds." *Weigel v. Green*, 218 Ill. 239, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821.

**In Sense of Children.** — In *Lamar v. Harris*, 121 Ga. 285, it was held that where the testator used the words *legatees* and children interchangeably, they were synonymous for the purposes of that item of the will.

**822. 3. Legislative Power.** — *Arms v. Ayer*, 192 Ill. 601; *Brown v. Galveston*, 97 Tex. 1; *Sluder v. St. Louis Transit Co.*, 189 Mo. 149, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 822. In this case the court said: "The term *legislative power* as so applied to a city means only the power to pass rules and regulations for the government of the municipality, the conduct of its officers, and the conduct of the citizens with respect to the municipality."

**825. 1a Legitimate Cause — Louisiana Law.** — *Miller v. Manhattan L. Ins. Co.*, 110 La. 652.

**826. 2. Lesion — Civil Law.** — See *Smart v. Bibbins*, 109 La. 986; *Linkswiler v. Hoffman*, 109 La. 948.

**827. 1. Assignees Not Included in the Term Lessees.** — *Hazelwood v. Rogan*, 95 Tex. 295.



**827. LET.**—See note 2.

**828. LETTER OF ATTORNEY.**—See note 2.

**827. 2. Let Distinguished from Demise.**—*Mershon v. Williams*, 63 N. J. L. 398.

**828. 2. Letter of Attorney.**—See *Leslie v. State*, 10 Wyo. 10.

## LETTERS OF CREDIT.

**834. III. CONSTRUCTION AND EFFECT—3. Who May Make Advances or Give Credit—b. IN THE CASE OF A SPECIAL LETTER OF CREDIT.**—See note 2.

**4. Advances or Credit Must Be on Faith of Letter.**—See note 6.

**838. LEVEE.**—See note 2.

**LEVY.**—See note 4.

**834. 2. Advances by Succeeding Bank.**—A special letter of credit addressed to a bank which goes out of business cannot be relied on by a bank which succeeds it. *Lyon v. Van Raden*, 126 Mich. 259.

**6. Advances Made or Credit Given Must Have Been on Faith of Letter.**—*Seneca Bank v. Carthage First Nat. Bank*, 105 Mo. App. 722.

**838. 2. Royse v. Evansville, etc., R. Co.,** 160 Ind. 592, *quoting* 18 AM. AND ENG. ENCYC.

OF LAW (2d ed.) 838; *McAlpine v. Chicago Great Western R. Co.*, 68 Kan. 207.

**Embankment and Levee.**—*Dehon v. Lafourche Basin Levee Board*, 110 La. 767.

**4. Seizure.**—*Textor v. Shipley*, 86 Md. 424.

**Collect—Assess.**—*Parsons v. People*, 32 Colo. 221; *Clifton v. Hobgood*, 106 La. 535.

**Levy and Service Distinguished.**—*Lahr v. Ulmer*, 27 Ind. App. 107.

## LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.

**841. I. DEFINITIONS—Lewd.**—See note 1.

**843. II. CONSTITUENTS OF THE OFFENSE—2. Under Statutes—Living Together as Husband and Wife.**—See note 4.

**845. Occasional Act.**—See note 1.

**III. EVIDENCE.**—See note 2.

**846. LIABILITY—LIABLE.**—See note 2.

**841. 1. Lewd.**—*State v. Wilson*, 124 Iowa 264.

**843. 4. Living Together as Husband and Wife.**—*State v. Cassida*, 67 Kan. 171.

**845. 1. Occasional Acts.**—*Whitehead v. State*, (Fla. 1904) 37 So. Rep. 302; *State v. Cassida*, 67 Kan. 171.

**2. Proof of Specific Acts—Rebuttal.**—*Com. v. O'Brien*, 179 Mass. 533.

**846. 2. Liability.**—*State v. Sheets*, 26 Utah 105.

**Alimony.**—*Lynde v. Lynde*, 64 N. J. Eq. 736.

**Contingent Liability.**—*State v. Sheets*, 26 Utah 105.

**Liability and Debt Distinguished.**—*Denver v. Hubbard*, 17 Colo. App. 346; *Hyatt v. Anderson*, (Ky. 1903) 74 S. W. Rep. 1094.

**Future.**—*Home Ins. Co. v. Peoria, etc., R. Co.*, 178 Ill. 64.

**Punishment for Crime.**—*Featherstone v. People*, 194 Ill. 325.

**Stockholder's Liability.**—*Hyatt v. Anderson*, (Ky. 1903) 74 S. W. Rep. 1094.

**Torts.**—*Miller v. Kern County Land Co.*, 134 Cal. 586; *Lowe v. Ozmun*, 137 Cal. 257.

# LIBEL AND SLANDER.

BY E. G. CHILTON.

**861. I. DEFINITIONS** — 1. Libel. — See note 1.

**862. 2. Slander.** — See note 1.

**863. II. WHAT IS LIBELOUS — ACTIONABLE QUALITY OF WORDS** — 1. Distinction Between Oral and Written Words. — See note 4.

**864. Reasons for Making Distinction Between Written and Oral Words.** — See notes 1, 2.

Written Words Are Actionable Where Oral Words Would Be. — See note 3.

**865. 2. Distinction Between Civil and Criminal Libels** — In General. — See note 3.

Statutes Defining Criminal Libels. — See note 5.

**3. Distinction Between Words Actionable Per Se and Per Quod** — In General. — See note 6.

**861. 1. Definition.** — *Weston v. Weston*, 83 N. Y. App. Div. 520, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *State v. Brock*, 61 S. Car. 141, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *Smith v. Bradstreet Co.*, 63 S. Car. 525, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 861; *Flood v. News, etc., Co.*, 71 S. Car. 112, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661 [861].

For other definitions, see the following cases:

*Alabama*. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

*California*. — *Schomberg v. Walker*, 132 Cal. 224.

*Georgia*. — *Colvard v. Black*, 110 Ga. 642; *Holmes v. Clisby*, 118 Ga. 820.

*Iowa*. — *Quinn v. Prudential Ins. Co.*, 116 Iowa 522.

*Kansas*. — *Werner v. Vogeli*, 10 Kan. App. 536; *Eckert v. Van Pelt*, 69 Kan. 357.

*Kentucky*. — *Evening Post Co. v. Richardson*, 113 Ky. 641.

*Missouri*. — *Minter v. Bradstreet Co.*, 174 Mo. 486; *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223.

*Montana*. — *Paxton v. Woodward*, 31 Mont. 195.

*New York*. — *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254; *O'Brien v. Bennett*, 72 N. Y. App. Div. 367.

*North Dakota*. — *Lauder v. Jones*, 13 N. Dak. 525.

*Oklahoma*. — *Lawton v. Territory*, 9 Okla. 456.

*South Dakota*. — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Texas*. — *Cranfill v. Hayden*, 97 Tex. 544.

*Vermont*. — *Jones v. Roberts*, 73 Vt. 201.

*Virginia*. — *Moss v. Harwood*, 102 Va. 386.

*Canada*. — *Harper v. Hamilton Retail Grocers' Assoc.*, 32 Ont. 205.

**Statutory Definitions.** — See *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Lauder v. Jones*, 13 N. Dak. 525; *Barron v. Smith*, (S.

Dak. 1904) 101 N. W. Rep. 1105; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165.

**862. 1. Slander Defined.** — See *Knipe v. Brooklyn Daily Eagle*, 101 N. Y. App. Div. 43, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 862; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15.

**Statutory Definition of Slander.** — See *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

**863. 4. Broad Distinction Between Oral and Written Words.** — *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203; *Herrick v. Tribune Co.*, 108 Ill. App. 244, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 863; *Weston v. Weston*, 83 N. Y. App. Div. 520; *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105. See also *Hamilton v. Lowery*, 33 Ind. App. 184; *Le Massena v. Storm*, 62 N. Y. App. Div. 150.

**864. 1. Reasons for Making Distinction Between Written and Oral Words.** — See *Herrick v. Tribune Co.*, 108 Ill. App. 244.

**2. Criticisms of Doctrine.** — *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319. See also *Herrick v. Tribune Co.*, 108 Ill. App. 244.

**3. Written Words Are Actionable Where Oral Words Would Be.** — *Simpson v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228; *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254; *Weston v. Weston*, 83 N. Y. App. Div. 520.

**865. 3. Definitions of Criminal Libel.** — In *Kentucky* any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to an indictable act constitutes a criminal libel. *Provident Sav. L. Assur. Soc. v. Johnson*, 115 Ky. 84.

**5. Statutory Definitions of Libel.** — *State v. Keenan*, 111 Iowa 286; *State v. Shippman*, 83 Minn. 441.

**6. Distinction Between Words Actionable Per Se and Per Quod.** — *Moss v. Harwood*, 102 Va. 386. See also *Doyle v. Kirby*, 184 Mass. 409; *Schoepflin v. Coffey*, 162 N. Y. 12; *Le Massena v. Storm*, 62 N. Y. App. Div. 150.

**866.** General Nature of Words Actionable Per Se. — See note 1.

**867.** All Defamatory Words. — See note 6.

**868.** 4. Words Importing Commission of Crime — *a.* WRITTEN WORDS. — See note 2.

*b.* ORAL WORDS — (1) *In General.* — See note 3.

**870.** (2) *As Respects Nature of Crime and Punishment* — (*a*) *In General.* — See note 1.

**866.** 1. General Nature of Words Actionable Per Se. — *Crashley v. Press Pub. Co.*, 179 N. Y. 27; *Triggs v. Sun Printing, etc., Assoc.*, 179 N. Y. 144; *Mauk v. Brundage*, 68 Ohio St. 96, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 866.

**867.** 6. Defamatory Oral Words — Special Damages Recoverable. — *Bray v. Callihan*, 155 Mo. 43; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Canning v. Owen*, 24 R. I. 233. See also *Dun v. Weintraub*, 111 Ga. 416.

**868.** 2. Written Words Importing Commission of Crime — *United States.* — *Palmer v. Mabin*, (C. C. A.) 120 Fed. Rep. 737; *Butler v. Barret*, 130 Fed. Rep. 944. See also *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646.

*California.* — *People v. Seeley*, 139 Cal. 118.

*Delaware.* — *Donahoe v. Star Pub. Co.*, 4 Penn. (Del.) 166; *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

*Illinois.* — *Gaines v. Gaines*, 109 Ill. App. 226.

*Kansas.* — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

*Louisiana.* — *Mequet v. Silverman*, 52 La. Ann. 1369.

*Massachusetts.* — *Conner v. Standard Pub. Co.*, 183 Mass. 474.

*Michigan.* — See *Weston v. Grand Rapids Pub. Co.*, 128 Mich. 375.

*Minnesota.* — *Johnson v. Force*, 80 Minn. 315.

*Missouri.* — *Jones v. Murray*, 167 Mo. 25; *Dunlevy v. Wolferman*, 106 Mo. App. 50.

*Nebraska.* — *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926.

*New Jersey.* — *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

*New York.* — *O'Leary v. New York News Pub. Co.*, 51 N. Y. App. Div. 2; *Cudlip v. New York Evening Journal Pub. Co.*, 174 N. Y. 158.

*Oklahoma.* — *Lawton v. Territory*, 9 Okla. 456.

*Pennsylvania.* — *Clark v. North American Co.*, 203 Pa. St. 346.

*South Dakota.* — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Texas.* — *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546.

*Wisconsin.* — *Pfister v. Sentinel Co.*, 108 Wis. 572.

*Canada.* — *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476; *Macdonald v. Mail Printing Co.*, 32 Ont. 163.

**3. Oral Words Imputing Commission of Crime Actionable** — *Alabama.* — *Hereford v. Combs*, 126 Ala. 369.

*California.* — *Jarman v. Rea*, 137 Cal. 339.

*Illinois.* — *Schofield v. Baldwin*, 102 Ill. App. 560; *Merrill v. Marshall*, 113 Ill. App. 447.

*Indiana.* — *Ruble v. Bunting*, 31 Ind. App. 654; *Short v. Acton*, 33 Ind. App. 361. See also *Grotius v. Ross*, 24 Ind. App. 543.

*Iowa.* — *McMinemee v. Smith*, (Iowa 1903) 93 N. W. Rep. 75; *McDonald v. Nugent*, 122 Iowa 651.

*Kansas.* — *Friedburg v. Nudd*, 9 Kan. App. 743.

*Kentucky.* — *Nicholson v. Merritt*, 109 Ky. 369; *Allen v. Brady*, (Ky. 1904) 83 S. W. Rep. 565.

*Louisiana.* — *Simpson v. Robinson*, 104 La. 180.

*Maine.* — *Kimball v. Page*, 96 Me. 487; *Davis v. Starrett*, 97 Me. 568; *Shepherd v. Piper*, 98 Me. 384.

*Massachusetts.* — *Faxon v. Jones*, 176 Mass. 206.

*Michigan.* — *McLeod v. Crosby*, 128 Mich. 641; *Savlan v. Ayer*, 129 Mich. 545; *Hinchman v. Knight*, 132 Mich. 532; *Dell v. McBride*, 133 Mich. 649; *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993.

*Minnesota.* — *Radke v. Kolbe*, 79 Minn. 440; *Earle v. Johnson*, 81 Minn. 472; *Laury v. Evans*, 87 Minn. 398; *Quist v. Kiichli*, 92 Minn. 160.

*Missouri.* — *Krup v. Corley*, 95 Mo. App. 640; *Carpenter v. Hamilton*, 185 Mo. 603; *Alderson v. Auerswald*, 80 Mo. App. 370.

*Nebraska.* — *Larson v. Cox*, (Neb. 1903) 93 N. W. Rep. 1011.

*New Jersey.* — *Moore v. Beck*, 71 N. J. L. 7.

*New York.* — *Warner v. Southall*, 165 N. Y. 496; *Keller v. Dean*, 57 N. Y. App. Div. 7; *Weston v. Weston*, 83 N. Y. App. Div. 520; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414. See also *Le Massena v. Storm*, 62 N. Y. App. Div. 150.

*North Carolina.* — See *Upchurch v. Robertson*, 127 N. Car. 127.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267.

*Ohio.* — *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83; *Phillips v. Le June*, 25 Ohio Cir. Ct. 107.

*Rhode Island.* — *Canning v. Owen*, 24 R. I. 233.

*South Dakota.* — *Bedtkey v. Bedtkey*, 15 S. Dak. 310.

*Texas.* — *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

*Vermont.* — *Smith v. Moore*, 74 Vt. 81.

*Wisconsin.* — *Hamlin v. Fantl*, 118 Wis. 596.

**870.** 1. Indictable Crimes Involving Moral Turpitude or Subjecting Offender to Infamous Punishment — Oral Words Actionable — *Alabama.* — *Hereford v. Combs*, 126 Ala. 369.

*California.* — *Jarman v. Rea*, 137 Cal. 339.

*Illinois.* — *Schofield v. Baldwin*, 102 Ill. App. 560; *Merrill v. Marshall*, 113 Ill. App. 447.

*Indiana.* — *Ruble v. Bunting*, 31 Ind. App. 654; *Short v. Acton*, 33 Ind. App. 361.

*Iowa.* — *McMinemee v. Smith*, (Iowa 1903) 93 N. W. Rep. 75.

*Kansas.* — *Friedburg v. Nudd*, 9 Kan. App. 743.

- 871.** (b) *Misdemeanors.* — See note 4.  
 (c) *Infamous Offenses.* — See note 5.  
**872.** (d) *Crimes Involving Moral Turpitude.* — See note 2.  
**873.** (3) *Crimes Committed in Another Jurisdiction* — (b) *In Foreign Country.*  
 — See note 2.  
 c. *UNNAMED CRIME.* — See note 3.  
 e. *IMPUTING CRIME FOR WHICH PARTY ACCUSED IS NOT LIABLE TO PUNISHMENT* — (i) *In General.* — See note 5.  
**874.** f. *OFFENSE PUNISHABLE AT COMMON LAW BUT NOT BY STATUTE.*  
 — See note 5.  
**875.** i. *IMPUTING THAT PLAINTIFF HAS BEEN INDICTED FOR CRIME.*  
 — See note 1.  
 k. *AS RESPECTS PARTICULAR CRIMES* — (i) *Abortion.* — See note 3.  
**876.** (3) *Arson* — (a) *In General.* — See note 1.  
 (b) *Burning Insured Building to Defraud Insurance Company.* — See note 2.  
 (c) *In What Words Actionable Charge May Be Made.* — See note 3.  
**877.** (4) *Assault and Battery.* — See note 3.  
**878.** (7) *Bribery.* — See note 4.

*Louisiana.* — *Simpson v. Robinson*, 104 La. 180; *Covington v. Roberson*, 111 La. 338.

*Maine.* — *Kimball v. Page*, 96 Me. 487.

*Massachusetts.* — *Faxon v. Jones*, 176 Mass. 206.

*Michigan.* — *McLeod v. Crosby*, 128 Mich. 641; *Savlan v. Ayer*, 129 Mich. 545; *Hinchman v. Knight*, 132 Mich. 532; *Dell v. McBride*, 133 Mich. 649; *Line v. Spies*, (Mich. 1903) 102 N. W. Rep. 993.

*Minnesota.* — *Laury v. Evans*, 87 Minn. 398; *Quist v. Kiichli*, 92 Minn. 160.

*Missouri.* — *Jones v. Murray*, 167 Mo. 25; *Alderson v. Auerswald*, 80 Mo. App. 370.

*New York.* — *Warner v. Southall*, 165 N. Y. 496.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267.

*Ohio.* — *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83.

*Vermont.* — *Smith v. Moore*, 74 Vt. 81.

*Canada.* — *Cleveland v. Sherman*, 19 Quebec Super. Ct. 270.

**871.** 4. *Indictable Misdemeanor Involving Moral Turpitude* — *Oral Words Actionable.* — *Earle v. Johnson*, 81 Minn. 472; *Moore v. Beck*, 71 N. J. L. 7. See also *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

5. *Rule that Offense Must Be Infamous.* — *Tharp v. Nolan*, (Ky. 1905) 84 S. W. Rep. 1168; *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72; *Payne v. Tancil*, 98 Va. 262. See also *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**872.** 2. *Offense Must Involve Moral Turpitude Where Words Are Actionable.* — *McDonald v. Nugent*, 122 Iowa 651; *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72; *Payne v. Tancil*, 98 Va. 262.

*Moral Turpitude Defined.* — See *Baxter v. Mohr*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 833.

The true test of moral turpitude is whether the acts in question should be regarded as contrary to good morals in the absence of any statute on the subject. *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72.

**873.** 2. *Crime Committed in Foreign Country*

— *Oral Words Actionable.* — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

3. *Words Charging Unnamed Crime Actionable.* — *Nord v. Gray*, 80 Minn. 143. See also *McDonald v. Nugent*, 122 Iowa 651.

5. *Liability of Party Accused to Criminal Prosecution.* — *Tharp v. Nolan*, (Ky. 1905) 84 S. W. Rep. 1168; *Laury v. Evans*, 87 Minn. 398, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873.

**874.** 5. *Doyle v. Kirby*, 184 Mass. 409. But see *Shepherd v. Piper*, 98 Me. 384.

**875.** 1. *Actionable Charge that Plaintiff Has Pleaded Guilty and Been Fined.* — *Duncan v. Williams*, 107 Mo. App. 539.

3. *Oral Words Charging Abortion Actionable.* — *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926; *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

**876.** 1. *Oral Words Charging Arson Actionable.* — *Covington v. Roberson*, 111 La. 338; *Warner v. Southall*, 165 N. Y. 496; *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83.

*Written Words Charging Arson Actionable.* — *Conner v. Standard Pub. Co.*, 183 Mass. 474; *Lawton v. Territory*, 9 Okla. 456.

2. *Burning Property to Defraud Insurance Company.* — *Conner v. Standard Pub. Co.*, 183 Mass. 474; *Keller v. Dean*, 57 N. Y. App. Div. 7.

3. *Charge that Plaintiff Set Fire to Building.* — See *Conner v. Standard Pub. Co.*, 183 Mass. 474.

"One or More Unsatisfactory Fires." — It is not actionable to write of a business man that he "has had one or more unsatisfactory fires." *Goll v. Delesderniers*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 549.

**877.** 3. *Written Words Charging Assault and Battery Actionable.* — *O'Leary v. New York News Pub. Co.*, 51 N. Y. App. Div. 2. See also *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

**878.** 4. *Written Words Charging Bribery Actionable.* — *Donahoe v. Star Pub. Co.*, 4 Penn. (Del.) 166; *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513; *Field v. Magee*, 122 Mich. 556; *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105; *Pfister v. Sentinel Co.*, 108

- 879.** (8) *Burglary and Housebreaking*. — See note 1.  
 (9) *Conspiracy*. — See note 2.
- 880.** (12) *Embezzlement* — In General. — See note 2.  
 In What Words Actionable Charge May Be Made. — See note 3.
- 881.** (13) *Extortion*. — See note 3.
- 882.** (15) *Forgery* — In General. — See note 2.
- 884.** (18) *Larceny—Receiving Stolen Goods* — (a) In General. — See note 1.
- 888.** (b) In What Words Actionable Charge May Be Made — Charge that Plaintiff Has Stolen. — See note 5.
- 889.** Charge that Plaintiff Is a Thief. — See note 2.
- 890.** See note 1.
- 891.** Charge that Plaintiff "Took" Property. — See note 1.
- 892.** (20) *Murder* — (a) In General. — See note 3.
- 893.** (b) In What Words Actionable Charge May Be Made — Meaning of Word "Kill." — See note 4.
- 894.** (21) *Perjury and Subornation of Perjury* — (a) In General. — See note 2.

Wis. 572. See also *Weston v. Grand Rapids Pub. Co.*, 128 Mich. 375.

**Oral Words Charging Bribery Actionable.** — *Jarman v. Rea*, 137 Cal. 339; *Quist v. Kiichli*, 92 Minn. 160. But see *Doyle v. Kirby*, 184 Mass. 409, holding that although at common law both the giver and the taker of a bribe were guilty of a crime, the taker of a bribe at elections does not commit a crime under the statutes of *Massachusetts*, which have superseded the common law, so that oral words charging the taking of such a bribe are not actionable *per se*.

**879. 1. Written Words Charging Burglary Actionable.** — *Clark v. North American Co.*, 203 Pa. St. 346.

**2. Charging Conspiracy Between Husband and Wife.** — To say that a man entered into a conspiracy with his wife to extort money from another is not actionable in *Pennsylvania*, since a man cannot conspire with his wife. *Hornburger v. Seiler*, 24 Pa. Co. Ct. 476.

**880. 2. Written Words Charging Embezzlement Actionable.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737. See also *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646.

**Oral Words Charging Embezzlement Actionable.** — *Friedburg v. Nudd*, 9 Kan. App. 743.

**3. Embezzlement—What Words Amount to Charge.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Friedburg v. Nudd*, 9 Kan. App. 743. See also *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 647.

**881. 3. Oral Words Charging Extortion Actionable.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Weston v. Weston*, 83 N. Y. App. Div. 520.

**Actionable Quality of Word "Blackmailer."** — *Macdonald v. Mail Printing Co.*, 2 Ont. L. Rep. 278, reversing in part 32 Ont. 163.

**882. 2. Oral Words Charging Forgery Actionable.** — *Ruble v. Bunting*, 31 Ind. App. 654.

**884. 1. Oral Words Charging Larceny—Illinois.** — *Schofield v. Baldwin*, 102 Ill. App. 560; *Merrill v. Marshall*, 113 Ill. App. 447.

*Indiana.* — *Short v. Acton*, 33 Ind. App. 361. See also *Grotius v. Ross*, 24 Ind. App. 543.

*Iowa.* — *McMinemee v. Smith*, (Iowa 1903) 93 N. W. Rep. 75.

*Louisiana.* — *Simpson v. Robinson*, 104 La. 180.

*Maine.* — *Kimball v. Page*, 96 Me. 487.

*Massachusetts.* — *Faxon v. Jones*, 176 Mass. 206.

*Michigan.* — *McLeod v. Crosby*, 128 Mich. 641; *Savlan v. Ayer*, 129 Mich. 545; *Hinchman v. Knight*, 132 Mich. 532; *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993.

*Minnesota.* — *Lawry v. Evans*, 87 Minn. 398.

*Missouri.* — *Krup v. Corley*, 95 Mo. App. 640; *Carpenter v. Hamilton*, 185 Mo. 603.

*Nebraska.* — *Larson v. Cox*, (Neb. 1903) 93 N. W. Rep. 1011.

*North Carolina.* — See *Upchurch v. Robertson*, 127 N. Car. 127.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267.

*Vermont.* — *Smith v. Moore*, 74 Vt. 81.

*Wisconsin.* — *Hamlin v. Fantl*, 118 Wis. 596.

*Canada.* — *Cleveland v. Sherman*, 19 Quebec Super. Ct. 270.

**Written Words Charging Larceny Actionable.** — *Butler v. Barret*, 130 Fed. Rep. 944; *Cudlip v. New York Evening Journal Pub. Co.*, 174 N. Y. 158.

**888. 5. Charge that Plaintiff Has Stolen Actionable.** — *Butler v. Barret*, 130 Fed. Rep. 944; *Short v. Acton*, 33 Ind. App. 361; *McMinemee v. Smith*, (Iowa 1903) 93 N. W. Rep. 75; *McLeod v. Crosby*, 128 Mich. 641; *Carpenter v. Hamilton*, 185 Mo. 603; *Wrege v. Jones*, 13 N. Dak. 267. See also *Upchurch v. Robertson*, 127 N. Car. 127.

**889. 2. Charge that Plaintiff Is a Thief Is Actionable.** — *Schofield v. Baldwin*, 102 Ill. App. 560; *Simpson v. Robinson*, 104 La. 180; *Faxon v. Jones*, 176 Mass. 206; *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993; *Krup v. Corley*, 95 Mo. App. 640; *Egan v. Semrad*, 113 Wis. 84. See also *Merrill v. Marshall*, 113 Ill. App. 447.

**890. 1. Where Word "Thief" Does Not Import Commission of Larceny.** — *Merrill v. Marshall*, 113 Ill. App. 447; *Faxon v. Jones*, 176 Mass. 206; *Egan v. Semrad*, 113 Wis. 84.

**891. 1. "Take" Actionable Where Larceny Is Imputed.** — *Short v. Acton*, 33 Ind. App. 361.

**892. 3. Written Charge of Murder Actionable.** — *Jones v. Murray*, 167 Mo. 25.

**893. 4. Word "Kill" Used in Actionable Sense.** — *Jones v. Murray*, 167 Mo. 25.

**894. 2. Oral Words Charging Perjury Action-**

**896.** (c) In What Words Actionable Charge May Be Made — Charge of Perjury in Express Terms. — See note 2.

**897.** That Plaintiff Is Forsworn, Etc. — See note 1.

**899.** Materiality of Testimony as to Which Charge of Perjury Was Made. — See note 3.

**900.** (22) *Prostitution — Keeping Bawdy House — In General.* — See note 2.

**901.** (25) *Robbery* — (a) In General. — See note 5.

(b) In What Words Actionable Charge May Be Made. — See note 6.

**902.** (27) *Sodomy* — In General. — See note 6.

**904.** (30) *Miscellaneous Crimes.* — See note 1.

**905.** 5. Words Not Importing Commission of Crime — a. WRITTEN WORDS — (1) *In General.* — See note 1.

**906.** Written Words Tending to Diminish the Respectability. — See note 1.

able. — *Hereford v. Combs*, 126 Ala. 369; *Dell v. McBride*, 133 Mich. 649; *Alderson v. Auerswald*, 80 Mo. App. 370. See also *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

Written Words Charging Perjury Actionable. — *Gaines v. Gaines*, 109 Ill. App. 226.

**896.** 2. Oral Charge of Perjury in Express Terms Actionable. — *Hereford v. Coombs*, 126 Ala. 369; *Dell v. McBride*, 133 Mich. 649; *Anderson v. Auerswald*, 80 Mo. App. 370. See also *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

**897.** 1. Oral Charge of False Swearing Not Ex Vi Termini Actionable. — See *Gerald v. Inter Ocean Pub. Co.*, 90 Ill. App. 205.

**899.** 3. *Alderson v. Auerswald*, 80 Mo. App. 370.

**900.** 2. Oral Words Charging Keeping Bawdy House Actionable. — *Moore v. Beek*, 71 N. J. L. 7; *Wilkins v. Hammann*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 23, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 900.

**901.** 5. Oral Words Charging Robbery Actionable. — *Jones v. Murray*, 167 Mo. 25.

6. Actionable Quality of Word "Rob." — *Jones v. Murray*, 167 Mo. 25.

**902.** 6. Charge of Bestiality Actionable Although Not a Crime. — See *State v. Hewlin*, 128 N. Car. 571.

**904.** 1. False Imprisonment — Written Words Actionable. — *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546.

Offense Against Postal Laws — Oral and Written Charges Actionable. — See *Middleby v. Effler*, (C. C. A.) 118 Fed. Rep. 261.

**905.** 1. Written Words May Be Actionable Though No Crime Imputed — *United States*. — *Culmer v. Canby*, (C. C. A.) 101 Fed. Rep. 195; *Hanchett v. Chiatovich*, (C. C. A.) 101 Fed. Rep. 742; *Willard v. Sun Printing, etc., Co.*, 106 Fed. Rep. 636; *Totten v. Sun Printing, etc., Assoc.*, 109 Fed. Rep. 289; *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

*Alabama*. — *Woffard v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

*California*. — *Schomberg v. Walker*, 132 Cal. 224.

*Georgia*. — *Colvard v. Black*, 110 Ga. 642; *Holmes v. Clisby*, 118 Ga. 820; *Pavesich v. New England L. Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104.

*Illinois*. — *Harkness v. Chicago Daily News Co.*, 102 Ill. App. 162, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 905; *Spolek Denni*

*Hlasatel v. Hoffman*, 204 Ill. 537; *Herrick v. Tribune Co.*, 108 Ill. App. 244.

*Indiana*. — *Hamilton v. Lowery*, 33 Ind. App. 184.

*Iowa*. — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kansas*. — *Eckert v. Van Pelt*, 69 Kan. 357.

*Kentucky*. — See *Browning v. Com.*, 116 Ky. 282.

*Minnesota*. — *State v. Shippman*, 83 Minn. 441; *Davis v. Hamilton*, 85 Minn. 209; *Alwin v. Liesch*, 86 Minn. 281; *Herringer v. Ingberg*, 91 Minn. 71.

*Montana*. — *Paxton v. Woodward*, 31 Mont. 195.

*Nebraska*. — *Williams v. Fuller*, (Neb. 1903) 94 N. W. Rep. 118.

*New Jersey*. — *Knowlden v. Guardian Printing, etc., Co.*, 69 N. J. L. 670.

*New York*. — *Morrison v. Smith*, 177 N. Y. 366; *Triggs v. Sun Printing, etc., Co.*, 179 N. Y. 144; *Simpson v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228; *D'Andrea v. New York Press Co.*, 61 N. Y. App. Div. 605; *Lehmann v. Tribune Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 506; *O'Brien v. Bennett*, 72 N. Y. App. Div. 367; *Owen v. Partridge*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415; *Weston v. Weston*, 83 N. Y. App. Div. 520; *Stuart v. Press Pub. Co.*, 83 N. Y. App. Div. 477; *Martin v. Press Pub. Co.*, 93 N. Y. App. Div. 531; *Daily v. Engineering, etc., Journal*, 94 N. Y. App. Div. 314; *Woolworth v. Star Co.*, 97 N. Y. App. Div. 525; *Kirman v. Sun Printing, etc., Assoc.*, 99 N. Y. App. Div. 367; *Kuhne v. Ahlers*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 454.

*North Dakota*. — *Lauder v. Jones*, 13 N. Dak. 525.

*Ohio*. — *Steen v. Friend*, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459.

*Pennsylvania*. — See *Wills v. Hardcastle*, 19 Pa. Super. Ct. 525.

*South Carolina*. — *Flood v. News, etc., Co.*, 71 S. Car. 112.

*South Dakota*. — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Texas*. — *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; *King v. Sassaman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 937; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165.

*Vermont*. — *Cross v. Flood*, 77 Vt. 285.

*West Virginia*. — *Swindell v. Harper*, 51 W. Va. 381.

**906.** 1. Written Words Tending to Diminish Respectability. — *Flood v. News, etc., Co.*, 71

- 906.** (2) *Criminal Libels*. — See note 2.
- 908.** *c.* AS RESPECTS PARTICULAR IMPUTATIONS — (2) *Breach of Contract, Negligence, Trespass, Etc.* — See note 9.
- 909.** (3) *Words Exposing Another to Ridicule, Contempt, Degradation, or Disgrace* — (a) *Statement of General Rule*. — See note 1.
- 910.** What Constitutes Degradation or Disgrace Within Meaning of Rule. — See note 1.
- Words Tending to Produce Social Ostracism. — See note 2.
- Written Words Need Not Necessarily Impute Disgraceful Conduct. — See note 3.
- 911.** (b) *Exemplification of Rule* — *aa.* CARICATURES AND PICTURES. — See note 1.
- 913.** *ii.* IMPUTING INSOLVENCY AND POVERTY. — See note 1.
- jj.* IMPUTING ROWDYISM, ILL-BREEDING, ETC. — Ill-Breeding, Bad Manners, Etc. — See note 5.
- mm.* IMPUTATIONS CONCERNING RACE, COLOR, SEX, ETC. — Charge that White Man Is a Negro. — See note 9.
- 914.** *Imputation upon Sex*. — See note 1.
- oo.* MISCELLANEOUS IMPUTATIONS. — See note 3.

S. Car. 112, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 966 [906].

**906.** 2. Criminal Libel Need Not Impute Criminal Offense. — See *Browning v. Com.*, 116 Ky. 282.

**908.** 9. Oral Charge of Conversion Not Actionable. — See *Allen v. Brady*, (Ky. 1904) 83 S. W. Rep. 565.

**909.** 1. Writings Exposing to Ridicule, Contempt, etc., Actionable — *United States*. — *Culmer v. Canby*, (C. C. A.) 101 Fed. Rep. 195; *Hanchett v. Chiatovich*, (C. C. A.) 101 Fed. Rep. 742; *Willard v. Sun Printing, etc., Co.*, 106 Fed. Rep. 636; *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

*California*. — *Schomberg v. Walker*, 132 Cal. 224.

*Georgia*. — *Holmes v. Clisby*, 118 Ga. 820; *Pavesich v. New England L. Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104.

*Illinois*. — *Herrick v. Tribune Co.*, 108 Ill. App. 244.

*Indiana*. — *Hamilton v. Lowery*, 33 Ind. App. 184.

*Iowa*. — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kansas*. — *Eckert v. Van Pelt*, 69 Kan. 357, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

*Nebraska*. — *Williams v. Fuller*, (Neb. 1903) 94 N. W. Rep. 118.

*Michigan*. — *Field v. Magee*, 122 Mich. 556.

*Minnesota*. — *Davis v. Hamilton*, 85 Minn. 209; *Alwin v. Liesch*, 86 Minn. 281; *Herringer v. Ingberg*, 91 Minn. 71. See also *State v. Shippman*, 83 Minn. 441.

*New York*. — *Morrison v. Smith*, 177 N. Y. 366; *Triggs v. Sun Printing, etc., Assoc.*, 179 N. Y. 144; *Simpson v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228; *D'Andrea v. New York Press Co.*, 61 N. Y. App. Div. 605; *Lehmann v. Tribune Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 506; *O'Brien v. Bennett*, 72 N. Y. App. Div. 367; *Weston v. Weston*, 83 N. Y. App. Div. 520; *Martin v. Press Pub. Co.*, 93 N. Y. App. Div. 535; *Daily v. Engineering, etc., Journal*, 94 N. Y. App. Div. 314; *Woolworth v. Star Co.*, 97 N. Y. App. Div. 525; *Kirman v. Sun Printing, etc., Assoc.*, 99 N. Y. App. Div. 367.

*North Dakota*. — *Lauder v. Jones*, 13 N. Dak. 525.

*South Dakota*. — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Texas*. — *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165.

**910.** 1. General Nature of Degradation and Disgrace Contemplated by Rule. — *Culmer v. Canby*, (C. C. A.) 101 Fed. Rep. 195; *Herringer v. Ingberg*, 91 Minn. 71.

2. Written Words Tending to Produce Social Ostracism Actionable. — *Herrick v. Tribune Co.*, 108 Ill. App. 244; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Eckert v. Van Pelt*, 69 Kan. 357; *Davis v. Hamilton*, 85 Minn. 209; *Herringer v. Ingberg*, 91 Minn. 71; *Simpson v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228.

3. Words Not Imputing Disgraceful Conduct Actionable. — *Daily v. Engineering, etc., Journal*, 94 N. Y. App. Div. 314.

Obloquy Defined. — See *D'Andrea v. New York Press Co.*, 61 N. Y. App. Div. 605.

**911.** 1. Libelous Picture or Photograph. — See *Owen v. Partridge*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415.

**913.** 1. Written Charge of Abject Poverty Actionable. — *Martin v. Press Pub. Co.*, 93 N. Y. App. Div. 535, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 913.

A Written Charge that Another Is an Applicant in the Bankruptcy Court for release from the payment of his just debts is actionable *per se*. *Davis v. Hamilton*, 85 Minn. 209.

5. Imputation that a Woman Lacks Delicacy Not Actionable *Per Se*. — *A. B. v. Blackwood*, (Sc. Ct. of Sess.) 5 F. 25.

9. A Written Charge that a White Man Is a Negro Is Actionable notwithstanding the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States. *Flood v. News, etc., Co.*, 71 S. Car. 112.

**914.** 1. To Publish in a Newspaper that a Man Is a Eunuch is actionable *per se*, as such a charge tends to render him contemptible and ridiculous. *Eckert v. Van Pelt*, 69 Kan. 357.

3. To Write of a Man that He Neglects His Wife and everything else in his absorbing pur-

**918.** (4) *Imputations Which Are Not Defamatory* — (b) Abuse, Profanity, Scurillity. — See notes 3, 4.

(5) *Imputing Criminal Disposition and Intention*. — See note 6.

**919.** See note 1.

**920.** (6) *Imputing Moral Turpitude and Commission of Dishonorable, Dishonest, and Immoral Acts* — (a) In General. — See note 1.

**921.** (b) In What Words Actionable Charge May Be Made — *bb. IMPUTING WANT OF VERACITY* — In General. — See note 1.

**923.** *cc. IMPUTING DISHONESTY AND COMMISSION OF DISHONEST ACTS* — In General. — See note 1.

**927.** *ii. IMPUTING THAT ANOTHER IS A GAMBLER*. — See notes 1, 2.

**928.** (8) *Blackleg, Cheat, Knave, Rascal, Rogue, Scoundrel, Swindler, Etc.* — In General. — See note 1.

**929.** The Words "Cheat" and "Swindler." — See note 1.

(9) *Impugning Mental Capacity* — Ignorance, Illiteracy, Etc. — In General. — See note 3.

**930.** (10) *Imputation of Loathsome or Contagious Disease* — In General. — See notes 1, 2.

To What Diseases the Rule Applies. — See notes 4, 5.

suit of money is actionable *per se*. Woolworth v. Star Co., 97 N. Y. App. Div. 525.

**Charging Conspiracy Resulting in Panic.** — To charge that one's office was the centre of the "most gigantic conspiracy ever known in Wall street," which "resulted in the events culminating in Black Friday," is actionable as tending to disgrace and degrade. Willard v. Sun Printing, etc., Co., 106 Fed. Rep. 636.

**To Say of a Hotel Keeper that He Refuses Board to Guests** who have no money to pay for it or detains their baggage for failure to pay their bills has no tendency to expose him to disgrace, ridicule, or obloquy and is not actionable. Zinserling v. Journal Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591.

**A Writing Which Describes a Man as "an Englishman of More or Less Indifferent Repute,"** without innuendo, is not libelous *per se*. Crashley v. Press Pub. Co., 179 N. Y. 27.

**918. 3. General Abuse, Profanity, and Scurillity** — Written Words Not Actionable. — See Payne v. Pencil, 98 Va. 262.

**4. General Abuse, Profanity, and Scurillity** — Oral Words Not Actionable. — Bloom v. Crescioni, 109 La. 667, 94 Am. St. Rep. 456; Baxter v. Mohr, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 833.

**6. Oral Words Imputing Disposition or Intention to Commit Crime Not Actionable.** — Browning v. Com., 116 Ky. 282, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918.

**919. 1. Written Words Charging Criminal Disposition or Intention Actionable.** — Browning v. Com., 116 Ky. 282, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919.

**920. 1. Written Words Imputing Moral Turpitude, etc., Actionable.** — Cunningham v. Underwood, (C. C. A.) 116 Fed. Rep. 803.

**921. 1. Written Words Imputing Want of Veracity Actionable.** — Colvard v. Black, 110 Ga. 642; Paxton v. Woodward, 31 Mont. 195, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 921.

**It Is Actionable to Impute that One Is a Gratuitous Liar** as well as to impute that he lies for consideration. Pavesich v. New England L. Ins. Co., 122 Ga. 190, 106 Am. St. Rep. 104.

**923. 1. Written Words Imputing Dishonesty or Commission of Dishonest Acts Actionable.** — Cunningham v. Underwood, (C. C. A.) 116 Fed. Rep. 803; Wofford v. Meeke, 129 Ala. 349, 87 Am. St. Rep. 66; Morse v. Times-Republican Printing Co., 124 Iowa 707. See also Wills v. Hardcastle, 19 Pa. Super. Ct. 525.

**927. 1. Oral Charge of Gambling Not Actionable.** — Cincinnati Times-Star Co. v. France, (Ky. 1901) 61 S. W. Rep. 18. But see Weston v. Weston, 83 N. Y. App. Div. 520.

**2. Written Charge of Gambling Actionable.** — Owen v. Partridge, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415.

**928. 1. Written Words Actionable.** — Colvard v. Black, 110 Ga. 642.

**929. 1. Oral Charge of Cheating or Swindling** — Colloquium of False Pretenses. — Kuhne v. Ahlers, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 454.

**3. Written Words Impugning Mental Capacity Actionable.** — Totten v. Sun Printing, etc., Assoc., 109 Fed. Rep. 289; Morse v. Times-Republican Printing Co., 124 Iowa 707.

**930. 1. Oral Imputation that Plaintiff Has Loathsome Disease Actionable.** — McDonald v. Nugent, 122 Iowa 651; Woodruff v. Woodruff, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; Simpson v. Press Pub. Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228; Hatcher v. Range, 98 Tex. 85; Swindell v. Harper, 51 W. Va. 381. See also Le Massena v. Storm, 62 N. Y. App. Div. 150; Patterson v. Frazer, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**2. Presumption that Words Tend to Exclude Plaintiff from Society.** — See Hatcher v. Range, 98 Tex. 85.

**4. Written Words Charging that Another Had Consumption** are not actionable, because such a disease does not cause him to be shunned or avoided by his neighbors. Rade v. Press Pub. Co., (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254.

**5. Simpson v. Press Pub. Co.,** (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 228.

**Gonorrhea or Clap.** — To say of a married woman that if she had a venereal disease, she contracted it from some person other than her



**931.** 6. Words Imputing Want of Chastity, Lechery, Etc. — *a.* WRITTEN WORDS — (1) *Imputing Want of Chastity* — In General. — See note 1.

**932.** Tendency of Writing to Bring Another into Scorn and Disgrace. — See note 1.

(3) *Criminal Libels*. — See note 3.

*b.* ORAL WORDS — (1) *Common-law Rule* — In General. — See note 4.

**933.** To Say Orally of a Woman that She Is a Common Prostitute. — See note 1.

Criticisms of and Departure from Doctrine. — See note 4.

**934.** (2) *Statutory Provisions* — (a) *Statutes Making Adultery, etc., Crimes*. — See note 1.

(b) *Statutes Expressly Giving Right of Action for Oral Words*. — See note 1.

**936.** See note 1.

(c) *Statutes Making Oral Imputations Criminal*. — See note 2.

**937.** *c.* IN WHAT WORDS ACTIONABLE CHARGE MAY BE MADE — (1) *In General* — Insinuations and Ambiguous Words. — See note 1.

**938.** (2) *As Respects Particular Imputations* — (a) *Imputations upon Women* — Use of Words "Whore," "Prostitute," "Strumpet," Etc. — See notes 1, 2.

**939.** The Word "Bitch." — See note 1.

Words Charging Woman with Pregnancy and with Having Given Birth to Bastard Child. — See notes 2, 3.

husband, is actionable *per se* as imputing a want of chastity. *King v. Sassaman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 937.

*Pox or Syphilis*. — *Swindell v. Harper*, 51 W. Va. 381.

**931.** 1. Written Words Imputing Want of Chastity to Woman Actionable *Per Se*. — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537; *Knowlton v. Guardian Printing, etc., Co.*, 69 N. J. L. 670; *Steen v. Friend*, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459; *King v. Sassaman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 937. See also *Morrison v. Ritchie*, (Sc. Ct. of Sess.) 4 F. 645.

Written Words Imputing Want of Chastity to Man Actionable *Per Se*. — *Stuart v. Press Pub. Co.*, 83 N. Y. App. Div. 477; *Cross v. Flood*, 77 Vt. 285. See also *Lachman v. Fuller*, 125 Mich. 473.

**932.** 1. Tendency of Writing to Bring Plaintiff into Scorn and Disgrace. — *Morrison v. Smith*, 177 N. Y. 366.

3. *Writings Imputing Want of Chastity* — *Criminal Libels*. — *Riley v. State*, 132 Ala. 13.

4. *Oral Words Imputing Want of Chastity to Man Not Actionable Where No Crime Is Charged*. — See *Brown v. Wintch*, 110 Mo. App. 264.

*Oral Words Imputing Want of Chastity to Woman Not Actionable Where No Crime Is Charged*. — *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1079. See also *Kersting v. White*, 107 Mo. App. 285; *Hatcher v. Range*, 98 Tex. 85; *Kidder v. Bacon*, 74 Vt. 263.

**933.** 1. *Oral Charge that Woman Is a Common Prostitute Not Actionable*. — *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1079.

4. *In Iowa*. — *Cushing v. Hederman*, 117 Iowa 637, 94 Am. St. Rep. 320. See also *Emerson v. Miller*, 115 Iowa 315.

**934.** 1. *Imputing Want of Chastity* — *Oral Words Actionable Where Crime Is Charged*. — *McDonald v. Nugent*, 122 Iowa 651; *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 282; *Stoner v. Erisman*, 206 Pa. St. 600; *Payne v. Tancil*, 98 Va. 262; *Hacker v. Heiney*, 111 Wis. 318. See also *Johnson v. Force*, 80 Minn. 315.

**935.** 1. *Statutes Giving Women Right of Ac-*

*tion for Oral Words Imputing Want of Chastity*. — *Riley v. State*, 132 Ala. 13; *Stutsman v. Stutsman*, 32 Ind. App. 73. See also *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15.

**936.** 1. *Statutes Giving Both Men and Women Right of Action for Oral Words Imputing Want of Chastity*. — *Iles v. Swank*, 105 Ill. App. 9, *affirmed* 202 Ill. 453; *Nicholson v. Merritt*, 109 Ky. 369, (Ky. 1902) 67 S. W. Rep. 5; *Brown v. Wintch*, 110 Mo. App. 264; *Israel v. Israel*, 109 Mo. App. 366. See also *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106.

2. *Statutes Making Oral Words Impugning Female Chastity Criminal*. — *Hatcher v. Range*, 98 Tex. 85.

**937.** 1. *Insinuations and Ambiguous Words*. — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537; *Cross v. Flood*, 77 Vt. 285.

**938.** 1. *Actionable Quality of Word "Whore"*. — *Israel v. Israel*, 109 Mo. App. 366; *Hacker v. Heiney*, 111 Wis. 318.

2. *Synonyms of Word "Whore" Actionable*. — *Riker v. Clopton*, 83 N. Y. App. Div. 310.

**939.** 1. *Word "Bitch" Capable of Referring to Whoredom*. — The word "bitch" does not generally refer to whoredom in any of its forms, but is capable of such reference, both in the intention of the speaker and the understanding of the hearers. *Stoner v. Erisman*, 206 Pa. St. 600.

It is for the Jury to Determine whether by reason of the time, place, and circumstances attending the utterances, a want of chastity is imputed by calling a woman a "bitch." *Craver v. Norton*, 114 Iowa 46, 89 Am. St. Rep. 346.

*Referring to a Woman as a "Slut"* is not in itself actionable, but the rule is quite the contrary where a woman is charged with being a certain man's "slut." *Kennenberg v. Neff*, 74 Conn. 62.

2. *Words Charging Unmarried Woman with Pregnancy Actionable*. — *Hocks v. Sprangers*, 113 Wis. 123.

3. *"Has One of Griff Nicholson's Girls Had a Young One? I Heard It,"* are actionable words. *Nicholson v. Merritt*, 109 Ky. 369.

**940.** To say that a Woman Is Kept. — See note 1.

**943.** 7. Words Touching Another in His Office, Trade, Profession, or Business — *a.* BROAD STATEMENT OF GENERAL RULE — In General. — See note 1.

**944.** Words Need Not Impute Moral Turpitude. — See note 2.

*b.* DISTINCTION BETWEEN IMPUTATIONS UPON GENERAL REPUTATION AND WORDS TOUCHING SPECIAL CHARACTER OR RELATION — (1) *In General.* — See note 5.

**945.** Where an Officer Exceeds His Jurisdiction. — See note 3.

**946.** Necessity to Aver that Words Touched Plaintiff in His Special Character or Relation. — See note 4.

**947.** *c.* WORDS TOUCHING ONE ENGAGED IN ILLEGAL BUSINESS — In General. — See note 4.

**948.** *d.* DISTINCTION BETWEEN ORAL AND WRITTEN WORDS — (1) *In General.* — See note 2.

(2) *Words Which Do Not Import Commission of Crime.* — See note 3.

**949.** *e.* IMPUTATIONS UPON PUBLIC OFFICERS — (1) *In General.* — See note 1.

**950.** (2) *As Respects Particular Imputations* — (a) *Ignorance and Want of Capacity to Perform Duties of Office.* — See note 3.

(c) *Commission of Crime.* — See note 7.

**940.** 1. "Kept" Defined — Susceptible of Actionable Meaning. — *Payne v. Tancil*, 98 Va. 262.

**943.** 1. Broad Statement of General Rule — *United States.* — *Daily v. De Young*, 127 Fed. Rep. 491.

*Georgia.* — *Brown v. Holton*, 109 Ga. 431; *Dun v. Weintraub*, 111 Ga. 416.

*Iowa.* — *McDonald v. Nugent*, 122 Iowa 651. *Kentucky.* — See *Manire v. Hubbard*, 110 Ky. 311; *Fred v. Traylor*, 115 Ky. 97.

*Maryland.* — *Kilgour v. Evening Star Newspaper Co.*, 96 Md. 24, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

*Missouri.* — *Minter v. Bradstreet Co.*, 174 Mo. 486; *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223.

*New York.* — *Ratzel v. New York News Pub. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 487, 67 N. Y. App. Div. 598; *Woodruff v. Woodruff*, (Supm. Ct. Spec. Ct.) 36 Misc. (N. Y.) 15; *Gibson v. Sun Printing, etc., Assoc.*, 71 N. Y. App. Div. 566; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Cassavoy v. Pattison*, 93 N. Y. App. Div. 370; *Daily v. Engineering, etc., Journal*, 94 N. Y. App. Div. 314. See also *O'Leary v. New York News Pub. Co.*, 51 N. Y. App. Div. 2; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Potter v. New York Evening Journal Pub. Co.*, 68 N. Y. App. Div. 95.

*Ohio.* — *Mauk v. Brundage*, 68 Ohio St. 96, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

*Pennsylvania.* — *McIntyre v. Weinert*, 195 Pa. St. 52.

*South Carolina.* — *Smith v. Bradstreet Co.*, 63 S. Car. 525.

*Tennessee.* — *Cooley v. Galyon*, 109 Tenn. 1. *Vermont.* — See *Jones v. Roberts*, 73 Vt. 201.

**It Must Appear that the Plaintiff Had a Profession in which the publication could or would injure him.** *Gray v. Times Newspaper Co.*, 78 Minn. 223.

**944.** 2. Words Need Not Impute Moral Turpitude. — 3 Supp. E. of L.—66

tude. — See *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

**5. Rule that Words Must Touch Another in His Special Character or Relation.** — *Fred v. Traylor*, 115 Ky. 97, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 944; *Paxton v. Woodward*, 31 Mont. 195; *O'Leary v. New York News Pub. Co.*, 51 N. Y. App. Div. 2; *Potter v. New York Evening Journal Pub. Co.*, 68 N. Y. App. Div. 95. See also *Manire v. Hubbard*, 110 Ky. 311.

**945.** 3. Acts Done by Officer in Excess of Jurisdiction. — *Kilgour v. Evening Star Newspaper Co.*, 96 Md. 24, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 945.

**946.** 4. Necessity to Aver that Words Touched Plaintiff in His Special Character or Relation. — *Smedley v. Soule*, 125 Mich. 192.

**947.** 4. Words Concerning Illegal Business Not Actionable. — *Weltner v. Bishop*, 171 Mo. 117, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947.

**948.** 2. No Distinction Between Oral and Written Words. — *Cooley v. Galyon*, 109 Tenn. 1. **Oral Words Touching Another in His Office, etc., Actionable Per Se.** — *McDonald v. Nugent*, 122 Iowa 651; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Cassavoy v. Pattison*, 93 N. Y. App. Div. 370.

**3. Words Actionable though No Crime Imputed.** — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Cassavoy v. Pattison*, 93 N. Y. App. Div. 370; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Cooley v. Galyon*, 109 Tenn. 1.

**949.** 1. Imputations upon Public Officers — **Written Words.** — *Coffin v. Brown*, 94 Md. 190, 89 Am. St. Rep. 422; *Scougale v. Sweet*, 124 Mich. 311; *Osborn v. Leach*, 135 N. Car. 633; *Nehrling v. Herold Co.*, 112 Wis. 558. See also *Herringer v. Ingberg*, 91 Minn. 71.

**950.** 3. Charge of Ignorance and Want of Capacity to Perform Duties Actionable. — *Nehrling v. Herold Co.*, 112 Wis. 558.

7. *Prussing v. Jackson*, 208 Ill. 96.

- 951.** (d) Corruption, Dishonesty, Want of Integrity. — See note 2.  
 (3) *As Respects Particular Officers.* — See note 6.
- 954.** g. IMPUTATIONS UPON MERCHANTS, TRADERS, AND BUSINESS MEN — (1) *In General.* — See note 1.
- 955.** (2) *As Respects Particular Imputations* — (a) *In General.* — See note 1.  
 (b) *Insolvency or Want of Credit* — *In General.* — See note 5.
- 956.** False Reports of Mercantile and Collecting Agencies. — See note 1.
- 957.** See note 1.  
 (a) *Fraud and Dishonesty.* — See note 2.
- 958.** (3) *Imputations upon Manufacturers* — *In General.* — See note 1.
- 959.** (4) *Imputations upon Corporations* — Words Actionable Per Se. — See note 1.

h. IMPUTATIONS UPON PERSONS IN OFFICES OF TRUST OR PROFIT — *In General.* — See note 8.

**960.** i. IMPUTATIONS UPON LAWYERS — *In General.* — See note 2.

**961.** j. IMPUTATIONS UPON PHYSICIANS, DENTISTS, DRUGGISTS, AND OBSTETRICIANS — (1) *In General* — Physicians and Surgeons. — See note 1.  
 To Call a Physician a Quack. — See note 2.

**962.** Words Spoken of a Physician Must Touch Him in His Profession. — See note 1.

**951.** 2. Oral Charge of Corruption in Office Actionable. — Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66.

6. Director of State Prison. — Osborn v. Leach, 135 N. Car. 633.

City Engineer. — Prussing v. Jackson, 208 Ill. 96.

**954.** 1. Imputations upon Merchants, Etc. — Oral Words. — Fred v. Traylor, 115 Ky. 97, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 954. See also Hatcher v. Range, 98 Tex. 85.

Imputations upon Business Men — Written Words. — Smith v. Bradstreet Co., 63 S. Car. 525; Robinson v. Eau Claire Book, etc., Co., 110 Wis. 369.

**955.** 1. Brown v. Holton, 109 Ga. 431.

5. Words Imputing Want of Credit or Insolvency to Merchant or Trader Actionable Per Se. — Salomon v. Armour, 123 Fed. Rep. 342; Dun v. Weintraub, 111 Ga. 416; Davis v. Hamilton, 85 Minn. 209; Minter v. Bradstreet Co., 174 Mo. 486; Brown v. Providence Telegram Pub. Co., 25 R. I. 117; Smith v. Bradstreet Co., 63 S. Car. 525. See also Hatcher v. Range, 98 Tex. 85.

Recovery of Judgment Against Merchant. — It is not actionable *per se* to write of a merchant that a judgment has been recovered against him. Dun v. Weintraub, 111 Ga. 416.

Merchant Giving Mortgage. — Without alleging special damage it is not actionable to write of a merchant that he has given a mortgage on his stock. Dun v. Weintraub, 111 Ga. 416.

**956.** 1. False Reports of Mercantile and Collecting Agencies. — Minter v. Bradstreet Co., 174 Mo. 486.

To write falsely of a merchant that he has not "succeeded in obtaining the implicit confidence of local people" and that he is regarded as of "small financial responsibility and uncertain prospects" is actionable. Dun v. Weintraub, 111 Ga. 416.

**957.** 1. Permissible Information as to Standing of Merchants, Etc. — Minter v. Bradstreet Co., 174 Mo. 486.

2. Words Imputing Fraud or Dishonesty to Business Man Actionable. — Fred v. Traylor, 115 Ky. 97; Robinson v. Eau Claire Book, etc., Co., 110 Wis. 369.

A Charge that a Merchant Has Sold Unwholesome Articles of Food is actionable. Leitz v. Hohman, 16 Pa. Super. Ct. 276.

**958.** 1. Actionable Imputations upon Manufacturers. — Inland Printer Co. v. Economical Half Tone Supply Co., 99 Ill. App. 8.

Statement by Trader that His Goods Surpass Those of Rival. — An untrue and malicious statement by a trader that his goods are superior to those manufactured by a rival is not actionable as a libel. Hubback v. Wilkinson, (1899) 1 Q. B. 86, 68 L. J. Q. B. 34.

**959.** 1. Oral Words Concerning Corporation Actionable. — Brayton v. Cleveland Special Police Co., 63 Ohio St. 83.

8. Imputations upon Persons in Office of Trust or Profit. — Flanders v. Daley, 120 Ga. 888; Lander v. Jones, 13 N. Dak. 525.

**960.** 2. Imputations upon Lawyers — Written Words. — Smedley v. Soule, 125 Mich. 102; Gibson v. Sun Printing, etc., Assoc., 71 N. Y. App. Div. 566. See also Pierce v. Rodliff, 95 Me. 346; Bornmann v. Star Co., 174 N. Y. 219; Gattis v. Kilgo, 128 N. Car. 402; Hatcher v. Range, 98 Tex. 85.

Imputations upon Lawyers — Oral Words. — To say of a solicitor that he "has lost thousands" is not actionable without proof of special damage, though he is in the habit of receiving from clients in his capacity as solicitor moneys in trust for investment. Dauncey v. Holloway, (1901) 2 K. B. 441.

**961.** 1. Oral Words Concerning Physician Actionable. — Parker v. Republican Co., 181 Mass. 392.

Written Words Concerning Physician Actionable. — Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Bornmann v. Star Co., 174 N. Y. 219; Elmergreen v. Horn, 115 Wis. 385.

A Charge of Want of Skill in a Particular Transaction is not ordinarily actionable. Manire v. Hubbard, 110 Ky. 311.

2. Charge that Physician Is a Quack Actionable. — Bornmann v. Star Co., 174 N. Y. 219, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 961; Elmergreen v. Horn, 115 Wis. 385.

**962.** 1. Using a Physician's Name to Adver-

- 963.** *k.* IMPUTATIONS UPON CLERGYMEN — *In General.* — See note 2.  
**964.** *l.* IMPUTATIONS UPON TEACHERS — *In General.* — See note 4.  
**965.** *m.* IMPUTATIONS UPON CLERKS, AGENTS, SERVANTS, ETC. — *In General.* — See note 4.  
**967.** *p.* IMPUTATIONS UPON PERSONS PURSUING MISCELLANEOUS VOCATIONS — *Any Lawful Employment Within Rule.* — See note 1.  
**968.** 9. Disparagement of Property — *In General.* — See note 5.  
**969.** See note 1.  
 10. Construction of Words — General Considerations as to Nature of Language Used — *a.* CHARGES BY IMPLICATION AND INDIRECTION — WORDS CALCULATED TO INDUCE SUSPICION — (1) *In General.* — See notes 3, 4.  
**970.** Words Calculated to Induce Suspicion. — See note 1.  
**971.** (4) *Interrogations.* — See note 5.  
 (5) *Expressions of Belief.* — See note 6.  
**972.** (6) *Assertions as to Reports and Rumors.* — See note 2.  
*b.* IRONICAL LANGUAGE. — See note 4.

tise a Certain Drug is not libelous unless it appears that such advertisement has injured his property, business, or profession. *Dockrell v. Dougall*, 80 L. T. N. S. 556.

**963.** 2. Oral Words Touching Clergymen Actionable *Per Se.* — *Flanders v. Daley*, 120 Ga. 888, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 963.

Written Words Touching Clergymen Actionable *Per Se.* — *Potter v. New York Evening Journal Pub. Co.*, 68 N. Y. App. Div. 95; *Jones v. Roberts*, 73 Vt. 201. See also *Wills v. Hardcastle*, 19 Pa. Super. Ct. 525.

Whether Clergyman Must Be in Receipt of Profit from Profession. — *In Gattis v. Kilgo*, 128 N. Car. 402, it was held that words spoken of a clergyman as such are not actionable unless he has some benefice or preferment of which he may be deprived.

But in *Flanders v. Daley*, 120 Ga. 888, it was said that while there is respectable authority for the proposition that a minister of the gospel cannot hold one liable for words spoken in reference to his profession, unless it appears that he is receiving profit therefrom, yet the correct rule is that the reputation or character of a minister is protected, without regard to whether he is receiving compensation for his services.

**964.** 4. Oral Imputations upon School Teachers Actionable. — *Finley v. Steele*, 159 Mo. 299. See also *Kidder v. Bacon*, 74 Vt. 263.

Written Imputations upon School Teachers Actionable. — *Bray v. Callihan*, 155 Mo. 43; *Paxton v. Woodward*, 31 Mont. 195.

Charging the President of an Institution of Learning with "Shameless Skullduggery" is actionable. *Danville Democrat Pub. Co. v. McClure*, 86 Ill. App. 432.

**965.** 4. Insurance Agents. — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

**967.** 1. Architects. — See *Bornmann v. Star Co.*, 174 N. Y. 219.

Artists and Illustrators. — *Freisinger v. Moore*, 65 N. J. L. 286.

Builders and Contractors. — *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203.

Editors. — Written words charging an editor of a trade journal with being "crooked" are libelous *per se*. *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223.

*Millers.* — *Fred v. Traylor*, 115 Ky. 97.

*Stockbrokers.* — *Willard v. Sun Printing, etc., Co.*, 106 Fed. Rep. 636.

*Tellers of Banks.* — See *Bornmann v. Star Co.*, 174 N. Y. 219.

**968.** 5. Words Disparaging Property Not Actionable *Per Se.* — *McDonald v. Green*, 176 Mass. 113; *Butts v. Long*, 106 Mo. App. 313; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Maglio v. New York Herald Co.*, 83 N. Y. App. Div. 44.

A Mere Expression of an Unfavorable Opinion of the goods of a rival in trade is not actionable. *Nonpareil Cork Mfg. Co. v. Keasbey, etc., Co.*, 108 Fed. Rep. 721.

**969.** 1. Disparagement of Property — Words Actionable Where Special Damage Is Shown. — See *Le Massena v. Storm*, 62 N. Y. App. Div. 150.

3. Form of Language Immaterial. — *Laury v. Evans*, 87 Minn. 398; *Lauder v. Jones*, 13 N. Dak. 525.

4. Charges by Implication and Indirection Actionable. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Ruble v. Bunting*, 31 Ind. App. 654; *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5; *Covington v. Roberson*, 111 La. 338; *Herringer v. Ingberg*, 91 Minn. 71; *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223; *Wilkins v. Hammann*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 23; *Lauder v. Jones*, 13 N. Dak. 525.

**970.** 1. Words Calculated to Induce Suspicion. — *Ruble v. Bunting*, 31 Ind. App. 654. See also *Emerson v. Miller*, 115 Iowa 315.

**971.** 5. Actionable Interrogations. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5; *Lauder v. Jones*, 13 N. Dak. 525.

6. Expressions of Belief Actionable. — *Covington v. Roberson*, 111 La. 338, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 971, 972.

**972.** 2. Assertions as to Reports and Rumors. — *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5; *Wilkins v. Hammann*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 23; *Lauder v. Jones*, 13 N. Dak. 525.

4. Ironical Words Actionable. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Herringer v. Ingberg*, 91 Minn. 71; *Wilkins v. Hammann*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 23; *Lauder v. Jones*, 13 N. Dak. 525.

**973.** *c.* CANT AND SLANG WORDS AND PROVINCIALISMS — In General. — See notes 1, 2.

**974.** *d.* RULE THAT WORDS MUST BE TAKEN IN NATURAL AND OBVIOUS SENSE — The Ancient Rule. — See note 1.

In Modern Times. — See note 2.

**976.** It Is Not the Ingeniously Possible Construction. — See note 1.

**977.** Intention of Writer or Understanding of Particular Reader Immaterial. — See note 1.

**978.** *e.* DISTINCTION BETWEEN WORDS WHICH ARE AND ARE NOT ACTIONABLE EX VI TERMINI — (1) In General — Words Actionable Ex Vi Termini. — See notes 2, 3.

Words Not Actionable Ex Vi Termini. — See note 4.

**979.** (2) Office of Inducement, Colloquium, and Innuendo — In General. — See note 2.

**973.** 1. Cant and Slang Words and Provincialisms. — *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223; *Lauder v. Jones*, 13 N. Dak. 525.

2. No Action Lies Where Covert Meaning Is Not Understood by Hearers. — *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223.

**974.** 1. Cases Decided under Rule in Mitiori Sensu. — See *Berea College v. Powell*, (Ky. 1903) 77 S. W. Rep. 381; *State v. Sutton*, 74 Vt. 12.

2. Modern Rule that Words Must Be Taken in Obvious and Natural Sense — *England*. — See *Marks v. Samuel*, (1904) 2 K. B. 287, 73 L. J. K. B. 587, 96 L. T. N. S. 590, 53 W. R. 88, 20 Times L. Rep. 430.

*Canada*. — *Major v. McGregor*, 6 Ont. L. Rep. 528, affirming 5 Ont. L. Rep. 81, and citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 973 [974]; *Macdonald v. Mail Printing Co.*, 32 Ont. 163.

*Alabama*. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

*Georgia*. — *Watters v. Retail Clerks' Union* No. 479, 120 Ga. 424.

*Illinois*. — *Harkness v. Chicago Daily News Co.*, 102 Ill. App. 162.

*Indiana*. — *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319.

*Iowa*. — *Wallace v. Homestead Co.*, 117 Iowa 348. See also *Emerson v. Miller*, 115 Iowa 315.

*Kentucky*. — *Berea College v. Powell*, (Ky. 1903) 77 S. W. Rep. 381.

*Minnesota*. — *Nord v. Gray*, 80 Minn. 143; *Davis v. Hamilton*, 85 Minn. 209, second appeal 88 Minn. 64; *Quist v. Kiichli*, 92 Minn. 160.

See also *Radke v. Kolbe*, 79 Minn. 440; *Johnson v. Force*, 80 Minn. 315.

*Missouri*. — *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223; *Israel v. Israel*, 109 Mo. App. 366.

*New Jersey*. — *Freisinger v. Moore*, 65 N. J. L. 286.

*New York*. — See *Foot v. Pitt*, 83 N. Y. App. Div. 76.

*North Dakota*. — See *Lauder v. Jones*, 13 N. Dak. 525.

*Pennsylvania*. — *Goebeler v. Wilhelm*, 17 Pa. Super. Ct. 432.

*South Dakota*. — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Vermont*. — *State v. Sutton*, 74 Vt. 12; *Smith*

*v. Moore*, 74 Vt. 81; *Kidder v. Bacon*, 74 Vt. 263.

*Virginia*. — *Payne v. Tancil*, 98 Va. 262; *Moss v. Harwood*, 102 Va. 386.

*West Virginia*. — *Swindell v. Harper*, 51 W. Va. 381.

**976.** 1. Technical, Grammatical, or Literal Construction Improper. — *Lauder v. Jones*, 13 N. Dak. 525.

**977.** 1. *Payne v. Tancil*, 98 Va. 262; *Macdonald v. Mail Printing Co.*, 32 Ont. 163.

**978.** 2. Words Which Convey Actionable Imputation Ex Vi Termini — *United States*. — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Butler v. Barret*, 130 Fed. Rep. 944. See also *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 647.

*Alabama*. — *Hereford v. Combs*, 126 Ala. 369. *California*. — *Jarman v. Rea*, 137 Cal. 339.

*Illinois*. — *Schofield v. Baldwin*, 102 Ill. App. 560. See also *Merrill v. Marshall*, 113 Ill. App. 447.

*Indiana*. — *Short v. Acton*, 33 Ind. App. 361. *Iowa*. — *McMinemee v. Smith*, (Iowa 1903) 93 N. W. Rep. 75.

*Kansas*. — *Friedburg v. Nudd*, 9 Kan. App. 743. *Louisiana*. — *Simpson v. Robinson*, 104 La. 180.

*Massachusetts*. — *Faxon v. Jones*, 176 Mass. 206.

*Michigan*. — *McLeod v. Crosby*, 128 Mich. 641; *Dell v. McBride*, 133 Mich. 649; *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993.

*Missouri*. — *Jones v. Murray*, 167 Mo. 25; *Krup v. Corley*, 95 Mo. App. 640; *Carpenter v. Hamilton*, 185 Mo. 603; *Alderson v. Auerswald*, 80 Mo. App. 370.

*North Carolina*. — See *Upchurch v. Robertson*, 127 N. Car. 127; *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

*North Dakota*. — *Wrege v. Jones*, 13 N. Dak. 267.

*Wisconsin*. — *Egan v. Semrad*, 113 Wis. 84.

**3. Actionable Imputations Made in Express Terms.** — *People v. Seeley*, 139 Cal. 118; *Gaines v. Gaines*, 109 Ill. App. 226; *Cleveland v. Sherman*, 19 Quebec Super. Ct. 270.

**4. Words Not Actionable Ex Vi Termini, but Requiring Explanation.** — *Morrison v. Ritchie*, Sc. Ct. of Sess. 4 F. 645; *Short v. Acton*, 33 Ind. App. 361; *Gerald v. Inter Ocean Pub. Co.*, 90 Ill. App. 205; *Jarman v. Rea*, 137 Cal. 339.

**979.** 2. Office of Inducement, Colloquium, and

**979.** It Is the Office of the Inducement. — See note 3.

**980.** It Is the Office of the Colloquium. — See note 1.

**981.** See note 1.

The Office of an Innuendo. — See note 2.

**982.** See note 1.

Undue Enlargement of Meaning by Innuendo. — See note 2.

**Innuendo in General.** — Schomberg v. Walker, 132 Cal. 224; Jarman v. Rea, 137 Cal. 339; Paxton v. Woodward, 31 Mont. 195; Kelly v. State, 24 Ind. App. 639; Jones v. Roberts, 73 Vt. 201; Elmergreen v. Horn, 115 Wis. 385; Tobin v. Gannon, 34 Nova Scotia 9, 37 Can. L. J. 205; Major v. McGregor, 6 Ont. L. Rep. 528, affirming 5 Ont. L. Rep. 81.

**979. 3. Office of Inducement.** — Duvivier v. French, (C. C. A.) 104 Fed. Rep. 278; Jarman v. Rea, 137 Cal. 339; Kelly v. State, 24 Ind. App. 639; Short v. Acton, 33 Ind. App. 361; Derham v. Derham, 123 Mich. 451; Paxton v. Woodward, 31 Mont. 195. See also Garrett v. Bissell Chilled Plow Works, 154 Ind. 319; State v. Grinstead, 62 Kan. 593; Gattis v. Kilgo, 128 N. Car. 402.

**Omission of Inducement Not Cured by Innuendo.** — Duvivier v. French, (C. C. A.) 104 Fed. Rep. 278.

**Position of Inducement May Follow Language Complained of.** — "The inducement, being in its nature introductory, usually precedes the language complained of, but may follow it." Short v. Acton, 33 Ind. App. 361.

**Inducement Sets Forth Matter Showing that Libel Refers to Plaintiff.** — When a libel does not naturally and *per se* refer to the plaintiff, it is the function of the inducement to set forth the extrinsic matter showing its relation to the plaintiff. Butler v. Carter, etc., Pub. Co., (C. C. A.) 135 Fed. Rep. 69.

**980. 1. Office of Colloquium.** — Hamilton v. Lowery, 33 Ind. App. 184; Walton v. Frost, 22 R. I. 157. See also Jarman v. Rea, 137 Cal. 339; Stutsman v. Stutsman, 32 Ind. App. 73.

**At Common Law** it was necessary in an action for libel to set up, by way of colloquium, matter connecting the plaintiff with the publication. Jacquelin v. Morning Journal Assoc., 39 N. Y. App. Div. 515.

**981. 1.** See Quist v. Kuchli, 92 Minn. 160; Daily v. Engineering, etc., Journal, 94 N. Y. App. Div. 314.

**2. Office of Innuendo** — United States. — Duvivier v. French, (C. C. A.) 104 Fed. Rep. 278; Cunningham v. Underwood, (C. C. A.) 116 Fed. Rep. 803.

**Alabama.** — Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66.

**Georgia.** — Holmes v. Clisby, 118 Ga. 820.

**Illinois.** — See Herrick v. Tribune Co., 108 Ill. App. 244.

**Indiana.** — Garrett v. Bissell Chilled Plow Works, 154 Ind. 319; Stutsman v. Stutsman, 32 Ind. App. 73; Hamilton v. Lowery, 33 Ind. App. 184; Kelly v. State, 24 Ind. App. 639.

**Iowa.** — Wallace v. Homestead Co., 117 Iowa 348.

**Kansas.** — See State v. Grinstead, 62 Kan. 593.

**Minnesota.** — State v. Shippman, 83 Minn. 441. See also Davis v. Hamilton, 85 Minn. 209.

**Nebraska.** — Williams v. Fuller, (Neb. 1903) 94 N. W. Rep. 118.

**New York.** — Zinserling v. Journal Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591; Morrison v. Smith, 177 N. Y. 366; Garby v. Bennett, 40 N. Y. App. Div. 163, affirmed 166 N. Y. 392; Beecher v. Press Pub. Co., 60 N. Y. App. Div. 536; Gibson v. Sun Printing, etc., Assoc., 71 N. Y. App. Div. 566; Brown v. Tribune Assoc., 74 N. Y. App. Div. 359; Kenworthy v. Brown, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 292. See also Kuster v. Press Pub. Co., 80 N. Y. App. Div. 615; Daily v. Engineering, etc., Journal, 94 N. Y. App. Div. 314.

**Vermont.** — Jones v. Roberts, 73 Vt. 201.

**Virginia.** — Payne v. Tancil, 98 Va. 262.

**The Innuendo Must Be Specific** and distinctly aver a definite actionable meaning. Tobin v. Gannon, 34 Nova Scotia 9, 37 Can. L. J. 205.

**If the Innuendo Meaning Fails** the case may go to the jury on the actual meaning. Hilder v. Brooklyn Daily Eagle, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 165.

**982. 1. When Words Are Unambiguous Innuendo Unnecessary.** — Central of Georgia R. Co. v. Sheftall, 118 Ga. 865; Quinn v. Prudential Ins. Co., 116 Iowa 522; State v. Shippman, 83 Minn. 441; Midland Pub. Co. v. Implement Trade Journal Co., 108 Mo. App. 223; Collis v. Press Pub. Co., 68 N. Y. App. Div. 38; Sanders v. Edmonson, (Tex. Civ. App. 1900) 56 S. W. Rep. 611; Moss v. Harwood, 102 Va. 386.

**Rejection of Innuendo as Surplusage.** — When the innuendo is not warranted by the preceding allegations, it may be rejected as surplusage if the complaint charges words actionable *per se*. Jones v. Roberts, 73 Vt. 201.

**2. Undue Enlargement of Meaning by Innuendo** — United States. — Culmer v. Canby, (C. C. A.) 101 Fed. Rep. 195; Cunningham v. Underwood, (C. C. A.) 116 Fed. Rep. 803.

**Alabama.** — Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66.

**Georgia.** — Holmes v. Clisby, 118 Ga. 820; Central of Georgia R. Co. v. Sheftall, 118 Ga. 865.

**Illinois.** — Herrick v. Tribune Co., 108 Ill. App. 244.

**Indiana.** — Garrett v. Bissell Chilled Plow Works, 154 Ind. 319; Kelly v. State, 24 Ind. App. 639; Stutsman v. Stutsman, 32 Ind. App. 73; Hamilton v. Lowery, 33 Ind. App. 184.

**Iowa.** — Quinn v. Prudential Ins. Co., 116 Iowa 522; Wallace v. Homestead Co., 117 Iowa 348.

**Kansas.** — See State v. Grinstead, 62 Kan. 593.

**Minnesota.** — Radke v. Kolbe, 79 Minn. 440; Herringer v. Ingberg, 91 Minn. 71.

**Missouri.** — Midland Pub. Co. v. Implement Trade Journal Co., 108 Mo. App. 223.

**New York.** — Zinserling v. Journal Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591;

**984. f. CONSIDERATION OF ENTIRE CONVERSATION OR WRITING, SURROUNDING CIRCUMSTANCES, AND SUBJECT-MATTER — (1) In General — Words Must Be Construed as a Whole. — See note 1.**

**985. Significance of Title or Headlines of Article. — See note 1.**

**986. Surrounding Circumstances and Subject-matter to Which Words Relate. — See note 2.**

**987. (3) Qualifying and Mitigating Circumstances Accompanying Words — False Characterization of Innocent Acts — In General. — See note 2.**

**990. g. WORDS WHICH DO NOT CHARGE CRIME WITH PRECISION REQUIRED IN INDICTMENT — (3) Failure to Charge Intent to Commit Crime, Guilty Knowledge, Etc. — See note 2.**

**11. Province of Court and Jury — a. IN GENERAL — Province of Court. — See note 3.**

**991. Sufficiency of Declaration, Complaint, or Indictment. — See note 1.**

**Province of Jury. — See note 2.**

*Verbeck v. Duryea*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 242; *Gibson v. Sun Printing, etc.*, Assoc., 71 N. Y. App. Div. 566; *Kenworthy v. Brown*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 292.

*North Dakota. — Lauder v. Jones*, 13 N. Dak. 525.

*Vermont. — Jones v. Roberts*, 73 Vt. 201.

*Virginia. — Payne v. Tancil*, 98 Va. 262; *Moss v. Harwood*, 102 Va. 386.

**984. 1. Consideration of Entire Conversation or Writing. —** *Hanchett v. Chiatovich*, (C. C. A.) 101 Fed. Rep. 742; *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Holmes v. Clisby*, 118 Ga. 820; *Watters v. Retail Clerks Union* No. 479, 120 Ga. 424; *Harkness v. Chicago Daily News Co.*, 102 Ill. App. 162; *Kilgour v. Evening Star Newspaper Co.*, 96 Md. 24, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983 [984]; *State v. Shippman*, 83 Minn. 441.

**985. 1. Consideration of Headlines and Title. —** *Jones v. Murray*, 167 Mo. 25. See also *Cranfill v. Hayden*, 97 Tex. 544.

**986. 2. Consideration of Surrounding Circumstances and Subject-matter. —** *Berea College v. Powell*, (Ky. 1903) 77 S. W. Rep. 381.

**987. 2. Words Not Actionable Construed with Reference to Entire Conversation and Surrounding Circumstances. —** *Israel v. Israel*, 109 Mo. App. 366, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Hamlin v. Fantl*, 118 Wis. 596, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987.

**990. 2. Words Which Do Not Charge Intent to Commit Crime, Guilty Knowledge, Etc. —** *Kennelly v. Bricker*, 31 Pittsb. Leg. J. N. S. (Pa.) 286.

**3. Province of Court — United States. —** *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

*Alabama. — Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

*Georgia. — Colvard v. Black*, 110 Ga. 642; *Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103.

*Illinois. — Gerald v. Inter Ocean Pub. Co.*, 00 Ill. App. 205; *Herrick v. Tribune Co.*, 108 Ill. App. 244.

*Indiana. — Hamilton v. Lowery*, 33 Ind. App. 184.

*Iowa. — Quinn v. Prudential Ins. Co.*, 116

*Iowa* 552, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990.

*New York. — Warner v. Southall*, 165 N. Y. 496; *Morrison v. Smith*, 177 N. Y. 366; *Zinserling v. Journal Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591; *Beecher v. Press Pub. Co.*, 60 N. Y. App. Div. 536; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *Collis v. Press Pub. Co.*, 68 N. Y. App. Div. 38; *Gibson v. Sun Printing, etc.*, Assoc., 71 N. Y. App. Div. 566; *Crashley v. Press Pub. Co.*, 74 N. Y. App. Div. 118, affirmed 179 N. Y. 27; *Kuster v. Press Pub. Co.*, 80 N. Y. App. Div. 615; *Daily v. Engineering, etc.*, Journal, 94 N. Y. App. Div. 314.

*Pennsylvania. — Naulty v. Evening Bulletin Co.*, 206 Pa. St. 128.

*Texas. — Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

*Wisconsin. — Hamlin v. Fantl*, 118 Wis. 596.

**991. 1. Sufficiency of Declaration, Complaint, or Indictment. —** *Duncan v. Williams*, 107 Mo. App. 539; *Warner v. Southall*, 165 N. Y. 496; *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162. See also *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

**2. Province of Jury — England. —** *Marks v. Samuel*, (1904) 2 K. B. 287, 73 L. J. K. B. 587, 90 L. T. N. S. 590, 53 W. R. 88, 20 Times L. Rep. 430.

*Canada. — Stirton v. Gummer*, 31 Ont. 227.

*United States. — Culmer v. Canby*, (C. C. A.) 101 Fed. Rep. 195; *Hanchett v. Chiatovich*, (C. C. A.) 101 Fed. Rep. 742.

*Alabama. — Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

*Georgia. — Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103.

*Illinois. — Merrill v. Marshall*, 113 Ill. App. 447.

*Iowa. — Quinn v. Prudential Ins. Co.*, 116 Iowa 522.

*Kansas. — Friedburg v. Nudd*, 9 Kan. App. 743.

*Maine. — See Pierce v. Rodliff*, 95 Me. 346.

*Michigan. — Derham v. Derham*, 123 Mich. 451.

*Missouri. — Duncan v. Williams*, 107 Mo. App. 539.

*New Jersey. — Freisinger v. Moore*, 65 N. J. L. 286.

*New York. — Garby v. Bennett*, 40 N. Y. App.

**993.** See note 1.

*b.* CONSTITUTIONAL AND STATUTORY PROVISIONS. — See note 2.

**994.** *c.* INSTRUCTIONS. — See note 1.

Invasion of Province of Jury. — See note 2.

**III. DEFAMATION MUST APPLY TO PLAINTIFF OR PROSECUTOR — 1. In General.** — See notes 3, 4.

**995.** See notes 1, 2.

**996.** See note 1.

**2. A Question for the Jury.** — See note 2.

**998.** **IV. MALICE — 1. Meaning of Term.** — See note 3.

**2. Whether a Necessary Ingredient — a. AFFIRMATIVE VIEW —**

(1) *Statement of Doctrine.* — See note 4.

**999.** (2) *Presumption of Malice.* — See note 1.

Div. 163, *affirmed* 166 N. Y. 392; *Zinserling v. Journal Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591; *Morrison v. Smith*, 177 N. Y. 366; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *D'Andrea v. New York Press Co.*, 61 N. Y. App. Div. 605; *Collis v. Press Pub. Co.*, 68 N. Y. App. Div. 38; *Gibson v. Sun Printing, etc., Assoc.*, 71 N. Y. App. Div. 566; *Kuster v. Press Pub. Co.*, 80 N. Y. App. Div. 615; *Daily v. Engineering, etc., Journal*, 94 N. Y. App. Div. 314.

*Ohio.* — *Phillips v. Le June*, 25 Ohio Cir. Ct. 107.

*Pennsylvania.* — *Stoner v. Erisman*, 206 Pa. St. 600.

*South Dakota.* — *Barron v. Smith*, (S. Dak. 1904) 101 N. W. Rep. 1105.

*Vermont.* — *State v. Sutton*, 74 Vt. 12.

*West Virginia.* — *Swindell v. Harper*, 51 W. Va. 381.

*Wisconsin.* — See *Hamlin v. Fantl*, 118 Wis. 596.

**993. 1. Question for Jury — Criminal Prosecution.** — *Duncan v. Williams*, 107 Mo. App. 539; *People v. Sherlock*, 166 N. Y. 180.

**2. Constitutional and Statutory Provisions.** — See *Paxton v. Woodward*, 31 Mont. 195.

**994. 1. American Rule as to Instructions.** — *Hamlin v. Fantl*, 118 Wis. 596.

**2. When Court May Take Case from Jury.** — It is only when the words are incapable of a construction injurious to the plaintiff's character that the court is justified in taking the case from the jury. *Lauder v. Jones*, 13 N. Dak. 525.

**When Verdict Not Disturbed.** — The verdict of the jury will not be disturbed by the court when it can construe the language in that sense which is necessary to support the verdict. *Berea College v. Powell*, (Ky. 1903) 77 S. W. Rep. 381.

**3. Some Particular Person Must Be Referred to.** — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

**4. Application to Plaintiff or Prosecutor Must Appear.** — *Duvivier v. French*, (C. C. A.) 104 Fed. Rep. 278; *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Van Alstyne v. Lewis*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 355; *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546. See also *Butler v. Carter, etc., Pub. Co.*, (C. C. A.) 135 Fed. Rep. 69.

**The Burden of Proof** rests upon the plaintiff to show that the publication referred to the defendant. *Butler v. Evening Leader Co.*, 134 Fed. Rep. 994.

**995. 1. Mention by Name Not Necessary.** — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Stromberg v. Tribune Assoc.*, 88 N. Y. App. Div. 389, *affirmed* 178 N. Y. 610. See also *Butler v. Carter, etc., Pub. Co.*, (C. C. A.) 135 Fed. Rep. 69.

**2. Defamation Clearly Applying to Plaintiff or Prosecutor.** — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66. See also *Butler v. Carter, etc., Pub. Co.*, (C. C. A.) 135 Fed. Rep. 69.

It is sufficient if those acquainted with the plaintiff can spell out that he is the person referred to in the publication. *Colvard v. Black*, 110 Ga. 642.

**996. 1. Defamation with Regard to Office, Business, or Occupation.** — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66.

**2. Question for the Jury.** — *Culmer v. Canby*, (C. C. A.) 101 Fed. Rep. 195; *Stokes v. Morning Journal Assoc.*, 66 N. Y. App. Div. 569; *Boone v. Herald News Co.*, 27 Tex. Civ. App. 546; *Hitzfelder v. Köppelmann*, 30 Tex. Civ. App. 162; *Dabold v. Chronicle Pub. Co.*, 107 Wis. 357. See also *Butler v. Barret*, 130 Fed. Rep. 944.

**998. 3. As to the Meaning of the Term Malice.** — *Western Union Tel. Co. v. Cashman*, (C. C. A.) 132 Fed. Rep. 805; *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Werner v. Vogel*, 10 Kan. App. 536; *Israel v. Israel*, 109 Mo. App. 366; *Carpenter v. Hamilton*, 185 Mo. 603; *Krup v. Corley*, 95 Mo. App. 640; *Minter v. Bradstreet Co.*, 174 Mo. 486; *Brandt v. Morning Journal Assoc.*, 81 N. Y. App. Div. 186, *affirmed* 177 N. Y. 544, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *Sun L. Assur. Co. v. Bailey*, 101 Va. 443.

**Malice Implies the Absence of Any Legal Excuse** for the speaking or publication of the injurious words. *McDonald v. Nugent*, 122 Iowa 651.

**4. Malice the Gist of the Action or Prosecution.** — *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106; *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998; *Israel v. Israel*, 109 Mo. App. 366; *Lauder v. Jones*, 13 N. Dak. 525; *Stayton v. State*, 46 Tex. Crim. 205, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998. See also *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

**999. 1. Kinds of Malice.** — *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106; *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [999]; *Davis v.*



**1000.** See notes 1, 2, 3.

**1002.** See notes 1, 2, 3, 4.

*b.* VIEW THAT MALICE IS NOT NECESSARY IN CIVIL ACTION.

— See notes 5, 7, 8.

**1003.** 3. Evidence — *a.* BURDEN OF PROOF. — See notes 2, 4, 5.

Starrett, 97 Me. 568; *Gambrill v. Schooley*, 95 Md. 289; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377; *Minter v. Bradstreet Co.*, 174 Mo. 486, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 999; *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317; *Wrege v. Jones*, 13 N. Dak. 267; *Lauder v. Jones*, 13 N. Dak. 525; *Cranfield v. Hayden*, 97 Tex. 544. See also *Merchants' Ins. Co. v. Buckner*, (C. C. A.) 110 Fed. Rep. 345; *Faxon v. Jones*, 176 Mass. 206.

**Personal Ill Will.** — See *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317.

**The Difference Between Implied Malice and Express Malice** is a difference in kind, rather than in degree. *Gambrill v. Schooley*, 95 Md. 289.

**1000. 1. Implied Malice Not Sufficient Where Communication Privileged.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1000]; *Lauder v. Jones*, 13 N. Dak. 525.

**2. Malice in Law Sufficient to Support Action.** — *Holmes v. Clisby*, 118 Ga. 820; *Central of Georgia R. Co. v. Sheftall*, 118 Ga. 865; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1000]; *Davis v. Starrett*, 97 Me. 568; *Gambrill v. Schooley*, 95 Md. 289; *Moore v. Beck*, 71 N. J. L. 7; *Brandt v. Morning Journal Assoc.*, 81 N. Y. App. Div. 186, *affirmed* 177 N. Y. 544; *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746; *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

**3. When Malice Is Presumed — United States.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Butler v. Barret*, 130 Fed. Rep. 944.

*Delaware.* — *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

*Georgia.* — *Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103; *Pavesich v. New England L. Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104.

*Illinois.* — *Schofield v. Baldwin*, 102 Ill. App. 560.

*Indiana.* — *Short v. Acton*, 33 Ind. App. 361.

*Iowa.* — *Nichols v. Eaton*, 110 Iowa 509, 80 Am. St. Rep. 319; *McDonald v. Nugent*, 122 Iowa 651; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kansas.* — *Werner v. Vogeli*, 10 Kan. App. 536; *Eckert v. Van Pelt*, 69 Kan. 357.

*Kentucky.* — *Blackwell v. Johnston*, (Ky. 1900) 56 S. W. Rep. 12; *John Brenner Brewing Co. v. McGill*, (Ky. 1901) 62 S. W. Rep. 722; *Evening Post Co. v. Richardson*, 113 Ky. 641.

*Louisiana.* — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1000].

*Maryland.* — *Gambrill v. Schooley*, 95 Md. 289; *Shepherd v. Baer*, 96 Md. 152.

*Massachusetts.* — *Faxon v. Jones*, 176 Mass. 206.

*Michigan.* — *Smurthwaite v. News Pub. Co.*, 124 Mich. 377; *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993.

*Missouri.* — *Jones v. Murray*, 167 Mo. 25; *Krup v. Corley*, 95 Mo. App. 640; *Kersting v. White*, 107 Mo. App. 265; *Israel v. Israel*, 109 Mo. App. 366; *Carpenter v. Hamilton*, 185 Mo. 603.

*Nebraska.* — *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926.

*New Jersey.* — *Moore v. Beck*, 71 N. J. L. 7.

*New York.* — *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *O'Brien v. Bennett*, 72 N. Y. App. Div. 367; *Brandt v. Morning Journal Assoc.*, 81 N. Y. App. Div. 183, *affirmed* 177 N. Y. 544.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267; *Lauder v. Jones*, 13 N. Dak. 525.

*Pennsylvania.* — *Clark v. North American Co.*, 203 Pa. St. 346.

*South Dakota.* — *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Texas.* — *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; *Cranfill v. Hayden*, 97 Tex. 544.

**Presumption of Malice May Be Rebutted.** — *Sollitt v. Moore*, 107 Ill. App. 479; *Blackwell v. Johnston*, (Ky. 1900) 56 S. W. Rep. 12; *Shepherd v. Baer*, 96 Md. 152; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377.

**1002. 1. Express Malice Never Presumed.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1002]. See also *Lauder v. Jones*, 13 N. Dak. 525.

**2. Express Malice as Authorizing Exemplary Damages.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998, [1002]; *Gambrill v. Schooley*, 95 Md. 289, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002.

**3. Express Malice as Rebutting Inference Arising from Qualified Privilege.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1002].

**4. Express Malice Must Be Shown Where Words Not Actionable Per Se.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1002].

**5. Defects in Doctrine that Malice Is Necessary.** — See *Israel v. Israel*, 109 Mo. App. 366.

**7. Malice Not Necessary.** — *Hearne v. De Young*, 132 Cal. 357; *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1002]; *Gambrill v. Schooley*, 95 Md. 289; *Paxon v. Woodward*, 31 Mont. 195; *Moore v. Beck*, 71 N. J. L. 7.

**8. For What Purpose Malice May Be Shown.** — *Covington v. Roberson*, 111 La. 338, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 998 [1002]; *Gambrill v. Schooley*, 95 Md. 289, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1002.

**Where the Words Spoken Impute a Crime** the absence of actual malice protects against punitive damages. *Moore v. Beck*, 71 N. J. L. 7.

**1003. 2. No Evidence Beyond Publication or**

**1004.** *b. ADMISSIBILITY, COMPETENCY, AND RELEVANCY OF EVIDENCE* — (1) *In General.* — See note 2.

(3) *Intrinsic or Extrinsic Evidence.* — See note 4.

**1005.** See notes 1, 2, 3.

(5) *Relations Between Parties.* — See note 5.

**1006.** (7) *Refusal to Retract or Apologize.* — See note 3.

(8) *Unsustained Plea of Justification.* — See notes 4, 5.

**1007.** (10) *Passion—Provocation.* — See note 2.

(12) *Circumstances Not Within Knowledge of Defendant.* — See note 4.

(14) *Falsity of Charge.* — See note 6.

**1008.** (16) *Truth of Charge or Belief Therein.* — See notes 2, 3.

**1009.** (17) *Repetition or Republication of Slander or Libel.* — See notes 1, 2.

**1010.** See note 1.

(18) *Other Publications or Statements Regarding Plaintiff.* — See note 2.

**Utterance of Defamatory Words Necessary.** — Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Gattis v. Kilgo, 128 N. Car. 402.

**1003. 4. When Burden of Proving Malice is upon Plaintiff or Prosecution—*Iowa.*** — Morse v. Times-Republican Printing Co., 124 Iowa 707.

*Kentucky.* — Evening Post Co. v. Richardson, 113 Ky. 641; Browning v. Com., 116 Ky. 282.

*Louisiana.* — Buisson v. Huard, 106 La. 768; Covington v. Roberson, 111 La. 338.

*Missouri.* — Wagner v. Scott, 164 Mo. 289.

*New York.* — D'Andrea v. New York Press Co., 61 N. Y. App. Div. 605; Ginsberg v. Union Surety, etc., Co., 68 N. Y. App. Div. 141. See also Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183, affirmed 177 N. Y. 544.

*North Carolina.* — Hudnell v. Eureka Lumber Co., 133 N. Car. 169.

*Pennsylvania.* — Echard v. Morton, 26 Pa. Super. Ct. 579.

*South Dakota.* — Ross v. Ward, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Tennessee.* — Cooley v. Gaylon, 109 Tenn. 1; Crockett v. McLanahan, (Tenn. 1903) 72 S. W. Rep. 950.

*Virginia.* — Tyree v. Harrison, 100 Va. 540; Brown v. Norfolk, etc., R. Co., 100 Va. 619.

*Wisconsin.* — Hocks v. Sprangers, 113 Wis. 123.

**5. Burden of Proving Actual Malice Rests upon Plaintiff.** — Star Pub. Co. v. Donahoe, (Del. 1904) 58 Atl. Rep. 513; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183, affirmed 177 N. Y. 544.

**1004. 2. Evidence Not Admissible to Show Malice.** — Sadgrove v. Hole, (1901) 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. N. S. 647, 49 W. R. 473.

**4. Extrinsic Evidence of Malice.** — Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319.

**1005. 1. Plaintiff Not Restricted to Extrinsic Evidence.** — Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319.

**2. Libel Itself Evidence of Malice.** — Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319; Wagner v. Scott, 164 Mo. 289; Mitchell v. Spradley, 23 Tex. Civ. App. 43. See also Wagner v. Scott, 164 Mo. 289.

**3. The Plaintiff May Rely upon the Words of the Libel Itself.** — Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319; Wagner v. Scott, 164 Mo. 289.

**5. Relations Between Parties.** — See English v. Lamb, 32 Ont. 73.

**Evidence of an Assault upon the Plaintiff** committed within half an hour after the speaking of the slanderous words is admissible to show actual malice. Zurawski v. Reichmann, 116 Iowa 388.

**1006. 3. Refusal to Retract Admissible to Show Malice.** — Clark v. North American Co., 203 Pa. St. 346.

**4. Unsustained Plea of Justification Evidence of Malice.** — Coffin v. Brown, 94 Md. 190, 89 Am. St. Rep. 422.

**Good Faith in Interposing Plea Material.** — Kansas City Star Co. v. Carlisle, (C. C. A.) 108 Fed. Rep. 345.

**5. Failure to Convince Jury of Truth of Alleged Slanderous Words Not Evidence of Malice.** — Moore v. Beck, 71 N. J. L. 7.

**1007. 2. Passion—Provocation.** — Emerson v. Miller, 115 Iowa 315.

**4. Circumstances Not Known to Defendant.** — Woodruff v. Woodruff, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15. See also English v. Lamb, 32 Ont. 73.

**6. Knowledge of Defendant that Charge Is False.** — Crane v. Bennett, 177 N. Y. 106.

**1008. 2. Truth of Charge Cannot Be Shown.** — Lauder v. Jones, 13 N. Dak. 525.

**3. Reasonable Belief in Truth of Charge.** — Davis v. Hamilton, 88 Minn. 64.

**1009. 1. Plaintiff May Show Repetition or Republication of Slander or Libel.** — Davis v. Starrett, 97 Me. 568; Phelan v. Rycroft, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 48; Stuart v. New York Herald Co., 73 N. Y. App. Div. 459; Swindell v. Harper, 51 W. Va. 381. See also Riley v. State, 132 Ala. 381.

**2. Repetition or Republication After Commencement of Action.** — Compare Swindell v. Harper, 51 W. Va. 381.

**1010. 1. Words of Same Import.** — Gambrill v. Schooley, 95 Md. 289, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1010; Swindell v. Harper, 51 W. Va. 381.

**2. Evidence of Other Publications or Statements**

- 1011.** See note 1.
- 1012.** *c.* WEIGHT AND SUFFICIENCY — (1) *A Question for the Jury.* — See notes 1, 2.
- 1013.** (3) *Failure to Establish Justification.* — See note 4.
- V. PUBLICATION — 1. Necessity For.** — See note 6.
- 2. What Constitutes — a. IN GENERAL.** — See note 8.
- 1014.** See note 1.
- c.* SALE OR DELIVERY OF LIBELOUS MATTER. — See note 3.
- 1015.** See note 1.
- g.* FURNISHING OF LIBELOUS ARTICLE BY NEWS ASSOCIATION. — See note 6.
- 1016.** *h.* PRINTING DEFAMATORY MATTER. — See note 1.
- i.* REPETITION OF SLANDER. — See note 3.
- m.* DICTATION TO STENOGRAPHER. — See note 7.
- 1017.** *q.* COMMUNICATION DIRECTLY TO PERSON DEFAMED — (1) *As the Foundation of a Civil Action* — (a) *Written Matter.* — See notes 1, 2, 3.
- Matter Sent Openly Through the Mail.* — See note 4.
- (b) *Spoken Words.* — See note 8.
- 1018.** (2) *As a Criminal Offense.* — See note 1.

**Admissible.** — *Grant v. State*, 141 Ala. 96; *Paxton v. Woodward*, 31 Mont. 195; *Kidder v. Bacon*, 74 Vt. 263.

Only subsequent Publications are admissible on the question of malice. *King v. McKissick*, 126 Fed. Rep. 215. See also *Caryll v. Daily Mail Pub. Co.*, 90 L. T. N. S. 307.

**1011. 1. Similarity to or Connection with Defamation on Which Action or Prosecution Is Based.** — *Cushing v. Hederman*, 117 Iowa 637, 94 Am. St. Rep. 320; *Lauder v. Jones*, 13 N. Dak. 525.

**Statements Not Connected with the Publication in Question** and having no bearing upon it are not admissible to establish express malice. *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317.

**1012. 1. Malice a Question for the Jury.** — *Evening Post Co. v. Richardson*, 113 Ky. 641; *Nicholson v. Merritt*, 109 Ky. 369; *Hartnett v. Goddard*, 176 Mass. 326; *Smedley v. Soule*, 125 Mich. 192; *Paxton v. Woodward*, 31 Mont. 195; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *Weston v. Weston*, 83 N. Y. App. Div. 520; *Clark v. North American Co.*, 263 Pa. St. 346. See also *Lauder v. Jones*, 13 N. Dak. 525.

**2. Evidence Sufficient to Show Malice.** — *Covington v. Roberson*, 111 La. 338, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1012.

**1013. 4. Failure to Establish Justification Not Conclusive of Malice.** — *Lauder v. Jones*, 13 N. Dak. 525. See also *Moore v. Beck*, 71 N. J. L. 7.

**6. Necessity for Publication.** — *Werner v. Vogeli*, 10 Kan. App. 536.

**8. Communication to Another or Others.** — *Werner v. Vogeli*, 10 Kan. App. 536. See also *Gambrill v. Schooley*, 93 Md. 48, 86 Am. St. Rep. 414.

**1014. 1. Doing of Act Intended to Result, or that Would Naturally Result, in Exposure of Contents of Libel.** — See *Werner v. Vogeli*, 10 Kan. App. 536.

**3. Sale or Delivery of Libel.** — *Werner v. Vogeli*, 10 Kan. App. 536.

**1015. 1. Defendant Ignorant of Libelous Nature and Not Chargeable with Knowledge Thereof.** — See *Mackenzie v. Cunningham*, 8 British Columbia 36.

**Burden of Proof on Defendant to Show Absence of Negligence in Failing to Discover Libelous Matter** — *Vizetelly v. Mudie's Select Library*, (1900) 2 Q. B. 170, 69 L. J. Q. B. 645.

**6. Furnishing of Libelous Article by News Association.** — See *Palmer v. United Press*, 67 N. Y. App. Div. 64, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1013 [1015], and holding that where a corporation engaged in furnishing news for publication transmits a libelous item to a newspaper, such transmission may constitute a publication, though it may not subsequently be actually used by the newspaper.

**1016. 1. When Printing Defamatory Matter Is a Publication.** — *Werner v. Vogeli*, 10 Kan. App. 536.

**3. Repetition.** — *Schoepflin v. Coffey*, 162 N. Y. 12.

**7. Dictation to Stenographer.** — See *Sun L. Assur. Co. v. Bailey*, 101 Va. 443.

**1017. 1. Communication to Plaintiff.** — *Yousling v. Dare*, 122 Iowa 539; *Schmuck v. Hill*, (Neb. 1901) 96 N. W. Rep. 158. See also *Rumney v. Worthley*, 186 Mass. 144.

**2. Defamation Reaching Third Person Contrary to Expectation of Sender.** — *Yousling v. Dare*, 122 Iowa 539; *Rumney v. Worthley*, 186 Mass. 144.

**3. Where Sender Has Reason to Suppose that Defamation Will Reach Third Persons.** — *Rumney v. Worthley*, 186 Mass. 144; *Schmuck v. Hill*, (Neb. 1901) 96 N. W. Rep. 158.

**4. Sending Postal Card Not a Publication.** — *L'Heureux v. Heroux*, 25 Quebec Super. Ct. 126.

**8. Words Spoken to Plaintiff Alone.** — See *Knipe v. Brooklyn Daily Eagle*, 101 N. Y. App. Div. 43.

**1018. 1. Defamation Sent or Addressed Directly to Prosecutor Sufficient to Support Prosecution.** — *Yousling v. Dare*, 122 Iowa 539; *Rumney v. Worthley*, 186 Mass. 144.

- 1018.** *t.* REPETITION OR CIRCULATION BY OTHERS. — See note 7.  
**1019.** See note 1.  
*u.* WORDS MUST BE UNDERSTOOD. — See note 3.  
**1020.** **3.** A Question for the Jury. — See note 1.  
**4.** Burden of Proof. — See note 2.  
**5.** Evidence — *c.* OTHER LIBELOUS PUBLICATIONS. — See note 8.  
**1021.** **VI. COMMENT AND CRITICISM** — **1.** In General. — See notes 2, 3, 4, 5.  
**1022.** See note 1.  
**2.** Conduct of Person Occupying Public Position. — See notes 2, 3.  
**3.** Literary Criticism. — See notes 4, 7.  
**1023.** **VII. PRIVILEGED COMMUNICATIONS** — **1.** General Statement. — See note 2. See generally the title PRIVILEGED COMMUNICATIONS.  
**2.** Absolute Privilege — *a.* IN GENERAL. — See note 3.  
*b.* JUDICIAL PROCEEDINGS — (1) In General. — See notes 4, 5.  
**1024.** (2) Communications by Party — (a) In Pleadings. — See notes 1, 2, 3.

**1018.** **7.** Subsequent Publications Which Are the Natural Result of the Defendant's Act. — Coffin *v.* Brown, 94 Md. 190, 89 Am. St. Rep. 422, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1018; Schmuck *v.* Hill, (Neb. 1901) 96 N. W. Rep. 158.

It is a Question for the Jury. — Coffin *v.* Brown, 94 Md. 190, 89 Am. St. Rep. 422.

**1019.** **1.** No Liability for Unauthorized Repetition or Republication by Third Person. — Hereford *v.* Combs, 126 Ala. 369.

**3.** Words Must Be Understood. — Sadgrove *v.* Hole, (1901) 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. N. S. 647, 49 W. R. 473.

**1020.** **1.** A Question for the Jury. — See Israel *v.* Israel, 109 Mo. App. 366.

**2.** Burden of Proof. — Sadgrove *v.* Hole, (1901) 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. N. S. 647, 49 W. R. 473; Holmes *v.* Clisby, 121 Ga. 241, 104 Am. St. Rep. 103; Krup *v.* Corley, 95 Mo. App. 649. See also Evening Post Co. *v.* Richardson, 113 Ky. 641; Schoepflin *v.* Coffey, 162 N. Y. 12.

**8.** Other Libelous Publications. — The defendant cannot, for the purpose of rebutting the presumption of malice or of mitigating damages, show other libelous publications of his own, even though unquestioned by the injured party. Davis *v.* Hamilton, 88 Minn. 64.

**1021.** **2.** Comment on Matters of Public Interest. — Klos *v.* Zahorik, 113 Iowa 161; Fay *v.* Harrington, 176 Mass. 270. See also Dorr *v.* U. S., 195 U. S. 138.

**Public Entertainments.** — A dramatic critic may have considerable license in commenting on a ridiculous and childish performance, and such comment, though exaggerated and sarcastic, does not, in the absence of express malice, constitute libel. Cherry *v.* Des Moines Leader, 114 Iowa 298, 89 Am. St. Rep. 365.

**3.** Cherry *v.* Des Moines Leader, 114 Iowa 298. See also Door *v.* U. S., 195 U. S. 138.

**4.** Fair Criticism Distinguished from Privilege. — Joynt *v.* Cycle Trade Pub. Co., (1904) 2 K. B. 292, 73 L. J. K. B. 752, 91 L. T. N. S. 155.

**5.** McQuire *v.* Western Morning News Co., (1903) 2 K. B. 100, 72 L. J. K. B. 612, 88 L. T. N. S. 757, 51 W. R. 689. See also Fay *v.* Harrington, 176 Mass. 270; Jackson *v.* State, 42 Tex. Crim. 497.

**1022.** **1.** Fair Comment & Question for the Jury. — Fay *v.* Harrington, 176 Mass. 270.

**2.** Fair Comment on Acts of Public Officials. — Schomberg *v.* Walker, 132 Cal. 224; Coffin *v.* Brown, 94 Md. 190, 89 Am. St. Rep. 422; Scottgale *v.* Sweet, 124 Mich. 311; Herringer *v.* Ingberg, 91 Minn. 71.

**3.** The Conduct of Public Worship by a Clergyman. — Klos *v.* Zahorik, 113 Iowa 161.

**4.** Fair Literary Criticism Not Actionable. — Triggs *v.* Sun Printing, etc., Assoc., 179 N. Y. 144; MacDonald *v.* Sun Printing, etc., Assoc., (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 441.

**7.** Personal Attack on Author Not Justified. — Triggs *v.* Sun Printing, etc., Assoc., 179 N. Y. 144.

**1023.** **2.** General Statement as to Privileged Communications. — See Star Pub. Co. *v.* Donahoe, (Del. 1904) 58 Atl. Rep. 513; Nichols *v.* Eaton, 110 Iowa 509, 80 Am. St. Rep. 319; Buisson *v.* Huard, 166 La. 768; Finley *v.* Steele, 159 Mo. 299; Jones *v.* Brownlee, 161 Mo. 258; Beggs *v.* McCrea, 62 N. Y. App. Div. 39; Cooley *v.* Galyon, 109 Tenn. 1; Cranfill *v.* Hayden, 97 Tex. 544.

**3.** Absolute Privilege in General. — Burdette *v.* Argile, 94 Ill. App. 171; Finley *v.* Steele, 159 Mo. 299; Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 477. See also Buisson *v.* Huard, 166 La. 768; Beggs *v.* McCrea, 62 N. Y. App. Div. 39.

**4.** English Rule as to Privilege in Judicial Proceedings. — Primrose *v.* Waterston, Sc. Ct. of Sess. 4 F. 783; McCabe *v.* Joynt, (1901) 2 Ir. R. 115. See also Sickels *v.* Kling, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 287, affirmed 60 N. Y. App. Div. 515.

**5.** Prevailing American Rules as to Privilege in Judicial Proceedings. — Burdette *v.* Argile, 94 Ill. App. 171; Smurthwaite *v.* News Pub. Co., 124 Mich. 377; Hartung *v.* Shaw, 130 Mich. 177; Sickels *v.* Kling, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 287, affirmed 60 N. Y. App. Div. 515; Beggs *v.* McCrea, 62 N. Y. App. Div. 39; Crockett *v.* McLanahan, (Tenn. 1903) 72 S. W. Rep. 950. See also Craig *v.* Burris, 4 Penn. (Del.) 156; Latder *v.* Jones, 13 N. Dak. 525.

The privilege as to reports of judicial proceedings does not extend to declarations of attorneys for one of the parties in private conversation. Desjardins *v.* Berthiaume, 16 Quebec Super. Ct. 506.

**1024.** **1.** Statements in Pleadings Held Absolutely Privileged. — Jones *v.* Brownlee, 161 Mo. 258.

- 1025.** Complaints Charging a Crime. — See notes 1, 2.  
 Communications Relating to Strangers to Record. — See note 5.  
 (b) In Open Court. — See note 8.
- 1026.** (3) *Communications by Counsel.* — See note 2.
- 1027.** (4) *Testimony of Witnesses.* — See note 1.  
 (5) *Official Utterances of Judges.* — See note 3.
- 1028.** c. LEGISLATIVE PROCEEDINGS. — See note 5.
- 1029.** 3. Qualified Privilege — a. IN GENERAL. — See notes 1, 2.

**1024.** 2. Pertinent Statements Held to Be Absolutely Privileged. — *McGehee v. Insurance Co. of North America*, (C. C. A.) 112 Fed. Rep. 853; *Crockett v. McLanahan*, (Tenn. 1903) 72 S. W. Rep. 950; *Wilkins v. Major*, 22 Quebec Super. Ct. 264; *Morrison v. Western Assur. Co.*, 24 Quebec Super. Ct. 111. See also *Hartung v. Shaw*, 130 Mich. 177, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.), but refraining from expressing any positive opinion on the question.

Words Relevant to the Issue, Pleaded in Good Faith, are privileged in *Canada*. *Wilkins v. Major*, 22 Quebec Super. Ct. 264.

3. See *Wilkins v. Major*, 22 Quebec Super. Ct. 264.

**1025.** 1. Complaints Charging a Crime Absolutely Privileged. — *Lauder v. Jones*, 13 N. Dak. 525.

2. *Laing v. Mitten*, 185 Mass. 233. See also *Crockett v. McLanahan*, (Tenn. 1903) 72 S. W. Rep. 950.

5. Statements Referring to Stranger to Cause. — *Crockett v. McLanahan*, (Tenn. 1903) 72 S. W. Rep. 950.

8. Statements Made by Party in Open Court Privileged. — See *Hartung v. Shaw*, 130 Mich. 181.

**1026.** 2. American Rule as to Statements by Counsel in Open Court. — *Smurthwaite v. News Pub. Co.*, 124 Mich. 377. See also *Hartung v. Shaw*, 130 Mich. 181.

In Addressing Juries it is not allowable to add to the probative force of the testimony the influence of a personal belief as to the guilt of an accused. *Covington v. Roberson*, 111 La. 238.

**1027.** 1. American Rule as to Privileged Testimony of Witnesses. — *Chambliss v. Blau*, 127 Ala. 86; *Lauder v. Jones*, 13 N. Dak. 525; *Cooley v. Galyon*, 109 Tenn. 1. See also *Jones v. Brownlee*, 161 Mo. 258; *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847; *Renaud v. Guenette*, 25 Quebec Super. Ct. 310.

Testimony Pertinent to the Matter on Hearing is absolutely privileged in *Massachusetts*, even if uttered maliciously. *Laing v. Mitten*, 185 Mass. 233.

3. Relevancy of Communication. — See *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847.

**1028.** 5. Words Spoken by Legislator in Discharge of Official Duty. — See *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847.

**1029.** 1. Communication of Qualified Privilege Defined. — *Iowa*. — *Nichols v. Eaton*, 110 Iowa 509, 80 Am. St. Rep. 319; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kansas*. — *Redgate v. Roush*, 61 Kan. 480.

*Kentucky*. — *Evening Post Co. v. Richardson*, 113 Ky. 641; *Browning v. Com.*, 116 Ky. 282.

*Louisiana*. — *Covington v. Roberson*, 111 La.

338, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1029; *Buisson v. Huard*, 106 La. 768.

*Missouri*. — *Wagner v. Scott*, 164 Mo. 289.

*Nebraska*. — *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847.

*New York*. — *D'Andrea v. New York Press Co.*, 61 N. Y. App. Div. 605; *Ginsberg v. Union Surety, etc., Co.*, 68 N. Y. App. Div. 141; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414.

*North Carolina*. — *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

*Pennsylvania*. — *Echard v. Morton*, 26 Pa. Super. Ct. 579.

*South Dakota*. — *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72; *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Tennessee*. — *Cooley v. Galyon*, 109 Tenn. 1; *Crockett v. McLanahan*, (Tenn. 1903) 72 S. W. Rep. 950.

*Texas*. — *Cranfill v. Hayden*, 97 Tex. 544.

*Virginia*. — *Tyree v. Harrison*, 100 Va. 540; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619; *Farley v. Thalheimer*, 103 Va. 504.

*West Virginia*. — *Ward v. Ward*, 47 W. Va. 766.

*Canada*. — *Gildner v. Busse*, 3 Ont. L. Rep. 561; *Fenton v. Macdonald*, 1 Ont. L. Rep. 422. See also *English v. Lamb*, 32 Ont. 73.

A Communication Necessary and Proper in the Protection of the Defendant's Interests is privileged. *Vansycle v. Parish*, 1 Ont. L. Rep. 13.

Statutory Definition. — See *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72.

2. Statement of General Rule as to Qualified Privilege — *United States*. — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803.

*Delaware*. — *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

*Iowa*. — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Louisiana*. — *Buisson v. Huard*, 106 La. 768.

*Minnesota*. — *State v. Ford*, 82 Minn. 452.

*Missouri*. — *Finley v. Steele*, 159 Mo. 299; *Wagner v. Scott*, 164 Mo. 289.

*New York*. — *Bowsky v. Cimiotti Unhairing Co.*, 72 N. Y. App. Div. 172.

*North Carolina*. — *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

*Pennsylvania*. — *Echard v. Morton*, 26 Pa. Super. Ct. 579.

*South Dakota*. — *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Texas*. — *Davis v. Wells*, 25 Tex. Civ. App. 155; *Stayton v. State*, 46 Tex. Crim. 205; *Cranfill v. Hayden*, 97 Tex. 544.

*Virginia*. — *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619.

*Wisconsin*. — *Hocks v. Sprangers*, 113 Wis. 123.

- 1030.** See notes 1, 2, 3.  
 Privilege Arising from Common Business Interest. — See note 4.
- 1031.** Burden of Proof. — See note 3.  
 b. VARIOUS COMMUNICATIONS CONSIDERED — (1) *Answers to Inquiries* — (a) In General. — See note 4.  
**1032.** (b) *Inquiry by Person Interested in Plaintiff's Behalf.* — See note 2.  
 (2) *Voluntary Communications.* — See note 11.  
**1033.** (3) *Statements Made in Self-Defense.* — See note 5.  
 (4) *Giving Character to Servant* — Communications to Prospective Employer. — See note 7.  
**1034.** See note 1.  
 (5) *Blacklisting Servants.* — See note 5.  
 (6) *Blacklisting Debtors.* — See note 7.  
**1035.** See note 1.  
 (7) *Report of Mercantile Agency.* — See notes 3, 4.  
 (8) *Proceedings of Voluntary Associations or Societies* — (a) In General. — See note 5.  
**1036.** (b) In the Course of Church Discipline — Preferring Charges Against Minister. — See notes 4, 5.  
**1037.** (10) *Communications Between Members of Family.* — See note 5.

*Good Faith Essential.* — St. Louis Southwestern R. Co. v. McArthur, 31 Tex. Civ. App. 205.

*Recovery Not Barred if Malice Existed.* — Minter v. Bradstreet Co., 174 Mo. 486.

**1030. 1. Moral or Social Duty Sufficient.** — Morse v. Times-Republican Printing Co., 124 Iowa 707; Buisson v. Huard, 106 La. 768; Finley v. Steele, 159 Mo. 299; Hudnell v. Eureka Lumber Co., 133 N. Car. 169; Stayton v. State, 46 Tex. Crim. 205; Ward v. Ward, 47 W. Va. 766. See also Bowsky v. Cimiotti Unhairing Co., 72 N. Y. App. Div. 172; Hocks v. Sprangers, 113 Wis. 123.

**2. Corresponding Interest or Duty Essential.** — Morse v. Times-Republican Printing Co., 124 Iowa 707. See also Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319.

**3. Compare Hudnell v. Eureka Lumber Co.,** 133 N. Car. 169.

**4. Privilege Arising from Common Business Interest.** — Sadgrove v. Hole, (1901) 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. N. S. 647, 49 W. R. 473; Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319; Morse v. Times-Republican Printing Co., 124 Iowa 707. See also Warner v. Missouri Pac. R. Co., 112 Fed. Rep. 114; Wagner v. Scott, 164 Mo. 289.

**1031. 3. Burden of Proof as to Qualified Privilege.** — Browning v. Com., 116 Ky. 282; State v. Ford, 82 Minn. 452; Steen v. Friend, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459.

**4. Answers to Inquiries by Persons Interested.** — Middleby v. Effler, (C. C. A.) 118 Fed. Rep. 261.

**1032. 2. Answer to Inquiry of Parent.** — See Buisson v. Huard, 106 La. 768.

**11. When Volunteered Communication Privileged.** — Tobin v. Gannon, 34 Nova Scotia 9, 37 Can. L. J. 205.

**1033. 5. Patton v. Cruce,** 72 Ark. 421, 105 Am. St. Rep. 46, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033.

**7. Giving Character to Servant in Response to Inquiry.** — See Morse v. Times-Republican Printing Co., 124 Iowa 707; Mertens v. Bee Pub. Co., (Neb. 1904) 99 N. W. Rep. 847.

The Word "Employee" in the original text is obviously a misprint for "employer."

**1034. 1. Volunteered Information as to Character of Servant.** — See Morse v. Times-Republican Printing Co., 124 Iowa 707.

**5. Brown v. Norfolk, etc.,** R. Co., 100 Va. 619.

**7. Blacklisting Debtors.** — Harper v. Hamilton Retail Grocers' Assoc., 32 Ont. 295; Western Union Tel. Co. v. Pritchett, 108 Ga. 411.

**1035. 1. A Communication Intended to Give Information for Future Protection of Members** has been held to be privileged. Harper v. Hamilton Retail Grocers' Assoc., 32 Ont. 295, following Lawless v. Anglo-Egyptian Cotton, etc., Co., L. R. 4 Q. B. 262.

**3. Report of Mercantile Agency to Interested Subscriber Privileged.** — Mower-Hobart Co. v. Dun, 131 Fed. Rep. 812, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035; Minter v. Bradstreet Co., 174 Mo. 486. See also Harper v. Hamilton Retail Grocers' Assoc., 32 Ont. 295.

**Careless Departure from Information Received.** — If the mercantile agency by carelessness substantially departs from information received, the privilege is lost. Douglass v. Daisley, (C. C. A.) 114 Fed. Rep. 628.

**4. Publication to Subscribers Generally.** — Mower-Hobart Co. v. Dun, 131 Fed. Rep. 812, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035; Lion Brewery Co. v. Bradstreet Co., 9 British Columbia 435.

**5. Communications Made in Course of Proceedings of Voluntary Associations.** — Kersting v. White, 107 Mo. App. 285, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1035.

**1036. 4. Preferring Charges Against Minister by Officers of Church.** — Redgate v. Roush, 61 Kan. 480.

**5. Charges Preferred Against Minister by Member of Church.** — Flanders v. Daley, 120 Ga. 888.

**1037. 5. Communication Between Aunt and Niece.** — See Fenton v. Macdonald, 1 Ont. L. Rep. 422.

**1038.** (11) *Principal and Agent* — Communication from Principal to Agent. — See note 2.

(15) *Information to Bring Criminal to Justice*. — See notes 11, 12.

**1039.** See note 1.

(16) *In Discharge of Public Official Duty*. — See notes 4, 5.

**1041.** (18) *Communications Addressed to General Public* — (a) In General — Matters of Public Interest. — See note 3.

(b) Concerning Public Officers. — See note 8.

**1042.** (c) Concerning Candidate for Public Office. — See note 2.

**1043.** See note 2.

(19) *Reports of Judicial, Legislative, or Other Proceedings* —

(a) *Judicial Proceedings* — aa. IN GENERAL. — See note 3.

bb. EX PARTE PROCEEDINGS SUFFICIENT. — See note 4.

**1044.** cc. MUST BE AN ACCOUNT OF A JUDICIAL PROCEEDING. — See notes 1, 2.

dd. JUDICIAL HEARING NECESSARY. — See note 3.

ee. MUST BE FAIR REPORT — Must Be Confined to Actual Occurrences. — See

note 4.

*Defamatory Comments*. — See note 5.

**1045.** Burden of Proof. — See note 5.

**1046.** (b) *Legislative Proceedings*. — See note 4.

**1047.** (20) *Presence of Uninterested Third Person*. — See notes 3, 4.

(21) *Dictation to Clerk*. — See notes 5, 6.

**1038. 2. Communication from Principal to Agent.** — Nichols v. Eaton, 110 Iowa 509, 80 Am. St. Rep. 319.

11. *Information to Bring Criminal to Justice Privileged*. — Davis v. Starrett, 97 Me. 568.

12. *Information Given to Officer of the Law*. — Covington v. Roberson, 111 La. 338.

**1039. 1. Information Given to Private Individual.** — Compare Covington v. Roberson, 111 La. 338.

4. *Statements by a Member at a Meeting of a Borough Council* are qualifiedly privileged. McGaw v. Hamilton, 15 Pa. Super. Ct. 181.

5. *Campeau v. Monette*, 19 Quebec Super. Ct. 429.

**1041. 3. Communications Addressed to General Public Held to Be Privileged.** — Reg. v. Brazeau, 3 Can. Crim. Cas. (Quebec) 89.

8. *Defamatory Charges Against Public Officers Not Privileged*. — Coffin v. Brown, 94 Md. 190, 89 Am. St. Rep. 422, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041; Scougale v. Sweet, 124 Mich. 311.

**1042. 2. False Defamatory Matter Concerning Candidate for Public Office Not Privileged.** — Jarman v. Rea, 137 Cal. 339; Star Pub. Co. v. Donahoe, (Del. 1904) 58 Atl. Rep. 513; Coffin v. Brown, 94 Md. 190, 89 Am. St. Rep. 422, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042; Smurthwaite v. News Pub. Co., 124 Mich. 377; Eikhoff v. Gilbert, 124 Mich. 353; Herring v. Ingberg, 91 Minn. 71; Mertens v. Bee Pub. Co., (Neb. 1904) 99 N. W. Rep. 847; Myers v. Longstaff, 14 S. Dak. 98; Boucher v. Clark Pub. Co., 14 S. Dak. 72. Compare Ross v. Ward, 14 S. Dak. 240, 86 Am. St. Rep. 746.

**1043. 2.** See Coffin v. Brown, 94 Md. 190, 89 Am. St. Rep. 422.

3. *Privilege Attaching to Reports of Judicial Proceedings*. — Morse v. Times-Republican Printing Co., 124 Iowa 707; Beiser v. Scripps-McRae Pub. Co., 113 Ky. 383; Stuart v. Press Pub. Co., 83 N. Y. App. Div. 477; Brown v. Providence

Telegram Pub. Co., 25 R. I. 117; Pfister v. Sentinel Co., 108 Wis. 572. See also Dorr v. U. S., 195 U. S. 138; Cudlip v. New York Evening Journal Pub. Co., 174 N. Y. 158.

4. *Report of Ex Parte Proceedings*. — Beiser v. Scripps-McRae Pub. Co., 113 Ky. 383; Conner v. Standard Pub. Co., 183 Mass. 474; Stuart v. Press Pub. Co., 83 N. Y. App. Div. 477.

**1044. 1. Proceeding Before Fire Marshal Quasi Judicial.** — Conner v. Standard Pub. Co., 183 Mass. 474.

2. *A Report of an Unsuccessful Application to a Justice for a Warrant* has been held, where fair and impartial, to be privileged. Beiser v. Scripps-McRae Pub. Co., 113 Ky. 383.

3. *Judicial Hearing Necessary*. — Stuart v. Press Pub. Co., 83 N. Y. App. Div. 477; Sutton v. Belo, (Tex. Civ. App. 1901) 64 S. W. Rep. 687.

4. *Report Must Be Fair*. — Stuart v. Press Pub. Co., 83 N. Y. App. Div. 477; Brown v. Providence Telegram Pub. Co., 25 R. I. 117. See also Dorr v. U. S., 195 U. S. 138.

5. *Report Must Be Confined to Proceedings in Court*. — Dorr v. U. S., 195 U. S. 138; Brown v. Providence Telegram Pub. Co., 25 R. I. 117.

**1045. 5. Burden of Proof as to Fairness of Report.** — See Stuart v. Press Pub. Co., 83 N. Y. App. Div. 477.

**1046. 4. Reports of Legislative Proceedings.** — Morse v. Times-Republican Printing Co., 124 Iowa 707; Garby v. Bennett, 166 N. Y. 392; Pfister v. Sentinel Co., 108 Wis. 572.

**1047. 3. Privilege Not Destroyed by Presence of Uninterested Third Person.** — Gildner v. Busse, 3 Ont. L. Rep. 561.

4. See Cunningham v. Underwood, (C. C. A.) 116 Fed. Rep. 803; Gildner v. Busse, 3 Ont. L. Rep. 561.

5. *Giving a Statement to a Clerk to Copy* has been held to be a privileged communication. Harper v. Hamilton Retail Grocers' Assoc., 32 Ont. 295.

**1048.** (24) *Repetitions*. — See note 4.

c. MALICE. — See notes 6, 7.

**1049.** See notes 1, 2, 3.

d. FALSITY OF COMMUNICATION. — See note 5.

**1050.** Falsity as Evidence of Malice. — See note 1.

e. WHETHER QUESTION OF LAW OR OF FACT — Existence of Privileged Occasion. — See notes 2, 3.

Existence of Malice. — See note 4.

**1051.** f. LIBERTY OF THE PRESS. — See notes 2, 3, 4.

**1047.** 6. Dictation by Merchant to Clerk Held Not Privileged. — *Puterbaugh v. Gold Medal Furniture Mfg. Co.*, 7 Ont. L. Rep. 382, reversing 5 Ont. L. Rep. 680.

The Dictation to a Stenographer by the secretary of a trade association of a list of persons deemed unworthy of credit is, in the absence of malice, privileged. *Harper v. Hamilton Retail Grocers' Assoc.*, 32 Ont. 295.

**1048.** 4. Privileged Repetitions. — *Kersting v. White*, 107 Mo. App. 265.

6. Conditional Privilege Defeated by Proof of Malice — *Alabama*. — *Grant v. State*, 141 Ala. 96.

*Delaware*. — See *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

*Georgia*. — *Central of Georgia R. Co. v. Sheftall*, 118 Ga. 865.

*Iowa*. — *Nichols v. Eaton*, 110 Iowa 509, 80 Am. St. Rep. 319; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kentucky*. — *Evening Post Co. v. Richardson*, 113 Ky. 641; *Browning v. Com.*, 116 Ky. 282.

*Louisiana*. — *Buisson v. Huard*, 106 La. 768.

*Maine*. — *Davis v. Starrett*, 97 Me. 568.

*Missouri*. — *Pinley v. Steele*, 159 Mo. 299; *Minter v. Bradstreet Co.*, 174 Mo. 486; *Israel v. Israel*, 109 Mo. App. 366. See also *Kersting v. White*, 107 Mo. App. 265.

*Montana*. — See *Paxton v. Woodward*, 31 Mont. 195.

*Nebraska*. — *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847.

*New York*. — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414.

*North Carolina*. — *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

*North Dakota*. — *Lauder v. Jones*, 13 N. Dak. 525.

*South Dakota*. — *Myers v. Longstaff*, 14 S. Dak. 98; *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72. See also *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Texas*. — *Cranfill v. Hayden*, 97 Tex. 544.

*Vermont*. — See *Kidder v. Bacon*, 74 Vt. 263.

*Virginia*. — *Farley v. Thalhimier*, 103 Va. 504.

*Canada*. — *Green v. Miller*, 33 Can. Sup. Ct. 193, reversing 35 Nova Scotia 117.

7. Want of Probable Cause Held Equivalent to Malice. — *Browning v. Com.*, 116 Ky. 282.

**1049.** 1. Want of Probable Cause Held Not Tantamount to Malice. — *Sadgrove v. Hole*, (1901) 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. N. S. 647, 49 W. R. 473.

2. Malice Inferred from Extrinsic Facts. — *Browning v. Com.*, 116 Ky. 282.

3. Excessive Language as Evidence of Malice. — *Browning v. Com.*, 116 Ky. 282; *Tyree v. Harrison*, 100 Va. 540.

It Is a Question for the Court whether the lan-

guage employed was too violent for the occasion and the circumstances to which it applied. *Gattis v. Kilgo*, 128 N. Car. 402.

5. Plaintiff Need Not Prove Falsity. — *Browning v. Com.*, 116 Ky. 282.

**1050.** 1. Falsity as Evidence of Malice. — *Evening Post Co. v. Richardson*, 113 Ky. 641.

2. Facts on Which Privilege Depends to Be Determined by Jury. — *Nichols v. Eaton*, 110 Iowa 509, 80 Am. St. Rep. 319; *Parker v. Republican Co.*, 181 Mass. 392; *Nord v. Gray*, 80 Minn. 143; *Brown v. Radebaugh*, 84 Minn. 347; *Wagner v. Scott*, 164 Mo. 289; *Gattis v. Kilgo*, 128 N. Car. 402; *Davis v. Wells*, 25 Tex. Civ. App. 155.

**South Dakota Rule.** — In *South Dakota* it is held that the court may state to the jury what constitutes a privileged communication as laid down in the law, but the question whether the communication is privileged is to be determined by the jury. *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

3. Existence of Privileged Occasion a Question of Law. — *Warner v. Missouri Pac. R. Co.*, 112 Fed. Rep. 114; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377; *Wagner v. Scott*, 164 Mo. 289; *Sickles v. Kling*, 60 N. Y. App. Div. 515; *Gattis v. Kilgo*, 128 N. Car. 402; *McGaw v. Hamilton*, 15 Pa. Super. Ct. 181; *Echard v. Morton*, 26 Pa. Super. Ct. 579; *Davis v. Wells*, 25 Tex. Civ. App. 155; *Brown v. Norfolk*, etc., R. Co., 100 Va. 619.

The Question of Privileged Communication on the Face of the Alleged Libel is always one of law for the court on demurrer. *Warner v. Missouri Pac. R. Co.*, 112 Fed. Rep. 114.

When the Occasion Was Undoubtedly Privileged, it is the duty of the court so to instruct the jury. *Nichols v. Eaton*, 110 Iowa 509, 80 Am. St. Rep. 319.

4. The Question of Malice to Be Submitted to the Jury. — *Smurthwaite v. News Pub. Co.*, 124 Mich. 377; *Wagner v. Scott*, 164 Mo. 289; *Sickles v. Kling*, 60 N. Y. App. Div. 515; *Echard v. Morton*, 26 Pa. Super. Ct. 579; *Tyree v. Harrison*, 100 Va. 540; *Brown v. Norfolk*, etc., R. Co., 100 Va. 619; *Green v. Miller*, 33 Can. Sup. Ct. 193, reversing 35 Nova Scotia 117; *Gildner v. Busse*, 3 Ont. L. Rep. 561; *Fenton v. Macdonald*, 1 Ont. L. Rep. 422; *English v. Lamb*, 32 Ont. 73.

**1051.** 2. *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

3. Newspapers Have No Peculiar Privilege. — *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66; *Stuart v. Press Pub. Co.*, 83 N. Y. App. Div. 477, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1051.

4. Meaning of Liberty of Press. — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.



**1051. VIII. WHO MAY MAINTAIN ACTION — 1. Generally.** — See note 5.

**1052.** See note 2.

2. *Infants.* — See note 4.

3. *Corporations.* — See note 5.

5. **Defamation of Married Woman — a. ACTION BY HUSBAND ALONE.** — See note 8.

**1053. b. JOINT ACTION BY HUSBAND AND WIFE.** — See note 2.

d. **ACTION BY WIFE AGAINST HUSBAND.** — See note 4.

**1055. 10. Joint or Several Actions — a. IN GENERAL.** — See note 3.

b. **IN THE CASE OF PARTNERS — (1) Joint Action.** — See notes 5, 7.

**1056. IX. WHO LIABLE FOR LIBEL OR SLANDER — 1. General Rule as to Libel.** — See note 7.

**1057. 2. Joint or Several Liability — a. IN THE CASE OF LIBEL — Where Several Have Taken Part in the Publication of a Libel.** — See note 2.

**1058. 3. Liability of Corporations — a. FOR LIBEL — (1) Civil Liability.** — See note 2.

**1059.** See note 1.

See also *Mertens v. Bee Pub. Co.*, (Neb. 1904) 99 N. W. Rep. 847.

**1051. 5. At Common Law Every Person Has the Right of Protection from defamation, oral or written.** *Lauder v. Jones*, 13 N. Dak. 525.

**1052. 2. Rights of Father of Slandered Person.** — See *Hurst v. Goodwin*, 114 Ga. 587, 88 Am. St. Rep. 43.

4. **Infant May Maintain Action.** — *Hurst v. Goodwin*, 114 Ga. 587, 88 Am. St. Rep. 43, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052.

5. **Corporation May Maintain Action.** — *Brooks v. Collier*, 3 Indian Ter. 468; *St. Louis Clothing Co. v. Hail Dry Goods Co.*, 156 Mo. 393.

**Corporation — Slander of Officer or Stockholder.** — A Corporation Cannot Sue for a Slander of One of Its Officers or Stockholders, if the slander be not in direct relation to its trade or business. *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83.

**An Indirect Injury to a Corporation** does not authorize it to maintain an action for a libel of one of its officers individually. *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223.

8. **Husband Has Right of Action for Slander of Wife.** — *Charest v. Tessier*, 8 Quebec Q. B. 500.

**1053. 2. Husband and Wife Should Join.** — See *Jones v. Brownlee*, 161 Mo. 258; *Charest v. Tessier*, 8 Quebec Q. B. 500.

**Joint Slander of Husband and Wife — Joint Action Maintainable.** — *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

4. **Common-law Rule — Wife Cannot Sue Husband for Slander.** — *Stayton v. State*, 46 Tex. Crim. 205, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1053, as to the rule at common law, but holding that under the *Texas* statute a husband may be prosecuted for orally imputing unchastity to his wife.

**Husband Cannot Sue Wife for Slander.** — *Young v. Young*, Sc. Ct. of Sess. 5 F. 330.

**1055. 3. Remedy Must Be Sought Severally, Not Jointly.** — *Brooks v. Collier*, 3 Indian Ter. 468.

5. **Joint Action by Partners.** — *Weltmer v. Bishop*, 171 Mo. 110.

7. **Injury Must Have Resulted to Firm.** — *Brooks v. Collier*, 3 Indian Ter. 468.

**1056. 7. General Rule as to Liability for Libel.** — *Mack v. Sharp*, (Mich. 1904) 101 N. W. Rep. 631, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056.

**Participation in a Libel Must Relate to the Libelous Matter**, and not simply to the article published containing it. *Klos v. Zahorik*, 113 Iowa 161.

**Ignorance of Contents or Probable Effect of Libel Immaterial.** — *Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103.

**1057. 2. Joint Action for Libel.** — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803.

**1058. 2. Action for Libel May Be Maintained Against a Corporation.** — *Western Union Tel. Co. v. Cashman*, (C. C. A.) 132 Fed. Rep. 805; *St. Louis Clothing Co. v. Hail Dry-Goods Co.*, 156 Mo. 393; *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683; *Stuart v. New York Herald Co.*, 73 N. Y. App. Div. 459; *Clifford v. Press Pub. Co.*, 78 N. Y. App. Div. 79; *St. Louis Southwestern R. Co. v. McArthur*, 31 Tex. Civ. App. 205; *Sun L. Assur. Co. v. Bailey*, 101 Va. 443. See also *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Lehmann v. Tribune Assoc.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 506; *Hudnell v. Eureka Lumber Co.*, 133 N. Car. 169.

**1059. 1. Punitive Damages.** — *Clifford v. Press Pub. Co.*, 78 N. Y. App. Div. 79; *St. Louis Southwestern R. Co. v. McArthur*, 31 Tex. Civ. App. 205. See also *Western Union Tel. Co. v. Cashman*, (C. C. A.) 132 Fed. Rep. 805; *Sun L. Assur. Co. v. Bailey*, 101 Va. 443.

**When Corporation Amenable to Punitive Damages.** — A corporation may not be subjected to punitive damages unless it authorized its employees' publication of the libel, or ratified it after publication. *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646. So a corporation is not liable in punitive damages where there was no evil motive or actual malice, and the wrongful act was not conceived by the corporation or its agents in the spirit of mischief or criminal indifference to civil obligations. *West-*

- 1059.** *b.* FOR SLANDER. — See note 4.  
**1061.** 8. Defamation by Married Woman. — See notes 1, 2.  
**1062.** 10. Defamation by Agent or Servant — *b.* LIABILITY OF PRINCIPAL OR MASTER. — See notes 2, 4.  
**1063.** 11. Defamation in Public Print — *a.* LIABILITY OF PROPRIETOR OF PUBLICATION — (1) *Civil Liability* — (a) *In General*. — See notes 2, 3.  
**1064.** See note 1.  
     (e) *Extent of Liability*. — See notes 7, 8.  
**1065.** *b.* LIABILITY OF MANAGER OR EDITOR. — See note 4.  
**1066.** *d.* LIABILITY OF AUTHOR. — See note 1.  
     *e.* LIABILITY OF PERSON PROCURING PUBLICATION. — See note 5.  
 12. Liability Question for Jury. — See note 7.  
**1067.** X. DEFENSES — 1. Truth or Justification — *a.* IN WHAT ACTIONS ALLOWABLE — (1) *Civil Actions*. — See note 7.

ern Union Tel. Co. v. Cashman, (C. C. A.) 132 Fed. Rep. 805.

**1059.** 4. When Corporation May Be Held Liable for Slander. — See *Rodger v. Noxon Co.*, 19 Ont. Pr. 327.

**When Corporation Liable for Words Spoken by Agent.** — The corporation is not liable unless the agent was acting within the scope of his employment, and was in the actual performance of his duties. *International Text-Book Co. v. Heartt*, (C. C. A.) 136 Fed. Rep. 129.

**1061.** 1. Husband Liable for Libel or Slander by Wife. — *Mackenzie v. Cunningham*, 8 British Columbia 206; *Dubuc v. Trottier*, 19 Quebec Super. Ct. 202. *Compare Camiré v. Bergeron*, 3 Quebec Pr. 281.

**In Louisiana** a husband is not liable for the defamatory utterances of his wife unless he is shown to have been cognizant of such utterances. *McClure v. McMartin*, 104 La. 496.

**2. Joint Action Against Husband and Wife.** — See *Mackenzie v. Cunningham*, 8 British Columbia 206.

**1062.** 2. Libel Published under Express Instructions. — *Rodger v. Noxon Co.*, 19 Ont. Pr. 327.

**4. Libel Published in Usual Course of Employment.** — *Citizens' L. Assur. Co. v. Brown*, (1904) A. C. 423, 73 L. J. P. C. 102, 90 L. T. N. S. 739, 53 W. R. 176, 20 Times L. Rep. 497.

**1063.** 2. Proprietor Liable. — *Dorr v. U. S.*, 195 U. S. 138; *Prussing v. Jackson*, 85 Ill. App. 324; *Danville Press Co. v. Harrison*, 99 Ill. App. 244; *Weston v. Weston*, 83 N. Y. App. Div. 520.

**Joint and Several Liability.** — In *Quebec* the president and manager of a newspaper publishing company, who has signed the declaration required by Rev. Stat. Quebec, art. 2924 *et seq.*, is jointly and severally liable with the company for a libel published in the newspaper. *Migneron v. Compagnie de Publication de La Patrie*, 5 Quebec Pr. 329.

**3. Publication Without Knowledge or Consent of Proprietor.** — *Dunn v. Hearst*, 139 Cal. 239; *Williams v. Fuller*, (Neb. 1903) 94 N. W. Rep. 118; *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317; *Crane v. Bennett*, 177 N. Y. 106. See also *Danville Press Co. v. Harrison*, 99 Ill. App. 244.

**1064.** 1. Publication by Employees or Agents  
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**in Regular Course of Employment.** — See *Crane v. Bennett*, 177 N. Y. 106.

**Competency of Employee Immaterial.** — *Dunn v. Hearst*, 139 Cal. 239.

**7. Liability Restricted to Compensatory Damages.** — *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317.

**8. Proprietor Not Responsible for Actual Malice of Reporter.** — *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317.

**1065.** 4. Liability of Manager or Editor. — *Dorr v. U. S.*, 195 U. S. 138; *Danville Press Co. v. Harrison*, 99 Ill. App. 244.

**1066.** 1. Liability of Author. — *Dorr v. U. S.*, 195 U. S. 138.

**5. Person Furnishing Information.** — *Weston v. Weston*, 83 N. Y. App. Div. 520, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1066.

**7. A Question for the Jury.** — *Weston v. Weston*, 83 N. Y. App. Div. 520. See also *Tobin v. Gannon*, 34 Nova Scotia 9, 37 Can. L. J. 205.

**1067.** 7. Truth as Defense in Civil Actions — *United States*. — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803.

*Delaware.* — *Star Pub. Co. v. Donahoe*, (Del. 1904) 58 Atl. Rep. 513.

*Iowa.* — *Wallace v. Homestead Co.*, 117 Iowa 348; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kentucky.* — *Browning v. Com.*, 116 Ky. 282.

*Maryland.* — *Coffin v. Brown*, 94 Md. 190, 89 Am. St. Rep. 422.

*Michigan.* — *Lachman v. Fuller*, 125 Mich. 473.

*Missouri.* — *Minter v. Bradstreet Co.*, 174 Mo. 486.

*Nebraska.* — *Larson v. Cox*, (Neb. 1903) 93 N. W. Rep. 1011. See also *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926.

*North Dakota.* — *Lauder v. Jones*, 13 N. Dak. 525.

*South Dakota.* — *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72; *Ross v. Ward*, 14 S. Dak. 240, 86 Am. St. Rep. 746.

*Texas.* — *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165.

*Washington.* — *Leghorn v. Review Pub. Co.*, 31 Wash. 631, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1067.

*Canada.* — *Macdonald v. Mail Printing Co.*, 32 Ont. 163.

Truth the Only Defense After Publication, —

**1068.** Necessity of Good Faith. — See note 2.

Qualification of Rule by Constitutional or Statutory Provisions. — See notes 4, 5, 6.

Burden of Proof. — See note 7.

(2) *Criminal Prosecutions.* — See notes 9, 10.

**1069.** *b.* WHAT AMOUNTS TO JUSTIFICATION — (1) *In General.* — See notes 4, 5.

(2) *Justification of Precise Charge.* — See note 6.

**1070.** (3) *Justification Must Be as Broad as the Charge.* — See notes 1, 2.

(4) *Where Crime Is Charged* — (a) *Proof of All Elements of Offense Necessary.* — See note 3.

**1071.** (b) *Quantum of Proof Required — In Civil Actions.* — See notes 1, 5.

**1072.** *c.* EVIDENCE ADMISSIBLE — (1) *By Defendant* — (b) *General Reputation.* — See notes 2, 3.

(c) *Specific Acts in Proof of General Charge.* — See note 4.

**1073.** (2) *By Plaintiff in Rebuttal* — (b) *Good Character.* — See notes 1, 3.

2. *Repetition of Rumors or Statements Made by Others.* — See note 5.

In *Mitchell v. Spradley*, 23 Tex. Civ. App. 43, it was held that after the plaintiff has proved the publication of a libel, the only defense available is proof of the truth of the charge.

*Insanity Constitutes a Complete Defense* in all civil actions for libel or slander. *Irvine v. Gibson*, (Ky. 1904) 77 S. W. Rep. 1106.

**1068.** 2. *Defense Not Destroyed by Malice in Publication.* — *Conner v. Standard Pub. Co.*, 183 Mass. 474; *Minter v. Bradstreet Co.*, 174 Mo. 486.

4. *Good Faith Required under Constitutional and Statutory Provisions.* — *Wineberg v. Wener*, 4 Quebec Pr. 463.

*Under Statutory Provisions in Maine* the truth constitutes a complete defense, "unless the publication is found to have originated in corrupt or malicious motives." *Pease v. Bamford*, 96 Me. 23; *Pierce v. Rodliff*, 95 Me. 346.

5. *Conner v. Standard Pub. Co.*, 183 Mass. 474.

6. See *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 282.

7. *Burden of Proof on Defendant.* — *Schomberg v. Walker*, 132 Cal. 224; *Knipe v. Brooklyn Daily Eagle*, 101 N. Y. App. Div. 43; *Osborn v. Leach*, 135 N. Car. 633; *Macdonald v. Mail Printing Co.*, 2 Ont. L. Rep. 278. See also *Evening Post Co. v. Richardson*, 113 Ky. 641; *Pierce v. Rodliff*, 95 Me. 346.

9. *Statutes.* — *Larson v. Cox*, (Neb. 1903) 93 N. W. Rep. 1011; *Ballew v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

10. *Dorr v. U. S.*, 195 U. S. 138; *People v. Sherlock*, 166 N. Y. 180; *State v. Brock*, 61 S. Car. 141.

**1069.** 4. *Matter in Justification Must Be Substantial Answer to Charge.* — *Wallace v. Homestead Co.*, 117 Iowa 348. See also *Conner v. Standard Pub. Co.*, 183 Mass. 474.

5. *Substantial Justification Sufficient.* — *Wallace v. Homestead Co.*, 117 Iowa 348; *Conner v. Standard Pub. Co.*, 183 Mass. 474.

6. *Precise Charge Must Be Justified.* — *Wallace v. Homestead Co.*, 117 Iowa 348; *Coffin v. Brown*, 94 Md. 190, 84 Am. St. Rep. 422, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069, and supporting the whole text paragraph.

*Proof of Embezzlement Sufficient Where Charge Was Stealing.* — *McLeod v. Crosby*, 128 Mich. 641.

**1070.** 1. *Justification Must Be as Broad as Charge.* — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Wallace v. Homestead Co.*, 117 Iowa 348; *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 282; *McLeod v. Crosby*, 128 Mich. 641, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1070; *Baldwin v. Genung*, 70 N. Y. App. Div. 271; *Xavier v. Oliver*, 80 N. Y. App. Div. 292; *Carpenter v. New York Evening Journal Pub. Co.*, 96 N. Y. App. Div. 376; *Lauder v. Jones*, 13 N. Dak. 525. See also *Paxton v. Woodward*, 31 Mont. 195.

2. *When Justification as to Part Allowable.* — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Baldwin v. Genung*, 70 N. Y. App. Div. 271.

3. *Proof of All Elements of Offense Essential.* — See *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926; *Hereford v. Combs*, 126 Ala. 369.

**1071.** 1. *Quantum of Proof Required in General.* — See *Hereford v. Combs*, 126 Ala. 369.

*Question for Jury.* — The truth of the matters alleged in the justification is always a question for the jury. *Inland Printer Co. v. Economical Half Tone Supply Co.*, 99 Ill. App. 8.

5. *Preponderance of Evidence Sufficient in Civil Action.* — *Hereford v. Combs*, 126 Ala. 369.

**1072.** 2. *General Reputation Generally Inadmissible to Show Justification.* — *Compare Steen v. Friend*, 11 Ohio Cir. Dec. 235, 20 Ohio Cir. Ct. 459, wherein evidence of character seems to have been admitted without question.

3. *General Reputation Admissible to Justify Charge of General Bad Character.* — *Côté v. Derrosiers*, 6 Quebec Pr. 65. See generally the title *CHARACTER (IN EVIDENCE)*.

4. *Evidence of Previous Acts Similar to Those Alleged in Libel Held Admissible.* — *Hewson v. Clevee*, (1904) 2 Ir. R. 536.

**1073.** 1. *Plaintiff May Show Good Character Where Justification Pleaded.* — *Hereford v. Combs*, 126 Ala. 369.

3. *Faxon v. Jones*, 176 Mass. 206.

5. *Repetition of Rumors, etc., Not Justified.* — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737;

- 1074.** See notes 1, 2.  
**3. Good Faith or Want of Malice.** — See note 3.  
**1075.** See note 1.  
**5. Words Published in Heat of Passion.** — See note 8.  
**6. Retraction or Apology.** — See note 9.  
**7. Independent Libel or Slander by Plaintiff.** — See notes 12, 13.  
**1076. XI. EVIDENCE — 2. Power of Court to Rule on Admissibility of Evidence.** — See note 9.  
**3. Proof of Libel.** — See notes 10, 11.  
**1077.** See note 1.  
**4. Actionable Quality of Words — a. BURDEN OF PROOF.** — See notes 2, 3, 4.  
**b. ENTIRE CONVERSATION OR PUBLICATION.** — See note 5.  
**1078. d. OPINION OF WITNESSES AS TO MEANING OF WORDS.** — See notes 4, 5, 6.

*Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *McClure v. McMartin*, 104 La. 496; *Covington v. Roberson*, 111 La. 338; *Kersting v. White*, 107 Mo. App. 285; *Stuart v. News Pub. Co.*, 67 N. J. L. 317; *Macdonald v. Mail Printing Co.*, 32 Ont. 163. But see *Baldwin v. Boulware*, 79 Mo. App. 5.

**1074. 1. Where Defendant Purports to Be Making a Repetition.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073 [1074]; *Kersting v. White*, 107 Mo. App. 285.

**2. Where Defendant Names His Informant.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1073 [1074]; *Kersting v. White*, 107 Mo. App. 265; *Macdonald v. Mail Printing Co.*, 32 Ont. 163.

**3. Good Faith No Defense.** — *Covington v. Roberson*, 111 La. 338, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074; *Coffin v. Brown*, 94 Md. 190, 89 Am. St. Rep. 422, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074; *Dunlevy v. Wolferman*, 106 Mo. App. 50; *Moore v. Beek*, 71 N. J. L. 7; *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476; *Desjardins v. Berthiaume*, 16 Quebec Super. Ct. 506.

**After Having Given Evidence of the Truth**, in a prosecution for criminal libel, it is proper to permit the defendant to testify to his belief in the truth as bearing on the question of his motives. *People v. Sherlock*, 166 N. Y. 180.

**1075. 1. Probable Cause No Excuse.** — *Covington v. Roberson*, 111 La. 338, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1074 [1075].

**8. Words Published in Heat of Passion.** — *Israel v. Israel*, 109 Mo. App. 366.

**9. Retraction or Apology No Defense.** — *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476. Compare *Gray v. Minnesota Tribune Co.*, 81 Minn. 333, where a retraction was interposed as a defense, and the court ruled it to be of no avail because it failed to meet the statutory requirements.

**12. Libel or Slander Not Justified by Another Libel or Slander.** — *Patton v. Cruce*, 72 Ark.

421, 105 Am. St. Rep. 46; *Borley v. Allison*, 181 Mass. 246; *Weston v. Grand Rapids Pub. Co.*, 128 Mich. 375; *Xavier v. Oliver*, 80 N. Y. App. Div. 292; *Burnham v. Franklin*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 299, affirmed 103 N. Y. App. Div. 595; *Wrege v. Jones*, 13 N. Dak. 267. See also *Downey v. Armstrong*, 1 Ont. L. Rep. 237, following *Stirton v. Gummer*, 31 Ont. 227, and *Downey v. Stirton*, 1 Ont. L. Rep. 186.

**13. Statements in Self-Defense.** — *Patton v. Cruce*, 72 Ark. 421, 105 Am. St. Rep. 46; *Borley v. Allison*, 181 Mass. 246; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377. See also *Vallée v. Canada L. Assur. Co.*, 3 Quebec Pr. 272.

**1076. 9. Court May Rule upon Admissibility of Evidence.** — *People v. Sherlock*, 166 N. Y. 180.

**10. The Libelous Publication the Best Evidence.** — *Prussing v. Jackson*, 208 Ill. 96, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076.

**11. The Original Libel Should Be Produced.** — *Prussing v. Jackson*, 208 Ill. 96, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076.

**1077. 1. When Secondary Evidence Is Admissible.** — *Prussing v. Jackson*, 208 Ill. 96, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1076 [1077].

**2. When Plaintiff Must Show Actionable Quality of Words.** — *Hanchett v. Chiatovich*, (C. C. A.) 101 Fed. Rep. 742. See also *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

**3. Words Actionable Per Se.** — *Macdonald v. Mail Printing Co.*, 2 Ont. L. Rep. 278, reversing in part 32 Ont. 163.

**The Burden of Proving the Falsity of Libelous Charges** does not rest upon the plaintiff unless a plea of justification has been interposed. *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

**4. When Defendant Must Show that Words Are Not Actionable.** — *Macdonald v. Mail Printing Co.*, 2 Ont. L. Rep. 278, reversing in part 32 Ont. 163.

**5. Entire Conversation or Publication Admissible.** — *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223; *Smith v. Moore*, 74 Vt. 81.

**1078. 4. The Test of the Admissibility of the testimony of witnesses as to their understanding of the words complained of has been held to be whether such words were of plain and obvious meaning or were ambiguous or**

- 1079.** 7. Words Must Be Proved Substantially as Alleged. — See notes 1, 2, 3, 4, 5.
- 1080.** 9. Hearsay Evidence. — See note 8.
- 1081.** 10. Reasonable Doubt in Criminal Prosecutions. — See note 1.
- XII. DAMAGES** — 1. Introductory. — See note 3.
2. Classification. — See note 5.
3. General Damages — *a.* MEANING OF TERM. — See note 6.
- 1082.** See notes 1, 2.
- b.* GENERAL DAMAGES NEED NOT BE SPECIFICALLY PLEADED OR PROVED. — See note 3.

equivocal. *Green v. Miller*, 33 Can. Sup. Ct. 193, reversing 35 Nova Scotia 117.

**1078.** 5. Witnesses May Testify as to Their Understanding of Meaning. — *Stirton v. Gummer*, 31 Ont. 227.

6. Witness Cannot Testify as to His Understanding of Words. — *Willis v. Western Union Tel. Co.*, 69 S. Car. 537, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078.

**1079.** 1. Words Must Be Proved Substantially as Alleged. — *Emerson v. Miller*, 115 Iowa 315, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078 [1079]; *Butts v. Long*, 94 Mo. App. 687; *State v. Fenn*, 112 Mo. App. 531; *McArthur v. State*, 41 Tex. Crim. 635; *West v. State*, 44 Tex. Crim. 417; *Smith v. Moore*, 74 Vt. 81; *Kidder v. Bacon*, 74 Vt. 263.

2. Not Necessary that Words Should Be Identical. — *Emerson v. Miller*, 115 Iowa 315, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1078 [1079]; *Smith v. Moore*, 74 Vt. 81; *Kidder v. Bacon*, 74 Vt. 263.

3. Proof of Words Not Set Out in Pleadings. — *Butts v. Long*, 94 Mo. App. 687; *McArthur v. State*, 41 Tex. Crim. 635.

4. Failure to Prove Words Set Out in Pleadings. — *Iles v. Swank*, 202 Ill. 453; *Butts v. Long*, 94 Mo. App. 687; *Smith v. Moore*, 74 Vt. 81.

5. Words Substantially Different but of Similar Import. — *Butts v. Long*, 94 Mo. App. 687; *State v. Fenn*, 112 Mo. App. 531; *West v. State*, 44 Tex. Crim. 417; *Smith v. Moore*, 74 Vt. 81; *Kidder v. Bacon*, 74 Vt. 263.

**1080.** 8. Hearsay Evidence Not Admissible. — *Hearne v. De Young*, 132 Cal. 357.

**1081.** 1. Defendant Entitled to Benefit of Reasonable Doubt. — *Rainwater v. State*, 46 Tex. Crim. 496.

3. No Damages Are Recoverable unless the words alleged in the complaint are actionable *per se* or facts are stated showing special damage. *Zinserling v. Journal Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 591. See generally *supra*, this title, 865. 6 *et seq.*

5. Classification. — See *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203; *Graybill v. De Young*, 140 Cal. 323; *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422; *Paxton v. Woodward*, 31 Mont. 195; *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081; *Green v. Western Union Tel. Co.*, 136 N. Car. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

6. Damage Presumed Where Words Libelous or Slanderous *Per Se* — *United States*. — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Western*

*Union Tel. Co. v. Cashman*, (C. C. A.) 132 Fed. Rep. 805.

*Kansas*. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

*Louisiana*. — *McClure v. McMartin*, 104 La. 496.

*Michigan*. — See *Line v. Spies*, (Mich. 1905) 102 N. W. Rep. 993.

*Missouri*. — *Midland Pub. Co. v. Implement Trade Journal Co.*, 108 Mo. App. 223; *Israel v. Israel*, 109 Mo. App. 366.

*Montana*. — *Paxton v. Woodward*, 31 Mont. 195, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081.

*Nebraska*. — *Williams v. Fuller*, (Neb. 1903) 94 N. W. Rep. 118.

*New Jersey*. — *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

*New York*. — *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Loftus v. Bennett*, 68 N. Y. App. Div. 128; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414. See also *Beecher v. Press Pub. Co.*, 60 N. Y. App. Div. 536; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15.

*North Carolina*. — See *Upchurch v. Robertson*, 127 N. Car. 127.

*North Dakota*. — *Wrege v. Jones*, 13 N. Dak. 267.

*Wisconsin*. — *Hacker v. Heiney*, 111 Wis. 318.

**1082.** 1. General Damages Are the Necessary Result of the Libel or Slander. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422; *Paxton v. Woodward*, 31 Mont. 195; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Hacker v. Heiney*, 111 Wis. 318, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1082]. See also *Graybill v. De Young*, 140 Cal. 323; *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 *et seq.*; *Ludlow v. Batson*, 5 Ont. L. Rep. 300.

2. Meaning of General Damages. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422; *Paxton v. Woodward*, 31 Mont. 195; *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Hacker v. Heiney*, 111 Wis. 318, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1082]. See also *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 *et seq.*

3. General Damages Need Not Be Specifically Pleaded or Proved. — *Hearne v. De Young*, 132 Cal. 357; *Graybill v. De Young*, 140 Cal. 323; *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St.

**1082.** *c.* INJURY NEED NOT BE OF PECUNIARY NATURE. — See note 4.

**1083.** *d.* ELEMENTS OF GENERAL DAMAGES — (1) *Injury to Feelings and Mental Suffering.* — See notes 1, 2.

(2) *Injury to Character or Reputation* — (a) *An Element of Damages.* —

See note 3.

**1084.** (b) *Constitutionality of Statutes Prohibiting Recovery for Injury to Reputation.* — See note 1.

**1085.** (4) *Injury to Business.* — See note 1.

Rep. 422. See also *Woodruff v. Woodruff*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15.

**1082. 4. Injury Need Not Be of Pecuniary Nature.** — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422; *Gambrill v. Schooley*, 93 Md. 48, 86 Am. St. Rep. 414; *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082; *Green v. Western Union Tel. Co.*, 136 N. Car. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082.

**1083. 1. Injury to Feelings** — *United States*. — *Butler v. Barrett*, 130 Fed. Rep. 944, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203. See also *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737. *California*. — *Hearne v. De Young*, 132 Cal. 357; *Graybill v. De Young*, 140 Cal. 323.

*Kansas*. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422. See also *Werner v. Vogeli*, 10 Kan. App. 536.

*Kentucky*. — *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5.

*Louisiana*. — *Simpson v. Robinson*, 104 La. 180.

*Maine*. — *Davis v. Starrett*, 97 Me. 568.

*Massachusetts*. — *Faxon v. Jones*, 176 Mass. 206.

*Michigan*. — *Smedley v. Soule*, 125 Mich. 192. *Minnesota*. — *Gray v. Times Newspaper Co.*, 78 Minn. 323.

*Missouri*. — *Krup v. Corley*, 95 Mo. App. 640; *Carpenter v. Hamilton*, 185 Mo. 603.

*New Jersey*. — *Knowlden v. Guardian Printing, etc., Co.*, 69 N. J. L. 670.

*North Carolina*. — *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*; *Green v. Western Union Tel. Co.*, 136 N. Car. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*

*South Carolina*. — *Willis v. Western Union Tel. Co.*, 69 S. Car. 537, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083.

*South Dakota*. — *Bedtkey v. Bedtkey*, 15 S. Dak. 310.

*Wisconsin*. — *Hacker v. Heiney*, 111 Wis. 318, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1083].

**2. Mental Suffering** — *California*. — *Hearne v. De Young*, 132 Cal. 357; *Graybill v. De Young*, 140 Cal. 323.

*Kansas*. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422. See also *Werner v. Vogeli*, 10 Kan. App. 536.

*Kentucky*. — *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5.

*Maine*. — *Davis v. Starrett*, 97 Me. 568.

*Massachusetts*. — *Faxon v. Jones*, 176 Mass. 206.

*Missouri*. — *Israel v. Israel*, 109 Mo. App. 366.

*North Carolina*. — *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*; *Green v. Western Union Tel. Co.*, 136 N. Car. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*

*South Carolina*. — *Willis v. Western Union Tel. Co.*, 69 S. Car. 537, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083.

*Vermont*. — *Kidder v. Bacon*, 74 Vt. 263.

*Washington*. — *Davis v. Tacoma R., etc., Co.*, 35 Wash. 203.

*Wisconsin*. — *Hacker v. Heiney*, 111 Wis. 318, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1083].

**3. Injury to Character or Reputation** — *United States*. — See *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

*California*. — *Hearne v. De Young*, 132 Cal. 357; *Turner v. Hearst*, 137 Cal. 232; *Graybill v. De Young*, 140 Cal. 323.

*Kansas*. — *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422. See also *Werner v. Vogeli*, 10 Kan. App. 536.

*Louisiana*. — *Simpson v. Robinson*, 104 La. 180.

*Maine*. — *Davis v. Starrett*, 97 Me. 568.

*Massachusetts*. — *Faxon v. Jones*, 176 Mass. 206; *Parker v. Republican Co.*, 181 Mass. 392.

*Michigan*. — *Smedley v. Soule*, 125 Mich. 192; *Savlan v. Ayer*, 129 Mich. 545.

*Minnesota*. — See *Gray v. Times Newspaper Co.*, 78 Minn. 323.

*New Jersey*. — *Stuart v. News Pub. Co.*, 67 N. J. L. 317, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1083; *Knowlden v. Guardian Printing, etc., Co.*, 69 N. J. L. 670.

*New York*. — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414.

*North Carolina*. — *Osborn v. Leach*, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*; *Green v. Western Union Tel. Co.*, 136 N. Car. 498, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1082 *et seq.*

*Wisconsin*. — *Hacker v. Heiney*, 111 Wis. 318, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1081 [1083].

**1084. 1. Kansas Statute Unconstitutional.** — The Kansas statute, similar in its provisions to the Michigan statute, has been declared to be unconstitutional. *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

**1085. 1. Injury to Business or Occupation.** — *Douglass v. Daisley*, (C. C. A.) 114 Fed. Rep. 628, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1084; *Parker v. Republican Co.*, 181 Mass. 392; *Couch v. Mining Journal Co.*, 130 Mich. 294; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Brown v. Providence Telegram Pub. Co.*, 25 R. I. 117; *Smith v. Moore*, 74 Vt. 81. See also *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *McLoughlin v.*

- 1085.** 4. **Special Damages** — *a.* MEANING OF TERM. — See note 3.  
*b.* SPECIAL DAMAGES NECESSARY WHERE WORDS NOT ACTIONABLE PER SE. — See notes 4, 5, 6.  
**1086.** *c.* SPECIAL DAMAGES MUST BE PLEADED. — See notes 1, 2.  
*d.* SPECIAL DAMAGES MUST BE PROVED. — See note 3.  
**1087.** *e.* DAMAGE MUST PARTAKE OF A PECUNIARY NATURE. — See note 1.  
**1088.** Instances of Injuries Held Ground for Special Damages. — See notes 3, 4, 5, 7, 9.  
**1088.** Instances of Injuries Held Not Ground for Special Damages. — See notes 3, 7.

American Circular Loom Co., (C. C. A.) 125 Fed. Rep. 203.

**1085.** 3. **Damages Not the Necessary Consequences.** — *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683.

"Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some special loss arises from uttering the slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable by reason of special damage." *Loftus v. Bennett*, 68 N. Y. App. Div. 128.

**Nature of Special Damages.** — Special damages must have actually accrued at the time of the commencement of the action, must be the immediate consequences of the defamatory words, and must be actual and substantial. *Dun v. Weintraub*, 111 Ga. 416.

**Damages Not the Direct Result of defamatory words** do not come within the definition of special damages. *Kersting v. White*, 107 Mo. App. 285.

**Special Damage Must Be Reasonable and Probable Consequence of Publication.** — *Speake v. Hughes*, (1904) 1 K. B. 138, 73 L. J. K. B. 172, 89 L. T. N. S. 576; *Ludlow v. Batson*, 5 Ont. L. Rep. 309.

4. **Words Not Per Se Actionable May Become So by Reason of Special Damage.** — *Canning v. Owen*, 24 R. I. 233. See also *Watters v. Retail Clerks Union No. 479*, 120 Ga. 424; *Doyle v. Kirby*, 184 Mass. 409; *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254, and see *supra*, this title, **865. 6 et seq.**

5. **Special Damage Necessary Where Words Not Defamatory Per Se.** — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414; *Canning v. Owen*, 24 R. I. 233. See also *Dun v. Weintraub*, 111 Ga. 416; *Watters v. Retail Clerks Union No. 479*, 120 Ga. 424; *Doyle v. Kirby*, 184 Mass. 409; *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254.

6. **Recovery Limited to Special Damages.** — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414.

**1086.** 1. **Special Damages Must Be Pleased** — *California*. — *Hearne v. De Young*, 132 Cal. 357; *Graybill v. De Young*, 140 Cal. 323.

*Kansas*. — See *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

*Maryland*. — *Gambrill v. Schooley*, 95 Md. 289, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086.

*Michigan*. — See *Smedley v. Soule*, 125 Mich. 192.

*Missouri*. — *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683.

*New Jersey*. — See *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

*New York*. — *Le Massena v. Storm*, 62 N. Y. App. Div. 150; *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254; *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414. See also *Beecher v. Press Pub. Co.*, 60 N. Y. App. Div. 536.

*Vermont*. — See *Kidder v. Bacon*, 74 Vt. 263.

**The Items of Special Damage must be alleged.** *Martin v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 524.

2. **Special Damages Not Pleased Cannot Be Proved.** — *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683; *Kidder v. Bacon*, 74 Vt. 263. See also *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

3. **Special Damages Must Be Proved.** — *Hearne v. De Young*, 132 Cal. 357; *Graybill v. De Young*, 140 Cal. 323; *Gambrill v. Schooley*, 95 Md. 289, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1086; *Smedley v. Soule*, 125 Mich. 192. See also *Beecher v. Press Pub. Co.*, 60 N. Y. App. Div. 536.

**1087.** 1. **Special Damage Must Be of a Pecuniary Nature.** — *Graybill v. De Young*, 140 Cal. 323.

3. **Injury to Business.** — *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Davis v. Starrett*, 97 Me. 568. See also *Loftus v. Bennett*, 68 N. Y. App. Div. 128.

**Diminution of Business Held Not Special Damage.** — *Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414, disapproving dicta to the contrary.

**Loss of Health, and Consequent Incapacity to Attend to Business**, is a ground for special damages. *Hitzfelder v. Koppelman*, 30 Tex. Civ. App. 162.

4. **Refusal of Credit.** — See *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203.

5. **Refusal of Third Person to Fulfil Contract.** — See *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254.

7. **Loss of Situation or Office.** — *Kidder v. Bacon*, 74 Vt. 263. See also *Rade v. Press Pub. Co.*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254.

9. **Loss of a Marriage.** — See *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203.

**1088.** 3. **Mental Anguish or Anxiety.** — See *McLoughlin v. American Circular Loom Co.*, (C. C. A.) 125 Fed. Rep. 203.

7. **Loss of Society of Friends and Neighbors.** —

**1088. *f.* DAMAGE MUST RESULT EXCLUSIVELY FROM LIBEL OR SLANDER OF DEFENDANT.** — See note 11.

**5. Nominal Damages.** — See note 12.

**6. Substantial Damages.** — See note 13.

**1089.** See note 1.

**7. Actual or Compensatory Damages — *a.* MEANING OF TERM.** — See note 2.

***b.* ACTUAL MALICE NOT NECESSARY.** — See note 3.

**1091. 8. Punitive, Exemplary, or Vindictive Damages — *a.* IN GENERAL.** — See notes 1, 2.

***b.* RIGHT TO AWARD.** — See note 3.

**1092.** See note 1.

***c.* WHEN ALLOWABLE — (1) *In General.*** — See note 3.

Rade v. Press Pub. Co., (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254.

**1088. 11. Damage Must Be Exclusively the Consequence of the Libel or Slander.** — Davis v. Starrett, 97 Me. 568.

**12. When Nominal Damages Proper.** — Weston v. Weston, 83 N. Y. App. Div. 520. See also McMahon v. New York News Pub. Co., 51 N. Y. App. Div. 488.

**13. It Cannot Be Assumed as a Matter of Law that Damages Should Be Nominal.** — Williams v. Fuller, (Neb. 1903) 94 N. W. Rep. 118.

**1089. 1. Substantial Damages May Be Awarded Though No Actual Injury Shown.** — Turner v. Hearst, 137 Cal. 232; Williams v. Fuller, (Neb. 1903) 94 N. W. Rep. 118.

**2. Meaning of Actual or Compensatory Damages.** — Minter v. Bradstreet Co., 174 Mo. 486; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Upchurch v. Robertson, 127 N. Car. 127. See also Palmer v. Mahin, (C. C. A.) 120 Fed. Rep. 737; Friedburg v. Nudd, 9 Kan. App. 743; Williams v. Fuller, (Neb. 1903) 94 N. W. Rep. 118; McMahon v. New York News Pub. Co., 51 N. Y. App. Div. 488.

**3. Actual Malice Not Necessary.** — Palmer v. Mahin, (C. C. A.) 120 Fed. Rep. 737; Jones v. Murray, 167 Mo. 25; Israel v. Israel, 109 Mo. App. 366; Paxton v. Woodward, 31 Mont. 195; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Wrege v. Jones, 13 N. Dak. 267; Lauder v. Jones, 13 N. Dak. 525.

**In Libel Actions, in Default of Justification, the plaintiff is in each and every contingency entitled to compensatory damages.** Robinson v. Evening Post Pub. Co., 39 N. Y. App. Div. 525.

**1091. 1. Meaning of Punitive, Exemplary, or Vindictive Damages.** — Washington Gas Light Co. v. Lansden, 172 U. S. 534; Palmer v. Mahin, (C. C. A.) 120 Fed. Rep. 737; Western Union Tel. Co. v. Cashman, (C. C. A.) 132 Fed. Rep. 805; Nicholson v. Merritt, (Ky. 1902) 67 S. W. Rep. 5; Minter v. Bradstreet Co., 174 Mo. 486; Carpenter v. Hamilton, 185 Mo. 603; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183, affirmed 177 N. Y. 544; Osborn v. Leach, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1091; Wrege v. Jones, 13 N. Dak. 267.

**2. Punitive or Vindictive Damages Awarded on Ground of Public Policy.** — Washington Gas Light Co. v. Lansden, 172 U. S. 534; Western Union Tel. Co. v. Cashman, (C. C. A.) 132 Fed. Rep.

805; Nicholson v. Merritt, (Ky. 1902) 67 S. W. Rep. 5; Osborn v. Leach, 135 N. Car. 633, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1091.

**3. Punitive or Exemplary Damages May Be Awarded — United States.** — Washington Gas Light Co. v. Lansden, 172 U. S. 534.

**Kansas.** — Werner v. Vogeli, 10 Kan. App. 536.

**Kentucky.** — Nicholson v. Merritt, (Ky. 1902) 67 S. W. Rep. 5.

**Michigan.** — Couch v. Mining Journal Co., 130 Mich. 294.

**Missouri.** — Minter v. Bradstreet Co., 174 Mo. 486; Friedman v. Pulitzer Pub. Co., 102 Mo. App. 683; Midland Pub. Co. v. Implement Trade Journal Co., 108 Mo. App. 223; Israel v. Israel, 109 Mo. App. 366; Carpenter v. Hamilton, 185 Mo. 603.

**Montana.** — Paxton v. Woodward, 31 Mont. 195.

**New York.** — Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Robinson v. Evening Post Pub. Co., 39 N. Y. App. Div. 525; McMahon v. New York News Pub. Co., 51 N. Y. App. Div. 488; Morse v. Press Pub. Co., 63 N. Y. App. Div. 61; Potter v. New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183, affirmed 177 N. Y. 544.

**North Carolina.** — Upchurch v. Robertson, 127 N. Car. 127.

**North Dakota.** — Wrege v. Jones, 13 N. Dak. 267.

**Texas.** — St. Louis Southwestern R. Co. v. McArthur, 31 Tex. Civ. App. 205; Cranfill v. Hayden, 97 Tex. 544.

**Wisconsin.** — Hacker v. Heiney, 111 Wis. 318.

**1092. 1. Punitive or Exemplary Damages Not Allowed in Nebraska.** — Williams v. Fuller, (Neb. 1903) 94 N. W. Rep. 118.

**3. When Punitive or Exemplary Damages May Be Allowed.** — Butler v. Barrett, 130 Fed. Rep. 944; Graybill v. De Young, 140 Cal. 323; Schofield v. Baldwin, 102 Ill. App. 560; Werner v. Vogeli, 10 Kan. App. 536; Minter v. Bradstreet Co., 174 Mo. 486; Carpenter v. Hamilton, 185 Mo. 603; Krug v. Pitass, 162 N. Y. 154, 76 Am. St. Rep. 317; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 186, affirmed 177 N. Y. 544; Upchurch v. Robertson, 127 N. Car. 127; Wrege v. Jones, 13 N. Dak. 267. See also Morse v. Press Pub. Co., 63 N. Y. App. Div. 61.



**1093.** (2) *Whether Actual or Express Malice Is Necessary.* — See notes 2, 3, 4.

**1094.** (6) *Punitive Damages Cannot Be Awarded unless Claimed.* — See note 5.

*d.* QUESTION FOR JURY. — See notes 6, 7.

**1095.** 9. *What May Be Considered on Question of Damages* — *b.* EXTENT OF CIRCULATION OF DEFAMATION. — See notes 5, 6.

*c.* SOCIAL RELATIONS AND STANDING OF PARTIES. — See note 7.

**1096.** See notes 1, 2.

*e.* PECUNIARY CONDITION OF PLAINTIFF. — See note 5.

*f.* FINANCIAL STANDING OF DEFENDANT. — See notes 7, 8.

**1097.** See notes 1, 2.

**1093.** 2. *Implied Malice May Support Award of Punitive or Exemplary Damages.* — *Nicholson v. Merritt*, (Ky. 1902) 67 S. W. Rep. 5; *Gambrill v. Schooley*, 95 Md. 289, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093; *Brandt v. Morning Journal Assoc.*, 81 N. Y. App. Div. 186, *affirmed* 177 N. Y. 544; *Davis v. Tacoma R., etc., Co.*, 35 Wash. 203.

*When the Falsity of the Libel Is Proved.* — *Compare Hume v. Kusche*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 414.

**3. Actual or Express Malice Necessary** — *United States.* — *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Western Union Tel. Co. v. Cashman*, (C. C. A.) 132 Fed. Rep. 805.

*Indiana.* — *Short v. Acton*, 33 Ind. App. 361. *Maryland.* — *Gambrill v. Schooley*, 95 Md. 289, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093, 93 Md. 48, 86 Am. St. Rep. 414.

*Missouri.* — *Minter v. Bradstreet Co.*, 174 Mo. 486, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

*Montana.* — *Paxton v. Woodward*, 31 Mont. 195.

*New York.* — *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317; *Willard v. Press Pub. Co.*, 52 N. Y. App. Div. 448; *Morse v. Press Pub. Co.*, 63 N. Y. App. Div. 61; *Crane v. Bennett*, 77 N. Y. App. Div. 102, *affirmed* 177 N. Y. 106; *Brandt v. Morning Journal Assoc.*, 81 N. Y. App. Div. 183, *affirmed* 177 N. Y. 544.

*North Carolina.* — See *Upchurch v. Robertson*, 127 N. Car. 127.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267.

*Texas.* — See *St. Louis Southwestern R. Co. v. McArthur*, 31 Tex. Civ. App. 205.

**4. Recklessness or Carelessness.** — *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Danville Press Co. v. Harrison*, 99 Ill. App. 244; *Minter v. Bradstreet Co.*, 174 Mo. 486, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093; *McMahon v. New York News Pub. Co.*, 51 N. Y. App. Div. 488; *Crane v. Bennett*, 77 N. Y. App. Div. 102, *affirmed* 177 N. Y. 106. See also *Upchurch v. Robertson*, 127 N. Car. 127; *St. Louis Southwestern R. Co. v. McArthur*, 31 Tex. Civ. App. 205.

**1094.** 5. *Where the Nature of the Damages Demanded Is Not Indicated*, it will be presumed in *Quebec* that exemplary damages are asked for. *Gauvreau v. Chapais*, 18 Quebec Super. Ct. 135.

**6. A Question for the Jury.** — *Schomberg v.*

*Walker*, 132 Cal. 224; *Emerson v. Miller*, 115 Iowa 315; *Gambrill v. Schooley*, 93 Md. 48, 86 Am. St. Rep. 414; *Krup v. Corley*, 95 Mo. App. 640; *Robinson v. Evening Post Pub. Co.*, 39 N. Y. App. Div. 525; *Lauder v. Jones*, 13 N. Dak. 525. See also *Butler v. Barret*, 130 Fed. Rep. 944.

*What Is Sufficient Evidence to Make Malice Question for Jury.* — Proof of the falsity of a libel, of its character, and of the circumstances under which it was published, is sufficient to present a question for the jury whether the malice was such as to justify an award of punitive damages. *Crane v. Bennett*, 177 N. Y. 106.

**7. Erroneous Instruction.** — *Krup v. Corley*, 95 Mo. App. 640.

**1095.** 5. *Extent of Circulation.* — *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72; *Smith v. Moore*, 74 Vt. 81; *Kidder v. Bacon*, 74 Vt. 263.

**6. Circulation of Newspaper.** — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Graybill v. De Young*, 140 Cal. 323; *Boucher v. Clark Pub. Co.*, 14 S. Dak. 72.

**7. Social Relations and Standing of Parties May Be Shown and Considered.** — *Smith v. Moore*, 74 Vt. 81, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095.

**1096.** 1. *Social Relations and Standing of Plaintiff.* — *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657; *Best v. Kessler*, (C. C. A.) 130 Fed. Rep. 24; *Whiting v. Carpenter*, (Neb. 1903) 93 N. W. Rep. 926; *Smith v. Moore*, 74 Vt. 81, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095 [1096].

**2. Social Relations and Standing of Defendant.** — *Graybill v. De Young*, 140 Cal. 323; *Smith v. Moore*, 74 Vt. 81, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095 [1096].

*Only on the Question of Punitive Damages is the standing of the defendant material.* *Sun L. Assur. Co. v. Bailey*, 101 Va. 443.

**5. Pecuniary Condition of Plaintiff May Be Shown.** — *Parker v. Republican Co.*, 181 Mass. 392.

**7. Financial Condition of Defendant Not Material.** — *King v. Sassaman*, (Tex. Civ. App. 1901) 64 S. W. Rep. 937.

**8. Financial Standing of Defendant May Be Shown.** — *Carpenter v. Hamilton*, 185 Mo. 603. See also *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683.

**1097.** 1. *Wealth an Element of Social Rank and Influence and Therefore Material.* — See *Kidder v. Bacon*, 74 Vt. 263.

**2. Wealth of Defendant Material on Question of Punitive Damages.** — *Kidder v. Bacon*, 74 Vt.

**1097.** *g.* MALICE. — See note 3.

**1098.** See notes 1, 2.

**1099.** *h.* CHARACTER OF DEFENDANT. — See note 2.

*j.* CHARACTER OR REPUTATION OF PLAINTIFF — (1) *Material on Question of Damages.* — See note 6.

**1100.** (2) *Bad Character or Reputation.* — See note 1.

**1101.** See note 1.

**1102.** Evidence Must Be Confined to General Reputation. — See note 1.

**1104.** *m.* EFFECT OF UNSUSTAINED PLEA OF JUSTIFICATION. — See notes 4, 5.

**1105.** *o.* MATTERS IN AGGRAVATION — (2) *Repetitions and Republications.* — See note 5.

**1106.** See notes 1, 2.

(3) *Other Defamations.* — See note 3.

(4) *Falsity of Charges.* — See note 5.

**1107.** (6) *Special Damages in Aggravation.* — See note 2.

*p.* MATTERS IN MITIGATION — (1) *In General.* — See notes 3, 4, 5.

263. See also *Carpenter v. Hamilton*, 185 Mo. 603.

**1097.** 3. Malice an Important Factor. — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683. See also *Davis v. Starrett*, 97 Me. 568; *Paxton v. Woodward*, 31 Mont. 195.

**1098.** 1. Evidence Showing or Intensifying Malice in Aggravation. — *Davis v. Starrett*, 97 Me. 568; *Faxon v. Jones*, 176 Mass. 206; *Lauder v. Jones*, 13 N. Dak. 525. See also *Paxton v. Woodward*, 31 Mont. 195.

2. Evidence Disproving or Reducing Degree of Malice in Mitigation. — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737; *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683; *Knowlden v. Guardian Printing, etc., Co.*, 69 N. J. L. 670. See also *Paxton v. Woodward*, 31 Mont. 195.

**1099.** 2. Character of Defendant Material. — *Smith v. Moore*, 74 Vt. 81, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1099.

6. Character or Reputation of Plaintiff Material. — *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Hearne v. De Young*, 132 Cal. 357; *Nicholson v. Merritt*, 109 Ky. 369; *Stark v. Knapp*, 160 Mo. 529; *Dinkelspiel v. New York Evening Journal Pub. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 74, modified and affirmed 91 N. Y. App. Div. 96.

**1100.** 1. Bad Character or Reputation of Plaintiff May Be Shown and Considered. — *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803; *Nicholson v. Merritt*, 109 Ky. 369; *Jones v. Murray*, 167 Mo. 25; *Dinkelspiel v. New York Evening Journal Pub. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 74, modified and affirmed 91 N. Y. App. Div. 96.

Only General Bad Character May Be Shown. — *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657.

**1101.** 1. Injury Less Where Plaintiff's Character or Reputation Already Bad. — *Tribune Assoc. v. Follwell*, (C. C. A.) 107 Fed. Rep. 646; *Cunningham v. Underwood*, (C. C. A.) 116 Fed. Rep. 803.

**1102.** 1. Evidence Must Be Confined to General Reputation. — *Tribune Assoc. v. Follwell*,

(C. C. A.) 107 Fed. Rep. 646; *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657; *Dinkelspiel v. New York Evening Journal Pub. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 74, modified and affirmed 91 N. Y. App. Div. 96.

**1104.** 4. Unsustained Plea of Justification an Aggravation of Wrong as Matter of Law. — *Hereford v. Combs*, 126 Ala. 369; *Stuart v. New York Herald Co.*, 73 N. Y. App. Div. 459.

5. Unsustained Plea of Justification Not Necessarily an Aggravation, but May Be Considered in Estimating Damages. — *Davis v. Starrett*, 97 Me. 568; *Willard v. Press Pub. Co.*, 52 N. Y. App. Div. 448.

**1105.** 5. Repetitions or Republications Admissible in Aggravation. — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 532; *Davis v. Starrett*, 97 Me. 568.

**1106.** 1. Repetition After Commencement of Action. — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 532.

2. Repetition or Republication Cannot Form Substantive Ground of Recovery. — *Patterson v. Frazer*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1077.

3. Other Defamations May Be Shown. — *Faxon v. Jones*, 176 Mass. 206; *Smith v. Moore*, 74 Vt. 81.

5. Falsity of Charges. — *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

**1107.** 2. Special Damages May Be Proved in Aggravation. — *Davis v. Starrett*, 97 Me. 568; *Loftus v. Bennett*, 68 N. Y. App. Div. 128.

3. Mitigation of Damages — *United States*. — *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657; *Butler v. Barret*, 130 Fed. Rep. 944.

*Illinois.* — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537.

*Louisiana.* — *Simpson v. Robinson*, 104 La. 180.

*Missouri.* — *Jones v. Murray*, 167 Mo. 25; *Minter v. Bradstreet Co.*, 174 Mo. 486; *Dunlevy v. Wolferman*, 106 Mo. App. 50; *Kersting v. White*, 107 Mo. App. 265; *Israel v. Israel*, 109 Mo. App. 366; *Baldwin v. Boulware*, 79 Mo. App. 5.

*New Jersey.* — *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

**1108.** (2) *Whether Circumstances in Mitigation Must Be Pleaded.* — See notes 1, 2.

(3) *Passion or Excitement — Provocation.* — See note 4.

**1109.** *Provocation Must Have Been Immediate and Proximate Cause of Defamation.* — See notes 3, 4, 5.

(4) *Drunkenness.* — See note 7.

(5) *Retraction or Apology.* — See note 8.

**1110.** (6) *Foundation of Charge.* — See note 3.

**1111.** See note 1.

**1112.** See note 1.

(7) *Mistake.* — See note 2.

(8) *Truth of Charge or Belief in Truth.* — See note 4.

**1113.** See note 1.

(9) *Facts Must Have Been Known to Defendant.* — See note 3.

**1114.** 10. *Amount of Recovery* — *a.* NO LEGAL MEASURE OF DAMAGES. — See note 2.

*New York.* — *Xavier v. Oliver*, 80 N. Y. App. Div. 292; *Dinkelspiel v. New York Evening Journal Pub. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 74, modified and affirmed 91 N. Y. App. Div. 96; *Carpenter v. New York Evening Journal Pub. Co.*, 96 N. Y. App. Div. 376.

*North Carolina.* — *Upchurch v. Robertson*, 127 N. Car. 127.

*North Dakota.* — *Wrege v. Jones*, 13 N. Dak. 267; *Lauder v. Jones*, 13 N. Dak. 525.

*Texas.* — *Mitchell v. Spradley*, 23 Tex. Civ. App. 43; *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165.

*Canada.* — *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476; *Dion v. Fafard*, 4 Quebec Pr. 351.

**1107.** 4. *Evidence in Mitigation Goes Only to Exemplary Damages.* — *Jones v. Murray*, 167 Mo. 25. See also *Robinson v. Evening Post Pub. Co.*, 39 N. Y. App. Div. 525.

5. *Circumstances Which Are Calculated to Reduce the Injury.* — *Davis v. Starrett*, 97 Me. 568 (prior reputation of being a rumseller); *Morse v. Press Pub. Co.*, 63 N. Y. App. Div. 61.

**1108.** 1. *Statutes Requiring Matters in Mitigation to Be Pleaded.* — *Walker v. San Antonio Light Pub. Co.*, 30 Tex. Civ. App. 165; *Cleveland v. Sherman*, 19 Quebec Super. Ct. 270.

2. *Matters in Mitigation May Be Shown under General Issue.* — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537; *Upchurch v. Robertson*, 127 N. Car. 127, holding otherwise, however, as to evidence in justification.

4. *Passion or Excitement — Provocation.* — *Simpson v. Robinson*, 104 La. 180; *Israel v. Israel*, 109 Mo. App. 366; *Xavier v. Oliver*, 80 N. Y. App. Div. 292; *Downey v. Armstrong*, 1 Ont. L. Rep. 237, following *Stirton v. Gummer*, 31 Ont. 227, and *Downey v. Stirton*, 1 Ont. L. Rep. 186; *Desmarais v. Geoffrion*, 22 Quebec Super. Ct. 229; *Renault v. Lortie*, 3 Quebec Pr. 495.

*Previous Provocatory Libel but Not Subsequent Libel by Plaintiff May Be Shown.* — *Downey v. Stirton*, 1 Ont. L. Rep. 186.

**1109.** 3. *Act of Plaintiff Must Have Been Immediate and Proximate Cause of Defamation.* — *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476.

4. *Provocation Must Be Connected with Subject of Defamation.* — *Stirton v. Gummer*, 31 Ont. 227.

5. *Where Heat of Passion Has Had Time to Cool.* — *Israel v. Israel*, 109 Mo. App. 366; *Stirton v. Gummer*, 31 Ont. 227.

7. *Drunkenness Not Admissible in Mitigation.* — *Israel v. Israel*, 109 Mo. App. 366.

8. *Retraction or Apology.* — *Auburn v. Berthiaume*, 23 Quebec Super. Ct. 476.

**1110.** 3. *Defendant May Show that He Did Not Originate the Charge.* — *Spolek Denni Hlasatel v. Hoffman*, 204 Ill. 537; *Jones v. Murray*, 167 Mo. 25; *Baldwin v. Boulware*, 79 Mo. App. 5; *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

**1111.** 1. *That Defamation Is Based on Common Rumors or Reports May Mitigate Damages.* — *Morse v. Times-Republican Printing Co.*, 124 Iowa 707; *Kersting v. White*, 107 Mo. App. 265; *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

**1112.** 1. *Defendant Cannot Show that Charge Originated with Another.* — *Wallace v. Homestead Co.*, 117 Iowa 348.

2. *Mistake May Be Shown.* — *Jones v. Murray*, 167 Mo. 25. See also *Desjardins v. Berthiaume*, 16 Quebec Super. Ct. 506.

*Compensatory Damages* cannot be lessened by showing that the publication was a mistake. *Palmer v. Mahin*, (C. C. A.) 120 Fed. Rep. 737.

4. *Defendant May Plead and Prove Truth of Charge or Reasonable Belief Therein.* — *Dunlevy v. Wolferman*, 106 Mo. App. 50, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1112; *Wrege v. Jones*, 13 N. Dak. 267; *Lauder v. Jones*, 13 N. Dak. 525; *Mitchell v. Spradley*, 23 Tex. Civ. App. 43.

**1113.** 1. *Truth of Charge Cannot Be Shown under General Issue.* — *Lauder v. Jones*, 13 N. Dak. 525.

3. *Facts Must Have Been Known to Defendant.* — *Morning Journal Assoc. v. Duke*, (C. C. A.) 128 Fed. Rep. 657; *Butler v. Barret*, 130 Fed. Rep. 944; *Dinkelspiel v. New York Evening Journal Pub. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 74, modified and affirmed 91 N. Y. App. Div. 96; *Carpenter v. New York Evening Journal Pub. Co.*, 96 N. Y. App. Div. 376; *Lauder v. Jones*, 13 N. Dak. 525.

**1114.** 2. *No Legal Measure of Damages.* — *Duke v. Morning Journal Assoc.*, 120 Fed. Rep. 860, affirmed (C. C. A.) 128 Fed. Rep. 657.

**1114.** *b.* RECOVERY LIMITED TO AMOUNT CLAIMED IN PLEADINGS. — See note 3.

*c.* QUESTION FOR JURY. — See note 4.

**1115.** A Verdict Will Not Be Disturbed as Excessive. — See note 1.

A Verdict Will Not Be Disturbed for Inadequacy. — See note 5.

**1116.** *d.* SPECIFIC RULINGS AS TO WHETHER DAMAGES EXCESSIVE. — See note 4.

**1117.** *e.* DAMAGES ACCRUING AFTER COMMENCEMENT OF ACTION. — See note 4.

*g.* ATTORNEYS' FEES AND EXPENSES OF SUIT. — See note 6.

**1118.** *h.* COSTS. — See notes 2, 4.

**XIII. LIMITATION OF ACTIONS** — 1. In General. — See note 5.

3. Admissions or Repetitions. — See notes 10, 11.

**1119.** **XIV. VENUE AND JURISDICTION** — 2. In Actions or Prosecutions for Libel. — See notes 4, 5.

**1120.** **XV. INJUNCTION AGAINST PUBLICATION OF LIBEL** — 1. English Rule. — See notes 2, 3.

2. United States Rule. — See note 5.

**1121.** See note 1.

**1114.** 3. The New Jersey Statute restricts the plaintiff to his "actual damage proven and specially alleged in his declaration." *Stuart v. News Pub. Co.*, 67 N. J. L. 317.

4. Amount of Damages a Question for the Jury. — *Duke v. Morning Journal Assoc.*, 120 Fed. Rep. 860, *affirmed* (C. C. A.) 128 Fed. Rep. 657; *John Brenner Brewing Co. v. McGill*, (Ky. 1901) 62 S. W. Rep. 722; *Gambrill v. Schooley*, 93 Md. 48, 86 Am. St. Rep. 474; *Carpenter v. Hamilton*, 185 Mo. 603; *McMahon v. New York News Pub. Co.*, 51 N. Y. App. Div. 488; *Crane v. Bennett*, 77 N. Y. App. Div. 102, *affirmed* 177 N. Y. 106; *Upchurch v. Robertson*, 127 N. Car. 127. See also *Stuart v. News Pub. Co.*, 67 N. J. L. 317; *Engel v. New York Evening Post Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 377. *Contra*, *Cooke v. O'Malley*, 109 La. 382, holding that in *Louisiana* the duty of fixing the amount is imposed upon the court, though the verdict has weight.

**1115.** 1. Court Will Not Disturb Verdict unless Grossly Excessive. — *Duke v. Morning Journal Assoc.*, 120 Fed. Rep. 860, *affirmed* (C. C. A.) 128 Fed. Rep. 657; *Crane v. Bennett*, 77 N. Y. App. Div. 102, *affirmed* 177 N. Y. 106 (passion).

5. Strong Case Must Be Made Out. — See *Milligan v. Jamieson*, 4 Ont. L. Rep. 650.

**1116.** 4. Cases Illustrative of Damages Held Excessive. — *Daisley v. Douglass*, 119 Fed. Rep. 485; *Duke v. Morning Journal Assoc.*, 120 Fed. Rep. 860, *affirmed* (C. C. A.) 128 Fed. Rep. 657; *Evening Post Co. v. Rhea*, (Ky. 1904) 81 S. W. Rep. 273; *Cooke v. O'Malley*, 109 La. 382; *Crane v. Bennett*, 77 N. Y. App. Div. 102, *affirmed* 177 N. Y. 106; *Riker v. Clopton*, 83 N. Y. App. Div. 310.

Cases Illustrative of Damages Held Not Excessive. — *John Brenner Brewing Co. v. McGill*, (Ky. 1901) 62 S. W. Rep. 722; *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683; *Carpenter v. Hamilton*, 185 Mo. 603; *Danville Press Co. v. Harrison*, 99 Ill. App. 244; *Lauder v. Jones*, 13 N. Dak. 525.

**1117.** 4. Publication After Commencement of Action. — *Lefebvre v. Godin*, 5 Quebec Pr. 279.

6. Plaintiff Not Entitled to Recover Attorneys' Fees, Etc. — *Grotius v. Ross*, 24 Ind. App. 543.

**1118.** 2. Successful Plaintiff Entitled to Costs. — *Bell v. Wilson*, 19 Ont. Pr. 167; *MacKenzie v. Cunningham*, 8 British Columbia 206.

4. Statutory Limitations as to Costs. — *Manitoba Farmers' Hedge, etc., Fence Co. v. Stovel Co.*, 14 Manitoba 55.

5. Statutes Limiting Time for Bringing Action. — *Evans v. Republican Pub. Co.*, (Colo. App. 1904) 78 Pac. Rep. 311; *Molleur v. Faubert*, 16 Quebec Super. Ct. 132.

10. Repetitions Do Not Prevent Running of Statute. — See *Phelan v. Rycroft*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 48.

11. Separate Action for Repetition. — *Phelan v. Rycroft*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 48.

**1119.** 4. Jurisdiction Where Defendant Resides or Is Found. — *Shields v. Com.*, (Ky. 1900) 55 S. W. Rep. 881.

5. Action or Prosecution in Jurisdiction Where Libel Published or Circulated. — *Shields v. Com.*, (Ky. 1900) 55 S. W. Rep. 881; *Cincinnati Times-Star Co. v. France*, (Ky. 1901) 61 S. W. Rep. 18; *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582; *Marcotte v. Therien*, 22 Quebec Super. Ct. 315.

**1120.** 2. Courts May Restrain Publication of Libel Injurious to Property or Trade. — See *Baliet v. Cassidy*, 104 Fed. Rep. 704; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 89 Am. St. Rep. 828.

3. Libels Injurious to Character May Be Restrained. — *Quirk v. Dudley*, 4 Ont. L. Rep. 532.

5. Libel or Slander Cannot Be Enjoined. — *Baliet v. Cassidy*, 104 Fed. Rep. 704, holding that "the court cannot assume to supervise the publication of offending newspapers, or otherwise constitute itself a press censor." See also *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 89 Am. St. Rep. 828.

**1121.** 1. Interference with Right of Free Speech, Etc. — *Owen v. Partridge*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415.

**1121. XVI. OBJECTS OF CRIMINAL LIBEL OR SLANDER — 3. Chaste or Innocent Women.** — See note 5.

**1122.** See notes 1, 3, 4.

**XVII. CRIMINAL PROSECUTION — PUNISHMENT — 1. In General.** — See notes 7, 8, 9.

**1124. LIBERTY.** — See note 3.

**1125. LIBERTY OF THE PRESS.** — See notes 2, 3.

**1121. 5. Chaste or Innocent Woman.** — State *v. Harwell*, 129 N. Car. 550; State *v. Hewlin*, 128 N. Car. 571. See also Ballew *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

Under the Texas Statute a husband may be prosecuted for orally imputing unchastity to his wife. Stayton *v. State*, 46 Tex. Crim. 205; Rainwater *v. State*, 46 Tex. Crim. 496.

It is a Statutory Offense in Alabama falsely and maliciously to impute want of chastity to a woman. Riley *v. State*, 132 Ala. 13.

**1122. 1. What Is Meant by a Chaste or Innocent Woman.** — See Grant *v. Haynes*, 105 La. 304.

**3. Good Character of Woman Essential to Sustaining of Prosecution.** — See Ballew *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

**4. The Innocence or Chastity of the Woman Is the Only Issue.** — See Ballew *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

**7. Libel as an Offense.** — Riley *v. State*, 132 Ala. 13; State *v. Hicks*, 113 La. 845; State *v. Ford*, 82 Minn. 452; State *v. Harwell*, 129 N. Car. 550; Mankins *v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 950; Jackson *v. State*, 42 Tex. Crim. 497; Kubricht *v. State*, 44 Tex. Crim. 94; Rainwater *v. State*, 46 Tex. Crim. 496; Ballew *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

**8. Libel Punishable at Common Law by Fine and Imprisonment.** — Hatcher *v. Range*, 98 Tex. 85.

**9. Statutes Prescribing Punishment** — *California*. — People *v. Storke*, (Cal. 1900) 60 Pac. Rep. 420; People *v. Seeley*, 139 Cal. 118.

*Iowa*. — See State *v. Keenan*, 111 Iowa 286.

*Kansas*. — State *v. Grimstead*, 62 Kan. 593; State *v. Elliott*, 62 Kan. 869, 64 Pac. Rep. 1027.

*Kentucky*. — Browning *v. Com.*, 116 Ky. 282.

*Minnesota*. — State *v. Ford*, 82 Minn. 452.

*Oklahoma*. — Lawton *v. Territory*, 9 Okla. 456.

*South Carolina*. — State *v. Brock*, 61 S. Car. 147.

*Texas*. — McArthur *v. State*, 41 Tex. Crim. 635; Mankins *v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 950; Jackson *v. State*, 42 Tex. Crim. 497; West *v. State*, 44 Tex. Crim. 417; Gipson *v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 216; Stayton *v. State*, 46 Tex. Crim. 205; Rainwater *v. State*, 46 Tex. Crim. 496; Hatcher *v. Range*, 98 Tex. 85; Ballew *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064.

**1124. 3. Right to Follow Lawful Avocation.** — Booth *v. Illinois*, 184 U. S. 425 (statute prohibiting options); State *v. New Orleans*, 113 La. 373 (right to sell intoxicating liquors); State *v. Dalton*, 22 R. I. 77 (trading stamps); Marshall, etc., Co. *v. Nashville*, 109 Tenn. 495 (ordinance requiring union label); Young *v. Com.*, 101 Va. 853 (trading stamps); State *v. Kreutzberg*, 114 Wis. 530 (labor combination).

**Life, Liberty, and Property — Due Process of Law.** — Block *v. Schwartz*, 27 Utah 387.

**1125. 2. Liberty of the Press.** — Pavesich *v. New England L. Ins. Co.*, 122 Ga. 203, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125.

**3. State *v. Shepherd***, 177 Mo. 245, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125, the whole text paragraph. See also People *v. Most*, 71 N. Y. App. Div. 160.

## LICENSE (REAL PROPERTY).

By G. W. WALSH.

**1127. I. DEFINITION AND NATURE.** — See note 1.

**1128.** See note 1.

**Effect of License.** — See note 2.

**1127. 1. Definition.** — Sullivan Timber Co. *v. Mobile*, 110 Fed. Rep. 195, quoting 2 [18] AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132 [1127]; Moore *v. Stetson*, 96 Me. 197.

**1128. 1. License to Convey and Use Water.** — Ewing *v. Rhea*, 37 Oregon 583, 82 Am. St. Rep. 783; Miller *v. Cronkhite*, 2 N. Bruns. Eq. Rep. 203.

**License to Cut Ice.** — Oliphant *v. Richman*, 67 N. J. Eq. 280.

**License to Build Wharf.** — Sullivan Timber Co. *v. Mobile*, 110 Fed. Rep. 186.

**Other Examples of Licenses.** — Moore *v. Stetson*, 96 Me. 197; Rockport *v. Rockport Granite Co.*, 177 Mass. 246; Sherman Lime Co. *v. Glens Falls*, 101 N. Y. App. Div. 269; Polk *v. Carney*, 17 S. Dak. 436; Huber *v. Stark*, 124 Wis. 359.

**2. No Title in Land.** — Hicks *v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38; Jackson *v. Emmons*, 19 App. Cas. (D. C.) 250; Andrews *v. Delhi*, etc., Telephone Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 23, affirmed 66 N. Y. App. Div. 616; Ewing *v. Rhea*, 37 Oregon 583, 82 Am. St. Rep. 783.

**1129.** See notes 1, 3.

**1130.** See note 1.

Adverse Possession. — See notes 7, 9.

**1131.** Title to Personality. — See note 1.

Mining Rights. — See note 2.

II. CREATION — 1. Express. — See note 6.

**1132.** 2. Implied. — See note 4.

**1133.** See note 3.

Licenses to General Public. — See note 8.

**1134.** Licenses on Sale of Goods. — See notes 1, 2.

III. SCOPE OF LICENSE. — See notes 7, 8.

**1135.** How Act Must Be Performed. — See note 4.

Time of Exercising License. — See note 9.

Acts of Licensee's Servants. — See note 10.

**1136.** IV. PARTIES — THEIR RIGHTS, DUTIES, AND LIABILITIES — 2. Li-  
censors — Who May Grant License. — See note 1.

Obligations of Licensors as to Condition of Premises — Carefulness — Hidden  
Defects. — See notes 7, 8.

In the Case of a Passive License. — See note 9.

Creates No Easement. — *Belser v. Moore*, 73 Ark. 296, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1128.

**1129.** 1. Exemption from Liability. — *Mine La Motte Lead, etc., Co. v. White*, 106 Mo. App. 222. See also *Huber v. Stark*, 124 Wis. 359.

To Build Railroad. — *Jackson v. Emmons*, 19 App. Cas. (D. C.) 250; *Smith v. Morse*, 70 N. Y. App. Div. 318.

3. Exemption from Liability. — *Sherman Lime Co. v. Glens Falls*, 101 N. Y. App. Div. 269.

**1130.** 1. *Sherman Lime Co. v. Glens Falls*, 101 N. Y. App. Div. 269. See also *Huber v. Stark*, 124 Wis. 359.

7. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 418, 91 Am. St. Rep. 38, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1130.

9. *Belser v. Moore*, 73 Ark. 296; *Percival v. Chase*, 182 Mass. 371.

"A landowner parts with none of his rights by simply permitting another to pass over his land. Permissive use is not sufficient to establish a prescriptive right." *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

**1131.** 1. *Garner v. Mahoney*, 115 Iowa 356; *Erskine v. Savage*, 96 Me. 57.

2. Mining. — *Arnold v. Bennett*, 92 Mo. App. 156; *Jack Harvard Zinc, etc., Co. v. Continental Zinc, etc., Min., etc., Co.*, 106 Mo. App. 66; *Hall v. Abraham*, 44 Oregon 477.

Gas and Oil Leases in Nature of Licenses. — *Dickey v. Coffeyville Vitrified Brick, etc., Co.*, 69 Kan. 106. See generally the title MINES AND MINING CLAIMS, vol. 20, p. 776 *et seq.*

6. License May Be Created Orally. — *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38. See also *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

**1132.** 4. *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 195, citing 2 [18] AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132.

**1133.** 3. Assent by Silence. — See *Ewing v. Rhea*, 37 Oregon 583, 82 Am. St. Rep. 783.

8. *Lawson v. Shreveport Waterworks Co.*, 111 La. 84, quoting 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133.

**1134.** 1. *Erskine v. Savage*, 96 Me. 57;

*Pierce v. Banton*, 98 Me. 553; *Welever v. Advance Shingle Co.*, 34 Wash. 331.

2. *Watson v. Adams*, 32 Ind. App. 281. See also *Erskine v. Savage*, 96 Me. 57; *Pierce v. Banton*, 98 Me. 553.

7. *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

8. Erection of Structure — Right to Substitute. — A parol license to build a dam does not carry a license to abandon the dam and build another at a different place. *Mather v. Wright*, 11 Ohio Cir. Dec. 578, 21 Ohio Cir. Ct. 103.

Termination of License. — A license to take water from a spring through pump logs laid on the grounds of the licensor terminated with the life of the logs. *Ainsworth v. Stone*, 73 Vt. 101.

**1135.** 4. Manner of Performance. — "Per-  
mission to haul timbers across land is not neces-  
sarily permission to fell trees, and thereby open  
a new road on such lands." *Jernigan v. Clark*,  
134 Ala. 313.

9. Reasonableness a Question for Jury. —  
*Snyder v. East Bay Lumber Co.*, 135 Mich. 31,  
10 Detroit Leg. N. 668.

10. License to Cut Timber Allows Cutting by  
Servant of Licensee. — *Smith v. Morse*, 70 N. Y.  
App. Div. 318.

**1136.** 1. By Whom License Granted. —  
See *Tucson Land, etc., Co. v. Everett*, 34 Tex.  
Civ. App. 340.

7. Injury to Licensee. — *Smith v. Hopkins*, (C.  
C. A.) 120 Fed. Rep. 921; *Means v. Southern  
California R. Co.*, 144 Cal. 473; *Northwestern  
El. R. Co. v. O'Malley*, 107 Ill. App. 599; *Dixon  
v. Swift*, 98 Me. 207; *Delaware, etc., R. Co. v.  
Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727;  
*Taylor v. Haddonfield, etc., Turnpike Co.*, 65  
N. J. L. 102; *McCann v. Thilemann*, (Supm. Ct.  
App. T.) 36 Misc. (N. Y.) 145, affirmed 74 N.  
Y. App. Div. 630.

8. Concealment of Defects. — See *Flaherty v.  
Nieman*, 125 Iowa 546. And see the title  
NEGLIGENCE, 475. 3 *et seq.*

9. Mere Passive Permission. — *United States. —  
Smith v. Day*, (C. C. A.) 100 Fed. Rep. 244;  
*Smith v. Hopkins*, (C. C. A.) 120 Fed. Rep. 921,

**1137.** See notes 1, 2.

**Invitation Express or Implied.** — See note 3.

**1138.** See notes 1, 2, 4.

**1139.** See note 1.

*California.* — Means *v.* Southern California R. Co., 144 Cal. 473.

*Delaware.* — Tully *v.* Philadelphia, etc., R. Co., 3 Penn. (Del.) 455.

*Illinois.* — Illinois Cent. R. Co. *v.* Hopkins, 100 Ill. App. 594, *affirmed* 200 Ill. 122; Bentley *v.* Loverock, 102 Ill. App. 166; Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599.

*Indiana.* — Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308.

*Iowa.* — Flaherty *v.* Nieman, 125 Iowa 546, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1136.

*Kentucky.* — Chesapeake, etc., R. Co. *v.* Wilder, 72 S. W. Rep. 353, 24 Ky. L. Rep. 1821.

*Maine.* — Moore *v.* Stetson, 96 Me. 197; Dixon *v.* Swift, 98 Me. 207.

*Massachusetts.* — Harobine *v.* Abbott, 177 Mass. 59; Cowen *v.* Kirby, 180 Mass. 504.

*Minnesota.* — Schreiner *v.* Great Northern R. Co., 86 Minn. 245.

*Missouri.* — Wencker *v.* Missouri, etc., R. Co., 169 Mo. 592; Glaser *v.* Rothschild, 106 Mo. App. 418; Barry *v.* Calvary Cemetery Assoc., 106 Mo. App. 358.

*New Jersey.* — Taylor *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 102.

*New York.* — McCann *v.* Thilemann, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 145, *affirmed* 74 N. Y. App. Div. 630; Crofoot *v.* Syracuse, etc., R. Co., 75 N. Y. App. Div. 157; Eckes *v.* Stetler, 98 N. Y. App. Div. 76.

*North Carolina.* — Quantz *v.* Southern R. Co., 137 N. Car. 136.

*Ohio.* — Cincinnati, etc., R. Co. *v.* Aller, 64 Ohio St. 183.

*Wisconsin.* — Muench *v.* Heinemann, 119 Wis. 441.

See further the title NEGLIGENCE, 475. 3 *et seq.*

**Need Only Refrain from Wilfully Injurious Acts.** — Land *v.* Fitzgerald, 68 N. J. L. 28. See also Byrnes *v.* Boston, etc., R. Co., 181 Mass. 322.

**1137. 1. Liability for "Active Negligence."** — Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308; Moore *v.* Stetson, 96 Me. 197; Chesley *v.* Rocheford, (Neb. 1903) 96 N. W. Rep. 241; Muench *v.* Heinemann, 119 Wis. 441.

**2. Implied License.** — See Barry *v.* Calvary Cemetery Assoc., 106 Mo. App. 358.

**3. Liability in Case of Invitation Express or Implied.** — *England.* — Marney *v.* Scott, (1899) 1 Q. B. 986, 68 L. J. Q. B. 736.

*Canada.* — Marshall *v.* Industrial Exhibition Assoc., 1 Ont. L. Rep. 319, *affirmed* 2 Ont. L. Rep. 62.

*Georgia.* — Horton *v.* Harvey, 119 Ga. 219.

*Illinois.* — Illinois Cent. R. Co. *v.* Hopkins, 100 Ill. App. 594, *affirmed* 200 Ill. 122.

*Indiana.* — Warner *v.* Mier Carriage Co., 26 Ind. App. 350.

*Louisiana.* — Lawson *v.* Shreveport Waterworks Co., 111 La. 84, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1138 [1137].

*Maine.* — Ward *v.* Maine Cent. R. Co., 96 Me. 136; Dixon *v.* Swift, 98 Me. 207; Moore *v.* Stetson, 96 Me. 197.

*Missouri.* — Miller *v.* George B. Peck Dry Goods Co., 104 Mo. App. 609.

*Nebraska.* — Tucker *v.* Draper, 62 Neb. 66; Chesley *v.* Rocheford, (Neb. 1903) 96 N. W. Rep. 241.

*New Hampshire.* — True *v.* Meredith Creamery, 72 N. H. 154.

*New Jersey.* — Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727; Sebeck *v.* Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 81 Am. St. Rep. 512; Spicer *v.* Boice, 66 N. J. L. 434; Land *v.* Fitzgerald, 68 N. J. L. 28; Smith *v.* Jackson, 70 N. J. L. 183.

*New York.* — De Boer *v.* Brooklyn Wharf, etc., Co., 51 N. Y. App. Div. 289; Fogarty *v.* Bogart, 59 N. Y. App. Div. 114; Albert *v.* New York, 75 N. Y. App. Div. 553; Fitzgerald *v.* New York Cent., etc., R. Co., 84 N. Y. App. Div. 59, *affirmed* 179 N. Y. 559; McDonough *v.* James Reilly Repair, etc., Co., (Supm. Ct. App. T.) 45 Misc. (N. Y.) 334.

*Ohio.* — Toledo Real Estate, etc., Co. *v.* Putney, 10 Ohio Cir. Dec. 698, 20 Ohio Cir. Ct. 486.

*South Carolina.* — League *v.* Stradley, 68 S. Car. 515.

*Tennessee.* — Baker *v.* Louisville, etc., R. Co., 106 Tenn. 490.

*Wisconsin.* — Hupfer *v.* National Distilling Co., 114 Wis. 279; Muench *v.* Heinemann, 119 Wis. 441.

And see the title NEGLIGENCE, 475. 3 *et seq.*

**Land Connected with Sidewalk.** — Rachmel *v.* Clark, 205 Pa. St. 314 (to the same effect as Tomle *v.* Hampton, 129 Ill. 379, cited in the original note). See also Lawson *v.* Shreveport Waterworks Co., 111 La. 84, *citing* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1137.

**Duty Extends to Servants of Licensee.** — "The duty which the licensor thus owes to the licensee he also owes to the servants of the licensee." Moore *v.* Stetson, 96 Me. 197.

**Liability Limited by Purposes of Invitation.** — Ryerson *v.* Bathgate, 67 N. J. L. 337.

**1138. 1. Question for Jury.** — Lawson *v.* Shreveport Waterworks Co., 111 La. 84, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1138.

**2. How Implied Invitation May Arise.** — Northwestern El. R. Co. *v.* O'Malley, 107 Ill. App. 599; Lawson *v.* Shreveport Waterworks Co., 111 La. 84, *quoting* 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1138; De Boer *v.* Brooklyn Wharf, etc., Co., 51 N. Y. App. Div. 289; Fogarty *v.* Bogart, 59 N. Y. App. Div. 114; Rachmel *v.* Clark, 205 Pa. St. 314; Muench *v.* Heinemann, 119 Wis. 441.

**Attractive Structure Not Implied Invitation to Children.** — Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727.

**4. Railroad Crossings.** — Booth *v.* Union Terminal R. Co., 126 Iowa 8; McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 24.

**1139. 1. Children Regarded as Other Tres.**

**1140. V. NONASSIGNABLE CHARACTER OF LICENSE.** — See note 2.

**VI. REVOCATION — 1. Modes — b. BY WORDS OR ACTS OF LICENSOR.** — See notes 5, 6.

**1141.** See notes 1, 5.

*d. BY DEATH.* — See note 9.

*e. BY CONVEYANCE — By Licensor — In General.* — See note 10.

**1142.** See note 1.

*A Parol Sale of Standing Trees.* — See note 7.

**1143.** *By Licensee.* — See note 2.

**3. Right to Revoke — a. IN GENERAL — License Not Coupled with an Interest.** — See note 7.

**1144.** See notes 2, 3.

passers or Licensees. — *Delaware, etc., R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727.

**1140. 2. General Rule — Licenses Not Assignable.** — *Jackson v. Emmons*, 19 App. Cas. (D. C.) 250; *Polk v. Carney*, 17 S. Dak. 436.

**5. Implied Revocation.** — *Miller v. Cronkhite*, 2 N. Bruns. Eq. Rep. 203.

**6. Hicks v. Swift Creek Mill Co.**, 133 Ala. 411, 91 Am. St. Rep. 38.

**1141. 1. Quimby v. Straw**, 71 N. H. 160.  
**5. Arbitrary Revocation.** — Where a railroad company had a license to run its cars over tracks situated on private property, its license could not be arbitrarily or suddenly revoked. *Darlington v. Missouri Pac. R. Co.*, 99 Mo. App. 1.

**9. Revocation by Death.** — *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38; *Pioneer Min., etc., Co. v. Shamblin*, 140 Ala. 486; *Jackson v. Emmons*, 19 App. Cas. (D. C.) 250; *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

**10. Revocation by Conveyance.** — *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141; *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404; *Worthen v. Garno*, 182 Mass. 243; *Jayne v. Cortland Water Works Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 263; *Price, etc., Co. v. Madison*, 17 S. Dak. 247, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141; *Polk v. Carney*, 17 S. Dak. 436. See also *Jackson v. Emmons*, 19 App. Cas. (D. C.) 250.

**1142. 1. Price, etc., Co. v. Madison**, 17 S. Dak. 247, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141 [1142].

**7. Price, etc., Co. v. Madison**, 17 S. Dak. 247; *Polk v. Carney*, 17 S. Dak. 436. See also *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

**1143. 2. Conveyance or Assignment by Licensee.** — *Polk v. Carney*, 17 S. Dak. 436, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143.

**7. General Rule — License Revocable — Eng-land.** — *Wilson v. Tavener*, (1901) 1 Ch. 578, 70 L. J. Ch. 263.

*Alabama.* — *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38; *Pioneer Min., etc., Co. v. Shamblin*, 140 Ala. 486.

*Arkansas.* — *Be'ser v. Moore*, 73 Ark. 296.

*Georgia.* — *Hiers v. Mill Haven Co.*, 113 Ga. 1002.

*Illinois.* — *Entwhistle v. Henke*, 113 Ill. App. 572, affirmed 211 Ill. 273. See also *West Chicago St. R. Co. v. People*, 214 Ill. 9.

*Indiana.* — *Watson v. Adams*, 32 Ind. App. 283, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1143; *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

*Michigan.* — *Greenwood v. School Dist. No. 4*, 126 Mich. 81, 7 Detroit Leg. N. 710.

*New Jersey.* — *Oliphant v. Richman*, 67 N. J. Eq. 280.

*New York.* — *Spink v. Corning*, 61 N. Y. App. Div. 84, affirmed 172 N. Y. 626; *Brown v. New York*, 78 N. Y. App. Div. 361, affirmed 176 N. Y. 571; *Jayne v. Cortland Water Works Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 263; *Little v. American Telephone, etc., Co.*, 96 N. Y. App. Div. 559.

*Oregon.* — *Ewing v. Rhea*, 37 Oregon 583, 82 Am. St. Rep. 783.

**Instances.** — The following licenses are revocable:

*To Pass over Land.* — *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

*To Carry Drain over Land.* — *Knoll v. Baker*, 34 Ind. App. 124.

*Mining License.* — *Entwhistle v. Henke*, 113 Ill. App. 572, affirmed 211 Ill. 273.

*To Dig Ditch.* — *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38.

*To Build Railroad.* — *Stratton's Independence v. Midland Terminal R. Co.*, 32 Colo. 493.

*To Cut Ice.* — *Oliphant v. Richman*, 67 N. J. Eq. 280.

*To Carry Water Main over Land.* — *Jayne v. Cortland Water Works Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 263.

*To Lay Pipe over Land.* — *Pioneer Min., etc., Co. v. Shamblin*, 140 Ala. 486.

*To Build Wharf.* — *Turner v. Mobile*, 135 Ala. 73.

*To Project Eaves over Premises of Another.* — *Huber v. Stark*, 124 Wis. 359.

*To Erect Boarding for Bill Posting.* — *Wilson v. Tavener*, (1901) 1 Ch. 578, 70 L. J. Ch. 263.

*To Erect Telephone Poles.* — *Little v. American Telephone, etc., Co.*, 96 N. Y. App. Div. 559.

**1144. 2. Effect of Consideration.** — See *Spink v. Corning*, 61 N. Y. App. Div. 84, affirmed 172 N. Y. 626.

**3. Contrary Rule.** — *Sullivan Timber Co. v. Mobile*, 124 Fed. Rep. 648, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144; *Patterson v. Mills*, (Cal. 1002) 68 Pac. Rep. 1034; *Hiers v. Mill Haven Co.*, 113 Ga. 1002; *Ewing v. Rhea*, 37 Oregon 583, 82 Am. St. Rep. 783.



**1145.** *b. EXECUTED LICENSES* — Held Irrevocable Where Expense Incurred. — See note 8.

**1146.** See notes 2, 3, 4.  
Held Revocable. — See note 7.

**1147.** See note 1.

*c. COUPLED WITH GRANT OR INTEREST* — Irrevocable. — See note 3.

**1148.** Where Trees or Crops Are Sold Orally. — See notes 2, 3, 4.

**1150.** 4. Rights of Parties on Revocation and Attempted Revocation — Character of Property. — See note 4.

#### VII. EVIDENCE — QUESTIONS OF LAW AND FACT. — See note 10.

**1145.** 8. Irrevocable if Executed and Expense Incurred — *United States*. — Sullivan Timber Co. v. Mobile, 110 Fed. Rep. 196, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145; Sullivan Timber Co. v. Mobile, 124 Fed. Rep. 648, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

*Alabama*. — See the cases supporting the contrary rule, *infra*, **1146.** note 7.

*Colorado*. — Compare Stratton's Independence v. Midland Terminal R. Co., 32 Colo. 493.

*Georgia*. — Hiers v. Mill Haven Co., 113 Ga. 1002; Brantley v. Perry, 120 Ga. 760.

*Indiana*. — Oster v. Broe, 161 Ind. 113; Watson v. Adams, 32 Ind. App. 281; Knoll v. Baker, 34 Ind. App. 124.

*Kansas*. — Kastner v. Benz, 67 Kan. 488, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

*Ohio*. — Compare Mather v. Wright, 11 Ohio Cir. Dec. 103, 21 Ohio Cir. Ct. 103.

*Oregon*. — Ewing v. Rhea, 37 Oregon 583, 82 Am. St. Rep. 783 (partially overruling Curtis v. La Grande Hydraulic Water Co., 20 Oregon 34); Miser v. O'Shea, 37 Oregon 231, 82 Am. St. Rep. 751.

*Pennsylvania*. — Moore v. Neubert, 21 Pa. Super. Ct. 144.

**1146.** 2. Easement Resulting from License. — Brantley v. Perry, 120 Ga. 760; Knoll v. Baker, 34 Ind. App. 124. See also Moore v. Neubert, 21 Pa. Super. Ct. 144.

3. Purchasers with Notice. — Brantley v. Perry, 120 Ga. 760.

4. Injunction. — Sullivan Timber Co. v. Mobile, 110 Fed. Rep. 186, 124 Fed. Rep. 648, citing 18 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1146; Hiers v. Mill Haven Co., 113 Ga. 1002.

7. Revocable Even if Expense Incurred — *Alabama*. — Hicks v. Swift Creek Mill Co., 133 Ala. 421, 91 Am. St. Rep. 38, quoting 18 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 1146; Turner v. Mobile, 135 Ala. 73. See also Pioneer Min., etc., Co. v. Shamblin, 140 Ala. 486.

*Colorado*. — Stratton's Independence v. Midland Terminal R. Co., 32 Colo. 493.

*Illinois*. — Entwistle v. Henke, 113 Ill. App. 572, affirmed 211 Ill. 273.

*Missouri*. — Mine La Motte Lead, etc., Co. v. White, 106 Mo. App. 222.

*New Hampshire*. — Quimby v. Straw, 71 N. H. 160.

*New York*. — Spink v. Corning, 61 N. Y. App. Div. 84, affirmed 172 N. Y. 626; Allerton v. Steele, 59 N. Y. App. Div. 622.

*Wisconsin*. — Huber v. Stark, 124 Wis. 359.

*Canada*. — See Miller v. Cronkhite, 2 N. Bruns. Eq. Rep. 203.

**1147.** 1. Statute of Frauds. — Mather v. Wright, 11 Ohio Cir. Dec. 578, 21 Ohio Cir. Ct. 103.

3. License Coupled with Grant or Interest Irrevocable. — Hall v. Abraham, 44 Oregon 477.

**1148.** 2. Growing Trees or Crops. — Emerson v. Shores, 95 Me. 237, 85 Am. St. Rep. 404; Mine La Motte Lead, etc., Co. v. White, 106 Mo. App. 222.

3. Trees or Crops Severed. — Watson v. Adams, 32 Ind. App. 281; Emerson v. Shores, 95 Me. 237, 85 Am. St. Rep. 404; Price, etc., Co. v. Madison, 17 S. Dak. 247. See also Mine La Motte Lead, etc., Co. v. White, 106 Mo. App. 222.

4. Garner v. Mahoney, 115 Iowa 356.

**1150.** 4. Structures Erected under License — Removal. — Jackson v. Emmons, 19 App. Cas. (D. C.) 250; Salley v. Robinson, 96 Me. 474, 90 Am. St. Rep. 410; Omaha Bridge, etc., R. Co. v. Whitney, (Neb. 1903) 94 N. W. Rep. 513.

10. Burden of Proof. — Spink v. Corning, 61 N. Y. App. Div. 84, affirmed 172 N. Y. 626.

# LIENS.

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The Right of Prior Payment. — See note 3.
  7. V. COMMON-LAW LIENS — 1. In General. — See note 4.
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  10. 6. General Characteristics and Requisites of Common-law Liens —  
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  13. VI. EQUITABLE LIENS — 1. In General — *c*. PROPERTY MUST BE DISTINCTLY TRACED. — See note 1.  
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The Maxim of Equity upon Which the Doctrine Rests. — See note 4.  
(2) *Essential Elements* — (a) Sufficient Identification of the Property Charged. — See note 6.
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6. 1. Term Defined. — See the concurring opinion of Poffenbarger, J., in *Morrison v. Clarksburg Coal, etc., Co.*, 52 W. Va. 331, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.
  3. Right to Prior Payment Not a Lien. — *Weisel v. Old Dominion Steamship Co.*, 99 N. Y. App. Div. 568, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 6.
  7. 4. Common-law Lien Defined. — *Burrough v. Ely*, 54 W. Va. 118, 102 Am. St. Rep. 926.
  8. 13. Lien for Services. — *Henderson v. Mahoney*, 31 Tex. Civ. App. 539. See also *Davidson v. Fankuchen*, (Supm. Ct. App. T.) 88 N. Y. Supp. 196; *Lithgow v. Sweedberg*, (Tex. Civ. App. 1904) 78 S. W. Rep. 246.
  - An Accountant Has No Lien on Books Which He Has Examined, unless he can show either that he has made, altered, or repaired the books, or else that he has added to their value or improved them. At common law accountants were not given liens similar to those of attorneys, warehousemen, wharfingers, and other special classes of persons. *Scott Shoe Machinery Co. v. Broaker*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 382.
  9. 9. General Liens May Arise from the Usage of the Trade. — See also *In re London, etc., Finance Corp.*, (1902) 2 Ch. 416.
  10. 4. An Innkeeper's Lien attaches to property of which the guest is in lawful possession as agent of another. *Polk v. Melenbacker*, 136 Mich. 611, and see the title INNS AND INN-KEEPERS, vol. 16, p. 550.
  5. Possession an Essential Element. — *Peoples Bank v. Frick Co.*, 13 Okla. 179.
  11. 2. Possession Must Be Rightful. — *Peoples Bank v. Frick Co.*, 13 Okla. 179.
  12. 4. Deposit of Goods for Purpose Inconsistent with Lien. — *Blumenberg Press v. Mutual Mercantile Agency*, 77 N. Y. App. Div. 87 [citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12], reversed on other grounds 177 N. Y. 362.
  13. 1. Property or Fund Must Be Distinctly Traced. — *Hutchinson v. Le Roy*, (C. C. A.) 113 Fed. Rep. 202; *Culver v. Guyer*, 129 Ala. 602; *Lang v. Metzger*, 101 Ill. App. 380, affirmed 206 Ill. 475; *Thornberry v. Thornberry*, (Ky. 1902) 68 S. W. Rep. 129.
  3. Written Contract Showing Intention to Charge Particular Property. — *In re Olzendam Co.*, 117 Fed. Rep. 179; *Howard v. Delgado*, (C. C. A.) 121 Fed. Rep. 26; *Gage v. Cameron*, 212 Ill. 146.
  14. 2. Verbal Contract Will Create Lien on Personal Property. — *Helfrech Lumber, etc., Co. v. Honaker*, (Ky. 1903) 76 S. W. Rep. 342.
  4. Maxim upon Which Doctrine Rests. — *Howard v. Delgado*, (C. C. A.) 121 Fed. Rep. 26; *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375.
  6. Property Must Be So Described that It Can Be Identified. — *Franklin v. Browning*, (C. C. A.) 117 Fed. Rep. 226.
  15. 3. Intention to Create Lien Must Be Clear. — *Franklin v. Browning*, (C. C. A.) 117 Fed. Rep. 226; *Industrial Lumber Co. v.*

**15.** (3) *Liens on Future-acquired Property.* — See note 4.

**16.** See note 1.

(4) *Construction of Contracts.* — See note 2.

**17.** *b. LIENS ARISING FROM ORDERS OR ASSIGNMENTS.* — See notes 1, 2.

**19.** 3. *Liens Founded on Equitable Principles in Absence of Express Contract* — *a. IN GENERAL.* — See note 6.

**21.** *b. LIENS FOR IMPROVEMENTS AND REPAIRS* — (2) *Of One Laboring under a Mistake as to Title.* — See notes 1, 2.

(3) *Fraud or Acquiescence on Part of Real Owner.* — See note 3.

**22.** *c. OWNER'S LIEN FOR MONEY OR PROPERTY UNLAWFULLY OBTAINED FROM HIM.* — See note 7.

**23.** *Lien of Person Beneficially Entitled to Money.* — See note 1.

**VII. STATUTORY LIENS** — 1. *Power to Create.* — See note 8.

**24.** 3. *Construction* — *a. IN GENERAL.* — See notes 1, 3.

4. *Possession Not Essential.* — See note 6.

5. *Power of Legislature to Modify or Destroy.* — See note 8.

**25.** **VIII. ASSIGNMENT OF LIENS** — 1. *Common-law Liens.* — See note 1.

2. *Statutory Liens.* — See note 11.

**26.** See note 1.

3. *Equitable Liens.* — See note 2.

**IX. SUBROGATION.** — See note 4.

**X. DETERMINATION OR DISCHARGE OF LIENS** — 1. *Waiver* — *a. BY VOLUNTARY SURRENDER OF POSSESSION* — (1) *Rule Stated.* — See note 6.

Texas Pine Land Assoc., 31 Tex. Civ. App. 375. See also *Gage v. Cameron*, 212 Ill. 146, reversing 110 Ill. App. 381.

**15.** 4. *Liens on Property to Be Subsequently Acquired.* — *Abell v. Middleton*, 2 Ont. L. Rep. 209.

**16.** 1. *Intention to Charge Must Be Clearly Expressed.* — *Thornberry v. Thornberry*, (Ky. 1902) 68 S. W. Rep. 129.

2. *Contract Construed.* — *Brown v. Neilson*, 61 Neb. 765, 87 Am. St. Rep. 525.

**17.** 1. *Lien Not Created by Mere Agreement to Pay Debt Out of Designated Fund.* — *Franklin v. Browning*, (C. C. A.) 117 Fed. Rep. 226; *Cushing v. Chapman*, 115 Fed. Rep. 237; *Elmore v. Symonds*, 183 Mass. 321; *Phillips v. Hogue*, 63 Neb. 192.

2. *Appropriation of Fund Pro Tanto Essential.* — *Cushing v. Chapman*, 115 Fed. Rep. 237; *Elmore v. Symonds*, 183 Mass. 321.

**19.** 6. *Liens Founded on Equitable Principles.* — *Ballard v. Camplin*, 161 Ind. 16; *Sutton v. Gibson*, (Ky. 1905) 84 S. W. Rep. 335.

**21.** 1. *Real Owner Seeking Equitable Aid Must Pay for Improvements.* — *Green v. McDonald*, 75 Vt. 93.

2. *Armstrong v. Ashley*, 22 App. Cas. (D. C.) 368.

3. *Improvements or Repairs Induced by Fraud or Acquiescence of Real Owner.* — See *Green v. McDonald*, 75 Vt. 93.

In *Robards v. Robards*, (Ky. 1905) 85 S. W. Rep. 718, A made improvements on B's land, relying on B's contract that he would convey the land to him. B refused to convey the land and it was held that equity would declare a lien on B's land in favor of A for the value of his improvements.

**22.** *Conversion of Stock by Pledgee.* — *Hutchinson v. Le Roy*, (C. C. A.) 113 Fed. Rep. 202.

**23.** 1. In *Culver v. Guyer*, 129 Ala. 602, A deposited an insurance policy with B as collateral security for a debt. The money that B secured on the insurance policy exceeded his debt and interest thereon. It was held that A could follow this excess fund into whatever property B had converted it into and subject such property to the payment of his debt.

8. *Power of Legislature to Create Liens.* — See *Fitch v. Applegate*, 24 Wash. 25.

**24.** 1. *Construction of Statutory Liens.* — *Chicago Title, etc., Co. v. McGlew*, 193 Ill. 457.

3. *Mott v. Wissler Min. Co.*, (C. C. A.) 135 Fed. Rep. 697, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

6. *Possession Essential* — *Factor's Lien.* — *Rosenbaum v. Hayes*, 10 N. Dak. 311.

8. *State Trust Co. v. Kansas City, etc., R. Co.*, 115 Fed. Rep. 367.

**25.** 1. *Common-law Liens Not Assignable.* — *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 97 Am. St. Rep. 609.

11. *Statutory Liens Not Dependent upon Possession of Property Generally Assignable.* — *Clark v. Brown*, 141 Cal. 93.

**26.** 1. *Assignment of Debt Usually Carries Right to Lien.* — See *Smith v. Butler*, 72 Ark. 350; *Ray v. Anderson*, 119 Ga. 926; *Mulky v. Karsell*, 31 Ind. App. 595; *Brandenburg v. Norwood*, (Tex. Civ. App. 1901) 66 S. W. Rep. 587.

2. *Liens Created by Express Contract.* — *Falls City First Nat. Bank v. Edgar*, 65 Neb. 340.

4. *Subrogation.* — *Ft. Jefferson Imp. Co. v. Dupoyster*, 112 Ky. 792.

6. *Common-law Lien Waived by Voluntary Surrender of Possession.* — See *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 97 Am. St. Rep. 609.

**27.** (2) *Constructive Possession Sufficient to Maintain Lien.* — See note 3.

(6) *Lien Not Determined by Involuntary Surrender of Possession.* — See note 10.

**28.** (7) *Surrender of Part of Property* — (a) *Where Property Was Delivered under a Single Contract.* — See note 1.

(b) *Where Property Was Delivered under Separate Contracts.* — See note 3.

b. *BY EXPRESS AGREEMENT.* — See note 5.

c. *BY ACTS OR AGREEMENTS INCONSISTENT WITH LIEN* — (1) *In General.* — See note 6.

**29.** (2) *Inconsistent Agreements as to Time or Mode of Payment.* — See note 1.

d. *BY TAKING OTHER SECURITY* — (1) *General Rule.* — See note 7.

**30.** (2) *Taking Note or Other Personal Security of Debtor.* — See note 1.

(3) *Taking Security of Third Person.* — See note 2.

(4) *Taking Mortgage or Pledge.* — See note 6.

**32.** h. *CONVERSION OF THE PROPERTY.* — See note 6.

**2.** *Payment* — b. *WHEN DEBTOR'S NOTE WILL CONSTITUTE PAYMENT.* — See note 9.

**33.** 3. *Tender.* — See note 6.

*Where a Holder of Goods Detains Them for Two Claims.* — See note 7.

**34.** XI. *ENFORCEMENT OF LIENS* — 1. *Common-law Liens* — a. *NO RIGHT OF SALE.* — See note 7.

**35.** b. *LIABILITY FOR UNAUTHORIZED SALE* — *OWNER'S RIGHTS.* — See note 2.

c. *REMEDY OF LIENHOLDER WHERE PROPERTY IS WRONGFULLY TAKEN BY THIRD PARTY.* — See note 5.

**27.** S. Davidson Steamship Co. v. 119254. Bushels Flaxseed, 117 Fed. Rep. 283.

**10.** *Involuntary Surrender of Possession Not a Waiver.* — McGill v. Chilhowee Lumber Co., 111 Tenn. 552, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27.

**28.** 1. *Property Delivered under a Single Contract* — *Surrender of Part.* — See Griffith v. Speaks, 111 Ky. 149.

**3.** *Rule Where Property Was Delivered under Separate Contracts.* — Shingleur-Johnson Co. v. Canton Cotton Warehouse Co., 78 Miss. 875.

**5.** *Waiver by Express Agreement.* — Planters Compress Co. v. Howard, 35 Tex. Civ. App. 300. See also Wimp v. Early, 104 Mo. App. 85.

**6.** *Inconsistent Acts or Agreements.* — See Young v. Austin, 100 Ill. App. 248.

*Taking Personal Judgment and Failing to Foreclose Lien.* — Bond v. Carter, (Tex. Civ. App. 1903) 73 S. W. Rep. 45.

**29.** 1. *Inconsistent Agreements as to Payment.* — Blumenberg Press v. Mutual Mercantile Agency, 77 N. Y. App. Div. 87 [citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29], reversed on other grounds 177 N. Y. 362; Rosenbaum v. Hayes, 10 N. Dak. 311.

**7.** *When Taking of Other Security Will Constitute a Waiver.* — Scott v. Edgar, (Ind. App. 1901) 60 N. E. Rep. 468.

**30.** 1. *Lien Not Waived by Taking Debtor's Personal Security.* — Chicago Title, etc., Co. v. McGlew, 193 Ill. 457, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30. See also Ford v. Hodgson, 3 Ont. L. Rep. 526.

**2.** *Waiver by Taking Joint Note of Debtor and*

*Third Parties.* — Shrimsher v. Newton, 3 Indian Ter. 555.

**6.** *Lien Presumptively Waived by Taking Mortgage or Pledge.* — Security Trust Co. v. Temple Co., 67 N. J. Eq. 514. But see Rosenbaum v. Hayes, 10 N. Dak. 311.

A vendor of land waives his lien by taking a trust deed for the purchase price. Nixon v. Knollenberg, 92 Mo. App. 22; Hunton v. Wood, 101 Va. 54.

**32.** 6. *Waiver by Conversion of Property.* — Peoples Bank v. Frick Co., 13 Okla. 179.

**9.** *Lien Divested by Accepting Note as Payment.* — Blumenberg Press v. Mutual Mercantile Agency, 77 N. Y. App. Div. 87, reversed on other grounds 177 N. Y. 362.

**33.** 6. *Valid Tender of Amount of Debt.* — See Davidson v. Fankuchen, (Supm. Ct. App. T.) 88 N. Y. Supp. 196.

**7.** *Where Goods Are Detained for Secured and Unsecured Claim.* — Weeks v. Robert A. Johnson Co., 116 Wis. 105, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**34.** 7. *Common-law Lien Cannot Be Enforced by Sale.* — Burrough v. Ely, 54 W. Va. 118, 102 Am. St. Rep. 926, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 34. See also Reebie v. Brackett, 100 Ill. App. 631; Lithgow v. Sweedberg, (Tex. Civ. App. 1904) 78 S. W. Rep. 246.

**35.** 2. *Liability for Unauthorized Sale.* — Darlington v. Missouri Pac. R. Co., 99 Mo. App. 1.

**5.** McGill v. Chilhowee Lumber Co., 111 Tenn. 552, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35; Burrough v. Ely, 54 W. Va. 118, 102 Am. St. Rep. 926.

**35. 2. Statutory Liens** — When Statutory Liens Are Enforceable in Equity. — See note 8.

**36. 3. Equitable Liens** — *a.* ENFORCEABLE ONLY IN EQUITY. — See note 5.

*c.* AGAINST WHOM ENFORCEABLE. — See notes 8, 9.

**37.** See notes 1, 2, 3.

**35. 8. When Equity Has Jurisdiction to Enforce Statutory Lien.** — *National Bank v. Petterson*, 200 Ill. 215, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 35.

**Equity Will Not Enforce Statutory Lien Where Amount Involved Is Trifling.** — *Kelahr v. English*, 62 N. J. Eq. 674.

**36. 5. Remedy at Law.** — The fact that a party could enforce his claim by an action at law is no defense to a bill for the enforcement of an equitable lien. *Tinsley v. Durfey*, 99 Ill. App. 239.

**8. Receiver.** — *Howard v. Delgado*, (C. C. A.) 121 Fed. Rep. 26.

**9. Voluntary Assignee.** — *In re Olzendam Co.*, 117 Fed. Rep. 179.

**37. 1. A Trustee in Bankruptcy** is entitled to

hold goods as against an equitable lien in jurisdictions where attaching creditors are classed as purchasers for value. *In re Olzendam Co.*, 117 Fed. Rep. 179.

**2. Subsequent Purchasers and Incumbrancers with Notice.** — *In re Olzendam Co.*, 117 Fed. Rep. 179; *Gage v. Cameron*, 212 Ill. 146; *Helbrech Lumber, etc., Co. v. Honaker*, (Ky. 1903) 76 S. W. Rep. 342. See also *Judge v. Curtis*, 72 Ark. 132.

**3. Not Enforceable Against Bona Fide Purchasers and Incumbrancers for Valuable Consideration Without Notice.** — *In re Olzendam Co.*, 117 Fed. Rep. 179. See also *Mulky v. Karsell*, 31 Ind. App. 595; *Halvorsen v. Halvorsen*, 120 Wis. 52.

## LIFE INSURANCE.

BY JOHN SIMPSON.

**43. III. THE PREMIUM** — **2. Discrimination in Rates.** — See note 5.

**44. 3. Necessity of Payment** — *a.* AS PREREQUISITE TO VALIDITY OF CONTRACT — Where Contract Does Not Require Prepayment. — See note 1.

Condition in Policy Requiring Prepayment. — See note 2.

*b.* TO AVOID A FORFEITURE — (1) *Nonpayment of Premium.* — See notes 5, 7.

**43. 5. Discrimination in Life Insurance Rates** — *Statutes.* — *Rothschild v. New York L. Ins. Co.*, 97 Ill. App. 547; *New York Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

**44. 1. Mutual Reserve Fund L. Assoc. v. Stephens**, 115 Ga. 192; *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482.

**2. Effect of Condition in Policy Requiring Prepayment of Premium.** — *Kearney v. Aetna L. Ins. Co.*, 109 Ill. App. 609; *Stramback v. Fidelity Mut. L. Ins. Co.*, (Minn. 1905) 102 N. W. Rep. 732; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656. See also *Mutual L. Assur. Co. v. Giguere*, 32 Can. Sup. Ct. 348.

**5. No Forfeiture for Nonpayment Apart from Contract.** — *Nederland L. Ins. Co. v. Meinert*, (C. C. A.) 127 Fed. Rep. 651, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 44; *Swander v. Northern Cent. L. Ins. Co.*, 25 Ohio Cir. Ct. 3.

**7. Forfeiture for Nonpayment of Premium** — *United States.* — *McMaster v. New York L. Ins. Co.*, 183 U. S. 25; *Schmerz v. U. S. L. Ins. Co.*, (C. C. A.) 118 Fed. Rep. 250.

*Arkansas.* — *Mutual Reserve Fund L. Assoc. v. Minchart*, 72 Ark. 630.

*California.* — *Cayford v. Metropolitan L. Ins. Co.*, 144 Cal. 763; *Brown v. Mutual Reserve Fund L. Assoc.*, 137 Cal. 278; *Nielsen v. Provident Sav. L. Assur. Soc.*, (Cal.) 66 Pac. Rep. 663.

*Illinois.* — *Roberts v. Aetna L. Ins. Co.*, 212 Ill. 382.

*Indiana.* — *Tibbits v. Mutual Ben. L. Ins. Co.*, 159 Ind. 671.

*Kentucky.* — *Letzler v. Pacific Mutual L. Ins. Co.*, (Ky. 1905) 85 S. W. Rep. 177; *Mutual L. Ins. Co. v. Lucas*, (Ky. 1904) 79 S. W. Rep. 279.

*Louisiana.* — *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474.

*Missouri.* — *Veidt v. Missouri, etc., R. Co.*, 109 Mo. App. 102.

*Nebraska.* — *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585.

*New York.* — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318; *Hewitt v. American Union L. Ins. Co.*, 66 N. Y. App. Div. 80.

*Texas.* — *Metropolitan L. Ins. Co. v. Bradley*, 98 Tex. 230; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

*Washington.* — *Nixon v. Travelers' Ins. Co.*, 25 Wash. 254.

*Wisconsin.* — *McDonald v. Provident Sav. L. Assur. Soc.*, 108 Wis. 213, 81 Am. St. Rep. 885.

*Canada.* — See *Greenwood v. Home L. Ins. Co.*, 37 Can. L. J. 129.

**Possession of Policy Prima Facie Evidence of Payment.** — *Page v. Virginia L. Ins. Co.*, 131 N. Car. 115; *Cole v. Preferred Acc. Ins. Co.*,

- 45.** Part Payment. — See note 1.  
 No Relief in Equity. — See note 2.  
 Effect of Death of Insured Before Time of Payment. — See note 3.  
 Right to Reinstatement by Terms of Policy. — See note 6.
- 46.** Whether Payment a Condition Precedent. — See note 3.  
 Under Nonforfeiture Statutes. — See note 4.  
 Whether Statutory Provision May Be Waived. — See note 6.  
 (2) Nonpayment of Premium Note. — See note 7.
- 47.** See notes 1, 2.  
 (3) Affirmative Action by Insurer Unnecessary. — See note 3.  
 Premium Note. — See note 4.
- 48.** 4. Mode of Payment — a. BY NOTE. — See note 2.

(Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 260, affirmed 92 N. Y. App. Div. 612.

Delivery of the Policy will estop the insurer from asserting that the policy is void, either from nonpayment of the premium or ill health, in the absence of fraud. *Grier v. Mutual L. Ins. Co.*, 132 N. Car. 542.

**45. 1. Forfeiture Not Avoided by Partial Payment.** — *Wood v. Confederation L. Ins. Co.*, 2 N. Bruns. Eq. Rep. 217.

**2. Forfeitures Are Not Equitable.** — *Nederland L. Ins. Co. v. Meinert*, (C. C. A.) 127 Fed. Rep. 651.

**3. Effect of Death of Insured Before Maturity of Premium.** — See *Stuart v. Freeman*, (1903) 1 K. B. 47.

**6. Right to Reinstatement by Terms of Policy.** — See *Crawford v. Sipprell*, 35 N. Bruns. 344.

**46. 3. Effect of Death of Insured Before Maturity of Premium.** — *McMaster v. New York L. Ins. Co.*, 183 U. S. 25; *Stramback v. Fidelity Mut. L. Ins. Co.*, (Minn. 1905) 102 N. W. Rep. 731.

**4. Nonforfeiture Statutes.** — *Washington L. Ins. Co. v. Glover*, (Ky. 1904) 78 S. W. Rep. 146.

**Missouri Statute Not Applicable to Assessment Policies.** — *Mutual Reserve L. Ins. Co. v. Roth*, (C. C. A.) 122 Fed. Rep. 853.

**6. Smith v. Mutual Ben. L. Assur. Soc.**, 173 Mo. 329.

**7. Forfeiture for Nonpayment of Premium Note by Condition in Policy.** — *Manhattan L. Ins. Co. v. Savage*, (Ky. 1901) 63 S. W. Rep. 278; *Leeper v. Franklin L. Ins. Co.*, 93 Mo. App. 602; *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012; *Union Cent. L. Ins. Co. v. Hughes*, (Tex. Civ. App. 1902) 70 S. W. Rep. 1010.

**Condition in Memorandum Made upon Policy.** — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 328, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46.

**Note of Third Person.** — Nonpayment of a note by a third party taken in payment of the first premium will not avoid the policy. *Galvin v. Union Cent. L. Ins. Co.*, 115 Ky. 547.

**47. 1. Union Cent. L. Ins. Co. v. Whetzel**, 29 Ind. 658; *New York L. Ins. Co. v. Meinken*, (Ky. 1904) 80 S. W. Rep. 175; *Fidelity Mut. L. Ins. Co. v. Price*, (Ky. 1903) 77 S. W. Rep. 384; *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 46; *Tilley v. Confederation L. Assoc.*, 7 British Columbia 144.

**Condition on Back of Premium Receipt.** — *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335.

**In Body of Receipt.** — *Ressler v. Fidelity Mut. L. Ins. Co.*, 110 Tenn. 411.

**Retention of the Note** by the insurer will not waive its right to forfeiture. *Sharpe v. New York L. Ins. Co.*, (Neb. 1904) 998 N. W. Rep. 66.

**2. No Forfeiture for Nonpayment of Premium Note in Absence of Contract.** — *New York L. Ins. Co. v. Smith*, 139 Ala. 303; *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47; *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87. Compare *Behling v. Northwestern Nat. L. Ins. Co.*, 117 Wis. 24.

**3. Affirmative Action by Insurer Unnecessary to Sustain Forfeiture.** — *Manhattan L. Ins. Co. v. Savage*, (Ky. 1901) 63 S. W. Rep. 278; *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012.

**4. New York L. Ins. Co. v. Warren Deposit Bank**, (Ky. 1903) 75 S. W. Rep. 234; *Manhattan L. Ins. Co. v. Savage*, (Ky. 1901) 63 S. W. Rep. 278; *York v. Railway Officials, etc.*, Acc. Assoc., 51 W. Va. 38, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47; *Behling v. Northwestern Nat. L. Ins. Co.*, 117 Wis. 24. But see *Raymond v. Metropolitan L. Ins. Co.*, 86 Mo. App. 391.

**48. 2. Payment of Premium by Note.** — *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134; *Penn Mut. L. Ins. Co. v. Norcross*, 163 Ind. 379; *National L. Ins. Co. v. Twiddell*, (Ky. 1900) 58 S. W. Rep. 699; *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87; *York v. Railway Officials, etc.*, Acc. Assoc., 51 W. Va. 38, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 48; *Crawford v. Sipprell*, 35 N. Bruns. 344. See also *Home L. Assoc. v. Walsh*, 36 Nova Scotia 73.

In *Oregon* the note must be expressly taken as in payment of the premium. *Stringham v. Mutual L. Ins. Co.*, 44 Oregon 447.

**Acceptance of Note by Agent.** — Where an agent had authority to waive a provision in the policy that it should not become binding until payment of the first premium, and took a note therefor, the time for payment of which was extended, it was held that in default of proof of any agreement between him and the insured that the note was in lieu of a cash payment of the first premium, no recovery could be had on the policy, the note not having been paid at maturity. *McDonald v. Provident Sav. L. Assur. Soc.*, 108 Wis. 213, 81 Am. St. Rep. 885.

- 48.** *b.* BY CHECK. — See note 4.  
*d.* BY PROPERTY OR SERVICES — *Agent's Authority to Accept Property in Payment.* — See note 8.  
**49.** *e.* PAYMENT BY MAIL. — See note 5.  
**50.** *g.* PAYMENT BY INSURANCE AGENT. — See note 1.  
*h.* APPLICATION OF DIVIDENDS. — See notes 4, 5.  
**52.** 5. *Excuses for Nonpayment* — *e.* WANT OF NOTICE OF TIME OF PAYMENT — (1) *In General.* — See note 5.  
**53.** (4) *Notice Required under Statute.* — See note 4.  
**54.** (5) *Agreement to Give Notice* — *By Terms of Policy.* — See note 1.  
*g.* WAIVER BY INSURER — (1) *In General.* — See notes 8, 9.  
**55.** Conditional Waiver. — See note 1.  
(2) *Parol Agreement At or Before Issuance of Policy* — *Effect of Unconditional Delivery on Clause Requiring Prepayment.* — See note 6.  
Waiver by Agent. — See notes 7, 8.

**48.** 4. *Acceptance of Check as Payment.* — *Travelers' Ins. Co. v. Brown*, 138 Ala. 526; *York v. Railway Officials, etc., Acc. Assoc.*, 51 W. Va. 38, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 48.

*Not Payment Where Express Agreement to Contrary.* — *York v. Railway Officials, etc., Acc. Assoc.*, 51 W. Va. 38.

*Acceptance of Draft as Payment.* — *MacMahon v. U. S. Life Ins. Co.*, (C. C. A.) 128 Fed. Rep. 388.

8. *Authority to Accept Property Not Implied from Agent's Authority to Collect Premiums.* — *Tomesek v. Travelers' Ins. Co.*, 113 Wis. 114, 90 Am. St. Rep. 846.

**49.** 5. *Mailing Check by Company's Authority.* — *Travelers' Ins. Co. v. Brown*, 138 Ala. 526.

**50.** 1. *Payment by Insurance Agent.* — *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559.

4. *Application of Dividends to Payment of Premiums.* — *Ætna L. Ins. Co. v. Hartley*, (Ky. 1902) 67 S. W. Rep. 19.

5. *Hogue v. Northwestern Mut. L. Ins. Co.*, 114 Fed. Rep. 778.

**52.** 5. *Notice of Time of Payment Generally Unnecessary.* — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551; *Crutchfield v. Union Cent. L. Ins. Co.*, 113 Ky. 53; *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474.

**53.** 4. *United States.* — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551, reversing 118 Fed. Rep. 708; *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 262; *Nederland L. Ins. Co. v. Meinert*, (C. C. A.) 127 Fed. Rep. 651.

*Arkansas.* — *Mutual Reserve Fund L. Assoc. v. Minehart*, 72 Ark. 630.

*California.* — *Nielsen v. Provident Sav. L. Assur. Soc.*, (Cal. 1901) 66 Pac. Rep. 663.

*Iowa.* — *Summit v. U. S. Life Ins. Co.*, 123 Iowa 681.

*Louisiana.* — *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474.

*New Hampshire.* — *Seely v. Manhattan L. Ins. Co.*, 72 N. H. 49.

*New York.* — *McCall v. Prudential Ins. Co.*, 98 N. Y. App. Div. 225; *Strauss v. Union Cent. L. Ins. Co.*, 170 N. Y. 349.

*Texas.* — *Cowen v. Equitable L. Assur. Soc.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 404; *Metropolitan L. Ins. Co. v. Bradley*, 98 Tex. 230; *Security Trust, etc., L. Ins. Co. v. Hallum*, 32 Tex. Civ. App. 134; *Washington L. Ins. Co. v.*

*Berwald*, (Tex. Civ. App. 1903) 72 S. W. Rep. 436; *New York L. Ins. Co. v. English*, 95 Tex. 391; *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284.

*Requirement May Be Waived in Policy.* — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551, reversing (C. C. A.) 118 Fed. Rep. 708. But see *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284.

The requirement may be waived where the contract is governed by the laws of another state. *Metropolitan L. Ins. Co. v. Bradley*, 98 Tex. 230.

*Long Delay.* — In *Lone v. Mutual L. Ins. Co.*, 33 Wash. 577, it was held that the provision of the statute was not available to the beneficiaries of an insured who had neglected to pay premiums for twelve years.

**54.** 1. *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311.

*Notice Must Comply with Terms of Policy.* — *Nederland L. Ins. Co. v. Meinert*, (C. C. A.) 127 Fed. Rep. 651.

8. *Payment of Premiums May Be Waived.* — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439; *Ætna L. Ins. Co. v. Sanford*, 200 Ill. 126; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. 131.

9. *Forfeitures Not Favored.* — *Battin v. Northwestern L. Ins. Co.*, (C. C. A.) 130 Fed. Rep. 874; *Travelers' Ins. Co. v. Brown*, 138 Ala. 526; *U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568; *Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191; *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439; *Lawrence v. Penn Mut. L. Ins. Co.*, 113 La. 87; *Ferguson v. Union Mut. L. Ins. Co.*, 187 Mass. 8.

**55.** 1. *Conditional Waiver.* — *Manhattan L. Ins. Co. v. Savage*, (Ky. 1901) 63 S. W. Rep. 278.

6. *Effect of Unconditional Delivery of Policy.* — *Snyder v. Nederland L. Ins. Co.*, 202 Pa. St. 161.

7. *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30; *Peck v. Washington L. Ins. Co.*, 91 N. Y. App. Div. 597, affirmed 181 N. Y. 595; *Genung v. Metropolitan L. Ins. Co.*, 60 N. Y. App. Div. 424; *Snyder v. Nederland*, 202 Pa. St. 161; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131. See also the dissenting

- 55.** (3) *Acts After Issuance of Policy but Prior to Forfeiture* — (a) *Acts Indicating that Prompt Payment Will Not Be Required* — *aa. IN GENERAL.* — See note 9.
- 56.** *bb. EXPRESS AGREEMENT.* — See note 1.  
*cc. CUSTOMARY INDULGENCE* — (*aa*) *To Policy Holders Generally.* — See note 4.  
*(bb) To the Insured.* — See notes 6, 7.
- 57.** (b) *Conduct of Insurer Indicating that Premium Will Not Be Accepted.* — See note 4.
- (c) *Waiver as to Place of Payment.* — See note 5.
- 58.** (4) *Acts Subsequent to Forfeiture* — (a) *In General.* — See notes 1, 2.

opinion of Haight, J., in *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55.

For a general discussion of waiver by agents, see the title *INSURANCE*, vol. 16, p. 942 *et seq.*

An agent who is actually authorized to extend the time for payment of a premium or waive a forfeiture may do so although the policy provides that only the president, vice-president, or secretary of the company shall have such power. *Washington L. Ins. Co. v. Berwald*, (Tex. Civ. App. 1903) 72 S. W. Rep. 436.

*Contra.* — *Ætna L. Ins. Co. v. Hartley*, (Ky. 1902) 68 S. W. Rep. 1081, *modifying* (Ky. 1902) 67 S. W. Rep. 19.

In *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, it was held that the agent must have express authority to make the waiver.

*Agent's Promise to Advance Premium Does Not Constitute Waiver.* — *Hewitt v. American Union L. Ins. Co.*, 66 N. Y. App. Div. 80, *reversing* (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 738.

**55.** 8. U. S. Life Ins. Co. v. Lesser, 126 Ala. 568; *National L. Ins. Co. v. Twiddell*, (Ky. 1900) 58 S. W. Rep. 699; *Ætna L. Ins. Co. v. Fallow*, 110 Tenn. 720. See also the dissenting opinion of Haight, J., in *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55.

*Contra.* — *Mutual Reserve Fund L. Assoc. v. Stephens*, 115 Ga. 192; *Reese v. Fidelity Mut. L. Assoc.*, 111 Ga. 482; *Mutual L. Ins. Co. v. Clancy*, 111 Ga. 865; *Crutchfield v. Union Cent. L. Ins. Co.*, 113 Ky. 53; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656; *Nixon v. Travellers' Ins. Co.*, 25 Wash. 254.

**9. Conduct Indicating that Prompt Payment Will Not Be Required.** — *Battin v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 130 Fed. Rep. 874; *U. S. Life Ins. Co. v. Lesser*, 126 Ala. 568; *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439; *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531; *Doney v. Prudential Ins. Co.*, 99 N. Y. App. Div. 23; *Cross v. Security Trust, etc., Ins. Co.*, 58 N. Y. App. Div. 602, *affirmed* 171 N. Y. 671.

**56.** 1. *Agreement to Accept Payment After Maturity.* — *Ætna L. Ins. Co. v. Sanford*, 200 Ill. 126, *affirming* 197 Ill. 310; *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658; *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311; *Prudential Ins. Co. v. Devoe*, 98 Md. 584.

*Consideration for Agreement.* — The waiver by extension of time for payment will protect the insured until the extension is renounced by the insurer, although such waiver is not based upon

a new consideration or upon estoppel. *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57. See also *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439, where it was held that the insured's transfer to the insurer of his interest in a judgment, as collateral security for premium notes, matured and unmatured, was sufficient consideration for the insurer's waiver.

*Acceptance of a Payment on Account* of the premium will constitute a waiver. *Battin v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 130 Fed. Rep. 874.

**4. Customary Indulgence Towards Policy Holders as Waiver.** — *Parker v. Knights Templars, etc., L. Indemnity Co.*, (Neb. 1903) 97 N. W. Rep. 281.

**6. Mere Occasional Indulgence to Insured No Waiver.** — *Schmerz v. U. S. Life Ins. Co.*, (C. C. A.) 118 Fed. Rep. 250; *Parker v. Knights Templars, etc., L. Indemnity Co.*, (Neb. 1903) 97 N. W. Rep. 281; *Sydnor v. Metropolitan L. Ins. Co.*, 26 Pa. Super. Ct. 521.

**7. Effect of Continued or Repeated Indulgence.** — *Modern Woodmen of America v. Tevis*, (C. C. A.) 111 Fed. Rep. 113; *Illinois L. Assoc. v. Wells*, 200 Ill. 445; *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616; *Suess v. Imperial L. Ins. Co.*, 86 Mo. App. 10.

**57.** 4. *Conduct of Insurer Indicating that Premium Will Not Be Accepted.* — *Doney v. Prudential Ins. Co.*, 99 N. Y. App. Div. 23; *Te Bow v. Washington L. Ins. Co.*, 59 N. Y. App. Div. 310.

*Nonpayment Fault of Insurer — Estoppel to Claim Forfeiture.* — *Provident Sav. L. Assur. Soc. v. Duncan*, (C. C. A.) 115 Fed. Rep. 277.

*Declaration of Forfeiture Not Presumed.* — Where a husband surrendered a policy payable to his wife and took another payable to himself, it was held that it could not be assumed in an action by the wife on the original policy that if she had tendered the premiums after the surrender as before, the company would not have accepted the money and fulfilled its obligations. *Weatherbee v. New York L. Ins. Co.*, 178 Mass. 575.

**5.** *Waiver as to Place of Payment.* — *Parker v. Knights Templars, etc., L. Indemnity Co.*, (Neb. 1903) 97 N. W. Rep. 281.

*Failure of Agent to Call for Premium.* — Where the policy provided that premiums should be paid at the home office of the company, but might be paid to its agent, it was held that the policy was not forfeited for nonpayment where the agent failed to call for the premium as he had been accustomed and had agreed to do. *Rutherford v. Prudential Ins. Co.*, 34 Ind. App. 531.

**58.** 1. *Waiver by Acts Subsequent to Forfeiture.* — *Bennett v. Union Cent. L. Ins. Co.*,



**58. (b) Acceptance of Premium — aa. IN GENERAL. — See note 3.**

**Acceptance by Agent. — See note 6.**

**bb. CONDITIONAL ACCEPTANCE. — See notes 7, 8.**

**59. cc. EFFECT OF IGNORANCE OF DEATH OF INSURED. — See notes 3, 6.**

**dd. DEMAND OF PAYMENT OF OVERDUE PREMIUM NOTE. — See note 8.**

**(e) Agreement to Revive or Reinstate. — See note 11.**

**60. Whether a New Consideration Is Required. — See notes 1, 2, 3.****61. IV. FORFEITURE AND AVOIDANCE — 1. Breach of Conditions — c. ENGAGING IN PROHIBITED OCCUPATION. — See note 4.**

**Entering Military or Naval Service. — See note 7.**

**d. CONDITION AS TO SOUNDNESS OF HEALTH. — See notes 9, 10.**

203 Ill. 439, *reversing* 104 Ill. App. 402, and *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 58; *McQuillan v. Mutual Reserve Fund Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986.

**58. 2. Bennett v. Union Cent. L. Ins. Co.**, 203 Ill. 439, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 58.

But see *Illinois L. Assoc. v. Wells*, 200 Ill. 445, where it was held that it was admissible to show conduct of the insurer tending to show a waiver, although at the time the insurer did not know of the death of the insured.

**3. Waiver by Acceptance of Premium After Forfeiture. —** *Bennett v. Union Cent. L. Ins. Co.*, 203 Ill. 439, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57, 58; *White v. McPeck*, 185 Mass. 451; *Andrus v. Fidelity Mut. L. Ins. Assoc.*, 168 Mo. 151; *Peck v. Washington L. Ins. Co.*, 91 N. Y. App. Div. 597, *affirmed* 181 N. Y. 585; *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131; *Page v. Metropolitan L. Ins. Co.*, 23 Quebec Super. Ct. 503. See also *Ryer v. Prudential Ins. Co.*, 85 N. Y. App. Div. 7.

**6. Baltimore L. Ins. Co. v. Howard**, 95 Md. 244; *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616.

**7. Effect of Conditional Acceptance of Overdue Premium. —** *Handler v. Mutual Reserve Fund L. Assoc.*, 90 L. T. N. S. 192; *Nielsen v. Provident Sav. L. Assur. Soc.*, (Cal. 1901) 66 Pac. Rep. 663; *McQuillan v. Mutual Reserve Fund Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986. But see *Andrus v. Fidelity Mut. L. Ins. Assoc.*, 168 Mo. 151.

**8. McQuillan v. Mutual Reserve Fund L. Assoc.**, 112 Wis. 665, 88 Am. St. Rep. 986.

**59. 3. Acceptance of Overdue Premium in Ignorance of Death of Assured. —** Where the period for payment was extended by arrangement, and within the extended period the assignee of the policy paid the premium, the death of the insured some hours before such payment, unknown both to the assignee and to the company, was held not to prevent recovery on the policy. *Stuart v. Freeman*, (1903) 1 K. B. 47, 72 L. J. K. B. 1, 87 L. T. N. S. 516.

**6. Page v. Metropolitan L. Ins. Co.**, 23 Quebec Super. Ct. 503.

**8. Suing on a Premium Note not paid at maturity will constitute a waiver. National L. Ins. Co. v. Reppond**, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012; *Union Cent. L. Ins. Co. v. Spinks*, (Ky. 1904) 83 S. W. Rep. 615.

**11. Agreement to Revive or Reinstate. —** *Muligan v. Prudential Ins. Co.*, 76 Conn. 676; *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167.

**Fraud in the Warranties on which a reinstatement is granted renders the renewal contract invalid. Ash v. Fidelity Mut. L. Assoc.**, 26 Tex. Civ. App. 501.

**60. 1. New Consideration Required for Agreement to Revive. —** A similar doctrine is laid down in *Kearney v. Aetna L. Ins. Co.*, 109 Ill. App. 609.

**2. Agreement to Revive with Tender of Payment. —** *Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191.

**Stipulation as to Good Health. —** The company is not bound to accept a tender of payment of premiums after the lapse of the policy where the insured is not in good health, and where it has not waived a stipulation in the policy for the presentation of evidence satisfactory to the company that the insured is in good health. *Metropolitan L. Ins. Co. v. Walton*, 25 Ohio Cir. Ct. 587.

**3. Retention of Premium by Insurer — Determination to Revive. —** Where the company had, after a policy had become void, actually received payment of premiums covering a period beyond the death of the insured, and had retained these for five weeks without requiring proofs as to health, it was held to be a question for the jury whether such retention did not show a determination to revive the policy. *White v. Metropolitan L. Ins. Co.*, 22 Pa. Super. Ct. 501.

**61. 4. Engaging in Prohibited Occupation. —** See *Elson v. North American L. Assur. Co.*, 9 British Columbia 474.

**Waiver. —** The condition will be waived by acceptance of premiums with knowledge of the fact that the insured is engaged in the prohibited occupation. *Metropolitan L. Ins. Co. v. Sullivan*, 112 Ill. App. 500; *Modern Woodmen of America v. Colman*, (Neb. 1903) 94 N. W. Rep. 814.

**7. Military Service. —** A provision that the insured might serve in the military or naval service in time of peace without prejudice to the policy, but in time of war only by giving notice to the company and paying an extra premium, was held to be broken by the insured's death while engaged in the service of the United States in suppressing an insurrection in the Philippine Islands. *La Rue v. Kansas Mut. L. Ins. Co.*, 68 Kan. 539.

**9. Austin v. Mutual Reserve Fund L. Assoc.**, 132 Fed. Rep. 555; *Thompson v. Travelers' Ins. Co.*, 13 N. Dak. 444; *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614; *Hood v. Prudential Ins. Co.*, 22 Pa. Super. Ct. 244.

The clause does not apply to any unsound-

**62. 2. Warranties and Representations — a. GENERAL STATEMENT. —** See note 2.

*b. SPECIFIC WARRANTIES OR REPRESENTATIONS — (1) As to Physical Condition of Insured — (a) Sound Health. —* See note 5.

*Meaning of the Term. —* See note 8.

*Good Faith as a Defense. —* See notes 9, 10.

**63. (b) Specific Disease or Complaint. —** See notes 2, 3, 4.

*Truth of Statement a Question for the Jury. —* See note 6.

ness of health at the time of or previous to the application and medical examination. *Metropolitan L. Ins. Co. v. Moore*, (Ky. 1904) 79 S. W. Rep. 219.

*Delivery by Agent with Knowledge of Insured's Ill Health Binds Insurer. —* *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494.

**61. 10. Meaning of "Sound Health."**—*Austin v. Mutual Reserve Fund L. Assoc.*, 132 Fed. Rep. 555; *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338; *Woodmen of the World v. Locklin*, 28 Tex. Civ. App. 486.

**62. 2. Infant Not Bound by Warranties. —** *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643.

**5. Warranty of "Good" or "Sound" Health. —** *Tobin v. Modern Woodmen of America*, 126 Mich. 161; *Finn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 17; *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

*Answers Falsely Reported by Medical Examiner. —* *Sternaman v. Metropolitan L. Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625.

*The Burden of Proof of the falsity of the statement is on the insurer. —* *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167.

*Insurer's Knowledge of Falsity Waives Right to Avoid. —* *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70 S. W. Rep. 603.

**8. Meaning of "Good Health" —***United States. —* *Black v. Travelers' Ins. Co.*, (C. C. A.) 121 Fed. Rep. 732.

*Alabama. —* *Mutual Ben. L. Ins. Co. v. Lehman*, 132 Ala. 640.

*Illinois. —* *Illinois L. Ins. Co. v. Lindley*, 110 Ill. App. 161.

*Maine. —* *Jeffrey v. United Order of Golden Cross*, 97 Me. 176.

*Michigan. —* *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 216, 104 Am. St. Rep. 604.

*New Hampshire. —* *Packard v. Metropolitan L. Ins. Co.*, 72 N. H. 1.

*New York. —* *Schmitt v. Michigan Mut. L. Ins. Co.*, 101 N. Y. App. Div. 12.

*Ohio. —* *Ohio Mut. L. Assoc. v. Draddy*, 10 Ohio Dec. 591, 8 Ohio N. P. 140.

*Pennsylvania. —* *Clemens v. Metropolitan L. Ins. Co.*, 20 Pa. Super. Ct. 567; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599.

*South Carolina. —* *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338.

*Texas. —* *Woodmen of the World v. Locklin*, 28 Tex. Civ. App. 486.

*Question for Jury. —* Whether a bodily infirmity materially impairs the bodily powers is ordinarily a question for the jury. *Black v. Travelers' Ins. Co.*, (C. C. A.) 121 Fed. Rep. 732.

**9. See** *Royal Neighbors of America v. Wallace*, 64 Neb. 330; *Dimick v. Metropolitan L. Ins. Co.*, 69 N. J. L. 384. But compare *Stand-*

*ard L.*, etc., *Ins. Co. v. Sale*, (C. C. A.) 121 Fed. Rep. 664.

**10. McClain v. Provident Sav. L. Assur. Soc.**, (C. C. A.) 110 Fed. Rep. 80; *Fidelity Mut. L. Assoc. v. Jeffords*, (C. C. A.) 107 Fed. Rep. 402; *Royal Neighbors of America v. Wallace*, (Neb. 1904) 99 N. W. Rep. 256. See also *Mulligan v. Prudential Ins. Co.*, 76 Conn. 676, and *Peterson v. Des Moines L. Assoc.*, 115 Iowa 668.

**63. 2. Warranty Against Specific Disease. —** *John Hancock Mut. L. Ins. Co. v. Houpt*, 113 Fed. Rep. 572; *Hoover v. Royal Neighbors of America*, 65 Kan. 616; *Dwyer v. Mutual L. Ins. Co.*, 72 N. H. 572; *Finn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 17; *Wynn v. Provident L.*, etc., *Co.*, 99 N. Y. App. Div. 103; *Finn v. Prudential Ins. Co.*, 98 N. Y. App. Div. 588; *Trudden v. Metropolitan L. Ins. Co.*, 69 N. Y. App. Div. 392; *Murphy v. Prudential Ins. Co.*, 205 Pa. St. 444; *Arnold v. Metropolitan L. Ins. Co.*, 20 Pa. Super. Ct. 61; *Flippen v. State L. Ins. Co.*, 30 Tex. Civ. App. 362.

"In the early days of life insurance, the warranty was general, and guaranteed sound mental and physical history and health. From time to time, inquiries were added, addressed to specific diseases and conditions. The result has been to avoid many policies which might have been held valid under the earlier requirements." *Jaggard, J.*, in *Rupert v. Supreme Ct.*, etc., (Minn. 1905) 102 N. W. Rep. 715.

*Giving the Wrong Name of the disease for which the insured was treated will void the policy. —* *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012; *Priestly v. Provident Sav. Co.*, 112 Fed. Rep. 271.

**3. Supreme Conclave, etc., v. Wood**, 120 Ga. 328; *Metropolitan L. Ins. Co. v. Moravec*, 214 Ill. 186.

*In Georgia* it is held that an untrue statement that the insured had never had a certain disease will not avoid the policy unless it is about a matter material to the risk, or unless it is warranted to be true. *Providence Sav. L. Assur. Soc. v. Pruett*, 141 Ala. 688.

*Under the Missouri Statute*, Rev. Stat. Mo. 1899, § 7890, the misrepresentation must be as to a disease which actually contributed to the death of the assured. *Ashford v. Metropolitan L. Ins. Co.*, 98 Mo. App. 505, affirming 80 Mo. App. 638; *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73 (Missouri insurance contract).

**4. Ignorance of Existence of Disease Held to Be No Excuse. —** *Jeffrey v. United Order of Golden Cross*, 97 Mo. 176; *Bankers' L. Ins. Co. v. Miller*, 100 Md. 1; *Thompson v. Travelers' Ins. Co.*, 13 N. Dak. 444.

**6. Falsity of Answers Question for Jury —** *Colorado. —* *Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191.

- 63.** (o) Presumption Against Trivial Ailments or Injuries. — See note 7.
- 64.** Serious Personal Injury, Etc. — See note 2.  
 "Disease." — See note 3.  
 "Serious Illness." — See note 5.
- 65.** "Spitting of Blood." — See notes 1, 4.  
 (d) Effect of Change in Health After Application. — See note 6.  
 (2) Medical Attendance — Warranty. — See note 9.
- 66.** See notes 1, 2.  
 Usual Medical Attendant. — See note 5.  
 The Phrase "Family Physician." — See note 7.  
 Treatment in Hospital. — See note 8.  
 (3) Facts Relating to Health of Family — Good Health of Member of Family — See note 9.
- 67.** Consumption. — See note 2.

*Georgia.* — Supreme Conclave, etc., *v. Wood*, 120 Ga. 328.

*Indiana.* — *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 593.

*Iowa.* — *Peterson v. Des Moines L. Assoc.*, 115 Iowa 668.

*Michigan.* — *Tobin v. Modern Woodmen of America*, 126 Mich. 161.

*Minnesota.* — *Rupert v. Supreme Ct.*, etc., (Minn. 1905) 102 N. W. Rep. 715.

*New Jersey.* — *Henn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 310; *Dimick v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367.

*New York.* — *Schmitt v. Michigan Mut. L. Ins. Co.*, 101 N. Y. App. Div. 12; *Sternaman v. Metropolitan L. Ins. Co.*, 94 N. Y. App. Div. 610, affirmed 181 N. Y. 514; *Genung v. Metropolitan L. Ins. Co.*, 60 N. Y. App. Div. 424.

*Pennsylvania.* — *Proctor v. Metropolitan L. Ins. Co.*, 20 Pa. Super. Ct. 523.

*South Carolina.* — *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338.

**63. 7. Presumption Against Trivial Ailments or Injuries.** — *Rupert v. Supreme Ct.*, etc., (Minn. 1905) 102 N. W. Rep. 715; *Genung v. Metropolitan L. Ins. Co.*, 60 N. Y. App. Div. 424.

**64. 2.** See *Black v. Travellers' Ins. Co.*, (C. C. A.) 121 Fed. Rep. 732.

**3. Term "Disease" Construed.** — *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 611, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 64.

**5. "Serious Illness" Construed.** — *Caruthers v. Kansas Mut. L. Ins. Co.*, 108 Fed. Rep. 487; *Finn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 17; *Wynn v. Provident L.*, etc., Co., 99 N. Y. App. Div. 103; *Drakeford v. Supreme Conclave*, etc., 61 S. Car. 338.

**65. 1. Representation as to Spitting of Blood.** — *Peterson v. Des Moines L. Assoc.*, 115 Iowa 668. See also *Rupert v. Supreme Ct.*, etc., (Minn. 1905) 102 N. W. Rep. 715.

**4.** See *Arnold v. Metropolitan L. Ins. Co.*, 20 Pa. Super. Ct. 61.

**6. Representation Held to Be Continuing until Consummation of Contract.** — *Cable v. U. S. Life Ins. Co.*, (C. C. A.) 111 Fed. Rep. 19, reversed on other grounds in 191 U. S. 288; *Packard v. Metropolitan L. Ins. Co.*, 72 N. H. 1; *Thompson v. Travelers' Ins. Co.*, 13 N. Dak. 444.

**9. Warranty as to Medical Attendance** — *United States.* — *John Hancock Mut. L. Ins. Co. v. Houtp*, 113 Fed. Rep. 572; *Caruthers v. Kansas Mut. L. Ins. Co.*, 108 Fed. Rep. 487; *McClain*

*v. Provident Sav.*, etc., Assur. Soc., 105 Fed. Rep. 834.

*Arkansas.* — *Mutual Reserve Fund L. Assoc. v. Cotter*, 72 Ark. 620.

*Kansas.* — *Hoover v. Royal Neighbors of America*, 65 Kan. 616.

*Michigan.* — *Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526; *Rhode v. Metropolitan L. Ins. Co.*, 129 Mich. 112.

*New Hampshire.* — *Dwyer v. Mutual L. Ins. Co.*, 72 N. H. 572.

*New York.* — *Schane v. Metropolitan L. Ins. Co.*, 76 N. Y. App. Div. 271; *Trudden v. Metropolitan L. Ins. Co.*, 69 N. Y. App. Div. 392.

*Texas.* — *Brock v. United Moderns*, 36 Tex. Civ. App. 12; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

*Canada.* — *Smith v. Grand Orange Lodge*, 6 Ont. L. Rep. 588.

But see *Hartford L. Ins. Co. v. Stallings*, 110 Tenn. 1, holding that under the *Tennessee* statute the warranty must be with intent to deceive or increase the risk.

**Giving the Wrong Name of a Physician** who had treated the insured will void the policy. *National L. Ins. Co. v. Reppond*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1012.

**66. 1.** *Caruthers v. Kansas Mut. L. Ins. Co.*, 108 Fed. Rep. 487; *Flippen v. State L. Ins. Co.*, 30 Tex. Civ. App. 362.

**2.** *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 216, 104 Am. St. Rep. 604; *Rhode v. Metropolitan L. Ins. Co.*, 132 Mich. 503; *Crosby v. Security Mut. L. Ins. Co.*, 86 N. Y. App. Div. 89. See also *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494.

**5. Warranty as to Last Medical Attendant.** — *Priestly v. Provident Sav. Co.*, 112 Fed. Rep. 271.

**7. Meaning of "Family Physician."** — *Henn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 310.

**8.** *Farrell v. Security Mut. L. Ins. Co.*, (C. C. A.) 125 Fed. Rep. 684. See also *Rupert v. Supreme Ct.*, etc., (Minn. 1905) 102 N. W. Rep. 715.

**9. Misrepresentation as to Death of Brother.** — *Provident L. Assur. Soc. v. Beyer*, (Ky. 1902) 67 S. W. Rep. 827. But in *McGowan v. Supreme Ct.*, etc., 107 Wis. 462, the policy was held void on this ground.

**67. 2. Representation as to Consumption in Family.** — But where it is not material to the risk, the insured being over forty years of age,

- 67.** (4) *Use of Alcoholic or Other Stimulants.* — See notes 7, 8, 10.  
**68.** See note 1.  
 (5) *Age.* — See notes 4, 5.  
 (6) *Occupation.* — See notes 6, 7, 8.  
 (7) *Whether Married or Single.* — See note 12.  
**69.** (8) *Previous Rejection for Insurance.* — See note 1.  
*Application Not Finally Passed upon by Company.* — See note 2.  
*Where Prior Rejection Was Made by Defendant.* — See note 6.  
 (9) *Other Existing Insurance.* — See note 8.

the misrepresentation will not avoid the policy. *New Era Assoc. v. Mactavish*, 133 Mich. 68.

**67. 7. Breach of Warranty as to Temperate Habits of Insured.** — *Supreme Lodge, etc., v. Foster*, 26 Ind. App. 333; *Drakeford v. Supreme Conclave, etc.*, 61 S. Car. 338; *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

**8. Elliott v. Des Moines L. Assoc.**, 163 Mo. 132.

**10. United States.** — *Provident Sav. L. Assur. Soc. v. Exchange Bank*, (C. C. A.) 126 Fed. Rep. 360; *Bacon v. New England Order of Protection*, 123 Fed. Rep. 152.

*California.* — *Holtum v. Germania L. Ins. Co.*, 139 Cal. 645.

*Indiana.* — *Supreme Lodge, etc., v. Foster*, 26 Ind. App. 333.

*Louisiana.* — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574.

*New York.* — *Moore v. Prudential Ins. Co.*, 92 N. Y. App. Div. 135.

*North Dakota.* — *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559.

*South Carolina.* — *Drakeford v. Supreme Conclave, etc.*, 61 S. Car. 338.

*Texas.* — *Pacific Mut. L. Ins. Co. v. Terry*, (Tex. Civ. App. 1904) 84 S. W. Rep. 656; *Equitable L. Assur. Soc. v. Liddell*, 32 Tex. Civ. App. 252.

**68. 1. Brignac v. Pacific Mut. L. Ins. Co.**, 112 La. 574.

**4. Warranty as to Age of Insured.** — *Wynn v. Provident L., etc., Co.*, 99 N. Y. App. Div. 103; *Dinan v. Supreme Council, etc.*, 201 Pa. St. 363. See also *Rupert v. Supreme Ct., etc.*, (Minn. 1905) 102 N. W. Rep. 715.

**Warranty as to Ages of Members of Family.** — *Kansas Mut. L. Ins. Co. v. Pinson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 818.

It has been held that a false warranty as to the ages of the sisters of the insured will void the policy. *Kansas Mut. L. Ins. Co. v. Pinson*, 94 Tex. 553.

**5. Representations as to Age of Insured.** — *Dillon v. Mutual Reserve Fund L. Assoc.*, 5 Ont. L. Rep. 434.

**Under the Massachusetts Statute**, 1894, c. 522, § 21, neither a false representation nor a false warranty as to age will avoid the policy unless made with intent to deceive, or unless it increases the risk. *Dolan v. Mutual Reserve Fund L. Assoc.*, 182 Mass. 413.

**6. False Warranty as to Occupation.** — *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494.

**The Occupation of Cattle Tender** does not include that of tender of horses. *Frink v. Brotherhood Acc. Co.*, 75 Vt. 249.

**7. Meaning of Term "Occupation."** — *Mortensen v. Central L. Assur. Assoc.*, 124 Iowa 277.

**8. Temporary Suspension Not Breach of Warranty.** — *Clemens v. Metropolitan L. Ins. Co.*, 20 Pa. Super. Ct. 567.

**12. Warranty that Assured Is Married Man.** — See *Rupert v. Supreme Ct., etc.*, (Minn. 1905) 102 N. W. Rep. 715.

Such a representation to a previous application for insurance cannot be taken as a warranty. *Metropolitan L. Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131.

**69. 1. Breach of Warranty as to Previous Rejection for Insurance.** — *Security Mut. L. Ins. Co. v. Webb*, (C. C. A.) 106 Fed. Rep. 808; *Webb v. Bankers' L. Ins. Co.*, 19 Colo. App. 456; *Fell v. John Hancock Mut. L. Ins. Co.*, 76 Conn. 494; *Moore v. Mutual Reserve Fund L. Assoc.*, 133 Mich. 526; *Finn v. Metropolitan L. Ins. Co.*, 70 N. J. L. 255; *Hook v. Michigan Mut. L. Ins. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 478. See also *Home L. Ins. Co. v. Myers*, (C. C. A.) 112 Fed. Rep. 846; *Rupert v. Supreme Ct., etc.*, (Minn. 1905) 102 N. W. Rep. 715.

**Rule Applies Even When Application Conditional.** — *Webb v. Security Mut. L. Ins. Co.*, (C. C. A.) 126 Fed. Rep. 635.

**The Burden of Proof** of the falsity of the statement is on the insurer. *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167.

**Knowledge of the Company's Agent** of the rejection of the insured by another company will avoid the representation. *Globe Mut. L. Ins. Assoc. v. Ahern*, 191 Ill. 167; *Provident Sav. L. Assur. Soc. v. Cannon*, 201 Ill. 260.

In *Speiser v. Phoenix Mut. L. Ins. Co.*, 119 Wis. 530, it was held that the question whether the local agent of the insurer has knowledge of the rejection of the applicant by another company should have been submitted to the jury.

**2. Where Application Was Not Finally Passed Upon.** — The same rule was held to apply where the insured had declined to complete an examination by undergoing a certain test, upon which his application was rejected. *Security Mut. L. Ins. Co. v. Webb*, (C. C. A.) 106 Fed. Rep. 808.

**6. Contra.** — In *Rhode Island* it is held that the agent procuring the insurance is the agent of the applicant in drawing the application, and his knowledge of the previous rejection of the insured by the company will not bind the latter. *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643.

**Where the Company Itself Has Knowledge** of the rejection, it cannot take advantage of the falsity of the statement. *O'Rourke v. John Hancock Mut. L. Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643.

**8. Breach of Warranty as to Other Existing Insurance.** — *Moore v. Mutual Reserve Fund L.*

**70.** (11) *Relation Between Insured and Beneficiary.* — See note 4.

**71.** 3. *Concealment in Absence of Inquiry.* — See note 3.

Failure to Answer Question. — See note 4.

**V. EXCEPTED CAUSES OF DEATH** — 1. *Death While Engaged in Violation of Law* — *a.* WHEN POLICY CONTAINS NO EXCEPTION. — See note 5.

**72.** *b.* WHEN POLICY CONTAINS EXCEPTION — (4) *Criminal and Civil Violations of Law.* — See note 3.

(5) *When Insured Provokes Acts of Violence.* — See notes 4, 6.

**73.** 2. *Self-destruction* — *a.* WHILE SANE — (1) *Implied Exception* — (a) *Insurance for Benefit of Estate of Insured.* — See note 6.

**74.** (b) *Policy Payable to Nominated Beneficiary.* — See notes 5, 6.

**75.** (3) *Statutory Limitations.* — See notes 2, 3, 4.

*b.* WHILE INSANE — (1) *Interpretation of Suicide Clause* — *United States Doctrine.* — See note 7.

**76.** (2) *When Policy Excepts Suicide "Sane or Insane."* — See notes 1, 2.

Assoc., 133 Mich. 526. See also Hood v. Prudential Ins. Co., 26 Pa. Super. Ct. 527.

**Facts Insufficient to Show Misrepresentation.** — Newton v. Southwestern Mut. L. Assoc., 116 Iowa 311.

**Accident Policy Not Within Meaning of Warranty.** — Montreal Coal, etc., Co. v. Metropolitan L. Ins. Co., 24 Quebec Super. Ct. 399.

**70.** 4. *False Warranty as to Relationship.* — A false warranty by the insured that he was the husband of the beneficiary was held to avoid the policy in Makel v. John Hancock Mut. L. Ins. Co., 95 N. Y. App. Div. 241. But such a misrepresentation was held to be immaterial in Ashford v. Metropolitan L. Ins. Co., 98 Mo. App. 505, affirming 80 Mo. App. 638.

**71.** 3. *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, affirmed 172 N. Y. 659. But see Wynn v. Provident L., etc., Co., 99 N. Y. App. Div. 103, where it was held that, though there was no direct inquiry of the insured as to whether he had been treated for alcoholism, the insurer was entitled to know the fact, and the concealment of it was fraudulent.

**4. Effect of Failure to Answer Question in Application.** — Rupert v. Supreme Ct., etc., (Minn. 1905) 102 N. W. Rep. 715.

**5. The Legal Execution of the Insured for Crime** will avoid the policy although he may in fact have been innocent. Burt v. Union Cent. L. Ins. Co., 187 U. S. 362.

**72.** 3. *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49.

**Where Suicide Not a Crime, Suicide Not a Death in Violation of the Law.** — Royal Circle v. Achterath, 204 Ill. 549, 98 Am. St. Rep. 224.

**4. Justifiable Homicide.** — Payne v. Union L. Guards, 136 Mich. 416.

**6. Where Deceased in Wrong in First Instance.** — See Brown v. Supreme Lodge, etc., 83 Mo. App. 633.

**73.** 6. *Contract for Benefit of Estate of Insured Void if Insured Commits Suicide.* — See Mooney v. Ancient Order of United Workmen, 114 Ky. 950, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73, and quoting the text through note 5 on p. 74.

**74.** 5. *Policy Payable to Nominated Beneficiary.* — Mooney v. Ancient Order of United Workmen, 114 Ky. 950, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73; Supreme

Conclave, etc., v. Miles, 92 Md. 613, 84 Am. St. Rep. 528; Campbell v. Supreme Conclave, etc., 66 N. J. L. 274. But see Mutual L. Ins. Co. v. Kelly, (C. C. A.) 114 Fed. Rep. 268.

**6.** *Supreme Conclave, etc., v. Miles*, 92 Md. 613, 84 Am. St. Rep. 528; Campbell v. Supreme Conclave, etc., 66 N. J. L. 274.

**75.** 2. *Missouri Statute.* — *Knights Templars' L. Indemnity Co. v. Jarman*, 187 U. S. 197.

**3.** See Whitfield v. Aetna L. Ins. Co., 125 Fed. Rep. 269.

**4.** *Knights Templars', etc., L. Indemnity Co. v. Jarman*, 187 U. S. 197; Huff v. Sovereign Camp Woodmen of the World, 85 Mo. App. 96.

**7.** *Prevailing View in United States.* — *Supreme Lodge, etc., v. Gelbke*, 198 Ill. 365, reversing 100 Ill. App. 190; *Central Mut. L. Ins. Assoc. v. Anderson*, 195 Ill. 135; *Mooney v. Ancient Order of United Workmen*, 114 Ky. 950; *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455; *Latimer v. Sovereign Camp Woodmen of the World*, 62 S. Car. 145.

**76.** 1. *When Policy Excepts Suicide "Sane or Insane"* — *Illinois.* — *Dickerson v. Northwestern Mut. L. Ins. Co.*, 200 Ill. 270, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 76; *Supreme Lodge, etc., v. Gelbke*, 198 Ill. 365, reversing 100 Ill. App. 190, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 76; *Northwestern Mut. Ins. Co. v. Churchill*, 105 Ill. App. 159; *Brunner v. Equitable L. Assur. Soc.*, 100 Ill. App. 22.

*Kentucky.* — *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455.

*Missouri.* — *Elliott v. Des Moines L. Assoc.*, 163 Mo. 132.

*New York.* — *Harms v. Metropolitan L. Ins. Co.*, 67 N. Y. App. Div. 139.

*South Carolina.* — *Latimer v. Sovereign Camp Woodmen of the World*, 62 S. Car. 145.

*South Dakota.* — *Dischner v. Piqua Mut. Aid, etc., Assoc.*, 14 S. Dak. 436.

*Tennessee.* — *Childress v. Fraternal Union of America*, 113 Tenn. 252, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 76.

**Degree of Insanity Immaterial.** — *Clarke v. Equitable L. Assur. Soc.*, (C. C. A.) 118 Fed. Rep. 374. See also *Jenkins v. National Union*, 118 Ga. 587; *Keefer v. Modern Woodmen of America*, 203 Pa. St. 129.

**2.** *Ellinger v. Mutual L. Ins. Co.*, (1905) 1 K. B. 31.

**77.** (3) *Burden of Proof.* — See notes 1, 3.

c. *BY ACCIDENT* — (1) *Construction of Words "Die by His Own Hand."* — See note 5.

(2) *Construction of Words "Voluntary or Involuntary."* — See note 6.

(3) *Presumption of Accident.* — See note 7.

d. *EVIDENCE* — (1) *Of Intentional Self-destruction* — *Circumstantial Evidence.* — See notes 8, 9, 10.

**78.** *Statement in Proof of Death.* — See notes 4, 5.

**Not Within Rule as to Contracts Impossible of Performance.** — *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. Rep. 268, reversing 109 Fed. Rep. 56.

**77.** 1. *Arnold v. Connecticut Mut. L. Ins. Co.*, 95 Me. 331. See also *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224.

3. *Dickerson v. Northwestern Mut. L. Ins. Co.*, 200 Ill. 270, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Arnold v. Connecticut Mut. L. Ins. Co.*, 95 Me. 331.

**Question for Jury.** — *Mooney v. Ancient Order of United Workmen*, 114 Ky. 950.

5. **Accidental Death.** — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Courtemanche v. Supreme Ct.*, etc., 136 Mich. 30.

6. *Dickerson v. Northwestern Mut. L. Ins. Co.*, 200 Ill. 270, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Supreme Lodge, etc., v. Gelhke*, 198 Ill. 365; *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77.

7. **Presumption in Favor of Accident and Against Suicide** — *United States*. — *National Union v. Fitzpatrick*, (C. C. A.) 133 Fed. Rep. 694; *Fidelity, etc., Co. v. Love*, (C. C. A.) 111 Fed. Rep. 773; *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Union Mut. L. Ins. Co. v. Payne*, (C. C. A.) 105 Fed. Rep. 172.

*Colorado*. — *Ross-Lewin v. Germania L. Ins. Co.*, (Colo. App. 1904) 78 Pac. Rep. 305.

*Illinois*. — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550; *Supreme Ct. of Honor v. Barker*, 96 Ill. App. 490; *Supreme Tent, etc., v. Stensland*, 206 Ill. 124, 99 Am. St. Rep. 137.

*Iowa*. — *Metztradt v. Modern Brotherhood of America*, 112 Iowa 522; *Beverly v. Supreme Tent, etc.*, 115 Iowa 524.

*Kentucky*. — *American Benev. Assoc. v. Stough*, (Ky. 1904) 83 S. W. Rep. 126; *Union Casualty, etc., Co. v. Goddard*, (Ky. 1903) 76 S. W. Rep. 832; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539.

*Louisiana*. — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Boynton v. Equitable L. Assur. Soc.*, 105 La. 202.

*Michigan*. — *Furbush v. Maryland Casualty Co.*, 133 Mich. 479.

*Minnesota*. — *Sartell v. Royal Neighbors of America*, 85 Minn. 369.

*Nebraska*. — *Hardinger v. Modern Brotherhood of America*, (Neb. 1904) 101 N. W. Rep. 983; *Modern Woodmen of America v. Kozak*, 63 Neb. 146; *Sovereign Camp v. Hruby*, (Neb. 1903) 96 N. W. Rep. 908.

*New York*. — *Seybold v. Supreme Tent, etc.*, 86 N. Y. App. Div. 195; *Harms v. Metropolitan L. Ins. Co.*, 67 N. Y. App. Div. 139.

*South Dakota*. — *Chambers v. Modern Woodmen of America*, (S. Dak. 1904) 99 N. W. Rep. 1107.

*Texas*. — *Equitable L. Assur. Soc. v. Liddell*, 32 Tex. Civ. App. 252.

8. **Evidence as to Cause of Death.** — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119.

9. **Intentional or Accidental Death Question of Fact** — *United States*. — *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49; *National Union v. Fitzpatrick*, (C. C. A.) 133 Fed. Rep. 694; *Kerr v. Modern Woodmen of America*, (C. C. A.) 117 Fed. Rep. 593; *Fidelity, etc., Co. v. Freeman*, (C. C. A.) 109 Fed. Rep. 847; *Fidelity, etc., Co. v. Love*, (C. C. A.) 111 Fed. Rep. 773.

*Illinois*. — *Treat v. Merchants' L. Assoc.*, 198 Ill. 431. See also *Central Mut. L. Ins. Assoc. v. Anderson*, 195 Ill. 135.

*Indiana*. — *Supreme Lodge, etc., v. Foster*, 26\* Ind. App. 333.

*Kentucky*. — *American Benev. Assoc. v. Stough*, (Ky. 1904) 83 S. W. Rep. 126; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539.

*Louisiana*. — *Brignac v. Pacific Mut. L. Ins. Co.*, 112 La. 574, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Boynton v. Equitable L. Assur. Soc.*, 105 La. 202.

*Maine*. — *Arnold v. Connecticut Mut. L. Ins. Co.*, 95 Me. 331.

*Michigan*. — *Furbush v. Maryland Casualty Co.*, 133 Mich. 479; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119.

*Minnesota*. — *Sartell v. Royal Neighbors of America*, 85 Minn. 369.

*Nebraska*. — *Hardinger v. Modern Brotherhood of America*, (Neb. 1904) 101 N. W. Rep. 983; *Modern Woodmen of America v. Kozak*, 63 Neb. 146.

*New York*. — *Seybold v. Supreme Tent, etc.*, 86 N. Y. App. Div. 195; *Harms v. Metropolitan L. Ins. Co.*, 67 N. Y. App. Div. 139.

*South Dakota*. — *Dischner v. Piqua Mut. Aid, etc., Assoc.*, 14 S. Dak. 436.

10. **Where Evidence Excludes Inference of Accident.** — *Hart v. Fraternal Alliance*, 108 Wis. 400. See also *Mason v. Supreme Ct.*, etc., 109 Ill. App. 10; *Fey v. I. O. O. F. Mutual L. Ins. Soc.*, 120 Wis. 358.

**78. 4. Statement in Proof of Death.** — *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49; *Supreme Tent, etc., v. Stensland*, 105 Ill. App. 267, affirmed 206 Ill. 124, 99 Am. St. Rep. 137; *Fey v. I. O. O. F. Mutual L. Ins. Soc.*, 120 Wis. 358.

**Proof of Death Not Admissible to Show Manner of Death.** — *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 570.

5. *Union Mut. L. Ins. Co. v. Payne*, (C. C.

**79.** (2) *Of Mental Condition of Suicide* — Verdict of Coroner's Jury. — See notes 1, 2.

**80.** VI. INCONTESTABLE CLAUSES — 1. Validity — Clause Operating After Specified Period. — See notes 1, 3, 4.

2. Rule of Construction Applicable. — See notes 6, 7, 8, 9.

**81.** See note 2.

VII. PAID-UP OR COMMUTED INSURANCE — 2. How the Right Arises — Under Nonforfeiture Clauses. — See note 4.

**82.** 4. Prerequisites to Existence of the Right — a. PAYMENT OF DESIGNATED NUMBER OF PREMIUMS — (3) *Payment of Interest on Premium Notes.* — See note 5.

**83.** Where Premium Notes Are Treated as Loans. — See note 1.

(4) *Note Given for Premium Subsequent to Designated Number.* — See note 5.

Payment Required by Terms of Note. — See note 6.

**84.** b. SURRENDER OF ORIGINAL POLICY AND DEMAND OF PAID-UP POLICY — Surrender Before Default. — See note 1.

A.) 105 Fed. Rep. 172; *Hassencamp v. Mutual Ben. L. Ins. Co.*, (C. C. A.) 120 Fed. Rep. 475; *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550; *Supreme Tent, etc., v. Stensland*, 206 Ill. 124, 99 Am. St. Rep. 137; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119; *Sartell v. Royal Neighbors of America*, 85 Minn. 369; *Modern Woodmen of America v. Kozak*, 63 Neb. 146; *Dischner v. Piqua Mut. Aid, etc., Assoc.*, 14 S. Dak. 436; *Hart v. Fraternal Alliance*, 108 Wis. 490.

**79.** 1. See *Metzradt v. Modern Brotherhood of America*, 112 Iowa 522. See also the cases cited *infra* 111. 1.

2. See *Metzradt v. Modern Brotherhood of America*, 112 Iowa 522.

**80.** 1. Policy Incontestable for Fraud After Specified Period. — *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80; *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524. See also *New York L. Ins. Co. v. Weaver*, 114 Ky. 295.

**Nonpayment of Premiums.** — Where the incontestable clause excepts from its provisions the agreement as to the payment of premiums, the nonpayment of a premium will forfeit it. *Ash v. Fidelity Mut. L. Assoc.*, 26 Tex. Civ. App. 501.

**May Set Up Actual Fraud.** — In *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799, it was held that the insurer was precluded from setting up constructive fraud, but was free to set up actual fraud.

3. *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224; *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524.

4. See *McMaster v. New York L. Ins. Co.*, 183 U. S. 25.

**6. Incontestable Clause Construed in Favor of Insured.** — *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80. See also *North American L. Assur. Co. v. Elson*, 33 Can. Sup. Ct. 383.

7. See *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224, quoting 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80; *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524.

8. See *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80. But compare *Hall v. Mutual Reserve Fund L. Assoc.*, 19 Pa. Super. Ct. 31.

In *Childress v. Fraternal Union of America*, 113 Tenn. 252, it was held that, the incontestable clause and a clause modifying the amount of the recovery in case of suicide being separate and independent, the former did not affect the latter.

9. See *Royal Circle v. Achterath*, 204 Ill. 549, 98 Am. St. Rep. 224, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80.

Where a policy was declared incontestable except for misstatement of age and "except as hereinbefore provided," it was held that the exception only referred to the conditions preceding the incontestable clause, and left the policy incontestable in all other respects. *Union Cent. L. Ins. Co. v. Fox*, 106 Tenn. 347, 82 Am. St. Rep. 885.

**81.** 2. Where the Insured Dies Before the Policy Becomes Incontestable by the lapse of the stipulated period the clause will not apply merely because, under the state laws, suit could not have been brought until after the period had elapsed. *Kelley v. Mutual L. Ins. Co.*, 109 Fed. Rep. 56.

4. *Equitable L. Assur. Soc. v. Evans*, 25 Tex. Civ. App. 553.

**82.** 5. Necessity of Payment of Interest on Outstanding Premium Notes. — *Madison v. Northwestern Mut. L. Ins. Co.*, 141 Cal. 475.

**83.** 1. Stipulation Requiring Payment of Interest. — *Madison v. Northwestern Mut. L. Ins. Co.*, 141 Cal. 475.

5. *Ferguson v. Union Mut. L. Ins. Co.*, 187 Mass. 8.

**6. Payment of Note Required by Its Terms.** — But an extension of the time for payment of a note extends the time within which the paid-up policy may be claimed. *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658.

**84.** 1. Surrender of Policy Before Default Required. — See *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474.

**Demand on the Company's General Agent** is demand on the company, although he is not au-

**84.** Surrender Within Stipulated Time After Default. — See notes 3, 4.

Effect of Death of Insured Within Designated Time for Surrender. — See note 6.

**85.** 6. Forfeiture of Policy. — See note 7.

**86.** See note 1.

**VIII. ASSIGNMENT — 1. Validity and Effect — a. IN GENERAL — ASSIGNABILITY OF POLICY.** — See note 7.

Policy Payable to Legal Representatives of Insured. — See note 8.

**87.** Effect of Assignment. — See note 5.

**b. ASSIGNMENT TO CREDITOR — Assignment as Collateral Security.** — See notes 7, 8.

**88.** The Fact that the Assignment Is Absolute in Form. — See note 1.

Duty of Assignor to Pay Premiums. — See note 4.

**89.** *d.* AS AGAINST CREDITORS OF ASSIGNOR. — See notes 2, 3.

thorized to issue paid-up policies. *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 658.

**84.** 3. Effect of Failure to Surrender Within Stipulated Time After Default. — *Nielsen v. Provident Sav. L. Assur. Soc.*, (Cal. 1901) 66 Pac. Rep. 663; *Wells v. Vermont L. Ins. Co.*, 28 Ind. App. 620; *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474; *Inloes v. Prudential Ins. Co.*, 109 Mo. App. 104; *Equitable L. Assur. Soc. v. Evans*, 25 Tex. Civ. App. 563.

Where Policy Is Lost. — *Lindenthal v. Germania L. Ins. Co.*, 174 N. Y. 76.

In an action to compel the issue of a new paid-up policy it is not necessary to plead that the insured had volunteered to execute and deliver an instrument that would operate as a surrender of the policy, as the court has power before rendering final judgment to require the execution of such a paper if it is necessary. *Wilcox v. Equitable L. Assur. Soc.*, 173 N. Y. 50, reversing 55 N. Y. App. Div. 529.

The Insurer May Waive a Surrender of the policy by disclaiming any liability under it. *Nielsen v. Provident Sav. L. Assur. Soc.*, 139 Cal. 332, 96 Am. St. Rep. 146.

**4.** *Mutual Ben. L. Ins. Co. v. Harvey*, (Ky. 1904) 79 S. W. Rep. 218; *Crutchfield v. Union Cent. L. Ins. Co.*, 113 Ky. 53; *Washington L. Ins. Co. v. Miles*, 112 Ky. 743.

In Kentucky Five Years has been fixed by the court as a reasonable time within which to demand a paid-up policy. *Washington L. Ins. Co. v. Glover*, (Ky. 1904) 78 S. W. Rep. 146; *Washington L. Ins. Co. v. Lyne*, (Ky. 1904) 83 S. W. Rep. 122. And a delay of five years or more after default is laches, and bars the right. *Equitable L. Assur. Soc. v. Warner Deposit Bank*, (Ky. 1903) 75 S. W. Rep. 275; *New York L. Ins. Co. v. Warren Deposit Bank*, (Ky. 1903) 75 S. W. Rep. 234; *Mutual L. Ins. Co. v. O'Neil*, 116 Ky. 742. The bankruptcy of the insured will not avoid the plea of laches. *Equitable L. Assur. Soc. v. Warren Deposit Bank*, (Ky. 1903) 76 S. W. Rep. 391.

**6.** Death of Insured Within Designated Time of Surrender. — *Nielsen v. Provident Sav. L. Assur. Soc.*, 139 Cal. 332, 96 Am. St. Rep. 146.

**85.** 7. Forfeiture of Paid-up Policy for Non-payment of Interest on Outstanding Note. — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

**86.** 1. *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

**7.** Life-insurance Policy Assignable. — *Steele v. Gatlin*, 115 Ga. 929; *Farmers', etc., Bank v. Johnson*, 118 Iowa 282; *Lockett v. Lockett*, (Ky. 1904) 80 S. W. Rep. 1152; *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

**8.** Policy Payable to Insured's Legal Representatives. — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

**87.** 5. *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *McGlynn v. Curry*, 82 N. Y. App. Div. 431.

**7.** Assignment as Collateral. — *Culver v. Guyer*, 129 Ala. 602; *Lee v. Mutual L. Ins. Co.*, (Ky. 1904) 82 S. W. Rep. 258; *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318; *Shaw v. Cornell*, 59 N. Y. App. Div. 573; *Roanoke First Nat. Bank v. Terry*, 99 Va. 194.

**8.** Title Passes to Assignee by Assignment. — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

The Assignee Is Entitled to Hold the Policy against the insured's administrator until the debt is paid, in the absence of proof of the former's insolvency, or of the danger of loss to the latter from permitting the assignee to collect the policy. *Cash v. Hayden*, (Ky. 1904) 83 S. W. Rep. 136.

Tender of Debt. — While the assignment vests in the creditor a title to enable him to collect the proceeds of the policy, it does not divest the assignor of the general property in the policy, and a tender of the debt extinguishes the creditor's lien and entitles the pledgor to the possession of the collateral. *Clark v. Equitable L. Assur. Soc.*, 133 Fed. Rep. 816.

Limitation of Liability to Amount of Debt. — The policy may provide that on assignment the company's liability shall be limited to the amount due to the assignee by the insured. *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, affirmed 112 Wis. 676, 88 Am. St. Rep. 986.

**88.** 1. Assignment Absolute in Form. — *Roanoke First Nat. Bank v. Terry*, 99 Va. 194.

**4.** Duty to Pay Premiums. — *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986.

Assignee under No Obligation to Pay Premiums. — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

**89.** 2. Assignment by Insolvent for Benefit of



**90. g. EFFECT OF INVALID ASSIGNMENT. — See note 2.**

Where the Insurer Has Paid the Assignee. — See note 4.

*h.* CONFLICT OF LAWS. — See note 8.

*2. Who May Assign — a. THE INSURED. — See note 9.*

**91. b. THE BENEFICIARY — Policy Taken Out in Favor of Wife and Children. — See note 6.****92. Statute Authorizing Assignment by Wife — New York. — See note 3.**

Consent of Husband. — See notes 7, 9.

**93. 3. Who May Be Assignee — Insurable Interest. — See notes 1, 2.****4. What Constitutes an Assignment — a. IN GENERAL — No Particular Form Required. — See note 4.**

The Assignment Need Not Necessarily Be in Writing. — See note 7.

**94. Assignment Without Delivery. — See note 3.**

Effect of Stipulations in Policy. — See note 5.

Assignment in Duplicate — Delivery. — See note 6.

**95. b. NOTICE OF ASSIGNMENT. — See note 5.****96. c. CONSENT OF INSURER. — See note 3.**

*5. Rights and Liabilities of Assignee — a. IN GENERAL. — See note 10.*

Wife, etc., Not Necessarily Void. — *Steeley v. Steeley*, (Ky. 1901) 64 S. W. Rep. 642; *Morehead v. Mayfield*, 109 Ky. 51.

**89. 3. Morehead v. Mayfield**, 109 Ky. 51.

**90. 2. Policy Not Vitiating by Invalid Assignment.** — *Miller v. Manhattan L. Ins. Co.*, 110 La. 652.

**4. Action Against Insurer.** — *Miller v. Manhattan L. Ins. Co.*, 110 La. 652.

**8. Validity of Assignment Determined by Lex Loci Contractus.** — *Miller v. Manhattan L. Ins. Co.*, 110 La. 652, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723.

**9. Policy Not Assignable by Insured to Prejudice of Beneficiary.** — *Penn Mut. L. Ins. Co. v. Norcross*, 163 Ind. 379.

**91. 6. Assignment by Wife Held Valid.** — On the husband's death the contingent interest of the wife vests, and the defeasible title of her assignee becomes absolute. *Herr v. Reinoehl*, 209 Pa. St. 483.

**92. 3. Assignment by Wife under New York Laws.** — *Sherman v. Allison*, 77 N. Y. App. Div. 49, affirmed 177 N. Y. 574.

**7. When Husband's Consent Unnecessary.** — The statute does not apply to a paid-up policy issued, payable to the wife of the insured, in exchange for a policy payable to the personal representatives of the insured, and an assignment thereof by the wife, without the consent of the husband, is valid. *Dannhausen v. Wallenstein*, 169 N. Y. 199. See also *Morschauer v. Pierce*, 64 N. Y. App. Div. 558.

**9. What Constitutes Written Consent.** — Separate assignments by the husband and wife to the same party, on the same date, and on the same paper satisfy the requirements of the statute. *Sherman v. Allison*, 77 N. Y. App. Div. 49, affirmed 177 N. Y. 574.

**93. 1. Assignee Must Have Insurable Interest.** — *Price v. Atchison First Nat. Bank*, 62 Kan. 743; *Lee v. Mutual L. Ins. Co.*, (Ky. 1904) 82 S. W. Rep. 258; *Lockett v. Lockett*, (Ky. 1904) 80 S. W. Rep. 1152; *Dugger v. Mutual L. Ins. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 335; *Hatch v. Hatch*, 35 Tex. Civ. App. 373.

**2. Assignee Not Required to Have Insurable Interest.** — *Farmers, etc., Bank v. Johnson*, 118

Iowa 282; *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625.

**If Assigned in Good Faith.** — *Chamberlain v. Butter*, 61 Neb. 730, 87 Am. St. Rep. 478.

**4. Informal Assignment Valid.** — *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558.

**May Be Assigned by Will under Quebec Statutes.** — *Hardy v. Shannon*, 19 Quebec Super. Ct. 325.

**7. Parol Assignment by Delivery of Policy.** — *Lockett v. Lockett*, (Ky. 1904) 80 S. W. Rep. 1152; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435; *McGlynn v. Curry*, 82 N. Y. App. Div. 431; *Box v. Lanier*, 112 Tenn. 393; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 3004.

**In Georgia Must Be in Writing.** — *Steele v. Gatlin*, 115 Ga. 929.

**94. 3. Assignment Without Delivery.** — *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231; *McDonough v. Aetna L. Ins. Co.*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 625; *Scully's Estate*, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

**5. Nonobservance of Prescribed Formalities Immaterial as Between Parties to Assignment.** — *McGlynn v. Curry*, 82 N. Y. App. Div. 431.

**6. Assignment in Duplicate — Want of Delivery to Assignee.** — Compare *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231; (*distinguishing* *Spooner v. Hilbish*, 92 Va. 333), holding such an assignment of a paid-up policy effectual without delivery where there was a sufficient consideration and the assignee had assented to the delivery.

**95. 5. Want of Notice Immaterial Where Insurer Not Injured Thereby.** — *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004.

**96. 3. Consent Required by Terms of Policy.** — *Newman v. John Hancock Mut. L. Ins. Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 320.

**A Letter of the Insurer Acknowledging Receipt of the assignment is a sufficient indication of consent.** *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

**10. Assignee Takes Only Title of Assignor.** — *Mutual L. Ins. Co. v. Kelly*, (C. C. A.) 114 Fed. Rep. 268; *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799; *Flaherty v. Metropolitan*

**97.** Right of Assignee under Void Assignment to Reimbursement. — See note 2.

**99.** **X. ABANDONMENT OF CONTRACT BY INSURER — RECOVERY OF PREMIUMS** — Change from One System of Insurance to Another. — See note 4.

**100.** **XI. NOTICE AND PROOFS OF DEATH — 1. Necessity for — a. AS A CONDITION PRECEDENT TO RIGHT OF ACTION ON POLICY.** — See notes 1, 2.

**c. WAIVER OF PROOF** — Implied Waiver — Denial of Liability. — See note 10.

**101.** See note 1.

**3. Sufficiency of Proof — a. IN GENERAL — Proof of Cause of Death.** — See note 6.

**102.** **b. WAIVER OF DEFECTS** — Failure to Object to Irregularities. — See note 1.

**Denial of Liability on Other Grounds.** — See note 2.

**XII. ACTIONS ON POLICIES — 1. Who May Sue.** — See note 3.

**103.** **2. Time of Bringing Suit — a. WHEN RIGHT OF ACTION ACCRUES.** — See notes 1, 2.

**c. LIMITATION IN POLICY.** — See note 6.

**104.** See note 3.

**When Limitation Begins to Run.** — See note 4.

L. Ins. Co., (Supm. Ct. App. T.) 38 Misc. (N. Y.) 759, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 824.

**97. 2. Right to Reimbursement.** — Connecticut Mut. L. Ins. Co. v. Dunscorn, 108 Tenn. 724, 91 Am. St. Rep. 769, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97; Stevens v. Germania L. Ins. Co., 26 Tex. Civ. App. 156.

**99. 4. A Reorganization of a Mutual Insurance Company**, where its corporate identity remains the same, and its rights and liabilities are not affected, will not entitle a member to recover a premium paid. Muller v. State L. Ins. Co., 27 Ind. App. 45.

**100. 1. Hart v. Fraternal Alliance**, 108 Wis. 490.

**2. Notice Sent to the Acting Secretary** of the company is sufficient without proof of his election to the office. Supreme Lodge, etc., v. Matejowsky, 190 Ill. 142.

**10. Denial of Liability.** — Rutherford v. Prudential Ins. Co., 34 Ind. App. 531; Prudential Ins. Co. of America v. Devoe, 98 Md. 584; Weber v. Ancient Order of Pyramids, 104 Mo. App. 729; Keller v. Home L. Ins. Co., 95 Mo. App. 627; Seely v. Manhattan L. Ins. Co., 72 N. H. 49; Cole v. Preferred Acc. Ins. Co., (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 260, affirmed 92 N. Y. App. Div. 612; Metropolitan L. Ins. Co. v. Gibbs, 34 Tex. Civ. App. 131.

A company will be held to have waived the requirement where it has unsuccessfully attempted to settle the claim and subsequently denied liability. Willison v. Jewelers', etc., Co., (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 216.

**Time of Denial.** — The denial must have been made before the period within which the proof of death is required to be made. Hart v. Fraternal Alliance, 108 Wis. 490.

**101. 1. Refusal to Furnish Blanks for Proof of Death.** — National Masonic Acc. Assoc. v. Seed, 95 Ill. App. 43; Metropolitan L. Ins. Co. v. Gibbs, 34 Tex. Civ. App. 131; New York L. Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284.

**Where the Insurer Mailed Blanks** for proof of death, which were not received by the insured,

and upon a further demand sent other blanks, which were filled up and sent in several days after the time limit, it was held that the insurer used the mails for sending the blanks at its own risk and that the delay arose from its omissions and delays. Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 379.

**6. Knights Templars, etc., L. Indemnity Co.** v. Crayton, 209 Ill. 550.

**Proofs Need Only Establish Prima Facie Case.** — Aetna L. Ins. Co. v. Milward, (Ky. 1904) 82 S. W. Rep. 364.

**102. 1. National Masonic Acc. Assoc. v. Seed**, 95 Ill. App. 43.

**2. White v. Metropolitan L. Ins. Co.**, 22 Pa. Super. Ct. 501.

**3. Suit on Policy Payable to Insured, Etc.** — Ives v. Mutual L. Ins. Co., 129 N. Car. 28. See also Metropolitan L. Ins. Co. v. Gibbs, 34 Tex. Civ. App. 131.

**Where there is No Personal Representative**, action may be brought by the widow and children of the insured, although the policy is payable to his executors, administrators, or assigns. Sun L. Ins. Co. v. Phillips, (Tex. Civ. App. 1902) 70 S. W. Rep. 603.

**103. 1. When Right of Action Accrues.** — Where proofs of death are furnished as required, the insurer's request for additional proof of death does not cause the time to run from the furnishing of the additional proof. Wood v. Farmer's L. Assoc., 121 Iowa 44.

**2. Ronan v. Michigan Mut. L. Ins. Co.**, 96 Ill. App. 355.

**6. Limitation of Time for Bringing Suit Valid.** — Lewis v. Metropolitan L. Ins. Co., 180 Mass. 317; Sullivan v. Prudential Ins. Co., 172 N. Y. 482; Fey v. I. O. O. F. Mutual L. Ins. Soc., 120 Wis. 358. See also Ryer v. Prudential Ins. Co., 85 N. Y. App. Div. 7.

**104. 3. Limitation Void under Statute.** — Rutherford v. Prudential Ins. Co., 34 Ind. App. 531; Union Cent. L. Ins. Co. v. Spinks, (Ky. 1904) 83 S. W. Rep. 615.

**4. Limitation Runs from Time Right of Action Accrues.** — Fidelity, etc., Co. v. Love, (C. C. A.) 111 Fed. Rep. 773.

**104.** Waiver of Limitation. — See note 6.

**105.** 3. Demand for Payment. — See note 2.

4. Defenses — The Nonpayment of Premiums. — See note 10.

**106.** 6. Amount of Recovery. — See notes 9, 10, 11.

**XIII. EVIDENCE — 1. As to Truth or Falsity of Statements in Application — a. DECLARATIONS OF INSURED — Authorities Conflicting. — See note 13.**

**107.** Declarations Prior to Application. — See notes 1, 3.

Declarations Not a Part of the Res Gestæ. — See note 4.

Declarations Subsequent to the Contract. — See note 5.

b. PROOFS OF DEATH. — See notes 7, 8.

**108.** Evidence Not Conclusive. — See note 2.

c. PHYSICIAN'S CERTIFICATE TO BOARD OF HEALTH. — See note 4.

d. CERTIFICATE OF EXAMINING PHYSICIAN. — See note 5.

**104. 6. Waiver of Limitation.** — *Home Friendly Soc. v. Roberson*, 100 Md. 85; *Peters v. Empire L. Ins. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 296; *Bowen v. Preferred Acc. Ins. Co.*, 82 N. Y. App. Div. 458; *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 83 Am. St. Rep. 844. See also *Fey v. I. O. O. F. Mutual L. Ins. Soc.*, 120 Wis. 358.

Negotiations carried on in good faith, without any promise of payment or attempt to prevent suit being brought in time, will not constitute a waiver. *Vincent v. Mutual Reserve Fund L. Assoc.*, 74 Conn. 684.

Denial of Liability waives the requirement of proof of death and consequently also the limitation of the right of action within a certain time after proof of death. *Cole v. Preferred Acc. Ins. Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 260, affirmed 92 N. Y. App. Div. 612.

Acceptance and Retention of the policy and papers are sufficient to raise a question of fact as to the waiver of the provision. *Tobin v. Workmen's Co-operative Assoc.*, 66 N. Y. App. Div. 21.

The fact that the insurer requested the policy and kept it in its possession is not a waiver of the provision, where it appeared that the insurer had continuously disclaimed liability. *Lewis v. Metropolitan L. Ins. Co.*, 180 Mass. 317.

**105. 2. Where the Insurer Denies Liability.** — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550.

**10. Premiums Paid by Third Person.** — See *Galvin v. Union Cent. L. Ins. Co.*, 115 Ky. 547, where it was held that nonpayment at maturity of a note taken by the insurer from a third person did not avoid the policy.

**106. 9. Where the Insurance Is Payable in Annual Instalments, beginning with the death of the insured, judgment cannot be rendered against the company for the whole amount of the policy on its refusal to pay the first instalment when due.** *New York L. Ins. Co. v. English*, 96 Tex. 268.

**10. Interest.** — *Kelley v. Mutual L. Ins. Co.*, 109 Fed. Rep. 56; *Mutual L. Ins. Co. v. Allen*, 212 Ill. 134; *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550; *Supreme Lodge, etc., v. Lapp*, (Ky. 1903) 74 S. W. Rep. 656.

**11. Set-off.** — *Grand Lodge, etc., v. Orrell*, 109 Ill. App. 422, affirmed 206 Ill. 208; *Smith v. Northwestern Nat. L. Ins. Co.*, 123 Wis. 586.

See *Bracher v. Equitable L. Assur. Soc.*, 103 N. Y. 269, reversing (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 299.

**13.** See *Elliott v. Des Moines L. Assoc.*, 163 Mo. 132.

**107. 1.** *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 593; *Finn v. Prudential Ins. Co.*, 98 N. Y. App. Div. 588.

**3.** *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 593.

**4. Prior Declarations Not Part of Res Gestæ Inadmissible.** — *Dimick v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367; *Henn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 310.

**5. Declaration Subsequent to Application Inadmissible.** — *Henn v. Metropolitan L. Ins. Co.*, 67 N. J. L. 310.

**7. Proofs of Death Prima Facie Evidence of Facts Therein.** — *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 593.

A Provision in the Policy that the proof of death shall be evidence of the facts therein stated in behalf of but not against the insurer is valid. *Donnelly v. Metropolitan L. Ins. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 87.

**8. Proofs of Death Admissible to Impeach Truth of Application.** — *Rondinella v. Metropolitan L. Ins. Co.*, 24 Pa. Super. Ct. 293; *Baldi v. Metropolitan L. Ins. Co.*, 24 Pa. Super. Ct. 275.

**108. 2. Statements in Proofs of Death Not Conclusive.** — *Abraham v. Mutual Reserve Fund L. Assoc.*, 183 Mass. 116; *Bowen v. Preferred Acc. Ins. Co.*, 82 N. Y. App. Div. 458; *Barnett v. Prudential Ins. Co.*, 91 N. Y. App. Div. 435; *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559; *Baldi v. Metropolitan L. Ins. Co.*, 24 Pa. Super. Ct. 275.

**4. Physician's Certificate Inadmissible.** — *Compare Ohmeyer v. Supreme Forest Woodmen Circle*, 91 Mo. App. 189.

The Certificate of the Board of Health is not admissible in evidence to show the age of the deceased, as it proceeded on nothing more than statements of members of the deceased's family to the undertaker. *Dinan v. Supreme Council, etc.*, 201 Pa. St. 363.

**5. Certificate of Examining Physician as Evidence.** — *Rhode v. Metropolitan L. Ins. Co.*, 129 Mich. 112.

**Under Statute in Iowa.** — *Brown v. Modern Woodmen of America*, 115 Iowa 450; *Wood v. Farmer's L. Assoc.*, 121 Iowa 44; *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa 203; *Welch v. Union Cent. L. Ins. Co.*, 117 Iowa 394.

**109.** *f.* TESTIMONY OF NONEXPERT. — See note 6.

**110.** 2. Of Death of the Insured — *b.* OF THE CAUSE OF DEATH — *Proofs of Death.* — See note 7.

**111.** The Verdict of a Coroner's Jury. — See note 1.

**LIGHT.** — See note 6.

The statute has no application to fraternal benefit associations. *Smith v. Supreme Lodge, etc.*, 123 Iowa 676.

**109.** 6. *Reininghaus v. Merchants' L. Assoc.*, 116 Iowa 364. See also *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614.

A nonexpert may testify that the insured was unable to speak above a whisper and was emaciated. *Home Circle Soc. No. 1 v. Shelton*, (Tex. Civ. App. 1904) 81 S. W. Rep. 84.

It has been held that the testimony of non-expert witnesses is admissible to show that the insured was in sound health at the time of issue of the policy. *Rondinella v. Metropolitan L. Ins. Co.*, 24 Pa. Super. Ct. 293.

**110.** 7. *Physician's Certificate Not Conclusive.* — *Dischner v. Piqua Mut. Aid, etc., Assoc.*, 14 S. Dak. 436; *Denver L. Ins. Co. v. Price*, 18 Colo. App. 30.

**111.** 1. *Verdict of Coroner's Jury.* — *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550, which further holds that depositions taken at the inquest are not competent except for contradiction.

*Competent but Not Conclusive.* — *Metzradt v.*

*Modern Brotherhood of America*, 112 Iowa 522. See also *Hassencamp v. Mutual Ben. L. Ins. Co.*, (C. C. A.) 120 Fed. Rep. 475.

*Cases Holding Coroner's Verdict Inadmissible.* — *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43; *Ætna L. Ins. Co. v. Milward*, (Ky. 1904) 82 S. W. Rep. 364; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137, *affirmed* 172 N. Y. 659; *Chambers v. Modern Woodmen of America*, (S. Dak. 1904) '99 N. W. Rep. 1107. See also *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559; *Fey v. I. O. O. F. Mutual L. Ins. Soc.*, 120 Wis. 358.

**6. Light in Hallways of Lodging Houses.** — The word *light* in the *New York* statute requiring the owner or lessee of a tenement or lodging house to keep a *light* burning in the hallway between certain hours, means an artificial *light*, such, for example, as is furnished by a lamp, a jet of illuminating gas, or some form of apparatus employed to illuminate buildings by means of electricity. *Bretsch v. Plate*, 82 N. Y. App. Div. 399.

## LIGHT AND AIR.

BY H. N. ELDRIDGE.

**112.** I. GENERAL DOCTRINE AS TO PROPERTY IN LIGHT AND AIR. — See note 1.

**113.** See notes 1, 2, 3.

II. ACQUISITION OF RIGHT TO LIGHT AND AIR — 2. By Grant —

*a.* EXPRESS GRANT. — See note 6.

**114.** See note 2.

*b.* IMPLIED GRANT — *English Doctrine.* — See note 4.

**112.** 1. *No Absolute Property in Light and Air.* — *Colls v. Home, etc., Stores*, (1904) A. C. 179.

**113.** 1. *Right to Light and Air Is Property.* — *Bloom v. Koch*, 63 N. J. Eq. 10.

2. *Right to Light and Air Incorporeal Hereditament.* — *Egerer v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 421.

3. *Nature of Easement in General.* — See *Colls v. Home, etc., Stores*, (1904) A. C. 179.

6. *Easement of Light and Air Acquired by Express Grant.* — *Bloom v. Koch*, 63 N. J. Eq. 10. See also *Harrow v. Marylebone Dist. Property Co.*, 86 L. T. N. S. 4; *Jackson v. Eli*, 23 App. Cas. (D. C.) 122.

**114.** 2. *Easement of Light and Air Not Created by Parol.* — *Hutchins v. Munn*, 22 App. Cas. (D. C.) 98, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114.

4. *Implied Grant of Easement of Light and Air*

— *English Rule.* — *Pollard v. Gare*, (1901) 1 Ch. 834. See also *Godwin v. Schweppes*, (1902) 1 Ch. 926.

But a Contract for the Sale of a House with Windows Looking over the Land of a Third Person implies no representation or warranty that the windows are entitled to the access of light over that land. *Greenhalgh v. Brindley*, (1901) 2 Ch. 324.

As to Easements of Light Which Grantor Had No Power to Grant Expressly. — The provision of the English Conveyancing Act, 1881, § 6, that a conveyance of land with houses on it shall operate to convey with the land (*inter alia*) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, and does not operate to convey an easement of light which he has no power to grant expressly. *Quicke v. Chapman*, (1903) 1 Ch. 659.

- 115.** United States Doctrine. — See note 2.  
Easement of Necessity. — See note 3.
- 117.** 3. By Prescription. — *a.* ENGLISH DOCTRINE — ANCIENT LIGHTS — Prescription Act. — See note 3.
- 118.** *b.* UNITED STATES DOCTRINE. — See note 3.
- 120.** IV. RIGHT TO LIGHT OR AIR IN CERTAIN CASES CONSIDERED —
2. From Streets and Highways. — See note 6.
- 121.** Obstruction of Light and Air by Elevated Railroad. — See note 1.
- 124.** V. ACTIONS FOR OBSTRUCTION OF LIGHT AND AIR — 3. Action at Law — What Constitutes Obstruction. — See note 1.
4. Suit in Equity. — See note 2.
- Must Be Substantial Interference with Plaintiff's Rights. — See note 4.
- 126.** 5. Evidence. — See note 1.
- 127.** VI. LOSS OR EXTINGUISHMENT OF EASEMENT — 4. By Abandonment. — See note 8.
- 128.** 5. Effect of Alteration of Building. — See note 5.
- 129.** Rebuilding House. — See note 4.
- 130.** LIKE. — See note 8.
- 132.** LIKEWISE. — See note 2.
- 133.** LIMIT — LIMITED. — See note 2.
- 134.** LIMITATION. — See note 1.

**115.** 2. Ordinarily No Implied Grant of Easement of Light and Air. — See *Hutchins v. Munn*, 22 App. Cas. (D. C.) 102, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115.

3. Implied Grant of Easement When Necessary to Enjoyment of Estate Conveyed. — *Bloom v. Koch*, 63 N. J. Eq. 10.

**117.** 3. Prescription Act. — *Smith v. Baxter*, (1900) 2 Ch. 138; *Ruscoe v. Grounsell*, 89 L. T. N. S. 426.

A Skylight Is a "Window" Within the Meaning of an Agreement allowing windows in plaintiff's conservatory to open into and overlook defendant's property. *Easton v. Isted*, (1903) 1 Ch. 405.

**118.** 3. No Prescriptive Right to Light and Air — Doctrine in the United States. — *Jesse French Piano, etc., Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71; *Hutchins v. Munn*, 22 App. Cas. (D. C.) 101, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 118; *Goodwin v. Alexander*, 105 La. 658; *Bloom v. Koch*, 63 N. J. Eq. 10.

**120.** 6. Compensation. — *Egerer v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 421.

**121.** 1. Loss of Easement by Owner. — *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

**124.** 1. No Right of Action for Damages in Absence of Material Injury. — *Colls v. Home, etc., Stores*, (1904) A. C. 179, reversing (1902) 1 Ch. 302, and overruling *Warren v. Brown*, (1902) 1 K. B. 15.

2. Remedy by Injunction. — *Cowper v. Laidler*, (1903) 2 Ch. 337; *Bloom v. Koch*, 63 N. J. Eq. 10.

4. Injunction Granted Only in Case of Material Injury. — *Colls v. Home, etc., Stores*, (1904) A. C. 179, reversing (1902) 1 Ch. 302, and overruling *Warren v. Brown*, (1902) 1 K. B. 15.

**126.** 1. Burden on Plaintiff to Establish

Easement. — *Feigenbaum v. Jackson*, 8 British Columbia 417.

**127.** 8. Abandonment by Permanent Closing of Windows. — See also *Smith v. Baxter*, (1900) 2 Ch. 138. See also *Johnson v. Hahne*, 61 N. J. Eq. 438, where windows to which an easement of air and light pertained were permanently closed for over forty years, and it was held that equity would not enjoin the erection of a building on an adjoining lot which would interfere with such easement, even if it still existed.

**128.** 5. Location of Windows Changed by Raising of Building. — An easement of light and air pertaining to windows in a building which is subsequently raised, thereby causing a substantial change in the location of the windows, is not continued as to such windows in their new position. *Johnson v. Hahne*, 61 N. J. Eq. 438.

**129.** 4. Rebuilding House. — See *Smith v. Baxter*, (1900) 2 Ch. 138.

**130.** 8. Like Courts. — See *Welborne v. State*, 114 Ga. 793.

Like Manner. — *Stuyvesant Real Estate Co. v. Sherman*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 205.

**132.** 2. Wills. — *Oetjen v. Diemmer*, 115 Ga. 1005.

**133.** 2. Limited Publication — Copyright Law. — "A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public." *Per Townsend, J.*, in *Werckmeister v. American Lith. Co.*, (C. C. A.) 134 Fed. Rep. 324.

Limited and Absolute Predestination. — See *Bennett v. Morgan*, 112 Ky. 512.

**134.** 1. Condition Distinguished from Limitation. — *Hoselton v. Hoselton*, 166 Mo. 182,

# LIMITATION OF ACTIONS.

By P. B. MCKENZIE.

**146. II. THE STATUTES OF LIMITATION — 2. Operation and Effect —**  
**b. STATUTES OF REPOSE.** — See note 10.

**147. c. WHETHER REMEDY ALONE OR MERITS AFFECTED.** — See note 1.

**149. e. DISTINGUISHED FROM SIMILAR QUESTIONS — (4) From Presumption of Payment** — At Common Law. — See note 6.

**150. (6) From Qualifications Annexed to Given Right.** — See note 6.

**151. f. HOW REGARDED AS DEFENSE — Statutes Favorably Regarded.** — See note 14.

**152. h. WHERE PLAINTIFF HAS SEVERAL REMEDIES.** — See note 7.

**146. 10.** *Nelson v. Montgomery First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52; *McWhorter v. Cheney*, 121 Ga. 541; *Bradley v. Lightcap*, 201 Ill. 511, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 146; *Cassell v. Lowry*, 164 Ind. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 146; *Haythorn v. Cooper*, 65 Kan. 338; *Lewis v. Duncan*, 66 Kan. 306; *Cone v. Hyatt*, 132 N. Car. 810; *Templeman v. Pugh*, 102 Va. 441.

**147. 1. Whether Remedy Alone and Not Merits Affected** — *United States*. — *Davis v. Mills*, 194 U. S. 451.

*Alaska*. — *Van Schuyver v. Hartman*, 1 Alaska 431.

*California*. — *Bickerdike v. State*, 144 Cal. 681.

*Georgia*. — *Conway v. Caswell*, 121 Ga. 254.

*Illinois*. — *Bradley v. Lightcap*, 201 Ill. 511; *Staninger v. Tabor*, 103 Ill. App. 330.

*Indiana*. — *Cassell v. Lowry*, 164 Ind. 1.

*Iowa*. — *German-American Sav. Bank v. Hanna*, 124 Iowa 374.

*Missouri*. — *Kreyling v. O'Reilly*, 97 Mo. App. 384.

*Montana*. — *Custer County v. Story*, 26 Mont. 522, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147; *Wilson v. Pickering*, 28 Mont. 435.

*New York*. — *Matter of Moench*, (Surrogate Ct.) 39 Misc. (N. Y.) 480.

*North Carolina*. — *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 146 [147]; *Cone v. Hyatt*, 132 N. Car. 810.

*Pennsylvania*. — *Strickler v. Scheible*, 13 Pa. Dist. 657, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

*Rhode Island*. — *Kilton v. Providence Tool Co.*, 22 R. I. 605.

*South Dakota*. — *McConnell v. Spicker*, 15 S. Dak. 98.

*Washington*. — *State v. Aberdeen*, 34 Wash. 66.

**149. 6. Presumption of Payment.** — *Kahm v. Klaus*, 64 Kan. 24.

"The mere running of the statute of limitations does not pay the debt or raise any presumption of payment." *Hixson v. Rodbourn*, 67 N. Y. App. Div. 424.

**150. 6. Statutory Qualifications Annexed to Right.** — *Peters v. Hanger*, (C. C. A.) 134 Fed. Rep. 586, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 150, and quoting the entire text paragraph; *Christie-St. Commission Co. v. U. S.*, 126 Fed. Rep. 991; *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674; *Bean v. Dove*, 33 Tex. Civ. App. 377.

**Statute Conferring Right to Redeem.** — See *Hawley v. Griffin*, 121 Iowa 667; *Meyer v. Moss*, 110 La. 132.

**151. 14. Statutes Regarded with Favor** — *Alabama*. — *Nelson v. Montgomery First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52.

*Massachusetts*. — *Gillingham v. Brown*, 178 Mass. 417.

*Minnesota*. — *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709.

*North Dakota*. — *Wheeler v. Castor*, 11 N. Dak. 355, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 151.

*Virginia*. — *Templeman v. Pugh*, 102 Va. 441.

*Washington*. — *Deering v. Holcomb*, 26 Wash. 588; *Libermon v. Gurensky*, 27 Wash. 410.

**152. 7. Where Several Remedies Available** — *Alabama*. — *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159.

*Georgia*. — *Conway v. Caswell*, 121 Ga. 254.

*Iowa*. — *Bonbright v. Bonbright*, 123 Iowa 305; *German-American Sav. Bank v. Hanna*, 124 Iowa 374.

*Kansas*. — *Jackson v. Longwell*, 63 Kan. 93.

*Montana*. — *Custer County v. Story*, 26 Mont. 522.

*Nebraska*. — *Hyde v. Hartford F. Ins. Co.*, (Neb. 1903) 97 N. W. Rep. 629.

*New York*. — *McManus v. Harrigan*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 615.

*North Carolina*. — *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647; *Cone v. Hyatt*, 132 N. Car. 810.

*Texas*. — *Ennis v. Gilder*, 32 Tex. Civ. App. 351.

**Court Will Apply Statute Prescribing Longest Time.** — *Crum v. Johnson*, (Neb. 1902) 92 N. W. Rep. 1054.

**153.** But This Rule Is Subject to the Qualification. — See note 1.

*j.* STATUTE DOES NOT BAR DEFENSES. — See note 6.

**154.** III. IN EQUITY — 1. Original Doctrine. — See note 2.

2. Under Ordinary Statutes of Limitation — *a.* IN CASES OF EXCLUSIVE JURISDICTION IN EQUITY. — See notes 5, 6, 8.

**155.** See note 1.

*b.* IN CASES OF CONCURRENT JURISDICTION — (1) *Controlling Effect of Statute.* — See note 3.

**156.** See note 1.

**159.** 3. Origin and Meaning of Rule of Analogy — *c.* EFFECT ON DOCTRINE OF STALE DEMANDS. — See note 10.

**160.** *d.* RESULT OF RULE. — See notes 2, 3.

**161.** See note 1.

4. Equity Attained Through Doctrine of Estoppel. — See note 2.

**153.** 1. *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 94 Am. St. Rep. 709.

6. *Defenses Not Affected.* — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Blackshear v. Dekle*, 120 Ga. 766; *Cassell v. Lowry*, 164 Ind. 1; *Thomas v. Rauer*, 62 Kan. 568; *Louisville Banking Co. v. Buchanan*, 80 S. W. Rep. 193, 25 Ky. L. Rep. 2167, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153.

**154.** 2. In Equity. — *Ryan v. Woodin*, 9 Idaho 525.

5. *Equity Applies Its Own Limitations.* — *Ryan v. Woodin*, 9 Idaho 525.

6. *Provisions of Statute Persuasive — Rule of Analogy.* — *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 154.

8. *Equity May Refuse Relief Where Statutory Time Has Not Expired.* — *United States.* — *Darnold v. Simpson*, 114 Fed. Rep. 368; *Ide v. Trorlicht*, etc., *Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257.

*Alabama.* — *Presley v. Weakley*, 135 Ala. 517, 93 Am. St. Rep. 39.

*Georgia.* — *McWhorter v. Cheney*, 121 Ga. 541. *Illinois.* — *Vermilion County Children's Home v. Varner*, 192 Ill. 594.

*Missouri.* — *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469.

*New Mexico.* — *Patterson v. Hewitt*, 11 N. Mex. 1.

*New York.* — *Jones v. Jones*, 68 N. Y. App. Div. 5, affirmed 171 N. Y. 653.

**155.** 1. *Relief Granted Though Time of Limitation Elapsed.* — *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470; *Ide v. Trorlicht*, etc., *Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

3. *Concurrent Jurisdiction.* — *United States.* — *McDonald v. Thompson*, 184 U. S. 71; *Higgins Oil, etc., Co. v. Snow*, 113 Fed. Rep. 433, 51 C. C. A. 267; *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470.

*Alabama.* — *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134.

*District of Columbia.* — *Washington L. & T. Co. v. Darling*, 21 App. Cas. (D. C.) 132.

*Georgia.* — *McWhorter v. Cheney*, 121 Ga. 541.

*Iowa.* — *Sioux City, etc., R. Co. v. O'Brien County*, 118 Iowa 582.

*Montana.* — *Mantle v. Speculator Min. Co.*, 27 Mont. 473.

*Nebraska.* — *Michigan Trust Co. v. Red Cloud*, (Neb. 1902) 92 N. W. Rep. 900.

*New Jersey.* — *Tucker v. Linn*, (N. J. 1904) 57 Atl. Rep. 1017.

*Pennsylvania.* — *Altoona, etc., R. Co. v. Pittsburg, etc., R. Co.*, 203 Pa. St. 102.

*Virginia.* — *Redford v. Clarke*, 100 Va. 115, 4 Va. Sup. Ct. 36.

*West Virginia.* — *Newberger v. Wells*, 51 W. Va. 624; *Sibley v. Stacey*, 53 W. Va. 292; *Maxwell v. Wilson*, 54 W. Va. 495.

**156.** 1. *This Notion as to Obedience Rather than Analogy.* — *Washington L. & T. Co. v. Darling*, 21 App. Cas. (D. C.) 132.

**159.** 10. *Boynton v. Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 301; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Ludington v. Patton*, 111 Wis. 208.

**160.** 2. *Effect of Rule of Analogy.* — *United States.* — *Darnold v. Simpson*, 114 Fed. Rep. 368; *Ide v. Trorlicht*, etc., *Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137; *Boynton v. Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 301; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

*District of Columbia.* — *Washington L. & T. Co. v. Darling*, 21 App. Cas. (D. C.) 132.

*Georgia.* — *McWhorter v. Cheney*, 121 Ga. 541.

*Texas.* — *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63; *Watson v. Texas, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 830.

*Virginia.* — *Redford v. Clarke*, 100 Va. 115, 4 Va. Sup. Ct. 36.

*West Virginia.* — *Newberger v. Wells*, 51 W. Va. 624.

3. *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Michigan Trust Co. v. Red Cloud*, (Neb. 1902) 92 N. W. Rep. 900.

**161.** 1. *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Washington L. & T. Co. v. Darling*, 21 App. Cas. (D. C.) 132.

2. *Estoppel.* — *Davis v. Ramage*, 65 S. W. Rep. 340, 23 Ky. L. Rep. 1420.

- 161.** IV. IN FEDERAL COURTS — 1. General Rule. — See note 5.
- 162.** 2. Subjects under Exclusive Control of Congress. — See note 3.
3. In Equity Cases. — See note 6.
- 163.** V. IN CRIMINAL CASES — 1. When Statute Begins to Run — *a.* FROM COMMISSION OF OFFENSE. — See note 3.
- b.* EXCEPTIONS TO RULE — (1) *Absence of Defendant from State.* — See note 4.
- 164.** (3) *Accused Fleeing from Justice.* — See note 4.
2. Effect of Pendency of Indictment. — See note 9.
- 165.** 3. Period of Limitation — Other Offenses. — See note 6.
- 166.** If a Defendant Charged with Murder Is Convicted of a Less Offense. — See note 1.
4. What Is Commencement of Prosecution. — See note 2.
- 167.** VI. CONSTITUTIONALITY OF STATUTES OF LIMITATION — 1. In General. — See note 5.
2. As Impairing Obligation of Contracts. — See note 6.
- 168.** 6. Repeal or Alteration — *a.* POWER OF STATE TO ALTER. — See note 8.
- 169.** *b.* ALLOWANCE OF REASONABLE TIME FOR SUIT. — See note 2.
- 170.** See note 1.
- The Question What Is a Reasonable Time. — See notes 2, 6.
- 171.** *c.* VESTED RIGHTS — REPEAL OF STATUTE AFTER BAR HAS ATTACHED — (1) *General Rule* — Such Statutes Upheld. — See note 4.
- 161.** 5. Same Rule Is Upheld in Many Other Cases. — *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211; *Taylor v. Union Pac. R. Co.*, 123 Fed. Rep. 155.
- 162.** 3. Ratican v. Terminal R. Assoc., 114 Fed. Rep. 666; *Atlanta v. Chattanooga Foundry, etc.*, (C. C. A.) 127 Fed. Rep. 23.
6. Equity Cases. — *Potts v. Alexander*, 118 Fed. Rep. 885; *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28. But see *Higgins Oil, etc.*, Co. v. Snow, 113 Fed. Rep. 433, 51 C. C. A. 267.
- 163.** 3. When Statute Begins to Run in Criminal Cases. — *State v. Langdon*, 159 Ind. 377.
4. Absence. — *In re Bruce*, 132 Fed. Rep. 390; *State v. Snyder*, 182 Mo. 462.
- 164.** 4. Louisiana — Statute Suspended by Flight of Defendant. — *State v. Gibson*, 108 La. 464.
9. Pendency of Indictment. — *State v. Hansbrough*, 181 Mo. 348.
- 165.** 6. Seduction. — In *California* seduction, though punishable by imprisonment, was held to be a misdemeanor and barred by the statute of one year. *People v. Gray*, 137 Cal. 267.
- 166.** 1. Conviction for Lesser Offense. — "The statute of limitations applicable in a criminal case is that which relates to the offense charged in the indictment and not to any minor offense included therein." *Jinks v. State*, 114 Ga. 430.
2. When Prosecution Deemed Commenced. — See *Rouse v. State*, 44 Fla. 148.
- The Mere Filing of a Complaint. — *State v. West*, 105 La. 639.
- The Filing of an Indictment stops the running of the statute. *Gardner v. State*, 161 Ind. 262.
- 167.** 5. Constitutionality. — *Bradley v. Lightcap*, 201 Ill. 511.
6. Impairment of Obligation of Contracts. — *Edelstein v. Carlile*, 33 Colo. 54; *Kreyling v. O'Reilly*, 97 Mo. App. 384.
- 168.** 8. No Vested Right in Particular Period of Limitation Unexpired. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Edelstein v. Carlile*, 33 Colo. 54; *Sharp v. Sharp*, 213 Ill. 332; *Matter of Moench*, (Surrogate Ct.) 39 Misc. (N. Y.) 480; *Rotchford v. Union R. Co.*, 25 R. I. 70. And see the title CONSTITUTIONAL LAW, 951. 1 *et seq.*
- 169.** 2. Must Allow Reasonable Time. — *Keyser v. Lowell*, 117 Fed. Rep. 400, 54 C. C. A. 574; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Edelstein v. Carlile*, 33 Colo. 54; *Gwin v. Brown*, 21 App. Cas. (D. C.) 295; *Bradley v. Lightcap*, 201 Ill. 511; *Wooster v. Bateman*, 126 Iowa 552, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169; *Thoeni v. Dubuque*, 115 Iowa 482; *Kreyling v. O'Reilly*, 97 Mo. App. 384.
- If the legislature fails to allow a reasonable time, and the plaintiff delays for an unreasonable time thereafter to bring his action, he is barred. *Sherman v. Nason*, 25 Mont. 283.
- 170.** 1. Statute Fixing Unreasonably Short Time Not Constitutional. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434.
2. What Is Reasonable Time. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Kreyling v. O'Reilly*, 97 Mo. App. 384; *Carson v. Norfolk, etc., R. Co.*, 128 N. Car. 95.
6. *Wooster v. Bateman*, 126 Iowa 552.
- A Contrary Rule. — See *Rotchford v. Union R. Co.*, 25 R. I. 70.
- 171.** 4. Cases Following United States Supreme Court View. — *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Matter of Moench*, (Surrogate Ct.) 39 Misc. (N. Y.) 480.
- In *Massachusetts*. — See *Danforth v. Groton Water Co.*, 178 Mass. 472. 86 Am. St. Rep. 495, sustaining the validity of a statute removing the bar within a short time after its accrual. And to the same effect, see *Dunbar v. Boston, etc., R. Corp.*, 181 Mass. 383.



**171.** Constitutionality of Such Statutes Denied. — See note 6.

**174.** VII. RETROACTIVE EFFECT OF STATUTES OF LIMITATION — 1. Usually Prospective Only. — See note 4.

**175.** 2. Controlling Effect of Language of Statute. — See note 1.

**176.** See note 1.

**3.** Effect of New Statute on Existing Causes of Action — *a.* WHEN NEW LIMITATION BEGINS TO RUN. — See note 2.

*b.* STATUTE MADE TO TAKE EFFECT AT LATER DATE. — See note 3.

*c.* EXISTING CAUSES OF ACTION EXPRESSLY EXEMPTED. — See note 4.

**177.** *d.* WHERE NO LIMITATION EXISTED AT ACCRUAL OF CAUSE OF ACTION. — See note 2.

**4.** Where New Statute Is Limitation of Jurisdiction. — See note 3.

VIII. OPERATION OF STATUTE ON PARTICULAR CLASSES OF CASES —

**1.** Debts Secured by Liens — *a.* BAR OF PRINCIPAL OBLIGATION — (1) *In General.* — See note 4.

**171.** 6. Right to Such Defense Deemed Vested Right. — *Edelstein v. Carlile*, 33 Colo. 54; *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63.

*In State v. Aberdeen*, 34 Wash. 66, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 171, the court referred to the conflict of authority, but did not find it necessary to decide the point.

**174.** 4. General Rule — Prospective Only. — *In re Stalker*, 123 Fed. Rep. 961; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Curtis v. Boquillas Land, etc., Co.*, (Ariz. 1904) 76 Pac. Rep. 612; *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 639; *Edelstein v. Carlile*, 33 Colo. 54; *Shelley v. Wescott*, 23 App. Cas. (D. C.) 135; *Walker v. People*, 202 Ill. 34; *Thoeni v. Dubuque*, 115 Iowa 482; *Reinhold v. Kerrigan*, 85 Mo. App. 256; *Wilson v. Pickering*, 28 Mont. 435; *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Matter of Gutfroff*, (Surrogate Ct.) 39 Misc. (N. Y.) 483; *Rotchford v. Union R. Co.*, 25 R. I. 70.

**175.** 1. Intent of Legislature. — *In re Stalker*, 123 Fed. Rep. 961, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 175; *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Curtis v. Boquillas Land, etc., Co.*, (Ariz. 1904) 76 Pac. Rep. 612; *Edelstein v. Carlile*, 33 Colo. 54; *Sharp v. Sharp*, 213 Ill. 332; *Thoeni v. Dubuque*, 115 Iowa 482; *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Matter of Moench*, (Surrogate Ct.) 39 Misc. (N. Y.) 480.

**176.** 1. *Shelley v. Wescott*, 23 App. Cas. (D. C.) 135.

**2.** Avoiding Unreasonable Operation of Statute. — *Curtis v. Boquillas Land, etc., Co.*, (Ariz. 1904) 76 Pac. Rep. 612; *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176; *State v. Gibson*, 27 Tex. Civ. App. 355.

**3.** Act Made to Take Effect at Later Date. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434.

**4.** Exception Embraces Only Accrued Causes of Action. — *McFaul v. Haley*, 166 Mo. 56; *Kreying v. O'Reilly*, 97 Mo. App. 384.

**177.** 2. *Curtis v. Boquillas Land, etc., Co.*, (Ariz. 1904) 76 Pac. Rep. 612.

**3.** See *Sharp v. Sharp*, 213 Ill. 332.

**4.** Bar of Debt — *United States*. — *Waterfield v. Rice*, 111 Fed. Rep. 625, 49 C. C. A. 504.

*Alabama*. — *Hood v. Hammond*, 128 Ala. 569, 86 Am. St. Rep. 159.

*Arkansas*. — *Goodman v. Pareira*, 70 Ark. 49.

*Connecticut*. — *Northrop v. Chase*, 76 Conn.

146.

*Georgia*. — *Conway v. Caswell*, 121 Ga. 254.

*Iowa*. — *German-American Sav. Bank v. Hanna*, 124 Iowa 379, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177; *Bonbright v. Bonbright*, 123 Iowa 305.

*Kansas*. — *Jackson v. Longwell*, 63 Kan. 93; *McDonald v. Hutchinson Wholesale Grocer Co.*, 65 Kan. 17.

*Nebraska*. — *Omaha Sav. Bank v. Simeral*, 61 Neb. 741; *Yomal v. Hupp*, (Neb. 1902) 90 N. W. Rep. 645. Compare *Nares v. Bell*, 66 Neb. 606.

*North Carolina*. — *Hooker v. Yellowley*, 128 N. Car. 297; *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647; *Cone v. Hyatt*, 132 N. Car. 810; *Robinson v. McDowell*, 133 N. Car. 182, 98 Am. St. Rep. 704; *Miller v. Cox*, 133 N. Car. 578.

*North Dakota*. — *Satterlund v. Beal*, 12 N. Dak. 122.

*Oregon*. — *Overholt v. Dietz*, 43 Oregon 194.

*Pennsylvania*. — *Brackenbridge v. Cummings*, 18 Pa. Super. Ct. 64.

*South Dakota*. — *Alexander v. Ransom*, 16 S. Dak. 302.

*Tennessee*. — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177.

*Texas*. — *Eastham v. Patly*, 29 Tex. Civ. App. 473; *Peacock v. Cummings*, 34 Tex. Civ. App. 431; *Brinkerhoff v. Goree*, 35 Tex. Civ. App. 142.

See also the title FORECLOSURE OF MORTGAGES, 786. 1.

*In California* it is expressly provided by statute (Civ. Code Cal., § 2911) that the bar of the debt also bars the lien securing it. *Vandall v. Teague*, 142 Cal. 471; *Mutual L. Ins. Co. v.*

**177.** (2) *Where Statute Fixes No Limitation.* — See note 5.

**178.** *b. BAR OF SECURITY — AFFIRMATIVE RELIEF TO DEBTOR —*  
(1) *Suit to Cancel Barred Mortgage.* — See note 1.

(2) *Suit to Recover Collateral Pledged.* — See note 3.

(3) *Suit to Enjoin Sale under Barred Trust Deed.* — See note 4.

(4) *Suit to Set Aside Sale under Barred Trust Deed.* — See note 5.

*d. EFFECT OF BAR OF SECURITY ON PRINCIPAL DEBT.* — See note 7.

**179.** 2. *Principal and Surety.* — See note 1.

**180.** 4. *Dower.* — See note 6.

**181.** 5. *Set-off, Counterclaim, Etc.* — *a. GENERAL RULE.* — See note 1.

**182.** *b. SUSPENSION OF STATUTE BY BRINGING OF PLAINTIFF'S SUIT.*  
— See notes 2, 3.

6. *Intervention.* — See note 4.

*Pacific Fruit Co.*, 142 Cal. 477; *San Jose Safe Deposit Bank v. Madera Bank*, 144 Cal. 574; *Casey v. Gibbons*, 136 Cal. 368.

In *Colorado* the debt and security are barred together. *McGovney v. Gwillim*, 16 Colo. App. 284.

In *Indiana* the bar of the debt bars the security. *Cassell v. Lowry*, 164 Ind. 1.

In *Missouri* (Rev. Stat. Mo. 1899, § 4276) it is provided that the bar of the debt shall bar the security. *Kreyling v. O'Reilly*, 97 Mo. App. 384.

**Securing Judgment on the Principal Debt Will Not Operate to Extend the statute of limitations as to a suit on the mortgage.** *Hanna v. Kasson*, 26 Wash. 568.

**Where the Mortgage Does Not Identify the Debt** to secure which it was given, and the debt is barred, the mortgage cannot be foreclosed. *Duke v. Story*, 116 Ga. 388.

**Where Husband and Wife Make a Note and join in a mortgage of the wife's land to secure it, and the husband keeps the note alive as to him by making payments thereon, the mortgage can be foreclosed, though the note is barred as to the wife.** *Cooper v. Haythorn*, 66 Kan. 91.

**177. 5. Where No Limitation as to Lien Fixed.** — *Bailey v. Butler*, 138 Ala. 153; *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647; *Miller v. Coxe*, 133 N. Car. 578; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103; *Stevens v. Osgood*, (S. Dak. 1904) 100 N. W. Rep. 161.

**Debts Secured by Pledge of Collateral.** — *German-American Sav. Bank v. Hanna*, 124 Iowa 374, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177.

**178. 1. Cancellation of Security.** — *Farmers L. & T. Co. v. Denver, etc., R. Co.*, (C. C. A.) 126 Fed. Rep. 46, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177, 178; *Fitch v. Miller*, 200 Ill. 170; *Carpenter v. Plagge*, 192 Ill. 82; *Cassell v. Lowry*, 164 Ind. 1, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 177; *Cone v. Hyatt*, 132 N. Car. 810, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**The Right of Redemption** is not barred where the mortgage is not. *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160.

**A Barred Judgment** will not be canceled at the instance of the judgment debtor. *Johnson v. Wynne*, 64 Kan. 138.

**3. Recovery of Collaterals.** — *Commercial Sav.*

*Bank v. Hornberger*, 140 Cal. 16; *Mutual L. Ins. Co. v. Pacific Fruit Co.*, 142 Cal. 477; *Conway v. Caswell*, 121 Ga. 254; *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178; *Myar v. El Paso Grocery Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 337.

**4. Enjoining Sale.** — *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**5. Setting Aside Sale.** — *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**7. Bar of Security Does Not Bar Debt.** — *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53; *Gleason v. Hawkins*, 32 Wash. 464.

**179. 1. Debt Barred as to Principal Held Not Barred as to Guarantor.** — *Seabury v. Sibley*, 183 Mass. 105, disapproving *Auchampaugh v. Schmidt*, 70 Iowa 642, cited in the original note.

**Claim Provable Against Surety's Estate.** — A claim barred as to the principal may be proved against the surety's estate where the statute was suspended by the latter's death. *Charbonneau v. Bouvet*, 98 Tex. 167.

**180. 6. Winchester v. Keith**, 70 S. W. Rep. 664, 24 Ky. L. Rep. 1033; *Harrison v. McReynolds*, 183 Mo. 533; *Sperry v. Swiger*, 54 W. Va. 283. See also *Wetyen v. Fick*, 178 N. Y. 223.

**181. 1. Set-off — Counterclaim — General Rule.** — *Brewer v. Grogan*, 116 Ga. 60; *Housman v. Long*, 66 S. W. Rep. 821, 23 Ky. L. Rep. 1994, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 181; *Louisville Banking Co. v. Buchanan*, 80 S. W. Rep. 193, 25 Ky. L. Rep. 2167, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *McClure v. Johnson*, 10 Okla. 663; *State Insane Hospital v. Philadelphia County*, 205 Pa. St. 336; *Sieger v. Sieger*, 209 Pa. St. 65; *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796.

**182. 2. See Also, as Sustaining the Rule of the Text**, *McDougald v. Hulet*, 132 Cal. 154.

**3. In West Virginia** the statute runs against the claim until it is filed. *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796.

**4. Intervention.** — *Louisville v. Kohnhorst*, 76 S. W. Rep. 43, 25 Ky. L. Rep. 532.

**183. 7. Several Parties Jointly or Severally Interested — *a.* JOINT PLAINTIFFS.** — See notes 1, 2.

**184. IX. BY AND AGAINST WHOM STATUTE MAY BE PLEADED — 1. In General.** — See notes 1, 2, 3.

2. Assignee or Grantee of Mortgagor. — See note 4.

**185. 3. Junior Mortgagee.** — See notes 2, 3.

4. Plaintiff. — See note 4.

5. Personal Representatives, Heirs, Legatees, Etc. — Actions in Behalf of Estate. — See note 7.

7. Nonresidents. — See note 13.

**186. 8. As Between Husband and Wife.** — See note 1.

9. Trustee and Cestui Que Trust. — See note 7.

**187. 10. In Insolvency Proceedings — Rights of Creditors.** — See note 5.

11. Principal and Agent. — See note 8.

**188. See notes 1, 2.**

12. Suits by and Against Government — *a.* IN GENERAL — GOVERNMENT NOT SUBJECT TO STATUTE. — See note 3.

**189. See note 1.**

**183. 1. A Contrary Rule.** — *Richter v. Noll*, 128 Ala. 198; *Love v. Butler*, 129 Ala. 531.

In *Mississippi*. — See *Leflore County v. Allen*, 80 Miss. 298.

**2. Right of Action in Plaintiffs Severally.** — *Redford v. Clarke*, 100 Va. 115, 4 Va. Sup. Ct. 36.

**184. 1. Who May Plead Statute — General Rule.** — *Haines v. Haines*, 69 N. J. L. 39; *Kahrs v. New York*, 98 N. Y. App. Div. 233, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184; *Woods v. Douglass*, 52 W. Va. 517.

**2. Mere Creditor Cannot Plead Statute for His Debtor.** — *Dozier v. Arkadelphia Cotton Mills*, 71 Ark. 407; *Knickerbocker v. Benes*, 93 Ill. App. 305, affirmed 195 Ill. 434; *Anderson v. McNeal*, 82 Miss. 542.

In *Virginia* a contrary rule has been adopted. *Calloway v. Saunders*, 99 Va. 350.

**First Mortgagee Cannot Plead Statute Against Second Mortgagee.** — *Tinsley v. Lombard*, (Oregon 1904) 78 Pac. Rep. 895.

**The Holder of a Subsequent Judgment Lien against the mortgagor may set up the statute as against the mortgage lien, where the statute appears *prima facie* to be a bar to foreclosure of the mortgage.** *Brandenstein v. Johnson*, 140 Cal. 29; *De Voe v. Rundle*, 33 Wash. 604.

**3. Defense Personal to Debtor.** — *Dozier v. Arkadelphia Cotton Mills*, 71 Ark. 407; *Roberts v. Brothers*, 119 Iowa 309; *Lincoln Mortg.*, etc., Co. v. *Parker*, 65 Kan. 819; *Anderson v. McNeal*, 82 Miss. 542; *Tinsley v. Lombard*, (Oregon 1904) 78 Pac. Rep. 895.

**4. Purchaser of Mortgaged Property.** — *Stancill v. Spain*, 133 N. Car. 76; *Hopkins v. Clyde*, 71 Ohio St. 141, 104 Am. St. Rep. 737; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756; *Hanna v. Kasson*, 26 Wash. 568.

**Notice to Mortgagee Required.** — Where the mortgagor sells the land and leaves the state the statute of limitations will not run in favor of the grantee until he records his deed or gives the mortgagee actual notice of his claim. *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766.

**185. 2. Junior Mortgagee.** — *Frates v. Sears*, 144 Cal. 246; *Perry v. Fries*, 90 N. Y. App.

Div. 484; *Miller v. Cox*, 133 N. Car. 578; *Hopkins v. Clyde*, 71 Ohio St. 141, 104 Am. St. Rep. 737, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185.

**3. Compare Brandenstein v. Johnson, 140 Cal. 29; *Frates v. Sears*, 144 Cal. 246.**

**4. How Far Plea Available to Party Plaintiff** — *Hogaboom v. Flower*, 67 Kan. 41.

**7. Executors and Administrators.** — *Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783.

**13. Nonresidents.** — See *Taylor v. Union Pac. R. Co.*, 123 Fed. Rep. 155.

**186. 1. Husband and Wife.** — *Collins v. Babbitt*, 67 N. J. Eq. 165; *Crouch v. Crouch*, 30 Tex. Civ. App. 288; *Brader v. Brader*, 110 Wis. 423; *Gudden v. Gudden*, 113 Wis. 297.

**Contra.** — *In re Deaner*, 126 Iowa 701, 106 Am. St. Rep. 374; *Wyatt v. Wyatt*, 81 Miss. 219; *Rosenberger v. Mallerson*, 92 Mo. App. 27.

**7. Trusts.** — *Matthews v. Darnell*, 27 Tex. Civ. App. 181; *Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783.

The statute will not run against a *cestui que trust* who is a minor. *Ward v. Ward*, 12 Ohio Cir. Dec. 59.

**187. 5. Insolvency Proceedings — Rights of Creditors.** — *In re Lafferty*, 122 Fed. Rep. 558, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; *Mason v. Taft*, 23 R. I. 388.

**8. Transactions Between Principal and Agent.** — *Carroll v. Montgomery*, 128 N. Car. 278; *State v. Davis*, 42 Oregon 34; *Cole v. Baker*, 16 S. Dak. 1. See also *Rowan v. Chenoweth*, 49 W. Va. 287, 89 Am. St. Rep. 796; *Ross v. Robertson*, 7 Ont. L. Rep. 413.

The statute begins to run upon the termination of the agency. *Housman v. Long*, 66 S. W. Rep. 821, 23 Ky. L. Ren. 1994.

**Demand.** — *Rucker v. Maddox*, 114 Ga. 899.

**188. 1. Guernsey v. Davis, 67 Kan. 378.**

**2. Jewell v. Jewell, (Mich. 1905) 102 N. W. Rep. 1059. See also *State v. Davis*, 42 Oregon 34.**

**3. Statute Does Not Run Against Government.** — *In re Stocver*, 127 Fed. Rep. 394; *Terre Haute*, etc., R. Co. v. *State*, 159 Ind. 438; *Zapeda v. Hoffman*, 21 Tex. Civ. App. 312.

**189. 1. State Statute Cannot Bind United**

**189.** *b.* REAL PARTY IN INTEREST. — See note 4.

**191.** *h.* GOVERNMENT AS DEFENDANT. — See note 4.

*i.* COUNTY GOVERNMENTS AND MUNICIPALITIES. — See note 6.

**192.** See note 1.

**193.** Where the Municipality Is a Defendant. — See note 1.

**X. WHEN STATUTE BEGINS TO RUN — 2. General Rule as to When Cause of Action Is Deemed to Accrue.** — See note 4.

**3. General Rule Applied to Various Causes of Action — a. CLAIMS DEPENDING ON CONTINGENCY OR CONDITION — (1) In General.** — See note 6.

**194.** (2) *When Contingency Is Result of Pending Suit.* — See note 7.

**195.** See note 1.

(3) *Contract to Take Effect on Happening of Event Certain.* — See note 3.

**States.** — *U. S. v. Fidelity Trust Co.*, 121 Fed. Rep. 766, 58 C. C. A. 42.

**189.** **4. Mandamus and Similar Proceedings in Name of State.** — *People v. Strauss*, 97 Ill. App. 47.

**191.** **4. San Luis Obispo County v. Gage**, 139 Cal. 398.

**6. Where Municipality Acts in Governmental Capacity.** — *McCartney v. People*, 202 Ill. 51; *Bay St. Louis v. Hancock County*, 80 Miss. 364; *Wright v. Oberlin*, 23 Ohio Cir. Ct. 509. *Contra*, *Bannock County v. Bell*, 8 Idaho 1, 101 Am. St. Rep. 140, *overruling* *Fremont County v. Brandon*, 6 Idaho 482, cited in the original note.

**192.** **1. Statute Held to Run in Favor of and Against Municipal Corporations.** — *Bannock County v. Bell*, 8 Idaho 1, 101 Am. St. Rep. 140, *overruling* *Fremont County v. Brandon*, 6 Idaho 482; *State v. Gibson*, 27 Tex. Civ. App. 355; *Johnson v. Black*, 103 Va. 477, 106 Am. St. Rep. 890.

**The Mississippi Constitution of 1890**, § 104, excepts the state, counties, and municipalities from the operation of the statute of limitations in civil causes. *Wayne County v. Helton*, 79 Miss. 122.

**193.** **1. It Is the Duty of a Municipality to Plead the statute of limitations where possible.** *Trowbridge v. Schmidt*, 82 Miss. 475.

**4. When Cause of Action Accrues — United States.** — *Christie St. Commission Co. v. U. S.*, 126 Fed. Rep. 991, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

*Alabama.* — *Washington v. Norwood*, 128 Ala. 383.

*Illinois.* — *Staninger v. Tabor*, 103 Ill. App. 330; *Parmellee v. Price*, 105 Ill. App. 271, *affirmed* 208 Ill. 544.

*Indiana.* — *Downham v. Holloway*, 158 Ind. 626, 92 Am. St. Rep. 330.

*Kentucky.* — *Lyttle v. Davidson*, 67 S. W. Rep. 34, 23 Ky. L. Rep. 2262; *Schroer v. Central Kentucky Insane Asylum*, 113 Ky. 288.

*Minnesota.* — *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461.

*Nebraska.* — *Brown v. Silver*, (Neb. 1901) 96 N. W. Rep. 281.

*Nevada.* — *Schwartz v. Stock*, 26 Nev. 128, 155. *New York.* — *Dodge v. Cornelius*, 168 N. Y. 242; *Matter of Goss*, 98 N. Y. App. Div. 489.

*Oklahoma.* — *Keagy v. Wellington Nat. Bank*, 12 Okla. 33; *Blackwell v. Hatch*, 13 Okla. 169.

*Oregon.* — *The Aurelia*, 45 Oregon 285, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 193.

*Pennsylvania.* — *Guarantee, etc., Co. v. Farmers, etc., Nat. Bank*, 202 Pa. St. 94.

*Rhode Island.* — *Kilton v. Providence Tool Co.*, 22 R. I. 605.

*Texas.* — *Darragh v. O'Connor*, (Tex. Civ. App. 1902) 69 S. W. Rep. 644.

*Washington.* — *Sterrett v. Northport Min., etc., Co.*, 30 Wash. 164.

*Canada.* — See *McFadden v. Brandon*, 8 Ont. L. Rep. 610, *affirming* 6 Ont. L. Rep. 247.

**A Cause of Action Against a Surgeon for Malpractice** accrues on the termination of his services. *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639.

**6. Statute Runs Only from Happening of Contingency or Performance of Condition.** — *Thompson v. Orena*, 134 Cal. 26; *Loewenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115; *Bryant v. Atlantic Coast Line R. Co.*, 119 Ga. 607; *Lucas v. White*, 120 Iowa 735, 98 Am. St. Rep. 380; *Reed v. Culp*, 63 Kan. 595; *Haven v. Haven*, 181 Mass. 573; *Noyes v. Young*, 32 Mont. 226; *Noreen v. Hansen*, 64 Neb. 858; *Hentz v. Havemeyer*, 172 N. Y. 597, *affirming* 58 N. Y. App. Div. 36; *Matter of Neil*, (Surrogate Ct.) 35 Misc. (N. Y.) 254; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570; *Stribling v. Moore*, 33 Tex. Civ. App. 297.

**194.** **7. Contingency Result of Suit Pending.** — *Nashville, etc., R. Co. v. Dale*, 68 Kan. 112, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 194; *Houghton v. Axelsson*, 64 Kan. 274; *Mantle v. Speculator Min. Co.*, 27 Mont. 473, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258; *Lincoln v. Lincoln First Nat. Bank*, 67 Neb. 401; *Beebe v. Redward*, 35 Wash. 615.

**195.** **1. Louisville, etc., R. Co. v. Biddell**, 112 Ky. 494; *Trout v. Marvin*, 24 Ohio Cir. Ct. 333. See also *Chalmers v. Sheehy*, 132 Cal. 450, 84 Am. St. Rep. 62.

**A Creditor's Bill** not being maintainable until after judgment in a court of law and return of execution "no property found," the statute of limitations will not begin to run against a bill by creditors until return of execution showing no property owned by the defendant in execution. *Blackwell v. Hatch*, 13 Okla. 169.

**3. Happening of Event Certain.** — *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660; *Acton v. Schultz*, (N. J. 1905) 59 Atl. Rep.

- 195.** (4) *Necessity of Notice of Happening of Contingency.* — See note 4.  
 (5) *Result of Wrongful Act Uncertain.* — See note 5.  
 (6) *Claim Payable Out of Particular Fund.* — See note 6.

**196.** See note 1.

*b.* WHERE DEMAND ESSENTIAL TO PERFECT CAUSE OF ACTION

— (1) *General Rule.* — See note 6.

**197.** (2) *Exceptions to Rule* — (c) *Notes Payable on Demand* — *aa.* IN GENERAL.  
 — See note 8.

**198.** *But Notes Payable at a Specified Time After Demand.* — See note 1.

**199.** *cc.* ASSESSMENT NOTES TO MUTUAL INSURANCE COMPANIES. — See note 1.

(d) *Bank Checks.* — See note 3.

*c.* PROMISSORY NOTES GENERALLY — (1) *Statement of Rule.* —

See notes 4, 5.

**200.** *d.* OCCURRENCE OF DAMAGE AS ESSENTIAL — *General Rule.* — See notes 6, 7.

876; *Matter of Neil*, (Surrogate Ct.) 35 Misc. (N. Y.) 254; *Ward v. Ward*, 12 Ohio Cir. Dec. 59.

**195.** 4. *Notice.* — *Gove v. Tacoma*, 26 Wash. 474.

5. *Douglass v. Ohio River R. Co.*, 51 W. Va. 523.

*Mine Operator Failing to Support Surface.* — Where a coal mine operator was bound by contract to make good any injury to the surface, it was held that the right of action accrued when he removed the coal and failed to leave proper support, and not at the time of the sinking of the surface. *Noonan v. Pardee*, 200 Pa. St. 474, 86 Am. St. Rep. 722.

6. *Claim Payable from Particular Fund.* — *School Dist. No. 5 v. Wabash First Nat. Bank*, 63 Kan. 668; *Van Auker v. Garfield Tp.*, 66 Kan. 594; *Greer County v. Clarke*, 12 Okla. 197; *Barnes v. Turner*, 14 Okla. 284; *Brannon v. White Lake Tp.*, 17 S. Dak. 83. *Compare Bodman v. Johnson County*, 115 Iowa 296.

The statute does not begin to run until the claimant has notice of the diversion of the fund. *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636.

**196.** 1. *When Particular Fund Proves Unavailable.* — *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 639; *New York Security, etc., Co. v. Tacoma*, 30 Wash. 661.

6. *Birkhead v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107; *White v. Costigan*, 138 Cal. 564; *Scrivner v. Woodward*, 139 Cal. 314; *Savannah v. Kassell*, 115 Ga. 310; *Sheaf v. Dodge*, 161 Ind. 270; *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51; *Rankin v. Anderson*, 69 S. W. Rep. 705, 24 Ky. L. Rep. 647; *Horton v. Seymour*, 82 Minn. 535; *Portner v. Wilfahrt*, 85 Minn. 73; *Mills v. Whitmore*, 12 Ohio Cir. Dec. 338, 22 Ohio Cir. Ct. 467; *Brown v. Brown*, 107 Tenn. 349; *Goodwin v. Ray*, 108 Tenn. 614, 91 Am. St. Rep. 761; *Bidwell v. Tacoma*, 26 Wash. 518; *Wilson v. Howe*, 5 Ont. L. Rep. 323.

**197.** 8. *Statute Runs on Demand Note from Its Date.* — *Bonbright v. Bonbright*, 123 Iowa 305; *De Raismes v. De Raismes*, 70 N. J. L. 15; *Jenkins v. De War*, 112 Tenn. 684; *Bachand v. Lalumiere*, 21 Quebec Super. Ct. 449.

*Duebills.* — See *Hemmingway v. Tong*, 66 S. W. Rep. 278, 23 Ky. L. Rep. 1757.

Where a duebill is payable on demand, de-

mand is necessary to start the statute of limitations to running. *Nash v. Woodward*, 62 S. Car. 418.

*On a Note Payable "on Demand After Date"* the statute begins to run on the day after the date thereof. *Hardon v. Dixon*, 77 N. Y. App. Div. 241.

**198.** 1. *Note Payable at Specified Time After Demand.* — *Wurth v. Paducah*, 116 Ky. 403, 105 Am. St. Rep. 225; *Brown v. Brown*, 107 Tenn. 349.

**199.** 1. *Assessment Notes — Mutual Insurance.* — *French v. Higgins*, 66 N. J. L. 579.

*In New York.* — See *Roeger v. Medicus*, 171 N. Y. 699, *affirming* 67 N. Y. App. Div. 127.

3. *Checks.* — The statute runs only from demand. *Wright v. MacCarty*, 92 Ill. App. 120.

4. *Promissory Notes Generally.* — *Reed v. Culp*, 63 Kan. 595.

*Days of Grace.* — *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888.

*Allowance by a Probate Court* of a note as a claim against a decedent before it is due does not mature the note and start the statute of limitations to running. *Linn v. Ziegler*, 68 Kan. 528.

5. *Where, at Maturity, a Note Is Extended by parol agreement between the maker and the payee*, the statute of limitations will run only from the end of the extension period. *Sedgwick v. Sanborn*, 63 Kan. 884, 65 Pac. Rep. 661.

**200.** 6. *Statute Runs from Commission of Wrongful Act.* — *Lambert v. McKenzie*, 135 Cal. 100; *Jackson v. Emmons*, 19 App. Cas. (D. C.) 250; *Illinois Cent. R. Co. v. Terrell*, 108 Ill. App. 659; *State v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244; *Southern Indiana R. Co. v. Brown*, 30 Ind. App. 684; *Nashville, etc., R. Co. v. Dale*, 68 Kan. 112; *Louisville, etc., R. Co. v. Cornelius*, 111 Ky. 752; *De Geofroy v. Merchants Bridge Terminal R. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524; *State v. Stonestreet*, 92 Mo. App. 214; *Matter of Opening Vanderbilt Ave.*, 95 N. Y. App. Div. 533; *Erwin v. Erie R. Co.*, 98 N. Y. App. Div. 402; *Fronce v. Nichols*, 12 Ohio Cir. Dec. 472, 22 Ohio Cir. Ct. 539; *Noonan v. Pardee*, 200 Pa. St. 474, 86 Am. St. Rep. 722; *Kruegel v. Trinity Cemetery Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 652; *Houston v. Houston, etc., R. Co.*, 26 Tex. Civ. App. 228.

**201.** *e.* RECURRING CAUSES OF ACTION — *Actions Ex Delicto.* — See notes 5, 7.

*Breach of Continuing Contract.* — See note 8.

**202.** *f.* OTHER PARTICULAR CASES — (2) *Breach of Contract.* — See note 5.

*The Date of the Breach.* — See note 6.

**203.** (4) *Claims of Distributees.* — See notes 3, 4.

(5) *Claims of Legatees.* — See note 5.

**204.** (7) *Deposits — Certificates of Deposit.* — See note 1.

(9) *Fidelity Bonds.* — See notes 6, 7.

**205.** (14) *Instalment Payments.* — See note 3.

*Provision that Default in Payment Shall Hasten Maturity of Notes.* — See notes 6, 7.

**200.** 7. *Action for Consequential Damages.* — St. Louis, etc., R. Co. v. Stephens, 72 Ark. 127; Love v. People, 94 Ill. App. 237; Kelly v. Pittsburgh, etc., R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134; Geneser v. Healy, 124 Iowa 310; Louisville, etc., R. Co. v. Cornelius, 111 Ky. 752; Griffin v. Drainage Commission, 110 La. 840; Missouri Pac. R. Co. v. Hemingway, 63 Neb. 610; Houston v. Houston, etc., R. Co., 26 Tex. Civ. App. 228; Houston, etc., R. Co. v. Charwaine, 30 Tex. Civ. App. 633; San Antonio v. Talerico, 98 Tex. 151; Gramann v. Eicholtz, 36 Tex. Civ. App. 309; Sterrett v. Northport Min., etc., Co., 30 Wash. 164; Eells v. Chesapeake, etc., R. Co., 49 W. Va. 65, 87 Am. St. Rep. 787.

**201.** 5. *Recurring Causes of Action — Arkansas.* — St. Louis, etc., R. Co. v. Stephens, 72 Ark. 127.

*Connecticut.* — Knapp, etc., Mfg. Co. v. New York, etc., R. Co., 76 Conn. 311, 100 Am. St. Rep. 994; Atwood v. Lockwood, 76 Conn. 555. *Georgia.* — Monroe v. McCrannie, 117 Ga. 890.

*Kentucky.* — Louisville, etc., R. Co. v. Cornelius, 111 Ky. 752; Finley v. Williamsburgh, 71 S. W. Rep. 502, 24 Ky. L. Rep. 1336.

*Louisiana.* — Griffin v. Drainage Commission, 110 La. 840.

*Maryland.* — Aberdeen v. Bradford, 94 Md. 670.

*New Jersey.* — Church of the Holy Communion v. Paterson Extension R. Co., 66 N. J. L. 218.

*New York.* — Bell v. Gibson, 71 N. Y. App. Div. 472.

*Ohio.* — Horstman v. Cincinnati St. R. Co., 13 Ohio Dec. 696, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201.

*Texas.* — Houston v. Houston, etc., R. Co., 26 Tex. Civ. App. 228; St. Louis Southwestern R. Co. v. Beck, (Tex. Civ. App. 1904) 80 S. W. Rep. 538.

*Washington.* — Doran v. Seattle, 24 Wash. 182, 85 Am. St. Rep. 948; Sterrett v. Northport Min., etc., Co., 30 Wash. 164.

*West Virginia.* — Eells v. Chesapeake, etc., R. Co., 49 W. Va. 65, 87 Am. St. Rep. 787.

*Canada.* — Bailey v. King, 27 Ont. App. 703, affirmed 31 Can. Sup. Ct. 338; Archibald v. Truro, 33 Nova Scotia 401, affirmed 31 Can. Sup. Ct. 380.

7. *Where Injury Permanent.* — Chaudiere Mach., etc., Co. v. Canada Atlantic R. Co., 33 Can. Sup. Ct. 11.

8. *Continuing Contract.* — Compare Whitley v. Whitley, 80 S. W. Rep. 825, 26 Ky. L. Rep. 134.

**202.** 5. *Contracts.* — Birkhead v. De Forest, 120 Fed. Rep. 645, 57 C. C. A. 107; Buelna v. Ryan, 139 Cal. 630; Bonbright v. Bonbright, 123 Iowa 305; Atchison, etc., R. Co. v. Atchison Grain Co., (Kan. 1902) 70 Pac. Rep. 933, 68 Kan. 585; Morrissey v. Morrissey, 180 Mass. 480; Everett v. O'Leary, 90 Minn. 154; Northern Assur. Co. v. Borgelt, 67 Neb. 282; Henry v. Rowell, 63 N. Y. App. Div. 620; Leahy v. Campbell, 70 N. Y. App. Div. 127; Crowley v. Johnston, 96 N. Y. App. Div. 319.

6. *Hale v. Cushman*, 96 Me. 148.

**203.** 3. *Distributees.* — Craddock v. Payton, 114 Ky. 298; Smith v. Hardesty, 83 S. W. Rep. 646, 26 Ky. L. Rep. 1266; Ganser v. Ganser, 83 Minn. 199, 85 Am. St. Rep. 461; Smith v. Moore, 102 Va. 260.

4. *No Order of Distribution Required to Set Statute in Motion.* — In Mortenson v. Berghold, 64 Neb. 203, it was held that the statute began running only from the entry of a decree for distribution.

5. *Legatees.* — Ward v. Ward, 12 Ohio Cir. Dec. 59.

For the rule under the *Kentucky* statutes, see Smith v. Hardesty, 83 S. W. Rep. 646, 26 Ky. L. Rep. 1266.

**204.** 1. *Deposits.* — Schinotti v. Whitney, 130 Fed. Rep. 780; Citizen's Bank v. Fromholz, 64 Neb. 284; Sharp v. Citizens' Bank, (Neb. 1904) 98 N. W. Rep. 50; Matter of Cook, 86 N. Y. App. Div. 586; Mifflin County Nat. Bank v. Fourth St. Nat. Bank, 199 Pa. St. 459; Tobin v. McKinney, 15 S. Dak. 257, 91 Am. St. Rep. 694; Larsen v. Utah L. & T. Co., 23 Utah 449. But see Jones v. Goldtree Bros. Co., 142 Cal. 383.

6. *Fidelity Bonds.* — Grant County Bldg., etc., Assoc. v. Lemmon, 78 S. W. Rep. 874, 25 Ky. L. Rep. 1725.

7. *Northern Assur. Co. v. Borgelt*, 67 Neb. 282.

**205.** 3. *Payments in Instalments.* — Washington L. & T. Co. v. Darling, 21 App. Cas. (D. C.) 132, citing 10 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205; Schuler v. Schuler, 209 Ill. 522; Nares v. Bell, 66 Neb. 606; George v. Butler, 26 Wash. 456, 90 Am. St. Rep. 756.

6. *San Antonio Real Estate, etc., Assoc. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864. (To the same effect as Dodge v. Signor, 18 Tex. Civ. App. 45, cited in the original note.)

*Where the Note Provides for Maturity of Entire*

- 206.** (15) *Interest* — Time When Each Instalment Matures. — See note 2.  
 (16) *Judgments*. — See note 6.

**207.** See note 1.

*In Foreclosure Proceedings* — Judgment for Deficiency. — See note 4.

(17) *Loans*. — See note 5.

- 208.** (19) *Money Lost at Gaming*. — See note 1.

(21) *Purchaser at Judicial Sale* — (b) *As to Recovery of Purchase Money*

*Where Title Fails*. — See note 7.

- 209.** (24) *Services Rendered* — Under Ordinary Contracts of Hiring. — See notes 1, 2.

*Under Contract for Service in Particular Matter*. — See notes 3, 4.

*If a Servant Is to Be Compensated by a Legacy*. — See notes 5, 6.

- 210.** *Where the Charge for Services Is Part of a Mutual Account Current*. — See note 1.  
*Attorneys' Fees*. — See note 2.

(25) *Miscellaneous Cases*. — See note 5.

**Debt at Option of Lender.** — When the lender exercises his option and begins suit for the collection of the debt the statute begins to run. *Baker v. Skinner*, 63 Kan. 83.

**205. 7. Better Doctrine.** — *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166; *Kennedy v. Gibson*, 68 Kan. 612; *Cone v. Hyatt*, 132 N. Car. 810; *Harrington v. Clafin*, 28 Tex. Civ. App. 100; *Cooper v. Ford*, 29 Tex. Civ. App. 253; *Snohomish First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828; *White v. Krutz*, 37 Wash. 34.

And this is the rule where the contract does not expressly give the option to the holder, but provides absolutely that the whole debt shall mature on default. *Keene Five Cent Sav. Bank v. Reid*, (C. C. A.) 123 Fed. Rep. 221.

**Effect of Default Obviated.** — Where the mortgagee exercises his option and brings suit for the whole debt, subsequently dismissing it on the death of the mortgagor, the election is final and the statute runs as to the whole debt. *Westcott v. Whiteside*, 63 Kan. 49.

**206. 2. Interest.** — No right of action can exist for interest where the principal debt is barred. *Porter v. Shattuck*, 75 Vt. 270, 98 Am. St. Rep. 823.

**6. Judgments.** — *Feeney v. Hinckley*, 134 Cal. 467, 86 Am. St. Rep. 290; *Harrier v. Bassford*, 145 Cal. 529; *Gaumer v. Terrel*, 65 Kan. 15. See also *Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748.

**207. 1. Judgment Nunc Pro Tunc.** — *Burns v. Skelton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 527.

**4. Deficiency Judgments.** — *Brand v. Garneau*, (Neb. 1903) 93 N. W. Rep. 219; *Carstens v. Eller*, (Neb. 1903) 97 N. W. Rep. 631; *Bignold v. Carr*, 24 Wash. 473.

**5. Loans.** — *Rounthwaite v. Rounthwaite*, 136 Cal. xx, 68 Pac. Rep. 304.

Loans to be repaid in the future are not subject to limitations until maturity. *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908.

**208. 1. Gaming.** — *Cutshall v. McGowan*, 98 Mo. App. 702. See also *Roff v. Harmon*, (Indian Ter. 1901) 54 S. W. Rep. 755.

**7. Purchaser at Mortgage Foreclosure Sale Bound by Same Rule.** — *Barden v. Stickney*, 132 N. Car. 416.

**209. 1. Wages Presumably Due at End of Each Month or Year** — *Watson v. Barber*, 105 La.

799; *Alexander's Succession*, 110 La. 1027; *In re Ward*, 12 Ohio Cir. Dec. 44, 21 Ohio Cir. Ct. 753; *Loper v. Sheldon*, 120 Wis. 26.

**2. Time of Payment or of Service Indefinite.** — *Crampton v. Logan*, 28 Ind. App. 405; *Harrison v. Harrison*, 124 Iowa 525; *Elwell v. Roper*, 72 N. H. 254; *Shafer v. Pratt*, 79 N. Y. App. Div. 447; *West v. Clark*, 28 Tex. Civ. App. 1; *Gulf, etc., R. Co. v. Berry*, 31 Tex. Civ. App. 408; *Morrissey v. Faucett*, 28 Wash. 52. See also *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660.

**3. Particular Service.** — *Taylor v. Crook*, 136 Ala. 354, 96 Am. St. Rep. 26.

**4. Thompson v. Oreña**, 134 Cal. 26; *Shafer v. Pratt*, 79 N. Y. App. Div. 447; *Meehan v. Figliuolo*, (Supm. Ct. App. T.) 88 N. Y. Supp. 920.

**5. Compensation by Way of Legacy.** — *Tuohy v. Trail*, 19 App. Cas. (D. C.) 79; *Gullet v. Gullett*, 28 Ind. App. 670; *Bennett v. Lutz*, 119 Iowa 215; *Banks v. Howard*, 117 Ga. 94; *Story v. Story*, 61 S. W. Rep. 279, 22 Ky. L. Rep. 1731, rehearing denied (Ky. 1901) 62 S. W. Rep. 865; *Davis v. Teachout*, 126 Mich. 135, 86 Am. St. Rep. 531; *Elwell v. Roper*, 72 N. H. 254; *Bair v. Hager*, 97 N. Y. App. Div. 358; *West v. Clark*, 28 Tex. Civ. App. 1. But see *Loper v. Sheldon*, 120 Wis. 26.

**Agreement to Compensate by Legacy Must Be Definite.** — *Watson v. Barber*, 105 La. 799.

**6.** See *Harrison v. Harrison*, 124 Iowa 525; *Rodgers v. Lamb*, (Mich. 1904) 100 N. W. Rep. 440, 11 Detroit Leg. N. 296.

**210. 1.** *Moore v. Renick*, 95 Mo. App. 202.

**2. Attorney's Compensation.** — *McCrea v. Scofield*, (Supm. Ct. App. T.) 86 N. Y. Supp. 10.

**5. Personal Injury.** — *Benoit v. New York Cent., etc., R. Co.*, 94 N. Y. App. Div. 24.

**Alienation of Husband's Affections.** — The statute does not run against the wife, who, being still a married woman, is excepted from it. *Linck v. Vorhauer*, 104 Mo. App. 368.

**Domestic Corporation Assuming to Pay Notes of Foreign Corporation.** — Where the statute of limitations did not run in favor of a foreign corporation and its obligations were assumed by a domestic corporation, the statute commenced to run in favor of the latter only from the day it assumed the debts. *Gray Lithograph Co. v. American Watchman's Time Detector Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 206.

**211.** 4. Effect of Plaintiff's Laches — Independently of Special Provision. — See note 1.

Reasonable Time Allowed to Plaintiff for Perfecting His Cause of Action. — See note 3.

**212.** XI. POSTPONEMENT, SUSPENSION, AND INTERRUPTION OF STATUTE — 2. General Principles as to Exceptions — *a.* NO EXCEPTIONS UNLESS EXPRESSLY PROVIDED — (1) *Rule Stated* — The Courts Cannot Create Exceptions. — See note 7.

**214.** (2) *Applications of Rule* — (c) Plaintiff's Ignorance of Cause of Action. — See note 1.

**215.** (d) Plaintiff's Lack of Education. — See note 5.

(3) *Exceptions to Rule* — (a) Exceptions by Necessity Generally. — See note 9.

**216.** (b) Prohibition to Sue by Paramount Authority — General Rule. — See note 3. Suit on Judgment Prohibited Without Leave of Court. — See note 4.

**217.** (c) Statutory Exemption of Executor or Administrator from Suit. — See note 1.

**218.** (f) Delay Caused by Injunction and the Like. — See note 7.

**219.** By Other Legal Proceedings. — See note 2.

(g) No Party in Existence to Sue or Be Sued — *aa.* STATEMENT OF RULE. — See note 5.

**211.** 1. Plaintiff's Laches — *United States*. — *Birchard v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107.

*Colorado*. — *McGovney v. Gwillim*, 16 Colo. App. 284.

*Idaho*. — *Ryan v. Woodin*, 9 Idaho 525.

*Indiana*. — *Sheaf v. Dodge*, 161 Ind. 270; *Hitchcock v. Cosper*, 164 Ind. 633.

*Iowa*. — *Bonbright v. Bonbright*, 123 Iowa 305.

*Kansas*. — *West v. Topeka Sav. Bank*, 66 Kan. 524, 97 Am. St. Rep. 385; *Donaldson v. Jacobitz*, 67 Kan. 244; *Rankin v. Barton*, 69 Kan. 629; *Becker v. Atchison*, etc., R. Co., 70 Kan. 193.

*Kentucky*. — *Wurth v. Paducah*, 116 Ky. 403, 105 Am. St. Rep. 225.

*Minnesota*. — *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461.

*Missouri*. — *Stanton v. Gibbins*, 103 Mo. App. 264.

*Ohio*. — *Hoiles v. Riddle*, 26 Ohio Cir. Ct. 366, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

*Pennsylvania*. — *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570.

3. Reasonable Time Allowed. — See *Hoiles v. Riddle*, 26 Ohio Cir. Ct. 367, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

**212.** 7. Exceptions Must Be Express. — *Birchhead v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107; *In re Deaner*, 126 Iowa 701, 106 Am. St. Rep. 374; *Atchison*, etc., R. Co. v. *Atchison Grain Co.*, 68 Kan. 585; *Cox v. Von Ahlefeldt*, 105 La. 543; *Sweet v. Boston*, 186 Mass. 79; *Wyatt v. Wyatt*, 81 Miss. 219; *Thompson v. Hoxsie*, 24 R. I. 493; *Christian v. John*, 111 Tenn. 92.

**214.** 1. Ignorance of Right of Action. — *Hale v. Coffin*, 114 Fed. Rep. 567, affirmed (C. C. A.) 120 Fed. Rep. 470; *Davis v. Boyett*, 120 Ga. 649, 102 Am. St. Rep. 118; *State v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244; *Atchison*, etc., R. Co. v. *Atchison Grain Co.*, 68 Kan. 585; *Everett v. O'Leary*, 90 Minn. 154;

*Redford v. Clarke*, 100 Va. 115, 4 Va. Sup. Ct. 36; *Pietsch v. Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 911.

**215.** 5. *Boren v. Boren*, (Tex. Civ. App. 1905) 85 S. W. Rep. 48.

9. "Invincible Necessity." — *Lefflore County v. Allen*, 78 Miss. 671, 80 Miss. 298.

No Court in Which to Sue. — *Bissell v. State*, 70 N. Y. App. Div. 238, affirmed 177 N. Y. 540.

**216.** 3. Paramount Authority. — *Union Collection Co. v. Soule*, 141 Cal. 99; *Wild v. People*, 92 Ill. App. 66; *St. Paul*, etc., R. Co. v. *Olson*, 87 Minn. 117, 94 Am. St. Rep. 693, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

4. Where Leave of Court Necessary. — See *Union Collection Co. v. Soule*, 141 Cal. 99.

**217.** 1. Exemption from Suit. — *Southern Contract Co. v. Newhouse*, 66 S. W. Rep. 730, 23 Ky. L. Rep. 2141; *Hopper v. Brown*, 67 N. Y. App. Div. 620, affirming (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 661; *In re Morgan*, (Oregon 1904) 77 Pac. Rep. 608, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 216.

Where the plaintiff had the right to sue the surviving partner of a firm, the fact that the statute prohibited suit against the administrator of the deceased partner did not stop the statute from running in favor of the surviving partner. *Brigham-Hopkins Co. v. Gross*, 107 Fed. Rep. 769.

**218.** 7. Suit Enjoined. — *Wild v. People*, 92 Ill. App. 66. But see *Paul v. Fidelity*, etc., Co., 186 Mass. 413, 104 Am. St. Rep. 594.

The Injunction Must Be Such as to Prevent Suit. — *Wells v. Vansickle*, 112 Fed. Rep. 398, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 218.

**219.** 2. Receivership. — *Ennis v. Eden Mills Paper Co.*, 65 N. J. L. 577.

5. The Term Cause of Action. — *Ross v. Frick Co.*, 73 Ark. 45; *Winslow v. Benton*, 130 N. Car. 58; *Hoiles v. Riddle*, 26 Ohio Cir. Ct. 367, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 219.



**220.** *bb.* DEATH OF PLAINTIFF OR DEFENDANT. — See note 3.

**221.** Reasonable Time Allowed for Appointment and Qualification of Personal Representative. — See note 3.

**222.** *cc.* DEATH AFTER ACCRUAL OF CAUSE OF ACTION. — See note 5.

**224.** *b.* WHEN STATUTE HAS BEGUN TO RUN. — See note 3.

**225.** *c.* CONTINUOUS AND UNINTERRUPTED DISABILITY — When Disability Must Have Existed — Time When Cause of Action Accrued. — See note 2.

**226.** *d.* TACKLING DISABILITIES — Cumulative Disabilities. — See note 1.

**228.** 3. Statutory Exceptions — *b.* ABSENCE OF DEFENDANT — (1) *Distinction Between Absence After and at Time of Accrual of Cause of Action.* — See note 4.

(2) *Absence at Accrual of Cause of Action.* — See notes 6, 7.

**229.** See notes 1, 2.

**230.** (3) *Absence After Accrual of Cause of Action.* — See note 3.

(4) *Character of Absence Necessary* — (a) In General — Repeated and Protracted Absences. — See note 5.

**Municipality — Incorporation.** — *Winneconne v. Winneconne*, 122 Wis. 348.

**220.** 3. Time Between Death of Party and Qualification of Personal Representative Not Counted. — *Ross v. Frick Co.*, 73 Ark. 45; *Casey v. Gibbons*, 136 Cal. 368; *Mason's Appeal*, 75 Conn. 406; *Southern Contract Co. v. Newhouse*, 66 S. W. Rep. 730, 23 Ky. L. Rep. 2141; *Winslow v. Benton*, 130 N. Car. 58; *Phifer v. Ford*, 130 N. Car. 208.

**Kentucky — Limited by Statute to Three Years.** — *Webb v. Webb*, 78 S. W. Rep. 166, 25 Ky. L. Rep. 1476.

**When Want of an Administrator Is No Obstacle to Suit.** — *Hibernia Sav., etc., Soc. v. Boland*, 145 Cal. 626.

**Where a Suit to Foreclose a Mortgage Could Be Maintained Against the Heirs**, the failure to appoint an administrator was held not to suspend the running of the statute of limitations. *Gleason v. Hawkins*, 32 Wash. 464. See also *Frew v. Clark*, 34 Wash. 561.

**221.** 3. Where Claimant May Have Representative Appointed. — *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239; *Hoiles v. Riddle*, 26 Ohio Cir. Ct. 368, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 221.

**222.** 5. Death After Accrual of Cause of Action. — Compare *Casey v. Gibbons*, 136 Cal. 368.

**224.** 3. When Statute Begins to Run Nothing Will Interrupt It. — *Roelefsen v. Pella*, 121 Iowa 153; *Meyer v. Christopher*, 176 Mo. 580; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796. See also *Mills v. Whitmore*, 12 Ohio Cir. Dec. 338, 22 Ohio Cir. Ct. 467.

"The statute of limitations having begun to run against a trustee or an undisclosed agent who is acting as principal, it is not suspended by the subsequent coming forward of a married woman as *cestui que trust* or as the undisclosed principal." *Barden v. Stickney*, 132 N. Car. 416.

**225.** 2. Disability Must Exist at Accrual of Cause of Action. — *Meyer v. Christopher*, 176 Mo. 580.

**Cause of Action Accruing in Lifetime of Ancestor — Infancy of Heirs or Distributees Interrupts Statute.** — *Meiggs v. Hoagland*, 68 N. Y. App. Div. 182.

**226.** 1. Cumulative Disabilities. — *York v.*

*Hutcheson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 895.

**228.** 4. Absence of Defendant. — *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533.

6. Absence at Time When Cause of Action Accrues. — *Martin v. Wilson*, 120 Fed. Rep. 202, 58 C. C. A. 181; *Janeway v. Burton*, 201 Ill. 78; *Spink v. Newby*, 64 Kan. 383; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339.

7. Defendant Never in State. — *Balph v. Magaw*, 33 Ind. App. 399; *Drake v. Bigelow*, 93 Minn. 112; *Berkeley v. Tootle*, 163 Mo. 584, 85 Am. St. Rep. 587; *Williams v. Iron Belt Bldg., etc., Assoc.*, 131 N. Car. 267; *McConnell v. Spicker*, 15 S. Dak. 98.

**229.** 1. Nonresidence at Accrual of Cause of Action. — *Davenport v. Allen*, 120 Fed. Rep. 172.

*Contra.* — *Drake v. Bigelow*, 93 Minn. 112.

2. The Departure Must Take Place after the accrual of the cause of action. *Lindauer Mercantile Co. v. Boyd*, 11 N. Mex. 464, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 229; *Habermann v. Heidrich*, (Tex. Civ. App. 1902) 66 S. W. Rep. 106.

**The Statutes of Virginia and West Virginia.** — *Griffin v. Woolford*, 100 Va. 473.

**230.** 3. *Horner v. Perry*, 112 Fed. Rep. 906; *Simpson v. Wicker*, 120 Ga. 418; *Southern Contract Co. v. Newhouse*, 66 S. W. Rep. 730, 23 Ky. L. Rep. 2141; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339; *Lindauer Mercantile Co. v. Boyd*, 11 N. Mex. 464; *Liner v. J. B. Watkins Land Mortg. Co.*, (Tex. Civ. App. 1902) 68 S. W. Rep. 311; *Bemis v. Ward*, (Tex. Civ. App. 1904) 84 S. W. Rep. 291; *Big-nold v. Carr*, 24 Wash. 413; *Weyburn, etc., Co. v. Bemis*, 122 Wis. 321. See also *McMurray v. McMurray*, 180 Mo. 526.

**The Rhode Island Statute** provides that the time of limitation shall begin anew on the return of the defendant. *Cottrell v. Kenney*, 25 R. I. 99.

5. Actual Residence Out of State Required. — *Connecticut Trust, etc., Co. v. Wead*, 58 N. Y. App. Div. 493, modified 172 N. Y. 497, 92 Am. St. Rep. 756.

**Defendant Absent When Cause of Action Accrued — Returning and Again Departing.** — See *Connecticut Trust, etc., Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756.

- 231.** Daily Presence During Business Hours. — See note 1.  
Continuous Absence. — See note 3.  
Absence and Nonresidence Not Synonymous Terms. — See note 5.  
Mere Absence Without Nonresidence. — See note 6.
- 232.** (b) Absence from What State. — See note 1.  
(c) Absence of Whom — The Absence of Proper but Not Necessary Parties. — See note 4.  
Absence or Return of One Joint Debtor. — See note 5.  
(d) Accumulating Absences or Returns. — See notes 8, 9.
- 233.** (e) Presumption as to Absence. — See note 2.  
(5) Absence of Both Debtor and Creditor. — See note 4.  
(6) Effect of Defendant's Return — (e) Temporary Return. — See note 8.  
(d) Total Failure of Defendant to Return. — See note 9.
- 234.** (7) Real Actions and Proceedings in Rem — But the Decided Weight of Authority. — See notes 2, 3.  
(8) Ability to Serve Process on Defendant. — See note 1.
- 235.** d. FOREIGN CORPORATIONS. — See note 3.  
e. DISABILITIES OF PLAINTIFF — (1) Infancy. — See notes 4, 5.
- 237.** (2) Insanity. — See notes 1, 3.  
(3) Imprisonment. — See note 7.
- 238.** (4) Plaintiff Beyond Seas. — See note 1.

**231.** 1. Defendant Daily in State but Residing Elsewhere — Statute Does Not Run. — Compare Webster v. Citizens' Bank, (Neb. 1902) 96 N. W. Rep. 118.

3. Hixson v. Rodbourn, 67 N. Y. App. Div. 424; Miller v. Warren, 94 N. Y. App. Div. 192, affirmed 182 N. Y. 539.

5. Absence and Not Mere Nonresidence Must Be Shown. — See Webster v. Citizens' Bank, (Neb. 1902) 96 N. W. Rep. 118.

Personal Absence of the Defendant from the State is necessary. It is not enough to show that he has at all times been a resident of another state. Miller v. Baier, 67 Kan. 292.

6. Bemis v. Ward, (Tex. Civ. App. 1904) 84 S. W. Rep. 291.

**232.** 1. Powers Mercantile Co. v. Blethen, 91 Minn. 339.

4. Persons Not Necessary Parties. — Filippini v. Trobock, 134 Cal. 441; Hogaboom v. Flower, 67 Kan. 41; Wetyen v. Fick, 178 N. Y. 223.

Absence of a Mortgagor will not prevent the statute running in favor of his grantee. Raymond v. Bales, 26 Wash. 493; Hanna v. Kasson, 26 Wash. 568.

5. Joint Debtors. — Hixson v. Rodbourn, 67 N. Y. App. Div. 424.

8. Accumulated Absences. — Bignold v. Carr, 24 Wash. 413.

9. Accumulated Returns. — Webster v. Citizens' Bank, (Neb. 1902) 96 N. W. Rep. 118.

**233.** 2. Hixson v. Rodbourn, 67 N. Y. App. Div. 424.

4. Hixson v. Rodbourn, 67 N. Y. App. Div. 424.

8. Temporary Return. — Connecticut Trust, etc., Co. v. Wead, 172 N. Y. 497, 92 Am. St. Rep. 756.

9. See Van Schuyver v. Hartman, 1 Alaska 431.

**234.** 2. Actions to Recover Land. — Brandenstein v. Johnson, 140 Cal. 29; Brittain v.

Lankford, 110 Ky. 484; Wetyen v. Fick, 178 N. Y. 223.

3. Suit to Foreclose Mortgage. — Wells v. Scanlan, 124 Wis. 229. But see Hogaboom v. Flower, 67 Kan. 41.

**235.** 1. Question as to Opportunity for Service of Process. — O'Connor v. Aetna L. Ins. Co., 67 Neb. 122; Green v. Snyder, (Tenn. 1905) 84 S. W. Rep. 808.

**236.** 3. Williams v. Metropolitan St. R. Co., 68 Kan. 17, 104 Am. St. Rep. 377.

4. Infancy. — Bradford v. Wilson, 140 Ala. 633; Rice v. Bolton, 126 Iowa 654; Jones v. Comer, 25 Ky. L. Rep. 773, 76 S. W. Rep. 392, rehearing denied (Ky. 1903) 77 S. W. Rep. 184; Gibson v. Gibson, 77 S. W. Rep. 928, 25 Ky. L. Rep. 1332; Smith v. Hardesty, 83 S. W. Rep. 646, 26 Ky. L. Rep. 1266; George v. Delaney, 111 La. 760; Albers v. Kozeluh, (Neb. 1903) 97 N. W. Rep. 646; Meiggs v. Hoagland, 68 N. Y. App. Div. 182; Matter of Pond, (Surrogate Ct.) 40 Misc. (N. Y.) 66; Jones v. Boykin, 70 S. Car. 309; Moyers v. Kinnick, 1 Tenn. Ch. App. 65; Missouri, etc., R. Co. v. Scarborough, 29 Tex. Civ. App. 194.

Where the statute gives an infant the full period of the statute within which to sue after attaining majority, he may, during minority, maintain suit by next friend on a claim against which the full statutory period has run. Bliven v. Wheeler, 23 R. I. 379.

5. Sweet v. Boston, 186 Mass. 79.

**237.** 1. Insanity. — La Grange Mills v. Kener, 121 Ga. 429; Spicer v. Holbrook, 66 S. W. Rep. 180, 23 Ky. L. Rep. 1812.

Contra. — Cox v. Von Ahlefeldt, 105 La. 543.

3. If the Insanity Did Not Exist When the Cause of Action Accrued. — Roelefsen v. Pella, 121 Iowa 153.

7. Texas Statute. — Lasater v. Waites, (Tex. Civ. App. 1902) 67 S. W. Rep. 518, reversed 95 Tex. 553.

**238.** 1. Matter of Davis, 136 Cal. 590.

**238.** (5) *Coverture*. — See note 6.

**239.** See note 1.

Exception Expressly Withdrawn by Statute. — See note 4.

Exception Impliedly Withdrawn by Passage of Married Women's Acts. — See note 6.

**240.** (6) *General Rules as to Effect of Disabilities of Plaintiff* — (b) Within What Time Party under Disability Must Sue. — See note 3.

**241.** (d) *Disability Not Preventing Suit*. — See note 2.

**242.** 4. *Fraud and Fraudulent Concealment* — a. SEVERAL CLASSES OF CASES — (2) *Open Fraud*. — See note 4.

(3) *Fraud Without Concealment* — It Is Sometimes Suggested that Both Fraud and Concealment Must Concur. — See note 5.

The Distinction. — See note 7.

**243.** When the Basis of the Action or Suit Is Some Fraud. — See note 1.

(4) *Concealment Without Fraud*. — See note 6.

b. EFFECT OF FRAUD AND CONCEALMENT — (1) *In Equity*. — See note 7.

**238.** 6. *Married Women Excepted from Operation of Statute*. — *Linck v. Vorhauer*, 104 Mo. App. 368; *Spruill v. Branning Mfg. Co.*, 130 N. Car. 42; *Wilkes v. Allen*, 131 N. Car. 279; *Thompson v. Cincinnati, etc., R. Co.*, 109 Tenn. 268; *Crouch v. Crouch*, 30 Tex. Civ. App. 288; *Estes v. Turner*, 30 Tex. Civ. App. 365.

In *Kentucky Expressly Excepted by Statute*. — *Terrell v. Maupin*, 83 S. W. Rep. 591, 26 Ky. L. Rep. 1203; *Furnish v. Lilly*, (Ky. 1905) 84 S. W. Rep. 734.

**239.** 1. *In re Deaner*, 126 Iowa 701, 106 Am. St. Rep. 374.

4. *Disability of Coverture Withdrawn from Statute*. — Rev. Stat. Tex. 1895, art. 3352, provided that limitations should not run against married women until one year from the passage of the article, and they should have thereafter the same time allowed others by the provisions thereof. In construing this article the court held that the statute of limitations did not begin to run against a married woman until one year after the passage of the article. *Thompson v. McConnell*, 107 Fed. Rep. 33, 46 C. C. A. 124.

6. *Linton v. Heye*, (Neb. 1903) 95 N. W. Rep. 1040. But see *Sturgill v. Chesapeake, etc., R. Co.*, 116 Ky. 659; *Higgins v. Stokes*, 116 Ky. 664.

**240.** 3. *Time of Suit After Removal of Disability*. — *Wilkinson v. Wilkinson*, 33 Ind. App. 540; *Bryson v. Collmer*, 33 Ind. 494; *Cahill v. Seitz*, 93 N. Y. App. Div. 105; *Spruill v. Branning Mfg. Co.*, 130 N. Car. 42.

*Texas Rule*. — *Ferguson v. Morrison*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1240.

**241.** 2. *Where Disability No Obstacle to Suit*. — *Terrell v. Maupin*, 83 S. W. Rep. 591, 26 Ky. L. Rep. 1203.

The fact that a next friend (a father) sues for injuries to an infant will not start the statute of limitations running against the infant. *Galveston, etc., R. Co. v. Washington*, 94 Tex. 510, 25 Tex. Civ. App. 600.

**242.** 4. *Rule as to Open Fraud*. — *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469.

5. *Fraud Without Concealment*. — *Black v. Black*, 64 Kan. 704.

7. *Pitman v. Holmes*, 34 Tex. Civ. App. 485;

*Newberger v. Wells*, 51 W. Va. 624, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242.

**243.** 1. *Birckhead v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107; *Faust v. Hosford*, 119 Iowa 97; *Newberger v. Wells*, 51 W. Va. 624, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242.

6. *Atchison, etc., R. Co. v. Atchison Grain Co.*, 68 Kan. 585.

7. *Fraud and Concealment — In Equity — United States*. — *Birckhead v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107.

*California*. — *Evans v. Duke*, (Cal. 1902) 69 Pac. Rep. 688.

*Illinois*. — *Mackey v. Northern Milling Co.*, 210 Ill. 115.

*Iowa*. — *Cole v. Charles City Nat. Bank*, 114 Iowa 632.

*Kansas*. — *Brown v. Brown*, 62 Kan. 666; *Kahn v. Klaus*, 64 Kan. 24; *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 306; *Black v. Black*, 64 Kan. 704.

*Kentucky*. — *Potter v. Benge*, 67 S. W. Rep. 1005, 24 Ky. L. Rep. 24.

*Michigan*. — *Wolkins v. Knight*, 134 Mich. 347, 10 Detroit Leg. N. 453.

*Missouri*. — *State v. Hawkins*, 103 Mo. App. 251, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 243; *Central Bank v. Thayer*, 184 Mo. 61.

*Nebraska*. — *Forsyth v. Easterday*, 63 Neb. 887; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

*New Jersey*. — *Clark v. Augustine*, 62 N. J. Eq. 689, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 243.

*New York*. — *Slayback v. Raymond*, 93 N. Y. App. Div. 326.

*Texas*. — *Scott v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485, rehearing denied (Tex. Civ. App. 1902) 67 S. W. Rep. 343; *Dashner v. Wallace*, 29 Tex. Civ. App. 151; *Watson v. Texas, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 830; *Pitman v. Holmes*, 34 Tex. Civ. App. 485; *Boren v. Boren*, (Tex. Civ. App. 1905) 85 S. W. Rep. 48. *West Virginia*. — *Newberger v. Wells*, 51 W. Va. 624.

*Wisconsin*. — *Ludington v. Patton*, 111 Wis. 208.

**245.** (2) *At Law*—The Doctrine of Many of the Early Cases. — See note 1.  
Later Doctrine. — See note 2.

**246.** (3) *Statutes Confining Rule to Equity Cases.* — See note 1.

**248.** *d. OPERATION AND EFFECT OF ORIGINAL AND STATUTORY RULES* — (2) *To What Cases Such Statutes Apply.* — See note 1.

(3) *What Character of Fraud Essential*—(a) *In General.* — See note 2.

(b) *Constructive Fraud.* — See note 6.

**249.** (e) *Acts of Defendant's Agent.* — See note 4.

(f) *Acts of Third Person.* — See note 5.

**250.** *e. QUALIFICATION OF RULE*—(1) *Necessity for Due Diligence.* — See note 1.

**245. 1.** For Other Cases Upholding the Same Rule, see *Liskey v. Paul*, 100 Va. 764.

**2.** That the Weight of Authority. — *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 306, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 245.

The Rule Has Also Been Applied in the Following Cases — *United States.* — *Horner v. Perry*, 112 Fed. Rep. 906.

*Alabama.* — *Bromberg v. Sands*, 127 Ala. 411.

*California.* — *People v. Perris Irrigation Dist.*, 142 Cal. 601.

*Colorado.* — *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256.

*Iowa.* — *Faust v. Hosford*, 119 Iowa 97.

*Kansas.* — *Brown v. Brown*, 62 Kan. 666; *Atchison, etc., R. Co. v. Atchison Grain Co.*, (Kan. 1903) 70 Pac. Rep. 933, modified on rehearing 68 Kan. 585.

*Massachusetts.* — *Dean v. Ross*, 178 Mass. 397.

*Missouri.* — *State v. Hawkins*, 103 Mo. App. 251, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 243 [245]; *Central Bank v. Thayer*, 184 Mo. 61; *Edwards v. Noel*, 88 Mo. App. 434; *Ruff v. Milner*, 92 Mo. App. 620.

*Nebraska.* — *Raymond v. Schriever*, 63 Neb. 719; *Kohout v. Thomas*, (Neb. 1903) 93 N. W. Rep. 421; *Jones v. Danforth*, (Neb. 1904) 99 N. W. Rep. 495.

*New York.* — *Kelly v. Pratt*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31.

*Oklahoma.* — *Blackwell v. Hatch*, 13 Okla. 169.

*South Carolina.* — *Toole v. Johnson*, 61 S. Car. 34.

*Texas.* — *Ward v. Marion County*, 26 Tex. Civ. App. 361; *Cetti v. Dunman*, 26 Tex. Civ. App. 433; *West v. Clark*, 28 Tex. Civ. App. 1; *Hodges v. Hodges*, 27 Tex. Civ. App. 537; *Missouri, etc., R. Co. v. Smith*, 28 Tex. Civ. App. 565; *Luter v. Hutchinson*, 30 Tex. Civ. App. 511.

*Utah.* — *Larsen v. Utah L. & T. Co.*, 23 Utah 449.

*Washington.* — *Stearns v. Hochbrunn*, 24 Wash. 206; *Irwin v. Holbrook*, 26 Wash. 89.

**246. 1.** *Statutes Limiting Rule to Equity Cases.* — *Daugherty v. Daugherty*, 116 Iowa 245.

**248. 1.** *Actions for Relief on Ground of Fraud* — *Statutes.* — *Campbell v. Campbell*, 133 Cal. 33; *Murto v. Lemon*, 19 Colo. App. 314, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247 [248]; *Atchison, etc., R. Co. v. Atchison Grain Co.*, 68 Kan. 585; *Stearns v. Hochbrunn*, 24 Wash. 206.

**2.** *Nature of Fraud.* — *Larsen v. Utah L. & T. Co.*, 23 Utah 449.

**6.** *Constructive Fraud Not Sufficient.* — *Maxwell v. Walsh*, 117 Ga. 467. But see *Stevens v. Summers*, 68 Ohio St. 421; *Lampman v. Lampman*, 118 Iowa 140, where it was held that constructive fraud, coupled with weak-mindedness of plaintiff, was sufficient.

**249. 4.** *Agency.* — *Koons v. Vanconsant*, 129 Mich. 260, 95 Am. St. Rep. 438, 8 Detroit Leg. N. 946, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 249.

**5.** *Fraud of Third Persons.* — *In re McCallum*, (1901) 1 Ch. 143; *Taylor v. Hammell*, 201 Pa. St. 546.

**250. 1.** *Due Diligence* — *United States.* — *Darnold v. Simpson*, 114 Fed. Rep. 368.

*California.* — *Smith v. Martin*, 135 Cal. 247; *Simpson v. Dalziel*, 135 Cal. 599.

*Georgia.* — *Maxwell v. Walsh*, 117 Ga. 467; *McWhorter v. Cheney*, 121 Ga. 541.

*Idaho.* — *Ryan v. Woodin*, 9 Idaho 525.

*Iowa.* — *Shircliffe v. Casebeer*, 122 Iowa 618; *McDonald v. Bayard Sav. Bank*, 123 Iowa 413.

*Kansas.* — *Black v. Black*, 64 Kan. 704; *Lewis v. Duncan*, 66 Kan. 306; *Donaldson v. Jacobitz*, 67 Kan. 244.

*Kentucky.* — *German Security Bank v. Columbia Finance, etc., Co.*, (Ky. 1905) 85 S. W. Rep. 761.

*Missouri.* — *State v. Hawkins*, 103 Mo. App. 251, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 280; *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469; *Callan v. Callan*, 175 Mo. 346.

*Nebraska.* — *Raymond v. Schriever*, 63 Neb. 719; *Forsyth v. Easterday*, 63 Neb. 887; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239.

*New York.* — *Talmage v. Russell*, 74 N. Y. App. Div. 7.

*Texas.* — *Moore v. Brown*, 27 Tex. Civ. App. 208; *Gerfers v. Mecke*, 28 Tex. Civ. App. 269; *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63; *Missouri, etc., R. Co. v. Smith*, 28 Tex. Civ. App. 565; *Prichard v. McCord-Collins Co.*, 30 Tex. Civ. App. 582; *Pitman v. Holmes*, 34 Tex. Civ. App. 485; *Boren v. Boren*, (Tex. Civ. App. 1905) 85 S. W. Rep. 48.

*Washington.* — *Irwin v. Holbrook*, 32 Wash. 349.

*West Virginia.* — *Edgell v. Smith*, 50 W. Va. 349.

There is no demand for the exercise of diligence until there is some cause for suspicion or some notice of the fraud. *Horner v. Perry*, 112 Fed. Rep. 906.

**250.** (2) *Statutes Limiting Time for Discovery of Fraud.* — See note 2.

**251.** (3) *What Is Discovery of Fraud* — (a) In General. — See note 1.

(b) Actual or Constructive Notice — Actual Notice. — See note 2.

Constructive Notice of the Fraud. — See note 3.

**252.** (c) Where Transaction Matter of Public Record. — See notes 1, 2.

But Where the Fraudulent Nature of the Conveyance Is Contingent upon Other Circumstances. — See note 3.

**253.** See note 2.

(d) Knowledge by Plaintiff's Agent. — See notes 3, 4.

f. WHAT CONSTITUTES FRAUDULENT CONCEALMENT — (1) *As Between Strangers* — (a) In General — When the Basis of the Action Is Some Wrong Other than a Fraud. — See note 6.

**254.** See notes 1, 2.

Where, However, the Basis of the Action or Suit Is a Fraud. — See note 3.

**250. 2. The Kentucky Statute.** — Chinn v. Curtis, 71 S. W. Rep. 923, 24 Ky. L. Rep. 1563; German Security Bank v. Columbia Finance, etc., Co., (Ky. 1905) 85 S. W. Rep. 761.

**251. 1. Meaning of "Discovery" of Fraud.** — Black v. Black, 64 Kan. 704; Atchison, etc., R. Co. v. Atchison Grain Co., 68 Kan. 585; Slayback v. Raymond, 93 N. Y. App. Div. 326; Irwin v. Holbrook, 26 Wash. 89.

Rule Generally Followed. — Raymond v. Schriever, 63 Neb. 719.

Discovery of Fraud Will Not Set the Statute to Running, unless the plaintiff's right of action has then accrued. Blackwell v. Hatch, 13 Okla. 169.

**2. Actual Notice Unnecessary.** — McDonald v. Bayard Sav. Bank, 123 Iowa 413; Black v. Black, 64 Kan. 704; Cox v. Von Ahlefeldt, 105 La. 543; Loomis v. Missouri Pac. R. Co., 165 Mo. 469; Callan v. Callan, 175 Mo. 346; Raymond v. Schriever, 63 Neb. 719; Forsyth v. Easterday, 63 Neb. 887; State Bank v. Frey, (Neb. 1902) 91 N. W. Rep. 239; Cole v. Boyd, (Neb. 1903) 93 N. W. Rep. 1003; Jones v. Danforth, (Neb. 1904) 99 N. W. Rep. 495; Talmage v. Russell, 74 N. Y. App. Div. 7; Kelly v. Pratt, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 31; Moore v. Brown, 27 Tex. Civ. App. 208; Gerfers v. Mecke, 28 Tex. Civ. App. 269; Irwin v. Holbrook, 32 Wash. 349.

**3. Constructive Notice.** — Black v. Black, 64 Kan. 704. But see Chinn v. Curtis, 71 S. W. Rep. 923, 24 Ky. L. Rep. 1563; Wilhoit v. Musselman, 72 S. W. Rep. 1112, 24 Ky. L. Rep. 2011; Stivens v. Summers, 68 Ohio St. 421.

**252. 1. Matters of Public Record** — United States. — Darnold v. Simpson, 114 Fed. Rep. 368.

Idaho. — Ryan v. Woodin, 9 Idaho 525.

Iowa. — State v. Soper, 118 Iowa 1; Murray v. Quigley, 119 Iowa 6, 97 Am. St. Rep. 276; Fuller v. McMahon, (Iowa 1903) 94 N. W. Rep. 205; McDonald v. Bayard Sav. Bank, 123 Iowa 413.

Kansas. — Black v. Black, 64 Kan. 704, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 251; Lewis v. Duncan, 66 Kan. 306; Donaldson v. Jacobitz, 67 Kan. 244; Rogers v. Richards, 67 Kan. 706.

Kentucky. — Schroer v. Central Kentucky Insane Asylum, 113 Ky. 288.

Nebraska. — State Bank v. Frey, (Neb. 1902) 91 N. W. Rep. 239; Jones v. Danforth, (Neb.

1904) 99 N. W. Rep. 495, disapproving Gillespie v. Cooper, 36 Neb. 775.

New York. — Talmage v. Russell, 74 N. Y. App. Div. 7.

Ohio. — Boies v. Johnson, 25 Ohio Cir. Ct. 331.

Pennsylvania. — State Insane Hospital v. Philadelphia County, 205 Pa. St. 336.

Texas. — Boren v. Boren, (Tex. Civ. App. 1905) 85 S. W. Rep. 48.

Virginia. — Vashon v. Barrett, 99 Va. 344.

Washington. — Irwin v. Holbrook, 32 Wash. 349.

West Virginia. — Edgell v. Smith, 50 W. Va. 349.

A Fraudulent Deed, Where the Grantor Remains in Possession, is not constructive notice, although recorded. Chinn v. Curtis, 71 S. W. Rep. 923, 24 Ky. L. Rep. 1563.

A fraudulent deed, though recorded, is not notice to the grantor's creditors. Wilhoit v. Musselman, 72 S. W. Rep. 1112, 24 Ky. L. Rep. 2011.

2. Black v. Black, 64 Kan. 704, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 251 [252]; Boren v. Boren, (Tex. Civ. App. 1905) 85 S. W. Rep. 48; Irwin v. Holbrook, 32 Wash. 349.

**3. When Fraudulent Nature of Transaction Dependent on Contingency.** — Forsyth v. Easterday, 63 Neb. 887; Jones v. Danforth, (Neb. 1904) 99 N. W. Rep. 495. See also Coulson v. Galtsman, (Neb. 1901) 96 N. W. Rep. 349.

**253. 2. Forsyth v. Easterday,** 63 Neb. 887.

**3. Knowledge on Part of Agent.** — Deering v. Holcomb, 26 Wash. 588. But see Downer v. Porter, 116 Ky. 422.

**4. Where Agent Colludes with Wrongdoer.** — Cooper v. Ford, 29 Tex. Civ. App. 253.

**6. Mere Silence.** — State v. Walters, 31 Ind. App. 77, 99 Am. St. Rep. 244; Callan v. Callan, 175 Mo. 346; Franklin v. Franklin, 22 Pa. Super. Ct. 463; Missouri, etc., R. Co. v. Smith, 28 Tex. Civ. App. 565.

**254. 1. State v. Walters,** 31 Ind. App. 77, 99 Am. St. Rep. 244; Stewart v. Indian Territory Bank, 68 Kan. 755; Callan v. Callan, 175 Mo. 346.

2. Evans v. Duke, (Cal. 1902) 69 Pac. Rep. 688.

3. Faust v. Hosford, 119 Iowa 97; Newberger v. Wells, 51 W. Va. 624.

- 254.** (b) *Duress*. — See note 4.
- 255.** (2) *As Between Fiduciaries*. — See note 2.  
*Party Must Still Use Due Diligence*. — See note 3.
- 256.** g. *QUESTION FOR JURY* — (1) *As to Existence of Fraud*. — See note 2.  
 (2) *As to Plaintiff's Diligence*. — See note 3.
5. *Hindrance or Obstruction of Prosecution*. — See note 4.
6. *Mistake* — a. *ORIGINAL RULE*. — See note 5.
- 257.** *When Relief Is Sought in Equity by a Party in Possession*. — See note 1.  
 b. *RULE CHANGED BY STATUTE*. — See notes 2, 3.
- XII. WHAT TERMINATES RUNNING OF STATUTE — 1. Commencement of Suit** — a. *EFFECT OF COMMENCING SUIT*. — See note 4.
- 258.** *The Pendency of the Suit*. — See notes 1, 4.  
 b. *NEGLIGENCE AFTER SUIT BEGUN*. — See note 5.
- 259.** d. *INSTITUTION OF SUIT FOR BENEFIT OF PLAINTIFF*. — See note 3.
- 260.** 2. *What Is Commencement of Suit* — a. *GENERAL RULE — The Fact that the Officer Fails to Serve the Summons*. — See note 1.  
 If the Judgment Obtained Is Void on Its Face. — See note 4.  
 e. *MUST BE AGAINST PROPER DEFENDANT*. — See note 9.
- 261.** f. *MUST RELATE TO PROPER SUBJECT-MATTER*. — See note 1.

**254.** 4. *Duress*. — *Leflore County v. Allen*, 78 Miss. 671, 80 Miss. 298.

**255.** 2. *Effect of Fiduciary Relation*. — *Birckhead v. De Forest*, 120 Fed. Rep. 645, 57 C. C. A. 107; *Arkins v. Arkins*, (Colo. App. 1904) 77 Pac. Rep. 256; *Barnes v. Huffman*, 113 Ill. App. 226; *Blakeney v. Wyland*, 115 Iowa 607; *Faust v. Hosford*, 119 Iowa 97; *Boren v. Boren*, (Tex. Civ. App. 1905) 85 S. W. Rep. 48; *Pitman v. Holmes*, 34 Tex. Civ. App. 485; *Ludington v. Patton*, 111 Wis. 208.

3. *Due Diligence*. — *Pitman v. Holmes*, 34 Tex. Civ. App. 485. See also *Horne v. Perry*, 112 Fed. Rep. 906.

In *Slayback v. Raymond*, 93 N. Y. App. Div. 326, it was said that there is no duty on the plaintiff to be active to discover fraud where there are no circumstances to induce inquiry.

**256.** 2. *Question for Jury*. — *Faust v. Hosford*, 119 Iowa 97.

3. *Cole v. Charles City Nat. Bank*, 114 Iowa 632; *Faust v. Hosford*, 119 Iowa 97; *State v. Hawkins*, 103 Mo. App. 251; *Pitman v. Holmes*, 34 Tex. Civ. App. 485.

4. *Kentucky Statute*. — *Southern Contract Co. v. Newhouse*, 66 S. W. Rep. 730, 23 Ky. L. Rep. 2141; *Chesapeake, etc., R. Co. v. Speakman*, 114 Ky. 628; *Exchange Bank v. Thomas*, 115 Ky. 832.

*Virginia Statute*. — *Liskey v. Paul*, 100 Va. 764; *Kesterson v. Hill*, 101 Va. 739; *Templeman v. Pugh*, 102 Va. 441.

5. *Compare as to Rule of Text*. — *Perry v. Williams*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 57.

**257.** 1. *Wall v. Meikle*, 89 Minn. 232.

2. *Rule as to Mistake Changed by Statute*. — *Eureka v. Gates*, 137 Cal. 89; *Bottomf v. Lewis*, 121 Iowa 27; *Cole v. Charles City Nat. Bank*, 114 Iowa 632; *Sioux City, etc., R. Co. v. O'Brien County*, 118 Iowa 582; *German Security Bank v. Columbia Finance, etc., Co.*, (Ky. 1905) 85 S. W. Rep. 761; *Webb v. Webb*, 64 S. W. Rep. 839, 23 Ky. L. Rep. 1057; *Prichard v. McCord-Collins Co.*, 30 Tex. Civ. App. 582.

See also *Lowry v. Lowry*, 135 Mich. 305, 10 Detroit Leg. N. 793; *Carter v. Leonard*, 65 Neb. 670; *Bardeen v. Stickney*, 132 N. Car. 416.

*Kentucky — Relief Barred in Ten Years*. — *Webb v. Webb*, 78 S. W. Rep. 166, 25 Ky. L. Rep. 1476.

3. *Statute Runs from Time When Plaintiff Ought to Have Discovered Mistake*. — *Sharp v. Behr*, 117 Fed. Rep. 864; *Simpson v. Dalziel*, 135 Cal. 599; *Cole v. Charles City Nat. Bank*, 114 Iowa 632; *Carter v. Leonard*, 65 Neb. 670; *State Insane Hospital v. Philadelphia County*, 205 Pa. St. 336.

4. *The Express Language of the Statutes*. — *Forman v. Brewer*, 62 N. J. Eq. 748, 90 Am. St. Rep. 475.

**258.** 1. *Mantle v. Speculator Min. Co.*, 27 Mont. 473, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796.

4. *The General Rule*. — *Mantle v. Speculator Min. Co.*, 27 Mont. 473, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258; *Gunnell v. Dixon*, 101 Va. 174; *Woods v. Douglass*, 52 W. Va. 517.

5. *Delay in Prosecution of Suit*. — *Louisville v. Hornsby*, 64 S. W. Rep. 996, 23 Ky. L. Rep. 1238; *St. Francis Mill Co. v. Sugg*, 169 Mo. 130.

**259.** 3. *Dunne v. Portland St. R. Co.*, 40 Oregon 295.

**260.** 1. *Cox v. Strickland*, 120 Ga. 104.

4. See *Miller v. Fulton*, 206 Pa. St. 595.

9. *Must Be Against Proper Defendant*. — *Frates v. Sears*, 144 Cal. 246; *Bissell v. State*, 70 N. Y. App. Div. 238, affirmed 177 N. Y. 540.

*Mere Misnomer of Defendant — Misnomer Connected After Statutory Period*. — *Martinez v. Dagna*, (Tex. Civ. App. 1903) 73 S. W. Rep. 425.

**261.** 1. *Missouri, etc., R. Co. v. Bagley*, 65 Kan. 188; *Bissell v. State*, 70 N. Y. App. Div. 238, affirmed 177 N. Y. 540; *Hinchman v. Anderson*, 32 Wash. 198.

**261. XIII. ACTION BEGUN AND DISMISSED WITHOUT CONCLUDING MERITS**

— 1. At Common Law — Journeys Account. — See note 7.

**262.** 2. Under Statutes — *a.* ORIGINAL STATUTE — The General Scope of the Statutes. — See note 4.

*b.* TO WHAT CASES STATUTE APPLIES — (2) *Judgment for Plaintiff Arrested.* — See note 7.

**263.** (4) *Plaintiff Nonsuited.* — See notes 2, 3.

(5) *First Action Prematurely Brought.* — See note 6.

(7) *Other Cases Within Statute.* — See note 9.

**264.** *c.* CONSTRUCTION AND OPERATION OF STATUTE — (1) *Time Within Which New Action Must Be Brought.* — See note 1.

(2) *Necessity for Strict Following of Statute.* — See note 2.

**265.** *d.* CONDITIONS ESSENTIAL FOR APPLICATION OF STATUTE —

(1) *Parties* — It Must Appear that the Parties Are the Same in Both Cases. — See notes 4, 5.

(2) *Cause of Action* — The Cause of Action Must Be the Same. — See notes 6, 8.

**266.** (4) *Courts* — Both Suits Need Not Have Been in the Same Court. — See note 2.

**261.** 7. Doctrine of Journeys Account Rejected. — *Cox v. Strickland*, 120 Ga. 104.

**262.** 4. Statute Does Not Affect Questions of Jurisdiction. — *Cox v. Strickland*, 120 Ga. 104. 7. See *Baker v. Sherman*, 77 Vt. 167.

**263.** 2. *Turner v. Gonzales*, 3 Indian Ter. 649; *Fleming v. Southern R. Co.*, 128 N. Car. 80; *Meekins v. Norfolk, etc., R. Co.*, 131 N. Car. 1. See also *Harris v. Davenport*, 132 N. Car. 697.

The statute runs from the entry of the judgment nonsuiting the plaintiff. *Estes v. Fry*, 166 Mo. 70.

**3. Involuntary Nonsuit.** — *Hinchliff v. Rudnik*, 212 Ill. 569; *Guthiel v. Gilmer*, 27 Utah 496.

**6. Action Premature.** — *McGlinchy v. Bowles*, 68 Kan. 190.

**9. Miscellaneous Cases.** — *Judgment of Trial Court Affirmed on Appeal, but Without Concluding Merits.* — *Guthiel v. Gilmer*, 27 Utah 496.

*Suit Dismissed Without Prejudice.* — A statute giving a right to file a new suit within one year was held not to apply in the case of dismissal of an action by a widow for the wrongful death of her husband. *Rodman v. Missouri Pac. R. Co.*, 65 Kan. 645.

*Suit Dismissed Because of Mistake in Form.* — *McMillan v. Reaume*, (Mich. 1904) 100 N. W. Rep. 166, 11 Detroit Leg. N. 168.

*Judgment Set Aside as Void.* — *Topeka Bank v. Clark*, 69 Kan. 864.

*Dismissal for Failure of Proof.* — *Goldman v. Tobias*, (Supm. Ct. App. T.) 88 N. Y. Supp. 991.

*A Suit Dismissed on the Merits* because of the plaintiff's failure to produce a certain document required by the statute under which he sued. *Conolly v. Hyams*, 176 N. Y. 403.

**264.** 1. *Georgia Statute.* — *Crawford v. Watkins*, 118 Ga. 631.

2. Where the first action was in the Circuit Court, and the defendant died, and the second action was brought in the probate court without dismissing the first, the second action was barred. *Hill v. Pipkins*, 72 Ark. 549.

*Statute Liberally Construed.* — *Cox v. Strickland*, 120 Ga. 104.

**265.** 4. *Parties Must Be Same.* — *H. B. Claflin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958; *Thompson v. Beeler*, 69 Kan. 462; *Meddis v. Wilson*, 175 Mo. 126, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265; *Bissell v. State*, 177 N. Y. 540, affirming 70 N. Y. App. Div. 238.

A decree for accounting in a creditors' suit will not toll the statute as to a claim not represented or proven under the decree. *Callaway v. Saunders*, 99 Va. 350.

**5. Parties Substantially Same** — Illustrations. — *Cox v. Strickland*, 120 Ga. 104.

*First Suit by Original Trustees.* — *Meddis v. Wilson*, 175 Mo. 126, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265.

*An Action by Partners for Tort to the Partnership* was held to suspend the statute as to a subsequent action by the latter. *Wolf v. New Orleans Tailor-Made Pants Co.*, 110 La. 427.

*A Garnishment* will not operate to suspend the statute in favor of the defendant in garnishment. *Holland v. Shannon*, (Tex. Civ. App. 1905) 84 S. W. Rep. 854.

**6. Cause of Action Must Be Same.** — *H. B. Claflin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958; *Cox v. Strickland*, 120 Ga. 104; *Thompson v. Beeler*, 69 Kan. 462; *McGlinchy v. Bowles*, 68 Kan. 190; *Com. v. Elkins*, 116 Ky. 303; *Meddis v. Wilson*, 175 Mo. 126, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 265; *Bissell v. State*, 177 N. Y. 540, affirming 70 N. Y. App. Div. 238.

**8. Mantle v. Speculator Min. Co.**, 27 Mont. 473, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

"A petition which does not state a cause of action at all does not delay the running of the statute of limitations." *McGlinchy v. Bowles*, 68 Kan. 190; *Becker v. Atchison, etc., R. Co.*, 70 Kan. 193.

Bpt in *North Carolina* it was held not necessary that the original complaint should state a cause of action. *Woodcock v. Bostic*, 128 N. Car. 243.

**266.** 2. *Suits in Different Courts.* — *Atlanta, etc., R. Co. v. Wilson*, 119 Ga. 781; *Cox v. Strickland*, 120 Ga. 104.

**266.** *e.* CASES NOT WITHIN STATUTE—(1) *Dismissal for Want of Jurisdiction.*—See notes 5, 6.

**267.** (2) *Dismissal for Negligence of Plaintiff.*—See note 1.

**268.** XIV. TIME OF LIMITATION—2. *Controlling Effect of Form of Action.*—See notes 1, 2.

**270.** 3. *Limitation in Particular Cases—*a. *CONTRACTS—*(3) *Contracts in Writing—*(a) *In General.*—See note 3.

**271.** (b) *Writing Not Signed by Party to Be Charged.*—See note 1.

(c) *Resolution Entered on Corporate Minutes.*—See note 2.

**272.** (d) *Respective Rights of Parties Fixed by Writing.*—See note 3.

(e) *Suit by Surety Against Principal for Indemnity.*—See note 5.

(g) *Where Writing Merely Link in Chain of Evidence.*—See note 8.

**274.** (5) *Contracts under Seal—*(a) *In General.*—See notes 1, 2.

(b) *Indorser or Surety on Sealed Instrument.*—See note 3.

(c) *Assumption of Debt Due by Specialty.*—See note 5.

(6) *Implied Contracts.*—See note 6.

**275.** *Money Had and Received.*—See note 3.

**276.** (7) *Merchants' Accounts—*Under Later Statutes.—See note 9.

**266.** 5. *Want of Jurisdiction.*—Compare *Atlanta, etc., R. Co. v. Wilson*, 119 Ga. 781.

6. *Solomon v. Bennett*, 62 N. Y. App. Div. 56.

**A Contrary Rule.**—*State v. Hansbrough*, 181 Mo. 348; *Pittsburgh, etc., R. Co. v. Bemis*, 64 Ohio St. 26. See also *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 43.

**267.** 1. *A Mere Mistake.*—*McMillan v. Reaume*, (Mich. 1904) 100 N. W. Rep. 166, 11 Detroit Leg. N. 168.

**Burden Is on Plaintiff.**—*Ceprey v. Paton*, 120 Iowa 559.

**Second Action Brought Before Nonsuit Entered in First.**—*Missouri, etc., Land Co. v. Quinn*, 172 Mo. 563.

**268.** 1. *Form of Action Controls.*—*Campbell v. Campbell*, 133 Cal. 33; *Atchison, etc., R. Co. v. Atchison Grain Co.*, 68 Kan. 585.

2. *Where Forms of Action Abolished.*—*Atlanta v. Chattanooga Foundry, etc.*, (C. C. A.) 127 Fed. Rep. 23; *South Tule Independent Ditch Co. v. King*, 144 Cal. 450; *Nelson v. Stull*, 65 Kan. 585, 592; *Chowen v. Phelps*, 26 Mont. 524; *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 102 Am. St. Rep. 881.

**270.** 3. *What Are Written Contracts.*—*Miner v. Howard*, 93 Mo. App. 569. Compare *Quattrochi v. Farmers', etc., Bank*, 89 Mo. App. 500.

**An Action to Recover the Price of Goods Sold on a Written Order.**—See *Kingman v. Davis*, 63 Neb. 578.

**Written Lease Renewed by Parol Agreement—Rent.**—Where the tenant under a written lease holds over after the expiration of his lease, the liability for rent is on an implied contract and not governed by the same statute of limitations as the lease. *Roller v. Zundelowitz*, 32 Tex. Civ. App. 165.

**A State Statute may be "a contract in writing."** *McCord v. Slavin*, 143 Cal. 325.

**School District Bonds Issued in Excess of the Constitutional Limit.**—*Everett v. Independent School Dist.*, 109 Fed. Rep. 697.

**271.** 1. *Whether Writing Must Be Signed by Party to Be Charged.*—*Botkin v. Middlesbor-*

*ough Town, etc., Co.*, 66 S. W. Rep. 747, 23 Ky. L. Rep. 1964; *Fowlkes v. Lea*, 84 Miss. 509; *Goodell v. Sanford*, 31 Mont. 163.

2. *Corporate Minutes.*—*Dearborn v. Grand Lodge, etc.*, 138 Cal. 658.

**272.** 3. *Contract Partly in Writing.*—*Prouty v. Kreamer*, 199 Pa. St. 273.

5. *Where Surety Signs as Joint Maker—Unwritten Contract.*—*Reed v. Sieckenius*, (Tex. Civ. App. 1901) 65 S. W. Rep. 487 (to the same effect as *Faires v. Cockerell*, 88 Tex. 428, stated in the original note).

8. *Contracts Held Not to Be in Writing—Assessments Against a Street Railroad for Paving City Streets.*—*Galveston v. Guaranty Trust Co.*, 107 Fed. Rep. 325, 46 C. C. A. 319.

**274.** 1. *New York v. Third Ave. R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 599. See also *Montreal Bank v. Lingham*, 7 Ont. L. Rep. 164; *Toronto Gen. Trusts Corp. v. Central Ontario R. Co.*, 8 Ont. L. Rep. 604.

**In Colorado.**—*McGooney v. Gwillim*, 16 Colo. App. 284.

2. *What Is Not Action on Sealed Instrument.*—*Mather v. San Francisco*, 115 Fed. Rep. 37, 52 C. C. A. 631.

3. *Indorsement of Sealed Instrument.*—*Baldwin Fertilizer Co. v. Carmichael*, 116 Ga. 762. But see *Spencer v. Holman*, 113 Wis. 340.

5. *Assumption of Specialty Debt.*—*Taylor v. Forbes*, 101 Va. 658. See also *Smith v. Davis*, 90 Mo. App. 533.

6. "Promises merely implied by law, and not supported by any express promise or stipulation in the written instrument, do not fall within the provision of section 337, relating to contracts in writing." *Scrivner v. Woodward*, 139 Cal. 314, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 274.

**275.** 3. *School Directors v. Asheville*, 128 N. Car. 249.

**276.** 9. *By the Texas Statute.*—*Dwight v. Matthews*, 94 Tex. 533.

**By the Kentucky Statute** such accounts are barred in five years. *Fennell v. Myers*, 76 S. W. Rep. 136, 25 Ky. L. Rep. 589.



- 278.** *f.* PERSONAL INJURIES — (1) *In General.* — See note 9.  
**280.** (2) *Actions for Assault, Etc.* — See note 1.  
 (3) *Actions for Wrongful Death.* — See note 3.  
*g.* TAKING OR INJURING PERSONAL PROPERTY. — See note 6.  
**281.** *h.* LIABILITY CREATED BY STATUTE. — See notes 1, 3.  
**282.** A Proceeding to Recover Taxes. — See note 2.  
*i.* CONTEST OF WILLS. — See notes 4, 5.

**283.** Probating Will. — See note 1.

**XV. WAIVER AND AGREEMENTS NOT TO PLEAD STATUTE — 3.** By Whom Waiver May Be Made — *a.* IN GENERAL. — See note 6.

- 284.** 5. Consideration for Waiver. — See note 5.  
**286.** 7. Construction and Effect — *c.* AS ESTOPPEL. — See note 8.  
**287.** There Must Be a Distinct Promise. — See note 3.  
**288.** **XVI. DEFENDANT ESTOPPED TO PLEAD STATUTE.** — See note 2.

**XVII. NEW PROMISE AND ACKNOWLEDGMENT — 1. Origin of Doctrine.**

— See notes 4, 5.

2. Theory of Rule. — See note 6.

**278.** 9. Injuries to Person — New York Statute. — Benoit *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 24.

**Malicious Prosecution.** — Ma-Ka-Ta-Wah-Qua-Twa *v.* Rebok, 111 Fed. Rep. 12.

**Action Against Foreign Corporation for Personal Injuries.** — Southern R. Co. *v.* Mayes, (C. C. A.) 113 Fed. Rep. 84.

**An Action by a Father for the Seduction of a Daughter** is governed by the statute applicable to actions for injuries to the person. Hutcherson *v.* Durden, 113 Ga. 987; Davis *v.* Boyett, 120 Ga. 649, 102 Am. St. Rep. 118.

**280.** 1. Sommerfield *v.* St. Louis Transit Co., 108 Mo. App. 718.

3. See Robinson *v.* Baltimore, etc., Min., etc., Co., 26 Wash. 484.

**6. An Action Against a Carrier for nondelivery of goods** is one *ex contractu* and governed by a different limitation. Southern R. Co. *v.* Rosenberg, 129 Ala. 287.

**281.** 1. What Is Liability Created by Statute — Action to Require Executor to Account. — Matter of Campbell, 96 N. Y. App. Div. 561.

A Municipal Tax. — Milster *v.* Spartanburg, 68 S. Car. 26.

**Liability of Insane Patient's Estate to Pay for His Maintenance in a State Hospital.** — Schroer *v.* Central Kentucky Insane Asylum, 113 Ky. 288.

A City Warrant Issued to a Contractor for Municipal Improvements. — Smith *v.* Lawler, 78 S. W. Rep. 851, 25 Ky. L. Rep. 1781.

**Liability for Three-fold Damages under Anti-trust Law.** — Atlanta *v.* Chattanooga Foundry, etc., (C. C. A.) 127 Fed. Rep. 23.

**Liability of Stockholders of Bank.** — Jones *v.* Goldtree Bros. Co., 142 Cal. 383.

**Bastardy Proceedings.** — State *v.* Patterson, (S. Dak. 1904) 100 N. W. Rep. 162.

**Liability of Public Officers.** — Sonoma County *v.* Hall, 132 Cal. 589; State *v.* Davis, 42 Oregon 34.

**3. Liability of Stockholder in National Bank for Corporate Debts.** — McDonald *v.* Thompson, 184 U. S. 71.

**The Local Statute.** — Platt *v.* Wilmot, 193 U. S. 602; Whitman *v.* Citizen's Bank, 110 Fed. Rep. 503, 49 C. C. A. 122; Seattle Nat. Bank

*v.* Pratt, 111 Fed. Rep. 841, 49 C. C. A. 662; Adams Express Co. *v.* Walker, 83 S. W. Rep. 106, 26 Ky. L. Rep. 1025; Manders *v.* Eastern State Hospital, (Ky. 1905) 84 S. W. Rep. 761; Pulsifer *v.* Greene, 96 Me. 438; Dennis *v.* Atlantic Coast Line R. Co., 70 S. Car. 254, 106 Am. St. Rep. 746; Ross *v.* Kansas City Southern R. Co., 34 Tex. Civ. App. 586. See also Montague *v.* Cummings, 119 Ga. 139.

**282.** 2. Taxes. — Com. *v.* Nute, 115 Ky. 239; Chicago, etc., R. Co. *v.* Com., 115 Ky. 278; Custer County *v.* Story, 26 Mont. 522, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 282.

4. Wills. — Matter of Davis, 136 Cal. 590.

5. Sutton *v.* Hancock, 118 Ga. 436.

**283.** 1. See Cleveland Orphan Inst. *v.* Helm, 74 S. W. Rep. 274, 24 Ky. L. Rep. 2485, where it was held that the probating of a will was an action and within the operation of a general statute of ten years.

**6. Who May Waive Statute.** — An officer of a corporation may waive. Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 94 Am. St. Rep. 293.

**284.** 5. Forbearance to Sue Sufficient Consideration. — Pollak *v.* Billing, 131 Ala. 519.

**286.** 8. Waiver Constitutes Estoppel. — Bishop *v.* U. S., 38 Ct. Cl. 473; Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 94 Am. St. Rep. 293; Clark *v.* Augustine, 62 N. J. Eq. 689, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 286; McIntosh *v.* Condron, 20 Pa. Super. Ct. 118; San Antonio Real Estate Bldg., etc., Assoc. *v.* Stewart, 94 Tex. 441, 86 Am. St. Rep. 864.

**287.** 3. See Fuller *v.* McMahon, (Iowa 1903) 94 N. W. Rep. 205.

**Waiver Need Not Be in Writing.** — Monroe *v.* Herrington, 110 Mo. App. 509.

**288.** 2. Defendant Leading Plaintiff to Delay Suit. — Clark *v.* Augustine, 62 N. J. Eq. 689, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

4. Florence, etc., R. Co. *v.* Tennant, 32 Colo. 71; Miller *v.* Kinsel, (Colo. App. 1904) 78 Pac. Rep. 1075; Wilson *v.* Pickering, 28 Mont. 435.

5. Cleland *v.* Hostetter, (N. Mex. 1905) 79 Pac. Rep. 801, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

6. Cleland *v.* Hostetter, (N. Mex. 1905) 79

**289. 3. Particular Applications Considered — c. SPECIALTIES.** — See note 8.  
*d. DEBTS SECURED BY LIENS.* — See note 11.

**290. 4. Effect of New Promise — a. IN GENERAL** — Starts Statute Anew. — See notes 4, 5.

*b. LIMITATION OF NEW PROMISE* — The Statute Begins to Run from the Time When Acknowledgment Is Made. — See note 8.

**291. 5. Consideration.** — See note 3.

**292. 6. Essential Elements Considered — c. EXPRESS PROMISE NOT NECESSARY.** — See note 5.

*d. DEFINITENESS* — (1) *As to Indebtedness Intended.* — See note 6.

**293. Where There Are Several Claims.** — See note 2.

(2) *As to Amount.* — See notes 3, 4.

**294. (3) As to What Debtor Will Do.** — See note 1.

*e. INTENTION TO MAKE ACKNOWLEDGMENT* — An Admission or Acknowledgment Must Have Been Deliberately Made. — See note 3.

A Mere Failure to Object. — See note 4.

Pac. Rep. 801, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 288.

**289. 8. Specialties.** — See St. Mark's Evangelical Lutheran Church v. Miller, 99 Md. 23.

**11. Newhall v. Hatch**, 134 Cal. 269; Wilcox v. Gregory, 135 Cal. 217; Kraft v. Holzmann, 206 Ill. 548; MacMillan v. Clements, 33 Ind. App. 120; German-American Sav. Bank v. Hanna, 124 Iowa 374; Wilson v. Pickering, 28 Mont. 435; Teegarden v. Burton, 62 Neb. 639; Ewbank v. Ewbank, 64 S. Car. 434, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 289; Eastham v. Patty, 29 Tex. Civ. App. 473; Hahl v. Ellwood, 34 Tex. Civ. App. 642. See also Weinberger v. Weidman, 134 Cal. 599; Alexander v. Muse, 112 Tenn. 233.

**290. 4. New Promise Starts Statute Anew.** — Dearborn v. Grand Lodge, etc., 138 Cal. 658. See also Shelley v. Wescott, 23 App. Cas. (D. C.) 135.

**5. Patterson v. Wade**, (C. C. A.) 115 Fed. Rep. 770; Dacovich v. Schley, (C. C. A.) 134 Fed. Rep. 72; Jenckes v. Rice, 119 Iowa 451; McConaughy v. Wilsey, 115 Iowa 589; Rankin v. Anderson, 69 S. W. Rep. 705, 24 Ky. L. Rep. 647; De Kruif v. Flieman, 130 Mich. 12, 8 Detroit Leg. N. 1118; Hazlett v. Stillwagen, 23 Pa. Super. Ct. 114.

**8. See Mutual Nat. Bank v. Coco**, 107 La. 268.

**291. 3. Moral Obligation Sufficient.** — Tridell v. Munhall, 124 Fed. Rep. 802; Thornton v. Nichols, 119 Ga. 50; Conway v. Caswell, 121 Ga. 254; Koons v. Vanconsant, 129 Mich. 260, 95 Am. St. Rep. 438, 8 Detroit Leg. N. 946; Henry v. Zurfleisch, 203 Pa. St. 440.

**292. 5. Implied Promise Sufficient.** — *In re Lorillard*, 107 Fed. Rep. 677, 46 C. C. A. 553; *In re McGuire*, 132 Fed. Rep. 394, reversed (C. C. A.) 134 Fed. Rep. 72; Walker v. Freeman, 209 Ill. 17; Haythorn v. Cooper, 65 Kan. 338; Slaughter's Succession, 108 La. 492; Connecticut Trust, etc., Co. v. Wead, 172 N. Y. 497, 92 Am. St. Rep. 756; Benedict v. Slocum, 95 N. Y. App. Div. 602; Union Bank v. Nickell, (W. Va. 1905) 49 S. E. Rep. 1003.

**6. Definiteness as to Indebtedness.** — Tridell v. Munhall, 124 Fed. Rep. 802; Pollak v. Billing, 131 Ala. 519; Slack v. Sexton, 113 Ga. 617; Hughes v. Treadway, 116 Ga. 663; Lambert v.

Doyle, 117 Ga. 81; Thornton v. Nichols, 119 Ga. 50; Durban v. Knowles, 66 Kan. 397; Good v. Ehrlich, 67 Kan. 94; Henry v. Zurfleisch, 203 Pa. St. 440; Peter's Estate, 20 Pa. Super. Ct. 223; Franklin v. Franklin, 22 Pa. Super. Ct. 463; Suber v. Richards, 61 S. Car. 393; Liberman v. Gurensky, 27 Wash. 410; Findley v. Cunningham, 53 W. Va. 1.

**293. 2. Where Single Transaction Only Between Parties.** — Campbell v. Campbell, 118 Iowa 131; Hodnett v. Gault, 64 N. Y. App. Div. 163. See also Neish v. Gannon, 198 Ill. 219; O'Hara v. Murphy, 196 Ill. 599, in which cases the claim was for wages for continuous services.

**3. Definiteness as to Amount.** — Tridell v. Munhall, 124 Fed. Rep. 802; Pollak v. Billing, 131 Ala. 519; Neish v. Gannon, 198 Ill. 219; O'Hara v. Murphy, 196 Ill. 599; Findley v. Cunningham, 53 W. Va. 1.

Interest on the Debt Acknowledged need not be specified in the acknowledgment in order to take it out of the statute of limitations. *Re Williams*, 7 Ont. L. Rep. 156.

**4. Carr v. Carr**, (Mich. 1904) 101 N. W. Rep. 550, 11 Detroit Leg. N. 580; Union Bank v. Nickell, (W. Va. 1905) 49 S. E. Rep. 1003.

**294. 1. Promises to "Settle" and the Like.** — Tridell v. Munhall, 124 Fed. Rep. 802; Durban v. Knowles, 66 Kan. 397; Liskey v. Paul, 100 Va. 764; Liberman v. Gurensky, 27 Wash. 410. See also Jenckes v. Rice, 119 Iowa 451; Will v. Marker, 122 Iowa 627; Jewell v. Jewell, (Mich. 1905) 102 N. W. Rep. 1059; O'Neill v. Ellis, (Tex. Civ. App. 1904) 78 S. W. Rep. 1083. "I will try and pay it this fall" was held a sufficient promise in *McConaughy v. Wilsey*, 115 Iowa 589.

**3. Intention to Acknowledge Necessary.** — Atchison, etc., R. Co. v. Atchison Grain Co., (Kan. 1902) 70 Pac. Rep. 933; Price v. Price, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911; Davis v. Davis, 98 Me. 135, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 294; Henry v. Zurfleisch, 203 Pa. St. 440; Kilton v. Providence Tool Co., 22 R. I. 605; Terrill v. Deavitt, 73 Vt. 188; Union Bank v. Nickell, (W. Va. 1905) 49 S. E. Rep. 1003.

**4. Failure to Object to Account.** — Matter of Goss, 98 N. Y. App. Div. 489; Moore v. Blackman, 109 Wis. 528.

**295.** *f.* CONSISTENCY WITH PROMISE TO PAY — *In General.* — See note 2.

*g.* IMPLICATION OF BOTH LIABILITY AND WILLINGNESS TO PAY

— (1) *In General.* — See notes 3, 5.

**296.** See note 3.

**297.** (2) *Statutory Regulations.* — See note 2.

*h.* UNQUALIFIED AND UNCONDITIONAL CHARACTER — (1) *General Rule.* — See note 3.

**298.** (2) *Conditional Acknowledgment or Promise* — *An Expression of a Willingness to Pay.* — See note 3.

**299.** (3) *Fulfilment of Condition.* — See note 1.

(5) *Offer to Compromise or Arbitrate.* — See notes 5, 6.

**300.** *i.* EXPRESSIONS OF HOPE, EXCUSES, ETC. — See note 2.

**295.** 2. *In re Lorillard*, 107 Fed. Rep. 677, 46 C. C. A. 553; *Park v. Park*, 32 Ind. App. 642; *Connecticut Trust, etc., Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756; *Kilton v. Providence Tool Co.*, 22 R. I. 605.

3. *Gillingham v. Brown*, 178 Mass. 417.

5. *Justice Story's Rule Followed* — *United States*. — *Tridell v. Munhall*, 124 Fed. Rep. 802; *In re McGuire*, 132 Fed. Rep. 394, reversed on other grounds *sub nom. Dacovich v. Schley*, (C. C. A.) 134 Fed. Rep. 72.

*Georgia*. — *Kelly v. Strouse*, 116 Ga. 872; *Lambert v. Doyle*, 117 Ga. 81.

*Illinois*. — *Walker v. Freeman*, 209 Ill. 17; *Hahn v. Gates*, 102 Ill. App. 385.

*Indiana*. — *Park v. Park*, 32 Ind. App. 642.

*Iowa*. — *McConaughy v. Wilsey*, 115 Iowa 589.

*Kansas*. — *Wood v. Merrietta*, 66 Kan. 748.

*Maryland*. — *Gill v. Donovan*, 96 Md. 518; *Gill v. Staylor*, 97 Md. 665.

*Massachusetts*. — *Gillingham v. Brown*, 178 Mass. 417.

*Pennsylvania*. — *Henry v. Zurflied*, 203 Pa. St. 440; *Hazlett v. Stillwagen*, 23 Pa. Super. Ct. 114.

*Tennessee*. — *Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. Rep. 749; *Alexander v. Muse*, 112 Tenn. 233.

*Washington*. — *Liberman v. Gurensky*, 27 Wash. 470.

*West Virginia*. — *Findley v. Cunningham*, 53 W. Va. 1; *Union Bank v. Nickell*, (W. Va. 1905) 49 S. E. Rep. 1003.

*In Kansas* the rule of *Gragg v. Barnes*, 32 Kan. 310 (stated in the original note), is followed. *Good v. Ehrlich*, 67 Kan. 94; *Durban v. Knowles*, 66 Kan. 397; *Haythorn v. Cooper*, 65 Kan. 338.

**296.** 3. *In New York* an acknowledgment of the debt is sufficient. *Brintnall v. Rice*, 173 N. Y. 618, affirming 63 N. Y. App. Div. 54; *Connecticut Trust, etc., Co. v. Wead*, 58 N. Y. App. Div. 493; modified 172 N. Y. 497, 92 Am. St. Rep. 756; *Hodnett v. Gault*, 64 N. Y. App. Div. 163.

**297.** 2. *Statutes*. — *Cleland v. Hostetter*, (N. Mex. 1905) 79 Pac. Rep. 801, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297.

3. *General Rule* — *England*. — *Barrett v. Davies*, 21 Times L. Rep. 21, reversing 90 L. T. N. S. 460.

*United States*. — *In re Lorillard*, 107 Fed. Rep. 677, 46 C. C. A. 553; *Dacovich v. Schley*, (C. C. A.) 134 Fed. Rep. 72, reversing 132 Fed. Rep. 394.

*Alabama*. — *Pollak v. Billing*, 131 Ala. 519.

*Illinois*. — *Boyter v. Atkinson*, 96 Ill. App. 580.

*Kansas*. — *Haythorn v. Cooper*, 65 Kan. 338; *Durban v. Knowles*, 66 Kan. 397.

*Kentucky*. — *Maddox v. Walker*, 74 S. W. Rep. 741, 25 Ky. L. Rep. 124.

*Nebraska*. — *Cook v. Farley*, (Neb. 1901) 95 N. W. Rep. 683.

*New Hampshire*. — *Rossiter v. Colby*, 71 N. H. 386.

*Pennsylvania*. — *Henry v. Zurflied*, 203 Pa. St. 440.

*South Dakota*. — *Dorsey v. Gunkle*, (S. Dak. 1904) 101 N. W. Rep. 36.

*Washington*. — *Liberman v. Gurensky*, 27 Wash. 470.

*West Virginia*. — *Findley v. Cunningham*, 53 W. Va. 1; *Union Bank v. Nickell*, (W. Va. 1905) 49 S. E. Rep. 1003.

**Promise to Pay What Was Found to Be Due upon an Accounting.** — When in an action commenced in 1902 upon a promissory note given by the defendant to the plaintiff in 1881, for £100, with interest, payable on demand, it was proved that the defendant had in 1901 written a letter, in which, after asserting that there had been certain payments by him on account of the note, he used expressions importing that he was willing that an account should be taken between himself and the plaintiff, and that he would pay what was thereupon found to be due, and it was found on trial that no payments had been made on account of the note, it was held that the letter afforded sufficient evidence of a new promise to take the case out of the statute of limitations. *Languish v. Watts*, (1903) 1 K. B. 636.

**298.** 3. *Promise to Pay as Soon as Able, and the Like.* — *Lusher v. Hassard*, 20 Times L. Rep. 563; *Tridell v. Munhall*, 124 Fed. Rep. 802; *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 8 Detroit Leg. N. 316; *Cleland v. Hostetter*, (N. Mex. 1905) 79 Pac. Rep. 801.

**299.** 1. *Conditional New Promise After Condition Fulfilled.* — *Tridell v. Munhall*, 124 Fed. Rep. 802; *Boone v. A'Hern*, 98 Ill. App. 610; *Gillingham v. Brown*, 178 Mass. 417; *Rossiter v. Colby*, 71 N. H. 386; *Liberman v. Gurensky*, 27 Wash. 470.

5. *Offer to Arbitrate.* — *Rossiter v. Colby*, 71 N. H. 386.

6. *Offer to Compromise.* — *Kelly v. Strouse*, 116 Ga. 872; *Rossiter v. Colby*, 71 N. H. 386; *Connecticut Trust, etc., Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756.

**300.** 2. See *Walker v. Freeman*, 209 Ill. 17.

- 300.** *j.* CONFESSION OF INABILITY TO PAY. — See note 3.  
**301.** *k.* ACKNOWLEDGMENT OF JUSTNESS OF DEBT. — See note 1.  
*l.* ADMISSION THAT DEBT IS UNPAID. — See notes 2, 3.  
**302.** *m.* ADMISSION THAT DEBT WAS ONCE DUE ACCOMPANIED BY CLAIM OF PAYMENT. — See note 2.  
*n.* TAKING ACTION TO ASCERTAIN VALIDITY OF DEBT. — See note 3.  
*p.* ACKNOWLEDGMENT IN PLEADING — The Acknowledgment in an Answer. — See note 7.  
*q.* INCLUDING DEBT IN SCHEDULE OF LIABILITIES. — See notes 9, 10.  
**303.** See note 1.  
*r.* DEBTOR GIVING SECURITY. — See notes 4, 6.  
*t.* ACKNOWLEDGMENT OF CLAIM AS EXISTING DEBT. — See note 8.  
**304.** *u.* PROMISE TO EXECUTE RENEWAL NOTE. — See note 1.  
7. Questions of Law and Fact. — See note 2.  
**305.** See note 2.  
8. By Whom Made — *a.* IN GENERAL. — See notes 3, 4.  
**307.** *d.* BY ONE OF TWO PARTNERS — (2) *After Dissolution* — But the Better Doctrine. — See note 6.

**300.** 3. Declaration of Inability to Pay. — *In re Lorillard*, 107 Fed. Rep. 677, 46 C. C. A. 553; *Connecticut Trust, etc., Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756; *Connecticut Trust, etc., Co. v. Wead*, 58 N. Y. App. Div. 493, modified 172 N. Y. 497, 92 Am. St. Rep. 756; *Kilton v. Providence Tool Co.*, 22 R. I. 605.

But It Seems that a Distinct New Promise. — *Walker v. Freeman*, 209 Ill. 17.

**301.** 1. Admission of Justness of Debt. — *Compare Tridell v. Munhall*, 124 Fed. Rep. 802.

2. Admission that Debt Is Unpaid. — *Thornton v. Nichols*, 119 Ga. 50; *Connecticut Trust, etc., Co. v. Wead*, 58 N. Y. App. Div. 493, modified 172 N. Y. 497, 92 Am. St. Rep. 756.

3. Held to Be Sufficient as Acknowledgment. — *Shircliffe v. Casebeer*, 122 Iowa 618; *Cleland v. Hostetter*, (N. Mex. 1905) 79 Pac. Rep. 801.

**302.** 2. Kelly v. Strouse, 116 Ga. 872; *Thornton v. Nichols*, 119 Ga. 50.

3. *Monroe v. Herrington*, 110 Mo. App. 509.

7. Admission in Pleadings. — *Thornton v. Nichols*, 119 Ga. 50 (to same effect as *Roberts v. Leak*, 108 Ga. 806, set out in original note).

9. Inclusion of Debt in Schedule of Liabilities. — *In re Wooten*, 118 Fed. Rep. 670.

10. *Compare In re Gibson*, (Indian Ter. 1902) 69 S. W. Rep. 974.

**303.** 1. Administrator Including Debt in Inventory. — *Weil v. Jacobs*, 111 La. 357.

4. Debtor Giving Security. — *Maddox v. Walker*, 74 S. W. Rep. 741, 25 Ky. L. Rep. 124.

6. See *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533.

8. Acknowledgment of Claim as Existing Debt. — *Coffin v. Kearney County*, 114 Fed. Rep. 518, modified 126 Fed. Rep. 689; *In re Lorillard*, 107 Fed. Rep. 677, 46 C. C. A. 553; *Tridell v. Munhall*, 124 Fed. Rep. 802; *Foster v. Bowles*, 138 Cal. 346; *Kelly v. Strouse*, 116 Ga. 872; *Thornton v. Nichols*, 119 Ga. 50; *Blake-ney v. Wyland*, 115 Iowa 607; *Durban v. Knowles*, 66 Kan. 397; *Cock v. Farley*, (Neb. 1901) 95 N. W. Rep. 683; *Bucker v. Korff*,

(Neb. 1903) 97 N. W. Rep. 804; *Brintnall v. Rice*, 173 N. Y. 618, affirming 63 N. Y. App. Div. 54; *Benedict v. Slocum*, 95 N. Y. App. Div. 602; *Hahl v. Ellwood*, 34 Tex. Civ. App. 642.

In Louisiana it has been held that "a man may acknowledge his debt and pay part of it, without renouncing the prescription acquired on it." *Slaughter's Succession*, 108 La. 492. See also *Weil v. Jacobs*, 111 La. 357.

What Acknowledgment Sufficient. — "A mere acknowledgment of the debt is not sufficient. The acknowledgment must be in terms sufficient to warrant the inference of a promise by the debtor to pay the debt, and that the particular debt is unpaid." *Liberman v. Gurensky*, 27 Wash. 410.

**304.** 1. See *Benedict v. Slocum*, 95 N. Y. App. Div. 602.

2. Question for Court. — *Walker v. Freeman*, 209 Ill. 17.

**305.** 2. Question of Fact. — *Suber v. Richards*, 61 S. Car. 393.

3. By Debtor or His Agent. — *Schofield v. Twin-ing*, 127 Fed. Rep. 488; *O'Hara v. Murphy*, 196 Ill. 599; *Cooper v. Haythorn*, 65 Kan. 860, 70 Pac. Rep. 581; *Good v. Ehrlich*, 67 Kan. 94; *Price v. Price*, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911; *Weil v. Jacobs*, 111 La. 357; *Borden v. Fletcher*, 131 Mich. 220, 9 Detroit Leg. N. 285; *Mizer v. Emigh*, 63 Neb. 245; *Mack v. Anderson*, 165 N. Y. 529.

Where a depositor in a bank transferred his account from a general to a savings bank deposit, it was held that the statute commenced to run from the time of the original deposit, and that the bank could not extend the time of the running of the statute by such a transfer, so as to affect the interests of the stockholders subsequently sued for the recovery of the deposit, the bank having failed. *Jones v. Goldtree Bros. Co.*, 142 Cal. 383.

4. Payment by Stranger under Agreement with Debtor. — *Walker v. Cassels*, 70 S. Car. 271.

**307.** 6. *Borden v. Fletcher*, 131 Mich. 220,

**308.** *e.* BY ONE OF SEVERAL JOINT DEBTORS—(1) *Lord Mansfield's Rule.*—See note 6.

**309.** (2) *Better Doctrine.*—See note 2.

**310.** (3) *Debtors Primarily and Secondarily Liable.*—See note 1.

**312.** (5) *Acquiescence or Ratification by Codebtor.*—See notes 4, 5.

**314.** *f.* BY ASSIGNEE FOR CREDITORS.—See note 1.

*h.* BY MORTGAGOR OR PURCHASER OF MORTGAGED PREMISES.—See note 3.

Junior and Senior Incumbrances.—See note 6.

**315.** Time of Acknowledgment by Mortgagor.—See notes 1, 2.

By Mortgagor After Transfer of Mortgaged Premises.—See note 3.

By Purchaser of Mortgaged Property.—See notes 4, 5.

By Mortgagor Before Sale of Mortgaged Property.—See note 6.

**316.** *i.* BY WIDOW OF MORTGAGOR—EFFECT ON HEIRS.—See note 2.

*l.* BY HUSBAND OR WIFE.—See note 5.

9 Detroit Leg. N. 285; Hixson v. Rodbourn, 67 N. Y. App. Div. 424; Eastham v. Patty, 29 Tex. Civ. App. 473.

**308.** 6. New Promise by One Joint Debtor Held Binding on All.—Regan v. Williams, 88 Mo. App. 577; Mason v. Kilcourse, 71 N. J. L. 472; Smith's Estate, 43 Oregon 595. But see Haines v. Haines, 69 N. J. L. 39.

**309.** 2. Payment or New Promise by One Joint Debtor Does Not Affect Others.—Coulter v. Clear Creek County Bank, 18 Colo. App. 444; McDonald v. Weidmer, 103 Ill. App. 390; Howe v. Stratton, 107 Ill. App. 281; Koons v. Vanconsant, 129 Mich. 260, 95 Am. St. Rep. 438, 8 Detroit Leg. N. 946, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 309; Borden v. Fletcher, 131 Mich. 220, 9 Detroit Leg. N. 285; Grovenor v. Signor, 10 N. Dak. 503; Hanna v. Kasson, 26 Wash. 568; Perkins v. Jennings, 27 Wash. 145.

**310.** 1. Payment or Acknowledgment by Principal Debtor Does Not Affect Surety or Indorser.—Deaton v. Deaton, 109 Ill. App. 7; Munroe v. Herrington, 110 Mo. App. 509; Mason v. Kilcourse, 71 N. J. L. 472; Eubank v. Eubank, 64 S. Car. 434.

**312.** 4. Ratification.—McDonald v. Weidmer, 103 Ill. App. 390.

5. See Perkins v. Jennings, 27 Wash. 145.

**314.** 1. Assignee for Creditors.—Robinson v. McDowell, 133 N. Car. 182, 98 Am. St. Rep. 704; Kilton v. Providence Tool Co., 22 R. I. 605.

3. By One of Two Joint Mortgagors.—Eastham v. Patty, 29 Tex. Civ. App. 473 (to the same effect as Stubblefield v. McAuliffe, 20 Wash. 442, stated in the original note).

6. Junior and Senior Incumbrances.—In California it is the settled rule that the mortgagor has no power to interrupt the statute of limitations as against subsequent incumbrancers. Brandenstein v. Johnson, 140 Cal. 29; Frates v. Sears, 144 Cal. 246.

In Washington the same rule prevails. De Voe v. Rundle, 33 Wash. 604. See also Raymond v. Bales, 26 Wash. 493.

**315.** 1. Acknowledgment Before Bar Attaches.—Mack v. Anderson, 165 N. Y. 529; Eastham v. Patty, 29 Tex. Civ. App. 473; Bangs v. Crebbin, (Tex. Civ. App. 1902) 69 S. W. Rep. 441.

Where the mortgagor sells the land and the rights of the grantee have attached, the mortgagor is powerless to interrupt the running of the statute in favor of the grantee. Hanna v. Kasson, 26 Wash. 568.

2. Acknowledgment After Bar Attaches.—Eastham v. Patty, 29 Tex. Civ. App. 473; Hanna v. Kasson, 26 Wash. 568.

3. After Sale under Mortgage.—Regan v. Williams, 88 Mo. App. 577; Raymond v. Bales, 26 Wash. 493.

Payment by the Mortgagor's Grantee, Who Assumes the Debt, will not toll the statute as to a prior grantee of a part of the mortgaged property, who did not assume the debt. Mack v. Anderson, 165 N. Y. 529.

4. Purchaser of Mortgaged Property.—Regan v. Williams, 185 Mo. 620, 105 Am. St. Rep. 600.

5. Foster v. Bowles, 138 Cal. 346.

An Agreement to Assume the Mortgage.—Christian v. John, 111 Tenn. 92.

6. Before Sale of Mortgaged Property.—Shaw v. Western Land, etc., Co., (Tex. Civ. App. 1901) 62 S. W. Rep. 941; White v. Krutz, 37 Wash. 34.

**316.** 2. Nickell v. Tracy, 100 N. Y. App. Div. 80. See also Goodman v. Pareira, 70 Ark. 49. But see Perry v. Horack, 63 Kan. 88, 88 Am. St. Rep. 225.

5. Husband and Wife.—Clark v. Staber, (Iowa 1904) 98 N. W. Rep. 560; Jackson v. Longwell, 63 Kan. 93; Curtiss v. Perry, 126 Mich. 600; San Antonio Real Estate, etc., Assoc. v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864.

Where the husband makes payments on his note secured by mortgage on the homestead executed by husband and wife jointly, the wife cannot plead the statute of limitations in a suit to foreclose the mortgage. Skinner v. Moore, 64 Kan. 360, 91 Am. St. Rep. 244; Investment Securities Co. v. Manwarren, 64 Kan. 636; Fuller v. McMahan, 64 Kan. 441; Roberts v. Roberts, 10 N. Dak. 531.

Where a man makes a mortgage on land, and subsequently the property becomes the community estate of himself and his wife, payments on the mortgage debt made by him will not stop the statute of limitations from running in favor of the wife. Hanna v. Kasson, 26 Wash. 568.

**316.** 9. To Whom Made — *a.* IN GENERAL — To Creditor or His Agent. — See note 6.

**317.** See note 1.

**318.** *b.* WHERE CAUSE OF ACTION HAS BEEN ASSIGNED. — See note 1.  
10. Time of Acknowledgment — *a.* IN GENERAL. — See note 2.

**319.** *b.* BY ONE OF SEVERAL JOINT DEBTORS. — See note 6.

*c.* AFTER INSTITUTION OF ACTION. — See note 7.

**320.** 11. Necessity for Writing — *a.* LORD TENTERDEN'S ACT. — See note 3.

**321.** *b.* OPERATION AND EFFECT OF STATUTES — (1) *In General.* — See notes 1, 2.

Letters Written by the Debtor. — See note 4.

Must Be Signed by Debtor. — See note 5.

**322.** See note 1.

Presumption of Writing. — See note 2.

(2) *Admissibility of Parol Evidence.* — See notes 3, 5.

A Subsequent Distinct Oral Contract. — See note 7.

**323.** XVIII. PART PAYMENT — 1. In General — Implication of New Promise. — See note 8.

**324.** See note 1.

**316.** 6. Must Have Been Made to Creditor or His Representative. — *Miller v. McDowell*, 69 Kan. 453; *Kirkpatrick v. Goldsmith*, 81 N. Y. App. Div. 265; *Dorsey v. Gunkle*, (S. Dak. 1904) 101 N. W. Rep. 36; *King v. Rogers*, 1 Ont. L. Rep. 69, 31 Ont. 573.

Where the debt was owing to the husband, but was claimed by the wife, and the debtor acknowledged the debt and promised to pay it to the wife, there was no consideration for the promise, and the running of the statute was not interrupted. *Rounthwaite v. Rounthwaite*, 136 Cal. xx, 68 Pac. Rep. 304.

An acknowledgment in an answer to a garnishment will not toll the statute. *Holland v. Shannon*, (Tex. Civ. App. 1905) 84 S. W. Rep. 854.

**317.** 1. See *Dearborn v. Grand Lodge*, etc., 138 Cal. 658; *Hahl v. Ellwood*, 34 Tex. Civ. App. 642.

**318.** 1. *Compare* *McBrayer v. Mills*, 62 S. Car. 36.

2. General Rule as to Time of Acknowledgment. — *Dearborn v. Grand Lodge*, etc., 138 Cal. 658.

In California. — *Morehouse v. Morehouse*, 140 Cal. 88.

In Washington an acknowledgment after the bar creates a new contract. *Liberman v. Gurensky*, 27 Wash. 410.

**319.** 6. Joint Debtors. — *Regan v. Williams*, 88 Mo. App. 577.

7. Acknowledgment After Action Begun. — *Kahrs v. New York*, 98 N. Y. App. Div. 233.

**320.** 3. For Application of the Statute. — *Morehouse v. Morehouse*, (Cal. 1902) 69 Pac. Rep. 625; *McBride v. Ulmer*, 30 Ind. App. 154; *Davis v. Davis*, 98 Me. 135; *Borden v. Fletcher*, 131 Mich. 220, 9 Detroit Leg. N. 285; *Monroe v. Herrington*, 110 Mo. App. 509; *Dorsey v. Gunkle*, (S. Dak. 1904) 101 N. W. Rep. 36; *San Antonio Real Estate*, etc., *Assoc. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864; *Mooré v. Blackman*, 109 Wis. 528.

**321.** 1. Promises Made Before the Enact-

ment of the statute are not within its scope. *Vinson v. Palmer*, 45 Fla. 630.

2. Substitution of a New Copy for an Old and Badly Worn Note is not a new promise in writing within the meaning of the statute. *Goodrich v. Case*, 68 Ohio St. 187.

4. Letters. — *Concannon v. Smith*, 134 Cal. 14; *Hewes v. Hurff*, 69 N. J. L. 263.

5. Signature of Debtor. — *Liberman v. Gurensky*, 27 Wash. 410.

The *New Jersey* statute, being identical with Lord Tenterden's Act, was construed to require the signature of the debtor *per se*, and an acknowledgment by the debtor's agent was inoperative to affect the bar of the statute. *De Raismes v. De Raismes*, 70 N. J. L. 15.

**322.** 1. Acknowledgment Contained in Resolution of Officers of Mutual Benefit Society. — *Dearborn v. Grand Lodge*, etc., 138 Cal. 658.

2. *Higgins v. Graham*, 143 Cal. 131.

3. Parol Evidence. — *McConaughy v. Wilsey*, 115 Iowa 589; *Suber v. Richards*, 61 S. Car. 393.

5. See *Shelley v. Wescott*, 23 App. Cas. (D. C.) 135.

7. An oral admission of an account stated which is barred does not remove the bar. *Rounthwaite v. Rounthwaite*, 136 Cal. xx, 68 Pac. Rep. 304.

**323.** 8. Part Payment. — *Concannon v. Smith*, 134 Cal. 14; *Vinson v. Palmer*, 45 Fla. 630; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570.

**324.** 1. Part Payment Starts Statute Anew — *United States*. — *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533.

*Alabama*. — *Bailey v. Butler*, 138 Ala. 153.

*Colorado*. — *Florence*, etc., *R. Co. v. Tennant*, 32 Colo. 71.

*Indiana*. — *McBride v. Ulmer*, 30 Ind. App. 154; *MacMillan v. Clements*, 33 Ind. App. 120.

*Kansas*. — *Atchison*, etc., *R. Co. v. Atchison Grain Co.*, (Kan. 1902) 70 Pac. Rep. 933; *Good v. Ehrlich*, 67 Kan. 94; *Miller v. McDowell*, 69 Kan. 453.

*Maine*. — *Pond v. French*, 97 Me. 403.

**324.** 2. Where Ineffective to Toll Statute. — See note 3.

**325.** 3. General Requisites — *a.* IDENTITY OF DEBT AND PAYMENT — Must Have Been on Debt in Question. — See notes 1, 2.

*b.* EXISTENCE OF RESIDUE. — See note 3.

If the Debt Consists of Several Distinct Items. — See note 4.

**326.** *c.* PROMISE TO PAY RESIDUE. — See note 2.

*d.* BY WHOM MADE. — See note 5.

*e.* VOLUNTARY CHARACTER — An Involuntary Payment Can Have No Effect. — See notes 6, 7.

**327.** 4. What Constitutes Part Payment — *c.* TENDER OF PART PAYMENT. — See note 1.

*d.* PAYMENT OF INTEREST. — See note 2.

**328.** *f.* MERE AGREEMENT TO CREDIT. — See note 3.

*g.* CREDITOR FORECLOSING SECURITY AND CREDITING NOTE WITH PROCEEDS. — See notes 5, 6.

5. Application of Part Payments. — See note 7.

*Massachusetts.* — *Gillingham v. Brown*, 178 Mass. 417.

*Michigan.* — *Borden v. Fletcher*, 131 Mich. 220, 9 Detroit Leg. N. 285; *Neilands v. Wright*, 134 Mich. 77, 10 Detroit Leg. N. 388.

*Missouri.* — *Elsea v. Pryor*, 87 Mo. App. 157.

*Montana.* — *Goodell v. Sanford*, 31 Mont. 163.

*Nebraska.* — *Teegarden v. Burton*, 62 Neb. 639; *Ebersole v. Omaha Nat. Bank*, (Neb. 1904) 99 N. W. Rep. 664.

*New York.* — *Jefferson County Nat. Bank v. Dewey*, 181 N. Y. 98; *Hodnett v. Gault*, 64 N. Y. App. Div. 163.

*Pennsylvania.* — *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570.

*South Carolina.* — *McBrayer v. Mills*, 62 S. Car. 36.

*Vermont.* — *Fletcher v. Brainerd*, 75 Vt. 300.

*Washington.* — *Perkins v. Jennings*, 27 Wash. 145.

It is the part payment, and not the indorsement, which tolls the statute. *Hastie v. Buraage*, 69 Kan. 560.

**324.** 3. Louisiana Rule. — "A man may acknowledge his debt and pay part of it, without renouncing the prescription acquired on it." *Slaughter's Succession*, 108 La. 492.

**325.** 1. Payment Must Have Been on Debt in Suit. — *Boughton v. Boughton*, 77 Conn. 7; *Rothschild v. Sessell*, 103 Ill. App. 274; *McBride v. Ulmer*, 30 Ind. App. 154; *Price v. Price*, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911; *Pond v. French*, 97 Me. 403; *Wilden v. McAllister*, 91 Mo. App. 446; *Hodnett v. Gault*, 64 N. Y. App. Div. 163; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325; *Marshall v. Brick*, 16 Pa. Super. Ct. 530.

2. *Concannon v. Smith*, 134 Cal. 14; *Terrill v. Deavitt*, 73 Vt. 188.

3. Payment Must Be Part of Greater Debt. — *Boughton v. Boughton*, 77 Conn. 7; *Rothschild v. Sessell*, 103 Ill. App. 274; *McBride v. Ulmer*, 30 Ind. App. 154; *Good v. Ehrlich*, 67 Kan. 94; *Pond v. French*, 97 Me. 403.

4. If the Account Consists of Many Items. — See *Pond v. French*, 97 Me. 403.

A general payment on an account of many items will remove the bar as to all. *Hammond v. Hammond*, 76 Vt. 437.

Part Payment of a Book Account will not revive

the whole debt. *Rogers v. Newton*, 71 N. J. L. 469.

**326.** 2. *Taylor v. Hollard*, (1902) 1 K. B. 676; *Boughton v. Boughton*, 77 Conn. 7; *Price v. Price*, 66 S. W. Rep. 529, 23 Ky. L. Rep. 1911; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325 et seq.

5. *Cooper v. Haythorn*, 65 Kan. 860, 70 Pac. Rep. 581.

Part payment by debtor's administrator will toll the statute. *Slattery v. Doyle*, 180 Mass. 27.

6. Involuntary Payment. — *Bay City Iron Co. v. Emery*, 128 Mich. 506, 8 Detroit Leg. N. 760; *Atchison, etc., R. Co. v. Atchison Grain Co.*, (Kan. 1902) 70 Pac. Rep. 933; *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325 et seq.; *Terrill v. Deavitt*, 73 Vt. 188; *Fletcher v. Brainerd*, 75 Vt. 300; *Lefurgey v. Harrington*, 36 Nova Scotia 88.

7. *Gorman v. Pettus*, 72 Ark. 76; *Gray v. Pierson*, 7 Idaho 540; *Atchison, etc., R. Co. v. Atchison Grain Co.*, (Kan. 1902) 70 Pac. Rep. 933; *Reeves v. Sawyer*, 88 Minn. 218; *Shafer v. Pratt*, 79 N. Y. App. Div. 447.

**327.** 1. *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325 et seq.

2. Payment of Interest. — *Lyman v. Warner*, (C. C. A.) 113 Fed. Rep. 87, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327; *Concannon v. Smith*, 134 Cal. 14; *Westinghouse Co. v. Boyle*, 126 Mich. 677, 86 Am. St. Rep. 570, 8 Detroit Leg. N. 180; *Rehm v. Frank*, 16 Pa. Sup. Ct. 175.

**328.** 3. *Freeze v. Lockhard*, 87 Mo. App. 102. See also *Atchison, etc., R. Co. v. Atchison Grain Co.*, (Kan. 1902) 70 Pac. Rep. 933.

5. Does Not Start Statute Anew. — *Westinghouse Co. v. Boyle*, 126 Mich. 677, 86 Am. St. Rep. 570, 8 Detroit Leg. N. 180; *Regan v. Williams*, 88 Mo. App. 577; *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743; *Fletcher v. Brainerd*, 75 Vt. 300, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; *Lefurgey v. Harrington*, 36 Nova Scotia 88.

6. Such Credit Cannot Affect Surety. — *Good v. Ehrlich*, 67 Kan. 94; *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600.

7. Applications of Part Payments. — *Good v. Ehrlich*, 67 Kan. 94.

**329.** 6. Proof of Part Payment — *a.* IN GENERAL. — See note 1.  
*b.* INDORSEMENTS OF PART PAYMENTS — (2) *By Creditor.* — See notes 4, 5.

**330.** See notes 1, 2.

*By Statute.* — See note 3.

*And Parol Evidence Is Admissible.* — See notes 5, 6.

**331.** (3) *By Third Persons.* — See note 3.

*c.* ENTRIES IN BOOKS OF ACCOUNT. — See notes 4, 5.

*d.* QUESTION FOR JURY. — See note 6.

**XIX. SPECIAL REQUEST FOR DELAY BY PERSONAL REPRESENTATIVE.**

— See note 7.

**332.** XX. BURDEN OF PROOF — In General. — See note 9.

**333.** See notes 1, 2, 4, 5, 6, 7.

*In Cases of Fraud or Concealment.* — See note 8.

*As to Discovery of Fraud.* — See note 9.

**329.** 1. *Gillingham v. Brown*, 178 Mass. 417; *Fowles v. Joslyn*, 135 Mich. 333, 10 Detroit Leg. N. 796.

*A Letter from the Debtor.* — *Bond v. Wilson*, 131 N. Car. 505.

*Oral Testimony.* — In *Quebec* partial payment may in a commercial matter be proved orally. *Boulet v. Metayer*, 23 Quebec Super. Ct. 289.

4. *Vinson v. Palmer*, 45 Fla. 630; *Fowles v. Joslyn*, 135 Mich. 333, 10 Detroit Leg. N. 796. See also *Gehres v. Orłowski*, 36 Wash. 156.

5. *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533; *Regan v. Williams*, 88 Mo. App. 577; *Ward v. Hoag*, 78 N. Y. App. Div. 510; *Bond v. Wilson*, 129 N. Car. 387. See also *McBride v. Ulmer*, 30 Ind. App. 154; *Good v. Ehrlich*, 67 Kan. 94; *Fletcher v. Brainerd*, 75 Vt. 300.

Indorsements, whether made before or after the bar, are competent evidence, though taken alone they are not sufficient. *McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831.

**330.** 1. *Presumption Against Indorsement Near Time of Bar.* — *Fowles v. Joslyn*, 130 Mich. 272, 9 Detroit Leg. N. 33; *Matter of Salisbury*, (Surrogate Ct.) 41 Misc. (N. Y.) 274; *Bachand v. Lalumiere*, 21 Quebec Super. Ct. 449.

2. *Good v. Ehrlich*, 67 Kan. 94; *Bay City Iron Co. v. Emery*, 128 Mich. 506, 8 Detroit Leg. N. 760; *Bond v. Wilson*, 129 N. Car. 387.

3. *Small v. Rose*, 97 Me. 286.

*The New Jersey Statute* is similar to that of *Wisconsin* as stated in the original note. *Christopher v. Wilkins*, (N. J. 1902) 51 Atl. Rep. 728.

5. *Fletcher v. Brainerd*, 75 Vt. 300.

6. *Fowles v. Joslyn*, 135 Mich. 333, 10 Detroit Leg. N. 796.

**331.** 3. *Indorsements by Third Persons.* — *Bond v. Wilson*, 129 N. Car. 387.

4. *Books of Account* — *Entries by Creditor.* — *Coulter v. Clear Creek County Bank*, 18 Colo. App. 444.

Books kept by the plaintiff's agent, containing entries of payments on notes, are admissible to prove payment. *Hastie v. Burrage*, 69 Kan. 560.

5. *Entries by Debtor in His Own Books.* — *Reeves v. Sawyer*, 88 Minn. 218; *Kirkpatrick v. Goldsmith*, 81 N. Y. App. Div. 265. See also *Vinson v. Palmer*, 45 Fla. 630.

6. *Becker v. Oliver*, 111 Fed. Rep. 672, 49 C. C. A. 533; *Bond v. Wilson*, 129 N. Car. 387.

7. *Special Request for Delay* — *Tennessee Stat-*

*ute.* — See *Hunter v. Hunter*, 63 S. Car. 78, 90 Am. St. Rep. 663.

**332.** 9. *Burden on Defendant.* — *Boynton v. Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 301; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Keagy v. Wellington Nat. Bank*, 12 Okla. 33; *Bradford v. Brennan*, 12 Okla. 333; *Hunter v. Hunter*, 63 S. Car. 78, 90 Am. St. Rep. 663; *Tyler v. Jester*, (Tex. Civ. App. 1903) 74 S. W. Rep. 359; *White v. Century Gold Min., etc., Co.*, 28 Utah 331; *Vashon v. Barrett*, 99 Va. 344; *Buck v. Newberry*, 57 W. Va. 681.

**333.** 1. *Where Plaintiff's Own Showing Prima Facie Establishes Bar of Statute.* — *Boynton v. Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 301; *Crissey v. Morrill*, 125 Fed. Rep. 878, 60 C. C. A. 460; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Watkins v. Martin*, 69 Ark. 311; *Thornton v. Nichols*, 119 Ga. 50; *Nelson v. Stull*, 65 Kan. 585, *affirmed* on rehearing 65 Kan. 592; *Griffin v. Drainage Commission*, 110 La. 840; *Westervelt v. Filter*, (Neb. 1902) 89 N. W. Rep. 994; *State Bank v. Frey*, (Neb. 1902) 91 N. W. Rep. 239; *Bond v. Wilson*, 129 N. Car. 387; *Wilkes v. Allen*, 131 N. Car. 279; *Hooker v. Worthington*, 134 N. Car. 283; *Bradford v. Brennan*, 12 Okla. 333; *Lieberman v. Gurensky*, 27 Wash. 410.

2. *Where Plaintiff Relies on New Promise or Part Payment.* — *Simpson v. Brown-Desnoyers Shoe Co.*, 70 Ark. 598; *Gregory v. Filbeck*, (Colo. App. 1904) 77 Pac. Rep. 369; *Keagy v. Wellington Nat. Bank*, 12 Okla. 33; *Lieberman v. Gurensky*, 27 Wash. 410; *Union Bank v. Nickell*, (W. Va. 1905) 49 S. E. Rep. 1003.

4. *Absence of Defendant.* — *Crissey v. Morrill*, 125 Fed. Rep. 878, 60 C. C. A. 460.

5. *Where the Plaintiff Sets Up Coverture or a Similar Disability.* — *Westervelt v. Filter*, (Neb. 1902) 89 N. W. Rep. 994.

6. *Watkins v. Martin*, 69 Ark. 311.

7. *McIntosh v. Condron*, 20 Pa. Super. Ct. 118.

8. *Crissey v. Morrill*, 125 Fed. Rep. 878, 60 C. C. A. 460; *Central Bank v. Thayer*, 184 Mo. 61; *Jones v. Danforth*, (Neb. 1904) 99 N. W. Rep. 495.

Where the relation of the parties is one of trust, the burden is on the trustee charged with concealment to show plaintiff's knowledge of the fraud. *Faust v. Hosford*, 119 Iowa 97.

9. *Burden on Plaintiff to Show Time of Discovery.* — *Hooker v. Worthington*, 134 N. Car. 283.



## LIMITED PARTNERSHIP.

**337.** I. DEFINITION, NATURE, AND ORIGIN — 2. Origin and Extent. — See notes 7, 8.

**338.** 3. Object or Purpose. — See note 9.

**339.** II. ESTABLISHMENT OF RELATION — 1. In General. — See note 5.

2. Compliance with Statute — *a.* EFFECT OF NONCOMPLIANCE — General Rule. — See note 8.

**340.** Unintentional Violation of Statute. — See note 6.

**342.** *b.* CONSTRUCTION OF STATUTE — (2) *Strict or Liberal Construction.* — See notes 5, 6, 10.

**343.** See note 1.

**344.** 6. Certificate — *a.* NECESSITY. — See note 10.

**346.** *b.* CONTENTS AND SUFFICIENCY — (2) *Statement as to Capital Contributed* — The Amount of Capital Contributed. — See note 4.

**347.** *c.* FALSE STATEMENTS IN CERTIFICATE. — See note 11.

**348.** *d.* ACKNOWLEDGMENT OR PROOF. — See note 7.

**351.** *f.* PUBLICATION — (1) *Necessity.* — See note 1.

**352.** (3) *Proof.* — See note 9.

**354.** 7. Affidavit — *c.* FALSE STATEMENTS IN AFFIDAVIT. — See notes 1, 5.

**355.** 8. Contributions to Capital — *a.* NECESSITY — The Special Partner. — See note 3.

**337.** 7. Limited Partnership Unknown to Common Law. — *Cummings v. Hayes*, 100 Ill. App. 347; *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050.

8. Limited Partnership Wholly Statutory. — *Durgin v. Colburn*, 176 Mass. 110; *Casola v. Kugelman*, 33 N. Y. App. Div. 428, *affirmed* 164 N. Y. 608; *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050.

**338.** 9. Object to Encourage Employment of Capital in Trade. — *Casola v. Kugelman*, 33 N. Y. App. Div. 428, *affirmed* 164 N. Y. 608.

**339.** 5. Compliance with Statute Essential. — *Peabody v. Oleson*, 15 Colo. App. 346. See also *Sturgeon v. Apollo Oil, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 197.

8. Noncompliance Imposes General Liability. — *Peabody v. Oleson*, 15 Colo. App. 346; *Cummings v. Hayes*, 100 Ill. App. 347; *Durgin v. Colburn*, 176 Mass. 110; *Casola v. Kugelman*, 33 N. Y. App. Div. 428, *affirmed* 164 N. Y. 608; *Lee v. Burnley*, 195 Pa. St. 58; *Sturgeon v. Apollo Oil, etc., Co.*, 203 Pa. St. 369.

**340.** 6. Reason for Noncompliance Immaterial. — *Contra, Decker v. Chesapeake Western Co.*, 101 Va. 804.

**342.** 5. Liberal Construction — Portions of Statute Protecting Public. — *Cummings v. Hayes*, 100 Ill. App. 347.

6. Substantial Compliance with Statute Sufficient. — *Cummings v. Hayes*, 100 Ill. App. 347; *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050; *Strang v. Thomas*, 114 Wis. 599.

10. Strict Construction and Compliance Nec-

sary. — *Lee v. Burnley*, 195 Pa. St. 58. See also *Cummings v. Hayes*, 100 Ill. App. 347 (portion of statute authorizing formation).

**343.** 1. Both Strict and Substantial Compliance Necessary. — See *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050.

**344.** 10. Statutory Certificate Necessary. — *Cummings v. Hayes*, 100 Ill. App. 347.

**346.** 4. Contribution of Special Partner Must Be Stated. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219.

**347.** 11. False Certificate Imposes General Liability. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219.

**348.** 7. Acknowledgment by Attorney in Fact. — *Cummings v. Hayes*, 100 Ill. App. 347.

**351.** 1. Noncompliance with Statute Imposes General Liability. — *Buckle v. Iler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 214.

**352.** 9. Proof of Publication. — *Buckle v. Iler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 214, holding, however, that failure to file proof of publication does not impose liability as a general partner where the statute does not specifically so declare.

**354.** 1. False Statement Imposes General Liability. — *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050; *Hartford Nat. Bank v. Beinecke*, 80 N. Y. App. Div. 546.

5. Affidavit Speaks from Date of Filing. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219.

**355.** 3. Contribution by Special Partner Necessary. — See *Sturgeon v. Apollo Oil, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 197.

- 356.** *c.* CONTRIBUTION IN CASH — (1) *In General.* — See note 3.
- 357.** See note 1.
- 360.** *e.* TIME OF CONTRIBUTION. — See note 2.
- f.* MANNER OF MAKING CONTRIBUTION — (2) *Must Be Bona Fide and Not Merely Colorable.* — See notes 9, 10.
- 361.** 9. Firm Name — *c.* USING WORD "LIMITED." — See note 9.
- 362.** See note 1.
- 365.** 12. Renewals — *a.* IN GENERAL. — See note 2.
- 368.** III. RIGHTS AND LIABILITIES — 1. In General — Accounting. — See note 4.
2. Liability for Debts — *a.* GENERAL RULE. — See note 9.
- 369.** *d.* AUTHORITY OF GENERAL PARTNER TO BIND SPECIAL PARTNER. — See note 10.
- 377.** 7. Interference — *a.* PROHIBITION AGAINST INTERFERENCE. — See note 6.
- 378.** *b.* PENALTY FOR INTERFERENCE. — See note 2.
- c.* WHAT CONSTITUTES INTERFERENCE — Definition. — See note 5.
- 387.** IV. TERMINATION OF RELATION — DISSOLUTION — 1. By Operation of Law — Bankruptcy or Insolvency. — See note 1.
- 391.** LIQUIDATE — LIQUIDATION — LIQUIDATOR, ETC. — See notes 8, 9.
- 356.** 3. Cash or Checks or Notes Convertible into Cash Sufficient. — *Deckert v. Chesapeake Western Co.*, 101 Va. 804.
- 357.** 1. Payment by Check Insufficient. — *Moorhead v. Seymour*, (N. Y. City Ct. Tr. T.) 77 N. Y. Supp. 1050.
- 360.** 2. Payment Before Filing of Certificate Necessary. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219.
9. Colorable Transaction to Evade Statute. — *Hartford Nat. Bank v. Beinecke*, 80 N. Y. App. Div. 546.
10. Question for Jury. — See *Hartford Nat. Bank v. Beinecke*, 80 N. Y. App. Div. 546.
- 361.** 9. Word "Limited" Necessary. — *Abington Dairy Co. v. Reynolds*, 24 Pa. Super. Ct. 632.
- Abbreviation "Ltd." Sufficient. — *Abington Dairy Co. v. Reynolds*, 24 Pa. Super. Ct. 632.
- 362.** 1. General Liability Penalty for Non-compliance. — *Abington Dairy Co. v. Reynolds*, 24 Pa. Super. Ct. 632.
- 365.** 2. Continuance Without Renewal Imposes General Liability. — *Durgin v. Colburn*, 176 Mass. 110; *Strang v. Thomas*, 114 Wis. 599.
- 368.** 4. Liability to Account. — *Bunting v. Bunting*, 199 Pa. St. 27.
9. Special Partner Liable if Statute Violated. — *Lee v. Burnley*, 195 Pa. St. 58.
- 369.** 10. Customary Practice Known to All. — See *Woodward v. Nelligan*, 19 App. Cas. (D. C.) 550.
- 377.** 6. Special Partner Prohibited from Acting in Business. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219.
- 378.** 2. General Liability the Penalty for Interference. — *La Montagne v. State Bank*, 94 N. Y. App. Div. 219; *Strang v. Thomas*, 114 Wis. 599.
5. Election of Directors. — See *Strang v. Thomas*, 114 Wis. 599.
- 387.** 1. Bankruptcy or Insolvency of Firm. — Matter of Price, 69 N. Y. App. Div. 37, reversed on other grounds 171 N. Y. 15.
- 391.** 8. Liquidated. — See *Chicago, etc., R. Co. v. Mills*, 18 Colo. App. 8.
9. Liquidating Partner. — *Smith v. Proskey*, 82 N. Y. App. Div. 19.

## LIQUIDATED DAMAGES.

**395.** II. DEFINITIONS — 1. Liquidated Damages. — See note 2.

**396.** 2. Penalty. — See note 1.

**395.** 2. Liquidated Damages. — *Stony Creek Lumber Co. v. Fields*, 102 Va. 1. See also *Deuninck v. West Gallatin Irrigation Co.*, 28 Mont. 255.

Contract Favored. — It is the policy of the courts to uphold and enforce contracts wherein the sum to be paid is not in the nature of a penalty, but is in that of agreed compensation. *Van Tuyl v. Young*, 23 Ohio Cir. Ct. 15.

**396.** 1. Definition of Penalty. — *J. G. Wagner Co. v. Monroe*, 52 La. Ann. 2132.

The term penalty *prima facie* excludes the notion of liquidated damages. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

Purpose of Penalty — Insuring Performance. — *Morrill v. Weeks*, 70 N. H. 178.

Penalty for Nonperformance. — See *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485.

**396. III. LIQUIDATED DAMAGES AS DISTINGUISHED FROM PENALTY.** — See notes 2, 3.

**397. IV. CONSTRUCTION OF CONTRACT IN CASE OF DOUBT.** — See note 2.

**398. V. RULE OF INTENT OF PARTIES — 1. General Rule.** — See notes 3, 4.

**396. 2. Distinction Stated.** — *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485. See also *Empire Loan, etc., Co. v. McRae*, 5 Ont. L. Rep. 710.

**3. Practical Effect of Distinction.** — *Heisen v. Westfall*, 86 Ill. App. 576.

**397. 2. Construction of Contract in Case of Doubt.** — *Edgar, etc., Foundry, etc., Works v. U. S.*, 34 Ct. Cl. 205; *Mundy v. U. S.*, 35 Ct. Cl. 265; *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251; *Emack v. Campbell*, 14 App. Cas. (D. C.) 186; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Radloff v. Haase*, 196 Ill. 365; *Kelly v. Fejervary*, 111 Iowa 693; *Day Bros. Lumber Co. v. Ison*, (Ky. 1901) 62 S. W. Rep. 516; *Disosway v. Edwards*, 134 N. Car. 254, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 397. See also *Rueker v. Campbell*, 35 Tex. Civ. App. 178; *Johnson v. Cook*, 24 Wash. 474.

**Burden of Proof.** — See *Emack v. Campbell*, 14 App. Cas. (D. C.) 186; *Kelly v. Fejervary*, 111 Iowa 693; *Small v. Burke*, 92 N. Y. App. Div. 338.

**398. 3. Intent Governs** — *United States*. — *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642; *Sherburne v. Hirst*, 121 Fed. Rep. 998; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

*California*. — *Pogue v. Kaweah Power, etc.*, Co., 138 Cal. 664.

*District of Columbia*. — *Emack v. Campbell*, 14 App. Cas. (D. C.) 186.

*Georgia*. — *Footo, etc., Co. v. Malony*, 115 Ga. 985.

*Illinois*. — *Heisen v. Westfall*, 86 Ill. App. 576; *Steer v. Brown*, 106 Ill. App. 361.

*Indiana*. — *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926.

*Kentucky*. — *Kilbourne v. Burt, etc., Lumber Co.*, 111 Ky. 693.

*Massachusetts*. — *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405; *Glynn v. Moran*, 174 Mass. 233. See also *Guerin v. Stacy*, 175 Mass. 595.

*Minnesota*. — *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473; *Womack v. Coleman*, 89 Minn. 17.

*Missouri*. — *St. Louis, etc., R. Co. v. Jefferson Stone Co.*, 90 Mo. App. 171; *May v. Crawford*, 150 Mo. 504. See also *Menges v. Milton Piano Co.*, 96 Mo. App. 283.

*Nebraska*. — *Lee v. Carroll Normal School Co.*, (Neb. 1901) 96 N. W. Rep. 65.

*New Hampshire*. — *Morrill v. Weeks*, 70 N. H. 178.

*New Jersey*. — *Moore v. Durnan*, 63 N. J. Eq. 96; *Robinson v. Centenary Fund*, 68 N. J. L. 725.

*New York*. — *Curtis v. Van Bergh*, 161 N. Y. 47; *Cæsar v. Rubinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *Dunn v. Morgenthau*, 73 N. Y. App. Div. 147, affirmed 175 N. Y. 518; *Liotta v. Abruzzo*, 82 N. Y. App. Div. 429; *Small v. Burke*, 92 N. Y. App. Div. 338;

*Murphy v. U. S. Fidelity, etc., Co.*, 100 N. Y. App. Div. 93; *Longobardi v. Yuliano*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 472; *Schreiber v. Cohen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 546.

*North Carolina*. — *Wheeldon v. American Bonding, etc., Co.*, 128 N. Car. 69; *Disosway v. Edwards*, 124 N. Car. 254.

*Ohio*. — See *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361.

*Oregon*. — *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485.

*Pennsylvania*. — *Emery v. Boyle*, 200 Pa. St. 249.

*Texas*. — *Santa Fe St. R. Co. v. Schutz*, (Tex. Civ. App. 1904) 83 S. W. Rep. 39; *Rucker v. Campbell*, 35 Tex. Civ. App. 178; *Millar v. Smith*, 28 Tex. Civ. App. 386; *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Copelan v. Holloman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 257.

*Virginia*. — *Stony Creek Lumber Co. v. Fields*, 102 Va. 1.

*Washington*. — *Jennings v. McCormick*, 25 Wash. 427; *Drumheller v. American Surety Co.*, 30 Wash. 530; *Jennings v. McCormick*, 25 Wash. 427.

*Wisconsin*. — *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

**4. Whole Instrument — Situation of Parties** — *United States*. — *Sherburne v. Hirst*, 121 Fed. Rep. 998; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609.

*California*. — *Pogue v. Kaweah Power, etc., Co.*, 138 Cal. 664.

*Connecticut*. — *New Britain v. New Britain Telephone Co.*, 74 Conn. 326.

*Indiana*. — *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642.

*Kentucky*. — *Kilbourne v. Burt, etc., Lumber Co.*, 111 Ky. 693.

*Minnesota*. — *Womack v. Coleman*, 89 Minn. 17; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473.

*Missouri*. — *May v. Crawford*, 150 Mo. 504. See also *Menges v. Milton Piano Co.*, 96 Mo. App. 283; *Brevard v. Wimberly*, 89 Mo. App. 331.

*Nebraska*. — *Lee v. Carroll Normal School Co.*, (Neb. 1901) 96 N. W. Rep. 65.

*New York*. — *Cæsar v. Rubinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *Dunn v. Morgenthau*, 73 N. Y. App. Div. 147, affirmed 175 N. Y. 518; *Curtis v. Van Bergh*, 161 N. Y. 47; *Peekskill, etc., R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, affirmed 165 N. Y. 628; *Liotta v. Abruzzo*, 82 N. Y. App. Div. 429; *Murphy v. U. S. Fidelity, etc., Co.*, 100 N. Y. App. Div. 93; *Schreiber v. Cohen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 546.

*North Carolina*. — *Disosway v. Edwards*, 134 N. Car. 254.

*Oregon*. — *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485.

*Pennsylvania*. — *Emery v. Boyle*, 200 Pa. St. 249.

**399.** See note 1.

**2. Qualification of General Rule.** — See notes 2, 3, 4

**400.** See note 1.

**VI. LANGUAGE NOT CONCLUSIVE.** — See notes 2, 3.

**401.** See notes 1, 2.

To the Use of the Terms "Forfeit," "Forfeiture," or "Forfeit and Pay." — See notes 3, 4.

*Texas.* — *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Rucker v. Campbell*, 35 Tex. Civ. App. 178; *Copeland v. Holloman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 257.

*Virginia.* — *Stony Creek Lumber Co. v. Fields*, 102 Va. 1.

*Washington.* — *Jennings v. McCormick*, 25 Wash. 427.

*Wisconsin.* — *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

**399. 1. Value of Property — Consideration.** — See *Emery v. Boyle*, 200 Pa. St. 249.

**2. Intention Not Conclusive.** — *McDaniels v. Gowey*, 30 Wash. 412.

**3. Where Intent Illegal.** — *Emery v. Boyle*, 200 Pa. St. 249; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480. See also *Kilbourne v. Burt*, etc., *Lumber Co.*, 111 Ky. 693; *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361.

**4. Compensation the Rule.** — *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 399; *New Britain v. New Britain Telephone Co.*, 74 Conn. 326; *Steer v. Brown*, 106 Ill. App. 361; *Kelley v. Fejervary*, 111 Iowa 693; *Menges v. Milton Piano Co.*, 96 Mo. App. 283; *Lee v. Carroll School Co.*, (Neb. 1901) 96 N. W. Rep. 65; *McDaniels v. Gowey*, 30 Wash. 412; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

**Reasonableness.** — *L. P.*, etc., *Smith Co. v. U. S.*, 34 Ct. Cl. 472; *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

**400. 1. Contracts to Pay Money.** — *McCullough v. Moore*, 111 Ill. App. 545, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Kelly v. Fejervary*, 111 Iowa 693; *Morrill v. Weeks*, 70 N. H. 178; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

**2. Language Not Conclusive.** — *L. P.*, etc., *Smith Co. v. U. S.*, 34 Ct. Cl. 472; *Pogue v. Kaweah Power, etc., Co.*, 138 Cal. 664; *Redloff v. Haase*, 196 Ill. 365; *McCullough v. Moore*, 111 Ill. App. 545; *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *May v. Crawford*, 150 Mo. 504; *Robinson v. Centenary Fund*, 68 N. J. L. 723, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Stony Creek Lumber Co. v. Fields*, 102 Va. 1. See also *Parlin, etc., Co. v. Boatman*, 84 Mo. App. 67, second appeal 89 Mo. App. 43; *McDaniels v. Gowey*, 30 Wash. 412.

**3. "Liquidated Damages" Held Penalty — United States.** — *Chicago House-Wrecking Co. v. U. S.*, (C. C. A.) 106 Fed. Rep. 385. See also *Edgar, etc., Foundry, etc., Works v. U. S.*, 34 Ct. Cl. 205.

*Alabama.* — *Mansur, etc., Implement Co. v. Tissier Arms, etc., Co.*, 136 Ala. 597;

*California.* — *Pogue v. Kaweah Power, etc., Co.*, 138 Cal. 664.

*Connecticut.* — *New Britain v. New Britain Telephone Co.*, 74 Conn. 326.

*Illinois.* — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Radloff v. Haase*, 196 Ill. 365; *Heisen v. Westfall*, 86 Ill. App. 576; *Steer v. Brown*, 106 Ill. App. 361; *McCullough v. Moore*, 111 Ill. App. 545.

*Indiana.* — *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642.

*Iowa.* — *Coen v. Birchard*, 124 Iowa 394.

*Massachusetts.* — See *Guerin v. Stacy*, 175 Mass. 595.

*Missouri.* — *Menges v. Milton Piano Co.*, 96 Mo. App. 283.

*New Jersey.* — *Robinson v. Centenary Fund*, 68 N. J. L. 723, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400.

*New York.* — *Cæsar v. Rubinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *D'Appuzo v. Albright*, (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654; *Schreiber v. Cohen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 546. See also *Peekskill, etc., R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, affirmed 165 N. Y. 628.

*North Carolina.* — *Wheeldon v. American Bonding, etc., Co.*, 128 N. Car. 69.

*Oregon.* — *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400.

*Texas.* — *Santa Fe St. R. Co. v. Schutz*, (Tex. Civ. App. 1904) 83 S. W. Rep. 39.

*Wisconsin.* — *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

**401. 1. "Penalty" Held Liquidated Damages.** — *Re White*, 84 L. T. N. S. 594; *Pogue v. Kaweah Power, etc., Co.*, 138 Cal. 664; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *McCullough v. Moore*, 111 Ill. App. 545; *Lamson v. Marshall*, 133 Mich. 250; *Robinson v. Centenary Fund*, 68 N. J. L. 723, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Small v. Burke*, 92 N. Y. App. Div. 338; *Liotta v. Abruzzo*, 82 N. Y. App. Div. 429; *Disosway v. Edwards*, 134 N. Car. 254; *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 400; *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933; *Monroe v. South*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1014; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

**2. "Penalty" More Nearly Conclusive than "Liquidated Damages."** — *Steer v. Brown*, 106 Ill. App. 361; *Kilbourne v. Burt*, etc., *Lumber Co.*, 111 Ky. 693; *Small v. Burke*, 92 N. Y. App. Div. 338; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

**3. D'Appuzo v. Albright.** (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654. See also *Edgar, etc., Foundry, etc., Works v. U. S.*, 34 Ct. Cl. 205,

**402. VII. WHERE ACTUAL DAMAGES ASCERTAINABLE ON BREACH.** — See note 2.

**VIII. WHERE ACTUAL DAMAGES NOT READILY SHOWN** — 1. In General. — See note 3.

**Penalty and Forfeiture Generally Synonymous.** — *Steer v. Brown*, 106 Ill. App. 361.

**401. 4. "Forfeit," etc., Denoting Liquidated Damages.** — *Womack v. Coleman*, 89 Minn. 17; *Hardie-Tynes Foundry, etc., Co. v. Glen Allen Oil Mill*, 84 Miss. 259; *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Millar v. Smith*, 28 Tex. Civ. App. 386.

**402. 2. Actual Damages Ascertainable in Breach** — *United States*. — *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642; *Chicago House-Wrecking Co. v. U. S.*, (C. C. A.) 106 Fed. Rep. 385; *Home Land, etc., Co. v. McNamara*, (C. C. A.) 111 Fed. Rep. 822; *Brooks v. Wichita*, (C. C. A.) 114 Fed. Rep. 297; *L. P., etc., Smith Co. v. U. S.*, 34 Ct. Cl. 472.

*Alabama*. — *Mansur, etc., Implement Co. v. Tissier Arms, etc., Co.*, 136 Ala. 597.

*California*. — *Jack v. Sinsheimer*, 125 Cal. 563.

*District of Columbia*. — *Emack v. Campbell*, 14 App. Cas. (D. C.) 186.

*Illinois*. — *Radloff v. Haase*, 196 Ill. 365.

*Iowa*. — *Coen v. Birchard*, 124 Iowa 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402.

*Kentucky*. — *Kilbourne v. Burt, etc., Lumber Co.*, 111 Ky. 693.

*Minnesota*. — *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473.

*Missouri*. — *Brevard v. Wimberly*, 89 Mo. App. 331; *May v. Crawford*, 150 Mo. 504; *Hill v. Wertheimer-Swartz Shoe Co.*, 150 Mo. 483; *Parlin, etc., Co. v. Boatman*, 84 Mo. App. 67, second appeal 89 Mo. App. 43.

*New York*. — *Cæsar v. Robinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *D'Apuzzo v. Albright*, (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654; *Schreiber v. Cohen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 546.

*North Carolina*. — *Disosway v. Edwards*, 134 N. Car. 254, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402.

*Ohio*. — See *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361.

*Oklahoma*. — *Mansur-Tebbetts Implement Co. v. Willet*, 10 Okla. 383.

*South Dakota*. — See *Seim v. Krause*, 13 S. Dak. 530.

*Texas*. — *Millar v. Smith*, 28 Tex. Civ. App. 386.

*Virginia*. — *Stony Creek Lumber Co. v. Fields*, 102 Va. 1.

*Washington*. — See *McDaniels v. Gowey*, 30 Wash. 412.

**3. Actual Damages Not Readily Shown** — *United States*. — *Davis v. Alpha Portland Cement Co.*, 134 Fed. Rep. 274; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609; *Sherburne v. Hirst*, 121 Fed. Rep. 998; *Schroeder v. California Yukon Trading Co.*, 95 Fed. Rep. 296.

*Arkansas*. — *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432.

*California*. — *Pogue v. Kaweah Power, etc., Co.*, 138 Cal. 664; *Escondido Oil, etc., Co. v. Glaser*, 144 Cal. 494.

*Connecticut*. — *New Britain v. New Britain Telephone Co.*, 74 Conn. 326.

*Illinois*. — *McCullough v. Moore*, 111 Ill. App. 545, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402; *Heisen v. Westfall*, 86 Ill. App. 576; *Steer v. Brown*, 106 Ill. App. 361; *Leavitt v. Bolton*, 102 Ill. App. 582.

*Indiana*. — *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926; *Jenner v. Magee*, 34 Ind. App. 176.

*Kentucky*. — *Kilbourne v. Burt, etc., Lumber Co.*, 111 Ky. 693.

*Massachusetts*. — *Garst v. Harris*, 177 Mass. 72; *Guerin v. Stacy*, 175 Mass. 595; *Glynn v. Moran*, 174 Mass. 233.

*Maine*. — *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496.

*Minnesota*. — *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473.

*Missouri*. — *Menges v. Milton Piano Co.*, 96 Mo. App. 283; *May v. Crawford*, 150 Mo. 504; *St. Louis, etc., R. Co. v. Jefferson Stone Co.*, 90 Mo. App. 171.

*New Jersey*. — *Moore v. Durnam*, 63 N. J. Eq. 96; *Robinson v. Centenary Fund*, 68 N. J. L. 723.

*New York*. — *Cæsar v. Robinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *Curtis v. Van Bergh*, 161 N. Y. 47; *Dunn v. Morgenthau*, 73 N. Y. App. Div. 147, affirmed 175 N. Y. 518; *Peekskill, etc., R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, affirmed 165 N. Y. 628; *Liotta v. Abruzzo*, 82 N. Y. App. Div. 429; *Longobardi v. Yuliano*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 472.

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*Pennsylvania*. — *Emery v. Boyle*, 200 Pa. St. 249.

*South Carolina*. — *Carter v. Kaufman*, 67 S. Car. 456.

*South Dakota*. — *Barnes v. Clement*, 12 S. Dak. 270.

*Tennessee*. — *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933.

*Texas*. — *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Millar v. Smith*, 28 Tex. Civ. App. 386; *Tobler v. Austin*, 22 Tex. Civ. App. 99; *Santa Fe St. R. Co. v. Schutz*, (Tex. Civ. App. 1904) 83 S. W. Rep. 39.

*Virginia*. — *Stony Creek Lumber Co. v. Fields*, 102 Va. 1.

*Washington*. — *Jennings v. McCormick*, 25 Wash. 427; *McDaniels v. Gowey*, 30 Wash. 412; *Johnson v. Cook*, 24 Wash. 474; *Jennings v. McCormick*, 25 Wash. 427.

*Wisconsin*. — *Madison v. American Sanitary*

**404. 3. Uncertainty of Actual Damages Not Conclusive of Construction.** — See note 5.

**405. IX. CONTRACTS FOR PERFORMANCE OF SINGLE THING — 1. In General.** — See note 1.

**X. CONTRACTS FOR PERFORMANCE OF SEVERAL CONDITIONS — 1. In General.** — See note 4.

**406. 2. Conditions Varying in Importance.** — See note 2.

**407. 5. Where Actual Damages Uncertain in Some Particulars Only.** — See note 3.

**408. 6. Contracts Susceptible of Part Performance or Breach in Unimportant Particular** — *a. IN GENERAL.* — See note 4.

**409. d. TRANSFORMATION OF LIQUIDATED DAMAGES INTO PENAL SUM.** — See note 3.

**XI. ALTERNATIVE AGREEMENTS.** — See note 4.

**410. XII. WHERE SUM NAMED COLLATERAL TO OBJECT OF CONTRACT.** — See note 1.

**XIII. WHERE SUM NAMED DISPROPORTIONATE TO ACTUAL DAMAGES — 1. General Rule.** — See note 2.

Engineering Co., 118 Wis. 480; *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

*Canada.* — *Snider v. McKelvey*, 27 Ont. App. 339.

**Rule by Statute.** — *Jack v. Sinsheimer*, 125 Cal. 563.

Statutes similar to that of California, stated in the original note, have been enacted in *Montana*, *Home Land, etc.*, Co. v. *McNamara*, (C. C. A.) 111 Fed. Rep. 822; *Denninck v. West Gallatin Irrigation Co.*, 28 Mont. 255; in *Oklahoma*, *Mansur-Tebbetts Implement Co. v. Willet*, 10 Okla. 383; and in *South Dakota*, *Seim v. Krause*, 13 S. Dak. 530.

**404. 5. Reasonableness of Amount.** — *Curtis v. Van Bergh*, 161 N. Y. 47.

**405. 1. Contract for Single Act or Condition.** — *Strickland v. Williams*, (1899) 1 Q. B. 382; *Robinson v. Centenary Fund*, 68 N. J. L. 725; *Stony Creek Lumber Co. v. Fields*, 102 Va. 1. See also *Tobler v. Austin*, 22 Tex. Civ. App. 99; *Johnson v. Cook*, 24 Wash. 474.

**4. Contract for Performance of Several Conditions.** — *Strickland v. Williams*, (1899) 1 Q. B. 382.

**406. 2. Conditions Varying in Importance.** — *East Moline Co. v. Weir Plow Co.*, (C. C. A.) 95 Fed. Rep. 250; *Mansur, etc., Implement Co. v. Tissier Arms, etc., Co.*, 136 Ala. 597; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582. See also *Guerin v. Stacy*, 175 Mass. 595; *Moore v. Durnam*, 63 N. J. Eq. 96.

**407. 3. Damages Uncertain in Some Particulars.** — *East Moline Co. v. Weir Plow Co.*, (C. C. A.) 95 Fed. Rep. 250; *Mansur, etc., Implement Co. v. Tissier Arms, etc., Co.*, 136 Ala. 597; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Parlin, etc., Co. v. Boatman*, 84 Mo. App. 67, second appeal 89 Mo. App. 43; *Emery v. Boyle*, 200 Pa. St. 249; *McDaniels v. Gowey*, 30 Wash. 412. See also *Brevard v. Wimberly*, 89 Mo. App. 331.

**408. 4. Contract Susceptible of Part Performance.** — *Mansur, etc., Implement Co. v. Tissier Arms, etc., Co.*, 136 Ala. 597.

**409. 3. Liquidated Damages Transformed into Penalty.** — *Coen v. Birchard*, 124 Iowa 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 409.

**4. Lapse of Time — Right of Election Shifts.** — *Amanda Gold Min., etc., Co. v. People's Min., etc., Co.*, 28 Colo. 251.

**410. 1. Stated Sum Collateral to Object of Contract.** — *Heisen v. Westfall*, 86 Ill. App. 576; *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485.

**2. Amount Disproportionate to Actual Damages** — *United States.* — *Northwest Fixture Co. v. Kilbourne, etc., Co.*, (C. C. A.) 128 Fed. Rep. 256, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410; *Wood v. Niagara Falls Paper Co.*, (C. C. A.) 121 Fed. Rep. 818; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609; *Home Land, etc., Co. v. McNamara*, (C. C. A.) 111 Fed. Rep. 822; *Chicago House-Wrecking Co. v. U. S.*, (C. C. A.) 106 Fed. Rep. 385; *Schroeder v. California Yukon Trading Co.*, 95 Fed. Rep. 296.

*Arkansas.* — *Stilwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432.

*Connecticut.* — *New Britain v. New Britain Telephone Co.*, 74 Conn. 326.

*District of Columbia.* — *Emack v. Campbell*, 14 App. Cas. (D. C.) 186.

*Illinois.* — *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Radloff v. Haase*, 196 Ill. 365.

*Indiana.* — *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *Chicago, etc., R. Co. v. McEwen*, (Ind. App. 1904) 71 N. E. Rep. 926; *Benner v. Magee*, 30 Ind. App. 176; *Bird v. St. John's Episcopal Church*, 154 Ind. 138.

*Iowa.* — *Coen v. Birchard*, 124 Iowa 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 410.

*Kentucky.* — *Whitehead v. Brothers Lodge, etc.*, (Ky. 1901) 62 S. W. Rep. 873.

*Moine.* — *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496.

*Michigan.* — See *Lamson v. Marshall*, 133 Mich. 250.

*Minnesota.* — *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473.

*Missouri.* — *St. Louis, etc., R. Co. v. Jefferson Stone Co.*, 90 Mo. App. 171; *Zimmerman v. Conrad*, (Mo. App. 1903) 74 N. W. Rep. 139; *Brevard v. Wimberly*, 89 Mo. App. 331; *May*

**411.** 2. Doctrine that Expressed Intent Governs. — See note 1.

3. Where Amount Named Excessive — *a.* IN GENERAL. — See note 3.

*b.* WHERE ACTUAL DAMAGES ONLY NOMINAL. — See note 5.

5. Several Conditions — Excessiveness as to Some, Inadequacy as to Others. — See note 7.

**413.** XV. DEPOSITS AND PARTIAL PAYMENTS — 1. Deposits. — See note 3.

**414.** 2. Partial Payments. — See note 1.

But Cases Are Not Wanting. — See note 2.

**415.** XVI. RETENTION OF CONSIDERATION FOR PART TO SECURE COMPLETE PERFORMANCE. — See note 1.

XVII. BOND IN PENALTY OF STATED SUM. — See note 2.

**416.** XVIII. CONTRACTS FOR PAYMENT OF MONEY — 1. General Rule. — See note 2.

**418.** 3. Money Due in Instalments. — See note 1.

**420.** XX. CONTRACTS WITH REFERENCE TO REAL PROPERTY — 2. Contracts of Lease. — See notes 2, 5.

XXI. CONTRACTS NOT TO ENGAGE IN PARTICULAR BUSINESS OR PROFESSION. — See note 7.

*v. Crawford*, 150 Mo. 504; *Parlin, etc., Co. v. Boatman*, 84 Mo. App. 67, second appeal 89 Mo. App. 43. See also *Thorn, etc., Lime, etc., Co. v. Citizens Bank*, 158 Mo. 272; *Ramlose v. Dollman*, 100 Mo. App. 347.

*Nebraska*. — *Lee v. Carroll Normal School Co.*, (Neb. 1901) 96 N. W. Rep. 65.

*New Jersey*. — *Moore v. Durnam*, 63 N. J. Eq. 96; *Robinson v. Centenary Fund*, 68 N. J. L. 725.

*New York*. — *Cæsar v. Robinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *Peekskill, etc., R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, affirmed 165 N. Y. 628; *Dunn v. Morgenthau*, 73 N. Y. App. Div. 147, affirmed 175 N. Y. 518; *Liotta v. Abruzzo*, 82 N. Y. App. Div. 429; *Schreiber v. Cohen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 546. See also *Curtis v. Van Bergh*, 161 N. Y. 47.

*North Carolina*. — *Wheeldon v. American Bonding, etc., Co.*, 128 N. Car. 69; *Disosway v. Edwards*, 134 N. Car. 254.

*Oregon*. — *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485.

*Pennsylvania*. — *Emery v. Boyle*, 200 Pa. St. 249.

*Tennessee*. — *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933.

*Texas*. — *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Copeland v. Holloman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 257. See also *Monroe v. South*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1014; *Brown Iron Co. v. Norwood*, (Tex. Civ. App. 1902) 69 S. W. Rep. 253.

*Washington*. — *Jennings v. McCormick*, 25 Wash. 427.

*Wisconsin*. — *J. G. Wagner Co. v. Cawker*, 112 Wis. 532; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480; *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

**411.** 1. Intent Governs. — See *Emack v. Campbell*, 14 App. Cas. (D. C.) 186; *Copeland v. Hollman*, (Tex. Civ. App. 1899) 51 S. W. Rep. 257.

3. Sum Excessive. — *Edgar, etc., Foundry, etc., Works v. U. S.*, 34 Ct. Cl. 205.

5. Where Damages Nominal Merely. — See *Northwest Fixture Co. v. Kilbourne, etc., Co.*, (C. C. A.) 128 Fed. Rep. 256.

Where No Actual Damage Sustained — Sum Held Penalty. — *Dunn v. Morgenthau*, 73 N. Y. App. Div. 147, affirmed 175 N. Y. 518.

7. Several Conditions — Amount Too Small for Some, Excessive for Others. — See *Johnson v. Cook*, 24 Wash. 474.

**413.** 3. Deposits — Rule Stated. — *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405; *Moore v. Durnam*, 63 N. J. Eq. 96; *Longobardi v. Yuliano*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 472; *Dobbs v. Turner*, (Tex. Civ. App. 1902) 70 S. W. Rep. 458; *Tharp v. Lee*, 25 Tex. Civ. App. 439.

**414.** 1. Partial Payments. — *Moore v. Durnam*, 63 N. J. Eq. 96.

2. Deposits or Part Payments Held Penalties. — *Cæsar v. Robinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180; *D'Appuzo v. Albright*, (N. Y. City Ct. Tr. T.) 76 N. Y. Supp. 654.

**415.** 1. Percentage Reserved as Security Against Breach — *Liquidated Damages*. — *Wilson v. Godkin*, 136 Mich. 106; *Thorn, etc., Lime, etc., Co. v. Citizens Bank*, 158 Mo. 272.

Penalty. — *Mundy v. U. S.*, 35 Ct. Cl. 265; *Kerslake v. McInnis*, 113 Wis. 659.

2. Bond in Penalty of Stated Sum. — *Disosway v. Edwards*, 134 N. Car. 254; *Johnson v. Cook*, 24 Wash. 474; *McDaniels v. Gowey*, 30 Wash. 412.

**416.** 2. Contracts for Payment of Money. — *Kilbourne v. Burt, etc., Lumber Co.*, 111 Ky. 693; *Morrill v. Weeks*, 70 N. H. 178; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480. See also *Guerin v. Stacy*, 175 Mass. 595; *Johnson v. Cook*, 24 Wash. 474.

**418.** 1. Provision Not Penal in Character. — *Keefe v. Fairfield*, 184 Mass. 334. See also *McDaniels v. Gowey*, 30 Wash. 412.

**420.** 2. Contracts of Lease. — *Martin v. Berwind-White Coal Min. Co.*, 114 Fed. Rep. 557, affirmed (C. C. A.) 124 Fed. Rep. 313.

5. *Cæsar v. Robinson*, 174 N. Y. 492, reversing 71 N. Y. App. Div. 180.

7. Contract Not to Engage in Business. — *Goldman v. Goldman*, 51 La. Ann. 761; *Au-*

**421. XXII. AMOUNT OF RECOVERY**—1. Where Sum Named Held to Be Penalty—*a. IN GENERAL.*—See note 3.

**422. 2. Where Provision Held to Be for Liquidated Damages**—*a. IN GENERAL.*—See notes 3, 4.

**423.** See note 1.

**XXIII. MISCELLANEOUS.**—See note 4.

Where Performance Prevented by Obligees.—See note 5.

Waiver.—See note 6.

**424. LIQUOR.**—See note 2.

**426. LITIGIOUS RIGHT.**—See note 3.

**428. LIVE.**—See note 1.

*gusta Steam Laundry Co. v. Debow*, 98 Me. 496; *Robinson v. Centenary Fund*, 68 N. J. L. 723; *Rucker v. Campbell*, 35 Tex. Civ. App. 178; *Snider v. McKelvey*, 27 Ont. App. 339. *Contra*, *Disosway v. Edwards*, 134 N. Car. 254.

**421. 3. Penalty—Recovery of Only Actual Damages.**—*East Moline Co. v. Weir Plow Co.*, (C. C. A.) 95 Fed. Rep. 250; *Northwest Fixture Co. v. Kilbourne, etc., Co.*, (C. C. A.) 128 Fed. Rep. 256; *Footte, etc., Co. v. Malony*, 115 Ga. 985; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Disosway v. Edwards*, 134 N. Car. 254; *Johnson v. Cook*, 24 Wash. 474.

**422. 3. Liquidated Damages Fixes Recovery.**—*Morris v. Wilson*, (C. C. A.) 114 Fed. Rep. 74; *Wood v. Niagara Falls Paper Co.*, (C. C. A.) 121 Fed. Rep. 818; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582; *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *Taylor v. Times Newspaper Co.*, 89 Minn. 12; *Woodford v. Kelly*, (S. Dak. 1904) 101 N. W. Rep. 1069; *Jackson v. Hunt*, 76 Vt. 284.

**4. No Actual Damages Need Be Proved.**—*Steer v. Brown*, 106 Ill. App. 361; *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642; *Salem v. Anson*, 40 Oregon 339, 91 Am. St. Rep. 485; *American Copper, etc., Works v. Galland-Burke Brewing, etc., Co.*, 30 Wash. 178. But compare *Northwest Fixture Co. v. Kilbourne, etc., Co.*, (C. C. A.) 128 Fed. Rep. 256; *Disosway v. Edwards*, 134 N. Car. 254.

**423. 1. American Copper, etc., Works v.**

*Galland-Burke Brewing, etc., Co.*, 30 Wash. 178.

**4. Performance by Plaintiff.**—*Florida Northern R. Co. v. Southern Supply Co.*, 112 Ga. 1.

**Delay Caused by Default of Both Parties.**—See *Champlain Constr. Co. v. O'Brien*, 117 Fed. Rep. 271.

**5. Completion Prevented by Owner's Agent.**—*Smith v. Vail*, 53 N. Y. App. Div. 628, *affirmed* 166 N. Y. 611.

**6. Waiver.**—See *Grant v. Pratt*, 52 N. Y. App. Div. 540.

**Payment by Instalments—Right to Retain.**—Where it is agreed in a contract of sale that on failure to pay an instalment by a certain time, the vendor may treat the contract as void, and retain payments made as liquidated damages, the vendor, by accepting payments after default, does not waive the right to proceed according to the terms of the contract upon a subsequent default. *Keefe v. Fairfield*, 184 Mass. 334.

**424. 2. Liquor.**—*Brass v. State*, 45 Fla. 1. **Whether Term Imports Intoxicating Liquor.**—*Brass v. State*, 45 Fla. 1.

**Distilled or Fermented.**—*Matter of Hunter*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 389; *People v. Cox*, (County Ct.) 45 Misc. (N. Y.) 311.

**426. 3. Litigious Right.**—*Sanders v. Ditch*, 110 La. 884.

**429. 1. Live Together.**—*Massey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 911; *Burnett v. State*, 44 Tex. Crim. 226.

## LIVERY-STABLE KEEPERS.

By H. O'B. COOPER.

**430. I. DEFINITION.**—See note 1.

**II. LIVERY STABLES AS NUISANCES.**—See notes 2, 3.

**431. III. MUNICIPAL CONTROL OF LIVERY STABLES—2. Livery-stable Keeper's License—General Rule.**—See note 5.

**430. 1. Massachusetts Statute.**—Where the owners of a stable do not take in horses for pay, but let out their stable in tenements for rent, the tenants taking care of their own horses, it is not "a stable for taking \* \* \* horses and carriages for hire," within Rev. Laws Mass., c. 102, § 70. *Congregation Beth Israel v. O'Connell*, 187 Mass. 236.

**2. Livery Stable Not Per Se Nuisance.**—*Fischer v. Sanford*, 12 Pa. Super. Ct. 435.

**3. Held Nuisance in Particular Case.**—*Fischer v. Sanford*, 12 Pa. Super. Ct. 435, discussing also the burden of proof and the measure of damages.

**431. 5. Unreasonable and Unlawful Ordinance.**—See *Plymouth v. Cooper*, 135 N. Car. 1.



**432. IV. DUTIES AND LIABILITIES OF LIVERY-STABLE KEEPERS — 1. As to Horses, etc., Left in Their Charge — a. IN GENERAL — DUTY TO TAKE ORDINARY CARE.** — See note 3.

**433. 2. As to Horses, etc., Let to Customer — Liability for Personal Injuries — a. IN GENERAL.** — See note 1.

*b. INJURIES CAUSED BY HORSE — Implied Warranty.* — See note 3.

*Must Inform Customer of Horse's Vicious Propensities.* — See note 4.

*Defects Not Discoverable by Exercise of Due Care.* — See note 5.

**435. V. RIGHTS OF LIVERY-STABLE KEEPERS — 1. Right to Compensation.** — See note 1.

**436. 2. Right to Lien — b. LIENS BY STATUTE — (1) *In General.*** — See note 1.

*(2) Construction of Statutes.* — See note 4.

**437. c. PERSONS ENTITLED TO LIEN — (1) *In General* — Supplying Feed.** — See note 3.

**3. Property Subject to Lien — a. IN GENERAL — Scope of Statutes.** — See note 8.

**438. d. PROPERTY NOT BELONGING TO BAILOR — Consent of Owner Requisite.** — See note 6.

**4. Relative Priority of Lien and Chattel Mortgage — General Rule.** — See note 9.

**439. Effect of Mortgagee's Consent.** — See note 4.

*The Consent of the Mortgagee May Be Implied.* — See note 6.

**440. Agistor's Lien Attaching Before Execution of Mortgage.** — See note 1.

**5. Loss of Lien by Waiver or Abandonment — c. WAIVER BY TAKING OTHER SECURITY OR COMPROMISING CLAIM.** — See note 8.

**441. d. DETENTION OF ANIMAL UNDER CLAIM OTHER THAN THAT UPON WHICH LIEN IS BASED.** — See notes 1, 2.

*f. EFFECT OF LOSS OF POSSESSION — (1) *In General* — Voluntary Relinquishment of Possession.* — See note 7.

*License Tax for Revenue.* — See *Ex p. Jackson*, 143 Cal. 564.

**432. 3. Duty to Exercise Ordinary Care.** — *Hunter v. Ricke*, 127 Iowa 108; *Peyser v. Lund*, 89 N. Y. App. Div. 195. See also *Wells v. Sutphin*, 64 Kan. 873.

**433. 1. Nisbet v. Wells, (Ky. 1903) 76 S. W. Rep. 120. See also *Miller v. Moyer*, 24 Pa. Co. Ct. 259.**

**3. Stable Keeper Liable for Injuries Caused by Unsafe Horse.** — *Nisbet v. Wells*, (Ky. 1903) 76 S. W. Rep. 120.

**4. See Nisbet v. Wells, (Ky. 1903) 76 S. W. Rep. 120.**

**5. Stanley v. Steele**, 77 Conn. 688.

**435. 1. Compensation.** — *Folsom v. Barrett*, 180 Mass. 439, 91 Am. St. Rep. 320. See also *Robinson v. Young*, 51 N. Y. App. Div. 603.

**436. 1. Lien Given by Statute to Livery-stable Keepers, Etc.** — See *In re Mero*, 128 Fed. Rep. 630; *In re Pratesi*, 126 Fed. Rep. 588; *Glascock v. Lemp*, 26 Ind. App. 175; *Griffith v. Speaks*, 111 Ky. 149; *Zartman-Thalman Carriage Co. v. Reid*, 99 Mo. App. 415; *Maryville Nat. Bank v. Snyder*, 85 Mo. App. 82; *Robinson v. Young*, 51 N. Y. App. Div. 603.

**4. Statutes Giving Lien Construed Strictly.** — *Zartman-Thalman Carriage Co. v. Reid*, 99 Mo. App. 415.

**Agistor's Lien — Liberal Construction.** — See *Becker v. Brown*, 65 Neb. 264.

**437. 3. W. H. Howard Commission Co. v. National Live Stock Bank**, 93 Ill. App. 473.

**8. Lien on Part for Whole Amount Due.** — See *Griffith v. Speaks*, 111 Ky. 149.

**Lien on Vehicle.** — Under the *Missouri* statute no lien attaches to a vehicle unless it comes into the possession of the livery-stable keeper at the same time with the horse. *Zartman-Thalman Carriage Co. v. Reid*, 99 Mo. App. 415.

**438. 6. No Lien on Animals Left to Be Boarded Without Owner's Consent.** — See *Blackford v. Ryan*, (Tex. Civ. App. 1901) 61 S. W. Rep. 161.

**9. Livery-stable Keeper's Lien Inferior to Lien of Prior Recorded Chattel Mortgage.** — *Beh v. Moore*, 124 Iowa 564; *Becker v. Brown*, 65 Neb. 264; *Blackford v. Ryan*, (Tex. Civ. App. 1901) 61 S. W. Rep. 161.

**439. 4. Mortgagee's Consent.** — See *Beh v. Moore*, 124 Iowa 564.

**6. See Beh v. Moore**, 124 Iowa 564.

**440. 1. Lien Attaching Prior to Mortgage.** — *Becker v. Brown*, 65 Neb. 264.

**8. Assignment of the Claim and of possession have been held to waive the lien.** *Glascock v. Lemp*, 26 Ind. App. 475.

**441. 1. Detention under Claim Other than Lien Debt.** — *Folsom v. Barrett*, 180 Mass. 439, 91 Am. St. Rep. 320.

**2. Folsom v. Barrett.** 180 Mass. 439, 91 Am. St. Rep. 320.

**7. Lien Lost by Voluntary Relinquishment of Possession.** — *Glascock v. Lemp*, 26 Ind. App. 175; *Folsom v. Barrett*, 180 Mass. 439, 91 Am. St. Rep. 320.

**443. 6. Enforcement of Lien.** — See note 1.**LIVE-STOCK INSURANCE.** — See note 5.

An **Agistor's Lien** will not, as between the parties, or as to third persons having notice, be lost by change of possession not inconsistent with it, and not under such circumstances as to indicate an intent to waive, relinquish, or abandon it. *Becker v. Brown*, 65 Neb. 264.

**443. 1. Enforcement of Lien.** — See, generally, *In re Mero*, 128 Fed. Rep. 630; *Griffith v. Speaks*, 111 Ky. 149; *Folsom v. Barrett*, 180 Mass. 439, 91 Am. St. Rep. 320; *Dale v. Council Bluffs Sav. Bank*, 65 Neb. 692.

**Enforceable in Bankruptcy.** — *In re Pratesi*, 126 Fed. Rep. 588.

**5. A Policy Insuring Live Stock Against Lightning Anywhere in Three Counties** has been held to cover horses owned by the insured which were stabled over night in the barn of a rela-

tive situated in one of the counties enumerated in the policy. *Hapeman v. Citizens Mut. F.*, etc., Ins. Co., 126 Mich. 191.

**Performance of a Provision in an Insurance Policy on a Horse that in Case of Its Sickness the Insurance Company Should Be Notified by Telegram** is not excused by reason of the fact that the horse was taken sick in the forenoon and died in the afternoon, and that the telegraph station was not less than nine miles from the place where the sickness and death occurred. *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337.

**A Loss of Live Stock by Fire Due to Lightning** is covered by a clause in a policy insuring such live stock against lightning. *Hapeman v. Citizens' Mut. F. Ins. Co.*, 126 Mich. 191.

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## LLOYD'S ASSOCIATIONS.

**448. I. DEFINITION AND EXPLANATIONS** — The Most Important Peculiarity. — See note 6.

**449. II. NATURE AND STATUS OF ASSOCIATION** — Character. — See note 2.

**451. IV. RIGHTS AND LIABILITIES OF INDIVIDUAL UNDERWRITERS** — On the Policy. — See note 3.

**452. LOAD.** — See note 3.

**453. LOAN — LEND — LENT, ETC.** — See note 2.

**454.** See notes 1, 2.

**448. 6. Definition.** — In *Durbrow v. Eppens*, 65 N. J. L. 19, the court said: "A Lloyd's insurance originally was an insurance based upon a fund made up of deposits by each one of the members, from which, when a loss was adjusted, the agent took the means of payment. In this country, in adopting the Lloyd's system of insurance, money representing the entire insurance was not deposited. In lieu of such a deposit the members each contributed a certain sum to make up a fund, and each contracted with agents, who were the representatives of the association, to pay in from time to time so much as should be needed to pay losses. Under the Lloyd's system of insurance, after the loss was adjusted or ascertained by action against the agents, the insured received from the fund so provided the amount of loss. The fund deposited was, in the strictest sense, a trust fund for the benefit of persons holding policies. Under the Lloyd's system, as adopted in this country, the trust in favor of the insured consists of the amount deposited by each member and the covenant on the part of each member to pay in money enough to answer the amount due from him upon such loss."

**449. 2. Lloyd's Association.** — Members of unincorporated association of insurers held lia-

ble as joint insurers. *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, *reversed* 42 N. Y. App. Div. 588.

**451. 3.** See *Durbrow v. Eppens*, 65 N. J. L. 19, holding that the attorney of a Lloyd's association in a suit against the executor of a deceased underwriter, whose share in the association fund was insufficient to satisfy claims on policies issued in his lifetime, was entitled to recover the amount of the deficiency.

**452. 3. Highways.** — *Heib v. Big Flats*, 66 N. Y. App. 88.

**Wagon Load.** — The word *load*, in an ordinance providing for the weighing of coal on the city scales, means wagon *load*. *Wills v. Ft. Smith*, 70 Ark. 221.

**453. 2. Delivery.** — *Ramsey v. Whitbeck*, 81 Ill. App. 210, *reversed* 183 Ill. 550. See also *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356.

**454. 1. Bailment.** — *Ramsey v. Whitbeck*, 81 Ill. App. 210, *reversed* 183 Ill. 550.

**2. Advance — When Not Synonymous with Loan.** — *Fisher v. Parr*, 92 Md. 245.

**Deposit and Loan.** — *Ramsey v. Whitbeck*, 81 Ill. App. 210; *Hunt v. Hopley*, 120 Iowa 695.

**Loan in the Sense of Borrow.** — *Griffen v. Train*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 290.

## LOANS.

By E. C. ELLSBREE.

### **462. II. DEFINITION AND GENERAL CONSIDERATIONS — 2. Nature of Loan**

**— c. OWNERSHIP OF THING LOANED — (1) In General — As to Third Persons. —**  
See note 4.

**466. IV. RIGHTS AND LIABILITIES OF PARTIES INTER SE — 3. Use of Thing Loaned — b. UNAUTHORIZED USE. —** See note 8.

**471. VI. STATUTORY RIGHTS OF THIRD PERSONS — 1. In General. —** See note 7.

**473. 3. Effect and Construction of Statutes — d. REQUISITES UNDER STATUTES — (3) Necessity for Expiration of Statutory Period — (a) General Rules. —** See note 8.

**462. 4. Purchasers. —** *Nichols v. Monjeau*, 132 Mich. 582; *Oyler v. Renfro*, 86 Mo. App. 321.

**466. 8. Not Liable for Ordinary Wear. —** By an agreement to lend for a particular use the borrower does not become liable for the ordinary wear incident to that use, but only for such damage as is in excess of the use stipu-

lated for. *U. S. v. McIntosh*, 117 Fed. Rep. 963.

**471. 7. Statutes — Unrecorded or Parol Loans Fraudulent as to Borrower's Creditors and Purchasers. —** A similar statute exists in *Missouri*. See *Oyler v. Renfro*, 86 Mo. App. 321.

**473. 8. Statutory Period Must Expire. —** *Oyler v. Renfro*, 86 Mo. App. 321.

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## LOAN, TRUST, AND SAFE-DEPOSIT COMPANIES.

**478. II. INCORPORATION — 2. Constitutionality of Laws Authorizing —**  
**a. NOT IN CONTRAVENTION OF PUBLIC POLICY. —** See note 2.

**III. POWERS — 1. In General. —** See note 6.

**479. 3. Banking Powers — a. IN GENERAL. —** See note 2.

**480. d. POWER TO ISSUE EVIDENCES OF INDEBTEDNESS. —** See note 5.

**482. [LOBBY SERVICES. —** See note 4a.]

**478. 2. Constitutionality of Georgia Statute. —** Acts Ga. 1898, p. 78, authorizing the secretary of state to grant charters to trust companies with banking privileges, is not violative of the state constitution. The companies provided for in that act are embraced within the description "banking companies," as used in the constitution. Under the provisions of that act the ordinary may, in a proper proceeding, appoint a trust company, so organized to act, as administrator on the estate of a deceased person. *Mulherin v. Kennedy*, 120 Ga. 1080.

**6. Powers in General. —** See *Ward v. Joslin*, (C. C. A.) 105 Fed. Rep. 224, affirmed 186 U. S. 142, denying the power of a loan and trust company to guarantee notes from one third party to another.

Under the *Missouri* statutes a trust company has been held to have the right to act as agent in the management and control of the property of a railroad company and to indorse a

note in aid of such company. *Kansas City First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494.

**479. 2. New York Trust Companies. —** See *Jenkins v. Neff*, 186 U. S. 230, affirming 163 N. Y. 320; *Venner v. Farmers' L. & T. Co.*, 176 N. Y. 549, affirming 54 N. Y. App. Div. 271.

**Trust Company Held Liable for Certification of Check. —** *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596.

**480. 5. A Company Authorized to Receive Deposits May Issue Certificates of Deposit in the absence of any statute to the contrary. —** *Saginaw Bank v. Title, etc., Co.*, 105 Fed. Rep. 491.

**482. 4a. "Lobby Services** are generally defined to mean the use of personal solicitation, the exercise of personal influence and improper or corrupt methods whereby legislative or official action is to be the product." *Dunham v. Hastings Pavement Co.*, 56 N. Y. App. Div. 244.

**482. LOCAL.** — See note 6.

**485. LOCALITY.** — See note 1.

**482. 6. Local.** — *Territory v. School Dist.* No. 83, 10 Okla. 556.

**Local Agent** — *Service of Process.* — Copland v. Wireless Tel. Co., 136 N. Car. 11.

**Local Office.** — *State v. Yates*, 66 Ohio St. 546.

**Local Officers.** — *Matter of Brenner*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 306.

**Local Concerns of County.** — *Little Rock v. North Little Rock*, 72 Ark. 195.

**485. 1. Locality.** — *Pierce v. Dillingham*, 96 Ill. App. 300; *People v. Shea*, 73 N. Y. App. Div. 232.

## LOCAL OPTION.

BY O. D. ESTEE.

**490. III. CONSTITUTIONALITY** — 1. *Delegation of Legislative Power* — b. *APPLICATION TO LOCAL-OPTION LAWS* — (1) *Prevailing View.* — See note 1.

**493. 2. Uniform Operation of General Laws.** — See note 3.

**495. 6. Interference with Regulation of Interstate Commerce** — Since the Passage of the "Wilson Act." — See note 3.

8. *Due Process of Law.* — See note 5.

9. *Denial of Equal Protection of Laws.* — See note 6.

**496. 13. Express Constitutional Provisions for Enactment of Local-option Laws.** — See note 4.

14. *Partial Unconstitutionality.* — See notes 5, 7.

**497. IV. ADOPTION OF LAW BY VOTERS OR INHABITANTS OF TERRITORY AFFECTED** — 2. *Elections* — a. *IN GENERAL.* — See note 2.

c. *PETITION* — (1) *Necessity.* — See notes 6, 7.

(2) *Form and Contents* — When Prescribed by Statute. — See note 9.

**498. (3) Signatures of Petitioners** — Who May Sign. — See note 3.

Sufficiency as to Number. — See note 5.

**499. (4) Time of Making and Presentation** — Time of Filing. — See note 3.

d. *ORDER FOR ELECTION* — (2) *Time and Place of Making.* —

See note 8.

**500. (3) To Whom Directed.** — See note 3.

**490. 1. Regulating or Prohibiting Sale of Liquors.** — *In re O'Brien*, 29 Mont. 530.

**493. 3. Uniformity in Operation.** — *People v. Shuler*, 136 Mich. 161; *Ex p. Handler*, 176 Mo. 383, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; *Lloyd v. Dollison*, 23 Ohio Cir. Ct 571.

**495. 3.** See *In re Bergen*, 115 Fed. Rep. 339.

5. *Busch v. Webb*, 122 Fed. Rep. 655.

6. *Ohio v. Dollison*, 194 U. S. 445; *Webster v. State*, (Tenn. 1903) 82 S. W. Rep. 179.

**496. 4. Exceptions.** — *Busch v. Webb*, 122 Fed. Rep. 655.

5. *Busch v. Webb*, 122 Fed. Rep. 655; *Hoover v. Thomas*, 35 Tex. Civ. App. 535.

7. *Com. v. Petranich*, 183 Mass. 217.

**497. 2. Irregularities Affecting Result.** — An election is not rendered void on account of the misconduct of election officers unless enough voters materially to affect the result of the election were denied the privilege of voting. *Ex p. Wood*, (Tex. Crim. 1904) 81 S. W. Rep. 529.

6. *Requirement of Petition Mandatory.* — *In re Huntsville Local Option Election*, 25 Ohio Cir. Ct. 535.

7. *Under the Texas Statute.* — *Williams v. Davidson*, (Tex. Civ. App. 1902) 70 S. W. Rep. 987. See also *Cantwell v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 18.

9. *Statutory Requirements Must Be Strictly Followed.* — *State v. Bird*, 108 Mo. App. 163.

**498. 3. Signers Must Be Residents of Precincts.** — *Wyatt v. Ryan*, 113 Ky. 306.

5. *What Constitutes Sufficient Number of Signers.* — See *Wyatt v. Ryan*, 113 Ky. 306; *In re Huntsville Local Option Election*, 25 Ohio Cir. Ct. 535.

*Presumption in Favor of Sufficiency.* — *Matter of Rice*, 95 N. Y. App. Div. 28.

**499. 3. Time of Filing under New York Statute.** — Under Laws N. Y. 1896, c. 112, § 16, it is absolutely necessary that a proper petition be filed with the town clerk twenty days before the election is held. *Matter of Krieger*, 59 N. Y. App. Div. 346.

*Delay in Filing.* — See *Matter of Rice*, 95 N. Y. App. Div. 28.

8. *Next Regular Term.* — See *Touscy v. De Huy*, (Ky. 1901) 62 S. W. Rep. 1118.

**500. 3. To Whom Directed.** — *Puckett v. Snider*, 110 Ky. 261.

**500.** (4) *Form and Contents* — (b) *Recitals as to Sufficiency of Petition*. — See note 6.

(c) *Designation of Voting Places and Election Officers*. — See note 9.

**501.** e. *NOTICE OF ELECTION* — (1) *Necessity*. — See notes 5, 6.

(2) *Publishing in Newspaper*. — See notes 7, 8.

**502.** (3) *Posting Notices in Public Places*. — See notes 1, 2, 3.

*Burden of Proof*. — See note 5.

(4) *Description of Territory*. — See note 6.

**503.** f. *TIME OF HOLDING ELECTION* — (4) *With Reference to Time of Prior Submission*. — See note 3.

(6) *With Reference to Time of Filing Petition or Making Order*. — See note 8.

**504.** h. *ELECTION OFFICERS*. — See note 4.

*Irregular Conduct*. — See note 5.

i. *PLACE OF HOLDING ELECTION*. — See note 7.

**505.** j. *CONDUCT OF ELECTION* — (2) *Opening and Closing Polls*. — See note 1.

(4) *Ballots*. — See note 4.

**500.** 6. *Sufficiency of Allegation*. — See *Com. v. Jones*, (Ky. 1905) 84 S. W. Rep. 305; *State v. Bird*, 108 Mo. App. 163.

9. *Names of Election Officers*. — It is unnecessary for the order authorizing a local option election to contain the names of the election officers where the election is held by the officers previously appointed to preside over the general election. *Nelson v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 502.

**501.** 5. *Notice a Prerequisite*. — Matter of O'Hara, 63 N. Y. App. Div. 512.

*Provisions of Local-option Law Control as to Manner*. — *Ex p. Neal*, (Tex. Crim. 1904) 83 S. W. Rep. 831; *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683.

*As to What Constitutes a Sufficient Statement of Purpose of Election*, see Matter of Woolston, (County Ct.) 35 Misc. (N. Y.) 735.

6. Matter of Rowley, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 662; Matter of France, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 693.

7. *Failure to Publish Notice for Full Period*. — Matter of Sullivan, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 598.

*Order Directing Publication*. — A notice of election is void in *Missouri* unless the County Court makes an order authorizing it and it is published accordingly. *State v. Baldwin*, 109 Mo. App. 573.

8. Matter of O'Hara, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 355. See also Matter of La Fayette, (County Ct.) 45 Misc. (N. Y.) 141.

**502.** 1. *Failure to Post Notices Required by Law*. — *Nelson v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 502.

*Failure to Post Notices of Election in Four Public Places*. — Matter of Powers, (Supm. Ct.) 34 Misc. (N. Y.) 636; Matter of Sullivan, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 598; Matter of Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

*The Fact that the Notices Were Torn or Blown Down* after they were properly posted does not affect the validity of the election. *Nelson v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 502.

2. *Posting Insufficient Number of Notices*. —

*Ex p. Conley*, (Tex. Crim. 1903) 75 S. W. Rep. 301.

3. *Posting for an Insufficient Length of Time*. — In *Norman v. Thompson*, 30 Tex. Civ. App. 537, affirmed 96 Tex. 250, it was held that a local-option election was not rendered invalid because one of the notices was published only nine days, where the result of the election was not affected thereby.

5. *Burden of Proof*. — *Keller v. State*, 46 Tex. Crim. 588.

6. *Substantial Description of Territory Sufficient*. — *Williams v. Davidson*, (Tex. Civ. App. 1902) 70 S. W. Rep. 987.

**503.** 3. *Territory Affected by Limitation*. — The rule applies to precincts forming part of a magisterial district in which a local-option election has been held. *Tousey v. Stites*, (Ky. 1902) 66 S. W. Rep. 277.

8. *Ex p. Conley*, (Tex. Crim. 1903) 75 S. W. Rep. 301.

**504.** 4. *Conduct of Election by De Facto Officer*. — *People v. Pierson*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 406, affirmed 64 N. Y. App. Div. 624.

5. *Irregular Conduct of Officers*. — *People v. Pierson*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 406, affirmed 64 N. Y. App. Div. 624.

7. *Roper v. Scurlock*, 29 Tex. Civ. App. 464.

**505.** 1. *Opening and Closing Polls*. — A failure to comply with the statute concerning keeping the polls open does not render the election void where the error was slight and the result of the election was not affected thereby. *Hoover v. Thomas*, 35 Tex. Civ. App. 535.

4. *Form of Ballot*. — *People v. Edwards*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 567; *Matter of Rice*, 95 N. Y. App. Div. 28; *Stick v. State*, 23 Ohio Cir. Ct. 392.

Where the ballots provided that the local prohibition law should become inoperative, the effect was held to be the same as if they had provided that liquor might be sold. *George v. Winchester*, (Ky. 1904) 80 S. W. Rep. 1158.

*Irregularity in Form of Ballot*. — Matter of Munson, 95 N. Y. App. Div. 23.

- 507.** 1. ORDER OR PROCLAMATION DECLARING RESULT OF ELECTION — (2) *Time of Making*. — See note 1.
- 508.** (3) *Form and Contents* — (t) *Recital of Exceptions of Statute*. — See note 1.  
 (4) *Conclusiveness of Order*. — See note 4.  
 (5) *Publication* — (c) *Designation of Newspaper*. — See note 9.  
 (d) *Interruption of Publication by Injunction*. — See note 10.
- 509.** (e) *Proof of Publication*. — See note 1.  
 m. CONTEST AND REVIEW — (1) *Jurisdiction*. — See note 7.  
 (2) *Manner of Contesting*. — See note 8.  
 (3) *Who May Contest*. — See note 10.
- 510.** V. OPERATION AND EFFECT — 3. *Sales by Druggists*. — See note 6.  
 4. *Territory Affected* — a. TERRITORY WHICH MAY ADOPT. — See note 8.
- 511.** b. EFFECT OF ADOPTION — IN MINOR SUBDIVISIONS OF TERRITORY ADOPTING. — See note 1.  
 d. EFFECT OF CHANGE OF BOUNDARIES. — See notes 8, 9.
- 513.** 6. Effect of Adoption on Unexpired Licenses. — See note 1.
- VII. REPEAL AND REVOCATION — 1. *Repeal by Legislative Enactment*. — See note 6.
- 514.** 3. Effect of Revocation on Prior Violations. — See note 5.
- VIII. PROSECUTIONS — Burden of Proof. — See notes 7, 8.

**507.** 1. *Time of Making*. — *Ex p.* Walton, 45 Tex. Crim. 74.

**508.** 1. *Recital of Exceptions of Statute*. — *Racer v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 968.

4. *Presumption as to Correctness of Certificate*. — In *Cooper v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 916, it was held that the order of the court declaring the result of a local-option election was sufficient evidence in the absence of attack to sustain the regularity of that election for the purpose of convicting a party of violating the excise law.

9. *Specifying Name of Paper in Order*. — It is not essential that the order authorizing publication should specify by name the paper in which publication is to be made, where it appears from the record that the publication was actually made in a paper designated by the proper officer. *Sinclair v. State*, 45 Tex. Crim. 487.

10. *Interruption of Publication by Injunction*. — In *Ex p.* Wood, (Tex. Crim. 1904) 81 S. W. Rep. 529, it was held that the validity of the publication could not be attacked in a collateral proceeding, where the fourth publication was made during the pendency of an injunction prohibiting it, the injunction having been subsequently dissolved.

**509.** 1. *Form of Entry*. — *Skipwith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 278.

*Insufficient Certificate of County Judge*. — *Lively v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 393.

7. *Power of District Court to Decide Contest*. — See *Kidd v. Truett*, 28 Tex. Civ. App. 618; *Oxford v. Frank*, 30 Tex. Civ. App. 343.

8. *Manner Prescribed Is Exclusive*. — *Puckett v. Snider*, 110 Ky. 261; *Fike v. State*, 25 Ohio Cir. Ct. 554.

10. *Who May Contest — Qualified Elector*. — *Fike v. State*, 25 Ohio Cir. Ct. 554.

**510.** 6. *Exemption of Druggists*. — *Truesdale v. State*, 42 Tex. Crim. 544.

In *Massachusetts* druggists are entitled to a license notwithstanding the fact that the voters

in the town have voted no license. *Fitzgerald v. Hurley*, 180 Mass. 151.

8. *Boundaries of District Must Be Defined with Reasonable Certainty* — *Ex p.* Waits, (Tex. Crim. 1901) 64 S. W. Rep. 254.

**511.** 1. *Town Subject to Result of County Election*. — In *re* O'Brien, 29 Mont. 530, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 510 [511].

8. *Effect of Change of Boundaries*. — The fact that the boundaries of a precinct were subsequently changed does not affect the validity of a local-option election. *Nelson v. State*, (Tex. Crim. 1902) 75 S. W. Rep. 502.

9. *Effect of Detaching Part of Territory Adopting*. — *Medford v. State*, 45 Tex. Crim. 180.

**513.** 1. *Effect of Adoption on Consent by Adjoining Property Owners*. — Where adjoining property owners, in accordance with the *New York* statute, have consented that the liquor business be carried on in certain premises, a vote for prohibition merely suspends this privilege, but does not destroy it, in the absence of an abandonment of it by the liquor dealer. On a repeal of the prohibition law it again becomes operative. *People v. Brush*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 56, affirmed 92 N. Y. App. Div. 611.

6. *Compare Ex p.* Elliott, 44 Tex. Crim. 575, holding that the legislature could not repeal the local-option law after it had been adopted by the voters of a district, as the voters alone had the right to repeal it.

**514.** 5. In *Ohio* a prosecution for violation of the local-option law is not barred by a return by the voters, at an election held after the violation, to the license system. *Lloyd v. Dollis*, 23 Ohio Cir. Ct. 571.

7. *State Must Prove Adoption — Evidence*. — Compliance with the law may be proved by introducing in evidence the original minutes of the court showing that all steps necessary to the validity of the law have been taken. It

**515.** Question for Court. — See note 1.

**LOCATE — LOCATED — LOCATION.** — See note 2.

**517.** See note 1.

**518.** [LOCKOUT. — See note 3a.]

**LOCOMOTIVE.** — See note 4.

**LODE.** — See note 8.

**520.** **LODGE — LODGER — LODGING.** — See note 4.

is not necessary for the prosecution to offer in evidence the original petition for holding an election. *Holley v. State*, 46 Tex. Crim. 324.

**514.** 8. Order Declaring Result Prima Facie Evidence of Valid Election. — See *Ex p. Douthitt*, (Tex. Crim. 1901) 63 S. W. Rep. 131.

**515.** 1. Question of Adoption for Court. — But where there is evidence that the election was illegal or that the law had not been properly put into effect, the question whether there was a local-option law in force in the district was for the jury. *Sebastian v. State*, 44 Tex. Crim. 508.

**2. Mining Claim.** — Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., 196 U. S. 337.

**517.** 1. Railroads. — *Hickory v. Southern R. Co.*, 137 N. Car. 189.

**Same — Appropriation — Eminent Domain.** — *Chesapeake, etc., R. Co. v. Deepwater R. Co.*, (W. Va. 1905) 50 S. E. Rep. 890.

**A Right of Way** may be definitely *located* by the actual construction of the road. *Pennsylvania Min., etc., Co. v. Everett, etc., R. Co.*, 29 Wash. 102.

**Location of a Route** in a statute implies the

right to construct and operate a railway upon such route if that was the meaning at the time it was used in the legislative act. *Currie v. Atlantic City*, 66 N. J. L. 140.

**518.** 3a. A Lockout has been defined to be the closing of a factory or workshop by an employer usually in order to bring the workmen to satisfactory terms by a suspension of wages. *Mathews v. People*, 202 Ill. 389.

**4. Locomotive.** — *Jarvis v. Hitch*, (Ind. App. 1902) 65 N. E. Rep. 608.

**A Hand Car** operated by gasoline is not a locomotive within a statute making railroads liable for injuries to stock by locomotives on right of way defectively fenced. *Henson v. Williamsville, etc., R. Co.*, 110 Mo. App. 595.

**8. Lode.** — *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525.

**520.** 4. Distinguished from Inn, Hotel, Boarding House. — The term *lodging* house and the words inn, hotel, or boarding house are none of them convertible terms or words, and a distinction exists between these several institutions and a *lodging* house. *Bailey v. People*, 190 Ill. 28.

## LOGS AND LUMBER.

By J. H. FREESE.

**524.** II. CONTRACTS FOR LABOR OR SERVICES. — See note 3.

III. FLOATING AND RAFTING — 1. In General — Use of Streams for Floating or Rafting Logs. — See note 5.

**525.** See note 2.

Contract to Drive Logs. — See note 5.

**526.** 2. Statutory Regulation. — See note 1.

3. Driving Intermingled or Obstructing Logs — Statutory Right to Drive Obstructing or Intermingled Logs. — See note 5.

**524.** 3. Contracts to Cut Timber, etc., Constructed. — *Prentiss v. Lyons*, 105 La. 382; *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404; *Pierce v. Banton*, 98 Me. 553; *Gatlin v. Serpell*, 136 N. Car. 202.

**For Contracts Held to Be Entire.** — See *Kangas v. Boulton*, 127 Mich. 539, 8 Detroit Leg. N. 431.

**5. Floating Logs.** — *The Mary*, 123 Fed. Rep. 609, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 524.

**525.** 2. *Banks v. Frazier*, 111 Ky. 909.

**5. Driver Bound to Exercise Reasonable Care.** — *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553.

**526.** 1. Liability for Injury Caused by Float-

ing Logs. — Under a *Nova Scotia* statute persons engaged in the floating or transmission of logs down rivers and streams are liable for all damage caused thereby, whether by negligence or otherwise, and the owner of the logs is not relieved from liability because the damage was done while the logs were being transmitted by another person under contract with him. *Dickie v. Campbell*, 34 Can. Sup. Ct. 265, affirming 36 *Nova Scotia* 40.

**5. Statutory Authority to Drive Obstructing or Intermingled Logs Belonging to Another.** — *Belows v. Crane Lumber Co.*, 126 Mich. 476.

**Question of Reasonable Care for Jury.** — It is for the jury to determine whether the defendant

**527.** No Compensation Except for Driving Obstructing or Intermingled Logs. — See note 8.

**529.** 4. Lost or Stranded Logs. — See note 9.

**531.** V. LIENS — 1. At Common Law. — See note 2.

**532.** 2. Statutory Liens — Statutes Construed Liberally. — See note 7.

3. Persons Entitled to Lien — *a.* IN GENERAL. — See note 8.

*b.* CONTRACTORS. — See note 11.

**533.** See note 1.

4. Against Whom Lien May Be Claimed — Owner of Property. — See note 4

Direct Privity. — See note 6.

**534.** 5. For What Labor or Services Lien May Be Claimed — *a.* IN GENERAL. — See note 1.

**535.** *c.* SERVICES OF TEAMS OR SERVANTS — Where Use of Team and Appliances Necessary to Performance of Work. — See note 5.

**536.** 6. Property Subject to Lien — *a.* IN GENERAL. — See note 2.

**537.** 7. Notice of Lien — *a.* NECESSITY FOR FILING NOTICE. — See note 2.

Sale of Property Before Filing Notice. — See note 4.

*b.* WHAT IS SUFFICIENT NOTICE — The Statutes Prescribe the Facts to Be Recited. — See note 5.

**538.** Notices Are Construed Liberally. — See note 1.

Description of Property. — See note 5.

used reasonable care when he attempted to float hard-wood logs, many of which sank and caused an obstruction, the cost of removing which the plaintiff sought to recover. *Bellows v. Crane Lumber Co.*, 126 Mich. 476.

**527.** 8. See *Doyle v. Pelton*, 134 Mich. 398, 10 Detroit Leg. N. 475, holding that under the Michigan statute the plaintiff was not entitled to compensation for moving logs from the channel of a stream in order to allow his own logs to pass.

**529.** 9. Lost or Stranded Logs. — See *Log-Owners' Booming Co. v. Hubbell*, 135 Mich. 65, 10 Detroit Leg. N. 679.

**531.** 2. Common-law Lien of Person Sawing Logs into Lumber. — *Walker v. Cassels*, 70 S. Car. 271.

**532.** 7. Statutes Construed Liberally. — *Comptare Dallaire v. Gauthier*, 24 Quebec Super. Ct. 495.

8. Under the Maine Statute giving a lien to those who labor at cutting or hauling logs, it has been held that neither a scaler nor the foreman or superintendent who has charge of the entire logging operation is entitled to a lien. *Meands v. Park*, 95 Me. 527.

Persons Entitled to Liens under Canadian Woodsmen's Lien Acts. — See *Davidson v. Frayne*, 9 British Columbia 369; *Baxter v. Kennedy*, 35 N. Bruns. 179; *Murchie v. Scott*, 36 N. Bruns. 161; *Rhéaume v. Batiscan River Lumber Co.*, 23 Quebec Super. Ct. 71; *Dallaire v. Gauthier*, 24 Quebec Super. Ct. 495.

11. Whether General Contractor Entitled to Lien. — *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966.

**533.** 1. *Littlefield v. Morrill*, 97 Me. 505, 94 Am. St. Rep. 513.

4. Logs Belonging to the United States cannot be subjected to the lien provided by the Minnesota statute. *Rowley v. Conklin*, 89 Minn. 172.

6. Lien Against Owner Without Direct Privity of Contract. — *Klondike Lumber Co. v. Williams*,

71 Ark. 334, limiting the extent of the lien, however, to the amount of the contract price. See also *Kangas v. Boulton*, 127 Mich. 539, 8 Detroit Leg. N. 431; *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966.

**534.** 1. One Who Repairs Mill Machinery has been held to be entitled to a lien under the Wisconsin statutes. *Engi v. Hardell*, 123 Wis. 407.

**535.** 5. *Klondike Lumber Co. v. Williams*, 71 Ark. 334.

**536.** 2. Property Subject to Lien — Illustrations. — In Wisconsin "slabs" are not included in the material designated as "lumber and timber," and therefore are not subject to a lien for service under the statute. *Engi v. Hardell*, 123 Wis. 407.

Under the Washington statute, as amended in 1893 and 1895, one who performs labor in cutting logs for a manufacturer of railroad ties is entitled to a lien on the finished ties in the hands of the manufacturer. *Robins v. Paulson*, 30 Wash. 459, distinguishing *Winsor v. Johnson*, 5 Wash. 429, stated in the original note.

Deals or Other Manufactured Lumber Are Not "Logs and Timber" within the meaning of the Woodsmen's Lien Acts of Canada. *Baxter v. Kennedy*, 35 N. Bruns. 179.

**537.** 2. Written Admission of Debt — Notice Not Required. — See *Harvey v. Harvey*, 19 Quebec Super. Ct. 153.

4. Statutory Provisions as to Sale of Logs, etc., Subject to Lien. — See *Livingstone v. Lovgren*, 27 Wash. 102.

5. Notice Need Not State When Cutting or Removal of Timber Began. — *Maris v. Clevenger*, 29 Wash. 395.

**538.** 1. Substantial Compliance with Statute. — *Maris v. Clevenger*, 29 Wash. 395.

5. Description of Property. — For descriptions held to be sufficient, see *Livingstone v. Lovgren*, 27 Wash. 102; *Grays' Harbor Boom Co. v. Lytle Logging, etc., Co.*, 36 Wash. 151,



- 538.** *c.* TIME OF FILING NOTICE. — See note 10.  
**539.** 8. Priority of Lien. — See note 5.  
**540.** 9. Waiver and Discharge of Lien — Surrender of Possession. — See note 3.  
**542.** VI. MARKS — Ownership — Presumption. — See note 5.  
 VII. SCALING — 1. In General. — See note 7.  
**543.** 2. By Person Agreed Upon — How Far Scale Binding as to Quantity. — See note 3.  
**547.** LONG. — See note 4.  
**549.** LOSS — LOST. — See note 4.

**538.** 10. *Hammond v. Pullman*, 129 Mich. 567, 8 Detroit Leg. N. 1052.

**539.** 5. Priority of Lien. — See *Bradley v. Cassels*, 117 Ga. 517; *Blumauer v. Clock*, 24 Wash. 596, 85 Am. St. Rep. 966.

**540.** 3. Common-law Lien Lost by Surrendering Possession of Property. — *Walker v. Cassels*, 70 S. Car. 271.

A Contract for Payment After Sale of the logs or manufactured lumber, and not before, precludes the idea of any lien thereon. *Rhodes v. Hinds*, 79 N. Y. App. Div. 379; *Anderson v. Tingley*, 24 Wash. 537.

**542.** 5. See *Tozier v. Brown*, 202 Pa. St. 359.

7. Scaling Logs and Lumber. — As to the construction of particular contract in respect to the scaling of logs, see *Southern Lumber Co. v. Asher*, 64 S. W. Rep. 462, 23 Ky. L. Rep. 901; *Boyle v. Musser-Sauntry Land, etc., Co.*, 86 Minn. 160.

**543.** 3. Parties Bound by Scale of Person Selected by Them. — *Yellow Poplar Lumber Co. v. Stephens*, 69 S. W. Rep. 715, 24 Ky. L. Rep. 621; *Bulkley v. Whited*, 113 La. 396. Compare *Nelson v. Charles Betcher Lumber Co.*, 88 Minn. 157.

A Third-party Vendee who converted logs upon which a lien is established is bound by the scale of the person agreed upon by his vendor and the lienor. *Carver v. Crookston Lumber Co.*, 84 Minn. 79.

**547.** 4. Long and Short Yearlings — Cattle — In stockmen's parlance "short yearlings are cattle about or approximately near one year of age. After entering the second year and before completing it they are called *long* yearlings." *Sparks v. Deposit Bank*, 115 Ky. 461.

**549.** 4. Suit on Fire Policy to Be Brought Within Certain Time After Loss or Damage. — *Rottier v. German Ins. Co.*, 84 Minn. 116.

Loss of Property — Injury to Property. — "To say that the phrases *loss* of property and injury to property have the same signification is to declare them synonymous, when, in fact, they are not. The one means a total destruction or *loss* of property, the other means a partial *loss* or destruction." *Per Poorman, C.* *Nelson v. Great Northern R. Co.*, 28 Mont. 297.

Loss of Society of a Husband or Wife. — See *McVeigh v. Gentry*, 72 N. Y. App. Div. 598.

As to When a Child Is Lost, within the meaning of an offer of reward, see *Peterson v. Mark*, 134 Mich. 594.

## LOST PAPERS AND RECORDS.

BY H. O'B. COOPER.

- 555.** II. RE-EXECUTION AND RESTORATION — 1. Instruments of Title —  
*a.* JURISDICTION IN EQUITY. — See note 7.  
*b.* JURISDICTION AT LAW. — See note 8.  
**556.** 2. Judicial Records — *a.* IN GENERAL. — See notes 2, 4, 14.  
**557.** Judgments. — See note 1.  
 Indictments Lost or Destroyed. — See note 5.

**555.** 7. Re-execution of Lost Title Deeds. — *Paschal v. Hutchinson*, 119 Ga. 243, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555; *South Chicago Brewing Co. v. Taylor*, 205 Ill. 132; *Niles v. Graham*, 181 Mass. 41.

Stock Certificate — Refusal to Issue. — Matter of *Coats*, 75 N. Y. App. Div. 469.

8. Jurisdiction at Law — Georgia Statute. — *Paschal v. Turner*, 116 Ga. 736.

**556.** 2. Restoration of Judicial Records in General. — *Warder, etc., Co. v. Libby*, 104 Mo. App. 140.

4. Pleadings. — *Pape v. Ferguson*, 28 Ind.

App. 298, 62 N.E. Rep. 712; *State v. Pierre*, 15 S. Dak. 559; *Bradburn v. State*, 43 Tex. Crim. 309.

Copies Must Be Substantial. — *Hamilton v. Western Union Tel. Co.*, 35 Tex. Civ. App. 602.

14. Papers on Appeal. — *Blalock v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 571.

**557.** 1. Certified Copy of Judgment Roll Admissible in Evidence. — *Wise v. Kerr Thread Co.*, 84 Miss. 200.

5. Restoration of Indictments. — *State v. Paul*, 87 Mo. App. 47.

Original Indictment Found Pending Substitution Proceeding. — *Owens v. State*, 46 Tex. Crim. 14.

**558.** See note 3.

Legal Sufficiency of Substitute Not Generally Considered. — See note 6.

**559.** *b.* JURISDICTION — (1) *Inherent Power of Courts Over Their Own Records* — (a) Rule Stated. — See note 3.

**561.** (3) *Statutory Jurisdiction*. — See note 2.

*c.* EVIDENCE — (1) *Proof of Existence and Loss*. — See note 3.

**562.** (2) *Proof of Contents* — *The Best Evidence*. — See note 1.

Minutes or Memoranda. — See note 2.

Parol Evidence. — See note 8.

**563.** Clear and Convincing Proof Required. — See notes 1, 2.

(3) *Rules of Evidence Not Changed by Statute*. — See note 5.

**565.** III. RECOVERY ON LOST INSTRUMENTS — 1. Jurisdiction — *b.* SIMPLE CONTRACTS — (1) *Negotiable Instruments* — (a) Jurisdiction in Equity — Requirement of Indemnity. — See notes 2, 3.

(b) Jurisdiction at Law. — See notes 4, 5.

**566.** Statutory Provisions. — See note 2.

(c) Exceptions to Rule Requiring Indemnity — *aa.* INSTRUMENTS NOT TRANSFERABLE BY DELIVERY. — See note 3.

Lost Information. — *Goodman v. State*, 161 Ind. 629.

**558.** 3. Information Lost or Destroyed After Trial and Conviction. — *Klein v. State*, 157 Ind. 146.

6. Legal Sufficiency of Substitute. — *McLanahan v. Blackwell*, 119 Ga. 64.

**559.** 3. Inherent Power of Court to Restore Its Records. — *Paschal v. Hutchinson*, 119 Ga. 243, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 559; *Paschal v. Turner*, 116 Ga. 736; *State v. Paul*, 87 Mo. App. 47; *Warder, etc., Co. v. Libby*, 104 Mo. App. 140. And see the title RECORDS, 209. 4.

**561.** 2. Statutes Merely Cumulative or Declaratory of Common Law. — *People v. Pike*, 197 Ill. 449.

3. Proof of Existence and Loss. — *U. S. v. Price*, 113 Fed. Rep. 851; *Hodge v. Palms*, (C. C. A.) 117 Fed. Rep. 396; *Kenniff v. Caulfield*, 140 Cal. 34; *Denny v. Broadway Nat. Bank*, 118 Ga. 221; *Dagley v. Black*, 197 Ill. 53; *Glos v. Talcott*, 213 Ill. 81; *State v. Paul*, 87 Mo. App. 47; *Cullinan v. Hosmer*, 100 N. Y. App. Div. 148; *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756; *Southern R. Co. v. Seymour*, 113 Tenn. 523. See *State v. Southern Mineral, etc., Co.*, 108 La. 24.

Sufficiency of Proof of Loss. — *Arnold v. Mangano*, 89 Ill. App. 327; *Thomson v. Flint, etc.*, R. Co., 131 Mich. 95.

**562.** 1. Best Secondary Evidence Required. — *The Schooner Uralia*, 37 Ct. Cl. 466; *Petrue v. Wakem*, 99 Ill. App. 463. See *Cross v. People*, 192 Ill. 291; *State v. Conser*, 24 Ohio Cir. Ct. 270; *Burr v. Shute*, 25 Ohio Cir. Ct. 735. Transcript of Record. — *Southern R. Co. v. Seymour*, 113 Tenn. 523.

A Copy of the Record, duly certified by the recorder, where there was a proper record in his office, is admissible. *Hodge v. Palms*, (C. C. A.) 117 Fed. Rep. 396.

Certified Copy of Judgment Roll. — *Wise v. Kerr Thread Co.*, 84 Miss. 200.

Printed Copy of Petition. — *State v. Pierre*, 15 S. Dak. 559.

Court Paper — Certified Copy. — *McLanahan v. Blackwell*, 119 Ga. 64.

A Copy is the best secondary evidence of a written instrument. *The Schooner Uralia*, 37 Ct. Cl. 466; *South Omaha v. Wrzensinski*, 66 Neb. 790.

2. Minutes or Memoranda Kept by Judges, Clerks, Etc. — *State v. Pierre*, 15 S. Dak. 559.

8. Parol Evidence of Contents of Lost Record. — *U. S. v. Price*, 113 Fed. Rep. 851; *Dagley v. Black*, 197 Ill. 53; *Meyer v. Purcell*, 214 Ill. 62; *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756; *Richardson v. Morris*, 26 Pa. Super. Ct. 192; *Smith v. Ridley*, 30 Tex. Civ. App. 158. See *Thistlethwaite v. Pierce*, 30 Ind. App. 642.

**563.** 1. Clear and Convincing Proof Required. — *Capell v. Fagan*, 30 Mont. 507.

Proof of Substance of Deed Sufficient. — *Kenniff v. Caulfield*, 140 Cal. 34.

Lost Deed. — *Dagley v. Black*, 197 Ill. 53.

2. Ancient Transactions. — See *Scott v. Crouch*, 24 Utah 377.

5. Rules of Evidence Not Changed by Statute. — *People v. Pike*, 197 Ill. 449, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563; *Gavitt v. Moulton*, 119 Wis. 35, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 563.

**565.** 2. Negotiable Instruments — Jurisdiction in Equity. — *Clinton Nat. Bank v. Stiger*, 67 N. J. Eq. 522; *Matter of Cook*, 86 N. Y. App. Div. 586. See *Zander v. New York Security, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 98, affirmed 81 N. Y. App. Div. 635; *Trunk v. Grier*, (Supm. Ct. Tr. T.) 66 N. Y. Supp. 382.

3. Right of Maker to Indemnity. — *Denver First Nat. Bank v. Wilder*, (C. C. A.) 104 Fed. Rep. 187.

Reasonable Indemnity. — *Matthews v. Matthews*, 97 Me. 40, 94 Am. St. Rep. 464.

4. Courts of Law May Require Indemnity. — *Denver First Nat. Bank v. Wilder*, (C. C. A.) 104 Fed. Rep. 187.

5. In Maine an action at law may be maintained against the maker of a lost note. *Matthews v. Matthews*, 97 Me. 40, 94 Am. St. Rep. 464.

**566.** 2. Statutory Provisions. — See *Clinton Nat. Bank v. Stiger*, 67 N. J. Eq. 522; *Matter of Cook*, 86 N. Y. App. Div. 586.

3. *Matthews v. Matthews*, 97 Me. 40, 94 Am.

**567.** *bb.* INSTRUMENTS LOST AFTER MATURITY. — See note 1.

*cc.* DESTROYED INSTRUMENTS. — See note 3.

**568.** *cc.* ACTION BY BONA FIDE HOLDER BARRED BY LIMITATION. — See note 1.

**569.** (2) *Non-negotiable Instruments.* — See note 1.

2. Demand, Protest, and Notice of Nonpayment. — See note 3.

3. Notice of Loss — *a.* TO THE PARTIES. — See notes 5, 6.

**570.** *b.* PUBLIC NOTICE. — See note 1.

**576.** 7. Evidence in Actions on Lost Instruments — *a.* PROOF OF EXISTENCE AND LOSS — (1) *General Rule.* — See notes 1, 2, 3.

St. Rep. 464; *Zander v. New York Security, etc., Co.*, 178 N. Y. 208. See *Trunk v. Grier*, (Supm. Ct. Tr. T.) 66 N. Y. Supp. 382. But see *Denver First Nat. Bank v. Wilder*, (C. C. A.) 104 Fed. Rep. 187.

**567.** 1. Loss After Maturity — Indemnity Not Required. — *Munroe v. Weir*, 177 Mass. 301; *Baker v. Weaver*, 1 Ohio Cir. Dec. 222.

3. Destroyed Instruments — Indemnity Not Required. — *Denver First Nat. Bank v. Wilder*, (C. C. A.) 104 Fed. Rep. 187; *Matthews v. Matthews*, 97 Me. 40, 94 Am. St. Rep. 464. See *Munroe v. Weir*, 177 Mass. 301.

**568.** 1. Action by Bona Fide Holder Barred by Limitation. — *Matthews v. Matthews*, 97 Me. 40, 94 Am. St. Rep. 464.

**569.** 1. Non-negotiable Instruments — Jurisdiction at Law. — *Zander v. New York Security, etc., Co.*, 178 N. Y. 208. See *Zander v. New York Security, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 98, affirmed 81 N. Y. App. Div. 635.

3. Lost Stock Certificate. — *Matter of Coats*, 75 N. Y. App. Div. 469.

5. Notice of Loss to Parties. — *Clayton v. Knox*, 80 N. Y. App. Div. 631.

Lost Stock Certificate. — *Matter of Coats*, 75 N. Y. App. Div. 469.

6. Effect of Notice as to Makers, Etc. — See *Clayton v. Knox*, 80 N. Y. App. Div. 631.

**570.** 1. Lost Stock Certificate. — *Matter of Coats*, 75 N. Y. App. Div. 469; *Matter of Speir*, 69 N. Y. App. Div. 149.

**576.** 1. Proof of Existence as Genuine Instrument and Loss — *Arkansas*. — *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47; *Arbuckle v. Matthews*, 73 Ark. 27.

*District of Columbia*. — *Guilford Granite Co. v. Harrison Granite Co.*, 23 App. Cas. (D. C.) 1. *Illinois*. — *Hawley v. Hawley*, 187 Ill. 351; *Glos v. Talcott*, 213 Ill. 81; *Meyer v. Purcell*, 214 Ill. 62.

*Indiana*. — *Pape v. Ferguson*, 28 Ind. App. 298. *Kentucky*. — *Combs v. Krish*, (Ky. 1905) 84 S. W. Rep. 562. See *Allen v. Hopson*, (Ky. 1904) 83 S. W. Rep. 575.

*Mississippi*. — *McCaughn v. Young*, 85 Miss. 277.

*Missouri*. — *Warder, etc., Co. v. Libby*, 104 Mo. App. 140.

*Montana*. — *Capell v. Fagan*, 30 Mont. 507.

*North Carolina*. — *State v. Peterson*, 129 N. Car. 556, 85 Am. St. Rep. 756.

*North Dakota*. — *Garland v. Foster County State Bank*, 11 N. Dak. 374.

*Oregon*. — *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187. See also *Manchester Assur. Co. v. Oregon R., etc., Co.*, (Oregon 1905) 79 Pac. Rep. 60.

*South Dakota*. — See *Mears v. Smith*, (S. Dak. 1905) 102 N. W. Rep. 295.

*Texas*. — *Lochridge v. Corbett*, 31 Tex. Civ. App. 676; *Williamson v. Work*, 33 Tex. Civ. App. 369; *Strohmeyer v. Wing*, (Tex. Civ. App. 1903) 77 S. W. Rep. 977; *Valentine v. Sweatt*, 34 Tex. Civ. App. 135. See also *Masterson v. Harris*, (Tex. Civ. App. 1904) 83 S. W. Rep. 428.

*Utah*. — *Scott v. Crouch*, 24 Utah 377.

*Wisconsin*. — *Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5*, 115 Wis. 622. See also *Siegel v. Liberty*, 118 Wis. 599; *State v. Rosenthal*, 123 Wis. 442.

See also the title RECORDS, 209, 8, 9.

Proof of Proper Execution of Lost Deed. — *Hawley v. Hawley*, 187 Ill. 351; *Rouleau v. Stradley*, 126 Mich. 681; *Scott v. Crouch*, 24 Utah 377.

Burden of Proof on Plaintiff. — *Lloyd v. Simons*, 90 Minn. 237; *Bond v. Hurd*, 31 Mont. 314.

Immaterial Variance. — *Alexander v. Wakefield*, (Tex. Civ. App. 1902) 69 S. W. Rep. 77.

Duplicate Contracts. — *Norris v. Billingsley*, (Fla. 1904) 37 So. Rep. 564.

2. Clear and Satisfactory Evidence Required. — *Bright v. Allan*, 203 Pa. St. 386, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576; *Garland v. Foster County State Bank*, 11 N. Dak. 374.

3. Circumstantial Evidence. — *Bright v. Allan*, 203 Pa. St. 386, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 576.

## LOST PROPERTY.

By H. O'B. COOPER.

**579. I. WHEN GOODS ARE LOST.** — See note 1.

**580. II. RIGHTS OF FINDER — 1. Title to Thing Found — a. IN GENERAL.**  
— See note 1.

**581. b. SPECIAL CIRCUMSTANCES AFFECTING TITLE OF FINDER —**  
(2) *Place of Finding.* — See notes 5, 6.

**582.** See note 1.

*Things Imbedded in Soil.* — See note 2.

(3) *Relation of Finder to Third Person.* — See note 4.

**584. III. DUTIES AND LIABILITIES OF FINDER — 1. Care of Thing Found.** —  
See note 4.

**2. Duty to Return Thing to Owner.** — See note 6.

**586. LOT.** — See note 1.

**587.** See note 1.

**579. 1. Distinction Between Things Lost and Things Misplaced.**—*Hoagland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740; *Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627; *Ferguson v. Ray*, 44 Oregon 557, 102 Am. St. Rep. 648.

**580. 1. Rights of Finder as Against Third Persons Generally.**—*Hoagland v. Forest Park Highland Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740; *Burdick v. Chesebrough*, 94 N. Y. App. Div. 532; *Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 579; *Ferguson v. Ray*, 44 Oregon 557, 102 Am. St. Rep. 648.

**581. 5. Place of Finding Generally Immaterial.**—*Hoagland v. Forest Park Highland Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740.

**6. Articles Found on Premises of Third Person.**—*Hoagland v. Forest Park Highland Amusement Co.*, 170 Mo. 335, 94 Am. St. Rep. 740; *Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627.

**582. 1. Rights of Owner of Premises to Which Public Has Not Access.**—*Ferguson v. Ray*, 44 Oregon 557, 102 Am. St. Rep. 648.

**2. Things Imbedded in Soil.**—*Burdick v. Chesebrough*, 94 N. Y. App. Div. 532.

**Gold Quartz.**—*Ferguson v. Ray*, 44 Oregon 557, 102 Am. St. Rep. 648.

**4. Master Held Not Entitled to Thing Found by Servant.**—*Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627.

**584. 4. Reasonable Care.**—*Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627.

**6. Duty to Return Thing to Owner.**—*Danielson v. Roberts*, 44 Oregon 108, 102 Am. St. Rep. 627.

**Duty of Finder to Endeavor to Ascertain Owner.**—*State v. Briscoe*, 3 Penn. (Del.) 7.

**586. 1. City Lot.**—*Long v. People*, 33 Colo. 159, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; *Greendale v. Suit*, 163 Ind. 284, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586.

**587. 1. Chance.**—*Johnson v. State*, 137 Ala. 101.

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## LOTTERIES.

By P. B. MCKENZIE.

**588. I. DEFINITION.** — See notes 1, 2.

**589.** See notes 1, 2, 3.

**588. 1. Lottery Defined.**—*Quatsoe v. Eggleston*, 42 Oregon 315.

**2. Small Sums Risked for Chance of Greater.**—*Johnson v. State*, 137 Ala. 101; *Quatsoe v. Eggleston*, 42 Oregon 315, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

**Depends Absolutely on Chance.**—*State v. Nebraska Home Co.*, 66 Neb. 349.

**Where Skill or Judgment Is Exercised.**—*U. S. v. Rosenblum*, 121 Fed. Rep. 180; *McRae v.*

*State*, 46 Tex. Crim. 489. See *contra*, *People v. Lavin*, 179 N. Y. 164.

**589. 1. Consideration Necessary to Criminal Lottery.**—*State v. Nebraska Home Co.*, 66 Neb. 349.

**2. Popular Meaning.**—*Quatsoe v. Eggleston*, 42 Oregon 315.

**3. Broad Scope of Term.**—*Quatsoe v. Eggleston*, 42 Oregon 315.

**Characteristic Features of Lottery Scheme.**—

**589. II. VARIOUS DEVICES AND GAMES HELD TO BE LOTTERIES**—Thing, Not Name, Important. — See note 4.

**590.** Policy. — See note 1.

A Raffle. — See note 2.

A Gift Enterprise. — See note 4.

**592.** Certain Miscellaneous Games. — See note 3.

**III. CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES AGAINST LOTTERIES**—1. Prohibition by Constitution, Statute, or Ordinance—*a.* IN GENERAL—Constitution or Statute. — See note 4.

**593.** See note 2.

**594.** 2. Classes of Statutes Considered—*a.* POSTAL LAWS INTENDED TO SUPPRESS LOTTERIES. — See note 5.

**595.** See note 4.

*b.* STATUTES MAKING ADVERTISEMENTS OF LOTTERIES UNLAWFUL. — See note 5.

**596.** *d.* STATUTES MAKING IT UNLAWFUL TO HAVE LOTTERY TICKETS OR SLIPS IN POSSESSION. — See note 4.

**598. IV. CIVIL STATUS OF LOTTERIES**—1. Lotteries Licensed by Legislature. — See note 1.

**599. LOW.**— See note 2.

LOWER—LOWEST. — See note 3.

**600. LOW-WATER MARK.**— See note 1.

**601. LUGGAGE.**— See note 4.

**602. LUNACY—LUNATIC.**— See note 5.

Equitable Loan, etc., *Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Siver v. Guarantee Invest. Co.*, 183 Mo. 41.

**589.** 4. Substance of Transaction to Be Considered. — *Johnson v. State*, 137 Ala. 101; *People v. Lavin*, 179 N. Y. 164.

A Home Purchasing Scheme Held a Lottery. — *State v. Nebraska Home Co.*, 66 Neb. 349. See also *Public Clearing House v. Coyne*, 194 U. S. 497.

Scheme to Increase Number of Subscribers to a Newspaper. — See *Hull v. McWilliam*, 85 L. T. N. S. 239.

**590.** 1. "Policy" Is a Lottery. — *Thomas v. State*, 118 Ga. 774; *State v. Wilkerson*, 170 Mo. 184; *Quatsoe v. Eggleston*, 42 Oregon 315, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

2. Raffle a Lottery. — *Contra, Risein v. State*, 44 Tex. Crim. 413.

4. Gift Enterprises Held Lotteries. — U. S. v. *Jefferson*, 134 Fed. Rep. 299; *Sheedy v. District of Columbia*, 19 App. Cas. (D. C.) 280. See also *De Florin v. State*, 121 Ga. 593, 104 Am. St. Rep. 177.

**592.** 3. Games and Devices Held Not to Be Lotteries — *Diamond Leases*. — Atty.-Gen. v. *Preferred Mercantile Co.*, 187 Mass. 516.

*Knife Rack*. — *McRae v. State*, 46 Tex. Crim. 489.

The "Trading Stamp" Scheme. — *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17; *People v. Dycker*, 72 N. Y. App. Div. 308; *State v. Dodge*, 76 Vt. 197; *Winston v. Beeson*, 135 N. Car. 271 (holding that the trading stamp scheme is not a "gift enterprise").

Compare *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328. See generally the title TRADING STAMPS, vol. 28, p. 442.

4. Act Authorizing Lotteries Unconstitutional in Such States. — *Johnson v. State*, 137 Ala. 101.

**593.** 2. State Statutes Prohibiting Lotteries. — *Johnson v. State*, 137 Ala. 101; *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Thomas v. State*, 118 Ga. 774; *Nichols v. State*, 28 Ind. App. 674; *State v. Arthur*, 70 N. J. L. 425; *Quatsoe v. Eggleston*, 42 Oregon 315.

**594.** 5. The Statute Is Constitutional. — *Public Clearing House v. Coyne*, 194 U. S. 497.

**595.** 4. Interstate Transportation of Lottery Tickets Prohibited. — *Lottery Case*, 188 U. S. 321; *Francis v. U. S.*, 188 U. S. 375, overruling *Reilly v. U. S.*, 106 Fed. Rep. 896, 46 C. C. A. 25; *U. S. v. Jefferson*, 134 Fed. Rep. 299.

Carrying Tickets Between State and District of Columbia Not Illegal. — *U. S. v. Whelpley*, 125 Fed. Rep. 616.

5. Statutes Making Advertising of Lottery Unlawful. — *Hall v. McWilliam*, 85 L. T. N. S. 239; *People v. Lavin*, 179 N. Y. 164.

**596.** 4. Statutes Making It Unlawful to Have Lottery Tickets or Slips in Possession. — *State v. Arthur*, 70 N. J. L. 425.

**598.** 1. Payment of Tax Imposed on Lotteries Does Not Authorize Operation. — *Johnson v. State*, 137 Ala. 101.

**599.** 2. Low and High Relative Terms. — See *Louisville, etc., R. Co. v. Tucker*, (Ky. 1901) 65 S. W. Rep. 453.

3. Lowest Bidder. — *Packard v. Hayes*, 94 Md. 233.

**600.** 1. Ordinary Low-water Mark. — *Kentucky Lumber Co. v. King*, (Ky. 1901) 65 S. W. Rep. 156.

**601.** 4. Luggage and Baggage Synonymous. — *Choctaw, etc., R. Co. v. Zwirtz*, 13 Okla. 411.

**602.** 5. Not Confined to Persons Having

**603. MACADAMIZE.** — See note 3.

**604. MACHINE—MACHINERY.** — See note 3.

**605. Patents.** — See note 1.

**608. MAILED.** — See note 4.

**610. MAINTAIN—MAINTENANCE.** — See note 3.

**612.** See note 1.

**614. MAJORITY**—Majority of Voters or Majority of Votes Actually Cast. — See note 2.

**621. MAKER.** — See note 1.

**622. MALFEASANCE.** — See note 4.

**Lucid Intervals.** — *Bicknell v. Spear*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 389.

**Other Definitions.** — *Matter of Wells*, 175 N. Y. 139; *Matter of Schrod*t, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 540; *In re Anderson*, 132 N. Car. 243.

**603. 3. Macadamize.** — *West Chester v. West Chester St. R. Co.*, 203 Pa. St. 201.

**Curbing.** — *City St. Imp. Co. v. Taylor*, 138 Cal. 364.

**604. 3. Machinery.** — *Brower v. Locke*, 31 Ind. App. 353.

**A Derrick and Appliances held machinery** within a guarantee of *machinery*. *Miller v. F. R. Patch Mfg. Co.*, 101 N. Y. App. Div. 22.

**A Trip Hammer held to be a machine** within a statute regulating the duty of an employer properly to guard such. *Green v. American Car, etc., Co.*, 163 Ind. 135.

**And an Emery Belt is a machine** within the meaning of this statute. *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922.

**605. 1. Patents.** — *Green v. American Car, etc., Co.*, 163 Ind. 135 (personal injury case).

**608. 4. Mailed.** — See *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404.

**610. 3. Hold, Preserve, Etc.** — *Lucas v. St. Louis, etc., R. Co.*, 174 Mo. 270.

**Maintenance of Public Schools.** — See *Maddox v. Adair*, (Tex. Civ. App. 1901) 66 S. W. Rep. 811.

**612. 1. Maintenance.** — *Winthrop Co. v. Clinton*, 196 Pa. St. 472.

**614. 2. Majority of Votes Actually Cast.** — *Tinkel v. Griffin*, 26 Mont. 426.

**621. 1.** The word *makers* in a statute allowing sales of native wines or of cider by the *makers* thereof, includes both farmers and manufacturers and is not limited to those who buy the apples from which they make cider or to those who buy cider manufactured in the commonwealth. *Com. v. Boyden*, 183 Mass. 1.

**622. 4. Malfeasance.** — *Dudley v. Flemingsburg*, 115 Ky. 5.

## MALICE.

BY H. N. ELDRIDGE.

**623. I. DEFINITION.** — See notes 1, 4, 5.

**623. 1. Malice as Motive**—*United States.* — *Tinker v. Colwell*, 193 U. S. 473; *U. S. v. Reed*, 86 Fed. Rep. 308.

*Indian Territory.* — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 871.

*Iowa.* — *McDonald v. Nugent*, 122 Iowa 651; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kentucky.* — *Louisville Press Co. v. Tenny*, 105 Ky. 365; *Ohio Valley Telephone Co. v. Meyer*, (Ky. 1900) 56 S. W. Rep. 673; *Ludwig v. Com.*, (Ky. 1900) 60 S. W. Rep. 8.

*Maryland.* — *Boyer v. Coxen*, 92 Md. 366.

*Michigan.* — *Zimmerman v. Whiteley*, 134 Mich. 39.

*Missouri.* — *State v. McKenzie*, 144 Mo. 40; *Minter v. Bradstreet Co.*, 174 Mo. 444.

*North Carolina.* — *State v. Spivey*, 132 N. Car. 989.

*Pennsylvania.* — *Reed v. Loosemore*, 197 Pa. St. 261.

*South Carolina.* — *Proctor v. Southern R. Co.*, 61 S. Car. 170; *Kibler v. Southern R. Co.*, 62 S. Car. 252; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

*Texas.* — *Bean v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 946; *Spangler v. State*, 42 Tex. Crim. 233.

**4. Malice in Law**—*United States.* — *Tinker v. Colwell*, 193 U. S. 473; *U. S. v. Reed*, 86 Fed. Rep. 308; *Times Pub. Co. v. Carlisle*, (C. C. A.) 94 Fed. Rep. 766; *In re Maples*, 105 Fed. Rep. 919.

*Delaware.* — *State v. Cole*, 2 Penn. (Del.) 344; *State v. Brinte*, 4 Penn. (Del.) 551.

*Georgia.* — *Carstarphen v. State*, 112 Ga. 230.

*Illinois.* — *London Guarantee, etc., Co. v. Horn*, 206 Ill. 503, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

*Indian Territory.* — *Williams v. U. S.*, (Indian Ter. 1902) 69 S. W. Rep. 871.

*Iowa.* — *McDonald v. Nugent*, 122 Iowa 651; *Morse v. Times-Republican Printing Co.*, 124 Iowa 707.

*Kansas.* — *State v. Boies*, 68 Kan. 167.

*Kentucky.* — *Louisville Press Co. v. Tenny*, 105 Ky. 365; *Jolly v. Com.*, 110 Ky. 190, 96 Am. St. Rep. 429; *Jones v. Todd*, (Ky. 1899) 51 S. W. Rep. 452; *Ohio Valley Telephone Co. v. Meyer*, (Ky. 1900) 56 S. W. Rep. 673; *Lud-*

**624.** II. EXPRESS AND IMPLIED MALICE. — See notes 1, 2, 3, 4.

**625.** IV. IN TORT. — See note 12.

**626.** See note 4.

**627.** MALICE AFORETHOUGHT. — See note 4.

MALICIOUS — MALICIOUSLY. — See note 5.

**628.** Malicious Act. — See note 1.

**629.** Maliciously. — See note 1.

wig v. Com., (Ky. 1900) 60 S. W. Rep. 8; Hathaway v. Com., (Ky. 1904) 82 S. W. Rep. 400.

Maryland. — Boyer v. Coxen, 92 Md. 366.

Massachusetts. — Berry v. Donovan, 188 Mass. 353.

Michigan. — People v. Severance, 125 Mich. 556; Zimmerman v. Whiteley, 134 Mich. 39; Austin v. Hyndman, 119 Mich. 615.

Missouri. — McNamara v. St. Louis Transit Co., 182 Mo. 676; Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597; Minter v. Bradstreet Co., 174 Mo. 444.

New York. — Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 186, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623, affirmed 177 N. Y. 544; People v. Sherlock, 166 N. Y. 180; McFadden v. Morning Journal Assoc., 28 N. Y. App. Div. 508.

North Carolina. — State v. Spivey, 132 N. Car. 989.

Ohio. — Johnson v. McDaniel, 5 Ohio Dec. 717.

Rhode Island. — State v. Gilligan, 23 R. I. 400.

South Carolina. — State v. Foster, 66 S. Car. 476, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623; Proctor v. Southern R. Co., 61 S. Car. 170; Kibler v. Southern R. Co., 62 S. Car. 252.

Texas. — Bean v. State, (Tex. Crim. 1899) 51 S. W. Rep. 946; Patterson v. State, (Tex. Crim. 1901) 60 S. W. Rep. 557; Spangler v. State, 42 Tex. Crim. 233; Honeycutt v. State, (Tex. Crim. 1901) 63 S. W. Rep. 639; Connell v. State, 46 Tex. Crim. 259; Stevens v. State, 42 Tex. Crim. 154; Cain v. State, 42 Tex. Crim. 210.

Canada. — Reg. v. Mennel, 1 N. W. Ter. 487.

Excusable Mistake Cannot Constitute Legal Malice. — T. B. Clark Co. v. Mt. Morris Bank, 85 N. Y. App. Div. 362, affirmed 181 N. Y. 533.

**623.** 5. London Guarantee, etc., Co. v. Horn, 206 Ill. 503, citing 19 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 623; McDowell v. Dublin Corp., (1903) 2 Ir. R. 541.

**624.** 1. Carstarphen v. State, 112 Ga. 230; Gambrell v. Schooley, 95 Md. 260; Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183, affirmed 177 N. Y. 544; Ginsberg v. Union Surety, etc., Co., 68 N. Y. App. Div. 141; Wrege v. Jones, 13 N. Dak. 267; State v. Lindgrind, 33 Wash. 440.

2. Express Malice. — Taylor v. Hearst, 107 Cal. 262; Hearne v. De Young, 132 Cal. 357; Henderson v. State, 120 Ga. 504; Cherry v. Des Moines Leader, 114 Iowa 298, 89 Am. St. Rep. 365; Johnson v. McDaniel, 5 Ohio Dec. 717; McDonald v. Brown, 23 R. I. 546, 91 Am. St. Rep. 659.

3. Implied Malice. — State v. Lindgrind, 33 Wash. 440.

Express and Implied Malice Differ Only in Method of Proof. — See also Patterson v. State, (Tex. Crim. 1901) 60 S. W. Rep. 557.

4. State v. McDaniel, 68 S. Car. 304, 102 Am. St. Rep. 661.

**625.** 12. Malicious Prosecution. — Griswold v. Griswold, 143 Cal. 617; Connelly v. White, 122 Iowa 391; Ahrens, etc., Mfg. Co. v. Hoehner, 106 Ky. 692; Savage v. Davis, 131 N. Car. 159.

**626.** 4. As Essential to Exemplary Damages. — Smith v. Philadelphia, etc., R. Co., 87 Md. 48.

**627.** 4. See Clark v. Com., 111 Ky. 443.

5. Malicious. — Roberson v. Rochester Folding Box Co., 171 N. Y. 538.

Wilful and Malicious. — Glover v. People, 204 Ill. 170.

Invasion of the Right of Privacy. — Roberson v. Rochester Folding Box Co., 171 N. Y. 538.

**628.** 1. Malicious Act. — Leicester v. Hoadley, 66 Kan. 172; Brandt v. Morning Journal Assoc., 81 N. Y. App. Div. 183.

**629.** 1. Maliciously. — State v. Gilligan, 23 R. I. 400; Fletcher v. Kezer, 73 Vt. 70. See State v. Buck, 74 Vt. 29.

## MALICIOUS ABUSE OF PROCESS.

**630. I. DEFINITION AND GENERAL PRINCIPLES.** — See notes 1, 2.

Liability of Plaintiff for Abuse of Process by Officer. — See note 4.

**631. Same — Collateral Purpose.** — See note 3.

Same — Misuse Necessary. — See notes 4, 5.

Same — Arrest or Seizure. — See note 6.

Examples. — See note 8.

**632. II. MALICIOUS ABUSE OF PROCESS DISTINGUISHED FROM MALICIOUS PROSECUTION.** — See note 1.

Malice. — See note 2.

Probable Cause. — See note 3.

Termination — Unlike Malicious Prosecution. — See note 6.

**630. 1. Definition.** — *Mullins v. Matthews*, 122 Ga. 286, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 630.

**2. Action.** — *Mullins v. Matthews*, 122 Ga. 286, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 630.

**4. Plaintiff Not Liable.** — *Wells-Fargo*, etc., Express v. *Waites*, (Tex. Civ. App. 1900) 60 S. W. Rep. 582.

**631. 3. Ulterior Purpose.** — *Bonnie v. King*, 201 Ill. 47. See also *Foy v. Barry*, 87 N. Y. App. Div. 291; *Petry v. Childs*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 108.

**4. Irregular Use Necessary.** — *Bonney v. King*, 103 Ill. App. 601, affirmed 201 Ill. 47; *Weeks v. Van Ness*, 104 N. Y. App. Div. 7. See also *Hendricks v. W. G. Middlebrooks Co.*, 118 Ga. 131; *Mullins v. Matthews*, 122 Ga. 286.

**5. Motive of Prosecutor Immaterial.** — *Bonney v. King*, 103 Ill. App. 601, affirmed 201 Ill. 47.

**6. Arrest or Seizure Necessary.** — *Pittsburg*, etc., R. Co. v. *Wakefield Hardware Co.*, 138 N. Car. 174.

**8. Ejecting a Sick Person from Premises**, though done under a valid writ of removal following a judgment of forcible entry and detainer, may constitute an abuse of process. *Bradshaw v. Frazier*, 113 Iowa 579, 86 Am. St. Rep. 394.

**Arrest on Criminal Charge to Compel Abandon-**

**ment of Claim of Right to Occupy House.** — *White v. Apsley Rubber Co.*, 181 Mass. 339.

**632. 1. Distinction Between Suing Out Writ and Improper Use of Writ.** — *Bonney v. King*, 201 Ill. 47, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *Pittsburg*, etc., R. Co. v. *Wakefield Hardware Co.*, 138 N. Car. 174; *Smith v. Jones*, 16 S. Dak. 337. See also *Foy v. Barry*, 87 N. Y. App. Div. 291.

**2. Malice Necessary.** — *Georgia L. & T. Co. v. Johnston*, 116 Ga. 628. See also *Hendricks v. W. G. Middlebrooks Co.*, 118 Ga. 131; *Foy v. Barry*, 87 N. Y. App. Div. 291; *Petry v. Childs*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 108; *Pittsburg*, etc., R. Co. v. *Wakefield Hardware Co.*, 138 N. Car. 174.

**3. Want of Probable Cause Necessary.** — *Georgia L. & T. Co. v. Johnston*, 116 Ga. 628; *Pittsburg*, etc., R. Co. v. *Wakefield Hardware Co.*, 138 N. Car. 174. See also *Hendricks v. W. G. Middlebrooks Co.*, 118 Ga. 131.

**6. Termination.** — *Montague v. Cummings*, 119 Ga. 139, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *Mullins v. Matthews*, 122 Ga. 286, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632; *Bonney v. King*, 201 Ill. 47; *White v. Apsley Rubber Co.*, 181 Mass. 339; *Pittsburg*, etc., R. Co. v. *Wakefield Hardware Co.*, 138 N. Car. 174.

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## MALICIOUS MISCHIEF.

BY J. H. FREESE.

**634. II. DISTINGUISHED FROM OTHER OFFENSES — 1. Larceny.** — See note 1.

**2. Trespass.** — See note 2.

**III. HISTORY AND NATURE OF THE OFFENSE.** — See note 3.

**634. 1. Breaking a Window Pane for the Purpose of Committing Larceny** is an indictable misdemeanor under the English Malicious Damage Act. *M'Dowell v. Dublin Corp.*, (1903) 2 Ir. R. 541.

**2. Distinguished from Trespass.** — See *State v.*

*Culbreath*, 71 Ark. 80, holding that the offense created by Sand. & H. Dig. Ark., § 1784, is trespass rather than malicious mischief.

**3. A Misdemeanor at Common Law.** — *State v. McLain*, 92 Mo. App. 456; *State v. Switzer*, 59 S. Car. 225.



**636.** IV. THE PROPERTY SUBJECT — 2. By Statute — Property. — See notes 1, 2, 3, 5.

Animals. — See note 7.

Cattle. — See note 18.

**637.** Buildings. — See notes 3, 4.

"Agricultural Product," "Vegetable Product," "Growing Crops," and "Grain." —

See note 10.

**638.** The Value of the Property Is Immaterial. — See note 18.

V. THE PHYSICAL ACT — 1. At Common Law. — See note 20.

**639.** 2. By Statute — a. STATUTES RELATING TO INANIMATE PROPERTY. — See notes 3, 4, 6, 7.

**640.** See note 1.

b. STATUTES RELATING TO ANIMALS. — See note 5.

**641.** VI. THE INTENT — 1. At Common Law and under Statutes in Affirmation Thereof — a. MALICE AN ESSENTIAL INGREDIENT OF THE OFFENSE. — See note 5.

b. WHAT CONSTITUTES MALICE — (1) *In General*. — See note 6.

(2) *In Killing or Injuring Domestic Animals*. — See note 12.

**642.** c. PROOF OF MALICE — PRESUMPTIONS. — See notes 4, 5, 6, 8.

**643.** 2. Under Statutes Changing the Common-law Rule. — See note 1.

**636.** 1. Property. — Pollet v. State, 115 Ga. 234.

2. Real or Personal Property. — Stanton v. State, 45 Tex. Crim. 168.

A Mere Possessory Right to real property was not intended to be protected by Pen. Code Tex. 1895, art. 791. The statute is intended as a protection to the owner. Adams v. State, (Tex. Crim. 1904) 81 S. W. Rep. 963.

3. Personal Property. — Stanton v. State, 45 Tex. Crim. 168.

A Threshing Machine was held to be within a statute prohibiting the wilful destruction of any goods, wares, merchandise, or other personal property of another. State v. McLain, 92 Mo. App. 456.

Oil in a Tank is "personal property" under Crim. Stat. S. Car., § 165. State v. Switzer, 59 S. Car. 225.

5. A Dog Is Property. — See Florida Cent., etc., R. Co. v. Davis, 45 Fla. 276; Vantrees v. McGee, 26 Ind. App. 525; Fagin v. Humane Soc., 5 Ohio Dec. 596.

7. Dog. — See Atchison v. State, 44 Tex. Crim. 551.

18. Goats. — See Garza v. State, (Tex. Crim. 1901) 62 S. W. Rep. 751.

**637.** 3. Public Building. — Mitchell v. State, (Tex. Crim. 1901) 62 S. W. Rep. 572.

Wilful Injury to Public Jail. — People v. Boren, 139 Cal. 210.

4. House. — Adkin v. Pillen, 136 Mich. 682, 11 Detroit Leg. N. 163.

10. Crops Attached to the Soil. — State v. Green, 106 La. 440.

**638.** 18. See Stanton v. State, 45 Tex. Crim. 168.

20. Extent of Injury. — Pollet v. State, 115 Ga. 234.

**639.** 3. Destroy or Injure. — Pollet v. State, 115 Ga. 234.

4. "Injuring and Defacing" Public Building. — Mitchell v. State, (Tex. Crim. 1901) 62 S. W. Rep. 572.

6. Burning. — Stanton v. State, 45 Tex. Crim. 168.

7. "Breaks Down, Pulls Down, or Otherwise Destroys or Impairs Any Public Jail." — People v. Boren, 139 Cal. 210.

**640.** 1. "Sever from the Soil." — State v. Green, 106 La. 440.

5. Kill, Maim, or Wound. — Reg. v. Mennel, 1 N. W. Ter. 487.

**641.** 5. Malice an Essential Ingredient. — State v. Boies, 68 Kan. 171.

"The act must be done with wicked or malicious intent or motive—wrongfully and intentionally done, without just cause or excuse." Carstarphen v. State, 112 Ga. 230.

6. Ill-will Towards Owner Not Essential. — State v. Boies, 68 Kan. 167; State v. Gilligan, 23 R. I. 400.

12. Killing an Animal Belonging to Another in the Honest Belief that It is an Act of Mercy to Do So, the animal being in a helpless and dying condition, is not malicious. Reg. v. Mennel, 1 N. W. Ter. 487.

**642.** 4. Proof of Ill-will to show motive. State v. Wideman, 68 S. Car. 119. See also Garza v. State, (Tex. Crim. 1901) 62 S. W. Rep. 751.

5. Malice Presumed from the Wilful Doing of an Unlawful Act. — Reg. v. Mennel, 1 N. W. Ter. 487.

6. Presumption of Malice from the Manner or Circumstances of the Act. — See State v. Gilligan, 23 R. I. 400.

8. Malice Inferred from the Wantonness, Cruelty, or Recklessness of the Act. — Porter v. State, 83 Miss. 23, wherein the court said: "The result arose out of a spirit of general abandoned deviltry, which was tantamount to wilfulness as to all men and to all animals he might confront."

**643.** 1. Under the Express Provisions of the Later English Statutes. — State v. Boies, 68 Kan. 167, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 643.

**643.** "Wilful" or "Wilfully." — See note 2.  
 "Wantonly." — See note 8.

**644.** None of These Terms "Wilfully," "Wantonly," or "Unlawfully" Imply Malice. — See note 2.

**VII. DEFENSES — 2. Bona Fide Claim of Right.** — See note 7.

**645.** See note 1.

**4. Protection of Property from Trespassing Animals.** — See note 4.

**646. VIII. PUNISHMENT.** — See note 6.

**643. 2. Brick Thrown at Owner Striking House.** — In *Niblo v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 31, it was held that a conviction for "unlawfully, wilfully, and maliciously" throwing a brickbat at the private residence of the prosecutor was not warranted by evidence showing that the defendant — a woman — threw the brick at the person of the prosecutor, and, by reason of defective marksmanship, struck the house.

**8. "Wanton" or "Wantonly."** — *State v. Gilligan*, 23 R. I. 400.

**644. 2. "Wantonly" Does not Imply Malice Toward Owner.** — *State v. Gilligan*, 23 R. I. 400.

**7. Act Done under Bona Fide Claim of Right.** — *Carstarphen v. State*, 112 Ga. 230; *Adams v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 963; *Rex v. Johnson*, 7 Ont. L. Rep. 525.

**Abatement of Nuisance.** — *People v. Severance*, 125 Mich. 556.

**House Belonging to Defendant's Wife.** — In *Adkin v. Pallen*, 136 Mich. 682, the injury to the house was done at a time when the title was still in the defendant's wife, although the prosecutor held a tax lien thereon. It was held that the defendant's act was presumably authorized by his wife, and therefore no offense was committed under Comp. Laws Mich. 1897, § 11584.

**645. 1. Claim of Right No Defense Where Unnecessary Damage Is Done.** — See *People v. Severance*, 125 Mich. 556, 7 Detroit Leg. N. 650.

**Shooting Dog — Self-defense.** — *Atchison v. State*, 44 Tex. Crim. 551.

**4. Killing of Dog by a Gamekeeper.** — *Miles v. Hutchings*, (1903) 2 K. B. 714.

**646. 6. Punishment — Construction of Peculiar Provisions of Statutes.** — *People v. Boren*, 139 Cal. 210.

# MALICIOUS PROSECUTION.

By H. F. BREITWIESER.

- 650. I. DEFINITION AND SCOPE OF ARTICLE.** — See notes 1, 2, 3.  
**II. GENERAL PRINCIPLES** — 1. **Rule of Public Policy.** — See note 4.  
**The Presumption of Law.** — See note 5.  
**Civil Actions.** — See note 6.  
**2. Nature of Wrong.** — See note 7.

- 651. 3. Assignability and Survival of Right of Action.** — See note 2.  
**III. WHAT CONSTITUTES MALICIOUS PROSECUTION** — 1. **In General.** —

See note 3.

- 2. Rule in Civil Cases** — *a.* **DOCTRINE AT COMMON LAW.** — See note 4.

- 652. b. RULE UNDER STATUTE OF MARLBIDGE.** — See notes 1, 2.

- c.* **PRESENT RULE IN UNITED STATES** — (1) *In General.* — See note 3.

- (2) *Doctrine that Special Damage Necessary.* — See notes 4, 5.

**650. 1.** *Woodley v. Coker*, 119 Ga. 226.

**That the Plaintiff Has Been Prosecuted for a Criminal Offense** is held to be an idea necessarily involved in an action for malicious prosecution. *Whaley v. Lawton*, 57 S. Car. 256.

**2.** See *Hayes v. Union Mercantile Co.*, 27 Mont. 272, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650; *Burt v. Smith*, 181 N. Y. 1.

**3. Elements Same in Criminal and Civil Suits.** — *Woodley v. Coker*, 119 Ga. 226; *Carbondale Invest. Co. v. Burdick*, 67 Kan. 329

**4. Public Policy** — *United States*. — *Ambs v. Atchison, etc.*, R. Co., 114 Fed. Rep. 317.

*Arkansas*. — *St. Louis, etc.*, R. Co. *v. Wallin*, 71 Ark. 422.

*California*. — *Griswold v. Griswold*, 143 Cal. 617.

*Connecticut*. — *Frisbie v. Morris*, 75 Conn. 637.

*Delaware*. — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Illinois*. — *Thomas v. Muehlmann*, 92 Ill. App. 571; *Chicago, etc.*, R. Co. *v. Pierce*, 98 Ill. App. 368.

*Maryland*. — *Campbell v. Baltimore, etc.*, R. Co., 97 Md. 341.

*Minnesota*. — *Shafer v. Hertzog*, 92 Minn. 175.

*Nebraska*. — *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039.

*New Jersey*. — *Magowan v. Rickey*, 64 N. J. L. 402.

*New York*. — *Burt v. Smith*, 181 N. Y. 1; *Paul v. Fargo*, 84 N. Y. App. Div. 9.

*Ohio*. — *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Rhode Island*. — *Fox v. Smith*, 25 R. I. 255, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

*South Dakota*. — *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

*Wisconsin*. — *Cullen v. Hanisch*, 114 Wis. 24; *Small v. McGovern*, 117 Wis. 608.

The principles governing the rights and lia-

bilities of the parties to an action for malicious prosecution are the result of a compromise between the right of the individual to be free from arrest or prosecution upon a charge of which he is innocent, and the right of the community to be protected from crime. *Burnham v. Collateral Loan Co.*, 179 Mass. 268.

**5.** *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Fox v. Smith*, 25 R. I. 255.

**6.** *Bonney v. King*, 201 Ill. 47; *Paul v. Fargo*, 84 N. Y. App. Div. 9.

**7. Personal Tort.** — *Porter v. Mack*, 50 W. Va. 595, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

**Loss to Business Mere Aggravation.** — *Hayes v. Union Mercantile Co.*, 27 Mont. 272, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

**651. 2. Survival.** — *Hunter v. Boyd*, 3 Ont. L. Rep. 183.

**3. Writ of Attachment.** — *Alsop v. Lidden*, 130 Ala. 548.

**4. At Common Law** — **Civil Cases.** — *Wade v. National Bank of Commerce*, 114 Fed. Rep. 377; *Hayes v. Union Mercantile Co.*, 27 Mont. 272, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651; *Powell v. Hiltgen*, 5 N. W. Ter. 16.

**652. 1. Statute of Marlbridge.** — *Wade v. National Bank of Commerce*, 114 Fed. Rep. 377, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652.

**2. McCormick Harvesting Mach. Co. v. Willan**, 63 Neb. 391, 93 Am. St. Rep. 449.

**3. McCormick Harvesting Mach. Co. v. Willan**, 63 Neb. 391, 93 Am. St. Rep. 449; *Paul v. Fargo*, 84 N. Y. App. Div. 9, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652; *Abbott v. Thorne*, 34 Wash. 692.

**4. Cases Holding Special Damage Necessary** — *United States*. — *Tamblin v. Johnston*, (C. C. A.) 126 Fed. Rep. 267.

*Georgia*. — *Woodley v. Coker*, 119 Ga. 226.

*Illinois*. — *Bonney v. King*, 201 Ill. 47.

*Iowa*. — *Dorr Cattle Co. v. Des Moines Nat.*

- 652.** (3) *Doctrine that Special Damage Unnecessary.* — See note 6.  
**653.** IV. CONSTITUENT ELEMENTS OF TORT. — See note 1.  
 V. INSTITUTION OF PROCEEDINGS — 1. In General. — See note 2.  
 2. What Constitutes Institution of Proceedings. — See note 3.  
**654.** 3. Where Proceedings Irregular. — See note 2.  
**655.** 5. Whether Court Must Have Jurisdiction. — See note 1.  
 VI. PROBABLE CAUSE — 1. In General. — See note 2.

*Bank*, 127 Iowa 153. See also *Rule v. McGregor*, 115 Iowa 323.

*Nebraska.* — See *McCormick Harvesting Mach. Co. v. Willan*, 63 Neb. 391, 93 Am. St. Rep. 449, holding that *Rice v. Day*, 34 Neb. 100, was not binding authority and adopting the contrary doctrine.

*New York.* — *Paul v. Fargo*, 84 N. Y. App. Div. 9, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652. See also *Burt v. Smith*, 181 N. Y. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652.

*Ohio.* — *Bartholomew v. Metropolitan L. Ins. Co.*, 1 Ohio Dec. 267, 7 Ohio N. P. 209.

*Washington.* — *Abbott v. Thorne*, 34 Wash. 692.

*Wisconsin.* — *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897.

**652.** 5. *Tamblyn v. Johnston*, (C. C. A.) 126 Fed. Rep. 267; *Woodley v. Coker*, 119 Ga. 226; *Cooper v. Scyoc*, 104 Mo. App. 414; *Burt v. Smith*, 181 N. Y. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652; *Paul v. Fargo*, 84 N. Y. App. Div. 9.

6. *Wade v. National Bank of Commerce*, 114 Fed. Rep. 377; *Carbondale Invest. Co. v. Burdick*, 67 Kan. 329, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652; *Metcalf v. Bockoven*, 62 Neb. 877; *McCormick Harvesting Mach. Co. v. Willan*, 63 Neb. 391, 93 Am. St. Rep. 449, holding that *Rice v. Day*, 34 Neb. 100, was not binding authority for the contrary proposition. Compare *Cooper v. Scyoc*, 104 Mo. App. 414.

**653.** 1. *Elements Necessary to Constitute Tort* — *United States.* — *Davis v. Johnson*, (C. C. A.) 101 Fed. Rep. 952.

*Arkansas.* — *St. Louis, etc., R. Co. v. Wallin*, 71 Ark. 422.

*Colorado.* — *French v. Guyot*, 30 Colo. 222.

*Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Georgia.* — *Fulton Grocery Co. v. Maddox*, 111 Ga. 260.

*Illinois.* — *Robertson v. Marion*, 97 Ill. App. 332; *Daily v. Donath*, 100 Ill. App. 52; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

*Indiana.* — *Lautman v. Pepin*, 26 Ind. App. 427.

*Kansas.* — *Carbondale Invest. Co. v. Burdick*, 67 Kan. 329, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652 [653].

*Missouri.* — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Kelley v. Osborn*, 86 Mo. App. 239.

*New Jersey.* — *Magowan v. Rickey*, 64 N. J. L. 402; *Toth v. Greisen*, (N. J. 1902) 51 Atl. Rep. 927.

*New York.* — *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *Paul v. Fargo*, 84 N. Y. App. Div. 9; *McMorris v. Howell*, 89 N. Y. App. Div. 272.

*North Dakota.* — *Merchant v. Pielke*, 10 N. Dak. 48.

*Oklahoma.* — *Schreiber v. Clapp*, 13 Okla. 215.

*Tennessee.* — *Swepson v. Davis*, 109 Tenn. 108.

*Texas.* — *Brady v. Georgia Home Ins. Co.*, 24 Tex. Civ. App. 464; *Kruegel v. Stewart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 365.

*West Virginia.* — *Porter v. Mack*, 50 W. Va. 595.

2. *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Page v. Citizens' Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144; *Roberts v. Keeler*, 111 Ga. 181; *Bryan v. Baird*, 117 Ga. 177; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Barry v. Third Ave. R. Co.*, 51 N. Y. App. Div. 385; *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Hull v. Sprague*, 23 R. I. 188.

It Should Be Shown that the Defendant Instituted, Instigated, or Continued the Proceedings. — *Sundmaker v. Gaudet*, 113 La. 887.

3. *When Proceedings Considered "Instituted."* — *Page v. Citizens' Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144.

**654.** 2. *Where Proceedings Irregular.* — *Clark v. Hill*, 96 Ill. App. 383.

**655.** 1. *Berger v. Saul*, 113 Ga. 869.

2. *Want of Probable Cause* — *United States.* — *Ambs v. Atchison, etc., R. Co.*, 114 Fed. Rep. 317; *Van v. Pacific Coast Co.*, 120 Fed. Rep. 699; *Berger v. Wild*, (C. C. A.) 130 Fed. Rep. 882.

*Alabama.* — *National Surety Co. v. Mabry*, 139 Ala. 217.

*Arkansas.* — *Kansas, etc., Coal Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. Rep. 79; *St. Louis, etc., R. Co. v. Wallin*, 71 Ark. 422; *Harr v. Ward*, 73 Ark. 437.

*California.* — *Dowdell v. Carpy*, 129 Cal. 168; *Hurgren v. Union Mut. L. Ins. Co.*, 141 Cal. 585; *Harrington v. Tibbet*, 143 Cal. 78; *Griswold v. Griswold*, 143 Cal. 617.

*Connecticut.* — *Frisbie v. Morris*, 75 Conn. 637.

*Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*District of Columbia.* — *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556.

*Georgia.* — *Hamilton v. Du Pre*, 111 Ga. 819.

*Illinois.* — *Dailey v. Donath*, 100 Ill. App. 52; *Watters v. De La Matter*, 109 Ill. App. 334.

*Indiana.* — *Lawrence v. Leathers*, 31 Ind. App. 414.

*Kentucky.* — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754.

*Louisiana.* — *Lang v. De Luca*, 108 La. 304; *Sundmaker v. Gaudet*, 113 La. 887.

*Missouri.* — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Jordan v. Chicago, etc., R. Co.*, 105

**657. Importance of This Element.** — See note 1.

Total Want of Cause. — See note 3.

**2. Definitions** — *a.* FOR CRIMINAL PROSECUTION — (1) *In General.*

— See note 4.

Mo. App. 446; *Boden v. St. Louis Transit Co.*, 108 Mo. App. 696.*Nebraska*. — *Lansing v. Oliver*, (Neb. 1901) 95 N. W. Rep. 782.*New Hampshire*. — *Cohn v. Saidel*, 71 N. H. 558.*New York*. — *Leake v. Carlisle*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382; *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *Loftus v. Meyer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 861; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Burt v. Smith*, 181 N. Y. 1.*Ohio*. — *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Bartholomew v. Metropolitan L. Ins. Co.*, 1 Ohio Dec. 267, 7 Ohio N. P. 209.*Oklahoma*. — *Ten Cate v. Fansler*, 10 Okla. 7.*Pennsylvania*. — *Campbell v. Sidwell*, 20 Pa. Super. Ct. 183; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Glace v. Hummel*, 24 Pa. Co. Ct. 550, 10 Pa. Dist. 110; *Lipowicz v. Jervis*, 209 Pa. St. 315.*Rhode Island*. — *Fox v. Smith*, 25 R. I. 255; *Fox v. Smith*, 26 R. I. 1.*South Dakota*. — *Richardson v. Dybedahl*, 14 S. Dak. 126.*Tennessee*. — *Swepson v. Davis*, 109 Tenn. 108.*Texas*. — *Kruegel v. Stewart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 365.*Washington*. — *Smits v. Hogan*, 35 Wash. 290.*West Virginia*. — *Porter v. Mack*, 50 W. Va. 595.*Wisconsin*. — *Small v. McGovern*, 117 Wis. 608.*Canada*. — *Pring v. Wyatt*, 5 Ont. L. Rep. 505; *Leonard v. Delorme*, 6 Quebec Pr. 349; *Baker v. Kilpatrick*, 7 British Columbia 150; *Lalonde v. Campeau*, 16 Quebec Super. Ct. 204; *Martin v. Montreal Gas Co.*, 23 Quebec Super. Ct. 222; *Dennison v. Canadian Pac. R. Co.*, 36 N. Bruns. 250; *Roach v. Shediach*, 38 Can. L. J. 767.**Need Not Charge Malice in Ancillary Proceedings.** — *Metcalf v. Bockoven*, 62 Neb. 877.**657. 1.** *Porter v. Mack*, 50 W. Va. 595, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 656.**3. Total Want of Cause.** — *Burt v. Smith*, 181 N. Y. 1.**4. Probable Cause for Criminal Prosecution Defined** — *United States*. — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *L. Bucki*, etc., *Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469.*Alabama*. — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147.*Arkansas*. — *Hitson v. Sims*, 69 Ark. 439; *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79.*California*. — *Griswold v. Griswold*, 143 Cal. 617.*Delaware*. — *Herbener v. Crossan*, 4 Penn. (Del.) 38.*District of Columbia*. — *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556.*Illinois*. — *Tumalty v. Parker*, 100 Ill. App. 382.*Indiana*. — *Lawrence v. Leathers*, 31 Ind. App. 414.*Iowa*. — *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242.*Kansas*. — *Atchison*, etc., R. Co. v. *Allen*, 70 Kan. 743, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 657.*Kentucky*. — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754; *Burks v. Ferriell*, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.*Louisiana*. — *Sandoz v. Veazie*, 106 La. 202.*Minnesota*. — *Shafer v. Hertzog*, 92 Minn. 175.*Missouri*. — *Stubbs v. Mulholland*, 168 Mo. 47; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Butcher v. Hoffman*, 99 Mo. App. 239; *Jordan v. Chicago*, etc., R. Co., 105 Mo. App. 446; *Kelley v. Osborn*, 86 Mo. App. 239.*Nebraska*. — *Miller Bank v. Richmond*, 64 Neb. 111; *Perrenoud v. Helm*, 65 Neb. 77; *Miles v. Walker*, 66 Neb. 728; *Sudborough v. Pacific Express Co.*, (Neb. 1903) 95 N. W. Rep. 3; *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494; *Gillispe v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039; *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.*New Hampshire*. — *Cohn v. Saidel*, 71 N. H. 558.*New York*. — *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Schwartz v. Van Wie New York Grocery Co.*, 60 N. Y. App. Div. 475; *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Parr v. Loder*, 97 N. Y. App. Div. 218, appeal dismissed 182 N. Y. 509; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Burt v. Smith*, 181 N. Y. 1.*Ohio*. — *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Miles v. Salisbury*, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333.*Oregon*. — *Stamper v. Raymond*, 38 Oregon 16.*Pennsylvania*. — *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Scott v. Dewey*, 23 Pa. Super. Ct. 396; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Glace v. Hummel*, 24 Pa. Co. Ct. 550, 10 Pa. Dist. 110; *Lear v. Watson*, 16 Montg. Co. Rep. (Pa.) 150; *Markley v. Snow*, 207 Pa. St. 447.*Rhode Island*. — *Fox v. Smith*, 25 R. I. 255.*South Dakota*. — *Richardson v. Dybedahl*, 14 S. Dak. 126.*West Virginia*. — *Porter v. Mack*, 50 W. Va. 595.*Wisconsin*. — *Cullen v. Hanisch*, 114 Wis. 24; *Small v. McGovern*, 117 Wis. 608; *Eggett v. Allen*, 119 Wis. 625.

It has been held to be error to instruct the jury that the information which will justify the making of a criminal complaint against another for the purpose of having him arrested must be of such character and obtained from

**658.** See note 1.

**Question Independent of Party's Innocence.** — See notes 2, 3.

**659.** Where No Offense Has Been Committed. — See note 1.

(2) *Mere Suspicion or Conjecture.* — See note 2.

(3) *Suspicion Based on Reasonable Grounds.* — See notes 4, 5.

(4) *Illustrative Cases* — *Some Illustrative Cases.* — See note 7.

**660.** Where Known Facts Constitute Only Civil Wrong. — See note 2.

such sources that business men generally, of ordinary care, prudence, and discretion, would feel authorized to act upon it under similar circumstances. *Jensen v. Halstead*, 61 Neb. 249.

**Belief of Prudent and Reasonable Man.** — *Alsop v. Lidden*, 130 Ala. 548; *Clark v. Hill*, 96 Ill. App. 383.

But the fact that a reasonable and prudent man would have declined to cause the prosecution does not constitute a want of probable cause. *Hitson v. Sims*, 69 Ark. 439.

**Impartiality and Freedom from Prejudice.** — *Alsop v. Lidden*, 130 Ala. 548.

**"Reasonable" Cause.** — It is hard to distinguish between "reasonable cause" and "probable cause." *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998.

**"Just" and "Proper" Cause.** — In *Bregman v. Kress*, 83 N. Y. App. Div. 1, it is held that "just" cause is equivalent to "probable" cause, and that the rule expounded in *Van De Wiele v. Callanan*, 7 Daly (N. Y.) 386, is too stringent in the light of the more recent decisions on the construction of pleadings upon demurrer.

**658. 1. Prima Facie Guilt — Exclusion of Exculpatory Circumstances.** — *Daily v. Donath*, 100 Ill. App. 52; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Flikkie v. Oberson*, 82 Minn. 82; *Maynard v. Sigman*, 65 Neb. 590; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Markley v. Snow*, 207 Pa. St. 447.

**2. United States.** — *Ambis v. Atchison*, etc., R. Co., 114 Fed. Rep. 317.

*Arkansas.* — *Kansas*, etc., *Coal Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. Rep. 79; *St. Louis*, etc., R. Co. v. Wallin, 71 Ark. 422.

*Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Illinois.* — *Tumalty v. Parker*, 100 Ill. App. 382.

*Indiana.* — *Hutchinson v. Wenzel*, 155 Ind. 49.

*Kentucky.* — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754; *Burks v. Ferriell*, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.

*Louisiana.* — *Lang v. De Luca*, 108 La. 304; *Sundmaker v. Caudet*, 113 La. 887.

*Maryland.* — *Campbell v. Baltimore*, etc., R. Co., 97 Md. 341.

*Minnesota.* — *Shafer v. Hertzog*, 92 Minn. 175; *Mundal v. Minneapolis*, etc., R. Co., 92 Minn. 33.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47.

*Nebraska.* — *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998.

*New York.* — *Schwartz v. Van Wie New York Grocery Co.*, 60 N. Y. App. Div. 475; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Rawson v. Leggett*, 97 N. Y. App. Div. 416;

*Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Burt v. Smith*, 181 N. Y. 1.

*Rhode Island.* — *Fox v. Smith*, 25 R. I. 255, 26 R. I. 1.

*Ohio.* — *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Pennsylvania.* — *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415.

*South Carolina.* — *Baker v. Hornick*, 57 S. Car. 213.

*Wisconsin.* — *Small v. McGovern*, 117 Wis. 608.

**3. Facts Insufficient for Conviction.** — *Southern Car. etc., Co. v. Adams*, 131 Ala. 147; *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Tumalty v. Parker*, 100 Ill. App. 382; *Campbell v. Baltimore*, etc., R. Co., 97 Md. 341; *Shafer v. Hertzog*, 92 Minn. 175, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658.

**659. 1. Where No Offense Committed.** — *Herbener v. Crossan*, 4 Penn. (Del.) 38; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**2. Mere Suspicion.** — *Stubbs v. Mulholland*, 168 Mo. 47; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**4. Well-grounded Suspicion.** — *Atchison*, etc., R. Co. v. Allen, 70 Kan. 743, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 659; *Sandoz v. Veazie*, 106 La. 202; *Stubbs v. Mulholland*, 168 Mo. 47; *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494; *Miles v. Salisbury*, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Baker v. Hornick*, 57 S. Car. 213; *Richardson v. Dybedahl*, 14 S. Dak. 126; *Eggett v. Allen*, 106 Wis. 633.

**5. Suspicion Induced by Folly or Fraud.** — *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494.

**7. Possession of Stolen Goods.** — *Knapp v. Chicago*, etc., R. Co., 113 Iowa 532; *Chicago*, etc., R. Co. v. Pierce, 98 Ill. App. 368.

**Failure to Account for Money Collected.** — Where the plaintiff had collected the money of the defendant insurance company, and had not charged himself with it or accounted for it, and had failed to make good the amount after default was discovered, there was probable cause for the arrest. *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754.

**Embezzlement.** — *Albin Co. v. Mumford*, (Ky. 1900) 55 S. W. Rep. 913.

**660. 2. Conversion — Larceny.** — *Necker v. Bates*, 118 Iowa 545.

**Taking Property under Claim of Right.** — *Long Island Bottler's Union v. Seitz*, 180 N. Y. 243.

**Debt.** — *Clark v. Folkers*, (Neb. 1901) 95 N. W. Rep. 328.

- 660.** *b.* FOR CIVIL SUIT. — See note 3.  
**3. Facts Within Prosecutor's Knowledge** — *a.* IN GENERAL. — See note 4.  
**661.** Subsequent Knowledge of Plaintiff's Innocence. — See note 1.  
 Actual Guilt of Plaintiff. — See note 2.  
*b.* PARTY'S DUTY TO MAKE INQUIRIES. — See note 3.  
 But Only Such Inquiries Are Required. — See note 4.  
*c.* INFORMATION RECEIVED FROM OTHERS. — See note 5.  
**662.** See note 1.  
 But Mere Rumor. — See notes 3, 4.  
**4. Belief of Prosecutor** — *a.* IN GENERAL. — See notes 5, 6.  
**663.** *b.* NECESSITY FOR BELIEF. — See note 1.

**660.** **3. Probable Cause in Civil Suits.** — *Kelley v. Osborn*, 86 Mo. App. 239; *Burt v. Smith*, 181 N. Y. 1.

**4. Rule as to Time of Knowledge of Prosecutor.** — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *L. Bucki*, etc., *Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469; *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265; *Lawrence v. Leathers*, 31 Ind. App. 414; *Stubbs v. Mulholland*, 168 Mo. 47; *Maynard v. Sigman*, 65 Neb. 590; *Miller Bank v. Richmond*, (Neb. 1903) 94 N. W. Rep. 998; *Cohn v. Saidel*, 71 N. H. 558; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Fox v. Smith*, 25 R. I. 255; *Cullen v. Hanisch*, 114 Wis. 24.

**661.** **1. Subsequent Knowledge of Innocence.** — *Maynard v. Sigman*, 65 Neb. 590; *Fox v. Smith*, 25 R. I. 255.

**2. Actual Guilt of Plaintiff.** — *Mack v. Sharp*, (Mich. 1904) 101 N. W. Rep. 631; *Paul v. Fargo*, 84 N. Y. App. Div. 9; *Jones v. Wilmington*, etc., R. Co., 131 N. Car. 133.

**3. Duty to Make Inquiries.** — *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; *Hutchinson v. Wenzel*, 155 Ind. 49; *Lawrence v. Leathers*, 31 Ind. App. 414; *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242; *Jeremy v. St. Paul Boom Co.*, 84 Minn. 516; *Stubbs v. Mulholland*, 168 Mo. 47; *Bechel v. Pacific Express Co.*, 65 Neb. 826, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Fox v. Smith*, 25 R. I. 255; *Cullen v. Hanisch*, 114 Wis. 24.

**4. What Inquiries Required.** — *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556; *Hutchinson v. Wenzel*, 155 Ind. 49; *Bechel v. Pacific Express Co.*, 65 Neb. 826.

**5. Personal Knowledge Unnecessary.** — *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Fox v. Smith*, 25 R. I. 255.

**662.** **1. L. Bucki, etc., *Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469; *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79; *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Clark v. Hill*, 96 Ill. App. 383; *Hutchinson v. Wenzel*, 155 Ind. 49; *Lang v. De Luca*, 108 La. 304; *Campbell v. Baltimore*, etc., R. Co., 97 Md. 341; *Cohn v. Saidel*, 71 N. H. 558; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Fox v. Smith*, 25 R. I. 255.**

**3. Rumor.** — *Sandoz v. Veazie*, 106 La. 202; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Cullen v. Hanisch*, 114 Wis. 24.

**4. Reports in Circulation.** — *Cullen v. Hanisch*, 114 Wis. 24.

**5. Prosecutor's Belief in Plaintiff's Guilt.** — *Hutchinson v. Wenzel*, 155 Ind. 49; *Perrenoud v. Helm*, 65 Neb. 77; *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Burt v. Smith*, 181 N. Y. 1; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Baker v. Hornick*, 57 S. Car. 213; *Powell v. Hiltgen*, 5 N. W. Ter. 16.

**6. United States.** — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317.

*Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Indiana.* — *Hutchinson v. Wenzel*, 155 Ind. 49.

*Iowa.* — *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242; *Kletzing v. Armstrong*, 119 Iowa 505.

*Louisiana.* — *Sandoz v. Veazie*, 106 La. 202.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47.

*Nebraska.* — *Perrenoud v. Helm*, 65 Neb. 77.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New York.* — *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Burt v. Smith*, 181 N. Y. 1.

*Ohio.* — *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Pennsylvania.* — *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Lear v. Watson*, 16 Montg. Rep. (Pa.) 150; *Markley v. Snow*, 207 Pa. St. 447.

*Rhode Island.* — *Fox v. Smith*, 25 R. I. 255.

*South Carolina.* — *Baker v. Hornick*, 57 S. Car. 213.

*West Virginia.* — *Harper v. Harper*, 49 W. Va. 661; *Porter v. Mack*, 50 W. Va. 595.

*Wisconsin.* — *Cullen v. Hanisch*, 114 Wis. 24; *Eggett v. Allen*, 119 Wis. 625.

*Canada.* — See *Laliberté v. Gingras*, 21 Quebec Super. Ct. 466.

**Exasperation Caused by the Loss of Money** is a circumstance which may be considered by the jury in deciding the question as to the effect of the facts upon the mind of an ordinarily prudent man. *Small v. McGovern*, 117 Wis. 608.

**663.** **1. Necessity for Actual Belief.** — *Hitson v. Sims*, 69 Ark. 439; *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79; *Kletzing v. Armstrong*, 119 Iowa 505; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Miles v.*

**663.** 5. Indictment by Grand Jury. — See note 4.

6. Refusal to Indict. — See note 7.

**664.** 7. Commitment by Examining Magistrate — *a.* IN GENERAL. — See notes 1, 3.

*b.* WHERE MAGISTRATE HAS JURISDICTION TO TRY AND DETERMINE. — See note 4.

8. Waiver of Preliminary Examination. — See note 5.

**665.** 9. Discharge by Examining Magistrate — *a.* IN GENERAL. — See notes 1, 3.

*b.* WHERE MAGISTRATE HAS JURISDICTION TO TRY AND DETERMINE. — See note 4.

10. Abandonment of Prosecution — Discontinuance — Dismissal. — See notes 5, 7.

**666.** 11. Acquittal on Criminal Charge. — See notes 1, 2, 3, 4, 5.

Salisbury, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333; Porter v. Mack, 50 W. Va. 595; Small v. McGovern, 117 Wis. 608.

**663.** 4. Indictment by Grand Jury. — Dean v. Noel, 70 S. W. Rep. 406, 24 Ky. L. Rep. 969; Jones v. Wilmington, etc., R. Co., 131 N. Car. 133.

"Some" Evidence, but Not Prima Facie Evidence. — Perkins v. Spaulding, 182 Mass. 218.

7. Refusal to Indict. — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317; Magowan v. Rickey, 64 N. J. L. 402.

"Some" Evidence. — Fox v. Smith, 26 R. I. 1.

**664.** 1. Commitment by Magistrate. — Thomas v. Muehlmann, 92 Ill. App. 571; Dean v. Noel, 70 S. W. Rep. 406, 24 Ky. L. Rep. 969; Bechel v. Pacific Express Co., 65 Neb. 826, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664; Nicholson v. Sternberg, 61 N. Y. App. Div. 51, appeal dismissed 170 N. Y. 589; Jones v. Wilmington, etc., R. Co., 131 N. Car. 133; Harper v. Harper, 49 W. Va. 661.

A Finding by Commissioners of Insanity that the defendant when brought before them was insane, is *prima facie* but not conclusive evidence of probable cause for the proceeding. Figg v. Hanger, (Neb. 1903) 96 N. W. Rep. 658.

3. Bechel v. Pacific Express Co., 65 Neb. 826.

4. Price v. Stanley, 128 N. Car. 38.

5. Waiver of Preliminary Examination. — Jones v. Wilmington, etc., R. Co., 131 N. Car. 133, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664.

**665.** 1. Discharge by Examining Magistrate. — Fiola v. McDonald, 85 Minn. 147; Stubbs v. Mulholland, 168 Mo. 47; Miles v. Walker, 66 Neb. 728; Miller Bank v. Richmon, (Neb. 1903) 94 N. W. Rep. 998; Jones v. Wilmington, etc., R. Co., 131 N. Car. 133; Scott v. Dewey, 23 Pa. Super. Ct. 396; Fox v. Smith, 26 R. I. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 665; Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886; Charlton v. Markland, 36 Wash. 40; Waldron v. Sperry, 53 W. Va. 116; Cullen v. Hanisch, 114 Wis. 24; Eggett v. Allen, 119 Wis. 625.

3. Not Prima Facie Evidence. — Thomas v. Muehlmann, 92 Ill. App. 571; Harper v. Harper, 49 W. Va. 661; Cullen v. Hanisch, 114 Wis. 24. See also Fox v. Smith, 26 R. I. 1.

4. Jurisdiction to Try. — Fox v. Smith, 26 R. I.

1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 665.

5. Abandonment — General Rule. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Harper v. Harper, 49 W. Va. 661.

Contrary Doctrine. — Campbell v. Sidwell, 20 Pa. Super. Ct. 183.

7. Discontinuance as Defense. — Southern Car, etc., Co. v. Adams, 131 Ala. 147.

**666.** 1. Acquittal on Criminal Charge. — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317.

Verdict of Acquittal Puts Burden on Defendant to Show Probable Cause. — Scott v. Dewey, 23 Pa. Super. Ct. 396.

2. Connelly v. White, 122 Iowa 391.

3. United States. — Carroll v. Central R. Co., 134 Fed. Rep. 684.

Arkansas. — Kansas, etc., Coal Co. v. Gallo-way, 71 Ark. 351, 100 Am. St. Rep. 79.

Delaware. — Herbener v. Crossan, 4 Penn. (Del.) 38.

District of Columbia. — Spitzer v. Friedlander, 14 App. Cas. (D. C.) 556.

Kentucky. — Tandy v. Riley, (Ky. 1904) 80 S. W. Rep. 776; Burks v. Ferriell, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.

Louisiana. — Sundmaker v. Gaudet, 113 La. 887.

Massachusetts. — Laing v. Mitten, 185 Mass. 233.

Michigan. — Mack v. Sharp, (Mich. 1904) 101 N. W. Rep. 631.

Missouri. — Ruth v. St. Louis Transit Co., 98 Mo. App. 1.

Nebraska. — Hiersche v. Scott, (Neb. 1901) 95 N. W. Rep. 494.

New Hampshire. — Cohn v. Saidel, 71 N. H. 558.

New York. — O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13.

Rhode Island. — Fox v. Smith, 26 R. I. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666.

Texas. — Bekkeland v. Lyons, 96 Tex. 255.

Wisconsin. — Cullen v. Hanisch, 114 Wis. 24.

4. Acquittal for Technical Error, Etc. — Fox v. Smith, 26 R. I. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666.

5. Enders v. Boisseau, 52 La. Ann. 1020; Stubbs v. Mulholland, 168 Mo. 47; Bekkeland v. Lyons, 96 Tex. 255; Cullen v. Hanisch, 114 Wis. 24.



**666.** 12. Conviction in Criminal Proceedings — *a.* IN GENERAL. — See note 6.

**667.** See note 1.

*b.* SUBSEQUENT REVERSAL OF JUDGMENT. — See note 2.

**668.** 13. Judgment Against Plaintiff in Civil Suit. — See note 1.

14. Discontinuance or Dismissal of Civil Suit. — See notes 3, 4.

15. Finding Adverse to Defendant in Civil Suit. — See note 5.

**669.** Reversal of Judgment in Appellate Court. — See note 1.

Fraud or Undue Means. — See note 2.

16. Mixed Question of Law and Fact — *a.* RESPECTIVE FUNCTIONS OF COURT AND JURY. — See notes 3, 4.

**670.** See note 1.

**666.** 6. Effect of Conviction — *United States.* — *Blackman v. West Jersey, etc., R. Co.,* 126 Fed. Rep. 252; *Carroll v. Central R. Co.,* 134 Fed. Rep. 684.

*Arkansas.* — *Kansas, etc., Coal Co. v. Galloway,* 71 Ark. 351, 100 Am. St. Rep. 79.

*Connecticut.* — *Frisbie v. Morris,* 75 Conn. 640, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667.

*Illinois.* — *Thomas v. Muehlmann,* 92 Ill. App. 571.

*Michigan.* — *Thick v. Washer,* (Mich. 1904) 100 N. W. Rep. 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666.

*Nebraska.* — *Maynard v. Sigman,* 65 Neb. 590.

*New York.* — *Mesnier v. Denike,* 82 N. Y. App. Div. 404.

*North Carolina.* — *Jones v. Wilmington, etc., R. Co.,* 131 N. Car. 133.

*Pennsylvania.* — *Lipowicz v. Jervis,* 209 Pa. St. 315.

*Tennessee.* — *Cooper v. Flemming,* 114 Tenn. 40.

*Texas.* — *Kruegel v. Stewart,* (Tex. Civ. App. 1904) 81 S. W. Rep. 365.

*Vermont.* — *King v. Estabrooks,* 77 Vt. 371.

*Washington.* — *McKenzie v. Royal Dairy,* 35 Wash. 390.

**667.** 1. Conviction Improperly Obtained. — *Blackman v. West Jersey, etc., R. Co.,* 126 Fed. Rep. 252; *Carroll v. Central R. Co.,* 134 Fed. Rep. 684; *Thick v. Washer,* (Mich. 1904) 100 N. W. Rep. 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667; *Maynard v. Sigman,* 65 Neb. 590; *Bechel v. Pacific Express Co.,* 65 Neb. 826; *Mesnier v. Denike,* 82 N. Y. App. Div. 404; *Hull v. Sprague,* 23 R. I. 188.

2. Reversal of Finding. — *Kansas, etc., Coal Co. v. Galloway,* 71 Ark. 351, 100 Am. St. Rep. 79; *Thomas v. Muehlmann,* 92 Ill. App. 571; *Thick v. Washer,* (Mich. 1904) 100 N. W. Rep. 394, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 667.

**668.** 1. Failure of Proceedings. — *McKenna v. Heinlen,* 128 Cal. 97; *Hiersche v. Scott,* (Neb. 1901) 95 N. W. Rep. 494; *Cohn v. Saidel,* 71 N. H. 558. But see *Hurgren v. Mutual L. Ins. Co.,* (Cal. 1902) 69 Pac. Rep. 615.

An Order for a Temporary Injunction is *prima facie* evidence of probable cause. *Burt v. Smith,* 181 N. Y. 1.

3. Not Prima Facie Evidence. — *Hurgren v. Union Mut. L. Ins. Co.,* 141 Cal. 585.

4. Default Not Sufficient Evidence. — *Hurgren v. Union Mut. L. Ins. Co.,* 141 Cal. 585; *Harper v. Harper,* 49 W. Va. 661.

5. Judgment Against Defendant in Civil Suit. — *Frisbie v. Morris,* 75 Conn. 640, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 668; *Roberts v. Keeler,* 111 Ga. 181 (distinguishing *Short v. Spragins,* 104 Ga. 628); *Mesnier v. Denike,* 82 N. Y. App. Div. 404; *Swepson v. Davis,* 109 Tenn. 108.

**669.** 1. The Reversal of a Judgment does not raise a presumption of want of probable cause. *Dowdell v. Carpy,* 129 Cal. 168.

2. Fraud or Undue Means. — *Thomas v. Muehlmann,* 92 Ill. App. 571; *Mesnier v. Denike,* 82 N. Y. App. Div. 404; *Hull v. Sprague,* 23 R. I. 188; *Swepson v. Davis,* 109 Tenn. 108.

3. To What Extent Probable Cause Question of Law. — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.,* 121 Fed. Rep. 233, 57 C. C. A. 469; *Scrivani v. Dondero,* 128 Cal. 31; *Atkinson v. Van Cleave,* 25 Ind. App. 508; *Atchison, etc., R. Co. v. Allen,* 70 Kan. 743; *Metropolitan L. Ins. Co. v. Miller,* 114 Ky. 754; *Campbell v. Baltimore, etc., R. Co.,* 97 Md. 341; *Clark v. Folkers,* (Neb. 1901) 95 N. W. Rep. 328; *Stoecker v. Nathanson,* (Neb. 1904) 98 N. W. Rep. 1061; *Bankell v. Weinacht,* 99 N. Y. App. Div. 316; *Burt v. Smith,* 181 N. Y. 1; *Bryant v. Kuntz,* 25 Pa. Super. Ct. 102; *Huckestein v. New York L. Ins. Co.,* 205 Pa. St. 27; *King v. Estabrooks,* 77 Vt. 371.

4. When Probable Cause Mixed Question of Law and Fact. — *Carroll v. Central R. Co.,* 134 Fed. Rep. 684; *Erb v. German American Ins. Co.,* 112 Iowa 357; *Atchison, etc., R. Co. v. Allen,* 70 Kan. 743, citing 1 [19] AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; *Sandoz v. Veazie,* 106 La. 202; *Stubbs v. Mulholland,* 168 Mo. 47; *Butcher v. Hoffman,* 99 Mo. App. 239; *Scott v. Dennett Surpassing Coffee Co.,* 51 N. Y. App. Div. 321; *Bankell v. Weinacht,* 99 N. Y. App. Div. 316; *Long Island Bottlers' Union v. Seitz,* 180 N. Y. 243; *Cooper v. Flemming,* 114 Tenn. 40; *Boush v. Fidelity, etc., Co.,* 100 Va. 735. See also the title QUESTIONS OF LAW AND FACT, 551. 5.

**670.** 1. *United States.* — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.,* 121 Fed. Rep. 233, 57 C. C. A. 469.

*California.* — *Scrivani v. Dondero,* 128 Cal. 31.

*Illinois.* — *Davis v. Baker,* 88 Ill. App. 251.

*Iowa.* — *Erb v. German American Ins. Co.,* 112 Iowa 357; *Flam v. Lee,* 116 Iowa 289, 93 Am. St. Rep. 242.

*Kansas.* — *Atchison, etc., R. Co. v. Allen,* 70 Kan. 743.

*Kentucky.* — *Davis v. Cassidy,* 64 S. W. Rep. 633, 23 Ky. L. Rep. 955; *Metropolitan L. Ins.*

**671.** See note 1.

**672.** Functions to Be Kept Separate. — See notes 2, 3.

**b. CONFLICT OF EVIDENCE — INFERENCES OF FACT — CREDIBILITY OF WITNESSES.** — See note 4.

**Question for Jury.** — See notes 5, 6.

*Co. v. Miller*, 114 Ky. 754; *Provident Sav. L. Assur. Soc. v. Johnson*, 115 Ky. 84.

*Maryland.* — *Campbell v. Baltimore, etc., R. Co.*, 97 Md. 341.

*Minnesota.* — *Jeremy v. St. Paul Boom Co.*, 84 Minn. 516; *Fiola v. McDonald*, 85 Minn. 147; *Shafer v. Hertzog*, 92 Minn. 175.

*Missouri.* — *Clark v. Thompson*, 160 Mo. 461; *Stubbs v. Mulholland*, 168 Mo. 47.

*Nebraska.* — *Miller Bank v. Richmon*, 64 Neb. 111; *Miles v. Walker*, 66 Neb. 728; *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New Jersey.* — *Toth v. Greisen*, (N. J. 1902) 51 Atl. Rep. 927.

*New York.* — *Ericson v. Edison Electric Illuminating Co.*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 379, affirmed 59 N. Y. App. Div. 612; *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586.

*Pennsylvania.* — *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Lear v. Watson*, 16 Montg. Co. Rep. (Pa.) 150.

*South Dakota.* — *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

*Tennessee.* — *Cooper v. Flemming*, 114 Tenn. 40.

*Virginia.* — *Boush v. Fidelity, etc., Co.*, 100 Va. 735.

**671. 1. United States.** — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469; *Carroll v. Central R. Co.*, 134 Fed. Rep. 684.

*California.* — *McKenna v. Heinlen*, 128 Cal. 97. *District of Columbia.* — *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556.

*Indiana.* — *Lawrence v. Leathers*, 31 Ind. App. 414.

*Iowa.* — *Erb v. German American Ins. Co.*, 112 Iowa 357; *Knapp v. Chicago, etc., R. Co.*, 113 Iowa 532.

*Kansas.* — *Atchison, etc., R. Co. v. Allen*, 70 Kan. 743.

*Kentucky.* — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754; *Provident Sav. L. Assur. Soc. v. Johnson*, 115 Ky. 84.

*Maryland.* — *Campbell v. Baltimore, etc., R. Co.*, 97 Md. 341.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47.

*Nebraska.* — *Miller Bank v. Richmon*, 64 Neb. 111; *Maynard v. Sigman*, 65 Neb. 590; *Bechel v. Pacific Express Co.*, 65 Neb. 826; *Miles v. Walker*, 66 Neb. 728; *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998; *Clark v. Folkers*, (Neb. 1901) 95 N. W. Rep. 328; *Figg v. Hanger*, (Neb. 1903) 96 N. W. Rep. 658; *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.

*New Jersey.* — *Magowan v. Rickey*, 64 N. J.

L. 402; *Toth v. Greisen*, (N. J. 1902) 51 Atl. Rep. 927.

*New York.* — *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *Coleman v. Botsford*, 89 N. Y. App. Div. 104.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586.

*Pennsylvania.* — *Lear v. Watson*, 16 Montg. Co. Rep. (Pa.) 150; *Huckstein v. New York L. Ins. Co.*, 205 Pa. St. 27; *Markley v. Snow*, 207 Pa. St. 447; *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Scott v. Dewey*, 23 Pa. Super. Ct. 396; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102.

*South Dakota.* — *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

*Tennessee.* — *Cooper v. Flemming*, 114 Tenn. 40.

*Virginia.* — *Boush v. Fidelity, etc., Co.*, 100 Va. 735.

*West Virginia.* — *Waldron v. Sperry*, 53 W. Va. 116.

*Wisconsin.* — *Lauterbach v. Netzo*, 111 Wis. 322.

*Canada.* — *Peck v. Peck*, 35 N. Bruns. 484.

**672. 2. Scrivani v. Dondero**, 128 Cal. 31.

**3. Miles v. Walker**, 66 Neb. 728; *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998.

**4. Functions of Jury — United States.** — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469.

*Indiana.* — *Hutchinson v. Wenzel*, 155 Ind. 49; *Lawrence v. Leathers*, 31 Ind. App. 414.

*Iowa.* — *Connelly v. White*, 122 Iowa 391.

*Kansas.* — *Atchison, etc., R. Co. v. Allen*, 70 Kan. 743.

*Kentucky.* — *Davis v. Cassidy*, 64 S. W. Rep. 633, 23 Ky. L. Rep. 955; *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754.

*Maryland.* — *Campbell v. Baltimore, etc., R. Co.*, 97 Md. 341.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New York.* — *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Ericson v. Edison Electric Illuminating Co.*, 59 N. Y. App. Div. 612; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Bankell v. Weinacht*, 99 N. Y. App. Div. 316; *Burt v. Smith*, 181 N. Y. 1.

*Pennsylvania.* — *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102.

*South Dakota.* — *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

*Tennessee.* — *Cooper v. Flemming*, 114 Tenn. 40.

*Virginia.* — *Boush v. Fidelity, etc., Co.*, 100 Va. 735.

*West Virginia.* — *Waldron v. Sperry*, 53 W. Va. 116.

**5. Stubbs v. Mulholland**, 168 Mo. 47; *Cohn v. Saidel*, 71 N. H. 558.

**6. L. Bucki, etc., Lumber Co. v. Atlantic Lum-**

**673. c. WHERE FACTS ADMITTED, UNDISPUTED, OR CLEARLY PROVEN.**

— See notes 1, 2.

**VII. MALICE — 1. In General. — See note 3.****674. 2. What Constitutes Malice — a. IN GENERAL. — See note 2.****675. In an Action for a Malicious Criminal Prosecution. — See note 1.****b. PERSONAL ILL-WILL, SPITE, OR HATRED. — See notes 3, 4.**

ber Co., 121 Fed. Rep. 233, 57 C. C. A. 469; Davis v. Baker, 88 Ill. App. 251; Kehl v. Hope Oil Mill, etc., Co., 77 Miss. 762.

**Writ of Attachment.**—In an action for the malicious suing out of a writ of attachment, where the plaintiff's evidence tends to show that the suit is groundless, it should be left to the jury to determine (1) whether the attachment was wrongfully sued out, (2) whether it was maliciously sued out, and (3) whether it was sued out without probable cause. Alsop v. Liden, 130 Ala. 548.

**673. 1. Where Facts Admitted — Questions of Law — United States.**—Carroll v. Central R. Co., 134 Fed. Rep. 684.

*District of Columbia.*—Spitzer v. Friedlander, 14 App. Cas. (D. C.) 556.

*Indiana.*—Hutchinson v. Wenzel, 155 Ind. 49; Lawrence v. Leathers, 31 Ind. App. 414.

*Kentucky.*—Albin Co. v. Mumford, (Ky. 1900) 55 S. W. Rep. 913; Davis v. Cassidy, 64 S. W. Rep. 633, 23 Ky. L. Rep. 955; O'Daniel v. Smith, 66 S. W. Rep. 284, 23 Ky. L. Rep. 1822.

*Nebraska.*—Clark v. Folkers, (Neb. 1901) 95 N. W. Rep. 328; Figg v. Hanger, (Neb. 1903) 96 N. W. Rep. 658; Stoecker v. Nathanson, (Neb. 1904) 98 N. W. Rep. 1061.

*New Jersey.*—Magowan v. Rickey, 64 N. J. L. 402.

*New York.*—O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; Coleman v. Botsford, 89 N. Y. App. Div. 104; Parr v. Loder, 97 N. Y. App. Div. 218, *appeal dismissed* 182 N. Y. 509; Rawson v. Leggett, 97 N. Y. App. Div. 416; Bankell v. Weinacht, 99 N. Y. App. Div. 316; Burt v. Smith, 181 N. Y. 1.

*Pennsylvania.*—Scott v. Dewey, 23 Pa. Super. Ct. 396; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Lear v. Watson, 16 Montg. Co. Rep. (Pa.) 150.

*South Dakota.*—Krause v. Bishop, (S. Dak. 1904) 100 N. W. Rep. 434.

*West Virginia.*—Waldron v. Sperry, 53 W. Va. 116.

2. O'Daniel v. Smith, 66 S. W. Rep. 284, 23 Ky. L. Rep. 1822; Bankell v. Weinacht, 99 N. Y. App. Div. 316; Lear v. Watson, 16 Montg. Co. Rep. (Pa.) 150; Krause v. Bishop, (S. Dak. 1904) 100 N. W. Rep. 434.

**3. Malice an Element.—United States.**—Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317; Van v. Pacific Coast Co., 120 Fed. Rep. 699; Berger v. Wild, (C. C. A.) 130 Fed. Rep. 882.

*Alabama.*—National Surety Co. v. Mabry, 139 Ala. 217.

*Arkansas.*—Kansas, etc., Coal Co. v. Gallo-way, 71 Ark. 351, 100 Ann. St. Rep. 79; St. Louis, etc., R. Co. v. Wallin, 71 Ark. 422.

*California.*—Hurgren v. Union Mut. L. Ins. Co., 141 Cal. 585; Harrington v. Tibbet, 143 Cal. 78; Griswold v. Griswold, 143 Cal. 617.

*Delaware.*—Herbener v. Crossan, 4 Penn. (Del.) 38.

*Georgia.*—Hamilton v. Du Pre, 111 Ga. 819; Page v. Citizens Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144.

*Illinois.*—Daily v. Donath, 100 Ill. App. 52; Watters v. De La Matter, 109 Ill. App. 334.

*Indiana.*—Lawrence v. Leathers, 31 Ind. App. 414; Judy v. Gifford, 33 Ind. App. 353.

*Kentucky.*—Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754.

*Louisiana.*—Lang v. De Luca, 108 La. 304; Sundmaker v. Gaudet, 113 La. 887.

*Michigan.*—James v. Sweet, 125 Mich. 132, 7 Detroit Leg. N. 468.

*Missouri.*—Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Jordan v. Chicago, etc., R. Co., 105 Mo. App. 446; Boden v. St. Louis Transit Co., 108 Mo. App. 696.

*New Hampshire.*—Cohn v. Saidel, 71 N. H. 558.

*New York.*—Leake v. Carlisle, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382; O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; McMorris v. Howell, 89 N. Y. App. Div. 272; Bankell v. Weinacht, 99 N. Y. App. Div. 316; Burt v. Smith, 181 N. Y. 1.

*Ohio.*—Johnson v. McDaniel, 5 Ohio Dec. 717; Bartholomew v. Metropolitan L. Ins. Co., 1 Ohio Dec. 267, 7 Ohio N. P. 209.

*Pennsylvania.*—Campbell v. Sidwell, 20 Pa. Super. Ct. 183; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Lipowicz v. Jervis, 209 Pa. St. 315.

*Rhode Island.*—Fox v. Smith, 25 R. I. 255, 26 R. I. 1.

*Tennessee.*—Swepson v. Davis, 109 Tenn. 108.

*Texas.*—Kruegel v. Stewart, (Tex. Civ. App. 1904) 81 S. W. Rep. 365.

*Washington.*—Smits v. Hogan, 35 Wash. 290.

*Wisconsin.*—Small v. McGovern, 117 Wis. 608.

*Canada.*—Martin v. Montreal Gas Co., 23 Quebec Super. Ct. 222.

**674. 2. Ordinary Sense of Term.**—Connelly v. White, 122 Iowa 391; Campbell v. Baltimore, etc., R. Co., 97 Md. 341.

**Definitions.**—O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13.

"Wrongfully" and "maliciously" are not synonymous. Talbott v. Great Western Plaster Co., 86 Mo. App. 558.

**675. 1. Malice — Criminal Proceedings.**—Griswold v. Griswold, 143 Cal. 617; Rulison v. Collins, (Indian Ter. 1904) 82 S. W. Rep. 748; Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754; Miles v. Walker, 66 Neb. 728; Eggett v. Allen, 119 Wis. 625, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675.

**3. Hostility, Anger, Vindictiveness.**—Herbener v. Crossan, 4 Penn. (Del.) 38; Campbell v. Baltimore, etc., R. Co., 97 Md. 341; Ruth v.

**675.** *c.* PROSECUTION BEGUN WILFULLY AND WANTONLY. — See note 5.

**676.** *e.* CRIMINAL PROSECUTION TO ACCOMPLISH PRIVATE OBJECT — In General. — See notes 3, 5.

*f.* CRIMINAL PROSECUTION FOR CIVIL WRONG. — See note 7.

**3.** Question of Fact for Jury. — See note 8.

**677.** See note 1.

**VIII. NECESSITY FOR CONCURRENCE OF MALICE AND WANT OF PROBABLE CAUSE.** — See note 2.

St. Louis Transit Co., 98 Mo. App. 1; Johnson v. McDaniel, 5 Ohio Dec. 717; Eggett v. Allen, 119 Wis. 625, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675.

Without Probable Cause. — Humphreys v. Mead, 23 Pa. Super. Ct. 415.

**675.** 4. Personal Hatred, Ill-will, or Spite Unnecessary. — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317; Griswold v. Griswold, 143 Cal. 617; Connelly v. White, 122 Iowa 391; Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754; Campbell v. Baltimore, etc., R. Co., 97 Md. 341; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152; Miles v. Walker, 66 Neb. 728; Leake v. Carlisle, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382; Johnson v. McDaniel, 5 Ohio Dec. 717; Stamper v. Raymond, 38 Oregon 16.

Contrary Doctrine. — Savage v. Davis, 131 N. Car. 159.

**5.** Wilfulness and Wantonness. — Alsop v. Liden, 130 Ala. 548; Harrington v. Tibbet, 143 Cal. 78; Herbener v. Crossan, 4 Penn. (Del.) 38; Campbell v. Baltimore, etc., R. Co., 97 Md. 341; Miles v. Walker, 66 Neb. 728; Leake v. Carlisle, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382; McMorris v. Howell, 89 N. Y. App. Div. 272; Johnson v. McDaniel, 5 Ohio Dec. 717; Stamper v. Raymond, 38 Oregon 16; Fox v. Smith, 25 R. I. 255; Eggett v. Allen, 119 Wis. 625, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675.

Proceedings Where Counterclaim Exists. — A person who brings suit on a valid claim against a person who he knows has a valid counterclaim exceeding the amount of his claim, does not thereby become liable to an action for malicious prosecution, although he is inspired by a malicious purpose in bringing the suit. Coleman v. Botsford, 89 N. Y. App. Div. 106.

**676.** 3. Prosecution for Private Purpose. — Eggett v. Allen, 119 Wis. 625, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 676, and supporting the other statements in the text paragraph.

**5.** Not Conclusive. — Wenger v. Phillips, 195 Pa. St. 214, 78 Am. St. Rep. 810.

**7.** Prosecution for Civil Wrong. — Navarino v. Dudrap, 66 N. J. L. 620; Long Island Bottlers' Union v. Seitz, 180 N. Y. 243.

**8.** Malice as Question for Jury. — United States. — L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469.

California. — Scrivani v. Dondero, 128 Cal. 31; McKenna v. Heinlen, 128 Cal. 97; Griswold v. Griswold, 143 Cal. 617.

Indiana. — Lawrence v. Leathers, 31 Ind. App. 414.

Iowa. — Flam v. Lee, 116 Iowa 289, 93 Am. St. Rep. 242.

Minnesota. — Shafer v. Hertzog, 92 Minn. 175.

Missouri. — Stubbs v. Mulholland, 168 Mo. 47;

Ruth v. St. Louis Transit Co., 98 Mo. App. 1;

Butcher v. Hoffman, 99 Mo. App. 239.

New Hampshire. — Cohn v. Saidel, 71 N. H. 558.

New York. — Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321; Long Island Bottlers' Union v. Seitz, 180 N. Y. 243.

Pennsylvania. — Humphreys v. Mead, 23 Pa. Super. Ct. 415.

**677.** 1. See Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Eggett v. Allen, 119 Wis. 625.

2. Concurrence of Malice and Want of Probable Cause — Alabama. — National Surety Co. v. Mabry, 139 Ala. 217.

Arkansas. — Kansas, etc., Coal Co. v. Gal- loway, 71 Ark. 351, 100 Am. St. Rep. 79.

California. — Griswold v. Griswold, 143 Cal. 617.

Delaware. — Herbener v. Crossan, 4 Penn. (Del.) 38.

District of Columbia. — Spitzer v. Fried- lander, 14 App. Cas. (D. C.) 556.

Illinois. — Clark v. Hill, 96 Ill. App. 383; Chicago, etc., R. Co. v. Pierce, 98 Ill. App. 368;

Tumalty v. Parker, 100 Ill. App. 382; Watters v. De La Matter, 109 Ill. App. 334.

Indiana. — Lawrence v. Leathers, 31 Ind. App. 414.

Iowa. — Connelly v. White, 122 Iowa 391.

Kentucky. — Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754.

Louisiana. — Lang v. De Luca, 108 La. 304;

Missouri. — Stubbs v. Mulholland, 168 Mo. 47;

Jordan v. Chicago, etc., R. Co., 105 Mo. App. 446; Talhott v. Great Western Plaster Co.,

86 Mo. App. 558.

Nebraska. — Clark v. Folkers, (Neb. 1901) 95 N. W. Rep. 328.

New Hampshire. — Cohn v. Saidel, 71 N. H. 558.

New York. — Coleman v. Botsford, 89 N. Y. App. Div. 106, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 677; Schwarting v. Van Wie

New York Grocery Co., 60 N. Y. App. Div. 475; Leake v. Carlisle, (N. Y. City Ct. Tr. T.)

75 N. Y. Supp. 382; Burt v. Smith, 181 N. Y. 1.

North Carolina. — Savage v. Davis, 131 N. Car. 159.

Ohio. — Johnson v. McDaniel, 5 Ohio Dec. 717.

Oklahoma. — Ten Cate v. Fansler, 10 Okla. 7.

Pennsylvania. — Campbell v. Sidwell, 20 Pa. Super. Ct. 183; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Lipowicz v. Jervis, 209 Pa. St. 315.

Rhode Island. — Fox v. Smith, 25 R. I. 255.

South Dakota. — Richardson v. Dybedahl, 14 S. Dak. 126.

**678.** See note 1.

**IX. INFERENCE OF MALICE FROM WANT OF PROBABLE CAUSE—1. In General.**—See note 4.

**679.** See note 1.

**680.** 2. Inference from Total Want of Cause.—See note 1.

**X. INFERENCE OF WANT OF PROBABLE CAUSE FROM MALICE.**—See note 2.

*Tennessee.*—Swepson v. Davis, 109 Tenn. 108.

*Texas.*—Brady v. Georgia Home Ins. Co., 24 Tex. Civ. App. 464.

*West Virginia.*—Harper v. Harper, 49 W. Va. 661; Porter v. Mack, 50 W. Va. 595.

*Wisconsin.*—Small v. McGovern, 117 Wis. 608; Eggett v. Allen, 119 Wis. 625.

*Canada.*—Giguère v. Jacob, 10 Quebec K. B. 501.

**678. 1. Where Probable Cause Exists—United States.**—Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317.

*Arkansas.*—Kansas, etc., Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79.

*Connecticut.*—Frisbie v. Morris, 75 Conn. 637.

*Delaware.*—Herbener v. Crossan, 4 Penn. (Del.) 38.

*District of Columbia.*—Spitzer v. Friedlander, 14 App. Cas. (D. C.) 556.

*Illinois.*—Tumalty v. Parker, 100 Ill. App. 382.

*Iowa.*—Connelly v. White, 122 Iowa 391.

*Kentucky.*—Burks v. Ferriell, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.

*Missouri.*—Babcock v. St. Louis Merchants' Exch., 159 Mo. 381; Jordan v. Chicago, etc., R. Co., 105 Mo. App. 446.

*New Hampshire.*—Cohn v. Saidel, 71 N. H. 558.

*New York.*—Coleman v. Botsford, 89 N. Y. App. Div. 104; Burt v. Smith, 181 N. Y. 1.

*Pennsylvania.*—Glance v. Hummel, 24 Pa. Co. Ct. 550, 10 Pa. Dist. 110; Scott v. Dewey, 23 Pa. Super. Ct. 396; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Lipowicz v. Jervis, 209 Pa. St. 315.

*Texas.*—Brady v. Georgia Home Ins. Co., 24 Tex. Civ. App. 464.

*Washington.*—Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

*West Virginia.*—Harper v. Harper, 49 W. Va. 661.

*Wisconsin.*—Cullen v. Hanisch, 114 Wis. 24; Small v. McGovern, 117 Wis. 608; Eggett v. Allen, 119 Wis. 625.

**4. Inference of Malice—United States.**—Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317; L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469.

*Alabama.*—Alsop v. Lidden, 130 Ala. 548; Southern Car, etc., Co. v. Adams, 131 Ala. 147.

*California.*—Griswold v. Griswold, 143 Cal. 617.

*Delaware.*—Herbener v. Crossan, 4 Penn. (Del.) 38.

*Illinois.*—Daily v. Donath, 100 Ill. App. 52; Tumalty v. Parker, 100 Ill. App. 382; Waters v. West Chicago St. R. Co., 101 Ill. App. 265.

*Indiana.*—Judy v. Gifford, 33 Ind. App. 353.

*Louisiana.*—Lang v. De Luca, 108 La. 304; Sundmaker v. Gaudet, 113 La. 887,

*Michigan.*—Gould v. Gregory, 133 Mich. 382; Adkin v. Pillen, 136 Mich. 682.

*Missouri.*—Stubbs v. Mulholland, 168 Mo. 47; Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Butcher v. Hoffman, 99 Mo. App. 239; Jordan v. Chicago, etc., R. Co., 105 Mo. App. 446; Boden v. St. Louis Transit Co., 108 Mo. App. 666.

*Nebraska.*—Miles v. Walker, 66 Neb. 728; Miller Bank v. Richmon, (Neb. 1903) 94 N. W. Rep. 998; Clark v. Folkers, (Neb. 1901) 95 N. W. Rep. 328; Rosenblatt v. Rosenberg, (Neb. 1901) 95 N. W. Rep. 686.

*New Hampshire.*—Cohn v. Saidel, 71 N. H. 558.

*New Jersey.*—Toth v. Greisen, (N. J. 1902) 51 Atl. Rep. 927.

*New York.*—Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321; Nicholson v. Sternberg, 61 N. Y. App. Div. 51, appeal dismissed 170 N. Y. 589; Schwartz v. Van Wie New York Grocery Co., 60 N. Y. App. Div. 475; Leake v. Carlisle, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382; Mesnier v. Denike, 82 N. Y. App. Div. 404; McMorris v. Howell, 89 N. Y. App. Div. 272.

*North Carolina.*—Savage v. Davis, 131 N. Car. 159; Kelly v. Durham Traction Co., 132 N. Car. 368; Coble v. Huffines, 132 N. Car. 399.

*Ohio.*—Johnson v. McDaniel, 5 Ohio Dec. 717.

*Oklahoma.*—Ten Cate v. Fansler, 10 Okla. 7.

*Pennsylvania.*—Humphreys v. Mead, 23 Pa. Super. Ct. 415.

*Rhode Island.*—Fox v. Smith, 25 R. I. 255.

*South Carolina.*—Baker v. Hornick, 57 S. Car. 213.

*South Dakota.*—Richardson v. Dybedahl, 14 S. Dak. 126.

*Washington.*—Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

*West Virginia.*—Porter v. Mack, 50 W. Va. 595.

*Wisconsin.*—Small v. McGovern, 117 Wis. 608.

*Canada.*—Peck v. Peck, 35 N. Bruns. 484.

**679. 1. Presumption One of Fact.**—Griswold v. Griswold, 143 Cal. 617; Tumalty v. Parker, 100 Ill. App. 382; Judy v. Gifford, 33 Ind. App. 353; Talbott v. Great Western Plaster Co., 86 Mo. App. 558; Stubbs v. Mulholland, 168 Mo. 47; Savage v. Davis, 131 N. Car. 159; Kelly v. Durham Traction Co., 132 N. Car. 368; Ten Cate v. Fansler, 10 Okla. 7; Humphreys v. Mead, 23 Pa. Super. Ct. 415; Baker v. Hornick, 57 S. Car. 213; Lauterbach v. Netzo, 111 Wis. 322; Small v. McGovern, 117 Wis. 608.

**680. 1. Entire Absence of Cause.**—Spitzer v. Friedlander, 14 App. Cas. (D. C.) 556; Roberts v. Keeler, 111 Ga. 181.

**2. Inference of Want of Probable Cause—California.**—McKenna v. Heinlen, 128 Cal. 97,

**680.** XI. TERMINATION OF PROSECUTION — 1. General Rule. — See note 3.

**681.** 2. Requisites as to Finality — *a.* IN GENERAL. — See note 1.

**682.** *b.* DISCHARGE BY EXAMINING MAGISTRATE. — See note 1.

*d.* DISCHARGE ON HABEAS CORPUS. — See note 7.

*e.* TERMINATION BY NOLLE PROSEQUI. — See note 9.

**683.** See note 1.

*f.* WHERE APPEAL PENDING — MOTION FOR NEW TRIAL. — See

note 3.

**684.** 3. Termination in Plaintiff's Favor — *a.* GENERAL RULE. — See note 1.

*Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*District of Columbia.* — *Spitzer v. Friedlander*, 14 App. Cas. (D. C.) 556.

*Illinois.* — *Tumalty v. Parker*, 100 Ill. App. 382.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47; *Jordan v. Chicago, etc., R. Co.*, 105 Mo. App. 446.

*Nebraska.* — *Clark v. Folkers*, (Neb. 1901) 95 N. W. Rep. 328.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New York.* — *Bankell v. Weinacht*, 99 N. Y. App. Div. 316.

*Rhode Island.* — *Fox v. Smith*, 25 R. I. 255.

*South Dakota.* — *Richardson v. Dybedahl*, 14 S. Dak. 126.

*West Virginia.* — *Harper v. Harper*, 49 W. Va. 661.

*Wisconsin.* — *Cullen v. Hanisch*, 114 Wis. 24; *Small v. McGovern*, 117 Wis. 608.

In *Shafer v. Hertzog*, 92 Minn. 175, it is stated that the existence of probable cause must depend upon the question of the defendant's malice.

**680.** 3. Legal Termination of Proceedings — *United States.* — *Davis v. Johnson*, (C. C. A.) 110 Fed. Rep. 952.

*Alabama.* — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147.

*California.* — *Dowdell v. Carpy*, 129 Cal. 168; *Hurgren v. Union Mut. L. Ins. Co.*, 141 Cal. 585.

*Connecticut.* — *Frisbie v. Morris*, 75 Conn. 637.

*Delaware.* — *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77; *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Georgia.* — *Page v. Citizens Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144; *Fulton Grocery Co. v. Maddox*, 111 Ga. 260.

*Illinois.* — *Bonney v. King*, 103 Ill. App. 601, affirmed 201 Ill. 47.

*Massachusetts.* — *Parker v. Com.*, 178 Mass. 109; *White v. Apsley Rubber Co.*, 181 Mass. 339.

*Missouri.* — See *Kelley v. Osborn*, 86 Mo. App. 239.

*New York.* — *Loftus v. Meyer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 861.

*Ohio.* — *Bartholomew v. Metropolitan L. Ins. Co.*, 1 Ohio Dec. 267, 7 Ohio N. P. 209.

*Rhode Island.* — *Hull v. Sprague*, 23 R. I. 188; *Tyler v. Smith*, 25 R. I. 486.

*South Carolina.* — *Whaley v. Lawton*, 57 S. Car. 256.

*Tennessee.* — *Swepson v. Davis*, 109 Tenn. 108.

*Texas.* — *Rogers v. Mullins*, 26 Tex. Civ. App. 250.

*Wisconsin.* — *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897; *Williams v. Ainsworth*, 121 Wis. 600.

*Canada.* — *Renaud v. Guenette*, 25 Quebec Super. Ct. 310.

Attachment Suit Need Not Be Terminated. — *Alsop v. Lidden*, 130 Ala. 548.

**681.** 1. Criterion as to Finality. — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147; *Hurgren v. Union Mut. L. Ins. Co.*, 141 Cal. 585, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681; *Schrieber v. Clapp*, 13 Okla. 215; *Tyler v. Smith*, 25 R. I. 486; *Swepson v. Davis*, 109 Tenn. 108; *Spangler v. Booze*, 103 Va. 276; *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897; *Beemer v. Beemer*, 9 Ont. L. Rep. 71, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

Voluntary Abandonment Sufficient Termination. — *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77.

**682.** 1. Discharge by Examining Magistrate. — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147; *Page v. Citizens' Banking Co.*, 111 Ga. 73, 78 Am. St. Rep. 144; *Miller Bank v. Richmond*, 64 Neb. 111; *Miller Bank v. Richmond*, (Neb. 1903) 94 N. W. Rep. 998; *Rogers v. Mullins*, 26 Tex. Civ. App. 250; *Waldron v. Sperry*, 53 W. Va. 116.

7. *Southern Car, etc., Co. v. Adams*, 131 Ala. 147.

9. *Nolle Prosequi.* — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147; *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77.

*Nolle Prosequi Held Insufficient.* — *Ward v. Reasor*, 98 Va. 399.

**683.** 1. *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77; *Russell v. Morgan*, 24 R. I. 134.

3. The Mere Right of Appeal from a judgment in an alleged malicious prosecution does not affect the right of the defendant therein, if he is the prevailing party, to pursue his prosecutor in an action for damages. *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897.

**684.** 1. Termination Favorable to Plaintiff — *United States.* — *Carroll v. Central R. Co.*, 134 Fed. Rep. 684.

*Arkansas.* — *St. Louis, etc., R. Co. v. Wallin*, 71 Ark. 422.

*Connecticut.* — *Frisbie v. Morris*, 75 Conn. 637.

*Delaware.* — *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77; *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Georgia.* — *Duckworth v. Boykin*, 114 Ga. 969.

**684.** *b.* TERMINATION BY COMPROMISE. — See note 2.

*c.* JUDGMENT ON MERITS — VERDICT OF ACQUITTAL. — See notes 3, 4.

**685.** *d.* DISMISSAL OF PROCEEDINGS. — See notes 1, 5.

**686.** XII. ADVICE OF COUNSEL — 1. General Rule. — See note 1.

*Michigan.* — *Coveney v. Phiscator*, 132 Mich. 261, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 685.

*Missouri.* — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1.

*Nebraska.* — *Lansing v. Oliver*, (Neb. 1901) 95 N. W. Rep. 782.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New York.* — *O'Dell v. Hatfield*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; *Loftus v. Meyer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 861; *McMorris v. Howell*, 89 N. Y. App. Div. 272; *Burt v. Smith*, 181 N. Y. 1.

*Tennessee.* — *Swepton v. Davis*, 109 Tenn. 108, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

*Texas.* — *Kruegel v. Stewart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 365.

*Wisconsin.* — *Cullen v. Hanisch*, 114 Wis. 24; *Williams v. Ainsworth*, 121 Wis. 600.

The termination must be such as to furnish *prima facie* evidence that the action was without foundation. *Tyler v. Smith*, 25 R. I. 486.

The Court Cannot Look Behind the Final Judgment in the original suit and ascertain which party was in fact successful. *Swepton v. Davis*, 109 Tenn. 108.

**684.** 2. Compromise. — *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77; *Loftus v. Meyer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 861; *Russell v. Morgan*, 24 R. I. 134.

3. Judgment or Verdict on Merits Unnecessary. — *Craig v. Ginn*, 3 Penn. (Del.) 117, 94 Am. St. Rep. 77. But see *Hurgren v. Mutual L. Ins. Co.*, (Cal. 1902) 69 Pac. Rep. 615.

4. An Acquittal Is, of Course, a Sufficient Termination. — *Southern Car. etc., Co. v. Adams*, 131 Ala. 147.

**685.** 1. Dismissal Followed by Discharge. — *Daily v. Donath*, 100 Ill. App. 52.

5. Advice of Counsel as Defense — *United States*. — *Annis v. Atchison*, etc., R. Co., 114 Fed. Rep. 317.

*Alabama.* — *Southern Express Co. v. Couch*, 133 Ala. 285; *National Surety Co. v. Mabey*, 139 Ala. 217.

*Arkansas.* — *Kansas, etc., Coal Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. Rep. 79, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 685; *St. Louis, etc., R. Co. v. Wallin*, 71 Ark. 422; *Harr v. Ward*, 73 Ark. 427.

*Illinois.* — *Chicago, etc., R. Co. v. Pierce*, 98 Ill. App. 368; *Daily v. Donath*, 100 Ill. App. 52; *Morrow v. Carnes*, 108 Ill. App. 621.

*Iowa.* — *Necker v. Bates*, 118 Iowa 545; *Connelly v. White*, 122 Iowa 301.

*Kentucky.* — *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754; *Tandy v. Riley*, (Ky. 1904) 80 S. W. Rep. 776.

*Michigan.* — *Adkin v. Pillen*, 136 Mich. 682.

*Minnesota.* — *Shea v. Cloquet Lumber Co.*, 92 Minn. 348. *Muncal v. Minneapolis, etc., R. Co.*, 92 Minn. 33.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47.

*Nebraska.* — *Perrenoud v. Helm*, 65 Neb. 77; *Maynard v. Sigman*, 65 Neb. 590; *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*New Jersey.* — *Magowan v. Rickey*, 64 N. J. L. 402.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Pennsylvania.* — *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Bell v. Atlantic City R. Co.*, 202 Pa. St. 178; *Lipowicz v. Jervis*, 209 Pa. St. 315.

*Rhode Island.* — *St. Pierre v. Warner*, 24 R. I. 295.

*South Carolina.* — *Baker v. Hornick*, 57 S. Car. 213.

*South Dakota.* — *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

*Tennessee.* — *Cooper v. Flemming*, 114 Tenn. 40.

*Texas.* — *Kleinsmith v. Hamlin*, (Tex. Civ. App. 1901) 60 S. W. Rep. 994; *Rogers v. Mullins*, 26 Tex. Civ. App. 250.

*Washington.* — *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886.

*Wisconsin.* — *Small v. McGovern*, 117 Wis. 608.

**Prosecution Barred by Statute of Limitations.** — Where a prosecution had been commenced by advice of the district attorney, which had been sought in good faith and was based upon a full disclosure to him of all the facts known to the prosecutor, the fact that the binding over was after the prosecution was barred by the statute of limitations did not make the defendant in an action for malicious prosecution liable, unless it appeared that he had persisted in the prosecution after he knew that it was barred. *Wenger v. Phillips*, 195 Pa. St. 214, 78 Am. St. Rep. 810.

**686.** 1. Rule Applies Though Advice Erroneous. — *National Surety Co. v. Mahry*, 139 Ala. 217; *Kansas, etc., Coal Co. v. Gallo-way*, 71 Ark. 351, 100 Am. St. Rep. 79, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686; *Morrow v. Carnes*, 108 Ill. App. 621; *Adkin v. Pillen*, 136 Mich. 682; *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Lipowicz v. Jervis*, 209 Pa. St. 315; *Cooper v. Flemming*, 114 Tenn. 40.

**Erroneous Advice on Question of Law.** — *Cooper v. Flemming*, 114 Tenn. 40.

A misapprehension of the law may affect the issue of malice, but not that of probable cause. *Clark v. Folkers*, (Neb. 1901) 95 N. W. Rep. 328.

**Rule Applies Only to Advice on Propositions of Law.** — *Campbell v. Sidwell*, 20 Pa. Super. Ct. 183.

**686.** 2. Probable Cause — Malice. — See note 2.

**687.** See notes 1, 2.

3. Requisites of Rule — *a.* FULL AND FAIR DISCLOSURE — (1) *In General.* — See note 4.

Facts Stated to Counsel. — See note 5.

**688.** (3) *Duty to Make Inquiries.* — See notes 3, 4.

**686.** 2. Advice of Counsel as Constituting Probable Cause. — *Amb's v. Atchison, etc., R. Co.,* 114 Fed. Rep. 317; *Kansas, etc., Coal Co. v. Gallo-way,* 71 Ark. 351, 100 Am. St. Rep. 79; *Griswold v. Griswold,* 143 Cal. 617; *Sandoz v. Veazie,* 106 La. 202; *Lang v. De Luca,* 108 La. 304; *Maynard v. Sigman,* 65 Neb. 590; *St. Pierre v. Warner,* 24 R. I. 295; *Krause v. Bishop, (S. Dak. 1904)* 100 N. W. Rep. 434; *Cooper v. Flemming,* 114 Tenn. 40; *Small v. McGovern,* 117 Wis. 608.

Not Conclusive of Probable Cause. — *Scott v. Dennett Surpassing Coffee Co.,* 51 N. Y. App. Div. 321; *Bell v. Atlantic City R. Co.,* 202 Pa. St. 178.

Where Question of Probable Cause for Court. — *Parr v. Loder,* 97 N. Y. App. Div. 218, *appeal dismissed* 182 N. Y. 509.

**687.** 1 Advice of Counsel as Negating Malice. — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.,* 121 Fed. Rep. 233, 57 C. C. A. 469; *Griswold v. Griswold,* 143 Cal. 617; *Stubbs v. Mulholland,* 168 Mo. 47; *Camphell v. Sidwell,* 20 Pa. Super. Ct. 183; *Humphreys v. Mead,* 23 Pa. Super. Ct. 415; *Baker v. Hornick,* 57 S. Car. 213.

Not Conclusive of Absence of Malice. — *Bell v. Atlantic City R. Co.,* 202 Pa. St. 178.

As Repelling Inference of Malice. — *Johnson v. McDaniel,* 5 Ohio Dec. 717; *Replogle v. Frothingham,* 16 Pa. Super. Ct. 374; *Lipowicz v. Jervis,* 209 Pa. St. 315.

2. Malice and Want of Cause. — *Berger v. Wild, (C. C. A.)* 130 Fed. Rep. 882; *Southern Express Co. v. Couch,* 133 Ala. 285; *Harr v. Ward,* 73 Ark. 437; *Chicago, etc., R. Co. v. Pierce,* 98 Ill. App. 368; *Morrow v. Carnes,* 108 Ill. App. 621; *Fowles v. Hayden,* 129 Mich. 586; *Adkin v. Pillen,* 136 Mich. 682; *Talbott v. Great Western Plaster Co.,* 86 Mo. App. 558; *Parr v. Loder,* 97 N. Y. App. Div. 218, *appeal dismissed* 182 N. Y. 509; *Bell v. Atlantic City R. Co.,* 202 Pa. St. 178.

4. Full and Fair Disclosure — *United States.* — *Amb's v. Atchison, etc., R. Co.,* 114 Fed. Rep. 317.

*Alabama.* — *Southern Express Co. v. Couch,* 133 Ala. 285; *National Surety Co. v. Mabry,* 139 Ala. 217.

*Arkansas.* — *Kansas, etc., Coal Co. v. Gallo-way,* 71 Ark. 351, 100 Am. St. Rep. 79; *Harr v. Ward,* 73 Ark. 437.

*California.* — *Griswold v. Griswold,* 143 Cal. 617.

*Illinois.* — *Daily v. Donath,* 100 Ill. App. 52; *Waters v. West Chicago St. R. Co.,* 101 Ill. App. 265; *Morrow v. Carnes,* 108 Ill. App. 621.

*Indiana.* — *Atkinson v. Vancleave,* 25 Ind. App. 508; *Lawrence v. Leathers,* 31 Ind. App. 414.

*Iowa.* — *Connelly v. White,* 122 Iowa 391; *Dorr Cattle Co. v. Des Moines Nat. Bank,* 127 Iowa 153.

*Kentucky.* — *Tandy v. Riley, (Ky. 1904)* 80 S. W. Rep. 776.

*Michigan.* — *Gould v. Gregory,* 133 Mich. 382. *Minnesota.* — *Jeremy v. St. Paul Boom Co.,* 84 Minn. 516; *Shea v. Cloquet Lumber Co.,* 92 Minn. 348.

*Missouri.* — *Stubbs v. Mulholland,* 168 Mo. 47; *Butcher v. Hoffman,* 99 Mo. App. 239.

*Nebraska.* — *Jensen v. Halstead,* 61 Neb. 249; *Perrenoud v. Helm,* 65 Neb. 77; *Miller Bank v. Richmon, (Neb. 1903)* 94 N. W. Rep. 998; *Hiersche v. Scott, (Neb. 1901)* 95 N. W. Rep. 494; *Rosenblatt v. Rosenberg, (Neb. 1901)* 95 N. W. Rep. 686; *Gillispie v. Stafford, (Neb. 1903)* 96 N. W. Rep. 1039.

*New Hampshire.* — *Cohn v. Sidel,* 71 N. H. 558.

*North Dakota.* — *Merchant v. Pielke,* 10 N. Dak. 48.

*Ohio.* — *Johnson v. McDaniel,* 5 Ohio Dec. 717; *Eihlert v. Gommoll,* 23 Ohio Cir. Ct. 586.

*Oklahoma.* — *Ten Cate v. Fansler,* 10 Okla. 7.

*Pennsylvania.* — *Replogle v. Frothingham,* 16 Pa. Super. Ct. 374; *Humphreys v. Mead,* 23 Pa. Super. Ct. 415; *Lipowicz v. Jervis,* 209 Pa. St. 315.

*Rhode Island.* — *St. Pierre v. Warner,* 24 R. I. 295; *Fox v. Smith,* 25 R. I. 255.

*South Carolina.* — *Baker v. Hornick,* 57 S. Car. 213.

*South Dakota.* — *Krause v. Bishop, (S. Dak. 1904)* 100 N. W. Rep. 434.

*Tennessee.* — *Cooper v. Flemming,* 114 Tenn. 40.

*Texas.* — *Rogers v. Mullins,* 26 Tex. Civ. App. 250.

*Wisconsin.* — *Small v. McGovern,* 117 Wis. 608.

*Canada.* — *Lachance v. Casault,* 12 Québec K. B. 179.

Where Attorney Already Informed. — It is unnecessary that the defendant state all the facts to the attorney at the time of seeking his advice, if by previous information communicated to him he was fully informed concerning the merits of the controversy and the prior acts and conduct of the plaintiff. *Shea v. Cloquet Lumber Co.,* 92 Minn. 348.

5. What Facts Were Disclosed. — *Maynard v. Sigman,* 65 Neb. 590; *Merchant v. Pielke,* 10 N. Dak. 48.

Where the plaintiff made a statement of facts of which he claimed to have personal knowledge to his attorney, a jury which decides that such statement was false is correct in saying that the advice of the attorney was no protection. *Miles v. Walker,* 66 Neb. 728.

**688.** 3. Duty to Make Inquiries. — *Amb's v. Atchison, etc., R. Co.,* 114 Fed. Rep. 317; *National Surety Co. v. Mabry,* 139 Ala. 217; *Scrivani v. Dondero,* 128 Cal. 31; *Daily v. Donath,* 100 Ill. App. 52; *Dorr Cattle Co. v. Des Moines Nat. Bank,* 127 Iowa 153; *Stubbs v. Mulhol-*



**688.** *b. DEFENDANT'S GOOD FAITH — (1) In General.* — See note 5.

**689.** See note 1.

(2) *Selection of Attorney.* — See note 2.

*c. GOOD FAITH OF ATTORNEY.* — See notes 3, 4.

**4. Questions for Jury.** — See notes 5, 6, 7, 8, 9.

land, 168 Mo. 47; *Butcher v. Hoffman*, 99 Mo. App. 239; *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998; *Rosenblatt v. Rosenberg*, (Neb. 1901) 95 N. W. Rep. 686; *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039; *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Cooper v. Flemming*, 114 Tenn. 40.

**688. 4. Rule Stated.** — *Shea v. Cloquet Lumber Co.*, 92 Minn. 348; *Lipowicz v. Jervis*, 209 Pa. St. 315.

**5. Requirement as to Good Faith** — *Alabama.* — *Southern Express Co. v. Couch*, 133 Ala. 285. *Arkansas.* — *Harr v. Ward*, 73 Ark. 437.

*Illinois.* — *Albrecht v. Ward*, 91 Ill. App. 38; *Morrow v. Carnes*, 108 Ill. App. 621; *Freeman v. Wright*, 113 Ill. App. 159.

*Iowa.* — *Connelly v. White*, 122 Iowa 391.

*Kentucky.* — *Tandy v. Riley*, (Ky. 1904) 80 S. W. Rep. 776.

*Michigan.* — *Fowles v. Hayden*, 129 Mich. 586; *Adkin v. Pillen*, 136 Mich. 682.

*Minnesota.* — *Jeremy v. St. Paul Boom Co.*, 84 Minn. 516; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348.

*Mississippi.* — *Kehl v. Hope Oil-Mill, etc.*, Co., 77 Miss. 762.

*Missouri.* — *Stubbs v. Mulholland*, 168 Mo. 47; *Butcher v. Hoffman*, 99 Mo. App. 239.

*Nebraska.* — *Biddle v. Jenkins*, 61 Neb. 400; *Miller Bank v. Richmon*, (Neb. 1903) 94 N. W. Rep. 998; *Hiersche v. Scott*, (Neb. 1901) 95 N. W. Rep. 494; *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*North Dakota.* — *Merchant v. Pielke*, 10 N. Dak. 48.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Oklahoma.* — *Ten Cate v. Fansler*, 10 Okla. 7.

*Pennsylvania.* — *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Lipowicz v. Jervis*, 209 Pa. St. 315.

*Rhode Island.* — *St. Pierre v. Warner*, 24 R. I. 295.

*Tennessee.* — *Cooper v. Flemming*, 114 Tenn. 40.

*Texas.* — *Brady v. Georgia Home Ins. Co.*, 24 Tex. Civ. App. 464; *Kleinsmith v. Hamlin*, (Tex. Civ. App. 1901) 60 S. W. Rep. 994.

*Wisconsin.* — *Small v. McGovern*, 117 Wis. 608.

**Presumption as to Good Faith.** — In an action for malicious prosecution, where the defendant acted upon the advice of counsel, it is the duty of the court to presume, in the absence of proof of malice, other than proof that the plaintiff was acquitted, that the defendant acted in good faith. *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

**689. 1. Mere Cloak for Prosecution.** — *Adkin*

*v. Pillen*, 136 Mich. 682; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

**2. Attorney Must Be Reputable and Competent.** — *Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79; *Davis v. Baker*, 88 Ill. App. 251; *Morrow v. Carnes*, 108 Ill. App. 621; *Tandy v. Riley*, (Ky. 1904) 80 S. W. Rep. 776; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348; *Stubbs v. Mulholland*, 168 Mo. 47; *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039; *Lipowicz v. Jervis*, 209 Pa. St. 315; *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434.

**Attorney Must Not Be Interested in Subject-matter of Suit.** — *Adkin v. Pillen*, 136 Mich. 682; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348.

**Attorney Learned and Skilled in Profession.** — In *Missouri*, "where a license to practice is obtained almost for the asking, it by no means follows, because a man has been licensed to practice law, that therefore he is qualified to give advice in a matter of such pith and moment as pertains to arresting a suspected man on a criminal charge." *Stubbs v. Mulholland*, 168 Mo. 47.

**Attorney Must Be Unbiased and Impartial.** — *Perrenoud v. Helm*, 65 Neb. 77.

**3. Good Faith of Attorney.** — *Morrow v. Carnes*, 108 Ill. App. 621; *Atkinson v. Van Cleave*, 25 Ind. App. 508; *Krause v. Bishop*, (S. Dak. 1904) 100 N. W. Rep. 434; *Small v. McGovern*, 117 Wis. 608.

**4. Good Faith of Counsel Not Considered.** — *Shea v. Cloquet Lumber Co.*, 92 Minn. 348.

**5. Defendant's Good Faith** — *Alabama.* — *Southern Express Co. v. Couch*, 133 Ala. 285.

*Arkansas.* — *Harr v. Ward*, 73 Ark. 437.

*Illinois.* — *Albrecht v. Ward*, 91 Ill. App. 38; *Morrow v. Carnes*, 108 Ill. App. 621.

*Iowa.* — *Connelly v. White*, 122 Iowa 391.

*Michigan.* — *Adkin v. Pillen*, 136 Mich. 682; *Thurkettle v. Frost*, (Mich. 1904) 100 N. W. Rep. 283.

*Mississippi.* — *Kehl v. Hope Oil Mill, etc.*, Co., 77 Miss. 762.

*Nebraska.* — *Miles v. Walker*, 66 Neb. 728; *Gillispie v. Stafford*, (Neb. 1903) 96 N. W. Rep. 1039.

*New Hampshire.* — *Cohn v. Saidel*, 71 N. H. 558.

*North Dakota.* — *Merchant v. Pielke*, 10 N. Dak. 48.

*Ohio.* — *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586.

*Pennsylvania.* — *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; *Bell v. Atlantic City R. Co.*, 202 Pa. St. 178; *Huckestein v. New York L. Ins. Co.*, 205 Pa. St. 27.

**6. Whether Full and Fair Disclosure** — *United States.* — *Ambs v. Atchison, etc.*, R. Co., 114 Fed. Rep. 317.

*Arkansas.* — *Harr v. Ward*, 73 Ark. 437.

*Illinois.* — *Albrecht v. Ward*, 91 Ill. App. 38.

**690.** 5. Advice of Layman or Magistrate. — See note 1.  
**XIII. FACT OF PLAINTIFF'S GUILT.** — See notes 2, 3.

**691.** XV. WHO LIABLE — 1. Agents. — See note 2.

2. Attorneys. — See note 3.

3. Corporations. — See note 5.

4. Liability of Principal for Acts of Agent. — See note 7.

**692.** See notes 1, 2.

5. Liability of Person Instigating or Inciting Prosecution. — See

notes 3, 4.

**Mere Making of Affidavit.** — See note 6.

**Need Not Originate Proceedings.** — See notes 7, 8.

*Io:va.* — Connelly v. White, 122 Iowa 391.

*Michigan.* — Thurkettle v. Frost, (Mich. 1904) 100 N. W. Rep. 283.

*Minnesota.* — Jeremy v. St. Paul Boom Co., 84 Minn. 516; Shea v. Cloquet Lumber Co., 92 Minn. 348.

*Missouri.* — Butcher v. Hoffman, 99 Mo. App. 239.

*Nebraska.* — Perrenoud v. Helm, 65 Neb. 77; Miles v. Walker, 66 Neb. 728; Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039.

*New Hampshire.* — Cohn v. Saidel, 71 N. H. 558.

*Pennsylvania.* — Replogle v. Frothingham, 16 Pa. Super. Ct. 374; Humphreys v. Mead, 23 Pa. Super. Ct. 415; Bell v. Atlantic City R. Co., 202 Pa. St. 178.

*Rhode Island.* — Fox v. Smith, 25 R. I. 255.

*Washington.* — Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

**689.** 7. Reasonable Diligence. — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317; Harr v. Ward, 73 Ark. 437; Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039; Bell v. Atlantic City R. Co., 202 Pa. St. 178; Humphreys v. Mead, 23 Pa. Super. Ct. 415.

8. Character and Competence of Attorney. — Atkinson v. Van Cleave, 25 Ind. App. 508; Perrenoud v. Helm, 65 Neb. 77; Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039.

9. Impartial and Unbiased Adviser. — L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469; Adkin v. Pillen, 136 Mich. 682; Shea v. Cloquet Lumber Co., 92 Minn. 348; Gillispie v. Stafford, (Neb. 1903) 96 N. W. Rep. 1039; Huckestein v. New York L. Ins. Co., 205 Pa. St. 27.

**Attorney in Civil Suit.** — Perrenoud v. Helm, 65 Neb. 77; Merchant v. Pielke, 10 N. Dak. 48.

**690.** 1. Advice of Layman or Magistrate. — Necker v. Bates, 118 Iowa 545; Mauldin v. Ball, 104 Tenn. 597.

**Police Judge.** — Morrow v. Carnes, 108 Ill. App. 621.

2. Plaintiff's Guilt Complete Defense. — Mack v. Sharp, (Mich. 1904) 101 N. W. Rep. 631; Paul v. Fargo, 84 N. Y. App. Div. 9; Lipowicz v. Jervis, 209 Pa. St. 315.

3. Mack v. Sharp, (Mich. 1904) 101 N. W. Rep. 631.

**691.** 2. Liability of Partner. — A partner, as such, is not liable for a malicious prosecution instituted by his copartner unless he in some way authorized it or it was done in the course of and for the purpose of transacting the partnership business. Noblett v. Bartsch, 31 Wash.

24, 96 Am. St. Rep. 886; Lawrence v. Leathers, 31 Ind. App. 414.

A partnership may be liable for a malicious prosecution if all of its members unite in instituting and carrying on the proceedings. Page v. Citizen's Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144.

3. Liability of Attorney. — Taylor v. Huff, 130 N. Car. 595.

5. Doctrine that Corporations Liable. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152; Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321.

7. Express or Implied Authority. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Southern Express Co. v. Couch, 133 Ala. 285; Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Atchison, etc., R. Co. v. Allen, 70 Kan. 743; Stubbs v. Mulholland, 168 Mo. 47; Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152; Boden v. St. Louis Transit Co., 108 Mo. App. 696; Markley v. Snow, 207 Pa. St. 447.

**692.** 1. Ratification. — Markley v. Snow, 207 Pa. St. 447.

2. When Principal Not Liable. — Tucker v. Erie R. Co., 69 N. J. L. 19.

Where the agent's act is done for the punishment of the supposed criminal, or for the vindication of the law, it is not the act of the principal and does not subject him to liability. Markley v. Snow, 207 Pa. St. 447.

3. Liability for Instigating or Inciting. — Southern Express Co. v. Couch, 133 Ala. 285, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692; Tucker v. Erie R. Co., 69 N. J. L. 19; Kelly v. Durham Traction Co., 132 N. Car. 368; Eggett v. Allen, 119 Wis. 625.

4. Aiding and Abetting Prosecution. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Mauldin v. Ball, 104 Tenn. 597.

6. Mere Making of Affidavit. — Herbener v. Crossan, 4 Penn. (Del.) 38.

In Missouri, in order to maintain a suit for malicious prosecution, it is essential to show that the defendant participated in the prosecution, and that it was on his complaint the prosecution was begun. Boden v. St. Louis Transit Co., 108 Mo. App. 696.

7. Need Not Originate Proceedings. — Kelly v. Durham Traction Co., 132 N. Car. 372, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692.

8. Southern Express Co. v. Couch, 133 Ala. 285; Herbener v. Crossan, 4 Penn. (Del.) 38; Eggett v. Allen, 119 Wis. 625.

- 692.** Some Affirmative Act Required. — See note 9.  
**693.** 6. Liability for Mistake of Magistrate. — See note 1.  
 7. Liability for Unauthorized Acts of Executive Officer. — See note 3.  
 8. Several Defendants. — See note 4.  
**694.** See note 1.  
**XVI. EVIDENCE — 1. To Prove Institution of Action.** — See note 2.  
 2. To Show Probable Cause or Want of It. — See note 5.  
 No General Rule. — See note 7.  
**695.** 3. To Show Malice — *a. IN GENERAL.* — See notes 1, 3.  
 The Defendant May Himself Testify as to His Motive. — See note 4.  
*b. DIRECT EVIDENCE UNNECESSARY.* — See note 5.  
**696.** See note 1.

**692.** 9. The Mere Signing of the Bond for an Attachment is not sufficient to subject the signer to the penalties of a malicious prosecution. *Harr v. Ward*, 73 Ark. 437.

**A Partner.** — *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886.

**693.** 1. Mistake of Magistrate. — *Chambliss v. Blain*, 127 Ala. 86; *Burnham v. Collateral Loan Co.*, 179 Mass. 268; *Navarino v. Dudrap*, 66 N. J. L. 620; *Lear v. Watson*, 16 Montg. Co. Rep. (Pa.) 180; *Pring v. Wyatt*, 5 Ont. L. Rep. 505.

**But if the Party Acted Maliciously and Without Probable Cause.** — *Harrington v. Tibbet*, 143 Cal. 78; *Navarino v. Dudrap*, 66 N. J. L. 620.

**Where Complaint Technically Defective.** — Where a party files a complaint upon which he causes the arrest of another for an alleged crime, it is no defense to an action for malicious prosecution that the complaint was technically defective. So long as it was treated by the justice as sufficient, and the defendant in fact arrested thereon, the party filing it is stopped from questioning its sufficiency. *Kerstetter v. Thomas*, 36 Wash. 620. See also *Harrington v. Tibbet*, 143 Cal. 78.

**3. Acts of Executive Officer.** — *Laing v. Mitten*, 185 Mass. 233.

**4. Several Defendants.** — In actions for malicious prosecution persons jointly engaged in the acts complained of may be united as defendants, or sued severally in separate suits. *Lasher v. Littell*, 202 Ill. 551.

**694.** 1. Innocence of Codefendants. — *Porter v. Mack*, 50 W. Va. 595, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 694.

**2. Original Record or Certified Copy.** — *Lautman v. Pepin*, 26 Ind. App. 427.

**5. Amount of Evidence.** — *Harper v. Harper*, 49 W. Va. 661.

**7. Evidence Admissible of Probable Cause — That the Acquittal Was the Result of a Compromise.** — *Carroll v. Central R. Co.*, 134 Fed. Rep. 684.

**Evidence Admissible of Want of Probable Cause — Statements of Judge in Prior Trial.** — *Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79.

**Evidence Admissible as to Advice of Counsel — Evidence that Attorney Consulted Had No Sign Displayed.** — *Atkinson v. Vancleave*, 25 Ind. App. 508.

**695.** 1. Evidence of Motive and Intent. — *Griswold v. Griswold*, 143 Cal. 617; *Waters v.*

*West Chicago St. R. Co.*, 101 Ill. App. 265; *Clark v. Folkers*, (Neb. 1901) 95 N. W. Rep. 328; *Cohn v. Saidel*, 71 N. H. 558; *Nicholson v. Sternberg*, 61 N. Y. App. Div. 51, appeal dismissed 170 N. Y. 589; *Kelly v. Durham Traction Co.*, 132 N. Car. 368; *Merchant v. Pielke*, 10 N. Dak. 48; *Stamper v. Raymond*, 38 Oregon 16; *Mylott v. Skinner*, 12 Pa. Super. Ct. 137.

The fact that the city attorney had advised that the ordinance upon which the alleged malicious prosecution was based was void was held not to be evidence of malice, or of want of probable cause. *James v. Sweet*, 125 Mich. 132, 7 Detroit Leg. N. 468.

**Failure to Make Suitable and Reasonable Inquiries.** — *Stubbs v. Mulholland*, 168 Mo. 47; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1.

**Invalid Warrant.** — *Stubbs v. Mulholland*, 168 Mo. 47.

**Abusive Language by Attorney.** — Unauthorized abusive language used by the defendant's attorney is not admissible as showing malice on part of the defendant. *Taylor v. Huff*, 130 N. Car. 595.

**3. Wilful Overstatement of Amount.** — Where the affidavit for an attachment grossly exaggerates the amount of the indebtedness, and the parties who made the affidavit were conscious of that fact when it was made, such fact would afford ground for an inference of such malice as would serve to sustain an action for malicious prosecution. *Tamblyn v. Johnston*, (C. C. A.) 126 Fed. Rep. 267.

**4. Defendant's Testimony as to Motive and Good Faith.** — *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. Rep. 233, 57 C. C. A. 469; *Griswold v. Griswold*, 143 Cal. 617; *Campbell v. Baltimore, etc., R. Co.*, 97 Md. 341; *Schwartz v. Van Wie New York Grocery Co.*, 60 N. Y. App. Div. 475; *Leake v. Carlisle*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 382.

**Qualification of Rule.** — Compare *Schwartz v. Van Wie New York Grocery Co.*, 60 N. Y. App. Div. 475.

**Where the Arrest Is Illegal,** proof that the defendant acted without malice is no defense to an action for malicious prosecution. *Kelly v. Durham Traction Co.*, 132 N. Car. 368.

**5. Direct Evidence Unnecessary.** — *Stubbs v. Mulholland*, 168 Mo. 47.

**696.** 1. Wide Range of Evidence Admissible. — *Stubbs v. Mulholland*, 168 Mo. 47; *Parr v. Loder*, 85 N. Y. App. Div. 96.

**696.** *c.* DEFENDANT'S ACTS, CONDUCT, AND DECLARATIONS. — See notes 2, 3.

*e.* SUCCESSIVE ACTIONS OR ATTEMPTS TO PROSECUTE. — See note 5.

**697.** 4. To Show Termination of Proceedings. — See note 1.

Record of Acquittal Admissible for Limited Purposes. — See note 4.

5. Incidents of Proceedings Complained of — *a.* IN GENERAL. — See note 5.

**698.** *b.* EVIDENCE ON PRIOR TRIAL. — See note 1.

7. Evidence of Character of Parties — *a.* EVIDENCE OF PLAINTIFF'S GOOD CHARACTER. — See notes 5, 6, 7.

**699.** *b.* EVIDENCE OF PLAINTIFF'S BAD CHARACTER — (1) *To Show Probable Cause.* — See note 1.

Malice. — See note 2.

(2) *In Mitigation of Damages.* — See note 3.

(3) *To Impeach Credit as Witness.* — See note 5.

**700.** (4) *Particular Acts of Misconduct.* — See note 1.

*c.* EVIDENCE OF DEFENDANT'S CHARACTER. — See note 3.

8. Evidence of Financial Condition — Domestic Relations. — See notes 4, 5.

**XVII. BURDEN OF PROOF — 1. In General.** — See note 6.

**696.** 2. Defendant's Acts, Conduct, and Declarations. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Walkup v. Pickering, 176 Mass. 174; Stubbs v. Mulholland, 168 Mo. 47; Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321; Coble v. Huffines, 132 N. Car. 399; Merchant v. Pielke, 10 N. Dak. 48.

3. Defendant's Activity and Zeal. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Southern Express Co. v. Couch, 133 Ala. 285; Ruth v. St. Louis Transit Co., 98 Mo. App. 1.

Publication in Newspapers of Report of Arrest. — Waters v. West Chicago St. R. Co., 101 Ill. App. 265.

Manner of Arrest. — Jeremy v. St. Paul Boom Co., 84 Minn. 516.

5. Successive Actions or Attempts to Prosecute. — Coble v. Huffines, 132 N. Car. 399.

**697.** 1. Record of Proceedings. — Tuntalty v. Parker, 100 Ill. App. 382; Lautman v. Pepin, 26 Ind. App. 427; Fox v. Smith, 25 R. I. 255.

4. Admissibility for Limited Purposes. — Tuntalty v. Parker, 100 Ill. App. 382; Mack v. Sharp, (Mich. 1904) 101 N. W. Rep. 631; Bekkeland v. Lyons, 96 Tex. 255.

5. Southern Express Co. v. Couch, 133 Ala. 285.

**698.** 1. Evidence on Prior Trial. — Carroll v. Central R. Co., 134 Fed. Rep. 684; Perkins v. Spaulding, 182 Mass. 218.

5. Evidence of Plaintiff's Good Character. — Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Thurkettle v. Frost, (Mich. 1904) 100 N. W. Rep. 283; Stubbs v. Mulholland, 168 Mo. 47; Miller Bank v. Richmond, 64 Neb. 111; Ehlert v. Gemmoll, 23 Ohio Cir. Ct. 586; Johnson v. McDaniel, 5 Ohio Dec. 717.

6. But See Contra. — Carroll v. Central R. Co., 134 Fed. Rep. 684.

7. Defendant's Knowledge of Plaintiff's Good Character. — Stubbs v. Mulholland, 168 Mo. 47; Miller Bank v. Richmond, 64 Neb. 111.

**699.** 1. Evidence of Plaintiff's Bad Character

— Probable Cause. — Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Hlubek v. Pinske, 84 Minn. 363; Stubbs v. Mulholland, 168 Mo. 47; Miles v. Salisbury, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333.

In Hart v. McLaughlin, 51 N. Y. App. Div. 411, it was held to be error to permit the defendant to testify that before he instituted the alleged malicious prosecution a person informed him that the plaintiff was one of the worst men he knew; that he had been in prison in Boston, was one of the biggest crooks in New York city, and that he had been in trouble in St. Louis and Chicago, and had to leave both these places, and that he was going to "do" the defendant.

2. Plaintiff's Character and Reputation — Malice. — Flam v. Lee, 116 Iowa 289, 93 Am. St. Rep. 242; Hlubek v. Pinske, 84 Minn. 363; Stubbs v. Mulholland, 168 Mo. 47.

3. Evidence in Mitigation of Damages. — Flam v. Lee, 116 Iowa 289, 93 Am. St. Rep. 242; Hlubek v. Pinske, 84 Minn. 363; Hiersche v. Scott, (Neb. 1901) 95 N. W. Rep. 494.

5. Credibility of Witness. — Waters v. West Chicago St. R. Co., 101 Ill. App. 265; Cullen v. Henisch, 114 Wis. 24.

**700.** 1. Stated Rationale of Rule. — Miles v. Walker, 66 Neb. 728.

3. To Impeach Credibility. — Miles v. Salisbury, 12 Ohio Cir. Dec. 7, 21 Ohio Cir. Ct. 333.

4. When Evidence Admissible. — French v. Guyot, 30 Colo. 222; Atkinson v. Vancleave, 25 Ind. App. 508; Eggett v. Allen, 119 Wis. 625. See also Miller Bank v. Richmond, (Neb. 1903) 94 N. W. Rep. 998.

Evidence Not Admissible. — Brown v. Smallwood, 86 N. Y. App. Div. 76.

5. Social Position — Domestic Relations. — Flam v. Lee, 116 Iowa 289, 93 Am. St. Rep. 242.

6. Burden of Proof — General Rule. — Southern Car, etc., Co. v. Adams, 131 Ala. 147; Herbener v. Crossan, 4 Penn. (Del.) 38; Carbondale Invest. Co. v. Burdick, 67 Kan. 329; O'Dell v.

**700.** 2. Want of Probable Cause — *a.* IN GENERAL. — See note 7.

**701.** *b.* WHEN BURDEN SHIFTS. — See note 1.

3. Malice — *a.* IN GENERAL. — See note 2.

**702.** *b.* WHEN BURDEN SHIFTS. — See note 1.

**XVIII. DAMAGES** — 1. In General. — See note 2.

3. Amount of Recovery. — See notes 4, 5.

Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; Johnson v. McDaniel, 5 Ohio Dec. 717; Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

**Need Not Prove Innocence of Charge for Which Prosecuted.** — Magowan v. Rickey, 64 N. J. L. 402.

**700.** 7. Want of Probable Cause — Burden of Proof — *United States.* — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317.

*Alabama.* — Southern Car, etc., Co. v. Adams, 131 Ala. 147.

*Arkansas.* — Kansas, etc., Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79.

*California.* — Griswold v. Griswold, 143 Cal. 617.

*Delaware.* — Herbener v. Crossan, 4 Penn. (Del.) 38.

*Illinois.* — Tumatly v. Parker, 100 Ill. App. 382; Waters v. West Chicago St. R. Co., 101 Ill. App. 265.

*Indiana.* — Hutchinson v. Wenzel, 155 Ind. 49; Lautman v. Pepin, 26 Ind. App. 427.

*Kentucky.* — Burks v. Ferriell, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.

*Massachusetts.* — Laing v. Mitten, 185 Mass. 233.

*Nebraska.* — Maynard v. Sigman, 65 Neb. 590; Figg v. Hanger, (Neb. 1903) 96 N. W. Rep. 658.

*New Hampshire.* — Cohn v. Saidel, 71 N. H. 558.

*New York.* — O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; Bankell v. Weinacht, 99 N. Y. App. Div. 316; Burt v. Smith, 181 N. Y. 1.

*Ohio.* — Johnson v. McDaniel, 5 Ohio Dec. 717; Scott v. Dewey, 23 Pa. Super. Ct. 396.

*Pennsylvania.* — Replogle v. Frothingham, 16 Pa. Super. Ct. 374; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Glace v. Hummel, 24 Pa. Co. Ct. 550, 10 Pa. Dist. 110; Lipowicz v. Jervis, 209 Pa. St. 315.

*Rhode Island.* — Fox v. Smith, 26 R. I. 1.

*South Dakota.* — Richardson v. Dybedahl, 14 S. Dak. 126.

*Virginia.* — Boush v. Fidelity, etc., Co., 100 Va. 735.

*Washington.* — Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

*West Virginia.* — Harper v. Harper, 49 W. Va. 661.

*Wisconsin.* — Cullen v. Hanisch, 114 Wis. 24.

**Where the Plaintiff's Evidence Shows Probable Cause** the court should direct a verdict for the defendant. Lear v. Watson, 16 Montg. Co. Rep. (Pa.) 150; Burt v. Smith, 181 N. Y. 1.

**701.** 1. When Burden Shifts. — Stubbs v. Mulholland, 168 Mo. 47; Toth v. Greisen, (N. J. 1902) 51 Atl. Rep. 927; Jones v. Wilmington, etc., R. Co., 131 N. Car. 133; Scott v. Dewey, 23 Pa. Super. Ct. 396.

**Verdict of Acquittal.** — Compare Lear v. Wat-

son, 16 Montg. Co. Rep. (Pa.) 150; Scott v. Dewey, 23 Pa. Super. Ct. 396.

**Discharge by Examining Magistrate Does Not Shift Burden.** — Griswold v. Griswold, 143 Cal. 617; Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886; Charlton v. Markland, 36 Wash. 40.

**2. Burden to Show Malice on Plaintiff** — *United States.* — Ambs v. Atchison, etc., R. Co., 114 Fed. Rep. 317.

*Alabama.* — Southern Car, etc., Co. v. Adams, 131 Ala. 147.

*Arkansas.* — Kansas, etc., Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79.

*California.* — Griswold v. Griswold, 143 Cal. 617.

*Illinois.* — Tumatly v. Parker, 100 Ill. App. 382.

*Indiana.* — Judy v. Gifford, 33 Ind. App. 353.

*Kentucky.* — Burks v. Ferriell, 80 S. W. Rep. 809, 26 Ky. L. Rep. 36.

*Massachusetts.* — Laing v. Mitten, 185 Mass. 233.

*Nebraska.* — Maynard v. Sigman, 65 Neb. 590.

*New Hampshire.* — Cohn v. Saidel, 71 N. H. 558.

*New York.* — O'Dell v. Hatfield, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 13; Bankell v. Weinacht, 99 N. Y. App. Div. 316.

*Pennsylvania.* — Replogle v. Frothingham, 16 Pa. Super. Ct. 374; Scott v. Dewey, 23 Pa. Super. Ct. 306; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Lipowicz v. Jervis, 209 Pa. St. 315.

*Rhode Island.* — Fox v. Smith, 26 R. I. 1.

**702.** 1. Malice — When Burden of Proof Shifts. — Stubbs v. Mulholland, 168 Mo. 47, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 702; Butcher v. Hoffman, 99 Mo. App. 239; Toth v. Greisen, (N. J. 1902) 51 Atl. Rep. 927.

**2. Proof of Damages.** — Herbener v. Crossan, 4 Penn. (Del.) 38; Bonney v. King, 201 Ill. 47; McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 93 Am. St. Rep. 440.

**Where Damages Are Necessarily Inferable** from the facts alleged, a statement of such facts sufficiently states the damages. Luby v. Bennett, 111 Wis. 613, 37 Am. St. Rep. 897.

**4. Question for Jury.** — Rule v. McGregor, 115 Iowa 323.

**5.** Tamblin v. Johnston, (C. C. A.) 126 Fed. Rep. 267; National Surety Co. v. Mabry, 139 Ala. 217; Scott v. Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321; Rawson v. Leggett, 97 N. Y. App. Div. 416.

**For Instances of Verdicts Held to Be Excessive.** — Gray v. Fanning, 73 Conn. 115; Shea v. Cloquet Lumber Co., 92 Minn. 348; Ruth v. St. Louis Transit Co., 98 Mo. App. 1; Farrell v. St. Louis Transit Co., 103 Mo. App. 454.

**For Instances of Verdicts Held Not to Be Excessive.** — Rule v. McGregor, 115 Iowa 323; Fiola v. McDonald, 85 Minn. 147; Rawson v. Leg-

**702.** 4. **Elements of Recovery** — *a.* DEPRIVATION OF LIBERTY. — See note 6.

**703.** *b.* VALUE OF TIME LOST — INTERRUPTION OF BUSINESS. — See note 1.

*c.* EXPENSES OF LITIGATION. — See note 2.

*d.* MENTAL SUFFERING. — See note 5.

**704.** *e.* INJURIES TO CREDIT AND REPUTATION. — See note 1.

*f.* INJURIES TO PROPERTY. — See note 2.

5. **Exemplary Damages.** — See note 3.

gett, 97 N. Y. App. Div. 416; *Charlton v. Markland*, 36 Wash. 40; *Eggett v. Allen*, 119 Wis. 625.

**702.** 6. **Deprivation of Liberty.** — *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Merchant v. Pielke*, 10 N. Dak. 48; *Ten Cate v. Fansler*, 10 Okla. 7.

**No Recovery for Peril to Life.** — *Kansas*, etc., *Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79.

**Filthy Condition of Jail May Be Shown.** — *Fuqua v. Gambill*, 140 Ala. 468, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 702; *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.

**703.** 1. **Loss of Time — Interruption of Business.** — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Rule v. McGregor*, 115 Iowa 323; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Kelly v. Durham Traction Co.*, 132 N. Car. 368; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Ten Cate v. Fansler*, 10 Okla. 7; *Porter v. Mack*, 50 W. Va. 595.

**Loss of Employment.** — *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.

**No Recovery Where Loss Remote Consequence.** — *Cooper v. Scyoc*, 104 Mo. App. 414.

2. **Expenses of Litigation — Counsel's Fees.** — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *Harr v. Ward*, 73 Ark. 437; *Herbener v. Crossan*, 4 Penn. (Del.) 43; *Rule v. McGregor*, 115 Iowa 323; *Connelly v. White*, 122 Iowa 391; *Hlubek v. Pinske*, 84 Minn. 363; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Rawson v. Leggett*, 97 N. Y. App. Div. 416; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Bartholomew v. Metropolitan L. Ins. Co.*, 1 Ohio Dec. 267, 7 Ohio N. P. 209; *Ten Cate v. Fansler*, 10 Okla. 7.

5. **Mental Suffering.** — *Ambs v. Atchison*, etc., R. Co., 114 Fed. Rep. 317; *Herbener v. Crossan*, 4 Penn. (Del.) 38; *Rule v. McGregor*, 115 Iowa 323; *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Dwyer v. St. Louis Transit Co.*, 108 Mo. App. 152; *Cohn v. Saidel*, 71 N. H. 558; *Kelly v. Durham Traction Co.*, 132 N. Car. 368; *Johnson v. McDaniel*, 5 Ohio Dec. 717; *Ten Cate v. Fansler*, 10 Okla. 7.

**Recovery for Indignity.** — *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242.

**Domestic Conditions — Evidence of Held Admissible.** — *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242; *Stoecker v. Nathanson*, (Neb. 1904) 98 N. W. Rep. 1061.

**704.** 1. **Credit and Reputation** — *United States*. — *Ambs v. Atchison*, etc., R. Co., 114

Fed. Rep. 317; *Wade v. National Bank of Commerce*, 114 Fed. Rep. 377; *Tamblyn v. Johnston*, (C. C. A.) 126 Fed. Rep. 267.

*Colorado.* — *French v. Guyot*, 30 Colo. 222. *Delaware.* — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

*Illinois.* — *Waters v. West Chicago St. R. Co.*, 101 Ill. App. 265.

*Iowa.* — *Rule v. McGregor*, 115 Iowa 323; *Flam v. Lee*, 116 Iowa 289, 93 Am. St. Rep. 242.

*Missouri.* — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1.

*Montana.* — *Hayes v. Union Mercantile Co.*, 27 Mont. 272, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

*Nebraska.* — *Miles v. Walker*, 66 Neb. 728.

*New York.* — *Scott v. Dennett Surpassing Coffee Co.*, 51 N. Y. App. Div. 321; *Brown v. Smallwood*, 86 N. Y. App. Div. 76.

*North Carolina.* — *Kelly v. Durham Traction Co.*, 132 N. Car. 368.

*Ohio.* — *Eihlert v. Gommoll*, 23 Ohio Cir. Ct. 586; *Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Oklahoma.* — *Ten Cate v. Fansler*, 10 Okla. 7. *Pennsylvania.* — *Glance v. Hummel*, 24 Pa. Co. Ct. 550, 10 Pa. Dist. 110.

*Texas.* — *Curlee v. Rose*, 27 Tex. Civ. App. 259.

*Wisconsin.* — *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897.

**Attachment Suit.** — In an action for the malicious prosecution of an attachment suit, injuries to credit or character or business are too remote, uncertain, and speculative to be considered. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153.

2. **Injuries to Property.** — *Luby v. Bennett*, 111 Wis. 613, 87 Am. St. Rep. 897.

In a suit for the malicious prosecution of an attachment suit it is competent to show damages sustained by reason of a party being unable to dispose of the property levied upon. *French v. Guyot*, 30 Colo. 222.

**Search of Dwelling.** — *Herbener v. Crossan*, 4 Penn. (Del.) 38.

3. **Exemplary Damages** — *United States*. — *Tamblyn v. Johnston*, (C. C. A.) 126 Fed. Rep. 267.

*Alabama.* — *Southern Car, etc., Co. v. Adams*, 131 Ala. 147; *National Surety Co. v. Mabry*, 139 Ala. 217.

*Georgia.* — *Woodley v. Coker*, 119 Ga. 226.

*Iowa.* — *Connelly v. White*, 122 Iowa 391.

*Missouri.* — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1; *Farrell v. St. Louis Transit Co.*, 103 Mo. App. 454; *Cooper v. Scyoc*, 104 Mo. App. 414.

*Montana.* — *Hayes v. Union Mercantile Co.*,

**705. MALT LIQUOR.** — See note 1.

**MALUM IN SE AND MALUM PROHIBITUM.** — See note 2.

**706. MANAGE.** — See note 1.

**MANAGEMENT.** — See note 2.

**707. MANAGER.** — See note 1.

27 Mont. 272, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

*North Carolina.* — Kelly v. Durham Traction Co., 132 N. Car. 368, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

*Ohio.* — Johnson v. McDaniel, 5 Ohio Dec. 717.

*Oklahoma.* — Ten Cate v. Fansler, 10 Okla. 7.

*West Virginia.* — Porter v. Mack, 50 W. Va.

595.

*Wisconsin.* — Eggett v. Allen, 119 Wis. 625.

**705. 1. Malt Liquor.** — State v. Gill, 89 Minn. 502; State v. Reily, 66 N. J. L. 399.

**Includes Intoxicants and Nonintoxicants.** — Allen v. Melrose, 184 Mass. 1.

2, Turner v. Merchants Bank, 126 Ala. 397.

**706. 1. Manage.** — Saunders v. U. S. Marble Co., 25 Wash. 475.

2. **Management of Cemetery.** — Tacoma v. Tacoma Cemetery, 28 Wash. 238.

**707. 1. Manager.** — State v. Hemenover, 188 Mo. 381, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707; Clinard v. White, 129 N. Car. 250.

**Managing Agent.** — Brown v. Chicago, etc., R. Co., 12 N. Dak. 61.

# MANDAMUS.

BY G. W. WALSH.

**716. I. DEFINITION AND SCOPE OF ARTICLE** — Definition. — See note 1.

**II. NATURE AND ORIGIN OF REMEDY** — 1. Origin and History. — See note 2.

**717.** See notes 1, 3.

2. Prerogative Character. — See notes 4, 5.

**718.** See note 2.

3. Civil or Criminal Character. — See note 3.

4. Legal or Equitable Character. — See note 5.

**719.** 5. Action or Special Proceeding. — See notes 2, 3.

**720.** See notes 1, 3.

6. Extraordinary Character. — See note 4.

**716. 1. Mandamus Defined.** — *State v. Nerry*, 105 Mo. App. 458, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 16 [7161]; *State v. Police Com'rs*, 108 Mo. App. 98; *Hoover v. Reap*, 10 Kulp (Pa.) 59.

2. Originally Not a Judicial Writ. — *Atlanta v. Wright*, 119 Ga. 211, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 716.

**717. 1. Later a Judicial Writ.** — *Atlanta v. Wright*, 119 Ga. 211, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

History of Writ. — *People v. Board of Trade*, 193 Ill. 577.

3. Used Only in Absence of Other Adequate Remedy. — *Dorrington v. Yuma County*, (Ariz. 1902) 68 Pac. Rep. 541; *State v. Wright*, 26 Mont. 540, 91 Am. St. Rep. 421; *State v. McQuade*, 36 Wash. 579.

4. Mandamus a Prerogative Writ. — *Rex v. Canterbury*, (1902) 2 K. B. 503, 86 L. T. N. S. 450; *Road Com'rs v. New Castle*, 2 Penn. (Del.) 466; *People v. Chicago*, 193 Ill. 507; *People v. Board of Trade*, 193 Ill. 577; *Cicero v. People*, 105 Ill. App. 406; *Beasley v. Ridout*, 94 Md. 641; *Bacon v. Chosen Freeholders*, 69 N. J. L. 195; *Cullen v. New York Telephone Co.*, 106 N. Y. App. Div. 250; *Com. v. State Treasurer*, 13 Pa. Dist. 231.

5. Original Nature of Writ. — *Mystic Milling Co. v. Chicago*, etc., R. Co., 132 Fed. Rep. 289; *State v. Clinton County*, 162 Ind. 580.

**718. 2. Mandamus Not a Prerogative Writ.** — *Mystic Milling Co. v. Chicago*, etc., R. Co., 132 Fed. Rep. 289; *Stott v. Chicago*, 205 Ill. 281; *Windsor v. Polk County*, 115 Iowa 738; *Moores v. State*, (Neb. 1903) 93 N. W. Rep. 986; *Matter of Epley*, 10 Okla. 631; *State v. Cranney*, 30 Wash. 594; *State v. McQuade*, 36 Wash. 579.

3. Mandamus a Civil Remedy and Not a Criminal Prosecution. — *State v. Board of Education*, 11 Ohio Dec. 422, 8 Ohio N. P. 186; *Hall v. Staunton*, 55 W. Va. 684.

5. Mandamus a Legal Proceeding. — *Carter County v. Schmalstig*, (C. C. A.) 127 Fed. Rep. 126; *Cleveland v. U. S.*, (C. C. A.) 127 Fed. Rep. 667; *Burlington*, etc., R. Co. v. *People*, (Colo. App. 1904) 77 Pac. Rep. 1026; *People*

*v. Board of Trade*, 193 Ill. 577; *Mason v. Byrley*, 84 S. W. Rep. 767, 26 Ky. L. Rep. 487; *Mercur v. Media Electric Light, etc., Co.*, 19 Pa. Super. Ct. 519; *Douglas v. McLean*, 25 Pa. Super. Ct. 9.

In Tennessee. — *State v. King*, (Tenn. Ch. 1901) 62 S. W. Rep. 314.

**719. 2. Mandamus an Action at Law.** — *Cleary v. Hoobler*, 207 Ill. 97; *Chicago v. People*, 210 Ill. 84; *Bolton v. People*, 95 Ill. App. 285; *Hall v. Mann*, 96 Ill. App. 659; *McDonald v. Judson*, 97 Ill. App. 414; *Chicago v. People*, 210 Ill. 84; *Watts v. Sangamon County*, 212 Ill. 86; *Seymour Water Co. v. Seymour*, 163 Ind. 120; *Moores v. State*, (Neb. 1903) 93 N. W. Rep. 986; *Matter of Epley*, 10 Okla. 631.

3. Mandamus a Civil Action under Code. — *Orman v. People*, 18 Colo. App. 302; *Seymour Water Co. v. Seymour*, 163 Ind. 120; *Windsor v. Polk County*, 115 Iowa 738; *State v. Mack*, 26 Nev. 430; *People v. Old Guard*, 87 N. Y. App. Div. 478, *affirmed* 178 N. Y. 576; *State v. Philbrick*, 69 Ohio St. 283; *State v. McQuade*, 36 Wash. 579; *State v. Chittenden*, 107 Wis. 354; *State v. Giljohann*, 111 Wis. 377; *State v. Policemen's Pension Fund*, 121 Wis. 44.

**720. 1. Mandamus a Special Proceeding.** — *Hart v. State*, 161 Ind. 189.

"The Application for a writ of mandate is a special proceeding of a civil nature." *Jones v. Police Com'rs*, 141 Cal. 96.

3. Mandamus in Nature of Action. — *State v. Policemen's Pension Fund*, 121 Wis. 44.

4. An Extraordinary Remedy — *United States*. — *U. S. v. Lehigh Valley R. Co.*, 115 Fed. Rep. 373.

*Alabama*. — *Ex p. Campbell*, 130 Ala. 171; *Southern R. Co. v. Walker*, 132 Ala. 62.

*California*. — *Williams v. Bagnelle*, (Cal. 1902) 70 Pac. Rep. 1058.

*Connecticut*. — *Hartford v. Hartford St. R. Co.*, 74 Conn. 194; *Lahiff v. St. Joseph's Total Abstinence, etc., Soc.*, 76 Conn. 648, 100 Am. St. Rep. 1012.

*Indiana*. — *Seymour Water Co. v. Seymour*, 163 Ind. 120.

*Kansas*. — *Davis v. Jewett*, 69 Kan. 651.



**721.** 8. *Mandamus Compared with Other Remedies* — *a.* INJUNCTION. — See notes 5, 6, 7, 8.

*b.* PROHIBITION. — See note 10.

**722.** *d.* CERTIORARI. — See note 6.

**723.** 10. *Mandamus as Res Judicata*. — See notes 2, 3.

III. PRINCIPLES GOVERNING ISSUANCE OF WRIT — 1. In General — Statement of Rule. — See notes 4, 5.

**724.** Statutory and Common-law Duties. — See notes 1, 2.

Stipulation or Agreement. — See note 3.

Restricted Use of Writ. — See note 4.

**725.** 2. Nature of Acts Compelled by *Mandamus* — *a.* IN GENERAL. — See notes 1, 2.

*Massachusetts*. — *Selectmen v. Templeton* St. R. Co., 184 Mass. 294.

*Michigan*. — *Clarke v. Hill*, 132 Mich. 434, 9 Detroit Leg. N. 671.

*Nebraska*. — *State v. Holmes*, (Neb. 1903) 97 N. W. Rep. 243.

*New Hampshire*. — *Storer Post, etc., v. Page*, 70 N. H. 280.

*New York*. — *People v. Listman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, affirmed 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784.

*Ohio*. — *State v. Board of Education*, 25 Ohio Cir. Ct. 424.

*Oklahoma*. — *Territory v. Crum*, 13 Okla. 9.

*Texas*. — *Watkins v. Huff*, (Tex. Civ. App. 1901) 63 S. W. Rep. 922, writ of error denied 94 Tex. 631.

*Virginia*. — *Rowe v. Drisgell*, 100 Va. 137, 4 Va. Sup. Ct. 1.

*Wyoming*. — *State v. Chatterton*, 12 Wyo. 168.

**721.** 5. *Mandamus Does Not Lie to Restrain Action*. — *State v. Clinton County*, 162 Ind. 580; *State v. Connersville Natural Gas Co.*, 163 Ind. 563, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721; *Newlin v. Harris*, 209 Pa. St. 558.

6. *Mandamus the Proper Remedy to Compel Action*. — *Board of Public Education v. Felder*, 116 Ga. 790, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 721; *Coleman v. New York*, 70 N. Y. App. Div. 218, affirmed 173 N. Y. 612; *State v. Board of Education*, 25 Ohio Cir. Ct. 424.

7. *Mandamus Used to Restrain Action*. — See *Elliott v. Detroit*, 121 Mich. 611.

8. *Injunction and Mandamus in Same Case*. — See *People v. Lewis*, 102 N. Y. App. Div. 408.

10. *Mandamus Counterpart of Prohibition*. — *Gates v. McGee*, 15 S. Dak. 247.

**722.** 6. *Mandamus and Certiorari Distinguished*. — *Corbett v. Naylor*, 25 R. I. 520. See also *Morgan v. Wetzel County Ct.*, 53 W. Va. 372.

**723.** 2. *Decision on Merits Operates as Res Judicata*. — *Hoffman v. Silverthorn*, (Mich. 1904) 100 N. W. Rep. 183, 11 Detroit Leg. N. 181.

3. *Decision Not on Merits No Bar to Second Application*. — *Hoffman v. Silverthorn*, (Mich. 1904) 100 N. W. Rep. 183, 11 Detroit Leg. N. 181. See also *Wierner v. Louisville Water Co.*, 130 Fed. Rep. 251; *State v. State Treasurer*, 68 S. Car. 411.

4. *Enforcement of Official Duty the Office of Mandamus*. — *State v. Beil*, 157 Ind. 25. See

also *Pulaski County v. De Lacy*, 114 Ga. 583; *Idaho Independent Telephone Co. v. Oregon Short Line R. Co.*, 8 Idaho 175.

5. *Writ Resulting from Office, Trust, or Station* — *United States*. — *Hair v. Burnell*, 106 Fed. Rep. 280.

*California*. — *McClatchy v. Matthews*, 135 Cal. 274; *Stanley-Taylor Co. v. San Francisco*, 135 Cal. 486; *Williams v. Bagnelle*, (Cal. 1902) 70 Pac. Rep. 1058; *Maxwell v. Fire Com'rs*, 139 Cal. 229; *Howe v. Southrey*, 144 Cal. 767. *Colorado*. — *Montrose v. Endner*, 18 Colo. App. 65.

*Indiana*. — *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463; *State v. Schmetzer*, 156 Ind. 528; *State v. Elliott*, 158 Ind. 168; *King v. Martin County*, 34 Ind. App. 231.

*Iowa*. — *Rummel v. Dealy*, 112 Iowa 503; *Leonard v. Wakeman*, 120 Iowa 140.

*Kansas*. — *Davis v. Jewett*, 69 Kan. 651.

*Ohio*. — *Selby v. State*, 63 Ohio St. 541; *Randall v. State*, 64 Ohio St. 57.

*Oklahoma*. — *Finley v. Territory*, 12 Okla. 621.

*South Dakota*. — *State v. Boyden*, (S. Dak. 1904) 100 N. W. Rep. 763.

*Washington*. — *State v. Cranney*, 30 Wash. 594; *State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858; *State v. Callvert*, 33 Wash. 380; *State v. McQuade*, 36 Wash. 579.

In *Louisiana*. — *State v. New Orleans Gas Light Co.*, 108 La. 67.

**724.** 1. *Statutory Duties*. — Generally as to the enforcement of statutory duties, see *State v. Lake Koen Nav., etc., Co.*, 63 Kan. 394; *State v. Coufal*, (Neb. 1901) 95 N. W. Rep. 362; *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551.

2. *Common-law Duties Enforced by Mandamus*. — *State v. Lake Koen Nav., etc., Co.*, 63 Kan. 394.

3. *Operation of Writ Cannot Be Enlarged by Waiver or Otherwise*. — *State v. Holmes*, (Neb. 1903) 97 N. W. Rep. 243.

4. *Remedy Not to Be Extended*. — *Lahiff v. St. Joseph's Total Abstinence, etc., Soc.*, 76 Conn. 648, 100 Am. St. Rep. 1012.

**725.** 1. *General Course of Conduct*. — *State v. Associated Press*, 150 Mo. 410, 81 Am. St. Rep. 368; *Godeil v. Woodbury*, 71 N. H. 378; *People v. Interurban St. R. Co.*, 177 N. Y. 296. But see *State v. Atlantic Coast Line R. Co.*, (Fla. 1904) 37 So. Rep. 652.

2. *Specific Acts Only Compelled*. — *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 650; *People v. Democratic Gen. Committee*, 175 N. Y. 415,

**725. b. CLEAR LEGAL RIGHTS AND DUTIES.** — See notes 3, 4.  
**727.** See note 1.

*affirming* 82 N. Y. App. Div. 173; *People v. Interurban St. R. Co.*, 177 N. Y. 296.

**725. 3. Lies to Enforce Clear Legal Rights and Duties** — *United States*. — *Weaver v. Ogden City*, 111 Fed. Rep. 323.

*Alabama*. — *State v. Waller*, 133 Ala. 199; *Moseley v. Collins*, 133 Ala. 326.

*Delaware*. — *Oxy-hydrogen Co. v. Simmons*, 3 Penn. (Del.) 291.

*Illinois*. — *McGann v. People*, 194 Ill. 526; *People v. Blocki*, 203 Ill. 363; *Yates v. People*, 207 Ill. 316; *People v. Rose*, 211 Ill. 252. See also *McNeill v. Chicago*, 212 Ill. 481.

*Indiana*. — *State v. Overman*, 157 Ind. 141.

*Iowa*. — See *Windsor v. Polk County*, 115 Iowa 738.

*Kentucky*. — *Williams v. Maysville Telephone Co.*, 82 S. W. Rep. 995, 26 Ky. L. Rep. 945.

*Louisiana*. — *State v. Brown*, 106 La. 437.

*Maine*. — *State v. Bangor*, 98 Me. 114.

*Maryland*. — *Westminster Water Co. v. Westminster*, 98 Md. 551; *Upshur v. Baltimore*, 94 Md. 743.

*Nebraska*. — *State v. Weston*, 67 Neb. 175.

*New Jersey*. — *Bierman v. Seymour*, 66 N. J. L. 122; *Barnert v. Board of Aldermen*, 69 N. J. L. 122; *Halsey v. Nowrey*, 71 N. J. L. 481.

*New Mexico*. — *Agricultural College v. Vaughn*, (N. Mex. 1904) 78 Pac. Rep. 51.

*New York*. — *People v. Ward*, 62 N. Y. App. Div. 531; *People v. Matthies*, 179 N. Y. 242, *affirming* 92 N. Y. App. Div. 16; *People v. Police Com'rs*, 174 N. Y. 450, *reversing* 79 N. Y. App. Div. 82; *People v. Interurban St. R. Co.*, 177 N. Y. 296, *dismissing appeal from* 85 N. Y. App. Div. 407.

*North Dakota*. — *State v. Albright*, 11 N. Dak. 22.

*Oklahoma*. — *Territory v. Crum*, 13 Okla. 9.

*Texas*. — *Shrewsbury v. Ellis*, 26 Tex. Civ. App. 406.

*Vermont*. — *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

*West Virginia*. — See *Hall v. Staunton*, 55 W. Va. 684.

*Wisconsin*. — *State v. Benzenberg*, 108 Wis. 435; *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551.

**4. Right or Duty Must Be Clear and Imperative** — *Alabama*. — *Minchener v. Carroll*, 135 Ala. 413, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

*Illinois*. — *McGann v. People*, 194 Ill. 526; *Yates v. People*, 207 Ill. 316; *People v. Chicago*, 210 Ill. 479; *People v. Rose*, 211 Ill. 252; *Bolton v. People*, 95 Ill. App. 285; *Seibert v. Swayne*, 97 Ill. App. 85; *Chicago v. People*, 98 Ill. App. 517; *Harrison v. People*, 101 Ill. App. 224; *Scanlan v. Schwab*, 103 Ill. App. 93; *People v. Perrin*, 103 Ill. App. 410; *Davis v. Miller Signal Co.*, 105 Ill. App. 657; *People v. Chicago*, 106 Ill. App. 72; *Lewis v. Drainage Com'rs*, 111 Ill. App. 222; *Knopf v. Corcoran*, 112 Ill. App. 320.

*Indiana*. — *State v. Elliott*, 158 Ind. 168.

*Kentucky*. — *German Security Bank v. Coulter*, 112 Ky. 577; *Louisville City Nat. Bank v. Coulter*, 112 Ky. 584.

*Louisiana*. — *State v. Smith*, 104 La. 370.

*Maryland*. — *Upshur v. Baltimore*, 94 Md. 743.

*Minnesota*. — *State v. Minneapolis*, 87 Minn. 156.

*Montana*. — *State v. District Ct.*, 29 Mont. 265; *State v. Toole*, 32 Mont. 4.

*Nebraska*. — *State v. Lincoln*, (Neb. 1903) 94 N. W. Rep. 719.

*Nevada*. — *State v. Mack*, 26 Nev. 85; *Hardin v. Guthrie*, 26 Nev. 246.

*New Jersey*. — *Bacon v. Chosen Freeholders*, 69 N. J. L. 195.

*New York*. — *Matter of Molineux*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 154, *affirmed* 88 N. Y. App. Div. 618; *People v. Woodbury*, 88 N. Y. App. Div. 443; *Dental Soc. v. Jacobs*, 103 N. Y. App. Div. 86; *People v. Greene*, 95 N. Y. App. Div. 397; *People v. Keating*, 168 N. Y. 390, *reversing* 62 N. Y. App. Div. 348.

*Ohio*. — *State v. Board of Elections*, 24 Ohio Cir. Ct. 654; *State v. Judges*, 69 Ohio St. 372; *State v. Smith*, 71 Ohio St. 13.

*Oklahoma*. — *Territory v. Crum*, 13 Okla. 9; *Christy v. Kingfisher*, 13 Okla. 585.

*South Carolina*. — *State v. Bowman*, 66 S. Car. 140; *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

*South Dakota*. — *Custer County Bank v. Custer County*, (S. Dak. 1904) 100 N. W. Rep. 424.

*Texas*. — *Moore v. Rogan*, 96 Tex. 375.

*Washington*. — *Northwestern Warehouse Co. v. Oregon R., etc., Co.*, 32 Wash. 218.

*West Virginia*. — *Hutton v. Holt*, 52 W. Va. 672.

*Wisconsin*. — *State v. Benzenberg*, 108 Wis. 435.

**727. 1. Writ Will Not Issue in Doubtful Cases** — *United States*. — *In re Key*, 189 U. S. 84.

*Delaware*. — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497; *Road Com'rs v. New Castle*, 2 Penn. (Del.) 466.

*Illinois*. — *McGann v. People*, 194 Ill. 526; *Scanlan v. Schwab*, 103 Ill. App. 93; *Davis v. Miller Signal Co.*, 105 Ill. App. 657; *People v. Chicago*, 106 Ill. App. 72; *Knopf v. Corcoran*, 112 Ill. App. 320.

*Indiana*. — *State v. Elliott*, 158 Ind. 168.

*Iowa*. — *Vincent v. Ellis*, 116 Iowa 615, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

*Maryland*. — *Westminster Water Co. v. Westminster*, 98 Md. 55.

*Missouri*. — *State v. Gibson*, 187 Mo. 536, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

*New Hampshire*. — *U. S. Fidelity, etc., Co. v. Linehan*, 71 N. H. 622, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 727.

*New Jersey*. — *Bacon v. Chosen Freeholders*, 69 N. J. L. 195.

*New York*. — *People v. Pierce*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 332; *Cullen v. New York Telephone Co.*, 106 N. Y. App. Div. 250.

*North Dakota*. — *State v. Albright*, 11 N. Dak. 22.

*Oklahoma*. — *Territory v. Crum*, 13 Okla. 9; *Territory v. Brown*, 14 Okla. 380.

**728.** See notes 2, 3.

**729.** See note 2.

**730.** See notes 1, 3, 4.

*c.* UNAUTHORIZED, ILLEGAL, OR PROHIBITED ACTS. — See note 5.

**731.** See notes 1, 3, 6.

**732.** *d.* EQUITABLE RIGHTS. — See note 1.

*e.* JUDICIAL AND DISCRETIONARY DUTIES. — See note 2.

*Texas.* — *Watkins v. Huff*, (Tex. Civ. App. 1901) 63 S. W. Rep. 922.

*Vermont.* — *Bankers' L. Ins. Co. v. Howland*,

73 Vt. 1.

*Washington.* — *State v. Byrne*, 32 Wash. 364.

*Wisconsin.* — *State v. McCann*, 107 Wis. 348.

**728.** 2. Right Must Exist at Time Writ Issues. — *Oxy-hydrogen Co. v. Simmons*, 3 Penn. (Del.) 291.

**3.** Writ Denied Because Right or Duty Claimed Did Not Exist. — *United States.* — *U. S. v. Saunders*, (C. C. A.) 124 Fed. Rep. 124.

*Colorado.* — *Stratton v. People*, 18 Colo. App. 85.

*Delaware.* — See *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497.

*Florida.* — *State v. Knott*, (Fla. 1904) 37 So. Rep. 307.

*Georgia.* — *Holtzclaw v. Riley*, 113 Ga. 1023.

*Kansas.* — *Sharpless v. Buckles*, 65 Kan. 838.

*Louisiana.* — *State v. Assessors*, 113 La. 925.

*Missouri.* — *State v. Brown*, 172 Mo. 374.

*New York.* — *Matter of O'Hara*, 63 N. Y. App. Div. 512; *People v. Calder*, 85 N. Y. App. Div. 31; *Matter of Molineux*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 154, *affirmed* 88 N. Y. App. Div. 618.

*Ohio.* — *Selby v. State*, 63 Ohio St. 541; *State v. Coleman*, 64 Ohio St. 377.

*Pennsylvania.* — *Hoover v. Reap*, 10 Kulp (Pa.) 59.

*Texas.* — *Boozar v. Terrell*, 96 Tex. 635; *Smith v. Conner*, 98 Tex. 434.

**729.** 2. Writ Imposes No New Powers or Duties. — *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *Ex p. Campbell*, 130 Ala. 171; *Sharpless v. Buckles*, 65 Kan. 838; *Davis v. Jewett*, 69 Kan. 651; *State v. Gentry*, 112 Mo. App. 589; *State v. Royse*, (Neb. 1903) 97 N. W. Rep. 473, *rehearing denied* (Neb. 1904) 98 N. W. Rep. 459; *People v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 549, *affirmed* 172 N. Y. 90; *State v. Albright*, 11 N. Dak. 22. See also *State v. District Ct.*, 26 Mont. 275.

**730.** 1. Compelling More than Statute Requires. — *State v. Williams*, 45 Oregon 314, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729 [730]; *Halliburton v. Martin*, 28 Tex. Civ. App. 127.

**3.** Only Mandatory Statutes Enforced by Mandamus. — *State v. Board of Education*, 10 Ohio Dec. 422, 8 Ohio N. P. 186.

**4.** Statutes Deemed Mandatory. — *Board of Liquidation v. U. S.*, (C. C. A.) 108 Fed. Rep. 689; *Kent v. U. S.*, (C. C. A.) 113 Fed. Rep. 232; *Crocker v. Conrey*, 140 Cal. 213; *State v. Gunn*, 92 Minn. 436.

**5.** Unauthorized or Illegal Acts. — *Farmers' Nat. Bank v. Jones*, 105 Fed. Rep. 459; *Haskens v. State*, 114 Ga. 837; *People v. Blocki*, 203 Ill. 363; *Louisville City Nat. Bank v. Coulter*, 112 Ky. 584; *Edward C. Jones Co. v. Gut-*

*tenberg*, 66 N. J. L. 58, *affirmed* 66 N. J. L. 659; *Smith v. Ferracute Mach. Co.*, 68 N. J. L. 237; *Justice v. Logan Tp.*, 71 N. J. L. 107; *Goodwin v. Carolina Telephone, etc., Co.*, 136 N. Car. 259; *Randall v. State*, 64 Ohio St. 57. *State v. Nichols*, 38 Wash. 309.

**731.** 1. Acts Forbidden by Statute or Ordinance. — *Eidson v. Flounlacker*, 115 Ky. 534, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 730 [731].

**3.** Acts Enjoined by Another Court. — *State v. Clinton County*, 162 Ind. 580; *State v. Snelling*, (Kan. 1905) 80 Pac. Rep. 966; *Rothschild v. Gould*, 84 N. Y. App. Div. 196.

**Where the Court Was Without Jurisdiction.** — *State v. Carlson*, (Neb. 1904) 101 N. W. Rep. 1004; *Morgan v. Wetzel County Ct.*, 53 W. Va. 372.

**6.** Acts Prohibited by Superior. — *Eidson v. Flounlacker*, 115 Ky. 534; *State v. Williams*, 45 Oregon 314, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 731; *State v. Hartman*, 26 Wash. 524.

**732.** 1. Equitable Rights Not Enforced. — *Davis v. Miller Signal Co.*, 105 Ill. App. 657; *Mocres v. State*, (Neb. 1903) 93 N. W. Rep. 986; *Riggins v. Richards*, (Tex. Civ. App. 1904) 79 S. W. Rep. 86, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732; *Howe v. Rose*, 35 Tex. Civ. App. 328. *Compare State v. Giljohann* 111 Wis. 377.

**2.** Action Compelled — *England.* — See *Rex v. Stepney*, (1902) 1 K. B. 317, 71 L. J. K. B. 238, 86 L. T. N. S. 21, 50 W. R. 412, 66 J. P. 183.

*United States.* — *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.*, (C. C. A.) 126 Fed. Rep. 746; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.

*Alabama.* — *Ex p. Campbell*, 130 Ala. 171

*Colorado.* — *Merwin v. Boulder County*, 29 Colo. 169; *Orman v. People*, 18 Colo. App. 302.

*Illinois.* — *State Board of Examiners v. People*, 93 Ill. App. 436; *Davis v. Miller Signal Co.*, 105 Ill. App. 657. See also *People v. Mottinger*, 212 Ill. 530.

*Indian Territory.* — *Horton v. Gill*, (Indian Ter. 1904) 82 S. W. Rep. 718.

*Iowa.* — *Leonard v. Wakeman*, 120 Iowa 140; *Preston v. Board of Education*, 124 Iowa 355.

*Kentucky.* — *Young v. Beckham*, 115 Ky. 246.

*Louisiana.* — *State v. St. Paul*, 113 La. 1066.

*Maryland.* — *Robey v. Prince George County*, 92 Md. 150; *Duvall v. Swann*, 94 Md. 608.

*Michigan.* — *Hallwood Cash Register Co. v. Mandell*, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818.

*Missouri.* — *State v. Walker*, 85 Mo. App. 247.

*Montana.* — *State v. District Ct.*, 25 Mont. 202.

*Nevada.* — *Hardin v. Guthrie*, 26 Nev. 246; *State v. Curler*, 26 Nev. 347.

**733.** See note 1.

*New Jersey.* — *Bierman v. Seymour*, 66 N. J. L. 122; *Cooper v. Springer*, (N. J. 1902) 52 Atl. Rep. 996.

*New York.* — *People v. Collier*, 175 N. Y. 196; *Myer v. Adam*, 63 N. Y. App. Div. 540, affirmed 169 N. Y. 605; *People v. Casey*, 66 N. Y. App. Div. 211; *People v. Hanes*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 475; *People v. Foster*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 19, affirmed 87 N. Y. App. Div. 193.

*North Carolina.* — *Ewbank v. Turner*, 134 N. Car. 77; *Loughran v. Hickory*, 129 N. Car. 281; *Barnes v. Wilson County*, 135 N. Car. 27.

*Ohio.* — *State v. Smith*, 69 Ohio St. 196.

*Pennsylvania.* — *Douglas v. McLean*, 25 Pa. Super. Ct. 9.

*Rhode Island.* — *Kenney v. State Board of Dentistry*, 26 R. I. 538.

*South Carolina.* — *Richland Drug Co. v. Moorman*, 71 S. Car. 236.

*Texas.* — *Gouhenour v. Anderson*, 35 Tex. Civ. App. 569.

*Washington.* — *Hester v. Thomson*, 35 Wash. 125, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732.

*West Virginia.* — *Poling v. Board of Education*, 50 W. Va. 374; *Fleshman v. McWhorter*, 54 W. Va. 161.

*Wisconsin.* — *State v. Chittenden*, 112 Wis. 569.

**733. 1. Judgment or Discretion Not Controlled by Mandamus** — *England.* — *Rex v. Justices*, 86 L. T. N. S. 589, 66 J. P. 547.

*United States.* — *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.*, (C. C. A.) 126 Fed. Rep. 746; *In re Coleman*, 131 Fed. Rep. 151; *U. S. v. Hitchcock*, 190 U. S. 316, affirming 21 App. Cas. (D. C.) 252.

*Alabama.* — *Ex p. Campbell*, 130 Ala. 171; *Harlan v. State*, 136 Ala. 150; *State v. Jelks*, 138 Ala. 115.

*Arizona.* — *Dorrington v. Yuma County*, (Ariz. 1902) 68 Pac. Rep. 541.

*California.* — *Riverside County v. San Bernardino County*, 134 Cal. 517; *Walker v. Superior Ct.*, 139 Cal. 108.

*Colorado.* — *Hover v. People*, 17 Colo. App. 375; *Orman v. People*, 18 Colo. App. 302; *Lockhaven Trust, etc., Co. v. U. S. Mortgage, etc., Co.*, 18 Colo. App. 447. See also *Merwin v. Boulder County*, 29 Colo. 169.

*Connecticut.* — *State v. Hurley*, 73 Conn. 536.

*District of Columbia.* — *U. S. v. Hitchcock*, 19 App. Cas. (D. C.) 333; *U. S. v. Hitchcock*, 19 App. Cas. (D. C.) 237, 503; *U. S. v. Root*, 22 App. Cas. (D. C.) 419.

*Georgia.* — *Atlanta v. Wright*, 119 Ga. 211.

*Illinois.* — *State Board of Examiners v. People*, 93 Ill. App. 436; *State Board of Health v. People*, 102 Ill. App. 614; *People v. Church*, 103 Ill. App. 132.

*Indian Territory.* — *Horton v. Gill*, (Indian Ter. 1904) 82 S. W. Rep. 718.

*Iowa.* — *Leonard v. Wakeman*, 120 Iowa 140; *Preston v. Board of Education*, 124 Iowa 355.

*Kansas.* — *Ward v. Piper*, 69 Kan. 773; *Davis v. Jewett*, 69 Kan. 651.

*Kentucky.* — *Blair v. McCann*, 64 S. W. Rep. 984, 23 Ky. L. Rep. 1226; *Northington v. Sub-*

*lette*, 114 Ky. 72; *Young v. Beckham*, 115 Ky. 246.

*Louisiana.* — *State v. Smith*, 111 La. 319, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740 [733]; *State v. Sommersville*, 105 La. 312; *State v. Sommersville*, 110 La. 953; *State v. Sommersville*, 111 La. 1015.

*Maryland.* — *Robey v. Prince George County*, 92 Md. 156.

*Massachusetts.* — *Provident Sav. L. Assur. Soc. v. Cutting*, 181 Mass. 261, 92 Am. St. Rep. 415.

*Michigan.* — *Stenglein v. Saginaw Circuit Judge*, 128 Mich. 440, 8 Detroit Leg. N. 721; *Bailey v. Van Buren Circuit Judge*, (Mich. 1901) 87 N. W. Rep. 890, 8 Detroit Leg. N. 798; *Beebe v. State Land Office*, (Mich. 1904) 100 N. W. Rep. 128, 11 Detroit Leg. N. 197; *Hallwood Cash Register Co. v. Mandell*, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818.

*Minnesota.* — *State v. Northfield*, (Minn. 1904) 101 N. W. Rep. 1063.

*Missouri.* — *State v. Butler County*, 164 Mo. 214; *State v. Cook*, 174 Mo. 100; *State v. Thomas*, 183 Mo. 220; *State v. McCammon*, 111 Mo. App. 626; *State v. Gentry*, 112 Mo. App. 589; *State v. Stiff*, 104 Mo. App. 685; *State v. Higgins*, 84 Mo. App. 531; *State v. Walker*, 85 Mo. App. 247.

*Montana.* — *State v. Second Judicial District Ct.*, 24 Mont. 566; *State v. First Judicial District Ct.*, 24 Mont. 539; *State v. District Ct.*, 25 Mont. 202; *State v. District Ct.*, 26 Mont. 275; *State v. District Ct.*, 26 Mont. 372; *State v. District Ct.*, 27 Mont. 280; *State v. District Ct.*, 30 Mont. 8.

*Nebraska.* — *State v. Lincoln*, (Neb. 1903) 94 N. W. Rep. 719; *State v. Stull*, (Neb. 1902) 96 N. W. Rep. 121.

*New Jersey.* — *Bierman v. Seymour*, 66 N. J. L. 122.

*New York.* — *People v. Collier*, 175 N. Y. 196, reversing 78 N. Y. App. Div. 620, 79 N. Y. App. Div. 636; *People v. Monticello*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 675; *People v. Hanes*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 475; *People v. Casey*, 66 N. Y. App. Div. 211; *People v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 549, affirmed 172 N. Y. 90; *Donovan v. Cantor*, 89 N. Y. App. Div. 50; *Dill v. Wheeler*, 100 N. Y. App. Div. 155; *Friel v. McAdoo*, 101 N. Y. App. Div. 155, affirmed 181 N. Y. 558; *Candee v. Cunneen*, 92 N. Y. App. Div. 71.

*North Carolina.* — *Ewbank v. Turner*, 134 N. Car. 77; *Barnes v. Wilson County*, 135 N. Car. 27.

*North Dakota.* — *State v. District Ct.*, 13 N. Dak. 211.

*Ohio.* — *State v. Hermann*, 63 Ohio St. 440; *Selby v. State*, 63 Ohio St. 541; *State v. Smith*, 69 Ohio St. 196; *State v. Judges*, 69 Ohio St. 372; *State v. Spiegel*, 11 Ohio Cir. Dec. 313, 20 Ohio Cir. Ct. 597; *State v. Board of Education*, 24 Ohio Cir. Ct. 383; *State v. Board of Education*, 25 Ohio Cir. Ct. 424; *State v. Spiegel*, 25 Ohio Cir. Ct. 552; *State v. Board of Education*, 11 Ohio Dec. 422, 8 Ohio N. P. 186.

**737.** See note 1.

**739.** See notes 1, 2.

**740.** See note 1.

*f.* MINISTERIAL DUTIES. — See note 2.

*Oregon.* — *Hayes v. Clifford*, 42 *Oregon* 568.  
*Pennsylvania.* — *Patterson v. School Directors*, 24 *Pa. Co. Ct.* 574; *Douglas v. McLean*, 25 *Pa. Super. Ct.* 9; *Miller v. Clement*, 205 *Pa. St.* 484.

*Rhode Island.* — *Corbett v. Naylor*, 25 *R. I.* 520; *Kenney v. State Board of Dentistry*, 26 *R. I.* 538.

*South Carolina.* — *Richland Drug Co. v. Moorman*, 71 *S. Car.* 236.

*Texas.* — *Aycock v. Clark*, 94 *Tex.* 375; *Le-wright v. Bell*, 94 *Tex.* 556; *Testard v. Brooks*, (*Tex. Civ. App.* 1902) 70 *S. W. Rep.* 240; *Matlock v. Smith*, 96 *Tex.* 211; *Gouhenour v. Anderson*, 35 *Tex. Civ. App.* 569.

*Virginia.* — *Simons v. Military Board*, 99 *Va.* 390; *Rowe v. Drisgell*, 100 *Va.* 137, 4 *Va. Sup. Ct.* 1.

*Washington.* — *Hester v. Thomson*, 35 *Wash.* 125, quoting 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 732 [733].

*West Virginia.* — *Poling v. Board of Educa-tion*, 50 *W. Va.* 374; *Roberts v. Paul*, 50 *W. Va.* 528; *Fleshman v. McWhorter*, 54 *W. Va.* 161.

*Wisconsin.* — *State v. McCann*, 107 *Wis.* 348; *State v. Chittenden*, 112 *Wis.* 569; *State v. Wil-son*, 121 *Wis.* 523.

**737. 1. Will Not Lie After Exercise of Dis-cretion** — *United States.* — *U. S. v. Hitchcock*, 190 *U. S.* 316, affirming 21 *App. Cas.* (*D. C.*) 252; *U. S. v. Marshall*, (*C. C. A.*) 122 *Fed. Rep.* 428; *Minnesota Moline Plow Co. v. Dow-agiac Mfg. Co.*, (*C. C. A.*) 126 *Fed. Rep.* 746; *Barber Asphalt Paving Co. v. Morris*, (*C. C. A.*) 132 *Fed. Rep.* 945.

*Alabama.* — *Ex p. Campbell*, 130 *Ala.* 171; *Ex p. Colley*, 140 *Ala.* 193.

*California.* — *Sullivan v. Gage*, 145 *Cal.* 759.

*Georgia.* — *Atlanta v. Wright*, 119 *Ga.* 212, quoting 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 733 [737].

*Illinois.* — *People v. Mottinger*, 212 *Ill.* 530.

*Indian Territory.* — *Horton v. Gill*, (*Indian Ter.* 1904) 82 *S. W. Rep.* 718.

*Kentucky.* — *Atkinson v. Riley*, 63 *S. W. Rep.* 752, 23 *Ky. L. Rep.* 731.

*Louisiana.* — *State v. King*, 105 *La.* 731; *State v. St. Paul*, 110 *La.* 722; *State v. St. Paul*, 113 *La.* 1066.

*Massachusetts.* — *Provident Sav. L. Assur. Soc. v. Cutting*, 181 *Mass.* 261, 92 *Am. St. Rep.* 415.

*Michigan.* — *Bailey v. Van Buren Circuit Judge*, (*Mich.* 1901) 87 *N. W. Rep.* 890, 8 *Detroit Leg. N.* 798.

*Missouri.* — *State v. Walker*, 85 *Mo. App.* 247.

*Montana.* — *State v. District Ct.*, 25 *Mont.* 202.

*Nebraska.* — *State v. Jessen*, 66 *Neb.* 515.

*New York.* — *People v. Woodbury*, 88 *N. Y. App. Div.* 597, affirming 179 *N. Y.* 525, citing 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 737; *Tuttle v. Iron Nat. Bank*, 170 *N. Y.* 9; *People v. Collier*, 175 *N. Y.* 106; *People v. Casey*, 66 *N. Y. App. Div.* 211; *People v. Lindenthal*, 77

*N. Y. App. Div.* 515; *Donovan v. Cantor*, 89 *N. Y. App. Div.* 50; *People v. Hanes*, (*Supm. Ct. Tr. T.*) 44 *Misc.* (*N. Y.*) 475.

*Nevada.* — *Hardin v. Guthrie*, 26 *Nev.* 246; *State v. Curler*, 26 *Nev.* 347.

*Pennsylvania.* — *Miller v. Clement*, 205 *Pa. St.* 484.

*Rhode Island.* — *Cannon v. Board of Can-vassers*, 24 *R. I.* 473; *Williams v. Champlin*, 26 *R. I.* 416; *Kenney v. State Board of Dentistry*, 26 *R. I.* 538.

*Texas.* — *Matlock v. Smith*, 96 *Tex.* 211; *Gouhenour v. Anderson*, 35 *Tex. Civ. App.* 569.

*Virginia.* — *Rowe v. Drisgell*, 100 *Va.* 137, 4 *Va. Sup. Ct.* 1.

*Washington.* — *Hester v. Thomson*, 35 *Wash.* 125, quoting 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 732 [737]; *State v. Board of Dental Examiners*, 38 *Wash.* 325.

*West Virginia.* — *Roberts v. Paul*, 50 *W. Va.* 528; *Fleshman v. McWhorter*, 54 *W. Va.* 161.

**739. 1. Abuse of Discretion** — *Georgia.* — *Atlanta v. Wright*, 119 *Ga.* 212, citing 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 739.

*Illinois.* — *State Board of Examiners v. Peo-ple*, 93 *Ill. App.* 436; *State Board of Health v. People*, 102 *Ill. App.* 614.

*Louisiana.* — See *State v. King*, 105 *La.* 731.

*Michigan.* — *Jackson, etc., Traction Co. v. Railroad Com'rs*, 128 *Mich.* 164, 8 *Detroit Leg. N.* 565.

*New Hampshire.* — *Goodell v. Woodbury*, 71 *N. H.* 380, citing 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 739.

*Pennsylvania.* — *Douglas v. McLean*, 25 *Pa. Super. Ct.* 9.

*Tennessee.* — Compare *State v. King*, (*Tenn. Ch.* 1901) 62 *S. W. Rep.* 314.

*Texas.* — *Halliburton v. Martin*, 28 *Tex. Civ. App.* 127; *Gouhenour v. Anderson*, 35 *Tex. Civ. App.* 569.

*Washington.* — *State v. Board of Dental Ex-aminers*, 38 *Wash.* 325. See also *Hester v. Thomson*, 35 *Wash.* 119.

*Wisconsin.* — *State v. Chittenden*, 112 *Wis.* 569.

**2. Writ Lies to Confine Officer Within Limits of Discretion.** — *Miller v. Dailey*, 136 *Cal.* 212; *Payne v. U. S.*, 20 *App. Cas.* (*D. C.*) 581; *Denny v. Bosworth*, 113 *Ky.* 794, quoting 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 737 [739]; *People v. Kennedy*, 97 *N. Y. App. Div.* 103.

**740. 1. Facts Admitted Entitling Relator to Relief.** — *Denny v. Bosworth*, 113 *Ky.* 794, quoting 19 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 737 [740]; *State v. St. Paul*, 110 *La.* 995; *Bostock v. Sams*, 95 *Md.* 400, 93 *Am. St. Rep.* 394; *State v. Guinotte*, 113 *Mo. App.* 399; *State v. Ccok*, 174 *Mo.* 100; *State v. District Ct.*, 30 *Mont.* 8.

**2. Ministerial Duties Enforced by Mandamus** — *United States.* — *Farmers' Nat. Bank v. Jones*, 105 *Fed. Rep.* 459.

*Alabama.* — *Harlan v. State*, 136 *Ala.* 150.

*Colorado.* — *Hover v. People*, 17 *Colo. App.*

**742.** See note 1.

*g.* PRIVATE RIGHTS. — See note 2.

**743.** *h.* CONTRACT RIGHTS. — See note 1.

*i.* UNDOING ACTS ALREADY PERFORMED. — See note 6.

*j.* RESTRAINING ACTION. — See note 7.

**744.** 3. Persons Subject to Writ — *c.* JUDICIAL OFFICERS. — See note 5.

*e.* UNOFFICIAL PERSONS. — See note 8.

**745.** See note 1.

*f.* DE FACTO OFFICERS. — See note 3.

375; Lockhaven Trust, etc., Co. v. U. S. Mortgage, etc., Co., 18 Colo. App. 447; People v. Vanhorn, (Colo. App. 1904) 77 Pac. Rep. 978.

*Connecticut.* — State v. Hurley, 73 Conn. 536.

*District of Columbia.* — Macfarland v. U. S., 18 App. Cas. (D. C.) 554; U. S. v. Hitchcock, 19 App. Cas. (D. C.) 333; U. S. v. Root, 22 App. Cas. (D. C.) 419.

*Iowa.* — Preston v. Board of Education, 124 Iowa 355.

*Kansas.* — Scott v. Schwab, 70 Kan. 306.

*Kentucky.* — Denny v. Bosworth, 113 Ky. 794, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737 [740]; Northington v. Sublette, 114 Ky. 72; Leslie County v. Wooten, 115 Ky. 850. See also Blair v. McCann, 64 S. W. Rep. 984, 23 Ky. L. Rep. 1226; Young v. Beckham, 115 Ky. 246.

*Louisiana.* — State v. Assessors, 113 La. 925.

*Maryland.* — Duvall v. Swann, 94 Md. 608.

*Michigan.* — People v. Ihnken, 129 Mich. 466, 8 Detroit Leg. N. 1033.

*Mississippi.* — Bourgeois v. Fairchild, 81 Miss. 708.

*Missouri.* — State v. Brown, 172 Mo. 374; State v. Stokes, 99 Mo. App. 236; State v. Pen-ter, 96 Mo. App. 416; State v. Cook, 174 Mo. 100.

*Montana.* — State v. Toole, 26 Mont. 22, 91 Am. St. Rep. 386; State v. Ledwidge, 27 Mont. 197; State v. Weston, 27 Mont. 185.

*Nebraska.* — Kas v. State, 63 Neb. 581; State v. Savage, 64 Neb. 684; State v. Coufal, (Neb. 1901) 95 N. W. Rep. 362.

*New Hampshire.* — Hart v. Folsom, 70 N. H. 213.

*New Jersey.* — Warmolts v. Keegan, 69 N. J. L. 186.

*New York.* — People v. Collier, 175 N. Y. 106; People v. Brooklyn Heights R. Co., 69 N. Y. App. Div. 549, affirmed 172 N. Y. 90; Brooklyn Teachers' Assoc. v. Board of Education, 85 N. Y. App. Div. 47, affirmed 176 N. Y. 564; Troy Press Co. v. Clark, 94 N. Y. App. Div. 514, affirmed 179 N. Y. 529; People v. Casey, 66 N. Y. App. Div. 211; People v. Anderson, 69 N. Y. App. Div. 619; People v. Oneida County, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirmed 68 N. Y. App. Div. 650; Kelly v. Van Wyck, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 210; People v. Listman, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, affirmed 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784.

*North Carolina.* — Jackson v. North Carolina Corp. Commission, 130 N. Car. 385.

*Ohio.* — State v. Nash, 66 Ohio St. 612.

*Pennsylvania.* — Carpenter v. Yeardon, 208 Pa. St. 396.

*Rhode Island.* — Rose v. Bennett, 25 R. I. 405.

*South Carolina.* — Gibson v. Greenville, 64 S. Car. 455; State v. Bowman, 66 S. Car. 140; State v. Morris, 67 S. Car. 153; Richland Drug Co. v. Moorman, 71 S. Car. 236. See also State v. Durant, 71 S. Car. 311.

*Texas.* — Gibbs v. Ashford, 27 Tex. Civ. App. 629; Altgelt v. Campbell, (Tex. Civ. App. 1904) 78 S. W. Rep. 967.

*Virginia.* — U. S. Fidelity, etc., Co. v. Peebles, 100 Va. 585; Lewis v. Christian, 101 Va. 135.

*Washington.* — State v. Taylor, 36 Wash. 607.

*West Virginia.* — Marsteller v. Ward, 52 W. Va. 74.

*Wisconsin.* — Roberts v. Erickson, 117 Wis. 324.

**742.** 1. Duty Must Be Clearly Enjoined by Law. — State v. Hurley, 73 Conn. 536. See also State v. Smith, 111 La. 319, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740, 741.

2. Private Rights Not Enforced by Mandamus. — State v. Hartford St. R. Co., 76 Conn. 174; Lahiff v. St. Joseph's Total Abstinence, etc., Soc., 76 Conn. 648, 100 Am. St. Rep. 1012; Terrell v. Georgia R., etc., Co., 115 Ga. 104; Akerman v. School Com'rs, 118 Ga. 334; Atlanta v. Wright, 119 Ga. 211.

**743.** 1. Contract Duties Not Enforced by Mandamus. — Howe v. Southrey, 144 Cal. 767; State v. New Orleans Gas Light Co., 108 La. 67; Payne v. School Dist. No. 3-25-10, 87 Mo. App. 415; Weidenfeld v. Keppler, 84 N. Y. App. Div. 235, affirmed 176 N. Y. 562; Mt. Vernon v. State, 71 Ohio St. 428, 104 Am. St. Rep. 783.

6. Writ Does Not Lie to Undo What Has Been Done. — State v. St. Paul, 104 La. 280; Dental Soc. v. Jacobs, 103 N. Y. App. Div. 86, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743; Butler v. Board of Aldermen, 22 R. I. 249; Corbett v. Naylor, 25 R. I. 520; State v. Bowman, 66 S. Car. 140.

7. Writ Not Proper to Restrain Action. — State v. Police Jury, 108 La. 311; State v. Board of Education, 25 Ohio Cir. Ct. 424; State v. Bowman, 66 S. Car. 140.

**744.** 5. Mandamus to Judicial Officers. — See Crocker v. Conrey, 140 Cal. 213; Keady v. Owers, 30 Colo. 1; Bostock v. Sams, 95 Md. 400, 93 Am. St. Rep. 394; Dickson v. Judge, 136 Mich. 479, 11 Detroit Leg. N. 85; State v. Scow, 93 Minn. 11; State v. Thomas, 25 Mont. 226; State v. Chapman, 67 Ohio St. 1; Finley v. Territory, 12 Okla. 621.

8. Writ Limited to Official Persons. — People v. Mottinger, 212 Ill. 530.

**745.** 1. Mandamus Against Private Persons. — Mercier v. Roy, 16 Quebec Super. Ct. 510.

3. De Facto Officers. — Mockett v. State, (Neb. 1903) 97 N. W. Rep. 588.

**745.** *g. CORPORATIONS.* — See note 4.

**4. Other Adequate Remedy** — *a. IN GENERAL.* — See notes 5, 6.

*b. SUFFICIENCY OF REMEDY TO OUST JURISDICTION IN MANDAMUS* — (1) *In General.* — See note 8.

**746.** See notes 1, 2, 4, 8.

**747.** See note 1.

(2) *Indictment or Criminal Prosecution.* — See note 2.

(3) *Impeachment of Officer.* — See note 4.

(4) *Equitable Remedies.* — See note 5.

**748.** See note 1.

(5) *Statutory Remedies.* — See notes 5, 6.

**749.** See notes 1, 3.

(6) *Ordinary Action at Law.* — See notes 4, 5, 6.

**745. 4. Private Corporations.** — See *Atlanta v. Wright*, 119 Ga. 207; *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, *affirmed* 176 N. Y. 562.

5. See *Rex v. Stepney*, (1902) 1 K. B. 317, 71 L. J. K. B. 238, 86 L. T. N. S. 21, 50 W. R. 412, 66 J. P. 183.

6. **Absence of Other Remedy Not Conclusive that Writ Will Lie.** — *Fleshman v. McWhorter*, 54 W. Va. 161; *Roberts v. Paul*, 50 W. Va. 528.

8. **Mandamus Lies Where Other Remedy Is Inadequate** — *England.* — *Rex v. Stepney*, (1902) 1 K. B. 317, 71 L. J. K. B. 238.

*California.* — *Holtum v. Greif*, 144 Cal. 521. *Indiana.* — *King v. Martin County*, 34 Ind. App. 231.

*Iowa.* — *Rummel v. Dealy*, 112 Iowa 503.

*Maryland.* — *Baltimore University v. Colton*, 98 Md. 623.

*Minnesota.* — *State v. Gunn*, 92 Minn. 436.

*Missouri.* — *State v. Patton*, 108 Mo. App. 26; *State v. Tenter*, 96 Mo. App. 416.

*Montana.* — *State v. District Ct.*, 32 Mont. 37.

*Nebraska.* — *Horton v. State*, 60 Neb. 701; *Hopkins v. State*, 64 Neb. 10; *Moore v. State*, (Neb. 1904) 99 N. W. Rep. 249.

*New Hampshire.* — *Goodell v. Woodbury*, 71 N. H. 379, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745.

*New Jersey.* — *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 659.

*Oklahoma.* — *Territory v. Crum*, 13 Okla. 9. *Virginia.* — *Sinclair v. Young*, 100 Va. 284,

4 Va. Sup. Ct. 176.

*Washington.* — *State v. McQuade*, 36 Wash. 579.

*Wyoming.* — *Lobban v. State*, 9 Wyo. 377.

**746. 1. Remedy Must Be Adequate to Enforce Duty.** — *Rex v. Stepney*, (1902) 1 K. B. 317, 71 L. J. K. B. 238, 86 L. T. N. S. 21, 50 W. R. 412, 66 J. P. 183; *Baltimore University v. Colton*, 98 Md. 623; *State v. Fraker*, 166 Mo. 130; *Goodell v. Woodbury*, 71 N. H. 379, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745-747.

2. **Remedy Must Afford Specific Relief.** — *Robertson v. Alameda Free Public Library*, 136 Cal. 403; *Hopkins v. State*, 64 Neb. 10; *Goodell v. Woodbury*, 71 N. H. 379, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 745-747; *Hazelwood v. Rogan*, 95 Tex. 295; *Lobban v. State*, 9 Wyo. 377.

4. **More Tedious Remedy.** — *State v. Hatch*,

36 Wash. 164. *Compare State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858.

8. **Remedy Against Third Person.** — *American Bridge Co. v. Wheeler*, 35 Wash. 40.

**747. 1. Relief by Application to Another Officer.** — *Goodell v. Woodbury*, 71 N. H. 379, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747.

2. **Criminal Prosecution No Bar to Issuance of Mandamus.** — *People v. Listman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, *affirmed* 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784; *Chapin v. Port Angeles*, 31 Wash. 535.

4. **Impeachment an Inadequate Remedy.** — *Goodell v. Woodbury*, 71 N. H. 379, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 747.

5. **Equitable Remedy Not Conclusive Against Writ.** — *Baltimore University v. Colton*, 98 Md. 623; *People v. New York Cent., etc., R. Co.*, 168 N. Y. 187; *Douglas v. McLean*, 25 Pa. Super. Ct. 9; *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551.

**748. 1. Mandamus Denied Because of Remedy in Equity.** — *Burlington, etc., R. Co. v. People*, (Colo. App. 1904) 77 Pac. Rep. 1026; *State v. Hartford St. R. Co.*, 76 Conn. 174; *Clarke v. Hill*, 132 Mich. 434, 9 Detroit Leg. N. 671; *State v. Fawcett*, 64 Neb. 496.

5. **Specific Statutory Remedy a Bar to Mandamus.** — *Scarborough v. Watson*, 140 Ala. 349; *Perry v. Hull*, 180 Mass. 547; *Selectmen v. Templeton St. R. Co.*, 184 Mass. 294; *Taubman v. Aurora Co.*, 14 S. Dak. 206; *Smith v. Conner*, 98 Tex. 434.

6. **Statutory Remedy Inadequate.** — *State v. Gibson*, 184 Mo. 490.

**749. 1. Penalty.** — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497; *People v. Listman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, *affirmed* 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784.

3. **Statutory Remedy Cumulative.** — *Chapin v. Port Angeles*, 31 Wash. 535.

4. **Action for Damages Not an Adequate Remedy.** — *People v. Lindenthal*, 77 N. Y. App. Div. 515; *People v. Greene*, 95 N. Y. App. Div. 397; *People v. New York Cent., etc., R. Co.*, 168 N. Y. 187.

5. **Action upon Official Bond.** — *American Bridge Co. v. Wheeler*, 35 Wash. 40.

6. **Action at Law Adequate to Compel Payment.** — *Davis v. Jewett*, 69 Kan. 651; *Maurer v. State*, (Neb. 1904) 98 N. W. Rep. 426; *Storer Post v. Page*, 70 N. H. 280; *Farr v. St. Johnsbury*, 73 Vt. 42.

**750.** (7) *Remedy by Appeal, Error, or Certiorari*. — See notes 3, 4.

**751.** See note 1.

**5. Discretion of Court — a. GENERAL RULES.** — See note 4.

**750. 3. Remedy by Appeal, Error, or Certiorari Ousts Remedy by Mandamus** — *United States*. — *In re Huguley Mfg. Co.*, 184 U. S. 297; *In re Key*, 189 U. S. 84.

*Alabama*. — *Bickley v. Bickley*, 129 Ala. 403; *Ex p. Campbell*, 130 Ala. 171; *Southern R. Co. v. Walker*, 132 Ala. 62.

*California*. — *Aldrich v. Superior Ct.*, 135 Cal. 12. See also *Williams v. Bagnelle*, (Cal. 1902) 70 Pac. Rep. 1058, rehearing granted (Cal. 1903) 71 Pac. Rep. 445, reversed on rehearing 138 Cal. 699.

*Colorado*. — *People v. District Ct.*, 32 Colo. 166.

*Idaho*. — *Heitman v. Morgan*, 10 Idaho 562.

*Indiana*. — *State v. Schmetzer*, 156 Ind. 528.

*Louisiana*. — *State v. King*, 105 La. 731; *State v. Judge*, 107 La. 474.

*Maryland*. — *Bembe v. Anne Arundel County*, 94 Md. 330.

*Michigan*. — *Moran v. Wayne Circuit Judge*, 125 Mich. 6, 7 Detroit Leg. N. 387; *Detroit, etc., R. Co. v. Eaton Circuit Judge*, 128 Mich. 495, 8 Detroit Leg. N. 761; *Hyde v. Chadwick*, (Mich. 1902) 90 N. W. Rep. 333, 9 Detroit Leg. N. 170; *Steel v. Clinton Circuit Judge*, 133 Mich. 695, 10 Detroit Leg. N. 364; *Blackburn v. Alpena Circuit Judge*, 136 Mich. 48, 10 Detroit Leg. N. 971; *Cattermole v. Ionia Circuit Judge*, 136 Mich. 274, 11 Detroit Leg. N. 21; *Skutt v. Kent Circuit Judge*, 136 Mich. 477, 11 Detroit Leg. N. 85; *Hopper v. Stowe*, (Mich. 1904) 100 N. W. Rep. 266, 11 Detroit Leg. N. 205; *Recor v. St. Clair Circuit Judge*, (Mich. 1905) 102 N. W. Rep. 643, 11 Detroit Leg. N. 778.

*Missouri*. — *State v. Smith*, 172 Mo. 446.

*Montana*. — *State v. District Ct.*, 26 Mont. 274.

*Nebraska*. — *State v. Houseworth*, 63 Neb. 658; *State v. Westover*, (Neb. 1902) 89 N. W. Rep. 1002; *State v. Graves*, 66 Neb. 17; *State v. Jessen*, 66 Neb. 515.

*New Jersey*. — *Stockton v. Board of Education*, (N. J. 1905) 59 Atl. Rep. 1061.

*New York*. — *People v. Matthies*, 179 N. Y. 242, affirming 92 N. Y. App. Div. 16.

*Texas*. — *State v. Fisher*, 94 Tex. 491; *Kruegel v. Nash*, 31 Tex. Civ. App. 15.

*Washington*. — *State v. Tallman*, 29 Wash. 317.

*Wisconsin*. — *State v. Elliott*, 108 Wis. 163.

**Certiorari**. — Where no appeal is provided, but the plaintiff might elect to take the case up by certiorari, and has asked for a proceeding to the commissioners, this is not imperative, like an appeal, and the plaintiff may have mandamus to compel public officers to obey a plain duty prescribed by statute. *Perry v. Chatham County* 130 N. Car. 558.

**4. Writ Not Used for Correction of Errors.** — *U. S. v. Hitchcock*, 190 U. S. 316, affirming 21 App. Cas. (D. C.) 252; *Gay v. Torrance*, 143 Cal. 169; *People v. Carpenter*, 29 Colo. 365; *Preston v. Board of Education*, 124 Iowa 355; *State v. First Judicial District Ct.*, 24 Mont. 539; *Ewbank v. Turner*, 134 N. Car. 77; *State v. Waite*, 70 Ohio St. 149.

**751. 1. Appeal Unavailable or Inadequate.** — *Rex v. Stepney*, (1902) 1 K. B. 317, 71 L. J. K. B. 238; *Holtum v. Greif*, 144 Cal. 521; *Williams v. Cleaveland*, 76 Conn. 426; *State v. Graves*, 66 Neb. 17; *State v. Fraker*, 166 Mo. 130; *State v. District Ct.*, 32 Mont. 37; *State v. Menzie*, 17 S. Dak. 535.

**4. Writ Is Discretionary with Court** — *United States*. — *In re Key*, 189 U. S. 84.

*California*. — *Gay v. Torrance*, 145 Cal. 144.

*Connecticut*. — *Hartford v. Hartford St. R. Co.*, 73 Conn. 327; *Hartford v. Hartford St. R. Co.*, 74 Conn. 194.

*Delaware*. — *Road Com'rs v. New Castle*, 2 Penn. (Del.) 466.

*Illinois*. — *People v. Chicago*, 193 Ill. 507; *People v. Board of Trade*, 193 Ill. 577; *People v. Rose*, 211 Ill. 252; *Hall v. Mann*, 96 Ill. App. 659; *Cicero v. People*, 105 Ill. App. 406; *People v. Chicago*, 106 Ill. App. 72.

*Indiana*. — *State v. Clinton County*, 162 Ind. 580.

*Iowa*. — *Vincent v. Ellis*, 116 Iowa 609.

*Kansas*. — *Orr v. Atcheson*, 66 Kan. 789; *Pherson v. Young*, 69 Kan. 655; *State v. Snelling*, (Kan. 1905) 80 Pac. Rep. 966.

*Maryland*. — *Upshur v. Baltimore*, 94 Md. 743.

*Michigan*. — *MacKinnon v. Auditor-Gen.*, 130 Mich. 552, 9 Detroit Leg. N. 177; *O'Brien v. Wayne Circuit Judge*, 131 Mich. 67, 9 Detroit Leg. N. 176; *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511, 11 Detroit Leg. N. 105.

*Missouri*. — *State v. Gibson*, 187 Mo. 536, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

*Nebraska*. — *State v. Holmes*, (Neb. 1902) 91 N. W. Rep. 175; *Donahue v. State*, (Neb. 1903) 96 N. W. Rep. 1038; *State v. Moores*, (Neb. 1904) 99 N. W. Rep. 842.

*Nevada*. — *Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233.

*New Jersey*. — *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 58, affirming 66 N. J. L. 659; *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198.

*New York*. — *People v. Interurban St. R. Co.*, 177 N. Y. 296, affirming 85 N. Y. App. Div. 407; *People v. Lindenthal*, 77 N. Y. App. Div. 515; *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, affirming 68 N. Y. App. Div. 650; *Cullen v. New York Telephone Co.*, 106 N. Y. App. Div. 250; *People v. Listman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, affirming 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784.

*Pennsylvania*. — *Com. v. State Treasurer*, 13 Pa. Dist. 231.

*South Carolina*. — *Moore v. Napier*, 64 S. Car. 566, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

*South Dakota*. — *Taubman v. Aurora County*, 14 S. Dak. 206; *State v. Boyden*, (S. Dak. 1904) 100 N. W. Rep. 763.

*Tennessee*. — *State v. Williams*, 110 Tenn. 549.

*Wyoming*. — *State v. Chatterton*, 12 Wyo. 168.



**753.** See notes 1, 2.

*b.* CONSIDERATIONS AFFECTING EXERCISE OF DISCRETION—

(1) *In General.*—See note 3.

**754.** See notes 3, 4, 7, 10, 11, 12, 13, 14.

**755.** See note 1.

(2) *Laches and Limitations.*—See notes 2, 4, 5, 6.

**756.** See notes 1, 2.

(4) *Writ Unnecessary or Unavailing.*—See note 6.

**757.** See note 1.

*Canada.*—Pettigrew v. Baillargé, 20 Quebec Super. Ct. 173.

**753. 1. Discretion Not Arbitrary.**—Gay v. Torrance, 145 Cal. 144; State v. Clinton County, 162 Ind. 580; Vincent v. Ellis, 116 Iowa 609; State v. Gibson, 187 Mo. 536, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751 [753]; State v. Holmes, (Neb. 1902) 91 N. W. Rep. 175; Loraine v. Pittsburg, etc., R. Co., 205 Pa. St. 132; Milster v. Spartanburg, 68 S. Car. 26.

**2. Mandamus Called a Writ of Right.**—Windsor v. Polk County, 115 Iowa 738; State v. Fraker, 166 Mo. 130.

"The writ of mandamus, though no longer a prerogative writ, only becomes a writ of right when it shows upon its face that the petitioner has a clear right to the relief he seeks." Stott v. Chicago, 205 Ill. 281.

**3. General Considerations Governing Exercise of Discretion.**—State v. Clinton County, 162 Ind. 580; Pherson v. Young, 69 Kan. 655; Stuart v. Corlette, 129 Mich. 611, 8 Detroit Leg. N. 1081; State v. Cottengin, 172 Mo. 134, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; Moores v. State, (Neb. 1904) 99 N. W. Rep. 249; State v. Williams, 110 Tenn. 549. See also State v. McQuade, 36 Wash. 579.

**Mere Inconvenience of Compliance** is not sufficient reason for refusal to enforce obedience by mandamus. Com. v. Pittsburg, 209 Pa. St. 333.

**754. 3. Public Interest Considered.**—Hartford v. Hartford St. R. Co., 74 Conn. 194.

**4. Doubtful and Difficult Cases.**—Cicero v. People, 105 Ill. App. 406; People v. Chicago, 106 Ill. App. 72; State v. Cottengin, 172 Mo. 134, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753 [754]; Padavano v. Fagan, 66 N. J. L. 167.

**7. Relator Responsible for Act Complained Of.**—Donahue v. State, (Neb. 1903) 96 N. W. Rep. 1038.

**10. Compliance in Violation of Spirit of Law.**—See Moore v. Napier, 64 S. Car. 564.

**11. Decision of Questions Between Persons Not Parties.**—State v. Cottengin, 172 Mo. 134, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753 [754].

**12. No Right to Ultimate Relief Sought.**—Gay v. Torrance, 145 Cal. 144, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754; De la Beck with v. Superior Ct., 146 Cal. 496.

**13. Matters Arising After Institution of Proceedings.**—Bishoff v. State, 43 Fla. 67.

**14. Relator Must Be Entitled at Time of Decision.**—Davenport v. Los Angeles, 146 Cal. 508; French v. State Senate, 146 Cal. 604; People v. Old Guard, 87 N. Y. App. Div. 478, *affirmed* 178 N. Y. 576.

**755. 1. Repeal of Statute or Ordinance Pending Proceedings.**—Preferred Tontine Mercantile Co. v. Secretary of State, 133 Mich. 395, 10 Detroit Leg. N. 233.

**2. Statute of Limitations Not Applicable.**—People v. Greene, 87 N. Y. App. Div. 346; McCurdy v. Conner, 95 Tex. 246. *Contra*, Jones v. Police Com'rs, 141 Cal. 96.

**A Statute Applicable to Special Proceedings.**—People v. Marsh, 82 N. Y. App. Div. 571, *affirmed* 178 N. Y. 618.

**4. Discretion Guided by Analogy of Statute.**—Manchester v. Funnald, 71 N. H. 153; Milster v. Spartanburg, 68 S. Car. 26.

**5. Laches Ground for Denying Writ.**—San Luis Obispo County v. Gage, 139 Cal. 398; State v. Wright, 67 Kan. 847; State v. Police Board, 107 La. 165, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775 [755]; State v. Gibson, 187 Mo. 536; State v. District Ct., 29 Mont. 265; State v. Holmes, (Neb. 1902) 91 N. W. Rep. 175, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 755; People v. Sturgis, 82 N. Y. App. Div. 580; People v. Maxwell, 87 N. Y. App. Div. 301; People v. Greene, 87 N. Y. App. Div. 346; Milster v. Spartanburg, 68 S. Car. 26.

**6. What Constitutes Laches.**—See Cahill v. Superior Ct., 145 Cal. 42; State v. Police Board, 107 La. 162, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775 [755]; State v. Smith, 172 Mo. 618; People v. Marsh, 82 N. Y. App. Div. 571, *affirmed* 178 N. Y. 618; People v. Greene, 87 N. Y. App. Div. 346.

**756. 1. Delay Not Exceeding Statutory Period.**—Hanna v. Chalker, 136 Mich. 8, 10 Detroit Leg. N. 958.

**2. Delay Short of Statutory Period May Bar Relief.**—State v. Gibson, 187 Mo. 536; State v. Holmes, (Neb. 1902) 91 N. W. Rep. 175.

**6. Writ Unnecessary.**—Ellis v. Warkman, 144 Cal. 113; State v. Frazier, (Tenn. 1905) 86 S. W. Rep. 310; State v. Sunset Telephone, etc., Co., 30 Wash. 686, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756; State v. Superior Ct., 37 Wash. 30; Hall v. Staunton, 55 W. Va. 684, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756.

**757. 1. Writ Unavailing, Fruitless, or Nugatory.**—United States.—U. S. v. Norfolk, etc., R. Co., (C. C. A.) 118 Fed. Rep. 556, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756 [757].

*Delaware.*—Road Com'rs v. New Castle, 2 Penn. (Del.) 466.

*Florida.*—Bishoff v. State, 43 Fla. 67.

*Illinois.*—People v. Finley, 97 Ill. App. 214; People v. Chicago, 106 Ill. App. 72. *Compare* People v. Alton, 209 Ill. 461.

**758.** See notes 1, 3, 4.

**759.** 6. Demand and Refusal — *a.* NECESSITY. — See note 2.

**760.** See note 1.

**761.** See note 1.

*b.* SUFFICIENCY OF DEMAND. — See notes 2, 4.

**762.** *c.* WHAT CONSTITUTES REFUSAL OR DEFAULT. — See notes 4, 5, 6, 7, 8, 9.

7. Time of Performance. — See note 10.

**763.** 8. Expiration of Term of Office. — See notes 1, 2.

9. Determination of Constitutional Questions — *a.* IN GENERAL. —

See notes 3, 4.

*b.* UNCONSTITUTIONALITY OF STATUTE AS GROUND FOR RELIEF.

— See notes 7, 8.

*Kansas.* — *Ellis v. Whitaker*, 62 Kan. 582.

*Louisiana.* — *State v. St. Paul*, 104 La. 280; *State v. Police Jury*, 108 La. 311; *State v. Lewis*, 111 La. 693; *State v. Sommerville*, 111 La. 1015.

*Maryland.* — *Summerson v. Schilling*, 94 Md. 582; *Duval v. Swann*, 94 Md. 608.

*Michigan.* — *Hatch v. Frazer*, (Mich. 1904) 101 N. W. Rep. 228.

*Missouri.* — *State v. Police Com'rs*, 80 Mo. App. 206, *affirmed* 184 Mo. 109; *State v. Corley*, 168 Mo. 126.

*Montana.* — *State v. District Ct.*, 29 Mont. 265; *State v. Toole*, 32 Mont. 4.

*Oregon.* — *State v. Williams*, 45 Oregon 314, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

*Texas.* — *Capps v. Russell*, 25 Tex. Civ. App. 257; *Testard v. Brooks*, (Tex. Civ. App. 1902) 70 S. W. Rep. 240.

*West Virginia.* — *Hall v. Staunton*, 55 W. Va. 686, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756 [757].

**758. 1. Acts Impossible of Performance.** — *McClatchy v. Matthews*, 135 Cal. 274; *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497; *Road Com'rs v. New Castle*, 2 Penn. (Del.) 466; *People v. Chicago*, 106 Ill. App. 72; *State v. Police Jury*, 108 La. 311; *State v. Board of Elections*, 24 Ohio Cir. Ct. 654; *Holdermann v. Schane*, 56 W. Va. 11.

**3. Acts Which Respondent Is Willing to Perform.** — *Park v. Chandler*, 113 Ga. 647.

**4. Abstract Right.** — *Gay v. Torrance*, 145 Cal. 144, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; *De la Beckwith v. Superior Ct.*, 146 Cal. 496; *U. S. v. Root*, 18 App. Cas. (D. C.) 239; *State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368; *Payne v. Staunton*, 55 W. Va. 209, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; *Hall v. Staunton*, 55 W. Va. 686, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 756 [758].

**759. 2. Demand and Refusal Necessary.** — *Moseley v. Collins*, 133 Ala. 326; *Wilson v. Veterans' Home*, 138 Cal. 67; *State Board of Equalization v. People*, 191 Ill. 528; *People v. Gibbons*, 91 Ill. App. 567; *State v. Fisher*, 157 Ind. 412; *State v. Holmes*, (Neb. 1903) 97 N. W. Rep. 243; *Swan v. Wilderson*, 10 Okla. 547; *Cavanaugh v. Pawtucket*, 23 R. I. 102; *Pettigrew v. Baillargé*, 20 Quebec Super. Ct. 172.

**760. 1. Demand and Refusal Unnecessary in**

**Case of Strictly Public Duties.** — *U. S. v. Saunders*, (C. C. A.) 124 Fed. Rep. 124; *Rizer v. People*, 18 Colo. App. 48, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 759 [760]; *State Board of Equalization v. People*, 191 Ill. 528; *Milster v. Spartanburg*, 68 S. Car. 26; *Lewis v. Christian*, 101 Va. 135; *State v. Byrne*, 32 Wash. 264. See also *Wilson v. Veterans' Home*, 138 Cal. 67.

**761. 1. Demand Excused Where It Would Be Useless.** — *Davenport Gas, etc., Co. v. Davenport*, 124 Iowa 27, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 761. See also *Wilson v. Veterans' Home*, 138 Cal. 67.

**2. Sufficiency of Demand in General.** — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 238; *Com. v. Pittsburg*, 209 Pa. St. 333.

**4. Demand Such as Defendant Should Comply With.** — *Com. v. Pittsburg*, 209 Pa. St. 333.

**762. 4. Sufficiency of Refusal or Default in General.** — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 238; *Loewenthal v. People*, 192 Ill. 222; *State v. Houseworth*, 63 Neb. 658; *People v. Oneida County*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 597, *affirmed* 68 N. Y. App. Div. 650.

**5. Reasonable Postponement Not a Refusal.** — *Cavanaugh v. Pawtucket*, 23 R. I. 102.

**6. Unreasonable Delay.** — *Swan v. Wilderson*, 10 Okla. 547.

**7. Anticipated Omissions of Duty.** — *Mann v. People*, 16 Colo. App. 475; *Orman v. People*, 18 Colo. App. 302; *State v. Kineval*, (Neb. 1903) 97 N. W. Rep. 798; *State v. Board of Elections*, 24 Ohio Cir. Ct. 654; *Northwestern Warehouse Co. v. Oregon R., etc., Co.*, 32 Wash. 218; *State v. Hunter*, 111 Wis. 582.

**8. There Is a Presumption.** — *State v. Board of Elections*, 24 Ohio Cir. Ct. 654.

**9. Refusal in Advance of Time for Performance.** — *State v. Metcalf*, (S. Dak. 1904) 100 N. W. Rep. 923.

**10. Time for Performance Passed.** — *State v. Cornell*, 60 Neb. 694. But see *Goodman v. Freeholders*, 66 N. J. L. 571.

**763. 1. Expiration of Term of Office.** — *State v. State Canvassers*, 32 Mont. 13; *Holdermann v. Schane*, 56 W. Va. 11.

**2. Mandamus Proper After Expiration of Term.** — *Finley v. Territory*, 12 Okla. 621.

**3. Acts Prohibited by Constitution.** — *State v. Craig* (Tenn. Ch. 1001) 64 S. W. Rep. 326.

**4. Compelling Action in Conformity to Constitution.** — *Brooks v. State*, 162 Ind. 568.

**7. Relator May Assert Unconstitutionality of**

**764.** *c.* UNCONSTITUTIONALITY OF STATUTE AS A DEFENSE. — See notes 1, 2, 3.

**765.** 10. Election of Remedies. — See note 2.

11. Mandamus Equivalent to Action Against State. — See note 4.

IV. ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS —

1. Controversies Relating to Office — *a.* APPOINTMENT OF OFFICER. — See notes 6, 9.

**766.** *d.* TRIAL OF TITLE TO OFFICE — In General. — See note 5.

**767.** Rule Limited to Technical Offices. — See note 6.

*e.* ADMISSION OR RESTORATION TO OFFICE — (1) *General Rules.*

— See note 7.

**768.** See note 1.

**769.** (2) *Where Office Is Full De Facto.* — See note 3.

**770.** See note 2.

**771.** (3) *Limitations of Rule.* — See note 2.

**772.** See note 4.

**773.** *g.* CIVIL SERVICE LAWS — (1) *In General.* — See note 1.

*Statute.* — *People v. Grout*, 179 N. Y. 417; *State v. Hubbard*, 12 Ohio Cir. Dec. 87.

**763.** 8. Necessity of Determining Constitutional Question. — *State v. Curler*, 26 Nev. 347.

**764.** 1. Unconstitutionality Not Available as a Defense. — *State v. Morris*, 67 S. Car. 153; *Compare Com. v. State Treasurer*, 13 Pa. Dist. 231.

2. Unconstitutionality of Statute a Good Defense. — See *Payne v. Staunton*, 55 W. Va. 202.

3. Interest or Duty of Officers to Raise Question. — *Com. v. State Treasurer*, 13 Pa. Dist. 240, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 764.

**765.** 2. Election Between Damages and Mandamus Necessary. — See *Lahiff v. St. Joseph's Total Abstinence, etc., Soc.*, 76 Conn. 648, 100 Am. St. Rep. 1012.

4. Mandamus Equivalent to Action Against State. — *State v. State Treasurer*, 68 S. Car. 411.

6. Appointment Compelled by Mandamus. — *State v. Kinney*, 63 Ohio St. 304.

9. Nominating and Appointing Power Separated. — Mandamus will lie against the state supervisor of elections in *Ohio* to compel him to appoint as deputy supervisor one who is regularly nominated by the county committee of one of the two principal political parties. *State v. Kinney*, 63 Ohio St. 304.

**766.** 5. Title to Office Not Tried on Mandamus — *Colorado.* — *Cripple Creek v. People*, 19 Colo. App. 399.

*Michigan.* — *Hartwig v. Manistee*, 134 Mich. 615, 10 Detroit Leg. N. 637.

*Missouri.* — *State v. Police Com'rs*, 80 Mo. App. 206, affirmed 184 Mo. 109.

*Nebraska.* — *State v. Haverly*, 62 Neb. 767.

*New Jersey.* — *Searing v. Clark*, (N. J. 1903) 55 Atl. Rep. 690.

*New York.* — *People v. Police Com'rs*, 174 N. Y. 450, reversing 79 N. Y. App. Div. 82; *People v. County Board of Canvassers*, 75 N. Y. App. Div. 110; *People v. Hinsdale*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 182.

*Rhode Island.* — *Butler v. Board of Aldermen*, 22 R. I. 249.

See also *Kline v. McKelvey*, (W. Va. 1905) 49 S. E. Rep. 896. But see *Duer v. Dashiell*, 91 Md. 660; *Sinclair v. Young*, 100 Va. 284,

4 Va. Sup. Ct. 176. Compare *Schmulbach v. Speidel*, 50 W. Va. 553.

**767.** 6. Rule Inapplicable to Employees as Distinguished from Officers. — *People v. Hamilton*, 98 N. Y. App. Div. 59, affirming (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 577; *People v. McAdoo*, 98 N. Y. App. Div. 312.

7. Writ Lies to Compel Admission to Office. — *Ward v. Sasscer*, 98 Md. 281; *State v. Police Com'rs*, 80 Mo. App. 206, affirmed 184 Mo. 109; *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719; *Com. v. Fleming*, 23 Pa. Super. Ct. 404; *Howard v. Burns*, 14 S. Dak. 383; *Kline v. McKelvey*, (W. Va. 1905) 49 S. E. Rep. 896; *Schmulbach v. Speidel*, 50 W. Va. 553; *State v. Kersten*, 118 Wis. 287.

**768.** 1. Restoration to Office. — *Sherman v. School Com'rs*, 118 Ga. 334; *Marshall v. Illinois State Reformatory*, 103 Ill. App. 65, affirmed 201 Ill. 9; *State v. New Orleans*, 107 La. 632; *People v. McAdoo*, 98 N. Y. App. Div. 312; *People v. Coleman*, 99 N. Y. App. Div. 88; *Kline v. McKelvey*, (W. Va. 1905) 49 S. E. Rep. 896.

**769.** 3. Writ Will Not Lie When There Is De Facto Incumbent. — *Cripple Creek v. People*, 19 Colo. App. 399; *People v. Police Com'rs*, 174 N. Y. 450, reversing 79 N. Y. App. Div. 82; *People v. Hinsdale*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 182. But see *Schmulbach v. Speidel*, 50 W. Va. 553.

**770.** 2. Incumbent's Title Colorable and Void. — See *Kline v. McKelvey*, (W. Va. 1905) 49 S. E. Rep. 896.

**771.** 2. Want of Clear Legal Right — Mandamus Refused. — *Searing v. Clark*, (N. J. 1903) 55 Atl. Rep. 690.

**772.** 4. Unreasonable Delay as Ground for Denying Writ. — See *State v. Barrett*, 22 Ohio Cir. Ct. 104, 12 Ohio Cir. Dec. 231.

**773.** 1. Certifying Payrolls. — Mandamus will lie to compel the civil service commission of New York city to certify on the payrolls the name of a janitor of a public school, notwithstanding the fact that such janitor may have acted wrongfully in the employment of subordinates. *Doyle v. Knox*, 67 N. Y. App. Div. 231. See also *People v. Ogden*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 246.

- 773.** (3) *Appointment*. — See notes 5, 9.
- 774.** See note 1.
- (4) *Reinstatement*. — See notes 4, 5.
- 775.** See note 1.
- h. ARMY, NAVY, OR MILITIA*. — See note 3.
- 776.** *j. DELIVERY OF BOOKS, RECORDS, INSIGNIA OF OFFICE, ETC.* —
- (1) *Statement of Rule*. — See notes 2, 5.
- 777.** (2) *Title to Office Not Determined*. — See note 6.
- 778.** 2. *Municipal Corporations*. — See notes 1, 4.
- 779.** 5. *Public Lands — Ministerial Duties*. — See note 2.
- 780.** See note 1.
- Discretionary Duties*. — See note 12.
- 781.** 6. *Attorney-General, District and Prosecuting Attorneys*. — See note 5.
- 783.** 7. *Auditing and Fiscal Officers — b. AUDIT AND PAYMENT OF CLAIMS* — (1) *General Rules* — (a) *Audit of Claims — It Is a Well-settled Rule*. — See notes 1, 3.
- 784.** *Decision of Auditor Not Reviewed*. — See note 2.
- Rejection of Claim Without Exercise of Discretion*. — See note 4.
- 786.** (b) *Issuance of Warrants — General Rule*. — See note 1.
- 773.** 5. *Certifying Persons for Appointment*. — See *Morrison v. Cantor*, 75 N. Y. App. Div. 480, *reversing* (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 328, *affirmed* 173 N. Y. 646.
9. *Office Filled De Facto*. — *People v. Scannell*, 63 N. Y. App. Div. 243.
- 774.** 1. *Discretion Not Controlled*. — *People v. Scannell*, 63 N. Y. App. Div. 243. See also *People v. Dobbs Ferry*, 63 N. Y. App. Div. 276.
4. *Reinstatement by Mandamus*. — *Thompson v. Troup*, 74 Conn. 121; *Chicago v. People*, 210 Ill. 84; *People v. Grout*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 47; *People v. Scannell*, 172 N. Y. 316, *affirming* 69 N. Y. App. Div. 400; *Sugden v. Partridge*, 174 N. Y. 87, *reversing* 78 N. Y. App. Div. 644; *Jones v. Willcox*, 80 N. Y. App. Div. 167.
5. *Reinstating Veteran Soldiers*. — *Pratt v. Phelan*, 67 N. Y. App. Div. 349.
- 775.** 1. *Laches and Delay*. — *State v. Police Board*, 107 La. 165, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 774 [775]; *People v. Sturgis*, 82 N. Y. App. Div. 580.
3. *Reinstatement to Rank in Army*. — See *U. S. v. Root*, 18 App. Cas. (D. C.) 239.
- 776.** 2. *Mandamus Lies to Compel Delivery*. — *State v. Givens*, (Fla. 1904) 37 So. Rep. 308; *Duer v. Dashiell*, 91 Md. 660; *Ward v. Sasscer*, 98 Md. 281; *Sinclair v. Young*, 100 Va. 284, 4 Va. Sup. Ct. 176.
5. *Official Duty to Surrender Office and Its Belongings*. — *Sinclair v. Young*, 100 Va. 284, 4 Va. Sup. Ct. 176.
- 777.** 6. *Rule that Title May Be Tried on Mandamus*. — See *Sinclair v. Young*, 100 Va. 284, 4 Va. Sup. Ct. 176.
- 778.** 1. *Writ Lies to Enforce Ministerial Duties*. — *Lawrence v. People*, 188 Ill. 407; *People v. Harris*, 203 Ill. 272; *State v. Red Lodge*, 30 Mont. 338; *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 669, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778; *Holroyd v. Indian Lake*, 180 N. Y. 318, *affirming* 85 N. Y. App. Div. 246.
4. *Discretionary Duties of Municipal Corporations*. — *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *State v. Noblesville*, 156 Ind. 590.
- 779.** 2. *Writ Lies to Enforce Ministerial Duties*. — *U. S. v. Hitchcock*, 19 App. Cas. (D. C.) 333.
- Mandamus Will Issue to Reinstatement a Purchaser* upon the records of the land office after wrongful cancellation by the commissioner of the land office. *Hazelwood v. Rogan*, 95 Tex. 295.
- Writ Issued to Compel Recognition of Lease*. — *State v. Callvert*, 33 Wash. 380.
- 780.** 1. *No Clear Legal Right — Writ Denied on Merits*. — *Juencke v. Terrell*, 98 Tex. 237.
12. *Discretion Not Controlled by Writ*. — *U. S. v. Hitchcock*, 190 U. S. 316; *U. S. v. Hitchcock*, 19 App. Cas. (D. C.) 347; *State v. Smith*, 111 La. 319; *Beebe v. State Land Office*, (Mich. 1904) 100 N. W. Rep. 128, 11 Detroit Leg. N. 197; *Clark v. Terrell*, 98 Tex. 15.
- 781.** 5. *Proceedings to Forfeit Charter of Corporation*. — *Lewright v. Bell*, 94 Tex. 556. *Compare Buggeln v. Doe*, (Ariz. 1904) 76 Pac. Rep. 458.
- 783.** 1. *Audit Compelled by Mandamus*. — *Contra Costa Water Co. v. Breed*, 139 Cal. 432; *People v. Washington County*, 66 N. Y. App. Div. 66; *Colby v. Day*, 75 N. Y. App. Div. 211, *reversed* on other grounds 177 N. Y. 548; *People v. Mole*, 85 N. Y. App. Div. 33; *People v. Livingston County*, 89 N. Y. App. Div. 152; *Martin v. Clark*, 135 N. Car. 178; *State v. Morris*, 67 S. Car. 153; *Poling v. Board of Education*, 50 W. Va. 374.
3. *Discretion Not Controlled*. — *State v. Albright*, 11 N. Dak. 22; *State v. Morris*, 67 S. Car. 153; *Simons v. Military Board*, 99 Va. 390; *Poling v. Board of Education*, 50 W. Va. 374.
- 784.** 2. *Audit Not Reviewed on Mandamus*. — *People v. Clark*, 174 N. Y. 259, *reversing* 79 N. Y. App. Div. 78; *People v. Matthies*, 179 N. Y. 242, *affirming* 92 N. Y. App. Div. 16.
4. *Claim Rejected Without Exercise of Discretion*. — *Chipman v. Wayne County Auditors*, 127 Mich. 490, 8 Detroit Leg. N. 471.
- 786.** 1. *Issuance of Warrant Compelled by*

- 786.** Claims Allowed by Other Tribunal. — See note 2.
- 788.** Invalid Claims. — See note 4.  
Where an Appropriation Has Been Made. — See note 7.
- 789.** Other Adequate Remedy. — See note 4.  
(c) Payment of Claims and Warrants — *aa.* IN GENERAL. — See note 6.
- 790.** Payment of Warrants and Orders. — See note 1.
- 791.** Necessity of Audit and Allowance. — See note 2.
- 794.** (d) Necessity of Reducing Claims to Judgment — Unliquidated, Doubtful, and Disputed Demands. — See note 1.
- 795.** (e) Necessity of Appropriation or Available Funds — It Is a General Rule. — See note 8.
- 797.** Where Warrants Are Payable Out of a Specific Fund. — See note 3.
- 798.** (2) *Particular Classes of Claims* — (a) Salaries — *bb.* AGAINST STATE OR COUNTY AUTHORITIES — Salary Fixed by Law. — See notes 2, 3.  
Salary of Public School Teacher. — See note 4.  
*cc.* AGAINST MUNICIPAL AUTHORITIES. — See notes 5, 6.
- 799.** *cc.* DETERMINATION OF QUESTION OF TITLE TO OFFICE. — See note 3.  
Whether Removal from Office Reviewable. — See note 6.
- 800.** (b) Judgments — *aa.* IN GENERAL — It Is a General Rule. — See notes 1, 2, 3, 4.

**Mandamus.** — *Gray v. Abbott*, 130 Ala. 322; *Robertson v. Alameda Free Public Library*, 136 Cal. 403; *State v. Coufal*, (Neb. 1901) 95 N. W. Rep. 362; *State v. Hubbard*, 12 Ohio Cir. Dec. 87; *Howard v. Burns*, 14 S. Dak. 383; *Altgelt v. Campbell*, (Tex. Civ. App. 1904) 78 S. W. Rep. 967.

Where There Are No Funds in the hands of a county treasurer legally applicable to the petitioner's claim, the writ will be refused. *McCaslan v. Major*, 64 S. Car. 188.

During the Pendency of an Appeal, mandamus will not lie to compel the delivery of the warrant. *Lobeck v. State*, (Neb. 1904) 101 N. W. Rep. 247.

**786. 2. Claims Certified by Other Tribunal.** — *People v. Anderson*, 69 N. Y. App. Div. 619; *American Bridge Co. v. Wheeler*, 35 Wash. 40.

**788. 4. Illegal Claims.** — *Perrin v. Honeycutt*, 144 Cal. 87.

**7. Claims for Which Appropriation Has Been Made.** — "Where a claim against the state is payable only out of a specific appropriation, which has been exhausted, \* \* \* courts cannot by mandate require the auditor to issue a warrant for the claim." *Bosworth v. Shuck*, (Ky. 1904) 81 S. W. Rep. 240.

**789. 4. Remedy by Appeal.** — *State v. Frank*, 11n County, 5 Ohio Dec. 579, 7 Ohio N. P. 563. *Contra*, *Howard v. Burns*, 14 S. Dak. 383.

**6. Payment Compelled by Mandamus.** — *Contra Costa Water Co. v. Breed*, 139 Cal. 432; *State v. Barret*, 25 Mont. 112; *State v. Nerry*, 105 Mo. App. 458, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789.

**790. 1. Payment of Warrants and Orders Compelled by Mandamus.** — *State v. Nerry*, 105 Mo. App. 458, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 790; *State v. Scotts Bluff County*, 64 Neb. 410; *Leonard v. State*, 67 Neb. 635; *Martin v. Clark*, 135 N. Car. 178; *Com. v. State Treasurer*, 13 Pa. Dist. 231; *Com. v. Johnson*, 24 Pa. Super. Ct. 400; *Times Pub. Co. v. White*, 23 R. I. 334; *Carolina Grocery Co. v. Burnet*, 61 S. Car. 205. See also *State v. Gentry*, 112 Mo. App. 589.

**791. 2. Warrant Necessary.** — *Knopf v. Corcoran*, 112 Ill. App. 320.

**794. 1. Judgment Necessary.** — *Poling v. Board of Education*, 50 W. Va. 374.

**795. 8. Appropriation or Available Funds Necessary.** — *Chicago v. People*, 210 Ill. 84, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795, and reversing 111 Ill. App. 594; *Bosworth v. Shuck*, (Ky. 1904) 81 S. W. Rep. 240; *Hager v. Shuck*, (Ky. 1905) 87 S. W. Rep. 301; *People v. Yerk*, 66 N. Y. App. Div. 453, affirmed 171 N. Y. 627; *State v. Craig*, (Tenn. Ch. 1901) 64 S. W. Rep. 326.

**797. 3. Confusion of Specific Funds.** — See *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259.

**798. 2. Compelling Payment of Salary by State or County Treasurer.** — *State v. Albright*, 11 N. Dak. 22. See also *Dorrington v. Yuma County*, (Ariz. 1902) 68 Pac. Rep. 541.

**3. Compelling Drawing of Warrant by State or County Official.** — *Von Forel v. State*, (Neb. 1903) 96 N. W. Rep. 648. See also *State v. State Treasurer*, 68 S. Car. 411.

**4. Compelling Payment of Teacher's Salary.** — *Williams v. Bagnelle*, 138 Cal. 699; *State v. Hubbard*, 12 Ohio Cir. Dec. 87; *Singleton v. Austin*, 27 Tex. Civ. App. 88; *State v. McQuade*, 36 Wash. 579. See also *Davis v. Jewett*, 69 Kan. 651, where mandamus was refused, the requisite foundation therefor not appearing. And see the title SCHOOLS, 16. 8.

**5. Salary Not Fixed by Law.** — *Moore v. State*, (Neb. 1903) 93 N. W. Rep. 986.

**6. Davenport v. Los Angeles**, 146 Cal. 508; *State v. Daggett*, 28 Wash. 1.

**799. 3. Void Appointment as Defense.** — See *State v. Daggett*, 28 Wash. 1.

**6. See Hartwig v. Manistee**, 134 Mich. 615, 10 Detroit Leg. N. 637.

**800. 1. Writ Lies to Enforce Judgment Against Municipal Corporation.** — *Thompson v. Perris Irrigation Dist.*, 116 Fed. Rep. 769; *Riverside County v. Thompson*, (C. C. A.) 122 Fed. Rep. 860; *Kinney v. Eastern Trust, etc., Co.*, (C. C. A.) 123 Fed. Rep. 297; *Anniston*

- 801.** Return of Execution Unsatisfied. — See note 2.  
State and Federal Courts. — See note 6.
- 802.** *bb.* CONCLUSIVENESS OF JUDGMENT. — See note 7.
- 803.** *dd.* AUDIT, ALLOWANCE, AND ISSUANCE OF WARRANT. — See notes 8, 9.  
(c) Municipal Securities. — See notes 11, 12.
- 804.** See note 3.
- 805.** 8. County Boards and Officers — The General Rule. — See notes 8, 9.
- 806.** The Writ Lies. — See note 15.
- 807.** The Writ Will Not Lie. — See note 4.  
10. Mayor. — See note 8.  
Illustrations. — See note 9.
- 808.** 14. Roads, Streets, and Highways — *a.* IN GENERAL — Discretion of Officer. — See note 3.  
Duties Imposed by Mandatory Statutes. — See note 6.
- 809.** *b.* ESTABLISHMENT, OPENING, AND VACATING — The Establishment or Opening of a Road. — See note 21.
- 810.** See note 3.
- 812.** *e.* OBSTRUCTIONS IN HIGHWAYS — General Rule. — See notes 7, 9.
- v.* Hurt, 140 Ala. 394; Chicago *v.* People, 98 Ill. App. 517; State *v.* Butler County, 164 Mo. 214; State *v.* Royse, (Neb. 1902) 91 N. W. Rep. 559; Poling *v.* Board of Education, 50 W. Va. 374.
- 800.** 2. Mandamus Is in the Nature of an Execution — Riverside County *v.* Thompson, (C. C. A.) 122 Fed. Rep. 860; Kinney *v.* Eastern Trust, etc., Co., (C. C. A.) 123 Fed. Rep. 297; U. S. *v.* Saunders, (C. C. A.) 124 Fed. Rep. 124; Carter County *v.* Schmalstig, (C. C. A.) 127 Fed. Rep. 126; Anniston *v.* Hurt, 140 Ala. 394.
- 3.** Payment Out of Available Funds. — Lewis *v.* Drainage Com'rs, 111 Ill. App. 222.
- 4.** No Available Funds. — Weaver *v.* Ogden City, 111 Fed. Rep. 323.
- 801.** 2. Return of Execution Unsatisfied. — Hubbel *v.* Maryville, 85 Mo. App. 165.
- 6.** Jurisdiction of Federal Court. — Board of Liquidation *v.* U. S., (C. C. A.) 108 Fed. Rep. 689.
- 802.** 7. Judgment as Res Judicata. — Hicks *v.* Cleveland, (C. C. A.) 106 Fed. Rep. 459; Riverside County *v.* Thompson, (C. C. A.) 122 Fed. Rep. 866.
- 803.** 8. Order or Warrant Necessary. — Weaver *v.* Ogden City, 111 Fed. Rep. 323; State *v.* Scotts Bluff County, 64 Neb. 419.
- 9.** Audit, Allowance, and Issuance of Warrant Compelled. — State *v.* Weston, (Neb. 1904) 99 N. W. Rep. 520.
- 11.** Validity Doubtful and Disputed. — Where the only denial of the validity of municipal bonds consists in asserting an erroneous conclusion as to the legal requirements of an ordinance directing their issue and providing for a tax levy for their payment, they need not be reduced to judgment before resort to mandamus. Territory *v.* Socorro, (N. Mex. 1904) 76 Pac. Rep. 283.
- 12.** Payment Out of Available Funds. — U. S. *v.* Kent, 107 Fed. Rep. 190, *affirmed* (C. C. A.) 113 Fed. Rep. 232; Ward *v.* Piper, 69 Kan. 773.
- 804.** 3. Revenues Needed for Current Expenses. — Territory *v.* Socorro, (N. Mex. 1904) 76 Pac. Rep. 283.
- 805.** 8. Mandatory Duties Enforced — Colorado. — People *v.* Vanhorn, (Colo. App. 1904) 77 Pac. Rep. 978.  
Illinois. — People *v.* Knopf, 198 Ill. 340.  
Kansas. — Scott *v.* Schwab, 70 Kan. 306.  
Kentucky. — Northington *v.* Sublette, 114 Ky. 72.  
Minnesota. — State *v.* Gunn, 92 Minn. 436.  
Missouri. — State *v.* Nerry, 105 Mo. App. 458.  
Nebraska. — State *v.* Cronin, (Neb. 1904) 101 N. W. Rep. 325.  
New York. — People *v.* Lewis, 102 N. Y. App. Div. 408.  
North Dakota. — State *v.* Larson, 13 N. Dak. 420.  
Oklahoma. — Swan *v.* Wilderson, 10 Okla. 547.  
South Dakota. — State *v.* Boyden, (S. Dak. 1904) 100 N. W. Rep. 763.  
Texas. — Lawhon *v.* Haas, (Tex. Civ. App. 1901) 65 S. W. Rep. 48.  
Wisconsin. — Roberts *v.* Erickson, 117 Wis. 324.
- 9.** Discretionary Duties. — Sullivan *v.* Gage, 145 Cal. 759; Simons *v.* Military Board, 99 Va. 390.
- 806.** 15. Designating Newspaper to Publish Legal Advertisements. — Braddy *v.* Whiteley, 113 Ga. 746.
- 807.** 4. Remedy by Appeal. — See State *v.* Coufal, (Neb. 1901) 95 N. W. Rep. 362.
- 8.** Action Compelled. — Clapp *v.* Titus, (Mich. 1904) 100 N. W. Rep. 1005, 11 Detroit Leg. N. 457; Halsey *v.* Nowrey, 71 N. J. L. 481.
- 9.** Signing Ordinances. — State *v.* McQuade, 36 Wash. 579.
- 808.** 3. Discretion Not Controlled by Mandamus. — Bacon *v.* Chosen Freeholders, 69 N. J. L. 195.
- 6.** Enforcement of Mandatory Statutes. — Welch *v.* State, 164 Ind. 104.
- 809.** 21. Discretion Not Controlled. — Howe *v.* Rose, 35 Tex. Civ. App. 328.
- 810.** 3. Opening and Working Road Compelled. — Welch *v.* State, 164 Ind. 104; People *v.* Marlette, 94 N. Y. App. Div. 592, *affirming* (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 151.
- 812.** 7. Removal of Fences and Other Obstruc-

- 812.** Effect of Other Remedy. — See note 10.  
 15. Bridges — Construction or Repair. — See note 12.
- 813.** See notes 2, 3.
- 814.** Bridge between Adjoining Counties. — See note 13.  
 The Purchase of a Bridge. — See note 15.
- 815.** 16. Patents and Trademarks — Granting or Refusing Patent. — See note 1.  
 Registration of Trademarks and Labels. — See note 7.  
 17. Corporations. — See notes 11, 13.
- 816.** See note 3.
- 817.** 22. Inspection and Copy of Records. — See notes 5, 6.
- 818.** 25. Contracts — *a.* ENFORCEMENT. — See note 4.
- 819.** See note 1.  
 Inspection and Acceptance of Public Work. — See note 4.  
*b.* LETTING OR AWARDING — (1) *In General* — Contract to Be Let to Lowest Responsible Bidder. — See note 8.  
 Lowest and Best Bidder. — See note 9.  
 Authority to Reject Bids. — See note 1.  
 (2) *Where Contract Has Been Awarded to Another.* — See note 2.  
 (3) *Where Remedy by Action Exists.* — See note 4.
- 821.** *c.* AFFIXING SIGNATURE OR SEAL. — See note 3.  
 26. Licenses — *a.* ISSUANCE — (1) *In General.* — See notes 10, 11.
- 822.** See note 1.
- tions. — *People v. Marlett*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 151.
- 812.** 9. Dispute as to Existence of Highway. — *State v. McCann*, 107 Wis. 348.
10. Indictment as a Bar to Mandamus. — See *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.
12. Discretion Not Controlled. — *Kingsley v. Nyland*, 136 Mich. 535, 11 Detroit Leg. N. 91; *State v. Thomas*, 183 Mo. 220.
- 813.** 2. Erection or Repair of Bridge. — *Leonard v. Wakeman*, 120 Iowa 140; *State v. Justices*, 108 Tenn. 259.
3. Erection or Repair under Mandatory Statute. — *Leslie County v. Wooten*, 115 Ky. 850; *Brophy v. Schindler*, 126 Mich. 341, 8 Detroit Leg. N. 35; *State v. Renville County*, 83 Minn. 65.
- 814.** 13. Maintenance of Bridge Between Adjoining Counties. — The duty of a county board either to join in a contract for the repair of an inter-county bridge, when properly notified, or to refuse in its discretion to do so, may be compelled by mandamus. *Iske v. State*, (Neb. 1904) 100 N. W. Rep. 315.
15. Purchase of Bridge. — *State v. Bangor*, 98 Me. 114.
- 815.** 1. See *U. S. v. Allen*, 192 U. S. 543; *Ex p. Frasch*, 192 U. S. 566.
7. Registration of Label Compelled by Mandamus. — See *Allen v. U. S.*, 22 App. Cas. (D. C.) 271.
11. Ministerial Duties Enforced. — *State v. Cook*, 174 Mo. 100.
13. No Right to Incorporation. — *Miller v. Tod*, 95 Tex. 404.
- 816.** 3. See *State v. Cook*, 171 Mo. 348.
- 817.** 5. Writ Lies to Permit Inspection and Copy. — *State v. Williams*, 110 Tenn. 549.
6. No Legal Right — Writ Denied on Merits. — *Hall v. Staunton*, 55 W. Va. 684; *Payne v. Staunton*, 55 W. Va. 203.
- 818.** 4. Effect of Constitutional Provision Against Suing the State. — *Farmers' Nat. Bank v. Jones*, 105 Fed. Rep. 459; *State v. Mortenson*, (Neb. 1903) 95 N. W. Rep. 831.
- 819.** 1. Compelling Performance of Acts Growing Out of Contracts. — See *State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386.
4. Inspection and Acceptance of Public Work. — *King v. Martin County*, 34 Ind. App. 231.
8. Letting of Contracts to Lowest Responsible Bidder. — *Kas v. State*, 63 Neb. 581.
9. *Akron v. France*, 24 Ohio Cir. Ct. 63; *State v. Lincoln*, (Neb. 1903) 94 N. W. Rep. 719. Compare *Marsh v. State*, 2 Neb. (unofficial) 372, 96 N. W. Rep. 520.
- 820.** 1. Where Officers Are Authorized to Reject Bids. — *Stanley-Taylor Co. v. San Francisco*, 135 Cal. 486.
2. Where Contract Has Been Awarded to Another. — *State v. Police Jury*, 108 La. 311.
4. Where Remedy by Action Exists. — See *Kas v. State*, 63 Neb. 581.
- 821.** 3. Compelling Affixing of Signature or Seal. — *Home Constr. Co. v. Duncan*, 68 S. W. Rep. 15, 24 Ky. L. Rep. 94.
10. Compelling Issuance of Licenses. — *State Board of Examiners v. People*, 93 Ill. App. 436; *Harrison v. People*, 101 Ill. App. 224; *Armstrong v. Murphy*, 65 N. Y. App. Div. 123. See also *State v. Chittenden*, 112 Wis. 569.
- To Insurance Company. — *Metropolitan L. Ins. Co. v. Darenkamp*, 66 S. W. Rep. 1125, 23 Ky. L. Rep. 2249; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1; *State v. Giljohann*, 111 Wis. 377.
- Permit to Build Sidewalk. — See *State v. St. Louis*, 158 Mo. 505.
- Permit to Erect Livery Stable. — See *Hester v. Thomson*, 35 Wash. 119.
11. Where Officer Abuses His Discretion. — *Bostock v. Sams*, 95 Md. 400, 93 Am. St. Rep. 394.
- 822.** 1. Clear Legal Right to License Necessary. — *State v. Cook*, 171 Mo. 348; *Armstrong*

- 822.** (2) *Sale of Intoxicating Liquors.* — See notes 2, 3.  
 (3) *To Physician, Dentist, Etc.* — See notes 5, 7, 9.

- 823.** *b. REVOCATION.* — See note 3.

27. *Approval of Official or Other Bonds* — *Approval Not to Be Compelled.* —

See note 6.

**825.** 29. *Register of Deeds.* — [The Allowance of Redemption from a Tax Sale may be compelled in *Louisiana* by mandamus against the register of conveyances.<sup>4a</sup>]

30. *Police Officers* — *Enforcement of Laws.* — See note 6.

*Reinstatement of Policeman.* — See note 8.

- 826.** 32. *Other Special Cases Enumerated* — *Writ Granted.* — See note 14.

*Writ Refused.* — See note 17.

**827. V. ACTS AND PROCEEDINGS OF COURTS AND JUDICIAL OFFICERS—**

3. *Hearing and Determination of Cause* — *a. IN GENERAL* — *Mandamus Lies to Compel an Inferior Court to Hear and Determine a Cause.* — See note 4.

*v. Murphy*, 65 N. Y. App. Div. 123; *Bankers' L. Ins. Co. v. Howland*, 73 Vt. 1.

**822.** 2. *License to Sell Intoxicating Liquor.* — *Riley v. Rowe*, 112 Ky. 817; *State v. Northfield*, (Minn. 1904) 101 N. W. Rep. 1063; *State v. Stiff*, 104 Mo. App. 685; *State v. Higgins*, 84 Mo. App. 531; *State v. McCammon*, 111 Mo. App. 626; *Loughran v. Hickory*, 129 N. Car. 281; *Burnes v. Wilson County*, 135 N. Car. 27.

*When Mandamus Would Be Nugatory.* — *State v. Corley*, 168 Mo. 126.

3. *Where Board Has No Discretion, or Acts Arbitrarily.* — *Harlan v. State*, 136 Ala. 150; *Harrison v. People*, 195 Ill. 466; *George v. Winchester*, 80 S. W. Rep. 1158, 26 Ky. L. Rep. 170; *State v. New Orleans*, 113 La. 371; *State v. McCammon*, 111 Mo. App. 626.

5. *Issuance of License to Practice Dentistry.* — *State v. Board of Dental Examiners*, 38 Wash. 325.

7. *State Board of Health v. People*, 102 Ill. App. 614; *Ewhank v. Turner*, 134 N. Car. 77.

9. *Where Board Abuses Its Discretion.* — *State v. Board of Dental Examiners*, 38 Wash. 325. See also *State Board of Health v. People*, 102 Ill. App. 614.

**823.** 3. See *Moores v. State*, (Neb. 1903) 96 N. W. Rep. 225.

*Revocation Pending Appeal.* — The fact that an appeal has been taken to the District Court from the order of the county board granting a liquor license will not prevent a writ of mandamus from issuing, on a proper application, directing the board to revoke such license pending appeal. *Swan v. Wilderson*, 10 Okla. 547.

6. *Where Compliance with All the Provisions of the Law Was Shown*, it was held in *South Dakota* that mandamus would lie to compel a county board to approve a bond, though the board had already acted in the matter. *Burke v. Collins*, (S. Dak. 1904) 99 N. W. Rep. 1112.

**825.** 4a. *Compelling Allowance of Redemption.* — *State v. Register of Conveyances*, 113 La. 93.

6. *Moores v. State*, (Neb. 1904) 99 N. W. Rep. 249; *Goodell v. Woodbury*, 71 N. H. 378; *State v. Williams*, 45 Oregon 314. See also *People v. Listman*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 372, affirmed 84 N. Y. App. Div. 633, 82 N. Y. Supp. 784.

8. *Compelling Reinstatement of Policeman.* — *State v. Police Com'rs*, 80 Mo. App. 206, af-

firmed 184 Mo. 109. See also *State v. Police Com'rs*, 184 Mo. 109.

*Exhaustion of Remedies Before Board Essential.* — *State v. Police Com'rs*, 113 La. 424.

**826.** 14. *Approval of Plat of Land.* — *Owen v. Moreland*, 132 Mich. 477, 9 Detroit Leg. N. 697.

17. *Oyster Inspectors.* — See *Lewis v. Christian*, 101 Va. 135.

**827.** 4. *Mandamus Lies to Compel Hearing and Determination of Cause* — *England.* — See *Rex v. Stegney*, (1902) 1 K. B. 317, 86 L. T. N. S. 21, 71 L. J. K. B. 238, 50 W. R. 412, 66 J. P. 183.

*Canada.* — *Rex v. Meehan*, 3 Ont. L. Rep. 567.

*United States.* — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.

*Alabama.* — *Ex p. Campbell*, 130 Ala. 171; *Ex p. Colley*, 140 Ala. 193.

*California.* — *Cahill v. Superior Ct.*, 145 Cal. 42; *De la Beckwith v. Superior Ct.*, 146 Cal. 496.

*Florida.* — *State v. Reeves*, 44 Fla. 179.

*Kentucky.* — *Shoemaker v. Hodge*, 111 Ky. 436; *Com. v. Newell*, 114 Ky. 419.

*Louisiana.* — *State v. Sommerville*, 105 La. 312.

*Michigan.* — *Hallwood Cash Register Co. v. Mandell*, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818.

*Missouri.* — *State v. Smith*, 172 Mo. 446; *State v. Dearing*, 173 Mo. 492.

*North Dakota.* — *State v. District Ct.*, 13 N. Dak. 211, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 827.

*Ohio.* — *State v. Smith*, 69 Ohio St. 196; *State v. Weite*, 70 Ohio St. 149.

*Pennsylvania.* — *Powell's Estate*, 209 Pa. St. 76.

*Texas.* — *Saycock v. Clark*, 94 Tex. 375; *Halliburton v. Martin*, 28 Tex. Civ. App. 127. See also *Wetz v. Thompson*, 26 Tex. Civ. App. 396.

*Virginia.* — *Valley Turnpike Co. v. Moore*, 100 Va. 702.

*West Virginia.* — *Roberts v. Paul*, 50 W. Va. 528; *Morgan v. Wetzel County Ct.*, 53 W. Va. 372.

*Mandamus Lies to Compel a Judge to Call in Another Judge to try a case at which the respondent is disqualified to preside.* *Gunn v. Lauder*, 10 N. Dak. 389.



- 828.** See note 1.  
The Question of Jurisdiction, Competency, Etc. — See note 2.  
Judicial Discretion Not Controlled. — See note 5.
- 829.** Where Lower Court Has Already Acted. — See note 1.  
Matters Preliminary to Trial. — See note 5.  
The Writ Will Be Denied. — See note 7.
- 830.** See notes 3, 7.  
*b.* DISMISSAL. — See note 11.  
*c.* REINSTATEMENT. — See note 12.
- 831.** See notes 1, 4.
- 832.** *d.* REHEARING — Vacation of Order Granting Rehearing. — See note 1.  
*e.* NEW TRIALS — Motion for New Trial. — See note 6.
- 833.** Retrial. — See note 1.
- 834.** 4. Removal of Cause — *b.* FROM ONE STATE COURT TO ANOTHER.  
— See note 3.  
5. Change of Venue. — See notes 6, 7.
- 835.** 6. Matters Relating to Trial — *b.* PRACTICE AND PROCEDURE —  
Where the Lower Court Has Plainly Erred. — See notes 3, 4.
- 837.** *d.* EVIDENCE — Interrogatories. — See note 7.

**828.** 1. Mandamus Substitute for Procedendo. — State *v.* Smith, 69 Ohio St. 196.

2. Question of Jurisdiction, etc., for Superior Court. — State *v.* Pitts, 139 Ala. 152.

5. Writ Not Used to Control Judicial Discretion — England. — Rex *v.* Justices, 86 L. T. N. S. 589, 66 J. P. 547.

Alabama. — *Ex p.* Colley, 140 Ala. 193.

California. — Walker *v.* Superior Ct., 139 Cal. 108.

Colorado. — Lockhaven Trust, etc., Co. *v.* U. S. Mortgage, etc., Co., 18 Colo. App. 447.

Louisiana. — State *v.* Sommerville, 105 La. 312.

Michigan. — Hallwood Cash Register Co. *v.* Mandell, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818.

Montana. — State *v.* District Ct., 25 Mont. 202; State *v.* District Ct., 26 Mont. 372; State *v.* District Ct., 27 Mont. 280.

New Hampshire. — Hart *v.* Folsom, 70 N. H. 213.

North Dakota. — State *v.* District Ct., 13 N. Dak. 211.

Ohio. — State *v.* Waite, 70 Ohio St. 149.

Pennsylvania. — Powell's Estate, 209 Pa. St. 76.

Texas. — Halliburton *v.* Martin, 28 Tex. Civ. App. 127; Gouhenour *v.* Anderson, 35 Tex. Civ. App. 569.

**829.** 1. Writ Denied Where Trial Court Has Already Acted. — Aldrich *v.* Superior Ct., 135 Cal. 12; Cahill *v.* Superior Ct., 145 Cal. 42; State *v.* District Ct., 13 N. Dak. 211, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 829; State *v.* Superior Ct., 24 Wash. 438.

5. Decision on Matters Preliminary to Trial. — State *v.* District Ct., 25 Mont. 202.

7. Trial Court Without Jurisdiction. — State *v.* Mack, 26 Nev. 430.

**830.** 3. Where Judge Has Not Refused to Proceed. — Halliburton *v.* Martin, 28 Tex. Civ. App. 127.

7. Mandamus Futile. — Terry *v.* Baker, 67 S. W. Rep. 258, 23 Ky. L. Rep. 2406; Hatch *v.* Frazer, (Mich. 1904) 101 N. W. Rep. 228.

11. Dismissal Discretionary. — Matlock *v.* Smith, 96 Tex. 211.

12. Reinstatement of Cause. — State *v.* Smith, 172 Mo. 446; State *v.* Smith, 172 Mo. 618; State *v.* District Ct., 32 Mont. 37.

**831.** 1. Writ Denied Where Court Has Acted Judicially. — *In re* Key, 189 U. S. 84 State *v.* Sommerville, 110 La. 953.

4. Remedy by Appeal. — State *v.* Sommerville, 110 La. 953; State *v.* Mosman, 112 Mo. App. 540.

**832.** 1. Writ Lies to Compel Vacation of Order for Rehearing. — Renaud *v.* State Ct. of Mediation, etc., 124 Mich. 648, 83 Am. St. Rep. 346.

6. Mandamus Lies to Compel Hearing of Motion for New Trial. — *Ex p.* Geter, 141 Ala. 323.

**833.** 1. Retrial. — Kroetch *v.* Morgan, 10 Idaho 172.

**834.** 3. Remedy by Appeal. — People *v.* Bolte, (Supm. Ct. Spec. A.) 35 Misc. (N. Y.) 53.

6. Writ Will Not Lie to Compel Granting of Change of Venue. — People *v.* Gibbons, 91 Ill. App. 567; People *v.* Church, 103 Ill. App. 132.

7. Writ Lies Where Inferior Court Has No Discretion to Refuse to Grant Change. — Gamble *v.* First Judicial Dist. Ct., 27 Nev. 233.

But mandamus to compel a justice of the peace to grant a change of venue will not issue after a wrongful refusal of such change, judgment, and satisfaction thereof on execution, since the writ would then be unavailing. Ellis *v.* Whitaker, 62 Kan. 582.

**835.** 3. Writ Granted in Case of Abuse of Discretion. — State *v.* Smith, 172 Mo. 446, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 385 [835]; Halliburton *v.* Martin, 28 Tex. Civ. App. 132, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835.

4. Preliminary Question of Practice. — State *v.* Foster, 106 La. 425.

**837.** 7. Irrelevant Interrogatories. — See State *v.* Judge, 107 La. 474, holding that the question whether interrogatories propounded are irrelevant should be determined by appeal from the final judgment and not by mandamus.

- 837.** *c.* TRIAL BY JURY AND JURY SERVICE. — See note 14.
- 838.** *h.* CONTINUANCES. — See note 9.  
*i.* SUPERSEDEAS AND STAY OF PROCEEDINGS. — See note 11.
- 839.** Vacation of Stay of Proceedings. — See note 5.  
*k.* JUDGMENTS AND ORDERS — (1) *Rendering or Entering Judgment.* — See note 11.
- 840.** Judgment on Verdict — Referee's Report — Award — Mandate. — See notes 3, 6.
- The Writ Will Be Denied. — See note 7.
- 841.** See note 5.  
 (2) *Vacation of Judgments or Orders.* — See note 6.  
 Interlocutory Order. — See notes 7, 8.
- 842.** The Writ Will Not Be Granted. — See notes 1, 2.  
 7. Appeals — *a.* GRANTING APPEAL — *Mandamus Lies.* — See note 7.
- 843.** But the Writ Will Not Be Granted. — See note 8.
- 844.** *b.* PERFECTING APPEAL — (2) *Bills of Exceptions* — *Mandamus Lies to Compel Signing, Etc.* — See note 4.
- 845.** Signing Particular Bill. — See notes 1, 2, 3, 4.
- 846.** Case Tried by Predecessor. — See note 2.

**837.** 14. Where There Is a Right to a Jury Trial mandamus will lie to enforce that right. *State v. Hart*, 26 Utah 229.

**838.** 9. Mandamus Not Issued to Compel Granting of Continuance. — *Atkinson v. Riley*, 63 S. W. Rep. 752, 23 Ky. L. Rep. 731; *State v. Sommerville*, 111 La. 1015.

11. Mandamus Lies to Compel Allowance of Supersedeas. — *McBride v. Whitaker*, (Neb. 1904) 98 N. W. Rep. 847; *Gutierrez v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 299; *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719.

**839.** 5. Vacation of Order Granting Stay of Proceedings. — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.

11. Mandamus Lies to Compel Rendering or Entering of Judgment. — *Claudius v. Melvin*, 146 Cal. 257; *Barlow v. Riker*, (Mich. 1904) 101 N. W. Rep. 820, 11 Detroit Leg. N. 707; *Marsteller v. Ward*, 52 W. Va. 74, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 839.

**840.** 3. Judgment on Verdict. — *Aycock v. Clark*, 94 Tex. 375.

6. Judgment According to Mandate. — *State v. Norris*, 61 Neb. 461.

7. Remedy by Appeal or Otherwise. — *Aycock v. Clark*, 94 Tex. 375.

**841.** 5. Judicial Discretion Not Controlled. — *Aycock v. Clark*, 94 Tex. 375; *Testard v. Brooks*, (Tex. Civ. App. 1902) 70 S. W. Rep. 240.

6. Mandamus Granted to Compel Vacation of Judgment or Order. — *Vincent v. Benzie Circuit Judge*, (Mich. 1905) 102 N. W. Rep. 369, 11 Detroit Leg. N. 761.

7. Vacation of Interlocutory Orders. — *Ex p. Jones*, 133 Ala. 212

8. Appeal from Final Judgment. — The writ will not ordinarily issue when its effect would be to reverse or vacate an order of a court or tribunal having jurisdiction to make the order, and especially when such order is one that may be reviewed on error or by appeal. *State v. Jessen*, 66 Neb. 515.

**842.** 1. Remedy by Appeal. — *Gay v. Torrance*, 143 Cal. 14; *Freud v. Saginaw Circuit* 3 Supp. E. of L.—75

*Judge*, 125 Mich. 670, 7 Detroit Leg. N. 671; *Poupard v. Judge*, 129 Mich. 662, 8 Detroit Leg. N. 1106; *Hopper v. Stowe*, (Mich. 1904) 100 N. W. Rep. 266, 11 Detroit Leg. N. 205; *State v. Westover*, (Neb. 1902) 89 N. W. Rep. 1002.

2. Relator Not Entitled to Relief. — See *Louisell v. Benzie Circuit Judge*, (Mich. 1905) 102 N. W. Rep. 371, 11 Detroit Leg. N. 747.

7. Writ Lies to Compel Granting of Appeal. — *U. S. v. Allen*, 192 U. S. 543, reversing 22 App. Cas. (D. C.) 56; *Gutierrez v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 299; *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719.

**843.** 8. Where Appeal Would Be Fruitless. — *People v. Church*, 103 Ill. App. 132.

**844.** 4. Mandamus Lies to Compel Signing, etc., of Bill of Exceptions. — *Crooks v. Superior Ct.*, 136 Cal. 23; *Lockhaven Trust, etc., Co. v. U. S. Mortgage, etc., Co.*, 18 Colo. App. 447; *Strickland v. Fite*, 114 Ga. 511; *Akerman v. Ford*, 116 Ga. 473; *Hartford L., etc., Ins. Co. v. Rossiter*, 196 Ill. 277, affirming 98 Ill. App. 11; *State v. Jarrott*, 183 Mo. 204; *State v. Gibson*, 184 Mo. 490; *State v. Cooper*, 107 Tenn. 202.

**845.** 1. Judge Not Compelled to Sign Any Particular Bill. — *State v. Cooper*, 107 Tenn. 202.

Settlement in Particular Manner. — See *Lockhaven Trust, etc., Co. v. U. S. Mortgage, etc., Co.*, 18 Colo. App. 477; *State v. Foster*, 106 La. 195.

2. Incorrect Bill. — *State v. Maiden*, 110 Tenn. 487; *State v. Cooper*, 107 Tenn. 202.

3. Bill Conceded to Be Correct. — *Strickland v. Fite*, 114 Ga. 511.

4. Matters Merely in the Judge's Mind are not properly a part of the bill of exceptions, and mandamus will lie to compel the settling of a bill that shows only the actual proceedings. *State v. Fawcett*, 63 Neb. 523, wherein the writ was issued to compel the signing of the bill presented by the relator.

**846.** 2. Case Tried by Predecessor — Writ Denied. — See *State v. Gibson*, 187 Mo. 536.

- 846.** Bill Must Be in Proper Form and Contain True Statement of Facts. — See note 6.
- 847.** Right to Mandamus Lost by Laches or Delay. — See note 3.  
Question of Laches for Trial Judge. — See note 6.
- 848.** The Granting of the Writ Will Be Denied. — See notes 1, 2, 3.  
Inquiry into Merits. — See note 5.  
*c.* ENFORCEMENT OF MANDATES AND ORDERS OF SUPERIOR COURT. — See note 8.
- 849.** The Construction of the Mandate. — See note 1.  
Matters Left to the Discretion of the Lower Court. — See note 3.  
**8.** Executions — *a.* ISSUANCE OF EXECUTION. — See notes 4, 6.
- 850.** See notes 3, 4.  
*b.* QUASHING EXECUTION. — See note 6.  
*c.* EXECUTION SALES. — See note 10.  
**9.** Costs — Taxation of Costs. — See note 13.
- 851.** See note 2.
- 852.** 10. In Particular Proceedings — *a.* CRIMINAL PROCEEDINGS — Sentence of Prisoner. — See note 3.
- 854.** *c.* CONTEMPT PROCEEDINGS — Mandamus Will Not Lie to Review Contempt Proceedings. — See notes 3, 4.  
Punishment for Contempt. — See note 5.

**846.** 6. Determination of Truth of Bill Matter for Trial Judge. — Lockhaven Trust, etc., Co. v. U. S. Mortgage, etc., Co., 18 Colo. App. 447.

**847.** 3. Right Lost by Laches. — State v. Gibson, 187 Mo. 536; State v. Holmes, (Neb. 1902) 91 N. W. Rep. 175; Hayes v. Clifford, 42 Oregon 568; Capps v. Russell, 25 Tex. Civ. App. 257; Kruegel v. Nash, 28 Tex. Civ. App. 306.

6. Question of Laches for Trial Judge. — Hayes v. Clifford, 42 Oregon 568.

**848.** 1. Another Adequate Remedy. — Nowlin v. Hall, 97 Tex. 441.

2. Where Judge Has Not Refused to Act. — Magee v. Penn, (Tex. Civ. App. 1902) 67 S. W. Rep. 1077.

3. Refusal Proper. — State v. Jarrott, 183 Mo. 204. Compare State v. Gibson, 184 Mo. 490.

5. Contrary Rule — Relator Must Show Error. — Harris v. Roan, 119 Ga. 379; Willis v. Felton, 119 Ga. 634.

8. Mandamus Lies to Compel Obedience to Mandate of Superior Court. — L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co., (C. C. A.) 128 Fed. Rep. 332; American Hydraulic Placer Co. v. Rich, 8 Idaho 570; Kroetch v. Morgan, 10 Idaho 172; State v. District Ct., 91 Minn. 161; State v. Douglass, (Mo. App. 1904) 83 S. W. Rep. 87; State v. Dickinson, 63 Neb. 869; State v. Thompson, (Neb. 1903) 95 N. W. Rep. 47; Schnepfer v. Whiting, (S. Dak. 1904) 99 N. W. Rep. 84.

**849.** 1. Construction of Mandate Function of Superior Court. — American Hydraulic Placer Co. v. Rich, 8 Idaho 570.

3. Discretion of Lower Court in Obeying Mandate Not Controlled. — James v. Central Trust Co., (C. C. A.) 108 Fed. Rep. 929; State v. Stull, (Neb. 1902) 96 N. W. Rep. 121.

4. Issuance of Execution. — Holtum v. Greif, 144 Cal. 521; State v. Hatch, 36 Wash. 164.

6. Proceedings on Judgment Suspended. — State v. Waite, 70 Ohio St. 149.

Where an Appeal Has Been Taken Without Right, in an action of forcible entry and de-

tainer, mandamus will lie to compel the issuance of a writ of restitution. State v. Fields, 62 Neb. 520.

**850.** 3. Another Adequate Remedy. — State v. Wright, 26 Mont. 540, 91 Am. St. Rep. 421.

4. Judicial Discretion Not Reviewed. — People v. Woodbury, 70 N. Y. App. Div. 416.

6. See State v. Waller, 133 Ala. 199.

10. Setting Aside Execution Sale. — Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23, 10 Detroit Leg. N. 957.

13. Mandamus to Compel Allowance of Costs Refused. — State v. Sommerville, 105 La. 312; O'Brien v. Wayne Circuit Judge, 131 Mich. 67, 9 Detroit Leg. N. 176; Roberts v. Paul, 50 W. Va. 528; Fleshman v. McWhorter, 54 W. Va. 161. See also State v. Thompson, 106 La. 395.

Retaxing Costs. — Mandamus is the proper remedy to review the action of the lower court in retaxation proceedings. Schmidt v. Wayne Circuit Judge, 136 Mich. 658, 11 Detroit Leg. N. 140.

**851.** 2. Entry of Judgment for Costs Compelled Where Duty Is Ministerial. — State v. Walker, 85 Mo. App. 247.

**852.** 3. Mandamus to Compel Imposition of Different Sentence. — See *Re Denison*, 6 Ont. L. Rep. 104.

**854.** 3. Contempt Proceedings Not Ordinarily Subject to Review by Mandamus. — Minnesota Moline Plow Co. v. Dowagiac Mfg. Co., (C. C. A.) 126 Fed. Rep. 746; Kruegel v. Nash, 31 Tex. Civ. App. 15. See also Toepel v. Donovan, (Mich. 1904) 102 N. W. Rep. 369.

4. Mandamus Lies Where There Is No Other Remedy. — Dillon v. Shiawassee Circuit Judge, 131 Mich. 574, 9 Detroit Leg. N. 440; State v. District Ct., 27 Mont. 128.

5. Mandamus Will Not Lie to Compel Punishment for Contempt. — See *Old Dominion Tel. Co. v. Powers*, 140 Ala. 220.

Proceedings to Secure Right. — Crocker v. Conrey, 140 Cal. 213.

**856. 11. In Respect to Particular Writs and Remedies — *b*. GARNISHMENT.**  
— See note 4.

*d*. CIVIL ARREST — Mandamus Is an Appropriate Remedy. — See note 7.  
Sufficiency of Affidavit to Hold to Bail. — See note 11.

**857. *g*. INJUNCTION — Granting of Injunction. — See note 4.**  
Dissolution of Injunction. — See note 6.

**858.** See note 1.

*h*. PROHIBITION. — See note 2.

*i*. CERTIORARI. — See note 4.

**12. Miscellaneous Acts and Duties — *a*. IN MATTERS RELATING TO BONDS — Fixing Amount of Bond. — See note 9.**

Judicial Discretion Not Controlled. — See note 13.

**859.** Writ Useless or Improper. — See note 2.

**861. *d*. AS TO RECORDS. — See note 6.**

**862. *h*. ALLOWANCE OF CLAIMS. — See notes 4, 6.**

**863. VI. ACTS AND PROCEEDINGS OF LEGISLATIVE BODIES AND OFFICERS —**  
**2. State Legislature and Officers — *a*. WHEN ACTING AS A BODY. — See note 1.**

**3. Municipal Legislative Bodies and Officers — *a*. WHEN ACTING AS A BODY — (1) Compelling Exercise of Functions in General. — See notes 6, 8, 9.**

**864. (3) Making Appropriations. — See note 7.**

(4) Compelling Issuance of Bonds. — See note 12.

(5) Compelling Levy of Tax — (a) To Pay Judgments. — See notes 14, 15.

**865.** See note 1.

Jurisdiction of Federal Courts. — See note 3.

**856. 4. Garnishment Proceedings. —** Valley City Desk Co. *v.* Wolcott, (Mich. 1905) 102 N. W. Rep. 651, 11 Detroit Leg. N. 767; Recor *v.* St. Clair Circuit Judge, (Mich. 1905) 102 N. W. Rep. 643, 11 Detroit Leg. N. 778.

7. Clark *v.* Kent Circuit Judge, 125 Mich. 449, 7 Detroit Leg. N. 574.

11. See Kreckler *v.* Kent Circuit Judge, 135 Mich. 94, 10 Detroit Leg. N. 684.

**857. 4. Discretion of Court in Issuing Injunction Not Controlled. —** Stenglein *v.* Saginaw Circuit Judge, 128 Mich. 440, 8 Detroit Leg. N. 721.

6. Mandamus to Compel Dissolution of Injunction Denied. — Central Bitulithic Paving Co. *v.* Manistee Circuit Judge, 132 Mich. 126, 9 Detroit Leg. N. 537; Emery *v.* Ionia Circuit Judge, (Mich. 1904) 101 N. W. Rep. 801, 11 Detroit Leg. N. 685; State *v.* Jensen, 66 Neb. 515.

**858. 1. Writ Granted in Particular Cases. —** Riker *v.* Oakland Circuit Judge, (Mich. 1904) 101 N. W. Rep. 229; State *v.* Graves, 66 Neb. 17.

Where Only Questions of Law Are Involved mandamus will lie to compel the dissolution of an injunction. See Central Bitulithic Paving Co. *v.* Manistee Circuit Judge, 132 Mich. 126, 9 Detroit Leg. N. 537.

2. To Compel Vacation of Writ of Prohibition. — See *Ex p.* Campbell, 130 Ala. 171.

4. Quashing Certiorari — Motion in Court Below. — Jacobs *v.* Wayne Circuit Judge, 132 Mich. 55, 9 Detroit Leg. N. 509.

9. Fixing Amount of Bond. — State *v.* Superior Ct., 28 Wash. 590.

13. Approval of Bonds — Discretion Not Controlled. — People *v.* Church, 103 Ill. App. 132; State *v.* Spiegel, 11 Ohio Cir. Dec. 313, 20 Ohio Cir. Ct. 507.

Where the Judge Fixes the Amount of a Bond

Too High, upon an erroneous conception of the law, he may be compelled by mandamus to approve a bond in the proper amount. Fleming *v.* Kirby, (Mich. 1904) 100 N. W. Rep. 272, 11 Detroit Leg. N. 211.

**859. 2. Writ Denied When Useless or Improper. —** Barnett *v.* Hart, 112 Ky. 728.

**861. 6. Mandamus to Compel Clerk of Peace to Deliver Copy of Record of Acquittal. —** Atty.-Gen. *v.* Scully, 4 Ont. L. Rep. 394, affirming 2 Ont. L. Rep. 315.

**862. 4. Payment of Claims. —** State *v.* Fraker, 166 Mo. 130.

6. Allowance Discretionary. — Murray *v.* Gillaspie, 96 Tex. 285.

**863. 1. State Legislature. —** French *v.* State Senate, 146 Cal. 604.

6. Municipal Legislative Bodies Exempt in regard to Legislative Functions. — State *v.* Bersch, 83 Mo. App. 657.

8. Ministerial Duty Resting on Legislative Body May Be Coerced. — Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659.

9. Council May Be Compelled to Exercise Functions. — Gibson *v.* Greenville, 64 S. Car. 455.

**864. 7. Appropriation for Public Board. —** State *v.* Massillon, 24 Ohio Cir. Ct. 249.

12. Duty to Issue Bonds Imposed by Mandatory Statute. — See Holroyd *v.* Indian Lake, 180 N. Y. 318, affirming 85 N. Y. App. Div. 246.

14. Levy of Tax by City Council. — Hicks *v.* Cleveland, (C. C. A.) 106 Fed. Rep. 459. As to demand, see U. S. *v.* Saunders, (C. C. A.) 124 Fed. Rep. 124.

15. County Board. — Padgett *v.* Post, (C. C. A.) 106 Fed. Rep. 600.

**865. 1. Hartman *v.* Brunswick, 98 Mo. App. 674.**

3. Jurisdiction of Federal Courts. — Padgett *v.* Post, (C. C. A.) 106 Fed. Rep. 600.

- 865.** (b) To Pay Bonds and Interest. — See notes 5, 6.  
 (6) *Compelling Award of Contract.* — See note 11.
- 866.** (8) *Ordering Holding of Election.* — See note 6.  
 (9) *Compelling Consideration of Qualification of Members.* — See note 9.  
 (10) *Compelling Restoration to Office.* — See note 11.
- 867.** (11) *Severing or Adding Territory to Corporation.* — See note 1.  
 (12) *Miscellaneous Matters.* — See note 2.  
*b. OFFICERS OF MUNICIPAL LEGISLATIVE BODY.* — See note 3.
- 869. VII. AGAINST PRIVATE CORPORATIONS, THEIR OFFICERS AND AGENTS, AND INDIVIDUALS — 2. Application Generally — a. AGAINST CORPORATIONS —**  
*General Rules Governing Issuance.* — See note 5.
- 870.** *c. OTHER REMEDIES.* — See note 5.
- 871.** See note 2.
- 872.** *d. DEMAND AND REFUSAL.* — See note 1.  
*3. Quasi-public Corporations — a. IN GENERAL.* — See note 4.
- 873.** *b. RAILROAD AND LIKE CORPORATIONS — (1) Construction and Operation of Improvement — (b) Across and Along Streets and Highways — aa. STATUTORY DUTIES.* — See note 3.
- 874.** *Manner of Performance.* — See note 2.  
*bb. COMMON-LAW DUTIES.* — See note 3.
- 875.** (a) *Miscellaneous Duties.* — See notes 2, 3.
- 876.** (2) *Duties as Common Carriers.* — See notes 2, 4.  
*c. MISCELLANEOUS CORPORATIONS — (1) In General.* — See note 6.

**865.** 5. *Payment of Bonds.* — *Hicks v. Cleveland*, (C. C. A.) 106 Fed. Rep. 459.

6. *Payment of Interest on Bonds.* — *U. S. v. Kent*, 107 Fed. Rep. 190, *affirmed* (C. C. A.) 113 Fed. Rep. 232.

11. *Compelling Execution of Agreement.* — *Mandamus* will not lie to compel a municipal corporation to execute an agreement which is a discretionary act, or to take any steps towards the consummation of such an agreement. *Carpenter v. Yeadon*, 208 Pa. St. 396.

**866.** 6. *Election to Fill Vacancy.* — *Rizer v. People*, 18 Colo. App. 40.

9. *Mandamus Will Not Lie to Seat Member.* — See *Scott v. State*, 43 Fla. 396.

11. *Compelling Restoration to Office.* — *State v. New Orleans*, 107 La. 632. See also *Riggins v. Richards*, (Tex. Civ. App. 1904) 79 S. W. Rep. 84, *writ of error dismissed* 97 Tex. 526.

**867.** 1. *Disconnecting or Adding Territory to Corporation.* — *Roberts v. People*, 93 Ill. App. 645; *Higgins v. Galesburg*, 96 Ill. App. 471; *Hall v. Mann*, 96 Ill. App. 659; *Mattoon v. Mattoon Tile Co.*, 97 Ill. App. 56; *Steele v. Willis*, 64 S. W. Rep. 417, 23 Ky. L. Rep. 826. See also *Seibert v. Swayne*, 97 Ill. App. 85; *Geneva v. People*, 98 Ill. App. 315.

2. *Compelling Drawing of Warrants.* — *Huey v. Waldrop*, 141 Ala. 318, *quoting* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864-867.

3. *Officer of Legislative Body Amenable to Mandamus.* — *Warmolts v. Keegan*, 69 N. J. L. 186.

**869.** 5. *Duty to Perform Not Absolute.* — See *Secretary of State v. National Salt Co.*, 126 Mich. 644, 8 Detroit Leg. N. 168.

**870.** 5. *Duty Arising Out of Contract.* — *Horton v. State*, 60 Neb. 701.

**871.** 2. *For Various Other Illustrations.* — *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.

**872.** 1. *Inspection of Corporate Books, Papers, Etc.* — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 238.

4. *Duties of Quasi-public Corporations.* — *State v. New Orleans Gas Light Co.*, 108 La. 67.

**873.** 3. *Statutory Duties Relative to Streets and Highways.* — *Chicago, etc., R. Co. v. State*, 158 Ind. 191, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 873; *Chicago, etc., R. Co. v. State*, 159 Ind. 237; *Swinney v. Chicago, etc., R. Co.*, 123 Iowa 219; *Houston, etc., R. Co. v. Dallas*, (Tex. Civ. App. 1904) 78 S. W. Rep. 525; *Mason v. Ohio River R. Co.*, 51 W. Va. 183; *Burlington, etc., R. Co. v. People*, (Colo. App. 1904) 77 Pac. Rep. 1026.

**874.** 2. *Chicago, etc., R. Co. v. State*, 158 Ind. 194, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874; *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551.

3. *Common-law Duty.* — *State v. Lake Koen Nav., etc., Co.*, 63 Kan. 394.

**875.** 2. *Establishment of Stations.* — *State v. Minneapolis*, 87 Minn. 156.

*Stopping Trains at Stations.* — *Railroad Com'rs v. Atlantic Coast Line R. Co.*, 71 S. Car. 130.

3. *Increasing Number of Trains.* — *People v. Brooklyn Heights R. Co.*, 66 N. Y. App. Div. 549, *affirmed* 172 N. Y. 90.

**876.** 2. *West Virginia Northern R. Co. v. U. S.*, (C. C. A.) 134 Fed. Rep. 198.

4. *Statutory Duties of Common Carriers.* — *State v. Atlantic Coast Line R. Co.*, (Fla. 1904) 37 So. Rep. 652, 657; *State v. Seaboard Air Line R. Co.*, (Fla. 1904) 37 So. Rep. 658; *Com. v. Louisville, etc., R. Co.*, (Ky. 1905) 85 S. W. Rep. 712. See also *U. S. v. Norfolk, etc., R. Co.*, 109 Fed. Rep. 831.

6. See *Bardsly v. Boise City Irrigation, etc., Co.*, 8 Idaho 155; *Seymour Water Co. v. Seymour*, 163 Ind. 120, *citing* 19 AM. AND ENG.

**877.** See note 1.

**878.** (3) *Corporation for Gathering and Disseminating News.*—See note 2.

**880.** 4. *Inspection of Corporate Books, Papers, Etc.*—*b.* PREVAILING RULE IN UNITED STATES.—See note 2.

**881.** Other Remedies.—See note 2.

5. *Issuance and Transfer of Corporate Stock*—*a.* GENERAL RULE.—See note 3.

**882.** 6. *Membership in Corporation or Association*—*a.* EARLY RULE GOVERNING ISSUANCE OF WRIT.—See note 4.

**883.** See note 1.

*b.* MEMBERSHIP IN CORPORATIONS.—See note 3.

**884.** *c.* SCOPE OF MANDAMUS TO REINSTATE.—See note 3.

**885.** *Pecuniary Right in Relator.*—See note 1.

**889.** VIII. JURISDICTION—1. In England and Canada.—See note 6.

**890.** See note 1.

2. In the United States—*b.* OF THE FEDERAL COURTS—(2) *Of the Supreme Court*—(a) *Original Jurisdiction.*—See note 9.

**891.** (3) *Of the Inferior Federal Courts*—(a) *In General.*—See note 11.

ENCYC. OF LAW (2d ed.) 876; *Indiana Natural Gas, etc., Co. v. State*, 162 Ind. 690; *Mahan v. Michigan Telephone Co.*, 132 Mich. 242.

**877.** 1. *Water Companies.*—*Long v. Springfield Water Co.*, 8 Del. Co. Rep. (Pa.) 151.

*Gas and Electric-light Companies.*—*State v. New Orleans Gas Light Co.*, 108 La. 67.

*Telephone Companies.*—*State v. Kinloch Telephone Co.*, 93 Mo. App. 349; *Godwin v. Carolina Telephone, etc., Co.*, 136 N. Car. 259, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877; *State v. Citizens' Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870.

**878.** 2. *Corporation for Gathering and Disseminating News.*—*State v. Associated Press*, 159 Mo. 410, 81 Am. St. Rep. 368.

**880.** 2. *Decisions Upholding View that Mandamus Lies*—*United States.*—See *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280.

*Alabama.*—*Cobb v. Lagarde*, 129 Ala. 488.

*California.*—*Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156.

*New Jersey.*—*Fuller v. Hollander*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456; *Bruning v. Hoboken Printing, etc., Co.*, 67 N. J. L. 119. Compare *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198.

*New York.*—*Latimer v. Herzog Teleseme Co.*, 75 N. Y. App. Div. 522; *Colwell v. Colwell Lead Co.*, 76 N. Y. App. Div. 615; *People v. Columbia Paper Bag Co.*, 103 Am. St. Rep. 208; *People v. Keeseville, etc., R. Co.*, 106 N. Y. App. Div. 349; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9. See also *Matter of Coats*, 73 N. Y. App. Div. 178; *Matter of Kennedy*, 75 N. Y. App. Div. 188, reversing (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 317.

*Pennsylvania.*—*McClintock v. Young Republicans*, 210 Pa. St. 115, 105 Am. St. Rep. 784.

*Inspection of By-laws.*—*Matter of Coats*, 75 N. Y. App. Div. 567.

**881.** 2. *No Remedy in Equity.*—*Fuller v. Hollander*, 61 N. J. Eq. 648, 88 Am. St. Rep. 456.

3. *Issuance of Certificates of Stock.*—*Clarke v. Hill*, 132 Mich. 434, 9 Detroit Leg. N. 671. But see *State v. Southern Mineral, etc., Imp. Co.*, 108 La. 24; *Scherck v. Montgomery*, 81 Miss. 426.

*Transfer of Stock.*—Compare *Upton v. Hutchinson*, 8 Quebec Q. B. 505, affirming 15 Quebec Super. Ct. 396.

The remedy of mandamus does not lie to compel the transfer of stock in an incorporated company, except in the case of a judicial sale thereof. *Terrell v. Georgia R., etc., Co.*, 115 Ga. 104.

**882.** 4. *Unincorporated Societies.*—See *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, affirmed 176 N. Y. 562.

**883.** 1. *Remedy Against Unincorporated Societies.*—See *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, affirmed 176 N. Y. 562.

3. *Mandamus to Reinstate.*—*Baltimore University v. Colton*, 98 Md. 623; *Jennings v. Supreme Lodge, etc.*, 67 N. J. L. 126.

**884.** 3. *Regular Proceedings Not Reviewable by Mandamus.*—*Crow v. Capital City Council*, 26 Pa. Super. Ct. 411.

**885.** 1. *Pecuniary Right in Relator.*—*Payne v. Staunton*, 55 W. Va. 209, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884 [885].

**889.** 6. *Prerogative Writ Still Within Exclusive Jurisdiction of King's Bench.*—See *Toronto Public Library Board v. Toronto*, 19 Ont. Pr. 329.

**890.** 1. *Jurisdiction in Ontario.*—*Toronto Public Library Board v. Toronto*, 19 Ont. Pr. 329.

9. *Limitation of Original Jurisdiction.*—*In re Massachusetts*, 197 U. S. 482; *Ex p. Glaser*, 198 U. S. 171.

**891.** 11. *Jurisdiction of Circuit Courts.*—*Hair v. Burnell*, 106 Fed. Rep. 280; *U. S. v. New Orleans, (C. C. A.)* 117 Fed. Rep. 650; *Cleveland v. U. S. (C. C. A.)* 127 Fed. Rep. 667; *Kelly v. Grand Circle, etc.*, 129 Fed. Rep. 830; *In re Coleman*, 131 Fed. Rep. 151; *Mystic Milling Co. v. Chicago, etc., R. Co.*, 132 Fed. Rep. 289.

**892.** See notes 2, 5, 6.

(b) Where the Writ Is Essential to Effectuate a Judgment — *aa.* IN GENERAL. —

See note 7.

*bb.* To COMPEL A COUNTY OR MUNICIPALITY TO LEVY A TAX. — See note 8.

**893.** See note 2.

**894.** *d.* OF THE STATE COURTS — (1) *Courts of Last Resort* — (a) Original Jurisdiction. — See notes 1, 3, 4.

**895.** (b) Appellate Jurisdiction. — See note 3.

**896.** See note 1.

(c) Supervisory Jurisdiction. — See notes 2, 3.

**897.** (d) Where the Court's Jurisdiction Is Concurrent with That of Inferior Courts. — See notes 1, 2, 3, 4.

**898.** (2) *Inferior Courts* — (a) In General. — See note 2.

**900.** (3) *Geographical Limitations of Jurisdiction* — (b) Inferior Courts. — See note 1.

**901. IX. PERFORMANCE AND ENFORCEMENT OF MANDATE — 2. Enforcement of Mandate — a. CONTEMPT PROCEEDINGS.** — See note 1.

**906. X. DAMAGES — 2. Under Statutes — c. WHAT DAMAGES RECOVERABLE.** — See note 8.

**892.** 2. *Mystic Milling Co. v. Chicago*, etc., R. Co., 132 Fed. Rep. 289

**5. Jurisdiction of the Circuit Courts of Appeals.** — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.

**6. Mandamus May Be Issued Whenever Essential to Exercise of Jurisdiction.** — *Hair v. Burnell*, 106 Fed. Rep. 280.

**7. Mandamus May Be Issued to Effectuate a Judgment.** — *Board of Liquidation v. U. S.*, (C. C. A.) 108 Fed. Rep. 689.

**8. Mandamus to County or Municipality to Levy a Tax.** — *Kent v. U. S.*, (C. C. A.) 113 Fed. Rep. 232; *Riverside County v. Thompson*, (C. C. A.) 122 Fed. Rep. 860.

**893.** 2. *Riverside County v. Thompson*, (C. C. A.) 122 Fed. Rep. 860; *Kinney v. Eastern Trust, etc., Co.*, 123 Fed. Rep. 297; *Carter County v. Schmalstig*, (C. C. A.) 127 Fed. Rep. 126.

**894.** 1. *Court of Exclusively Appellate Powers Has No Original Jurisdiction in Mandamus.* — *Savannah, etc., R. Co v. Postal Tel. Cable Co.*, 113 Ga. 916.

**3. Original Jurisdiction Conferred by Express Constitutional or Statutory Provision.** — *Keady v. Owers*, 30 Colo. 1; *People v. Chicago*, 193 Ill. 507; *People v. Board of Trade*, 193 Ill. 577; *People v. Board of Education*, 197 Ill. 43; *State v. District Ct.*, 27 Mont. 128.

**4. Limited Original Jurisdiction — Alabama.** — See *Christopher W. Stewart*, 133 Ala. 348; *Ex p. Giles*, 133 Ala. 211.

**895.** 3. *Test of Jurisdiction.* — On appeal from a judgment rejecting the relator's demand for a mandamus, the amount involved is the test of jurisdiction. *State v. Police Jury*, 109 La. 266.

**896.** 1. *Jurisdiction Expressly Conferred by Constitution or Statute.* — *State v. Woodhull*, 27 Ind. App. 576.

In *Indiana*, under a statute which provides that the writ of mandate shall issue "only when necessary for the exercise of its functions and powers," the appellate court cannot issue the writ in any case that is not appealable. *State v. Branyan*, 30 Ind. App. 502.

**2. Grant of Supervisory Power Confers Jurisdiction to Issue Mandamus.** — *Renaud v. State Ct. of Mediation, etc.*, 124 Mich. 648, 83 Am. St. Rep. 346; *State v. Graves*, 66 Neb. 17.

**3. Right to Issue Writ Expressly Granted.** — *State v. Smith*, 172 Mo. 446; *State v. Smith*, 172 Mo. 618.

In *Louisiana*. — *State v. Foster*, 106 La. 425.

**897.** 1. *Jurisdiction of Court of Last Resort and Inferior Courts Concurrent.* — *People v. Chicago*, 193 Ill. 507; *People v. Board of Education*, 197 Ill. 43. See also *Cooper v. Nisbet*, 118 Ga. 872; *People v. Board of Trade*, 193 Ill. 577.

**2. Discretion of Higher Court.** — *People v. Chicago*, 193 Ill. 507; *State v. Moores*, (Neb. 1904) 99 N. W. Rep. 842.

**3. People v. Chicago, 193 Ill. 507, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297 [897].**

**4. Where Only Private Rights Are Involved.** — *People v. Board of Education*, 197 Ill. 43; *People v. Board of Trade*, 193 Ill. 577; *People v. Chicago*, 193 Ill. 507; *Armstrong v. Mayer*, 61 Neb. 355; *State v. Houseworth*, 63 Neb. 658. See also *State v. Barret*, 25 Mont. 112; *State v. Chittenden*, 112 Wis. 569. Compare *State v. Kineval*, (Neb. 1903) 97 N. W. Rep. 798.

**898.** 2. *Constitutional Provisions or Statutes Prescribing or Limiting Jurisdiction.* — See *People v. Chicago*, 193 Ill. 507.

In *Tennessee*. — *State v. King*, (Tenn. Ch. 1901) 62 S. W. Rep. 314.

Under the *Constitution of Texas*. — See *Wetz v. Thompson*, 26 Tex. Civ. App. 396; *McCurdy v. Conner*, 95 Tex. 246.

In *Pennsylvania*. — *Com. v. Barnett*, 199 Pa. St. 161.

**900.** 1. *Geographical Limits of the Jurisdiction of Inferior Courts.* — *Loraine v. Pittsburg, etc.*, R. Co., 205 Pa. St. 132.

**901.** 1. *Performance Enforced by Contempt Proceedings.* — *Ball v. Wright*, 115 Ga. 729.

**906.** 8. *Damages Awarded for Original Injury.* — In *Kansas*, where a judgment is rendered in favor of the plaintiff in a mandamus proceeding, he may, in the same proceeding,

**906. XI. Costs** — 1. **Right to and Liability for Costs** — *a. AT COMMON LAW.* — See note 10.

**907. b. UNDER STATUTES** — (2) *Under the Statute of Anne* — **Recovery of Costs as Affected by Nature of Right.** — See note 7.

(3) *Statutes Vesting Awarding of Costs in Discretion of Court.* — See note 8.

**908. (5) Statutes Awarding Costs in Actions.** — See note 14.

**909. c. LIABILITY OF PUBLIC OFFICERS FOR COSTS** — (2) *Ministerial Officers Other than State Officers* — **Public Board.** — See note 8.

**910. (3) Judicial Officers.** — See note 1.

*e. EFFECT OF TERMINATION OF RELATOR'S RIGHT PENDING PROCEEDINGS.* — See note 7.

**2. Amount of Costs.** — See note 9.

and as a part of his remedy, recover such damages as he has actually sustained through the wrongdoing of the defendants. *McClure v. Scates*, 64 Kan. 282.

**906. 10. The Common-law Doctrine that the Crown Never Pays or Receives Costs** has never been altered as respects the prerogative writ of mandamus. *Rex v. Canterbury*, (1902) 2 K. B. 503, 71 L. J. K. B. 932, 86 L. T. N. S. 450, 50 W. R. 476, 66 J. P. 455.

**907. 7. Clute v. Ionia Circuit Judge, 131 Mich. 203, 9 Detroit Leg. N. 253.**

**8. Costs Discretionary with Court.** — *State v. Holm*, (Neb. 1902) 92 N. W. Rep. 1006.

**908. 14. Mandamus under Statute an Action.** — *State v. Policemen's Pension Fund*, 121 Wis. 44.

**909. 8. Costs Against Public Board.** — When public officers refuse to perform a statutory duty and are compelled to do so by mandamus, the costs of the mandamus proceedings will be adjudged against them when the relator is himself without fault, notwithstanding the officers were acting in obedience to an injunction order supposed by them to be valid, but which was in fact void. *State v. Carlson*, (Neb. 1904) 101 N. W. Rep. 1004.

**910. 1. Party Beneficially Interested Liable for Costs.** — *Hill v. Morgan*, 9 Idaho 777; *Johnson v. New Orleans*, 109 La. 696.

**7. See People v. Mt. Vernon, 95 N. Y. App. Div. 75.**

**9. Mandamus an Action.** — *State v. Policemen's Pension Fund*, 121 Wis. 44.

## MANDATE (BAILMENT).

**913. II. LIABILITY** — *In General.* — See note 1.

**915. Money.** — See note 2.

**917. MANIFEST — MANIFESTLY.** — See note 4.

**918. MANNER.** — See note 2.

**921.** See note 1.

**922. MANUFACTURE — MANUFACTURER — MANUFACTURING, ETC.** — See notes 3, 4, 5.

**913. 1. Liability — In General.** — *McKenna v. Walker*, 85 Mo. App. 570; *Cochran v. Cochran*, (Neb. 1901) 95 N. W. Rep. 778; *Wood v. Grifenhagen*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 553; *Leggo v. Welland Vale Mfg. Co.*, 2 Ont. L. Rep. 45.

**915. 2. Money.** — See *Tempest v. Bertrand*, 19 Quebec Super. Ct. 365.

**917. 4. Manifest Distinguished from Bill of Lading.** — *In New York, etc., Mail Steamship Co. v. U. S.*, 125 Fed. Rep. 320, the court said: "A manifest is a declaration of the entire cargo; a bill of lading is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading."

**918. 2. Manner.** — See *Smalley v. Bowling*, 64 Kan. 818, dissenting opinion.

**921. 1. Manner Not Including Time.** — See

dissenting opinion in *Smalley v. Bowling*, 64 Kan. 818.

**922. 3. Manufacture.** — *Landgraf v. Kuh*, 188 Ill. 484; *State v. American Sugar Refining Co.*, 108 La. 603.

**4. State v. American Sugar Refining Co., 108 La. 603.**

**5. Manufacturer.** — *State v. American Sugar Refining Co.*, 108 La. 603; *State v. A. W. Wilbert's Sons Lumber, etc., Co.*, 51 La. Ann. 1223; *Wilson v. Tennent*, (Supm. Ct. Gen. T.) 32 Misc. (N. Y.) 273; *Consumers Brewing Co. v. Norfolk*, 101 Va. 171.

**Manufactured.** — See *Landgraf v. Kuh*, 188 Ill. 484.

**New Article.** — *Landgraf v. Kuh*, 188 Ill. 484; *State v. A. W. Wilbert's Sons Lumber, etc., Co.*, 51 La. Ann. 1223.



**928. MAP.** — See note 1.

**MARE.** — See note 5.

**MARGIN — MARGINAL.** — See note 6.

**Produce and Manufacture** held synonymous terms in a prohibition act, and latter term held to apply both to the one who actually makes the wine and to the one who causes it to be made. *Harris v. State*, 114 Ga. 436.

**Building Used for Manufacturing Purposes.** — Under a statute requiring fire escapes on a building used for *manufacturing* purposes it was held that a loft used for *manufacturing* garters and hose supporters by electric machinery was within the statute. *Landgraf v. Kuh*, 188 Ill. 484.

**Cotton.** — *Meyer v. U. S.*, 124 Fed. Rep. 296.

**Electric Light Company.** — See *Burke v. Mead*, 159 Ind. 252; *State v. American Sugar Refining Co.*, 108 La. 603.

The production and control of electric power by mechanical means and its adoption for use upon a trolley system is a *manufacturing* purpose within the *New Jersey* Mechanic's Lien Law. *Bates Mach. Co. v. Trenton, etc., R. Co.*, 70 N. J. L. 684.

**A Laundry** is not a *manufacturing* corporation within the Bankruptcy Act. *In re White Star Laundry Co.*, 117 Fed. Rep. 570.

Nor is it within a state statute exempting *manufacturing* corporations from taxation. *Com. v. Keystone Laundry Co.*, 203 Pa. St. 289.

Neither is a laundry a *manufacturing* establishment within a statute giving employees a lien. *Muir v. Samuels*, 110 Ky. 605.

**Lumber.** — *Benedict v. Davidson County*, 110 Tenn. 183; *Robins v. Paulson*, 30 Wash. 459.

**Metals.** — See *Downing v. U. S.*, 116 Fed. Rep. 779.

**Mining Company.** — See *In re White Star Laundry Co.*, 117 Fed. Rep. 570; *In re Chesapeake Oyster, etc., Co.*, 112 Fed. Rep. 960.

**A Natural Gas Company.** — *Wilson v. Tenant*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 273.

**A Sawmill Owner and Operator** is a *manufacturer* within a statute exempting *manufacturers* from license taxes. *State v. A. W. Wilbert's Sons Lumber, etc., Co.*, 51 La. Ann. 1223.

**Silk.** — *Garrison v. U. S.*, 121 Fed. Rep. 149.

**Wool.** — *U. S. v. Rouss*, 113 Fed. Rep. 816; *Vandegrift v. U. S.*, 113 Fed. Rep. 816; *Veit v. U. S.*, 121 Fed. Rep. 205; *Wolff v. U. S.*, 113 Fed. Rep. 1001.

**Exemption from Taxation.** — *People v. Morgan*, 61 N. Y. App. Div. 373.

**928. 1. Map Distinguished from Model.** — "A *map* is a drawing upon a plane surface representing a part of the earth's surface and the relative position of objects thereon," and is easily distinguishable from a model, which is "a facsimile in three dimensions — a reproduction in miniature of the object under investigation." *Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co.*, 27 Mont. 324.

**5. Mare.** — *Teal v. State*, 119 Ga. 102.

**6. See** *De Mary v. Burtenshaw*, 131 Mich. 326.

**Margin in the Sense of Security.** — *Winward v. Lincoln*, 23 R. I. 476.

## MARINE INSURANCE.

By A. W. VARIAN.

**940. I. DEFINITION.** — See note 1.

**III. INSURABLE INTERESTS — 1. In General — a. NECESSITY OF INSURABLE INTEREST.** — See note 3.

**941. b. WHAT CONSTITUTES INSURABLE INTEREST — (2) Quality of Interest.** — See note 7.

**944. 2. Persons Having Insurable Interests — b. CHARTERER.** — See note 6.

**946. g. CARRIERS AND BAILEES.** — See notes 3, 4.

**951. IV. THE CONTRACT IN GENERAL — 1. Nature, Requisites, and Incidents — f. "FLOATING" OR "RUNNING" POLICIES — (2) Declaration and Indorsement — Manner of Making.** — See note 9.

**940. 1. Marine Insurance Defined.** — *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 68 Ohio St. 469. See also *The Dora Forster*, (1900) 2 P. 241; *Soelberg v. Western Assur. Co.*, (C. C. A.) 119 Fed. Rep. 23.

**3. Necessity of Insurable Interest.** — *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 68 Ohio St. 469.

**941. 7. Risk of Loss.** — *Cunard Steamship Co. v. Marten*, (1902) 2 K. B. 624, *affirmed* (1903) 2 K. B. 511; *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410.

**944. 6. A Charterer** may insure the cargo against general average charges. *Dodwell v. Munich Assur. Co.*, 123 Fed. Rep. 841, *affirmed* (C. C. A.) 128 Fed. Rep. 410.

**946. 3. Carrier Has Insurable Interest.** — *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410.

**4. Warehousemen and Wharfingers.** — *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410.

**951. 9. Manner of Making Indorsement.** —

**952.** Assent of Insured and Time of Declaration. — See notes 4, 5.

But There Is a Conflict of Authority. — See note 6.

**953.** 2. Legality — *a.* VIOLATION OF REVENUE, TRADE, AND NAVIGATION LAWS — (1) *Domestic Laws.* — See note 3.

**955.** *c.* AS AFFECTED BY WAR POLICY — (1) *Alien Enemies Cannot Be Insured.* — See notes 2, 3, 6.

(2) *Trading with the Enemy.* — See note 8.

**956.** 3. Construction and Operation — *b.* DESCRIPTION OF PARTIES — (2) "*For Whom It May Concern.*" — See note 9.

Parties Not Known. — See note 10.

**957.** Persons Originally Intended. — See notes 7, 8.

**958.** *c.* DESCRIPTION OF SUBJECT — (2) *Ship* — The General Description. — See note 6.

**960.** (5) *Other Special Descriptions* — (a) *Advances.* — See note 5.

**961.** *d.* DESIGNATION OF INTEREST — (1) *Interest Need Not Be Specified.* — See note 7.

**962.** *e.* DESCRIPTION OF ADVENTURE AS TO TIME, VOYAGE, AND PLACE — (1) *In General* — (a) *Necessity of Description.* — See note 3.

(b) *Voyage Policies.* — See note 6.

(c) *Time Policies* — Definition. — See note 7.

**963.** (d) *Mixed Policies.* — See note 4.

See *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, (C. C. A.) 109 Fed. Rep. 334.

**952.** 4. Policy in General Terms. — *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, (C. C. A.) 109 Fed. Rep. 334.

5. Express Exception. — *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, (C. C. A.) 109 Fed. Rep. 334.

6. Where Premium Is Not Fixed. — *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.*, (C. C. A.) 109 Fed. Rep. 334.

**953.** 3. Contract Prohibited by Statute. — Royal Exch. Assur. Corp. *v.* Sjöforsakrings Aktiebolaget Vega, (1901) 2 K. B. 567, *affirmed* (1902) 2 K. B. 384.

**955.** 2. Alien Enemies Cannot Be Insured. — *Driefontein Consol. Gold Mines v. Janson*, (1901) 2 K. B. 419, *affirmed* (1902) A. C. 484.

3. But it is not against public policy to insure aliens although the relations between the respective governments of the insurer and the insured are strained and war is imminent. *Driefontein Consol. Gold Mines v. Janson*, (1901) 2 K. B. 419, *affirmed* (1902) A. C. 484, 87 L. T. N. S. 372.

6. Becoming Alien Enemy After Loss. — *Driefontein Consol. Gold Mines v. Janson*, (1901) 2 K. B. 419, *affirmed* (1902) A. C. 484, 87 L. T. N. S. 372.

8. *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484, 87 L. T. N. S. 372.

"Enemy" Means a De Facto Enemy within the meaning of the rule of public policy. *Driefontein Consol. Gold Mines v. Janson*, (1901) 2 K. B. 419, *affirmed* (1902) A. C. 484.

**956.** 9. "For Whom It May Concern" Covers Interest of Persons Intended. — *Hagan v. Scottish Union, etc., Ins. Co.*, 98 Fed. Rep. 129, *affirmed* 186 U. S. 423. See also *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191.

10. Though Such Person Not Known at Time. — *Hagan v. Scottish Union, etc., Ins. Co.*, 98 Fed. Rep. 129, *affirmed* 186 U. S. 423; *Marine*

*Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191.

**957.** 7. In Ohio the agent effecting the insurance may sue for the person for whose benefit it was intended. *Marine Ins. Co. v. Walsh-Upstill Coal Co.*, 23 Ohio Cir. Ct. 191.

8. Need Not Be Specific Individual. — *Hagan v. Scottish Union, etc., Ins. Co.*, 98 Fed. Rep. 129, *affirmed* 186 U. S. 423.

**958.** 6. What Constitutes Furniture of a Ship. — *Hogarth v. Walker*, (1900) 2 Q. B. 283, 69 L. J. Q. B. 634, 82 L. T. N. S. 744, 48 W. R. 545, 5 Com. Cas. (Eng.) 292, 9 Asp. M. Cas. 84.

**960.** 5. Accepted Drafts Against Freight. — *The Clintonia*, 104 Fed. Rep. 92; *Neall v. Union Marine Ins. Co.*, 95 Fed. Rep. 491, *affirmed* (C. C. A.) 115 Fed. Rep. 776.

**961.** 7. Nature of Interest Need Not Be Specified. — *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410.

**962.** 3. Policy Must Contain Description. — Royal Exch. Assur. Corp. *v.* Sjöforsakrings Aktiebolaget Vega, (1902) 2 K. B. 384, 71 L. J. K. B. 739, 87 L. T. N. S. 356, 50 W. R. 694, 7 Com. Cas. (Eng.) 205, 9 Asp. M. Cas. 329, *affirming* (1901) 2 K. B. 567, 70 L. J. K. B. 874, 85 L. T. N. S. 241, 50 W. R. 25, 6 Com. Cas. (Eng.) 189, 9 Asp. M. Cas. 233.

6. Voyage Policy Defined. — See *Greenock Steamship Co. v. Maritime Ins. Co.*, (1903) 2 K. B. 657, 72 L. J. K. B. 868, 89 L. T. N. S. 200, 52 W. R. 186, 9 Com. Cas. (Eng.) 41, 9 Asp. M. Cas. 463.

7. Time Policy Defined. — Royal Exch. Assur. Corp. *v.* Sjöforsakrings Aktiebolaget Vega, (1902) 2 K. B. 384, 71 L. J. K. B. 739, 87 L. T. N. S. 356, 50 W. R. 694, 7 Com. Cas. (Eng.) 205, 9 Asp. M. Cas. 329.

**963.** 4. In a Policy "Against Fire in Shops and on Board on Stocks, Trials and All Marine Risks to Completion and Acceptance by the Admiralty" the word "trials" refers to a risk insured against and does not, like the preceding words, refer to a period during which the

- 963.** (2) "*Lost or Not Lost.*" — See note 7.
- 969.** (8) *Commencement of Risk* — (a) *In General* — *cc. DELAY IN COMMENCEMENT.* — See note 11.
- 975.** (9) *Duration and Termination of Risk* — (g) "*Until Moored in Safety*" — *aa. AT PORT OF DESTINATION.* — See note 3.
- 976.** (h) "*Until Safely Landed.*" — See note 1.
- 977.** (k) *Extension of Time in Port* — *Extension in Port of Discharge.* — See note 2.
- 990.** VIII. *CONCEALMENT* — 5. *Loading, Sailing, and Weather* — *c. TIME OF SAILING.* — See note 3.
- 993.** 10. *Concealment of Facts by Agent* — *Agent Procuring Insurance.* — See note 5.
- 997.** IX. *REPRESENTATIONS* — 4. *Representations of Fact or Expectation or Belief* — *c. REPRESENTATIONS OF EXPECTATION OR INTENTION.* — See note 5.
- 998.** 6. *Materiality* — *a. TEST OF MATERIALITY.* — See note 3.
- b. ILLUSTRATIONS* — (1) *Material Representations.* — See note 11.
- 1000.** 8. *Effect of Misrepresentations* — *a. MATERIAL FACTS.* — See note 3.
- 1001.** X. *WARRANTIES* — 1. *Implied Warranties* — *a. SEAWORTHINESS* — (1) *Dependent upon Policy* — (a) *Voyage Policies.* — See note 7.
- 1002.** (c) *Cargo, Freight, and Salvage Policies.* — See note 4.
- 1003.** (e) *Exceptions in Policy.* — See note 2.
- (2) *Dependent upon Time or Place* — (c) *Commencement of Voyage.* — See note 6.
- 1004.** (e) *Continuance of Seaworthiness.* — See note 4.
- American Exception.* — See note 5.
- 1005.** See note 1.
- (4) *What Constitutes Unseaworthiness* — (b) *Condition of Vessel.* — See notes 7, 8, 9.

vessel is to be insured against fire. *Jackson v. Mumford*, 52 W. R. 342, 9 Com. Cas. (Eng.) 114, 20 Times L. Rep. 172, *affirming* 51 W. R. 91, 8 Com. Cas. (Eng.) 61.

**963.** 7. *Parties Must Be Ignorant of Loss.* — *Gauntlett v. Sea Ins. Co.*, 127 Mich. 504.

**969.** 11. *Delay in Commencement May Avoid Contract.* — *Maritime Ins. Co. v. Stearns*, (1901) 2 K. B. 912.

**975.** 3. *Days of Twenty-four Hours.* — *Cornfoot v. Royal Exch. Assur. Corp.*, (1904) 1 K. B. 40.

**976.** 1. "*Safely Landed*" — *Term of Policy.* — *Jacob v. Gaviller*, 87 L. T. N. S. 26, 50 W. R. 428, 7 Com. Cas. (Eng.) 116.

**977.** 2. *Extension, How Computed* — *Where the Words "Twenty-four Hours" Are Struck Out.* — *Cornfoot v. Royal Exch. Assur. Corp.*, (1904) 1 K. B. 40, 73 L. J. K. B. 22, 89 L. T. N. S. 490, 52 W. R. 49, 9 Com. Cas. (Eng.) 80, 9 Asp. M. Cas. 489, 20 Times L. Rep. 34, *affirming* 8 Com. Cas. (Eng.) 204.

**990.** 3. *Time of Sailing Material.* — *Kerr v. Union Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 415, 124 Fed. Rep. 835.

**993.** 5. *Knowledge Acquired by Lloyd's Agents* cannot be treated as knowledge of a member of Lloyd's where such member had no actual knowledge. *Wilson v. Salamandra Assur. Co.*, 88 L. T. N. S. 96, 8 Com. Cas. (Eng.) 129, 9 Asp. M. Cas. 370.

**997.** 5. *Expected to Sail.* — See *Kerr v. Union Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 415, *reversing* 124 Fed. Rep. 835.

**998.** 3. *Test of Materiality.* — *Kerr v. Union*

*Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 415, *reversing* 124 Fed. Rep. 835.

**11.** *That She Has Not Sailed.* — *Kerr v. Union Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 415, *reversing* 124 Fed. Rep. 835.

**1000.** 3. *Misrepresentation of Material Fact Avoids Policy.* — *Kerr v. Union Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 415, *reversing* 124 Fed. Rep. 835.

**1001.** 7. *Implied Warranty of Seaworthiness in Voyage Policies.* — *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820; *Long Dock Mills, etc., Co. v. Mannheim Ins. Co.*, 116 Fed. Rep. 886, *affirmed* (C. C. A.) 123 Fed. Rep. 861; *Mannheim Ins. Co. v. Atlantic, etc., R. Co.*, 11 Quebec K. B. 200, *affirming* 15 Quebec Super. Ct. 469.

**1002.** 4. *Vessel Warranted Seaworthy in Cargo Policy.* — *Sleigh v. Tyser*, (1900) 2 Q. B. 333.

**1003.** 2. *Exceptions in Policy.* — *Sleigh v. Tyser*, (1900) 2 Q. B. 333.

**6.** *Must Be Seaworthy at Commencement of Voyage.* — *Sleigh v. Tyser*, (1900) 2 Q. B. 333.

**1004.** 4. *Continuance of Seaworthiness Not Implied.* — See *Morse v. St. Paul F. & M. Ins. Co.*, 122 Fed. Rep. 748.

**5.** *Implied Warranty to Keep in Repair.* — See *Ryan v. Providence Washington Ins. Co.*, 79 N. Y. App. Div. 316.

**1005.** 1. *Exception in Case of Cargo Owners.* — *Morse v. St. Paul F. & M. Ins. Co.*, 122 Fed. Rep. 748.

**7.** *Vessel Must Be Stanch and Sound for Entire Voyage.* — *Sleigh v. Tyser*, (1900) 2 Q. B. 333,

**1006.** (a) Equipment. — See notes 7, 14.

**1008.** (f) Temporary Deficiencies. — See note 10.

(5) *Evidence and Burden of Proof* — (a) *Presumption of Seaworthiness*. — See note 11.

**1009.** See note 1.

(b) *Shifting of Burden of Proof*. — See note 2.

**1010.** (c) *Evidence* — *aa. To Overcome Presumption of Seaworthiness* — *The Evidence Is Sufficient*. — See note 2.

**1013.** 2. *Express Warranties* — *a. IN GENERAL* — (4) *Strict Compliance*. — See notes 8, 10.

**1017.** *b. VARIOUS PARTICULAR WARRANTIES* — (4) *Master and Crew*. — See note 5.

(5) *Time of Sailing or Departure* — *Warranty "to Sail"*. — See note 11.

**1019.** (8) *Location of Vessel*. — See note 6.

**1020.** (11) *Waters and Ports* — *Construction of Policy*. — See note 4.

**1021.** XI. *RISKS AND CAUSES OF LOSS* — 1. *General Principles*. — See note 7.

**1022.** See note 3.

2. *"All Risks."* — See note 5.

**1024.** 4. *Perils of the Sea* — *c. ILLUSTRATIONS* — (i) *Losses Caused by Perils of the Sea* — *Loss of or Injury to Vessel*. — See note 5.

69 L. J. Q. B. 626, 82 L. T. N. S. 804, 5 Com. Cas. (Eng.) 271, 9 Asp. M. Cas. 97; *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820.

**1005.** 8. *Fit to Carry Cargo*. — *Sleigh v. Tyser*, (1900) 2 Q. B. 333, 69 L. J. Q. B. 626, 82 L. T. N. S. 804, 5 Com. Cas. (Eng.) 271, 9 Asp. M. Cas. 97.

9. *Vessel Must Be Properly Built*. — See *Cleveland, etc., Transit Co. v. Insurance Co. of North America*, 115 Fed. Rep. 431.

**1006.** 7. *Proper Equipment for Intended Voyage*. — *Sleigh v. Tyser*, (1900) 2 Q. B. 333, 69 L. J. Q. B. 626, 82 L. T. N. S. 804, 5 Com. Cas. (Eng.) 271, 9 Asp. M. Cas. 97.

14. *Stores and Supplies*. — *Greenock Steamship Co. v. Maritime Ins. Co.*, (1903) 2 K. B. 657, 72 L. J. K. B. 868, 89 L. T. N. S. 200, 52 W. R. 186, 9 Com. Cas. (Eng.) 41, 9 Asp. M. Cas. 463, *affirming* (1903) 1 K. B. 367, 72 L. J. K. B. 59, 88 L. T. N. S. 207, 51 W. R. 447, 8 Com. Cas. (Eng.) 78, 9 Asp. M. Cas. 364.

**1008.** 10. *Temporary Deficiency*. — *Ajum v. Union Marine Ins. Co.*, (1901) A. C. 362, 84 L. T. N. S. 366; *Lewis v. Aetna Ins. Co.*, 123 Fed. Rep. 157, *affirmed* (C. C. A.) 129 Fed. Rep. 1006.

11. *Rebuttal of Presumption of Unseaworthiness*. — *Ajum v. Union Marine Ins. Co.*, (1901) A. C. 362, 70 L. J. P. C. 34, 84 L. T. N. S. 366, 9 Asp. M. Cas. 167.

**1009.** 1. *Rule that Seaworthiness Is Presumed*. — *Ajum v. Union Marine Ins. Co.*, (1901) A. C. 362, 84 L. T. N. S. 366; *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820.

2. *Shifting Burden of Proof*. — *Ajum v. Union Marine Ins. Co.*, (1901) A. C. 362, 84 L. T. N. S. 366.

**1010.** 2. *Overloaded Vessel*. — See *Ajum v. Union Marine Ins. Co.*, (1901) A. C. 362, 84 L. T. N. S. 366.

**1013.** 8. *Warranties Must Be Strictly and Accurately Complied With*. — *Snyder v. Home*

*Ins. Co.*, 133 Fed. Rep. 848; *Ryan v. Providence Washington Ins. Co.*, 79 N. Y. App. Div. 316.

10. *Loss Not Connected with Breach of Warranty Immaterial*. — *Snyder v. Home Ins. Co.*, 133 Fed. Rep. 848; *Fulton v. Insurance Co. of North America*, 127 Fed. Rep. 413; *Ryan v. Providence Washington Ins. Co.*, 79 N. Y. App. Div. 316.

**1017.** 5. *Warranted to Keep on Board a Competent Watchman*. — *Snyder v. Home Ins. Co.*, 133 Fed. Rep. 848.

11. *Bona Fide Departure Necessary*. — *Maritime Ins. Co. v. Stearns*, (1901) 2 K. B. 912, 71 L. J. K. B. 86, 6 Com. Cas. (Eng.) 182.

**1019.** 6. *Warranted "Safely Moored"*. — *Ryan v. Providence Washington Ins. Co.*, 79 N. Y. App. Div. 316.

**1020.** 4. *Warranty as to Waters and Places*. — *Hastorf v. Greenwich Ins. Co.*, 132 Fed. Rep. 122.

**1021.** 7. *"Disbursements" Policies*. — There are now in common use policies upon disbursements, which "are designed to cover a variety of interests not covered by policies in the ordinary form, including moneys which have gone into the construction of the hull and equipment and sunk in depreciation; the value of the contracts in the performance of which the ship may be engaged; any interest in the nature of the good will or profits of her business; any peculiar interest of the owner in the vessel irrespective of her actual value; and, though not designed as an insurance on hull, would have the effect of covering any uninsured value of the vessel." *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1022.** 3. *Violent Operation of Perils Essential*. — *Miller v. Law Acc. Ins. Co.*, (1902) 2 K. B. 694, *affirmed* (1903) 1 K. B. 712.

5. *"All Risks, Including Mortality"*. — *Jacob v. Gaviller*, 87 L. T. N. S. 26, 50 W. R. 428, 7 Com. Cas. (Eng.) 116.

**1024.** 5. *Salvage Losses and Expenses*. —

- 1024.** Loss of or Injury to Cargo. — See note 7.  
 (2) *Losses Not Caused by Perils of the Sea.* — See note 24.
- 1025.** 5. Collision — *c.* EXTENT OF LIABILITY. — See note 13.
- 1026.** *e.* "RUNNING DOWN" CLAUSE — (2) *What Damages Included.* — See note 2.
- 1027.** (4) *Exceptions.* — See note 2.  
*f.* PARTICULAR PROVISIONS. — See note 4.  
 6. Stranding — *Perils of the Sea.* — See note 7.
- 1028.** 7. Fire — *d.* LOCATION OF PROPERTY. — See note 11.
- 1029.** 9. Capture and Seizure — *b.* DEFINITION. — See note 2.  
*c.* ASSUMPTION OF RISK — (3) *War Risks.* — See note 5.  
*d.* WHAT CONSTITUTES. — See note 1.
- 1030.** 11. Arrests, Restraints, and Detentions — *a.* FORM OF POLICY. — See note 5.
- 1034.** *c.* WHAT CONSTITUTES — (2) *Blockade or Fear of Capture.* — See note 1.  
 (3) *Other Arrests, Restraints, and Detentions.* — See note 8.
- 1035.** 13. "All Other Perils" — *b.* DEFINITION. — See note 5.
- 1037.** 14. Proximate and Remote Causes of Loss — *c.* EFFICIENT AND PRE-DOMINATING CAUSE. — See note 2.

*International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

*Cutting Away Mast in Stress of Weather.* — *Montgomery v. Indemnity Mut. Marine Ins. Co.*, (1901) 1 K. B. 147, *affirmed* (1902) 1 K. B. 734.

**1024.** 7. By Sea Water. — *Brown v. Fleming*, 7 Com. Cas. (Eng.) 245, *distinguishing* *Cator v. Great Western Ins. Co.*, L. R. 8 C. P. 552, 42 L. J. C. Pl. 266.

All General Average Charges. — *De Farconnet v. Western Ins. Co.*, 110 Fed. Rep. 405, *affirmed* (C. C. A.) 122 Fed. Rep. 448.

24. *Inchmaree Clause.* — *Cleveland, etc., Transit Co. v. Insurance Co. of North America*, 115 Fed. Rep. 431.

"Latent Defects" in machinery does not extend to a weakness in design. *Jackson v. Mumford*, 51 W. R. 91.

**1025.** 13. Damages Recovered from Assured. — *Ferguson v. Providence Washington Ins. Co.*, 125 Fed. Rep. 141.

**1026.** 2. Collision with an Anchor to which a schooner is riding is covered by a policy against "actual collision between any such tug and any vessel." *In re Margetts*, (1901) 2 K. B. 792, 70 L. J. K. B. 762, 85 L. T. N. S. 94, 49 W. R. 669, 9 Asp. M. Cas. 217.

A Clause Rendering the Insurer Liable for Sums Paid "in Respect of Injury to Such Other Ship or Vessel" does not cover the expenses of the removal of the wreck of such other ship or vessel. *Burger v. Indemnity Mut. Marine Assur. Co.*, (1900) 2 Q. B. 348, 69 L. J. Q. B. 838, 82 L. T. N. S. 831, 48 W. R. 643, 5 Com. Cas. (Eng.) 315, 9 Asp. M. Cas. 85.

**1027.** 2. Money Paid to a Salvage Company for Increased Expenses of Raising a Vessel Run upon by the Assured's Vessel Within Proviso. — *Chapman v. Fisher*, 20 Times L. Rep. 319.

4. Removal of Wreck. — *Burger v. Indemnity Mut. Marine Assur. Co.*, (1900) 2 Q. B. 348.

7. Stranding Is a Peril of the Seas. — *De Farconnet v. Western Ins. Co.*, 110 Fed. Rep. 405, *affirmed* (C. C. A.) 122 Fed. Rep. 448.

**1028.** 11. Deck Cargo — Inland Canals. — *Apollinaris Co. v. Nord Deutsche Ins. Co.*, (1904) 1 K. B. 252, 73 L. J. K. B. 62, 89 L. T. N. S. 670, 52 W. R. 174, 9 Com. Cas. (Eng.) 91, 9 Asp. M. Cas. 526, 20 Times L. Rep. 79.

**1029.** 2. Capture and Seizure Defined. — See *Robinson Gold Min. Co. v. Alliance Ins. Co.*, (1902) 2 K. B. 489.

5. "Consequences of Hostilities" — *Voyage Interrupted by Blockade.* — *Nickels v. London, etc., Marine, etc., Ins. Co.*, 70 L. J. K. B. 29, 6 Com. Cas. (Eng.) 15.

**1030.** 1. Belligerent Taking Not Necessary. — *Robinson Gold Min. Co. v. Alliance Ins. Co.*, (1904) A. C. 359, 73 L. J. K. B. 898, 91 L. T. N. S. 202, 53 W. R. 160, 9 Com. Cas. (Eng.) 301, 20 Times L. Rep. 645, *affirming* (1902) 2 K. B. 489, 71 L. J. K. B. 942, 86 L. T. N. S. 858, 51 W. R. 105, 7 Com. Cas. (Eng.) 219; *Janson v. Driefontein Consol. Mines*, (1902) A. C. 484, 71 L. J. K. B. 857, 87 L. T. N. S. 372, 51 W. R. 142, 7 Com. Cas. (Eng.) 268.

**1033.** 5. Warranted Free of Capture, Seizure, or Detention. — *Miller v. Law Acc. Ins. Co.*, (1903) 1 K. B. 712.

**1034.** 1. A Lawful Order Forbidding the Landing of a Cargo is within a warranty exempting the insurer from liability against "capture, seizure, or detention." *Miller v. Law Acc. Ins. Co.*, (1903) 1 K. B. 712, 72 L. J. K. B. 428, 88 L. T. N. S. 370, 51 W. R. 420, 8 Com. Cas. (Eng.) 161, 9 Asp. M. Cas. 386, *affirming* (1902) 2 K. B. 694, 71 L. J. K. B. 551, 50 W. R. 474, 7 Com. Cas. (Eng.) 151, which *distinguished* *Rodoconachi v. Elliott*, L. R. 9 C. P. 518, 43 L. J. C. Pl. 255.

8. Restraining the Landing of Diseased Cattle. — *Miller v. Law Acc. Ins. Co.*, (1903) 1 K. B. 712, *affirming* (1902) 2 K. B. 604.

**1035.** 5. Definition. — *Miller v. Law Acc. Ins. Co.*, (1902) 2 K. B. 694, *affirmed* (1903) 1 K. B. 712; *Cleveland, etc., Transit Co. v. Insurance Co. of North America*, 115 Fed. Rep. 431.

**1037.** 2. Efficient and Predominating Cause. — *Nickels v. London, etc., Marine, etc., Ins.*

**1039.** 15. Negligence, Default, or Misconduct — *a.* PROXIMATE CAUSE OF LOSS. — See notes 1, 2.

*b.* CONTRIBUTING CAUSE. — See note 4.

**1040.** See note 1.

**1041.** 17. Delay — *b.* LOSS OF CHARTERED FREIGHT. — See note 12.

**1048.** XII. EXTENT OF LOSS AND LIABILITY THEREFOR — 1. Value of Subject-matter — *c.* VALUED POLICIES — (1) *Definition.* — See note 4.

(4) *Separate Valuations.* — See note 8.

**1049.** (6) *Conclusiveness of Valuation* — (a) *General Rule.* — See note 7.

**1050.** (d) *In Case of Partial Loss.* — See note 6.

**1052.** 2. Total Loss — *b.* MEASURE OF INDEMNITY — (2) *Open Policies.* — See note 5.

**1055.** 4. Particular Average and Partial Loss — *d.* LIABILITY FOR PARTIAL LOSS — (2) *On Goods* — (d) *Extraordinary Expenditures.* — See note 10.

**1056.** See note 2.

**1058.** (3) *On Ship* — (b) *Expenditures* — *ff.* SALVAGE CHARGES. — See note 2.

(4) *On Freight.* — See note 8.

**1059.** *e.* ADJUSTMENT — (1) *Scope of Section.* — See note 3.

Co., 70 L. J. K. B. 29, 6 Com. Cas. (Eng.) 15; Cline *v.* Western Assur. Co., 101 Va. 496.

**1039.** 1. Negligence Proximate Cause of Loss. — But see *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820.

Loss Caused by Failure to Procure Lien Stipulated in Charter Party. — *Williams v. Canton Ins. Office*, (1901) A. C. 462, 70 L. J. K. B. 962, 85 L. T. N. S. 317, 9 Asp. M. Cas. 247, 6 Com. Cas. (Eng.) 256, *affirming* 47 W. R. 611, 8 Asp. M. Cas. 563.

A Clause Covering the Negligence of Masters, Mariners, Etc., does not cover the voluntary acts of the navigators of the vessel. *Greenock Steamship Co. v. Maritime Ins. Co.*, (1903) 1 K. B. 367, 72 L. J. K. B. 59, 88 L. T. N. S. 207, 51 W. R. 447, 8 Com. Cas. (Eng.) 78, 9 Asp. M. Cas. 364.

2. Misconduct or Wilful Act. — *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820; *Standard Marine Ins. Co. v. Nome Beach Lighterage, etc., Co.*, (C. C. A.) 133 Fed. Rep. 636.

4. Insurer Liable Though Negligence Was a Contributing Cause of Loss. — *Standard Marine Ins. Co. v. Nome Beach Lighterage, etc., Co.*, (C. C. A.) 113 Fed. Rep. 636; *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410; *Nome Beach Lighterage, etc., Co. v. Munich Assur. Co.*, 123 Fed. Rep. 820.

**1040.** 1. Negligence of Assured No Defense. — *Munich Assur. Co. v. Dodwell*, (C. C. A.) 128 Fed. Rep. 410.

**1041.** 12. Loss of Chartered Freight. — *Turnbull v. Hull Underwriters' Assoc.*, (1900) 2 Q. B. 402, 69 L. J. Q. B. 588, 82 L. T. N. S. 818, 5 Com. Cas. (Eng.) 248, 9 Asp. M. Cas. 93; *Musgrave v. Mannheim Ins. Co.*, 32 Nova Scotia 405.

"Chartered or Hire Money" means hire money in the nature of freight payable under a contract, and does not cover a loss of hire caused by an option which a charterer has to discharge the vessel and which is exercised by reason of defects discovered in the vessel. *Manchester Liners v. British, etc., Marine Ins. Co.*, 86 L. T. N. S. 148, 9 Asp. M. Cas. 266, 7 Com. Cas. (Eng.) 26.

**1048.** 4. Agreement as to Value. — *Ursula Bright Steamship Co. v. Amsinck*, 115 Fed. Rep. 242, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1048.

8. Separate Valuations. — *American Steamship Co. v. Indemnity Mut. Marine Ins. Co.*, 108 Fed. Rep. 421, *affirmed* (C. C. A.) 118 Fed. Rep. 1014.

**1049.** 7. Valuation Conclusive in Absence of Fraud. — *The Livingstone*, 122 Fed. Rep. 278, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049, *reversed* on another point (C. C. A.) 130 Fed. Rep. 746; *Steamship Balmoral Co. v. Marten*, (1901) 2 K. B. 896, *affirmed* (1902) A. C. 511; *Standard Marine Ins. Co. v. Nome Beach Lighterage, etc., Co.*, (C. C. A.) 133 Fed. Rep. 636; *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1050.** 6. Partial Loss—Valuation Not Opened. — *Steamship Balmoral Co. v. Marten*, (1901) 2 K. B. 896, *affirmed* (1902) A. C. 511; *Ursula Bright Steamship Co. v. Amsinck*, 115 Fed. Rep. 242; *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1052.** 5. Measure of Indemnity under Open Policy. — *Ursula Bright Steamship Co. v. Amsinck*, 115 Fed. Rep. 242, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052.

**1055.** 10. Extraordinary Expenses in Saving Cargo. — See *De Farconnet v. Western Ins. Co.*, 110 Fed. Rep. 405, *affirmed* (C. C. A.) 122 Fed. Rep. 448.

**1056.** 2. Salvage Charges and Costs of Suit. — See *De Farconnet v. Western Ins. Co.*, 110 Fed. Rep. 405, *affirmed* (C. C. A.) 122 Fed. Rep. 448.

**1058.** 2. Salvage Charges. — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

8. Cargo Received by Shipper at Intermediate Port. — *Turnbull v. Hull Underwriters' Assoc.*, (1900) 2 Q. B. 402.

**1059.** 3. Place of Adjustment, and Conclusiveness and Effect. — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1059.** (2) *Insurance of Part Value or Interest* — *Insurance of Part of Value.* — See note 4.

*Insurance of Part Interest.* — See note 5.

**1060.** (4) *On Goods* — (a) *Basis of Indemnity.* — See note 2.

(c) *Deterioration in Value* — *aa. WHERE CARGO HAS ARRIVED AT DESTINATION.*

— See note 5.

**1061.** (5) *On Ship* — (a) *Rule for Determining Proportion.* — See note 5.

**1062.** (d) *In Case of Repairs* — *aa. GENERAL RULE.* — See note 1.

*cc. HOW VALUE ESTIMATED* — (bb) *Replacement in Kind.* — See note 8.

(cc) *Increased Expenses in Intermediate Port.* — See note 9.

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**1065.** *f. EXCEPTION OF PARTICULAR AVERAGE OR PARTIAL LOSS* —

(1) *Memorandum Clause* — (a) *Origin and Object.* — See notes 6, 7.

(b) *Form of Memorandum.* — See note 8.

**1066.** (2) *Total Loss of Part.* — See note 12.

**1068.** (4) *Exception of General Average Losses.* — See note 4.

**1070.** (5) *Exception of Stranding, Collision, Bilging, and Burning* —

(c) *What Constitutes Collision.* — See note 5.

**1071.** *g. EXPENDITURE UNDER SUE AND LABOR CLAUSE* — (2) *Effect*

— (a) *Recovery Beyond Amount of Policy.* — See note 3.

(b) *Exception of Particular Average.* — See note 4.

(3) *Expenses Recoverable* — (a) *Embraced in Risk.* — See notes 6, 7.

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(b) *To Prevent Losses Covered by Policy.* — See notes 10, 11.

**1059.** 4. *Adjustment Where Only Part of Value Is Insured.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987; *Chicago Ins. Co. v. Graham, etc., Transp. Co.*, (C. C. A.) 108 Fed. Rep. 271; *Egan v. British, etc., Marine Ins. Co.*, 88 Ill. App. 552, *affirmed* 193 Ill. 295, 86 Am. St. Rep. 342.

5. *Insurance of a Part Interest.* — See *Egan v. British, etc., Marine Ins. Co.*, 193 Ill. 295, 86 Am. St. Rep. 342.

**1060.** 2. *Basis of Indemnity for Loss on Cargo.* — See *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

5. *Where Cargo Has Arrived at Destination.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1061.** 5. *In Adjusting a Loss on Salvage.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

**1062.** 1. *Right to Repair.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

8. *Replacement in Kind.* — *Agenoria Steamship Co. v. Merchants Marine Ins. Co.*, 8 Com. Cas. (Eng.) 212.

9. *Bankers' Charges for Overdraft Occasioned by Sending Money to Pay for Repairs.* — *Agenoria Steamship Co. v. Merchants Marine Ins. Co.*, 8 Com. Cas. (Eng.) 212.

11. *Expenses for Surveyor Sent from United Kingdom to Foreign Port.* — *Agenoria Steamship Co. v. Merchants Marine Ins. Co.*, 8 Com. Cas. (Eng.) 212.

**1065.** 6. *Origin of Memorandum Clause.* — *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1.

7. *Devitt v. Providence Washington Ins. Co.*, 173 N. Y. 17.

8. *Form of Memorandum Clause.* — See *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1.

**1066.** 12. *Insurer Liable Only for Actual Total Loss.* — *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1; *Devitt v. Providence Washington Ins. Co.*, 173 N. Y. 17.

**1068.** 4. *Exception of General Average Losses.* — *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1.

**1070.** 5. *Striking a Sunken Wreck Not a Collision.* — *Cline v. Western Assur. Co.*, 101 Va. 496.

**1071.** 3. *The Clause Must Receive a Liberal Application.* — *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1.

4. *Exception of Particular Average Does Not Prevent Recovery.* — See *Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1.

6. *General Average Losses Not Covered.* — *Montgomery v. Indemnity Mut Marine Ins. Co.*, (1901) 1 K. B. 147, *affirmed* (1902) 1 K. B. 734.

7. *Unless Services Rendered at Instance of Master or Owners.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

8. *Legal Expenses of Defending Salvage Suit Recoverable.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304, *affirmed* (C. C. A.) 108 Fed. Rep. 987.

10. *Losses Not Covered.* — *Cunard Steamship Co. v. Marten*, (1903) 2 K. B. 511, 72 L. J. K. B. 754, 89 L. T. N. S. 152, 52 W. R. 79, 9 Com. Cas. (Eng.) 9, 9 Asp. M. Cas. 342, *affirming* (1902) 2 K. B. 624, 71 L. J. K. B. 968, 87 L. T. N. S. 400.

11. *Services Not Recoverable.* — *McLeod v. In-*

**1072.** Total Loss Only at Risk. — See note 1.

**1073.** XIII. ACTIONS — 1. Time of Commencing Action — The Time When the Loss Occurs. — See note 1.

2. Jurisdiction. — See note 2.

**1075.** 4. Evidence and Burden of Proof — *b.* LOSS — (3) Cause of Loss. — See note 4.

**1076.** *d.* ADMISSIBILITY OF EVIDENCE — (1) Protest. — See note 11.

**1078.** MARITIME. — See note 1.

insurance Co. of North America, 34 Nova Scotia 88, 37 Can. L. J. 357.

**1072.** 1. Expenses to Avert Partial Loss Not Covered. — Standard Marine Ins. Co. v. Nome Beach Lighterage, etc., Co., (C. C. A.) 133 Fed. Rep. 636.

**1073.** 1. Waiver of Condition. — De Farconnet v. Western Ins. Co., 110 Fed. Rep. 405, affirmed (C. C. A.) 122 Fed. Rep. 448.

2. Jurisdiction of Admiralty — Binding Slip. — Kerr v. Union Marine Ins. Co., 124 Fed. Rep. 835, reversed (C. C. A.) 130 Fed. Rep. 415.

**1075.** 4. In Other Cases Cause of Loss Must Be Proved. — Long Dock Mills, etc., Co. v. Mannheim Ins. Co., 116 Fed. Rep. 386, affirmed (C. C. A.) 123 Fed. Rep. 861.

**1076.** 11. Evidence of Usage or Custom. — Ocean Steamship Co. v. Aetna Ins. Co., 121 Fed. Rep. 882.

**1078.** 1. Maritime Contract. — Taylor v. Weir, 110 Fed. Rep. 1005 (contract for charter not *maritime*); Olsen v. Birch, 133 Cal. 479 (contract for construction not *maritime*).

## MARITIME LIENS.

By A. W. VARIAN.

**1083.** III. LIENS ON VESSELS AT COMMON LAW DISTINGUISHED FROM MARITIME LIENS — Possession Necessary to Common-law Lien. — See note 4.

**1084.** IV. LIENS UNDER STATE STATUTES DISTINGUISHED FROM MARITIME LIENS. — See notes 8, 9.

**1085.** V. THINGS SUBJECT TO MARITIME LIENS — 2. Vessels Generally and Their Appurtenances — Independent Motive Power. — See note 5.

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**1086.** Shares in Vessels. — See note 9.

**1087.** 3. Fixed and Immovable Things. — See notes 4, 5.

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*a.* CONTRACT MUST BE MARITIME. — See note 8.

**1088.** *b.* CONTRACT MUST BE ON CREDIT OF VESSEL. — See note 9.

**1089.** *c.* CONTRACT MUST BE EXECUTED. — See note 16.

**1083.** 4. Possession Necessary to Common-law Lien. — The Sue, 137 Fed. Rep. 133.

**1084.** 8. Admiralty Jurisdiction Cannot Be Enlarged or Diminished by State Statutes. — The Universe, 108 Fed. Rep. 968.

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**1085.** 5. Independent Motive Power Not Essential. — The Robert W. Parsons, 191 U. S. 17.

6. Canal Boats. — The Robert W. Parsons, 191 U. S. 17.

**1086.** 9. Vessels Engaged in Joint Enterprise. — The Warner Miller Co., 120 Fed. Rep. 520.

**1087.** 4. Dry Docks Not Subject to Maritime Liens. — The Warfield, 120 Fed. Rep. 847.

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6. Reciprocal Liens Between Ship and Cargo. — The Ripon City, (C. C. A.) 102 Fed. Rep. 176.

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8. Maritime Liens Ex Contractu Arise Only under Maritime Contracts. — The Arthur B., 1 Alaska 353, 403, holding that services performed in launching a vessel are not maritime and create no lien.

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**1089.** 16. Performance of Contract Essential to Lien. — The Ripon City, (C. C. A.) 102 Fed. Rep. 176; The Universe, 108 Fed. Rep. 968; The Energia, 124 Fed. Rep. 842; The S. L. Watson, (C. C. A.) 118 Fed. Rep. 945.



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**1093.** 2. Particular Contracts — *b.* REPAIRS AND SUPPLIES — (1) *Right to Lien.* — See note 5.

(2) *Doctrine of Necessity* — (a) *Rule Stated.* — See notes 10, 11.

**1094.** See notes 1, 2.

**1095.** (b) *Items of Necessary Repairs and Supplies* — *aa.* IN GENERAL. — See notes 2, 5.

**1096.** (3) *Credit of Vessel* — (a) *In General.* — See notes 4, 5.

**1097.** *Stipulated Sum.* — See note 4.

(b) *Necessity for Credit.* — See note 5.

**1098.** (c) *Master's Order.* — See notes 3, 6.

*Master Without Authority.* — See note 9.

(d) *Presence of Owner.* — See note 10.

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(g) *Contractor's Authority.* — See note 15.

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**1102.** (4) *Vessel in Home Port* — (a) *Rule under Maritime Law* — *aa.* IN GENERAL. — See notes 1, 3.

**1090.** 1. What Constitutes a Delivery in General. — *The Energia*, 124 Fed. Rep. 842; *Guffey v. Alaska, etc., Steamship Co.*, (C. C. A.) 130 Fed. Rep. 271.

**1093.** 5. Lien for Repairs and Supplies — Rule of General Maritime Law Recognized in United States. — *The Roanoke*, 189 U. S. 185; *The Underwriter*, 119 Fed. Rep. 713.

**10.** Lien Arises Only for Necessary Repairs and Supplies. — *The Mary F. Chisholm*, 129 Fed. Rep. 814; *The Underwriter*, 119 Fed. Rep. 713.

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**1094.** 1. *The Underwriter*, 119 Fed. Rep. 713.

2. Order of Master on Credit of Vessel Held Sufficient Proof of Necessity. — *The Underwriter*, 119 Fed. Rep. 713.

**1095.** 2. Food for Crew and Passengers. — *The Surprise*, (C. C. A.) 129 Fed. Rep. 873.

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**1096.** 4. Lien Only Where Credit Was Given to Vessel in Foreign Port. — *Alaska, etc., Steamship Co. v. Chamberlain*, (C. C. A.) 116 Fed. Rep. 600; *The C. W. Moore*, 107 Fed. Rep. 957; *The Underwriter*, 119 Fed. Rep. 713.

5. Presumption as to Vessel in Foreign Port. — *Prince v. Ogdensburg Transit Co.*, 107 Fed. Rep. 978, *affirmed* (C. C. A.) 113 Fed. Rep. 454; *The Underwriter*, 119 Fed. Rep. 713; *The Surprise*, (C. C. A.) 129 Fed. Rep. 873.

**1097.** 4. Lien Not Negativated by Express Contract. — *Prince v. Ogdensburg Transit Co.*, 107 Fed. Rep. 978, *affirmed* (C. C. A.) 113 Fed. Rep. 454.

5. No Lien unless Necessities of the Vessel Required Credit. — *The Alcalde*, 132 Fed. Rep. 576.

**1098.** 3. Hypothecation of Vessel by Master. — *The Surprise*, (C. C. A.) 129 Fed. Rep. 873; *The Underwriter*, 110 Fed. Rep. 713.

6. Necessity Presumed from Master's Order. — *The Underwriter*, 110 Fed. Rep. 713.

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**10.** *The Roanoke*, (C. C. A.) 107 Fed. Rep. 743; *Cuddy v. Clement*, (C. C. A.) 113 Fed. Rep. 454, *affirming* 107 Fed. Rep. 978; *The Surprise*, (C. C. A.) 129 Fed. Rep. 873; *Reed Bros. Dredge No. 1*, 135 Fed. Rep. 867; *The New Brunswick*, (C. C. A.) 129 Fed. Rep. 893; *Alaska, etc., Steamship Co. v. Chamberlain*, (C. C. A.) 116 Fed. Rep. 600; *The George Farwell*, (C. C. A.) 103 Fed. Rep. 882; *The Iris*, (C. C. A.) 100 Fed. Rep. 104; *The Underwriter*, 119 Fed. Rep. 713; *Prince v. Ogdensburg Transit Co.*, 107 Fed. Rep. 978, *affirmed* (C. C. A.) 113 Fed. Rep. 454; *The C. W. Moore*, 107 Fed. Rep. 957.

**1099.** 1. Circumstances Negativating Inference from Owner's Presence. — *The Worthington*, (C. C. A.) 133 Fed. Rep. 725.

2. *Cuddy v. Clement*, (C. C. A.) 113 Fed. Rep. 454, *affirming* 107 Fed. Rep. 978; *The Worthington*, (C. C. A.) 133 Fed. Rep. 725.

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5. Insolvency of Owner. — See *The Newport*, (C. C. A.) 114 Fed. Rep. 713.

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5. *Stewards.* — *The Surprise*, (C. C. A.) 129 Fed. Rep. 873.

**1102.** 1. No Lien in Home Port — Rule in United States. — *The Roanoke*, 189 U. S. 185; *The Underwriter*, 119 Fed. Rep. 713; *The Sue*, 137 Fed. Rep. 133; *Fredericks v. James Rees, etc., Co.*, (C. C. A.) 135 Fed. Rep. 730; *The John S. Parsons*, 110 Fed. Rep. 994; *The Gordon Campbell*, 131 Fed. Rep. 963.

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- 1102.** Reason of Rule — Presumption of Personal Credit. — See note 4.  
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- 1103.** *bb.* WHAT IS HOME PORT — (*aa.*) Residence of Owner and Port of Enrolment. — See note 2.
- 1104.** (*bb.*) Ports of Different States Foreign as to Each Other. — See note 2.  
 (*dd.*) Corporation as Owner. — See notes 5, 6.
- 1105.** *dd.* DOMESTIC VESSEL BELIEVED TO BE FOREIGN. — See note 3.
- 1106.** *ee.* PLACE OF PERFORMANCE. — See note 1.
- 1107.** (*b.*) Rule by Statute — *aa.* STATUTORY PROVISIONS. — See note 3.
- 1108.** *bb.* JURISDICTION TO ENFORCE STATUTORY LIENS — (*aa.*) In General. — See notes 3, 4.
- 1110.** *dd.* STRICT COMPLIANCE WITH STATUTE. — See note 9.
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 (5) *Chartered Vessel* — (*a.*) Presumption as to Credit — In Dealing with a Known Charterer in a Foreign Port. — See note 9.
- 1112.** See note 1.  
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- 1113.** Duty to Inquire into Terms of Charter-Party. — See notes 2, 4.
- 1114.** *c.* ADVANCES OF MONEY — (1) *Right to Lien for Advances Generally* — (*b.*) Rule in United States — Advances to Discharge Existing Liens. — See note 4.

**1102.** 4. Presumption of Personal Credit. — The John S. Parsons, 110 Fed. Rep. 994.

7. Lien for Repairs in Home Port Denied in England. — The Underwriter, 119 Fed. Rep. 713.

**1103.** 2. Home Port the Place of Owner's Residence. — The New Brunswick, (C. C. A.) 129 Fed. Rep. 893.

**1104.** 2. Ports of Different States Foreign as to Each Other. — The Roanoke, 189 U. S. 185; The Underwriter, 119 Fed. Rep. 713.

5. Corporation as Owner — Place of Incorporation. — The New Brunswick, (C. C. A.) 129 Fed. Rep. 893.

6. Location of Principal Office and Residence of Officers. — But see The New Brunswick, (C. C. A.) 129 Fed. Rep. 893.

**1105.** 3. Domestic Vessel Believed to Be Foreign. — The Underwriter, 119 Fed. Rep. 713.

**1106.** 1. Right to Lien Dependent on Locality of Vessel. — Bennett v. Beadle, 142 Cal. 239, 75 Pac. Rep. 843, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1106.

**1107.** 3. Unconstitutional Statute. — The Roanoke, 189 U. S. 185.

**1108.** 3. Statutory Lien for Repairs, etc., Not Enforceable in Rem in State Court. — Fredericks v. James Rees, etc., Co., (C. C. A.) 135 Fed. Rep. 730.

4. Statutory Lien Enforceable in Rem Only in Admiralty Court. — The Robert Dollar, 115 Fed. Rep. 218, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1108; The Roanoke, 189 U. S. 185; The John S. Parsons, 110 Fed. Rep. 994; Fredericks v. James Rees, etc., Co., (C. C. A.) 135 Fed. Rep. 730.

**1110.** 9. Strict Compliance with Statute Required. — Fredericks v. James Rees, etc., Co., (C. C. A.) 135 Fed. Rep. 730; The John S. Parsons, 110 Fed. Rep. 994. See also Elstner-Martin Grocery Co. v. Lamont, 113 La. 894.

**1111.** 3. Employment of Vessel. — A statute giving a lien on vessels "navigating" certain waters does not apply to a dredge which

is without means of propulsion and not fitted for carrying either freight or passengers. Fredericks v. James Rees, etc., Co., (C. C. A.) 135 Fed. Rep. 730.

9. Dealing with Known Charterer — Personal Credit Presumed. — The Underwriter, 119 Fed. Rep. 713; The Chicklade, 120 Fed. Rep. 1003; The Barge David Wallace v. Bain, 8 Can. Exch. 205; Alaska, etc., Steamship Co. v. Chamberlain, (C. C. A.) 116 Fed. Rep. 600; The C. W. Moore, 107 Fed. Rep. 957; The George Farwell, (C. C. A.) 103 Fed. Rep. 882; The Iris, (C. C. A.) 100 Fed. Rep. 104.

**1112.** 1. Home Port — Residence of Charterer. — Alaska, etc., Steamship Co. v. Chamberlain, (C. C. A.) 116 Fed. Rep. 600.

3. Stipulation Against Liens — Notice of Stipulation. — The George Farwell, (C. C. A.) 103 Fed. Rep. 882; The Underwriter, 119 Fed. Rep. 713.

Charterer Cannot Avail Himself of Such Stipulation. — The Robert Dollar, 115 Fed. Rep. 218.

Stipulation Immaterial. — It seems that there is no real distinction between charters containing stipulations against liens and those without them, for in the absence of such stipulation the charterer is bound to protect the vessel from liens. The Surprise, (C. C. A.) 129 Fed. Rep. 873.

6. Creditor Without Notice of Stipulation. — The George Farwell, (C. C. A.) 103 Fed. Rep. 882; The Underwriter, 119 Fed. Rep. 713.

**1113.** 2. Circumstances Calling for Inquiry. — The George Farwell, (C. C. A.) 103 Fed. Rep. 882. See also The C. W. Moore, 107 Fed. Rep. 957.

4. Dealing with Apparent Owner. — The George Farwell, (C. C. A.) 103 Fed. Rep. 882.

**1114.** 4. Lien for Advances to Discharge Existing Liens. — The Worthington, (C. C. A.) 133 Fed. Rep. 725; The Alcalde, 132 Fed. Rep. 576; The Pauline, 136 Fed. Rep. 815.

- 1114.** Advances for Necessary Disbursements. — See note 6.
- 1116.** *d. SERVICES TO VESSEL* — (1) *Seamen and Officers* — Master of Vessel. — See note 4.  
Subordinate Officers. — See note 5.  
(2) *Ship's Husband, Brokers, and Stevedores* — A Ship's Husband. — See note 10.
- 1117.** Ship Brokers and Stevedores. — See note 1.  
VII. LIENS EX DELICTO — 1. In General. — See note 9.
- 1118.** VIII. PRIORITIES — 1. General Principles. — See note 10.
- 1119.** 2. Priority of Various Claims — *a. ORDER OF CREATION IN TIME* — (1) *Liens Ex Contractu*. — See note 10.
- 1121.** *b. NATURE OF CLAIM* — (1) *Costs* — The Costs of the Libellant. — See note 3.  
(2) *Salvage*. — See note 6.  
(3) *Wages of Seamen and Stevedores*. — See note 11.
- 1122.** (4) *Supplies and Repairs*. — See note 15.
- 1126.** *c. INITIATIVE IN PURSUIT OF REMEDY*. — See note 8.
- 1127.** *d. WAIVER OF PRIORITY*. — See note 3.  
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- 1129.** 3. Sale — *b. JUDICIAL SALE* — (2) *By State Court*. — See note 6.
- 1130.** 4. Waiver of Lien — *c. LACHES* — (1) *In General*. — See note 5.
- 1131.** Lien for Supplies. — See note 3.
- 1132.** Lien for Collision. — See note 3.
- 1134.** *e. TAKING COLLATERAL SECURITY*. — See note 5.  
*f. GIVING CREDIT*. — See note 10.
- 1136.** 8. Proceedings in Personam — *a. AT COMMON LAW*. — See note 6.
- 1114.** 6. Necessary Disbursements in General. — The Alcalde, 132 Fed. Rep. 576.
- 1116.** 4. Master of Vessel. — The Laurel, 113 Fed. Rep. 373, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1116; Bruce v. Murray, (C. C. A.) 123 Fed. Rep. 366.
5. Subordinate Officers. — But the minor son of the master has no lien for wages earned while acting as mate on the vessel. The John T. Williams, 107 Fed. Rep. 750.
10. Ship's Husband Not Entitled to Lien for Services. — The Ripon City, (C. C. A.) 102 Fed. Rep. 176.
- 1117.** 1. Lien of Ship Brokers and Stevedores. — The Chicklade, 120 Fed. Rep. 1003.
9. Lien for Damages Caused by Collision. — Harrison v. Hughes, (C. C. A.) 125 Fed. Rep. 860, affirming 110 Fed. Rep. 545.
- 1118.** 10. General Principle Governing Priority of Maritime Liens. — The Thomas Morgan, 123 Fed. Rep. 781.
- 1119.** 10. Maritime Liens Dischargeable in Inverse Order of Creation. — The John T. Williams, 107 Fed. Rep. 750; The Thomas Morgan, 123 Fed. Rep. 781.
- 1121.** 3. Costs of Libellant Prior to All Other Claims. — The Northern Light, 106 Fed. Rep. 748.
6. Priority over Lien for Repairs and Supplies. — The Thomas Morgan, 123 Fed. Rep. 781.
11. The Thomas Morgan, 123 Fed. Rep. 781; The Northern Light, 106 Fed. Rep. 748.
- 1122.** 15. Priority of Lien for Supplies and Repairs. — The Sleepy Hollow, 114 Fed. Rep. 367.
- 1126.** 8. Munsen v. The Ship Comrade, 7 Can. Exch. 330, following The Saracen, 6 Moo. P. C. (Toml. ed.) 56.
- 1127.** 3. Waiver of Priority by Delay in Enforcement. — See The John T. Williams, 107 Fed. Rep. 750; Munsen v. The Ship Comrade, 7 Can. Exch. 330.
9. But see The James G. Swan, 106 Fed. Rep. 94.
- 1129.** 6. Appearance in State Suit. — But one loses his lien by taking part in a proceeding in a state court in which a sale of the vessel is made. Northwestern Commercial Co. v. Bartels, (C. C. A.) 131 Fed. Rep. 25.
- 1130.** 5. Waiver by Delay in Enforcement. — Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778; The Thornley, 103 Fed. Rep. 686.
- Liens Created by State Statute Lost by Delay. — The James G. Swan, 106 Fed. Rep. 94.
- 1131.** 3. Laches Dependent on Circumstances of Case. — Norfolk Sand, etc., Co. v. Owen, (C. C. A.) 115 Fed. Rep. 778.
- 1132.** 3. Libeling vessel on second visit to port after accident does not show libellant to be guilty of laches. The Slingsby, 116 Fed. Rep. 227, affirmed (C. C. A.) 120 Fed. Rep. 748.
- 1134.** 5. Lien Not Waived by Taking Collateral Security for Claim. — The Thomas Morgan, 123 Fed. Rep. 781.
10. Credit Inconsistent with Lien. — The Underwriter, 119 Fed. Rep. 713.
- 1136.** 6. See Northwestern Commercial Co. v. Bartels, (C. C. A.) 131 Fed. Rep. 25.

**1138. MARKETABLE TITLE.** — See note 2.

**1138. 2. Marketable Title.** — *Brokaw v. Duffy*, 165 N. Y. 391; *Roberts v. McFadden*, 32 Tex. Civ. App. 47.

**Reasonable Doubt.** — *Sproule v. Davies*, 69 N.

Y. App. Div. 502; *Kerrigan v. Backus*, 69 N. Y. App. Div. 329; *Fuhr v. Cronin*, 82 N. Y. App. Div. 210.

## MARKETS.

BY F. G. BAMMAN.

**1145. III. POWER OF MUNICIPALITY TO ESTABLISH AND REGULATE MARKETS** — 1. In General. — See note 1.

**Grant of Market Privileges to Private Individual.** — See note 4.

**1146. A Duly Authorized Public Market Is Not Per Se a Nuisance.** — See note 1.

**2. Establishment of Markets** — Purchase of Site and Erection of Buildings. — See note 2.

**1147. The Right to Establish a Market Includes.** — See note 1.

**Establishment of Market in Public Street** — Nuisance. — See notes 2, 3.

**Leasing Stands, etc., on Public Street.** — See notes 8, 9.

**1148. 3. Regulation and Control** — *a. IN GENERAL.* — See notes 1, 2, 3.

**The Power to Regulate Markets Falls Within the Police Power.** — See note 4.

**The Right to Regulate Markets Includes.** — See note 5.

**1149. b. CERTAIN SPECIFIC REGULATIONS CONSIDERED** — (2) *As to the Sale of Particular Articles.* — See notes 1, 2.

(3) *As to Who May Sell in the Market.* — See notes 3, 5.

(4) *As to Sales Outside Established Markets.* — See note 7.

**1150. (5) As to Weights and Scales.** — See note 4.

(6) *As to License Fees.* — See note 5.

**1151. See note 1.**

**1145. 1. Power Delegated to Municipal Corporations.** — *State v. Smith*, 123 Iowa 654; *Crowley v. Rucker*, 107 La. 213; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Meadville v. Miller*, 29 Pa. Co. Ct. 519; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.

**4. Grant of Market Privileges to Private Persons.** — See *State v. Smith*, 123 Iowa 654.

**1146. 1. See State v. Smith, 123 Iowa 654.**

**2. Power of Municipality to Establish Markets.** — *Crowley v. Rucker*, 107 La. 213; *Meadville v. Miller*, 29 Pa. Co. Ct. 519. See also *State v. Smith*, 123 Iowa 654.

**1147. 1. Meadville v. Miller, 14 Pa. Dist. 28, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1147; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.**

**2. Market Held in Open Streets.** — *State v. Smith*, 123 Iowa 654; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.

**3. No Power to Create a Nuisance.** — *State v. Smith*, 123 Iowa 654.

**8. Leasing Stands, etc., in Street.** — *State v. Smith*, 123 Iowa 654.

**9. State v. Smith, 123 Iowa 654.**

**1148. 1. General Power of Municipality to Adopt Market Regulations.** — *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Meadville v. Miller*, 14 Pa. Dist. 28, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1148; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643. See also *Crowley v. Rucker*, 107 La. 213.

**2. Regulations Must Be Reasonable and Not in Restraint of Trade.** — See *Meadville v. Miller*, 29 Pa. Co. Ct. 519.

**3. Buffalo v. Hill, 79 N. Y. App. Div. 402.**

**4. Regulation of Markets Within Police Power.** — *Buffalo v. Hill*, 79 N. Y. App. Div. 402. See also *Meadville v. Miller*, 29 Pa. Co. Ct. 519.

**5. Meadville v. Miller, 14 Pa. Dist. 28, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1148.**

**1149. 1. Sale Limited to Perishable Articles.** — See *State v. Smith*, 123 Iowa 654.

**2. Sale of Certain Articles Limited to Designated Stands.** — *Crowley v. Rucker*, 107 La. 213. See *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

**3. Meadville v. Miller, 14 Pa. Dist. 28, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1149.**

**5. Producer May Not Sell in Violation of Ordinance.** — See *Crowley v. Rucker*, 107 La. 213.

**7. Ordinance Prohibiting Sales Outside Established Markets Held Valid.** — *State v. Smith*, 123 Iowa 654; *Crowley v. Rucker*, 107 La. 213; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Meadville v. Miller*, 29 Pa. Co. Ct. 519. See also *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.

**1150. 4. Regulation of Weights and Scales.** — *State v. Smith*, 123 Iowa 654.

**5. Buffalo v. Hill, 79 N. Y. App. Div. 402.**

**1151. 1. Municipality May Tax Stall Keepers for Use of Market.** — See *Crowley v. Rucker*, 107 La. 213; *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

**1151.** Penalty for Sale Without License. — See note 3.

**1153. MARKET VALUE — MARKET PRICE.** — See note 5.

**1151. 3. Penalty for Selling Without Authority.**—A municipality may enact ordinances prescribing reasonable penalties for selling articles outside of the established market. *Crowley v. Rucker*, 107 La. 213.

**1153. 5. Market Value.** — *Sharpe v. U. S.*, (C. C. A.) 112 Fed. Rep. 893; *Orleans, etc., R.*

*Co. v. Jefferson, etc., R. Co.*, 51 La. Ann. 1605; *Kennebec Water Dist. v. Waterville*, 97 Me. 185; *Reilly v. Cullen*, 101 Mo. App. 32; *Reiber v. Butler, etc., R. Co.*, 201 Pa. St. 49.

**Purposes for Which Used.**—*Boyer v. St. Louis, etc., R. Co.*, 97 Tex. 107.

## MARRIAGE.

By W. B. ROBINSON.

**1159. I. DEFINITION.** — See note 1.

**1160. Marriage Not a Contract.** — See notes 2, 3.

**Marriage Not a Sacrament.** — See note 5.

**1161.** See note 1.

**1162. III. MENTAL CAPACITY OF PARTIES — 2. Insanity — b. DEGREE OF MENTAL CAPACITY — Ability to Transact Business.** — See note 3.

**Present Rule — Ability to Understand Marriage Contract.** — See note 4.

**1164. 4. Drunkenness.** — See note 2.

**5. Effect of Marriage — Void or Voidable — a. IN GENERAL.** —

See note 3.

**b. COLLATERAL ATTACK AS VOID — Validity Determined in Any Proceeding.** — See note 4.

**1168. IV. PHYSICAL CAPACITY — IMPOTENCY — 6. When Decree Denied — b. DELAY AND ACQUIESCENCE — Period of Delay.** — See note 9.

**1169. 8. Effect of Marriage — Void or Voidable — Statutes Relating to Marriage and Divorce.** — See note 5.

**V. STATUS AND CIVIL CONDITION OF PARTIES — 2. Slavery — a. INCAPACITY TO CONSENT.** — See note 8.

**1170. c. REPUDIATION AFTER EMANCIPATION — Divorce.** — See note 6.

**1159. 1. Marriage Defined as Status.** — *Payne v. Burdette*, 84 Mo. App. 332; *Michigan University v. McGuckin*, 64 Neb. 390; *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821. See also *Svenson v. Svenson*, 178 N. Y. 54, reversing 78 N. Y. App. Div. 536.

**1160. 2. Marriage Considered as a Contract.** — See *Delpit v. Cote*, 20 Quebec Super. Ct. 338; *Davis v. Pryor*, 50 C. C. A. 579, 112 Fed. Rep. 274; *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. Rep. 124; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 95 Am. St. Rep. 609; *Rutledge v. Tunno*, 69 S. Car. 400.

**3. Marriage Distinguished from Ordinary Contracts.** — See *Riddle v. Riddle*, 26 Utah 268; *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821.

**5. In Canada marriage is a civil tie.** *Delpit v. Cote*, 20 Quebec Super. Ct. 338.

**1161. 1. Contract as Distinguished from Sacrament.** — *Michigan University v. McGuckin*, 64 Neb. 300.

**1162. 3. Ability to Make Contracts or Transact Business Sufficient.** — See *Aldrich v. Steen*, (Neb. 1904) 98 N. W. Rep. 445, judgment modified, in 100 N. W. Rep. 311.

**4. Test of Mental Capacity — Ability to Under-**

**stand Marriage Contract.** — *Pyott v. Pyott*, 191 Ill. 280.

**1164. 2. Intoxication Renders Marriage Voidable.** — *Barber v. People*, 203 Ill. 543, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1164.

**3. Marriage of Insane Person Void.** — *Winslow v. Troy*, 97 Me. 130. See also *Busch v. Supreme Tent, etc.*, 81 Mo. App. 562; *Payne v. Burdette*, 84 Mo. App. 332.

**Cohabitation During Lucid Intervals.** — *Gross v. Gross*, 96 Mo. App. 486.

**4. Marriage of Insane Person Subject to Collateral Attack in Actions Concerning Administration, Dower, or Inheritance.** — *Medlock v. Merritt*, 102 Ga. 212; *Winslow v. Troy*, 97 Me. 130.

**1168. 9. Delay of Twenty Years.** — *G — v. G —*, 67 N. J. Eq. 30.

**1169. 5. G — v. G —, 67 N. J. Eq. 30.**

**8. Incapacity of Slaves.** — See *Keen v. Keen*, 184 Mo. 358; *Roberson v. McCauley*, 61 S. Car. 411; *Wood v. Cole*, 25 Tex. Civ. App. 378; *Gilbert v. Edwards*, 32 Tex. Civ. App. 460.

**Marriage in Free State — Actual Freedom.** — *Irving v. Ford*, 179 Mass. 216.

**1170. 6. Slave Marriage Repudiated After Emancipation.** — *Keen v. Keen*, 184 Mo. 358.

**1171.** *d.* RATIFICATION AFTER EMANCIPATION — *New Marriage.* — See note 1.

*e.* CURATIVE ACTS DECLARING SLAVE MARRIAGES VALID. — See note 3.

**1172.** *3.* Intermarriage of Races — *a.* STATUTES PROHIBITING INTER-MARRIAGE — Marriage of Whites with Negroes or Mulattoes. — See note 1.

**1173.** *d.* INTERMARRIAGE OF WHITES AND INDIANS. — See note 5.

**1175.** *4.* Consanguinity and Affinity — *f.* EFFECT OF MARRIAGE CONTRARY TO STATUTE. — See note 10.

**1176.** *5.* Prior Marriage Undissolved — *a.* VALIDITY OF SECOND MARRIAGE. — See note 1.

Belief that Prior Marriage Had Been Dissolved — Good Faith of Parties. — See notes 2, 5.

*b.* MARRIAGE AFTER VOID DIVORCE — Want of Jurisdiction. — See note 6.

**1177.** See note 1.

*c.* MARRIAGE BEFORE DIVORCE IN EFFECT — (1) *Pending Appeal.* — See note 8.

**1178.** (2) *Marriage Before Decree Made Absolute* — Effect of Decree Nisi. — See note 2.

*e.* MARRIAGE VALID BY STATUTE UNTIL ANNULLED. — See note 6.

What Marriages Entitled to Protection of Statute. — See note 7.

**1179.** *f.* EFFECT OF SUBSEQUENT DIVORCE DISSOLVING PRIOR MARRIAGE. — See note 2.

*g.* PROHIBITION ON GUILTY PARTY TO DIVORCE MARRYING — Statutes Prohibiting Remarriage. — See note 6.

**1171.** *1.* Cohabitation After Emancipation. — *Sterrett v. Samuel*, 108 La. 346; *Wood v. Cole*, 25 Tex. Civ. App. 378; *Waff v. Sessions*, 28 Tex. Civ. App. 183. See also *Gilbert v. Edwards*, 32 Tex. Civ. App. 460; *Irving v. Ford*, 179 Mass. 216.

*3.* Curative Acts Confirming Slave Marriages. — *Johnson v. Wilson*, (Fla. 1904) 37 So. Rep. 179; *Roberson v. McCauley*, 61 S. Car. 411; *Patterson v. Bingham*, 101 Va. 372.

**1172.** *1.* Marriage of White Person to Negro or Mulatto Forbidden. — *Keen v. Kenn*, 184 Mo. 358.

**1173.** *5.* Marriage According to Indian Custom Valid if Not Prohibited by Law. — *Compare Re Sheran*, 4 N. W. Ter. 83.

**1175.** *10.* Statutes. — *Martin v. Martin*, 54 W. Va. 301, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1175.

**1176.** *1.* Prior Marriage Undissolved — Subsequent Marriage Void — *California.* — *Matter of Richards*, 133 Cal. 524.

*Illinois.* — *Robinson v. Ruprecht*, 191 Ill. 424; *Manning v. Spurck*, 199 Ill. 447; *Barber v. People*, 203 Ill. 543; *Potter v. Clapp*, 203 Ill. 502, 96 Am. St. Rep. 322.

*Minnesota.* — *McHenry v. Bracken*, 93 Minn. 510 (statutory provision).

*Mississippi.* — *Blanks v. Southern R. Co.*, 82 Miss. 703.

*Missouri.* — *Busch v. Supreme Tent, etc.*, 81 Mo. App. 562.

*New Jersey.* — *Knott v. Knott*, (N. J. 1902) 51 Atl. Rep. 15.

*New York.* — *Herz v. Herz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 125; *Matter of Schmidt*, (Surrogate Ct.) 42 Misc. (N. Y.) 463.

*Pennsylvania.* — *Klaas v. Klaas*, 14 Pa. Super. Ct. 550; *Wilhelmi v. Wilhelmi*, 9 Pa. Dist. 685.

*Utah.* — *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821; *Riddle v. Riddle*, 26 Utah 268.

*2.* Belief that Prior Marriage Was Dissolved by Death Immaterial. — *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821.

*5.* Void Marriage in Good Faith — Statute Declaring Issue Legitimate. — See *Com. v. Josselyn*, 186 Mass. 186.

*6.* Divorce Void for Want of Jurisdiction — Subsequent Marriage Void. — *Aldrich v. Steen*, (Neb. 1904) 100 N. W. Rep. 311.

**1177.** *1.* Divorce Void Where Neither Party Domiciled in State. — *Manning v. Spurck*, 199 Ill. 447.

*8.* Marriage Pending Time for Appeal Void. — *Eaton v. Eaton*, 66 Neb. 676.

**1178.** *2.* Marriage After Decree Nisi Void. — *Petit v. Petit*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 155.

*6.* Absence for Five Years. — *Matter of Harrington*, 140 Cal. 244, rehearing denied 140 Cal. 294; *Taylor v. Taylor*, 173 N. Y. 266; *Circus v. Independent Order Ahawas Israel*, 55 N. Y. App. Div. 534; *Hervey v. Hervey*, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 218.

*7.* Second Marriage Must Be Contracted in Good Faith. — *Circus v. Independent Order Ahawas Israel*, 55 N. Y. App. Div. 534; *Taylor v. Taylor*, 63 N. Y. App. Div. 231, affirmed 173 N. Y. 266.

**1179.** *2.* Subsequent Dissolution of Prior Marriage by Divorce. — *Chamberlain v. Chamberlain*, (N. J. 1905) 59 Atl. Rep. 813.

*6.* Marriage by Permission of Court. — See Bar-

- 1180.** Effect of Marriage Void or Voidable. — See note 3.  
**VI. MARRIAGE AS A CONTRACT — 1. Mutuality.** — See note 6.  
**1181.** 2. No Particular Form of Assent Required. — See notes 1, 3.  
 3. Essentials of Contract — Intention of Parties. — See notes 5, 7.  
**1182.** 4. When Marriage Contract Complete — Incidents Fixed. — See note 1.  
 5. Promises of Marriage in Future. — See note 4.  
**1183.** See note 1.  
**1184.** **VII. FRAUD AND ERROR — 2. Degree or Nature of Fraud — Fraud Vitiating Ordinary Contracts Not Sufficient — Public Policy.** — See notes 4, 5.  
 Degree Where Marriage Not Consummated. — See note 6.  
**1185.** 3. Misrepresentations as to Character and Wealth — The Fortune, Character, and Social Standing. — See note 1.  
 4. Concealment of Unchastity or Prior Marriage — Unchastity of Woman. — See note 4.  
**1186.** 6. Concealment of Disease — Syphilis. — See note 3.  
**1187.** 7. False Claim of Pregnancy by Future Husband — Marriage After Illicit Intercourse. — See note 1.

field v. Barfield, 139 Ala. 290; Com. v. Josse-lyn, 186 Mass. 186.

**1180. 3. Marriage of Guilty Party Voidable.** — See Com. v. Josselyn, 186 Mass. 186.

**6. Estoppel to Deny Consent.** — Chamberlain v. Chamberlain, (N. J. 1905) 59 Atl. Rep. 813.

**1181. 1. Marriage per Verba de Presenti.** — Delpit v. Côté, 20 Quebec Super. Ct. 338; Hutchinson v. Hutchinson, 196 Ill. 432; *in re* Maher, 204 Ill. 25; Herz v. Herz, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 125.

**Words of Present Assent Required.** — Con. v. Haylout, 17 Pa. Super. Ct. 541.

**3. Consent of Parties Presumed from Formal Ceremony.** — Hilton v. Roylance, 25 Utah 129, 95 Am. St. Rep. 821, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1181.

**5. Mere Agreement to Go to Housekeeping Will Not Constitute Marriage.** — Makel v. John Hancock Mut. L. Ins. Co., 95 N. Y. App. Div. 241.

**7. Stipulation that Marriage Be Kept Secret.** — See Hemmway v. Miller, 87 Minn. 123; Hills v. State, 61 Neb. 589.

**Public Recognition Required.** — See Sorenson v. Sorenson, (Neb. 1904) 100 N. W. Rep. 930.

**1182. 1. When Marriage Complete — Cohabitation Unnecessary.** — State v. McKay, 122 Iowa 658; Rutledge v. Tunno, 69 S. Car. 400; Hilton v. Roylance, 25 Utah 129, 95 Am. St. Rep. 821, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182.

**Informal Marriages — Consummation Required.** — Sorenson v. Sorenson, (Neb. 1904) 100 N. W. Rep. 930.

**4. Modified Doctrine.** — *In re* Maher, 204 Ill. 25; Sorenson v. Sorenson, (Neb. 1904) 100 N. W. Rep. 930.

**Consent, Not Cohabitation, Constitutes Marriage.** — Hilton v. Roylance, 25 Utah 129, 95 Am. St. Rep. 821.

**1183. 1. Doctrine Denied.** — Bott's Estate, 10 Pa. Dist. 122. See also Com. v. Haylow, 17 Pa. Super. Ct. 541; Lorimer v. Lorimer, 124 Mich. 631.

**1184. 4. Marriages Not Annulled for Fraud Sufficient to Vitate Ordinary Contracts.** — Boehs v. Hanger, (N. J. 1905) 59 Atl. Rep. 904;

Glean v. Glean, 70 N. Y. App. Div. 576; Anonymous, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 109. See also Crane v. Crane, 62 N. J. Eq. 21. But see Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 609, reversing 71 N. Y. App. Div. 509 (which cites 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1184), wherein the court said: "The free and full consent which is of the essence of all ordinary contracts is expressly made by the statute necessary to the validity of the marriage contract."

**5. Public Policy.** — Crane v. Crane, 62 N. J. Eq. 21; Boehs v. Hanger, (N. J. 1905) 59 Atl. Rep. 904. See also Svenson v. Svenson, 178 N. Y. 54.

**6. Less Degree of Fraud Where Marriage Not Consummated.** — Svenson v. Svenson, 178 N. Y. 54. See Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 609, reversing 71 N. Y. App. Div. 509.

**1185. 1. Misrepresentation of Character, Etc.** — See Crane v. Crane, 62 N. J. Eq. 21.

**4. Antenuptial Incontinence Not Ground for Divorce.** — Glean v. Glean, 70 N. Y. App. Div. 576.

**Concealment of the Birth of an Illegitimate Child Prior to Marriage.** — See Glean v. Glean, 70 N. Y. App. Div. 576.

**Concealment of Prior Marriage.** — See Glean v. Glean, 70 N. Y. App. Div. 575.

**1186. 3. Concealment of Venereal Disease.** — Crane v. Crane, 62 N. J. Eq. 21; Svenson v. Svenson, 178 N. Y. 54, reversing 78 N. Y. App. Div. 536. See also Anonymous, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 109.

**1187. 1. Pretended Birth of Child.** — A husband was induced to marry by the false statement of the wife that she had borne him a child, whereas she had not, but instead had imposed upon him a child which did not belong to either one. On this state of facts the court annulled the marriage on the ground that the misrepresentation was of such a nature as to deceive an ordinarily prudent man. Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 609, reversing 71 N. Y. App. Div. 509 (citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1187).

**1190.** IX. STATUTORY REGULATIONS — 1. Publication of Banns. — See note 3.

**1191.** 2. Consent of Parent or Guardian — *c.* VALIDITY OF MARRIAGE UNDER STATUTES — Statutes Requiring Consent of Parents and Guardians. — See note 4.

**1192.** 5. Persons Authorized to Perform Ceremony — *c.* JUSTICES OF THE PEACE AND MAGISTRATES. — See note 5.

*d.* CONSULS. — See note 6.

**1193.** *e.* VALIDITY OF MARRIAGE BEFORE UNAUTHORIZED PERSON. — See note 2.

Statutes Declaring Valid Marriages in Good Faith. — See note 3.

**6.** Solemnization of Marriage — *a.* REQUIREMENTS OF CANON LAW — Necessity of Marriage Ceremony. — See note 4.

*b.* DECREE OF COUNCIL OF TRENT. — See note 6.

*c.* REQUIREMENTS OF COMMON LAW — (1) *Nature and Validity of Informal Marriage.* — See note 9.

**1194.** See note 3.

(2) *American Doctrine* — Informal Marriage Valid. — See note 4.

**1195.** *e.* STATUTES IN UNITED STATES REGULATING MARRIAGE — (1) *Marriage Not Conforming to Statutory Regulations Valid.* — See notes 2, 3.

**1196.** (2) *Marriage Not Conforming to Statutory Regulations Invalid.* — See note 1.

**1190.** 3. See *Durocher v. Degré*, 20 Quebec Super. Ct. 456.

**1191.** 4. Marriage Without Consent of Parents Valid. — *Wood v. Baker*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 310. See also *Guillebert v. Grenier*, 107 La. 614, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1191; *Becker v. Becker*, 58 N. Y. App. Div. 374; *Silveira v. Silveira*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 267.

**1192.** 5. Justice of the Peace. — See *State v. McKay*, 122 Iowa 658.

**6.** Consular Marriage Act. — *Hay v. Northcote*, (1900) 2 Ch. 262, 69 L. J. Ch. 586, 82 L. T. N. S. 656, 48 W. R. 615, applying *Simonin v. Mal-lac*, 29 L. J. P. & M. 97, 2 Sw. & Tr. 67.

**1193.** 2. Solemnization by a Person Claiming Creed Other than That of the Parties Held Void. — *Durocher v. Degre*, 20 Quebec Super. Ct. 456.

3. Statutes Declaring Marriage Before Un-authorized Person Valid. — *Barclay v. Com.*, 116 Ky. 275; *Offield v. Davis*, 100 Va. 250, 4 Pa. Super. Ct. 206.

4. No Ceremony Required. — See *Delpit v. Coté*, 20 Quebec Super. Ct. 338.

6. Decree of Council of Trent. — See *Delpit v. Coté*, 20 Quebec Super. Ct. 338.

9. See *Lightbody v. West*, 87 L. T. N. S. 138, 50 W. R. 494, affirmed 88 L. T. N. S. 484.

**1194.** 3. Reg. v. Millis Discussed and Dis-tinguished. — *In re De Wilton*, (1900) 2 Ch. 481, 69 L. J. Ch. 717, 83 L. T. N. S. 70, 48 W. R. 645, also discussing and distinguishing *Lindo v. Belisario*, 1 Hag. Cons. 216.

Applicability of Reg. v. Millis Where Ordained Minister Cannot Be Procured. — *Lightbody v. West*, 87 L. T. N. S. 138, 50 W. R. 494, affirmed 88 L. T. N. S. 484.

The Courts of Canada. — See *Delpit v. Coté*, 20 Quebec Super. Ct. 338.

4. Common-law Marriages Valid Without Cere-mony or Formal Celebration. — *Davis v. Pryor*, 50 C. C. A. 579, 112 Fed. Rep. 274; *Adger v. Ack-erman*, 52 C. C. A. 568, 115 Fed. Rep. 124; *Robinson v. Ruprecht*, 191 Ill. 424; *Mullaney v. Mullaney*, 65 N. J. Eq. 384.

**1195.** 2. The Object of Marriage Statutes. — See *Sorensen v. Sorensen*, (Neb. 1904) 100 N. W. Rep. 930.

3. Marriage Not in Conformity to Statute — Informal or Common-law Marriages — *California.* — *Matter of Richards*, 133 Cal. 524.

*Illinois.* — *Robinson v. Ruprecht*, 191 Ill. 424; *Hutchinson v. Hutchinson*, 196 Ill. 432; *Manning v. Spurek*, 199 Ill. 447; *Alden v. Church*, 106 Ill. App. 347.

*Indiana.* — *Franklin v. Lee*, 30 Ind. App. 31.

*Michigan.* — *Lorimer v. Lorimer*, 124 Mich. 631; *Barker v. Valentine*, 125 Mich. 336, 7 Detroit Leg. N. 540.

*Missouri.* — *Busch v. Supreme Tent*, etc., 81 Mo. App. 562.

*Nebraska.* — *Michigan University v. Mc-Guckin*, 62 Neb. 480, affirmed 64 Neb. 300; *Eaton v. Eaton*, 66 Neb. 676.

*New York.* — *Taylor v. Taylor*, 173 N. Y. 266; *Herz v. Herz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 125.

*Pennsylvania.* — *Com. v. Haylow*, 17 Pa. Super. Ct. 541.

*Rhode Island.* — See *In re Chace*, 26 R. I. 351.

*Texas.* — *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436; *Lee v. State*, 44 Tex. Crim. 354; *Edelstein v. Brown*, 35 Tex. Civ. App. 625; *Burnett v. Burnett*, (Tex. Civ. App. 1904) 83 S. W. Rep. 238.

*Utah.* — *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821.

**1196.** 1. See *Barclay v. Com.*, 116 Ky. 275; *Offield v. Davis*, 100 Va. 250, 4 Va. Sup. Ct. 206.



**1197.** (3) *Statutes Validating Marriages Where Certain Forms Are Omitted.* — See note 1.

**X. EVIDENCE** — 1. *Nature of Proof of Marriage.* — See note 2.

**1198.** 2. *Necessity of Proof by Record* — Best Evidence. — See note 1.

3. *Witnesses.* — See note 2.

4. *Clergyman or Celebrant as Witness.* — See note 3.

5. *Contracting Parties as Witnesses.* — See note 5.

**1199.** 7. *Marriage Certificates.* — See notes 4, 5.

8. *License and Return.* — See note 6.

9. *Marriage Records and Certified Copies.* — See note 7.

**1200.** 10. *Identity of Parties.* — See note 3.

**1201.** 11. *Admissions of Parties.* — See note 1.

12. *Declarations of Parties as to Marriage.* — See note 3.

**1202.** 13. *Declarations of Decedents as to Marriage* — *b. CHURCH RECORDS AND PRIVATE RECORDS OF MARRIAGE.* — See note 1.

14. *Presumptions Concerning Formal Marriage* — *a. PRESUMPTIONS GENERALLY IN FAVOR OF MARRIAGE.* — See note 3.

**1203.** *Lapse of Time.* — See note 1.

*c. PRESUMPTIONS IN FAVOR OF FORMAL MARRIAGE* — *That Parties Consented.* — See note 4.

*That Parties Were Competent.* — See note 5.

**1197.** 1. *Validating Statutes.* — See State *v. McKay*, 122 Iowa 658.

2. *Proof by Record or Document Not Essential.* — See State *v. Miller*, 3 Penn. (Del.) 518; *Norman v. Goode*, 113 Ga. 121; *Casley v. Mitchell*, 121 Iowa 96, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1197; *Tompkins v. Com.*, 77 S. W. Rep. 712, 25 Ky. L. Rep. 1254; *State v. Tillinghast*, 25 R. I. 391, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1197; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105; *Mathews v. Silvester*, 14 S. Dak. 505.

**1198.** 1. *Record Not Only Evidence* — *Other Testimony Admissible.* — *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198; *State v. Tillinghast*, 25 R. I. 391, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198.

2. *Witnesses to Marriage.* — *Norman v. Goode*, 113 Ga. 121; *Lyman v. People*, 98 Ill. App. 386, *affirmed* 198 Ill. 544; *Casley v. Mitchell*, 121 Iowa 96; *State v. Eggleston*, 45 Oregon 346; *Perrine v. Kohr*, 20 Pa. Super. Ct. 36; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105; *State v. Tillinghast*, 25 R. I. 391, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198; *Rutledge v. Tunno*, 69 S. Car. 400; *Mathews v. Silvester*, 14 S. Dak. 505.

3. *Officiating Minister Competent Witness* — *Fact of Marriage.* — See *Hearne v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1009.

5. *Contracting Parties Incompetent as Witnesses.* — *Barber v. People*, 203 Ill. 543.

**1199.** 4. *Marriage Certificates.* — See *Dailey v. Frey*, 206 Pa. St. 227.

5. *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

6. *License and Return Showing Marriage.* — *Norman v. Goode*, 113 Ga. 121. See also *De Lucenay v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 796.

7. *Marriage Registers and Certified Copies.* — *Eldridge v. State*, 126 Ala. 63.

**1200.** 3. *Identity of Parties Named in Certificate or Record.* — *Snowman v. Mason*, 99 Me. 490. See also *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105; *Dailey v. Frey*, 206 Pa. St. 227.

**1201.** 1. *Admissions of Parties.* — *State v. Miller*, 3 Penn. (Del.) 518, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201; *Hall v. Gabbert*, 213 Ill. 208; *State v. Goulden*, 134 N. Car. 743; *Com. v. Haylow*, 17 Pa. Super. Ct. 541; *Perrine v. Kohr*, 20 Pa. Super. Ct. 36; *State v. Tillinghast*, 25 R. I. 391; *Rutledge v. Tunno*, 69 S. Car. 400.

*Admissions in Letters and Deeds.* — *Heminway v. Miller*, 87 Minn. 123.

3. *Declarations of Parties Living Together.* — See *Klenke v. Noonan*, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305.

*Marriage may be proved by general reputation and the declaration of the parties.* *State v. Still*, 68 S. Car. 37, 102 Am. St. Rep. 657.

**1202.** 1. *Entries of Clergyman in Discharge of Duty.* — *Casley v. Mitchell*, 121 Iowa 96, *citing* 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1202.

3. *Marriage Presumed as a General Rule.* — *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. Rep. 124; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193; *Franklin v. Lee*, 30 Ind. App. 31; *State v. Tillinghast*, 25 R. I. 391; *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821. See *Shank v. Wilson*, 33 Wash. 612; *Delpit v. Coté*, 20 Quebec Super. Ct. 338.

**1203.** 1. *Presumption Stronger After Lapse of Time.* — *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193; *Howton v. Gilpin*, 69 S. W. Rep. 766, 24 Ky. L. Rep. 630; *Scott v. Scott*, 77 S. W. Rep. 1122, 25 Ky. L. Rep. 1356; *Com. v. Haylow*, 17 Pa. Super. Ct. 541.

4. *Consent of Parties Presumed.* — *Hilton v. Roylance*, 25 Utah 129, 95 Am. St. Rep. 821.

5. *Presumption that Parties Were Competent* — *Proof of Disability or Prior Marriage.* — *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322;

**1203.** That Person Officiating Was Authorized. — See note 6.

**1204.** That Proceedings Were Regular and Valid. — See note 1.

*d.* PRESUMPTION FROM COHABITATION AND REPUTATION. —

See note 2.

**15. Presumptions Concerning Informal Marriage — a. IN GENERAL.**

— See note 3.

**1205.** *b.* PRESUMPTION FROM COHABITATION. — See note 1.

*c.* MUTUAL ACKNOWLEDGMENT. — See notes 2, 3.

**1206.** *d.* PRESUMPTION FROM REPUTATION OF MARRIAGE — Reputation Not General or Uniform. — See note 1.

*e.* PRESUMPTION AS AGAINST PRIOR MARRIAGE — No Impeachment of Formal Marriage by Presumption of Prior Marriage. — See note 4.

*f.* PRESUMPTION THAT ILLICIT RELATION CONTINUED. — See note 5.

**1207.** See note 3.

Scott *v.* Scott, 77 S. W. Rep. 1122, 25 Ky. L. Rep. 1356; Winslow *v.* Troy, 97 Me. 130. See also Franklin *v.* Lee, 30 Ind. App. 31; Bull *v.* Bull, 29 Tex. Civ. App. 364.

**1203.** 6. Presumption that Person Officiating Was Authorized. — Franklin *v.* Lee, 30 Ind. App. 31. See also Norman *v.* Goode, 113 Ga. 121.

**1204.** 1. A Marriage Formally Solemnized in Another State or Foreign Country. — Franklin *v.* Lee, 30 Ind. App. 31; Summerville *v.* Summerville, 31 Wash. 411.

2. Presumption from Cohabitation and Reputation. — Shank *v.* Wilson, 33 Wash. 612. See also Summerville *v.* Summerville, 31 Wash. 411.

3. Marriage Presumed from Cohabitation and Reputation — England. — *In re* Shephard, (1904) 1 Ch. 456, 73 L. J. Ch. 401, 90 L. T. N. S. 249.

United States. — Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. Rep. 124.

California. — People *v.* Hartman, 130 Cal. 487.

Delaware. — State *v.* Miller, 3 Penn. (Del.) 518.

Illinois. — Robinson *v.* Ruprecht, 191 Ill. 424; *In re* Maher, 204 Ill. 25.

Indiana. — Franklin *v.* Lee, 30 Ind. App. 31.

Kentucky. — Klenke *v.* Noonan, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305.

Minnesota. — See Hemingway *v.* Miller, 87 Minn. 123.

New Jersey. — Mullaney *v.* Mullaney, 65 N. J. Eq. 384.

New York. — See Makel *v.* John Hancock Mut. L. Ins. Co., 95 N. Y. App. Div. 241.

Pennsylvania. — Com. *v.* Haylow, 17 Pa. Super. Ct. 541.

Rhode Island. — Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1204; State *v.* Tillinghast, 25 R. I. 391.

Texas. — Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436.

Utah. — Hilton *v.* Roylance, 25 Utah 129, 95 Am. St. Rep. 821.

Washington. — Summerville *v.* Summerville, 31 Wash. 411.

Rebutting Presumption — Admissions. — Bott's Estate, 10 Pa. Dist. 122.

In Criminal Cases. — See People *v.* Hartman, 130 Cal. 487; State *v.* Hansbrough, 181 Mo. 348.

**1205.** 1. Marriage Not Presumed from Mere Cohabitation. — Pike *v.* Pike, 112 Ill. App. 243; Hemingway *v.* Miller, 87 Minn. 123. See also Matter of Richards, 133 Cal. 524; Davis's Estate, 204 Pa. St. 602.

Presumption from Acknowledgment, Cohabitation, and Reputation. — Klenke *v.* Noonan, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305.

2. Acknowledgment in Public. — See Dailey *v.* Frey, 206 Pa. St. 227.

3. Acknowledgment Merely to Conceal Illicit Relations. — See *In re* Maher, 204 Ill. 25.

**1206.** 1. Reputation Must Be General or Uniform. — Quackenbush *v.* Swortfiguer, 136 Cal. 149; Rutledge *v.* Tunno, 69 S. Car. 400. See also Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436.

4. No Presumption of Prior Marriage as Against Subsequent Formal Marriage. — Norman *v.* Goode, 113 Ga. 121.

5. Illicit Relation Presumed to Continue. — Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. Rep. 124; Robinson *v.* Ruprecht, 191 Ill. 424; Potter *v.* Clapp, 203 Ill. 592, 96 Am. St. Rep. 322; Pike *v.* Pike, 112 Ill. App. 243; Bell *v.* Clarke, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 272; Matter of Schmidt, (Surrogate Ct.) 42 Misc. (N. Y.) 463; Bott's Estate, 10 Pa. Dist. 122; Rutledge *v.* Tunno, 69 S. Car. 400; Henry *v.* Taylor, 16 S. Dak. 424; Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436. See Kidd *v.* Harris, 3 Ont. L. Rep. 60, *approving* Hodgins *v.* McNeil, 9 Grant Ch. (U. C.) 305, and *Re* Murray Canal, 6 Ont. 685.

It seems that the illicit relation will not be presumed where one of the parties to the unlawful marriage acted in good faith and without knowledge of its character. Townsend *v.* Van Buskirk, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 287; Matter of Schmidt, (Surrogate Ct.) 42 Misc. (N. Y.) 463.

**1207.** 3. Presumption Overcome by Proof of Cohabitation, Etc. — Robinson *v.* Ruprecht, 191 Ill. 424. See also Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436.

So strong is the presumption in favor of marriage that slight circumstances may be sufficient to establish a change from an illicit to

**1207. 16. Presumptions in Favor of Subsequent Marriage** — *a. PRESUMPTION AGAINST BIGAMY.* — See note 7.

**1208. *b. PRESUMPTION OF DEATH*** — Presumption that Disability Had Been Removed by Death. — See note 1.

*c. PRESUMPTION OF DIVORCE* — Presumption that Disability Had Been Removed by Divorce. — See note 2.

*d. PRESUMPTION OF REMARRIAGE AFTER REMOVAL OF DISABILITY.* — See note 3.

**1209.** See note 1.

**17. Burden of Proof** — *a. ALL PRESUMPTIONS MUST BE OVERCOME.* — See note 2.

*b. BURDEN AS TO EXISTENCE AND VALIDITY OF PRIOR MARRIAGE.* — See note 4.

*c. NECESSITY OF PROVING NEGATIVE.* — See note 5.

**XI. VALIDITY AND EFFECT OF MARRIAGE** — **1. Void Marriage.** — See note 6.

**1210.** Civil Law — Marriage in Good Faith. — See note 6.

Statutes Rendering Marriage Voidable until Annulled. — See notes 7, 8.

**1211. 2. Voidable Marriage** — Effect of Annulment. — See note 1.

**XII. FOREIGN MARRIAGES** — **CONFLICT OF LAWS** — **1. Validity Determined by Law of Place of Celebration** — *a. GENERAL RULE.* — See note 6.

a legal relation. *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. Rep. 124.

**1207. 7. Presumption Against Bigamy.** — *McKibbin v. McKibbin*, 139 Cal. 448; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193; *Murphy v. People*, 213 Ill. 154, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206; *Alabama, etc., R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660; *State v. St. John*, 94 Mo. App. 229; *Dailey v. Frey*, 206 Pa. St. 227.

**Decisions Favor Presumption.** — See *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105.

**1208. 1. Presumption of Death.** — See also *Matter of Schmidt*, (Surrogate Ct.) 42 Misc. (N. Y.) 463.

**2. Presumption of Divorce.** — *McKibbin v. McKibbin*, 139 Cal. 448; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Tuttle v. Raish*, 116 Iowa 331; *Howton v. Gilpin*, 69 S. W. Rep. 766, 24 Ky. L. Rep. 630, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1208; *Scott v. Scott*, 77 S. W. Rep. 1122, 25 Ky. L. Rep. 1356, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1208; *Tompkins v. Com.*, 77 S. W. Rep. 712, 25 Ky. L. Rep. 1254; *Alabama, etc., R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660.

**When Divorce Not Presumed.** — *Tuttle v. Raish*, 116 Iowa 331; *Casley v. Mitchell*, 121 Iowa 96. See also *Goodwin v. Goodwin*, 113 Iowa 319.

**3. Presumption of Remarriage After Prior Marriage Dissolved.** — *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. Rep. 124; *Barker v. Valentine*, 125 Mich. 336, 7 Detroit Leg. N. 540; *Busch v. Supreme Tent, etc.*, 81 Mo. App. 562; *Eaton v. Eaton*, 66 Neb. 676; *Matter of Schmidt*, (Surrogate Ct.) 42 Misc. (N. Y.) 463; *Taylor v. Taylor*, 63 N. Y. App. Div. 231, affirmed 173 N. Y. 266; *Petit v. Petit*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 155; *Bull v. Bull*, 29 Tex. Civ. App. 364.

**Massachusetts Statute.** — *Lufkin v. Lufkin*, 182 Mass. 476.

**1209. 1. Presumption that Consent Continued**

**After the Removal of Disability.** — *Manning v. Spurck*, 199 Ill. 447; *Land v. Land*, 108 Ill. App. 131, affirmed 206 Ill. 288, 99 Am. St. Rep. 171; *Eaton v. Eaton*, 66 Neb. 676. See also *Adger v. Ackerman*, 52 C. C. A. 568, 115 Fed. Rep. 124; *Chamberlain v. Chamberlain*, (N. J. 1905) 59 Atl. Rep. 813.

**2. Burden of Proof** — **Question of Fact Requiring Satisfactory Evidence.** — *Delpit v. Coté*, 20 Quebec Super. Ct. 338. See also *Shank v. Wilson*, 33 Wash. 612.

**4. Burden as to Prior Marriage.** — *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Franklin v. Lee*, 30 Ind. App. 31; *Rhode Island Hospital Trust Co. v. Thorndike*, 24 R. I. 105.

**5. Negative Proof** — **Nonexistence of Divorce.** — *Alabama, etc., R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660. See also *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322.

**6. Void Marriage Confers No Rights.** — *Barfield v. Barfield*, 139 Ala. 290. See also *McIlvain v. Scheibley*, 109 Ky. 455.

**1210. 6. Civil Law.** — See *Benton's Succession*, 106 La. 494; *Matter of Hall*, 61 N. Y. App. Div. 266.

**7. Marriage Declared Valid until Annulled.** — *Taylor v. Taylor*, 173 N. Y. 266; *Silveira v. Silveira*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 267. See also *Svenson v. Svenson*, 178 N. Y. 54.

**8. Marriage Rendered Voidable.** — *Martin v. Martin*, 54 W. Va. 301, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1210.

**1211. 1. Children of Voidable Marriage Legitimate.** — *Matter of Harrington*, 140 Cal. 244, rehearing denied 140 Cal. 294.

**6. Validity Determined by Law of Place Where Marriage Contracted.** — *U. S. v. Rodgers*, 109 Fed. Rep. 886; *Klenke v. Noonan*, 81 S. W. Rep. 241, 26 Ky. L. Rep. 305; *McHenry v. Bracken*, 93 Minn. 510, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1211; *Hills v. State*, 61 Neb. 589; *In re Chace*, 26 R. I. 351; *State v. Richardson*, 72 Vt. 49.

**1212.** *b. EXCEPTIONS TO RULE.* — See note 2.

**1213.** *Marriages Contrary to Laws and Public Policy of Domicil.* — See note 1.

*c. VALIDITY OF CONTRACT AND CEREMONY OF MARRIAGE.* —

See note 2.

**1214.** *2. Validity Determined by Law of Domicil — English Doctrine.* — See note 1.

*Capacity of Parties.* — See note 4.

**1216.** *6. Indian Marriages — Tribal Laws and Customs.* — See note 4.

**1218.** *XVI. ANNULMENT OF MARRIAGE — 1. Distinguished from Divorce.* —

See note 7.

*2. Jurisdiction — a. IN ABSENCE OF STATUTE — (1) In General.* — See note 8.

*(3) Fraud, Duress, Lack of Consent, and Insanity.* — See note 10.

**1220.** *6. Decree of Annulment — a. EFFECT ON MARRIAGE RELATION.* — See note 9.

**1221.** *7. Alimony.* — See note 6.

**1222.** *XVII. CIVIL AND CRIMINAL LIABILITY FOR ILLEGAL MARRIAGE —*

*1. Liability of Officer Granting License.* — See note 1.

*Good Faith of Officer.* — See note 3.

**1223.** *MARRIAGE BROKERAGE.* — See note 6.

**1212.** *2. Exceptions Stated.* — As recognizing the exception, see *U. S. v. Rodgers*, 109 Fed. Rep. 886; *Martin v. Martin*, 54 W. Va. 301, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1212.

**1213.** *1. Foreign Marriages Contrary to Laws and Public Pol* — *Newman v. Kimbrough*, (Tenn. Ch. 1900) 59 S. W. Rep. 1061. See also *In re Chace*, 26 R. I. 351.

**2. A Marriage in Another State to Avoid the Law Requiring the Consent of Parents.** — See *Durocher v. Dugré*, 20 Quebec Super. Ct. 456; *Guillebert v. Grenier*, 107 La. 614; *In re Chace*, 26 R. I. 351.

**1214.** *1. Law of Domicil Governs as to Essentials of Marriage.* — *In re De Wilton*, (1900) 2 Ch. 481, 69 L. J. Ch. 717, 83 L. T. N. S. 70, 48 W. R. 645; *In re Bozzelli*, (1902) 1 Ch. 751, 50 W. R. 447.

**4. American Decisions — Capacity of Parties Controlled by Law of Domicil.** — See *Matter of Hall*, 61 N. Y. App. Div. 266.

**1216.** *4. Indian Marriages.* — *Kalyton v. Kalyton*, 45 Oregon 116; *Henry v. Taylor*, 16 S. Dak. 424; *Reg. v. Nan-e-quis-a-ka*, 1 N. W. Ter. 215.

**1218.** *7. G — v. G —*, 67 N. J. Eq. 30.

**8. Jurisdiction Must Be Inherent or Derived from Statute.** — *Becker v. Becker*, 58 N. Y. App. Div. 374; *Silveira v. Silveira*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 267.

**10. Jurisdiction Independent of Statute — Fraud.** — *Crane v. Crane*, 62 N. J. Eq. 21; *Boehs v. Hanger*, (N. J. 1905) 59 Atl. Rep. 904; *Di*

*Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 95 Am. St. Rep. 609.

**1220.** *9. Nullity Decree Merely Declares Marriage Void.* — See *Gore v. Gore*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 323, affirmed 103 N. Y. App. Div. 74.

**1221.** *6. No Permanent Alimony in Absence of Statute.* — *G — v. G —*, 67 N. J. Eq. 30; *Gore v. Gore*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 323, affirmed 103 N. Y. App. Div. 74. See also *Knott v. Knott*, (N. J. 1902) 51 Atl. Rep. 15; *Higgins v. Sharp*, 164 N. Y. 4.

**Connecticut.** — Gen. Stat. Conn. (1902), § 2562, empowers the court, on entering a decree of nullity, to make an order concerning alimony, as it might make in divorce proceedings. *Stapleberg v. Stapleberg*, 77 Conn. 31.

**1222.** *1. Penalties for Issuing License or Performing Ceremony Without Parents' Consent.* — *Harcum v. Marsh*, 130 N. Car. 154. See also *Barnidge v. Kilpatrick*, 111 La. 587.

**3. The Statutes of North Carolina.** — *Harcum v. Marsh*, 130 N. Car. 154.

For a case where the register of deeds did not make reasonable inquiry, see *Trolinger v. Boroughs*, 133 N. Car. 312.

**1223.** *6. A contract to hasten an intended marriage held to be a marriage-brokerage contract and void.* *Jangraw v. Perkins*, 76 Vt. 127.

An agreement to pay a woman to give advice to another with the view of inducing the latter to marry the promisor is a *marriage-brokerage* contract and void as against public policy. *In re Grobe*, (Iowa 1905) 102 N. W. Rep. 804.

# MARRIAGE SETTLEMENTS.

By W. B. ROBINSON.

**1225. I. DEFINITION.** — See note 1.

**II. ANTENUPTIAL SETTLEMENTS — 1. Validity and Binding Effect —**

**a. IN GENERAL** — The Personal Rights, Duties, and Liabilities. — See note 3.

Settlements Regulating Property Rights Valid. — See note 4.

**1226.** See notes 1, 3, 5.

**1227. b. CONTRACT NOT EXTINGUISHED BY INTERMARRIAGE OF PARTIES.** — See note 9.

**1228. c. AS BETWEEN PARTIES — (1) In General** — Contract Void When Procured by Fraud or Undue Influence. — See notes 2, 3.

Disproportion Between Provision for Wife and Extent of Husband's Estate. —

See note 5.

**1229.** Strict Proof of Fairness. — See note 2.

(2) *Revocation, Alteration, or Forfeiture After Marriage.* — See

notes 7, 8.

**1230. d. AS TO CREDITORS AND PURCHASERS — (1) Settlements in Favor of Persons Within Marriage Consideration.** — See note 7.

**1233. 2. Capacity of Parties — b. INFANTS** — Settlement of Personal Property — See note 1.

**3. Consideration — Marriage.** — See note 8.

**1225. 1. A Marriage Settlement Is Not a Bill of Sale** within the definition in the English Bills of Sale Acts. *In re Reis*, (1904) 2 K. B. 769.

**3. Personal Rights, Duties, and Liabilities Not Affected by Antenuptial Contracts.** — *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

**4. Antenuptial Contracts Affecting Property Rights Valid.** — See *Isaacs v. Isaacs*, (Neb. 1904) 99 N. W. Rep. 268.

**1226. 1. Antenuptial Contracts Regarded with Favor.** — *Moore v. Harrison*, 26 Ind. App. 408; *Green v. Benham*, 57 N. Y. App. Div. 9; *Mauk's Estate*, 19 Pa. Super. Ct. 338; *Yost's Estate*, 23 Pa. Super. Ct. 183.

**3. Contract for Mutual Relinquishment of Marital Property Rights.** — *Coulter v. Lyda*, 102 Mo. App. 401; *Matter of Stilson*, 85 N. Y. App. Div. 132; *Cummings v. Gummings*, 25 R. I. 528.

**5. Antenuptial Agreement Releasing Dower, etc., Valid.** — *Cummings v. Cummings*, 25 R. I. 528.

**1227. 9. Antenuptial Contract Not Destroyed by Intermarriage of Parties.** — *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1227.

**1228. 2. Antenuptial Contract Rendered Invalid by Fraud or Undue Influence.** — *Russell v. Russell*, 129 Fed. Rep. 434.

**3. Parties to Antenuptial Contracts Stand in Confidential Relation.** — *Russell v. Russell*, 129 Fed. Rep. 434; *Barker v. Barker*, 126 Ala. 503; *Warner's Estate*, 210 Pa. St. 431; *Mauk's Estate*, 19 Pa. Super. Ct. 338; *Yost's Estate*, 23 Pa. Super. Ct. 183.

**5. Inadequacy of Wife's Provision Prima Facie**

**Evidence of Concealment or Fraud.** — *Russell v. Russell*, 129 Fed. Rep. 434; *Brooks v. Brooks*, (Ky. 1900) 58 S. W. Rep. 450; *Warner's Estate*, 210 Pa. St. 431; *Mauk's Estate*, 19 Pa. Super. Ct. 338; *Yost's Estate*, 23 Pa. Super. Ct. 183.

**1229. 2.** See *In re Devoe*, 113 Iowa 4.

**7. Husband and Wife Cannot Alter or Annul Settlement to Prejudice of Children's Rights.** — *South Carolina L. & T. Co. v. Lawton*, 69 S. Car. 345, 104 Am. St. Rep. 802, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229.

**8. Contract Cannot Be Altered by One Party.** — *Bowman v. Knorr*, 206 Pa. St. 272.

**1230. 7. Settlement Valid as Against Creditors and Purchasers in Absence of Fraud.** — *In re Reis*, (1904) 2 K. B. 769; *Metz v. Blackburn*, 9 Wyo. 481. See also *In re Denis*, 18 Quebec Super. Ct. 436.

**1233. 1. Settlement of Wife's Personal Property.** — See *Viditz v. O'Hagan*, (1900) 2 Ch. 87.

**8. Marriage Sufficient Consideration to Support Antenuptial Settlement.** — *Barlow v. Comstock*, (Ky. 1904) 78 S. W. Rep. 475; *Kramer v. Kramer*, 90 N. Y. App. Div. 176, reversed 181 N. Y. 477 (here the note in question was found to have been given to secure peace between a newly-married couple and not in consideration of marriage); *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1233; *Metz v. Blackburn*, 9 Wyo. 481.

**That One Party Has Another Spouse Living** will not invalidate the agreement if the other acted in ignorance. *Broadrick v. Broadrick*, 25 Pa. Super. Ct. 225.

**1235.** 4. Form and Execution — *b.* STATUTE OF FRAUDS — (1) *In General.* — See note 11.

**1236.** Contracts Not Made upon Sole Consideration of Marriage. — See note 1.  
Agreements Reduced to Writing After Marriage. — See note 2.

**1237.** (2) *Effect of Performance.* — See note 1.

*c.* RECORDING ACTS. — See note 5.

**1239.** 5. Property or Rights Affected — *b.* FUTURE-ACQUIRED PROPERTY. — See note 2.

**1240.** *c.* DOWER. — See note 1.

6. Construction. — See note 6.

**1241.** 7. Conflict of Laws — Construction of Contract. — See note 5.

**1242.** Rule as to Future-acquired Property. — See note 3.

8. Enforcement — *a.* IN GENERAL. — See note 6.

**1243.** Executed and Executory Agreement. — See note 1.

Reformation of Contract. — See note 6.

**1247.** III. POSTNUPTIAL SETTLEMENTS — 1. General Nature — Marriage as Consideration. — See notes 5, 7.

2. Validity and Binding Effect — *a.* AS BETWEEN PARTIES. — See note 8.

**1248.** *b.* AS TO CREDITORS — (2) *Where There Is Valuable Consideration* — A Postnuptial Settlement Founded on Valuable Consideration. — See note 9.

**1235.** 11. Marriage Contracts Required to Be in Writing. — *Powell v. Meyers*, (Ky. 1901) 64 S. W. Rep. 428; *Kramer v. Kramer*, 90 N. Y. App. Div. 176, reversed on other grounds 181 N. Y. 477.

**1236.** 1. Antenuptial Contracts Not Made upon Sole Consideration of Marriage. — See *Steen v. Kirkpatrick*, 84 Miss. 63.

2. Agreements Reduced to Writing After Marriage. — *Moore v. Harrison*, 26 Ind. App. 408; *Kohl v. Frederick*, 115 Iowa 517.

**1237.** 1. Contract Fully Performed Not Within Statute. — *Kramer v. Kramer*, 90 N. Y. App. Div. 176, reversed on other grounds 181 N. Y. 477.

5. Statutory Requirement of Record. — See *In re Denis*, 18 Quebec Super. Ct. 436.

**1239.** 2. Future-acquired Property Included by Express Terms of Settlement. — *In re Pares*, (1901) 1 Ch. 708; *In re Van Straubenzee*, (1901) 2 Ch. 779; *In re Maddy*, (1901) 2 Ch. 820; *Davenport v. Marshall*, (1902) 1 Ch. 82; *In re Bankes*, (1902) 2 Ch. 333; *In re Reis*, (1904) 2 K. B. 769; *In re Simpson*, (1904) 1 Ch. 1; *Russell v. Lawder*, (1904) 1 Ir. R. 328.

Life Interest or Annuity Not Included by General Terms. — *In re Dowding*, (1904) 1 Ch. 441.  
Property Subject to General Power of Appointment Included. — *In re O'Connell*, (1903) 2 Ch. 574.

Savings from Wife's Separate Income Not Included. — *In re Clutterbuck*, 73 L. J. Ch. 598.

Subsequent Gift from Husband to Wife Not Included. — *Coles v. Coles*, (1901) 1 Ch. 711.

**1240.** 1. Dower Barred by Antenuptial Agreement. — *Koch v. Koch*, 126 Mich. 187. See also *Coulter v. Lyda*, 102 Mo. App. 401.

Renunciation of Dower Strictly Construed in Wife's Favor. — *Turgeon v. Shannon*, 20 Quebec Super. Ct. 135.

6. Contract of Settlement Liberally Construed. — *Moore v. Harrison*, 26 Ind. App. 408; *Barlow v. Comstock*, (Ky. 1904) 78 S. W. Rep. 475; *Stevenson v. Renardet*, 83 Miss. 392.

As to the Construction and Effect of Particular

Contracts and Settlements, see the following cases: *In re Pares*, (1901) 1 Ch. 708; *Coles v. Coles*, (1901) 1 Ch. 711; *In re Maffé*, (1902) 2 Ch. 112; *In re Smith*, (1903) 1 Ch. 373; *In re Brydone*, (1903) 2 Ch. 84; *Cartwright v. Cartwright*, (1903) 2 Ch. 306; *In re Crawford*, (1905) 1 Ch. 11; *In re Woodhouse*, (1903) 1 Ir. R. 126; *Re Peirson*, 88 L. T. N. S. 794; *Coulson v. Coulson*, Sc. Ct. of Sess. 3 F. 1041; *Newman v. Desposas*, 17 Quebec Super. Ct. 477; *Desrochers v. Roy*, 18 Quebec Super. Ct. 70; *Pagé v. Beauchamp*, 20 Quebec Super. Ct. 220; *Gaudreau v. Tétu*, 20 Quebec Super. Ct. 402; *Goyette v. Leclerc*, 23 Quebec Super. Ct. 542; *Allan v. Trihey*, 5 Quebec Pr. 298.

**1241.** 5. Contract to Be Performed Elsewhere than in Place Where Made. — *In re Bankes*, (1902) 2 Ch. 333, 87 L. T. N. S. 432.

**1242.** 3. Future-acquired Property. — See *In re Bankes*, (1902) 2 Ch. 333, 87 L. T. N. S. 432.

6. Antenuptial Settlements Enforced in Equity. — *Green v. Benham*, 57 N. Y. App. Div. 9. See also *Kramer v. Kramer*, 90 N. Y. App. Div. 176, reversed on other grounds 181 N. Y. 477.

**1243.** 1. Executed and Executory Agreements. — See *South Carolina L. & T. Co. v. Lawton*, 69 S. Car. 345, 104 Am. St. Rep. 802.

6. Reformation of Contract. — *Johnson v. Bragge*, (1901) 1 Ch. 28, 83 L. T. N. S. 621. See also *Ellis v. Ellis*, 1 Tenn. Ch. App. 198.

**1247.** 5. Postnuptial Settlements Not Supported by Marriage. — *Clow v. Brown*, (Ind. App. 1904) 72 N. E. Rep. 534.

7. Settlement in Pursuance of Parol Antenuptial Agreement Voluntary as to Creditors. — See *Powell v. Meyers*, (Ky. 1901) 64 S. W. Rep. 428.

8. See *Powell v. Meyers*, (Ky. 1901) 64 S. W. Rep. 428; *Fennell's Estate*, 207 Pa. St. 309.  
Covenants of Postnuptial Settlements Construed. — See *In re Johnstone*, (1904) 1 Ch. 470; *In re Simpson*, (1904) 1 Ch. 1.

**1248.** 9. Settlement Supported by Valuable Consideration Valid as Against Creditors. — *Clow v. Brown*, (Ind. App. 1904) 72 N. E. Rep. 534.

# MARSHALING ASSETS.

BY H. W. HOYE.

## 1257. I. DEFINITION AND GENERAL CONSIDERATION — 2. Nature of Doctrine

— *a.* IN GENERAL — As a Consequence of This Principle. — See note 4.

**1259.** In Respect to Specialty and Simple Contract Creditors. — See note 2.

Junior Creditor's Right Not a Lien. — See note 4.

**1261.** *b.* IN RESPECT TO SUBSEQUENT PURCHASERS AND INCUMBRANCERS — Subsequent Purchasers or Incumbrancers with Actual or Record Notice. — See note 2.

**1264.** II. METHODS OF ENFORCING DOCTRINE — 3. Subrogation. — See note 3.

4. Distribution. — See note 4.

III. RIGHTS AND LIABILITIES OF PARAMOUNT CREDITOR — 1. Rights of Paramount Creditor — *a.* TO FULL AND PROMPT PAYMENT AND ALL AVAILABLE LEGAL REMEDIES. — See note 6.

**1265.** See note 5.

**1266.** *b.* BURDEN OF PROOF — General Rule. — See note 1.

*c.* TO NOTICE OF JUNIOR CREDITOR'S CLAIM — (1) *In General.* — See note 3.

(2) *Nature and Sufficiency of Notice.* — See note 5.

**1267.** Notice of Mere Existence of Lien. — See note 1.

**1257.** 4. General Rule Recognized and Applied — *England.* — See *M'Carthy v. M'Cartie*, (1904) 1 Ir. R. 100.

*United States.* — *Rock Springs First Nat. Bank v. Roder*, (C. C. A.) 114 Fed. Rep. 451.

*Arkansas.* — *Bagley v. Weaver*, 72 Ark. 29.

*California.* — *Mack v. Shafer*, 135 Cal. 113.

*Kansas.* — *St. Marys First Nat. Bank v. Taylor*, 69 Kan. 28.

*Kentucky.* — *Griffin v. Gingell*, (Ky. 1904) 79 S. W. Rep. 284; *Smith v. May*, (Ky. 1902) 70 S. W. Rep. 199; *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708; *Shewmaker v. Yankey*, (Ky. 1902) 66 S. W. Rep. 1.

*Michigan.* — *Holliday v. Snow*, 129 Mich. 494.

*Missouri.* — *Wendler v. Lambeth*, 163 Mo. 428; *State v. Cryts*, 87 Mo. App. 440.

*Nebraska.* — *Anthes v. Schroeder*, (Neb. 1903) 94 N. W. Rep. 611.

*New Jersey.* — *Harron v. Du Bois*, 64 N. J. Eq. 657.

*New York.* — *Breed v. National Bank*, 57 N. Y. App. Div. 468, *affirmed* 171 N. Y. 648.

*North Carolina.* — *Graves v. Currie*, 132 N. Car. 307.

*South Carolina.* — *Blackwell v. British-American Mortg. Co.*, 65 S. Car. 105.

*West Virginia.* — *Huntington First Nat. Bank v. Simms*, 49 W. Va. 442.

**1259.** 2. *State v. Cryts*, 87 Mo. App. 440.

**4. Equity Does Not Amount to Lien.** — *State v. Cryts*, 87 Mo. App. 440.

**1261.** 2. *Purchasers and Incumbrancers with Notice.* — *Harron v. Du Bois*, 64 N. J. Eq. 657.

**1264.** 3. *Subrogation.* — *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129; *Anthes v. Schroeder*, (Neb. 1903) 94 N. W.

Rep. 611; *Boice v. Conover*, 63 N. J. Eq. 273; *Clinton v. Buffalo Land Security Co.*, 55 N. Y. App. Div. 440, *affirmed* 166 N. Y. 621.

**4. Distribution of Funds in Court.** — *New York Public Library v. Tilden*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 169.

**6. Marshaling Not Enforced to Injury of Paramount Creditor.** — *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129; *Anthes v. Schroeder*, (Neb. 1903) 94 N. W. Rep. 611; *Boice v. Conover*, 63 N. J. Eq. 273, (N. J. 1901) 53 Atl. Rep. 910; *New York Co-operative Bldg., etc., Assoc. v. Brennan*, 62 N. Y. App. Div. 610; *New York Public Library v. Tilden*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 169; *Blanchette v. Farsch*, (S. Dak. 1904) 99 N. W. Rep. 79.

**1265.** 5. Where a wife has mortgaged her lands to secure her husband's debt, a subsequent creditor of the husband cannot compel the holder of the mortgage to proceed against the wife's property before exhausting the husband's assets. *Stewart v. Stewart*, 207 Pa. St. 59.

**1266.** 1. *Onus Probandi upon Junior Lienor.* — *Gibson v. Honnett*, 72 Ark. 412; *Staniels v. Whitcher*, (N. H. 1905) 59 Atl. Rep. 934; *New York Co-operative Bldg., etc., Assoc. v. Brennan*, 62 N. Y. App. Div. 610.

**3. Paramount Creditor Entitled to Notice.** — *Bridgewater Roller Mills Co. v. Baltimore Bldg., etc., Assoc.*, 124 Fed. Rep. 718; *Hart v. Anderson*, 198 Pa. St. 558.

**5. Actual Notice.** — *Hart v. Anderson*, 198 Pa. St. 558; *Blackwell v. British-American Mortg. Co.*, 65 S. Car. 105.

**1267.** 1. *Junior Lienor Must Make Actual*

**1267. 2. Liabilities of Paramount Creditor — a. FOR RELEASE OF SECURITY WITH NOTICE OF JUNIOR INCUMBRANCE.** — See note 7.

**1268.** See note 1.

**Qualifications and Exceptions — When Junior Creditor Is Not Injured by Release.**

— See note 3.

**1269. b. FOR RELEASE OF SECURITY WITHOUT NOTICE OF JUNIOR INCUMBRANCE.** — See note 3.

**1270. IV. APPLICATIONS OF DOCTRINE — 1. In Respect to Homestead Lands — The General Rule.** — See note 2.

**1273. V. INVERSE ORDER OF ALIENATION — 1. General Principle.** — See notes 5, 7.

**1275.** Rule in Iowa and Kentucky. — See note 1.

**1278. 3. Scope of Principle — g. LANDS CONVEYED TO VOLUNTEERS.** — See notes 5, 7.

**1279. 4. Limits of Application — a. IN GENERAL — Effect of Laches.** — See note 4.

**1280. b. LANDS SOLD SUBJECT TO INCUMBRANCE — Incumbrance Part of Purchase Price.** — See note 3.

**1282. 5. Enforcement of Principle — c. NECESSITY OF NOTICE TO SUBSEQUENT PART PURCHASER.** — See note 5.

**1284. VI. LIMITATIONS AND EXCEPTIONS TO DOCTRINE — 1. Persons Who Cannot Enforce Doctrine — a. COMMON DEBTOR.** — See note 2.

**2. Persons Against Whom Doctrine Cannot Be Enforced — a. IN GENERAL — (1) Persons Having Equities Equal or Superior to Those of Junior Creditor.** — See note 6.

**1285. (3) Creditors of Different Persons.** — See note 1.

**1287. 3. Miscellaneous Limitations and Exceptions — g. WHERE PARAMOUNT CREDITOR HAS SUPERIOR RIGHT TO ONE FUND.** — See note 1.

**Demand.** — *Rock Springs First Nat. Bank v. Roder*, (C. C. A.) 114 Fed. Rep. 451.

**1267. 7. Effect of Release of Security — With Notice.** — *Merced Security Sav. Bank v. Simon*, 141 Cal. 11; *St. Marys First Nat. Bank v. Taylor*, 69 Kan. 28; *Cohn v. Souders*, 175 Mo. 455.

**1268. 1.** *Huntington First Nat. Bank v. Simms*, 49 W. Va. 442.

**3. Qualifications and Exceptions.** — *Blanchette v. Farsch*, (S. Dak. 1904) 99 N. W. Rep. 79.

**1269. 3. Effect of Release of Security Without Notice.** — *Graves v. Currie*, 132 N. Car. 307.

**1270. 2. General Rule — Marshaling Not Applied to Defeat Homestead Exemption.** — *Blanchette v. Farsch*, (S. Dak. 1904) 99 N. W. Rep. 79.

**1273. 5. Unsold Residue of Encumbered Lands First Liable.** — *Mills v. Kelley*, 62 N. J. Eq. 213.

**7. Successive Conveyances Chargeable in Inverse Order of Alienation.** — *Gray v. H. M. Loud, etc.*, *Lumber Co.*, 128 Mich. 427; *Hudson v. Barham*, 101 Va. 63, 99 Am. St. Rep. 849.

**1275. 1. Kentucky.** — *Griffin v. Gingell*, (Ky. 1904) 79 S. W. Rep. 284.

**1278. 5. In Favor of Voluntary Grantee.** — *Mills v. Kelley*, 62 N. J. Eq. 213.

**7.** *Mills v. Kelley*, 62 N. J. Eq. 213.

**1279. 4. Laches Bars Compensation from Bona Fide Purchaser.** — See *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39.

**1280. 3. Where Parcel Conveyed Is Not Charged with Whole Debt.** — *Monarch Coal, etc., Co. v. Hand*, 197 Ill. 288.

**1282. 5. Subsequent Purchaser Not Liable Without Notice.** — *Gray v. H. M. Loud, etc.*, *Lumber Co.*, 128 Mich. 427.

**1284. 2. Common Debtor Cannot Marshal Assets.** — *Vankirk Land, etc., Co. v. Morris*, 129 Ala. 249.

**6. Marshaling Not Enforced Against Equal or Superior Equities.** — *Bridgewater Roller Mills Co. v. Baltimore Bldg., etc., Assoc.*, 124 Fed. Rep. 718; *Shewmaker v. Yankey*, (Ky. 1902) 66 S. W. Rep. 1.

**1285. 1. Both Funds Must Belong to Common Debtor.** — *Peery v. Elliott*, 101 Va. 709.

**1287. 1. Superior Right of Lien in One Fund.** — See *New York Co-operative Bldg., etc., Assoc. v. Brennan*, 62 N. Y. App. Div. 610.



# MARSHALING DECEDENTS' ESTATES.

By H. W. HOYE.

**1293.** III. COMMON-LAW AND STATUTORY LIABILITY OF HEIRS, DEVISEES, AND LEGATEES — 1. Liability of Heirs and Devisees — *b.* BY STATUTE. — See note 5.

**1295.** Debt Subsequently Discovered. — See note<sup>2</sup>.

Personal Liability of Heirs and Devisees. — See notes 6, 7.

**1296.** 2. Liability of Purchasers from Heirs or Devisees. — See notes 1, 3.

**1298.** 3. Liability of Legatees — *b.* REMEDIES OF CREDITORS — (2) *In Equity*. — See notes 2, 3.

**1299.** *c.* REFUNDING INTER SE. — See note 4.

**1300.** IV. ORDER OF LIABILITY OF ASSETS — 2. Personal Estate — *a.* LIABILITY FOR PAYMENT OF DEBTS. — See note 6.

**1302.** *b.* LIABILITY FOR PAYMENT OF LEGACIES. — See note 4.

**1305.** 3. Realty Devised or Personalty Bequeathed to Pay Debts — *a.* GENERAL RULE. — See notes 2, 3.

**1309.** 4. Lands Descended — *b.* CONTRIBUTION BETWEEN CO-HEIRS — (1) *General Rule*. — See note 1.

(2) *Statutory Provisions*. — See note 2.

**1311.** 5. Specific Devises or Bequests Subject to Charge of Debts — *c.* ENCUMBERED LANDS DESCENDED OR DEVISED. — See note 6.

**1312.** 6. General Legacies and Devises — *a.* IN GENERAL. — See notes 1, 3.

**1293.** 5. Statutory Liabilities of Heirs and Devisees. — Rankin *v.* Big Rapids, (C. C. A.) 133 Fed. Rep. 670; Whittern *v.* Krick, 31 Ind. App. 577; Williams *v.* Weeks, 70 S. Car. 1.

**1295.** 2. Liability for Taxes. — Com. *v.* Sweigart, 115 Ky. 293.

6. Heir Not Personally Liable Before Alienation. — Haines *v.* Haines, 69 N. J. L. 39.

7. Alienation Before Suit. — Alderson *v.* Alderson, (Ky. 1904) 83 S. W. Rep. 1129.

The Recovery will be only for the value of the lands in the condition in which they were at the time of the descent cast. Haines *v.* Haines, 69 N. J. L. 39.

**1296.** 1. Purchaser from Heir or Devisee Held to Take Subject to Decedent's Debts. — Alderson *v.* Alderson, (Ky. 1904) 83 S. W. Rep. 1129; Hooker *v.* Yellowley, 128 N. Car. 297.

3. Land Sold by Heir or Devisee Held Not Chargeable in Action by Creditor. — Russell *v.* Smith, 115 Iowa 261; Yager *v.* Turbeville, 1 Tenn. Ch. App. 227.

**1298.** 2. Subsequent Insufficiency of Assets. — McClung *v.* Lieg, 54 W. Va. 467.

Creditor Must First Establish His Claim. — Brinkworth *v.* Hazlett, 64 Neb. 592.

3. Rankin *v.* Big Rapids, (C. C. A.) 133 Fed. Rep. 670.

**1299.** 4. Debt Due from One Legatee Deducted. — Matter of Foster, (Surrogate Ct.) 38 Misc. (N. Y.) 347.

**1300.** 6. Personalty the Primary Fund for Payment of Debts. — Matter of Traver, 145 Cal. 508; Baptist Female University *v.* Borden, 132 N. Car. 476; Martin for Opinion, 25 R. I. 1,

citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1300; Jenks *v.* Steere, 23 R. I. 160.

**1302.** 4. Personalty the Primary Fund for Payment of Legacies. — Martin for Opinion, 25 R. I. 1.

**1305.** 2. Devise for Payment of Wife's Debts. — Where a testator devised personalty and realty for the payment of his wife's debts, after her death, it is not necessary that her own estate be exhausted in payment of her debts, but her creditors may proceed directly against the property devised by her husband. Hallock *v.* Hallock, 79 N. Y. App. Div. 508.

3. Matter of Traver, 145 Cal. 508.

**1309.** 1. Co-heirs Must Contribute to Pay Ancestor's Debts. — Smith *v.* Catlin, (Ky. 1901) 63 S. W. Rep. 473.

2. Statutory Provisions. — Smith *v.* Catlin, (Ky. 1901) 63 S. W. Rep. 473.

**1311.** 6. Encumbered Lands Liable for Incumbrances Before Pecuniary Legacies. — Woodruff *v.* Woodruff, 23 Ohio Cir. Ct. 408.

**1312.** 1. General Legacies. — Lynch *v.* Spicer, 53 W. Va. 426.

3. General Legacies and Devises Contribute Ratably. — Martin for Opinion, 25 R. I. 1, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1312.

Where a decedent's estate consisted partly of land which descended to him and partly of land which he purchased, there is no principle of law that will throw the burden of the decedent's debts upon either parcel of land, but the heirs of each parcel must share alike in payment thereof. Jenks *v.* Steere, 23 R. I. 160.

**1313.** 8. Specific Legacies and Devises Not Charged with Debts — *a.* GENERAL RULE. — See note 9.

**1314.** *c.* CONTRIBUTION BETWEEN SPECIFIC LEGATEES AND DEVISEES — (1) *General Rule.* — See note 1.

Apportionment of Burden. — See note 3.

**1317.** V. EXONERATION OF ENCUMBERED LANDS — 1. General Rule. — See note 5.

**1325.** 4. Circumstances Affecting General Rule — *b.* INSUFFICIENCY OF PERSONAL ESTATE TO PAY DEBTS AND LEGACIES. — See note 7.

**1339.** VII. CHARGES OF DEBTS AND LEGACIES — 1. Charge of Debts — *b.* CHARGE ON REALTY IN EXONERATION OF PERSONALTY — (2) *What Constitutes Charge* — (a) *In General.* — See note 1.

**1349.** 2. Charge of Legacies — *a.* IN GENERAL. — See notes 4, 7.

**1350.** *b.* INTENTION OF TESTATOR — (1) *In General.* — See note 4.

**1354.** *d.* EFFECT OF RESIDUARY CLAUSE — (2) *Blending Real and Personal Estate in Residuary Clause.* — See note 6.

**1356.** *e.* CHARGE ON LANDS SPECIFICALLY DEVISED — (1) *In General.* — See note 6.

**1357.** (3) *Direction for Payment of Legacies* — *Direction to Devisee to Pay Legacies.* — See note 4.

**1360.** *i.* EQUITABLE CONVERSION OF REALTY. — See note 5.

*k.* CHARGES FOR MAINTENANCE AND SUPPORT. — See note 8.

**1374.** VIII. RULE OF MARSHALING APPLIED — 3. *In Favor of Legatees* — *b.* SUBROGATION TO RIGHTS OF CREDITORS AGAINST LANDS DEVISED — (1) *General Rule.* — See note 4.

**1313.** 9. Specific Legacies and Devises Not Charged. — Martin for Opinion, 25 R. I. 1; Lynch v. Spicer, 53 W. Va. 426, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1313.

**1314.** 1. Specific Legacies and Devises Liable Pro Rata. — McClung v. Sieg, 54 W. Va. 467. 3. Reimbursement for Overpayment. — McClung v. Sieg, 54 W. Va. 467.

**1317.** 5. Exoneration of Encumbered Lands by Personal Estate. — Knight v. Newkirk, 92 Mo. App. 258; Peters's Estate, 16 Pa. Super. Ct. 462.

**1325.** 7. Rule Not Applied to Defeat Legatees. — Woodruff v. Woodruff, 23 Ohio Cir. Ct. 408.

**1339.** 1. Intention of Testator Controlling. — Mathews v. Tyree, 53 W. Va. 298; Lynch v. Spicer, 53 W. Va. 426.

**1349.** 4. Legacies Not Payable Out of Realty unless Charged Thereon — Personal Estate Fund for Payment of Legacies. — Baptist Female University v. Borden, 132 N. Car. 476.

7. Land Specifically Devised. — Baptist Female University v. Borden, 132 N. Car. 476.

**1350.** 4. Intention of Testator Controlling. — Martin for Opinion, 25 R. I. 1.

**1354.** 6. Blending Real and Personal Property in Residuary Disposition. — Perkins v. Yazoo City First Nat. Bank, 81 Miss. 358, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1354.

**1356.** 6. Perkins v. Yazoo City First Nat. Bank, 81 Miss. 358, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1356; Lynch v. Spicer, 53 W. Va. 426, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1356.

**1357.** 4. Paying Out of Proceeds. — Peery v. Elliott, 101 Va. 709.

**1360.** 5. Equitable Conversion. — Lynch v. Spicer, 53 W. Va. 426, quoting 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1360.

8. Construction of Wills with Regard to Charges for Maintenance. — Tate v. Chandler, 115 Ga. 462, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1360.

**1374.** 4. Assets Not Marshaled Against Devisees. — But see *In re Roberts*, (1902) 2 Ch. 834.

1. **MARTIAL LAW.** — See note 1.

2. **MASSSES.** — See note 2.

1. 1. **Martial Law.** — *Com. v. Shortall*, 206 Pa. St. 165.

2. 2. **Masses.** — See *Coleman v. O'Leary*, 114 Ky. 388.

## MASTER AND SERVANT.

BY THEODOR MEGAARDEN.

11. I. **DEFINITIONS** — A Master. — See note 1.

12. **Servant Distinguished from Contractor.** — See note 1.

III. **WHAT CONSTITUTES RELATION.** — See notes 3, 4, 5.

13. IV. **NATURE AND REQUISITES OF CONTRACT OF HIRING.** — See note 1.

11. 1. **Master Defined.** — *Nelson v. Richardson*, 108 Ill. App. 128.

12. 1. **Contractor and Servant Distinguished.** — *Arthur v. Texas*, etc., R. Co., (C. C. A.) 139 Fed. Rep. 132, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 11, 12.

3. **Right of Selection.** — *Nelson v. Richardson*, 108 Ill. App. 128, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 12.

4. **Power of Removal and Discharge.** — *Crudup v. Schreiner*, 98 Ill. App. 337.

5. **Particular Instances in Which Relation Held Not to Exist** — *Railroad Company and Porter in Employ of Sleeping Car Company.* — *Chicago*, etc., R. Co. v. *Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187.

13. 1. **Relation Based on Contract.** — *Nelson v. Richardson*, 108 Ill. App. 128; *Hess v. Citron*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 849; *Nye v. Bill Nye Gold Min.*, etc., Co., 42 Oregon 560; *Kosloski v. Kelly*, 122 Wis. 665. See *Mackintosh v. Kimball*, 101 N. Y. App. Div. 494.

**Mutuality of Contract Necessary.** — *Johnson v. Lawson*, 18 Colo. App. 297; *International Power Co. v. Hardy*, 118 Ga. 512; *Osterberg v. Trinity Church*, 69 N. Y. App. Div. 612; *Sagalowitz v. Pellman*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 508. See *Gulf*, etc., R. Co. v. *Jackson*, 29 Tex. Civ. App. 342.

**Contract Must Be Certain and Explicit.** — *Lee v. Smith*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 792; *Mackintosh v. Thompson*, 58 N. Y. App. Div. 25; *Miles v. Columbia Packers' Assoc.*, 41 Oregon 617; *Cohn v. Sherman Refining Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1170.

**Sufficiency of Contract.** — Where plaintiff's claim is for services under an alleged contract of a certain date, and the evidence tends to show an offer to engage services at a fixed price at that time on defendant's part, and immediately afterwards a beginning of such services on plaintiff's part, with defendant's knowledge, and with no retraction of the proposition, it is error to instruct the jury, in substance, that there can be no recovery unless an express agreement on both sides was reached at the time alleged. *Pettis v. Green River Asphalt Co.*, (Neb. 1904) 99 N. W. Rep. 235.

**Terms of Contract Agreed upon but Not Reduced to Writing.** — Where the terms of a contract of

employment were agreed upon with the understanding that it should be reduced to writing, but the reduction to writing was not made a condition precedent to its completion, there was a valid oral contract. *Featherstone Foundry, etc., Co. v. Criswell*, (Ind. App. 1905) 75 N. E. Rep. 30.

**Adoption of Terms of One Contract in Another.** — Where a contract employing a person as agent to sell certain merchandise on commission provided that commissions should be paid back in all cases in which the account should be lost or the goods taken back, and a second contract for a different territory superseding the former contract is subsequently made, the provisions in the first contract for the repayment of commissions become a part of the second contract. *Morrison Mfg. Co. v. Bryson*, (Iowa 1905) 103 N. W. Rep. 1016.

**Consideration for Modification of Contract.** — It has been held that where a contract of employment is made for one year at a stipulated salary per month, an agreement during the term to receive less, or to pay more, than the contract price is void, unless supported by some change in place, hours, character of employment, or other consideration. *Davis v. Morgan*, 117 Ga. 504, 97 Am. St. Rep. 171.

**Place of Performance.** — *Cook v. Todd*, 72 S. W. Rep. 779, 24 Ky. L. Rep. 1909.

**Construction of Contract.** — The construction of a contract of employment is for the court. *School Dist. v. McDonald*, 68 Neb. 610.

In the absence of express stipulations in a contract of employment, the question is not what was the understanding of the respective parties in fact, but what ought to have been their understanding in view of what was said and done under the circumstances in which they were placed. *Higgins v. Shepard*, 182 Mass. 364.

In the construction of a contract of employment all its terms are to be considered. *Mayer v. Goldberg*, 116 Wis. 96.

**Parol Evidence Inadmissible to Vary Written Contract.** — *Harrington v. F. W. Brockman Commission Co.*, 107 Mo. App. 418; *Eden v. Silberberg*, 89 N. Y. App. Div. 259; *McGarrigle v. McCosker*, 83 N. Y. App. Div. 184, affirmed in part without opinion, 178 N. Y. 637; *Shaff v. Schlachetzky*, 62 N. Y. App. Div. 459.

Testimony as to conversations between the

**13. V. OBLIGATION OF MASTER TO FURNISH WORK.** — See note 2.

**14. VI. DURATION OF CONTRACT OF HIRING** — 1. **Contracts for Indefinite Time** — *a. CONTRACTS OF GENERAL HIRING* — (2) *Status of Contract in United States.* — See notes 5, 7.

**15. Hiring at Stipulated Yearly Sum.** — See note 2.

*c. HIRING FOR DEFINITE PERIOD PROVIDED SERVICES ARE SATISFACTORY.* — See notes 5, 6, 7.

**16. *d. OTHER CONTRACTS FOR INDEFINITE TIME* — A Contract for Permanent Employment.** — See note 1.

*Other Cases.* — See note 2.

**2. Effect of Continuing in Employment After Termination of Contract.** — See notes 3, 4.

parties to a contract of employment after its execution is admissible to explain ambiguities in the contract. *Sabin v. Kendrick*, 58 N. Y. App. Div. 108.

**13. 2. Master Bound to Furnish Work During Term.** — *Stone v. Bancroft*, 139 Cal. 78, affirming 139 Cal. 82.

It has been held that where a merchant employs a clerk for four months and refuses to allow him to enter upon his duties, the clerk cannot immediately bring suit for the full amount of the wages which the merchant has agreed to pay for the services of the clerk for four months. *Harris v. Moss*, 112 Ga. 95.

**14. 5. Contract of General Hiring Terminable at Will.** — *Louisville Soap Co. v. Vance*, 58 S. W. Rep. 985, 22 Ky. L. Rep. 847; *Dunbar v. Cuban Land, etc., Co.*, (N. Y. City Gen. T.) 37 Misc. (N. Y.) 360; *Lertora v. Central Fruit Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 425. See *Beck v. Walker*, 24 Pa. Co. Ct. 403, 31 Pittsb. Leg. J. N. S. (Pa.) 249. But see *Kevill v. Standard Oil Co.*, 11 Ohio Dec. 114, 8 Ohio N. P. 311.

**7. Contracts for a Year.** — *Hotchkiss v. Godkin*, 63 N. Y. App. Div. 468.

**Contracts for a "Season."** — *Johnston-Woodbury Hat Co. v. Lightbody*, 18 Colo. App. 239.

**Contract Dependent on Duration of Job or Piece of Work.** — *Potter v. New York*, 59 N. Y. App. Div. 70.

**Facts Showing Contract for a Definite Time.** — *Woods v. Shumard*, 114 La. 451.

**Duration of Employment a Question of Fact.** — *Davis v. Ames Mfg. Co.*, 177 Mass. 54.

**15. 2. Hiring at Stipulated Yearly Sum an Indefinite Hiring.** — *Carthage Wheel Co. v. Kelly*, 8 Ohio Dec. 549. See *Egbert v. Sun Co.*, 126 Fed. Rep. 568.

**5. Master May Discharge Servant When in Good Faith Dissatisfied.** — *Kendall v. West*, 196 Ill. 221, 89 Am. St. Rep. 317, affirming 98 Ill. App. 116; *Williams v. Kansas City Suburban Belt R. Co.*, 85 Mo. App. 103; *Gwynne v. Hitchner*, 67 N. J. L. 654, 66 N. J. L. 97; *Walker v. McCormick*, (Supm. Ct. App. T.) 88 N. Y. Supp. 406. See *Carter v. Weber*, 138 Mich. 576, 11 Detroit Leg. N. 668; *Zeiss v. American Wringer Co.*, 62 N. Y. App. Div. 463. Compare *Brall v. Clausen*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 129, affirmed without opinion (Supm. Ct. App. T.) 35 Misc. (N. Y.) 861.

**6. See Teichner v. Pope Mfg. Co., 125 Mich. 91, 7 Detroit Leg. N. 423.**

**7. Dissatisfaction Must Be Genuine.** — *Sax v.*

*Detroit, etc., R. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572, 7 Detroit Leg. N. 486; *Atlanta Stove Works v. Hamilton*, 83 Miss. 704.

**16. 1. Contracts for "Permanent Employment."** — *Davidson v. Laughlin*, (Cal. 1902) 68 Pac. Rep. 101, decided under section 1999 of the California Code; *Sullivan v. Detroit, etc., R. Co.*, 135 Mich. 673, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 16; *Hickey v. Kiam*, (Tex. Civ. App. 1904) 83 S. W. Rep. 716.

**2. Contract for "Steady Employment" unless There Should Be a Failure of Crops.** — *Turnbull v. Frey*, (Neb. 1904) 99 N. W. Rep. 648.

**Contract for Employment While Employer Retains Certain Business.** — Where the plaintiff's assignor entered into the employ of the defendants, subject to the account of a certain silk mill remaining with them, it was held that the contract was not wholly indefinite, but depended for its determination upon the discontinuance of business relations between the defendants and the silk mill, and without other and more sufficient reasons than a mere whim or desire the defendants could not summarily dismiss their employee. *Downes v. Poncet*, (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 799.

**Employment of Physician.** — A physician employed in pursuance of the authority conferred by the regulations of the relief and hospital department of a railroad company to treat an injured employee in an emergency, where the company's surgeon cannot be reached, who was employed for no definite period of time, cannot recover for services rendered after being notified that his services were no longer needed, as the hospital surgeons were then ready to take charge of the case, and properly treat the patient in the company's hospital. *Florida Southern R. Co. v. Steen*, 45 Fla. 313.

**Evidence as to Duration of Hiring.** — Plaintiff testified that defendants employed him for the year 1897 at a salary of \$450 for the year. The defendant with whom the agreement was made testified that he employed plaintiff for an indefinite time at thirty-five dollars per month. It was held that on this state of case it was manifest error to allow plaintiff to prove that it was defendants' custom to employ their clerks by the year, and that they so employed other clerks during the year 1897. The terms of express contracts cannot be proved in this way. *Hartsell v. Masterson*, 132 Ala. 275.

**3. Continuance Equivalent to New Hiring on Same Terms.** — *State Board of Agriculture v. Meyers*, 20 Colo. App. 139; *Morgan v. McCas-*

**17. Presumption a Rebuttable One.** — See note 1.**VII. WAGES OR COMPENSATION — 1. Determination of Amount —****a. WHERE AMOUNT NOT FIXED BY CONTRACT.** — See note 2.**c. WHERE COMPENSATION IS DEPENDENT ON CONTINGENCY —****(1) In General.** — See note 5.**(2) Salary Dependent on Profits of Business.** — See notes 6, 7.

lin, 114 Ill. App. 427, *affirmed* 213 Ill. 358; Travelers' Ins. Co. v. Parker, 92 Md. 22; Wright v. Elk Rapids Iron Co., 129 Mich. 543, 8 Detroit Leg. N. 1053; Lee v. Hampton, 79 Miss. 321; Home F. Ins. Co. v. Barber, 67 Neb. 644. See Dunton v. Derby Desk Co., 186 Mass. 35; Gates v. Stead, 54 N. Y. App. Div. 448; Brightson v. H. B. Clafin Co., 180 N. Y. 76, *reversing* 84 N. Y. App. Div. 557; Treffinger v. Groh, 100 N. Y. App. Div. 433. Compare O'Connor v. Briggs, 182 Mass. 387.

If the original contract of employment is not for a year, the mere continuance of the employment after the expiration of a year raises no presumption that there is a new employment for the period of one year. Carthage Wheel Co. v. Kelly, 8 Ohio Dec. 549.

It has been held that before the rule that where one enters into the employ of another under a contract for a year's service, and continues in the employment after the expiration of the year, it is presumed, in the absence of evidence to the contrary, that the parties agreed to a continuance for another year at the same salary, can have any application, it must appear that in fact there was a prior contract for a whole year's service, and that services were rendered thereunder for at least one year. Caldwell v. Caldwell Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 970.

In California it is provided by statute (Cal. Civ. Code, § 2012) that "where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." Gabriel v. Suisun Bank, 145 Cal. 266.

**16. 4. Contract of Hiring for a Year.** — Brightson v. H. B. Clafin Co., 180 N. Y. 76.

**17. 1. Presumption May Be Rebutted.** — Laubach v. Cedar Rapids Supply Co., 122 Iowa 643; Home F. Ins. Co. v. Barber, 67 Neb. 644; Segler v. Bernstein, 82 N. Y. App. Div. 267.

**2. What Servant May Recover.** — Mugnier v. Dendinger, 104 La. 767; Williams v. Kansas City Suburban Belt R. Co., 85 Mo. App. 103; Hendrickson v. Woods, 77 N. Y. App. Div. 644. See Graves v. Graves, 70 Ark. 541.

It has been held that where a person is employed to do certain work at a reduced compensation in consideration of receiving future employment at a higher salary, the failure of the employer to perform his agreement as to future employment with increased compensation entitles the employee to treat the contract as rescinded, and to recover for the services rendered what they were actually worth. Davidson v. Laughlin, 138 Cal. 320.

**5. Measure of Recovery by Servant.** — See Stevens v. Michigan Soap Works, 134 Mich. 350, 10 Detroit Leg. N. 451.

A contract of employment at a salary of

seventy-five dollars per month and traveling expenses provided that, should the employee continue his service for an entire year, and should the character of his business as to volume, etc., and his manner of conducting it, be satisfactory to the employer, the latter would make the salary equivalent to one hundred dollars per month by the payment of the twenty-five dollars excess at the close of the year, the determination of which should be left entirely to the employer. In an action to recover the excess salary, it was held that the satisfaction of the employer at the end of the year must be proved. Joseph Campbell Preserve Co. v. Holcomb, 67 Kan. 48.

**Right to Bonus.** — Where a servant was to receive a bonus, unless the master should exercise the reserved right to discharge him within the year, and he was not discharged, but served the full term, without any expression of dissatisfaction, it was held that he was entitled to the extra compensation. Fischer v. Conhaim, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 125, *affirmed* (Supm. Ct. App. T.) 35 Misc. (N. Y.) 791.

**Commissions with Advances.** — A servant who is to be paid in commissions and is to be allowed advances must refund the excess of advances over earned commissions if he abandons the employment before the expiration of the contract period. Kupfer v. Holtzmann, (Supm. Ct. App. T.) 88 N. Y. Supp. 362.

It has been held that where the employer has contracted to advance monthly sums to traveling salesmen, which are to be deducted at the end of the term of employment from the commissions earned, the employer cannot defeat an action to recover an unpaid advance by showing that the amount of the advances made exceeds the commissions earned. Schlesinger v. Burland, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 206.

When a contract provides for the payment of the servant by commissions, and for the payment of specified allowances to him at stated times, and no time is specified for the payment of the commissions, but the commission account is to be adjusted at the end of the period of employment, it has been held that the stipulated advances are to be paid irrespective of whether sufficient commissions have accumulated to cover the advances. Schwerin v. Rosen, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 409.

There can be no recovery for advances when the contract of employment has terminated and the commissions earned do not equal the advances which have been made. Souler v. McDowell Garment Mach. Co., (Supm. Ct. App. T.) 38 Misc. (N. Y.) 786.

**6. Lee v. Washburn,** 80 N. Y. App. Div. 410, *reversing* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 311; Shute v. McVitee, (Tex. Civ. App.

**18.** See note 1.

**Remedy of Employee.** — See notes 5, 6.

**d. BOARD AS PART OF COMPENSATION.** — See note 7.

**e. PASSAGE MONEY.** — See note 9.

**19.** **2. Extra Services — Working at Unseasonable Hours.** — See note 2.

**Services Presumed to Be Covered by Salary.** — See notes 3, 4.

**Voluntary Performance of Extra Services.** — See note 5.

**Services Outside Scope of Employment.** — See note 6.

**3. Time Lost by Servant.** — See note 7.

**20.** **4. Reduction of Compensation.** — See note 2.

**5. Forfeiture of Compensation.** — See note 6.

**21.** **Forfeiture for Improper Conduct.** — See note 1.

**Waiver of Forfeiture.** — See note 2.

**6. Time and Mode of Payment — a. IN GENERAL.** — See notes 3, 4.

1903) 72 S. W. Rep. 433. See *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320; *Sims v. Harris*, 1 Ont. L. Rep. 445.

**17. 7.** See *Rosenberg v. Heidelberg*, 98 N. Y. App. Div. 17; *Tuthill v. Smith*, (Supm. Ct. App. T.) 88 N. Y. Supp. 942; *Sims v. Harris*, 1 Ont. L. Rep. 445.

The servant is restricted to the profits of the business in connection with which he is employed, and is not entitled to share in other business ventures of the master. *Amsden v. Dunham*, 78 N. Y. App. Div. 33.

**18. 1. Servant Restricted to Profits Actually Earned.** — One who has contracted to sell goods for another on commission cannot recover of the employer for a failure to conduct the business with reasonable skill and diligence. *Byrns v. United Telpherage Co.*, 105 N. Y. App. Div. 69.

**5. Action to Recover Value of Services.** — *Gillespie v. Montgomery*, 93 N. Y. App. Div. 403.

**6. No Action for Accounting.** — *Lee v. Washburn*, 80 N. Y. App. Div. 410, reversing (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 311.

**7. Board.** — See *McDonald v. Alexander*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 279.

**9. Right of Servant to Passage Money.** — *Gulf, etc., R. Co. v. Jackson*, 29 Tex. Civ. App. 342.

**19. 2. Unseasonable Hours.** — See *O'Boyle v. Detroit*, 131 Mich. 15, 9 Detroit Leg. N. 208.

**3. Services Presumed to Be Paid for by Salary.** — *Mathison v. New York Cent., etc., R. Co.*, 72 N. Y. App. Div. 254. See *Lachine v. Manistique R. Co.*, 126 Mich. 519.

**Statute Limiting Hours of Labor.** — It has been held that an employer is not liable under a statute declaring that eight hours shall constitute a day's labor, to an employee hired by the day, for labor beyond the statutory time unless it was provided for in the contract of employment, in the absence of any stipulation for extra compensation in the contract of employment. *Gray v. Hall*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 683.

**4. Measure of Recovery under Express Agreement to Pay for Extra Services.** — When there is an express promise by the master to pay for extra services, the servant is entitled to be paid what the services are reasonably worth. *Elwell v. Roper*, 72 N. H. 585.

**5. Mere Performance of Extra Service No Ground for Extra Pay.** — *Levi v. Reid*, 91 Ill. App. 430.

**6. Services Rendered on Request.** — See *Wil-*

*son v. Godkin*, 136 Mich. 106, 10 Detroit Leg. N. 997.

**7. No Recovery for Lost Time Without Agreement.** — *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91.

**20. 2. No Reduction of Wages Without Servant's Consent.** — Compare *Russell v. National Exhibition Co.*, 60 N. Y. App. Div. 40.

**Deduction from Wages for Beneficial Fund.** — *Mocomber v. Proctor*, 22 Pa. Super. Ct. 483.

**6. Duty of Master to Return Amount Retained.** — *Silberman v. Schwarcz*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 352.

**Injunction.** — A servant who has abandoned a contract of employment before its expiration for the purpose of entering the employment of a business competitor of the master will not be enjoined from so doing unless there is something special, unique, or extraordinary in the services which the servant under his contract is called upon to render. *Kessler v. Chapelle*, 73 N. Y. App. Div. 447.

**21. 1. Strict Construction of Provisions Necessary.** — See *Cross v. Detroit Base Ball Club*, 84 Mo. App. 526.

**2. Waiver of Forfeiture.** — It has been held that a master, by keeping a servant in his service to the end of the term, after notice of misconduct on the part of the servant, waives, as a matter of law, all right to forfeit his wages. *Person v. McCargar*, 92 Minn. 294.

**3. Time of Payment Not Fixed.** — *Burnetta v. Marceline Coal Co.*, 180 Mo. 241.

But it has been said that an engagement to work one year for two dollars per day, payment to be made at the expiration of the term, is so unusual that it will not be presumed. *Chicago Soap, etc., Co. v. Stansbury*, 99 Ill. App. 488.

In a contract between the plaintiff and the defendant mining company employing the plaintiff as caretaker of the defendant's mine, it was agreed that the plaintiff should be paid for his services at the rate of four dollars per day, and that he was to be paid "at the end of each consecutive fourth week of service" the sum of two dollars per day, and the balance of two dollars per day was to be retained as an earnest for faithful services up to the time defendant might resume operations of its business or dispose of its property, when the whole amount that was retained, as above stated, would become due and payable. At the time of his

**21. b. STATUTORY REGULATIONS — Time of Payment. — See notes 5, 6.****22. See note 2.**

**Payment in Money. — See note 3.**

**7. Defenses and Set-offs in Actions for Wages. — See notes 6, 9.****23. Statute of Limitations. — See note 3.****VIII. TERMINATION OF CONTRACT BY MUTUAL CONSENT. — See notes 5, 6.****IX. TERMINATION OF CONTRACT BY EXPIRATION OF TERM. — See note 7.**

employment it was the general understanding that the defendant would resume operations within a reasonable time, or use reasonable efforts to dispose of its property. It was held that in the absence of any express declarations of the parties to that effect, there being no time specified within which operations should be resumed or property be sold, the law presumes that it was the intention of the parties that the contingencies mentioned should occur within a reasonable time, and the plaintiff, who had been performing the services of caretaker for a period of four years, was entitled to be paid the amount retained, although the defendant had neither resumed operations nor disposed of the mine. *Hoods v. Hampton Plains Exploration Co.*, 106 Fed. Rep. 408.

**Presumption of Payment of Wages of Domestics. —** Wages for domestic servants are presumed to be paid at the periods customary at the time and in the neighborhood, and claims for such wages for unusual length of time, especially those not made until after the claimant has left the service, must be supported by affirmative proof that they have not been paid. *Hayes's Estate*, 17 Pa. Super. Ct. 412.

**21. 4. Time of Payment Fixed. —** See *Wagner v. Edison Electric Illuminating Co.*, 82 Mo. App. 287.

It has been held that under a contract of employment for ten years, with compensation fixed at a specified sum per month, the amount specified was due and owing at the conclusion of each month's service. *Stone v. Bancroft*, 139 Cal. 78, *affirming* 139 Cal. 82.

**5. Statutes Held Unconstitutional. —** Republic Iron, etc., Co. *v. State*, 160 Ind. 379.

**6. Statutes Held Constitutional — Kentucky. —** *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885; *Com. v. Hillside Coal Co.*, 109 Ky. 47.

**22. 2. Penalty for Delay in Paying Discharged Employee. —** *St. Louis Southwestern R. Co. v. Brown*, (Ark. 1905) 86 S. W. Rep. 994, applying section 6243 of Sand. & H. Ark. Dig.

The penalty prescribed by the Arkansas statute (Ark. Acts 1889, p. 76) for a failure to pay servants on the day of their discharge is incurred although the amount due a discharged servant has been paid before suit brought. *St. Louis, etc., R. Co. v. Pickett*, 70 Ark. 226.

Where at the time of a servant's discharge there was a shortage in his account with the master it was held that the penalty prescribed by the Arkansas statute did not attach until the master had had a reasonable opportunity to ascertain the amount due the discharged servant. *Fordyce v. Gorey*, 69 Ark. 344.

In an action to recover the penalty and attorney's fees prescribed by the Indiana statute it is necessary that the facts showing the ab-

sence of the contract mentioned in the statute be alleged and proved. *Toledo, etc., R. Co. v. Long*, 160 Ind. 564.

It is essential to a recovery under the Indiana statute that the facts showing the absence of a written contract be alleged and proved. *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166.

**Construction of Statutes. —** These statutory provisions, being penal and in derogation of the common law, must be strictly construed. *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166.

**3. Payment in Money. —** In the absence of any contract stipulation providing otherwise, payment is to be in money. *Preble v. Wicklund*, 12 N. Dak. 81; *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429.

**6. Selley v. American Lubricator Co.**, 119 Iowa 591. See *Gillespie v. Ashford*, 125 Iowa 729.

**Negligence of Servant. —** Ordinarily a servant cannot be charged with negligence in following an example set by the master in the conduct of the master's business. *Rawlings v. Clark*, 19 Colo. App. 214.

**9. Nonperformance. —** *Pungs v. American Brake-Beam Co.*, 128 Mich. 318, 8 Detroit Leg. N. 682; *Seaburn v. Zachmann*, 99 N. Y. App. Div. 218; *Moynahan v. Interstate Min., etc., Co.*, 31 Wash. 417.

**23. 3. Presumption of Payment. —** It has been held that where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made. *Taylor v. Beatty*, 202 Pa. St. 120.

**5. Termination by Consent. —** *Scheuer v. Monash*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 668; *Greer v. Featherston*, (Tex. Civ. App. 1902) 68 S. W. Rep. 48.

**6. Recovery of Wages. —** *Trawick v. Trussell*, 122 Ga. 320; *Braum v. Weill*, 111 La. 973. See *Beckel v. Ashton Plantation Co.*, 105 La. 677; *Freudenberger v. Sternberg*, 67 N. J. L. 297.

**Right to Stipulated Bonus. —** Where a salesman was employed for a year on a salary and was to receive a certain bonus if his sales exceeded a stated amount, and the contract was terminated before the expiration of the year by mutual consent, it was held that he was entitled to the bonus if the sales made by him exceeded the stipulated amount. *Scheuer v. Monash*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 668.

**7. See Harris v. Harwell, (Tex. Civ. App. 1902) 71 S. W. Rep. 701.**

**Contract Providing Method of Terminating. —** Where the contract itself provides the method

**23. X. ABANDONMENT OF CONTRACT BY SERVANT — 1. Grounds for Abandoning Contract — Grounds Held to Justify Abandonment. —** See note 9.

**24.** See note 3.

**2. Rights of Servant Who Has Abandoned Contract Without Cause — a. WHERE CONTRACT IS ENTIRE — No Recovery Allowed. —** See note 12.

**25. Minority Rule — Recovery Less Damages. —** See note 1.

**b. WHERE CONTRACT IS SEVERABLE. —** See note 2.

**26. 3. Rights of Master Where Servant Has Abandoned Contract Without Cause. —** See note 5.

**XI. DISCHARGE OF SERVANT — 1. What Constitutes Discharge. —** See notes 7, 9.

**27. 2. Grounds for Discharge — a. IN GENERAL. —** See notes 1, 2, 4.

**b. NEGLIGENCE OF DUTY. —** See notes 5, 6.

of terminating it, the method prescribed should be followed. *McCormick Harvesting Mach. Co. v. Cordsiemon*, 101 Ill. App. 140.

**23. 9. Refusal to Pay for Services. —** *Dunn v. Crichfield*, 214 Ill. 292; *Tichenor v. Bruckheimer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 194.

**24. 3. Assault and Battery. —** *Erickson v. Sorby*, 90 Minn. 327.

**12. No Recovery Permissible when Servant Abandons Contract Without Cause. —** *Hofstetter v. Gash*, 104 Ill. App. 455; *Paul v. Minneapolis Threshing Mach. Co.*, 87 Mo. App. 647; *Natalizio v. Valentino*, 71 N. J. L. 500; *Eden v. Silberberg*, 89 N. Y. App. Div. 259; *Knox v. Munro*, 13 Manitoba 16. See *Walsh v. New York, etc., Co.*, 88 N. Y. App. Div. 477; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171.

**25. 1. If an employee breaks his contract, he may recover of the employer for what he has done, measured by the contract price, subject to such damages as the employer may sustain by the breach of the contract. —** *Asher v. Tomlinson*, 60 S. W. Rep. 714, 22 Ky. L. Rep. 1494.

**2. Recovery on Severable Contract. —** *Tichenor v. Bruckheimer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 194.

**26. 5. Criminal Liability of Servant. —** In *South Carolina* it is by statute (S. Car. Crim. Code, § 357) made an indictable offense for any laborer, under verbal or written contract to labor on farm lands, and after receiving advances in money or supplies, to wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract. *State v. Long*, 66 S. Car. 398; *State v. Leak*, 62 S. Car. 405; *State v. Easterlin*, 61 S. Car. 71.

**7. What Constitutes a Discharge. —** *Shields v. Carson*, 102 Ill. App. 38; *Van Sicken v. Ballard*, 97 Ill. App. 640; *Curtis v. Lehmann*, (La. 1905) 38 So. Rep. 887; *Schauh v. Welded-Barrel Co.*, 125 Mich. 591, 7 Detroit Leg. N. 625; *Johnson v. Crookston Lumber Co.*, 92 Minn. 395, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *Mee v. Bowden Gold Min. Co.*, (Oregon 1905) 81 Pac. Rep. 980; *Lewis v. Moorhead*, 201 Pa. St. 245. See *Isaacs v. Andrews*, 69 N. Y. App. Div. 430; *Griffin v. Brooklyn Ball Club*, 68 N. Y. App. Div. 566, affirmed without opinion 174 N. Y. 535.

**9. Failure to Pay Wages. —** Where a servant who was employed by the month was not paid

for the first month, and left the employment voluntarily about the middle of the second month, it was held that the nonpayment of wages for the prior month was not tantamount to a discharge, and his recovery should have been directed to the wages actually earned. *Wheaton v. Higgins*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1041.

**27. 1. Good Cause for Discharge Necessary. —** *Berlin v. Cusachs*, 114 La. 744; *Burt v. Catlin*, 65 N. Y. App. Div. 456, affirmed without opinion 175 N. Y. 486; *Brall v. Clausen*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 129, affirmed without opinion (Supm. Ct. App. T.) 35 Misc. (N. Y.) 861; *Dodson Braun Mfg. Co. v. Dix*, (Tex. Civ. App. 1903) 76 S. W. Rep. 451; *Mudgett v. Texas Tobacco Growing, etc., Co.*, (Tex. Civ. App. 1901) 61 S. W. Rep. 149; *Millan v. Dominion Carpet Co.*, 22 Quebec Super. Ct. 234.

**Employment for Indefinite Period. —** No action can be maintained for the breach of a contract to employ unless there is some stipulation as to the length of time for which the employment shall continue. If a term of employment be discretionary with either party, or be indefinite, either party may terminate it at any time. *Savannah, etc., R. Co. v. Willett*, 43 Fla. 311.

Every employee, in the absence of contractual relations binding him to work for his employer a given length of time, has the legal right to quit the service of his employer without notice, and either with or without cause, at any time; and in the absence of such contractual relations any employer may legally discharge his employee with or without notice, at any time. *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246.

**2. Acts Prejudicial to Interests of Master. —** *Minzey v. Marcy Mfg. Co.*, 25 Ohio Cir. Ct. 593. **Breach of Trust. —** *Townesley v. Bankers' L. Ins. Co.*, 56 N. Y. App. Div. 232.

**4. Actual Loss Unnecessary. —** *Beckman v. Garrett*, 66 Ohio St. 136; *Millan v. Dominion Carpet Co.*, 22 Quebec Super. Ct. 236, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27.

**5. Habitual Neglect a Ground for Discharge. —** *School Directors v. Birch*, 93 Ill. App. 499; *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91.

**Absence and Tardiness in Reporting for Work. —** *Mindel v. Hocquard*, 99 Ill. App. 75.

**6. Neglect Injurious to Master's Business. —** *Allen v. Glen Creamery Co.*, 101 N. Y. App.



27. *c.* INCAPACITY TO WORK CAUSED BY ILLNESS. — See notes 9, 11.  
 28. *d.* INSOLENCE OR DISRESPECT TO MASTER. — See notes 3, 5.  
*f.* INTOXICATION AND DRUNKENNESS. — See note 9.  
 29. *h.* SEXUAL IMMORALITY. — See note 2.  
*i.* ENGAGING IN OTHER BUSINESS OR EMPLOYMENT. — See notes 3, 4.  
*j.* INCOMPETENCY. — See note 7.  
 30. See note 1.  
*k.* DISOBEDIENCE. — See notes 4, 5.  
 31. See note 2.  
 Unlawful or Unreasonable Orders. — See note 4.

Div. 306. See *Lavery v. Harrisburg Rolling Mill Co.*, 17 Pa. Super. Ct. 66.

**Negligence of Railroad Employee Resulting in Collision.** — *Busby v. Pittsburg, etc., R. Co.*, 9 Ohio Dec. 823.

27. 9. *McGarrigle v. McCosker*, 83 N. Y. App. Div. 184, *affirmed* in part, without opinion, 178 N. Y. 637.

11. **Absence for Short Period.** — See *Spindel v. Cooper*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 569.

It has been held that under a contract for personal service for a definite period, "illness which will justify a master in dismissing his servant must be something more than a mere temporary malady of short duration compared with the entire period of service contemplated by the agreement. In other words, it must be a serious sickness, lasting, or likely to last, so long as to interfere substantially with the interests of the employer." *Gaynor v. Jonas*, 104 N. Y. App. Div. 35.

28. 3. **Insubordination.** — *Parker v. Farlin*, 122 Ga. 315.

5. **Discourtesy Provoked by Dishonest Proposal of Master.** — See *Loveman v. Brown*, 138 Ala. 608.

9. *Mowbray v. Gould*, 83 N. Y. App. Div. 255.

29. 2. **Immoral Conduct.** — *Gould v. Magnolia Metal Co.*, 207 Ill. 172; *Millan v. Dominion Carpet Co.*, 22 Quebec Super. Ct. 236, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 29. See *Moynahan v. Interstate Min., etc., Co.*, 31 Wash. 417.

3. **Where Services Do Not Require Whole Time.** — See *Stone v. Bancroft*, 139 Cal. 78, *affirming* 139 Cal. 82; *Conklin v. John H. Woodbury Dermatological Institute*, 51 N. Y. App. Div. 638, *affirmed* without opinion 170 N. Y. 571. Compare *Seaburn v. Zachmann*, 99 N. Y. App. Div. 218.

Instructions that if plaintiff gave some attention to his own affairs while in defendant's employ, with defendant's consent, and that if he gave time to his own affairs, but not so as to take up time which should have been devoted to defendant's business, such acts were not breaches of plaintiff's contract, were held proper, especially in view of the counterparts of said instructions given at defendant's request, that if plaintiff neglected defendant's business, to attend to his own, this was a breach of his contract. *Biest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137.

Where it is stipulated in the contract of employment that the servant shall give his whole time and attention to the business of the employer, he has no right to engage in other work

even though it may not interfere with his duties to the master. *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91; *Atlantic Compress Co. v. Young*, 118 Ga. 868.

4. **Engaging in Business in Competition with Master.** — See *Day v. American Machinist Press*, 86 N. Y. App. Div. 613.

7. *Minzey v. Marcy Mfg. Co.*, 25 Ohio Cir. Ct. 593. See *Peck v. Dexter Sulphite Pulp, etc., Co.*, 164 N. Y. 127, *reversing* (Supm. Ct. App. Div.) 46 N. Y. Supp. 1098.

30. 1. **Competency Imports Reasonable Skill.** — In an action to recover damages for the alleged wrongful discharge of the plaintiff from his position as electrical engineer for the defendant company, it was held that the trial court properly refused to charge that if the plaintiff made an improvident contract with his two assistants, which was corrected at the defendant's request, as soon as made, such single act, as matter of law, justified the company in discharging him from the position of its electrical engineer. *New York Insulated Wire Co. v. Broadnax*, (C. C. A.) 107 Fed. Rep. 634.

4. **Refusal of Traveling Salesman to Make Reports.** — *Johnson v. E. Van Winkle Gin, etc., Works*, 130 N. Car. 441.

5. **Disobedience of Lawful Orders Sufficient Ground.** — *Kendall v. West*, 196 Ill. 221, 89 Am. St. Rep. 317, *affirming* 98 Ill. App. 116; *Shields v. Carson*, 102 Ill. App. 38, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; *Kenner v. Southwestern Oil Co.*, 113 La. 80; *Von Heyne v. Tompkins*, 89 Minn. 83; *Shute v. McVitie*, (Tex. Civ. App. 1903) 72 S. W. Rep. 433.

**Refusal to Work on Sunday** may be a ground for discharge under a contract which contemplates Sunday work. *McCurdy v. Alaska, etc., Commercial Co.*, 102 Ill. App. 120.

31. 2. **Disregarding Instructions.** — The act of a traveling salesman in repeatedly selling goods on commission in disobedience of instructions has been held to be a sufficient ground for his discharge. *Walsh v. New York, etc., Co.*, 88 N. Y. App. Div. 477.

**Refusal of Traveling Salesman to Return Samples.** — *Shields v. Carson*, 102 Ill. App. 38.

**Violation of Rule Against Signing of Servant's Name to Correspondence of Master.** — *Russell v. Inman*, 79 N. Y. App. Div. 227.

4. **Unreasonable Orders.** — Where the plaintiff had been employed "to take charge of the dress-making department" of the defendant "as manager and dressmaker" with power to employ and discharge the employees in said department, and to have entire management and control of the department, but to confer and advise

**31.** 1. MISCELLANEOUS — Sufficient Grounds. — See notes 6, 12, 13.

**32.** See notes 2, 3.

Insufficient Grounds. — See note 11.

m. SUFFICIENCY OF GROUNDS QUESTION FOR JURY. — See notes 12, 13.

**3.** Motive and Assignment of Reasons for Discharge. — See notes 14, 15.

**33.** See notes 1, 2.

**4.** Waiver of Right to Discharge. — See notes 3, 4, 5, 8.

**34.** **5.** Waiver of Rights Based on Wrongful Discharge. — See note 1.

**6.** Duty to Seek Other Employment. — See note 5.

with defendant from time to time with reference to the best interest of said department of said business, it was held that her refusal to perform the work of a seamstress was not a sufficient ground for discharge. *Marx v. Miller*, 134 Ala. 347.

**31.** **6.** Absence from Place of Duty Without Leave. — *Beckman v. Garrett*, 66 Ohio St. 136.

**12.** Converting Money and Goods of Master. — But compare *Hood v. Hampton Plains Exploration Co.*, 106 Fed. Rep. 408.

**13.** False Representations. — An employer is justified in discharging an agent who, at the time of entering into the contract of employment, falsely represented that he had an office as suitably located and as well furnished as the office of the employer's competitor in the same place. *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91.

But a representation by a servant made at the time of entering into the employment, that he could divert business to the employer, has been held to be a mere statement of an opinion and not a fraud upon the employer. *Weik v. Williamson-Gunning Advertising Co.*, 109 Mo. App. 6.

**Concealing Marriage.** — An employer has been held justified in discharging an employee who on entering the employment concealed the fact that she was married, although she knew that the employer would not employ married women in his service. *Parks v. Tolman*, 113 Mo. App. 14.

**32.** **2.** Claiming Payment of Expenses Which Master Is Not Bound to Pay. — *Kuno v. Fitzgerald Bros. Brewing Co.*, 65 N. Y. App. Div. 612.

**3.** See *Von Heyne v. Tompkins*, 89 Minn. 83.

**11.** *Burt v. Catlin*, 65 N. Y. App. Div. 456, affirmed without opinion 175 N. Y. 486.

**12.** Sufficiency of Grounds of Discharge Held a Question for Jury. — *New York Insulated Wire Co. v. Broadnax*, 107 Fed. Rep. 634, 46 C. C. A. 518; *Sun Printing, etc., Assoc. v. Edwards*, (C. C. A.) 136 Fed. Rep. 591; *M. Hemmway, etc., Silk Co. v. Porter*, 94 Ill. App. 609; *Turnbull v. Frey*, (Neb. 1904) 99 N. W. Rep. 648; *Webb v. Whitesell*, (Supm. Ct. App. T.) 87 N. Y. Supp. 454; *Marsh v. Bergman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 469; *Day v. American Machinist Press*, 86 N. Y. App. Div. 613; *Conklin v. John H. Woodbury Dermatological Institute*, 51 N. Y. App. Div. 638, affirmed without opinion 170 N. Y. 571. See *Burt v. Catlin*, 65 N. Y. App. Div. 456, affirmed without opinion 175 N. Y. 486.

**13.** *Gould v. Magnolia Metal Co.*, 207 Ill. 172; *Carson v. West Branch Hosiery Co.*, 15 Pa. Super. Ct. 476. See *Von Heyne v. Tompkins*, 89 Minn. 83.

**14.** Motive of Master Immaterial. — *Von Heyne v. Tompkins*, 89 Minn. 83; *McKeithan v. American Telephone, etc., Co.*, 136 N. Car. 213, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32.

**15.** Statement of Reasons at Time of Discharge Unnecessary. — *Loveman v. Brown*, 138 Ala. 608; *McKeithan v. American Telephone, etc., Co.*, 136 N. Car. 213, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32.

**33.** **1.** Adequate Reason Known at Time of Discharge Sufficient. — *Von Heyne v. Tompkins*, 89 Minn. 83, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *McKeithan v. American Telephone, etc., Co.*, 136 N. Car. 213, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**2.** Knowledge of Ground at Time of Discharge Unnecessary. — *Loveman v. Brown*, 138 Ala. 608; *Von Heyne v. Tompkins*, 89 Minn. 83, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33; *Hutchinson v. Washburn*, 80 N. Y. App. Div. 367; *McKeithan v. American Telephone, etc., Co.*, 136 N. Car. 213, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

**3.** Waiver. — *Daniell v. Boston, etc., R. Co.*, 184 Mass. 337; *Person v. McCargar*, 92 Minn. 294; *Spindel v. Cooper*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 569; *Sabin v. Kendrick*, 58 N. Y. App. Div. 168. See *Conklin v. John H. Woodbury Dermatological Institute*, 51 N. Y. App. Div. 638, affirmed without opinion 170 N. Y. 571.

**4.** Subsequent Offenses. — *Daniell v. Boston, etc., R. Co.*, 184 Mass. 337; *Johnson v. E. Van Winkle Gin, etc., Works*, 130 N. Car. 441; *Cook v. School Com'rs*, 35 Nova Scotia 405.

**5.** Retention of Servant. — *Atlantic Compress Co. v. Young*, 118 Ga. 868; *Von Heyne v. Tompkins*, 89 Minn. 83. See *Moynahan v. Interstate Min., etc., Co.*, 31 Wash. 417.

**8.** Question for Jury. — *Atlantic Compress Co. v. Young*, 118 Ga. 868.

**34.** **1.** Acquiescence in Discharge. — *Bell v. Gund*, 110 Wis. 271. See *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479. Compare *Beck v. Walker*, 24 Pa. Co. Ct. 403, 31 Pittsb. Leg. J. N. S. (Pa.) 249.

**Acquiescence in Sufficiency of Notice.** — *Leslie v. Robie*, (Supm. Ct. App. T.) 84 N. Y. Supp. 289.

**5.** Servant's Duty to Seek Employment. — *Alaska Fish, etc., Co. v. Chase*, (C. C. A.) 128 Fed. Rep. 886; *Gillespie v. Ashford*, 125 Iowa 729; *Kessler v. Ellis*, 87 S. W. Rep. 798, 27 Ky. L. Rep. 1042; *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91; *Goebel v. Pomeroy Bros. Co.*, (N. J. 1903) 55 Atl. Rep. 690; *Weber Gas, etc., Co. v. Bradford*, 34 Tex. Civ. App. 543; *Gulf, etc., R. Co. v. Jackson*, 29 Tex. Civ. App. 342.

**35.** See note 1.

7. Offer of Re-employment — Character of the Work. — See note 2.

Terms of Offer. — See notes 4, 5.

**36.** 8. Necessity of Offer to Perform Services. — See note 2.10. Rights and Remedies of Servant Wrongfully Discharged — *a.* ACTION FOR WAGES EARNED BEFORE DISCHARGE. — See note 7.*b.* ACTION ON QUANTUM MERUIT. — See note 8.**37.** See note 1.*c.* ACTION FOR BREACH OF CONTRACT — (1) *Statement of Rule.* — See note 2.(2) *Measure of Damages* — (a) *In General* — *aa.* IN ACTIONS COMMENCED AFTER EXPIRATION OF TERM. — See note 3.**38.** See notes 1, 2.*bb.* IN ACTIONS WHERE TIME OF BRINGING SUIT IS NOT SHOWN. — See note 3.

Where a servant is reasonably expecting that he will be called upon by the master to render services at any time, he is under no obligation to seek other employment. *Mathews v. Wallace*, 104 Mo. App. 96.

**35.** 1. Reasonable Effort a Question for Jury. — *Gillespie v. Ashford*, 125 Iowa 729.

2. Work Not of Same General Character. — *Harger v. Jenkins*, 17 Pa. Super. Ct. 615; *Lone Star Salt Co. v. Wilderspin*, (Tex. Civ. App. 1904) 81 S. W. Rep. 327.

4. Offer of Similar Employment for Same Wages and Same Term. — Compare *Youngberg v. Lambertson*, 91 Minn. 109.

5. Offer of Re-employment at Smaller Salary. — See *Howard v. Vaughan-Monnig Shoe Co.*, 82 Mo. App. 405.

**36.** 2. Offer of Performance Unnecessary. — See *Griffin v. Brooklyn Ball Club*, 68 N. Y. App. Div. 566, *affirmed* without opinion 174 N. Y. 535.

7. Action for Wages Actually Earned. — *Hood v. Hampton Plains Exploration Co.*, 106 Fed. Rep. 408; *McCormick Harvesting Mach. Co. v. Cordsiemon*, 101 Ill. App. 140; *Dibble v. Roberts*, 35 Ind. App. 159.

*Demand.* — A suit for wages due under a contract may be brought without a previous demand; the suit constitutes a sufficient demand. *Hartford L. Ins. Co. v. Bryan*, 25 Ind. App. 406.

8. Treating Contract as Rescinded and Suing on a Quantum Meruit. — *McPherson v. Trustees, etc.*, 1 Ont. L. Rep. 261; *James v. Parsons*, 70 Kan. 156, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 36; *Von Heyne v. Tompkins*, 89 Minn. 83; *Banta v. Banta*, 84 N. Y. App. Div. 138; *Welch v. Livingston*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 116.

**37.** 1. Action on Quantum Meruit Bars Action for Breach. — *James v. Parsons*, 70 Kan. 156; *Ornstein v. Yahr, etc., Drug Co.*, 119 Wis. 429.

2. Suing for Breach of Contract. — *Alaska Fish, etc., Co. v. Chase*, (C. C. A.) 128 Fed. Rep. 886; *Shields v. Carsom*, 102 Ill. App. 38; *James v. Parsons*, 70 Kan. 156; *Forked Deer Pants Co. v. Shipley*, 80 S. W. Rep. 476, 25 Ky. L. Rep. 2299; *Menage v. Rosenthal*, 187 Mass. 470; *Banta v. Banta*, 84 N. Y. App. Div. 138.

Where a contract for work and labor has been substantially performed as to time, and

in its most material parts, an employer has no right to dismiss a servant and to refuse to carry out a contract previously made for a term not yet expired. *Potter v. Barton*, 86 Minn. 288.

3. Actions Begun Subsequent to End of Term. — *Morgan v. McCaslin*, 114 Ill. App. 427, *affirmed* 213 Ill. 358; *Warren v. Nash*, 68 S. W. Rep. 658, 24 Ky. L. Rep. 479; *Wirth v. Calhoun*, 64 Neb. 316; *Latimer v. York Cotton Mills*, 66 S. Car. 135, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 37; *Lone Star Salt Co. v. Wilderspin*, (Tex. Civ. App. 1904) 81 S. W. Rep. 327. See *Hartsell v. Masterson*, 132 Ala. 275; *Van Sicklen v. Ballard*, 97 Ill. App. 640.

Earnings Subsequent to Expiration of Term Not to Be Deducted. — *Hughes v. School Dist. No. 37*, 66 S. Car. 259.

Injury to Health, Feelings, or Reputation. — The plaintiff in an action to recover damages for breach of a contract of employment by a wrongful discharge is not entitled to recover for injuries to his health, feelings, or reputation. *Westwater v. Grace Church*, 140 Cal. 339.

**38.** 1. Recovery Not Defeated by Showing Opportunity for Employment. — *Latimer v. York Cotton Mills*, 66 S. Car. 135, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

2. Evidence of Opportunity for Other Employment Competent in Mitigation. — *Busell Trimmer Co. v. Coburn*, 188 Mass. 254; *Latimer v. York Cotton Mills*, 66 S. Car. 135, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

Amount Actually Received to Be Deducted from Recovery. — *School Directors v. Birch*, 93 Ill. App. 499; *Evesson v. Ziegfeld*, 22 Pa. Super. Ct. 79.

3. Actions Where Time of Bringing Suit Not Shown. — *Hancock v. Board of Education*, 140 Cal. 554; *Cross v. Florsheim*, 102 N. Y. App. Div. 498; *Jones v. Oppenheim*, (Supm. Ct. App. T.) 91 N. Y. Supp. 343; *Griffin v. Brooklyn Ball Club*, 68 N. Y. App. Div. 566, *affirmed* without opinion 174 N. Y. 535.

It has been held that where the contract is entire, is one for personal services only, and a breach of it is total, the measure of damages is what the plaintiff would have earned, less what it would have cost him to perform it according to its terms. *School Dist. v. McDonald*, 68 Neb. 610.

**38.** *cc.* IN ACTIONS COMMENCED BEFORE BUT TRIED AFTER EXPIRATION OF TERM. — See note 4.

*dd.* IN ACTIONS TRIED BEFORE EXPIRATION OF TERM — View that Damages Recoverable for Whole Term. — See note 5.

**39.** View that Damages Only Up to Time of Trial Are Recoverable. — See note 1.

(b) Where Damages Consist of Profits Lost. — See notes 2, 3.

**42.** *f.* COMPELLING MASTER TO RETAIN SERVANT IN EMPLOYMENT. — See note 2.

*g.* ACTION FOR WRONGFULLY CAUSING DISCHARGE. — See notes 3, 4.

*h.* EVIDENCE. — See note 6.

**43.** *i.* RIGHTS OF SERVANT DISCHARGED FOR CAUSE. — See notes 2, 3, 4.

**XII. TOTAL OR PARTIAL NONPERFORMANCE BY SERVANT NOT ATTRIBUTABLE TO FAULT OF EITHER PARTY — 1. Resulting from Illness of Servant. — See note 5.**

Right to Recover for Services Rendered. — See note 7.

**44.** See note 2.

**38. 4. Actions Commenced Before but Tried After Expiration of Term.**— *Morgan v. McCaslin*, 114 Ill. App. 427, *affirmed* 213 Ill. 358; *Cohen v. Walker*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 114, 11 N. Y. Annot. Cas. 135; *Howay v. Going-Northrup Co.*, 24 Wash. 88, 85 Am. St. Rep. 942.

**5. Damages Recoverable for Whole Term.**— *Alaska Fish, etc., Co. v. Chase*, (C. C. A.) 128 Fed. Rep. 886; *Forked Deer Pants Co. v. Shipley*, 80 S. W. Rep. 476, 25 Ky. L. Rep. 2299; *Curtis v. Lehmann*, (La. 1905) 38 So. Rep. 887; *Woods v. Shumard*, 114 La. 451.

**Deduction of Amount Which Servant Could Have Earned.**— *Moore v. Central Foundry Co.*, 68 N. J. L. 14.

**39. 1. Damages Only to Time of Trial Recoverable.**— *Weber Gas, etc., Co. v. Bradford*, 34 Tex. Civ. App. 543.

**2. Profits Lost Through Breach of Contract.**— *Laishley v. Goolld Bicycle Co.*, 6 Ont. L. Rep. 326, *reversing* 4 Ont. L. Rep. 350, and *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.

**3. Where No Services Have Been Performed.**— *Laishley v. Goolld Bicycle Co.*, 6 Ont. L. Rep. 326, *reversing* 4 Ont. L. Rep. 350, and *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.

**42. 2. Compelling Retention of Servant.**— *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246.

**3. When Action Lies.**— *Glamorgan Coal Co. v. South Wales Miners' Federation*, 89 L. T. N. S. 393, 72 L. J. K. B. 893, (1903) 2 K. B. 545; *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289. See *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392, 138 N. Car. 308.

It has been held that a patron of a street railway company incurs no liability to a conductor by reporting to the superintendent of the company such conductor's misconduct while on duty toward a passenger, though in making the report he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company. *Lancaster v. Hamburger*, 70 Ohio St. 156.

**4.** It has been held that when the master has a right to discharge a servant, the servant cannot recover against a third person for procuring

the master to discharge him. *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392, 138 N. Car. 308.

**6. View that Burden Is on Defendant.**— *Marx v. Miller*, 134 Ala. 347; *Allen v. Glen Creamery Co.*, 101 N. Y. App. Div. 306; *Griffin v. Brooklyn Ball Club*, 68 N. Y. App. Div. 566, *affirmed* without opinion 174 N. Y. 535; *Weber Gas, etc., Co. v. Bradford*, 34 Tex. Civ. App. 543.

**Burden of Showing Grounds for Discharge.**— It has been held that where a servant has been discharged before the expiration of the contract of employment the burden is upon the master of showing cause for the discharge. *Deitrick v. Cashie, etc., R., etc., Co.*, 127 N. Car. 25.

**43. 2. Parker v. Farlinger**, 122 Ga. 315; *Von Heyne v. Tompkins*, 89 Minn. 83.

**3. Contrary View.**— *Parks v. Tolman*, 113 Mo. App. 14; *Walsh v. New York, etc., Co.*, 88 N. Y. App. Div. 477; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171.

**4. Master Entitled to Recoup Damages.**— *Shute v. McVitie*, (Tex. Civ. App. 1903) 72 S. W. Rep. 433; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171.

**Servant Discharged by Giving Notice Prescribed in Contract.**— Where it was expressly stipulated in the contract of employment that the master might terminate the relation existing between the parties at any time upon two weeks' notice in writing, it was held that, the servant having been given the prescribed notice, he could only recover two weeks' salary. *Dallas v. Murry*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 599.

**5. Illness an Excuse for Nonperformance.**— *O'Connor v. Briggs*, 182 Mass. 387; *Johnson v. Crookston Lumber Co.*, 92 Minn. 395; *Spindel v. Cooper*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 569. See *Loates v. Maple*, 88 L. T. N. S. 288.

**7. Recovery for Services Rendered Permissible.**— *Gaynor v. Jonas*, 104 N. Y. App. Div. 35.

**44. 2. Time During Which Servant Is Incapacitated.**— *Hughes v. Toledo Scale, etc., Co.*, 112 Mo. App. 91; *Adlets v. Progressive Shoe Co.*, 84 Mo. App. 288.

**45. XIII. EFFECT ON CONTRACT OF MASTER'S DEATH, INSOLVENCY, INSANITY, OR BANKRUPTCY** — 1. Death of Master. — See note 1.

**XIV. EFFECT ON CONTRACT OF DISSOLUTION OF FIRM.** — See notes 6, 7.

**46. XVIII. EMPLOYMENT AND COMPENSATION AS AFFECTED BY RULES AND REGULATIONS OF MASTER** — 1. Power to Make Rules and Regulations. — See note 4.

**47. XIX. EARNINGS OF SERVANT OUTSIDE OF EMPLOYMENT** — Rights of Master. — See note 6.

If the Term of Employment Does Not Require the Servant's Whole Time. — See note 7.

Rights of Servant. — See note 8.

**XX. CONTRACTS OF HIRING AS AFFECTED BY STATUTE OF FRAUDS** —

1. What Contracts Are Within Statute — Contract of Hiring for More than One Year. — See note 10.

Contracts Not to Be Performed Within a Year. — See note 11.

**48.** Contracts Which May Be Performed Within a Year. — See note 1.

2. Rights of Servant Where Contract Is Within Statute. — See notes 2, 3, 5, 6, 7.

**49. XXII. RIGHT TO SERVANT'S INVENTIONS.** — See note 9.

**45. 1. Termination by Death of Master.** — *Casto v. Murray*, (Oregon 1905) 81 Pac. Rep. 883; *Zinnell v. Bergdoll*, 19 Pa. Super. Ct. 508.

**6. Dissolution of Firm by Death.** — *Contra*, *Johnson v. Judge*, 16 Pa. Super. Ct. 137.

**7. Voluntary Dissolution of Firm — Effect.** — See *Glenn v. Rudd*, 3 Ont. L. Rep. 422.

**46. 4. Prohibiting Servant from Signing His Name to Correspondence of Master.** — *Russell v. Inman*, 79 N. Y. App. Div. 227.

**Prohibiting Servants from Smoking on Premises.** — *Honigstein v. Hollingsworth*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 314.

**47. 6. Profits of Partnership in Which Servant Is a Member.** — But it has been held that the master is not entitled to share in the profits of a partnership of which the servant is a member, when it does not appear that the servant neglected his duties to the master. *Jackson v. Seevers*, 115 Iowa 370.

**7. Earnings at Work Not Conflicting with Servant's Duties.** — See *Genco v. Remington*, 100 N. Y. App. Div. 223.

**8. Earnings Outside of Business Hours.** — *Jones v. Linde British Refrigeration Co.*, 2 Ont. L. Rep. 428, reversing 32 Ont. 191.

**10. Necessity of Written Contract.** — *Spinney v. Hill*, 81 Minn. 316.

**11.** It has been held that an agreement which cannot be performed in one year from the date of making is within the statute of frauds, although it may be completely performed in one year from the time when performance is to begin. *Biest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137.

**48. 1. Contracts Which May Be Performed Within a Year.** — *Sax v. Detroit, etc., R. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572, 7 Detroit Leg. N. 486; *Glenn v. Rudd*, 3 Ont. L. Rep. 422.

It has been held that the contract of a party to render service to another for more than a year from its date is within the statute, notwithstanding one or both parties may have the option of ending the contract by notice before a year elapses. *Biest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137.

**Contract for Indefinite Period.** — A contract of hiring for no definite time, it has been held, is not within the statute of frauds for the reason that the contract may be performed to the satisfaction of the parties within a year. *Mathews v. Wallace*, 104 Mo. App. 96.

**2. No Recovery on Contract.** — *Spinney v. Hill*, 81 Minn. 316.

**3.** It has been held that a contract to perform services, though within the statute of frauds, is valid to the extent of performance, and the contract governs as to the rate of compensation. *Murphy v. De Haan*, 116 Iowa 61.

**5. Contract Terminated Without Servant's Fault.** — *Banta v. Banta*, 84 N. Y. App. Div. 138, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 48.

It has been held that the contract of employment, though within the statute, controls the rights and remedies of the parties with respect to what has been done, and fixes the value of services rendered under it, when the person performing such services is discharged after part performance, without fault on his part. *Spinney v. Hill*, 81 Minn. 316.

**6.** It has been held that the invalidity of a contract for services by its terms not to be performed within a year is not available to the master to defeat a recovery by the servant of his agreed compensation where he has been permitted to perform and has performed the conditions imposed upon him. In such case the void contract may afford a measure of the value of the services. *Scheuer v. Monash*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 668.

**7. Contrary View.** — *Scheuer v. Monash*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 276.

**49. 9. Contract Providing that Musical Compositions of Servant Shall Be Joint Property of Master and Servant.** — *Blakely v. Sousa*, 197 Pa. St. 335.

**Discovery of Gold by Servant.** — The defendants, who were owners of certain mines, employed the plaintiff as a laborer to assist in

**50. XXIII. STATUTES LIMITING HOURS OF EMPLOYMENT.** — See note 5.

**51. XXV. GIVING CHARACTER TO SERVANT** — 1. Duty to Give Testimonials. — See note 3.

**XXVI. SERVANT'S LIABILITY FOR HIS OWN NEGLIGENCE OR MISCONDUCT** — 1. To Master. — See note 8.

The Burden of Proof. — See note 9.

**52. Extent of Master's Right.** — See note 1.

3. To Third Persons. — See note 5.

**XXVII. MEDICAL ATTENDANCE ON SERVANT** — 1. Duty of Employer to Furnish. — See note 8.

**53. 2. Authority of Agent.** — See note 3.

3. Liability for Negligence of Physician or Attendants — Medical Attendance Furnished Gratuitously by Master. — See note 13.

**54.** See note 2.

the grading of a mill site on public lands for the use of the mines, and the plaintiff, in digging and leveling off a grade for a quartz mill, discovered a pocket of quartz gold. The ground was public land of the United States, and the defendants had entered upon it for the purpose of grading a site for a quartz mill, but there was no location of the land with a view of acquiring title under the laws of the United States. This gold was not found within the limits of the space occupied by the defendants for the site of a quartz mill. It was held that the plaintiff, by his discovery and appropriation, acquired title to the gold. *Burns v. Clark*, 133 Cal. 634, 85 Am. St. Rep. 233.

**50. 5. Contracts for Work Longer than Specified Hours.** — *Fitzgerald v. International Paper Co.*, 96 Me. 220.

**Statute Limiting Hours of Labor in Manufacturing Establishments Held Valid.** — *Com. v. Beatty*, 15 Pa. Super. Ct. 5.

**Statute Limiting Hours of Labor of Street Railway Employees Held Valid.** — *In re Ten-Hour Law*, etc., 24 R. I. 603.

**Statute Limiting Hours of Labor in Bakeries Held Unconstitutional.** — *Lochner v. New York*, 198 U. S. 45, reversing 177 N. Y. 145, 101 Am. St. Rep. 773, which affirmed 73 N. Y. App. Div. 120.

**Statute Limiting the Hours of Employment of Females in Certain Employments Held Valid.** — *Wenham v. State*, 65 Neb. 394.

**Statute Limiting Hours of Labor of Miners, Etc.** — It has been held that the *Nevada Act*, Feb. 23, 1903 (Stat. 1903, p. 33, c. 10) imposing a penalty on any one working more than eight hours a day in any mine, smelter, or mill, for the reduction of ores, is not void, under the constitution of Nevada, art. 1, § 1, guaranteeing the right to acquire and possess property, but is sustainable as a valid health regulation under the police power. *Ex p. Kair*, (Nev. 1905) 80 Pac. Rep. 463.

**New York Statute Held to Apply Only to Public Work.** — Section 3 of the New York Labor Law (N. Y. Laws 1897, c. 415, as amended by N. Y. Laws 1899, c. 567) has been held to apply only to public work. *Downey v. Bender*, 57 N. Y. App. Div. 310.

**51. 3. Giving Servant a "Character."** — *New York, etc., R. Co. v. Schaffer*, 65 Ohio St. 414, 87 Am. St. Rep. 628; *Rushy v. Pittsburg, etc., R. Co.*, 9 Ohio Dec. 823.

**8. Damages Paid by Master to Third Person.** — *Costa v. Yochim*, 104 La. 170; *Gaffner v. Johnson*, 39 Wash. 437.

**9. Judgment Against Master as Evidence.** — It has been held that the judgment against the master for damages is evidence against the servant, who was notified and who was a witness in the case in which the master was condemned to pay damages. *Costa v. Yochim*, 104 La. 170.

**52. 1. Gaffner v. Johnson, 39 Wash. 437, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 52.**

**5. Nonfeasance in Course of Employment.** — See *Bryce v. Southern R. Co.*, 125 Fed. Rep. 958.

It has been said that master and servant cannot be jointly liable for the tort of the servant in the line of his employment, where the liability of the master is predicated solely upon the doctrine of *respondeat superior*. Each may be sued separately, the servant for his negligent act done, the master under the doctrine of *respondeat superior*. *McNemar v. Cohn*, 115 Ill. App. 31.

**8. Contract to Furnish Medical Attendance.** — *Galveston, etc., R. Co. v. Rubio*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1126.

**Statute Requiring Ambulances to Be Maintained at Mines.** — *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153.

**Hospital Maintained by Master.** — Where a hospital is maintained by the master for the treatment of injured servants, and the servants are required to contribute from their wages to the support of the hospital, the master becomes liable for refusing to admit an injured servant to the hospital. *Illinois Cent. R. Co. v. Gheen*, 112 Ky. 695.

**Seamen.** — By the maritime law, when a seaman is injured in the service of his ship, without fault on his part, he is entitled to medical care, nursing, and attendance, and to a cure, so far as a cure is possible, at the expense of the ship. *The Troy*, 121 Fed. Rep. 901. See the title *SEAMAN*, vol. 25, p. 126 *et seq.*

**53. 3. General Agent.** — *Emporia v. Kowalski*, 66 Kan. 64.

**13. Injuries by Physician.** — *Cummings v. Chicago, etc., R. Co.*, 89 Ill. App. 199, writ dismissed 189 Ill. 608.

**54. 2. See Sawdey v. Spokane Falls, etc., R. Co., 30 Wash. 349, 94 Am. St. Rep. 889.**

**54.** The Master Who Conducts a Hospital for the Use of His Injured Employees. — See notes 4, 5.

## XXVIII. MASTER'S LIABILITY FOR PERSONAL INJURIES TO SERVANT —

**1.** Duty to Protect Servant from Injury — *a.* IN GENERAL. — See note 6.

**54.** 4. *Scanlon v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 930; *Poling v. San Antonio, etc., R. Co.*, 32 Tex. Civ. App. 487; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839.

5. *Haggerty v. St. Louis, etc., R. Co.*, 100 Mo. App. 424.

6. **Duty to Protect Servant from Injury — United States.** — *Cumberland Telephone, etc., Co. v. Bills*, (C. C. A.) 128 Fed. Rep. 272; *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311.

*Georgia.* — *Louisville, etc., R. Co. v. Hairston*, 122 Ga. 372.

*Illinois.* — *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399; *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54, affirmed 207 Ill. 576; *Ostot v. Indiana, etc., R. Co.*, 103 Ill. App. 136; *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337, affirmed 191 Ill. 340.

*Indiana.* — *Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145; *Cleveland, etc., R. Co. v. Bergschlicker*, 162 Ind. 198; *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393; *Princeton Coal, etc., Co. v. Roll*, (Ind. 1903) 66 N. E. Rep. 169; *Gould Steel Co. v. Richards*, 30 Ind. App. 348.

*Iowa.* — *Allen v. Chicago, etc., R. Co.*, 126 Iowa 213; *Beresford v. American Coal Co.*, 124 Iowa 34; *Kelly v. Chicago, etc., R. Co.*, 118 Iowa 387; *Pierson v. Chicago G. W. R. Co.*, 116 Iowa 601.

*Kentucky.* — *Guthrie v. Carney*, (Ky. 1905) 86 S. W. Rep. 1126; *Cincinnati, etc., R. Co. v. Cook*, (Ky. 1904) 83 S. W. Rep. 58a; *Illinois Cent. R. Co. v. Elliott*, 82 S. W. Rep. 374, 26 Ky. L. Rep. 669; *Illinois Cent. R. Co. v. McIntosh*, 118 Ky. 145, rehearing denied 118 Ky. 156; *Louisville, etc., R. Co. v. Lowe*, 118 Ky. 269; *Illinois Cent. R. Co. v. Jones*, 118 Ky. 158; *Illinois Cent. R. Co. v. Burton*, 79 S. W. Rep. 231, 25 Ky. L. Rep. 1916; *Illinois Cent. R. Co. v. Jordan*, 117 Ky. 512; *Southern R. Co. v. Otis*, 78 S. W. Rep. 480, 25 Ky. L. Rep. 1686; *Louisville, etc., R. Co. v. Sullivan*, 76 S. W. Rep. 525, 25 Ky. L. Rep. 854; *Cincinnati, etc., R. Co. v. Maley*, 76 S. W. Rep. 334, 25 Ky. L. Rep. 690; *Louisville, etc., R. Co. v. Chandler*, 72 S. W. Rep. 805, 24 Ky. L. Rep. 2035; *King v. Covington, etc., R. Co.*, 72 S. W. Rep. 737, 24 Ky. L. Rep. 1942; *Middlesborough R. Co. v. Stallard*, 72 S. W. Rep. 17, 24 Ky. L. Rep. 1666; *Louisville, etc., R. Co. v. Gilliam*, 71 S. W. Rep. 863, 24 Ky. L. Rep. 1536; *Louisville, etc., R. Co. v. Davis*, 115 Ky. 270; *Louisville, etc., R. Co. v. Chandler*, 70 S. W. Rep. 666, 24 Ky. L. Rep. 998; *Board v. Chesapeake, etc., R. Co.*, 70 S. W. Rep. 625, 24 Ky. L. Rep. 1079; *Louisville, etc., R. Co. v. Pointer*, 113 Ky. 952; *Cincinnati, etc., R. Co. v. Cook*, 113 Ky. 161; *Louisville, etc., R. Co. v. Lowe*, (Ky. 1902) 66 S. W. Rep. 736; *Illinois Cent. R. Co. v. Stewart*, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637; *Illinois Cent. R. Co. v. Josey*, 110 Ky. 342,

*Louisiana.* — *Merchant v. Pine Woods Lumber Co.*, 107 La. 463; *Moffet v. Koch*, 106 La. 371; *Levins v. Bancroft*, 114 La. 105; *Stewart v. Texas, etc., R. Co.*, 113 La. 525.

*Maryland.* — *Baltimore, etc., R. Co. v. State*, (Md. 1905) 61 Atl. Rep. 189.

*Massachusetts.* — *Edgar v. New York, etc., R. Co.*, 188 Mass. 420; *Cunningham v. Atlas Tack Co.*, 187 Mass. 51.

*Michigan.* — *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330, 11 Detroit Leg. N. 31.

*Minnesota.* — *Swartz v. Great Northern R. Co.*, 93 Minn. 339; *Comers v. Washburn-Crosby Co.*, 91 Minn. 105; *Schus v. Powers-Simpson Co.*, 85 Minn. 447; *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458.

*Missouri.* — *Paden v. Van Blarcom*, 181 Mo. 117; *Rinard v. Omaha, etc., R. Co.*, 164 Mo. 270; *Howard v. Terminal R. Assoc.*, 110 Mo. App. 574; *Buckalew v. Quincy, etc., R. Co.*, 107 Mo. App. 575; *Cameron v. B. Roth Tool Co.*, 108 Mo. App. 265; *Mitchell v. Chicago, etc., R. Co.*, 108 Mo. App. 142; *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; *Payne v. Missouri Pac. R. Co.*, 105 Mo. App. 155; *Prophet v. Kemper*, 95 Mo. App. 219; *Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226; *Kane v. Falk Co.*, 93 Mo. App. 209; *Shuler v. Omaha, etc., R. Co.*, 87 Mo. App. 618; *Harris v. H. D. Williams Co.*, 107 Mo. App. 249; *Benedict v. Chicago G. W. R. Co.*, 104 Mo. App. 218; *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; *Paden v. Van Blarcom*, 100 Mo. App. 185.

*New Hampshire.* — *Story v. Concord, etc., R. Co.*, 70 N. H. 364.

*New Jersey.* — *Ricker v. Central R. Co.*, (N. J. 1905) 61 Atl. Rep. 89; *Albanese v. Central R. Co.*, 70 N. J. L. 241; *Carroll v. Tidewater Oil Co.*, 67 N. J. L. 679.

*New York.* — *Fleming v. Tuttle*, 98 N. Y. App. Div. 222; *Di Stefano v. Peekskill Lighting, etc., Co.*, 107 N. Y. App. Div. 293; *Holzman v. Katzman*, (Supm. Ct. App. T.) 87 N. Y. Supp. 478; *Loughrain v. Autophone Co.*, 77 N. Y. App. Div. 542.

*North Carolina.* — *Harris v. Balfour Quarry Co.*, 137 N. Car. 204; *Whisenant v. Southern R. Co.*, 137 N. Car. 349; *Allison v. Southern R. Co.*, 129 N. Car. 336.

*Ohio.* — *Ham v. Lake Shore, etc., R. Co.*, 23 Ohio Cir. Ct. 496.

*Oregon.* — *Wagner v. Portland*, 40 Oregon 302.

*Pennsylvania.* — *Brommer v. Philadelphia, etc., R. Co.*, 205 Pa. St. 432; *Ortlip v. Philadelphia, etc., Traction Co.*, 198 Pa. St. 586; *Levy v. Rosenblatt*, 21 Pa. Super. Ct. 543; *Garity v. Pennsylvania Casting, etc., Co.*, 17 Pa. Super. Ct. 623.

*Rhode Island.* — *Dion v. Richmond Mfg. Co.*, 24 R. I. 187; *Carll v. Interstate Consol. R. Co.*, 23 R. I. 592. See *King v. Interstate Consol. R. Co.*, 23 R. I. 583.

*South Carolina.* — *Scott v. Seaboard Air Line R. Co.*, 67 S. Car. 136,

- Texas.*—*International, etc., R. Co. v. Still*, (Tex. Civ. App. 1905) 88 S. W. Rep. 257; *Missouri, etc., R. Co. v. Nelson*, (Tex. Civ. App. 1905) 87 S. W. Rep. 706; *Gulf, etc., R. Co. v. Mintner*, (Tex. Civ. App. 1905) 85 S. W. Rep. 477; *Galveston, etc., R. Co. v. McAdams*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *Ft. Worth, etc., R. Co. v. Caskey*, (Tex. Civ. App. 1904) 84 S. W. Rep. 264; *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *International, etc., R. Co. v. Villareal*, 36 Tex. Civ. App. 534; *Houston, etc., R. Co. v. Jennings*, 36 Tex. Civ. App. 375; *Missouri, etc., R. Co. v. Keaveney*, (Tex. Civ. App. 1904) 80 S. W. Rep. 387; *Missouri, etc., R. Co. v. Jones*, 35 Tex. Civ. App. 584; *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; *San Antonio, etc., R. Co. v. Brock*, 35 Tex. Civ. App. 155; *Gulf, etc., R. Co. v. Elmore*, 35 Tex. Civ. App. 56; *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *Missouri, etc., R. Co. v. Schilling*, 32 Tex. Civ. App. 417; *Houston, etc., R. Co. v. McGowan*, (Tex. Civ. App. 1903) 74 S. W. Rep. 339; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, writ of error denied 97 Tex. 69; *Texas Cent. R. Co. v. Yarbro*, 32 Tex. Civ. App. 246; *Missouri, etc., R. Co. v. Bodie*, 32 Tex. Civ. App. 168; *St. Louis Southwestern R. Co. v. Arnold*, 32 Tex. Civ. App. 272; *St. Louis Southwestern R. Co. v. McDowell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 974; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300; *Roberts v. Fielder Salt Works*, (Tex. Civ. App. 1903) 72 S. W. Rep. 618; *San Antonio, etc., R. Co. v. Ankerson*, 31 Tex. Civ. App. 327; *Missouri, etc., R. Co. v. Smith*, 31 Tex. Civ. App. 332; *International, etc., R. Co. v. Cochrane*, (Tex. Civ. App. 1902) 71 S. W. Rep. 41; *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App. 496; *Galveston, etc., R. Co. v. Puente*, 30 Tex. Civ. App. 246; *Galveston, etc., R. Co. v. Karrer*, (Tex. Civ. App. 1902) 70 S. W. Rep. 328; *Gulf, etc., R. Co. v. Hill*, 29 Tex. Civ. App. 12; *Missouri, etc., R. Co. v. Hawk*, 30 Tex. Civ. App. 142; *Gulf, etc., R. Co. v. Cornell*, 29 Tex. Civ. App. 596; *Pledger v. Texas Cent. R. Co.*, (Tex. Civ. App. 1902) 68 S. W. Rep. 516, 69 S. W. Rep. 92; *International, etc., R. Co. v. Vinson*, 28 Tex. Civ. App. 247; *Missouri, etc., R. Co. v. Williams*, 28 Tex. Civ. App. 615; *St. Louis Southwestern R. Co. v. Kelton*, 28 Tex. Civ. App. 137; *Missouri, etc., R. Co. v. Pawkett*, 28 Tex. Civ. App. 583; *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150; *Missouri, etc., R. Co. v. Walden*, 27 Tex. Civ. App. 567; *Texas, etc., R. Co. v. Mortensen*, 27 Tex. Civ. App. 106; *Galveston, etc., R. Co. v. Quay*, 27 Tex. Civ. App. 516; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1064; *Gulf, etc., R. Co. v. Wood*, (Tex. Civ. App. 1901) 63 S. W. Rep. 164; *International, etc., R. Co. v. Newburn*, (Tex. Civ. App. 1900) 58 S. W. Rep. 542.
- Utah.*—*Hicks v. Southern Pac. R. Co.*, 27 Utah 526; *Mathews v. Daly-West Min. Co.*, 27 Utah 193; *Fritz v. Western Union Tel. Co.*, 25 Utah 263.
- Virginia.*—*Virginia Iron, etc., Co. v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362; *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205.
- Washington.*—*Dean v. Oregon R., etc., Co.*, 38 Wash. 565; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261; *Rush v. Spokane Falls, etc., R. Co.*, 23 Wash. 501.
- West Virginia.*—*Richards v. Riverside Iron Works*, 56 W. Va. 510.
- Wisconsin.*—*Segall v. Padlasky*, 123 Wis. 207.
- Canada.*—*Robitaille v. White*, 19 Quebec Super. Ct. 432; *McCarthy v. Thomas Davidson Mfg. Co.*, 18 Quebec Super. Ct. 272.
- Duty to Employ Competent Servants.**—It is the duty of a master to exercise reasonable care to employ competent servants.
- United States.*—*Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272; *The Elton*, 131 Fed. Rep. 562; *Kasadarian v. James Mill Mfg. Co.*, 130 Fed. Rep. 62; *Elliott v. Canadian Pac. R. Co.*, 129 Fed. Rep. 163; *Olsen v. North Pac. Lumber Co.*, (C. C. A.) 119 Fed. Rep. 77; *Southern Pac. R. Co. v. Huntsman*, 118 Fed. Rep. 412, 55 C. C. A. 366; *Brady v. Western Union Tel. Co.*, (C. C. A.) 113 Fed. Rep. 909; *Weeks v. Scharer*, (C. C. A.) 111 Fed. Rep. 330; *Olsen v. North Pac. Lumber Co.*, 106 Fed. Rep. 298.
- Delaware.*—*Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.
- Georgia.*—*Riverside Mills v. Jones*, 121 Ga. 33.
- Illinois.*—*Metropolitan West Side El. R. Co. v. Fortin*, 203 Ill. 454, affirming 107 Ill. App. 157; *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194.
- Indiana.*—*Hall v. Bedford Quarries Co.*, 156 Ind. 460.
- Iowa.*—*Scott v. Iowa Telephone Co.*, 126 Iowa 524; *Wicklund v. Saylor Coal Co.*, 119 Iowa 335.
- Kentucky.*—*Rose v. Louisville, etc., R. Co.*, 81 S. W. Rep. 218, 26 Ky. L. Rep. 321; *Bell-Coggeshall Co. v. Lewis*, 89 S. W. Rep. 135, 28 Ky. L. Rep. 149.
- Louisiana.*—*Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943; *Evans v. Louisiana Lumber Co.*, 111 La. 534; *Bell v. Globe Lumber Co.*, 107 La. 725.
- Michigan.*—*Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129.
- Minnesota.*—*Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24.
- Mississippi.*—*Yazoo, etc. R. Co. v. Schraag*, 84 Miss. 125.
- Missouri.*—*Adams v. McCormick Harvesting Mach. Co.*, 110 Mo. App. 367; *Adams v. McCormick Harvesting Mach. Co.*, 95 Mo. App. 111.
- New Hampshire.*—*Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625.
- New York.*—*Sullivan v. Metropolitan St. R. Co.*, 53 N. Y. App. Div. 89, affirmed without opinion 170 N. Y. 570; *Alcott v. Kirkham*, 101 N. Y. App. Div. 77; *Austin v. Fisher Tanning Co.*, 96 N. Y. App. Div. 550; *Irwin v. Brooklyn Heights R. Co.*, 50 N. Y. App. Div. 95; *McCarty v. Ritch*, 59 N. Y. App. Div. 145.



**55. Master Not an Insurer of Servants' Safety.** — See note 1.

*North Carolina.* — *Lamb v. Littman*, 132 N. Car. 978; *Harris v. Balfour Quarry Co.*, 131 N. Car. 553.

*Ohio.* — *Cleveland, etc., R. Co. v. Tehan*, 26 Ohio Cir. Ct. 457; *Cincinnati, etc., R. Co. v. Thompson*, 12 Ohio Cir. Dec. 326, 21 Ohio Cir. Ct. 778.

*Oregon.* — *Johnson v. Portland Stone Co.*, 40 Oregon 436.

*Pennsylvania.* — *Ging v. Miller*, 207 Pa. St. 482; *Duffy v. Platt*, 205 Pa. St. 296; *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1.

*South Carolina.* — *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315; *Biggers v. Catawba Power Co.*, 72 S. Car. 264; *Anderson v. Southern R. Co.*, 70 S. Car. 490; *Hicks v. Southern R. Co.*, 63 S. Car. 559; *Hicks v. Southern R. Co.*, (S. Car. 1901) 38 S. E. Rep. 725.

*Texas.* — *Consumers Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *Gulf, etc., R. Co. v. Hays*, (Tex. Civ. App. 1905) 89 S. W. Rep. 29; *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23; *Galveston, etc., R. Co. v. Jones*, 29 Tex. Civ. App. 214; *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776; *International, etc., R. Co. v. Jackson*, 25 Tex. Civ. App. 619; *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293; *Galveston, etc., R. Co. v. Eckles*, 25 Tex. Civ. App. 179; *Lantry v. Lowrie*, (Tex. Civ. App. 1900) 58 S. W. Rep. 837.

*Virginia.* — *Meyers v. Falk*, 99 Va. 385, 3 Va. Snp. Ct. 273; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362.

*Washington.* — *Conover v. Neher-Ross Co.*, 38 Wash. 172, 107 Am. St. Rep. 741; *Green v. Western American Co.*, 30 Wash. 87; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847.

*Wisconsin.* — *Grams v. C. Reiss Coal Co.*, 125 Wis. 1; *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328; *Kamp v. Cox*, 122 Wis. 206.

*Canada.* — *Sparano v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 292.

See the title **FELLOW SERVANTS**, vol. 12, p. 909 *et seq.*

It is the duty of the master to discharge a servant when he knows, or by the exercise of reasonable diligence would know, that the servant has contracted the habit or character of negligence, of drunkenness, or of lack of skill, so that he is incompetent. *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272.

**Duty to Exercise Special Supervision.** — Ordinarily there seems to be no duty resting upon the master, to be discharged by him, or by an agent standing in his place, to exercise special supervision over the work in which his servants are engaged. *Roytio v. Litchfield*, (C. C. A.) 113 Fed. Rep. 240.

See the title **FELLOW SERVANTS**, vol. 12, p. 929, note 2, the subdivision dealing with the *Missouri* cases.

**Carrying Servants to and from Work.** — A railroad company in carrying employees to or from work is bound to exercise care to furnish

them a safe place in which to ride. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 213 Ill. 545.

**Protracted Employment of Servants.** — It has been held that a violation by a railroad company of a statute prohibiting the continuous employment of certain servants for more than a prescribed period without an opportunity to obtain rest is proof of negligence. *Pelin v. New York Cent., etc., R. Co.*, 102 N. Y. App. Div. 71.

**Injury to Servant by Mob of Strikers.** — It has been held that a master is not liable for injuries to a servant inflicted by a mob of strikers. *Lewis v. Taylor Coal Co.*, 112 Ky. 845.

**55. 1. Master Not Insurer of Servants' Safety** — *Colorado.* — *Greeley v. Foster*, 32 Colo. 292; *Poorman Silver Mines v. Devling*, (Colo. 1905) 81 Pac. Rep. 252.

*Delaware.* — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Croker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1; *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

*Georgia.* — *Merchants, etc., Transp. Co. v. Jackson*, 120 Ga. 211; *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; *Edwards v. Central of Georgia R. Co.*, 118 Ga. 678.

*Illinois.* — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124, *affirming* 115 Ill. App. 621; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468; *Trakal v. Heusner Baking Co.*, 204 Ill. 179, *affirming* judgment 107 Ill. App. 327; *Illinois Steel Co. v. Rolewicz*, 113 Ill. App. 312; *Lobstein v. Sajatovich*, 111 Ill. App. 654; *Illinois Steel Co. v. Byczynski*, 106 Ill. App. 331; *Illinois Cent. R. Co. v. May*, 106 Ill. App. 613; *Moster v. Terminal R. Assoc.*, 106 Ill. App. 494; *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194; *Baltimore, etc., R. Co. v. Greer*, 103 Ill. App. 448; *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532. See *Odin Coal Co. v. Tadlock*, 216 Ill. 624.

*Indiana.* — *Robertson v. Ford*, 164 Ind. 538; *Southern Indiana R. Co. v. Messick*, 35 Ind. App. 676; *Dill v. Marmon*, 164 Ind. 507; *J. Wooley Coal Co. v. Bracken*, 30 Ind. App. 624; *Baxter v. Lusher*, 159 Ind. 381.

*Iowa.* — *Agar v. Harbach*, (Iowa 1903) 93 N. W. Rep. 601; *Brown v. Chicago, etc., R. Co.*, 120 Iowa 280; *Lanza v. Le Grand Quarry Co.*, 115 Iowa 299; *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Kansas.* — *Consolidated Kansas City Smelting, etc., Co. v. Sharber*, (Kan. 1905) 81 Pac. Rep. 476; *Bateman v. Atchison, etc., R. Co.*, (Kan. 1905) 81 Pac. Rep. 190; *Lane v. Missouri Pac. R. Co.*, 64 Kan. 755.

*Kentucky.* — *Collins v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 973; *Witten v. Bell, etc., Co.*, 85 S. W. Rep. 1094, 27 Ky. L. Rep. 580; *Shemwell v. Owensboro, etc., R. Co.*, 117 Ky. 556.

*Louisiana.* — *Budge v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349.

*Maine.* — *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; *Snowdale v. United Box Board, etc., Co.*, (Me. 1905) 61 Atl. Rep. 683; *Cowett v. American Woollen Co.*, 97 Me. 543.

*Maryland.*—Baltimore, etc., R. Co. v. State, 101 Md. 359; Maryland Telephone, etc., Co. v. Cloman, 97 Md. 620; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560.

*Massachusetts.*—McRea v. Hood Rubber Co., 187 Mass. 326; Needham v. Stone, 186 Mass. 565; Delory v. Blodgett, 185 Mass. 126, 102 Am. St. Rep. 328; Gauges v. Fitchburg R. Co., 185 Mass. 76; Tirrell v. New York, etc., R. Co., 180 Mass. 490; Mooney v. Beattie, 180 Mass. 451; Morris v. Walworth Mfg. Co., 181 Mass. 326; Drum v. New England Cotton Yarn Co., 180 Mass. 113; Girard v. Griswold, 177 Mass. 57; Hoard v. Blackstone Mfg. Co., 177 Mass. 69.

*Michigan.*—Fuller v. Ann Arbor R. Co., (Mich. 1905) 104 N. W. Rep. 414, 12 Detroit Leg. N. 348; Beunk v. Valley City Desk Co., 133 Mich. 440, 10 Detroit Leg. N. 288; Storrs v. Michigan Starch Co., 126 Mich. 666, 8 Detroit Leg. N. 182.

*Minnesota.*—Martyn v. Minnesota, etc., R. Co., (Minn. 1905) 104 N. W. Rep. 133; Griffin v. Minnesota Transfer R. Co., 94 Minn. 191; Thomas v. Smith, 90 Minn. 379; Setterstrom v. Brainerd, etc., R. Co., 89 Minn. 262; Boyer v. Eastern R. Co., 87 Minn. 367; Koralewski v. Great Northern R. Co., 85 Minn. 140; Sours v. Great Northern R. Co., 84 Minn. 230; Crane v. Chicago, etc., R. Co., 83 Minn. 278.

*Mississippi.*—Yazoo City Transp. Co. v. Smith, 78 Miss. 140.

*Missouri.*—Blundell v. Wm. A. Miller Elevator Mfg. Co., 189 Mo. 552; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300; Deckerd v. Wabash R. Co., 111 Mo. App. 117; Helm v. Missouri Pac. R. Co., 185 Mo. 212; Mathis v. Kansas City Stock-Yards Co., 185 Mo. 434; Stalzer v. Jacob Dold Packing Co., 84 Mo. App. 565; Whitley v. Chicago, etc., R. Co., 109 Mo. App. 123; Dickey v. Dickey, 111 Mo. App. 304; Glasscock v. Swafford Bros. Dry Goods Co., 106 Mo. App. 657, (Mo. App. 1903) 74 S. W. Rep. 1039; Harrington v. Wabash R. Co., 104 Mo. App. 663; Leitner v. Grieb, 104 Mo. App. 173; Wendall v. Chicago, etc., R. Co., 100 Mo. App. 556; Reames v. Jones Dry Goods Co., 99 Mo. App. 396; Kelly v. Stewart, 93 Mo. App. 47; Caldwell v. Missouri Pac. R. Co., 181 Mo. 455; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; Chandler v. Kansas City Missouri Gas Co., 174 Mo. 321, 97 Am. St. Rep. 570; Haviland v. Kansas City, etc., R. Co., 172 Mo. 106; Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; Roberts v. Missouri, etc., Telephone Co., 166 Mo. 370; George v. St. Louis Mfg. Co., 159 Mo. 333.

*Montana.*—Shaw v. New Year Gold Mines Co., 31 Mont. 118; McCabe v. Montana Cent. R. Co., 30 Mont. 323; Nolan v. Montana Cent. R. Co., 25 Mont. 107.

*Nebraska.*—Lincoln Gas, etc., Co. v. Thomas, (Neb. 1905) 104 N. W. Rep. 153; Weed v. Chicago, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 827; Cudahy Packing Co. v. Roy, (Neb. 1904) 99 N. W. Rep. 231; Fifer v. Burch. 68 Neb. 217; Evans Laundry Co. v. Crawford, 67 Neb. 153; Fremont Brewing Co. v. Hansen, 65 Neb. 456, 462; O'Neill v. Chicago, etc., R. Co., 62 Neb. 358, rehearing 66 Neb. 638.

*New Jersey.*—Loid v. J. S. Rogers Co., 68 N. J. L. 713; Meany v. Standard Oil Co., (N. J. 1900) 47 Atl. Rep. 803.

*New York.*—Reilly v. Troy Brick Co., 108 N. Y. App. Div. 108; McQueen v. Delaware, etc., R. Co., 102 N. Y. App. Div. 195; Sheridan v. Interborough Rapid Transit Co., 101 N. Y. App. Div. 534; Purcell v. Hoffman House, 97 N. Y. App. Div. 307; Ryan v. Third Ave. R. Co., 92 N. Y. App. Div. 306; Sheehan v. Standard Gas Light Co., 87 N. Y. App. Div. 174; Trapasso v. Coleman, 74 N. Y. App. Div. 33; Young v. Eugene Dietzgen Co., 72 N. Y. App. Div. 618, affirmed without opinion 176 N. Y. 590; Duffy v. Williams, 71 N. Y. App. Div. 115; Nolan v. Brooklyn Heights R. Co., 68 N. Y. App. Div. 219; O'Sullivan v. Flynn, 67 N. Y. App. Div. 516; Craig v. Laffin, etc., Powder Co., 55 N. Y. App. Div. 49; Carlson v. Walsh, 56 N. Y. App. Div. 551; Biddiscomb v. Cameron, 35 N. Y. App. Div. 561, affirmed without opinion 161 N. Y. 637.

*North Carolina.*—Hendrix v. Cooleemee Cotton Mills, 138 N. Car. 169; Keck v. American Telephone, etc., Co., 137 N. Car. 277; Harris v. Balfour Quarry Co., 131 N. Car. 553; Bingham v. Carolina Cent. R. Co., 130 N. Car. 623; Raiford v. Wilmington, etc., R. Co., 130 N. Car. 597; Martin v. Highland Park Mfg. Co., 128 N. Car. 264, 83 Am. St. Rep. 671; Bryan v. Southern R. Co., 128 N. Car. 387.

*Ohio.*—Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547; Scanlon v. Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256; Lake Shore, etc., R. Co. v. Whidden, 23 Ohio Cir. Ct. 85; Shailer, etc., Co. v. Corcoran, 11 Ohio Cir. Dec. 599, 21 Ohio Cir. Ct. 639; Beucker v. Baker, 11 Ohio Cir. Dec. 642, 21 Ohio Cir. Ct. 540.

*Oregon.*—Duntley v. Inman, 42 Oregon 334.

*Pennsylvania.*—Jones v. Scranton Coal Co., 211 Pa. St. 577; Fox v. Clearfield Wooden Ware Co., 211 Pa. St. 645; Allen v. Kingston Coal Co., 212 Pa. St. 54; Laven v. Moore, 211 Pa. St. 245; White v. Roydhouse, 211 Pa. St. 13; Gallagher v. Snellenburg, 210 Pa. St. 642; Davis v. Pennsylvania Coal Co., 209 Pa. St. 153; Briggs v. East Broad Top R., etc., Co., 206 Pa. St. 564; Baldwin v. Urner, 206 Pa. St. 459; Diver v. Singer Mfg. Co., 205 Pa. St. 170; McGinnis v. Kerr, 204 Pa. St. 615; Lawson v. American Steel, etc., Co., 204 Pa. St. 604; Lehman v. Carbon Steel Co., 204 Pa. St. 612; Ehni v. National Tube Works Co., 203 Pa. St. 186, 93 Am. St. Rep. 761; Hall v. Simpson, 203 Pa. St. 146; Price v. Lehigh Valley R. Co., 202 Pa. St. 176; Alexander v. Pennsylvania Water Co., 201 Pa. St. 252; Hughes v. Leonard, 199 Pa. St. 123; McCarthy v. Shoneman, 198 Pa. St. 568; Spees v. Boggs, 198 Pa. St. 112, 82 Am. St. Rep. 792; Cunningham v. Ft. Pitt Bridge Works, 197 Pa. St. 625; Carnegie v. Penn Bridge Co., 197 Pa. St. 441; Purdy v. Westinghouse Electric, etc., Co., 197 Pa. St. 257, 80 Am. St. Rep. 876; O'Dowd v. Burnham, 19 Pa. Super. Ct. 464.

*Rhode Island.*—Smith v. Naushon Co., 26 R. I. 578; Paoline v. J. W. Bishop Co., 25 R. I. 298; Donohoe v. Lonsdale Co., 25 R. I. 187; Russell v. Riverside Worsteds Mills, 24 R. I.

**55. Proximate Cause of Injury.** — See note 2.

591: King v. Interstate Consol. R. Co., 23 R. I. 583.

*South Carolina.* — Willis v. Cherokee Falls Mfg. Co., 72 S. Car. 126; Charing v. Toxaway Mills, 70 S. Car. 470; Land v. Southern R. Co., 67 S. Car. 290.

*Texas.* — Harry Bros. Co. v. Brady, (Tex. Civ. App. 1905) 86 S. W. Rep. 615; Seery v. Gulf, etc., R. Co., 34 Tex. Civ. App. 89; Lancaster Cotton Oil Co. v. White, 32 Tex. Civ. App. 608; Jones v. Missouri, etc., R. Co., 32 Tex. Civ. App. 286; Rea v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 555; Brown v. Miller, (Tex. Civ. App. 1901) 62 S. W. Rep. 547; Hernischel v. Texas Drug Co., 26 Tex. Civ. App. 1; McNiff v. Texas Midland R. Co., 26 Tex. Civ. App. 558.

*Utah.* — Downey v. Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798.

*Virginia.* — Norfolk, etc., R. Co. v. Cromer, 101 Va. 667; Chesapeake, etc., R. Co. v. Sparrow, 98 Va. 630, 2 Va. Sup. Ct. 526; Norfolk, etc., R. Co. v. Mann, 99 Va. 180, 3 Va. Sup. Ct. 90.

*Washington.* — Hansen v. Seattle Lumber Co., 31 Wash. 604; Decker v. Stimson Mill Co., 31 Wash. 522; Goe v. Northern Pac. R. Co., 30 Wash. 654; Anderson v. Oregon R., etc., Co., 28 Wash. 467.

*West Virginia.* — Cochran v. Shanahan, 51 W. Va. 137.

*Canada.* — Dugal v. Peoples Bank, 34 N. Bruns. 581.

In order that it may be said that a case of actionable negligence has been made out, it must appear that the conditions and circumstances were such that the defendant ought to have foreseen that such an accident might happen, or, if such an accident could reasonably have been anticipated, that there was an omission to provide against it. Branco v. Illinois Cent. R. Co., 119 Iowa 211.

It has been held to be error to charge that, where an employer has agreed to furnish an employee a harness sufficiently strong to enable him to control a certain horse, the employer is thereby made an insurer of the quality of the harness furnished, and that he is not in the exercise of ordinary care unless he makes his assurance good. Robert Portner Brewing Co. v. Cooper, 116 Ga. 171.

**Unforeseen Accidents.** — See *infra*, cases supplementing page 132, note 3.

**Care Required in Employing Servants.** — When a master has exercised reasonable care to employ competent servants, his duty with respect to the employment of competent servants is discharged. Southern Pac. R. Co. v. Hetzer, (C. C. A.) 135 Fed. Rep. 272.

The diligence required of the master to learn the habits or characters of servants employed with due care is not of that degree demanded in his employment of servants or in his inspection of machinery, because careful and skilful men grow more careful and skilful, and the legal presumption is that servants once competent continue so. The master may rely upon the presumption of competency until he has notice or knowledge to the contrary.

Southern Pac. R. Co. v. Hetzer, (C. C. A.) 135 Fed. Rep. 272.

**55. 2. Proximate Cause of Injury** — *United States.* — Northern Pac. R. Co. v. Dixon, (C. C. A.) 139 Fed. Rep. 737.

*Arkansas.* — Walker v. Louis-Werner Sawmill Co., (Ark. 1905) 88 S. W. Rep. 988.

*Colorado.* — Denver, etc., R. Co. v. Scott, (Colo. 1905) 81 Pac. Rep. 763.

*Georgia.* — Western, etc., R. Co. v. Bryant, 123 Ga. 77.

*Illinois.* — Chicago Hair, etc., Co. v. Mueller, 203 Ill. 558, affirming 106 Ill. App. 21; Midendorf v. Schulze, 105 Ill. App. 221; Webster Mfg. Co. v. Goodrich, 104 Ill. App. 76.

*Indiana.* — South Bend Chilled Plow Co. v. Cissne, 35 Ind. App. 373; La Porte Carriage Co. v. Sullender, (Ind. 1905) 75 N. E. Rep. 277; Southern Indiana R. Co. v. Messick, 35 Ind. App. 676; Davis v. Mercer Lumber Co., 164 Ind. 413; Eureka Block Coal Co. v. Wells, 29 Ind. App. 1. See Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308.

*Iowa.* — Phinney v. Illinois Cent. R. Co., 122 Iowa 488; Dillon v. Iowa Cent. R. Co., 118 Iowa 645; Martin v. Chicago, etc., R. Co., 118 Iowa 148, 96 Am. St. Rep. 371.

*Kentucky.* — Louisville, etc., R. Co. v. Ewing, 117 Ky. 624; Cincinnati, etc., R. Co. v. Curd, (Ky. 1905) 89 S. W. Rep. 140.

*Louisiana.* — Williams v. Illinois Cent. R. Co., 114 La. 13; Ray v. Vicksturg, etc., R. Co., 113 La. 502; Neider v. Illinois Cent. R. Co., 108 La. 154.

*Maryland.* — Baltimore, etc., R. Co. v. State, 101 Md. 359; Maryland Clay Co. v. Goodnow, 95 Md. 330.

*Massachusetts.* — Fay v. Wilmarth, 183 Mass. 71.

*Michigan.* — Seccombe v. Detroit Electric R. Co., 133 Mich. 179, 10 Detroit Leg. N. 129.

*Minnesota.* — Griffin v. Minnesota Transfer R. Co., 94 Minn. 191; McKenna v. Chicago, etc., R. Co., 92 Minn. 508, judgment affirmed on rehearing 92 Minn. 513; Kohout v. Newinan, (Minn. 1905) 104 N. W. Rep. 764; Campbell v. Railway Transfer Co., (Minn. 1905) 104 N. W. Rep. 547; Hermann v. Clark, 89 Minn. 132; Truax v. Minneapolis, etc., R. Co., 89 Minn. 143.

*Missouri.* — Kelley v. Chicago, etc., R. Co., 105 Mo. App. 365; Anderson v. Forrester-Nace Box Co., 103 Mo. App. 382; Stagg v. Edward Western Tea, etc., Co., 169 Mo. 489; Lee v. Kansas City Gas Co., 91 Mo. App. 612. See Reed v. Missouri, etc., R. Co., 94 Mo. App. 371.

*Nebraska.* — Chicago, etc., R. Co. v. Healey, (Neb. 1904) 97 N. W. Rep. 1024.

*New York.* — Burnos v. American Sugar Refining Co., 107 N. Y. App. Div. 286; Nelson v. New York, 101 N. Y. App. Div. 18; Stenger v. Buffalo Union Furnace Co., 98 N. Y. App. Div. 361; Voegelé v. Bardusch, 98 N. Y. App. Div. 127; Grant v. National Railway Spring Co., 86 N. Y. App. Div. 593; Loushay v. Erie R. Co., 75 N. Y. App. Div. 619; O'Connell v. Thompson-Starrett Co., 72 N. Y. App. Div. 47; Stackpole v. Wray, 74 N. Y. App. Div. 310; Dolan v. Burden Iron Co., 62 N. Y. App. Div. 545.

**55. d. DUTY TO PROVIDE AND MAINTAIN REASONABLY SAFE PLACE FOR WORK — (1) Statement of Rule.** — See note 3.

*North Carolina.* — *Hendrix v. Cooleemee Cotton Mills*, 138 N. Car. 169; *Lindsay v. Norfolk, etc.*, R. Co., 132 N. Car. 59; *Marcus v. Loane*, 133 N. Car. 54.

*Ohio.* — *Erie R. Co. v. McCormick*, 69 Ohio St. 45; *Crawford v. New York, etc.*, R. Co., 23 Ohio Cir. Ct. 207; *Shailer, etc.*, *R. Co. v. Corcoran*, 11 Ohio Cir. Dec. 599, 21 Ohio Cir. Ct. 639; *Beucker v. Baker*, 11 Ohio Cir. Dec. 642, 21 Ohio Cir. Ct. 540.

*Oregon.* — *Robinson v. Taku Fishing Co.*, 42 Oregon 537.

*Pennsylvania.* — *Douglass v. New York Cent., etc.*, R. Co., 209 Pa. St. 128; *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. St. 573; *Tomaczewski v. Dobson*, 208 Pa. St. 324; *Fullmer v. New York Cent., etc.*, R. Co., 208 Pa. St. 598; *Butterman v. McClintic-Marshall Constr. Co.*, 206 Pa. St. 82; *Webster v. Monongahela River Consol. Coal, etc.*, Co., 201 Pa. St. 278.

*South Carolina.* — *Anderson v. Southern R. Co.*, 70 S. Car. 490; *Carson v. Southern R. Co.*, 68 S. Car. 55, judgment affirmed *Southern R. Co. v. Carson*, 194 U. S. 136; *Land v. Southern R. Co.*, 67 S. Car. 290.

*Texas.* — *Ray v. Pecos, etc.*, R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 466; *Gulf, etc.*, R. Co. *v. Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; *Vicars v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1904) 84 S. W. Rep. 286; *San Antonio, etc.*, R. Co. *v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *San Antonio, etc.*, R. Co. *v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Missouri, etc.*, R. Co. *v. Gearheart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 325; *Johnson v. Houston, etc.*, R. Co., 31 Tex. Civ. App. 532; *Hilje v. Hettich*, 95 Tex. 321, reversing (Tex. Civ. App. 1901) 65 S. W. Rep. 491; *International, etc.*, R. Co. *v. Newburn*, (Tex. Civ. App. 1900) 58 S. W. Rep. 542; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194; *Roe v. Thomason*, 25 Tex. Civ. App. 67.

*Utah.* — *Faulkner v. Mammoth Min. Co.*, 23 Utah 437.

*Virginia.* — *Gay v. Southern R. Co.*, 101 Va. 466; *Norfolk, etc.*, R. Co. *v. Cromer*, 99 Va. 763, 3 Va. Sup. Ct. 502; *Virginia Iron, etc.*, Co. *v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362; *Persinger v. Alleghany Ore. etc.*, Co., 102 Va. 350; *Norfolk, etc.*, R. Co. *v. Cromer*, 101 Va. 667.

*Washington.* — *Stratton v. C. H. Nichols Lumber Co.*, 39 Wash. 323; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654.

*Wisconsin.* — *Yess v. Chicago Brass Co.*, 124 Wis. 406; *Pautz v. Plankinton Packing Co.*, 118 Wis. 47; *Nix v. C. Reiss Coal Co.*, 114 Wis. 493; *Cosgrove v. Filer, etc.*, Co., 112 Wis. 457; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57.

When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. *Craig v. Laffin, etc.*, *Powder Co.*, 55 N. Y. App. Div. 49.

Where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. *Norfolk, etc.*, R. Co. *v. Poole*, 100 Va. 148, 4 Va. Sup. Ct. 42.

**55. 3. Duty to Provide Safe Place of Work — Liability of Master — United States.** — *The Westport*, 131 Fed. Rep. 815; *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311; *Western Electric Co. v. Hanselmann*, (C. C. A.) 136 Fed. Rep. 564; *Pittsburgh, etc.*, R. Co. *v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Florence, etc.*, R. Co. *v. Whipps*, (C. C. A.) 138 Fed. Rep. 13; *National Biscuit Co. v. Nolan*, (C. C. A.) 138 Fed. Rep. 6; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312; *Tracy v. Western Union Tel. Co.*, 110 Fed. Rep. 103; *In re California Nav., etc.*, Co., 110 Fed. Rep. 670; *Beattie v. Edge Moor Bridge Works*, 109 Fed. Rep. 233; *Lafayette Bridge Co. v. Olsen*, (C. C. A.) 108 Fed. Rep. 335; *Ellis v. Northern Pac. R. Co.*, 103 Fed. Rep. 416. *Compare Dwyer v. Nixon*, 108 Fed. Rep. 751, 47 C. C. A. 666.

*California.* — *Davis v. Diamond Carriage, etc.*, Co., 146 Cal. 59; *Thompson v. California Constr. Co.*, (Cal. 1905) 82 Pac. Rep. 367; *McRae v. Erickson*, (Cal. 1905) 82 Pac. Rep. 209.

*Colorado.* — *Roche v. Denver, etc.*, R. Co., 19 Colo. App. 204.

*Delaware.* — *Szymanski v. Blumenthal*, 4 Penn. (Del.) 511; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Winkler v. Philadelphia, etc.*, R. Co., 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*Georgia.* — *Jackson v. Merchants, etc.*, *Transp. Co.*, 118 Ga. 651; *Chenall v. Palmer Brick Co.*, 117 Ga. 106.

*Illinois.* — *Hansell Elcock Foundry Co. v. Clark*, 214 Ill. 399; *Illinois Steel Co. v. Olste*, 214 Ill. 181; *Baier v. Selke*, 211 Ill. 512; *Mobile, etc.*, R. Co. *v. Vallowe*, 214 Ill. 124, affirming 115 Ill. App. 621; *Rock Island Sash, etc.*, *Works v. Pohlman*, 210 Ill. 133, affirming 99 Ill. App. 670; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, affirming judgment 112 Ill. App. 463; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, affirming 106 Ill. App. 30; *Armour v. Golkowska*, 203 Ill. 144, affirming 95 Ill. App. 492, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55; *Morris v. Malone*, 200 Ill. 132, 93 Am. St. Rep. 180; *D. Sinclair Co. v. Waddill*, 200 Ill. 17, affirming 99 Ill. App. 334; *Himrod Coal Co. v. Clark*, 197 Ill. 514, affirming 99 Ill. App. 332; *Street's Western Stable Car Line v. Bonander*, 196 Ill. 15, affirming 97 Ill. App. 601; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, affirming 96 Ill. App. 288; *Ide v. Fratcher*, 194 Ill. 552, affirming 96 Ill. App. 549; *McBeath v. Rawle*,

192 Ill. 626, *affirming* 93 Ill. App. 212; William Graver Tank Works *v.* O'Donnell, 191 Ill. 236, *affirming* 91 Ill. App. 524; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55, *affirmed* 207 Ill. 576; Pioneer Fireproof Constr. Co. *v.* Howell, 189 Ill. 123; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Whalen *v.* Utica Hydraulic Cement Co., 103 Ill. App. 149; Frost Mfg. Co. *v.* Smith, 98 Ill. App. 308, *affirmed* 197 Ill. 253; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; McLean County Coal Co. *v.* Simpson, 97 Ill. App. 21, *affirmed* 196 Ill. 258; Knickerbocker Ice Co. *v.* Bernhardt, 95 Ill. App. 23; Decatur Cereal Mill Co. *v.* Boland, 95 Ill. App. 601; McFadden *v.* Sollitt, 94 Ill. App. 271; Western Tube Co. *v.* Polobinski, 94 Ill. App. 640, *affirmed* 192 Ill. 113.

*Indiana.*—Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016; Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393; Diamond Block Coal Co. *v.* Cuthbertson, (Ind. 1905) 73 N. E. Rep. 818; Dill *v.* Marmon, (Ind. App. 1904) 71 N. E. Rep. 669; Chicago, etc., R. Co. *v.* Wicker, (Ind. App. 1904) 71 N. E. Rep. 223, *judgment reversed* on rehearing 34 Ind. App. 215; La Porte Carriage Co. *v.* Sullender, (Ind. App. 1904) 71 N. E. Rep. 922; Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541; Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308; Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1; Southern Indiana R. Co. *v.* Moore, 29 Ind. App. 52.

*Iowa.*—Hughes *v.* Iowa Cent. R. Co., (Iowa 1905) 103 N. W. Rep. 339; Calloway *v.* Agar Packing Co., (Iowa 1905) 104 N. W. Rep. 721; Barto *v.* Iowa Telephone Co., 126 Iowa 241, 106 Am. St. Rep. 347; Lanza *v.* Le Grand Quarry Co., 124 Iowa 659; Shebeck *v.* National Cracker Co., 120 Iowa 414; Lanza *v.* Le Grand Quarry Co., 115 Iowa 299; Forbes *v.* Boone Valley Coal, etc., Co., 113 Iowa 94.

*Kansas.*—Cudahy Packing Co. *v.* Sedlack, 69 Kan. 472; Schwarzschild *v.* Drysdale, 69 Kan. 119; Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436; Good-eye Min. Co. *v.* Robinson, 67 Kan. 510; Schmalstieg *v.* Leavenworth Coal Co., 65 Kan. 753.

*Kentucky.*—Straight Creek Coal Co. *v.* Haney, 87 S. W. Rep. 1114, 27 Ky. L. Rep. 1117; Paducah R., etc., Co. *v.* Bell, (Ky. 1905) 85 S. W. Rep. 216; Wilson *v.* Alpine Coal Co., 118 Ky. 463; Kentucky Freestone Co. *v.* McGee, 118 Ky. 306; Harp *v.* Cumberland Telephone, etc., Co., 80 S. W. Rep. 510, 25 Ky. L. Rep. 2133; Logsdon *v.* Western Brick Co., 79 S. W. Rep. 290, 25 Ky. L. Rep. 2060; Wilson *v.* Chess, etc., Co., 117 Ky. 567; Pfisterer *v.* Peter, 117 Ky. 501, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55; Monongahela River Consol. Coal, etc., Co. *v.* Campbell, 78 S. W. Rep. 405, 25 Ky. L. Rep. 1599; Shanks *v.* Citizens' Gen. Electric Co., 76 S. W. Rep. 379, 25 Ky. L. Rep. 811; Henderson Tobacco Extracts Works *v.* Wheeler, 116 Ky. 322; St. Bernard Coal Co. *v.* Southard, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638; Angel *v.* Jellico Coal Min. Co., 115 Ky. 728; Tradewater Coal Co. *v.* Johnson, 72 S. W. Rep. 274, 24 Ky. L. Rep.

1777; Adams Express Co. *v.* Smith, 72 S. W. Rep. 752, 24 Ky. L. Rep. 1915; Reliance Textile, etc., Works *v.* Martin, 65 S. W. Rep. 809, 23 Ky. L. Rep. 1625; Koltinsky *v.* Wood, 112 Ky. 372.

*Louisiana.*—Fuller *v.* Tremont Lumber Co., 114 La. 266.

*Maine.*—Erickson *v.* Monson Consol. Slate Co., 100 Me. 107; Snowdale *v.* United Box Board, etc., Co., (Me. 1905) 61 Atl. Rep. 683; Caven *v.* Bodwell Granite Co., 99 Me. 278; Stewart *v.* International Paper Co., 96 Me. 30. See Bowden *v.* Derby, 97 Me. 536, 94 Am. St. Rep. 516.

*Maryland.*—Philadelphia, etc., R. Co. *v.* Devers, 101 Md. 341; Brager *v.* Austin, 99 Md. 473; Skinner *v.* McLaughlin, 94 Md. 524; Hearn *v.* Quillen, 94 Md. 39.

*Massachusetts.*—Dawson *v.* Lawrence Gas Light Co., 188 Mass. 481; Kirk *v.* Sturdy, 187 Mass. 87; Foster *v.* New York, etc., R. Co., 187 Mass. 21; Chisholm *v.* New England Telephone, etc., Co., 185 Mass. 82; Bartolomeo *v.* McKnight, 178 Mass. 242.

*Michigan.*—McDonald *v.* Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; McDonald *v.* Michigan Cent. R. Co., 132 Mich. 372, 102 Am. St. Rep. 426, 9 Detroit Leg. N. 700; Hayes *v.* Stearns, 130 Mich. 287, 9 Detroit Leg. N. 15; Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 8 Detroit Leg. N. 527; Wellihan *v.* National Wheel Co., 128 Mich. 1, 8 Detroit Leg. N. 487.

*Minnesota.*—Carlson *v.* Haglin, (Minn. 1905) 104 N. W. Rep. 297; Kohout *v.* Newman, (Minn. 1905) 104 N. W. Rep. 764; Merrill *v.* Pike, 94 Minn. 186; Dieters *v.* St. Paul Gaslight Co., 86 Minn. 474; Ready *v.* Peavy Elevator Co., 89 Minn. 154; Namyst *v.* Batz, 85 Minn. 366.

*Missouri.*—Fouts *v.* Swift, 113 Mo. App. 526; Zeigenmeyer *v.* Charles Goetz Lime, etc., Co., 113 Mo. App. 330, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55; Gibson *v.* Midland Bridge Co., 112 Mo. App. 594; Purcell *v.* Tennent Shoe Co., 187 Mo. 276; Briner *v.* Chicago, etc., R. Co., (Mo. App. 1905) 85 S. W. Rep. 653; Mathis *v.* Kansas City Stock-Yards Co., 185 Mo. 434; Livengood *v.* Joplin-Galena Consol. Lead, etc., Co., 179 Mo. 229; Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427; Harff *v.* Green, 168 Mo. 308; Minnier *v.* Sedalia, etc., R. Co., 167 Mo. 99; Wendler *v.* People's House Furnishing Co., 165 Mo. 527; Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 85 Am. St. Rep. 539; Shore *v.* American Bridge Co., 111 Mo. App. 278; Neves *v.* Green, 111 Mo. App. 634; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110; Nash *v.* Kansas City Hydraulic Press Brick Co., 109 Mo. App. 600; Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265; Stumbo *v.* Duluth Zinc Co., 100 Mo. App. 635; Wendall *v.* Chicago, etc., R. Co., 100 Mo. App. 556; Sinberg *v.* Falk Co., 98 Mo. App. 546; Cothron *v.* Cudahy Packing Co., 98 Mo. App. 343; Borden *v.* Falk Co., 97 Mo. App. 566; Prophet *v.* Kemper, 95 Mo. App. 219; Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107; Knight *v.* Sadtler Lead, etc., Co., 91 Mo. App. 574; Lee *v.* St. Louis, etc., R. Co., 112 Mo. App. 372; Scott *v.* Springfield, 81 Mo. App. 312; Carter *v.*

Baldwin, 107 Mo. App. 217; Browning v. Kasten, 107 Mo. App. 59; Kelley v. Chicago, etc., R. Co., 105 Mo. App. 365; Rogers v. Meyer-son Printing Co., 103 Mo. App. 683; Harrington v. Wabash R. Co., 104 Mo. App. 663; Hunt v. Desloge Consol. Lead Co., 104 Mo. App. 377; Glasscock v. Swofford Bros. Dry Goods Co., (Mo. App. 1903) 74 S. W. Rep. 1039.

*Montana.*—Shaw v. New Year Gold Mines Co., 31 Mont. 138; McCabe v. Montana Cent. R. Co., 30 Mont. 323.

*Nebraska.*—New Omaha Thompson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 71.

*New Hampshire.*—Wallace v. Boston, etc., R. Co., 72 N. H. 504; Thompson v. Bartlett, 71 N. H. 174, 93 Am. St. Rep. 504; Story v. Concord, etc., R. Co., 70 N. H. 364.

*New Jersey.*—Kalker v. Hedden, (N. J. 1905) 61 Atl. Rep. 395; D'Agostino v. Pennsylvania R. Co., (N. J. 1905) 60 Atl. Rep. 1113; Burns v. Delaware, etc., Tel., etc., Co., 70 N. J. L. 745; Albanese v. Central R. Co., 70 N. J. L. 241; Meany v. Standard Oil Co., (N. J. 1903) 55 Atl. Rep. 653; Smith v. Erie R. Co., 67 N. J. L. 636.

*New York.*—Bateman v. New York Cent. etc., R. Co., 178 N. Y. 84, reversing 67 N. Y. App. Div. 241; Simone v. Kirk, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; McGuire v. Bell Telephone Co., 167 N. Y. 208, affirming (Supm. Ct. App. Div.) 66 N. Y. Supp. 1137; Finn v. Cassidy, 165 N. Y. 584, affirming (Supm. Ct. App. Div.) 57 N. Y. Supp. 1138; Eastland v. Clarke, 165 N. Y. 420, reversing 28 N. Y. App. Div. 621; Corrigan v. Oceanic Steam Nav. Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 368; Irish v. Union Bag, etc., Co., 103 N. Y. App. Div. 45; Stenger v. Buffalo Union Furnace Co., 98 N. Y. App. Div. 361; Diamond v. Planet Mills Mfg. Co., 97 N. Y. App. Div. 43; Schermerhorn v. Glens Falls Portland Cement Co., 94 N. Y. App. Div. 600; Nelson v. Young, 91 N. Y. App. Div. 457, affirmed 180 N. Y. 523; Franck v. American Tartar Co., 91 N. Y. App. Div. 571; Ryan v. Third Ave. R. Co., 92 N. Y. App. Div. 306; Wood v. New York Cent., etc., R. Co., 93 N. Y. App. Div. 53; Leaux v. New York, 87 N. Y. App. Div. 405; Wolf v. Devitt, 83 N. Y. App. Div. 42, affirmed without opinion 179 N. Y. 569; Carena v. Zanmatti, 82 N. Y. App. Div. 11; Duggan v. Phelps, 82 N. Y. App. Div. 509; Hoelter v. McDonald, 82 N. Y. App. Div. 423; Walsh v. New York, etc., R. Co., 80 N. Y. App. Div. 316, affirmed without opinion 178 N. Y. 588; Devaney v. Degnon-McLean Constr. Co., 79 N. Y. App. Div. 62, affirmed without opinion 178 N. Y. 620; Ward v. Naughton, 74 N. Y. App. Div. 68; O'Connell v. Thompson-Starrett Co., 72 N. Y. App. Div. 47; True v. Niagara Gorge R. Co., 70 N. Y. App. Div. 385, affirmed without opinion 175 N. Y. 487; Eichholz v. Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, affirmed without opinion 174 N. Y. 519; Dyer v. Brown, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616; Witkowski v. George W. Carter, etc., Co., 60 N. Y. App. Div. 577; Meeker v. C. R. Remington, etc., Co., 62 N. Y. App. Div. 472; Dorney v. O'Neill, 60 N. Y. App. Div. 19, affirmed without opinion 172 N. Y. 595; Kiras v. Nichols Chemical Co., 59 N.

Y. App. Div. 79; Pilkey v. Harrower, 59 N. Y. App. Div. 378; Wiedeman v. Everard, 56 N. Y. App. Div. 358, appeal dismissed without opinion 166 N. Y. 598; Pursley v. Edge Moor Bridge Works, 56 N. Y. App. Div. 71, affirmed without opinion 168 N. Y. 589; Hoes v. Ocean Steamship Co., 56 N. Y. App. Div. 259, affirmed without opinion 170 N. Y. 581; Hatton v. Hilton Bridge Constr. Co., 42 N. Y. App. Div. 398, affirmed without opinion 167 N. Y. 590; Tully v. New York, etc., Steamship Co., 10 N. Y. App. Div. 463, affirmed without opinion 162 N. Y. 614; Cavanagh v. O'Neill, 27 N. Y. App. Div. 48, affirmed without opinion 161 N. Y. 657. See Riola v. New York Cent., etc., R. Co., 97 N. Y. App. Div. 252.

*North Carolina.*—Hicks v. Naomi Falls Mfg. Co., 138 N. Car. 319; Hedrick v. Southern R. Co., 136 N. Car. 510; Dorsett v. Clement Ross Mfg. Co., 131 N. Car. 254; McCord v. Southern R. Co., 138 N. Car. 491; McDougald v. Lumberton, 129 N. Car. 200; Myers v. Concord Lumber Co., 129 N. Car. 252.

*Ohio.*—Davis v. Turner, 69 Ohio St. 101; Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547; Green v. New York, etc., R. Co., 26 Ohio Cir. Ct. 609; Kracht v. Lake Shore, etc., R. Co., 25 Ohio Cir. Ct. 521; New York, etc., R. Co. v. Roe, 25 Ohio Cir. Ct. 628; Forlich v. Cranker, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Oregon.*—Busch v. Robinson, (Oregon 1905) 81 Pac. Rep. 237; Sorenson v. Oregon Power Co., (Oregon 1905) 82 Pac. Rep. 10; Mundhenke v. Oregon City Mfg. Co., (Oregon 1905) 81 Pac. Rep. 977; Geldard v. Marshall, 43 Oregon 438; Miller v. Inman, 40 Oregon 161; Robinson v. Taku Fishing Co., 42 Oregon 537; Hough v. Grants Pass Power Co., 41 Oregon 531; Johnson v. Portland Stone Co., 40 Oregon 436.

*Pennsylvania.*—Schiglizza v. Dunn, 211 Pa. St. 253, 107 Am. St. Rep. 549; Buttermann v. McClintic-Marshall Constr. Co., 206 Pa. St. 82; Williams v. Clark, 204 Pa. St. 416; Surles v. Kistler, 202 Pa. St. 289; McCarthy v. Shoneman, 198 Pa. St. 568; Garrity v. Pennsylvania Casting, etc., Co., 17 Pa. Super. Ct. 623; Conley v. Lincoln Foundry Co., 14 Pa. Super. Ct. 626. See Baldwin v. Urner, 206 Pa. St. 459.

*Rhode Island.*—McLaughlin v. Atlantic Mills, 27 R. I. 158; Vartanian v. New York, etc., R. Co., 25 R. I. 398; Collins v. Harrison, 25 R. I. 489; Carll v. Interstate Consol. R. Co., 23 R. I. 592; Benson v. New York, etc., Co., 23 R. I. 147; Flynn v. Shaw, 22 R. I. 328; McGar v. National, etc., Worsteds Mills, 22 R. I. 317. See King v. Interstate Consol. St. R. Co., 23 R. I. 583.

*South Carolina.*—Willis v. Cherokee Falls Mfg. Co., 72 S. Car. 126; Biggers v. Catawba Power Co., 72 S. Car. 264; Sanders v. Aiken Mfg. Co., 71 S. Car. 58.

*Tennessee.*—Freeman v. Illinois Cent. R. Co., 107 Tenn. 340; Louisville, etc., R. Co. v. Jackson, 106 Tenn. 438.

*Texas.*—Proffitt v. Missouri, etc., R. Co., 95 Tex. 503; Missouri, etc., R. Co. v. Kellerman, (Tex. Civ. App. 1905) 87 S. W. Rep. 401; Cane

Belt R. Co. *v.* Crosson, (Tex. Civ. App. 1905) 87 S. W. Rep. 867; Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; Texas Cent. R. Co. *v.* Phillips, (Tex. Civ. App. 1905) 87 S. W. Rep. 187; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; Austin *v.* Forbis, (Tex. Civ. App. 1905) 86 S. W. Rep. 29; Texas, etc., R. Co. *v.* Hemphill, (Tex. Civ. App. 1905) 86 S. W. Rep. 350; San Antonio Foundry Co. *v.* Drish, (Tex. Civ. App. 1905) 85 S. W. Rep. 440; Missouri, etc., R. Co. *v.* Keefe, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; Galveston, etc., R. Co. *v.* Manns, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; International, etc., R. Co. *v.* Jacobs, (Tex. Civ. App. 1904) 84 S. W. Rep. 288; Hightower *v.* Gray, 36 Tex. Civ. App. 674; San Antonio, etc., R. Co. *v.* Stevens, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; Missouri, etc., R. Co. *v.* Baker, 35 Tex. Civ. App. 542; Consumers Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18; Galveston, etc., R. Co. *v.* Butshek, 34 Tex. Civ. App. 194; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319; Galveston, etc., R. Co. *v.* Walker, (Tex. Civ. App. 1903) 76 S. W. Rep. 228; Missouri, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; General Electric Co. *v.* Murray, 32 Tex. Civ. App. 226; Rea *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 555; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425; Galveston, etc., R. Co. *v.* Jenkins, 29 Tex. Civ. App. 440; Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194; Dupree *v.* Tamborilla, 27 Tex. Civ. App. 603; Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283; Burns *v.* Merchants, etc., Oil Co., 26 Tex. Civ. App. 223; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. Rep. 769; Galveston, etc., R. Co. *v.* English, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

*Utah.* — Merrill *v.* Oregon Short Line R. Co., 20 Utah 264; Roth *v.* Eccles, (Utah 1905) 79 Pac. Rep. 918; Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534; Christenson *v.* Rio Grande Western R. Co., 27 Utah 132, 101 Am. St. Rep. 945; Braegger *v.* Oregon Short Line R. Co., 24 Utah 391; Downey *v.* Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798; Palmquist *v.* Mine, etc., Supply Co., 25 Utah 257; Hill *v.* Southern Pac. R. Co., 23 Utah 94.

*Vermont.* — Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232.

*Virginia.* — Pocahontas Collieries Co. *v.* Rukas, (Va. 1905) 51 S. E. Rep. 449; Black *v.* Virginia Portland Cement Co., (Va. 1905) 51 S. E. Rep. 831; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356; Virginia Portland Cement Co. *v.* Luck, 103 Va. 427; Chesapeake, etc., R. Co. *v.* Pierce, 103 Va. 99; Southern R. Co. *v.* Oliver, 102 Va. 710; Parlett *v.* Dunn, 102 Va. 459; Persinger *v.* Allegheny Ore., etc., Co., 102 Va. 350; Atlantic, etc., R. Co. *v.* West, 101 Va. 13.

*Washington.* — Hall *v.* West, etc., Mill Co., 30 Wash. 447; Miller *v.* Moran Bros. Co., 39 Wash. 631; Smith *v.* Hecla Min. Co., 38 Wash. 454; Dean *v.* Oregon R., etc., Co., 38 Wash. 565; Gaudie *v.* Northern Lumber Co., 34

Wash. 34; Wilson *v.* Northern Pac. R. Co., 31 Wash. 67; Myrberg *v.* Baltimore, etc., Min., etc., Co., 25 Wash. 364; McDonald *v.* Svenson, 25 Wash. 441; Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119; Metzler *v.* McKenzie, 34 Wash. 470; Steeples *v.* Panel, etc., Co., 33 Wash. 359; McMillan *v.* North Star Min. Co., 32 Wash. 579, 98 Am. St. Rep. 908; Decker *v.* Stimson Mill Co., 31 Wash. 522; Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467; Goe *v.* Northern Pac. R. Co., 30 Wash. 654; Morton *v.* Moran Bros. Co., 30 Wash. 362; Green *v.* Western American Co., 30 Wash. 87; Costa *v.* Pacific Coast Co., 26 Wash. 138. See Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501.

*West Virginia.* — Purkey *v.* Southern Coal, etc., Co., 57 W. Va. 595; Fulton *v.* Crosby, etc., Co., 57 W. Va. 91; Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84; Giebell *v.* Collins Co., 54 W. Va. 518.

*Wisconsin.* — Mueller *v.* Northwestern Iron Co., 125 Wis. 326; Williams *v.* North Wisconsin Lumber Co., 124 Wis. 328; Baumann *v.* C. Reiss Coal Co., 118 Wis. 330; Nix *v.* C. Reiss Coal Co., 114 Wis. 493; Groth *v.* Thomann, 110 Wis. 488.

**Duty as to Telegraph Poles.** — It has been held that it was the duty of a railroad company to equip its telegraph system in the first instance in such a manner that the poles would furnish a reasonably safe place for its employees to work upon in stringing, repairing, altering, or removing the wires. Riker *v.* New York, etc., R. Co., 64 N. Y. App. Div. 357.

**Degree of Care.** — The obligation of the master as to furnishing the employee a safe place to work is discharged by the exercise of reasonable care. Fuller *v.* Ann Arbor R. Co., (Mich. 1905) 104 N. W. Rep. 414, 12 Detroit Leg. N. 348.

On the ground that it is the duty of the master to use ordinary care only in providing a reasonably safe place for his servant to work, and to use in going to and from his work, it was held to be error to instruct the jury, in an action by a servant against his master to recover for personal injuries, that it was the absolute duty of the defendant to afford the plaintiff a reasonably safe passageway to and from his work. Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568.

In a case in which the jury were told that it was the duty of the defendant to provide a safe place for the plaintiff to work in, and if, in this respect, there was negligence, plaintiff was entitled to recover, it was held that the instruction was erroneous in that the duty of the defendant was said to be to provide an absolutely, and not a reasonably, safe place in which to work. Greeley *v.* Foster, 32 Colo. 292.

In an action in which it was admitted that the work place was dangerous, it was held that the defendant was not injured by an instruction that "it is the duty of the employer to furnish a suitable and safe place for his employees to work," although the true rule is that the place must be reasonably suitable and safe. Grijalva *v.* Southern Pac. Co., 137 Cal. 569.

**57.** See notes 1, 2, 3, 4.

**Proximate Cause of Injury.**—To render a master liable for injuries sustained by servants through his negligence in failing to provide and maintain a safe place to work, the negligence of the master must have been the proximate cause of the injuries. *In re Michigan Steamship Co.*, 133 Fed. Rep. 577.

**57. 1. Duty to Maintain Place in Safe Condition.**—*In re Michigan Steamship Co.*, 133 Fed. Rep. 577; *Union Traction Co. v. Buckland*, 34 Ind. App. 420; *Pfisterer v. Peter*, 117 Ky. 501, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 56 and 57; *Jensen v. Commodore Min. Co.*, 94 Minn. 53; *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474; *Louisville, etc., R. Co. v. Jackson*, 106 Tenn. 438; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254.

**2. Care Required Commensurate with Character of Service.**—*Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *Armour v. Golkowska*, 202 Ill. 144, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57, affirming 95 Ill. App. 492; *Barto v. Iowa Telephone Co.*, 126 Iowa 241, 106 Am. St. Rep. 347; *Reilly v. Troy Brick Co.*, 108 N. Y. App. Div. 108.

The duty to exercise care to provide a safe place to work is always to be considered in view of the character of work to be performed and the ordinary hazards of the employment. *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596, affirming 207 Ill. 576.

**3. Negligence of Master Not an Assumed Risk.**—*Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818; *Pfisterer v. Peter*, 117 Ky. 501, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57. See *infra*, this title, the cases supplementing page 123, note 1.

**4. Servant May Assume that Master Has Performed Duty**—*United States*.—*Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813. *Compare Florence, etc., R. Co. v. Whippis*, (C. C. A.) 138 Fed. Rep. 13.

**Alabama.**—*Northern Alabama R. Co. v. Shea*, 142 Ala. 119; *Western R. Co. v. Russell*, (Ala. 1905) 39 So. Rep. 311; *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; *Osborne v. Alabama Steel, etc., Co.*, 135 Ala. 571.

**California.**—*Davis v. Diamond Carriage, etc., Co.*, 146 Cal. 59.

**Illinois.**—*Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, affirming 115 Ill. App. 209; *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Allen B. Wisley Co. v. Burke*, 203 Ill. 250, affirming 106 Ill. App. 30; *Armour v. Golkowska*, 202 Ill. 144, affirming 95 Ill. App. 492; *Himrod Coal Co. v. Clark*, 197 Ill. 514, affirming 99 Ill. App. 332; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, affirming 96 Ill. App. 288; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319; *Wells v. Bourdages*, 193 Ill. 328; *Chicago, etc., R. Co. v. Kinnare*, 190 Ill. 9, affirming 91 Ill. App. 508; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, affirming 112 Ill. App. 463; *Barnett, etc., Co. v. Schlafka*, 208 Ill. 426, affirming 110 Ill. App. 672; *Cichowicz v. International Packing Co.*, 206 Ill. 346, affirming 107 Ill. App. 234; *Momence Stone Co. v. Turrell*, 205 Ill. 515; *Chicago, etc., R. Co. v. Kinnare*, 115 Ill. App. 132; *Pressed Steel Car Co.*

*v. Herath*, 110 Ill. App. 596, affirming 207 Ill. 576; *Chicago, etc., R. Co. v. Huff*, 104 Ill. App. 594; *Whalen v. Utica Hydraulic Cement Co.*, 103 Ill. App. 149; *Chicago, etc., R. Co. v. Vi-pond*, 101 Ill. App. 607; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, affirming 197 Ill. 186; *Hass v. Chicago, etc., R. Co.*, 97 Ill. App. 624; *McLean County Coal Co. v. Simpson*, 97 Ill. App. 21, affirming 196 Ill. 258; *Chicago, etc., R. Co. v. Cleveland*, 92 Ill. App. 308; *La Salle v. Kostka*, 92 Ill. App. 91, affirming 190 Ill. 130; *Alabaster Co. v. Lonergan*, 90 Ill. App. 353. *But compare Erie, etc., Transp. Co. v. Gaines*, 112 Ill. App. 189.

**Indiana.**—*Southern R. Co. v. Sittasen*, (Ind. App. 1905) 74 N. E. Rep. 898; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818, (Ind. App. 1903) 67 N. E. Rep. 558; *Baltimore, etc., R. Co. v. Roberts*, 161 Ind. 1; *Chicago, etc., R. Co. v. Martin*, 31 Ind. App. 308; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480.

**Iowa.**—*Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Calloway v. Agar Packing Co.*, (Iowa 1905) 104 N. W. Rep. 721; *Hamilton v. Mendota Coal, etc., Co.*, 120 Iowa 147; *Gorham v. Sioux City Stock Yards Co.*, 118 Iowa 749.

**Kansas.**—*Schwarzschild v. Drysdale*, 69 Kan. 119; *Hoffmeier v. Kansas City-Leavenworth R. Co.*, 68 Kan. 831; *Emporia v. Kowalski*, 66 Kan. 64.

**Kentucky.**—*Louisville, etc., R. Co. v. Poulter*, 84 S. W. Rep. 576, 27 Ky. L. Rep. 193; *Wilson v. Alpine Coal Co.*, 118 Ky. 463; *Kentucky Freestone Co. v. McGee*, 118 Ky. 306; *Harp v. Cumberland Telephone, etc., Co.*, 80 S. W. Rep. 510, 25 Ky. L. Rep. 2133; *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; *Pfisterer v. Peter*, 117 Ky. 501, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57; *St. Bernard Coal Co. v. Southard*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638; *Henderson Tobacco Extracts Works v. Wheeler*, 116 Ky. 322; *Adams Express Co. v. Smith*, 72 S. W. Rep. 752, 24 Ky. L. Rep. 1915; *Tradewater Coal Co. v. Johnson*, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777.

**Louisiana.**—*Hailey v. Texas, etc., R. Co.*, 113 La. 533.

**Maine.**—*Caven v. Bodwell Granite Co.*, 99 Me. 278.

**Massachusetts.**—*Edgar v. New York, etc., R. Co.*, 188 Mass. 420; *Bartolomeo v. McKnight*, 178 Mass. 242.

**Michigan.**—*Clark v. Wolverine Portland Cement Co.*, 138 Mich. 673, 11 Detroit Leg. N. 723; *Hayes v. Stearns*, 130 Mich. 287, 9 Detroit Leg. N. 15.

**Minnesota.**—*Merrill v. Pike*, 94 Minn. 186; *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474.

**Missouri.**—*Browning v. Kasten*, 107 Mo. App. 59.

**Montana.**—*McCabe v. Montana Cent. R. Co.*, 30 Mont. 323.

**New Hampshire.**—*Thompson v. Bartlett*, 71 N. H. 174, 93 Am. St. Rep. 504.

**New Jersey.**—*Smith v. Erie R. Co.*, 67 N. J. L. 636.



**57. If the Place Is Unsafe Because of the Nature of the Work. — See note 5.**

*New York.* — *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; *Eastland v. Clarke*, 165 N. Y. 420, reversing 28 N. Y. App. Div. 621; *Walsh v. New York, etc., R. Co.*, 80 N. Y. App. Div. 316, affirmed without opinion 178 N. Y. 588; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, affirmed without opinion 174 N. Y. 519; *Wiedeman v. Everard*, 56 N. Y. App. Div. 358, appeal dismissed without opinion 166 N. Y. 598.

*North Carolina.* — *Wilkie v. Raleigh, etc., R. Co.*, 127 N. Car. 203.

*Ohio.* — *Davis v. Turner*, 69 Ohio St. 101; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547; *Strabler v. Toledo Bridge Co.*, 11 Ohio Cir. Dec. 87. See *New York, etc., R. Co. v. Roe*, 25 Ohio Cir. Ct. 628.

*Oregon.* — *Miller v. Inman*, 40 Oregon 161.

*Tennessee.* — *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340.

*Texas.* — *Missouri, etc., R. Co. v. Kellerman*, (Tex. Civ. App. 1905) 87 S. W. Rep. 401; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, affirmed 98 Tex. 123; *Galveston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 589; *International, etc., R. Co. v. Moynahan*, 33 Tex. Civ. App. 302; *Galveston, etc., R. Co. v. Mortson*, 31 Tex. Civ. App. 142; *Dupree v. Alexander*, 29 Tex. Civ. App. 31; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 769; *Galveston, etc., R. Co. v. Butchek*, (Tex. Civ. App. 1901) 66 S. W. Rep. 335; *Gulf, etc., R. Co. v. Moore*, 28 Tex. Civ. App. 603; *Dupree v. Tamborilla*, 27 Tex. Civ. App. 603; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44; *Texas, etc., R. Co. v. McClane*, 24 Tex. Civ. App. 321.

*Utah.* — *Leach v. Oregon Short Line R. Co.*, 29 Utah 285; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; *Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299.

*Washington.* — *McDonald v. Svenson*, 25 Wash. 441. Compare *Smith v. Hecla Min. Co.*, 38 Wash. 454.

*West Virginia.* — *Purkey v. Southern Coal, etc., Co.*, 57 W. Va. 595.

*Wisconsin.* — Compare *Hencke v. Ellis*, 110 Wis. 32.

See *infra*, the cases supplementing page 90, note 7, and page 124, note 1.

**57. 5. Work of Such Character as to Render Place Dangerous.** — *United States.* — *Fortin v. Manville Co.*, 128 Fed. Rep. 642; *Florence, etc., R. Co. v. Whipps*, (C. C. A.) 138 Fed. Rep. 13; *Davis v. Trade Dollar Consol. Min. Co.*, (C. C. A.) 117 Fed. Rep. 122; *Moon-Anchor Consol. Gold Mines v. Hopkins*, (C. C. A.) 111 Fed. Rep. 298. See *Swensen v. Bender*, (C. C. A.) 114 Fed. Rep. 1; *Roytlo v. Litchfield*, (C. C. A.) 113 Fed. Rep. 240. Compare *Ellis v. Northern Pac. R. Co.*, 103 Fed. Rep. 416.

*Arkansas.* — *Grayson-McLeod Lumber Co. v. Carter*, (Ark. 1905) 88 S. W. Rep. 597.

*California.* — *Turner v. Southern Pac. Co.*, 142 Cal. 580; *Thompson v. California Constr. Co.*, (Cal. 1905) 82 Pac. Rep. 367.

*Colorado.* — *Poorman Silver Mines v. Devling*, (Colo. 1905) 81 Pac. Rep. 252.

*Illinois.* — *Mattson v. Qualey Constr. Co.*, 90 Ill. App. 260. See *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, affirming 99 Ill. App. 670. Compare *Barnett, etc., Co. v. Schlappa*, 208 Ill. 426, affirming 110 Ill. App. 672; *Momence Stone Co. v. Turrell*, 205 Ill. 515; *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, affirming 91 Ill. App. 15.

*Kentucky.* — *Pfisterer v. Peter*, 117 Ky. 501, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

*Missouri.* — *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229; *Zeigenmeyer v. Charles Goetz Lime, etc., Co.*, 113 Mo. App. 330, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57; *Henson v. Armour Packing Co.*, 113 Mo. App. 618; *Abbott v. Marion Min. Co.*, 112 Mo. App. 550; *Gibson v. Midland Bridge Co.*, 112 Mo. App. 594.

*New York.* — *Batty v. Niagara Falls Hydraulic Power, etc., Co.*, 79 N. Y. App. Div. 466. Compare *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461.

*Tennessee.* — *Heald v. Wallace*, 109 Tenn. 346.

*Utah.* — *Christienson v. Rio Grande Western R. Co.*, 27 Utah 132, 101 Am. St. Rep. 945.

*Virginia.* — *Black v. Virginia Portland Cement Co.*, (Va. 1905) 51 S. E. Rep. 831.

*Washington.* — *Cully v. Northern Pac. R. Co.*, 35 Wash. 241; *Smith v. Hecla Min. Co.*, 38 Wash. 454.

*West Virginia.* — *Richards v. Riverside Iron Works*, 56 W. Va. 510.

*Wisconsin.* — *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503. Compare *Nix v. C. Reiss Coal Co.*, 114 Wis. 493.

See *Welch v. Bath Iron Works*, 98 Me. 361; *O'Keefe v. John P. Squire Co.*, 188 Mass. 210; *Cisney v. Pennsylvania Sewer Pipe Co.*, 199 Pa. St. 519. Compare *Garrity v. Pennsylvania Casting, etc., Co.*, 17 Pa. Super. Ct. 623. See *infra*, this title, the cases supplementing page 132, note 4, et seq.

The principle of a safe place does not apply when the prosecution of the work itself makes the place and creates its dangers. *Brown v. Terry*, 67 N. Y. App. Div. 223.

It has been held that the rule that the law does not compel the master to keep the place where the servant works at all times safe when the work being done is of such a character as necessarily renders the place temporarily, or from time to time, insecure, had no application in an action to recover for personal injuries sustained by a miner by the caving in of a stope which was in a certain sense a completed chamber, under ground, through which men were expected to pass, and in which they were required to work, and in which it also appeared that the plaintiff's injuries were not occasioned by any work which he was doing which made the place insecure. *Highland Boy Gold Min. Co. v. Pouch*, (C. C. A.) 124 Fed. Rep. 148.

**Place in Which to Work Provided by Injured Servant.** — If the servant is himself engaged in

**57. If the Place Is Obviously Unsafe. — See note 6.****Work Done in Place Not Provided by Master. — See note 7.**

making the place in which to work at the time of his injury, and is solely responsible for its creation, condition, and care, then, of course, the rule as to the duty of the master to furnish his employee with a safe place in which to work does not apply. *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121.

**Servant Charged with Duty of Making Place Safe.** — When the work of the servant is to render safe a place which is unsafe, the rule requiring the master to provide a safe place in which to work does not apply. *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335; *Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518; *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475; *Jennings v. Ingle*, 35 Ind. App. 153; *Indiana, etc., Coal Co. v. Batey*, 34 Ind. App. 16. See *infra*, this title, the cases supplementing page 82, note 1.

Whenever a servant is employed to work in the construction, alteration, or repair of any place or thing where the work as it is being prosecuted involves the construction of the place itself, the master fulfils his duty to the servant when he furnishes reasonably safe material and appliances for the performance of the work and selects competent servants to do it. *Greeley v. Foster*, 32 Colo. 292.

**Removing Wreck on Railroad.** — It has been said that since the business of clearing away and removing a wreck on a railroad is to make the place safe, it would seem that as to that work the doctrine that it is the duty of the master to use reasonable care in making the working place of his servant reasonably safe would not apply. *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27.

**Tearing Down Building.** — The rule that a master must furnish to the servant a reasonably safe place in which to work, as applied in ordinary cases, does not apply to the work of tearing down a building. *Western Wrecking, etc., Co. v. O'Donnell*, 101 Ill. App. 492; *Merchant v. Mickelson*, 101 Ill. App. 401; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284, *affirmed* 195 Ill. 31.

An employer does not undertake and is not required to make a building in process of destruction safe at all times for the workmen who are expressly employed to make it insecure by tearing it down. But it is nevertheless the master's duty to notify the employee of any latent defect or danger existing at the place where he is employed to work, which increases the ordinary risk of his employment, if the defect or danger is not known to the servant, or is not so open and visible that by ordinary care it would be so seen and known. *McFarland v. Edmunds Mfg. Co.*, 97 Ill. App. 629.

**Work of Erecting or Repairing Buildings.** — It has been declared in effect that it is well settled that the rule with reference to providing a suitable and safe place for the use of employees does not apply to buildings in course of erection or under repair, in the same way as to those which are complete and in use for practical purposes; in view of the fact that the contingencies of construction or repair are con-

stantly changing, the obligation of the master to exercise care to provide a safe place to work is not the same that is ordinarily required. *Fournier v. Pike*, 128 Fed. Rep. 991.

**Place Rendered Dangerous by Servants.** — If the place provided by the master is reasonably safe, but is rendered dangerous because of the manner in which the details of the work are executed by the workmen, the master is not liable. *United States*. — *Deye v. Lodge, etc.*, Mach. Tool Co., (C. C. A.) 137 Fed. Rep. 480.

*Montana*. — *Allen v. Bell*, 32 Mont. 69; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138.

*New Jersey*. — *Sharp v. Durand*, 71 N. J. L. 354.

*New York*. — *Koszowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40; *Belt v. Henry Du Bois' Sons Co.*, 97 N. Y. App. Div. 392; *Peet v. Remington, etc., Pulp, etc., Co.*, 86 N. Y. App. Div. 101; *Toohy v. Ocean Steamship Co.*, 78 N. Y. App. Div. 178; *Ward v. Naughton*, 74 N. Y. App. Div. 68; *O'Brien v. Buffalo Furnace Co.*, 68 N. Y. App. Div. 451; *Rosa v. Volkening*, 64 N. Y. App. Div. 426, *affirmed* without opinion 173 N. Y. 590; *Page v. Naughton*, 63 N. Y. App. Div. 377.

*Oregon*. — *Johnson v. Portland Stone Co.*, 40 Oregon 436.

*Pennsylvania*. — *Baldwin v. Urner*, 206 Pa. St. 459.

*Texas*. — *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65; *Wells v. Page*, 29 Tex. Civ. App. 489.

It has been held that if one class of servants negligently constructs an unsafe place for another class of servants to work in, one of the first class cannot recover from the master for injuries sustained by him, caused by such negligence, while working in such place, although at the time he may have joined the other class of servants, and been engaged with them in doing work in no manner connected with preparing the place to work in. *Litchfield v. Buffalo, etc., R. Co.*, 73 N. Y. App. Div. 1.

**Adjustment of Simple Appliances.** — It has been held that the responsibility of the master to exercise care to give a safe place in which to work does not extend to the adjustment of simple and merely temporary appliances for doing the work. *Galow v. Chicago, etc., R. Co.*, (C. C. A.) 131 Fed. Rep. 242.

**Place Rendered Unsafe by Third Person.** — A master is not liable for failure to provide a safe place in which to work where the place is safe, and is only made unsafe by the negligent act of a third person for which the master is not liable. *Penner v. Vinton Co.*, (Mich. 1905) 104 N. W. Rep. 385, 12 Detroit Leg. N. 381.

**57. 6. Place Obviously Unsafe.** — *Indiana, etc., Coal Co. v. Batey*, 34 Ind. App. 16; *Pfisterer v. Peter*, 117 Ky. 501, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57; *Zeigenmeyer v. Charles Goetz Lime, etc., Co.*, 113 Mo. App. 330, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

*Alabama*. — *Geis v. Tennessee Coal, etc., R. Co.*, 143 Ala. 299.

**57. (2) Applications of Rule — (a) Buildings or Premises Generally. —** See note 8.

*Illinois.* — *Lobstein v. Sajatovich*, 111 Ill. App. 654; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532.

*Indiana.* — *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 373.

*Maine.* — *Moore v. Stetson*, 96 Me. 197.

*Massachusetts.* — *Hyde v. Booth*, 188 Mass. 290; *Ahern v. Hildreth*, 183 Mass. 296.

*New York.* — *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, *affirming* (Supm. Ct. App. Div.) 66 N. Y. Supp. 1137; *Hogan v. Strauss*, 104 N. Y. App. Div. 623; *Huebner v. Hammond*, 80 N. Y. App. Div. 122, *affirmed* without opinion 177 N. Y. 537; *Szotak v. Berwind-White Coal Min. Co.* (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 98. See *Haughey v. Thatcher*, 89 N. Y. App. Div. 375.

*Pennsylvania.* — *Fox v. Clearfield Wooden Ware Co.*, 211 Pa. St. 645; *Jones v. Scranton Coal Co.*, 211 Pa. St. 577; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348.

*Rhode Island.* — *Carbury v. Eastern Nut, etc.*, Co., 27 R. I. 116.

*Texas.* — *Hettich v. Hillje*, 33 Tex. Civ. App. 571.

See *Lassiter v. Raleigh, etc.*, R. Co., 133 N. Car. 244. Compare *Hunting v. Quarterman*, 120 Ga. 344; *Moore v. W. R. Pickering Lumber Co.*, 105 La. 504.

**Place to Which Duty Extends.** — A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *Morrison v. Burgess Sulphite-Fibre Co.*, 70 N. H. 406, 85 Am. St. Rep. 634; *Edwards v. Tilton Mills*, 70 N. H. 574.

The duty of a master respecting the provision of a safe place of work for his workman extends to providing a reasonably safe mode of entrance to and exit from the place where the workman is employed. *Haber v. Jenkins Rubber Co.*, (N. J. 1905) 61 Atl. Rep. 382.

**Place Where Servants Are Accustomed to Go.** — In an action to recover for the death of a miner alleged to have been caused by his coming in contact with an insufficiently insulated wire in a passage through which he was passing in returning to his station in the mine from the room of a fellow workman where he had spent part of the noon hour visiting, it was held that, while it was error to treat the case as one turning upon the duty owing by the employer to the employee injured in the course of his duty, yet since there was evidence that the place in which the plaintiff's intestate was killed was a place where the miners were accustomed to go at noon for the purpose of eating their dinners and for social intercourse, and the owner had knowledge of and did not object to the practice, the plaintiff's intestate occupied the situation of a licensee. *Ellsworth v. Metheney*, 104 Fed. Rep. 119, 44 C. C. A. 484, 51 L. R. A. 389.

When a safe mode of entrance and exit is furnished, evidence of the use by some of the workmen of another mode of entering and leav-

ing the place of employment will not impose a duty upon the employer to care for the safety of a workman who deviates from the path which such workman had been accustomed to use, and proceeds to another part of the grounds out of mere idle curiosity. When out of the path provided or customarily used, the employer owes the workman no duty of a higher degree than that which is due to a licensee. *Haber v. Jenkins Rubber Co.*, (N. J. 1905) 61 Atl. Rep. 382.

The duty of a master to furnish a reasonably safe place in which the servant is to perform his labor extends to the necessary incidents of that labor. It has been held that where the employees in the defendant's brewery had been accustomed to repair to a certain place in the brewery to change their clothes, and the defendant had knowledge, through its representatives at least, of the custom prevailing in its establishment, the duty arose of exercising a reasonable degree of care that the place used was reasonably safe. *Muhlen v. Obermeyer*, 83 N. Y. App. Div. 88.

**Place Provided by Master for Servants to Spend Dinner Hour.** — *Heldmaier v. Cobbs*, 195 Ill. 172, *affirming* 96 Ill. App. 315.

**Passageway Not Provided by Master.** — *McKean v. Colorado Fuel, etc., Co.*, 18 Colo. App. 285.

**Leased Premises.** — The duty of a master to exercise care to furnish a safe place to work is, as between master and servant, absolute, and the master cannot absolve himself from responsibility in that behalf by showing that the premises furnished by him were rented from a third person, and were jointly occupied by him with other tenants. *Dieters v. St. Paul Gas-light Co.*, 86 Minn. 474.

**Responsibility of Lessor of Mine for Safety of Place to Work.** — *Union Gold Min. Co. v. Crawford*, 29 Colo. 511.

**Work to Be Performed on Premises of Third Person.** — It has been held that there is a difference in the obligation of the employer in the manner of furnishing a suitable place for the employee to work where it is to be done upon the premises of a third party, and where it is to be done at the shop or factory of the employer. The employee in this case must inform himself of the dangers of doing the work, and if he knows the danger, or by the exercise of reasonable care would know the danger, connected with the work, he is deemed to have assumed it. *Shadle v. Cleveland Electric Illuminating Co.*, 12 Ohio Cir. Dec. 37, 22 Ohio Cir. Ct. 49.

**57. 8. Buildings and Places for Work Generally.** — *Libby v. Banks*, 209 Ill. 109, *affirming* 110 Ill. App. 330; *D. Sinclair Co. v. Waddill*, 200 Ill. 17, *affirming* 99 Ill. App. 334; *Illinois Steel Co. v. Stonevick*, 199 Ill. 122; *Helbig v. Slaughter*, 95 Ill. App. 623; *Chamberlain v. Waymire*, 32 Ind. App. 442, *rehearing denied* (Ind. App. 1904) 70 N. E. Rep. 81; *Nugent v. Cudahy Packing Co.*, 126 Iowa 517; *Shemwell v. Owensboro, etc., R. Co.*, 117 Ky. 556. See *Snowdale v. United Box Board, etc., Co.*, (Me. 1905) 61 Atl. Rep. 683.

**Gallery Not Inclosed by Railing.** — *Armour v.*

**58.** See notes 1, 2, 3, 4, 5, 6, 7, 8.

Golkowska, 202 Ill. 144, *affirming* 95 Ill. App. 492.

**Insecure Piling of Lumber in Lumberyard.**—The master may be chargeable with negligence in providing a safe place in which to work because of the insecure piling of lumber in his lumberyard. *Brooks v. W. T. Joyce Co.*, 127 Iowa 266.

**Flagman's Watch-box.**—A railroad company has been held liable for injuries to a flagman through the negligence of its servants in placing a watch-box provided for his use in dangerous proximity to the tracks. *Philadelphia, etc., R. Co. v. Devers*, 101 Md. 341.

**Overheated Building.**—It has been held that for a result so unusual and extraordinary as being overcome by heat while at work in the defendant's engine shed the plaintiff could not recover where the evidence justified the conclusion that the heated condition of the air in the engine shed was due partly to the heat of the outside atmosphere, and not alone to the absence of sufficient ventilation. *Western Stone Co. v. Earnshaw*, 98 Ill. App. 538, *affirmed* 200 Ill. 220.

**58. 1. Buildings and Premises Not Properly Lighted**—*Georgia*.—*Steele v. Georgia Iron, etc., Co.*, 121 Ga. 459.

*Illinois*.—*Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, *affirming* 106 Ill. App. 30; *Illinois Steel Co. v. Stenevick*, 199 Ill. 122.

*Iowa*.—*Cushman v. Carbondale Fuel Co.*, 116 Iowa 618.

*Kentucky*.—*Reliance Textile, etc., Works v. Martin*, 65 S. W. Rep. 809, 23 Ky. L. Rep. 1625.

*Maryland*.—*Brager v. Austin*, 99 Md. 473; *Mercantile Laundry Co. v. Kearney*, 97 Md. 15.

*Missouri*.—*Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Nash v. Kansas City Hydraulic Press Brick Co.*, 109 Mo. App. 600.

*New Hampshire*.—*English v. Amidon*, 72 N. H. 301.

*New York*.—*Eastland v. Clarke*, 165 N. Y. 420, *reversing* 28 N. Y. App. Div. 621. See *Grant v. National Railway Spring Co.*, 86 N. Y. App. Div. 593.

*Pennsylvania*.—*Held v. American Window Glass Co.*, 207 Pa. St. 534. See *Gallagher v. Snellenburg*, 210 Pa. St. 642.

*Texas*.—*Galveston, etc., R. Co. v. Walker*, (Tex. Civ. App. 1903) 76 S. W. Rep. 228.

See *Hilje v. Hettich*, 95 Tex. 321, *reversing* (Tex. Civ. App. 1901) 65 S. W. Rep. 491; *Chisholm v. Donovan*, 188 Mass. 378; *Beucker v. Baker*, 11 Ohio Cir. Dec. 642, 21 Ohio Cir. Ct. 540.

It has been held that the master is under no obligation to keep his premises so lighted that all repair work may be done without the necessity of additional light. If such additional light is needed for repair work and the servant, instead of procuring it, undertakes to do the work without it, and is injured, he cannot recover against the master. *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 104 Am. St. Rep. 452.

**2. Unguarded Hatchways, Etc.**—*Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; *Jackson*

*v. Merchants, etc., Transp. Co.*, 118 Ga. 651; *Schwarzschild v. Drysdale*, 69 Kan. 119; *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Bateman v. New York Cent., etc., R. Co.*, 178 N. Y. 84, *reversing* 67 N. Y. App. Div. 241; *Eastland v. Clarke*, 165 N. Y. 420, *reversing* 28 N. Y. App. Div. 621; *Tully v. New York, etc., Steamship Co.*, 10 N. Y. App. Div. 463, *affirmed* without opinion 162 N. Y. 614. See *Rooney v. Brogan Constr. Co.*, 107 N. Y. App. Div. 258; *Kupp v. Rummel*, 199 Pa. St. 90.

**Unguarded Elevator Shafts.**—*H. Channon Co. v. Hahn*, 189 Ill. 28; *Wolt v. Devitt*, 83 N. Y. App. Div. 42, *affirmed* without opinion 179 N. Y. 569.

**3. Failure to Provide Proper Fire Escapes.**—*Landgraf v. Kuh*, 188 Ill. 484; *Galveston, etc., R. Co. v. Fitzpatrick*, (Tex. Civ. App. 1904) 83 S. W. Rep. 406. See *Carrigan v. Stillwell*, 99 Me. 434.

**4. Unsafe Floors**—*Illinois*.—*Missouri Mal-leable Iron Co. v. Dillon*, 206 Ill. 145; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, *affirming* 106 Ill. App. 30; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, *affirmed* 197 Ill. 186; *Chicago Gen. R. Co. v. McNamara*, 94 Ill. App. 188. See *Swift v. Campbell*, 97 Ill. App. 360.

*Kentucky*.—*Louisville Hotel Co. v. Kalten-brun*, 80 S. W. Rep. 1163, 26 Ky. L. Rep. 208; *Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167, 27 Ky. L. Rep. 305.

*Massachusetts*.—*Thompson v. American Writing Paper Co.*, 187 Mass. 93.

*Minnesota*.—*Bredeson v. C. A. Smith Lum-ber Co.*, 91 Minn. 317.

*Missouri*.—*Zellars v. Missouri Water, etc., Co.*, 92 Mo. App. 107.

*Oregon*.—*Mundhenke v. Oregon City Mfg. Co.*, (Oregon 1905) 81 Pac. Rep. 977.

*Texas*.—*Missouri, etc., R. Co. v. Baker*, 35 Tex. Civ. App. 542.

See *Diver v. Singer Mfg. Co.*, 205 Pa. St. 170; *Surles v. Kistler*, 202 Pa. St. 289; *McCarthy v. Shoneman*, 198 Pa. St. 568; *Venbuur v. Lafayette Worsted Mills*, 27 R. I. 89; *McLaughlin v. Atlantic Mills*, 27 R. I. 158.

It has been held that the presence of oil on the floor of a mill cannot be held to be negligence in the absence of evidence to show how long the oil has been there, or what caused it to be there. *Dene v. Arnold Print Works*, 181 Mass. 560.

**5. Stairways.**—*Mann v. Moore*, 68 S. W. Rep. 402, 24 Ky. L. Rep. 253; *English v. Ami-don*, 72 N. H. 301.

**Movable Steps.**—*Henderson Tobacco Extracts Works v. Wheeler*, 116 Ky. 322.

**6. Unsafe Roofs.**—*Mitchell-Tranter Co. v. Ehmett*, 65 S. W. Rep. 835, 23 Ky. L. Rep. 1788; *Hearn v. Quillen*, 94 Md. 39; *Miller v. Merritt*, 211 Pa. St. 127; *Collins v. Harrison*, 25 R. I. 489.

**7. Unsafe Ceilings.**—*Anderson v. Steinreich*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 680.

**8. Defective Walks or Ways**—*Illinois*.—*Mc-Lean County Coal Co. v. Simpson*, 97 Ill. App. 21, *affirmed* 196 Ill. 258; *Alabaster Co. v. Lone-ergan*, 90 Ill. App. 353.

**58. (b) Mines.** — See notes 9, 10, 11.

*Indiana.* — *Etna Powder Co. v. Earlandson*, 33 Ind. App. 251.

*Iowa.* — *Norris v. Cudahy Packing Co.*, 124 Iowa 748.

*Kentucky.* — *Conrad Tanning Co. v. Munsey*, 76 S. W. Rep. 841, 25 Ky. L. Rep. 936.

*Michigan.* — *McDonald v. Champion Iron, etc., Co.*, (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; *Hayes v. Stearns*, 130 Mich. 287, 9 Detroit Leg. N. 15.

*Minnesota.* — *Hebert v. Interstate Iron Co.*, 94 Minn. 257.

*Montana.* — *Nord v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 48.

*New Hampshire.* — *Edwards v. Tilton Mills*, 70 N. H. 574.

*New York.* — *Finn v. Ironclad Mfg. Co.*, (Supm. Ct. App. Div.) 90 N. Y. Supp. 887; *Dorney v. O'Neill*, 60 N. Y. App. Div. 19, affirmed without opinion 172 N. Y. 595. *Compare Dolan v. New York Sanitary Utilization Co.*, 104 N. Y. App. Div. 14.

*North Carolina.* — *Myers v. Concord Lumber Co.*, 129 N. Car. 252.

*Pennsylvania.* — *Conley v. Lincoln Foundry Co.*, 14 Pa. Super. Ct. 626; *Hickey v. Solid Steel Casting Co.*, 212 Pa. St. 255.

*Texas.* — *San Antonio Foundry Co. v. Drish*, (Tex. Civ. App. 1905) 85 S. W. Rep. 440; *Consumers Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *Galveston, etc., R. Co. v. Butchek*, (Tex. Civ. App. 1901) 66 S. W. Rep. 335.

*Virginia.* — *Virginia Portland Cement Co. v. Luck*, 103 Va. 427.

*Compare Carbury v. Eastern Nut, etc., Co.*, 27 R. I. 116.

**58. 9. Duty to Make Mine Reasonably Safe Place for Work** — *Colorado.* — *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; *Carleton Min., etc., Co. v. Ryan*, 29 Colo. 401.

*Illinois.* — *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; *Muren Coal, etc., Co. v. Howell*, 204 Ill. 515, judgment reversed 107 Ill. App. 1; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156, affirming 96 Ill. App. 248; *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, affirming 91 Ill. App. 15; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644.

*Indiana.* — *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1.

*Iowa.* — *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Kentucky.* — *Angel v. Jellico Coal Min. Co.*, 115 Ky. 728; *Tradewater Coal Co. v. Johnson*, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777.

*Minnesota.* — *Hebert v. Interstate Iron Co.*, 94 Minn. 257; *Jensen v. Commodore Min. Co.*, 94 Minn. 53.

*Missouri.* — *Knight v. Sadtler Lead, etc., Co.*, 91 Mo. App. 574; *Carter v. Baldwin*, 107 Mo. App. 217.

*Montana.* — *Allen v. Bell*, 32 Mont. 69.

*New Jersey.* — *Smith v. Thomas Iron Co.*, 69 N. J. L. 11.

*Pennsylvania.* — *Webster v. Monongahela River Consol Coal, etc., Co.*, 201 Pa. St. 278; *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1.

*Utah.* — *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Garity v. Bullion-Beck, etc., Min. Co.*, 27 Utah 534; *Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299; *Morgan v. Mammoth Min. Co.*, 26 Utah 174; *Downey v. Gemini Min. Co.*, 24 Utah 431; *Jenkins v. Mammoth Min. Co.*, 24 Utah 513.

It has been held to be gross negligence to permit heavy loaded cars to be sent down a narrow inclined passageway in a coal mine, without light or attendant, or brake or signal of any kind, with nothing to retard the speed except sprags in the wheels. *Spring Valley Coal Co. v. Chiaventone*, 115 Ill. App. 558, judgment affirmed 214 Ill. 314.

**Roadway in Mine.** — *Henrietta Coal Co. v. Campbell*, 211 Ill. 216.

**Defectively Insulated Electric Wire in Passage.** — *Ellsworth v. Metheney*, 104 Fed. Rep. 119, 44 C. C. A. 84.

**Keeping Shaft Free from Obstruction.** — *Alaska United Gold Min. Co. v. Keating*, (C. C. A.) 116 Fed. Rep. 561.

**10. Ventilation and Prevention of Accumulation of Gases.** — *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312; *Western Coal, etc., Co. v. Jones*, (Ark. 1905) 87 S. W. Rep. 440; *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530; *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294, affirmed 207 Ill. 395; *Schmalstieg v. Leavenworth Coal Co.*, 65 Kan. 753; *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 43; *Pocahontas Collieries Co. v. Lukas*, (Va. 1905) 51 S. E. Rep. 449; *Czarecki v. Seattle, etc., R., etc., Co.*, 30 Wash. 288; *Costa v. Pacific Coast Co.*, 26 Wash. 138. See *Hall v. Simpson*, 203 Pa. St. 146.

**Illinois Statute.** — A statute in Illinois (Ill. Laws 1899, p. 317, § 19) providing for the health and safety of persons employed in coal mines enacts among other things that "throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan or some other artificial means." See *Fulton v. Wilmington Star Min. Co.*, (C. C. A.) 133 Fed. Rep. 193.

**11. Preventing Fall of Rock, Earth, Etc. — United States.** — *Mountain Copper Co. v. Van Buren*, (C. C. A.) 133 Fed. Rep. 1; *Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *Highland Boy Gold Min. Co. v. Pouch*, (C. C. A.) 124 Fed. Rep. 148; *Harder, etc., Coal Min. Co. v. Schmidt*, (C. C. A.) 104 Fed. Rep. 282.

*Alabama.* — *Tennessee Coal, etc., R. Co. v. Garrett*, 140 Ala. 563.

*Arkansas.* — *Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518.

*California.* — *Hobshaw v. Standard Quick-silver Co.*, 131 Cal. 430.

*Illinois.* — *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9, affirming judgment 110 Ill. App. 664; *Donk Bros. Coal, etc., Co. v. Stroff*, 200 Ill. 483, affirming 190 Ill. App. 576; *Himrod Coal Co. v. Clark*, 107 Ill. 514, affirming 09 Ill. App. 332; *Consolidated Coal Co. v. Lundak*, 196 Ill. 594, affirming 97 Ill. App. 109; *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258.

**59.** See note 1.

(e) Excavations, Trenches, Pits, Sewers, Etc. — See note 2.

*Indiana*. — *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818.

*Iowa*. — *Wahlquist v. Maple Grove Coal, etc.*, Co., 116 Iowa 720; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121.

*Kansas*. — *Good-eye Min. Co. v. Robinson*, 67 Kan. 510.

*Kentucky*. — *Straight Creek Coal Co. v. Haney*, 87 S. W. Rep. 1114, 27 Ky. L. Rep. 1117; *McFarland v. Harbison, etc.*, Co., 82 S. W. Rep. 430, 26 Ky. L. Rep. 746; *Wilson v. Alpine Coal Co.*, 118 Ky. 463; *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; *St. Bernard Coal Co. v. Southard*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638; *Crabtree Coal Min. Co. v. Sample*, 72 S. W. Rep. 24, 24 Ky. L. Rep. 1703; *Koltinsky v. Wood*, 112 Ky. 372; *Sandy River Cannel Coal Co. v. Caudill*, 60 S. W. Rep. 180, 22 Ky. L. Rep. 1175.

*Missouri*. — *Wojtylak v. Kansas, etc.*, Coal Co., 188 Mo. 260; *Stumbo v. Duluth Zinc Co.*, 100 Mo. App. 635; *Weston v. Lackawanna Min. Co.*, 195 Mo. App. 702. See *Abbott v. Marion Min. Co.*, 112 Mo. App. 550.

*New York*. — *Lentino v. Port Henry Iron Ore Co.*, 71 N. Y. App. Div. 466; *Tetherton v. U. S. Talc Co.*, 41 N. Y. App. Div. 613, *affirmed* without opinion 165 N. Y. 665.

*Ohio*. — *Davis v. Turner*, 69 Ohio St. 101; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547.

*Utah*. — *Hone v. Mammoth Min. Co.*, 27 Utah 168; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437.

*Vermont*. — *Severance v. New England Talc Co.*, 72 Vt. 181.

*Washington*. — *Smith v. Hecla Min. Co.*, 38 Wash. 454.

See *Heald v. Wallace*, 109 Tenn. 346.

**59. 1. Statutory Requirements — Safety Appliances** — *Illinois*. — *Madison Coal Co. v. Hayes*, 215 Ill. 625; *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, *affirming judgment* 112 Ill. App. 4; *Donk Bros. Coal, etc.*, Co. v. Stroff, 200 Ill. 483, *affirming* 100 Ill. App. 576; *O'Fallon Coal, etc.*, Co. v. Laquet, 198 Ill. 125, *affirming* 89 Ill. App. 13; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156, *affirming* 96 Ill. App. 248; *Western Anthracite Coal, etc.*, Co. v. Beaver, 192 Ill. 333, *affirming* 95 Ill. App. 95; *Mt. Olive, etc.*, Coal Co. v. Herbeck, 190 Ill. 39, *affirming* 92 Ill. App. 441; *Mt. Olive, etc.*, Coal Co. v. Rademacher, 190 Ill. 538; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294, *affirmed* 207 Ill. 395; *Sunnyside Coal Co. v. Center*, 100 Ill. App. 546; *Donk Bros. Coal, etc.*, Co. v. Peton, 192 Ill. 41, *affirming* 95 Ill. App. 193; *Kellyville Coal Co. v. Yehnika*, 94 Ill. App. 74; *Himrod Coal Co. v. Adack*, 94 Ill. App. 1; *Himrod Coal Co. v. Schroath*, 91 Ill. App. 234.

*Indiana*. — *Diamond Block Coal Co. v. Cuthbertson*, (Ind. App. 1903) 67 N. E. Rep. 558; *Indiana, etc.*, Coal Co. v. Neal, (Ind. App. 1905) 75 N. E. Rep. 295; *Bodell v. Brazil Block Coal*

*Co.*, 25 Ind. App. 654. See *J. Wooley Coal Co. v. Bracken*, 30 Ind. App. 624.

*Iowa*. — *Jacobson v. Smith*, 123 Iowa 263.

*Missouri*. — *Adams v. Kansas, etc.*, Coal Co., 85 Mo. App. 486; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Bowerman v. Lackawanna Min. Co.*, 98 Mo. App. 308. See *Barron v. Missouri Lead, etc.*, Co., 172 Mo. 228.

*Pennsylvania*. — *Kless v. Youghiogeny Min. Co.*, 18 Pa. Super. Ct. 551. See *Allen v. Kings-ton Coal Co.*, 212 Pa. St. 54.

*Washington*. — *Green v. Western American Co.*, 30 Wash. 87.

See *Heald v. Wallace*, 109 Tenn. 346.

**Signals**. — *Island Coal Co. v. Swaggerty*, 159 Ind. 664.

**Places of Refuge**. — *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 169; *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 175.

**Attendants at Principal Doorways**. — *Himrod Coal Co. v. Stevens*, 203 Ill. 115, *affirming* 104 Ill. App. 639.

**Passageway Around Landing at Bottom of Shaft**. — *Chicago-Coulterville Coal Co. v. Fidelity, etc.*, Co., 130 Fed. Rep. 957.

**Statute Requiring Coal Mine Operator to Have Constantly on Hand a Sufficient Supply of Timber**. — It has been held that under a statute (Ohio Rev. Stat. 1892, § 6871) imposing on the owner or operator of a coal mine the duty to keep constantly on hand a sufficient supply of timber, without undertaking to declare or define the degree of care which the mine owner or operator must exercise in that regard, the degree of care which must be exercised is left to be determined on common-law principles. *Cecil v. American Sheet Steel Co.*, (C. C. A.) 129 Fed. Rep. 542.

**2. Reasonable Care in Adopting Safe Appliances Necessary** — *United States*. — *Swensen v. Bender*, (C. C. A.) 114 Fed. Rep. 1.

*Colorado*. — *Greeley v. Foster*, 32 Colo. 292; *Colorado City v. Liafe*, 28 Colo. 468.

*Illinois*. — *Barnett, etc.*, Co. v. Schlapka, 208 Ill. 426, *affirming* 110 Ill. App. 672; *La Salle v. Kostka*, 190 Ill. 130, *affirming* 92 Ill. App. 91; *Legenhardt v. Gent*, 97 Ill. App. 145; *Walter v. Fisher*, 96 Ill. App. 590. See *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, *affirming* 96 Ill. App. 288.

*Indiana*. — *Perry-Matthews-Buskirk Stone Co. v. Speer*, (Ind. App. 1905) 73 N. E. Rep. 933; *Ft. Wayne v. Christie*, 156 Ind. 172.

*Kansas*. — *Walker v. Scott*, (Kan. 1901) 64 Pac. Rep. 615.

*Kentucky*. — *Logsdon v. Western Brick Co.*, 79 S. W. Rep. 290, 25 Ky. L. Rep. 2060; *Logsdon v. Western Brick Co.*, 74 S. W. Rep. 706, 25 Ky. L. Rep. 141.

*Massachusetts*. — *Bartolomeo v. McKnight*, 178 Mass. 242.

*Minnesota*. — *Kurstelska v. Jackson*, 93 Minn. 385, 89 Minn. 95; *Kohout v. Newman*, (Minn. 1905) 104 N. W. Rep. 764.

*Missouri*. — *Gibson v. Midland Bridge Co.*, 112 Mo. App. 594; *Scott v. Springfield*, 81 Mo. App. 312.

*New York*. — *Simone v. Kirk*, 173 N. Y. 7,

**59. (d) Railroad Track and Roadbed — aa, IN GENERAL — (aa) Statement of Rule.**— See note 3.

*reversing* 57 N. Y. App. Div. 461; *Finn v. Cassidy*, 165 N. Y. 584, *affirming* (Supm. Ct. App. Div.) 57 N. Y. Supp. 1138; *Overbaugh v. Wieber*, 106 N. Y. App. Div. 283; *Reilly v. Troy Brick Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 530; *Winters v. Naughton*, 91 N. Y. App. Div. 80; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, *affirmed* without opinion 174 N. Y. 519. See *Quinn v. Baird*, 49 N. Y. App. Div. 270, *affirmed* without opinion 172 N. Y. 631.

*North Carolina.*— *McDougald v. Lumberton*, 129 N. Car. 200.

*Oregon.*— *Scott v. Astoria R. Co.*, 43 Oregon 26, 99 Am. St. Rep. 710.

*Pennsylvania.*— *Garrity v. Pennsylvania Casting, etc., Co.*, 17 Pa. Super. Ct. 623. See *Cisney v. Pennsylvania Sewer Pipe Co.*, 199 Pa. St. 519.

*Rhode Island.*— *Flynn v. Shaw*, 22 R. I. 328; *Laporte v. Cook*, 22 R. I. 554.

*Washington.*— *Christianson v. Pacific Bridge Co.*, 27 Wash. 582.

See *Shailer, etc., Co. v. Corcoran*, 11 Ohio Cir. Dec. 599, 21 Ohio Cir. Ct. 639.

**Shoring Up Excavations.**— It has been held that when the master has furnished a competent and experienced foreman and fellow servant, and suitable and sufficient material, he has discharged his duty to the servants. *Litchfield v. Buffalo, etc., R. Co.*, 73 N. Y. App. Div. 1.

**Duty to Light When Work Done at Night.**— *Devaney v. Degnon-McLean Constr. Co.*, 79 N. Y. App. Div. 62, *affirmed* without opinion 178 N. Y. 620.

**59. 3. Reasonable Care to Provide Safe Track Necessary.**— *United States.*— *Erie R. Co. v. Moore*, (C. C. A.) 113 Fed. Rep. 269.

*Alabama.*— *Northern Alabama R. Co. v. Shea*, 142 Ala. 119; *Western R. Co. v. Russell*, (Ala. 1905) 39 So. Rep. 311.

*California.*— *Peters v. McKay*, 136 Cal. 73; *Dolan v. Sierra R. Co.*, 135 Cal. 435.

*Illinois.*— *Momence Stone Co. v. Turrell*, 205 Ill. 515; *Chicago, etc., R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, *affirming* 96 Ill. App. 570; *Chicago, etc., R. Co. v. Kinnare*, 115 Ill. App. 132.

*Indiana.*— *Cleveland, etc., R. Co. v. Snow*, (Ind. App. 1905) 74 N. E. Rep. 908; *Southern R. Co. v. Sittasen*, (Ind. App. 1905) 74 N. E. Rep. 898; *Union Traction Co. v. Buckland*, 34 Ind. App. 420; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480; *Flutter v. New York, etc., R. Co.*, 27 Ind. App. 511.

*Iowa.*— *Bach v. Iowa Cent. R. Co.*, 112 Iowa 241.

*Kentucky.*— *King v. Covington, etc., R. Co.*, 72 S. W. Rep. 757, 24 Ky. L. Rep. 1942; *Chesapeake, etc., R. Co. v. Venable*, 111 Ky. 41.

*Louisiana.*— *Fuller v. Tremont Lumber Co.*, 114 La. 266.

*Massachusetts.*— *Donahue v. Boston, etc., R. Co.*, 178 Mass. 251.

*Michigan.*— *Hamilton v. Michigan Cent. R. Co.*, 135 Mich. 95, 10 Detroit Leg. N. 711; *Jarvis v. Flint, etc., R. Co.*, 128 Mich. 61, 8 Detroit Leg. N. 527.

*Minnesota.*— *Baker v. Great Northern R. Co.*, 83 Minn. 184.

*Mississippi.*— *Gulf, etc., R. Co. v. Bussey*, 82 Miss. 616.

*Missouri.*— *Smith v. Fordyce*, 190 Mo. 1; *Minnier v. Sedalia, etc., R. Co.*, 167 Mo. 99; *Hurst v. Kansas City, etc., R. Co.*, 163 Mo. 309; *Montgomery v. Chicago G. W. R. Co.*, 109 Mo. App. 88; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686.

*New Hampshire.*— *Smith v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 359.

*New Jersey.*— *Smith v. Erie R. Co.*, 67 N. J. L. 636.

*New York.*— *Coughlin v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 126.

*North Carolina.*— *Wilkie v. Raleigh, etc., R. Co.*, 127 N. Car. 203.

*Pennsylvania.*— *Hammer v. Pressed Steel Car Co.*, 204 Pa. St. 594. See *Savitz v. Lehigh, etc., R. Co.*, 199 Pa. St. 218.

*South Carolina.*— *Richey v. Southern R. Co.*, 69 S. Car. 387; *Sims v. Southern R. Co.*, 66 S. Car. 520.

*Texas.*— *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *Southern Kansas R. Co. v. Sage*, 98 Tex. 438; *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *International, etc., R. Co. v. Penn.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 624; *Jefferson, etc., R. Co. v. Woods*, (Tex. Civ. App. 1901) 64 S. W. Rep. 830; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 413; *St. Louis Southwestern R. Co. v. Keltan*, 28 Tex. Civ. App. 137; *Texas, etc., R. Co. v. McClane*, 24 Tex. Civ. App. 321.

The foreman of a switching crew in the yard of a railway company was walking a few feet in advance and to the side of the rear of a train of backing cars, signaling to the engineer, when the rear car was derailed by low joints in the track, veered upon and killed him. These low joints were opposite each other, had existed for six months, and the fish plates upon them were loose. They were at a busy place in the yard, where during daylight the wheels of about 600 cars pounded over them daily. They were perceptible to one riding over them upon a train, but they were at a street crossing, which was planked, and there was no evidence that the foreman had ever examined them, or that he knew the condition of the fish plates. It was held that the questions of negligence, assumption of risk, and contributory negligence were for the jury. *Chicago, etc., R. Co. v. Benton*, (C. C. A.) 132 Fed. Rep. 460.

**Logging Railroad.**— Although a logging railroad is not expected or required to be laid with the same care and security, nor to be operated with the same degree of prudence, as is demanded in the construction and operation of railway tracks in use by common carriers, nevertheless such road should be so constructed and operated as to render it reasonably safe for those whose employment necessitates their going upon such road and performing service in connection with the same. *Lynn v. Antrim Lumber Co.*, 105 La. 451.

**60.** See note 2.

**61.** Track Used for Construction Purposes. — See note 1.

(bb) *Limitations of Rule — Only Reasonable Care Necessary.* — See notes 2, 3, 4.  
**What Is Reasonable Care.** — See note 5.

**Proximate Cause.** — See note 6.

(cc) *Applications of Rule.* — See notes 7, 8, 9, 11.

**62.** See notes 1, 2, 3.

bb. **OBSTRUCTIONS ON OR NEAR TRACK.** — See note 4.

**Duty of Licensee.** — A railway company running its trains over another road by permission is liable to its employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master. *Brady v. Chicago, etc., R. Co.*, 114 Fed. Rep. 100, 52 C. C. A. 48.

**60. 2. Use of Tracks Belonging to Another Company.** — *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463; *Story v. Concord, etc., R. Co.*, 70 N. H. 364. See *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, *affirming* (Supm. Ct. App. Div.) 66 N. Y. Supp. 1137.

**61. 1. Road Used Only for Construction Purposes.** — *Hoelter v. McDonald*, 82 N. Y. App. Div. 423.

**2. Southern Pac. R. Co. v. Gloyd**, (C. C. A.) 138 Fed. Rep. 388; *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175; *Southern Indiana R. Co. v. Moore*, 29 Ind. App. 52; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480; *Sankey v. Chicago, etc., R. Co.*, 118 Iowa 39; *Godfrey v. St. Louis Transit Co.*, 107 Mo. App. 193; *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *O'Neill v. Chicago, etc., R. Co.*, 62 Neb. 358, *rehearing* 66 Neb. 638; *Smith v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 359; *Van Blarcom v. Central R. Co.*, (N. J. 1905) 60 Atl. Rep. 182; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551. See *Mattson v. Qualey Constr. Co.*, 90 Ill. App. 260.

In *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480, it was said that "we think the rule might be stated that the employer must exercise ordinary skill and care to provide a safe working place, or the employer must exercise skill and care to provide an ordinarily safe working place."

But on the other hand it has been held that it was error to instruct a jury in effect that a railroad company is under a duty to keep its track in a reasonably safe condition for the use of its employees. The court said: "The duty which the law imposes upon the company is to exercise reasonable watchfulness and care in inspecting its tracks and in keeping them in a reasonably safe condition. The law does not impose the absolute duty to keep them in a reasonably safe condition." *Culver v. South Haven, etc., R. Co.*, 138 Mich. 443, 11 Detroit Leg. N. 642.

**3. No Guaranty of Absolute Safety.** — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124; *Cleveland, etc., R. Co. v. Snow*, (Ind. App. 1905) 74 N. E. Rep. 908.

**4. Master Not Required to Anticipate Every**

**Contingency.** — *Cleveland, etc., R. Co. v. Haas*, 35 Ind. App. 626.

**5. Reasonable Care Dependent on Dangers to Be Apprehended.** — *Mace v. Boedker*, 127 Iowa 721.

**6. Negligence Proximate Cause.** — *Ray v. Vicksburg, etc., R. Co.*, 113 La. 502; *Ederle v. Vicksburg, etc., R. Co.*, 112 La. 728; *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129; *Texas, etc., R. Co. v. McClane*, 24 Tex. Civ. App. 321.

**7. Defective Cross-ties.** — *Chesapeake, etc., R. Co. v. Venable*, 111 Ky. 41; *Fuller v. Tremont Lumber Co.*, 114 La. 266; *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395.

**Cross-ties Insufficiently Supported.** — *Momence Stone Co. v. Turrell*, 203 Ill. 515.

**8. Defective Rails.** — *Montgomery v. Chicago G. W. R. Co.*, 109 Mo. App. 88; *Hoelter v. McDonald*, 82 N. Y. App. Div. 423; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44.

**Street Railway Tracks Out of Alignment.** — *Coughlin v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 126.

**9. Defective Platforms.** — See *Nugent v. Brooklyn Union El. R. Co.*, 64 N. Y. App. Div. 351.

**11. Unballasted Tracks.** — *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295; *Jarvis v. Flint, etc., R. Co.*, 128 Mich. 61, 8 Detroit Leg. N. 527.

It is the duty of a railroad company to keep its roadbed between the tracks in its switching yard in a reasonably safe condition so that the switchmen can walk thereon with reasonable safety while coupling cars. *Baltimore, etc., R. Co. v. Clifford*, 99 Ill. App. 381.

**62. 1. Holes Between Ties.** — *Chicago, etc., R. Co. v. Myers*, 95 Ill. App. 578; *De Cair v. Manistee, etc., R. Co.*, 133 Mich. 578, 10 Detroit Leg. N. 328; *Jarvis v. Flint, etc., R. Co.*, 128 Mich. 61, 8 Detroit Leg. N. 527; *Smith v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 359; *International, etc., R. Co. v. Penn.* (Tex. Civ. App. 1904) 79 S. W. Rep. 624.

**Sunken Box Near Track Insufficiently Covered.** — *Baltimore, etc., R. Co. v. Doty*, (C. C. A.) 133 Fed. Rep. 866.

**2. Tracks Laid Too Close Together.** — *Baltimore, etc., R. Co. v. Roberts*, 161 Ind. 1; *True v. Niagara Gorge R. Co.*, 70 N. Y. App. Div. 383, *affirmed without opinion* 175 N. Y. 487. Compare *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175.

**3. Defective Semaphores.** — *Chicago, etc., R. Co. v. Vipond*, 101 Ill. App. 607. See *Chapman v. Pere Marquette R. Co.*, 133 Mich. 311, 10 Detroit Leg. N. 194.

**4. Structures Placed Dangerously Near Tracks**



**63.** See notes 1, 2.

— *United States*. — Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; Northern Pac. R. Co. v. Perry, (C. C. A.) 116 Fed. Rep. 609.

*Alabama*. — Northern Alabama R. Co. v. Mansell, 138 Ala. 548.

*Illinois*. — Mobile, etc., R. Co. v. Vallowe, 214 Ill. 124; Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463; Chicago, etc., R. Co. v. Howell, 208 Ill. 155, *affirming* 109 Ill. App. 546; Chicago, etc., R. Co. v. Stevens, 189 Ill. 226; Chicago, etc., R. Co. v. Cleveland, 92 Ill. App. 308; Malott v. Laufman, 89 Ill. App. 178. See Chicago Terminal Transfer R. Co. v. Schiavone, 216 Ill. 275; Mobile, etc., R. Co. v. Vallowe, 214 Ill. 124, *affirming* 115 Ill. App. 621.

*Indiana*. — Wright v. Chicago, etc., R. Co., 160 Ind. 583.

*Iowa*. — Coles v. Union Terminal R. Co., 124 Iowa 48; Gorham v. Sioux City Stock Yards Co., 118 Iowa 749.

*Kansas*. — Hoffmeier v. Kansas City-Leavenworth R. Co., 68 Kan. 831.

*Kentucky*. — Louisville, etc., R. Co. v. Hall, 115 Ky. 567; Louisville, etc., R. Co. v. Mulfinger, 80 S. W. Rep. 499, 26 Ky. L. Rep. 3.

*Maine*. — McTaggart v. Maine Cent. R. Co., 100 Me. 223; Withee v. Somerset Traction Co., 98 Me. 61.

*Michigan*. — Bradburn v. Wabash R. Co., 134 Mich. 575, 10 Detroit Leg. N. 592.

*Montana*. — McCabe v. Montana Cent. R. Co., 30 Mont. 323.

*New York*. — Brown v. New York Cent., etc., R. Co., 42 N. Y. App. Div. 548, *affirmed* without opinion 166 N. Y. 626. See Drake v. Auburn City R. Co., 173 N. Y. 466.

*Ohio*. — Lake Shore, etc., R. Co. v. Fisher, 26 Ohio Cir. Ct. 143, *affirmed* without opinion 51 Ohio St. 574.

*Texas*. — Texas, etc., R. Co. v. Kelly, 34 Tex. Civ. App. 21, *affirmed* 98 Tex. 123; Galveston, etc., R. Co. v. Brown, 33 Tex. Civ. App. 589; Houston Electric Co. v. Robinson, (Tex. Civ. App. 1903) 76 S. W. Rep. 209; Galveston, etc., R. Co. v. Mortonson, 31 Tex. Civ. App. 142; International, etc., R. Co. v. Bearden, 31 Tex. Civ. App. 58; Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 413; San Antonio, etc., R. Co. v. Engelhorn, 24 Tex. Civ. App. 324.

*Utah*. — Leach v. Oregon Short Line R. Co., 29 Utah 285.

*Vermont*. — Morrisette v. Canadian Pac. R. Co., 74 Vt. 232. See Morrisette v. Canadian Pac. R. Co., 76 Vt. 267.

*Virginia*. — Norfolk, etc., R. Co. v. Cheatwood, 103 Va. 356. See Norfolk, etc., R. Co. v. Hawkes, 102 Va. 452.

*Washington*. — McDannald v. Washington, etc., R. Co., 31 Wash. 585.

*Canada*. — Day v. Dominion Iron, etc., Co., 36 Nova Scotia 113.

See Fearn v. New York Cent., etc., R. Co., 186 Mass. 529; Smith v. Atlanta, etc., R. Co., 130 N. Car. 344; Lindsay v. Norfolk, etc., R. Co., 132 N. Car. 59. Compare Chattanooga, etc., Electric R. Co. v. Moore, 113 Tenn. 551.

**Company Held Free from Negligence.** — Kenney v. Meddaugh, (C. C. A.) 118 Fed. Rep. 209.

**Overhead Structures.** — Coles v. Union Terminal R. Co., 124 Iowa 48.

**Branches of Trees Overhanging Track.** — Pittsburgh, etc., R. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120.

**Cars Negligently Placed on Track.** — International, etc., R. Co. v. Vanlandingham, (Tex. Civ. App. 1905) 85 S. W. Rep. 847.

**Pole Near Track Erected by Third Person.** — A railroad company using the track of another company is responsible for the dangerous proximity of a telegraph pole near the track although the pole was erected by the company owning the track. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463.

**Pole Erected by Telegraph Company.** — If the close proximity of a pole constitutes a source of danger to the employees of a railroad company it is not essential to the liability of the company to prove that the company had in any way participated in placing the pole in position. South Side El. R. Co. v. Nesvig, 214 Ill. 463.

**63. 1. Things Left On or Near Tracks — Rocks Stumps, Timber, Etc.** — Texas, etc., R. Co. v. Swearingen, (C. C. A.) 122 Fed. Rep. 193, *affirmed* 196 U. S. 51; Choctaw, etc., R. Co. v. Stallings, 70 Ark. 603; Donahue v. Boston, etc., R. Co., 178 Mass. 251; Pierce v. Brennan, 88 Minn. 50; Hurst v. Kansas City, etc., R. Co., 163 Mo. 309; Murray v. Boston, etc., R. Co., 72 N. H. 32, 101 Am. St. Rep. 660; Louisville, etc., R. Co. v. Jackson, 106 Tenn. 438; Ray v. Pecos, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 466; El Paso, etc., R. Co. v. Whately, (Tex. Civ. App. 1905) 85 S. W. Rep. 300; Texarkana, etc., R. Co. v. Toliver, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; Missouri, etc., R. Co. v. Keefe, (Tex. Civ. App. 1905) 84 S. W. Rep. 679. See Cane Belt R. Co. v. Crosson, (Tex. Civ. App. 1905) 87 S. W. Rep. 867. Compare McNiff v. Texas Midland R. Co., 26 Tex. Civ. App. 558.

**Cars on Side Track in Dangerous Proximity to Main Track.** — Rogers v. Cleveland, etc., R. Co., 211 Ill. 126; Struble v. Burlington, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 142; Milbourne v. Arnold Electric Power, etc., Co., (Mich. 1905) 103 N. W. Rep. 821, 12 Detroit Leg. N. 177.

**Cars Escaping from Side Track upon Main Track.** — Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434; Norfolk, etc., R. Co. v. Cromer, 101 Va. 667, 99 Va. 763, 3 Va. Sup. Ct. 502.

**2. Ice, Snow, Ashes, etc., On or Near Track.** — Chicago, etc., R. Co. v. Kinnare, 190 Ill. 9, *affirming* 91 Ill. App. 508; Pittsburgh, etc., R. Co. v. Elwood, 25 Ind. App. 671; Sankey v. Chicago, etc., R. Co., 118 Iowa 39; Atchison, etc., R. Co. v. Stanley, (Kan. 1905) 81 Pac. Rep. 176; Chittick v. Minneapolis, etc., R. Co., 88 Minn. 11; Ferguson v. Central R. Co., 71 N. J. L. 647.

**Cattle on Track.** — A railroad company owes a duty to its employees to exercise care to guard against the danger arising from cattle straying

**63.** *cc.* SIDE TRACKS. — See note 3.

**64.** *dd.* SWITCHES. — See notes 2, 3.

Switch Locks. — See note 5.

Lights. — See note 7.

Misplaced Switches. — See notes 9, 10.

**65.** *ee.* BLOCKING FROGS, GUARD RAILS, AND SWITCHES — (*aa*) *Duty of Master in Absence of Statutory Requirements.* — See notes 2, 3.

(*bb*) *Duty of Master under Statutory Requirements.* — See note 5

**66.** *ff.* FENCING TRACKS — *Statutory Provisions.* — See notes 1, 2.

upon the track. *Mendizabal v. New York Cent., etc., R. Co.*, 89 N. Y. App. Div. 386; *Illinois Cent. R. Co. v. Szamans*, 79 Miss. 106.

**63. 3. Failure to Provide Derrail Switches.** — *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *Cooper v. New York, etc., R. Co.*, 84 N. Y. App. Div. 42, reversed on other grounds 180 N. Y. 12.

**Failure to Use Stop-blocks.** — It seems that the failure to equip a side track with a "bumping post" or other obstruction may, together with other facts, be taken into consideration by the jury in deciding whether the premises were reasonably safe. *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1903) 71 Pac. Rep. 957.

In an action to recover for the death of a brakeman alleged to have resulted from the negligence of the defendant in not providing, at a certain point on its road, a sufficiently long side track or switch to accommodate a long train, without danger of running off the end thereof which was raised five and one-half feet from the ground, on a trestle, and in not having provided at the end of the side track a sufficient bumper or obstruction by which a train backed thereon might be checked from running off, it was held that the jury was justified in finding that the defendant had been negligent. *Pennsylvania R. Co. v. Jones*, (C. C. A.) 123 Fed. Rep. 753.

**64. 2. Duty of Railroad Company in Regard to Switches.** — *Birmingham Traction Co. v. Reville*, 136 Ala. 335; *Turritin v. Chicago, etc., R. Co.*, (Minn. 1905) 104 N. W. Rep. 225; *Loushay v. Erie R. Co.*, 75 N. Y. App. Div. 619; *Richey v. Southern R. Co.*, 69 S. Car. 387; *St. Louis Southwestern R. Co. v. Arnold*, (Tex. Civ. App. 1905) 87 S. W. Rep. 173; *International, etc., R. Co. v. Moynahan*, 33 Tex. Civ. App. 302; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

**Switch Negligently Left Open.** — *Dover v. Mississippi River, etc., R. Co.*, 100 Mo. App. 330.

**3. Extent of Obligation.** — *Cleveland, etc., R. Co. v. Snow*, (Ind. App. 1905) 74 N. E. Rep. 908.

6. See *Noe v. Rapid R. Co.*, 133 Mich. 152, 10 Detroit Leg. N. 155.

**7. Necessity of Lighting Switches.** — See *Louisville, etc., R. Co. v. Mounce*, 71 S. W. Rep. 518, 24 Ky. L. Rep. 1378; *Noe v. Rapid R. Co.*, 133 Mich. 152, 10 Detroit Leg. N. 155.

**9. Misplaced Switches — Opened by Stranger.** — *Contra, Yazoo, etc., R. Co. v. Block*, 86 Miss. 426.

**10. Opened by Employee.** — Compare *Missouri, etc., R. Co. v. Mayfield*, 29 Tex. Civ. App. 477;

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*Missouri, etc., R. Co. v. Follin*, 29 Tex. Civ. App. 512; *St. Louis Southwestern R. Co. v. Kelton*, 28 Tex. Civ. App. 137.

**65. 2. Necessity of Using Blocks.** — *Gilbert v. Burlington, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 529, affirming 123 Fed. Rep. 832; *Lane v. Missouri Pac. R. Co.*, 64 Kan. 755; *O'Neill v. Chicago, etc., R. Co.*, 62 Neb. 358, rehearing 66 Neb. 638.

It has been held that a railway company which is engaged in constructing a new switch is not required to block the frog during the progress of construction. *Hauss v. Lake Erie, etc., R. Co.*, (C. C. A.) 105 Fed. Rep. 733.

The rule has been stated in effect as follows: So long as blocked and unblocked frogs are in use on railroads and many roads prefer those that are unblocked, and it is questionable which is the safest or most suitable appliance for the business of railroads, a jury cannot impute negligence to a company which uses one of these appliances in preference to the other. *Kilpatrick v. Choctaw, etc., R. Co.*, (C. C. A.) 121 Fed. Rep. 11.

**Use of Blocking of Unusual but Reasonable Size.** — A railway company used a piece of lumber one inch thicker, six inches wider, and one foot longer than the customary blocking to fill the space between the guard rail and a main rail. It was held that the use of this blocking of unusual size was but the rightful exercise of the judgment of the company, and was no evidence of negligence or of liability for an injury resulting from a brakeman's stumbling over it. *Morris v. Duluth, etc., R. Co.*, 108 Fed. Rep. 747, 47 C. C. A. 661.

**3. Negligence a Question for Jury.** — *Schroeder v. Chicago, etc., R. Co.*, (Iowa 1905) 103 N. W. Rep. 985; *Pierson v. Chicago, etc., R. Co.*, 127 Iowa 13; *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80, petition for rehearing overruled 115 Iowa 88; *Texarkana, etc., R. Co. v. Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375. See *Ray v. Vicksburg, etc., R. Co.*, 113 La. 502; *Cleveland, etc., R. Co. v. Ullom*, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512.

**Use of "Loose Tongue" Switch on Electric Street Railroads.** — *Birmingham Traction Co. v. Reville*, 136 Ala. 335.

**5. Noncompliance with Statutes Held Negligence.** — *Jones v. Flint, etc., R. Co.*, 127 Mich. 198, 8 Detroit Leg. N. 295; *Coleman v. Himelberger-Harrison Land, etc., Co.*, 105 Mo. App. 254; *Johns v. Cleveland, etc., R. Co.*, 10 Ohio Dec. 348, 7 Ohio N. P. 592.

**66. 1. Statutes Requiring Gates at Crossings.** — *Chicago, etc., R. Co. v. Wise*, 206 Ill. 453, affirming 106 Ill. App. 174.

**2. Statutes Making Company Liable for Injury**

- 66.** *gg.* CULVERTS AND OTHER INSTRUMENTALITIES FOR DRAINAGE. — See note 4.
- 67.** *hh.* BRIDGES — (*aa*) *In General.* — See note 2.
- 68.** Limit as to Degree of Care Necessary. — See notes 1, 2.  
*(bb)* Covered and Overhead Bridges — *aaa.* Height of Bridges. — See notes 3, 4, 5, 6.  
 Assumption of Risk. — See note 8.
- 69.** Contributory Negligence. — See note 1.  
*bbb.* "Whipping Straps" or "Telltale." — See note 2.  
 In the Absence of a Statutory Requirement of This Nature. — See note 3.  
*(3)* Evidence in Actions for Injuries from Defects in Place of Work —
- (a) *In General.* — See note 4.
- 70.** See notes 2, 3, 4.

to Stock — Effect. — Compare *Snyder v. Pennsylvania R. Co.*, 205 Pa. St. 619.

**66.** 4. Reasonable Care in Constructing and Maintaining Culverts Necessary. — *Western R. Co. v. Russell*, (Ala. 1905) 39 So. Rep. 311; *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395.

**67.** 2. Bridges — Reasonable Care in Construction and Maintenance Necessary. — *Maydole v. Denver, etc., R. Co.*, 15 Colo. App. 449; *Southern R. Co. v. Cooper*, 62 S. W. Rep. 858, 23 Ky. L. Rep. 290; *Copeland v. Wabash R. Co.*, 175 Mo. 650; *Leach v. Oregon Short Line R. Co.*, 29 Utah 285; *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91.

*Trestles.* — *Dolan v. Sierra R. Co.*, 135 Cal. 435; *Harrill v. South Carolina, etc., R. Co.*, 135 N. Car. 601.

*Bridge Destroyed by Fire.* — *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25.

*Bridge Controlled by Municipality.* — A street car company, when using a city bridge for its tracks, thereby adopts such bridge as one of its appliances, and if such company knows, or by the exercise of reasonable care could know, that such bridge is in a defective and unsafe condition, and liable to give way and fall by reason of such condition, and knowingly causes or permits its cars to be run over such bridge, and the bridge gives way and falls because of said defective condition, while cars of such company are in the act of crossing, and its employees in charge of the cars, or upon them, in the line of their employment, are, without negligence on their part, injured in the fall of such cars, such employees would be entitled to recover for injuries so received. *Indianapolis v. Cauley*, 164 Ind. 304.

**68.** 1. What Degree of Care Sufficient. — *Erie R. Co. v. McCormick*, 69 Ohio St. 45; *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25.

In an action to recover for personal injuries sustained by the plaintiff, a brakeman in the employ of the defendant railroad company, by the breaking of a trestle alleged to have been defective, it was said that if defendant exercised ordinary care in the construction of the trestle — that is, if it was built in the manner that an ordinarily prudent man would have built it, if he himself had intended to use it in the way the plaintiff was using it, then the defendant performed its full duty toward its servant. *Dolan v. Sierra R. Co.*, 135 Cal. 435.

2. Not Bound to Anticipate Every Possible

*Danger.* — *Cleveland, etc., R. Co. v. Haas*, 35 Ind. App. 626; *Krebbs v. Oregon R., etc., Co.*, 40 Wash. 138.

**3.** Duty as to Construction of Overhead Bridges Stated. — *Pittsburgh, etc., R. Co. v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Hollingsworth v. Chicago, etc., R. Co.*, 160 Ind. 259; *Gulf, etc., R. Co. v. Knox*, 25 Tex. Civ. App. 450.

**4.** Duty as to Construction of Covered Bridges. — *Louisville, etc., R. Co. v. Tucker*, 65 S. W. Rep. 453, 23 Ky. L. Rep. 1929.

*Width of Bridges.* — If the employees of a railroad company are required to be on the side of its cars in the discharge of their duty as the trains pass over bridges, it is incumbent on the company to so construct and maintain its bridges as to make them reasonably safe for such use; but if the employees are not required to be on the side of the cars at such times, the company violates no duty it owes them by failing to construct its bridges of sufficient width to permit of an employee riding on the side of a car over a bridge. *Krebbs v. Oregon R., etc., Co.*, 40 Wash. 138.

**5.** Construction of Low Bridges Justified by Circumstances. — *Hedrick v. Southern R. Co.*, 136 N. Car. 510.

**6.** Duty to Warn or Instruct Employees. — *Hedrick v. Southern R. Co.*, 136 N. Car. 510; *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530.

**8.** Assumption of Known Risks. — *Hollingsworth v. Chicago, etc., R. Co.*, 160 Ind. 259; *Erie R. Co. v. McCormick*, 69 Ohio St. 45. Compare *Hedrick v. Southern R. Co.*, 136 N. Car. 510, decided under *Virginia* statutes.

**69.** 1. Contributory Negligence. — See *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530.

2. Necessity of Providing Whipping Straps. — *Hailey v. Texas, etc., R. Co.*, 113 La. 533.

*Injuries Received from Contact with "Telltale."* — *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269.

3. See *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530; *Gulf, etc., R. Co. v. Knox*, 25 Tex. Civ. App. 450.

4. The knowledge of a defendant railroad company of the condition of the track at the place where a servant was injured, and at other points, is admissible. *International, etc., R. Co. v. Penn.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 624.

**70.** 2. Other Accidents. — See *Schwarzschild v. Drysdale*, 69 Kan. 119; *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683; *Coughlin v.*

**70. (b) Methods in Use by Other Companies.** — See notes 6, 7, 8.

Presumptions. — See note 9.

**71.** See note 1.

Brooklyn Heights R. Co., 59 N. Y. App. Div. 126; Cavanagh v. O'Neill, 27 N. Y. App. Div. 48, *affirmed* without opinion 161 N. Y. 657. But see Bach v. Iowa Cent. R. Co., 112 Iowa 241. Compare Roche v. Llewellyn Ironworks Co., 140 Cal. 563; Gustafson v. Young, 91 N. Y. App. Div. 453.

**70. 3. Evidence that No Accident Had Happened.** — Mobile, etc., R. Co. v. Vallowe, 214 Ill. 124, *affirming* 115 Ill. App. 621; Mueller v. Northwestern Iron Co., 125 Wis. 326. *Contra*, Southern R. Co. v. McLellan, 80 Miss. 700.

**4. Defect in Proximity to Place of Accident.** — See Baltimore, etc., R. Co. v. Clifford, 99 Ill. App. 381; Southern R. Co. v. Sittasen, (Ind. App. 1905) 74 N. E. Rep. 898. Compare Briggs v. East Broad Top R., etc., Co., 206 Pa. St. 564.

**Condition of Railroad Track After Accident.** — Where inferences may properly be drawn as to conditions existing at the time of a derailment from the condition of the rails and timbers of the railway as they appeared shortly after the accident, evidence to prove such subsequent condition is admissible. E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206. See Meyers v. Highland Boy Gold Min. Co., 28 Utah 96.

**Condition of Place Prior to Accident.** — In an action to recover for the death of the plaintiff's intestate by the falling of a building in the construction of which he was employed, it was held that under the circumstances of the case evidence of the condition of the building about six weeks before the accident was properly admitted. Nelson v. Young, 91 N. Y. App. Div. 457, *affirmed* 180 N. Y. 523.

**6. Methods in Common Use by Other Companies as Evidence for Defendant.** — Nyback v. Champagne Lumber Co., (C. C. A.) 109 Fed. Rep. 732; Southern R. Co. v. McLellan, 80 Miss. 700. See Rafferty v. Nawn, 182 Mass. 503. Compare Gruenendahl v. Consolidated Coal Co., 108 Ill. App. 644. *Contra*, Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, *affirming* 115 Ill. App. 209; Chicago, etc., R. Co. v. Kinnare, 115 Ill. App. 132.

In an action to recover for injuries received by a mule driven in a mine in consequence of coming in contact with the roof or side of an entry, which was alleged to be of insufficient height, it was held that witnesses were properly permitted to testify to the custom in that particular mining district as to the height and width of entries. Hamilton v. Mendota Coal, etc., Co., 120 Iowa 147.

In an action to recover for the death of a brakeman in the employ of the defendant, alleged to have been caused by the negligence of the defendant in erecting and maintaining a stock gap in dangerous proximity to the track, it was held that the trial court erred in assuming that, subject only to the defense of contributory negligence, the plaintiff would be entitled to recover if the track and the stock gap in question were not such as were furnished on well regulated railroads generally, and if the failure to have it so was the proximate cause of the death of the plaintiff's intestate. Such

failure would not necessarily and as a matter of law have established the charge of negligence. As evidential of what in the exercise of due care ought to have been done in the construction and maintenance of the roadway, it was proper to consider the usage prevailing on other well regulated railroads; but "all railroads are not required to conform to one standard," and safety may be conserved, and, therefore, the duty of care performed, by providing a roadway not in conformity with such usage. Northern Alabama R. Co. v. Mansell, 138 Ala. 548.

**Usual and Customary Construction.** — It has been held that where a negligent construction is alleged as the basis of an action, evidence as to the usual and customary manner of construction is inadmissible. Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399.

**7. As Evidence for Plaintiff.** — Schroeder v. Chicago, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 985. *Contra*, Chicago, etc., R. Co. v. Cleveland, 92 Ill. App. 308; Donovan v. American Linen Co., 180 Mass. 127.

But since the track of a well regulated cross-country railroad furnishes no standard of comparison, and no criterion of excellence as to a furnace company's tracks laid on its cinder pile for the sole purpose of carting off the slag from the furnace, the fact that such cinder tracks are not like the tracks of well regulated cross-country railroads is not pertinent to the issue whether the cinder tracks are defectively constructed, and throws no legitimate light upon it. Sloss-Sheffield Steel, etc., Co. v. Mobley, 139 Ala. 425, holding that the testimony of a witness that the defendant's cinder track was not like the tracks of regular cross-country roads should have been excluded.

**8. Methods of Particular Company.** — Sloss-Sheffield Steel, etc., Co. v. Mobley, 139 Ala. 425.

**9. Presumption that Master Has Done His Duty.** — *Railey v. Garbutt*, 112 Ga. 288; *Stackpole v. Wray*, 99 N. Y. App. Div. 262, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70. See *Consolidated Kansas City Smelting, etc., Co. v. Allen*, 64 Kan. 70; *Grant v. National Railway Spring Co.*, 86 N. Y. App. Div. 593.

**71. 1. No Presumption of Negligence from Injury.** — *United States.* — Highland Boy Gold Min. Co. v. Pouch, (C. C. A.) 124 Fed. Rep. 148; *Mountain Copper Co. v. Van Buren*, (C. C. A.) 123 Fed. Rep. 61; *In re California Nav., etc., Co.*, 110 Fed. Rep. 670.

*California.* — *Turner v. Southern Pac. Co.*, 142 Cal. 580; *Thompson v. California Constr. Co.*, (Cal. 1905) 82 Pac. Rep. 367.

*Colorado.* — *Greeley v. Foster*, 32 Colo. 292.

*Iowa.* — *Bergman v. Altman*, 127 Iowa 693; *Allen v. Chicago, etc., R. Co.*, 126 Iowa 213.

*Massachusetts.* — *Hofnauer v. R. H. White Co.*, 186 Mass. 47.

*Minnesota.* — *Thomas v. Smith*, 90 Minn. 379.

*Missouri.* — *Copeland v. Wabash R. Co.*, 175 Mo. 650; *Wojtylak v. Kansas, etc., Coal Co.*, 188 Mo. 260. But compare *Johnson v. Metropolitan St. R. Co.*, 104 Mo. App. 588; *Jones v.*

**71. c. DUTY TO PROVIDE AND MAINTAIN SAFE MACHINERY AND APPLIANCES** — (1) *Statement of General Rule.* — See note 2.

Kansas City, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434.

*New York.* — *Holzman v. Katzman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 250. See *Dolan v. New York Sanitary Utilization Co.*, 104 N. Y. App. Div. 14.

*Pennsylvania.* — *Laven v. Moore*, 211 Pa. St. 245; *Surles v. Kistler*, 202 Pa. St. 289; *Price v. Lehigh Valley R. Co.*, 202 Pa. St. 176. See *McCarthy v. Shoneman*, 198 Pa. St. 568.

*Texas.* — *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551.

*Utah.* — *Downey v. Gemini Min. Co.*, 24 Utah 431.

*Wisconsin.* — *Cosgrove v. Filer, etc., Co.*, 112 Wis. 457.

See *Fuller v. Ann Arbor R. Co.*, (Mich. 1905) 104 N. W. Rep. 414, 12 Detroit Leg. N. 348. Compare *McLean v. Pere Marquette R. Co.*, 137 Mich. 482, 11 Detroit Leg. N. 358; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267. But see *Palmer Brick Co. v. Chenall*, 119 Ga. 837, in which it is said that the maxim *res ipsa loquitur* is applicable, under certain circumstances, in suits by a servant against his master for damages resulting from the master's negligence.

In an action to recover for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendant in consequence of being placed at work in an unsafe place under an arch that had been unskillfully constructed, it was held that where no explanation was given as to the cause of the fall of a brick arch, the maxim *res ipsa loquitur* applied, and the jury might infer that there was negligence on the part of the owner, either in its original construction or in its subsequent maintenance. *Chenall v. Palmer Brick Co.*, 117 Ga. 106.

In an action to recover for injuries sustained by the plaintiff by the falling of the roof of a building in which he was working for the defendant, it was held that the fact that the roof fell under the circumstances disclosed by the record while it was in course of construction was, until otherwise explained, *prima facie* evidence of the insufficiency of the building. *Hearn v. Quillen*, 94 Md. 39.

Where the plaintiff, who was employed in the defendant's mine, was injured while walking to his work with other workmen in the usual place and manner upon a narrow ledge of earth on the edge of a precipice, by the giving way of the earth, whereby he was precipitated into the deep opening, it was held that a *prima facie* case was established in the plaintiff's favor sufficient at least to require a submission to the jury. *Lentino v. Port Henry Iron Ore Co.*, 71 N. Y. App. Div. 466.

**71. 2. Duty to Provide Safe Machinery and Appliances** — *United States.* — *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311; *Pittsburgh, etc., R. Co. v. Lampshire*, (C. C. A.) 137 Fed. Rep. 20; *Cincinnati, etc., R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519; *Cudahy Packing Co. v. Anthes*, (C. C. A.) 117

Fed. Rep. 118; *The Frey*, 113 Fed. Rep. 1003; *The Anchoria*, 113 Fed. Rep. 982, *affirmed* without opinion (C. C. A.) 120 Fed. Rep. 1017; *In re California Nav., etc., Co.*, 110 Fed. Rep. 670; *Lafayette Bridge Co. v. Olsen*, (C. C. A.) 108 Fed. Rep. 335. Compare *Kelly v. Jutte, etc., Co.*, (C. C. A.) 104 Fed. Rep. 955.

*Alabama.* — *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537.

*California.* — *Helling v. Schindler*, 145 Cal. 303; *Olsen v. Gray*, 147 Cal. 112.

*Colorado.* — *Tanner v. Harper*, 32 Colo. 156; *Roche v. Denver, etc., R. Co.*, 19 Colo. App. 204; *Floyd v. Colorado Fuel, etc., Co.*, 18 Colo. App. 153.

*Connecticut.* — *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617; *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46; *Currelli v. Jackson*, 77 Conn. 115.

*Delaware.* — *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Crocker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1; *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*District of Columbia.* — *Staubley v. Potomac Electric Power Co.*, 21 App. Cas. (D. C.) 160.

*Georgia.* — *Savannah, etc., R. Co. v. Pughslley*, 113 Ga. 1012.

*Illinois.* — *Franke v. Hanly*, 215 Ill. 216; *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583, *affirming* 115 Ill. App. 455; *Morton v. Zwierzykowski*, 192 Ill. 328, *affirming* 91 Ill. App. 462; *Armour v. Brazeau*, 191 Ill. 117; *Union Bridge Co. v. Teehan*, 190 Ill. 374, *affirming* 92 Ill. App. 259; *Bates Mach. Co. v. Crowley*, 115 Ill. App. 540; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Hass v. Chicago, etc., R. Co.*, 97 Ill. App. 624; *Illinois Cent. R. Co. v. North*, 97 Ill. App. 124; *Maxwell v. Zdarski*, 93 Ill. App. 334.

*Indiana.* — *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379; *Baltimore, etc., R. Co. v. Roberts*, 161 Ind. 1; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71; *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393; *American Tin-Plate Co. v. Williams*, 30 Ind. App. 46.

*Iowa.* — *Fries v. Bettendorf Axle Co.*, 126 Iowa 138; *Klaffke v. Bettendorf Axle Co.*, 125 Iowa 224; *Crane v. Chicago, etc., R. Co.*, 124 Iowa 81; *Shebeck v. National Cracker Co.*, 120 Iowa 414; *Aga v. Harbach*, (Iowa 1903) 93 N. W. Rep. 601; *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Kansas.* — *Cudahy Packing Co. v. Sedlack*, 69 Kan. 472; *Buoy v. Clyde Milling, etc., Co.*, 68 Kan. 436; *Emporia v. Kowalski*, 66 Kan. 64; *Atchison, etc., R. Co. v. Kingscott*, 65 Kan. 131; *Mirick v. Morton*, 62 Kan. 870, 64 Pac. Rep. 609.

*Kentucky.* — *Buey v. Chess, etc., Co.*, 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; *Carey v. Samuels*, 88 S. W. Rep. 1052, 28 Ky. L. Rep.

6; Ahrens, etc., *Mfg. Co. v. Rellihan*, 82 S. W. Rep. 993, 26 Ky. L. Rep. 919; James *v. Ames*, 82 S. W. Rep. 229, 26 Ky. L. Rep. 498; Dune-kake *v. Beyer*, 79 S. W. Rep. 209, 25 Ky. L. Rep. 2001; Henderson Brewing Co. *v. Folden*, 76 S. W. Rep. 520, 25 Ky. L. Rep. 969; Clay City Lumber, etc., Co. *v. Noe*, 76 S. W. Rep. 195, 25 Ky. L. Rep. 668; Shanks *v. Citizens' Gen. Electric Co.*, 76 S. W. Rep. 379, 25 Ky. L. Rep. 811; Republic Iron, etc., Works *v. Gregg*, 71 S. W. Rep. 900, 24 Ky. L. Rep. 1627; Brooks *v. Louisville, etc., R. Co.*, 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318; Louisville, etc., R. Co. *v. Roberts*, 70 S. W. Rep. 833, 24 Ky. L. Rep. 1160; United Laundry Co. *v. Steele*, 72 S. W. Rep. 305, 24 Ky. L. Rep. 1899; Covington, etc., Bridge Co. *v. Goodnight*, 60 S. W. Rep. 475, 22 Ky. L. Rep. 1242; Louisville, etc., Packet Co. *v. Samuels*, 59 S. W. Rep. 3, 22 Ky. L. Rep. 979; Wake *v. Price*, 58 S. W. Rep. 519, 22 Ky. L. Rep. 696.

*Louisiana.*—Smith *v. Minden Lumber Co.*, 114 La. 1035; Moses *v. Grant Lumber Co.*, 114 La. 933; Williams *v. Levert Lumber, etc., Co.*, 114 La. 805; Burns *v. Ruddock-Orleans Cypress Co.*, 114 La. 247; Carter *v. Fred W. Dubach Lumber Co.*, 113 La. 239; Bonnin *v. Crowley*, 112 La. 1025; Broadfoot *v. Shreveport Cotton Oil Co.*, 111 La. 467; Merritt *v. Victoria Lumber Co.*, 111 La. 159; Kimbell *v. Homer Compress, etc., Co.*, 109 La. 963; Gauden *v. Kansas City Southern R. Co.*, 106 La. 409; Lynn *v. Antrim Lumber Co.*, 105 La. 451.

*Maine.*—Beal *v. Bryant*, 99 Me. 112; Moore *v. Stetson*, 96 Me. 197; Rounds *v. Carter*, 94 Me. 535; Caven *v. Bodwell Granite Co.*, 99 Me. 278; Amburg *v. International Paper Co.*, 97 Me. 327. See McTaggart *v. Maine Cent. R. Co.*, 106 Me. 223; Bowden *v. Derby*, 97 Me. 536, 94 Am. St. Rep. 516.

*Maryland.*—Maryland Steel Co. *v. Engleman*, 101 Md. 661; Philadelphia, etc., R. Co. *v. Devers*, 101 Md. 341; Buttner *v. South Baltimore Steel Car. etc., Co.*, 101 Md. 168; Brager *v. Austin*, 99 Md. 473; Yentsch *v. Chloride of Silver Dry Cell Battery Co.*, 96 Md. 679; National Enameling, etc., Co. *v. Cornell*, 95 Md. 524; Baltimore Boot, etc., Mfg. Co. *v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.

*Massachusetts.*—O'Neil *v. Ginn*, 188 Mass. 346; Harris *v. Putnam Mach. Co.*, 188 Mass. 85; Lynch *v. M. T. Stevens, etc., Co.*, 187 Mass. 397; Kirk *v. Sturdy*, 187 Mass. 87; Carter *v. Boston Towboat Co.*, 185 Mass. 496; Chisholm *v. New England Telephone, etc., Co.*, 185 Mass. 82; Murphy *v. Marston Coal Co.*, 183 Mass. 385; Ellis *v. Thayer*, 183 Mass. 309; McLean *v. Paine*, 181 Mass. 287; Slattery *v. Walker, etc., Mfg. Co.*, 179 Mass. 307; Haskell *v. Cape Ann Anchor Works*, 178 Mass. 485; Littlefield *v. Edward P. Allis Co.*, 177 Mass. 151.

*Michigan.*—Sipes *v. Michigan Starch Co.*, 137 Mich. 258, 11 Detroit Leg. N. 287; Geller *v. Briscoe Mfg. Co.*, 136 Mich. 330, 11 Detroit Leg. N. 31; Corbett *v. American Screen Door Co.*, 133 Mich. 669, 10 Detroit Leg. N. 305; Rick *v. Saginaw Bay Towing Co.*, 132 Mich. 237, 102 Am. St. Rep. 422, 9 Detroit Leg. N. 589; McDonald *v. Michigan Cent. R. Co.*, 132 Mich. 372, 102 Am. St. Rep. 426, 9 Detroit Leg. N. 700; Noble *v. Bessemer Steamship Co.*, 127

Mich. 103, 89 Am. St. Rep. 461, 8 Detroit Leg. N. 244.

*Minnesota.*—Swanson *v. Oakes*, 93 Minn. 404; Shalgren *v. Red Cliff Lumber Co.*, (Minn. 1905) 104 N. W. Rep. 531; Kurstelska *v. Jackson*, 93 Minn. 385; Le Duc *v. Northern Pac. R. Co.*, 92 Minn. 287; Hendricks *v. Lesure Lumber Co.*, 92 Minn. 318, rehearing denied 92 Minn. 322; Gittens *v. William Porten Co.*, 90 Minn. 512; Dieters *v. St. Paul Gaslight Co.*, 86 Minn. 474; Jacobson *v. Johnson*, 87 Minn. 185; Kerrigan *v. Chicago, etc., R. Co.*, 86 Minn. 407; Gray *v. Commutator Co.*, 85 Minn. 463; Attix *v. Minnesota Sandstone Co.*, 85 Minn. 142; Miller *v. Great Northern R. Co.*, 85 Minn. 272; Thiel *v. Kennedy*, 82 Minn. 142.

*Mississippi.*—Bradford *v. Taylor*, 85 Miss. 409.

*Missouri.*—Blundell *v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; Purcell *v. Tenant Shoe Co.*, 187 Mo. 276; Goransson *v. Ritter-Conley Mfg. Co.*, 186 Mo. 300; Howard *v. Missouri Pac. R. Co.*, 173 Mo. 524; Holmes *v. Brandenbaugh*, 172 Mo. 53; Minnier *v. Sedalia, etc., R. Co.*, 167 Mo. 99; Lore *v. American Mfg. Co.*, 160 Mo. 608; Lee *v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; Dean *v. St. Louis Woodenware Works*, 106 Mo. App. 167; Harrington *v. Wabash R. Co.*, 104 Mo. App. 663; Glasscock *v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; Deckerd *v. Wabash R. Co.*, 111 Mo. App. 117; Cameron *v. B. Roth Tool Co.*, 108 Mo. App. 265; Glasscock *v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; Robbins *v. Big Circle Min. Co.*, 105 Mo. App. 78; Mitchell *v. Wabash R. Co.*, 97 Mo. App. 411; Franklin *v. Missouri, etc., R. Co.*, 97 Mo. App. 473; Parsons *v. Hammond Packing Co.*, 96 Mo. App. 372; Kane *v. Falk Co.*, 93 Mo. App. 209; Weldon *v. Omaha, etc., R. Co.*, 93 Mo. App. 668; Palmer *v. Kinloch Telephone Co.*, 91 Mo. App. 106; Herbert *v. Mound City Boot, etc., Co.*, 90 Mo. App. 305; Devore *v. St. Louis, etc., R. Co.*, 86 Mo. App. 429. See Rendlich *v. Hammond Packing Co.*, 106 Mo. App. 717.

*Nebraska.*—Cudahy Packing Co. *v. Roy*, (Neb. 1904) 99 N. W. Rep. 231; Swift *v. Holoubek*, 60 Neb. 784, rehearing 62 Neb. 31.

*New Hampshire.*—Wallace *v. Boston, etc., R. Co.*, 72 N. H. 504; Olney *v. Boston, etc., R. Co.*, 71 N. H. 427; Thompson *v. Bartlett*, 71 N. H. 174, 93 Am. St. Rep. 504.

*New Jersey.*—Carroll *v. Tidewater Oil Co.*, 67 N. J. L. 679; Kalker *v. Hedden*, (N. J. 1905) 61 Atl. Rep. 395; Burns *v. Delaware, etc., Tel. etc., Co.*, 70 N. J. L. 745; McDonald *v. Standard Oil Co.*, 69 N. J. L. 445; Campbell *v. T. A. Gillespie Co.*, 69 N. J. L. 279.

*New York.*—Welle *v. Celluloid Co.*, 175 N. Y. 401, reversing 52 N. Y. App. Div. 522; Welsh *v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; McGuire *v. Bell Telephone Co.*, 167 N. Y. 208, affirming (Supm. Ct. App. Div.) 66 N. Y. Supp. 1137; Quigley *v. Levering*, 167 N. Y. 58, affirming 50 N. Y. App. Div. 354; Motzing *v. Excelsior Brewing Co.*, 107 N. Y. App. Div. 275; Pluckham *v. American Bridge Co.*, 104 N. Y. App. Div. 404; O'Keefe *v. Great Northern Elevator Co.*, 105 N. Y. App. Div. 8; Kremer *v. New York Edison Co.*, 102 N. Y. App. Div. 433; Hunt *v. Dexter Sulphite Pulp*,

etc., Co., 106 N. Y. App. Div. 119; Stackpole v. Wray, 99 N. Y. App. Div. 262; Earle v. Clyde Steamship Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 535, reversed 103 N. Y. App. Div. 21; Newton v. New York Cent., etc., R. Co., 96 N. Y. App. Div. 81; Krueger v. Bartholomay Brewing Co., 94 N. Y. App. Div. 58, affirmed 182 N. Y. 544; Meehan v. Atlas Safe Moving, etc., Truckage Co., 94 N. Y. App. Div. 306; Smith v. New York, etc., R. Co., 86 N. Y. App. Div. 188, affirmed without opinion 178 N. Y. 635; Murphy v. Hopper, 75 N. Y. App. Div. 606; Allison v. Long Clove Trap Rock Co., 75 N. Y. App. Div. 267; Walters v. George A. Fuller Co., 74 N. Y. App. Div. 388; O'Connell v. Thompson-Starrett Co., 72 N. Y. App. Div. 47; Smith v. King, 74 N. Y. App. Div. 1; Murphy v. Coney Island, etc., R. Co., 65 N. Y. App. Div. 546; Fink v. Slade, 66 N. Y. App. Div. 105; Apati v. Delaware, etc., R. Co., 64 N. Y. App. Div. 515; Vincent v. Alden, 62 N. Y. App. Div. 558; Hoes v. Ocean Steamship Co., 56 N. Y. App. Div. 259, affirmed without opinion 170 N. Y. 581; Dzinbienski v. J. L. Mott Iron Works, 56 N. Y. App. Div. 58; Jarvis v. Northern New York Marble Co., 55 N. Y. App. Div. 272; Yaw v. Whitmore, 46 N. Y. App. Div. 422, affirmed without opinion 167 N. Y. 605; Hatton v. Hilton Bridge Constr. Co., 42 N. Y. App. Div. 398, affirmed without opinion 167 N. Y. 590; Daly v. Lee, 39 N. Y. App. Div. 188, affirmed without opinion 167 N. Y. 537; Biddiscomb v. Cameron, 35 N. Y. App. Div. 561, affirmed without opinion 161 N. Y. 637; Stimper v. Fuchs, etc., Mfg. Co., 26 N. Y. App. Div. 333, affirmed without opinion 161 N. Y. 636.

*North Carolina.*—Pressly v. Dover Yarn-mills, 138 N. Car. 410; Walker v. Carolina Cent. R. Co., 135 N. Car. 738; Dorsett v. Clement-Ross Mfg. Co., 131 N. Car. 254; Myers v. Concord Lumber Co., 129 N. Car. 252; Hicks v. Naomi Falls Mfg. Co., 138 N. Car. 319; Stewart v. Van Deventer Carpet Co., 138 N. Car. 60; Creech v. Wilmington Cotton Mills, 135 N. Car. 680; Womble v. Merchants Grocery Co., 135 N. Car. 474; Orr v. Southern Bell Telephone, etc., Co., 132 N. Car. 691, 130 N. Car. 627; Fleming v. Greenleaf-Johnson Lumber Co., 128 N. Car. 532; Halton v. Southern R. Co., 127 N. Car. 255.

*Ohio.*—Forest City Stone Co. v. Richardson, 12 Ohio Cir. Dec. 177, 22 Ohio Cir. Ct. 139; Frolich v. Cranker, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615; Michigan Cent. R. Co. v. Waterworth, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 498.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Oregon.*—Busch v. Robinson, (Oregon 1905) 81 Pac. Rep. 237; Mundhenke v. Oregon City Mfg. Co., (Oregon 1905) 81 Pac. Rep. 977; Geldard v. Marshall, 43 Oregon 438; Miller v. Inman, 40 Oregon 161; Stager v. Troy Laundry Co., 38 Oregon 480; Robinson v. Taku Fishing Co., 42 Oregon 537.

*Pennsylvania.*—Bartholomew v. Kemmerer, 211 Pa. St. 277; Patterson v. Harrisburg Trust Co., 211 Pa. St. 173; Wallace v. Henderson, 211 Pa. St. 142; Sweigert v. Klingensmith, 210 Pa. St. 565; Kepler v. Lackawanna Lumber Co., 209 Pa. St. 244; Calhoun v. Holland Laundry, 208 Pa. St. 139; Buttermann v. McClintic-Marshall

Constr. Co., 206 Pa. St. 82; Marsh v. Lehigh Valley R. Co., 206 Pa. St. 558; Finnerty v. Burnham, 205 Pa. St. 305; Winters v. Boll, 204 Pa. St. 41; O'Rourke v. Alphons Custodis Chimney Constr. Co., 21 Pa. Super. Ct. 52.

*Rhode Island.*—McCaughy v. Jenckes Spinning Co., 26 R. I. 426; Petrarca v. Quindnick Mfg. Co., 27 R. I. 265; Crandall v. Stafford Mfg. Co., 24 R. I. 555; Collins v. Harrison, 25 R. I. 489; McGarrity v. New York, etc., R. Co., 25 R. I. 269; Cummings v. National, etc., Worsted Mills, 24 R. I. 390; Benson v. New York, etc., R. Co., 23 R. I. 147; McGar v. National, etc., Worsted Mills, 22 R. I. 347.

*South Carolina.*—Keys v. Winnsboro Granite Co., 72 S. Car. 97; Willis v. Cherokee Falls Mfg. Co., 72 S. Car. 126; Biggers v. Catawba Power Co., 72 S. Car. 264; Sanders v. Aiken Mfg. Co., 71 S. Car. 58; Roach v. Haile Gold Min. Co., 71 S. Car. 79; Richey v. Southern R. Co., 69 S. Car. 387; Koon v. Southern R. Co., 69 S. Car. 101; Carson v. Southern R. Co., 68 S. Car. 55, judgment affirmed Southern R. Co. v. Carson, 194 U. S. 136; Wood v. Victor Mfg. Co., 66 S. Car. 482; Bodie v. Charleston, etc., R. Co., 66 S. Car. 302; Lowrimore v. Palmer Mfg. Co., 60 S. Car. 153; Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, 85 Am. St. Rep. 824. See Gallman v. Union Hardwood Mfg. Co., 65 S. Car. 192.

*Tennessee.*—Chattanooga Machinery Co. v. Hargraves, 111 Tenn. 476; Robertson v. Cayard, 111 Tenn. 356; Record v. Chickasaw Co-op-erage Co., 108 Tenn. 657; Ritt v. True Tag Paint Co., 108 Tenn. 646; Central Mfg. Co. v. Cotton, 108 Tenn. 63.

*Texas.*—El Paso, etc., R. Co. v. Vizard, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; American Cotton Co. v. Simmons, (Tex. Civ. App. 1905) 87 S. W. Rep. 842; Missouri, etc., R. Co. v. Kellerman, (Tex. Civ. App. 1905) 87 S. W. Rep. 401; Peck v. Peck, (Tex. 1905) 87 S. W. Rep. 248; Texas, etc., R. Co. v. Hemp-hill, (Tex. Civ. App. 1905) 86 S. W. Rep. 450; Smith v. Armour, (Tex. Civ. App. 1905) 84 S. W. Rep. 675; Missouri, etc., R. Co. v. Smith, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; Galveston, etc., R. Co. v. Perry, 36 Tex. Civ. App. 414; Gulf, etc., R. Co. v. Davis, 35 Tex. Civ. App. 285; Missouri, etc., R. Co. v. Hoskins, 34 Tex. Civ. App. 627; San Antonio, etc., R. Co. v. Klaus, 34 Tex. Civ. App. 492; Dallas Electric Co. v. Mitchell, 33 Tex. Civ. App. 424; Texas, etc., R. Co. v. Hartnett, 33 Tex. Civ. App. 103; Missouri, etc., R. Co. v. Blackman, 32 Tex. Civ. App. 200; Gulf, etc., R. Co. v. Hayden, 29 Tex. Civ. App. 280; Galveston, etc., R. Co. v. Butchek, (Tex. Civ. App. 1901) 66 S. W. Rep. 335; Bering Mfg. Co. v. Peterson, 28 Tex. Civ. App. 194; Smith v. Gulf, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 83; Ladonia Cotton Oil Co. v. Shaw, 27 Tex. Civ. App. 65; Dupree v. Tamborilla, 27 Tex. Civ. App. 603; Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503; Galveston, etc., R. Co. v. Buch, 27 Tex. Civ. App. 283; Galveston, etc., R. Co. v. Newport, 26 Tex. Civ. App. 583; Galveston, etc., R. Co. v. Hampton, 24 Tex. Civ. App. 458; Galveston, etc., R. Co. v. English, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

*Utah.*—Wood v. Rio Grande Western R. Co., 28 Utah 351; Moyes v. Ogden Sewer Pipe, etc.,

- 73.** (2) *Exception to Rule.* — See note 1.  
 (3) *Master's Duty a Continuing One.* — See note 2.

Co., 28 Utah 148; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Morgan v. Mammoth Min. Co.*, 26 Utah 174; *Boyle v. Union Pac. R. Co.*, 25 Utah 420; *Palmquist v. Mine, etc., Supply Co.*, 25 Utah 257; *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; *Hill v. Southern Pac. R. Co.*, 23 Utah 94.

*Vermont.* — *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

*Virginia.* — *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356; *Parlett v. Dunn*, 102 Va. 459; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 140; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362; *Southern R. Co. v. Mauzy*, 98 Va. 692, 2 Va. Sup. Ct. 575. See *W. R. Trigg Co. v. Lindsay*, 101 Va. 193.

*Washington.* — *Hart v. Cascade Timber Co.*, 39 Wash. 279; *Westby v. Washington Brick, etc., Co.*, 40 Wash. 289; *De Mase v. Oregon R., etc., Co.*, 40 Wash. 108; *Bailey v. Cascade Timber Co.*, 35 Wash. 295; *Metzler v. McKenzie*, 34 Wash. 470; *Jancko v. West Coast Mfg., etc., Co.*, 34 Wash. 556; *Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Towle v. Stimson Mill Co.*, 33 Wash. 305; *Bailey v. Cascade Timber Co.*, 32 Wash. 319; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227; *McDonald v. Svenson*, 25 Wash. 441; *Shoemaker v. Bryant Lumber, etc., Mill Co.*, 27 Wash. 637.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91; *Giebell v. Collins Co.*, 54 W. Va. 518.

*Wisconsin.* — *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328; *Hocking v. Windsor Spring Co.*, 125 Wis. 575; *Lounsbury v. Davis*, 124 Wis. 432; *Revolinski v. Adams Coal Co.*, 118 Wis. 324; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883.

*Canada.* — *Wyman v. The Steamship Duart Castle*, 6 Can. Exch. 387; *Moore v. J. D. Moore Co.*, 4 Ont. L. Rep. 167; *Sault Ste. Marie Pulp, etc., Co. v. Myers*, 33 Can. Sup. Ct. 23, *affirming* 3 Ont. L. Rep. 600; *Sim v. Dominion Fish Co.*, 2 Ont. L. Rep. 69; *Godwin v. Newcombe*, 1 Ont. L. Rep. 525.

**Rule Applicable to Appliances Owned by Others but Which Servant Is Required to Use in Time of Duty.** — *Sharpley v. Wright*, 205 Pa. St. 253.

The duty of a master to exercise care to furnish his servants with reasonably safe appliances is not affected by the fact that an appliance which he supplies to his servants is owned by a third person. *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90; *Ehlen v. O'Donnell*, 205 Ill. 38, *affirming* 102 Ill. App. 141.

**Rule Applicable to Animate Appliances.** — *McCready v. Stepp*, 104 Mo. App. 340; *Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106; *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808.

**Sufficient Number of Servants.** — It has been

said that the duty to provide reasonably safe instrumentalities embraces the obligation to provide a sufficient number of servants to perform the work safely. *Peterson v. American Grass Twine Co.*, 90 Minn. 343. See *infra*, this title, the cases supplementing page 91, notes 1-4.

**Appliances Unsited to the Particular Work.** — *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407.

**Customary Appliance Used by Servant.** — A failure to furnish suitable appliances will justify a servant in availing himself of such necessary means to accomplish the result as are usual and customary. Instrumentalities which are usually employed will, in the absence of any means at all furnished by the master, be considered those contemplated by the master. *Riverside Mills v. Jones*, 121 Ga. 33.

**73. 1. When Servant Not Engaged in Work Requiring Tools.** — *McDonnell v. Central of Georgia R. Co.*, 118 Ga. 86; *Buoy v. Clyde Milling, etc., Co.*, 68 Kan. 436; *Louisville, etc., R. Co. v. Poulter*, 84 S. W. Rep. 576, 27 Ky. L. Rep. 193.

**Appliances to Be Constructed and Adjusted by Servants.** — It is well settled that where certain persons are employed to do certain work, and by the contract of employment, either express or implied, such employees are to construct and adjust the appliances by which the work is to be done, the employer to furnish proper material and the employees to construct and adjust such appliances as in their judgment are necessary, the employer is not liable to such employees for any defect in the construction or adjustment of such appliances. *Kerrigan v. Market St. R. Co.*, 138 Cal. 506.

**Temporary Instrumentalities Adopted by Servants.** — The plaintiff and S., the servants of the defendant, were assigned the duty of loading a pile-driver hammer upon a wagon. In doing so they used a tree standing by as a tackle post, which was uprooted, fell, and injured the plaintiff, by reason of the force applied in an attempt to swing the hammer upon the wagon by the use of the tackle. S. selected the tree and directed the work as foreman. It was held upon the special facts of this case that the tree was not an appliance furnished by the defendant, but a mere temporary instrumentality provided by the servants themselves during the progress of the work, and that in selecting the tree S. was not acting as a vice-principal. *Bell v. Lang*, 83 Minn. 228.

**2. Duty a Continuing One** — *United States.* — *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311.

*Alabama.* — *Houston Biscuit Co. v. Dial*, 135 Ala. 168.

*Connecticut.* — *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617.

*Delaware.* — *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24.

*Illinois.* — *Pittsburg, etc., R. Co. v. Hewitt*, 102 Ill. App. 428, *affirmed* 202 Ill. 28.

*Indiana.* — *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73.



**73. (4) Right of Servant to Rely on Master's Performance of Duty.**—See note 3.

*Iowa.*—Shebeck v. National Cracker Co., 120 Iowa 414.

*Kentucky.*—Buey v. Chess, etc., Co., 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; Clay City Lumber, etc., Co. v. Noe, 76 S. W. Rep. 195, 25 Ky. L. Rep. 668.

*Minnesota.*—Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407; Attix v. Minnesota Sandstone Co., 85 Minn. 142.

*Missouri.*—Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372.

*New York.*—Walters v. George A. Fuller Co., 74 N. Y. App. Div. 388.

*North Carolina.*—Hicks v. Naomi Falls Mfg. Co., 138 N. Car. 319.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Pennsylvania.*—Finnerty v. Burnham, 205 Pa. St. 305; De Grazia v. Piccardo, 15 Pa. Super. Ct. 107. Compare Ehni v. National Tube Works Co., 203 Pa. St. 186, 93 Am. St. Rep. 761.

*South Carolina.*—Richey v. Southern R. Co., 69 S. Car. 387.

*Utah.*—Jenkins v. Mammoth Min. Co., 24 Utah 513.

**73. 3. Servant May Assume that Master Has Performed His Duty**—*United States.*—*In re California Nav., etc., Co.*, 110 Fed. Rep. 670; Pittsburgh, etc., R. Co. v. Lamphere, (C. C. A.) 137 Fed. Rep. 20; Tennessee Coal, etc., R. Co. v. Currier, (C. C. A.) 108 Fed. Rep. 19.

*Alabama.*—Going v. Alabama Steel, etc., Co., 141 Ala. 537; Illinois Car, etc., Co. v. Walch, 132 Ala. 490; Louisville, etc., R. Co. v. Jones, 130 Ala. 456.

*Colorado.*—Mulligan v. Colorado Fuel, etc., Co., 20 Colo. App. 198; Roche v. Denver, etc., R. Co., 19 Colo. App. 204.

*Delaware.*—Crocker v. Pusey, etc., Co., 3 Penn. (Del.) 1.

*Georgia.*—Southern Cotton Oil Co. v. Dukes, 121 Ga. 787; Duke v. Bibb Mfg. Co., 120 Ga. 1074.

*Illinois.*—Rock Island Sash, etc., Works v. Pohlman, 210 Ill. 133, *affirming* 99 Ill. App. 670; Rock Island Sash, etc., Works v. Pohlman, 210 Ill. 133, *affirming* 99 Ill. App. 670; Fehlen v. O'Donnell, 205 Ill. 38, *affirming* 102 Ill. App. 141; Chicago, etc., R. Co. v. Heerey, 203 Ill. 492; Momence Stone Co. v. Groves, 197 Ill. 88; Chicago, etc., R. Co. v. Cullen, 187 Ill. 523; National Enameling, etc., Co. v. Fagan, 115 Ill. App. 590; Bates Mach. Co. v. Crowley, 115 Ill. App. 540; McCormick Harvesting Mach. Co. v. Wojciechowski, 111 Ill. App. 641; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Chicago, etc., R. Co. v. Huff, 104 Ill. App. 594; Hass v. Chicago, etc., R. Co., 97 Ill. App. 624. See Chicago, etc., R. Co. v. Vipond, 101 Ill. App. 607.

*Indiana.*—Baltimore, etc., R. Co. v. Roberts, 161 Ind. 1; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281; Chicago, etc., R. Co. v. Tackett, 33 Ind. App. 379.

*Iowa.*—Klaffke v. Bettendorf Axle Co., 125 Iowa 224; Beresford v. American Coal Co., 124 Iowa 34; Shebeck v. National Cracker Co., 120 Iowa 414.

*Kansas.*—Emporia v. Kowalski, 66 Kan. 64.

*Kentucky.*—Ahrens, etc., Mfg. Co. v. Rellihan, 82 S. W. Rep. 993, 26 Ky. L. Rep. 919; Carey v. Samuels, 88 S. W. Rep. 1052, 28 Ky. L. Rep. 6; Continental Tobacco Co. v. Knoop, 71 S. W. Rep. 3, 24 Ky. L. Rep. 1268; De Hart v. Chesapeake, etc., R. Co., 68 S. W. Rep. 647, 24 Ky. L. Rep. 431. Compare George Weidemann Brewing Co. v. Wood, (Ky. 1905) 87 S. W. Rep. 772, followed in Herman v. George Weidemann Brewing Co., 87 S. W. Rep. 775, 27 Ky. L. Rep. 1016.

*Louisiana.*—Smith v. Minden Lumber Co., 114 La. 1035; Burns v. Ruddock-Orleans Cypress Co., 114 La. 247; Hailey v. Texas, etc., R. Co., 113 La. 533; Carter v. Fred W. Dubach Lumber Co., 113 La. 239.

*Maine.*—Caven v. Bodwell Granite Co., 99 Me. 278.

*Massachusetts.*—Foster v. New York, etc., R. Co., 187 Mass. 21; Carroll v. Metropolitan Coal Co., 189 Mass. 159.

*Michigan.*—McLean v. Pere Marquette R. Co., 137 Mich. 482, 11 Detroit Leg. N. 358.

*Minnesota.*—Morris v. Eastern R. Co., 88 Minn. 112; Campbell v. Railway Transfer Co., (Minn. 1905) 104 N. W. Rep. 547; Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407; Fry v. Great Northern R. Co., (Minn. 1905) 103 N. W. Rep. 733; Dieters v. St. Paul Gaslight Co., 86 Minn. 474; Gray v. Commutator Co., 85 Minn. 463.

*Missouri.*—Franklin v. Missouri, etc., R. Co., 97 Mo. App. 473; Parsons v. Hammond Packing Co., 96 Mo. App. 372; Hester v. Jacob Dold Packing Co., 95 Mo. App. 16.

*Nebraska.*—New Omaha Thompson-Houston Electric Light Co. v. Dent, 68 Neb. 668.

*New Hampshire.*—Thompson v. Bartlett, 71 N. H. 174, 93 Am. St. Rep. 504.

*New York.*—Welle v. Celluloid Co., 175 N. Y. 401, *reversing* 52 N. Y. App. Div. 522; Madden v. Hughes, 104 N. Y. App. Div. 101; Swenson v. Wilson, etc., Mfg. Co., 102 N. Y. App. Div. 477; Hoes v. Ocean Steamship Co., 56 N. Y. App. Div. 259, *affirmed* without opinion 170 N. Y. 581; Dzinbienski v. J. L. Mott Iron Works, 56 N. Y. App. Div. 58; Jarvis v. Northern New York Marble Co., 55 N. Y. App. Div. 272.

*Ohio.*—Frolich v. Cranker, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615; Strabler v. Toledo Bridge Co., 11 Ohio Cir. Dec. 87.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Oregon.*—Geldard v. Marshall, 43 Oregon 438; Miller v. Inman, 40 Oregon 161.

*Pennsylvania.*—O'Rourke v. Alphons Custodis Chimney Constr. Co., 21 Pa. Super. Ct. 761.

*South Carolina.*—Keys v. Winnsboro Granite Co., 72 S. Car. 97; Koon v. Southern R. Co., 69 S. Car. 101; Carson v. Southern R. Co., 68 S. Car. 55, *judgment affirmed* 194 U. S. 136; Wood v. Victor Mfg. Co., 66 S. Car. 482; Barksdale v. Charleston, etc., R. Co., 66 S. Car. 204.

**74.** See note 1.

(5) *Degree of Care Required of Master*—(a) *Reasonable or Ordinary Care Sufficient.*—See note 2.

*Tennessee.*—Record *v. Chickasaw Cooper-age Co.*, 108 Tenn. 657.

*Texas.*—El Paso, etc., *R. Co. v. Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; Missouri, etc., *R. Co. v. Kellerman*, (Tex. Civ. App. 1905) 87 S. W. Rep. 401; Denison, etc., Suburban *R. Co. v. Binkley*, (Tex. Civ. App. 1905) 87 S. W. Rep. 386; Hynson *v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928; Gulf, etc., *R. Co. v. Smith*, (Tex. Civ. App. 1904) 83 S. W. Rep. 719; Missouri, etc., *R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; El Paso, etc., *R. Co. v. McComus*, 36 Tex. Civ. App. 170; Missouri, etc., *R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; Gulf, etc., *R. Co. v. Davis*, 35 Tex. Civ. App. 285; Missouri, etc., *R. Co. v. Hoskins*, 34 Tex. Civ. App. 627; San Antonio, etc., *R. Co. v. Klaus*, 34 Tex. Civ. App. 492; Horton *v. Ft. Worth Packing, etc., Co.*, 33 Tex. Civ. App. 150; Texas, etc., *R. Co. v. Hartnett*, 33 Tex. Civ. App. 103; Missouri, etc., *R. Co. v. Blackman*, 32 Tex. Civ. App. 200; El Paso, etc., *R. Co. v. McComas*, (Tex. Civ. App. 1903) 72 S. W. Rep. 629; Moore *v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 266; Gulf, etc., *R. Co. v. Hayden*, 29 Tex. Civ. App. 280; Dupree *v. Alexander*, 29 Tex. Civ. App. 31; Galveston, etc., *R. Co. v. Butchek*, (Tex. Civ. App. 1901) 66 S. W. Rep. 335; Smith *v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 83; Pippin *v. Sherman, etc., R. Co.*, (Tex. Civ. App. 1900) 58 S. W. Rep. 961; Dupree *v. Tamborilla*, 27 Tex. Civ. App. 603; San Antonio, etc., *R. Co. v. Lindsey*, 27 Tex. Civ. App. 316; Galveston, etc., *R. Co. v. Newport*, 26 Tex. Civ. App. 583; Peck *v. Peck*, (Tex. 1905) 87 S. W. Rep. 248. See Lawrence *v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

*Utah.*—Leach *v. Oregon Shore Line R. Co.*, 29 Utah 285, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73; Wood *v. Rio Grande Western R. Co.*, 28 Utah 351.

*Washington.*—McDonald *v. Svenson*, 25 Wash. 441; Shoemaker *v. Bryant Lumber, etc., Mill Co.*, 27 Wash. 637.

*Wisconsin.*—Lounsbury *v. Davis*, 124 Wis. 432.

Compare Lambert *v. Missisquoi Pulp Co.*, 72 Vt. 278. See *supra*, the cases supplementing page 73, note 3.

**74. 1. Servant's Knowledge of Defects.**—Texas, etc., *R. Co. v. Hemphill*, (Tex. Civ. App. 1905) 86 S. W. Rep. 350.

**2. Reasonable Care Sufficient.**—*United States.*—Illinois Cent. *R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; Cincinnati, etc., *R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519; Glenmont Lumber *Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; Rabe *v. Consolidated Ice Co.*, (C. C. A.) 113 Fed. Rep. 905.

*Alabama.*—Southern Car, etc., *Co. v. Jennings*, 137 Ala. 247.

*California.*—Luman *v. Golden Ancient Channel Min. Co.*, 140 Cal. 700.

*Delaware.*—Boyd *v. Blumenthal*, 3 Penn. (Del.) 564; Croker *v. Pusey, etc., Co.*, 3 Penn.

(Del.) 1; Strattner *v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245; Ray *v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*Georgia.*—Atlantic, etc., *R. Co. v. Reynolds*, 117 Ga. 47; Robert Portner Brewing *Co. v. Cooper*, 116 Ga. 171.

*Illinois.*—Baltimore, etc., *R. Co. v. Greer*, 103 Ill. App. 448; Garden City Wire Spring *Co. v. Boecher*, 94 Ill. App. 96; Smith *v. Foster*, 93 Ill. App. 138; Mattson *v. Qualey Constr. Co.*, 90 Ill. App. 260. See Odin Coal *Co. v. Tadlock*, 216 Ill. 624.

*Indiana.*—Johnson *v. Gebhauer*, 159 Ind. 271.

*Iowa.*—Lynn *v. Glucose Sugar Refining Co.*, (Iowa 1905) 104 N. W. Rep. 577.

*Kentucky.*—Collins *v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 973; Brooks *v. Louisville, etc., R. Co.*, 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318.

*Louisiana.*—Budge *v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349.

*Maine.*—Caven *v. Bodwell Granite Co.*, 99 Me. 278.

*Michigan.*—Beunk *v. Valley City Desk Co.*, 133 Mich. 440, 10 Detroit Leg. N. 288.

*Minnesota.*—Anderson *v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665; Attix *v. Minnesota Sandstone Co.*, 85 Minn. 142.

*Missouri.*—Smith *v. Fordyce*, 190 Mo. 1; Blundell *v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; Goransson *v. Riter-Conley Mfg. Co.*, 186 Mo. 300; Mathis *v. Kansas City Stockyards Co.*, 185 Mo. 434; Jones *v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; Howard *v. Missouri Pac. R. Co.*, 173 Mo. 524; Haviland *v. Kansas City, etc., R. Co.*, 172 Mo. 106; Holmes *v. Brandenbaugh*, 172 Mo. 63; Minnier *v. Sedalia, etc., R. Co.*, 167 Mo. 99; Harrington *v. Wabash R. Co.*, 104 Mo. App. 663; Glasscock *v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; Cunningham *v. Journal Co.*, 95 Mo. App. 47; Stalzer *v. Jacob Dold Packing Co.*, 84 Mo. App. 565.

*Nebraska.*—Cudahy Packing *Co. v. Roy*, (Neb. 1904) 99 N. W. Rep. 231.

*New Jersey.*—Tompkins *v. Marine Engine, etc., Co.*, 70 N. J. L. 330; McDonald *v. Standard Oil Co.*, 69 N. J. L. 445.

*New York.*—Welsh *v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; Quigley *v. Levering*, 167 N. Y. 58, affirming 50 N. Y. App. Div. 354; Diamond *v. Planet Mills Mfg. Co.*, 97 N. Y. App. Div. 43; Young *v. Mason Stable Co.*, 96 N. Y. App. Div. 305; Sheehan *v. Standard Gas Light Co.*, 87 N. Y. App. Div. 174; Skapura *v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21; La Point *v. Howland Paper Co.*, 75 N. Y. App. Div. 611; Apati *v. Delaware, etc., R. Co.*, 64 N. Y. App. Div. 515; Rosa *v. Volkening*, 64 N. Y. App. Div. 426, affirmed without opinion 173 N. Y. 590; Green *v. Lawrence Cement Co.*, 57 N. Y. App. Div. 284; Biddiscomb *v. Cameron*, 35 N. Y. App. Div. 561, affirmed without opinion 161 N. Y. 637.

*North Carolina.*—Marks *v. Harriet Cotton*

**75. (b) What Is Reasonable or Ordinary Care.** — See notes 1, 2, 3.

Mills, 135 N. Car. 287; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254; *Ausley v. American Tobacco Co.*, 130 N. Car. 34; *Carter v. Cape Fear Lumber Co.*, 129 N. Car. 203; *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 83 Am. St. Rep. 671.

*Ohio*. — *Toledo, etc., R. Co. v. Beard*, 11 Ohio Cir. Dec. 406, 20 Ohio Cir. Ct. 681.

*Oklahoma*. — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon*. — *Duntley v. Inman*, 42 Oregon 334.

*Pennsylvania*. — *Brommer v. Philadelphia, etc., R. Co.*, 205 Pa. St. 432; *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625; *Purdy v. Westinghouse Electric, etc., Co.*, 197 Pa. St. 257, 80 Am. St. Rep. 816; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

*Rhode Island*. — *Carr v. American Locomotive Co.*, 26 R. I. 180; *Donohoe v. Lonsdale Co.*, 25 R. I. 187; *Benson v. New York, etc., R. Co.*, 23 R. I. 147; *Dwyer v. Shaw*, 22 R. I. 648.

*South Carolina*. — *Willis v. Cherokee Falls Mfg. Co.*, 72 S. Car. 126; *Keys v. Winnsboro Granite Co.*, 72 S. Car. 97; *Charping v. Toxaway Mills*, 70 S. Car. 470; *Koon v. Southern R. Co.*, 69 S. Car. 101; *Boyd v. Seaboard Air Line R. Co.*, 67 S. Car. 218; *Lowrimore v. Palmer Mfg. Co.*, 60 S. Car. 153.

*Tennessee*. — *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657.

*Texas*. — *Dullnig v. G. A. Duerler Mfg. Co.*, (Tex. 1905) 87 S. W. Rep. 332, *affirming* (Tex. Civ. App. 1904) 83 S. W. Rep. 889; *Harry Bros. Co. v. Brady*, (Tex. Civ. App. 1905) 86 S. W. Rep. 615; *Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *St. Louis Southwestern R. Co. v. Corrigan*, (Tex. Civ. App. 1904) 81 S. W. Rep. 554; *Hirsch v. Ashe*, 35 Tex. Civ. App. 495; *Missouri, etc., R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; *Chicago, etc., R. Co. v. Oldridge*, 33 Tex. Civ. App. 436; *Missouri, etc., R. Co. v. Dyer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 930; *Lancaster Cotton Oil Co. v. White*, 32 Tex. Civ. App. 608; *St. Louis, etc., R. Co. v. Skaggs*, 32 Tex. Civ. App. 363; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, *writ of error denied* 97 Tex. 69; *Missouri, etc., R. Co. v. Hawk*, 30 Tex. Civ. App. 142; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194; *Brown v. Miller*, (Tex. Civ. App. 1901) 62 S. W. Rep. 547.

*Utah*. — *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Boyle v. Union Pac. R. Co.*, 25 Utah 420.

*Virginia*. — *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 3 Va. Sup. Ct. 502; *Southern R. Co. v. Mauzy*, 98 Va. 692, 2 Va. Sup. Ct. 575; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667.

*Washington*. — *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30.

It has been said that while it is the duty of the employer to furnish reasonably safe appliances, yet when he has furnished such appliances as may by ordinary care be used without danger, or with no more danger than is necessarily incident to the character of the

work, he has discharged his duty. *Corletti v. Southern Pac. R. Co.*, 136 Cal. 642.

The master's duty in choosing materials for his servants is to use care similar to that which a man of ordinary prudence in similar business, acting for his own safety, would use in choosing such materials for himself, were he doing the work. The rule is the same whether the master buy the appliance ready made, cause it to be made, or purchase the materials and make it. *Murphy v. Coney Island, etc., R. Co.*, 65 N. Y. App. Div. 546.

The objection to an instruction that it stated that it is the duty of a master to furnish reasonably safe tools, appliances, etc., with which his servant is to work, instead of stating to the jury that it is the duty of the master to use reasonable care in furnishing such tools and appliances, has been declared to be too subtle for practical purposes. *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379.

**75. 1. Reasonable Care Defined** — *Indiana*. — *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016.

*Maine*. — *Cowett v. American Woolen Co.*, 97 Me. 543; *Cowett v. American Woolen Co.*, 100 Me. 65.

*Michigan*. — *Turner v. Detroit Southern R. Co.*, 137 Mich. 142, 11 Detroit Leg. N. 206.

*Missouri*. — *Trigg v. Ozark Land, etc., Co.*, 187 Mo. 227; *Furber v. Kansas City Bolt, etc., Co.*, 185 Mo. 301; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382.

*New York*. — *Kremer v. New York Edison Co.*, 102 N. Y. App. Div. 433.

*North Carolina*. — *Carter v. Cape Fear Lumber Co.*, 129 N. Car. 203; *Whitson v. Wrenn*, 134 N. Car. 86.

*Rhode Island*. — *Briggs v. Callender, etc., Co.*, 23 R. I. 359.

*Texas*. — *Dullnig v. G. A. Duerler Mfg. Co.*, (Tex. 1905) 87 S. W. Rep. 332, *affirming* (Tex. Civ. App. 1904) 83 S. W. Rep. 889; *Missouri, etc., R. Co. v. Dyer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 930; *Texas Cent. R. Co. v. Wal-ler*, 28 Tex. Civ. App. 4.

*Virginia*. — *Persinger v. Alleghany Ore, etc., Co.*, 102 Va. 350; *Wise Terminal Co. v. McCormick*, (Va. 1905) 51 S. E. Rep. 731.

*Wisconsin*. — *Powalske v. Cream City Brick Co.*, 110 Wis. 461.

See *Morrison v. Burgess Sulphite Fibre Co.*, 70 N. H. 406, 85 Am. St. Rep. 634.

**2. Degree of Care Proportioned to Hazard.** — *Szymanski v. Blumenthal*, 4 Penn. (Del.) 511; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Crocker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1; *Caven v. Bodwell Granite Co.*, 99 Me. 278; *Yentsch v. Chloride of Silver Dry Cell Battery Co.*, 96 Md. 679; *Kirk v. Sturdy*, 187 Mass. 87; *Beunk v. Valley City Desk Co.*, 133 Mich. 440, 10 Detroit Leg. N. 288; *Goransson v. Riter-Conley Mfg. Co.*, 186 Mo. 300; *Curtis v. McNair*, 173 Mo. 270; *Welle v. Celluloid Co.*, 175 N. Y. 401, *reversing* 52 N. Y. App. Div. 522; *Smith v.*

- 75.** (6) *Necessity of Furnishing Absolutely Safe Machinery.*—See note 4.  
**76.** (7) *Necessity of Furnishing Best Machinery and Appliances Obtainable.*—See notes 1, 2.

Gulf, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 83.

The degree of care required of the master in furnishing suitable appliances has been declared to be such as reasonably prudent men would exercise under similar circumstances, having in mind the danger naturally to be apprehended. *Tanner v. Harper*, 32 Colo. 156.

It has been said that the master is not bound to exercise that extraordinary diligence which necessarily would be demanded if he were obliged to make every instrumentality safe for any and every use to which it might suddenly and unexpectedly be applied. His duty and diligence are primarily to be decided by considering whether he has furnished an appliance or instrumentality reasonably safe and suitable for the purpose for which it is intended or might naturally be expected to be used. *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030.

It has been held that a defendant is not to be held to the same accountability in constructing a logging road used solely for its own purposes, and on which no freight or passengers are carried, that would apply to the case of an ordinary railroad. *Demko v. Carbon Hill Coal Co.*, (C. C. A.) 136 Fed. Rep. 162.

**75. 3. Care Such as Prudent Man Would Exercise in His Own Behalf.**—*Westinghouse Electric, etc., Co. v. Heimlich*, (C. C. A.) 127 Fed. Rep. 92; *Marks v. Harriet Cotton Mills*, 135 N. Car. 287; *Carr v. American Locomotive Co.*, 26 R. I. 180; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Parlett v. Dunn*, 102 Va. 459.

It has been said that in all cases reasonable care means such care as reasonable and prudent men use under like circumstances. *Caven v. Bodwell Granite Co.*, 99 Me. 278.

And it has been said that "it is the master's duty to furnish machinery and appliances that are as safe as reasonable prudence and ordinary care can make them, not the safest and best possible, but as safe and good as may be obtained by the exercise of such care as a man of ordinary experience and prudence engaged in such work usually exercises." *Curtis v. McNair*, 173 Mo. 270.

**4. Master Not an Insurer Against Injury—United States.**—*Patton v. Texas, etc., R. Co.*, 179 U. S. 658; *Palato v. International Silver Co.*, 129 Fed. Rep. 652; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *Farrell v. Continental Iron Works*, 102 Fed. Rep. 514, *affirmed* without opinion 106 Fed. Rep. 987, 46 C. C. A. 75. See *Choctaw, etc., R. Co. v. Tennessee*, 101 U. S. 326, *affirming* (C. C. A.) 116 Fed. Rep. 23; *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, *affirming* (C. C. A.) 114 Fed. Rep. 458.

*Alabama.*—*Clements v. Alabama G. S. R. Co.*, 127 Ala. 166.

*Kansas.*—*Lane v. Missouri Pac. R. Co.*, 64 Kan. 755.

*Maine.*—*Cowett v. American Woolen Co.*, 97 Me. 543.

*Missouri.*—*Smith v. Fordyce*, 190 Mo. 1;

*Purcell v. Tennent Shoe Co.*, 187 Mo. 276; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473.

*New York.*—*Skapura v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21.

*Rhode Island.*—*Donohoe v. Lonsdale Co.*, 25 R. I. 187.

*South Carolina.*—*Keys v. Winnsboro Granite Co.*, 72 S. Car. 97.

It has been said that the master is not a guarantor of the safety of machinery or implements furnished his employees, and is only bound to use ordinary care, diligence, and skill for the purpose of protecting them, and it is not negligence to use and employ such machinery or implements as the experience of trade and manufacture sanctions as reasonably safe. *Westinghouse Electric, etc., Co. v. Heimlich*, (C. C. A.) 127 Fed. Rep. 92.

**76. 1. Master Need Not Furnish Best Machinery Obtainable—United States.**—*Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524.

*Delaware.*—*Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Illinois.*—*Wabash R. Co. v. Burress*, 111 Ill. App. 258; *Eckhart, etc., Milling Co. v. Schaefer*, 101 Ill. App. 500; *American Malting Co. v. Lelivelt*, 101 Ill. App. 320; *Mobile, etc., R. Co. v. Healy*, 100 Ill. App. 586; *Maxwell v. Zdarski*, 93 Ill. App. 334; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532.

*Iowa.*—*Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Minnesota.*—*Vant Hul v. Great Northern R. Co.*, 90 Minn. 329.

*Missouri.*—*Holmes v. Bradenburgh*, 172 Mo. 53; *Harrington v. Wabash R. Co.*, 104 Mo. App. 663; *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382.

*New Jersey.*—*McDonald v. Standard Oil Co.*, 69 N. J. L. 445.

*New York.*—*Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305; *Skapura v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21; *Dickscheid v. Betz*, 80 N. Y. App. Div. 8, *affirmed* without opinion 176 N. Y. 611; *Apati v. Delaware, etc., R. Co.*, 64 N. Y. App. Div. 515.

*Ohio.*—*Scanlon v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 256.

*Oklahoma.*—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*South Carolina.*—*Sanders v. Aiken Mfg. Co.*, 71 S. Car. 58.

*Virginia.*—*Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 3 Va. Sup. Ct. 502; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667.

*West Virginia.*—*Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606.

See *McCarthy v. Shoneman*, 198 Pa. St. 568.

**2. Appliances Ordinarily in Use—United States.**—*Briggs v. Chicago, etc., R. Co.*, (C. C. A.) 125 Fed. Rep. 745.

*District of Columbia.*—*Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359; *Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410.

**77.** (8) *Necessity of Adopting Latest Inventions and Improvements* — (a) In General. — See note 1.

**78.** (9) *Use by Servant of Machinery for Purposes Not Designed*. — See note 2.

(10) *Failure of Servant to Use Appliances Furnished*. — See note 3.

*Illinois*. — *Smith v. Foster*, 93 Ill. App. 138.  
*Massachusetts*. — *Demers v. Marshall*, 178 Mass. 9.

*Minnesota*. — *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142.

*Missouri*. — *Beckman v. Anheuser-Busch Brewing Assoc.*, 98 Mo. App. 555; *Cunningham v. Journal Co.*, 95 Mo. App. 47; *Kane v. Falk Co.*, 93 Mo. App. 209.

*Nebraska*. — *O'Neill v. Chicago, etc., R. Co.*, 62 Neb. 358, rehearing 66 Neb. 638.

*New Jersey*. — *Tompkins v. Marine Engine, etc., Co.*, 70 N. J. L. 330.

*New York*. — *Rosa v. Volkening*, 64 N. Y. App. Div. 426, affirmed without opinion 173 N. Y. 590; *Green v. Lawrence Cement Co.*, 57 N. Y. App. Div. 284.

*North Carolina*. — *Womble v. Merchant's Grocery Co.*, 135 N. Car. 474; *Marks v. Harriet Cotton Mills*, 135 N. Car. 287; *Dorsett v. Clement Ross Mfg. Co.*, 131 N. Car. 254; *Stewart v. Van Deventer Carpet Co.*, 138 N. Car. 60.

*Ohio*. — *Memphis, etc., Packet Co. v. Britton*, 25 Ohio Cir. Ct. 153; *Toledo, etc., R. Co. v. Beard*, 11 Ohio Cir. Dec. 406, 20 Ohio Cir. Ct. 681.

*Oregon*. — *Duntley v. Inman*, 42 Oregon 334.  
*Pennsylvania*. — *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625; *Purdy v. Westinghouse Electric, etc., Co.*, 197 Pa. St. 257, 80 Am. St. Rep. 816.

*Rhode Island*. — *Carr v. American Locomotive Co.*, 26 R. I. 180; *Desrosiers v. Bourn*, 26 R. I. 6, reargument denied 26 R. I. 156; *McGarritty v. New York, etc., R. Co.*, 25 R. I. 269; *Dwyer v. Shaw*, 22 R. I. 648; *Benson v. New York, etc., R. Co.*, 23 R. I. 147; *McGar v. National, etc., Worsted Mills*, 22 R. I. 347.

*Washington*. — *Roberts v. Fort Blakely Mill Co.*, 30 Wash. 25.

It has been said that the use of like tools and machinery in other establishments is not the test of fitness. The true test is not alone that others use them, but whether they are reasonably suitable and safe for the work to be done; and not whether other persons do in fact use them, but whether they are such as reasonably careful and prudent men would use under like circumstances. *Croker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1.

Ordinarily the fitness of a railroad appliance for special uses of one company may be tested by what is shown to be the custom of well regulated railroad companies with respect to such uses under like circumstances. But the practice of a few railroad companies, though it may tend to show what is the custom, is not conclusive upon the question as to whether there has been a performance of the master's duty. Hence a charge which makes the usage of eight other companies conclusive upon the question of negligence is erroneous as invading the province of the jury. *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456.

#### Appliances Used by Prudent Persons in the Same Business.

It has been held that while it is true that an employer is not required to use the best possible appliances to protect his employees from danger, and while he may show in order to rebut the charge of negligence on his part that the appliances that he did use were such as were adopted and used by many prudent persons engaged in the same kind of business, yet such evidence does not exempt the employer from liability. Prudent persons may do imprudent things and may fail to use proper appliances for the safety of their employees. *Davis v. Kornman*, 141 Ala. 479. See *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537.

**77. 1. Need Not Adopt Latest Inventions.** — *American Maltng Co. v. Lelivelt*, 101 Ill. App. 320; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532; *Bryce v. Burlington, etc., R. Co.*, 119 Iowa 274; *Buttner v. S. Baltimore Steel Car, etc., Co.*, 101 Md. 168; *Demers v. Marshall*, 178 Mass. 9; *Smith v. Fordyce*, 190 Mo. 1; *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Minnier v. Sedalia, etc., R. Co.*, 167 Mo. 99; *Quigley v. Levering*, 167 N. Y. 58, affirming 50 N. Y. App. Div. 354; *Apati v. Delaware, etc., R. Co.*, 64 N. Y. App. Div. 515; *Duntley v. Inman*, 42 Oregon 334, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 77; *Schlemmer v. Buffalo, etc., R. Co.*, 207 Pa. St. 198; *Keys v. Winnsboro Granite Co.*, 72 S. Car. 97.

**78. 2. Use of Machinery for Purpose Not Intended.** — *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456; *Gribben v. Yellow Aster Min., etc., Co.*, 142 Cal. 248; *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; *Illinois Cent. R. Co. v. Mercer*, 88 S. W. Rep. 1054, 28 Ky. L. Rep. 3; *Moore v. Stetson*, 96 Me. 197; *Morrison v. Burgess Sulphite Fibre Co.*, 70 N. H. 406, 85 Am. St. Rep. 634; *Hettich v. Hillje*, 33 Tex. Civ. App. 571. See *Haughey v. Thatcher*, 89 N. Y. App. Div. 375. Compare *Dupree v. Tamborilla*, 27 Tex. Civ. App. 603. See *infra*, the cases supplementing page 141, note 2.

If the master has furnished complete and adequate appliances for the work, he cannot be held liable because a part of the apparatus furnished by him was joined with a thing not furnished by him, but substituted without his notice or authority, with the consequence that the part furnished by him in connection with the foreign appliance did not work safely. *Hackett v. Masterson*, 88 N. Y. App. Div. 73.

But when an appliance, though intended for one purpose, is used for another purpose with the knowledge and consent of the master, the rule holding the master responsible for a failure to exercise care to provide safe appliances is to be applied. *Hunting v. Quarterman*, 120 Ga. 344.

**3. Neglect to Use Appliances Furnished.** — *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475; *Floyd v. Colorado Fuel, etc., Co.*, 18 Colo. App. 153; *Hayes v. New York, etc., R.*

**78. (11) Master's or Servant's Knowledge of Defects as Affecting Liability.**—See notes 4, 5.

(12) *Proximate Cause of Injury.*—See note 6.

Co., 187 Mass. 182; *McGinty v. Waterman*, 93 Minn. 242; *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382; *Wagner v. New York, etc.*, R. Co., 93 N. Y. App. Div. 14; *O'Connell v. Thompson-Starrett Co.*, 72 N. Y. App. Div. 47; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464. See *Crawford v. American Steel, etc.*, Co., (C. C. A.) 123 Fed. Rep. 275; *Allison v. Long Clove Trap Rock Co.*, 75 N. Y. App. Div. 267. Compare *Galveston, etc.*, R. Co. v. *Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776. See *infra*, this title, p. 140, note 3.

**78. 4. Master's Knowledge or Opportunity for Knowledge Necessary.**—*Tennessee Coal, etc.*, Co. v. *Currier*, (C. C. A.) 108 Fed. Rep. 19; *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668; *Stackpole v. Wray*, 99 N. Y. App. Div. 262, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 78, affirmed 182 N. Y. 567. See *infra*, this title, the cases supplementing page 92, note 4.

**5. Servant's Ignorance of Defects Necessary.**—*Sardo v. Moreland*, 17 App. Cas. (D. C.) 219; *Davitt v. Metropolitan St. R. Co.*, 106 N. Y. App. Div. 567; *Wingert v. Krakauer*, 76 N. Y. App. Div. 34; *Hall v. U. S. Canning Co.*, 76 N. Y. App. Div. 475.

It has been held that in the case of an experienced employee it is necessary, to relieve the master of liability, that the servant should not only know the defect, but appreciate the danger which might result from it. *Pittsburg, etc.*, R. Co. v. *Hewitt*, 102 Ill. App. 428, affirmed 202 Ill. 28.

Under the Georgia Code (Ga. Civ. Code, § 2612) although a master may be negligent in furnishing defective machinery, a servant who is injured because of the fact that it is not in a reasonably safe condition is not entitled to recover unless it appears that he "did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." *Western, etc.*, R. Co. v. *Moran*, 116 Ga. 441; *Hobbs v. Bowie*, 121 Ga. 421; *Cartledge v. Pierpont Mfg. Co.*, 120 Ga. 221; *Ludd v. Wilkins*, 118 Ga. 525; *De Lay v. Southern R. Co.*, 115 Ga. 934; *Stewart v. Seaboard Air Line R. Co.*, 115 Ga. 624; *Manchester Mfg. Co. v. Polk*, 115 Ga. 542; *Western, etc.*, R. Co. v. *Bradford*, 113 Ga. 276; *Blackstone v. Central of Georgia R. Co.*, 112 Ga. 762.

It has been said that the mere fact that machinery is not perfect and not adapted to use under all circumstances will not necessarily prevent a recovery by the servant, resulting from the use of such machinery. If the machinery, though defective, can be safely used for certain purposes and under certain circumstances, and the servant has reason to believe that it will not be used except for such purposes and under such circumstances, he has a right to recover for injuries which he may sustain as the result of the master permitting the use of the machinery for other purposes and under other circumstances; such purposes and circumstances not being brought to the knowledge of the servant, and he not being able to inform himself of them by the use of ordinary

care. *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787.

**6. Defect Must Be Proximate Cause—United States.**—*Choctaw, etc.*, R. Co. v. *Holloway*, 191 U. S. 334, affirming (C. C. A.) 114 Fed. Rep. 458; *Briggs v. Chicago, etc.*, R. Co., (C. C. A.) 125 Fed. Rep. 745; *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745. See *Cudahy Packing Co. v. Anthes*, (C. C. A.) 117 Fed. Rep. 118.

*Arizona.*—*Gila Valley, etc.*, R. Co. v. *Lyon*, (Ariz. 1903) 71 Pac. Rep. 957.

*Arkansas.*—*Neal v. St. Louis, etc.*, R. Co., 71 Ark. 445.

*California.*—*Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700.

*Colorado.*—*Denver, etc.*, R. Co. v. *Scott*, (Colo. 1905) 81 Pac. Rep. 763.

*Connecticut.*—*Rinecotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617.

*Illinois.*—*Deering Harvester Co. v. Hefferman*, 107 Ill. App. 636; *Ritchie v. Krueger*, 102 Ill. App. 654.

*Indiana.*—*Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, reversing (Ind. App. 1903) 66 N. E. Rep. 1016; *Clear Creek Stone Co. v. Dearmin*, 160 Ind. 162; *Roberts v. Indianapolis St. R. Co.*, 158 Ind. 634; *Espenlaub v. Ellis*, 34 Ind. App. 163; *Baltimore, etc.*, R. Co. v. *Henderson*, 31 Ind. App. 441.

*Iowa.*—*Foster v. Chicago, etc.*, R. Co., 127 Iowa 84; *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354.

*Kansas.*—*Griffin Wheel Co. v. Stanton*, 70 Kan. 762.

*Kentucky.*—*Central Coal, etc.*, Co. v. *Pearce*, 80 S. W. Rep. 449, 25 Ky. L. Rep. 2269.

*Louisiana.*—It has been held that if a break occurs in machinery, and a workman undertakes to mend it, and is injured, the causes which brought about the break are only the remote causes of the injury, and juridically are not its causes at all. *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 104 Am. St. Rep. 452.

*Maine.*—*Kirstead v. Bryant*, 98 Me. 523. *Massachusetts.*—*Nordquist v. Fuller*, 182 Mass. 411.

*Michigan.*—*Kupkofski v. John S. Sniegol Co.*, 135 Mich. 7, 10 Detroit Leg. N. 640; *Kellogg v. Stephens Lumber Co.*, 125 Mich. 222, 7 Detroit Leg. N. 483.

*Missouri.*—*Trigg v. Ozark Land, etc.*, Co., 187 Mo. 227; *Goransson v. Ritter-Conley Mfg. Co.*, 186 Mo. 300; *Oglesby v. Missouri Pac. R. Co.*, 177 Mo. 272; *Doerr v. St. Louis Brewing Assoc.*, 176 Mo. 547; *Cambron v. Omaha, etc.*, R. Co., 165 Mo. 543; *Lore v. American Mfg. Co.*, 160 Mo. 608; *Nash v. Dowling*, 93 Mo. App. 156.

*New Jersey.*—*McGrath v. Delaware, etc.*, R. Co., 68 N. J. L. 425, affirmed 69 N. J. L. 331.

*New York.*—*Kremer v. New York Edison Co.*, 102 N. Y. App. Div. 433; *Stenger v. Buffalo Union Furnace Co.*, 98 N. Y. App. Div. 361; *Loushay v. Erie R. Co.*, 75 N. Y. App. Div. 619; *Dolan v. Burden Iron Co.*, 62 N. Y. App. Div. 545; *Green v. Lawrence Cement Co.*,

**79.** (13) *Application of Rules to Designated Kinds of Machinery or Appliances* — (a) *Locomotives*. — See note 1.

57 N. Y. App. Div. 284; Cleary v. Long Island R. Co., 54 N. Y. App. Div. 284; Johansen v. Eastmans Co., 44 N. Y. App. Div. 270, *affirmed* without opinion 168 N. Y. 648.

*North Carolina*. — Marcus v. Loane, 133 N. Car. 54.

*North Dakota*. — Meehan v. Great Northern R. Co., 13 N. Dak. 432.

*Ohio*. — Hunt v. Caldwell, 11 Ohio Cir. Dec. 562, 22 Ohio Cir. Ct. 283; Gensen v. Ohio Oil Co., 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276.

*Oregon*. — Robinson v. Taku Fishing Co., 42 Oregon 537.

*Pennsylvania*. — Owens v. Thomas Kent Mfg. Co., 211 Pa. St. 406; Gallagher v. Snellenburg, 210 Pa. St. 642; Douglass v. New York Cent., etc., R. Co., 209 Pa. St. 128; Laudeman v. Ryan, 209 Pa. St. 3; Fullmer v. New York Cent., etc., R. Co., 208 Pa. St. 598; Tomaczewski v. Dobson, 208 Pa. St. 324; Snyder v. Pennsylvania R. Co., 205 Pa. St. 619; Brommer v. Philadelphia, etc., R. Co., 205 Pa. St. 432; De Grazia v. Pccardo, 15 Pa. Super. Ct. 107.

*Rhode Island*. — Langlois v. Dunn Worsted Mills, 25 R. I. 645; Ennis v. Little, 25 R. I. 342, *rehearing denied* 25 R. I. 401; Paoline v. J. W. Bishop Co., 25 R. I. 298; Briggs v. Calender, etc., Co., 23 R. I. 359.

*South Carolina*. — Anderson v. Southern R. Co., 70 S. Car. 490.

*Texas*. — Chicago, etc., R. Co. v. Harton, 36 Tex. Civ. App. 475; El Paso Northeastern R. Co. v. Ryan, 36 Tex. Civ. App. 190; Hettich v. Hillje, 33 Tex. Civ. App. 571; Texas Cent. R. Co. v. Bender, 32 Tex. Civ. App. 568; Johnson v. Houston, etc., R. Co., 31 Tex. Civ. App. 532; Galveston, etc., R. Co. v. Newport, 26 Tex. Civ. App. 583; Roe v. Thomason, 25 Tex. Civ. App. 67.

*Vermont*. — Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 93 Am. St. Rep. 887.

*Virginia*. — Driver v. Southern R. Co., 103 Va. 650; Persinger v. Allegheny Ore, etc., Co., 102 Va. 350; Southern R. Co. v. Mauzy, 98 Va. 692, 2 Va. Sup. Ct. 575.

*Washington*. — Bailey v. Cascade Timber Co., 35 Wash. 295.

*Wisconsin*. — Pautz v. Plankinton Packing Co., 118 Wis. 47; Groth v. Thomann, 110 Wis. 488.

See Southern Car, etc., Co. v. Jennings, 137 Ala. 247; Wallin v. Eastern R. Co., 83 Minn. 149; Jenkins v. Mammoth Min. Co., 24 Utah 513.

**79. 1. Locomotives** — *United States*. — Choctaw, etc., R. Co. v. Holloway, 191 U. S. 334, *affirming* (C. C. A.) 114 Fed. Rep. 458; Cincinnati, etc., R. Co. v. Robertson, (C. C. A.) 139 Fed. Rep. 519; Moore v. Illinois Cent. R. Co., (C. C. A.) 135 Fed. Rep. 67.

*Louisiana*. — Davenport v. F. B. Dubach Lumber Co., 112 La. 943.

*Minnesota*. — Fry v. Great Northern R. Co., (Minn. 1905) 103 N. W. Rep. 733.

*Nevada*. — Taylor v. Nevada-California Oregon R. Co., 26 Nev. 415.

*New Hampshire*. — Olney v. Boston, etc., R. Co., 71 N. H. 427.

*North Carolina*. — Coley v. North Carolina R. Co., 128 N. Car. 534, *rehearing* 129 N. Car. 407; Cogdell v. Southern R. Co., 129 N. Car. 398.

*South Carolina*. — Sims v. Southern R. Co., 66 S. Car. 520.

*Tennessee*. — Robertson v. Cayard, 111 Tenn. 356.

*Texas*. — San Antonio, etc., R. Co. v. Klaus, 34 Tex. Civ. App. 492; St. Louis, etc., R. Co. v. Skaggs, 32 Tex. Civ. App. 363; Gulf, etc., R. Co. v. Brooks, (Tex. Civ. App. 1903) 73 S. W. Rep. 571; Sugarland R. Co. v. Archer, (Tex. Civ. App. 1902) 69 S. W. Rep. 430; Galveston, etc., R. Co. v. Buch, 27 Tex. Civ. App. 283.

*Virginia*. — Norfolk, etc., R. Co. v. Cheatwood, 103 Va. 356. See Driver v. Southern R. Co., 103 Va. 650.

*Washington*. — Rush v. Spokane Falls, etc., R. Co., 23 Wash. 501.

See Brommer v. Philadelphia, etc., R. Co., 205 Pa. St. 432.

**Illustrations** — *Pilots or Cowcatchers*. — Baker v. Great Northern R. Co., 83 Minn. 184.

It is not negligence for a railroad company to equip its engines with short or "stub" pilots when the change from long to short pilots is made necessary by compliance with the Act of Congress requiring the adoption of automatic couplers. Briggs v. Chicago, etc., R. Co., (C. C. A.) 125 Fed. Rep. 745.

**Footboards and Steps**. — Ellis v. Northern Pac. R. Co., 103 Fed. Rep. 416; Le Duc v. Northern Pac. R. Co., 92 Minn. 287; Ellington v. Great Northern R. Co., 92 Minn. 470; Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407; Texas, etc., R. Co. v. Hartnett, 33 Tex. Civ. App. 103; Gulf, etc., R. Co. v. Garren, (Tex. Civ. App. 1903) 72 S. W. Rep. 1028; San Antonio, etc., R. Co. v. Lindsey, 27 Tex. Civ. App. 316.

**Boilers**. — McDonnell v. Central of Georgia R. Co., 118 Ga. 86; Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, *affirming* 109 Ill. App. 468; Illinois Cent. R. Co. v. Behrens, 208 Ill. 20; Chicago, etc., R. Co. v. Rains, 203 Ill. 417; Markey v. Louisiana, etc., R. Co., 185 Mo. 348; Marsh v. Lehigh Valley R. Co., 206 Pa. St. 558; Missouri, etc., R. Co. v. Crum, 35 Tex. Civ. App. 609; International, etc., R. Co. v. Walters, (Tex. Civ. App. 1904) 80 S. W. Rep. 668.

**Side Rods**. — Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70.

**Hand Holds**. — Dunn v. New York, etc., R. Co., (C. C. A.) 107 Fed. Rep. 666; Atchison, etc., R. Co. v. Sledge, 68 Kan. 321.

**Spark Arresters**. — See Duree v. Chicago, etc., R. Co., 118 Iowa 640.

**Headlights**. — Southern Pac. R. Co. v. Yeargin, (C. C. A.) 109 Fed. Rep. 436; Illinois Cent. R. Co. v. McNicholas, 98 Ill. App. 54.

**Brake Shoes**. — Cambron v. Omaha, etc., R. Co., 165 Mo. 543.

**Locomotives Embraced by Federal Statute Requiring Automatic Couplers**. — A locomotive is included by the words "any car" in the second section of the Act of March 2, 1893 (27 U. S. Stat. 531, c. 196) requiring any common carrier engaged in interstate commerce by railroad

**79.** (b) Railroad Cars — Cars Owned by Company. — See note 2.

**80.** Cars of Another Company. — See note 1.

to equip any car used in moving interstate traffic with automatic couplers. *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462.

**79. 2. Cars Owned by Company.** — *Illinois Car, etc., Co. v. Walch*, 132 Ala. 490; *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; *Budge v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349; *Hewitt v. East Jordan Lumber Co.*, 136 Mich. 110, 10 Detroit Leg. N. 1008; *Griffin v. Ithaca St. R. Co.*, 62 N. Y. App. Div. 551; *Michigan Cent. R. Co. v. Waterworth*, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495; *International, etc., R. Co. v. Bayne*, 28 Tex. Civ. App. 392; *Boyle v. Union Pac. R. Co.*, 25 Utah 420. See *Freeman v. Nashville, etc., R. Co.*, 120 Ga. 469; *Brenson v. New York, etc., R. Co.*, 23 R. I. 147.

**Illustrations — Wheels.** — *Roberts v. Port Blakely Mills Co.*, 30 Wash. 25.

**Grab Irons.** — *Belt R. Co. v. Confrey*, 209 Ill. 344; *Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. 459.

The Act of Congress of March 2, 1893, requiring cars used in interstate commerce to be provided with secure grab irons, applies, it has been said, not only to cars that are loaded, but to all cars, whether empty or loaded, which are being used in interstate commerce. *Malott v. Hood*, 201 Ill. 202, affirming 99 Ill. App. 360.

**Hand Holds.** — *Texas, etc., R. Co. v. Allen*, 114 Fed. Rep. 177, 52 C. C. A. 133; *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Crawford v. United R., etc., Co.*, 101 Md. 402; *El Paso, etc., R. Co. v. Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *St. Louis Southwestern R. Co. v. Corrigan*, (Tex. Civ. App. 1904) 81 S. W. Rep. 554; *Missouri, etc., R. Co. v. Hoskins*, 34 Tex. Civ. App. 627; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556; *Galveston, etc., R. Co. v. Jones*, 29 Tex. Civ. App. 214; *San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324.

**Running Boards.** — *Mexican Cent. R. Co. v. Townsend*, (C. C. A.) 114 Fed. Rep. 737.

**Steps.** — *O'Connell v. Pennsylvania Co.*, (C. C. A.) 118 Fed. Rep. 989; *Smith v. Thomson-Houston Electric Co.*, 188 Mass. 371; *Scott v. Eastern R. Co.*, 90 Minn. 143.

**Ladders.** — *El Paso Northeastern R. Co. v. Ryan*, 36 Tex. Civ. App. 190; *Missouri, etc., R. Co. v. Bailey*, 28 Tex. Civ. App. 609; *Missouri, etc., R. Co. v. Miller*, 25 Tex. Civ. App. 460; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887.

**Platforms.** — *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608.

**Drawheads.** — *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Joyce v. Rome, etc., R. Co.*, 92 Hun (N. Y.) 107, affirmed without opinion 168 N. Y. 665. See *Dolan v. Burden Iron Co.*, 62 N. Y. App. Div. 545.

**Buffers.** — *Taylor v. Boston, etc., R. Co.*, 188 Mass. 390. See *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224.

**Car Doors.** — *Missouri, etc., R. Co. v. Hutchens*, 35 Tex. Civ. App. 343.

**Couplings.** — *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Pittsburg, etc., R. Co. v. Hewitt*, 102 Ill. App. 428, affirmed 202 Ill. 28; *Turritin v. Chicago, etc., R. Co.*, (Minn. 1905) 104 N. W. Rep. 225.

**Mainpin.** — *Missouri, etc., R. Co. v. Hensertlang*, (Tex. Civ. App. 1905) 86 S. W. Rep. 948.

**Hand Cars, Push Cars, and Dump Cars.** — *Brooks v. Louisville, etc., R. Co.*, 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318; *De Hart v. Chesapeake, etc., R. Co.*, 68 S. W. Rep. 647, 24 Ky. L. Rep. 431; *McGinn v. McCormick*, 109 La. 396; *Wallin v. Eastern R. Co.*, 83 Minn. 149; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Mitchell v. Wabash R. Co.*, 97 Mo. App. 411; *Weldon v. Omaha, etc., R. Co.*, 93 Mo. App. 668; *Devore v. St. Louis, etc., R. Co.*, 86 Mo. App. 429; *Compton v. Omaha, etc., R. Co.*, 82 Mo. App. 175; *Texas Cent. R. Co. v. Bender*, 32 Tex. Civ. App. 568; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, writ of error denied 97 Tex. 69; *Missouri, etc., R. Co. v. Blackman*, 32 Tex. Civ. App. 200; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 140; *De Mase v. Oregon R., etc., Co.*, 40 Wash. 108.

**Improperly Loaded Cars.** — *Roche v. Denver, etc., R. Co.*, 19 Colo. App. 204; *Louisville, etc., R. Co. v. Chandler*, 70 S. W. Rep. 666, 24 Ky. L. Rep. 998; *Fleming v. Greenleaf-Johnson Lumber Co.*, 128 N. Car. 532; *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204; *El Paso, etc., R. Co. v. McComus*, 36 Tex. Civ. App. 170, (Tex. Civ. App. 1903) 72 S. W. Rep. 629.

**Overcrowded Hand Car.** — *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215.

**Improper Make-up of Train.** — *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458.

**Car Must Be Adapted to Purpose for Which Employed.** — It has been said that the duty to use reasonable care to provide safe cars is not performed by furnishing a car designated suitable and safe for one purpose, to be used for another purpose for which it is unsuitable and unsafe. *McLean v. Pere Marquette R. Co.*, 137 Mich. 482, 11 Detroit Leg. N. 358.

**80. 1. Cars of Another Company.** — *Belt R. Co. v. Confrey*, 111 Ill. App. 473, affirmed 209 Ill. 344; *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206; *Budge v. Morgan's Louisiana, etc., R., etc., Co.*, 108 La. 349; *Foster v. New York, etc., R. Co.*, 187 Mass. 21; *Strauss v. New York, etc., R. Co.*, 91 N. Y. App. Div. 583; *Youngblood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *International, etc., R. Co. v. Reeves*, 35 Tex. Civ. App. 162; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *Wood v. Rio Grande Western R. Co.*, 28 Utah 351; *Woods v. Northern Pac. R. Co.*, 36 Wash. 658. See *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606.

See the title FELLOW SERVANTS, vol. 12, p. 965.



**81.** See note 5.

(c) Elevators. — See note 6.

(d) Stagings, Scaffoldings, Etc. — When Master Furnishes Completed Structure. —

See notes 7, 9.

**81.** 5. *Anderson v. Erie R. Co.*, 68 N. J. L. 647.6. *England*. — *Lloyd v. Woolland*, 87 L. T. N. S. 73.*Delaware*. — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.*Illinois*. — *Slack v. Harris*, 200 Ill. 96; *Siegel v. Trecka*, 115 Ill. App. 56, *affirmed* 218 Ill. 559; *Pardridge v. Gilbride*, 98 Ill. App. 134; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532. See *Central Union Bldg. Co. v. Kolander*, 212 Ill. 27; *H. Channon Co. v. Hahn*, 189 Ill. 28.*Kentucky*. — *Continental Tobacco Co. v. Knoop*, 71 S. W. Rep. 3, 24 Ky. L. Rep. 1268.*Maryland*. — *Brager v. Austin*, 99 Md. 473; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.*Massachusetts*. — *Moylon v. D. S. McDonald Co.*, 188 Mass. 499; *Droney v. Doherty*, 186 Mass. 205; *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363; *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75.*Missouri*. — *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657, (Mo. App. 1903) 74 S. W. Rep. 1039.*New Hampshire*. — *Stone v. Boscawen Mills*, 71 N. H. 288.*New York*. — *Starer v. Stern*, 100 N. Y. App. Div. 393; *Stackpole v. Wray*, 99 N. Y. App. Div. 262, *affirmed* 182 N. Y. 567; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Stackpole v. Wray*, 74 N. Y. App. Div. 310; *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, *affirmed* without opinion 165 N. Y. 610. See *Ingram v. Fosburgh*, 73 N. Y. App. Div. 129; *Sullivan v. Poor*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 575; *Biddiscomb v. Cameron*, 35 N. Y. App. Div. 561, *affirmed* without opinion 161 N. Y. 637; *Gallenkamp v. Garvin Mach. Co.*, 179 N. Y. 588, *reversing* 91 N. Y. App. Div. 141, on dissenting opinion of Ingraham, J.*North Carolina*. — *Womble v. Merchants Grocery Co.*, 135 N. Car. 474.*Ohio*. — *Frolich v. Cranker*, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615.*Pennsylvania*. — *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1; *Skelley v. Crutchfield*, 17 Pa. Super. Ct. 198. See *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792.*Texas*. — *Peck v. Peck*, (Tex. 1905) 87 S. W. Rep. 248.*Washington*. — *Young v. O'Brien*, 36 Wash. 570. See *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705.See *Hyde v. Mendel*, 75 Conn. 140.**7. Whether a "Place" for Work or an "Appliance."** — *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 81; *Hutton v. Holdbrook, etc., Contracting Co.*, 139 Fed. Rep. 734; *Fink v. Slade*, 66 N. Y. App. Div. 105; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278; *Garrow v. Miller*, 72 Vt. 284.**Telephone Pole.** — In an action by a lineman to recover for injuries sustained by the falling of one of the defendant telephone company's poles, it was held that a telephone pole is more in the nature of an appliance than of a place to work. *Britton v. Central Union Telephone Co.*, (C. C. A.) 131 Fed. Rep. 844.**9. Completed Structures Furnished by Master — Reasonable Care in Construction Necessary — United States.** — *Chambers v. American Tin Plate Co.*, (C. C. A.) 129 Fed. Rep. 562, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 81.*Illinois*. — *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243; *Ehlen v. O'Donnell*, 205 Ill. 38, *affirming* 102 Ill. App. 141; *John S. Metcalf Co. v. Nystedt*, 203 Ill. 333, *affirming* 102 Ill. App. 71; *McBeath v. Rawle*, 192 Ill. 626, *affirming* 93 Ill. App. 212; *Chicago, etc., R. Co. v. Huff*, 104 Ill. App. 594; *Frost Mfg. Co. v. Smith*, 98 Ill. App. 308, *affirmed* 197 Ill. 253. See *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96.*Iowa*. — *Foley v. Cudahy Packing Co.*, 119 Iowa 246.*Kansas*. — *Buoy v. Clyde Milling, etc., Co.*, 68 Kan. 436.*Kentucky*. — *George Weidemann Brewing Co. v. Wood*, (Ky. 1905) 87 S. W. Rep. 772, *followed* in *Herman v. George Weidemann Brewing Co.*, 87 S. W. Rep. 775, 27 Ky. L. Rep. 1016; *Louisville, etc., R. Co. v. Poulter*, 84 S. W. Rep. 576, 27 Ky. L. Rep. 193; *Pfisterer v. Peter*, 117 Ky. 501. See *Gratz v. Worden*, 82 S. W. Rep. 395, 26 Ky. L. Rep. 721.*Louisiana*. — *Ingham v. John B. Honor Co.*, 113 La. 1040.*Maine*. — *McCarthy v. Clafin*, 99 Me. 290; *Caven v. Bodwell Granite Co.*, 99 Me. 278.*Massachusetts*. — *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 250; *Gurney v. Le Baron*, 182 Mass. 368. See *Rapson v. Leighton*, 187 Mass. 432.*Minnesota*. — *Carlson v. Haglin*, (Minn. 1905) 104 N. W. Rep. 297.*Missouri*. — *Neves v. Green*, 111 Mo. App. 634; *Shore v. American Bridge Co.*, 111 Mo. App. 278.*New Hampshire*. — *Thompson v. Bartlett*, 71 N. H. 174, 93 Am. St. Rep. 504.*New York*. — *Mengle v. McClintic-Marshall Constr. Co.*, 89 N. Y. App. Div. 334; *Hatton v. Hilton Bridge Constr. Co.*, 42 N. Y. App. Div. 398, *affirmed* without opinion 167 N. Y. 590.*Ohio*. — *Strabler v. Toledo Bridge Co.*, 11 Ohio Cir. Dec. 87.*Pennsylvania*. — *Geist v. Rapp*, 206 Pa. St. 411. *Compare* *Ehni v. National Tube Works Co.*, 203 Pa. St. 186, 93 Am. St. Rep. 761.*West Virginia*. — *Richards v. Riverside Ironworks*, 56 W. Va. 510.

Where a scaffold is required for the purpose of sustaining the workmen and also the strain of hoisting up sections of heavy iron pipe, the weight of such pipe, and the additional weight caused by bracing up the pipe after being put

**82. Where Master Furnishes Materials for Structure. — See notes 1, 2.****(e) Miscellaneous. — See note 4.**

into place, presumptively the ordinary workman, not familiar with the construction of scaffolds, and having no experience in such work, is not able to judge of the sufficiency of the appliance for such purpose. In such case, if the master directs such workman to go upon the scaffold and assist in handling the pipe, there is an implied agreement upon his part that the same is reasonably safe and suitable for the purpose. *Hagerty v. Evans*, 87 Minn. 435.

**82. 1. Where Duty of Construction Devolves on Servant.**—*United States.*—*Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 82; *Chambers v. American Tin Plate Co.*, (C. C. A.) 129 Fed. Rep. 562, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 82. See *Cecil v. American Sheet Steel Co.*, (C. C. A.) 129 Fed. Rep. 542; *Fournier v. Pike*, 128 Fed. Rep. 991.

*Idaho.*—*Larsen v. Le Doux*, (Idaho 1905) 81 Pac. Rep. 600.

*Maine.*—*Beal v. Bryant*, 99 Me. 112; *Pellerin v. International Paper Co.*, 96 Me. 388, See *McCarthy v. Clafin*, 99 Me. 290.

*Massachusetts.*—*White v. Unwin*, 188 Mass. 490; *Thompson v. Worcester*, 184 Mass. 354.

*Michigan.*—*Landowski v. Chapoton*, 137 Mich. 429, 11 Detroit Leg. N. 307; *Lockwood v. Tennant*, 137 Mich. 305, 11 Detroit Leg. N. 342. *Minnesota.*—*Hagerty v. Evans*, 87 Minn. 435. Compare *Carlson v. Haglin*, (Minn. 1905) 104 N. W. Rep. 297.

*Missouri.*—*Shore v. American Bridge Co.*, 111 Mo. App. 278; *Herbert v. Wiggins Ferry Co.*, 107 Mo. App. 287.

*New Jersey.*—*Fuker v. Kerbaugh*, (N. J. 1905) 61 Atl. Rep. 376. See *Enright v. Oliver*, 69 N. J. L. 357.

*Vermont.*—*Garrow v. Miller*, 72 Vt. 284; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278.

*Washington.*—*Metzler v. McKenzie*, 34 Wash. 470; *Ralph v. American Bridge Co.*, 39 Wash. 500.

See *Harvey v. McConchie*, 77 N. Y. App. Div. 361, affirmed without opinion 177 N. Y. 569.

**The New York Statute** makes it the absolute duty of the master to furnish a safe structure. *Madden v. Hughes*, 104 N. Y. App. Div. 191; *Swenson v. Wilson, etc., Mfg. Co.*, 102 N. Y. App. Div. 477; *Siversen v. Jenks*, 102 N. Y. App. Div. 313; *Iesief v. New York Cent., etc., R. Co.*, 102 N. Y. App. Div. 168; *Welk v. Jackson Architectural Iron Works*, 98 N. Y. App. Div. 247; *Tierney v. Vunck*, 97 N. Y. App. Div. 1; *Conley v. Lackawanna Iron, etc., Co.*, 94 N. Y. App. Div. 149; *Flannigan v. Ryan*, 89 N. Y. App. Div. 624; *Johnson v. Roach*, 83 N. Y. App. Div. 351, 13 N. Y. Annot. Cas. 86; *Gmaehle v. Rosenberg*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 267, affirmed 178 N. Y. 147; *Wingert v. Krakauer*, 76 N. Y. App. Div. 34; *Healy v. Burke*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 792, 35 Misc. (N. Y.) 384; *Kuss v. Freid*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 628.

It has been held that the New York statute

which gives a remedy against the master in favor of an employee who is injured while working on a scaffold by reason of some defect therein, has reference to a completed scaffold. *Pussley v. Edgemoor Bridge Works*, 56 N. Y. App. Div. 71, affirmed without opinion 168 N. Y. 589.

A scaffold constructed in a room in a factory from four to six feet above the floor, for the purpose of affixing shafting to the ceiling, has been held not to be a scaffold contemplated by the provisions of the New York statute of 1897. *Schapp v. Bloomer*, 181 N. Y. 125.

A vessel in course of construction in a shipyard is a "structure" within the meaning of the statute. *Chaffee v. Union Dry Dock Co.*, 68 N. Y. App. Div. 578.

But it has been held that an iron arch used as a temporary support upon which to lay bricks of terra cotta forming the permanent arch cannot be regarded as a scaffold within the meaning of the statute. *Haughey v. Thatcher*, 89 N. Y. App. Div. 375.

It has been held that a scaffold which was constructed by the workmen who were to work upon it, and was in their charge and under their control, did not come within the provision of the New York statute. *Rotondo v. Smyth*, 92 N. Y. App. Div. 153.

The provision of the New York statute relating to scaffolds does not mean that the master, who has furnished a safe scaffold to his workmen, is bound to see that they use proper care in moving it and adjusting it from time to time as the nature of the work requires. *Hutton v. Holdbrook, etc., Contracting Co.*, 139 Fed. Rep. 734.

**2. Reasonable Care in Selecting Materials Necessary.**—*Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46; *Hober v. W. P. Nelson Co.*, 101 Ill. App. 336; *Beal v. Bryant*, 99 Me. 112; *Shore v. American Bridge Co.*, 111 Mo. App. 278. See *Sitterding v. Patterson*, 101 Va. 296.

**4. Brakes.**—*United States.*—*Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, affirming (C. C. A.) 114 Fed. Rep. 458; *Mexican Cent. R. Co. v. Jones*, (C. C. A.) 107 Fed. Rep. 64.

*Indiana.*—*Terre Haute Electric Co. v. Kieley*, 35 Ind. App. 180; *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379; *Baltimore, etc., R. Co. v. Henderson*, 31 Ind. App. 441.

*Iowa.*—*Foster v. Chicago, etc., R. Co.*, 127 Iowa 84.

*Kentucky.*—*Hurt v. Louisville, etc., R. Co.*, 116 Ky. 545.

*Missouri.*—*Cole v. St. Louis Transit Co.*, 183 Mo. 81.

*New York.*—*Newton v. New York Cent., etc., R. Co.*, 96 N. Y. App. Div. 81; *Allison v. Long Clove Trap Rock Co.*, 92 N. Y. App. Div. 611; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, affirmed without opinion 178 N. Y. 635.

*North Carolina.*—*Wright v. Southern R. Co.*, 127 N. Car. 225.

*Ohio.*—*Hunt v. Caldwell*, 11 Ohio Cir. Dec. 562, 22 Ohio Cir. Ct. 283.

**83.** See notes 1, 2, 3, 7, 8, 9, 11, 12, 13, 18, 19, 20.

**84.** See notes 1, 3, 4, 5, 6, 10, 12, 15, 16, 17, 18, 19, 20, 21.

*Oregon.*—*Bowers v. Star Logging Co.*, 41 Oregon 301.

*South Carolina.*—*Boyd v. Seaboard Air Line R. Co.*, 67 S. Car. 218.

*Tennessee.*—*Robertson v. Cayard*, 111 Tenn. 356. See *East Tennessee, etc.*, R. Co. v. *Lindamood*, 111 Tenn. 457.

*Utah.*—*Wood v. Rio Grande Western R. Co.*, 28 Utah 351.

*Virginia.*—*Norfolk, etc.*, R. Co. v. *Phillips*, 100 Va. 362.

**83. 1. Brake Chains.**—*Hurt v. Louisville, etc.*, R. Co., 116 Ky. 545; *McDonald v. Michigan Cent. R. Co.*, 132 Mich. 372, 9 Detroit Leg. N. 700.

**Brake Shoes.**—*Cambron v. Omaha, etc.*, R. Co., 165 Mo. 543.

**2. Brake Beams.**—See *Texas Cent. R. Co. v. Waller*, 28 Tex. Civ. App. 4.

**3. Brake Pins.**—See *East Tennessee, etc.*, R. Co. v. *Lindamood*, 109 Tenn. 407.

**7. Boilers.**—*Markey v. Louisiana, etc.*, R. Co., 185 Mo. 348.

**8. Cables.**—*Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93. Compare *Owen v. Retsof Min. Co.*, 102 N. Y. App. Div. 130.

**9. Chains.**—*Haskell v. Cape Ann Anchor Works*, 178 Mass. 485; *Vincent v. Alden*, 62 N. Y. App. Div. 558; *Finnerty v. Burnham*, 205 Pa. St. 305; *Newton v. Vulcan Iron Works*, 199 Pa. St. 646; *International, etc.*, R. Co. v. *Jourdan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 266.

**11. Cranes.**—*Southern Car, etc.*, Co. v. *Jennings*, 137 Ala. 247; *Shickle-Harrison, etc.*, Iron Co. v. *Beck*, 212 Ill. 268; *Jacobson v. Johnson*, 87 Minn. 185; *Dzinbienski v. J. L. Mott Iron Works*, 56 N. Y. App. Div. 58; *Finnerty v. Burnham*, 205 Pa. St. 305.

**12. Derricks.**—*California.*—*Dyas v. Southern Pac. Co.*, 140 Cal. 296.

*Connecticut.*—*Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617.

*Delaware.*—*Crocker v. Pusey, etc.*, Co., 3 Penn. (Del.) 1.

*Illinois.*—*Illinois Steel Co. v. Ostrowski*, 194 Ill. 376.

*Indiana.*—*Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, reversing (Ind. App. 1903) 66 N. E. Rep. 1016; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241; *Clear Creek Stone Co. v. Dearmin*, 160 Ind. 162.

*Michigan.*—*Ouellette v. Michigan Alkali Co.*, 129 Mich. 484, 8 Detroit Leg. N. 1073.

*Minnesota.*—*Attix v. Minnesota Sandstone Co.*, 85 Minn. 142.

*New York.*—*Gorman v. Milliken*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 336, affirmed without opinion 102 N. Y. App. Div. 617; *Walters v. George A. Fuller Co.*, 74 N. Y. App. Div. 388; *Jarvis v. Northern New York Marble Co.*, 55 N. Y. App. Div. 272; *Yaw v. Whitmore*, 46 N. Y. App. Div. 422, affirmed without opinion 167 N. Y. 605. See *Wagner v. New York Cent., etc.*, R. Co., 76 N. Y. App. Div. 552; *Welsh v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; *Rosa v. Volkening*, 64 N. Y. App. Div. 426, affirmed without opinion 173

N. Y. 590. Compare *Wagner v. New York, etc.*, R. Co., 93 N. Y. App. Div. 14.

*Pennsylvania.*—*Sharpley v. Wright*, 205 Pa. St. 253.

*Rhode Island.*—*Sherman v. J. W. Bishop Co.*, 23 R. I. 6.

*South Carolina.*—*Keys v. Winnebago Granite Co.*, 72 S. Car. 97.

*Virginia.*—*Parlett v. Dunn*, 102 Va. 459.

*Wisconsin.*—*Lounsbury v. Davis*, 124 Wis. 432.

See *Kelly v. Jutte, etc.*, Co., (C. C. A.) 104 Fed. Rep. 955.

**13. Engines.**—*Green v. Lawrence Cement Co.*, 57 N. Y. App. Div. 284; *Moore Lime Co. v. Johnston*, 103 Va. 84; *Hencke v. Babcock*, 24 Wash. 556.

**18. Hammers.**—*Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 8 Detroit Leg. N. 244; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607; *Robbins v. Big Circle Min. Co.*, 105 Mo. App. 78; *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471. See *Lynn v. Glucose Sugar Refining Co.*, (Iowa 1905) 104 N. W. Rep. 577; *Gernand v. Smith*, 66 N. J. L. 390; *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264.

**Flogging Hammer.**—*Morris v. Eastern R. Co.*, 88 Minn. 112.

**19. Hooks.**—*The Frey*, 113 Fed. Rep. 1003; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256; *Momence Stone Co. v. Groves*, 197 Ill. 88; *Henderson Brewing Co. v. Folden*, 76 S. W. Rep. 520, 25 Ky. L. Rep. 969; *Martin v. Merchants, etc.*, Transp. Co., 185 Mass. 487; *Anderson v. Fielding*, 92 Minn. 42; *Cosselman v. Dunfee*, 59 N. Y. App. Div. 467, affirmed 172 N. Y. 507; *Jernigan v. Houston Ice, etc.*, Co., 33 Tex. Civ. App. 501; *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 32 Wash. 319. See *Pioneer Fire Proof Constr. Co. v. Sandberg*, 98 Ill. App. 36; *Skapura v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21; *Murphy v. Hopper*, 75 N. Y. App. Div. 606; *Gensen v. Ohio Oil Co.*, 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

**Rail Hooks.**—See *San Antonio, etc.*, R. Co. v. *Drake*, (Tex. Civ. App. 1905) 85 S. W. Rep. 447.

**20. Horses.**—*Palmer v. Coyle*, 187 Mass. 136; *Farmer v. Cumberland Telephone, etc.*, Co., 86 Miss. 55; *McCready v. Stepp*, 104 Mo. App. 340; *Roberti v. Anderson*, 27 Nev. 396; *Carena v. Zanmatti*, 82 N. Y. App. Div. 11; *Wysocki v. Wisconsin Lakes Ice, etc.*, Co., 121 Wis. 96. See *Carena v. Zanmatti*, 82 N. Y. App. Div. 11.

**Mules.**—*East Jellico Coal Co. v. Stewart*, 68 S. W. Rep. 624, 24 Ky. L. Rep. 420.

**84. 1. Hoisting Tongs Used in Foundry.**—*Mulligan v. Colorado Fuel, etc.*, Co., 20 Colo. App. 198.

**3. Ladders.**—*National Enameling, etc.*, Co. v. *Fagan*, 115 Ill. App. 590; *Ehlen v. O'Donnell*, 205 Ill. 38, affirming 102 Ill. App. 141; *Durcan v. Gernert Bros. Lumber Co.*, 87 S. W. Rep. 762,

27 Ky. L. Rep. 1039; *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353; *Carroll v. Metropolitan Coal Co.*, 189 Mass. 159; *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *McConnell v. Morse Iron Works, etc., Co.*, 102 N. Y. App. Div. 324, applying New York Laws 1897, p. 467, c. 415, § 18; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *Ritt v. True Tag Paint Co.*, 108 Tenn. 646; *Hirsch v. Ashe*, 35 Tex. Civ. App. 495; *Sault Ste. Marie Pulp, etc., Co. v. Myers*, 33 Can. Sup. Ct. 23, *affirming* 3 Ont. L. Rep. 600. See *Higgins v. Higgins*, 188 Mass. 113; *Snyder v. J. S. Rogers Co.*, 69 N. J. L. 347; *Henggger v. Cohn*, 68 N. J. L. 240; *Morton v. Moran Bros. Co.*, 30 Wash. 362. *Compare Drum v. New England Cotton Yarn Co.*, 180 Mass. 113; *Davitt v. Metropolitan St. R. Co.*, 106 N. Y. App. Div. 567.

**84. 4. Lamps.**—*Langdon-Creasy Co. v. Rouse*, 72 S. W. Rep. 1113, 24 Ky. L. Rep. 2095.

**5. Mauls.**—*Deckerd v. Wabash R. Co.*, 111 Mo. App. 117; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Nash v. Dowling*, 93 Mo. App. 156. See *Dwyer v. Shaw*, 22 R. I. 648; *Missouri, etc., R. Co. v. Dyer*, (Tex. Civ. App. 1903) 75 S. W. Rep. 930.

**Spike Mauls.**—*Louisville, etc., R. Co. v. Roberts*, 70 S. W. Rep. 833, 24 Ky. L. Rep. 1160.

**Beetles.**—*Daly v. Lee*, 39 N. Y. App. Div. 188, *affirmed* without opinion 167 N. Y. 537.

**6. File Drivers.**—*Swanson v. Oakes*, 93 Minn. 404; *Koon v. Southern R. Co.*, 69 S. Car. 101.

**10. Ropes.**—*Bates Mach. Co. v. Crowley*, 115 Ill. App. 540; *Amburg v. International Paper Co.*, 97 Me. 327; *Geldard v. Marshall*, 43 Oregon 438; *Wallace v. Henderson*, 211 Pa. St. 142; *De Grazia v. Piccardo*, 15 Pa. Super. Ct. 107; *Ft. Worth Iron Works v. Stokes*, 33 Tex. Civ. App. 218; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847. See *Kelly v. Hogan*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 761.

**12. Skids.**—*Wake v. Price*, 58 S. W. Rep. 519, 22 Ky. L. Rep. 696; *Comers v. Washburn-Crosby Co.*, 91 Minn. 105. See *Beckman v. Anheuser-Busch Brewing Assoc.*, 98 Mo. App. 555.

**15. Trucks.**—*Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Gulf, etc., R. Co. v. Davis*, 35 Tex. Civ. App. 285.

**16. Turntables.**—*Atchison, etc., R. Co. v. Bancord*, 66 Kan. 81; *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258.

**17. Unguarded Machinery**—*United States*.—*Wheeler v. Oak Harbor Head Lining, etc., Co.*, (C. C. A.) 126 Fed. Rep. 348; *Rabe v. Consolidated Ice Co.*, (C. C. A.) 113 Fed. Rep. 905.

*Georgia*.—*Canton Cotton Mills v. Edwards*, 120 Ga. 447.

*Illinois*.—*Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, *affirming* 99 Ill. App. 670; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452; *Morris v. Malone*, 200 Ill. 132, 93 Am. St. Rep. 180; *Ide v. Fratcher*, 194 Ill. 552, *affirming* 96 Ill. App. 549.

*Indiana*.—*Robertson v. Ford*, 164 Ind. 538; *M. S. Huey Co. v. Johnston*, 164 Ind. 489; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Buehner Chair Co. v. Feulner*, 164 Ind. 368; *Green v. American Car, etc., Co.*, 163 Ind. 135; *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Espenlaub v. Ellis*, 34 Ind.

App. 163; *American Car, etc., v. Clark*, 32 Ind. App. 644; *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398; *Indiana Mfg. Co. v. Wells*, 31 Ind. App. 460; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Baltimore, etc. R. Co. v. Cavanaugh*, 35 Ind. App. 32. See *La Porte Carriage Co. v. Sullender*, (Ind. 1905) 75 N. E. Rep. 277.

*Iowa*.—*Woolf v. Nauman Co.*, (Iowa 1905) 103 N. W. Rep. 785; *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354.

*Kentucky*.—*Hood v. Argonaut Cotton-Mill Co.*, (Ky. 1901) 62 S. W. Rep. 1043. See *Chicago Veneer Co. v. Walden*, (Ky. 1904) 82 S. W. Rep. 294.

*Massachusetts*.—*Dolan v. Boott Cotton Mills*, 185 Mass. 576; *Gomes v. New Bedford Cordage Co.*, 187 Mass. 124. But *compare Arkland v. Taber-Prang Art Co.*, 184 Mass. 243.

*Minnesota*.—*Erickson v. Northwest Paper Co.*, (Minn. 1905) 104 N. W. Rep. 291; *Perry v. Tozer*, 90 Minn. 431; *Walker v. Grand Forks Lumber Co.*, 86 Minn. 328; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25. *Compare Torske v. Commonwealth Lumber Co.*, 86 Minn. 276.

*Missouri*.—*Henderson v. Kansas City*, 177 Mo. 477; *Stafford v. Adams*, 113 Mo. App. 717; *Lore v. American Mfg. Co.*, 160 Mo. 608.

*Nebraska*.—*Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234.

*New Jersey*.—*Dowd v. Erie R. Co.*, 70 N. J. L. 451.

*New York*.—*Levy v. Grove Mills Paper Co.*, 80 N. Y. App. Div. 384; *Johansen v. Eastman's Co.*, 44 N. Y. App. Div. 270, *affirmed* without opinion 168 N. Y. 648. See *Shaw v. Union Bag, etc., Co.*, 76 N. Y. App. Div. 296.

*North Carolina*.—*Creech v. Wilmington Cotton Mills*, 135 N. Car. 680; *Dorsett v. Clement Ross Mfg. Co.*, 131 N. Car. 254; *Myers v. Concord Lumber Co.*, 129 N. Car. 252. See *Ausley v. American Tobacco Co.*, 130 N. Car. 34.

*Oregon*.—*Viohl v. North Pac. Lumber Co.*, (Oregon 1905) 80 Pac. Rep. 112; *Stager v. Troy Laundry Co.*, 38 Oregon 480.

*Pennsylvania*.—*Bartholomew v. Kemmerer*, 211 Pa. St. 277.

*Washington*.—*Hall v. West, etc., Mill Co.*, 39 Wash. 447; *Crooker v. Pacific Lounge, etc., Co.*, 34 Wash. 191; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30.

*Canada*.—*Sault Ste. Marie Pulp, etc., Co. v. Myers*, 33 Can. Sup. Ct. 23, *affirming* 3 Ont. L. Rep. 600; *Moore v. J. D. Moore Co.*, 4 Ont. L. Rep. 167; *Godwin v. Newcombe*, 1 Ont. L. Rep. 525.

See *Pierce v. Contrexville Mfg. Co.*, 25 R. I. 512; *Powalske v. Cream City Brick Co.*, 110 Wis. 461; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645.

But see *Bair v. Heibel*, 103 Mo. App. 621, in which it is said that, independently of statutory provisions, "it seems there is no rule of the common law requiring dangerous machinery to be fenced or guarded, and that the master is not answerable if a servant of full capacity is injured in consequence of working about unguarded machines."

**Statutory Obligation to Guard Machinery.**—*Klein v. Garvey*, 94 N. Y. App. Div. 183; *Sitts v. Waiontha Knitting Co.*, 94 N. Y. App. Div. 38.

It has been held that a master could not be charged with negligence, under the New York Factory Act, in failing to guard a shaft which could be reached only by the use of a ladder. *Dillon v. National Coal Tar Co.*, 181 N. Y. 215.

Similarly, it has been held that the provision of the New York Labor Law (N. Y. Laws 1897, p. 480, c. 415, § 18) requiring machinery to be properly guarded does not apply to shafting or machinery located about eight feet above the floor, and hence negligence cannot be imputed, as a matter of law, because of a failure to guard the shafting, although it might be a question of fact whether such machinery should be guarded or protected. *Scialo v. Steffens*, 105 N. Y. App. Div. 592.

And it has been held that this statute does not require an employer to cover or guard machinery in the course of construction so that persons engaged in constructing it would not be injured. *Foster v. International Paper Co.*, 71 N. Y. App. Div. 47.

**§4. 18. Wagons.**—*Edwards v. Barber Asphalt Paving Co.*, 92 Mo. App. 221.

**Harnesses.**—*Cooper v. Robert Portner Brewing Co.*, 112 Ga. 894; *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171; *Smith v. King*, 74 N. Y. App. Div. 1.

**19. Windlasses.**—*Fletcher Bros. Co. v. Hyde*, (Ind. App. 1905) 75 N. E. Rep. 9.

**Winch Used on Shipboard.**—*The Nordfarer*, 115 Fed. Rep. 416.

**20. Wires.**—*Delaware.*—*Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24.

*Illinois.*—*Commonwealth Electric Co. v. Rose*, 214 Ill. 545.

*Iowa.*—*Barto v. Iowa Telephone Co.*, 126 Iowa 241, 106 Am. St. Rep. 347. See *Aga v. Harbach*, (Iowa 1903) 93 N. W. Rep. 601.

*Kentucky.*—*Paducah R., etc., Co. v. Bell*, (Ky. 1903) 85 S. W. Rep. 216; *Cumberland Telephone, etc., Co. v. Ware*, 115 Ky. 581.

*Louisiana.*—*Whitworth v. Shreveport Belt R. Co.*, 112 La. 363; *Thompson v. New Orleans, etc., R. Co.*, 108 La. 52; *Potts v. Shreveport Belt R. Co.*, 110 La. 1.

*Missouri.*—*Haworth v. Mineral Belt Telephone Co.*, 105 Mo. App. 161.

*Nebraska.*—*New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 68 Neb. 72, 54; *New Omaha Thomson-Houston Electric Light Co. v. Dent*, 68 Neb. 668.

*New York.*—*Irish v. Union Bag, etc., Co.*, 103 N. Y. App. Div. 45.

See *Jackson, etc., St. R. Co. v. Simmons*, 107 Tenn. 392; *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

**Defectively Insulated Switches in Electric Power House.**—*Strattnr v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245; *Staubley v. Potomac Electric Power Co.*, 21 App. Cas. (D. C.) 160.

**21. Wringers.**—*Mercantile Laundry Co. v. Kearney*, 97 Md. 15; *Pittsburg, etc., R. Co. v. Stone*, 24 Ohio Cir. Ct. 192; *Golthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467.

**Belts.**—*Harttrich v. Hawes*, 202 Ill. 334, affirming 103 Ill. App. 433; *Maryland Steel Co.*

*v. Engleman*, 101 Md. 661; *Boucher v. Robeson Mills*, 182 Mass. 500; *Devcreux v. Utica Steam Cotton Mills*, 84 N. Y. App. Div. 34; *Toomey v. Avery Stamping Co.*, 11 Ohio Cir. Dec. 216, 20 Ohio Cir. Ct. 183; *Petrarca v. Quindick Mfg. Co.*, 27 R. I. 265; *McGar v. National, etc., Worsted Mills*, 22 R. I. 347; *McCaughy v. Jenckes Spinning Co.*, 26 R. I. 426; *Cummings v. National, etc., Worsted Mills*, 24 R. I. 390; *McGar v. National, etc., Worsted Mills*, 24 R. I. 447, 95 Am. St. Rep. 749; *Chase v. Spartanburg R., etc., Co.*, 64 S. Car. 212; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194.

**Belt Shifters.**—*Indiana Mfg. Co. v. Wells*, 31 Ind. App. 460; *Pressly v. Dover Yarn Mills*, 138 N. Car. 410; *Sweigert v. Klingensmith*, 210 Pa. St. 565; *Winters v. Boll*, 204 Pa. St. 41; *Gulf, etc., R. Co. v. Hayden*, 29 Tex. Civ. App. 280.

Under the provisions of the *Indiana Factory Inspection Act* requiring the owner of establishments in which machinery is used to provide belt shifters, "in the discretion of the chief inspector," the absence of a belt shifter is not *per se* negligence in the absence of an order or direction by the chief inspector to furnish such appliances. *Robertson v. Ford*, 164 Ind. 538.

**Capstans.**—*Drapeau v. International Paper Co.*, 96 Me. 299.

**Chisels.**—*Crilley v. New Amsterdam Gas Co.*, 106 N. Y. App. Div. 127.

**Coal Buckets.**—*Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787.

**Coal Chutes.**—*Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440.

**Fuses.**—*Curran v. Seattle, etc., R., etc., Co.*, 34 Wash. 512.

**Grindstones and Emery Wheels.**—*Ide v. Fratcher*, 194 Ill. 552, affirming 96 Ill. App. 549; *Hall v. Emerson-Stevens Mfg. Co.*, 94 Me. 445.

**Hoisting Machinery or Appliances.**—*Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407; *Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410; *Riverside Mills v. Jones*, 121 Ga. 33; *Union Bridge Co. v. Teehan*, 190 Ill. 374, affirming 92 Ill. App. 259; *Slattery v. Walker, etc., Mfg. Co.*, 179 Mass. 307. See *Pioneer Fire Proof Constr. Co. v. Sandberg*, 98 Ill. App. 36.

**Iron Moulds.**—*Haslin v. National Foundry Co.*, 106 N. Y. App. Div. 152.

**Jacks.**—*Missouri, etc., R. Co. v. Puckett*, 62 Kan. 770; *Meehan v. Atlas Safe Moving, etc., Co.*, 94 N. Y. App. Div. 306; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458.

**Mangles.**—*Ball v. Gussenhoven*, 29 Mont 321; *Coleman v. Perry*, 28 Mont. 1; *Fronk v. J. H. Evans City Steam Laundry*, (Neb. 1903) 96 N. W. Rep. 1053; *Thomas v. Exeter, etc., St. R. Co.*, (N. H. 1904) 58 Atl. Rep. 838; *Stager v. Troy Laundry Co.*, 38 Oregon 480; *Bartholomew v. Kemmerer*, 21 Pa. St. 277; *Young v. Mercantile Steam Laundry Co.*, 198 Pa. St. 553; *Bier v. Hosford*, 35 Wash. 544. See *Baynard v. Standard Knitting Mills Co.*, 80 N. Y. App. Div. 626.

**Pulleys.**—*Szymanski v. Blumenthal*, 4 Penn. (Del.) 511; *Eagle, etc., Mills v. Herron*, 119 Ga. 389; *Indiana Bituminous Coal Co. v. Buffev*, 28 Ind. App. 108.

**Punches.**—*Galveston, etc., R. Co. v. Whisenhunt*, 36 Tex. Civ. App. 135.

**Riveting Machines.** — *Patterson v. Harrisburg Trust Co.* 211 Pa. St. 173

**Saws.** — *Bell, etc., Co. v. Applegate*, 62 S. W. Rep. 1124, 23 Ky. L. Rep. 470; *Dempsey v. Sawyer*, 95 Me. 295; *McLean v. Paine*, 181 Mass. 287; *Chilson v. Lansing Wagon Works*, 128 Mich. 43, 8 Detroit Leg. N. 520; *Dean v. St. Louis Woodware Works*, 106 Mo. App. 167; *Central Mfg. Co. v. Cotton*, 108 Tenn. 63; *Jancko v. West Coast Mfg., etc., Co.*, 40 Wash. 230; *Prior v. Eggert*, 30 Wash. 481.

**Set Screw.** — It has been said that it cannot be held as a matter of law that the mere use of a set screw attached to a drill is negligence. *Aurora Boiler Works v. Colligan*, 115 Ill. App. 527. See *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 11 Detroit Leg. N. 87.

**Sewing Machines.** — *McAleer v. Walter*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 474.

**Socket Wrench for Opening Drawbridge.** — *Galveston, etc., R. Co. v. Newport*, 26 Tex. Civ. App. 583.

**Steam Drums.** — *In re California Nav., etc.*, Co., 110 Fed. Rep. 670.

**Steam Shovels.** — *Bender v. Great Northern R. Co.*, 89 Minn. 163.

**Water Cooler.** — *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330, 11 Detroit Leg. N. 31.

**Car Couplers.** — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359; *Western, etc., R. Co. v. Beason*, 112 Ga. 553; *Branž v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; *Carson v. Southern R. Co.*, 68 S. Car. 55, judgment affirmed Southern R. Co. v. Carson, 194 U. S. 136; *Youghlood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824; *Denison, etc., Suburban R. Co. v. Binkley*, (Tex. Civ. App. 1905) 87 S. W. Rep. 386; *San Antonio, etc., R. Co. v. Hahl*, (Tex. Civ. App. 1904) 83 S. W. Rep. 27; *Texas Cent. R. Co. v. Yarbro*, 32 Tex. Civ. App. 246; *Missouri, etc., R. Co. v. Hawk* 30 Tex. Civ. App. 142; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503.

**Automatic Couplers.** — It is provided by the Act of Congress known as the Safety Appliance Act, approved March 2, 1893) 6 Fed. Stat. Annot. 752), in effect that common carriers engaged in interstate commerce by railroad should equip cars used in moving interstate traffic with couplers working automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. And statutes requiring railroads to adopt automatic couplers have been enacted in several of the states.

The Act of Congress applies not only where the cars are being actually used in moving interstate commerce at the time of the injury, but also to cars which are being made up into a train for the purpose of moving interstate traffic at the time of the injury. *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258. The act has no application in a case in which there is no proof that the engine and cars were used in interstate commerce. *Rosney v. Erie R. Co.*, (C. C. A.) 135 Fed. Rep. 311. It has been held that in an action to recover damages for personal injuries alleged to have been received in consequence of the failure of the defendant railroad company to equip cars with automatic

couplers as required by Act of Congress, the question whether the cars were engaged in interstate commerce is for the jury when there is a conflict of evidence upon the point. *Kansas City, etc., R. Co. v. Filippo*, 138 Ala. 487.

It has been held that the tender of a locomotive engine engaged in interstate commerce is a car within the scope of the Act of Congress which uses the general terms "locomotive," "car," or "train." *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387. But in *Iowa*, it has, on the other hand, been held that the statute (Iowa Code. §§ 2079-2089) requiring cars to be equipped with automatic couplers does not apply to engines and their tenders. *Bryce v. Burlington, etc., R. Co.*, (Iowa 1905) 104 N. W. Rep. 483, 119 Iowa 174. And it has been held that the tender of a locomotive is not a car within the meaning of the *Massachusetts* statute (Mass. R. L., c. 111, § 203) requiring cars to be equipped with automatic couplers. *Larabee v. New York, etc., R. Co.*, 182 Mass. 348. It has been held that the *Ohio* statute requiring railroad companies to equip their cars with automatic couplers is not applicable to electric cars or to railroads in process of construction, and the cars used for that purpose. *Cleveland, etc., R. Co. v. Somers*, 24 Ohio Cir. Ct. 67.

There is not a compliance with the Act of Congress unless the cars are equipped with automatic couplers which can be coupled as well as uncoupled without the necessity of men going between the ends of the cars. *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462. And it has been held that the Act of Congress and the Iowa act of 1892 (Iowa Code 1897, §§ 2097, 2080) requiring cars to be equipped with automatic couplers both apply the test of whether the person operating the coupler is required to go between the ends of the cars to the act of coupling as well as to that of uncoupling. *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522, reversing 116 Fed. Rep. 863.

In *Whalin v. Illinois Cent. R. Co.*, 112 Ill. App. 428, there is a dictum to the effect that "it would be a strained construction of the statute far beyond the contemplation and purpose of Congress in the enactment, to hold that under no circumstance or condition of convenience or necessity, cars duly equipped with automatic couplers required by the act may not be temporarily linked or coupled by special device. Were this the meaning of the law, it would be impossible to remove broken cars from a wreck, or transport them with defective couplers to the repair shop, or on other occasion, when required for the greater security of person or property, to substitute a special device or coupler."

In *North Carolina* it has been held, independently of statute, that it is negligence *per se* for a railroad company not to equip its cars with automatic couplers. *Harden v. North Carolina R. Co.*, 129 N. Car. 354. And it has been held that engines as well as cars must be so equipped. *Fleming v. Southern R. Co.*, 131 N. Car. 476. A failure to keep the couplers in proper condition and repair is as culpable as if the cars have never been so equipped. *Elmore*

**84.** (14) *Evidence in Actions for Injuries from Defective Machinery and Appliances* — (a) *Admissibility of Evidence* — *aa. IN GENERAL.* — See note 22.

**85.** *bb. APPLIANCES AND MACHINERY USED BY OTHER COMPANIES.* — See notes 1, 3.

*cc. CONDITION OF APPLIANCES PRIOR TO ACCIDENT.* — See note 4.

*v. Seaboard Air Line R. Co.*, 130 N. Car. 506, *rehearing* 131 N. Car. 569, *second rehearing* 132 N. Car. 865.

**84. 22. Master's Knowledge or Means of Knowledge.** — *Birmingham Traction Co. v. Reville*, 136 Ala. 335; *Currelli v. Jackson*, 77 Conn. 115; *Louisville, etc., Packet Co. v. Samuels*, 59 S. W. Rep. 3, 22 Ky. L. Rep. 979. See *Sardo v. Moreland*, 17 App. Cas. (D. C.) 219.

**Evidence of Actual Notification of Defect Admissible.** — *Bates Mach. Co. v. Crowley*, 115 Ill. App. 540.

**Unsafe Character of Appliances Similarly Constructed.** — In an action to recover for the death of the plaintiff's intestate, alleged to have been caused by the bursting of a wooden pulley, it was held that evidence that pulleys similar in construction to the one involved in the case, and made by the same persons, had burst while in operation, and that the defendant knew of it, was admissible in support of an allegation that the pulley which burst and injured the deceased was made by employees of the defendant who were not competent, and that the defendant knew they were not competent. *Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721.

**Other Accidents.** — According to some decisions, evidence of other accidents previous to the one causing the injury complained of is admissible to show the master's knowledge of the defect. *Dyas v. Southern Pac. Co.*, 140 Cal. 296; *Franke v. Hanly*, 215 Ill. 216; *Auld v. Manhattan L. Ins. Co.*, 34 N. Y. App. Div. 491, *affirmed* without opinion 165 N. Y. 610; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254. See *Revolinski v. Adams Coal Co.*, 118 Wis. 324. *Compare Duntley v. Inman*, 42 Oregon 334. *Contra, Edwards v. Barber Asphalt Paving Co.*, 92 Mo. App. 221; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645.

It has been held that the defendant may properly be permitted to show that during the operation of the machine alleged to be defective no accidents had occurred for many years. *Hoppe v. Parmalee*, 11 Ohio Cir. Dec. 24, 20 Ohio Cir. Ct. 303.

**85. 1. Appliances in Use by Other Companies.** — *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292; *Benson v. New York, etc., R. Co.*, 23 R. I. 147; *McGar v. National, etc., Worsted Mills*, 22 R. I. 347; *Crooker v. Pacific Lounge, etc., Co.*, 34 Wash. 191. See *Davis v. Kornman*, 141 Ala. 479; *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456; *Stover Mfg. Co. v. Mil-lane*, 89 Ill. App. 532; *Turner v. Detroit Southern R. Co.*, 137 Mich. 142, 11 Detroit Leg. N. 206; *Alabama, etc., R. Co. v. Overstreet*, 85 Miss. 78. *Compare Ide v. Fratcher*, 194 Ill. 552, *affirming* 96 Ill. App. 549; *Marks v. Harriet Cotton Mills*, 135 N. Car. 287; *Southern R. Co. v. Mauzy*, 98 Va. 692, 2 Va. Sup. Ct. 575.

It has been held that evidence of common and general use of a particular appliance is competent on the question of its reasonable

safety, and also on the question whether an employer selecting and furnishing it to his employee exercised ordinary care. *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665.

And it has been said that on the question whether the use of a particular machine or appliance by a defendant is negligence, the fact that something safer has been invented and is in common use is ordinarily one of considerable significance. *Dolan v. Boott Cotton Mills*, 185 Mass. 576.

**3. Anderson v. Fielding**, 92 Minn. 42, 104 Am. St. Rep. 665; *Dean v. St. Louis Wood-enware Works*, 106 Mo. App. 167.

**4. Condition Before Accident.** — *O'Connell v. Pennsylvania R. Co.*, 118 Fed. Rep. 989, 55 C. C. A. 483; *Williams v. Deering*, 104 Ill. App. 290; *Cahow v. Chicago, etc., R. Co.*, 113 Iowa 224; *Chicago, etc., R. Co. v. Wicker*, (Ind. App. 1904) 71 N. E. Rep. 223, *judgment reversed on rehearing* 34 Ind. App. 215; *Dunekake v. Beyer*, 79 S. W. Rep. 209, 25 Ky. L. Rep. 2001; *National Enameling, etc., Co. v. Cornell*, 95 Md. 524; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 166 Mo. 639; *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258; *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269; *Williams v. Gobble*, 106 Tenn. 367.

In an action to recover for the death of a locomotive engineer, whose death was caused by the explosion of the boiler of his engine, it was held that it was proper to permit the introduction of proof to show when the locomotive was built, and that it had during its years of service been run over half a million miles, and that four years before the explosion it collided with another engine. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468.

In an action to recover for injuries sustained on account of the sudden starting of a winding machine in a thread factory the plaintiff offered to show by a witness that about eleven weeks before the accident the witness was working on the machine, and it started of itself, after having been once stopped; that the attention of the proper employee of the defendant was called to the matter, and the machine was taken to pieces, and an attempt made to repair it, which the plaintiff contended was not effective. In holding that this evidence was properly excluded, the court said: "We are of opinion that it was within the discretion of the judge to exclude the evidence on the ground of remoteness." *Gregory v. American Thread Co.*, 187 Mass. 239.

**Evidence of Official Inspection.** — In an action to recover for damages alleged to have been sustained by the plaintiff in consequence of the defective condition of the defendant's elevator, it was held to be error to exclude evidence offered by the defendant to show an inspection of the elevator by a city official. *Pardridge v. Gilbride*, 98 Ill. App. 134.

**85.** *dd.* EVIDENCE OF CHANGES OR REPAIRS SUBSEQUENT TO ACCIDENT — View that Evidence Is Competent. — See note 5.

View that Evidence Is Not Admissible. — See note 7.

**86.** To Show Condition of Appliances at Time of Accident. — See note 1.

*cc.* CONDITION OF APPLIANCES SUBSEQUENT TO ACCIDENT. — See notes 2, 3, 4.

*ff.* GOOD QUALITY OF APPLIANCES. — See note 5.

(b) Burden of Proof — *aa.* WHAT PLAINTIFF MUST SHOW TO AUTHORIZE RECOVERY. — See note 6.

**85.** 5. See *Coleman v. Perry*, 28 Mont. 1.

7. View that Evidence Not Admissible. — *Davis v. Kornman*, 141 Ala. 479; *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537; *Helling v. Schindler*, 145 Cal. 303; *Robert Portier Brewing Co. v. Cooper*, 116 Ga. 171; *Alabaster Co. v. Longergan*, 90 Ill. App. 353; *Lally v. Crookston Lumber Co.*, 82 Minn. 407; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305; *Myers v. Concord Lumber Co.*, 129 N. Car. 252; *Toledo, etc., R. Co. v. Beard*, 11 Ohio Cir. Dec. 406, 20 Ohio Cir. Ct. 681; *McGarr v. National, etc., Worsted Mills*, 24 R. I. 447; *Morancy v. Hennessey*, 24 R. I. 205; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645. See *Palato v. International Silver Co.*, 129 Fed. Rep. 652; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680; *American Lead Pencil Co. v. Davis*, 108 Tenn. 251; *St. Louis Southwestern R. Co. v. Arnold*, (Tex. Civ. App. 1905) 87 S. W. Rep. 173; *Wyman v. The Steamship Duart Castle*, 6 Can. Exch. 387.

**86.** 1. *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281; *Galveston, etc., R. Co. v. Newport*, 26 Tex. Civ. App. 583. But compare *Helling v. Schindler*, 145 Cal. 303.

**Question Whether Machinery Could Be Guarded.** — In an action to recover for injuries received in consequence of a failure to comply with statutory provisions requiring the guarding of machinery, it was held that evidence that a guard was provided after the accident was admissible upon the question whether the machinery was of such a character that it could be safeguarded. *La Porte Carriage Co. v. Sulender*, (Ind. App. 1904) 71 N. E. Rep. 922.

**2. Condition of Appliances Immediately After Accident.** — *Slack v. Harris*, 200 Ill. 96; *East Tennessee, etc., R. Co. v. Lindamood*, 109 Tenn. 407, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 86. See *Meyers v. Highland Boy Gold Min. Co.*, 28 Utah 96. Compare *Petrarca v. Quinick Mfg. Co.*, 27 R. I. 265.

In an action to recover for injuries alleged to have been received on account of the defective condition of a belt, it was held that the belt was properly admitted in evidence to show the condition of the belt at the time of the accident. *Boucher v. Robeson Mills*, 182 Mass. 500.

When the parties to an action on trial were at issue as to whether or not a machine by which the plaintiff had been injured was, at the time he was hurt, out of order and operating in a dangerous manner, evidence tending to

show that shortly thereafter, and while in substantially the same condition, this machine operated in a similar manner and by so doing injured other parties, was relevant. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

It has been held that where injury results from the falling of an electric light pole belonging to the city, occasioned by having become rotten beneath the surface of the ground, evidence of the condition of other poles which have been in the ground the same length of time, but taken up six months after the accident, and exposed to the atmosphere six months before the examination, is competent, as tending to show the general condition of the poles in use by the city at the time of the accident. *Emporia v. Kowalski*, 66 Kan. 64.

**3. No Evidence of Alterations.** — *Dronney v. Doherty*, 186 Mass. 205.

**4. But compare** *Browning v. Chicago, etc., R. Co.*, 106 Mo. App. 729.

**Subsequent Operation of Machine Without Accident.** — Evidence that a machine alleged to have been defective was operated after the accident without any change having been made and that no accident resulted has been held to be inadmissible. *Republic Iron, etc., Works v. Gregg*, 71 S. W. Rep. 900, 24 Ky. L. Rep. 1627.

**5.** In an action by a servant to recover damages against the employer for injuries sustained while lighting a gasoline lamp which had been furnished by the employer, it was held that the employer was entitled to introduce evidence to show that, before purchasing the lamp, he had acquainted himself with its character, operation, and safety, and to show exactly what steps he had taken in this regard. *Langdon-Creasy Co. v. Rouse*, 72 S. W. Rep. 1113, 24 Ky. L. Rep. 2095.

**6. Burden of Proving Absence of Reasonable Care** — *United States*. — *Patton v. Texas, etc., R. Co.*, 179 U. S. 658; *Diamond Coal, etc., Co. v. Allen*, (C. C. A.) 137 Fed. Rep. 705; *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; *The Columbia*, 106 Fed. Rep. 745; *Hodges v. Kimball*, 104 Fed. Rep. 745, 44 C. C. A. 193.

*Arkansas*. — *Fordyce v. Key*, 74 Ark. 19.

*California*. — *Towne v. United Electric Gas, etc., Co.*, 146 Cal. 766.

*District of Columbia*. — *Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410.

*Georgia*. — *Cartledge v. Pierpont Mfg. Co.*, 120 Ga. 221; *Stewart v. Seaboard Air Line R. Co.*, 115 Ga. 624.

*Illinois*. — *Omaha Packing Co. v. Murray*, 112 Ill. App. 233; *Deering Harvester Co. v. Hefferman*, 107 Ill. App. 636; *Baltimore, etc., R. Co.*



**87.** See notes 1, 2, 3.

*Greer*, 103 Ill. App. 448; *Meyer v. Meyer*, 101 Ill. App. 92.

*Indiana*.—*Standard Pottery Co. v. Moudy*, 35 Ind. App. 427; *Chicago, etc., R. Co. v. Wicker*, (Ind. App. 1904) 71 N. E. Rep. 223, judgment reversed on rehearing 34 Ind. App. 215.

*Kansas*.—*Fowler v. Brooks*, 65 Kan. 861, 70 Pac. Rep. 600; *Lane v. Missouri Pac. R. Co.*, 64 Kan. 755.

*Kentucky*.—*Hurt v. Louisville, etc., R. Co.*, 116 Ky. 545.

*Maine*.—*Boston v. Buffum*, 97 Me. 230.

*Massachusetts*.—*Dronney v. Doherty*, 186 Mass. 205.

*Missouri*.—*Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657, (Mo. App. 1903) 74 S. W. Rep. 1039.

*Montana*.—*Nolan v. Montana Cent. R. Co.*, 25 Mont. 107.

*New Hampshire*.—*Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292.

*New Jersey*.—*Schaumberger v. Somerset Chemical Co.*, 69 N. J. L. 234.

*New York*.—*Welsh v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; *Smith v. New York Cent., etc., R. Co.*, 164 N. Y. 491; *Hughes v. Russell*, 104 N. Y. App. Div. 144; *Holm v. Empire Hardware Co.*, 102 N. Y. App. Div. 505; *Purcell v. Hoffman House*, 97 N. Y. App. Div. 307; *Baumwald v. Trenkman*, (Supm. Ct. App. Div.) 88 N. Y. Supp. 182; *Moran v. Munson Steamship Line*, 82 N. Y. App. Div. 489; *Stackpole v. Wray*, 74 N. Y. App. Div. 310; *Ingram v. Fosburgh*, 73 N. Y. App. Div. 129; *Fink v. Slade*, 66 N. Y. App. Div. 105; *Brown v. New York Cent., etc., R. Co.*, 42 N. Y. App. Div. 548, affirmed without opinion 166 N. Y. 626.

*North Carolina*.—*Womble v. Merchants Grocery Co.*, 135 N. Car. 474.

*Oregon*.—*Geldard v. Marshall*, 43 Oregon 438.

*Pennsylvania*.—*Marsh v. Lehigh Valley R. Co.*, 206 Pa. St. 558; *Alexander v. Pennsylvania Water Co.*, 201 Pa. St. 252.

*Tennessee*.—*East Tennessee, etc., R. Co. v. Lindamood*, 111 Tenn. 457.

*Virginia*.—*Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 636, 2 Va. Sup. Ct. 526; *Moore Lime Co. v. Johnston*, 103 Va. 84.

*Washington*.—*Towle v. Stimson Mill Co.*, 33 Wash. 305; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

See *Smith v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 83.

The burden of proof is on the plaintiff to make out a case against the master by showing that the accident was from a cause for which the master is liable. *Purcell v. Tennent Shoe Co.*, 187 Mo. 276.

In an action against a railroad company based upon the failure to comply with the Safety Appliance Act (6 Fed. Stat. Annot. 753), the burden of proof is upon the plaintiff to show that at the time of the accident he was engaged in moving cars then used in interstate traffic, and that at the time of the accident the cars then in use were not equipped with automatic couplers as required by the Act of Con-

gress: *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80.

**87. 1. Burden of Proving Defects**—*United States*.—*Farrell v. Continental Iron Works*, 102 Fed. Rep. 514, affirmed without opinion (C. C. A.) 106 Fed. Rep. 987.

*Arkansas*.—*Fordyce v. Key*, 74 Ark. 19.

*California*.—*Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700.

*Illinois*.—*O'Donnell v. MacVeagh*, 205 Ill. 23; *Pioneer Fire Proof Constr. Co. v. Sandberg*, 98 Ill. App. 36; *Chicago, etc., R. Co. v. Cleveland*, 92 Ill. App. 308; *Doolittle v. Pfaff*, 92 Ill. App. 301.

*Indiana*.—*Standard Pottery Co. v. Moudy*, 35 Ind. App. 427.

*Kentucky*.—*Brooks v. Louisville, etc., R. Co.*, 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318; *Justice v. W. M. Ritter Lumber Co.*, (Ky. 1905) 89 S. W. Rep. 171; *Hood v. Argonaut Cotton-Mill Co.*, (Ky. 1901) 62 S. W. Rep. 1043.

*Louisiana*.—*O'Donnell v. American Mfg. Co.*, 112 La. 720.

*Maine*.—*Kirstead v. Bryant*, 98 Me. 523; *Pellerin v. International Paper Co.*, 96 Me. 388.

*Maryland*.—*Crawford v. United R., etc., Co.*, 101 Md. 402; *Buttner v. South Baltimore Steel Car, etc., Co.*, 101 Md. 168.

*Massachusetts*.—*Gauges v. Fitchburg R. Co.*, 185 Mass. 76; *Fay v. Wilmarth*, 183 Mass. 71; *Palmer v. Coyle*, 187 Mass. 136.

*Michigan*.—*Erickson v. Cummer Mfg. Co.*, (Mich. 1905) 103 N. W. Rep. 828, 12 Detroit Leg. N. 194; *Beunk v. Valley City Desk Co.*, 133 Mich. 440, 10 Detroit Leg. N. 288; *Sargee v. Clark Can Co.*, 126 Mich. 508, 8 Detroit Leg. N. 88.

*Minnesota*.—*Carleton v. Great Northern R. Co.*, 93 Minn. 378. See *Sandahl v. Lammers*, 85 Minn. 162.

*Missouri*.—*Howard v. Missouri Pac. R. Co.*, 173 Mo. 524; *Furber v. Kansas City Bolt, etc., Co.*, 185 Mo. 301; *Browning v. Chicago, etc., R. Co.*, 106 Mo. App. 729; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Breeden v. Big Circle Min. Co.*, 103 Mo. App. 176.

*New Jersey*.—*Gernand v. Smith*, 66 N. J. L. 390.

*New York*.—*Welsh v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; *McQueen v. Delaware, etc., R. Co.*, 102 N. Y. App. Div. 195; *Schapiro v. Levy*, 101 N. Y. App. Div. 444; *Jones v. John Kroder, etc., Co.*, 95 N. Y. App. Div. 140; *Filbert v. New York, etc., R. Co.*, 95 N. Y. App. Div. 199; *Hoehn v. Lautz*, 94 N. Y. App. Div. 14; *Carley v. Gair*, 93 N. Y. App. Div. 614; *Bookman v. Master-son*, 83 N. Y. App. Div. 4; *Moran v. Munson Steamship Line*, 82 N. Y. App. Div. 489; *Loushay v. Erie R. Co.*, 75 N. Y. App. Div. 619; *Webb v. Haynes*, 75 N. Y. App. Div. 620; *Stackpole v. Wray*, 74 N. Y. App. Div. 310; *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224; *Kelly v. Hogan*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 761; *Buckley v. Palmer*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 337; *Fink v. Slade*, 66 N. Y. App. Div. 105; *Apati v. Delaware, etc., R. Co.*, 64 N. Y. App. Div. 515.

**87. (c) Presumptions.** — See notes 6, 7.

*North Carolina.* — *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 83 Am. St. Rep. 671; *Meekins v. Norfolk, etc.*, R. Co., 127 N. Car. 29.

*Oregon.* — *Duntley v. Inman*, 42 Oregon 334.

*Pennsylvania.* — *Alexander v. Pennsylvania Water Co.*, 201 Pa. St. 252; *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792.

*South Carolina.* — *Edgens v. Gaffney Mfg. Co.*, 69 S. Car. 529; *Gentry v. Southern R. Co.*, 66 S. Car. 256.

*Texas.* — *Broadway v. San Antonio Gas Co.*, 24 Tex. Civ. App. 603; *International, etc.*, R. Co. *v. Mills*, 34 Tex. Civ. App. 127; *El Paso, etc.*, R. Co. *v. McComas*, (Tex. Civ. App. 1903) 72 S. W. Rep. 629; *Pippin v. Sherman, etc.*, R. Co., (Tex. Civ. App. 1900) 58 S. W. Rep. 961.

*Washington.* — *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705.

*West Virginia.* — *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606.

*Wisconsin.* — *Groth v. Thomann*, 110 Wis. 488; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57.

In a personal injury action, the complaint having charged that the defect in the machinery existed in certain imperfect valves improperly adjusted, and no evidence having been received at the trial tending to show that the machinery in question was defective, except that it did not work easily, plaintiff was not entitled to an instruction to the effect that it was not essential to his recovery that he be able to show the exact nature of the defect. *Scarlotta v. Ash*, (Minn. 1905) 103 N. W. Rep. 1025.

It has been said that the emission of particles of coal or sparks, not unusual in size or quantity, will not, alone, warrant the inference of negligence, either in the improper management of the engine or its lack of equipment with appliances of approved efficiency. *Duree v. Chicago, etc.*, R. Co., 118 Iowa 640.

It has been held that the burden is upon the plaintiff to show not only defects in the machinery, but also to show that his injury came from these defects. *Trigg v. Ozark Land, etc.*, Co., 187 Mo. 227.

The burden is upon plaintiff to show the existence of the negligent act and injury directly resulting therefrom, and mere proof alone of negligence and injury is not sufficient without evidence tending to establish a connection between them. But when facts and circumstances are shown from which with reasonable certainty the existence of such elemental fact may be inferred, the burden of proof is sustained. *Shore v. American Bridge Co.*, 111 Mo. App. 278.

It is necessary for the plaintiff to allege and prove a causal connection between the injury and the negligence of the master. The corollary of this rule is that, if the accident might have resulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove, in the first instance, that the injury arose from the cause for which the master is liable, for it is not the province of a court or jury to speculate or guess from which

cause the accident happened. *Goeransson v. Riter-Conley Mfg. Co.*, 186 Mo. 300.

**87. 2. Burden of Proving Master's Knowledge of Defects** — *Arkansas.* — *Fordyce v. Key*, 74 Ark. 19.

*Illinois.* — *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96; *Chicago, etc.*, R. Co. *v. Cleveland*, 92 Ill. App. 308.

*Iowa.* — *Agar v. Harbach*, (Iowa 1903) 93 N. W. Rep. 601.

*Kentucky.* — *Hood v. Argonaut Cotton-Mill Co.*, (Ky. 1901) 62 S. W. Rep. 1043.

*Louisiana.* — *Budge v. Morgan's Louisiana, etc.*, R., etc., Co., 108 La. 349.

*Maryland.* — *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560; *Buttner v. South Baltimore Steel Car, etc.*, Co., 101 Md. 168.

*Missouri.* — *Howard v. Missouri Pac. R. Co.*, 173 Mo. 524; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; *Franklin v. Missouri, etc.*, R. Co., 97 Mo. App. 473; *McCready v. Stepp*, 104 Mo. App. 340; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039.

*New York.* — *Welsh v. Cornell*, 168 N. Y. 508, *reversing* 49 N. Y. App. Div. 203.

*North Dakota.* — *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

*Ohio.* — *Cleveland, etc.*, R. Co. *v. Ullom*, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512; *Record v. Dean*, 11 Ohio Cir. Dec. 808.

*Oregon.* — *Duntley v. Inman*, 42 Oregon 334. 3. *Baltimore, etc.*, R. Co. *v. Greer*, 103 Ill. App. 448; *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560; *Duntley v. Inman*, 42 Oregon 334, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 87.

**6. Presumption that Master Has Done His Duty.** — *Droney v. Doherty*, 186 Mass. 205; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657, (Mo. App. 1903) 74 S. W. Rep. 1039; *Franklin v. Missouri, etc.*, R. Co., 97 Mo. App. 473; *Duntley v. Inman*, 42 Oregon 334; *East Tennessee, etc.*, R. Co. *v. Lindamood*, 111 Tenn. 457.

**7. No Presumption of Negligence from Injury** — *United States.* — *Patton v. Texas, etc.*, R. Co., 179 U. S. 658; *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; *In re California Nav., etc.*, Co., 110 Fed. Rep. 670.

*Arkansas.* — *Fordyce v. Key*, 74 Ark. 19.

*Illinois.* — *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468; *Omaha Packing Co. v. Murray*, 112 Ill. App. 233; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96. See *Illinois Cent. R. Co. v. Swift*, 213 Ill. 307.

*Iowa.* — *Bergman v. Altman*, 127 Iowa 693.

*Kansas.* — *Lane v. Missouri Pac. R. Co.*, 64 Kan. 755.

*Kentucky.* — *Brooks v. Louisville, etc.*, R. Co., 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318. See *Cincinnati, etc.*, R. Co. *v. Cook*, 73 S. W. Rep. 765, 24 Ky. L. Rep. 2152, *rehearing denied* (Ky. 1903) 75 S. W. Rep. 218.

*Maine.* — *Pellerin v. International Paper Co.*, 96 Me. 388.

## 88. See note 1.

*Maryland.*—South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560.

*Massachusetts.*—Hofnauer v. R. H. White Co., 186 Mass. 47. See Drum v. New England Cotton Yarn Co., 180 Mass. 113.

*Michigan.*—Sargee v. Clark Can Co., 126 Mich. 508, 8 Detroit Leg. N. 88. See Beunk v. Valley City Desk Co., 133 Mich. 440, 10 Detroit Leg. N. 288; Turner v. Detroit Southern R. Co., 137 Mich. 142, 11 Detroit Leg. N. 206.

*Missouri.*—Deckerd v. Wabash R. Co., 111 Mo. App. 117; Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657, (Mo. App. 1903) 74 S. W. Rep. 1039; Mitchell v. Wabash R. Co., 97 Mo. App. 411.

*New York.*—Welsh v. Cornell, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; Starer v. Stern, 100 N. Y. App. Div. 393; Stackpole v. Wray, 99 N. Y. App. Div. 262, affirmed 182 N. Y. 567; Skapura v. National Sugar Refining Co., 83 N. Y. App. Div. 21; Stackpole v. Wray, 74 N. Y. App. Div. 310; Ingram v. Fosburgh, 73 N. Y. App. Div. 129; Buckley v. Palmer, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 337; Fink v. Slade, 66 N. Y. App. Div. 105. See Pursley v. Edgemoor Bridge Works, 56 N. Y. App. Div. 71, affirmed without opinion 168 N. Y. 589.

*North Carolina.*—Stewart v. Van Deventer Carpet Co., 138 N. Car. 60.

*North Dakota.*—Meehan v. Great Northern R. Co., 13 N. Dak. 432.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Oregon.*—Geldard v. Marshall, 43 Oregon 438.

*Pennsylvania.*—Price v. Lehigh Valley R. Co., 202 Pa. St. 176; Alexander v. Pennsylvania Water Co., 201 Pa. St. 252; Spees v. Boggs, 198 Pa. St. 112, 82 Am. St. Rep. 792; Jones v. Scranton Coal Co., 211 Pa. St. 577; Hanna v. Gresh, 16 Montg. Co. Rep. (Pa.) 182.

*Rhode Island.*—Venbuur v. Lafayette Worsted Mills, 27 R. I. 89.

*South Carolina.*—Keys v. Winnsboro Granite Co., 72 S. Car. 97; Edgens v. Gaffney Mfg. Co., 69 S. Car. 529.

*Tennessee.*—East Tennessee, etc., R. Co. v. Lindamood, 111 Tenn. 457.

*Texas.*—Jernigan v. Houston Ice, etc., Co., 33 Tex. Civ. App. 501; Pippin v. Sherman, etc., R. Co., (Tex. Civ. App. 1900) 58 S. W. Rep. 961.

*Virginia.*—Moore Lime Co. v. Johnston, 103 Va. 84.

*Washington.*—Towle v. Stimson Mill Co., 33 Wash. 305.

*West Virginia.*—Richards v. Riverside Iron Works, 56 W. Va. 510; Ketterman v. Dry Fork R. Co., 48 W. Va. 606.

*Canada.*—Wyman v. The Steamship Duart Castle, 6 Can. Exch. 387.

See Beyersdorf v. Cream City Sash, etc., Co., 109 Wis. 456.

If there is a reasonable possibility that the accident may have been due to a cause other than the alleged negligence of the defendant, it becomes the duty of the court to take the question from the jury, unless there is some evidence other than the mere happening of the

accident to establish the efficacy of such negligence. Schultz v. Chicago, etc., R. Co., 116 Wis. 31.

88. 1. Bradford Glycerine Co. v. Kizer, 113 Fed. Rep. 894, 51 C. C. A. 524; Budge v. Morgan's Louisiana, etc., R., etc., Co., 108 La. 349; Womble v. Merchants Grocery Co., 135 N. Car. 474; Geldard v. Marshall, 43 Oregon 438; Missouri, etc., R. Co. v. Bailey, 28 Tex. Civ. App. 609; Missouri, etc., R. Co. v. Hawk, 30 Tex. Civ. App. 142; Gulf, etc., R. Co. v. Hayden, 29 Tex. Civ. App. 280; Gulf, etc., R. Co. v. Wood, (Tex. Civ. App. 1901) 63 S. W. Rep. 164. See Louisville, etc., R. Co. v. Davis, 115 Ky. 270.

It has been said that the doctrine of *res ipsa loquitur* "can only be invoked, as between master and servant, if at all, where the facts not only warrant an inference of negligence, but also establish that such negligence was that of the master." Haughey v. Thatcher, 89 N. Y. App. Div. 375.

Before the maxim of *res ipsa loquitur* can apply, the facts and the attendant circumstances must be such as to point to some omission or commission in violation of the legal obligation due from master to servant. Moran v. Munson Steamship Line, 82 N. Y. App. Div. 489.

It has been said that while the plaintiff is bound to introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident. Kleibaz v. Middleton Paper Co., 180 Mass. 363.

In an action to recover for injuries caused by the sudden starting of a winding machine in a thread factory, when it had been stopped for the purpose of being cleaned, it was held that the starting of the machine was some evidence that it was in a defective condition, and it was said that "while the plaintiff was bound to introduce evidence from which the jury properly might infer that the accident was caused by the defendant's negligence, she was not required to point out the particular act or omission which caused the accident." Gregory v. American Thread Co., 187 Mass. 239.

It has been held that under the New York Labor Law (N. Y. Laws 1897, p. 467, c. 415) making it the duty of the master to use reasonable care to furnish safe appliances, when a ladder, scaffold, or other appliance mentioned in the statute breaks while in use for the purposes for which it was designed, it raises a presumption of negligence, which, unexplained, justifies a recovery. Cummings v. Kenny, 97 N. Y. App. Div. 114.

And the falling of a scaffold has been held to be *prima facie* evidence of negligence. Johnson v. Roach, 83 N. Y. App. Div. 351, 13 N. Y. Annot. Cas. 86.

In an action to recover for the death of the plaintiff's intestate, while in the employ of the defendants, by the falling of a derrick, it was held that the fall of the derrick afforded *prima facie* evidence of the negligence of the defendants. Gorman v. Milliken, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 336, affirmed without opinion 102 N. Y. App. Div. 617.

**Derailment of Train.**—In an action against a

**88. d. DUTY TO INSPECT AND REPAIR PLACE OF WORK, MACHINERY, AND APPLIANCES — (1) Statement of Rule.** — See note 3.

railway company by a servant to recover for personal injuries sustained by the derailment of a train no presumption of negligence arises from the fact of the derailment of the train. Chicago, etc., R. Co. v. O'Brien, (C. C. A.) 132 Fed. Rep. 593. But in *North Carolina* it has been held that where there is a derailment of railroad cars a presumption of negligence arises. Wright v. Southern R. Co., 127 N. Car. 225.

**Rule under Ohio Statute.** — In Ohio it is by statute (Bates' Annot. Stat., § 3365-21) provided, in effect, that when the fact of a defective appliance upon a railroad car or locomotive shall be made to appear on the trial of an action by an employee to recover for personal injuries, the same shall be *prima facie* evidence of negligence on the part of the corporation. O'Connell v. Pennsylvania R. Co., (C. C. A.) 118 Fed. Rep. 989.

By this statute the burden of proof of want of knowledge of an existing defect and of due diligence in ascertaining it is cast upon the railroad company. Baltimore, etc., R. Co. v. Burris, (C. C. A.) 111 Fed. Rep. 882; Pittsburgh, etc., R. Co. v. Stone, 24 Ohio Cir. Ct. 192.

**88. 3. Duty to Inspect and Repair — United States.** — Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Chicago, etc., R. Co. v. Voelker, (C. C. A.) 129 Fed. Rep. 522, reversing 116 Fed. Rep. 867; Northern Pac. R. Co. v. Perry, (C. C. A.) 116 Fed. Rep. 609; Alaska United Gold Min. Co. v. Keating, (C. C. A.) 116 Fed. Rep. 561; Western Union Tel. Co. v. Tracy, (C. C. A.) 114 Fed. Rep. 282; *In re* California Nav., etc., Co., 110 Fed. Rep. 670; Lafayette Bridge Co. v. Olsen, (C. C. A.) 108 Fed. Rep. 335; Dunn v. New York, etc., R. Co., 107 Fed. Rep. 666, 46 C. C. A. 546.

**Arkansas.** — Mt. Nebo Anthracite Coal Co. v. Williamson, 73 Ark. 530.

**California.** — Shea v. Pacific Power Co., 145 Cal. 680; Dyas v. Southern Pac. Co., 104 Cal. 296.

**Colorado.** — Colorado City v. Liae, 28 Colo. 468; Maydole v. Denver, etc., R. Co., 15 Colo. App. 449.

**Connecticut.** — Rincicotti v. John J. O'Brien Contracting Co., 77 Conn. 615.

**Georgia.** — Central of Georgia R. Co. v. Grady, 113 Ga. 1045.

**Illinois.** — Belt R. Co. v. Confrey, 209 Ill. 344; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; Morton v. Zwierzykowski, 192 Ill. 328, affirming 91 Ill. App. 462; Armour v. Brazeau, 191 Ill. 117; Pittsburg, etc., R. Co. v. Hewitt, 102 Ill. App. 428, affirmed 202 Ill. 28; Illinois Steel Co. v. Mann, 100 Ill. App. 367, affirmed 197 Ill. 186.

**Iowa.** — Lanza v. Le Grand Quarry Co., 124 Iowa 659.

**Kansas.** — Atchison, etc., R. Co. v. Kingscott, 65 Kan. 131.

**Kentucky.** — Buey v. Chess, etc., Co., 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; Wilson v. Alpine Coal Co., 118 Ky. 463; Henderson Brewing Co. v. Folden, 76 S. W. Rep. 520, 25 Ky. L. Rep. 969; Covington Sawmill, etc., Co. v. Clark, 116 Ky. 461; Tradewater Coal Co. v. Johnson, 72 S. W. Rep. 274, 24 Ky. L. Rep. 1777.

**Louisiana.** — Williams v. Levert Lumber, etc., Co., 114 La. 805; Burns v. Ruddock-Orleans Cypress Co., 114 La. 247; Broadfoot v. Shreveport Cotton Oil Co., 111 La. 467; Merritt v. Victoria Lumber Co., 111 La. 159; Budge v. Morgan's Louisiana, etc., R., etc., Co., 108 La. 349.

**Maine.** — Caven v. Bodwell Granite Co., 99 Me. 278; Twombly v. Consolidated Electric Light Co., 98 Me. 353; Hall v. Emerson-Stevens Mfg. Co., 94 Me. 445.

**Maryland.** — Crawford v. United R., etc., Co., 101 Md. 402; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560.

**Massachusetts.** — Harris v. Putnam Mach. Co., 188 Mass. 85; Carroll v. Metropolitan Coal Co., 189 Mass. 159; Murphy v. Marston Coal Co., 183 Mass. 385; Ellis v. Thayer, 183 Mass. 309; Rapson v. Leighton, 187 Mass. 432. Compare Dunn v. Boston, etc., St. R. Co., 189 Mass. 62. But see Kirk v. Sturdy, 187 Mass. 87.

**Michigan.** — McDonald v. Michigan Cent. R. Co., 132 Mich. 372, 9 Detroit Leg. N. 700; Ouellette v. Michigan Alkali Co., 129 Mich. 484, 8 Detroit Leg. N. 1073; Jones v. Flint, etc., R. Co., 127 Mich. 198, 8 Detroit Leg. N. 295.

**Minnesota.** — Vant Hul v. Great Northern R. Co., 90 Minn. 329; Campbell v. Railway Transfer Co., (Minn. 1905) 104 N. W. Rep. 547; Scott v. Eastern R. Co., 90 Minn. 143; Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407; Miller v. Great Northern R. Co., 85 Minn. 272; Attix v. Minnesota Sandstone Co., 85 Minn. 142; Fry v. Great Northern R. Co., (Minn. 1905) 103 N. W. Rep. 733.

**Missouri.** — Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88; Deckerd v. Wabash R. Co., 111 Mo. App. 117; Zongker v. People's Union Mercantile Co., 110 Mo. App. 382.

**Nebraska.** — New Omaha Thompson-Houston Electric Light Co. v. Rombold, 68 Neb. 54, 72.

**New Jersey.** — Hopwood v. Benjamin Atha, etc., Co., 68 N. J. L. 707.

**New York.** — Starer v. Stern, 100 N. Y. App. Div. 393; Rowley v. American Illuminating Co., 83 N. Y. App. Div. 609; Smith v. New York, etc., R. Co., 86 N. Y. App. Div. 188, affirmed without opinion 178 N. Y. 635; Franck v. American Tartar Co., 91 N. Y. App. Div. 571; Meehan v. Atlas Safe Moving, etc., Co., 94 N. Y. App. Div. 306; Newton v. New York Cent., etc., R. Co., 96 N. Y. App. Div. 81; Walsh v. New York, etc., R. Co., 80 N. Y. App. Div. 316, affirmed without opinion 178 N. Y. 588; Swenson v. Metropolitan St. R. Co., 78 N. Y. App. Div. 379; Stackpole v. Wray, 74 N. Y. App. Div. 310; Murphy v. Coney Island, etc., R. Co., 65 N. Y. App. Div. 546; Riker v. New York, etc., R. Co., 64 N. Y. App. Div. 357; Dyer v. Brown, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616; McAleer v. Walter, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 474; Kiras v. Nichols Chemical Co., 59 N. Y. App. Div. 79; Hoes v. Ocean Steamship Co., 56 N. Y. App. Div. 259, affirmed without opinion 170 N. Y. 581; Jarvis v. Northern New York Marble Co., 55 N. Y. App. Div. 272; Simone v. Kirk, 173 N. Y. 7,

**89. (2) Exceptions to Rule.** — See notes 1, 2, 3.

reversing 57 N. Y. App. Div. 461; McGuire v. Bell Telephone Co., 167 N. Y. 208, affirming 52 N. Y. App. Div. 635; 53 N. Y. App. Div. 650; Hutton v. Hilton Bridge Constr. Co., 42 N. Y. App. Div. 398, affirmed without opinion 167 N. Y. 590.

*North Carolina.* — Womble v. Merchants Grocery Co., 135 N. Car. 474; Elmore v. Seaboard Air Line R. Co., 130 N. Car. 506, rehearing 131 N. Car. 569; second rehearing 132 N. Car. 865.

*North Dakota.* — Meehan v. Great Northern R. Co., 13 N. Dak. 432.

*Ohio.* — Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547; Frolich v. Cranker, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615; Michigan Cent. R. Co. v. Waterworth, 11 Ohio Cir. Dec. 621, 21 Ohio Cir. Ct. 495.

*Oklahoma.* — Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Pennsylvania.* — Marsh v. Lehigh Valley R. Co., 206 Pa. St. 558; Finnerty v. Burnham, 205 Pa. St. 305, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88; Sharpley v. Wright, 205 Pa. St. 253; De Grazia v. Piccardo, 15 Pa. Super. Ct. 107.

*Rhode Island.* — Vartanian v. New York, etc., R. Co., 25 R. I. 398; Petrarca v. Quidnick Mfg. Co., 27 R. I. 265; McGarrity v. New York, etc., R. Co., 25 R. I. 269; Dwyer v. Shaw, 22 R. I. 648; McGar v. National, etc., Worsteds Mills, 22 R. I. 347.

*South Carolina.* — Boyd v. Seaboard Air Line R. Co., 67 S. Car. 218.

*Tennessee.* — Chattanooga Machinery Co. v. Hargraves, 111 Tenn. 476; Ritt v. True Tag Paint Co., 108 Tenn. 646; Louisville, etc., R. Co. v. Jackson, 106 Tenn. 438.

*Texas.* — Peck v. Peck, (Tex. 1905) 87 S. W. Rep. 248; Southern Kansas R. Co. v. Sage, 98 Tex. 438; Gulf, etc., R. Co. v. Larkin, 98 Tex. 225, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 94; Dupree v. Tambofilla, 27 Tex. Civ. App. 603; Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503; San Antonio, etc., R. Co. v. Lindsey, 27 Tex. Civ. App. 316; Galveston, etc., R. Co. v. Buch, 27 Tex. Civ. App. 283; Missouri, etc., R. Co. v. Miller, 25 Tex. Civ. App. 460; El Paso, etc., R. Co. v. Vizard, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; St. Louis Southwestern R. Co. v. Corrigan, (Tex. Civ. App. 1904) 81 S. W. Rep. 554; Missouri, etc., R. Co. v. Hutchens, 35 Tex. Civ. App. 343; International, etc., R. Co. v. Reeves, 35 Tex. Civ. App. 162; Galveston, etc., R. Co. v. Bufshek, 34 Tex. Civ. App. 194; Jernigan v. Houston Ice, etc., Co., 33 Tex. Civ. App. 501; Texas, etc., R. Co. v. Hartnett, 33 Tex. Civ. App. 103; St. Louis, etc., R. Co. v. Skaggs, 32 Tex. Civ. App. 363; Missouri, etc., R. Co. v. Blackman, 22 Tex. Civ. App. 200; El Paso, etc., R. Co. v. McComas, (Tex. Civ. App. 1903) 72 S. W. Rep. 629; Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70; Dupree v. Alexander, 29 Tex. Civ. App. 31; Gulf, etc., R. Co. v. Hayden, 29 Tex. Civ. App. 280; De la Vergne Refrigerating Mach. Co. v. Stahl, 24 Tex. Civ. App. 471.

*Utah.* — Johnson v. Union Pac. Coal Co., 28

Utah 46; Hill v. Southern Pac. R. Co., 23 Utah 94; Jenkins v. Mammoth Min. Co., 24 Utah 513. *Virginia.* — Norfolk, etc., R. Co. v. Wade, 102 Va. 140; Norfolk, etc., R. Co. v. Phillips, 100 Va. 362.

*Washington.* — Smith v. Hecla Min. Co., 38 Wash. 454; Young v. O'Brien, 36 Wash. 570; Ralph v. American Bridge Co., 30 Wash. 500; Costa v. Pacific Coast Co., 26 Wash. 138.

*West Virginia.* — Fulton v. Crosby, etc., Co., 57 W. Va. 91.

*Canada.* — Sim v. Dominion Fish Co., 2 Ont. L. Rep. 69.

**Electric Wire Poles.** — It has been held that a telegraph company owes its linemen the duty of inspecting the poles upon which they are required to work. Tracy v. Western Union Tel. Co., 110 Fed. Rep. 103.

But it has, on the other hand, been held that an electric railway company does not owe a lineman in its employ any duty to inspect the poles which the lineman is called upon to ascend in the course of his work to see whether they are decayed and unsafe. Kellogg v. Denver City Tramway Co., 18 Colo. App. 475.

**89. 1. Inspections Which Would Embarrass Work.** — Randolph v. New York Cent., etc., R. Co., 69 N. J. L. 420; Peet v. H. Remington, etc., Pulp, etc., Co., 86 N. Y. App. Div. 101.

It has been held that a telephone company is not liable to a lineman in its employ for injuries received by the falling of one of its telephone poles, if the company has not undertaken to make an independent inspection before requiring its linemen to climb any particular pole, but has left the duty of making the necessary inspection to the linemen. Britton v. Central Union Telephone Co., (C. C. A.) 131 Fed. Rep. 844.

**2. Defects of Temporary Character.** — Quigley v. Levering, 167 N. Y. 58, affirming 50 N. Y. App. Div. 354; Yaw v. Whitmore, 46 N. Y. App. Div. 422, affirmed without opinion 167 N. Y. 605; Grams v. C. Reiss Coal Co., 125 Wis. 1. See Langdon-Creasy Co. v. Rouse, 72 S. W. Rep. 1113, 24 Ky. L. Rep. 2095.

**Adjustment of Machinery.** — South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560.

**Slackness of Belt.** — Helling v. Schindler, 145 Cal. 303.

**Dullness of Knives in Planer.** — A mere dullness of the knives in a planer, produced by the ordinary use thereof, which might be remedied by the use of a file in the hands of one of the employees, has been said to be a defect of such a nature that the employer could not be held responsible therefor under ordinary circumstances. Helling v. Schindler, 145 Cal. 303, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 89.

**3. Simple Appliances.** — Amburg v. International Paper Co., 97 Me. 327; Dompier v. Lewis, 131 Mich. 144, 9 Detroit Leg. N. 299; Campbell v. T. A. Gillespie Co., 69 N. J. L. 279; Martini v. Highland Park Mfg. Co., 128 N. Car. 264, 83 Am. St. Rep. 671; Ehni v. National Tube Works Co., 203 Pa. St. 186, 93 Am. St. Rep. 761; Gulf, etc., R. Co. v. Larkin, 98 Tex.

- 90.** (3) *Duty of Master to Use Reasonable Care.* — See note 1.  
 (4) *What Constitutes Reasonable Care.* — See notes 2, 3, 4, 5, 6.

225, *reversing* (Tex. Civ. App. 1904) 80 S. W. Rep. 94, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 89; *O'Brien v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 528. See *Relyea v. Tomahawk Pulp, etc., Co.*, 110 Wis. 307. *Campare Morris v. Eastern R. Co.*, 88 Minn. 112; *Rinberry v. Burnham*, 205 Pa. St. 305.

**Appliances Whose Construction Is Devolved on the Workmen.** — Although a master who furnishes an appliance is charged with the duty of inspecting its condition, where the construction of an appliance is devolved upon the workmen as a part of the work to be performed by them the master is not charged with the duty of inspection. *Phoenix Bridge Co. v. Castleberry*, (C. C. A.) 131 Fed. Rep. 175.

**Flogging Hammer.** — A flogging hammer used in a machine shop for striking chisels and similar instruments, when manufactured and furnished by the master, is an implement within the rule requiring the master to furnish tools and appliances reasonably safe for the purpose used. *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329.

**Extension Ladder.** — A forty-foot extension ladder is not a common tool or appliance which the master is under no duty to inspect. *Twombly v. Consolidated Electric Light Co.*, 98 Me. 353.

**90. 1. What Care Essential.** — *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Shea v. Pacific Power Co.*, 145 Cal. 689; *Cleveland, etc., R. Co. v. Snow*, (Ind. App. 1905) 74 N. E. Rep. 908; *Mooney v. Beattie*, 180 Mass. 451; *Fulton v. Grieb Rubber Co.*, 69 N. J. L. 221; *Hopwood v. Benjamin Atha, etc., Co.*, 68 N. J. L. 707; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305; *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432; *St. Louis Southwestern R. Co. v. Corrigan*, (Tex. Civ. App. 1904) 81 S. W. Rep. 554; *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25; *Young v. O'Brien*, 36 Wash. 570; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 696; *Kramer v. Willy*, 109 Wis. 602.

**2. Reasonable Care.** — *Murphy v. Marston Coal Co.*, 183 Mass. 385; *Randolph v. New York Cent., etc., R. Co.*, 69 N. J. L. 420; *Rowley v. American Illuminating Co.*, 83 N. Y. App. Div. 609.

It has been said that "a master must make such inspection as ordinary prudence requires, involving the use of such tests as are known to him to be called for, or as are so commonly employed in such inspections that he might reasonably be deemed to have known of them." *McGrath v. Delaware, etc., R. Co.*, 69 N. J. L. 331, *affirming* 68 N. J. L. 425.

Although it may be the duty of a master to examine hoisting gear used in loading and unloading a vessel, every time it is taken down and put up, there is no obligation to take the structure apart on each of these examinations. *The King Gruffydd*, (C. C. A.) 131 Fed. Rep. 189.

In a case in which the accident resulted from the removal by a servant of a safeguard which the master had provided, it was said that the

master "was under no obligation to inspect what it had no reason to believe any one of its employees would interfere with, and which he had no right to interfere with." *Schwandt v. William Wright Co.*, 126 Mich. 609.

**Inspection by Other Railroad Company.** — In an action to recover for the death of the plaintiff's intestate, while in the employ of the defendant as an engineer, due to the alleged defective condition of the engine, it was said that it was competent for the defendant company to prove the general custom of well regulated and prudently managed railroad companies with reference to the time and manner of making inspections of their engines and boilers. It was held that it was proper to sustain an objection to the following question propounded by the defendant's counsel: "What was the usual time of railroad companies for inspecting engines?" The inquiry, it was said, should have been limited to the custom of well regulated and prudently managed companies. *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468.

**3. Degree of Care Commensurate with Nature of Business.** — *Dyas v. Southern Pac. Co.*, 140 Cal. 296.

**4. United States.** — *The King Gruffydd*, (C. C. A.) 131 Fed. Rep. 189; *The Columbia*, 124 Fed. Rep. 745; *Texas, etc., R. Co. v. Allen*, (C. C. A.) 114 Fed. Rep. 177.

*Louisiana.* — *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 98 Am. St. Rep. 452.

*Maryland.* — *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.

*Minnesota.* — *Jacobson v. Johnson*, 87 Minn. 185.

*New Jersey.* — *Carroll v. Tidewater Oil Co.*, 67 N. J. L. 679.

*New York.* — *Nelson v. New York*, 101 N. Y. App. Div. 18; *Meehan v. Atlas Safe Moving, etc., Co.*, 94 N. Y. App. Div. 306; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, *affirmed* without opinion 178 N. Y. 635; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Murphy v. Coney Island, etc., R. Co.*, 65 N. Y. App. Div. 546.

*Ohio.* — *Frolich v. Cranker*, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615.

*Tennessee.* — *Chattanooga Machinery Co. v. Hargraves*, 111 Tenn. 476.

*Texas.* — *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *Gulf, etc., R. Co. v. Hayden*, 29 Tex. Civ. App. 280; *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471.

**5. Defects Such as Reasonable Inspection Will Disclose.** — *United States.* — *Cecil v. American Sheet Steel Co.*, (C. C. A.) 129 Fed. Rep. 542; *Diamond Coal, etc., Co. v. Allen*, (C. C. A.) 137 Fed. Rep. 705; *Westinghouse Electric, etc., Co. v. Heimlich*, (C. C. A.) 127 Fed. Rep. 92.

*Alabama.* — *Southern Car, etc., Co. v. Jennings*, 137 Ala. 247.

*Georgia.* — *Atlantic, etc., R. Co. v. Reynolds*, 117 Ga. 47; *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720.

**90.** (5) *Servant's Right to Rely on Master's Performance of Duty.* — See note 7.

**91.** *e.* DUTY TO PROVIDE SUFFICIENT FORCE FOR WORK. — See notes 1, 2, 3, 4.

*Illinois.* — *Belt R. Co. v. Confrey*, 111 Ill. App. 473, affirmed 209 Ill. 344.

*Indiana.* — *Bedford Quarries Co. v. Turner*, (Ind. App. 1905) 75 N. E. Rep. 25.

*Maryland.* — *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560; *Maryland Telephone, etc., Co. v. Cloman*, 97 Md. 620.

*Massachusetts.* — *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113.

*Missouri.* — *Furber v. Kansas City Bolt, etc., Co.*, 185 Mo. 301.

*New Jersey.* — *Snyder v. J. S. Rogers Co.*, 69 N. J. L. 347; *McGrath v. Delaware, etc., R. Co.*, 69 N. J. L. 331, affirming 68 N. J. L. 425; *Hengler v. Cohn*, 68 N. J. L. 240.

*New York.* — *Smith v. New York Cent., etc., R. Co.*, 164 N. Y. 491; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Stackpole v. Wray*, 74 N. Y. App. Div. 310; *Sullivan v. Poor*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 575. *North Dakota.* — *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

*Pennsylvania.* — *Davis v. Spencer*, 7 Lack. Leg. N. (Pa.) 95.

*Texas.* — *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414.

*Wisconsin.* — *Hencke v. Ellis*, 110 Wis. 532.

**90. 6. Defects Rendering Appliance Unsuitable for Purpose Not Designed.** — Since a master is not chargeable with negligence because an appliance fails to serve a purpose not intended, he is not chargeable with negligence because he has omitted to inspect so as to discover that it was not suited for such unexpected and unintended use. *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030.

**7. Right to Rely on Master's Performance of Duty.** — *Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *Southern R. Co. v. Howell*, 135 Ala. 639; *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530; *McDonnell v. Central of Georgia R. Co.*, 118 Ga. 86; *Himrod Coal Co. v. Clark*, 197 Ill. 514, affirming 99 Ill. App. 332; *Momence Stone Co. v. Groves*, 197 Ill. 88; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, affirmed 197 Ill. 186; *Campbell v. Railway Transfer Co.*, (Minn. 1905) 104 N. W. Rep. 547; *El Paso, etc., R. Co. v. Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *Missouri, etc., R. Co. v. Hutchens*, 35 Tex. Civ. App. 343; *Dupree v. Alexander*, 29 Tex. Civ. App. 31. See *supra*, cases supplementing page 57, note 4, and *infra*, the cases supplementing page 124, note 1.

**Servant under No Obligation to Inspect.** — *Morton v. Zwierzykowski*, 91 Ill. App. 462, affirmed 192 Ill. 328.

**91. 1. Sufficient Force for Work** — *Alabama.* — *Alabama G. S. R. Co. v. Vail*, 142 Ala. 134.

*Illinois.* — *Supple v. Agnew*, 191 Ill. 439.

*Indiana.* — *Diezi v. G. H. Hammond Co.*, 156 Ind. 583.

*Iowa.* — *Cahow v. Chicago, etc., R. Co.*, 113 Iowa 224.

*Kentucky.* — *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318.

*Minnesota.* — *Peterson v. American Grass Twine Co.*, 90 Minn. 343; *Dell v. McGrath*, 92 Minn. 187.

*Missouri.* — *Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106; *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612. See *Meily v. St. Louis, etc., R. Co.*, 107 Mo. App. 466.

*New Hampshire.* — *Hilton v. Fitchburg R. Co.*, (N. H. 1904) 59 Atl. Rep. 625.

*New York.* — *Young v. Syracuse, etc., R. Co.*, 166 N. Y. 227, affirming 45 N. Y. App. Div. 296; *Aleckson v. Erie R. Co.*, 101 N. Y. App. Div. 395; *O'Connell v. Thompson-Starrett Co.*, 72 N. Y. App. Div. 47.

*North Carolina.* — *Lassiter v. Raleigh, etc., R. Co.*, 137 N. Car. 150.

*Ohio.* — *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668; *Toomey v. Avery Stamping Co.*, 11 Ohio Cir. Dec. 216, 20 Ohio Cir. Ct. 183.

*South Carolina.* — *Anderson v. Southern R. Co.*, 70 S. Car. 490; *Biggers v. Catawba Power Co.*, 72 S. Car. 264; *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302, 61 S. Car. 468.

*Tennessee.* — *Robertson v. Cayard*, 111 Tenn. 356.

*Texas.* — *Burns v. Merchants, etc., Oil Co.*, 26 Tex. Civ. App. 223; *Smith v. Armour*, (Tex. Civ. App. 1905) 84 S. W. Rep. 675; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Texas, etc., R. Co. v. Miller*, 36 Tex. Civ. App. 240; *San Antonio Traction Co. v. De Rodriguez*, (Tex. Civ. App. 1903) 77 S. W. Rep. 420; *Galveston, etc., R. Co. v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776. See *Merchants, etc., Oil Co. v. Burns*, 96 Tex. 553, reversing (Tex. Civ. App. 1903) 72 S. W. Rep. 626; *Gulf, etc., R. Co. v. Elmore*, 35 Tex. Civ. App. 56; *Hettich v. Hillje*, 33 Tex. Civ. App. 571.

*Washington.* — *Gustafson v. Seattle Traction Co.*, 28 Wash. 227. See *Sandquist v. Independent Telephone Co.*, 38 Wash. 313.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91.

See *Rosney v. Erie R. Co.*, (C. C. A.) 135 Fed. Rep. 311; *McQueeney v. Norcross*, 75 Conn. 381; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96; *Bertholet v. J. W. Bishop Co.*, 187 Mass. 32; *Pauline v. J. W. Bishop Co.*, 25 R. I. 298.

**Lookout on Railroad Trains.** — *Lewis v. Vicksburg, etc., R. Co.*, 114 La. 161; *Neider v. Illinois Cent. R. Co.*, 108 La. 154.

**Lookout on Cars Switched upon Side Tracks.** — *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53.

**Watchman on Footboard of Engine Backed Over Street Crossing.** — *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300.

**Failure to Station Watchman to Give Warning to Track Repairer.** — See *Clark v. Manhattan R. Co.*, 77 N. Y. App. Div. 284.

**91. f. MASTER'S KNOWLEDGE OF DEFECTS AND DANGERS — (1) Liability for Injuries Caused by Known Defects — (a) In General.** — See note 5.

**92. (b) Defects from Which Injury Not Reasonably Anticipated.** — See note 2.

(2) *Necessity of Knowledge or Means of Knowledge — (a) In General.* — See note 4.

**Statute Requiring Attendants at Principal Doorways in Mines.** — *Himrod Coal Co. v. Stevens*, 203 Ill. 115, affirming 104 Ill. App. 639.

**Failure to Furnish Sufficient Force Must Be Proximate Cause of Accident.** — *McKenna v. Chicago, etc., R. Co.*, 92 Minn. 508, judgment affirmed on rehearing 92 Minn. 513; *Zentz v. Chappell*, 103 Mo. App. 208; *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612.

**91. 2.** See the title **FELLOW SERVANTS**, vol. 12, p. 905.

**3. Knowledge and Assumption of Risk.** — *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Leitner v. Grieb*, 104 Mo. App. 173; *O'Connell v. Thompson-Starrett Co.*, 72 N. Y. App. Div. 47; *Bryan v. Southern R. Co.*, 128 N. Car. 387; *Lake Shore, etc., R. Co. v. Whidden*, 23 Ohio Cir. Ct. 85; *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668; *Mayott v. Norcross*, 24 R. I. 187; *Haywood v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 433; *Smith v. Armour*, (Tex. Civ. App. 1905) 84 S. W. Rep. 675; *Texas, etc., R. Co. v. Miller*, 36 Tex. Civ. App. 240; *San Antonio Traction Co. v. De Rodriguez*, (Tex. Civ. App. 1903) 77 S. W. Rep. 420.

**4.** *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318.

**5. Defects Known or Which Should Have Been Known to Master — United States.** — *Sink v. Sikes Co.*, 134 Fed. Rep. 144; *The Westport*, 131 Fed. Rep. 815.

*District of Columbia.* — *Klopfer v. District of Columbia*, 25 App. Cas. (D. C.) 41, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 91.

*Illinois.* — *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Knickerbocker Ice Co. v. Bernhardt*, 93 Ill. App. 23.

*Indiana.* — *Consumers' Paper Co. v. Eyer*, 160 Ind. 424; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241; *Pittsburgh, etc., R. Co. v. Elwood*, 25 Ind. App. 671; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. App. 1903) 67 N. E. Rep. 558.

*Kentucky.* — *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; *Conrad Tanning Co. v. Munsey*, 76 S. W. Rep. 841, 25 Ky. L. Rep. 936; *Coleman v. Pittsburg, etc., R. Co.*, 63 S. W. Rep. 39, 23 Ky. L. Rep. 401; *Southern R. Co. v. Cooper*, 62 S. W. Rep. 858, 23 Ky. L. Rep. 290.

*Louisiana.* — *Broadfoot v. Shreveport Cotton Oil Co.*, 111 La. 467; *Burns v. Ruddock-Orleans Cypress Co.*, 114 La. 247.

*Maine.* — *Cowett v. American Woolen Co.*, 97 Me. 543.

*Minnesota.* — *Kerrigan v. Chicago, etc., R. Co.*, 86 Minn. 407; *Gray v. Commutator Co.*, 85 Minn. 463.

*Missouri.* — *Markey v. Louisiana, etc., R. Co.*, 185 Mo. 348; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382;

*Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; *Zellars v. Missouri Water, etc., Co.*, 92 Mo. App. 107; *Herbert v. Mound City Boot, etc., Co.*, 90 Mo. App. 305; *Devore v. St. Louis, etc., R. Co.*, 86 Mo. App. 429; *Hester v. Jacob Dold Packing Co.*, 84 Mo. App. 451.

*New Hampshire.* — *Smith v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 359.

*New York.* — *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; *Jarvis v. Northern New York Marble Co.*, 55 N. Y. App. Div. 272; *Dzinbienski v. J. L. Mott Iron Works*, 56 N. Y. App. Div. 58; *Wiedeman v. Everard*, 56 N. Y. App. Div. 358, appeal dismissed without opinion 166 N. Y. 598; *Kiras v. Nichols Chemical Co.*, 59 N. Y. App. Div. 79; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *O'Donnell v. Welz*, 97 N. Y. App. Div. 286.

*Ohio.* — *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547; *Forest City Stone Co. v. Richardson*, 12 Ohio Cir. Dec. 177, 22 Ohio Cir. Ct. 139.

*Oregon.* — *Busch v. Robinson*, (Oregon 1905) 81 Pac. Rep. 237.

*Pennsylvania.* — *Schiglizzo v. Dunn*, 211 Pa. St. 253, 107 Am. St. Rep. 549.

*Rhode Island.* — *Vartanian v. New York, etc., R. Co.*, 25 R. I. 398; *Petrarca v. Quidnick Mfg. Co.*, 27 R. I. 265.

*Texas.* — *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *San Antonio, etc., R. Co. v. Hahl*, (Tex. Civ. App. 1904) 83 S. W. Rep. 27; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *St. Louis Southwestern R. Co. v. Arnold*, 32 Tex. Civ. App. 272; *General Electric Co. v. Murray*, 32 Tex. Civ. App. 226; *Missouri, etc., R. Co. v. Baker*, (Tex. Civ. App. 1902) 68 S. W. Rep. 556; *Pledger v. Texas Cent. R. Co.*, (Tex. Civ. App. 1902) 68 S. W. Rep. 516, 69 S. W. Rep. 92; *Smith v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 83.

*Utah.* — *Morgan v. Mammoth Min. Co.*, 26 Utah 174.

*Washington.* — *Rush v. Spokane Falls, etc., R. Co.*, 23 Wash. 501.

*Wisconsin.* — *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330.

*Canada.* — *Godwin v. Newcombe*, 1 Ont. L. Rep. 525.

**Means of Knowledge.** — The master is liable where the circumstances are such that he ought to have had notice of the defective condition of the cause of the injury, whether he had actual notice or knowledge or not. The master cannot screen himself from liability upon the ground that he did not know of the defects in his appliances if he might have known of them by the exercise of due care. *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145.

**92. 2. Improbability of Injury.** — *Chicago Bridge, etc., Co. v. Hayes*, 91 Ill. App. 269.

**4. Necessity of Knowledge or Means of Knowledge — California.** — *Thompson v. California*



- 93.** (b) *Defects in Original Construction.* — See notes 1, 2.  
 (3) *Notice or Knowledge Inferable from Length of Time.* — See note 3.  
**94.** (4) *Notice to Master's Representative.* — See note 2.  
 (5) *Time Allowed Master to Remedy Defect.* — See notes 3, 4.

Constr. Co., (Cal. 1905) 82 Pac. Rep. 367, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 92.

*Illinois.* — *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608; *Chicago, etc., R. Co. v. Merriman*, 95 Ill. App. 628; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96.

*Indiana.* — *Cleveland, etc., R. Co. v. Snow*, (Ind. App. 1905) 74 N. E. Rep. 908.

*Kentucky.* — *Collins v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 973.

*Louisiana.* — *Neider v. Illinois Cent. R. Co.*, 108 La. 154.

*Maine.* — *Moore v. Stetson*, 96 Me. 197.

*Maryland.* — *Buttner v. South Baltimore Steel Car, etc., Co.*, 101 Md. 168; *Maryland Telephone, etc., Co. v. Cloman*, 97 Md. 620; *National Enameling, etc., Co. v. Brady*, 93 Md. 646.

*Massachusetts.* — *Wyman v. Clark*, 180 Mass. 173.

*Missouri.* — *Wojtylak v. Kansas, etc., Coal Co.*, 188 Mo. 260; *Mueller v. La Puelle Shoe Co.*, 109 Mo. App. 506; *Glasscock v. Swofford Brgrs. Dry Goods Co.*, 106 Mo. App. 657; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Zella v. Missouri Water, etc., Co.*, 92 Mo. App. 107; *Hester v. Jacob Dold Packing Co.*, 84 Mo. App. 451; *Abbott v. Marion Min. Co.*, 112 Mo. App. 550; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Kelley v. Chicago, etc., R. Co.*, 105 Mo. App. 365; *McCready v. Stepp*, 104 Mo. App. 340.

*Montana.* — *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138.

*Nebraska.* — *Lincoln Gas, etc., Co. v. Thomas*, (Neb. 1905) 104 N. W. Rep. 153; *Cudahy Packing Co. v. Roy*, (Neb. 1904) 99 N. W. Rep. 231.

*New York.* — *Welsh v. Cornell*, 168 N. Y. 508, reversing 49 N. Y. App. Div. 203; *Smith v. New York Cent., etc., R. Co.*, 164 N. Y. 491; *Quinn v. Baird*, 49 N. Y. App. Div. 270, affirmed without opinion 172 N. Y. 631; *Hughes v. Russell*, 104 N. Y. App. Div. 144; *Dolan v. New York Sanitary Utilization Co.*, 104 N. Y. App. Div. 14; *Stackpole v. Wray*, 99 N. Y. App. Div. 262, affirmed 182 N. Y. 567; *Haughey v. Thatcher*, 89 N. Y. App. Div. 375; *O'Connell v. Clark*, 75 N. Y. App. Div. 619; *Sullivan v. Poor*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 575.

*North Carolina.* — *Bryan v. Southern R. Co.*, 128 N. Car. 387; *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 83 Am. St. Rep. 671.

*North Dakota.* — *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

*Ohio.* — *Record v. Dean*, 11 Ohio Cir. Dec. 808; *Cleveland, etc., R. Co. v. Ullom*, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512.

*Pennsylvania.* — *Surles v. Kistler*, 202 Pa. St. 289.

*Rhode Island.* — *Venbu v. Lafayette Worsted Mills*, 27 R. I. 89; *Dwyer v. Shaw*, 22 R. I. 648.

*Texas.* — *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65; *Hirsch v. Ashe*, 35 Tex. Civ. App. 495; *Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23.

*Virginia.* — *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 4 Va. Sup. Ct. 42.

*Washington.* — *Metzler v. McKenzie*, 34 Wash. 470; *Lynch v. North Yakima*, 37 Wash. 657; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67.

*West Virginia.* — *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606.

*Wisconsin.* — *Groth v. Thomann*, 110 Wis. 488.

*Canada.* — *Dugal v. Peoples Bank*, 34 N. Bruns. 581.

See *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185. See *supra*, this title, the cases supplementing page 78, note 4.

**93. 1. Structural Defects.** — *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93; *Finnerty v. Burnham*, 205 Pa. St. 305, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93.

**2.** *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93; *Finnerty v. Burnham*, 205 Pa. St. 305, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.

**3. Defects Discoverable by Ordinary Care.** — *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406; *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; *Lore v. American Mfg. Co.*, 160 Mo. 608; *Markey v. Louisiana, etc., R. Co.*, 185 Mo. 348; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Simone v. Kirk*, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *Toomey v. Avery Stamping Co.*, 11 Ohio Cir. Dec. 216, 20 Ohio Cir. Ct. 183; *St. Louis, etc., R. Co. v. Skaggs*, 32 Tex. Civ. App. 363; *Jenkins v. Mammoth Min. Co.*, 24 Utah 513; *Meyers v. Falk*, 99 Va. 385, 3 Va. Sup. Ct. 273. See *Robert Portner Brewing Co. v. Cooper*, 120 Ga. 20; *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269.

**94. 2.** It has been held that notice of the defective condition of a mine to the mine manager and fire boss constitutes notice to the owner. *Riverton Coal Co. v. Shepherd*, 207 Ill. 395.

**3. Knowledge Without Opportunity to Act Not Negligence.** — *Chicago, etc., R. Co. v. Merriman*, 95 Ill. App. 628; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121; *Pavey v. St. Louis, etc., R. Co.*, 85 Mo. App. 218; *Kelley v. Chicago, etc., R. Co.*, 105 Mo. App. 365. But see *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379.

**4. Must Remedy Defect in Reasonable Time.** — *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379; *Elmore v. Seaboard Air Line R. Co.*, 130 N. Car. 506, rehearing 131 N. Car. 569, second rehearing 132 N. Car. 865.

In *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571, the court, by Jenks, J., in answer to the contention of counsel that the master, after discovery of defects, is entitled to a reasonable time to make repairs, said: "So far as this proposition is in the case, it may be

**94. g. DUTY TO WARN AND INSTRUCT SERVANT — (1) As to Obvious Defects or Dangers — (a) Statement of Rule. —** See note 5.

said that the jury were entitled to find that the defendant ought, in the exercise of reasonable care, to have known some time before this accident that the wooden top of the vat was rotten. But, in any event, it surely is not the law that, when the master is apprised of a defective place, he is not liable if he continues to offer it to the servant, provided an accident happens before he can with due diligence make the place safe. I know of no such interval of immunity."

**94. 5. No Duty to Warn of Patent Dangers —** *United States.* — *National Biscuit Co. v. Nolan*, (C. C. A.) 138 Fed. Rep. 6; *Fortin v. Manville Co.*, 128 Fed. Rep. 642.

*Alabama.* — *Melton v. E. E. Jackson Lumber Co.*, 133 Ala. 580; *North Birmingham St. R. Co. v. Wright*, 130 Ala. 419.

*Connecticut.* — *Dickenson v. Vernon*, 77 Conn. 537; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680.

*Georgia.* — *Evans v. Josephine Mills*, 119 Ga. 448; *Crown Cotton Mills v. McNally*, 123 Ga. 35.

*Illinois.* — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124, *affirming* 115 Ill. App. 621; *Chicago, etc., R. Co. v. Bell*, 209 Ill. 25, *reversing* 111 Ill. App. 280; *Reynolds v. Grace*, 115 Ill. App. 473; *Electrical Installation Co. v. Kelly*, 110 Ill. App. 334; *Illinois Cent. R. Co. v. Brown*, 107 Ill. App. 512; *American Malting Co. v. Lelivelt*, 101 Ill. App. 320; *Anderberg v. Chicago, etc., R. Co.*, 98 Ill. App. 207; *Brown Hoisting, etc., Mach. Co. v. Bennett*, 96 Ill. App. 514; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284, *affirmed* 195 Ill. 31; *Marsden Co. v. Johnson*, 89 Ill. App. 100. See *Iroquois Furnace Co. v. McCrear*, 91 Ill. App. 337, *affirmed* 191 Ill. 340.

*Indiana.* — *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250.

*Iowa.* — *Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434; *Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302.

*Kentucky.* — *McCormick Harvesting Mach. Co. v. Liter*, 66 S. W. Rep. 761, 23 Ky. L. Rep. 2154; *Coleman v. Pittsburg, etc., R. Co.*, 63 S. W. Rep. 39, 23 Ky. L. Rep. 401.

*Maine.* — *Bryant v. Great Northern Paper Co.*, 100 Me. 171.

*Massachusetts.* — *O'Keeffe v. John P. Squire Co.*, 188 Mass. 210; *Chisholm v. Donovan*, 188 Mass. 378; *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260; *Nye v. Dutton*, 187 Mass. 549; *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511; *Hofnauer v. R. H. White Co.*, 186 Mass. 47; *Gavin v. Fall River Automatic Telephone Co.*, 185 Mass. 78; *Arkland v. Taber-Prang Art Co.*, 184 Mass. 243; *Buston v. Harvard Brewing Co.*, 183 Mass. 438; *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566; *Gaudet v. Stansfield*, 182 Mass. 451; *Conner v. Draper Co.*, 182 Mass. 184; *Ward v. Connor*, 182 Mass. 170; *Chmiel v. Thorndike Co.*, 182 Mass. 112; *Dene v. Arnold Print Works*, 181 Mass. 560; *Ladd v. Brockton St. R. Co.*, 180 Mass. 454; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476; *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69; *Lemoine v. Aldrich*, 177 Mass. 89; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35.

*Michigan.* — *Erickson v. Cummer Mfg. Co.*, (Mich. 1905) 103 N. W. Rep. 828, 12 Detroit Leg. N. 194; *Hathaway v. Washington Milling Co.*, 139 Mich. 708; *Harrison v. Detroit, etc., R. Co.*, 137 Mich. 78, 11 Detroit Leg. N. 228; *Mushinski v. Vincent*, 135 Mich. 26, 10 Detroit Leg. N. 658; *Berlin v. Mershon*, 132 Mich. 183, 9 Detroit Leg. N. 575; *Willis v. Besser-Churchill Co.*, 126 Mich. 659, 8 Detroit Leg. N. 199; *Davis v. Port Huron Engine, etc., Co.*, 126 Mich. 429.

*Minnesota.* — *Jensen v. Regan*, 92 Minn. 323; *Boyer v. Eastern R. Co.*, 87 Minn. 367.

*Missouri.* — *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683; *Mueller v. La Puelle Shoe Co.*, 109 Mo. App. 506; *Herbert v. Mound City Boot, etc., Co.*, 90 Mo. App. 305.

*New Hampshire.* — *Thomas v. Exeter, etc., St. R. Co.*, (N. H. 1904) 58 Atl. Rep. 838; *O'Hare v. Cocheco Mfg. Co.*, 71 N. H. 104, 93 Am. St. Rep. 499.

*New Jersey.* — *Tompkins v. Marine Engine, etc., Co.*, 70 N. J. L. 330; *Carrington v. Mueller*, 65 N. J. L. 244.

*New York.* — *Dillon v. National Coal Tar Co.*, 181 N. Y. 215; *Maltbie v. Belden*, 167 N. Y. 307, *reversing* 45 N. Y. App. Div. 384; *Vykess v. Duncan Co.*, 88 N. Y. App. Div. 129; *Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527, *affirmed* without opinion 179 N. Y. 552; *Wahl v. Chatillon*, 56 N. Y. App. Div. 554.

*North Carolina.* — *Kiser v. Hot Springs Barytes Co.*, 131 N. Car. 595.

*Ohio.* — *Diamond Rubber Co. v. McClurg*, 26 Ohio Cir. Ct. 481; *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530.

*Pennsylvania.* — *Cracraft v. Bessemer Limestone Co.*, 210 Pa. St. 15; *Gallagher v. Snellenburg*, 210 Pa. St. 642; *Baldwin v. Urner*, 206 Pa. St. 459; *McGinnis v. Kerr*, 204 Pa. St. 615; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625; *Fricker v. Penn Bridge Co.*, 197 Pa. St. 442.

*Rhode Island.* — *Frangiose v. Horton*, 26 R. I. 291; *Paoline v. J. W. Bishop Co.*, 25 R. I. 208; *Russell v. Riverside Worsted Mills*, 24 R. I. 591; *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; *Pintorelli v. Horton*, 22 R. I. 374.

*South Carolina.* — *Martin v. Royster Guano Co.*, 72 S. Car. 237.

*Tennessee.* — *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236.

*Texas.* — *Waxahachie Cotton Oil Co. v. McLain*, 27 Tex. Civ. App. 334; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65; *Texas, etc., R. Co. v. Sherman*, (Tex. Civ. App. 1905) 87 S. W. Rep. 887; *Tucker v. National Loan, etc., Co.*, 35 Tex. Civ. App. 474; *Seery v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 89; *Parish v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 234; *St. Louis Southwestern R. Co. v. Austin*, (Tex. Civ. App. 1903) 72 S. W. Rep. 212; *Moore v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 266.

*Washington.* — *Woods v. Northern Pac. R. Co.*, 36 Wash. 658.

**95. (2) As to Latent Defects or Dangers.** — See note 2.

*Wisconsin.* — Groth *v.* Thomann, 110 Wis. 488; Wagner *v.* Plano Mfg. Co., 110 Wis. 48.

See Grayson-McLeod Lumber Co. *v.* Carter, (Ark. 1905) 88 S. W. Rep. 597. See dissenting opinion by Archbald, D. J., in Pennsylvania R. Co. *v.* Jones, (C. C. A.) 123 Fed. Rep. 753, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 94.

It has been held that working in close proximity to a large, heavy, metallic shaft revolving at an exceedingly rapid rate of speed is so obviously attended with danger that the same should be apparent to any adult of ordinary common sense, in the least degree familiar with the operation of machinery of this kind; and it is not, in such a case, incumbent upon an employer to give to an employee of the description above indicated any warning of the existence of such danger. Commercial Guano Co. *v.* Neather, 114 Ga. 416.

**95. 2. Latent Dangers** — *United States.* — Mountain Copper Co. *v.* Pierce, (C. C. A.) 136 Fed. Rep. 150; The Anchoria, 113 Fed. Rep. 982, affirmed without opinion (C. C. A.) 120 Fed. Rep. 1017; Ellis *v.* Northern Pac. R. Co., 103 Fed. Rep. 416. See Western Union Tel. Co. *v.* Burgess, (C. C. A.) 108 Fed. Rep. 26. *California.* — Tedford *v.* Los Angeles Electric Co., 134 Cal. 76.

*Colorado.* — Holshouser *v.* Denver Gas, etc., Co., 18 Colo. App. 431; Colorado City *v.* Liae, 28 Colo. 468.

*District of Columbia.* — Stauble *v.* Potomac Electric Power Co., 21 App. Cas. (D. C.) 160.

*Georgia.* — Crown Cotton Mills *v.* McNally, 123 Ga. 35.

*Illinois.* — Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, affirming 115 Ill. App. 621; Shickle-Harrison, etc., Iron Co. *v.* Beck, 212 Ill. 268; Chicago, etc., R. Co. *v.* Bell, 209 Ill. 25; Morris *v.* Malone, 200 Ill. 132, 93 Am. St. Rep. 180; Chicago, etc., R. Co. *v.* Spurney, 197 Ill. 471; Western Tube Co. *v.* Polobinski, 192 Ill. 113, affirming 94 Ill. App. 640; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428, affirmed 202 Ill. 28; McFarland *v.* Edmunds Mfg. Co., 97 Ill. App. 629.

*Indiana.* — Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120.

*Iowa.* — Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223; Norris *v.* Cudahy Packing Co., 124 Iowa 478; Vohs *v.* A. E. Shorthill Co., 124 Iowa 471; Crane *v.* Chicago, etc., R. Co., 124 Iowa 81.

*Kansas.* — Consolidated Kansas City Smelting, etc., Co. *v.* Sharber, (Kan. 1905) 81 Pac. Rep. 476; Brower *v.* Timreck, 66 Kan. 770.

*Kentucky.* — Collins *v.* Louisville, etc., R. Co., (Ky. 1905) 86 S. W. Rep. 973; Harp *v.* Cumberland Telephone, etc., Co., 80 S. W. Rep. 510, 25 Ky. L. Rep. 2133; Conrad Tanning Co. *v.* Munsey, 76 S. W. Rep. 841, 25 Ky. L. Rep. 936; Shanks *v.* Citizens' Gen. Electric Co., 76 S. W. Rep. 379, 25 Ky. L. Rep. 811.

*Louisiana.* — Thompson *v.* New Orleans, etc., R. Co., 108 La. 52; Stewart *v.* Texas, etc., R. Co., 113 La. 525; Daly *v.* Kiel, 106 La. 170.

*Maine.* — Erickson *v.* Monson Consol. Slate

Co., 100 Me. 107; Welch *v.* Bath Iron Works, 98 Me. 361.

*Massachusetts.* — Dolan *v.* Boott Cotton Mills, 185 Mass. 576; Manning *v.* Excelsior Laundry Co., 189 Mass. 231; Joyce *v.* American Writing Paper Co., 184 Mass. 230; Grimaldi *v.* Lane, 177 Mass. 565; Jarvis *v.* Coes Wrench Co., 177 Mass. 170.

*Michigan.* — Kopf *v.* Monroe Stone Co., (Mich. 1905) 104 N. W. Rep. 313, 12 Detroit Leg. N. 319; La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 10 Detroit Leg. N. 146; Barr *v.* Guelph Patent Cask Co., 129 Mich. 278, 8 Detroit Leg. N. 956; Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 8 Detroit Leg. N. 520.

*Minnesota.* — Dell *v.* McGrath, 92 Minn. 187; Kohout *v.* Newman, (Minn. 1905) 104 N. W. Rep. 764; Torske *v.* Commonwealth Lumber Co., 86 Minn. 276; Gray *v.* Commutator Co., 85 Minn. 463; Peterson *v.* American Grass Twine Co., 90 Minn. 343.

*Missouri.* — Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265; Nickel *v.* Columbia Paper Stock Co., 95 Mo. App. 226; Gibson *v.* Midland Bridge Co., 112 Mo. App. 594.

*Montana.* — Allen *v.* Bell, 32 Mont. 69.

*New Hampshire.* — Miller *v.* Boston, etc., R. Co., (N. H. 1905) 61 Atl. Rep. 360; Kasjeta *v.* Nashua Mfg. Co., (N. H. 1904) 58 Atl. Rep. 874; Thomas *v.* Exeter, etc., St. R. Co., (N. H. 1904) 58 Atl. Rep. 838; Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 101 Am. St. Rep. 660; Boyce *v.* Johnson, 72 N. H. 41.

*New York.* — Simone *v.* Kirk, 173 N. Y. 7, reversing 57 N. Y. App. Div. 461; Nelson *v.* New York, 101 N. Y. App. Div. 18; O'Brien *v.* Buffalo Furnace Co., 68 N. Y. App. Div. 451; Dyer *v.* Brown, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616.

*North Carolina.* — Turrentine *v.* Wellington, 136 N. Car. 308; Allison *v.* Southern R. Co., 129 N. Car. 336.

*Ohio.* — New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628; Toomey *v.* Avery Stamping Co., 11 Ohio Cir. Dec. 216, 20 Ohio Cir. Ct. 183; Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530; Joswoyak *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 317, 1 Cleve. L. Rep. 306.

*Oregon.* — Hough *v.* Grants Pass Power Co., 41 Oregon 531.

*Pennsylvania.* — Patterson *v.* Harrisburg Trust Co., 211 Pa. St. 173; Conger *v.* Wiggins, 208 Pa. St. 122; Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543; De Grazia *v.* Piccardo, 15 Pa. Super. Ct. 107.

*Rhode Island.* — Flynn *v.* Shaw, 22 R. I. 328.

*South Carolina.* — Hutchings *v.* Mills Mfg. Co., 68 S. Car. 512; Biggers *v.* Catawba Power Co., 72 S. Car. 264.

*Tennessee.* — Tennessee Coal, etc., R. Co. *v.* Jarrett, (Tenn. 1904) 82 S. W. Rep. 224.

*Texas.* — Southern Pac. R. Co. *v.* Winton, 27 Tex. Civ. App. 503; International, etc., R. Co. *v.* Tisdale, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 87

**96.** See notes 1, 2.

S. W. Rep. 371; *San Antonio Foundry Co. v. Drish*, (Tex. Civ. App. 1905) 85 S. W. Rep. 440; *Texarkana, etc., R. Co. v. Toliver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, *affirmed* 98 Tex. 123; *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; *General Electric Co. v. Murray*, 32 Tex. Civ. App. 226; *Galveston, etc., R. Co. v. Mortson*, 31 Tex. Civ. App. 142; *Texas, etc., R. Co. v. Gardner*, (Tex. Civ. App. 1902) 69 S. W. Rep. 217.

*Utah*.—*Leach v. Oregon Shore Line R. Co.*, 29 Utah 285; *Mathews v. Daly-West Min. Co.*, 27 Utah 193; *Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798.

*Virginia*.—*Pocahontas Collieries Co. v. Rukas*, (Va. 1905) 51 S. E. Rep. 449.

*Washington*.—*McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. St. Rep. 908; *Dossett v. St. Paul, etc., Lumber Co.*, 40 Wash. 276; *Myrberg v. Baltimore, etc., Min., etc., Co.*, 25 Wash. 364; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654; *Decker v. Stimson Mill Co.*, 31 Wash. 522; *Morton v. Moran Bros. Co.*, 30 Wash. 362; *Shoemaker v. Bryant Lumber, etc., Mill Co.*, 27 Wash. 637; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119; *Rush v. Spokane Falls, etc., R. Co.*, 23 Wash. 501.

*West Virginia*.—*Richards v. Riverside Iron Works*, 56 W. Va. 510.

*Wisconsin*.—*Yess v. Chicago Brass Co.*, 124 Wis. 406.

*Canada*.—*Choate v. Ontario Rolling-Mill Co.*, 27 Ont. App. 155.

It has been held that it is the duty of a corporation, when it employs inexperienced men and places them in dangerous positions directly under others having the direction and control of dangerous appliances, to give the latter notice of the fact of such inexperience, and caution them as to the necessity of exercising special caution towards assuring their safety. *Evans v. Louisiana Lumber Co.*, 111 La. 534.

**Obstructions on Railway Track.**—*Rogers v. Cleveland, etc., R. Co.*, 211 Ill. 126.

**Dangers Along the Line of a Railway by Extraordinary Storms.**—It has been held that where an extraordinary storm had produced and was producing landslides and washouts along the line of the defendant's railway, it was the duty of the company to warn trainmen on trains which were sent out, of the dangers which might be encountered. *Mercantile Trust Co. v. Pittsburgh, etc., R. Co.*, (C. C. A.) 115 Fed. Rep. 475.

**Presence of Explosives.**—It has been held that it was the duty of a master to warn a servant of a large quantity of a high explosive at or near the place where the servant was at work. *Robinson Min. Co. v. Tolbert*, 132 Ala. 462.

**Warnings During Blasting Operations.**—It has been held that it is the duty of a master who is engaged in blasting operations to give his servants warning of coming blasts. *Orman v. Salvo*, (C. C. A.) 117 Fed. Rep. 233.

**Perfect Condition of Dangerous Appliance.**—The master is not necessarily relieved of the

duty to warn and instruct the servant by the mere fact that the appliance from which the danger arises is in perfect working order, if the danger be not open and obvious. *Fletcher Bros. Co. v. Hyde*, (Ind. App. 1905) 75 N. E. Rep. 9.

**Delegation of Duty to Warn and Instruct Servants.**—The duty of a master to warn and instruct his servants is a primary duty of the master, and the delegation thereof to one of his servants cannot relieve him of the responsibility imposed upon him by law. *Mercantile Trust Co. v. Pittsburgh, etc., R. Co.*, (C. C. A.) 115 Fed. Rep. 475. See the title *FELLOW SERVANTS*, vol. 12, p. 969.

**Duty of Contractor.**—It has been held that where a person in control of premises engages a contractor to do work thereon, the contractor will not be liable to his employees on account of the unsafe condition of the place, in the absence of actual notice of a defect, unless he has specially, or upon facts found impliedly, assumed such obligation. *Roche v. Llewellyn Ironworks Co.*, 140 Cal. 563.

**96.** 1. *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229.

2. **Rule Applicable Only to Dangers Known to Master.**—*Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1903) 71 Pac. Rep. 957; *Crown Cotton Mills v. McNally*, 123 Ga. 35; *Girard v. Griswold*, 177 Mass. 57; *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185; *Bauer v. American Car, etc., Co.*, 132 Mich. 537, 10 Detroit Leg. N. 17; *Nowakowski v. Detroit Stove Works*, 130 Mich. 308, 9 Detroit Leg. N. 25; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138; *Christensen v. Lambert*, 67 N. J. L. 341; *Carrington v. Mueller*, 65 N. J. L. 244; *Diehl v. Standard Oil Co.*, 70 N. J. L. 424; *Diamond Rubber Co. v. McClurg*, 26 Ohio Cir. Ct. 481; *San Antonio Sewer Pipe Co. v. Noll*, (Tex. Civ. App. 1904) 83 S. W. Rep. 900; *Gay v. Southern R. Co.*, 101 Va. 466. See *Western Tube Co. v. Polobinski*, 192 Ill. 113, *affirming* 94 Ill. App. 640; *Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 83 Am. St. Rep. 671.

It has been said that "no duty is imposed upon the master to caution his servant against dangers incident to his work, as to which the master has no better information than his servant, or as to which there is [no] reason why the master should be better informed than the servant." *Roessler, etc., Chemical Co. v. Peterson*, (C. C. A.) 134 Fed. Rep. 789.

**Dangers Arising from Negligence of Fellow Servants.**—A master has a right to presume that competent employees will not be negligent in their work, and is not under a duty to inform a servant of possible or probable dangers that will arise in case of negligence on the part of his fellow employees. *Klos v. Hudson River Ore, etc., Co.*, 77 N. Y. App. Div. 566.

The master has a right to assume that a competent servant whom he places in charge of work will perform his duty properly, and is not required to inform his other servants that he may not, and is not called upon to explain what the result may be in case he does not, or to instruct them as to what they should do in case he performs some detail of the work in a negli-

**96.** (3) *As to Dangers from Causes Extraneous to Employment.* — See note 3.

(4) *As to Increased Hazard from Changes in Machinery or Appliances.* — See note 4.

**97.** See note 1.

(5) *As to Dangers from Other Work Incident to Master's Business.* — See note 2.

(6) *As to Hazards from Work Outside Scope of Employment.* — See notes 3, 4.

(7) *Duty as Affected by Skill or Inexperience or Youth of Servant* — (a) *Skilled and Experienced Employees.* — See note 5.

gent manner. *O'Brien v. Buffalo Furnace Co.*, 68 N. Y. App. Div. 451.

**96. 3. Danger from Striking Employees.** — *Holshouser v. Denver Gas, etc., Co.*, 18 Colo. App. 431.

**4. Changes in Machinery or Appliances — Duty to Warn.** — *Walsh v. Chicago*, 94 Ill. App. 311; *Johnson v. Crookston Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 891; *Bartholomew v. Kemmerer*, 211 Pa. St. 277; *Hedlun v. Holy Terror Min. Co.*, 16 S. Dak. 261; *Galveston, etc., R. Co. v. Quay*, 27 Tex. Civ. App. 516; *Texarkana Table, etc., Co. v. Webb*, (Tex. Civ. App. 1905) 86 S. W. Rep. 782; *Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798. See *Tennessee Coal, etc., Co. v. Currier*, (C. C. A.) 108 Fed. Rep. 19; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; *Hutchings v. Mills Mfg. Co.*, 68 S. Car. 512; *Texarkana, etc., R. Co. v. Tolver*, (Tex. Civ. App. 1904) 84 S. W. Rep. 375; *Lane v. Bauserman*, 103 Va. 146, 106 Am. St. Rep. 872.

**Changes in Floor of Building.** — *Chicago Gen. R. Co. v. McNamara*, 94 Ill. App. 188.

**Change in Grade of Powder Used.** — *Chambers v. Chester*, 172 Mo. 461.

**97. 1.** *Bryant v. Great Northern Paper Co.*, 100 Me. 171.

**2. Perils from Work on Which Servant Is Not Engaged.** — *Western Electric Co. v. Hanselmann*, (C. C. A.) 136 Fed. Rep. 564; *Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95; *Coffeyville Vitrified Brick, etc., Co. v. Shanks*, 69 Kan. 306; *Carroll v. New York, etc., R. Co.*, 182 Mass. 237; *Bowes v. New York, etc., R. Co.*, 181 Mass. 89; *Smith v. Atlanta, etc., Air Line R. Co.*, 132 N. Car. 819; *International, etc., R. Co. v. Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Gulf, etc., R. Co. v. Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; *Virginia Iron, etc., Co. v. Lore*, (Va. 1905) 51 S. E. Rep. 371. *Compare Gill v. National Storage Co.*, 70 N. J. L. 53.

It has been held that where a workman, in the discharge of his duty, has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning was given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court. *D'Agostino v. Pennsylvania R. Co.*, (N. J. 1905) 60 Atl. Rep. 1113.

**Danger to Car Repairer from Switching of Cars.** — *Street's Western Stable Car Line v. Bonander*, 196 Ill. 15, affirming 97 Ill. App. 601.

**3. Injuries Sustained While Working Outside**

**Scope of Employment.** — *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185; *Albanese v. Central R. Co.*, 70 N. J. L. 241; *St. Louis Southwestern R. Co. v. Spivey*, 97 Tex. 143, reversing (Tex. Civ. App. 1903) 73 S. W. Rep. 973. See *Smith v. Thomas Iron Co.*, 69 N. J. L. 11.

**4. Work Done under Direction of Master.** — *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622; *Daubert v. Western Meat Co.*, 135 Cal. 144; *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Small v. Brainerd Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 726; *Tennessee Coal, etc., R. Co. v. Jarrett*, (Tenn. 1904) 82 S. W. Rep. 224; *Texas, etc., R. Co. v. Utley*, 27 Tex. Civ. App. 472; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; *Texarkana, etc., R. Co. v. Preacher*, (Tex. Civ. App. 1900) 59 S. W. Rep. 593; *Virginia Iron, etc., Co. v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362.

It has been held that when a servant is ordered by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the superior knows or ought to know, from all the circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character, and is aware, or under all the circumstances should be aware, that the risks and hazards of the work, or the proper mode of doing the work to avoid the incident risks, are not obvious or known and appreciated by the subordinate, by reason of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant sufficiently to enable him to understand the dangers he will encounter, and how to do the work with safety, if he exercise due care himself. *Felton v. Girardy*, (C. C. A.) 104 Fed. Rep. 127.

**Obvious Danger of Work Outside Scope of Employment.** — *Illinois Cent. R. Co. v. Brown*, 107 Ill. App. 512.

**5. Alabama.** — *Northern Alabama Coal, etc., Co. v. Beacham*, 140 Ala. 422.

**California.** — *Fries v. American Lead Pencil Co.*, 141 Cal. 610.

**Illinois.** — *Reynolds v. Grace*, 115 Ill. App. 473; *American Malting Co. v. Lelivelt*, 101 Ill. App. 320.

**Maine.** — *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107.

**Massachusetts.** — *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100; *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566; *Conner v. Draper Co.*, 182 Mass. 184; *Ward v. Connor*, 182 Mass. 170; *Cushman v. Cushman*, 179 Mass. 601.

**97. (b) Inexperienced Employees — aa. IN GENERAL. — See note 6.**

*Michigan.*—Berlin *v.* Mershon, 132 Mich. 183, 9 Detroit Leg. N. 575; Nowakowski *v.* Detroit Stove Works, 130 Mich. 308, 9 Detroit Leg. N. 25. See Carnes *v.* Guelph Patent Cask Co., (Mich. 1905) 104 N. W. Rep. 322, 12 Detroit Leg. N. 331.

*Missouri.*—Livengood *v.* Joplin-Galena Consol. Lead, etc., Co., 179 Mo. 229; Mueller *v.* La Puelle Shoe Co., 109 Mo. App. 506; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305.

*New Hampshire.*—St. Jean *v.* Tolles, etc., Co., 72 N. H. 587.

*New Jersey.*—Murphy *v.* Rockwell Engineering Co., 70 N. J. L. 374.

*New York.*—McManus *v.* Davitt, 94 N. Y. App. Div. 481; Wahl *v.* Chatillon, 56 N. Y. App. Div. 554.

*Texas.*—Hettich *v.* Hillje, 33 Tex. Civ. App. 571. See Parish *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 234.

*Washington.*—Sandquist *v.* Independent Telephone Co., 38 Wash. 313.

**Knowledge of Servant's Inexperience.**—It has been held that a master is entitled to rely upon the representations of a servant that he is a skilled and experienced workman, and that he knows and appreciates the dangers liable to arise from the operation of the machines in common use. Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292.

In *New Jersey* the rule is declared to be that the liability or responsibility of a master to instruct a servant as to the danger of employment arises only when the servant is himself ignorant, and when the master knows the fact, or ought to know it. Tompkins *v.* Marine Engine, etc., Co., 70 N. J. L. 330.

It has been said that the duty of cautioning a servant rests upon the master only in case he is informed or has reason to believe that the servant is inexperienced and ignorant of the probable dangers he is about to encounter. The master, in the absence of such information, may assume that an applicant who is apparently mature and intelligent is qualified for the particular work applied for by him. "It is only where such facts are brought to his notice of the disqualification of the servant to safely encounter dangers known to him, and presumptively unknown to the servant, that the duty of cautioning and instructing the servant arises." King *v.* Morgan, (C. C. A.) 109 Fed. Rep. 446.

**97. 6. Inexperienced Employees — Duty to Warn and Instruct—England.**—Lloyd *v.* Woolland, 87 L. T. N. S. 73.

*Canada.*—Choate *v.* Ontario Rolling Mill Co., 27 Ont. App. 155.

*United States.*—Mountain Copper Co. *v.* Pierce, (C. C. A.) 136 Fed. Rep. 150; Cumberland Telephone, etc., Co. *v.* Bills, (C. C. A.) 128 Fed. Rep. 272; Wheeler *v.* Oak Harbor Head Lining, etc., Co., (C. C. A.) 126 Fed. Rep. 348; Wright *v.* Stanley, (C. C. A.) 119 Fed. Rep. 330; Nyback *v.* Champagne Lumber Co., (C. C. A.) 109 Fed. Rep. 732; Felton *v.* Girardy, (C. C. A.) 104 Fed. Rep. 127.

*Alabama.*—Alabama Steel, etc., Co. *v.* Wrenna, 136 Ala. 475.

*California.*—Merrifield *v.* Maryland Gold Quartz Min. Co., 143 Cal. 54; Mansfield *v.* Eagle Box, etc., Co., 136 Cal. 622; O'Connor *v.* Golden Gate Woolen Mfg. Co., 135 Cal. 537, 87 Am. St. Rep. 127; Tedford *v.* Los Angeles Electric Co., 134 Cal. 76.

*Delaware.*—Karczewski *v.* Wilmington City R. Co., 4 Penn. (Del.) 24.

*Georgia.*—Vinson *v.* Morning News, 118 Ga. 655.

*Illinois.*—Chicago Screw Co. *v.* Weiss, 203 Ill. 536, affirming 107 Ill. App. 39; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444, affirmed 212 Ill. 268; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428, affirmed 202 Ill. 28.

*Indiana.*—Fletcher Bros. Co. *v.* Hyde, (Ind. App. 1905) 75 N. E. Rep. 9; Flickner *v.* Lambert, (Ind. App. 1905) 74 N. E. Rep. 263; La Porte Carriage Co. *v.* Sullender, (Ind. App. 1904) 71 N. E. Rep. 922; Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393.

*Iowa.*—Wilder *v.* Great Western Cereal Co., (Iowa 1905) 104 N. W. Rep. 434; Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 97; Vohs *v.* A. E. Shorthill Co., 124 Iowa 471; Shebeck *v.* National Cracker Co., 120 Iowa 414.

*Kansas.*—Patterson *v.* Cole, 67 Kan. 441.

*Kentucky.*—James *v.* Ames, 82 S. W. Rep. 229, 26 Ky. L. Rep. 498; Standard Oil Co. *v.* Eiler, 110 Ky. 209.

*Louisiana.*—Carter *v.* Fred W. Dubach Lumber Co., 113 La. 239; Bonnin *v.* Crowley, 112 La. 1025.

*Maryland.*—Skinner *v.* McLaughlin, 94 Md. 524; Yentsch *v.* Chloride of Silver Dry Cell Battery Co., 96 Md. 679.

*Michigan.*—McDonald *v.* Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208.

*Minnesota.*—Small *v.* Brainerd Lumber Co., (Minn. 1905) 103 N. W. Rep. 726.

*Montana.*—Coleman *v.* Perry, 28 Mont. 1.

*Nebraska.*—Evans Laundry Co. *v.* Crawford, 67 Neb. 153.

*New Hampshire.*—Kasjeta *v.* Nashua Mfg. Co., (N. H. 1904) 58 Atl. Rep. 874; Lapelle *v.* International Paper Co., 71 N. H. 346; Bennett *v.* Warren, 70 N. H. 564.

*New York.*—Lowry *v.* Anderson Co., 96 N. Y. App. Div. 465; Dyer *v.* Brown, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616.

*North Carolina.*—Jones *v.* American Warehouse Co., 137 N. Car. 337, 138 N. Car. 546.

*Ohio.*—Bowe *v.* Bowe, 26 Ohio Cir. Ct. 409. See Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457.

*Oregon.*—Bowers *v.* Star Logging, etc., Co., 41 Oregon 301.

*Pennsylvania.*—Sweigert *v.* Klingensmith, 210 Pa. St. 565; Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543.

*South Carolina.*—Biggers *v.* Catawba Power Co., 72 S. Car. 264.

*Tennessee.*—Tennessee Coal, etc., Co. *v.* Jarrett, (Tenn. 1904) 82 S. W. Rep. 224.

*Texas.*—Texarkana Table, etc., Co. *v.* Webb, (Tex. Civ. App. 1905) 86 S. W. Rep. 782; Gulf, etc., R. Co. *v.* Newman, 27 Tex. Civ. App.

**98. Incapacity of Servant to Appreciate Danger.** — See note 1.

**99. *bb. INFANT EMPLOYEES—(aa) In General.*** — See note 1.

77; Texas, etc., *R. Co. v. Uteley*, 27 Tex. Civ. App. 472.

Utah. — *Pence v. California Min. Co.*, 27 Utah 378.

Virginia. — *Virginia Iron, etc., Co. v. Lore*, (Va. 1905) 51 S. E. Rep. 371.

Washington. — *Jancko v. West Coast Mfg., etc., Co.*, 34 Wash. 556.

West Virginia. — *Giebell v. Collins Co.*, 54 W. Va. 518.

Wisconsin. — *Yess v. Chicago Brass Co.*, 124 Wis. 406.

**Instruction as to Mode of Doing Work.** — It has been said that when the work which an employee is set to do may be done in different ways, one of which is dangerous but the others are shown by experience to be safe, then the inexperienced employee is entitled to instruction as to the way in which the work ought to be done. *Brislin v. Kingston Coal Co.*, 20 Pa. Super. Ct. 234.

**Work Not Requiring Experience or Instruction.** — It is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience and instruction are not necessary to enable him to do with safety the work he is employed or required to perform. *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49.

**Obvious Dangers.** — If the servant is ignorant and inexperienced, it is a duty to warn him of dangers not obvious to one without experience, but there is no duty to notify or instruct him as to dangers which are open and apparent to every person. *Chicago, etc., R. Co. v. Bell*, 209 Ill. 25.

**Knowledge by Master of Inexperience of Servant.** — There is no duty to instruct when the master does not and ought not to know or take notice of the youth or inexperience of the servant. *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49.

And it has been held that where a person of apparent maturity and of average capacity solicits a particular kind of work, the master has a right, in the absence of information to the contrary, to assume that the applicant is qualified for the particular work applied for. *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80.

Undoubtedly an employer, in the absence of other evidence, would be justified in assuming that one who represented himself as competent for a particular line of work did not need cautioning and instructing in that line. But if an employer knows that a servant, to whom he assigns a particular work involving peculiar dangers, and requiring experience and skill to avoid the danger which he knows the servant will encounter, has not had the experience necessary to enable him to comprehend and avoid such dangers, he cannot absolve himself from the duty of cautioning and instructing such servant, although the servant represents himself as altogether qualified. It is the knowledge of the master of the inexperience and disqualification of the servant regarding dangers known to the master which fastens upon the latter the duty of taking reasonable care that

the servant shall not sustain an injury through such known inexperience. *Felton v. Girardy*, (C. C. A.) 104 Fed. Rep. 127.

**98. 1. Patent Dangers — Incapacity of Servant to Understand.** — *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49; *Henderson Cotton Mills v. Warren*, 70 S. W. Rep. 658, 24 Ky. L. Rep. 1030, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

**99. 1. Infant Employees of Tender Years — Duty to Show and Instruct — Delaware.** — *Stratner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

Illinois. — *Siegel v. Trcka*, 115 Ill. App. 56, affirmed 218 Ill. 559; *Marsden Co. v. Johnson*, 89 Ill. App. 100. Compare *Reynolds v. Grace*, 115 Ill. App. 473.

Indiana. — *Flickner v. Lambert*, (Ind. App. 1905) 74 N. E. Rep. 263; *Brower v. Locke*, 31 Ind. App. 353. See *La Porte Carriage Co. v. Sullender*, (Ind. 1905) 75 N. E. Rep. 277.

Iowa. — *Sachau v. Milner*, 123 Iowa 387; *Shebeck v. National Cracker Co.*, 120 Iowa 414.

Kansas. — *Patterson v. Cole*, 67 Kan. 441.

Kentucky. — *Standard Oil Co. v. Eiler*, 110 Ky. 209; *Henderson Cotton Mills v. Warren*, 70 S. W. Rep. 658, 24 Ky. L. Rep. 1030, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

Louisiana. — *Gracia v. C. N. Maestri Furniture Mfg. Co.*, 114 La. 371; *Lindsey v. Tioga Lumber Co.*, 108 La. 468, 92 Am. St. Rep. 384.

Maryland. — *Mercantile Laundry Co. v. Kearney*, 97 Md. 15.

Massachusetts. — *Rudberg v. Bowden Felting Co.*, 188 Mass. 365.

Michigan. — *Dompier v. Lewis*, 131 Mich. 144, 9 Detroit Leg. N. 299; *Ertz v. Pierson*, 130 Mich. 160, 8 Detroit Leg. N. 1177.

Minnesota. — *Small v. Brainerd Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 726; *Torske v. Commonwealth Lumber Co.*, 86 Minn. 276.

Missouri. — *Vanesler v. Moser Cigar, etc., Co.*, 108 Mo. App. 621.

Nebraska. — *Ittner Brick Co. v. Killian*, 67 Neb. 589; *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

North Carolina. — *Marcus v. Loane*, 133 N. Car. 54; *Fitzgerald v. Alma Furniture Co.*, 131 N. Car. 636.

Ohio. — *Jacobs v. Fuller, etc., Co.*, 67 Ohio St. 70; *E. P. Breckenridge Co. v. Reagan*, 12 Ohio Cir. Dec. 50, 22 Ohio Cir. Ct. 71.

Pennsylvania. — *Noden v. Verlenden*, 211 Pa. St. 135; *Creachen v. Bromley Bros. Carpet Co.*, 209 Pa. St. 6; *Dynes v. Bromley*, 208 Pa. St. 633; *Doyle v. Pittsburg Waste Co.*, 204 Pa. St. 618; *Welsh v. Butz*, 202 Pa. St. 59; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457.

Rhode Island. — *Le Febvre v. Lawton Spinning Co.*, 24 R. I. 215; *Morancy v. Hennessey*, 24 R. I. 205.

Tennessee. — *American Lead Pencil Co. v. Davis*, 108 Tenn. 251.

Texas. — *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; *Galveston, etc., R. Co. v. Hitzfelder*, 24 Tex. Civ. App. 318; *Wood v. Texas Cotton Product Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 496; *W. G. Ragley Lumber Co. v. Goldsmith*, (Tex. Civ. App. 1902) 66 S.

**99.** (bb) *Where Servant Is Too Young to Understand Danger After Instruction.* — See note 2.

(8) *Sufficiency of Instructions.* — See notes 3, 4.

W. Rep. 581; *Texarkana, etc., R. Co. v. Preacher*, (Tex. Civ. App. 1900) 59 S. W. Rep. 593. *Compare Tucker v. National Loan, etc., Co.*, 35 Tex. Civ. App. 474.

*Utah.* — *Moyes v. Ogden Sewer Pipe, etc., Co.*, 28 Utah 148.

*Virginia.* — *Virginia Iron, etc., Co. v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590.

*Washington.* — *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415; *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707.

*West Virginia.* — *Giebell v. Collins Co.*, 54 W. Va. 518.

*Canada.* — *McCarthy v. Thomas Davidson Mfg. Co.*, 18 Quebec Super. Ct. 272.

The duty of a master to instruct a youthful or inexperienced servant is limited by the right of the master to presume, in the absence of knowledge to the contrary, that the servant has the knowledge, discretion, and experience of the average servant of his age and intelligence. *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544.

**Where There Are Two Ways of Doing a Duty.** — In an action to recover for personal injuries which were received by the plaintiff, a boy seventeen years old, while at work on a planing machine in the defendant's mill, it was held that where the work is to be done by machinery with the operation of which the employee is not acquainted, and there is a safe way and an unsafe way, the employer, if he has reason to know that the employee is unskilled, is required to give him instructions for operating it in the way by which he will avoid injury. *Wright v. Stanley*, (C. C. A.) 119 Fed. Rep. 330.

**Danger Not Within Scope of Employment.** — It has been said that this "duty upon the part of the employer becomes more imperative in instances when the employment is special and the hazard to which he by his direction subjects the minor employee is not within the contemplation of the contract of service." *National Enameling, etc., Co. v. Brady*, 93 Md. 646.

**99. 2. Servant Too Young to Understand Danger After Instruction.** — *Henderson Cotton Mills v. Warren*, 70 S. W. Rep. 658, 24 Ky. L. Rep. 1030, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 99; *Stimper v. Fuchs, etc., Mfg. Co.*, 26 N. Y. App. Div. 333, affirmed without opinion 161 N. Y. 636. See *Canton Cotton Mills v. Edwards*, 120 Ga. 447; *Gammel-Statesman Pub. Co. v. Monfort*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1209.

**3. Instructions Must Be Plain.** — *Western R. Co. v. Russell*, (Ala. 1905) 39 So. Rep. 311; *Staubley v. Potomac Electric Power Co.*, 21 App. Cas. (D. C.) 160; *Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434; *United Laundry Co. v. Steele*, 72 S. W. Rep. 305, 24 Ky. L. Rep. 1899; *Daly v. Kiel*, 106 La. 170; *Small v. Brainerd Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 726; *Lake Shore, etc., R. Co. v. Fisher*, 26 Ohio Cir. Ct. 143, affirmed

without opinion 51 Ohio St. 574; *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530. See *Brown Hoisting, etc., Mach. Co. v. Bennett*, 96 Ill. App. 514; *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 10 Detroit Leg. N. 592; *Preuschoff v. B. Stroh Brewing Co.*, 132 Mich. 107, 9 Detroit Leg. N. 549.

Notice that digging is being done between ties around a certain yard office has been held to be a sufficient notice of danger arising from the construction of a new switch at the place indicated. *Hauss v. Lake Erie, etc., R. Co.*, (C. C. A.) 105 Fed. Rep. 733.

It has been held that where a railroad bridge or trestle has been injured by fire, if the conductor and engineer on a train are informed of the burning, and of the number of the bridge or trestle, and the mileposts between which it is located, the notice is sufficient. *St. Louis, etc., R. Co. v. Mize*, 71 Ark. 159.

Where a cotton mill company posted notices in a place where they could be read by the employees, warning them as to how they should dress, etc., it was held that the warning was sufficient; it was not necessary to call the attention of each operative to the notice. *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260.

It has been held that a servant who is engaged to help in the operation of setting a die on a press while the press is not in use need not be instructed by the master either in the management of the machine or in the use of a safety device which forms part of the machine. *Kasadarian v. James Hill Mfg. Co.*, 130 Fed. Rep. 62.

**Improper Instructions.** — Where the master assumes to instruct the servant in the manner of performing a dangerous duty, and such instructions are improper, the servant may ordinarily recover for injuries sustained in consequence of obeying the instructions. *Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527, affirmed without opinion 179 N. Y. 552.

**4. Instruction Must Be Graduated to Youth or Inexperience of Employee.** — *Bowden v. Marlborough Electric Mach., etc., Co.*, 185 Mass. 549; *Jahrmatter v. Kline*, 129 Mich. 154, 8 Detroit Leg. N. 897; *Small v. Brainerd Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 726; *E. P. Breckenridge Co. v. Reagan*, 12 Ohio Cir. Dec. 50, 22 Ohio Cir. Ct. 71; *Welsh v. Butz*, 202 Pa. St. 59; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415.

It has been said that "it is the duty of the master to give such instruction and warning to his servant as to the dangerous character of his employment as may reasonably enable him to understand the peril to which he is exposed. Such instruction and warning should be measured in each case by the youth, inexperience, measure of such instruction in case of infancy or ignorance of the servant. \* \* \* The would be modified according to the maturity and capacity of the infant, his ability to understand, and appreciate the danger, and his



**99.** (9) *Effect of Acquiring Information from Other Sources.*—See note 5.

**100.** (10) *Assumption of Risk After Instruction.*—See note 1.

(11) *Proximate Cause of Injury.*—See note 2.

(12) *Evidence in Actions for Injuries.*—See notes 3, 4.

**101.** 2. *Rules for Carrying On Master's Business*—*a. DUTY OF MASTER TO ADOPT RULES*—(1) *Where Business Is Complex and Dangerous*—(a) *Statement of Rule.*—See note 1.

familiarity with all the surroundings and conditions in each particular case." *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

**Servant's Ignorance of Language in Which Warning Given.**—It has been said that it may well be questioned whether an employer, giving an order or warning to a gang of men of whose nationality or knowledge of the language he has no knowledge, can be said to be guilty of negligence in law or fact, merely because he does not call up each man separately and question him as to whether he understands the English language so as to comprehend what is said. There may be cases where, independently of whether the men understand the language or not, the risk is so great, the danger so imminent, that it would become the duty of the master to take special pains to see to it that every man is cautioned before he undertakes some work of difficulty and danger, which the master knows or ought to know about and which the servant is not capable of understanding or appreciating. But in ordinary cases, unless the master's attention is called to the fact that one or more of his employees do not understand the language of the country sufficiently to comprehend his order or warning, it may well be doubted whether he is guilty of negligence or want of ordinary care, if he assumes that his employees all understand an order or warning plainly given in the vernacular. *Lobstein v. Sajatovich*, 111 Ill. App. 654.

**99. 5. Acquiring Information from Other Sources.**—*Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518; *Gorman v. Minneapolis, etc., R. Co.*, 117 Iowa 720; *Nye v. Dutton*, 187 Mass. 549; *Wendler v. Red Wing Gas, etc., Co.*, 92 Minn. 122; *Nelson v. Kelso*, 91 Minn. 77; *McManus v. Davitt*, 94 N. Y. App. Div. 481; *Wagner v. Portland*, 40 Oregon 392; *Morancy v. Hennessey*, 24 R. I. 205.

**Rule as Affected by Minority of Servant.**—*Kiser v. Hot Springs Barytes Co.*, 131 N. Car. 595.

**100. 1. Assumption of Risk After Instruction.**—*Vinson v. Morning News*, 118 Ga. 655; *Lobstein v. Sajatovich*, 111 Ill. App. 654; *Smith v. Foster*, 93 Ill. App. 138; *Davis v. Port Huron Engine, etc., Co.*, 126 Mich. 429; *Cron v. Toledo, etc., R. Co.*, 132 Mich. 497; *Detroit Leg. N. 704*; *Evans Laundry Co. v. Crawford*, 67 Neb. 153; *Webb v. Haynes*, 75 N. Y. App. Div. 620; *Hoppe v. Parmalee*, 11 Ohio Cir. Dec. 24, 20 Ohio Cir. Ct. 303. See *Hitchcock v. Railway Transfer Co.*, 81 Minn. 352.

**2. Proximate Cause of Injury.**—*Doolittle v. Pfaff*, 92 Ill. App. 301; *Ward v. Connor*, 182 Mass. 170; *Clark v. Missouri, etc., R. Co.*, 179 Mo. 66; *Rogers v. Meyerson Printing Co.*, 103

Mo. App. 683; *Fronk v. J. H. Evans City Steam Laundry*, (Neb. 1903) 96 N. W. Rep. 1053; *Carr v. Manchester Electric Co.*, 70 N. H. 308; *O'Brien v. Buffalo Furnace Co.*, 68 N. Y. App. Div. 451; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604.

**3. Knowledge of Servant's Inexperience.**—Evidence to show that the plaintiff was inexperienced and that the master or his representative knew it is admissible. *Alabama Steel, etc., Co. v. Wrenn*, 136 Ala. 475.

**4. Instruction of Other Employees.**—See *Virginia Iron, etc., Co. v. Tomlinson*, (Va. 1905) 51 S. E. Rep. 362.

**101. 1. Master Must Adopt Rules**—*United States.*—*Baltimore, etc., R. Co. v. Doty*, (C. C. A.) 133 Fed. Rep. 866, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101; *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333; *Cowen v. Ray*, (C. C. A.) 108 Fed. Rep. 320.

*Iowa.*—*Lanza v. Le Grand Quarry Co.*, 124 Iowa 659, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101.

*Kansas.*—*Griffin Wheel Co. v. Stanton*, 70 Kan. 762.

*Maine.*—*Moran v. Rockland, etc., St. R. Co.*, 99 Me. 127.

*Minnesota.*—*Scott v. Eastern R. Co.*, 90 Minn. 143; *Wallin v. Eastern R. Co.*, 83 Minn. 149.

*Missouri.*—*Poindexter v. Benedict Paper Co.*, 84 Mo. App. 352.

*New Hampshire.*—*Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936; *Wallace v. Boston, etc., R. Co.*, 72 N. H. 504.

*New York.*—*Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1, reversing 70 N. Y. App. Div. 495; *Burns v. Palmer*, 107 N. Y. App. Div. 321; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Tully v. New York, etc., Steamship Co.*, 10 N. Y. App. Div. 463, affirmed without opinion 162 N. Y. 614; *Hosford v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 327, affirmed without opinion 161 N. Y. 660; *Lane v. New York Cent., etc., R. Co.*, 107 N. Y. App. Div. 166; *Shannon v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 349; *Smith v. Lidgerwood Mfg. Co.*, 56 N. Y. App. Div. 528.

*Ohio.*—*Kracht v. Lake Shore, etc., R. Co.*, 25 Ohio Cir. Ct. 521.

*Pennsylvania.*—*O'Rourke v. Alphons Custodis Chimney Constr. Co.*, 21 Pa. Super. Ct. 52.

*Texas.*—*Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; *Proffitt v. Missouri, etc., R. Co.*, 95 Tex. 593.

*Utah.*—*Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Smith v. Centennial Eureka*

**102.** (b) *Limitation of Rule.* — See notes 1, 2, 3, 5, 7.

(2) *Where Business Is Not Complex or Dangerous.* — See note 8.

b. DUTY OF MASTER TO PROMULGATE RULES — (1) *In General.*

— See note 9.

**103.** (2) *What Notice Sufficient.* — See notes 1, 3, 5.

c. DUTY OF MASTER TO ENFORCE RULES. — See note 6.

Min. Co., 27 Utah 307; *Boyle v. Union Pac. R. Co.*, 25 Utah 420.

*Virginia.* — *Virginia Iron, etc., Co. v. Lore*, (Va. 1905) 51 S. E. Rep. 371; *Wright v. Southern R. Co.*, 101 Va. 36.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91.

*Wisconsin.* — *Bain v. Northern Pac. R. Co.*, 120 Wis. 412.

In *Delaware* it has been said that it is the duty of the master to make and promulgate proper rules for the government of his servants and business whenever this is so large or complicated as to make his personal supervision impracticable. *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.

A master is under no obligation to make and promulgate rules for the government of his servants and business where the business is not so large or complicated as to make his personal supervision impracticable. *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544.

**Rules for Signaling During Switching.** — A railroad company owes its employees the duty of establishing and promulgating rules and regulations for signaling to engineers of switch engines in a yard where there are many tracks, and where two or more engines are employed near each other at night, so that the engineers may be able to distinguish the signals intended for them respectively. *Louisville, etc., R. Co. v. York*, 128 Ala. 305.

**102. 1. What Degree of Care Necessary.** — *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129; *Ehrenfried v. Lackawanna Iron, etc., Co.*, 89 N. Y. App. Div. 130, affirmed without opinion 180 N. Y. 515; *Kapella v. Nichols Chemical Co.*, 83 N. Y. App. Div. 45; *Wagner v. New York, etc., R. Co.*, 76 N. Y. App. Div. 552; *Wagner v. Portland, 40 Oregon 392*; *Johnson v. Portland Stone Co.*, 40 Oregon 436; *Merchants, etc., Oil Co. v. Burns*, 96 Tex. 573, reversing (Tex. Civ. App. 1903) 72 S. W. Rep. 626.

**Obvious Dangers.** — It has been said, in effect, that where the dangers connected with the performance of a particular task are open and obvious a rule for the government of the employees in performing the particular work is not necessary. *Austin v. Fisher Tanning Co.*, 96 N. Y. App. Div. 550.

**2. Only Ordinary Care Essential.** — *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659, citing 20 AM. AND ENCYC. OF LAW (2d ed.) 102; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138; *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1, reversing 70 N. Y. App. Div. 495; *Johnson v. Prince Line*, 104 N. Y. App. Div. 157; *Dooling v. Deutscher Verein*, 97 N. Y. App. Div. 39; *Koszlowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40; *Johnson v. Portland Stone Co.*, 40 Oregon 436; *Mer-*

*chants, etc., Oil Co. v. Burns*, 96 Tex. 573, reversing (Tex. Civ. App. 1903) 72 S. W. Rep. 626.

Where a railroad has established and promulgated rules relating to the management of its trains and the government of its employees, and such rules have been uniformly enforced, and it appears that had the rules been followed no accident would have occurred, such railroad is not guilty of negligence because of its failure to promulgate other or additional rules. *Shannon v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 349.

**3. Failure to Make Rules Not Practicable or Useful, Not Negligence.** — *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170, 10 Detroit Leg. N. 129; *Corcoran v. New York, etc., R. Co.*, 77 N. Y. App. Div. 505; *Corcoran v. New York, etc., R. Co.*, 58 N. Y. App. Div. 606. See *Smith v. Lidgerwood Mfg. Co.*, 56 N. Y. App. Div. 528.

**5. Practice of Other Companies.** — *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1.

**7. When a Question for Jury.** — *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1; *Lane v. New York Cent., etc., R. Co.*, 93 N. Y. App. Div. 40.

**8. Rules Unnecessary Where Work Not Dangerous.** — *Deye v. Lodge, etc., Mach. Tool Co.*, (C. C. A.) 137 Fed. Rep. 480; *Olsen v. North Pac. Lumber Co.*, (C. C. A.) 119 Fed. Rep. 77; *Boyer v. Eastern R. Co.*, 87 Minn. 367; *Quigley v. Levering*, 167 N. Y. 58, affirming 50 N. Y. App. Div. 354.

**9. Employees Must Have Reasonable Opportunity to Ascertain.** — *Weeks v. Scharer*, (C. C. A.) 129 Fed. Rep. 333; *Daubert v. Western Meat Co.*, 135 Cal. 144; *Moran v. Rockland, etc., St. R. Co.*, 99 Me. 127; *Humphries v. Raritan Copper Works*, (N. J. 1905) 60 Atl. Rep. 62; *Quinn v. Brooklyn Heights R. Co.*, 91 N. Y. App. Div. 489; *Springs v. Southern R. Co.*, 130 N. Car. 186; *Wright v. Southern R. Co.*, 101 Va. 36.

**103. 1. Knowledge of Rule from Any Source Sufficient.** — *Moran v. Rockland, etc., St. R. Co.*, 99 Me. 127.

**3. Notices Posted in Conspicuous Places.** — Compare *Himrod Coal Co. v. Clark*, 197 Ill. 514, affirming 99 Ill. App. 332.

**5. Reasonable Opportunity to Know Equivalent to Knowledge.** — *Moeller v. Delaware, etc., R. Co.*, 55 N. Y. App. Div. 636, appeal dismissed without opinion 172 N. Y. 644.

**6. Reasonable Care and Vigilance in Enforcement Necessary.** — *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 169; *International, etc., R. Co. v. Vanlandingham*, (Tex. Civ. App. 1905) 85 S. W. Rep. 847; *Missouri, etc., R. Co. v. Gearheart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 325; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Wright v. Southern R. Co.*, 101 Va. 36.

**104.** See note 1.*d.* REASONABLENESS OF RULES. — See notes 2, 3, 4.*e.* SUFFICIENCY OF RULES. — See notes 7, 8.**105.** *f.* DUTY OF SERVANT TO OBEY RULES — (1) *Statement of Rule.*  
— See note 2.**104. 1. Master Not an Insurer of Observance.** — *Reberk v. Horne, etc., Co.*, 85 Minn. 326; *Clark v. Manhattan R. Co.*, 77 N. Y. App. Div. 284.**2. Rules May Be Oral.** — *Lake Shore, etc., R. Co. v. Whidden*, 23 Ohio Cir. Ct. 85.**3. Impossible or Impracticable Rules Not Binding.** — *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Le Duc v. Northern Pac. R. Co.*, 92 Minn. 287.**Rules in Effect Exempting Master from Liability for Negligence.** — *Consolidated Coal Co. v. Lundak*, 196 Ill. 594, *affirming* 97 Ill. App. 109.**4. Reasonableness of Rules Question of Law.** — *Scott v. Eastern R. Co.*, 90 Minn. 143. *Compare Texas Cent. R. Co. v. Yarbro*, 32 Tex. Civ. App. 246.**Construction of Rules a Question of Law.** — *Denver, etc., R. Co. v. Maydole*, 33 Colo. 150.**7. Whether Sufficiency of Rules a Question for Jury.** — *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1, *reversing* 70 N. Y. App. Div. 495.**8. See Rosney v. Erie R. Co., (C. C. A.)** 135 Fed. Rep. 311; *Ward v. Manhattan R. Co.*, 95 N. Y. App. Div. 437.**105. 2. Disobedience of Reasonable Rules Contributory Negligence** — *United States*. — *Erie R. Co. v. Kane, (C. C. A.)* 118 Fed. Rep. 223; *Canadian Pac. R. Co. v. Elliott, (C. C. A.)* 137 Fed. Rep. 904; *Southern R. Co. v. Craig, (C. C. A.)* 113 Fed. Rep. 76.*Delaware.* — *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80.*Georgia.* — *Atlanta R., etc., Co. v. Bennett*, 115 Ga. 879; *Central of Georgia R. Co. v. McWhorter*, 115 Ga. 476; *Binion v. Georgia Southern, etc., R. Co.*, 115 Ga. 530.*Illinois.* — *Chicago, etc., R. Co. v. Myers*, 95 Ill. App. 578.*Kentucky.* — *Louisville, etc., R. Co. v. Hiltner*, 60 S. W. Rep. 2, 22 Ky. L. Rep. 1141.*Louisiana.* — *Moore v. St. Louis, etc., R. Co.*, (La. 1905) 38 So. Rep. 913.*Michigan.* — *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 10 Detroit Leg. N. 185; *Nichols v. Chicago, etc., R. Co.*, 125 Mich. 394, 7 Detroit Leg. N. 558.*Minnesota.* — *Scott v. Eastern R. Co.*, 90 Minn. 143, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *Kerrigan v. Chicago, etc., R. Co.*, 86 Minn. 407; *Green v. Brainerd, etc., R. Co.*, 85 Minn. 318; *Turrittin v. Chicago, etc., R. Co.*, (Minn. 1905) 104 N. W. Rep. 225; *Burris v. Minneapolis, etc., R. Co.*, (Minn. 1905) 103 N. W. Rep. 717; *Hjelm v. Western Granite Contracting Co.*, 94 Minn. 169; *Nordquist v. Great Northern R. Co.*, 89 Minn. 485.*Nebraska.* — *Chicago, etc., R. Co. v. Healey*, (Neb. 1904) 97 N. W. Rep. 1024.*New York.* — *Shannon v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 349; *Kilkin v. New York Cent., etc., R. Co.*, 76 N. Y. App. Div. 529, *affirmed* without opinion 177 N. Y. 566; *Frounfelker v. Delaware, etc., R. Co.*, 74N. Y. App. Div. 224; *Mohr v. Lehigh Valley R. Co.*, 55 N. Y. App. Div. 176; *Moeller v. Delaware, etc., R. Co.*, 55 N. Y. App. Div. 636, *appeal dismissed* without opinion 172 N. Y. 644; *Dickescheid v. Betz*, 80 N. Y. App. Div. 8, *affirmed* without opinion 176 N. Y. 611.*North Carolina.* — *Howard v. Southern R. Co.*, 131 N. Car. 829, *petition to rehear dismissed* 132 N. Car. 709; *Holland v. Seaboard Air Line R. Co.*, 137 N. Car. 368.*Ohio.* — *Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. 459. *Compare Gamble v. Akron, etc., R. Co.*, 63 Ohio St. 352.*South Carolina.* — *Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 242.*Texas.* — *Quinn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 395; *Texas, etc., R. Co. v. Fields*, 32 Tex. Civ. App. 414; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551; *Texas, etc., R. Co. v. Maupin*, 26 Tex. Civ. App. 385. *See Galveston, etc., R. Co. v. Brown*, 95 Tex. 2; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928; *Horton v. Ft. Worth Packing, etc., Co.*, 33 Tex. Civ. App. 150. *Compare Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *International, etc., R. Co. v. Vanlandingham*, (Tex. Civ. App. 1905) 85 S. W. Rep. 847.*Utah.* — *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307. *Compare Merrill v. Oregon Short Line R. Co.*, 29 Utah 264.*Virginia.* — *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667.*West Virginia.* — *McCreery v. Ohio River R. Co.*, 49 W. Va. 301.*Canada.* — *Coutlée v. Grand Trunk R. Co.*, 23 Quebec Super. Ct. 242; *Holden v. Grand Trunk R. Co.*, 5 Ont. L. Rep. 301; *Anderson v. Mikado Min. Co.*, 3 Ont. L. Rep. 581. *See Heald v. Wallace*, 109 Tenn. 346.**Time Card.** — It has been held that a card furnished by a railroad company to its engineers and containing a column headed "Minimum time freight trains between stations," but relatively to which there is no rule of the company making it an engineer's duty to regard this minimum time, is not legally binding upon the engineer so as to forfeit the right of his widow to recover, if he, while attempting to run his train between two stations in less than the time given in the column mentioned, is killed by the negligence of his co-employees. *Central of Georgia R. Co. v. Vining*, 116 Ga. 284.**Violation of Rules Not Negligence Per Se.** — *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; *Missouri, etc., R. Co. v. Bodie*, 32 Tex. Civ. App. 168; *Texas Cent. R. Co. v. Yarbro*, 32 Tex. Civ. App. 246; *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App. 496; *Gulf, etc., R. Co. v. Cornell*, 29 Tex. Civ. App. 596; *Missouri, etc., R. Co. v. Follin*, 29 Tex. Civ. App. 512; *Missouri, etc., R. Co. v. May-*

**106.** Disobedience Must Be Proximate Cause. — See note 1.

**107.** (2) *Waiver of Disobedience to Rules by Master* — (a) In General. — See note 1.

Necessity of Knowledge or Notice. — See note 2.

Either Actual or Constructive Notice. — See notes 5, 6.

**108.** (b) Knowledge of or Notice to What Officer Binds Master. — See notes 2, 3.

*g.* FAILURE TO ADOPT AND ENFORCE RULES MUST BE PROXIMATE CAUSE OF INJURY. — See note 4.

*h.* EVIDENCE IN ACTIONS FOR INJURIES — (1) *Necessity, Existence, and Sufficiency of Rules.* — See notes 5, 6.

**109.** (2) *Servant's Knowledge of Rules.* — See notes 3, 4, 5.

(3) *Waiver of Obedience to Rules.* — See notes 6, 7.

field, 29 Tex. Civ. App. 477; Missouri, etc., R. Co. v. Pawkett, 28 Tex. Civ. App. 583; Texas, etc., R. Co. v. Mortensen, 27 Tex. Civ. App. 106.

**106.** 1. Disobedience Must Be Proximate Cause of Injury. — Gamble v. Akron, etc., R. Co., 63 Ohio St. 352.

**107.** 1. Effect of Disobedience to Rule Abrogated. — Canadian Pac. R. Co. v. Elliott, (C. C. A.) 137 Fed. Rep. 904; Tullis v. Lake Erie, etc., R. Co., (C. C. A.) 105 Fed. Rep. 554; Louisville, etc., R. Co. v. Hiltner, 60 S. W. Rep. 2, 22 Ky. L. Rep. 1141; Brady v. New York, etc., R. Co., 184 Mass. 225; Turrittin v. Chicago, etc., R. Co., (Minn. 1905) 104 N. W. Rep. 225; Cleveland, etc., R. Co. v. Ullom, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512; International, etc., R. Co. v. Jacobs, (Tex. Civ. App. 1904) 84 S. W. Rep. 288; Texas Cent. R. Co. v. Yarbrow, 32 Tex. Civ. App. 246; Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70; Sugarland R. Co. v. Archer, (Tex. Civ. App. 1902) 69 S. W. Rep. 430; Missouri, etc., R. Co. v. Mayfield, 29 Tex. Civ. App. 477; Boyle v. Union Pac. R. Co., 25 Utah 420; Merrill v. Oregon Short Line R. Co., 29 Utah 264. Compare St. Louis Southwestern Co. v. Spivey, 97 Tex. 143, reversing (Tex. Civ. App. 1903) 73 S. W. Rep. 973.

**2.** Necessity of Knowledge or Notice. — Erie R. Co. v. Kane, (C. C. A.) 118 Fed. Rep. 223; Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Kopf v. Monroe Stone Co., 133 Mich. 286, 10 Detroit Leg. N. 185; Nichols v. Chicago, etc., R. Co., 125 Mich. 394, 7 Detroit Leg. N. 558; Cleveland, etc., R. Co. v. Ullom, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512; Driver v. Southern R. Co., 103 Va. 650; Anderson v. Mikado Min. Co., 3 Ont. L. Rep. 581.

**5.** Injured Party Must Show Nonenforcement. — Canadian Pac. R. Co. v. Elliott, (C. C. A.) 137 Fed. Rep. 904; Louisville, etc., R. Co. v. Scanlon, 60 S. W. Rep. 643, 22 Ky. L. Rep. 1400.

**6.** Disregard for Length of Time Charges Master with Notice. — Boyle v. Columbian Fire Proofing Co., 182 Mass. 93.

**108.** 2. Compare Carson v. Southern R. Co., 68 S. Car. 55, judgment affirmed Southern R. Co. v. Carson, 194 U. S. 136.

**3.** Conductors and Engineers. — The knowledge of a conductor and an engineer that firemen in a certain yard cleaned their engines while in motion has been held to be insufficient to charge the railroad company with notice of the custom. Erie R. Co. v. Kane, (C. C. A.) 118 Fed. Rep. 223.

**4.** Failure to Adopt Must Be Proximate Cause. — Griffin Wheel Co. v. Stanton, 70 Kan. 762; Murphy v. Milliken, 84 N. Y. App. Div. 582; Crawford v. New York, etc., R. Co., 23 Ohio Cir. Ct. 207.

**5.** Adoption of Rules by Other Companies. — See Wagner v. Portland, 40 Oregon 392. Compare Devoe v. New York Cent., etc., R. Co., 174 N. Y. 1, reversing 70 N. Y. App. Div. 495.

**6.** Parol Evidence. — Florida Cent., etc., R. Co. v. Mooney, 45 Fla. 286. See Devoe v. New York Cent., etc., R. Co., 174 N. Y. 1, reversing 70 N. Y. App. Div. 495; Missouri, etc., R. Co. v. Bodie, 32 Tex. Civ. App. 168.

**109.** 3. In a suit against a railway company by an employee, a rule of the company relative to the duty of such employee is admissible in evidence in behalf of the company without first proving that the employee had knowledge of the rule. Such knowledge may be shown either before or after the admission of the rule in evidence. Binion v. Georgia Southern, etc., R. Co., 111 Ga. 878.

**4.** Knowledge of Fellow Servant. — Springs v. Southern R. Co., 130 N. Car. 186.

**5.** Continued Existence of Rule. — Frounfelker v. Delaware, etc., R. Co., 74 N. Y. App. Div. 224.

**6.** Waiver of Rule — Habitual Violation. — Compare Clark v. Manhattan R. Co., 77 N. Y. App. Div. 284.

It has been said that proof of habitual violation by others in the same line of employment is admissible as affecting the question of ordinary care. The theory is that although the employee at the time of taking employment was given such a rule and promised to obey it, yet by its subsequent and habitual violation by others, he is led to the belief that it has been abrogated. Chicago, etc., R. Co. v. Myers, 95 Ill. App. 578.

On an issue whether a rule of a railway company, which it claimed an employee had expressly contracted to observe, had been rescinded or abrogated by general nonobservance on the part of its employees, with knowledge or acquiescence of the company, it was error for the court to refuse to instruct the jury, when duly requested by the company so to do, that they should not consider such nonobservance occurring prior to the date of the contract. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83.

**7.** In a suit for damages against a railroad company by one of its brakemen, where the defense relied upon by the company was that the plaintiff's injuries were caused by his disregard

**109.** (4) *Presumptions.* — See note 8.

**110.** 3. *Assumption of Risks by Servant* — *a.* RISKS ORDINARILY INCIDENT TO SERVICE. — See note 1.

of a rule of the company, of which he had notice and by which he was bound, and which required him to use a "stick" in making all couplings, evidence that the conductor in charge of the train at the time the injuries were received, and other conductors of the defendant company under whom the plaintiff worked, knew that he had no "stick," was properly excluded, there being nothing to impute such knowledge of the conductors to the defendant so as to give rise to the presumption that by acquiescence in the violation of the rule the company had consented to its abrogation. *Binion v. Georgia Southern, etc., R. Co.*, 118 Ga. 282.

**109.** 8. *Presumption that Master Has Discharged His Duty.* — *Rosney v. Erie R. Co.*, (C. C. A.) 135 Fed. Rep. 311.

*Presumption as to Adoption of Rules.* — It has been held that when the plaintiff relies upon the absence of rules as a basis of the charge of negligence, the burden is upon him to prove affirmatively the want of such rules, since the presumption is that such rules as were necessary were prescribed. *Hill v. Boston, etc., R. Co.*, 72 N. H. 518; *Smith v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 359; *Corcoran v. New York, etc., R. Co.*, 58 N. Y. App. Div. 606.

*Presumption for Collision.* — In an action to recover for the death of a locomotive engineer in the defendant's service, caused by a collision between trains, it was held that a presumption of negligence arose from the fact of the collision. *Stewart v. Raleigh, etc., Air Line R. Co.*, 137 N. Car. 687. But see *Holland v. Seaboard Air Line R. Co.*, 137 N. Car. 368.

**110.** 1. *Risks Ordinarily Incident to Service* — *United States.* — *Northern Pac. R. Co. v. Dixon*, (C. C. A.) 139 Fed. Rep. 737; *Deye v. Lodge, etc., Mach. Tool Co.*, (C. C. A.) 137 Fed. Rep. 480; *Florence, etc., R. Co. v. Whipps*, (C. C. A.) 138 Fed. Rep. 13; *Southern Pac. R. Co. v. Gloyd*, (C. C. A.) 138 Fed. Rep. 388; *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495; *Crawford v. American Steel, etc., Co.*, (C. C. A.) 123 Fed. Rep. 275; *Sievers v. Eyre*, 122 Fed. Rep. 734; *The Troy*, 121 Fed. Rep. 901; *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745.

*Colorado.* — *Greeley v. Foster*, 32 Colo. 292.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Crocker v. Pusey, etc., Co.*, 3 Penn. (Del.) 1; *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

*Georgia.* — *Wrightsville, etc., R. Co. v. Lättimore*, 118 Ga. 581.

*Illinois.* — *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, *affirming* 115 Ill. App. 209; *Chicago, etc., R. Co. v. White*, 209 Ill. 124; *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273; *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 110; *Slack v. Harris*, 200 Ill. 96; *O'Donnell v. Ar-*

*mour Curled Hair Works*, 111 Ill. App. 516; *Mobile, etc., R. Co. v. Healy*, 109 Ill. App. 531; *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 403; *Illinois Cent. R. Co. v. Satkowski*, 107 Ill. App. 524; *Ewald v. Michigan Cent. R. Co.*, 107 Ill. App. 294; *Moster v. Terminal R. Assoc.*, 106 Ill. App. 494; *Middendorf v. Schulze*, 105 Ill. App. 221; *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76; *Harte v. Fraser*, 104 Ill. App. 201; *Baltimore, etc., R. Co. v. Greer*, 103 Ill. App. 448; *Dolese, etc., R. Co. v. Schultz*, 101 Ill. App. 569; *American Malting Co. v. Lelivelt*, 101 Ill. App. 320; *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175; *Mattson v. Qualey Constr. Co.*, 90 Ill. App. 260.

*Indiana.* — *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, *reversing* (Ind. App. 1903) 66 N. E. Rep. 1016; *Stone v. Bedford Quarries Co.*, 156 Ind. 432; *Baltimore, etc., R. Co. v. Roberts*, 161 Ind. 1; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281; *Chicago, etc., Stone Co. v. Nelson*, 32 Ind. App. 355; *Smallwood v. Bedford Quarries Co.*, 28 Ind. App. 692; *Bedford Quarries Co. v. Turner*, (Ind. App. 1905) 75 N. E. Rep. 25; *Southern Indiana R. Co. v. Messick*, 35 Ind. App. 676.

*Iowa.* — *Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434; *Shebeck v. National Cracker Co.*, 120 Iowa 414; *Duree v. Chicago, etc., R. Co.*, 118 Iowa 640; *Martin v. Chicago, etc., R. Co.*, 118 Iowa 148, 96 Am. St. Rep. 371; *Martin v. Chicago, etc., R. Co.*, (Iowa 1901) 87 N. W. Rep. 654.

*Kansas.* — *Missouri Pac. R. Co. v. Johnson*, 69 Kan. 721.

*Kentucky.* — *Kentucky Freestone Co. v. McGee*, 118 Ky. 396; *Illinois Cent. R. Co. v. Mercer*, 88 S. W. Rep. 1054, 28 Ky. L. Rep. 3; *Wilson v. Chess, etc., Co.*, 117 Ky. 567.

*Maine.* — *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; *Withee v. Somerset Traction Co.*, 98 Me. 61.

*Maryland.* — *Maryland Telephone, etc., Co. v. Cloman*, 97 Md. 620; *Skinner v. McLaughlin*, 94 Md. 524, 51 Atl. Rep. 98.

*Massachusetts.* — *Fearn v. New York Cent., etc., R. Co.*, 186 Mass. 529; *Donovan v. American Linen Co.*, 180 Mass. 127; *McClusky v. Garfield, etc., Coal Co.*, 180 Mass. 115; *Hall v. Wakefield, etc., St. R. Co.*, 178 Mass. 98.

*Michigan.* — *Willis v. Besser-Churchill Co.*, 126 Mich. 659, 8 Detroit Leg. N. 199.

*Minnesota.* — *Gittens v. William Porten Co.*, 90 Minn. 512; *Boyer v. Eastern R. Co.*, 87 Minn. 367; *McKenney v. Chicago, etc., R. Co.*, 92 Minn. 508, *judgment affirmed* on rehearing 92 Minn. 513; *Schus v. Powers-Simpson Co.*, 85 Minn. 447.

*Missouri.* — *Clark v. Missouri, etc., R. Co.*, 179 Mo. 66; *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *Curtis v. McNair*, 173 Mo. 270; *Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106; *Holmes v. Brandenbaugh*, 172 Mo. 53; *Erickson v. Kansas City, etc., R. Co.*, 171 Mo. 647; *Minnier v. Sedalia, etc., R. Co.*, 167 Mo. 99; *Roberts v. Missouri, etc., Telephone Co.*, 166 Mo. 370; *Zeigenmeyer*

*v. Goetz Lime, etc., Co.*, 113 Mo. App. 330; *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Goransson v. Riter-Conley Mfg. Co.*, 186 Mo. 300; *Mathis v. Kansas City Stock Yards Co.*, 185 Mo. 434; *Deckerd v. Wabash R. Co.*, 111 Mo. App. 117; *Smith v. Hammond Packing Co.*, 111 Mo. App. 13; *Deputy v. Chicago, etc., R. Co.*, 110 Mo. App. 110; *Robbins v. Big Circle Min. Co.*, 105 Mo. App. 78; *Beckman v. Anheuser-Busch Brewing Assoc.*, 98 Mo. App. 555; *Cothron v. Cudahy Packing Co.*, 98 Mo. App. 343; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; *Adams v. McCormick Harvesting Mach. Co.*, 95 Mo. App. 111; *Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226; *Zellars v. Missouri Water, etc., Co.*, 92 Mo. App. 107; *Shields v. Kansas City Suburban Belt R. Co.*, 87 Mo. App. 637; *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141; *Stalzer v. Jacob Dold Packing Co.*, 84 Mo. App. 565; *Kane v. St. Louis, etc., R. Co.*, 112 Mo. App. 650; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Gibson v. Midland Bridge Co.*, 112 Mo. App. 594; *Carter v. Baldwin*, 107 Mo. App. 217; *Kelley v. Chicago, etc., R. Co.*, 105 Mo. App. 365; *Weston v. Lackawanna Min. Co.*, 105 Mo. App. 702; *Harrington v. Wabash R. Co.*, 104 Mo. App. 663.

*Montana.*—*Allen v. Bell*, 32 Mont. 69; *McCabe v. Montana Cent. R. Co.*, 30 Mont. 223; *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434.

*Nebraska.*—*Weed v. Chicago, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 827; *Chicago, etc., R. Co. v. Healey*, (Neb. 1904) 97 N. W. Rep. 1024; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456, 65 Neb. 462.

*New Hampshire.*—*Miller v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 360; *Boyce v. Johnson*, 72 N. H. 41; *O'Hare v. Cochecho Mfg. Co.*, 71 N. H. 104, 93 Am. St. Rep. 499; *Story v. Concord, etc., R. Co.*, 70 N. H. 364; *Carr v. Manchester Electric Co.*, 70 N. H. 308.

*New Jersey.*—*Tompkins v. Marine Engine, etc., Co.*, 70 N. J. L. 330; *Dunkerley v. Webendorfer Mach. Co.*, 71 N. J. L. 60; *Murphy v. Rockwell Engineering Co.*, 70 N. J. L. 374; *McDonald v. Standard Oil Co.*, 69 N. J. L. 445; *Durand v. New York, etc., R. Co.*, 65 N. J. L. 656.

*New York.*—*Quigley v. Levering*, 167 N. Y. 58, *affirming* 50 N. Y. App. Div. 354; *Schapiro v. Levy*, 101 N. Y. App. Div. 444; *Riola v. New York Cent., etc., R. Co.*, 97 N. Y. App. Div. 252; *Ryan v. Third Ave. R. Co.*, 92 N. Y. App. Div. 306; *Mullen v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 21; *Gerstner v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 562, *affirmed* without opinion 178 N. Y. 627; *Willidigg v. Knox*, 80 N. Y. App. Div. 390; *Huebner v. Hammond*, 80 N. Y. App. Div. 122, *affirmed* without opinion 177 N. Y. 537; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, 134, note, *affirmed* without opinion 169 N. Y. 579; *Brown v. New York Cent., etc., R. Co.*, 42 N. Y. App. Div. 548, *affirmed* without opinion 166 N. Y. 626; *Tully v. New York, etc., Steamship Co.*, 10 N. Y. App. Div. 463, *affirmed* without opinion 162 N. Y. 614; *Renninger v. New York Cent., etc., R. Co.*, 11 N. Y. App. Div. 565,

*affirmed* without opinion 162 N. Y. 595; *Klos v. Hudson River Ore, etc., Co.*, 77 N. Y. App. Div. 566; *Ward v. Naughton*, 74 N. Y. App. Div. 68; *O'Sullivan v. Flynn*, 67 N. Y. App. Div. 516; *Dolan v. Burden Iron Co.*, 62 N. Y. App. Div. 545; *Griffin v. Ithaca St. R. Co.*, 62 N. Y. App. Div. 551.

*North Carolina.*—*Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546; *Marks v. Harriet Cotton Mills*, 135 N. Car. 287; *Ausley v. American Tobacco Co.*, 130 N. Car. 34; *McDougald v. Lumberton*, 129 N. Car. 200.

*Ohio.*—*Scanlon v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 256; *Frolich v. Cranker*, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615; *Joswoyak v. Lake Shore, etc., R. Co.*, 4 Ohio Dec. (Reprint) 317, 1 Cleve. L. Rep. 306.

*Oklahoma.*—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon.*—*Bowers v. Star Logging, etc., Co.*, 41 Oregon 301; *Sorenson v. Oregon Power Co.*, (Oregon 1905) 82 Pac. Rep. 10; *Tucker v. Northern Pac. Terminal Co.*, 41 Oregon 82; *Johnson v. Portland Stone Co.*, 40 Oregon 436; *Miller v. Inman*, 40 Oregon 161; *Stager v. Troy Laundry Co.*, 38 Oregon 480.

*Pennsylvania.*—*Masteron v. Eldridge*, 208 Pa. St. 242; *Schlemmer v. Buffalo, etc., R. Co.*, 207 Pa. St. 198; *Sanker v. Pennsylvania R. Co.*, 205 Pa. St. 609; *Fricker v. Penn Bridge Co.*, 197 Pa. St. 442; *Benignia v. Pennsylvania R. Co.*, 197 Pa. St. 384; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

*Rhode Island.*—*King v. Interstate Consol. R. Co.*, 23 R. I. 583; *Benson v. New York, etc., R. Co.*, 23 R. I. 147; *Frangiose v. Horton*, 26 R. I. 291.

*South Carolina.*—*Charping v. Foxaway Mills*, 70 S. Car. 470; *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315; *Biggers v. Catawba Power Co.*, 72 S. Car. 264; *Martin v. Royster Guano Co.*, 72 S. Car. 237; *Scott v. Seaboard Air Line R. Co.*, 67 S. Car. 136; *Rosemand v. Southern R. Co.*, 66 S. Car. 91; *Gallman v. Union Hardwood Mfg. Co.*, 65 S. Car. 192; *Youngblood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824; *Hicks v. Southern R. Co.*, (S. Car. 1901) 38 S. E. Rep. 725.

*Tennessee.*—*Heald v. Wallace*, 109 Tenn. 346; *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657.

*Texas.*—*Ray v. Pecos, etc., R. Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 466; *Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; *San Antonio Foundry Co. v. Drish*, (Tex. Civ. App. 1905) 85 S. W. Rep. 440; *Ft. Worth, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 410; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *International, etc., R. Co. v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991, *rehearing denied* (Tex. Civ. App. 1904) 83 S. W. Rep. 34, *reversed* on another point (Tex. 1905) 87 S. W. Rep. 328; *Chicago, etc., R. Co. v. Oldridge*, 33 Tex. Civ. App. 436; *Houston Electric Co. v. Robinson*, (Tex. Civ. App. 1903) 76 S. W. Rep. 209; *Parish v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 234; *Gulf, etc., R. Co. v. Wilder*, 33 Tex. Civ. App. 72; *Missouri, etc., R. Co. v. Schilling*, 32 Tex. Civ.

App. 417; International, etc., *R. Co. v. Cochran*, (Tex. Civ. App. 1902) 71 S. W. Rep. 41; *Hightower v. Gray*, 36 Tex. Civ. App. 674; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551; *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *International, etc., R. Co. v. Story*, 26 Tex. Civ. App. 23; *Roe v. Thomason*, 25 Tex. Civ. App. 67. Compare *Missouri, etc., R. Co. v. Blackman*, 32 Tex. Civ. App. 200.

*Utah*.—*Leach v. Oregon Short Line R. Co.*, 29 Utah 285; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307; *Hone v. Mammoth Min. Co.*, 27 Utah 168; *Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798.

*Vermont*.—*Skinner v. Central Vermont R. Co.*, 73 Vt. 336; *Kilpatrick Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887.

*Virginia*.—*Parlett v. Dunn*, 102 Va. 459; *Big Stone Gap Iron Co. v. Ketrone*, 102 Va. 23, 102 Am. St. Rep. 839; *Black v. Virginia Portland Cement Co.*, (Va. 1905) 51 S. E. Rep. 831; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362; *Gay v. Southern R. Co.*, 101 Va. 466; *Southern R. Co. v. Mauzy*, 98 Va. 692, 2 Va. Sup. Ct. 575.

*Washington*.—*Smith v. Hecla Min. Co.*, 38 Wash. 454; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241; *Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

*West Virginia*.—*Cochran v. Shanahan*, 51 W. Va. 137; *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91; *Richards v. Riverside Iron Works*, 56 W. Va. 510.

*Wisconsin*.—*Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885; *Hocking v. Windsor Spring Co.*, 125 Wis. 575.

*Canada*.—*Sparano v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 292; *Dugal v. Peoples Bank*, 34 N. Bruns. 581.

**Negligence of Fellow Servants.**—See the title FELLOW SERVANTS, vol. 12, p. 902, note 4.

When the employer, or those representing him, has provided a place which is reasonably safe in itself, and has furnished reasonably safe tools and appliances and reasonably competent fellow workmen, then the risk incident to the progress of the work as carried on by the employees is assumed by virtue of the employment, and for an injury received in the prosecution of the work in such place with such appliances and in connection with such fellow workmen the employee cannot recover from the employer. *McQueeney v. Chicago, etc., R. Co.*, 120 Iowa 522.

It has been said that a servant impliedly assumes the risks and hazards incident to the service he contracts to render, and, in the absence of knowledge to the contrary, an employer may assume, as between the master and the servant, that one applying for a particular employment possesses the skill and judgment requisite to the safe and proper performance of his duty. *Felton v. Girardy*, (C. C. A.) 104 Fed. Rep. 127.

**Infant Employees.**—The rule of the assumption of the ordinary risks incident to an em-

ployment applies to infants as well as adults. *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

But it has been held that, under the *New York* law (N. Y. Laws 1897, p. 477, c. 415) prohibiting the employment of children under the age of fourteen years in factories, a child under the prescribed age cannot be held to have assumed the risk of an employment contrary to the statute. *Lee v. Sterling Silk Mfg. Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 182. See *Sitts v. Waiontha Knitting Co.*, 94 N. Y. App. Div. 38.

**Negligence of Fellow Servants.**—One who enters the service of another assumes all the ordinary risks and dangers of that service, and one of those risks is the danger of injury from the negligence of fellow servants. *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272.

**Limitation of the Rule.**—The doctrine in regard to the assumption of risk by an employee applies only to the natural and ordinary risks incident to the work in which the servant is engaged. *Landgraf v. Kuh*, 188 Ill. 484; *Wabash R. Co. v. Bhymer*, 112 Ill. App. 225, reversed on other points 214 Ill. 579.

It has been said that "it is only such injuries as have arisen after the exercise of that diligence and care on the part of the master, that can properly be termed accidents or casualties which the servant has impliedly agreed to risk, and for which the master is not liable." *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319.

"An employee does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment." *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558, affirming 106 Ill. App. 21; *Malott v. Hood*, 201 Ill. 202, affirming 99 Ill. App. 360; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, affirming 112 Ill. App. 463.

It cannot be said that danger from branches of trees which a railroad company permits to hang over its tracks so low that they come in contact with employees while engaged in their duties on the tops of the cars is a danger incident to the service. *Pittsburgh, etc., R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120.

**Incompetency of Fellow Servants.**—The wrongful employment of incompetent fellow servants is not one of the common and obvious hazards assumed by a servant. *Hall v. Bedford Quarries Co.*, 156 Ind. 460.

**Negligence of Other Servants Who Are Not Fellow Servants.**—A servant does not assume the risk of a negligent manner of doing the work by other servants who are not his fellow servants unless it is customary to do the work in that manner. The risk of such an act is not one of the usual or ordinary hazards of the employment. *Chicago, etc., R. Co. v. White*, 209 Ill. 124.

**111.** See note 1.

**112.** *b.* PATENT AND OBVIOUS DEFECTS AND DANGERS — (1) *General Rule.* — See note 1.

**Convict Laborers.** — The doctrine of assumption of risks does not apply to convicts who are leased out by the state without their consent and without their free will being exercised in the matter. *Simonds v. Georgia Iron, etc., Co.*, 133 Fed. Rep. 776, *affirmed* without opinion (C. C. A.) 133 Fed. Rep. 1019.

**Previous Happening of Similar Accident.** — The question whether an accident or injury is included in the risks of the employment is to be determined from the question whether it is an accident or injury liable to issue in the ordinary prosecution of the business, and it is not necessary to the assumption of such risks that the same accident should have happened before. *Chicago, etc., R. Co. v. White*, 209 Ill. 124.

**114. 1. Risks Incident to Slacking Time.** — *Roessler, etc., Chemical Co. v. Peterson*, (C. C. A.) 134 Fed. Rep. 789.

**Lineman — Falling of Decayed and Weak Poles.** — *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475.

**Risks Incident to Duties of Flagman.** — A flagman in the employ of a railroad company assumes the risks ordinarily incident to his crossing the tracks in going to and from work. *O'Neil v. Pittsburg, etc., R. Co.*, 130 Fed. Rep. 204.

**Injuries to Track Hands, Section Hands, or Laborers.** — As a general rule, section men assume the risks of being injured by approaching trains. *Murren v. Chicago, etc., R. Co.*, 86 Minn. 470.

**Passing of Train at High Speed Without Signal or Whistle.** — *Chicago, etc., R. Co. v. Wild*, 109 Ill. App. 38.

**Basis of Doctrine of Assumption of Risks.** — The doctrine of assumption of risks is placed by the authorities and sustained upon two grounds. The first ground is the maxim *Volenti non fit injuria*. A servant is not compelled to begin or to continue to work for his master. Ordinarily, he does not work for him under a contract for a stated time. He is at liberty to retire from his employment, and his master is free to discharge him, at any time. The latter constantly offers him day by day his wages, his place to work, and the appliances which he is to use. The former day by day voluntarily accepts them. By the continuing acceptance of the work and the wages, he voluntarily accepts and assumes the risk of the defects and dangers which a person of ordinary prudence in his place would have known. No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur. The second ground upon which assumption of risk is based is that every servant who enters or continues in the employment of a master without complaint thereby either expressly or impliedly agrees with him to assume the risks and dangers incident to the employment which a person of ordinary prudence in his situation would have known by the exercise of ordinary diligence and care, and to hold his master free

from liability therefor. Thus, a master employs a servant to tear down or repair a building that is obviously in danger of falling upon the workman. The latter perceives the dangerous character of the place, and agrees upon the wages he will accept to perform it. The building falls upon and injures him. He cannot recover of his employer, because he willingly assumed the risk. *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495.

**Distinction Between Assumption of Risks and Contributory Negligence.** — Assumption of risks and contributory negligence are separate and distinct defenses. The risks which employees assume by entering and continuing in the service of a master with knowledge of the situation and its dangers, and without complaint, are not limited to those risks the danger from which is so imminent that persons of ordinary prudence would not incur them. The defense of assumption of risks is not conditioned or limited by the existence of contributory negligence, and the latter is not an element or attribute of it. Assumption of risk is alike available whether the risk assumed is great or small, whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger. *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495.

**112 1. Servant Assumes Patent and Obvious Risks** — *United States.* — *Choctaw, etc., R. Co. v. Kolloway*, 191 U. S. 334, *affirming* (C. C. A.) 114 Fed. Rep. 458; *Pittsburgh, etc., R. Co. v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; *Nottingham v. Sawmill Phoenix*, 133 Fed. Rep. 979; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495; *Crawford v. American Steel, etc., Co.*, (C. C. A.) 123 Fed. Rep. 275; *Texas, etc., R. Co. v. Swearingen*, (C. C. A.) 122 Fed. Rep. 193, *affirmed* 196 U. S. 51; *Northern Pac. R. Co. v. Mix*, (C. C. A.) 121 Fed. Rep. 476; *Kenney v. Meddaugh*, (C. C. A.) 118 Fed. Rep. 209; *Terry v. Schmidt*, (C. C. A.) 116 Fed. Rep. 627; *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335; *Volk v. B. F. Sturtevant Co.*, (C. C. A.) 104 Fed. Rep. 276. See *Southern Pac. R. Co. v. Yeargin*, (C. C. A.) 109 Fed. Rep. 436.

*Alabama.* — *Alabama Steel, etc., Co. v. Wrenn*, 136 Ala. 475; *Boyd v. Indian Head Mills*, 131 Ala. 356.

*California.* — *Limberg v. Glenwood Lumber Co.*, 145 Cal. 255.

*Colorado.* — *Iowa Gold Min. Co. v. Diefenthaler*, 32 Colo. 391; *Harvey v. Mountain Pride Gold Min. Co.*, 18 Colo. App. 234.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544.

*District of Columbia.* — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359.



*Georgia*. — Porter v. Ocean Steamship Co., 113 Ga. 1007; Cooper v. Robert Portner Brewing Co., 112 Ga. 894.

*Illinois*. — Illinois Cent. R. Co. v. Smith, 208 Ill. 608; Cichowicz v. International Packing Co., 206 Ill. 346, *affirming* 107 Ill. App. 234; Chicago, etc., R. Co. v. Heerey, 203 Ill. 492; Armour v. Golkowska, 202 Ill. 144, *affirming* 95 Ill. App. 492, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112; Chicago, etc., R. Co. v. Camper, 199 Ill. 569; Browne v. Siegel, 191 Ill. 226, *affirming* 90 Ill. App. 49; Armour v. Brazeau, 191 Ill. 117; Ward v. Daniels, 114 Ill. App. 374; Whalin v. Illinois Cent. R. Co., 112 Ill. App. 428; Stationers' Mfg. Co. v. Benjamin, 109 Ill. App. 96; Illinois Cent. R. Co. v. Brown, 107 Ill. App. 512; Illinois Cent. R. Co. v. Satkowski, 107 Ill. App. 524; Moster v. Terminal R. Assoc., 106 Ill. App. 494; Harte v. Fraser, 104 Ill. App. 201; Anderberg v. Chicago, etc., R. Co., 98 Ill. App. 207; Chicago Edison Co. v. Davis, 93 Ill. App. 284, *affirmed* 195 Ill. 31; Illinois Cent. R. Co. v. Sprieder, 90 Ill. App. 590.

*Indiana*. — Jennings v. Ingle, 35 Ind. App. 153; Shaver v. Home Telephone Co., (Ind. App. 1905) 75 N. E. Rep. 288; American Rolling Mill Co. v. Hullinger, 161 Ind. 673; Braxil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281; Hollingsworth v. Chicago, etc., R. Co., 160 Ind. 259; Bedford Quarries Co. v. Thomas, 29 Ind. App. 85; Stone v. Bedford Quarries Co., 156 Ind. 432; Fletcher Bros. Co. v. Hyde, (Ind. App. 1905) 75 N. E. Rep. 9; Chicago, etc., R. Co. v. Tackett, 33 Ind. App. 379; Baltimore, etc., R. Co. v. Hunsucker, 33 Ind. App. 27; Corning Steel Co. v. Pohlplatz, 29 Ind. App. 250; Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112; Chicago, etc., Stone Co. v. Nelson, 32 Ind. App. 355; Indiana Natural Gas, etc., Co. v. Vauble, 31 Ind. App. 370; Southern Indiana R. Co. v. Moore, 29 Ind. App. 52; Pittsburgh, etc., R. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120; Bodell v. Brazil Block Coal Co., 25 Ind. App. 654.

*Iowa*. — Jacobson v. Smith, 123 Iowa 263; McQueeney v. Chicago, etc., R. Co., 120 Iowa 522; Shebeck v. National Cracker Co., 120 Iowa 414; Branco v. Illinois Cent. R. Co., 119 Iowa 211; Olson v. Hanford Produce Co., 118 Iowa 55; Geesen v. Saguin, 115 Iowa 7.

*Kansas*. — Consolidated Kansas City Smelting, etc., Co. v. Sharber, (Kan. 1905) 81 Pac. Rep. 476; Atchison, etc., R. Co. v. Bancord, 66 Kan. 81; Lanyon Zinc Co. v. Bell, 64 Kan. 739; Walker v. Scott, (Kan. 1901) 64 Pac. Rep. 615; Beal v. Atchison, etc., R. Co. 62 Kan. 250.

*Kentucky*. — Duncan v. Gernert Bros. Lumber Co., 87 S. W. Rep. 762, 27 Ky. L. Rep. 1039; Carey v. Samuels, 88 S. W. Rep. 1052, 28 Ky. L. Rep. 6; Chicago Veneer Co. v. Walden, (Ky. 1904) 82 S. W. Rep. 294; Wilson v. Chess, etc., Co., 117 Ky. 567; Shemwell v. Owensboro, etc., R. Co., 117 Ky. 556; Louisville, etc., R. Co. v. Hall, 115 Ky. 567; Mann v. Moore, 68 S. W. Rep. 402, 24 Ky. L. Rep. 253; Reis v. Struck, 64 S. W. Rep. 729, 23 Ky. L. Rep. 1113; Sandy River Cannel Coal

Co. v. Caudill, 60 S. W. Rep. 180, 22 Ky. L. Rep. 1175.

*Louisiana*. — Welton v. Genesee Lumber Co., 114 La. 842; Neider v. Illinois Cent. R. Co., 108 La. 154; McKinney v. McNeely, 108 La. 27; Merchant v. Pine Woods Lumber Co., 107 La. 463; Moffet v. Koch, 106 La. 371.

*Maine*. — Erickson v. Monson Consol. Slate Co., 100 Me. 107; Babb v. Oxford Paper Co., 99 Me. 298; Caven v. Bodwell Granite Co., 99 Me. 278; Withee v. Somerset Traction Co., 98 Me. 61; Dempsey v. Sawyer, 95 Me. 295.

*Maryland*. — Tkac v. Maryland Steel Co., 101 Md. 179; State v. South Baltimore Car Works, 99 Md. 461; Skinner v. McLaughlin, 94 Md. 524.

*Massachusetts*. — Chisholm v. Donovan, 188 Mass. 378; Taylor v. Boston, etc., R. Co., 188 Mass. 390; Cohen v. Hamblin, etc., Mfg. Co., 186 Mass. 544; Langley v. Wheelock, 181 Mass. 474; Hall v. Wakefield, etc., St. R. Co., 178 Mass. 98; Whalen v. Whitcomb, 178 Mass. 33; Demers v. Marshall, 178 Mass. 9; Meehan v. Holyoke St. R. Co., 186 Mass. 511; Daily v. Fiberloid Co., 186 Mass. 318; Slade v. Beattie, 186 Mass. 267; Archibald v. Cygolf Shoe Co., 186 Mass. 213; Hofnauer v. R. H. White Co., 186 Mass. 47; Kennedy v. Merrimack Paving Co., 185 Mass. 442; Gilgan v. New York, etc., R. Co., 185 Mass. 139; Gavin v. Fall River Automatic Telephone Co., 185 Mass. 78; Archambault v. Archambault, 184 Mass. 274; Arkland v. Taber-Prang Art Co., 184 Mass. 243; Lodi v. Maloney, 184 Mass. 240; Alvey v. American Writing Paper Co., 184 Mass. 234; Wood v. Tileston, etc., Co., 182 Mass. 449; Chmiel v. Thorndike Co., 182 Mass. 112; Dobbins v. Lang, 181 Mass. 397; Bence v. New York, etc., R. Co., 181 Mass. 221; Ladd v. Brockton St. R. Co., 180 Mass. 454; McClusky v. Garfield, etc., Coal Co., 180 Mass. 115; Cushman v. Cushman, 179 Mass. 601; Silvia v. Sagamore Mfg. Co., 177 Mass. 476; Barry v. New York Biscuit Co., 177 Mass. 449; Lamson v. American Axe, etc., Co., 177 Mass. 144, 83 Am. St. Rep. 267; Kelley v. Calumet Woolen Co., 177 Mass. 128; Lemoine v. Aldrich, 177 Mass. 89; Hoard v. Blackstone Mfg. Co., 177 Mass. 69.

*Michigan*. — Carnes v. Guelph Patent Cask Co., (Mich. 1905) 104 N. W. Rep. 322, 12 Detroit Leg. N. 331; Martin v. Detroit Lumber Co., (Mich. 1905) 104 N. W. Rep. 692; Minnie v. Mueller, (Mich. 1905) 103 N. W. Rep. 524; McDonald v. Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; Erickson v. Cummer Mfg. Co., (Mich. 1905) 103 N. W. Rep. 828, 12 Detroit Leg. N. 194; Clark v. Wolverine Portland Cement Co., 138 Mich. 673, 11 Detroit Leg. N. 723; Harrison v. Detroit, etc., R. Co., 137 Mich. 78, 11 Detroit Leg. N. 228; Taylor v. Withington, etc., Mfg. Co., 136 Mich. 652, 11 Detroit Leg. N. 152; Lenderink v. Rockford, 135 Mich. 531, 10 Detroit Leg. N. 832; Kupkofski v. John S. Spiegel Co., 135 Mich. 7, 10 Detroit Leg. N. 640; Bradburn v. Wabash R. Co., 134 Mich. 575, 10 Detroit Leg. N. 592; Miller v. Detroit, etc., R. Co., 133 Mich. 564, 10 Detroit Leg. N. 342; Seecombe v. Detroit Electric R. Co., 133 Mich. 170, 10 Detroit Leg. N. 129; Bauer v. American Car, etc., Co., 132 Mich. 537, 10

Detroit Leg. N. 17; Fischer v. Goldie, 132 Mich. 574, 10 Detroit Leg. N. 29; Cronin v. Russel Wheel, etc., Co., 132 Mich. 500, 9 Detroit Leg. N. 681; Bays v. Warren Featherbone Co., 131 Mich. 205, 9 Detroit Leg. N. 256; Storrs v. Michigan Starch Co., 126 Mich. 666, 8 Detroit Leg. N. 182; Davis v. Port Huron Engine, etc., Co., 126 Mich. 429; Deering v. Canfield, etc., Co., 126 Mich. 373, 8 Detroit Leg. N. 48; Cantwell v. Brennan, 125 Mich. 349, 7 Detroit Leg. N. 543; Shanke v. U. S. Heater Co., 125 Mich. 346, 7 Detroit Leg. N. 530; Kellogg v. Stephens Lumber Co., 125 Mich. 222, 7 Detroit Leg. N. 483.

*Minnesota.*—Hjelm v. Western Granite Contracting Co., 94 Minn. 169; Jensen v. Regan, 92 Minn. 323; Wexler v. Salisbury, 91 Minn. 308; Swenson v. Osgood, etc., Mfg. Co., 91 Minn. 509; Nelson v. Kelso, 91 Minn. 77; Gray v. Commutator Co., 85 Minn. 463; Bartley v. Howell, 82 Minn. 382; Dixon v. Union Iron Works, 90 Minn. 492; Peterson v. American Grass Twine Co., 90 Minn. 343; Hermann v. Clark, 89 Minn. 132; Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407; Blom v. Yellowstone Park Assoc., 86 Minn. 237; Reberk v. Horne, etc., Co., 85 Minn. 326.

*Mississippi.*—Natchez Cotton Mill Co. v. McLain, (Miss. 1903) 33 So. Rep. 723; Truly v. North Lumber Co., 83 Miss. 430.

*Missouri.*—Zeigenmeyer v. Goetz Lime, etc., Co., 113 Mo. App. 330; Mathis v. Kansas City Stock Yards Co., 185 Mo. 434; Harff v. Green, 168 Mo. 308; Roberts v. Missouri, etc., Telephone Co., 166 Mo. 370; Hurst v. Kansas City, etc., R. Co., 163 Mo. 309, 85 Am. St. Rep. 539; McKee v. Chicago, etc., R. Co., 96 Mo. App. 671; Parsons v. Hammond Packing Co., 96 Mo. App. 372; Hester v. Jacob Dold Packing Co., 95 Mo. App. 16; Kleine v. S. E. Friends Sons Shoe, etc., Co., 91 Mo. App. 102; Kane v. St. Louis, etc., R. Co., 112 Mo. App. 650; Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112; Carter v. Baldwin, 107 Mo. App. 217; Harrington v. Wabash R. Co., 104 Mo. App. 663; Bair v. Heibel, 103 Mo. App. 621; Breeden v. Big Circle Min. Co., 103 Mo. App. 176.

*New Hampshire.*—Murphy v. Grand Trunk R. Co., (N. H. 1904) 58 Atl. Rep. 835.

*New Jersey.*—Luckey v. Sofield, (N. J. 1904) 57 Atl. Rep. 870; Dowd v. Erie R. Co., 70 N. J. L. 451; Gill v. National Storage Co., 70 N. J. L. 53; McDonald v. Standard Oil Co., 69 N. J. L. 445; Enright v. Oliver, 69 N. J. L. 357; Green v. Barnes Mfg. Co., 69 N. J. L. 596; Loid v. J. S. Rogers Co., 68 N. J. L. 713; Hesse v. National Casket Co., 66 N. J. L. 652; Durant v. New York, etc., R. Co., 65 N. J. L. 656; Meany v. Standard Oil Co., (N. J. 1900) 47 Atl. Rep. 803.

*New York.*—Kline v. Abraham, 178 N. Y. 377; Riddle v. Forty-second St., etc., R. Co., 173 N. Y. 327; Drake v. Auburn City R. Co., 173 N. Y. 466; Dowd v. New York, etc., R. Co., 170 N. Y. 459, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112; Maltbie v. Belnden, 167 N. Y. 307, reversing 45 N. Y. App. Div. 384; Hutchinson v. Parker, 39 N. Y. App. Div. 133, 134 note, affirmed without opinion 169 N. Y. 579; Renninger v. New York Cent.,

etc., R. Co., 11 N. Y. App. Div. 565, affirmed without opinion 162 N. Y. 595; Baker v. Empire Wire Co., 102 N. Y. App. Div. 125; Karch v. Kipp, (Supm. Ct. App. T.) 90 N. Y. Supp. 404; Austin v. Fisher Tanning Co., 96 N. Y. App. Div. 550; Dooling v. Deutscher Verein, 97 N. Y. App. Div. 39; Loushay v. Erie R. Co., 95 N. Y. App. Div. 102; Ryan v. Third Ave. R. Co., 92 N. Y. App. Div. 306; Mullen v. Metropolitan St. R. Co., 89 N. Y. App. Div. 21; Willdigg v. Knox, 80 N. Y. App. Div. 390; Harvey v. McConchie, 77 N. Y. App. Div. 361, affirmed without opinion 177 N. Y. 569; McCarthy v. Emerson, 77 N. Y. App. Div. 562; Scheir v. Quirin, 77 N. Y. App. Div. 624, affirmed without opinion 177 N. Y. 568; Kilkin v. New York Cent., etc., R. Co., 76 N. Y. App. Div. 529, affirmed without opinion 177 N. Y. 566; Mull v. Curtice Bros. Co., 74 N. Y. App. Div. 561; Kueckel v. O'Connor, 73 N. Y. App. Div. 594; Trapasso v. Coleman, 74 N. Y. App. Div. 33; Di Pietro v. Empire Portland Cement Co., 70 N. Y. App. Div. 501; Rosa v. Volkening, 64 N. Y. App. Div. 426, affirmed without opinion 173 N. Y. 590; Nugent v. Brooklyn Union El. R. Co., 64 N. Y. App. Div. 351; Warszawski v. McWilliams, 64 N. Y. App. Div. 63; Griffin v. Ithaca St. R. Co., 62 N. Y. App. Div. 551; Thompson v. Cary Mfg. Co., 62 N. Y. App. Div. 279; Rohan v. Metropolitan St. R. Co., 59 N. Y. App. Div. 250; Carlson v. Walsh, 56 N. Y. App. Div. 551; Wahl v. Chatillon, 56 N. Y. App. Div. 554; Goodman v. Crystal, 56 N. Y. App. Div. 64; Rice v. New York Cent., etc., R. Co., 55 N. Y. App. Div. 339; Cleary v. Long Island R. Co., 54 N. Y. App. Div. 284.

*North Carolina.*—Jones v. American Warehouse Co., 137 N. Car. 337, 138 N. Car. 546.

*Ohio.*—Pennsylvania Co. v. McCurdy, 66 Ohio St. 118; Scanlon v. Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256.

*Oklahoma.*—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

*Oregon.*—Viohl v. North Pac. Lumber Co., (Oregon 1905) 80 Pac. Rep. 112; Mundhenke v. Oregon City Mfg. Co., (Oregon 1905) 81 Pac. Rep. 977; Wagner v. Portland, 40 Oregon 392; Miller v. Inman, 40 Oregon 161; Stager v. Troy Laundry Co., 38 Oregon 480; Bowers v. Star Logging, etc., Co., 41 Oregon 301.

*Pennsylvania.*—Meixner v. Philadelphia Brewing Co., 210 Pa. St. 597; Michael v. Henry, 209 Pa. St. 213; Masterson v. Eldridge, 208 Pa. St. 242; Simmons v. Southern Traction Co., 207 Pa. St. 589; Nelson v. Oil City St. R. Co., 207 Pa. St. 363; Wilkinson v. H. W. Johns Mfg. Co., 198 Pa. St. 634; Fricker v. Penn Bridge Co., 197 Pa. St. 442; De Grazia v. Piccardo, 15 Pa. Super. Ct. 107; Auburn v. National Tube Works Co., 14 Pa. Super. Ct. 568.

*Rhode Island.*—McLaughlin v. Atlantic Mills, 27 R. I. 158; Smith v. Naushon Co., 26 R. I. 578; Frangiose v. Horton, 26 R. I. 291; Desrosiers v. Bourn, 26 R. I. 6, reargument denied 26 R. I. 156; Durell v. Hartwell, 26 R. I. 125; Paoline v. J. W. Bishop Co., 25 R. I. 298; Morancy v. Hennessy, 24 R. I. 205; Pintorelli v. Horton, 22 R. I. 374.

*South Carolina.*—Biggers v. Catawba Power Co., 72 S. Car. 264.

*Tennessee.*—Ohio River, etc., R. Co. v. Ed-

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wards, 111 Tenn. 31; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236.

*Texas.* — *Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; *St. Louis Southwestern R. Co. v. Rea*, (Tex. 1905) 87 S. W. Rep. 324, *reversing* (Tex. Civ. App. 1904) 84 S. W. Rep. 428; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928; *Missouri, etc., R. Co. v. Barnes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1006; *Ft. Worth, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 410; *Quinn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 395; *International, etc., R. Co. v. Royal*, (Tex. Civ. App. 1904) 83 S. W. Rep. 713; *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *Sauls v. Chicago, etc., R. Co.*, 36 Tex. Civ. App. 155; *Tucker v. National Loan, etc., Co.*, 35 Tex. Civ. App. 474; *Ft. Worth Stock Yards Co. v. Whittenburg*, 34 Tex. Civ. App. 163; *Seery v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 89; *Hettich v. Hillje*, 33 Tex. Civ. App. 571; *Chicago, etc., R. Co. v. Oldridge*, 33 Tex. Civ. App. 436; *Galveston, etc., R. Co. v. Walker*, (Tex. Civ. App. 1903) 76 S. W. Rep. 228; *Horton v. Ft. Worth Packing, etc., Co.*, 33 Tex. Civ. App. 150; *Houston Electric Co. v. Robinson*, (Tex. Civ. App. 1903) 76 S. W. Rep. 209; *Texas, etc., R. Co. v. Peden*, 32 Tex. Civ. App. 315; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; *Rea v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 555; *St. Louis Southwestern R. Co. v. Barrett*, (Tex. Civ. App. 1903) 72 S. W. Rep. 884; *St. Louis Southwestern R. Co. v. Austin*, (Tex. Civ. App. 1903) 72 S. W. Rep. 212; *Houston v. Owen*, (Tex. Civ. App. 1902) 67 S. W. Rep. 788; *Rio Grande, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 66 S. W. Rep. 712; *Hilje v. Hettich*, 95 Tex. 321, *reversing* (Tex. Civ. App. 1901) 65 S. W. Rep. 491; *Houston, etc., R. Co. v. Scott*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1077; *Brown v. Miller*, (Tex. Civ. App. 1901) 62 S. W. Rep. 547; *Lantry v. Lowrie*, (Tex. Civ. App. 1900) 58 S. W. Rep. 837; *Hightower v. Gray*, 36 Tex. Civ. App. 674; *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135; *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65; *Webb v. Gulf, etc., R. Co.*, 27 Tex. Civ. App. 75; *International, etc., R. Co. v. Story*, 26 Tex. Civ. App. 23; *Gulf, etc., R. Co. v. Gray*, 25 Tex. Civ. App. 99.

*Utah.* — *Leach v. Oregon Short Line R. Co.*, 29 Utah 285; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Dunn v. Oregon Short Line R. Co.*, 28 Utah 478; *Christianson v. Rio Grande Western R. Co.*, 27 Utah 132; *Ohlenkamp v. Union Pac. R. Co.*, 24 Utah 232; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437.

*Vermont.* — *McKane v. Marr*, 77 Vt. 7; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887; *Skinner v. Central Vermont R. Co.*, 73 Vt. 336.

*Virginia.* — *Parlett v. Dunn*, 102 Va. 459; *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 2 Va. Sup. Ct. 526; *Southern R. Co. v. Mauzy*, 98 Va. 692, 2 Va. Sup. Ct. 575.

*Washington.* — *Lee v. Northern Pac. R. Co.*, 39 Wash. 388; *Miller v. Moran Bros. Co.*, 39 Wash. 631; *Krickeberg v. St. Paul, etc., Lumber Co.*, 37 Wash. 63; *Woods v. Northern Pac. R. Co.*, 36 Wash. 658; *French v. First Ave. R. Co.*, 24 Wash. 83; *Bier v. Hosford*, 35 Wash. 544; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241; *Decker v. Stimson Mill Co.*, 31 Wash. 522; *Danuser v. Seller*, 24 Wash. 565.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841.

*Wisconsin.* — *Faber v. C. Reiss Coal Co.*, 124 Wis. 554; *Upthegrove v. Jones, etc., Coal Co.*, 118 Wis. 673; *Koepecke v. Wisconsin Bridge, etc., Co.*, 116 Wis. 92; *McMillan v. Spider Lake Saw Mill, etc., Co.*, 115 Wis. 332, 95 Am. St. Rep. 947; *Muenchow v. Theo. Zschetztsche, etc., Co.*, 113 Wis. 8; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645; *Hencke v. Ellis*, 110 Wis. 532; *Relyea v. Tomahawk Pulp, etc., Co.*, 110 Wis. 307.

**Assumption of Risks Resulting from Incompetency of Fellow Servants.** — *Illinois Cent. R. Co. v. Smiesni*, 104 Ill. App. 194.

**Infant Employees.** — Minor employees assume the risk of those dangers attendant upon their work which are obvious to them. *Bender v. New York Glucose Co.*, (N. J. 1905) 61 Atl. Rep. 388.

Minor servants are held to assume by their contract of employment those ordinary risks of their service that are obvious to them, or that have been pointed out to them in a manner suited to their youth and inexperience. *Carrington v. Muller*, 65 N. J. L. 244.

A minor employed as a servant assumes to the same extent as an adult the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them. *Cudahy Packing Co. v. Marcan*, (C. C. A.) 106 Fed. Rep. 645.

**115. 1. Dangerous Premises or Place of Business.** — *United States.* — *National Biscuit Co. v. Nolan*, (C. C. A.) 138 Fed. Rep. 6; *Fortin v. Manville Co.*, 128 Fed. Rep. 642; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495; *Terry v. Schmidt*, (C. C. A.) 116 Fed. Rep. 627; *Moon-Anchor Consol. Gold Mines v. Hopkins*, (C. C. A.) 111 Fed. Rep. 298; *Volk v. B. F. Sturtevant Co.*, (C. C. A.) 104 Fed. Rep. 276.

*Colorado.* — *Greeley v. Foster*, 32 Colo. 292; *Harvey v. Mountain Pride Gold Min. Co.*, 18 Colo. App. 234.

*Connecticut.* — *Dickenson v. Vernon*, 77 Conn. 537.

*Georgia.* — *Central of Georgia R. Co. v. Price*, 121 Ga. 651.

*Illinois.* — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124, *affirming* 115 Ill. App. 621; *Gunning System v. Lapointe*, 212 Ill. 274; *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608; *Cichowicz v. International Packing Co.*, 206 Ill. *affirming*

107 Ill. App. 234; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, *affirming* 106 Ill. App. 30, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114, 115; *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Illinois Steel Co. v. Downey*, 103 Ill. App. 101; *Anderberg v. Chicago, etc., R. Co.*, 98 Ill. App. 207; *Degenhart v. Gent*, 97 Ill. App. 145; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284, *affirmed* 195 Ill. 31.

*Indiana*.—*Jennings v. Ingle*, 35 Ind. App. 153; *L. T. Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546; *Indiana, etc., Coal Co. v. Batey*, 34 Ind. App. 16.

*Iowa*.—*Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94; *Olson v. Hanford Produce Co.*, 118 Iowa 55. See *Coles v. Union Terminal R. Co.*, 124 Iowa 48.

*Kansas*.—*Walker v. Scott*, (Kan. 1901) 64 Pac. Rep. 615.

*Kentucky*.—*Wilson v. Chess, etc., Co.*, 117 Ky. 567; *Shemwell v. Owensboro, etc., R. Co.*, 117 Ky. 556; *Louisville, etc., R. Co. v. Hall*, 115 Ky. 567; *Sandy River Cannell Coal Co. v. Caudill*, 60 S. W. Rep. 180, 22 Ky. L. Rep. 1175.

*Louisiana*.—*Welton v. Genesee Lumber Co.*, 114 La. 842.

*Maryland*.—*Tkac v. Maryland Steel Co.*, 101 Md. 179; *State v. South Baltimore Car Works*, 99 Md. 461; *Skinner v. McLaughlin*, 94 Md. 524.

*Massachusetts*.—*Whalen v. Whitcomb*, 178 Mass. 33; *Hall v. Wakefield, etc., St. R. Co.*, 178 Mass. 98; *Daily v. Fiberloid Co.*, 186 Mass. 318; *Bence v. New York, etc., R. Co.*, 181 Mass. 221; *Donovan v. American Linen Co.*, 180 Mass. 127; *Hoard v. Blackstone Mfg. Co.*, 177 Mass. 69.

*Michigan*.—*Lenderink v. Rockford*, 135 Mich. 531, 10 Detroit Leg. N. 832; *Miller v. Detroit, etc., R. Co.*, 133 Mich. 564, 10 Detroit Leg. N. 342; *Cronin v. Russel Wheel, etc., Co.*, 132 Mich. 500, 9 Detroit Leg. N. 681; *Shanke v. U. S. Heater Co.*, 125 Mich. 346, 7 Detroit Leg. N. 530.

*Minnesota*.—*Ziegler v. Gotzian*, 86 Minn. 290.

*Missouri*.—*Zeigenmeyer v. Goetz Lime, etc., Co.*, 113 Mo. App. 330; *Kane v. St. Louis, etc., R. Co.*, 112 Mo. App. 650; *Carter v. Baldwin*, 107 Mo. App. 217; *Harff v. Green*, 168 Mo. 308; *Hurst v. Kansas City, etc., R. Co.*, 163 Mo. 309, 85 Am. St. Rep. 539; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467.

*New York*.—*Kline v. Abraham*, 178 N. Y. 377; *Drake v. Auburn City R. Co.*, 173 N. Y. 466; *Mullen v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 21; *Ehrenfried v. Lackawanna Iron, etc., Co.*, 89 N. Y. App. Div. 130, *affirmed* without opinion 180 N. Y. 515; *Leach v. Central New York Telephone, etc., Co.*, 81 N. Y. App. Div. 637; *Batty v. Niagara Falls Hydraulic Power, etc., Co.*, 79 N. Y. App. Div. 466; *Toohey v. Ocean Steamship Co.*, 78 N. Y. App. Div. 178; *McCarthy v. Emerson*, 77 N. Y. App. Div. 562, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114; *Kueckel v. O'Connor*, 73 N. Y. App. Div. 594; *O'Connell v. Thompson-Starrett Co.*, 72 N. Y. App. Div. 47; *Nugent v. Brooklyn Union El. R. Co.*, 64 N. Y. App. Div. 351; *Rohan v. Metropolitan St. R. Co.*, 59 N. Y. App. Div. 250.

*Ohio*.—*Shadle v. Cleveland Electric Illuminating Co.*, 12 Ohio Cir. Dec. 37, 22 Ohio Cir. Ct. 49.

*Pennsylvania*.—*Meixner v. Philadelphia Brewing Co.*, 210 Pa. St. 597; *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. St. 573; *Simmons v. Southern Traction Co.*, 207 Pa. St. 589; *Nelson v. Oil City St. R. Co.*, 207 Pa. St. 363; *Cisney v. Pennsylvania Sewer Pipe Co.*, 199 Pa. St. 519; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

*Rhode Island*.—*Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; *Durell v. Hartwell*, 26 R. I. 125.

*Tennessee*.—*Heald v. Wallace*, 109 Tenn. 346.

*Texas*.—*St. Louis Southwestern R. Co. v. Rea*, (Tex. 1905) 87 S. W. Rep. 324, *reversing* (Tex. Civ. App. 1904) 84 S. W. Rep. 428; *Missouri, etc., R. Co. v. Barnes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1006; *Ft. Worth, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 410; *International, etc., R. Co. v. Royal*, (Tex. Civ. App. 1904) 83 S. W. Rep. 713; *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *Sauls v. Chicago, etc., R. Co.*, 36 Tex. Civ. App. 155; *Houston Ice, etc., Co. v. Pisch*, 33 Tex. Civ. App. 684; *Hightower v. Gray*, 36 Tex. Civ. App. 674; *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135; *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 65.

*Utah*.—*Dunn v. Oregon Short Line R. Co.*, 28 Utah 478; *Roth v. Eccles*, 28 Utah 456.

*Virginia*.—*Parlett v. Dunn*, 102 Va. 459.

*Washington*.—*Smith v. Hecla Min. Co.*, 38 Wash. 454; *Krickeberg v. St. Paul, etc., Lumber Co.*, 37 Wash. 63; *French v. First Ave. R. Co.*, 24 Wash. 83; *Decker v. Stimson Mill Co.*, 31 Wash. 522.

*West Virginia*.—*Purkey v. Southern Coal, etc., Co.*, 57 W. Va. 595.

*Wisconsin*.—*Koepecke v. Wisconsin Bridge, etc., Co.*, 116 Wis. 92; *McMillan v. Spider Lake Saw Mill, etc., Co.*, 115 Wis. 332, 95 Am. St. Rep. 947; *Nix v. C. Reiss Coal Co.*, 114 Wis. 493; *Hencke v. Ellis*, 110 Wis. 532.

The servant may assume that the master has provided a safe place, where the defect is so hidden that its discovery would require special inspection. But where the defect is apparent to casual inspection, he is presumed to have knowledge thereof. *Flockhart v. Hocking Coal Co.*, 126 Iowa 576.

**Illustrations — Defective Stairways.**—*Mann v. Moore*, 68 S. W. Rep. 402, 24 Ky. L. Rep. 253.

**Floor Dangerous** by reason of defective construction, *McCarthy v. Shoneman*, 198 Pa. St. 568; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236; defective condition, *Yess v. Chicago Brass Co.*, 124 Wis. 406; being unevenly worn, *McLaughlin v. Atlantic Mills*, 27 R. I. 158; or being in an oily and slippery condition, *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind. 507.

It has been held that a minor who for four weeks had been working upon a block fourteen inches square and five inches in thickness, placed upon a wet, greasy, and slippery floor by himself, assumed the risk and danger

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of the slipping of the block upon the greasy floor, by means of which his hand was involuntarily thrown into the cylinders of a chopping machine. *Cudahy Packing Co. v. Marcan*, (C. C. A.) 106 Fed. Rep. 645.

**Unguarded Elevator Entrance.** — *Browne v. Siegel*, 191 Ill. 226, *affirming* 90 Ill. App. 49.

**Insufficiently Lighted Premises.** — *Beucker v. Baker*, 11 Ohio Cir. Dec. 642, 21 Ohio Cir. Ct. 540; *Hilje v. Hettich*, 95 Tex. 321, *reversing* (Tex. Civ. App. 1901) 65 S. W. Rep. 491; *Faber v. C. Reiss Coal Co.*, 124 'Vis. 554.

**Defective Railroad Tracks.** — *Arnold v. Louisville*, etc., R. Co., 58 S. W. Rep. 370, 22 Ky. L. Rep. 511; *Rice v. New York Cent.*, etc., R. Co., 55 N. Y. App. Div. 339; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; *Skinner v. Central Vermont R. Co.*, 73 Vt. 336. *Compare Gulf*, etc., R. Co. *v. Moore*, 28 Tex. Civ. App. 603.

**Obstructions Near Railway Track.** — *Choctaw*, etc., R. Co. *v. McDade*, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; *Ladd v. Brockton St. R. Co.*, 180 Mass. 454; *Houston Electric Co. v. Robinson*, (Tex. Civ. App. 1903) 76 S. W. Rep. 209.

**Mail Crane Near Railroad Track.** — *Kenney v. Meddaugh*, 118 Fed. Rep. 209, 55 C. C. A. 115.

**Caving in of Earth in Making Excavation.** — *Foley v. Grand Rapids Gaslight Co.*, 127 Mich. 671, 8 Detroit Leg. N. 507; *Ft. Worth Stock Yards Co. v. Whittenburg*, 34 Tex. Civ. App. 163; *Christienson v. Rio Grande Western R. Co.*, 27 Utah 132; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241.

**Excavations under Spring Rail Frog.** — *Riley v. Louisville*, etc., R. Co., (C. C. A.) 133 Fed. Rep. 904.

**Improperly Piled Lumber in Lumber Yard.** — *Brooks v. W. T. Joyce Co.*, 127 Iowa 266.

**Track in Railroad Yard Obstructed by Loose Rocks and Stones.** — *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335.

**Place Rendered Unsafe Because of the Nature of the Work.** — See *supra*, the cases supplementing page 57, note 5.

**117. 1. Dangerous Machinery and Appliances** — *United States*. — *Cincinnati*, etc., R. Co. *v. Robertson*, (C. C. A.) 139 Fed. Rep. 519, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 117; *Pittsburgh*, etc., R. Co. *v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Nottage v. Sawmill Phoenix*, 133 Fed. Rep. 979; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524; *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495; *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745; *Farrell v. Continental Iron Works*, 102 Fed. Rep. 514, *affirmed* without opinion (C. C. A.) 106 Fed. Rep. 987. *Compare Southern Pac. R. Co. v. Yeargin*, (C. C. A.) 109 Fed. Rep. 436.

*Alabama*. — *Boyd v. Indian Head Mills*, 131 Ala. 356.

*Colorado*. — *Hughes v. Schnavel*, 20 Colo. App. 306; *Denver*, etc., R. Co. *v. Scott*, (Colo. 1905) 81 Pac. Rep. 763; *Iowa Gold Min. Co. v. Diefenthaler*, 32 Colo. 391.

*District of Columbia*. — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359.

*Georgia*. — *Smalls v. Southern R. Co.*, 115 Ga. 137.

*Illinois*. — *Chicago*, etc., R. Co. *v. Heerey*, 203 Ill. 492; *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 403; *Stationers' Mfg. Co. v. Benjamin*, 109 Ill. App. 96; *Illinois Cent. R. Co. v. Satkowski*, 107 Ill. App. 524; *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76.

*Indiana*. — *Chicago*, etc., R. Co. *v. Tackett*, 33 Ind. App. 379; *Bodell v. Brazil Block-Coal Co.*, 25 Ind. App. 654.

*Iowa*. — *Foster v. Chicago*, etc., R. Co., 127 Iowa 84; *Crane v. Chicago*, etc., R. Co., 124 Iowa 81.

*Kansas*. — *Atchison*, etc., R. Co. *v. Bancord*, 66 Kan. 81.

*Kentucky*. — *Duncan v. Gernert Bros. Lumber Co.*, 87 S. W. Rep. 762, 27 Ky. L. Rep. 1039.

*Massachusetts*. — *Wood v. Tileston*, etc., Co., 182 Mass. 449; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476; *Barry v. New York Biscuit Co.*, 177 Mass. 449; *Lamson v. American Axe*, etc., Co., 177 Mass. 144, 83 Am. St. Rep. 267; *Lemoine v. Aldrich*, 177 Mass. 89; *Demers v. Marshall*, 178 Mass. 9.

*Michigan*. — *Carnes v. Guelph Patent Cask Co.*, (Mich. 1905) 104 N. W. Rep. 322, 12 Detroit Leg. N. 331; *Erickson v. Cummer Mfg. Co.*, (Mich. 1905) 103 N. W. Rep. 828, 12 Detroit Leg. N. 194; *Minnie v. Mueller*, (Mich. 1905) 103 N. W. Rep. 524; *Hathaway v. Washington Milling Co.*, 139 Mich. 708; *Kupkowski v. John S. Spiegel Co.*, 135 Mich. 7, 10 Detroit Leg. N. 640; *Bauer v. American Car*, etc., Co., 132 Mich. 537, 10 Detroit Leg. N. 17; *Fischer v. Goldie*, 132 Mich. 574, 10 Detroit Leg. N. 29; *Cronin v. Russel Wheel*, etc., Co., 132 Mich. 500, 9 Detroit Leg. N. 681; *Bays v. Warren Featherbone Co.*, 131 Mich. 205, 9 Detroit Leg. N. 256; *Price v. U. S. Baking Co.*, 130 Mich. 500, 9 Detroit Leg. N. 122; *Crawford v. Detroit*, etc., R. Co., 127 Mich. 312, 8 Detroit Leg. N. 363; *Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 89 Am. St. Rep. 461, 8 Detroit Leg. N. 244; *Storrs v. Michigan Starch Co.*, 126 Mich. 666, 8 Detroit Leg. N. 182; *Willis v. Besser-Churchill Co.*, 126 Mich. 659, 8 Detroit Leg. N. 199. See *Randa v. Detroit Screw Works*, 134 Mich. 343, 10 Detroit Leg. N. 504.

*Minnesota*. — *Nelson v. Kelso*, 91 Minn. 77; *Gray v. Commutator Co.*, 85 Minn. 463; *Bartley v. Howell*, 82 Minn. 382.

*Mississippi*. — *Truly v. North Lumber Co.*, 83 Miss. 430.

*Missouri*. — *Purcell v. Tennent Shoe Co.*, 187 Mo. 276; *Mathis v. Kansas City Stock Yards Co.*, 185 Mo. 434; *Hollingsworth v. National Biscuit Co.*, 114 Mo. App. 20; *Beymer v. Hammond Packing Co.*, 106 Mo. App. 726; *Franklin v. Missouri*, etc., R. Co., 97 Mo. App. 473; *Kleine v. S. E. Freunds Sons Shoe*, etc., Co., 91 Mo. App. 102; *Lee v. St. Louis*, etc., R. Co., 112 Mo. App. 372; *Blair v. Heibel*, 103 Mo. App. 621; *Brederf v. Big Circle Min. Co.*, 103 Mo. App. 176.

*New Hampshire.*—*Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835.

*New Jersey.*—*McGrath v. Delaware, etc., R. Co.*, 69 N. J. L. 331, *affirming* 68 N. J. L. 425; *Henggler v. Cohn*, 68 N. J. L. 240.

*New York.*—*Zevin v. Goldman*, (Supm. Ct. App. T.) 94 N. Y. Supp. 35; *Loushay v. Erie R. Co.*, 95 N. Y. App. Div. 102; *Wagner v. New York, etc., R. Co.*, 93 N. Y. App. Div. 14; *Scheir v. Quirin*, 77 N. Y. App. Div. 624, *affirmed* without opinion 177 N. Y. 568; *Wingert v. Krakauer*, 76 N. Y. App. Div. 34; *Hall v. U. S. Canning Co.*, 76 N. Y. App. Div. 475; *Kilkin v. New York Cent., etc., R. Co.*, 76 N. Y. App. Div. 529, *affirmed* without opinion 177 N. Y. 566; *Mull v. Curtice Bros. Co.*, 74 N. Y. App. Div. 561; *Walters v. George A. Fuller Co.*, 74 N. Y. App. Div. 388; *Rosa v. Volkening*, 64 N. Y. App. Div. 426, *affirmed* without opinion 173 N. Y. 590; *Wahl v. Chatillon*, 56 N. Y. App. Div. 554; *Renninger v. New York Cent., etc., R. Co.*, 11 N. Y. App. Div. 565, *affirmed* without opinion 162 N. Y. 595. See *Bookman v. Masterson*, 83 N. Y. App. Div. 4.

*Ohio.*—*Northern Ohio R. Co. v. Rigby*, 69 Ohio St. 184; *Pennsylvania Co. v. McCurdy*, 66 Ohio St. 118.

*Oregon.*—*Stager v. Troy Laundry Co.*, 38 Oregon 480.

*Pennsylvania.*—*Masterson v. Eldridge*, 208 Pa. St. 242; *Wilkinson v. H. W. Johns Mfg. Co.*, 198 Pa. St. 634.

*Rhode Island.*—*Morancy v. Hennessey*, 24 R. I. 205; *Day v. Achron*, 23 R. I. 627; *Pintorelli v. Horton*, 22 R. I. 374; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645.

*Texas.*—*Wood v. Texas Cotton Product Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 496; *Smith v. Armour*, (Tex. Civ. App. 1905) 84 S. W. Rep. 675; *Ft. Worth, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 410; *Gulf, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 83 S. W. Rep. 719; *Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; *Bell v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 134; *St. Louis Southwestern R. Co. v. Barrett*, (Tex. Civ. App. 1903) 72 S. W. Rep. 884; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65.

*Washington.*—*French v. First Ave. R. Co.*, 24 Wash. 83.

*West Virginia.*—*Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841.

*Wisconsin.*—*Relyea v. Tomahawk Pulp, etc., Co.*, 110 Wis. 307; *Kramer v. Willy*, 109 Wis. 602.

The rule has been stated as follows: If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant not only knows this, but also knows and understands, or ought in the exercise of ordinary prudence to understand, the risks to which such defects expose him, he assumes the risks incident to the use of such defective instrumentalities. *Blom v. Yellowstone Park Assoc.*, 86 Minn. 237.

It has been held that an intelligent man, with full knowledge of the character and quality of the implement furnished him for use, and of all the facts and physical laws which render its use dangerous, after having voluntarily ac-

cepted employment in a hazardous business involving the use of such implements, will not be heard to say he did not know it was dangerous. *King v. Morgan*, 109 Fed. Rep. 446, 48 C. C. A. 507.

**§17. 2. Master Not Bound to Make Alterations.**—*Cushman v. Cushman*, 179 Mass. 601; *Lemoine v. Aldrich*, 177 Mass. 89.

**3. Unguarded Machinery.**—*National Biscuit Co. v. Nolan*, (C. C. A.) 138 Fed. Rep. 6; *Ward v. Daniels*, 114 Ill. App. 374; *Chicago Veneer Co. v. Walden*, (Ky. 1904) 82 S. W. Rep. 294; *Arkland v. Taber-Prang Art Co.*, 184 Mass. 243; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476; *McGinty v. Waterman*, 93 Minn. 242; *Swenson v. Osgood, etc., Mfg. Co.*, 91 Minn. 509; *Lally v. Crookston Lumber Co.*, 82 Minn. 407; *Sitts v. Waiontha Knitting Co.*, 94 N. Y. App. Div. 38; *Di Pietro v. Empire Portland Cement Co.*, 70 N. Y. App. Div. 501; *Hettich v. Hillje*, 33 Tex. Civ. App. 571; *Williams v. J. G. Wagner Co.*, 110 Wis. 456; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645; *Muenchow v. Theo. Zschetzsch, etc., Co.*, 113 Wis. 8.

**Cogwheels.**—*Ausley v. American Tobacco Co.*, 130 N. Car. 34.

**Belts and Gearing.**—*Taylor v. Withington, etc., Mfg. Co.*, 136 Mich. 652, 11 Detroit Leg. N. 152.

**Mangles.**—*Bier v. Hosford*, 35 Wash. 544.

**Unblocked Frogs, Guard Rails, and Switches.**—*Johns v. Cleveland, etc., R. Co.*, 10 Ohio Dec. 348, 7 Ohio N. P. 592; *Hynson v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 928.

**Application of Rule as to Obviously Dangerous or Defective Machinery—Ladders.**—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *Higgins v. Southern Pac. R. Co.*, 26 Utah 164.

**Hooks.**—*O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

**Rail Hooks.**—*San Antonio, etc., R. Co. v. Drake*, (Tex. Civ. App. 1905) 85 S. W. Rep. 447.

**Ropes.**—*Cronin v. Russel Wheel, etc., Co.*, 132 Mich. 500, 9 Detroit Leg. N. 681; *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 2 Va. Sup. Ct. 526.

**Locomotives.**—*Texas, etc., R. Co. v. Peden*, 32 Tex. Civ. App. 315.

**Headlights.**—*Galveston, etc., R. Co. v. Fitzpatrick*, (Tex. Civ. App. 1904) 83 S. W. Rep. 406.

**Cars and Hand Cars.**—*Crawford v. New York, etc., R. Co.*, 23 Ohio Cir. Ct. 207; *Toledo, etc., R. Co. v. Beard*, 11 Ohio Cir. Dec. 406, 20 Ohio Cir. Ct. 681; *Ohio River, etc., R. Co. v. Edwards*, 111 Tenn. 31; *Denison, etc., Suburban R. Co. v. Binkley*, (Tex. Civ. App. 1905) 87 S. W. Rep. 386; *St. Louis Southwestern R. Co. v. Austin*, (Tex. Civ. App. 1903) 72 S. W. Rep. 212; *Rio Grande, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1900) 66 S. W. Rep. 712; *International, etc., R. Co. v. Story*, 26 Tex. Civ. App. 23; *Woods v. Northern Pac. R. Co.*, 36 Wash. 658.

**Chisels.**—*San Antonio Sewer Pipe Co. v. Noll*, (Tex. Civ. App. 1904) 83 S. W. Rep. 900; *Ft. Worth, etc., R. Co. v. Ramp*, 30 Tex. Civ. App. 483.

**118.** (4) *In Methods of Work.* — See note 1.

**119.** See note 1.

*Mauls.* — Missouri, etc., R. Co. v. Dyer, (Tex. Civ. App. 1903) 75 S. W. Rep. 930.

*Tool Boxes.* — Moore v. Missouri, etc., R. Co., 30 Tex. Civ. App. 266.

*Drawheads.* — Cleary v. Long Island R. Co., 54 N. Y. App. Div. 284.

*Improperly Loaded Cars.* — Tucker v. Northern Pac. Terminal Co., 41 Oregon 82.

**118.** 1. *Dangerous Methods of Work* — *United States.* — Southern R. Co. v. Logan, (C. C. A.) 138 Fed. Rep. 725; Deye v. Lodge, etc., Mach. Tool Co., (C. C. A.) 137 Fed. Rep. 480.

*Indiana.* — Shaver v. Home Telephone Co., (Ind. App. 1905) 75 N. E. Rep. 288.

*Iowa.* — Gorman v. Minneapolis, etc., R. Co., 117 Iowa 720.

*Kansas.* — Beal v. Atchison, etc., R. Co., 62 Kan. 250.

*Kentucky.* — Carey v. Samuels, 88 S. W. Rep. 1052, 28 Ky. L. Rep. 6.

*Maine.* — Leard v. International Paper Co., 100 Me. 59.

*Maryland.* — State v. South Baltimore Car Works, 99 Md. 461.

*Massachusetts.* — Meehan v. Holyoke St. R. Co., 186 Mass. 511; Lodi v. Maloney, 184 Mass. 240. See Cushman v. Cushman, 179 Mass. 601.

*Michigan.* — Carnes v. Guelph Patent Cask Co., (Mich. 1905) 104 N. W. Rep. 322, 12 Detroit Leg. N. 331; Secombe v. Detroit Electric R. Co., 133 Mich. 170, 10 Detroit Leg. N. 129; Deering v. Canfield, etc., Co., 126 Mich. 373, 8 Detroit Leg. N. 48.

*Missouri.* — Harrington v. Wabash R. Co., 104 Mo. App. 663; Livengood v. Poplin-Galena Consol. Lead, etc., Co., 179 Mo. 229. Compare Kane v. Falk Co., 93 Mo. App. 209.

*New York.* — Mullins v. Manhattan Brass Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 138; Tydeman v. Prince Line, 102 N. Y. App. Div. 279; Fields v. New York Cent., etc., R. Co., 86 N. Y. App. Div. 148; Kapella v. Nichols Chemical Co., 83 N. Y. App. Div. 45; Warszawski v. McWilliams, 64 N. Y. App. Div. 63.

*North Carolina.* — Jones v. American Ware-house Co., 137 N. Car. 337, 138 N. Car. 546.

*Ohio.* — Memphis, etc., Packet Co. v. Britton, 25 Ohio Cir. Ct. 153; Huron Dock Co. v. Swart, 24 Ohio Cir. Ct. 504; Cleveland, etc., R. Co. v. Somers, 24 Ohio Cir. Ct. 67.

*Pennsylvania.* — Fricker v. Penn Bridge Co., 197 Pa. St. 442.

*Rhode Island.* — Paoline v. J. W. Bishop Co., 25 R. I. 298.

*Texas.* — Brown v. Miller, (Tex. Civ. App. 1901) 62 S. W. Rep. 547; Ladonia Cotton Oil Co. v. Shaw, 27 Tex. Civ. App. 65; Webb v. Gulf, etc., R. Co., 27 Tex. Civ. App. 75; Missouri, etc., R. Co. v. Schilling, 32 Tex. Civ. App. 417.

*Utah.* — Dunn v. Oregon Short Line R. Co., 28 Utah 478; Christenson v. Rio Grande Western R. Co., 27 Utah 132; Ohlenkamp v. Union Pac. R. Co., 24 Utah 232.

*Virginia.* — Southern R. Co. v. Mauzy, 98 Va. 692, 2 Va. Sup. Ct. 575.

*Washington.* — Lee v. Northern Pac. R. Co.,

39 Wash. 388; Griffiths v. Craney, 38 Wash. 90; Danuser v. Seller, 24 Wash. 565.

*Wisconsin.* — Zahn v. Milwaukee, etc., R. Co., 114 Wis. 38.

See Cincinnati, etc., R. Co. v. Maley, 76 S. W. Rep. 334, 25 Ky. L. Rep. 690. Compare Hartley v. Chicago, etc., R. Co., 197 Ill. 440.

**The Mere Fact that Safer Method Might Have Prevented Injury** is not a ground of recovery. Chicago, etc., R. Co. v. Wild, 109 Ill. App. 38; Degenhart v. Gent, 97 Ill. App. 145; Guaranty Constr. Co. v. Broeker, 93 Ill. App. 272.

**Defective Telephone Poles.** — It has been held that there is no reason why a lineman, in view of the peculiar character of his work, may not lawfully contract to do any inspecting or testing reasonably necessary to determine whether he can safely climb a particular pole for the purpose of adjusting, transposing, or placing new wires. His acceptance of service with knowledge of the way in which the company conducts this part of its business, whether that way be the safest way for him or not, would imply an assumption of the risks incident to that mode of carrying on its work. Britton v. Central Union Telephone Co., (C. C. A.) 131 Fed. Rep. 844.

**119.** 1. *Insufficient Force for Work.* — Reis v. Struck, 64 S. W. Rep. 729, 23 Ky. L. Rep. 1113; Scanlon v. Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256; Lake Shore, etc., R. Co. v. Whidden, 23 Ohio Cir. Ct. 85; Pennsylvania R. Co. v. Hickley, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668; Mayott v. Norcross, 24 R. I. 187; Ohio River, etc., R. Co. v. Edwards, 111 Tenn. 31; Haywood v. Galveston, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 433; Smith v. Armour, (Tex. Civ. App. 1905) 84 S. W. Rep. 675; Texas, etc., R. Co. v. Miller, 36 Tex. Civ. App. 240; Bell v. Gulf, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. Rep. 134; San Antonio Traction Co. v. De Rodriguez, (Tex. Civ. App. 1903) 77 S. W. Rep. 420.

It has been held that although a railroad company was negligent in sending out a work train without a conductor, and the negligence was the proximate cause of an accident to the fireman on the train, if the fireman, who was an experienced railroad man, knew that the train had no conductor, he assumed the increased risk incident thereto by voluntarily starting with and working on the train. Poin-ton v. St. Louis, etc., R. Co., 90 Ill. App. 623.

**Running Train Backwards.** — Chicago, etc., R. Co. v. Camper, 199 Ill. 569.

**Making Flying Switches.** — Carr v. St. Clair Tunnel Co., 131 Mich. 592, 9 Detroit Leg. N. 455.

**Custom of Kicking Cars Without Notice to Servant Engaged in Coupling.** — Chicago, etc., R. Co. v. Voelker, (C. C. A.) 129 Fed. Rep. 522, reversing 116 Fed. Rep. 867.

**Cleaning Wool-carding Machine While in Motion.** — Sauvageau v. River Spinning Co., 129 Fed. Rep. 961.

**Failure to Inspect Telephone Poles to Be Climbed by Linemen.** — Britton v. Central Union Telephone Co., (C. C. A.) 131 Fed. Rep. 844.

**119.** (5) *Extra-hazardous Employment.* — See note 2.

**120.** (6) *Working under Orders.* — See note 2.

**Failure to Furnish Proper Insulating Gloves to Linemen.** — *Wagner v. Portland*, 40 Oregon 392.

**Failure to Make Rules and Regulations.** — *Green v. New York, etc., R. Co.*, 26 Ohio Cir. Ct. 609.

**119. 2. Risks of Extra-hazardous Work Assumed.** — *Delaware.* — *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Illinois.* — *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, *affirming* 115 Ill. App. 209; *Cummings v. Chicago, etc., R. Co.*, 89 Ill. App. 199, *writ dismissed* 189 Ill. 608; *O'Donnell v. Armour Curled Hair Works*, 111 Ill. App. 516; *Mobile, etc., R. Co. v. Healy*, 109 Ill. App. 531; *Ewald v. Michigan Cent. R. Co.*, 107 Ill. App. 294; *Merchant v. Mickelson*, 101 Ill. App. 401.

*Indiana.* — *Indiana, etc., Canal Co. v. Batey*, 34 Ind. App. 16.

*Iowa.* — *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Kentucky.* — *Wilson v. Chess, etc., Co.*, 117 Ky. 567; *McCormick Harvesting Mach. Co. v. Lister*, 66 S. W. Rep. 761, 23 Ky. L. Rep. 2154; *Daniels v. Covington, etc., El. R., etc., Co.*, 66 S. W. Rep. 187, 23 Ky. L. Rep. 1800.

*Massachusetts.* — *Taylor v. Boston, etc., R. Co.*, 188 Mass. 390.

*Minnesota.* — *McKenna v. Chicago, etc., R. Co.*, 92 Minn. 508, *judgment affirmed on rehearing* 92 Minn. 513.

*Missouri.* — *Zeigenmeyer v. Goetz Lime, etc., Co.*, 113 Mo. App. 330; *Kane v. St. Louis, etc., R. Co.*, 112 Mo. App. 650. *Compare Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371.

*New York.* — *Malthbie v. Belden*, 167 N. Y. 307, *reversing* 45 N. Y. App. Div. 384; *Gerstner v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 562, *affirmed without opinion* 178 N. Y. 627; *Willdigg v. Knox*, 80 N. Y. App. Div. 390; *Dolan v. Burden Iron Co.*, 62 N. Y. App. Div. 545; *Brown v. New York Cent., etc., R. Co.*, 42 N. Y. App. Div. 548, *affirmed without opinion* 166 N. Y. 626; *Hutchinson v. Parker*, 39 N. Y. App. Div. 133, *affirmed without opinion* 169 N. Y. 579.

*Ohio.* — *Cincinnati, etc., R. Co. v. Thompson*, 12 Ohio Cir. Dec. 326, 21 Ohio Cir. Ct. 778.

*Oregon.* — *Wagner v. Portland*, 40 Oregon 392.

*Pennsylvania.* — *Durst v. Bromley Bros. Carpet Co.*, 208 Pa. St. 573; *Simmons v. Southern Traction Co.*, 207 Pa. St. 589; *Sanker v. Pennsylvania R. Co.*, 205 Pa. St. 609; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

*Texas.* — *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300; *International, etc., R. Co. v. Story*, 26 Tex. Civ. App. 23.

*Washington.* — *Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Robare v. Seattle Traction Co.*, 24 Wash. 577.

*West Virginia.* — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91; *Cochran v. Shanahan*, 51 W. Va. 137.

A degree of peril being necessarily incident to service on a railroad train, one accepting

such service impliedly agrees to take upon himself the risk of all ordinary and usual dangers that attend such service. *Hollingsworth v. Chicago, etc., R. Co.*, 160 Ind. 259.

**120. 2. Dangerous Work Done under Master's Orders.** — *Alabama.* — *Kansas City, etc., R. Co. v. Thornhill*, 141 Ala. 215.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544.

*Illinois.* — *Henrietta Coal Co. v. Campbell*, 211 Ill. 216; *Barnett, etc., Co. v. Schlapka*, 208 Ill. 426, *affirming* 110 Ill. App. 672; *Pressed Steel Car Co. v. Herath*, 207 Ill. 576, *affirming* 110 Ill. App. 596; *Illinois Steel Co. v. Wierzbicki*, 206 Ill. 201, *affirming* 107 Ill. App. 69; *Chicago Screw Co. v. Weiss*, 203 Ill. 536, *affirming* 107 Ill. App. 39; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, *affirming* 102 Ill. App. 347; *Slack v. Harris*, 200 Ill. 96; *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200, *affirming* 100 Ill. App. 513; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, *affirming* 96 Ill. App. 288; *William Graver Tank Works v. O'Donnell*, 191 Ill. 236, *affirming* 91 Ill. App. 524; *Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596, *affirmed* 207 Ill. 576; *Kapaczynski v. Wells, etc., Co.*, 110 Ill. App. 477, *affirmed* 218 Ill. 149; *McFadden v. Sollitt*, 94 Ill. App. 271. See *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492.

*Indiana.* — *Perry-Matthews-Buskirk Stone Co. v. Speer*, (Ind. App. 1905) 73 N. E. Rep. 933; *Pittsburgh, etc., R. Co. v. Nicholas*, (Ind. App. 1905) 73 N. E. Rep. 195; *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *Diezi v. G. H. Hammond Co.*, 156 Ind. 583.

*Kansas.* — *Wurtenberger v. Metropolitan St. R. Co.*, 68 Kan. 642.

*Kentucky.* — *Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167, 27 Ky. L. Rep. 305; *Dryden v. H. E. Pogue Distillery Co.*, 82 S. W. Rep. 262, 26 Ky. L. Rep. 528; *Mayfield Woolen Mills v. Frazier*, 80 S. W. Rep. 456, 25 Ky. L. Rep. 2263; *Smith v. Kentucky Lumber Co.*, 78 S. W. Rep. 120, 25 Ky. L. Rep. 1386; *Shanks v. Citizens Gen. Electric Co.*, 76 S. W. Rep. 379, 25 Ky. L. Rep. 811; *Illinois Cent. R. Co. v. Langgan*, 116 Ky. 318; *Long v. Illinois Cent. R. Co.*, 113 Ky. 806, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 120.

*Minnesota.* — *Gray v. Commutator Co.*, 85 Minn. 463.

*Missouri.* — *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141.

*New Jersey.* — *Luckey v. Sofield*, (N. J. 1904) 57 Atl. Rep. 870.

*New York.* — *Motzing v. Excelsior Brewing Co.*, 107 N. Y. App. Div. 275; *Klein v. Garvey*, 94 N. Y. App. Div. 183; *Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527, *affirmed without opinion* 179 N. Y. 552; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, *affirmed without opinion* 174 N. Y. 519; *McAleer v. Walter*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 474.

*Texas.* — *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *Texas Cent.*



- 120.** (7) *Master's Assurance that Work Is Safe.*—See note 3.  
 (8) *Momentary Forgetfulness of Risk.*—See note 4.  
**121.** (9) *Fear of Losing Employment.*—See note 1.  
 (10) *Statutes Requiring Maintenance of Safeguards.*—See notes

2, 3.

R. Co. v. Hicks, 24 Tex. Civ. App. 400; Galveston, etc., R. Co. v. Hitzfelder, 24 Tex. Civ. App. 318. *Compare* International, etc., R. Co. v. Royal, (Tex. Civ. App. 1904) 83 S. W. Rep. 713; Hildenbrand v. Marshall, 30 Tex. Civ. App. 135.

*Utah.*—Faulkner v. Mammoth Min. Co., 23 Utah 437.

*Virginia.*—Virginia, etc., Wheel Co. v. Harris, 103 Va. 708.

*Washington.*—Jancko v. West Coast Mfg., etc., Co., 34 Wash. 556; Green v. Western American Co., 30 Wash. 87.

*Compare* Northern Ohio R. Co. v. Rigby, 69 Ohio St. 184; Cisney v. Pennsylvania Sewer Pipe Co., 199 Pa. St. 519; Horn v. La Crosse Box Co., 123 Wis. 399.

It has been held that the assumption of risk by employees has no application to cases where, by direction of the master, an exceptional and unusual method of doing the business is pursued. Goss Printing Press Co. v. Lempke, 90 Ill. App. 427, *affirmed* 191 Ill. 199.

**Knowledge by Servant of Danger.**—An employee who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, assumes the risk of injury and cannot recover damages therefor. Haywood v. Galveston, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 433.

**Working under Orders Outside of Scope of Employment.**—See *infra*, the cases supplementing page 132, note 2.

**120. 3. Master's Assurance of Safety.**—Reis v. Struck, 64 S. W. Rep. 729, 23 Ky. L. Rep. 1113; Lord v. Wakefield, 185 Mass. 214; Cisney v. Pennsylvania Sewer Pipe Co., 199 Pa. St. 519; Pintorelli v. Horton, 22 R. I. 374; Frangiose v. Horton, 26 R. I. 291; Haywood v. Galveston, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 433; Ft. Worth Iron Works v. Stokes, 33 Tex. Civ. App. 218; McKane v. Marr, 77 Vt. 7; Purkey v. Southern Coal, etc., Co., 57 W. Va. 595; Hencke v. Ellis, 110 Wis. 532. See McClusky v. Garfield, etc., Coal Co., 180 Mass. 115. But see Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, *affirming* 95 Ill. App. 110. *Compare* La Salle County Carbon Coal Co. v. Offergeld, 104 Ill. App. 494; Walter v. Fisher, 96 Ill. App. 590; Connolly v. St. Joseph Press Printing Co., 166 Mo. 447; Duerst v. St. Louis Stamping Co., 163 Mo. 607; Carter v. Baldwin, 107 Mo. App. 217; Stalzer v. Jacob Dold Packing Co., 84 Mo. App. 565; Roberti v. Anderson, 27 Nev. 396; Wolf v. Devitt, 83 N. Y. App. Div. 42, *affirmed* without opinion 179 N. Y. 569; McDougald v. Lumber-ton, 129 N. Car. 200; Chicago Screw Co. v. Weiss, 203 Ill. 536, *affirming* 107 Ill. App. 39; Harder, etc., Coal Min. Co. v. Schmidt, (C. C. A.) 104 Fed. Rep. 282; Bane v. Irwin, 172 Mo. 306; Adloff v. Columbia Pretzel, etc., Co., 100 Mo. App. 199.

If the master, having knowledge of the danger of which he knows the servant is ignorant, by his conduct and words gives the servant assurance of safety, so that he feels secure, and in consequence thereof he is injured, the master is answerable. Fletcher Bros. Co. v. Hyde, (Ind. App. 1905) 75 N. E. Rep. 9.

Although the servant is aware that there is some danger connected with the work which he is set to do, he may nevertheless be justified under the circumstances in relying upon the positive assurance of the master or his representative that there is no danger. Allen v. Gilman, 127 Fed. Rep. 609. See *infra*, cases supplementing page 148, note 2.

It has been said that it is the rule that where a servant has knowledge of a defect and calls the attention of the master to it and is assured by him that everything is right and told to go on with his work, the servant will not be held to have assumed the risk of so doing, unless the danger was so manifest that a person of ordinary prudence and caution would not have incurred it. Harte v. Fraser, 104 Ill. App. 201.

**4. Momentary Forgetfulness of Danger.**—See Tuscaloosa Water Works Co. v. Herren, 131 Ala. 81; Hartrich v. Hawes, 202 Ill. 334, *affirming* 103 Ill. App. 433; Langlois v. Dunn Worsted Mills, 25 R. I. 645. But see Pitts-burgh, etc., R. Co. v. Lamphere, (C. C. A.) 137 Fed. Rep. 20; Viohl v. North Pac. Lumber Co., (Oregon 1905) 80 Pac. Rep. 112. *Compare* Sriver v. Lowe, 32 Ont. 290; Moore v. J. D. Moore Co., 4 Ont. L. Rep. 167.

**121. 1. Unwilling Performance under Fear of Losing Employment.**—Dickenson v. Vernon, 77 Conn. 537; Pressed Steel Car Co. v. Herath, 207 Ill. 576, *affirming* 110 Ill. App. 596; Missouri Pac. R. Co. v. Johnson, 69 Kan. 721; Harff v. Green, 168 Mo. 308; Leitner v. Grieb, 104 Mo. App. 173; Meehan v. Great Northern R. Co., 13 N. Dak. 432; Bonn v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 808; Lee v. Northern Pac. R. Co., 39 Wash. 388. See Kueckel v. O'Connor, 73 N. Y. App. Div. 594; Orr v. Southern Bell Telephone, etc., Co., 130 N. Car. 627; Gensen v. Ohio Oil Co., 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276. *Compare* Memphis, etc., Packet Co. v. Britton, 25 Ohio Cir. Ct. 153.

In *Missouri* it has been said that if a servant attempt a perilous task under protest, and for fear of losing his employment, full voluntary assent to incurring the danger is displaced to some extent by compulsion; and in that state, as well as according to many modern decisions in other jurisdictions, the question whether the risk was assumed is then for the jury. Adloff v. Columbia Pretzel, etc., Co., 100 Mo. App. 199.

**2. Effect of Statutes Requiring Precautions for Servant's Safety.**—Nottage v. Sawmill Phenix, 133 Fed. Rep. 979; McGinty v. Waterman, 93

**121. c. LATENT DEFECTS AND DANGERS.**—See note 4.

Minn. 242; *Swenson v. Osgood, etc., Mfg. Co.*, 91 Minn. 509; *Hermann v. Clark*, 89 Minn. 132; *Sitts v. Waiontha Knitting Co.*, 94 N. Y. App. Div. 38; *Mull v. Curtice Bros. Co.*, 74 N. Y. App. Div. 561; *Cleveland, etc., R. Co. v. Somers*, 24 Ohio Cir. Ct. 67; *Johns v. Cleveland, etc., R. Co.*, 23 Ohio Cir. Ct. 442; *Johns v. Cleveland, etc., R. Co.*, 10 Ohio Dec. 348, 7 Ohio N. P. 592; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121; *Berg v. U. S. Leather Co.*, 125 Wis. 262; *Williams v. J. G. Wagner Co.*, 110 Wis. 456; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645.

**Ordinance Requiring Precautions for Servant's Safety.**—*Munn v. L. Wolff Mfg. Co.*, 94 Ill. App. 122.

**Statute Requiring Employers to Guard or Fence Dangerous Machinery.**—The Factory Act of *Minnesota* (Gen. Stat. 1894, § 2248), which requires employers to guard or fence dangerous machinery as far as possible, does not abolish the defense of assumption of risk. It does not deprive parties of their right to contract regarding the risks of their avocations. *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524.

**Statute Requiring Gearing and Belting to Be Guarded.**—The Factory Act of *Missouri* (2 Rev. Stat. 1899, § 6433), which requires gearing and belting to be guarded, does not abolish the defense of assumption of risk. *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495.

**Ordinance Limiting Speed of Trains.**—It has been held that where a brakeman in the employ of a railroad company knows that trains are run through a city at a rate of speed prohibited by ordinance, he assumes the risk of the danger incident to the violation of the ordinance. *Martin v. Chicago, etc., R. Co.*, 118 Iowa 148, 96 Am. St. Rep. 371.

**121. 3. Illinois.**—*Spring Valley Coal Co. v. Pating*, 210 Ill. 342, affirming judgment 112 Ill. App. 4; *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Himrod Coal Co. v. Adack*, 94 Ill. App. 1.

*Indiana.*—*Island Coal Co. v. Swaggerty*, 159 Ind. 664; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364; *Indiana, etc., Coal Co. v. Neal*, (Ind. App. 1905) 75 N. E. Rep. 295; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Green v. American Car, etc., Co.*, 163 Ind. 135; *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Espenlaub v. Ellis*, 34 Ind. App. 163; *American Car, etc., Co. v. Clark*, 32 Ind. App. 644; *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Chamberlain v. Waymire*, 32 Ind. App. 442, rehearing denied (Ind. App. 1904) 70 N. E. Rep. 81; *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479. See *Brower v. Locke*, 31 Ind. App. 353.

*Michigan.*—*Sipes v. Michigan Starch Co.*, 137 Mich. 258, 11 Detroit Leg. N. 287.

*Missouri.*—*Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683; *Stafford v. Adams*, 113 Mo. App. 717.

*North Carolina.*—*Elmore v. Seaboard Air Line R. Co.*, 130 N. Car. 506, rehearing 131 N. Car. 569, second rehearing 132 N. Car. 865.

*Vermont.*—*Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887.

*Washington.*—*Hall v. West, etc., Mill Co.*, 39 Wash. 447; *Green v. Western American Co.*, 30 Wash. 87.

See *Chicago-Coulterville Coal Co. v. Fidelity, etc., Co.*, 130 Fed. Rep. 957; *Carson v. Southern R. Co.*, 68 S. Car. 55, judgment affirmed *Southern R. Co. v. Carson*, 194 U. S. 136; *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302; *Barksdale v. Charleston, etc., R. Co.*, 66 S. Car. 204; *Youngblood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356.

Under the *North Carolina* statute extending the common-law liability of railroad companies to employees, the defense of assumption of risks is not available to the negligent railroad company. *Mott v. Southern R. Co.*, 131 N. Car. 234; *Coley v. North Carolina R. Co.*, 128 N. Car. 534, rehearing 129 N. Car. 407; *Cogdell v. Southern R. Co.*, 129 N. Car. 398; *Thomas v. Raleigh, etc., Air Line R. Co.*, 129 N. Car. 392.

**Safety Appliance Act.**—As to whether the defense of assumption of risks is excluded by the Act of Congress, approved March 2, 1893 (6 Fed. Stat. Annot. 752), known as the Safety Appliance Act, see *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487.

**4. Defects Known or Discoverable by Master by Ordinary Care**—*United States*.—*Pittsburgh, etc., R. Co. v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Wheeler v. Oak Harbor Head Lining, etc., Co.*, (C. C. A.) 126 Fed. Rep. 348; *Pennsylvania R. Co. v. Jones*, (C. C. A.) 123 Fed. Rep. 753; *Wright v. Stanley*, (C. C. A.) 119 Fed. Rep. 330; *Rockport Granite Co. v. Bjornholm*, (C. C. A.) 115 Fed. Rep. 947; *Harder, etc., Coal Min. Co. v. Schmidt*, (C. C. A.) 104 Fed. Rep. 282; *Choctaw, etc., R. Co. v. Holloway*, 191 U. S. 334, affirming (C. C. A.) 114 Fed. Rep. 458.

*Alabama.*—*Western R. Co. v. Russell*, (Ala. 1905) 39 So. Rep. 311.

*California.*—*Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256; *Dolan v. Sierra R. Co.*, 135 Cal. 435.

*Delaware.*—*Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*Illinois.*—*Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124; *Cichowicz v. International Packing Co.*, 206 Ill. 346, affirming 107 Ill. App. 234; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, affirming 106 Ill. App. 30, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121; *Bates Mach. Co. v. Crowley*, 115 Ill. App. 540.

*Indiana.*—*Indianapolis v. Cauley*, 164 Ind. 304; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818; *Union Traction Co. v. Buckland*, 34 Ind. App. 420; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281; *Hall v. Bedford Quarries Co.*,

156 Ind. 460; *Ft. Wayne v. Christie*, 156 Ind. 172; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480.

*Iowa*.—*Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434; *Calloway v. Agar Packing Co.*, (Iowa 1905) 104 N. W. Rep. 721; *Klaflke v. Bettendorf Axle Co.*, 125 Iowa 223; *Vohs v. A. E. Shorthill Co.*, 124 Iowa 471; *Barto v. Iowa Telephone Co.*, 126 Iowa 241, 106 Am. St. Rep. 347; *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa 406.

*Kansas*.—*Atchison, etc., R. Co. v. Stanley*, (Kan. 1905) 81 Pac. Rep. 176; *Schwarzschild v. Drysdale*, 69 Kan. 119; *Atchison, etc., R. Co. v. Bancord*, 66 Kan. 81; *Emporia v. Kowalski*, 66 Kan. 64; *Mirick v. Morton*, 62 Kan. 870, 64 Pac. Rep. 609.

*Kentucky*.—*Pfisterer v. Peter*, 117 Ky. 501; *Shanks v. Citizens' Gen. Electric Co.*, 76 S. W. Rep. 379, 25 Ky. L. Rep. 811; *St. Bernard Coal Co. v. Southard*, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638; *United Laundry Co. v. Steele*, 72 S. W. Rep. 305, 24 Ky. L. Rep. 1899; *De Hart v. Chesapeake, etc., R. Co.*, 68 S. W. Rep. 647, 24 Ky. L. Rep. 431.

*Louisiana*.—*Ingham v. John B. Honor Co.*, 113 La. 1040; *Daly v. Kiel*, 106 La. 170; *Levins v. Bancroft*, 114 La. 105; *Moses v. Grant Lumber Co.*, 114 La. 933; *Stewart v. Texas, etc., R. Co.*, 113 La. 525.

*Maine*.—*Welch v. Bath Ironworks*, 98 Me. 361.

*Maryland*.—*Philadelphia, etc., R. Co. v. Devers*, 101 Md. 341; *Yentsch v. Chloride of Silver Dry Cell Battery Co.*, 96 Md. 679.

*Massachusetts*.—*Fearns v. New York Cent., etc., R. Co.*, 186 Mass. 529; *Martin v. Merchants, etc., Transp. Co.*, 185 Mass. 487; *Chisholm v. New England Telephone, etc., Co.*, 185 Mass. 82; *Joyce v. American Writing Paper Co.*, 184 Mass. 230; *Murphy v. Marston Coal Co.*, 183 Mass. 385; *Garant v. Cashman*, 183 Mass. 13; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93; *McLean v. Paine*, 181 Mass. 287; *Littlefield v. Edward P. Allis Co.*, 177 Mass. 151; *Lamson v. American Axe, etc., Co.*, 177 Mass. 144, 83 Am. St. Rep. 267; *Moylon v. D. S. McDonald Co.*, 188 Mass. 499; *Wagner v. Boston El. R. Co.*, 188 Mass. 437; *Dawson v. Lawrence Gas Light Co.*, 188 Mass. 481; *Thompson v. American Writing Paper Co.*, 187 Mass. 93; *Murphy v. New York, etc., R. Co.*, 187 Mass. 18; *Slattery v. Walker, etc., Mfg. Co.*, 179 Mass. 307; *Donahue v. Boston, etc., R. Co.*, 178 Mass. 251.

*Minnesota*.—*Fry v. Great Northern R. Co.*, (Minn. 1905) 103 N. W. Rep. 733; *Jensen v. Commodore Min. Co.*, 94 Minn. 53; *Ellington v. Great Northern R. Co.*, 92 Minn. 470; *Dell v. McGrath*, 92 Minn. 187; *Dieters v. St. Paul Gas-light Co.*, 86 Minn. 474; *Perras v. Booth*, 82 Minn. 191; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; *Bender v. Great Northern R. Co.*, 89 Minn. 163; *Kerrigan v. Chicago, etc., R. Co.*, 86 Minn. 407; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142.

*Michigan*.—*Clark v. Wolverine Portland Cement Co.*, 138 Mich. 673, 11 Detroit Leg. N. 723; *McLean v. Pere Marquette R. Co.*, 137 Mich. 482, 11 Detroit Leg. N. 358; *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 11 Detroit

Leg. N. 246; *Hewitt v. East Jordan Lumber Co.*, 136 Mich. 110, 10 Detroit Leg. N. 1008; *Corbett v. American Screen Door Co.*, 133 Mich. 669, 10 Detroit Leg. N. 305; *Noe v. Rapid R. Co.*, 133 Mich. 152, 10 Detroit Leg. N. 155; *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237, 102 Am. St. Rep. 422, 9 Detroit Leg. N. 589; *Chilson v. Lansing Wagon Works*, 128 Mich. 43, 8 Detroit Leg. N. 520.

*Missouri*.—*Nickel v. Columbia Paper Stock Co.*, 95 Mo. App. 226; *Zellars v. Missouri Water, etc., Co.*, 92 Mo. App. 107; *Stalzer v. Jacob Dold Packing Co.*, 84 Mo. App. 565; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 121; *Gibson v. Midland Bridge Co.*, 112 Mo. App. 594; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167.

*New Hampshire*.—*Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936; *Story v. Concord, etc., R. Co.*, 70 N. H. 364; *Lapelle v. International Paper Co.*, 71 N. H. 346; *Edwards v. Tilton Mills*, 70 N. H. 574; *Bennett v. Warren*, 70 N. H. 564.

*New Jersey*.—*Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745; *Meany v. Standard Oil Co.*, (N. J. 1903) 55 Atl. Rep. 653; *Smith v. Erie R. Co.*, 67 N. J. L. 636.

*New York*.—*Eastland v. Clarke*, 165 N. Y. 420, reversing 28 N. Y. App. Div. 621; *Finn v. Cassidy*, 165 N. Y. 584, affirming 39 N. Y. App. Div. 641; *Johansen v. Eastmans Co.*, 44 N. Y. App. Div. 270, affirmed without opinion 168 N. Y. 648; *Overbaugh v. Wieber*, 106 N. Y. App. Div. 283; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119; *Krueger v. Bartholomay Brewing Co.*, 94 N. Y. App. Div. 58, affirmed 182 N. Y. 544; *Hoelter v. McDonald*, 82 N. Y. App. Div. 423; *Wingert v. Krakauer*, 76 N. Y. App. Div. 34; *Allison v. Long Clove Trap Rock Co.*, 75 N. Y. App. Div. 267; *True v. Niagara Gorge R. Co.*, 70 N. Y. App. Div. 383, affirmed without opinion 175 N. Y. 487; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, affirmed without opinion 174 N. Y. 519; *Witkowski v. George W. Carter, etc., Co.*, 60 N. Y. App. Div. 577; *Dorney v. O'Neill*, 60 N. Y. App. Div. 19, affirmed without opinion 172 N. Y. 595; *Kiras v. Nichols Chemical Co.*, 59 N. Y. App. Div. 79; *Pursley v. Edge Moor Bridge Works*, 56 N. Y. App. Div. 71, affirmed without opinion 168 N. Y. 589; *Dzinbienski v. J. L. Mott Iron Works*, 56 N. Y. App. Div. 58; *Jarvis v. Northern New York Marble Co.*, 55 N. Y. App. Div. 272.

*North Carolina*.—*Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546; *Womble v. Merchants Grocery Co.*, 135 N. Car. 474; *Orr v. Southern Bell Telephone, etc., Co.*, 132 N. Car. 691; *McDougald v. Lumberton*, 129 N. Car. 200; *Wilkie v. Raleigh, etc., R. Co.*, 127 N. Car. 203.

*Ohio*.—*Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. 459.

*Oklahoma*.—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon*.—*Hough v. Grants Pass Power Co.*, 41 Oregon 531.

*Pennsylvania*.—*Levy v. Rosenblatt*, 21 Pa. Super. Ct. 543.

**122.** See note 1.

Effect of Equal Opportunities of Knowledge. — See note 2.

*Rhode Island.* — Cox v. American Agricultural Chemical Co., 24 R. I. 503.

*Texas.* — Denison, etc., Suburban R. Co. v. Binkley, (Tex. Civ. App. 1905) 87 S. W. Rep. 386; Ft. Worth, etc., R. Co. v. Smith, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; St. Louis Southwestern R. Co. v. Pope, 98 Tex. 535, reversing (Tex. Civ. App. 1904) 82 S. W. Rep. 360; San Antonio Foundry Co. v. Drish, (Tex. Civ. App. 1905) 85 S. W. Rep. 440; Galveston, etc., R. Co. v. McAdams, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076; Missouri, etc., R. Co. v. Keefe, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; Galveston, etc., R. Co. v. Manns, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; Missouri, etc., R. Co. v. Crum, 35 Tex. Civ. App. 609; Consumers Cotton Oil Co. v. Jonte, 36 Tex. Civ. App. 18; Missouri, etc., R. Co. v. Hutchens, 35 Tex. Civ. App. 343; Gulf, etc., R. Co. v. Davis, 35 Tex. Civ. App. 285; Galveston, etc., R. Co. v. Butshek, 34 Tex. Civ. App. 194; International, etc., R. Co. v. Moynahan, 33 Tex. Civ. App. 302; Texas Cent. R. Co. v. Bender, 32 Tex. Civ. App. 568; Galveston, etc., R. Co. v. Courtney, 30 Tex. Civ. App. 544; International, etc., R. Co. v. Hoyt, 30 Tex. Civ. App. 518; Texas, etc., R. Co. v. Gardner, 29 Tex. Civ. App. 90; Dupree v. Alexander, 29 Tex. Civ. App. 31; Gulf, etc., R. Co. v. Hayden, 29 Tex. Civ. App. 280; Smith v. Gulf, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 83; De la Vergne Refrigerating Mach. Co. v. Stahl, 24 Tex. Civ. App. 471; Missouri, etc., R. Co. v. Bailey, 28 Tex. Civ. App. 609; Gulf, etc., R. Co. v. Moore, 28 Tex. Civ. App. 603; International, etc., R. Co. v. Bayne, 28 Tex. Civ. App. 392; International, etc., R. Co. v. Vinson, 28 Tex. Civ. App. 247; St. Louis Southwestern R. Co. v. Kelton, 28 Tex. Civ. App. 137; Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503; San Antonio, etc., R. Co. v. Lindsey, 27 Tex. Civ. App. 316; Gulf, etc., R. Co. v. Knox, 25 Tex. Civ. App. 450; Gulf, etc., R. Co. v. Gray, 25 Tex. Civ. App. 99; San Antonio, etc., R. Co. v. Engelhorn, 24 Tex. Civ. App. 324; Texas, etc., R. Co. v. McClane, 24 Tex. Civ. App. 321.

*Utah.* — Leach v. Oregon Short Line R. Co., 29 Utah 285; Faulkner v. Mammoth Min. Co., 23 Utah 437; Garity v. Bullion-Beck, etc., Min. Co., 27 Utah 534.

*Vermont.* — Morrisette v. Canadian Pac. R. Co., 74 Vt. 232; Severance v. New England Talc Co., 72 Vt. 181.

*Washington.* — Hart v. Cascade Timber Co., 39 Wash. 279; De Mase v. Oregon R., etc., Co., 40 Wash. 108; Myrberg v. Baltimore, etc., Min., etc., Co., 25 Wash. 364; McMillan v. North Star Min. Co., 32 Wash. 579, 98 Am. St. Rep. 908; Czarecki v. Seattle, etc., R., etc., Co., 30 Wash. 288; Shoemaker v. Bryant Lumber, etc., Mill Co., 27 Wash. 637; Uren v. Golden Tunnel Min. Co., 24 Wash. 261.

*West Virginia.* — Giebell v. Collins Co., 54 W. Va. 518.

*Wisconsin.* — Berg v. U. S. Leather Co., 125 Wis. 262; Hocking v. Windsor Spring Co., 125 Wis. 575; Williams v. North Wisconsin Lumber Co., 124 Wis. 328.

**Defectively Blocked Switches.** — Pierson v. Chicago, etc., R. Co., 127 Iowa 13.

**Knowledge of Master.** — "The doctrine of assumed risk," it has been said, "applies, and is limited in its application, to dangers which the employee either actually knows or should know." Bradburn v. Wabash R. Co., 134 Mich. 575, 10 Detroit Leg. N. 592.

**122. 1. Servant Not Bound to Inspect for Latent Defects** — *United States.* — American Distributing Co. v. Thorne, (C. C. A.) 122 Fed. Rep. 431.

*Alabama.* — Southern R. Co. v. Howell, 135 Ala. 639.

*California.* — Dolan v. Sierra R. Co., 135 Cal. 435.

*Illinois.* — Rock Island Sash, etc., Works v. Pohlman, 210 Ill. 133, affirming 99 Ill. App. 670; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, affirming 106 Ill. App. 30, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122; Armour v. Golkowska, 202 Ill. 144, affirming 95 Ill. App. 492.

*Indiana.* — Union Traction Co. v. Buckland, 34 Ind. App. 420.

*Iowa.* — Wahlquist v. Maple Grove Coal, etc., Co., 116 Iowa 720; Forbes v. Boone Valley Coal, etc., Co., 113 Iowa 94.

*Kansas.* — Emporia v. Kowalski, 66 Kan. 64.

*Kentucky.* — Louisville, etc., R. Co. v. Ewing, 117 Ky. 624; Pfisterer v. Peter, 117 Ky. 501; St. Bernard Coal Co. v. Southard, 76 S. W. Rep. 167, 25 Ky. L. Rep. 638.

*Minnesota.* — Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407.

*Missouri.* — Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122.

*New York.* — Hoelter v. McDonald, 82 N. Y. App. Div. 423.

*Texas.* — Southern Kansas R. Co. v. Sage, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; Horton v. Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150; San Antonio, etc., R. Co. v. Waller, 27 Tex. Civ. App. 44.

*Utah.* — Leach v. Oregon Short Line R. Co., 29 Utah 285; Merrill v. Oregon Short Line R. Co., 29 Utah 264.

*Washington.* — Shoemaker v. Bryant Lumber, etc., Mill Co., 27 Wash. 637. Compare Smith v. Hecla Min. Co., 38 Wash. 454. See *infra*, the cases supplementing page 124, note 1.

**Obstructions Near Railroad Track.** — A railroad employee owes no duty of inspection to discover obstructions dangerously near the track, which are due to the company's negligence, and does not necessarily assume them by his contract of service, though they are permanent in character, and exist at the time he enters the service. Texas, etc., R. Co. v. Swearingen, (C. C. A.) 122 Fed. Rep. 193, affirmed 196 U. S. 51.

**2. Equal Opportunities for Knowledge.** — Kentucky Freestone Co. v. McGee, 118 Ky. 306; Pfisterer v. Peter, 117 Ky. 501; Adams Express Co. v. Smith, 72 S. W. Rep. 752, 24 Ky. L. Rep. 1915; Marks v. Harriet Cotton Mills, 138 N. Car. 401; Hicks v. Naomi Falls Mfg. Co.,

**122.** Knowledge of Both Defect and Danger Necessary to Assumption of Risk. — See note 3.

138 N. Car. 319; *Pressly v. Dover Yarn Mills*, 138 N. Car. 410; *Peck v. Peck*, (Tex. 1905) 87 S. W. Rep. 248. See *Lee v. St. Louis*, etc., R. Co. 112 Mo. App. 372; *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293. *Compare* *Ohio River*, etc., R. Co. v. *Edwards*, 111 Tenn. 31; *Moore v. Missouri*, etc., R. Co., 30 Tex. Civ. App. 266; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271; *Miller v. Moran Bros. Co.*, 39 Wash. 631; *Hencke v. Ellis*, 110 Wis. 532; *Dugal v. Peoples Bank*, 34 N. Bruns. 581.

**122. 3. Knowledge of Both Defect and Danger Necessary.** — *United States*. — *American Distributing Co. v. Thorne*, (C. C. A.) 122 Fed. Rep. 431; *Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440.

*Alaska*. — *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407.

*California*. — *Anderson v. Seropian*, 147 Cal. 201.

*Illinois*. — *Chicago*, etc., R. Co. v. *Howell*, 208 Ill. 155, *affirming* 109 Ill. App. 546; *Chicago*, etc., R. Co. v. *Heerey*, 203 Ill. 492; *Hartrich v. Hawes*, 202 Ill. 334, *affirming* 103 Ill. App. 433; *Armour v. Golkowska*, 202 Ill. 144, *affirming* 95 Ill. App. 492; *Slack v. Harris*, 200 Ill. 96; *Omaha Packing Co. v. Murray*, 112 Ill. App. 233; *Pardridge v. Gilbride*, 98 Ill. App. 134; *Chicago*, etc., R. Co. v. *Cleveland*, 92 Ill. App. 308. See *Siegel v. Trcka*, 115 Ill. App. 56.

*Indiana*. — *Ft. Wayne v. Christie*, 156 Ind. 172; *Baltimore*, etc., R. Co. v. *Roberts*, 161 Ind. 1; *Wright v. Chicago*, etc., R. Co., 160 Ind. 583; *Chicago*, etc., R. Co. v. *Lee*, 29 Ind. App. 480; *Pittsburgh*, etc., R. Co. v. *Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120; *Chicago*, etc., R. Co. v. *Tackett*, 33 Ind. App. 379; *Avery v. Nurdyke*, etc., Co., 34 Ind. App. 541.

*Iowa*. — *Mace v. Boedker*, 127 Iowa 721; *Woolf v. Nauman Co.*, (Iowa 1905) 103 N. W. Rep. 785; *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Shebeck v. National Cracker Co.*, 120 Iowa 414, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122; *Cushman v. Carbondale Fuel Co.*, 116 Iowa 618; *Morby v. Chicago*, etc., R. Co., 116 Iowa 84.

*Kansas*. — *Brinkmeier v. Missouri Pac. R. Co.*, 69 Kan. 738; *Seeds v. American Bridge Co.*, 68 Kan. 522; *Buoy v. Clyde Milling*, etc., Co., 68 Kan. 436; *Atchison*, etc., R. Co. v. *Bancord*, 66 Kan. 81.

*Louisiana*. — *Gualden v. Kansas City Southern R. Co.*, 106 La. 409.

*Maine*. — *Drapeau v. International Paper Co.*, 96 Me. 299.

*Massachusetts*. — *Moylon v. D. S. McDonald Co.*, 188 Mass. 499; *Wagner v. Boston El. R. Co.*, 188 Mass. 437.

*Minnesota*. — *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317; *Campbell v. Railway Transfer Co.*, (Minn. 1905) 104 N. W. Rep. 547; *Bender v. Great Northern R. Co.*, 89 Minn. 163; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 Am. St. Rep. 440. See *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; *Ziegler v. Gotzian*, 86 Minn. 290.

*Missouri*. — *Henderson v. Kansas City*, 177

Mo. 477; *Connolly v. St. Joseph Press Printing Co.*, 166 Mo. 447; *Depuy v. Chicago*, etc., R. Co., 110 Mo. App. 110; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Thompson v. Chicago*, etc., R. Co., 86 Mo. App. 141; *Compton v. Omaha*, etc., R. Co., 82 Mo. App. 175; *Scott v. Springfield*, 81 Mo. App. 312; *Harriman v. Kansas City Star Co.*, 81 Mo. App. 124; *Lee v. St. Louis*, etc., R. Co., 112 Mo. App. 372, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 122.

*New Hampshire*. — *English v. Amidon*, 72 N. H. 301.

*New Jersey*. — *Burns v. Delaware*, etc., Tel., etc., Co., 70 N. J. L. 745.

*New York*. — *Smith v. King*, 74 N. Y. App. Div. 1; *Griffin v. Ithaca St. R. Co.*, 62 N. Y. App. Div. 551; *Pursley v. Edge Moor Bridge Works*, 56 N. Y. App. Div. 71, *affirmed* without opinion 168 N. Y. 589.

*Rhode Island*. — *Mayott v. Norcross*, 24 R. I. 187; *McGar v. National*, etc., *Worsted Mills*, 22 R. I. 347; *Pierce v. Contrexville Mfg. Co.*, 25 R. I. 512; *McGarrity v. New York*, etc., R. Co., 25 R. I. 269; *Cox v. American Agricultural Chemical Co.*, 24 R. I. 503. *Compare* *Desrosiers v. Bourn*, 26 R. I. 6, *reargument denied* 26 R. I. 156.

*South Carolina*. — *Wood v. Victor Mfg. Co.*, 66 S. Car. 482.

*Texas*. — *El Paso*, etc., R. Co. v. *Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; *Peck v. Peck*, (Tex. 1905) 87 S. W. Rep. 248; *Austin v. Forbis*, (Tex. Civ. App. 1905) 86 S. W. Rep. 29; *International*, etc., R. Co. v. *Jourdan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 266; *International*, etc., R. Co. v. *Shaughnessy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1026; *Missouri*, etc., R. Co. v. *Crum*, 35 Tex. Civ. App. 609; *Galveston*, etc., R. Co. v. *Hampton*, 24 Tex. Civ. App. 458. See *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65.

*Virginia*. — *Virginia Portland Cement Co. v. Luck*, 103 Va. 427.

*Washington*. — *Shoemaker v. Bryant Lumber*, etc., Mill Co., 27 Wash. 637.

*Wisconsin*. — *Hocking v. Windsor Spring Co.*, 125 Wis. 575.

See *Shea v. Manning*, 141 Ala. 628; *Busch v. Robinson*, (Oregon 1905) 81 Pac. Rep. 237; *Stager v. Troy Laundry Co.*, 38 Oregon 480. *Compare* *Pennsylvania Co. v. McCurdy*, 66 Ohio St. 118.

It has been declared to be the rule in *Ohio* that where the facts are simple and the conditions not complex, and the circumstances such as to be easily comprehended, one who knows the conditions and the facts and circumstances is bound and conclusively presumed to know the dangers resulting from such facts. *Green v. New York*, etc., R. Co., 26 Ohio Cir. Ct. 609.

It has been said that if the master places defective tools in the hands of his servant, or insufficient appliances, and requires him to use them, and the risk incurred by such use is not so imminent that persons of ordinary prudence would, under the circumstances of the case, de-

**123. d. RISKS ARISING FROM MASTER'S NEGLIGENCE — Statement of Rule. — See note i.**

cline to incur it, it would seem that the master ought not to be absolved from liability for his neglect of duty merely because the servant was aware of the defect before being hurt, and did not retire from the service. *Southern Pac. R. Co. v. Yeargin* (C. C. A.) 109 Fed. Rep. 436.

**123. 1. Risks Caused by Master's Negligence — United States.** — *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; *Sink v. Sikes Co.*, 134 Fed. Rep. 144; *Hawley v. Chicago, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 150; *Mountain Copper Co. v. Van Buren*, (C. C. A.) 133 Fed. Rep. 1; *Bunker Hill, etc., Min., etc., Co. v. Jones*, (C. C. A.) 130 Fed. Rep. 813; *National Steel Co. v. Lowe*, (C. C. A.) 127 Fed. Rep. 311; *Pennsylvania R. Co. v. Jones*, (C. C. A.) 123 Fed. Rep. 753; *Texas, etc., R. Co. v. Swearingen*, (C. C. A.) 122 Fed. Rep. 193, *affirmed* 196 U. S. 51; *Rockport Granite Co. v. Bjornholm*, (C. C. A.) 115 Fed. Rep. 947; *Swensen v. Bender*, (C. C. A.) 114 Fed. Rep. 1; *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312.

*Alabama.* — *Northern Alabama R. Co. v. Shea*, 142 Ala. 119; *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401.

*Arkansas.* — *Arkansas Cent. R. Co. v. Jackson*, 70 Ark. 295.

*California.* — *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, *rehearing denied* (Cal. 1903) 74 Pac. Rep. 444.

*District of Columbia.* — *Stauble v. Potomac Electric Power Co.*, 21 App. Cas. (D. C.) 160.

*Illinois.* — *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, *affirming* 115 Ill. App. 209; *Illinois Steel Co. v. Olste*, 214 Ill. 181; *Allen B. Wisley Co. v. Burke*, 203 Ill. 250, *affirming* 106 Ill. App. 30; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558, *affirming* 106 Ill. App. 21; *Malott v. Hood*, 201 Ill. 202, *affirming* 99 Ill. App. 360; *D. Sinclair Co. v. Waddill*, 200 Ill. 17, *affirming* 99 Ill. App. 334; *Slack v. Harris*, 200 Ill. 96; *Chicago, etc., R. Co. v. Spurney*, 197 Ill. 471; *Himrod Coal Co. v. Clark*, 197 Ill. 514, *affirming* 99 Ill. App. 332; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319; *Ide v. Fratcher*, 194 Ill. 552, *affirming* 96 Ill. App. 549; *La Salle v. Kostka*, 190 Ill. 130, *affirming* 92 Ill. App. 91; *Mobile, etc., R. Co. v. Vallowe*, 115 Ill. App. 621, *judgment affirmed* 214 Ill. 124; *National Enameling, etc., Co. v. Fagan*, 115 Ill. App. 590; *Illinois Third Vein Coal Co. v. Cioni*, 115 Ill. App. 455, *judgment affirmed* 215 Ill. 583; *Spring Valley Coal Co. v. Buzis*, 115 Ill. App. 196, *judgment affirmed* 213 Ill. 341; *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285; *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294, *affirmed* 207 Ill. 395; *Montgomery Coal Co. v. Barlinger*, 109 Ill. App. 185; *Pittsburg, etc., R. Co. v. Hewitt*, 102 Ill. App. 428, *affirmed* 202 Ill. 28; *Mallen v. Waldowski*, 101 Ill. App. 367, *reversed on other grounds* 203 Ill. 87; *Walter v. Fisher*, 96 Ill. App. 590; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463; *Cichowicz v. International Packing Co.*, 206 Ill. 346, *affirming* 107 Ill. App. 234.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Nicholas*, (Ind. App. 1905) 73 N. E. Rep. 195; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123; *Hollingsworth v. Chicago, etc., R. Co.*, 160 Ind. 259; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1; *Terre Haute, etc., R. Co. v. Rittenhouse*, 28 Ind. App. 633; *Barley v. Southern Indiana R. Co.*, 30 Ind. App. 406.

*Iowa.* — *Mace v. Boedker*, 127 Iowa 721; *Scott v. Iowa Telephone Co.*, 126 Iowa 524; *Pierson v. Chicago, etc., R. Co.*, 127 Iowa 13; *Beresford v. American Coal Co.*, 124 Iowa 34; *Phinney v. Illinois Cent. R. Co.*, 122 Iowa 488; *Morby v. Chicago, etc., R. Co.*, 116 Iowa 84.

*Kansas.* — *Schwarzschild v. Drysdale*, 69 Kan. 119; *Hoffmeier v. Kansas City-Leavenworth R. Co.*, 68 Kan. 831; *Emporia v. Kowalski*, 66 Kan. 64.

*Kentucky.* — *Illinois Cent. R. Co. v. McIntosh*, 118 Ky. 145, *rehearing denied* 118 Ky. 156.

*Louisiana.* — *Williams v. Levert Lumber, etc., Co.*, 114 La. 805; *Hailey v. Texas, etc., R. Co.*, 113 La. 533.

*Massachusetts.* — *Wagner v. Boston El. R. Co.*, 188 Mass. 437; *Murphy v. New York, etc., R. Co.*, 187 Mass. 18; *Meagher v. Crawford Laundry Mach. Co.*, 187 Mass. 586; *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287; *Boucher v. Robeson Mills*, 182 Mass. 500; *Pierce v. Arnold Print Works*, 182 Mass. 260.

*Michigan.* — *Milbourne v. Arnold Electric Power, etc., Co.*, 103 N. W. Rep. 821, 12 Detroit Leg. N. 177; *La Barre v. Grand Trunk Western R. Co.*, 133 Mich. 192, 10 Detroit Leg. N. 146.

*Minnesota.* — *Schus v. Powers-Simpson Co.*, 85 Minn. 447.

*Mississippi.* — *Bradford v. Taylor*, 85 Miss. 409.

*Missouri.* — *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Smith v. Fordyce*, 190 Mo. 1; *Stafford v. Adams*, 113 Mo. App. 717; *Warren v. Chicago, etc., R. Co.*, 113 Mo. App. 498; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Curtis v. McNair*, 173 Mo. 270; *Chambers v. Chester*, 172 Mo. 461; *Bane v. Irwin*, 172 Mo. 306; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467; *Shore v. American Bridge Co.*, 111 Mo. App. 278; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Deputy v. Chicago, etc., R. Co.*, 110 Mo. App. 110; *Montgomery v. Chicago G. W. R. Co.*, 109 Mo. App. 88; *Cothron v. Cudahy Packing Co.*, 98 Mo. App. 343; *Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371; *Nash v. Dowling*, 93 Mo. App. 156; *Thompson v. Chapell*, 91 Mo. App. 297; *Harris v. Williams Cooperage Co.*, 107 Mo. App. 249; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167; *Benedict v. Chicago G. W. R. Co.*, 104 Mo. App. 218.

*New Hampshire.* — *Wallace v. Boston, etc., R. Co.*, 72 N. H. 504.

*New Jersey.*—*D'Agostino v. Pennsylvania R. Co.*, (N. J. 1905) 60 Atl. Rep. 1113; *Christensen v. Lambert*, 67 N. J. L. 341.

*New York.*—*Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 N. Y. App. Div. 600; *Smith v. New York, etc., R. Co.*, 86 N. Y. App. Div. 188, *affirmed* without opinion 178 N. Y. 635.

*North Carolina.*—*Hicks v. Naomi Falls Mfg. Co.*, 138 N. Car. 319; *Pressly v. Dover Yarn Mills*, 138 N. Car. 410; *Orr v. Southern Bell Telephone, etc., Co.*, 132 N. Car. 691.

*North Dakota.*—*Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

*Ohio.*—*Kracht v. Lake Shore, etc., R. Co.*, 25 Ohio Cir. Ct. 521; *Scanlon v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 256; *Cincinnati, etc., R. Co. v. Thompson*, 12 Ohio Cir. Dec. 326, 21 Ohio Cir. Ct. 778; *Frolich v. Crankir*, 11 Ohio Cir. Dec. 592, 21 Ohio Cir. Ct. 615.

*Oregon.*—*Miller v. Inman*, 40 Oregon 161; *Hough v. Grants Pass Power Co.*, 41 Oregon 531.

*Pennsylvania.*—*Bartholomew v. Kemmerer*, 211 Pa. St. 277; *Ortlip v. Philadelphia, etc., Traction Co.*, 198 Pa. St. 586; *Levy v. Rosenblatt*, 21 Pa. Super. Ct. 543.

*South Carolina.*—*Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 244; *Carson v. Southern R. Co.*, 68 S. Car. 55, *judgment affirmed* Southern R. Co. v. Carson, 194 U. S. 136.

*Texas.*—*Gulf, etc., R. Co. v. Moore*, 28 Tex. Civ. App. 603; *Gulf, etc., R. Co. v. Darby*, 28 Tex. Civ. App. 413.

*Utah.*—*Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Mathews v. Daly West Min. Co.*, 27 Utah 153; *Hene v. Mammoth Min. Co.*, 27 Utah 168; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437; *Hill v. Southern Pac. R. Co.*, 23 Utah 94; *Garity v. Bullion-Beck, etc., Min. Co.*, 27 Utah 534; *Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798.

*Vermont.*—*Severance v. New England Talc Co.*, 72 Vt. 181.

*Virginia.*—*Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362; *Black v. Virginia Portland Cement Co.*, (Va. 1905) 51 S. E. Rep. 831.

*Washington.*—*Rush v. Spokane Falls, etc., R. Co.*, 23 Wash. 501.

*Canada.*—*Sparano v. Canadian Pac. R. Co.*, 22 Quebec Super. Ct. 292.

But see *Langlois v. Dunn Worsteds Mills*, 25 R. L. 645. *Compare* *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841; *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91.

It has been said that "the employee does not assume risks arising from the negligence of the master unless he is chargeable with knowledge of the fact of such negligence and of the defect or risk." *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492.

The rule that the servant assumes the ordinary risks incident to the business presupposes that his master has performed the duties of caution, care, and vigilance which the law casts upon him. It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes. *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, *affirming* 96 Ill. App. 288.

**Knowledge of Master's Negligence.**—While a servant does not, as a general rule, assume the risks and dangers arising from the master's negligence, yet if the servant knows, or, by the exercise of ordinary care, should have known of the master's negligence subjecting the former to risks or dangers in the course of his employment, he assumes such risks and cannot recover for an injury caused thereby, unless there is some special circumstance shown, as that he acted in obedience to an order of the master, or that there was a promise on the part of the master to remedy the defect complained of, or perhaps in some other cases. *Chicago City R. Co. v. Enroth*, 113 Ill. App. 285. See *supra*, the cases supplementing page 112, note 1 *et seq.*

In *Texas* the rule is declared to be that a servant does not assume the risks arising from the failure of the master to do his duty, unless he knows the failure and the attendant risks, or in the ordinary discharge of his duty must necessarily have acquired that knowledge. *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Ray v. Pecos, etc., R. Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 466; *Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 87 S. W. Rep. 371; *St. Louis, etc., R. Co. v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 790; *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *International, etc., R. Co. v. Shaughnessy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1026; *International, etc., R. Co. v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991, *rehearing denied* (Tex. Civ. App. 1904) 83 S. W. Rep. 34, *reversed* on another point (Tex. 1905) 87 S. W. Rep. 328; *Missouri, etc., R. Co. v. Gearheart*, (Tex. Civ. App. 1904) 81 S. W. Rep. 325; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, *affirmed* 98 Tex. 123; *Texas Cent. R. Co. v. Pelfrey*, 35 Tex. Civ. App. 501; *Gulf, etc., R. Co. v. Davis*, 35 Tex. Civ. App. 285; *San Antonio, etc., R. Co. v. Klaus*, 34 Tex. Civ. App. 492; *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *Missouri, etc., R. Co. v. Blackman*, 32 Tex. Civ. App. 200; *St. Louis Southwestern R. Co. v. McDowell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 974; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300; *International, etc., R. Co. v. Cochran*, (Tex. Civ. App. 1902) 71 S. W. Rep. 41; *Missouri, etc., R. Co. v. Hawk*, 30 Tex. Civ. App. 142; *Smith v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1901) 65 S. W. Rep. 83; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1064; *Pippin v. Sherman, etc., R. Co.*, (Tex. Civ. App. 1900) 58 S. W. Rep. 961; *Missouri, etc., R. Co. v. Walden*, 27 Tex. Civ. App. 567; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44; *Galveston, etc., R. Co. v. Newport*, 26 Tex. Civ. App. 583; *Texas, etc., R. Co. v. McClane*, 24 Tex. Civ. App. 321; *San Antonio, etc., R. Co. v. Engelhorn*, 24 Tex. Civ. App. 324.

**Failure to Give Customary or Promised Warning.**—*Postal Tel. Cable Co. v. Hulsey*, 132 Ala.

**124.** See note 1.

**125.** *c.* CONTINUING IN EMPLOYMENT WITH KNOWLEDGE OF RISKS  
—(1) *Without Complaint or Assurance of Remedy.* — See note 1.

444; *Carroll v. New York, etc., R. Co.*, 182 Mass. 237.

**Negligence of Employees of Same Master Who Are Not Fellow Servants.**—A servant does not assume the risk of the negligence of the servants of the same master who are not fellow servants with him. *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583.

**124. 1. Servant May Presume that Master Performed Duties.**—*Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, *affirming* (C. C. A.) 112 Fed. Rep. 888; *Mountain Copper Co. v. Van Buren*, (C. C. A.) 133 Fed. Rep. 1; *Chicago, etc., R. Co. v. Benton*, (C. C. A.) 132 Fed. Rep. 460; *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399; *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, *affirming* 99 Ill. App. 670; *Momence Stone Co. v. Turrell*, 205 Ill. 515; *Armour v. Golkowska*, 202 Ill. 144, *affirming* 95 Ill. App. 492; *Chicago, etc., R. Co. v. Kinnare*, 190 Ill. 9, *affirming* 91 Ill. App. 508; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 124; *Hollingsworth v. Chicago, etc., R. Co.*, 160 Ind. 259. See *Cincinnati, etc., R. Co. v. Maley*, 76 S. W. Rep. 334, 25 Ky. L. Rep. 690. See *supra*, the cases supplementing page 57, note 4; page 73, note 3; page 90, note 7; and page 122, note 1.

**125. 1. Continuing in Employment After Knowledge of Risk—United States.**—*Hull v. Northern Pac. R. Co.*, (C. C. A.) 136 Fed. Rep. 153; *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495.

*Alabama.*—*Thomas v. Bellamy*, 126 Ala. 253.

*Colorado.*—*Hughes v. Schnavel*, 20 Colo. App. 306.

*Delaware.*—*Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24.

*Illinois.*—*Cichowicz v. International Packing Co.*, 206 Ill. 346, *affirming* 107 Ill. App. 234; *Odin Coal Co. v. Tadlock*, 216 Ill. 624; *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Swift v. Campbell*, 97 Ill. App. 360.

*Indiana.*—*Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind. 507; *Robertson v. Ford*, 164 Ind. 538; *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Crum v. North Vernon Pump, etc., Co.*, 34 Ind. App. 253; *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154.

*Iowa.*—*Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354; *Crane v. Chicago, etc., R. Co.*, 124 Iowa 81; *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Geesen v. Saguin*, 115 Iowa 7; *Martin v. Chicago, etc., R. Co.*, (Iowa 1901) 87 N. W. Rep. 654; *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94; *Sankey v. Chicago, etc., R. Co.*, 118 Iowa 39.

*Kansas.*—*Emporia v. Kowalski*, 66 Kan. 64.  
*Kentucky.*—*Buey v. Chess, etc., Co.*, 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; *Reiser v. Southern Planing Mill, etc., Co.*, 114 Ky. 1; *East*

*Jellico Coal Co. v. Stewart*, 68 S. W. Rep. 624, 24 Ky. L. Rep. 420; *Arnold v. Louisville, etc., R. Co.*, 58 S. W. Rep. 370, 22 Ky. L. Rep. 511.  
*Louisiana.*—*Neider v. Illinois Cent. R. Co.*, 108 La. 154.

*Maine.*—*Drapeau v. International Paper Co.*, 96 Me. 299; *Dempsey v. Sawyer*, 95 Me. 295.

*Maryland.*—*Maryland Steel Co. v. Engleman*, 101 Md. 661.

*Massachusetts.*—*McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155; *McClusky v. Garfield, etc., Cdal Co.*, 180 Mass. 115; *Silvia v. Wampanoag Mills*, 177 Mass. 194. But *compare* *Moylon v. D. S. McDonald Co.*, 188 Mass. 499.

*Michigan.*—*Taylor v. Withington, etc., Mfg. Co.*, 136 Mich. 652, 11 Detroit Leg. N. 152; *Miller v. Detroit, etc., R. Co.*, 133 Mich. 564, 10 Detroit Leg. N. 342; *Price v. U. S. Baking Co.*, 130 Mich. 500, 9 Detroit Leg. N. 122; *Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 89 Am. St. Rep. 461, 8 Detroit Leg. N. 244; *Crawford v. Detroit, etc., R. Co.*, 127 Mich. 312, 8 Detroit Leg. N. 363.

*Minnesota.*—*Ready v. Peavy Elevator Co.*, 89 Minn. 154; *Kerrigan v. Chicago, etc., R. Co.*, 86 Minn. 407; *Reberk v. Horne, etc., Co.*, 85 Minn. 326; *Wexler v. Salisbury*, 91 Minn. 308; *Bartley v. Howell*, 82 Minn. 382; *Lally v. Crookston Lumber Co.*, 82 Minn. 407.

*Missouri.*—*Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106; *Hollingsworth v. National Biscuit Co.*, 114 Mo. App. 20; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Carter v. Baldwin*, 107 Mo. App. 217; *Neves v. Green*, 111 Mo. App. 634.

*New Hampshire.*—*Olney v. Boston, etc., R. Co.*, 71 N. H. 427; *Shaw v. Manchester St. R. Co.*, (N. H. 1904) 58 Atl. Rep. 1073; *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835.

*New Jersey.*—*McDonald v. Standard Oil Co.*, 69 N. J. L. 445; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710.

*New York.*—*Dillon v. National Coal Tar Co.*, 181 N. Y. 215; *Drake v. Auburn City R. Co.*, 173 N. Y. 466; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Austin v. Fisher Tanning Co.*, 96 N. Y. App. Div. 550; *Lynch v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 217; *Ehrenfried v. Lackawanna Iron, etc., Co.*, 89 N. Y. App. Div. 130, *affirmed* without opinion 180 N. Y. 515; *Field v. New York Cent., etc., R. Co.*, 86 N. Y. App. Div. 148; *Mull v. Curtice Bros. Co.*, 74 N. Y. App. Div. 561; *Szotak v. Berwind-White Coal Min. Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 98; *Thompson v. Cary Mfg. Co.*, 62 N. Y. App. Div. 279; *Carlson v. Walsh*, 56 N. Y. App. Div. 551; *Rice v. New York Cent., etc., R. Co.*, 55 N. Y. App. Div. 339. *Compare* *Smith v. Lidgerwood Mfg. Co.*, 56 N. Y. App. Div. 528.

*North Carolina.*—*Marks v. Harriet Cotton Mills*, 138 N. Car. 401.

*Ohio.*—*Memphis, etc., Packet Co. v. Britton*, 25 Ohio Cir. Ct. 153; *Michigan Cent. R. Co. v. Butler*, 23 Ohio Cir. Ct. 459; *Crawford v. New*



**127. Limitation on Rule.** — See note 1.**(2) On Promise to Remedy or Repair** — General Rule. — See note 2.

York, etc., R. Co., 23 Ohio Cir. Ct. 207; Record v. Dean, 11 Ohio Cir. Dec. 808.

*Oregon.* — *Stager v. Troy Laundry Co.*, 38 Oregon 480. See *Johnson v. Portland Granite, etc., Co.*, 40 Oregon 436.

*Pennsylvania.* — *Wilkinson v. H. W. Johns Mfg. Co.*, 198 Pa. St. 634.

*Rhode Island.* — *Mayott v. Norcross*, 24 R. I. 187; *McGar v. National, etc., Worsted Mills*, 22 R. I. 347.

*Tennessee.* — *Heald v. Wallace*, 109 Tenn. 346.

*Texas.* — *Hettich v. Hillje*, 33 Tex. Civ. App. 571; *Webb v. Gulf, etc., R. Co.*, 27 Tex. Civ. App. 75.

*Utah.* — *Leach v. Oregon Short Line R. Co.*, 29 Utah 285; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Roth v. Eccles*, 28 Utah 456; *Faulkner v. Mammoth Min. Co.*, 23 Utah 437.

*Vermont.* — *Skinner v. Central Vermont R. Co.*, 73 Vt. 336.

*Virginia.* — *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708; *Parlett v. Dunn*, 102 Va. 459.

*Washington.* — *Bier v. Hosford*, 35 Wash. 544; *Shoemaker v. Bryant Lumber, etc., Mill Co.*, 27 Wash. 637; *Robare v. Seattle Traction Co.*, 24 Wash. 577; *Young v. O'Brien*, 36 Wash. 570.

*Wisconsin.* — *Faber v. C. Reiss Coal Co.*, 124 Wis. 554; *Egnor v. N. C. Foster Lumber Co.*, 115 Wis. 530; *Pautz v. Plankinton Packing Co.*, 118 Wis. 47.

*Compare Sim v. Dominion Fish Co.*, 2 Ont. L. Rep. 69.

**Risks of Working with Incompetent Fellow Servant.** — *White v. Lewiston, etc., Frontier R. Co.*, 94 N. Y. App. Div. 4. See the title *FELLOW SERVANTS*, vol. 12, page 920, note 3.

It is the duty of a servant to report to his master, or to those whom the master empowers to hire and discharge his workmen, the dangerous incompetence of his fellows known to him, and notice of such incompetency and a failure to report it entail upon him an assumption of its risk. *Weeks v. Scharer*, (C. C. A.) 111 Fed. Rep. 330.

**127. 1. Limitation of Rule.** — See *infra*, this title, the cases supplementing page 141, note 1.

In *Missouri* the rule is that if the master fails in his duty to his servant to furnish safe appliances, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse the appliances or quit the service of the master, if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances, notwithstanding they are not so reasonably safe; and if he does use them and exercises such care and caution, and is injured, the servant does not waive his right to compensation for injuries received in consequence, nor is he guilty of contributory negligence. *Shepherd v. St. Louis Transit Co.*, 189 Mo. 362; *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Mathis v. Kansas City Stock Yards Co.*, 185 Mo. 434; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Haviland v.*

*Kansas City, etc., R. Co.*, 172 Mo. 106; *Holmes v. Brandenbaugh*, 172 Mo. 53; *Harff v. Green*, 168 Mo. 308; *Minnier v. Sedalia, etc., R. Co.*, 167 Mo. 99; *Weston v. Lackawanna Min. Co.*, 105 Mo. App. 702; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Neves v. Green*, 111 Mo. App. 634; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Adams v. McCormick Harvesting Mach. Co.*, 110 Mo. App. 367; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 480; *Robbins v. Big Circle Min. Co.*, 105 Mo. App. 78; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Prophet v. Kemper*, 95 Mo. App. 219; *Adams v. McCormick Harvesting Mach. Co.*, 95 Mo. App. 111; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; *Nash v. Dowling*, 93 Mo. App. 156; *Haworth v. Kansas City Southern R. Co.*, 94 Mo. App. 215; *Weldon v. Omaha, etc., R. Co.*, 93 Mo. App. 668; *Kane v. Falk Co.*, 93 Mo. App. 209; *Cardwell v. Chicago G. W. R. Co.*, 90 Mo. App. 31; *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141; *Devore v. St. Louis, etc., R. Co.*, 86 Mo. App. 429; *Scott v. Springfield*, 81 Mo. App. 312; *Harri-man v. Kansas City Star Co.*, 81 Mo. App. 124.

**Discovery of Defect Immediately Before Accident.**

— The doctrine of assumption of risk has been held not to apply where the defect which caused the injury did not come to the knowledge of the servant in time to avoid the accident, without instantly abandoning his service. *Bryce v. Burlington, etc., R. Co.*, (Iowa 1905) 104 N. W. Rep. 483.

**2. Remaining in Service After Promise to Repair** — *United States.* — *Cincinnati, etc., R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519; *Musser-Sauntry Land, etc., Co. v. Brown*, (C. C. A.) 126 Fed. Rep. 141; *Cudahy Packing Co. v. Skoumal*, (C. C. A.) 125 Fed. Rep. 470; *Highland Boy Gold Min. Co. v. Pouch*, (C. C. A.) 124 Fed. Rep. 148; *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335; *Barney Dumping Boat Co. v. Clark*, 112 Fed. Rep. 921, 50 C. C. A. 616, *affirming* 109 Fed. Rep. 235.

*Alabama.* — *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537.

*Arkansas.* — *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55.

*California.* — *Anderson v. Seropian*, 147 Cal. 201.

*Delaware.* — *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*Illinois.* — *Shickle, etc., Iron Co. v. Glon*, 106 Ill. App. 645; *Odin Coal Co. v. Tadlock*, 216 Ill. 624; *Kimmundy v. Anderson*, 103 Ill. App. 457; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, *affirmed* 197 Ill. 186; *Pardridge v. Gilbride*, 98 Ill. App. 134; *Illinois Cent. R. Co. v. North*, 97 Ill. App. 124; *Westville Coal Co. v. Wood*, 96 Ill. App. 616. *Compare* *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 403.

*Indiana.* — *Terre Haute Electric Co. v. Kieley*, 35 Ind. App. 180.

*Iowa.* — *Bryce v. Burlington, etc., R. Co.*,

**128. Reliance on Promise Necessary.** — See note 1.

(Iowa 1905) 104 N. W. Rep. 483; *Foster v. Chicago, etc., R. Co.*, 127 Iowa 84; *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa 445, 104 Am. St. Rep. 354.

*Kansas.* — *Atchison, etc., R. Co. v. Sledge*, 68 Kan. 321; *Missouri, etc., R. Co. v. Puckett*, 62 Kan. 770.

*Kentucky.* — *Louisville Hotel Co. v. Kaltenbrun*, 82 S. W. Rep. 378, 26 Ky. L. Rep. 669, 80 S. W. Rep. 1163, 26 Ky. L. Rep. 208; *Republic Iron, etc., Works v. Gregg*, 71 S. W. Rep. 900, 24 Ky. L. Rep. 1627; *Reiser v. Southern Planing Mill, etc., Co.*, 114 Ky. 1; *Bell, etc., Co. v. Applegate*, 62 S. W. Rep. 1124, 23 Ky. L. Rep. 470.

*Maryland.* — *Maryland Steel Co. v. Engleman*, 101 Md. 661.

*Massachusetts.* — *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155.

*Minnesota.* — *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665; *Shalgrer v. Red Cliff Lumber Co.*, (Minn. 1905) 104 N. W. Rep. 531.

*Missouri.* — *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 480; *Prophet v. Kemper*, 95 Mo. App. 219; *Nash v. Dowling*, 93 Mo. App. 156; *Herbert v. Mound City Boot, etc., Co.*, 90 Mo. App. 305; *Fouts v. Swift*, 113 Mo. App. 526; *Whaley v. Coleman*, 113 Mo. App. 594. See *Mueller v. La Prella Shoe Co.*, 109 Mo. App. 506.

*Nevada.* — *Taylor v. Nevada-California-Oregon R. Co.*, 26 Nev. 415.

*New Jersey.* — *Dunkerley v. Webendorfer Mach. Co.*, 71 N. J. L. 60; *Dowd v. Erie R. Co.*, 70 N. J. L. 451.

*New York.* — *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 95 Am. St. Rep. 585, *reversing* 70 N. Y. App. Div. 336; *Anderson v. Steinreich*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 680; *Hempstock v. Lackawanna Iron, etc., Co.*, 98 N. Y. App. Div. 332; *Leaux v. New York*, 87 N. Y. App. Div. 405. See *Allcot v. Kirkham*, 101 N. Y. App. Div. 77.

*North Carolina.* — *Springs v. Southern R. Co.*, 130 N. Car. 186.

*Pennsylvania.* — *Held v. American Window Glass Co.*, 207 Pa. St. 534; *Webster v. Monongahela River Consol. Coal, etc., Co.*, 201 Pa. St. 278. See *Schiglizzo v. Dunn*, 211 Pa. St. 253, 107 Am. St. Rep. 549; *Calhoun v. Holland Laundry*, 208 Pa. St. 139; *Young v. Mercantile Steam Laundry Co.*, 198 Pa. St. 553.

*Rhode Island.* — *Collins v. Harrison*, 25 R. I. 489.

*Tennessee.* — *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657.

*Texas.* — *Missouri, etc., R. Co. v. Baker*, 35 Tex. Civ. App. 542; *Gulf, etc., R. Co. v. Garren*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1028; *Houston v. Owen*, (Tex. Civ. App. 1902) 67 S. W. Rep. 788. *Compare Hilje v. Hettich*, 95 Tex. 321, *reversing* (Tex. Civ. App. 1901) 65 S. W. Rep. 491.

*Virginia.* — *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708; *Newport News Pub. Co. v. Beaumeister*, 102 Va. 677.

*Washington.* — *Iverson v. McDonnell*, 36 Wash. 73; *Crooker v. Pacific Lounge, etc., Co.*, 34 Wash. 191, 29 Wash. 30.

*Wisconsin.* — *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961. See *Albrecht v. Chicago, etc., R. Co.*, 108 Wis. 530.

*Canada.* — *Day v. Dominion Iron, etc., Co.*, 36 Nova Scotia 113.

See *Carleton Min., etc., Co. v. Ryan*, 29 Colo. 401; *Dempsey v. Sawyer*, 95 Me. 295.

See also *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492, wherein it is suggested that in the case of promise to repair, the question is one of contributory negligence rather than an assumption of risks.

**Defect Caused by Negligence of Servant.** — This rule obtains as well where the defective condition is the result of the servant's own carelessness or negligence as where it results from other causes. *Atchison, etc., R. Co. v. Sledge*, 68 Kan. 321.

**Remaining in Service After Promise to Replace Incompetent Servant.** — If the servant complains to and notifies the master that a collaborator or fellow servant with whom he is associated in the performance of the duties of his employment is incompetent, and the master agrees and promises to replace him with a competent workman, the servant so complaining may, in reliance thereon, continue in the discharge of his duties associated with such incompetent workman, for a reasonable time, to enable the master to fulfil his agreement. During such time the servant so complaining is held not to assume the risks incident to and arising from such incompetency, unless they are so obvious and imminent that a person of ordinary prudence would not incur the same. *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24. See the title *FELLOW SERVANTS*, vol. 12, p. 921, note 7.

**Servant's Knowledge of the Danger.** — It has been said that with respect to a danger which the servant knows as well as the master, the servant is not absolved from the charge of contributory negligence if he proceeds to ignore the danger, even though he does so upon the assurance of the master that at some future time the defect may be repaired. *Rosa v. Volkening*, 64 N. Y. App. Div. 426, *affirmed* without opinion 173 N. Y. 590.

**Appliances of Simple Construction.** — It has been held in effect that the rule which exempts a servant from assumption of risk where a promise to repair is made does not apply when the servant is engaged in ordinary labor with tools of simple construction. *Gunning System v. Bapointe*, 212 Ill. 274; *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273; *Crum v. North Vernon Pump, etc., Co.*, 34 Ind. App. 253; *Baumwald v. Trenkman*, (Supm. Ct. App. T.) 88 N. Y. Supp. 182.

**Master's Knowledge of the Danger.** — It has been held that if a promise to repair is made, and an order to continue working is made, there is not a waiver of the assumption of risk by the servant, if the order to continue working was made without knowledge, or reasonable cause to believe, that the work had become extra hazardous. *Equitable Powder Mfg. Co. v. Green*, 109 Ill. App. 403.

**128. 1. Continued Service Must Be in Reli-**

**128.** Where the Defect Which the Master Promised to Remedy Was Not the Cause of the Accident. — See note 2.

As to What Constitutes a Reasonable Time. — See note 3.

**129.** See notes 1, 2.

Express or Implied Promise Sufficient. — See note 3.

Promise to Employees Generally. — See note 4.

Whose Promise Binds the Master. — See note 5.

What Complaint of Defects Sufficient. — See note 6.

**ance on Promise.** — *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484; *Daily v. Fiberloid Co.*, 186 Mass. 318; *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *Houston v. Owen*, (Tex. Civ. App. 1902) 67 S. W. Rep. 788; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961.

The rule has no application to a case where neither master nor servant contemplated any additional danger to the servant in the use of the defective instrument, but only inconvenience in the work done by it. *Chicago Bridge, etc., Co. v. Hayes*, 91 Ill. App. 269.

**Refusal of Master to Make Changes.** — Where the plaintiff, about five days before he was hurt, told the defendant's superintendent that he needed a helper, and the superintendent told him that he could not give him any helper, it was held that this did not relieve the plaintiff of the assumed risk of continuing in the service after a refusal to furnish him a helper. *Alton Roller Milling Co. v. Bender*, 112 Ill. App. 484.

**128.** 2. *Cantwell v. Brennan*, 125 Mich. 349, 7 Detroit Leg. N. 543; *Shemwell v. Owensboro, etc.*, R. Co., 117 Ky. 556.

**3. What Constitutes a Reasonable Time.** — *Gunning System v. Lapointe*, 212 Ill. 274; *Shickle, etc., Iron Co. v. Glon*, 106 Ill. App. 645; *Hilje v. Hettich*, 95 Tex. 321, reversing (Tex. Civ. App. 1901) 65 S. W. Rep. 491; *Missouri, etc., R. Co. v. Baker*, 35 Tex. Civ. App. 542.

It has been said that a reasonable time, within the meaning of this rule, is any period which does not preclude all reasonable expectations that the promise may be kept. *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665.

**129.** 1. **How Long May Servant Rely on Master's Promises.** — *Cincinnati, etc., R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519. See *Louisville Hotel Co. v. Kaltebrun*, 80 S. W. Rep. 1163, 26 Ky. L. Rep. 208.

**2. Reasonable Time a Question for Jury.** — *Cincinnati, etc., R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519; *Illinois Cent. R. Co. v. North*, 97 Ill. App. 124; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, affirmed 197 Ill. 186; *Kimmund v. Anderson*, 103 Ill. App. 457; *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665; *Taylor v. Nevada-California-Oregon R. Co.*, 26 Nev. 415; *Dowd v. Erie R. Co.*, 70 N. J. L. 451; *Missouri, etc., R. Co. v. Baker*, 35 Tex. Civ. App. 542; *Houston v. Owen*, (Tex. Civ. App. 1902) 67 S. W. Rep. 788; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, See

*Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30. But see *Albrecht v. Chicago, etc., R. Co.*, 108 Wis. 530.

**3. Express or Implied Promise Sufficient.** — *Cincinnati, etc., R. Co. v. Robertson*, (C. C. A.) 139 Fed. Rep. 519. See *Gulf, etc., R. Co. v. Garren*, 96 Tex. 605, 97 Am. St. Rep. 939.

A promise by a representative of the master to remedy the defect complained of "as soon as he could" has been held to be a sufficient promise. *Dowd v. Erie R. Co.*, 70 N. J. L. 451.

**4. Promise to Servant Individually Unnecessary.** — See *Odin Coal Co. v. Tadlock*, 216 Ill. 624.

**5. Who May Make Promise — Vice-Principal.** — *Odin Coal Co. v. Tadlock*, 216 Ill. 624; *Chicago, etc., R. Co. v. Wicker*, (Ind. App. 1904) 71 N. E. Rep. 223, judgment reversed on rehearing 34 Ind. App. 215; *Gulf, etc., R. Co. v. Garren*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1028.

As a general rule, to be binding upon the master, the promise must have been made by a servant having authority to make it. *Bunker Hill, etc., Min., etc., Co. v. Kettleson*, (C. C. A.) 121 Fed. Rep. 529.

But it has been held that a servant will be excused for remaining in the employment a reasonable time in reliance upon a promise to make changes by the master's superintendent, although the superintendent actually did not have the authority to make the changes, if he assumed to have the authority, and the servant reasonably reposed in the assumption. *Barney Dumping Boat Co. v. Clark*, (C. C. A.) 112 Fed. Rep. 921, affirming 109 Fed. Rep. 235.

**Foreman.** — Notice of defects given to the foreman having charge of the particular work and department is notice to the master; and the promise to remedy the defect, made by such foreman, is in law the promise of the master. *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

But it has been held that the rule relieving a servant from assumption of a risk where there has been a promise to repair does not apply where the promise to repair relied upon was made by a foreman of one of many gangs of men, all engaged in the prosecution of one enterprise for a common master, to a foreman of another one of such gangs; otherwise, by an interchange of such promises by the several foremen, all would be relieved from the assumption of risk without the knowledge of the master. *Hempstock v. Lackawanna Iron, etc., Co.*, 93 N. Y. App. Div. 332.

**6. Sufficiency of Complaint.** — *Anderson v. Seropian*, 147 Cal. 201; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367, affirmed 197 Ill. 186; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961.

**129.** Duty to Use Care After Promise. — See note 7.

**130.** See note 1.

(3) *On Assurance that Repairs Have Been Made.* — See note 2.

*f.* SERVANT'S MEANS OF KNOWLEDGE AS AFFECTING RULE — Equal Facilities for Knowledge with Master. — See notes 3, 4, 5.

**131.** Servant Having Better Means of Knowledge than Master. — See note 1.

*g.* WORKING OUTSIDE SCOPE OF EMPLOYMENT — Without Orders. — See note 2.

**129.** 7. Contributory Negligence Not Excused by Promise. — *Louisville Hotel Co. v. Kaltenbrun*, 80 S. W. Rep. 1163, 26 Ky. L. Rep. 208; *Reiser v. Southern Planing Mill, etc., Co.*, 114 Ky. 1; *Babb v. Oxford Paper Co.*, 99 Me. 298; *Brown Oil Can Co. v. Green*, 12 Ohio Cir. Dec. 510, 22 Ohio Cir. Ct. 518; *Johnson v. Anderson, etc., Lumber Co.*, 31 Wash. 554; *Crooker v. Pacific Lounge, etc., Co.*, 34 Wash. 191. See *Missouri, etc., R. Co. v. Puckett*, 62 Kan. 770; *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24.

**130.** 1. Assumption of Risk from Great and Immediate Dangers. — *Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518; *Illinois Cent. R. Co. v. North*, 97 Ill. App. 124; *Crum v. North Vernon Pump, etc., Co.*, 34 Ind. App. 253; *Shemwell v. Owensboro, etc., R. Co.*, 117 Ky. 556. See *Dowd v. Erie R. Co.*, 70 N. J. L. 451.

**Dangers Known to Be Likely to Cause Injury at Any Moment.** — If the workman expose himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, he assumes the risk of the danger which he knows and appreciates, and, if the danger be so obvious or threatening as likely to cause injury at any moment, he has no right to continue at such work in the expectation that promised assistance will be sent. *Roccia v. Black Diamond Coal Min. Co.*, (C. C. A.) 121 Fed. Rep. 451.

**2. Servant's Reliance on Assurance that Repairs Have Been Made.** — *Hayward v. Key*, (C. C. A.) 138 Fed. Rep. 34; *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335; *Kerrigan v. Chicago, etc., R. Co.*, 86 Minn. 407. See *Lynch v. M. T. Stevens, etc., Co.*, 187 Mass. 397; *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 N. Y. App. Div. 600; *McCord v. Southern R. Co.*, 130 N. Car. 491; *Ritt v. True Tag Paint Co.*, 108 Tenn. 646.

**3. Overworked Servant.** — The fact that a servant has been overworked to an extent rendering him less capable of appreciating the dangers of the employment may be considered upon the question of assumption of risks. *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393.

**4. Obligation Must Be Equal.** — *Rockport Granite Co. v. Bjornholm*, (C. C. A.) 115 Fed. Rep. 947; *Pittsburgh, etc., R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120.

**5. Equal Facility for Knowledge** — *United States* — *Riley v. Louisville, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 904.

*California.* — *Thompson v. California Constr. Co.*, (Cal. 1905) 82 Pac. Rep. 367, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 130.

*Colorado.* — *Poorman Silver Mines v. Devling*, (Colo. 1905) 81 Pac. Rep. 252.

*Delaware.* — *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Georgia.* — *Central of Georgia R. Co. v. Price*, 121 Ga. 651.

*Illinois.* — *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243; *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124; *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492; *McCormick Harvesting Mach. Co. v. Wojciechowski*, 111 Ill. App. 641; *Illinois Steel Co. v. Downey*, 103 Ill. App. 101; *Swift v. Campbell*, 97 Ill. App. 360; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96.

*Indiana.* — *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind. 507; *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 98 Am. St. Rep. 281; *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Bedford Quarries Co. v. Thomas*, 29 Ind. App. 85; *Bedford Quarries Co. v. Turner*, (Ind. App. 1905) 75 N. E. Rep. 25.

*Iowa.* — *Jacobson v. Smith*, 123 Iowa 263; *Crane v. Chicago, etc., R. Co.*, 124 Iowa 81; *Branco v. Illinois Cent. R. Co.*, 119 Iowa 211.

*Massachusetts.* — *Vallie v. Hall*, 184 Mass. 358; *Alvey v. American Writing Paper Co.*, 184 Mass. 234; *Tanner v. New York, etc., R. Co.*, 180 Mass. 572.

*Tennessee.* — *Jackson, etc., St. R. Co. v. Simmons*, 107 Tenn. 392. See *Ohio River, etc., R. Co. v. Edwards*, 111 Tenn. 31.

*Utah.* — *Higgins v. Southern Pac. Co.*, 26 Utah 164.

*Vermont.* — *Sias v. Consolidated Lighting Co.*, 73 Vt. 35.

*Wisconsin.* — *Hencke v. Ellis*, 110 Wis. 532.

See *Davitt v. Metropolitan St. R. Co.*, 106 N. Y. App. Div. 567; *Moore v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 266; *Miller v. Moran Bros. Co.*, 39 Wash. 631; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271. *Compare* *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *Lawrence v. Texas Cent. R. Co.*, 25 Tex. Civ. App. 293.

**131.** 1. Better Means of Knowledge than Master. — *Baxter v. Lusher*, 159 Ind. 381; *L. T. Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546; *McKinney v. McNeely*, 108 La. 27; *Livengood v. Joplin-Galena Consol. Lead, etc., Co.*, 179 Mo. 229.

**2. Work Performed Without Master's Directions** — *United States.* — *Baltimore, etc., R. Co. v. Doty*, (C. C. A.) 133 Fed. Rep. 866, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 131. See *Roessler, etc., Chemical Co. v. Peterson*, (C. C. A.) 134 Fed. Rep. 789.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Giordano v.*

**132.** See note 1.

Working Outside Scope of Employment under Orders. — See note 2.

*h.* UNFORESEEN ACCIDENTS. — See note 3.*i.* RISKS ASSUMED BY SERVANTS ENGAGED IN CONSTRUCTION OR REPAIR — Statement and Applications of Rule. — See note 4.

Brandywine Granite Co., 3 Penn. (Del.) 423;  
 Boyd v. Blumenthal, 3 Penn. (Del.) 564; Ray  
 v. Diamond State Steel Co., 2 Penn. (Del.) 525.  
*Indiana.* — Robertson v. Ford, 164 Ind. 538.  
*Kentucky.* — Floyd v. Kentucky Lumber Co.,  
 66 S. W. Rep. 501, 23 Ky. L. Rep. 1914.  
*Maine.* — McTaggart v. Maine Cent. R. Co.,  
 100 Me. 223.

*Michigan.* — Kopf v. Monroe Stone Co., 133  
 Mich. 286, 10 Detroit Leg. N. 185.

*New Hampshire.* — Parent v. Nashua Mfg.  
 Co., 70 N. H. 199.

*New York.* — Ingram v. Fosburgh, 73 N. Y.  
 App. Div. 129; Thompson v. Cary Mfg. Co., 62  
 N. Y. App. Div. 279.

*North Carolina.* — Hamrick v. Balfour Quarry  
 Co., 132 N. Car. 282.

*Pennsylvania.* — Michael v. Henry, 209 Pa.  
 St. 213.

*Wisconsin.* — Egnor v. N. C. Foster Lumber  
 Co., 115 Wis. 530.

See Tirrell v. New York, etc., R. Co., 180  
 Mass. 490; Green v. Brainerd, etc., R. Co., 85  
 Minn. 318. See *infra*, the cases supplementing  
 page 149, note 4.

**Voluntarily Working on Sunday.** — Nottage v.  
 Sawmill Phoenix, 133 Fed. Rep. 979.

**132. 1. Same — Against Master's Directions.**  
 — Ray v. Diamond State Steel Co., 2 Penn.  
 (Del.) 525.

**2. Work Outside Scope of Employment under  
 Master's Orders — United States.** — Felton v.  
 Girardy, 104 Fed. Rep. 127, 43 C. C. A. 439.

*California.* — Daubert v. Western Meat Co.,  
 135 Cal. 144.

*Illinois.* — Supple v. Agnew, 191 Ill. 439;  
 Chicago, etc., R. Co. v. Kinnare, 190 Ill. 9,  
*affirming* 91 Ill. App. 508. Compare Cummings  
 v. Chicago, etc., R. Co., 89 Ill. App. 199, *writ*  
*dismissed* 189 Ill. 608.

*Indiana.* — Republic Iron, etc., Co. v. Ohler,  
 161 Ind. 393; Flickner v. Lambert, (Ind. App.  
 1905) 74 N. E. Rep. 263; American Car, etc.,  
 Co. v. Clark, 32 Ind. App. 644. See Avery v.  
 Nurdyke, etc., Co., 34 Ind. App. 541; Chicago,  
 etc., R. Co. v. Martin, 31 Ind. App. 308; Chi-  
 cago, etc., Stone Co. v. Nelson, 32 Ind. App. 355.

*Louisiana.* — Bonnin v. Crowley, 112 La.  
 1025.

*Michigan.* — Hayes v. Stearns, 130 Mich. 287,  
 9 Detroit Leg. N. 15.

*Missouri.* — Browning v. Kasten, 107 Mo.  
 App. 59; Adolff v. Columbia Pretzel, etc., Co.,  
 100 Mo. App. 199.

*Rhode Island.* — Cox v. American Agricul-  
 tural Chemical Co., 24 R. I. 503. See Fran-  
 giose v. Horton, 26 R. I. 291.

*Texas.* — Hildenbrand v. Marshall, 30 Tex.  
 Civ. App. 135; Gulf, etc., R. Co. v. Newman, 27  
 Tex. Civ. App. 77; International, etc., R. Co. v.  
 Gaitanes, (Tex. Civ. App. 1902) 70 S. W. Rep.  
 101.

Where the servant is employed "as a shov-  
 eler on the dump" of a quartz mill, receiving

a shoveler's wages, and is put to work in a  
 dangerous place in the mill, and is required to  
 perform labor upon machinery for which he  
 was not employed and with which he was not  
 familiar, it cannot be said as a matter of law  
 that he accepted all the ordinary risks incident  
 to that work. Merrifield v. Maryland Gold  
 Quartz Min. Co., 143 Cal. 54.

**Obvious Defects and Dangers.** — Although a  
 servant may be unwilling to undertake work  
 outside of the scope of his employment, if he  
 does so with a knowledge of its dangerous  
 character he assumes the risks. Dickenson v.  
 Vernon, 77 Conn. 537.

As to dangers which it requires no special  
 intelligence or training to foresee, it is not  
 material whether the servant is engaged in the  
 performance of his regular work or not. He  
 assumes the risk of any danger which is plain,  
 open, and apparent to his mind, although en-  
 gaged in doing extra work or work outside of  
 his usual employment. Chicago, etc., R. Co. v.  
 Kinnare, 190 Ill. 9, *affirming* 91 Ill. App. 508.

**Servant Engaging in Work Without Objection.**  
 — When an employee of mature years and or-  
 dinary intelligence is directed to do a temporary  
 work outside of the line of his employment, and  
 proceeds to do such work without any objec-  
 tion whatever, negligence of the employer can-  
 not be predicated upon that state of facts  
 alone. Garden City Wire Spring Co. v. Boecher,  
 94 Ill. App. 96.

**3. Unforeseen Accidents.** — Illinois Steel Co. v.  
 Rolewicz, 113 Ill. App. 312; Mooney v. Beattie,  
 180 Mass. 451.

**Master Not Insurer of Servant's Safety.** — See  
*supra*, the cases supplementing page 55, note 1.

**4. Servants Engaged in Construction and Repair**  
 — *United States.* — Florence, etc., R. Co. v.  
 Whipps, (C. C. A.) 138 Fed. Rep. 13; Galow v.  
 Chicago, etc., R. Co., (C. C. A.) 131 Fed. Rep.  
 242; Roccia v. Black Diamond Coal Min. Co.,  
 (C. C. A.) 121 Fed. Rep. 451; Kansas City  
 Southern R. Co. v. Billingslea, (C. C. A.) 116  
 Fed. Rep. 335.

*Illinois.* — Illinois Steel Co. v. Downey, 103  
 Ill. App. 101.

*Iowa.* — Wahlquist v. Maple Grove Coal, etc.,  
 Co., 116 Iowa 720.

*Minnesota.* — Saxton v. Northwestern Tele-  
 phone Exch. Co., 81 Minn. 314.

*Missouri.* — Kleine v. S. E. Freunds Sons  
 Shoe, etc., Co., 91 Mo. App. 102; Henson v.  
 Armour Packing Co., 113 Mo. App. 618.

*New York.* — Van Derhoff v. New York  
 Cent, etc., R. Co., 88 N. Y. App. Div. 418;  
 Batty v. Niagara Falls Hydraulic Power, etc.,  
 Co., 79 N. Y. App. Div. 466. See Kindorf v.  
 Hoellerer, 87 N. Y. App. Div. 628. Compare  
 Riker v. New York, etc., R. Co., 64 N. Y. App.  
 Div. 357.

*North Carolina.* — Ausley v. American To-  
 bacco Co., 130 N. Car. 34. Compare Pressly v.  
 Dover Yarn Mills, 138 N. Car. 410.

**133.** See notes 1, 2.

Limitation of Rule. — See note 3.

**134.** *j.* BURDEN OF PROVING ASSUMPTION OF RISK. — See notes 1, 2, 3.*Tennessee.* — Heald *v.* Wallace, 109 Tenn. 346.*Vermont.* — Sias *v.* Consolidated Lighting Co., 73 Vt. 35.*West Virginia.* — Richards *v.* Riverside Iron Works, 56 W. Va. 510.*Wisconsin.* — Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503.See W. R. Trigg Co. *v.* Lindsay, 101 Va. 193. Compare Dupree *v.* Alexander, 29 Tex. Civ. App. 31.

The doctrine that the employer must furnish the employee a safe place to work does not apply to a case where an employee is called upon with knowledge to do work which is inherently hazardous, such as repairing defects, or the like. The employee cannot recover for injuries received by reason of the very defect which he is employed to repair. Wahlquist *v.* Maple Grove Coal, etc., Co. 116 Iowa 720.

**Removal of Defective Telegraph Poles.** — A servant who is engaged in taking down defective telegraph poles assumes the dangers arising from their defective condition. Ewald *v.* Michigan Cent. R. Co., 107 Ill. App. 294.

**133. 1. Railroad Construction and Repairs.** — Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309.

It has been held that an employee cannot recover on account of injuries received by reason of defects in the roadbed which he was employed to construct and make safe. Barley *v.* Southern Indiana R. Co., 30 Ind. App. 406.

**2. Risks Assumed by Servants Repairing — Defective Bridge.** — Grayson-McLeod Lumber Co. *v.* Carter, (Ark. 1905) 88 S. W. Rep. 597.

**Setting Die on Press Which Is Not in Use.** — Kasadarian *v.* James Hill Mfg. Co., 130 Fed. Rep. 62.

**Clearing Railroad Yard Obstructed by Loose Rocks and Stones.** — Kansas City Southern R. Co. *v.* Billingslea, (C. C. A.) 116 Fed. Rep. 335.

**Braicing Electric Wire Pole.** — Kellogg *v.* Denver City Tramway Co., 18 Colo. App. 475.

**Replacing Defective Telegraph Poles.** — Saxton *v.* Northwestern Telephone Exch. Co., 81 Minn. 314.

**3. Danger Increased by Master's Negligence.** — Nugent *v.* Cudahy Packing Co., 126 Iowa 517.

**134. 1. Burden of Proof — United States.** — Hawley *v.* Chicago, etc., R. Co., (C. C. A.) 133 Fed. Rep. 150; Pennsylvania R. Co. *v.* Jones, (C. C. A.) 123 Fed. Rep. 753.

*Alabama.* — E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206.

*Iowa.* — Mace *v.* Boedker, 127 Iowa 721; Woolf *v.* Nauman Co., (Iowa 1905) 103 N. W. Rep. 785; Shebeck *v.* National Cracker Co., 120 Iowa 414.

*New York.* — Dowd *v.* New York, etc., R. Co., 170 N. Y. 459; Rooney *v.* Brogan Constr. Co., 107 N. Y. App. Div. 258; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119; Devereux *v.* Utica Steam Cotton Mills, 84 N. Y. App. Div. 34; Allison *v.* Long Clove Trap Rock Co., 75 N. Y. App. Div. 267; Kueckel *v.* O'Connor, 73 N. Y. App. Div. 594. See Scheir

*v.* Quirin, 77 N. Y. App. Div. 624, affirmed without opinion 177 N. Y. 568.

*North Carolina.* — Jones *v.* American Warehouse Co., 137 N. Car. 337, 138 N. Car. 546; Dorsett *v.* Clement-Ross Mfg. Co., 131 N. Car. 254. See Womble *v.* Merchants Grocery Co., 135 N. Car. 474.

*Texas.* — Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584; Galveston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 589.

See Chicago, etc., R. Co. *v.* Stevens, 189 Ill. 226; Duerst *v.* St. Louis Stamping Co., 163 Mo. 607.

It has been said that "the assumption of risk by virtue of his employment is a matter which inheres in plaintiff's case, and the question is sufficiently raised by the defendant's denial of negligence; but assumption of the risk arising from defendant's negligence, if negligence be established, can only be raised by an affirmative plea, and defendant assumes the burden of its proof." Sankey *v.* Chicago, etc., R. Co., 118 Iowa 39.

When the master on being sued for personal injuries by a servant interposes the defense that the servant had knowledge of the dangerous condition of the place to work which caused the injury, the burden is upon the master to prove knowledge on the part of the servant. Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596, affirmed 207 Ill. 576.

**2.** Chicago, etc., R. Co. *v.* Heerey, 203 Ill. 492; Chicago, etc., Stone Co. *v.* Nelson, 32 Ind. App. 355; Indiana Natural Gas, etc., Co. *v.* Vauble, 31 Ind. App. 370; Cleveland, etc., R. Co. *v.* Scott, 29 Ind. App. 519; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480; Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108. See Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; American Rolling Mill Co. *v.* Hullinger, 161 Ind. 673; Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479; Glasscock *v.* Swofford Bros. Dry Goods Co., 106 Mo. App. 657; Bier *v.* Hosford, 35 Wash. 544.

It is not necessary that the defendant set up by answer that the risk on account of which the injury complained of occurred was an assumed one in order that he receive the benefit of that fact. American Car, etc., Co. *v.* Clark, 32 Ind. App. 644.

That the plaintiff assumed the risk which resulted in his injury may, of course, be established by the testimony of the plaintiff. Iowa Gold Min. Co. *v.* Diefenthaler, 32 Colo. 391.

If assumption of the risk appears from the evidence of the plaintiff, the defendant is entitled to the benefit of the defense. White *v.* Lewiston, etc., Frontier R. Co., 94 N. Y. App. Div. 4; at least if it has been pleaded, Ehrenfried *v.* Lackawanna Iron, etc., Co., 89 N. Y. App. Div. 130, affirmed without opinion 180 N. Y. 515.

The fact that the plaintiff assumed the risk of the accident causing the injury complained of may so clearly appear from the evidence produced by the plaintiff himself that the defendant

- 134. 4. Contributory Negligence — a. INTRODUCTORY STATEMENT —**  
 (1) *Reasonable or Ordinary Care Required of Servant.* — See note 4.  
 (2) *What Is Reasonable or Ordinary Care.* — See note 5.

may avail himself thereof by a motion for a nonsuit or for an instruction directing a verdict in his favor. *Greeley v. Foster*, 32 Colo. 292.

In *Indiana* it has been said that in an action by a servant against the master to recover for injuries alleged to have been received on account of defects in the machinery, appliances, etc., the complaint must disclose an absence of knowledge on the part of the plaintiff of the defects or dangers of which he complains. *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27.

And it has been held that section 359a of Burns's Rev. Stat. Ind., 1901, does not abolish or modify the well-settled rule that in an ordinary action against an employer to recover for the injury or death of an employee through negligence of the employer, the plaintiff shall negative knowledge on the part of the employee of the danger through fault in the employment or retention of servants or want of safety of implements or appliances. *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 87 Am. St. Rep. 279.

**134. 3. Tucker v. Northern Pac. Terminal Co.**, 41 Oregon 82; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808. See *Baltimore, etc., R. Co. v. Clifford*, 90 Ill. App. 381; *Evans Laundry Co. v. Crawford*, 67 Neb. 153.

**Evidence of Assumption of Risks.** — In an action by a brakeman to recover for injuries received by being thrown from the ladder on the side of a freight car, by coming in contact with a scale box structure alongside the track, it was held that the written application of the plaintiff for employment, which was offered by the defendant for the purpose of showing that the plaintiff had notice of the location of the track scale box and that he was in danger of being knocked off a car when passing the structure, was properly excluded. *Texas, etc., R. Co. v. Swearingen*, (C. C. A.) 122 Fed. Rep. 193, *affirmed* 196 U. S. 51.

**4. Servant Bound to Use Ordinary Care — United States.** — *Choctaw, etc., R. Co. v. Tennessee*, (C. C. A.) 116 Fed. Rep. 23, *affirmed* 191 U. S. 326.

*Alaska.* — *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407.

*Georgia.* — *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90; *Sanders v. Central of Georgia R. Co.*, 123 Ga. 763; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

*Illinois.* — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124, *affirming* 115 Ill. App. 621; *Erie, etc., Transp. Co. v. Gaines*, 112 Ill. App. 189.

*Iowa.* — *Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434; *Camp v. Chicago G. W. R. Co.*, 124 Iowa 238.

*Michigan.* — *Chilson v. Lansing Wagon Works*, 128 Mich. 43, 8 Detroit Leg. N. 520.

*Minnesota.* — *Parker v. Pine Tree Lumber Co.*, 85 Minn. 13.

*Missouri.* — *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Erickson v. Kansas City, etc., R. Co.*, 171 Mo. 647.

*Nebraska.* — *Kitzberger v. Chicago, etc., R. Co.*, (Neb. 1903) 93 N. W. Rep. 935.

*New Hampshire.* — *O'Hara v. Cocheco Mfg. Co.*, 71 N. H. 104, 93 Am. St. Rep. 499.

*New York.* — *Walsh v. New York, etc., R. Co.*, 80 N. Y. App. Div. 316, *affirmed* without opinion 178 N. Y. 588.

*North Carolina.* — *Marks v. Harriet Cotton Mills*, 138 N. Car. 401; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. Car. 319; *Turrentine v. Wellington*, 136 N. Car. 308; *Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546; *Creech v. Wilmington Cotton Mills*, 135 N. Car. 680.

*Ohio.* — *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547; *Green v. New York, etc., R. Co.*, 26 Ohio Cir. Ct. 609; *Lake Shore, etc., R. Co. v. Fisher*, 26 Ohio Cir. Ct. 143, *affirmed* without opinion 51 Ohio St. 574.

*Oklahoma.* — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon.* — *Viohl v. North Pac. Lumber Co.*, (Oregon 1905) 80 Pac. Rep. 112.

*Pennsylvania.* — *Ehni v. National Tube Works Co.*, 203 Pa. St. 186, 93 Am. St. Rep. 761; *McCarthy v. Shoneman*, 198 Pa. St. 568.

*Rhode Island.* — *Russell v. Riverside Worsted Mills*, 24 R. I. 591.

*Tennessee.* — *Jackson, etc., St. R. Co. v. Simmons*, 107 Tenn. 392.

*Texas.* — *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Gulf, etc., R. Co. v. Cooper*, 33 Tex. Civ. App. 319; *Gulf, etc., R. Co. v. Roane*, 33 Tex. Civ. App. 299; *Horton v. Ft. Worth Packing, etc., Co.*, 33 Tex. Civ. App. 150; *Texas Cent. R. Co. v. Yarbrow*, 32 Tex. Civ. App. 246; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 769; *Dupree v. Tamborilla*, 27 Tex. Civ. App. 603; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334.

*Vermont.* — *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

*Virginia.* — *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 2 Va. Sup. Ct. 526.

*Washington.* — *Smith v. Hecla Min. Co.*, 38 Wash. 454; *Beltz v. American Mill Co.*, 37 Wash. 300.

**Convict Laborers** who are leased out by the state are under the same duty as free men to exercise ordinary and reasonable care and diligence, and if such a convict voluntarily and freely incurs unnecessary risks, and puts himself, of his own volition, in a position of danger, he cannot recover, any more than a free man, under like circumstances, in the same service. *Simonds v. Georgia Iron, etc., Co.*, 133 Fed. Rep. 776, *affirmed* without opinion (C. C. A.) 132 Fed. Rep. 1019.

**5. Care Used by Persons of Ordinary Prudence under Similar Circumstances — Alabama.** — *Alabama Steel, etc., Co. v. Wrenn*, 136 Ala. 475; *Southern R. Co. v. Howell*, 135 Ala. 639.

*Florida.* — *Florida Cent., etc., R. Co. v. Mooney*, 15 Fla. 286.

*Georgia.* — *Wrightsville, etc., R. Co. v. Lat-*

**135.** See notes 1, 2.*b.* AS A BAR TO RECOVERY—(1) *Statement of General Rule.*—

See notes 3, 4.

timore, 118 Ga. 581; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

*Illinois.*—*Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644.

*Indiana.*—*Espenlaub v. Ellis*, 34 Ind. App. 163; *Baltimore, etc., R. Co. v. Cavanaugh*, 35 Ind. App. 32.

*Kentucky.*—*Louisville, etc., R. Co. v. Shumaker*, 67 S. W. Rep. 829, 23 Ky. L. Rep. 2458.

*Michigan.*—*Milbourne v. Arnold Electric Power, etc., Co.*, 103 N. W. Rep. 821, 12 Detroit Leg. N. 177; *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 11 Detroit Leg. N. 246.

*Minnesota.*—*Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317; *Sours v. Great Northern R. Co.*, 84 Minn. 230.

*Missouri.*—*Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372.

*Nebraska.*—*Missouri Pac. R. Co. v. Fox*, 60 Neb. 531.

*Ohio.*—*Gensen v. Ohio Oil Co.*, 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276.

*Tennessee.*—*Ritt v. True Tag Paint Co.*, 108 Tenn. 646.

*Texas.*—*Gulf, etc., R. Co. v. Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *International, etc., R. Co. v. Vanlandingham*, (Tex. Civ. App. 1905) 85 S. W. Rep. 847; *San Antonio, etc., R. Co. v. Lester*, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254.

*Vermont.*—*Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

*Washington.*—*Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512.

It has been held that it was not error to refuse to instruct the jury that a servant must be "observing" and that his "failure to observe what he should have observed" would defeat a recovery, and to modify the instruction so that, in substance, it required the servant to use due care, diligence, etc. The word "observe," it was said, is defined by Webster to mean "to notice with care, to be on the watch respecting," and a servant is not required to "notice with care" and "to be on the watch" for defects and imperfections. *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, affirming 99 Ill. App. 670.

An infant is bound to exercise only such care and prudence as reasonably might be expected of a boy of his age and capacity in the same circumstances, and the law does not require as high care from a person of tender years and imperfect discretion as from one of mature years and discretion. *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683.

**135.** 1. *Pennsylvania R. Co. v. Jones*, (C. C. A.) 123 Fed. Rep. 753; *Erie R. Co. v. Moore*, (C. C. A.) 113 Fed. Rep. 269; *Nybeck v. Champagne Lumber Co.*, (C. C. A.) 109 Fed. Rep. 732; *Neeley v. Southwestern Cotton Seed*

*Oil Co.*, 13 Okla. 356; *Hone v. Mammoth Min. Co.*, 27 Utah 168; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961.

The question of contributory negligence cannot be measured and determined alone by what actually happened. *Olsen v. Cook Inlet Coal Fields Co.*, (C. C. A.) 121 Fed. Rep. 726.

**Failure to Anticipate Negligence in Others.**—In some circumstances it may be negligence not to anticipate negligence in others. *Erie R. Co. v. Kane*, (C. C. A.) 118 Fed. Rep. 223.

2. *Wyman v. Clark*, 180 Mass. 173; *Swartz v. Great Northern R. Co.*, 93 Minn. 339.

**3. Injury Caused Solely by Negligence of Master.**—*Alaska United Gold Min. Co. v. Keating*, (C. C. A.) 116 Fed. Rep. 561.

**4. Contributory Negligence Bars Recovery.**—*United States.*—*Sievers v. Eyre*, 122 Fed. Rep. 734.

*Alabama.*—*Tuscaloosa Water Works Co. v. Herren*, 131 Ala. 81.

*Arkansas.*—*Western Coal, etc., Co. v. Jones*, (Ark. 1905) 87 S. W. Rep. 440; *Wadsworth v. Bugg*, 71 Ark. 501; *Choctaw, etc., R. Co. v. Stallings*, 70 Ark. 603.

*California.*—*Fries v. American Lead Pencil Co.*, 141 Cal. 610; *Killelea v. California Horse-shoe Co.*, 140 Cal. 602.

*Colorado.*—*Denver, etc., R. Co. v. Maydole*, 33 Colo. 150.

*Delaware.*—*Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.) 24; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

*Georgia.*—*Little v. Southern R. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104; *Sanders v. Central of Georgia R. Co.*, 123 Ga. 763; *Georgia, etc., R. Co. v. Lasseter*, 122 Ga. 679; *Edwards v. Central of Georgia R. Co.*, 118 Ga. 678; *Roberts v. Albany, etc., R. Co.*, 114 Ga. 678; *Louisville, etc., R. Co. v. Thompson*, 113 Ga. 983; *Western, etc., R. Co. v. Jackson*, 113 Ga. 355.

*Illinois.*—*Cullen v. Higgins*, 216 Ill. 78; *Trakal v. Heusner Baking Co.*, 204 Ill. 179, affirming judgment 107 Ill. App. 327; *Deering Harvester Co. v. Hefferman*, 107 Ill. App. 636; *Chicago, etc., R. Co. v. Van Every*, 101 Ill. App. 451; *Mattoon Gas Light, etc., Co. v. Dolan*, 96 Ill. App. 652; *Wierzbicki v. Illinois Steel Co.*, 94 Ill. App. 400; *Tri-City R. Co. v. Killeen*, 92 Ill. App. 57.

*Indiana.*—*Nickey v. Steuder*, 164 Ind. 189; *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569; *Baltimore, etc., R. Co. v. Clapp*, 35 Ind. App. 403; *Chicago, etc., R. Co. v. Wicker*, (Ind. App. 1904) 71 N. E. Rep. 223, judgment reversed on rehearing 34 Ind. App. 215.

*Iowa.*—*Crane v. Chicago, etc., R. Co.*, 124 Iowa 81; *Geesen v. Saguin*, 115 Iowa 7; *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84. See *Bryce v. Burlington, etc., R. Co.*, (Iowa 1905) 104 N. W. Rep. 483.

*Kansas.*—*National Brass Mfg. Co. v. Rawl-*



**137.** (2) *Qualifications of Rule* — (a) *Discovery of Servant's Negligence in Time to Avoid Injury.* — See notes 2, 3, 4, 5.

ings, (Kan. 1905) 80 Pac. Rep. 628; Higgins v. Atchison, etc., R. Co., 70 Kan. 814.

*Kentucky.* — Straight Creek Coal Co. v. Haney, 87 S. W. Rep. 1114, 27 Ky. L. Rep. 1117; Witten v. Bell, etc., Co., 85 S. W. Rep. 1094, 27 Ky. L. Rep. 580; Cincinnati, etc., R. Co. v. Cook, 73 S. W. Rep. 765, 24 Ky. L. Rep. 2152, rehearing denied (Ky. 1903) 75 S. W. Rep. 218; Illinois Cent. R. Co. v. Mercer, 70 S. W. Rep. 287, 24 Ky. L. Rep. 908; Daniels v. Covington, etc., El. R., etc., Co., 66 S. W. Rep. 187, 23 Ky. L. Rep. 1800; Sandy River Cannel Coal Co. v. Caudill, 60 S. W. Rep. 180, 22 Ky. L. Rep. 1175.

*Louisiana.* — Williams v. Illinois Cent. R. Co., 114 La. 13; Ederle v. Vicksburg, etc., R. Co., 112 La. 728; O'Donnell v. American Mfg. Co., 112 La. 720; Carrierre v. McWilliams, 104 La. 678.

*Massachusetts.* — Jones v. New York, etc., R. Co., 184 Mass. 89; Gaudet v. Stansfield, 182 Mass. 451; Bodwell v. Moore, 180 Mass. 590.

*Minnesota.* — Schus v. Powers-Simpson Co., 85 Minn. 447.

*Missouri.* — Harff v. Green, 168 Mo. 308; Kaminski v. Tudor Iron Works, 167 Mo. 462; Rice v. Wabash R. Co., 92 Mo. App. 35; Meily v. St. Louis, etc., R. Co., 107 Mo. App. 466; Rice v. Wabash R. Co., 101 Mo. App. 459.

*Nebraska.* — Kitzberger v. Chicago, etc., R. Co., (Neb. 1903) 93 N. W. Rep. 935.

*New Jersey.* — Smith v. Erie R. Co., 67 N. J. L. 636.

*New York.* — Voegele v. Bardusch, 98 N. Y. App. Div. 127; Mull v. Curtice Bros. Co., 74 N. Y. App. Div. 561.

*North Carolina.* — Hicks v. Naomi Falls Mfg. Co., 138 N. Car. 319; Stewart v. Van Deventer Carpet Co., 138 N. Car. 60; Pressly v. Dover Yarn Mills, 138 N. Car. 410; Jones v. American Warehouse Co., 137 N. Car. 337, 138 N. Car. 546.

*Ohio.* — Wellston Coal Co. v. Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547; Lake Shore, etc., R. Co. v. Callahan, 25 Ohio Cir. Ct. 115; Joswoyak v. Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 317, 1 Cleve. L. Rep. 306.

*Oregon.* — Stager v. Troy Laundry Co., 38 Oregon 480.

*South Carolina.* — Keys v. Winnsboro Granite Co., 72 S. Car. 97; Charping v. Toxaway Mills, 70 S. Car. 470; Scott v. Seaboard Air Line R. Co., 67 S. Car. 136.

*Texas.* — St. Louis Southwestern R. Co. v. Rea, (Tex. 1905) 87 S. W. Rep. 324, reversing (Tex. Civ. App. 1904) 84 S. W. Rep. 428; St. Louis Southwestern R. Co. v. Arnold, (Tex. Civ. App. 1905) 87 S. W. Rep. 173; Quinn v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 84 S. W. Rep. 395; Texas Portland Cement, etc., Co. v. Lee, 36 Tex. Civ. App. 482; El Paso Northeastern R. Co. v. Ryan, 36 Tex. Civ. App. 190; Consumers Cotton Oil Co. v. Gentry, 35 Tex. Civ. App. 445; International, etc., R. Co. v. Villareal, 36 Tex. Civ. App. 532; Southern Pac. R. Co. v. Winton, 27 Tex. Civ. App. 503; Ft. Worth, etc., R. Co. v. Kelley, 33

Tex. Civ. App. 442; Gulf, etc., R. Co. v. Wilder, 33 Tex. Civ. App. 72; St. Louis, etc., R. Co. v. Skaggs, 32 Tex. Civ. App. 363; Andrews v. Jefferson Cotton Oil, etc., Co., (Tex. Civ. App. 1903) 74 S. W. Rep. 342; Texas, etc., R. Co. v. Maupin, 26 Tex. Civ. App. 385.

*Utah.* — Fritz v. Western Union Tel. Co., 25 Utah 263; Ohlenkamp v. Union Pac. R. Co., 24 Utah 232.

*Vermont.* — La Flam v. Missisquoi Pulp Co., 74 Vt. 129; Kilpatrick v. Grand Trunk R. Co., 72 Vt. 263.

*Virginia.* — Norfolk, etc., R. Co. v. Mann, 99 Va. 180, 3 Va. Sup. Ct. 90; Wise Terminal Co. v. McCormick, (Va. 1905) 51 S. E. Rep. 731; McDaniel v. Lynchburg Cotton Mills Co., 99 Va. 146, 3 Va. Sup. Ct. 63.

*Washington.* — Kirkham v. Wheeler-Osgood Co., 39 Wash. 415; Currans v. Seattle, etc., R., etc., Co., 34 Wash. 512.

*West Virginia.* — McCreery v. Ohio River R. Co., 49 W. Va. 301.

*Canada.* — Robitaille v. White, 19 Quebec Super. Ct. 431.

**Infant Employees.** — It has been held that under the *New York Labor Law* (N. Y. Laws 1897, p. 477, c. 415) prohibiting the employment of children under the age of fourteen years in factories, the contributory negligence of a child employed in a factory in violation of the statute cannot be urged as a defense to a recovery for personal injuries. *Lee v. Sterling Silk Mfg. Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 182.

**Contributory Negligence of Third Person.** — The contributory negligence of the plaintiff or the party injured is usually a good defense, but the fact that the negligence of a third person contributed with that of the master to cause the injury is no defense, for in such a case each of the wrongdoers is responsible for the entire injury. *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445.

**Contributory Negligence of Fellow Servant.** — See the title FELLOW SERVANTS, vol. 12, p. 905 *et seq.*

**137. 2. When Ordinary Care of Master Would Have Averted Accident.** — *United States.* — Texas, etc., R. Co. v. Putman, (C. C. A.) 120 Fed. Rep. 754.

*Alabama.* — Alabama G. S. R. Co. v. Williams, 140 Ala. 230; Louisville, etc., R. Co. v. Banks, 132 Ala. 471.

*Indiana.* — Southern Indiana R. Co. v. Fine, 163 Ind. 617.

*Iowa.* — Morbey v. Chicago, etc., R. Co., 116 Iowa 84. See Kelley v. Chicago, etc., R. Co., 118 Iowa 387.

*Kentucky.* — Louisville, etc., R. Co. v. Lowe, 118 Ky. 260, (Ky. 1902) 66 S. W. Rep. 736; Illinois Cent. R. Co. v. Josey, 110 Ky. 342, 96 Am. St. Rep. 455.

*Louisiana.* — Davenport v. F. B. Dubach Lumber Co., 112 La. 943.

*Minnesota.* — Murrin v. Chicago, etc., R. Co., 86 Minn. 470.

*Missouri.* — Hinzeman v. Missouri Pac. R. Co., 182 Mo. 611; Dale v. Hill O'Meara Constr. Co.,

**137.** (b) Where Master or Vice-Principal Is Guilty of Wilful Negligence. — See note 6.

**138.** See notes 1, 2.

108 Mo. App. 90; *Payne v. Missouri Pac. R. Co.*, 105 Mo. App. 155.

*Nebraska.* — *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180.

*North Carolina.* — *Lassiter v. Raleigh, etc.*, R. Co., 133 N. Car. 244; *Smith v. Atlanta, etc.*, Air Line R. Co., 132 N. Car. 819. See *Lassiter v. Raleigh, etc.*, R. Co., 137 N. Car. 150.

*Ohio.* — *Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. 86.

*Texas.* — *Chicago, etc.*, R. Co. *v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *San Antonio, etc.*, R. Co. *v. Brock*, 35 Tex. Civ. App. 155; *St. Louis, etc.*, R. Co. *v. Skaggs*, 32 Tex. Civ. App. 363; *Chicago, etc.*, R. Co. *v. Long*, 32 Tex. Civ. App. 40, writ of error denied 97 Tex. 69; *Texas, etc.*, R. Co. *v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 50; *Ft. Worth, etc.*, R. Co. *v. Bowen*, 95 Tex. 364; *Gulf, etc.*, R. Co. *v. Roane*, 33 Tex. Civ. App. 299, reversing on rehearing (Tex. Civ. App. 1903) 75 S. W. Rep. 845; *Galveston, etc.*, R. Co. *v. Jenkins*, 29 Tex. Civ. App. 440; *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150. See *St. Louis, etc.*, R. Co. *v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 790.

*Utah.* — *Coates v. Union Pac. R. Co.*, 24 Utah 304.

*West Virginia.* — *McCreery v. Ohio River R. Co.*, 49 W. Va. 301.

*Compare Morehead v. Yazoo, etc.*, R. Co., 84 Miss. 112.

**Continuing Negligence.** — In *North Carolina* it is held that where the negligence of the master is a continuing negligence there can be no contributory negligence which will discharge the master's liability. *Orr v. Southern Bell Telephone, etc.*, Co., 132 N. Car. 691; *Fleming v. Southern R. Co.*, 131 N. Car. 476.

**137. 3. Negligent Act Committed After Knowledge of Servant's Danger.** — *Richmond Locomotive Works v. Ramsey*, (C. C. A.) 131 Fed. Rep. 197; *Illinois Cent. R. Co. v. Jones*, 118 Ky. 158; *Helm v. Missouri Pac. R. Co.*, 185 Mo. 212; *Koons v. Kansas City Suburban Belt R. Co.*, 178 Mo. 591; *Evans v. Wabash R. Co.*, 178 Mo. 508; *Smith v. Atlanta, etc.*, R. Co., 130 N. Car. 344; *Stewart v. Southern R. Co.*, 128 N. Car. 517; *Erie R. Co. v. McCormick*, 69 Ohio St. 45; *Cardwell v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 422; *Dean v. Oregon R., etc.*, Co., 38 Wash. 565. See *Illinois Cent. R. Co. v. Stewart*, 63 S. W. Rep. 596, 23 Ky. L. Rep. 637; *Sharp v. Missouri Pac. R. Co.*, 161 Mo. 214.

In an action to recover damages for the death of plaintiff's intestate, on the ground that the defendant failed to take any measures to protect the deceased from the consequences of his voluntary intoxication while upon one of its freight trains as a brakeman, it was held that the trial court rightly directed a verdict for the defendant, because the evidence failed to show that its train employees had any notice or knowledge of the condition of the deceased. *Parker v. Winona, etc.*, R. Co., 83 Minn. 212.

**4. Where Accident Could Not Have Been Averted**

**by Ordinary Care.** — *Illinois Cent. R. Co. v. Mencer*, 80 S. W. Rep. 816, 25 Ky. L. Rep. 2250; *Holland v. Seaboard Air Line R. Co.*, 137 N. Car. 368; *Wise Terminal Co. v. McCormick*, (Va. 1905) 51 S. E. Rep. 731.

**Concurrent Negligence.** — It has been held that the doctrine is not to be applied when the injury was the result of the concurrent negligence of the plaintiff and defendant. *Lake Shore, etc.*, R. Co. *v. Callahan*, 25 Ohio Cir. Ct. 115.

**5. Negligent Act of Fellow Servant.** — See *Bowling Green Stone Co. v. Capshaw*, 64 S. W. Rep. 507, 23 Ky. L. Rep. 945.

**6. Wilful Negligence.** — *Donk Bros. Coal, etc.*, Co. *v. Stroff*, 200 Ill. 483, affirming 100 Ill. App. 576; *Browne v. Siegel*, 191 Ill. 226, affirming 90 Ill. App. 49; *Sunnyside Coal Co. v. Center*, 100 Ill. App. 546; *Himrod Coal Co. v. Adack*, 94 Ill. App. 1; *Yazoo, etc.*, R. Co. *v. Block*, 86 Miss. 426. *Compare Denver, etc.*, R. Co. *v. Maydole*, 33 Colo. 150.

In an action to recover under the *Alabama Employer's Liability Act* (Ala. Code. § 1749) for the consequences of a wanton, wilful, or intentional wrong, contributory negligence is not a defense. *Louisville, etc.*, R. Co. *v. York*, 128 Ala. 305.

**Wilful Violation of Statute Requiring Safeguards in Mines.** — In an action against mine owners by a servant to recover for personal injuries sustained by him in consequence of the wilful disregard of statutory provisions requiring the adoption of specified safeguards for the protection of servants, the contributory negligence of the plaintiff is not a defense. *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156, affirming 96 Ill. App. 248; *Western Anthracite Coal, etc.*, Co. *v. Beaver*, 192 Ill. 333, affirming 95 Ill. App. 95.

**Servant's Knowledge of Negligent Habit or Reckless Act.** — It has been said that the rule of nonliability for contributory negligence, in case of injuries wantonly, wilfully, or recklessly inflicted, does not apply where the injured person had or should have had knowledge of the grossly negligent habit or the impending reckless act of the injurer, and could have avoided their consequences by prudence and caution upon his own part. Only when an act of contributory negligence is performed without knowledge or apprehension that the reckless and wanton conduct of another will or may conjoin to produce an evil effect will the injured person be relieved from liability for the result of his own negligence. *Beal v. Atchison, etc.*, R. Co., 62 Kan. 250.

**138. 1. Gross Negligence.** — The law does not permit a recovery by a plaintiff guilty of contributory negligence, on the ground that the negligence of the defendant was gross. Nothing short of a wilful act or wilful or intentional neglect of duty will authorize a recovery by a plaintiff guilty of negligence contributing to the injury complained of. *Chicago, etc.*, Coal Co. *v. Moran*, 210 Ill. 9, affirming judgment 110 Ill. App. 664.

**138.** *c.* RIGHT TO RELY ON MASTER'S ASSURANCES OF SAFETY. — See notes 4, 6.

*d.* SERVANT'S NEGLIGENCE MUST BE PROXIMATE CAUSE OF INJURY. — See note 7.

**138.** 2. Sharp *v.* Missouri Pac. R. Co., 161 Mo. 214.

4. *Reliance on Master's Assurances of Safety — United States.* — Swensen *v.* Bender, (C. C. A.) 114 Fed. Rep. 1; Harder, etc., Coal Min. Co. *v.* Schmidt, (C. C. A.) 104 Fed. Rep. 282; Compare Dwyer *v.* Nixon, (C. C. A.) 108 Fed. Rep. 751.

*Illinois.* — Gundlach *v.* Schott, 192 Ill. 509, 85 Am. St. Rep. 348, affirming 95 Ill. App. 110.

*Kansas.* — Wurttenberger *v.* Metropolitan St. R. Co., 68 Kan. 642.

*Kentucky.* — Dryden *v.* H. E. Pogue Distillery Co., 82 S. W. Rep. 262, 26 Ky. L. Rep. 528; Bell-Coggeshall Co. *v.* Lewis, 89 S. W. Rep. 135, 28 Ky. L. Rep. 149; Smith *v.* Kentucky Lumber Co., 78 S. W. Rep. 120, 25 Ky. L. Rep. 1386; Crabtree Coal Min. Co. *v.* Sample, 72 S. W. Rep. 24, 24 Ky. L. Rep. 1703; East Jellico Coal Co. *v.* Stewart, 68 S. W. Rep. 624, 24 Ky. L. Rep. 420; Wake *v.* Price, 58 S. W. Rep. 519, 22 Ky. L. Rep. 696. See *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318.

*Massachusetts.* — Lynch *v.* M. T. Stevens, etc., Co., 187 Mass. 397; Lord *v.* Wakefield, 185 Mass. 214; Mahoney *v.* Bay State Pink Granite Co., 184 Mass. 287. See Brady *v.* New York, etc., R. Co., 184 Mass. 225; O'Brien *v.* Nute-Hallett Co., 177 Mass. 422.

*Missouri.* — Cole *v.* St. Louis Transit Co., 183 Mo. 81; Curtis *v.* McNair, 173 Mo. 270; Connolly *v.* St. Joseph Press Printing Co., 166 Mo. 447; Duerst *v.* St. Louis Stamping Co., 163 Mo. 607; Haworth *v.* Mineral Belt Telephone Co., 105 Mo. App. 161; Stalzer *v.* Jacob Dold Packing Co., 84 Mo. App. 565.

*Montana.* — Allen *v.* Bell, 32 Mont. 69.

*New York.* — Wolf *v.* Devitt, 83 N. Y. App. Div. 42, affirmed without opinion 179 N. Y. 569. See Dyer *v.* Brown, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616.

*Pennsylvania.* — Schiglizzo *v.* Dunn, 211 Pa. St. 253, 107 Am. St. Rep. 549.

*South Carolina.* — Keys *v.* Winnsboro Granite Co., 72 S. Car. 97.

*Texas.* — Galveston, etc., R. Co. *v.* Fitzpatrick, (Tex. Civ. App. 1904) 83 S. W. Rep. 406. See International, etc., R. Co. *v.* Royal, (Tex. Civ. App. 1904) 83 S. W. Rep. 713.

See Roberti *v.* Anderson, 27 Nev. 396; Maurer *v.* Gould, (N. J. 1904) 59 Atl. Rep. 28, affirmed without opinion (N. J. 1905) 60 Atl. Rep. 1134; McCord *v.* Southern R. Co., 130 N. Car. 491. Compare Purkey *v.* Southern Coal, etc., Co., 57 W. Va. 595.

6. McCormick Harvesting Mach. Co. *v.* Liter, 66 S. W. Rep. 761, 23 Ky. L. Rep. 2154; Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356; Ft. Worth Iron Works *v.* Stokes, 33 Tex. Civ. App. 218.

7. *Servant's Negligence Must Be Proximate Cause — United States.* — Tullis *v.* Lake Erie, etc., R. Co., (C. C. A.) 105 Fed. Rep. 554.

*Illinois.* — Chicago, etc., R. Co. *v.* Howell,

208 Ill. 155, affirming 109 Ill. App. 546; Chicago, etc., R. Co. *v.* Camper, 199 Ill. 569.

*Iowa.* — Wilder *v.* Great Western Cereal Co., (Iowa 1905) 104 N. W. Rep. 434.

*Louisiana.* — Davenport *v.* F. B. Dubach Lumber Co., 112 La. 943. See McGinn *v.* McCormick, 109 La. 396; Moore *v.* W. R. Pickering Lumber Co., 105 La. 504.

*Massachusetts.* — Smith *v.* Thomson-Houston Electric Co., 188 Mass. 371.

*Michigan.* — Milbourne *v.* Arnold Electric Power, etc., Co., (Mich. 1905) 103 N. W. Rep. 821, 12 Detroit Leg. N. 177.

*Minnesota.* — Chittick *v.* Minneapolis, etc., R. Co., 88 Minn. 11.

*Missouri.* — Lee *v.* St. Louis, etc., R. Co., 112 Mo. App. 372. See Dale *v.* Hill O'Meara Constr. Co., 108 Mo. App. 90; Rice *v.* Wabash R. Co., 92 Mo. App. 35.

*New Hampshire.* — Stone *v.* Boscawen Mills, 71 N. H. 288.

*North Carolina.* — Wisenhant *v.* Southern R. Co., 137 N. Car. 349; Lindsay *v.* Norfolk, etc., R. Co., 132 N. Car. 59.

*Ohio.* — Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 87 Am. St. Rep. 547.

*Rhode Island.* — Desrosiers *v.* Bourn, 26 R. I. 6, reargument denied 26 R. I. 156.

*South Carolina.* — Anderson *v.* Southern R. Co., 70 S. Car. 490; Bodie *v.* Charleston, etc., R. Co., 61 S. Car. 468; Lourimore *v.* Palmer Mfg. Co., 60 S. Car. 153; Youngblood *v.* South Carolina, etc., R. Co., 60 S. Car. 9.

*Texas.* — Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; St. Louis Southwestern R. Co. *v.* Rea, (Tex. 1905) 87 S. W. Rep. 324, reversing (Tex. Civ. App. 1904) 84 S. W. Rep. 428; Missouri, etc., R. Co. *v.* Purdy, 98 Tex. 557; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, affirmed 98 Tex. 123; Consumers Cotton Oil Co. *v.* Gentry, 35 Tex. Civ. App. 445; Houston, etc., R. Co. *v.* Turner, 34 Tex. Civ. App. 397; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319; Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568; Rea *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 555; San Antonio, etc., R. Co. *v.* Ankerson, 31 Tex. Civ. App. 327; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. Rep. 769; International, etc., R. Co. *v.* Vinson, 28 Tex. Civ. App. 247. See Gulf, etc., R. Co. *v.* Hill, 20 Tex. Civ. App. 12; Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076.

*Virginia.* — Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 3 Va. Sup. Ct. 502.

*Canada.* — Godwin *v.* Newcombe, 1 Ont. L. Rep. 525.

It has been held that the test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether or not it is a more proximate cause of it than the negligence of the defendant. If it directly

**139.** *e.* APPLICATION OF GENERAL RULES STATED — (1) *Working with Knowledge of Defects and Dangers.* — See note 1.

**140.** See note 1.

(2) *Failure to Use Appliances Furnished.* — See note 3.

contributes to the injury, it is fatal to the plaintiff's recovery although the negligence of the defendant may be the more proximate cause of it. *Gilbert v. Burlington, etc., R. Co., (C. C. A.)* 128 Fed. Rep. 529, *affirming* 123 Fed. Rep. 832.

**139. 1. Obvious Dangers**—*United States.* — *Kilpatrick v. Choctaw, etc., R. Co.,* 195 U. S. 624; *National Biscuit Co. v. Nolan, (C. C. A.)* 138 Fed. Rep. 6.

*Alabama.* — *Shea v. Manning,* 141 Ala. 628. *Arkansas.* — *King-Ryder Lumber Co. v. Cochran,* 71 Ark. 55; *Kansas, etc., Coal Co. v. Chandler,* 71 Ark. 518.

*Colorado.* — *Greeley v. Foster,* 32 Colo. 292.

*Delaware.* — *Strattner v. Wilmington City Electric Co.,* 3 Penn. (Del.) 245.

*Indiana.* — *Republic Iron, etc., Co. v. Jones,* 32 Ind. App. 189; *L. T. Dickason Coal Co. v. Peach,* 32 Ind. App. 33.

*Iowa.* — *Geesen v. Saguin,* 115 Iowa 7.

*Kansas.* — *Beal v. Atchison, etc., R. Co.,* 62 Kan. 250.

*Maine.* — *Babb v. Oxford Paper Co.,* 99 Me. 298.

*Massachusetts.* — *Droney v. Doherty,* 186 Mass. 205; *Tiffany v. Hathaway,* 182 Mass. 431; *Dobbins v. Lang,* 181 Mass. 397; *Barry v. New York Biscuit Co.,* 177 Mass. 449; *Silvia v. Wampanoag Mills,* 177 Mass. 194.

*Minnesota.* — *Gray v. Commutator Co.,* 85 Minn. 463; *Ready v. Peavy Elevator Co.,* 89 Minn. 154; *Hitchcock v. Railway Transfer Co.,* 81 Minn. 352.

*Missouri.* — *Whaley v. Coleman,* 113 Mo. App. 594; *Curtis v. McNair,* 173 Mo. 270; *Harff v. Green,* 168 Mo. 308; *Minnier v. Sedalia, etc., R. Co.,* 167 Mo. 99; *Pauck v. St. Louis Dressed Beef, etc., Co.,* 159 Mo. 467; *McKee v. Chicago, etc., R. Co.,* 96 Mo. App. 671; *Adams v. Kansas, etc., Coal Co.,* 85 Mo. App. 486; *Adolf v. Columbia Pretzel, etc., Co.,* 100 Mo. App. 199.

*Nebraska.* — *Fielding v. Chicago, etc., R. Co., (Neb. 1904)* 101 N. W. Rep. 1022; *Weed v. Chicago, etc., R. Co., (Neb. 1904)* 99 N. W. Rep. 827.

*New Jersey.* — *Gill v. National Storage Co.,* 70 N. J. L. 53; *McDonald v. Standard Oil Co.,* 69 N. J. L. 445.

*New York.* — *Mullins v. Manhat'an Brass Co., (Supm. Ct. App. T.)* 47 Misc. (N. Y.) 138; *Vykess v. Duncan Co.,* 88 N. Y. App. Div. 129; *Skapura v. National Sugar Refining Co.,* 83 N. Y. App. Div. 21; *Szotak v. Berwind-White Coal Min. Co., (N. Y. City Ct. Gen. T.)* 36 Misc. (N. Y.) 98.

*North Carolina.* — *Harrill v. South Carolina, etc., Extension R. Co.,* 135 N. Car. 601.

*Ohio.* — *Wellston Coal Co. v. Smith,* 65 Ohio St. 70, 87 Am. St. Rep. 547; *Gensen v. Ohio Oil Co.,* 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276.

*Pennsylvania.* — *Michael v. Henry,* 209 Pa. St. 213; *Doyle v. Pittsburg Waste Co.,* 204 Pa.

St. 618; *Lehman v. Carbon Steel Co.,* 204 Pa. St. 612.

*Rhode Island.* — *Russell v. Riverside Worsted Mills,* 24 R. I. 591.

*Texas.* — *St. Louis Southwestern R. Co. v. Rea, (Tex. 1905)* 87 S. W. Rep. 324, *reversing* (Tex. Civ. App. 1904) 84 S. W. Rep. 428; *International, etc., R. Co. v. Royal, (Tex. Civ. App. 1904)* 83 S. W. Rep. 713; *Ft. Worth, etc., R. Co. v. Gilstrap,* 25 Tex. Civ. App. 304.

*Vermont.* — *Kilpatrick v. Grand Trunk R. Co.,* 74 Vt. 288.

*Washington.* — *Lynch v. North Yakima,* 37 Wash. 657; *Griffiths v. Craney,* 38 Wash. 90; *Johnson v. Anderson, etc., Lumber Co.,* 31 Wash. 554; *Robare v. Seattle Traction Co.,* 24 Wash. 577. *Compare Hall v. West, etc., Mill Co.,* 39 Wash. 447.

*Wisconsin.* — *Pautz v. Plankinton Packing Co.,* 118 Wis. 47; *Koepeke v. Wisconsin Bridge, etc., Co.,* 116 Wis. 92.

But in *Osborne v. Alabama Steel, etc., Co.,* 135 Ala. 571, it was said: "An employee may be negligent in failing to give notice of defects in his employer's ways, works, plant, or machinery, when to do so is necessary for his own protection, and he may be negligent also in the manner of prosecuting his work by failing to use due care to avoid danger created by the defects; but his mere continuance in the service for which he was employed, though with knowledge of such defects and danger, cannot, as between him and the employer, be accounted an act of negligence. The employer cannot treat as a breach of duty, but is held to sanction, that which by contract of employment he has required the employee to do."

It has been held that a servant is not guilty of contributory negligence in continuing in the employment unless the danger is great enough to deter a man of ordinary prudence. *Dean v. St. Louis Woodenware Works,* 106 Mo. App. 167.

**140. 1. Defects Discoverable by Exercise of Ordinary Prudence.** — *Flockhart v. Hocking Coal Co.,* 126 Iowa 576; *Wellston Coal Co. v. Smith,* 65 Ohio St. 70, 87 Am. St. Rep. 547.

If the defect or danger is open and obvious, though it exists through the employer's negligence, an employee of mature years will be presumed to have knowledge of it, and though the employer may have been negligent in the matter, the employee is also guilty of negligence in accepting or continuing in the service, and this becomes equivalent to contributory negligence which prevents a recovery. *Bodell v. Brazil Block Coal Co.,* 25 Ind. App. 654.

A servant is not chargeable with contributory negligence simply because of working around uncovered cogwheels, unless the danger was so great that a prudent person of his years and capacity would have declined to face it. *Bair v. Hibel,* 103 Mo. App. 621.

**3. Neglect to Use Appliances Furnished.** — *Alaska United Gold Min. Co. v. Muset, (C. C. A.)* 114 Fed. Rep. 66; *Binion v. Georgia South-*

**140.** (3) *Using Defective Appliances When Sufficient Appliances Are Furnished.* — See note 4.

**141.** (4) *Using Appliances Known to Be Dangerous.* — See note 1.

(5) *Unauthorized or Improper Use of Appliances.* — See note 2.

ern, etc., R. Co., 118 Ga. 282; *Frink v. Potts*, 105 Ill. App. 92; *Wabash R. Co. v. Propst*, 92 Ill. App. 485; *Crane v. Chicago, etc., R. Co.*, 124 Iowa 81; *East Jollico Coal Co. v. Golden*, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; *Carrierre v. McWilliams*, 104 La. 678; *McGinty v. Waterman*, 93 Minn. 242; *Anderson v. Forrester-Nace Box Co.*, 103 Mo. App. 382; *Hart v. Alleghany County Light Co.*, 201 Pa. St. 234; *Laporte v. Cook*, 22 R. I. 554; *Keys v. Winnsboro Granite Co.*, 72 S. Car. 97; *Nashville Spoke, etc., Co. v. Thomas*, 114 Tenn. 458; *St. Louis Southwestern R. Co. v. Barrett*, (Tex. Civ. App. 1903) 72 S. W. Rep. 884. See *Wagner v. New York, etc., R. Co.*, 93 N. Y. App. Div. 14. *Compare Lynch v. M. T. Stevens, etc., Co.*, 187 Mass. 397.

**Application of Rule — Failure to Use Props Furnished to Hold Up Roof of Mine.** — *L. T. Dickason Coal Co. v. Peach*, 32 Ind. App. 33.

**Failure to Attach Guy Lines to File Driver.** — *Illinois Cent. R. Co. v. Swift*, 213 Ill. 307.

**Failure of Servant Working on Emery Wheel to Use Goggles Provided by Master.** — *Munn v. L. Wolff Mfg. Co.*, 94 Ill. App. 122.

**Failure of Servant to Use Automatic Coupler.** — The Act of March 2, 1893, 27 U. S. Stat. at L. c. 196, p. 351, which makes it the duty of common carriers to equip their cars engaged in interstate traffic with couplers which can be uncoupled "without the necessity of men going between the ends of the cars," imposes upon the employees the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of cars to uncouple them. A failure of a servant to discharge this duty, which directly contributes to his injury, is fatal to an action for damages on account of it. *Gilbert v. Burlington, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 529, affirming 123 Fed. Rep. 832.

It seems that where cars are equipped with automatic couplers, which are in working order and can reasonably be used, it is negligence on the part of an employee to ignore the safety appliance provided, and resort to the method formerly in use, obviously more dangerous, of stepping between moving cars, within the rail, for the purpose of making a coupling or uncoupling. *Pierson v. Chicago, etc., R. Co.*, 127 Iowa 13.

**140. 4. Unnecessarily Using Defective Appliances.** — *Herbert v. Wiggins Ferry Co.*, 107 Mo. App. 287; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464; *O'Brien v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 528. See *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612; *Higgins v. Southern Pac. Co.*, 26 Utah 164.

**141. 1. Attempt to Use Appliances Known to Be Dangerous.** — *Musser-Sauntry Land, etc., Co. v. Brown*, (C. C. A.) 126 Fed. Rep. 141; *Droney v. Doherty*, 186 Mass. 205; *Whaley v. Coleman*, 113 Mo. App. 594; *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Sheperd v. St. Louis Transit Co.*, 189 Mo. 362; *Dunkerley v.*

*Webendorfer Mach. Co.*, 71 N. J. L. 60; *Warszawski v. McWilliams*, 64 N. Y. App. Div. 63; *Cleary v. Long Island R. Co.*, 54 N. Y. App. Div. 284; *Elmore v. Seaboard Air Line R. Co.*, 130 N. Car. 506, rehearing 131 N. Car. 569, second rehearing 132 N. Car. 865; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *San Antonio Sewer Pipe Co. v. Noll*, (Tex. Civ. App. 1904) 83 S. W. Rep. 900; *Bell v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 81 S. W. Rep. 134; *Virginia Portland Cement Co. v. Luck*, 103 Va. 427.

Mere knowledge of a defect which is not of such a character as to indicate danger in the use of the appliance, does not necessarily charge the servant with contributory negligence. *International, etc., R. Co. v. Jourdan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 266.

In *Missouri* it is held that if the condition of the appliance is such that the servant might reasonably suppose that he could safely use it by taking due care, he is not chargeable with contributory negligence for continuing to use it. *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Herbert v. Mound City Boot, etc., Co.*, 90 Mo. App. 305. See *supra*, this title, the cases supplementing page 127, note 1.

**2. Unauthorized or Improper Use of Appliances — United States.** — *Debro v. James Lee's Sons Co.*, 130 Fed. Rep. 385. But compare *Dunn v. New York, etc., R. Co.*, (C. C. A.) 107 Fed. Rep. 666.

*California.* — *Gribben v. Yellow Aster Min., etc., Co.*, 142 Cal. 248.

*Illinois.* — *O'Donnell v. MacVeagh*, 205 Ill. 23; *Chicago, etc., R. Co. v. Van Every*, 101 Ill. App. 451.

*Kentucky.* — *Bush v. Grant*, 61 S. W. Rep. 363, 22 Ky. L. Rep. 1766; *Illinois Cent. R. Co. v. Mercer*, 88 S. W. Rep. 1054, 28 Ky. L. Rep. 3.

*Maine.* — *Moore v. Stetson*, 96 Me. 197.

*Massachusetts.* — *Barry v. New York Biscuit Co.*, 177 Mass. 449; *Gillette v. General Electric Co.*, 187 Mass. 1.

*Missouri.* — *Holmes v. Brandenbaugh*, 172 Mo. 53; *Beymer v. Hammond Packing Co.*, 106 Mo. App. 726. See *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 189 Mo. 552; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473. *Compare Brimer v. Chicago, etc., R. Co.*, 109 Mo. App. 493.

*New Jersey.* — *Snyder v. J. S. Rogers Co.*, 69 N. J. L. 347.

*New York.* — *Hoehn v. Lautz*, 94 N. Y. App. Div. 14; *Wagner v. New York, etc., R. Co.*, 93 N. Y. App. Div. 14.

*North Carolina.* — *Covington v. Smith Furniture Co.*, 138 N. Car. 374; *Stewart v. Van Deventer Carpet Co.*, 138 N. Car. 60. See *Meekins v. Norfolk, etc., R. Co.*, 127 N. Car. 29.

*Texas.* — *O'Brien v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 528.

See *supra*, the cases supplementing page 78, note 2.

- 141.** (6) *Disregard of Warnings or Signals.* — See notes 3, 4.  
**142.** (7) *Failure to Give Notice of Dangerous Position.* — See note 1.  
 (8) *Neglect of Servant to Inspect and Repair.* — See note 2.

**Careless Use of Appliance.** — *Laudeman v. Ryan*, 209 Pa. St. 3.

**Failure to Make Fast the Ends of Skids.** — *McKenna Steel Working Co. v. Lewis*, 111 Fed. Rep. 320, 49 C. C. A. 369.

**Shifting Cars by Kicking-back Process.** — Shifting cars by means of the kicking-back process is not necessarily at all times an act of negligence *per se*, even though there may be a safer method of shifting them. *Florida Cent., etc., R. Co. v. Mooney*, 45 Fla. 286.

**141. 3. Disregard of Warnings or Signals.** — *United States.* — *The Esperanza*, 133 Fed. Rep. 1015; *Kilpatrick v. Choctaw, etc., R. Co.*, 195 U. S. 624; *Chicago G. W. R. Co. v. Roddy*, (C. C. A.) 131 Fed. Rep. 712; *The Frey*, 113 Fed. Rep. 1003.

*Arkansas.* — *St. Louis, etc., R. Co. v. Mize*, 71 Ark. 159.

*Connecticut.* — *Hyde v. Mendel*, 75 Conn. 140.

*Delaware.* — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544. See *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Illinois.* — *Chicago, etc., R. Co. v. Myers*, 95 Ill. App. 578; *Tri-City R. Co. v. Killeen*, 92 Ill. App. 57.

*Indiana.* — *Baltimore, etc., R. Co. v. Clapp*, 35 Ind. App. 403.

*Kentucky.* — *Hollingsworth v. Pineville Coal Co.*, 74 S. W. Rep. 205, 24 Ky. L. Rep. 2437; *Shannon v. Louisville, etc., R. Co.*, 70 S. W. Rep. 626, 24 Ky. L. Rep. 1083.

*Louisiana.* — *Govan v. New Orleans, etc., R. Co.*, 111 La. 125.

*Maine.* — *Erickson v. Monson Consol. Slate Co.*, 100 Me. 107.

*Massachusetts.* — *Slade v. Beattie*, 186 Mass. 267.

*Minnesota.* — *Hitchcock v. Railway Transfer Co.*, 81 Minn. 352.

*New York.* — *Sheehan v. Standard Gas Light Co.*, 87 N. Y. App. Div. 174.

*Ohio.* — *Diamond Rubber Co. v. McClurg*, 26 Ohio Cir. Ct. 481; *Wheeling, etc., R. Co. v. Fisher*, 25 Ohio Cir. Ct. 566.

*Pennsylvania.* — *Schlemmer v. Buffalo, etc., R. Co.*, 207 Pa. St. 198.

*Texas.* — *Ft. Worth, etc., R. Co. v. Robinson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 410.

See *Green v. Barnes Mfg. Co.*, 69 N. J. L. 596.

**4. Warnings or Signals Repeatedly Given.** —

*Johnson v. Bridgeport Deoxidized Bronze, etc., Co.*, 135 Fed. Rep. 216; *Street v. Norfolk, etc., R. Co.*, 101 Va. 746.

**142. 1. Neglect to Notify of Dangerous Position.** — *Brown Hoisting, etc., Mach. Co. v. Bennett*, 96 Ill. App. 514; *Bowling Green Stone Co. v. Capshaw*, 64 S. W. Rep. 507, 23 Ky. L. Rep. 945; *Riley v. Banner Lumber Co.*, 109 La. 274; *Dickey v. Dickey*, 111 Mo. App. 304; *Whitley v. Chicago, etc., R. Co.*, 109 Mo. App. 123; *Fay v. Chicago, etc., R. Co.*, (Neb. 1903) 96 N. W. Rep. 638. Compare *Sorenson v. Oregon Power Co.*, (Oregon 1905) 82 Pac. Rep. 10.

**2. Servant's Failure to Inspect and Repair.** —

*United States.* — *Mexican Cent. R. Co. v. Hen-*

*derson*, 114 Fed. Rep. 892, 52 C. C. A. 512. See *Western Union Tel. Co. v. Tracy*, (C. C. A.) 114 Fed. Rep. 282.

*Illinois.* — *Chicago, etc., R. Co. v. Merriman*, 95 Ill. App. 628; *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206.

*Kentucky.* — *George Weidemann Brewing Co. v. Wood*, (Ky. 1905) 87 S. W. Rep. 772, followed in *Herman v. George Weidemann Brewing Co.*, 87 S. W. Rep. 775, 27 Ky. L. Rep. 1016.

*Michigan.* — *Krimmel v. Edison Illuminating Co.*, 130 Mich. 613, 9 Detroit Leg. N. 134.

*Missouri.* — *Roberts v. Missouri, etc., Telephone Co.*, 166 Mo. 370; *Kelley v. Chicago, etc., R. Co.*, 105 Mo. App. 365.

*Nebraska.* — *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 72, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142.

*New York.* — *Kilkin v. New York Cent., etc., R. Co.*, 76 N. Y. App. Div. 529, affirmed without opinion 177 N. Y. 566.

*Pennsylvania.* — *Hart v. Allegheny County Light Co.*, 201 Pa. St. 234.

*South Carolina.* — *Keys v. Winncboro Granite Co.*, 72 S. Car. 97.

*Utah.* — *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307.

*Virginia.* — *Atlantic, etc., R. Co. v. West*, 101 Va. 13.

*Washington.* — *Griffiths v. Craney*, 38 Wash. 90.

*Wisconsin.* — *Kramer v. Willy*, 109 Wis. 602.

See *Hencke v. Ellis*, 110 Wis. 532; *Wyman v. Clark*, 180 Mass. 173; *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113; *Bartley v. Howell*, 82 Minn. 382; *Murphy v. Grand Trunk R. Co.*, (N. H. 1904) 58 Atl. Rep. 835. Compare *Olney v. Boston, etc., R. Co.*, 71 N. H. 427; *McGarrity v. New York, etc., R. Co.*, 25 R. I. 269; *Dupree v. Tamborilla*, 27 Tex. Civ. App. 603; *San Antonio, etc., R. Co. v. Lindsey*, 27 Tex. Civ. App. 316; *Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194.

It has been held that a servant who sees a defect in the appliance furnished him by his master in his employment, which he can easily and without skill remedy as well as his master, and which he fails to remedy, is guilty of contributory negligence and not entitled to recover. *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657.

**Duty of Conductor to Inspect Train.** — It has been held that by a rule of a railroad company requiring conductors and brakemen to be at the starting points of their trains at least forty minutes before leaving time, to see that their trains are ready for departure on time and that their cars are in proper running order before starting, and to examine them at water stations, stopping places, and wherever opportunity offers, to see if the running gear, brakes, etc., are in proper order, it was not intended that the conductor should critically examine the several cars in his train, and the attachments thereto, with that degree of particularity which measures the duty of the company itself. Other

**143.** (9) *Failure to Notify Master of Defects.* — See note 5.

**144.** (10) *Failure to Observe Obvious Precautions for Safety* — (a) *In General.* — See note 1.

employees (the car inspectors) are charged with that special duty, and, besides, the time prescribed for his preparations for leaving would frequently, if not ordinarily, be insufficient for him to make such thorough examination in addition to the other duties imposed upon him for execution within the time mentioned. *Baltimore, etc., R. Co. v. Burris*, (C. C. A.) 111 Fed. Rep. 882, holding that a conductor was not negligent in failing to discover the defective and insecure condition of a brake beam upon one of the cars in his train.

**Failure of Lineman to Inspect Telegraph Pole.**

— In an action to recover for personal injuries sustained by the plaintiff, while working for the defendant telegraph company, by the falling of a defective pole upon which he was working, it was held that if the plaintiff had not sufficient experience to enable him to do the work, and if he was neither warned nor instructed as to the proper mode of performing it, he could not be said as a matter of law to be guilty of contributory negligence in not making an inspection of the pole before proceeding to work upon it. *Western Union Tel. Co. v. Burgess*, (C. C. A.) 108 Fed. Rep. 26.

**Reliance by Servant on Master's Performance of Duty.** — Ordinarily the servant may rely on the performance by the master of his duty to inspect and repair. See *supra*, the cases supplementing page 90, note 7.

**143. 5. Failure to Notify Master of Defects.**

— *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668; *Swift v. Campbell*, 97 Ill. App. 360; *Chicago, etc., R. Co. v. Merriman*, 95 Ill. App. 628; *Helbig v. Slaughter*, 95 Ill. App. 623; *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206; *Buey v. Chess, etc., Co.*, 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; *Glasscock v. Swofford Bros. Dry Goods Co.*, 106 Mo. App. 657; *Streets v. Grand Trunk R. Co.*, 76 N. Y. App. Div. 480, *affirmed* without opinion 178 N. Y. 553; *Szotak v. Berwind-White Coal Min. Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 98; *Heald v. Wallace*, 109 Tenn. 346; *Egnor v. N. C. Foster Lumber Co.*, 115 Wis. 530. See *Thomas v. Bellamy*, 126 Ala. 253; *Osborne v. Alabama Steel, etc., Co.*, 135 Ala. 571; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Hollingsworth v. National Biscuit Co.*, 114 Mo. App. 20; *Keating v. Coon*, 102 N. Y. App. Div. 112. *Compare Roach v. Haile Gold Min. Co.*, 71 S. Car. 79. But see *Murphy v. Marston Coal Co.*, 183 Mass. 385.

**Failure to Notify Master of Defects in Work Place.** — In an action to recover for injuries received by a gas explosion in the defendant's mine, the court was asked to instruct the jury as follows: "If you find that the amount of air required was circulated in the mine, and the plaintiff knew of the existence of gas in his place of working, but did not inform the persons whose duty it was to make such examination, then the plaintiff was guilty of contributory negligence, and you will find for the defendant." It was held that the instruction was properly refused because it was erroneous; ac-

cording to this request for an instruction, it was the duty of the plaintiff, if he knew of the existence of gas in his place of working, to inform the defendant, notwithstanding it knew or ought to have known that fact. *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530.

**144. 1. Nonobservance of Obvious Precautions** — *California.* — *Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479.

*Illinois.* — *Chicago Terminal Transfer R. Co. v. Schiavone*, 216 Ill. 275; *Cullen v. Higgins*, 216 Ill. 78; *Electrical Installation Co. v. Kelly*, 110 Ill. App. 334; *Jarvis v. Drake*, 97 Ill. App. 153; *Brown Hoisting, etc., Mach. Co. v. Bennett*, 96 Ill. App. 514; *Swift v. McNerny*, 90 Ill. App. 294. See *Pardridge v. Gilbride*, 98 Ill. App. 134.

*Indiana.* — *Baxter v. Lusher*, 159 Ind. 381; *Roberts v. Indianapolis St. R. Co.*, 158 Ind. 634; *Bedford Quarries Co. v. Thomas*, 29 Ind. App. 85; *Indiana, etc., R. Co. v. Trinosky*, 32 Ind. App. 113; *Chicago, etc., R. Co. v. Lee*, 29 Ind. App. 480; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; *Cleveland, etc., R. Co. v. Goddard*, 33 Ind. App. 321; *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27; *Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145. See *Ætna Powder Co. v. Earlandson*, 33 Ind. App. 251.

*Iowa.* — *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270; *Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302.

*Kentucky.* — *Carmony v. Louisville, etc., R. Co.*, 87 S. W. Rep. 319, 27 Ky. L. Rep. 948; *Illinois Cent. R. Co. v. Mercer*, 70 S. W. Rep. 287, 24 Ky. L. Rep. 908; *Tradewater Coal Co. v. Head*, 66 S. W. Rep. 721, 23 Ky. L. Rep. 2064; *Coleman v. Pittsburg, etc., R. Co.*, 63 S. W. Rep. 39, 23 Ky. L. Rep. 401.

*Louisiana.* — *Riley v. Banner Lumber Co.*, 109 La. 274.

*Massachusetts.* — *Gavin v. Fall River Automatic Telephone Co.*, 185 Mass. 78; *Archambault v. Archambault*, 184 Mass. 274; *Mulligan v. McCaffery*, 182 Mass. 420; *Ladd v. Brockton St. R. Co.*, 180 Mass. 454; *Wyman v. Clark*, 180 Mass. 173; *Meunier v. Chemical Paper Co.*, 180 Mass. 109; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476; *Kelley v. Calumet Woolen Co.*, 177 Mass. 128.

*Michigan.* — *Chapman v. Pere Marquette R. Co.*, 133 Mich. 311, 10 Detroit Leg. N. 194; *Schwandt v. William Wright Co.*, 126 Mich. 609.

*Minnesota.* — *Swenson v. Osgood, etc., Mfg. Co.*, 91 Minn. 509; *Parker v. Pine Tree Lumber Co.*, 85 Minn. 13.

*Missouri.* — *Roberts v. Missouri, etc., Telephone Co.*, 166 Mo. 370; *Reames v. Jones Dry Goods Co.*, 99 Mo. App. 396; *Poindexter v. Benedict Paper Co.*, 84 Mo. App. 352.

*Montana.* — *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434.

*New York.* — *Vykess v. Duncan Co.*, 88 N. Y. App. Div. 129; *McCarthy v. Emerson*, 77 N. Y. App. Div. 562; *Szotak v. Berwind-White Coal Min. Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 98; *Nugent v. Brooklyn Union El. R. Co.*,

**144.** (b) **Precautions Necessary for Servant at Work on Railroad Track.** — See notes 2, 3.

**145.** (c) **Precautions Necessary for Servant Crossing Track.** — See note 1.

64 N. Y. App. Div. 351; *Goodman v. Crystal*, 56 N. Y. App. Div. 64; *Renninger v. New York Cent., etc.*, R. Co., 11 N. Y. App. Div. 565, affirmed without opinion 162 N. Y. 595.

*Pennsylvania.* — *Gallagher v. Snellenburg*, 210 Pa. St. 642; *Kupp v. Rummel*, 199 Pa. St. 90; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

*Rhode Island.* — *Donohoe v. Lonsdale Co.*, 25 R. I. 187.

*South Carolina.* — *Sanders v. Aiken Mfg. Co.*, 71 S. Car. 58.

*Tennessee.* — *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236.

*Texas.* — *Galveston, etc.*, R. Co. v. *Brown*, 95 Tex. 2; *Missouri, etc.*, R. Co. v. *Williams*, 28 Tex. Civ. App. 615; *Texas, etc.*, R. Co. v. *Sherman*, (Tex. Civ. App. 1905) 87 S. W. Rep. 887; *Texas, etc.*, R. Co. v. *Hemphill*, (Tex. Civ. App. 1905) 86 S. W. Rep. 350; *Missouri, etc.*, R. Co. v. *Barnes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1006.

*Virginia.* — *Norfolk, etc.*, R. Co. v. *Hawkes*, 102 Va. 452.

See *Daniel v. Central of Georgia R. Co.*, 119 Ga. 246.

**Momentary Forgetfulness of Danger.** — *Tuscaloosa Water Works Co. v. Herren*, 131 Ala. 81; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645. See *supra*, this title, the cases supplementing page 120, note 4.

**Reliance on Warnings Required to Be Given.** — Under a rule governing the operation of a shale pit, that men at the foot of the pit wall shall shovel shale into cars while the pit boss watches that drillers at work at the top of the pit do not throw fragments of loosened shale down upon them without previous warning, a man shoveling shale is not obliged to observe the progress of the drillers' work, but may rely upon the warnings the pit boss is required to give. *Coffeyville Vitriified Brick, etc., Co. v. Shanks*, 69 Kan. 306.

**144. 2. Care Required of Servant Working on Railroad Track.** — *Illinois Cent. R. Co. v. Atwell*, 100 Ill. App. 513, affirmed 198 Ill. 200; *Baltimore, etc.*, R. Co. v. *Peterson*, 156 Ind. 364; *Murran v. Chicago, etc.*, R. Co., 86 Minn. 470; *Erickson v. Kansas City, etc.*, R. Co., 171 Mo. 647; *D'Agostino v. Pennsylvania R. Co.*, 72 N. J. L. 358; *Smith v. Atlanta, etc.*, Air Line R. Co., 132 N. Car. 819; *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340; *International, etc.*, R. Co. v. *Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Texas, etc.*, R. Co. v. *Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 50; *Missouri, etc.*, R. Co. v. *Goss*, 31 Tex. Civ. App. 300. See *Welch v. New York, etc.*, R. Co., 182 Mass. 84; *Albanese v. Central R. Co.*, 70 N. J. L. 241.

When signals and warnings are usually given, or a limited speed is required, at certain places, one going rightfully upon the track may, in some instances, assume that these duties will be observed. *San Antonio, etc.*, R. Co. v. *Brock*, 35 Tex. Civ. App. 155.

**3. Vigilance Such as Proper Attention to Duties**

**Will Permit Necessary** — *Alabama.* — *Kansas City, etc.*, R. Co. v. *Thornhill*, 141 Ala. 215.

*Illinois.* — *Indiana, etc.*, R. Co. v. *Otstot*, 212 Ill. 429, affirming 113 Ill. App. 37; *Illinois Cent. R. Co. v. Curran*, 94 Ill. App. 182.

*Iowa.* — *Camp v. Chicago G. W. R. Co.*, 124 Iowa 238.

*Kentucky.* — *Jacobs v. Chesapeake, etc.*, R. Co., 72 S. W. Rep. 308, 24 Ky. L. Rep. 1879; *Louisville, etc.*, R. Co. v. *Mounce*, 71 S. W. Rep. 518, 24 Ky. L. Rep. 1378.

*Louisiana.* — *Lewis v. Vicksburg, etc.*, R. Co., 114 La. 161.

*Massachusetts.* — *Gilgan v. New York, etc.*, R. Co., 185 Mass. 139; *Morris v. Boston, etc.*, R. Co., 184 Mass. 368.

*Minnesota.* — *Sours v. Great Northern R. Co.*, 88 Minn. 504, 84 Minn. 230.

*Missouri.* — *Evans v. Wabash R. Co.*, 178 Mo. 508; *Sharp v. Missouri Pac. R. Co.*, 161 Mo. 214.

*New York.* — *Riddle v. Forty-second St., etc.*, R. Co., 173 N. Y. 327.

*North Carolina.* — *Lassiter v. Raleigh, etc.*, R. Co., 133 N. Car. 244; *Smith v. Atlanta, etc.*, R. Co., 130 N. Car. 344; *Stewart v. Southern R. Co.*, 128 N. Car. 517.

*Ohio.* — *Green v. New York, etc.*, R. Co., 26 Ohio Cir. Ct. 609; *Lake Shore, etc.*, R. Co. v. *Callahan*, 25 Ohio Cir. Ct. 115; *McCarty v. Baltimore R. Co.*, 11 Ohio Cir. Dec. 229, 20 Ohio Cir. Ct. 536.

*Pennsylvania.* — *Sanker v. Pennsylvania R. Co.*, 205 Pa. St. 609.

*Tennessee.* — *Greenlaw v. Louisville, etc.*, R. Co., 114 Tenn. 187.

*Texas.* — *International, etc.*, R. Co. v. *Tisdale*, 36 Tex. Civ. App. 174.

*Washington.* — *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30.

*Wisconsin.* — *Buckmaster v. Chicago, etc.*, R. Co., 108 Wis. 353.

**145. 1. Servant Crossing Track.** — *Dishon v. Cincinnati, etc.*, R. Co., (C. C. A.) 133 Fed. Rep. 471; *O'Neil v. Pittsburg, etc.*, R. Co., 130 Fed. Rep. 204; *Pittsburgh, etc.*, R. Co. v. *Seivers*, 162 Ind. 245, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *Chicago, etc.*, R. Co. v. *Cunningham*, 33 Ind. App. 145; *Libbey v. Atchison, etc.*, R. Co., 69 Kan. 869; *Dolphin v. New York, etc.*, R. Co., 182 Mass. 509; *Jean v. Boston, etc.*, R. Co., 181 Mass. 197; *Morehead v. Yazoo, etc.*, R. Co., 84 Miss. 112; *Wabash R. Co. v. Skiles*, 64 Ohio St. 458; *Huron Dock Co. v. Swart*, 24 Ohio Cir. Ct. 504; *Pennsylvania R. Co. v. Mahoney*, 12 Ohio Cir. Dec. 366, 22 Ohio Cir. Ct. 469; *Bennett v. St. Louis Southwestern R. Co.*, 36 Tex. Civ. App. 459; *Gulf, etc.*, R. Co. v. *Howard*, (Tex. Civ. App. 1903) 75 S. W. Rep. 803, 96 Tex. 582. See *Indiana, etc.*, R. Co. v. *Trinosky*, 32 Ind. App. 113; *McLeod v. Chicago, etc.*, R. Co., 125 Iowa 270. Compare *Gulf, etc.*, R. Co. v. *Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863.

**Servant Walking Along Track.** — *Lake Shore, etc.*, R. Co. v. *Callahan*, 25 Ohio Cir. Ct. 115;



**145.** (d) **Precautions Necessary in Regard to Unguarded Holes.** — See note 2.

(11) *Voluntary and Needless Assumption of Position of Peril.* — See note 3.

*Erie R. Co. v. McCormick*, 24 Ohio Cir. Ct. 86; *Ham v. Lake Shore, etc.*, R. Co., 23 Ohio Cir. Ct. 496.

**Motorman Driving Car Across Track.**—Bobb *v. Union Traction Co.*, 206 Pa. St. 265.

**145. 2. Unguarded Holes — Care Required of Servant.** — But see *Foster v. New York, etc.*, R. Co., 187 Mass. 21.

**3. Voluntarily Assuming Place of Peril — United States.** — *Demko v. Carbon Hill Coal Co.*, (C. C. A.) 136 Fed. Rep. 162; *Richmond Locomotive Works v. Ramsey*, (C. C. A.) 131 Fed. Rep. 197; *Erie R. Co. v. Kane*, (C. C. A.) 118 Fed. Rep. 223; *The Frey*, 113 Fed. Rep. 1003.

*Arkansas.* — *Choctaw, etc.*, R. Co. *v. Stallings*, 70 Ark. 603; *Walker v. Louis-Werner Sawmill Co.*, (Ark. 1905) 88 S. W. Rep. 988.

*Georgia.* — *Wrightsville, etc.*, R. Co. *v. Latimore*, 118 Ga. 581; *Central of Georgia R. Co. v. McWhorter*, 115 Ga. 476.

*Illinois.* — *Chicago Terminal Transfer R. Co. v. Schiavone*, 216 Ill. 275; *Chicago, etc.*, R. Co. *v. Barr*, 204 Ill. 163; *Hartrich v. Hawes*, 202 Ill. 334, *affirming* 103 Ill. App. 433; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Ritchie v. Krueger*, 102 Ill. App. 654; *Anderberg v. Chicago, etc.*, R. Co., 98 Ill. App. 207; *Brown Hoisting, etc.*, Mach. Co. *v. Bennett*, 96 Ill. App. 514; *Chicago, etc.*, R. Co. *v. Myers*, 95 Ill. App. 578; *Cleveland, etc.*, R. Co. *v. Carr*, 95 Ill. App. 576; *Illinois Cent. R. Co. v. Curran*, 94 Ill. App. 182; *Smith v. Foster*, 93 Ill. App. 138; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532.

*Indiana.* — *Bedford Quarries Co. v. Thomas*, 29 Ind. App. 85; *Barley v. Southern Indiana R. Co.*, 30 Ind. App. 406.

*Iowa.* — *Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302; *Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645; *Haynes v. Ft. Dodge, etc.*, R. Co., 118 Iowa 393.

*Kansas.* — *Libbey v. Atchison, etc.*, R. Co., 69 Kan. 869; *Fowler v. Brooks*, 65 Kan. 861, 70 Pac. Rep. 600; *Beal v. Atchison, etc.*, R. Co., 62 Kan. 250.

*Kentucky.* — *Illinois Cent. R. Co. v. Mencer*, 80 S. W. Rep. 816, 25 Ky. L. Rep. 2250; *Baker v. Lexington, etc.*, R. Co., 89 S. W. Rep. 149, 28 Ky. L. Rep. 140; *Calvert v. Brosius*, 77 S. W. Rep. 1098, 25 Ky. L. Rep. 1393; *Hollingsworth v. Pineville Coal Co.*, 74 S. W. Rep. 205, 24 Ky. L. Rep. 2437; *Shannon v. Louisville, etc.*, R. Co., 70 S. W. Rep. 626, 24 Ky. L. Rep. 1083, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *Louisville, etc.*, R. Co. *v. Hocker*, 111 Ky. 707; *Bush v. Grant*, 61 S. W. Rep. 363, 22 Ky. L. Rep. 1766.

*Louisiana.* — *Govan v. New Orleans, etc.*, R. Co., 111 La. 125; *Riley v. Banner Lumber Co.*, 109 La. 274.

*Maine.* — *McDonough v. Grand Trunk R. Co.*, 98 Me. 304.

*Massachusetts.* — *Alvey v. American Writing Paper Co.*, 184 Mass. 234; *Buston v. Harvard Brewing Co.*, 183 Mass. 438; *Ladd v. Brockton*

*St. R. Co.*, 180 Mass. 454; *Meunier v. Chemical Paper Co.*, 180 Mass. 109.

*Michigan.* — *Dutchowski v. Handy Things Co.*, (Mich. 1905) 104 N. W. Rep. 358, 12 Detroit Leg. N. 328.

*Minnesota.* — *Braafat v. Minneapolis, etc., Elevator Co.*, 90 Minn. 367; *Parker v. Pine Tree Lumber Co.*, 85 Minn. 13.

*Mississippi.* — *Morehead v. Yazoo, etc.*, R. Co., 84 Miss. 112.

*Missouri.* — *Caldwell v. Missouri Pac. R. Co.*, 181 Mo. 455; *Doerr v. St. Louis Brewing Assoc.*, 176 Mo. 547; *Richardson v. Mesker*, 171 Mo. 666; *Montgomery v. Chicago G. W. R. Co.*, 109 Mo. App. 88.

*New Jersey.* — *Smith v. Thomas Iron Co.*, 69 N. J. L. 11.

*New York.* — *Riddle v. Forty-second St., etc.*, R. Co., 173 N. Y. 327; *Mull v. Curtice Bros. Co.*, 74 N. Y. App. Div. 561; *Behsmann v. Waldo*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 863, *affirmed* without opinion (Supm. Ct. App. T.) 38 Misc. (N. Y.) 820; *Goodman v. Crystal*, 56 N. Y. App. Div. 64; *Mohr v. Lehigh Valley R. Co.*, 55 N. Y. App. Div. 176. See *Karch v. Kipp*, (Supm. Ct. App. T.) 90 N. Y. Supp. 404.

*North Carolina.* — *Howard v. Southern R. Co.*, 131 N. Car. 829, *petition to rehear dismissed* 132 N. Car. 709.

*Ohio.* — *Crossman v. P. & T. Degnan Sand, etc.*, Co., 24 Ohio Cir. Ct. 585. *Compare Gamble v. Akron, etc.*, R. Co., 63 Ohio St. 352.

*Pennsylvania.* — *McIntire v. Pittsburg Steel Foundry*, 208 Pa. St. 34; *Schlemmer v. Buffalo, etc.*, R. Co., 207 Pa. St. 198 *Baldwin v. Urner*, 206 Pa. St. 459; *Fricker v. Penn Bridge Co.*, 197 Pa. St. 442. See *Fox v. Clearfield Wooden Ware Co.*, 211 Pa. St. 645.

*Rhode Island.* — *Benson v. New York, etc.*, R. Co., 26 R. I. 405; *Desrosiers v. Bourn*, 26 R. I. 6, *reargument denied* 26 R. I. 156; *Carbury v. Eastern Nut, etc.*, Co., 27 R. I. 116.

*Texas.* — *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551; *Smith v. Atchison, etc.*, R. Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 1052; *Burns v. Chronister Lumber Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 163.

*Virginia.* — *Norfolk, etc.*, R. Co. *v. Hawkes*, 102 Va. 452; *Street v. Norfolk, etc.*, R. Co., 101 Va. 746.

*Washington.* — *Miller v. Moran Bros. Co.*, 39 Wash. 631. See *Krebbs v. Oregon R., etc.*, Co., 40 Wash. 138.

*Wisconsin.* — *Koepecke v. Wisconsin Bridge, etc.*, Co., 116 Wis. 92.

See *Geis v. Tennessee Coal, etc.*, Co., 143 Ala. 299.

One who voluntarily and unnecessarily exposes himself to an imminent known danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the unknown negligence of the defendant, which concurred to produce the injury, made the danger greater than he supposed it to be. *Gilbert v. Burlington, etc.*, R.

**146.** (12) *Choosing More Dangerous Course of Action.*—See notes 1, 2, 3.

Co., (C. C. A.) 128 Fed. Rep. 529, *affirming* 123 Fed. Rep. 832.

The act of an engineer in going under his engine, while the train was standing on a sidetrack, to find and repair a leak in the air-brake apparatus, without first setting the brakes which would have held the train, or notifying any of the train crew that he was under the engine, although he knew that another train would soon be run upon the sidetrack, has been held to be contributory negligence as a matter of law. *Whitcomb v. McNulty*, (C. C. A.) 105 Fed. Rep. 863.

**Brakeman Riding on Locomotive.**—The widow of a brakeman in the employ of a railroad company who was killed by the derailment of a locomotive upon which he was riding and whose presence thereon was in violation of a duty devolving upon him to be elsewhere, cannot recover for his death, even if the derailment was due to the negligence of the company. Under such circumstances it could not properly be held that the employee was free from fault directly contributing to his death. *Chattanooga Southern R. Co. v. Myers*, 112 Ga. 237.

**146. 1. Duty of Servant to Choose Less Dangerous Way.**—*United States.*—*Debro v. James Lee's Sons Co.*, 130 Fed. Rep. 385; *Southern R. Co. v. Logan*, (C. C. A.) 138 Fed. Rep. 725; *Gilbert v. Burlington, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 529, *affirming* 123 Fed. Rep. 832; *Dawson v. Chicago, etc., R. Co.*, 114 Fed. Rep. 870, 52 C. C. A. 286. See *Denver, etc., R. Co. v. Arrighi*, (C. C. A.) 129 Fed. Rep. 347. *Compare Western Union Tel. Co. v. Burgess*, (C. C. A.) 108 Fed. Rep. 26.

*Georgia.*—*Central of Georgia R. Co. v. Mosely*, 112 Ga. 914. See *Riverside Mills v. Jones*, 121 Ga. 33.

*Illinois.*—*O'Donnell v. MacVeagh*, 205 Ill. 23; *Chicago, etc., R. Co. v. Barr*, 204 Ill. 163; *Illinois Cent. R. Co. v. Swift*, 213 Ill. 307; *Foster v. Lake St. El. R. Co.*, 108 Ill. App. 113; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Ritchie v. Krueger*, 102 Ill. App. 654; *Smith v. Foster*, 93 Ill. App. 138; *Wabash R. Co. v. Propst*, 92 Ill. App. 485.

*Indiana.*—*Chamberlain v. Waymire*, 32 Ind. App. 442, *rehearing denied* (Ind. App. 1904) 70 N. E. Rep. 81; *Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145.

*Kentucky.*—*Tradewater Coal Co. v. Head*, 66 S. W. Rep. 721, 23 Ky. L. Rep. 2064; *Carey v. Samuels*, 88 S. W. Rep. 1052 28 Ky. L. Rep. 6.

*Louisiana.*—*Ederle v. Vicksburg, etc., R. Co.*, 112 La. 728; *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 104 Am. St. Rep. 452.

*Maine.*—*Leard v. International Paper Co.*, 100 Me. 59.

*Massachusetts.*—*Slade v. Beattie*, 186 Mass. 267; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442; *Connors v. Merchants Mfg. Co.*, 184 Mass. 466; *Lodi v. Maloney*, 184 Mass. 240; *Cushman v. Cushman*, 179 Mass. 601; *Gillette v. General Electric Co.*, 187 Mass. 1; *Demers v. Marshall*, 178 Mass. 9.

*Michigan.*—*Dutchowski v. Handy Things Co.*, (Mich. 1905) 104 N. W. Rep. 358, 12 De-

troit Leg. N. 328; *Deering v. Canfield, etc., Co.*, 126 Mich. 373, 8 Detroit Leg. N. 48.

*Minnesota.*—*Braafiat v. Minneapolis, etc., Elevator Co.*, 90 Minn. 367; *Jensen v. Regan*, 92 Minn. 323; *Bischoff v. St. Paul Bethel Assoc.*, 82 Minn. 105.

*Missouri.*—*Caldwell v. Missouri Pac. R. Co.*, 181 Mo. 455; *Hurst v. Kansas City, etc., R. Co.*, 163 Mo. 309, 85 Am. St. Rep. 539; *George v. St. Louis Mfg. Co.*, 159 Mo. 333; *Whaley v. Coleman*, 113 Mo. App. 594; *Montgomery v. Chicago G. W. R. Co.*, 109 Mo. App. 88.

*Nebraska.*—*Weed v. Chicago, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 827.

*New York.*—*Patterson v. V. J. Hedden, etc., Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1069; *Sheehan v. Standard Gas Light Co.*, 87 N. Y. App. Div. 174; *Szotak v. Berwind-White Coal Min. Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 98. See *O'Sullivan v. Flynn*, 67 N. Y. App. Div. 516.

*North Carolina.*—*Covington v. Smith Furniture Co.*, 138 N. Car. 374; *Whitson v. Wrenn*, 134 N. Car. 86.

*Ohio.*—*Lake Shore, etc., R. Co. v. Whidden*, 23 Ohio Cir. Ct. 85; *Crossman v. P. & T. Degnan Sand, etc., Co.*, 24 Ohio Cir. Ct. 585.

*Rhode Island.*—*Carbury v. Eastern Nut, etc., Co.*, 27 R. I. 116; *Benson v. New York, etc., R. Co.*, 26 R. I. 405.

*South Carolina.*—*Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468.

*Tennessee.*—*Nashville Spoke, etc., Co. v. Thomas*, 114 Tenn. 458.

*Texas.*—*Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; *Consumers Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *San Antonio, etc., R. Co. v. Anderson*, 31 Tex. Civ. App. 327.

*Virginia.*—*Newport News Pub. Co. v. Beaumeister*, 102 Va. 677; *Wise Terminal Co. v. McCormick*, (Va. 1905) 51 S. E. Rep. 731; *Street v. Norfolk, etc., R. Co.*, 101 Va. 746.

*Washington.*—*Johnson v. Anderson, etc., Lumber Co.*, 31 Wash. 554; *Stratton v. C. H. Nichols Lumber Co.*, 39 Wash. 323; *Beltz v. American Mill Co.*, 37 Wash. 399. *Compare Crooker v. Pacific Lounge, etc., Co.*, 34 Wash. 191.

See *McKean v. Colorado Fuel, etc., Co.*, 18 Colo. App. 285.

**Using Defective Lever to Uncouple Cars.**—A railway train was equipped with two levers—one at each side of it—to enable the brakeman to draw a pin between two cars without entering between them. The machinery attached to the lever on the side of the plaintiff was out of order, while that attached to the lever on the opposite side was in good condition. It was held that the fact that the brakeman chose to and did step in between the cars while in motion to draw the pin, instead of using the lever on the opposite side of the train, provided for the purpose, was evidence of negligence contributing to an injury resulting from his stumbling while walking between the cars. *Morris v. Duluth, etc., R. Co.*, (C. C. A.) 108 Fed. Rep. 747.

**147. (13) Acting in Obedience to Orders — (a) Where Danger Not Obvious. —**  
See note 1.

**146. 2. United States.**—Erie R. Co. v. Moore, (C. C. A.) 113 Fed. Rep. 269.

*Florida.*—Florida Cent., etc., R. Co. v. Mooney, 45 Fla. 286.

*Indiana.*—Aetna Powder Co. v. Earlendon, 33 Ind. App. 251.

*Iowa.*—Pierson v. Chicago, etc., R. Co., 127 Iowa 13.

*Kansas.*—Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738.

*Kentucky.*—Illinois Cent. R. Co. v. Stith, (Ky. 1905) 85 S. W. Rep. 1173.

*Massachusetts.*—Boyle v. Columbian Fire Proofing Co., 182 Mass. 93; O'Neil v. Ginn, 188 Mass. 346.

*Michigan.*—Hewitt v. East Jordan Lumber Co., 136 Mich. 110, 10 Detroit Leg. N. 1008.

*Missouri.*—Curtis v. McNair, 173 Mo. 270; Fouts v. Swift, 113 Mo. App. 526; Benedict v. Chicago G. W. R. Co., 104 Mo. App. 218.

*Montana.*—McCabe v. Montana Cent. R. Co., 30 Mont. 323.

*New Hampshire.*—Olney v. Boston, etc., R. Co., 71 N. H. 427.

*Ohio.*—Michigan Cent. R. Co. v. Butler, 23 Ohio Cir. Ct. 459.

*Pennsylvania.*—Hickey v. Solid Steel Casting Co., 212 Pa. St. 255.

*Texas.*—St. Louis, etc., R. Co. v. Vestal, (Tex. Civ. App. 1905) 86 S. W. Rep. 790; Missouri, etc., R. Co. v. Keefe, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; Consumers Cotton Oil Co. v. Gentry, 35 Tex. Civ. App. 445; Galveston, etc., R. Co. v. Walker, (Tex. Civ. App. 1903) 76 S. W. Rep. 228.

*Vermont.*—Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 93 Am. St. Rep. 887.

*Washington.*—Gaudie v. Northern Lumber Co., 34 Wash. 34.

*Canada.*—Day v. Dominion Iron, etc., Co., 36 Nova Scotia 113.

See Merrill v. Pike, 94 Minn. 186; Norfolk, etc., R. Co. v. Cheatwood, 103 Va. 356.

**Switchman Boarding Moving Train.**—It has been said that contributory negligence cannot be predicated upon the mere fact that a switchman mounted a moving train which was being switched in the yard of the company. *Kansas City Southern R. Co. v. Billingslea*, (C. C. A.) 116 Fed. Rep. 335.

**Going Between Cars to Make Coupling on the Inside Instead of the Outside of a Curve.**—It cannot be said that a brakeman is guilty of contributory negligence in going between cars on the inside instead of the outside of a curve to make a coupling, unless he can perform his duties as well and efficiently in the one way as the other. *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258.

**3. Osborne v. Alabama Steel, etc., Co.**, 135 Ala. 571; *Hughes v. Iowa Cent. R. Co.*, (Iowa 1905) 103 N. W. Rep. 339; *Gualden v. Kansas City Southern R. Co.*, 106 La. 409; *Mathews v. Daly-West Min. Co.*, 27 Utah 193; *Dossett v. St. Paul, etc., Lumber Co.*, 40 Wash. 276.

**147. 1. Acting in Obedience of Orders — United States.**—*Sauvageau v. River Spinning*

*Co.* 129 Fed. Rep. 961; *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312.

*Arkansas.*—*Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

*California.*—*Daubert v. Western Meat Co.*, 135 Cal. 144.

*Georgia.*—*Fenn v. Seaboard Air Line R. Co.*, 120 Ga. 664.

*Illinois.*—*Barnett, etc., Co. v. Schlapka*, 208 Ill. 426, affirming 110 Ill. App. 672; *Pressed Steel Car Co. v. Herath*, 207 Ill. 576, affirming 110 Ill. App. 596; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452; *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201, affirming 107 Ill. App. 69; *Hartrich v. Hawes*, 202 Ill. 334, affirming 103 Ill. App. 433; *Illinois Cent. R. Co. v. Sporleder*, 199 Ill. 184; *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200, affirming 100 Ill. App. 513; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, affirming 96 Ill. App. 288; *William Graver Tank Works v. O'Donnell*, 191 Ill. 236, affirming 91 Ill. App. 524; *Hass v. Chicago, etc., R. Co.*, 97 Ill. App. 624; *Wierzbicky v. Illinois Steel Co.*, 94 Ill. App. 400; *McFadden v. Sollitt*, 94 Ill. App. 271; *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68; *Illinois Cent. R. Co. v. Sporleder*, 90 Ill. App. 590; *Bennett v. Brown Hoisting, etc., Mach. Co.*, 89 Ill. App. 113. See *Illinois Cent. R. Co. v. Swift*, 213 Ill. 307.

*Indiana.*—*Republic Iron, etc., Co. v. Berkes*, 162 Ind. 517; *Diezi v. G. H. Hammond Co.*, 156 Ind. 583; *Perry-Matthews-Buskirk Stone Co. v. Spear*, (Ind. App. 1905) 73 N. E. Rep. 933; *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *Gould Steel Co. v. Richards*, 30 Ind. App. 348.

*Iowa.*—*Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434. See *Pierson v. Chicago, etc., R. Co.*, 127 Iowa 13.

*Kansas.*—*Wurtenberger v. Metropolitan St. R. Co.*, 68 Kan. 642.

*Kentucky.*—*Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167, 27 Ky. L. Rep. 305; *Mayfield Woolen Mills v. Frazier*, 80 S. W. Rep. 456, 25 Ky. L. Rep. 2263; *Smith v. Kentucky Lumber Co.*, 78 S. W. Rep. 120, 25 Ky. L. Rep. 1386; *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318; *Long v. Illinois Cent. R. Co.*, 113 Ky. 806, 101 Am. St. Rep. 374.

*Massachusetts.*—*Joyce v. American Writing Paper Co.*, 184 Mass. 230.

*Michigan.*—*Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 11 Detroit Leg. N. 246.

*Minnesota.*—*Barrett v. Reardon*, (Minn. 1905) 104 N. W. Rep. 309; *Gray v. Commutator Co.*, 85 Minn. 463.

*Missouri.*—*Mitchell v. Chicago, etc., R. Co.*, 108 Mo. App. 142; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Browning v. Kasten*, 107 Mo. App. 59.

*Nebraska.*—*Ittner Brick Co. v. Killian*, 67 Neb. 589.

*New York.*—*Finn v. Cassidy*, 165 N. Y. 584, affirming 39 N. Y. App. Div. 641; *Fleming v. Tuttle*, 98 N. Y. App. Div. 222; *Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527,

**148.** See notes 1, 2, 3.(b) **Where Danger Is Obvious.**—See note 4.(14) **Acting in Disobedience to Orders.**—See note 6.

*affirmed* without opinion 179 N. Y. 552; *Smith v. King*, 74 N. Y. App. Div. 1.

*North Carolina.*—*Springs v. Southern R. Co.*, 130 N. Car. 186; *Thomas v. Raleigh, etc.*, Air Line R. Co., 129 N. Car. 392; *Haltom v. Southern R. Co.*, 127 N. Car. 255.

*Ohio.*—*E. P. Breckenridge Co. v. Reagan*, 12 Ohio Cir. Dec. 50, 22 Ohio Cir. Ct. 71. *Compare Cleveland v. Wolf*, 25 Ohio Cir. Ct. 406.

*Oregon.*—*Sorenson v. Oregon Power Co.*, (Oregon 1905) 82 Pac. Rep. 10.

*Pennsylvania.*—*Schiglizzo v. Dunn*, 211 Pa. St. 253, 107 Am. St. Rep. 549; *Sweigert v. Klingensmith*, 210 Pa. St. 565; *Williams v. Clark*, 204 Pa. St. 416.

*South Carolina.*—*Carson v. Southern R. Co.*, 68 S. Car. 55, *judgment affirmed* Southern R. Co. v. Carson, 194 U. S. 136.

*Texas.*—*Missouri, etc., R. Co. v. Walden*, 27 Tex. Civ. App. 567; *Texas Cent. R. Co. v. Hicks*, 24 Tex. Civ. App. 400; *St. Louis, etc., R. Co. v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 790; *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, *affirmed* 98 Tex. 123; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Galveston, etc., R. Co. v. Puente*, 30 Tex. Civ. App. 246; *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893.

*Vermont.*—*La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125.

*Virginia.*—*Virginia Portland Cement Co. v. Luck*, 103 Va. 427, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

*Washington.*—*Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; *Green v. Western American Co.*, 30 Wash. 87; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271.

**Assisting to Remove Hand Car from Track in Front of Approaching Train.**—*Kansas City, etc., R. Co. v. Thornhill*, 141 Ala. 215.

**148. 1. Apparent Danger.**—*Kansas, etc., Coal Co. v. Chandler*, 71 Ark. 518; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, *affirming* 102 Ill. App. 347; *Slack v. Harris*, 200 Ill. 96; *Illinois Steel Co. v. Sitar*, 199 Ill. 116; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319; *Wells v. Bourdages*, 193 Ill. 328; *Kapaczynski v. Wells, etc., Co.*, 110 Ill. App. 477, *affirmed* 218 Ill. 149; *Allison v. Southern R. Co.*, 129 N. Car. 336; *Virginia Portland Cement Co. v. Luck*, 103 Va. 427, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 148. See *Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440; *Jancko v. West Coast Mfg., etc., Co.*, 34 Wash. 556.

**2. Assurance of Safety When Complaint Made.**—*Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348, *affirming* 95 Ill. App. 110. See *Allen v. Gilman*, 127 Fed. Rep. 609.

**3. Necessity for Exercising Ordinary Care.**—*Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475.

**Orders to Do Work Quickly.**—The mere fact that a servant is told to do a thing "as quick as possible" does not excuse a failure on his part

to exercise due care. *Illinois Car, etc., Co. v. Walch*, 132 Ala. 490.

**4. Obvious Danger—Effect of Orders—United States.**—*Southern R. Co. v. Logan*, (C. C. A.) 138 Fed. Rep. 725.

*Alabama.*—*Coosa Mfg. Co. v. Williams*, 133 Ala. 606.

*Colorado.*—*Greeley v. Foster*, 32 Colo. 292.

*Georgia.*—*Wrightsville, etc., R. Co. v. Lattimore*, 118 Ga. 581.

*Illinois.*—*Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475.

*Kentucky.*—*Shemwell v. Owensboro, etc., R. Co.*, 117 Ky. 556; *Reis v. Struck*, 64 S. W. Rep. 729, 23 Ky. L. Rep. 1113.

*Louisiana.*—*McKinney v. McNeely*, 108 La. 27.

*Mississippi.*—*Truly v. North Lumber Co.*, 83 Miss. 430.

*Missouri.*—*Zentz v. Chappell*, 103 Mo. App. 208. See *Whaley v. Coleman*, 113 Mo. App. 594.

*Nebraska.*—*Ittner Brick Co. v. Killian*, 67 Neb. 589.

*New Hampshire.*—*O'Hare v. Cocheco Mfg. Co.*, 71 N. H. 104, 93 Am. St. Rep. 499.

*New Jersey.*—*Luckey v. Sofield*, (N. J. 1904) 57 Atl. Rep. 870.

*New York.*—*Date v. New York G'ucose Co.*, 104 N. Y. App. Div. 207.

*North Carolina.*—*Allison v. Southern R. Co.*, 129 N. Car. 336.

*Ohio.*—*Gensen v. Ohio Oil Co.*, 12 Ohio Cir. Dec. 10, 22 Ohio Cir. Ct. 276; *Joswoyak v. Lake Shore, etc., R. Co.*, 4 Ohio Dec. (Reprint) 317, 1 Cleve. L. Rep. 306.

*Texas.*—*Houston East, etc., Texas R. Co. v. De Walt*, 96 Tex. 121, 97 Am. St. Rep. 877; *Hightower v. Gray*, 36 Tex. Civ. App. 674; *Hildenbrand v. Marshall*, 30 Tex. Civ. App. 135; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551; *International, etc., R. Co. v. Tisdale*, 36 Tex. Civ. App. 174. See *Haywood v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 433.

*Washington.*—*Bier v. Hosford*, 35 Wash. 544; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582.

*Wisconsin.*—*Goodrich v. Chippewa Valley Electric R. Co.*, 108 Wis. 329.

When an implement or appliance is defective to such an extent or the character of the work is such that it cannot be prosecuted by means of the defective tool without subjecting the servant to such great or imminent risk of being seriously hurt that a person of ordinary prudence would not incur it, the request of the master that the servant continue using the defective implement does not free the servant from the charge of contributory negligence. *Musser-Sauntru Land, etc., Co. v. Brown*, (C. C. A.) 126 Fed. Rep. 141.

**6. Injury Resulting from Disobedience of Orders—United States.**—*McMillan v. Grand Truck R. Co.*, (C. C. A.) 130 Fed. Rep. 827; *Debro v. James Lee's Sons Co.*, 130 Fed. Rep. 385.

**149.** See notes 1, 2.

(15) *Injuries Sustained While Acting in Violation of Law.*—See note 3.

(16) *Working Outside Scope of Employment*—(a) *In General.*—See notes 4, 5.

**150.** (17) *Acting in Emergencies Caused by Master's Negligence.*—See notes 1, 2, 3.

*Delaware.*—Punkowski v. New Castle Leather Co., 4 Penn. (Del.) 544.  
*Connecticut.*—Hyde v. Mendel, 75 Conn. 140.

*Illinois.*—Kinmundy v. Anderson, 103 Ill. App. 457; Illinois Steel Co. v. Kinnare, 100 Ill. App. 208; Chicago, etc., R. Co. v. Myers, 95 Ill. App. 578; Mendota Light, etc., Co. v. Lafferty, 92 Ill. App. 74; Tri-City R. Co. v. Killeen, 92 Ill. App. 57.

*Kentucky.*—Straight Creek Coal Co. v. Haney, 87 S. W. Rep. 1114, 27 Ky. L. Rep. 1117; Louisville, etc., R. Co. v. Hiltner, 60 S. W. Rep. 2, 22 Ky. L. Rep. 1141. But compare Illinois Cent. R. Co. v. Stith, (Ky. 1905) 85 S. W. Rep. 1173.

*Louisiana.*—Moore v. St. Louis, etc., R. Co., (La. 1905) 38 So. Rep. 913.

*Massachusetts.*—Demers v. Marshall, 178 Mass. 9.

*Minnesota.*—Burris v. Minneapolis, etc., R. Co., (Minn. 1905) 103 N. W. Rep. 717; Nordquist v. Great Northern R. Co., 89 Minn. 485; Green v. Brainerd, etc., R. Co., 85 Minn. 318.

*Mississippi.*—Natchez Cotton Mill Co. v. McLain, (Miss. 1903) 33 So. Rep. 723.

*Nebraska.*—Weed v. Chicago, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 827; Western Matress Co. v. Ostergaard, (Neb. 1904) 99 N. W. Rep. 229, judgment affirmed on rehearing, (Neb. 1904) 101 N. W. Rep. 334; Chicago, etc., R. Co. v. Healey, (Neb. 1904) 97 N. W. Rep. 1024.

*New York.*—Shannon v. New York Cent., etc., R. Co., 88 N. Y. App. Div. 349; Dickescheid v. Betz, 80 N. Y. App. Div. 8, affirmed without opinion 176 N. Y. 611.

*North Carolina.*—Howard v. Southern R. Co., 131 N. Car. 829, petition to rehear dismissed 132 N. Car. 709; Hicks v. Naomi Falls Mfg. Co., 138 N. Car. 319; Stewart v. Van Deventer Carpet Co., 138 N. Car. 60; Holland v. Seaboard Air Line R. Co., 137 N. Car. 368; Whitson v. Wrenn, 134 N. Car. 86. See Hamrick v. Balfour Quarry Co., 132 N. Car. 282.

*Ohio.*—Wheeling, etc., R. Co. v. Fisher, 25 Ohio Cir. Ct. 566.

*South Carolina.*—Morrow v. Gaffney Mfg. Co., 70 S. Car. 244.

*Texas.*—Galveston, etc., R. Co. v. Brown, 95 Tex. 2; Horton v. Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150; Texas, etc., R. Co. v. Fields, 32 Tex. Civ. App. 414.

*Utah.*—Smith v. Centennial Eureka Min. Co., 27 Utah 307.

*Virginia.*—Street v. Norfolk, etc., R. Co., 101 Va. 746.

*Canada.*—Holden v. Grand Trunk R. Co., 5 Ont. L. Rep. 301; Anderson v. Mikado Min. Co., 3 Ont. L. Rep. 581.

**Injury Resulting from Disobedience of Reason-**

**able Rules.**—See *supra*, the cases supplementing page 105, note 2.

**149. 1.** Tullis v. Lake Erie, etc., R. Co., (C. C. A.) 105 Fed. Rep. 554. See Kerrigan v. Chicago, etc., R. Co., 86 Minn. 407.

**2. Obedience to Orders Inconsistent with Rules.**—See Illinois Steel Co. v. Olste, 214 Ill. 181.

**3. Injuries Sustained while Acting in Violation of Law.**—See Little v. Southern R. Co., 120 Ga. 347, 102 Am. St. Rep. 104.

**4. Working Outside Scope of Employment—United States.**—Baltimore, etc., R. Co. v. Doty, (C. C. A.) 133 Fed. Rep. 866.

*Georgia.*—Central of Georgia R. Co. v. McWhorter, 115 Ga. 476.

*Indiana.*—Roberts v. Indianapolis St. R. Co., 158 Ind. 634; Robertson v. Ford, 164 Ind. 538.

*Kentucky.*—Floyd v. Kentucky Lumber Co., 66 S. W. Rep. 501, 23 Ky. L. Rep. 1914; Bowling Green Stone Co. v. Capshaw, 64 S. W. Rep. 507, 23 Ky. L. Rep. 945. See Hollingsworth v. Pineville Coal Co., 74 S. W. Rep. 205, 24 Ky. L. Rep. 2437.

*Maine.*—McTaggart v. Maine Cent. R. Co., 100 Me. 223.

*Massachusetts.*—Aziz v. Atlantic Cotton Mills, 189 Mass. 156.

*New York.*—Mull v. Curtice Bros. Co., 74 N. Y. App. Div. 561; Di Pietro v. Empire Portland Cement Co., 70 N. Y. App. Div. 501. See Young v. Eugene Dietzgen Co., 72 N. Y. App. Div. 618, affirmed without opinion 176 N. Y. 590.

*Pennsylvania.*—Michael v. Henry, 209 Pa. St. 213.

*Texas.*—International, etc., R. Co. v. Walters, (Tex. Civ. App. 1904) 80 S. W. Rep. 668. Compare W. G. Ragley Lumber Co. v. Goldsmith, (Tex. Civ. App. 1902) 66 S. W. Rep. 581.

*Wisconsin.*—Egnor v. N. C. Foster Lumber Co., 115 Wis. 530.

See Cleveland, etc., R. Co. v. Carr, 95 Ill. App. 576; Fowler v. Brooks, 65 Kan. 861, 70 Pac. Rep. 600; Tirrell v. New York, etc., R. Co., 180 Mass. 490; Coleman v. Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254; Phillips v. Central R. Co., 68 N. J. L. 605. Compare Virginia Iron, etc., Co. v. Tomlinson, (Va. 1905) 51 S. E. Rep. 362. See *supra*, the cases supplementing page 131, note 2.

**5.** Werner v. Trautwein, 25 Tex. Civ. App. 608. See Kopf v. Monroe Stone Co., 133 Mich. 286, 10 Detroit Leg. N. 185.

**150. 1. Effect of Adopting More Dangerous Course—Alabama.**—Postal Tel. Cable Co. v. Hulsey, 132 Ala. 444. Compare Kansas City, etc., R. Co. v. Thornhill, 141 Ala. 215.

*Illinois.*—Mومence Stone Co. v. Groves, 197 Ill. 88; Junction Min. Co. v. Ench, 111 Ill. App. 346.

**151.** (18) *Assuming Extra-hazardous Risks to Save Life and Property.* — See notes 1, 2, 3.

(19) *Sudden Illness at Post of Duty.* — See note 4.

g. MASTER'S VIOLATION OF STATUTORY DUTIES AS AFFECTING DEFENSE. — See notes 5, 6.

*Indiana.* — *Chicago, etc., R. Co. v. Martin*, 31 Ind. App. 308.

*Kentucky.* — *Middlesborough R. Co. v. Stalard*, 72 S. W. Rep. 17, 24 Ky. L. Rep. 1666.

*Missouri.* — *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372.

*Ohio.* — *Gamble v. Akron, etc., R. Co.*, 63 Ohio St. 352.

*Texas.* — *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150; *El Paso, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 83 S. W. Rep. 855; *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235.

*Utah.* — *Mathews v. Daly-West Min. Co.*, 27 Utah 193; *Hicks v. Southern Pac. R. Co.*, 27 Utah 526.

*Washington.* — *Sandquist v. Independent Telephone Co.*, 38 Wash. 313.

See *Western, etc., R. Co. v. Bryant*, 123 Ga. 77; *Allison v. Southern R. Co.*, 129 N. Car. 336. Compare *Morancy v. Hennessey*, 24 R. I. 205; *Mayott v. Norcross*, 24 R. I. 187; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645; *Jackson, etc., St. R. Co. v. Simmons*, 107 Tenn. 392.

**Jumping from a Moving Engine When Collision Is Imminent** has been held not to be contributory negligence on the part of a fireman. *Cowen v. Ray*, (C. C. A.) 108 Fed. Rep. 320.

**150. 2. Limitation of Doctrine.** — It has been held that the servant must act upon a reasonable apprehension of peril; that "he has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury on himself, and then recover damages for it." *Ford v. Robinson-Pettett Co.*, 65 S. W. Rep. 793, 23 Ky. L. Rep. 1654.

*3. McRae v. Erickson*, (Cal. 1905) 82 Pac. Rep. 309; *McGinn v. McCormick*, 109 La. 396.

**151. 1. Risks Incurred in Saving Life.** — *Kansas City, etc., R. Co. v. Thornhill*, 141 Ala. 215; *Pittsburg, etc., R. Co. v. Lynch*, 69 Ohio St. 123, 100 Am. St. Rep. 658; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300; *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App. 496. See *Hicks v. Southern Pac. R. Co.*, 27 Utah 526.

But it has been held that in order that there may be a recovery against the master, there must have been negligence on the part of the master either toward the person rescued or toward the servant making the rescue after the attempt has been begun. *Saylor v. Parsons*, 122 Iowa 679, 101 Am. St. Rep. 283.

*2. Saylor v. Parsons*, 122 Iowa 679, 101 Am. St. Rep. 283; *Whitworth v. Shreveport Belt R. Co.*, 112 La. 363; *Pittsburg, etc., R. Co. v. Lynch*, 69 Ohio St. 123, 100 Am. St. Rep. 658.

**Removing Obstruction from Track.** — In order to justify going upon the track to remove a supposed obstruction, it is not necessary that danger should actually exist, but the appearance of danger ought to be such as to arouse a reasonable apprehension of danger. *Gulf,*

*etc., R. Co. v. Roane*, (Tex. Civ. App. 1903) 75 S. W. Rep. 845, judgment reversed on rehearing 33 Tex. Civ. App. 299.

**3. Risks to Save Property.** — *Illinois Cent. R. Co. v. Stith*, (Ky. 1905) 85 S. W. Rep. 1173. Compare *Maltbie v. Belden*, 167 N. Y. 307, reversing 45 N. Y. App. Div. 384.

**4. Sudden Illness while on Duty.** — A servant may be chargeable with contributory negligence by remaining in the employment after he is taken ill. *Hewitt v. East Jordan Lumber Co.*, 136 Mich. 110, 10 Detroit Leg. N. 1008.

**5. Violation of Statutory Duties.** — *Indiana.* — *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654; *La Porte Carriage Co. v. Sulender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Baltimore, etc., R. Co. v. Cavanaugh*, 35 Ind. App. 32. See *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398.

*Michigan.* — *Jones v. Flint, etc., R. Co.*, 127 Mich. 198, 8 Detroit Leg. N. 295.

*Minnesota.* — *Turritin v. Chicago, etc., R. Co.*, (Minn. 1905) 104 N. W. Rep. 225; *McGinty v. Waterman*, 93 Minn. 242; *Swenson v. Osgood, etc., Mfg. Co.*, 91 Minn. 509.

*Ohio.* — *Cleveland, etc., R. Co. v. Ullom*, 11 Ohio Cir. Dec. 321, 20 Ohio Cir. Ct. 512.

*Pennsylvania.* — *Schlemmer v. Buffalo, etc., R. Co.*, 207 Pa. St. 198.

*Texas.* — *Smith v. Atchison, etc., R. Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1052.

*Vermont.* — *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939.

*Virginia.* — *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356.

See *Hailey v. Texas, etc., R. Co.*, 113 La. 533; *Coley v. North Carolina R. Co.*, 128 N. Car. 534, rehearing 129 N. Car. 407.

**Alabama Employer's Liability Act.** — There cannot be a recovery under subdivision 1 of the Alabama Employer's Liability Act if the injured employee is himself the agent through whom the employer undertakes to see that the ways, works, etc., are in proper condition, and if the employee undertakes that responsibility, he cannot complain. *Pioneer Min., etc., Co. v. Thomas*, 133 Ala. 279.

**Federal Statute Requiring Automatic Couplers.** — The Act of Congress of March 2, 1893 (27 U. S. Stat. at L. 532, c. 196, § 8, 6 Fed. Stat. Annot. 752), requiring cars to be equipped with automatic couplers, does not exclude the defense of contributory negligence. *Denver, etc., R. Co. v. Arrighi*, (C. C. A.) 129 Fed. Rep. 347.

*6. See Kellyville Coal Co. v. Strine*, 217 Ill. 516.

**Illinois Statutes.** — It has been held that contributory negligence of the servant is not a defense in an action against a mine owner who is shown to have been guilty of a wilful violation of a statute prescribing precautions to be

**152. h. EVIDENCE — (1) Admissibility — (a) Evidence in Behalf of Plaintiff. —**  
See notes 1, 2, 3, 5, 6, 8.

taken for the safety of miners. *Riverton Coal Co. v. Shepherd*, 207 Ill. 395; *Fulton v. Wilmington Star Min. Co.*, (C. C. A.) 133 Fed. Rep. 193, following *Carterville Coal Co. v. Abbott*, 181 Ill. 495.

Under the *Illinois* statute (4 Starr & C. Annot. Stat. 1902, c. 93) relating to mines and miners, requiring a safe and commodious passageway around the landing place at the bottom of every shaft, and providing a penalty for any wilful neglect, refusal, or failure to do the things required to be done by the act, it has been held that the defense of contributory negligence on the part of the person injured does not lie to an action for the wilful failure of the mine operator to comply with the requirements of the statute. *Chicago-Coulterville Coal Co. v. Fidelity, etc., Co.*, 130 Fed. Rep. 957.

In an action brought under the *Illinois* statute (*Hurd's Ill. Rev. Stat.* 1903, c. 48, § 33), which prohibited the employment of children under fourteen years of age in manufacturing establishments, it was held that the contributory negligence of the plaintiff, who was a mere infant, while he was in the performance of the work he had been directed to do, was not a defense. It was said, however, that if the plaintiff left the task which he had been directed to perform, and while not engaged in doing work which he had been directed to do by his master was injured through an accident to which his own negligence contributed, while he was still in or upon the premises of the master, a different question would present itself. *American Car, etc., Co. v. Armentraut*, 214 Ill. 509.

**152. 1. Nature of Employment — Inexperience of Plaintiff.** — *Neilson v. Nebo Brown Stone Co.*, 25 Utah 37.

**Evidence of Due Care.** — It is not necessary that evidence of the exercise of due care by the plaintiff should be direct; the fact may be inferred from the circumstances. *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 101 Am. St. Rep. 660.

**Danger Not Obvious.** — It has been held that a plaintiff who is charged with contributory negligence may testify that he could not see that it was dangerous to do work in the manner in which he was doing it. *Southern Car, etc., Co. v. Bartlett*, 137 Ala. 234.

**Assurance of Safety.** — Evidence of the contents of a telegram from a conductor of the defendant to the plaintiff, signed by a train dispatcher, directing cars to be started at a certain place, and stating that the track was "O. K.," has been held to have been admissible as tending to prove that the plaintiff when injured was acting in the scope of his employment, and was assured of the track's good condition. *Southern R. Co. v. Howell*, 135 Ala. 639.

**2. Actions of Other Employees.** — *Chattanooga Southern R. Co. v. Myers*, 112 Ga. 237; *Montgomery v. Chicago, etc., R. Co.*, 109 Mo. App. 88. Compare *Western R. Co. v. Arnett*, 137 Ala. 414; *International, etc., R. Co. v. Bearden*, 31 Tex. Civ. App. 58. But compare *Stauning v. Great Northern R. Co.*, 88 Minn. 480.

*Contra, De Cair v. Manistee, etc., R. Co.*, 133 Mich. 578, 10 Detroit Leg. N. 328; *International, etc., R. Co. v. Penn.* (Tex. Civ. App. 1904) 79 S. W. Rep. 624; *Galloway v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 32.

But in an action in which it was contended that the plaintiff's intestate, a brakeman who was killed while attempting to make a coupling, had been guilty of contributory negligence in going between the cars on the inside instead of the outside of a curve for the reason that there was not space enough on the inside of the curve between the cars, when the cars came together, to do the coupling, it was held that testimony that another person had successfully made a coupling on the inside of the curve was admissible. *Mobile, etc., R. Co. v. Bromberg*, 114 Ala. 258.

It has been held that proof of the usual and customary method of performing a service may be received as bearing on the question of the employee's exercise of reasonable care in following the method indicated by custom and usage. *Pierson v. Chicago, etc., R. Co.*, 127 Iowa 13. See *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44.

In an action to recover damages for injuries received by the plaintiff by falling into a trench which had been dug across a pathway on the premises of the defendant, which was customarily used by the plaintiff and other employees in going to and from their work, it was held that the plaintiff was properly allowed to testify as to what was done by other persons who were in her company when they encountered the trench. *Norris v. Cudahy Packing Co.*, 124 Iowa 748.

**Reliance by the Servant upon a Custom to Give Warning** of the approach of the trains may be shown, it has been held in an action to recover for the death of a servant by being run down by a train while he was crossing a track. *Pennsylvania R. Co. v. Mahoney*, 12 Ohio Cir. Dec. 366, 22 Ohio Cir. Ct. 469.

**3. Habits of Employee.** — *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, affirming 109 Ill. App. 468; *Malott v. Laufman*, 89 Ill. App. 178; *Pittsburgh, etc., R. Co. v. Parish*, 28 Ind. App. 180, 91 Am. St. Rep. 120.

**Presumption Arising from Instinct of Self-Preservation.** — It has been held that in a case in which there is no direct evidence of what the injured servant was doing at the time of the accident, or how he came to receive his injuries, it is proper to instruct the jury to consider "the instincts which naturally lead men to avoid injury and preserve their own lives, and the presumption that they will ordinarily do so." *Morbey v. Chicago, etc., R. Co.*, 116 Iowa 84.

**5. Promise to Warn of Danger.** — See *Mathews v. Daly-West Min. Co.*, 27 Utah 193.

**6. Engrossment in Duties.** — *Bennett v. Warren*, 70 N. H. 564.

**8. Acting in Emergencies — Circumstantial Evidence.** — The absence of contributory negligence, as any other disputed fact, may be estab-

**152.** (b) Evidence in Behalf of Defendant. — See notes 9, 12, 14.

(2) Burden of Proof — View that Burden of Proof Is on Plaintiff. — See note 16.

**153.** See notes 1, 2.

View that Burden of Proof Is on Defendant. — See note 3.

lished by circumstantial evidence. *Pittsburgh, etc., R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120.

**152.** 9. Opinion Evidence. — See the cases supplementing the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 421, note 5.

**12.** Knowledge of Danger. — *Quinlan v. New York, etc., R. Co.*, 89 N. Y. App. Div. 266, affirmed without opinion 181 N. Y. 523.

**14.** Failure to Take Precautions. — *Buey v. Chess, etc., Co.*, 84 S. W. Rep. 563, 27 Ky. L. Rep. 198.

**16.** View that Burden of Proof Is on Plaintiff — *Illinois*. — *Cullen v. Higgins*, 216 Ill. 78; *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175; *Chicago, etc., R. Co. v. Myers*, 95 Ill. App. 578; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284, affirmed 195 Ill. 31.

*Iowa*. — *Calloway v. Agar Packing Co.*, (Iowa 1905) 104 N. W. Rep. 721. See *Wilder v. Great Western Cereal Co.*, (Iowa 1905) 104 N. W. Rep. 434.

*New York*. — *Wilson v. New York Mills*, 107 N. Y. App. Div. 99, holding that the rule is not changed by section 3 of chapter 600 of New York Laws of 1902; *Goodhines v. Chase*, 100 N. Y. App. Div. 87; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119; *Lowry v. Anderson Co.*, 96 N. Y. App. Div. 465; *Filbert v. New York, etc., R. Co.*, 95 N. Y. App. Div. 199; *Hoehn v. Lautz*, 94 N. Y. App. Div. 14; *Carley v. Gair*, 93 N. Y. App. Div. 614; *Huff v. American Fire Engine Co.*, 88 N. Y. App. Div. 324; *Skapura v. National Sugar Refining Co.*, 83 N. Y. App. Div. 21; *Scheir v. Quirin*, 77 N. Y. App. Div. 624, affirmed without opinion 177 N. Y. 568; *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224; *Di Pietro v. Empire Portland Cement Co.*, 70 N. Y. App. Div. 501.

See *McDonnell v. Central of Georgia R. Co.*, 118 Ga. 86.

It has been stated as a general rule that in an action to recover damages for the death of a plaintiff's intestate, alleged to have been caused by defendant's negligence, when there is neither direct nor circumstantial evidence which points either to the presence or absence of contributory negligence, the plaintiff cannot recover without some affirmative evidence to show that the decedent was not guilty of contributory negligence. *Scialo v. Steffens*, 105 N. Y. App. Div. 592.

In *Indiana* the rule as to the burden of proving contributory negligence has been changed by statute. See *infra*, this title, the cases supplementing page 153, note 3.

**153.** 1. Direct or Positive Evidence Unnecessary. — *Irish v. Union Bag, etc., Co.*, 103 N. Y. App. Div. 45; *Hoes v. Ocean Steamship Co.*, 56 N. Y. App. Div. 259, affirmed without opinion 170 N. Y. 581.

**2.** *Wilson v. New York Mills*, 107 N. Y. App.

Div. 99; *Goodhines v. Chase*, 100 N. Y. App. Div. 87.

**3.** View that Burden of Proof Is on Defendant — *United States*. — *Wheeler v. Oak Harbor Head Lining, etc., Co.*, (C. C. A.) 126 Fed. Rep. 348; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Texas, etc., R. Co. v. Reagan*, 118 Fed. Rep. 815, 55 C. C. A. 427; *Baltimore, etc., R. Co. v. Burris*, (C. C. A.) 111 Fed. Rep. 882.

*Alabama*. — *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; *Alabama Steel, etc., Co. v. Wrenn*, 136 Ala. 475.

*California*. — *Anderson v. Seropian*, 147 Cal. 201.

*Delaware*. — *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 80; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

*Georgia*. — *Central of Georgia R. Co. v. Vining*, 116 Ga. 284.

*Minnesota*. — *Ready v. Peavy Elevator Co.*, 89 Minn. 154.

*Missouri*. — *Erickson v. Kansas City, etc., R. Co.*, 171 Mo. 647; *Cambron v. Omaha, etc., R. Co.*, 165 Mo. 543; *Adams v. McCormick Harvesting Mach. Co.*, 110 Mo. App. 367.

*Montana*. — *Nord v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 48; *Ball v. Gussenhoven*, 29 Mont. 321; *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434.

*Nebraska*. — *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 668; *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180.

*North Carolina*. — *Peoples v. North Carolina R. Co.*, 137 N. Car. 96; *Womble v. Merchants Grocery Co.*, 135 N. Car. 474; *Thomas v. Raleigh, etc., Air Line R. Co.*, 129 N. Car. 392; *Halton v. Southern R. Co.*, 127 N. Car. 255; *Wilkie v. Raleigh, etc., R. Co.*, 127 N. Car. 203.

*Ohio*. — *Cleveland, etc., R. Co. v. Tehan*, 26 Ohio Cir. Ct. 457; *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530.

*Oregon*. — *Tucker v. Northern Pac. Terminal Co.*, 41 Oregon 82.

*Texas*. — *International, etc., R. Co. v. Tisdale*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1063; *Gulf, etc., R. Co. v. Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Consumers' Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *Hirsch v. Ashe*, 35 Tex. Civ. App. 495; *Gulf, etc., R. Co. v. Elmore*, 35 Tex. Civ. App. 56; *International, etc., R. Co. v. Pina*, 33 Tex. Civ. App. 680; *Gulf, etc., R. Co. v. Cooper*, 33 Tex. Civ. App. 319; *Gulf, etc., R. Co. v. Howard*, (Tex. Civ. App. 1903) 75 S. W. Rep. 803, 96 Tex. 582; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, writ of error denied 97 Tex. 69; *General Electric Co. v. Murray*, 32 Tex. Civ. App. 226; *Texas, etc., R. Co. v. Scott*, 30 Tex. Civ. App.



**154.** Where Contributory Negligence Is Shown by Pleadings or Evidence. — See notes 1, 2.

**5. Necessity of Relation of Master and Servant, and What Constitutes — General Rule.** — See notes 3, 4.

496; *San Antonio, etc., R. Co. v. Lindsey*, 27 Tex. Civ. App. 316.

*Washington.* — *Currans v. Seattle, etc., R. Co.*, 34 Wash. 512; *Prior v. Eggert*, 39 Wash. 481.

*Wisconsin.* — *Bain v. Northern Pac. R. Co.*, 120 Wis. 412.

**By Statute in Indiana** (Burns's Ann. Stat. 1901, § 359a) the burden is cast on the defendant to establish that the plaintiff was guilty of contributory negligence by a fair preponderance of all of the evidence in the case applicable to that issue. *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. App. 1903) 67 N. E. Rep. 558; *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569; *Cleveland, etc., R. Co. v. Goddard*, 33 Ind. App. 321; *Wortman v. Minich*, 28 Ind. App. 31; *Brower v. Locke*, 31 Ind. App. 353; *Chicago, etc., R. Co. v. Wicker*, (Ind. App. 1904) 71 N. E. Rep. 223, *judgment reversed on rehearing* 34 Ind. App. 215.

**In North Carolina** contributory negligence is expressly made an affirmative defense by statute and the burden is upon the defendant to establish it. *Pharr v. Atlanta, etc., Air Line R. Co.*, 132 N. Car. 418.

**154. 1.** Contributory negligence may be established by the evidence adduced on behalf of the plaintiff. *Pittsburgh, etc., R. Co. v. Collins*, 163 Ind. 569.

The defendant may avail himself of all the facts and circumstances which appear as a part of the plaintiff's case. *M. S. Huey Co. v. Johnston*, 164 Ind. 489.

Contributory fault, like any other fact that must be affirmatively shown, is to be considered established when it is found to be sustained by a preponderance of all the evidence in the case, without reference to whether it was produced by one party or the other. Hence it is error to instruct the jury to the effect that it must not charge the plaintiff with fault unless the defendants have proven the fact by a preponderance, thus depriving the defendants of the benefit of any evidence that may have been disclosed by the plaintiff and his witnesses. *Indianapolis v. Cauley*, 164 Ind. 304.

If the evidence in plaintiff's behalf establishes beyond question that his own omission to use ordinary care contributed immediately to, or itself caused, the injury, the court should, on motion, direct a verdict or grant a nonsuit. *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434.

**Instructions as to Burden of Proof.** — In cases in which the plaintiff's evidence raises the issue of contributory negligence it has been held that an instruction that the burden of establishing contributory negligence is on the defendant is misleading, unless the jury are also instructed that in determining such issue they may look to all the evidence in the case, whether introduced by plaintiff or defendant. *Gulf, etc., R. Co. v. Melville*, (Tex. Civ. App. 1903) 87 S. W. Rep. 863.

**2.** *Green v. New York, etc., R. Co.*, 26 Ohio Cir. Ct. 609; *Lake Shore, etc., R. Co. v. Whidden*, 23 Ohio Cir. Ct. 85; *Pennsylvania R. Co. v. Mahoney*, 12 Ohio Cir. Dec. 366, 22 Ohio Cir. Ct. 469; *Tucker v. Northern Pac. Terminal Co.*, 41 Oregon 82; *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *Bier v. Hosford*, 35 Wash. 544. See *Gulf, etc., R. Co. v. Hill*, 95 Tex. 629; *Sandquist v. Independent Telephone Co.*, 38 Wash. 313.

Existence of contributory negligence may be adduced from the whole evidence, including that of plaintiff. *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, *rehearing denied* 163 Ind. 264.

Where the evidence of the plaintiff contains evidence in support of the defense of contributory negligence, the court should either not charge that the burden of proof to establish contributory negligence is on the defendant or should give a charge so modified as to permit the jury to look to the whole evidence in determining whether the defense has been established. *Gulf, etc., R. Co. v. Hill*, 29 Tex. Civ. App. 12.

**3. Relation of Master and Servant Necessary — United States.** — *Busby v. Anderson Water, etc., Co.*, (C. C. A.) 136 Fed. Rep. 156; *Brady v. Chicago, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 100.

*Delaware.* — *Taylor v. George W. Bush, etc., Co.*, (Del. 1905) 61 Atl. Rep. 236.

*Illinois.* — *Grace, etc., Co. v. Probst*, 208 Ill. 147; *Pittsburgh, etc., R. Co. v. Hewitt*, 102 Ill. App. 428, *affirmed* 202 Ill. 28; *Western Wheel Works v. Stachnick*, 102 Ill. App. 420; *Crudup v. Schreiner*, 98 Ill. App. 337.

*Indiana.* — *Wright v. Bertiaux*, 161 Ind. 124.

*Kansas.* — *Brower v. Timreck*, 66 Kan. 770.

*Kentucky.* — *Goodwin v. Smith*, 66 S. W. Rep. 179, 23 Ky. L. Rep. 1810; *Baker v. Lexington, etc., R. Co.*, 89 S. W. Rep. 149, 28 Ky. L. Rep. 140; *Bush v. Grant*, 61 S. W. Rep. 363, 22 Ky. L. Rep. 1766.

*Louisiana.* — *Ederle v. Vicksburg, etc., R. Co.*, 112 La. 728.

*Maine.* — *Dixon v. Swift*, 98 Me. 207; *Bowden v. Derby*, 97 Me. 536, 94 Am. St. Rep. 516.

*Maryland.* — *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.

*Massachusetts.* — *Vallie v. Hall*, 184 Mass. 358; *Eldred v. Mackie*, 178 Mass. 1.

*Michigan.* — *Lenderink v. Rockford*, 135 Mich. 531, 10 Detroit Leg. N. 832.

*Missouri.* — *Chaney v. Louisiana, etc., R. Co.*, 176 Mo. 598; *Appel v. Eaton, etc., Co.*, 97 Mo. App. 428.

*New Hampshire.* — *O'Brien v. Derry*, (N. H. 1905) 60 Atl. Rep. 843.

*New Jersey.* — *Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31.

*New York.* — *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, *affirming* 79 N. Y. App. Div. 334; *Diehl v. Robinson*, 72 N. Y. App. Div. 19; *Callan v. Pugh*, 54 N. Y. App. Div. 545. See *Weizinger v. Erie R. Co.*, 105

N. Y. App. Div. 411. See *Anderson v. Steinreich*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 680.

*North Carolina*.—*Harrill v. South Carolina, etc.*, Extension R. Co., 135 N. Car. 601.

*Oregon*.—*Ringue v. Oregon Coal, etc., Co.*, 44 Oregon 407.

*Pennsylvania*.—*Wieder v. Bethlehem Steel Co.*, 205 Pa. St. 186; *Patton v. McDonald*, 204 Pa. St. 517. See *Kelly v. Union Traction Co.*, 199 Pa. St. 322.

*Texas*.—*Missouri, etc., R. Co. v. Reasor*, 28 Tex. Civ. App. 302; *Werner v. Trautwein*, 25 Tex. Civ. App. 608; *American Cotton Co. v. Simmons*, (Tex. Civ. App. 1905) 87 S. W. Rep. 842; *Freeman v. San Antonio Brewing Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1165; *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424; *Reser v. American Cotton Co.*, (Tex. Civ. App. 1903) 71 S. W. Rep. 782.

*Utah*.—*Mickelson v. New East Tintic R. Co.*, 23 Utah 42.

*Washington*.—*Currans v. Seattle, etc., R. etc., Co.*, 34 Wash. 512; *Larson v. American Bridge Co.*, 40 Wash. 224.

See *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474.

The duty of the master to an employee or a servant arises out of the contract between them. *Western Wrecking, etc., Co. v. O'Donnell*, 101 Ill. App. 492.

In an action against a slaughtering and packing company by a servant to recover for personal injuries received, while salting beef which was being packed in refrigerator cars, by the collision of an engine and cars with the car in which the beef was being packed, it was held that there clearly could be no recovery against the defendant except on the theory that the engine crew causing the accident was under the defendant's control to such an extent as to establish the relation of master and servant. *Swift v. Ronan*, 202 Ill. 202, reversing 103 Ill. App. 475.

It is not a defense to an action to recover for personal injuries sustained by a servant while in the service of the master that the servant was not at the particular time of the accident actually at work, but was standing by doing nothing. *Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371.

It has been held that the relation of master and servant is not interrupted by the act of the servant in quitting his actual work for a few minutes for the purpose of obtaining a drink of water. *Jarvis v. Hitch*, (Ind. App. 1902) 65 N. E. Rep. 608.

**Status of Employee During Dinner Hour.**—The relation of master and servant is not necessarily suspended during the servant's dinner hour. *Heldmaier v. Cobbs*, 195 Ill. 172, affirming 96 Ill. App. 315.

In an action in which it was claimed that the injured employee could not recover for the reason that at the time of the accident the noon hour had come and he was going down from one of the upper floors in which he worked, to eat his dinner, it was said that "going from the particular part of a building where he has been set to work, to eat dinner, is an incident of a workman's employment who is engaged by

the day in erecting the building in question, at least so long as he has not finished passing over or through the building to get his dinner." *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

**Status of Servant Riding Home on Master's Hand Car.**—It has been held that where an employer returns his laborers to their homes by means of a hand car, a number of miles from the place of work, after working hours, the employer is liable in damages for an accident which happened while so returning home, due to the negligence of the foreman in charge of the men, though the accident happened after the day's work had been completed. *Wilson v. Banner Lumber Co.*, 108 La. 590.

**Person Riding on Train to Learn Duties of Flagman.**—It has been held that a person riding on a train by permission of the railroad company to learn the duties of a flagman with a view to entering the employ of the company, and performing such elementary and simple service as he was capable of under the direction of the conductors of trains, sustained the relation of a servant to the company. *Huntzicker v. Illinois Cent. R. Co. (C. C. A.)* 129 Fed. Rep. 548.

**Express Messengers.**—It has been held that an express messenger, while upon a train in the performance of his duties, sustains to the railroad company a relation which is analogous to one of its own employees, and the measure of care which the railway company owes to him in respect of its track, engine, cars, and the operation of its train is the same as that which it owes to those in its immediate service. *Chicago, etc., R. Co. v. O'Brien (C. C. A.)* 132 Fed. Rep. 593. See the titles *CARRIERS OF PASSENGERS*, vol. 5, p. 512, note 2; *FELLOW SERVANTS*, vol. 12, p. 995, note 1.

**Liability of Defendant to Servants of Independent Contractor.**—There is no liability on the part of a master to servants of independent contractors except for his own negligence. *Nyback v. Champagne Lumber Co. (C. C. A.)* 109 Fed. Rep. 732. See the title *INDEPENDENT CONTRACTORS*, vol. 16, p. 195, notes 1 and 2.

**Liability of Agent of Undisclosed Principal.**—Although the employer may be acting as the agent of another, if the fact of agency is not disclosed he becomes liable to the employees for negligence in the same manner and to the same extent as if he were a principal in interest. *Morris v. Malone*, 200 Ill. 132, 93 Am. St. Rep. 180.

**Liability of Lessor of Railroad to Servants of Lessee.**—It has been held that where a railroad has been leased by one company to another, the lessor is not liable for injuries to servants of the lessee in consequence of the negligence of the lessee. *Swice v. Maysville, etc., R. Co.*, 116 Ky. 253.

**Liability of Lessor of Factory to Servants of Lessee.**—When a factory was being operated by a lessee under a lease which gave him complete control of the business, it was held that the lessor was not responsible for the negligence of the lessee resulting in injury to an employee in the factory. *Ault Woodenware Co. v. Baker*, 26 Ind. App. 374.

154. 4. *Shadoan v. Cincinnati, etc., R. Co.*, (Ky. 1904) 82 S. W. Rep. 567; *Illinois Cent. R.*

**154. If a Person Volunteers.**—See note 5.

Agency.—See notes 7, 8.

**155. 6. Contracts Limiting or Releasing Master's Liability for Negligence—****a. CONTRACTS MADE BEFORE INJURY OCCURS—(1) In General.**—See note 2.**156. (2) Option to Accept Benefits of Relief Department or to Sue—**  
**Effect of Receiving of Benefits.**—See note 3.

Co. v. Dotson, 71 S. W. Rep. 636, 24 Ky. L. Rep. 1459; Green v. Brainerd, etc., R. Co., 85 Minn. 318; Stagg v. Edward Western Tea, etc., Co., 169 Mo. 489; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602; Benson v. Lancashire, etc., R. Co., (1904) 1 K. B. 242, 73 L. J. K. B. 122, 89 L. T. N. S. 715, 52 W. R. 243, 68 J. P. 149, 20 Times L. Rep. 139. See Nutzmam v. Germania L. Ins. Co., 82 Minn. 116; Sims v. Omaha, etc., R. Co., 89 Mo. App. 197.

**154. 5. Busby v. Anderson Water, etc., Co.,** (C. C. A.) 136 Fed. Rep. 156; Langan v. Tyler, 114 Fed. Rep. 716, 51 C. C. A. 503; Manchester Mfg. Co. v. Polk, 115 Ga. 542; Atlanta, etc., R. Co. v. West, 121 Ga. 641, 104 Am. St. Rep. 179; Ehmett v. Mitchell-Tranter Co., 80 S. W. Rep. 1148, 26 Ky. L. Rep. 303; Mitchell-Tranter Co. v. Ehmett, 65 S. W. Rep. 835, 23 Ky. L. Rep. 1788; Cleveland, etc., R. Co. v. Marsh, 63 Ohio St. 236. But compare Harder, etc., Coal Min. Co. v. Schmidt, (C. C. A.) 104 Fed. Rep. 282; Toledo, etc., R. Co. v. Pfisterer, 26 Ohio Cir. Ct. 669.

**7. Palmer v. Coyle,** 187 Mass. 136. See Meyer v. Kenyon-Rosing Machinery Co., (Minn. 1905) 104 N. W. Rep. 132.

It has been held that one who in good faith enters upon the master's work at the request of a servant in apparent charge of such work is not a trespasser, but assumes for the time being the relation of a servant even though he may not be entitled to receive wages. *Aga v. Harbach*, 127 Iowa 144.

**8. Andrews Bros. Co. v. Burns,** 12 Ohio Cir. Dec. 305, 22 Ohio Cir. Ct. 437.

**155. 2. Contracts Stipulating for Immunity Against Negligence.**—*Himrod Coal Co. v. Clark*, 197 Ill. 514, affirming 99 Ill. App. 332; Consolidated Coal Co. v. Lundak, 196 Ill. 594, affirming 97 Ill. App. 109; Johnston v. Fargo, 98 N. Y. App. Div. 436; Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 413, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 155; Tarbell v. Rutland R. Co., 73 Vt. 347, 87 Am. St. Rep. 734. See Fleming v. Southern R. Co., 131 N. Car. 476.

**Rules Exempting the Master from Liability for Negligence.**—Consolidated Coal Co. v. Gruber, 188 Ill. 584, affirming 91 Ill. App. 15.

In Canada it has been held that a railway company may stipulate with its employee that in consideration of a contribution by the former to the funds of an insurance and provident society established for the aid of workmen and their families in case of injury or death by accident, it will not be liable for the consequences of an accident to the employee caused by the fault of his fellow workmen. *Ferguson v. Grand Trunk R. Co.*, 20 Quebec Super. Ct. 54.

Under the Iowa statutes a railroad company is not relieved of liability for the death of an

express messenger, by a contract between the express company and the messenger in which the latter assumes all the risks of the employment. *O'Brien v. Chicago, etc., R. Co.*, 116 Fed. Rep. 502.

**Contracts Limiting the Master's Liability Held Valid.**—It has been held that a contract of employment between a sleeping car company and a porter whereby the porter assumes all risks of accidents and casualties by railway travel or otherwise, incident to the employment and service, which is executed without fraud or misrepresentation on the part of the company, constitutes a valid defense to an action against the company by the porter to recover for personal injuries sustained by him. *New York Cent., etc., R. Co., v. Difendaffer*, (C. C. A.) 125 Fed. Rep. 893; *McDermon v. Southern Pac. R. Co.*, 122 Fed. Rep. 669.

Such a contract, it has been held, is not rendered invalid by the Missouri statute (Mo. Rev. Stat. 1899, § 2276) providing as follows: "No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding but all such contracts or agreements shall be null and void." *McDermon v. Southern Pac. R. Co.*, 122 Fed. Rep. 669.

It has been held that a Texas statute providing that no contract made between the employer and the employee, based upon the contingency of death or injury of the employee, and limiting the liability of the employer or fixing damages to be recovered, shall be valid or binding, was applicable in an action brought against a sleeping car company by the plaintiff, who was a citizen of the state of Texas, wherein he resided, to recover for personal injuries received by him while in the defendant's employ in the republic of Mexico. *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549.

**Failure of Servant to Read Contract.**—It has been held that where a contract of employment between a sleeping car company and a porter releases the company from liability to the porter for personal injuries by accidents or casualties by railway travel or otherwise, incident to the employment and service, the mere failure of the porter to read the contract which he signed does not amount to fraud on the part of the company, if he had an opportunity given to him to read the contract, and his failure to read it was his own negligence. *New York Cent., etc., R. Co. v. Difendaffer*, (C. C. A.) 125 Fed. Rep. 893.

**156. 3. Effect of Accepting Benefits.**—*Pittsburgh, etc., R. Co. v. Elwood*, 25 Ind. App. 671.

In an action for personal injuries against

**156. b. CONTRACTS MADE AFTER INJURY OCCURS — (1) When Release Not Obtained by Fraud or Misrepresentation — General Rule.** — See note 6.

**The Consideration.** — See note 7.

**157. Mutuality.** — See note 1.

**An Agreement to Furnish Steady and Permanent Employment.** — See note 3.

**(2) When Release Obtained by Fraud or Misrepresentation.** — See note 5.

a railroad company it has been held that a stipulation manifestly designed for the benefit of the company, to the effect that a beneficiary would not be paid under the relief and hospital system unless the employee first filed with the proper officers of this department satisfactory releases, does not authorize one who has received benefits at the hands of this department, in accordance with his terms of membership therein, to prosecute his claim for damages merely because he has failed or refused to execute such a release. *Carter v. Brunswick, etc., R. Co.*, 115 Ga. 853.

It has been held that an employee of a railroad company who has accepted from it damages for injuries cannot recover benefits for such injuries from the relief department of such corporation, under an agreement of membership releasing the company from liability in case of such acceptance. *Clinton v. Chicago, etc., R. Co.*, 60 Neb. 692.

Suit against the master and a judgment against the plaintiff on demurrer has been held not to bar a claim against the relief fund. *O'Reilly v. Pennsylvania R. Co.*, 69 N. J. L. 119, *affirmed* without opinion (N. J. 1904) 59 Atl. Rep. 1118.

In *Nebraska* it has been held that the election of the widow of a member of the voluntary relief department of the Chicago, B. & Q. R. Co. to accept the provisions of a relief certificate in which she is the beneficiary, does not bar an action by the personal representative of the deceased against the railroad company, under the provisions of section 2, chapter 21, Comp. Stat. Neb., for the benefit of the minor children of the deceased. *Oyster v. Burlington Relief Dept.*, 65 Neb. 789.

**156. 6. Contracts of Release After Injury.** — *Fleming v. Southern R. Co.*, 131 N. Car. 476; *Bowers v. Detroit Southern R. Co.*, 26 Ohio Cir. Ct. 518; *Lake Shore, etc., R. Co. v. Vogelson*, 23 Ohio Cir. Ct. 361; *Chicago, etc., R. Co. v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *Moore v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 266; *Houston, etc., R. Co. v. Burns*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1035; *Webb v. Gulf, etc., R. Co.*, 27 Tex. Civ. App. 75. See *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360.

**Release Executed by Widow Not Binding on Administratrix of Deceased Person.** — *Cowen v. Ray*, 108 Fed. Rep. 320, 47 C. C. A. 352.

**Receipt in Full of All Demands.** — It has been held that it could not be decided as a matter of law that a receipt in full of all demands executed by a plaintiff who had sustained injuries while in the employ of the defendant was a release of the plaintiff's claim for damages for the personal injuries, where the plaintiff testified that the receipt was for his wages and the amount which was paid at the time of making the receipt exactly covered his wages and

the ten dollars which defendant proposed to pay on a doctor's bill. *Davis v. Diamond Carriage, etc., Co.*, 146 Cal. 59.

**7. What Consideration Sufficient.** — *Gulf, etc., R. Co. v. Minter*, (Tex. Civ. App. 1905) 85 S. W. Rep. 477; *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 826.

**Consideration Held Insufficient.** — *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 43.

**Agreement to Employ.** — *Bowers v. Detroit Southern R. Co.*, 26 Ohio Cir. Ct. 518.

**Parol Evidence to Contradict Consideration.** — If a contractual consideration is stated in the release, parol evidence is not admissible to vary or contradict the consideration expressed. *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494.

**Insufficiency of Consideration as Evidence of Fraud.** — Inadequacy of the consideration is proper evidence to be considered upon an issue of fraud, and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud and to set aside the release. *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

**157. 1. Mutuality of Contract.** — *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 826.

**3. Usher v. New York Cent., etc., R. Co.**, 76 N. Y. App. Div. 422, *affirmed* without opinion 179 N. Y. 544; *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 826. See *Texas Midland R. Co. v. Morris*, 29 Tex. Civ. App. 491.

**5. Release Obtained by Fraud or Misrepresentation.** — *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341, *affirming* 115 Ill. App. 196; *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Illinois Cent. R. Co. v. Keebler*, 84 S. W. Rep. 1167, 27 Ky. L. Rep. 305; *Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943; *Erickson v. Northwest Paper Co.*, (Minn. 1905) 104 N. W. Rep. 291; *Schus v. Powers-Simpson Co.*, 85 Minn. 447; *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 72; *Hedlun v. Holy Terror Min. Co.*, 16 S. Dak. 261; *Chicago, etc., R. Co. v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *Galloway v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 32. See *Merrill v. Pike*, 94 Minn. 186.

**Misrepresentation of Contents of Instrument.** — *Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440.

**Mental Incapacity of Servant to Understand Transaction.** — A release is not binding when the servant, at the time of signing it, was not in a condition to comprehend what he was doing because of the effect of the accident and of drugs. *Colorado City v. Liae*, 28 Colo. App. 468.

**Failure to Read Release.** — If the execution of a release is procured by fraud, it is not bind-

**157. 7. Damages for Injury to Servant—***a. HOW ESTIMATED.*—See notes 6, 7.

*Elements.*—See notes 8, 9, 10, 11.

**159. 8. EVIDENCE TO ESTABLISH.**—See notes 1, 2, 3.

*b. Questions of Law and Fact in Actions for Injuries—Where More than One Inference Deducible from Facts.*—See note 9.

**160.** See notes 1, 2.

ing on the servant even though he may have neglected to read the instrument or to have it read to him. *Western R. Co. v. Arnett*, 137 Ala. 414.

**Release Incorrectly Read to Person Who Cannot Read.**—Where a party cannot read and it is read to him incorrectly, he may have it set aside for fraud. *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

**Burden of Proof.**—When the plaintiff alleges that a release was made without a good and valuable consideration, and that it was in effect procured by fraud, the burden of proof is upon him to show the truth of the allegations. *St. Louis, etc., Electric R. Co. v. Erlinger*, 112 Ill. App. 506.

On an issue as to whether a party had been induced to sign a contract by fraudulent misrepresentations, the mere failure to specifically instruct the jury that the burden was on him who attacked the contract to show that it was so procured was no cause for a new trial, when the court charged generally that the burden of proof lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. *Central of Georgia R. Co. v. Goodwin*, 120 Ga. 83.

**157. 6. Measure of Damages—General Rule.**—*Fries v. American Lead Pencil Co.*, 141 Cal. 610; *Illinois Terminal R. Co. v. Thompson*, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463; *Busch v. Robinson*, (Oregon 1905) 81 Pac. Rep. 237, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157; *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44; *Galveston, etc., R. Co. v. Hitzfelder*, 24 Tex. Civ. App. 318; *Galveston, etc., R. Co. v. Perry*, 36 Tex. Civ. App. 414; *International, etc., R. Co. v. Shaughnessy*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1026; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, *affirmed* 98 Tex. 123; *San Antonio, etc., R. Co. v. Brock*, 35 Tex. Civ. App. 155; *Galveston, etc., R. Co. v. Jones*, 29 Tex. Civ. App. 214; *St. Louis Southwestern R. Co. v. Smith*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1064.

**Exemplary Damages.**—Under section 1739 of the Alabama Code it has been held that exemplary or punitive damages may be awarded in an action for personal injuries to a servant where death does not ensue. *Southern R. Co. v. Bunt*, 131 Ala. 591.

7. *Kansas City, etc., R. Co. v. Thornhill*, 141 Ala. 215; *Muren Coal, etc., Co. v. Howell*, 204 Ill. 515, *judgment reversed* 107 Ill. App. 1.

8. **Value of Time Lost.**—*Prior v. Eggert*, 39 Wash. 481. See *Missouri, etc., R. Co. v. Pawkett*, 28 Tex. Civ. App. 583.

9. **Physical and Mental Suffering.**—*Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *Galveston, etc., R. Co. v. Jenkins*, 29 Tex. Civ.

App. 440; *Missouri, etc., R. Co. v. Miller*, 25 Tex. Civ. App. 460.

10. **Medical Expenses.**—*Missouri, etc., R. Co. v. Reasor*, 28 Tex. Civ. App. 302. See *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194.

11. **Reduction of Earning Capacity.**—*Chicago House Wrecking Co. v. Birney*, (C. C. A.) 117 Fed. Rep. 72; *Barnett, etc., Co. v. Schlafka*, 208 Ill. 426, *affirming* 110 Ill. App. 672; *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, *affirming* 106 Ill. App. 30; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471; *Galveston, etc., R. Co. v. Hampton*, 24 Tex. Civ. App. 458; *Palmquist v. Mine, etc., Supply Co.*, 25 Utah 257; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961.

**159. 1. Earning Capacity.**—*Southern R. Co. v. Howell*, 135 Ala. 639; *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456; *Tutwiler Coal, etc., Co. v. Enslen*, 129 Ala. 336; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, *affirming* 102 Ill. App. 347.

2. **Habits of Plaintiff.**—*Louisville, etc., R. Co. v. Jones*, 130 Ala. 456.

3. **Diminution of Earning Capacity.**—*Southern Car, etc., Co. v. Bartlett*, 137 Ala. 234.

9. **Duty to Adopt, Promulgate, and Enforce Rules.**—*Szymanski v. Blumenthal*, 4 Penn. (Del.) 511; *Binion v. Georgia Southern, etc., R. Co.*, 111 Ga. 878; *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1, *reversing* 70 N. Y. App. Div. 495; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Burns v. Palmer*, 107 N. Y. App. Div. 321; *Tully v. New York, etc., Steamship Co.*, 10 N. Y. App. Div. 463, *affirmed without opinion* 162 N. Y. 614; *Quinn v. Brooklyn Heights R. Co.*, 91 N. Y. App. Div. 489; *Kracht v. Lake Shore, etc., R. Co.*, 25 Ohio Cir. Ct. 521; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46; *Wright v. Southern R. Co.*, 101 Va. 36; *Bain v. Northern Pac. R. Co.*, 120 Wis. 412.

**Whether Rules Necessary.**—The question whether a master was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule. *Wagner v. Portland*, 40 Oregon 392.

**160. 1. Duty to Provide Safe Place for Work—United States.**—*Western Electric Co. v. Hanselmann*, (C. C. A.) 136 Fed. Rep. 564; *Baltimore, etc., R. Co. v. Doty*, (C. C. A.) 133 Fed. Rep. 866; *Simonds v. Georgia Iron, etc., Co.*, 133 Fed. Rep. 776, *affirmed without opinion* (C. C. A.) 133 Fed. Rep. 1019; *Mountain Copper Co. v. Van Buren*, (C. C. A.) 133 Fed.

Rep. 1; Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Chicago G. W. R. Co. v. Roddy, (C. C. A.) 131 Fed. Rep. 712; Cecil v. American Sheet Steel Co., (C. C. A.) 129 Fed. Rep. 542; Pennsylvania R. Co. v. Jones, (C. C. A.) 123 Fed. Rep. 753; Alaska United Gold Min. Co. v. Keating, (C. C. A.) 116 Fed. Rep. 561; Choctaw, etc., R. Co. v. Tennessee, (C. C. A.) 116 Fed. Rep. 23, *affirmed* 191 U. S. 326; Jones v. Pennsylvania R. Co., 114 Fed. Rep. 984; Erie R. Co. v. Moore, (C. C. A.) 113 Fed. Rep. 269; Portland Gold Min. Co. v. Flaherty, (C. C. A.) 111 Fed. Rep. 312.

*Alabama*.—E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206.

*Arizona*.—Gila Valley, etc., R. Co. v. Lyon, (Ariz. 1903) 71 Pac. Rep. 957.

*California*.—McRae v. Erickson, (Cal. 1905) 82 Pac. Rep. 209; Davis v. Diamond Carriage, etc., Co., 146 Cal. 59; Merrifield v. Maryland Gold Quartz Min. Co., 143 Cal. 54; Peters v. McKay, 136 Cal. 73; Dolan v. Sierra R. Co., 135 Cal. 435.

*Colorado*.—Maydole v. Denver, etc., R. Co., 15 Colo. App. 449.

*Delaware*.—Szymanski v. Blumenthal, 4 Penn. (Del.) 511.

*District of Columbia*.—Baltimore, etc., R. Co. v. Landrigan, 20 App. Cas. (D. C.) 135.

*Georgia*.—Palmer Brick Co. v. Chenall, 119 Ga. 837; Jackson v. Merchants, etc., Transp. Co., 118 Ga. 651.

*Illinois*.—Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, *affirming* 115 Ill. App. 209; Libby v. Banks, 209 Ill. 109, *affirming* 110 Ill. App. 330; Barnett, etc., Co. v. Schlapka, 208 Ill. 426, *affirming* 110 Ill. App. 672; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; Muren Coal, etc., Co. v. Howell, 204 Ill. 515, *judgment reversed* 107 Ill. App. 1; Metropolitan West Side El. R. Co. v. Fortin, 203 Ill. 454, *affirming* 107 Ill. App. 157; Armour v. Golkowska, 202 Ill. 144, *affirming* 95 Ill. App. 498; Illinois Steel Co. v. Ryska, 200 Ill. 280, *affirming* 102 Ill. App. 347; Morris v. Malone, 200 Ill. 132, 93 Am. St. Rep. 180; D. Sinclair Co. v. Waddill, 200 Ill. 17, *affirming* 99 Ill. App. 334; Illinois Steel Co. v. Stonevick, 199 Ill. 122; Himrod Coal Co. v. Clark, 197 Ill. 514, *affirming* 99 Ill. App. 332; Consolidated Coal Co. v. Lundak, 196 Ill. 594, *affirming* 97 Ill. App. 109; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325, *affirming* 96 Ill. App. 288; Street's Western Stable Car Line v. Bonander, 196 Ill. 15, *affirming* 97 Ill. App. 601; Ide v. Fratcher, 194 Ill. 552, *affirming* 96 Ill. App. 549; Pagels v. Meyer, 193 Ill. 172; William Graver Tank Works v. O'Donnell, 191 Ill. 236, *affirming* 91 Ill. App. 524; Chicago, etc., R. Co. v. Kinnare, 190 Ill. 9, *affirming* 91 Ill. App. 508; H. Channon Co. v. Hahn, 189 Ill. 28; Consolidated Coal Co. v. Gruber, 188 Ill. 584, *affirming* 91 Ill. App. 15; Chicago, etc., R. Co. v. Kinnare, 115 Ill. App. 132; River-ton Coal Co. v. Shepherd, 111 Ill. App. 294, *affirmed* 207 Ill. 395; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596, *affirmed* 207 Ill. 576; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Gruenendahl v. Consolidated Coal Co., 108 Ill. App. 644; Chicago, etc., R. Co. v. Huff, 104 Ill. App. 594; Hober v. W. P. Nelson Co., 101 Ill. App. 336; Illinois Steel Co. v.

Mann, 100 Ill. App. 367, *affirmed* 197 Ill. 186; Frost Mfg. Co. v. Smith, 98 Ill. App. 308, *affirmed* 197 Ill. 253; Illinois Cent. R. Co. v. McNicholas, 98 Ill. App. 54; McFadden v. Sollitt, 94 Ill. App. 271.

*Indiana*.—Perry-Matthews-Buskirk Stone Co. v. Speer, (Ind. App. 1905) 73 N. E. Rep. 933; Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308.

*Iowa*.—Barto v. Iowa Telephone Co., 126 Iowa 241, 106 Am. St. Rep. 347; Calloway v. Agar Packing Co., (Iowa 1905) 104 N. W. Rep. 721; Hamilton v. Mendota Coal, etc., Co., 120 Iowa 147; Gorham v. Sioux City Stock Yards Co., 118 Iowa 749.

*Kentucky*.—McFarland v. Habison, etc., Co., 82 S. W. Rep. 430, 26 Ky. L. Rep. 746; Wilson v. Alpine Coal Co., 118 Ky. 463; East Jellico Coal Co. v. Golden, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; Monongahela River Consol. Coal, etc., Co. v. Campbell, 78 S. W. Rep. 405, 25 Ky. L. Rep. 1599; Angel v. Jellico Coal Min. Co., 115 Ky. 728; Louisville, etc., R. Co. v. Hall, 115 Ky. 567; Chesapeake, etc., R. Co. v. Venable, 111 Ky. 41; Southern R. Co. v. Cooper, 62 S. W. Rep. 858, 23 Ky. L. Rep. 290.

*Maryland*.—Brager v. Austin, 99 Md. 473; Mercantile Laundry Co. v. Kearney, 97 Md. 15.

*Massachusetts*.—Thompson v. American Writing Paper Co., 187 Mass. 93; Foster v. New York, etc., R. Co., 187 Mass. 21; Gurney v. Le Baron, 182 Mass. 368.

*Michigan*.—Breeze v. MacKinnon Mfg. Co., (Mich. 1905) 103 N. W. Rep. 908, 12 Detroit Leg. N. 195; McDonald v. Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; Noe v. Rapid R. Co., 133 Mich. 152, 10 Detroit Leg. N. 155; Wellihan v. National Wheel Co., 128 Mich. 1, 8 Detroit Leg. N. 487; Jones v. Flint, etc., R. Co., 127 Mich. 198, 8 Detroit Leg. N. 295.

*Minnesota*.—Hebert v. Interstate Iron Co., 94 Minn. 257; Kohout v. Newman, (Minn. 1905) 104 N. W. Rep. 764; Merrill v. Pike, 94 Minn. 186; Jensen v. Commodore Min. Co., 94 Minn. 53; Dieters v. St. Paul Gaslight Co., 86 Minn. 474; Pierce v. Brennan, 88 Minn. 50; Chittick v. Minneapolis, etc., R. Co., 88 Minn. 11; Namyst v. Batz, 85 Minn. 366.

*Missouri*.—Smith v. Fordyce, 190 Mo. 1; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; Copeland v. Wabash R. Co., 175 Mo. 650; Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; Wendler v. People's House Furnishing Co., 165 Mo. 527; Depuy v. Chicago, etc., R. Co., 110 Mo. App. 110; Haworth v. Mineral Belt Telephone Co., 105 Mo. App. 161; Wendall v. Chicago, etc., R. Co., 100 Mo. App. 556; Sinberg v. Falk Co., 98 Mo. App. 546; Zellars v. Missouri Water, etc., Co., 92 Mo. App. 107; Scott v. Springfield, 81 Mo. App. 312; Rogers v. Meyerson Printing Co., 103 Mo. App. 683; Dover v. Mississippi River, etc., R. Co., 100 Mo. App. 330.

*Montana*.—Nord v. Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48.

*New Hampshire*.—Story v. Concord, etc., R. Co., 70 N. H. 364; English v. Amidon, 72 N. H. 301; Edwards v. Tilton Mills, 70 N. H. 574.

*New Jersey*.—Ferguson v. Central R. Co., 71 N. J. L. 647.

*New York.*—*Bateman v. New York Cent., etc., R. Co.*, 178 N. Y. 84, *reversing* 67 N. Y. App. Div. 241; *Simone v. Kirk*, 173 N. Y. 7, *reversing* 57 N. Y. App. Div. 461; *Farrell v. Middletown*, 172 N. Y. 666, *reversing* 56 N. Y. App. Div. 525; *Finn v. Cassidy*, 165 N. Y. 584, *affirming* 39 N. Y. App. Div. 641; *Eastland v. Clarke*, 165 N. Y. 420, *reversing* 28 N. Y. App. Div. 621, 622; *Stenger v. Buffalo Union Furnace Co.*, 98 N. Y. App. Div. 361; *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 N. Y. App. Div. 600; *Winters v. Naughton*, 91 N. Y. App. Div. 80; *Wood v. New York Cent., etc., R. Co.*, 93 N. Y. App. Div. 53; *Quinlan v. New York, etc., R. Co.*, 89 N. Y. App. Div. 266, *affirmed* without opinion 181 N. Y. 523; *Wolf v. Devitt*, 83 N. Y. App. Div. 42, *affirmed* without opinion 179 N. Y. 569; *True v. Niagara Gorge R. Co.*, 70 N. Y. App. Div. 383, *affirmed* without opinion 175 N. Y. 487; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, *affirmed* without opinion 174 N. Y. 519; *Witkowski v. George W. Carter, etc., Co.*, 60 N. Y. App. Div. 577; *Pilkey v. Harrower*, 59 N. Y. App. Div. 378; *Carena v. Zanmatti*, 82 N. Y. App. Div. 11; *Hatton v. Hilton Bridge Constr. Co.*, 42 N. Y. App. Div. 398, *affirmed* without opinion 167 N. Y. 590; *Brown v. New York Cent., etc., R. Co.*, 42 N. Y. App. Div. 548, *affirmed* without opinion 166 N. Y. 626.

*North Carolina.*—*Stewart v. Raleigh, etc., Air Line R. Co.*, 137 N. Car. 687; *Hedrick v. Southern R. Co.*, 136 N. Car. 510; *Lindsay v. Norfolk, etc., R. Co.*, 132 N. Car. 59; *McCord v. Southern R. Co.*, 130 N. Car. 491; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

*Ohio.*—*Lake Shore, etc., R. Co. v. Fisher*, 26 Ohio Cir. Ct. 143, *affirmed* without opinion 51 Ohio St. 574; *New York, etc., R. Co. v. Roe*, 25 Ohio Cir. Ct. 628.

*Oregon.*—*Mundhenke v. Oregon City Mfg. Co.*, (Oregon 1905) 81 Pac. Rep. 977.

*Pennsylvania.*—*Schiglizzo v. Dunn*, 211 Pa. St. 253, 107 Am. St. Rep. 549; *Hickey v. Solid Steel Casting Co.*, 212 Pa. St. 255; *Miller v. Merritt*, 211 Pa. St. 127; *Held v. American Window Glass Co.*, 207 Pa. St. 534; *Webster v. Monongahela River Consol. Coal, etc., Co.*, 201 Pa. St. 278; *Garrity v. Pennsylvania Casting, etc., Co.*, 17 Pa. Super. Ct. 623; *Conley v. Lincoln Foundry Co.*, 4 Pa. Super. Ct. 626.

*Rhode Island.*—*Cox v. American Agricultural Chemical Co.*, 24 R. I. 503; *Laporte v. Cook*, 22 R. I. 554.

*South Carolina.*—*Willis v. Cherokee Falls Mfg. Co.*, 72 S. Car. 126; *Scott v. Seaboard Air Line R. Co.*, 67 S. Car. 136; *Wood v. Victor Mfg. Co.*, 66 S. Car. 482; *Sims v. Southern R. Co.*, 66 S. Car. 520; *Davis v. Atlanta, etc., Air Line R. Co.*, 63 S. Car. 370.

*Tennessee.*—*Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340.

*Texas.*—*Proffitt v. Missouri, etc., R. Co.*, 95 Tex. 593; *Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *Texas Cent. R. Co. v. Phillips*, (Tex. Civ. App. 1905) 87 S. W. Rep. 187; *Texas Mexican R. Co. v. Mendez*, (Tex. Civ. App. 1903) 78 S. W. Rep. 25; *Galveston, etc., R. Co. v. Mortson*, 31 Tex. Civ. App. 142.

*Utah.*—*Hill v. Southern Pac. R. Co.*, 23

*Utah* 94; *Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299.

*Vermont.*—*Severance v. New England Talc Co.*, 72 Vt. 181.

*Washington.*—*Gaudie v. Northern Lumber Co.*, 34 Wash. 34; *McDannald v. Washington, etc., R. Co.*, 31 Wash. 585.

*Wisconsin.*—*Mueller v. Northwestern Iron Co.*, 125 Wis. 326; *Nix v. C. Reiss Coal Co.*, 114 Wis. 493.

It has been held that a nonsuit is improper where an injury results from the sudden and unexplained giving way of a place furnished to a workman in order to enable him to work or which he is required to pass over in order to reach his work. *Lentino v. Port Henry Iron Ore Co.*, 71 N. Y. App. Div. 466.

**Inspection of Telegraph Poles.**—In an action to recover for injuries sustained by a lineman in the employ of an electric light company by the falling of a pole upon which he was working, it was held that it was for the jury to determine whether a reasonable inspection of the pole had been made by the defendant, and that it was error to charge the jury that the duty to inspect had been performed if the defendant had made the usual and ordinary inspection. *Rowley v. American Illuminating Co.*, 83 N. Y. App. Div. 609.

**160. 2. Duty to Provide Safe Machinery and Appliances.**—*United States.*—*Texas, etc., R. Co. v. Behymer*, 189 U. S. 468, *affirming* (C. C. A.) 112 Fed. Rep. 35; *Moore v. Illinois Cent. R. Co.*, (C. C. A.) 135 Fed. Rep. 67; *Simonds v. Georgia Iron, etc., Co.*, 133 Fed. Rep. 776, *affirmed* without opinion (C. C. A.) 133 Fed. Rep. 1019; *Northern Pac. R. Co. v. Perry*, (C. C. A.) 116 Fed. Rep. 609; *Choctaw, etc., R. Co. v. Tennessee*, (C. C. A.) 116 Fed. Rep. 23, *affirmed* 191 U. S. 326; *Mexican Cent. R. Co. v. Townsend*, (C. C. A.) 114 Fed. Rep. 737; *Lafayette Bridge Co. v. Olsen*, (C. C. A.) 108 Fed. Rep. 335; *Tennessee Coal, etc., Co. v. Currier*, (C. C. A.) 108 Fed. Rep. 19; *Mexican Cent. R. Co. v. Jones*, (C. C. A.) 107 Fed. Rep. 64; *Great Northern R. Co. v. Kasischke*, (C. C. A.) 104 Fed. Rep. 440.

*Alabama.*—*Going v. Alabama Steel, etc., Co.*, 141 Ala. 537; *Illinois Car, etc., Co. v. Walch*, 132 Ala. 490; *Sloss-Sheffield Steel, etc., Co. v. Mobley*, 139 Ala. 425; *Southern Car, etc., Co. v. Jennings*, 137 Ala. 247.

*Arkansas.*—*Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445.

*California.*—*Olsen v. Gray*, 147 Cal. 112; *Shea v. Pacific Power Co.*, 145 Cal. 680; *Kerrigan v. Market-St. R. Co.*, 138 Cal. 506; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256.

*Colorado.*—*Mulligan v. Colorado Fuel, etc., Co.*, 20 Colo. App. 198; *Tanner v. Harper*, 32 Colo. 156; *Roche v. Denver, etc., R. Co.*, 19 Colo. App. 204.

*District of Columbia.*—*Washington Asphalt Block, etc., Co. v. Mackey*, 15 App. Cas. (D. C.) 410.

*Georgia.*—*Duke v. Bibb Mfg. Co.*, 120 Ga. 1074; *Fenn v. Seaboard Air-Line R. Co.*, 120 Ga. 664; *McDonnell v. Central of Georgia R. Co.*, 118 Ga. 86; *Binion v. Georgia Southern, etc., R. Co.*, 111 Ga. 878.

*Illinois.*—*Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, *affirming* 109 Ill. App. 468; *Belt*

R. Co. *v.* Confrey, 209 Ill. 344; Illinois Cent. R. Co. *v.* Behrens, 208 Ill. 20; Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417; John S. Metcalf Co. *v.* Nystedt, 203 Ill. 333, *affirming* 102 Ill. App. 71; Hartrich *v.* Hawes, 202 Ill. 334, *affirming* 103 Ill. App. 433; Slack *v.* Harris, 200 Ill. 96; Momence Stone Co. *v.* Groves, 197 Ill. 88; Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376; Union Bridge Co. *v.* Teehan, 190 Ill. 374, *affirming* 92 Ill. App. 259; Franke *v.* Hanly, 215 Ill. 216; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233; American Malting Co. *v.* Lelivelt, 101 Ill. App. 320; Bulter Ballast Co. *v.* Hoshaw, 94 Ill. App. 68; Maxwell *v.* Zdarski, 93 Ill. App. 334; Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308.

*Indiana.*—Dill *v.* Marmon, 164 Ind. 507; M. S. Huey Co. *v.* Johnston, 164 Ind. 489; Chestnut *v.* Southern Indiana R. Co., 157 Ind. 509; Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32.

*Iowa.*—Fries *v.* Bettendorf Axle Co., 126 Iowa 138; Crane *v.* Chicago, etc., R. Co., 124 Iowa 81.

*Kansas.*—Atchison, etc., R. Co. *v.* Kingscott, 65 Kan. 131.

*Kentucky.*—Ahrens, etc., Mfg. Co. *v.* Rellihan, 82 S. W. Rep. 993, 26 Ky. L. Rep. 919; Langdon-Creasy Co. *v.* Rouse, 72 S. W. Rep. 1113, 24 Ky. L. Rep. 2095; Republic Iron, etc., Works *v.* Gregg, 71 S. W. Rep. 900, 24 Ky. L. Rep. 1627; Continental Tobacco Co. *v.* Knoop, 71 S. W. Rep. 3, 24 Ky. L. Rep. 1268; Covington, etc., Bridge Co. *v.* Goodnight, 60 S. W. Rep. 415, 22 Ky. L. Rep. 1242.

*Maine.*—Hall *v.* Emerson-Stevens Mfg. Co., 94 Me. 445.

*Maryland.*—Crawford *v.* United R., etc., Co., 101 Md. 402; National Enameling, etc., Co. *v.* Cornell, 95 Md. 524; Mercantile Laundry Co. *v.* Kearney, 97 Md. 15.

*Massachusetts.*—Moylon *v.* D. S. McDonald Co., 188 Mass. 499; Carroll *v.* Metropolitan Coal Co., 189 Mass. 159; O'Neil *v.* Ginn, 188 Mass. 346; Smith *v.* Thomson-Houston Electric Co., 188 Mass. 371; Lynch *v.* M. T. Stevens, etc., Co., 187 Mass. 397; Gregory *v.* American Thread Co., 187 Mass. 239; Harris *v.* Putnam Mach. Co., 188 Mass. 85; Carter *v.* Boston Towboat Co., 185 Mass. 496; Martin *v.* Merchants, etc., Transp. Co., 185 Mass. 487; Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250; Ellis *v.* Thayer, 183 Mass. 309; Boucher *v.* Robeson Mills, 182 Mass. 500; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93; McLean *v.* Paine, 181 Mass. 287; Littlefield *v.* Edward P. Allis Co., 177 Mass. 151.

*Michigan.*—Ouellette *v.* Michigan Alkali Co., 129 Mich. 484, 8 Detroit Leg. N. 1073; Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 8 Detroit Leg. N. 520.

*Minnesota.*—Swanson *v.* Oakes, 93 Minn. 404; Shalgren *v.* Red Cliff Lumber Co., (Minn. 1905) 104 N. W. Rep. 531; Campbell *v.* Railway Transfer Co., (Minn. 1905) 104 N. W. Rep. 547; Ellington *v.* Great Northern R. Co., 92 Minn. 470; LeDuc *v.* Northern Pac. R. Co., 92 Minn. 287; Anderson *v.* Fielding, 92 Minn. 42, 104 Am. St. Rep. 665; Comers *v.* Washburn-Crosby Co., 91 Minn. 105; Jacobson *v.* Johnson, 87 Minn. 185; Walker *v.* Grand Forks Lumber Co., 86 Minn. 328; Thiel *v.* Ken-

nedy, 82 Minn. 142; Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407; Perry *v.* Tozer, 90 Minn. 431, 101 Am. St. Rep. 416; Bender *v.* Great Northern R. Co., 89 Minn. 163; Hagerty *v.* Evans, 87 Minn. 435; Attix *v.* Minnesota Sandstone Co., 85 Minn. 142.

*Missouri.*—Smith *v.* Fordyce, 190 Mo. 1; Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543; Duerst *v.* St. Louis Stamping Co., 163 Mo. 607; Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167; McCready *v.* Stepp, 104 Mo. App. 340; Decker *v.* Wabash R. Co., 111 Mo. App. 117; Mueller *v.* La Puelle Shoe Co., 109 Mo. App. 506; Glasscock *v.* Swofford Bros. Dry Goods Co., 106 Mo. App. 657; Mitchell *v.* Wabash R. Co., 97 Mo. App. 411; Hester *v.* Jacob Dold Packing Co., 95 Mo. App. 16; Van Edwards *v.* Barber Asphalt Paving Co., 92 Mo. App. 221; Compton *v.* Omaha, etc., R. Co., 82 Mo. App. 175.

*Montana.*—Ball *v.* Gussenhoven, 29 Mont. 321; Coleman *v.* Perry, 28 Mont. 1.

*Nebraska.*—Fremont Brewing Co. *v.* Schulz, (Neb. 1904) 101 N. W. Rep. 234; Cudahy Packing Co. *v.* Roy, (Neb. 1904) 99 N. W. Rep. 231; Fronk *v.* J. H. Evans City Steam Laundry, (Neb. 1903) 96 N. W. Rep. 1053; Swift *v.* Holoubek, 60 Neb. 784, *rehearing* 62 Neb. 31.

*New Hampshire.*—Prescott *v.* Laconia Car Co. Works, 71 N. H. 59.

*New Jersey.*—Kalker *v.* Hedden, (N. J. 1905) 61 Atl. Rep. 395; Maurer *v.* Gould, (N. J. 1904) 59 Atl. Rep. 28, *affirmed* without opinion (N. J. 1905) 60 Atl. Rep. 1134; Dowd *v.* Erie R. Co., 70 N. J. L. 451; Hopwood *v.* Benjamin Atha, etc., Co., 68 N. J. L. 707; Huebner *v.* Erie R. Co., 68 N. J. L. 468; Carroll *v.* Tidewater Oil Co., 67 N. J. L. 679.

*New York.*—Welle *v.* Celluloid Co., 175 N. Y. 401, *reversing* 52 N. Y. App. Div. 522; Joyce *v.* Rome, etc., R. Co., 92 Hun (N. Y.) 107, *affirmed* without opinion 168 N. Y. 665; Yaw *v.* Whitmore, 46 N. Y. App. Div. 422, *affirmed* without opinion 167 N. Y. 605; Auld *v.* Manhattan L. Ins. Co., 34 N. Y. App. Div. 491, *affirmed* without opinion 165 N. Y. 610; Motzing *v.* Excelsior Brewing Co., 107 N. Y. App. Div. 275; Dolan *v.* Herring-Hall-Marvin Safe Co., 105 N. Y. App. Div. 366; Crilley *v.* New Amsterdam Gas Co., 106 N. Y. App. Div. 127; Haslin *v.* National Foundry Co., 106 N. Y. App. Div. 152; Pluckham *v.* American Bridge Co., 104 N. Y. App. Div. 404; Madden *v.* Hughes, 104 N. Y. App. Div. 101; McConnell *v.* Morse Iron Works, etc., Co., 102 N. Y. App. Div. 324, *applying* N. Y. Laws 1897, p. 467, c. 415, § 18; Silversen *v.* Jenks, 102 N. Y. App. Div. 313; Iesief *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 168; Starer *v.* Stern, 100 N. Y. App. Div. 393; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119; O'Donnell *v.* Welz, 97 N. Y. App. Div. 286; Earle *v.* Clyde Steamship Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 535, *reversed* 103 N. Y. App. Div. 21; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81; Krueger *v.* Bartholomay Brewing Co., 94 N. Y. App. Div. 58, *affirmed* 182 N. Y. 544; Meehan *v.* Atlas Safe Moving, etc., Co., 94 N. Y. App. Div. 306; Allison *v.* Long Clove Trap Rock Co., 92 N. Y. App. Div. 611; Devereux *v.* Utica Steam Cot-



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ton Mills, 84 N. Y. App. Div. 34; *Levy v. Grove Mills Paper Co.*, 80 N. Y. App. Div. 384; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Dickescheid v. Betz*, 80 N. Y. App. Div. 8, *affirmed* without opinion 176 N. Y. 611; *Allison v. Long Clove Trap Rock Co.*, 75 N. Y. App. Div. 267; *Walters v. George A. Fuller Co.*, 74 N. Y. App. Div. 388; *Murphy v. Coney Island, etc.*, R. Co., 65 N. Y. App. Div. 546; *Vincent v. Alden*, 62 N. Y. App. Div. 558; *McAleer v. Walter*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 474; *Cosselmon v. Dunfee*, 59 N. Y. App. Div. 467, *affirmed* 172 N. Y. 507; *Dzinbienski v. J. L. Mott Iron Works*, 56 N. Y. App. Div. 58.

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*Rhode Island*.—*Le Febvre v. Lawton Spinning Co.*, 24 R. I. 215; *Sherman v. J. W. Bishop Co.*, 23 R. I. 6; *McGar v. National, etc.*, *Worsted Mills*, 22 R. I. 347; *McGarrity v. New York, etc.*, R. Co., 25 R. I. 269.

*South Carolina*.—*Koon v. Southern R. Co.*, 69 S. Car. 101; *Boyd v. Seaboard Air Line R. Co.*, 67 S. Car. 218; *Sims v. Southern R. Co.*, 66 S. Car. 520; *Chase v. Spartanburg R., etc.*, Co., 64 S. Car. 212.

*Tennessee*.—*Chattanooga Machinery Co. v. Hargraves*, 111 Tenn. 476; *Central Mfg. Co. v. Cotton*, 108 Tenn. 63; *Williams v. Gobble*, 106 Tenn. 367.

*Texas*.—*El Paso, etc.*, R. Co. *v. Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; *Jernigan v. Houston Ice, etc., Co.*, 33 Tex. Civ. App. 501; *St. Louis, etc., R. Co. v. Skaggs*, 32 Tex. Civ. App. 363; *Missouri, etc., R. Co. v. Blackman*, 32 Tex. Civ. App. 200; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503.

*Utah*.—*Moyes v. Ogden Sewer Pipe, etc.*, Co., 28 Utah 148.

*Virginia*.—*Norfolk, etc., R. Co. v. Wade*, 102 Va. 140.

*Washington*.—*Prior v. Eggert*, 39 Wash. 481; *Jancko v. West Coast Mfg., etc., Co.*, 40 Wash. 230; *Westby v. Washington Brick, etc., Co.*, 40 Wash. 289; *De Mase v. Oregon R., etc., Co.*, 40 Wash. 108; *Hart v. Cascade Timber Co.*, 39 Wash. 279; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30; *Jancko v. West Coast Mfg., etc., Co.*, 34 Wash. 556; *Curran v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Towle v. Stimson Mill Co.*, 33 Wash. 305; *Bailey v. Cascade Timber Co.*, 32 Wash. 319; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847.

*Wisconsin*.—*Berg v. U. S. Leather Co.*, 125 Wis. 262; *Kreider v. Wisconsin River Paper, etc., Co.*, 110 Wis. 645.

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**161. 1. Duty to Provide Sufficient Force for Work.**—*Supple v. Agnew*, 191 Ill. 439; *Diezi v. G. H. Hammond Co.*, 156 Ind. 583; *Aleckson v. Erie R. Co.*, 101 N. Y. App. Div. 395; *Lassiter v. Raleigh, etc., R. Co.*, 137 N. Car. 150; *Wright v. Southern R. Co.*, 127 N. Car. 225; *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302, 61 S. Car. 468; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227.

**Employment of Competent Servants.**—*Texas, etc., R. Co. v. Lee*, 32 Tex. Civ. App. 23.

**2. Texas, etc., R. Co. v. Dashiell**, (C. C. A.) 128 Fed. Rep. 23; *Illinois Steel Co. v. Sitar*, 199 Ill. 116; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319; *Dolese, etc., Co. v. Schultz*, 101 Ill. App. 569; *Kopf v. Monroe Stone Co.*, (Mich. 1905) 104 N. W. Rep. 313, 12 Detroit Leg. N. 319; *Shalgren v. Red Cliff Lumber Co.*, (Minn. 1905) 104 N. W. Rep. 531; *Depuy v. Chicago, etc., R. Co.*, 110 Mo. App. 110; *Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371; *Thompson v. Chappell*, 91 Mo. App. 297; *Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546; *Marks v. Harriet Cotton Mills*, 138 N. Car. 401; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456, 462.

**3. Duty to Warn and Instruct Servant**—*United States*.—*Western Electric Co. v. Hanselmann*, (C. C. A.) 136 Fed. Rep. 564; *Sauvageau v. River Spinning Co.*, 129 Fed. Rep. 961; *Cumberland Telephone, etc., Co. v. Bills*, (C. C. A.) 128 Fed. Rep. 272; *Felton v. Girardy*, (C. C. A.) 104 Fed. Rep. 127.

*California*.—*Olsen v. Gray*, 147 Cal. 112; *Merifield v. Maryland Gold Quartz Min. Co.*, 143 Cal. 54; *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622.

*District of Columbia*.—*Stauble v. Potomac Electric Power Co.*, 21 App. Cas. (D. C.) 160.

*Illinois*.—*Rogers v. Cleveland, etc., R. Co.*, 211 Ill. 126; *Morris v. Malone*, 200 Ill. 132, 93 Am. St. Rep. 180; *Illinois Steel Co. v. Stonevick*, 199 Ill. 122; *Street's Western Stable Car Line v. Bonander*, 196 Ill. 15, *affirming* 97 Ill. App. 601; *Shickle-Harrison, etc., Iron Co. v. Beck*, 112 Ill. App. 444, *affirmed* 212 Ill. 268;

McFarland v. Edmunds Mfg. Co., 97 Ill. App. 629.

Indiana. — Island Coal Co. v. Swaggerty, 159 Ind. 664.

Iowa. — Vohs v. A. E. Shorthill Co., 124 Iowa 471; Sachau v. Milner, 123 Iowa 387.

Kansas. — Brower v. Timreck, 66 Kan. 770.

Maryland. — Mercantile Laundry Co. v. Kearney, 97 Md. 15; Yentsch v. Chloride of Silver Dry Cell Battery Co., 96 Md. 679.

Massachusetts. — Bowden v. Marlborough Electric Mach., etc., Co., 185 Mass. 549.

Michigan. — McDonald v. Champion Iron, etc., Co., (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; Preuschoff v. B. Stroh Brewing Co., 132 Mich. 107, 9 Detroit Leg. N. 549.

Minnesota. — Torske v. Commonwealth Lumber Co., 86 Minn. 276; Kohout v. Newman, (Minn. 1905) 104 N. W. Rep. 764; Small v. Brainerd Lumber Co., (Minn. 1905) 103 N. W. Rep. 726.

Nebraska. — Western Mattress Co. v. Ostergaard, (Neb. 1904) 99 N. W. Rep. 229, judgment affirmed on rehearing (Neb. 1904) 101 N. W. Rep. 334; Evans Laundry Co. v. Crawford, 67 Neb. 153.

New Hampshire. — Lapelle v. International Paper Co., 71 N. H. 346; Bennett v. Warren, 70 N. H. 564.

North Carolina. — Fitzgerald v. Alma Furniture Co., 131 N. Car. 636.

Ohio. — E. P. Breckenridge Co. v. Reagan, 12 Ohio Cir. Dec. 50, 22 Ohio Cir. Ct. 71.

Oregon. — Bowers v. Star Logging Co., 41 Oregon 301.

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Rhode Island. — Le Febvre v. Lawton Spinning Co., 24 R. I. 215.

South Dakota. — Hedlun v. Holy Terror Min. Co., 16 S. Dak. 261.

Texas. — St. Louis Southwestern R. Co. v. Rea, (Tex. 1905) 87 S. W. Rep. 324, reversing (Tex. Civ. App. 1904) 84 S. W. Rep. 428; Gulf, etc., R. Co. v. Newman, 27 Tex. Civ. App. 77; Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36; Galveston, etc., R. Co. v. Mortson, 31 Tex. Civ. App. 142.

Utah. — Moyes v. Ogden Sewer Pipe, etc., Co., 28 Utah 148; Pence v. California Min. Co., 27 Utah 378.

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**161. 4. Contributory Negligence** — United States. — Cincinnati, etc., R. Co. v. Robertson, (C. C. A.) 139 Fed. Rep. 519; Hayward v. Key, (C. C. A.) 138 Fed. Rep. 34; Baltimore, etc., R. Co. v. Doty, (C. C. A.) 133 Fed. Rep. 866; Hawley v. Chicago, etc., R. Co., (C. C. A.) 133 Fed. Rep. 150; Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Chicago G. W. R. Co. v. Roddy, (C. C. A.) 131 Fed. Rep. 712; Kasadarian v. James Hill Mfg. Co.,

130 Fed. Rep. 62; Cecil v. American Sheet Steel Co., (C. C. A.) 129 Fed. Rep. 542; Elliott v. Canadian Pac. R. Co., 129 Fed. Rep. 163; Cumberland Telephone, etc., Co. v. Bills, (C. C. A.) 128 Fed. Rep. 272; Wheeler v. Oak Harbor Head Lining, etc., Co., (C. C. A.) 126 Fed. Rep. 348; American Distributing Co. v. Thorne, (C. C. A.) 122 Fed. Rep. 431; Olsen v. Cook Inlet Coal Fields Co., (C. C. A.) 121 Fed. Rep. 726; Texas, etc., R. Co. v. Putman, (C. C. A.) 120 Fed. Rep. 754; Northern Pac. R. Co. v. Tynan, (C. C. A.) 119 Fed. Rep. 288; Chicago Terminal Transfer R. Co. v. Stone, (C. C. A.) 118 Fed. Rep. 19; Alaska United Gold Min. Co. v. Keating, (C. C. A.) 116 Fed. Rep. 561; Choctaw, etc., R. Co. v. Tennessee, (C. C. A.) 116 Fed. Rep. 23, affirmed 191 U. S. 326; Texas, etc., R. Co. v. Parks, (C. C. A.) 114 Fed. Rep. 161; Mexican Cent. R. Co. v. Knox, (C. C. A.) 114 Fed. Rep. 73; Alaska United Gold Min. Co. v. Muset, (C. C. A.) 114 Fed. Rep. 66; Southern R. Co. v. Craig, (C. C. A.) 113 Fed. Rep. 76; Erie R. Co. v. Moore, (C. C. A.) 113 Fed. Rep. 269; Portland Gold Min. Co. v. Flaherty, (C. C. A.) 111 Fed. Rep. 312; Tennessee Coal, etc., Co. v. Currier, (C. C. A.) 108 Fed. Rep. 19.

Alabama. — Kansas City, etc., R. Co. v. Thornhill, 141 Ala. 215; Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; Alabama Steel, etc., Co. v. Wrenn, 136 Ala. 475; McGhee v. Willis, 134 Ala. 281; Illinois Car, etc., Co. v. Walch, 132 Ala. 490; Woodward Iron Co. v. Herndon, 130 Ala. 364; Sloss-Sheffield Steel, etc., Co. v. Mobley, 139 Ala. 425; Alabama G. S. R. Co. v. Ellis, 137 Ala. 560; Southern R. Co. v. Howell, 135 Ala. 639; Houston Biscuit Co. v. Dial, 135 Ala. 168.

Alaska. — Gibson v. Canadian Pac. Nav. Co., 1 Alaska 407.

Arkansas. — Kansas, etc., Coal Co. v. Chandler, 71 Ark. 518.

California. — Davis v. Diamond Carriage, etc., Co., 146 Cal. 59; Killelea v. California Horse-shoe Co., 140 Cal. 602; Hillebrand v. Standard Biscuit Co., 139 Cal. 233; O'Connor v. Golden Gate Woolen Mfg. Co., 135 Cal. 537, 87 Am. St. Rep. 127; Layng v. Mt. Shasta Mineral Spring Co., 135 Cal. 141; Habishaw v. Standard Quick-silver Co., 131 Cal. 430.

Colorado. — Mulligan v. Colorado Fuel, etc., Co., 20 Colo. App. 198; Tanner v. Harper, 32 Colo. 156; Roche v. Denver, etc., R. Co., 19 Colo. App. 204.

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Cent. R. Co. v. Sporleder, 199 Ill. 184; Illinois Steel Co. v. Stonevick, 199 Ill. 122; Illinois Steel Co. v. Sitar, 199 Ill. 116; Illinois Cent. R. Co. v. Atwell, 198 Ill. 200, *affirming* 100 Ill. App. 513; Momence Stone Co. v. Groves, 197 Ill. 88; Illinois Steel Co. v. McFadden, 196 Ill. 344, 89 Am. St. Rep. 319; H. Channon Co. v. Hahn, 189 Ill. 28; Shickle-Harrison, etc., Iron Co. v. Beck, 112 Ill. App. 444, *affirmed* 212 Ill. 268; Belt R. Co. v. Confrey, 111 Ill. App. 473, *affirmed* 209 Ill. 344; Junction Min. Co. v. Ench, 111 Ill. App. 346; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Pardridge v. Gilbride, 98 Ill. App. 134; McFadden v. Sollitt, 94 Ill. App. 271; Garden City Wire Spring Co. v. Boecher, 94 Ill. App. 96; Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337, *affirmed* 191 Ill. 340; Bennett v. Brown Hoisting, etc., Mach. Co., 89 Ill. App. 113.

*Indiana.*—Annadall v. Union Cement, etc., Co., (Ind. 1905) 74 N. E. Rep. 893; Flickner v. Lambert, (Ind. App. 1905) 74 N. E. Rep. 263; M. S. Huey Co. v. Johnston, 164 Ind. 489; Diamond Block Coal Co. v. Cuthbertson, (Ind. 1905) 73 N. E. Rep. 818; Buchner Chair Co. v. Feulner, 164 Ind. 368; Diezi v. G. H. Hammond Co., 156 Ind. 583; Baltimore, etc., R. Co. v. Peterson, 156 Ind. 364; Espenlaub v. Ellis, 34 Ind. App. 163; Baltimore, etc., R. Co. v. Cavanaugh, 35 Ind. App. 32; Ætna Powder Co. v. Earlandson, 33 Ind. App. 251; Republic Iron, etc., Co. v. Jones, 32 Ind. App. 189; Wortman v. Minich, 28 Ind. App. 31; Flutter v. New York, etc., R. Co., 27 Ind. App. 511; Jarvis v. Hitch, (Ind. App. 1902) 65 N. E. Rep. 608.

*Iowa.*—Mace v. Boedker, 127 Iowa 721; Calloway v. Agar Packing Co., (Iowa 1905) 104 N. W. Rep. 721; Schroeder v. Chicago, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 985; Woolf v. Nauman Co., (Iowa 1905) 103 N. W. Rep. 785; Hughes v. Iowa Cent. R. Co., (Iowa 1905) 103 N. W. Rep. 339; Struble v. Burlington, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 142; Foster v. Chicago, etc., R. Co., 127 Iowa 84; Pierson v. Chicago, etc., R. Co., 127 Iowa 13; Barto v. Iowa Telephone Co., 126 Iowa 241, 106 Am. St. Rep. 347; Collingwood v. Illinois, etc., Fuel Co., 125 Iowa 537; Norris v. Cudahy Packing Co., 124 Iowa 748; Buchner v. Creamery Package Mfg. Co., 124 Iowa 445, 104 Am. St. Rep. 354; Coles v. Union Terminal R. Co., 124 Iowa 48; Phinney v. Illinois Cent. R. Co., 122 Iowa 488; Williams v. Iowa Cent. R. Co., 121 Iowa 270; Foley v. Cudahy Packing Co., 119 Iowa 246; Gorham v. Sioux City Stock Yards Co., 118 Iowa 749; Pierson v. Chicago, etc., R. Co., 116 Iowa 601; Trott v. Chicago, etc., R. Co., 115 Iowa 80, *petition for rehearing overruled* 115 Iowa 88.

*Kansas.*—Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738; Missouri Pac. R. Co. v. Johnson, 69 Kan. 721; Cudahy Packing Co. v. Sedlack, 69 Kan. 472.

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tral Coal, etc., Co. v. Pearce, 80 S. W. Rep. 449, 25 Ky. L. Rep. 2269; East Jellico Coal Co. v. Golden, 79 S. W. Rep. 291, 25 Ky. L. Rep. 2056; Smith v. Kentucky Lumber Co., 78 S. W. Rep. 120, 25 Ky. L. Rep. 1386; Republic Iron, etc., Works v. Gregg, 71 S. W. Rep. 900, 24 Ky. L. Rep. 1627; Louisville, etc., R. Co. v. Lowe, (Ky. 1902) 66 S. W. Rep. 736; Koltinsky v. Wood, 112 Ky. 372; Reliance Textile, etc., Works v. Martin, 65 S. W. Rep. 809, 23 Ky. L. Rep. 1625; Ford v. Robinson-Pettett Co., 65 S. W. Rep. 793, 23 Ky. L. Rep. 1654; Louisville, etc., R. Co. v. Tucker, 65 S. W. Rep. 453, 23 Ky. L. Rep. 1929; Standard Oil Co. v. Eiler, 110 Ky. 209.

*Maine.*—Caven v. Bodwell Granite Co., 99 Me. 278; Withee v. Somerset Traction Co., 98 Me. 61.

*Massachusetts.*—Moylan v. D. S. McDonald Co., 188 Mass. 499; Wagner v. Boston El. R. Co., 188 Mass. 437; Smith v. Thomson-Houston Electric Co., 188 Mass. 371; Taylor v. Boston, etc., R. Co., 188 Mass. 390; Gregory v. American Thread Co., 187 Mass. 239; Gomes v. New Bedford Cordage Co., 187 Mass. 124; Murphy v. New York, etc., R. Co., 187 Mass. 18; Bartolomeo v. McKnight, 178 Mass. 242; Donahue v. Boston, etc., R. Co., 178 Mass. 251; Cote v. Lawrence Mfg. Co., 178 Mass. 295; Fearn v. New York Cent., etc., R. Co., 186 Mass. 529; Droney v. Doherty, 186 Mass. 205; Carter v. Boston Towboat Co., 185 Mass. 496; Martin v. Merchants, etc., Transp. Co., 185 Mass. 487; Chisholm v. New England Telephone, etc., Co., 185 Mass. 82; Rafferty v. Nawn, 182 Mass. 503; Boucher v. Robeson Mills, 182 Mass. 500; Gurney v. Le Baron, 182 Mass. 368; Pierce v. Arnold Print Works, 182 Mass. 260; Boyle v. Columbian Fire Proofing Co., 182 Mass. 93; Welch v. New York, etc., R. Co., 182 Mass. 84; Haskell v. Cape Ann Anchor Works, 178 Mass. 485.

*Michigan.*—Breeze v. MacKinnon Mfg. Co., (Mich. 1905) 103 N. W. Rep. 908, 12 Detroit Leg. N. 195; McLean v. Pere Marquette R. Co., 137 Mich. 482, 11 Detroit Leg. N. 358; Sipes v. Michigan Starch Co., 137 Mich. 258, 11 Detroit Leg. N. 287; De Cair v. Manistee, etc., R. Co., 133 Mich. 578, 10 Detroit Leg. N. 328; Rick v. Saginaw Bay Towing Co., 132 Mich. 237, 102 Am. St. Rep. 422, 9 Detroit Leg. N. 589; Ertz v. Pierson, 130 Mich. 160, 8 Detroit Leg. N. 1177; Jarvis v. Flint, etc., R. Co., 128 Mich. 61, 8 Detroit Leg. N. 527; Chilson v. Lansing Wagon Works, 128 Mich. 43, 8 Detroit Leg. N. 520; Wellihan v. National Wheel Co., 128 Mich. 1, 8 Detroit Leg. N. 487; Jones v. Flint, etc., R. Co., 127 Mich. 198, 8 Detroit Leg. N. 295.

*Minnesota.*—Barrett v. Reardon, (Minn. 1905) 104 N. W. Rep. 309; Shalgren v. Red Cliff Lumber Co., (Minn. 1905) 104 N. W. Rep. 531; Campbell v. Railway Transfer Co., (Minn. 1905) 104 N. W. Rep. 547; Turrittin v. Chicago, etc., R. Co., (Minn. 1905) 104 N. W. Rep. 225; Meyer v. Kenyon-Rosing Mach. Co., (Minn. 1905) 104 N. W. Rep. 132; Johnson v. Crookston Lumber Co., (Minn. 1905) 103 N. W. Rep. 891; Hebert v. Interstate Iron Co., 94 Minn. 257; Merrill v. Pike, 94 Minn. 186; Haidt v. Swift, 94 Minn. 146; Ellington v. Great Northern R. Co., 92 Minn. 470; Le Duc v. Northern

Pac. R. Co., 92 Minn. 287; *Hendricks v. Lesure Lumber Co.*, 92 Minn. 318, *rehearing denied* 92 Minn. 322; *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317; *Setterstrom v. Brainerd*, etc., R. Co., 89 Minn. 262; *Lyons v. Dee*, 88 Minn. 490; *Stauning v. Great Northern R. Co.*, 88 Minn. 480; *Walker v. Grand Forks Lumber Co.*, 86 Minn. 328; *Torske v. Commonwealth Lumber Co.*, 86 Minn. 276; *Schus v. Powers-Simpson Co.*, 85 Minn. 447; *Chittick v. Minneapolis*, etc., R. Co., 88 Minn. 11; *Isherwood v. H. L. Jenkins Lumber Co.*, 87 Minn. 388; *Murran v. Chicago*, etc., R. Co., 86 Minn. 470; *Kerrigan v. Chicago*, etc., R. Co., 86 Minn. 407; *Namyst v. Batz*, 85 Minn. 366; *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 Am. St. Rep. 440.

*Mississippi*. — *Anderson v. Cumberland Telephone, etc., Co.*, 86 Miss. 341; *Yazoo, etc., R. Co. v. Schraag*, 84 Miss. 125.

*Missouri*. — *Wojtylak v. Kansas*, etc., Coal Co., 188 Mo. 260; *Stafford v. Adams*, 113 Mo. App. 717; *Henderson v. Kansas City*, 177 Mo. 477; *Gayle v. Missouri Car, etc., Co.*, 177 Mo. 427; *Black v. Missouri Pac. R. Co.*, 172 Mo. 177; *Erickson v. Kansas City, etc., R. Co.*, 171 Mo. 647; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 166 Mo. 639; *Cambron v. Omaha, etc., R. Co.*, 165 Mo. 543; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467; *Shore v. American Bridge Co.*, 111 Mo. App. 278; *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Adams v. McCormick Harvesting Mach. Co.*, 110 Mo. App. 367; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Bien v. St. Louis Transit Co.*, 108 Mo. App. 399; *Brimer v. Chicago, etc., R. Co.*, 109 Mo. App. 493; *Carter v. Baldwin*, 107 Mo. App. 217; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167; *Benedict v. Chicago G. W. R. Co.*, 104 Mo. App. 218; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Adolff v. Columbia Pretzel, etc., Co.*, 100 Mo. App. 199; *Studenroth v. Hammond Packing Co.*, 106 Mo. App. 480; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Eberly v. Chicago, etc., R. Co.*, 96 Mo. App. 361; *Fox v. Jacob Dold Packing Co.*, 96 Mo. App. 173; *Prophet v. Kemper*, 95 Mo. App. 219; *Adams v. McCormick Harvesting Mach. Co.*, 95 Mo. App. 111; *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16; *Reed v. Missouri, etc., R. Co.*, 94 Mo. App. 371; *Kane v. Falk Co.*, 93 Mo. App. 209; *Van Edwards v. Barber Asphalt Paving Co.*, 92 Mo. App. 221; *Sikes v. Missouri Granite Co.*, 92 Mo. App. 12; *Palmer v. Kinloch Telephone Co.*, 91 Mo. App. 106; *Devore v. St. Louis, etc., R. Co.*, 86 Mo. App. 429; *Stalzer v. Jacob Dold Packing Co.*, 84 Mo. App. 565; *Compton v. Omaha, etc., R. Co.*, 82 Mo. App. 175; *Scott v. Springfield*, 81 Mo. App. 312; *Harriman v. Kansas City Star Co.*, 81 Mo. App. 124.

*Montana*. — *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323; *Nord v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 48.

*Nebraska*. — *Holmes v. Chicago, etc., R. Co.*, (Neb. 1905) 103 N. W. Rep. 77; *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 72; *New Omaha Thompson-*

*Houston Electric Light Co. v. Dent*, 68 Neb. 668; *Ittner Brick Co. v. Killian*, 67 Neb. 589.

*New Hampshire*. — *Olney v. Boston, etc., R. Co.*, 71 N. H. 427; *Stone v. Boscawen Mills*, 71 N. H. 288; *Thompson v. Bartlett*, 71 N. H. 174, 93 Am. St. Rep. 504; *Edwards v. Tilton Mills*, 70 N. H. 574; *Bennett v. Warren*, 70 N. H. 564; *Carr v. Manchester Electric Co.*, 70 N. H. 308.

*New Jersey*. — *Maurer v. Gould*, (N. J. 1904) 59 Atl. Rep. 28, *affirmed* without opinion (N. J. 1905) 60 Atl. Rep. 1134; *Dunkerley v. Webendorfer Mach. Co.*, 71 N. J. L. 60; *Albanese v. Central R. Co.*, 70 N. J. L. 241; *Ruch v. Gas Electric Co.*, 65 N. J. L. 399.

*New York*. — *Finn v. Cassidy*, 165 N. Y. 584, *affirming* 39 N. Y. App. Div. 641; *Eastland v. Clarke*, 165 N. Y. 420, *reversing* 28 N. Y. App. Div. 621, 622; *Di Vito v. Cragg*, 165 N. Y. 378, *reversing* 35 N. Y. App. Div. 155; *Brown v. New York Cent., etc., R. Co.*, 42 N. Y. App. Div. 548, *affirmed* without opinion 166 N. Y. 626; *Hatton v. Hilton Bridge Constr. Co.*, 42 N. Y. App. Div. 398, *affirmed* without opinion 167 N. Y. 590; *Stimper v. Fuchs, etc., Mfg. Co.*, 26 N. Y. App. Div. 333, *affirmed* without opinion 161 N. Y. 636; *Tully v. New York, etc., Steamship Co.*, 10 N. Y. App. Div. 463, *affirmed* without opinion 162 N. Y. 614; *Rooney v. Brogan Constr. Co.*, 107 N. Y. App. Div. 258; *Lane v. New York Cent., etc., R. Co.*, 107 N. Y. App. Div. 166; *Overbaugh v. Wieber*, 106 N. Y. App. Div. 283; *Vaughn v. Glens Falls Portland Cement Co.*, 105 N. Y. App. Div. 136; *Irish v. Union Bag, etc., Co.*, 103 N. Y. App. Div. 45; *McConnell v. Morse Iron Works, etc., Co.*, 102 N. Y. App. Div. 324, *applying* N. Y. Laws 1897, p. 467, c. 415, § 18; *Aleckson v. Erie R. Co.*, 101 N. Y. App. Div. 395; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119; *Hempstock v. Lackawanna Iron, etc., Co.*, 98 N. Y. App. Div. 332; *Kruger v. Bartholomay Brewing Co.*, 94 N. Y. App. Div. 58, *affirmed* 182 N. Y. 544; *Franck v. American Tartar Co.*, 91 N. Y. App. Div. 571; *Quinn v. Brooklyn Heights R. Co.*, 91 N. Y. App. Div. 489; *Wood v. New York Cent., etc., R. Co.*, 93 N. Y. App. Div. 53; *Levy v. Grove Mills Paper Co.*, 80 N. Y. App. Div. 384; *Huebner v. Hammond*, 80 N. Y. App. Div. 122, *affirmed* without opinion 177 N. Y. 537; *Loughrain v. Autophone Co.*, 77 N. Y. App. Div. 542; *Smith v. King*, 74 N. Y. App. Div. 1; *True v. Niagara Gorge R. Co.*, 70 N. Y. App. Div. 383, *affirmed* without opinion 175 N. Y. 487; *Eichholz v. Niagara Falls Hydraulic Power, etc., Co.*, 68 N. Y. App. Div. 441, *affirmed* without opinion 174 N. Y. 519; *Healy v. Burke*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 384; *Vincent v. Alden*, 62 N. Y. App. Div. 558; *Griffin v. Ithaca St. R. Co.*, 62 N. Y. App. Div. 551; *Cosselman v. Dunfee*, 59 N. Y. App. Div. 467, *affirmed* 172 N. Y. 507; *Coughlin v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 126.

*North Carolina*. — *Marks v. Harriet Cotton Mills*, 138 N. Car. 401; *Whisenant v. Southern R. Co.*, 137 N. Car. 349; *Peoples v. North Carolina R. Co.*, 137 N. Car. 96; *Hedrick v. Southern R. Co.*, 136 N. Car. 510; *Coley v. North Carolina R. Co.*, 128 N. Car. 534, *rehearing* 129 N. Car. 407; *Creech v. Wilmington Cotton Mills*, 135 N. Car. 680; *Pharr v.*

Atlanta, etc., Air Line R. Co., 132 N. Car. 418; *Wilkie v. Raleigh*, etc., R. Co., 127 N. Car. 203.

*Ohio*.—*Lake Shore*, etc., R. Co. *v. Fisher*, 26 Ohio Cir. Ct. 143, *affirmed* without opinion 51 Ohio St. 574; *Green v. New York Cent.*, etc., R. Co., 26 Ohio Cir. Ct. 609; *Memphis*, etc., Packet Co. *v. Britton*, 25 Ohio Cir. Ct. 153; *Kracht v. Lake Shore*, etc., R. Co., 25 Ohio Cir. Ct. 521; *Cleveland*, etc., R. Co. *v. Somers*, 24 Ohio Cir. Ct. 67; *Pittsburg*, etc., R. Co. *v. Stone*, 24 Ohio Cir. Ct. 192; *Ham v. Lake Shore*, etc., R. Co., 23 Ohio Cir. Ct. 496; *E. P. Breckenridge Co. v. Reagan*, 12 Ohio Cir. Dec. 50, 22 Ohio Cir. Ct. 71; *Forest City Stone Co. v. Richardson*, 12 Ohio Cir. Dec. 177, 22 Ohio Cir. Ct. 139; *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668; *Hoppe v. Parmalee*, 11 Ohio Cir. Dec. 24, 20 Ohio Cir. Ct. 303.

*Oklahoma*.—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon*.—*Busch v. Robinson*, (Oregon 1905) 81 Pac. Rep. 237; *Mundhenke v. Oregon City Mfg. Co.*, (Oregon 1905) 81 Pac. Rep. 977; *Viohl v. North Pac. Lumber Co.*, (Oregon 1905) 80 Pac. Rep. 112.

*Pennsylvania*.—*Schiglizzo v. Dunn*, 211 Pa. St. 253, 107 Am. St. Rep. 549; *Hickey v. Solid Steel Casting Co.*, 212 Pa. St. 255; *Miller v. Merritt*, 211 Pa. St. 127; *Dynes v. Bromley*, 208 Pa. St. 633; *Conger v. Wiggins*, 208 Pa. St. 122; *Held v. American Window Glass Co.*, 207 Pa. St. 534; *Geist v. Rapp*, 206 Pa. St. 411; *Butterman v. McClintic-Marshall Constr. Co.*, 206 Pa. St. 82; *Doyle v. Pittsburgh Waste Co.*, 204 Pa. St. 618; *Hammer v. Pressed Steel Car Co.*, 204 Pa. St. 594; *Williams v. Clark*, 204 Pa. St. 416; *Young v. Mercantile Steam Laundry Co.*, 198 Pa. St. 553; *Brislin v. Kingston Coal Co.*, 20 Pa. Super. Ct. 234; *Royer v. Tinkler*, 16 Pa. Super. Ct. 457.

*Rhode Island*.—*Lebeau v. Dyerville Mfg. Co.*, 26 R. I. 34; *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555; *Le Febvre v. Lawton Spinning Co.*, 24 R. I. 215; *Flynn v. Shaw*, 22 R. I. 328; *McGarrity v. New York*, etc., R. Co., 25 R. I. 269.

*South Carolina*.—*Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 244; *Keys v. Winnsboro Granite Co.*, 72 S. Car. 97; *Sanders v. Aiken Mfg. Co.*, 71 S. Car. 58; *Bodie v. Charleston*, etc., R. Co., 66 S. Car. 302; *Barksdale v. Charleston*, etc., R. Co., 66 S. Car. 204; *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468.

*Tennessee*.—*Robertson v. Cayard*, 111 Tenn. 356.

*Texas*.—*Missouri*, etc., R. Co. *v. Purdy*, 98 Tex. 557; *Gulf*, etc., R. Co. *v. Melville*, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; *Texas Cent. R. Co. v. Phillips*, (Tex. Civ. App. 1905) 87 S. W. Rep. 187; *St. Louis*, etc., R. Co. *v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 790; *Texarkana Table*, etc., Co. *v. Webb*, (Tex. Civ. App. 1905) 86 S. W. Rep. 782; *Austin v. Forbis*, (Tex. Civ. App. 1905) 86 S. W. Rep. 29; *Texas Cent. R. Co. v. Powell*, (Tex. Civ. App. 1905) 86 S. W. Rep. 21; *International*, etc., R. Co. *v. Vanlandingham*, (Tex. Civ. App. 1905) 85 S. W. Rep. 847; *Gulf*, etc., R. Co. *v. Minter*, (Tex. Civ. App. 1905) 85 S. W. Rep.

477; *El Paso*, etc., R. Co. *v. Whatley*, (Tex. Civ. App. 1905) 85 S. W. Rep. 306; *Galveston*, etc., R. Co. *v. McAdams*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076; *Missouri*, etc., R. Co. *v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; *International*, etc., R. Co. *v. Jacobs*, (Tex. Civ. App. 1904) 84 S. W. Rep. 288; *Ft. Worth*, etc., R. Co. *v. Caskey*, (Tex. Civ. App. 1904) 84 S. W. Rep. 264; *San Antonio*, etc., R. Co. *v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Bonn v. Galveston*, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *O'Brien v. Missouri*, etc., R. Co., 36 Tex. Civ. App. 528; *Texas Portland Cement*, etc., Co. *v. Lee*, 36 Tex. Civ. App. 482; *International*, etc., R. Co. *v. Penn*, (Tex. Civ. App. 1904) 79 S. W. Rep. 624; *Missouri*, etc., R. Co. *v. Hoskins*, 34 Tex. Civ. App. 627; *Galveston*, etc., R. Co. *v. Butshek*, 34 Tex. Civ. App. 194; *Galveston*, etc., R. Co. *v. Walker*, (Tex. Civ. App. 1903) 76 S. W. Rep. 228; *Texas Cent. R. Co. v. Bender*, 32 Tex. Civ. App. 568; *Texas Portland Cement Co. v. Poe*, 32 Tex. Civ. App. 469; *Andrews v. Jefferson Cotton Oil*, etc., Co., (Tex. Civ. App. 1903) 74 S. W. Rep. 342; *Missouri*, etc., R. Co. *v. Bodie*, 32 Tex. Civ. App. 168; *Texas*, etc., R. Co. *v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 50; *San Antonio*, etc., R. Co. *v. Ankerson*, 31 Tex. Civ. App. 327; *Missouri*, etc., R. Co. *v. Goss*, 31 Tex. Civ. App. 300; *International*, etc., R. Co. *v. Bearden*, 31 Tex. Civ. App. 58; *Galveston*, etc., R. Co. *v. Courtney*, 30 Tex. Civ. App. 544; *International*, etc., R. Co. *v. Cochrane*, (Tex. Civ. App. 1902) 71 S. W. Rep. 41; *Texas*, etc., R. Co. *v. Scott*, 30 Tex. Civ. App. 496; *Galveston*, etc., R. Co. *v. Puente*, 30 Tex. Civ. App. 246; *Missouri*, etc., R. Co. *v. Follin*, 29 Tex. Civ. App. 512; *Galveston*, etc., R. Co. *v. Sherwood*, (Tex. Civ. App. 1902) 67 S. W. Rep. 776; *Galveston*, etc., R. Co. *v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *Parks v. St. Louis Southwestern R. Co.*, 29 Tex. Civ. App. 551; *American Cotton Co. v. Smith*, 29 Tex. Civ. App. 425; *Missouri*, etc., R. Co. *v. Pawkett*, 28 Tex. Civ. App. 583; *Gulf*, etc., R. Co. *v. Darby*, 28 Tex. Civ. App. 413; *Galveston*, etc., R. Co. *v. Quay*, 27 Tex. Civ. App. 516; *Gulf*, etc., R. Co. *v. Newman*, 27 Tex. Civ. App. 77.

*Utah*.—*Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Hone v. Mammoth Min. Co.*, 27 Utah 168; *Hill v. Southern Pac. R. Co.*, 23 Utah 94; *Hicks v. Southern Pac. R. Co.*, 27 Utah 526; *Boyle v. Union Pac. R. Co.*, 25 Utah 420.

*Vermont*.—*Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125. See *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939.

*Virginia*.—*Virginia Iron*, etc., Co. *v. Lore*, (Va. 1905) 51 S. E. Rep. 371; *Virginia Portland Cement Co. v. Luck*, 103 Va. 427; *Chesapeake*, etc., R. Co. *v. Pierce*, 103 Va. 99; *Meyers v. Falk*, 99 Va. 385, 3 Va. Sup. Ct. 273.

*Washington*.—*Hart v. Cascade Timber Co.*, 39 Wash. 279; *Dossett v. St. Paul*, etc., Lumber Co., 40 Wash. 276; *Sandquist v. Independent Telephone Co.*, 38 Wash. 313; *Bier v. Hosford*, 35 Wash. 544; *Crooker v. Pacific Lounge*, etc., Co., 34 Wash. 191; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; *Jancko v.*

**162.** See notes 1, 2, 3.

West Coast Mfg., etc., Co., 34 Wash. 556; Currans v. Seattle, etc., R., etc., Co., 34 Wash. 512; Bailey v. Cascade Timber Co., 32 Wash. 319; McDannald v. Washington, etc., R. Co., 31 Wash. 585; Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467; Norton v. Moran Bros. Co., 30 Wash. 362; Green v. Western American Co., 30 Wash. 87; Roberts v. Port Blakely Mill Co., 30 Wash. 25; Christianson v. Pacific Bridge Co., 27 Wash. 582; Costa v. Pacific Coast Co., 26 Wash. 138; Hencke v. Babcock, 24 Wash. 556.

*Wisconsin.*—Berg v. U. S. Leather Co., 125 Wis. 262; Lounsbury v. Davis, 124 Wis. 432; Williams v. North Wisconsin Lumber Co., 124 Wis. 328; Horn v. La Crosse Box Co., 123 Wis. 399; Kath v. Wisconsin Cent. R. Co., 121 Wis. 503; Bain v. Northern Pac. R. Co., 120 Wis. 412; Revolinski v. Adams Coal Co., 118 Wis. 324; Yerkes v. Northern Pac. R. Co., 112 Wis. 184, 88 Am. St. Rep. 961.

*Canada.*—Scriven v. Lowe, 32 Ont. 290; Moore v. J. D. Moore Co., 4 Ont. L. Rep. 167; Godwin v. Newcombe, 1 Ont. L. Rep. 525.

Contributory negligence is ordinarily a question of law and fact, but, where only one inference can be drawn from the undisputed facts, then the question may become one of law for the court. Barley v. Southern Indiana R. Co., 30 Ind. App. 406.

By statute in New York (N. Y. Laws 1902, p. 1750, c. 600, § 3), the question whether the plaintiff was guilty of contributory negligence is one of fact. McBride v. New York Tunnel Co., 101 N. Y. App. Div. 448.

**162. 1. Assumption of Risk—United States.**—Hayward v. Key, (C. C. A.) 138 Fed. Rep. 34; Pittsburgh, etc., R. Co. v. Lamphere, (C. C. A.) 137 Fed. Rep. 20; Hawley v. Chicago, etc., R. Co., (C. C. A.) 133 Fed. Rep. 150; Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Pennsylvania R. Co. v. Jones, (C. C. A.) 123 Fed. Rep. 753; Crawford v. American Steel, etc., Co., (C. C. A.) 123 Fed. Rep. 275; American Distributing Co. v. Thorne, (C. C. A.) 122 Fed. Rep. 431; Wright v. Stanley, (C. C. A.) 119 Fed. Rep. 330; Jones v. Pennsylvania R. Co., 114 Fed. Rep. 984; Southern Pac. R. Co. v. Yeagin, (C. C. A.) 109 Fed. Rep. 436; Felton v. Girardy, (C. C. A.) 104 Fed. Rep. 127; Texas, etc., R. Co. v. Behmyer, 189 U. S. 468, *affirming* 112 Fed. Rep. 35.

*Alabama.*—Going v. Alabama Steel, etc., Co. 141 Ala. 537.

*Arkansas.*—King-Ryder Lumber Co. v. Cochran, 71 Ark. 55.

*California.*—Anderson v. Seropian, 147 Cal. 201; Merrifield v. Maryland Gold Quartz Min. Co., 143 Cal. 54; Daubert v. Western Meat Co., 135 Cal. 144; Habisshaw v. Standard Quicksilver Co., 131 Cal. 430.

*Colorado.*—Mulligan v. Colorado Fuel, etc., Co., 20 Colo. App. 198.

*Delaware.*—Szymanski v. Blumenthal, 4 Penn. (Del.) 511.

*Illinois.*—South Side El. R. Co. v. Nesvig, 214 Ill. 463; Mobile, etc., R. Co. v. Vallowe, 214 Ill. 124, *affirming* 115 Ill. App. 621; Indiana, etc., R. Co. v. Otsot, 212 Ill. 429, *affirming* 113 Ill.

App. 37; Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, *affirming judgment* 112 Ill. App. 463; Rock Island Sash, etc., Works v. Pohlman, 210 Ill. 133, *affirming* 99 Ill. App. 670; Chicago Hair, etc., Co. v. Mueller, 203 Ill. 558, *affirming* 106 Ill. App. 21; Chicago Screw Co. v. Weiss, 203 Ill. 536, *affirming* 107 Ill. App. 39; Chicago, etc., R. Co. v. Heerey, 203 Ill. 492; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, *affirming* 106 Ill. App. 30; Hartrich v. Hawes, 202 Ill. 334, *affirming* 103 Ill. App. 433; Armour v. Golkowska, 202 Ill. 144, *affirming* 95 Ill. App. 492; Illinois Steel Co. v. Ryska, 200 Ill. 280, *affirming* 102 Ill. App. 347; Slack v. Harris, 200 Ill. 96; Chicago, etc., R. Co. v. Camper, 199 Ill. 569; Hartley v. Chicago, etc., R. Co., 197 Ill. 440; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325, *affirming* 96 Ill. App. 288; Ide v. Fratcher, 194 Ill. 552, *affirming* 96 Ill. App. 549; La Salle v. Kostka, 190 Ill. 130, *affirming* 92 Ill. App. 91; Chicago, etc., R. Co. v. Kinnare, 190 Ill. 9, *affirming* 91 Ill. App. 508; Chicago, etc., R. Co. v. Stevens, 189 Ill. 226; Pioneer Fireproof Constr. Co. v. Howell, 189 Ill. 123; Landgraf v. Kuh, 188 Ill. 484; Chicago, etc., R. Co. v. Kinnare, 115 Ill. App. 132; Siegel v. Trcka, 115 Ill. App. 56, *affirmed* 218 Ill. 559; Riverton Coal Co. v. Shepherd, 111 Ill. App. 294, *affirmed* 207 Ill. 395; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185; Whalen v. Utica Hydraulic Cement Co., 103 Ill. App. 149; Otsot v. Indiana, etc., R. Co., 103 Ill. App. 136; Wierzbicky v. Illinois Steel Co., 94 Ill. App. 400; Chicago, etc., R. Co. v. Cleveland, 92 Ill. App. 308.

*Indiana.*—Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281; Diezi v. G. H. Hammond Co., 156 Ind. 583; Ft. Wayne v. Christie, 156 Ind. 172; Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308; Pittsburgh, etc., R. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120; Annadall v. Union Cement, etc., Co., (Ind. 1905) 74 N. E. Rep. 893.

*Iowa.*—Calloway v. Agar Packing Co., (Iowa 1905) 104 N. W. Rep. 721; Mace v. Boedker, 127 Iowa 721; Schroeder v. Chicago, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 985; Woolf v. Nauman Co., (Iowa 1905) 103 N. W. Rep. 785; Nugent v. Cudahy Packing Co., 126 Iowa 517; Klaffke v. Bettendorf Axle Co., 125 Iowa 223; Coles v. Union Terminal R. Co., 124 Iowa 48; Hamilton v. Mendota Coal, etc., Co., 120 Iowa 147; Copeland v. Ferris, 118 Iowa 554; Gorham v. Sioux City Stock Yards Co., 118 Iowa 749; Trott v. Chicago, etc., R. Co., 115 Iowa 80, *petition for rehearing overruled* 115 Iowa 88.

*Kansas.*—Missouri Pac. R. Co. v. Johnson, 69 Kan. 721; Cudahy Packing Co. v. Sedlack, 69 Kan. 472.

*Kentucky.*—Dryden v. H. E. Pogue Distillery Co., 82 S. W. Rep. 262, 26 Ky. L. Rep. 528; Louisville Hotel Co. v. Kaltenbrun, 80 S. W. Rep. 1163, 26 Ky. L. Rep. 208; Mayfield Woolen Mills v. Frazier, 80 S. W. Rep. 456, 25 Ky. L. Rep. 2263; East Jellico Coal Co. v. Stewart, 68 S. W. Rep. 624, 24 Ky. L. Rep. 420.

*Maine.*—Caven v. Bodwell Granite Co., 99 Me. 278; Dempsey v. Sawyer, 95 Me. 295.

*Maryland.*—*Maryland Steel Co. v. Engleman*, 101 Md. 661; *Yentsch v. Chloride of Silver Dry Cell Battery Co.*, 96 Md. 679.

*Massachusetts.*—*Taylor v. Boston, etc., R. Co.*, 188 Mass. 390; *Manning v. Excelsior Laundry Co.*, 189 Mass. 231; *Wagner v. Boston El. R. Co.*, 188 Mass. 437; *Moylon v. D. S. McDonald Co.*, 188 Mass. 499; *Higgins v. Higgins*, 188 Mass. 113; *Murphy v. New York, etc., R. Co.*, 187 Mass. 18; *Fearns v. New York Cent., etc., R. Co.*, 186 Mass. 529; *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155; *Martin v. Merchants, etc., Transp. Co.*, 185 Mass. 487; *Rafferty v. Nawn*, 182 Mass. 503; *Gurney v. Le Baron*, 182 Mass. 368.

*Michigan.*—*Breeze v. MacKinnon Mfg. Co.*, (Mich. 1905) 103 N. W. Rep. 908, 12 Detroit Leg. N. 195; *McDonald v. Champion Iron, etc., Co.*, (Mich. 1905) 103 N. W. Rep. 829, 12 Detroit Leg. N. 208; *Clark v. Wolverine Portland Cement Co.*, 138 Mich. 673, 11 Detroit Leg. N. 723.

*Minnesota.*—*Barrett v. Reardon*, (Minn. 1905) 104 N. W. Rep. 309; *Meyer v. Kenyon-Rosing Mach. Co.*, (Minn. 1905) 104 N. W. Rep. 132; *Fry v. Great Northern R. Co.*, (Minn. 1905) 103 N. W. Rep. 733; *Haidt v. Swift*, 94 Minn. 146; *Ellington v. Great Northern R. Co.*, 92 Minn. 470; *Le Duc v. Northern Pac. R. Co.*, 92 Minn. 287; *Hendricks v. Lesure Lumber Co.*, 92 Minn. 318, rehearing denied 92 Minn. 322; *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665; *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354; *Ziegler v. Gotzian*, 86 Minn. 290; *Gray v. Commutator Co.*, 85 Minn. 463; *Perras v. Booth*, 82 Minn. 191; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329; *Bender v. Great Northern R. Co.*, 89 Minn. 163; *Ishewood v. H. L. Jenkins Lumber Co.*, 87 Minn. 388; *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142; *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 Am. St. Rep. 440.

*Missouri.*—*Whaley v. Coleman*, 113 Mo. App. 594; *Henderson v. Kansas City*, 177 Mo. 477; *Neves v. Green*, 111 Mo. App. 634; *Muel-ler v. La Prelle Shoe Co.*, 109 Mo. App. 506; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Sinberg v. Falk Co.*, 98 Mo. App. 546; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372; *Adams v. McCormick Harvesting Mach. Co.*, 95 Mo. App. 111; *Van Edwards v. Barber Asphalt Paving Co.*, 92 Mo. App. 221; *Herbert v. Mound City Boot, etc., Co.*, 90 Mo. App. 305; *Lee v. St. Louis, etc., R. Co.*, 112 Mo. App. 372; *Thompson v. Chicago, etc., R. Co.*, 86 Mo. App. 141; *Compton v. Omaha, etc., R. Co.*, 82 Mo. App. 175; *Carter v. Baldwin*, 107 Mo. App. 217; *Scott v. Springfield*, 81 Mo. App. 312; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Adolf v. Columbia Pretzel, etc., Co.*, 100 Mo. App. 199.

*Montana.*—*McCabe v. Montana Cent. R. Co.*, 30 Mont. 323; *Nord v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 48; *Coleman v. Perry*, 28 Mont. 1.

*Nebraska.*—*New Omaha Thompson-Houston*

*Electric Light Co. v. Rombold*, 68 Neb. 72, 68 Neb. 54.

*New Hampshire.*—*Sirois v. Henry*, (N. H. 1905) 59 Atl. Rep. 936; *Slack v. Carter*, 72 N. H. 267; *Murray v. Boston, etc., R. Co.*, 72 N. H. 32, 101 Am. St. Rep. 660; *English v. Amidon*, 72 N. H. 301; *Boyce v. Johnson*, 72 N. H. 41.

*New Jersey.*—*Albanese v. Central R. Co.*, 70 N. J. L. 241; *Durand v. New York, etc., R. Co.*, 65 N. J. L. 656; *Smith v. Erie R. Co.*, 67 N. J. L. 636; *Carrington v. Mueller*, 65 N. J. L. 244.

*New York.*—*Farrell v. Middletown*, 172 N. Y. 666, reversing 56 N. Y. App. Div. 525; *Di Stefano v. Peekskill Lighting, etc., Co.*, 107 N. Y. App. Div. 293, applying the New York statute making assumption of risk a question of fact; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Finn v. Cassidy*, 165 N. Y. 584, affirming 39 N. Y. App. Div. 641; *Johansen v. Eastmans Co.*, 44 N. Y. App. Div. 270, affirmed without opinion 168 N. Y. 648; *Rooney v. Brogan Constr. Co.*, 107 N. Y. App. Div. 258; *Lane v. New York Cent., etc., R. Co.*, 107 N. Y. App. Div. 166; *Vaughn v. Glens Falls Portland Cement Co.*, 105 N. Y. App. Div. 136; *Madden v. Hughes*, 104 N. Y. App. Div. 101; *Siversen v. Jenks*, 102 N. Y. App. Div. 313; *Baker v. Empire Wire Co.*, 102 N. Y. App. Div. 125; *Aleckson v. Erie R. Co.*, 101 N. Y. App. Div. 395; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119; *Hempstock v. Lackawanna Iron, etc., Co.*, 98 N. Y. App. Div. 332; *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 N. Y. App. Div. 600; *Krueger v. Bartholomay Brewing Co.*, 94 N. Y. App. Div. 58, affirmed 182 N. Y. 544; *Klein v. Garvey*, 94 N. Y. App. Div. 183; *Lynch v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 217; *Devereux v. Utica Steam Cotton Mills*, 84 N. Y. App. Div. 34; *Allison v. Long Clove Trap Rock Co.*, 75 N. Y. App. Div. 267; *Walters v. George A. Fuller Co.*, 74 N. Y. App. Div. 388; *De Maio v. Standard Oil Co.*, 68 N. Y. App. Div. 167; *Dyer v. Brown*, 64 N. Y. App. Div. 89, appeal dismissed 170 N. Y. 616; *Griffin v. Ithaca St. R. Co.*, 62 N. Y. App. Div. 551; *Witkowski v. George W. Carter, etc., Co.*, 60 N. Y. App. Div. 577; *Cosselman v. Dunfee*, 59 N. Y. App. Div. 467, affirmed 172 N. Y. 507; *Jarvis v. Northern New York Marble Co.*, 55 N. Y. App. Div. 272.

*North Carolina.*—*Marks v. Harriet Cotton Mills*, 138 N. Car. 401; *Pressly v. Dover Yarn Mills*, 138 N. Car. 410; *Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546; *McDougald v. Lumberton*, 129 N. Car. 200.

*Ohio.*—*Lake Shore, etc., R. Co. v. Fisher*, 26 Ohio Cir. Ct. 143, affirmed without opinion 51 Ohio St. 574; *Cleveland, etc., R. Co. v. Somers*, 24 Ohio Cir. Ct. 67; *Pennsylvania R. Co. v. Hickley*, 11 Ohio Cir. Dec. 379, 20 Ohio Cir. Ct. 668.

*Oregon.*—*Stager v. Troy Laundry Co.*, 38 Oregon 480; *Mundhenke v. Oregon City Mfg. Co.*, (Oregon 1905) 81 Pac. Rep. 977; *Bowers v. Star Logging Co.*, 41 Oregon 301; *Busch v. Robinson*, (Oregon 1905) 81 Pac. Rep. 237.

*Pennsylvania.*—*Bartholomew v. Kemmerer*, 211 Pa. St. 277; *Held v. American Window Glass Co.*, 207 Pa. St. 534; *Giles v. Jones*, 204

Pa. St. 444; *Garrity v. Pennsylvania Casting, etc., Co.*, 17 Pa. Super. Ct. 623.

*Rhode Island.* — *Pierce v. Contrexville Mfg. Co.*, 25 R. I. 512.

*South Carolina.* — *Roach v. Haile Gold Min. Co.*, 71 S. Car. 79; *Wood v. Victor Mfg. Co.*, 66 S. Car. 482; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468; *Youngblood v. South Carolina, etc., R. Co.*, 60 S. Car. 9, 85 Am. St. Rep. 824.

*Texas.* — *Proffitt v. Missouri, etc., R. Co.*, 95 Tex. 593; *International, etc., R. Co. v. McVey*, (Tex. 1905) 87 S. W. Rep. 328, *reversing* (Tex. Civ. App. 1904) 81 S. W. Rep. 991, 83 S. W. Rep. 34; *Texas Cent. R. Co. v. Phillips*, (Tex. Civ. App. 1905) 87 S. W. Rep. 187; *St. Louis, etc., R. Co. v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 790; *Austin v. Forbis*, (Tex. Civ. App. 1905) 86 S. W. Rep. 29; *El Paso, etc., R. Co. v. Whatley*, (Tex. Civ. App. 1905) 85 S. W. Rep. 306; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *San Antonio, etc., R. Co. v. Stevens*, (Tex. Civ. App. 1904) 83 S. W. Rep. 235; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Galveston, etc., R. Co. v. Whisenhunt*, 36 Tex. Civ. App. 135; *Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194; *Rea v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 555; *International, etc., R. Co. v. Bearden*, 31 Tex. Civ. App. 58; *Galveston, etc., R. Co. v. Courtney*, 30 Tex. Civ. App. 544; *Missouri, etc., R. Co. v. Follin*, 29 Tex. Civ. App. 512; *Ft. Worth, etc., R. Co. v. Gary*, 29 Tex. Civ. App. 122; *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *Galveston, etc., R. Co. v. Hitzfelder*, 24 Tex. Civ. App. 318.

*Utah.* — *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264; *Hone v. Mammoth Min. Co.*, 27 Utah 168.

*Washington.* — *Hart v. Cascade Timber Co.*, 39 Wash. 279; *De Mase v. Oregon R., etc., Co.*, 40 Wash. 108; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34; *Crooker v. Pacific Lounge, etc., Co.*, 29 Wash. 30; *Curran v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *McDannald v. Washington, etc., R. Co.*, 31 Wash. 585; *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707.

*Wisconsin.* — *Lounsbury v. Davis*, 124 Wis. 432; *Hocking v. Windsor Spring Co.*, 125 Wis. 575; *Horn v. La Crosse Box Co.*, 123 Wis. 399; *Bain v. Northern Pac. R. Co.*, 120 Wis. 412; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883; *Revolinski v. Adams Coal Co.*, 118 Wis. 324; *Yerkes v. Northern Pac. R. Co.*, 112 Wis. 184, 88 Am. St. Rep. 961.

*Canada.* — *Sim v. Dominion Fish Co.*, 2 Ont. L. Rep. 69.

Where the obvious defect is such that there is no room for diverse inference with regard to the knowledge and appreciation of the danger thereof by the injured employee, assumption of the risk becomes a question for the court, exactly as any other question of fact with regard to which the evidence is uncontroverted. Where there is room for diverse inference, the question is one for the jury. *Avery v. Nordyke, etc., Co.*, 34 Ind. App. 541.

By statute in *New York*, the question of assumption of risk is for the jury. *Ward v. Manhattan R. Co.*, 95 N. Y. App. Div. 437.

**162. 2. Proximate Cause of Injury** — *United*

*States.* — *Cecil v. American Sheet Steel Co.*, (C. C. A.) 129 Fed. Rep. 542; *Southern Pac. R. Co. v. Yeargin*, 109 Fed. Rep. 436, 48 C. C. A. 497; *Felton v. Harbeson*, 104 Fed. Rep. 737, 44 C. C. A. 188. See *Robinson v. Pittsburgh Coal Co.*, (C. C. A.) 129 Fed. Rep. 324.

*Alabama.* — *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; *McGhee v. Willis*, 134 Ala. 281.

*Arizona.* — *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1903) 71 Pac. Rep. 957.

*California.* — *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622.

*Illinois.* — *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Kellyville Coal Co. v. Strine*, 217 Ill. 516; *Central Union Bldg. Co. v. Kollander*, 212 Ill. 27; *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, *affirming* 99 Ill. App. 670; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; *Chicago Hair, etc., Co. v. Mueller*, 203 Ill. 558, *affirming* 106 Ill. App. 21; *Armour v. Golkowska*, 202 Ill. 144, *affirming* 95 Ill. App. 492; *Landgraf v. Kuh*, 188 Ill. 484; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Ostot v. Indiana, etc., R. Co.*, 103 Ill. App. 136; *Regan v. Sargent Co.*, 98 Ill. App. 617; *Donk Bros. Coal, etc., Co. v. Peton*, 95 Ill. App. 193, *affirmed* 192 Ill. 41; *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13, *affirmed* 198 Ill. 125.

*Indiana.* — *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Indiana, etc., Coal Co. v. Neal*, (Ind. App. 1905) 75 N. E. Rep. 295; *Terre Haute Electric Co. v. Kieley*, 35 Ind. App. 180.

*Kentucky.* — *Louisville, etc., R. Co. v. Ewing*, 117 Ky. 624.

*Michigan.* — *Wellihan v. National Wheel Co.*, 128 Mich. 1, 8 Detroit Leg. N. 487.

*Minnesota.* — *Jensen v. Commodore Min. Co.*, 94 Minn. 53; *Kohout v. Newman*, (Minn. 1905) 104 N. W. Rep. 764; *Truax v. Minneapolis, etc., R. Co.*, 89 Minn. 143.

*Missouri.* — *Henderson v. Kansas City*, 177 Mo. 477; *Haworth v. Mineral Belt Telephone Co.*, 105 Mo. App. 161; *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372.

*New Hampshire.* — *Olney v. Boston, etc., R. Co.*, 71 N. H. 427.

*New York.* — *O'Keefe v. Great Northern Elevator Co.*, 105 N. Y. App. Div. 8; *Hosford v. New York Cent., etc., R. Co.*, 39 N. Y. App. Div. 327, *affirmed* without opinion 161 N. Y. 660.

*North Carolina.* — *Peoples v. North Carolina R. Co.*, 137 N. Car. 96; *Walker v. Carolina Cent. R. Co.*, 135 N. Car. 738; *Stewart v. Raleigh, etc., Air Line R. Co.*, 137 N. Car. 687.

*Oregon.* — *Miller v. Inman*, 40 Oregon 161.

*Rhode Island.* — *Venbuhr v. Lafayette Worsted Mills*, 27 R. I. 89.

*South Carolina.* — *Carson v. Southern R. Co.*, 68 S. Car. 55, *judgment affirmed* Southern R. Co. v. Carson, 194 U. S. 136.

*Texas.* — *Galveston, etc., R. Co. v. Pendleton*, 30 Tex. Civ. App. 431. *Compare* *El Paso, etc., R. Co. v. Vizard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 457; *Gulf, etc., R. Co. v. Hill*, 29 Tex. Civ. App. 12.

*Utah.* — *Hill v. Southern Pac. R. Co.*, 23 Utah 94.

*Virginia.* — *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362.



**163. Where Only One Inference Deducible from Facts. — See note 1.**

*Washington.* — *Goe v. Northern Pac. R. Co.*, 30 Wash. 654.

*Wisconsin.* — *Segall v. Padlasky*, 123 Wis. 207; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883; *Nix v. C. Reiss Coal Co.*, 114 Wis. 493.

**162. 3. Scope of Employment.** — *Mitchell-Tranter Co. v. Ehmet*, 65 S.W. Rep. 835, 23 Ky. L. Rep. 1788; *Louisville, etc., R. Co. v. Tucker*, 65 S.W. Rep. 453, 23 Ky. L. Rep. 1929; *Barr v. Guelph Patent Cask Co.*, 129 Mich. 278, 8 Detroit Leg. N. 956; *Bennett v. Warren*, 70 N. H. 564; *Doyle v. Pittsburg Waste Co.*, 204 Pa. St. 618; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

**163. 1. Where Only One Inference Deducible from Facts — United States.** — *Riley v. Louisville, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 904; *Southern Pac. R. Co. v. Gloyd*, (C. C. A.) 138 Fed. Rep. 388; *Deye v. Lodge, etc., Mach. Tool Co.*, (C. C. A.) 137 Fed. Rep. 480; *Canadian Pac. R. Co. v. Elliott*, (C. C. A.) 137 Fed. Rep. 904; *Diamond Coal, etc., Co. v. Allen*, (C. C. A.) 137 Fed. Rep. 705; *Richmond Locomotive Works v. Ramsey*, (C. C. A.) 131 Fed. Rep. 197; *McMillan v. Grand Trunk R. Co.*, (C. C. A.) 130 Fed. Rep. 827; *Denver, etc., R. Co. v. Arrighi*, (C. C. A.) 129 Fed. Rep. 347; *Robinson v. Pittsburg Coal Co.*, (C. C. A.) 129 Fed. Rep. 324; *Gilbert v. Burlington, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 529, *affirming* 123 Fed. Rep. 832; *Parotte v. Holbrook*, 127 Fed. Rep. 1013; *Bunker Hill, etc., Min., etc., Co. v. Kettleson*, (C. C. A.) 121 Fed. Rep. 529; *Erie R. Co. v. Kane*, (C. C. A.) 118 Fed. Rep. 223; *Kenney v. Meddaugh*, (C. C. A.) 118 Fed. Rep. 209; *Patton v. Southern R. Co.*, 111 Fed. Rep. 712, 49 C. C. A. 569; *McKenna Steel Working Co. v. Lewis*, (C. C. A.) 111 Fed. Rep. 320; *Mexican Cent. R. Co. v. Glover*, 107 Fed. Rep. 356, 46 C. C. A. 334; *Cudahy Packing Co. v. Marcan*, (C. C. A.) 106 Fed. Rep. 645; *Whitcomb v. McNulty*, (C. C. A.) 105 Fed. Rep. 863; *Hodges v. Kimball*, (C. C. A.) 104 Fed. Rep. 745; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658. See *Chicago G. W. R. Co. v. Roddy*, (C. C. A.) 131 Fed. Rep. 712; *Boudrot v. Cocrane Chemical Co.*, 110 Fed. Rep. 919.

*Alabama.* — *Northern Alabama Coal, etc., Co. v. Beacham*, 140 Ala. 422; *Coosa Mfg. Co. v. Williams*, 133 Ala. 606; *Melton v. E. E. Jackson Lumber Co.*, 133 Ala. 580; *Pioneer Min., etc., Co. v. Thomas*, 133 Ala. 279; *Tuscaloosa Water Works Co. v. Herren*, 131 Ala. 81.

*Arkansas.* — *Walker v. Louis-Werner Sawmill Co.*, (Ark. 1905) 88 S. W. Rep. 988.

*California.* — *Turner v. Southern Pac. Co.*, 142 Cal. 580; *Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479; *Thompson v. California Constr. Co.*, (Cal. 1905) 82 Pac. Rep. 367.

*District of Columbia.* — *Hayzel v. Columbia R. Co.*, 19 App. Cas. (D. C.) 359; *Sardo v. Moreland*, 17 App. Cas. (D. C.) 219.

*Georgia.* — *Cartledge v. Pierpont Mfg. Co.*, 120 Ga. 221; *Daniel v. Central of Georgia R. Co.*, 119 Ga. 246; *Edwards v. Central of Georgia R. Co.*, 118 Ga. 678; *Roul v. Palmer Brick Co.*, 114 Ga. 910; *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720.

*Illinois.* — *Cullen v. Higgins*, 216 Ill. 78; *Chicago, etc., R. Co. v. Howell*, 208 Ill. 155, *affirming* 109 Ill. App. 546; *Chicago, etc., R. Co. v. Barr*, 204 Ill. 163; *Browne v. Siegel*, 191 Ill. 226, *affirming* 90 Ill. App. 49; *Whalin v. Illinois Cent. R. Co.*, 112 Ill. App. 428; *Sanks v. Chicago, etc., R. Co.*, 112 Ill. App. 385; *Electrical Installation Co. v. Kelly*, 110 Ill. App. 334; *Stationers' Mfg. Co. v. Benjamin*, 109 Ill. App. 96; *Deering Harvester Co. v. Hefferman*, 107 Ill. App. 636; *Shickle, etc., Iron Co. v. Glon*, 106 Ill. App. 645; *Moster v. Terminal R. Assoc.*, 106 Ill. App. 494; *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76; *Baltimore, etc., R. Co. v. Greer*, 103 Ill. App. 448; *Illinois Cent. R. Co. v. Schumann*, 101 Ill. App. 668; *Pioneer Fire Proof Constr. Co. v. Sandberg*, 98 Ill. App. 36; *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175; *Munn v. L. Wolff Mfg. Co.*, 94 Ill. App. 122; *Greaser v. Chicago, etc., R. Co.*, 93 Ill. App. 476; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284, *affirmed* 195 Ill. 31; *Doolittle v. Pfaff*, 92 Ill. App. 301; *Mattson v. Qualey Constr. Co.*, 90 Ill. App. 260.

*Indiana.* — *Cleveland, etc., R. Co. v. Haas*, 35 Ind. App. 626; *Jennings v. Ingle*, 35 Ind. App. 153; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280; *Shaver v. Home Telephone Co.*, (Ind. App. 1905) 75 N. E. Rep. 288; *Cleveland, etc., R. Co. v. Goddard*, 33 Ind. App. 321; *Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145; *Barley v. Southern Indiana R. Co.*, 30 Ind. App. 406.

*Iowa.* — *Brooks v. W. T. Joyce Co.*, 127 Iowa 266; *Lynn v. Glucose Sugar Refining Co.*, (Iowa 1905) 104 N. W. Rep. 577; *Dillon v. Iowa Cent. R. Co.*, 118 Iowa 645; *Forbes v. Boone Valley Coal, etc., Co.*, 113 Iowa 94.

*Kentucky.* — *Buey v. Chess, etc., Co.*, 84 S. W. Rep. 563, 27 Ky. L. Rep. 198; *Justice v. W. M. Ritter Lumber Co.*, (Ky. 1905) 89 S. W. Rep. 171; *Carey v. Samuels*, 88 S. W. Rep. 1052, 28 Ky. L. Rep. 6; *Illinois Cent. R. Co. v. Mercer*, 88 S. W. Rep. 1054, 28 Ky. L. Rep. 3; *Illinois Cent. R. Co. v. Mercer*, 80 S. W. Rep. 816, 25 Ky. L. Rep. 2250; *Calvert v. Brosius*, 77 S. W. Rep. 1098, 25 Ky. L. Rep. 1393; *Louisville, etc., R. Co. v. Hall*, 115 Ky. 567; *Brooks v. Louisville, etc., R. Co.*, 71 S. W. Rep. 507, 24 Ky. L. Rep. 1318; *Illinois Cent. R. Co. v. Mercer*, 70 S. W. Rep. 287, 24 Ky. L. Rep. 908; *Coleman v. Pittsburg, etc., R. Co.*, 63 S. W. Rep. 39, 23 Ky. L. Rep. 401; *Bush v. Grant*, 61 S. W. Rep. 363, 22 Ky. L. Rep. 1766; *Louisville, etc., R. Co. v. Scanlon*, 60 S. W. Rep. 643, 22 Ky. L. Rep. 1400.

*Louisiana.* — *Rucks v. Minden Lumber Co.*, 109 La. 933.

*Maine.* — *Snowdale v. United Box Board, etc., Co.*, (Me. 1905) 61 Atl. Rep. 683.

*Maryland.* — *Baltimore, etc., R. Co. v. State*, 101 Md. 359; *Tkac v. Maryland Steel Co.*, 101 Md. 179; *Maryland Telephone, etc., Co. v. Cloman*, 97 Md. 620.

*Massachusetts.* — *Needham v. Stone*, 186 Mass. 565; *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511; *Morris v. Boston, etc., R. Co.*, 184 Mass. 368; *Ahern v. Hildreth*, 183 Mass. 296; *Chmiel v. Thorndike Co.*, 182 Mass. 112;

*Morris v. Walworth Mfg. Co.*, 181 Mass. 326; *Wyman v. Clark*, 180 Mass. 173; *Donovan v. American Linen Co.*, 180 Mass. 127; *McClusky v. Garfield, etc.*, Coal Co., 180 Mass. 115; *Langley v. Wheelock*, 181 Mass. 474; *Bodwell v. Moore*, 180 Mass. 590; *Hall v. Wakefield, etc.*, St. R. Co., 178 Mass. 98.

*Michigan*.—*Fuller v. Ann Arbor R. Co.*, (Mich. 1905) 104 N. W. Rep. 414, 12 Detroit Leg. N. 348; *Martin v. Detroit Lumber Co.*, (Mich. 1905) 104 N. W. Rep. 692; *Mushinski v. Vincent*, 135 Mich. 26, 10 Detroit Leg. N. 658; *Schwandt v. William Wright Co.*, 126 Mich. 609.

*Minnesota*.—*Griffin v. Minnesota Transfer R. Co.*, 94 Minn. 191; *Carleton v. Great Northern R. Co.*, 93 Minn. 378; *McKenna v. Chicago, etc.*, R. Co., 92 Minn. 508 judgment affirmed on rehearing 92 Minn. 516; *Wendler v. Red Wing Gas, etc.*, Co., 92 Minn. 122; *Parker v. Pine Tree Lumber Co.*, 89 Minn. 500; *Sours v. Great Northern R. Co.*, 88 Minn. 504; *Bischoff v. St. Paul Bethel Assoc.*, 82 Minn. 105; *Dixon v. Union Ironworks*, 90 Minn. 492; *Blom v. Yellowstone Park Assoc.*, 86 Minn. 237.

*Missouri*.—*Evans v. Wabash R. Co.*, 178 Mo. 508; *Oglesby v. Missouri Pac. R. Co.*, 177 Mo. 272; *Doerr v. St. Louis Brewing Assoc.*, 176 Mo. 547; *Chandler v. Kansas City Missouri Gas Co.*, 174 Mo. 321, 97 Am. St. Rep. 570; *Holmes v. Bradenbaugh*, 172 Mo. 53; *Roberts v. Missouri, etc.*, Telephone Co., 166 Mo. 370; *George v. St. Louis Mfg. Co.*, 159 Mo. 333; *Purcell v. Tennent Shoe Co.*, 187 Mo. 276; *Furber v. Kansas City Bolt, etc.*, Co., 185 Mo. 301; *Helm v. Missouri Pac. R. Co.*, 185 Mo. 212; *Dickey v. Dickey*, 111 Mo. App. 304; *Smith v. Hammond Packing Co.*, 111 Mo. App. 13; *Wendall v. Chicago, etc.*, R. Co., 100 Mo. App. 556; *Borden v. Falk Co.*, 97 Mo. App. 566; *Morelock v. Chicago, etc.*, R. Co., 112 Mo. App. 640.

*Montana*.—*Cummings v. Helena, etc.*, Smelting, etc., Co., 26 Mont. 434.

*Nebraska*.—*Fielding v. Chicago, etc.*, R. Co., (Neb. 1904) 101 N. W. Rep. 1022; *Weed v. Chicago, etc.*, R. Co., (Neb. 1904) 99 N. W. Rep. 827; *Chicago, etc.*, R. Co. v. *Healey*, (Neb. 1904) 97 N. W. Rep. 1024; *Fifer v. Burch*, 68 Neb. 217.

*New Jersey*.—*Humphries v. Raritan Copper Works*, (N. J. 1905) 60 Atl. Rep. 62.

*New York*.—*Gallenkamp v. Garvin Mach. Co.*, 179 N. Y. 588, reversing 91 N. Y. App. Div. 141, on dissenting opinion of Ingraham, J.; *Johnson v. Prince Line*, 104 N. Y. App. Div. 157; *Holm v. Empire Hardware Co.*, 102 N. Y. App. Div. 505; *Owen v. Retsof Min. Co.*, 102 N. Y. App. Div. 130; *Jones v. John Kroder, etc.*, Co., 95 N. Y. App. Div. 140; *Ehrenfried v. Lackawanna Iron, etc.*, Co., 89 N. Y. App. Div. 130, affirmed without opinion 180 N. Y. 515; *Bookman v. Masterson*, 83 N. Y. App. Div. 4; *Corcoran v. New York, etc.*, R. Co., 77 N. Y. App. Div. 505; *Loushay v. Erie R. Co.*, 75 N. Y. App. Div. 619; *Webb v. Haynes*, 75 N. Y. App. Div. 620; *O'Connell v. Clark*, 75 N. Y. App. Div. 619; *Kueckel v. O'Connor*, 73 N. Y. App. Div. 594; *Trapasso v. Coleman*, 74 N. Y. App. Div. 33; *Apati v. Delaware, etc.*, R. Co., 64 N. Y. App. Div. 515.

*North Carolina*.—*Covington v. Smith Furni-*

*ture Co.*, 138 N. Car. 374; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. Car. 319; *Holland v. Seaboard Air Line R. Co.*, 137 N. Car. 368; *Walker v. Carolina Cent. R. Co.*, 135 N. Car. 738; *Bingham v. Carolina Cent. R. Co.*, 130 N. Car. 623; *Raiford v. Wilmington, etc.*, R. Co., 130 N. Car. 597; *Carter v. Cape Fear Lumber Co.*, 129 N. Car. 203; *Stewart v. Southern R. Co.*, 128 N. Car. 517; *Bryan v. Southern R. Co.*, 128 N. Car. 387; *Haltom v. Southern R. Co.*, 127 N. Car. 255; *Meekins v. Norfolk, etc.*, R. Co., 127 N. Car. 29.

*Ohio*.—*Wabash R. Co. v. Skiles*, 64 Ohio St. 458; *Hunt v. Caldwell*, 11 Ohio Cir. Dec. 562, 22 Ohio Cir. Ct. 283; *Crawford v. New York, etc.*, R. Co., 23 Ohio Cir. Ct. 207; *Shadle v. Cleveland Electric Illuminating Co.*, 12 Ohio Cir. Dec. 37, 22 Ohio Cir. Ct. 49; *Beucker v. Baker*, 11 Ohio Cir. Dec. 642, 21 Ohio Cir. Ct. 540; *McCarty v. Baltimore R. Co.*, 11 Ohio Cir. Dec. 229, 20 Ohio Cir. Ct. 536.

*Oklahoma*.—*Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

*Oregon*.—*Tucker v. Northern Pac. Terminal R. Co.*, 41 Oregon 82.

*Pennsylvania*.—*Owens v. Thomas Kent Mfg. Co.*, 211 Pa. St. 406; *Laven v. Moore*, 211 Pa. St. 245; *White v. Roydhouse*, 211 Pa. St. 13; *Meixner v. Philadelphia Brewing Co.*, 210 Pa. St. 597; *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153; *Douglass v. New York Cent., etc.*, R. Co., 209 Pa. St. 128; *Laudeman v. Ryan*, 209 Pa. St. 3; *Tomaczewski v. Dobson*, 208 Pa. St. 324; *Masterson v. Eldridge*, 208 Pa. St. 242; *McIntire v. Pittsburg Steel Foundry*, 208 Pa. St. 34; *Nelson v. Oil City St. R. Co.*, 207 Pa. St. 363; *Schlemmer v. Buffalo, etc.*, R. Co., 207 Pa. St. 198; *Baldwin v. Urner*, 206 Pa. St. 459; *Diver v. Singer Mfg. Co.*, 205 Pa. St. 170; *Lehman v. Carbon Steel Co.*, 204 Pa. St. 612; *Ehni v. National Tube Works Co.*, 203 Pa. St. 186, 93 Am. St. Rep. 761; *Hall v. Simpson*, 203 Pa. St. 146; *Price v. Lehigh Valley R. Co.*, 202 Pa. St. 176; *Hart v. Allegheny County Light Co.*, 201 Pa. St. 234; *Hughes v. Leonard*, 199 Pa. St. 123; *Kupp v. Rummel*, 199 Pa. St. 90; *Wilkinson v. H. W. Johns Mfg. Co.*, 198 Pa. St. 634; *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625; *Carnegie v. Penn Bridge Co.*, 197 Pa. St. 441; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

*Rhode Island*.—*Venbuur v. Lafayette Worsted Mills*, 27 R. I. 89; *Smith v. Naushon Co.*, 26 R. I. 578; *Desrosiers v. Bourn*, 26 R. I. 6, reargument denied 26 R. I. 156; *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430.

*South Carolina*.—*Gentry v. Southern R. Co.*, 66 S. Car. 256; *Martin v. Royster Guano Co.*, 72 S. Car. 237.

*Tennessee*.—*Greenlaw v. Louisville, etc.*, R. Co., 114 Tenn. 187.

*Texas*.—*Gulf, etc.*, R. Co. v. *Larkin*, 98 Tex. 225, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 94; *Hernischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1; *McNiff v. Texas Midland R. Co.*, 26 Tex. Civ. App. 558; *Broadway v. San Antonio Gas Co.*, 24 Tex. Civ. App. 603; *Cardwell v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 422; *Smith v. Atchison, etc.*, R. Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 1052; *Texas, etc.*, R. Co. v. *Sherman*, (Tex. Civ. App.

**163. XXIX. MASTER'S LIABILITY TO THIRD PERSONS—1. Negligence of Servant—***a. ACTS WITHIN SCOPE OF EMPLOYMENT—(1) In General.*—See note 2.

1905) 87 S. W. Rep. 887; *Burns v. Chronister Lumber Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 163; *Texas, etc., R. Co. v. Hemphill*, (Tex. Civ. App. 1905) 86 S. W. Rep. 350; *Missouri, etc., R. Co. v. Barnes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1006; *Gulf, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 83 S. W. Rep. 719; *Bennett v. St. Louis Southwestern R. Co.*, 36 Tex. Civ. App. 459; *Sauls v. Chicago, etc., R. Co.*, 36 Tex. Civ. App. 155; *Ft. Worth Stock Yards Co. v. Whittenburg*, 34 Tex. Civ. App. 163; *Seery v. Gulf, etc., R. Co.*, 34 Tex. Civ. App. 89; *Jones v. Missouri, etc., R. Co.*, 32 Tex. Civ. App. 286; *Texas, etc., R. Co. v. Stewart*, 30 Tex. Civ. App. 408; *Ft. Worth, etc., R. Co. v. Ramp*, 30 Tex. Civ. App. 483; *Houston, etc., R. Co. v. Loeffler*, (Tex. Civ. App. 1900) 59 S. W. Rep. 558.

*Utah.*—*Dunn v. Oregon Short Line R. Co.*, 28 Utah 478; *Roth v. Eccles*, 28 Utah 456; *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307; *Christenson v. Rio Grande Western R. Co.*, 27 Utah 132, 101 Am. St. Rep. 945.

*Vermont.*—*Skinner v. Central Vermont R. Co.*, 73 Vt. 336; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939.

*Virginia.*—*Norfolk, etc., R. Co. v. Hawkes*, 102 Va. 452; *Wise Terminal Co. v. McCormick*, (Va. 1905) 51 S. E. Rep. 731; *Street v. Norfolk, etc., R. Co.*, 101 Va. 746; *McDaniel v. Lynchburg Cotton Mills Co.*, 99 Va. 146, 3 Va. Sup. Ct. 63.

*Washington.*—*Steeple v. Panel, etc., Co.*, 33 Wash. 359; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604; *Johnson v. Anderson, etc., Lumber Co.*, 31 Wash. 554; *Decker v. Stimson Mill Co.*, 31 Wash. 522; *Robare v. Seattle Traction Co.*, 24 Wash. 577; *Danuser v. Seller*, 24 Wash. 565; *Lee v. Northern Pac. R. Co.*, 39 Wash. 388; *Beltz v. American Mill Co.*, 37 Wash. 399; *Krickeberg v. St. Paul, etc., Lumber Co.*, 37 Wash. 63; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705; *French v. First Ave. R. Co.*, 24 Wash. 83.

*West Virginia.*—*Cochran v. Shanahan*, 51 W. Va. 137; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606.

*Wisconsin.*—*Grams v. C. Reiss Coal Co.*, 125 Wis. 1; *Gardner v. Paine Lumber Co.*, 123 Wis. 338; *Upthegrove v. Jones, etc., Coal Co.*, 118 Wis. 673; *Zahn v. Milwaukee, etc., R. Co.*, 114 Wis. 38; *Muenchow v. Theo. Zschetzsch, etc., Co.*, 113 Wis. 8; *Cosgrove v. Filer, etc., Co.*, 112 Wis. 457; *Relyea v. Tomahawk Pulp, etc., Co.*, 110 Wis. 307; *Williams v. J. G. Wagner Co.*, 110 Wis. 456; *Powalske v. Cream City Brick Co.*, 110 Wis. 461; *Dunlavy v. Racine Malleable, etc., Iron Co.*, 110 Wis. 391; *Groth v. Thomann*, 110 Wis. 488; *Byersdorf v. Cream City Sash, etc., Co.*, 109 Wis. 456; *Buckmaster*

*v. Chicago, etc., R. Co.*, 108 Wis. 353; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57.

**Assumption of Risks.**—Where the uncontradicted evidence discloses the fact that the defect in the place or machinery was obvious, and the danger from it apparent to an ordinarily prudent person of the intelligence and capacity of the servant, and that the servant entered upon or continued in the service without complaint of it, the defense of assumption of risk is conclusively established, there is no question for a jury, and the court should instruct them to return a verdict for the master. *St. Louis Cordage Co. v. Miller*, (C. C. A.) 126 Fed. Rep. 495; *Glenmont Lumber Co. v. Roy*, (C. C. A.) 126 Fed. Rep. 524.

**163. 2. Liability of Master for Servant's Negligence—***United States.*—*De Haven v. Hennessey Bros., etc., Co.*, (C. C. A.) 137 Fed. Rep. 472.

*Alabama.*—*Steele v. May*, 135 Ala. 483, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

*Connecticut.*—*Rooney v. Woolworth*, (Conn. 1905) 61 Atl. Rep. 366.

*Illinois.*—*Chicago v. O'Malley*, 196 Ill. 197; *Belt R. Co. v. Banicki*, 102 Ill. App. 642.

*Indiana.*—*Brudi v. Luhrman*, 26 Ind. App. 221.

*Iowa.*—*Williams v. Mineral City Park Assoc.*, (Iowa 1905) 102 N. W. Rep. 783.

*Kentucky.*—*Merschel v. Louisville, etc., R. Co.*, (Ky. 1905) 85 S. W. Rep. 710.

*Massachusetts.*—*Brough v. Towle*, 187 Mass. 590. See *Firth v. Rich*, 179 Mass. 206.

*Minnesota.*—*Lesch v. Great Northern R. Co.*, 93 Minn. 435.

*Mississippi.*—*Barmore v. Vicksburg, etc., R. Co.*, 85 Miss. 426.

*Nebraska.*—*Chicago, etc., R. Co. v. Kerr*, (Neb. 1905) 104 N. W. Rep. 49; *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440, affirmed on rehearing (Neb. 1905) 103 N. W. Rep. 446; *L. W. Pomerene Co. v. White*, (Neb. 1903) 97 N. W. Rep. 232, judgment modified on rehearing (Neb. 1904) 98 N. W. Rep. 1040.

*New Jersey.*—*Salisbury v. Erie R. Co.*, 66 N. J. L. 233, 88 Am. St. Rep. 480.

*New York.*—*Ford v. Arbuckle*, 107 N. Y. App. Div. 221; *Magar v. Hammond*, 95 N. Y. App. Div. 249; *Kavanagh v. Vollmer*, (Supm. Ct. App. T.) 84 N. Y. Supp. 475; *Kelmer v. Reckitt*, 75 N. Y. App. Div. 180; *P. Cox Shoe Mfg. Co. v. Gorsline*, 63 N. Y. App. Div. 517; *Monahan v. Eidlitz*, 59 N. Y. App. Div. 224; *Bower v. Cushman*, 55 N. Y. App. Div. 45; *Riegler v. Tribune Assoc.*, 40 N. Y. App. Div. 324, affirmed without opinion 167 N. Y. 542; *Block v. Sherry*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 344, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163.

*Pennsylvania.*—*Hyman v. Tilton*, 208 Pa. St. 641; *Garner v. Citizen's Natural Gas Co.*, 198 Pa. St. 16.

*South Dakota.*—*Lovejoy v. Campbell*, 16 S. Dak. 231.

**164.** See notes 1, 2.

**166.** (3) *Negligence in Using Master's Horses.* — See notes 1, 3.  
Deviation from Route. — See notes 4, 5.

**167.** (4) *Obstruction of Roads, Streams, Etc.* — See note 1.

(5) *Disobedience of Orders or Instructions of Master.* — See note 2.

**168.** *b.* ACTS OUTSIDE SCOPE OF EMPLOYMENT. — See note 1.

*Texas.* — Houston, etc., R. Co. v. Bulger, 35 Tex. Civ. App. 478; International, etc., R. Co. v. Branch, 29 Tex. Civ. App. 144; Missouri, etc., R. Co. v. Edwards, (Tex. Civ. App. 1902) 67 S. W. Rep. 891.

*Washington.* — Dumontier v. Stetson, etc., Mill Co., 39 Wash. 264.

*Wisconsin.* — Euting v. Chicago, etc., R. Co., 116 Wis. 13, 96 Am. St. Rep. 936.

*Canada.* — Minns v. Omemee, 2 Ont. L. Rep. 579.

**164. 1. Act Unnecessary to Performance of Duties.** — Alsever v. Minneapolis, etc., R. Co., 115 Iowa 338; P. Cox Shoe Mfg. Co. v. Gorsline, 63 N. Y. App. Div. 517.

**2. Knowledge of or Express Authorization by Master Not Necessary.** — Steele v. May, 135 Ala. 483, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 164; Lesch v. Great Northern R. Co., 93 Minn. 435; Barmore v. Vicksburg, etc., R. Co., 85 Miss. 426; Weber v. Lockman, 66 Neb. 469; Kavanagh v. Vollmer, (Supm. Ct. App. T.) 84 N. Y. Supp. 475. See Brough v. Towle, 187 Mass. 590; Riegler v. Tribune Assoc., 40 N. Y. App. Div. 324, affirmed without opinion 167 N. Y. 542; Guille v. Campbell, 200 Pa. St. 119, 86 Am. St. Rep. 705.

**Servant Combining Personal Business with Business of Master.** — The fact that the servant is combining his own business with that of the master does not necessarily relieve the master from liability. Carl Corper Brewing, etc., Co. v. Huggins, 96 Ill. App. 144.

**166. 1. Negligence in Using Master's Horses.** — Brudi v. Luhrman, 26 Ind. App. 221; Doherty v. Rice, 182 Mass. 182; Driscoll v. Towle, 181 Mass. 416; Steinacker v. Hills Bros. Co., 91 N. Y. App. Div. 521; O'Leary v. Muldoon, 56 N. Y. App. Div. 626; Prinz v. Lucas, 210 Pa. St. 620.

**Leaving Horse Unsecured.** — A master has been held liable for the negligence of his servant in leaving the master's horse unsecured in a street contrary to the provisions of an ordinance. Healy v. Johnson, 127 Iowa 221.

**Ownership of Conveyance by Servant.** — It has been said that where the conveyance is used about the master's business, and with his knowledge of such use, the fact that it is owned by the servant does not alone relieve the master of liability. Carl Corper Brewing, etc., Co. v. Huggins, 96 Ill. App. 144.

**3. Where Servant Is Acting Solely for His Own Purpose.** — Carl Corper Brewing, etc., Co. v. Huggins, 96 Ill. App. 144; McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490; Perlstein v. American Express Co., 177 Mass. 530. See Long v. Richmond, 68 N. Y. App. Div. 466, affirmed without opinion 175 N. Y. 495; Marquis v. Robidoux, 19 Quebec Super. Ct. 361.

**4. Deviation from Route.** — Krzikowsky v. Sper-

ring, 107 Ill. App. 493; Lovejoy v. Campbell, 16 S. Dak. 231.

If the negligent act be done by the servant while engaged directly or indirectly in the master's business, liability of the master is not to be avoided on the ground alone that the servant has, for purposes of his own, chosen a method less direct than he might have selected for the work. Carl Corper Brewing, etc., Co. v. Huggins, 96 Ill. App. 144.

5. See Beard v. London Gen. Omnibus Co., (1900) 2 Q. B. 530, 69 L. J. Q. B. 895, 83 L. T. N. S. 362, 48 W. R. 658.

**167. 1. Using Water When Cleaning Sidewalk so as to Form Ice Thereon.** — Kavanagh v. Vollmer, (Supm. Ct. App. T.) 84 N. Y. Supp. 475.

**2. Disobedience of Express Orders.** — Healy v. Johnson, 127 Iowa 221; Crandall v. Boutell, (Minn. 1905) 103 N. W. Rep. 890; P. Cox Shoe Mfg. Co. v. Gorsline, 63 N. Y. App. Div. 517; Riegler v. Tribune Assoc., 40 N. Y. App. Div. 324, affirmed without opinion 167 N. Y. 542; St. Louis Southwestern R. Co. v. Mayfield, 35 Tex. Civ. App. 82. But compare Axtell v. Northern Pac. R. Co., 9 Idaho 392.

**Acts in Excess of Express Instructions.** — A master is responsible for the negligent conduct of his servants in furtherance of the master's business and within the line of their duty, although in excess of express instructions. Crandall v. Boutell, (Minn. 1905) 103 N. W. Rep. 890.

**168. 1. Acts Not Within Scope of Employment.** — England. — Sanderson v. Collins, 89 L. T. N. S. 42, 51 W. R. 558.

*Canada.* — Marquis v. Robidoux, 19 Quebec Super. Ct. 361.

*Connecticut.* — Fiske v. Enders, 73 Conn. 338.

*Idaho.* — Axtell v. Northern Pac. R. Co., 9 Idaho 392.

*Illinois.* — Sullivan v. Morrice, 109 Ill. App. 650; Krzikowsky v. Sperring, 107 Ill. App. 493; Belt R. Co. v. Banicki, 102 Ill. App. 642; Carl Corper Brewing, etc., Co. v. Huggins, 96 Ill. App. 144.

*Indiana.* — Wabash R. Co. v. Linton, 26 Ind. App. 596; Harrell v. Cleveland, etc., R. Co., 27 Ind. App. 29.

*Iowa.* — Reynolds v. Buck, 127 Iowa 601; Williams v. Mineral City Park Assoc., (Iowa 1905) 102 N. W. Rep. 783; Healy v. Patterson, 123 Iowa 73.

*Maryland.* — Hall v. Poole, 94 Md. 171.

*Massachusetts.* — McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490; Perlstein v. American Express Co., 177 Mass. 530; Ober-toni v. Boston, etc., R. Co., 186 Mass. 481.

*Michigan.* — Formall v. Standard Oil Co., 127 Mich. 496, 8 Detroit Leg. N. 453; Schulwitz v. Delta Lumber Co., 126 Mich. 559.

*Missouri.* — Atherton v. Kansas City Coal, etc., Co., 106 Mo. App. 591.

**169. 2. Wilful, Wanton, or Malicious Acts of Servant — a. ACTS WITHIN SCOPE OF EMPLOYMENT — (1) In General.** — See note 2.

**170.** See notes 1, 2.

*New Hampshire.* — *Turley v. Boston, etc., R. Co.*, 70 N. H. 348.

*New York.* — *Clark v. Buckmobile Co.*, 107 N. Y. App. Div. 120; *Stewart v. Baruch*, 103 N. Y. App. Div. 577; *Sandles v. Levenson*, 78 N. Y. App. Div. 306, *affirmed* without opinion 176 N. Y. 610; *Ray v. Keene*, 19 N. Y. App. Div. 147, *affirmed* without opinion 160 N. Y. 706.

*North Carolina.* — *Palmer v. Winston-Salem R., etc., Co.*, 131 N. Car. 252, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 168 notes, 169.

*Ohio.* — *Lima R. Co. v. Little*, 67 Ohio St. 91.

*Pennsylvania.* — *Guille v. Campbell*, 200 Pa. St. 119, 86 Am. St. Rep. 705; *Arzt v. Lit*, 198 Pa. St. 519; *Connor v. Pennsylvania R. Co.*, 24 Pa. Super. Ct. 241; *Nicholas v. Keeling*, 21 Pa. Super. Ct. 181.

*Texas.* — *St. Louis Southwestern R. Co. v. Mayfield*, 35 Tex. Civ. App. 82.

A boy about six years of age, a guest of the defendants at their hotel, wandered out of the room assigned to him, and into a room in which a bell boy or porter of the defendants was engaged in playing a harmonica for his own amusement, and the latter accidentally or wilfully shot the former with a pistol. It was held that the bell boy was not acting within the course or within the apparent or actual scope of his employment at the time of the shooting, and the innkeepers were not liable for the injury he inflicted. *Clancy v. Barker*, (C. C. A.) 131 Fed. Rep. 161.

**Liability of Husband for Wife's Negligence.** — It has been held that where a wife is engaged in the use of her husband's personal property in the performance of her duty as a wife, in domestic service for herself and her family, including her husband, not in his presence, he is not liable for a personal injury inflicted by her, not by his direction, but by her trespass, through her negligent use of such property. *Radke v. Schlundt*, 30 Ind. App. 213.

**Acts of Servant Intrusted with Dangerous Instrument.** — A master who intrusts the custody and control of a dangerous appliance or agency to the management of a servant will not be permitted to avoid responsibility for injuries inflicted thereby on the plea that the servant in the particular act complained of was acting outside the scope of his employment. *Barmore v. Vicksburg, etc., R. Co.*, 85 Miss. 426.

**169. 2. Modern Rule — Master Liable for Wilful or Malicious Acts of Servant — Alabama.** — *City Delivery Co. v. Henry*, 139 Ala. 161.

*Georgia.* — *Southern R. Co. v. James*, 118 Ga. 340, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169; *Central of Georgia R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250.

*Illinois.* — *Franklin L. Ins. Co. v. People*, 103 Ill. App. 554, *affirmed* 200 Ill. 619; *Belt R. Co. v. Banicki*, 102 Ill. App. 642; *Regan v. Reed*, 96 Ill. App. 460.

*Massachusetts.* — *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269.

*Minnesota.* — *Lesch v. Great Northern R. Co.*, 93 Minn. 435.

*Mississippi.* — *Yazoo, etc., R. Co. v. Martin*, (Miss. 1901) 29 So. Rep. 829.

*Missouri.* — *Overstreet v. Moser*, 88 Mo. App. 72.

*Nebraska.* — *Chicago, etc., R. Co. v. Kerr*, (Neb. 1905) 104 N. W. Rep. 49. See *Clancy v. Barker*, (Neb. 1904) 98 N. W. Rep. 440, *affirmed* on rehearing (Neb. 1905) 103 N. W. Rep. 446.

*New Jersey.* — *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 169.

*New York.* — *Reed v. New York, etc., Gas Co.*, 93 N. Y. App. Div. 453; *McGrath v. Michaels*, 80 N. Y. App. Div. 458; *Curley v. Electric Vehicle Co.*, 68 N. Y. App. Div. 18; *Griffith v. Friendly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 393, *affirmed* without opinion, 47 N. Y. App. Div. 635. See *Kessler v. Deutsch*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 209.

*South Carolina.* — *Reeves v. Southern R. Co.*, 68 S. Car. 89.

*Wisconsin.* — *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909.

See *Elsever v. Minneapolis, etc., R. Co.*, 115 Iowa 338; *Patterson v. Maysville, etc., R. Co.*, 78 S. W. Rep. 870, 25 Ky. L. Rep. 1750.

**Liability of Master Dependent on Negligence.** — Under section 746 of the Revised Code of Civil Procedure of *South Dakota*, giving to the widow of the deceased a right of action for damages against a railroad company for the killing of her husband, by reason of the neglect, carelessness, or unskilfulness of the corporation, its agents, servants, and employees, it seems that a railroad company is not liable for a wanton and reckless act of a servant unless it can be made to depend upon the negligence of the company, either in selecting such an agent, or in retaining him after having notice of his vicious character. *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. Rep. 306.

**In Louisiana.** — Under the Louisiana Civil Code, art. 2320, the responsibility of masters is confined to damages occasioned by their servants in the "exercise of the functions in which they are employed," and they are not liable for collateral torts committed by servants while attending to the duties of their employment. *Vara v. R. M. Quigley Constr. Co.*, 114 La. 261.

**170. 1. Servant's Belief that He Acted Within Scope of Employment Immaterial.** — *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

**2. Immaterial that Servant Acted Contrary to Express Orders of Master.** — A master may be held responsible for the acts of his servant within the general scope of his employment while engaged in the master's business, even though the servant may have disregarded some particular direction of the master in respect to the manner in which he shall discharge his duties. *Kastner v. Long Island R. Co.*, (Supm. Ct. App. Div.) 12 N. Y. Annot. Cas. 77, 76 N. Y. App. Div. 323.

- 171.** (2) *Trespass*. — See note 1.  
 (4) *Assault and Battery*. — See note 3.  
**172.** *Servants Retaking Master's Property*. — See note 1.  
*Watchmen, Detectives, Etc.* — See note 2.  
*Railroad Companies*. — See note 4.  
**173.** (5) *False Arrest and Imprisonment*. — See note 7.  
**174.** (6) *Malicious Prosecution*. — See note 3.  
 (7) *Libel*. — See note 4.  
 (8) *Fraud*. — See note 5.

**175.** *b. ACTS OUTSIDE OF SCOPE OF EMPLOYMENT*. — See notes 1, 3, 4, 5, 6.

**171. 1. Trespass by Breaking and Entering Dwelling.** — *Reed v. New York, etc., Gas Co.*, 93 N. Y. App. Div. 453.

*Trees Cut by Servant to Prevent Obstruction of Master's Electric Wires.* — *Van Siclen v. Jamaica Electric Light Co.*, 45 N. Y. App. Div. 1, *affirmed* without opinion 168 N. Y. 650.

**3. Liability of Master for Assault and Battery by Servant.** — *Brooks v. Jennings County Agricultural Joint-Stock Assoc.*, 35 Ind. App. 221; *Boyer v. Coxen*, 92 Md. 366; *Overstreet v. Moser*, 88 Mo. App. 72; *Hyman v. Tilton*, 208 Pa. St. 641; *McFarlan v. Pennsylvania R. Co.*, 199 Pa. St. 408. See *Memphis, etc., Packet Co. v. Hill*, (C. C. A.) 122 Fed. Rep. 246.

**172. 1. Assault by Servant Reclaiming Master's Property.** — *Griffith v. Friendly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 393, *affirmed* without opinion 47 N. Y. App. Div. 635.

**2. Assaults by Watchmen, Etc.** — *Letts v. Hoboken R., etc., Co.*, 70 N. J. L. 358; *Magar v. Hammond*, 95 N. Y. App. Div. 249.

**4. Power of Conductor to Remove Trespasser.** — *Central of Georgia R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250; *Chicago, etc., R. Co. v. Kerr*, (Neb. 1905) 104 N. W. Rep. 49. See *McFarlan v. Pennsylvania R. Co.*, 199 Pa. St. 408.

**173. 7. Liability of Master for False Imprisonment by Servant.** — *Kastner v. Long Island R. Co.*, (Supm. Ct. App. Div.) 12 N. Y. Annot. Cas. 77, 76 N. Y. App. Div. 323.

**174. 3. Liability of Master for Malicious Prosecution by Servant.** — *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1.

**4. Liability of Master for Libel by Servant.** — See *Citizen's L. Assur. Co. v. Brown*, (1904) A. C. 423, 73 L. J. P. C. 102, 90 L. T. N. S. 739.

**5. Liability of Master for Fraud of Servant.** — *Palo Alto Bank v. Pacific Postal Tel. Cable Co.*, 103 Fed. Rep. 841, decided under *California Civil Code*, § 2338. See *Franklin L. Ins. Co. v. People*, 103 Ill. App. 554, *affirmed* 200 Ill. 619.

**175. 1. Master Not Liable for Wilful and Malicious Acts of Servant Outside of Scope of Employment** — *Indiana*. — *Wabash R. Co. v. Linton*, 26 Ind. App. 596.

*Kentucky*. — *Mace v. Ashland Coal, etc., R. Co.*, 118 Ky. 885; *Patterson v. Maysville, etc., R. Co.*, 78 S. W. Rep. 870, 25 Ky. L. Rep. 1750; *Louisville, etc., R. Co. v. Routt*, 76 S. W. Rep. 513, 25 Ky. L. Rep. 887.

*Massachusetts*. — *Berry v. Boston El. R. Co.*, 188 Mass. 536; *Brown v. Boston Ice Co.*, 178 Mass. 108, 86 Am. St. Rep. 469.

*Mississippi*. — *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 84 Am. St. Rep. 620.

*Missouri*. — *Collette v. Reböri*, 107 Mo. App. 711.

*New Hampshire*. — *Turley v. Boston, etc., R. Co.*, 70 N. H. 348.

*New Jersey*. — *Evers v. Krouse*, 70 N. J. L. 653; *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546.

*Rhode Island*. — *Benton v. James Hill Mfg. Co.*, 26 R. I. 192; *Sekator v. Lannon*, 26 R. I. 125; *Paulton v. Keith*, 23 R. I. 164, 91 Am. St. Rep. 624.

*South Carolina*. — *Davenport v. Charleston, etc., R. Co.*, 72 S. Car. 205.

*Texas*. — *St. Louis Southwestern R. Co. v. Mayfield*, 35 Tex. Civ. App. 82.

*Wisconsin*. — *Cobb v. Simon*, 124 Wis. 467, 119 Wis. 597, 100 Am. St. Rep. 909.

**Apparent Scope of Authority.** — On the ground that it is the actual and not the apparent authority which governs, it has been held to be error to instruct a jury that the master is responsible for the tortious acts of the agent when committed by him while acting within the apparent scope of his authority. *McGrath v. Michaels*, 80 N. Y. App. Div. 458.

**South Dakota Statute.** — Under sections 745 and 746 of the Revised Code of Civil Procedure of South Dakota a railroad company is liable for a wanton and wilful act of a servant only when the servant's act is done in and about the conduct of the business to which he was assigned by the company. *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. Rep. 306.

**3. Fraud of Servant Not Acting Within Scope of Employment.** — *Benton v. James Hill Mfg. Co.*, 26 R. I. 192.

**4. Malicious Prosecution by Servant Not Acting Within Scope of Employment.** — *Staton v. Mason*, 106 N. Y. App. Div. 26; *Markley v. Snow*, 207 Pa. St. 447.

**5. False Imprisonment, etc., by Servant Not Acting Within Scope of Employment.** — *Patterson v. Maysville, etc., R. Co.*, 78 S. W. Rep. 870, 25 Ky. L. Rep. 1750; *McKay v. Hudson River Line*, 56 N. Y. App. Div. 201; *Lubliner v. Tiffany*, 54 N. Y. App. Div. 326; *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517; *Cobb v. Simon*, 124 Wis. 467, 119 Wis. 597, 100 Am. St. Rep. 909.

**6. Assaults by Servants Not Within Scope of Employment.** — *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. Rep. 306, decided under sections 745 and 746 of the *South Dakota Revised Code of Civil Procedure*; *Rahmel v. Lehnendorff*, 142 Cal. 681, 100 Am. St. Rep. 154;

**176.** 4. Criminal Acts of Servant — Civil Liability of Master. — See notes 3, 4.

**177.** 5. Acts of Assistant Employed by Servant. — See note 2.

6. Acts of Servant Who Is Also Officer of the Law. — See note 3.

**178.** 8. Acts of Servant under Both General and Special Employments. — See notes 2, 3, 4.

Driver and Team Hired to Third Person — Injuries to Third Person. — See note 5.

**180.** 10. Intent or Motive of Servant as Affecting Master's Liability. — See note 2.

**12. Evidence in Actions for Injuries Caused by Acts of Servant.** — See notes 4, 8.

Belt R. Co. v. Banicki, 102 Ill. App. 642; Missouri Pac. R. Co. v. Divinney, (Kan. 1902) 69 Pac. Rep. 351; McDermott v. American Brewing Co., 105 La. 124, 83 Am. St. Rep. 225; Brown v. Boston Ice Co., 178 Mass. 108, 86 Am. St. Rep. 469; Collette v. Rebori, 107 Mo. App. 711; Höller v. Ross, 68 N. J. L. 324, 96 Am. St. Rep. 546; Kessler v. Deutsch, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 209; Kennedy v. White, 91 N. Y. App. Div. 475; Palmer v. Winston-Salem R., etc., Co., 131 N. Car. 252; Sekator v. Lannon, 26 R. I. 125; Waaler v. Great Northern R. Co., 18 S. Dak. 420.

**Assault Arising Out of Personal Quarrel.** — A railroad company is not liable for damages resulting from an assault and battery inflicted by its station agent and another upon a third person, when it appears that the difficulty which gave rise to the beating arose out of a personal quarrel, and that the agent, so far as related to his participation therein, was acting upon his individual responsibility and not within the scope of the business of his agency as an employee of the company. Lynch v. Florida Cent., etc., R. Co., 113 Ga. 1105.

**176.** 3. Crimes Outside Scope of Employment. — Bowen v. Illinois Cent. R. Co., (C. C. A.) 136 Fed. Rep. 306.

**4. Acts Within Scope of Employment.** — Southern R. Co. v. James, 118 Ga. 340, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176.

**177.** 2. Liability for Acts of Person Assisting Servant. — Foster v. Grand Rapids R. Co., (Mich. 1905) 104 N. W. Rep. 380, 12 Detroit Leg. N. 311. See Chicago v. O'Malley, 196 Ill. 197.

3. But where the servant at the time of the wrongful act was acting as an officer of the law and not as the defendant's servant, the latter cannot be held liable. Foster v. Grand Rapids R. Co., (Mich. 1905) 104 N. W. Rep. 380, 12 Detroit Leg. N. 311; Sharp v. Erie R. Co., 90 N. Y. App. Div. 502.

**178.** 2. General Employer Not Necessarily Responsible. — See Toledo, etc., R. Co. v. Hydel, 25 Ohio Cir. Ct. 579.

3. Servant Loaned or Hired Out by Master Without Retaining Control. — Consolidated Fireworks Co. v. Koehl, 190 Ill. 145, reversing 92 Ill. App. 8; Howard v. Ludwig, 57 N. Y. App. Div. 94, affirmed 171 N. Y. 507; O'Leary v. Muldoon, 56 N. Y. App. Div. 626.

**4. Master Retaining Control of Servant Loaned or Hired Out.** — Waldock v. Winfield, (1901) 2 K. B. 596, 85 L. T. N. S. 202, 70 L. J. K. B. 925; Consolidated Fireworks Co. v. Koehl, 206 Ill. 283, affirming 103 Ill. App. 152; Wright

Steam Engine Works v. Lawrence Cement Co., 167 N. Y. 440, reversing 45 N. Y. App. Div. 629.

Where a mover of safes, upon undertaking to move a safe for the owners of a building from one floor to another, stipulated that the owners of the building should take the risk of the elevator by which the safe was to be moved, it was held that the janitor of the building, who operated the elevator, was the servant of the owners with respect to the work of moving the safe, and they were liable to an employee of the safe-mover for injuries sustained by him through the negligence of the janitor. Thayer v. Checkley, (C. C. A.) 127 Fed. Rep. 556.

**5. Owner of Team Liable for Driver's Negligence.** — But compare Baldwin v. Abraham, 57 N. Y. App. Div. 67, affirmed without opinion 171 N. Y. 677.

**180.** 2. Intent as Affecting Question of Scope of Employment. — Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909.

**4. Burden of Showing Negligence.** — Obertoni v. Boston, etc., R. Co., 186 Mass. 481.

**Negligence of Master in Selection of Servant.** — The presumption of law exists that the master has exercised due care and circumspection in the selection of a competent servant, and the burden rests upon him who asserts the negligence to prove affirmatively not only the fact of incompetency, but the want of due care by the master in making the selection. Bowen v. Illinois Cent. R. Co., (C. C. A.) 136 Fed. Rep. 306.

**Burden of Showing Relation of Master and Servant.** — The plaintiff must show that the relation of master and servant existed between the defendant and the person whose negligence caused the injury. De Grazia v. Rudden, (Supm. Ct. App. T.) 88 N. Y. Supp. 397.

In an action against a railroad company for the wrongful acts of its employees, it must be shown that the person committing the injury was the employee of the company; and the difficulty of making the proof cannot obviate the necessity of doing so, although it may permit of slighter evidence than otherwise might be required. Axtell v. Northern Pac. R. Co., 9 Idaho 392.

**Burden of Proving Scope of Servant's Authority.** — It has been held that in order to recover against the master for the act of his servant, the plaintiff must show that the servant acted within the general scope of his authority. Kessler v. Deutsch, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 209.

**Question Whether Servant Acted Within Scope of Employment for the Jury.** — It has been held

**180. 13. What Constitutes Relation of Master and Servant — Selection and Control.** — See note 10.

**181.** See note 1.

Contract of Employment Not Indispensable. — See notes 2, 3.

The Mode of Payment. — See note 5.

**XXX. INTERRUPTION OF RELATION OF MASTER AND SERVANT BY THIRD PERSON — 1. In General.** — See note 6.

**182. 2. Statutory Provisions — Purpose of Enactments.** — See notes 1, 2.

Knowledge of Relation. — See notes 9, 10.

**183. Contracts of Minors.** — See note 6.

that the question whether the servant acted within the scope of his employment is for the jury. *Collins v. Butler*, 179 N. Y. 156.

**180. 8. Incompetency of Servant.** — The incompetency of a servant cannot be shown by a single act of carelessness or recklessness after the contract of employment. *Bowen v. Illinois Cent. R. Co.*, (C. C. A.) 136 Fed. Rep. 306.

**10. Power of Control Essential to Liability.** — *Brady v. Chicago, etc., R. Co.*, (C. C. A.) 114 Fed. Rep. 100; *The Slingsby*, (C. C. A.) 120 Fed. Rep. 748, affirming 116 Fed. Rep. 227, holding that a winchman in the general employ of a vessel was not a servant of a firm of stevedores that was engaged in unloading the vessel; *Stewart v. California Imp. Co.*, 131 Cal. 125; *Driscoll v. Towle*, 181 Mass. 416; *New Omaha Thomson Houston Electric Light Co. v. Anderson*, (Neb. 1905) 102 N. W. Rep. 89; *Moore v. Stainton*, 80 N. Y. App. Div. 295, affirmed without opinion 177 N. Y. 581; *Connor v. Koch*, 63 N. Y. App. Div. 257; *Stajakowski v. New York Cent., etc., R. Co.*, 63 N. Y. App. Div. 532; *Cleveland, etc., R. Co. v. Marsh*, 63 Ohio St. 236; *Paddock v. Toledo, etc., R. Co.*, 11 Ohio Cir. Dec. 789, 21 Ohio Cir. Ct. 626; *Swackhamer v. Johnson*, 39 Oregon 383; *Connor v. Pennsylvania R. Co.*, 24 Pa. Super. Ct. 241; *Nicholas v. Keeling*, 21 Pa. Super. Ct. 181.

It has been held that the true test in determining whether the doctrine of *respondet superior* applies in any case is, does the person holding the position of master have, for the time being, or is it his duty to assume, control over the servant in respect to the performance of his duties? If such right or duty of control exists, the doctrine applies; otherwise not. The right to employ and discharge the servant is an element tending to show a right of control, but is not conclusive or indispensably necessary; the ultimate test being the right or duty to control. *Roe v. Winston*, 86 Minn. 77, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 178.

**Liability of Corporation for Acts of Tenants.** — It has been held that a corporation is not liable under the *Arkansas* statute (*Sand. & H. Dig.*, § 4792) for the acts of its tenants in employing the servants of another before the expiration of their contracts where the corporation has no control over the tenants. *Sunnyside Co. v. Read*, 71 Ark. 59.

**Evidence of Existence of Relation.** — If a man is seen operating the machinery of a carrier, this fact, unexplained, is sufficient to justify the conclusion that he is acting as a servant of the carrier, if there is nothing in the manner or circumstances of the occurrence to negative

the conclusion. *Wilson v. Alexander*, 115 Tenn. 125.

**181. 1. Ratification Necessary in Absence of Power of Control.** — *Long v. Richmond*, 68 N. Y. App. Div. 466, affirmed without opinion 175 N. Y. 495. See *Walsh v. Riesenbergh*, 94 N. Y. App. Div. 466.

**Liability of Nominal Partner for Acts of Servant of Firm.** — *Brudi v. Luhrman*, 26 Ind. App. 221.

**Relation of Master and Servant a Question of Fact.** — It has been held that when there is any real question, under the testimony, as to whether the relation of master and servant did exist between the negligent servant and the one sought to be held as master, as to the particular service in which the injury was sustained, it should be submitted to the jury. *Sacker v. Waddell*, 98 Md. 43.

**2. Liability in Absence of Contract of Employment.** — *Klages v. Gillette-Herzog Mfg. Co.*, 86 Minn. 458.

**3. Servant in General Employment of Another.** — See *Ray v. Jones, etc., Co.*, 92 Minn. 101.

**5. Mode of Payment Not Conclusive.** — One person may be the agent of another even though he receives commissions instead of being paid a fixed salary. *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

**6. Conspiracy to Procure Discharge of Servant.** — *Hines v. Whitehead*, 124 Iowa 262.

**182. 1. Statutes.** — *Triplett v. State*, 80 Miss. 379.

**Georgia Statute.** — An essential element of the offense defined in section 122 of the Georgia Penal Code is enticing, persuading, or decoying the servant of another to leave his employer during his term of service, and proof of such facts as establish that the accused did one of these things is essential to sustain a conviction of the offense therein defined. Hence a conviction under this section cannot lawfully stand where the evidence in this regard shows no more than that the servant left the place of his employment in company with the accused. *Broughton v. State*, 114 Ga. 34.

**2. McAllister v. State**, 122 Ga. 744. See *State v. Aye*, 63 S. Car. 458.

**9. McAllister v. State**, 122 Ga. 744; *Kline v. Eubanks*, 109 La. 241.

**10. Breach of Contract Before Entering Service.** — It has been held that the *North Carolina* statute does not subject to liability persons who induce servants to break their contracts as laborers with their employers before entering into such service. *Sears v. Whitaker*, 136 N. Car. 37.

**183. 6. Contracts of Minors.** — *State v. Richardson*, 86 Miss. 439.



**184. XXXI. INJURIES TO SERVANT BY THIRD PERSON — 1. Rights of Master — Death of Servant. — See note 5.**

**185. XXXII. OFFENSES COMMITTED BY MASTER AND SERVANT AGAINST EACH OTHER — 3. Obtaining Money or Other Property Fraudulently by Means of Contract of Employment. — See notes 6, 8, 11.**

**186. XXXIII. STATUTORY LIENS OF LABORERS AND OTHER SERVANTS — 2. Who Are Entitled to Lien — a. LABORERS — (1) *Who Are Laborers.* — See notes 6, 15.**

**187. b. OTHER EMPLOYEES. — See note 6.**

**188. 3. What Property Is Subject to Lien. — See note 7.**

**4. Labor or Services for Which Lien Is Given. — See note 14.**

**189. 5. Amount for Which Lien May Be Claimed — b. INTEREST NOT INCLUDED. — See note 4.**

**191. 7. Enforcement of Lien — a. METHOD OF ENFORCEMENT. — See note 2.**

**8. Priorities. — See note 4.**

**192. 9. Assignment. — See note 3.**

**184. 5. Death of Servant. —** Callaghan v. Lake Hopatcong Ice Co., 69 N. J. L. 103, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 184.

**185. 6. Under the Alabama statute, unless the money or other personal property is obtained from the employer, the offense denounced by the statute has not been committed; it is not sufficient that the money or property belongs to the employer.** Hilliard v. State, 137 Ala. 89.

**8. Facts Essential to Conviction. —** See Glenn v. State, 123 Ga. 585.

**11. Glenn v. State, 123 Ga. 585.**

**186. 6. Laborer Defined. —** It has been held that persons having contracts with a sugar manufacturing company to weigh and load cane on railroad cars for transportation and delivery to the refinery, the scale, derricks, and machinery used for weighing and loading being furnished by the company, the contractors operating them with laborers employed and paid by them, were independent contractors, and were not workmen and laborers employed in working the plantations of the company whose wages, under the laws of Louisiana, would have a special privilege on the crop. Fortier v. Delgado, (C. C. A.) 122 Fed. Rep. 604.

**Bar tender. —** It has been held that a bartender, whose duties are mainly manual, and who is also required to keep books as a part of his duties, is a laborer within the meaning of the law creating a lien in favor of laborers, for their labor, upon the property of their employers. Lowenstein v. Meyer, 114 Ga. 709.

**15. Superintendent of Mill Not a Laborer. —** Moore v. American Indust. Co., 138 N. Car. 304.

**187. 6. Clerks, Secretaries, or Agents. —** It has been held that persons having contracts with a sugar manufacturing company to weigh and load cane on railroad cars for transportation and delivery to the refinery, the scale, derricks and machinery used for weighing and loading being furnished by the company, the contractors operating them with laborers employed and paid by them, were not clerks, secretaries, or agents, whose salaries are privileged under the laws of Louisiana, as to both the moveables and immovables of the debtor. Fortier v. Delgado, (C. C. A.) 122 Fed. Rep. 604.

Under the Florida statute (Fla. Rev. Stat., § 1732), providing for liens in favor of bookkeepers, clerks, agents, porters, and other employees of merchants and transportation companies and other corporations, it has been held that a bookkeeper of a corporation conducting a saw-mill business, and another employee, whose duty it was to keep a record of the time of the employees and to attend to a commissary run in connection with such mill, and another employee, who was under contract to haul logs to the mill at the wages of five dollars per day, using his own team in so doing, were all entitled to a lien for their wages on the lumber produced by such mill. St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376.

**188. 7. See Pugh v. Baker, 127 N. Car. 2.**

**14. Georgia Statute. —** The general lien given to laborers by Civ. Code Ga., § 2792, upon all property of their employers, and the special lien on the products of their labor, given by Civ. Code Ga., § 2793, arise only for the work done. Hence when a contract between an employer and an employee provides for the labor of the latter as well as for the use of his property, the employee is entitled to a laborers lien only for the work done, and not for the hire of his property. Cox v. Cagle, 112 Ga. 157.

**189. 4. Compare Sandberg v. Victor Gold, etc., Min. Co., 24 Utah 1.**

**191. 2. Prerequisites to Right to Enforce Lien Against Real Estate. —** Overholt v. Old Dominion Mfg. Co., 98 Va. 654, 2 Va. Sup. Ct. 549.

**4. Arkansas. —** Sheeks Stephens Store Co. v. Richardson, (Ark. 1905) 88 S. W. Rep. 983.

**Georgia. —** By Ga. Civ. Code, §§ 2792, 2793, liens of laborers have priority of mortgages given to secure the payment of purchase money, and all other liens except those specially provided for and expressly declared by law to be superior. Bradley v. Cassels, 117 Ga. 517.

**Indiana. —** Small v. Hammes, 156 Ind. 556; McDaniel v. Osborn, (Ind. App. 1904) 72 N. E. Rep. 601.

**Ohio. —** *In re* Hobelman, 5 Ohio Dec. 403, 7 Ohio N. P. 661.

**192. 3. Lien Assignable. —** Clark v. Brown, 141 Cal. 93. See Pere Marquette R. Co. v. Baertz, (Ind. App. 1905) 74 N. E. Rep. 51.









